

IN THE MATTER OF : APPLICATION NO. IW-96-131  
CONNECTICUT DEPARTMENT :  
OF TRANSPORTATION: ROUTE :  
66 MIDDLEFIELD : JUNE 6, 2000

**COMMISSIONER'S DECISION  
REMANDING TO THE HEARING OFFICER**

I. OVERVIEW

This matter involves an application by the Department of Transportation (hereinafter Applicant) for an inland wetlands and watercourses permit under Conn. Gen. Stat. §§22a-36 *et seq.* The Applicant seeks to eliminate 1.77 acres of inland wetlands and watercourses in connection with the proposed widening and realignment of a 2.1-mile section of Route 66 in Middlefield, Connecticut. The widening would increase Route 66 in the project area from two to four lanes (hereinafter 4-lane alternative).

The project area runs through the Mount Higby Reservoir and is located within the Mount Higby Reservoir and Coginchaug River watersheds of the Mattabasset Regional Drainage Basin, a Class A perennial stream and a Class A intermittent stream are within the proposed project area.

On December 22, 1999, the Hearing Officer, Lew Miller, issued a proposed final decision recommending that I grant the permit, subject to certain conditions. The intervenors, the Town of Middlefield and the Citizens for a Sensible 66, filed exceptions. Briefing and oral argument followed on March 3, 2000.

Having reviewed all of the testimony and documentary evidence admitted in this proceeding as detailed below, I conclude that the Applicant has failed to discharge its burden of proof that the proposed activities are consistent with key statutory requirements and standards. More specifically, the Applicant failed to adequately assess the wetlands and watercourses that directly or indirectly will be affected by the proposed project, and has failed to demonstrate that there were not less environmentally damaging alternatives to the proposed project that would satisfy the Applicant's safety and capacity concerns. Accordingly, there is insufficient evidence in the record to support the hearing officer's conclusions that a permit should issue.

The evidence that the Applicant offered consisted to a large extent on conclusions unsupported by facts<sup>1</sup> and on speculation.<sup>2</sup> Moreover, testimony concerning an exhibit or points of interest on an exhibit at times failed to identify the exhibit number and the locus on the exhibit being referred to. This, plus testimony that was inaudible and therefore not recorded, render a significant portion of the transcript incomprehensible.

Because the Applicant claims (although as yet has not conclusively demonstrated) that the project is necessary to relieve safety hazards, rather than deny this application I am remanding it to the hearing officer to give the Applicant an opportunity to provide additional evidence.

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<sup>1</sup> For example, bald assertions such as 'there will be no impacts on the watershed,' or 'accidents have occurred because drivers have no room to maneuver their vehicles to avoid accidents,' were not supported with evidence to prove such assertions. *See also infra*. at pp. 5, 6.

<sup>2</sup> For example, there was testimony from Mr. Hagman, a soil scientist who was one of the Applicant's experts, that he "probably" observed the wetlands over two breeding seasons, that he looked through the whole area "pretty much," and that he "guesses" he based his wildlife value evaluation on his field knowledge of other wetlands he has seen. Tr. 8/11/98 at 31, 32, 42-43. Such speculative testimony does not inspire confidence about the quality of his evaluation. *See also* testimony of Mr. Wardell, another DOT expert, testifying that he "thinks" there is a sufficient amount of water coming from the slopes to keep the vernal pool-like areas filled with water, and that he "believes" the proposed impacts on the watershed were assessed by determining that it was a Class A stream, and by adding swales and down sizing the pipe. Tr. 8/17/98 at 84, 90-92.

To focus and hasten this process, the remainder of this decision identifies the applicable law governing this proceeding and the type of evidence that should be presented on remand, and sets up a schedule for submitting additional evidence and conducting the remand hearing.

## II. APPLICABLE LAW

### A. **Burden of Proof**

Under the Regulations of Connecticut State Agencies § 22a-3a-6, the applicant bears the burden of proof in a proceeding on an application:

...the applicant and other proponents of the application shall have the burden of going forward with evidence and the burden of persuasion with respect to each issue which the Commissioner is required by law to consider in deciding whether to grant or deny the application. Each factual issue in controversy shall be determined upon a preponderance of the evidence.

*See* Newtown v. Keeney, 234 Conn. 312, 322 (1995).

Here, as previously noted, the Applicant failed to satisfy its burden of proof by failing to (1) show that the proposed project, which will destroy wetlands, is necessary; (2) show that should there be a genuine safety problem, that a less environmentally harmful alternative to address this problem does not exist; and (3) adequately assess the proposal's adverse environmental impacts so that appropriate mitigation measures may be identified. *See infra* section III.

### B. **Inland Wetlands and Watercourses Act**

As noted, the application at issue is for a permit under the Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §§ 22a-36 *et seq.* Under § 22a-41, in deciding whether to issue a permit, the following factors must be considered:

- (1) The environmental impact of the proposed regulated activity on wetlands or watercourses;

- (2) The applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or watercourses;
- (3) The relationship between the short-term and long-term impacts of the proposed regulated activity on wetlands or watercourses and the maintenance and enhancement of long-term productivity of such wetlands or watercourses;
- (4) Irreversible and irretrievable loss of wetland or watercourse resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, and any mitigation measures which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: restore, enhance and create productive wetland or watercourse resources;
- (5) The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity; and
- (6) Impacts of the proposed regulated activity on wetlands or watercourses outside the area for which the activity is proposed and future activities associated with, or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses.

Additionally, where, as here, a public hearing is held pursuant to Conn. Gen. Stat. § 22a-39(k), “a permit shall not be issued unless the commissioner finds **on basis the of the record** that a feasible and prudent alternative does not exist.” Conn. Gen. Stat. § 22a-41(b) (emphasis added). Conn. Gen. Stat. § 22a-19(b) under which the Town of Middlefield and the Citizens for a Sensible 66 have intervened, contains a similar provision.

### III. EVIDENCE ON REMAND

#### A. **Capacity**

The Applicant claims that at least during the morning and afternoon rush hours, this stretch of Route 66 operates at Level of Service (LOS) F; the lowest rating for traffic flow. The main issue with respect to capacity -- that is, the ability of the subject section of Route 66 to

handle existing and projected traffic -- is whether the 4-lane alternative is necessary to address the capacity problem. This issue will be discussed in more detail below under the heading of "Alternatives." *See infra* at pp. 7-9. Suffice it here to say that the Applicant has not met its burden that the 4-lane proposal, and the loss of wetlands and watercourses associated therewith, is necessary to address capacity problems.

**B. Safety**

The Applicant claims that safety hazards along the subject stretch of Route 66 justify the destruction of wetlands and watercourses and that these hazards would be eliminated by the 4-lane alternative. The evidence on safety hazards is confusing and conclusory. Although the Applicant and the intervenors are in accord that the accident rate on this stretch of road needs to be reduced, it is not at all apparent from the record that the 4-lane alternative would accomplish this.<sup>3</sup>

The record contains information concerning the accident rate on this stretch of Route 66; a 1"=250' scale map depicting the general area where accidents have occurred, and an accident summary; a few police reports; and a computer print-out of accidents for the period of 1/1/94 through 12/31/96. *See* Exhs. DOT-16a, DOT-6a, and I-3. However, there is virtually no analysis of *why* these accidents occurred. Absent an understanding of the cause of the accidents on this stretch of Route 66, it cannot be determined whether the Applicant's proposed reconstruction would reduce the number of accidents.

For example, Exh. I-3 indicates that the police have attributed the most accidents to speeding, following too closely, and failing to grant the right-of-way. It is from this information

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<sup>3</sup> In fact, Mr. Hillson, a DOT expert who testified concerning accidents along the subject stretch of Route 66, indicated that he had not analyzed the accident rate of the 4-lane or the 4/2-lane alternatives. Tr. 8/12, p. 51-52. *See infra* at p. 7 re the 4/2 alternative.

that the next steps of analysis should occur: (1) why is speeding an issue, what can be done to control speeding, and would the proposed 4-lane alternative help control speeding? (2) why are vehicles following too closely and would the addition of two more lanes prevent them from doing so? (3) specifically, where are these rear-end accidents occurring and where are drivers failing to grant the right-of-way and how would the 4-lane alternative affect these problems?

Related to these inquiries are the Applicant's unsupported assertions that accidents are occurring because the road is 'unforgiving' and because there is no room for vehicles to maneuver to avoid accidents because there are no shoulders or because of roadside obstructions. Absent facts to support these assertions, it is impossible to determine their validity and whether the 4-lane alternative is really necessary to address this alleged safety problem. Evidence concerning what and where the obstructions are located and how many accidents are occurring because of these obstructions is needed. Without such evidence, exactly what the safety issues are and how they can be resolved in the least environmentally damaging way cannot be determined.

Although the Applicant appears to assert that the fatalities that have occurred along this stretch of road are the result of the roadside obstructions and the inability to maneuver to avoid an accident, a review of the police records in evidence suggests that "acts of God," such as stroke or bad snowstorms, or driver impairment (legally blind or legally drunk) are relevant factors here. A complete assessment of all fatalities<sup>4</sup> and of whether the proposed reconstruction

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<sup>4</sup> Included here should be an assessment of whether the fatalities occurred from striking roadside obstructions, and an identification of where this roadside obstruction is; and an assessment of whether the fatality occurred from an inability to maneuver.

could have prevented any of them is relevant and should be offered at the remand hearing. Since it appears that the majority of fatalities occurred within 750 feet of the intersection of Route 66 and School Street, a detailed analysis of this area would be of interest, including the extent to which vehicles pulling onto Route 66 from School Street contribute to the fatality problem (and more generally, the high incidence of accidents) in this area.

In addition, the design of the 4-lane proposal could generate new safety problems. Accordingly, at a minimum, evidence concerning whether hydroplaning would become a problem as a result of the proposed curbing along this stretch of Route 66, and evidence concerning any anticipated safety problems at the point where the proposed 4-lane project joins the remaining 2-lane segment of Route 66 should be presented.

### **C. Alternatives**

With regard to alternatives, it must be said that evidence concerning alternatives to the 4-lane proposal is sorely wanting. The only alternative to the 4-lane proposal that was seriously presented was an alternative that involved some 2-lane and some 4-lane portions (hereinafter 4/2-lane alternative). The difference between the 4-lane and the 4/2-lane alternatives is so minimal in the amount of wetland affected as to hardly present an alternative at all. The fact that only one alternative to the 4-lane proposal was presented without a clear disqualification of other alternatives does not satisfy the statutory directive for consideration of “any feasible and prudent alternatives.”<sup>5</sup> Conn. Gen. Stat. §§22a-41(a)(2) and 22a-41(b). The applicant should provide clear evidence concerning the feasibility of potential alternatives, in sufficient scope and detail to allow a determination of a feasible and prudent alternative which is likely to serve the

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<sup>5</sup> Although the record indicates that the Applicant considered alternatives in addition to the 4-lane and the 4/2-lane alternatives, a paragraph on each of these alternatives or an oral listing or snippet about them at the public hearing does not provide any information from which the hearing officer or I can undertake the required Conn. Gen. Stat. § 22a-41 alternatives analysis.

Applicant's legitimate purposes with the least harm to wetlands and watercourses. Conn. Gen. Stat. §§22a-41(a)(2), 22a-41(b). At a minimum, on remand, evidence concerning the following alternatives should be presented:

- (1) adding shoulders to the existing 2-lane road;
- (2) a 3-lane alternative;<sup>6</sup>
- (3) reducing truck traffic by closing the weigh station on Route I-91 so that trucks do not use Route 66 as a means of avoiding the weigh station;
- (4) any other available measures to reduce traffic within the project corridor, including projects that meet genuine safety needs without providing for additional traffic capacity;
- (5) to the extent that evidence shows that the primary safety hazard results from the S-curve, measures to solely address the S-curve hazard;
- (6) the use of climbing lanes and/or turning lanes;
- (7) moving the road at the western terminus of the project corridor south so as to avoid wetland #1.<sup>7</sup>
- (8) widening the existing two lanes;
- (9) removing guard rails and other obstructions;
- (10) non-structural alternatives, such as signage to warn of dangerous sections of road, or to keep drivers alert;
- (11) signalization at the intersection of Route 66 and School Street;

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<sup>6</sup> The Record indicates that congestion is worse in the morning than the evening rush hours. Therefore, an alternative of two westbound lanes, possibly combined with appropriate turning lanes at the main intersections, may be feasible.

<sup>7</sup> The Record indicates that the Applicant rejected this alternative because more talus slope would have to be removed; and, concluded it was more important to avoid the talus slope than to preserve the wetland in this area. Although I may ultimately concur with this conclusion, there is no evidence from which I can do so.



- (12) any combinations of the above, such as shoulders and turning lanes, or shoulders and the removal of roadside obstructions.

For each alternative, the applicant should provide a succinct analysis of its effect on roadway capacity and safety and its impact, both direct and indirect, on wetlands, watercourses,<sup>8</sup> and endangered species; the relationship between its short-term and long-term impacts; the potential for irreversible and irretrievable loss of wetlands or watercourses;<sup>9</sup> and its impacts on wetlands or watercourses outside the proposed project area.<sup>10</sup>

**E. Endangered species**

Conn. Gen. Stat. § 26-310 requires each state agency to conserve endangered and threatened species and their essential habitats, and ensure that any action authorized by such agency does not threaten the continued existence of any such species or result in the destruction or adverse modification of its essential habitat. Here, the Applicant did not satisfy its burden of proof that the project would not threaten any such species or its essential habitat

Evidence in the record concerning threatened and endangered species is scant and non-probative. For example, evidence that Mr. Hagman, an expert for the Applicant, did not personally find any threatened or endangered species in the project area, Tr. 8/11/98 at 37, begs the question of whether he or anyone on the Applicant's behalf systematically surveyed the area

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<sup>8</sup> The evidence is unclear about the direct and indirect impacts. For example, it appears that at least some of the wetlands rely on runoff from the existing road as part of the hydrologic regime. The proposed curbing would eliminate this runoff. What would be the effect on the wetlands? Additionally, a determination, based on field study by a qualified person, of whether vernal pools exist, and if so, the direct and indirect impacts of the proposed project on such areas is also needed to assess impacts. Conn. Gen. Stat. §§ 22a-38(16) (defining "watercourses" to include vernal pools; 22a-41.

<sup>9</sup> I note that the record contains evidence from DEP staff noting that the area is "excellent habitat" for birds. What will be the effect of the proposed activities and of each alternative on this habitat?

<sup>10</sup> It appears that wetlands #1-7 (or #1-3 and #4-7), as depicted on Exh. DOT-17 are actually one wetland which would be affected at different locations by the proposed activities. The evidence under Conn. Gen. Stat. § 22a-41 should include an evaluation of the effect the proposed project will have on the viability of the entire wetland.

for threatened and endangered species.<sup>11</sup> Without information from such a survey, it is impossible to ensure that threatened or endangered species and their essential habitat is not being impaired or destroyed.

A witness for the Applicant suggested that a systematic survey for endangered or threatened species was unnecessary because DEP did not tell the Applicant to conduct one, and further suggested that reliance on the DEP Natural Diversity Database was sufficient. As the Applicant acknowledged, however, the Natural Diversity Database is nothing more than a collection of reported sitings of threatened and endangered species and therefore is only a starting point -- not conclusive evidence -- in the determination of whether endangered or threatened species are present in a given location. Moreover, that the DEP did not instruct the Applicant how to discharge its burden with respect to threatened and endangered species is irrelevant.

#### **F. Mitigation areas**

The evidence is insufficient to determine whether the three-wetland creation and restoration areas mitigate the destruction of wetlands and watercourses. Conn. Gen. Stat. §22a-41(a)(4); Branhaven Plaza v. Inland Wetlands Commission, 251 Conn. 269 (1999). The location of mitigation areas and the planting plans for these areas are provided, and conclusory statements are offered as to how these areas will provide additional protection to the Mount Higby Reservoir from contamination. Lacking, however, is evidence concerning whether these mitigation areas will replace the functions being lost through the filling of wetlands, and

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<sup>11</sup> Mr. Hagman testified that a protocol was followed at each wetland site to see if there were any species (presumably flora and fauna) there. However, the testimony is ambiguous as to whether this protocol was applied for all species or specifically for endangered and threatened species. Additionally, there was no evidence as to what the "protocol" was such that its sufficiency may be evaluated.

evidence concerning the likely success in the long-term of replacing those functions without the need for continuing human assistance.

**G. Additional evidence**

Evidence concerning the following should also be presented in order for the Applicant to discharge its burden:

- (1) The number of properties in the project corridor that have potable groundwater wells, and the effect, if any, of construction activities on these wells.
- (2) The potential effect of construction and of any increased traffic on the wildlife corridor in the state forest abutting the project area.
- (3) The environmental effect of the proposed project in conjunction with the other completed and planned phases of the Route 66 project. *See* Tr. 8/17/98 pp. 24, 129; Exh. DOT-4, p. 30. Conn. Gen. Stat. §22a-41(a)(6). Of particular interest is the combined effect of all phases on the Mount Higby Reservoir watershed and the Coginchaug River watershed.
- (4) Evidence to support the Applicant's assertion that there will be no impact to wetlands and watercourses beyond those to be directly filled.<sup>12</sup>
- (5) Evidence responding to the attached documents from John E. Hibbard of the Connecticut Forest and Park Association regarding pedestrian access to the Mattabesett Trail.
- (6) Any evidence or argument that the parties may wish to offer concerning the attached letter from Representative Raczka.

Conn. Gen. Stat. §22a-41.

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<sup>12</sup> Section 22a-41(a)(6) specifically directs that the impacts of the proposed activity on wetlands or watercourses outside the area for which the activity is proposed shall be considered.

IV. PROCEEDINGS ON REMAND

As it is in the interest of all concerned to resolve this pending application as soon as possible, I direct the following:

> That a hearing be scheduled to take evidence consistent with the foregoing within 60 days of the date of this decision, provided that the hearing officer may, on motion by any party and for good cause shown, extend this date; and

> That no later than 30 days before the hearing, the parties file with the hearing officer and serve on the parties all exhibits they may offer at the remand hearing.

In the interim, I encourage the Applicant to put into effect, with the assistance of the State Traffic Commission, any non-construction measures, such as appropriate signage, to address safety concerns within the project corridor.

June 6, 2000  
Date

Arthur J. Rocque, Jr.  
Arthur J. Rocque, Jr.  
Commissioner

Copies to all parties by  
certified mail.

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