



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ESA 10164-04

AGENCY DKT. NO. PEA040002-
0613-0003.1

**DEPARTMENT OF ENVIRONMENTAL
PROTECTION, COASTAL & LAND USE
COMPLIANCE & ENFORCEMENT,**

Petitioner,

v.

**HOPEWELL NURSERY, INC.
& ROBERT ENCH,**
Respondents

Bruce A. Velzy, Deputy Attorney General, for petitioner (John J. Hoffman, Acting
Attorney General of New Jersey, attorney)

Neil Yoskin, Esq., for respondents (Sokol, Behot & Fiorenzo, attorneys)

Record Closed: August 7, 2013

Decided: August 12, 2013

BEFORE **SOLOMON A. METZGER**, ALJ/ta,

This matter arises out of an Administrative Order & Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the Department of Environmental Protection against Hopewell Nursery, Inc., and its President, Robert Ench. The alleged violations involve the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1., to -30; N.J.A.C. 7:7A-1.1 et seq. and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 to -101; N.J.A.C. 7:13-1 et seq. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 to-13. There were some twenty-one hearing days commencing in February 2008¹.

Many facts are undisputed. Hopewell Nursery is a large scale grower of container stock. It is located on approximately 422 acres in Deerfield and Upper Deerfield Township, Cumberland County. Traditional field cultivation methods were used until 2000, at which time the farm began converting to the use of greenhouses, a process completed in 2002. The land was cleared and graded and an extensive number of buildings were constructed, known as hoop-houses and poly-houses. The construction itself typically consists of metal framing covered by plastic sheeting with electrical service, piping for irrigation, and permeable matting on the ground inside. The larger poly-houses also require concrete footings. Drainage pipes, crushed stone and rip-rap were placed to control surface water flow. Plants are grown within these buildings in soil pots. This system provides a controlled environment that extends the growing season and allows for more efficient use of water, fertilizers and herbicides. Horticultural production by these methods is increasing.

The Department alleges that in the process of converting from field cultivation to greenhouses respondent's eliminated extensive areas of wetlands and transition zones

¹ The hearing was conducted initially before John Tassini, ALJ, who denied cross-motions for summary decision. Upon Judge Tassini's appointment to the Superior Court the case was reassigned to me briefly, but I retired soon thereafter. Patricia Kerins, ALJ, was assigned and she heard the liability phase of the hearing to conclusion. However, a conflict arose at that point and Judge Kerins recused. I have been temporarily assigned to complete the OAL's role in this matter. With certain agreed-upon steps the parties have consented to proceeding thusly. The parties ultimately agreed to proceed to penalty without bifurcation; the Department's penalty rationale was submitted by certification in lieu of testimony. A site visit was conducted at respondent's request to generally orient me to the farm. As the AONOCAPA relates to transitions on the property that occurred more than a decade ago, the farm's current appearance sheds no specific light on the questions at bar.

in four distinct portions of the property. No permits were sought for any of this work. The Department directed respondents to restore the wetlands and pay a penalty of \$603,000².

There is a prior incident involving the property. In August 1997, the Department received a complaint that Hopewell Nursery had used railroad ties to dam Thundergust Brook as it enters the property from Centeron Nursery to the north, and had deposited fill on associated wetlands. The violation was resolved amicably. Respondents retained the engineering firm of Lynch, Giuliano & Associates, P.A. to prepare a restoration plan. The restoration followed wetlands lines previously established by Lynch Giuliano in a 1988 survey prepared for respondents in connection with a proposed residential development. The Cumberland County Soil Conservation Service reviewed and approved the project.

There is an incident involving respondent Ench on a nearby property. In November 2003, DEP issued a Notice of Violation alleging that he cleared and graded approximately 15,000 square feet of freshwater wetlands on a nearby farm and filled part of a stream. Once the violation came to light the parties agreed to corrective action and the property was restored.

Roderick Falla, who retired during the course of this matter, had been employed by the DEP in wetlands permitting and enforcement for approximately seventeen years. He was the inspector who observed the 1997 violations, as well as the 2003 violations on a nearby farm.

Mr. Falla testified that he visited the Hopewell property on March 18, and April 16, 2004 to investigate a complaint of wetlands violations. In the field wetlands are determined by evaluating soils, vegetation and hydrology, known as the three parameter test. Where land has recently been altered a "disturbed site" methodology is

² The AONOCAPA alleges a total disturbance of 33.5 acres. Following the hearing the Department asserts that it established a disturbance of 31.57 acres and thus has reduced the penalty sought to \$568,260.

employed, which uses available information such as historic maps, aerial photography, U.S.D.A. soil surveys, as well as soil borings within the suspected wetlands and on nearby-like topography. These methods were developed in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands and the Department has adopted these approaches. Mr. Falla found extensive clearing, filling, grading, placement of culverts and road crossings in Thundergust Brook, and intrusion of agricultural buildings into what were wetlands and wetland transition zones. In 1997, there were no agricultural structures on site. The AONOCAPA was issued in September 2004 and Mr. Falla returned to the property in April 2005 to further quantify his results.

Mr. Falla testified that there are four areas on the farm where wetlands were disturbed or filled. Each of these sites consists of intermediate resource value wetlands, requiring fifty-foot buffers. Site 1 is in the Northeast corner of the property. There Hopewell Nursery graded the land and erected hoop-houses. This activity impacted 7.7 acres of wetlands and 3.2 acres of buffers.

Site 2 runs along both banks of Thundergust Brook, which flows southeasterly through the center of the farm. Mr. Falla testified that wetlands in and around the Brook were filled; borings revealed hydric soils beneath the fill. Culverts had been placed in the stream to facilitate road crossings. This impacted 5.13 acres of wetlands and 3.0 acres of buffer along the northern stream bank and 5.16 acres of wetlands and 2.97 acres of buffer along the south bank.

Mr. Falla testified that .82 acres of the wetlands and 1.2 acres of buffer were impacted at site 3. At site 4 the same grading, filling and construction impacted .79 acres of wetlands and 1.6 acres of buffer. In total 19.6 acres of wetland and 11.97 acres of buffer were destroyed.

Robert Pacione is the inspector who worked with Mr. Falla and took over the file upon his retirement. He visited the site in April, November and December 2005. Mr. Pacione's conclusions were substantially in accord with Mr. Falla's recollections. Mr.

Pacione explained his use of Department and United States Geological Survey mapping, aerial photography, photographs of the site both before and after greenhouse construction, and the soil boring data collected. In all these show that wetlands existed in the four locations at issue before site preparations converted them to uplands. Mr. Pacione testified as well that impacts extended to wetlands beyond the Hopewell property. This effect was particularly evident after an observed rain event when sediment flowed through the property into an unstable channel and then downstream for a considerable distance.

Lou Jacoby and John Tyrawski are employed by the Department in the Bureau of Geographic Information Systems. They were admitted as experts in geo-referencing systems. Both men assisted in the Department's effort to produce accurate mapping and overlays for purposes of the enforcement action. They were both satisfied that the results are highly reliable.

Ralph Spagnolo has been employed by the Federal Environmental Protection Agency for some twenty years. He is a member of the National Technical Committee for Hydric Soils, an arm of the U.S. Department of Agriculture, concerned with mapping hydric soils in the United States. Mr. Spagnolo was admitted as an expert in hydric soils. On February 6, through 8, 2008, he was part of a team that dug test pits with a backhoe throughout the property to assess soil conditions beneath fill material. He entered these pits and collected the data. Mr. Spagnolo determined that most of the test pits contained hydric soils. He acknowledged that once hydric, a soil remains so and thus this factor alone cannot isolate the period when the area would have been sufficiently wet to support hydrophytic vegetation.

Vincent Mazzei is a supervising environmental engineer within the Division of Land Use Regulation. He was admitted as an expert on stream encroachment questions. Thundergust Brook as it runs through this property is a "blue line stream", meaning that USGS mapping considers it to be flowing much of the time. He testified that at least three of the four culverts in the stream do not appear on 1988 mapping and

thus their installation required a permit. The fourth road crossing and culvert at the northwestern corner of the property may have preexisted, but if they were moved or enlarged in connection with the contouring that took place in 2001, then they too would require approval. Given that the stream bisects the property for some 4,000 square feet in a northwest to southeast direction, it is logical for a farmer to need a few stream crossings. Had they been sought in the correct dimensions, approval would have been likely.

William Voeltz is a professional engineer employed by Lynch Guiliano. In 1997 Mr. Ench asked him to communicate with the Department to the effect that any wetlands violations would be corrected and he did so. Although he was not involved with Hopewell Nursery in the 1988 time period, his firm prepared plans for the Army Corps of Engineers seeking a wetlands jurisdictional determination in connection with a development then being proposed for the property. These plans depicted the wetlands lines in existence at that time. The violations occurring in 1997 were to be restored to the lines established in the 1988 plans. Mr. Voeltz was also involved in the 2001 grading plan used to prepare the property for greenhouses.

Wayne Sweet is the contractor hired to effectuate the 2001 grading plan. In July of that year he brought heavy machinery onto the property and over the course of six weeks scraped, leveled and graded the land south of Thundergust Brook.

Robert Ench was called initially by the Department and then recalled in his own case. To him Thundergust Brook is a useful drainage ditch traversing his land and he has no interest in undermining it. He recalled that the hoop-houses and poly-houses were built in stages beginning in 2001. He did not determine the exact pace of the project or siting locations; his growers played a part in this. He was involved and paid the bills. Mr. Ench testified that all buildings were to have been constructed within areas that had previously been farmed.

Mr. Ench saw tainted motives in the Department's actions. He testified that Hopewell Nursery asserted its right not to pay local realty taxes or obtain building permits for its greenhouses, as they are temporary farm buildings. The mayor of Deerfield Township was displeased and reported alleged wetlands violations to the Department. Mr. Falla was mayor of the nearby town of Estelle Manor from 2000 until 2003. Though Mr. Ench advised Mr. Falla that Centerton Nursery, his neighbor to the north, had cleared trees on wetlands and completely eliminated Thundergust Brook on its property, it received gentle treatment.

Don Baldwin has been working for respondents since 1998 as production manager. He was involved with the construction of hoop-houses on site 1 and testified that they were built in the then-existing farm field. No trees were taken down to make room for any of the buildings.

James Newman is eighty-five years of age and worked on the property for seventy years. He had plowed the area known as site 1 and never cleared any trees. The brook was plowed right up to its banks. It was never as deep as it is now; you could walk across in the northerly part of the site.

John Van Pelt is the general manager for Hopewell and reports directly to Mr. Ench. He testified that Thundergust Brook conveys water from the property that would otherwise pool; depositing fill into it would be contrary to the farm's interests. The property still floods from time to time, but it would be worse without the Brook.

William Hoffman is an engineer who designs and builds greenhouses. The poly-house design allows for the building to be moved, though to his knowledge none of the Hopewell Nursery poly-houses have been moved since their erection. The land must be graded for this construction and in this instance the natural slope was maintained so that water drains toward the east. Greenhouse farming is more efficient than traditional farming and is a necessity if farmers in New Jersey are to compete with out-of-state concerns.

Dr. James Schmid was retained by respondents in 2007, and was admitted as an expert in environmental science. He reviewed mapping dating back to the nineteenth century and testified that stream corridors on the Hopewell property have changed periodically as they are not natural channels. Rather, they are swales and depressions formed and reformed by farming. The channel now known as Thundergust Brook was first identified on maps in 1953 and is typically dry. It is a drainage feature for Hopewell and Centerton Nursery irrigation water and also flows during rain events.

Dr. Schmid testified that setting wetlands lines correctly requires methodical field work. The test pits he excavated in June 2007, December 2008 and February 2009 revealed minimal wetlands. Dr. Schmid reviewed the Department's field work and found that it vastly overstated the presence of wetlands. Two of three wetlands markers, hydrophytic vegetation and wetness were largely absent. With respect to the latter, any wetness found was in the main too far below the natural or pre-disturbance soil level to qualify as wetlands hydrology. Saturation should be at twelve inches or above in these soil types to satisfy the criterion. Dr. Schmid agreed that hydric soils were present, but this criterion cannot alone establish wetlands. Hydric soils persist for centuries after wetness ceases and thus is necessary but not sufficient for a finding of wetlands.

Dr. Schmid opined that aerial mapping is a planning tool and no substitute for field work. He thought that the reference sites chosen by the DEP inspectors were not representative of conditions on the farm. They were located in undisturbed wetlands at considerably lower elevations than the farm. The soils in these areas had increased in wetness over time owing to runoff from both Hopewell and Centerton. Dr. Schmid testified that in this instance there were no suitable off-site points of comparison because farming had dramatically altered the natural landscape.

Dr. Schmid rejected the 1988 findings of Lynch Guiliano. He rejected the findings of Marathon Engineering, a consulting firm retained by Mr. Ench in 2005 to assess wetlands conditions prior to 2000-02. Dr. Schmid did not disagree with the data

collection; he opined rather that these professionals drew mistaken inferences. He had no contact with any of the individuals involved in producing the data. In his opinion the Hopewell project impacted less than an acre of wetlands in total.

Dr. Schmid offered an entirely benign explanation for current conditions on the property. Upland soils found atop historic wetlands arrived there as a result of farming. Over the course of many decades plowing can displace upland soils onto lower lying wetlands soils. Likewise, water pumping from irrigation wells can over long periods lower the water table. Dr. Schmid produced well usage data for the property over a number of years. Thus, in his view wetlands were likely eliminated by these processes long before adoption of the Wetlands Act in 1988. Finally, to the extent that site 2 was not already largely uplands, the Department's 1997 direction to move soils may have caused additional filling along the banks of the Brook.

David Fanz is chief of the Bureau of Coastal Regulation and has been employed by the Department since 1988. He was called in rebuttal and admitted as an expert in wetlands delineation. Mr. Fanz testified that typically wetlands lines are set with reference to hydric soils and in his experience relic hydric soils are rare. The hydrology factor is not relied on to set wetlands lines because of seasonal variability in water table. However, once wetlands have been filled this measure is virtually useless. Mr. Fanz found highly unlikely the explanation that farming over decades eliminated the wetlands on site. In some areas the fill material is four to five feet thick and erosion cannot explain that. He also saw no evidence for the notion that the water table on the farm had been lowered due to decades of irrigation; no baseline information exists and thus there are no means of testing this hypothesis.

Mr. Fanz testified additionally that the farmland exemption was intended to allow farmers to continue plowing, seeding and cultivating wet areas on their fields after passage of the Wetlands Act. Yet, farmed wetlands continue to serve certain wetlands functions, such as erosion control, and may not simply be eliminated.

This is the substance of the record.

Beginning in 2000, Hopewell Nursery converted from field cultivation of nursery stock to the use of greenhouses. Considerable land contouring and construction were undertaken to accomplish this, and the four sites on the property under review were extensively impacted by this effort. The questions presented are whether these four sites were at the time comprised of wetlands and associated buffers and if so whether the work was exempted from the Wetlands Act as “normal farming”, N.J.S.A. 13:9B-4(a); N.J.A.C. 7:7A-2.8. Additionally, the Department alleges that culverts and road crossings placed in Thundergust Brook violate the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50.

As to the first question, a sizeable record establishes that these areas were wetlands and associated buffers. As the wetlands were disrupted, inspectors Falla and Pacione employed the “disturbed site” methodology. They are both inspectors of long experience and they presented a coherent body of testimony that included their personal observations supported by soil borings, soil surveys, photographs, USGS and DEP mapping, and offsite reference points. Their assessments concerning hydric soils were buttressed by Mr. Spagnolo and their overall approach was supported by Mr. Fanz. The 1988 Lynch Guiliano report also found wetlands at sites 1 and 2 that were largely consistent with the Department’s mapping. Marathon Engineering, respondents’ first expert, also found substantial evidence of wetlands. The use of multiple sources such as these is authorized at N.J.A.C. 7:7A-2.3 and in the Federal Manual. Of course the three-parameter approach is of necessity superior to reconstructive tools, but the loss of more visual forms of confirmation should not deter use of acceptable proofs.

Dr. Schmid saw matters differently. Thundergust Brook was a manmade irrigation channel. The scene today reflects no wetlands and although hydric soil was found in areas thought by the Department to be wetlands, this criterion is by itself incapable of supporting such a finding, as soils maintain a hydric signature indefinitely after water is gone. Hydrology and vegetation were largely absent. Aerial photography

and soil charts are planning tools not meant for field delineations. Dr. Schmid did not question the data collected by the DEP, EPA, Lynch Guiliano, and Marathon Engineering; he evaluated the data differently. He found no merit in the use of off-site undisturbed wetlands as reference points to glean information about a farm field. These differences in perspective lead to the wide disparity of opinion on the ultimate question. Having dismissed the Department's analysis, Dr. Schmid submitted instead that wetlands on the property were eliminated long before 2000-02 by decades of draining, groundwater pumping and open-field farming.

This position is a heavy lift. Initially even if Thundergust Brook was in some measure shaped by farming, it was no less a stream in 1988 when the Wetlands Act became effective. U.S.G.S. mapping depicts it as a stream. There is no evidence that Thundergust Brook was excavated as a drainage ditch and its shape does not suggest such origins. It is also apparent from numerous maps that on exiting Hopewell Nursery the stream continues along a well-established wetlands complex.

To maintain the posture that the wetlands were slowly undone by farming over the course of generations, Dr. Schmid was forced to reject the 1988 Lynch Guiliano report, prepared for Mr. Ench in connection with a proposed residential development. Yet, this was a detailed on-site study of the very conditions the parties here seek to reconstruct. At the least there would have been much less need for extrapolation in 1988 and Lynch Guiliano had no interest in overstating the extent of wetlands, as this would have constrained the residential development being proposed. Dr. Schmid disagreed as well with findings in 2005 by Marathon Engineering. That firm was retained by respondents to reconstruct the scene prior to greenhouse farming. They dug some thirty-six pits on site and found substantial evidence of wetlands. Dr. Schmid was not present for this testing and had no contact with the professionals who reached these conclusions. He simply reinterpreted their data.

Neither did Dr. Schmid credit any of the DEP aerial photography depicting wetlands prior to greenhouse construction, as these results had not been confirmed by

field testing. He rejected off-site comparisons though all of the other professionals who evaluated the farm were able to locate and use off-site data to aid their investigations. He found soil surveys generally helpful, but inexact for our purposes. In these particulars Dr. Schmid's debate may be with the regulatory regime that authorizes alternate proofs in disturbed sites. Though the parties agree that the presence of hydric soils is not dispositive on the question of wetlands, there is a considerable difference in emphasis. Dr. Schmid focused on the possibility that these were relic, or historic hydric soils. He did not testify as to the incidence of relic soils in this part of southern New Jersey. Mr. Fanz related that in his experience hydric soils reflect wetlands and relic soils are rare. Dr. Schmid pointed to the lack of hydrology near the surface of pre-disturbance layers as proof that the Department's wetlands lines were grossly overstated. Mr. Fanz noted that soil saturation is unreliable when establishing wetlands lines owing to seasonal variability. The Federal Manual is in accord with this view. It notes the difficulty of using hydrology to establish a wetlands line and directs the investigator toward the hydric soils criterion. Moreover, Dr. Schmid's reliance on low saturation levels some six years after filling to infer pre-disturbance hydrology, takes no account of the fact that the re-engineered field no longer functions as before. Slopes and depressions having been minimized, surface water traverses the field differently.

We know that the property south of Thundergust Brook was leveled in the summer of 2001, over the course of six weeks utilizing heavy machinery. The area north of the Brook was graded in preparation for hoop-houses. Dr. Schmid glosses past these explanations for the loss of wetlands, and posits instead that ongoing farming drained and covered the wetlands over time. With respect to site 2, Dr. Schmid supposed that soil movements ordered in 1997 by the Department may have exacerbated the loss of wetlands. This latter suggestion is made in the face of the NOV of that period ordering respondents to unclog Thundergust Brook as it enters the property and to remove fill deposited. Though Dr. Schmid held the Department to a rigorous standard of empiricism, he speculated freely. There is no information in the record, site specific or otherwise, in support of the idea that pumping lowered the water table on the property and/or that plowing added multiple feet of fill. In the end Dr.

Schmid dutifully provided the record with an alternative explanation of events, but the evidence is largely to the contrary.

As to the second question it does not appear that these greenhouses fall within the exemption for “normal farming”. N.J.S.A. 13:19B-4(a) lists “normal farming, silviculture and ranching” as exempt agricultural enterprises. It then provides examples of the work contemplated such as plowing, sowing, cultivating, and harvesting. In general the exemption appears to address agricultural activities that occur in the soils of open fields and forests. Greenhouse farming in pots utilizes substantially different methods in a controlled environment and finds no mention in the Act. As a general rule reference to one grouping of examples in a statute suggests the exclusion of unlike examples, Brodsky v. Grinnell Haulers, Inc. 181 N.J. 102 (2004). Beyond that, exemptions in remedial legislation are construed restrictively, MCG Assoc. v. Department of Environmental Protection, 278 N.J. Super. 108, 120 (App. Div. 1994), and longstanding agency interpretations of the statutes they administer are entitled to deference, In re Berwick Ice, Inc. 231 N.J. Super. 391 (App. Div. 1989). In this instance the Department has held the view that greenhouses do not enjoy the exemption since the inception of its administration, see 20 N.J.R. 1247 (June 6 1988).

Respondents argue that the exemption cannot be understood with reference to the Wetlands Act alone, but must be harmonized with other legislation encouraging farming. They point out that these buildings are temporary structures for purposes of the Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq. and do not require construction permits under the State Uniform Construction Code Act, N.J.S.A. 52:27D-119 et seq. Classification of these greenhouses as farm buildings means they do not incur taxes at the commercial rate and avoid building code requirements. It does not follow that they may be sited on wetlands and does not explain multiple feet of fill, underground drainage pipes, crushed stone, and in the case of the larger poly-houses concrete footings. To this respondents say that the exemption must be sufficiently elastic to encompass the entire undertaking. Modern greenhouse horticulture is farming and the exemption must harmonize with multiple statutes favoring agriculture, citing, In

Re Agricultural, Aquacultural and Horticultural Water Usage Certification Rules, N.J.A.C. 7:20A-1.1 et seq., 410 N.J. Super. 209 (App. Div. 2009). While this precedent does encourage a reading of farming and environmental legislation that minimizes conflict, it does not change the rules of statutory construction. The legislature must be understood to have known its favorable policy concerning farming when it wrote the farming exemption of the Wetlands Act. It could have used expansive language and can at any time amend the exemption to accommodate newer forms of agriculture.

Even if this reading is overly narrow, the balance struck by the Act does not exempt farming, traditional or otherwise, from all care in respect of wetlands. Raising elevations so as to eliminate wetlands, sinking concrete footings, depositing crushed stone, erecting agricultural buildings, placing culverts, and allowing extensive runoff, all without permits, does not become acceptable because the exemption tolerates degrees of impact, see, N.J.S.A. 13:9B-4(a)(e); N.J.A.C. 7:7A-2.8; N.J.A.C. 7:7A-1.4 defining “plowing” to exclude the deposition of fill; see also, U.S. v. Brace, 41 F.3d 117 (3rd Cir. 1994).

There is scarcely any debate that placing culverts in Thundergust Brook without seeking a permit violates the Flood Hazard Area Control Act. Respondents argue that they simply reconstructed existing crossings, but it is plain from the aerial photography that culverts did not preexist the 2000-02 period. In terms of seriousness, the DEP acknowledged that culverts would have been approved if properly sized because a farmer needs to get across his field. Nonetheless, the violations occurred and it is worth noting that the 1997 NOV issued to Mr. Ench informed him that activity in Thundergust Brook required a Flood Hazard Area permit. When the current AONOCAPA was drafted administrative penalties were not available under this Act.

The Department seeks to hold Mr. Ench personally liable for these violations under the “responsible corporate official” doctrine, citing, DEP v. Ventron, 94 N.J. 473 (1983); DEP v. Standard Tank Cleaning Corp. 284 N.J. Super. 381 (App. Div. 1995). Mr. Ench is president of the company and it is under his control. He made the shift to

greenhouse farming, which required multiple steps spanning a few years. Mr. Ench has two prior citations concerning wetlands intrusion, one of which was in Thundergust Brook. Thus, he cannot credibly deny understanding the wetlands implications of his project. Yet that is not the standard of personal liability. In Ventron the Supreme Court dealt with parent and subsidiary corporations in the context of highly toxic waste. It found specific authority within the Spill Compensation & Control Act, N.J.S.A. 58:10-23.11, to extend responsibility to the parent corporation. In Standard Tank, individual responsibility was established in the definitional section of the Water Pollution Control Act, N.J.S.A. 58:10A-3. The term “person” there includes a responsible corporate officer. No such explicit authorization exists in the Wetlands Act and the argument is an effort to broaden the reach of these holdings. Personal liability was recently rejected for wetlands violations in Asdell Builders v. DEP, 426 N.J. Super. 564 (App. Div. 2012), the only reported case on point. The Department must fall back upon general rules concerning piercing the corporate veil. That principal is designed to be applied sparingly as a long history protects corporate officials from individual liability. Small corporations fairly typically have one or two main actors; that alone does not create personal responsibility. There is no indication of crime or fraud, nor does it appear that manifest injustice will result without imposition of personal responsibility, Ventron, supra.

Respondents argue also that the Department’s approach to the investigation, as well as the large proposed penalty, violate principals of fundamental fairness and/or the square corners doctrine, see, Doe v. Poritz, 142 N.J. 1 (1995); W.V. Pangborne & Co. v. N.J. Dep’t of Transportation, 116 N.J. 543 (1989). These are doctrines cautiously applied when government has been plainly abusive or harassing toward a citizen. The general problem with the argument in this instance is that Hopewell Nursery actually did the things of which it is accused. As for the details Mr. Ench believes that Centerton Nursery, his immediate neighbor to the north, committed significant violations and received light treatment. The Centerton Nursery matter is barely touched on by the record and has no relevance to the instant violations. Counsel points out that the AONOCAPA was issued on thin data and the Department then went on to find the supporting documentation. It is true that much of the data collection on both sides

continued long after issuance of the AONOCAPA. Respondents mounted a vigorous defense and the investigation continued for a number of years, some of it under Judge Tassini's supervision. Respondents say the Department is engaged in a "witch hunt." Yet, the other major matter to which it refers has to date resulted in findings of responsibility, see, NJDEP v. Bench Realty, ECE-LU 2360-08, Initial Decision (May 13, 2010), adopted in part, rejected in part, and modified, Comm'r (February 21, 2011), <<http://njlaw.rutgers.edu/collections/oal/>>; 2013 N.J. Super. Unpub. LEXIS 1657 (App. Div. 7/03/13).

The penalty was derived with reference to a regulatory point system that considers the intentionality of the conduct, the resource value of the wetlands and the acreage involved, N.J.A.C. 7:7A-16.8. The knowing nature of the violations is plain, there is no serious debate that these are other than intermediate resource value wetlands and more than three acres were impacted. This calculates to eight points and a daily penalty of \$9,000. The Department submitted the certification of Scott Brubaker in lieu of testimony to explain the number of days chosen by which to multiply the daily penalty. Mr. Brubaker was at the time chief of the Bureau of Coastal Land Use Compliance & Enforcement and responsible for penalty assessment. He certified that as a general rule an acre of wetlands is disturbed over a three-day period and thus the practice was to multiply the number of acres disturbed by three. In this instance the AONOCAPA alleged that 33.5 acres were disturbed, but Mr. Brubaker concluded that using the three-day norm would lead to an excessive penalty. Instead he multiplied by two to arrive at sixty-seven days. This number of days at \$9,000 per day resulted in an assessment of \$603,000. This figure has now been reduced to \$568,260 based on violations within 31.57 acres.

N.J.S.A. 13:9B-21 grants wide discretion in penalty assessment and the Department's decisions in this regard are entitled to deference. Respondents argue that the methodology used leads to ad hoc decision-making. The three-day estimate of the length of time it takes to disturb an acre is unsupported and in any case, it was not used. A more objective formula may be possible, but any reader of the regulatory

framework would be cautioned that ongoing and substantial violations can be met with heavy daily penalties. The three-day estimate is a proxy for case specific evidence, information not readily available without the cooperation of the violator. Here the policy greatly narrows the potential span of continuing violation days and Mr. Brubaker narrowed them further. Respondents were not disadvantaged by this exercise of discretion. They nonetheless maintain that the sum imposed is excessive, but the penalty is a function of the scale, duration and willfulness of their wetlands intrusion. Moreover, Mr. Brubaker was scheduled to be called as a witness and his understandings concerning the Department's practice at the time could have been probed. The parties attempted a stipulation concerning his testimony and failing that respondents acceded to the submission of a certification. Having relinquished the opportunity to cross-examine, respondents cannot now forcefully argue that the process is uneven.

Based on the foregoing it is **ORDERED** that respondent Hopewell Nursery pay a penalty of \$568,260 and remediate the property in accordance with the AONOCAPA.

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.



August 12, 2013

DATE

SOLOMON A. METZGER, ALJ/ta

Date Received at Agency:

Date Mailed to Parties:

mph

LIST OF EXHIBITS:

For petitioner:

- | | |
|------------|--|
| P-1 | Administrative Order & Notice of Civil Administrative Penalty Assessment |
| P-2 | Hearing Request, October 13, 2004 |
| P-3 | Resume of Roderick Falla |
| P-4 | Wetlands Training Certificate of Roderick Falla |
| P-6 | David J. Eddowes Letter, July 31, 1997 |
| P-7 | Barry Perlow Letter, August 21, 1997 |
| P-8 | DEP Land Use Enforcement Phone Complaint Form, August 19, 1997 |
| P-9 | Letter from David Eddowes to Barry Perlow, August 25, 1997 |
| P-11 | Elmer Topographic Map NE |
| P-12 | Topographic Map, Elmer Jct. |
| P-13 | Not admitted |
| P-14 | DEP Freshwater Wetlands Map, Bridgeton NE quadrangle |
| P-14C | Colorized Aerial Photo, DEP Freshwater Wetlands Map, Bridgeton NE quadrangle |
| P-15 | DEP Freshwater Wetlands Map, Bridgeton NE Quadrangle |
| P-16 | Tax Map, Upper Deerfield |
| P-17 | Tax Map, Deerfield Township |
| P-18 & 18A | Soil Survey, Hopewell Nursery & Text of Soil Survey Book |
| P-18C | Colorized Soil Survey, Hopewell Nursery |
| P-20 | Excerpt from DEP freshwater wetlands map, Elmer SE Quadrant |
| P-20A | DEP freshwater wetlands map - Elmer SE Quadrant |
| P-20C | Excerpt from colorized DEP freshwater wetlands map, Elmer SE Quadrant |
| P-20D | Excerpt from colorized DEP freshwater wetlands map, Elmer SE Quadrant |
| P-20E | DEP Freshwater Wetlands Protection Act Pamphlet |

- P-21 Rod Falla Handwritten Notes, August 22, 1997
- P-22 Rod Falla Handwritten Notes, August 26, 1997 (page two)
- P-23 August 25, 1997 Hopewell Nursery Pictures
- P-24 Notice of Violation, September 4, 1997 (Notice only)
- P-25 Rod Falla Phone Log, September 4 and 19, 1997
- P-26 Hopewell Nursery Topographic map (created by Lynch Giuliano), Lot 10, Block 64 and Lot 33, Block 4 - April 1988, updated September 1997
- P-27 William Voeltz Letter to Rod Falla, September 17, 1997
- P-28 William Voeltz Letter to Rod Falla, September 19, 1997
- P-30 Compliance Evaluation Summary, January 28, 2004 (Thorn Branch location)
- P-31 Field Notice of Violation (Thorn Branch location) - January 20, 2003
- P-32 Resume of Robert Pacione
- P-33 Elmer USGS Quadrangle (Thorn Branch Location)
- P-34 Excerpt from survey of Thorn Branch Location
- P-35 E-mail from Kathleen Cann to Rod Falla - March 16, 2004
- P-36 Hopewell Nursery Incident Report, dated March 16, 2004
- P-37 Employee Training Transcript - Robert Pacione
- P-38 Handwritten Notes from April 16, 2004 inspection
- P-39 to P-39AA Pictures, Hopewell Nursery, April 16, 2004 (All Admitted, except Exhibits P-39V, P-39W, P-39X, P-39Y, P-39Z)
- P-40 Resume of Lou Jacoby
- P-41 Picture of June 2001 grading at Hopewell Nursery by Wayne Sweet
- P-42 Picture of type of bulldozer used at Hopewell Nursery by Wayne Sweet

- P-43 June 2001 Grading Plan by Lynch Giuliano, annotated by Wayne Sweet
- P-44 June 1988 Wetlands Delineation, Map and Nationwide Permit Application by Lynch Giuliano for Hopewell Nursery Property
- P-45 1998 Hopewell Nursery Survey
- P-48 Aerial Photo of Hopewell Nursery, 2002 Image, with Wetlands Overlay and Location of April 2004 photos and soil borings
- P-50 Edward Sweet Grading Invoices, June - August 2001
- P-52 2007 Aerial Photo of Hopewell Nursery
- P-53A & P-53B Pictures of June 2001 Grading at Hopewell Nursery by Wayne Sweet
- P-54 Inspection Report, Wetlands Determination Sheet and Pictures - April 28, 2005
- P-55 Field Notes by Rod Falla and Bob Pacione - April 28, 2005
- P-56A-56DD Pictures of Hopewell Nursery, April 28, 2005
- P-59 Munsell Soil Color Charts
- P-60 Enlarged 1995 Aerial Photo of Hopewell Nursery with freshwater wetlands lines
- P-61 Enlarged 2002 Aerial Photo of Hopewell Nursery with freshwater wetlands lines

EXHIBIT BINDER #2

- P-62 Deed, made on August 22, 1986, between Landholders, Inc., and Robert Ench and Benjamin Kasper
- P-63 Lease Agreement made on December 13, 1996 between Robert Ench and The Estate of Benjamin Kasper
- P-64 Deed, made on June 16, 1999, between Robert Ench and Sanderina R. Kasper

- P-65 Unanimous Consent of Directors in Lieu of Annual Meeting, dated October 10, 1995
- P-66 Unanimous Consent of Shareholders in Lieu of Annual Meeting, dated October 14, 1996
- P-67 Unanimous Consent of Shareholders in Lieu of Annual Meeting, dated October 10, 1997
- P-68 Unanimous Consent of Directors in Lieu of Meeting, dated September 1, 1998
- P-69 Unanimous Consent of Directors in Lieu of Meeting, dated October 16, 1998
- P-70 Unanimous Consent of Directors in Lieu of Meeting, dated June 16, 1999
- P-71 Unanimous Consent of Directors in Lieu of Meeting, dated October 1999
- P-72 Unanimous Consent of Directors in Lieu of Meeting, dated February 15, 2000
- P-73 Unanimous Consent of Shareholders in Lieu of Meeting, dated August 17, 2000
- P-74 Unanimous Consent of Directors in Lieu of Annual Meeting, dated October 2000
- P-75 Unanimous Consent of Directors in Lieu of Annual Meeting, dated October 5, 2001
- P-76 Unanimous Consent of Shareholders in Lieu of Meeting, dated August 2, 2002
- P-77 Unanimous Consent of Shareholders in Lieu of Annual Meeting, dated October 2002
- P-78 Unanimous Consent of Directors in Lieu of Meeting, dated September 2004
- P-79 Letter from Cumberland County Dept. of Planning and Development to Bob Ench, dated April 6, 1999

- P-80 Letter from Hopewell Nursery, Inc. to State of New Jersey Agriculture Development Committee, Farmland Preservation Program, dated April 18, 1999
- P-81 Letter from Hopewell Nursery, Inc. entitled Resolution of the Board of Directors & Shareholders, dated April 23, 1999
- P-82 Letter from Hopewell Nursery, Inc. entitled Resolution of the Board of Directors, dated May 24, 2000
- P-83 Invoice from Giberson Plumbing and Excavating, Inc., dated November 19, 2001
- P-84 Letter from Giberson Plumbing and Excavating, Inc. to Hopewell Nurseries, Inc., dated July 5, 2001
- P-85 Invoice from Giberson Plumbing and Excavating, Inc., dated July 6, 2001
- P-86 Invoice from Giberson Plumbing and Excavating, Inc., dated July 13, 2001
- P-87 Poly Greenhouse Proposal for Hopewell Nursery, Inc.
- P-89 Hopewell Nursery, Block Map
- P-91 Respondents' Objections and Responses to NJDEP's Initial Interrogatories and Request for Production of Documents - Nos. 15-18
- P-92 Respondents' Objections and Responses to NJDEP's Initial Interrogatories and Request for Production of Documents, Nos. 21-24
- P-106 Resume of John Tyrawski
- P-107 Report on Geo-Referencing 1988 Topographic Survey into Other Documents
- P-108 Report - GPS Data Processing Done on Hopewell Nursery GPS Data Files Collected on February 7-8, 2008

EXHIBIT BINDER #3

- P-109 Hopewell Nursery Quantities and Locations of Affected Wetlands and Transition Areas (Arcview file Hopewell Nursery Coordinate info. Mxd, 2002 Photo base with 1988 Giuliano Survey Overlay)

- P-110 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas 1 North East (Arcview file Hopewell Nursery Coordinate info Area 1 Complete, Mxd., 1995 Photo base)
- P-111 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas 1 North East (Arcview file Hopewell Nursery Coordinate info Area 1 Complete, Mxd, 2002 Photo base)
- P-112 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas 1 North East (Arcview file Hopewell Nursery Coordinate info Area 1 Complete. Mxd, 2002 Photo base with 1988 Giuliano Survey Overlay)
- P-113 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas Area 2 North and South (Arcview file Hopewell Nursery Coordinate info. Area 2 Complete, Mxd, 1995 Photo base)

EXHIBIT BINDER #4

- P-114 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas Area 2 North and South (Arcview file Hopewell Nursery Coordinate info Area 2 Complete. Mxd, 2002 Photobase with 1988 Giuliano Survey Overlay)
- P-115 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas Area 2 North and South (Arcview file Hopewell Nursery Coordinate info Area 2 Complete. Mxd, 2002 Photo base)
- P-116 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas 3 and 4 (Arcview file Hopewell Nursery Coordinate info Area 3 and 4 Complete. Mxd, 2002 Photo base)
- P-117 Hopewell Nursery Quantities State Plane Coordinates and Locations of Affected Wetlands and Transition Areas 3 and 4 (Arcview file Hopewell Nursery Coordinate info Area 3 and 4 Complete. Mxd, 1995 Photo base)

- P-118 Hopewell Nursery NJDOT Backhoe Excavations/Boring Locations (Arcview file Hopewell Boring and Trench Locations, Mxd, 2002 Photo base)
- P-119 Hopewell Nursery NJDOT Backhoe Excavations/Boring Locations (Arcview file Hopewell Boring and Trench Locations, Mxd, 1995 Photo base)

EXHIBIT BINDER #5

- P-120 Hopewell Nursery on Site Impacts to Thundergust Brook (Arcview file Hopewell Nursery on Site Impacts to Thundergust Brook.mxd, 1995 Photo base)
- P-121 Hopewell Nursery on Site Impacts to Thundergust Brook (Arcview file Hopewell Nursery on Site Impacts to Thundergust Brook.mxd, 2002 Photo base)
- P-123 Inspection Report - November 22, 2005
- P-124 Pictures from November 22, 2005
- P-125 December 2, 2005 Inspection Report
- P-126A-B Photos from December 2, 2005 Inspection
- P-128A, B, C, E, F & G Photos from February 2008 Site Inspection
- P-129 Curriculum Vitae of Vincent Mazzei, P.E.
- P-130 Flood Hazard Area Control Act regulations adopted on March 20, 1995

EXHIBIT BINDER #6

- P-131 Resume of Ralph Spagnolo
- P-132 PowerPoint Presentation/Pictures from EPA February 2008 Site Inspection
- P-133 Hydric Soil Data Sheets - February 2008 EPA Site Inspection
- P-135 October 12, 2007 Letter from Marathon Engineering to Franklin Riesenburger, Esq.

P-135A 15 October 2007 Letter from James C. Schmid to Franklin Riesenburger, Esq.

EXHIBIT BINDER #7

P-137 Resume of David Fanz, DEP
P-138 Expert Report Summary by David Fanz
P-139 N.J.A.C. 7:7A-1.4 as of August 19, 2002
P-140 N.J.A.C. 7:7A-2.8 as of August 19, 2002
P-143 1991 Aerial Photograph of Hopewell Nursery property
P-148 21 March 1986 NJDEP Photo base used for 1988 NJDEP wetlands maps

For respondent:

R-1 1989 Federal Wetland Delineation Manual (previously supplied)
R-2(a-h) May 20, 2010, Photos of Thundergust Brook
R-3 Hopewell Nursery Fall '94-Spring '95 Catalog
R-4 Hopewell Nursery Fall 2001-Spring 2002 Catalog
R-5 Fralinger Survey, 2000
R-6 Letter from Frank Riesenburger, Esq. to Judge Tassini, enclosing correspondence dated December 19, 2005 from Charles Kuperus and January 5, 2006 from Carl Nordstrom, February 27, 2006
R-7 Letter from William Taylor to Gary Timberman regarding Centerton Nursery's disconnected irrigation pipes, November 26, 1997
R-8 James A. Schmid, Wetlands and Wetland Incursions at Hopewell Nursery Farm 3, August 14, 2007
R-9 James A. Schmid, Expert Opinion Regarding Wetlands and Wetland Incursions at Hopewell Nursery Farm 3, February 20, 2009

- R-10 James A. Schmid, Supplemental Expert Opinion Regarding Wetlands and Wetland Impacts, February 27, 2009
- R-11 James A. Schmid, Supplemental Letter Report, March 1, 2010
- R-12 Willem Hofman, Expert Report, June 27, 2007
- R-13 Robert W. Shuey, Aerial Photograph Interpretation Hopewell Nursery Site, August 24, 2005
- R-14 Video of Centerton Nursery Stormwater Discharge, December 9, 2009
- R-15 Google Aerial Photos of Thundergust Brook, 1995 (two) and 2006 (two)
- R-16 Aerial image of Hopewell Nursery (US Geological Survey/Google), imagery date March 10, 1991
- R-17 Aerial images of "Site 1", March 9, 1991, March 24, 1995, July 15, 2006 and May 28, 2008 (US Geological Survey and/or USDA Farm Service Agency/Google)
- R-18 Aerial images of Hopewell Nursery, 1997-2000
- R-19 Photos of Thundergust Brook restoration/regrading, September – November 1997
- R-20 Photos of stormwater flows from Centerton Nursery and to Thundergust Brook and adjacent fields, June 1998-March 2000
- R-21 Photo of discharge from Centerton Nursery outfall, March 24, 2011
- R-22 NJDEP 1995 Ortho Photo – Centerton Nursery
- R-23 NJDEP 2001 Ortho Photo – Centerton Nursery
- R-24 NJDEP 2007 Ortho Photo – Centerton Nursery
- R-25 NJDEP Notice of Violation to Centerton Nursery dated June 21, 2006
- R-26 NJDEP Inspection Report of Centerton Nursery dated May 25, 2006
- R-27 NJDEP Farming Exemption Denial for Centerton Nursery, July 25, 2006

- R-28 NJDEP e-mail from Robert Pacione to Mark Godfrey dated July 17, 2007
- R-29 NJDEP letter regarding revision to prior FWPA exemption status determination for Centerton Nursery, April 3, 2008
- R-30 Inventory/Field Block Sketch, Farm 3, Back 30, Field Boundary 1999
- R-31 Fact Sheet for Temporary Greenhouses Under the New Jersey Uniform Construction Code, New Jersey Department of Agriculture in consultation with New Jersey DCA, December 2004 revised
- R-32 Farm leases between Bench Realty and various tenant farmers, 1987-1994
- R-33 Excerpts from "This Place Called Home – an Illustrated History of the Township of Upper Deerfield in the County of Cumberland, State of New Jersey", F. Alan Palmer, published by the Upper Deerfield Township Committee, 1985
- R-34 Excerpt from Federal Manual for Identifying and Delineating Jurisdictional Wetlands (January 1989) for Disturbed Area Methodology
- R-35 NJDEP e-mail from Scott Brubaker to Jan Arnett, July 14, 2005
- R-36 Historic Photos of Seabrook Farm Eastern Division (now Hopewell and Centerton Nursery Properties)
- R-37 Photograph of poly-house concrete anchoring post
- R-38 Enlarged aerial photo of site No. 1 with J.A. Schmid wetland overlaid
- R-39 NJDEP freshwater wetland Letter of Interpretation, Ganes Chemicals, Inc., April 29, 1999
- R-40 Letter from James Schmid to David Fanz re Ganes Chemicals, October 28, 1998
- R-41 Not admitted
- R-42 Photos of machines

LIST OF WITNESSES:

For petitioner:

Roderick Falla
Robert Pacione
Lou Jacoby
John Tyrawski
Ralph Spagnolo
Vincent Mazzei
William Voeltz
Wayne Sweet
David Fanz

For respondent:

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