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Connecticut Bar Association Environmental Law Section
Senate Bill 835, An Act Concerning the Structures and Dredging Permit Process
Environment Committee
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The Environmental Law Section of the Connecticut Bar Association supports passage of SB 835. This bill would provide the applicant for Structures and Dredging Permit under Section 22a-361 of the General Statutes the right to a contested case hearing on the application under the Uniform Administrative Procedures Act ("UAPA"), and an appeal of an adverse final decision to the Superior Court.

The existing statute requires a permit before anyone may dredge, fill, or place a structure waterward of the high tide line in tidal, coastal, or navigable waters, but it provides the applicant no right to a hearing. (§ 22a-361, C.G.S.) Many, if not most, of the applications submitted every year under the statute are for docks, seawalls, and bulkheads serving residential properties on Long Island Sound, the Connecticut River, and the state's many other tidal creeks and rivers. The remainder is for waterfront commercial and industrial activities, such as marinas, marine transportation terminals and industries requiring waterfront access.

Although the Department has never issued regulations governing this program, the Office of Long Island Sound Programs nonetheless requires applicants to support their applications with A-2 surveys, engineered drawings, and extensive site-specific resource information. As a result, the costs to perfect an application are significant, and the Department charges applicants fees to actually process the applications.

The Connecticut Supreme Court has held that the lack of a statutory provision mandating a hearing creates a circumstance where the agency proceedings are not considered a "contested case" within the meaning of the UAPA, and therefore there is no right of appeal to the Superior Court from an adverse ruling. See Summit Hydropower v. Commissioner, 226 Conn. 792, 811 (1993). Even if a hearing were in fact held, the proceeding is not a contested case under the UAPA, because the agency is not "required by statute to provide an opportunity for a hearing to determine a party's legal rights or privileges." Id.

As a result, when the Department issues a Notice of Tentative Determination to deny an application, or to impose onerous conditions on the permit, based upon a staff review of the application, the applicant's only recourse is to write a letter objecting to the denial during the 30 day comment period. If the Commissioner renders a final decision

denying the application, or imposing conditions unacceptable to the applicant, following the close of the comment period, the applicant has no right to appeal the decision to court.

Under Summit Hydropower, the applicant's only right following an adverse final decision by the Commissioner is to request a Declaratory Ruling that the decision she has just made is erroneous. Id. at fn 18. The final decision from the Declaratory Ruling could then be appealed to Superior Court under the UAPA.

At the agency level, this remedy would require that the applicant proceed through a second round of administrative proceedings without any likely prospect of relief. Moreover, the Declaratory Ruling process fails to guarantee the applicant the right to a proceeding conducted by an independent hearing officer, the right to present expert testimony, or the right to cross examine DEP staff concerning the basis for the decision reached.

In summary, under the current statute, the agency can make an arbitrary or erroneous decision on an application, and the applicant has no right to a contested case hearing to correct the error at the agency level, and no direct right of appeal to Superior Court.

In pursuing such an application, the applicant is exercising common law property rights granted to riparian and littoral owners. To do so, the applicant must spend considerable sums of money. Therefore, fundamental fairness dictates that the applicant should have the right to 1) a contested case hearing under the UAPA in the event staff recommends a denial or unacceptable conditions, and 2) the right to an appeal to Superior Court in the event the Commissioner issues a final decision adverse to the applicant.

In closing, I should note that the Summit Hydropower decision involved a decision by the Commissioner on a Water Quality Certification under Sections 22a-6g and h, which likewise fail to provide the applicant a mandatory hearing and appeal. The Environmental Law Section supports legislation that would provide these rights to applicants for Water Quality Certifications, as well. For all the foregoing reasons, the CBA Environmental Law Section urges the committee to **favorably report** SB 835.

Thank you for the opportunity to appear and testify on this matter. I would be pleased to answer any questions that you may have.