



IN THE MATTER OF : ***APPLICATION NO. 202010786 –***
SDF, 202010780-FM

DEPARTMENT OF TRANSPORTATION: ***SEPTEMBER 16, 2022***
(Old Saybrook, Back River)

FINAL DECISION

I

SUMMARY

The Connecticut Department of Transportation (“Applicant”) has applied for a permit from the Department of Energy and Environmental Protection (“DEEP” or “Department”) to replace bridge No. 01386 (“the bridge”), which carries Route 154 over the Back River in Old Saybrook. The parties to the proceeding are the Applicant, DEEP staff,¹ and the Intervening Party, Thomas Armstrong (“Intervening Party” or “Mr. Armstrong”).² In a May 6, 2022, Proposed Final Decision (“PFD”), the hearing officer found that activity conducted pursuant to the draft permit would comply with all of the applicable standards, goals, and policies of the Structures, Dredging and Fill provisions of the Connecticut General Statutes (“CGS”) §§ 22a-359 through 22a-363f; with the Tidal Wetlands Act, CGS §§ 22a-28 through 22a-35, and corresponding Regulations of Connecticut State Agencies (“Regs., Conn. State Agencies”) §§ 22a-30-1 through 22a-30-17; and

¹ DEEP was represented by staff from the Bureau of Water Protection and Land Reuse, Land and Water Resources Division.

² Mr. Armstrong filed a petition to intervene and was granted status under the Connecticut Environmental Protection Act (“CEPA”), CGS § 22a-19. Armstrong’s intervening party status was limited to his claim that the proposed project will or is reasonably likely to cause unreasonable pollution, impairment, or destruction of the air, water, or other natural resources of the state.

with the relevant provisions of the Connecticut Coastal Management Act, CGS §§ 22a-90 through 22a-112.³ The hearing officer recommended issuance of the permit.

Mr. Armstrong filed Exceptions to the Proposed Final Decision on May 20, 2022 (“Exceptions”) and did not request oral argument. The Applicant filed a Request for Technical Corrections on May 20, 2022 (“Technical Corrections”), which were not Exceptions to the PFD. Pursuant to Regs., Conn. State Agencies § 22a-3a-6(y)(3)(B), an opportunity for the parties to file briefs was provided. Briefs were filed by the Applicant, Department staff, and the Intervening Party.

Mr. Armstrong’s Exceptions have been assessed and are improper because they either go beyond the scope of admissible objections under Regs, Conn. State Agencies § 22a-3a-6(y)(3) or raise issues that have already been considered and found to be without merit. Even if the Exceptions were proper, they are found to be unpersuasive. After consideration of the administrative record, the draft permit, and the PFD and its recommendations, I find that the proposed activity will comply with all applicable state statutory and regulatory criteria, and will not unreasonably pollute, impair, or destroy the public trust in the air, water, or other natural resources of the state. Furthermore, I find that the Applicant’s proposed clerical and typographic corrections to the PFD are warranted. Accordingly, this Final Decision rejects the Exceptions filed by the Intervening Party and affirms and adopts the findings of fact and conclusions of law reached in the PFD and authorizes issuance of the proposed draft permit as a final permit to replace the bridge over the Back River as specified in the PFD, incorporating the Applicant’s proposed Technical Corrections.

³ The Applicant applied for a Water Quality Certification under Section 401 of the federal Clean Water Act, as noted in the Notice of Tentative Determination. This hearing did not consider this application, as there was no right to a hearing on that decision at the time this matter was initiated.

II

EXCEPTIONS

A

RULINGS ON EXCEPTIONS

The Intervening Party's Exceptions reiterate arguments that were presented through the evidentiary hearing and addressed in the PFD. The Exceptions filed by Mr. Armstrong were of a limited nature that did not refute the findings of fact with legal objections or support a legal analysis contrary to that in the PFD.

The Exceptions have been reviewed in full and do not provide grounds to modify or overturn the PFD. The Exceptions are therefore rejected and are not a factor in this final decision, as is fully discussed below. While the Exceptions are improper for being outside the permissible scope of this matter under Regs, Conn State Agencies § 22a-3a-6(y)(3) or for raising arguments which have already been considered and found meritless, several themes were presented that will be addressed to clarify the record. Most of Mr. Armstrong's Exceptions can be grouped as follows. Not every Exception warrants a specific response. This final decision neither acknowledges nor stipulates to any Exception not specifically referenced herein, as the Exceptions raise no legal basis to do so. Addressing these issues further demonstrates the substantial evidence in the record and legal support in favor of granting the draft permit.

1.

Evidentiary Rulings

Mr. Armstrong was admitted as an intervening party under CGS § 22a-19, which places a burden upon the intervening party to provide sufficient evidence to demonstrate that the environmental impacts the party alleges are both reasonably likely and will result in unreasonable

harm. See e.g., *City of Waterbury v. Town of Washington*, 260 Conn. 506, 551 (2002). An intervening party must “first come forward and show that the [proposed regulated activities are] reasonably likely to unreasonably pollute, impair or destroy a natural resource.” *Manchester Env. Coal v. Stockton*, 184 Conn. 51, 58 (1981), overturned on other grounds by *City of Waterbury v. Town of Washington*, supra 260 Conn. 506. In this case, the Mr. Armstrong failed to meet his burden of proof.

Further, pursuant to Regs., Conn. State Agencies § 22a-3a-6(y)(3)(A), Exceptions require a legal basis for such objection or a clear correction to facts based on evidence in the record, not a mere disagreement with the language of the PFD.⁴ Several of Mr. Armstrong’s Exceptions were addressed by the hearing officer in earlier rulings, including the scope of his intervention related to issues such as sea level rise and the admissibility of exhibits. Any Exceptions related to these issues are improper, as Exceptions must be used only to object to the PFD. See *In the Matter of Megrue-Cliff Place, LLC Final Decision*, p. 3, December 22, 2015. Mr. Armstrong could, and did, raise such issues through the evidentiary hearing process, and they were appropriately addressed by the hearing officer. The remaining Exceptions simply reiterate arguments that were raised by Mr. Armstrong through the hearing and have been fully addressed in the PFD. These Exceptions do not raise legal objections but instead assert mere disagreements. Such Exceptions are therefore denied.

2.

Sea Level Rise

⁴ Regs., Conn. State Agencies § 22a-3a-6(y)(3)(A) states that exceptions “shall state with particularity the party’s or intervenor’s objection to the proposed final decision. Exceptions shall state with particularity the party’s or intervenor’s objections to the proposed final decision, and may not raise legal issues or . . . factual issues which could have been, but were not, raised at the hearing.”

Through the Exceptions, Mr. Armstrong attempts to broaden the scope of this hearing and again raise issues related to sea level rise. Mr. Armstrong's Exceptions are not persuasive as they are nearly identical to the claims initially addressed through the hearing process. As noted above, such an attempt to broaden the scope of this hearing and re-litigate rulings from the hearing process are improper. Even if such Exceptions were proper, the Applicant complied with the appropriate and relevant portions of the Coastal Management Act, and the permit application considers the impacts of sea level rise and the need for a resilient structure, as is fully addressed in the PFD. Therefore, all such Exceptions related to the issue of sea level rise are denied.

3.

The "1935 Status Quo"

Mr. Armstrong again asserts through his Exceptions that the design of the replacement bridge should not be based on the existing 1935 structure and that approving the application to replace the original bridge would create a dangerous precedent by allowing an unpermitted structure to be replicated. Except from stating that the PFD should be revised to reject the "status quo," the Exceptions do not specify any legal objection to the PFD. Therefore, these Exceptions will not be further addressed, except to clarify that the PFD addresses the stringent permitting process regarding this permit application and that it has been determined that the application meets all relevant and applicable statutes and regulations.

4.

Interpretation of the Tidal Wetlands Regulations

The Exceptions reiterated Mr. Armstrong's arguments regarding the Tidal Wetlands Regulations and do not properly assert legal Exceptions to the PFD. (Intervening Party's Exceptions, pp. 8-12.) Mr. Armstrong requests that additional mitigation measures be put in place,

such as scour matting and a living shoreline. Such arguments were raised and addressed during the hearing process. Additionally, as addressed through the PFD, the Applicant provided compelling and sufficient evidence that the replacement bridge will not change the current velocity, water patterns, or erosion in the Back River. The Exceptions regarding the Tidal Wetlands Regulations are denied.

5.

Erosion, Navigation and Scour Holes

Mr. Armstrong submits Exceptions to the PFD's findings of fact concerning erosion, navigation of the River by small craft, and scour holes. Specifically, Armstrong believes the hearing officer should have accepted evidence he presented. 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. This Final Decision will not reiterate the arguments that have been well supported in the PFD.

a. Erosion

Mr. Armstrong asserts that, contrary to the findings of fact in the PFD, erosion occurring on the Back River banks and bottom in the vicinity of the bridge are non-natural, and he references the testimony of his own expert witness from the hearing as evidence. (Intervening

Party's Exceptions, p. 15.) Notably, the Intervening Party's expert testified that scouring and bank erosion at the site were separate issues. (Tr. Stapleton, 2/17/22, 03:14:50.) As fully addressed in the PFD, the Intervening Party's expert witness "testified that there is natural erosion within tidal channels, and he stated that he could not quantify a percentage of natural vs. non-natural erosion at the shoreline. He further indicated that he . . . could not speak to the overall performance of the Marsh [sic] or if there was suspended sediment in the channel." (At PFD p. 39 (referring to Tr. Stapleton, 2/17/22, 02:50)). The PFD thoroughly addresses the issue of erosion, and its findings are supported by substantial evidence in the administrative record.

b. Navigation via Small Craft of the Back River

Mr. Armstrong's Exceptions and brief reiterated the Intervening Party's original arguments regarding navigation and the impact of small craft use on the Back River. These Exceptions do not raise legal objections to the PFD, aside from presenting a disagreement with its findings. As indicated through the administrative record, the permitted bridge will not curtail recreational boating of the Back River to an extent that would run afoul of the Coastal Management Act or its accompanying regulations.

c. Mitigation and Scour Holes

Mr. Armstrong failed to meet his burden under CEPA, CGS § 22a-19, and therefore, the hearing officer did not need to consider prudent and feasible alternatives. With that said, the hearing officer did address the Intervening Party's proposed mitigation measures in the PFD. Again, the Exceptions do not assert legal objections to the findings of the PFD but instead ask for "reconsideration" of the party's arguments. As previously indicated, the PFD has been fully adopted, and while such findings will not be reiterated here, Armstrong's proposed mitigation measures are not warranted.

Further, the Intervening Party raised arguments in regard to scour holes throughout the evidentiary hearing, and such arguments were fully addressed through the PFD. Despite the Intervening Party's failure to raise the issue of scour holes in his Petition to Intervene, the PFD does consider the scour holes on the channel bottom. The evidence in the record demonstrates that the replacement bridge has been designed to further protect against additional scour. Finally, the Intervening Party's own expert witness testified that the Intervening Party's preferred treatment of the scour at the river bottom would likely not reduce flow velocity or impact bank erosion. (Tr. Stapleton, 2/17/22, 03:12-3:14.) The PFD appropriately addresses Mr. Armstrong's arguments regarding scour holes, and scour holes have been appropriately addressed through the permit application.

B

RULINGS ON OTHER CLAIMS

Technical Corrections

In response to the PFD, the DOT submitted a Request for Technical Correction. These corrections, which address basic typographic or clerical errors, include:

1. Changing the year referenced in Section II.A.6 paragraph 66 at PFD p. 18 from 1988 to 1998 to accurately reflect the year of the exhibit referenced.
2. Changing the word "hydrologic" to "hydraulic" in numerous sections⁵ to accurately reflect the types of studies being referenced in those sections.
3. Deleting subscript footnote 16 from the PFD on page 46, as there is no corresponding text.
4. Replacing "DOT" with "DEEP" to correct a typographical error in section IV at PFD p. 50.

⁵ The sections in which DOT requests this change are: Section II.A.6. paragraph 53 at PFD, p. 14; Section II.B.2.c.iv at PFD, p. 29; Section II.B.3.f at PFD, p. 35; Section III.A.3 at PFD, p. 40; and Section III.D.2 at PFD, p. 44.

These Technical Corrections are agreed to and are hereby adopted in this Final Decision.

III

CONCLUSIONS

There is substantial evidence in the record that the permit application complies with the applicable standards, goals, and policies of the Tidal Wetlands Act and its implementing regulations, the Structures, Dredging and Fill Act, and the applicable portions of the Coastal Management Act. The Exceptions filed are not persuasive and do not support overturning the Proposed Final Decision as inconsistent with the applicable legal standards. The findings and conclusions of the Proposed Final Decision are adopted and affirmed, incorporating the Technical Corrections proposed by the Applicant. The final permit shall be issued to the Applicant without further delay.



Katherine S. Dykes

September 16, 2022

Date

SERVICE LIST

In the matter of Department of Transportation, Old Saybrook, Back River.

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