

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : **APPLICATION NO. DIV-200303936**

JNS DEVELOPMENT, LLC : **DECEMBER 20, 2005**

PROPOSED FINAL DECISION

JNS Development, LLC (applicant) has filed an application with the Department of Environmental Protection (DEP) for a water diversion permit in connection with a planned unit development to be constructed in Plainville. General Statutes §22a-369.

The parties to this proceeding are the applicant and staff of the DEP Inland Water Resources Division. Following its review, staff issued a tentative determination to approve the application. Public comments were received during a hearing on October 31, 2005, at the Plainville Municipal Center. Written public comments were submitted at and after the hearing.

The parties have submitted the attached *Agreed Draft Decision* for consideration as my proposed final decision in this matter. Staff has prepared a draft permit that would authorize this diversion, which is appended to this Agreement (Attachment I). This draft permit incorporates special terms and conditions within the jurisdiction of the DEP.

I find that the application complies with all relevant statutes and regulations. The *Agreed Draft Decision* submitted by the parties satisfactorily conveys the findings of fact and conclusions of law necessary to support this conclusion. I therefore adopt this attached *Agreed Draft Decision* as my proposed final decision and recommend that the Commissioner issue the permit requested by this application.

December 20, 2005
Date

/s/ Jean F. Dellamarggio
Jean F. Dellamarggio, Hearing Officer

(Attachment I)

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN RE THE MATTER OF:

JNS Development, LLC Diversion
Permit Application No. DIV-20030936

:
:
:
:
:
:
:

December 14, 2005

AGREED DRAFT DECISION

Findings of Fact

Taking into consideration and giving due regard to all the substantial evidence in the record, I make the following findings of fact:

A. Procedural History

On December 22, 2003, the Connecticut Department of Environmental Protection (“CTDEP”) received from JNS Development, LLC (the “Applicant”), an application dated December 19, 2003, for a water diversion permit pursuant Conn. Gen. Stat. § 22a-365 *et seq.* (the “Act”) (the “Application”). (Exhibit APP-1). The application for nonconsumptive use is required due to the fact that the tributary watershed area above the point of diversion is greater than 100 acres.

Notice of the Application was published on January 31, 2005 in The Herald. (Exhibit APP-2).

Following a technical review of the Application and all supplementary material, CTDEP Staff made a tentative determination to approve the Application and issue a diversion permit. On June 21, 2005, the Commissioner published a Tentative Determination and Intent to Waive Public Hearing. (Exhibit DEP-1).

On August 22, 2005, after receiving a petition signed by more than twenty-five (25) persons requesting a hearing, (Exhibit DEP-12) CTDEP Staff submitted a Request for Hearing Officer to the Office of Adjudications.

I held a Status Conference on September 14, 2005. On September 15, 2005 I issued a Status Conference Summary that set a hearing date, set a Pre-Hearing Conference date, and designated Francesca Heap as an interested person. I set a date for the site visit for October 25, 2005 at 8:00 A. M. and the public hearing for November 1, 2005 at 6:30 P. M. at the Plainville Town Hall.

On October 6, 2005, I held a Pre-Hearing Conference at which the parties submitted respective lists of issues, witnesses and proposed exhibits. The parties stipulated to the admission Exhibits APP-1 through APP-22 (APP-23 having been withdrawn) and DEP-1 through DEP-15 and I admitted same. Certification of the Publication of the Notice of Hearing will be marked as Exhibit DEP-16 and submitted at the hearing.

The site visit was postponed from October 25, 2005 at 8:00 AM to October 31, 2005 at 8:30 AM due to inclement weather. The site visit occurred on October 31, 2005 and the Public hearing occurred at the scheduled date and time. At the hearing I received testimony and exhibits from Christopher Juliano (for the Applicants), Ms. Sara Yates (CTDEP), and Mr. Jeff Caiola (CTDEP). Ms. Heap and other members of the public spoke at the hearing and provided a variety of materials, but did not provide testimony. With respect to Mr. Juliano, Ms. Yates, and Mr. Caiola, the parties submitted resumes or documentation for these witnesses regarding their professional experience and also provided a summary as to the general nature of the opinions these witnesses would give. I closed the hearing on November 1, 2005, but left the record open until November 8, 2005, to allow for the submission of additional information.

On November 9, 2005, I closed the record in this matter.

B. Parties

The parties to the proceeding are JNS Development, LLC, and CTDEP Staff of the Inland Water Resources Division. Ms. Francesca Heap did not formally intervene or seek party status, and was, therefore, designated an interested person.

C. Project Description

The Applicant seeks to construct a 116 unit Planned Unit Development on approximately 39 acres of land located just off the northeast corner of intersection of Upper and Lower Camp Streets in the Town of Plainville together with roads, sewer and water lines, storm water drainage facilities, utilities, and related infrastructure as per the plans submitted pursuant to the application (Exhibits APP-1 through 9). The layout of the project includes a public road named High Meadow Lane which enters the site from Upper Camp Street in the northwest corner of the parcel and terminates in a cul-de-sac in the upper middle of the site. A private road named Nicholas Court starts from the north side of the public road cul-de-sac of High Meadow Lane and loops within the site in a clockwise direction terminating in a cul-de-sac in the southeast corner of the site east of the lower pond. A private road name Timothy Court starts from the south side of the public road cul-de-sac and loops within the site in a counter clockwise direction crossing between the upper detention pond and the lower pond intersecting with Nicholas Court just north of the terminus of Nicholas Court cul-de-sac.. The project includes a private road/culvert crossing (Nicholas Court) a small wetlands area in the northeast corner of the site and the installation of an outlet structure and an additional culvert in connection with an existing road/culvert crossing (Timothy Court between the upper detention pond and the lower pond) in the southeast corner of the site. In addition there are four storm water drainage outfalls leading into the upper detention pond: one at the end of Sarah Court which runs south from Nicholas Court with the outfall on the west side of the upper detention pond; one from Nicholas Court which runs west with the outfall on the east side of the upper detention pond, one located at the Nicholas Court culvert crossing, and one which runs northeast from Timothy Court with the outfall on the southwest side of the upper detention pond.

D. Site Description

The Site is approximately 39 acres in size located at the northeast corner of Upper and Lower Camp Streets in the Town of Plainville. The site contains an upper pond or detention pond created by a previous developer in the late 1980's as part of a residential development that was approved but never constructed and a lower naturally occurring lower pond. The culvert in the southeast corner of the property was installed between the detention pond and the lower pond in the late 1980's. The parcel is subject to a drainage easement in favor of the Town of Plainville which allows drainage onto the subject parcel from a detention pond offsite northeast of the subject parcel which contributes to the flow between the two existing ponds on the site. A water line easement in favor of the City of New Britain crosses the northeast corner of the Site. It contains a 36 inch high pressure water line. As part of the maintenance of this line it is sporadically vented and drains into the water system on the Site.

The Site is located in the Pequabuck River watershed, Basin # 4315. The subject property is located in a 143 acre watershed area which feeds into an unnamed stream which runs into the Pequabuck River about 2 miles away from the site. The Pequabuck River is a tributary of the Farmington River.

E. The Applicants

The Applicant is JNS Development, LLC (Exhibit APP-1). JNS Development, LLC, has an address of 143 West Main Street, Plainville, Connecticut 06062.

F. The Application

The Application consists of Exhibit APP-1 as supplemented by the Applicants' other exhibits and the testimony provided at the public hearing. Exhibit APP-1 consists of a completed application form entitled "Permit Application for Programs Administered by the Inland Water Resources Division" (DEP-IWRD-APP-100) ("Application Form") and Attachments A through P (but excluding those attachments that are not required for this diversion application).

Attachment A consists of the form "Attachment A-2: Technical Documentation" which, as the title suggests, provides technical information regarding the water diversion by describing the diversion, the nonconsumptive use of water, the need for the diversion, explains that the diversion will not impact wildlife and fish habitat and that, therefore, no mitigation measures are needed, that the diversion will not cause an interbasin transfer of water, and that no instream flow maintenance is provided. The remaining attachments are those required in Part V of the Application Form. Of particular note are Attachment H Part 1 (an "Engineering and Hydrogeologic Report" or "Stormwater Drainage Report" prepared by Juliano Associates, Consulting Engineers, dated July 2002 as revised May 20, 2005) ("Exhibit APP-10"), Attachment H Part 2 (Stormwater Management calculations), Attachment J (Alternative Assessment), and Attachment L (Flood Contingency Plan).

1. Need for the Diversion

The diversion is needed in order to install culverts at two wetland crossings on the site.

The culvert at the crossing in the northeast corner of the site calls for two 24 inch culverts and an outlet structure to allow for a private roadway crossing within the 116 unit development (Exhibit APP-3, Sheet 11 of 40). The culvert at the crossing in the southeast corner of the site consists of a single 36 inch culvert that was installed in 1987 in connection with an approved residential subdivision that was never completed. The work at this crossing will be the installation of second new 36 inch culvert along side the existing 36 inch culvert and new outlet structures. The plans as originally submitted to the CTDEP and the USACOE called for the removal of the existing 36 inch culvert and its replacement with two 24 inch culverts. After the preparation of several flood models and the exploration of several alternative locations for detention ponds (Exhibits DEP-4, APP-4, APP-5, APP-9, APP-10, and APP-12) it was determined that the least intrusive manner of creating the crossing would be to keep the existing 36 inch culvert in place and install an additional 36 inch culvert and new outlet structures to regulate storm water flows during rain events (Exhibits APP-3, Sheet 12 of 40). Since the culvert road crossing already exists in the southeast corner of the site it makes no sense not to use it in connection with the development of the site.

2. Reasons for the Diversion

A Diversion permit was required for this project because the proposed activities met the statutory requirements of the definition of a Diversion (Section 22a-367(2)), which means any activity which causes, allows or results in the withdrawal from or the alteration, modification or diminution of the instantaneous flow of waters of the state. Instantaneous flow means the volume of water that would occur in waters at a given point at any given moment.

The project and proposed activities are also regulated under the Regulations of Connecticut, Section 22a-377(c)- 1(a)(2) which regulates the collection and discharge of runoff, including storm water drainage or skimming flood flows, from a watershed area of 100 acres or greater.

The upper pond, constructed in 1987 currently functions to provide storm water detention for a previous subdivision that was not constructed (Exhibits APP-4, APP-5, APP-7 and APP-8). The proposed culvert installations at Nicholas and Timothy Court are designed to provide detention of storm water, thereby changing the instantaneous flow of the site from a watershed area of 143 acres. The pond and associated wetland systems will receive additional water during storm events from the proposed development (Exhibits APP-4, APP-5, and APP-10. The design of the proposed development will prevent flooding downstream of the site (Exhibits DEP-4, APP-10 and APP-13).

3. Description of the Existing Water System

The Application provides a detailed description of the existing water system. (Exhibits, APP-1 through APP-9).

4. Locations of Withdrawals and Discharges

There are no withdrawals in connection with this application. The discharges are depicted in the Application (Exhibits APP-1 through 9, APP-3, Sheets 10, 11, 12, and 13 of 40). The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres.

5. Quantity, Frequency and Rate of Water Diversion

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres (Exhibits APP-10, APP-20, and APP-22).

Instantaneous flows will only be disrupted during storm events (Exhibits DEP-4, APP-4, APP-5, APP-10, and APP-13). This is necessary to regulate the peak discharges leaving the property and flowing under lower Camp Street. In order to control the stormwater flows, outlet structures will be constructed at both the Nicholas Court and Timothy Court road crossings (Exhibits APP-3, Sheets 11 and 12 of 40). The outlet structures will retard stormwater flows and temporarily inundate the existing wetland system and raise water surface elevations (Exhibits DEP-4, APP-4, APP-5, APP-13, and APP-21). The applicant's soil scientist and biologist have submitted reports that indicate that the temporary inundation, approximately 24 to 36 hours, will not have a detrimental affect upon the ecosystem (Exhibits APP-14 and APP-15).

6. Length of Time for Which the Diversion is Sought

The non-consumptive Diversion Permit will expire three years from the date that it is issued. The construction of the residential development and the associated culvert installations will be concluded within this three year time frame (Exhibit APP-3 Sheet 5 of 40) or the applicant will need to reapply for a new Diversion Permit to complete the regulated activities.

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres and the storm water discharges into the water system (Exhibits DEP-4, APP-4, APP-5, APP-10, APP-13, and APP-20). The diversion will be permanent to the extent that storm water drainage systems will feed into the existing water system

7. Effect of the Proposed Diversion

There should be no significant effect from the proposed diversion activities. The site was surveyed by a biologist, Jen Beno (Exhibit APP-14) to determine the effect to vegetation species located adjacent to the banks of the ponds. The report stated that the vegetation was found to be tolerant of brief duration inundation conditions associated with storm events ranging from 24 to 36 hours. It was concluded that short duration inundation events should have no significant impact on the dominant species observed within the wetlands (Exhibits DEP-3, APP-14 and APP-15).

The Diversion will allow for the slow release of storm water events from the site thereby preventing flooding off site. Water surface elevations will increase in the existing ponds but the peak discharge will be contained on-site (Exhibits DEP-4, APP-4, APP-5, APP-7, APP-10, and APP-13). There will be a decrease in peak runoff from existing to proposed conditions through the use of detention (Exhibits DEP-4, APP-4, APP-5, APP-7, APP-10, and APP-13). Water surface elevations will decrease from existing to proposed conditions at the existing cross culvert where the water system exits the site at Lower Camp Street (Exhibit DEP-4).

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres.

8. Alternatives

The Application contains an Alternatives Assessment at Attachment J of Exhibit APP-1. (See also Exhibits APP-9 and APP-12). The Alternatives Assessment discusses in great detail a variety of alternatives, including the creation of additional detention ponds. It was determined through engineering analysis that none of the five alternative stormwater management plans were prudent and feasible. In each case, it was determined that the alternative detention pond locations increased the peak discharges at lower Camp Street and increased water surface elevations in the lower pond (Exhibit APP-9).

9. Conservation Measures

Since there are no withdrawals in connection with this application there is no need to explore conservation measures.

10. Environmental Impact Report

Since there is no interbasin transfer of water, the Application does not contain an Environmental Impact Report but Attachment F to the Application (Exhibit APP-1) contains environmental evaluation of the impact on vegetation on the Site (Exhibit

APP-14) and three soils investigation reports dated July 17, 2002, September 18, 2002, and November 5, 2003 (Exhibits APP-15, APP-16, and APP-17) which indicate no adverse impact on existing wildlife on the site.

G. Conn. Gen. Stat. § 22a-373(b) Considerations

1. Effect of the Proposed Diversion on Related Needs for Public Water Supply Including Existing and Projected Uses, Safe Yield and Reservoir Systems and Reservoir and Groundwater Development

The diversion will not have any effect on related needs for public water supply. There are no withdrawals in connection with this application (Exhibits APP-1, DEP-1, DEP-3, and DEP-4). The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres.

Based on the foregoing, I find that the diversion will not affect related needs for public water supply including existing and projected uses, safe yield, and reservoirs and reservoir and groundwater development.

2. Compatibility of the Proposed Diversion With the Policies and Programs of the State of Connecticut Dealing With Long-Range Planning, Management, Allocation and Use of Water Resources

The diversion is compatible with the policies and programs of the State of Connecticut dealing with long range planning, management, allocation and use of water resources. (Exhibits DEP-1, DEP-3, and DEP-4).

3. Relationship of the Proposed Diversion to Economic Development and the Creation of Jobs.

The diversion makes it possible to construct 116 units of residential housing which will provide construction jobs to area residents and provide new and moderately priced housing for area residents; both those seeking to downsize into smaller housing and those seeking to purchase their first home (Testimony of C. Juliano at November 1, 2005 Public Hearing). Based on the foregoing, I find that there is a positive relationship between the diversion and economic development and the creation of jobs.

4. Effect of the Proposed Diversion on Existing Water Conditions

The proposed diversion will have no significant effect on existing water conditions. (Exhibits APP-9, DEP-1, DEP-3, and DEP-4). There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres. The incorporation and required continued maintenance of the hydrodynamic separators will provide for long-term integrity of the quality of the surface water (Exhibit APP-21). Since the site already

has been partially developed with a culvert crossing and the construction of a detention pond it would be imprudent to develop the site and not take advantage of the existing wetland crossing and detention pond in the scheme of development (Exhibit APP-8).

The proposed stormwater management plan closely mimics the current drainage patterns that are presently occurring on the site (Exhibits DEP-4, APP-4, APP-5, and APP-7). The only significant change occurs during storm events when water surface elevations are increased in the area of the upper detention pond and easterly of the Nicholas Court road crossing (Exhibits DEP-4, APP-4, APP-5, APP-10, and APP-13). In both of these areas, there are stormwater control outlets that regulate the flow of the stormwater runoff. These structures are designed to meter the flows so that peak discharges are reduced below pre-existing levels. This insures that the water surface elevation of the lower pond is maintained at pre-existing levels during all storm events (Exhibits DEP-4, APP-4, APP-5, App-10, and APP-13).

With respect to water quality, a Best Management Practices (BMP) calculation was performed to determine the amount of total suspended solids (TSS) removal anticipated by the proposed treatment tree (Exhibits APP-10 and APP-22). These calculations indicated that the proposed system will remove in excess of ninety-five (95%) percent of the suspended solids which far exceeds the federal requirement of eighty (80%) percent. In addition, with the inclusion of hydrodynamic separators within the treatment process, there will be a substantial removal of hydrocarbons such as gasoline, oil, and grease prior to the storm water entering the wetland systems (Exhibits DEP-4 and APP-21).

5. Effect, including thermal effect, of the Proposed Diversion on Fish and Wildlife

The diversion will not have any adverse effect on fish or Wildlife. (Exhibits DEP-3, DEP-4; APP-1, Attachment F, APP-14 through 18).

6. Effect of the Proposed Diversion on Navigation

The diversion will have little or no negative effect on existing water conditions. (Exhibits APP-1, DEP-3, and DEP-4, APP-4, APP-5, APP-7, APP-10, and APP-13). Since the diversion will have at most a negligible effect on water conditions, and is located at a pond on an unnamed stream above local streets with culvert crossings, I find that the diversion will not affect navigation.

7. Necessity

Taking into consideration and giving due regard to the Alternatives Assessment (Exhibits APP-9, Attachment J, APP-10, APP-11, APP-12) proffered by the Applicants, and the testimony by Mr. Juliano, I find that there are no prudent and feasible

alternatives to the diversion. Since the site already has been partially developed with a culvert crossing and the construction of a detention pond it would be imprudent to develop the site and not take advantage of the existing wetland crossing and detention pond in the scheme of development, I find that the diversion is necessary. (Exhibits APP-1 through APP-13).

8. Effect on Interstate Waters

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres. The Application shows a wholly intra-state diversion of water that does not impact interstate waters. (Exhibit APP-1). Based on that evidence, I find that the diversion will not have any effect on interstate waters.

9. Municipal Interests

Notice of the Application was provided to the Town of Plainville. (Exhibits APP-2, DEP-1 and DEP-2). The Town of Plainville did not comment on the Application. The site plan has been approved for the development of 116 units of planned unit residential housing by both the Plainville Planning and Zoning Commission (March 25, 2003) and the Inland Wetlands and Water Courses Commission of the Town of Plainville (November 6, 2002) (Exhibit APP-1, Attachment A). Based on that information, and on the Town of Plainville's silence, I find that the diversion does not conflict with the Town of Plainville's interests.

H. Conn. Gen. Stat. § 26-310 Requirements

Conn. Gen. Stat. § 26-310 requires that "any action authorized, funded or performed by . . . [a state] agency . . . not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species." The Site and diversion are not located within any area identified as habitat for endangered, threatened or special concern species. (Exhibits DEP-3, DEP-4, APP-14 through 18). I, therefore, find that approval of the diversion permit will not have any effect on such species.

I. Other Required Permits

401 Water Quality Certification (Pending Application No. WQC-200500243).

J. R.C.S.A. § 22a-377(c)-2(f) (1) Requirements

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres. It will not have a significant effect on groundwater levels. (Exhibits APP-1, DEP-3, and DEP-4). Therefore, the Applicants have demonstrated that the diversion is consistent with the requirements of R.C.S.A. § 22a-377(c)-2(f) (1).

K. R.C.S.A. § 22a-377(c)-2(f) (2) Requirements

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres. The diversion will not have a significant effect on the wetlands and watercourses on site. (Exhibits DEP-3, DEP-4, and APP-1 through 18). Therefore, the Applicants have demonstrated that the diversion is consistent with the requirements of R.C.S.A. § 22a-377(c)-2(f) (2).

L. R.C.S.A. § 22a-377(c)-2(f) (3) Requirements

There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres. The equipment and material associated with the diversion will not have any significant effect on potential floodplain storage, and the underground equipment will not create any floodplain hazard. (Exhibits APP-1 through APP-9, APP-21, DEP-3, and DEP-4). Therefore, the Applicants have demonstrated that the diversion is consistent with the requirements of R.C.S.A. § 22a-377(c)-2(f) (3).

M. R.C.S.A. § 22a-377(c)-2(f) (4) Requirements

The diversion is not located within a coastal area. (Exhibit APP-1).

N. R.C.S.A. § 22a-377(c)-2(f) (5) Requirements

The diversion is consistent with the relevant policies and long term planning requirements of the State of Connecticut. (Exhibits DEP-3, DEP-4, and DEP-1). Therefore, the Applicants have demonstrated that the diversion is consistent with the requirements of R.C.S.A. § 22a-377(c)-2(f) (5).

O. The Draft Permit and Proposed Permit Conditions

CTDEP Staff has proposed the issuance of a water diversion permit to the Applicants, authorizing JNS Development, LLC, to divert waters of the State at an unnamed stream tributary to the Pequabuck River in Basin #4315 in accordance with the Application. There are no withdrawals in connection with this application. The application is based on the size of the tributary watershed area above the point of diversion being greater than 100 acres. The stated purpose is to allow the construction of 116 units of residential housing and the accompanying infrastructure.

By virtue of the draft permit, JNS Development, LLC would be authorized to divert the waters of the State in accordance with the plans entitled "HIGH MEADOW CAMP STREET, PLAINVILLE Juliano Associates Engineers & Surveyors 405 Main Street (Yalesville) Wallingford, Connecticut Date: 5/12/02 Revised 12/12/02, 06/28/02, 3/28/03, 1/25/04, 1/25/05, and 06/22/05", supplemental materials and other information provided in the Application. (Exhibit DEP-11)

The CTDEP staff has proposed special and general conditions to the proposed permit. The proposed conditions include an expiration date of three (3) years from the date of issuance, recording and reporting violations requirements. Id.

The Applicants have reviewed both the special and general conditions contained in the proposed draft permit and have no objection to their inclusion in the final permit.

Proposed Conclusions of Law and Decision

I. Jurisdiction

Conn. Gen. Stat. § 22a-368(b) provides, in relevant part, as follows:

...no person or municipality shall, after July 1, 1982, commence to divert water from the waters of the state without first obtaining a permit for such diversion from the [C]ommissioner [of Environmental Protection]

The Commissioner is empowered pursuant to Conn. Gen. Stat. § 22a-369 to issue diversion permits and the Applicant has applied for such a permit in this case. Accordingly, the Commissioner has subject matter jurisdiction as to this matter.

II. Regulatory Requirements

A. Application Contents

Conn. Gen. Stat. § 22a-369 requires an applicant for a diversion permit to submit the application on forms prescribed by the Commissioner and with information that the Commissioner deems necessary to fulfill the purposes of the Connecticut Water Diversion Policy Act, Conn. Gen. Stat. §§ 22a-365 to 22a-378. In addition, the application must, at a minimum, contain the information specified in Conn. Gen. Stat. § 22a-369. CTDEP regulations also specify requirements for the contents of diversion permit applications (see R.C.S.A § 22a-377(c)-2); as well as that specified in DEP-IWRD-APP-100 (Exhibit APP-1), as evidenced by DEP staff's completeness determination pursuant to Conn. Gen. Stat. § 22a-371 as contained in its Notice of Tentative Determination (Exhibit DEP-1) as well as the Hearing Officer's personal review of the record. Accordingly, I conclude that the application contains that material required pursuant to applicable law.

B. Procedural Requirements

Based on the record, I conclude that the procedural requirements of Conn. Gen. Stat. §§ 22a-370, 22a-371(c), (d), and (f), and 22a-372(e) have been fulfilled. (Exhibits APP-1, APP-2, DEP-1, DEP-2, DEP-15, and DEP-16).

C. Evidence

As noted in the Findings of Fact, Mr. Juliano, Ms. Yates, and Mr. Caiola were the only persons identified as having professional training or expertise, or specialized knowledge, with respect to the criteria for rendering a decision on an application for a diversion permit. The evidence offered by the foregoing persons at the hearing represents expert testimony as to the matters within their respective areas of expertise. No other expert testimony was offered as part of the hearing or record in this matter. Therefore, the testimony provided by Mr. Juliano, Ms. Yates, and Mr. Caiola, both orally at the hearing and in the application and the accompanying reports and submissions by Mr. Caiola, Mr. Juliano, and Ms. Yates represents un rebutted expert testimony. While I am not required to believe expert testimony, in this case the expert testimony is credible and worthy of belief. See, e.g., Simard v. Commissioner of Motor Vehicles, 62 Conn. App. 690, 695-96 (2001). Other persons took the time to attend the hearing or prepare written comments. Those persons testified at the hearing or in writing, some under oath, and expressed their opinion with respect to various matters that are before me. However, while their concerns are no doubt genuinely felt, none of those persons provided expert testimony on the specific criteria that I must consider in rendering a decision in this matter. As a result, in rendering this decision, I have given the expert testimony I received the greater weight it deserves, and assigned less weight to testimony provided by lay persons at the hearing or in writing in the record. Moreover, to the extent that testimony I received from non-experts raised concerns regarding the diversion at issue here, I conclude that the evidence in the record, and the special and general conditions of the Draft Permit address those concerns.

D. Standards for Issuing Permit

Conn. Gen. Stat. § 22a-373 sets forth certain substantive matters which must be considered in rendering a decision on a diversion permit. In addition, R.C.S.A. § 22a-377(c)-2(f) sets forth additional substantive matters that must be considered. As set forth in the Findings of Fact, the record reflects that substantial evidence has been presented on the record relevant to each of the substantive matters that must be considered. Based upon the record, The Applicants have demonstrated to my satisfaction that:

the proposed diversion will not have a substantial adverse impact on related needs for public water supply including existing and projected uses, safe yield of reservoir systems and reservoir and groundwater development;

the proposed diversion will not have a substantial adverse impact on existing and planned water uses in the area affected such as a public water supplies, relative density of private wells, hydropower, flood management, water-based recreation, wetland habitats, waste assimilation and agriculture;

the proposed diversion is compatible with the policies and programs of the state of Connecticut, as adopted or amended,

dealing with long-range planning, management, allocation and use of the water resources of the state;

the relationship of the proposed division to economic development and the creation of jobs are positive;

the proposed diversion will not have a substantial adverse impact on the existing water conditions, with due regard to groundwater availability, watershed characterization, potential, evapotranspiration conditions, and water quality;

there will be no substantial adverse impact, including thermal effect, on fish and wildlife as a result of flow reduction, alteration or augmentation caused by the proposed diversion;

there will be no substantial adverse effect on navigation from the proposed diversion; the activities/diversion is necessary for the Applicants to construct the residential development and, considering all of the alternatives, is the best alternative; since the proposed diversion will not affect interstate waters, it will not be inconsistent with actions taken by the Attorney General pursuant to Conn. Gen. Stat. §§ 3-126 or 3-127; the diversion is not in substantial conflict with the interests of any municipality which would be affected by the proposed diversion, and may be in harmony with such interests;

the proposed diversion is consistent with the standards, criteria, policies, and water quality classifications for ground and surface water adopted and amended under Conn. Gen. Stat. § 22a-426;

the proposed diversion is consistent with the policies and requirements of chapter 440 of the General Statutes and regulations thereunder;

the proposed division is designed and will be carried out so as to minimize and, if possible, eliminate flooding and flood hazards, and to be consistent with the policies and requirements of chapter 476 a of the General Statutes and regulations thereunder;

the proposed diversion is not within and will not significantly affect the coastal area as defined by Conn. Gen. Stat. § 22a-94(a); and

the proposed diversion is consistent with the relevant policies of the State Plan of Conservation and Development adopted under sections 16a-24 to 16a-32, inclusive, of the General Statutes.

E. Conn. Gen. Stat. §22a-373(c) Requirements

There are no capital expenditures and other resource commitments made prior to July 1, 1982, in connection with the diversion at issue here. In addition, the diversion is not one that was recommended in a water supply plan. As a result, the requirements of Conn. Gen. Stat. § 22a373(c) do not apply.

F. Permit and Permit Conditions

The Draft Permit meets all the statutory requirements and contains provisions that are sufficiently protective of the environment. CTDEP Staff has proposed changes to the Draft Permit to include add the following special condition in addition to the first Special Condition regarding “Recording and Reporting Violations”:

2) The Permittee shall maintain the stormwater system and hydrodynamic separators in proper working order to ensure they are continually operating as designed. The Permittee shall annually on or before January 15 each year provide to the Commissioner a report that describes inspections of the stormwater system and hydrodynamic separators and maintenance and repairs performed during the preceding calendar year. The report shall include a certification consistent with the requirements of condition (special condition) number 11.

The language of the draft permit as to the AUTHORIZED ACTIVITY shall be amended as follows:

“ 2) an outlet structure installed under the proposed Timothy Court together with a new 36 inch culvert/outlet pipe adjacent to the existing 36 inch culvert under the proposed Timothy Court in the southeast corner of the site; and”

The Applicants have not objected to any of the Draft Permit’s terms, modifications, and conditions. Accordingly, I recommend issuance of the diversion permit (Exhibit DEP-11), as modified; except as may be needed to correct typographical errors, if any exist. The application for a water diversion permit complies with all applicable statutory and regulatory requirements. Accordingly, the Permit, as modified herein, should be issued.

AGREEMENT

Based on the foregoing, the undersigned hereby agrees to the granting of a permit subject to the general and special conditions stated in Exhibit DEP-11, Draft Permit, attached hereto.

JNS DEVELOPMENT, LLC

By: /s/ Sylvain Carrier
Sylvain Carrier, Its Member/Manager

**WATER DIVERSION PERMIT
401 WATER QUALITY CERTIFICATE**

Permittee: JNS Development
143 West Main Street
Plainville, CT 06062

Attn: Sylvain Carrier

Permit No.: DIV-200303936, WQC-200500243
Permit Type: Water Diversion, Water Quality Certification
Town: Plainville
Project: Condominium Complex on Camp Street

Pursuant to Connecticut General Statutes Section 22a-368 the Commissioner of Environmental Protection hereby grants a permit to JNS Development (the "permittee") to divert waters of the state and pursuant to Section 401 of the Federal Clean Water Act (33USC 1341) Water Quality Certification is hereby issued to the permittee for the discharge(s) of materials into waters of the State in the Town of Plainville in accordance with the application and plans which are part thereof filed with this Department on December 22, 2003 and described herein. The purpose of the discharge(s) is to construct a roadway to access the site for the development of a 116 unit residential development. (the "site").

AUTHORIZED ACTIVITY

Specifically, the permittee is authorized to construct a 116-unit residential condominium development including three wetland/watercourse roadway crossings. The three wetland/watercourse roadway crossings include: 1) twin 24" culverts installed downstream of the school detention basin under the proposed Nicholas Court road; 2) an outlet structure together with a new 36" culvert adjacent to an existing 36" culvert under the proposed Timothy Court road in the southeast corner of the site; 3) two new 24" culverts installed between stations 104+50 to 106 +100 at the proposed Timothy Court road.

The proposed residential development and wetland/watercourse roadway crossings shall be constructed in accordance with the said application and plans which are part thereof entitled, "High Meadow, Camp Street, Plainville, Applicant JNS Development, LLC, 143 West Main Street, Plainville, Connecticut, prepared by Juliano Associates, 405 Main Street, Wallingford, Connecticut dated December 12, 2002 revised through June 22, 2005 (the "site"). Approximately 5,782 square feet of wetlands and watercourses will be affected by the regulated activities.

Said discharge(s) of material will comply with the applicable provisions of Section 301, 302, 303, 306 and 307 of the Federal Clean Water Act and will not violate Connecticut's Water Quality Standards.

This authorization constitutes the permits and approvals required by Section 22a-368 of the Connecticut General Statutes and is subject to and does not derogate any present or future property rights or other rights or powers of the State of Connecticut, conveys no property rights in real estate or material nor any exclusive privileges, and is further subject to any and all public and private rights and to any federal, state, or local laws or regulations pertinent to the property or activity affected thereby.

This authorization does not comprise the permits or approvals as may be required by Chapters 446j and 446k of the Connecticut General Statutes.

PERMITTEE'S FAILURE TO COMPLY WITH THE TERMS AND CONDITIONS OF THIS PERMIT SHALL SUBJECT PERMITTEE AND PERMITTEE'S CONTRACTOR(S) TO ENFORCEMENT ACTIONS AND PENALTIES AS PROVIDED BY LAW.

This authorization is subject to the following conditions:

SPECIAL CONDITIONS

1. **Recording and Reporting Violations.** Within 48 hours after the permittee learns of a violation of this permit, the permittee shall submit in writing a report of the violation to the Commissioner. Such report shall be certified in accordance with General Condition #11 and shall include the following information:
 - a. The provision(s) of this permit that has been violated;
 - b. The date and time the violation(s) was first discovered and by whom;
 - c. The cause of the violation(s), if known;
 - d. If the violation(s) has ceased, the duration of the violation(s) and the exact date(s) and time(s) it was corrected;
 - e. If the violation(s) has not ceased, the anticipated date when it will be corrected; and
 - f. Actions taken and actions planned to prevent a reoccurrence of the violation(s) and the date(s) such actions were implemented or will be implemented.

GENERAL CONDITIONS

1. The permittee shall notify the Commissioner in writing two weeks prior to: (A) commencing construction or modification of structures or facilities authorized herein; and (B) initiating the diversion authorized herein.
2. The permittee may not make any alterations, except de minimis alterations, to any structure, facility, or activity authorized by this permit unless the permittee apply for and receive a modification of this permit in accordance with the provisions of section 22a-377(c)-2 of the Regulations of Connecticut State Agencies. Except as authorized by subdivision (5) of section 22a-377(b)-1(a) of the Regulations of Connecticut State Agencies, the permittee may not make any de minimis

alterations to any structure, facility, or activity authorized by this permit without written permission from the Commissioner. A de minimis alteration means an alteration which does not significantly increase the quantity of water diverted or significantly change the capacity to divert water.

3. All structures, facilities, or activities constructed, maintained, or conducted pursuant hereto shall be consistent with the terms and conditions of this permit, and any structure, facility or activity not specifically authorized by this permit, or exempted pursuant to section 22a-377 of the General Statutes or section 22a-377(b)-1 of the Regulations of Connecticut State Agencies, shall constitute a violation hereof which may result in modification, revocation or suspension of this permit or in the institution of other legal proceedings to enforce its terms and conditions.
4. Unless the permittee maintains in optimal condition any structures or facilities authorized by this permit, the permittee shall remove such structures and facilities and restore the affected waters to their condition prior to construction of such structures or facilities.
5. In issuing this permit, the Commissioner has relied on information provided by the permittee. If such information was false, incomplete, or misleading, this permit may be modified, suspended or revoked and the permittee may be subject to any other remedies or penalties provided by law.
6. If construction of any structures or facilities authorized herein is not completed within three years of issuance of this permit or within such other time as may be provided by this permit, or if any activity authorized herein is not commenced within three years of issuance of this permit or within such other time as may be provided by this permit, this permit shall expire three years after issuance or at the end of such other time.
7. This permit is subject to and does not derogate any rights or powers of the State of Connecticut, conveys no property rights or exclusive privileges, and is subject to all public and private rights and to all applicable federal, state, and local law. In constructing or maintaining any structure or facility or conducting any activity authorized herein, the permittee may not cause pollution, impairment, or destruction of the air, water, or other natural resources of this State. The issuance of this permit shall not create any presumption that this permit should be renewed.
8. In constructing or maintaining any structure or facility or conducting any activity authorized herein, or in removing any such structure or facility under paragraph 4 hereof, the permittee shall employ best management practices to control storm water discharges, to prevent erosion and sedimentation, and to otherwise prevent pollution of wetlands and other waters of the State in accordance with the guidance manuals entitled, "2002 Connecticut Guidelines For Soil Erosion and Sediment Control by the Connecticut Council on Soil and Water Conservation in Cooperation with the Connecticut Department of Environmental Protection, May 2002 and the 2004 Connecticut Stormwater Quality Manual by the Connecticut

Department of Protection.” The permittee shall immediately inform the Commissioner of any adverse impact or hazard to the environment which occurs or is likely to occur as the direct result of the construction, maintenance, or conduct of structures, facilities, or activities authorized herein.

9. This permit is not transferable without the prior written consent of the Commissioner.
10. **Expiration of the Permit:** The Connecticut Water Diversion Policy Act permit DIV-200303936 shall expire on September 1, 2008. The Section 401 Water Quality Certification WQC-200500243 shall expire with the expiration of the Section 404 permit issued by the U. S. Army Corps of Engineers for the same activity.
11. **Certification of Documents.** Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this permit shall be signed by the permittee, a responsible corporate officer of the permittee, a general partner of the permittee, or the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows:

"I have personally examined and am familiar with the information submitted in this document and all attachments and certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief, and I understand that any false statement made in this document or its attachment may be punishable as a criminal offense in accordance with Section 22a-376 under 53a-157 of the Connecticut General Statutes."

12. **Submission of Documents.** Any document or notice required to be submitted to the Commissioner under this permit shall, unless otherwise specified in writing by the Commissioner, be directed to:

Director
Department of Environmental Protection
Bureau of Water Management
Inland Water Resources Division
79 Elm Street
Hartford, CT 06106-5127

The date of submission to the Commissioner of any document required by this permit shall be the date such document is received by the Commissioner. The date of any notice by the Commissioner under this permit, including but not limited to notice of approval or disapproval on any document or other action, shall be the date such notice is personally delivered or the date three days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified

in this permit, the word "day" as used in this permit means any calendar day. Any document or action which is required by this permit to be submitted or performed by a date which falls on a Saturday, Sunday or legal holiday shall be submitted or performed by the next business day thereafter.

This authorization constitutes the permit required by section 22a-368(b) of the Connecticut General Statutes.

Issued as a permit of the Commissioner of Environmental Protection on

Gina McCarthy
Commissioner

P A R T Y L I S T

Proposed Final Decision in the Matter of JNS Development, LLC
Application No. DIV-200303936

PARTY

The Applicant
JNS Development, LLC
c/o Sylvain Carrier
143 West Main Street
Plainville, CT 06062

REPRESENTED BY

Barry L. Thompson, Esq.
Thompson and Vollono, LLC
49 Broad Street
P.O. Drawer 190
Plainville, CT 06062-0190
(860) 747-5745
(860) 793-2344 (FAX)

Department of Environmental Protection
79 Elm Street
Hartford, CT 06106
Bureau of Water Management,
Inland Water Resources Division
Sara Yates
(860) 424-3019
(860) 424-4075)
