SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

Adam D. Gelof, Esquire
Deputy Attorney General
Department of Justice
115 E. Market Street
Georgetown, Delaware 19947

Timothy G. Willard, Esquire
Fuqua & Yori, P.A.
P.O. Box 250
Georgetown, Delaware 19947

Submitted: March 12, 2004
Decided: May 19, 2004

RE: ***State of Delaware v. Daniel M. Wien***
ID #0305020899

Dear Counsel:

This is my decision on Defendant, Daniel Wien's Motion to Dismiss, Motion to Compel, Motion to Compel/Writ of Mandamus and Motion in Limine. For the following reasons, Defendant's Motion to Compel expert witness information pursuant to Super. Ct. Crim. R. 16(a)(1)(E) is granted. Defendant's Motions to Dismiss and to Compel/Writ of Mandamus are denied. As to Wien's Motion in Limine, an evidentiary hearing will be held on May 24, 2004.

STATEMENT OF THE CASE

Defendant, Daniel Wien ("Wien") was indicted by Grand Jury on October 9th, 2003 of 3 counts of "intentionally or knowingly conduct[ing] or maintain[ing] any activity in a wetland without a permit" in violation of 7 *Del. C.* § 6604 of the Wetlands Act, penalty as provided in 7 *Del. C.* §

6617. The language of the 3 counts was supplemented by superseding indictment on December 15, 2003. The violations were discovered on April 24th and 25th of 2003 when Officer Costello, an enforcement agent for the Department of Natural Resources and Environmental Control ("the DNREC"), inspected Wien's property. Allegedly, Wien constructed a wall of concrete bags and dumped two truck loads of fill on his land.

7 *Del. C.* § 6604 provides:

> (a) Any activity in the wetlands requires a permit from the Department except the activity or activities exempted by this chapter and no permit may be granted unless the county or municipality having jurisdiction has first approved the activity in question by zoning procedures provided by law.

7 *Del. C.* § 6603(a) provides:

> (a) "Activity" means any dredging, draining, filling, bulkheading, construction of any kind, including but not limited to, construction of a pier, jetty, breakwater, boat ramp, or mining, drilling or excavation.

7 *Del. C.* § 6617 is the penalty provision, providing:

> (a) Any person who intentionally or knowingly violates any rule, regulation, order, permit condition or provision of this chapter shall be fined not less than $500 or more than $10,000 for each offense. Continuance of any activity prohibited by this chapter during any part of a day shall constitute a separate offense. Any person found guilty of violating any cease and desist order of the Secretary shall be fined for each offense, starting from the date of receipt of the order. The Superior Court shall have jurisdiction of offenses under this subsection.

Wien has filed several motions in this case. In a Motion to Dismiss, he challenges the constitutionality of the Wetlands Act, claiming that 7 *Del. C.* §§ 6604 and 6603 are constitutionally overbroad and vague. He has also filed a Motion in Limine to suppress evidence gathered by Officer Costello on January 24th and 25th on the basis that he violated the requirements of the act by not providing written notice before searching Wien's land, as is required by 7 *Del. C.* § 6616. As a result, Wien claims the search was made in violation of the Fourth Amendment, as applied to the

states through the Fourteenth Amendment, and of Article 1, § 6 of the Delaware Constitution. In addition, Wien has made a Motion to Compel the State to provide information regarding a State's expert witness, Dr. William Meredith ("Meredith") of the Division of Fish and Wildlife pursuant to Superior Court Criminal Rule 16(a)(1)(E). He is also, in a Motion to Compel/ Writ of Mandamus, requesting an order that would require the DNREC (and the Office of the Attorney General) to permit inspection of certain records under the Freedom of Information Act (FOIA). Beginning with the constitutional issues, the Court will address each issue in turn.

DISCUSSION

A. Overbreadth

A statute is unconstitutionally overly broad if it tends to regulate or punish conduct that is constitutionally protected, whether directly or incidentally. Such a law "is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights." Laurence H. Tribe, *American Constitutional Law* 1022 (2d ed. 1988), *quoting*, *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). "In a facial challenge to the overbreadth . . . of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

Traditionally, the United States Supreme Court has only entertained facial[1] challenges for overbreadth when addressing conduct protected by the First Amendment. In cases where a law is overly broad without affecting freedom of expression, the Court will generally construe the law to the point where it can be constitutionally applied. As Laurence Tribe puts it:

> [T]he usual approach of constitutional adjudication – gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case – does not respond sufficiently to the peculiarly vulnerable character of activities protected by the first amendment. For an 'overbroad' law of the sort described here 'hangs over [people's] heads like a sword of Damocles.'

Tribe, *supra* at 1023, *quoting*, *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

The U.S. Supreme Court has, however, at least on one occasion voided a statute in its entirety for overbreadth when the protected constitutional conduct being unduly limited was not a freedom of expression, but was instead the right to travel. *See Aptheker v. Sec'y of State*, 378 U.S. 500 (1964).[2] In addition, the Delaware Supreme Court has found a criminal statute governing driving under the influence to be unconstitutionally overbroad. *See State v. Baker*, 720 A.2d 1139 (Del. 1998) (finding 21 *Del. C.* § 4177(a)(5) was unconstitutionally overbroad when it relieved the State from proving a defendant's alcohol content was .10 or greater *while* driving; § 4177(a)(5) required only that a person's blood alcohol level be 0.10% or greater within 3 hours of driving). Thus, it is not unheard of for a facial challenge to a statute to succeed if that statute reaches constitutionally protected conduct other than those activities protected by the First Amendment.

In this regard, the first business of the Court is to determine whether the Wetlands Act regulates constitutionally protected activity and, if so, what is the nature of that activity. Defendant claims that the constitutionally protected activity being threatened by the Act is the riparian right of access to the waterways. While it is true that riparian rights are "a distinct class of property rights that include the right of access to the navigable portion of a waterway," property rights are not constitutionally protected activity. *Collazuol v. Tulou*, 1996 WL 658966, at *6 (Del. Super. Ct.), *citing*, *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1168 (Del. 1992). Constitutionally protected conduct includes those activities which are asserted in the United States Constitution or Bill of Rights (or Delaware State Constitution and Delaware Bill of Rights) as affirmative rights,

such as the rights to vote and to freedom of speech, religion and association. It also includes rights recognized by the judiciary as liberty rights through the application of the substantive due process protections inherent in the Fifth and Fourteenth Amendments. In addition, there are other various and sundry personal rights carved from the "shadows" of other amendments. See *Tribe*, *supra* at 1304 - 1435 for a discussion of the "Rights of Privacy and Personhood."

A person does have a common law right to exercise control over that property which he owns; however, this control is not absolute where government is concerned and where semi-public property, such as a waterway is concerned. Property rights are addressed constitutionally at that place where the need for government action to provide for the public welfare intersects with private interests protected at common law. One recognized analysis for resolving a conflict of governmental rights and of individual property rights is to apply a test to determine if there has been a taking under the Fifth Amendment, and, if so, if compensation is in order. This provides a remedy to protect individual rights. An overbreadth analysis would not be germane in this context.

In *City of Wilmington v. Parcel of Land Known as Tax Parcel*, 607 A.2d 1163, 1168 (Del. 1992), the Delaware Supreme Court found, "[t]he foreshore, that portion of riparian property which fronts a navigable river, 'is a distinct class of property right in tidal waters and is capable of independent ownership.'" *Quoting*, *State ex rel. Buckson v. Pennsylvania R.R. Co.*, 228 A.2d 587, 598 (Del. Super. Ct. 1976), *aff'd*, 267 A.2d 455 (Del. 1969). The Court elaborated that those riparian rights included "the right to wharf out directly from the foreshore to the bulkhead line and the right to have free access to the navigable portion of a river." *City of Wilmington*, 607 A.2d at 1168, *citing*, *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 456-57 (1882). In *City of Wilmington*, the City condemned some acres of land adjacent to the Christina river for the purposes

of expanding the Port of Wilmington without compensating the owner for the taking of its riparian property rights. There, the Court found that the State "'cannot [directly] take [riparian rights attached to] private property for public use without [just] compensation,'" such that an award of compensation for a complete and direct taking must also separately take into consideration the loss of a riparian right of access. *Id.* at 1169, *quoting*, *Bailey v. Philadelphia, Wilmington and Baltimore R.R. Co.*, 4 Harr. 389, 397 (Del. Ct. Err. & App. 1846). It also noted, however, that "[i]t is well settled that the State possesses the power to regulate or restrict private riparian property rights for public purposes without the payment of compensation." *City of Wilmington*, 607 A.2d at 1168.

In another case, *Collazuol v. Tulou*, 1996 WL 658966 (Del. Super. Ct.), the Superior Court addressed a fact pattern similar to the case at bar, in that it involved a statute requiring a permit for activities in designated wetlands. The appellants in *Collazuol* were denied a permit to build a foot bridge by the DNREC and alleged upon appeal from the Board decision that the regulation, 7 *Del. C.* § 6604, impermissibly abridged their riparian right of access. Pointing out that the State has the power to restrict private riparian rights, the *Collazuol* Court continued, "[t]o the contrary, . . . a property owner who desires to build a structure over wetlands to access a boat may do so, provided that the owner has applied for a permit, the structure is fairly evaluated under the six statutory factors . . ., and the DNREC approves the application." 1996 WL 658966, at *9. Here, as in *Collazuol*, the DNREC is not placing a total restriction upon access to waterways.

In conclusion, 7 *Del. C.* § 6604 is not void for overbreadth. It sweeps within its purview activity the government may legitimately regulate, i.e. a property owner's rights as regards their activity near or on and their access to a public waterway. Such rights are adequately protected the takings clause of the Constitution.conduct. The Court finds also that there has not been a taking that

requires any compensation in the circumstances of this case. The State may restrict riparian rights without providing compensation. *See Ohio Oil Co. v. Indiana*, 177 U.S. 190, 210-11 (1900) (finding that to the extent an owner of land has a property interest in natural gas under it, the state may regulate his access to that gas in order to prevent destruction of the common property in the interest of the common owners; in such a case the state need not provide compensation.) In addition, the State has provided for a comprehensive permit scheme which does not completely prohibit the building of structures on wetlands.

B. Vagueness

If, as in this case, the enactment implicates no constitutionally protected activity, "[t]he court should then examine the facial vagueness challenge and . . . should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-5 (1982). When the vagueness challenge does not involve activity protected under the First Amendment, the statute must be examined "'in the light of the facts of the case at hand.'" *Id.*, at 495 n.7, *quoting*, *U.S. v. Mazurie*, 419 U.S. 544, 550 (1975). Thus Wien must confine his argument to the facts and circumstances of this case. *State v. Sailer*, 684 A.2d 1247, 1249 (Del. Super. Ct. 1995). If the defendant's activity is clearly proscribed by the statute, then he cannot challenge it for vagueness as it is applied to others. *Village of Hoffman Estates*, 455 U.S. at 495. Defendant must prove that the statute is vague, "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id*. at 495 n.7, *quoting*, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

A statute is said to be so vague as to violate due process when "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). In accordance with due process requirements, a law must give a person fair warning of what it is he must avoid and it must contain a standard sufficient that it will not be enforced in an arbitrary and discriminatory manner by law enforcement officials. This standard was set out in more elaborate detail in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

In the case at bar, Defendant Wien is accused of three counts of "intentionally or knowingly conduct[ing] or maintain[ing] any activity [as defined by 7 Del. C. § 6603(a)] in a wetland without a permit from Department of Natural Resources, in violation of Title 7, Section 6604 . . . ." Grand Jury Indictment at 1-2. 7 *Del. C.* § 6603(a) defines "activity" as "any dredging, draining, filling, bulkheading, construction of any kind, including but not limited to, construction of a pier, jetty, breakwater, boat ramp, or mining, drilling or excavation." Wien claims that §§ 6604 and 6603(a), in concert, create an unconstitutionally vague standard because the terms, "dredging, draining, filling, bulkheading, or construction" are undefined and that the modifying phrases "of any kind" and "including but not limited to" broaden the scope of activities covered so as to make it unclear to a landowner exactly what activity is prohibited. Section 6604, says Wien, does not provide sufficient

notice for due process purposes and places too much unfettered discretion in the hands of law enforcement authorities.

1. Discretion of Agency Officials

The best place to begin the analysis of the language of §§ 6604 and 6603(a) is to review the purpose of the Wetlands Act, Chapter 66 of Title 7. "The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Village of Hoffman*, 455 U.S. at 498. Thus, the purpose as stated in 7 *Del. C.* § 6602[3] demonstrates that "the preservation of the coastal wetlands is *crucial* to the protection of the natural environment of [the State's] coastal areas" and that it is the declared "public policy of this State to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands." (Emphasis added.) In conformity with this purpose, the legislature has delineated that no activity may be conducted in a wetland without a permit.

The legislature has delegated to the DNREC the power to designate and inventory wetlands, grant or deny permits for activity on those wetlands, and to adopt regulations consistent with the provisions of the enabling statute. *See In re Dep't of Natural Res. and Envtl. Control*, 401 A.2d 93, 94, 96 (Del. Super. Ct. 1978). "[A]s Article II, s. 1 of the Delaware Constitution recites, it is recognized that the legislature may declare policy and announce legislative principles . . . but delegate to an administrative body the authority to apply those principles in factual situations. . . ." *Id*. at 95. In determining whether a legislative grant of power to an administrative agency gives too much "unguided and uncontrolled discretionary power" to administrators, a court must look to whether there are "adequate safeguards and standards to guide discretion." *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711, 713 (Del. 1979). In *Atlantis*, the Court upheld the validity of the Beach

Preservation Act of 1972 despite the fact that it found the act did not have precise standards to control administrative discretion. The Court noted:

> Where it is not feasible for the General Assembly to supply precise statutory standards without frustrating the purposes of the legislation, the presence of procedural safeguards may compensate substantially for the lack of precise statutory standards. The preciseness of the statutory standards will vary with both the complexity of the area at which the legislation is directed and the susceptibility to change of the area in question.

Id. (Citations omitted.).

The statute in question in *Atlantis* was similar to the Wetlands Act in that it gave the DNREC the authority to preserve and protect the beaches of the state. *Id*. at 714. At that time, 7 *Del. C*. § 6803(c) provided, "No substantial change in the existing characteristics of any beach shall be made without prior written approval of the Department." *Id*. The DNREC, pursuant to this authority, had adopted regulations governing the issuance of permits for certain beach construction. *Id*. at 715. In finding that those regulations provided the necessary standard which tended to "circumscribe the broad administrative discretion given to the DNREC in the Act," the Court stated:

> Although the Act does not specify what constitutes a "substantial change" in the characteristics of a beach, the DNREC's regulations define a "substantial change" to include "the erection of any permanent or semi-permanent structure." That definition is well within the apparent intent of the General Assembly to prevent unrestricted development of beaches and "to effectuate an equitable balance between utilization, conservation and protection of this resource consistent with sound coastal engineering principles."

Id. at 716, 715 (citations omitted).

Thus, as to this issue, the Court finds, a due process challenge on the basis that a statute is so vague that it "impermissibly delegates basic policy matters to policemen, judges, and juries" is inapplicable in a case such as this one where the authority delegated is invested in an administrative agency and its officers. Such officers have broader discretion to decide policy matters. In addition, the Wetlands Act has sufficient safeguards to ensure that the power of the Secretary and the Board

is limited. See *In re Dep't of Natural Res. and Envtl. Control*, 401 A.2d 93 for a discussion of the limitations on the power of the Board and the Secretary in administering the Wetlands Act. That Court noted that when discretion at the administrative level involves "the exercise of the police power, i.e. the protection of public morals, health and safety, the delegation of legislative authority may be cast in general terms." *Id*. at 95. 7 *Del. C*. § 6619 also provides that the Wetlands Act is to be liberally construed in order to preserve the wetlands. Accordingly, Defendant's contention that the language of §§ 6604 and 6603(a) is so vague as to invest the DNREC with unfettered discretion is not persuasive.

2. Fair warning of the prohibited activity

Defendant is also alleging that the language of §§ 6604 and 6603(a) does not provide sufficient notice for due process purposes. The Court finds, however, that the meaning of "activity," as it is defined in § 6603(a) is sufficiently definite to provide a person of ordinary intelligence a reasonable opportunity to know what conduct is proscribed under § 6604. In fact there is nothing more clear than a complete prohibition of activity. Taken out of context, such a prohibition would seem absurdly inclusive, but the activity is limited by the context of the statute to that which is done on wetlands and which may cause harm to those wetlands.

Section 6603(a) provides further guidance to those who are not certain what conduct might be included in "any activity." While these examples may be nonexclusive, they do provide an idea of what specific activities were contemplated by the legislature as being most pervasive and/or harmful to the wetlands. In statutory construction this concept is the principle of *ejusdem generis*, or the idea that if a list of examples is given, then other prohibited activity will be assumed to be of a similar nature.

> General and specific words in a statute which are associated together and which are capable of an analogous meaning take color from each other, so that the general words are restricted to a sense analogous to the less general. . . . In accordance with the rule of ejusdem generis, such terms as "other," "other thing," "other persons," "others," "otherwise," or "any other," when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described.

73 Am. Jur. 2d *Statutes* § 135 (2001) (citations omitted).

Granted, it cannot be presumed from a rule of statutory construction that a person of normal intelligence will have notice of prohibited activity; however, the principle of *ejusdem generis* is helpful because it is common for ordinarily intelligent people to categorize in a similar manner, giving meaning to generic terms based upon the context of those words.

Defendant seems to take issue predominately with the use of the words, "construction of any kind," noting that no definition is given for "construction" and that "an ordinary man must guess what may constitute 'any construction.'" Def.'s Memo. in Support of Def.'s Mot. at 2. "A court has a duty to read statutory language so as to avoid constitutional questionability and patent absurdity . . . ." *Moore v. Wilmington Housing Authority*, 619 A.2d 1166, 1173 (Del. 1993). Construction is a word that is commonly used in the English language and its meaning is clear when measured by common understanding and practices. According to Webster's Third New Int'l Dict. (1968) it means "the act of putting parts together to form a complete integrated object; something built, erected."[4] Given, the purpose of the statute, the circumstances and the context, it is evident that it was used in the sense of construction of a building, wall, dam, bridge, berm or other structure, as opposed to, for example, construction of a sentence.

Moreover, a requirement of mens rea mitigates the extent to which a statutory standard may be unconstitutionally vague in that "'it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.'" *State v. Sailer*, 684 A.2d 1247,

1249 (Del. Super. Ct. 1995), *quoting*, *Colautti v. Franklin*, 439 U.S. 379, 395 n. 13 (1979). *Accord Village of Hoffman Estates,* 455 U.S. at 499; *Robinson v. State*, 600 A.2d 356, 365 (1991). 7 *Del. C.* § 6617(a), the penalty provision of the Wetlands Act, includes a scienter element, stating, "[a]ny person who *intentionally or knowingly* violates any rule, regulation, order, permit condition or provision of this chapter shall be fined . . . ." (Emphasis added). In conclusion, the Court finds that the complete definition of "activity" in § 6603(a), including the words "construction of any kind" and "including but not limited to" is sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what behavior is prohibited.

On a final note, even if Defendant wanted to challenge the statute on the basis that other, unintended conduct, might be criminalized under § 6604, he has no standing because his conduct is clearly proscribed by the statute. He was constructing a wall made of concrete bags, i.e. he was "putting [concrete bags] together to form a complete integrated object," in this case, a wall. It might also be said he was "bulkheading" (to create a wall that acts as a protective barrier), an activity explicitly prohibited under the definition in § 6603(a). In addition, Wien stands accused of filling a wetland, for allegedly dumping two truck loads of fill on his land. "Filling" is also an activity specifically prohibited under the statute.

C. 4th Amendment

Defendant Wien has presented a motion to suppress the evidence obtained against him during the visit to his property. He alleges that when the DNREC entered his land it was an illegal search because the DNREC officers failed to give written notice as required by 7 *Del. C.* § 6616. He alleges this oversight is a violation of the Fourth Amendment protection against unreasonable searches and seizures (as applied to the states through the Fourteenth Amendment), and that it is a violation of

Article 1, § 6 of the Delaware Constitution. 7 *Del. C.* § 6616 authorizes agency inspections to assure compliance with wetlands regulations enacted for the public welfare; however, it requires that the officer first given written notice and present official identification:

> The Secretary or the Secretary's duly authorized designee, in regulating any activity over which he or she has jurisdiction pursuant to this chapter, may enter, at reasonable times, upon any private or public property for the purpose of determining whether a violation exists of a statute or regulation enforceable by him or her, upon giving written notice, and after presenting official identification to the owner, occupant, custodian or agent of said property.

Administrative spot checks of this nature are not uncommon. The law on this subject can be seen in *State v. Faircloth,* 1995 WL 465323 (Del. Super. Ct.); *State v. Arnold*, 2001 WL 985101 (Del. Super. Ct.); *Passerin v. State*, 419 A.2d 916 (Del. 1980). *See also Donovan v. Dewey*, 452 U.S. 594 (1981); *New York v. Burger*, 482 U.S. 691 (1987). The presence of an agent on property may be lawful under the well known open fields or plain view doctrines. *State v. Halko*, 188 A.2d 100 (Del. Super. Ct. 1962); *State v. Hoster*, 2001 WL 34084909 (Del. Com. Pl.). *See also Oliver v. U.S.*, 466 U.S. 170, 173 (1984)*; Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974); *Johnson v. Wolgemuth*, 257 F. Supp.2d 1013 (S.D. Ohio 2003). Here, the Court does not have enough information to make a decision without holding an evidentiary hearing. This will be done on the morning of trial, May 24, 2004.

On February 14, 2004, the State obtained a search warrant and searched Wien's residence. In response to that search, Wien filed a Motion to Compel/ Writ of Mandamus asking the Court to exclude all evidence obtained pursuant to that search. Defendant argued 7 *Del. C.* § 6616 was violated because Wien was not given written notice beforehand. By its terms, this Section applies to administrative searches which may be permissible without a warrant. Thus, when a warrant is procured, advance notice is not required.

D. Defense's Rule 16(a)(1)(E) request

Defendant has requested information about the State's expert witnesses pursuant to Superior Court Criminal Rule 16(a)(1)(E). Super. Ct. Crim. R. 16(a)(1)(E) provides:

> Upon request of a defendant, the state shall disclose to the defendant any evidence which the state may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

In response to the defendant's request for this information, the State has stated:

> [Mr. Meredith] will testify in general to the age of certain structures built on the site (the bag wall), the various types of measures used to counter erosion on a site such as Mr. Wien's, the positive and negative effects of those measures and the types and manner or erosion on the site. Further, he will testify to the requirements and compliance with Mr. Wien to the regulatory framework for the actions in question. Specifically that the area in question was a designated wetland and the timing (from aerial and other photos) of additions of fill and or the wall (structure) to the site.

State's Reply Letter of 2/03/2004 at 2.

The State has merely provided a general summary of Mr. Meredith's prospective testimony. This summary is insufficient to meet the requirements of Rule 16(a)(1)(E) for it does not say much if anything about the substance of the opinions to be expressed. The standard of disclosure was set out in *State v. Sailer*, 684 A.2d 1247, at *48-49 (Del. Super. Ct. 1995):

> [I]t is only appropriate to read the two sections [16(a)(1)(E) and 16(b)(1)(C)] contained in Rule 16 together in order to come to a common sense resolution of this issue. Doing so would logically lead to a conclusion that the term 'substance of the opinions to be expressed' relates back to the requirement of disclosure of the material relevant to Delaware Rules of Evidence 703 and 705. As such, each side is to identify all facts and data provided by the party to their expert which was reasonably relied upon in reaching their decision.

Since the defense has requested disclosure of the substance of expert witness testimony pursuant to Rule 16(a)(1)(E), the State must satisfy the requirements of the rule as set out in *Sailer*. *See also State v. Patterson*, 1997 WL 720719 (Del. Super. Ct.).

E. Defendant's Freedom of Information Act Request

To the extent that Wien is requesting information regarding public records from the Attorney General's Office in relation to this suit, he is restricted to discovery rules and procedures and the Freedom of Information Act is inapplicable. In other words, the Deputy Attorney General need only provide relevant information under Superior Court Criminal Rules and pursuant to *Brady*. The Court has already expressed this point once. The Deputy Attorney General states that he has cursorily reviewed the files in question and in addition he claims that they are voluminous and that it is not clear to him why they are pertinent to this suit. In addition, he has in the past and with his response to the motion provided to the defense some of the documents in question.

To the extent Wien wishes to request public records from the DNREC pursuant 29 *Del. C.* § 10003(a) of the Freedom of Information Act (FOIA), he must pursue the proper enforcement procedures as laid out in the act. According to § 10005, the enforcement provision, "[a]ny citizen denied access to public records as provided in this chapter may bring suit within 60 days of such denial." In addition, there is some precedent tending to show that these records may be exempted from the disclosure rules because pursuant to § 10002(g)(9), "any records pertaining to pending litigation or potential litigation which are not records of any court" are not public records. *See Office of the Public Defender v. Delaware State Police*, Del. Super. Ct., No. 01C-09-208, Silverman, J. (March 31, 2003). However, this would be an issue to be decided in a civil suit brought by Wien against the DNREC pursuant to the enforcement section.

CONCLUSION

For the reasons set forth herein, Defendant's Motion to Compel is granted. The State shall provide a more extensive description of the content of their expert, Meredith's prospective

testimony. Defendant's Motion to Dismiss is denied. 7 *Del. C.* §§ 6603 and 6604 are neither constitutionally overbroad nor vague. Defendant's Motion to Compel/ Writ of Mandamus is also denied. Finally, an evidentiary hearing is scheduled for May 24, 2004 in order to conclusively resolve the issues underlying Defendant's Motion in Limine.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. A facial challenge means a claim that a law should be voided in its entirety. *Village of Hoffman Estates*, 455 U.S. at 494 n.5.

2. The Supreme Court stated in *Aptheker*, at 514:

> In our view, the foregoing considerations compel the conclusion that s 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation "narrowly drawn to prevent the supposed evil," *cf. Cantwell v. Connecticut*, 310 U.S., at 307, 60 S.Ct. at 905, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, *NAACP v. Button*, 371 U.S., at 438, 83 S.Ct., at 340.

3. The full text of § 6602 is as follows:

> It is declared that much of the wetlands of this State have been lost or despoiled by unregulated dredging, dumping, filling and like activities and that the remaining wetlands of this State are in jeopardy of being lost or despoiled by these and other activities; that such loss or despoliation will adversely affect, if not entirely eliminate, the value of such wetlands as sources of nutrients to finfish, crustacea and shellfish of significant economic value; that such loss or despoliation will destroy such wetlands as habitats for plants and animals of significant economic and ecological value and will eliminate or substantially reduce marine commerce, recreation and aesthetic enjoyment; that such loss or despoliation will, in most cases, disturb the natural ability of wetlands to reduce flood damage and adversely affect the public health and welfare; that such loss or despoliation will substantially reduce the capacity of such wetlands to absorb silt and will thus result in the increased silting of channels and harbor areas to the detriment of free navigation. It is hereby determined that the coastal areas of Delaware are the most critical areas for the present and future quality of life in the State and that the preservation of the coastal wetlands is crucial to the protection of the natural environment of these coastal areas. Therefore, it is declared to be the public policy of this State to preserve and protect the productive public and private wetlands

and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands.

4. 11 *Del. C.* § 221(c) also provides, "[i]f a word used in this Criminal Code is not defined herein, it has its commonly accepted meaning, and may be defined as appropriate. . . ."