



**STATE OF CONNECTICUT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**



*IN THE MATTER OF*

:

*APPLICATION NO. 200402741*

*STEVEN TONER*

:

*MARCH 7, 2011*

***FINAL DECISION***

***I  
SUMMARY***

Stephen Toner has applied to the Department of Environmental Protection (DEP) for a permit to construct a dock in Ash Creek in Fairfield. This proposed dock will encroach sixty feet into public waters, spanning thirty-five feet of tidal wetland vegetation to accommodate the berthing and operation of a twenty-four foot powerboat. This application is subject to the statutory scheme that governs the management of coastal resources. General Statutes §§22a-28 through 22a-35 (Tidal Wetlands Act); §§22a-90 through 22a-112 (Coastal Management Act); §§22a-359 through 22a-363f ("Structures and Dredging Act"); and Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17 (implementing regulations).

The DEP tentatively approved this application and prepared a draft permit that would allow Mr. Toner to build the proposed dock. A hearing was conducted after a petition was filed by the Ash Creek Conservation Association (ACCA), which also intervened as a party in the proceeding. The other parties are the applicant and staff of the DEP Office of Long Island Sound Programs (DEP/staff).

The primary issue raised by ACCA in its opposition to the permit centered on the applicant's intended use of the dock to launch and berth a 24-foot powerboat.<sup>1</sup> During the hearing, it was evident that staff had not considered this issue when reviewing the permit application. The parties were directed to file post-hearing briefs that included the issue of whether the Commissioner was authorized to consider the intended use of the dock as an aspect of the permitting process. Staff's brief recommended a series of special permit terms and conditions (STCs) to mitigate impacts if the use of the dock were considered.

The hearing officer issued a ruling that the DEP had the authority to consider use of the dock. In her subsequent Proposed Final Decision (PFD), the hearing officer concluded that she could not find that the proposed dock and its intended use complied with relevant statutes and regulations and therefore recommended that the application be denied without prejudice, allowing the applicant to request a re-evaluation of the application or to submit a modified proposal. Accordingly, the STCs proposed by staff were not given any further consideration.

Following the release of the PFD, the parties entered into mediation to address permit issues which was not successful. However, the applicant and DEP staff later reached an agreement on permit conditions that provided for the use of the dock and asked that the record be reopened for the hearing officer to consider their Agreed Draft Decision (ADD). This ADD, which incorporated or revised some of staff's previously-proposed STCs, was admitted into the

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<sup>1</sup> The ACCA was also concerned about a permit condition that requires that the applicant, prior to construction of the dock, record a restrictive covenant that establishes and describes the boundary of a "no mow zone" to encourage the restoration of high marsh vegetation along an extant 159-foot stone retaining wall along the entire shoreline of the applicant's property. The ACCA is not correct in its claim that this permit is the only means by which this situation can be addressed. Placing such a condition in a permit is an efficient way to resolve what would be an appropriate enforcement matter. Even if this permit were not issued, the DEP could bring an enforcement action to pursue remediation of the area.

record at a reconvened hearing session. All the parties participated in the hearing session at which evidence was presented in favor of and against the STCs in the ADD.

In an August 4, 2010 Supplemental Proposed Final Decision (SPFD), the hearing officer recommended that the permit be issued incorporating the STCs outlined in the ADD. On August 18, 2010, ACCA filed procedural exceptions and challenged the new STCs. Oral argument on the exceptions was held on October 26, 2010.

The procedural objections raised by ACCA are without merit; there were no errors in the administrative process associated with this matter. I do, however, appreciate ACCA's desire to protect Ash Creek, a salt marsh estuary that provides habitat and feeding opportunities for a variety of fish, shellfish, wading birds and waterfowl and which supports a state-designated natural shellfish area for hard clams and seed oysters. I understand its concern that this fragile and precious resource could be impacted by the use of this proposed dock.

The applicant has a riparian right of access to navigable waters and the law requires that this right be given proper regard. This right, however, must be subordinated to possible environmental impacts of the requested dock. *Barbara O. Murphy v. EAPWJP, LLC*, 123 Conn App. 316, 330 (2010). After reviewing this record, I am persuaded that staff appropriately considered such impacts to determine that this application complies with current relevant statutory and regulatory criteria, which are intended to protect coastal resources. Therefore, with revisions to the STCs and technical corrections specified herein, I agree with the hearing officer's recommendation and issue this permit.

*II*  
*DECISION*

*A*  
*ACCA PROCEDURAL EXCEPTIONS*

ACCA objects to the timing of both the unsuccessful mediation and the subsequent agreement between the applicant and DEP staff because each occurred after the issuance of the PFD and because the ADD was negotiated and executed without ACCA's participation. However, I find that the mediation and the subsequent ADD between the applicant and DEP staff were reasonable and appropriate occurrences within the context of the administrative process.

Section 4-177(c) of the Uniform Administrative Procedure Act (UAPA), General Statutes §§4-166 through 4-189, authorizes the resolution of contested cases through settlement. The DEP Rules of Practice also encourage the disposition of proceedings by agreement. Regs., Conn. State Agencies §22a-3a-6(I) (1). Neither the UAPA nor the DEP Rules of Practice specify or prescribe any particular point during the course of a contested case proceeding when settlement may or may not occur. In addition, as long as the hearing officer is not involved in discussions that exclude other parties, there is no violation of the prohibition against ex parte communication. General Statutes §4-181(a). The DEP Rules of Practice also specifically provide an opportunity for any party objecting to an agreement to have those objections considered by the hearing officer; this consideration can include a hearing on those objections. Regs., Conn. State Agencies §22a-3a-6(3) (B). ACCA was afforded a full opportunity to air its concerns during the hearing held to take testimony and additional evidence for and against the proposed STCs. Finally, ACCA also outlined its objections to the new STCs in its exceptions to the SPFD and at oral argument.

ACCA also takes exception to the hearing officer's finding in her SPFD that the state and municipal agencies had sufficient opportunity to comment on the application and did not need to review the subsequent agreement that was reached between the applicant and the DEP. ACCA argues that the final "application" in its current state differs significantly from the original application and claims that other agencies, particularly the Bureau of Aquaculture (BOA), were given no opportunity to analyze the potential impacts on Ash Creek that are associated with the "current proposal." ACCA maintains that the final "application" will now differ from the original without a review by other agencies.

The ACCA has misconstrued the nature of the STCs. These special terms and conditions would modify the final permit, not the application. Neither the applicant nor DEP staff had any obligation to submit these agreed-to proposed STCs to other state agencies, including the BOA, for review or comment. The BOA is part of the Department of Agriculture, the State's lead agency for aquaculture regulation. General Statutes §26-192a. Section 22a-361(b) of the General Statutes provides that if the BOA determines that a proposed dock would significantly impact a shellfish area and a hearing is requested, the DEP is obliged to conduct one. This determination was made in this case; therefore, when the ACCA filed a petition, a hearing was provided pursuant to the provisions of §22a-361(b). The DEP often calls on the expertise of this sister agency in permitting matters that involve aquaculture impacts; however, there is no requirement that the BOA review any modifications to a proposed permit in any case.

**B**

***SPECIAL PERMIT TERMS AND CONDITIONS***

The applicant has a riparian right to seek a permit for a dock to gain reasonable access to navigable waters. *Barbara O. Murphy v. EAPWJP, LLC, supra*, 123 Conn App. 330. It is well settled in Connecticut that the public, represented by the state, owns the soil between the high and low water marks on navigable waters where the tide ebbs and flows. An owner of adjoining upland has exclusive but qualified rights to wharf out and construct piers over such soil provided that use does not interfere with navigation. *Id.* It is also established that these rights are “subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those rights may be.” *Id.* at 331; *Port Clinton Associates v. Brd of Selectmen of the Town of Clinton*, 217 Conn 588, 597-598 (1991). See also *Shorehaven Golf Club, Inc. v. Water Resources Cmsn*, 146 Conn 619, 625 (1959) (Commissioner may restrict exercise of riparian rights and impose restrictions, even to the point of prohibition).

The Connecticut legislature has imposed restrictions on the exercise of riparian rights through a statutory scheme that includes the Tidal Wetlands, Coastal Management, and Structures and Dredging Acts. The DEP must therefore determine the extent of the applicant’s exercise of his riparian right to a dock in light of the policies reflected in these statutes and their implementing regulations to promote sound resource management practices. This mandate logically results in permit terms and conditions that implement the intent of the legislature. In this case, DEP staff considered the extent of the applicant’s riparian right when it first reviewed this application, when it first recommended permit terms and conditions, and later when it agreed to the proposed STCs included in the ADD.

The first STCs, those not incorporated in the ADD, were outlined by staff in a non-evidentiary post-hearing memorandum. These STCs included a general prohibition against benthic scouring or other impacts associated with berthing, approaching or leaving the dock. The applicant was required to submit three A2/T2 surveys, which would give a very accurate picture of existing contours of the substrate, showing bathymetric conditions within a fifty-foot radius of the authorized terminus of the dock. The first survey would be done prior to construction; a second and third survey would be performed following the first and second full boating seasons. With a baseline established by the initial survey, staff would be able to detect changes to the substrate due to prop-dredging (a disturbance to the substrate caused by direct contact by a turning propeller) or prop-wash (a jet stream created as a propeller turns that can result in sediment disturbances in shallow waters) caused by the applicant's improper operation of his boat. Additional surveys to determine benthic scouring or bathymetric re-contouring beyond the first two boating seasons could be required at the Commissioner's discretion. Because the parties did not agree to these STCs and they were not in evidence, they were not part of the PFD and are not before me for consideration.

The agreed-upon STCs in the Agreed Draft Decision are before me. These include more specific berthing conditions, requiring that any motorized vessel berthed at the proposed dock be of a size that provides a minimum clearance of two feet between its propeller in the down position and the substrate of Ash Creek. In addition, if water levels are too low to maintain that clearance, the vessel must be stored on davits or at an alternate location. Another STC requires the applicant to submit "as-built plans" after the construction of the dock that include the results

of an A2/T2 level survey showing the bathymetric conditions within a fifty-foot radius from the authorized terminus of the dock to establish a baseline assessment.

In her SPFD, the hearing officer noted that the STCs in the ADD were the result of an agreement that reflects the understanding of staff and the applicant that the STCs are intended to protect coastal resources. It is apparent that the hearing officer found that the single post-construction survey required in the ADD was a reasonable accommodation to meet this goal. I disagree. This single survey set out in the ADD, an initial baseline assessment, is necessary but will not show whether the applicant is complying with the berthing conditions. An additional survey is necessary to confirm this compliance. This survey would determine if any further changes in the substrate have occurred due to the use of the dock by the applicant to operate his boat. This survey would also be an automatic check on the substrate in the area around the dock without waiting for observable damage.

The STCs proposed in the ADD for the draft permit must therefore be revised to require that an A2/T2 survey be performed and submitted to the DEP after the second full boating season following the construction of the dock. This survey, which must encompass the fifty-foot radius from the primary terminus of the dock on its waterward end, will provide sufficient data to establish any pattern of activity that could damage the substrate, without allowing too much time to pass if damage is occurring as a result of that activity.

Further, the STCs provide that in the event the Commissioner determines noncompliance with the berthing conditions at any time, the Commissioner may order an additional survey. The



record shows that DEP staff explained at the hearing on the ADD that if a visual, low-tide inspection by the DEP raised concerns that possible improper berthing or use of the dock was causing adverse impacts to the substrate, the applicant could be required to conduct an additional survey to determine whether the suspected impacts have occurred. Staff recommended at the hearing on the ADD that conclusive evidence of actual damage should not be necessary to require another survey, that a survey should be required if the DEP observes conditions that would support issuance of an NOV. I agree. The STC must therefore be revised to include the following language: "If the DEP observes disturbance to the substrate and believes it to be caused by improper berthing or boating operations, the DEP may require the permittee to conduct an A2/T2 survey. Conclusive evidence of actual damage is not necessary; the conditions may be of a nature to support the issuance of a Notice of Violation (NOV)."

ACCA questions the effectiveness of the STCs in the ADD to prevent adverse environmental impacts to Ash Creek. In particular, ACCA claims that these STCs are not as strict, and are therefore less protective, than those STCs initially offered by staff in its post-hearing brief. The STCs in the ADD set out more specific berthing conditions than the first STCs. The hearing record reveals that DEP staff is confident that if the applicant complies with the required separation distance now required in the STCs, there should be no direct contact with the substrate by the boat or its propeller in the down position. A required survey after the second full boating season will monitor the effectiveness of those berthing conditions. Finally, the Commissioner's discretion is broadened by revising the STCs to eliminate the need for conclusive evidence of damage before DEP can order the permittee to conduct a survey.

In addition, although the STCs are intended primarily to address adverse impacts due to prop-dredging, to a lesser extent they address turbulence caused by prop-wash. Other controls will also help prevent and mitigate such disturbances. The hearing record includes references to a report published by the U. S. Environmental Protection Agency that reveals that prop-wash occurs when a boat travels at wake-producing speeds in shallow waters and near-shore habitats. Boats traveling at such speeds can disturb bottom sediments or adversely impact sub-aquatic vegetation or shellfish beds. As DEP staff has noted, boat speed is regulated by Connecticut boating regulations, which limit operating speeds in shallow and near-shore waters to prevent or at least mitigate impacts from prop-wash in water bodies. The applicant is required to comply with these speed restrictions, which are in place at Ash Creek.

The ACCA objects that the dock is longer than it needs to be to provide the applicant with access to the waters of Ash Creek. While the dock that would be constructed under the conditions of the permit is longer than those previously permitted in Ash Creek, length is not the sole consideration under the coastal management laws enacted in Connecticut. What is required is that coastal resources are protected from significant alteration or unreasonable effects to the extent that adverse impacts can be avoided or minimized. General Statutes §§22a-92(a)(1) and (5); 22a-92(b)(1)(D); 22a-93(15); Regs. Conn. State Agencies §22a-30-10(b)(1) and (4).

In this case, staff determined that the size and design of a dock is reasonable such that it provides an applicant with access to navigable water and does not significantly impact protected resources, obstruct navigation or impede public access along the shore. Staff therefore considered the extent of the encroachment acceptable and concluded that no modification to the size or design of the proposed dock was required. I find staff's approach to be a reasonable

application to this particular case of DEP's responsibilities under the Tidal Wetlands, Structures and Dredging and Coastal Management Acts.

*C*

*ATTACHMENTS TO THE FINAL PERMIT*

In order to clearly define the scope of the proposed activity for which this permit will be issued, the final permit must include the following. The document in the record as Exhibit DEP - 12 must be attached as Sheet 1 of 2 to the "plan view." As Sheet 1, this must be revised to show the boundaries of the fifty-foot radius for the survey and to identify the proposed davits and their exact location on the dock. Sheet 2 of 2 must also be revised to include the placement of the specific mechanical components and associated structures that would be part of the proposed davits.

*III*

*CONCLUSION*

The hearing officer found that without any specific statute, regulation, local ordinance or harbor management plan that could be interpreted to require or permit a limitation on the dock's size or the applicant's right to berth a motorized vessel within Ash Creek, my authority is limited. I understand the hearing officer's reasoning and have considered it in arriving at my decision. However, I must also consider the powers and duties that the Commissioner has been granted to carry out the environmental policies of the state and my authority to exercise discretion in doing so. General Statutes §§22a-1, 22a-5, and 22a-6.

Here, my discretion is impacted by the record before me. The applicant has demonstrated that this structure, if constructed in accordance with the draft permit, would be consistent with the relevant provisions of the Tidal Wetlands, Structures and Dredging and Coastal Management Acts. Additionally, if the use of the dock complies with the draft permit and proposed STCs as modified herein and the boating regulations, any adverse impacts to coastal resources would be minimized or insignificant. Such use would be consistent with the policies of preservation and protection of coastal resources, including tidal wetlands and intertidal flats.

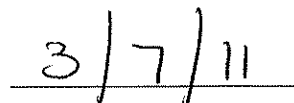
Consideration of this application was a deliberate process that included the hearing officer's review of evidence presented by ACCA to support its opposing claims. ACCA did not demonstrate beyond speculation and possibilities that the applicant's use of a powerboat in the area of the dock will create disturbances that would result in adverse impacts to shellfish resources. See *Finley v. Wetlands Commission*, 289 Conn. 12, 50 (2008) (Mere speculation or general concerns do not qualify as substantial evidence.) ACCA therefore failed to meet its burden of proving, by prima facie evidence, its allegations of unreasonable pollution under §22a-19(a). See *City of Waterbury v. Town of Washington*, 260 Conn. 506, 549-551 (2002). (Where there is a governing statutory scheme, party with burden must show that proposed activities do not comply with the applicable statutes and regulations.)

Moreover, and notably, there is no provision for the regulation of the operation of vessels in Ash Creek in the Fairfield Harbor Management Plan, notwithstanding the apparent authority of the Harbor Management Commission to recommend such regulation and the binding effect that regulation would have had on this permit determination. General Statutes §22a-113n(b).

Although I know that the current law supports this decision and no local restrictions prohibit the issuance of this permit, I issue the permit reluctantly. The fact remains that this permit will allow a 60-foot dock to be constructed in Ash Creek and used to berth a 24-foot powerboat. The view from a fairly undeveloped shoreline will now include a large dock on which a relatively large powerboat will be elevated at least to the height of the dock and suspended on davits during periods of low water. The STCs do not address the broader issue of whether power boats should be permitted to operate in Ash Creek. I encourage the ACCA to work with the Fairfield Harbor Management Commissioner to consider possible local controls to address these issues.

Staff is directed to prepare for my signature a final permit that revises the STCs proposed in the ADD to require that an A2/T2 survey be performed and submitted to the DEP after the second full boating season following the construction of the dock. As staff recommended at the hearing on the ADD, the appropriate STC should be revised to provide that if the DEP observes conditions that would support issuance of an NOV, then DEP may require the permittee to conduct an additional survey. This STC must make clear that conclusive evidence of actual damage is not necessary to require another survey. Finally, the clarifications to the attachments to the final permit must be revised as set out above in Section II. C.

  
Amey Marrella, Deputy Commissioner

  
Date

*P A R T Y L I S T*

Final Decision

In the matter of Steven Toner, Application No. 200402741

PARTY

REPRESENTED BY

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