STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

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| IN RE: | : | |
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| APPLICATION OF NTE CONNECTICUT, LLC | : | DOCKET NO. 470 |
| FOR A CERTIFICATE OF ENVIRONMENTAL | : | |
| COMPATIBILITY AND PUBLIC NEED FOR | : | |
| THE CONSTRUCTION, MAINTENANCE AND | : | |
| OPERATION OF AN ELECTRIC POWER | : | |
| GENETATING FACILITY OFF LAKE ROAD, | : | |
| KILLINGLY, CONNECTICUT | : | November 2, 2016 |

**MEMORANDUM OF LAW IN SUPPORT OF CONNECTICUT FUND FOR THE ENVIRONMENT'S MOTION TO DISMISS**

**Facts**

NTE Connecticut, LLC ("NTE") proposes to construct a 550 MW electric generating plant on a 63-acre parcel off of Lake Road in Killingly. The proposed Killingly Electric Center (KEC) power plant location contains physical obstacles to development such as steep slopes, extensive inland wetlands and watercourses, vernal pools and a man-made pond. The wetlands are associated with the Quinebaug River located immediately to the west of the proposed power plant. NTE also proposes to install an electric switchyard on a 10-acre parcel adjacent to the electric generating plant. In order to operate the KEC facility, NTE must connect to the Eversource natural gas distribution pipeline that runs from the Algonquin mainline to Lake Road in Killingly.

NTE's Application for a Certificate of Environmental Compatibility and Public Need ("Application") states that the generation plant and switch yard will require Eversource to replace the 50 year old natural gas distribution pipeline line with a new, larger pipeline capable of providing 3.9 million cubic feet of natural gas per hour at a minimum pressure of 550 pounds per square inch over the course of 2.8 miles. In the replacement of the existing pipeline and in order to provide the required natural gas to the KEC facility, Eversource will need to perform the following work: (a) remove acres of vegetation; (b) excavate, remove the existing pipeline and replace it with an upgraded 14-inch natural gas pipeline (replacement pipeline) rated for 700 psi through wetlands, protected open space, woodlands, and a public multi-use trail; and (c) cross the expanse of the Quinnebaug River. There are also four interconnections associated with the construction of these facilities. They consist of a natural gas pipe line interconnection at the KEC facility, electric transmission interconnection, a water pipe interconnection, and a wastewater pipeline interconnection.

Although inextricably essential components for an operational power generation plant, the natural gas pipeline replacement and these other components of the project are not part of this Application. NTE simply states that these components are associated with KEC but that they are anticipated to be permitted, constructed, owned, and operated by others.[1] These components are defined as "associated equipment" necessary for the operation electric generating facility. RCSA § 16-50-2a(1)(B). An application for a certificate of environmental compatibility and need is required to contain a statement in narrative form of the environmental effects of the proposed facility and associated equipment. RCSA § 16-50j-59(9). In a brief discussion of the community and environmental considerations of these interconnections, NTE simply states that construction of these components will have no significant impact on natural resources and, as for the 2.8 mile replacement pipeline, NTE states only that because the replacement pipeline will be installed in an established Eversource right of way, environmental impacts will be minimized.[2]

**Completeness of the Application**

The purpose of the Public Utility Environmental Standards Act, Chapter 277a of the Connecticut General Statutes, Conn. Gen. Stats. § 16-50g, et seq., is "[t]o provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historical, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria." Conn. Gen. Stat. § 16-50g. In order to facilitate the Siting Council in the weighing of these competing public interests, the Application must provide sufficient information in order for the Siting Council to diligently execute its statutory obligations. Therefore, any Application for any electric generating facility using any fuel shall contain, among other things, a justification for adoption of the site selected, including comparison with alternative sites, a description of provisions, including devices and operations, for mitigation of the effect of operation of the facility on air and water quality, for waste disposal, and for noise abatement, and information on other environmental aspects. Conn. Gen. Stat. § 16-50i(a)(3) (definition of electric generating "facility"); Conn. Gen. Stat. § 16-50*l*(a)(2)(requirements for information in application). An application for an electric switchyard shall include a justification for the site selected, including comparison with alternative sites which are environmentally, technically and economically

[1] NTE Connecticut Application for a Certificate of Environmental Compatibility and Public Need, Attachment II, Section 8.0, Project-Related Interconnections, p. 166.
[2] *Id.* pp. 166,169-170.

practical and a description of the effect of the proposed switchyard on the environment, scenic, historic and recreational values. Conn. Gen. Stat. § 16-50i (4)(definition of electric switchyard "facility"); Conn. Gen. Stat. § 16-50*l*(a)(1)( requirements for application).

Gen. Stat. §§ 16-50*l*(a)(1) and (a)(2) require the assessment of the environmental aspects and impacts of a proposed electric generating facility and electric switchyard by the Siting Council in its review of an Application. As such, they are clearly environmental protection laws. Environmental protection laws are remedial in nature and should be broadly construed to accomplish their purpose. *Avalon Bay v. Zoning Commission Town of Stratford,* 87 Conn. App. 537, 548 (2005), citing *Environmental Coalition v. Stockton,* 184 Conn. 51, 57 (1981), *Keeney v. Fairfield Resources, Inc.* 41 Conn. App. 120, 132-133 (1996). NTE's application to the Siting Council cannot be properly reviewed by the regulatory authority without consideration of the environmental impacts of all of the component parts of the proposed project and, specifically, consideration of the substantial adverse environmental impacts that the replacement of a 50 year old pipeline line with a new, larger pipeline in environmentally sensitive areas may cause, and the potential negative impacts to the ground and surface waters in the area of the NTE facility that an interconnection with the Connecticut Water Company's public water system to obtain 400,000 gallons per day of process water could cause. KEC simply cannot operate without the expanded pipelines and interconnections. The power plant is not a stand-alone facility. Therefore, the totality of the project and potential environmental impacts from the construction and installation of all essential components of the project must be adequately presented in the Application. The environmental impacts of all aspects and components of an electric generating plant and switchyard must be thoroughly assessed in the Application for the siting of these facilities in order to comply with the legislature's intended purpose of these statutory provisions.

The incomplete nature of the information in NTE's Application as it applies to the public water supply interconnection was raised by the Connecticut Department of Public Health (DPH) in its October 20, 2016 comment letter to the Siting Council. It is DPH's position that the water supply analysis provided by NTE in its Application does not adequately document that the Connecticut Water Company's Crystal Division has adequate water available with the appropriate margin of safety to supply the KET plant. Further, in response to Interrogatories from Not Another Power Plant to NTE which question the ability of the NTE facility to operate should the Siting Council fail to approve the modifications to the Eversource 2.8 mile natural gas distribution pipeline and the water pipe interconnection with the Connecticut Water Company, NTE states, without further detail, that there are potential alternatives for both of these interconnections.[3]

Because NTE's Application fails to provide adequate information to address the potential environmental impacts of all of the component parts of its electric generating facility and potential alternatives for sources of natural gas and process water, it is incomplete and should be denied.

[3] NTE's Redacted Response to NAAP's Interrogatories, October 17, 2016, Questions 13 and 14, pp. 8-9.

**NTE's Application Improperly Segments Its Proposed Project To Minimize Its Adverse Environmental Impacts**

NTE's Application, which seeks to defer action on necessary components of its proposed project to a later time in applications to be filed by others, improperly segments its proposed project to lessen the potential environmental impacts of the generating facility, switchyard, natural gas pipeline modifications, and interconnections. Segmentation is defined as "an attempt to circumvent the [environmental protection laws] by breaking up one project into smaller projects and not studying the overall impacts of the single project." *Stewart Park and Reserve Coalition, Inc. v. Slater,* 352 F. 3d 545, 559 (2nd Cir., 2003); see also *Connecticut Coalition for Environmental Justice v.Development Options, Inc.*, 2005 WL 525631, January 5, 2005 (copy attached).. "Segmentation is to be avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions. *Id,* citing, *Town of Huntington v. Marsh,* 859 F. 2d. 1134, 1142 (2d Cir. 1988). A project is properly segmented if it (1) connects logical termini and is of sufficient length to address environmental matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives .... A project has been improperly segmented, on the other hand, if it has no independent utility, no life of its own, or is simply illogical when viewed in isolation. *Id.* As noted above, an electric generating facility and switchyard are useless without a source of fuel and other necessary interconnections.

As noted above, one of the statutory mandates to the Siting Council is to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria." Conn. Gen. Stat. § 16-50g. In the review of the action of the Federal Energy Regulatory Commission (FERC) approving a Certificate of Public Convenience and Necessity for the construction and operation of the Northeast Upgrade Project by the Tennessee Gas Pipeline Company, LLC, the United States Court of Appeals for the District of Columbia Circuit determined that in applying the National Environmental Policy Act (NEPA), FERC erred in failing to consider the environmental impact of all other upgrade projects planned for the same pipeline. In *Delaware Riverkeeper Network v. FERC,* 753 F. 3d 1304 (D.C. Cir. 2014), the Court of Appeals held that in applying NEPA, FERC must consider the cumulative impacts of all related projects. "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Delaware Riverkeeper,* 753 F. 3d 1304, 1313.

NTE's Application improperly segments its proposed project and impedes the ability of the Siting Council to perform its statutory obligation to balance the need for the project with the need to protect the environment and ecology of the state and should be dismissed.

2005 WL 525631
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Connecticut Coalition for Environmental Justice, Inc. v. Development Options, Inc.
Superior Court of Connecticut, Judicial District of Hartford. January 5, 2005 Not Reported in A.2d 2005 WL 525631 (Approx. 10 pages)

Judicial District of Hartford.

CONNECTICUT COALITION FOR ENVIRONMENTAL JUSTICE, et al.

v.

DEVELOPMENT OPTIONS, INC., et al.

No. CV030828997S.
Jan. 5, 2005.

## Attorneys and Law Firms

Jacobi & Case PC, Milford, for Connecticut Coalition For Environmental Justice Inc, Connecticut Citizen Action Group, CT Working Families Party, Carolyn Bell, Vivienne C. Bell, Clarke King, Luz Santana, Sherril Coleman, Samuel Goldberger and Leslie M. Simoes.

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## Opinion

BERGER, J.

*1 The plaintiffs, Connecticut Coalition for Environmental Justice, Inc., Connecticut Citizens Action Group, Connecticut Working Families Party, Carolyn Bell, Vivienne C. Bell, Clarke King, Luz Santana, Sherril Coleman, Samuel Goldberger, and Leslie M. Simoes, [1] instituted this action by complaint dated September 19, 2003, seeking declaratory and injunctive relief against the defendants, Development Options, Inc., CBL & Associates Properties, Inc., and the Charter Oak Marketplace, LLC, in connection with the development of the Charter Oak Marketplace. The plaintiffs allege that the development will unreasonably pollute, impair or destroy the public trust in the air, water and other natural resources of the state of Connecticut as set forth in General Statutes § 22a-16 et seq. [2]

The property in dispute concerns 34.5 acres of a larger sixty-seven acre parcel owned and being developed by the Hartford Housing Authority. It sits on the west bank of the South Branch of the Park River, now channelized as part of a flood control project. The property was formerly the site of the 1000 unit housing community known as Charter Oak Terrace Housing Project that was razed in 1995. After the demolition, portions of the property were seeded and turned into meadow. The subject parcel is now being developed into a retail commercial venture known as "The Marketplace" and will include a Wal-Mart, Marshalls, restaurants and other businesses. Twenty-two acres of the remaining acreage will contain a job training center and the rest will have an office complex owned by the city. [3]

The application process commenced in April 2002 when plans were submitted to the Hartford design review board as part of the zoning process; [4] they were approved on November 12, 2002 with certain conditions. In May 2002, the defendants sought wetlands approval from the Hartford inland wetlands agency to fill five small man-made wetlands on the property and to construct two storm water outfalls to discharge into the river. A public hearing was held on June 24, 2002 and on July 8, 2002, the agency approved the application. In June 2002, the defendants applied to the state traffic commission (STC) for a certificate of operation which was granted on July 16, 2002. In October 2002, the

defendants submitted another application to the Hartford inland wetlands agency for a permit for offsite improvements. After a public hearing on November 25, 2002, the permit was granted on January 27, 2003. In September 2002, the defendants applied to the Army Corps for a federal wetlands permit pursuant to 33 U.S.C. § 1344. After review and a finding of "minor individual or cumulative impact," the federal wetlands permit was issued on December 2002. In February 2003, the state department of environmental protection (DEP) issued a water quality certification pursuant to 33 U.S.C. § 1344 and General Statutes § 22a-426.

On March 25, 2003, the design review board approved revised plans for the Marketplace. On April 30, 2003, the Greater Hartford flood control commission approved an amended July 2002 application for the placement of fill in the floodplain in connection with another development in the overall parcel and the construction of a recreation field for compensatory flood storage capacity. In July 2003, the defendants sought approval from the city to remove soil and received a permit on July 31, 2003. In August 2003, the defendants sought and received a general commercial construction storm water discharge permit from DEP[5] and an encroachment permit from the state department of transportation (DOT). In November 2003, the defendants entered into an agreement with the Metropolitan District Commission concerning the construction of sewers. That same month the defendants also applied for signal permits from the STC which were approved on December 2003. Also in that same month, the defendants received further approvals from the design review board concerning landscaping.

*2 On January 8, 2004, the city of Hartford issued a building permit for the Wal-Mart building of the Marketplace and on March 13, 2004, the city issued the building permit for the retail portion of the Marketplace. On June 9, 2004, the self development building permit was issued.

With the exception of one mandamus action that was dismissed on October 24, 2003,[6] the plaintiffs, three associations and seven individuals, never sought to intervene in any of the above permit processes pursuant to General Statutes § 22a-19[7] or appeal any of the decisions of the above agencies. The initial complaint was filed on October 7, 2003 and did not seek temporary injunctive relief. As of October 21, 2003, the five wetlands no longer existed and the storm water outfalls had been installed.

II.

A.

The first issue that must be addressed is whether the plaintiffs have standing to bring this action. The Environmental Protection Act of 1971 (CEPA) declares that "[i]t is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction." General Statutes § 22a-15. Section 22a-16 allows any person to seek declaratory or injunctive relief against another person to protect public trust in air, water and other natural resources from unreasonable pollution, impairment or destruction. The Connecticut Supreme Court has held that "a plaintiff has standing to bring an independent action under § 22a-16 where an administrative body does not have jurisdiction to consider the environmental issues raised by the parties ... Where the alleged conduct involves a permitting claim, however, there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes." (Citations omitted.) *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 147-48, 836 A.2d 414 (2003).

*Millstone, supra*, relied on *Waterbury v. Washington*, 260 Conn. 506, 800 A.2d 506 (2002), in which our Supreme Court discussed the interrelationship between a claim of unreasonable impairment of the public trust under CEPA and activity conducted pursuant to a related environmental regulatory permit. The *Waterbury* court held that "when ... the legislature has enacted an environmental legislative and regulatory scheme specifically designed to govern the particular conduct that is the target of the action, that scheme gives substantive content to the meaning of the word 'unreasonable' as used in the context of an independent action under CEPA. Put another way, when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA,

whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." *Waterbury v. Washington, supra*, 260 Conn. at 557.[8]

*3 The rulings of *Millstone* and *Waterbury v. Washington* have loomed over this whole trial. The plaintiffs have consistently maintained that the applications as well as the approvals of the applications were invalid or deficient. Of course they have made other claims such as, for instance, that the plans fail to "protect and foster biological diversity and habitat sustainability"; that "the defendants have failed to use reasonable and rational spatial planning considerations ... to develop the property" or that "the development will destroy green space for recreational activities and destroy the recreational benefits of the Park River." The plaintiffs additionally claim that the pollutant load from vehicular traffic will cause environmental degradation as it finds its way into the soil, surface, groundwater and the Park River. With the exception of the claims dealing specifically with the uplands meadow, which will be discussed hereinafter, all other claims concern permitting issues. Thus, all claims that concern water pollution or degradation, whether surface or ground, to the Park River, or elsewhere, and impairment or filling of on-site inland wetlands, may not be raised in this action as they were covered by the permitting processes of the inland wetlands act, § 22a-36 et. seq. or the federal Army Corps permitting process, 33 U.S.C. § 1344; 3 C.F.R. § 325.7. See *Millstone, supra*, 267 Conn. at 134-48.

As noted earlier, the five on-site man-made inland wetlands (resulting from the grading practices during the demolition of the housing project) had been filled and the outfall stations to the Park River had been constructed prior to the filing of this suit. Those previously existing wetlands were described during trial as small, containing sparse vegetation, providing little function from a wildlife habitat standpoint and not supporting any groundwater recharge function. The two new outfall stations (three were already in existence) will allow the discharge of treated run-off through the use of Vortechnic units into the Park River, which is and has been, a concrete channelized river with a riprap embankment. The existing outfalls have allowed the discharge of untreated storm water from Newfield Avenue and Overlook Terrace into the river. As noted by the plaintiffs' experts, the bivalve clam has been observed in the river; it is an alien species whose presence indicates deteriorated water quality. The plaintiffs did not intervene in any applicable permitting proceedings where the issues they now ague could easily have been raised or addressed. See *Millstone, supra*, 267 Conn. at 148.

The plaintiffs also claim that a related flood commission application is likewise deficient. The defendants proposed and received approval to create an on-site storage capacity of approximately 11,700 cubic yards through the construction of a recreational field. The flood control commission approved the proposal in July 2002 but in March 2003, concerns were raised by certain individuals, triggering further review. In May 2003, the commission again approved the defendants' proposal and the commission was asked by the plaintiffs' attorney to have the city council review the matter. After the commission refused the request, plaintiffs Carolyn and Vivian Bell filed a mandamus action but the matter was dismissed by the court, Stengel, J.[9] Any claims alleging deficiencies in the flood commission approvals cannot be raised in this action. *Millstone, supra*, 267 Conn. at 148.

*4 If *Millstone* and *Waterbury* preclude standing for review of matters related to environmental permitting, what then is left of the plaintiffs' claim? The plaintiffs do have standing to seek review of environmental claims covered by § 22a-16 (allegations of unreasonable pollution, impairment or destruction to the air, water and other natural resources of the state) that were not included in the permitting process. The plaintiffs thus have standing here to assert that the destruction of the meadow, as a natural resource, or the destruction of related wildlife and plant life, constitute an unreasonable impairment of the environment as those and other related issues[10] were not addressed in the development applications. *Fort Trumbull Conservancy v. Alves*, 262 Conn. 480, 495, 815 A.2d 1188 (2003). The defendants dispute this arguing that the city of Hartford considered the implication to the meadow and the environment when it granted the defendants permits for demolition of the meadow. There is nothing in the applicable sections (35-67; 35-68; 35-356 to 371) of the zoning ordinances, however that require the zoning administrator to consider any environmental impact when deciding whether to grant a permit.[11] Therefore, the plaintiffs may seek review of permitting claims which do not involve environmental review and non-permitting claims which are alleged to cause unreasonable pollution, impairment or destruction to the air, water and other natural resources of the state. This leads us to a general discussion of the development of the property and specifically, the meadow.

B.

We know that the thirty-five acre meadow, as it once existed, was created after the razing of the 1000 housing units of Charter Oak Terrace in 1995. The property is a portion of a larger sixty-seven acre parcel owned by the Hartford Housing Authority and bordered by Flatbush Avenue on the north, Newfield Avenue on the west, Overlook Terrace and then the South Branch of the Park River on the east. After demolition, the land was stabilized by seeding non-native grasses and vegetative cover; the plaintiffs' experts have described it as a "habitat patch" or a "parkland" with ecological and aesthetic value.

It is not unreasonable to argue that an "undeveloped" sixty acre parcel with a significant portion of meadow abutting a river in an urban area and home to a somewhat varied bird population is not a de facto parkland. Nevertheless, that scenario does not exist today nor did it at the time of trial. At that time, it had been fully graded with most of the site alterations and buildings completed. The claim concerning the destruction and development of the meadow requires an analyses of (1) the natural resources that are implicated including, whether the meadow itself is a natural resource under the provisions of § 22a-16 and, if so, whether the impairment or destruction of these resources is unreasonable; and (2) whether the claims for relief are precluded due to the doctrine of laches or because they are moot.

1.

*5 As noted, the purpose of CEPA, is to protect the public trust in the air, water and other natural resources of the state of Connecticut. While there was an initial claim that the development of the parcel would cause air pollution, that claim has been abandoned. Moreover, as mentioned, the claims involving any degradation of water quality or contamination or pollution to ground or surface water, including related inland wetlands or watercourses, are controlled by the rulings in *Millstone* and *Waterbury*. Indeed the plaintiffs admitted this fact in argument before the court. That leaves the question of whether the former meadow falls within the definition of a natural resource.

We know from a review of our case law that prime agricultural land is not a natural resource. *Red Hill Coalition v. Town Plan & Zoning Commission*, 212 Conn. 727, 739-40, 563 A.2d 1347 (1989). As explained in *Paige v. Town Plan & Zoning Commission*, 235 Conn. 448, 668 A.2d 340 (1995), which did hold that trees and wildlife are natural resources, regardless of whether they have any economic value, "[p]rime agricultural land is different from what is claimed to be a natural resource in this case. Prime agricultural land is a subcategory of land subject to human alteration that is kept barren of plant and animal life that would otherwise eventually live on it through natural succession. Agricultural land is not naturally occurring." *Id.*, at 463.

It is hard for this court to conceive that, in a general sense, a thirty-five acre meadow, a habitat for a number of plant and animal species whether native or alien, common or protected, could not be a natural resource within the statutory definition. As noted by the *Paige* court, "[b]ecause § 22a-19 fails to provide a detailed definition of natural resources, we are compelled to produce a definition that reflects legislative intent using traditional tools of statutory construction. In construing a statute, we seek to ascertain and give effect to the apparent intent of the legislature ..." (Internal quotation marks omitted.) *Id.*, at 454. The court added, "[i]n promulgating regulations regarding its responsibilities, the department of environmental protection (department) has elaborated on what constitutes natural resources. Section 22a-1-1 of the Regulations of Connecticut State Agencies provides that [t]he department operates according to powers conferred in various titles of the General Statutes relating to management, protection and preservation of the air, water, land, wildlife and other natural resources of the state ... This regulatory enumeration is consistent with the legislature's express reference to plants and wild animals as natural resources in General Statutes § 22a-6a(a), which provides that [s]uch person shall also be liable to the state for the reasonable costs and expenses of the state in restoring the air, waters, lands and other natural resources of the state, including plant, wild animal and aquatic life to their former condition ... Equally consistent is the use of the term natural resources in General Statutes § 22a-342, which provides that the department, in deciding whether to grant a permit, must consider various factors including the protection and preservation of the natural resources and ecosystems of the state, including but not limited to ground and surface water, animal, plant and aquatic life, nutrient exchange, and energy flow ... Therefore, where the legislature has chosen to specifically articulate what is meant by natural resources, it has included trees and wildlife and has given no indication that the term as used throughout the act should be afforded different meanings. Moreover, had the legislature intended the illustrative lists in § 22a-6a(a) or § 22a-342 to be limited to those particular statutes, it could have provided a

definitional section within the act to control all the other statutes in which the term is used ... The narrow reading of the term natural resources ascribed by the majority of the Appellate Court contradicts the specific illustrations of what the legislature has stated a natural resource includes as found in certain provisions of the act as well as the broad policy language found throughout the act." (Citation omitted; internal quotation marks omitted; footnotes omitted.) *Id.*, at 456-57. See also, *Animal Rights Front v. Rocque*, Superior Court, judicial district of Hartford/New Britain at Hartford, Docket No. PJR CV 97-0575920 (April 16, 1998, O'Neill, S.T.R.) (22 Conn. L. Rptr. 26) (standing conferred to seek injunctive action to stop the killing of deer under § 22a-16); *Lewis v. Planning and Zoning Commission*, 49 Conn.App. 684, 692, 717 A.2d 246 (1998) (wetlands constitute a natural resource of the state); *Animal Rights Front v. P. & Z. Commission*, Superior Court, judicial district of Hartford at Hartford, Docket No. CV-057 9968 (March 9, 1999, Wagner, J.T.R.) (24 Conn. L. Rptr. 241) (timber rattlesnakes and whippoorwill are natural resources).

*6 Thus starting with the premise that a thirty-five-acre meadow could surely constitute a natural resource, the next focus is on this particular meadow. Of course, it had only been here since the razing of the housing project in 1995 and while it was certainly not in a true natural or pristine state as it contained some construction debris, it was for the most part, a large undeveloped grassed parcel that had evolved since 1995. The focus on its purity or when it was created is a non-starter however. Our national, state, local and even private parks and open spaces contain all types of man-made intrusions, and while parts of them are pristine, some are not. Yet, certainly no one would suggest that they are not natural resources, in terms of their rich diversity of plant and animal life because they have roadwork and hotels and construction material, etc. Additionally, while size is surely a factor, the testimony of plaintiffs' experts credibly and understandably stress that, in an urban area, a parcel of the size such as that in controversy is important.

CEPA, however, not only inquires whether the activity will involve a natural resource but also asks whether that resource is being unreasonably polluted, impaired or destroyed. *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 56-58, 441 A.2d 68 (1981). The *Stockton* court noted that "[u]nder 22a-17, the plaintiff must first come forward and show that the defendant has, or is reasonably likely to unreasonably pollute, impair, or destroy a natural resource. The legislative history shows that the word 'unreasonably' was added as a means of preventing lawsuits directed solely for harassment purposes." *Id.*, at 58. Moreover in *Waterbury*, the court added that "the term 'unreasonable' as used in the context of an independent action under CEPA does not mean something more than de minimis ..." *Waterbury v. Washington, supra*, 260 Conn. at 557. The action in the present case was the total destruction of the meadow; that is surely something more than de minimis. But unreasonable? This court believes not. First, we turn back to the discussion of the meadow itself. It was, as mentioned, created after the razing of the 1000 housing units. Portions of the road infrastructure remained notwithstanding the seeded area. In April 2003, the plaintiffs' experts Robert DeSanto and Noble Proctor viewed the property and in July 2003 conducted transects of the property and a portion of the riverine area. The trial testimony was that the plant life was common to that found throughout the state, provided only poor quality habitat, and did not support any rare species. All witnesses testified that plant life diversity was low. The meadow had been home to about twenty species of birds. Other than the migrating Savannah sparrows, a species of special concern while nesting, and swamp sparrows, none of the animal species have been identified as endangered or threatened or of special concern pursuant to General Statutes § 26-310 et seq. [12] Obviously the birds will no longer use the thirty-five acres as it is now developed but there was additional testimony that those species had the whole riverine corridor for feeding and nesting. According to the plaintiffs' experts, by May 2004, various species of the bird population were returning to the river corridor. Moreover, the witnesses testified that the adjoining land is of the same or better quality than the developed piece.

*7 The impact to the existing vegetation from the construction of the outfalls next to the river is both short term and rather negligible since, as acknowledged by the plaintiffs' expert Dr. DeSanto, that which has been removed for the construction will grow back. Additionally, the water discharged to the river from the outfalls is now being treated by the Vortechnic unit-a highly effective hydrodynamic device using swirl technology to capture approximately 80% of the sediment load. [13] The unit is part of the greater storm water collection system along with the fifty-five catch basins in the parking lot and the plunge pool and riprap at the end of the outfall pipe. The plaintiffs argued that one component of the "treatment tram," namely a detention pond, should have been included. While such additional pollution treatment might be effective, this was a consideration for the

permitting process. The installation of the Vortechnic unit, an EPA recognized treatment, is certainly a gigantic step over the untreated outfalls.

Much of the trial was spent discussing the impact of the storm water runoff and especially two metals, zinc and copper, on the river. Using a number of assumptions and a theory derived from a number of prior EPA studies and a mathematical algorithm, Dr. DeSanto testified that, under certain conditions, a hypothetical worst case scenario would result in violations of certain state water quality standards for zinc.[14] The defendants have painstakingly attacked the opinions of Dr. DeSanto and notwithstanding that this court believes the cross-examination was effective in negating many elements of his equation, including: the rate of deposit; the distance of roadway; the number of vehicles; and the number of axles per vehicle, the whole proposition, as it is premised on surface water and, perhaps, ground water impairment, is precluded under the rule of *Millstone*. The outfall construction and their discharges were part of the permitting processes of the federal 404 program and the state's inland wetlands and watercourses regulatory scheme and the specific aspects of that environmental permitting are not allowed in this CEPA challenge.

Finally, the parties take a different approach to environmental assessment. The plaintiffs segment the thirty-five acres as a singular habitat patch while the defendants portrayed the total riverine area as the wildlife habitat.[15] As a result of the abutting land and river, it is hard, if not impossible, to conclude that the development has caused unreasonable impairment of the bird population.

Segmentation arguments, like those put forth by the plaintiffs, are viewed critically however. Usually, "[s]egmentation is an attempt to circumvent [environmental regulations] by breaking up one project into small projects and not studying the overall impacts of the single overall project. Segmentation is to be avoided in order to ensure that interrelated projects ... not be fractionalized ... A project is properly segmented if it (1) connects logical termini and is of sufficient length to address environmental matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements ... A project has been improperly segmented, on the other hand, if the segmented project has no independent utility, no life of its own, or is simply illogical when viewed in isolation." (Citations omitted; internal quotation marks omitted.) *Stewart Park & Reserve Coalition v. Slater*, 352 F.3d 545, 559 (2nd Cir.2003). Due to the quality and amount of the surrounding land, the plaintiffs' tactical segmentation of only a portion of the overall development is unavailing to support their claim of a CEPA violation.

2.

*8 This then leads us to a discussion about whether the doctrines of mootness and laches preclude granting the relief sought by the plaintiffs. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction ... Indeed, we are required to address this question of justiciability, even in the unusual situation where all of the parties agree that the matter is not moot ... We begin with the four-part test for justiciability established in *State v. Nardini* ... Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute ... (2) that the interests of the parties be adverse ... (3) that the matter in controversy be capable of being adjudicated by judicial power ... and (4) that the determination of the controversy will result in practical relief to the complainant ..." (Citations omitted; internal quotation marks omitted.) *Wallingford v. Dept of Public Health*, 262 Conn. 758, 766-67, 817 A.2d 644 (2003). "[A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal ... When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Id.*, at 767. In this case, the meadow and the five wetlands are gone, many of the buildings and most of the infrastructure are substantially, if, not by now, totally complete.[16] To return to the prior condition would require a total demolition of the thirty five acres worth of construction not to mention the adjoining construction that was not involved in this suit. As noted in *Millstone*, "Connecticut courts have rejected injunctive remedies on the ground of mootness where the issue before the court has been resolved or has lost its significance because of intervening circumstances ... Connecticut courts also have dismissed cases on the ground of mootness where the court can offer no practical relief because the position of one of the parties has changed." (Citation omitted.) *Connecticut Coalition Against Millstone v. Rocque*, *supra*, 267 Conn. at 126-27. While the

option of demolition of the total project is arguably possible or potential, it is surely not practical or warranted.

This, of course, leads directly to the related issue of laches. "Laches consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) *Papcun v. Papcun*, 181 Conn. 618, 620-21, 436 A.2d 282 (1980). The defendants maintain that by not participating in the application process and by both waiting to institute suit and not seeking temporary injunctive relief until after construction was well under way, the doctrine of laches bars the plaintiffs' claim for permanent injunctive relief. Indeed, the first request for a temporary injunction came at the end of evidence on July 27, 2004. As noted previously, the defendants started seeking their permits in April 2002 and in April 2003, the plaintiffs' expert Dr. DeSanto viewed the premises returning in July 2003 with Dr. Proctor. The plaintiffs' initial complaint was filed on October 7, 2003; by October 21, 2003, the five wetlands no longer existed, the outfalls had been installed and the defendants had spent in excess of $2,500,000 on site work. By the time of trial total expenses for site work exceeded $6,000,000.

*9 Many of the issues raised herein could surely have been addressed in those specific and proper forums. Our Supreme Court has, of course, rejected the exhaustion of administrative remedies argument, *Waterbury v. Washington*, *supra*, 260 Conn. at 544-45, and thus this court is not finding that failure to participate in the administrative permitting processes deprives this court of jurisdiction. The court did say, however, in *Connecticut Coalition Against Millstone v. Rocque*, *supra*, 267 Conn. at 148, that "where an administrative body has been granted authority to adjudicate conduct with adverse environmental effects ... [and][w]here the alleged conduct involves a permitting claim ... there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes." (Citations omitted.) The delay in their involvement at the administrative level denies the plaintiffs' standing to raise the permitting issues now. Additionally, whether due to a tactical trial decision or not, the plaintiffs were cognizant that construction would continue while the case was pending.[17]

The problem for this court is that the plaintiffs' decisions to not become involved in the administrative proceedings where the real planning issues concerning the project took place, or to sue only certain parties and not sue those developing the twenty-two acre job corp site or the housing authority portion, or to wait to seek injunctive relief until after the bulldozers had filled the subject wetlands and destroyed the meadow, belie the very nature and purpose of CEPA. No named plaintiff, whether institutional or individual, appeared at the trial to testify about the case or explain why they had not participated in any of the many proceedings below.[18] Yet, the plaintiffs now argue that certain agencies should have considered alternatives. For those matters that this court has jurisdiction over, it is simply too late. This is not to say that to bring a § 22a-16 action, a plaintiff must be involved at the administrative level or must seek immediate injunctive relief as a matter of law. Rather, the party seeking such relief must understand that a court will take all factors into account when deciding whether to issue equitable relief. Our courts take all allegations of environmental harm seriously and the failure to seek a cessation of alleged environmental harm certainly raises questions. This court finds that the plaintiffs have not only failed to prove that the meadow or any natural resource was unreasonably destroyed but that they waited too long to obtain injunctive relief. *Connecticut Coalition Against Millstone v. Rocque*, *supra*, 267 Conn. at 126.

For the above reasons, judgment enters for the defendants.

### All Citations

Not Reported in A.2d, 2005 WL 525631

### Footnotes

1 While certainly not required, it is interesting to note that no plaintiff testified or attended any hearing, the trial, or closing argument.

2 General Statutes § 22a-16 states:

> The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other

legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state.

3 Neither the housing authority nor the city as the owners and developers of the subject parcel and the other adjoining parcels were named as defendants.

4 Section 35-371 of the municipal code (zoning) states in part, "[i]n the B-3 zoning district, the zoning administrator shall refer all applications for zoning or building permits ... to the design review board."

5 A storm water management plan must be approved by DEP prior to commencing operation.

6 *Carolyn Bell v. Court of Common Council,* Superior Court, judicial district of Hartford, Docket No. HHD CV 03-0827370 (October 24, 2003, Stengel, J.).

7 General Statutes § 22a-19 states:

(a) In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

(b) In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

8 In reviewing the history of standing in CEPA cases, the *Millstone* court explained "[w]e now clarify our decision in *Waterbury* to recognize *Middletown,* [192 Conn. 591, 473 A.2d 787 (1984),] and *Fish II,* [254 Conn. 21, 755 A.2d 860 (2000),] involved claims that the plaintiffs lacked standing because the court did not have jurisdiction to litigate environmental issues that are governed by § 22a-430, and which clearly have been placed within the exclusive domain of the department ... We also note, however, that *Waterbury* properly characterized our ruling in *Fish I,* [254 Conn. 1, 756 A.2d 262 (2000),] as based on the exhaustion doctrine. In *Fish I,* we concluded that the trial court should have dismissed the case for lack of standing under § 22a-16 and remanded the matter to the department for an initial determination before bringing their action to the court, because the department had authority to grant the requested injunctive relief during the permit renewal proceeding in which Fish Unlimited had intervened ... Although this clarification does not affect our holding in *Waterbury* that the exhaustion doctrine does not apply where the legislature determines that a court may exercise jurisdiction pursuant to § 22a-16, despite the availability of administrative procedures, there must be no possible confusion as to our

reasoning in *Middletown* and *Fish II*, because we rely on those two cases as precedent in the current matter. With each new case, we have continued to refine the law on standing under § 22a-16. We have determined that a plaintiff has standing to bring an independent action under § 22a-16 where an administrative body does not have jurisdiction to consider the environmental issues raised by the parties ... We also have concluded that where an administrative body has been granted authority to adjudicate conduct with adverse environmental effects, the exhaustion doctrine does not apply ... In cases such as *Waterbury*, an independent action may be brought directly in the Superior Court, but the court has discretion to retain jurisdiction and remand the matter for administrative proceedings ... Where the alleged conduct involves a permitting claim, however, there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes ... The present claim falls within this last category." (Citations omitted; internal quotation marks omitted.) *Millstone*, *supra*, 267 Conn. at 146-48.

9 See footnote 6.

10 The plaintiffs claim that an April 2002 application submitted to the design review board of the city of Hartford and approved with certain conditions on November 12, 2002 was also improper. They claim that the board failed to consider any feasible and prudent alternatives to the plan. The board's regulations do not require such a determination and its review does not include, under § 35-371, environmental review as, discussed above.

11 In *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 788 A.2d 1158 (2002), the court, in the context of a § 22a-19 intervention dispute, discussed the ability of an administrative agency "to address environmental concerns regardless of whether that agency has jurisdictional authority over the environmental concerns [sought to be] raise[d]." *Id.*, at 148-49. After discussing *Middletown v. Hartford Electric Light Co.*, 192 Conn. 590, 596-97 which did concern a similar issue in the context of a § 22a-16 action ("The city's alternate claim of standing rests on its statutory claim under the Environmental Protection Act, General Statutes § 22a-16. This statute permits any private party, including a municipality, to seek injunctive relief for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction. We have recently concluded, however ... that invocation of the EPA is not an open sesame for standing to raise environmental claims with regard to any and all environmental legislation."), the court noted its decision in *Connecticut Water Co. v. Beausoleil*, 204 Conn. 38, 46, 526 A.2d 1329 (1987) in which it reaffirmed the prior mentioned decisions and added that "22a-19 does not expand the jurisdictional authority of an administrative body acting pursuant to a separate act of title 22a to hear any and all environmental matters, but rather, *limits an intervenor to the raising of those environmental matters which impact on the particular subject of the act pursuant to which the commissioner is acting*." (Emphasis supplied.) *Nizzardo*, *supra*, 259 Conn. at 153. The *Nizzardo* court rejected the plaintiff's argument that § 22a-19 intervention required consideration of any and all environmental issues regardless of whether the agency had jurisdictional authority leaving those issues outside the scope for an independent action under § 22a-16. It further noted that the state traffic commission had no jurisdictional authority to consider any environmental issues. *Nizzardo v. State Traffic Commission*, *supra*, 259 Conn. at 167. In *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 509, 815 A.2d 1188, (2003), the court then added, "[n]othing in this decision is contrary to our dicta in *Nizzardo v. State Traffic Commission*, *supra*, 259 Conn. at 159, that, [i]f a party wants to raise environmental concerns that are beyond the scope of authority of a particular agency, [§ 22a-16] provides a means for doing so ..."

Unlike the state traffic commission, land use (zoning, planning, and inland wetlands) agencies have different concerns. While the zoning regulations herein did not require review that could be deemed environmental, it is surely plausible that a land use agency could have such review

encompassed in its regulations. Examples come to mind for specific areas such as, for instance, aquifer protection (General Statutes § 8-2(a)), open space (§ 8-2(a)) and ridge line protection regulations (§ 8-2(c)). Nevertheless, the development of a parcel of land-for whatever use-has some environmental impact, whether large or small. The approval by the land use agency, if environmental considerations are included within the scope of its review, implicate the *Millstone* and *Waterbury* rulings.

12 General Statutes § 26-310 states in relevant part:

(a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section.

In fulfilling the requirements of this section, each agency shall use the best scientific data available.

13 The sediment must, of course, be removed during normal maintenance; if this does occur, the device will not work as designed.

14 Pursuant to General Statutes § 22a-426, the DEP has promulgated the Connecticut Water Quality Standards to "set an overall policy for the management of water quality." Testimony at trial focused on Appendix D, numerical water quality criteria for chemical constituents, specifically copper and zinc of the toxic metal section and the accompanying table notes (2); (3); (6) and (7).

15 As noted previously, the plaintiffs' review and, indeed this litigation, only focused on the "marketplace property," and not the other parcels undergoing development. Plaintiffs' argument that this activity, on this portion of the total parcel, constitutes a violation of CEPA while the remaining construction and related impact apparently does not is perplexing to this court. Unlike the defendants' experts, the plaintiffs' experts did not study the adjacent land.

16 Counsel for the parties and this court conducted a view of the premises on July 20, 2004.

17 Of course, the same could be said of the defendants: that despite the institution of this action, they continued construction knowing the type of relief the plaintiffs were seeking.

18 This court is not referring to the plaintiffs' two experts-both reputable, knowledgeable and highly qualified witnesses.

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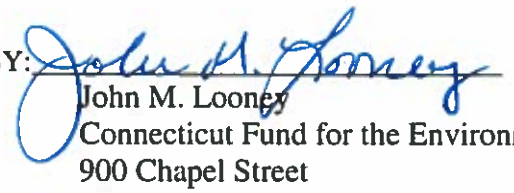
## Conclusion

For all of the foregoing reasons, NTE's Application should be dismissed.

Respectfully submitted,

Connecticut Fund for the Environment

BY: 

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## CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing document was delivered via electronic mail to persons on the attached service list on November 2, 2016.

By: _____
John M. Looney

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