

**STATE OF CONNECTICUT**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**



79 ELM STREET HARTFORD, CT 06106-5127

Amey W. Marrella  
*Commissioner*

PHONE: 860-424-3001

<b>IN THE MATTER OF</b>	:	<b>APPLICATION NOS.</b>
	:	<b>DIV-200900712 (Diversion)</b>
	:	<b>DS-200900714 (Dam Safety)</b>
<b>TOWN OF DARIEN</b>	:	
<b>FLOOD CONTROL PROJECT</b>	:	<b>August 27, 2010</b>

**FINAL DECISION**

The Town of Darien (“Town” or “Applicant”) has applied to the Department of Environmental Protection (“DEP”) for several permits to conduct regulated activities related to the Stony Brook Tributary Flood Control Project (“Project”). This final decision addresses the exceptions filed by the intervening party, the Coalition to Save Baker Woods (“Coalition”), in response to the hearing officer’s January 4, 2010 proposed final decision (“PFD”) recommending that the permits be issued.

A final decision may affirm, modify, or reverse a proposed final decision. Regs., Conn. State Agencies § 22a-3a-6(y)(3)(D). The entire record has been reviewed, including the docket file, transcripts of the hearing and oral argument, and the briefs, pleadings, rulings and other aspects of the evidentiary record. This final decision affirms the proposed final decision except as expressly indicated herein, and adopts the hearing officer’s recommendation to issue the draft permits with the additional special condition recommended by the hearing officer. The hearing officer’s conclusions of law are modified as set forth in further detail below; these additional modifications further support the issuance of these permits.

The evidence in the record shows that the above-referenced applications of the Town comply with the applicable statutory and regulatory criteria. General Statutes §§ 22a-365 through 22a-379 (“Diversion Act”); General Statutes § 22a-403; and Regs., Conn. State Agencies § 22a-377(c)-2. The Town has provided substantial evidence to demonstrate its applications’ compliance with the requirements contained therein. The Coalition, which was granted intervening party status pursuant to Regs., Conn. State Agencies § 22a-3a-6(k)(1)(B), has not provided sufficient evidence to demonstrate that the statutory and regulatory requirements have not been met.

## **I. Procedural History**

The Town filed applications with the DEP on March 9, 2009 for permits to conduct regulated activities related to the Stony Brook Tributary Flood Control Project. The Town seeks a non-consumptive water diversion permit pursuant to the Diversion Act, a dam safety construction permit pursuant to General Statutes § 22a-403, and a water quality certificate pursuant to section 401 of the Federal Clean Water Act.<sup>1</sup>

On May 11, 2009, the DEP issued a Notice of Tentative Determination indicating its intent to issue the requested permits and to waive the public hearing. On June 5, 2009, a petition for a hearing signed by twenty-five members of the public was submitted to DEP. James Tatum submitted a timely request for intervening party status on behalf of the Coalition to Save Baker Woods on August 18, 2009, and following an August 24, 2009 amended request, the Coalition was granted intervening party status.<sup>2</sup> The hearing in this matter began on September 10, 2009, in Darien for collection of public comments, and continued on September 15 and 17, 2009, at DEP headquarters in Hartford for the presentation of evidence by the parties.

Following the hearing and prior to the release of the proposed final decision, the parties and DEP staff submitted post-hearing submittals and reply briefs. The hearing officer issued the proposed final decision on January 4, 2010, recommending issuance of the permits with a special condition to address mosquito population control in the basin. Exceptions and a request for oral argument were submitted by the Coalition on January 15, 2010. Oral argument was held on the exceptions on April 27, 2010.<sup>3</sup> Post-oral argument filings were submitted by the Coalition and the Applicant on May 28, 2010.

As the applicant, the Town has the “the burden of going forward with evidence and the burden of persuasion with respect to each issue which the Commissioner is required by law to consider.” Regs., Conn. State Agencies § 22a-3a-6(f). The Town was also required to show that

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<sup>1</sup> The decision to grant the Town’s § 401 water quality certificate was not subject to review in the hearing and is not mentioned further in this final decision.

<sup>2</sup> The Coalition, which objects to the timing of the published notice of the application, takes exception to the hearing officer’s finding that it had a full opportunity to participate in the hearing process. Exceptions of Intervenor, Coalition to Save Baker Woods, Jan. 15, 2010 (“Exceptions”), p. 4. The Coalition’s objection fails to demonstrate that any statutory notice requirements were not met.

<sup>3</sup> On February 19, 2010, I disclosed through correspondence from DEP’s legal director to the parties my previous involvement, as DEP Deputy Commissioner, on an application filed in 2008 by the Town that was ultimately rejected by the DEP. After being notified of this involvement, neither party objected to my continuing as the final decision maker in this matter.

its proposed project is consistent with the legislative findings supporting the Diversion Act and its statutory and regulatory requirements, and that the project satisfies General Statutes § 22a-403.

## **II. Coalition's Exceptions to Findings of Fact**

The scope of a final decision includes the findings of fact and conclusions of law necessary to the decision. The findings of fact are based exclusively on the evidence in the record and on matters noticed. General Statutes § 4-180(c). A proposed final decision may be affirmed if there is substantial evidence in the record as a whole to support the agency's decision. *Town of Newtown v. Keeney*, 234 Conn. 312, 319-21 (1995). The Coalition's exceptions to the proposed final decision fail to demonstrate that the Town's application is insufficient in any way due to a lack of substantial evidence; in other words, the evidence supports the issuance of the permits. The majority of the Coalition's exceptions are related to the application for the diversion permit; consequently, the discussion below will address almost exclusively the sufficiency of the evidence concerning that permit. Only one exception concerns the hearing officer's findings in reference to the dam safety permit; this exception addresses mosquito presence and is discussed in part II.E of this decision.

### **A. Evidence of Flooding at Heights Road**

In its post-hearing briefs and exceptions, the Coalition disputes the sufficiency of evidence of significant flood events occurring in the Heights Road area. Brief by Intervenor Coalition to Save Baker Woods, pp. 2, 5-7 (Nov. 3, 2009); Exceptions, p. 1; Post Oral Argument Brief by Intervenor Coalition to Save Baker Woods ("Intervenor's Post Oral Argument Brief"), May 28, 2010, pp. 3-6. The Town presented the testimony of several witnesses who were directly involved in the planning process undertaken by the Town in response to at least one documented serious flooding event that impacted businesses along Heights Road, as well as photographs of severe flooding and flood damage to businesses related to an October 2007 flood event. APP-16; test. E. Klein, 9/15/09, pp. 8-10, 12-13; test. R. Steeger, 9/15/09, pp. 59-60, 63-67, 83-84. The Coalition did not present any evidence related to the frequency of rain events affecting the area. This limited nature of the evidence showing the extent of the flooding history of the project area, however, does not impact the sufficiency of the Town's applications. The Town has established at least one significant flooding event on the record in the Heights Road area causing serious damage to an economically important area of the town.

## **B. Environmental Findings of Wetlands Quality**

The Coalition takes exception to the sufficiency of evidence relating to wetlands quality as it relates to evaluation for habitat and visual aesthetics. The Commissioner is required to consider information about wetland habitats, along with many other factors, when evaluating whether the proposed diversion permit should be granted. General Statutes § 22a-373. William Kenny Associates (“WKA”) prepared the environmental report that was filed with the application. In its report, WKA found that the wetland areas of Baker Park were in a partially drained condition due to man-made surface alterations, but found that the southern portion of the wetlands had “the *potential* to provide habitat to some wildlife species.” Ex. APP-5, tab 12, pp. 12-14 (emphasis added). The report indicates, however, that the Baker Park wetlands do not appear to provide fish or shellfish habitat at this time. Ex. APP-5, tab 12, p. 19.

In making the finding that the wetlands were of limited habitat value (PFD, p. 7), the hearing officer relied on the testimony of the only wetlands expert offered by either party. William Kenny of WKA testified at the hearing that no wetland obligate species were found in the affected wetland areas and that in his opinion he would not categorize the wetlands as high-quality wetlands. Test. W. Kenny, 9/15/09, pp. 125-127, 139-41, 174. The Coalition did not offer any evidence to challenge these findings during the hearing, and did not challenge Mr. Kenny’s findings on the quality of the wetlands during cross examination. Test. W. Kenny, 9/15/10, pp. 174-77.

There was no testimony presented by either party concerning the aesthetic or educational value of the wetlands; however, the environmental report prepared by WKA indicates that the wetlands do have a present educational and scientific value and the southern wetlands contribute to the area’s visual quality and aesthetics. Ex. APP-5, tab 12, pp. 19-20. The hearing officer’s finding on page seven of the PFD that “the areas have limited value for education and visual aesthetics” is therefore supported by the record; the report indicates that only a portion of the wetlands presently contributes to aesthetics and could currently be used for educational value, and the wetland areas are thus limited for the site as a whole. Ex. APP-5, tab 12. Additionally, a finding of some aesthetic or educational value must be balanced with the net improvement to the wetlands’ ecological functions and other factors to be considered by the Commissioner under both the wetlands and diversion statutes. In light of the project’s potential to increase the net wetlands quality of town property at both Baker Park and the mitigation sites, and in the absence of substantive evidence that would tend to contradict the findings of WKA, the hearing officer was correct in finding that the Applicant has, on balance, put forward a proposal that would

increase the functionality of the wetlands, both ecologically and aesthetically. Test. W. Kenny, 9/15/09, p.133; PFD, pp. 7-8.

### **C. Impact of Increased Evaporation from Basin Construction on Existing Wetlands**

The Coalition takes exception to the hearing officer's failure to address or agree with its evidence regarding increased evaporation due to increased sunlight and airflow to existing wetlands as a result of the construction of the basin. Exceptions, p. 2. In its exceptions, the Coalition also points to the hearing officer's finding that seepage into the basin from existing wetlands will not result in drainage of the wetlands. PFD, p. 8.

There is sufficient evidence to indicate that construction of the basin will not result in drainage of existing wetlands. There was testimony regarding the soil make up and that the water source for the existing wetlands was from precipitation. Test. W. Kenny, 9/15/09, pp. 154-60. The Coalition's evidence regarding evaporation, which consisted solely of the testimony of a non-wetlands expert witness, was insufficient to demonstrate that the increased sunlight and airflow to existing wetlands would or could result in lower water levels of the existing wetlands. A non-wetlands expert witness testified on behalf of the Coalition that, in his opinion, increased sunlight due to the removal of trees would result in increased temperature and evaporation, noting that the effects of increased air flow or wind is a factor usually only considered for larger basins. Test. B. Hammons, 9/17/09, pp. 338-43. This testimony with respect to the effect of sunlight on water levels in the wetlands is given limited weight due to its non-expert nature. There was no other evidence in the record to show that increased sunlight or air flow resulting from the basin construction would lead to a loss of water in the adjacent wetlands.

#### **D. Impact of Loss of Trees on Wildlife**

The Coalition takes exception to the finding in the PFD that the project's resulting tree removal will not have a negative impact on Baker Park wildlife. Exceptions, p. 2. This finding was based on the testimony of the Applicant's wetlands expert, William Kenny. Mr. Kenny, who testified that he was a DEP Master Wildlife Conservationist, supplied detailed testimony that the mature woodland habitat in the park and the surrounding area is already prevalent in Connecticut, and the loss of four acres of woodland habitat in this instance could actually result in a net increase in the potential for wildlife diversity. Test. W. Kenny, 9/15/09, pp. 136-38. The Coalition did not cross examine this witness on this testimony and did not provide any evidence of its own with respect to impacts on wildlife. There exists substantial evidence that the basin will not impact any endangered or threatened species. Test. W. Kenny, 9/15/09, pp. 110, 138. Consequently, there is substantial evidence in the record to find that the removal of approximately four acres of trees and replacement thereof with meadow habitat will not have a negative impact on wildlife in the area of the proposed project. Test. W. Kenny, 9/15/09, pp. 136-37.

#### **E. Mosquito Presence**

The Coalition takes exception to the hearing officer's finding that the proposed basin will not significantly increase the presence of mosquitoes in the area. Exceptions, p. 2. There was testimony that the project would have the potential to create shallow pools that would provide breeding grounds for mosquitoes in an area that already has a significant mosquito presence, but also that the increased wet meadow habitat would support birds and insects that are natural mosquito predators. Test. W. Kenny, 9/15/09, p. 163. Therefore, the hearing officer's finding on page nine of the PFD that the increase in mosquitoes in the area would not be significant is supported by the evidence in the record. The hearing officer also recommended a special condition to ensure that any potential increase would be offset by an increase in the presence of natural mosquito predators. There was testimony that the presence of common reed grass (*phragmites australis*) in the wet meadow habitat might prevent mosquito control through natural predation because the grass would prevent birds from being able to prey on the mosquitoes. Test. W. Kenny, 9/15/09, p. 164. The hearing officer recommended a special condition to require monitoring and removal of common reed grass in order to allow bird populations to prey on mosquitoes potentially supported by the newly-created wet meadow habitat. PFD, p. 22.

I concur with the hearing officer's recommendation to require monitoring and removal of common reed grass. This special condition is expected to prevent any net increase in mosquito habitat as a result of the construction of the project and may actually decrease their presence in the area. See Test. W. Kenny, 9/15/09, p. 164.

### **III. Coalition's Exception to Conclusions of Law**

The Coalition takes exception to the conclusions of law of the hearing officer, specifically his legal interpretation of certain aspects of the Diversion Act, to include the Act's applicability to the Town's proposed activities. I agree with the hearing officer's conclusions, with the exception of the discussion concerning the three legislative findings contained in General Statutes § 22a-366. I am modifying the hearing officer's conclusion relative to this discussion because I wish to make it clear that all three legislative findings must be addressed and satisfied by the application.

#### **A. Applicability of the Diversion Act**

##### **1. Project drainage area is greater than one-hundred acres**

The Coalition takes exception to the hearing officer's statement that the project involves the alteration and detention of stormwater flow in a drainage area over 100 acres (PFD, p. 15) and suggests that the Diversion Act is not applicable. Exceptions, p. 2. The Coalition, however, offered no evidence relating to a showing of the size of the drainage area involved in the project. Mr. Leonard Jackson, a qualified expert in the area of hydrology and hydraulics, testified that the drainage area that contributed to the Heights Road outlet is 140 acres. Test. L. Jackson, 9/15/09, pp. 192-93. This testimony supports the applicability of the Diversion Act to the proposed project. A diversion permit was properly applied for and shall be issued.

##### **2. The Diversion Act definitions encompass the project**

The Coalition takes exception to the applicability of the Diversion Act to this project based on its assertions that the project does not meet many of the statutory definitions contained in General Statutes § 22a-367. Therefore, the Coalition argues, this permit would be improperly granted.

Specifically, the Coalition claims that the project does not meet the definition of a diversion as the “instantaneous flow of waters of the state.” Exceptions, p. 3; Intervenor’s Post Oral Argument Brief, p. 6. The Diversion Act contains a broad definition of a “diversion” as “any activity which causes, allows or results in the withdrawal from or the alteration, modification, or diminution of the instantaneous flow of the waters of the state[.]” General Statutes § 22a-367(2). By design, a flood control project necessarily seeks to divert the instantaneous flow of waters of the state in order to mitigate present flooding conditions caused by rain events. To exclude activities such as those proposed in the application from the Diversion Act would be to ignore the potentially substantial ecological impacts that flood control projects may have on Connecticut’s water resources. The Coalition does not provide any explanation or reasoning to support its argument that the proposed project fails to meet either the definition of “instantaneous flow” or “waters.” I can discern no support for this claim in the exceptions or briefs filed by the Coalition, and would note that the diversion activity that would be permitted under the proposal involves the diversion of waters of all significant rain events, not just 100-year storm events. The Coalition also seems to argue without foundation that the project fails to address “water resources” of the state and therefore is not compatible with the Diversion Act. Exceptions, p. 4. Stormwater, as impacted by our management practices, is an extremely important water resource of the state as reflected by the legislature’s expansive definition of “waters” covered by the Diversion Act. General Statutes § 22a-367(9).

### **3. Flood management statute does not apply**

The Coalition argues in its exceptions that because the application fails to qualify under various definitions contained in the Diversion Act, the Town should have properly applied for a permit under the Flood Management provisions under Chapter 476a of the Connecticut General Statutes. Chapter 476a applies to proposed, state sponsored activities within or affecting a floodplain; it is not the proper vehicle for addressing the activities proposed by the Town. In addition, for the reasons discussed above, the Diversion Act provides the proper framework under which this project is proposed and permitted. In fact, the Diversion Act requires the Commissioner to obtain information concerning the impacts of a proposed project on flood management and to review applications for consistency with flood management policies. The Town’s application for a diversion permit has been reviewed for consistency with flood management policies of the state and I find that the project is consistent with those policies



## **B. Application satisfies statutory criteria**

Given that the Town's application is properly submitted under the Diversion Act, I turn to the Coalition's arguments which pose legal challenges to the substantive provisions of the Diversion Act as applied to the Town's application.

### **1. The application is consistent with all three legislative findings**

The Coalition takes exception to the hearing officer's determination that the Town's application satisfies the legislative findings provision of the Diversion Act. Section 22a-366 contains the legislative findings for the Act and states:

"[I]t is found and declared that diversion of the waters of the state shall be permitted only when such diversion is found to be necessary, is compatible with long-range water resource planning, proper management and use of the water resources of Connecticut and is consistent with Connecticut's policy of protecting its citizens against harmful interstate diversions..."

General Statutes § 22a-366. I disagree with the Coalition's reading of this statute; specifically with its interpretation that because a project does not involve an interstate diversion of water, it is somehow inconsistent with Connecticut's policy of protecting its citizens against harmful interstate diversions. Exceptions, p. 3; Intervenor's Post Oral Argument Brief, p. 5. I also believe that the finding of the PFD that "the application does not have to address all the priorities stated in the introductory findings of the statute" can be easily misinterpreted and warrants clarification. PFD, p. 15.

A plain reading of the word "only" in General Statutes § 22a-366 leads me to conclude that all three legislative findings must be addressed in the application. For instance, there need not be an interstate diversion, but the policy statement relating to protecting state citizens from harmful interstate diversions must be addressed in the application. If a project does not involve an interstate diversion of water, it can safely be presumed to be consistent with state policies relating to interstate water resource concerns. This interpretation is also supported by the legislative history of the Diversion Act. "We cannot remain in the position of opposing the diversion policies of other states, while hypocritically leaving our own house in confused disarray." Conn. Joint Standing Committee Hearings, Environment, Pt. 4, 1982 Sess., p.781, remarks of Deputy Commissioner of the Department of Environmental Protection. This interpretation is also supported by the application of General Statutes § 22a-373 and the various factors which I must consider when issuing a decision on a permit. See, e.g., General Statutes § 22a-373(9) (consistency with action taken by the Attorney General pursuant to the protection of

and negotiating concerning interstate watercourses). To extend the Coalition's reasoning on the provision concerning legislative findings would substantially, and almost completely, narrow the scope of permissible diversion activity.

The Town's application does address consistency with interstate diversions by providing sufficient information to determine that an interstate diversion is not present in this project. The application indicates with specificity the site information associated with the project, including its precise location. See, Ex. APP-5, Tab 3, IWRD Application Form, Part IV "Site Information." Based on this supplied location, staff can request further information under General Statutes § 22a-371 in order to evaluate a project's consistency with state policies for interstate diversions. All three legislative findings must be satisfied for a diversion permit to be granted, and in this case, the legislative findings are satisfied.

## **2. The alternatives analysis scope is sufficient**

The Coalition takes exception to the sufficiency of the alternatives analysis presented by the Town, and to DEP's review of this analysis. Specifically, the Coalition claims that there was no rational basis for staff and the hearing officer to conclude only one alternative is acceptable, and that the Town failed to present to the Department all alternatives considered. Exceptions, p. 2; Intervenor's Post Oral Argument Brief, pp. 2-3.

Both challenges relate to the scope of the required alternatives analysis under General Statutes § 22a-369(8). The proposed final decision adequately outlines the rationale for rejecting each of the considered alternatives as less prudent and feasible than the alternative outlined in the permit applications, and I will not repeat that discussion here. PFD, pp. 13-14. The Coalition states in its exceptions that "there is no rational basis for concluding that only one alternative is acceptable." Exceptions, p. 2. This, however, misinterprets the finding that the proposed alternative is the most, not the *only*, feasible and prudent alternative presented. The conclusion that the proposed alternative is the most feasible and prudent alternative is supported by the analysis contained in the application and testimony in the record that demonstrated the Town's responsiveness to the initial rejection of the first application, and resulting pre-application consultation with DEP staff regarding more appropriate alternatives. Ex. APP-5, tab 14, p. M1; Test. M. Salter, 9/17/09, pp. 409-10; Test. J. Caiola, 9/17/09, pp. 414-16.

The Coalition also takes exception to the scope of the alternatives analysis as presented by the Town, with specific objection to the testimony of the Town's Director of Public Works that some alternatives were not included in the application because they had "obvious major

problems.” Test. R. Steeger, 9/15/09, p. 75. It is true that the alternatives analysis presented did not include every alternative imaginable or attempt to evaluate innumerable combinations of alternatives; however, it did not need to. The mere suggestion that an alternative is possible does not constitute a showing that the combined approach would be feasible or prudent. See *Red Hill Coalition, Inc. v. Conservation Commission*, 212 Conn. 710, 726 (1989) (applicants not compelled to submit plans for all possible alternatives). The Coalition provided no evidence or testimony demonstrating the feasibility, including cost analysis, of taking any other approach.<sup>4</sup> Test. B. Hammons, 9/17/09, p. 359. In the context of a wetlands alternatives analysis, the Connecticut Supreme Court has said that the reviewing entity is “required to consider other alternatives *only* if they are both feasible and prudent.” *Tarullo v. Inland Wetland and Watercourses Commission of the Town of Wolcott*, 263 Conn. 572, 583 (2003) (emphasis added). Alternatives with “obvious major problems” do not appear to be alternatives for the Town that are both feasible and prudent on a fundamental level, and there is no statutory requirement, or practical need for DEP staff to be presented with alternatives that could not be seriously considered by the Applicant. The application presents a sufficient array of alternatives for staff to consider and compare to the preferred alternative and to demonstrate that the chosen alternative meets all other necessary statutory and regulatory requirements.

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<sup>4</sup> The Coalition provides a calculation on page two of its exceptions where it finds a possible 55% reduction in the size of the Baker Park retention project, by combining the storage capacity of two alternatives *for the same location*. Even if it were possible to implement two approaches for one site at once, this mere suggestion does not constitute evidence of the feasibility or prudence of the combined approach for which it advocates.

### **3. The diversion is necessary**

The Coalition takes issue with the finding that the project is necessary, a condition required by General Statutes §§ 22a-366 and 22a-373(8). Exceptions, p. 3; Intervenor's Post Oral Argument Brief, pp. 3, 5. Part of the Coalition's argument appears founded in its related exception that there was insufficient evidence of the frequency of flooding in the Heights Road area. See, Part II.A above. The Town established one significant flooding event in the Heights Road area causing significant economic damage to an important town business district. The severity of this flooding event alone clearly establishes an objective potential need to address flooding in the area. Given that the cause of the flooding at Heights Road appears to be an undersized culvert and any flood control project would need to increase the size of the culvert to alleviate the flooding, a resulting need to relocate the water once retained in the Heights Road area to somewhere else other than directly downstream is also apparent. Test. L. Jackson, 9/15/09, pp. 192-98. This evidence demonstrates a sufficient showing on the part of the Applicant that the project is necessary from the standpoint of flood management.

Whether a project is necessary under the statutory terms does not depend on Department staff's or my opinion as to the financial or political wisdom of endeavoring to complete a project and this permit process is not the proper or effective place to voice complaints about allocation of town resources. From an environmental review perspective, whether a diversion is "necessary" might normally also involve questions of waste associated with consumptive diversions of water, where a proposed diversion has identifiable opportunities for conservation rather than diversion of water. General Statutes § 22a-373(8). Since this is a non-consumptive diversion and the Town has made an adequate showing both in its application material and through testimony that this project is a high priority project for the Town to address safety and flooding in an important economic area of the town, the need for the project has been adequately demonstrated. Ex. APP-5, tab 7, p. 4b; test. E. Klein, 9/15/09, pp. 8-10, 12-13; test. R. Steeger, 9/15/09, pp. 59-60, 63-67, 83-84; Test. L. Jackson, 9/15/09, pp. 192-98.

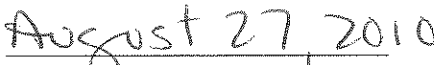
#### **4. The positive impact of diversion to economic development and job creation**

The Coalition takes exception to the proposed final decision's determination regarding the relationship of the proposed diversion to economic development and the creation of jobs. It asserts that the diversion has nothing to do with economic development and creation of jobs. Exceptions, p. 4. This is in stark contrast to testimony supplied by First Selectman Evonne Klein regarding the importance of flood prevention measures in the Heights Road area to the Town's economic development. Test. E. Klein, 9/15/09, pp. 37-39. In issuing a diversion permit, I am required to consider the relationship of the diversion and economic impacts. From the evidence before me, I can make no other determination that if the project resolves the flooding issues along Heights Road then the project will have a positive economic impact on the businesses and the jobs created by existing and potentially new businesses along Heights Road. This is but one factor for my consideration, and given the uncontroverted testimony of First Selectman Klein, I conclude that the project would result in a net positive economic impact.

#### **IV. Conclusion**

I concur with the Hearing Officer's findings in the Proposed Final Decision. The Town has satisfied all relevant substantive requirements, and the Coalition has offered no evidence that would tend to demonstrate that the Town's applications are insufficient in any manner. The Town has proposed a project that is acceptable from an environmental, water resources, and flood safety standpoint, and its permits should be granted with the hearing officer's recommended special condition to the dam safety permit as discussed above.

  
Amey W. Martella  
Commissioner

  
Date

SERVICE LIST

In the matter of Town of Darien, Flood Control Project  
Application Nos. DIV-200900712, DS-200900714

The foregoing final decision was sent via e-mail and U.S. regular mail to:

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