



30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

Testimony of Gregory A. Sharp
Connecticut Bar Association, Environmental Law Section
Raised Bill No. 86, 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** the passage of Raised Bill No. 86 with one small but important change which will be discussed below. This bill would provide the applicant for a 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.

Section 22a-361 requires a permit from the Department of Energy and Environmental Protection (“DEEP”) for anyone seeking to dredge, fill, or place a structure waterward of the high tide line in tidal, coastal, or navigable waters. The existing statute fails to provide the applicant with the right to a hearing before the agency. (§ 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 of the applications address 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, if, based on Staff review, the Department issues a Notice of Tentative Determination to deny an application, or to impose onerous conditions on the permit, the applicant’s only recourse is to write a letter objecting to the denial during the 30 day comment period. If, following the close of the comment period, the Commissioner renders a final decision denying the application, or imposing unacceptable conditions, 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 he 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 circuitous remedy would require the applicant to proceed through a second round of administrative proceedings without any likely prospect of relief. Moreover, it 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 a structures and dredging permit, the applicant is exercising common law property rights granted to riparian and littoral owners, and must spend considerable sums of money to do so. Fundamental fairness dictates that the applicant should have the right to a contested case hearing under the UAPA in the event staff recommends a denial or unacceptable conditions, and the right to an appeal to Superior Court in the event the Commissioner issues a final decision adverse to the applicant.

I would suggest one minor, but important change to the language in the raised bill. In line 25, following the word "receives," I would suggest adding a colon, followed by a "1" in parentheses, and in line 26 following the word "or," I would suggest adding a semi-colon followed by a "2" in parentheses. The language would then read "The commissioner shall hold a public hearing if the commissioner receives; (1) a written request for such public hearing from the applicant; or (2) a petition requesting such public hearing that is signed by twenty-five or more persons and an application will: (A) Significantly impact any shellfish area,"

These changes would make it clear that the applicant's right to a hearing on any structures and dredging application is separate and apart from, and independent of, the language in lines 28-32 which provides for a hearing upon the filing of a petition but only under limited project-specific circumstances.

For the foregoing reasons, the CBA Environmental Law Section urges the committee to **favorably report** Raised Bill No. 86 with the changes I have proposed.

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