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## In re Authorization for Freshwater Wetlands Gen. Permits, 860 A.2d 450 (N.J. Super. Ct. App. Div. 2004)

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high as the owner of the easement desires, subject to the natural fluctuations of weather and seasons” was a long-standing rule of law in New Hampshire. Furthermore, the court clarified an owner had the right to increase water levels as high as possible, regardless of any seasonal variations in water levels during the prescriptive period.

Looking to Sandford’s case, the court then concluded a reasonable person could have found the town did have an easement to flow Sandford’s land to 534.7 feet above sea level. The court reasoned this was consistent with the historical and customary use of the dam, taking into account seasonal changes in weather. Therefore, the New Hampshire Supreme Court agreed with the trial court in determining the scope of the town’s easement and affirmed its ruling.

*John Lintzenich*

## NEW JERSEY

***In re Authorization for Freshwater Wetlands Gen. Permits, 860 A.2d 450 (N.J. Super. Ct. App. Div. 2004)*** (holding the New Jersey Department of Environmental Protection must gather additional facts and conduct further analysis to determine whether wetlands were isolated because evidence suggesting otherwise).

Preserve Old Northfield (“POND”) appealed the decision of the New Jersey Department of Environmental Protection (“DEP”) to issue Daniel Markowitz of Maramark Builders, L.L.C. (“Markowitz”) a Letter of Interpretation (“LOI”) and a Freshwater Wetlands General Permit (“GP6”). DEP issued the LOI and the GP6 after it concluded the wetlands on Markowitz’s land were “isolated wetlands” within the meaning of New Jersey state law. POND contended Markowitz’s land, which sat adjacent to POND land, contained numerous wetlands consisting in part of an inland tributary system and the GP6 violated the Freshwater Wetlands Protection Act (“FWPA”).

In February 2001 Markowitz applied to DEP for authorization to fill a portion of the wetlands in connection with his residential construction project. From the time of application time until the end of 2003, POND, its engineering expert, and other interested parties submitted numerous documents and reports to DEP in opposition of the application. Specifically, POND submitted information that indicated a loss of flood storage from stormwater would occur with filled wetlands, resulting in ponding and flooding on POND land.

On June 8 and August 20, 2001, DEP inspected the property at issue. After these inspections, DEP issued the LOI on August 30, 2001. The LOI reflected DEP’s finding that the wetlands were of “intermediate” and “ordinary” resource value as defined in the FWPA and New Jersey state law. DEP denied POND’s request for an adjudicatory hearing. POND continued to submit additional reports and requested DEP visit the property during the rainy months in order to observe the

stormwater flows. In February 2002 Markowitz submitted a revised application for GP6, and POND again submitted additional materials in opposition of Markowitz's application. DEP responded to POND's submitted materials by indicating that DEP's on-site inspections did not find any evidence to support an opinion that the wetlands were not isolated. Consequently, DEP issued the GP6 in May 2003 and concluded a portion of the land contained isolated wetlands and that these wetlands could be disturbed for the construction project.

The Superior Court of New Jersey, Appellate Division, concluded DEP's permitting process was quasi-judicial and, thus, DEP needed to engage in fact-finding to the extent required by statute or regulation. The court also determined all FWPA permitting actions required certain fact-finding consistent with statutory criteria and reflected in the record. The court pointed to evidence POND provided, including POND's engineering expert, and decided an abundance of factual material contrary to DEP's determinations existed. The court also noted its discomfort with the fact that DEP's 1986 Freshwater Wetlands map reflected the wetlands in question as part of the inland tributary system and that DEP's on-site visits took place during a dry period. The court further stated that statutes and regulations did not define "sheet flow" and "concentrated flow," and DEP failed to provide significantly distinct definitions of these two different types of flows. Because ample evidence of water flowing from Markowitz's property existed, and due to DEP's failure to distinguish the evidence as "sheet flow" or "concentrated flow," the court remanded the case to DEP for further fact-finding and analysis to address the court's concerns.

*Laura L. Chartrand*

## NEW MEXICO

**State v. City of Las Vegas, 89 P.3d 47 (N.M. 2004)** (overturning the pueblo rights doctrine for inconsistency with the doctrines of prior appropriation and beneficial use).

This case arose through the course of adjudicating water rights on the Gallinas River when the New Mexico state engineer sought a declaration of the City of Las Vegas' ("City") water rights based on the pueblo rights doctrine. The state engineer argued the inapplicability of this doctrine in New Mexico, thus prohibiting the City's water right entitlement under the doctrine's invocation. The Court of Appeals of New Mexico did not follow the precedent of *Cartwright v. Public Service Company of New Mexico*, but instead offered an opinion to aid the New Mexico Supreme Court's further independent consideration. Specifically, the appellate court expressed reservations over reconciliation between the pueblo rights doctrine and the prior appropriation doctrine.