Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

79 Elm Street • Hartford, CT 06106-5127 www.ct.gov/deep Affirmative Action/Equal Opportunity Employer

IN THE MATTER OF : ***APPLICATION NO. DS-201814638***

FIRST TAXING DISTRICT
CITY OF NORWALK (NEW CANAAN) : ***SEPTEMBER 9, 2021***

FINAL DECISION

I
SUMMARY

The First Taxing District, City of Norwalk ("First Taxing District" or "Applicant") has applied for a permit from the Department of Energy and Environmental Protection ("DEEP" or the "Department") for a dam safety permit for the proposed rehabilitation of the Grupes Reservoir Dam ("Grupes Dam") in New Canaan. General Statutes § 22a – 403. The parties to the proceeding are the Applicant, DEEP staff,[1] and the intervening parties, Norwalk River Watershed Association ("NRWA") and New Canaan Land Trust (the "Land Trust").[2]

The First Taxing District developed this permit application over several years and submitted its application to DEEP in November 2018. DEEP staff reviewed the permit application and a tentative notice of approval was issued in February 2020. A petition for hearing was filed by the NRWA on March 20, 2020. Following several public informational meetings and other efforts by the Applicant and DEEP to address public concerns and questions, a hearing for public comment was held on September 29, 2020. Three evidentiary hearing sessions were held on September 30, October 9, and October 19, 2020. A site visit was also held on October 6, 2020. The parties filed their post-hearing briefs on November 20, 2020.

---

[1] Bureau of Water Protection and Land Reuse, Water Planning and Management Division.
[2] Also referred to herein as the intervenor or intervenors.

The hearing officer issued her Proposed Final Decision ("PFD") on April 6, 2021. She recommended approval of First Taxing District's application and issuance of the dam safety permit. The NRWA filed exceptions to the PFD. The parties filed briefs on the exceptions and oral argument was held on June 17, 2021.

Based on the material in the administrative record and the preponderance of the evidence, the hearing officer's recommendation to approve the application and issue the permit is affirmed. The exceptions filed by the NRWA have been considered and have been found to be unavailing. These are more fully discussed below.

II
BACKGROUND

This matter concerns a dam safety permit for the rehabilitation of the Grupes Reservoir Dam, which is classified as a high hazard class C dam under Regs., Conn. Gen. Stat. § 22a-409-2(a)(1)(E)(i)-(v). The Grupes Dam was originally constructed in 1871, with upgrades made in 1905 and 1962. The current, proposed upgrades are required to address overtopping of the Grupes Dam during the ½ Probable Maximum Flood ("1/2 PMF"), which is the applicable design standard. Flood events have caused an overtopping of the Grupes Dam, which has impacted its stability and has led to overflow to the east of the Reservoir to the property of the First Taxing District and to off-site properties. A dam failure at this site would result in probable loss of life and major property damage to downstream properties, which could impact as many as 252 private properties located in the 5.4-mile area between the Grupes Dam and the Merritt Parkway to the south. This application was filed to achieve the primary goals of flood control and to preserve the integrity of the public drinking water supply from the Reservoir, which provides service to more than 42,000 customers in Norwalk and New Canaan.

III
EXCEPTIONS

The Department's Rules of Practice provide that "[e]xceptions shall state with particularity the party's or intervenor's objections to the proposed final decision, and may not raise legal issues or, subject to subsection (w) of this section, factual issues which could have been, but were not, raised at the hearing." Regs., Conn State Agencies § 22a-3a-6(y)(3)(A).[3] The NRWA raised 36 exceptions to the Proposed Final Decision (PFD). Even if all 36 qualify as objections within the meaning of § 22a-3a-6(y)(3)(A), none of the exceptions provides compelling or justifiable reasons to modify or overturn the PFD. The exceptions are therefore rejected and are not a factor in this final decision.

The NRWA was given the opportunity to file a brief on its exceptions and to present oral argument, giving it sufficient opportunity to state its objections with particularity in its brief and to summarize salient points concerning those exceptions at oral argument, yet it failed to do more than make assertions without providing persuasive support or sound legal argument to support its position. Many of the exceptions were not even addressed in the brief on exceptions or at oral argument. Many of those exceptions that were addressed within the brief were not adequately supported by law or the evidentiary record.[4] Many exceptions were merely conclusory statements and "analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . Where a claim receives only

[3] Regs, Conn. State Agencies §§ 22a-3a-2 through 22a-3a-6, known as DEEP's "Rules of Practice."
[4] In its brief on its exceptions, the NRWA only addressed its assertion that there existed an issue of municipal jurisdiction, questioned the statutory requirements regarding the burden of proof, and raised an issue with certain case law used in the PFD. These issues, although briefed, do not present legitimate legal arguments to change or overturn the PFD.

cursory attention in the brief without substantive discussion, it is deemed to be abandoned." (Internal quotation marks omitted.) *Billboards Divinity v. Commissioner of Transportation*, 133 Conn. App. 405, 412, 35 A.3d 395 (2012); *Lane v. Commissioner of Environmental Protection*, 136 Conn. App. 135, 159 (2012). It is established law that there is no obligation to consider issues that are not adequately briefed. *West Haven v. Norback,* 263 Conn. 155 (2003). When an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. *Bridgeport Hospital v. CHRO*, 232 Conn. 91 (1995). In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority fails to suffice. *Celantano v. Rocque*, 282 Conn. 645 (2007). See Practice Book § 67-4; *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 57 (2008). In addition, "...mere speculation or general concerns do not qualify as substantial evidence." *River Bend Associates v. Conservation & Inland Wetlands Commission,* 269 Conn. 57, 71 (2004). See also *Estate of Casimir Machowski v Inland Wetlands Commission,* 137 Conn. App. 830, 836 (2012).

The exceptions include those that mischaracterize descriptive terms and phrases in the PFD and misstate the record. Some misinterpret testimony and other evidence in the record, and several are based on an incorrect analysis of legal concepts that govern the review of this application and this adjudication on that application. A question of jurisdiction is raised that is not applicable to a dam safety permit adjudication,[5] and there is a continued miscomprehension of the concept of the burden of proof regarding feasible and prudent alternatives to the Applicant's proposed work design. Some exceptions would require this final decision to find new facts, even when such facts would contradict the record. Still other exceptions would have this final decision agree with a new interpretation of agency regulations or adopt new analyses of

[5] For example, Exception Nos. 7, 18, 23.

established case law.[6] Many exceptions do little more than disagree with the PFD, without showing why these disagreements matter, while others challenge the hearing officer's role and authority by re-litigating the hearing officer's acceptance or rejection of certain evidence.[7] More than a few exceptions exhibit confusion about testimony, particularly the purpose of that testimony and the role of the witness who gave it. [8] One exception raises an objection to testimony that was introduced merely to correct the record, [9] many others raise objections without specifically citing errors.[10]

While most of the exceptions do not have a legal basis, several themes were presented which will be addressed to clarify the record. Most of the NRWA's exceptions can be grouped within the below-stated themes and each exception does not warrant a specific response. This final decision neither acknowledges nor stipulates to any exception not specifically referenced herein, as the exceptions do not raise a legal basis to do so. Addressing these issues raised by the NRWA further demonstrates there is substantial evidence in the record and legal support in favor of granting the application and issuing the dam safety permit.

a. Regs., Conn. State Agencies § 22a-3a-6(y)(3)(A)

Under § 22a-3a-6(y)(3)(A) of the Department's Rules of Practice, an exception requires a legal basis for such objection or a clear correction to facts based on evidence in the hearing record, not a mere disagreement with, confusion about, or questionable interpretation of the language of the PFD.

---

[6] For example, Exception Nos. 22, 26, 29.
[7] For example, Intervenor's Exception Nos. 1, 8, 9, 16.
[8] For example, Intervenor's Exception Nos. 2, 10, 18, 30.
[9] Intervenor's Exception No. 4.
[10] Intervenor's Exception No. 1 is particularly perplexing as it seems to misread what was intended as an explanatory footnote (PFD, fn. 5, p. 3).

For example, the NRWA takes exception to the hearing officer's description in paragraph 12 on page seven of the PFD that "[t]he primary objectives of the permit application are to address dam safety deficiencies through activities..." (Intervenor's Exception No. 3.) The NRWA argues in this exception that the "[t]he primary objective of a permit application is to address statutory requirements for issuance of a permit, which include environmental considerations, which the hearing officer failed to note."

A common sense reading of the hearing officer's statement that is the subject of the NRWA's exception, particularly in the context of the PFD, is that this statement explains why the Applicant applied for the permit – to achieve the goals of the work for which the permit was required.[11] Moreover, this third exception does not have a legal basis; the hearing officer was merely addressing the objectives of the permit application in front of her, while the exception asserts a general objective for permit applications. Regardless, such an exception does not impact the factual or legal findings of the PFD.

NRWA raised an issue with the hearing officer's finding of fact in paragraph 21 on page twelve of the PFD that "the results of other concepts could impact the use of the gatehouse and footbridge, require more land than what is available ...." (Intervenor's Exception No. 14). The hearing officer's finding is directly supported by NRWA's own witness, who indicated that NRWA's alternatives required land outside of the First Taxing District's property. (See Wildman

[11] Paragraph 12 of the PFD, in its entirety, provides: "The primary objectives of the permit application are to address dam safety deficiencies through activities that include stabilizing the stone masonry of the Dam and mitigating observed seepage/leakage, increasing spillway capacity to safely pass the ½ PMF, providing operational upgrades and structural repairs to the gatehouse, and managing ½ PMF flood waters by holding the waters in the Reservoir and routing them over the dam spillway to prevent offsite and downstream flooding and the undermining of the Dam by flood waters. Flooding on the east side of the Reservoir will be addressed with a partial wall with elevated natural terrain and a berm to hold flood waters in the Reservoir and channel them over the spillway of the Dam to the existing downstream channel of the Silvermine River, preventing downstream flooding the [sic] undermining of the Dam. (Test. 9/30/20. DiGangi. D., DeLano, J.; exs. APP-1, 2, DEEP-1.)"

Testimony, 10/9, ~21:18). The facts do not support this exception and it does not require further evaluation.

The NRWA also raised an issue with the hearing officer's finding of fact in paragraph 14 on page eight of the PFD that "[t]he primary spillway will remain in place, but the top of the Dam will be increased by four feet to elevation 306 to provide additional spillway capacity and freeboard..." (Intervenor's Exception No. 4). The NRWA implies there was an error in the record, but the record was clarified to show that the height of the spillway was not being increased following the raising of this issue at the hearing. Since the record was clarified, there is no basis for this exception.

In addition to these examples of "exceptions," there are others that fail to comport with statutory requirements and legal precedent, and fall outside of the proper scope of this hearing. The law and established precedent will be followed in regard to the application at issue. The hearing officer considered the relevant facts and properly applied the statutory and regulatory framework in her proposed decision.

b. Hearing Officer's Authority

Some examples of exceptions that appear to challenge the hearing officer's authority are discussed below. These exceptions are not persuasive. The hearing officer appropriately established throughout the hearing and stated in the PFD that the scope of this hearing was focused on the review of the Applicant's permit under General Statutes § 22a-403(b). The hearing officer's duty is to base the decision on the information contained within the evidentiary record, to include exhibits and witness testimony.

Section 22a-3a-6(d) of the Department's Rules of Practice enumerates the powers and duties of the hearing officer. In addition to determining the scope of the hearing, the hearing

officer may "do any other acts and take any other measures to administer this section, expedite proceedings and maintain order." Regs., Conn. State Agencies § 22a-3a-6(d)(2) (A) and (I).

The first exception raised by the NRWA concerned the hearing officer's use of her discretion to allow the NRWA to offer evidence and put on witnesses. More specifically, on page three, footnote five of the PFD, the hearing officer said, "Intervenors are bound by the record as of the date they intervene." NRWA said, "This is contradicted by the proceedings. The NRWA was permitted to put on witnesses and offer evidence." Intervenor's Exception No. 1. The NRWA failed to acknowledge that its request to intervene was summitted after the deadline for filing prehearing information. NRWA also failed to consider the entirety of footnote five, in which the hearing officer cited to Regs., Conn. State Agencies § 22a-3a-6(k)(8), while also noting that she "allowed the NRWA to file pre-hearing information to give the potential party the chance to present its environmental claim." (PFD p. 3, fn. 5). The NRWA's exception seems to misinterpret the purpose of the footnote, which was to note that the NRWA was allowed to present evidence and witnesses despite its failure to meet a procedural deadline. Regardless, the hearing officer was well within her authority to rule on this issue and no legal support was provided by the NRWA to demonstrate otherwise.

The NRWA raised the issue that the hearing officer denied its post hearing submission of a digital video of water on the Land Trust property. Intervenor's Exception No. 8. Section 22a-3a-6(w) of the Rules of Practice provides that no further evidence shall be admitted post-hearing unless it is relevant and material and there was good cause for the failure to offer it at the hearing. The hearing officer held that the proposed evidence merely supplemented what was already in the record and that the record demonstrated that there was ample time throughout the hearing process when the NRWA could have submitted such information. The hearing officer had the authority to make this evidentiary ruling and her ruling will stand. Regs., Conn. State

Agencies §22a-3a-6(d)(2)(E).

Finally, the NRWA raised exceptions related to its experts' testimony and concerns that the hearing officer did not give credence to such testimony.[12] It is well established that a hearing officer "is privileged to adopt whatever testimony he reasonably believes to be credible." *Windels v. Environmental Protection Commission of the Town of Darien*, 284 Conn. 268, 291 (2007) (citing *Melillo v. New Haven*, 249 Conn. 138, 151 (1999) (internal quotation marks omitted). Further, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence..." *Sams v. Dept. of Environmental Protection*, 308 Conn. 359, 374 (2013) (quoting *Shanahan v. Dept. of Environmental Protection*, 305 Conn. 681, 700 (2012)). The PFD fully addresses the evaluation of witnesses and the substance of the evidence presented through the record. The NRWA simply disagrees with the hearing officer's adoption of the testimony that she reasonably believed to be credible, consistent with legal standards.

c. Jurisdiction

The NRWA raised an issue regarding jurisdiction and the need to involve local wetlands commissions for the first time through its exceptions and again at oral argument. This issue should have been raised at the hearing and it is untimely to raise it now. See Regs., Conn. State Agencies § 22a-3a-6(y). It is important to emphasize that DEEP has exclusive jurisdiction in this dam safety permitting matter. General Statutes § 22a-403. No local wetlands commission review was necessary.

As the NRWA admitted, the commissioner has exclusive jurisdiction over the repair, removal or reconstruction of a dam and shall determine the impact of such construction work on

[12] For example, Intervenor's Exception Nos. 17, 28, 30.

the environment, including wetlands and watercourses. General Statutes § 22a-403 (b).[13] Despite acknowledging DEEP's exclusive jurisdiction, the intervenor seeks to have a "bright line" established so that "the jurisdiction remaining to the municipal wetlands and watercourses agency is clear." (Intervenor's Post Exception Brief, p. 1). While a coordinated partnership with local commissions is necessary in some matters, such as in the *Phoenix* and *Wray* cases, no such collaboration is required in the matter at hand. [14] The NRWA's exceptions related to the question of jurisdiction are not only untimely, but without merit.[15]

The reasons for the desire of the NRWA to involve local wetland commissions after this permit application is completed are unclear. Even if a local commission evaluated wetlands on the Land Trust property, the local commission would have no authority regarding the dam safety construction and the Applicant's project would move forward as provided for in the final permit.

d. NRWA's Burden of Proof Under General Statutes § 22a-19: Unreasonable Pollution and Alternatives

---

[13] General Statutes § 22a-40(a)(5) identifies that the operation of dams in wetlands and watercourses by water companies providing a public water supply is a permitted activity regulated under § 22a-403(b). The Inland Wetlands and Watercourses Act balances the need to protect wetlands and watercourses with the need to permit beneficial and necessary activities. Further, section 22a-401 of the General Statutes gives DEEP exclusive jurisdiction over dam safety permit applications.

[14] General Statutes § 22a–401, et seq., gives jurisdiction over the construction and regulation of dams to the commissioner. Regs., Conn. State Agencies § 22a–39–4.3.a provides that the commissioner shall exclusively regulate the construction or modification of any dam. See *Samperi v. Inland Wetlands Agency,* 226 Conn. 579, 599 n. 18, 628 A.2d 1286 (1993).

[15] The NRWA mistakenly relies on two cases to assert that a "bright line" jurisdiction is required. See *Phoenix Horizon Corp v. North Canaan Inland Wetlands – Conservation Commission*, 1996 WL 88270, Superior Court, judicial district of Litchfield No. CV 950068461; *Wray v. New Canaan Inland Wetlands and Watercourses Commission,* FSTCV106004827S (2011). Both *Phoenix Horizon Corp* and *Wray* considered the scope of the authority of a local inland wetlands commission regarding an inland wetlands application. In *Phoenix Horizon*, the Court determined that DEEP "had the power and responsibility to investigate and analyze the impact of any proposed dam construction upon inland wetlands pursuant to § 22a-403(b) of the General Statutes." Similarly, in *Wray*, the court again recognized that "[l]ocal inland wetland bodies are not little environmental protection agencies. Their environmental authority is limited to the wetland and watercourse area that is subject to their jurisdiction. They have no authority to regulate any activity that is situated outside their jurisdictional limits." (Internal quotation marks omitted.) *Samperi v. Inland Wetlands Agency, supra,* 226 Conn. 599. *Wray v. New Canaan Inland Wetlands & Watercourses Comm'n,* FSTCV106004827S (2011). Neither of these cases questioned the exclusive jurisdiction of the DEEP.

In its petition to intervene pursuant to General Statutes § 22a-19(a), the NRWA alleged that this proceeding involves conduct which is reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the flora, fauna, habitats for the flora and fauna, inland wetlands and watercourses of the state as provided by the statute. When the NRWA intervened, it asserted it could prove unreasonable pollution. Through its exceptions and oral argument, the NRWA erroneously attempted to broaden the scope of the burden of proof under § 22a-19.

1. Unreasonable Pollution

The NRWA claimed that it could raise the issue of deficiencies in the application to establish unreasonable pollution under *Finley v Inland Wetlands Commission*, 289 Conn. 12 (2008), and appeared to re-argue this claim in its exceptions,[16] although the specific error alleged was not clear. The record shows that the NRWA erroneously relied on *Finley* to argue that the case added a second way for NRWA to satisfy its burden of proof. NRWA claimed that *Finley* established that an intervening party may meet its burden of proof under a "two-prong" test by either proving unreasonable pollution *or* demonstrating that the applicant did not comply with a governing statute.

Section 22a-19 does not establish a two-prong standard for the burden of proof; it requires an intervening party to demonstrate that the proposed work is reasonably likely to have the effect of unreasonable pollution.[17] In *Finley,* the Court reiterated that under § 22a-19, an intervening party must prove unreasonable pollution. The Court went on to state "that an

[16] For example, Intervenor's Exception No. 26.

[17] "In any administrative, licensing or other proceeding...any person, partnership, corporation, association, organization or other legal entity *may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."* General Statutes § 22a-19(a)(1) (emphasis added).

intervenor pursuant to § 22a–19 *can prevail on appeal* not only by proving that the proposed development likely would cause harm to the wetlands, but also by proving that the commission's decision was not based on a determination, supported by substantial evidence, that the development complied with governing statutes and regulations and would not cause such harm." *Finley v Inland Wetlands Commission, supra*, 289 Conn. 12 at 40 (emphasis added). *Finley* supports the principle that an administrative decision may be overturned if the decision is not supported by substantial evidence that the application complied with governing statutes and regulations. This neither changes the statutory and regulatory requirements of an intervening party nor creates a two-prong test regarding the intervenor's burden of proof. The hearing officer properly found that the NRWA did not meet its burden of proof under § 22a-19. See *Manchester Envtl. Coal. v. Stockton*, 184 Conn. 51, 58 (1981), overturned on other grounds by *City of Waterbury v. Town of Washington*, 260 Conn. 506 (2002). Under General Statutes § 22a-19, an intervening party has the burden of proving unreasonable pollution, i.e., the allegations of environmental harm that it asserted to gain party status.

2. Alternatives

Under General Statutes § 22a-19(b), if an intervening party meets its burden to show that the proposed regulated activities are reasonably likely to result in unreasonable environmental harm, then an applicant has the burden to show that there are no feasible and prudent alternatives to its proposed work that would avoid the identified unreasonable environmental harm. See *City of Waterbury* v. *Town of Washington, supra*, 260 Conn. 506 at 550.

The NRWA did not meet its burden of proving that the permit is likely to result in unreasonable pollution, and it continues its attack on the principles of the burdens of proof and the proof of alternatives in its exceptions.[18]

The NRWA was allowed to present its case that feasible and prudent alternatives existed, not because it had a burden to show its alternatives were feasible and prudent, but because if it had satisfied its burden as to unreasonable pollution, the burden would have shifted to the Applicant to prove that there was no feasible and prudent alternative to the design it had chosen for its work. In that event, evidence of the proposed alternatives offered by NRWA would have already been placed in the record. [19]

The NRWA also claims that the Applicant failed to consider alternatives which "would cause less or no environmental impact to wetlands or watercourses" pursuant to General Statutes § 22a-41(a)(2), which NRWA argues is part of the Applicant's burden to establish it is entitled to the permit. This issue is improperly raised, as the intervenors presented a new legal argument that was not first raised during the evidentiary hearing. See Regs., Conn. State Agencies § 22a-3a-6(y). In any event, this exception reflects a misunderstanding of the intersection of General Statutes § 22a-41(a)(2) and § 22a-403.

General Statutes § 22a-403 provides that dam safety permit applications consider the provisions of §§ 22a-28 to 22a-45. Section 22a-41 (a)(2) provides that if a feasible and prudent alternative was not considered by an applicant and that alternative would cause less or no environmental impact, the Commissioner will propose the consideration of that alternative.

---

[18] For example, see Intervenor's Exception Nos. 11,12,13,23, 24.

[19] The intervenor asserted in its oral argument that it was not able to access the Applicant's property, and therefore, could not conduct testing and provide engineering support for its proposed alternatives. The NRWA was, of course, not required to present proof of alternatives, but to the extent it sought to present its proposed alternatives for the record, the NRWA failed to perform any engineering studies or reports on environmental impacts to support any of its alternatives, including those that could have been performed on Land Trust property, to which the NRWA had access.

The evidence presented at the hearing showed that the Applicant considered alternatives to ascertain whether they were feasible and prudent and rejected those that were found to be neither. If an alternative is neither feasible nor prudent, whether that alternative would cause less or no environmental impacts is immaterial. There was no reason for the Applicant to make this determination; its assessment was correctly focused on whether an alternative was feasible or prudent.

It is also noteworthy that the Applicant did consider environmental impacts. Certain alternatives were rejected by the Applicant on environmental grounds. If the NRWA believed that there were alternatives which would cause less or no environmental impact to wetlands or watercourses on properties of the Land Trust, the NRWA could have fully examined the Applicant on this specific issue at the time of the hearing. The NRWA did not; these exceptions are untimely and improper. [20]

e. Sufficiency of Application

The NRWA challenged the sufficiency of the Applicant's permit application during the pre-hearing process, throughout the evidentiary hearing, and reiterated these arguments in its exceptions to the PFD.[21] The hearing officer opined on this issue in her pre – hearing conference summary:

> An agency has the authority to determine when an application is complete, i.e., whether it has all the information required by statute or regulations. *Commission on Hospitals and Health Care v. Stamford,* 208 Conn. 663, 668-69 (1988). The completeness of the application is part of the statutory scheme on which [the Hearing Officer] must base [her] decision as to whether the application complies with the provisions of CGS § 22a-403. This issue is part of the Applicant's burden of proof and will be part of the evidence it provides. This determination will also be included in the evidence presented by DEEP.

[20] For example, Intervenor's Exception Nos. 11, 23.
[21] For example, Intervenor's Exception Nos. 2, 5, 20, 32, 35.

As the hearing officer correctly indicated, the sufficiency of the application is first determined by the DEEP staff evaluating the permit application. The hearing officer then evaluates the information provided through the application process when evaluating whether the applicant has complied with the provisions of General Statutes § 22a-403.

a. Impact to Wetlands

The exhaustive argument of the NRWA that wetlands were not properly identified or studied by the Applicant and DEEP staff is proven inaccurate by the evidence in the record and under the law governing this dam safety permit. A permissible but regulated activity is allowed, as here, when there is not unreasonable pollution or unreasonable invasion of wetland areas. *Indian Spring Land Co v. Inland Wetlands and Watercourses Agency*, 322 Conn. 1, 7-12 (2016).[22]

The Applicant identified the wetlands that would be impacted in its application. The application documented that 3,340 square feet ("sqft") of wetlands will be temporarily impacted by construction and these wetlands will be restored following the construction work. The application further identified 1,542 sqft of wetlands that will be permanently impacted, and notably, these wetlands have already been altered due to previous construction projects. The application appropriately identified these areas and the potential impact. The Applicant testified and presented documentary evidence at the hearing regarding potential environmental impacts and demonstrated how the application complied with applicable requirements of General Statutes

[22] The NRWA argues the PFD improperly relies on *Indian Spring Land Co v. Inland Wetlands and Watercourses Agency*, 322 Conn. 1 (2016) because it concerned an agricultural exception under General Statutes § 22a-40(a)(1). *Indian Springs* was cited as an example of one of the exemptions under General Statutes § 22a-40(a) that allows an activity without the permission of the municipal wetlands agency. Section 22a-40(a)(5) recognizes an exception for dams and reservoirs providing a public water supply as permitted activities subject to DEEP regulation under General Statutes § 22a-403. As noted by the Applicant, *Indian Springs* emphasizes that "the statute therefore strikes a balance between ensuring the long-term viability of wetlands ecosystems and encouraging beneficial social economic activities." *Id.* at 12.

§ 22a-403(b). The Applicant identified the wetlands that will be impacted through the construction. DEEP reviewed the application and confirmed its conclusions and the hearing officer thoroughly addressed this issue in the PFD. While the exceptions attempt to refocus this matter on wetlands and watercourses, wetlands occupy 0.002% of this 54-acre reservoir, exclusive of the Reservoir water.

DEEP determined that the Applicant demonstrated that its proposed project represents a proper balance of its dam safety goals and environmental impacts from its planned construction work. DEEP evaluated the application, and this review demonstrated that the application considered alternatives and the impacts to the environment, including the wetlands and watercourses.

The exceptions raised by the NRWA raise concerns in regard to two specific wetlands. [23] The first wetland has been identified as "Wetland A," which is partially on the First District property and partially on the Land Trust property. As evidence at the hearing indicated, this wetland is outside the construction area and is not within a water course. The elevation of this wetland is approximately at Elevation 304, which indicates that the water flows toward the reservoir, rather than away from it. DEEP concluded "... there is no work being proposed in the location of Wetland A. Therefore, there are no additional regulated wetland or watercourse impacts associated with the project resulting from the delineation of Wetland A." The hearing officer properly found that Wetland A was "outside of the limits of the proposed work." (PFD, p. 21.)

NRWA further raised an issue related to a 600-sqft area located on the Land Trust property. *Hoffman v Inlands Wetlands Commission*, 28 Conn. App. 262, 267-68 (1992) indicates that there are instances where an offsite wetland may be considered. However, *Hoffman* does not

[23] For example, Intervenor's Exception Nos. 7, 9, 27.

require consideration of the adjoining wetland, but merely permits consideration of it when the wetland is relevant. Here, the proposed dam safety project does not have an impact on the Land Trust wetland. The record shows that this determination was based on the topography maps, the geographics observed during the site visit, and the testimonial evidence provided through the Applicant's expert. The Applicant's expert was a certified wetlands scientist who visited the site and found that the wetlands on the Land Trust property were outside the construction area and not impacted in any way.[24] The PFD is correct that insufficient evidence was provided to prove an impact would occur and even if such impact were to occur, there is no information in the record to link an alleged impact to an unreasonable impairment of the Land Trust's wetlands.

b. Wildlife Study

The NRWA alleged that the application is insufficient because a wildlife study was not completed.[25] DEEP staff reviewing this matter consulted the Natural Diversity Data Base ("NDDB") and found no indicators in this database that would necessitate a wildlife study. DEEP wildlife personnel perform hundreds of environmental reviews each year to determine the impact of proposed development projects on state listed species. The NDDB is used to help DEEP staff and landowners conserve the state's biodiversity.[26] DEEP staff testified at the hearing that it was common practice to consult the NDDB in these situations and order a wildlife study if a listed species were identified. (Test. Missell, D. 10/9/20; ex. DEEP-38.) It is appropriate to rely on DEEP staff when determining the information and studies required through the permit process, and the Connecticut Supreme Court has recognized that the Department may rely on its own expertise. *E.g., MacDermid v. Dep't of Environmental*

[24] The NRWA's exceptions asserted that the hearing officer was using "regulated wetland" as a statutory term and this is an inaccurate representation of the PFD. (See Intervenor's Exception Nos. 7, 19.) The term was not used as a "term of art."

[25] For example, Intervenor's Exception Nos. 2, 20, 32.

[26] https://portal.ct.gov/DEEP/Endangered-Species/Endangered-Species-ReviewData-Requests

Protection, 257 Conn. 128, 139 (2001) ("When the application of agency regulations requires a technical, case-by-case review, that is precisely the type of situation that calls for agency expertise"); *Connecticut Building and Wrecking Co. v. Carothers*, 218 Conn. 580, 593 (1991) ("An agency composed of [experts] is entitled . . . to rely on its own expertise within the area of its professional competence"). A wildlife study was not required and therefore there is no error in the application for failure to provide such a study.[27] The omission of a wildlife study did not render the application incomplete such that the NRWA could prove "unreasonable pollution" under General Statutes § 22a-19.

c. Impact on Trees

The NRWA claimed in its exceptions that there will be a "clearcutting of trees" as a result of this permit, that the Applicant did not evaluate this impact on trees, and that the PFD ignored this impact.[28] These exceptions aim to challenge the sufficiency of the submitted application by challenging the information presented regarding the impact and removal of trees on site. As the PFD made clear, some trees will be removed. These trees have been randomly and naturally grown and are primarily of a small size of less than sixteen inches in diameter. The evidence and testimony demonstrated that the only trees that will be removed will be those necessary for the wall to be constructed, and for any portion of the berm not located in the existing reservoir service road. (See, e.g., test. DiGangi D., DeLano, J., 9/30/20, Laskin, A., Missell D, 10/09/20; ex. DEEP-1, C2 to C4.) This tree removal follows Regs., Conn. State Agencies § 22a – 409 - 2(f)(6)(A)(B), which stipulates that trees and shrubs are not permitted in

[27] NRWA raised exceptions such as Intervenor's Exception Nos. 32 and 35, reiterating its concern that DEEP did not consider impacts on flora and fauna. This issue was addressed in the PFD and DEEP confirmed through the hearing process that the site is not in a conservation or preservation restriction area or in an area identified as a habitat for endangered, threatened or special concern species. The record supports the hearing officer's statement that "the NRWA did not identify any rare species of flora or fauna that would be impacted." (PFD, p. 24.) These exceptions are not grounded in a legal basis and are mere disagreements with the PFD.

[28] For example, Intervenor's Exception Nos. 5, 7, 10, 16, 18, 31.

the embankment area. This removal prevents the undermining of the embankment, which could possibly weaken the Dam by roots and require continued maintenance of the Dam. The PFD correctly held that "there was no showing that any impacts would occur, or, if any impacts did occur, they would be harmful to trees of a significant size. Thus, counter to NRWA's assertions[29] the Applicant did evaluate the impact on trees, complies with DEEP regulations, and this issue was addressed in the PFD.

f. Prudent and Feasible Alternatives

As noted, the PFD fully evaluates the application under the applicable statutes and regulations, including its analysis of proposed alternatives. The NRWA's exceptions do not raise a legal objection to the hearing officer's findings regarding the alternatives, except to note its disagreement.

The Applicant explored other alternative designs to determine the final design before it submitted its application. These alternatives were eliminated on engineering, operational and environmental grounds. The alternatives were found to have potentially harmful impacts on the Dam and the area, to be impractical as they required maintenance or human intervention, particularly during a storm event, to lack some necessary quality or element, or to otherwise not be feasible or prudent. DEEP's review and tentative determination showed that it accepted the alternatives analysis presented by the Applicant.

g. Language of PFD

The NRWA raised several exceptions about the use of vague language in the PFD, claiming this was confusing and could lead to misinterpretation of the PFD.[30] Although the legal basis of these objections is unclear, many of these claims have been addressed in this decision.

---

[29] For example, Intervenor's Exception Nos. 5, 35.
[30] For example, Intervenor's Exception Nos. 31, 36.

In any event, this allegedly ambiguous language makes sense when read within the context of the PFD.

The NRWA also asserts that the PFD includes phrases such as "regulated wetland" or "total wetlands system" to suggest a statutory term or "term of art." [31] The hearing officer did not use certain terms with regard to the wetlands to imply they were defined terms with statutory implications. These were descriptions of the wetlands to which the PFD was referring. Upon review of the PFD and the evidentiary record, no such clarification is needed. When read alone, in the context of the paragraph in which they were used, or as part of the entire proposed decision, misinterpretation of the language and terms used in the PFD seems implausible.

IIII
CONCLUSION

There is substantial evidence in the record that the application and draft permit are consistent with General Statutes § 22a-403. The findings and conclusions of the Proposed Final Decision are adopted and affirmed. The final permit should be issued to the Applicant without further delay so that this essential dam safety project may proceed.

Katherine S. Dykes, Commissioner

9/9/21
Date

[31] For example, Intervenor's Exception Nos. 7, 19, 27, 31.

SERVICE LIST

In the matter of First Taxing District, New Canaan
Dam Safety Permit
Grupes Reservoir Dam

Applicant – First Taxing District

Frank Murphy, Esq.
Kara Murphy, Esq.
Tierney, Zullo, Flaherty & Murphy, PC
fmurphy@tierneyzullo.com
kmurphy@tierneyzullo.com

John De Lano
John.delano@gza.com
Dominick DiGangi
ddigangi@firstdistrictwater.org

DEEP
Bureau of Water Protection and Land Reuse
Permitting and Enforcement Division
Dam Safety

Ken Collette
Kenneth.collette@ct.gov

Corinne Fitting
Yvonne Hall
Chuck Lee
Anna Laskin
Danielle Missell

Petitioner
Norwalk River Watershed Assn (NRWA)
Janet P. Brooks
Attorney at Law, LLC
http://www.attorneyjanetbrooks.com/

Louise Washer lbwasher@gmail.com
Alicea Charamut, Rivers Alliance: alicea@riversalliance.org
Margaret Miner, consultant: margaret.miner@charter.net
Bill Lucey, Save the Sound: blucey@savethesound.org
William Kenny, William Kenny Associates: wkenny@wkassociates.net
Cathy Smith, NRWA: mcath144@gmail.com

Land Trust

Alfred Tibbets, atibbetts@butlertibbetts.com
Aaron Lefland, New Canaan Land Trust: aaron@newcanaanlandtrust.org