

In the Matter of

:

:

:

Dorothy A. Smulley

:

August 10, 2021

Response to Petition for Declaratory Ruling

Introduction

The Department of Energy and Environmental Protection (“DEEP” or “Department”) received a Petition for a Declaratory Ruling from Dorothy A. Smulley (the “Petitioner”) on June 11, 2021. The Petitioner alleges that the Connecticut Department of Transportation (“DOT”) has violated various provisions of law as a result of activity it conducted to reconstruct its salt shed and maintenance area off of Ryders Lane in Stratford (the “Project”), and seeks the following rulings:

- 1) An order directing the DOT in conjunction with the Town of Stratford to perform an unbiased Environmental Impact Study (EIS);
- 2) An order directing the DOT in conjunction with Stratford to conduct a public hearing on the EIS findings;
- 3) An order directing the DOT to cease all further Project activities until a decision is reached based upon the EIS and public hearing;
- 4) An order directing the DOT and Stratford to properly identify Oronoque Shores Condominium Associations Nos. 1, 2, 3 as situate in tidal wetlands governed by Connecticut General Statutes §§ 22a-28 to 22a-35 in which the petitioner’s property rests; and
- 5) An Order for such further relief as may be required.

Applicable Procedural Status

Connecticut General Statutes (“Conn. Gen. Stat.”) § 4-176(a) permits the filing of a petition “for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.” Within sixty days of a petition’s filing, Conn. Gen. Stat. §

4-176(e) requires issuance of a response to the petition. In that response, a recipient of a petition must respond to the Petition in one of the following manners: (1) issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action. This response is intended to meet the obligation of Conn. Gen. Stat. § 4-176(e).

Analysis

The Petition requests that specific action be taken against DOT in the form of an enforcement action requiring DOT to study the environmental impacts of the Project and to cease and desist further action on the Project due to alleged tidal wetlands violations. A declaratory ruling will not provide the relief sought by the Petition as a declaratory ruling can only provide a determination on the applicability of a statute, regulation, or final decision of the Department. As to the applicability of the tidal wetlands statute in general, it speaks for itself without a ruling by the department. If regulated activities are to be conducted in tidal wetlands as defined by the act, then a permit from the Department is required. Conn. Gen. Stat. § 22a-32. The Department will not, in response to the Petition, act to expand the authority provided to it by § 4-176 by providing relief beyond what is identified in the statute. An enforcement order is a separate action and subject to the rights provided under the Uniform Administrative Procedure Act (Conn. Gen. Stat § 4-166, et seq.) and the Department's Rules of Practice (§§ 22a-3a-1 to 22a-3a-6, inclusive of the Regulations of Connecticut State Agencies). The requested orders can only be issued by the Department in accordance with required procedures and after the necessary facts are documented to support the allegation of a violation and subsequent injunctive relief.¹ Further, the Department's administrative enforcement discretion must remain the Department's to exercise. The Department cannot be compelled to take enforcement action by a declaratory ruling petition, but instead will analyze potential enforcement matters on a case by case basis using the expertise and experience of its staff to develop the necessary facts and determine the appropriate action, if any, to take.

Separate from the request for tidal wetlands enforcement is the request that further environmental study be initiated by DOT. The Connecticut Environmental Policy Act (CEPA) requires state agencies to review actions which may significantly affect the environment. Ultimately, the Office of Policy and Management ("OPM") determines whether a state agency has complied with the requirements of CEPA. OPM and individual state agencies may also identify state agency actions that do not require CEPA review by adopting an Environmental

¹ This factual review includes among other things, whether tidal wetlands have been impacted. The defined term "wetlands" includes areas subject to regular tidal incursion, and all areas that come into contact with tidal waters cannot be assumed to be tidal wetlands. As an indicator, the area has to be capable of supporting the growth of distinct tidal wetlands species listed in the definition. See Conn. Gen. Stat. § 22a-29.

Classification Document in accordance with § 22a-1a-4 of the Regulations of Connecticut State Agencies. DOT has specifically identified, within its Environmental Classification Document, certain actions that do not require further action under CEPA. These actions include demolition of buildings, construction of new facilities under 100,00 square feet, and stormwater improvements. As noted in the Petition, this facility is currently in use by DOT and there is nothing to suggest it will not be used in the same manner once the Project is complete. DOT, in conjunction with OPM, must determine whether the Project requires CEPA review. DEEP is not authorized by CEPA to make this determination for DOT, and DEEP will not issue a declaratory ruling ordering such additional review in response to the Petition.

In addition to the lack of authority to provide requested relief through a declaratory ruling, the Department also notes that staff from its Land and Water Resources Division has separately inspected the site during construction and has observed no impacts to regulated areas or other relevant violations. The department continues to monitor the project's overall compliance with its registration under the General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities and can utilize its enforcement authority if, at any time, it identifies violations that it determines warrant an enforcement action against DOT. A declaratory ruling is not needed to take such an enforcement action and the Department will not initiate such an action through a declaratory ruling.

For these reasons and in accordance with Conn. Gen. Stat, § 4-176(e)(5), a declaratory ruling will not be issued in response to the Petition.



Katherine S. Dykes, Commissioner