



IN THE MATTER OF :  
RANALD K. AND ROBIN L. NICHOLAS :  
PETITION FOR DECLARATORY RULING : APRIL 24, 2023

**DECISION NOT TO ISSUE DECLARATORY RULING**

Pursuant to Conn. Gen. Stat. § 4-176(e) and Regs., Conn. State Agencies § 22a-3a-4(c)(3), I am issuing this decision in response to a Petition for Declaratory Ruling submitted by Ranald K. and Robin L. Nicholas (“Petitioners”).

A. Background. SR Litchfield, LLC (“Applicant”) is proposing to construct a 19.8 MW photovoltaic solar installation on a 70-acre portion of a 212-acre site in Litchfield and Torrington (“Project”). In connection with the Project, on or about June 30, 2022, the Applicant submitted a registration with the Department of Energy and Environmental Protection (“Department”) seeking coverage under the General Permit for the Discharge of Stormwater and Dewatering Wastewater from Construction Activities (“General Permit”).

B. The Petition. On February 21, 2023 the Petitioners Ranald K. and Robin L. Nicholas submitted a Petition for Declaratory Ruling (“Petition”) to the Commissioner of Energy and Environmental Protection. The Petition seeks a declaratory ruling that I exercise my authority under Conn. Gen. Stat. § 22a-430b(c) and Regs., Conn. State Agencies § 22a-430-3(b)(6)(E) and require that the Applicant obtain an individual discharge permit under Conn. Gen. Stat. § 22a-430 for the Project. In addition, pursuant to Conn. Gen. Stat. § 22a-19, the Petitioners have requested party status in the declaratory ruling proceedings and the Applicant’s registration seeking coverage under the General Permit. The Petitioners have requested a hearing.

On March 3, 2023 the Department provided notice of the Petition and of the opportunity to file comments, pursuant to Regs., Conn. State Agencies § 22a-3a-4.<sup>1</sup> The Department has received 11 comments, including, on April 5, 2023, comments and objections from SR Litchfield, LLC.<sup>2</sup>

C. The Decision Not to Issue the Requested Rulings. Conn. Gen. Stat. § 4-176(e) requires that “[w]ithin sixty days after receipt of a petition for a declaratory ruling” an agency must take one of five specified actions.<sup>3</sup> Among those actions, and the option I have selected with respect to the Petition, is to decide not to issue a declaratory ruling and state the reasons for my action.

General Statutes § 4-176(a) provides that “any person may petition an agency . . . for a declaratory ruling as to . . . *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.” (Emphasis added.) The Petition does not seek a ruling as to the applicability of a statute or regulation to the facts specified therein. Rather, the petition requests that I exercise the discretion provided to me by statute or regulation in a particular way, based on certain assertions of fact. Such a request is not cognizable pursuant to Conn. Gen. Stat. § 4-176, and I therefore decline to issue a declaratory ruling in response to the Petition.

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<sup>1</sup> Notice was mailed to each person, business, or governmental entity or official to whom a copy of the Petition was sent by the Petitioner. Eighty persons, businesses and governmental entities and officials were sent notice.

<sup>2</sup> SR Litchfield, LLC also indicated it may, at some later time, seek intervening party or intervenor status.

<sup>3</sup> Conn. Gen. Stat. § 4-176(e) provides that:

- (e) 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.

The Department’s Rules of Practice also require compliance with § 4-176(e). See, Regs. Conn. State Agencies § 22a-3a-4(c)(3).

The Petitioners “respectfully request that [I] *should* require the Applicant . . . to apply for an individual permit pursuant to Conn. Gen. Stat. § 22a-430b(c) and [Regs., Conn. State Agencies] § 22a-430-3(6)(E).” (Petition at pp. 1-2)(Emphasis added.) And, indeed, I *may* require the Applicant to seek an individual permit. But neither statute nor regulation require that I direct the Applicant to seek an individual permit. Instead, each provides me the discretion to require an individual permit should I determine that an individual permit is necessary. To require an individual permit is therefore an exercise of discretion rather than an application of the law.<sup>4</sup>

Section 22a-430b(c) provides, in relevant part, that “[T]he commissioner *may* require a person or municipality initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to section 22a-430 if the commissioner determines that an individual permit would better protect the waters of the state from pollution.” (Emphasis added.) This language is discretionary.<sup>5</sup> While the next sentence contains an illustrative list of scenarios in which an individual permit may be useful, that sentence does not direct

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<sup>4</sup> I note that the last sentence of Conn. Gen. Stat. § 22a-430b(c) provides that “[a]ny interested person or municipality may petition the commissioner to take action under this subsection.” It does not appear, however, that this sentence was intended as an invitation to file petitions for declaratory ruling. Nor does this sentence impose upon me any criteria for determining whether an individual permit is required; that decision remains in my discretion. Indeed, this provision is likely borrowed from an analogous provision in federal regulations implementing the Clean Water Act. Commentary on that federal provision has addressed the very issue being considered here. “Finally, under the regulations ‘interested persons’ are also authorized to petition the permit writer to require that a specific source be subject to an individual rather than a general NPDES permit. *There is no mandatory language associated with this right of petition; the permit writer has discretion to grant or deny the petition.*” (Emphasis added.) Jeffrey M. Gaba, Generally Illegal: NPDES General Permits Under the Clean Water Act, 31 Harv. Envtl. L. Rev. 409, 428 (2007). There is no reason to reach a different conclusion in this context. I further note that this approach is also consistent with the language of § 22a-430-3(b)(6)(E), which describes a “request” to require an individual permit – rather than a “petition” – and similarly does not specify any mandatory criteria or process to be used to evaluate such a request.

<sup>5</sup> The Department has also previously characterized the determination to require an individual permit as discretionary. *Decision Not To Issue A Declaratory Ruling*, In the matter of The Town of New Milford Petition for Declaratory Ruling, March 14, 2019, p. 3, available online at: [https://portal.ct.gov/-/media/DEEP/declaratory\\_rulings\\_other\\_decisions/2019March14CandlewoodSolarRulingpdf.pdf](https://portal.ct.gov/-/media/DEEP/declaratory_rulings_other_decisions/2019March14CandlewoodSolarRulingpdf.pdf) (“I am also, in this declaratory ruling, declining to exercise my authority to require . . . an individual discharge permit . . .”).

me to require an individual permit based on any listed scenario. Even assuming I agree with each fact specified by the petition, the decision to require an individual permit still would not be required by General Statutes § 22a-430b(c) or the regulations that implement it.<sup>6</sup>

Absent some applicable statutory or regulatory criteria to apply to the specific facts presented, I decline to issue declaratory ruling in this matter. Having so concluded, I also want to make unmistakably clear that by declining to issue the requested rulings in response to the Petition, I have not foreclosed, and do not intend to foreclose, the possibility that I may indeed exercise my discretion under Conn. Gen. Stat. § 22a-430b(c) and require an individual permit for the Project. I have decided at this time, however, not to exercise this authority in this context.

D. Requests for Party Status and a Hearing. Given my decision not to issue the ruling requested in the Petition, there is no longer any proceeding into which the Petitioners can intervene. As such, I am denying the Petitioners' request for party or intervenor status. As there are no issues of fact to be decided, a hearing is not necessary and no hearing will be held.

Petitioners have also requested intervening party or intervenor status in the General Permit registration that underlies this matter. I note that typically the only proceeding associated with any general permit is the issuance of such permit; registration under a general permit does not create a proceeding into which intervention is possible.<sup>7</sup> Registration under the General Permit in question,

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<sup>6</sup> The language of the parallel provision of the Regulations of Connecticut State Agencies similarly contains no mandatory criteria to be evaluated and is instead discretionary, beginning with the phrase "[t]he commissioner may . . ." Regs., Conn. State Agencies § 22a-430-3(b)(6)(E).

<sup>7</sup> The Department's Rules of Practice do not identify registration pursuant to a general permit as initiating a proceeding. Regs., Conn. State Agencies § 22a-3a-2(c)(1) ("A proceeding commences when (A) an application or petition [for declaratory ruling] is received by the Department, (B) the Commissioner issues notice under subdivision 22a-3a-4(a)(5) of these Rules of Practice that he has on his own initiative initiated a declaratory ruling proceeding, (C) the Commissioner issues a notice under section 4-168 (a) of the General Statutes concerning a regulation-making which he has initiated on his own initiative, (D) the Commissioner issues an order, or (E) a proceeding commences under law.")

however, does initiate a series of process steps – including a limited opportunity for public participation – which might create the impression that there exists a proceeding into which intervention is possible. While I question whether registration pursuant to this General Permit is a proceeding into which one may intervene, assuming, *arguendo*, that a proceeding has commenced I hereby grant the Petitioners intervening party status in that proceeding. I note, in any case, that intervention does not transform the nature of a proceeding, nor does it create a right to participate, request a hearing, or appeal where such rights do not otherwise exist. Instead, an intervenor takes a proceeding as it finds it. See, e.g. *Hunter Ridge, LLC v. Plan. & Zoning Comm'n of Town of Newtown*, 318 Conn. 431, 436 (2015)(“an intervenor under § 22a–19 must take the proceeding as he finds it at the time of his intervention. The act does not permit the intervenor to expand the remedies allowed in the underlying proceeding[.]” To the extent that registration under the General Permit is a proceeding, such a proceeding is limited; nothing herein expands or modifies that proceeding.

E. Conclusion. For the reasons set out herein, and pursuant to Conn. Gen. Stat. § 4-176(e), I hereby decline to issue a declaratory ruling in response to the above captioned petition.

/s/ Tracy Babbidge, Deputy Commissioner

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Tracy Babbidge, Deputy Commissioner of Environmental Quality  
Department of Energy and Environmental Protection

## SERVICE LIST

Pursuant to General Statutes §§ 4-166(12) and 4-176(e) and Regs. Conn. State Agencies § 22a-3a-3(c)(3), copies of this ruling have been personally delivered by electronic mail and send certified mail, return receipt requested, on April 24, 2023 to the Petitioners and to each commenter whose electronic mail and mailing address were provided as indicated below.

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