STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

PETITION OF STUART BELL FOR A
DECLARATORY RULING AS TO THE
DEPARTMENT'S POLICY PROHIBITING
CONSIDERATION OF DREDGING
IN CONNECTION WITH APPLICATIONS
UNDER THE STRUCTURES,
DREDGING AND FILL ACT FOR
RESIDENTIAL COASTAL PROPERTIES

PETITION FOR DECLARATORY RULING

I. INTRODUCTION

The Department of Environmental Protection, through its Office of Long Island Sound Programs ("OLISP"), has wrongfully adopted a policy interpreting the Structures, Dredging and Fill Act ("Act"), Conn. Gen. Stat. § 22a-359 et seq., to preclude consideration of new dredging in connection with private residential boating facilities ("Policy"). OLISP is the program within the Department that handles applications under the Act. OLISP has applied the Policy unlawfully to the Petitioner's pending application for a permit under the Act (Application No. 200600806, hereinafter "the Application") to restore boating access at his residence at 340 Willow Street in Southport ("Property"). The Act requires a permit for any dredging or placement of structures or fill in tidal and navigable waters waterward of the high tide line. Conn. Gen. Stat. § 22a-361. The Petitioner requests the Commissioner to declare the OLISP Policy void and of no effect for the reasons set forth herein.

In addition, OLISP has misinterpreted the applicability of Conn. Gen. Stat. § 22a-363b to the existing structures at the Applicant's property. As relevant to the facts of this Petition, that statute provides for the expedited issuance of a Certificate of Permission ("COP") for substantial maintenance, which is defined to include maintenance dredging, to a structure which has previously obtained a permit under Conn. Gen. Stat. § 22a-361. The Petitioner requests the Commissioner to declare OLISP's previous interpretation in error and direct OLISP to process an application for a COP upon receipt of an application for same to make substantial repairs to the structure, including the dredge footprint, in accordance with prior approvals.

This request is made pursuant to the provisions of the Uniform Administrative Procedure Act ("UAPA"), Connecticut General Statutes § 4-175 and 4-176, and the Regulations of Connecticut State Agencies ("RCSA") § 22a-3a-4. Conn. Gen. Stat. § 4-176 provides that any person may petition an agency for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.

Section 4-176(e) provides that the agency must act on the petition in one of five ways.

> Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

Section 4-176(e).

Conn. Gen. Stat. § 4-175 provides that a petitioner is entitled to seek a declaratory ruling directly from the Superior Court if the agency does not take action as provided in § 4-176(e)(1), (2), or (3). A ruling by an agency on a petition for declaratory ruling issued pursuant to § 4-176(e) is appealable as a final decision under the UAPA. Conn. Gen. Stat. § 4-166.

OLISP's interpretation of the Act and the corresponding Policy which it has articulated disallowing dredging in connection with residential structures, as specifically applied to the Application, is inconsistent with both the express language and the legislative intent of the statute. Nor is it authorized or required by the Coastal Management Act, Conn. Gen. Stat. § 22a-90 et seq. ("CMA"). Furthermore, it violates the Petitioner's common law littoral rights. Moreover, OLISP's interpretation of Section 22a-363b as prohibiting Certificates of Permission ("COP") for maintenance dredging for permitted structures is at odds with the plain language and intent of the statute and must be reversed. In addition, the Department's position that dredging represents a significant environmental problem is belied by the fact that it has granted a blanket Water Quality Certificate under § 401 of the Clean Water Act for dredging up to one acre.

Furthermore, OLISP's Policy, which it applies generically, to reject any new dredging for residential docks is in violation of the UAPA because it has not been properly promulgated as a regulation and is therefore unenforceable.

OLISP's interpretation of Sections 22a-359 and 22a-363b as applied to the Petitioner's efforts to restore waterfront access to his property interferes with or impairs the legal rights of

the Petitioner by impairing his right to utilize and restore an existing structure serving his shorefront property, thereby impairing his common law littoral rights.

II. HISTORY AND STATUTORY BACKGROUND

A. Historical Pier Structure and Permits.

The Property is the site of a historic pier dating from at least as early as the 1930s. Aerial photographs of the Property document the existence of a 200-foot long steel and timber pier with concrete supports, terminating in a timber pier head. The pier head was surrounded by deep water, presumably as a result of historical dredging, to permit vessels to access the federal navigation channel, from at least 1934. (Ex. A, Aerial Photo dated April and May (sic), 1934).

In 1947, the Connecticut Flood Control and Water Policy Commission[1] issued a permit to a previous owner of the Property, Cornelia Ford, to reinforce the existing pier, construct a pile jetty with steel sheeting perpendicular to the end of the existing pierhead, install a float and ramp perpendicular to the pierhead, and dredge a basin as shown on the March 26, 1947 drawing associated with the permit. (Ex. B). A review of the map reveals that the dredge footprint approved in the permit involved one area approximately 45 x 40 feet landward of the jetty to allow access to the new float, and another area approximately 22 x 8 feet off the head of the existing pier. The permitted structure is shown in the photo attached as Exhibit C.

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[1] The Connecticut Flood Control and Water Policy Commission, later the Water Resources Commission, was the precursor to DEP as the permit-issuing authority under the Structures, Dredging and Fill Act. See 1939, Special Act 568; P.A. 71-872.

In 1964, subsequent owner Hoyt Perry applied to the Water Resources Commission and the Army Corps of Engineers ("Corps") for a permit to re-dredge a basin off the end of the pier and adjacent to the pierhead on the north side to a depth of six feet. According to the plans associated with that application, the dimensions of the approved dredging in 1964 were 100 feet wide parallel to the channel, 110 feet long, and 50 feet wide on the landward side of the footprint, for a total of 6,478 square feet. The March 21, 1964 application is attached at Exhibit D. The Corps granted a permit on April 3. 1964. (Ex. E). The Water Resources Commission advised by letter dated March 20, 1964 that no permit was necessary as the requested dredging was maintenance dredging. (Ex. F).

B. Recent Proceedings.

The Petitioner Stuart Bell acquired the Property in 2003. Triton Environmental, Inc., on behalf of the Petitioner, initially approached OLISP about obtaining a COP for pier repairs and maintenance dredging. In September of 2004, Triton submitted a Conceptual Work Plan to OLISP and the Army Corps of Engineers as a preliminary step toward seeking a COP under Conn. Gen. Stat. §22a-363b to rebuild the structure and dredge the previously authorized footprint to its 1947 permitted condition. (Ex. G, Conceptual Work Plan). Several meetings were subsequently held to discuss project details. At the time, OLISP indicated that dredging would likely be approved as long as areas with elevations above Mean Low Water were avoided. However, they indicated that it may be possible to dredge these areas if it could be demonstrated that the material was relatively "inert" sand that did not support a significant benthic community.

The discussions about a possible COP ended when OLISP advised Triton by letter dated March 23, 2005 that the project would not be eligible for a COP. (Ex. H). As to the dredging component, the letter advises that, because the dredging has not been "continuously maintained and serviceable," it would not be allowed under a COP. Then, for the first time, OLISP references the Policy, stating that "it is the policy of this Office to disallow dredging for private recreational boating use and as such, it is unlikely that you would be successful in securing a Structures, Dredging and Fill permit for such work." Id.

As a result of the indication that OLISP believed the dredging was not eligible for a COP and following further discussions with OLISP staff that indicated that it may be eligible under a full permit, the Petitioner submitted the Application for a Structures, Dredging and Fill permit under § 22a-361 on March 13, 2006. A copy of the Application is attached as Exhibit I.

On December 26, 2006, OLISP responded by letter to the Petitioner's Application stating that the proposed application was "inconsistent with state policies, standards and criteria" relating to Conn. Gen. Stat. §§ 22a-28 though 22a-35 of the tidal wetlands statutes, Conn. Gen. Stat. § 22a-359 of the structures, dredging and fill statutes, and Conn. Gen. Stat. §§ 22a-92 and 22a-98 of the Coastal Management statutes. (Dec. 26, 2006 Letter attached at Exhibit J). The main objection in OLISP's letter was that the proposed dredging went beyond the previously approved dredge footprint. The letter continued, "it is the policy of the Department to disallow the expansion of authorized dredge footprints for private residential docks. Thus, it is the opinion of the Department that you can exercise your right to reasonable

access by minimizing the proposed dredge footprint such that it is contained entirely within the previously authorized dredged basin." Id.

In response to comments by OLISP in the December 26, 2006 letter critical of perceived plans to dredge outside the previously approved dredge footprint, the Petitioner submitted revised plans reducing the scope of the dredging ("Revised Plans"). (Revised Plans at Exhibit K). The Application, as modified by the Revised Plans, seeks permission to re-dredge part of the previously dredged berthing area and a small area beyond it to reach water deep enough to navigate at low tide, install a floating dock with a gangway, and re-construct a modified flow-through wave attenuation structure in order to decrease the overall impacts to the dock from wave action from wind and boat wakes from vessels using the adjacent federal navigation channel.[2]

The historic dredge footprint around the berthing area approved by the ACOE in the mid-1960s was approximately 6,500 square feet in area. Although extensive dredging of the navigation channel 100 feet out from the pier head has been conducted, no maintenance dredging in the area of the pier head has been performed in some time.[3] As a result, sand has accumulated, filling in the historic dredge footprint, including the vessel berth slip and the area between the dredge footprint and the navigation channel. Maintenance dredging of the

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[2] In October 2006, Petitioner applied for, and was granted, a Certificate of Permission ("COP") to replace superstructure to the existing pier and concrete bases to the existing pier head.

[3] The dredging of the federal navigation channel authorized by DEP allowed dredging of the same shoal in front of the Bell property and upstream into the harbor for a total length of 5,700 feet with an average width of 100 feet and a depth of 9 feet. The footprint for the dredging of the federal navigation channel was approximately 600,000 square feet compared to the 4,300 square feet requested by the Applicant.

berthing area would have reduced the accumulation of shoaled sands and maintained the ability to allow reasonable access to and from the pier during mid to low tides. However, previous owners apparently did not conduct maintenance dredging.

For this reason, the Petitioner's initial Application sought permission to dredge approximately 4,300 square feet in front of the pier head, including an area outside the historic footprint that is necessary to connect the pier area with the adjacent federal channel. By comparison, this is a one-third reduction of the approved historic dredge footprint of 6,400 square feet. (Application, Attachment A, page 2 attached hereto as Exhibit I). In addition to a reduction in area, the proposed dredge footprint would eliminate any activity within the tidal wetland pocket on and around the rock outcropping and the tidal flat with elevations above Mean Low Water that is located between the rock outcropping and the shore.

In the Revised Plans submitted March 5, 2007, the proposed dredge footprint was further reduced based on discussions with OLISP staff at a meeting in January 17, 2007 and the comments contained in the December 26, 2006 OLISP letter. In May of 2007, Petitioner met again with OLISP to present the Revised Plans, which altered the location and design of the wave attenuator, the alignment of the ramp and float, and further minimized the dredged footprint to 3,131 square feet, all in order to address OLISP concerns with the original proposal. The Applicant also presented conceptual drawings to show an extension of the pier to reach a depth of 3 ft. at Mean Low Water which would be necessary if the proposed dredge footprint were not allowed. (Ex. L). At the meeting, Staff responded that extending the pier would not be allowed.

OLISP's written response of June 1, 2007 to the Revised Plans stated that, since a significant amount of time had elapsed since the last dredging, the project would not be eligible to be treated as "maintenance dredging" under Conn. Gen. Stat. § 22a-363b(a), which requires that such dredging be "continuously maintained and serviceable as authorized." (OLISP June 1, 2007 Letter, Exhibit M). Therefore, according to OLISP, the proposed dredging, even in the area of the formerly permitted footprint, would have to be considered new dredging. Id.

OLISP then referenced the Policy of prohibiting new dredging for residential docks. "As we explained during our January 17, 2007 and May 1, 2007 meetings and in a March 23, 2005 letter to Triton (copy enclosed), it is the policy of the Department to disallow new dredging for private recreational boating facilities." Id. "In light of the foregoing," the letter continued, "we are unable to make a recommendation for approval for this facet of your proposal and your application materials will need to be updated to remove the references to dredging on-site." Id. OLISP has taken the position that not only is the proposed dredging not eligible for a COP under Section 22a-363b, it is not even eligible for consideration for a permit under Section 22a-361.[4]

The dredging and improvements proposed in the Application are consistent with historical usage and reasonable use of the property, and would not result in significant impacts to natural resources. Historically, the pier was able to accommodate vessels that were at least

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[4] This has not always been OLISP's policy, even after the adoption of the CMA. As just one example, on October 20, 1997, OLISP granted a permit for new residential dredging to William and Deborah Nightingale, which allowed new dredging in order to reposition a float in the Four Mile River in Norwalk. DEP Permit No. 199600607-PF.

thirty feet in length. See Application, Attachment A, at page 1, Attachment D, Photo 1. At this time, due to accumulated shoaling of sand in and around the berthing area, a vessel of any reasonable draft can only be berthed at the pier at high tide. The proposed dredging is needed to accommodate berthing of a reasonably sized vessel of thirty feet, which is consistent with the historic usage of the pier.

Contrary to OLISP's position, this is exactly the type of operation that is intended to be authorized, by permit or COP, under the Structures and Dredging Act. The proposed dredging is necessary to restore historic use of the pier by providing reasonable access during mid to low tides. It is also necessary to prevent a vessel from grounding at low tide and being damaged by wind and wave action. The pier has historically supported the berthing of a vessel of up to thirty feet in length and was designed with a dredged footprint as a design element. Rejection of both dredging and an extension to the pier leaves the Petitioner without reasonable access to deep water, which, as will be discussed below, is contrary to controlling law.

In addition, considering the size of dredging projects recently approved for the area, which includes the aforementioned Corps dredging of the navigation channel and the anchorage at the yacht club within the harbor, the natural resource impacts of the Petitioner's proposed dredging project are negligible.

III. QUESTIONS AS TO WHICH THE DECLARATORY RULING IS SOUGHT

Petitioner requests a Declaratory Ruling on the following questions:

(1) Is the OLISP Policy to prohibit any consideration of new dredging for residential docks, as applied to Mr. Bell's application, authorized by the Structures, Dredging and Fill Act, or the Coastal Management Act (Conn. Gen. Stat. § 22a-90 et seq.)?

(2) Is the OLISP Policy of prohibiting consideration of new dredging for residential docks an agency statement of general applicability adopted by the Commissioner that implements, interprets, or prescribes law or policy?

(3) Does Section 22a-363b(a)(1) require that a proposed maintenance dredging footprint has been continuously maintained and serviceable to be eligible for a COP when associated with a proposal to perform substantial repairs to a permitted structure?

IV. ARGUMENTS IN SUPPORT OF THE PETITION

A. The OLISP Policy Violates The Petitioner's Common Law Littoral Rights.

OLISP's interpretation of the Section 22a-361 as applied to the Application and its interpretation of Section 22a-363b as applied to Petitioner's prior proposals violate the Petitioner's common law littoral or riparian property rights and are contrary to well-established state law, because they deny him reasonable access to deep water. "The fundamental riparian[5] right on which all others depend is the right of access. . . . This is the most important consideration in any division of the respective rights of the parties to land

[5] "The term [riparian] is sometimes used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the characteristics of

under water." Rochester v. Barney, 117 Conn. 462, 469 (1933); Water St. Assocs. Ltd. Pshp. v. Innopak Plastics Corp., 230 Conn. 764, 769-770 (1994). "The right of access is distinct from that which each has as a member of the public." Rochester v. Barney, 117 Conn. at 468; McGibney v. Waucoma Yacht Club, Inc., 149 Conn. 560, 563 (1962). "The privilege of wharfing out is given to the owner of the upland to enable him in that way to reach deep water." Lane v. Board of Harbor Comm'rs, 70 Conn. 685, 697-698 (1898).

"[O]wners of adjoining upland have the exclusive, yet qualified, right and privilege to dig channels and wharf out from the owner's land in a manner that does not interfere with free navigation." Water St. Assocs. Ltd. Pshp., 230 Conn. at 769; DelBuono v. Brown Boat Works, 45 Conn. App. 524, 526 (1997); Shorehaven Golf Club, Inc. v. Water Resources Comm'n, 146 Conn. 619, 624 (1959). It is well established law:

> (1) that, subject to the limitations of the Federal Constitution, the State has the jus publicum, or right of governing its shores and navigable waters for the protection of public rights, and also the jus privatum, or title to the soil itself below high-water mark, in trust for the public use and benefit; (2) that the littoral proprietor owns in fee only to high-water mark, but that he has, in the shore in front of his upland, certain exclusive advantages called in our reports rights, privileges, and franchises, among which is the right of access to actually navigable water by wharfing out; (3) that the right or privilege of wharfing out, certainly so far at least as it has not been actually exercised, is held subordinate and subservient to the public right of navigation.

Lane v. Board of Harbor Comm'rs, 70 Conn. 685, 694 (1898).

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a watercourse. But this is not accurate. The proper word to be employed in such connections is 'littoral.'" Water St. Assocs. Ltd. Partnership v. Innopak Plastics Corp., 230 Conn. 764, 770 (1994), citing Black's Law Dictionary (6th Ed. 1990).

The common law rights of the public are subservient to the dominant rights of navigation and littoral owners' right to access and wharf out. "It is settled in Connecticut that the public has the right to boat, hunt and fish on the navigable waters of the state, subject only to the paramount right of navigation and to the lawfully acquired privileges or franchises of littoral or riparian owners, such as wharfing out, erecting piers and reclamation, in the exercise, principally, of the right of access to the adjoining upland." State v. Brennan, 3 Conn. Cir. Ct. 413, 416-417 (Conn. Cir. Ct. 1965); citing McGibney v. Waucoma Yacht Club, Inc., 149 Conn. 560, 563 (1962); Shorehaven Golf Club, Inc., 146 Conn. at 624; Orange v. Resnick, 94 Conn. 573, 582 (1920); State v. Hooper, 3 Conn. Cir. Ct. 143, 148 (1965). Therefore, to the extent that OLISP is purporting to protect the public trust in coastal resources, at common law, those public rights exist subject to the rights of littoral owners to wharf out and dredge to gain access to deep water.

OLISP's interpretation of the Act and CMA purports to extinguish the Petitioner's common law right of access to deep water. Such extinguishment would give rise to a claim under the State and Federal constitutions for taking of private property without just compensation. Extinguishment of littoral rights without just compensation has been held to be a violation of takings jurisprudence in Connecticut. In Orange v. Resnick, 94 Conn. at 580-82, the Connecticut Supreme Court invalidated an act purporting to convey adjoining upland between high and low-water mark to the town for the purpose of developing a park, insofar as it extinguished the riparian rights of an adjoining upland owner without condemning them and providing just compensation. See also Port Clinton Assoc. v. Board of Selectmen, 217 Conn. 588, 597 (1991) (dismissing a takings claim relating to limitations of

expansion of a marina based on lack of final administrative decision, but discussing the possibility that loss of such rights could give rise to takings claim). Given the demonstrated enhancement to the value of property from a dock accessing deep water, such a taking could give rise to significant damages. See Ben Casselman, *When the Dock is Worth More Than the House*, WALL STREET JOURNAL, June 29, 2007, at W1 (attached as Exhibit O).

B. The Structures, Dredging and Fill Act Does Not Support an Interpretation that Dredging for Residential Docks is Prohibited.

1. The Interpretation is Contrary to the Language of the Act.

OLISP's interpretation that dredging to utilize an existing dock is prohibited by the Structures, Dredging and Fill Act is not supported by the language of that Act, or by the legislative history surrounding the passage of the Act. OLISP tacitly acknowledges this, stating instead that its Policy is based not upon the Structures, Dredging and Fill Act, but instead is based upon of policies set forth in the CMA. (See Ex. J, M). As will be discussed in a later section, the CMA does not support such an interpretation of the permitting provisions in the Structures, Dredging and Fill Act.

The standards applicable to a decision by the Commissioner on the Application are set forth in Conn. Gen. Stat. § 22a-359. They provide that, in deciding an application for dredging, the erection of structures, or other activities waterward of the high tide line, the Commissioner shall

> give due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests

of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.

Conn. Gen. Stat. § 22a-359 (emphasis added). Throughout the statute, dredging is an activity contemplated for consideration by the Commissioner. There is no language anywhere in the Act which discourages or prohibits dredging by residential property owners, or which discriminates among different classes of applicants for dredging permits.

The Act provides several mechanisms by which property owners can gain approvals for work regulated under the Act. Conn. Gen. Stat. § 22a-361(a) provides for individual permits and certificates, stating that:

> No person, firm or corporation, public, municipal or private, shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person, firm or corporation has submitted an application and has secured from said commissioner a certificate or permit for such work.

Conn. Gen. Stat. § 22a-361(a). Section 22a-361(d) provides for the issuance of general permits for certain types of minor activities,[6] and Section 22a-363(b) provides the process for COPs. Therefore, the Act provides for at least three methods (individual permits, general permits, and COPs) under which property owners are entitled to submit, and DEP is required to consider, applications for approval of regulated work. It is evident from the tiered structure

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[6] The general permit provisions in Section 22a-361(d), like the COP process discussed below, add support for the proposition that residential dredging is a permitted activity. However, DEP has not issued a general permit that would cover the proposed activities in the Application.

of the Act that parties ineligible for COPs or general permits would be entitled to apply for an individual permit.

Contrary to obvious legislative intent, OLISP takes the position that the only way dredging can be allowed for a structure serving a residential property is if it meets the eligibility criteria for a COP, under Section 22a-363b. OLISP apparently views the legislature's 1990 directive to provide fast-track permitting for maintenance dredging, one of the expressly eligible activities in the statute, as a legislative limitation to disallow processing of dredging requests for permits under Section 22a-361. Neither the language nor the legislative history of Section 22a-363b supports such an interpretation.

a) COP Process

Certificates of Permission or COPs are intended to provide a fast-track approval process which gives preference to existing and established uses. Section 22a-363b provides this streamlined process for previously existing structures, built with or without prior permits, to encourage owners to obtain current authorizations and bring them into compliance. The COP process offers an applicant a permit turn-around time of 45 days, unless the Commissioner requests additional information. See Conn. Gen. Stat. § 22a-363b(c).

Among other activities, a COP may be issued for dredging activities in connection with (1) substantial maintenance or repair of previously permitted structures, fill, obstructions or encroachments; (2) substantial maintenance of any structures, fill, obstructions or encroachments in place prior to June 24, 1939, and continuously maintained and serviceable since such time; and (3) maintenance dredging of areas which have been dredged and

continuously maintained and serviceable as authorized pursuant to section 22a-33 or Section 22a-361. Conn. Gen. Stat. § 22a-363b(a).

If a proposed activity does not meet the criteria for a COP, the statute directs the applicant to seek a permit under the relevant statute for the proposed work. If the work is to be conducted in tidal wetlands, it requires a permit under Section 22a-33. If it is to be conducted in tidal or navigable waters, it requires a permit under Section 22a-361. Conn. Gen. Stat. § 22a-363b(d).

As will be discussed in a later section (Section IV.F, page 37), OLISP maintains that the proposed dredging constitutes new dredging and therefore does not fall within the "substantial maintenance" provisions of Section 22a-363b(a)(1), which it believes requires the dredging to be "continuously maintained and serviceable." In fact, the Application should be eligible for a COP, as "substantial maintenance of a structure previously permitted under Section 22a-361," which is defined to include maintenance dredging with no requirement that such dredging be continuously maintained. Conn. Gen. Stat. § 22a-363b(a)(1).

b) Eligibility for an Individual Permit

As described above, if a proposed activity does not meet the criteria necessary to qualify for a COP or a general permit, then an applicant is entitled to seek an individual permit for the proposed work. However, contrary to this tiered permitting scheme, OLISP seems to contend that if an activity, in this case, residential dredging, is not eligible for a COP, it is therefore not eligible for a permit.

Effectively, the OLISP position, which is not supported by any of the relevant statutes, is that even pre-existing residential docks with permits, which have not been continuously

maintained by dredging, are not eligible for a new permit for dredging. As a result of this position, a private property owner may not now dredge, despite the fact that previous owners would have been entitled to dredge and make repairs. This would penalize those who could not afford to continuously dredge, while favoring those with a steady stream of available money to continually maintain their property. Moreover, it is directly contrary to the express statutory preference for granting approvals for existing structures and uses, and for giving "due regard for . . . the use and development of adjacent lands and properties . . . , with proper regard for the rights and interests of all persons concerned." Conn. Gen. Stat. § 22a-359. In the Applicant's case, the adjoining upland is, and at all relevant times has been, put to residential use. The dock was designed and built to enhance that use.

The standards for issuing a permit or making any other decision under the Act require the Commissioner to give proper and due regard to littoral private property interests. As quoted earlier, in deciding an application for dredging, structures or fill, the Act provides that the Commissioner shall

> give due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.

Conn. Gen. Stat. § 22a-359. See Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. 483, 500 (1978) (stating that the criteria in Section 25-7b (now Section 22a-359) are the standards to be considered in reviewing an application).

The only other guidance for decision-making on a permit in the Act may be found in Section 22a-361(c), which provides that the Commissioner may adopt regulations establishing

> criteria for granting, denying, limiting, conditioning or modifying permits giving due regard for the impact of regulated activities and their use on the tidal, coastal or navigable waters of the state, adjoining coastal and tidal resources, tidal wetlands, navigation, recreation, erosion, sedimentation, water quality and circulation, fisheries, shellfisheries, wildlife, flooding and other natural disasters and water-dependent use opportunities as defined in section 22a-93.

Conn. Gen. Stat. § 22a-361(c). However, the Commissioner has never adopted such regulations, so it is at best unclear whether Section 22a-361 should be used as guidance in any decision-making process on a permit application. It is clear, however, that Section 22a-361 does not provide any basis for an argument that the CMA should trump the Act's proclamation that due and proper regard must be paid to private property interests. Conn. Gen. Stat. § 22a-359.

2. <u>The Legislative History of the Act is Contrary to OLISP's Position.</u>

The legislative history of the Act also makes clear that the Act did not abrogate any rights a littoral or riparian owner had to access the water. In describing the bill, Representative Dreyfous explained that "the bill also recognized that riparian property owners have certain qualified rights that must be recognized. . ." <u>See</u> H.R. Proc., 1963, p. 5098. In the Joint Committee Hearings, Commissioner Wise, the Commissioner of the Flood Control Commission, explained that a riparian owner has certain franchised rights:

> [The riparian landowner can] build a dock. He can build a marina. He can build a channel, or he can get to navigable water from his property. Those are franchised rights that he has, and they've been upheld by the courts of this state over a period of many years. And that's why we wanted to include in this bill the fact that the riparian owner has certain

franchised rights, but to exercise. . . [his rights] he will have to get a permit and things of that sort.

See Joint Standing Committee, Water Resources and Flood Control, 1963, p. 254-255. The legislation clearly was aimed at curtailing unpermitted "reckless building without regard for anybody else's rights and interests." Id. at p. 255. Commissioner Wise clearly viewed the riparian property owner's rights as important, explaining that the language of the statute "with [proper] regard for the rights and interests of all persons concerned" directed the Commission to consider these rights. See id. at 256.

Moreover, later revisions to the Act emphasized preferential treatment for existing structures. As part of the debate on the 1987 amendments to the Act, Representative Casey asked the Department's representative, Arthur Rocque, how the legislation affected existing structures. Mr. Rocque responded:

> Well, there isn't a lot that we can do. . . If the structure exists, then it's grandfathered, and there's not much we can do, and I would say if we were to regulate them on a repair or replacement, we would have to look at two things, we would have to look at how it is functioning now and how it would function under repair, and unfortunately with a seawall or a groin or jetty-type structure, the impact occurs when the structure goes in initially. If you remove it, and then don't replace it, you get the same types of impact back that you had normally when you put it in the first place. In other words, you interrupt the natural system one time, it stabilizes, if you remove it and don't replace it, then you may cause an additional problem in the other direction, so I would say that the ones that are there are already there, we've pretty much got to live with. Regretfully.

See Joint Standing Committee, Environment, 1987, p. 787.

Legislative history on the 1990 revisions to the Act adding the COP procedure is instructive. It compels the conclusion that the tiered system created by the COP mechanism was never meant to be construed to mean that activities which are not eligible for a COP are

also not eligible for a consideration under the full-blown permit process under § 22a-361. Senator Spellman, in describing the 1990 legislation explained the way it would streamline the process for eligible activities:

> Under this bill, simple maintenance of any dock or dredging under a permit could be done without the necessity of any certificate of permission, nor the necessity of a full blown hearing. . . And its also sets up a middle tier approach, which is called a certificate of permission. . . whereby the Commissioner could issue a permit without the requirement of a hearing and all of the attendant notice requirements required by the statute.

S. Proc., 1990 (April 18, 1990).

3. The Interpretation is Contrary to Settled Case Law Regarding the Act.

OLISP's Policy that new residential dredging should be prohibited is directly contrary to settled case law on this matter. In Thompson v. Water Resources Comm'n, 159 Conn. 82 (1970), the Connecticut Supreme Court held that the Water Resources Commission (the agency charged with granting permits under the Act prior to DEP) properly balanced environmental concerns and private property rights under both the Structures, Dredging and Fill Act and the Tidal Wetlands Act, where it granted a permit for both new dredging and filling to serve a proposed residential subdivision. The court acknowledged that "…from the point of view of conservation, considered as a single factor, it might be ideal that the land be kept in its natural state . . ." (id. at 88), but, in considering whether to grant a permit under the two laws, the Commission was required to consider private property rights, and had a duty to consider benefits to the applicant's property in its calculus. Id. at 88-89. The court specifically dismissed the argument that dredging should be prohibited for this purpose. Id. at 89.

Similarly, in Lovejoy v. Water Resources Comm'n, 165 Conn. 224 (1973), the Connecticut Supreme Court upheld the issuance of a permit under the Act for the extension of a residential dock. The court noted that the property owner enjoyed "the right of a riparian owner to wharf out to deep water," a right which the court held was "superior to the rights of the owner of an oyster bed franchise," the plaintiff challenging the issuance of the permit. Id. at 230. Likewise, in another case upholding a permit under the Act, the Connecticut Supreme Court in recognized the rights of littoral property owners, including "the right to dig channels and build wharves from his land to reach deep water, so long as he does not interfere with navigation." Bloom v. Water Resources Comm'n, 157 Conn. 528, 532, 536 (1969).

In Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. at 502, the court upheld the granting of a permit for a floating dock and other structures. The Supreme Court held that the Commission had properly considered the statutory factors (now Section 22a-359), and the evidence of possible environmental harm as raised under Section 22a-16 of the Connecticut General Statutes was not persuasive. Id.

In yet another case, the court upheld the decision of the Water Resources Commission, pursuant to § 25-7d of the General Statutes, approving an application for a permit to install a new 110-foot pier, a twenty-five-foot ramp, and a twenty-foot float into the waters of Long Island Sound for residential use. Sea Beach Assoc. v. Water Resources Comm'n, 164 Conn. 90, 91 (1972) (finding the plaintiffs had not sufficiently proved aggrievement).

Notably, at least one of the cases cited above allowed new dredging for residential docks. Thompson v. Water Resources Comm'n, 159 Conn. at 82. Furthermore, in several cases, courts acknowledged the littoral owner's right to wharf out or to dredge to gain access

to deep water. Lovejoy v. Water Resources Comm'n, 165 Conn. at 230; Bloom v. Water Resources Comm'n, 157 Conn. 528, 532, 536 (1969). See also Water Street Associates Ltd. Partnership, 230 Conn. at 769; DelBuono v. Brown Boat Works, 45 Conn. App. 524, 526 (1997); Shorehaven Golf Club, Inc. v. Water Resources Commission, 146 Conn. 619, 624 (1959); Lane v. Board of Harbor Comm'rs, 70 Conn. 685, 694 (1898).

Despite the Supreme Court's confirmation of the littoral owner's right to wharf out or dredge to reach deep water, OLISP in the instant Application is allowing neither.

C. The Coastal Management Act does not Does Not Support an Interpretation that Dredging for Residential Docks is Prohibited.

1. The Language of CMA Does Not Support the Interpretation.

OLISP has also taken the position that dredging to utilize an existing residential dock is not eligible for a permit under Section 22a-361, because policies set forth in the CMA, Conn. Gen. Stat. § 22a-90 et seq., prohibit it. (See Ex. J, M). However, the only policies in the CMA that address dredging do not limit the dredging proposed in the Application.

a) CMA Policies Relating to Dredging do Not Support the OLISP Interpretation.

The only pertinent mention of dredging in any detail in the CMA is found in Section (c)(1) of Conn. Gen. Stat. § 22a-92, which lays out policies established for state and federal agencies in carrying out their responsibilities under the CMA. These two policies are as follows:

> D) to reduce the need for future dredging by requiring that new or expanded navigation channels, basins and anchorages take advantage of existing or authorized water depths, circulation and siltation patterns and

> the best available technologies for reducing controllable sedimentation; and
>
> (E) to disallow new dredging in tidal wetlands except where no feasible alternative exists and where adverse impacts to coastal resources are minimal.

Conn. Gen. Stat. § 22a-92(c)(1) (emphasis added).

Subsection D does not preclude the proposed dredging, which adheres to authorized depths per the historical dredging permit. Furthermore, that section only requires "reducing the need" for dredging, not prohibiting it outright. At best, subsection D is a directive to use best available technology to reduce controllable sedimentation, which is what the proposed wave break design provides.

Subsection E is not applicable here, at all, because the proposed dredging does not include dredging in tidal wetlands. Notably, only Subsection E mentions "disallowing" dredging, and even in that instance, the prohibition must be tempered to allow tidal wetlands dredging where no feasible alternative exists and where adverse impacts to coastal resources are minimal.

The only other policy to reference dredging in any detail pertains to federal navigation channels and is not pertinent here. Conn. Gen. Stat. § 22a-92(c)(1)(C). A very general reference to dredging occurs in Conn. Gen. Stat. § 22a-92(b)(1)(a), regarding management of uses within the coastal boundary though existing permitting schemes, which will be discussed in the next section.

Importantly, neither of the only two specific CMA policies that would apply to non-federal dredging give any support to a prohibition on dredging to utilize an existing permitted residential dock. Moreover, the fact that the legislature specifically created a limited

prohibition on dredging in tidal wetlands, but not on other types of dredging, indicates that the legislature did not intend other kinds of dredging to be prohibited. Section 22a-92(c)(1)(E) shows that the legislature's understanding that it could impose prohibitory language. If the legislature had intended to generally prohibit dredging, it knew how to enact such limitations. See AvalonBay Cmtys., Inc. v. Zoning Comm'n, 280 Conn. 405, 417-418 (2006); Stitzer v. Rinaldi's Restaurant, 211 Conn. 116, 119 (1989) (legislature knows how to use limiting terms when it chooses to do so); Monaco v. Turbomotive, Inc., 68 Conn. App. 61, 67 (2002) (legislature knows how to draft legislation consistent with its intent). In light of the specific prohibition in Section 22a-92(c)(1)(E), the absence of such a prohibition for residential dredging compels the conclusion that no such prohibition was intended.

b) "Water Dependent Uses" under CMA

The only other CMA section that makes even a passing reference to dredging is Conn. Gen. Stat. § 22a-92(b)(1)(A), which states, with respect to development on land within Connecticut's coastal boundary[7], a policy "to manage uses in the coastal boundary . . . through existing state structures, dredging, wetlands and other state siting and regulatory authorities, giving highest priority and preference to water dependent uses and facilities in shorefront areas." Id. (emphasis added).

OLISP apparently relies on this section for its position that a permit is not available for the residential dredging, because OLISP believes residential land use is not a

[7] Defined by Conn. Gen. Stat. § 22a-94 (b) as the landward edge of the 100 year coastal flood zone, or a 1,000 foot setback from mean high water, or a 1,000 foot setback from the inland boundary of tidal wetlands, whichever is furthest inland.

"water-dependent use" under CMA. OLISP's June 1, 2007 letter stating that it would not consider the Application for a Structures, Dredging and Fill Act permit explains, "it is the policy of the Department to disallow new dredging for private recreational boating facilities. Again, the reasoning behind this is that dredging activities generally cause significant adverse impact to benthic resources and ecological communities with no benefit provided to public facilities or water-dependent uses." (Exhibit M at 1) (emphasis added).

This interpretation reflects a complete lack of understanding of Connecticut's statutory framework for land use decision-making. A critical point overlooked by OLISP is that the policy encouraging preferred uses of land within the coastal boundary is an encouragement to all levels of government to use regulatory processes to prefer water dependent uses in siting or locating such uses. For shorefront lands owned by private parties, however, the regulatory scheme determining land use is the same as that for inland properties. It is prescribed by Title 8 of the General Statutes and is implemented by municipal zoning authorities. See Conn. Gen. Stat. § 8-2. The Coastal Management Act delegates the administration of the state-wide policy of planned coastal development to local agencies charged with responsibility for zoning and planning decisions. See General Statutes §§ 22a-105, 22a-106; Vartuli v. Sotire, 192 Conn. 353, 358 (1984).

Where a Town zones property for residential use, neither the CMA nor the Commissioner acting on a permit for a structure under the Act, can trump such a land use determination. Likewise, nothing in CMA authorizes the Commissioner to withhold permits authorized by statutes such as Conn. Gen. Stat. § 22a-361, based on her preference that a Town zoning commission should convert property zoned residential to a zoning classification

which would restrict use of the land to a port facility, fish processing plant, or similar "preferred water-dependent use."

OLISP compounds this misunderstanding by trying to deprive private shorefront residential use and its accessory water access of <u>any</u> preference under the CMA. However, "water-dependent uses" as defined under CMA, can include residential docks.

Water-dependent use under the CMA means:

> [T]hose uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: Marinas, <u>recreational and commercial fishing and boating facilities</u>, finfish and shellfish processing plants, <u>waterfront dock</u> and port facilities, shipyards and boat building facilities, <u>water-based recreational uses</u>, navigation aides, basins and channels, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site and uses which provide general public access to marine or tidal waters.

Conn. Gen. Stat. § 22a-93(16) (emphasis added). Notably, the definition of "water-dependent use" includes recreational boating facilities and waterfront docks, with no limitation that such facilities be <u>public</u> to qualify as such.

After concluding that shorefront residential property and accessory private water access is not a preferred "water-dependent use," OLISP then makes the leap that because private recreational access to coastal water is not specifically listed as a preferred water-dependent use, such use is precluded from obtaining a structures, dredging, and fill permit under Section 22a-361 for new dredging.

As discussed above, OLISP references the CMA as justification for the Policy of prohibiting residential dredging without any clear articulation of how CMA prohibits this activity, other than the conclusory "water-dependent use" theory. OLISP's conclusion is not

supported by the CMA, which explicitly requires balancing of environmental factors and development.

The Commissioner of the DEP is required to implement the CMA. Conn. Gen. Stat. § 22a-90 et seq. Among other requirements, the Commissioner must ensure that all regulatory programs under DEP's jurisdiction are consistent with the goals and policies of the CMA. Conn. Gen. Stat. § 22a-98. Accordingly, any person seeking a license, permit or approval of an activity within the coastal boundary must demonstrate that the activity is consistent with the policies of the CMA and that the activity incorporates as reasonable measures mitigating any adverse impacts on coastal resources and future water-dependent development activities. Conn. Gen. Stat. § 22a-98.

The CMA consists of numerous policies that, on the one hand, contemplate and support sound coastal development and, on the other hand, call for the preservation of Connecticut's coastal resources. Recognizing the inherent conflict between development and preservation, the legislature set forth a basic balancing test that is to be applied when decisions are made regarding coastal land and water development, preservation, or use. The balancing test requires a decision-maker to consider (1) the capability of the specific land and water resource at issue to support (or not support) the proposed development and (2) whether the proposed development (or conversely the proposed preservation) significantly disrupts the natural environment (or conversely disrupts sound economic development). See Conn. Gen. Stat. § 22a-92(a)(1). The CMA sets forth nine additional general policies, followed by detailed policies established for federal, state and municipal agencies to follow concerning (1) development, facilities and uses in the coastal boundary, and (2) coastal resources within

the coastal boundary. See Conn. Gen. Stat. § 22a-92(a)-(b). These policies are quite detailed, but make no mention of prohibiting dredging for residential uses. Many of the policies involve siting new uses in coastal areas. Notably, nothing in the policies supports the termination of existing coastal residential uses or discrimination against those uses.

2. The Legislative History of CMA Does Not Support the Interpretation.

Nor does the legislative history of CMA support OLISP's position. It is clear from the legislative history that the preference towards water-dependent does not prohibit other uses. Representative Janet Polinsky raised this very concern before the Joint Standing Environment Committee in 1979, asking, "[C]ould anybody prevent something from happening just because it wasn't water dependent or water enhanced? That concerns me and I think it should be looked at closely." See Joint Standing Committee, Environment, Pt. 5, 1979, p. 1515. In response, Representative Julie Belaga described the objective of the preference toward water-dependent uses as follows:

> Water dependent users [get] a priority. *That's all. It simply says that what we're going to look for if we have an option*, are those things that are dependent upon the water for their viability. *It doesn't preclude other things from going there, but that's the priority.*

22 H.R. Proc., Pt. 8, 1979 Sess., p. 10,289 (emphasis added).

In the instant matter, there is no other option for the Commissioner on the underlying land use of the adjoining upland. It is, and has been for at least 70 years, already committed to residential use.[8]

Representative Belaga's explanation makes it clear that the CMA does not prohibit other uses along the coastline. In sum, while the Commissioner may prefer that coastal resources are exclusively devoted to water-dependent uses, the legislature clearly did not make that a requirement.

3. Courts Have Interpreted CMA Contrary to OLISP's Interpretation.

Connecticut courts have recently held that the Coastal Management Act does not take priority over vested property rights.

> More fundamentally, we disagree with the trial court's assumption that, in enacting the Coastal Management Act, the legislature intended the preservation and enhancement of coastal resources to take priority over vested property rights. On the contrary, General Statutes § 22a-92 (a) (6) describes the act's goals and policies as the development of sound resource

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[8] It is worth noting that in the Environment Committee hearing on changes to the Structure, Dredging and Fill Act in 1987, the role of the Coastal Management Act ("CMA") was also discussed. See Joint Standing Committee, Environment, 1987, p. 780. In response to a question regarding whether extending jurisdiction to the high tide line was necessary given DEP's "authority" pursuant to the CMA, Representative Casey explained:

> But there is an important difference [between extending DEP's jurisdiction to the high tide mark and DEP's authority under the CMA]. Coastal Area Management is more of a planning tool and it is the interpretation of final taxable (sic) approval of the local Planning and Zoning Board which has the ultimate decision on upper bounds.

Id. at p. 821. In other words, under the CMA, the Department's role with respect to coastal land use was the ability to comment, but, ultimately, it was a local decision as to how the upland property would be zoned and developed.

> conservation practices that are "consistent with . . . constitutionally protected rights of private property owners . . . ."

Dean v. Zoning Comm'n, 96 Conn. App. 561, 569 (2006). In Dean, the Connecticut Appellate Court held that the CMA did not authorize a court to subordinate the interests created by a valid easement to the interests of an illegal use of the servient estate. The court held the local zoning commission improperly relied on CMA to deny a property owner's petition to expand an existing waterfront use by using a recorded parking easement. Id.

Likewise, in Leabo v. Leninski, 182 Conn. 611, 616-18 (1981), the Connecticut Supreme Court held that, although the CMA was intended to encourage public access to the Long Island Sound, this public policy did not justify material interference with the rights of private property owners to use their own beach easement rights. Accord Dean v. Zoning Comm'n, 96 Conn. App. at 570. Similarly, in Smith v. Zoning Bd. of Appeals, 1991 Conn. Super. LEXIS 771 (Apr. 10, 1991), a superior court held that the CMA did not support a zoning commission denying a subdivision application due to relatively minor impacts on natural vistas, in light of the Act's policy of promoting both the natural environment and economic growth.

D. DEP's Issuance of a Water Quality Certification for the U.S. Army Corps Programmatic General Permit is Contrary to OLISP's Contention that New Dredging Has a De Facto Negative Impact.

On June 1, 2006, the United States Army Corps of Engineers reissued the Connecticut Programmatic General Permit ("PGP") for which the DEP issued a conditional Water Quality Certification ("WQC") under Section 401 of the Clean Water Act for Category 1 and

Category 2 activities in the coastal area provided that applicants obtain the appropriate OLSIP permit. See U.S. Army Corp PGP, issued June 1, 2006.

Section 401 of the Clean Water Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U.S.C. § 1341(a). Clean Water Act Section 401(d) further provides that "any certification ... shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d); PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 707-708 (1994).

The PGP was issued "to expedite review of minimal impact projects in coastal and inland waters and wetlands within the State of Connecticut." PGP at 1. These "minimal impact" activities are divided into two categories: Category 1, non reporting and Category 2, requiring screening and reporting. Category 1 activities under the PGP are authorized by the PGP and associated WQC without screening or notification to the Corps of Engineers. Id. Category 2 activities require submittal of an application to the Corps, which is then screened and processed jointly by the Corps, DEP, EPA, National Marine Fisheries Service and U.S. Fish and Wildlife. Category 2 activities must receive written authorization to proceed. Id.

The fact that DEP granted these conditional WQCs for "minimal impact" activities covered by the PGP undermines any argument that OLISP might make that residential dredging categorically harms coastal resources. Many of the listed minimal impact activities are similar in character and impact to those implicated in residential dredging. For example, the PGP Category 1 coastal activities include: 1) repair and/or maintenance of existing currently serviceable grandfathered or authorized fills and structures with no expansion or change in use; and 2) maintenance dredging with proper best management practices. PGP, Appendix B at 2. Notably, "maintenance dredging" is not defined in the PGP, and includes no requirements that it be continuously maintained or serviceable.

Category 2 coastal activities include: 1) up to one acre of waterway or wetlands fill or excavation; 2) repair of any non-serviceable structures or fill; 3) repair or maintenance of serviceable structures of fills with expansion of up to one acre or change in use; and 4) "maintenance, new or improvement dredging with disposal at upland, open water, confined aquatic disposal cells . . ." PGP, Appendix B, at 5 (emphasis added).

DEP has granted blanket WQCs for the above activities, which would clearly encompass the dredging activities proposed by the Petitioner, as conditionally compliant with State Water Quality Standards and relevant provision of the Clean Water Act. In so doing, DEP has agreed to the characterization of these activities, including dredging of up to an acre, as "minimal impact activities." The WQC granted for the PGP is an acknowledgement that these minimal impact activities, if they received proper permits from OLSIP, would not represent a threat to water quality and would comply with State Water Quality Standards. This is quite contrary to OLISP's position that "new" residential dredging to service historical

permitted structures categorically must be denied under the applicable statutory schemes due to adverse environmental impacts. See June 1, 2007 OLISP Letter at Exhibit M.

E. The OLISP Policy is Unenforceable Because It Constitutes a "Regulation" Under the UAPA But Was Not Duly Promulgated as Required by That Act.

The UAPA defines the term "regulation" as "each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy." CGS § 4-166(13).

Two of OLISP's letters to the Petitioner document the Policy. In its March 23, 2005 letter, OLSIP stated that "it is the policy of this Office to disallow dredging for private recreational boating use and as such, it is unlikely that you would be successful in securing a Structures, Dredging and Fill permit for such work." (Ex. J). Again, in its June 1, 2007 letter, OLISP referenced the Policy of prohibiting new dredging for residential docks. (Exhibit M). "As we explained during our January 17, 2007 and May 1, 2007 meetings and in a March 23, 2005 letter to Triton (copy enclosed), it is the policy of the Department to disallow new dredging for private recreational boating facilities." Id. The Policy, according to OLISP's letters, applies generally to private recreational boating facilities, and is being used to interpret the eligibility of those affected uses for a permit. The Policy goes far beyond the language of the Structures, Dredging and Fill Act or the CMA, so it must be viewed as a substantive interpretation that prescribes and implements new law or policy.

The Policy falls squarely within the UAPA definition of a regulation. Under the UAPA: "The criteria that determines whether administrative action is a regulation are neither

linguistic nor formalistic. . . . The test is, rather, whether a [policy] has a substantial impact on the rights of parties who may appear before the agency in the future." Sweetman v. State Elections Enforcement Comm'n, 249 Conn. 296, 317 (1999) (internal quotation marks omitted).

The Connecticut Supreme Court has long and consistently held that an agency statement meeting the UAPA definition of a regulation may not be applied or enforced unless it has been duly promulgated as required by law. The seminal case on this point is Salmon Brook Convalescent Home, Inc. v. Commission on Hospitals and Health Care, 177 Conn. 356 (1979). In that case the Commission denied Salmon Brook's application for certain rate increases based on internal "guidelines" that described the factors it would evaluate in reviewing such applications. Salmon Brook appealed and argued that the guidelines were in fact a substantive rule impacting its rights and obligations that should have been promulgated as a regulation under the UAPA. The Supreme Court unanimously agreed, holding that "[w]here a rule has a substantial impact on the rights and obligations of parties who may appear before the agency in the future, it is a substantive rule, i.e., a *'regulation' requiring compliance with the UAPA*." Id. at 362 (emphasis added). The Court rejected the Commission's argument that its guidelines were not being used as formal regulations, holding that the test is not what the agency calls the statement but how it uses it in fact. Id.

The Supreme Court reiterated this approach in Walker v. Commissioner, Dept. of Income Maintenance, 187 Conn. 458 (1982). Walker, a recipient of benefits under a public assistance program, sought reimbursement for moving expenses. The Department denied the request on the ground that she had not obtained approval of the expenses prior to the move as

required by an "interdepartmental bulletin, not generally available to the public." Id. at 460. The Court quickly rejected the Department's initial argument that the prior approval requirement was "implicitly" a part of its promulgated Moving Expense Regulations: "[T]here is nothing in the regulation which even suggests – let alone provides notice – that this [reimbursement approval] determination must be made prior to the move." Id. at 461. Then the Department argued that its prior approval policy "is only a detail concerning the procedure of administering the regulation and does not involve any substantive rights which would raise it to the level of a regulation." Id. Again, the Court rejected that argument out of hand:

> The prior approval policy is a statement of general applicability because it applies to all AFDC recipients seeking help with their moving expenses. The policy also affects the substantial rights of potential recipients in ways in which purely procedural requirements, such as requiring particular information on specific forms, do not. . . . This policy, therefore, concerns more than the department's internal management; it affects substantial rights of potential recipients.

Id. at 463 (citations omitted). The court reaffirmed its holdings in the Sweetman decision. 249 Conn. 296.

The Supreme Court's jurisprudence on the nature of agency statements of general applicability clearly applies here. The Policy undoubtedly affects the substantive rights of property owners. It dictates new criteria, not found in the Structures, Dredging and Fill Act, upon which DEP is categorically denying permits. Tellingly, DEP is specifically authorized by the Act to promulgate regulations stating criteria for considering permits, but has never formally done so. Instead, it appears to be relying on internal policies which OLISP adopted without public comment or participation.

The Policy was not promulgated in accordance with UAPA provisions governing adoption of administrative regulations, which require public notice and comment, among other requirements. Conn. Gen. Stat. § 4-166 - 4-189. Unless the promulgation of a regulation complies with the provisions of the UAPA, it is unenforceable. Conn. Gen. Stat. §§ 4-167; 4-169. OLISP's Policy prohibiting residential dredging affects substantial rights of parties that appear before it, is generally applicable, and does not involve purely procedural requirements. Whether the policy is reasonable, or whether there is a rational basis for it, is irrelevant; the policy is a regulation as defined in the UAPA that was not duly promulgated. It is therefore unenforceable.

F. OLISP's Interpretation of Section 22a-363b(a)(1) is Contrary to the Act.

OLISP maintains that the proposed dredging constitutes new dredging and therefore does not fall within the "substantial maintenance" provisions of Section 22a-363b(a)(1), which it believes requires the dredging to be "continuously maintained and serviceable." In fact, the Application should be eligible for a COP, as "substantial maintenance of a structure previously permitted under Section 22a-361." Conn. Gen. Stat. § 22a-363b(a)(1). The definition of "substantial maintenance" includes maintenance dredging, with no requirement that such dredging be continuously maintained or serviceable. Conn. Gen. Stat. § 22a-363a.

As described above, a COP may be issued for dredging activities in connection with several categories of work, among them:

> (1) Substantial maintenance or repair of existing structures, fill, obstructions or encroachments authorized pursuant to section 22a-33 or section 22a-361;

> (2) substantial maintenance of any structures, fill, obstructions or encroachments in place prior to June 24, 1939, and continuously maintained and serviceable since such time;
> (3) maintenance dredging of areas which have been dredged and continuously maintained and serviceable as authorized pursuant to section 22a-33 or section 22a-361.

Conn. Gen. Stat. § 22a-363b(a)(1) – (3). Notably, although subsections (2) and (3) require that structures, dredging or fill be "continuously maintained or serviceable" to be eligible for a COP, subsection (1) does not include such a requirement. The term "substantial maintenance", used in subsection (1), itself includes "maintenance dredging" as part of its definition. Conn. Gen. Stat. § 22a-363a. As set forth in the statute, "substantial maintenance" means "rebuilding, reconstructing, or reestablishing to a preexisting condition and dimension any structure, fill, obstruction or encroachment, including maintenance dredging." Id. (emphasis added). Nowhere in the Act does it specify that maintenance dredging, which is not a defined term, must always be continuously maintained. In some circumstances the term is modified with that requirement (as in subsections (2) and (3)), and in others it is not (as in the definition of substantial maintenance, as incorporated in subsection (1)). Therefore, where, as here, a structure has received a permit, and the applicant proposes to rebuild it to its pre-existing condition, including any maintenance dredging associated with it, it is eligible for a COP under Conn. Gen. Stat. § 22a-363b(a)(1) without the requirement that it has been continuously maintained and serviceable.

It is consistent with the purposes of the Act to treat previously permitted structures in Section 22a-363b(a)(1) differently than pre-existing, but not permitted, structures and dredging in Sections 22a-363b(a)(2) and (3). While those pre-existing but not permitted uses

must show that they have been continuously maintained and serviceable, there is no such requirement for existing permitted structures, under Section 22a-363b(a)(1).

The Petitioner's dock is a previously permitted structure with a permit granted for its construction under Section 22a-361 in 1947. See Exhibit C. The work which the Petitioner has sought to perform on the dock, including the dredging, falls within the definition of "substantial maintenance" and should therefore be eligible for a COP.

Request for Hearing

The Petitioners request that the Commissioner hold a hearing on this Petition. RCSA §§ 22a-3a-4(c)(4). If OLISP had followed the proper procedures under the UAPA for promulgating a regulation, the Petitioners would have had the right to a hearing under Conn. Gen. Stat. § 4-168(a)(7). To the extent that the Commissioner would be exercising rulemaking authority in issuing a declaratory ruling, a hearing is appropriate. Conn. Gen. Stat. § 4-168.

Address of Petitioner

Pursuant to RCSA § 22a-3a-4(2), the Petitioner's address and phone number are as follows: Mr. Stuart Bell, 340 Willow Street, Southport, CT 06890, telephone (203) 845-8718.

CONCLUSION

For all of the reasons set forth herein, Petitioner respectfully requests a Ruling declaring that:

(1) The Structures, Dredging and Fill Act does not prohibit new dredging for previously permitted residential docks.

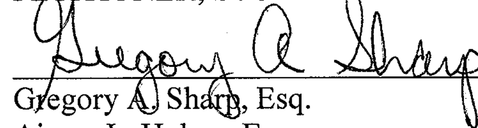
(2) The OLISP Policy of disallowing new dredging for residential docks constitutes an agency statement of general applicability that implements, interprets, or prescribes law or policy. Therefore, OLISP may not implement or enforce the Policy without first promulgating it as a regulation under the UAPA, Conn. Gen. Stat. §§ 4-166 – 4-189.

(3) That Section 22a-363b(a)(1) does not require that a proposed maintenance dredging footprint, when associated with a proposal to perform substantial repairs to a permitted structure, to have been continuously maintained and serviceable to be eligible for a COP.

Dated: Hartford, CT
November 1, 2007

Respectfully submitted,

PETITIONER, STUART BELL



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