STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

OFFICE OF ADJUDICATIONS

IN THE MATTER OF	:	*REMOVAL ORDER* *FILE NO. LIS-2005-017-V*
JOHN AND RHODA LOEB	:	*MARCH 18, 2009*

FINAL DECISION

I

SUMMARY

This an appeal of a Removal Order issued by the Commissioner of Environmental Protection on June 10, 2008 pursuant to the authority granted by General Statutes §§ 22a-6, 22a-32, 22a-108, and 22a-361. This order, issued to the respondents John and Rhoda Loeb, requires the removal of (1) approximately 14,611 cubic feet of fill material consisting of stone, sediment, and loam; (2) two sections of stone terraces measuring 94.6 square feet and 54.1 square feet each; and (3) 165.1 square feet of granite stone placed as a walkway.

The Connecticut Department of Environmental Protection Office of Long Island Sound Programs and the respondents are the parties to this matter. The respondents challenge the authority of the Commissioner to order the removal of these structures because the DEP has not proven that they were placed waterward of the high tide line or in tidal wetlands. The respondents further deny that identified structures and fill are a public nuisance.

I have reviewed the evidence presented by the parties, including documentary exhibits and oral testimony. The respondents acknowledge placing the structures and fill on the property. The evidence shows that these structures and material were placed waterward of the high tide line and upon tidal wetlands without a permit in violation of §§ 22a-361 and 22a-32 respectively and that the two terraces and the fill material are shoreline erosion control structures placed without municipal site plan approval as required by §22a-109. I affirm the order to remove these offending structures.

II

DECISION

A

FINDINGS OF FACT

1

Background

1. John and Rhoda Loeb (the respondents) are the owners of waterfront property at 130 Johnson's Point Road in Branford and have owned this property since 1990. The property is located at the southern tip of Johnson's Point and its southern terminus directly abuts Long Island Sound. The property supports a residential structure and driveway. The shoreline is characterized as a rocky shorefront mixed with tidal wetland vegetation. The rocky shorefront resists alteration over time from erosion or deposition of materials. (Exs. DEP-8, 12; test. K. Zawoy, 12/16/08, p. 11, R. Loeb, 12/22/08, p. 46.)

2. In 2003, the respondents arranged for construction of three separate structures: a granite slab walkway to access a tidal pool adjacent to their property; a set of four stone terraces used for gardening; and an area of fill and lawn east and northeast of the residence's easternmost corner. The filled area was constructed, at least in part, to provide a stable staging area for the heavy equipment needed to place the granite slabs that comprise the walkway. The respondents had no permit or approval from the DEP or the Town of Branford to complete this work. In order to provide stability for the walkway, the contractor placed cut granite slabs up to a foot thick on the ground's surface. Each granite slab is either polygonal or nearly rectangular in shape and is approximately four feet wide by six feet long. Seven granite slabs were placed linearly, from west to east, to form a walkway totaling 165.1 square feet (sq. ft.). The lower two of the four terraces are located west of the granite slab walkway and southeast of the residence. They cover an area of approximately 148.7 sq. ft. A portion of the fill area was placed waterward of the masonry sea wall[1] and covers approximately 3250 sq. ft. The fill consists of cut granite boulders placed at the most waterward extent of the fill to

[1] There are two walls on the respondent's property. One borders the driveway on the property and the other is more waterward and is referred to on plans and exhibits as "masonry wall (buried)" or "masonry wall." In the remainder of this opinion, any reference to the masonry sea wall or masonry wall is intended to mean the more waterward wall on the property that is currently covered by fill.

serve as a base and soil and loam materials that support a small lawn placed behind and on top of the boulders. (Exs. DEP-6, 12, 17B (Sheet 2), 17D (Sheet 8); test. K. Zawoy, 12/16/08, pp. 12, 25-26, 82-83, 93, 117, R. Loeb, 12/22/08, pp. 54-55.)

3. On March 21, 2005, Kevin Zawoy of the Office of Long Island Sound Programs (OLISP) of the Department of Environmental Protection (DEP or department) received an anonymous complaint alleging on-going filling activities in tidal wetlands on Johnson's Point Road. The initial complaint presented only a name of a potential party and no exact address or description of the property. After subsequent research, including a review of aerial photographs, Mr. Zawoy located recent work at 130 Johnson's Point Road and conducted a site inspection there on September 21, 2005. At this site inspection, Mr. Zawoy took measurements, made notes of existing conditions, took photographs, and completed an inspection report. (Exs. DEP-6, 7a through 7j, 12; test. K. Zawoy, 12/16/08, pp. 8-10.)

4. On January 23, 2006, DEP issued a Notice of Violation (NOV) to the respondents based on Mr. Zawoy's observations during his site inspection. The NOV alleged that the respondents constructed an area of fill, two stone terraces, and a granite slab walkway waterward of the high tide line (HTL) and upon areas of tidal wetlands in violation of General Statutes §§ 22a-361 and 22a-32. The NOV further alleged that the fill and terraces were sediment and erosion control structures placed without a coastal site plan review from the Town of Branford in violation of §§ 22a-105, 106, 107. The NOV required the respondents to file a restoration plan for review and approval by the department. (Ex. DEP-13; test. K. Zawoy, 12/16/08, pp. 12-13.)

5. On October 11, 2006, William Kenny Associates submitted a letter with attached drawings on behalf of the respondents that represented the respondents' restoration plan. The restoration plan as submitted called for the removal of the fill area and restoration of tidal wetland vegetation. The plan requested retention of the granite slab walkway and the garden terraces. (Ex. DEP-17A; test. K. Zawoy, 12/16/08, p.15.)

6. On October 24, 2006, the DEP responded to the proposed restoration plan and requested its revision include the removal of the garden terraces and granite slab walkway. The letter also requested revision of the proposed location of the pre-existing HTL to reflect the pre-existing reach of tidal wetland vegetation. (Ex. DEP-18.)

7. On June 15, 2007, the restoration plan was resubmitted by the respondents. This plan included the removal of the fill area and the lower two stone terraces but did not include the removal of the granite slab walkway. (Exs. DEP 17-B, 17-D, and 17-E.)

8. On August 2, 2007 the department approved the restoration plan subject to the condition that the granite slab walkway also had to be removed. The approval letter required the removal work to be complete by September 15, 2007 and planting to be done by September 30, 2007. The respondents did not complete the work identified in the approval letter by the deadlines. The respondents and DEP had discussions about the plan and the removal of the granite slab walkway. As a result of these discussions, the DEP sent the respondents a consent order that called for removal of the fill and lawn area and the lower stone terraces. The respondents never signed the consent order and never completed the work identified in it. (Exs. DEP-19, 21; test. K. Zawoy, 12/16/08, pp. 19-23, R. Loeb, 12/22/08.)

9. On June 10, 2008, the Commissioner of Environmental Protection issued Removal Order LIS-2005-017-V that required removal of the fill material, the two lower stone terraces, and the granite slab walkway. The Commissioner issued the removal order under the authority of General Statutes, §§ 22a-6, 22a-32, and 22a-361 and properly served it on the respondents. (Exs. DEP-32, 37.)

10. An elevation of 5.4 feet referenced to National Geodetic Vertical Datum 1929[2] (NGVD or mean sea level) represents the HTL at the property. This HTL elevation is based on data derived from the NOAA[3] tide gauge in Branford Harbor. DEP utilized this elevation as its basis for determining that the structures in questions were placed waterward of the HTL. (Test. 12/9/08[4], L. Fisher, J. Lust, 12/16/08, K. Zawoy, p. 42.)

[2] NGVD 1929 is a fixed reference point used as a standard geodetic datum for elevations on the east coast.
[3] National Oceanic and Atmospheric Administration
[4] There is no transcript from the proceedings on 12/9/08. Those proceedings were recorded and a copy of the recording is on file with the Office of Adjudications. The recording is the official record of that day's proceedings.

2

Site Evaluation

11. Lawrence Fisher is a land surveyor licensed by the State of Connecticut. He performed a site survey of the Loeb property using historical land record information and historical photogrammetric surveys, aerial photographs and maps. The location of the HTL depicted on the Fisher survey is based only on an analysis of existing conditions after the construction of the structures subject to the removal order. Mr. Fisher used data from three photogrammetric plans, including the 1961 Town of Branford survey that depicted the area and provided them to John Lust.

12. Photogrammetric mapping is based on aerial photographs. Photogrammetrists take overlapping aerial photos and turn them into a three-dimensional stereo image. Their accuracy depends on the height of the flight and quality of photos and controls. Photogrammetric surveys may indicate highpoints and low points and identify elevations of those points. In some cases, contours are derived using 2-foot intervals and incorporated into the photogrammetric survey. (Exs. DEP-15, RESP-B, K; test. L. Fisher, 12/9/08.)

13. John Lust is a permitting agent with over twenty years of experience with costal site permitting and restoration. The respondents hired Mr. Lust to prepare a restoration plan for the site in response to the NOV. Mr. Lust used the Fisher survey and the historical materials used to complete that survey to determine the location of the HTL on the property prior to the construction. These materials included but were not limited to the 1961 photogrammetric survey completed by the Town of Branford. This survey was the most accurate of the historical photogrammetric surveys available to Mr. Lust and the best information available to identify the preexisting location of the HTL. The 1961 survey was completed in a smaller scale that allowed review of elevations and topographic conditions. Mr. Lust used the elevation information and contours from this photogrammetric map and, using a digital scan of this map, overlaid this information on the Fisher survey to show the approximate location of the HTL relative to site boundaries and features shown on the actual survey. The drawings prepared by Mr. Lust were completed using sound engineering methods and analysis and reflect an accurate

approximation of the pre-construction HTL. (Exs. DEP-16, 17A through 17E; test. 12/9/08, J. Lust, K. Zawoy, 12/16/08, 95-98.)

14. At the request of the respondents, John Roberge, P.E. inspected the site on November 21 and November 24, 2008. Mr. Roberge is a coastal engineer with over 35 years of experience. Through visual inspection, Mr. Roberge concluded that the fill area and terraces were constructed landward of the HTL as depicted on the Fisher survey. He did not rely on the drawings completed by Mr. Lust because he did not personally verify the information used to create them or understand the data that supported them. Mr. Roberge did not take any measurements in the field to determine the location of the HTL prior to or after construction and relied on the location of the HTL shown on the Fisher survey. He did not confirm that the Fisher survey was completed after the construction. Mr. Roberge has used aerial photographs in his work to identify the location of tidal wetlands and the location of tidal wetlands as indicators of the location of the HTL. (Exs. RESP-L, M; test. J. Roberge, 12/22/08, pp. 22, 24-25, 28, 31, 39-40.)

15. DEP used field observations and reviewed aerial photographs from 1974, 1980, 1981, 1986, 1990, 1995, 2000, and 2005 to determine the location of tidal wetland plants on the property prior to and after construction. These methods are typically used by DEP staff to determine the location of structures relative to tidal wetlands and the approximate location of the HTL. Tidal wetland species require daily contact with tidal waters to survive and their presence indicates the regular presence of tidal waters and the location of the HTL elevation. The site characteristics, including the presence and extent of tidal wetlands vegetation, are consistent in these aerial photos from 1974 through 2000 and only change on the 2005 photo after the construction was complete. DEP also relied on the 1961 Town of Branford photogrammetric survey to confirm the location of the HTL because its smaller scale allowed the review of elevations and topographic condition of the site. DEP's review of historical sources and the Fisher survey and its efforts to field verify information from these sources confirmed the accuracy of Mr. Lust's approximation of the pre-construction HTL. (Exs. DEP-8, 23 through 30; test. K. Zawoy, 12/16/08, p. 73-74, 95-98, J. Roberge, 12/22/08, p. 39-40.)

16. Kevin Zawoy is an Environmental Analyst III with over 13 years of experience with the DEP's Office of Long Island Sound Programs and has participated in over 200

enforcement matters. He and other DEP staff inspected and photographed the property on September 21, 2005, July 3, 2008, and October 15, 2008. On each of those inspections, Mr. Zawoy observed a variety of tidal wetland species growing: (1) immediately adjacent to the cut granite boulders placed by the respondents as part of the fill area; (2) adjacent to and between the cut granite slabs that make up the granite slab walkway on both the landward and waterward side of the walkway; and (3) adjacent to the lower stone terraces. During the October 15, 2008 inspection, Mr. Zawoy observed tidal waters in contact with the lower stone terraces on both the landward and waterward side of the terrace walls and with portions of the cut granite boulders placed as part of the fill area. The observations on October 15, 2008 were made during high tide. The observed tide on that day did not represent a departure from the predicted tide for that day. (Exs. DEP-1, 7b, 7e, 7f, 7h, 7i, 7j, 31a, 31c, 34a, 34c, 34d, 34e, and 35; test. K. Zawoy, 12/16/08 pp. 4-6, 53, 59-61, 65-67, 70-72, 87-89, 91, 111, 115-116.)

3

Site Violations

17. The portion of fill and lawn area waterward of the masonry sea wall was constructed upon an area of tidal wetlands, including the wetland species, *spartina alterniflora.* This material was placed on tidally influenced areas, including rocky ledge outcroppings, waterward of the HTL as it was located at the time prior to construction. The placed boulders, used as a base for smaller boulders and for soil and loam materials, are distinguished from the native rocky ledge by the presence of cut marks, drill marks, and because the material is stony creek granite native to Branford but not native to the property in question. The native rocky ledge is distinguished by wear and markings from tidal activity, weather, and blue-green algae, a tidal species. Tidal water comes in contact with portions of the placed granite boulders. The placement of fill, including large cut granite boulders and soil material altered the location of the HTL in the horizontal plane. The location of the HTL on the Fisher survey is further waterward of its original location prior to the construction of the fill and lawn area and only considers the existing conditions after the construction. (Exs. DEP-6, 7a, 7b, 7g, 17-B sheets 1 and 2, 31a, 31b

and 34b, RESP-K; test. J. Lust, 12/9/08; K. Zawoy, 12/16/08, pp. 99, 101-102, 111-113, 115-116.)

18. The two lower stone terraces were placed upon tidal wetlands species, including *distichlis spicata*, *spartina patens*, and *juncus gerardii*. These two terraces were also placed upon a tidally influenced area waterward of the HTL as it was located prior to construction. Tidal water comes in contact with the lowest terrace. The top elevation of the lowest and westernmost stone terrace is 7.3 ft. NGVD. The wall is approximately two feet high. Its bottom elevation is approximately 5.3 ft. NGVD. The top elevation of the second lowest stone terrace is 7.7 ft. NGVD. The wall of this terrace is approximately two feet high. Its bottom elevation is approximately 5.7 ft. NGVD. The US Army Corps of Engineers flood profile map defines local extreme high water for Johnson's point and this property as 5.4 ft. NGVD. (Exs. DEP-6, Attachment A, DEP-31C, 34C, 34E, RESP-K; test. K. Zawoy, 12/16/08, pp. 82-92.)

19. The granite slab walkway was placed upon tidal wetlands species, including *distichlis spicata* and *spartina patens.* The slabs were placed waterward of the HTL elevation of 5.4 ft. NGVD. The top elevation on the waterward side of the easternmost stone in the granite walkway is 5.9 ft. NGVD 1929. The slabs are approximately one foot thick. The elevation under the easternmost stone is approximately 4.9 ft. NGVD. (Exs. DEP-7B, 31A, 34A; test. K. Zawoy, 12/16/08, pp. 46-48, J. Roberge 12/22/08, pp. 30-31.)

20. The fill area and the stone terraces are shoreline erosion control structures as defined by General Statutes §22a-109(c). These structures were built without a coastal site plan review or approval from the Town of Branford. (Exs. DEP-9, 10, 12; test. K. Zawoy, 12/16/08, p. 117.)

21. The respondents previously owned coastal property at 44 Howard Avenue in Branford. DEP and the respondents signed a consent order for removal of work performed waterward of the HTL at that property without a permit from the Commissioner pursuant to General Statutes 22a-361. The respondents were informed in writing that a walkway at 130 Johnson's Point Road would require a permit. (Exs. DEP-4, 5.)

4

Impacted Resources

22. The granite slab walkway and terraces impact tidal wetlands. The walkway stones have not only impacted the wetland areas upon which they were placed but also are impacting the tidal wetland species that now grow among the stones. The stones have demonstrated signs of shifting and movement. Their area of impact has increased over the passage of time due to the tidal influence of the area and they will continue to impact the adjacent tidal wetlands. (Test. K. Zawoy, 12/16/08, p. 81.)

23. The fill area impacted tidal wetlands as well as the additional resources of rocky shorefront and near shore waters. Rocky shorefronts are considered highly functional systems in Connecticut that serve as habitat for numerous vertebrate and invertebrate species. Near shore waters are areas waterward of mean high water and up to ten feet deep. (Test. K. Zawoy, 12/16/08, p.110.)

B

CONCLUSIONS OF LAW

1

Tidal Wetlands

The DEP has jurisdiction over tidal wetlands and may order the removal of structures placed in those areas without a permit. General Statutes §§ 22a-32. Tidal wetlands include those areas that support or are capable of supporting the tidal species listed in General Statutes § 22a-29. The jurisdiction of the DEP pursuant to the Tidal Wetlands Act extends to the surface that is at or below an elevation one foot above local extreme high water. General Statutes § 22a-29(2). The respondents performed regulated activities, namely, the placement of fill and permanent structures in areas that supported tidal wetlands species, without a permit in violation of General Statutes §22a-32. Historical photographic evidence and post-construction inspections revealed that the areas subject to filling and construction supported a variety of tidal wetland species. The site characteristics, including the presence and extent of tidal wetlands vegetation, are consistent in aerial photos from 1974 through 2000 and only change on the 2005 photo after the construction is complete. This is consistent with the description of the site as

rocky shorefront resistant to erosion and deposition of materials. The historical evidence and the presence of these species in and around the current structures is sufficient evidence that the structures were placed in tidal wetland areas without a permit.

To avoid further environmental harm to existing tidal wetlands and address the impact to those wetland resources lost at the time the fill and structures were placed, the Commissioner is authorized to order the removal of the offending structures and restoration of the impacted area to pre-work condition. General Statutes §22a-6. On that basis alone, Removal Order LIS-2005-017-V can be upheld.

In their post-hearing brief[5], the respondents maintain that the definition of tidal wetlands is not relevant to my decision on this order because the Removal Order does not include Chapter 440 (Wetlands and Watercourses) under the provision regarding potential penalties for violating a final order. At the same time, the respondents' brief acknowledges that the order was issued in part under General Statutes 22a-32 (Tidal Wetlands Act). To the extent the respondents are arguing that the order did not provide proper notice of the alleged violations, I disagree.

The order very clearly alleged that the respondents violated both the structures and dredging act and the tidal wetlands act and provided adequate notice of the alleged violations and the Commissioner's jurisdiction and authority to issue the order. It also clearly states, as acknowledged by the respondents, that the removal order was issued under both of those authorities and more generally under §22a-6. In fact, the respondents deny the allegations in their answer and request for hearing without raising this objection. I will not ignore the entire text and apparent scope of the order. Any choice the respondents have made to proceed "in this matter based on the definition of 'high tide line' and not on the definition of wetland contained in §22a-29(2)…."[6] is to their detriment. The definition of tidal wetlands is relevant to this proceeding and always has been. The DEP has met its burden and demonstrated that the respondents have violated the provisions of §22a-32 by placing fill and structures in and upon tidal wetlands without a permit and correctly ordered the removal of the offending structures.

[5] I note the respondent never raised this issue in the form of an objection as DEP offered evidence on the presence of tidal wetlands. The opportunity to make this argument may have been waived. However, I will respond to this argument because it may be intended to question DEP's jurisdiction, an argument that cannot be waived, and because the response is straightforward.

2

Structures and Dredging Act

The DEP has jurisdiction over the intertidal zone waterward of the high tide line (HTL) as defined in General Statutes § 22a-359(c). The HTL is the:

> line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the *maximum height* reached by a rising tide. The mark may be determined by (1) a line of oil or scum along shore objects, (2) a more or less continuous deposit of fine shell or debris on the foreshore or berm, (3) physical markings or characteristics, *vegetation lines*, tidal gauge, or (4) by any other suitable means delineating the general height reached by a rising tide. *The term includes spring high tides and other high tides that occur with periodic frequency* but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. General Statutes, § 22a-259(c) (emphasis added).

No one may perform regulated activities waterward of the HTL without a permit from the Commissioner. General Statutes §22a-361. The respondents performed regulated activities, namely, the placement of fill and permanent structures in areas waterward of the HTL, without a permit in violation of General Statutes §22a-361.

The examination of historical evidence, including elevations on historical photogrammetric surveys and post-construction inspections, revealed that the areas subject to filling and construction were intertidal. Aerial photos taken prior to the construction show tidal wetland species reached almost to the masonry sea wall. Although a protected resource by itself, tidal wetlands, as testified to by Mr. Lust, Mr. Zawoy, and Mr. Roberge, can assist one in locating the HTL in the horizontal plane. The use of tidal wetlands or "vegetation lines" is anticipated in the statutory definition.

The respondents argue that Mr. Roberge did not use the Lust drawings or the other historical documents in evaluating the site. Mr. Roberge's evaluation was a limited investigation that only relied on the post-construction Fisher survey. The fact that the scope of his review was so limited does not require me to ignore other credible evidence used by other experts, including DEP staff. In fact, his failure to use the Lust drawings was apparently due more to his lack of understanding of the method by which they were

[6] See Respondent's brief, 2/2/09, p. 3.

completed and the data used to support them rather than his opinion on their veracity or accuracy.

Mr. Lust used a scientific approach and best available information to approximate the location of the HTL elevation prior to construction. Furthermore, photographic evidence shows water in contact with the lower terraces and the placed boulders that support the fill area. For the walkway, the respondents' own expert testified that it was in the middle of a tidal wetland and was subject to daily interaction with tidal waters to support the tidal species growing around it. Also the respondents' survey shows that the bottom elevation of all of the stones is waterward of the elevation 5.4 ft. NGVD. Most importantly, the respondents acknowledge in their post hearing brief that the granite slab walkway is waterward of the HTL.

For the terraces and the fill area, the respondents argue that only the Fisher survey shows the HTL with any degree of certainty and those structures are both landward of the HTL on that survey. The respondents suggest that DEP's use of a 1961 photogrammetric survey from the Town of Branford as a basis for the location of the HTL prior to construction was inappropriate.

First, extensive testimony showed this historical survey was only one of the tools used by the department to determine the preexisting resource areas, including the intertidal area and the HTL. The DEP interpreted aerial photos and verified its interpretation in the field, a tool acknowledged by all witnesses to be useful in determining the location of the HTL. Again, these photos show an area consistent in its appearance from 1974 through 2000 with the changes to the site only occurring in the 2005 photo taken after the construction.

Second, four witnesses, including DEP, representing approximately 100 years of total experience, acknowledged the usefulness of historical sources including aerial photographs, surveys, and maps in identifying boundaries, elevations, and the location of tidal wetlands. The respondents seem to argue that you cannot refer to these historical sources to determine the existence or scope of an environmental violation. The DEP was left with no choice but to use the only information available to it to determine the characteristics of the property prior to construction. This information included historical survey work and aerial photographs.

Finally, the Fischer survey was completed after the construction. The DEP is not bound by the post-construction location of the HTL on that survey because other viable sources exist to assist in determining the location of the HTL prior to the work. The respondents proceeded with work in the intertidal zone at their own risk with full knowledge that the department can and does take action to remove structures placed without proper permits. A pre-construction survey would have been the ideal information and would leave little doubt as to the location of resources in relationship to any planned work. However, the fact that one was not completed does not preclude the DEP from investigating other historical sources of information. This investigation revealed that the most accurate preconstruction survey was the 1961 Town of Branford photogrammetric survey. That survey and the aerial photographs were used appropriately in conjunction with field inspections to verify that the work was completed waterward of the HTL.

Next, in its post-hearing brief, the respondents focus on the definition of "high tide line" in an attempt to restrict the jurisdiction of DEP to the area waterward of the mean high water line. The respondents cite to *Rapoport v. Stamford Zoning Board of Appeals*, 2008 Conn. Super. LEXIS 2937 as support for their position. However, this case is unrelated to DEP's jurisdiction under §22a-361 as it is focused on the jurisdiction of a municipal zoning authority over a dock. *Rapoport v. Stamford, supra, 1.* Part of the opinion correctly states that the state has exclusive jurisdiction waterward of the high water mark except in instances where a municipality has established a harbor management plan and harbor management commission. Id. 11. This cannot be read as an interpretation of the department's jurisdiction under the definition of HTL at § 22a-359(c). The definition does not limit the jurisdiction of the DEP to the mean high water mark.

In § 22a-359(c), the legislature identified the extent of DEP's jurisdiction by defining the HTL. It is not the same as the mean high water mark and was never intended to be. As DEP correctly states in its reply brief, the legislature actually amended the statute to extend DEP's jurisdiction beyond mean high water by defining the HTL as currently defined.[7] The respondents' argument would require me to ignore the

[7] See General Statutes § 22a-359(c) and Public Act 87-495.

overt act of the legislature to define the extent of DEP's jurisdiction as being beyond mean high water and up to the HTL. I am authorized to interpret the law, not to ignore it. The definition of HTL anticipates that it will be higher than the average reach of the tide. It clearly states that it is the "maximum height" of a rising tide. I find the respondents' argument that the HTL is only intended to be the height that the tide generally reaches unpersuasive and the case cited as unsupportive.

Nevertheless, there is no disagreement about the elevation of the HTL. The parties, throughout the process, generally agreed on a HTL elevation of 5.4 ft. NGVD. The disagreement is about the location in the horizontal plane of that elevation prior to the construction of the fill area, the stone terraces and the granite slab walkway. The approximate location of the HTL prior to construction offered in the Lust drawings is a fair and accurate representation. It was checked by DEP staff using historical data, verified through field inspection, and placed in the context of the Fisher survey to accurately fix its position relevant to site boundaries and features. The DEP has met its burden that the respondents have violated the provisions of §22a-361 by placing fill and structures waterward of the HTL without a permit and correctly ordered the removal of the offending structures.

3

Coastal Site Plan Review

The DEP has concurrent jurisdiction over erosion control structures with the Town of Branford. General Statutes §22a-109. The respondents were required to obtain coastal site plan approval from the Town of Branford for the erection of the stone terraces and the placement of the fill area. As part of the process, DEP would have had an opportunity to review and comment on these plans as part of the municipal approval process. The respondents never obtained proper approval for these structures under §22a-109. Therefore, the Commissioner correctly classified these structures as a public nuisance and ordered their removal under her authority to do so under §22a-108.

C

CONCLUSION

The Commissioner had the authority to issue the order to remove the offending structures. They were placed in tidal wetlands and waterward of the high tide line without the necessary permits in violation of General Statutes §§ 22a-32 and 22a-361 respectively. In addition, the stone terraces and the fill area were constructed without coastal site plan review in violation of General Statutes § 22a-109 and are a public nuisance. The order is affirmed.

Kenneth M. Collette, Hearing Officer

SERVICE LIST

In the matter of John and Rhoda Loeb
Removal Order – File No. LIS-2005-017-V

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