Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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IN THE MATTER OF	**:**	***APPLICATION NO. 201407131-KR***
MEGRUE-CLIFF PLACE, LLC	**:**	***DECEMBER 22, 2015***

FINAL DECISION

I

SUMMARY

On July 8, 2014, Megrue-Cliff Place, LLC (Applicant) applied to the Department of Energy and Environmental Protection (DEEP or Department) Office of Long Island Sound Programs (OLISP) for a coastal permit to construct a residential dock to serve the property at 5 Cliff Place in the Bell Island area of Rowayton in Norwalk, Connecticut, and to perform work incidental thereto (Application). The Application seeks a permit for the following regulated activities, to be conducted in tidal waters waterward of the Coastal Jurisdiction Line:

a. Erection of a 4' x 40' timber pier supported by three concrete-filled steel mono-piles;
b. Installation of a 3' x 40' aluminum gangway;
c. Installation of a 8' x 20' (160 square feet) floating dock secured by three float anchor piles, a cut-off float stop pile and 6' x 12' timber float stops; and
d. The removal of up to 5 cubic yards of rocks to accommodate the installation of the timber float stops.

The proposed activities are regulated under the Structures, Dredging and Fill Act, Conn. Gen. Stat. §§ 22a-359 through 22a-363, and the applicable portions of the Coastal Management Act, Conn. Gen. Stat. §§ 22a-90 through 22a-112.

On August 28, 2014, OLISP staff issued a Notice of Tentative Determination which recommended that the Application be approved. Bell Island Improvement Association, Inc. (BIIA or Intervening Party) intervened in this matter under the Connecticut Environmental

Protection Act (CEPA), pursuant to Conn. Gen. Stat. § 22a-19, based on allegations that authorization of the proposed activities will or 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. The Applicant, DEEP staff and BIIA were given the opportunity to present evidence and testimony in this matter.

The hearing officer issued his Proposed Final Decision (PFD) on June 11, 2015, recommending issuance of the permit. On June 24, 2015, BIIA filed six specific exceptions to the PFD, and requested oral argument concerning its exceptions. BIIA also filed a brief in support of its exceptions on August 10, 2015. The Applicant and DEEP Staff each filed briefs in support of the PFD. Oral argument on the exceptions was held at DEEP's Hartford headquarters on September 24, 2015.

I have analyzed BIIA's exceptions and the arguments raised in the briefs and oral argument, and find all six of BIIA's exceptions to be without factual or legal support. After consideration of the administrative record, the draft permit, and the PFD and its recommendations, I have determined that the proposed activity will comply with all applicable state statutory and regulatory criteria, and will not unreasonably pollute, impair or destroy the public trust in the air, water or other natural resources of the state. Accordingly, this Final Decision rejects the exceptions filed for the reasons explained below and affirms the PFD in full.

II
EXCEPTIONS

A
RULINGS ON INTERVENTION

In its exceptions, BIIA argues that the hearing officer exceeded his authority in limiting BIIA's standing in this matter. BIIA claims that as an intervening party, "BIIA has a right to raise all issues within the jurisdiction of the DEEP relating to the contested case." BIIA's understanding of its rights under Conn. Gen. Stat. § 22a-19 is inaccurate.

The Department's Rules of Practice make clear that exceptions "shall state with particularity the party's or intervenor's *objections to the proposed final decision*." Regs. Conn. State Agencies § 22a-3a-6(y)(3)(A) (*emphasis added*). The Intervening Party's challenges to the

hearing officer's prior rulings on intervention do not constitute objections to the proposed final decision. Thus, they are not valid exceptions under the Rules of Practice.

Even if this exception were procedurally sound, however, BIIA's argument overstates the objective of Conn. Gen. Stat. § 22a-19. Intervention, upon the filing of a verified pleading, is permitted under § 22a–19 (a), only for the limited purpose of raising *environmental* issues. *Red Hill Coalition, Inc. v. Town Plan & Zoning Commission,* 212 Conn. 727, 734, 563 A.2d 1347 (1989); *Mystic Marinelife Aquarium, Inc. v. Gill,* 175 Conn. 483, 499, 400 A.2d 726 (1978). Section 22a-19 is not meant to provide parties with an alternative to classical aggrievement. Rather, § 22a-19 provides limited standing for the purpose of allowing interested parties, who may or may not be classically aggrieved, to raise environmental issues. See *Burton v. Connecticut Siting Council*, 161 Conn. App. 329, 337-38 (2015) (CEPA waives the specific, personal aggrievement requirement to allow intervention in an administrative proceeding of those who wish to challenge whether particular conduct has, or is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the state's air, water or other natural resources). Intervening parties may not treat § 22a-19 as a means to achieve the airing of grievances wholly unrelated to the unreasonable pollution, impairment or destruction of the public trust. Accordingly, the hearing officer properly limited BIIA's participation in this proceeding to only those allegations related to unreasonable pollution, impairment or destruction of a natural resource.

Furthermore, the administrative record clearly demonstrates that BIIA was allowed to participate in the hearing process, to include having the opportunity to present witness testimony, to cross examine witnesses, and to submit exhibits, in order to meet its burden in demonstrating that the Application, if approved, would be likely to result in unreasonable pollution or impairment. As such, BIIA has been provided wide latitude to express and explain its views in connection with the subject application and has suffered no prejudice.

B

TREATMENT OF PUBLIC TESTIMONY

BIIA argues that the hearing officer erred in failing to consider the testimony of the speakers at the public hearing as evidence. I find no error here on the part of the hearing officer. The statements of speakers, who were not placed under oath and made available for cross examination by the parties, cannot be considered evidence. The hearing officer's treatment of the public comments is consistent with both the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 *et seq.,* and the Department's Rules of Practice, Regs. Conn. State Agencies § 22a-3a-6.

Public comments on the application were received during a January 15, 2015 hearing on this application at the Norwalk City Hall. Public comments focused on such issues as the danger posed by the proposed structures in the event of a storm, associated visual and sound impacts of the project, concerns about dock "clutter," and navigational impediments to paddle boarding and kayaking at the project site.

Section 22a-3a-6(t) of the Department's Rules of Practice provides the following, in relevant part:

> Any person who is not a party or intervenor nor called by a party or intervenor as a witness may make an oral or written statement at the hearing. Such a person shall be called a speaker. If the hearing officer is going to consider a speaker's statement as evidence or if the speaker wants his statement to be considered as evidence, the hearing officer shall require that the statement be made under oath or affirmation and shall permit the parties and intervenors to cross-examine the speaker and to challenge or rebut the statement.

In this proceeding, members of the public were apprised of the opportunity to speak under oath and thus have their comments included in the evidentiary record. Specifically, the hearing officer advised attendees that:

> "Members of the public may speak under oath or comment without taking an oath. If you choose to speak under oath your comments become part of the evidentiary record, but you may be subject to cross-examination by the parties and intervenors. If you choose to be sworn you must be available to attend the evidentiary hearing in Hartford on the 21st."

Transcript of public hearing, 1/15/15, pp. 19-20. Despite the hearing officer's notice, none of the speakers present at the public hearing elected to be sworn in or have their comments considered as evidence. Furthermore, as the Applicant points out during the September 24, 2015 oral argument and in its earlier legal brief dated August 24, 2015, "[i]f the Intervenor's position was accepted, and comments by speakers were deemed evidence, but [the speakers] were under no obligation to be cross-examined by the parties, it is the due process rights of the parties that would be undermined." Applicant's Brief, p. 8.

Furthermore, a review of the public comments reveals that the issues the public speakers expressed concerns over were not overlooked by the hearing officer in rendering the proposed final decision. As noted above, public comments dealt primarily with the danger posed by the proposed structures in the event of a storm, associated visual and sound impacts of the project, concerns about dock "clutter," and navigational impediments to paddle boarding and kayaking at the project site. While he could not consider these comments as evidence, the hearing officer did refer to the public's concerns in shaping his recommendations. *See* PFD, pp. 2 (noting that the hearing officer did undertake review of the public comments in making his recommendations), 7 n.4 & n.5 (concerning safety and environmental concerns raised in public comments), 13 (addressing concerns over encroachment on public access to the shorefront and intrusion into the public trust waters), 24 (referring to public concern over storm damage in the area), and 24 n.12 (noting that "[w]hile public comment is not evidence in the record upon which [the hearing officer] may ultimately rely, [he] may use it to guide [his inquiry] into a subject matter). Accordingly, there is no error.

C

STATUTORY AND REGULATORY SCHEME

BIIA argues that the Department lacks regulations specific to residential dock applications, and that the absence of such regulations renders it impossible for DEEP to discharge its duties pursuant to Conn. Gen. Stat. § 22a-359. Intervening Party's Brief, p. 12. More specifically, BIIA argues that "[n]o regulations; no criteria for deviating from the language set forth in the DEEP's guidelines; no studies or calculations to justify such a deviation; and staff reliance upon anecdotal criteria in reviewing applications, do not a properly administered

regulatory program make," and "having a [h]earing [o]fficer 'rubber stamp' the DEEP staff determinations, does not elevate the process to one conducted pursuant to regulations which contain clearly articulated standards." Intervening Party's Brief, pp. 12-13.

"An administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority[.]" *State v. State Employees' Review Board*, 231 Conn. 391, 406, 650 A.2d 158 (1994). When reviewing a permit application, the function of agency staff and the hearing officer is to determine whether or not the proposed activity meets the applicable statutory and regulatory requirements. It is not the role of the Department in this proceeding to assess the reasonableness of its statutory commands or to rule on the prudence of promulgating regulations under the Structures, Dredging and Fill Act. The proper venue for challenging the legislature's delegation of authority is the rulemaking process or the floor of the legislature or the courts, not an adjudicative proceeding of limited scope.

At the same time, BIIA argues that the hearing officer erred in approving the proposed structures notwithstanding the fact that the size of the proposed dock does not comply with the Residential Dock Guidelines. BIIA asserts that although the Department has not promulgated regulations specific to the permitting of residential docks, the Department has published Residential Dock Guidelines which provide that a floating dock "generally" should not exceed 100 square feet in area, and that

> At no time did the DEEP staff request any additional information to justify a floating dock larger than 100 square feet...Ms. Romero did not reference the guidelines in determining that a floating dock larger than 100 square feet was acceptable.

Brief of Intervening Party, pp. 6-7. By BIIA's own admission, however, the Residential Dock Guidelines are not regulations enacted pursuant to the Uniform Administrative Procedure Act (UAPA); they are simply intended as a point of reference for applicants and do not carry the force of law or reflect the requirements for all cases. It is well settled that "informal guidelines, promulgated outside the rulemaking framework of the [UAPA] . . . may not be applied as substantive rules." *Hospital of St. Raphael v. Commission on Hospitals and Health Care*, 182 Conn. 314, 322, 438 A.2d 103 (1980) (citing *Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 368, 417 A.2d 358 (1979)). DEEP therefore cannot enforce the Residential Dock Guidelines as law without first adopting those guidelines as

regulations pursuant to the UAPA. Rather than a static, "one size fits all" approach, General Statutes §§ 22a-97(b) and 22a-359(a) empower the Commissioner to exercise his discretion in determining whether or not the statutory requirements and policies have been met with respect to a particular project. In the context of this flexible approach, departure from the Guidelines alone does not negate a finding that the proposed activity complies with the applicable statutory and regulatory requirements.

Furthermore, contrary to BIIA's assertions, although the approved float exceeds the Department's 100-foot recommendation, the approval of a larger float is well supported by evidence in the record. Specifically, the hearing officer found that typical waves at the dock's proposed site have a wavelength of about twenty feet. Accordingly, "[a] floating dock twenty feet in length is appropriate under these conditions because it reaches from the crest of one wave to the crest of the next, creating added stability by minimizing the pitch and yaw of the float." Based on this evidence, the hearing officer reasonably concluded that the proposed float size is appropriate given the tide conditions at the proposed dock site. BIIA has not presented any credible evidence demonstrating adverse impacts to navigation, benthic environment, or coastal resources as a result of the longer float. Rather, BIIA's challenge rests wholly on its belief that the Residential Dock Guidelines should be strictly adhered to, despite not being binding regulations. I find that this exception is without merit.

D

THE APPLICANT'S LITTORAL RIGHTS

BIIA argues that the hearing officer and DEEP Staff have failed to recognize that "littoral rights . . . are limited by 'superior public rights,' and are often referred to as a mere franchise." Intervening Party's Brief, p. 14. Rather, BIIA argues, DEEP and the hearing officer have treated littoral rights as a "blanket justification" for the Department's "laissez-faire approach" to the regulation of private docks. Intervening Party's Brief at 16. BIIA's argument, however, mischaracterizes the regulatory framework applicable to residential docks, and writes off as insignificant waterfront property owners' right to wharf out.

Connecticut courts have long recognized waterfront property owners' littoral rights to wharf out. *Rochester v. Barney*, 117 Conn. 462, 468 (1933) ("The owner of the adjoining upland

has certain exclusive yet qualified rights and privileges in the waters and submerged land adjoining his upland. He has the exclusive privilege of wharfing out . . . and the right of access by water to and from his upland."). Having recognized the right to wharf out as an essential right in the littoral property owner's bundle of property rights, DEEP may not now ignore this right to quell neighborhood strife. While it is true that these rights are qualified by reasonable regulation, *Lane v. Comm'r of Envtl. Protection,* 136 Conn. App. 135, 157-58 (2012), those qualifications take the form of the statutory and administrative regulations that govern applications for structures waterward of the state's coastal jurisdiction line—particularly the Structures, Dredging and Fill Act and the Coastal Management Act. The governing statutory scheme emphasizes "minimizing impacts to navigation, coastal resources, water circulation and sedimentation, public access to the intertidal area and conflicts with adjacent riparian owners." *In the Matter of Ronald B. Harvey*, App. No. 200802576-KB, Final Decision, Sept. 23, 2014, p. 1 (quoting Conn. Gen. Stat. § 22a-92(b)(1)(D)). Consistent with these acts,

> [t]he construction of a structure over the inter-tidal area to gain access to navigable waters from the upland is understood to be an acceptable exercise of one's littoral rights if impacts to navigation and coastal resources are sufficiently minimized in compliance with the applicable statutes, regulations and policies.

In the Matter of Ronald B. Harvey, App. No. 200802576-KB, Proposed Final Decision, June 17, 2014, p.12. BIIA's argument fails to recognize that the Coastal Management Act and the Structures, Dredging and Fill Act are the regulatory overlay that qualify the littoral rights of waterfront property owners and ensure that the proper balance is struck between private littoral rights and the public interest. The Coastal Management Act in particular aims at "ensur[ing] that the development, preservation or use of the land and water resources of the coastal area proceeds *in a manner consistent with the rights of private property owners.*" Conn. Gen. Stat. § 22a-92(a)(1) (emphasis added). Rather than reducing private property owners' littoral rights to a mere technicality, as BIIA suggests, the law requires that DEEP give due regard to the Applicant's rights. As with BIIA's argument regarding the Department's regulations, challenges to these legislative policies are the better left to the floor of the legislature or the courts, not an adjudicative proceeding of limited scope.

E

CUMULATIVE IMPACTS

BIIA argues that the hearing officer and DEEP Staff failed to consider the cumulative impacts of residential dock applications. According to BIIA, "proliferation of docks will impact the ability of shorebirds to forage and will impact the aesthetics of the Connecticut shoreline," but "DEEP has elected to ignore the issue." Intervening Party's Brief, p. 16. BIIA argues that DEEP ignores the cumulative impacts of docks because "[t]here are no regulations or guidelines that address the cumulative impacts of piers and docks in the navigable waters of the State of Connecticut." Brief of Intervening Party, p. 9. This argument misapprehends the nature of DEEP's review of coastal applications.

Cumulative impacts associated with shoreline congestion and "dock clutter" are concerns that DEEP recognizes and takes very seriously. Although such considerations are not memorialized in specific regulations, these considerations are taken into account in reviewing an application through the broader considerations related to impacts to navigation and coastal resources.

In this particular case, the presence of such cumulative impacts as a result of this Application have not adequately been demonstrated. As the hearing officer noted in the PFD, "BIIA has failed to establish that it is reasonably likely other structures will be constructed on the south side of Bell Island." PFD at 21. Although BIIA's expert claims "there is a potential for an additional nineteen docks on Bell Island," Test. M. Aurelia, 1/23/15, p. 111, concerns about the impacts of additional, residential docks not yet proposed or constructed in the Bell Island area are purely conjectural at this time. This Application is the only dock permit for the Bell Island area currently pending before the Department, and the Department is not at this time aware of any other Bell Island resident's plans to apply for a permit to construct a dock in the Bell Island area. Furthermore, although Mr. Aurelia testified that "the impact of the proposed structure will 'double' the impact of the Manning dock," Test. M. Aurelia, 1/23/15, p. 114, BIIA failed to quantify the particular impacts that will be amplified by Applicant's proposed activities outside of vague references to impacts on shorebird foraging. However, as the hearing officer noted, the record as a whole indicates that "shorebirds forage over a wide area, and are resilient in their ability to find food." PFD at 21. With little more than mere suggestion tying this Application to

quantifiable impacts on shorebirds, there simply is not enough record evidence to find in favor of BIIA on this issue.

Rather than address the merits of the Application at issue, BIIA asks the Department to engage in a never-ending hypothetical as to what *could* happen in the future. At this time, BIIA's concern is illusory at best and does not amount to credible evidence supporting denial of the permit.

F
UNREASONABLE POLLUTION

BIIA claims that the hearing officer erred in finding that the proposed structures would not unreasonably pollute or impair the public trust in the waters and other natural resources of the state. In support of their claim that the Application, if granted, will result in unreasonable pollution, BIIA claims that "[a]n environmental impact that can be avoided is unreasonable." Intervening Party's Brief, p. 5. BIIA's argument conflates the assertions of its expert with the appropriate legal standard under the Connecticut Environmental Protection Act.

BIIA has raised two specific allegations regarding unreasonable pollution and impairment of environment: (1) that the proposed structures will negatively impact public access to shellfish beds, and (2) that the proposed structures will negatively impact the ability of shorebirds to forage.

As to the first of these claims, pertaining to impacts on public access to the shellfish beds in the vicinity of the proposed structures, BIIA argues that the location of the proposed structures will infringe on the area available to shell fishermen seeking to avail themselves of the City of Norwalk's public shellfish beds. To support its claims, BIIA proffered the testimony of Michael Aurelia, a soil scientist and geologist with experience in shellfish regulation and management. Mr. Aurelia testified that:

> People usually don't shellfish near docks. . . . They usually shellfish in more open areas. . . . They tend to be focused primarily on the public beds off public property. And I think by constructing docks, you're shrinking the size of the area that's available to the average shell fisherman.

Test. M. Aurelia, 1/23/15, pp. 109-10. This testimony falls far short of the substantial evidence necessary to support a CEPA challenge. The proposed dock will not physically impede public

access to the adjacent public shellfish bed, nor will it encroach into the footprint of the bed. BIIA plainly did not demonstrate beyond speculation and possibility that the proposed structures will hinder public access to the public shellfish beds in the area.

With regard to BIIA's second claim, namely, that the proposed dock will negatively impact foraging shorebirds, the evidence offered by BIIA was equally unconvincing. In its brief, BIIA argues that if every property in the Bell Island area were to construct a dock, shorebirds would be forced to relocate to lesser populated areas. Intervening Party's Brief, p. 5 ("According to Mr. Aurelia, if everybody gets a dock, shorebirds are going to be in trouble in Connecticut and the birds will be forced to live in areas where there is limited activity along the shore."). BIIA's contentions seem to be founded upon an assumption that additional property owners will choose to construct docks in the Bell Island area, and that a heavy concentration of docks in the area will consume foraging habitats and force shorebirds to relocate. At this time, however, the Applicant's project is the only application pending before the Department to construct a dock in the Bell Island area. Claims that other Bell Island residents may wish to construct a dock in the future amount to nothing more than mere conjecture and are insufficient on their own to support a finding that the Applicant's dock is reasonably likely to unreasonably impair the public trust. BIIA's argument also falls short in that it fails to connect the Application presently before the Department to any unreasonable impacts to shorebirds. According to BIIA's own expert, Mr. Aurelia, the proposed structures will not remove any nesting habitat. Test. M. Aurelia, 1/23/15, p. 130. Additionally, Mr. Aurelia testified that the site of the proposed activity was not an exclusive foraging area for any particular shorebird. Test. M. Aurelia, 1/23/15, p. 133. Aside from mere speculation, BIIA has failed to present any real evidence that this Application, if granted, is reasonably likely to unreasonably pollute or otherwise impair the public trust.

In short, BIIA's arguments do little more than voice disagreement with the hearing officer's findings. BIIA has offered no credible, let alone substantial, evidence to support a finding of unreasonable pollution. BIIA failed to meet its burden in demonstrating that the authorization of the Applicant's proposed activities will, or are reasonably likely to, cause unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state, and the hearing officer's refusal to rule in their favor on the basis of unsubstantiated and unpersuasive evidence is not error.

III

CONCLUSION

The record as a whole demonstrates that the permit application complies with the applicable standards, goals and policies of the Structures, Dredging and Fill Act and the applicable portions of the Coastal Management Act and its implementing regulations.

While I appreciate BIIA's desire to protect Bell Island and the shellfish, shorebirds and other wildlife that utilize the Norwalk shoreline for habitat and feeding opportunities, the objections raised by BIIA are without merit. After reviewing all of the arguments and the record evidence before me, I am persuaded that DEEP Staff appropriately considered the impacts to natural resources in determining that this Application complies with current relevant statutory and regulatory criteria. The Applicant has a littoral right to access the water from his upland, and the law requires that this right be given proper regard. Having determined that the recommendations in the PFD strike the appropriate balance between the public interest and the Applicant's littoral rights, I hereby adopt the PFD as the final decision of the DEEP and authorize issuance of the proposed permit as a final permit in accordance with that decision.

Susan K. Whalen

Susan K. Whalen, Deputy Commissioner

SERVICE LIST

In the matter of Megrue – Cliff Place, LLC – Structures, Dredging and Fill Permit Application No.: 201407131-KR

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