Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

79 Elm Street • Hartford, CT 06106-5127 www.ct.gov/deep Affirmative Action/Equal Opportunity Employer

OFFICE OF ADJUDICATIONS

| | | |
|---|---|---|
| ***IN THE MATTER OF*** | ***:*** | ***APPLICATION # IW-201502274*** |
| ***2772 BPR, LLC*** | ***:*** | ***February 10, 2017*** |

**FINAL DECISION**

The Proposed Final Decision in this matter was issued on January 17, 2017. That decision recommends that a permit be issued, authorizing 2772 BPR, LLC to conduct certain activities regulated by the Inland Wetlands and Watercourses Act at property known as 40 Ciro Rd., North Branford[1].

The deadline for filing exceptions to the Proposed Final Decision was February 1, 2017; no exceptions were filed. I have been delegated the authority to issue final decisions in certain circumstances, including in matters where a proposed final decision has been issued and no exceptions have been filed. I therefore issue the Proposed Final Decision as the Final Decision in this matter.

I also note that a petition for declaratory ruling, which implicates issues similar to those addressed by the decisions in this matter, is currently pending before the Department. This petition initiated a separate administrative proceeding, and a separate ruling will be issued in that proceeding.

Brendan Schain, Hearing Officer

enc: Proposed Final Decision dated January 17, 2017

[1] The Proposed Final Decision inadvertently identified the property as 14 Ciro Rd., North Branford. I correct that error with this Final Decision.

***SERVICE LIST***

In the matter of 2772 BPR, LLC – Application No.: IW-201502274

| PARTY | REPRESENTED BY |
|---|---|
| The Applicant | |
| 2772 BPR, LLC<br>229 River St.<br>Guilford, CT 06437 | Jeffrey T. Beatty, Esq.<br>25 Boston St.<br>Guilford, CT 06437<br>jtbeatty@cshore.com |
| Department of Energy and Environmental Protection | |
| Land and Water Resources Division<br>Bureau of Water Protection and Land Reuse | Robert Gilmore<br>robert.gilmore@ct.gov |

Courtesy copies

Robert M. Constantinople
Mary9125@comcast.net

Chris Kranick
CGK1@aol.com

Peter C. White, Esq.
attorneypeterwhite@icloud.com

Carey Duques
townplanner@townofnorthbranfordct.com

Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

79 Elm Street • Hartford, CT 06106-5127 www.ct.gov/deep Affirmative Action/Equal Opportunity Employer

OFFICE OF ADJUDICATIONS

| | | |
|---|---|---|
| *IN THE MATTER OF* | : | *APPLICATION # IW-201502274* |
| *2772 BPR, LLC* | : | *January 17, 2017* |

# PROPOSED FINAL DECISION

## *I*
## *SUMMARY*

2772 BPR, LLC has applied to the Department of Energy and Environmental Protection ("Department" or "DEEP") for permit to conduct activities regulated by the Connecticut Inland Wetlands and Watercourses Act, General Statutes §§ 22a-36 through 22a-45d ("Act"). The regulated activities proposed include discharge of stormwater to an existing stormwater detention basin which has been delineated as an inland wetland located on property known as 14 Ciro Road in North Branford ("Property"). The Department issued a Notice of Tentative Determination to approve the Application and a petition for hearing was filed, initiating the hearing process.

The parties to this matter are 2772 BPR, LLC (Applicant) and staff of Land and Water Resource Division[1] of the DEEP Bureau of Water Protection and Land Reuse (Department staff).[2]

The testimony and exhibits presented by the parties indicate the proposed regulated activities, if conducted in accordance with the terms and conditions of the proposed draft permit

[1] This matter was previously assigned to staff in the Inland Water Resources Division of the Bureau of Water Protection and Land Reuse. Due to an internal reorganization of the Bureau, this matter was assigned to the newly created Land and Water Resource Division.

[2] Attorney Peter White twice sought intervening party status in the matter pursuant to General Statutes § 22a-19. Each time, his request was found to be insufficient to confer standing. Copies of the requests, objections, and rulings are available in the administrative record maintained by the Office of Adjudications.

(Appendix 1) will comply with all relevant statutory and regulatory criteria, specifically those found in the Act and relevant implementing regulations. Based on this evidence, I recommend that the Commissioner issue the requested permit incorporating the terms and conditions set out in the draft permit.

## *II*
## *DECISION*

### *A*
### *FINDINGS OF FACT*

Nearly every matter concerning a permit reaches this stage in the process by following a well-trod path, beginning with the filing of an application with the Department. This matter did not follow that path, at least at first. Several of the facts found here, and a portion of the legal analysis that follows, concern actions undertaken by the Town of North Branford before any application was filed with the Department. For this reason, I set out the following procedural facts, which, although not directly related to the ultimate question of whether a permit in this matter should or should not be issued, are nonetheless necessary to the disposition of this matter.

#### *1*
#### *Procedural Facts*

1. The Applicant first filed an application for a permit to conduct regulated activities on the Property with the North Branford Inland Wetlands Agency (IWA) ("local application"). The regulated activities proposed consisted of the discharge of stormwater to an existing stormwater detention basin, containing wetlands soils, located near Ciro Road, and the removal of invasive plants and replacement with native plants in that wetland area. That local application was filed in August 2014. A meeting of the IWA was held on or about August 27, 2014, at which time that local application was formally received. The IWA did not convene a public hearing on the Application, in fact more than sixty-five days passed from the date the Application was recieved, and the IWA took no action to approve or deny the local application. (Exs. DEEP-6, 14.)

2. On January 9, 2015, in response to an inquiry from the Applicant, the Department sent a letter in which it outlined the process that would be followed if the Applicant sought review of the proposed regulated activities by the Department following the IWA's failure to act. This letter advised the Applicant that to initiate the Department's review, the Applicant must "complete the Notice of Application requirements (CGS section 22a-6g) and submit

a complete application with the necessary documents to the DEEP Central Processing Unit." (Ex. DEEP-14.)

3. On March 25, 2015, the Applicant submitted a permit application to the Department which consisted of the Department's Permit Application Transmittal Form and twelve attachments ("Application"). The regulated activities proposed by the Applicant in the Application submitted to the Department are the "discharge of stormwater to an existing stormwater detention basin engineered to serve lots in the surrounding industrial subdivision, and removal of invasive species in the stormwater detention basin and replanting of suitable native species." These are the same regulated activities proposed in the local application. (Ex. DEEP-1; test. R. Sonnichesen, R. Gilmore, 9-15-16.)[3]

4. Department staff issued notices of application insufficiency on May 14, 2015 and August 21, 2015. Department staff also requested additional information, via e-mail, on August 4, 2015 and September 18, 2016. Each time, the Applicant responded with the additional information requested, including additional drainage calculations. (Exs. DEEP-1-4 APP-2-5.)

5. On April 21, 2016, the Department issued a Notice of Tentative Determination to approve the Application. A petition for public hearing was filed, and this hearing process was initiated. (Ex. DEEP-7.)

6. On September 8, 2016, the hearing commenced with the receipt of public comment in North Branford. Written public comments were also accepted until September 12, 2016. The hearing was continued to receive exhibits and testimony from witnesses offered by the parties on September 15, 2016. Robert Gilmore, a registered soil scientist, testified on behalf of Department Staff. Robert Sonnichesen, P.E. and Robert Russo, a registered soil scientist, testified on behalf of the Applicant.

***2***
***The Proposed Regulated Activity***

7. There are two small areas of wetlands on the Property. One area of wetlands soils is located in the northwestern portion of the Property, near Ciro Road. The other is located in the southeast corner of the Property. These wetlands were delineated by Mr. Russo. (Ex. APP-1; test., R. Russo, 9/15/16.)

8. The Applicant intends to construct a bulk propane storage facility, consisting of two 30,000 gallon propane storage tanks and associated improvements including two structures, driveways, fences, parking areas, a septic system and landscaping. Neither the propane

[3] At the time of the issuance of this Proposed Final Decision, a transcript of the evidentiary hearing has not been prepared. The recording of the evidentiary hearing is the official record of this proceeding and is maintained on file by the Office of Adjudications.

storage tanks nor the associated improvements are to be located within the physical area of either wetland. (Ex. APP-1; test., R. Gilmore, R. Sonnichesen, R. Russo, 9/15/16.)

9. No regulated activities are proposed in the wetland located in the southeast corner of the Property, nor is any disturbance of that area permitted by the Draft Permit prepared by Department staff. The Applicant also proposes to remove phragmites, an invasive plant species, from the northwest wetland. The Applicant proposes replanting the area with native vegetation including wool grass, cattail, green bull rush, Canada rush, eastern red cedars and blue flag iris. (Exs. APP-1, DEEP-10; test. R. Sonnichesen, R. Russo, 9/15/16.)

10. The wetlands soils in the northwest portion of the Property are within a previously constructed detention basin designed to collect stormwater. The use of this wetland for this purpose was previously approved by the IWA at the request of a prior owner. The Applicant proposes to collect stormwater from the Property, including from driveways, parking areas and roofs of structures the Applicant intends to construct, and discharge that stormwater into the detention basin. Before reaching the detention basin, stormwater will pass through an oil and grit separator structure and a rip rap lined swale and splash pad to remove oil or suspended solids. (Exs. APP-1, DEEP-14.)

11. Stormwater discharged into the detention basin will eventually reach Munger Brook, a nearby watercourse. (Ex. DEEP-10.)

12. The discharge of stormwater and the removal and replacement of invasive vegetation are the only regulated activities permitted by the draft permit. Discharges other than the discharge of stormwater into the wetlands, such as those associated with firefighting activities, are not authorized by the draft permit. (Ex. DEEP-10; test., R. Gilmore, 9/16/15.)

13. The discharge of stormwater, after it has passed through an oil and grit separator, into a previously approved and constructed stormwater detention basin will not adversely impact the wetlands soils located within the detention basin. (Test., R. Gilmore, R. Russo, 9/16/15.)

## ***B***
## ***CONCLUSIONS OF LAW***

There are two types of legal questions implicated by the Application: (1) whether the Department has jurisdiction to review and approve the Application; and, (2) whether the proposed regulated activities, if performed in the manner required by the draft permit, satisfy the criteria of the Inland Wetlands and Watercourses Act ("Act"), General Statutes §§ 22a-36 through 22a-45d.

I conclude, for the reasons set out below, that the consideration of the Application was within the jurisdiction of the Department and that the proposed regulated activities will have no adverse impact on inland wetlands, consistent with the requirements of the Act.

***1***
***The Department's Jurisdiction***

It is unusual that the Department is asked to issue a permit to a private party to conduct activities regulated by the Act. From a permitting standpoint, the Commissioner's role under the Act is usually limited to consideration of regulated activities proposed by subdivisions of the government of the State of Connecticut. General Statutes § 22a-39. An applicant to a local inland wetlands agency may, however, request that the Commissioner "review and act" on an application when

> the [local] inland wetlands agency . . . fails to act on any application within thirty-five days after the completion of a public hearing or in the absence of a public hearing within sixty-five days from the date of receipt of the application, or within any extension of any such period as provided in section 8-7d.

General Statutes § 22a-42a.

The IWA had two paths down which to proceed – to make a final decision on the local application or to commence a public hearing on the local application – it did neither. It is not disputed that more than sixty-five days had passed before the Applicant filed the Application with the Department. As a result of the IWA's inaction, the Applicant properly requested that the Commissioner review the Application, and the Commissioner properly accepted the request and began his review. However, because questions about the Department's jurisdiction were of great

interest to those making public comments, I offer the following legal conclusions to clarify the Department's jurisdiction in this matter.[4]

From the record in this matter, it is clear that the local application was transmitted to the IWA sometime before the IWA's August 2014 regular meeting. By law, the local application would have been formally received at the August 2014 meeting.[5]

Nor is it disputed that the IWA failed to act on the local application. Although it appears, from both the evidentiary record and some of the public comments received, that the IWA attempted to take some steps to begin its review the local application, the IWA never made a decision to approve or deny the Application. Only a decision to grant or deny the local application would have satisfied the directive found in General Statutes § 22a-42a. The clear intent of § 22a-42a is to require a local commission to make a decision on the merits of an application. If a local commission is unable, or refuses, to do so, the applicant may ask that the Commissioner review and act on that application. To argue, as certain comments did, that some intermediate review of the application – such as formal receipt, discussion at a meeting or even a determination that no significant impacts will be caused by the proposed activity – is "to act on an application" as required by § 22a-42a(c)(1) would allow local commissions to indefinitely retain jurisdiction over an application but never require them to make any decision. If that were the case, an application

[4] Public comments are not, according the Department's Rules of Practice, evidence upon which I may rely on in making my decision. Nor are those who offer comments afforded any status as parties or intervenors which would allow them to challenge whether the Applicant has satisfied its burden of proof. Instead, the purpose of public comments are to guide my inquiry into this matter. It is, however, the practice of this office, to discuss issues raised by public comments when those issues are relevant. While comments place no formal burden on either the Applicant or decision maker, certain relevant issues were identified and so they are discussed here.

[5] Although the exact date of transmittal is not clear, it is also immaterial. Section 22a-42a indicates that the date of receipt of an application "shall be determined in accordance with the provisions of subsection (c) of section 8-7d." Section 8-7d(c) states, in relevant part, that "the date of receipt of a[n] . . . application . . . shall be the day of the next regularly scheduled meeting of such commission, board or agency, immediately following the day of submission . . . or thirty-five days after such submission, whichever is sooner." It is not disputed that the local application was received by the IWA at its August 2014 regular meeting, which was apparently held on August 27, 2014.

could be endlessly stalled at the local commission and an applicant would effectively be denied any right to obtain a decision or appeal the decision of the local commission. This is precisely the scenario the legislature intended to avoid. In this matter, the IWA was required to decide whether to grant the requested permit within sixty-five days of receiving the local application; because it failed to do so, once the Applicant filed its Application with the Department, the Commissioner had jurisdiction to make a decision on the Application.

*In the matter of Grey Rock Development, LLC*, which reached the Department in a similar procedural posture, the Proposed Final Decision, which was adopted as the Final Decision of the Department, finds nearly identical facts to those found above. The local commission did not make a decision on an application within sixty-five days of its reciept and no extensions of time were granted. In that matter, it was determined that the local commission "failed to act within the requisite time period and that the applicant was legally entitled to file is application with the Commissioner." *In the Matter of Grey Rock Development, LLC*, Proposed Final Decision, November 15, 2000, p. 13; *aff'd. by In the Matter of Grey Rock Development, LLC*, Final Decision, December 6, 2000. I see no reason to reach a different result in this matter.

Members of the public also commented that the Applicant had declined to grant the IWA an extension of time to act, even though the IWA had requested additional time. It is true that the Act allows for extension of the time in which the IWA may act. General Statutes § 22a-42a. The Act refers to the requirements of General Statutes § 8-7d, which states, in relevant part, that "[t]he petitioner or applicant *may consent* to one or more extensions of any period specified in this subsection." (Emphasis added.) This language vests an applicant with the discretion to consent to an extension; an applicant may choose to consent to an extension of time or may decline to do so. If an applicant declines to consent to an extension of time, the Commission must act within the statutorily mandated time period. "This is apparent from the fact that [General Statutes § 8-7(d)]

vests solely in '[t]he applicant' the power to 'consent to one or more extensions ....' It does not, as it might have, give the commission the power to extend the time even for one such period." *Univ. Realty, Inc. v. Planning Comm'n of City of Meriden*, 3 Conn. App. 556, 565 (1985)(Internal quotation marks omitted, internal citations omitted.) Here the Applicant refused to consent to an extension of time and instead exercised its right to have the Commissioner review and act on its Application.

The Application at question in this matter was not filed with the Department until March 25, 2015, well more than sixty-five days after the date of the acceptance of the local application. Under the plain meaning and application of General Statutes § 22a-42a-(c)(1), the Commissioner clearly had jurisdiction to act on the Application.

***2***

***The Department's Review***

Several commenters took issue with two aspects of the Department's review of the Application: (1) that the Department requested, and the Applicant provided, information not submitted to the IWA, in effect creating a new "application" which should have been filed with the IWA, removing the matter from the Department's jurisdiction; and (2) that the Department reviewed the Application using the criteria identified in General Statutes § 22a-41 and not the criteria contained in local regulations adopted by the IWA. For each of these reasons, the commenters argue, the Application should be denied.

It is important to note that General Statues § 22a-42a requires that the Commissioner both "review and act" on the Application. The review of any land use application, at the state or local level, necessarily consists of the exchange of documents and correspondence to ensure that decisions are made using complete and accurate information. In fact, had the IWA engaged in the review of the Application, it could have sought additional information at any time prior to the expiration of the sixty-five day review period. To require the Commissioner to consider only the

information initially submitted to the local commission would impose upon the Commissioner restrictions that would not apply at the local level. There is no support for this in § 22a-42a(c)(1).

There is, however, a point at which additional information may instead constitute a modified application, resetting the deadline for action at the local level. In a decision regarding zoning approval of a site plan, the Connecticut Appellate Court recognized "the possibility that a revised site plan may be submitted to a [local permitting authority] which differs so substantially from the original that it could itself constitute a revised application." *Univ. Realty*, supra., 3 Conn. App. 561. This holding was extended to the review of an inland wetlands application by the Commissioner in *Ambrose v. Commissioner of the Department of Environmental Protection,* an appeal of the Department's decision in *Grey Rock*. In that case, the court determined that the submission of a revised site plan to the local commission constituted a new application. *Ambrose v. Commissioner of the Department of Environmental Protection,* 2003 WL 1477782, 5 (2003). In reaching that conclusion, however, the court noted that the applicant "refer[ed] to the [original submission] as a 'prior site plan' which was abandoned in lieu of the [revised plan]." (Internal citations omitted. Internal quotation marks omitted.) *Id.* at 4. The Court determined that this abandonment, and the substitution of a substantively different revised plan proposing different regulated activities, was the type action contemplated by the Connecticut Appellate Court in *Univ. Realty* – meaning that the revised plan was a new application which carried with it a new time period for review by the Commission. Id.

*Ambrose* is factually distinct from the matter at hand. In that case, the new information submitted was a revised site plan with substantively different proposed regulated activities. In this matter, only additional information related to the review of the proposed regulated activities was provided. The regulated activities proposed by the Application were not modified or abandoned. This analysis leads to the same conclusion as any common sense reading of the statute; additional

information which assists in the review of proposed regulated activities may be submitted without creating a new application but significant substantive changes to the proposed regulated activities may constitute a revised application. In this matter, given the nature of the information submitted, no new application was created and the matter remains within the Department's jurisdiction.

The second issue, regarding whether the Commissioner should act on the Application based on the criteria contained in the local wetlands regulations or state statute, can be addressed by looking to the text of the Act. General Statutes § 22a-42a(c)(1) states that the Commissioner shall "review and act on such application in accordance with this section." Subsection (d)(1) of section 22a-42a specifically incorporates the review criteria found in § 22a-41, which directs the Commissioner to "take into consideration all relevant facts and circumstances . . . ." Section 22a-41 also provides a list of some facts and circumstances to be considered, while not ruling out the consideration of other relevant facts and circumstances. It does not, however, require the Commissioner to consider local regulations when reviewing the Application, as local regulations are neither "facts" nor "circumstances." Local regulations are similarly absent from the more specific list of considerations in that section. Given the language of § 22a-41(a) which specifies what the Commissioner must consider, without a specific statutory charge to apply local regulation, the Commissioner must apply only those statutes and regulations that direct his consideration. In this matter, that means the Commissioner is guided by the provisions § 22a-41, not local regulation.

Finally, it is important to note that although the proposed regulated activities in the Application will be reviewed and considered only by the Department, this is not the first time that the collection of stormwater in this wetland area has been considered. The evidence in this record reveals that, at some point in the past, the IWA considered and approved the construction of the stormwater detention basin the Applicant now proposes to use. Although the proposed use of the

upland may have changed since that time, and while the volume of the discharge of stormwater associated with the use of the upland may be different, the proposed regulated activity is virtually identical to the regulated activities already considered and approved by the IWA. My recommendation that the Commissioner authorize the proposed regulated activities is not in conflict with past local decisions regarding activity in the wetland.

***3***

***The Proposed Regulated Activities Will Not Adversely Impact Wetlands***

The proposed regulated activities in this matter are the discharge of stormwater, after it has passed through an oil and grit separator, to a stormwater detention basin containing wetlands soils and the removal of invasive vegetation and planting of native plants in the wetland. These are the only regulated activity proposed, and the only activities considered. General Statutes § 22a-41 states, in relevant part, that when considering whether to recommend authorization of the proposed regulated activities, I must evaluate

> all relevant facts and circumstances, including but not limited to:
>
> > (1) The environmental impact of the proposed regulated activity on wetlands or watercourses;
> >
> > (2) The applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or watercourses;
> >
> > (3) The relationship between the short-term and long-term impacts of the proposed regulated activity on wetlands or watercourses and the maintenance and enhancement of long-term productivity of such wetlands or watercourses;
> >
> > (4) Irreversible and irretrievable loss of wetland or watercourse resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, and any mitigation measures which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following

> order of priority: Restore, enhance and create productive wetland or watercourse resources;
>
> (5) The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity; and
>
> (6) Impacts of the proposed regulated activity on wetlands or watercourses outside the area for which the activity is proposed and future activities associated with, or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses.

General Statutes § 22a-41(a). In addition, because a hearing was requested pursuant to § 22a-39, § 22a-41(b)(1) requires that "a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist."

Each of the criteria in § 22a-41(a) require an evaluation of the impact on the affected wetland caused by the proposed regulated activity. The results of this evaluation are then used to consider the impact on the productivity of the wetland, the potential to cause the loss of wetlands, and "inevitable" adverse impacts to nearby wetlands. In this matter, the analysis of these criteria is straightforward; the proposed regulated activities, if conducted in accordance with the draft permit, will not adversely impact the wetland. The proposed activity will not decrease the functioning of this or any other wetland, nor will it lead to the loss of any wetlands.

This conclusion is supported by uncontradicted expert testimony in the record. Robert Sonnichesen, P.E.; Robert Russo, a registered soil scientist; and, Robert Gilmore, a registered soil scientist and a supervising environmental analyst for the Department, each testified that the proposed regulated activities would not adversely impact the wetland. "An administrative agency is not required to believe any of the witnesses, including expert witnesses… but it must not disregard the only expert evidence available on the issue . . . ." *Bain v. Inland Wetlands Commission,* 78 Conn. App. 808, 817 (2003). "The trier of fact is not required to believe

unrebutted expert testimony, but may believe all, part or none of such unrebutted expert evidence." *Bancroft v. Commissioner of Motor Vehicles,* 48 Conn. App. 391, 405 (1998). In this instance, I find the uncontradicted expert testimony of Mr. Sonnichesen, Mr. Russo, and Mr. Gilmore to be credible and reliable.

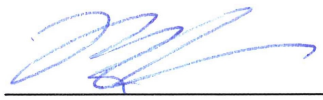
I am also required to consider whether a "feasible and prudent alternative" to the proposed regulated activities exists. "Feasible" and "prudent" are defined terms. Feasible alternatives are those that are "able to be constructed or implemented consistent with sound engineering principles." General Statutes § 22a-38(17). Prudent alternatives are those that are "economically and otherwise reasonable in light of the social benefits to be derived from the proposed regulated activity . . . ." General Statutes § 22a-38(18). An alternative will be deemed to be a feasible and prudent alternative *only* if it meets both criteria. *Manchester Environmental Coalition v. Stockton,* 184 Conn. 51, 62-63 (1981); *Samperi v. Inland Wetlands Agency,* 226 Conn. 579, 595 (1993); *Tarullo v. Inland Wetlands and Watercourses Commission of Wolcott,* 263 Conn. 572, 582 (2003). In this case, while there may be many feasible alternatives to the proposed activity, none would be prudent. The stormwater detention basin the Applicant proposes to utilize has already been engineered and constructed. Any alternative approach to discharging stormwater would carry additional costs. Because the proposed regulated activity will not adversely impact the wetland, those additional costs would be incurred without achieving any additional social or environmental benefit. It is clear, then, that to require the Applicant to incur additional costs, instead of using an already constructed stormwater management system for its intended purpose, would not be economically reasonable. For this reason, no prudent alternative to the proposed regulated activities exists.[6]

[6] The only possible alternative to the other regulated activities, the removal of invasive species and planting of native vegetation, would be to not undertake such activities. Because there is a clear social and environmental benefit to these activities, it would not be prudent to eliminate this work.

Section 22a-41 also indicates that the Commissioner may evaluate all relevant facts and circumstances when determining whether to authorize the proposed regulated activities. The relevant facts and circumstances in this matter compel me to recommend approval. While I understand that the proposed use of the upland areas of the Property for propane storage has inflamed the passions of those who live near the Property and thrown a wrench into the normal process for evaluating and approving activities regulated by the Act in North Branford, the proposed regulated activities themselves are relatively innocuous and, in different circumstances, I can only imagine that local approval would have been routinely granted. The proposed regulated activities have received extraordinary scrutiny from Department staff and members of the public and the record in this matter reveals no reason why they should not be authorized.

## *IV*
## *CONCLUSION*

For those reason discussed above, I conclude that the Department properly asserted jurisdiction over the Application and applied the proper legal standards to its review of the proposed regulated activities. The regulated activities proposed, if conducted in accordance with the proposed draft permit, are consistent with the standards set out in the Act. I recommend that the Commissioner issue the requested permit incorporating the terms and conditions set out in the draft permit (Appendix 1).



Brendan Schain, Hearing Officer

# *SERVICE LIST*

In the matter of 2772 BPR, LLC – Application No.: IW-201502274

| PARTY | REPRESENTED BY |
|---|---|
| The Applicant | |
| 2772 BPR, LLC<br>229 River St.<br>Guilford, CT 06437 | Jeffrey T. Beatty, Esq.<br>25 Boston St.<br>Guilford, CT 06437<br>jtbeatty@cshore.com |
| Department of Energy and Environmental Protection | |
| Land and Water Resources Division<br>Bureau of Water Protection and Land Reuse | Robert Gilmore<br>robert.gilmore@ct.gov |

Courtesy copies

Robert M. Constantinople
Mary9125@comcast.net

Chris Kranick
CGK1@aol.com

Peter C. White, Esq.
attorneypeterwhite@icloud.com

Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

EXHIBIT
tabbies
DEEP-10

79 Elm Street • Hartford, CT 06106-5127 www.ct.gov/deep Affirmative Action/Equal Opportunity Employer

# PERMIT

Permittee: 2772 BPR, LLC
c/o Beatty & Beatty LLC
25 Boston Street
Guilford, CT 06437

Attn: Jeffrey Beatty, Attorney

Permit No: IW-201502274

Town: North Branford

Project: Proposed Propane Storage Facility 40 Ciro Road
- Stormwater Discharge/Detention

Waters: Stormwater Runoff, Detention Basin/Wetland

Pursuant to Connecticut General Statutes Section 22a-39, the Commissioner of Energy and Environmental Protection ("Commissioner") hereby grants a permit to the 2772 BPR LLC ("the Permittee") to conduct regulated activities associated with the discharge of stormwater from a proposed propane storage facility to an existing stormwater detention basin/wetland previously constructed under a permit issued by the North Branford Inland Wetlands Agency. The purpose of said activities is to collect and detain stormwater runoff from the facility.

## AUTHORIZED ACTIVITY

Specifically, the permittee is authorized to discharge collected stormwater runoff from a proposed propane storage facility at 40 Ciro Rd., North Branford to an existing stormwater detention basin/wetland previously constructed under a permit issued by the North Branford Inland Wetlands Agency. The stormwater from the detention basin/wetland is discharged to Munger Brook via a 24"reinforced concrete pipe.

The activities proposed will impact an existing stormwater detention basin/wetland previously constructed under a permit authorized by the North Branford Inland Wetlands Agency.

All activities shall be conducted in accordance with plans entitled: *"Site Plan – Property of Donald J. Fucci II 40 Ciro Road North Branford, Connecticut"* prepared by Waldo & Associates LLC, Professional Engineers & Land Surveyors, Guilford, CT, dated August 6, 2014, revised through September 23, 2014, submitted as a part of the application.

This authorization constitutes the licenses and approvals required by Section 22a-39 of the Connecticut General Statutes.

This authorization is subject to and does not derogate any present or future property rights or other rights or powers of the State of Connecticut, conveys no property rights in real estate or material nor any exclusive privileges, and is further subject to any and all public and private rights and to any federal, state, or local laws or regulations pertinent to the property or activity affected thereby.

***The permittee's failure to comply with the terms and conditions of this permit shall subject the permittee, including the permittee's agents or contractor(s) to enforcement actions and penalties as provided by law.***

This authorization is subject to the following conditions:

**CONDITIONS:**

1. **Expiration.** This permit shall expire on [five years from date issued].

2. **Construction Commencement and Completion.** If construction of any structures or facilities authorized herein is not completed within five years of issuance of this permit or within such other time as may be provided by this permit, or if any activity authorized herein is not commenced within five of issuance of this permit or within such other time as may be provided by this permit, this permit shall expire five years after issuance or at the end of such time as may be authorized by the Commissioner.

3. **Notification of Project Initiation.** The permittee shall notify the Commissioner in writing two weeks prior to commencing construction or modification of structures or facilities authorized herein.

4. **De minimis Alteration**. The permittee may not make any alterations, except de minimis alterations, to any structure, facility, or activity authorized by this permit unless the permittee applies for and receives a modification of this permit. A de minimis alteration means a change in the design, construction or operation authorized under this permit that does not increase environmental impacts or substantively alter the construction of the project as permitted.

5. **Maintenance of Structures.** All structures, facilities, or activities constructed, maintained, or conducted pursuant hereto shall be consistent with the terms and conditions of this permit, and any structure, facility or activity not specifically authorized by this permit, or exempted pursuant to section 22a-377 of the General Statutes or section 22a-377(b)-1 of the Regulations of Connecticut State Agencies, or otherwise exempt pursuant to other General Statutes, shall constitute a violation hereof which may result in

modification, revocation or suspension of this permit or in the institution of other legal proceedings to enforce its terms and conditions.

Unless the permittee maintains in optimal condition any structures or facilities authorized by this permit, the permittee shall remove such structures and facilities and restore the affected waters to their condition prior to construction of such structures or facilities.

6. **Accuracy of Documentation.** In issuing this permit, the Commissioner has relied on information provided by the permittee. If such information was false, incomplete, or misleading, this permit may be modified, suspended or revoked and the permittee may be subject to any other remedies or penalties provided by law.

7. **Best Management Practices & Notification of Adverse Impact**. In constructing or maintaining any structure or facility or conducting any activity authorized herein, or in removing any such structure or facility under condition 5 hereof, the permittee shall employ best management practices to control storm water discharges, to prevent erosion and sedimentation, and to otherwise prevent pollution of wetlands and other waters of the State. Best Management Practices include, but are not limited, to practices identified in the *Connecticut Guidelines for Soil Erosion and Sediment Control* as revised, *2004 Connecticut Stormwater Quality Manual*, Department of Transportation's *ConnDOT Drainage Manual* as revised, and the Department of Transportation Standard Specifications as revised.

   The permittee shall immediately inform the Commissioner of any adverse impact or hazard to the environment which occurs or is likely to occur as the direct result of the construction, maintenance, or conduct of structures, facilities, or activities authorized herein.

8. **Reporting of Violations.** The permittee shall, no later than 48 hours after the permittee learns of a violation of this permit, report same in writing to the Commissioner. Such report shall contain the following information:

   a. the provision(s) of this permit that has been violated;
   b. the date and time the violation(s) was first observed and by whom;
   c. the cause of the violation(s), if known
   d. if the violation(s) has ceased, the duration of the violation(s) and the exact date(s) and times(s) it was corrected;
   e. if the violation(s) has not ceased, the anticipated date when it will be corrected;
   f. steps taken and steps planned to prevent a reoccurrence of the violation(s) and the date(s) such steps were implemented or will be implemented;
   g. the signatures of the permittee and of the individual(s) responsible for actually preparing such report, each of whom shall certify said report in accordance with condition 12 of this permit.

9. **Material Storage in the Floodplain.** The storage of any materials at the site which are buoyant, hazardous, flammable, explosive, soluble, expansive, radioactive, or which could in the event of a flood be injurious to human, animal or plant life, below the elevation of the five-hundred (500) year flood is prohibited. Any other material or equipment stored at the site below said elevation by the permittee or the permittee's contractor must be firmly anchored, restrained or enclosed to prevent flotation. The quantity of fuel stored below such elevation for equipment used at the site shall not exceed the quantity of fuel that is expected to be used by such equipment in one day.

10. **Permit Transfer.** This permit is not transferable without the prior written consent of the Commissioner.

11. **Contractor Notification**. The permittee shall give a copy of this permit to the contractor(s) who will be carrying out the activities authorized herein prior to the start of construction and shall receive a written receipt for such copy, signed and dated by such contractor(s). The permittee's contractor(s) shall conduct all operations at the site in full compliance with this permit and, to the extent provided by law, may be held liable for any violation of the terms and conditions of this permit.

12. **Certification of Documents**. Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this permit shall be signed by the permittee or a responsible corporate officer of the permittee, a general partner of the permittee, and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows:

    "I have personally examined and am familiar with the information submitted in this document and all attachments thereto and I certify that based on reasonable investigation, including my inquiry of the individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that a false statement in the submitted information may be punishable as a criminal offense in accordance with Section 22a-6 of the General Statutes, pursuant to Section 53a-157b and in accordance with any other applicable statute."

13. **Submission of Documents**. Any document or notice required to be submitted to the Commissioner under this permit shall, unless otherwise specified in writing by the Commissioner, be directed to:

    Director, Inland Water Resources Division
    Department of Energy and Environmental Protection
    79 Elm Street
    Hartford, CT 06106-5127

The date of submission to the Commissioner of any document required by this permit shall be the date such document is received by the Commissioner. The date of any notice by the Commissioner under this permit, including but not limited to notice of approval or disapproval on any document or other action, shall be the date such notice is personally delivered or the date three days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified in this permit, the word "day" means any calendar day. Any document or action which is required by this permit to be submitted or performed by a date which falls on a Saturday, Sunday or legal holiday shall be submitted or performed by the next business day thereafter.

14. **Rights.** This permit is subject to and does not derogate any rights or powers of the State of Connecticut, conveys no property rights or exclusive privileges, and is subject to all public and private rights and to all applicable federal, state, and local law. In constructing or maintaining any structure or facility or conducting any activity authorized herein, the permittee may not cause pollution, impairment, or destruction of the air, water, or other natural resources of this State. The issuance of this permit shall not create any presumption that this permit should be renewed.

Issued by the Commissioner of Energy and Environmental Protection on:



Date

Michael Sullivan
Deputy Commissioner