

**CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF ADJUDICATIONS**

IN THE MATTER OF : **APPLICATION NO. 200103104**
ARTHUR AND JUDITH SCHALLER : **DECEMBER 2, 2002**

**POST-HEARING BRIEF OF THE OBJECTIONS RAISED BY THE
CONNECTICUT RIVER COMMITTEE FOR THE PUBLIC TRUST TO THE
HEARING OFFICER'S PROPOSED FINAL DECISION**

SUBMITTED BY:

James S. McKay, Coordinator
Connecticut River Committee for
the Public Trust
14 Ridge Road
Chester, CT
06412
(860) 526-4236

Overview

Intervenor Connecticut River Committee for the Public Trust raised 7 specific objections to the Hearing Officer's Proposed Final Decision. In addition, the Commissioner has requested the briefs address the question of "Whether or not the availability of allegedly reasonably available alternatives to the exercise of riparian rights diminishes or extinguishes those riparian rights." This brief will address the question posed by the Commissioner first, with a discussion of additional objections to follow.

COMMISSIONER'S QUESTION:

"Whether or not the availability of allegedly reasonably available alternatives to the exercise of riparian rights diminishes or extinguishes those riparian rights."

The answer to the above question is no.

The analysis of alternatives under Section 22a-19(b) is not a freestanding requirement and cannot in and of itself justify the limitation of riparian rights. As noted in the proposed final decision, it is activated only when there is a showing that conduct "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." Sec. 22a-19(a).

This distinction is important because most areas of the state are likely to have some form of reasonable alternative to the exercise of riparian rights and if the mere existence of such alternatives were alone sufficient to limit those rights it would effectively curtail them throughout the state. Such is clearly not the design or intent of Section 22a-19. In the absence of any harm to the public, riparian rights would still prevail even if reasonably available alternatives exist.

An important underlying question is whether the state has a right to limit private conduct that is "likely to impair" the public trust. On this question the law is well-settled.

The power of the state to regulate under Section 22a-19 is unassailable. As Appellant's concede, "there is no dispute that the riparian right of access can be controlled under the police power of the state." (App. Reply Brief at 6). As stated by our Supreme Court, "There is no reason why, because of its peculiar nature as property, this right cannot, like any other property right, be made subject to reasonable police regulation in the interest of public welfare." The Court further noted: "the right has been subject to regulation in this state and elsewhere for many years." Shorehaven Golf Club v. Water Resources Commission, 146 Conn. 619, at 624 (1959).

The statutory scheme set up by Section 22a-19 is an excellent example of a rational and valid exercise of the police power to protect the health, safety and welfare of the general public. Sec. 22a-19. Its obvious purpose is to assure that private acts do not unnecessarily impair the public good. Where reasonably available alternatives are available, there is simply no compelling reason to allow injurious private acts to prevail.

The Commissioner's question raises an important concern for the interplay between the valid regulations of Section 22a-19 and the law of riparian rights. Does the statutory scheme necessarily diminish or extinguish the Applicant's riparian rights?

Again, the answer to this question is no. It is not the statute that limits the "size" of a riparian landowner's rights but the unique circumstances of his/her property. As stated by our Supreme Court in Richards v. New York, N.H. & N.R. Co., 70 Conn. 501(1905), a landowner

"must take their riparian rights as they find them, and they are entitled only to such as the condition of the cove and the situation of their land with respect to the cove will afford." (at 505).

In addition, the statute will never fully extinguish a riparian landowner's rights. A riparian landowner will always have preferred access to the river by virtue of owning the frontage.¹ It is his/her right to "wharf out" beyond that frontage into public waters that is and has always been limited by its impact on the public good, most obviously the public's superior right of navigation. State v. Sargent and Company, 45 Conn. 358, 372 (1877).

Section 22a-19 and the "alternatives" analysis that it requires takes nothing from the applicants. By virtue of the unique characteristics of their property, the "size" of their right to wharf out has always been, at best, minimal. Their property is simply too shallow to allow construction of a powerboat dock without infringing on the superior right of small craft owners to freely navigate the safe shallows where the proposed dock would be located. A structure such as that proposed has the additional problem of being plainly visible to thousands who look upon this portion of the riverfront from the public access points that surround it. This is not the "fault" of the legislature or the DEP. The applicants "must take their riparian rights as they find them" and suffer the consequences. Richards, id. Fortunately for these applicants, if they wish to dock a powerboat, there are numerous "reasonably available alternatives" just minutes away.

¹ It is worth noting that in the present case, DEP has found that there are segments of the frontage that are not protected by the Tidal Wetlands Act and do not contain protected Sub Aquatic Vegetation. As a result, the Applicants would be able to launch paddle or other small craft from the shore without endangering important ecological features of the riverfront.

OBJECTIONS RAISED BY INTERVENOR PUBLIC TRUST

1. The Proposed Final Decision ignores the sworn testimony and writings of dozens of citizens.

Perhaps the most remarkable feature of the Proposed Final Decision is that it utterly ignores the citizen input that the unprecedented public hearing procedure employed by the Commissioner was ostensibly designed to solicit, including but not limited to the sworn testimony and writings of:

- Dozens of citizens who actually paddle the precise area where the proposed dock would be located.
- An expert in paddling safety (Worthington).
- A commercial riverboat captain who operates regularly in the precise location in question.(Lee)
- A Certified Captain who paddles the precise area in question on a regular basis.(Bermann)
- A professional photographer who prepared exhibits accurately depicting the visual impact of the proposed dock and its accompanying boat.(Goff)
- Dozens of citizens who expressed the view that the project would significantly alter the existing vistas and viewpoints of the highly used and historically unaltered location in question.

Indeed, from the text of the proposed final decision, it would be impossible to discern that the input of these citizens was in any way a significant part of the record. A review of the following charts makes this “oversight” powerfully clear:

Chart A: Sworn Testimony Adduced at the Evidentiary Hearings on 2/27/02, 2/28/02, 3/5/02

<p align="center">Sworn Testimony in Support of <u>Denying</u> the Application (all testimony at Chester Meeting House on 2/27/02 unless otherwise noted)</p>	<p align="center">Sworn Testimony in Support of <u>Granting</u> the Application</p>
<ul style="list-style-type: none"> • Bert Armington-Director, Chester Land Trust: Resident since 1966. Dock impedes both aesthetics and navigation. • Gail Carmody-President, Hadlyme Ferry Association: Group helped state purchase Gillette Castle. Dock violates aesthetics. • Leonora Prowell-President, Hadlyme Historic District Commission: Actually knew Gillette family when castle was built. View has remained intact. • Michael “Sandy” Prisløe, Jr.-Vice-Chairperson, Chester Conservation Commission: 25 year resident. Dock violates town’s open space plan. (Also Testified at DEP on 2/28/02) • Hank Montrose-Hadlyme Resident: Expressed opposition based on aesthetics. • Todd Bermann-U.S. Licensed Captain, Master Status: Ivoryton Resident. Paddled area since 1979, including dozens of times in recent years. Describes unique navigation and safety problems posed by the proposed dock in this location. • Phillip Miller-Essex Selectman: Proposed dock has no redeeming value to the public. • Sandra Austin-Hiker and Boater: Describes need of the many older adults who frequently paddle the area to be able to hug the shore in the area of the proposed dock in order to remain safe from powerboat wakes. • Don Hanson-Kayaker: Frequently paddles the area. Describes negative aesthetic impact of boatlift based on his personal observation of similar structures elsewhere. • Alan Geste(last name unclear on tape): Describes negative aesthetic impact based on personal observation of similar structures, and safety concerns for water skiers. • George Bourne: Describes negative visual impact of boat lift from personal observation of such structures t Oyster Bay, NY • Suzanne Haig: sailor on river for 10 years describing hazard of docks for sailboat navigation. • Gerry Mathews-Haddam Resident for 22 years, 35 in area: Describes personal experience of kayaking area of proposed dock and unique safety hazards posed by the precise location in question. • Therese DesJardins-Artist: Describes negative impact of proposed dock on aesthetics of the particular location. • Paul John Flory-Master Rower: Works out 5-7 days per week on the River. Describes navigation problems for rowers, also questions necessity of boatlift which provides storage, not access. • Jean Luchtenberg-Essex Resident: concurs on everything already stated by opponents of the dock. • Gene Bartholomew-Chester Resident: Called Chester marinas and confirmed availability of space. • Caroline Greenleaf-26 year resident and riparian landowner in Essex: Active kayaker, powerboater. Views Eagles from Chester Ferry Landing on Sundays. Describes negative impact of proposed dock on aesthetics. • Peter Auster: frequently fishes in the location in question from his 16-foot powerboat and describes how structure would directly diminish his experience. • Sam Lindberg: Distinguishes public value of Ferry dock from private value of proposed dock. • Bonnie Bennet-Attorney: Describes recent denial of 100-foot dock in Maine based on adverse scenic and aesthetic impact. • Matt Elgart: 50 year resident grew up in Deep River: Objects to negative aesthetic impact of proposed dock on one of the biggest tourist attractions in the state. • Elizabeth Morgan-Lyme Resident: Describes personal experience of paddling the area in question and how proposed dock would negatively impact aesthetics and safety of navigation. • Kevin Carroll: Describes how proposed dock would be an “eyesore in one of the most serene parts of the river.” • Tom Gootz-Deep River: Describes personal experience of canoeing the proposed location and concerns that dock and its ice prevention pilings would pose a danger for paddlers of limited skills such as himself. • Francine Cornaglia: States her agreement with Chester Land Trust. • Alice Willard-Paddler and Birder: States that Ferry Landing is one of the places where eagles can be very reliably seen and that the proposed dock threatens a wild and scenic area that few places can duplicate. • David Hayes-Dock Builder: Describes lack of necessity of proposed project for access, fishing, or public safety. • James Morgan-Kayaker: Describes numerous paddle trips to the area and how paddlers stick to the shallows of the west side because it is safer to navigate. Also describes negative aesthetic impact of the proposed dock. • Carol Kimball-Author, Tidelands of the Connecticut River: Testified as to lack of manmade structures at the proposed dock location and to the proximity of unique historic and natural features.(Testified at DEP on 2/28/02 and 3/5/02) 	<ul style="list-style-type: none"> • Gary Sharpe-Engineer and Agent for the State: Testified to his opinions that navigation and aesthetics would not be adversely affected by the proposed dock. (Also testified at DEP on 2/28/02 and 3/5/02) • Susan Gradante-DEP Permit Analyst: Testified to her opinions that navigation and aesthetics would not be adversely affected by the proposed dock. (Also testified at DEP on 2/28/02 and 3/5/02) • Wendy King-Lifelong resident and powerboater: Predicted that tourism at Gillette Castle would decline if proposed dock is granted. Called the dock “Crazy” if they are on the river on Saturdays.

Chart B: Sworn Statements by Citizens

<p align="center">Sworn Statements in Support of <u>Denying</u> the Application (Date of Receipt by DEP Noted)</p>	<p align="center">Sworn Statements in Support of <u>Granting</u> the Application</p>

- **Alice Willard-Deep River:** Elaborates on concerns expressed in oral testimony that proposed dock will negatively impact aesthetics and navigation for small boaters and eagle-watchers. Received 3/5/02
- **Gordon Willard-Deep River:** Explains how paddlers desire to stay close to shore in order to avoid being swamped and suffering “cold shock” as a result of powerboat wakes and how the proposed dock will be dangerous because it will put them closer to such wakes. Received 3/5/02
- **Gerald B. Dubey-Chester:** Longtime citizen official cites concerns about the aesthetic and safety issues, and criticizes the Hearing Officer for seeming prejudicial against the intervenors and members of the public. Received 3/4/02.
- **Jennifer Hillhouse-Lyme:** Expresses concern about the aesthetic impact if multiple docks are constructed and the hazard posed by pushing kayakers such as herself closer to the path of tankers and cigarette boats. Received 3/6/02.
- **Kevin Carrol-Chester:** Reiterates sworn testimony that proposed dock will mar the scenic beauty of one of the most serene and unspoiled areas of the River. Received 3/6/02.
- **Paul John Flory-Essex:** Elaborates in detail on concerns expressed in oral testimony regarding the danger of the proposed dock to rowers, the negative impact, and the fact that a lift is a manner of storage. (Accepted as Exhibit SPKR-1 by the Hearing Officer on 2/27/02)
- **Thomas E. Worthley-Higganum:** American Canoe Association Certified Instructor with 20 years paddling experience provides detailed explanation and diagrams of the dangerous “strainer” effect of the proposed dock and the need for paddlers to stay in the shallows to remain safe. Received 3/5/02.
- **Steven C. Lee-East Hampton:** License Captain of commercial riverboat describes how his riverboat navigates the area in question and how the proposed dock will increase danger to small pleasure craft by forcing them away from the shallows and closer to dangerous river traffic. Received 3/19/02.
- **Harry Bird-Essex:** Detailed analysis of the limited utility of the proposed dock given normal tidal cycles. Letter also contains a rendering of how the proposed dock will look with a 24 foot Sea Ray on the lift. Received 3/6/02.
- **Diane Mela-Ivoryton:** 32 year resident and retired sailor states views that dock will negatively impact aesthetics and safety of the location in question. Received 3/19/02.
- **Barbara O. David-Farmington and Lyme:** Describes multiple visits to area by the Ferry, by land and by boat and how the proposed dock will negatively impact an area with minimal human disturbance. Received 3/12/02.
- **Lois Nadel-Chester:** 30 year resident expresses view that proposed dock will do enormous harm to environment, tourism, and visitors and users of the River. Received 3/13/02.
- **Eleanor Czarnowski-Old Lyme:** Expresses concerns about the lack of Tidal Wetland scrutiny and the need to protect the environment generally. Received 3/1/02.
- **Sandy Prisløe-Chester:** States in detail the Conservation Commission’s views that the application violates the town’s open space policy and portions of the Harbor Management Plan. Accepted by the Hearing Officer on 2/28/02).
- **Joan A. Meek-President, Potapaug Audubon Society:** Expresses groups opposition to the project on the grounds that dredging activity will be necessary and will negatively affect the environment. Received 3/21/02.
- **Carol Kimball-Lyme:** Elaborates on oral testimony describing how there has never been a dock at the proposed location and how the proposed dock would be the river equivalent of a “billboard.” Received 3/20/02.
- **Robert Braunfield-Hadlyme and East Haddam:** Expresses views that proposed project will endanger paddlers, fishermen, and sailors and impact the scenic beauty and unique character of the river. Received 3/22/02.
- **Laurie Giemza-Chester:** Member of longtime resident family explains how proposed dock would adversely affect her ability to kayak the area safely and the ability of many to enjoy the natural beauty of the place. Received 3/4/02.
- **George Bourne-Old Lyme:** Riparian landowner in Hamburg Cove expresses view that proposed dock would depreciate the view enjoyed by thousands of visitors. Dated 2/23/02.
- **Helena B. Coombs:** Former member of Essex Harbor Management Commission opposes dock due to its impact on thousands who enjoy the “uncluttered vista.” Received 3/4/02.
- **William Carl Dolle-Deep River:** Boater of 40 years experience on the River objects to adverse impact on the ability of canoes and kayaks to hug the shore to avoid boats and their wakes, also objects on grounds that proposed dock will adversely affect the “unspoiled beauty” of an area enjoyed by many. Received 3/20/02.
- **Jocelyn Goldman-East Haddam:** Objects to proposed dock describing how danger to paddlecraft is increased because they must travel around such structures in a triangular pattern that brings them closer to river traffic. Received 3/21/02.
- **Roger W. Denoyers-Old Lyme:** Former member of Wetlands Commission and paddler who kayaks the River 6 months a year objects on ecological, navigational, and aesthetic grounds. Received 3/19/02.
- **Collin Goff-Old Saybrook:** Professional photographer and technical draftsman points out misleading aspects of Applicants’ exhibits and provides photocomposites depicting the way the proposed dock will actually appear if it is allowed to be built. Received 3/21/02.
- **Brooke Samuelson-Old Saybrook:** Frequent paddler of the area in question objects on grounds that proposed dock will put more small craft owners at risk by forcing them out into the river along with the “huge ferry” and “other large boats.” Received 3/5/02.

• NO

Even a cursory review of the testimony and writings of the citizens depicted on these charts belies any notion that they can be easily dismissed as “nuts” or liars. Almost to a man (or woman), they are well spoken and polite in describing their personal experiences and opinions based on those experiences. They come from all over the region and yet their clarity and consistency on the key issues of fact is remarkable. Their collective knowledge of the area and its circumstances comes by land and by sea and represents hundreds of years of experience with the area in question.

The Hearing Officer’s near total disregard for the sworn testimony and writings of these citizens is never explained in any portion of the proposed final decision. There is no attempt whatsoever to deal with their evidentiary value. Did the Hearing Officer find these of citizens to be either mistaken or untruthful in their assessments of the key factual matters in the case? Is there some form of widespread dementia in the air? Has a statewide conspiracy been hatched? What possible reason can there be for totally ignoring the citizen input that the hearing process was designed to solicit?

The applicants bear the burden of proving the proving their right to the proposed dock by a “preponderance of the evidence.” Similarly, the intervenors bear the burden of proving that it is “reasonably likely” that the proposed dock would “impair” the public trust. Sec. 22a-19. Dozens of citizens testified and submitted sworn writings on the facts that would determine these issues, yet they are never mentioned in the proposed final decision.

As stated by our Supreme Court, the “fair preponderance of the evidence” is “properly defined as ‘the better evidence, the evidence having the greater weight.’” Cross v. Huttenlocher, 185 Conn. 390, 394 (1981) That standard has been satisfied with respect to a fact if all the evidence considered fairly and impartially evinces a reasonable belief that it is more probable than not that the fact is true.” Id., at Page 395(emphasis added).

It is elemental that the standard of proof cannot be met if only some of the evidence has been considered and the rest has been dismissed without any articulated rationale whatsoever. This is precisely what the proposed final decision does.

The near total absence of any mention, much less thoughtful analysis of the sworn citizen input is indefensible and renders the proposed final decision arbitrary, unreasonable, and unworthy of the Commissioner’s signature.

The Proposed Final Decision relies entirely on the views expressed by interested parties; staff member Ms. Gradante whose decision is being challenged, and the applicant's agent, Gary Sharpe.

The only evidence adduced contrary to the views expressed by the dozens of citizens referenced above came from the staff member who approved the project, Susan Gradante, and the applicant's agent Gary Sharpe. No other witnesses were introduced by either staff or by the applicants. (See Chart A, above). No letters of support were received from members of the general public. (See Chart B, above).

It is elemental that a person's interest in the outcome of a case may effect their credibility. See Sec 52-145. (b) ("A person's interest in the outcome of the action or his conviction of crime may be shown for the purpose of affecting his credibility); See also, State v. Hanks, 39 Conn. App. 333, 350 (1995).

Mr. Sharpe and Ms. Gradante both have an interest in the outcome of the case. By Mr. Sharpe's own admission, it was his paid role as the applicants' agent to secure approval for the proposed dock. (Sharpe, 2/28/02 or 3/5/02) His livelihood is clearly dependent upon his success in that regard.

Similarly, Ms. Gradante has an obvious interest in vindicating her approval of an application that has been the subject of strident and very public debate. Indeed, it is obvious from her testimony that she reached her opinions prior the public hearings and that the extensive citizen input played no significant role in her analysis. (Gradante, 2/28/02, 3/5/02).

Even if we are to take the testimony of both Mr. Sharpe and Ms. Gradante at face value, the proposed final decision is fatally defective because there is no explanation whatsoever as to why their views are entitled to greater weight than those of the dozens of citizens who represent hundreds of years of experience actually paddling and visiting the area in question. This is particularly true on the key issues of fact concerning small craft navigation and aesthetics on which Mr. Sharpe and Ms. Gradante clearly have no superior basis for their opinions than the citizens.²

The failure of the proposed final decision to provide any analysis of why the testimony of Mr. Sharpe and Ms. Gradante should be preferred is a fatal flaw. It makes the decision indefensible, and leads to the inevitable conclusion that

² Applicants attempt to address this oversight by asserting that the intervenors "overlook Gary Sharpe's twenty five years of experience designing docks to meet DEP criteria and Susan Gradante's experience reviewing over 800 dock applications to determine if the statutory criteria are met." (Applicant's Reply Brief, at 8). Yet both Mr. Sharpe and Ms. Gradante CONCEDED at the hearing that they had no special expertise or training in assessing the visual impact of a project. (Sharpe and Gradante, 2/28/02 or 3/5/02) Indeed, Ms. Gradante made it clear that such considerations were rare, usually occurring only when complaints are made by adjacent riparian landowners. (Gradante, 2/28/02 or 3/5/02) Thus, any assertion that their opinions should be entitled to greater weight than those of the public by virtue of their expertise is contrary to their sworn testimony at the hearing.

the decision is arbitrary, unreasonable, and unworthy of the Commissioner's signature.

2. The Proposed Final Decision misstates the law on riparian rights in its reference to the right to "wharf out" into "deep" waters.

There is no right to wharf out to "deep" waters as stated in the decision at page 2. The right is at best a limited right to wharf out to "navigable" waters. This distinction is critical in the instant case because the overwhelming evidence was that the proposed location was objectionable precisely because it was an unsafe, and therefore unreasonable, intrusion into the "navigable" waters of paddlecraft and other small boaters who frequent the area. Nowhere in the law is there an unqualified right to "wharf out" in order to accommodate a 24-foot Sea Ray as is desired by the applicant.

Our Supreme Court made this distinction clear In Port Clinton Associates v. Board of Selectmen, 217 Conn. 588, fn. 13 (1991) when it stated:

“ The right to wharf out derives from the right of access to ‘navigable’ or ‘deep’ water. 1 H. P. Farnham, *Water and Water Rights* 62. **For that reason, ‘as soon as the point of navigability is reached, the purpose of the pier is fulfilled, and the right to construct it ceases at that point.** Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 [1892].’ Id., 111, p. 522; accord Lane v. Harbor Commissioners, 70 Conn. 685, 40 A. 1058 (1898). “**(Emphasis added)**.”

The point of navigability in the instant case is clear. Paddlecraft, a common form of transportation in this part of the river, must navigate the shallows where the proposed dock would be built in order to remain safe. (See citizens' evidence summarized in Charts A and B, also, Intervenor Public Trust's Brief and Reply Brief). Under Port Clinton, “as soon as the point of navigability is reached, the purpose of the pier is fulfilled, and the right to construct it ceases at that point.” Id. The powerboat dock proposed by the Applicants exceeds the point of navigability by paddle and other small craft that frequent the area and violates their rights to navigate the area safely.

3. The Proposed Final Decision mechanically applies standards that are inappropriate in assessing the navigational needs of small boaters in the area in question.

In lieu of analyzing the overwhelming citizen evidence to the contrary, the Proposed Final Decision instead relies on a mathematical formula to reject the contention that the proposed dock will present a navigational hazard. Under this formula, the fact that 92% of the river's width and .06% of the area between the applicant's river frontage and the main channel will remain available for small craft navigation if the project is completed is considered determinative.

This analysis is fatally flawed in that it utterly overlooks how the location is actually used by small boaters. The uncontroverted testimony was that the only safe location for paddlers is along the shallow waters of the west shore in the precise area of the proposed project. (See citizens' evidence summarized in Charts A and B, above, also, Intervenor Public Trust's Brief and Reply Brief). In other words, the paddlers "channel" runs right through the proposed project and the alternatives to that "channel" are dangerous because of the presence of turbulent waters and large craft.

It may be true that "as the crow flies" there would be room for small craft to get around the proposed dock. The problem is that kayaks are not crows. As is the case with highways on land, one's mode of transportation inevitably constrains one's ability to move safely from one location to another. The truth is, sometimes you just can't go "as the crow flies," that is, unless you are a crow. You must stick to the road or, in this case, the paddler's "channel" along the safe shallows of the western shore where the proposed project would be located.

The mechanistic approach is fatally flawed because it fails to answer the key question in the case, which is not whether the river is wide, but rather whether the proposed dock is in a location that will interfere with safe navigation by paddlecraft and other small boats. By relying on a mathematical formula and ignoring the testimony of dozens of witnesses with personal knowledge of how the river is actually used, the proposed final decision creates the illusion of reason rather than its substance. A rational and defensible analysis would deal forthrightly with the overwhelming testimony that this proposed dock will obstruct navigation. This one does not, and as such, it is arbitrary, unreasonable, and unworthy of the Commissioner's signature.

4. The Proposed Final Decision mechanically applies standards that are inappropriate in assessing the alteration of the vistas and viewpoints of the area in question.

The Proposed Final Decision supports its conclusion that the project would not have a negative visual impact by relying on the same mechanical formula cited in Point 4, above, to show that it will occupy only a small portion of river's surface.

The same could be said about the Statue of Liberty in New York harbor or the Race Rock Lighthouse, but it would have little to do with whether the structure was visible to the public. Indeed, it is precisely because 92% of the rest of the river's width and 99.94% of its area would remain unspoiled by manmade objects that the project would stand out and be visually objectionable. If the area were already filled with structures it would be a different issue. But it's not. That's the point of the dozens of citizens whose statements are not mentioned in the Proposed Final Decision. (See citizens' evidence summarized in Charts A and B, above, also, Intervenor Public Trust's Brief and Reply Brief).

Contrary to the assertions of some, the citizen evidence cannot be simply dismissed as a "referendum." Those who came forward did so at their own time and expense, took oaths, and either subjected themselves to cross-examination or took the time to reduce their thoughts to writing, have them notarized, and direct them to the DEP. This is not the same as taking a few minutes to enter your local voting booth and record an anonymous tally that need never be explained. It is a consummate act of citizenship for which the Commissioner (contrary to the views of his staff as expressed at page 10 of its post-hearing brief) must surely be thankful.

The citizen evidence is based upon hundreds of hours of collective experience with the aesthetics of a location that the citizens find beautiful precisely because it has never seen a manmade structure. It is not the product of a brief site visit made during the off season. Nobody was paid to say this. It is not a matter of defending their professional actions. Far from being a referendum, the evidence provided by these citizens is in fact a unanimous verdict on the aesthetics of this unique location.³

The Department has failed to adopt articulable standards for assessing visual impact. There is no reason for it to suddenly adhere to an arbitrary mathematical formula and the lay opinion of staff and the applicants' paid agent over the overwhelming evidence provided by the citizen witnesses. Unlike highly technical matters on which the Department might claim some special expertise, there is no reason to substitute its judgment for that of the citizenry on what is essentially a value judgment like aesthetics.⁴

³ It is worth noting that over the long course of these proceedings, not one single citizen has stepped forward to join the applicants in their assessment that the project would not degrade the aesthetics of the area.

⁴ On a related matter, the decision also misinterprets the evidence by asserting that the project will weather into the background over time. at 15. The testimony of Mr. Sharpe clearly established that the

Reliance on the mathematical formula in lieu of live testimony is indefensible because it casts no light on the aesthetic impact of the proposed dock. As a result, it is arbitrary, unreasonable, and unworthy of the Commissioner's signature.

5. The Proposed Final Decision fails to address the applicant's alternative of using one of the readily available public marinas in the area.

The proposed final decision fails to address the easy availability of commercial marinas in the vicinity. Instead, it seems to assume, without any discussion whatsoever, that a riparian landowner is entitled to his own dock and that such an alternative would be per-se unreasonable.

This assumption is clearly unfounded. The uncontroverted teaching of our cases is that the right to "wharf out" is limited. State v. Sargent and Company, 45 Conn. 358, 372(1928). If the wharf interferes with public navigation, then public navigation will prevail. Water Street Associates v. Innopak Plastics, 230 Conn. 764, 769 (1994). If the wharf interferes with legitimate exercises of the police power, the police power will prevail. Shorehaven Golf Club v. Water Resources Commission, 146 Conn. 619,624 (1959). If that means the applicant cannot construct a wharf, then so be it. Richards, supra, 70 Conn. 501, at 505. He takes his riparian rights "as he finds them." Id. The public's right to safely navigate and reasonably regulate public waters will always trump the limited riparian rights of an adjacent landowner. ⁵

In the instant case, the evidence shows that the proposed dock would interfere with public navigation and reasonable regulation of the river. Insofar as, there is a complete and readily available alternative such as the nearby commercial marinas, there is no rationale for them to be allowed to intrude into the public waters and endanger the public's safe use and enjoyment of this unique location. Sec. 22a-19. The proposed final decision omits any reference to this alternative, which would preclude them from constructing the proposed dock.

white powerboat that would occupy approximately 1/4 of the project's length would never "weather" into the background overtime. (Testimony of Sharpe, 2/28/02 or 3/5/02).

⁵ In the relatively recent case of Port Clinton Associates v. Board of Selectmen, 217 Conn. 588, fn. 13 (1991), our Supreme Court indicated that it had serious doubts about how far the right to "wharf out" should extend, and seemed to invite a more thoughtful analysis on the subject. The Court said:

"Both Port Clinton and the board appear to have implicitly assumed throughout this litigation that Port Clinton's right to wharf out extends as far as the federal channel designated by the United States government and mapped out in Port Clinton's proposal. See Appendix. The board has argued that because this right to wharf out is subject to the public's superior right of navigation, its deprivation cannot be a "taking," but has not claimed that Port Clinton had no right whatever to expand its dock. See Lane v. Harbor Commissioners, supra. We shall assume, therefore, **for purposes of this opinion only**, that Port Clinton had the right to wharf out until it reached the federal channel so long as its exercise of that right did not interfere with the public's superior right of navigation. (emphasis added) 217 Conn. 588, at fn. 13

7. The Proposed Final Decision fails to strike an appropriate balance between the riparian rights of the applicant and the rights of the public under the Public Trust Doctrine.

On the one hand, we have the personal recreational convenience of an individual. On the other, we have the right of thousands of citizens to safely navigate and to enjoy the unique vistas and viewpoints of the most popular destination along the state's namesake river. There is no public benefit in the former and great public benefit in the later. To hold that they are in proper balance, particularly in light of the easy availability of commercial marinas and public access ramps, would be to elevate the right to "wharf out" above those of the greater good of the public. Such was never the intent of our law and to hold otherwise would be in error. State v. Sargent and Company, 45 Conn. 358, 372(1928).

Conclusion

For the reasons stated herein, Intervenor Connecticut River Committee for the Public Trust respectfully requests that the Commissioner reject the Proposed Final Decision in this case and deny the Applicant's application for a permit for the proposed dock on the Connecticut River in Chester.

Submitted on Behalf of the
Connecticut River Committee for the
Public Trust

James S. McKay

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing POST-HEARING BRIEF OF THE OBJECTIONS RAISED BY THE CONNECTICUT RIVER COMMITTEE FOR THE PUBLIC TRUST TO THE HEARING OFFICER'S PROPOSED FINAL DECISION was mailed on December 2, 2002, postage paid, faxed or hand delivered to the following:

Gregory A. Sharp, Esq.
Murtha, Cullina, Richter & Pinney
City Place I
185 Asylum Avenue
Hartford, CT 06103

David Blatt
Office of Long Island Sound
Programs
Dept. of Environmental
Protection
79 Elm Street
Hartford, CT 06106-5127

The Chester Land Trust
c/o William Burr, Director
18 Butter Jones Road
Chester, CT 06412

The Chester Land Trust
c/o Albert Armington, Director
10 Ferry Road
Chester, CT 06412

The Hadlyme Ferry Association
C/o Gail Carmody, Presiding
Officer
P.O. Box 407
Hadlyme, CT 06439

Jil Nelson
C/o Austin Carey, Jr.
43 Woodland Street
Hartford, CT 06105

James S. McKay