

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : **APPLICATION NO. 199902870**

JOSEPH BOVINO : **SEPTEMBER 21, 2001**

PROPOSED FINAL DECISION

I

SUMMARY

Joseph Bovino (Applicant) applied to the Department of Environmental Protection (DEP) on September 30, 1999 for a permit to reconstruct a dock and associated structures, regulated activities that will affect the coastal resources and tidal wetlands of Mud Creek located in Old Saybrook. The application was filed pursuant to the *Tidal Wetlands Act* and the *Structures and Dredging Act*. General Statutes §§22a-28 through 22a-35 and §§22a-359 through 22a-361f. On May 5, 2000, the Commissioner issued a Notice of Tentative Determination to approve the application.

The parties to this proceeding are the Applicant, the DEP Office of Long Island Sound Programs (Staff) and an intervenor, Joseph Petruzelo.¹ The Staff recommends issuance of the permit and has entered on the record a draft permit with conditions that would authorize the proposed regulated activities. Hearings on the application were held

¹ Intervenors Martinelli, Sullivan, Gallo, Jacobs and Lombardo were granted party status on September 22, 2000, and subsequently withdrew from the proceedings.

on February 13, March 9, and April 6, 2001. The record on these proceedings was closed on April 16, 2001.

Upon review of the relevant facts and applicable law in this matter, I find that the proposed regulated activities, if conducted in accordance with the terms and conditions of the draft permit, are consistent with the applicable legal standards for permit issuance. General Statutes §§22a-32, 22a-33, 22a-92, and 22a-361; Regs., Conn. State Agencies §22a-30-10. I therefore recommend issuance of the permit to conduct the proposed regulated activities based on the terms and conditions set forth in the draft permit (Attachment A).

II

DECISION

A

FINDINGS OF FACT

1

The Site

1. The site is located waterward of the high tide line at the end of Cottage Avenue. It includes two and one-half acres of salt marsh and an adjacent area of Mud Creek that extends just beyond the mean low water mark. The marsh is dominated by *Spartina patens*, a salt meadow cord grass. *Phragmites australis* (common reed), *Juncus gerardii* (black grass), *Distichlis spicata* (spike grass), *Limonium carolinum* (sea lavender), *Salicornia biglovii* (saltwort), and *Iva frutescens* (high tide bush) also

appear at the site. A smooth cord grass, *Spartina alterniflora*, appears along the Mud Creek edge of the parcel. (Ex. APP-1; exs. DEP-8, 10; test. P. Baillie, 2/13/01, pp. 30-32.)

2. The maximum height of the plants that dominate the area along the path of a proposed fixed walkway (i.e., *Spartina Patens*, spike grass) is approximately twelve inches. The *Spartina alterniflora* that appear in the vicinity of a proposed fixed wooden platform are generally twelve to twenty-four inches high with a maximum measured height of thirty-eight inches. (Ex. APP-1; test. P. Baillie, 2/13/01, p. 31.)

3. Mud Creek is a small estuarine system that discharges into Long Island Sound. The creek drains an expanse of salt marshes before it reaches the Sound. The creek is slightly constricted at the mouth due to a small bridge but there is free tidal exchange between the creek and the Sound and the marshes appear to be well flushed. This is evidenced in part from shells that were noted in the intertidal sediments including blue mussel, hard-shelled clam and American oyster. The water passes through the channel on the incoming tide and then spreads, causing the currents to slacken and sediment to settle. The result is a large tidal flat upstream from the site and an accumulation of soft sediments in the area around the proposed dock site. (Ex. APP-1; test. K. Zawoy, 4/6/01, p.33.)

2

The Applicant

4. The Applicant is one of nine individuals who currently hold a right of way over the marsh by virtue of a warranty deed from Samuel A. Catalina dated December 17, 1974. This right of way is described in the deed as ten feet wide with the center line

in the middle of an existing “wooden walk”. Mr. Catalina conveyed title to the marsh to the State of Connecticut, but reserved a right of access or easement across it so that nineteen named individuals (Schedule A Beneficiaries) could reach an existing dock structure. The easement is characterized as personal to the Schedule A Beneficiaries and does not run with the land. Nine of the original nineteen Schedule A Beneficiaries are known to be living at this time. Staff proposes a special permit condition that requires the Applicant or another Schedule A Beneficiary to certify to the DEP every two years the names and addresses of all living Schedule A Beneficiaries who wish to continue to exercise their right of access to the walkway and dock structures.² (Exs. DEP-1, 10, 28; test. K. Zawoy, 4/06/01, pp. 44-45.)

5. The Applicant has granted a license to Salvatore Carabetta (licensee) to access the walkway and dock structures, and has authorized him to perform all of the proposed regulated activities. Mr. Carabetta, who is not a Schedule A Beneficiary, will maintain the proposed structures and manage the use of the docks by the Schedule A Beneficiaries. (Exs. DEP-1, 3; test. S. Carabetta, 4/06/01, pp. 20-25; test. K. Zawoy, 4/06/01, p. 48.)

3

The Proposed Regulated Activities

6. The Applicant proposes to install a walkway, platform, floating ramp, and floating dock with six finger floats. The walkway will cross the marsh to provide access to the platform. The platform will extend across the bank of Mud Creek and support the

² This special permit condition makes it possible for the DEP to honor the covenants of the 1974 deed after the death of the Applicant provided one of the remaining Schedule A Beneficiaries complies with this provision or grants a license to the Applicant’s licensee, Mr. Carabetta.

floating ramp that leads to the main floating dock. The Applicant's purpose for the proposed regulated activities is to provide a dock for small boats and jet skis. (Ex. APP-1; exs. DEP-3, 10, 28.)

7. The Applicant will remove and replace the one-foot wide planks that are staked or supported by cinder blocks and currently serve as a means of access across the parcel to the existing dock structures.³ This walkway rests on top of a large span of tidal wetlands and runs northeasterly 238 feet from the corner of Cottage Avenue toward the westerly line of Mud Creek. This walkway is two to three inches above the sediment surface and there is no vegetation beneath it. The proposed replacement walkway will be two feet wide and constructed at an elevation of twenty-four inches above the marsh for the entire 238 feet. The walkway will lead to a three foot by twenty-five foot fixed platform that will be constructed thirty-six inches above the marsh. (Exs. APP-1; exs. DEP-3, 7, 28; test. P. Baillie, 2/13/01, pp. 33-34, 52-55; test. K. Zawoy, 4/6/01, pp. 33-35.)

8. The Applicant will remove and dispose of all other existing new and derelict structures located waterward of the high tide line or in tidal wetlands within the boundaries of the site. The existing dock structures will be replaced by a floating ramp leading to the main floating dock, which will support six finger floats. The finger floats will be secured in place by thirty-one plastic pole piles. The ramp will be three feet wide and twenty feet long. The main dock will be four feet wide and sixty-nine feet long. The

³ Mr. Carabetta has entered into a Consent Order with the DEP that requires him to remove structures that he installed at the site in violation of General Statutes §§22a-361 and 22a-32. The Consent Order also requires Carabetta to remove and dispose of all remnants of the walkway and dock structures that existed prior to the filing of this application. (Exs. DEP-2, 28.)

finger floats will each be five feet two inches wide and eleven feet three inches long. All work will be done manually. (Exs. DEP-2, 10, 28.)

9. The Applicant and Staff have designed a walkway and dock configuration that is functionally similar to the structures that existed in 1974 when Mr. Catalina conveyed access rights to the Schedule A Beneficiaries. The 1974 configuration is discernable from aerial photographs maintained by the DEP. Staff proposes a special permit condition that prohibits the Applicant (or Mr. Carabetta, his licensee) from denying other Schedule A Beneficiaries reasonable access to the proposed structures, but permits the Applicant (or his licensee) to charge a reasonable maintenance fee to those who will use the docks. (Exs. DEP-2, 10, 28; test. K. Zawoy, 4/6/01, pp. 40-41, 44.)

10. The site is owned and managed by the State of Connecticut and is part of the Plum Bank Wildlife Management Area. Structures are not permitted on state property unless the property is subject to a reservation of right at the time it is conveyed. The terms and conditions of the draft permit and the proposed activities it authorizes are viewed by the State to be consistent with the covenants in the 1974 deed that provide for such a reservation. When the Schedule A Beneficiaries cease to exercise their rights of access, the DEP intends to remove the dock structures and preserve the site. (Exs. DEP-1, 28; test. C. Reed, 4/06/01, pp. 37, 73-76.)

*Impacts of the Proposed Activities**a**Navigation*

11. The proposed dock structure will berth five to ten boats of no more than twenty feet in length. The distances from the mean high water line on the site to the bulkhead on the opposite side of Mud Creek are in the range of seventy to one hundred feet. This area of the Creek can only be accessed by small, shallow-draft boats. Boats of twenty feet in length or less berthed at the proposed dock and boats of similar size moored on the bulkhead will leave approximately thirty feet for maneuvering and navigating in the Creek. This distance, one and one-half times the maximum length of the boats that can navigate in the area, is an acceptable fairway width. The distance between boats berthed inside of the dock fingers to boats berthed on the opposite side of creek and bulkhead will not cause crowding or otherwise adversely impact navigation. The size and location of the dock have been designed not to impede navigation. (Ex. APP-3; ex. DEP-10; test. T. Law, 3/9/01, pp. 175-178; test. K. Zawoy, 4/6/01, pp 33, 42-43).

*b**Erosion/Sedimentation and**Flushing/Water Quality/Flooding*

12. The floating docks will be positioned just beyond the mean low water mark at the site in order to provide some depth for small boats. The proposed dock configuration is located slightly more south or waterward than the structures that existed

in 1974 because the contours of the marsh have changed over the years due to the silt and sediment accumulation along the shoreline. This location will eliminate the need for dredging and will keep boats from the edges of the wetlands. (Test. K. Zawoy, 4/6/01, pp. 40-41.)

13. The proposed configuration of the dock has limited capacity for the number and size of boats that can be docked at the site. Although a well-flushed marsh, the presence of a larger number of boats in this small, fairly constricted area can cause adverse impacts to water quality. (Ex. APP-1; test. K. Zawoy, 4/6/01, pp. 65-67.)

c

Wetlands

14. The elevations of the walkway and the platform are intended to minimize shading and promote growth of the tidal wetland vegetation. The height and width of these structures are sufficient to provide safe access to the dock without requiring railings or the type of extensive support structures that would adversely impact the tidal wetlands. The north/south orientation of these structures will allow for optimum sunlight conditions for the wetland vegetation below. The new walkway will clear the tops of the plants by approximately one foot. This will promote growth of vegetation underneath the walkway where there presently is none, even though the density and height of the plants may be reduced to fifty or sixty percent of what is considered normal for this type of vegetation. This vegetation will provide habitat for small invertebrates and will stabilize sediment. (Ex. APP-1; test. P. Baillie, 2/13/01, pp. 33-35; test. K. Zawoy, 4/6/01, pp. 34-45.)

d

Aquatic Plants, Fish, Shellfish and Wildlife

15. There is no subaquatic vegetation at the site. The estaurine fauna in the area include fiddler crab, blue crab and ribbed mussel. Birds noted at the site include the great egret, snowy egret, great blue heron, osprey and barn swallow. The National Diversity Database Maps indicate that only one state species of special concern, the Purple Martin, may be present in the area. The proposed activities in the marsh will not adversely impact this bird as it tends to nest in trees and comes to the marsh to feed on insects. (Exs. APP-1, 19; exs. DEP-4, 5; test. P. Baillie, 2/13/01, pp. 32-33; test. K. Zawoy, 4/6/01, pp. 40-44.)

III

CONCLUSIONS OF LAW

A

Statutory and Regulatory Criteria

The Applicant has the burden to demonstrate that the proposed application is consistent with all applicable statutory and regulatory requirements. The proposed activities must comply with the statutes and regulations that protect coastal and aquatic resources. General Statutes §§22a-32 and 22a-361; Regs. Conn. State Agencies §22a-30-10. The application must also be consistent with the policies and provisions of *The Coastal Management Act*. General Statutes §§22a-90 through 22a-112.

The present application was filed pursuant to the requirements of General Statutes §22a-359 though 22a-363, commonly referred to as the *Structures and Dredging Act*.

Section 22a-359 provides that the Commissioner shall regulate the erection of structures and associated work in the tidal, coastal or navigable waters of the state waterward of the high tide line. This section requires the Commissioner to act on an application giving:

due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.

The Commissioner established the criteria for granting, denying, or limiting permits in §22a-30-10. This criteria gives due regard to the impact of regulated activities on the wetlands, adjoining coastal and tidal resources, navigation, recreation, erosion, sedimentation, water quality and circulation, fisheries, shellfisheries, wildlife, flooding and other natural water-dependent uses. §22a-30-10(a). The Commissioner shall grant, or grant with limitations or conditions, a permit to conduct a proposed activity only if it is determined that the application is consistent with all applicable criteria set forth in this regulation and with the considerations and public policy set forth in the *Coastal Management Act*. §§22a-90 through 22a-113. The policies of the preservation of tidal wetlands and the protection, preservation and enhancement of coastal resources, including those used for recreational purposes, must therefore be assessed.

(1)

Preservation of Tidal Wetlands

In order to find that wetlands will be preserved and that their despoliation and destruction will be prevented, the Commissioner must find the following:

- (a) *There is no alternative for accomplishing the applicant's objectives that is technically feasible and would further minimize adverse impacts.*
- (b) *Any structure or fill is no greater in length, width and height than necessary to accomplish its intended function.*
- (c) *Pile-supported construction will be used to the fullest extent possible.*
- (d) *All reasonable measures that would minimize the adverse impacts of the proposed activity on wetlands and adjoining coastal and tidal resources are incorporated as limitations on or conditions to the permit.*

Regs., Conn. State Agencies §22a-30-10(b).

The Applicant's objective is to reconstruct an improved dock structure to be used for recreational purposes. The dock reconfiguration and elevated walkway will accomplish this objective. The record demonstrates that there is no technically feasible alternative that will accomplish the objectives of the Applicant and further mitigate or minimize any significant environmental impacts.

The Applicant, in consultation with the DEP, is proposing a plan that provides for a structure that is no greater in length, width and height than necessary to accomplish its intended function. The Applicant has considered the proposed project against this requirement as demonstrated by its plan to use floating docks and to construct a walkway that is of sufficient height and width to allow individuals to access to the dock without the need for structural supports that would adversely impact the wetlands.

Pile-supported construction will be used to the fullest extent possible. The fixed walkway, platform, floating ramp and the floating docks will be supported by wood or plastic pole pilings.

The draft permit includes limitations and conditions that will provide reasonable measures to minimize any adverse impacts of the proposed project on the wetlands and adjoining coastal and tidal resources. The permit specifically provides that the Applicant will not be able to place any structures or conduct any work that would deviate from the plans incorporated therein. The permit also requires that the Applicant remove all derelict and existing structures and that all work be done by hand, including driving the piles.

The specific limitations and restrictions listed in the permit, the activities that it will authorize, and the way in which they will be carried out by the Applicant, will preserve the wetlands and the adjoining coastal and tidal resources.

(2)

Recreational and Navigational Uses

In order to find that a proposed activity will not destroy existing or potential recreational or navigational uses, the Commissioner shall find the following relevant conditions:

- (a) *The proposed activity will not unreasonably interfere with established public rights of access to and use of wetlands.*
- (b) *The proposed activity will not be located in a way that unreasonably interferes with a navigable channel or small craft navigation; and*
- (c) *The proposed activity will not cause or contribute to sedimentation problems in adjacent or nearby navigable waters, channels, anchorages or turning basins.*

Regs., Conn. State Agencies §22a-30-10(c).

The work proposed by the Applicant will not unreasonably interfere with established rights of access and will not unreasonably interfere with a navigable channel or small craft navigation. The walkway reconstruction and new docks will provide for safer access for those who hold access rights to the dock. The navigational fairway will be large enough to accommodate boats on both sides of the channel.

There is no evidence in the record that the proposed project will cause or contribute to sedimentation problems in adjacent or nearby navigable waters or channels. The proposed project will not cause a significant adverse impact to the adjacent shoreline or destroy any existing or potential recreational or navigational uses in this part of Mud Creek.

(3)

Erosion and Sedimentation

There is no evidence in the record to indicate that the proposed activity will change current patterns, water velocity or exposure to storm conditions that will result in adverse effects on erosion or sedimentation patterns. There is no proposal to fill, dredge or excavate as part of the project. There is no evidence to indicate that the structures will cause a significant adverse impact on the movement of sediments on or along the shoreline or cause erosion of adjacent or down drift areas. There is therefore no basis for a finding pertaining to any adverse effects of the proposed activities on erosion and sedimentation. See Regs., Conn. State Agencies §22a-30-10(d).

(4)

Marine Fisheries, Shellfisheries, and Wildlife

In order to make a determination that a proposed activity will not result in significant adverse impacts on marine fisheries, shellfisheries or wildlife, the commissioner shall make the following applicable conclusions:

- (a) *The existing biological productivity of any wetland will not be unreasonably affected.*
- (b) *Habitat areas, such as habitat of rare and endangered wildlife and fish species, will not be destroyed, filled or otherwise unreasonably affected.*
- (c) *Wildlife and their nesting, breeding or feeding habitats will not be unreasonably reduced or altered.*
- (d) *Erosion from the proposed activity will not result in the formation of deposits harmful to any fish, shellfish or wildlife habitat.*
- (e) *Shellfish beds will not be adversely affected.*
- (f) *The timing and construction activities take into consideration the movements and lifestages of fish, shellfish and wildlife.*
- (g) *The proposed activity will not unreasonably interfere with the harvesting or maintenance of natural shellfish beds.*

Regs., Conn. State Agencies §22a-30-10(e).

The existing biological productivity of the wetlands will not be unreasonably affected by the proposed activities. The insect habitats and wildlife feeding habitats of the wetlands will not be destroyed or unreasonably reduced or altered by the proposed activities. Some habitats are expected to be improved after reconstruction of the walkway and platform. The proposed activity will not adversely impact marine fisheries, shellfisheries or wildlife in the Mud Creek area, including the Purple Martin.

(5)

Circulation and Quality of Coastal or Tidal Waters

In order to decide that a proposed activity will not result in a significant adverse impact on the circulation and quality of coastal or tidal waters, the Commissioner shall find the following:

- (a) *The proposed activity will not cause the significant adverse alteration of patterns of tidal exchange or flushing rates, freshwater input or existing basin characteristics and channel contours.*
- (b) *Water stagnation will be neither caused nor contributed to, and the ability of wetlands and adjacent water bodies to flush themselves will not be adversely affected.*
- (c) *Pile-supported construction will be utilized to the fullest extent practical.*
- (d) *The proposed activity will not result in water pollution that unduly affects the bottom fauna, the physical or chemical nature of the bottom, and the propagation and habitats of shellfish, finfish, and wildlife.*

Regs., Conn. State Agencies §22a-30-10(f).

There is no evidence that the proposed activity will significantly alter the patterns of tidal exchange or flushing rates, freshwater input or existing characteristics and channel contours. Pile-supported construction will be utilized to the fullest extent practical. The proposed activity will not result in water pollution that unduly affects bottom fauna or the propagation of fish and wildlife. The proposed activity will not result in any significant adverse impact on the circulation and quality of coastal or tidal waters.

(6)

Protection of life and Property from Natural Disaster

To make a determination that a proposed activity is consistent with the need to protect life and property from natural disasters, including flooding, the Commissioner shall find the following applicable facts:

- (a) *The proposed activity will not increase the potential for flood damage on adjacent or adjoining properties.*
- (b) *The proposed activity will not increase the exposure of any property, land or structures to damage from storm waves and erosion produced thereby.*
- (c) *The proposed activity will not result in significant increase in the velocity or volume of flood water flow both in streams and estuaries.*
- (d) *The proposed activity will not significantly reduce the capacity of any stream, river, creek or other watercourse to transmit flood waters generated by hurricanes or other storm events and will not result in significantly increased flooding either up or downstream or its location.*

Regs., Conn. State Agencies §22a-30-10(g).

By its very nature, the methods to be used to reconstruct the walkway and platform, and its location, the proposed activity will not increase the potential for flood or storm damage on adjacent or adjoining properties. The proposed activity is intended to replace existing structures and to remove derelict structures from the area. It is therefore reasonable to conclude that the proposed activity will not have any impact on the volume or velocity of flood water flow or the capacity of any other watercourse to transmit flood waters.

(7)

Criteria for Water-Dependent Uses of Tidal Waters

In order to make a determination that a proposed activity within the coastal boundary, as statutorily defined and mapped, is consistent with the state policy that water-dependent uses of the shoreline be given highest priority and preference, the Commissioner shall make the following applicable findings:

- (a) *All reasonable measures that would minimize adverse impacts on future water-dependent uses are incorporated as limitations on or conditions of the permit.*
- (b) *The proposed activity will not unreasonably interfere with the riparian rights of adjacent landowners or claimants of water or shellfish rights in or adjacent to the wetland.*

Regs., Conn. State Agencies §22a-30-10(h).

The DEP is the owner of the site and therefore holds the appurtenant riparian rights. There is no evidence that the proposed activity will unreasonably interfere with the riparian rights of adjacent landowners or claimants of water rights adjacent to the wetland. The Applicant proposes to reconstruct docking that will accommodate at least as many small crafts as the previous structure. The conditions of the permit incorporate measures to ensure that the Applicant will provide reasonable access to the structure and to prohibit the Applicant from charging anything more than a reasonable maintenance fee for water-dependent uses. The proposed activity will promote water-dependent uses and will not unreasonably interfere with the rights of adjacent landowners.

B

Public Trust

The proposed structure has been appropriately designed to strike a reasonable balance between the responsibility of the DEP to accommodate the rights of the Schedule A Beneficiaries, preserve its ownership interests and protect coastal resources. This is consistent with the policies and guidelines set forth in the *Coastal Management Act*. General Statutes §§22a-90 through 22a-113. The DEP wishes to preserve the site for its wetland and wildlife value but must honor the reserved rights of the Schedule A Beneficiaries. To that end, it has permitted a structure of the size and configuration that is functionally equivalent to the structure that was in place at the time DEP took ownership of the parcel. The rights of the Schedule A Beneficiaries will be preserved for their lifetimes. The Applicant may not deny reasonable access to any one of them. Moreover, the proposed regulated activities will not impede the rights of others to navigate in Mud Creek or inhibit other public trust uses.

IV

Conclusion

The application meets the relevant statutory and regulatory criteria that guide the Commissioner's decision to grant or deny such an application. This proposal to reconstruct the walkway, platform, floating ramp and dock will improve and enhance the wetlands and provide access to the water while avoiding, minimizing or limiting any significant adverse environmental impacts as a result of the activity.

V

Recommendation

I recommend that the Commissioner issue the requested permit incorporating the terms and conditions set forth in the draft permit (Attachment A).

September 21, 2001
Date

/s/ Jean Dellamarggio
Jean Dellamarggio, Hearing Officer