



# STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
79 ELM STREET HARTFORD, CT 06106-5127



## OFFICE OF ADJUDICATIONS

*IN THE MATTER OF* : *APPLICATION NO. 200402741*  
*STEPHEN TONER* : *AUGUST 4, 2010*

### SUPPLEMENTAL PROPOSED FINAL DECISION

#### *I*

#### *SUMMARY*

This decision supplements the June 23, 2009 Proposed Final Decision (PFD) issued in this matter. In that decision, I recommended that the application be denied without prejudice based on issues regarding the applicant's intended use of his dock. The applicant, Stephen Toner, and staff have submitted an Agreed Draft Decision<sup>1</sup>, which is intended to address those issues and which outlines proposed Special Permit Terms and Conditions (STCs) that were not included in the draft permit that was the subject of the initial proceedings in this case. This Agreed Draft Decision has been entered in the record and a hearing was held to take testimony and additional evidence concerning the proposed STCs.

The record was reopened on December 14, 2009 and the hearing was reconvened on February 22, 2010 over the objection of the intervening party, the Ash Creek Conservation Association (ACCA). The applicant, staff and ACCA fully participated in the hearing; staff and ACCA filed post-hearing submissions on March 10, 2010.

The PFD contains factual findings regarding the applicant's proposed dock, his intended use of the dock and the potential impacts of his proposal on the coastal resources present in Ash Creek. The conclusions of law outlined in the PFD do not fully assess the applicant's proposal in

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<sup>1</sup> The Agreed Draft Decision was admitted to the record as exhibit HO-3.

relation to relevant statutes, regulations and policies.<sup>2</sup> The focus of the legal conclusions was on the need for staff to reconsider the subject application or a modified proposal while taking into account the applicant's intent to operate an outboard-powered boat from his dock in a shallow waterbody that supports significant coastal resources, including productive natural seed oyster beds. This Supplemental Proposed Final Decision contains findings of fact related to the Agreed Draft Decision and specifically to the STCs, and conclusions of law that include consideration of the applicant's proposed activities in relation to applicable statutes and regulations.<sup>3</sup>

The record in this case clearly demonstrates that there is no one "perfect" permit condition that would guarantee that the applicant's proposed regulated activities have no impact on coastal resources in the area of those activities. The recommended STCs, with appropriate revisions, provide a workable means to avoid, minimize or mitigate unreasonable or significant adverse impacts to coastal resources, even if some degree of impact is not entirely preventable. ACCA has failed to establish by prima facie evidence its allegations to the contrary.

In the absence of a specific statute, regulation or ordinance that could be construed to require the Commissioner to limit the size of the applicant's dock or type and size of the boat he intends to operate from his dock, public policy dictates that the applicant's riparian rights must be balanced against sound resource management practices. The draft permit<sup>4</sup> and proposed, revised STCs achieve that balance. I therefore recommend that the Commissioner authorize the recommended revisions to the proposed STCs and thereafter issue the requested permit.

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<sup>2</sup> The Tidal Wetlands Act, General Statutes §§22a-28 through 22a-35; Tidal Wetlands Regulations, Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17, the statutes relating to structures, commonly referred to as the Structures and Dredging Act, General Statutes §22a-359 through 22a-363f; and the goals and policies set forth in the Coastal Management Act, General Statutes §§22a-90 through 22a-113.

<sup>3</sup> The DEP Rules of Practice provide that when a hearing is held on an agreed draft decision, if the agreement is accepted, the hearing officer is required to include findings of fact and conclusions of law in a proposed decision. Regs., Conn. State Agencies §22a-3a-6(l) (3)(B). In this case, it is not reasonable to accept or reject the Agreed Draft Decision, in part, because the June 23, 2009 PFD did not present a complete assessment of the application. Therefore, the pertinent provisions of the Agreed Draft Decision are accepted to the extent that they are incorporated into the findings or conclusions included in this Supplemental Proposed Final Decision. Regs., Conn. State Agencies §22a-3a-6(d)(2)(I).

<sup>4</sup> The draft permit, exhibit DEP-14, is an attachment to the June 23, 2009 PFD.

## II

### *PRELIMINARY RULING ON JURISDICTION*

#### A

##### *Background*

The June 23, 2009 PFD recommended that the Commissioner deny the subject application without prejudice to allow the applicant to request a re-evaluation of his proposed activities or to submit a modified proposal for staff's review and consideration. The applicant timely filed exceptions to the PFD, to which ACCA objected. Prior to filing briefs on the exceptions, staff requested an extension of time to reconsider the application with regard to the applicant's intended use of his proposed dock, in accordance with the recommendations in the PFD. On August 5, 2009, the Commissioner granted staff's request over the objection of ACCA.

The Commissioner encouraged the parties to discuss their issues and to consider mediation if it appeared that an agreement could be reached. On October 5, 2009, staff advised the Commissioner that the three parties had engaged in mediation; the outcome was an agreement between the applicant and staff. Staff requested additional time to prepare an Agreed Draft Decision, which was filed on December 2, 2009, with a Motion to Reopen the Record to admit the agreement for consideration. ACCA timely filed its objection to staff's motion, which was overruled on December 14, 2009.<sup>5</sup>

The hearing was reconvened on February 22, 2010, to take evidence and testimony on the proposed STCs that were outlined in the Agreed Draft Decision. All parties were permitted to make opening statements and to present evidence and cross-examine witnesses. The parties were also authorized to recall any witnesses who previously testified, provided any additional testimony was relevant to the issues that were the subject of the reconvened hearing. Staff, with the concurrence of the applicant, presented evidence in support of the recommended STCs.

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<sup>5</sup> Pleadings, petitions, rulings, briefs, formal notices, directives and conference summary memoranda are contained in the Office of Adjudications docket file and are a part of the record of this proceeding. General Statutes §4-177(d).

ACCA challenged the evidence in opposition to the STCs. ACCA and staff also filed post-hearing briefs on March 10, 2010.

*B*

*ACCA Objection to Additional Proceedings*

At the start of the continued hearing, ACCA renewed its objection to the reopening of the record and further objected to the hearing on the Agreed Draft Decision. ACCA also argued its objections in its post-hearing brief. Before proceeding further with this supplemental decision, it is appropriate that I address the ACCA claims that the record was reopened and the hearing reconvened in violation of the DEP Rules of Practice and Connecticut law<sup>6</sup> because the claims implicate the Commissioner's jurisdiction.

ACCA essentially argues that, because a proposed decision was issued in this matter, the Rules of Practice require this contested case to proceed to oral argument on the applicant's exceptions and to a final decision to complete the administrative review process. ACCA contends that there is no provision in the rules that allows for "off-the-record" discussions between staff and the applicant or for a "bilateral agreement" between these two parties that results in new permit conditions. ACCA also argues that the application, denied for incompleteness in the PFD, cannot be reopened by agreement over the objection of the intervening party and without an evaluation of the merits of the PFD.

ACCA mischaracterizes the conclusions in the PFD by incorrectly stating that the application was found to be incomplete. The completeness of the application was determined by staff prior to the issuance of the Notice of Tentative Determination to authorize the proposed activities. ACCA also incorrectly implies that the applicant has somehow amended his application by entering into the agreement with staff, thereby short-cutting the hearing process.

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<sup>6</sup> ACCA argues that the additional proceedings conducted in this matter are not provided for under Connecticut law and are entirely "extra-legal".

The application that was the subject of the initial proceedings in this matter has not changed and there is presently no pending request to supplement the record with a revised or modified application.

## *C*

### *Discussion*

The department's Rules of Practice conform to the provisions of the Uniform Administrative Procedure Act (UAPA). General Statutes §§4-166 through 4-189. The UAPA authorizes resolution of contested cases "by stipulation, agreed settlement, or consent order or by the default of a party." §4-177(c). The UAPA does not specify, nor does it proscribe, any particular point during the course of a contested case proceeding when settlement may or may not occur.

In furtherance of the UAPA provisions, the DEP Rules of Practice specifically provide for and encourage disposition of contested cases by agreement. Regs., Conn State Agencies §22a-3a-6(1)(1). The Rules contemplate agreements between staff and permit applicants. §22a-3a-6(1)(3). In fact, the Rules specifically provide for consideration of such agreements without the participation and over the objection of intervening parties. §22a-3a-6(1)(3)(A)(ii) and (B). In addition, as was the case here, when the hearing officer has questions about an agreement or an intervening party objects to it, a hearing must be held. §§22a-3a-6(1)(3)(B) and 22a-3a-6(1)(4). A hearing was especially required in this case because additional facts were necessary to allow for adequate consideration of the proposed STCs.

The Rules of Practice are intended to "secure the just and expeditious determination of proceedings," and are "interpreted liberally so as to further the purposes and policies of the statutes and regulations administered by the Commissioner." §22a-3a-2(b). In this case, the applicant and staff have responded to the recommendations in the PFD with their agreement and have attempted to expedite the re-evaluation of the applicant's proposed activities in accordance with governing statutes and regulations. There is no rule or statute that precludes consideration of that re-evaluation after an initial hearing and before a final decision is rendered.

The recommendation in the PFD that the application be denied without prejudice contemplated an efficient and expeditious process for further consideration of the applicant's proposed activities. The public and other state and municipal agencies have had an opportunity to comment on the application,<sup>7</sup> which has not changed. If the recommended STCs are incorporated into the permit, the applicant would be acting under a permit that is more stringent than the proposed draft permit. A change in permit terms such as those proposed in this case without a significant change in the proposed activities should not and does not require additional public response. In addition, ACCA has not been prejudiced by the continued proceedings on the Agreed Draft Decision. ACCA had full opportunity to participate in the continued proceedings and to file a post-hearing brief. ACCA will also have an opportunity to file exceptions to this Supplemental Proposed Final Decision and to argue its exceptions before the Commissioner should it choose to do so.

## *D*

### *Conclusion*

As discussed above, the Rules of Practice specifically encourage resolution of matters by agreement. ACCA's argument that that the Commissioner is prohibited from considering the agreement prior to the issuance of her final decision would result in an illogical interpretation of rules that are intended to be liberally construed. The Commissioner clearly has the authority to consider the Agreed Draft Decision at any time during the proceedings. ACCA's objection to reopening the record and reconvening the hearing is therefore *overruled*.

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<sup>7</sup> ACCA also argues that the continued proceedings are improper because the Department of Agriculture Bureau of Aquaculture (BOA) has not reviewed or commented on the recommended STCs. The PFD discussed the extensive comments made by BOA on the application and its determination that the proposed activities, specifically the proposed operation of a motorized vessel, would significantly impact seed oyster development, recruitment and habitat in Ash Creek. There is no requirement in the governing statutes or regulations that the applicant or staff must submit additional proposed permit terms and conditions to BOA for its consideration after BOA has issued its impact determination. In this case, the BOA significant impact determination set the stage for the hearing as provided by General Statutes §22a-361(b). The statute requires nothing more from BOA.

### *III*

#### *DECISION*

##### *A*

#### *FINDINGS OF FACT*

The following findings are based on my review of the evidence presented during the continued hearing and determination of the credibility of witnesses and weight to be given to and reasonable inferences drawn from that evidence.

##### *1*

#### *The Proposed Final Decision*

1. At the conclusion of the initial proceedings in this matter, I issued a preliminary ruling that it was within the Commissioner's authority to consider and regulate the intended use of the applicant's proposed dock in determining whether to approve a permit in accordance with applicable statutes and regulations. Subsequent to that ruling, the June 23, 2009 PFD was issued. The following is a summary of the conclusions set out in the PFD regarding the department's evaluation of the application:

- a. The intended use of the dock and any associated adverse impacts were not evaluated with respect to the regulatory criteria set forth in the Tidal Wetlands Act, including whether there are technically feasible alternatives that would further minimize impacts if the dock were modified, and whether powerboat use in the area of the dock would be protective of wetlands and adjoining coastal resources.
- b. Any impacts associated with the use of the dock should be examined to determine whether such activity will adversely and significantly affect protected resources in a manner that would be inconsistent with the goals and policies of the CMA as implemented through the Structures and Dredging Act.
- c. Review of the application should include consideration of the BOA determination that the presence of the dock and the uses associated with it are likely to cause adverse impacts to coastal resources in Ash Creek, particularly to the seed oyster habitat.

d. The length and structural design of the applicant's proposed dock are dictated by his intended use of the dock, i.e., the size and type of boat to be berthed at and launched from this dock, and staff should give consideration to such use and whether there are adequate safeguards that can be incorporated as permit conditions that will address any impacts associated with this use.

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*Agreed Draft Decision/Proposed Special Permit Terms*

2. The record was reopened on December 14, 2009 and the hearing was reconvened on February 22, 2010, for the purpose of taking evidence on the Agreed Draft Decision. Staff and the applicant represent that this agreement addresses the issues raised in the PFD. The agreement includes the five recommended STCs. (HO-3; test. J. Westermeyer.<sup>8</sup>)

3. The STCs reflect staff's consideration of the applicant's intended use of his proposed dock within the context of the following carefully defined parameters: (1) the potential for adverse impacts to coastal resources due to berthing a powerboat at the dock, and (2) the potential for adverse impacts due to powerboat operations within a fifty-foot radius of the waterward end of the dock. Staff considers these activities to be associated with the applicant's use of his dock. Adverse impacts that could be caused by operation of the applicant's boat beyond the fifty-foot limit are not covered by the STCs. Staff considers a boat traveling beyond the fifty-foot limit to be entirely underway, not associated with berthing or attendant to the use of the dock, and therefore outside the scope of its regulatory authority. (Test. J. Westermeyer.)

4. Of the five STCs, two conditions address berthing activities and provide that "[a]ny motorized vessel moored, rafted or otherwise berthed at the fixed pier ... shall be of a size which provides a minimum clearance of [two feet] between the propeller of such vessel, when said propeller is in the down position, and the bottom of Ash Creek. The minimum clearance of [two feet] shall be maintained at all times when the vessel is berthed at the fixed pier. If the "water levels prevent such motorized vessel from maintaining the clearance ... the Permittee shall store

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<sup>8</sup>All testimony and continued proceedings were conducted on February 22, 2010 and were recorded. No written transcript has been prepared. The audio recording of this continued hearing is on file with the Office of Adjudications and is part of the official record of this proceeding.



said vessel on the davits authorized herein, or at an alternative location.” (Ex. HO-3; test. J. Westermeyer.)

5. There is no statutory definition of the term “berthed”. Staff considers a boat to be berthed any time that it is physically tied to the dock, whether for minutes or days. The berthing conditions are intended to address the potential for direct adverse impacts, such as scars or scouring, that could occur to the substrate in the immediate vicinity of the dock due to the boat or its propeller sitting on the bottom for an extended period during low tide. (Test. J. Westermeyer.)

6. Two other STCs set out monitoring requirements. The applicant would be required to submit, within ninety days of construction, as-built plans “showing all contours, bathymetries, tidal datum and structures, including an A2/T2 level survey showing the existing bathymetric conditions within a [fifty-foot] radius” from the waterward end of the dock. The applicant must “allow the Commissioner to inspect the work area following construction of the fixed pier to determine if any change in bathymetric conditions has occurred as a result of non-compliance with [the STCs].” (Ex. HO-3; test. J. Westermeyer.)

7. The purpose of the A2/T2 survey is to establish a baseline for assessing whether disturbances have occurred due to prop-dredging<sup>9</sup> or prop-wash<sup>10</sup> within the fifty-foot limit. The A2/T2 survey would show the elevations and natural contours of the bottom of Ash Creek in the area of the dock. The survey would provide a representation of the natural conditions that can be used for comparison to assess visible changes during subsequent site inspections. (Test. J. Westermeyer.)

8. The standards for an A2/T2 survey require dozens of elevation points, which would give a very accurate picture of existing contours to within tenths of a foot so that staff could later discern changes to the baseline conditions. Naturally occurring changes in substrate contours due to tidal cycles may be subtle; man-made changes, such as changes due to boating impacts,

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<sup>9</sup> Prop-dredging is physical disturbance to the substrate caused by direct contact between a turning propeller and the bottom of the waterbody. (Test. J. Westermeyer.)

<sup>10</sup> Prop-wash is a jet stream that is created as the propeller turns; if the boat is operating in shallow waters or at a particular speed, prop-wash can result in sediment disturbance or turbulence. (Test. J. Westermeyer.)

would be very concentrated and in stark contrast to any natural changes. With a baseline established by the initial survey, staff would be able to detect any level of change to the substrate due to prop-wash or prop-dredging. (Test. J. Westermeyer.)

9. Staff considers the berthing conditions to also have the effect of limiting the applicant's boating operations to periods when water levels are high enough to maintain the required two-foot separation distance. The monitoring conditions are proposed to allow the department to conduct an assessment of any adverse impacts attributable to the applicant's improper operation of his boat, whether through non-compliance with the berthing conditions or by leaving or approaching the proposed dock at water levels or speeds that would cause prop-wash or prop-dredging. (Test. J. Westermeyer.)

10. The fifth STC would authorize the Commissioner to require an additional A2/T2 survey in the event the department has determined that the applicant has not complied with the berthing and monitoring conditions. As drafted, this STC could limit the Commissioner's authority to require the additional survey to those circumstances where the department has *actually confirmed* that adverse impacts have occurred within the prescribed area.<sup>11</sup> However, this additional survey requirement is intended to confirm a *suspected* adverse impact. For example, if a visual, low tide inspection in the area covered by the STCs raised concerns that use of the dock caused adverse impacts to the substrate, the Commissioner should be able to require the applicant to conduct an additional survey to confirm the suspected impacts or to show that such impacts have not occurred. (Ex. HO-3; test. J. Westermeyer.)

11. Staff recommends that this STC be revised to accurately reflect its intended purpose such that if conditions are observed that would warrant issuance of a Notice of Violation<sup>12</sup>, the Commissioner would be authorized to require the second survey. In addition to the requirement of an additional A2/T2 survey, the draft permit provides for enforcement actions, including

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<sup>11</sup> This STC states: "In the event that the Commissioner *determines* non-compliance with SPECIAL TERMS AND CONDITIONS paragraphs \_\_\_\_ and \_\_\_\_ above, the Commissioner may require an additional A2/T2 bathymetric survey." (Emphasis added.) (Ex. HO-3.)

<sup>12</sup> A Notice of Violation (NOV) consists of allegations of violations of a statute, regulation or permit. Frequently, the NOV requires, or a response to the NOV provides verification of the allegations or an explanation that demonstrates that violations have not occurred. (Test. J. Westermeyer.)

penalties and injunctions, as provided by law as a consequence of demonstrated non-compliance with any of the permit terms and conditions. (Ex. DEP-14; test. J. Westermeyer.)

12. The STCs are intended primarily to address adverse impacts due to prop-dredging, but do not entirely discount the potential for disturbances caused by prop-wash. A report of a compilation of studies published by the U. S. Environmental Protection Agency reveals that prop-wash occurs when a boat travels at wake producing speeds (i.e., greater than six miles per hour) in shallow waters and nearshore habitats. Boats traveling at such speeds can disturb bottom sediments or adversely impact subaquatic vegetation or shellfish beds. Boat speed is regulated by Connecticut boating regulations, which limit operating speeds in shallow and nearshore waters. The applicant is therefore legally required to comply with these speed restrictions, which should prevent or at least mitigate against any significant impacts from prop-wash. (Test. J. Westermeyer.)

14. The proposed STCs, which are unique to this application, warrant site inspections at least once every two to three months during the boating season. Any adverse impacts associated with the applicant's failure to comply with the STCs, or where the applicant misjudges the tide or is otherwise unable to operate his boat to avoid prop-dredging, could be observed during low-tide site inspections. However, limited departmental resources may not permit frequent inspections. Additionally, impacts from prop-dredging or other sediment disturbing activities could resolve within several months, so changes in substrate contours that might have been immediately observed may not be detected. (Test. J. Westermeyer.)

15. There is no scientific basis for the recommended two-foot separation distance between the applicant's propeller in the down position and the bottom of Ash Creek. The level of the water necessary to maintain this separation distance would afford the applicant a reasonable amount of time for boating activities. The water levels in Ash Creek are such that if a greater separation distance were required, it would shorten the time available to the applicant for boating. However, if the applicant complies with the required separation distance, there should be no direct contact with the substrate by the boat or its propeller in the down position. (Test. J. Westermeyer.)

16. Even if the applicant does comply with the STCs, the possibility of impacts due to motorized or other types of boats operating in the area of the dock is not entirely eliminated. A number of other factors that can cause impacts or disturbances of varying magnitude, frequency and duration include: boat size, shape and speed; substrate susceptibility to erosion; and the pattern, duration and frequency of boating activity. However, if the applicant is operating his boat in compliance with the boating regulations and the STCs, it is less likely that adverse impacts or disturbances would be significant. (Ex. ACCA-8a<sup>13</sup>; test. J. Westermeyer, S. Danzer.)

17. At the conclusion of the initial hearing on the subject application, staff filed a post-hearing brief in which it recommended permit conditions that required three A2/T2 surveys; one prior to construction of the dock, a second after the first year of boating use, and the third after a second boating season.<sup>14</sup> Additional surveys could have been required at the discretion of the Commissioner. The current proposed STCs limit the Commissioner's discretion to require an additional survey to circumstances where there is some evidence of the applicant's failure to comply with the proposed STCs. (Test. J. Westermeyer.)

18. Three A2/T2 surveys would impose a greater financial burden on the applicant but would not necessarily assure a better environmental outcome. Any one survey would capture the bathymetric conditions at the time and would not reveal prior adverse impacts to the substrate that have already resolved. There is no correlation between the number of required surveys and the potential for adverse impacts. It is possible that if the Commissioner were afforded more discretion to require additional surveys there would be a greater likelihood that the applicant or any future property owner would comply with the STCs. (Test. J. Westermeyer.)

19. The STCs do not require any modification to the size or design of the proposed dock. The present design and the two-foot distance requirement would limit the size of boat that could be used at the dock. The proposed dock length is sixty feet, which is necessary to accommodate

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<sup>13</sup> Intervenor's exhibit ACCA-8 was previously offered during the initial hearing. During the continued hearing, an exhibit not previously offered was also marked ACCA-8. For clarification of the record, this new exhibit is re-marked as ACCA-8a.

<sup>14</sup> Staff supported this recommendation by acknowledging that "a boat operated under power in the vicinity of the dock during periods of low water could suspend sediments, smother shellfish, and affect the benthic contours. To some degree it is possible – if not probable – that Mr. Toner will be unable, because of time constraints, misjudgment of the tides, or other reason, to operate his powerboat in the vicinity of the dock such that no propeller dredging will take place." (Test. J. Westermeyer.)

a boat of the size intended to be used by the applicant. Specifically, that length allows the applicant to berth a twenty-four foot powerboat at the dock without the boat coming into direct contact with the nearshore tidal wetland vegetation. A shorter dock, which might be as protective of coastal resources but minimize encroachment into public waters, would not necessarily be required by the department in light of the potential for impacts to the wetlands from its intended use. As in this case, when staff determines that the size and design of a dock is reasonable such that it provides the applicant with access to navigable water and does not significantly impact protected resources, obstruct navigation or impede public access along the shore, staff considers the extent of the encroachment acceptable. (Test. J. Westermeyer.)

21. Staff and the applicant agreed to the following factual findings set forth in the Agreed Draft Decision:

- a. Tidal Wetlands Vegetation: The structure will not cause significant adverse impacts to tidal wetlands vegetation.
- b. Shellfish: The inclusion of the STCs will “prevent or minimize the potential for adverse impacts to seed oysters in Ash Creek from a powerboat while berthing or berthed at the proposed pier.”
- c. Connecticut Endangered, Threatened and Special Concern Species: Historical records indicate that a Special Concern Species, the saltmarsh bulrush, was present at the site. The applicant and staff have since confirmed that this species does not now grow at the site.
- d. Intertidal Mudflats: The proposed structure will span twenty feet of intertidal mudflat, habitat for seed oyster. The inclusion of the STCs “will prevent or minimize the potential for adverse impacts to seed oysters in Ash Creek from operation of a powerboat while berthing or berthed at the proposed pier.”
- e. Finfish: “The proposed project will not adversely impact fisheries resources and habitat in Ash Creek.”

f. Navigation Impacts: The dock will encroach sixty feet into public waters (i.e., the length of the dock waterward of the high tide line). “The pier does not extend into the navigable channel that is present at low tide and will not cause adverse impacts to navigation in Ash Creek.”

g. Public Trust: The dock “represents a reasonable encroachment into public trust waters located waterward of mean high water.” The dock will be elevated to a height that is acceptable to allow public access onto public trust areas along the shoreline.

h. Environmental Impacts: The environmental impacts associated with the dock have been minimized to the greatest extent practicable. The agreed-upon STCs will “minimize potential adverse impacts from a powerboat while berthing or berthed at the pier.”

(Ex. HO-3.)

22. The applicant and staff also agreed to the following conclusions of law that take into account the proposed STCs.

“1. Consideration of the proposed dock: The Department has evaluated the potential adverse environmental impacts that might result from a powerboat berthing or berthed at the proposed pier. With the inclusion of the [STCs], use of the proposed pier by a powerboat will not result in significant adverse impacts to coastal resources. Therefore, powerboating is an acceptable potential use of this pier.

“2. Environmental Impact of the Proposed Action: The proposed project would provide the Applicant with reasonable access to public trust waters for recreational boating. The record supports a finding that the potential environmental impacts from the proposed project have been sufficiently minimized and the proposed project is consistent with the [applicable] policies regarding coastal resources, tidal wetlands, and coastal management... .

“3. Consistent with All Applicable Standards: The proposal is consistent with applicable standards, goals and policies of sections 22a-28 through 22a-35 and 22a-359 of the General Statutes, which requires the Department to make permit decisions with due regard for indigenous aquatic life, fish and wildlife, the use and development of adjoining uplands, and the recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.

“4. Alternative to the Proposed Action: There is no feasible or prudent alternative which would provide the applicant reasonable riparian access which would have less impact on the adjacent coastal resources.”

(Ex. HO-3.)

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*Unpermitted Fill and Retaining Wall*

20. As noted in the PFD, an unpermitted retaining wall and associated backfill are present on the applicant’s property waterward of the high tide line. Provisions in the draft permit prohibit future maintenance of the wall and require the applicant to establish a “no mow zone” to allow colonization of tidal wetlands on the property in that area.<sup>15</sup> It is unlikely that staff would recommend approval of the application if these permit conditions were not included. Apparently, in the exercise of discretion, the department would forgo any enforcement action to address the unpermitted structure and fill. However, in the event the subject permit is not issued, staff would recommend that the department bring an enforcement action to pursue remediation of the area. (Test. J. Westermeyer.)

*B*

*CONCLUSIONS OF LAW*

The construction, maintenance and use of the proposed dock are subject to the provisions of the Tidal Wetlands Act and its implementing regulations; the Structures and Dredging Act and must be consistent with the goals and policies of the Coastal Management Act. The Agreed Draft Decision is intended to reflect staff’s consideration of the applicant’s use of his dock and,

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<sup>15</sup> Proposed Final Decision, Findings of Fact Nos. 6, 9, 11, 24, 25, 41.

with the incorporation of the recommended STCs into the draft permit, to demonstrate that the applicant's proposed activities are consistent with coastal management policies and the governing statutory scheme.

*I*  
*Coastal Management Act*

Through the Coastal Management Act (CMA), the legislature has established goals for the development and preservation of land and water resources within defined coastal areas. §§22a-92 and 22a-94(a). The following coastal management goals and policies are relevant to the application that is the subject of these proceedings:

- Insure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting either the natural environment or sound economic growth. §22a-92(a)(1).
- Require structures in tidal wetlands and coastal waters to be designed, constructed and maintained to minimize adverse impacts on coastal resources, circulation and sedimentation patterns, water quality, and flooding and erosion, to reduce to the maximum extent practicable the use of fill, and to reduce conflict with riparian rights of adjacent landowners. §22a-92(b)(1)(D).
- Manage intertidal flats so as to preserve their value as a nutrient source and reservoir, a healthy shellfish habitat and a valuable feeding area for invertebrates, fish and shorebirds, to encourage the restoration and enhancement of degraded intertidal flats; to allow coastal uses that minimize change in the natural current flows, depth, slope, sedimentation, and nutrient storage functions and to disallow uses that substantially accelerate erosion or lead to significant despoliation of tidal flats. §22a-92(b)(2)(D).
- Preserve tidal wetlands and to prevent the despoliation and destruction thereof in order to maintain their vital natural functions; to encourage the rehabilitation and restoration of degraded tidal wetlands and where feasible and environmentally acceptable, to encourage the creation of wetlands for the purposes of shellfish and finfish management, habitat creation and dredge spoil disposal. §22a-92(b)(2)(E).
- Disallow any filling of tidal wetlands and nearshore, offshore and intertidal waters for the purpose of creating new land from existing wetlands and coastal waters which would otherwise be undevelopable, unless it is found that adverse impacts on coastal resources are minimal. §22a-92(c)(1)(B).



- Manage estuarine embayments so as to insure that coastal uses proceed in a manner that assures sustained biological productivity, the maintenance of healthy marine populations and the maintenance of essential patterns of circulation, drainage and basin configuration; and protect, enhance and allow natural restoration of eelgrass flats except in special limited cases, notably shellfish management, where the benefits accrued through alteration of the flat may outweigh the long-term benefits to marine biota, waterfowl, and commercial and recreational fisheries. §22a-92(c)(2)(A).

2

*Tidal Wetlands/Structures and Dredging Acts*

The Tidal Wetlands Act and its implementing regulations and the Structures and Dredging Act require the Commissioner to consider various factors in determining whether to grant a permit. In this case, the Commissioner must take into account the effects of the proposed activities on tidal wetlands, adjoining coastal and tidal resources, navigation, recreation, erosion, sedimentation, water quality and circulation, fisheries, shellfisheries, wildlife, flooding and other natural disasters and determine whether the activities would significantly and adversely impact these resources. §§22a-33, 22a-359(a), 22a-361(c). The analytical framework for consideration of these factors is provided in the relevant provisions of the Tidal Wetlands Regulations. Regs., Conn. State Agencies §22a-30-10. Because the Tidal Wetlands, Structures and Dredging and Coastal Management Acts are interrelated, activities that are conducted in a manner that complies with the criteria established to protect these resources would be consistent with the applicable goals and policies of the CMA set forth above. See §22a-92(a)(2).

3

*Construction and Maintenance of Proposed Dock*

In determining whether the structure satisfies the regulatory criteria referenced above, the evidence regarding the construction and maintenance of the proposed dock supports the following conclusions:

1. The dock would be constructed at an elevation that would allow for access to public trust areas during periods of low water. The proposed dock would not unreasonably interfere with or cause sedimentation problems in any navigational channel or adversely impact

adjacent navigational uses and would not impact the abutting neighbors. The proposed dock would not destroy existing or potential recreational or navigational uses of tidal wetlands. §22a-30-10 (c) (1) – (3).

2. There is no evidence in the record that the construction and maintenance of the proposed dock would cause significant changes in current patterns, water velocity or exposure to storm or wave conditions, which could cause or produce unreasonable erosion or sedimentation. No filling or dredging is proposed and the dock would not adversely impact movement of sediments on or along the shoreline. Therefore, the proposed structure would not cause or produce unreasonable erosion or sedimentation. §22a-30-10(d). There is also no evidence that the dock would cause significant alterations of tidal exchange patterns or flushing rates, limit the ability of the tidal wetlands to flush, or result in water pollution or cause other adverse changes that could impact water circulation or water quality. §22a-30-10(f).
3. Construction of the dock would be restricted to seasons that would avoid impacts to migratory shorebirds known to be present in the area. The location and design of the dock would ensure that wildlife habitat, habitat of rare and endangered wildlife and fish species and shellfish beds would not be unreasonably impacted by the construction and maintenance of the dock. The draft permit also requires the applicant to use his best efforts to ensure that the dock would not impede access to shellfish resources.<sup>16</sup> This evidence demonstrates that the construction and maintenance of the dock would not result in significant adverse impacts on marine fisheries, shellfisheries or wildlife in the area. §22a-30-10 (e).
4. There is no evidence that the presence of the proposed dock would increase the potential for flood or hurricane damage on adjacent properties or increase the exposure of any property, land or other docks to damage from storm waves or erosion. There is also no evidence that the dock would cause a significant increase in the velocity or volume of

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<sup>16</sup> The Town of Fairfield Shellfish Commission would also require the applicant to execute a Shellfish Easement to the town. PFD, Finding of Fact #8.

flood water flow in the estuary or significantly reduce the capacity of Ash Creek to transmit flood waters caused by hurricanes or other storm events. The structure would not result in a significant adverse impact on water circulation and quality. §22a-30-10 (f).

5. The proposed dock would span the tidal wetland vegetation in the area at a height that would minimize shading impacts to the vegetation and provide boaters with access to Ash Creek without having to trample the vegetation. There is no float proposed and pile supports would be used and impacts to intertidal flats would be minimized by permit conditions that require installation of the piles from a barge during periods of high water, thereby preventing the barge from having direct contact with the flats and creating benthic disturbances.
6. The evidence indicates the possibility that a shorter dock could be an acceptable alternative. There is no evidence, however, that such a structure would further minimize adverse impacts to tidal wetlands or coastal resources. The regulations require a finding that any structure “will be no greater in length, width and height than necessary to accomplish its intended function.” §22a-30-10(b)(2) Although designed to accommodate a particular use, the record indicates that the proposed dock is reasonable in light of that use as it would prevent any impact to tidal wetlands that might result from direct contact from a powerboat if the structure were too short. Tidal wetlands in the area of the dock would therefore be protected and preserved. §22a-30-10(b)(1) – (4).

The record clearly demonstrates that the dock, if constructed in accordance with the draft permit terms and conditions, would comply with the applicable provisions of the Tidal Wetlands Act, these implementing regulations and the Structures and Dredging Act. As noted above, compliance with these various standards necessitates a conclusion that the construction and maintenance of the proposed dock would be consistent with the applicable coastal management goals established by the CMA.

*The STCs and Use of the Proposed Dock*

The record shows that the applicant intends to use his dock to berth, launch and retrieve a twenty-four foot powerboat, along with small dinghies and sailboats. To accommodate the powerboat, the dock is designed to be sixty feet with davits installed to store it during periods of low water. The Department of Agriculture Bureau of Aquaculture considers Ash Creek a valuable source of seed oyster habitat; and is concerned that powerboat traffic in the Creek will disturb sediments, threaten seed oyster habitat and recruitment, and disrupt the restoration of commercially viable seed oyster beds in the area. Additionally, the evidence shows that staff agrees that the operation of powerboats in the shallow waters of Ash Creek could adversely impact benthic resources, shellfish and other shallow water habitat. Any use of the dock that would cause such impacts, if significant, would violate the applicable legal standards and be inconsistent with coastal management policies. §§22a-32 and 22a-93(15).

It is evident from the Agreed Draft Decision, the STCs and the evidence presented during the continued hearing that staff considered the applicant's intended use of his proposed dock in light of the standards established by the Tidal Wetlands, Structures and Dredging and Coastal Management Acts. The evidence reflects consideration of the water levels in Ash Creek, the potential for erosion along the shoreline, tidal wetlands vegetation, intertidal mudflats, shellfish, seed oysters and seed oyster habitat in the area of the dock. Consideration was also given to impacts that could be caused by powerboat operating speed, although staff concluded that the state boating regulations govern operating speed. The STCs proposed in the Agreed Draft Decision are specifically intended to mitigate the effects of the applicant's use of his dock on coastal resources to the extent that any adverse impacts caused by such use are insignificant, even though not entirely preventable.

In its post-hearing brief regarding the STCs, ACCA notes that the recommended permit terms and conditions in staff's earlier brief were relaxed or entirely left out of the Agreed Draft Decision. ACCA argues that the STCs, having no basis in science, are of little to no benefit in protecting coastal resources. In contrast to the agreed-upon STCs, ACCA points out that staff's earlier recommendations carried the penalty of permit revocation and dock removal for a violation of permit conditions, even if unintentional. ACCA contends that the Agreed Draft

Decision carries no sanction, other than a second A2/T2 survey, for damage to the environment due to the use of the proposed dock, the determination of which would require on-site observations at the time of the violation.

It is reasonable to infer from the evidence that there may not be a permit term or condition that would completely eliminate the potential for impacts to protected resources from the applicant's intended use of his dock. The STCs were the result of an agreement and the record reflects an understanding between the parties to that agreement that the STCs are intended to protect the coastal resources in the area around the proposed dock from adverse impacts. However, the STCs embody a compromise, so it is understandable that staff might choose one set of presumably several possible sets of permit terms to achieve this goal.

The evidence shows that the draft permit does provide for sanctions in the event the applicant violates its terms. Such sanctions would also apply to violations of the STCs. Although ACCA correctly points out that demonstrated violations of the STCs would likely require on-site inspections at a time when departmental resources are limited, there is no evidence that multiple AT/T2 surveys will better protect the resources in the area. Additionally, ACCA offers no evidence of alternative meaningful monitoring mechanisms to protect coastal resources from adverse impacts associated with the applicant's use of his dock.

ACCA also argues that the ability for the Commissioner to impose permit conditions that would require multiple surveys constitutes a feasible alternative that is more protective of the environment and on that basis alone, the application should be denied. ACCA misconstrues more stringent permit conditions as a feasible alternative to the applicant's proposed activities. Feasible alternatives, as contemplated by the Tidal Wetlands regulations, represent alternatives to the actual proposed activities, not the permit provisions regulating those activities. §22a-30-10 (b) (1).

The CMA clearly defines adverse impacts as degradation of coastal resources due to *significant* alteration of natural or existing features, habitats, characteristics or functions. §22a-93(15). Also, the goals and policies of the CMA and the objectives embodied in the Tidal Wetlands Regulations seek to "minimize", "mitigate", or avoid "unreasonable" or "significant" effects. See, e.g., §§22a-92 (a)(1) and (5); 22a-92 (b)(1)(D); Regs., Conn State Agencies §§22a-

30-10)(b)(1),(4). There is no statute or regulation that specifically requires a determination that a structure or its use will not impact a protected resource to some degree. While there may be no permit condition that could entirely prevent impacts to adjacent resources; it is apparent that compliance with the berthing and monitoring conditions, in the manner intended by staff, would lessen the degree of impact to a point where it would be insignificant. The proposed STCs appear to be a workable means to avoid, minimize or mitigate unreasonable or significant adverse impacts. In light of the absence of evidence to the contrary, the record supports a conclusion that the applicant's intended use of his dock will not cause adverse impacts to coastal resources, provided such use is conducted in accordance with the proposed STCs.

5

*Riparian Rights of Reasonable Access*

The department recognizes a property owner's riparian right to access navigable waters and must balance that right against the common law public trust doctrine.<sup>17</sup> In doing so, the department also recognizes that riparian interests are subject to regulation,<sup>18</sup> which, as in this case, subjects private residential docks and other structures to the applicable provisions of the Tidal Wetlands, Structures and Dredging and Coastal Management Acts and the policies of the state that are carried out through these provisions.

In the course of implementing these regulatory provisions, the department integrates into the process the State's role as trustee of the public trust area on behalf of the public. The department has consistently carried out its responsibility under a basic duty to minimize environmental impacts and private encroachments into public trust lands and waters. In other words, the department is obligated to require the minimum encroachment necessary to allow the applicant reasonable access to navigable waters giving due regard to protected resources and public safety and well-being.<sup>19</sup> Reasonable access may therefore be limited in terms of time,

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<sup>17</sup> The "term traditionally has been used to refer to the body of common law under which the state holds in trust for public use title in waters and submerged lands waterward of the mean high tide line." *Leydon v. Town of Greenwich*, 257 Conn. 318, 332 (2001).

<sup>18</sup> See *Port Clinton Association v. Board of Selectmen*, 217 Conn. 588 (1991) (riparian rights subject to such general rules and regulations as legislature may see proper to impose for protection of rights of public).

<sup>19</sup> This requirement is also a criterion for consideration under the Tidal Wetlands Regulations. §22a-30-10 (b) (2).

type and size of structure, or the size of a vessel to be moored at the structure. In fact, there may be times when regulatory limits preclude any structure at all.

The applicant's proposed dock will encroach sixty feet into public waters, spanning thirty-five feet of tidal wetland vegetation and allowing for berthing and storing a twenty-four foot powerboat. The applicant has indicated his intended use of his dock and therefore what length it needs to be. If, as a riparian property owner, an applicant were left to determine the extent to which a structure should encroach into public waters without regard for public interests and protected resources such a determination would contravene the public trust doctrine. However, the record in this case indicates that the interests of the public and the policies and standards of the applicable statutes and regulations established to protect coastal resources were considered. Beyond the fact that the proposed dock is longer than those previously permitted in Ash Creek, there is no evidence that the structure or its use will cause adverse impacts as defined by the CMA. I therefore find that the draft permit and proposed STCs, which would impose limitations on the applicant's activities, are consistent with the public trust doctrine and in balance with the applicant's riparian rights.

## 6

### *Retention of Unpermitted Fill and Retaining Wall*

The draft permit authorizes the applicant to retain the unpermitted fill and retaining wall that were placed on his property waterward of the high tide line sometime between 1990 and 1995. The record shows that by leaving the wall in place, approximately 400 square feet of vegetation would remain undisturbed from the effects of removing the wall and re-grading the area. Additionally, the "no mow zone" would support colonization of additional tidal wetlands along the shoreline.

The ACCA has maintained throughout these proceedings that staff is motivated to recommend approval of the applicant's proposed activities because issuance of the permit would be the means by which the department could address the presence of the unpermitted fill and retaining wall. In its post-hearing brief, the ACCA claims that "the Office of Long Island Sound Programs and the [department] lacked the will or the resources or both, to cause the [a]pplicant to remediate environmental damage [on his property]." The ACCA argues that staff "had an

impermissible but powerful incentive to issue the permit for reasons that are “unrelated to the merits of the application itself.”

The record reflects that staff is of the opinion that the department would choose to forgo an enforcement action to require the applicant to remediate and restore the area of unpermitted fill and the retaining wall, in the absence of the draft permit conditions referenced herein. However, there is nothing in the draft permit, the Agreed Draft Decision or other record evidence that would suggest that the Commissioner has waived her authority to exercise her discretion to issue an order to the applicant to address the environmental statutory violations that are present on his property or to require him to apply for and obtain authorization to continue to maintain the violations. General Statutes §§22a-361a, 22a-362, 22a-363, 22a-363b and 22a-363f. Moreover, staff testified that in the event that the subject permit is not issued, it would recommend that enforcement proceedings be initiated for these specific violations.

There is insufficient evidence in the record and no legal basis to conclude that, without the requirements specified in the draft permit, the Commissioner would be precluded from addressing the illegal fill and retaining wall on the applicant’s property. There is therefore no basis to conclude that staff was unduly motivated to reach an agreement with the applicant and to recommend approval of his application. However, it is reasonable to conclude that the relevant draft permit requirements, which would promote future colonization of wetland vegetation on the site and avoid disturbance to existing vegetation, are consistent with the policies and statutes governing such activity.

7

*ACCA Burden of Proof*

ACCA has the burden of proving, by prima facie evidence, its allegations of unreasonable pollution under §22a-19(a).<sup>20</sup> Because there is a statutory scheme that governs the applicant’s proposal, ACCA must show that the proposed activities do not comply with the applicable statutes and regulations to meet this burden. *City of Waterbury v. Town of Washington*, 260 Conn. 506, 549-551 (2002).

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<sup>20</sup> A summary of ACCA’s allegations of unreasonable pollution is provided in the 6/23/09 PFD, Finding of Fact #2.



ACCA made specific allegations regarding such issues as the direct and adverse impacts of the proposed activities on tidal wetlands, intertidal flats and “marine invertebrate populations” and supportive habitats. ACCA also alleged that the structure would adversely affect navigation and that berthing and operation of an outboard-powered boat would subject shellfish resources to “stress and harm, to the detriment of the public’s right to use and enjoy this marine resource.” ACCA claims that there is a feasible and prudent alternative to the proposed dock such as a shorter fixed pier appropriate only for berthing or using smaller vessels such as kayaks, canoes, rowboats, small sailboats and other non-outboard motored craft” that would minimize harm to shellfish resources and lessen the impacts to navigation.

There is no evidence in the record that the applicant’s proposed dock and his use of the dock will directly and adversely impact coastal resources. The evidence also indicates that even at the proposed length, the dock does not encroach into the navigable channel of Ash Creek. ACCA has not demonstrated beyond speculation and possibilities that the applicant’s use of a powerboat in the area of the dock will create disturbances that would result in adverse impacts to shellfish resources. Although there is evidence that a shorter dock might be acceptable at this site, there is no evidence that such a dock would be any more protective of environmental resources than the proposed structure or that any other dock would preclude the use of some sort of power boat. ACCA has not demonstrated that the proposed dock and its use are inconsistent with the statutory scheme that governs such activities. ACCA has therefore failed to sustain its burden of proof.

8  
*Revisions to STCs*  
a  
*Berthing Conditions*

There is no statute or regulation that defines the terms “berthed” or “berthing”. Notwithstanding staff’s opinion of what circumstances are contemplated by these terms, it is not clear from the wording of the proposed berthing conditions that the terms are intended to include all times when the boat is tied to the dock whether for a few minutes or several days. To ensure that the berthing conditions accurately reflect staff’s intent, I recommend that the STCs be revised to include a definition of the terms or additional wording that is consistent with staff’s

opinion. For example, it should be clear to the applicant and future users of the dock that berthed or berthing includes the few minutes it may take to secure the boat to the davits and activate the necessary mechanism to lift it out of the water, and the occasions when the boat is weighed down with gear and passengers and not merely tied to the dock.

*b*  
***Monitoring Conditions***

As recommended by staff, the monitoring conditions require revisions that would authorize the Commissioner to require the applicant to submit an A2/T2 survey any time that conditions are observed during a visual inspection that would cause the department to issue a Notice of Violation to the applicant or other owners subject to the permit conditions. I recommend that this condition be revised to make it clear that indications of disturbance to the substrate believed to be caused by improper berthing or boating operations, although not conclusive, would subject the applicant or any future property owner to the burden of a verifying A2/T2 survey.

***IV***  
***CONCLUSION***

Ash Creek is a shallow and valuable resource that provides habitat and feeding opportunities for a variety of fish, shellfish, wading birds and waterfowl and supports a state-designated natural shellfish area for hard clams and seed oysters. The shores of Ash Creek are relatively undeveloped although other permits have been issued for docks in recent years. In each case the department has endeavored to restrict the use of the permitted dock in a manner that would protect the coastal resources in the area by imposing permit terms that in retrospect could be difficult to enforce. With the spotlight trained on the applicant's intended use of his dock in this case, staff and the applicant propose the STCs, which if revised as indicated above, would prohibit the applicant from operating his powerboat during periods of low water and would provide an accurate baseline reference for monitoring his compliance with the STCs.

It is clear from the record that the STCs will not protect the resources in the area of the applicant's dock from every impact associated with its use. However, the statutes, regulations

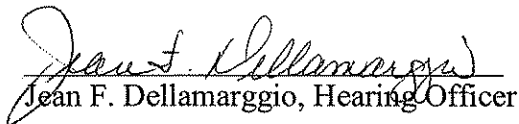
and coastal management policies do not require that degree of protection. What is required is that resources are safeguarded from significant alteration or unreasonable effects to the extent that adverse impacts are avoided or mitigated but not necessarily eliminated entirely. The record in this case demonstrates this balance and the Agreed Draft Decision reflects the intent of the applicant and staff to employ workable permit conditions that do not overly burden the applicant with no guarantee of a better environmental outcome.

I find no specific statutory or regulatory provision that can be fairly construed to mandate that the Commissioner limit the size and or type of boat to be used at a dock or limit the size of a dock merely because such dock would be present and used in a shallow and valuable waterbody such as Ash Creek. Although such a restriction could appropriately be part of a municipal harbor management plan, that is not the case here. However, the absence of any statute, regulation or ordinance that would expressly address this issue does not create unfettered rights in the applicant or restrict the Commissioner's authority to impose limitations or restrictions on the proposed dock or its use to protect coastal resources. The relevant statutory scheme, when considered as a whole, identifies the pertinent public policy to be implemented through such restrictions on the applicant's proposed activities. This public policy requires a balance between sound resource management practices and the applicant's individual property rights.

The applicant has demonstrated that his proposed dock, if constructed in accordance with the draft permit, would be consistent with the relevant provisions of the Tidal Wetlands and Structures and Dredging Acts, and sound resource management practices. If the applicant's boating operations are conducted in accordance with the draft permit and proposed STCs revised as recommended above and the boating regulations and any local ordinances, any impacts to coastal resources would be mitigated or insignificant. Such use would be consistent with the policies of preservation and protection of coastal resources, including tidal wetlands and intertidal flats. §§22a-92(a)(1); 22a-92(b)(1)(D); 22a-92(b)(2)(D) and (E); 22a-92(c)(2)(A). The permit conditions that govern the area of the unpermitted retaining wall and fill, which would lead to the restoration of tidal wetland vegetation in the affected area, would be consistent with the policy prohibiting the creation of new upland from existing tidal wetlands. §22a-92(c)(1)(B).

V  
**RECOMMENDATION**

I recommend that the Commissioner issue the requested permit. This permit should incorporate the STCs proposed in the Agreed Draft Decision as revised in accordance with the recommendations outlined above.

  
Jean F. Dellamarggio, Hearing Officer

*P A R T Y L I S T*

Supplemental Proposed Final Decision  
In the matter of Steven Toner, Application No. 200402741

PARTY

REPRESENTED BY

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