The Department of Environmental Protection's Proposed Settlement of the Wetlands Violation by A.R. DeMarco Enterprises, Inc.

A Fact Finding Report to the Attorney General
by
The Office of Inspector General

Edward M. Neafsey, ADAG
Inspector General

November 10, 2000

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November 10, 2000

Honorable John J. Farmer, Jr.
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Dear Attorney General Farmer:

On August 10, 2000, the New Jersey Department of Environmental Protection ("DEP") and A.R. DeMarco Enterprises, Inc. ("A.R. DeMarco") entered into an Administrative Consent Order ("ACO"), which set forth settlement terms concerning a violation of the New Jersey Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.) and the regulations implementing the Act (N.J.A.C. 7:7A-1 et seq.) by A.R. DeMarco. Due to questions that were raised about the settlement terms, you assigned the Office of the Inspector General (OIG) to conduct a fact finding review of the A.R. DeMarco matter and report to you. Our review is now complete. This letter summarizes OIG's processes and conclusions.

On September 13, 2000, notice of the ACO was published in the DEP Bulletin. In accordance with the terms of the ACO, the ACO could become final and effective only after the expiration of a 30 day public comment period. In order for OIG to perform its fact-finding task, I wrote to the DEP requesting a 30 day extension of the public comment period. This request was

granted by Deputy DEP Commissioner Gary Sondermeyer, who is presently serving as the Acting Commissioner in the A.R. DeMarco matter. Additionally, I requested that you assign investigative staff to assist OIG. You assigned Civil State Investigators William McGough and Shawn Stewart from the Office of Insurance Fraud Prosecutor in the Division of Criminal Justice. These investigators handled the bulk of the interviews conducted as a part of OIG's fact finding.

During its review, OIG conducted 20 interviews with individuals directly and indirectly involved with the A.R. DeMarco matter (Exhibit 1). OIG also examined the files maintained on the A.R. DeMarco matter by key DEP employees, including letters, internal memoranda, electronic mail and newspaper articles. I note that all DEP employees were fully cooperative during this investigation, as were members of the Division of Law (DOL). Additionally, I note the assistance of DAG Mala Narayanan from DOL, who provided OIG guidance on the tax implications of the ACO. Finally, Anthony Drollas, Esq. and Glenn R. Paulsen, Esq., who represent A.R. DeMarco, made themselves available for interview upon the request of OIG. Mr. Paulsen provided a summary of the settlement between his client and the DEP and requested that it be included in this Report. It is, as Exhibit 2.

Pursuant to the assignment, OIG provides this fact finding Report to you. It is a detailed summary of the events leading up to and resulting in the A.R. DeMarco settlement, as reconstructed from witness interviews and documentary evidence. In this Report, OIG traces DEP's handling of A.R. DeMarco's freshwater wetlands violation, from its preliminary investigation to the issuance of a notice of violation, the Commissioner's recusal, the site inspection, the settlement negotiations, the entry into an ACO and the public announcement. Additionally, OIG analyzes DEP's enforcement process in this matter and identifies the issues

raised by that process. This letter reaches conclusions based on the factual summary and the analysis. Finally, OIG makes recommendations pertaining both to this specific matter and to State government conduct in the future.

I believe it is important to address first the question of whether DEP Commissioner Robert Shinn's "longstanding relationship," which was of both a political and business nature, with Garfield DeMarco, the President of A.R. DeMarco, contributed to the settlement. OIG did not uncover any act on the part of Commissioner Shinn intended to impart undue influence in the settlement of the DeMarco matter. Commissioner Shinn recused himself from the matter when he realized that the investigation supported an enforcement action. However, the recusal was not perfect. At times post recusal, he inquired as to the status of the matter and at one point a member of his staff forwarded a memorandum on the matter's status to him (Exhibit 3). As you are aware, upon recusal, an impenetrable wall must be created between all of those working on the case and the recused individual. While Commissioner Shinn stated that he sought to avoid situations where a member of DEP "may feel some implied influence," these penetrations raise the possibility of indirect or implied influence on the actions of DEP members. While OIG does not find these breaches of the wall to be evidence of corrupt intent or conduct on the part of anyone at DEP, they were mistakes that undermined the effectiveness of the recusal. Therefore, OIG concludes that DEP's failure to adhere to a pristine recusal process in this matter is one reason for the State to refrain from finalizing the terms of this ACO. (Because of the governmental importance of ensuring that recusals are handled properly, OIG recommends in this Report that guidelines be developed which set forth a detailed recusal process.) Unfortunately, there are additional reasons, involving DEP's enforcement process, that lead OIG to conclude that this settlement should not be finalized.

Achieving deterrence is one of the purposes of DEP penalty regulations. As described more fully in the Analysis Section of this Report, to assure that this settlement satisfied that purpose by exacting a sufficient and appropriate penalty for A.R. DeMarco's actions, would require (1) a finding of the necessity and reasons for negotiating a property settlement instead of a monetary penalty, and (2) a measurable and valid assessment of both the value received by the State through the land deal and the cost to DeMarco.

As a general rule, a violator should be required to disgorge any economic benefit that his violation affords him and pay an additional penalty in order to deter unpermitted and unlawful conduct. This ensures that the ultimate penalty determination is not treated by the violator as a mere cost of doing business. In this case, DEP did not adequately ensure that its ultimate settlement recouped the economic benefit - i.e., the financial profit or business advantage the violation had accorded A.R. DeMarco.

A.R. DeMarco's attorney, Anthony Drollas, Esq., stated in the negotiation that A.R. DeMarco was "cash poor" and unable to pay a monetary penalty. DEP, however, did not undertake an ability-to-pay analysis to confirm DeMarco's financial situation. DEP failed to perform a due diligence check on this claim by requesting financial and tax records from A.R. DeMarco's attorney. Thus, OIG concludes that DEP did not adequately verify A.R. DeMarco's need to forego payment of a monetary penalty.

In a similar vein, DEP's valuation of the conservation easement was done hurriedly and informally and, accordingly, cannot be deemed to be reliable. It appears that the DEP was so eager to obtain a conservation easement for this ecologically valued land that it was less than appropriately concerned with whether there was a straightforward correlation between the value of the easement and property obtained and the penalty amount - $300,000 - which it sought from

A.R. DeMarco in the settlement and later claimed to have achieved.

In fact, the dollar value placed on the settlement by the DEP is not supported by the evidence. While I am aware of the beauty of the Batona Trail and agree that Apple Pie Hill is environmentally significant, crediting a specific monetary penalty, "a minimum of $300,000," to this ACO, as DEP did, was misleading (Exhibit 4). DEP failed to do the research necessary to reach this conclusion, such as conducting up-to-date appraisals of the property, which would have established the true worth of the conservation easement imposed on already deed restricted Pinelands property. This failure undermines both the legitimacy of the settlement and public confidence in it.

Moreover, it was simply incorrect for DEP to tout this ACO as a "historic" and "largest ever" wetlands penalty in its press announcement. The settlement was for A.R. DeMarco's property and property rights, as A.R. DeMarco did not pay a monetary penalty, and members of the DEP, including their experts on land valuation, hadn't determined the exact value of the conservation easement. Indeed, a member of the Green Acres Program, who was asked to value the deed restricted property, explicitly questioned placing a monetary value on the land because it was a "difficult problem" and urged that reference to monetary value in the settlement summary be removed. He felt the deal should be justified on its merits; i.e., what it accomplishes ecologically - not on a monetary value. Rejecting the advice of its own experts, DEP's public announcement of the settlement accredited it a minimum value of $300,000. At best, this is a mere "guesstimate," which is insufficient to ensure that this settlement sends a clear message of deterrence.

As mentioned above, during OIG's fact finding review, it became clear that DEP's motivation for entering the ACO was its desire to acquire parts of A.R. DeMarco's property in

the Pinelands for use by the State. While this is a salutary goal, the way the goal was achieved compromised the enforcement aspect of the case. It sounds trite, but it is true in every enforcement case: the end never justifies the means. In fact, it is adherence to the enforcement process itself that ensures equitable treatment of violators, and maintains public confidence in the integrity of the enforcement system. Honoring the process is always of paramount importance. DEP's neglect of the process in this case ultimately resulted in a settlement that, rather than being salutary, is not in the public interest.

Nothing is more telling in this regard than the failure of some individuals, who were responsible for presenting the settlement to the public, to be aware that just two months before the settlement, A.R. DeMarco had received more than $600,000 from the State for Pinelands Development Credits (PDCs) on the exact property that was subject to further deed restriction under the ACO. The DEP admits there was a "communications breakdown" on this issue, though unintentional, which led to DEP's failure to disclose at the time the settlement was announced that A.R. DeMarco had just received that money from the State for PDCs on 591 acres which were part of the deal. This oversight had a destructive impact on the public's perception of the ACO.

One DEP press officer found it "infuriating" that some would think the Commissioner was "showing favoritism'" or that cranberry growers in general and Garfield DeMarco in particular were getting "a sweet deal" because they were politically connected. Nonetheless, DEP's omission of the $600,000 payment from its announcement of the deal made it appear that the DEP was trying to hide the truth by concealing some of the relevant facts surrounding the A.R. DeMarco deal. DEP agreed to resolve the wetlands violation in a deal that required the transfer of property and property rights to the State (albeit, with the PDCs already removed from

some of the property) but did not require any monetary penalty on top of the land transfer. Many in the public perceived this to be too lenient, and thus inferred that there was political interference in the deal. OIG did not find any evidence of favoritism by the Commissioner or undue influence. Nevertheless, there are too many process flaws - such as the failure to appraise the deed restricted property, the failure to consider the possible favorable tax implications to A.R. DeMarco from the deal, and the failure to conduct an ability-to-pay analysis or to ensure recoupment of economic benefit - to dispel the perception that the settlement was unjust. In short, while DEP's intentions were to the contrary, their deviations from the process resulted in the public perception that this settlement has the trappings of a "sweet deal."

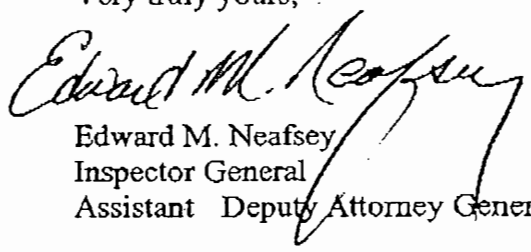
Because of these failures, the public cannot be assured that the penalty was appropriate and commensurate with the violation. Moreover, because the recusal process was flawed, this settlement is subject to question. Again, OIG did not find any criminal culpability or deliberate malfeasance on the part of anyone involved in this settlement. But the appearance of impropriety coupled with an inappropriate enforcement process leads OIG to conclude that it would not be in the public interest to finalize this ACO.

In light of the unresolved issues and process flaws OIG has identified surrounding this case, OIG concludes that in order to maintain public confidence that the case will be handled properly and justly, DEP should create a high level State team that assumes shared responsibility for a candid and complete re-assessment of this matter. OIG recommends that enforcement officials at the highest level of DEP's enforcement element, who were not involved in this matter, since it did not fall within their chain of command, and of the Division of Law's Environmental Section form a team to handle this enforcement action, to address the issues raised in this Report, and to resolve the matter in a manner that recognizes both the need to

achieve deterrence and to credibly explain the terms of any settlement to the public. The DEP could also refer the A.R. DeMarco matter to the United States Environmental Protection Agency, which has expertise in these matters and oversight responsibility for an enforcement case under a program it has delegated to the State, such as the Freshwater Wetlands Program, for its independent evaluation.

As we discussed, these conclusions and this Report shall be forwarded to DEP as part of the public comment period.

Very truly yours,



Edward M. Neafsey
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EMN/ner
Enclosures

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TABLE OF CONTENTS

TABLE OF APPENDIX I

TABLE OF APPENDIX II

TRANSCRIPTS OF INTERVIEWS

I. A.R. DeMARCO FACT FINDING SUMMARY

INTRODUCTION

The following provides a factual summary, derived from witness interviews and documentary evidence, of the events which preceded the execution of the ACO between DEP and A.R. DeMarco. Generally, this factual summary will detail the processes followed by the DEP before executing the ACO, including the preliminary investigation which led to the issuance of a Notice of Violation against A.R. DeMarco, the subsequent site inspection performed on the A.R. DeMarco property, DEP Commissioner Robert Shinn's recusal, and the various issues which arose from the settlement negotiations leading up to the execution of the ACO and its public announcement.

BACKGROUND

In February, 1998, the United States Environmental Protection Agency ("EPA") contacted DEP's Coastal and Land Use Compliance and Enforcement Section ("CLUCE Section") to report suspected violations of the New Jersey Freshwater Wetlands Protection Act (the "Act")[1] on three pieces of property located in Burlington County, New Jersey. The EPA requested the assistance of DEP to identify the owners of the properties and to initiate an

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[1]The purpose of the New Jersey Fresh Water Protection Act (the "Act"), N.J.S.A. 13:9B-1 et seq., is to preserve areas defined by the Act as "freshwater wetlands." According to the Act, the preservation of freshwater wetlands is necessary to protect and preserve drinking water, provide a natural means of flood and storm damage protection, and provide essential breeding, spawning, and nesting for wildlife. Generally, the Act prohibits the destruction of freshwater wetlands and regulates what activities may and may not be performed in areas designated as freshwater wetlands. To conduct activities that are regulated by the Act, an individual must obtain a permit before engaging in the regulated activity. A violation of the Act or a failure to obtain a permit for a regulated activity may result in the assessment of penalties of up to $10,000 per day for each violation. Prior to the Act's adoption in July of 1988, section 404 of the Federal Water Pollution Control Act (the "Federal Act") controlled the preservation of freshwater wetlands in New Jersey. The Federal Act provides that the provisions of the Act may be more stringent than the Federal Act, but must be at least as stringent as the Federal Act.

investigation to determine whether any of the property owners had, in fact, encroached upon protected wetlands in violation of the Act. After performing a preliminary investigation on each of the properties, the CLUCE Section identified one of the subject properties, Block 4601, Lot 5.01 and parts of Lot 3, Woodland Township, New Jersey (the "Property"), as being owned by A.R. DeMarco Enterprises, Inc ("A.R. DeMarco"). The Property consists of hundreds of acres of farmland which is primarily utilized by A.R. DeMarco for agricultural activities related to cranberry cultivation.

According to John Higgins, who has been employed with DEP and its predecessor agency since 1962 and is currently a Coastal Zone Implementation Specialist I with the CLUCE Section,[2] the A.R. DeMarco matter first came to the attention of the DEP on February 3, 1998. On that date, John Aduddell, an investigator with EPA, showed Mr. Higgins aerial photographs taken by EPA of three pieces of farm property, primarily used for cranberry and blueberry cultivation, located in Burlington County. Mr. Aduddell asked Mr. Higgins for assistance in identifying the three pieces of property for the purpose of determining whether the owners of the properties had expanded their cranberry and/or blueberry farming activities onto protected wetlands in violation of the Act. Mr. Higgins stated:

> The individual came into our office, his name [was] Jack Aduddell. . . . He indicated that he was from EPA and Criminal Justice or Federal Criminal Justice, something like that. He put three photographs down and asked us, asked me, if I knew what they were. And I asked him to provide just a little bit more information so I could identify what he was looking at. After going through topographic maps and some soil surveys that we had, I was able to indicate [to him that I had knowledge] of each of [the] sites. . . . [One of the photographs] we all determined to be the Garfield DeMarco bogs on Route 563, south of Chatsworth. . . .

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[2]Mr. Higgins' duties involve responding to complaints concerning possible violations of the Act within the Pinelands Region of Southern New Jersey, including Burlington County.

PRELIMINARY INVESTIGATION

According to Mr. Higgins and a CLUCE Section internal memorandum dated May 22, 1998,[3] on February 10, 1998, Mr. Higgins conducted a roadside inspection of the Property to determine whether any potential wetland violations could be viewed from the perimeter of the Property. This perimeter inspection was done because the Property was clearly posted with a no trespassing sign. During the perimeter inspection, Higgins observed that a forested area on the Property was being cleared and burned adjacent to existing cranberry bogs located on the Southeast portion of the Property. Based on this observation, and other information gathered concerning the Property, on April 17, 1998, Higgins made arrangements to conduct a preliminary on-site inspection of the Property.

On May 5, 1998, Higgins met with Pat Slavin, the farm manager of the Property, and Francis Pandullo, an engineer who was a consultant for A.R. DeMarco, to conduct the preliminary on-site inspection on the Property. According to Higgins, during the preliminary inspection, he observed a cranberry bog expansion on the Property. Higgins' general observations indicated that the expansion had occurred along a sand ridge and that the vegetation that had been cleared and burned appeared to have been mostly Pitch Pine and Oak forest. Higgins informed Mr. Slavin and Mr. Pandullo that the cranberry bog expansion might be a violation of the Act because the bog expansion involved the possible deforesting of wetlands. According to the May 22, 1998 memorandum, Mr. Pandullo informed Mr. Higgins that the area of the cranberry bog expansion was not wetlands because the area did not have the hydrology to

[3]The May 22, 1998 memorandum is from Higgins to Leroy Cattaneo, Administrator of CLUCE, and Peter Lynch, Chief of CLUCE.

meet the definition of wetlands under the Act.[4] Mr. Pandullo then indicated that he would provide Mr. Higgins with a report supporting Mr. Pandullo's position that the area of expansion was not wetlands. During his interview, Mr. Higgins stated the following concerning the on-site inspection:

> We had an on-site meeting out on the bog. [It was a] very nice meeting, very calm. We looked at certain areas and I suggested that [an area] could be part of the violation, and that another area may not be, it may be an upland. Frank Pandullo was going to submit a report to me detailing what his findings were as a consultant. And in fact, he did do that. I disagreed with Frank on the soil analysis portion of it. I had information that the hydric list for New Jersey included the soils that were on site as being hydric. I said I thought you better go back and check that again.

On May 15, 1998, Mr. Higgins and Mr. Pandullo met to discuss a report prepared by Pandullo which indicated that the cranberry bog expansion on the Property did not encroach on wetlands in violation of the Act. According to Higgins, while he agreed with certain aspects of Pandullo's report, Higgins believed that the report was incomplete, and he requested additional information from Pandullo to decide whether the bog expansion was a violation of the Act. In his May 22, 1998 memorandum, Higgins advised his supervisors (Leroy Cattaneo, Administrator, and Peter Lynch, Chief) that based on his observations of the property on May 5, and the information Higgins possessed as of the date of the memorandum, there did not appear to be a violation of the Act on the Property.

According to Higgins, as the preliminary investigation of the Property progressed,

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

however, he came to believe that the cranberry bog expansion on the Property owned by A.R. DeMarco may have encroached on wetlands in violation of the Act. This conclusion was based on Higgins' observations of the Property during the preliminary site inspection as compared to the Geographic Information System (the "GIS") mapping of the Property prepared by others in June of 1998. The GIS maps permitted Higgins to compare the type of vegetation that existed on the Property before the expansion of the cranberry bogs to the Property as it existed at the time of the site inspection. The GIS maps revealed that the cranberry bog expansion had eliminated from the Property vegetation common in freshwater wetlands. After review of this information and the report submitted by Mr. Pandullo concerning the Property, Higgins concluded that the GIS maps showed that approximately 19 acres of forested freshwater wetlands located on the Property were possibly converted or altered when fill material was used to construct dikes in the wetlands for the purpose of creating cranberry bogs. Additionally, Higgins' review of the Burlington County Soils Survey revealed that portions of the Property converted to cranberry bogs contained hydric soils indicating that the cranberry bog expansion may have encroached on freshwater wetlands.

RECUSAL OF COMMISSIONER SHINN

In June, 1998, as the preliminary investigation progressed, DEP Commissioner Robert C. Shinn, Jr. (the "Commissioner") recused himself from involvement in the DeMarco matter. The Commissioner believed his recusal was necessary because of his "longtime relationship" with Mr. Garfield DeMarco, the President of A.R. DeMarco Enterprises, Inc. However, the exact date of the recusal is unknown.

A. The Commissioner's Involvement in the A.R. DeMarco Matter

According to the Commissioner, he first became involved in the A.R. DeMarco matter in early June, 1998. The Commissioner indicated that at that time, he received a telephone call from Jeanne Fox, Regional Administrator, U.S. Environmental Protection Agency, Region II, who informed him that EPA believed that the owners of certain properties located in Burlington County, New Jersey, had possibly violated the Act by disturbing wetlands. Ms. Fox informed the Commissioner that one of the properties was owned by A.R. DeMarco. During the phone conversation, the Commissioner referred Ms. Fox to Mr. Leroy Cattaneo, who, at that time, was the Administrator of the CLUCE Section. The Commissioner informed Ms. Fox that Mr. Cattaneo would assist her in handling the suspected violations on behalf of DEP. During his interview, the Commissioner stated:

> I believe [I received] a phone call from Jeanne Fox of Region II -- she's a Region II Administrator -- advising me that they had identified some wetlands violations in the Pinelands. So, I basically got her in touch with Lee Cattaneo, who was at that time in the Land Use Department and his responsibility was enforcement. So, between those two agencies that started to work through these violations that were apparently from aerial photography. . . . They identified four or five violations or potential violations, and I think one was the Burlington property. . . DeMarco was the larger one . . . .

The Commissioner also indicated that this contact with Ms. Fox, and his subsequent referral of the matter to Mr. Cattaneo, were basically the extent of his "hands on" involvement in the DeMarco matter. He further indicated that once he recused himself, his involvement was limited to general questions to his Chief of Staff, Mark Smith, concerning where the case was in the administrative process and whether the case was nearing resolution. In response to a question concerning whether the Commissioner had any further involvement in the DeMarco matter, the Commissioner stated:

> [J]ust follow-up [questions] with Mark Smith as to [how the case was]

> progressing, [such as] are we getting close to the final resolution of this, and just where it [was] in the process. He'd give me, you know, a generic rendition of the case . . . .
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> [I would ask Mark Smith] the status of the case. The activity every month or every other month. I would ask Mark about . . . where are we in this process, is it moving forward, and so on. His response would be its in dispute resolution, it's, you know, tentative settlements on the table. . . . Other than what I read in the newspaper, that's about my information source. (Emphasis added).

Indeed, the Commissioner was sent an internal memorandum from Ray Cantor, Assistant Commissioner for Land Use Management, and Lee Cattaneo, dated April 27, 1999 (Exhibit 3), which provided a summary of the status of the DeMarco investigation.[5]

In his interview, the Commissioner also stated his reasons for not immediately recusing himself from the A.R. DeMarco matter when he first learned that the EPA suspected that A.R. DeMarco had violated the Act. The Commissioner indicated that he initially believed that the matter would resolve itself in accordance with the Pinelands Comprehensive Management Plan (the "CMP").[6] The Commissioner said he was familiar with the DeMarco property, and with the provisions and the restrictions of the CMP.[7]

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[5]Ray Cantor confirmed that he and Leroy Cattaneo sent this status memorandum to the Commissioner. However, the Commissioner, when asked whether he reviewed the memorandum, could not recall ever reading the memorandum.

[6]The A.R. DeMarco property is located in the Pinelands Area, as defined in the Pinelands Protection Act. The CMP applies stricter land use controls in the Pinelands Area than in any other region of New Jersey for the purpose of protecting this environmentally sensitive area. The CMP encourages the continued production of cranberries as one of the few permitted land uses in areas designated as "Agricultural Production Districts." In addition, the CMP provides for comprehensive protection of the region's natural resources which results in the preservation of large areas of wetlands and uplands from development.

[7]Additionally, the Commissioner explained that he was a member of the Pinelands Commission when the CMP was adopted. In fact, according to the Commissioner, his vote was

(continued...)

The Commissioner believed that the CMP permitted A.R. DeMarco to expand its cranberry bogs for agricultural purposes without obtaining a freshwater wetlands permit. Thus, the Commissioner believed that A.R. DeMarco's cranberry bog expansion was not in violation of the Act because such an agricultural activity was permitted by the CMP.

However, once the Commissioner became aware that a preliminary site inspection of the Property revealed that A.R. DeMarco might have violated the Act, notwithstanding the provisions of the CMP, the Commissioner decided to recuse himself from any further involvement in the A.R. DeMarco matter due to his relationship with its owner, Garfield DeMarco. The Commissioner stated:

> [W]hen we adopted the Comprehensive Management Plan, there was an area called the preservation area and then there was an area we delineated as special agricultural. This is where cranberry agricultural and blueberry agricultural took place. In the CMP that we adopted on August the 8th of 1980, in exchange for the loss of beneficial use of property rights, cranberry growers could expand their acreage. This line, I believe, was drawn on the historic boundary of where cranberry agricultural existed. . . . [S]o, when I first heard about the violation, I thought, well, they're not recognizing the CMP and how it controls agricultural [activities]. So I thought ultimately this would all [resolve itself]. But, when I saw that, you know, this was really [going to] be a violation, I thought I [have got to] recuse myself, and that probably took two or three weeks to get to that determination.

In further discussing his recusal, the Commissioner indicated that he had concerns regarding any "implied influence" he might have on his staff handling the DeMarco investigation. The Commissioner stated:

> "[I]t's difficult being a Commissioner and having a section of the Department you really don't want to communicate with. And you find yourself doing that. You

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[7](...continued)
the deciding vote which led to the adoption of the CMP. The Commissioner stated "I was the eighth vote on the Pinelands Comprehensive Management Plan in favor of it and that was a very controversial vote. [It was] probably the most memorable vote of my whole career. So, I [have] a lot of strong feelings about [the] Pinelands and [the] people in agriculture . . ."

> sort of, you know, Ray Cantor's shop, I don't talk to a lot, mostly through Bob Tudor or Gary [Sondermeyer][8], just because of this, this issue is ongoing. . . . Well, I, just found myself being uncomfortable, you know, if I had Ray in my office. He may feel some implied influence talking about something else, you know, and I didn't want to, I didn't want to be there, so I found myself just sort of trying to work through Bob Tudor, or Gary Sondermeyer relative to those issues that, that Ray's involved with. There's a lot of controversy in Land Uses, you know. . . . So, I, I just wanted to try to not appear to be any influence on, on that section's decision making process. I think I carried that out fairly well. I made every effort to do that.

B. The Commissioner's Relationship with Garfield DeMarco

According to the Commissioner, his relationship with Garfield DeMarco dates back to at least the early 1970s. The Commissioner described his relationship with Mr. DeMarco as one which developed from a business relationship into a relationship where Garfield DeMarco became a political mentor and advisor to the Commissioner.

The Commissioner said that he first became acquainted with Garfield DeMarco in the course of operating his business, which occasionally would sell some farming equipment and parts to cranberry growers in Burlington County. The Commissioner's relationship with Garfield DeMarco developed further when the Commissioner became a Burlington County Freeholder in 1977. At that time, Garfield DeMarco was the Chair of the Burlington County Republican Party.

The Commissioner stated that because of this longstanding relationship with Mr. DeMarco, once it was determined that the DEP would be taking some sort of action concerning A.R. DeMarco's suspected freshwater wetlands violation, the Commissioner believed that it would be best to recuse himself from the DeMarco matter so that there would be no "appearance of impropriety" in the handling of the investigation. The Commissioner stated:

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[8]Robert Tudor became Deputy Commissioner, and was Assistant Commissioner Cantor's supervisor, in May 2000. Gary Sondermeyer became Chief of Staff, succeeding Mark Smith, in May 2000.

> [M]y real reason for recusing myself [was] not my familiarity with the [CMP], but my longtime relationship with Garfield. That [is what] really led me to do that. I thought that was, you know, the conflict in itself. [It] was certainly the appearance of a conflict, and appearance is 99 percent of the battle in this business. So, I just wanted to remove myself. . . .
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> I worked closely with Garfield through [some] campaigns. So, I had a relationship there. [Additionally], my business, Material Handling Systems and Highway Tractor, we sold some equipment to cranberry growers, not a lot, but some. So, there was a business relationship [with Garfield DeMarco] as well.

C. The Recusal Process

The Commissioner did not follow any formal process in recusing himself. According to the Commissioner, he simply informed the people whom he believed needed to be aware of his recusal by word of mouth. The Commissioner stated that at different points in time he informed a number of people of his recusal, including his counsel, Michael Hogan, his Chief of Staff, Mark Smith, CLUCE Administrator Leroy Cattaneo, and certain personnel in the Governor's Office.

To accomplish the recusal, the Commissioner first contacted Michael Hogan. The Commissioner said that he told Mr. Hogan that he was recusing himself from the DeMarco matter because of his longtime relationship with Garfield DeMarco. At that time, the Commissioner asked Mr. Hogan to take control of the DeMarco matter in the Commissioner's stead. According to the Commissioner, Mr. Hogan replied that there would still be an appearance of impropriety if Mr. Hogan handled the DeMarco matter because of Mr. Hogan's longtime employment with the Commissioner and the fact that Mr. Hogan was also acquainted with Mr. DeMarco. According to the Commissioner, Mr. Hogan at that time also recused himself from any involvement in the DeMarco matter to avoid any appearance of impropriety.

In explaining the recusal process, the Commissioner stated:

> I talked to Mike [Hogan] and told him that I was recusing myself, and I wanted him to sort of handle this case on my behalf and for the Department. He said, 'well, I can't do that. I feel that I need to recuse myself as well.' So, shortly after that, I asked Lee [Cattaneo] to take charge of that case and handle it. Shortly after that, I don't think I remember the exact time frame, but, I asked Mark [Smith] just to keep track of where it's going and make sure it progresses.

The Commissioner, in explaining why be believed that Michael Hogan recused himself, stated:

> I asked [Michael Hogan] why he recused himself and he said, 'well, I just thought the perception would be that I was acting on your behalf anyway. I'm your counsel, and you know, I know Garfield on top of that. So, I felt that I should step aside as well.' In retrospect, I think that was a good decision.

From the OIG interview with Mr. Hogan, it is unclear whether Mr. Hogan actually recused himself from the DeMarco matter. Mr. Hogan indicated that there was no legal reason for him to formally recuse himself from the matter because he did not know Garfield DeMarco well. However, Mr. Hogan indicated that he decided not to become involved in the DeMarco investigation because if A.R. DeMarco contested the matter in the Office of Administrative Law, Mr. Hogan wanted to be able to act on behalf of the Commissioner's Office to review an Administrative Law Judge's decision in the case. By way of background, if a person who has been cited by a department for an administrative violation, such as a wetlands violation, wishes to contest the citation, he does so before an Administrative Law Judge (ALJ). The ALJ makes findings of facts and recommends a course of action to the commissioner of the appropriate department. The commissioner then reviews the ALJ's findings and recommendations, and either accepts, modifies or rejects them. The commissioner's decision, not the ALJ's is the final order. As counsel to Commissioner Shinn, it is part of Mr. Hogan's job to review ALJ recommendations for the Commissioner. According to Mr. Hogan, his "recusal" was done only

for the purpose of preserving his ability to act impartially on behalf of the Commissioner should an Administrative Law Judge render a decision in the DeMarco matter. Mr. Hogan stated:

> I felt that it would be inappropriate for the Commissioner's Office to get involved in a violation because, if it were to go to a hearing, the Commissioner has to hear and rule on the violation. So, . . ., in other words, . . ., if they cite them and if they can't agree, it goes to the [Office of Administrative Law (OAL)], and then OAL rules. Then, it comes to the Commissioner's Office. And we are pretty clear about not involving ourselves in an issue once it gets to that point because chances are, the Commissioner's supposed to stand apart so that he can be effective in the event that he would have to rule on any violation. . . .

In responding to a question concerning his recusal, Mr. Hogan stated:

> Well, I don't think that I needed to recuse myself. I had, you know, I know Garfield DeMarco, but I haven't spoken to him in ten years . . . . I hadn't spoken to him since 1991 or earlier. So, . . . , what I felt was that I was looking [at the DeMarco matter] from a different level. I didn't want to get involved in it because of the violation. The violation could go to the OAL. The OAL could end up coming up here, and it would be inappropriate for me to get involved in any violation. So, and I think that afterwards, after [the Commissioner] did recuse himself, I may have even mentioned to him it was probably better because that way people wouldn't make the same allegations against me. . . .

Regardless of his rationale, Mr. Hogan did not substantively involve himself in DEP's handling of the A.R. DeMarco matter.

In June 1998, the Commissioner then asked the Chief of Staff, Mark Smith, to handle the DeMarco matter. Mr. Smith, in effect, became the "Acting Commissioner" in the DeMarco matter as a result of the Commissioner's recusal.[9] The Commissioner further stated that at some point in June 1998, he telephoned Leroy Cattaneo at his home to inform Mr. Cattaneo that the Commissioner had recused himself from the DeMarco investigation.

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[9]Mr. Smith left the DEP as Chief of Staff in May, 2000. His successor was Gary Sondermeyer. Mr. Sondermeyer was the "Acting Commissioner" at the time the ACO was entered into by DEP and A.R. DeMarco.

D. Date of the Commissioner's Recusal

The exact date of Commissioner Shinn's recusal from the A.R. DeMarco matter is unknown. The Commissioner stated "near as I can tell, . . ., I haven't been able to pin down the date that I actually recused myself, but I think it was the third or fourth week of June of '98, somewhere around that time frame." The Commissioner further stated:

> I had trouble finding out exactly when I recused myself as well, which I thought would be easy because Mike [Hogan] always makes notes of that sort of thing, and, he didn't really make any notes either, I found out. So. . . but I'm pretty sure it was the third or fourth week in June of '98, [that] is when I actually did it.

Through OIG interviews, it has been determined that all those who were informed of the Commissioner's recusal, learned of the recusal at different stages of the DeMarco investigation, and thus have varying accounts of when the recusal actually occurred and when they first became aware of the recusal.[10]

For example, Leroy Cattaneo believes he learned of the Commissioner's recusal in late May or early June, 1998.[11] Mr. Cattaneo confirms the information provided by the Commissioner concerning how Mr. Cattaneo learned of the recusal. According to Mr. Cattaneo, he received a telephone call at his home from the Commissioner indicating that the Commissioner was recusing himself from the A.R. DeMarco matter and that the Commissioner wanted Mr. Cattaneo to continue to supervise the DeMarco investigation.

Similarly, interviews with staff members of the DEP and others involved in the DeMarco matter revealed that every individual involved in the DeMarco matter became aware of the

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[10]It should be noted that everyone interviewed by OIG regarding the Commissioner's recusal also believed that Mr. Hogan was recused from the DeMarco matter, except, of course, Mr. Hogan himself.

[11]In a subsequent interview, Mr. Cattaneo stated that he believed the Commissioner recused himself on about May 7, 1999.

Commissioner's recusal through informal means. For example, Raymond Cantor, Assistant Commissioner, Land Use Management, who has been with DEP since March 1998, stated that he was informed about the Commissioner's recusal when he received a telephone call from Mr. Cattaneo informing him that the Commissioner and Mr. Hogan had recused themselves from the DeMarco matter and were not to be contacted. Mr. Cantor also stated that he could not be certain of when he first learned of the Commissioner's recusal, but he believed it occurred around the time General Permit 23 was being considered for promulgation . In response to the question of when he learned of the Commissioner's recusal, Mr. Cantor stated:

> I'm not sure. I know it was shortly after a number of articles appeared in the press criticizing the Department and the Commissioner, in particular, for having interest with cranberry growers and with DeMarco. It may have been right after we initially proposed our cranberry general permit, or around when we had the first public hearings.

Similarly, Peter Page, Director of Communications for DEP since 1997, indicated that he became aware of the Commissioner's recusal quite informally through speaking with others in the DEP. Mr. Page could not provide an exact date of when he became aware of the recusal. In response to a question concerning how Mr. Page learned of the Commissioner's recusal, Mr. Page stated:

> I think it was indirectly in the first place, which happens a lot around here. . . . I don't remember why I heard about it in the first place, but I confirmed it with [the Commissioner]. Somebody or other told me. . . . [The Commissioner] didn't make a big announcement at all, like there was [not] some ceremony. He just, I think, he just told . . . just told Ray [Cantor] and Lee [Cattaneo] that he was staying out of this and he didn't want to know what was going on.

Further, Robert A. Tudor, who has been with DEP for approximately 20 years and who became a Deputy Commissioner with the DEP in May, 2000, stated that he first became aware of the Commissioner's recusal in June or July of 2000. Finally, Christine Piatek, a Deputy Attorney General with the Environmental Enforcement Section of the Department of Law and Public

Safety, indicated that she did not become aware of the Commissioner's recusal from the DeMarco matter until March 13, 2000, although she had been involved in the DeMarco investigation since December 21, 1998.

Although all of the people interviewed concerning this matter became aware of the Commissioner's recusal at different points in time, they all indicated that they never contacted the Commissioner or Mr. Hogan regarding DEP's substantive position on the DeMarco matter, although as noted above, the Commissioner periodically did receive information about the status of the case. Further, all of those interviewed indicated that they were not contacted directly or indirectly by the Commissioner or Mr. Hogan regarding the DeMarco matter, after the recusal. In this regard, Mr. Cattaneo, in response to a question concerning whether he was ever directly or indirectly contacted by the Commissioner concerning the DeMarco matter, stated:

> No, and the reason that's almost a humorous question there [is] because there was no contact, I mean, I had absolutely no guidance whatsoever. . . . I was on my own, you know, and between me and Ray [Cantor], we were working on this with absolutely no influence whatsoever, that I am aware of, you know. I can not tell you if Ray had any influence, but I'll tell you I did not, at all. (Emphasis added).

ISSUANCE OF THE NOTICE OF VIOLATION

After Commissioner Shinn's recusal and the conclusion of the preliminary inspection of the Property, on October 19, 1998, the DEP issued a Notice of Violation ("NOV")[12] to A.R. DeMarco. (Exhibit 5). The NOV alleged that A.R. DeMarco may have violated the Act by eliminating forested wetlands to expand its cranberry bogs.

The NOV issued to A.R. DeMarco allowed three courses of action for the resolution of the violation. The NOV provided that A.R. DeMarco may: (1) submit documentation which

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[12]A Notice of Violation places an individual on notice that the DEP believes that the individual has violated the Act.

would demonstrate that the cranberry bog expansion was an activity which is exempted from the Act; (2) submit a mitigation and restoration proposal for the removal of the violation and the restoration of the site; or (3) submit a complete Freshwater Wetlands Permit Application for review with the appropriate fee and required information.

In response to the NOV, Anthony T. Drollas, Jr.[13], one of A.R. DeMarco's attorneys, wrote a letter to DEP, dated October 29, 1998. (Exhibit 6). In that letter, Mr. Drollas requested that the DEP withdraw the NOV because his client's property did not contain freshwater wetlands. To support his position, Mr. Drollas relied on the report prepared by Francis Pandullo, P.E., of Omega Engineering Services, Mt. Laurel, New Jersey. In the letter Mr. Drollas stated that according to the report, the Property did not contain freshwater wetlands because it did not meet any of the criteria for identifying the presence of wetlands, such as, hydric soils, wetland vegetation, and wetlands hydrology. Mr. Drollas' letter also requested that the DEP submit any additional information in its possession that supported its position that A.R. DeMarco violated the Act, because A.R. DeMarco was of the opinion that DEP had no jurisdiction over the activities on the A.R. DeMarco property. Finally, Mr. Drollas requested the opportunity to meet with the DEP if DEP intended to pursue the alleged violation.

SUBSEQUENT SITE INSPECTION ON THE DEMARCO PROPERTY

A. Development of an Inspection Team and Gathering of Additional Information

In light of Mr. Drollas' letter in response to the NOV, the DEP determined that A.R. DeMarco might litigate this matter in defense of its positions that its cranberry bog expansion did

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[13]Mr. Drollas is a former Deputy Attorney General who was assigned to the Division of Law's Environmental Sections. Glenn R. Paulsen, Esq. is the Chair of the Republican Party in Burlington County. After completing its fact finding, OIG found that at all times A.R. DeMarco's attorneys provided effective advocacy for their client, but did not attempt to exert any undue influence.

not encroach on wetlands in violation of the Act, and that DEP had no jurisdiction over the activities performed on the property. In preparation for possible litigation, DEP decided to assemble an inspection team comprised of experienced individuals from the CLUCE Section, the DEP's Land Use Regulation Program, and the Pinelands Commission (the "Inspection Team"), to gather additional information concerning the alleged violation.

According to Leroy Cattaneo[14], who was responsible for the activities of the Inspection Team, DEP decided to use a team approach in investigating the DeMarco matter because the case was considered "high profile," it was suspected to be the largest wetland encroachment in DEP history, and it was likely to be litigated.[15]

Concerning the team approach, Mr. Cattaneo stated:

> [K]nowing that we, that this was going to be a high profile case that was, undoubtedly at that time, we thought would be litigated, we wanted to make sure that everything we did was admissible in court, so we had to make sure we followed all procedures for access to the site. We wanted to make sure that everybody that went out on the site was capable of being qualified in court as an expert witness, so we only got people that had been qualified prior to that. . . . So, when we went out and did these locations, everyone was qualified to testify in court. So, that's why we had a team approach for this. Normally, we don't do that. And, you are quite correct when you're saying that it took us a long time to put together a team and that was something that we normally do not do. The purpose of that being, this is not a normal case. This is a case that was very high profile, that was brought to our attention by EPA, that was the subject of correspondence from U.S. Fish and Wildlife Service, [and] that was sent to the newspapers before it was even sent to us. [The reason the team approach was used was] that it was a high profile case and it was handled that way.

According to an DEP internal office memorandum dated November 22, 1999, and OIG

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[14]Mr. Cattaneo has been with DEP since 1973, and is currently the Director of the Office of State Plan Coordination.

[15]All of the individuals interviewed regarding why the team approach was used in this case confirmed Mr. Cattaneo's position that the team approach was used to prepare for possible litigation and because the case was considered high profile.

interviews, the Inspection Team was assembled in late January 1999. Initially, the Inspection Team reviewed historical aerial photography of the Property taken between 1951 and 1995. These aerial photographs were used by the Inspection Team to establish a site history of the Property and to observe past vegetation patterns and hydrological indicators on the property. The aerial photographs further led to the selection of proposed locations on the Property where soil samples could be taken to establish whether the Property contained freshwater wetlands.

In further preparation for possible litigation, on March 12, 1999, a helicopter overflight of the Property was conducted with the assistance of the New Jersey State Police Aviation Division to view and document with aerial photographs the extent of work activities being performed on the Property and to further assist in establishing where soil samples should be taken from the Property.

According to OIG interviews, after the Inspection Team gathered all of the preliminary information needed to establish that the A.R. DeMarco cranberry bog expansion may have encroached on freshwater wetlands in violation of the Act, a subsequent site inspection of the Property was required to observe, and to gather evidence of, the hydrology, soil characteristics, and vegetation, which would determine whether the site contained wetlands, and whether those wetlands had been filled. In order to gain entry onto the DeMarco Property to perform the second on-site inspection, the Inspection Team began to prepare a Search Warrant Certification to be used in the event that A.R. DeMarco was not willing to allow the Inspection Team on the Property. However, according to interviews, the use of a search warrant was not necessary as A.R. DeMarco agreed to allow the Inspection Team to perform an on-site inspection.

B. On-Site Inspection of the Property

On April 12, 1999, beginning at 9:00 a.m., the DEP Inspection Team performed a site

inspection on the Property. Present during the inspection representing the DEP were Mr. Cattaneo and five environmental specialists, including, Rick Brown, John Higgins, Robert Pacione, Lou Jacoby, and Evelyn Hall. Others present during the inspection were Donna McBride with the New Jersey Pinelands Commission, Leander Brown with the United States Department of Agriculture, Natural Resource Conservation Service, Pat Slavin, farm manager for A.R. DeMarco, Anthony Drollas, Esq., representing A.R. DeMarco, and Christine Piatek, Deputy Attorney General with the Division of Law, representing the DEP.[16]

The site inspection was completed on the evening of April 12, 1999. According to Robert Pacione, who has been with the DEP since March of 1988, and who was part of the Inspection Team as a Principal Environmental Specialist, the preliminary results of the site inspection revealed that A.R. DeMarco had encroached on approximately 22 acres of freshwater wetlands in the expansion of its cranberry bogs.

In May, 1999, DAG Piatek and members of the Inspection Team met with Anthony Drollas to discuss the preliminary results of the on-site inspection of the Property. During this meeting, Mr. Drollas took the position that regardless of the results of the on-site inspection, he was of the opinion that A.R. DeMarco was not in violation of the Act because the Property was exempt from regulation by DEP by virtue of the farming exemption in Section 404 of the federal Water Pollution Control Act.

C. Preparation of the Inspection Report

According to DAG Piatek and Mr. Pacione, after the May, 1999 meeting with Mr. Drollas, they believed it quite likely that the DeMarco matter would result in litigation because

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[16]Mr. Drollas and DAG Piatek did not participate in the inspection and departed the site at around 11:00 a.m.

Mr. Drollas was of the opinion that a violation of the Act had not occurred despite the preliminary findings of the site inspection on the Property. DEP began preparing a detailed inspection report supporting DEP's conclusion that A.R. DeMarco had violated the Act.

During their separate interviews, DAG Piatek and Mr. Pacione both indicated that the report took almost a year to complete.[17] The report was drafted by members of the Inspection Team and was reviewed and edited by DAG Piatek. According to DAG Piatek and Mr. Pacione, the report was drafted in a detailed and comprehensive manner so that it could be used as evidence in support of DEP's position should DEP decide to take formal enforcement action against A.R. DeMarco by issuance of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AO/NOCAPA).[18]

SETTLEMENT NEGOTIATIONS

A. Background

As demonstrated by OIG interviews with Mr. Cattaneo and Mr. Drollas, sometime after the May 1999 meeting detailing the preliminary results of the site inspection, and during the preparation of the inspection report, Mr. Cattaneo and Mr. Drollas engaged in early settlement discussions concerning the possible resolution of the A.R. DeMarco matter. The early settlement discussions, which usually took place via telephone, centered around the possibility of A.R. DeMarco paying a substantial fine, and applying for a general permit, specifically, General Permit 23 ("GP-23"), a proposal being developed at the time by DEP which would allow, under certain circumstances, the expansion of cranberry bogs in freshwater wetlands located in the

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[17]Although the inspection report is not dated, Mr. Pacione and DAG Piatek believe that it was completed in March or April of 2000.

[18]An AO/NOCAPA is the formal means by which the DEP brings an enforcement action against an individual suspected of engaging in activities in violation of the Act.

Pinelands Area. The freshwater wetlands violation under settlement discussions, however, had occurred well before the general permits ultimately became available in early 2000. At the time of the wetlands disturbance, only an individual permit would have been available.

At this point in the settlement discussions, GP-23 was merely a proposal which had been published for public comment on June 21, 1999. However, in these early discussions, Mr. Cattaneo and Mr. Drollas believed that GP-23 might provide a viable resolution to the alleged violation outlined in the NOV. Mr. Cattaneo stated:

> It was, we had proposed a general permit so it would have been public[ly] noticed and that was a clear indication that we were going ahead with this at that point, even though that permit actually was not available to them, [A.R. DeMarco], because it was still in a proposal. . . . Tony Drollas, the attorney, he indicated that they would be willing to enter some sort of settlement provided that we let them apply for the general permit.

In response to a question concerning whether settlement negotiations were deliberately placed on hold until the adoption of GP-23, Mr. Cantor, Assistant Commissioner for Land Use Management, stated:

> I'm not sure if it was done deliberately, but, we did know and we were cognizant of the fact that these two tracts were working in, pretty much, you know, in parallel, and we did not try to push one, the settlement, to be ahead of the general permit. In fact, I think we consciously were hopeful that we could do general permits for us before the settlement came about. And that either conscious, or either deliberate, or at least conscious understanding may have delayed the process maybe a month or two. (Emphasis added).[19]

On October 4, 1999, GP-23 was adopted as a rule. Mr. Drollas stated that shortly before the enactment of GP-23, he resumed settlement discussions with DEP. In a letter dated October 19, 1999 (Exhibit 7), Mr. Drollas informed Mr. Cattaneo that A.R. DeMarco was willing

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[19]In late September, 1999, while settlement negotiations were placed on hold, the DEP submitted a draft AO/NOCAPA to DAG Piatek for review in anticipation of possible litigation. The draft AO/NOCAPA was never formalized as DEP and A.R. DeMarco entered into the ACO.

to settle the matter provided A.R. DeMarco was permitted to apply for a general permit, and was not required to pay more than a reasonable monetary penalty. The letter stated:

> In addition, you will recall that our client's general agreement to apply for the general permit would be conditioned upon the payment of a reasonable monetary penalty, should DEP demand the payment of a monetary penalty as part of a settlement of this case. As we discussed, should DEP issue a disproportionately large penalty demand in this matter, our client would be far less inclined to entertain the permit application process. . . .

B. DEP's Development of a Settlement Proposal

According to Mr. Cattaneo and Mr. Cantor, in developing a settlement proposal to submit to A.R. DeMarco, DEP had to first determine what would be the appropriate monetary penalty to impose on A.R. DeMarco for the violation alleged in the NOV, and then determine what remedial action it would require A.R. DeMarco to perform in order to bring the alleged violation into compliance with the Act. In formulating the penalty component of the proposed settlement, the DEP used the penalty matrix outlined in the regulations implementing the Act (N.J.A.C. 7:7A-17.1 et seq.).

1. The Penalty Matrix

The regulations implementing the Act establish the process for penalty determination, which assigns point values to three factors: 1) the conduct of the violator; 2) the acreage of wetlands impacted by the violation; and 3) the resource value classification of the wetlands.

According to the regulations, the "conduct" factor of the violation can be classified as major, moderate, or minor. A "major" violation is assigned three points, a "moderate" violation is assigned two points, and a "minor" violation is assigned one point.

Similarly, the acreage of the wetlands impacted by the violation is also assigned points. If the acreage impact is greater than three acres of wetlands, three points are assigned. If

the acreage impact is one to three acres of wetlands, two points are assigned. Finally, if the acreage impact is less than one acre of wetlands, one point is assigned.

With respect to the resource value classification of the wetlands, if it is determined that the resource value of the wetlands is classified as "exceptional," three points are assigned. If the resource value of the wetlands is classified as "intermediate," two points are assigned. Finally, if the resource value of the wetlands is classified as "ordinary," one point is assigned. Each of these resource value classifications is defined in the regulations.

According to an internal memorandum dated November 22, 1999, from Leroy Cattaneo and Raymond Cantor, to Chief of Staff Mark Smith and Deputy Commissioner Kerri Ratcliffe, Mr. Cattaneo and Mr. Cantor determined the following pursuant to the penalty matrix: 1) that the "conduct" of A.R. DeMarco should be classified as "major,"[20] and assigned three points; 2) that the acreage impacted as a result of the violation was approximately 22 acres, and therefore should be assigned three points; and 3) that the resource classification of the wetlands was determined to be "intermediate," [21] and therefore should be assigned two points, for a total of eight points (3 + 3 + 2 = 8).

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[20]In accordance with the regulations, conduct classified as "major" includes "an intentional, deliberate, purposeful, knowing or willful act or omission by the violator[.]" (emphasis added).

[21]In accordance with the regulations, an "intermediate" resource classification is defined as "all freshwater wetlands not defined as exceptional or ordinary." Freshwater wetlands classified as "exceptional" are defined by the regulations as "those which discharge into FW-1 waters or FW-2 trout production (TP) waters or their tributaries; or those which are present habitats for threatened or endangered species, or those which are documented habitats for threatened or endangered species, and which remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat." Freshwater wetlands classified as having an "ordinary" resource value are defined as "isolated wetlands which are more than 50 percent surrounded by development and less than 5,000 square feet in size. . . ."

In accordance with the regulations, a violation involving a total of eight points pursuant to the above factors is assigned a penalty amount of $9,000 per day. Using the $9,000 figure, DEP determined that the maximum penalty to be assigned to the A.R. DeMarco violation was $594,000. As explained in the November 22, 1999 memorandum, the DEP arrived at the amount of $594,000 as follows:

> In the subject case, and consistent with our experience with similar activities, a conservative judgement is that a minimum of 3 days of activity was required to disturb each acre [of freshwater wetlands]. Multiplying $9000 x 22 acres x 3 days [per acre] yields a total maximum penalty of $594,000.

In determining the amount that should be proposed to A.R. DeMarco as part of the monetary component of the settlement, DEP was prepared to propose the amount of $300,000, constituting approximately one half of the $594,000 maximum penalty. The November 22, 1999 memorandum stated:

> In the context of a settlement incorporating timely submission of applications for the required permits and a binding commitment for restoration and/or mitigation for any areas which ultimately do not qualify for a permit, a penalty settlement reduction of 50% could be applied resulting in a penalty figure of $300,000.

In discussing the penalty matrix, Mr. Cattaneo said that the $300,000 settlement figure seemed fair considering that should DEP prevail against A.R. DeMarco in litigation, there was a strong possibility that a judge would not order A.R. DeMarco to pay more than $300,000 for committing the violation. According to Mr. Cattaneo, a judge could reasonably have concluded that, in the Pinelands, the DEP's jurisdiction is governed not just by the Freshwater Wetlands Protection Act, but also by the Pinelands Protection Act and the federal Water Pollution Control Act. Reading the three laws together, Mr. Cattaneo said, a judge could conclude that, in the Pinelands, cutting the trees and removing the stumps were not violations of the law. Thus, instead of three days per acre, the violation would only have taken one day per acre. In this

regard, Mr. Cattaneo stated:

> What we had formalized the penalty to be based upon our best position, okay, and I, would like to say that, that's probably not what we would have been able to go with because of the way the penalties are set up. I'd like to get that on here now that the penalties are based upon conducting the activity, and it's different than just some of the other ones that say you do it and everyday that remains after that is a violation. This says everyday you conduct the activity, it's a violation. The activity here is discharge of fill material, not clearing anything off. We calculated the $600,000 penalty based upon [A.R. DeMarco's] ability to clear 22 acres, to stump 22 acres, and fill 22 acres, taking approximately three days per acre to do that, times the $9,000 penalty that was calculated as a result of using the penalty matrix, and came up with almost $600,000. I doubt, seriously doubt, that we would have been able to, if we went and presented that [figure] to the judge, the judge would have said, 'well you don't regulate cutting and you don't regulate the removal of the soil, so let's take two-thirds of that penalty [of $600,000] and throw it away.' So, you know, I mean, to me that's probably what would have happened even if we had . . . [taken] the case to court and won.

In accordance with the regulations, DEP may also impose a civil administrative penalty for recoupment of any economic benefit derived from a freshwater wetlands violation. According to the November 22, 1999 memorandum, DEP determined that A.R. DeMarco had derived approximately $286,000 in economic benefit from the violation, in that it was able to place 22 acres of cranberry bogs into production years earlier than it could have if it had applied for a permit. DEP, however, did not include a separate economic benefit component in its settlement proposals to A.R. DeMarco. As explained by Peter Lynch, Chief of the Bureau of Coastal and Land Use Compliance and Enforcement, who has been with DEP since 1970, if the amount of the maximum assessed penalty determined by the penalty matrix is more than the economic benefit derived from the violation, then the economic benefit component is not added to the maximum assessed penalty amount because any economic benefit received by the violator would be lost in the violator's payment of the maximum assessed penalty. As noted, however, in the A.R. DeMarco matter, DEP was imposing a penalty of $9,000 per day for the alleged violation of the Act. In accordance with the Act and its regulations, DEP could have assessed a

maximum penalty of $10,000 per day. Thus, the DEP did not impose the maximum statutory penalty in this case, as it could have by attempting to recoup any economic benefit derived by A.R. DeMarco in violating the law.

In short, in an effort to settle the alleged DeMarco violation, the DEP was willing to propose a penalty in the amount of $300,000.

2. Remedial Component of the Settlement

In addition to the monetary penalty component of the settlement, DEP also had to determine what remedial action it would require from A.R. DeMarco as part of the settlement proposal. According to Mr. Cattaneo and Mr. Cantor, the DEP considered two basic options, either have A.R. DeMarco pay a penalty and convert the expanded cranberry bog back to its original freshwater wetlands state, or have A.R. DeMarco pay a penalty and apply for a freshwater wetlands permit which would bring the expanded cranberry bog into compliance with the Act. As part of the original proposal for settlement, DEP decided on the latter remedial action, to allow A.R. DeMarco the opportunity to apply for a freshwater wetlands permit.

a. Freshwater Wetland Permits

As discussed above, generally, the Act does not permit the disturbance of freshwater wetlands. However, under certain circumstances, the Act does permit the disturbance of freshwater wetlands provided that a freshwater wetlands permit is obtained. There are two types of freshwater wetland permits which allow the disturbance of freshwater wetlands -- a general permit and an individual permit.

As indicated above, the DEP adopted the general permit program, GP-23, which allows existing cranberry growing operations in the Pinelands Area to encroach upon freshwater wetlands. Generally, GP-23 allows the discharge of dredged or fill material into freshwater wetlands and waters for dikes, berms, pumps, water control structures, or

modification of existing cranberry production operations. Under GP-23, owners of cranberry growing operations located in the Pinelands Area would be permitted to disturb 10 acres per year of freshwater wetlands and/or State open water for the purpose of expanding their cranberry growing operations (i.e. the creation or expansion of cranberry bogs). The GP-23 program will last for five years. A maximum of 300 acres of wetlands in total can be filled during the GP-23 program. (See, N.J.A.C. 7:7A-9.23 et seq).[22]

An individual permit also allows existing cranberry growing operations in the Pinelands Area to encroach upon freshwater wetlands. However, in order to obtain an individual permit to expand an existing cranberry growing operation, the applicant must first show that the cranberry growing operation is water-dependant. To prove the water-dependancy of the cranberry growing operation, a cranberry grower must hire engineering firms to perform environmental studies that support the conclusion that the cranberry growing operation is water-dependant. The process of obtaining an individual permit is believed to be time consuming and extremely costly.

Conversely, a general permit operates on the presumption that a cranberry growing operation is water dependant. Therefore, there is no need for a cranberry grower applying for a general permit to prove the water-dependancy of the cranberry growing operation. In effect, the general permit is viewed as more cost effective and easier to obtain than an individual permit.

In developing a settlement proposal, DEP made a preliminary decision to allow A.R. DeMarco to apply for a general permit (GP-23), rather than an individual permit. In

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[22]DEP and USEPA approved the GP-23 program after a public comment period. This Report does not discuss the merits of the GP-23 program.

explaining DEP's decision to allow A.R. DeMarco to apply for a general permit, Mr. Cattaneo stated "Tony Drollas, the attorney, indicated that they would be willing to enter some sort of settlement provided that [DEP] let them apply for the general permit." Further, Mr. Cattaneo, in explaining the benefits of the general permit as part of a settlement proposal, as opposed to the individual permit, stated:

> [N]ormally, [DEP] needs to kick start those type of discussions with the person that has conducted the activity. However, in this case, A.R. DeMarco [was] represented by a former [Deputy Attorney General] that was well aware of our settlement positions -- that we normally try to settle a case if at all possible due to litigation risk and cost and everything else. And, at this point, [A.R. DeMarco] said if we're going to [settle], we will consider applying for a permit. And again, one thing that changed was the fact that the State now was going ahead with the general permit for the cranberry [growers], where [A.R. DeMarco] felt that the activity that they did . . . seems to be consistent with what would be required under a general permit. . . . The individual permit is more difficult to obtain because the general permit starts out with the assumption that the cranberry operation is water dependant and has to be done in an area where there is water. . . . The general permit . . . has already made that out to the public, and you are applying to use that [general permit] underneath that determination. In an individual permit, you would have to go back and prove that the cranberry operation is water dependant and go through that whole testing, so [A.R. DeMarco was] reluctant to do that.

Therefore, DEP determined that its initial settlement proposal to A.R. DeMarco would be that A.R. DeMarco pay a fine of at least $300,000, and apply for a general permit in order to maintain the cranberry bog on the Property. Additionally, DEP decided that in the event A.R. DeMarco was denied a general permit, A.R. DeMarco would be required to apply for an individual permit, and, failing that, to restore the cranberry bog expansion back to its original freshwater wetlands state.

3. EPA's Involvement in the Settlement Proposal

According to Robert Tudor, DEP Deputy Commissioner, who has been with DEP since

1980, in the early stages of the DeMarco investigation, EPA informed DEP that it would be monitoring the A.R. DeMarco matter in accordance with a Memorandum of Agreement between the DEP and the EPA. In explaining why EPA was involved in the case, Mr. Tudor stated:

> [EPA's] interest is, the fact that from their enforcement and compliance perspective, they would want to make sure it meets the letter of their law, so to speak, in terms of how we handled this. So, . . . specifically, in our Memorandum of Agreement with the EPA for permits, they get to look at a certain class of them. Similarly, for enforcement cases, they would reserve the right to make a different decision if for some reason they didn't agree with us.

According to Mr. Cattaneo and Mr. Cantor, EPA was involved in the early development of the settlement proposal. As such, DEP had several discussions with EPA staff concerning possible options for settlement. In the November 22, 1999 memorandum, Mr. Cantor and Mr. Cattaneo indicated that EPA opposed the use of a general permit in the DeMarco matter as a settlement option, and recommended, instead, that A.R. DeMarco be required to apply for an individual permit. According to the November 22, 1999 memorandum, and OIG interviews with Mr. Cantor and Mr. Cattaneo, EPA was of the opinion that because the A.R. DeMarco violation occurred prior to the enactment of GP-23, A.R. DeMarco should not be permitted to apply for that permit. Instead, A.R. DeMarco should be required to apply for an individual permit, which was the type of permit available to A.R. DeMarco at the time of the alleged violation of the Act. Additionally, according to the November 22, 1999 memorandum, EPA expressed concern about any settlement proposal that would allow land preservation or restoration activities in lieu of a monetary payment.

According to Mr. Cattaneo and Mr. Cantor, DEP informed EPA that A.R. DeMarco might reject a settlement proposal that required it to apply for an individual permit "due to the uncertainties of the process." The November 22, 1999 memorandum states:

> Since receiving US EPA's notification, we have had several discussions

> with Kathleen Callahan, of US EPA Region 2, and her staff concerning possible options for settlement. During these discussions it has been US EPA's opinion that the use of the [general permit] in this instance is not appropriate and that an individual permit must be pursued. We advised US EPA that it was our impression that DeMarco may not agree to pursue obtaining an individual permit due to the uncertainties of the process. However, it is also our impression that DeMarco might accept a settlement agreement that contained the conditions that would be in an individual permit. We have also discussed the previously noted penalty amounts with US EPA and, while they are generally satisfied with the amount, they expressed some concern as to whether or not, and to what extent, the Department should accept land preservation or restoration activities in lieu of a monetary payment. (Emphasis added).

4. The First Settlement Proposal

In light of EPA's position that A.R. DeMarco should apply for an individual permit, rather than a general permit, DEP's first settlement proposal in this case was to require A.R. DeMarco to apply for an individual permit in order to maintain its cranberry bog expansion, and to impose a monetary penalty between $250,000 and $300,000. The November 22, 1999 memorandum additionally states:

> It is recommended that a settlement be proposed whereby DeMarco would be allowed to maintain the 22 acres of freshwater wetlands as a cranberry agricultural operation after receiving an individual permit. Mitigation under the individual permit would provide that 8 acres of freshwater wetlands be created as mitigation for the areas occupied by the berms and 36 acres of freshwater wetlands be enhanced, perhaps by creating Atlantic White Cedar wetlands. Under this scenario, a penalty settlement in the range of $250,000 to $300,000 would be accepted by the Department. The Department would also accept land preservation or Atlantic White Cedar restoration equal to and in lieu of part of the monetary penalty. The settlement agreement would be subject to public comment and hearing in accordance with the Department's regulations. Although we have concerns that DeMarco might not accept having to apply for and obtain an individual permit, following this process is essential to the integrity of the program. We can also assure DeMarco that the permit will be processed in a fairly quick fashion, especially given the fact that US EPA now considers cranberry growing to be a water dependent activity. In the absence of a settlement agreement with DeMarco, it is recommended that an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) be issued which would require restoration of the site and would assess a penalty of $594,000.

C. Settlement Meetings

The first settlement meeting between A.R. DeMarco and DEP occurred on March 15, 2000. Present at the meeting on behalf of DEP were Deputy Attorneys General Piatek and Scott Dubin, Mr. Cantor, Mr. Cattaneo, and Mr. Lynch. Present on behalf of A.R. DeMarco were Mr. Drollas and Mr. Slavin. According to DAG Piatek, prior to the meeting with representative of A.R. DeMarco, DEP had an internal meeting to discuss DEP's settlement position. During her interview with OIG, DAG Piatek stated:

> [T]he internal meeting was in essence a meeting where the Department [DEP] laid out its approach and rationale for the meeting with DeMarco in terms of what was going to be presented for purposes of resolving the case. During the internal meeting, we had discussion about the application for an individual permit. There was some discussion of the applicability of the general permit provisions to this case. There were some discussion of possible land conservation as forming a basis or a part of the basis of the penalty component in the case. There was some discussion, I believe the Department used the terms 'a substantial cash component' to any settlement that we would reach. And there was also discussion of EPA's position up until that time and the understanding that Ray Cantor was having, I wouldn't say ongoing, but at least had had numerous conversations with someone from EPA as to EPA's position on this violation and potential settlement of the case.

After the internal meeting, DEP met with Mr. Drollas and Mr. Slavin. During the meeting, Mr. Cattaneo advised Mr. Drollas that the settlement would entail a substantial monetary penalty and the requirement that A.R. DeMarco submit an application for an individual permit. During the OIG interview concerning the initial settlement proposal, Mr. Cattaneo stated:

> When I told [A.R. DeMarco] that we needed a very substantial settlement, [I indicated that] it had to be something that would pass the 'laugh test', is basically what I told them. Something that said 'yeah, this is something that represents an interest of the State,' and at that time we were looking at, what we had in mind was around $300,000.
>
> * * *

> I said, well, you know, we want, it's going to be in the six figures. You know, I never said we want exactly $300,000 . . . .

According to OIG interviews with DAG Piatek, Mr. Cattaneo, and Mr. Cantor, the applicability of the general permit was also discussed during this first settlement meeting. Further, there was some discussion about the possibility of transferring land as part of the overall settlement. However, no commitments were made by either party at the conclusion of the first settlement meeting. The meeting was adjourned with the expectation that Mr. Drollas would communicate DEP's settlement proposal to his client and would advise DEP of his client's position concerning the monetary penalty and applying for an individual permit.

According to Mr. Cattaneo and Mr. Cantor, Mr. Drollas contacted DEP to inform them that A.R. DeMarco was not willing to apply for an individual permit, and was also "cash poor" and would not be able to pay a fine of six figures. According to Mr. Cantor, it was at this point in the settlement negotiations that DEP believed that requiring A.R. DeMarco to apply for an individual permit would be a "deal breaker." The DEP then decided to provide A.R. DeMarco with the opportunity to apply for the general permit. Although, up until this point, DEP had been discussing the progress of the settlement negotiations with EPA, DEP decided to allow A.R. DeMarco to apply for the general permit without obtaining prior approval from the EPA to make this settlement offer. In explaining why DEP chose this course of action, Mr. Cantor in an interview with Investigator William McGough stated the following:

> Investigator McGough ("WM"): Now, even at this particular time, the Environmental Protection Agency is adamantly against this general permit idea versus [the] individual permit idea?
>
> Raymond Cantor ("RC"): They were opposed to it. I'm not sure, you know, how adamant they were. I'm not sure, you know, if push came to shove, you know, what they would do, or not. But, that was part of my eventual strategy in allowing

the general permit to come about. I didn't think that EPA would over file[23] us based on that difference of opinion.

WM: In the negotiations, it becomes evident to you, as we discussed previously, that the individual permit, which may be, which is much more protracted in time, may not even be passed, could be as you, your words a 'deal breaker.'

RC: In DeMarco's mind, I believe it was a deal breaker. And, just to clarify, yes [the individual permit] could be more protracted in time, but it's very possible, given what we've done in the past and the fact that we now became aware of EPA guidelines that cranberry growing is water-dependant, it may not have been as long a period as it had taken in the past.

WM: Okay. But, in the negotiations within DEP and in strategies, if you will, forcing DeMarco to apply for an [individual permit] may have been a deal breaker in your mind here?

RC: It was my belief that it would have been a deal breaker.

WM: But, in the same vein, although EPA retains the right to take jurisdiction away or over file, you did not really believe that they felt strong enough against the [general permit] to over file?

RC: It was my belief, based on all our conversations with EPA, that substantially we were achieving everything that we hoped to achieve, and that they would not over file us based just on a process versus a substance issue.

WM: So, when it came down to the final language, whether it's going to be [the general permit] or [the individual permit], you really took a calculated risk, somewhat very calculated, that I'm not going to ask EPA to sign off on the [general permit], I'm just gonna do it?

RC: Right. Yes, at some point in time we decided, this was again a strategic maneuver to make, that we were no longer, we are in a sense stopping our negotiations with EPA and we were gonna tell them, 'here's what we're doing,' and then explain it to them why we did it. And, obviously, you know, that they weren't happy with that decision.

WM: And, I think as we discussed earlier, if [DEP] ask[ed] [EPA] to put the [general permit] in as opposed to the [individual permit], they'll probably say no, but if we do it anyway, they won't over file?

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[23]"Over file" refers to EPA's filing its own enforcement action for a violation under the federal Water Pollution Control Act, which EPA has the authority to do. The over file action would be in addition to DEP's enforcement action.

RC: Yes, I think someone once told me it's easier to apologize than to ask for permission.

WM: And so that was pretty much the philosophy?

RC: That was, that was my strategy.

A second settlement meeting between members of DEP and A.R. DeMarco was held in late March 2000 as a follow-up to the March 15, 2000 meeting. Again, there was discussion of a substantial penalty and DEP's willingness to allow A.R. DeMarco to apply for a general permit rather than an individual permit. However, no commitments were made by either side during this second settlement meeting.

Between the March 2000 meetings and about June 2000, the DEP made a substantial change in its settlement position. At this point in the settlement negotiations, DEP was no longer seeking a substantial monetary penalty from A.R. DeMarco, but rather the acquisition of property owned by A.R. DeMarco in lieu of a monetary penalty. According to Mr. Cattaneo, DEP's change in its settlement position occurred when Mr. Cattaneo received a telephone call from Mr. Drollas. During this telephone conversation, Mr. Drollas said that his client would be willing to apply for a general permit to bring the alleged violation into compliance with the Act, but was not able to pay a $300,000 penalty assessment as part of settlement because the cranberry market was in a state of depression and his client was "cash poor." At this point, Mr. Cattaneo, negotiating on behalf of DEP, agreed to consider the transfer of ownership of approximately 591 acres of land from A.R. DeMarco to the State, and a penalty assessment of approximately $25,000.

The land that A.R. DeMarco was willing to transfer to the State was land DEP's Green Acres Program had previously tried to purchase from A.R. DeMarco as part of Green Acres'

open space land preservation program. DEP was interested in acquiring this particular land owned by A.R. DeMarco because it would provide the State with public access to the Batona Trail, and allow the State to preserve the property in its original state for the benefit of those who camped and hiked in the Pinelands.

In discussing the telephone conversation and the negotiations which led DEP to consider the transfer of ownership of the land in lieu of a "substantial cash penalty", Mr. Cattaneo explained:

> [H]e [Mr. Drollas] said 'well we can't do that [i.e. pay $300,000].' . . . They then went back, and I guess talked. Then, they called me and said 'well, . . ., would you accept some land donated, some sort of donation to the State of land, or some sort of other activity, [such as], restoration or anything, and some cash?' I said, 'yes', because we normally do that. So, then, they came back and said we have this tract of land that the State had indicated interest in. This was the 540 acres, whatever it was. [Mr. Drollas asked] 'would you accept that?' And at this point I checked with . . . Jack Ross over in Green Acres, . . ., and [Jack Ross] indicated to me that DeMarco had previously turned down an offer of $649,000. I think it was for this property, and I think there may have been, the other two lots, may have been included with that as a package. And [Jack Ross] said 'yeah, if you can get that, that's fine.' So, I went back to DeMarco's attorney and said give us that property and some cash. We still had the cash on the table, and at that time we're thinking $20,000 to $25,000 and the property.

According to Mr. Cattaneo, and confirmed by Mr. Drollas, after this settlement proposal was considered by A.R. DeMarco, Mr. Drollas again telephoned Mr. Cattaneo and declined the settlement offer because A.R. DeMarco was no longer willing to transfer the ownership of the 591 acres to the State. In explaining the settlement negotiations that took place at this point, Mr. Cattaneo stated:

> I said, what's your interest in keeping this [property]? And they, he told me that they wanted to protect the headwaters of their cranberry operation, he had an interest in doing that. They didn't want the State going in there and doing whatever they wanted to do. I said, well, our interest in this is having the Batona Trail because it crosses the property, which they didn't even know, he said 'what trail?' You know, [A.R. DeMarco] didn't even know that [the Batona Trail] crossed their property. And having this property remain in a natural state, this is

> what [the State] wants to do because the [property] is adjacent to a State forest and it is highly visible from a point out there called Apple Pie Hill. It has a, there's a tower on [Apple Pie Hill] and everybody that hikes along the Batona Trail goes up Apple Pie Hill and stands up there and looks out on the Pinelands. We didn't want this area, you know, cut down and put into an agricultural [use] or used as a horse farm, or whatever. So, that was our interest in keeping [the A.R. DeMarco property] natural. . . . [I stated to Mr. Drollas], if you can do that and give us the public access on the Batona Trail, that takes care of the [State's] interest. And, if [A.R. DeMarco's] interest is maintaining some control over this property and the water rights from it, and [A.R. DeMarco] wants to retain ownership, we can satisfy both our interest [by a conservation easement attached to the property].

Thus, at this point in the settlement negotiations, DEP and A.R. DeMarco were considering a monetary penalty of $25,000 and the placement of a conservation easement on the 591 acres which A.R. DeMarco had originally proposed to transfer to the State. According to Mr. Cattaneo, this proposal would address A.R. DeMarco's interest in preserving the headwaters for his cranberry growing operation, and the State's interest in preserving the land and ensuring public access to the Batona Trail.

According to DAG Piatek, on about June 16, 2000, she was sent a draft ACO and a draft Conservation Easement for her review. The ACO and Conservation Easement drafts were the first attempt by DEP and A.R. DeMarco to formalize a settlement proposal.

According to Mr. Cattaneo and Mr. Drollas, in the course of settlement negotiations, Mr. Drollas proposed to offer additional tracts of land as part of the settlement in lieu of the $25,000 penalty assessment. Mr. Cattaneo stated:

> Now, we have this other $25,000 out here and he does not want to pay. [Mr. Drollas] goes back, comes back to us and said 'will you take more property for the $25,000?' We discussed it internally. I talked to Ray [Cantor] and, at the time it was [Deputy Commissioner] Kerri Ratcliffe, and they say 'yeah, we'll take more property if it's something that we want.' He says 'if [sic] it's a piece of property within Bass River State Forest surrounded by State lands and another piece of property' he said, 'named Pygmy Forest.' So, I said I would find out about these [pieces of property]. I called over to Green Acres and they said, 'well, look, that was all part of this prior offer. Can you get something else?' So, I go back to [A.R. DeMarco] and say what else do you have? We want some more [property].

> And that's when [A.R. DeMarco] offered up another piece of property that was in an area where some of the non-governmental organizations and the Natural Lands Trust was acquiring property, and [A.R. DeMarco] said 'we can give you that property.' This actually has, in order to access some of the other property that has been obtained by some of the conservancies, you'd have to cross his property. So, they offered that up. Everyone looked at it and said, 'yep, that's the very property we would want.' It, you know, is building a chain between two State lands . . . . I think it's Lebanon and the Wharton tract, or one of those tracts. So, it is a connection between two big chunks of State owned land that's being built and filling in the hole within the Bass River State Forest. So we thought it was a pretty good deal.

In explaining why DEP was willing to accept a land transfer, rather than a substantial monetary penalty, Mr. Cantor said that DEP's acquisition of land was more beneficial to DEP because money obtained as a penalty "would disappear into the general fund." In further explaining why a land transfer was preferable, Mr. Cantor stated:

> As far as the dollar amount of the penalty, it was my belief, it still is my belief, that I would rather have environmental benefits accruing from that type of sanction, then I would having the money go into the general fund where I believe it would just, you know, be gone into the Department and the environment would have no benefit. So, to the extent that I can in this and other situations, I would rather see land donation, land preservation of any type of environmental benefit which would serve the same deterrent, the same type of sanction, but benefit the environment as opposed to just money, you know, disappearing into a 21 billion dollar budget.

In late June, 2000, settlement negotiations between DEP and A.R. DeMarco had concluded. The parties agreed to a tentative settlement proposal whereby A.R. DeMarco would deed restrict, through a conservation easement (the "Conservation Easement"), 591 acres of property adjacent to State land in Burlington County. The deed restriction would allow A.R. DeMarco to maintain ownership of the property for the purpose of using the headwaters for the cranberry growing operation, but prohibited the construction of agricultural housing. In addition, the settlement provided that A.R. DeMarco would transfer title of three parcels of property totaling approximately 73 acres to DEP. Further, the settlement would allow A.R. DeMarco to apply for three general permits over the course of three years in order to bring the cranberry bog

expansion into compliance with the Act. It was further agreed that if any of the general permits could not be granted, A.R. DeMarco would be required to apply for an individual permit. The tentative agreement also provided that if A.R. DeMarco could not obtain an individual permit, A.R. DeMarco would have to restore the 22-acre bog expansion back to its original freshwater wetland state.

SETTLEMENT ISSUES

A. Valuation of the Property

Before entering into a formal settlement agreement by way of an Administrative Consent Order, several settlement issues arose which needed to be resolved. The first was the value of the property that was the subject of the proposed agreement. According to OIG interviews on this subject, DEP never obtained a formal appraisal of the value of the settlement properties. To assess the value of the settlement properties, DEP relied on two-year old property appraisals performed by Green Acres. According to an e-mail dated March 23, 2000, from Mr. Cattaneo to Mr. Lynch and Mr. Cantor, "Green Acres has assessed one of DeMarco's properties for $649k. It is adjacent to state land and in an area that we would want to preserve. The acreage is 648.9. The [G]reen [A]cres person is out today, so I could not find out the status of the negotiations. I will let you know. Sounds promising. By the way, a $649k donation is worth a least $300k in tax savings."[24] Similarly, DAG Piatek said in an e-mail correspondence dated July 12, 2000:

> In addition, although there is no provision for penalty, the Department has assessed the parcels through the green acres program and has valued the

[24]In response to a question concerning why this e-mail correspondence mentioned "tax savings," Mr. Cattaneo stated that when A.R. DeMarco initially proposed to donate 591 acres of land to the State, Mr. Cattaneo wanted Mr. Lynch and Mr. Cantor to be aware that a land donation might provide A.R. DeMarco with a tax savings. However, as discussed above, A.R. DeMarco's original proposal to donate 591 acres of land to the State was recanted because of its interest in maintaining the headwaters to the property.

> properties to be and transferred at approximately $1000 per acre, which would place the total value of the land in excess of $700,000.

At this point, DEP had not informed DAG Piatek that the Pineland Development Credits had been removed from the property.

In explaining what information he relied on in assessing the settlement proposal, Mr. Cantor stated:

> Lee [Cattaneo] had had earlier negotiations, not negotiations, but discussions with our Green Acres staff talking about the valuation of the land. And early on we thought that, you know, 75 acres plus the 591 [acres] was worth in the neighborhood, actually I think $600,000. However, right before we went ahead with this, the Green Acres staff . . . thought that the valuation was closer to $300,000. So, I relied entirely on Green Acres' expert opinion on valuation. (Emphasis added).

The Green Acres program had appraised 649 acres of A.R. DeMarco's property for purposes of purchasing title to the property. The settlement terms, however, did not call for A.R. DeMarco to transfer title to all the property. Rather, it was to transfer title to 73 acres, but retain title to 591 acres which would be deed restricted with a Conservation Easement.

It appears that DEP's first concerted effort to assess the value of the conservation easement and of the 73 acres of transferred land occurred on August 3, 2000. On that date, Dennis Davidson, Deputy Administrator of DEP's Green Acres program, was asked to review a summary of the terms of the proposed settlement. The Green Acres program is part of DEP's Natural and Historic Resources element, under Assistant Commissioner Cari Wild. Thus, it is not part of Assistant Commissioner Ray Cantor's Land Use Management element. The Green Acres program purchases land to preserve it for its environmental benefits. In 1998, Green Acres had attempted to purchase much the same land from A.R. DeMarco for $714,000. Mr. Davidson was familiar with this land from that earlier acquisition effort.

When Mr. Davidson reviewed the summary memo of the settlement terms, he noted

several factual errors concerning the lot and block and descriptions of the properties involved, and their acreage. He also saw that the summary memo contained assumptions about the value of the 73 acres which were to be transferred entirely, and about the value of the conservation easement to be placed on the 591 acres. Based on his familiarity with the property and his experience in appraising land, including land in the Pinelands, Mr. Davidson believed that these assumptions were wrong in that they over-stated the value of the conservation easement. Mr. Davidson brought his concerns to the attention of Assistant Commissioner Wild. She called Assistant Commissioner Ray Cantor to discuss the matter with him. Mr. Cantor told Ms. Wild that because the matter was expected to be settled rather than litigated, Land Use Management did not need a formal appraisal report, but only an overall "sense" of the value of the settlement. He further said that he wanted to know if the value of the settlement was in the range of $300,000. In a subsequent written summary of his actions, Mr. Davidson wrote that he told Ms. Wild that the issue was a complex valuation problem, and that he wanted to take a more detailed look at it, but that the value of the settlement probably was in the neighborhood of $300,000. Mr. Davidson also wrote:

> I then called back Lee Cattaneo and I explained that I felt the overall settlement was a good one as far as Green Acres was concerned in that it would be accomplishing almost all of the things that we had been trying to accomplish two years earlier in our acquisition effort. (That we would guarantee a wooded buffer next to Apple Pie Hill-one of the premier viewing areas in the Pines, that we would be protecting the public access to the Batona Trail, and that we would be further limiting any development potential for agricultural purposes). I further stated, however, that placing a monetary value on the deal would be a difficult problem. It would be unlikely that there would be comparable sales and any valuation would be difficult to explain. I further stated that in my opinion that DEP should be justifying the settlement in the context - what it accomplishes, not what it is worth. (Emphasis added) (Exhibit 8).

That same day, Mr. Davidson sent Mr. Cattaneo a memo noting his corrections to the lot

and block and acreage descriptions. He also informed Mr. Cattaneo that in 1998, Green Acres had appraised 649 acres of DeMarco property at $1,000 an acre including the value of the Pinelands Development Credits (PDC), and that the land would be worth approximately $286,000 if the PDCs were removed. (Although his memorandum to Mr. Cattaneo does not say so explicitly, the appraisal value represented the cost to purchase title to the property, whereas the settlement called for the State to acquire an easement with A.R. DeMarco retaining the title to the 591 acres.) Mr. Davidson told Mr. Cattaneo that the PDCs had been severed from the 591 acre DeMarco property. Land Use Management did not request any more detailed appraisal and Mr. Davidson did not do any until after the ACO was signed. After the ACO was signed, and DEP received several requests for information from the news media, Mr. Davidson discussed the settlement with his staff at Green Acres.

> We had the opportunity to review several more appraisal reports, which have been prepared on lands that have had the PDCs removed. The lowest of these reports were indicated $700 an acre in the after value. Using that number as a basis, we felt that it was reasonable to suggest that a more restrictive conservation easement would further damage the property by up to 50%. This is a common factor used in rural areas when we place a conservation easement. Where land has a high development value, a higher percentage is used and where land has a lower development potential, a lower percentage is used. At this rate, the value of the easement would be plus-minus $350 an acre, or a total value for the 591 acres of $206,850. In addition, the settlement will provide for 73.5 acres in fee [that is, ownership transferred entirely to the State.] Trends in the Pinelands of similar land have been showing about $1,200 an acre (up about 20% over the last couple of years.) $1,200 x 73.5 = $88,200. Thus a total "estimate of value" is $295,050.

In short, DEP, in reliance on the informal assessments performed by Green Acres, considered the easement and the property to be transferred to the State by A.R. DeMarco to be worth approximately $300,000. However, up to date appraisals were never conducted by DEP.

B. Pinelands Development Credits

On June 20, 2000, approximately two months before signing the ACO, A.R. DeMarco

severed the Pinelands Development Credits (PDCs)[25] from the 591 acres in Tabernacle Township. The land had 29.75 PDCs attributable to it, and A.R. DeMarco sold them to the State, through the Pinelands Development Credit Bank. The Pinelands Development Credit Bank pays a set amount for all PDCs, $22,250 per credit. A.R. DeMarco received $661,937.50 for its 29.75 PDCs. According to John Ross, Executive Director of the Pinelands Development Credit Bank, PDCs have been selling for about $32,000 per credit on the private market. Therefore, A.R. DeMarco could have received approximately $10,000 more per credit if it had sold its PDCs on the private market rather than to the State. Furthermore, when PDCs are sold to the State, those credits are retired, and can never be used to allow construction in the outlying areas of the Pinelands. In contrast, Pinelands credits sold on the private market to developers allow those developers to build more densely than would otherwise be allowed in areas of the Pinelands slated to receive development. While the State may pay less per credit, it is a ready and willing buyer which purchases all PDCs offered to it. Also, sales to the State are generally quicker than private sales. The Pinelands Development Credit Bank can complete the transaction in less than two weeks, less time than it typically takes a seller to find a private buyer, negotiate a price, and consummate the sale. As part of the sale of the PDCs from the subject properties, A.R. DeMarco placed an easement (the "PDC Easement") on the 591 acres, permanently restricting certain types of development on those properties.

Once A.R. DeMarco sold the PDCs, an issue arose as to whether in its settlement offer the DEP was agreeing to accept development restrictions, through the Conservation Easement,

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[25]Pinelands Development Credits are assigned to properties located in the Pinelands Area for the purpose of compensating land owners for restrictive zoning regulations placed on property located in the Pinelands Area. Part of the process of selling Pinelands Development Credits requires the property owner to place an easement on the property which makes the Pinelands development restrictions permanent .

on already restricted pieces of property. The DEP determined that the Conservation Easement went further in restricting the subject properties than did the PDC Easement. The Conservation Easement to be executed as part of the settlement grants a right of public access on the Batona Trail, not allowed by the PDC Easement. In addition, while the PDC Easement would not limit berry harvesting and would allow the construction of agricultural housing, the Conservation Easement allows only "limited berry harvesting" and expressly prohibits the construction of agricultural housing.

After an analysis was performed concerning the Conservation Easement and the PDC Easement, DEP determined that the proposed settlement was still acceptable and went forward with its execution. When asked whether DEP was aware that A.R. DeMarco intended to sever the PDCs associated with the settlement properties, Mr. Cantor stated "we had knowledge that he was severing his PDCs from his land. We had no knowledge that he was, had actually sold it, whether he was selling it to the State. Although it didn't affect, again, the valuation of the land." Similarly, when Mr. Cattaneo was asked whether DEP was aware that A.R. DeMarco intended to sever the PDCs from the settlement properties prior to the execution of the ACO, Mr. Cattaneo stated:

> We knew, when I say we, I'm talking about Ray Cantor and I knew and were very aware that DeMarco was going to sever the PDCs from these properties so that he could sell them, and that factored into our decision. We were still comfortable with it and everybody else was comfortable with it. What we did not know, and I don't know who knew except Jack Ross, was that the State was going to buy the PDCs from DeMarco at less than he could have sold them for on the market. So, . . . I don't understand that myself and I never even thought that he would be doing that because he could have [received] more money selling them on the market. Plus, if it's sold on the market, then the builder can take and build somewhere with those credits. [If] the State buys them, they retire the credits so that way the houses don't even happen. So, you get a benefit somewhat by having the State buy [the PDCs]. DeMarco gets less money, and yet everybody is still in an uproar about it. So, I don't understand that.

C. Urgency of Settlement

According to OIG interviews, in early August, 2000, there became a sense of "urgency" to get the settlement between A.R. DeMarco and DEP finalized. Apparently, EPA was concerned that DEP had not taken timely action in the DeMarco matter. When asked about whether there was any kind of urgency to have the settlement agreement signed, Mr. Cattaneo stated:

> EPA was concerned, there is a provision in the Delegation Agreement that says that we must take timely and effective, I believe is the wording, enforcement action. They were receiving inquiries from the environmental groups, Fish and Wildlife Service and in responding to newspapers, I guess that we were not taking timely and effective enforcement action. . . .

When Mr. Cantor was asked whether there was any urgency in getting the A.R. DeMarco matter finalized in August, 2000, Mr. Cantor stated:

> There were probably three things happening at that point in time. One, I think, we were either accepting or, about to accept, you know, applications for our general permit for cranberries. The DeMarco situation had been dragging on for an extremely long period of time, and I was getting impatient, you know, with how long it was taking, plus we were hearing rumors or rumblings from EPA staff, you know, coming to me in indirect lines asking about what's happening with DeMarco, why haven't we taken action. And, with the possibility that if they saw that we were not acting, then they may over file us. Actually, it wouldn't even be an over filing at that point, it would be just taking an action.

D. Final Settlement Agreement

Once DEP considered the issues surrounding the execution of the ACO and the Conservation Easement to be resolved, DEP and A.R. DeMarco executed the ACO on August 10, 2000. (Exhibit 9). The provisions of the settlement agreement were that A.R. DeMarco would deed restrict, through the Conservation Easement, 591 acres of property in Tabernacle Township, adjacent to State land. The form Conservation Easement appended to the ACO states

that A.R. DeMarco was granting the easement in exchange for one dollar paid by the State. Under the terms of the ACO, A.R. DeMarco is to execute this easement once the ACO becomes final. In addition, A.R. DeMarco would transfer title of three parcels of property, two in Bass River Township and one in Woodland Township, Burlington County, totaling approximately 73 acres, to DEP. Further, the settlement would allow A.R. DeMarco to apply for three general permits over the course of three years in order to bring the cranberry bog expansion into compliance with the Act. It was further agreed that if any of the general permits were not granted, A.R. DeMarco would be required to apply for an individual permit. The ACO agreement also provided that if A.R. DeMarco was not granted an individual permit, A.R. DeMarco would have to restore the 22-acre bog expansion back to its original freshwater wetland state.

The ACO also provided for a public comment period, which closes on November 13, 2000. Thereafter, DEP has 15 days to notify A.R. DeMarco of any modifications it wishes to make to the terms of the ACO. A.R. DeMarco then has 15 days to notify DEP whether it accepts or rejects any modifications. If it accepts them, the ACO becomes final. If it rejects them, the ACO becomes void.

On July 3, 2000, before the ACO was signed, A.R. DeMarco submitted the first of its anticipated three general permit applications. On about September 28, DEP notified A.R. DeMarco the information A.R. DeMarco submitted did not justify the granting of a general permit. Specifically, the regulations provide that DEP will grant a general permit "only if the activities will be conducted on the area with the lowest number ranking on the list. . . below, which is available [to the applicant and which is useable for cranberry growing.]" N.J.A.C. 7:7A-9.23(c),(d). The DEP notified Mr. Drollas that the application did not establish that the 22 acre

expansion had occurred in the area owned or controlled by A.R. DeMarco which had the lowest environmental ranking under the regulation quoted above. In addition, the application did not demonstrate that the expansion did not jeopardize a threatened or endangered species or its habitat. A.R. DeMarco requested an extension of time to submit further information to address these concerns, and DEP granted the extension. A.R. DeMarco has until November 29, 2000 (after the date of this Report) to submit that information.

After executing the ACO, DEP issued a press release dated August 11, 2000 (Exhibit 4). The press release stated that the property which is the subject of the ACO was worth "a minimum of $300,000", purportedly making the settlement the largest settlement of a freshwater wetlands case since the law took effect in 1988.

However, Peter Page, DEP's Director of Communication, and the contact person for the press on this matter, was not aware that A.R. DeMarco had removed PDCs from the 591 acres subject to deed restriction. Mr. Page, stated "The failure for me to know about the Pinelands Development Credits, the sale of that and how that affects the perception of this [settlement], that was just, that was a communications breakdown and it was not a deliberate effort by anybody to try to hide it. So, I really want that to be made clear."[26]

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[26]Mr. Page, also stated:

> I personally, because I know [the] Commissioner very well, I found that infuriating because [the Commissioner], he practically invented preservation of the Pinelands and has certainly done as much as any single individual to preserve open space in the Pinelands. So, I took, I personally conducted a very aggressive rebuttal campaign to the allegations and the cornerstone to that really was that we had an enforcement action against DeMarco. But, it was just preposterous to allege that Bob Shinn was showing favoritism towards the cranberry growers, in general. And this one, who is, you know, sort of the premiere of the largest of them and the most influential, one of the most influential Republicans in the State, and

(continued...)

After the press release was made public, the DEP received criticism in newspaper articles about the terms of the settlement. Generally, the critical comments expressed the opinion that Garfield DeMarco received a highly favorable deal because of his political connections in the State, including his longtime relationship with Commissioner Shinn. The settlement was also criticized because it was viewed as a settlement which would not deter other would-be violators of the Act. Due to the questions raised about the settlement, the Attorney General assigned the Office of the Inspector General to review the matter and report its findings to him. This Report is the result of that assignment.

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[26](...continued)

> certainly the most influential Republican in Burlington County, that if these guys were getting a sweet deal because they were connected, it just, you couldn't say that credibly, because he was, you know, being, that he was prosecuted. I use that term loosely, you know, it was a civil action.

II. ANALYSIS

THE IMPORTANCE OF FOLLOWING A PROCESS

The negotiation of the settlement in the DeMarco matter illustrates the importance of governmental actors following a predetermined and standard process, and having certain parameters within which to negotiate, when they seek to resolve an enforcement action. The benefits to having and adhering to a predefined process are three-fold. First, the process itself guards against political favoritism in a given case, and, equally important, it protects against the appearance that political favoritism played a part in the settlement. Second, the process insures that the lessons learned by the agency through its experience over the years are applied in each enforcement action. Third, the process and the predetermined settlement parameters help to insure fairness to both sides.

The need to follow a process and to work within settlement parameters increases when the settlement terms being discussed are novel, and the private party has well known political affiliations. Those factors increase the likelihood that the settlement will be viewed as the result of political favoritism. If the government agency has not followed a set process in negotiating the settlement, there is little that it can point to in order to convince a skeptical public that politics did not play a role in the settlement.

In this matter, DEP went out of its way to scrupulously follow procedures in the investigative stage of this action. The informality with which it arrived at its settlement position stands in stark contrast. That informality occurred in each of the major aspects of the settlement negotiations: the Commissioner's recusal; the decision to accept a conservation easement and the transfer of land instead of a cash penalty; and the valuation of what the public received in the settlement. As a result, a settlement which many in DEP sincerely believe brings substantial environmental benefits to the public, has been greeted with skepticism and unanswered public

questions.

THE QUESTION OF POLITICAL INFLUENCE

OIG conducted an extensive fact finding review of DEP's investigation and settlement of the DeMarco wetlands matter. The fact finding review did not uncover any evidence that political influence played any part in the settlement terms. Nonetheless, as discussed below, the absence of evidence of political influence may not be sufficient to engender public confidence that the settlement of this particular matter was apolitical.

OIG interviewed and took recorded statements from 20 people, including all of the key employees involved in the investigation of the wetlands violation and the negotiation of the settlement. OIG interviewed the lead investigator in charge of the on-site inspection; his immediate supervisor, the Chief of the Bureau of Coastal and Land Use Compliance and Enforcement; and Leroy Cattaneo, who was the DEP employee with the most hands-on involvement in the settlement negotiations. In addition, OIG interviewed Cattaneo's immediate supervisor, Assistant Commissioner Ray Cantor, and the Chief of Staff, Gary Sondermeyer, both of whom ultimately approved the settlement. OIG also interviewed Commissioner Shinn, his counsel, Michael Hogan, and Anthony Drollas and Glenn Paulsen, Esquires, attorneys for A.R. DeMarco. A complete list of those persons who were interviewed is attached as Exhibit 1. In addition to the interviews, OIG obtained copies of the files on this matter maintained by Leroy Cattaneo, by Bureau Chief Peter Lynch and by Dennis Davidson, Deputy Administrator of the Green Acres program, who provided information to the land use enforcement unit on the value of the land transfers. Also, OIG obtained and reviewed the file maintained by Division of Law DAG Christine Piatek.

This fact finding review indicates that Commissioner Shinn recused himself when he

learned that the Department would be proceeding with an enforcement action. The exact date of his recusal is unknown, but it likely occurred in approximately June, 1998. Every DEP employee interviewed stated that there was no communication, direct or indirect, with Commissioner Shinn or his counsel Mr. Hogan about the substance of this matter after the recusal (although, as discussed more fully below, Commissioner Shinn did ask for updates on the status of the matter even after his recusal.) There is no evidence that Commissioner Shinn, or anyone acting on behalf of A.R. DeMarco, attempted to exert undue influence on any DEP employee involved in the matter.

Leroy Cattaneo was the key DEP employee in negotiating this settlement. Indeed, even after he transferred from the CLUCE section to the Office of State Plan Coordination, he continued to handle the A.R. DeMarco matter. The terms of settlement which Mr. Cattaneo negotiated were reviewed and approved by Assistant Commissioner Cantor, Deputy Commissioner Tudor and Chief of Staff Sondermeyer, but it was Cattaneo who conducted the face-to-face negotiations. Mr. Cattaneo has been employed by the Department of Environmental Protection since 1973. There is no indication that this 27-year veteran of Environmental Protection altered his actions due to Republican politics. To the contrary, he expressed his belief that the settlement achieved substantial environmental benefits for the people of New Jersey. In a recorded interview, Mr. Cattaneo said:

> [I]t fills in a hole within the State park system. It goes towards a green belt connecting two large tracts of State lands that [are] out there. This is, was the area that's being acquired by the uh, conservancy groups and the Natural Lands Trust and it goes to protecting the rights of the citizens in the State of New Jersey to use the Batona Trail which crosses DeMarco's land, that he could at any given time say, no, I'm blocking this trail and you no longer have one of the longest, oldest trails in the State, and it also protects the view from Apple Pie Hill. I mean how many people want to hike up to Apple Pie Hill and stand there and look at a denuded tract of land that maybe somebody's using now for uh, blueberries or horses or whatever he wants to use as, because that's what would be allowed even

> with the Pinelands credits taken off of it, which we didn't talk about [to that point in the interview]. And, the, the other thing is we're now conserving it. All the natural features of this land that were identified in a report that was prepared several years ago that went, when we went to acquire this property. So we know what the natural features are. We know why this whole area should be suited for acquisition. This is one of the areas of the State that's a large tract of unbroken, undeveloped land around and we want to keep it that way. This agreement does that. It protects those interests. While we might not own the property, while people may be upset about it, it protects what the State wanted to do in there. It gives us a big chunk of land out there.

Nonetheless, considering the novelty of the settlement agreement, and considering the political connections which Garfield DeMarco, the president of A.R. DeMarco, had with Commissioner Shinn, it is understandable that questions have been raised regarding whether politics played a part in the settlement. Indeed, Commissioner Shinn anticipated these questions and tried to head them off when he recused himself. Thus, it is appropriate to consider the efficacy of the Commissioner's recusal in detail.

COMMISSIONER SHINN'S RECUSAL

Commissioner Shinn stated that he first learned of the alleged wetlands violation on the A.R. DeMarco property when he received a telephone call from EPA Regional Administrator Jeanne Fox. Ms. Fox told the Commissioner that EPA had information about potential wetlands violations by cranberry growers in the Pinelands. The Commissioner directed Ms. Fox to have her staff contact the Coastal Land Use Compliance and Enforcement section with the information. Some time passed before Commissioner Shinn learned that DEP was investigating the information for possible enforcement action. Once he learned that, Commissioner Shinn decided to recuse himself from any involvement in the A.R. DeMarco matter. He did this because he has known Garfield DeMarco for many years. Before becoming Commissioner, Mr. Shinn had a business relationship with Garfield DeMarco, selling farm equipment to him. He also had a political relationship with Garfield DeMarco. Commissioner Shinn had been a

freeholder and an assemblyman representing Burlington County while Garfield DeMarco was chair of the Burlington County Republican Party. Commissioner Shinn appropriately recognized that there would be "an appearance of impropriety" if he were involved in an enforcement action involving Garfield DeMarco's company. Thus, he recused himself.

OIG staff interviewed all those in the chain of command on the DeMarco matter, including former Chief of Staff Mark Smith, current Chief of Staff Gary Sondermeyer, Deputy Commissioner Robert Tudor, Assistant Commissioner Ray Cantor, Leroy Cattaneo and Peter Lynch . All of them stated that after the recusal, there was no contact, direct or indirect, actual or attempted, with Commissioner Shinn about the substance of DEP's positions on the matter, either on the propriety of bringing an enforcement action or on the proper settlement of it. All of them stated that no one had attempted to improperly influence them in the performance of their duties. The files and the e-mails reviewed by OIG contained no evidence of any communications between Commissioner Shinn and any of these employees about the substance of DEP's positions.

Nonetheless, most of the DEP employees involved in the DeMarco matter were uncertain of how and when they learned of the recusal. Indeed, even Commissioner Shinn and his counsel Mr. Hogan differ on whether Mr. Hogan had actually recused himself, as Commissioner Shinn thought, or whether he simply had had no occasion to work on the case, as Mr. Hogan believed.

More significant is the fact – candidly acknowledged by Commissioner Shinn – that even after the recusal, he continued to ask his staff for updates on the status of the settlement negotiations. As he explained in a subsequent interview, he wanted to be sure that the matter kept moving forward through the process. In asking to be kept abreast of the status of the matter, Commissioner Shinn erred. Commissioner Shinn properly recognized that he had to recuse

himself to avoid the appearance of impropriety. And he was aware that even after the recusal, there was a possibility that his staff might feel some indirect pressure due to the Commissioner's relationship to Garfield DeMarco. As Commissioner Shinn explained, after the recusal, he found himself avoiding direct contact with Assistant Commissioner Ray Cantor on land use issues unrelated to the DeMarco matter:

> Well I, I just found myself being uncomfortable you know, if I had Ray [Cantor] in my office. He may feel some implied influence talking about something else, you know, and I didn't want to, I didn't want to be there. So I found myself just sort of trying to work through [Deputy Commissioner] Bob Tudor, or [Chief of Staff] Gary Sondermeyer relative to those issues that, that Ray's involved with. (Emphasis added).

In any department of state government, there is the possibility that staff members will feel an implied pressure to favor an entity with well-known affiliations to the commissioner, or to avoid taking action unfavorable to that entity. A commissioner's act of recusing himself is an essential weapon to fight that implied pressure. By the same token, every small deviation from total recusal weakens the effect of the recusal, and reawakens the implied pressure on staff. Here, Commissioner Shinn's act of requesting status updates on the DeMarco matter, even though he avoided any substantive discussion on DEP's actions, weakened the effectiveness of his decision to recuse himself.

This discussion of the manner in which Commissioner Shinn recused himself provides lessons about how a Commissioner - or indeed any executive branch decision-maker regardless of his rank - should go about recusing himself or herself when the need to do so arises.

First, all recusals should be done in writing when at all possible. (Recusals could be stated on the record if they arise in the context of a hearing in which there is a verbatim record.) The writing creates a record of when the Commissioner recused himself or herself. It also helps to lessen the chances of inadvertent breaches of the recusal. The writing can also define the

extent of the matter as to which the Commissioner has recused himself or herself.

The writing should be sent to the person who assumes the Commissioner's responsibilities for purposes of that matter. The writing should clearly inform that person of the recusal, and the extent of the matter as to which the recusal applies. The writing should instruct the Acting Commissioner that he has the full authority of the Commissioner's office for purposes of that matter, and that he should exercise it in the way that he believes most appropriate.

The letter should clearly explain the effect of the recusal. It should, for example, state that the Commissioner can have no role in discussions or deliberations on the matter, that he or she can not be present during those discussions, and that no information about the matter should pass to the Commissioner.

Finally, copies of the writing should be sent to all persons who ought to be informed of the recusal. Choosing who those persons are will depend on the facts of the case. Commissioners should notify all the key decision-makers on the matter below them. Commissioners should err on the side of over-inclusion, in order to guard against inadvertent breaches by persons who may possess information about the matter but who may be unaware of the recusal if they are not notified directly. In situations in which the agency maintains a central file, a copy of the recusal memorandum should be placed in the central file, so that anyone who later becomes involved in the matter will be able to learn about the recusal, and comply with it. In matters in which there is an adverse party, the Commissioner may properly notify the adverse party or its attorney that he has recused himself, so that party is aware that it should no longer deal with the Commissioner.

OIG's review of Commissioner Shinn's recusal did not uncover any evidence that the recusal was breached in a substantive way. It did, however, bring into relief ways in which the

recusal could have been done better. In order to bring these lessons to the attention of executive branch employees in all departments, and thereby improve the government's performance, OIG recommends that the Executive Commission on Ethical Standards, the Division of Law and OIG draft a set of short written guidelines on the specific steps executive branch officers should follow once they have determined that they should recuse themselves. These guidelines could be sent as client agency advice by the Division of Law to each Commissioner, and distributed by them to their staff as they deem appropriate.[27]

Commissioner Shinn did not communicate his recusal in a memorandum, nor did he properly consider the recusal as prohibiting all communications about the matter. These shortcomings took away from the goal he tried to achieve: avoiding even the appearance of political influence in the Department's handling of the matter. Unfortunately, the absence of a rigorous evaluation of the value of the settlement to the people of New Jersey, as discussed below, further hampered the Commissioner's stated goal of avoiding even the appearance of impropriety.

THE DECISION TO ACCEPT A CONSERVATION EASEMENT AND THE TRANSFER OF LAND IN LIEU OF A CASH PENALTY

The decision to accept a conservation easement and the transfer of additional land in lieu of a cash penalty to settle the wetlands allegation was an unusual, although not unprecedented, settlement term. On the one hand, some DEP employees see it as a creative settlement which attains significant environmental benefits for the people of New Jersey. On the other hand, critics of the settlement note that A.R. DeMarco is not required to make a cash payment in

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[27] OIG discussed this recommendation with Rita Strmensky, Executive Director of the Executive Commission on Ethical Standards, and Jeffrey Miller, Director of the Division of Law, both of whom were amenable to the recommendation.

settlement of the alleged violation, and have questioned the value of the conservation easement. That easement comprises the bulk of the value attained in the settlement. Given these disparate perceptions of the settlement, one may question how the agreement came to be.

The land preserved as part of the settlement was practically identical to the land which the DEP Green Acres program had tried to purchase from DeMarco in 1998. In 1998, the Green Acres program had offered DeMarco $714,000 to purchase the 591 acres in Tabernacle Township, and an additional three plots of land in Bass River Township which totaled 57.9 acres. The wetlands settlement agreement would result in the imposition of a conservation easement on the same 591 acres. In addition, A.R. DeMarco would transfer ownership of two of the three Bass River Township plots, plus a third plot in Woodland Township, totaling 73.6 acres.

Before making its offer, Green Acres had obtained two appraisals from independent real estate appraisal firms. Based on those appraisals, Green Acres concluded that the purchase of all the property (648.9 acres), including all Pinelands Development Credits, was worth approximately $649,000. In addition, DEP had conducted a study cataloging the environmental benefit to be obtained by preserving this land. In sum, the 591 acres in Tabernacle Township are adjacent to Wharton State Forest, within the largest unbroken forest in New Jersey. The land provides high quality habitat for 35 species of mammals and 150 bird species, and it contains a segment of the Batona Trail. This was land which the Green Acres program had identified for acquisition, and which it valued highly. However, A.R. DeMarco wanted more money than Green Acres was willing to pay, and so the sale did not occur.

Once DEP and A.R. DeMarco began to negotiate a settlement of the wetlands violation, the parties discussed using some combination of a cash penalty and a land transfer as a settlement. DeMarco's attorney and its farm manager represented that A.R. DeMarco was cash

poor at the time, due to the depressed condition of the cranberry market, and so would be unable to pay a significant cash penalty. Nonetheless, records of the Election Law Enforcement Commission show that A.R. DeMarco contributed a total of $54,000 to various political action committees and a political campaign in March, June and October, 1999. Also, A.R. DeMarco received $661,937 in June 2000 from the sale of the Pinelands Development Credits from the 591 acres. It is not known what debt and other expenses A.R. DeMarco had at the time it cashed in the PDCs, and so it is not known how large a cash penalty it could have afforded. But that lack of information is part of the problem. Normal process in an enforcement agency is to require a violator to prove with objectively reliable evidence any claimed inability to pay a penalty. DEP did not require A.R. DeMarco to produce an audited financial statement or in any other way demonstrate its inability to pay a monetary penalty. Thus, the genesis of DEP's willingness to accept land instead of cash is open to question.

DEP could have put itself in a better position to answer public questions about the settlement if it had pre-existing procedures or criteria to guide its employees' discretion in deciding whether, and in which cases, it is appropriate to accept land conservation in lieu of a cash penalty. The current regulation governing DEP's ability to negotiate settlements of freshwater wetlands violations offers no guidance, merely providing, "The Department may in its discretion settle any civil administrative penalty assessed under [these rules]." N.J.A.C. 7:7A-17.1(e).

The idea of having criteria to guide decision-making is not to make DEP moribund and its employees unable to exercise creativity. Rather, the idea is for the Department to provide some guidance for its employees to use in all cases. In that way, the Department would have an answer to critics who question whether political influence led to the decision to accept land

instead of cash in a given case.

In August, 2000, DEP proposed numerous revisions to the Freshwater Wetlands Protection Act regulations, which are scheduled to expire in December, 2000. One of these proposals is to amend the rule on negotiating settlements of wetlands violations to require the Department to consider four factors before negotiating a reduced penalty. Those factors are the presence of mitigating or extenuating circumstances, the violator's timely implementation of measures leading to compliance or to removal of the violation, the violator's full payment of a specified part of the civil penalty, and "any other terms or conditions acceptable to the Department." 32 N.J.R. 2693(a), 2829 (proposed R. 7:7A-17.8(c)). Obviously, the fourth factor does not provide guidance to Department decision makers; rather, it permits the exercise of discretion. This is not only unavoidable, but it is desirable. According to DEP's rule proposal, "These factors are being added to the rule in order to codify the Department's existing practice for settling assessed penalties. These factors are consistent with factors used in other Department enforcement rules in order to ensure consistency in enforcement practice across the Department." Id. at 2739.

Still, the acceptance of land preservation, or other environmental projects, in lieu of some or all of a monetary penalty is different from a simple agreement to lessen the amount of a monetary penalty. It is clear to the public how a monetary penalty can deter future violations of the law. It is clear that monetary penalties also level the playing field for those regulated entities which incur expenses in complying with the law. It is not so apparent how land preservation addresses these needs. DEP would do well to provide additional guidance to its employees in negotiating settlements which involve land preservation or other environmental projects, to ensure that these settlements only occur in cases and in ways that further the policy goals of all

enforcement actions: punishing past violations, deterring future violations, bringing violators into compliance, leveling the field for others, and assuring the public that there is a system in place and that it works. The United States Environmental Protection Agency (EPA) has such a written policy guiding the acceptability of environmental projects in partial settlement of civil penalties. EPA's policy allows a violator to perform an environmental project at its own cost, in partial settlement of an enforcement action, provided the environmental project satisfies EPA's guidelines, and is approved by EPA. For example, the policy defines seven broad categories of acceptable projects, and requires a nexus between the violation and the benefits the project is expected to produce. The net, after-tax costs incurred by the violator in performing the environmental project can then be deducted from the civil fine amount. But the policy requires that some monetary penalty amount always remain. See EPA Supplemental Environmental Projects Policy (USEPA, May 1, 1998).[28]

It may be that transferring ownership of the 73 acres, and placing the conservation easement on the 591 acres, would be acceptable environmental projects to mitigate a civil fine. Determining whether those actions are valuable enough to entirely replace any monetary penalty, however, requires consideration of exactly what the State received in this settlement.

THE VALUATION OF THE CONSERVATION EASEMENT AND 73 ACRES

Any assessment of the settlement agreement necessarily requires consideration of what DEP received in exchange for settling the wetlands allegations. One must consider the value of

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[28] EPA's policy states: "As a general rule, the net costs to be incurred by a violator in performing a [supplemental environmental project] may be considered as one factor in determining an appropriate settlement amount.... [T]he final settlement penalty must equal or exceed either: a) the economic benefit of noncompliance plus 10 percent of the gravity component; or b) 25 percent of the gravity component only; whichever is greater." The "gravity component" refers to the authorized penalty amount adjusted by settlement considerations such as litigation risks. See USEPA, Supplemental Environmental Projects Policy, supra at E.

the conservation easement and of the transfer of ownership of the 73 acres, before judging the fairness of the settlement. Similarly, one must consider the value of the conservation easement and of the land which was transferred in order to assess whether the settlement agreement will serve any deterrent purpose, or on the contrary, will undercut deterrence. Settlements which are perceived by the public as being "sweet deals" can have the perverse effect of fostering a lack of compliance with a regulatory program by those who are regulated, and a lack of confidence by the general public. If enforcement actions do not result in appropriately stiff penalties, regulated entities would have an incentive to delay incurring the expense of complying with environmental laws until such time as they are caught and ordered to comply. Penalties promote environmental compliance and help protect the public health by deterring violations, both by the same entity and by others. Penalties also help ensure a level playing field by preventing violators from obtaining an unfair economic advantage over their competitors who incur the expense of complying with environmental laws. While the deterrent effect of a penalty action can never be measured with mathematical certainty, in this case, the valuation of the settlement terms was done so informally that it cannot be said with any assurance that this settlement will deter rather than encourage future violations.

The most serious shortcomings in DEP's settlement process all concern the valuation of the land conservation. First, DEP's appraisal of the value of the conservation easement was done hurriedly and informally. Second, DEP did not adequately consider the possible tax consequences to A.R. DeMarco of the settlement agreement. Third, DEP did not adequately consider the consequences of A.R. DeMarco's sale of the Pineland Development Credits from the 591 acres of preserved land.

A. The Difficulties of Attaching a Value to the Conservation Easement

It appears that DEP's first concerted effort to assess the value of the Conservation Easement and of the 73 acres of transferred land occurred on August 3, 2000, when Dennis Davidson, Deputy Administrator of DEP's Green Acres program, was asked to review a summary of the terms of the proposed settlement. As discussed above, Mr. Davidson was familiar with this land from Green Acres' 1998 attempted purchase.

When Mr. Davidson reviewed the summary memo, he saw that it contained assumptions about the value of the 73 acres which were to be conveyed entirely, and about the value of the Conservation Easement to be placed on the 591 acres, which he believed over-stated the value of the conservation easement. Mr. Davidson brought his concerns to the attention of his Assistant Commissioner, Cari Wild, and through her to Assistant Commissioner Ray Cantor. Mr. Cantor told Ms. Wild that because the matter was expected to be settled rather than litigated, Land Use Management did not need a formal appraisal report from Green Acres, but only an overall "sense" of the value of the settlement. He further stated that he wanted to know if the value of the settlement was in the range of $300,000. In a subsequent written summary of his actions, Mr. Davidson wrote that he told Ms. Wild that the issue was a complex valuation problem, and that he wanted to take a more detailed look at it, but that the value of the settlement "probably" was in the neighborhood of $300,000.

The problem with attributing a "value" to the Conservation Easement in the context of a penalty settlement is that it assumes the Conservation Easement lessened the value of the land to the property owner. In this case, however, it is not clear how much, if at all, the Conservation Easement lessens the value of the 591 acres to A.R. DeMarco. A.R. DeMarco is a cranberry grower and the 591 acres contains the source of its water supply for its cranberry growing and

harvesting operations. Therefore, at least for the foreseeable future, A.R. DeMarco itself has an interest in preserving the acreage in its natural state. Accordingly, granting the Conservation Easement cost A.R. DeMarco only potential future uses of the property.[29]

There is a second problem with attributing a value to the Conservation Easement in the context of a penalty settlement, namely, that the easement does not take into account the economic benefit A.R. DeMarco derived from the violation. DeMarco was able to put 22 acres of cranberry bogs into production several years earlier than it would have been able to if it had complied with the law. As explained by Bureau Chief Peter Lynch, CLUCE's standard procedure in wetlands cases in which there was an economic benefit is to ensure that the penalty assessed under the penalty matrix is larger than the economic benefit which the violator attained through the violation. If it is, then payment of the penalty itself requires the violator to disgorge the economic benefit. If the penalty assessed under the penalty matrix is less than the economic benefit, then CLUCE will add an economic benefit component to the assessed penalty, up to the maximum allowable penalty of $10,000 per violation. Here, DEP determined that A.R. DeMarco's economic benefit amounted to $286,000. DEP determined that the settlement terms were worth $300,000. Therefore, it did not seek to add a separate economic benefit component to the settlement. However, the proposed settlement terms shifted during the negotiations from a

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[29] The Green Acres program had commissioned two reports by independent real estate appraisers for the 1998 attempted purchase of 649 acres. One appraisal report concluded that the "only practical use for the site is for conservation purposes." It stated that "[t]he site contains predominantly sandy soils which are not suitable for agricultural use." The other appraisal concluded that the "highest and best use" for the property was "recreation, conservation." In contrast, in its summary of the settlement, provided to OIG by its attorneys and included as Exhibit 2, A.R. DeMarco notes that it had commissioned its own independent appraisal, and that "DeMarco's appraiser emphasized how DEP incorrectly determined that the highest and best use for the Tabernacle lands was for recreation and conservation, as opposed to the agricultural uses permitted by Pinelands zoning."

substantial cash penalty, to a transfer of ownership of the 591 acres, to A.R. DeMarco's retaining ownership of the 591 acres and granting an easement (on top of the PDC Easement). If the Conservation Easement does not deprive A.R. DeMarco of any real value in the property, then it does nothing to recoup economic benefit. Given the appraisal reports obtained by Green Acres which conclude that the only practical use for the site was conservation and recreation, it is not at all clear that the Conservation Easement, on top of the PDC Easement, deprived A.R. DeMarco of any use that was likely or feasible. Therefore, it is not clear whether the Conservation Easement served to recover the economic benefit. That is a problem.

If a penalty settlement does not have a sufficient sting to it, it cannot serve to deter future violations either by this respondent or by others. DEP could have assured that this settlement agreement served a deterrent purpose by assessing some penalty amount that could be readily quantified, and then accepting the Conservation Easement, if DEP is convinced it provides environmental benefits to the people of New Jersey. The addition of the Conservation Easement to the settlement could be used to mitigate the amount of penalty which would otherwise be required. This is similar to the approach used by EPA, whose policy allows the costs of a supplemental environmental project to off-set or reduce a civil penalty assessment by up to 75%.

In one sense, DEP did accept a quantifiable penalty when it insisted that DeMarco turn over ownership of 73 acres of property which has a value of approximately $88,200. But, DEP did not say that DeMarco paid a penalty worth $88,200 and also agreed to the Conservation Easement, and that in consideration for that further conservation benefit, DEP agreed to accept a lower penalty amount. Rather, it issued a press release in which Assistant Commissioner Ray Cantor was quoted as saying, "The property is worth a minimum of $300,000, and probably more, making this the largest settlement of a freshwater wetlands case since the law took effect in

1988. This compensates for any monetary penalties that would have been assessed for the conversion of wetlands without obtaining a permit." As discussed above, however, the $300,000 figure was only the roughest approximation of what was, after all, "a complex valuation problem." Thus DEP entered into a settlement of the largest freshwater wetlands case in its history, with only the vaguest sense of the value of what it was getting.

B. Tax Consequences of the Settlement

In negotiating a settlement of any civil enforcement action, the enforcing agency should bear in mind the possible tax consequences of the settlement to the violator. Here, the question is whether A.R. DeMarco will be able to claim a deduction on its federal income tax return for the value of the Conservation Easement and the value of the three parcels of land which were conveyed to the State.

Under the terms of the proposed administrative consent order, A.R. DeMarco is to place a permanent Conservation Easement on the 591 acres located in Tabernacle Township. In addition, A.R. DeMarco is required to transfer title to the State of New Jersey of the 73 acres of property located in Bass River Township and Woodland Township. The ACO provides that its terms "may be enforced as a binding contractual agreement should A.R. DeMarco fail to fulfill any obligations" under it. (See Exhibit 9, ACO at para. 29.) The ACO further provides that DeMarco's obligations are not "intended to constitute a debt, damage claim, penalty or civil action which should be limited or discharged in a bankruptcy proceeding. All obligations imposed by this Administrative Consent Order shall constitute continuing regulatory obligations imposed pursuant to the police powers of the State of New Jersey." (See Exhibit 9, ACO at para. 31.) Paragraph 31 contains standard language intended to protect the State by providing that the violator can not escape his obligations by declaring bankruptcy. It is appropriate for the ACO to

address bankruptcy concerns. On the other hand, the ACO does not explicitly address the possible tax consequences to A.R. DeMarco. In addition, the tax consequences of the settlement are further muddled by an inaccurate sentence in the Conservation Easement, which states that A.R. DeMarco granted the easement to the State "in consideration of the sum of ONE DOLLAR[.]" This makes it sound as though the State had paid A.R. DeMarco one dollar in exchange for the easement, which is untrue, but which on its face could mislead any Internal Revenue Service agent who might review a claim that the easement was a charitable contribution.[30]

Internal Revenue Code §170(b)(2) permits a corporation to deduct charitable contributions up to 10% of its taxable income. A charitable contribution can be deducted when a corporation donates a conservation easement to the government. IRC §§170(f)(3)(B)(iii); 170(h). If the donor makes a contribution in order to receive some benefit, however, the contribution is not deductible. That is, the taxpayer must not expect to receive a substantial quid pro quo for the transfer. McLennan v. United States, 23 Ct. Cl. 99, 105 (Ct. Cl. 1991). In addition, the taxpayer must make the transfer without contractual compulsion. Myers v. United States, 1980 W.L. 1733 (N.D. Ala. 1980).

In this case, it may be that the value of the Conservation Easement and of the transfer of the 73 acres is not deductible as a charitable contribution because A.R. DeMarco received the benefit of settling the pending enforcement action in exchange, and because the easement and the transfer were made under the contractual compulsion of the consent order. However, this is not

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[30] The form of the Conservation Easement which contains this erroneous recital was drafted by the Division of Law. DAG Piatek reviewed a draft of the easement before the ACO was signed. She made several changes to improve the document from the State's perspective (for example, ensuring that the easement would take priority over existing mortgages), but did not catch the error concerning the consideration.

certain, because the ACO does not address the issue and because the Conservation Easement inaccurately recites that it was granted in exchange for one dollar. Any uncertainty on the issue could have been removed by including appropriate language in the ACO to state that the transfers are not tax deductible charitable contributions.

Similarly, the ACO should have explicitly addressed whether the transfers could be deducted as business expenses. Corporations are entitled to deduct ordinary business expenses under IRC §162. However, amounts paid in settlement of an "actual or potential liability for a fine or penalty (civil or criminal)" are not deductible. Treasury Regulation §1.162-21(b)(1)(iii). In this case, the easement and the land transfer were made in settlement of a potential liability for a civil fine or penalty. Therefore, it would seem that the transfers are not deductible as business expenses. However, the language in ACO paragraph 31, inserted to protect the State in the event of a bankruptcy, causes some ambiguity. That paragraph states that the obligations are not "intended to constitute a ... penalty or civil action [.]" DeMarco could argue that if the transfers are not deemed penalties for federal bankruptcy purposes, they should not be deemed penalties for federal tax purposes.[31] While the IRS is likely to analyze the state law which DeMarco was accused of violating in order to decide the question of deductibility (see Tech. Adv. Mem. 8704003) and to disregard language clearly inserted to protect DEP in the event of a bankruptcy, still, the ambiguity could have been eliminated by inserting appropriate language in the ACO to clearly provide that the transfers are not deductible as business expenses under the Internal Revenue Code.

The Department of Environmental Protection should have used language in the ACO to

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[31] Further, if it were to claim the transfers as a deduction, A.R. DeMarco could use DEP's "minimum of $300,000" estimate as the amount of the contribution or expense.

clearly provide that the value of the Conservation Easement and the value of the 73 acres of property conveyed to the State, cannot be deducted in any way from A.R. DeMarco's taxable income.

C. **The Sale of Pinelands Development Credits**

In June 2000, approximately two months before signing the ACO, A.R. DeMarco severed the Pinelands Development Credits (PDCs) from the 591 acres in Tabernacle Township, and received over $660,000 for them from the Pinelands Development Credit Bank.

Because A.R. DeMarco owned the 591 acres in June of 2000, it was legally entitled to sever the PDCs and to sell them. DEP was aware before the execution of the ACO that A.R .DeMarco had severed the PDCs. At the latest, Dennis Davidson of the Green Acres program told Leroy Cattaneo on August 3, 2000, that the PDCs had been severed from the 591 acres. Mr. Cattaneo also stated that he was aware that A.R. DeMarco had severed the PDCs before the ACO was executed, and that he considered that fact in deciding whether to recommend the settlement terms. Mr. Cantor said that he was aware that A.R. DeMarco had severed the PDCs, but not that the PDCs had already been sold to the State. However, the Director of Communications, Peter Page, was not aware of this fact, which caused difficulties in DEP's public announcement of the settlement.

DEP's acceptance of a conservation easement on the same land which was already subject to a Pinelands Development Credit deed restriction ("PDC Easement") has raised a question of public confidence in the actions of DEP. Since the State had already paid A.R. DeMarco over $660,000 to preserve the property under a PDC Easement, why should the State take a second conservation easement as part of the "largest ever settlement of a wetlands violation"? Did the State get much value in exchange for giving up its wetlands case?

DEP's answer would appear to be, first, that this land is ecologically highly valuable. The land is within the largest area of unbroken forest in the State, and provides high quality habitat for a variety of wildlife, as documented in an environmental assessment performed by DEP before it had attempted to purchase the property. The land borders Wharton State Forest and includes a segment of the Batona Trail. For these reasons, DEP's Green Acres program had attempted to buy the properties, offering more than $700,000. DEP would answer further that the Conservation Easement negotiated as part of the ACO provides more protection to the land than does the PDC Easement alone. That is, the conservation easement prohibits forestry, which is allowed under the PDC Easement. It prohibits any building on the land, whereas the PDC Easement permits A.R. DeMarco to build housing for agricultural workers. The conservation easement prohibits any agricultural activities which would alter the natural habitat characteristics of the property, whereas the PDC Easement would allow limited agricultural uses such as horse farming or blueberry cultivation.

The question then becomes whether obtaining these additional protections on the land, plus obtaining ownership of three parcels of land worth $88,200, is a fair settlement for this large a wetlands violation. It is difficult to answer this question in a manner which would earn the public's trust for the following reasons.

First, as discussed above, the valuation of the Conservation Easement was done hurriedly and informally. It may be that the value of the Conservation Easement can never be more than a subjective approximation by those experienced in the appraisal of conserved land. Still, DEP should have obtained two independent, well-considered assessments of the value of the conservation easement. Given the complexity of the appraisal issues, and considering that settlement negotiations had languished for months, there is no justification for DEP's settling its

"largest ever" wetlands case based on a hurried ballpark estimate of value from one employee appraiser.

Second, as discussed above, DEP did not adequately address the tax consequences of the settlement terms in the Administrative Consent Order.

Third, and finally, the Administrative Consent Order does not adequately address the need to deter others from violating the Fresh Water Wetlands Protection Act. The Conservation Easement is consistent with A.R. DeMarco's own interests. That is, it is in A.R. DeMarco's economic interest to protect the environment around the water supply for its cranberry bogs. The Conservation Easement does that. Therefore, placing the Conservation Easement on the property does not penalize A.R. DeMarco for its violation. Nor was adequate consideration given to the economic advantage DeMarco enjoyed during the violation. Yet, DEP publicized the settlement as its largest wetlands enforcement action.

Public information about enforcement actions, and about the results of enforcement actions, plays an important role in efforts to achieve general deterrence. Enforcement actions deter other potential violators only if those future violators learn of the enforcement actions, and then, only if the results of the actions carry sufficient sting to discourage would-be violators. In this matter, DEP compounded the problem of a difficult to explain settlement by creating high expectations in the minds of the public. The day after the ACO was signed, DEP issued a press release quoting Assistant Commissioner Ray Cantor as saying, "The property is worth a minimum of $300,000, and probably more, making this the largest settlement of a fresh water wetlands case since the law took effect in 1988." This quote invites questions about how DEP arrived at the determination that the Conservation Easement and the transferred land was worth a minimum of $300,000. DEP was in a poor position to answer these questions because of the

informality with which it had considered these questions during the settlement negotiations.

DEP touted this settlement as the "largest settlement ever" for a wetlands violation in New Jersey. Presenting a case as the "largest ever" creates a public expectation that the penalty will also be appropriately large. When DEP instead followed up its announcement of the largest ever case with a novel settlement, the value of which is debatable for all the reasons stated above, DEP undermined public confidence in both its competency and its apolitical nature .

III. RECOMMENDATIONS

THE PENDING SETTLEMENT

DEP's settlement in the DeMarco matter, and the public outcry it sparked, underscore the importance to enforcement agencies of having established procedures to follow when settling enforcement actions. A predetermined process can provide a bulwark against political influence, and just as important, it can provide the agency with an appropriate answer when it is questioned about whether political influence played a part in its decisions. The process can improve the government's performance by institutionalizing the lessons learned through experience. Finally, the process heightens the fairness of outcomes, and in that way too, strengthens public confidence in the actions of government.

This Report has discussed a number of flaws in the process which led DEP to sign the ACO with A.R. DeMarco. Nonetheless, DEP has signed the consent order, and is bound by its terms. One of those terms, however, permits DEP to "see[k] to add or revise terms in the ACO that were not agreed to as of the execution date, [in which case] DEP shall so notify DeMarco no later than 15 days after the end of the public comment period." (Exhibit 9, ACO at para. 22). A.R. DeMarco then has 15 days in which either to accept the changes, in which case an amended ACO would be signed, or to reject them, in which case the pending ACO would become void. Id. OIG recommends that DEP seek to add or revise terms to the pending ACO which are sufficient to address all of the issues raised in this Report. These added or revised terms must lead to either of two results. First, an amended ACO could be signed, incorporating settlement terms arrived at through a candid and open re-assessment of this matter, performed in a manner which promotes public confidence in the integrity of DEP's enforcement actions. Second, the pending ACO could become void, if A.R. DeMarco does not agree to the added or revised terms.

These added or revised terms, and any amended ACO that my result, must at a minimum address the following salient points.

First, two independent, formal appraisals should be done on the value of the 73 acres transferred in fee simple, and on the value of the conservation easement placed on the 591 acres in Tabernacle Township. The valuation of the conservation easement would have to consider that development of that property is already greatly restricted by the PDC Easement.

Second, the uncertainty about the tax consequences of the settlement to A.R. DeMarco must be eliminated by redrafting the ACO so that A.R. DeMarco specifically agrees that the transfer of the 73 acres and the placement of the Conservation Easement are not charitable contributions and are not business expenses within the meaning of the Internal Revenue Code, and are not deductible on A.R. DeMarco's tax returns. If A.R. DeMarco does not agree to these amendments to the ACO, then the settlement must be scuttled.

Third, DEP could do a better job of explaining to the public the factors which led its employees to make this agreement to preserve land. Since some DEP employees are sincerely convinced that the environmental benefits of this agreement are substantial, the explanation would need to include a full and open discussion of DEP's point of view, and allow for public comment. The explanation would need to discuss in detail the environmental benefits achieved by placing the additional Conservation Easement on top of the PDC Easement, while remaining mindful of the need for penalty settlements to achieve deterrence.

Finally, and most importantly, DEP would need to establish an internal review procedure to assess whether the pending settlement, and any amendments to it which may be negotiated, fairly and adequately fulfill the purposes of all enforcement actions: to punish past violations, to deter future violations, to bring the violator into compliance, and to deprive the violator of the

economic benefit of the violation. This assessment could only be done after the factual questions raised in this Report -- such as the valuation of the Conservation Easement -- are answered. The assessment would require consideration of whether the Conservation Easement has any "sting" to it at all, or whether its terms are so insignificant to A.R. DeMarco, given the PDC Easement and the possible agricultural uses to which the property was suited, that it cannot be counted as part of a penalty. In addition, the assessment would need to consider the imposition of a monetary penalty on A.R. DeMarco, as an amendment to the ACO, in conjunction with the land transfers. The assessment would need to consider the economic benefit A.R. DeMarco has realized through the wetlands expansion, which has allowed it to put 22 acres of cranberry bogs into production years earlier than it could have if it had complied with the law -- as its competitors have. Finally, the assessment would need to address how the settlement, and any amendments to it, serve to deter other potential wetlands violations.

In undertaking this assessment, DEP must acknowledge that its handling of the settlement has caused the public to question the operations of the DEP. The essential judgment made by those in the Department who reviewed and approved this settlement was that accepting the Conservation Easement on top of the PDC Easement and accepting title to 73 acres of land was a fair settlement for the largest ever wetlands violation in New Jersey's history. This judgment was made from within the process which was flawed in all of the ways described above. A second statement by the same personnel in DEP that they stand by their judgment could not possibly dispel the public perception that political influence played a role in DEP's settlement position. Accordingly, DEP should have the settlement reviewed by a committee of senior personnel who are experienced in reviewing enforcement actions, and who had not reviewed and approved this settlement. This committee should include the Assistant Commissioner for

Compliance and Enforcement, Catherine Tormey, and the Deputy Commissioner who supervises her, Marlen Dooley. Furthermore, Assistant Attorneys General Lawrence Stanley and Gerard Burke, who are in charge of the Environmental Section in the Division of Law, should be part of the review committee and should share responsibility for the disposition of the matter. If this review committee approves the pending settlement, and any amendment to it, there should be a public comment period before it is allowed to become final.

In addition, DEP could also invite the United States Environmental Protection Agency to file its own wetlands enforcement action under federal law. EPA has substantial expertise in evaluating the severity of wetlands violations, and in evaluating the worth of preserving land. Thus, EPA is well-suited to make its own independent evaluation of this wetlands violation and the appropriate settlement for it.

THE RECUSAL PROCESS

OIG recommends that DEP establish a more formal recusal process, to clearly memorialize each instance in which the Commissioner, or another decision-maker, has recused himself or herself. The process should require that all recusals be memorialized in a writing which delineates the extent of the recusal, clearly states the effect of the recusal, names the person who is to assume responsibility for the matter, delegates the Commissioner's full authority to that person, and provides adequate notice of the recusal. In addition, as discussed above, OIG recommends that the Executive Commission on Ethical Standards, the Division of Law and OIG draft written guidelines on the specific steps executive branch officers should follow once they have determined that they should recuse themselves. These guidelines should be sent as client agency advice by the Division of Law to each Commissioner.

APPENDIX I

Individuals Interviewed Regarding the A.R. DeMarco Investigation

1. Dennis B. Davidson, Deputy Administrator, Green Acres Program. Interviewed on 9/27/00.

2. John Higgins, DEP Coastal Zone Specialist I. Interviewed on 9/27/00.

3. Peter Lynch, Chief, Bureau of Coastal and Land Use Compliance and Enforcement. Interviewed on 9/27/00; and 11/6/00.

4. Robert Pacione, DEP Principle Environmental Specialist. Interviewed on 9/27/00.

5. Thomas Wells, Administrator, Green Acres Program. Interviewed on 9/27/00.

6. Leroy Cattaneo, DEP Director, Office of State Plan Coordination. Interviewed on 9/28/00; and 11/8/00.

7. John Ross, Executive Director, Pinelands Development Credit Bank. Interviewed on 9/29/00.

8. Gary Sondermeyer, DEP Chief of Staff. Interviewed on 9/29/00.

9. Robert A. Tudor, DEP Deputy Commissioner. Interviewed on 9/29/00.

10. Scott Dubin, DAG, Environmental Enforcement Section, Division of Law . Interviewed on 10/2/00.

11. Randall L. Pease, DAG, Department of Environmental Protection. Interviewed on 10/2/00.

12. Christine Piatek, DAG, Environmental Enforcement Section, Division of Law. Interviewed on 10/2/00.

13. Ray Cantor, Assistant Commissioner, Land Use Management. Interviewed on 10/5/00; and 11/6/00.

14. Peter Page, DEP Director of Communications. Interviewed on 10/5/00.

EXHIBIT 1

15. Janice Brogle, Section Chief, Bureau of Costal and Land Use Compliance and Enforcement. Interviewed on 10/12/00.

16. Michael Hogan, Esq., Counsel, DEP. Interviewed on 10/18/00.

17. Robert C. Shinn, Jr., Commissioner, DEP. Interviewed on 10/18/00.

18. Mark Smith, former DEP Chief of Staff. Interviewed on 10/20/00.

19. Anthony Drollas, Esq., Capehart & Scatchard, P.A., attorney for A.R. DeMarco, Inc. Interviewed on 11/2/00.

20. Glenn Paulsen, Esq., Capehart & Scatchard, P.A., attorney for A.R. DeMarco, Inc. Interviewed on 11/8/00.

(All of these interviews were tape recorded. Typed transcripts of the interviews, which provide statements quoted in this Report, appear in Appendix II.)

CAPEHART & SCATCHARD, P.A.

SUMMARY OF SETTLEMENT BETWEEN
A.R. DeMARCO ENTERPRISES AND NJDEP

1. More than a full square mile of undeveloped, privately-owned land will be deeded for permanent preservation as open space.

   a. Approximately 591 acres of privately-owned land located in Tabernacle Township will be deed restricted for preservation purposes, prohibiting any large-scale clearing of vegetation or tilling of soil for agricultural purposes. These acres are located within the largest area of unbroken forest in the State, and provide high-quality natural habitat for a wide variety of wildlife species, including 35 species of mammals and 150 bird species reported to occur within the interior of the Wading River watershed. These acres are also adjacent to the Wharton State Forest and include a short segment of the Batona Trail, which will be dedicated for public access as a result of the settlement.

   b. Approximately 74 acres of Pinelands forest will be dedicated to the State parks system. Approximately 50 acres of land located in Bass River Township, which had previously been sought by DEP for acquisition as open space, will be dedicated for inclusion in the Bass River State Forest, and approximately 20 of those acres contain a rare Pygmy Pine Forest. Another 25-acre parcel located in Woodland Township will be deeded to the State for preservation and will be administered by the Natural Lands Trust.

   c. DEP estimates that the value of the property included in the settlement is a minimum of $300,000 which, according to DEP, compensates for any monetary penalties that DEP might have assessed in this matter.

2. A.R. DeMarco Enterprises, Inc. applied to DEP to obtain a "general permit" for construction of the 22 acres of cranberry bogs at issue. A DEP "general permit" authorizes certain activities in wetlands which, by their nature, have only minimal adverse impacts on the functions and values of freshwater wetlands. In 1999 DEP established a "general permit" for the expansion of cranberry bogs located within the Pinelands National Reserve. The United States Environmental Protection Agency approved DEP's establishment of a "general permit" for the expansion of cranberry bogs in the Pinelands.

3. The State of New Jersey purchased and retired the Pinelands Development Credits ("PDC's") allocated by the Pinelands Commission to the Tabernacle Township property. PDC's are transferable use rights established by the Pinelands Commission for properties which were the most heavily restricted against development pursuant to the Comprehensive Management Plan. PDC's are ordinarily available for sale to private developers for purposes of increasing the density of developments located in the growth

areas of the Pinelands. DeMarco could not have utilized the PDC's to develop the Tabernacle property. The sale price for the PDC's acquired by the State was substantially less than the current market price for the sale of PDC's to private developers. In addition, the PDC's acquired by the State have been retired from the private marketplace, thereby limiting an increase in the density of available development in the growth areas of the Pinelands.

a. A deed restriction permitting large-scale agricultural activities and prohibiting public access to the property was imposed on the Tabernacle Township lands as a condition of the Pinelands Commission's allocation of PDC's to the property. The deed restriction to be imposed as a result of DeMarco's settlement with DEP prohibits any such large-scale agricultural activities, including any widespread clearing of vegetation or the tilling of soil, and establishes permanent public access to the portion of the property containing a segment of the Batona Trail, at no cost to the State.

4. A.R. DeMarco Enterprises, Inc. made no admission of liability pursuant to the settlement with DEP. Moreover, the 22 acres of land in the location of the cranberry bog construction were previously utilized by the overall farming operation for purposes of irrigating and storing flood waters from adjacent bogs, and as a result the area may have been considered exempt from regulation according to an available state law exemption for farming activities which take place in freshwater wetlands.

5. Had DeMarco sold the PDC's available on the 591 acres in Tabernacle without accepting the additional deed restrictions set forth in the settlement with DEP, DeMarco could have: 1) continued to farm the property and, in theory, cleared the forest; or 2) DeMarco could have sold the property for appropriate farming uses (i.e., "berry" farming, but not for cranberry farming given the property's upland characteristics), which could have involved clearing the forest. In addition, no right of public access to the property was established by selling the PDC's to the State. By contrast, the settlement with DEP included relinquishing additional development rights (including large-scale farming operations) and imposing a permanent conservation easement over the property, as well as establishing permanent public access through a portion of the property at no additional cost. In addition, the settlement requires DeMarco to transfer title to an additional 74 acres of pristine wilderness to the State for permanent preservation.

6. DEP's Green Acres program previously sought to acquire the Tabernacle property, as well as 57.9 acres of the Bass River lands to be deeded to the State by DeMarco, for open space purposes, and by appraisals prepared for DEP in April, 1998 DEP valued the lands in Tabernacle and Bass River at $286,000. In a rebuttal appraisal prepared on behalf of DeMarco and submitted to DEP in October, 1998, DeMarco's appraiser emphasized how DEP incorrectly determined that the highest and best use of the Tabernacle lands was for recreation and conservation, as opposed to the agricultural uses permitted by Pinelands

zoning. DeMarco's appraiser valued the Tabernacle lands at $650,500, and valued the 57.9 acres of the Bass River lands at $52,000, for a total value of $702,500. The value of the agricultural uses of the Tabernacle lands which will be effectively extinguished by the conservation easement proposed in the settlement with DEP is therefore probably even higher than the value estimated by DEP pursuant to the settlement.

7. The value of the PDC's (i.e., the transferable development rights) associated with the Tabernacle property and the value of the underlying real estate and its developability under current zoning laws are entirely separate and unique issues, and the value of the PDC's (transferable development rights) associated with the property is irrelevant for purposes of determining the value of the development rights in the underlying real estate which will be extinguished as a result of the settlement with DEP. For example, in its April, 1998 appraisal of the Tabernacle property, not only did DEP value the lands in Tabernacle and Bass River at $286,000, but DEP separately valued the PDC's associated with the property at $363,000. DEP arrived at its estimate of value for the PDC's based solely on an analysis of the 1997-98 market rate among buyers and sellers of PDC's, which typically fluctuates as a function of supply and demand for PDC's and the corresponding pressures of a changing housing market. In other words, DEP's estimate of the value of the PDC's associated with the Tabernacle property had nothing to do with the value of the underlying real estate in Tabernacle. Moreover, the price paid by the State for the PDC's in 2000 reflects a substantial increase in the market value of PDC's which resulted from a 1999 public auction. As a result of that auction, the minimum value of PDC's roughly doubled, from $12,000 in 1997-98 to approximately $22,500 in 2000.

8. Even if DeMarco sold and retired all of the PDC's (transferable development rights) associated with the Tabernacle property, the land itself still had value, and still had development potential for agricultural purposes. The conservation easement proposed in the ACO greatly inhibits the land's development potential for agricultural purposes and its market value, which can be determined by the appraisals prepared by DEP and by DeMarco's appraiser in 1998.

State of New Jersey

.cman | Department of Environmental Protection | Robert C. Shinn, Jr. *Commissioner*

MEMORANDUM

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

O: Robert C. Shinn, Jr., Commissioner

HROUGH: Ray Cantor, Assistant Commissioner

ROM: Lee Cattaneo, Administrator Lee

UBJECT: FILE# 0339-98-0002, Block 4106, Lot 5.01, Part Lot 3,
Woodland Township, Burlington County., A.R DeMarco Enterprises Inc.

ATE: April 27, 1999

ACKGROUND

As a result of a referral from the US EPA Region 2, Coastal and Land Use Compliance and nforcement conducted a preliminary investigation of three possible freshwater wetland violations in urlington County where there were ongoing agricultural activities related to cranberry cultivation. As a sult of the preliminary investigation at the A. R. DeMarco Enterprises, Inc. (DeMarco) site, a notice of iolation was issued on October 19, 1998 for the discharge of dredged or fill material for the purpose of onversion or alteration of an estimated 19 acres of forested freshwater wetlands into an agricultural area cranberry bog) in violation of the Freshwater Wetlands Protection Act. The NOV allowed for three ifferent courses of action for the resolution of the violation. The options were to document that the ctivities were exempt, to submit a mitigation and restoration proposal for the removal of the violation nd the restoration of the site or to submit a complete Freshwater Wetlands Permit Application for review vith the appropriate fee and required information.

On October 29, 1998, Counsel for DeMarco responded by first informing the Department that an nvironmental consultant investigated the property and concluded that the "subject property did not ontain freshwater wetlands because it met none of the criteria for identifying the presence of wetlands, ydric soils, wetland vegetation not wetland hydrology". The letter requested that the Department vithdraw the Notice of Violation and further requested that if the Department possessed any additional nformation to support its allegation that it forward this information for further review. Finally, the letter equested that if the Department wished to pursue the matter, that the Department meet with DeMarco at ts earliest convenience to discuss the matter in detail.

EXHIBIT 3

RECENT ACTIVITIES:

In late January of 1999 Coastal and Land Use Compliance and Enforcement assembled an investigation team consisting of representatives from the Departments Coastal & Land Use Compliance and Enforcement Program, the Land Use Regulation Program and the Pinelands Commission to gather additional information and to establish the extent of regulatory jurisdiction.

The investigation team reviewed historical aerial photography of the site from 1951 to 1995 in an effort to establish a site history and observe past vegetation patterns and hydrological indicators on the property. Further consultation with representatives both in house and from the Pinelands Commission skilled in the interpretation of aerial photography led to the selection of proposed site sampling locations based on historic photo signatures imparted by observed vegetative communities, saturation patterns and terrene relief observable on historic aerial photographs. On March 12, 1999 a helicopter over flight was performed with assistance from the New Jersey State Police Aviation Division stationed out of Mercer County Airport. The flight was used to over view and document the present extent of work activities performed on the site and to further assist with establishing sampling locations.

On April 12, 1999 a site inspection was performed by the investigation team to gather on site information in an effort to establish the extent of work activities occurring in Freshwater Wetlands on the property. Assisting in the investigation were representatives from NJDEP'S Division of Information Resource Management Geographic Information and Analysis, the New Jersey Division of Law, the New Jersey Pinelands Commission and the United States Department of Agriculture, Natural Resources Conservation Service.

During this inspection, Geographic Positioning System (GPS) work proceeded in establishing the outbound locations of the newly constructed dikes and work activity areas as well flagging sampling locations previously established in accordance with prior aerial photograph signature observations including additional sampling locations established by on site observations. Vegetative community classification, soils information and hydrological observations were performed in accordance with the January 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands and the January 1991 New Jersey Pinelands Commission Manual for Identifying and Delineating Pinelands Area Wetlands (Pinelands Supplement to the Federal Manual).

One sampling site included a remnant area of hydric Atsion type soils within a bog under construction. Atsion soils were suspected due to the uniform dark gray/blackish appearance of the bogs surface in this area and the evident soil saturation observed despite influences the perimeter ditch constructed around the bogs interior perimeter (points I and M on the attached GIS imagery). Sampling at these points revealed intact profiles of an Atsion soil. The remnant plant community in this location was dominated with hydrophytic wetland vegetation and observations of a water table within one foot of the surface fulfilled all three wetlands parameters necessary to classify this area as a wetland. Additional sampling locations were within intact areas of pitch pine lowlands (point A) and points.K and L. All three wetland parameters were found in these locations also. One sample was taken in a typical upland area (point H) to provide a base line for contrasting soil profiling, vegetative community composition and to further assist with photo signature ground validation.

Preliminary observations of the 1986 wetland mapping coverage applied to the existing GIS imagery suggests that the site activity has impacted 22 acres of freshwater wetlands. This estimate is due

to be refined through the use of additional ground validation data gathered during this inspection as it is applied to expanded photo signature areas.

The program is currently in the process of preparing a detailed report documenting our observations. With further photographic observations and ground validation applied using the information gathered during the inspection, the program believes that a successful defense of the extent of freshwater wetlands encroachment on the property can be established. We will be meeting with DeMarco and counsel to discuss the findings of our inspection and, hopefully, to discuss settlement options.

Attachments:
GIS imagery (sampling areas, outbound site activity, additional coverages applied)
Overflight Photograph 3-12-99

New Jersey
Department of Environmental Protection

PRESS OFFICE
CN 402
Trenton, New Jersey 08625-0402

Christine Todd Whitman, *Governor*
Robert C. Shinn, Jr., *Commissioner*

NEWS

RELEASE: 8/11/00 CONTACT: Peter Page at (609) 984-1795 or (609)292-2994
00/82

DEP REACHES LARGEST EVER SETTLEMENT OF WETLANDS VIOLATION

More than a full square mile of undeveloped, privately owned land will be deeded for permanent preservation as open space in the largest settlement ever for a violation of the New Jersey Freshwater Wetlands Protection Act. The settlement, negotiated by the state Department of Environmental Protection and A.R. DeMarco Enterprises, Inc., of Hammonton, will result in deed restrictions precluding development of 591 acres and the donation of approximately 74 acres of Pinelands to the state parks system for permanent preservation as open space.

DeMarco Enterprises voluntarily negotiated the settlement but gave no admission of liability. The agreement is memorialized in an Administrative Consent Order (ACO) executed Thursday. The violation of the state Freshwater Wetlands Protection Act occurred in October 1998 when DeMarco Enterprises converted 22 acres of regulated freshwater wetlands into cranberry bogs without first obtaining a state Freshwater Wetlands permit.

The settlement will allow DeMarco Enterprises to keep the 22 acres of freshwater wetlands as a cranberry agricultural operation, provided that they obtain a permit.

Highlights of the settlement include:

* Donation of two parcels in Bass River Township, Burlington County, to the state for inclusion in Bass River State Forest. One parcel is 29.1 acres and is surrounded by Bass River State Forest. The second parcel is 19.5 acres of rare Pygmy Pine Forest. Both parcels have been sought by DEP for acquisition as open space. DEP's Division of Parks and Forestry will administer the lands.

* A 25-acre parcel in Woodland Township, Burlington County, will be deeded to the state and administered by the Natural Lands Trust.

*An undeveloped 591-acre swath of forest in Tabernacle Township, Burlington County, will be protected by a deed restriction permanently precluding development. The land borders Wharton State Forest and includes a short segment of the Batona Trail. The property is open land within the largest area of unbroken forest in the state. Although there is no immediate development pressure on the land, the deed restriction and conservation easement allow a publicly accessible corridor and scenic buffer for the Batona Trail. The land is high-quality habitat for a variety of wildlife, including 35 species of mammals and 150 bird species residing in the Wading River watershed. DEP's Division of Parks and Forestry will administer the conservation easement.

EXHIBIT 4

"The property is worth a minimum of $300,000, and probably more, making this the largest settlement of a Freshwater Wetlands case since the law took effect in 1988," said Assistant Commissioner of Land Use Regulation Ray Cantor. "This compensates for any monetary penalties that would have been assessed for the conversion of wetlands without obtaining a permit.

By law, wetlands cannot be disturbed or altered without a state permit. DeMarco Enterprises could have applied for an individual wetlands permit at the time of the conversion. Under a regulation that took effect in April, cranberry growers in the Pinelands can apply for a general permit to convert wetlands to cranberry bogs. The regulation allows the conversion of a maximum of 300 acres of wetlands over the next five years, at a rate of no more than 60 acres per year. Each grower is limited to a maximum wetland expansion of 10 acres in any given year. The 10 acre per year restriction will require DeMarco Enterprises to annually apply for a general permit for the 22 acre conversion over the next three years.

"The Department respects the right of farmers to farm cranberries in the Pinelands, including the right to expand bogs," said Cantor. "The Freshwater Wetlands Act allows for legitimate uses of wetlands but it is crucial that wetland conversions be limited and regulated. This settlement amply compensates for any ecological damage done by the unpermitted conversion of the 22 acres to cranberry bogs and should make it clear to everyone that protection of wetlands is a serious priority of the department."

DEP issued a Notice of Violation (NOV) to DeMarco Enterprises on Oct. 19, 1998. DeMarco Enterprises is one of six cranberry growers who have been issued NOV's by the DEP for violation of the Freshwater Wetlands Act. Settlements of those violations, all of which involve much less acreage than in the DeMarco Enterprises case, are still being finalized.

###

State of New Jersey

Christine Todd Whitman
Governor

Department of Environmental Protection

Robert C. Shinn,
Commissio

BUREAU OF COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT
1510 HOOPER AVENUE
TOMS RIVER, NEW JERSEY 08753
TELEPHONE NO. 732-255-0757
FAX NO. 732-255-0877

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Z 566-230-757

A. R. DeMarco Enterprises, Inc.
44 North Packard Street
Hammonton, New Jersey 08037

NOTICE OF VIOLATION OF N.J.S.A. 13:9B-1 et seq.,
The Freshwater Wetlands Protection Act

Re: Bureau File # 0339-98-0002
A. R. DeMarco Enterprises, Inc.
Block 4601, Lot 5.01 and p/o Lot 3,
Woodland Township, Burlington County

Gentlemen:

On May 5, 1998, an inspection of the above referenced site was conducted by personnel from the Bureau of Coastal and Land Use Compliance and Enforcement. The inspection revealed a possible violation of the New Jersey Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.) and the subsequent Rules and Regulations implementing the Act (N.J.A.C. 7:7A-1 et seq.). The subject activity is described as follows:

The discharge of dredged or fill material for the purpose of conversion or alteration of approximately 19 acres of forested freshwater wetlands into an agricultural area (cranberry bog) in violation of the Freshwater Wetlands Protection Act.

In accordance with N.J.S.A. 13:9B-9(a), "A person proposing to engage in a regulated activity shall apply to the Department for a Freshwater Wetland Permit". Please be advised that

EXHIBIT 5

violations of N.J.S.A. 13:9B-1 et seq., may result in the assessment of penalties of up to $10,000 for each violation. Each day during which each violation continues constitutes an additional, separate and distinct offense.

Since you may be in violation of the Act, you are hereby advised to refrain from conducting, contracting, or permitting any further work at the site which may constitute a violation of the Act. Failure to cease conducting regulated or prohibited activities and to comply with the requirements contained in this letter may result in further enforcement action including the imposition of additional monetary penalties accruing on a daily basis for every day the violation continues.

In order to address this matter, the following courses of action are available to you:

1. Submit to this office, within 10 calendar days of receipt of this letter, documentation which would demonstrate that the aforementioned regulated activities are exempted from the Freshwater Wetlands Protection Act and have reached advanced stages of construction by March 2, 1994 (see Appendix "A"); pursuant to N.J.A.C. 7:7A-1.4; OR

2. Submit to this office, within 30 calendar days of receipt of this letter, a mitigation proposal, prepared in accordance with N.J.A.C. 7:7A-14.4, for removal of the violation and restoration of the site. The proposal shall include a stabilization narrative for the disturbed area in accordance with procedures outlined in "Standards for Soil Erosion and Sediment Control in New Jersey". In addition, the proposal shall include a time schedule for the implementation and completion of the above. This action will require prior approval from this office; OR

3. Submit, within 30 calendar days of receipt of this letter, a completed Freshwater Wetlands Permit Application for review along with the appropriate fee and required data to the New Jersey Department of Environmental Protection, Land Use Regulation Program, P.O. Box 439, Trenton, New Jersey 08625, with a copy of the LURP-1 form sent to this office. The results of this review may be approval, conditional approval with possible partial restoration, or denial. Although you have been afforded this option, please be advised that the regulated activities conducted at the above referenced property may not qualify for a permit under the provisions of N.J.A.C. 7:7A-9.1. In the event of a denial you will be required to implement course of action number 2 noted above.

You must submit a written reply, within 10 calendar days of receipt of this letter specifying which of the courses of action outlined above you plan to pursue including a time schedule in which compliance will occur.

Furthermore, should the Department confirm that a violation has in fact occurred, compliance with the requirements contained in this letter does not relieve you of your liability, including any applicable monetary penalty, from having conducted, or conducting in the future,

regulated activities within a freshwater wetlands without a permit. In addition, compliance does not relieve you from any further liabilities for violations of other State, Federal or local statutes in connection with your project.

In conclusion, you are required to take all measures necessary to stabilize the site pursuant to Soil Erosion and Sediment Control Standards promulgated under P.L. Chapter 251, within 10 days. Be advised that any stabilization measures taken, although accomplished in accordance with applicable standards, may be temporary in nature and may require modification at some future date.

Should you have any questions regarding this matter, please contact John Higgins, Case Manager, at the New Jersey Department of Environmental Protection, Bureau of Coastal and Land Use Compliance and Enforcement, 1510 Hooper Avenue, Toms River, New Jersey 08753 or by telephone at 732-255-0787.

For Chief,
Bureau of Coastal and Land Use
Compliance and Enforcement

Date: Oct 19, 1998

By: Lynn Conover
Lynn Conover, Region Supervisor

c: Leroy Cattaneo, Administrator
Peter Lynch, Chief
Municipal Construction Official
Dan Montella, EPA, Region II
Jeff Stein, ACOE, Phila. District
Soil Conservation District

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R. PAULSEN
N SAGINARIO JR.
P. KOWALSKI
NY T. DROLLAS, JR.

October 29, 1998

VIA OVERNIGHT MAIL

Lynn Conover
Region Supervisor
Bureau of Coastal and Land Use Compliance
and Enforcement
New Jersey Department of Environmental Protection
1510 Hooper Avenue
Toms River, New Jersey 08753

Re: Notice of Violation dated October 19, 1998
DEP File No.: 0339-98-0002
A.R. DeMarco Enterprises, Inc.
Block 4601, Lot 5.01 and p/o Lot 3
Woodland Township, Burlington County

Dear Mr. Conover:

We represent A.R. DeMarco Enterprises, Inc. in the above matter. Please accept this letter in response to the Department's Notice of Violation dated October 19, 1998 alleging a possible violation of the New Jersey Freshwater Wetlands Protection Act on the above-referenced property.

After reviewing the Notice of Violation and discussing this matter with our client, it is our understanding that our client investigated and responded to similar allegations raised by the Department earlier this year. Indeed, we understand that our client responded to an inquiry from the Department regarding the possible disturbance of freshwater wetlands on the site which had been prompted by random surveillance conducted by the Environmental Protection Agency. By letter report dated April 23, 1998, Francis Pandullo, P.E., of Omega Engineering Services, Mt. Laurel, New Jersey, investigated the subject property for purposes of determining the presence of freshwater wetlands. Mr. Pandullo's report, which is attached, investigated the subject property according to the standard three-parameter approach for identifying the presence of freshwater wetlands, and concluded that the subject property did not contain freshwater wetlands because it met none of the criteria for identifying the presence of hydric soils, wetlauds vegetation, and wetlands hydrology. We also understand that Mr. Pandullo's report was transmitted earlier this year to the enforcement group of the Department's Land Use Regulation Program.

EXHIBIT 6

Since the subject property does not contain freshwater wetlands -- which has been our position in this matter since its inception earlier this year -- there appears to be no factual basis for the Department to allege a possible violation of the Freshwater Wetlands Protection Act, nor to assert jurisdiction over the activities on the property. Under these circumstances, we respectfully request that the Notice of Violation dated October 19, 1998 be withdrawn.

If the Department is in possession of any additional information in support of its allegation of a possible violation of the Freshwater Wetlands Protection Act on the site, we hereby request that the Department immediately produce that information for our review and further response, if appropriate.

Finally, to the extent that the Department wishes to pursue this matter, we hereby request the opportunity to meet with you at your earliest convenience to discuss all aspects of this matter in detail.

If you have any further questions or require any additional information, please contact me immediately.

Very truly yours,

Anthony T. Drollas, Jr.

c: P. Slavin
F. Pandullo
J. Higgins
L. Cattaneo

l.conover.01

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R. PAULSEN
I SAGINARIO JR.
. KOWALSKI
Y T. DROLLAS, JR.

October 19, 1999

Leroy Cattaneo
New Jersey Department of Environmental Protection
P.O. Box 401
401 East State Street
Trenton, New Jersey 08625

Re: New Jersey DEP v. A.R. DeMarco Enterprises
DEP file No. 339-98-0002

Dear Mr. Cattaneo:

Please accept this letter as an update on the status of the above matter. Since this letter discusses the status of a potential settlement, this letter is therefore privileged and may not be used as evidence in this or in any other matter.

As we discussed by telephone on October 18, 1999, we are currently awaiting a response from DEP and EPA with respect to the terms of a potential settlement that you and I discussed in late September, which included our client's general agreement to apply for the newly-established DEP general permit governing the expansion of cranberry bogs for the 19-acre area on the subject property where DEP alleges that cranberry bogs have been established without the required DEP approval. In this regard, on behalf of our client we requested that DEP provide us with an estimate of the total number of acres within the subject 19-acre area in which cranberry farming and related activities in freshwater wetlands would be authorized by the general permit.

In addition, you will recall that our client's general agreement to apply for the general permit would be conditioned upon the payment of a reasonable monetary penalty, should DEP demand the payment of a monetary penalty as part of a settlement of this case. As we discussed, should DEP issue a disproportionately large penalty demand in this matter, our client would be far less inclined to entertain the permit application process. In addition, our client's general agreement to apply for the general permit would be conditioned upon the issuance of a general release by DEP to our client with respect to liability for activities which may have occurred on the subject 19-acre area on the property, as well as an acknowledgment by DEP that it does not intend to pursue any other similar violations against our client with respect to this or any other properties.

EXHIBIT 7

Thank you for your cooperation. If you have any other questions on this matter, please contact me.

Very truly yours,

Anthony T. Drollas, Jr.

Sept 15, 2000

To: File Dennis B Davidson
From Dennis B. Davidson
Re: DeMarco Settlement file
The following is a chronological outline and summary of the Green Acres role in the above settlement case as it relates to value.

On Aug 3 Cari Wild forwarded to Tom Wells and I via email a draft summary of information concerning the above file. I reviewed that information and found several factual errors dealing with lot numbers, acreage numbers, and other information that had been listed. I was also concerned about value conclusions listed in this summary. I contacted Lee Cattaneo and described to him several of the errors. Lee complained at that time that Green Acres had not been responsive to his office on this issue previously. I explained that this was the first time that I had seen any thing on this issue. I further explained that I did not think that the value that was indicated in the draft ($594,000) could be supported because the Pineland Development credits had been severed from the 591-acre parcel thus reducing the value of the parcel substantially.

After this discussion I spent some time reviewing old appraisal reports that had been prepared as part of a past effort by Green Acres to purchase much of the land in the settlement. I concluded that while the overall proposal looked good as far as what it accomplished in terms of land preservation but that it could not support $594000 in value.

I then met with Tom Wells to describe to him some of the problems that I saw in the document. I explained that there were technical errors that needed fixing but more importantly that the value judgements were flawed.

Tom and I then met with Cari Wild. We outlined some of the problems to Cari who then called Mr. Cantor. She told Ray that we could not support the $594,00 figure. Mr. Cantor explained that he did not need the full value but need to be in the range of $300,000. Cari explained that this was a settlement and that the Department did not need appraisal report but only a overall "sense of value." At that point we suggested that it was a complex valuation problem but that we felt that there was the potential to justify $300,000 subject to further analasis.

I then called back Lee Cattaneo and explained that I felt the overall settlement was a good one as far as Green Acres was concerned in that it would be accomplishing almost all of the things that we had been trying to accomplish two years earlier in our acquisition effort. (That we would guarantee a wooded buffer next to Apple Pie Hill - one of the premiere viewing areas with in the pines, that we would be protecting the public access to the Botona trail, and that we would be further limiting any development potential for agricultural purposes). I further stated however that placing a monetary value on the deal would be a difficult problem. It would be unlikely that there would be comparable sales and any valuation would be difficult to explain. I further said that in my opinion that DEP should be justifying the settlement in the context – what it accomplishes not what it is worth. Lee said that he agreed and that they would be removing all reference to value in the settlement summary. Lee had further indicated that the process could allow for adjustment after public comment.
We then went through and corrected the various errors on the document concerning acreage and various Lot and Block number.

I then told Lee that I would send over a short memo correcting the information concerning the original appraisals. No further work was completed on value justification.

On Aug 11 I was forwarded via email a corrected summary document. That document included no reference to values as Lee had previously indicated.

EXHIBIT 8

On Aug 18 I was copied on an email from Ray Cantor indicating that he told the press that they had relied on Green Acres to support the values. Mr. Peter Page then replied that the issue should be discussed on its merits not on its value. I replied via email that I agreed with Peter especially since we told them is was a stretch to justify it based on monetary value. And "That the deal is a good one in what it accomplishes not what its monetary value would be."

Over the last several weeks I took the opportunity to discuss the value problem with various staff members, in order to confirm our earliest suggestion that $300,000 could be plausible. This included primarily Tom Wells, Jack Ross, Tony Derrico and John Flynn.

We had the opportunity to review several more appraisal reports, which have been prepared on lands that have had the PDCs removed. The lowest of these reports were indicated $700 an acre in the after value. Using that number, as a basis we felt that it was reasonable to suggest that a more restrictive conservation easement would further damage the property by up to 50%. This is a common factor used in rural areas when we place a conservation easement. Where Land has a high development value a higher % is used and where land has a lower development potential a lower % is used. At this rate the value of the easement would be +-350 an acre or a total value for the 591 acres of $206,850.
In addition the settlement will provide for 73.5 acres in fee. Trends in the pinelands of similar land have been showing about $1200 an acre (up about 20% over the last couple of years.) 1200 X 73.5 = $88,200
Thus a total "estimate of value" is $295,050.

We also looked at some other methods including using the old appraisals and adjusting for time and looking at the forestry values. We felt that these methods would more be more difficult and even harder to explain generally.

IN THE MATTER OF:

ADMINISTRATIVE CONSENT ORDER

A. R. DeMarco Enterprises, Inc. :
44 North Packard Street :
Hammonton, New Jersey :

The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection ("NJDEP" or the "Department") by N.J.S.A. 13:1D-1 et seq., and the Freshwater Wetlands Protection Act, N.J.S.A. 13: 9B-1 et seq. (the Act), and duly delegated to the Assistant Commissioner of Land Use Management and Compliance or their assignee pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. A. R. DeMarco Enterprises, Inc., 44 North Packard Street, Hammonton, New Jersey 08037 is the owner of record for the property located at Block 4601 Part Lot 3 Woodland Township, Burlington County, New Jersey (hereinafter "the site"). The site is part of a cranberry growing operation conducted by A. R. DeMarco Enterprises, Inc.. Mr. J. Garfield DeMarco is a principal of A. R. DeMarco Enterprises, Inc. and Mr. Patrick Slavin is the Site Manager.

2. On May 5, 1998, representatives of the Department conducted an inspection of the site in response to a report that activities regulated pursuant to the Act were being conducted without the required permits.

3. Following the above referenced inspection, the Department determined that activities regulated pursuant to the Act, including the placement of fill material in freshwater wetlands, had occurred on the site without the required permits having been obtained.

4. On October 19, 1998, the Department issued a notice of violation of the Act to A. R. DeMarco, Enterprises, Inc. alleging a possible violation of the New Jersey Freshwater Wetlands Protection Act and the Department's Rules and Regulations.

5. A. R. DeMarco Enterprises, Inc. responded to the notice of violation and certain exchange of information and meetings occurred between representatives of A. R. DeMarco Enterprises, Inc. and the Department in an effort to resolve the matter.

6. On April 12, 1999, representatives of the Department conducted a comprehensive investigation of the site which, according to the Department, documented that A. R. DeMarco Enterprises, Inc. has conducted unauthorized activities including the discharge of dredged or fill material for the creation of cranberry bogs and associated facilities within previously undisturbed wetland areas, resulting in the disturbance of approximately 22 acres of regulated freshwater wetlands. The dumping, discharging or filling with any materials is included within the definition of "regulated activities" at N.J.S.A. 13:9B-3 and N.J.A.C. 7:7A-2.3. According to the Department said activities were conducted in the absence of obtaining a freshwater wetlands

permit resulting in a violation of N.J.S.A. 13:9B-1et seq.

7. On May 14, 1999 in a further attempt to resolve this matter, representatives of the Department met with representatives of A. R. DeMarco Enterprises, Inc. As previously stated in the October 19, 1998 Notice of Violation, the options of applying for a permit or restoring the affected freshwater wetlands were again explained to the representatives of A.R. DeMarco Enterprises, Inc. Representatives of A. R. DeMarco Enterprises, Inc. requested additional time to reach a decision and inform the Department of their course of action.

8. Since the May 14, 1999 meeting, representatives of the Department and representatives of A. R. DeMarco Enterprises, Inc. have had numerous discussions and several meetings in an ongoing effort to resolve this matter. Meetings during March 2000 established a basis of settlement which was acceptable to the Department and A. R. DeMarco Enterprises, Inc. Subsequent discussions and exchanges of information established the specifics of the settlement which are embodied in this Administrative Consent Order.

9. On July 3, 2000, A. R. DeMarco Enterprises, Inc. submitted an application to the Department for authorization under Statewide General Permit 23 for 10 acres of the loss and/or disturbance of freshwater wetlands described in the findings of this Administrative Consent Order.

10. Based on the facts set forth in these FINDINGS, the Department has determined that A.R. DeMarco Enterprises, Inc., has violated the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and the regulations promulgated pursuant thereto, N.J.A.C. 7:7A-1 et seq., specifically N.J.A.C. 7:7A-2.2.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED AND AGREED THAT:

11. Upon execution of this Administrative Consent Order, A. R. DeMarco Enterprises shall not conduct any activities on the site that are regulated by the Act without the prior authorization of the Department.

12. No later than January 1, 2001, A. R. DeMarco Enterprises, Inc. shall submit a complete application to the Department for authorization under Statewide General Permit 23 for 10 acres of the loss and/or disturbance of freshwater wetlands described in the findings of this Administrative Consent Order.

13. No later than January 1, 2002, A. R. DeMarco Enterprises, Inc. shall submit a complete

application to the Department for authorization under Statewide General Permit 23 for the balance of the acres of loss and/or disturbance of freshwater wetlands described in the findings of this Administrative Consent Order which have not received authorization from the Department.

14. The Department's review of the applications submitted pursuant to paragraphs 9, 12 and 13 above may result in approval, partial approval or denial. In the event that a partial approval and/or denial of any of these applications makes it impossible to obtain authorization for the total number of acres of loss and/or disturbance of freshwater wetlands described in the findings of this Administrative Consent Order by March 1, 2002, A. R. DeMarco Enterprises, Inc. shall, within 90 days of the date of such occurrence, submit to the Department, either an application for a freshwater wetlands individual permit or a restoration plan for the acres of loss and/or disturbance of freshwater wetlands that did not obtain authorization. In the event A. R. DeMarco Enterprises, Inc. elects to submit an application for a freshwater wetlands individual permit pursuant to this paragraph and such application is denied, A. R. DeMarco Enterprises, Inc. shall submit and implement a restoration proposal as specified in paragraphs 16 through 21 below. The Department shall not unreasonably withhold its approval of the general permit applications submitted by A. R. DeMarco Enterprises, Inc. pursuant to paragraphs 12, 13 and 14 above. Nothing herein shall preclude A. R. DeMarco Enterprises, Inc. from requesting an administrative hearing and appeal from any partial approval and / or denial or rejection by the Department of the above-referenced permit applications, and / or from any denial or rejection by the Department of any application for an individual permit submitted pursuant to this Administrative Consent Order.

15. In lieu of submitting applications for permits for the loss and/or disturbance of the freshwater wetlands described in the findings of this Administrative Consent Order, A. R. DeMarco Enterprises, Inc. may submit within the same time frames provided in paragraphs 12, 13 and 14 above, a restoration proposal as specified in paragraphs 16 through 21 below.

16. Any restoration proposal submitted pursuant to paragraph 14 above shall be prepared in accordance with N.J.A.C. 7:7A-14.4 for removal of the fill, re-vegetation and restoration of the freshwater wetlands that did not obtain authorization. The proposal shall include a stabilization narrative for the disturbed area in accordance with procedures outlined in "Standards for Soil Erosion and Sediment Control in New Jersey". In addition, the proposal shall include a time schedule for the implementation and completion of the above and a guarantee of 85 percent areal coverage of vegetation over a three year growing period. The Department shall not unreasonably deny approval of a restoration proposal submitted in accordance with this paragraph.

17. Should the Department determine that any part of a restoration proposal submitted by A. R. DeMarco Enterprises, Inc. is inadequate or incomplete, the Department shall provide the submitter with written comments on the proposal. Within 30 calendar days of the Department's comments on the proposal, A. R. DeMarco Enterprises, Inc. shall modify the proposal to conform with the Department's comments and submit the modified plan to the Department. The determination of whether or not the modified proposal, as resubmitted, conforms to the Department's comments shall be made solely by the Department. The Department shall not unreasonably deny approval of a modified restoration proposal submitted in accordance with this paragraph.

18. Within 30 calendar days after receipt of the Department's final approval of the restoration proposal, A. R. DeMarco Enterprises, Inc. shall commence the implementation of the final approved restoration plan in accordance with the approved schedule.

19. A three-year monitoring and maintenance plan is required for any restoration area. A. R. DeMarco Enterprises, Inc. shall submit a monitoring report, which summarizes the implementation and success or failure of the restoration area. The first report shall be submitted one year from the date of completion and two subsequent reports shall be submitted at one-year intervals thereafter. Should the restoration activities not achieve 85% survival and 85% areal coverage of the required plantings, the Department shall require additional restoration activities as described in paragraph 20 below.

20. Should the Department determine that the restoration activities did not achieve 85% survival and 85% areal coverage of the required plantings, the Department shall provide A. R. DeMarco Enterprises, Inc. with written comments for the replanting required. Within 30 calendar days of the Department's comments for replanting, A. R. DeMarco Enterprises, Inc. conform with the Department's comments and replant the area to conform with the originally approved planting plan provided within the restoration plan referenced in paragraph 14 above.

21. A. R. DeMarco Enterprises, Inc. shall notify the Department by telefax (609-292-1803) at least 72 hours prior to the commencement of the approved restoration proposal. In addition, A. R. DeMarco Enterprises, Inc. shall notify the Department within seven calendar days of completion of the final grading in the restoration area.

22. The date when the ACO is signed by the parties prior to the commencement of the time period for public comment shall be referred to as the "execution date". Following the execution date, DEP shall publish notice of this Administrative Consent Order ("ACO") in the DEP Bulletin affording a thirty-day time period for public comment prior to the ACO becoming final and effective. If at the end of the public comment period DEP notifies DeMarco that DEP will not seek to add or revise any terms in the ACO, the date when DEP so notifies DeMarco shall be referred to as the "final effective date" of the ACO. If at the end of the public comment period DEP seeks to add or revise terms in the ACO that were not agreed to as of the execution date, DEP shall so notify DeMarco no later than 15 days after the end of the public comment period. If DeMarco agrees to those terms, then this ACO shall be amended in writing and signed by both parties, and the date when the amended ACO is signed by both parties shall be referred to as the "final effective date" of the ACO. If DeMarco does not agree to those terms within fifteen days after receiving DEP's notice of proposed modifications to the ACO, then this ACO shall become null and void and of no force and effect.

SETTLEMENT

23. Within 60 days after the effective date of this Administrative Consent Order, A. R. DeMarco Enterprises, Inc. shall transfer to the State of New Jersey clear titles for the following properties to be administered by the Division of Parks and Forestry:

> Block 120, Lot 9 in Bass River Township, Burlington County, comprising approximately 29.1 acres, and
>
> Block 82, Lot 1 in Bass River Township, Burlington County, comprising approximately 19.5 acres.

24. Within 60 days after the effective date of this Administrative Consent Order, A. R DeMarco Enterprises, Inc. shall transfer to the State of New Jersey clear title for the following property to be administered by the Natural Lands Trust:

> Block 102, Lot 5 in Woodland Township, Burlington County, comprising approximately 25 acres.

25. Within 60 days after the effective date of this Administrative Consent Order, A. R. DeMarco Enterprises, Inc. shall effect a permanent deed restriction/conservation easement on Block 2201, Lot 5; Block 2401, Lot 2; Block 2402, Lot 2; and Block 2403, Lot 1 in Tabernacle Township, Burlington County, comprising in total approximately 591 acres. A. R. DeMarco Enterprises, Inc. shall file the deed restriction/conservation easement with the Burlington County Clerk and submit proof of such filing to the Department. The required form and content of the deed restriction/conservation easement is attached to and incorporated into this Administrative Consent Order and designated "Appendix A".

STIPULATED PENALTIES

26. A. R. DeMarco Enterprises, Inc. shall pay stipulated penalties to the Department for failure to comply with any single term or requirement of this Administrative Consent Order, according to the following schedule, unless the Department has modified applicable compliance dates in writing, provided, further that no such stipulated penalties shall be payable by A. R. DeMarco Enterprises, Inc.with respect to such period that said failure to comply results from force majeure, as defined in paragraph 27 below

CALENDAR DAYS AFTER REQUIRED DATE	STIPULATED PENALTIES PER CALENDAR DAY
1 to 7	$100
8 to 14	$200
15 to 21	$300
22 to 28	$400
over 28	$500

Within 14 calendar days after receipt of a written demand from the Department, A. R. DeMarco Enterprises, Inc. shall submit a cashier's or certified check payable to the "Treasurer, State of New Jersey" in the amount of the stipulated penalties demanded by the Department. Payment shall be submitted with the penalty invoice which will be provided with the written demand to the address below:

New Jersey Department of Treasury
Division of Revenue, P.O. Box 417
Trenton, New Jersey 08625-0417

GENERAL PROVISIONS

27. Force Majeure. If any event occurs which purportedly causes or may cause delays in the achievement of any provisions of this Administrative Consent Order, A. R. DeMarco Enterprises, Inc. shall notify the Department, within five calendar days of becoming aware, of this delay or anticipated delay, describing the anticipated length, precise cause or causes, measures taken or to be taken, and the time required to minimize the delay. A. R. DeMarco Enterprises, Inc. shall adopt all reasonable necessary measures to minimize the delay. Failure by A. R. DeMarco Enterprises, Inc. to comply with the notice requirements of this paragraph shall render this Force Majeure provision void and of no effect as to the particular incident involved. If delay or anticipated delay has been or will be caused by circumstances alleged to be beyond the control of the A. R. DeMarco Enterprises, Inc., then the time for performance hereunder shall be extended subject to the approval of the Department, no longer than the delay resulting from such circumstances. However, if the events causing such delay are not found to be beyond the control of the A. R. DeMarco Enterprises, Inc., failure to comply with the provisions of this Administrative Consent Order shall not be excused as herein provided and shall constitute a breach of this Administrative Consent Order. The burden of proving that any delay is caused by circumstances beyond the control of the A. R. DeMarco Enterprises, Inc., and the length of such delay attributable to those circumstances shall rest with A. R. DeMarco Enterprises, Inc. Increases in the costs or expenses incurred in fulfilling the requirements contained herein shall not be basis for an extension of time. A delay in an interim requirement shall not justify or excuse delay in attainment of subsequent requirements unless A. R. DeMarco Enterprises, Inc. can

establish that any such delay in the attainment of subsequent requirements is appropriate pursuant to the Force Majeure provisions of this Administrative Consent Order.

28. All submissions of information required by this Administrative Consent Order shall be mailed to:

PETER LYNCH, ACTING ADMINISTRATOR
COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
401 EAST STATE STREET, P.O. BOX 422
TRENTON, NEW JERSEY 08625-0422

29. Nothing in this Administrative Consent Order shall constitute a waiver of any statutory right of NJDEP pertaining to any of the laws of the State of New Jersey should NJDEP determine that further remedial measures are necessary to protect the public health, safety, welfare, and environment. A. R. DeMarco Enterprises, Inc. hereby consents to and agrees to comply with all the terms and provisions of this Administrative Consent Order, which shall be fully enforceable in the Superior Court of New Jersey which has jurisdiction over the subject matter and signatory parties upon the filing of an action for compliance pursuant to N.J.S.A. 13:9B-1 et seq., and also may be enforced in the same fashion as an Administrative Order issued by this Department pursuant to this same statutory authority. This Administrative Consent Order may be enforced as a binding contractual agreement should A. R. DeMarco Enterprises, Inc. fail to fulfill any obligations or agreements made under it.

30. The provisions of this Administrative Consent Order shall be binding on A. R. DeMarco Enterprises, Inc., its principals, agents, employees, successors, assigns, tenants, and any trustee in bankruptcy or receiver appointed pursuant to a proceeding in law or equity.

31. No obligations imposed by this Administrative Consent Order are intended to constitute a debt, damage claim, penalty or civil action which should be limited or discharged in a bankruptcy proceeding. All obligations imposed by this Administrative Consent Order shall constitute continuing regulatory obligations imposed pursuant to the police powers of the State of New Jersey.

32. By entering into this Administrative Consent Order and taking any actions pursuant to the terms of this Administrative Consent Order, A. R. DeMarco Enterprises, Inc., and its officers, directors, shareholders, employees, agents, and assigns, make no admission of liability with respect to any issue of fact, law or liability arising out of this matter, and this executed Administrative Consent Order shall not in any way constitute an adjudication or finding as to facts, claims, or liabilities arising out of any of the matters alleged. In addition, this Administrative Consent Order shall not be used as evidence of a violation in a court of law or administrative tribunal, including but not limited to any pending or threatened enforcement action by the Department pursuant to the New Jersey Freshwater Wetlands Protection Act and the Department's regulations promulgated thereunder.

33. A. R. DeMarco Enterprises, Inc. hereby agrees not to contest the authority or jurisdiction of the Department to issue this Administrative Consent Order and also agrees not to contest the terms of this Administrative Consent Order in any action to enforce its provisions except as set forth in other provisions of this Administrative Consent Order. This Administrative Consent Order takes effect on "the final effective date" as determined in accordance with paragraph 22.

BY THE AUTHORITY OF
PETER LYNCH, ACTING ADMINISTRATOR
DEPARTMENT OF ENVIRONMENTAL PROTECTION
COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT

Signatory on behalf of A.R. DeMarco Enterprises, Inc. certifies that he has full authority to sign on behalf of A.R. DeMarco Enterprises, Inc. and to bind A.R. DeMarco Enterprises, Inc. to the terms of this Administrative Consent Order.

DATE: 8/10/2000

BY:

Anthony T. Drollas, Jr., Esq. for
A. R. DeMarco Enterprises, Inc.

DATE: 8/10/00

BY: Janice Brogle

Janice Brogle, Section Chief
Coastal and Land Use Compliance and Enforcement

Appendix A

PROJECT:

DEED OF CONSERVATION EASEMENT

This Deed of Conservation Easement ("Easement"), made this_____day of _____, 2000,

Between _____ ("Grantor"), residing at _____, New Jersey and State of New Jersey, Department of Environmental Protection having its principal place of business at 401 East State Street, Trenton, New Jersey 08625, ("Grantee").

Witnesseth:

Whereas, Grantor is the sole owner in fee simple of Property which consists of approximately 591 acres of land, located in the township of Tabernacle, County of Burlington, State of New Jersey known as: Block 2201, Lot 5; Block 2401, Lot 2; Block 2402, Lot 2; and Block 2403, Lot 1 on the current tax map of said municipality (the "Property"), more particularly described in a metes and bounds description of the Property attached to and made a part here of as Schedule A; and

Whereas, the Property is primarily open land, within the largest area of unbroken forest in New Jersey, with scenic qualities that can be enjoyed by the general public, namely by providing a corridor and scenic buffer for the Batona Trail, and natural habitat for a variety of wildlife species, including 35 species of mammals and 150 bird species reported to occur within the interior of the Wading River watershed; and

Whereas, the specific conservation values of the Property are further documented in a report titled "Environmental Assessment for the Wading River Ecosystem Project Area New Jersey Pinelands National Reserve, Prepared for the National Park Service by the New Jersey Department of Environmental Protection, October 1990" and attached hereto as Schedule B and which is intended to serve as an information baseline for monitoring compliance with the terms of this grant; and

Whereas, Grantor intends, as owner of the Property, to convey to Grantee the right to preserve and protect the Conservation Values of the Property in perpetuity; and

Whereas, this conservation easement is entered into in accordance with the New Jersey Conservation and Historic Preservation Restriction Act (N.J.S.A. 13:8B-1 et seq.) and shall be binding upon the Grantor its successors and assigns and upon the Grantee, its successors and assigns;

NOW THEREFORE, and in consideration of the sum of ONE DOLLAR, the receipt of which is hereby acknowledged, the Grantor does hereby convey to the Grantee, a conservation easement in perpetuity, pursuant to the laws of New Jersey, for the exclusive purpose of assuring that the open space character, wildlife habitat, recreational opportunities and scenic qualities of the Property ("Conservation Values") will be conserved and maintained forever and that uses of the Property that are inconsistent with these Conservation Values will be prevented or corrected.

I. **Purpose.** It is the purpose of this Easement to assure that the Property will be retained forever and predominantly in its natural and open space condition and to prevent any use of the Property that will impair or interfere with the Conservation Values of the Property.

II. **Prohibited Acts.** Except for those rights expressly reserved, any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited:

A. **Subdivision and Development.** Any new development or subdivision of the Property is expressly prohibited, except for specific rights retained in this Easement.

B. **Structures.** Construction of any new structures, including but not limited to residential, commercial and agricultural structures, billboards, communication towers, golf courses, airstrips, and helicopter pads is expressly prohibited.

C. **Mining.** No topsoil, sand, gravel, loam, rock, or other minerals shall be deposited on, excavated, dredged, regraded or removed from the Property.

D. **Roads.** No new roads may be constructed or other portions of the Property covered with concrete, asphalt, or any other paving material. Existing roads and paved surfaces may be maintained in their current condition.

E. **Trash.** No dumping or placing of trash or waste material shall be permitted on the Property.

F. **Natural resource protection.** No activity shall be permitted on the Property that would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation.

G. **Timber harvesting.** Clear cutting of timber stands is expressly prohibited. However, select trees may be cut to: control insects and disease; to prevent personal injury and property damage; and for the preservation of plant and animal species and natural communities described in this Easement. Grantee may remove vegetation in support of the development and maintenance of the Buffer/Public Access area described in paragraph V.B.

H. **Agricultural Activities.** Only those agricultural activities which are consistent with the Conservation Values which are to be conserved and maintained forever by this Easement and which are consistent with the requirements of the Special Agricultural Zone of the Pinelands Comprehensive Management Plan shall be permitted on the property. Grantor shall be permitted to utilize mechanized equipment on the property for the purposes of fire control and for limited forestry and berry harvesting activities which are consistent with the Conservation values which are to be conserved and maintained forever by this Easement. It is understood that extensive and systematic clearing of vegetation and extensive, systematic tilling or recontouring of soil that would alter the natural habitat characteristics on the property is inconsistent with the Conservation Values which are to be conserved and maintained forever by this easement.

III. **Rights of Grantor.** The ownership rights of the Grantor extend to Grantor's personal representatives, heirs, successors, and assigns and include, but are not limited to, the right to sell or otherwise transfer the Property, and the right to exclude any member of the public from the Property except within the boundaries of the Buffer/Public Access Area described in paragraph V.B.

IV. **Consistency with Pinelands Development Credit Deed Restriction:** It is understood that this Conservation Easement is more restrictive in terms of permitted uses on the property and more expansive in terms of the grantee's and the public's use of the property covered. The provisions of this Conservation Easement control in the interpretation and implementation of the use of the property, notwithstanding the terms of

the Pinelands Development Credit Deed Restriction executed on June 29, 2000 by A. R. DeMarco Enterprises Inc., in favor of the State of New Jersey.

V. Right of First Refusal. Grantor agrees to give the Grantee, jointly and severally, a Right of First Refusal to purchase the Property, which right shall be of perpetual duration. The conditions of this Right shall be such that whenever the Grantor receives a written offer from a person or persons to purchase all or any part of the Property, and Grantor accepts the offer subject to this Right of First Refusal, the Grantor shall notify the Grantee via certified mail of the offer. Grantee may elect to purchase the Property at the offered price and upon such other terms and conditions not less favorable to the Grantor than those contained in the conditionally accepted offer. Grantor shall have ninety (90) days to elect to purchase the Property and will notify the Grantor by certified mail of such an election.

This Right of First Refusal shall not apply to:

(i) any gift, inheritance, or other transfer of the Property without consideration, or

(ii) any sale or other conveyance of the Property to any of Grantor's children.

The Right of First Refusal shall apply to all other sales and conveyances of the Property, including any sale or conveyance for consideration of any interest in the Property including any conveyance by, or conveyance of any interest in a family corporation, partnership or other holding entity.

VI. Rights of Grantee. To accomplish the conservation purposes of this Easement the following rights are conveyed to the Grantee:

A. Enforcement. Grantee has the right to preserve and protect the conservation values of the Property.

B. Buffer/Public Access Area. A 100 foot buffer/public access strip extending 50 feet to either side of the center of the Batona Trail located within Block 2201, Lot 5, shall be created and used exclusively for the benefit of the Grantee and the public for 1) trail maintenance, and 2) potential passive recreational purposes.

C. Inspection. Grantee and its agents shall be permitted access to areas outside of the Buffer/Public Access Area located within Block 2201, Lot 5, and shall have the right to enter upon the remainder of the Property, with reasonable notice to the Grantor, for the purposes of inspection in order to enforce and assure compliance with the terms and conditions of this Easement. Except in cases where Grantee determines that immediate entry is required to prevent, terminate, or mitigate a violation of this Easement, such entry shall be upon prior notice to the Grantor. Grantee and its agents shall be permitted to utilize existing sand roads on the property for administrative purposes related to the Buffer/Public Access Area located within Block 2201, Lot x.

VII. Responsibilities of Grantor and Grantee not affected. Other than as specified herein, this Easement is not intended to impose any legal or other responsibility on the Grantee, or in any way to affect any existing obligations of the Grantor as owner of the Property. This shall apply to:

A. Taxes. Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the Property.

B. Upkeep and Maintenance. The Grantor, as owner of the Property, shall continue to be solely responsible for the upkeep and maintenance

of the Property, to the extent it may be required by law. The Grantee shall have no obligation for the upkeep or maintenance of the Property except for the Buffer/Public access area identified in paragraph V.B. Nothing in this Easement shall require the Grantor to take any action to restore the condition of the Property after any Act of God or other event over which they had no control.

C. **Liability and Indemnification.** Grantor shall hold harmless, indemnify and defend Grantee and its members, directors, officers, employees, agents, and contractors, and their successors and assigns from and against all liabilities, penalties, costs, losses, damages, expenses or claims, including, without limitation, reasonable attorneys' fees arising from or in any way connected with injury to or the death of any person or physical damage to any property resulting from any act, omission condition or other matter related to or occurring on or about the Property, regardless of cause, unless due solely to the negligence of any of the indemnified parties.

Grantee shall be responsible for losses or damages resulting from the negligent use, maintenance or occupancy of the Buffer/Public Access Area to the extent legally liable for such actions by the New Jersey Tort Claims Act, NJSA 59:1-1 et seq. The liability, if any, of the Grantee shall be subject to the availability of state of New Jersey funds.

Grantor's agreement to hold harmless and indemnify Grantee shall not affect the statutory protections available to the Grantor under the Landowner's Liability Act, NJSA 2A:42A-2, et seq.

VIII. **Remedies.** The Grantee shall have the right to prevent and correct violations of the terms of this Easement. Enforcement of the terms of this Easement shall be at the discretion of the Grantee and any failure on behalf of the Grantee to exercise its rights hereunder shall not be deemed or construed to be a waiver of the Grantee of those rights. This shall be true regardless of the number of violations of the terms of this Easement by the Grantor that occur or the length of time it remains unenforced.

If the Grantee finds what it believes is a violation of the terms of this Easement, it may without limitation as to other available legal recourse, at its discretion take any of the following action:

A. **Notice of Violation; Corrective Action.** If Grantee determines that a violation of the terms of this Easement has occurred or is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation in accordance with a plan approved by the Grantee.

B. **Injunctive Relief.** If Grantor fails to cure the violation within 45 days after receipt of notice from the Grantee, or under circumstances where the violation cannot reasonably be cured with a 45 day period, fail to begin curing such violation, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin ex parte the violation by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to such injury. The Grantor acknowledges that any actual or threatened failure to comply or cure will cause irreparable harm to the Grantee and that money damages will not provide an adequate remedy.

C. Damages. Grantee shall be entitled to recover damages for a proven violation of the terms of this Easement or injury to any Conservation Values protected by this Easement, including, without limitation, alleged damages for the loss of Conservation Values. Without limiting Grantors' potential liability, Grantee, in it sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property.

D. Costs of Enforcement. In any case where a court finds that a violation has occurred, all reasonable costs incurred by Grantee in enforcing the terms of this Easement against Grantor, including, without limitation, costs and expenses of suit and reasonable attorney's fees, and any costs of restoration necessitated by Grantor's violation of the Easement shall be borne by the Grantor.

IX. Development Rights. Grantor hereby grants to Grantee all development rights or credits with the exception of those credits allocated to the Grantor by the Pinelands Development Credit Bank that are now or hereafter allocated to, implied, reserved or inherent in the Property, and the parties agree that such rights are terminated and extinguished, and may not be used on or transferred to any portion of the Property as it now or hereafter may be bounded or described, or to any other property adjacent or otherwise, nor used for the purpose of calculating permissible lot yield on the Property or any other property.

X. Grantor's Warranties.

A. Title. Grantor warrants good and sufficient title to the Property, with the exception of certain mortgages which will not interfere with the proposed use of the Property as set forth in this Deed of Conservation Easement. The Property may only be subject to a mortgage if the holder of such mortgage agrees to subordinate it to the Easement in a manner satisfactory to the Grantee.

B. Hazardous Substances. Grantor warrants no actual knowledge of a release or threatened release of hazardous substances or wastes on the Property. For the purposes of this Paragraph, "actual knowledge" includes only that information which is currently available to the Grantor, and does not impose upon the Grantor the affirmative obligation to prepare a "preliminary assessment report" and/or a "site investigation report", nor to undertake similar investigative action in accordance with relevant statutes and the regulations of the New Jersey Department of Environmental Protection, including but not limited to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E et seq.. Grantor shall be liable under the requirements of the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, et seq., and the New Jersey Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., upon any judicial determination that is inconsistent with the Grantor's warranty contained in this Paragraph.

XI. Amendment of Easement. This easement may be amended only with the written consent of Grantee and Grantor. Any such amendment shall be consistent with the purposes of this Easement and with the laws of the State of New Jersey and any regulations promulgated pursuant to those laws.

XII. Interpretation. This Easement shall be interpreted under the laws of the State of New Jersey, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation purposes.

XIII. Enforcement. The provisions of this Easement shall be enforceable by the filing of an action in the Superior Court of New Jersey.

XIV. Perpetual Duration. This Easement shall be servitude running with the land in perpetuity. Every provision of this Deed that applies to the Grantor or Grantee shall also apply to their respective agents, heirs, executors, administrators, assigns, and all other successors as their interests may appear.

XV. Notices. Any notices required by this Easement shall be in writing and shall be personally delivered or sent by first class mail, to Grantor and Grantee at the following addresses, unless a party has been notified of a change of address:

To Grantor:
[insert legal address]

To Grantee:
New Jersey Dept. of Environmental Protection
401 East State Street
Trenton, NJ 08625

XVI. Throughout this Deed, the singular shall include the plural, and the masculine shall include the feminine unless the text indicates otherwise.

IN WITNESS WHEREOF, the Grantor and Grantee have hereunder set their hand and seal on the day and year first written above.

_____ _____

Witness as to Signature of Grantor [Name] Grantor

STATE OF NEW JERSEY)
ss.
COUNTY OF)

On , personally appeared before me who I am satisfied is the person named in and who executed this Instrument and they acknowledged that they signed, sealed and delivered the same as their act and deed, for the uses and purposes therein expressed, and that the full and actual consideration paid or to be paid for this easement as such consideration is defined in P.L. 1969, c49 is $One Dollar.

Attachments:
Schedule A – Metes and Bounds Description
Schedule B – Environmental Assessment Report

Prepared by:

_____

Randall L. Pease
Deputy Attorney General
State of New Jersey