



For the reasons stated below the Board unanimously reverses the decision of the Secretary of the Department of Natural Resource and Environmental Control ("Secretary").

#### SUMMARY OF THE EVIDENCE

The Board submitted the Chronology as Board Exhibit 1. The background of the bulkhead permit application reveals that the application was received by DNREC on February 28, 1990. (Chron A.) On March 23, 1990 an on-site inspection was performed by Tracy Skrabal, Program Manager of the Wetlands and Aquatic Protection Branch. The on-site inspection checklist prepared by Ms. Skrabal states that the site is "well-suited to vegetation or rip-rap" for stabilization. (Chron. B.)

In a letter dated March 28, 1990 Ms. Skrabal advised Mr. Centofanti that the field inspection revealed that alternatives to bulkhead were more suitable and that he should submit an amended application with plan for alternatives. The letter also advised that the application would be withdrawn if the amended application was not received or if a written request for a decision on the existing application was not made within 60 days of the date of the letter. (Chron. D.) On April 4, 1990 Mr. Centofanti responded by letter and requested a decision on the existing application. (Chron. E.) On May 21, Robert T. Zimmerman, Administrator, Surface Water Management Section of DNREC forwarded a letter denying the permit application. (Chron H.) The appellant filed his appeal on June 6, 1980 (Chron. I.)

Mr. Centofanti testified in his own behalf. He stated that old trees line the shore of his property which is located on Red Mill Pond at Lot 24, 124 Overbrook Shores in Sussex County and that employing rip-rap would result in destruction of many of the trees. The appellant also testified that other landowners on Red Mill Pond recently had installed bulkheads and that the denial of his permit was discriminatory as well as arbitrary. Mr. Centofanti introduced five photographs of his property which were taken from different angles. (Appellant's Exhibits 1 through 5).

On cross examination Mr. Centofanti testified that he did not know the circumstances which led to the other landowners obtaining bulkhead permits.

The next person to testify on behalf of the appellant was Mark Allen. Mr. Allen is a contractor with over 15 years construction experience, with the majority of his work involving construction near natural and man made bodies of water. He was also employed for a period of time as a field inspector by Ocean City, MD.

Mr. Allen testified that in December of 1989 he constructed bulkhead for three other landowners on Red Mill Pond. These landowners were simply identified as "Stokes", "Kellogg" and "Wolf". He stated the neighboring properties were substantially similar. He also stated that the "Moore" property (a fourth neighboring parcel) recently had its bulkhead replaced.

He further testified that the preservatives to be used in the bulkhead were environmentally safe and that shore birds would not normally eat along the shore line because of its shallowness.

He added that the retainer could be constructed of stone or wood, but whereas wood would require building two feet into the pond, stone would require six feet of construction into the pond. He testified that a bulkhead was more suitable in this location, would keep the present hillside stable, and that installation would be easier and less costly than with a stone revetment. He also felt there was more likelihood of tree damage or loss by installing the stone. On direct examination he stated that use of stone was possible but very difficult. He stated that using stone would require him to use a wheelbarrow to get much of the material to the site since his machinery would destroy many of the trees, tree roots and turf.

On cross-examination Mr. Allen stated that he has performed only one rip-rap project whereas in the past year he has done approximately one mile of bulkhead. He explained that he feels very comfortable doing rip-rap and pointed out that rip-rap is fairly new in Sussex County. He added that he did one of only two such projects currently found along the Nanticoke River.

Mr. Allen completed his testimony on cross-examination by explaining the difficult problems associated with placing stone rip-rap on the Centofanti property. He stated that stone could be placed by hand if necessary, but still would have access problem if done entirely by hand.

Presenting testimony on behalf of DNREC was Tracy Skrabal. She first described the permit application review process. She stated that the goal in reviewing an application is to avoid any

environmental impact. If that is not possible, then to effect the least detrimental environmental impact and if that cannot be achieved, to compensate where possible, for any impact or damage. Ms Skrabal then presented a ten minute slide program which demonstrated the effects of rip-rap versus bulkhead on the food chain.

The witness testified that DNREC has had a regulation for several years which requires that an applicant for a bulkhead permit examine alternative methods such as rip-rap and vegetation to stabilize a shoreline. She stated that this regulation had not been enforced until she assumed the position of Program Manager in November 1989. She also stated that DNREC has attempted to make known the intended enforcement to contractors and the general public.

Ms. Skrabal testified that it would be difficult to walk and work along the Centofanti shore line to do rip-rap, but that it could be done. She testified that she has designed over 100 rip-rap projects and that the Centofanti property was conducive to rip-rap. The witness stated that the appellant wished to also build a dock and pier which would require an access road to the shore whether rip-rap or bulkhead was used. The access road would result in the destruction of some trees.

Ms. Skrabal stated that damage to tree roots, etc. could be minimized if the contractor transported construction equipment across wooden planks rather than the bare ground surface. She added that the water level in the pond is routinely lowered during

the winter months which would afford access for the construction of rip-rap by laying mats in the mud so as to move equipment along the shoreline.

The witness continued her testimony by explaining that a site inspection is done to determine if there are alternatives to bulkhead installation. If an alternative appears, the applicant is requested to submit an engineer's analysis which is commonly referred to as a "Section M."

Ms. Skrabal testified that the national trend is now towards natural stabilization alternatives while achieving the owner's goals. She stated that as part of the trend she meets with owners to discuss natural versus artificial stabilization. She will help design plans and provide other technical assistance to contractors.

The witness stated that in 1990 there were 25 bulkhead applications, of which only two were granted. In both instances the access to the shoreline was extremely difficult. Each required an engineer's analysis which determined rip-rap was not suitable.

On cross examination Ms. Skrabal admitted that one property on Red Mill Pond was recently granted a permit for a bulkhead. The property was simply identified as the "Webb" property. She explained that the landowner's original request was for 158 feet of bulkhead in order to protect a tree along the shoreline. DNREC finally approved 28 feet of bulkhead, with the remainder being rip-rap. DNREC initially opposed the bulkhead on the grounds that bulkhead actually offered less protection to the tree than other stabilization methods and because other methods would create an

area around the tree conducive to the health of fish and other wildlife. She stated that the reason for granting the partial bulkhead was because the owner insisted upon it to protect the tree.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 4.02 of the Regulations governing the Use of Public Subaqueous states that projects such as bulkheads "shall have a minimum detrimental effect on ... fish and wildlife... ." In addition, Section 4.05 requires that "[a]ny person attempting to stabilize a shoreline with a vertical bulkhead ... shall examine alternative methods (rip-rap, vegetation) for shoreline stabilization."

The appellant does not dispute that these regulations are valid or applicable. He contends that the actual application of them, are arbitrary and discriminatory as to him.

The evidence reveals that although Section 4.05 had been in place for several years, DNREC had only commenced enforcement of it in November 1989. At the time of the hearing DNREC stated that as evidence of its enforcement, 23 out of 25 applications were denied in 1990.

The evidence did not demonstrate that the technical assistance testified to by Ms. Skrabal was ever offered to Mr. Centofanti.


The evidence does indicate, however, that DNREC granted a permit in 1990 to one owner to install 28 feet of bulkhead together with about 130 feet of rip-rap in order to protect a single tree

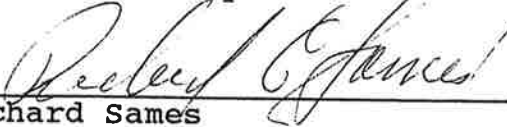
at the owners insistence. Also as recently as in late 1989 three bulkhead projects occurred at Red Mill Pond after permit approval in the summer of 1989. Mr. Centofanti sought to build a bulkhead because construction of rip-rap was at best difficult and would result in harm or destruction to not one, but many trees on his property and a bulkhead was more suitable for his lot and less expensive. The Board finds that the need for an alternative to a bulkhead at this site was not demonstrated; bulkhead stabilization is workable and is consistent with recent activity in the area; the Department's response was unnecessarily inflexible and inconsistent.



ACTION OF THE BOARD

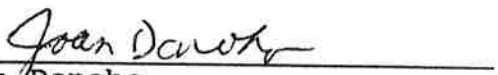
For the foregoing reasons, by a unanimous vote, the board hereby reverses the decision of the Secretary.

  
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Thomas J. Kealy

  
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Richard Sames

  
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Mary Jane Willis

  
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Clifton H. Hubbard

  
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Joan Donoho

Dated: December 14, 1990

