

In Re Department of Transportation
Stratford Salt Shed Construction
Project No. 138-247

State of Connecticut

**Department of Energy and
Environmental Protection**

Petition No. _____

June 9, 2021

**VERIFIED PETITION FOR DECLARATORY RULINGS
on Department of Transportation Project 138-247**

This is a petition for declaratory rulings from the Connecticut Department of Energy and Environmental Protection (DEEP). Petitioner Dorothy A Smulley (petitioner), alleges the Department of Transportation (DOT) and town of Stratford (Stratford town), Connecticut, violated the Environmental Policy Act, General Statute § 22a-1 *et seq.* This petition requests the following declaratory rulings.

1. An Order directing the DOT in conjunction with Stratford town to perform an unbiased Environmental Impact Study (EIS);
2. An Order directing the DOT in conjunction with Stratford town to conduct a public hearing on the EIS findings;
3. An Order directing the DOT to cease all further activities on the maintenance property until a decision is reached based upon the EIS and public hearing ;
4. An Order directing the DOT and Stratford town to properly identify Oronoque Shores Condominium Associations Nos. 1, 2, 3 as situate in tidal wetlands governed by General Statutes § 22a-28 thru 22a-35a in which petitioner's property interest rests; and
5. An Order for such other and further relief as may be required.

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EXHIBITS
(filed separately)

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Introduction

The DOT and Stratford town violated the Environmental Policy Act, General Statute § 22a-1 *et seq* when Stratford falsely determined wetlands did not exist in order to prevent public notice of DOT planned critical activity in a tidal wetland.

Petitioner further alleges the DOT violated § 22a-1 *et seq* when the DOT designed, graded and constructed a land extension waterward into tidal wetlands using undefined fill on, at, near or abutting the critical Housatonic River tidal wetlands. The wetlands in question are influenced by tidal currents and directly affect a tidal ravine which traverses petitioner's backyard and the backyard of others. DOT did so without first evaluating the environmental impact of, among other things, permanently altering the tidal wetlands thereby placing petitioner and a significant number of other homeowners at a heightened risk of tidal flooding when such risks were determined minimal prior thereto.

Statement of Facts

1. Plaintiff lives in a forty-unit townhouse condominium association, Oronoque Shores Condominium Association (Oronoque) No. 1, situated on the banks of the Housatonic River tidal wetland just south of Sikorsky Birdge in Stratford (Affd ¶2; E1-2) ¹.

2. Situated in the same tidal wetland area, and immediately adjacent to Oronoque No.1, are Oronoque Shores Condominium Association No. 2 and Oronoque

¹ Affidavit and paragraph number will be cited (Affd___).
Exhibits will be cited (E___).

Shores Condominium Association No. 3, each of which comprise ten townhouses. All three associations total 60 homeowners (Affd ¶¶2) (E1).

3. Plaintiff resides at 408 Bar Harbour Road, plaintiff's principal residence since 1984 (Affd ¶¶3).

4. Plaintiff's backyard terminates where a twenty-foot-plus deep tidal ravine lies perpendicular (E2). The ravine begins from the mouth of the Housatonic River tidal wetlands and traverses landward for approximately a quarter-mile to the approximate end of the 400 row of Oronoque No.1 (Affd ¶¶4; E1). Oronoque No.3 is situated directly upon the wetlands and closer to the tidal wetland river bank from which the ravine fills (E1).

5. This tidal ravine will fill with water overflow from the Housatonic during high tides and storms although not necessarily every day or with every storm (Affd ¶¶5).

6. Since 1984, plaintiff has witnessed the ravine fill to the top edge of her backyard on a number of occasions. Most significant was Hurricane Sandy when the ravine's capacity ebbed and flowed in such a way Oronoque structures did not incur building damage although significant damage occurred to the embankments throughout the complex. Other tidal reactions occurred since Sandy and prior thereto (Affd ¶¶6-8).

7. DOT has a maintenance area situated on or near the banks of the Housatonic River tidal wetlands in question. The DOT actively used this maintenance area during the period of time when the Sikorsky Bridge was upgraded from metal construction to a steel and concrete construction (Affd ¶¶9-10; E3-4).

8. Ryders Lane begins from Route 110 (also known as River Road and/or Main Street), runs parallel with the curve of the ravine and terminates where the DOT maintenance area begins. A DOT fence erected during the Sikorsky Bridge upgrade separates Ryders Lane from the north edge of the tidal ravine. This fence terminates where the DOT maintenance area begins (Affd ¶¶12; E1, 25).

9. Since completion of the Sikorsky Bridge upgrade, the DOT activity is minimal and limited with most activity occurring during winter months for snow removal purposes (Affd ¶¶13).

10. Several weeks prior to May 27, 2021, plaintiff noticed heightened activity on Ryders Lane by DOT dump trucks which culminated in a substantial portion of the tidal wetlands filled in with undefined and undeclared fill (Affd ¶¶14; E3-4, 25).

11. This DOT land extension waterward into the wetlands, is on, at, near or abuts the mouth of the ravine and permanently alters the tidal ebb and flow of the ravine which significantly alters the defined flood plain discussed further in this brief. The DOT's land extension altered and reduced the ravine's natural overflow capability and those effects on plaintiff's home and other building structures within Oronoque. Prior to the DOT land extension and according to the Federal Emergency Management Agency (FEMA), plaintiff's risk of potential flood damage was defined as minimal and manageable as established by the natural evolution of the wetland topography. The risks created by the DOT's land extension permanently inflicts a higher probability of flood risks which, but for DOT's intentional acts, such higher probability would not exist (Affd ¶¶15-19; E5-6).

12. On or about May 26, 2021, plaintiff email the Connecticut Audubon Society about her concerns not only for the heightened risk of flood but also for the seasonal habitat of migratory herons, plovers and other bird life which during the spring had shown decline from previous years. Plaintiff's email was forwarded to David J. Kozak of DEEP who forwarded same onto an automated DEEP general enforcement address (E11-12).

13. Plaintiff's email traveled around a bit; to Stratford's town engineer, John Casey, Stratford's conservationist, Kelly Kerrigan, then onto the DOT project engineer, Amber Berry (E13-15). An email from Mr. Casey of May 29, 2021, noted Ms Kerrigan "walked the site last year and there are no inland wetlands" (E14, 27) ². The emails indicate a great deal of confusion as to what exactly the DOT was doing and the location of the DOT site. Upon searching the DOT website for some form of project identification, plaintiff discovered a press release dated February 4, 2019, where the DOT concluded, "At this time, it is not anticipated that a formal public hearing will be necessary" regarding Project 138-247 (Affd ¶¶20-22; E10).

14. On June 1, 2021, Ms. Berry of the DOT attempted to coordinate a field meeting with petitioner and others (E20). But for reasons unknown, no such field meeting took place.

15. On June 2, 2021, plaintiff received an email from DOT Travis Woodward (E21-25) where he asserts, "The construction project... holds a Permit under CTDEEP's General Permit for Discharge of Stormwater and Dewatering Wastewaters from

² In a most recent email dated June 8, 2021, Ms. Kerrigan reiterated no inland waterways (E__) in contradiction with General Statutes § 22a-28 thru 22a-35a.

Construction Activities (Stormwater Permit) and a Flood Management certification to ensure any potential flooding hazards are identified and mitigated.” Mr. Woodward further states, “no impacts or recontouring of the existing ravine situated between the Housatonic River and the Maintenance Facility.” However, the ravine Mr. Woodward referenced appears not to be the Oronoque ravine in question. Mr. Woodward further states notices were sent to homeowners and, “no comments were received at any time that justified a town meeting.”

16. Plaintiff responded (E26) specifically attempting to identify if an environmental impact study (EIS) was done. No further communication has been received from the DOT. Whatever notice Mr. Woodward refers, petitioner was not in receipt (Affd ¶¶23-24). In addition, with the state and public shutdown from COVID since March, 2020, the DOT continued lack of connection with the Oronoque community introduces many questions which remain unanswered. How can petitioner as part of the public participate when state actors do not welcome the participation?

17. “Tidal wetlands are defined in the Tidal Wetlands Act by their current or former tidal connection, and their capacity to support certain wetland vegetation. Unlike inland wetlands, tidal wetlands are regulated exclusively by DEEP and not by municipal inland wetlands agencies. Tidal wetlands are threatened with inundation due to a rise in sea level attributed to the impacts of climate change, that will result in loss of habitat for marsh-dependent species.” (E7) <https://portal.ct.gov/CEQ/Publications/CEQ-Reports#EnvironmentalUpdate>, last accessed 6/6/2021. See General Statute § 25-102qq(a), “The Commissioner of Energy and Environmental Protection shall be

responsible for state-wide river policy and comprehensive protection of rivers..” See also, “How are Inland Wetlands and Watercourses Defined in Connecticut?” (E8-9) <https://portal.ct.gov/DEEP/Water/Inland-Wetlands/How-Are-Inland--Westlands-and-Watercourses--Defined> last accessed 6/5/2021 (same).

Oronoque and the Housatonic tidal ravine and wetlands

18. Oronoque homes Rows 101-110 and 501-510 face the Housatonic River. Row 601-610 face the tidal wetland. Row 401-410 face the tidal ravine and Rows 201-210 and 301-310 face landward. Plaintiff lives at 408. The DOT facility faces Row 601-610 in the tidal wetlands. The tidal ravine parallels Ryders Lane. See E1.³

19. The DOT land extension indicated on (E1), affects not only the overall wetlands but is most relevant as to how the tidal action affects the ravine. Plus, the cumulative detrimental effects of wastewater discharge will further destroy vegetation in the wetlands which in turn will create further decline in insectivorous migratory birds.

20. The FEMA flood plain map (E5-6) presents a clear comparison of how the DOT land extension overtakes FEMA guidelines.

Petitioner is classically aggrieved

"The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the [town] as a whole. Second, the party claiming aggrievement must

³ Location of the DOT land extension is approximate as is the course of the ravine. successfully establish that the specific personal and legal interest has been specially

and injuriously affected by the decision.... Cannavo Enterprises, Inc. v. Burns, 194 Conn. 43, 47, 478 A.2d 601(1984)... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected.... Light Rigging Co. v. Dept. of Public Utility Control, 219 Conn. 168, 173, 592 A.2d 386 (1991)."

Here, the DOT created a significant heightened increase of flood risk by the positive acts of designing, grading and constructing a land extension on DOT property waterward in the tidal wetlands. The DOT did so using undefined fill on, at, near or abutting a critical area where tidal currents influence the ravine which traverses plaintiff's backyard, among others. DOT's positive acts thereby restrict the natural ebb and flow of the tides, which, prior to DOT's positive acts, plaintiff's risk of flooding was classified as minimal. Petitioner has an identifiable legal interest.

Petitioner is statutorily aggrieved

A. General Statute § 22a-28, Preservation of tidal wetlands, provides in relevant part, "[W]etlands [have] been lost or despoiled by unregulated dredging, dumping, filling and like activities.. and... such loss or despoliation will... disturb the natural ability of tidal wetlands to reduce flood damage and adversely affect the public health and welfare..." The DOT violated § 22a-28 when the DOT designed, graded and constructed a land extension waterward using undefined fill which restricts the natural ebb and flow of tides posing heightened risk of flooding to plaintiff's home.

B. General Statute § 22a-1a-8, Environmental Impact Evaluations, provides in relevant part, “(a) A sponsoring agency shall prepare an environmental impact evaluation... for those actions for which the full degree or actual impact remains undetermined... which may significantly affect the environment...” The DOT violated § 22a-1a-8 when the DOT proceeded with the land extension waterward into the tidal wetlands without an EIS which would have determined environmental significance pursuant to General Statute § 22a-1a-3

C. General Statute § 22a-359a, Regulation of dredging, erection of structures and placement of fill in tidal, coastal or navigable waters, provides in relevant part, (a) The Commissioner of Energy and Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal... waters. Any decisions made... shall be made with due regard for indigenous aquatic life, fish and wildlife... with proper regard for the rights and interests of all persons concerned.” The DOT violated General Statute § 22a-359a because the DOT failed to inform the DEEP of the land extension waterward into the tidal wetlands prior to commencing such activity. If the DOT did inform DEEP, such communication was inadequate in view of the specific circumstances articulated in this matter as a result of failure to perform an EIS pursuant to § 22a-1b-d,h. Further, by the DOT’s own admission, “the storage shed is functionally obsolete...”, thus, the DOT was ineligible for an exemption pursuant to § 22a-363b.

D. Title 25, Water Resources, Flood and Erosion Control, General Statute § 25-68d, Certification of activity or critical activity within or affecting the floodplain,

provides in relevant part, “(a) No state agency shall undertake an activity or critical activity within or affecting the floodplain without first obtaining an approval...” The DOT violated § 25-68d by failing to obtain such certification and if a certification was obtained, the DOT failed to advise the DEEP Commissioner the true extent of the planned critical activity as defined in § 22a-1c because the DOT failed to comply with §§ 22a-1b and 22a-1d and thus failed to perform an EIS pursuant to § 22a-1h.

As a result of DOT’s failures cited here of which plaintiff is aware and those failures of which plaintiff is not aware because an EIS was not performed, any involvement of the DEEP in DOT Project 138-247 relied upon incomplete, inaccurate and/or invalid information. According to DOT Travis Woodward, as late as May 17, 2021, the DEEP’s “Enforcement Division performed a site inspection of the project. At that time, no exceptions were taken.” Mr. Woodward’s statement supports petitioner’s view. The DEEP site inspector failed to consider during the site inspection, the Oronoque side of the fence and the tidal wetlands. If Oronoque’s side was considered, at least one significant exception would have been demonstrated, the substantial tidal ravine which feeds into the tidal wetlands. DOT failed to provide the site inspector complete, accurate and/or valid information which would have recognized as least some of the issues set forth in this petition.

Negligence of DOT and Stratford Town

The emails petitioner received from May 26, 2021, to June 8, 2021, demonstrate an incredible amount of confusion about, and disregard of, Oronoque and petitioner’s location within Oronoque as situated in the Housatonic River tidal wetlands. Hours

spent in online on the DEEP, DOT and Stratford town websites provided very confusing, out-of-date and sometimes contradictory information.

Both the DOT and Stratford classify Oronoque wetlands as part of the Inland Wetlands and Watercourses Act, General Statute § 22a-36 *et seq* where municipal regulation comes into play pursuant to § 22a-42. However, General Statutes §§ 22a-28 to 22a-35a governs tidal wetlands where DEEP has exclusive authority.

When DOT issued the February 4, 2019 press release, the DOT had already decided not to conduct a public hearing and announced as much by stating, “[I]t is not anticipated that a formal public hearing will be necessary”, thereby setting the stage to minimize public exposure to the DOT critical activity. Per the Stratford town engineer, conservationist, Kelly Kerrigan, “walked the site last year [2020] and there are no inland wetlands”, thereby validating DOT’s goal of no public hearing.

The tidal water in the ravine has a natural tendency to create and inflict damage to private property which is in close proximity to the ravine. Petitioner’s property interest borders the southern edge of the ravine in her backyard. The northern edge tracks Ryders Lane which is separated by a fence. The ravine significantly widens waterward until the ravine is engulfed in the wetlands as a whole. Neither DOT, Stratford town nor the DEEP site inspector walked the site on petitioner’s side of the fence to identify this tidal flood hazard and exception. And, if anyone did, such inspection has been silenced.

The danger of property damage is continuous. Prior to the DOT land extension, such danger was classified by FEMA as minimal. Since petitioner’s ownership from 1984, the danger has not interfered with petitioner’s property enjoyment rights and the rights of adjacent homeowners.

The DOT as a state actor has a duty to maintain DOT property in such a manner as to prevent any increase of danger which, in fact, the DOT did not do with intent. The DOT knew or should have known, in the exercise of reasonable care, the positive acts of designing, grading and constructing a land extension waterward into tidal wetlands were unreasonable. With the knowledge of unreasonable acts, the DOT withheld communication from the public at large and from affected homeowners of which plaintiff is one. The DOT withheld performing an EIS before initiating such positive acts. If an EIS was in fact performed, the DOT withheld results from the public at large of which plaintiff is one. The DOT did all this because the DOT did not want to hold a public hearing on the matter and incur any of the time, labor and expense which an EIS and public hearing entailed.

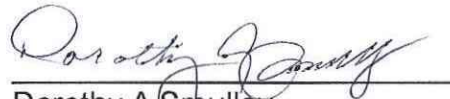
Petitioner has presented sufficient evidence to establish petitioner's right to seek a declaratory ruling from DEEP for an EIS. Results of the study should be made available to the public during a public hearing and the results of both should be presented to DEEP for final determination and action. Petitioner's requests are reasonable in view of DOT's intentional damage to tidal wetlands and the consequential and continuous heightened danger of flooding to petitioner's property.

Relief Requested

For all the reasons discussed, petitioner respectfully requests the DEEP to take the following action:

1. An Order directing the DOT in conjunction with Stratford town to perform an unbiased Environmental Impact Study (EIS);
2. An Order directing the DOT in conjunction with Stratford town to conduct a public hearing on the EIS findings;
3. An Order directing the DOT to cease all further activities on the maintenance property until a decision is reached based upon the EIS and public hearing;
4. An Order directing the DOT and Stratford town to properly identify Oronoque Shores Condominium Associations Nos. 1, 2, 3 as situated in tidal wetlands governed by General Statutes § 22a-28 thru 22a-35a in which petitioner's property interest rests.
5. An Order for such other and further relief as may be required.

Respectfully submitted,



Dorothy A Smulley
Petitioner, self-represented
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In Re Department of Transportation
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State of Connecticut

**Department of Energy and
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Petition No. _____

AFFIDAVIT OF DOROTHY A SMULLEY

I, Dorothy A Smulley, hereby declare,

1. I have personal knowledge of all of the facts in this declaration.
2. I live in a forty-unit townhouse condominium association, Oronoque Shores Condominium Association No. 1, situated on the banks of the Housatonic River tidal wetland just south of Sikorsky Bridge in Stratford Connecticut. Situated in the same area, and immediately adjacent to, are Oronoque Shores Condominium Association No. 2 and Oronoque Shores Condominium Association No. 3, each of which comprise ten townhouses. All three associations total 60 homeowners.
3. I reside at 408 Bar Harbour Road which is my principal residence and has been since 1984.
4. My backyard terminates where a twenty-foot-plus deep tidal ravine lies perpendicular which begins from the mouth of the Housatonic River and traverses westward for approximately a quarter-mile to the approximate end of the 400 row of Oronoque Shores.
5. This tidal ravine will fill with water overflow from the Housatonic during high tides and storms although not necessarily every day or with every storm.

6. Since 1984, I have witnessed the ravine fill to the top edge of my backyard on a number of occasions.

7. Most significant was Hurricane Sandy when the ravine's capacity ebbed and flowed in such a way Oronoque structures did not incur building damage although significant damage occurred to the embankments throughout the complex.

8. Other tidal reactions occurred since Sandy and prior thereto.

9. The Connecticut Department of Transportation (DOT) maintains a maintenance area situated on or near the banks of the Housatonic River tidal wetlands.

10. The DOT actively used this maintenance area during the period of time the Sikorsky Bridge was upgraded from metal construction to a steel and concrete construction.

11. Ryders Lane, which begins from Route 110 (also known as River Road and/or Main Street), terminates where the DOT maintenance area begins.

12. Ryders Lane runs parallel with the curve of the ravine. A DOT fence erected during the Sikorsky Bridge upgrade, separates Ryders Lane from the north edge of the ravine. This fence terminates where the DOT maintenance area begins.

13. Since completion of the Sikorsky Bridge upgrade, the DOT activity has been minimal with most occurring during winter months for snow removal purposes.

14. Sometime prior to May 27, 2021, the DOT designed, graded and constructed a land extension waterward in the tidal wetlands with undefined fill.

15. The DOT land extension is on, near or abuts the mouth of the ravine.

16. The DOT land extension into the wetlands permanently alters the tidal ebb and flow of the ravine and permanently alters the flood plain.

17. Prior to the DOT land extension, my risk of potential flood damage was minimal and manageable as established by the natural evolution of the wetland topography.

18. The DOT's land extension altered and reduced the ravine's natural overflow capability and those effects on my home's foundation and other building structures of Oronoque.

19. The risks created by the DOT's land extension permanently inflicts a higher probability of flood risks which, but for DOT's intentional acts, such higher probability would not exist.

20. During discovery, I found on the DOT website, a press release dated February 4, 2019, which announced improvements to the storage facility on Ryders Lane.

21. In the press release, the DOT explains magnesium chloride tanks will be included with a new salt storage facility.

22. The DOT also stated, "it is not anticipated that a formal public hearing will be necessary."

23. As a home owner, the press release discovered is the first notice I received regarding the DOT activity.

24. If the DOT issued any notice to home owners, I did not receive such notice.

CERTIFICATION OF SERVICE

Petitioner gives notice this date, June 9, 2021, of the substance of this petition, the opportunity to file comments with the Commissioner and the right to request party or intervenor status by emailing the following persons who have an interest. Persons known to petitioner to have an interest in the subject matter of the declaratory ruling proceeding are as follows.

Petitioner Dorothy A Smulley
Self-represented
408 Bar Harbour Road
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tel/fax 203 386 0171
email francesca04@gmail.com

Parties Commissioner
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John R Casey, P.E., Town Engineer
email jcasey@townofstratford.com

Courtesy Connecticut Council on Environmental Quality
Peter B. Hearn, Executive Director, email peter.hearn@ct.gov

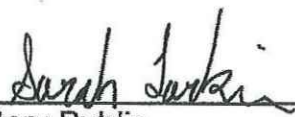
Connecticut Audubon Society
Patrick Comins, Executive Director, email pcomins@ctaudubon.org

I declare under penalty of perjury the foregoing is true and correct.

Executed this 8 day of June, 2021, in Stratford, Connecticut.


Dorothy A Smulley




Notary Public

My commission expires AUGUST 31, 2025

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Stratford Salt Shed Construction
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Tidal ravine
Oronoque Shores
408 Bar Harbour backyard
Stratford
6/8/2021



Tidal wetland into which tidal ravine flows
DOT land extension waterward & construction
6/8/2021
(composite of 5 frames)

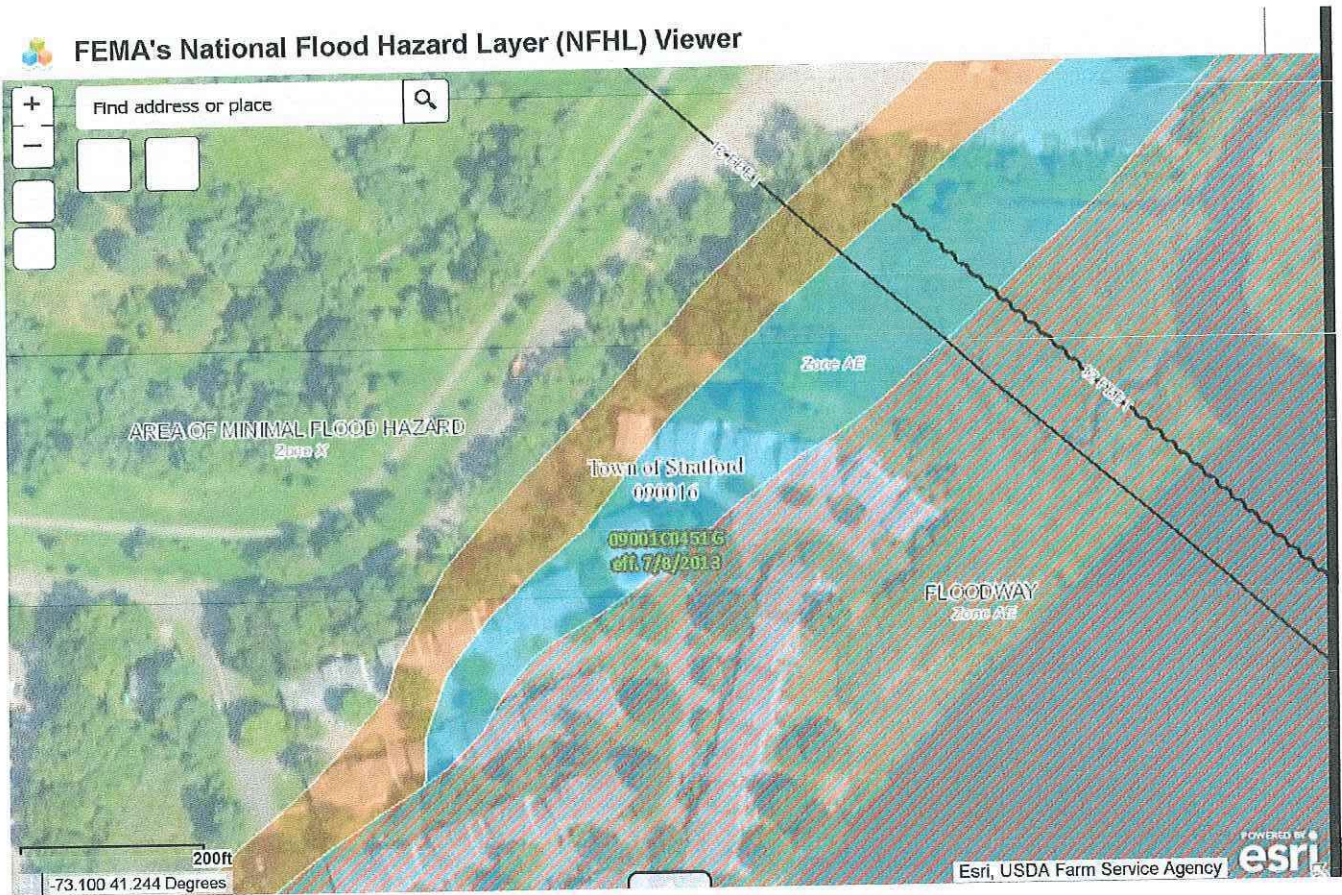


DOT land extension & construction site
view from Ryders Lane
5/28/2021

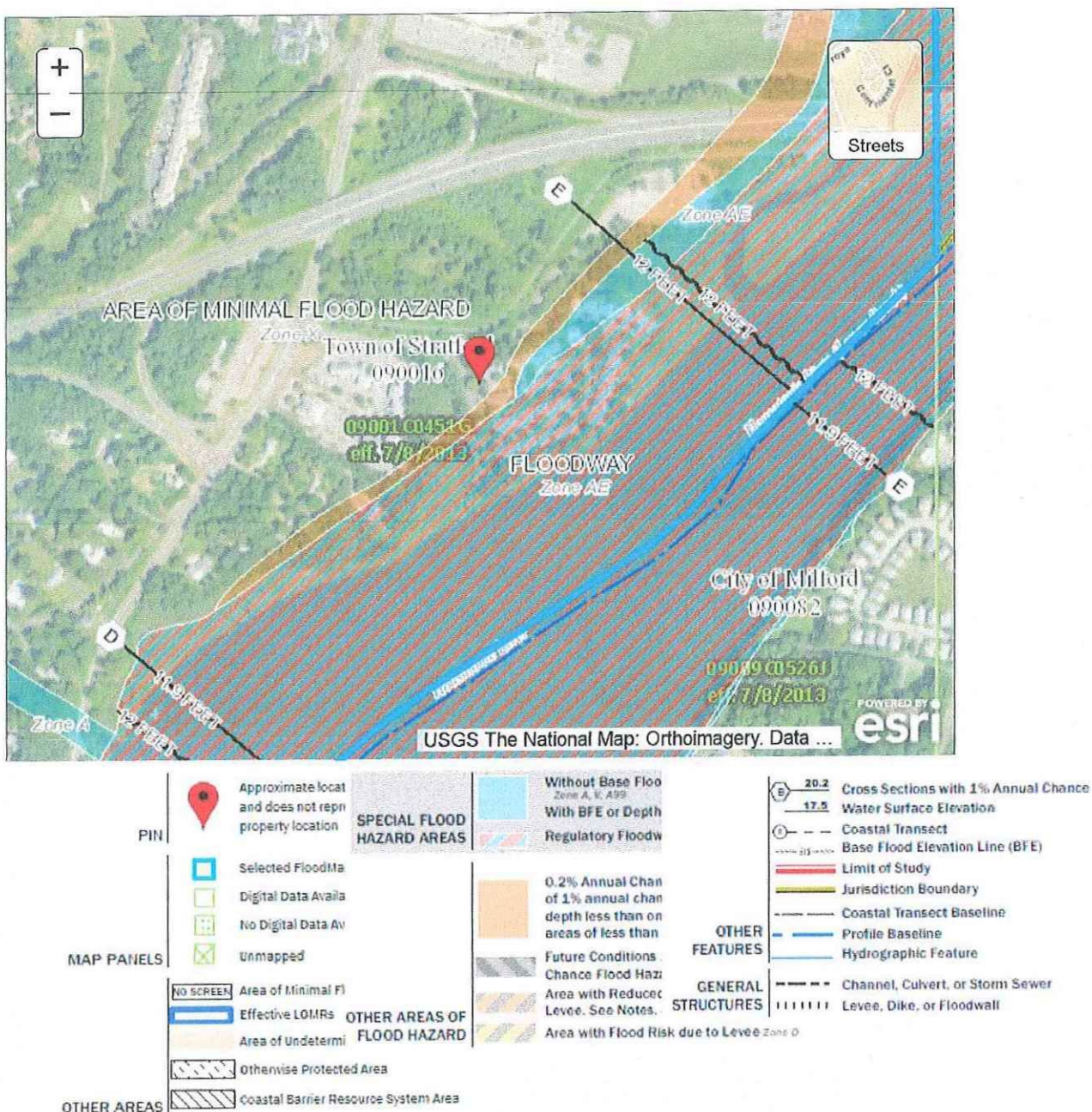


Gravel area on right is undefined
fill used to extend DOT area into
the tidal wetland
5/28/2021

<https://hazards-fema.maps.arcgis.com/apps/webappviewer/index.html?id=8b0adb51996444d4879338b5529aa9cd&extent=-73.10254480517526,41.24271180452711,-73.09913839972587,41.24472858985806>
last accessed June 5, 2021



<https://msc.fema.gov/portal/search?AddressQuery=408%20bar%20harbour%20road%20stratford%20ct#searchresultsanchor>
last accessed June 5, 2021



E6