



Connecticut Department of
**ENERGY &
ENVIRONMENTAL
PROTECTION**

IN THE MATTER OF : ***APPLICATION NO. IW-201005239***

CONNECTICUT

DEPARTMENT OF TRANSPORTATION : ***March 16, 2012***

FINAL DECISION

In the context of a controversial project, this Final Decision addresses exceptions filed in response to the January 31, 2012 *Proposed Final Decision* in the matter of the Connecticut Department of Transportation's ("DOT" or "Applicant") application to the Connecticut Department of Energy and Environmental Protection ("DEEP") for a permit to conduct regulated activities in inland wetlands and watercourses ("Proposed Regulated Activity") in connection with the construction of a proposed dedicated bus rapid transit facility between New Britain and Hartford ("the Busway"). The parties are the applicant DOT, DEEP Staff, and the following intervening parties¹: Block the Bus, State Representative Whit Betts, Robert Fromer, Molly McKay, and Richard Stowe (collectively, "Intervenors" or "Intervening Parties"). State Senator Joseph Markley also participated in this proceeding.

This Final Decision affirms the findings of fact and conclusions of law in the *Proposed Final Decision*, except as expressly provided herein, and adopts, with the following modifications, the Hearing Officer's recommendation to issue to the Applicant the permit to conduct regulated activities in inland wetlands and watercourses.

Please note that information presented at Oral Argument was necessarily bifurcated into information that had been previously entered into the record and therefore could be taken into

¹ Pursuant to C.G.S. §22a-19.

consideration and that which had not, which would have been prejudicial if had been contemplated in the Final Decision.

I. Introduction

The procedural record in this matter is voluminous; and, its history through January 31, 2012, is delineated in the *Proposed Final Decision*. The parties have since filed exceptions to the *Proposed Final Decision*, requests for Oral Argument, and briefs on the exceptions. Oral argument was held before me on March 1, 2012.

The Applicant and DEEP Staff filed several recommendations for clarifications to the record and permit. DEEP also requested clarification of the record regarding two findings of fact. Most of the exceptions filed by the Intervening Parties focused on the consideration of transportation alternatives to the Busway.

Having reviewed the record, draft permit and the *Proposed Final Decision*, and having considered the arguments raised in exceptions, briefs, and Oral Argument, I have made the following conclusions and render the following Final Decision.

II. Applicant DOT and DEEP Staff Exceptions

DOT and DEEP Staff independently submitted two similar requests for clarification.

a. Unreasonable Pollution – C.G.S. §22a-41(a)(2) Alternatives Analysis

The Applicant and DEEP Staff proposed modifications to the language in the *Proposed Final Decision* to clarify that the Intervenors did not demonstrate that the Proposed Regulated Activity will or will likely result in unreasonable pollution or the destruction of the public trust in the air, water or other natural resources of the state (“unreasonable pollution”).

The record makes clear that the Intervenors had to prove that the Proposed Regulated Activity would result in unreasonable pollution pursuant to C.G.S. §22a-19(a), the statute under which they intervened in this hearing process.² To prevail, it was first necessary for the Intervenors to demonstrate unreasonable pollution on the basis of the statutory and regulatory

² *Proposed Final Decision*, V, p. 25.

scheme that governs inland wetlands and watercourses permits. C.G.S. §22a-41 and R.C.S.A. §22a-39-6.1.³ The claim of unreasonable pollution was therefore rightly judged by the Hearing Officer pursuant to the alternatives analysis set out in C.G.S. §22a-41(a)(2), which requires consideration of “[t]he 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[.]”

Because the Hearing Officer found that the Intervening Parties did not present credible evidence of feasible and prudent alternatives to the Proposed Regulated Activity pursuant to C.G.S. §22a-41(a)(2), they did not demonstrate unreasonable pollution under C.G.S. §22a-19(a).⁴ Therefore, the Hearing Officer was not required to also assess alternatives pursuant to C.G.S. §22a-19(b), which only requires the consideration of alternatives when unreasonable pollution has been established. Therefore, I find that any discussion⁵ of prudent and feasible alternatives in the *Proposed Final Decision* was correctly limited to an evaluation pursuant to the provisions of C.G.S. §22a-41(a)(2).

b. Clarification to Draft Permit

The Applicant and DEEP Staff both sought a similar, minor clarification to the Draft Permit. The Draft Permit (DEEP Exhibit 10A), which is attached to the *Proposed Final Decision*, contains a listing of all of the supporting documents and submissions made by DOT as part of its application. In order to clarify which of these documents takes precedence over the other, the second full paragraph on page 2 of the Draft Permit shall be revised as follows (*strikeout represents deletion; new language is italicized*):

The Permittee is *granted authority* ~~authorized~~ to conduct the authorized activities in accordance with the application submitted to the Department on August 6, 2010, including all revisions thereto and all ~~plans supporting plans, documents, or submissions~~ which are a part thereof. *The Environmental Impact Plates referred to below are one such revision and supersede any conflicting provision in any supporting plans, documents, or submissions made part of the application.* The application is comprised of the following: . . .

³ *Proposed Final Decision*, II, p. 2 and V, p. 25.

⁴ See *Proposed Final Decision*, p. 31. It is only after unreasonable pollution has been demonstrated as defined by C.G.S. §22a-41(a)(2) that the Hearing Officer could consider alternatives pursuant to the provisions of C.G.S. §22a-19(b). *Evans v. Planning & Zoning Commission*. 73 Conn. App. 647 (2002).

⁵ The Hearing Officer’s discussion of feasible and prudent alternatives in Sections V and V.A. of the *Proposed Final Decision* is in the context of an attempt by the Intervenors to prove non-compliance with C.G.S. §22a-41(a)(2). See *Proposed Final Decision*, pp. 25-27.

III. DEEP Staff Exceptions

DEEP Staff presented two additional requests for specific clarifications to the record.

a. *Stormwater Treatment Practices*

DEEP Staff asked for a clarification of Finding of Fact # 29 in the *Proposed Final Decision*, in which the Hearing Officer notes that “[t]he goal of removal of eighty percent of total suspended solids (TSS) outlined in the SWQM is the standard in the industry.” DEEP Staff recommends that this finding state explicitly that the stormwater treatment systems and practices proposed by the DOT will meet or exceed that industry standard and, further, that the Stormwater Quality Manual makes clear that the stormwater treatment systems and practices proposed by DOT will not only remove eighty percent of TSS, but will also treat and/or remove numerous other pollutants.

Finding of Fact #29 provides that the DOT, consistent with industry standards and application requirements, designed necessary stormwater treatment practices and systems for the Proposed Regulated Activity in accordance with the DEEP 2004 Stormwater Quality Manual (SWQM) and notes that the goal of eighty percent removal of TSS outlined in the SWQM is the standard in the industry. The evidence in the record regarding the proposed stormwater treatment systems, as well as practices cited in the *Proposed Final Decision* (e.g., Applicant Exhibits 1E, 1G, 1I, 1J) and the SWQM (Applicant Exhibit 8), support a determination that those systems and practices will remove at least eighty percent TSS and will treat or remove numerous other pollutants. Therefore, it is reasonable to conclude, and I hereby do so, that the industry standard of eighty percent removal of TSS will be met or exceeded and this finding be explicitly added to the record.

b. *Water Quality Standards*⁶

DEEP Staff requested the deletion of the following sentence in Finding of Fact #35: “The WQS establish the authorities and procedures for permitting discharges to the waters of the State

⁶ The related opinions and exceptions of the Intervening Parties regarding the Water Quality Standards are hereby noted, but the record supports the *Proposed Final Decision* as clarified above. The Intervenors did not provide credible evidence in the record or in support of their oral argument that the inland wetlands and watercourses resources will be harmed; rather the record evidences the contrary.

and for the abatement of pollution.” DEEP Staff is correct that the Connecticut General Statutes, not the WQS, establish the authorities and procedures for permitting discharges. The WQS provides guidance on “[d]ecisions on the acceptability of a type of discharge to a specific water resource.” (Fromer Exhibit 5). It is not clear why the Hearing Officer included the statement noted above in Finding of Fact #35. The record is now clarified to omit this statement.

IV. Intervening Parties Exceptions

Each of the Intervenors took exception to the *Proposed Final Decision*. Robert Fromer filed specific exceptions, which were adopted by Molly McKay, Richard Stowe, Senator Joseph Markley⁷, and Representative Whit Betts. Ms. McKay and Mr. Stowe additionally filed their own exceptions. Mr. Fromer, Ms. McKay, and Mr. Stowe participated in Oral Argument.

Fundamental to many of the exceptions raised by the Intervenors is a misunderstanding about whether the construction of the Busway facility or the particular, regulated work being done in inland wetlands and watercourses in the course of the construction of the Busway facility is subject to contemplation of other feasible and prudent alternatives. The bulk of the remaining exceptions involve disagreements with the findings of fact and conclusions of law as well as determinations made by the Hearing Officer regarding the credibility and application of evidence, testimony, and law.⁸ Several of the Intervenors’ other exceptions are unsubstantiated opinions with no relevance to this Final Decision. Statements,⁹ such as those relating to political expedience and congestion along the Interstate 84 corridor, have no relevance to this Final Decision and serve to obscure issues in an already substantial record.

a. Feasible and Prudent Alternatives

i. Interpretation of C.G.S. §22a-41(a)(2)

⁷ The record shows that Senator Markley adopted Fromer’s Exceptions as “my” exceptions rather than on behalf of Block the Bus.

⁸ For example, Mr. Fromer argued that the Hearing Officer neglected to consider her findings and conclusions in light of C.G.S. §22a-427. Fromer, 2/15/12 Exceptions, pp. 2, 44.

⁹ See examples in Fromer, 2/15/12 Exceptions, Findings of Fact #9 and #10, or Exceptions to (b), (j), or (k).

An integral point of contention among the parties is the extent to which the consideration of alternatives should include the Busway facility or just the particular, regulated work in the inland wetlands and watercourses in the course of the construction of the Busway facility.¹⁰ The Intervenor continued to argue¹¹ that an alternatives assessment must include consideration of alternatives to the Busway itself, which is the purpose for the Proposed Regulated Activity. The focus of this permit application is the Proposed Regulated Activity, the work that will be conducted that will impact inland wetlands and watercourses. Alternatives assessed are those in regard to this activity. C.G.S. §22a-41(a)(2).

Mr. Fromer quotes as fact Attorney Eldergill's allegation that "[t]he applicant has failed to demonstrate that its proposal for the Busway is the only feasible and prudent alternative, given the purpose of its proposed regulated activity[.]"¹² Mr. Fromer erroneously suggests the Hearing Officer erred in her conclusion regarding the particular authority granted the DEEP Commissioner.¹³ Ms. McKay took exception to the premise cited in the *Proposed Final Decision* regarding the inadmissibility in this permit proceeding of transportation alternatives for consideration.¹⁴ Mr. Stowe¹⁵ likewise took a similar exception.

At Oral Argument and in the record, both Ms. McKay and Mr. Stowe spoke passionately about their beliefs that there are alternatives to the proposed Busway facility. However, I affirm the Hearing Officer's findings of fact in the *Proposed Final Decision* regarding the legal interpretation of what is modified by "prudent and feasible alternatives" as clarified above.¹⁶ The actual work in the inland wetlands and watercourses to be permitted is the Proposed

¹⁰ Fromer, 2/15/12 Exceptions, at II.D.

¹¹ See Section II.a. above.

¹² Fromer, 2/15/12 Exceptions, p.11; September 22, 2011, *Position Statement and Offer of Proof by Intervenor Block the Bus and Whit Betts*.

¹³ The Hearing Officer offered the following: "The Commissioner must determine whether there are feasible and prudent alternatives to the proposed regulated activity that would have less of an impact on wetlands or watercourses. Contrary to the arguments of the intervening parties, §22a-41(a)(2) does not require the Commissioner to consider alternatives to the purpose for the Proposed Regulated Activity. First, the phrase "and any feasible and prudent alternatives to" modifies "proposed regulated activity." Second, and more definitively, the Commissioner cannot consider whether there are alternatives to the Busway, the purpose for the Proposed Regulated Activity, as he has no authority to make a decision regarding the mode of transportation selected by the DOT." (FN5 omitted). *Proposed Final Decision*, p. 2.

¹⁴ McKay, 2/27/12 Brief; See also Fromer Brief, Pages 6-7 (regarding evidence deemed by the Hearing Officer as inadmissible pertaining to AMTRAK rail line).

¹⁵ Stowe, 2/15/12 Exceptions.

¹⁶ *Proposed Final Decision*, II, p. 2.

Regulated Activity. It is not the determination of whether a rapid bus transit system or some other mode of conveyance is most appropriate.

Mr. Stowe and Ms. McKay asserted consistently throughout the proceedings and Ms. McKay specifically stated on page 3 of her Exceptions the following.

[a]s a result of the rulings made prior to the commencement of the hearing on this application, parties, including intervenors, as well as members of the public have not been permitted to offer evidence in support of the claim that there exist feasible and prudent alternatives which will fulfill the project purposes of “reducing congestion levels on I-84 and parallel roadways and providing alternative modes of transportation,” to the extent these alternatives reflect “alternate transportation choices”; that is, alternatives which do not constitute a “busway.”

The record is clear¹⁷ that the Intervenor have not only misinterpreted C.G.S. §22a-41(a)(2), but have also confused the permit process at hand with the extensive, earlier comprehensive environmental contemplations and reviews addressed under the National Environmental Policy Act (“NEPA”) and Connecticut Environmental Policy Act (“CEPA”) Environmental Impact Statement (“EIS”) process, as outlined in Finding of Fact #7 in the *Proposed Final Decision*. These followed the underlying Major Investment Study (“MIS”) that the record shows was undertaken in the late 1990s by several area agencies and other processes much earlier in the life of the Busway project.¹⁸

Allowing a broader transportation strategy determination to be made as part of this DEEP permit proceeding would serve to provide both DEEP and intervenors additional bureaucratic bites at the apple; the appropriate opportunities afforded to address such concerns occur much earlier in the planning stage as intended in the NEPA and CEPA legislation.¹⁹ In his Exceptions and at Oral Argument, Mr. Stowe proffered extensive opinions regarding the content of the EIS and a series of options that, while segments may have appeal, are not pertinent to this proceeding. In short, the Intervenor attempt to challenge the findings and conclusions of the completed EIS, which was approved under both NEPA and CEPA, through the guise of alternatives within the permitting process for a regulated activity under the inland wetlands and

¹⁷ *Proposed Final Decision*, pp. 25-26.

¹⁸ Fromer Exhibit F-7. Though, not relevant to this proceeding, it is helpful to note that, in this exhibit submitted by Mr. Fromer, the record shows that in those processes the public was noticed and had the opportunity to participate in a series of hearings.

¹⁹ The EIS process affords consideration of potential pollution generated by proposed projects and alternatives. The record shows the EIS process was engaged for the Busway. Fromer, Exhibit F-7. That process is the proper forum for a consideration of general pollution with respect to transportation modalities. Fromer, 2/27/12 Brief, pp.7-8.

watercourses permit process. This is a misuse of the regulatory procedure in that the alternatives analysis at the permitting stage does not revisit the broader issues of the structural alternatives evaluated at the NEPA/CEPA planning stage.²⁰

The exceptions noted above and more²¹ address a transportation decision not within the authority of the DEEP in the midst of an inland wetlands and watercourses permit process and take exception to evidence that is neither in the record nor relevant to the environmental considerations for this permit application.

I explicitly affirm the Finding of Fact #7 as is in the *Proposed Final Decision*.

ii. No Feasible and Prudent Alternatives Pursuant to C.G.S. §22a-41(b)(1)

Despite the DEEP finding that the Proposed Regulated Activity will have no significant impact on wetlands or watercourses and because there was a public hearing, C.G.S. §22a-41(b)(1) provides that a permit shall not be issued unless the Commissioner finds on the basis of the record that a feasible and prudent alternative to a proposed regulated activity does not exist. There is considerable evidence in the record to support the Hearing Officer's conclusion of law that a feasible and prudent alternative does not exist.²² The Hearing Officer concluded that the current proposed alignment and design of the Busway corridor and various engineering decisions about the project were made after consideration of alternatives and that certain decisions about design alternatives were made to avoid or minimize impacts to wetlands.²³ The Hearing Officer's conclusion of law further noted that there is "also evidence that the selected alternatives . . . will improve and enhance wetlands and watercourses."²⁴

I concur with the Hearing Officer's conclusion that the DOT demonstrated that there are no feasible and prudent alternatives to the Proposed Regulated Activity which would cause less or no environmental impact to wetlands or watercourses. I further affirm her finding that no

²⁰ Further, while confusing this permitting process with the larger transit selection process, the Intervenor have erroneously averred that the DOT did not compare environmental impacts in its planning process (see Fromer Exceptions, IID, page 10). The record shows that DOT compared environmental impacts and provided opportunity for public hearing and comment during the process. (Fromer Exhibit F-7; Fromer Exhibit F-6). The NEPA/CEPA Environmental Impact Statement process was the appropriate place for engaging the prudent and feasible alternatives that have been argued so passionately by the Intervenor in this permit process.

²¹ For example, Stowe, 2/15/12 Exceptions; Fromer, 2/15/12 Exceptions, Exception to Finding of Fact #7, pp. 14-15.

²² *Proposed Final Decision*, IV.A.2, p. 20; DOT/DEEP Exhibit 1-A, Attachment M. *Alternatives Assessment*.

²³ *Ibid*.

²⁴ *Ibid*.

Intervening Party presented substantive evidence of any feasible or prudent alternative to the Proposed Regulated Activity and that the proposed Busway project has been planned and designed to avoid or minimize impacts to wetlands or watercourses. Finally, I emphasize the conclusion that there was also evidence that the selected alternatives for the planned project will improve and enhance watercourses.²⁵

b. Commissioner's Authority

The Intervenors questioned Footnote 3 on page 2 of the *Proposed Final Decision* where the Hearing Officer surmised the following.

It is precisely because he has no knowledge as to transportation planning, design or construction that the Commissioner could not determine whether a particular alternative was feasible or prudent, which are indispensable elements of such a decision.

The record more accurately reflects that the Commissioner of DEEP is not statutorily granted the authority to make determinations as to feasible or prudent alternatives to broader transportation strategy determinations in the permitting process at hand. The record supports the Hearing Officer's conclusion that General Statutes and case law both constrain DEEP's authority and delegate to the DOT the authority to make transportation project determinations such as whether to build rail, roads, or use existing systems.

c. Deputy Commissioner Conflict of Interest and Inference of Governor's Influence on Decision-Makers

Prior to Oral Argument, Mr. Fromer filed a motion for me to recuse myself as the final decision-maker. I declined to do so and ruled accordingly. In his Exceptions and his Brief on those Exceptions, Mr. Fromer continued to claim that I am biased, essentially because he presumes that I am appointed by, and serve at the pleasure of, the Governor. There was no credible evidence provided to substantiate such speculative allegations of bias. As the Deputy Commissioner for Environmental Quality at DEEP, I am not appointed by the Governor and do not serve at his discretion. See C.G.S. §§4-8 and 4-12. Moreover, the Intervenors provided no evidence of actual bias such as any prejudgment of adjudicative facts that are in dispute. *Rado v. Board of Education*, 216 Conn. 541 (1990).

²⁵ *Ibid.*

With respect to this permit application, there was no credible evidence provided to substantiate Mr. Stowe's similarly tenuous insinuations that the Hearing Officer "may have had an inside pipeline to the Governor's line of reasoning regarding his aggressive pursuit of the busway."²⁶

In another unfounded attempt to infer political motivations, Mr. Stowe raises Governor Malloy's call for the dissolution of the Connecticut Public Transportation Commission.²⁷ That is a matter of public record, has no relevance on the permit matter at hand, and merits no further response.

d. Findings of Fact

Most of Mr. Fromer's exceptions are listed as "Exceptions to the Findings of Fact."²⁸ Most of these exceptions either do not cite supporting evidence in the record or rely on evidence that was determined to be irrelevant or lacking in credibility. Fromer's exceptions are often solely based on information he wants to add to a finding or reflect his opinion of what the DEEP should require in the permit or what the DOT should require of its contractors.²⁹ A finding of fact is made by a hearing officer based on the record presented at the hearing. Exceptions are not a venue for adding new information or for arguing for conclusions that were not part of the evidence.

e. Completeness of Application

The Intervenors took exception³⁰ to the sufficiency, quality of review, and completeness of the permit application because it does not include certain information or analysis they believe is necessary. While the Intervenors may disagree with the information on which DEEP based its decision, DEEP has the authority to determine when an application is complete and contains all the information required by applicable statutes or regulations. *Commission on Hospitals and*

²⁶ Stowe, 2/27/12 Brief, p. 2.

²⁷ Stowe, 2/27/12 Brief, pp. 2-3.

²⁸ Fromer, 2/15/12 Brief, pp.13-31.

²⁹ For example, Mr. Fromer argues that Finding of Fact #8 should have indicated that the DOT and DEEP discussed "pollutant loads," which he argues should have been included in this application process. However, this finding of fact reflected the evidence of what was actually discussed between the DOT and DEEP, which did not include "pollutant loads." Mr. Fromer's disagreement and his desire to include "pollutant loads" as part of the application process is not a proper exception. *Proposed Final Decision*, Finding of Fact #8, p. 5; See e.g. Fromer, 2/15/12 Brief, p. 15, 21-22, 25.

³⁰ For example, Fromer, 2/27/12 Brief, ID, IIA, IIC, and Exceptions regarding Finding of Fact #2 and Exception to (c).

Health Care v. Stamford, 208 Conn. 663, 668-69 (1988). See R.C.S.A. §22a-39-5.1.b. (Application deemed complete when in such form and contains such information as Commissioner deems necessary for a fair determination of the issues.)

f. Credibility and Relevance of Evidence and Witnesses

The Intervenors proffered several exceptions³¹ challenging the Hearing Officer's determination of credibility or weight applied to particular submitted evidence or testimony. Mr. Fromer took particular exception to the Hearing Officer's disregard of some of the evidence presented by his witness.³² Mr. Stowe likewise took exception to the emphasis the Hearing Officer placed upon testimony and evidence provided by the Applicant and employees of DEEP rather than upon the testimony he claims he was qualified to present.³³

It is well within the purview of the Hearing Officer, as trier of fact, to adjudge the relevance and credibility of evidence and testimony.

"The determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible." (Internal quotation marks omitted.) *Melillo v. New Haven*, 249 Conn. 138, 151, 732 A.2d 133 (1999). *Windels v. Environmental Protection Commission*, 284 Conn. 268, 291 (2007).

No abuse or error of the Hearing Officer's judgment regarding credibility has been proven and deference is therefore given to the Hearing Officer, her relevant findings of fact, and her relevant determinations.

Further, Mr. Fromer alleged³⁴ that the DOT and DEEP witnesses did not specify credentials and expertise in the areas he felt necessary for the review of the application. The record, which includes prehearing filings, clearly manifests that these witnesses were qualified to present evidence that was relevant to this adjudication. Further, as stated in the *Proposed Final*

³¹ See Fromer, 2/15/12 Exceptions, Exceptions to (c) and (d), pp. 44-45 and (g), p. 45, and Exception to Finding of Fact #8.

³² It is noteworthy that Mr. Fromer asserts that the evidence presented by his witness was undisputed. The record clearly shows otherwise. Fromer, 2/27/12 Brief, pp. 18-19, e.g., DOT, 11/29/11 Post-Hearing Brief, pp. 32-35 and DEEP, 11/29/11 Post-Hearing Brief pp. 33-35.

³³ See Stowe, 2/27/12 Brief, p. 5.

³⁴ Fromer, 2/27/12 Brief, p. 7.

Decision,³⁵ the Hearing Officer may rely on the technical expertise of DEEP staff. *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580, 593 (1991).

g. Criticisms of Hearing Officer and Integrity of Process

Throughout Mr. Fromer's Brief and Exceptions, he opines about the quality of the Hearing Officer's judgment, skill set, and knowledge as well as DEEP's breach of its fiduciary duty to the public. At times, Mr. Fromer³⁶ does not rely on the facts in the record but rather bases his statements on his perceptions of "circumstances at the hearing" to make derogatory comments about the Hearing Officer and unfounded allegations against the integrity of the process. His personal attack on the Hearing Officer is inappropriate at best and offers no credible evidentiary support. Further, the Intervenors allege that this DEEP's administrative process has been driven by political expedience. There is no evidence to support such an accusation. Here, it is also interesting to note that the larger Busway transportation project, along with the EIS, has been in planning and underway for well over a decade under several governors and commissioners.

Mr. Fromer's opinions are unsupported and do not merit a response.

h. Public Hearing

Mr. Fromer seemingly suggests that a public hearing was inappropriately waived. He rightly states that when the Commissioner determines that the regulated activity for which a permit is sought is not likely to have a significant impact on the wetland or watercourse, he may waive the requirement for the public hearing.³⁷ He acknowledges that the Notice of Tentative Determination waived the public hearing because it was determined that the impacts to the wetlands and watercourses were insignificant. This is in the record with no readily identifiable, substantiated exceptions appearing in Mr. Fromer's Exceptions or Brief.³⁸

³⁵ *Proposed Final Decision*, p. 29.

³⁶ See Fromer, 2/27/12 Brief, Exception to (h), p. 46.

³⁷ C.G.S. §22a-39(k).

³⁸ Fromer, 2/27/12 Brief, IID, p. 6.

i. Allegation of Discrimination

Mr. Stowe alleged that the Busway facility is discriminatory through an analogy to *Plessy v. Ferguson*.³⁹ He suggested that bicyclists and pedestrians will be treated separate and unequal because they will not be permitted to utilize the same, continuous path as buses. His argument holds no relevance for the permit issue under consideration.

j. Assurances of Maintenance Funding / Maintenance Plan

Mr. Fromer raised the “absence of a maintenance plan and committed funding”⁴⁰ as being of concern with respect to obstructing potential stormwater pollutants entrance into the wetlands or watercourses. He suggested DOT needs to demonstrate and assure that it will provide 100% maintenance for improved water quality using best management practices.

While the issue raised is beyond the scope of this proceeding, the *Proposed Final Decision* did indicate that the DOT has developed an Operations Plan that includes maintenance for structures along the Busway such as culverts.⁴¹ In addition, Finding of Fact #34 in the *Proposed Final Decision* concludes that there is a budget placeholder to provide financing for this maintenance that will be finalized as the Busway gets closer to operation.⁴²

Therefore, no further relief is warranted to address the Intervenors’ concern.

k. Mr. Stowe’s Introduction of Information Not In Record

During Oral Argument, Mr. Stowe raised a series of proposed alternatives to the underlying Busway facility including the display of a manually highlighted map. Following Mr. Stowe’s argument, objections were raised by the DOT and DEEP Staff to the inclusion of information that was not in the record and, thus, not subject to cross-examination. On this, the law is clear. Findings of fact shall be based exclusively on the evidence in the record and on

³⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896), is a landmark case where the United States Supreme Court upheld the constitutionality of state laws requiring racial segregation in public facilities under the doctrine of “separate but equal.”

⁴⁰ Fromer, 2/27/12 Brief, p. 29 and Exception to (e), p. 45.

⁴¹ *Proposed Final Decision*, Finding of Fact #34, p. 16.

⁴² *Ibid.*

matters noticed.⁴³ My findings of fact herein are based only on evidence that was both in the record and relevant to the exceptions raised to the *Proposed Final Decision*.

1. Procedural Exceptions

Mr. Fromer also raises many unsubstantiated claims that a careful review of the record and applicable law or regulation call into question. For example, he contends that the Hearing Officer wrongfully denied his amended verified petition to intervene.⁴⁴ The record shows valid reasons why this petition was denied but also shows that his amended petition was later admitted into the record by the Hearing Officer during a pre-hearing conference.

The procedural record of this proceeding demonstrates that Mr. Fromer was quite prolific before, during, and after the hearing. His frequent filings included at least three amended exchanges of pre-hearing information, several motions to file additional evidence or amend evidence, numerous rebuttals to objections to his motions, several requests for reconsideration of procedural rulings, and even an objection to public comments made at the public hearing on this application. Mr. Fromer asked the Hearing Officer at least twice to allow him to place evidence into the record to rebut DEEP testimony after the hearing was over and the record was closed.

Certainly any party has the right to make fair use of the pre-hearing and hearing process in an adjudicatory hearing. However, Mr. Fromer's actions appear and, at time, extreme.

V. Additional Comments

I would like to take this opportunity to thank the Hearing Officer, the Applicant, the DEEP Staff, and the Intervening Parties for their dedication and passion in their respective endeavors to promote environmental objectives in the midst of a significant, proposed transportation initiative.

⁴³ C.G.S. §4-10(c).

⁴⁴ He claims he had the right to amend his petition at any time "by adding, deleting and modifying his assertions, provided it cause no prejudice to the parties" and that the amended petition "aroused no objections." Fromer, 2/27/12 Brief, p. 13. In fact, DEEP staff objected that it was unnecessary since Mr. Fromer was already an intervening party and he had not articulated the purpose for making this filing. DEEP 8/31/11 Objection to Fromer Amended Petition to Intervene.

While the matter at hand concerns an inland wetlands and watercourses permit, the record of the proceedings underscores that the broader transportation context is an important policy issue. I strongly agree that mass transit is both a critical component of the future infrastructure needs of Connecticut and an important driver of both environmental and economic benefits, but the specific form of mass transit is not within DEEP's purview. This inland wetlands and watercourses permit proceeding was not, and is not, the appropriate venue for a mass transit strategy discussion.

I would also like to emphasize that the record is replete in its demonstration that the Proposed Regulated Activity will create, greatly enhance, and restore wetlands and watercourses.⁴⁵ Further, the record underscored that the Proposed Regulated Activity will result in no loss of high quality wetlands functions or values and will produce both a net benefit of the inland wetlands and watercourses resources due to the creation and enhancement of a new wetlands area at the mitigation site and also improvements such as erosion and sedimentation controls, the installation of new or enhanced stormwater treatment systems, and the removal or isolation of contaminated soils.⁴⁶ For every acre of wetland impacted, the DOT will create or enhance approximately 4.5 acres of wetlands.⁴⁷ New intermittent watercourses will be created when 7,108 linear feet of impacted track side ditches will be replaced with 11,132 linear feet of new, higher functioning, grass-lined swales, ditches and channels.⁴⁸ Low-quality, fragmented, isolated, and degraded wetlands will be replaced, resulting in higher functioning wetlands with a high probability of developing into a long-term, self-sustaining wetland system.⁴⁹

⁴⁵ *Proposed Final Decision, IV Conclusions of Law*, pp. 18-25.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 22.

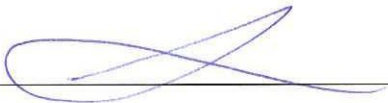
⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 22-23.

VI. Conclusion

There is substantial evidence in the record that the permit application complied with the applicable statutes and regulations to support the *Proposed Final Decision* and Draft Permit with the incorporated minor revisions and clarifications as stated herein. I therefore adopt, as modified above, the *Proposed Final Decision* and Draft Permit; as such, I hereby affirm the recommendation to issue the permit as amended above to the Applicant to conduct the regulated activities in the wetlands and watercourses.

3/16/12
Date


Macky McCleary, Deputy Commissioner

SERVICE LIST

In the Matter of the Connecticut Department of Transportation, APP. # IW- 201005239

Applicant DOT

AAG Charles Walsh
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
Charles.walsh@ct.gov

DEEP

Dean Applefield, Esq.
Dept of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106
860-424-3048
Dean.applefield@ct.gov

Intervening Parties

Rep. Whit Betts
1924 Perkins Street
Bristol, CT 06010
whit.betts@cga.ct.gov

Block the Bus
Sen. Joseph Markley
47 Elm Street
Plantsville, CT 06479
joe@joemarkley.com

Robert Fromer
P.O. Box 71
Windsor, CT 06905
saintrobert@comcast.net

Molly McKay
8 Riverbend Drive
Mystic, CT 06355
mollymckay@gmail.com

Richard Stowe
12 Mead Street
New Canaan, CT 06840
bike.rail.politics@gmail.com

CERTIFICATION

I, Jamie Mowat Young, hereby certify that a copy of the foregoing “Final Decision” has been sent via electronic mail this 16th day of March, 2012, to:

Charles Walsh, Esq.
Assistant Attorney General
Office of the Attorney General
charles.walsh@ct.gov

Dean Applefield, Esq.
Department of Energy and Environmental Protection
dean.applefield@ct.gov

Robert Fromer
saintrobert@comcast.net

Molly McKay
mollynmckay@gmail.com

Richard Stowe
Bike.rail.politics@gmail.com

Representative Whit Betts
whitbetts@comcast.net

Senator Joseph Markley
joe@joemarkley.com

Janice Deshais, Esq.
Director of Adjudications
Department of Energy and Environmental Protection
janice.deshais@ct.gov

/s/ Jamie Mowat Young
Jamie Mowat Young, Esq.



Connecticut Department of
**ENERGY &
ENVIRONMENTAL
PROTECTION**

APPENDIX A

ENVIRONMENTAL PROTECTION
OFFICE OF ADJUDICATIONS

IN THE MATTER OF : ***APPLICATION NO. IW-201005239***

***CONNECTICUT
DEPARTMENT OF TRANSPORTATION
(BUSWAY)*** : ***JANUARY 31, 2012***

PROPOSED FINAL DECISION

***I
SUMMARY***

The applicant Connecticut Department of Transportation (DOT) has applied to the Department of Energy and Environmental Protection (DEEP)¹ for a permit to conduct regulated activities in wetlands and watercourses during the construction of a dedicated bus rapid transit facility (the Busway). The parties to this proceeding are the applicant DOT, DEEP and the following intervening parties: Block the Bus (BTB), State Representative Whit Betts, Robert Fromer, Molly McKay and Richard Stowe. State Senator Joseph Markley was included as a member of BTB.²

I have reviewed the entire record in this matter, including the testimony and exhibits admitted into the record, and have assessed the relevant law and issues raised in this adjudication. Based upon my findings and conclusions of law set out below, I recommend that the Commissioner of Energy and Environmental Protection (Commissioner) grant the application of the DOT and issue the inland wetlands and watercourses permit.

¹ The DOT filed its application with the Department of Environmental Protection (DEP). In July 2011, this agency became the Department of Energy and Environmental Protection (DEEP). (P.A. 11-80.)

² The Docket File, which is a non-evidentiary file in the administrative record. This file includes the petitions filed by BTB and these individuals, as well as rulings granting them intervening party status.

II *JURISDICTION*

The scope of my authority in this matter is unambiguous. The DOT seeks a permit to conduct a regulated activity that will cause temporary and permanent impacts to wetlands and watercourses. This application is therefore subject to the provisions of the Inland Wetlands and Watercourses Act (IWWA). General Statutes §§22a-36 through 22a-45. The Commissioner administers the provisions of the IWWA, which include decisions to grant or deny applications for permits for activities that will impact wetlands and watercourses. §22a-39(a) and (h).

Section 22a-41 sets out the factors the Commissioner must consider when evaluating an application for a permit to conduct a regulated activity, which, by its definition, is regulated because that activity will impact wetlands and watercourses. General Statutes §22a-38 (13). These factors include “[t]he 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. §22a-41(a)(2). In addition, where an application has received a public hearing, “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.” §22a-41(b)(1).

The Commissioner must determine whether there are feasible and prudent alternatives to the proposed regulated activity that would have less of an impact on wetlands or watercourses. Contrary to the arguments of the intervening parties, §22a-41(b)(2) does not require the Commissioner to consider alternatives to the purpose for the proposed regulated activity. First, the phrase “and any feasible and prudent alternatives to” modifies “proposed regulated activity.” Second, and more definitively, the Commissioner cannot consider whether there are alternatives to the Busway, the purpose for the proposed regulated activity, as he has no authority to make a decision regarding the mode of transportation selected by the DOT.³

³ Robert Fromer argues that even though the Commissioner cannot plan, design or construct transportation systems, he can determine whether a transportation alternative exists, and therefore deny this application. This argument is flawed. It is precisely because he has no knowledge as to transportation planning, design or construction that the Commissioner could not determine whether a particular alternative was feasible or prudent, which are indispensable elements of such a decision.

In addition, the intervening parties were granted that status pursuant to the provisions of General Statutes §22a-19(a). This statute provides for intervention in environmental matters within the jurisdiction of the agency conducting the proceeding into which the party seeks to intervene. *Nizzardo v. State Traffic Commission*, 259 Conn. 131 (2002). Argument on alternative modes of transportation is beyond the scope of the §22-19(a) interventions granted in this environmental proceeding on an application for an inland wetlands and watercourses permit.

III FINDINGS OF FACT

A Procedural History

1. On or about August 12, 2010, the DOT submitted an application for a permit to conduct regulated activities in wetlands or watercourses during the construction of a 9.4 mile dedicated bus rapid transit facility (the Busway). Because this work will involve temporary and permanent impacts to wetlands and watercourses, the application is subject to the Inland Wetland and Watercourses Act.⁴ General Statutes §§22a-36 through 22a-45; Regs. Conn. State Agencies §§22a-39-1 through 22a-39-15. Notice of the application was published in the Hartford Courant and the New Britain Herald on August 10, 2010. General Statutes §22q-6g. (Exs. DEEP/DOT-1A, ex. DEEP – 2.)
2. Following its determination that the application was complete and its technical review of that application,⁵ DEEP issued a Notice of Tentative Determination to approve DOT’s application on May 31, 2011. The Notice also indicated that because the Commissioner found that the regulated activity for which DOT sought a permit was not likely to have a significant impact on wetlands or watercourses, the requirement for a public hearing in connection with the application was being waived as permitted by General Statutes §22a-39(k). The Notice was published in the Hartford Courant and New Britain Herald and mailed to a number of public officials. (Exs. DEEP – 3, 4, 5, 10⁶.)

⁴ The DOT also sought permits for a flood management certification, §25-68(b) through (h), a stream channel encroachment permit, §22a-342, and a water quality certification, Section 401 of the Clean Water Act (33 U.S.C. §1341). None of these permits were the subject of this proceeding. (Exs. DEEP- 10A, 10B.)

⁵ See e.g. ex. DEEP/APP-1JJ.

⁶ Ex. DEEP- 10 is comprised of 10A and 10B, which are redlined and clean copies of the September 16, 2011 draft permit.

3. DEEP received a petition on June 17, 2011 that was signed by twenty-five or more persons requesting a hearing on DOT's application as provided by §22a-39(k).⁷ A Notice of Public Hearing and Site Visit was mailed to public officials, published in the Hartford Courant and New Britain Herald and posted on the DEEP website. The Notice was also mailed to all abutting property owners. The Notice indicated that DOT's application was available for inspection on-line through DEEP's website and at the DEEP office in Hartford. (Exs. DEEP – 6, 7, 8.)
4. A site visit took place on August 22, 2011. The hearing officer, staff of the DOT and DEEP, the intervening parties, and members of the public viewed the planned corridor from New Britain through Newington to Hartford on a bus provided by the DOT. The site visit included observation of areas of expected wetlands and watercourse impacts, the wetlands mitigation site, locations for proposed passenger stations, and bridges and roadway features that will be repaired and/or constructed. Representatives of the DOT and DEEP guided the visit, providing an overview of the project, explaining certain aspects of the planned work and answering questions. The intent of a site visit is observation of a site's general characteristics and features; therefore, no testimony or evidence was offered or accepted. (Exs. DEEP - 6, 7, 8.)
5. At the request of the hearing officer, the DOT held a public information meeting on August 11, 2011 at Central Connecticut State University (CCSU). Public comment was received on the record during the opening session of the DEEP public hearing, which was conducted on September 7, 2011, also at CCSU. The public hearing was continued for the collection of evidence from the parties on September 12, 13, 16, 27 and October 3, and 7, 2011. The record closed on October 7, except for the filing of revised exhibit lists and post-hearing submissions by the parties.
6. The parties filed post-hearing briefs on November 29, 2011.⁸ Robert Fromer moved to file an amended brief on December 12, 2011. The DOT and DEEP filed objections. Mr. Fromer's motion was denied on December 22, 2011.⁹

⁷ The petition is in the docket file of the Office of Adjudications. See fn.2, supra. .

⁸ Intervening parties BTB, Molly McKay, and Richard Stowe each filed statements that they had read Mr. Fromer's brief, agreed with it, and wished to adopt it.

⁹ The Docket File includes the post-hearing submissions filed by the parties, the motion filed by Mr. Fromer, the objections of the DOT and DEEP to that motion, and my ruling denying the motion.

B

The Busway

7. The Busway project is the result of a major investment study (MIS) of the West Hartford/Hartford corridor in 1999 that looked at ways to relieve peak-hour congestion on Interstate 84 (I-84) and to increase opportunities for the use of mass transit.¹⁰ In preparing an Environmental Impact Statement (EIS) in 2001, the DOT evaluated three different options, including a no-build option and a transportation demand management (TDM) alternative. The DOT selected the Busway after considering several alternative transportation modes and eliminating options that would either not provide or provide little of the benefits of the purpose of the project. After selecting the Busway, the DOT evaluated three build alternatives using different alignments. Twenty-one potential locations were also considered for the proposed stations. The final EIS recommended the Busway as the preferred alternative and selected the current alignment proposed in the application. The Federal Transit Administration (FTA) determined that the project met the requirements of the National Environmental Policy Act (NEPA) in a 2002 Record of Decision.¹¹ (Exs. APP- 1B, DEEP/APP- 1A, Attachment A, pp.17-18,¹² Attachment M, pp. 809 – 811, ex. F- 6, 7; test. 9/12/11, M. Sanders.¹³)
8. During its selection process, the DOT met with the DEEP during numerous pre-application meetings which included DOT consultants. Drainage and design alternatives and other engineering issues were discussed. Various alignments for the Busway were assessed and choices were made to avoid impacts to higher quality wetlands or watercourses and minimize impacts to others. Final locations for stations were also selected to avoid impacts to wetlands. (Exs. APP- 1B, ex. DEEP/APP - 1A, Attachment A, pp. 17-18, Attachment M, pp. 809-818, exs. DEEP- 11, 12; test. 9/12/11, M. Sanders, B. Cunningham, A. Morelli, 9/13/11, D. Missell, S. Yurasevecz.)

¹⁰ The MIS included a consideration of options such as light rail. (Test. 9/12/11, M. Sanders.)

¹¹ The FTA determined that the preservation and enhancement of the environment had been considered and that no adverse environmental effect was likely to result or there was no feasible and prudent alternative to the effect on the environment and all reasonable steps had been taken to minimize environmental effects. (Ex. F-6.)

¹² Exhibits were submitted in electronic format. Where helpful and particularly in larger exhibits (e.g., DEEP/APP - 1A), page numbers are used to identify the electronic page number.

¹³ The hearing proceedings were recorded, but no written transcript was prepared. This recording is on file with the Office of Adjudications and is the official record of this proceeding. Citations to testimony will include the date of the recorded testimony and the name of the witness providing that testimony.

9. A dedicated roadway reserved exclusively for buses and vehicles authorized for its operation, the Busway corridor will run between New Britain and Hartford and pass through Newington and West Hartford. The Busway will include eleven passenger stations: three in New Britain; two in Newington and West Hartford; and four in Hartford. The corridor will be two lanes wide, with one twelve-foot lane in each direction. There will be additional lanes at passenger stations to allow non-stop buses to pass a bus stopped at a station. Buses from local bus stops will be able to enter and exit the Busway at controlled entry and exit points. As a result, buses will circulate through local transit areas before and after accessing the Busway. (Exs. APP – 1A, 1B, exs. DEEP/APP – 1A, Attachment A, p. 16, exs. DEEP/APP - 1E through 1H; test. 9/12/11, A. Morelli.)
10. The DOT expects the Busway to fulfill its purpose of reducing congestion on I-84, encouraging mass transit ridership and providing an alternative mode of transportation. The project is also intended to increase opportunities for interregional transit service by enhancing access for the Farmington Valley to Hartford and its business district. (Ex. APP-1B, ex. DEEP/APP- 1A, Attachment A, pp. 16 -18.)

C

The Busway Corridor

11. The New Britain to Newington Junction section of the Busway will be located along DOT property in a former and now-abandoned Conrail right-of-way and will include a multi-use trail for bicycle and pedestrian use. From Newington Junction to Hartford, the Busway will occupy the existing Amtrak access road west of the active Amtrak railroad tracks. The access road is used by Amtrak to maintain its rail line; therefore, DOT will construct a new Amtrak access road to the east of the existing active rail line so Amtrak can maintain its railroad tracks. No multi-use trail will be constructed from Newington Junction to Hartford. (Exs. APP - 1A, 3A through 3C, 11, exs. DEEP/APP – 1A, Attachment A, p. 16, 1B through 1D, 1I through 1L, 1N through 1O, ex. DEEP – 10, ex. F-6; test. 9/12/11, B. Cunningham.)
12. The Busway corridor will be entirely located in highly urbanized areas. Surrounding land uses include pockets of residential development, highway infrastructure for Routes 9, 72 and I-84 and large and small commercial industrial sites. The properties abutting the Busway corridor have a long history of industrial, commercial and residential use. As a result, the corridor is constrained due to existing development along the abandoned rail line and along the active Amtrak right-of-way. Most of the sites are covered with impervious surfaces and many are contaminated from

prior development or nearby activities. (Exs. APP- 1A, 1K, 3A through 3C, ex. DEEP/APP- 1A, pp. 28-31, ex. DEEP - 12; test. 9/12/11., B. Cunningham, A. Morelli.)

13. There are no water quality basins currently in use along the proposed Busway corridor.¹⁴ There are no vernal pools.¹⁵ No drinking water supplies will be impacted by the project. In its evaluation of wetlands, the DOT found no occurrences of threatened or endangered species within the project area. Due to the urbanized nature of the area of the Busway corridor and the previously disturbed lands, the Busway project will not greatly reduce the amount of natural wildlife habitat and there will be no effect on fish populations or communities. The DOT determined that the total impact of the Busway to wildlife habitat would be 1.06 acres over 12 wetland areas, which is not a substantial loss of that wetland function or value. Therefore, the design of the Busway does not require mitigation such as wildlife tunnels. (Ex. APP- 1C, exs. DEEP/APP - 1A, Attachment L, 1MM, exs. DEEP – 10, 11; test. 9/12/11, D. Hageman, 9/13/11, D. Missell.)
14. The Busway was designed to avoid or minimize impacts to wetlands or watercourses. For example, the roadway was designed to be as close as possible to existing grade to avoid the use of fill. Alignments for the Busway corridor were chosen to avoid or minimize impacts to higher quality wetlands. (Exs. APP-7, 8, 11; test., 9/12/11, B. Cunningham, A. Morelli.)
15. The DOT performed environmental investigations of soil and groundwater to identify areas within the project with contamination that would require special handling during construction. DOT discovered seventy-two areas of environmental concern where the level of contaminants exceed the DEEP remedial standard regulations (RSRs)¹⁶ and seventy-five low-level areas of environmental concern where contaminants are present in levels below the RSRs within the Busway corridor. DOT construction contractors will handle all soil excavated from areas of environmental concern as “controlled material.” Excess soil material from low-level areas of environmental concern that cannot be used within the Busway project limits will be properly disposed of at a DOT-approved treatment and/or disposal facility. (Ex. APP- 1K, ex. DEEP/APP – 1A, pp. 820 – 821; test. 9/13/11, R. Hathaway.)

¹⁴ A water quality basin, a type of secondary stormwater treatment, is not intended to treat water quality; it is designed to capture or detain stormwater, often so particulate in stormwater can settle between storms. (Ex. APP-8.)

¹⁵ Vernal pools are small bodies of standing fresh water found in the spring of the year. Usually temporary, they result from various combinations of snowmelt, precipitation, and high water tables associated with the spring season. www.ct.gov/dep/cwp.

¹⁶ Connecticut's Remediation Standard Regulations (RSRs) provide detailed guidance and standards that may be used at any site to determine whether or not remediation of contamination is necessary to protect human health and the environment. Regs., Conn. State Agencies §22a-133k- 1 through 133k-3.

16. The draft permit requires the DOT to ensure that all authorized activities performed during construction are in accordance with DOT Form 816, Standard Specifications for Roads, Bridges and Incidental Construction, which specifies contractual requirements that include best management practices to protect wetlands and watercourses. DOT is also required to ensure that erosion and sedimentation controls used in the project are consistent with the 2002 Connecticut Guidelines for Erosion and Sedimentation Control. The permit also places prohibitions on the location and storage of certain types of materials and prohibits unauthorized staging areas below the 100-year flood elevation. Other best management practices include keeping equipment out of sensitive areas, reducing disruption of soils and water, stabilizing exposed areas and properly handling and disposing of wastes, and employing an independent environmental coordinator to monitor implementation of the project. As an active transportation corridor, there are certain safety measures already in place such as a fence to prevent crossing of the corridor. Additional and improved fencing and structures such as bridges and retaining walls will provide further protections. Construction contractors will be bound by Form 816. Construction sequencing will also be employed to minimize temporary impacts. (Exs. APP- 1A, 1K, 7, 10, ex. DEEP/APP – 1A, p.3, pp.43-50, ex. DEEP-10; test. 9/12/11, B. Cunningham, T. Walb, 9/13/11, R. Hathaway.)

D

Wetlands and Watercourses

I

Identification and Impacts

17. Through its contractors, the DOT delineated both state and federal wetlands and watercourses throughout the Busway corridor. This work was performed through the identification of soils that characterize state wetlands and, for the federal wetlands, in accordance with the U.S. Army Corps of Engineers Delineation Manual. As a result, the DOT identified fifty-three isolated wetland systems and twenty-one intermittent watercourses. Thirty-seven of the fifty-three wetland systems and eighteen of the twenty-one watercourses will be impacted by the construction of the corridor. The construction will permanently impact 2.115 acres of wetlands and 7108 linear feet of intermittent watercourses.¹⁷ A total of 0.468 acres of wetlands will be

¹⁷ Permanent impacts will result from: a) cut, fill and footprint of the corridor; b) installation of access ramps and driveways; c) cut and fill for the access road; d) development of the multi-use trail; e) construction of retaining walls and concrete barriers; and f) drainage features and structures to convey surface water and drainage. (Ex. APP- 1C.)

temporarily impacted.¹⁸ The largest permanent impact site is 0.218 acres. The smaller impact areas are 0.001 acres. (Exs. APP – 1C, 2C, 5, 13,¹⁹ ex. DEEP – 11; test. 9/12/11, D. Hageman, 9/13/11, D. Missell.)

18. The wetlands within the proposed project were evaluated for their functions and values in accordance with the Highway Methodology Supplement prepared by the U.S. Army Corps of Engineers and recognized by the U.S. Department of Energy and DEEP for this evaluation. The wetlands exhibited only four of eight possible wetland functions.²⁰ With respect to wetland values, none of the wetlands within the Busway corridor area exhibited any of the five recognized wetland values.²¹ The identified wetlands and watercourses have been accurately delineated and depicted, with adequate descriptions of the vegetation and habitat. Wetlands functions and values have been adequately described. An opposing expert witness had not visited the site and had no reason to disagree with the assessment of the DOT regarding wetlands functions and values. (Exs. APP- 1C, 6, 13, exs. DEEP – 10, 11; test. 9/12/11, D. Hageman, 9/16/11, R. DeSanto.)
19. The DOT determined that for the most part, the wetlands and watercourses located to the east of the proposed Busway corridor are of higher quality than the wetlands located to the west. The extensive Piper Brook floodplain is a significant wetland system and contains the majority of wetlands with four functions. Most of this system is located east of the abandoned railroad right-of-way and a small fringe of this floodplain would be impacted by the Busway project. However, this floodplain extends well beyond the project area and the fringe impacted would not adversely affect the much larger Piper Brook wetland area. Similar to the Piper Brook floodplain, the majority of all impacts to wetlands associated with the project are long, narrow or “fringe” impacts along the edge of larger wetlands, where the remaining wetlands are so large that their functions will not be impaired as a result of the proposed Busway project. (Ex. APP- 1C, ex. DEEP/APP – 1A, pp. 507-511, exs. DEEP – 10, 11; test. 9/12/11, A. Morelli, D. Hageman.)

¹⁸ Temporary impacts will come from: a) grading activities; b) installation and removal of sheeting during construction; c) staging areas; d) water handling and activities to install culverts and reinforce concrete piping. (Ex. APP- 1C.)

¹⁹ Exhibit APP – 13 supersedes ex. DEEP/APP- 1A, Attachment K, Table 1, p. 497. (Test. 9/12/11, D. Hageman.)

²⁰ Groundwater recharge/discharge; flood flow alteration; sediment/toxicant/pathogen retention; and wildlife habitat. (Ex. APP-1C.)

²¹ Recreation, education/scientific, uniqueness/heritage, visual quality/aesthetics; and threatened or endangered species. (Ex. APP-6.)

20. There are five drainage basins²² within the area of the Busway project: Piper Brook, Bass Brook, Trout Brook, the Park River and the Park River's north branch. The predominant surface water in the area is Piper Brook, which defines the Piper Brook drainage basin. Other major surface waters include Bass Brook (a tributary to Piper Brook) and Trout Brook. There are no surface waters associated with the Park River or its north branch within the footprint of the Busway since much of the drainage has been piped underground. The area of the Busway also includes several perennial watercourses that either cross the alignment or flow parallel to the proposed Busway; certain segments of these in the project area are categorized as impaired by DEEP.²³ (Ex. APP-1C, ex. DEEP – 10.)
21. There is no evidence that any pollutants would enter impaired waters as a result of the Busway or that any alleged pollutants from the Busway would be a cause or source of impairment. Those water body segments listed as impaired within the limits of the Busway project are identified as such due to not meeting designated uses for recreation and as habitat for fish and other aquatic life. Impairment for recreation is due to the presence of *E. coli* bacteria and physical substrate habitat alterations as a result of the channelization of the waters through a concrete culvert or conduit. The Busway will not contribute to or further the recreational impairment due to physical alterations. There is no evidence that stormwater from the Busway contains *E. coli* or that the buses that use the Busway would or could serve as a source of *E. coli*.²⁴ One cause of impairment for fish and other aquatic life is physical substrate habitat alteration or channelization of waters. This impairment will not be impacted by any stormwater entering those water body segments. The DEEP Integrated Water Quality Report lists a second cause of impacts to habitat as "unknown." Possible sources listed include urban stormwater, loss of riparian habitat and sewer overflows. There is no evidence that even if stormwater from the Busway enters these impaired water bodies, it will exacerbate or have any impact on this impairment as water body segments that are channelized by concrete are no longer a natural channel. (Exs. F-4, 12; test. 9/9/27/11, R. Fromer.)
22. Nearly all of the wetlands and watercourses within the corridor of the Busway have been previously disturbed or modified during urbanization or construction of the active Amtrak rail

²² A drainage basin is the land area that gathers and carries surface runoff and groundwater to a particular stream, river or lake. *Understanding Groundwater Glossary*, www.ct.gov/dep.

²³ Waters that do not meet designated uses specified in the State's Water Quality Standards are known as impaired waters. (Ex. F-5, p.5.)

²⁴ *E. coli* is a bacterium that is an indicator of fecal pollution. www.merriam-webster.com/dictionary.

line or the abandoned Conrail railroad line and construction associated with other adjoining uses of land. Many are in a degraded state. Most of the intermittent watercourses that will be impacted by the Busway project are narrow linear areas or small ditches where drainage collects for a period of time after storm events; most run parallel to the rail line. They are repeatedly subject to inflows of sediments and toxicants and urban debris, inhibiting vegetative development. Significant portions of watercourses have been replaced with concrete culverts. The majority of the wetlands that will be totally impacted are unable to provide much of any wetlands function due to their small size, shape and sparse vegetation. These wetlands are isolated and exhibit poor water quality and siltation. They often contain visible garbage and other debris. While some of these small wetland areas have wetland vegetation, it is generally sparse. These areas are also dominated by invasive wetland plant species. (Exs. APP- 1C, 13, ex. DEEP/APP – 1A, ex. DEEP- 10; test. 9/12/11, D. Hageman.)

23. Contaminated soils could be conveyed by stormwater runoff into nearby wetlands and watercourses. The activities of the DOT will remediate a number of areas where soil or groundwater contamination has been identified. Soils will be disposed according to applicable protocols. The creation of an impervious bituminous surface for the Busway and the Busway stations will aid in the protection of wetlands and watercourses since it will effectively cap any remaining contaminated soils underneath the impervious surfaces within the Busway corridor that would otherwise be transported to wetlands and watercourses by stormwater runoff. (Ex. APP-1K; test. 9/13/11, R. Hathaway, 9/16/11, R. DeSanto.)

2

Mitigation

24. The draft permit facilitates the two mitigation strategies proposed by the DOT. Along the Busway corridor, mitigation will include the use of temporary access roads during construction that will be removed and the re-grading and re-establishment of wetland areas. Restoration will include re-grading of soil surfaces and establishing native non-invasive wetland species. Non-native invasive species will be removed. Impacted areas will be enhanced through slope stabilization and wetland seeding and planting.²⁵ (Ex. APP-1C, ex. DEEP/APP- 1A, Attachment L, IMM, exs. DEEP-10, 11.)

²⁵ For example, almost 800 wetland shrub and tree plantings will be located at one of the largest enhancement areas along the corridor. (Ex. DEEP/APP- 1JJ, exs. DEEP – 10, 11.)

25. The design of the proposed Busway corridor incorporates measures to avoid impacts to wetlands and watercourses that will occur from the filling of the degraded trackside ditches that comprise the majority of the wetlands and intermittent watercourses. These include, where possible, the utilization of existing grades within the abandoned rail corridor to minimize the amount of excavation or fill needed to construct the new roadway. Impacts from the project will also be minimized by the use of steeper slopes and retaining walls. The DOT also shifted the Busway alignment within the abandoned rail corridor as far west as possible to avoid or minimize the impact to higher quality wetlands and watercourses which it had identified as located to the east of the corridor, particularly those associated with the Piper Brook floodplain. This will result in impacts to the lower quality track side ditches along the west side of the Busway and limits the impacts to the Piper Brook floodplain to minimal fringe impacts, without impacting the functions and values of the remaining wetlands. The design also utilizes construction access and staging to avoid or minimize the need for construction equipment or disturbances to regulated areas. Other design strategies were used to the greatest extent possible to avoid or minimize impacts to the wetlands. (Ex. APP – 1C, ex. DEEP/APP – 1A, Attachment C, p. 43, Attachment K, p. 493, Attachment M, p. 811, ex. DEEP - 11; test. 9/12/11, A. Morelli.)
26. As its second mitigation strategy, the DOT has developed a compensatory mitigation plan in which it proposes to create a single wetlands mitigation site within the highway right-of-way of the I-84 Flatbush Avenue interchange in Hartford. The approximately twenty-acre site is currently divided into northern and southern sections. The DOT will remove the existing I-84 on-ramp and relocate it to the west, adjacent to the I-84 off-ramp, connecting the sections to create a single, contiguous wetland area. Wetlands will be restored and created through a combination of re-grading soil, placing wetlands soils, planting more than 1000 trees and shrubs at the site²⁶ and establishing native, non-invasive plant species. Enhancement will include the removal of invasive species such as phragmites and purple loosestrife, which will help restore wetlands. The creation of a large contiguous wetland system will improve the habitat connectivity of the wetlands and result in the creation and improvement of other wetland functions and values that can be sustained in perpetuity. This mitigation will create 5.26 acres of wetlands and enhance another 3.86 acres of wetlands for a total creation and enhancement area of 9.12 acres at this site. This mitigation, including the amount of wetlands mitigated, the type

²⁶ 102 trees and 633 shrubs will be planted along the site's southern border; 94 trees and 745 shrubs will be planted along the northern buffer area. (Ex. DEEP/APP – 1JJ, pp. 431-432.)

of wetlands mitigated and the methods of mitigation conform to the US Army Corps of Engineers 2010 New England District Compensatory Mitigation Guidance. This document provides the methodology recognized by the DEEP for performing such assessments. The DOT will be replacing scattered, isolated or single fringe wetlands along the Busway corridor with wetlands at a single location that will exhibit higher wetlands functions. For every acre of wetland impacted by the proposed Busway, the DOT will create or enhance approximately 4.5 acres of wetlands. (Exs. APP – 1C, 12A through 12C, exs. DEEP/APP – 1KK through NN, ex. DEEP – 11.)

3

Stormwater Management and Water Quality

a

Erosion and Sedimentation

27. Currently, there is inadequate outlet protection for stormwater within the proposed area of the Busway project, resulting in erosion, turbidity and siltation in wetlands and watercourses. Using the 2002 DEEP Guidelines for Erosion and Sediment Control, DOT design engineers developed a plan for erosion and sediment control, which includes the use of silt fences and hay bales around all fill boundaries to prevent erosion and to contain sediment within the project area. The DOT will use hay bales near all catch basins during construction to prevent sediment from entering those basins. Additional erosion control will include outlet protection such as riprap scour holes, aprons and level spreaders. This protection will prevent damage from erosion, turbidity, and siltation. (Exs. APP-1A, 7, exs. DEEP/APP- 1B through 1O, ex. DEEP – 12; test. 9/12/11, B. Cunningham.)
28. The Busway project will install new drainage systems. Two of four existing and inadequate culverts will be replaced. Replacement of these culverts will also include lining portions of stream channels with stone riprap to protect the stream bed and associated bank slopes from scour or erosion. All new culverts are designed to pass a 100-year design storm without overtopping the highway. (Exs. DEEP/APP – 1P through 1II.)

b

Stormwater Treatment

29. The DOT did not prepare a pollution loading analysis for potential pollutants in stormwater runoff.²⁷ Consistent with industry standards and the requirements for its application, the DOT designed stormwater treatment practices and systems where needed for the proposed Busway project²⁸ in accordance with the DEEP 2004 Stormwater Quality Manual (SWQM). The SWQM, which describes various drainage systems, is the most comprehensive document that guides highway design engineers and regulatory agencies on various methods that are useful to protect the waters of the State and was used by the DOT to employ best management practices to protect wetlands and watercourses in the design of the Busway. The goal of removal of eighty percent of total suspended solids (TSS) outlined in the SWQM is the standard in the industry. No evidence was presented that challenged the reliability, basis or science underlying the SWQM. (Exs. APP – 1A, 8; test. 9/12/11, B. Cunningham, T. Walb, 9/13/11, C. Garro, S. Suehr, A. Margiotta, A. Bisacky, D. Missell, S. Yurasevecz.)
30. Dr. Robert DeSanto, expert witness for Robert Fromer, testified about the type and quality of pollutants that he expected to find in stormwater from the proposed Busway and proposed a method to predict environmental harm from those pollutants. Dr. DeSanto did not testify as to the extent to which he believes such stormwater may impact wetlands or watercourses. Most of his testimony focused on how vehicles or buses pollute stormwater, however, DeSanto has no expertise in vehicular operation, the alleged source of the pollutants that would appear in stormwater.²⁹ As to his assessment of pollutants, DeSanto's analytical methodology was based on data developed more than thirty years ago, and, when challenged, was not able to establish its credibility.³⁰ He had also never been to any of the sites included in the area of the proposed Busway and was not familiar with the wetlands and watercourses within its boundaries. DeSanto

²⁷ Apparently, such an analysis would involve quantifying the level of any pollutant present in stormwater runoff from the Busway and tracking its route and ultimate fate. (Exs. F-3, 13; test. 9/27/11, 10/3/11, R. DeSanto.)

²⁸The existing Cedar Street Bridge in Newington (Route 175) will be replaced with a precast concrete arch structure. This will accommodate Busway traffic and the multi-use trail. This construction also includes wing walls and the installation of new sanitary sewer facilities. This project does not change any storm drainage system and no stormwater treatment is required. (Ex. APP – 1F; test. 9/13/11, R. Daily.)

²⁹ Robert Fromer also testified about how vehicles or buses could cause pollution; he also has no expertise in vehicular construction or performance. (Exs. F-19, 19A.)

³⁰ I cannot consider evidence that is untrustworthy or unreliable and Dr. DeSanto did not present convincing evidence that this data is still reliable. Regs., Conn. State Agencies §22a-3a-6(s)(1).

never reviewed the DOT's application and had no knowledge of any of the numerous stormwater treatment systems that will be utilized in connection with the Busway. DeSanto opined as to the pollution he would expect from the Busway, but was not familiar with any of the data regarding the actual sampling of stormwater from roads in the municipalities where the proposed Busway corridor will be built and many of his predictions were inaccurate when compared with actual data presented by DEEP.³¹ (Ex. DEEP-16, exs. F-3, 3A, 13, 14, 20; test. 9/16/11, R. DeSanto, 9/27/11, R. Fromer, 10/7/11, T. Iott.)

31. The DOT proposes to install and use new stormwater management systems as the primary treatment system where possible and necessary for long-term management of the quality of the stormwater runoff that could reach the wetlands and watercourses. Given the size of the proposed Busway corridor, numerous individualized systems were designed and will be used. Wherever possible, the DOT will use new natural drainage systems, such as water quality basins, grass-lined swales, vegetative strips and the promotion of sheet or overland flow by minimizing or eliminating curbing.³² The DOT will be replacing 7108 linear feet of impacted track side ditches with 11,132 linear feet of new grass-lined swales, ditches and channel throughout the project area designed to treat stormwater. These swales will perform at a higher level than the existing intermittent watercourses to improve sediment/toxicant retention. These swales will also promote groundwater recharge and stormwater retention. The use of natural drainage system features will also avoid flow concentrations, remove pollutants, filter sediments and promote filtration of storm water. As a result, some stormwater from the Busway will never reach areas of wetland and watercourses. (Exs. APP- 1A, 1D, 1E, 1G, 1I, 1J, 12A, DEEP/APP – 1A, Attachment L, p. 16, 1P through 1GG, 1JJ, 1MM, 11; test. 9/12/11, B. Cunningham, A. Morelli, T. Walb, 9/13/11, C. Garro, S. Suehr, A. Margiotta, A. Bisacky, D. Missell, S. Yurasevecz.)
32. The DOT will also utilize secondary stormwater treatment methods, as described in the SWQM, as part of the stormwater treatment system for the Busway. Engineered components include underground detention facilities, hydrodynamic separators, deep sump catch basins, conventional oil/particle separators and grass-lined channels. These methods are necessary where existing development and site constraints make exclusive reliance on natural drainage features

³¹ For example, Dr. DeSanto's predictions as to levels of oil and grease were ten times higher than what was shown in data from actual sampling. (Ex. DEEP – 16; test. 10/7/11, T. Iott.)

³² Examples of natural drainage systems are the vegetative bio-retention basin that will receive storm water from both the Elmwood Station and a nearby section of the Busway and an area along the proposed Busway (from Route 9 to Allen Street) that encompasses approximately ten acres of stormwater drainage that will all be routed through a water quality pond. (Ex. APP-1G; test. 9/13/11, S. Suehr.)

impractical and engineered components may be used in combination with the new natural drainage system components. One feature of this system will be that each catch basin will be individually connected to a main trunk line drainage pipe rather than connecting one catch basin to the next catch basin. This use of a trunk line drainage pipe for stormwater conveyance eliminates re-suspension of sediment that could result from directly conveying stormwater from one catch basin to the next. No credible evidence was presented that challenged the operation and efficacy of these systems, including the hydro-dynamic separators.³³ (Ex. APP- 1A, ex. DEEP/APP- 1A, 1J, ex. DEEP – 12; test. 9/12/11, A. Morelli, T. Walb, 9/13/11, C. Garro, S. Suehr, A. Margiotta, A. Bisacky, S. Yurasevecz.)

33. The creation of new natural and engineered stormwater treatment systems will mitigate the impacts associated with stormwater from the proposed Busway. Also, by utilizing treatment where little to none is currently occurring and improving upon treatment systems that may currently be in place, the proposed Busway project will be an improvement to the current treatment of stormwater resulting in improved water quality within the proposed project area. The DOT will also take measures to improve certain remaining wetland areas within the project area. (Ex. APP- 1C, exs. DEEP/APP – 1A, Attachment 1, 1 MM, exs. DEEP- 10, 11, 12, test. 9/12/11, A. Morelli, 9/13/11, D. Missell, S. Yurasevecz.)
34. The DOT has developed an Operations Plan that provides for facility maintenance for Busway stations, roads and traffic signals and major structures along the Busway such as culverts and retaining walls. There is a budget placeholder to provide financing for this maintenance as well as a draft maintenance plan that will be finalized as the Busway gets closer to operation. (Ex. F-18, §6; test. 9/12/11, M. Sanders.)
35. The proposed stormwater treatment methods and other enhancements resulting from the Busway will improve water quality in the area of the project. During the hearing, Robert Fromer was not allowed to pursue his claim that the application was not evaluated for compliance with or did not comply with the State's Water Quality Standards (WQS).³⁴ The WQS establish the authorities

³³ DeSanto's testimony regarding hydrodynamic separators was not persuasive; he selected results to support his theories and could not describe the testing protocols for the research on which he based his resulting opinions.

³⁴ As a procedural matter, Mr. Fromer failed to notify the parties that he intended to make these claims before the hearing began. He was prohibited from introducing evidence on the issue at the hearing to avoid substantial prejudice to the due process rights of the other parties. Regs., Conn. State Agencies §22a-3a-6(q). As a substantive point, in his arguments for consideration of his claim, Fromer continually referred to the numeric water quality criteria for chemical constituents in Appendix D of the WQS. These numeric criteria apply to in-stream water quality of a water body, not the water quality of any particular influent to surface water. (Ex. F-5, Appendix D, pp. 49-57.)

and procedures for permitting discharges to the waters of the State and for the abatement of pollution. Whatever Mr. Fromer's claims might be, the WQS would not prohibit the approval of a project with beneficial water quality impacts. Moreover, the record shows that to the extent an issue of water quality was relevant to this application, it was evaluated. (Exs. DEEP -12, exs. F-5, 19; test. 9/13/11, S. Yurasevecz.)

IV

CONCLUSIONS OF LAW

The Commissioner is charged with the responsibility of protecting inland wetland and watercourses by regulating activity that might have an adverse environmental impact on such natural resources. *River Bend Associates v. Conservation and Inland Wetlands Commission*, 269 Conn. 57, 74 (2004), citing *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247, 249 (1984). The Inland Wetlands and Watercourses Act (IWWA) provides that “no regulated activity shall be conducted upon any wetland or watercourse without a permit.” General Statutes §22a-42a(c)(1). When the applicant for the permit is a state agency such as the DOT, the Commissioner has the authority to “[g]rant, deny, limit or modify in accordance with the provisions of section 22a-42a, an application for a license or permit for any proposed regulated activity....” §22a-39(h).

Because a public hearing was held pursuant to General Statutes §22a-39(k), the provisions of §22a-41(b) (1) apply to this application. Under §22a-41(b) (1), “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.” In making this finding, this statute specifies that the Commissioner shall consider the facts and circumstances set forth in §22a-41(a).

The intervening parties in this proceeding were granted that status pursuant to the provisions of General Statutes §22a-19(a). Part of the Connecticut Environmental Protection Act of 1971 (CEPA), §22a-19(a) provides for party status upon the filing of a verified pleading asserting that the proceeding involves conduct “which has, or is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.” The agency shall consider such unreasonable pollution “as long

as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative³⁵ consistent with the reasonable requirements of the public health, safety and welfare.” §22a-19(b).

The intervening parties have the burden of demonstrating that the proposed regulated activities to be conducted in connection with the proposed Busway project will, or are likely to result in unreasonable pollution. *Waterbury v. Washington*, 260 Conn. 506, 551 (2002). In addition, when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that is alleged to be an unreasonable impairment under CEPA, whether the conduct is unreasonable will depend on whether it complies with that scheme. *Id.* at 548. Any claim that the proposed project will result in unreasonable pollution must therefore be evaluated in light of factors the Commissioner must consider in General Statutes §22a-41(a).

A

INLAND WETLANDS AND WATERCOURSES ACT

In evaluating the application of the DOT for a permit to conduct regulated activities in wetlands or watercourses, the following six factors for consideration are set out in §22a-41(a).³⁶

I

The environmental impact of the proposed regulated activity on wetlands or watercourses

The Busway will permanently impact 2.115 acres of wetlands and 7108 linear feet of intermittent watercourses. Temporary impacts will involve an additional 0.468 acres of wetlands. The largest area of impact is 0.218 acres; smaller areas of impact are 0.001 acres. The DOT properly delineated wetland and watercourses within the limits of the proposed project area and assessed each resource for its function and value. These are not high quality wetlands or watercourses with significant values or functions. These resources presently in the project area

³⁵ The terms “feasible” and “prudent” are defined in General Statutes §22a-38 (17) and (18). The courts have further interpreted these factors. Prudent alternatives are those that are economically reasonable in light of the social benefits derived from the act. Feasible alternatives are sound from an engineering standpoint. An alternative will be deemed to be a feasible and prudent alternative only if it meets both criteria. *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 595 (1993); *Tarullo v. Inland Wetlands and Watercourses Commission of Wolcott*, 263 Conn. 572, 582 (2003).

³⁶ Regs., Conn. State Agencies §22a-39-6(1) sets out these same factors.

have already been impaired and impacted by urbanization, construction of a now-abandoned railway, maintenance of an active rail line and development in the area of the proposed Busway. Wetlands are in a degraded condition and exhibit little to no wetland values or functions. Most of the wetlands or intermittent watercourses that will be permanently impacted are unable to serve any functions due to their isolation, small size, shape, or sparse vegetation. Significant portions of perennial watercourses have been replaced with concrete culverts.

Wetlands or watercourses temporarily impacted by the construction of the Busway will be restored to original or improved conditions through enhancements such as slope stabilization, wetland plantings and removal of invasive species. The majority of permanent impacts to wetlands are in long, narrow areas along the edge of larger wetlands where the remaining area of wetlands not impacted is so large that the narrow impacts will not impair the wetland as a whole. A total of 9.12 acres of wetlands will be created or enhanced at a single mitigation site. Even if waters from the Busway reach impaired watercourses, they will have no effect on the designated impairment for recreation or as a habitat for fish and other aquatic life.

The alignment of the Busway corridor, the locations of the Busway stations and other aspects of its design were chosen to avoid or minimize impacts to wetlands and watercourses. The construction plans incorporate measures to avoid impacts to wetlands and watercourses. The stormwater management system will not only avoid impacts, but will improve water quality by providing treatment for stormwater in areas where no treatment currently exists or by improving current systems. Inadequate erosion and sedimentation protection within the proposed area of the Busway will be improved through the installation of new drainage systems and structures. Contaminated soils discovered during construction, which could be conveyed by stormwater to wetlands or watercourses, will be removed or covered as a result of the construction of the impervious bituminous surface for the Busway.

The regulated activity that is the subject of the application filed by the DOT will not adversely impact wetlands or watercourses with significant (or, in most cases, any) value or functions. Instead, this activity will result in a net benefit to these resources due to improvements such as erosion and sedimentation controls, the installation of new or enhanced stormwater treatment systems, and the removal or isolation of contaminated soils.

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

The purpose of the Busway is to reduce congestion on I-84, encourage mass transit ridership and provide an alternative mode of transportation. The project is also intended to increase opportunities for interregional transit service by enhancing access for the Farmington Valley to Hartford and its business district. There is substantial evidence in the record that the Busway was selected after the DOT considered various transportation options and determined that this mode of transportation would fulfill the purpose of this project.

There is also considerable evidence that the current proposed alignment of the Busway corridor, the design of the roadway, and engineering decisions about the project were made after consideration of alternatives. Decisions about various design alternatives, such as the locations of stations or the grade at which the roadway would be constructed were made to avoid or minimize impacts to wetlands.

The DOT demonstrated that there are no feasible and prudent alternatives to the regulated activity proposed in its application for this inland wetlands and watercourses permit which would cause less or no environmental impact to wetlands or watercourses. No intervening party presented substantive evidence of any feasible or prudent alternative to the regulated activity to be conducted in connection with the Busway. The proposed Busway project has been planned and designed to avoid or minimize impacts to wetlands or watercourses. There is also evidence that the selected alternatives for the planned project will improve and enhance wetlands and watercourses.

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

Short-term or temporary impacts of the project will be primarily due to construction activities. The DOT will be required under the permit to rely on a number of strategies to minimize short-term impacts to wetlands or watercourses. Activities will be consistent with erosion and sediment control guidance and will include measures such as the use of silt fences and hay bales around all fill boundaries to prevent erosion and contain sediment within the project area. Hay bales will be placed near all catch basins during construction to prevent sediment from entering those basins. DOT contractors will be required to comply with DOT Form 816, Standard Specifications for Roads, Bridges and Incidental Construction, which specifies best management practices to protect wetlands and watercourses.

The majority of the wetlands that will be permanently impacted are unable to provide much of any function or value due to their degraded state, their isolation from other wetland areas, their small size and shape and sparse vegetation. These wetlands exhibit poor water quality and siltation and often contain visible garbage and other debris. While some of these small wetland areas have wetland vegetation, it is generally sparse and many areas are dominated by invasive plant species.

In sum, there will be no loss of high quality wetlands functions or values. The intermittent watercourses that will be impacted are narrow, shallow ditches along the side of the railroad right-of way that become filled with water, sediments and urban debris after a storm. Significant portions of perennial watercourses are channelized through concrete culverts. Water quality is poor and these watercourses do not support wildlife habitats, fish or other aquatic life.

When considering “all relevant facts and circumstances” pursuant to General Statutes §22a-41(a), the nature of the existing wetlands and watercourses at issue must be considered. The Busway project will greatly enhance the long-term productivity of the wetlands and watercourses currently in the project area. New and modified stormwater drainage and treatment systems, replacement of culvert structures and better erosion and sedimentation controls will significantly improve the current situation where there is ineffective treatment, limited treatment or no treatment of stormwater generated within the limits of the proposed Busway. This will provide for better water quality treatment than currently exists. The creation of 5.26 acres of wetlands and the enhancement of 3.86 acres at a single site will result in the development of a 9.12 acre resource that does not now exist. The removal of invasive species and the planting of thousands of native trees and shrubs throughout the Busway corridor and at the mitigation site will enhance wetland areas. The impervious bituminous roadway will cover contaminated soils. Remaining soils that are not covered by impervious surfaces will be removed from areas of environmental concern.

For every acre of wetland impacted by the proposed Busway, the DOT will create or enhance approximately 4.5 acres of wetlands. Quantitatively, thousands of linear feet of new intermittent watercourses will be created; 7108 linear feet of impacted track side ditches will be replaced with 11,132 linear feet of new higher functioning grass-lined swales, ditches and channels throughout the project area designed to treat stormwater. Qualitatively, the additional wetlands to be enhanced or created will be higher functioning than the wetlands that are lost. Replacing low-quality, fragmented, isolated, degraded wetlands on the fringe of larger wetlands will result in a larger contiguous wetland area that has a higher probability of developing into a self-sustaining wetlands system or a larger area to serve as a buffer to protect wetlands. The proposed Busway project will not only maintain any current productivity of wetlands and watercourses, but will greatly enhance or establish their long-term productivity.

The 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 resources³⁷

Although the wetlands and watercourses that will be irreversibly and irretrievably lost due to the proposed regulated activity are not of significant value and function, these resources are an irreplaceable fragile natural resource. The DOT has proposed a plan for a 9.4 mile Busway corridor that will result in the loss of only 2.115 acres of wetlands and 7108 linear feet of watercourses. Over the long term, the wetlands and watercourses that currently exist and will not be lost will be enhanced due to improved management and treatment of stormwater and other measures that will encourage and support restoration of presently degraded wetlands and watercourses. Throughout the Busway corridor, the DOT will remove invasive species and plant native trees and shrubs, further enhancing and restoring wetlands and watercourses.

To compensate for loss of wetlands, the draft permit requires the DOT to take a significant step to create and improve productive wetlands. The DOT has proposed a comprehensive mitigation plan to develop one contiguous wetlands mitigation site of 9.12 acres. Because this site will be a large, adjoining wetland area, it has a high probability of developing into a self-sustaining wetland system. Intended to compensate for harm to current wetland areas, this single contiguous mitigation site is more likely to achieve and maintain higher value wetlands functions than the fragmented wetland edges being disturbed by the Busway project.

³⁷ Subdivision (1) of subsection 22a- 42(d) also provides that terms of a permit may include any reasonable measures which would mitigate the impacts of the proposed activity which would (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.

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

Safety and health issues could be presented during construction and later when the property is being used by the Busway. As a current and former transportation corridor, certain areas of the proposed Busway already have safety measures in place, such as a fence to prevent crossing of the corridor. Additional and improved fencing and structures such as bridges and retaining walls will provide further protections. Contaminated materials discovered on the site during construction will be handled and disposed of in accordance with protective protocols. Measures will be taken to control erosion and sediment that could present possible safety issues. The DOT must ensure that all authorized activities performed during construction are in accordance with DOT Form 816, Standard Specifications for Roads, Bridges and Incidental Construction. This requires contractors to follow OSHA mandates and take precautions to keep workers and the public safe from hazards at and near construction sites.

The proposed Busway corridor will be located along an abandoned rail line and an existing access road being used to support an active rail line. The entire corridor was used for transportation purposes. The Busway will restore the property that is an abandoned rail line to its use for transportation and will cause the access road to continue its use for transportation. Continuity of use is a suitable and reasonable use of this property.

Impacts of the proposed regulated activity on wetlands and watercourses outside the area which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses

The Busway is intended to help promote transit-oriented development along and near its route. While there was no evidence of plans for further development in the area of the Busway, its impact may spur further growth. Such activities may impact wetlands and watercourses in the area. While an assessment of the nature of those impacts would be speculative, it is reasonable to reach certain conclusions based on evidence of the nature of the area. The area of the Busway is highly urbanized. Surrounding land uses include pockets of residential development, highway infrastructure for Routes 9, 72 and I-84 and large and small commercial industrial sites.

All of the wetlands and watercourses within the Busway corridor have been modified and impacted during urbanization and development. It is therefore reasonable to conclude that at least some and probably many wetlands and watercourses adjacent to those in the corridor footprint that could be impacted by future development are likely to be in conditions similar to the wetlands and watercourses within the boundary of the Busway corridor.

The proposed activity will create, enhance and restore wetlands and watercourses within the area of the Busway. Measures were taken to avoid or minimize impacts to high quality wetlands and watercourses that exist outside the Busway area, such as the Piper Brook floodplain. Improvements such as stormwater treatment, erosion and sedimentation controls may positively influence wetlands and watercourses outside the immediate area of the Busway. Finally, the creation and enhancement of a new wetlands area at the mitigation site will improve a wetlands resource in an area that goes beyond the path of the Busway.

V

THE INTERVENING PARTIES

The intervening parties had the burden of demonstrating that the proposed regulated activity will, or will likely result in unreasonable pollution or impairment or destruction of the public trust in the air, water, or other natural resources of the state. General Statutes §22a-19(a). Whether pollution is unreasonable is judged on the basis of the statutory scheme in §22a-41 that sets out the factors that are considered for a permit to conduct regulated activities that will impact wetlands and watercourses. If an intervening party had met the burden to show that the proposed regulated activity that is the subject of the permit was reasonably likely to result in unreasonable pollution, I would be obliged to consider alternatives to that activity. §22a-19(b).

The intervening parties all filed verified petitions to intervene pursuant to the provisions of §22a-19(a), alleging that the proposed Busway project was reasonably likely to result in unreasonable pollution. All were advised of my jurisdiction in this matter and the scope of their intervention. All of the intervening parties were dedicated to their challenge to the Busway and sincere in their belief that other modes of transportation should be explored to fulfill the purposes of the Busway, including rail lines, bike trails and combinations of alternatives. However, that

issue was not before me. The question before me is whether the DOT has met its burden regarding its application for an inland wetlands and watercourses permit.

The intervening parties each filed statements that they had read the post-hearing brief submitted by Mr. Fromer, and that they agreed with it and wished to adopt it. The following paragraphs address those arguments these parties raised at the hearing or which were not adequately addressed by Mr. Fromer in his brief. The paragraphs below will also specifically address Mr. Fromer's claims in his post-hearing brief in which the other intervening parties join.

A

BLOCK THE BUS, MOLLY MCKAY AND RICHARD STOWE

Block the Bus (BTB) claims that the DOT failed to demonstrate that the proposed project is the only feasible and prudent alternative to fulfill the purposes of the Busway. Specifically, BTB asserts that other than issues they characterize as minor that were discussed between the DOT and DEEP staff, the only consideration of alternatives by the DOT is reflected in the Alternatives Assessment included in its application as Attachment M.

There was substantial evidence that the DOT considered alternatives in addition to those set out in Attachment M, including choices about alignment, the selection of locations for passenger stations and engineering decisions such as the use of trunk lines in the stormwater management system. The DOT testified that the guiding principle in designing the Busway was avoidance or minimization of impacts to wetlands and watercourses. These and other decisions by the DOT, sometimes in consultation with DEEP, were choices following the consideration of alternatives and selection of the alternative with the least impact to wetlands and watercourses. There is overwhelming evidence that the alternatives selected by the DOT in planning the proposed Busway will cause little or no adverse environmental impact to wetlands and watercourses and abundant evidence that the plans for the project will enhance, restore or create productive wetlands and watercourses. BTB offered no evidence of alternatives to the choices made by the DOT that would avoid or further minimize impacts.

BTB also contended that DOT did not meet its statutory burden to consider the environmental impacts associated with a rail alternative to the Busway. In addition to not having the jurisdiction to consider a rail alternative, General Statutes §22a-41(a) (2) does not require the Commissioner to consider any particular alternative. See *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 590 (1993) (§22a-41 does not require agency to consider and rule on every possible alternative presented to it.) See also *Tarullo v. Inland Wetlands and Watercourses Commission of Wolcott*, 263 Conn. 572, 582 (2003).

Molly McKay and Richard Stowe, who intervened as individuals, objected to the proposed Busway project on the grounds the DOT was not building a rail line or that the DOT consideration of a rail line was inadequate. Mr. Stowe, who admitted he had no expertise in transportation planning, testified regarding an alternative using over-the-street buses. In his testimony, Michael Sanders of the DOT testified about alternatives considered in the MIS that seem very similar to the option discussed by Mr. Stowe. However, for the same reasons outlined above, evidence of rail or other alternative transportation was not relevant to this proceeding.

B

ROBERT FROMER

Intervening as an individual, Robert Fromer also argues that alternative modes of transportation should be considered. In addition, he attempts to present evidence of unreasonable pollution. In addition to minor claims that are addressed in my findings of fact³⁸, he makes the following main arguments.

Mr. Fromer claims that in order to protect wetlands and watercourses, the Stormwater Quality Manual (SWQM) requires the DOT to perform a “pollution load analysis” for each potential pollutant in stormwater runoff. Without such analysis, he contends that the Busway’s impact upon the environment is undetermined and the application remains incomplete.

³⁸ See e.g. Finding of Fact #13, *supra*.

Neither General Statutes §22a-41 nor its implementing regulations require such an analysis. The application was not incomplete without it. The evidence Mr. Fromer presented regarding calculations of pollution loading through his expert witness was not supported by adequate data and was not persuasive. In addition, Mr. Fromer did not demonstrate that the proposed Busway project would result in unreasonable pollution. Without such proof, Mr. Fromer cannot allege pollution will occur because an analysis that he believes should be done was not done. The stormwater treatment systems planned for the project were properly designed in accordance with the SWQM.

Mr. Fromer also presented evidence through his expert witness Robert DeSanto that vehicles and buses pollute stormwater and how polluted stormwater from the Busway will impact wetlands and watercourses within the Busway. This testimony, which included evidence as to the alleged type and quantity of pollutants from vehicles expected in stormwater from the proposed Busway, was based on data and methodologies developed more than thirty years ago. There was no evidence as to how this data and methods for calculation could still be reliable and Dr. DeSanto is not an expert in vehicle construction or operation. He had also never seen the site of the proposed Busway, was not familiar with the wetlands and watercourses within the limits of the Busway, had not reviewed the DOT's application, and was not familiar with the proposed stormwater treatment systems that will be used in connection with the Busway. In addition, DeSanto was not familiar with any actual data from sampling of stormwater from the municipalities in the area of the proposed Busway. DEEP review of some of the data provided by DeSanto showed significant overestimations of levels of predicted pollution. Evidence of general environmental impacts, mere speculation or general concerns do not qualify as substantial evidence. *AvalonBay Communities, Inc. v. Inland Wetlands and Watercourses Agency of the Town of Stratford*, 130 Conn. App. 69, 75 (2011), citing *River Bend Associates v. Conservation & Inland Wetlands Commission of the Town of Simsbury*, 269 Conn. 57, 70-71 (2004).

Although he predicted what may or may not be in stormwater, Dr. DeSanto did not indicate the extent to which he believes such stormwater may impact wetlands or watercourses and Mr. Fromer did not present any evidence of such results. There is abundant evidence that not all of the stormwater from the proposed Busway will ever reach these areas. There are

natural areas of overland flows where infiltration will be promoted and stormwater will never reach a wetland or watercourse. Other stormwater reaching wetlands or watercourses will first be treated in one of numerous stormwater treatment systems. DeSanto's opinion about what might be in stormwater is not relevant without evidence of what pollutants may reach a wetland or watercourse as a result of the Busway. Mr. Fromer failed to demonstrate that any such stormwater will result in unreasonable pollution. Mr. Fromer also failed to show that any pollutants would enter impaired waters or that if they did, that these pollutants from the Busway would be a cause or source of impairment.

Mr. Fromer tried to raise an issue that this application was not evaluated for compliance with the Connecticut Water Quality Standards (WQS) but was precluded from doing so as he failed to timely notify the parties of his intent to raise this issue. Even if he had been able to argue this claim, Mr. Fromer would have had to show that a failure to evaluate the application for WQS compliance meant that the Busway project would result in unreasonable pollution. It is insufficient to simply allege that DOT or DEEP failed to consider standards that a party believes should be considered as a substitute for the burden of proof as to unreasonable pollution. *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116 (2003).

Mr. Fromer challenges the credentials and expertise of DEEP staff. He provided no evidence to support his claim. Also, as a hearing officer for DEEP, I may rely on the technical expertise of DEEP staff. *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580, 593(1991).

Finally, in his conclusion to his post-hearing brief Mr. Fromer makes the following assertions. "DOT and DEEP have intentionally failed to preserve, protect and enhance the public trust in the water resources of the state. It appears from the evidence and testimonies that DEEP conspired with DOT to intentionally promote the Busway as environmentally benign, which is inconsistent with the facts." Mr. Fromer also alleges that "DOT appeared to have played a dominant role in the Busway design without bothering to scientifically consider pesky water quality issues. On the other hand, DEEP appears to have enabled the DOT in seeking application approval and issuance of a permit."

An administrative proceeding serves to protect the public interest by guarding against any attempt on the part of the parties to evade judicial review and scrutiny. *Brookridge District Association v. Planning and Zoning Commission of the Town of Greenwich*, 259 Conn. 607, 616 (2002). This hearing was a complete adjudication of whether the application submitted by the DOT complies with applicable laws and regulations. As reflected in this decision, an extensive administrative record was developed, including seven days of hearings, hours of testimony from the parties and thousands of pages of exhibits. Mr. Fromer was a party and an active participant in this process. He had access to the entire application, was able to request and review the files of the DOT and DEEP during pre-hearing proceedings and was able to cross-examine witnesses for the DOT and DEEP who were involved in the decision on this application. He was able to present his own witnesses and evidence.


Other than his comment during the hearing that a list of DOT contracts (which he obtained from the public website of the DOT about this project) was proof that issuance of the permit was “pre-determined,” there is no evidence in this record to support Mr. Fromer’s meager claim that the DOT intentionally failed to protect wetlands and watercourses. However, there is abundant evidence in the record that avoiding or minimizing impacts to wetlands and watercourses was the primary motivation of the DOT. There is also nothing in the record that would merit an accusation that the role of the DOT in its own application was somehow inappropriately “dominant” or that the DOT considered water quality issues to be “pesky,” a characterization that would be silly if it was not so serious a charge. There is also nothing to support Mr. Fromer’s claim that DEEP somehow enabled the DOT in seeking application approval. The record includes information about pre-application meetings held between the DOT and DEEP. These are standard procedures intended to help facilitate a more efficient application process for all applicants.

Mr. Fromer’s unfounded provocations do not influence me; instead, they reinforce my belief that the record is substantial and the administrative process was sound. Mr. Fromer presented no evidence during the hearing regarding any allegations of inappropriate behavior or motivation on the part of the DOT or DEEP. For Mr. Fromer to make such baseless allegations now, indeed, for any party to make such charges at any time, is not only indefensible but offensive to this administrative process.

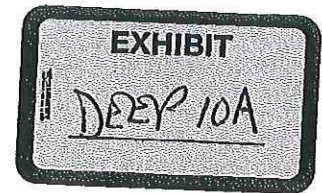
VI
RECOMMENDATION

The DOT has demonstrated that the application complies with the requirements of General Statutes §22a-41(a). Based on the factors outlined in §22a-41(a), substantial evidence shows that there is no feasible and prudent alternative to the proposed regulated activity that meets the purpose of the Busway project and that would cause substantially fewer impacts to wetlands and watercourses resources. No intervening party presented substantive evidence of such alternatives. This dedicated bus rapid transit facility has been planned and designed to avoid or minimize impacts to wetlands or watercourses and there is evidence that the wetlands and watercourses that are presently of poor quality with little or no functions or values will be restored, enhanced and established through improvements such as the installation of stormwater treatment systems and the development of a wetlands mitigation site.

Based on my findings of fact and conclusions of law, I recommend that the Commissioner issue the attached permit to the applicant DOT.



Janice B. Deshais, Director
Hearing Officer



REVISED DRAFT

9/16/11

PERMIT (As Revised)

Permittee: Connecticut Department of Transportation
2800 Berlin Turnpike
P.O. Box 317546
Newington, CT 06131
Attn: Mark Alexander

Permit No: WQC-201005238/IW-201005239/SCEL-201005240
Permit Type: Inland Wetlands and Watercourses
Water Quality Certification
Stream Channel Encroachment Lines

Town: New Britain, Newington, West Hartford and Hartford
Project: State Project Number 171-305 and 93-166
New Britain to Hartford Busway

The Connecticut Department of Transportation, ("the Permittee") has submitted an application to the Department of Energy and Environmental Protection ("the Department" or "DEEP") in connection with a 9.4 mile long Busway from New Britain to Hartford, eleven bus stations and a multi-use trail, all of which is described in the Permittee's application ("the project" or "the site"). Pursuant to Connecticut General Statutes Sections 22a-39 and 22a-342 the Commissioner of Energy and Environmental Protection ("the Commissioner") hereby grants a permit to the Permittee to conduct activities within inland wetlands and watercourses and to conduct activities riverward of Stream Channel Encroachment Lines for the Piper Brook and Piper Brook tributaries in the town of New Britain, Newington and West Hartford. In addition, pursuant to Section 401 of the Federal Clean Water Act (33USC 1341), the Commissioner finds that the discharge(s) of material in connection with authorized activities described below, will comply with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Federal Clean Water Act and will not violate Connecticut's Water Quality Standards and accordingly, issues a Water Quality Certification to the Permittee for the discharge(s) of material into waters of the State in accordance with the application referenced below.

AUTHORIZED ACTIVITY

Specifically, the Permittee is authorized to impact 2.11 acres of inland wetlands, 7,108 linear feet of watercourses, and waters of the state, and to place or excavate 4,086 cubic yards riverward of Stream Channel Encroachment Lines ("the authorized activities") in association with the project. This authorization constitutes the licenses and approvals required by Section 22a-39 and Section 22a-342 of the Connecticut General Statutes and 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.

DRAFT

In addition, this authorization does not comprise the license or approval that may be required by any other federal, state or local requirement, including, but not limited to, any license or approval required under Chapters 446i, 446j and 446k of the Connecticut General Statutes.

The Permittee is authorized to conduct the authorized activities in accordance with the application submitted to the Department on August 6, 2010, including all revisions thereto and all plans which are a part thereof. The application is comprised of the following:

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR REPLACEMENT OF BRIDGE NO. 04324 (ROUTE 175 OVER ABANDONED RAIL ROAD) IN THE TOWN(S) OF NEWINGTON” STA 11+20 TO STA 13+00, prepared by State of Connecticut Department of Transportation Office of Engineering, and dated July 29, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR CONSTRUCTION OF NEW BRITAIN – HARTFORD BUSWAY AND AMTRAK IN THE TOWN(S) OF WEST HARTFORD AND HARTFOD” STA 11+00 TO STA 25+40, prepared by URS Corporation AES, and dated July 29, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR CONSTRUCTION OF NEW BRITAIN – HARTFORD BUSWAY IN THE TOWN(S) OF NEW BRITAIN,CONNECTICUT” STA 18+80 TO STA 118+00, prepared by URS Corporation AES, and dated July 27, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR CONSTRUCTION OF NEW BRITAIN – HARTFORD BUSWAY CONTRACT NO. 88-H034 IN THE TOWN(S) OF NEW BRITAIN AND NEWINGTON” STA 118+00 TO STA 203+00, prepared by Close Jensen & Miller, P.C., and dated July 29, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR CONSTRUCTION OF NEW BRITAIN – HARTFORD BUSWAY WEST HARTFORD SECTION IN THE TOWN(S) OF NEWINGTON AND WEST HARTFORD” STA 203+00 TO STA 332+00, prepared by Ammann & Whitney, and dated July 28, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR CONSTRUCTION OF NEW BRITAIN – HARTFORD BUSWAY IN THE TOWN(S) OF WEST HARTFORD AND HARTFOD” STA 332+00 TO STA 450+00, prepared by URS Corporation AES, and dated July 29, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR CONSTRUCTION OF NEW BRITAIN – HARTFORD BUSWAY HARTFORD-NORTH SEGMENT IN THE CITY OF

Connecticut Department of Transportation
WQC-201005238/IW-201005239/SCCL-201005240
New Britain, Newington, West Hartford and Hartford
Page 3 of 9

DRAFT

HARTFORD” STA 450+00 TO STA 490+54.89, prepared by H.W. Lochner Inc., and dated August 2, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION PLAN FOR NEW BRITAIN – HARTFORD BUSWAY CONSTRUCTION OF AMTRAK ACCESS ROAD IN THE TOWN(S) OF NEWINGTON, WEST HARTFORD, AND HARTFORD” STA 701+25 TO STA 937+50, prepared by Michael Baker Engineering, Inc., and dated July 30, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION NEW BRITAIN – HARTFORD BUS RAPID TRANSIT STATIONS IN THE TOWN(S) OF NEWINGTON, WEST HARTFORD, AND HARTFORD” prepared by SEA Consultants, and dated July 8, 2010.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION NEW BRITAIN – HARTFORD BUS RAPID TRANSIT STATIONS IN THE TOWN(S) OF NEW BRITAIN” prepared by State of Connecticut Department of Transportation Office of Engineering, and dated September 11, 2009.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION NEW BRITAIN – HARTFORD BUS RAPID TRANSIT STATIONS DOWNTOWN NEW BRITAIN STATION IN THE TOWN(S) OF NEW BRITAIN” prepared by State of Connecticut Department of Transportation Office of Engineering, and dated September 11, 2009.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION NEW BRITAIN – HARTFORD BUS RAPID TRANSIT STATIONS UNION STATION IN THE TOWN(S) OF NEW BRITAIN” prepared by State of Connecticut Department of Transportation Office of Engineering, and dated September 11, 2009.

“CONNECTICUT DEPARTMENT OF TRANSPORTATION NEW BRITAIN – HARTFORD BUSWAY Environmental Impact Plates” prepared by Michael Baker Engineering, Inc., and dated February 2011.

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.

DRAFT

This authorization is subject to the following conditions:

SPECIAL CONDITIONS:

1. The Permittee shall ensure that all authorized activities are performed in accordance with the Connecticut Department of Transportation's Standard Specifications for Roads, Bridges and Incidental Construction Form 816. The Permittee shall also ensure that all Erosion and Sedimentation Controls used in connection with the project are consistent with the 2002 Connecticut Guidelines for Soil Erosion and Sediment Control.
2. Materials which could be injurious to human, animal or plant life are prohibited below the 500-year flood elevation. Also, in addition to general condition #3, the Permittee shall ensure that no materials or equipment shall be stored and no staging areas shall be placed below the 100-year flood elevation unless the Permittee, including any of the Permittee's agents or contractors receives written approval from the DEEP for such activity.
3. Prior to the start of construction of the project described in its application the Permittee shall (i) provide to the Commissioner a copy of the Metropolitan District Commission and City of Hartford written approval for all connections into the existing drainage systems as well as approval and/or acknowledgement of all storm drainage surcharge areas; and (ii) register for and obtain approval from the Commissioner of its registration under the Connecticut DEEP "*General Permit for the Discharge of Stormwater and Dewatering Wastewaters Associated with Construction Activities*".
4. The Permittee shall employ an independent environmental coordinator with experience in transportation construction projects to monitor all activities authorized by the Permit, including, but not limited to, all mitigation activities. At a minimum, such coordinator shall prepare a daily written report on the condition and effectiveness of sedimentation and erosion controls being implemented for protection of water quality, wetlands and aquatic resources. The independent environmental coordinator shall work under the authority and direction of the Commissioner of Energy and Environmental Protection. The independent coordinator shall have the authority to direct project contractors and the permittee to implement modifications or additional measures deemed necessary by such coordinator to prevent, remediate or correct erosion, sedimentation and all other adverse water quality and aquatic resource impacts emanating from the activities authorized under this Permit.
5. Within sixty days after this issuance of this permit, the Permittee shall submit for the Commissioner's review and approval a full set of wetland mitigation plans, including the actions to be taken, any maintenance activities and a schedule for implementing such plan and

DRAFT

maintaining such mitigation areas. Such plans shall implement and be consistent with the wetlands and watercourse mitigation outlined in the revision to Attachment L of the application submitted on August 26, 2011, and the conceptual mitigation plan noted on sheet No. 6, titled "Wetland Mitigation Index Plan". (The August 25, 2011 drawing noted on sheet 6 indicates that it supercedes plates #72 through #85, dated February, 2011). Upon approval by the Commissioner, the Permittee shall implement the approved wetlands mitigation plan, including, but not limited to, the schedule for wetland mitigation and maintenance. In addition, the Permittee shall place a notice on the land records (i) identifying the mitigation areas approved by the Commissioner; and (ii) identifying such areas as mitigation areas pursuant to this permit. The Permittee shall maintain such areas as wetlands, and shall not use such areas for any other purpose unless the permittee first obtains the written approval of the Commissioner.

GENERAL TERMS AND CONDITIONS:

1. **Initiation and Completion of Work.** At least five (5) days prior to starting any construction activity authorized by this permit, the Permittee shall notify the Commissioner, in writing, as to the date activity will start, and no later than five (5) days after completing such activity, notify the Commissioner, in writing, that the activity authorized by this permit has been completed.
2. **Expiration of Permit.** If the activities authorized herein are not completed by five years after the date of the issuance of this permit, or by the expiration date of the permit issued by the U.S. Army Corps of Engineers for any activity authorized by this permit, whichever is sooner, said activity shall cease and, if not previously revoked or specifically extended, this permit shall be null and void.

Upon the written request of the Permittee and without notice, the Commissioner may extend the expiration date of this permit for a period of up to one year, which period may be extended once for a like period, in order for the Permittee to complete activities authorized herein which have been substantially initiated but will not be completed by the expiration date of this permit. Any request to extend the expiration date of this permit shall state with particularity the reasons therefore.

In making his decision to extend the expiration date of this permit, the Commissioner shall consider all relevant facts and circumstances including, but not limited to, the extent of work completed to date, the Permittee's compliance with the terms and conditions of this permit and any change in environmental conditions or other information since the permit

DRAFT

was issued. Any application to renew or reissue this permit shall be filed in accordance with the Section 22a-39 of the General Statutes and section 22a-3a-5(c) of the regulations of Connecticut State Agencies.

3. **Compliance with Permit.** The Permittee shall comply with the terms and conditions of this permit. Any activity carried out at the site, including but not limited to, construction of any structure, excavation, fill, obstruction, or encroachment, that is not specifically identified and authorized herein shall constitute a violation of this permit and may result in its modification, suspension, or revocation. In undertaking and maintaining the activities authorized herein, the Permittee shall not store, deposit or place equipment or material including without limitation, fill, construction materials, or debris in any wetland or watercourse on or off site unless specifically authorized by this permit .
4. **Transfer of Permit.** This permit is not transferable without the written authorization of the Commissioner.
5. **Reliance on Application.** In making a determination to issue this permit, the Commissioner has relied on information provided by the Permittee in its application. If such information subsequently proves to be false, deceptive, incomplete or inaccurate, this permit may be modified, suspended or revoked. In addition, if the Permittee becomes aware that any such information is materially false, deceptive, incomplete or inaccurate, the Permittee shall immediately report such information to the Commissioner in writing.
6. **Best Management Practices.** In undertaking and maintaining the activities authorized herein, the permittee shall employ best management practices to control storm water discharges and erosion and sedimentation and to prevent pollution. Such practices include, but are not necessarily limited to:
 - a. Prohibiting dumping of any quantity of oil, chemicals or other deleterious material on the ground;
 - b. Immediately informing the Commissioner's Oil and Chemical Spill Section at 424-3338 of any adverse impact or hazard to the environment, including any discharges, spillage or loss of oil or petroleum or chemical liquids or solids, which occurs or is likely to occur as the direct or indirect result of the activities authorized herein;
 - c. Separating staging areas at the site from the regulated areas by silt fences or haybales at all times;

DRAFT

- d. Prohibit storage of any fuel and refueling of equipment within 25 feet from any wetland or watercourse;
- e. Inspecting all sedimentation and erosion controls for deficiencies at least once per week and immediately after each rainfall and at least daily during prolonged rainfall. The permittee shall immediately correct any such deficiencies unless to do so is not practicable. All such deficiencies shall, at the latest, be corrected within forty eight (48) hours of said deficiencies being found or identified;
- f. Stabilizing disturbed soils in a timely fashion to minimize erosion. If a grading operation at the site will be suspended for a period of thirty (30) or more consecutive days, the permittee shall, within the first seven (7) days of that suspension period, seed and mulch or take such other appropriate measures to stabilize the soil involved in such grading operation. Within seven (7) days after establishing final grade in any grading operation at the site the permittee shall seed and mulch the soil involved in such grading operation or take such other appropriate measures to stabilize such soil until seeding and mulching can be accomplished;
- g. Prohibiting 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. Any other material or equipment stored at the site below said elevation shall 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; and
- h. Immediately informing the Commissioner's Inland Water Resources Division (IWRD) of the occurrence of pollution or other environmental damage resulting from construction or maintenance of the authorized activity or any construction associated therewith in violation of this permit. 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:
 - (i) the provision(s) of this permit that has been violated;

DRAFT

- (ii) the date and time the violation(s) was first observed and by whom;
 - (iii) the cause of the violation(s), if known

 - (iv) if the violation(s) has ceased, the duration of the violation(s) and the exact date(s) and times(s) it was corrected;

 - (v) if the violation(s) has not ceased, the anticipated date when it will be corrected;

 - (vi) 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;

 - (vii) 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 section 9 of this license.
7. **Contractor Liability.** The permittee shall provide a copy of this permit to all of its agents and contractor(s) who will be carrying out the activities authorized herein prior to any such agent or contractor undertaking any activities and shall receive a written receipt for such copy, signed and dated by such agent or contractor(s). The permittee shall ensure that its agents and contractor(s) conduct all operations at the site in full compliance with this permit.
8. **Monitoring and Reports to the Commissioner.** The Permittee shall record all actions taken pursuant to General Terms and Conditions 6(e) of this permit and shall, on a monthly basis, submit a report to the Commissioner. This report shall indicate compliance or noncompliance with this permit for all aspects of the project covered by this permit. This report shall be signed by the environmental inspector assigned to the site or project by the Permittee and shall be certified in accordance with General Terms and Condition 9 of this permit. Such monthly report shall be submitted to the Commissioner no later than the 15th of the month subsequent to the month being reported. The Permittee shall submit such reports until all activities authorized by this permit are completed.
9. **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 duly authorized representative of the Permittee, as specified in Conn. Agencies Regs. § 22a-430-3(b)(2) and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows:

DRAFT

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

10. **Submission of Documents.** 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. Except as otherwise specified in this permit, the word "day" as used means the calendar day. Any document or action which falls on a Saturday, Sunday, or legal holiday shall be submitted or performed by the next business day thereafter.

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:

The Director
DEEP/Inland Water Resources Division
79 Elm Street, 3rd Floor
Hartford, Connecticut, 06106-5127

Issued by the Commissioner of Energy and Environmental Protection on:

Date

Daniel C. Esty, Commissioner

SERVICE LIST

In the Matter of the Connecticut Department of Transportation, APP. # IW- 201005239

Applicant DOT

AAG Charles Walsh
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
Charles.walsh@ct.gov

DEEP

Dean Applefield, Esq.
Dept of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106
860-424-3048
Dean.applefield@ct.gov

Intervening parties

Block the Bus

Rep. Whit Betts
1924 Perkins Street
Bristol, CT 06010
whit.betts@cga.ct.gov
Sen. Joseph Markley
47 Elm Street
Plantsville, CT 06479
joe@joemarkley.com

Robert Fromer

P.O. Box 71
Windsor, CT 06905
saintrobert@comcast.net

Molly McKay

8 Riverbend Drive
Mystic, CT 06355
mollymckay@gmail.com

Richard Stowe

12 Mead Street
New Canaan, CT 06840
bike.rail.politics@gmail.com

