

IN THE MATTER OF

: APPLICATION NO. IW-96-131

**CONNECTICUT DEPARTMENT OF
TRANSPORTATION / ROUTE 66 MIDDLEFIELD**

**:
: JANUARY 2, 2002**

FINAL DECISION

Procedure:

The applicant Department of Transportation (DOT) filed an application for an inland wetlands and watercourses permit to conduct regulated activities along Route 66 in the Town of Middlefield.¹ On October 15, 2001, Hearing Officer Lewis J. Miller issued a *Proposed Final Decision on Remand* in the above-captioned matter.

Previously, Mr. Miller issued a *Proposed Final Decision* dated December 22, 1999. On March 3, 2000, I heard oral argument on that *Proposed Final Decision*. On June 6, 2000, I issued a decision remanding this matter back to the hearing officer.² In my decision I “conclude[d] that the Applicant . . . failed to discharge its burden of proof that the proposed activities . . . [we]re consistent with key statutory requirements and standards.”³ Accordingly, I directed the hearing officer to “give the Applicant an opportunity to provide additional evidence” to “discharge its burden of proof.”

An evidentiary hearing commenced on August 7, 2000, to address issues identified in the remand decision. Additional evidentiary hearings continued through September 27, 2000. After the September 27 hearing, with the encouragement of Mr. Miller the parties met to “explore what issues, if any, could be the subject of potential stipulation.”⁴ The parties met on October 2, 2000, and “developed a list of issues that, if satisfactorily addressed, may lead to a resolution of all of the differences between the parties.”⁵

¹ The parties in this proceeding include the applicant, Department of Transportation (DOT); staff of the Department of Environmental Protection Division of Inland Water Resources (staff); and Intervenors: Town of Middlefield, City of Middletown, and Citizens for a Sensible 66!

² My remand decision specified a list of alternatives to be considered based upon the specific issues presented in this specific case. (See also, *Agreed Draft Decision* at pp.21 to 24.)

³ *Commissioner’s Decision Remanding to the Hearing Officer* dated 6/12/00 at p.2

⁴ Letter to Mr. Miller from Asst. Attorney General Snook dated 10/6/00 at p.1.

⁵ *Id.* at p.1.

The parties then requested multiple continuances in order to resolve the issues presented. The parties continued to meet and to evaluate new information, the results of new ecological studies, and revisions to the original site plans. Multiple continuances were granted by the Mr. Miller based upon representations made to him by the parties that progress on resolution of this matter was taking place. In June 2001, Mr. Miller granted the parties a continuance so that they could mediate the unresolved issues between them. This mediation assisted the parties in completing an agreed draft decision.

Finally, on October 5, 2001, pursuant to the Regulations of Connecticut State Agencies §22a-3a-6(1)(3)(A)(i), staff and the applicant “filed an agreed draft decision, signed by at least the applicant, which set out the terms of the agreement between the Staff and the applicant.” The applicant signed the *Agreed Draft Decision on Remand* and staff submitted a memorandum in support of it. No party or intervenor filed timely objections to the *Agreed Draft Decision on Remand*.

However, on October 30, 2001, the Town of Middlefield filed *Exceptions to Proposed Final Decision and Request for Oral Argument of the Intervenor Town of Middlefield*. After notice, I commenced oral argument on November 29, 2001. I continued those proceedings until December 10, 2001. On December 10, 2001, I was informed by the intervenor Town of Middlefield that the “Applicant and the Intervenors have reached agreement on all issues.”⁶ Staff indicated they were not a party to the settlement agreement.

The applicant proffered two executed “side agreements”, and the Town of Middlefield proffered thirteen documentary exhibits. The Town of Middlefield “with[drew] both its exceptions and its request for oral argument relating to the Proposed Final Decision on Remand.”⁷

As a result of the Town of Middlefield decision to withdraw its exceptions and its request for oral argument, I must now issue a final decision in this matter. The record before me includes the following items: 1) Hearing Officer Miller’s *Proposed Final Decision on Remand* (that incorporates the *Agreed Draft Decision* filed by the applicant and supported by staff); 2) two executed “side agreements”; and 3) thirteen documentary items presented to me by the Town of Middlefield at oral argument.

The “side agreements” include two documents: 1) *Project Agreement Regarding the Transfer of Land to the Town of Middlefield* (signed by the Department of Transportation and the Town of Middlefield with one attachment); and 2) *Agreement of the Parties Concerning Improvements to Route 66* (signed by the Department of Transportation, the Town of Middlefield, the City of Middletown, and Citizens for a Sensible 66! with six attached schedules).

⁶ Letter from Michael A. Zizka, Esq. to Commissioner Rocque dated 12/7/01.

⁷ Motion by intervenor Town of Middlefield dated 12/10/01 entitled *Withdrawal of Exceptions to Proposed Final Decision and of Request for Oral Argument*.

No party objected to the 13 documentary items (Nos. OA/R-91 through OA/R-103) presented by the Town of Middlefield, so I accepted these documents into the record for informational purposes only.

Permit Conditions and the Hearing Record:

I “may affirm, modify, or reverse the proposed final decision, in whole or in part . . .”.⁸ While I accept most of the *Proposed Final Decision on Remand*, I am compelled to modify it to be consistent with my statutory obligations. I therefore modify the *Proposed Final Decision on Remand* as follows:

- 1) According to the *Proposed Final Decision on Remand*, the “side-agreements” noted above are “outside the scope of this proceeding.” I agree with this conclusion. Yet, the language in the *Agreed Draft Decision* states that “Attachments A through D [are] incorporated by reference”. Inclusion of Attachments A (the draft permit) and D (letter from staff supporting permit issuance) is appropriate. However, inclusion of the “side agreements” (Attachment B: *Agreement of the Parties Concerning Improvements to Route 66* and Attachment C: *Project Agreement Regarding the Transfer of Land to the Town of Middlefield*) is not appropriate.

These agreements address issues of concern to the parties that have signed them and they memorialize a settlement of issues between them. For example, the “side-agreement” entitled *Project Agreement Regarding the Transfer of Land to the Town of Middlefield* describes the future transfer of land between the signatories to the agreement “upon completion of the project.” Clearly, this agreement deals with matters outside the scope of my obligation to take action on an application and to issue or deny a permit to conduct regulated activities within or around inland wetlands and watercourses.⁹

On the other hand, the “side-agreement” entitled *Agreement of the Parties Concerning Improvements to Route 66* comes closer to issues related to permit issuance. This agreement provides assurances to the signatories that the project will proceed in a manner consistent with their respective interests. These interests, as stated in the agreement, include, “the best possible protection for the Higby Reservoir and adjacent wetlands and watercourses and [to] improve Route 66 in order to protect human health and safety.” While I may agree with these goals, my statutory and regulatory duties require that I “[g]rant deny, limit or modify in accordance with the provisions of 22a-42a, an application for a license or permit for any proposed regulated activity conducted by any department, agency or instrumentality of the

⁸ Regs., Conn. State Agencies § 22a-3a-6(y)(3)(D)

⁹ Unless such an agreement was part of a mitigation effort (e.g. acquisition and protection of off-site inland wetlands or watercourses).

state . . .”¹⁰ Thus, only those terms and conditions actually included in the draft permit (Attachment A), as modified herein, are included in my final disposition of the application for Permit No. IW-96-131.

- 2) In the *Agreement of the Parties Concerning Improvements to Route 66*, the section entitled “Item 12. Inspectors” states “[d]uring construction, qualified inspectors, **approved by DEP**, will be present to oversee all regulated activities and ensure compliance with all relevant permit conditions and terms of this agreement . . .”. These are responsibilities delegated to DEP staff, not independent “inspectors”. Further, there is no condition in the draft permit that I approve the selection of “qualified inspectors”. Under these circumstances, I do not intend to approve such inspectors. However, should such an inspector discover suspected violations of the permit or any applicable laws, she or he may certainly report such a discovery to the appropriate personnel within the Department of Environmental Protection for agency action. However, no such “inspector” shall interfere with Department personnel in the course of the Department’s inspection or investigation of the site.
- 3) In the *Agreement of the Parties Concerning Improvements to Route 66*, the section entitled “Item 21. Berm” states “DOT agrees that, subject to the approval of DEP, it will create a low berm a few feet north of the inlet to the twin 24” CMP pipes near station 125+50 in an effort to maintain existing water levels in the wetland in that area.” The draft permit (Special Conditions 12 and 13) requires my review and written approval of changes to the site plans. Thus, the addition of a berm in the area noted above needs to be reviewed and approved by me in accordance with the terms of the permit.
- 4) The third sentence of Item 4 of the Special Conditions section of the draft permit states: “The permittee shall obtain written approval from the Commissioner prior to initiating any control measures involving the use of herbicides at the site.” I am modifying this sentence to read as follows: “The permittee shall obtain any and all necessary approvals, permits and/or licenses prior to initiating any control measures involving the use of herbicides at the site.”
- 5) The first two sentences of Special Conditions No. 10 in the draft permit state: “Prior to the start of any construction at the site, the permittee shall conduct, through the use of a qualified

¹⁰ General Statutes §22a-39.

consultant(s) approved by the Commissioner, a detailed onsite ecological survey to determine if any Connecticut listed endangered species, threatened species, or species of special concern are present in the regulated areas of the site. The permittee shall conduct such survey in inland wetlands and watercourses encompassing an area of no less than 100 feet away from the area proposed to be disturbed.”

According to the *Agreement of the Parties Concerning Improvements to Route 66* at page 3, a species of special concern, “*Carex squarrosa* [Squarrose Sedge] was located on Coe Hill.”

According to the terms of the draft permit “if [Connecticut listed endangered species, threatened species, or species of special concern] . . . are found at any time prior to or during construction at the site, the permittee shall not conduct any construction in the regulated area where such species have been located until either the species have been relocated or impacts to the species have been mitigated. The permittee shall notify the Commissioner, the Town of Middletown Water Department, the Town of Middlefield and Citizens for a Sensible 66! and shall contact the DEP’s Natural Diversity Database staff at telephone number (860) 424-3540 for assistance prior to any relocation or mitigation effort. If action is taken the permittee shall notify the commissioner in writing of such action taken.”

By this final decision, I direct the applicant to follow the requirements of Special Condition No. 10 with respect to the fourteen individuals of the species of special concern, *Carex squarrosa*, found within and adjacent to Wetland Impact Area 10.

In addition, I am modifying Special Condition No. 10 to read as follows: “Prior to the start of any construction activity in a regulated area at the site, the permittee shall conduct, through the use of a qualified consultant(s) and method(s) approved, in writing, by the commissioner, a detailed onsite ecological survey to determine if any Connecticut listed endangered species, threatened species, or species of special concern are present in the regulated areas of the site. The permittee shall conduct such survey in inland wetlands and watercourses encompassing an area of no less than 100 feet away from the area proposed to be disturbed. The permittee shall allow a reasonable opportunity for input into the methodology of the ecological survey by interested parties. If any such species are found at any time prior to or during construction at the site, the permittee shall not conduct any construction in the regulated area where such species have been located until either the species have been relocated or impacts to the species have been mitigated. The permittee shall notify the Commissioner, the Town of Middletown Water Department, the Town of

Middlefield and Citizens for a Sensible 66! and shall contact the DEP Natural Diversity Database staff at telephone number (860) 424-3540 (or other appropriate telephone number) for assistance prior to any relocation or mitigation effort. If action is taken the permittee shall notify the commissioner in writing of such action taken.”

Conclusion:

Having reviewed the hearing officer’s *Proposed Final Decision on Remand*, I affirm his findings and conclusions and adopt his recommendation to GRANT the above-captioned application in accordance with the draft permit (Attachment A of the *Proposed Final Decision on Remand*) as modified by this Final Decision.

January 2, 2000
Date

/s/ Arthur J. Rocque, Jr.
Arthur J. Rocque, Jr.
Commissioner