

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter of the Alleged Violations
of Article 24 of the Environmental Conservation
Law of the State of New York and of Part 663 of
Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York

-by-

**BRADLEY CORPORATE PARK and JOHN MAGEE and PATRICK MAGEE,
individually and as general partners of BRADLEY CORPORATE PARK,**

Respondents.

DEC Case No. 3-2000-0424-43

DECISION AND ORDER
OF THE COMMISSIONER

January 21, 2004

DECISION AND ORDER OF THE COMMISSIONER

Pursuant to a Notice of Hearing and Complaint dated May 11, 2000, Department of Environmental Conservation ("Department") Region 3 staff commenced this proceeding against respondents alleging violations of article 24 of the Environmental Conservation Law (ECL) and part 663 of title 6 of the New York Compilation of Codes, Rules and Regulations ("6 NYCRR"). Department staff alleged that respondents John Magee and Patrick Magee, who are partners in Bradley Industrial Park (a/k/a Bradley Corporate Park) and Bradley Corporate Park, violated ECL 24-0701 and 6 NYCRR part 663 by filling, grading, and performing construction in a State-regulated wetland (NA-4) and adjacent area.

As a result of Department staff's motion for an expedited hearing, Administrative Law Judge ("ALJ") Susan J. Dubois and ALJ P. Nicholas Garlick convened a hearing on the question of liability. Based upon the hearing report, the Commissioner issued an order on June 18, 2001 holding respondents liable for violations of article 24 of the ECL and 6 NYCRR part 663 for having undertaken activities within a freshwater wetland and its adjacent area without the required permits, and remanding the matter for hearing on the issues of penalty and possible remediation.

ALJ Garlick convened a hearing on the issue of penalties and appropriate relief on August 8, August 9, and September 6, 2001, and April 9, 2002 in the Region 3 offices of the Department. By letter dated February 28, 2003, counsel were advised that the ALJ's hearing report would be circulated as a recommended decision pursuant to 6 NYCRR 622.18(a)(2). Following circulation of the recommended decision on February 27, 2003, respondents and Department staff submitted comments dated March 28, 2003.

ALJ Garlick determined that respondents disturbed 0.649 acres of a Class I freshwater wetland and 2.625 acres within the adjacent area to that wetland. Recommended Decision, Findings of Fact #41 & 42. The ALJ recommended a civil penalty of \$83,500 and a restoration plan for the site.

As set forth below, I differ with the ALJ on certain findings of fact, and aspects of the analysis and recommendations on the issues of penalty and wetland restoration. Based upon my review of the record, and for the reasons set forth in this Decision and Order, a higher penalty and a more comprehensive restoration of the wetland and its adjacent area are appropriate in this matter.

I. Civil Penalty

ECL 71-2303(1) provides for a civil penalty of up to \$3,000 for each violation of Article 24. In determining appropriate monetary penalties, the Department's Civil Penalty Policy ("CPP") and Freshwater Wetlands Enforcement Guidance Memorandum ("FWEGM") are considered.

The starting point for penalty calculations in freshwater wetlands cases is to compute the potential statutory maximum for all provable violations. See FWEGM § IV.B.1 ("Guidelines for Determining Penalty Amounts/Statutory Maximum"). As stated in the FWEGM, "each distinct illegally conducted regulatory activity that would independently require a permit constitutes a separate violation." Id.

The determination that each illegal placement of fill constitutes a separate violation has been previously established. See Matter of Chester Industrial Park Associates, L.P., Decision and Order of the Commissioner, October 24, 2000 ("Chester").¹ See also Matter of Nieckoski v New York State Dept. of Env'tl. Conservation, 215 AD2d 761 (2d Dept 1995) (affirming the propriety of the Department's assessment of separate penalties for each tidal wetland violation involved in a project and that each placement of fill is a separate violation); Matter of Linda Wilton and Costello Marine, Inc., Order of the Commissioner, February 1, 1991 (although only a single transaction, each of three distinct activities, each of which independently required a permit, constituted a separate violation).

(A) Number of Violations

Numerous violations of the wetland statute and regulations were alleged in this proceeding, including truck trips bringing fill to be deposited in the wetland and the adjacent area, truck trips bringing cement to be used for footings and building

¹ The Appellate Division reduced the penalty set by the Commissioner in Chester. This, however, was due to the fact that Department staff had alleged only 90 violations in the complaint and, therefore, the penalty was limited to the number of violations times \$3,000 per violation maximum (for each petitioner). Matter of Chester Indus. Park Assoc., L.P. v Cahill, 295 AD2d 508 (2d Dept 2002). The decision did not affect the Department's authority to assess penalties in the manner herein described.

foundation in the wetland area, and other illegal clearing, grading and building construction activities.

(1) Department Staff Motion to Amend the Complaint with Respect to the Number of Alleged Violations

Department staff, in its complaint, alleged that respondents committed in excess of twenty-five separate instances of grading, excavation and filling activities in State-regulated wetland NA-4 and the adjacent area. Complaint, ¶ 8. By notice of motion dated July 19, 2002, Department Assistant Regional Attorney Steven Goverman sought to amend the complaint to substitute "295 separate occasions" in lieu of the "in excess of twenty-five (25) occasions" alleged in the initial pleading. This was to conform the pleadings to the proof presented at the hearing.

Subsequently, in a reply affirmation dated August 6, 2002 and a revised notice of motion to conform the complaint, Mr. Goverman stated that he had made an error in calculation and the correct number of fill violations should be 329. ALJ Garlick granted Department staff's motion to amend the complaint. Recommended Decision, at 9-10. Respondents, who had opposed Department staff's motion, argued in their March 28, 2003 comments on the Recommended Decision that no amendment to the pleadings should have been permitted and that Department staff's amendment was "extremely prejudicial."

Section 622.5(b) of 6 NYCRR provides that "[c]onsistent with the CPLR a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond." See also Civil Practice Law and Rules § 3025(c) (court may permit pleadings to be amended "before or after judgment to conform them to the evidence"). Cf. Chester, at 2 ("[g]iven the testimony at the hearing" as to the volume of unpermitted fill deposited in the wetland and the number of truckloads to deposit that amount of fill, the "more preferred and suitable course" would be for Department staff to move before the ALJ to amend the pleadings to conform to the proof).

Respondents were on notice during the proceedings of Department staff's intentions with respect to the multitude of violations based upon Department staff's statements and filings and the record that Department staff established in the hearing. Department staff made clear that it was presenting proof of the amount of fill placed in the wetland and adjacent area in order to establish the number of truck trips and, in part, based on the number of truck trips, the number of violations. As ALJ Garlick

indicated, respondents themselves conceded that a significant number of truck trips to the site were made based on respondents' estimates of the amount of fill at the site. Recommended Decision, at 10.²

I concur with the ALJ's granting Department staff's motion to amend the complaint, and do not find that the determination to grant the motion caused prejudice or surprise to respondents. Accordingly, that portion of the Recommended Decision granting Department staff's motion to amend the complaint is affirmed.

(2) Calculation of the Number of Violations

In calculating the number of violations, a considerable portion of the record addressed the amount of fill that was brought to the site and the capacity of the vehicles that transported the fill. As stated by the ALJ, an appropriate methodology in determining the number of violations "is to divide the total amount of fill [illegally deposited] by the size of the vehicle used to transport each load of fill." Recommended Decision, at 7.³

The ALJ's Recommended Decision reviews and evaluates the conflicting evidence presented by Department staff and respondents on the amount of fill deposited illegally at the site and the capacity of the trucks by which the fill was transported to the site. The higher the capacity of the truck, the fewer number of trips and, consequently, based on the methodology cited by the ALJ, a lesser number of violations.

(a) Amount of Fill Brought to the Site

A critical issue during the penalty phase of the enforcement proceeding was the amount of fill that was illegally deposited at the site. The ALJ summarizes the conflicting testimony of Robert

² Department staff, in their motion for an order without hearing, sought a penalty in excess of \$500,000. Transcript ("Tr."), Vol. 6, at 178-179; Affirmation of Steven Goverman, Esq., ¶ 10 (Dec. 15, 2000). Accordingly, from the earliest stages of this proceeding, respondents had notice of the significant penalties that were being sought relative to their unpermitted activities.

³ Although an appropriate methodology, this does not represent the only method by which the number of violations may be determined.

Burgher, a Department staff surveyor, and Joseph Corless, respondents' expert. Recommended Decision, at 8-9.

Estimates varied, in part, due to the use of different elevations for the site prior to the placement of fill. Respondents' expert estimated that up to 5,000 cubic yards were deposited. Tr., Vol. 8, at 594. Department staff initially testified that 15,726 cubic yards of fill had been deposited at the site. Department staff subsequently moved to revise their estimate of fill to 7,922 cubic yards, based on a reduced elevation and the removal from the estimate of an area that was not subject to state wetland jurisdiction. See Department staff's Revised Fill Estimate, Exh. 100. A hearing was reconvened to allow respondents to examine the Department's expert on the revised estimate.

The ALJ declined to include Department staff's revised estimate in the record (Recommended Decision, at 9), and found that approximately 5,000 cubic yards were placed in State-regulated wetland NA-4 and the adjacent area. Based on the record in this proceeding, I adopt the ALJ's factual finding.

(b) Capacity of the Transporting Vehicle

With respect to the capacity of the trucks that brought the fill to the site, respondent John Magee testified that a 746B Euc was used and that this off-road vehicle holds between 36 and 40 yards of fill. Tr., Vol. 6, at 155 (the off-the-road vehicle "holds somewhere between thirty-six and forty yards of fill"). The following day, Mr. Magee corrected his testimony to state that a Caterpillar 769 was used, but he did not make a change in his testimony on capacity. Tr., Vol 7, at 272. At the hearing, a Department mined land reclamation specialist testified as to his familiarity with these vehicles and that they hold approximately 30 cubic yards. Tr., Vol. 7, at 276.

The ALJ found that the vehicle capacity was 40 cubic yards. Recommended Decision, Finding of Fact #48.

Department staff, in their comments on the Recommended Decision, contest the ALJ's finding. Specifically, Department staff maintains that the ALJ improperly concluded that the vehicle used to transport fill to the site had a capacity of 40 cubic yards.

ALJ Garlick stated that Department staff failed to meet their burden of proving that the vehicle had a smaller capacity. He detailed the type of evidence which, if it had been

introduced, would have met that burden. Also, he stated that no evidence was presented indicating whether the vehicle was fully loaded each time it was used. Recommended Decision, at 12. In light of the ALJ's analysis, I adopt the ALJ's determination that the capacity of the vehicle was 40 cubic yards.

(3) Total Violations

ALJ Garlick found that 119 truck trips were needed to bring fill to State-regulated wetland NA-4 and the adjacent area. In addition, the ALJ found that 29 truck trips were required to bring cement for footings and the building foundation. The ALJ also found five more violations based on respondents' clearing of vegetation in the adjacent area and in NA-4, grading in the wetland and in the adjacent area, and erecting a steel framework in NA-4. See Recommended Decision, Findings of Fact #50-52. I am adopting these findings, except that I decline, in the absence of sufficient evidence in the record and the approximations involved in the calculation, to accept the percentage division of violations between the regulated wetland and the adjacent area set forth in Finding of Fact #52.

The ALJ concluded that a total of 153 violations occurred. Id., Finding of Fact #49. Based on the ALJ's computation of the number of violations and, in light of the maximum penalty of \$3,000 per violation authorized by ECL 71-2303(1), the maximum penalty would amount to \$459,000.

The ALJ, however, based upon his review of the FWEGM, the CPP and the Chester decision, recommended a penalty of \$83,500. I disagree with the ALJ's analysis based on my further review of the record, and consideration of the FWEGM, the CPP, and the Chester decision.

(B) Penalty Adjustments

In determining any penalty, various factors must be considered. The amount to be appropriately imposed generally does not reflect a simple mechanical application of the number of violations times a penalty amount. See CPP, § II ("[f]or any given violation, there is no single 'correct' penalty amount which can be determined by any formula").

In considering the factors under the CPP, I concur with the ALJ that no basis exists for any downward adjustments in this matter. However, the CPP factors of culpability and history of non-compliance, as well as the actual damage to the environment that has occurred, justify imposing a higher penalty than that

proposed by the ALJ.

Respondents have previously been cited for violations of wetlands laws and regulations, and this past conduct is a relevant factor to be considered. In 1990, these respondents signed a consent order for freshwater wetland violations involving approximately two acres and the disturbance of a stream at this same general location, and a \$90,000 penalty was imposed. Tr., Vol. 6, at 238-240; Tr., Vol 7, at 284 (referencing consent order that was entered into "with regard to the Bradley Corporate Park and some violations in regard to wetland[//]water courses that occurred" in the 1980s); Exh. 59 (consent order (paragraph 3) detailing that respondents John and Patrick Magee d/b/a Bradley Corporate Park "[o]n or about October 3, 1984, and continuing until at least December, 1985," undertook grading, filing and construction activities within the boundary of wetland NA-4 and its adjacent area without a permit).

With respect to the violations at issue in this proceeding, respondents knew that a permit was required for the activity at the site, but nonetheless continued with their planned work in the wetland and adjacent area. Recommended Decision, Finding of Fact #61 ("After submitting the permit application, the Respondents continued construction activities at the site, despite their knowledge that a permit was required"); Tr., Vol. 6, at 117; Vol 7, at 399. See also Matter of Bradley Corporate Park, Order of the Commissioner, June 18, 2001 (attached ALJ Expedited Fact Finding Hearing Report setting forth ongoing unpermitted filling and clearing activities in regulated wetland).

Respondents' avoidance of a Department permit review process for the filling and other activities in this Class I wetland undermined the State's Freshwater Wetlands Act and the applicable wetland regulations. See Matter of Staten Island R. T. Operating Auth., Hearing Report of Administrative Law Judge Susan Weber, November 27, 1995, 1995 WL 775064, *16 ("The permitting process is central to the statutory and regulatory scheme embodied in the Freshwater Wetlands Act. The value of wetlands recognized by the Legislature in enacting the Act cannot be protected if an entity does not subject itself to regulation").

Furthermore, I disagree with the ALJ that respondents' past violation should not be considered because it was more than ten years old. While violations that have occurred over ten years ago are not considered in permitting cases, this is an enforcement proceeding. Evidence of past violations goes precisely to the factor of respondents' compliance with

environmental laws and must be considered in any assessment of an appropriate penalty. See CPP IV.E.3 (“[a] history of violations subsequent to environmental enforcement actions is usually evidence that the violator has not been deterred by the previous enforcement response”).

I also disagree with the ALJ’s application of Chester in calculating a penalty. See Recommended Decision, at 14-15. The ALJ is correct that the FWEGM requires consideration of the relative seriousness of harm based on the regulatory designations relating to incompatibility and compatibility. See FWEGM, IV.B.3. However, filling and grading, as occurred in this matter without authorization, are all activities that are incompatible with freshwater wetlands and usually incompatible with respect to adjacent areas. Constructing a commercial building is an incompatible activity. See 6 NYCRR 663.4(d).

Under the State’s freshwater wetland classification system, Class I wetlands, such as N-4, have the highest rank with respect to their ability to perform wetland functions and to provide wetland benefits, and represent the highest value in terms of the State’s hierarchy of wetland classification. See 6 NYCRR 664.4(a). The classification of the wetland must be considered in any penalty assessment.

Based upon my review of the record, I have determined that a penalty of \$120,000 should be imposed. Respondents’ prior non-compliance with the regulations governing wetlands, their knowing culpable conduct, and the fact that unpermitted activities occurred in a Class I wetland and adjacent area demonstrate that a higher penalty than that recommended by the ALJ and what was assessed in 1990 is warranted. Such a penalty is also necessary to deter such activities in the future.

My review of the record indicates that a substantially higher penalty than \$120,000 is supportable. I am, however, taking into account that respondents have recognized and voluntarily offered to undertake certain wetland restoration activities at the site.

II. Restoration

Department policy requires complete restoration of the full functions and values of regulated wetland areas that have been illegally altered. FWEGM, § IV.C. See also ECL 71-2303. Respondents agreed with certain elements of the wetland restoration proposed by Department staff. Recommended Decision, at 17. The following addresses areas of contested restoration.

(A) Removal of Fill from the Adjacent Area

As recognized by the ALJ, violations of Article 24 include any kind of unauthorized construction, filling, grading or intrusion into a wetland or its adjacent area. The ALJ, however, indicates that, although respondents disturbed 2.625 acres of adjacent area and deposited fill in 2.338 acres, the Commissioner is without jurisdiction to require restoration of the adjacent area. The ALJ states that ECL 71-2303 addresses restoration of "the affected freshwater wetland" but not specifically the adjacent areas. Recommended Decision, at 7. I do not accept the ALJ's interpretation, which is inconsistent with Department precedent and the law.

Various sections of Article 24 speak to the requirement for a permit for conducting activities in a State-regulated freshwater wetland. See, e.g., ECL 24-0703(1). ECL 24-0701(2) establishes that activities subject to regulation include activities conducted on adjacent areas to such freshwater wetlands. See also 6 NYCRR 663.2(z)(regulated activity includes activities "whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetland and are located within the adjacent area").

The Department's regulations require that persons proposing to conduct specific activities "on wetlands or adjacent areas" (including, for example, filling and grading) must obtain a permit. 6 NYCRR 663.4(a) & (d). Respondents clearly failed to do so for the regulated wetland and its adjacent area at this site.

The importance of an adjacent area to a regulated wetland is well-recognized. See, e.g., Tr., Vol. 6, at 216-219 (illustrating how adjacent areas preserve and protect wetland benefits, including preventing sediment or turbidity from entering a wetland, removing pollutants from run-off water, and providing habitat and protection to wetland-dependent wildlife).

Respondents' construction and other landclearing activities in the adjacent area have directly and adversely affected the functions and benefits of wetland NA-4. The evidence clearly demonstrates that the restoration of the adjacent area is necessary to protect the benefits of the wetland and to ensure its viability. See, e.g., Tr., Vol. 6, at 217-218 (detailing specific benefits of the adjacent area to wetland NA-4 as to turbidity and pollution control); Vol. 6, at 208-209 (need to restore a treed canopy cover in this "deciduous . . . forested wetland"). See also Tr., Vol. 7, at 315-316 (restoring adjacent area to prevent siltation of wetland).

Prior decisions have directed the restoration of adjacent areas where unpermitted activity has occurred. See, e.g., Matter of Biggica v State (Dept. of Env'tl. Conservation), 70 AD2d 591 (2d Dept 1979) (dismissing article 78 petition challenging Commissioner's order directing that petitioner submit a plan for restoration of "affected freshwater wetlands and adjacent areas"); Matter of Rose Harding, Order of the Commissioner, October 10, 1991 (requiring restoration of adjacent area to regulated wetland); Matter of Daniel Scifo, Order of the Commissioner, December 10, 1991 (requiring a restoration plan for disturbed areas within a freshwater wetland or its adjacent area); Matter of Tremont, Order of the Commissioner, July 6, 1990 (requiring removal of fill from, and revegetation of, regulated wetland and adjacent area); and Matter of Philip Hoeneffer, Order of the Commissioner, March 8, 1984 (adopting ALJ report which directs respondent to remove fill and restore wetland and adjacent area to its natural state as it existed prior to commencement of filling activities).

Restoration of the adjacent area is to include, as part of the restoration program, the removal of fill and the planting of trees and shrubs. Because respondents engaged in unpermitted activity and illegally placed fill in the adjacent area, respondents shall be required to remove it. If it is possible to leave some fill in the adjacent area and still achieve the restoration goals, this may be allowed. However, respondents will need to demonstrate as part of their submission of a restoration plan to Department staff that the leaving of any fill in the adjacent area would not impair restoration. The restoration of the adjacent area must also include the planting of trees and shrubs to facilitate the restoration of the full functions and values of wetland NA-4 in as short a timeframe as is feasible.

Although respondents have questioned the extent to which restoration in the adjacent area was contemplated, the record is clear that Department staff have sought restoration from the very commencement of this proceeding to address the environmental damage arising from respondents' unpermitted activities.

(B) Size of Trees To Be Planted

Department staff proposed, as part of the restoration plan, that trees between five and six inches in caliper (approximately 25 to 30 feet in height) be planted every 250 square feet. Respondents recommended that smaller trees, one inch in caliper and approximately 5 to 6 feet in height, be planted. The ALJ recommended the planting of one-inch diameter trees every hundred

square feet in wetland NA-4.

The goal of restoration is to restore the affected area "to its condition prior to the violation" and "within a reasonable time." ECL 71-2303(1); see also FWEGM § IV.C. As discussed, restoration will be required in both the wetland and adjacent area, and respondents will be required to prepare a restoration plan for the Department's review and approval.

The use of trees of only one-inch in caliper would mean that the restoration of the wetland and adjacent area and the attendant benefits of these resources will be delayed up to 15 years. Tr., Vol. 7, at 331-332. The record demonstrates the benefits of this forested wetland prior to respondents' violations. Planting more mature (larger caliper) trees will result in replacing lost wetland values in a shorter period of time. See, e.g., Tr., Vol.6, at 208-209 ("the critical part is to have a canopy cover . . . [p]articularly in a wetland like this, a deciduous swamp or forested wetland"); id. at 213-216 (describing NA-4 wetland values).

The ALJ found that Hurricane Floyd, which passed through the vicinity of Bradley Corporate Park on August 19, 1999, brought down a significant number of trees on the site. Recommended Decision, Finding of Fact #66. The ALJ concluded that respondents should not be required to replace canopy that did not exist at the time of the wetland violations. The ALJ relied on the testimony of respondents' expert who described tree loss on an area near the site and that of respondent John Magee who claimed a 40-50% loss of trees at the site. Recommended Decision, at 18-19.

I do not adopt Finding of Fact #66 or the conclusions of the ALJ with respect to tree loss due to the hurricane. While the ALJ concludes that Department staff did not challenge this testimony or provide any conflicting testimony, evidence in the record supports Department staff's position that the subject site did not suffer significant blow-down as a result of Hurricane Floyd. Photographs taken in August and September 2000 of the forest at the northeast and south of the location (and which were introduced during the expedited fact-finding hearing) indicate virtually undisturbed, unbroken stands of trees, with little or no tree loss. See Exhs. 24 & 25. The Department biologist testified that the only information that he had of a blow-down was an observation "that one or two trees in the wetland were knocked down," and that he had no knowledge of any blow-down of trees caused by Hurricane Floyd at the site. See Tr., Vol. 6, at 223-4. Furthermore, observation of the property at a time

following erection of the building on the wetland and adjacent area did not indicate any evidence of a blow-down. Tr., Vol. 7, at 321.

Respondents, by removing the vegetation in the areas of violation, effectively precluded Department staff from providing further documentary evidence of the state of the deciduous forest that existed prior to the violations. It should be noted that Mr. Magee provided no documentary evidence to support his claim of tree loss in the area of the violations.

Mr. Roy Jacobson, a biologist with the Bureau of Habitat in Region 3, testified to the benefits of requiring five-inch to six-inch caliper trees in the restoration plan in order to achieve full functioning of the wetland as well as an appropriate canopy cover. Tr., Vol. 6, at 208-9, 221-3. Mr. Jacobson concluded that, in these circumstances, having smaller caliper trees would prevent a proper restoration plan in this enforcement matter. See Tr., Vol. 6, at 223.

I am mindful of the testimony of respondents' consultant regarding maintenance requirements and survival rates with respect to larger caliper trees, and the "shock" involved in re-planting trees. See Tr., Vol. 7, at 333. However, respondents' offer of one-inch caliper trees of only 5 to 6 feet in height would not, based on this record, adequately achieve a timely restoration of benefits of the wetland and its adjacent area. Tr., Vol. 7, at 331-332.

Establishing the appropriate size of trees to be planted is a case-by-case determination, taking into account site-specific factors and the record of the proceeding. Furthermore, in enforcement matters, requiring the planting of trees that are closer in size to those lost is an appropriate consideration, where restoration is a primary focus. For purposes of this enforcement proceeding, based on the Department biologist's testimony concerning the restoration plan and the need to reestablish canopy cover, the type of the forested wetland that was impacted and is to be restored, and the significant fact that it was respondents' unpermitted actions that caused the removal of trees and other vegetation, I adopt Department staff's request for the planting of five-inch to six-inch caliper trees, but with certain qualifications.

In restoring the wetland and adjacent area, there may be certain sections, based on an evaluation of the natural setting, the tree species to be planted or other related factors, where it would be preferable to plant smaller caliper trees. In this

regard, the types of equipment that would be required to plant larger caliper trees and their impact on the wetland and adjacent area are factors to be considered. In addition, where any planted trees need to be subsequently replaced, consideration must be given to whether re-planting smaller caliper replacement trees would be more appropriate in order to avoid impacting or disturbing other trees and vegetation which have been successfully re-planted.

Accordingly, respondent may in its restoration plan propose certain sections where it would plant smaller caliper trees with a modified density of the number of trees per square feet. If respondents can demonstrate to the satisfaction of Department staff that planting such smaller caliper trees in certain sections would be environmentally justified and/or would serve to more effectively promote restoration, such plantings will be acceptable. The goal is to restore the wetland and adjacent area as expeditiously and effectively as possible, while avoiding, to the extent possible, any further impacts to this natural area. With respect to the Department's evaluation of respondents' restoration plan, I direct Department staff in Region 3 to include at least one individual (whether from the region or central office) knowledgeable in forestry and re-planting of trees in that review.

I recognize that planting larger trees and performing restoration in the adjacent area, as well as the wetland, will be more costly than using one-inch caliper trees and limiting restoration to within the boundaries of State-regulated wetland NA-4. However, as provided in ECL 71-2303(1), the restoration should be accomplished so as to restore to the condition prior to the violation, "insofar as that is possible." See also FWEGM § IV.C.

III. Respondents' Comments on the Recommended Decision

Respondents submitted comments on the Recommended Decision that addressed Department staff's proposed amendment to the pleadings on the number of violations; the period of time that elapsed between the close of the record and the issuance of the Recommended Decision; compensating wetland mitigation; and mitigation of the adjacent area. Respondents' comments on Department staff's proposed amendment to the pleadings are addressed in Section I of this Decision and Order and their comments on mitigation of the adjacent area are addressed in Section II.

(A) Elapse of Time

Respondents argue that the period of time that elapsed between the close of the record and the issuance of the Recommended Decision constitutes a delay resulting in loss of jurisdiction and a denial of due process. I disagree.

The State Administrative Procedure Act ("SAPA") requires that parties to an adjudicatory proceeding "be afforded an opportunity for hearing within reasonable time." SAPA 301 (1)(emphasis added). SAPA establishes no time requirement for a decision, as advanced by respondents.

Respondents argue that they have been "severely prejudiced" by the delay, but have not provided any showing of how and in what manner they have been prejudiced. In fact, while State-regulated wetland NA-4 and its adjacent area have not been restored during this period, respondents have benefitted by not having had to expend their resources on any penalty or restoration to address their unpermitted activities.

(B) Compensating Wetland Mitigation

Respondents also maintain that the Recommended Decision is flawed because the ALJ was made aware of their offer to provide "compensating wetlands" and failed to consider this alternative.

As provided in the FWEGM, "complete restoration of the full functions of regulated wetland areas that have been illegally altered" is the preferred remedy. FWEGM, § IV.C. Only in cases where wetland restoration is not technically feasible or more damage would be caused by such activity are other alternatives to be considered. See id.

Respondents made no showing that it is technically infeasible to fully restore the degraded wetlands and adjacent areas or that restoration would result in greater damage to these disturbed wetlands. Respondents themselves agreed to the restoration of the wetland that was disturbed, albeit in a limited manner. In light of the foregoing, the ALJ was not required to consider respondents' offered alternative of other wetland mitigation.

To the extent that the remaining findings of fact and conclusions of law in the Recommended Decision are not otherwise inconsistent with this Decision and Order, I hereby adopt them.

NOW, THEREFORE, having considered this matter, and after being duly advised, it is ORDERED that:

- I. That portion of the Recommended Decision as granted Department staff's motion to amend the complaint is affirmed.
- II. Respondents are jointly and severally assessed a civil penalty of \$120,000.00 for illegally placing fill in a wetland and adjacent area. One half of this penalty shall be payable by certified check, cashiers check or bank check made payable to the order of the "New York State Department of Environmental Conservation" and shall be submitted to the Department within sixty days of the service of this Decision and Order upon respondents; and the remaining half shall be payable by certified check, cashiers check or bank check and submitted to the Department within one hundred twenty days after service of this Decision and Order upon respondents.
- III. Respondents are further directed to restore State-regulated wetland NA-4 and the adjacent area affected by the violations to the condition that they were in prior to the violations and in accordance with Department staff's recommendations as follows:
 - A. The present building and all concrete and all structures must be removed completely from the wetland and adjacent area;
 - B. All fill shall be removed from the wetland and adjacent area, and the wetland and adjacent area is to be graded to restore appropriate grade and wetland hydrology, provided, however, that if respondents can demonstrate to the satisfaction of the Department that some fill can remain in the adjacent area and not preclude achievement of the restoration goals, this will be allowable;
 - C. A suitable substrate shall be provided in the wetland and adjacent area to the extent necessary to establish plantings;
 - D. The canopy cover within the wetland and adjacent area shall be restored by planting native five-inch to six-inch caliper trees at the density of one tree per 250 square feet, with such species selection and relative proportions of each species to be approved by the Department, provided, however, that if respondents

can demonstrate to the satisfaction of the Department that the planting (or re-planting) of smaller caliper trees with a modified density in certain areas of the wetland and adjacent area to be restored would be environmentally justified and/or would serve to more effectively promote restoration, this will be allowable;

E. The understory vegetation in the wetland and adjacent area shall be restored by planting one native planting at the density of one shrub for every 100 square feet, with such species selection and relative proportions of each species to be approved by the Department;

F. The ground cover in the wetland and adjacent area shall be restored by the broadcasting of mixed annual and perennial grass seed, with such species selection and relative proportions of each species to be approved by the Department;

G. All plantings shall be monitored for five full growing seasons and a narrative report submitted to the Department beginning on December 1, 2004 and each year thereafter, with the submission of the last report on December 1, 2008. Vegetation shall be maintained and re-planted as necessary to assure the survival of 85% of the plantings by species; and

H. As soon as practicable in the spring and prior to the commencement of any work, respondents shall place erosion controls around the perimeter of the disturbed areas and maintain them until the site is fully vegetated.

Respondents are directed to submit a plan to fulfill the restoration requirements set forth in this Paragraph III to the Regional Director in Region 3 within 90 days after service of this Decision and Order on respondents. In the event that Department staff determine that the plan needs to be revised or supplemented, Department staff shall notify respondents in writing of the revisions and/or supplementation required and shall establish a date for the submission of a revised plan.

Respondents are to complete the restoration work by no later than August 1, 2004. Department staff is authorized to extend this date upon a showing by respondents of good cause for any requested extension.

IV. All communications between respondents and the Department concerning this Decision and Order, including the payment of penalties, shall be made to the Department's Region 3 Director, New York State Department of Environmental Conservation, 21 S. Putt Corners Road, New Paltz, New York 12561.

V. The provisions, terms, and conditions of this Decision and Order shall bind respondents, their agents, servants, employees, successors, and assigns and all persons, firms and corporations acting for or on behalf of respondents.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____

ERIN M. CROTTY, COMMISSIONER

Dated: Albany, New York
January 21, 2004

TO: **By Certified Mail**

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By First Class Mail:

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New Paltz, New York 12561

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged violation of Article 24 of the Environmental
Conservation Law and Part 663 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York by:

**BRADLEY CORPORATE PARK and JOHN MAGEE and
PATRICK MAGEE, individually and as general
partners of BRADLEY CORPORATE PARK,**

Respondents.

NYSDEC NO. 3-2000-04240-43

RECOMMENDED DECISION

- by -

/s/

P. Nicholas Garlick
Administrative Law Judge

August 26, 2002

INTRODUCTION

On June 18, 2001 the Commissioner issued an Order in this case incorporating the Expedited Fact Finding Hearing Report by Administrative Law Judges ("ALJs") Susan J. DuBois and P. Nicholas Garlick. That Order found that Bradley Corporate Park, John F. Magee and Patrick Magee ("Respondents") had undertaken construction activities without a permit in both a regulated freshwater wetland known as NA-4 and its adjacent area in the Town of Clarkstown, Rockland County. These unpermitted construction activities included the filling of approximately one-half acre of freshwater wetland and approximately 2.3 acres of adjacent area, the construction of concrete footings and foundations, and the erection of the steel skeleton of an approximately 30,000 square foot building. The Order remanded the matter back to hearing to develop an administrative record regarding penalties and remediation.

This Recommended Decision addresses the penalty phase in this matter held pursuant to Article 71, Title 27 of the Environmental Conservation Law of the State of New York ("ECL") and Part 622 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The only issues to be decided in this second hearing phase are the amount of monetary penalty and appropriate remediation.

PROCEEDINGS

The penalty phase of this administrative enforcement hearing was held before ALJ P. Nicholas Garlick of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation, ("DEC" or the "Department"). The hearing was held on August 8, August 9, September 6, 2001, and April 9, 2002 in New Paltz, New York.

DEC Staff was represented in this phase of the hearing by Steven Governman, Esq., Assistant Regional Attorney, DEC Region 3. DEC Staff called as their witnesses: Robert Burgher, a DEC Staff surveyor; Respondent John Magee; Respondent Patrick Magee; Lance Kolts, a DEC Staff Fish and Wildlife Technician 3; Roy A. Jacobson, Jr., a DEC Staff biologist; and Robert Martin, a DEC Staff mined land reclamation specialist.

The Respondents were represented by Dennis Lynch, Esq. and Burton Dorfman, Esq. of the law firm Dorfman, Lynch & Knoebel, Nyack, New York. The Respondents presented the following witnesses: Michael P. Bontje, the President of Lang Associates, an environmental consulting firm employed by the Respondents;

and, Joseph Corless, a licensed New York State engineer and surveyor also employed by the Respondents.

Following the September 6, 2001 hearing, a schedule was established for DEC Staff to make a motion to submit additional information regarding the amount of fill at the site, and to allow Respondents to reply. DEC's motion contended that the existence of an elevation marker used by the Respondents' expert to calculate the volume of fill had been improperly withheld during discovery and that DEC Staff had been prejudiced. On October 25, 2001, DEC Staff filed its motion, along with a revised estimate of the fill at the site (Ex. 100). This motion was opposed by the Respondents by papers dated November 9, 2001. Closing briefs were filed in late December 2001. On February 12, 2002, I ruled that the Respondents were entitled to cross-examine Robert Burgher, the member of DEC Staff who had prepared the revised estimate of fill. On April 9, 2002, the hearing was reconvened for this purpose. Final letter briefs from the parties were received on April 19. The record of the hearing closed on May 22, 2002 with the receipt of the transcript.

While this Recommended Decision was being reviewed, DEC Staff moved on July 19, 2002 to amend its complaint. Specifically, the motion sought to replace DEC Staff's allegation that the Respondents had committed violations "in excess of twenty-five separate occasions" with the phrase "on 295 separate occasions". This motion was opposed by the Respondents in papers dated July 24, 2002. With the permission of the ALJ by letter dated August 2, 2002, DEC Staff responded to the Respondents' papers and sought a further amendment of the Complaint to read "on 329 separate occasions". The Respondents submitted a letter dated August 16, 2002 continuing their opposition to DEC Staff's motion and to the latest proposed revision.

BACKGROUND

DEC Staff's Position

DEC Staff seeks an order of the Commissioner requiring both the payment a civil penalty and a six-point remediation plan. This plan would require remediation the wetland and the adjacent area in the site of the violation.

On the issue of civil penalties, DEC Staff asserts that 329 separate violations occurred (maximum penalty is \$3,000 per violation). DEC Staff request a civil penalty lower than the statutory maximum, \$450,000.

DEC Staff's remediation plan includes the following six points:

1. The removal of the building, including all steel, concrete and any other materials.
2. The removal of all fill in the area of the violation, from both NA-4 and the adjacent area.
3. The planting trees with a diameter of between 5" and 6" in the area of the violation to replace the canopy lost above both NA-4 and the adjacent area at the site of the violation. This would require approximately 560 trees at an estimated total cost of \$230,000.
4. The planting of native shrubbery approximately two feet tall, every one hundred square feet in both NA-4 and the adjacent area (a total of approximately 1,300 shrubs).
5. The planting of ground cover, a combination of annual and perennial mix, in both NA-4 and the adjacent area.
6. The monitoring and maintenance of the above for a period of five years.

The Respondents' Position

Respondents assert that only 125 violations occurred and that the maximum penalty is \$375,000 (Respondents closing brief, p.5) but that no penalty should be imposed.

The Respondents take the following positions regarding DEC Staff's proposed remediation plan:

1. The Respondent does not object to the removal of the building, including all steel, concrete and any other materials (reserving their rights to challenge the Commissioner's finding of liability).
2. The Respondents do not object to removing fill to the point of restoring the original grade; however, they argue that some fill should be allowed to remain as long as it is similar to the original grade in both NA-4 and the adjacent area.
3. The Respondents assert that the canopy above the site of the violation was significantly damaged by Hurricane Floyd in August 1999 before the violations occurred.

Therefore, the planting of large trees is not required. Rather, they argue that Commissioner should order the planting of trees 1" in diameter in NA-4. Further, they argue that the Commissioner does not have the authority to order that trees be planted in the adjacent area.

4. The Respondents agree that the planting of shrubbery in NA-4 is appropriate and do not dispute the proposed height or density of the shrubs. Again, they argue that the Commissioner does not have the authority to order that shrubs be planted in the adjacent area.
5. The Respondents do not dispute DEC Staff's proposed planting of ground cover in both NA-4 and the adjacent area.
6. The Respondents agree that the site should be maintained and monitored for five years.

FINDINGS OF FACT

The 40 findings of fact from the June 18, 2001 Report are incorporated, unchanged.

The Size of the Violation

- The area which the Respondents disturbed within freshwater wetland NA-4 is 0.649 acres (Ex. 100, 8:597).
- The area which the Respondents disturbed within the adjacent area of NA-4 is 2.625 acres (Ex. 100, 8:597).
- The area of fill within NA-4 is 0.518 acres (Ex. 100, 8:597).
- The area of fill within the adjacent area of NA-4 is 2.338 acres (Ex. 100, 8:597).
- The quantity of fill placed in NA-4 is approximately 1,000 cubic yards (8:594, Ex. 100).
- The quantity of fill placed in the adjacent area of NA-4 is approximately 4,000 cubic yards (8:594, Ex. 100).
- Of the 5,000 cubic yards of fill, 239 cubic yards were poured concrete, used in the footings and foundation. These 239 cubic yards were brought to the site in 29 separate truckloads (Ex. 58, 6:144).

The Size of the Vehicle Used

- The vehicle used to deposit the fill (except for the concrete) was a 1968 Caterpillar 769B (6:154). The capacity of this vehicle is 40 cubic yards (6:155).

Number of Violations Committed by the Respondents

- The total number of violations committed by the Respondents is 153.
- The Respondents committed the following five violations: 1) they cleared vegetation in the adjacent area of NA-4 without a permit; 2) they cleared in NA-4 without a permit; 3) they graded in the adjacent area of NA-4 without a permit; 4) they graded in NA-4 without a permit; and, 5) they erected steelwork in NA-4 without a permit(Ex. 29, 3:19-25).
- The Respondents also committed 29 violations: one violation for each truckload of cement delivered to the site (Ex. 58, 6:144).
- The Respondents also committed 119 violations by depositing 119 truckloads of fill into the adjacent area of NA-4 and NA-4 (simple math $(5,000 - 239)/40$). Of these, 80% occurred in the adjacent area and 20% occurred in NA-4.⁴ All fill material came from within Bradley Corporate Park (6:183).

Chronology of Violations

- Construction activity at the site commenced in December 1999 or January 2000 (Repeat of fact #29).
- Before construction began, the Respondents received all necessary approvals from local government.
- Before construction began, the Respondents' wetlands consultant, Robert Torgersen, marked the limits of the federal (and New York State) wetlands at the site. Subsequently, the Respondents constructed a fence around the wetlands (7:361).
- Respondents began placing fill at the site in the adjacent area of NA-4 in February 2000. None of this fill was placed in NA-4 itself (6:188).

⁴ These percentages are approximations based upon: the area of adjacent area compared to the area of the entire violation; and the area of NA-1 compared to the area of the entire violation.

- By letter dated February 29, 2000, the Respondents were advised by Mr. Torgersen that construction could proceed in the wetland (Ex. 71).
- Prior to March 15, 2000, the Respondents had cleared the adjacent area and were preparing to pour the footings (6:117).
- By documents dated 3/15/00, the Respondents submitted an application to DEC Staff for a freshwater wetlands permit (Repeat of fact #31).
- Respondents never received a freshwater wetlands permit for this construction (6:138).
- After submitting the permit application, the Respondents continued construction activities at the site, despite their knowledge that a permit was required (6:117).
- On March 28, 2000, Respondents received permission from the Army Corps of Engineers ("ACOE") to place fill in the federal wetland (Ex.65).
- Following receipt of the ACOE permit, the Respondents commenced work in NA-4. All the violations that occurred in the wetland occurred after the Respondents had applied for a state freshwater wetlands permit.
- The Respondents erected the steelwork at the site in late April and early May 2000 (6:142).
- The Respondents stopped all construction activity at the site in May 2000 (7:376).

Condition of the Trees at the Site

- Before the violation occurred, 40-50% of the trees at the site of the violation had been knocked over by Hurricane Floyd in August 1999(7:371).

APPLICABLE LAW

DEC Staff bears the burden of proof on all charges (6 NYCRR 622.11(b)(1)). DEC Staff must sustain its burden of proof by a preponderance of the evidence (6 NYCRR 622.11(c)).

Civil Penalties

Any person who violates any provision of article 24 of the Environmental Conservation Law (ECL) or any regulation promulgated pursuant to article 24 shall be liable for a civil penalty not to exceed three thousand dollars (\$3,000) for every such violation (ECL §71-2303(1)). Any form of filling and the erection of structures in a freshwater wetland or its adjacent area without a permit is a violation (ECL §24-0701, 6 NYCRR 663). Each instance when fill is deposited into a wetland can be considered a separate violation (Nieckoski v. NYSDEC, 215 A.D. 761 (2d Dept., 1995)). An appropriate methodology to determine the number of violations is to divide the total amount of fill by the size of the vehicle used to transport each load of fill (In the Matter of Chester Industrial Park, Commissioner's Order, October 24, 2000 WL 1681595).⁵ The parties agree that using truckloads of fill is an appropriate method of determining the number of violations (6:163; Ex. 66).

Remediation

The Commissioner has the power, after an administrative enforcement hearing, to direct the violator to restore the affected freshwater wetland to its condition prior to the violations, insofar as that is possible within a reasonable time (ECL §71-2303(1)). The Commissioner does not have the power to order restoration of the adjacent area as she does for tidal wetland violations (ECL §71-2503(1)(b)). The laws regulating freshwater and tidal wetlands were both passed in 1975, in Chapters 614 and 182, respectively. Because the tidal wetlands law passed first and allows restoration of the adjacent area but such a provision was left out of the freshwater wetlands law, it must be assumed that the legislature did not intend to authorize the Commissioner to order the restoration of the adjacent area of freshwater wetlands. This is not to say that the Commissioner cannot order work outside of the wetland to be performed. However, any such work must be directly linked to restoration of the wetland, such as re-establishing drainage patterns and preventing siltation or other damage to the freshwater wetland.

⁵ In Chester the Commissioner ordered a civil penalty of \$1,000,000. On appeal, this penalty was lowered to \$270,000 because DEC Staff had only alleged 90 separate violations (at \$3,000 per violation maximum). 2002 WL 1333559 (N.Y.A.D. 2 Dept., June 17, 2002). The Courts ruling in this case does not affect the appropriateness of basing the number of violations on the size of the vehicle used to commit such violations. Rather the Court dealt with the narrow issue of the correctness of DEC Staff's pleadings.

DISCUSSION

Rulings on Outstanding Motions

There are two outstanding motions yet to be ruled upon. The first motion relates to the amount of fill placed at the site of the violations. The second relates to DEC Staff's motion to amend its complaint.

Regarding the first motion, in its direct case, DEC Staff called Mr. Robert Burgher, a DEC Staff surveyor. Mr. Burgher testified that 15,726 cubic yards of fill had been placed in NA-4 and the adjacent area (6:56, Ex. 52). He based this estimate on a field visit he made to the site and three reference maps (Ex. 67A, 67B, and 67C). Critical to this calculation was the elevation of the site prior to the placement of the fill. He had tried to find an elevation marker close to site, but it had been destroyed (8:512). In his calculation, Mr. Burgher used an approximate elevation on one reference map that was not prepared by a surveyor or an engineer (8:457, Ex. 67A). He confirmed this estimated elevation against a story board (a 2x4 nailed to a tree at the site with projected elevations) (8:527, Ex. 25). While at the site, he did observe some monitoring wells. Mr. Burgher subsequently checked DEC files and found an engineering report (9:475, Ex. 102). In this report, he found the correct elevation of the site which was 2.23 feet lower than the estimate used in his calculation. He recalculated his estimate, using the correct elevation (Ex. 104). The revised calculation indicated that the amount of fill was approximately half that of his previous estimate (9:462). Although he performed the recalculation prior to testifying at the hearing, he used the larger, less accurate number in his testimony.

On cross-examination, Mr. Burgher acknowledged an error in his estimate because he had included an area in his calculations that was not regulated by DEC (8:522, Ex. 68).

The Respondents' expert, Mr. Joseph Corless, then testified that he had tried to reproduce Mr. Burgher's results but was unable to. Mr. Corless stated that he also tried to find the elevation marker that had been destroyed, and had found another marker adjacent to the location of the destroyed marker (8:570). From this marker, which is about one quarter mile from the site of the violations, Mr. Corless determined that Mr. Burgher's testimony was in error because Mr. Burgher had used the wrong initial elevation, which was 2.23 feet too low. On the basis of his field observations, Mr. Corless estimated that the amount of fill was about 5,000 cubic yards. This estimate is not inconsistent with the testimony of Mr. Burgher who stated that (assuming an even distribution of fill at the site) each foot in

error in the elevation would be equivalent to about 4,500 cubic yards (8:501). Therefore, an error of 2.23 feet would account for approximately 10,000 cubic yards.

DEC Staff objected to Mr. Corless' testimony because the existence of the elevation marker was not disclosed during discovery. DEC Staff claimed prejudice and moved to revise Mr. Burgher's fill estimate to account for the correct elevation, as well as his erroneous inclusion of areas not regulated by DEC. DEC Staff filed a motion seeking to revise its estimate of fill, along with a map of the site (Ex. 100). Respondents opposed the motion. I ruled that the Respondents were entitled to cross-examine Robert Burgher, the member of DEC Staff who had prepared the revised estimate of fill. On April 9, 2002, the hearing was reconvened for this purpose.

Ruling 1: DEC Staff was not prejudiced by not knowing of the existence of the elevation marker. DEC Staff had the correct elevation, based upon reliable engineering data, in its possession before Mr. Burgher testified. Mr. Burgher had used this data to calculate the amount of fill at the site before he first testified. This estimate was lower than the estimate based upon unreliable estimates of elevation. Despite his knowledge of the error, he chose to testify on the basis of the unreliable information in his possession. Under the circumstances, DEC Staff's claim of prejudice is baseless.

Accordingly, DEC Staff's revised estimate of fill will not be included in the record. Exhibit 100 is accepted in the record of this hearing for the other information it contains, such as area of fill. Nonetheless, the revised estimate of fill will not be considered.

Regarding the second motion, DEC seeks to revise language in its Complaint regarding the number of violations alleged. The motion was initially to change the allegation from "in excess of twenty-five" to "on 295 separate occasions" and subsequently changed to "on 329 separate occasions". DEC Staff seeks this amendment to conform the Complaint to the evidence in this proceeding. DEC enforcement hearing regulations allow amendment of pleadings by a party at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond (6 NYCRR 622.5(b)).

The Respondents oppose this second motion and argue: (1) that DEC Staff waived its right to amend its complaint; and (2) that allowing DEC Staff to amend its complaint at this late-stage in the proceeding would prejudice the Respondents. First, Respondents argue that because DEC Staff did not move to amend

its complaint earlier in the proceeding, that it waived its right to do so now. However, as DEC Staff points out in its response, the Respondents do not show exactly where or how this waiver occurred. Since the regulations clearly allow for the amendment of the pleadings any time before a final decision and the Respondents have not demonstrated that DEC Staff waived its right to amend, the Respondents claim of waiver is unpersuasive.

Second, the Respondents claim that allowing the amendment at this juncture would prejudice them. Specifically, they argue that had they known that DEC was alleging over 300 violations, they would have been more receptive to settlement offers, would have altered the number and type of witnesses offered at the hearing, and would have altered the scope of representation. Respondents request an additional day of hearing if this motion is granted.

DEC Staff counters that the Respondents have been on notice regarding the number of violations alleged since before the hearing began. Specifically, in DEC Staff's Motion for an Order Without Hearing made on December 15, 2000, DEC Staff set forth its allegation that hundreds of violations had been committed by the Respondents. DEC Staff states that during opening statements at the penalty phase of this hearing it restated its contention that hundreds of violations had occurred, and that throughout the hearing itself it offered proof of the same. Again the Respondents point is without merit because during the hearing, they themselves conceded that 5,000 cubic yards of fill had been placed at the site by a 40 cubic yard truck (and it is the Respondents' calculations which are relied upon for penalty calculation in this Recommended Decision).

Ruling 2: DEC Staff's motion to amend the complaint to allege 329 violations is granted. DEC Staff did not waive its right to make such an amendment and for the reasons set forth above, the Respondents did not suffer any prejudice. The Respondents knew from DEC filings in this case, from DEC statements to the press, and from the evidence presented at the hearing the large number of violations alleged and, therefore, the magnitude of the penalty sought.

CALCULATION OF MONETARY PENALTY

Determining the appropriate civil penalty in this case is guided by two documents, the Department's Civil Penalty Policy ("CPP"), issued June 20, 1990, and the Freshwater Wetlands Enforcement Guidance Memorandum ("EGM"), issued February 4, 1992. These two documents are to be used in concert to effectuate fair and efficient enforcement of environmental infractions. The CPP provides a broad overview of DEC's enforcement policy, while the

EGM sets forth a specific framework for determining penalties for freshwater wetland violations.

The purpose of the CPP is to punish violators and deter future violations in a fair manner. This policy recognizes that there is no single correct penalty amount which can be determined by any formula. Rather, it articulates a process to arrive at a penalty figure which lies within a range of amounts which would be fair and effective. The fundamental goal of the CPP is to promote compliance with environmental laws and thus protect the environment. In order to accomplish this goal, penalties should act to deter both the violator and the rest of the regulated community. The CPP requires examination of the amount of penalty authorized by statute, the economic benefit the violator received, the gravity or harm of the violation, the culpability of the violator, whether the violator cooperated with DEC, the violator's history of non-compliance, the violator's ability to pay, other similar cases and other factors unique to a particular case.

The EGM sets forth a specific framework for determining the appropriate monetary penalty in this case and this framework provides the structure for the discussion, below.

Statutory Maximum

The starting point of all penalty calculations is the computation of the potential statutory maximum for the proven violations. The statutory maximum is the product of number of violations found times the maximum penalty per violation, which is \$3,000 in this case.

The total number of violations is a simple mathematical calculation. As noted above, there are two estimates of fill in the record: DEC Staff's estimate of 15,726 cubic yards, which both parties agree is wrong, and the Respondents' estimate of 5,000 cubic yards. Since DEC Staff has not met their burden of proof by a preponderance of the evidence (6 NYCRR 622.11(c)) on this point, the Respondents' estimate is accepted.

The method for calculating the number of violations is not contested. Both DEC Staff and the Respondents agree that an appropriate calculation determines the amount of fill at the site, and divides that number by the size of the vehicle used to deposit the fill. This methodology was adopted by the Commissioner in the most recent case involving a large quantity of fill placed in a wetland (In the Matter of Chester Industrial Park, DEC Commissioner's Order, October 24, 2000).

In Chester, the respondents placed 50,000 cubic yards of fill using a 25 cubic yard truck which resulted in 2,000 violations and a penalty of \$1,000,000. The penalty was reduced by the Appellate Division, Second Department because DEC Staff had only alleged 90 violations in the complaint (Chester Industrial Park Associates v. Cahill, 2002 WL 1333559). This decision did not in anyway invalidate the methodology used to determine the number of violations.

In this case, the parties dispute the size of the truck used to bring fill to the site. The vehicle used to deposit the fill in the wetland and adjacent area was identified as a 1968 Caterpillar 769B, which is an off-road dump truck (Ex. 60-62). In order to establish the capacity of this vehicle DEC Staff introduced only the testimony of Robert Martin, a DEC mined land reclamation specialist with ten years experience. Mr. Martin testified that he was familiar with this type of vehicle and that its capacity is approximately 30 yards(7:272-9). The Respondents offered the testimony of John Magee, who stated that the capacity of this vehicle was between 36-40 cubic yards (6:155). Mr. Magee is an experienced contractor who has used this vehicle for many years and is familiar with it.

I find that DEC Staff has not met its burden of proving the vehicle has the smaller capacity (6 NYCRR 622.11(b)(1)). Given the credibility of both witnesses and the conflicting testimony regarding the size of the vehicle, DEC Staff should have introduced evidence from the manufacturer or dealer of this vehicle or an expert on mining equipment, in order to meet its burden. This equipment is in widespread use in the mining and construction industry and authoritative information regarding its capacity must be widely available. Since DEC Staff has failed to meet its burden, the Respondents' estimate of the capacity is accepted. Further, since DEC Staff failed to include any information in the record as to whether the vehicle was fully loaded each time it was used, DEC Staff again failed to meet its burden. Therefore, for the purposes of this ruling, the capacity of this vehicle is deemed to be 40 cubic yards.

Thus, I find that the Respondents committed 119 violations by placing fill material in NA-4 and its adjacent area. I arrive at this by subtracting the 239 cubic yards of concrete from the 5,000 total yards of fill and dividing the difference by the 40 cubic yard truck used to haul the fill.

DEC Staff has also proved an additional thirty-four (34) violations. At hearing, DEC Staff introduced a series of invoices that showed that twenty-nine (29) truckloads of concrete were delivered to the site and used for the footings and foundation of

the building (Ex. 58, 6:146-7). Each truckload of concrete is a separate violation.

DEC Staff also proved five (5) other violations: 1) that the Respondents cleared in the adjacent area of a wetland without a permit; 2) that the Respondents cleared in the wetland without a permit; 3) that the Respondents graded in the adjacent area without a permit; 4) that the Respondents graded in the wetland without a permit; and 5) that the Respondents erected steelwork within the wetland without a permit(Ex. 29, 3:19-25).

The total number of violations the Commissioner should find is 153 and the statutory maximum penalty is \$459,000.

At the hearing, Mr. Martin also testified that in order to accurately compute the number of truck trips, and thus violations, the amount of fill should be increased by 15-20% (7:279). This is because when fill material is placed into a truck, it expands in volume by 15-20%, and needs to be compacted when it is dumped. At the close of its direct case, DEC Staff stated that it was not relying on the swell factor for its penalty calculations (7:395). However, in its closing brief, DEC Staff did use the swell factor. By first stating that it would not use the swell factor and then attempting to use it, DEC Staff denied the Respondents the opportunity to introduce evidence to rebut Mr. Martin's testimony. This is unfair. For this reason, DEC Staff's attempt to increase the number of violations by using the swell factor is rejected. I also note that the swell factor has not been used to determine penalties in any other case.

Economic Benefit

The second factor identified in the EGM is the economic benefit derived from the alleged violation. In this case, both parties agree that the Respondents enjoyed no economic benefit from the violations. Therefore, in this case no adjustment to the penalty calculation is appropriate.

Gravity of Harm

The third factor identified in the EGM is the relative gravity of harm. This is one aspect of evaluating the overall seriousness of the violation, which includes such other factors as violator culpability and cooperation. The EGM suggests the proper method for evaluating the gravity of harm resulting from the violation is to compare the violation to the activities chart in 6 NYCRR 663.4(d) which sets forth whether an activity in a freshwater wetland and adjacent area is usually compatible, usually incompatible or incompatible with the functions and benefits provided by a wetland.

In this case, the single violation of clearing vegetation in the wetland is classified as incompatible. The single violation of clearing vegetation in the adjacent area is classified as usually incompatible (6 NYCRR 663.4(d)(23)). The single violation of grading in the wetland is classified as incompatible. The single violation of grading in the adjacent area is classified as usually incompatible (6 NYCRR 663.4(d)(25)). The single violation of erecting steelwork is classified as incompatible (6 NYCRR 663.4(d)(43)). The twenty-nine violations involving the placement of concrete in the wetland and adjacent area are also classified as incompatible (6 NYCRR 663.4(d)(43)). The 95 violations of placing fill in the adjacent area are classified as usually incompatible. The 24 violations of placing fill in the wetland are classified as incompatible (6 NYCRR 663.4(d)(20)).⁶

Thus, in total, 56 violations are incompatible, or the most serious violation, while 97 violations are usually incompatible, which caused a lesser degree of harm.

Recent Administrative Precedents

In addition to considering the potential statutory maximum, the Civil Penalty Policy and the EGM, other similar cases must be considered. The most recent freshwater wetlands enforcement case is Chester, which was cited previously. Chester involved 2,000 violations of placing fill in a Class II freshwater wetland, which resulted in the Commissioner imposing a penalty of \$1,000,000 (or \$500 per violation). All of these violations were the result of acts deemed incompatible within freshwater wetlands under the regulations. As discussed above, this penalty was reduced for reasons outside this analysis.

In this case, the Respondents committed 56 violations which are incompatible, the same category as the violations in Chester. The Respondents also committed 97 violations in the adjacent area. These violations are categorized as usually incompatible and are not as serious as those in Chester. Thus, using the \$500 per violation administrative precedent, an appropriate penalty is \$28,000 for the 56 incompatible violations. If the usually incompatible violations are less than \$500 per violation, or \$400 per violation, the penalty for the 97 usually incompatible violations is \$38,800. However, this simple comparison is based

⁶ There is nothing in the record that specifies how much fill was placed in the wetland and adjacent area. The total area where the violations occurred is approximately 2.856 acres. Of this, 0.518 acres of wetland were filled and 2.338 acres of adjacent area were filled. It is reasonable to infer then that approximately 20% of the fill violations occurred in the wetland (24) and 80% occurred in the adjacent area (Ex. 100).

upon number of violations, and does not directly relate to the resulting damage to the environment. Since most of the violations here (119/153) involve the use of a 40 cubic yard truck, vs. a 25 cubic yard truck in Chester, it is appropriate to increase the penalty amount by 25% $((119/153) \times (40/25))$. Thus, assuming that all facts in the two cases are similar, an appropriate penalty here would be \$83,500.

Culpability

According to the CPP, culpability may only be used to increase the penalty amount, because a violator's mental state is irrelevant in most cases to the determination of legal liability. DEC Staff argues that the Respondents here are more culpable than those in Chester. DEC Staff seeks a finding of greater culpability because all of the filling in NA-4, all of the concrete pouring and all of the steel work occurred after the Respondents applied for a state freshwater wetlands permit. Thus, the Respondents knew, or should have known, that the construction activity was not permitted and still proceeded. In contrast, in Chester, the Respondents had not applied for a permit, however, they knew they were impermissibly filling a freshwater wetland. Thus, the Respondents here are at least equally culpable.

Violator Cooperation

The CPP also suggests that the violator's cooperation in remedying the violation may be an appropriate factor to consider in adjusting a penalty. In this case, the Respondents asserted that no violation had occurred. When the Commissioner found otherwise, the Respondents were willing to remedy the environmental damage, as evidenced by their agreement to some of the six remediation steps proposed by DEC Staff (as discussed above). However, no agreement could be reached regarding the appropriate monetary penalty or the remediation plan. Because of this, remediation has not yet begun.

There is nothing in the record to indicate that the Respondents have cooperated in a manner contemplated by the EGM as a prerequisite for a penalty adjustment downward. Nor under the facts of the case is there a reason to adjust the penalty amount upward.

History of Non-Compliance

The EGM states that a history of violations subsequent to environmental enforcement actions is usually evidence that the violator has not been deterred by the previous enforcement response. Unless violations are caused by factors entirely out

of the violator's control, penalties in subsequent enforcement actions should be more severe. In considering whether and how large an upward non-compliance history adjustment should be, the CPP suggests consideration of the following: how recent the previous violations were; the number of previous violations; and the violator's response to previous violations in regard to correction of the previous problem and attempts to avoid repeat violations.

In this case it is undisputed that in 1985 the Respondents illegally filled approximately two acres of wetland. This violation was resolved through a consent order and the payment of a \$90,000 fine (Exhibit 59). Also, in 1999, DEC Staff cited the Respondents for failure to maintain erosion controls (6:242). This violation was quickly remedied and no fine or other sanction was imposed (7:351).

DEC Staff asserts that this is evidence of the Respondents' irresponsible attitude toward the importance of wetlands. However, in permit cases, only violations that occurred within ten years of the permit application are considered (Record of Compliance Enforcement Guidance Memorandum, March 5, 1993, page 5). It seems reasonable that such a time limit be used in enforcement cases as well. Therefore, in calculating the penalty in the instant case, the 1985 violation has no bearing. Regarding the 1999 violation, the record indicates that the Respondents quickly addressed the problem and no penalty was assessed. Therefore, this seems to be a very minor offense which was promptly and responsibly dealt with, which does not justify any upward adjustment to the monetary penalty.

Ability to Pay

The Civil Penalty Policy allows violators to allege that they do not have the ability to pay a penalty sought by DEC Staff. No such assertion was made in this case by the Respondents and no adjustment is appropriate.

Unique Factors

There are no unique factors in this case that warrant adjustment to the monetary penalty. However, had the Respondents ceased construction when they knew or should have known that such construction was not permitted, the penalty would have been greatly reduced because far fewer violations would have occurred. On March 15, 2000, when the Respondents signed the state freshwater wetlands permit application, no work had been done in NA-4. At that point, Respondents should not have proceeded. In addition to a reduced penalty, the cost of remediation would have been much lower.

Recommended Civil Penalty

The Commissioner should impose a civil penalty in this case that is calculated similarly to that in Chester. While the Chester Respondents' compliance record was more egregious, the Respondents here knew or should have known to stop construction when the state permit application was signed on March 15, 2000. Therefore, it is reasonable to view these Respondents as at least as culpable than the Respondents in Chester. Overall, these factors should cancel each other and a penalty calculated similarly to that imposed in Chester is appropriate. As explained above, that penalty should be \$83,500.

RESTORATION AND MITIGATION OF WETLAND IMPACTS

The EGM sets forth the Department's policy that in all cases restoration of the altered wetland is preferred. In this case, DEC Staff has requested that the Respondents perform six specific steps to restore the wetland. The Respondents have agreed to three of these and contest the Department's legal authority to order parts of the remaining three. In addition, the Respondents challenge the factual basis for one of the steps.

Uncontested Remediation

Removal of the Building. The first step proposed by DEC Staff would require the Respondents to remove the steel skeleton and concrete footings and foundation from the site. The Respondents have agreed to do this, based upon the Commissioner's earlier determination of liability (6:206).

Planting Ground Cover. The fifth step proposed by DEC Staff would require the planting of a ground cover. This should be a mix of annual and perennial seeds to be broadcast and then mulched. Respondents do not object(6:212).

Monitoring for Five Years. The sixth step proposed by DEC Staff is that the site and the plantings should be monitored and maintained for a period of five years (6:212).

Contested Remediation

Removal of Fill. The second step proposed by DEC Staff would require the Respondents to remove all the fill down to the original grade in both NA-4 and the adjacent area. Since the fill material was of a red color, as opposed to the original brown soil present before filling, DEC Staff asserts that removal

of the fill should be relatively easy (6:206). The Respondents seek only to be required to remove fill to the original grade, thus being allowed to leave some of the fill at the site. The soil used as fill was not from a wetland but from the site of other buildings at Bradley Corporate Park (6:183-5). The Respondents' wetlands expert testified that leaving some of the fill at the site, if the original grade was restored, would be acceptable if the fill was similar in nature to that in the wetland (7:305). He did not testify that the fill in the wetland was suitable for remaining in a wetland.

DEC Staff has met its burden of proving that filling occurred. The EGM requires restoration of wetland functions. Given the importance of the type of soil in a wetland for its function (Ex.28), the fact that the soil is a different color and there is nothing in the record to indicate that it is compatible with wetland function, the Commissioner should order the removal of all fill from NA-4. However, DEC Staff has not met its burden of proving that the removal of all fill from the adjacent area is necessary to restore the wetland function. Therefore, the Commissioner should order the restoration of the original grade within the adjacent area, but some fill could remain. This will allow for drainage into NA-4, which will restore its function.

Planting of Trees. The third step proposed by DEC Staff is the planting of trees in both NA-4 and the adjacent area. The Respondents raise a factual challenge to DEC Staff's assertion that before the violation occurred, the site was a fully mature deciduous swamp with large trees. DEC Staff asks the Commissioner to require the planting of trees, between 5-6 inches in diameter (approximately 25-30 feet in height) every 250 square feet. Each tree would cost approximately \$500 (7:331-3). This would mean the Respondent would have to plant approximately 560 trees (6:211), for a total cost of \$230,000. According to DEC Staff these trees are necessary to restore the canopy cover and are appropriate to restore the site of the violation. DEC Staff's wetland expert had not been to site before the violations took place and had no personal knowledge of the condition of the canopy at the site (6:220) but had reviewed a list of plants found at the site prior to the violations.

The Respondents take issue with DEC Staff's position. They argue that Hurricane Floyd, which passed through the area on August 19, 1999 (6:207), knocked down a significant number of trees in the area of the violation. Respondents' wetland expert testified that he had observed an area immediately adjacent to the site of the violation an area where there was a 70-80% loss in the canopy (7:298). Respondent John Magee stated 40-50% of the trees at the site of the violations were blown down during Floyd (7:370). DEC Staff has not challenged this testimony or

offered conflicting evidence. Thus, DEC Staff has not met its burden of proving that a canopy existed at the site before the violation. If no canopy existed, the Commissioner cannot order it restored.

In addition, the Respondents argue that the size of the trees proposed by DEC Staff is excessive and that smaller trees (protected from deer as necessary), placed closer together and well-fertilized should be adequate to remediate the site(7:308). The Respondents' wetland expert stated he had never heard of a case where DEC Staff has required the use of 5-6" diameter trees (7:308). Further, in testimony unchallenged by DEC Staff, the Respondents' wetland expert testified that larger trees are more difficult to move and have a higher mortality rate(7:309). If they do survive, these bigger trees may suffer shock when moved which may stunt the trees' growth (7:333).

The Respondents recommend that the Commissioner order the planting of smaller trees, 1 inch in diameter and approximately 5-6 feet in height in NA-4(7:330). These trees would be adequate to restore the wetland and would cost much less, approximately \$25-30 per tree (7:336). Since the Commissioner lacks the authority to order restoration in the adjacent area and DEC Staff have not met its burden of proving a canopy existed at the site before the violations, the Commissioner should order the planting of 1 inch diameter trees every 100 square feet in NA-4.

Planting of Shrubs. The fourth step proposed by DEC Staff would require the planting of shrubs in both NA-4 and its adjacent area. This would involve the planting of one shrub every 100 square feet. These shrubs should be native to the area and approximately two feet tall. In all, DEC Staff seeks that the Respondents be required to plant approximately 1,300 shrubs (6:212). The Respondents did not challenge the need to plant shrubs in NA-4, but assert the Commissioner does not have the authority to order the planting of shrubs in the adjacent area as part of a restoration plan. Since the Commissioner does not have the authority to order restoration of the adjacent area, the Commissioner should order the planting of shrubs in NA-4, only. DEC Staff did not prove why planting shrubs in the adjacent area would be necessary in order to restore the freshwater wetland.

RESPONDENTS' ARGUMENTS

In their closing briefs, the Respondents make a number of arguments not addressed above. Each is discussed below.

CPP Not Provided to Respondents

The Respondents argue that no penalty should be imposed because they never received a copy of the CPP. However, it is undisputed that the Respondents never requested a copy. They did ask for a copy of the EGM, which was promptly provided. The Notice of Hearing does state "DEC maintains certain guidance memoranda that may be used to determine appropriate penalties. If you wish to obtain copies of these memoranda prior to a scheduled hearing or pre-hearing conference, inform the attorney who has signed this Notice of Hearing, and you will be provided with appropriate information." In addition, the CPP is available on DEC's website. There is no requirement that the CPP be provided to Respondents. Therefore, DEC Staff did not breach any duty and there is no impediment to imposing a civil penalty.

The Commissioner is limited to finding fewer violations

The Respondents also argue alternatively: 1) that the Commissioner cannot impose a civil penalty because no sum certain was included in the Complaint; 2) that the Complaint only alleges four violations; and 3) the Complaint alleges only 25 violations.⁷ All of these arguments are without merit.

First, the Complaint states DEC Staff is seeking a civil penalty "not to exceed the maximum amount authorized by law." Thus, it is clear that a monetary penalty was sought by DEC Staff. Therefore, the Respondents were put on notice that DEC Staff was seeking a monetary penalty.

Second, Respondents allege that because the Complaint alleges four causes of action, the maximum penalty is \$12,000. However, the Complaint also alleges at least 25 separate violations. Thus, the Complaint put the Respondents on notice that DEC Staff was alleging more than four violations.

Third, Respondents allege that the language in the Complaint, alleging at least 25 violations, in some way limits the Commissioner to a \$75,000 maximum civil penalty. This argument is negated by Ruling 2, above, which grants DEC Staff's motion to amend its Complaint. In addition, the Respondents were on notice that DEC Staff was seeking a penalty greater than \$75,000 before DEC Staff's motion to amend its complaint. Even without Ruling 2, DEC Staff could have sought a penalty greater than \$75,000. This is so because under DEC's administrative rules (Part 622) an enforcement action may be commenced either by service of a Complaint or by a Motion for Order Without Hearing. In this case, after the Complaint was served, DEC Staff served a

⁷ Closing briefs were received before DEC Staff's motion to amend its complaint with regard to the number of violations.

Motion for Order Without Hearing. This Motion, in effect, amended the Complaint and this Motion contained a much more detailed analysis of the penalties sought and a higher number of violations.

The ALJ did not rule on the maximum number of violations

Another argument raised by the Respondents is that the ALJ ruled that only 25 violations occurred and that the maximum penalty is \$75,000 (6:175-176). The Respondents have taken a statement by the ALJ out of context. The statement in question was in no way a ruling, but rather an attempt to understand the various theories of liability advanced by each party.

The comments cited by the Respondents occurred during the direct examination by DEC Staff of John Magee, one of the Respondents. During this examination, a heated exchange occurred between counsel regarding the number of violations. Respondents were alternatively arguing that four or twenty-five violations could be found, while DEC Staff was arguing for a much higher number. In an attempt to understand the Respondents' argument, the ALJ asked a series of questions, one of which was whether, if the Respondents assertion that only 25 violations could be found (due to statements in the complaint) the maximum penalty would be \$75,000. The ALJ was not asked to rule on this question and made no ruling on this point, as the Respondents assert. This argument is rejected.

The Respondents argue that the Commissioner cannot order remediation in the adjacent area because DEC Staff did not specifically request such relief in the complaint (7:339). However, in the complaint, DEC Staff did request "such other and further relief as to the Commissioner may seem just and proper" (Complaint, p.5). The Respondents cannot claim that they were not on notice that DEC Staff was seeking the planting of shrubs and trees in the adjacent area. This was discussed at length during the hearing (6:206-230) and the Respondents' expert also testified about the proposed remediation (7:283-310). However, given the limited statutory authority of the Commissioner to order activities in the adjacent area, the argument is moot.

Allegations of improperly withheld information

Both parties have alleged that the other improperly withheld information demanded during discovery. However, the record was developed so that neither side was prejudiced by this alleged improper withholding.

While the Respondents had been provided a copy of DEC Staff's original estimate of fill (Ex. 52) before the hearing,

they had been prejudiced by not being provided access to the field work that supported this exhibit. Accordingly, the ALJ ruled that the cross examination of the surveyor should be delayed for nearly a month to allow the Respondents an opportunity to prepare cross examination.

DEC Staff asserted that the Respondents improperly withheld information regarding the vehicle used to commit the violations. DEC Staff only learned of the existence of the vehicle at the hearing while examining John Magee (6:151). The next day, the Respondents provided photographs of the vehicle (Ex. 60-62) and repair records for the vehicle (Ex. 63). Thereafter, DEC Staff did not pursue this issue.

CONCLUSION

For the reasons set forth above, I recommend that the Commissioner impose a civil penalty of \$83,500.

The Commissioner should also order the Respondents to submit, within sixty (60) days of her order, a remediation plan which includes the following six points:

1. The removal of the building, including all steel, concrete and any other materials.
2. The removal of all fill from NA-4, and the restoration of pre-violation grades in the adjacent area.
3. The planting of trees with a diameter of 1" in the disturbed area of NA-4.
4. The planting of native shrubbery approximately two feet tall, every one-hundred square feet in the disturbed area of NA-4.
5. The planting of ground cover, a combination of annual and perennial mix, in the disturbed area of both NA-4 and its adjacent area.
6. The monitoring and maintenance of the above for a period of five years.