

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

RONALD HASTINGS,

Appellant,

v.

EAB Appeal No.: 2018-03

SECRETARY M. SHAWN GARVIN and the
DELAWARE DEPARTMENT of NATURAL
RESOURCES and ENVIRONMENTAL
CONTROL,

Appellees.

DECISION AND FINAL ORDER

Pursuant to due notice and in accordance with the Delaware Administrative Procedures Act, a public hearing was convened by the Environmental Appeals Board (“EAB” or “Board”) on January 8, 2019 in the auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Delaware on the appeal filed by the Appellants challenging the issuance of Secretary’s Order No. 2018-03 by the Delaware Department of Natural Resources and Environmental Control.

Members of the Board present and constituting a quorum at the January 8, 2019 public hearing included Chairperson Dean Holden, Fran Riddle, Guy Marcozzi, Michael Horsey, Robert Mulrooney, and Sebastian LaRocca. Deputy Attorney General Patricia Davis advised the Board. The Appellant appeared *pro se* and the Appellees were represented by Deputy Attorney General Devera Scott.

SUMMARY OF THE EVIDENCE

The parties submitted documentary evidence for the Board's consideration. The Appellant's Exhibits consisted of:

- A. Sussex Conversation District Notice of Violation 10/4/05
- B. Ronald Hastings response to the Notice of Violation 10/18/05
- C. Sussex Conversation District Letter 1/10/07
- D. Sussex Conversation District Final Notice 6/12/07
- E. Ronald Hastings response to the Final Notice 6/20/07
- F. Sussex Conversation District Letter 5/5/14
- G. Emails between Jessica Watson & R.E. Hastings 6/2/14 & 9/1/14
- H. Sussex Conversation District Letter 6/25/14
- I. R.E. Hastings Letter 7/7/14
- J. Pre-Construction letters between J. Watson and Simpler Surveying 6/2/04, 6/8/04 & 6/18/04
- K. Caleb Figueroa memo to Rivers End Property Owners Association (REPO)
- L. Caleb Figueroa memo to Sussex Conservation District
- M. Caleb Figueroa Letter to REPO
- N. Excerpt from Court of Chancery Sussex County Delaware, trial transcript CA-#9748-VCG dated January 22, 2016
- O. Jessica Watson discovery deposition given under oath for the Court of Chancery trial in Sussex County Delaware, CA-#9748-VCG
- P. Clifford Horler deposition given under oath for the Court of Chancery trial Sussex County, Delaware, trial CA-#9748-VCG
- Q. Sussex Conversation District Inspection Reports for Phase V Rivers End 2005, 2006 & 2007

- R. Deed from Ronald Hastings to REPO dated 7/27/09
- S. Pre-construction meeting letter 9/13/04 for Phase V
- T. Status Evaluation Storm Water Pond Rivers End Phase V dated September 29, 2015
- U. Brad Cate President of Eastern Shore Soil Services qualification sheet
- V. Deeds Tax Map Parcel 231-12-129
- W. Rivers End Phase V Plat plan
- X. Drainage ditch Map Rivers End
- Y. Sediment and Stormwater Regulations DNREC
- Z. Contour Map Rivers End Phase IV
- AA. Plat Plan Phase IV Rivers End
- BB. Sussex Conversation District Letter 11/25/15
- CC. Notice of Violation dated 12/21/16
- DD. Figueroa Movie describing storm water flowing from Lot 12 River End Phase V onto his property
- EE. Allen movie showing stormwater flowing across his property Tax map 231-12-129 into adjoining farm field
- FF. Drainage maps Rivers End
- GG. Photo Rivers End
- HH. Contour maps Phase V
- II. Photos Stormwater Pond Phase V
- JJ. Photos of Phase V Rivers End during and after the 500 year storm in 2006
- KK. Photos of Stormwater pond Phase V taken on 1/9/16
- LL. Stormwater Pond Maintenance fact sheet
- NN. (There was no Exhibit MM) Blow up color copy with arrows of II

The DNREC's Exhibits consisted of:

- 1 Notice of Appeal from Mr. Ronald Hastings, dated 7/20/2018.
- 2 Notice of Administrative Penalty Assessment and Secretary's Order, dated 6/28/2018.
- 3 Notice of Violation, dated 12/21/2016.
- 4 Letter and attachments from Sussex Conservation District to DNREC referring matter for enforcement, dated 12/9/2014.
- 5 Application for Sediment and Stormwater Management Plan, dated 8/27/2003.
- 6 Attachment 1 to Application for Sediment and Stormwater Management Plan, dated 8/27/2003.
- 7 Attachment 2 to Application for Sediment and Stormwater Management Plan, dated 8/27/2003.
- 8 Approved Plan, including final plans and drawings, dated 7/5/2004.
- 9 Correspondence between Sussex Conservation District, DNREC, and Mr. Hastings from January 2007 to March 2017.
- 10 Environmental Control Act, 7 *Del. C.* §§ 6003, 6005, 6008.
- 11 Erosion and Sedimentation Control Act, 7 *Del. C.* §§ 4002, 4003, 4012, 4015.
- 12 1993 Sediment and Stormwater Regulations.
- 13 2014 Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 *Del. Admin. C.* § 7101.
- 14 Google Earth images from 2005 to 2018.
- 15 Photographs from 6/25/2006 and 7/21/2006.
- 16 Watershed boundary map.
- 17 Contour map.
- 18 Engineering drawing of Rivers End Phase V subdivision.

In addition to the documentary evidence, the Board considered sworn testimony of live witnesses. Mr. Hastings called as his first witness Jamie Rutherford. Ms. Rutherford testified that she is an Environmental Program Manager II with the Sediment and Storm Water Management Program. She has been with DNREC for 30 years. She has a BS in Environmental Sciences. Ms. Rutherford started with this program in 2004. Her understanding is that the Sediment and Storm Water Regulations were enacted in 1991. These regulations delegated the Storm Water Program to Conservation Districts and Municipalities. This is the point at which plan review, review and approval of plans, construction, and maintenance would have been delegated to the Sussex County Conservation District (“SCCD”). DNREC conducts monthly meetings with SCCD to discuss various program issues. DNREC has conducted delegation review every three years as required by Chapter 40 of Delaware Code, Title 7. Jessica Watson is an employee of SCCD and not DNREC. She does not report to anyone in DNREC. Ms. Watson reports to the SCCD, who employs her. The SCCD, Jessica Watson, and her staff have monthly meeting calls with DNREC. Ms. Rutherford was aware that Jessica Watson appeared as a witness in a Chancery Court matter in 2016. Turning to DNREC’s Exhibit 2, Ms. Rutherford testified that she did assist with the creation of this Administrative Order, with the assistance of Mr. Watkins, who is no longer employed with DNREC. Ms. Rutherford testified that usually, when a site is referred to DNREC, they obtain all of the program files, the approved plan, the NOI—Notice of Intent—if there is one, and so Mr. Watkins may have had discussions with Ms. Watson before the Administrative Order was created. There is no verification process, but there is a template for Administrative Orders and what that contains. Secretary Garvin should expect that the information in the Administrative Order is accurate. In this Administrative Order, it states four times that Mr. Hastings did not respond to the DNREC. Ms. Rutherford believes she was copied on all correspondence between

Ms. Watson and Mr. Hastings. Ms. Rutherford does not recall whether Mr. Hastings responded to every letter that Ms. Watson sent to Mr. Hastings. The Administrative Order indicates that Mr. Hastings did not respond to some communication from SCCD to resolve the non-compliance. DNREC issued a notice of violation to which Mr. Hastings did not respond. Ms. Rutherford ended up having to call Mr. Hastings in an attempt to gain compliance. Ms. Rutherford had a verbal conversation with Mr. Hastings to explain that per the approved plan, “as built” were supposed to be submitted, and there was concern about the drainage and the calculations, and things may have needed to be revised. After explaining this to Mr. Hastings, he responded that he would see her in court.

Ms. Rutherford testified that on the approved plan, there was language that once the Storm Water Management System was built, “as built” were required to be submitted. They have never been submitted as of today’s date. In addition, Ms. Rutherford believes there was no record of any NOI being filed. The DNREC is delegated from the EPA’s construction general permit. That is, any plan of common development of over an acre needs to have an NOI submitted to and approved by DNREC in order to fall under the EPA’s construction general permit. Ms. Rutherford is not aware of any correspondence from SCCD asking for an NOI. If an NOI was not on file, there is no obligation for SCCD to inform a developer that an NOI is required. The obligation is on the builder to know that a NOI is required. The violations here are the failure to submit “as built” and the failure to submit an NOI.

Chapter 60 in the Delaware Code says “permit” but it is permit coverage for the NIFTY program. A party must submit a NOI in order to obtain the coverage of the permit. The NOI is in reference to the original Phase 5 of the development construction. DNREC is looking for the “as built” so that it can determine if the pond is appropriate for the run off.

On cross-examination, Ms. Rutherford indicated that the Secretary's Order indicates violations of the SCCD approved plan. Number 11 of the SCCD approved plan indicates that "as built" are a requirement of the approved plan. They were required to be submitted within 60 days of the completion of construction. If the approved plan needs to be modified after the "as built" are reviewed, additional control measures may be deemed necessary by the SCCD. SCCD has the authority to require modifications if, for example, the pond cannot adequately handle the flow of water. That was a part of the approved plan, signed by Mr. Hastings on June 23, 2004. Tab Q of Mr. Hastings' Exhibits include inspection reports for Rivers End dated 2004, 2005, 2006, 2007. On June 6, 2006 and on June 30, 2006, the inspection reports indicate one of the "Actions Required" was "provide as built on pond." On January 30, 2007 and June 25, 2007, it was again noted on both dates that an "as built" was required to be submitted on the pond.

Upon questioning from the Board, Ms. Rutherford indicated that DNREC has not yet received the "as built." Part of the "as built" includes the calculations that are required. DNREC is asking for the updated calculations to reflect the drainage area. The indications that the drainage area was inadequate included the fact that there was a wooded area next to the pond that was not included in the original calculations. The drainage area has been developed and is now running into the pond. Although she is not an engineer, she does believe it is significant that the drainage area has now been developed, but DNREC is still trying to ascertain that. Impervious area would be asphalt, driveways, dry roofing. The pond has been in existence for approximately fifteen years. It may be adequate. No one can say definitively without the updated information DNREC is seeking from Mr. Hastings.

On redirect, Ms. Rutherford testified that her knowledge that an "as built" was never received came from the SCCD. Any developer in the state must do everything on the approved

plan. SCCD is the delegated agency who attempts to obtain the “as built” and if they are not received, SCCD may refer the matter to DNREC for enforcement. Ms. Rutherford received a referral letter from SCCD for enforcement in this matter. One of the enforcement actions DNREC could take would be to halt construction by withholding building permits. Ms. Rutherford believes that SCCD was working with Mr. Hastings to attempt to get him to come into compliance rather than withhold his building permits. Ms. Rutherford testified that Mr. Hastings was informed that “as built” were missing via inspection reports and her notice of violation in 2016. It is not standard operating procedure to allow development to continue after a Storm Water Plan expires. SCCD is not required by regulation to take enforcement action within a particular period of time. Ms. Rutherford is aware that there was a Chancery Court action where the Home Owners Association took Mr. Hastings to court. She is not aware of the specifics of that action. At the time she created the Administrative Order, she had no knowledge that anything in the background section was inaccurate. She was not aware that Ms. Watson had put forth statements that were inaccurate. In the NOV issued by DNREC at Tab 3, DNREC asked Mr. Hastings to submit “as built” data. This was never received. At Tab 2, DNREC indicated that Mr. Hastings was required to submit “as built” data.

Mr. Hastings called as his second witness Jessica Watson. After Ms. Watson was sworn, she testified that her first communication with Mr. Hastings regarding the adjoining property was in 2005. While the Storm Water Drainage Plan had an approved area, it was brought to light in 2005 when there was additional Earth work done in an adjoining property that there was additional drainage area, and therefore SCCD suspected that the drainage area was larger than what was approved. The correspondence directly from her may not have used the words “as built” but she did request a plan revision, addressing whether the pond was functioning as designed. SCCD

believed that the drainage area was larger than what was shown on the original calculations. In the 2015 letter, Ms. Watson used the information available at that time, from the LIDAR, to calculate that the drainage area was larger than on the original Plan. Ms. Watson believed that Tax Parcel 129 was enhanced because of unauthorized site work. The February 2006 inspection report references this belief. Ms. Watson believes that the drainage area is larger than what was approved. Ms. Watson has not recanted the allegation that from 2004 to 2005 there was run off from Tax Parcel 129 running into Phase V. When the ponds and drainage ditch were dug, it was brought to light that the drainage area is larger than what was expressed in the original plan. The ditch was closed. In 2005, when there were man made improvements were made, it brought to light that the drainage area is larger than what was in the original plan. Ms. Watson did speak with Mr. Hastings sometime in February of 2006 about the outstanding "as built" and the drainage issue. From 2005 to 2014, Ms. Watson believed there was a contributory drainage area based on visual inspection and she requested an evaluator. She has visited the area numerous times from 2004 to present. She has seen water come from Tax Parcel 129 into Phase 5. She does not remember testifying under oath that she did not visit Tax Parcel 129. Today, Ms. Watson is using contour data, LIDAR data, all of this are technical resources available to DNREC to determine run off. Turning to Appellant's Exhibit F, Ms. Watson explained that the area beyond the property line is contributing offsite drainage onto Phase V. There are arrows drawn that indicate water coming from a property that is not Rivers End that has water flowing off of it onto Rivers End. This is the data that was available at the time Ms. Watson determined that the drainage area may be larger than what was in the original plan. Ms. Watson would not go onto Tax Parcel 129 because she does not have a Plan that allows her to go onto Tax Parcel 129. She viewed the area generally and the topography leads her to believe that water flows into Phase V. The two acre parcel was included in the plans

previously as “woods.” The two acre parcel was not included as developed land. The plot plan on Rivers End indicated this was not a developable lot in the Storm Water Plan that was approved. Phase V is zoned agriculture residential, as is the two acre parcel. On the Sediment and Storm Water Plan it was indicated as an undevelopable parcel. The way a project is submitted to the SCCD is that storm water calculations are submitted along with a Plan so that the SCCD can look at the run off coming off of the land before and after development. The CN values are important because they indicate the amount of runoff to be expected so that downstream impact can be calculated. Mr. Hastings’ submission at Exhibit J includes the Tax Parcel 129 lot as wooded lots, not developed lots. There were only 13 lots proposed and today there are 14 lots that drain to the pond. A plan revision would be required whenever there is a change to the plan, such a changing a wooded lot to a developed lot. Developing a wooded lot will impact the amount of runoff that comes off of a lot. There is a statement on the approved plan that requires the submission of “as builds.” Thereafter, the inspection reports indicate that “as builds” must be submitted. Ms. Watson requested plan revision multiple times verbally as well as by letter.

On cross-examination, Ms. Watson testified that she has been involved with Phase V and communicating with Mr. Hastings about the Phase since 2003. In 2007, Ms. Watson began corresponding with Mr. Hastings about concerns she had with the storm water pond. In January 2007, Ms. Watson asked for a revised plan to address the flooding onto neighboring properties. Ms. Watson has consistently requested information about the sufficiency of the storm water plan. She has consistently visited the site. She has photographs of the site. She has reviewed LIDAR data. Based on this information, she began to believe that the storm water pond was insufficient. Mr. Hastings has never provided “as built” drawings. If they had been submitted, they would have been included as part of the plan. In 2014, Ms. Watson began communicating with Mr. Hastings

again. In 2014, Ms. Watson was requesting the revised plan to reflect the changes to the development from what was on the original plan. A revised plan was never submitted. The Owner Certification Statement is signed by Mr. Hastings, indicating his acknowledgement that he agreed to abide by the approved plan. The conditions of the permit require that "as built" must be submitted within sixty days of construction completion. The conditions also indicate that additional storm water measures may be required, in the discretion of the SCCD, after the "as built" are submitted and reviewed. Based on her site visits and field experience, Ms. Watson believes that the drainage area has increased.

In May and June 2014, Ms. Watson requested information from Mr. Hastings and that information was not received from Mr. Hastings. If the owner developer changes addresses, it is the responsibility of the owner developer to update his address with the SCCD. "As built" surveys are not always provided within sixty days of the completion of construction, but they are typically received at some point. Sometimes the consultant engineer will complete the "as built" as part of the final punch list. This can take anywhere from six to eighteen months after construction completion. There are frequently numerous changes to plans. However, in only 10% of the cases does the SCCD have to step in and force a revision.

The Appellant called Mark Allen as his third witness. After being sworn, Mr. Allen testified that he is an owner operator of a marine construction company. He is an excavator, he works on the water. Prior to this, he worked for a municipality as a surveyor. He is certified in the state of Maryland. He has done work in Rivers End. He has done work for about twenty-five people in that neighborhood. He was asked in the Chancery Court whether he was the builder for the development and he answered that he was not. He was not carbon copied on any inspection reports. He owns the property referred to as Tax Parcel 129. He purchased this property with Mr.

Hastings in approximately 2004. Sometime around 2007 or 2008, Mr. Hastings sold his interest in Tax Parcel 129 to Mr. Allen. Around that time, Mr. Hastings and Mr. Allen dissolved their partnership. There were no ponds or ditch located on Tax Parcel 129 since he has been associated with the property. The only thing on Tax Parcel 129 is a dirt road and some ditches and berms from previous ownership. Mr. Allen was a defendant in the Court of Chancery trial. The Home Owners Association accused Mr. Allen of diverting water from his property into Phase V. Since he purchased Tax Parcel 129 with Mr. Hastings, he has monitored that parcel closely. After the meeting with the SCCD in 2014, Mr. Allen started visiting Tax Parcel 129 after a heavy rain. A wetland delineation on Tax Parcel 129 was done in 2004 or 2005. About ten years later, he had another delineation done and the conclusion was that the wetlands were getting wetter. When visiting Tax Parcel 129 after a heavy rain since 2014, he has not seen water flowing into Phase V, but this was after the development. Before the development, it would flow both ways. Mr. Allen dug a ditch to assist with drainage on his neighbor's property into the street. During the 2014 meeting, Mr. Allen offered to SCCD to give up some of his property if needed to address the flooding or drainage issue.

On cross-examination, Mr. Allen testified that he is not the developer of Phase V. He did not certify the Storm Water Plan for Phase V. He offered some property to alleviate the drainage issues, but SCCD did not require him to do anything with his property.

Mr. Hastings testified in the narrative as the final Appellant witness. After being sworn, Mr. Hastings testified that in 2005 he was contacted by Ms. Watson at his home in Florida about a breach in the development. He asked for some time to address the issue, including filling in a ditch as she requested. At that time, Mr. Hastings indicated that he had dug two wildlife ponds in Rivers End. Rivers End is high and sandy. When he laid it out, Mr. Hastings worked with DNREC

to enhance wildlife. He has been told by DNREC that he dedicated more open land than any development in the state of Delaware. There are hardly any houses that do not back up to his open land. He saved one two acre lot for his daughter that is not part of Rivers End. Mr. Hastings cleared that lot. On March 25, Mr. Hastings travelled to Delaware and met the crew to fill in the ditch. While at dinner, Mr. Hastings received a call that his older daughter was involved in a car accident and passed away. Mr. Hastings then had a heart attack and had to have open heart surgery. In the next six months, Mr. Hastings had three mini-strokes that precluded him from conducting any business. Mr. Hastings had gone out of business and his equipment had been sold. However, his crew was able to fill in the ditch with rip rap, hoping that would satisfy the DNREC, but it did not.

In 2014, Mr. Hastings reached out to the SCCD because a lawsuit was filed by the Home Owners Association against one of the homeowners for digging a ditch on his property. There has never been any follow up by SCCD on missing "as built." To the best of Mr. Hastings knowledge, these "as built" were turned in. In 2015, Mr. Hastings attempted to get in touch with Mr. Simpler to get copies of the "as built" but Mr. Simpler had gone out of business. Mr. Hastings has never done anything to alter the drainage of any section of Rivers End or Tax Parcel 129. He did not dig the ditch that was the subject of the Chancery Court lawsuit. There never was and never has been any ditches on Tax Parcel 129. There has been water from Phase IV this whole time. As far as he knows, the "as built" was submitted in a timely manner and DNREC never said anything to him until 14 years later regarding any missing "as built." In 2009, Mr. Hastings sold all of the open land in Rivers End to the Home Owners Association, with a stipulation that it was to take responsibility for repairing, replacing, and refurbishing this area as needed. Mr. Hastings does not believe he should have been issued the NOV because he doesn't own the pond anymore, the Home

Owners Association owns the pond. The response that he received from DNREC when he raised this was that there was an outstanding allegation against Mr. Hastings from 2007 and therefore the NOV was issued to him.

On cross-examination, Mr. Hastings agreed that he is the developer of Rivers End and he certified the approved Storm Water Management Plan. The Home Owners Association did not certify the approved plan. Mr. Hastings agreed that the approved plan required “as built” surveys. He submitted the “as built” but he can’t provide copies of them because the company that made them went out of business. When he reviewed the SCCD file, it was inadequate, and there were no inspection reports. In response to the NOV and the Secretary’s Order, Mr. Hastings did not submit an “as built” to DNREC. At DNREC Tab 9, DNREC sent two letters to Mr. Hastings in 2007 indicating that the pond “has the potential to greatly increase the flooding on the property of others. As the owner, you should realize the increased liability created by increasing the contributory drainage area to the pond.” In response to these two letters, Mr. Hastings replied that he does not believe he is in violation of the DNREC’s Storm Water program. He does not believe there is any way to respond to DNREC’s request for “further investigation by the designer or another consulting firm to evaluate what modifications are needed to allow the storm water system to function as designed” because he believes the allegations of SCCD are incorrect factually. Mr. Hastings was sued by the Home Owners Association, who alleged that Mr. Hastings had dug ditches and taken other actions in the neighborhood that affected the drainage in the neighborhood. The Court determined that Mr. Hastings had not dug the ditches or the ponds and was therefore not responsible to the Home Owners Association in that action. However, the Court expressly did not rule on the sufficiency of the pond, its size or design. The Court noted that determination was exclusively within the purview of DNREC. In the May 5, 2014 letter, Ms. Watson indicated that

the storm water concerns brought to Mr. Hastings' attention in 2007 were still not addressed. Mr. Hastings did not provide the design report as requested because he asked Ms. Watson to explain to him the "when, where, and how" of the non-compliance. Because she did not answer these questions for him, he would not provide any of the information she sought. Mr. Hastings did receive the Notice of Violation in 2016. That NOV asks for "as built" and those were not provided in 2016. This was the first time he was asked for this information and he did not provide it. The Administrative Order in 2017 asked Mr. Hastings for a corrective action plan including the "as built" data with revised calculations, Mr. Hastings did not provide this either.

Upon questioning from the Board, Mr. Hastings indicated that he does not own any property in Phase V. The Home Owners Association assumed ownership of the property in June of 2009. When Mr. Hastings received the NOV, he called Mr. Watkins at DNREC to ask why the NOV was directed to him and not the Home Owners Association. Mr. Watkins indicated that Mr. Hastings had "outstanding issues" dating back to 2007. Mr. Hastings believes the 2007 issues are "made up" by Ms. Watson at SCCD. Mr. Hastings never obtained an "as built" because he believes that Ms. Watson is wrong in her position that the drainage area has enlarged. He believes that he proved that the drainage area was not any larger so he doesn't have to get an expert report to address whether the pond is adequate for the drainage area.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 28, 2018, Secretary Garvin of the Department of Natural Resources and Environmental Control issued a Notice of Administrative Penalty Assessment and Secretary's Order to Rivers End Phase V, care of Mr. Ronald E. Hastings. The Secretary's Order finds that Mr. Hastings violated 7 *Del. C.* § 4003 as his development of Phase V of the residential community of Rivers End failed to comply with the approved sediment and stormwater erosion control plan.

The Secretary's Order further finds that Mr. Hastings violated 7 *Del. C.* § 6003 as he did not properly obtain a permit before undertaking activity that caused or contributed to discharge into the surface or ground water; specifically, Mr. Hastings did not submit a Notice of Intent to DNREC in order to fall under the EPA's delegated permit. Mr. Hastings timely appealed the Secretary's Order to the Environmental Appeals Board.

On appeal, the burden is on Mr. Hastings to demonstrate that the Secretary's decision is not supported by the evidence on the record before the Board. 7 *Del. C.* § 6008(b). The Board may affirm, reverse, or remand with instructions any appeal of a case decision of the Secretary. *Id.* Here, the Board finds as a matter of fact that the approved sediment control and stormwater management plan for Rivers End, Phase V required the submissions of "as built" within sixty days of the stormwater management facility completion. In reaching this finding, the Board relies on the sworn testimony of Ms. Rutherford (p. 28), Ms. Watson (p. 183, 197-198), and DNREC's Exhibit 8. The Board further finds as a matter of fact that "as built" were never submitted. In reaching this finding, the Board relies on the sworn testimony of Ms. Rutherford (p. 36, 66) and Ms. Watson (p. 198). Although Mr. Hastings testified that he believed "as built" were submitted, his testimony on this point was not consistent. Specifically, Mr. Hastings testified that "as built" were turned in "to the best of his knowledge" (p. 259); that he himself submitted the "as built" (p. 263); and that "as built" were submitted by his contractor, Mr. Simpler (p. 189). The Board cannot find that this testimony is enough to overcome the credible, consistent testimony of Ms. Rutherford and Ms. Watson on this point and the Board finds that "as built" were never submitted.

There were open questions as to whether the pond was adequate for the drainage area in 2007. The Board bases this finding of fact on the testimony of Ms. Watson (p. 124, 153-154, 192). Mr. Hastings definitely believes that the pond is still adequate. Unfortunately, he never hired a

consultant to corroborate his belief and he never complied with the terms of his permit because he failed to submit “as built” data so the adequacy of the pond and the previously-submitted sediment and stormwater erosion control plan could be confirmed. The Board bases this finding on the testimony of Mr. Hastings who conceded he did not hire a professional to opine on, or otherwise technically demonstrate, the adequacy of the pond because he didn’t need an expert in the Court of Chancery case, wherein he believes he proved that the drainage area was not larger than what he originally submitted. (p. 290).

Based on the testimony and the documentary evidence submitted, the Board concludes that the smooth line topography lines that were originally submitted by Mr. Hastings were clearly not what Ms. Watson saw when she went out to the site, and it was completely reasonable for her to ask for “as built.” Not only were “as built” required by the permit, the sediment and stormwater erosion control plan submitted by Mr. Hastings indicates that the project boundary is the drainage boundary. But Mr. Allen testified that he has observed water going across the property line in both directions. (p. 228). From the testimonial evidence then, it is clear that today the drainage boundary is not the project boundary, as was originally submitted as part of the sediment and stormwater erosion control plan. Requiring “as built” data and a corrective plan of action if that data indicates the original plan is not sufficient is a completely reasonable requirement of Mr. Hastings’ permit.

Nonetheless, the Board finds the work on the part of SCCD and DNREC to be lacking professional rigor. The Board is very concerned that there was a complete break in communication between these agencies and Mr. Hastings for seven years. Mr. Hastings presents a very sympathetic case insofar as he clearly believes there is no need to update his stormwater plan and he heard nothing from DNREC for seven years and understandably presumed the matter to be

closed. None of this, however, excuses Mr. Hastings from compliance with the permit requirements.

7 Del. C. § 6008(c) makes clear that the burden of proof is on Mr. Hastings to show that the Secretary's decision is not supported by the evidence on the record before the Board. Mr. Hastings signed the permit that clearly states it requires the submission of "as built" and he has no evidence that he ever submitted "as built." The Secretary's decision, that Mr. Hastings violated 7 Del. C. § 4003 for failing to comply with the approved sediment and stormwater erosion control plan by failing to submit "as built" data is supported by substantial evidence.

Accordingly, the Secretary's decision is AFFIRMED.

It is so ordered this 7th day of March, 2019 by the
Environmental Appeals Board:

Dean Holden, Chairperson

Robert Mulrooney, Board Member

Michael Horsey, Board Member

Frances Riddle, Board Member

Guy Marcozzi, Board Member

Sebastian LaRocca, Board Member

EAB Appeal No. 2018-03 Decision and Final Order

Date: 3/7/2019


Dean Holden, Chairperson

EAB Appeal No. 2018-03 Decision and Final Order

Date: 2/25/2019


Robert Mulrooney, Board Member

EAB Appeal No. 2018-03 Decision and Final Order

Date: 3/8/19



Michael Horsey, Board Member

EAB Appeal No. 2018-03 Decision and Final Order

Date:

2/25/19

A handwritten signature in black ink, appearing to read "Frances Riddle", written over a horizontal line.

Frances Riddle, Board Member

EAB Appeal No. 2018-03 Decision and Final Order

Date: 02-26-19



Guy Marozzi, Board Member

EAB Appeal No. 2018-03 Decision and Final Order

Date: 2/26/19


Sebastian LaRocca, Board Member