

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Weaver's Cove Energy, LLC
AAD No. 07-002/WRA
Water Quality Certificate No. 04-062
Dredge Permit Application No. DP-04-31
2009

DECISION AND ORDER

This matter is on appeal from a Decision ("Decision") by the Director of the Rhode Island Department of Environmental Management ("the Director") dated August 10, 2007 dismissing without prejudice two Applications of Weaver's Cove Energy, LLC ("WCE" or "Applicant") filed on July 16, 2004 ("Application"), updated January 31, 2006. The Applications sought a Water Quality Certification ("WQC") pursuant to § 401 of the Clean Water Act ("CWA") (33 U.S.C. 1251 et seq.) and a Permit pursuant to Rhode Island Rules and Regulations for Dredging and the Management of Dredged Materials, February 2003 ("Dredging Regulations") (R.I.G.L. 46-6.1 et seq.) and Rhode Island Water Quality Regulations (R.I.G.L. 46.12 et seq.). The Applicant filed an appeal of Decision on August 30, 2007. The Appeal requests that the Decision of the Director be reversed and that the Applications be approved. This appeal is governed by the Rule of the Administrative Adjudication of Environmental Matters.

HISTORY OF CASE

The appeal was originally assigned to be heard by Chief Hearing Officer Kathleen M. Lanphear. Through the winter of 2007 and spring of 2008 the parties agreed to the record and filed briefs. Weaver's Cove filed its Brief on February 8, 2008. The Rhode Island Department of Environmental Management (RIDEM) filed its brief on March 21, 2008. Briefs were also filed by participating parties, the City of Fall River, Massachusetts ("Fall River") and Save the Bay - Narragansett Bay ("Save the Bay") on March 20, 2008 and March 21, 2008 respectively. Weaver's Cove filed a reply brief on April 14, 2008. The matter was set down for Oral Argument on June 3, 2008.

On May 9, 2008 the appeal was assigned to Hearing Officer Mary F. McMahon due to the transfer of Chief Hearing Officer Kathleen M. Lanphear from the AAD to the Rhode Island Department of Administration. Hearing Officer McMahon scheduled a conference by May 29, 2008 to discuss the matter generally and establish a schedule for Hearing.

On June 6, 2008 the parties submitted Appellant and Appellee's Joint Chronology and Appellant and Appellee's Agreed Statement of Facts which are annexed hereto and made a part hereof as Addenda A and B respectively. The parties also agreed to a Certified Index of Exhibits Numbered 1-100.

On June 16, 2008 an Order was entered reflecting the fact that the parties had agreed to have the matter decided upon the administrative record pursuant to Rule 15.00 (b) of the AAD Rules of Practice. An oral argument was set down to be heard on June 30, 2008.

Oral Argument was held on June 30, 2008. On October 1, 2008 the appeal was assigned to Acting Chief Hearing Officer David P. Kerins upon the retirement of Hearing Officer Mary F. McMahon. Hearing Officer Kerins will issue a Decision based on the Stipulated Facts, Stipulated Exhibits, Briefs filed by the parties and transcript of oral argument.

ANALYSIS

The issues presented in this Appeal are diverse and flow from the Decision issued by the Director in August 10, 2007 (Exhibit #100). The Decision denies without prejudice the Applications of WCE to dredge approximately 230,000 cubic yards of sediment from 33 acres within the 117 acre, 2.4 mile long Rhode Island portion of the Mount Hope Bay/Fall River Harbor Federal Navigation Channel. The Application to dredge, filed on July 19, 2004 was accompanied by an Application for Water Quality Certification.

Rule 13 of the Water Quality Regulations entitled "Approvals" under subsection A (3)(a) provides a list of activities which require a Water Quality Certification from RIDEM. Dredging and Dredged Material Disposal is listed in subsection (3)(a)i. A Water Quality Certification is a prerequisite to the issuance of a Dredging Permit.

The Decision issued by the Director contained five (5) reasons for his denial of the Application. All of these reasons were presented in relationship to the Water Quality Regulations. The Director found in his five (5) reasons for denial that the Water Quality Application was either "insufficient/incomplete" or that it failed to meet the requirements of the Water Quality Regulations. The Decision did not address compliance with the Dredging Regulations except to the extent that it did not meet the requirements of the Water Quality Regulations.

In the instant Appeal the Applicant bears the burden of proof by a "preponderance of the evidence" that the Application was improperly denied. A "preponderance of the evidence" has been defined as "A trier of fact must believe that the facts asserted by the proponent are more probably true than false." Narragansett Electric Co. v. Carbone, 898 A2d 87,99 (RI 2006)

"The burden of proof rests upon the party who asserts the affirmation of an issue, and this burden never shifts." General Acc Inc., Co. v. American National Fireproofing, Inc. 716 A2d 751,575 (RI 1998)

The Decision

The Decision (Exhibit #100) identifies five (5) reasons for the denial. The five (5) reasons listed in the Decision are as follows:

1. Weaver's Cove Application is insufficient/incomplete as demonstrated by Department Findings No. 13. Pursuant to Rule 14A(6) and Rule 15C(3)(e) of the Water Quality Regulations, Applicant must establish by "a preponderance of clear and scientifically valid evidence having a probative value demonstrating, to the satisfaction of the Director, that the activity will not violate the surface water quality standards established by these Water Quality Regulations, and amendments thereto."
2. Weaver's Cove Application is incomplete/insufficient as demonstrated further by Department Findings No. 14a, 15a, 15b, 17 and 18. Pursuant to Rule 14C and Rule 15C(3)(d) of the Rhode Island Water Quality Regulations, where Applicant has failed "to submit information deemed necessary by the Department in order to fully assess the impact of the proposed project on waters of the State ..., it [shall] constitute valid cause for denial of the application."
3. Weaver's Cove Application is invalid for failure to adequately define the scope of the final project. The scope of the Weaver's Cove project has substantially changed as demonstrated by Department Findings No. 18, 19 and 21. Pursuant to Rule 14C of the Rhode Island Water Quality Regulations, where Applicant has failed "to support any changes in the scope of the proposed project, actual, or anticipated, [it] shall constitute valid cause for denial of the application."
4. Weaver's Cove, as demonstrated by Department Findings No. 13 and 17 has not demonstrated that the proposed activities will not violate the antidegradation standards pursuant to Rules 9C and 18 of the Water Quality Regulations.
5. Upon consideration of Department Findings No. 18, 19, 21, 22, and 23, Weaver's Cove actions failed to comply with the requirements under the Clean Water Act and specifically the purposes of Section 401 of the Clean Water Act at 33 U.S.C. § 1341(a)(1), the Marine Waterways and Boating Facilities Act of 2001, at RI Gen. Laws Chapter 46-6.1 (1956), and the purposes of

Rhode Island's Dredging Regulations Rule 1.2. Applicant failed to provide adequate information to enable the Department to determine the nature of its project(s); and failed to explain how the project(s) are viable in light of the United State's Coast Guard's May 9, 2007 letter; Applicant substantially changed the project(s); and failed to explain how the project(s) are viable in light of the United State's Coast Guard's May 9, 2007 letter; Applicant substantially changed the project(s); and Applicant continues to provide additional information to the Department regarding the project(s). These laws, rules and regulations are designed to balance the need to prevent environmental degradation with the need to prevent undue delay in the planning permitting and implementation of dredging projects.

I. REASON ONE FOR DENIAL

“Weaver's Cove Application is insufficient/incomplete as demonstrated by Department Findings No. 13. Pursuant to Rule 14A(6) and Rule 15C(3)(e) of the Water Quality Regulations, Applicant must establish by “a preponderance of clear and scientifically valid evidence having a probative value demonstrating, to the satisfaction of the Director, that the activity will not violate the surface water quality standards established by these Water Quality Regulations, and amendments thereto.”

A. Department findings

Department finding No. 13 states:

“Applicant proposed dredge window fails to address the effects on fish species other than winter flounder. Additionally, Applicant has failed to demonstrate the need to dredge outside of Rhode Island's standard dredge window.”

Water Quality Regulations (WQR) in Rule 14 states:

“Application for Approvals” states in part in section (A) ... Applications for Orders of Approval and Water Quality Certificates will be on forms provided by or in the manner prescribed by, DEM, to be submitted to the Director and shall contain such documentation as the Director may require, including but not limited to.”

B. Regulations

Section (6) of Rule 14(A) of the WQR it states:

“A preponderance of clear and scientifically valid evidence having a probative value demonstrating, to the satisfaction of the Director, that the activity will not violate the surface water quality standards established by these Water Quality Regulations, and amendments there to.”

Rule 15(C) of the WQR states:

“At any time during review, the Director may; ... (3) deny the Application for failure to satisfy the requirements of applicable State or Federal Laws and advise the Applicant of the right to appeal under Rule 21 of these regulations.

A denial may be based on, but not limited to any of the following:”

The Director has denied the Application on the grounds that it is “insufficient/incomplete” on two issues:

1. The effects of the dredging on species other than winter flounder; and
2. A demonstration of need to dredge outside of Rhode Island's standard dredge window.

1. Other Species

The Director found that the Application was insufficient/incomplete in part because it did not provide evidence regarding the adverse affects on species other than winter flounder. WCE argues in their briefs that the Director's position is unfounded. WCE first asserts that it submitted voluminous data on the effects on a variety of marine species in the Application as well as after the proceedings. WCE also points out that abundant information was provided in the Application under the Federal Clean Water Act along with Application to FERC and USACE. WCE argues that their testing indicates that the act of dredging will not adversely affect the winter flounder population. RIDEM in its May 30, 2006 letter to WCE (Exhibit #48) advised that they are concerned about the “adverse impacts of this project and other existing activities on winter flounder, shellfish and other important species”.

WCE in its response dated June 29, 2006 (Exhibit #50) stated that “There are no mapped shellfish beds within the Federal navigation channel or the footprint of the dredging operation. (See Attachment D) Hence, there will be no significant adverse impact to shellfish in Rhode Island waters and there is no need for a mitigation plan for shellfish.” (Page 2)

The fact that there is no “mapped shellfish beds” in the dredge area does not mean that there is no shellfish present and that those shellfish will not be adversely affected by the dredging project. Shellfish may exist in areas which are not mapped for shellfish harvesting. The burden is on the Applicant to provide RIDEM with “scientifically probative evidence” that there is no shellfish present in the affected area. The response of WCE to RIDEM's request for assurances regarding shellfish is to refer to an attachment (Attachment D of Exhibit #50) which is a map which indicates no “mapped shellfish beds” in the dredge area.

RIDEM takes exception to the position of WCE that they have submitted documentation relating to other species in its Federal applications to FERC and USACE. RIDEM references the Federal District Case of *Mountain Rhythm Resources v. FERC*, 302 F.3d 958. The court said “[a]lthough it is not improper to expect cooperation between state and federal agencies, referring [the state agency] to FERC's files was neither effective for [the Applicant] nor particularly helpful to [the state agency].” at FN 4. I do not find scientifically probative evidence within the material submitted with the Application which addresses the issue of “other species” especially shellfish. The Applicant takes the position that a letter from RIDEM to WCE dated June 19, 2007 (Exhibit #93) serves as an acknowledgment that the Applications were complete. The letter states “We believe that these two submissions complete your response for the additional information requested in our letter of April 24, 2007.” I do not agree that RIDEM's letter stands for the proposition that the Applications are complete. When the letter is read in its entirety, it is clear that the Department would continue with review of various issues brought up in the Application as well as through the public comments.

I find that the Applicant has not met its burden of proof by a preponderance of the evidence that it has provided a complete Application in the issue of adverse affects on species other than winter flounder. On this issue I uphold the Decision of the Director that the Application is insufficient/incomplete.

2. Dredge Window

The Director found as part of the first reason for Denial that the Application was insufficient/incomplete because the Applicant failed to demonstrate the need to dredge outside the standard dredge window. In its Appeal the Applicant takes a number of positions.

First it argues that there is no standard dredge window. Applicant states that the Dredge Regulations do not define a “Dredge window” but does refer to it in Section 8.2.8. Secondly the Applicant alleges that the modeling done by its consultant, A.S.A., establish that the proposed dredge project would not have adverse impacts on marine wildlife or the environment.

The Dredge window at the time of WCE's Application was November 1st through December 31st. When WCE submitted its “updated” Application in 2006 the standard dredge window was from

October 15th through January 15th. A document entitled “State of Rhode Island Dredging Application Checklist” is attached to the Applications submitted by the Applicant in July of 2004 (Exhibits #19 and 20). On page 4 thereof it states “Additional information that may be required: (1) A letter requesting the timeframe other than November 1 through December 31.

WCE proposed specific information regarding the length of time it intended to dredge in its “updated” Application (Exhibit #43). WCE indicated that the dredging effort in Rhode Island was expected to continue for seven and a half (7.5) months on a twenty-four (24) hour basis, seven (7) days a week. This extent of dredging is clearly beyond the standard dredge window. WCE alleges in its reply brief that the need to dredge at the proposed intensity was in order to meet the “three year construction schedule required to complete the remainder of the LNG facility” (p. 20). WCE does not indicate that this information was ever communicated to RIDEM.

RIDEM requested WCE to provide specific information on the issue of the Dredge window twice in its comments on March 7, 2005 (Exhibit #30) and its comments on May 30, 2006 (Exhibit #48). WCE proposes not to dredge between “January 15 through May 31 of any year” (Exhibit #50 p. 2). The dredging therefore would be from June 1 through January 14. WCE response to RIDEM comments only address that their test shows no adverse impact. The responses never address the “need to dredge outside the standard dredge window”.

I find by a preponderance of the evidence that WCE's Application is insufficient/incomplete due to its failure to provide evidence to show the need to dredge outside the standard dredge window.

II. REASON TWO FOR DENIAL

“Weaver's Cove Application is incomplete/insufficient as demonstrated further by Department Findings No. 14a, 15a, 15b, 17 and 18. Pursuant to Rule 14C and Rule 15C(3)(d) of the Rhode Island Water Quality Regulations, where Applicant has failed ‘to submit information deemed necessary by the Department in order to fully assess the impact of the proposed project on waters of the State ..., it [shall] constitute valid cause for denial of the application’.”

A. Department Findings

Department Findings No 14 states:

“Applicant failed to provide information requested and essential to:

- a. adequately quantify elevated turbidity levels during dredging operations in Rhode Island.
- b. determine the effect of increasing water depth on circulation patterns and dissolved oxygen levels in Massachusetts.”

Department Findings No. 15 states:

“Applicant failed to provide

- a. a proposed mixing zone in Rhode Island waters
- b. a dredging water quality monitoring plan for dredging in Rhode Island waters, including procedures to follow in the event water quality impacts are observed.”

Department Findings No. 17 states:

“Narragansett Bay and Mount Hope Bay provide significant opportunities for recreational boating and fishing. An estimated 60,000 recreational boaters use these waters every year. The Applicant failed to provide adequate documentation on the effect that increased LNG (smaller) vessel transit will have on the designated uses of Class SA, SB and SB1 waters, including secondary contact recreational activities.”

Department Findings No. 18 states:

“Applicant's **May 3, 2007** submission, reported that the size of the proposed LNG ship will be reduced to accommodate a capacity of 55,000 cubic meters resulting in approximately 120 to 130 deliveries per year (240 to 260 roundtrips per year).”

B. Regulations

Rule 14c of the WQR states:

“Failure of the applicant to submit information deemed necessary by the Department in order to fully assess the impact of the proposed project on the waters of the State or to support any changes in the scope of the proposed project, actual or anticipated, shall constitute valid cause for denial of the application.”

Rule 15C of the WQR states:

“At any time during review, the Director may:

... (3) Deny the application for failure to satisfy the requirements of applicable State or Federal Laws ... A denial may be based on, but is not limited to any or all of the following:

... (d) Failure to submit any information required by the Department.”

The rules are clear in its language giving the Department in Rule 14 with broad power in the matter of requesting information it deems necessary “to fully assess the impact of the proposed project on waters of the State”. The Director is afforded authority in Rule 15 to deny applications which he so determines for “failure to provide information required by the Department”.

1. Turbidity

In its letter to WCE dated March 7, 2005 (Exhibit #30), the Department in its first specific comment stated:

“Water Quality Sampling and Sediment Characterization RIDEM is concerned with the topic of resuspension of sediment and the attendant turbidity and dissolved metals fields in the water column that results from the dredging operation. The analysis contained in the EIS also does not address turbidity explicitly: TSS is modeled instead.”

In its “updated” Application dated January 30, 2006 (Exhibit #43) at page 4 states that it “also incorporates certain information necessary to respond to your March 7, 2005 comments on our original July 2004 Section 401 WQC Application”. There does not appear to have been any documented response to the Department's concern to WCE's failure to provide information regarding turbidity.

WCE disagrees with the necessity to provide information in terms of turbidity. WCE argues in its brief that its Application is complete on the issue of “sediment loadings” during dredging and the potential impact on the environment” (p. 23). WCE takes the position that “Turbidity is simply a measure of how the particles in the water affect the transmission of light through the water column and, as such, “turbidity” is an indirect measure of the mass, number and size of the particles in the river water” (WCE Brief page. 23, footnote 23).

WQR Rule 8D(3) establishes the standard for surface water quality in Rhode Island. In Table 2 of Rule 8D(3) there is express criteria relating to “Color and Turbidity” where it states for Class SA, SA(b) that “None in such concentrations that would impair any usages specifically assigned to this class. Turbidity not to exceed 5 NTU over background.” Table 2 of Rule 8D(3) goes on to establish a criteria for Class SB, SB1, SB(a), SB1(a) and Class SC as follows: “None in such concentrations that would impair any usages specifically assigned to this class. Turbidity not to exceed 10 NTU over background.”

The fact that the WQR tables contain specific reference to levels of Turbidity supports the fact that the Department acted within its authority to request test results in terms of Turbidity. WCE reacts to the request for data in terms of turbidity by asserting that the data and analysis in terms of total suspended solids (TSS) provide an appropriate if not better standard. WCE states in its “updated” Application that it would provide turbidity measurements during the dredging as part of its monitoring program. WCE has failed and refused to provide data regarding turbidity that allowed the Department to fully assess the impact of the proposed project on surface water quality as required by WQR Rule 14. I find that the Applicant has not met its burden of proof by

a preponderance of the evidence that it has provided a complete Application on the issue of turbidity. The Director acted within his authority in denying the Application as established in WQR Rule 15.

2. Mixing Zone

The Director asserts in his decision that the Applicant has not provided scientifically probative evidence on the issue of a “Mixing Zone”. WCE responds by arguing that in light of the fact that they are not disposing of dredge material within the State of Rhode Island they are not required to provide information regarding a “Mixing Zone”.

RIDEM in its letter to WCE dated April 24, 2007 (Exhibit #79) requests “information on the required mixing zone proposed for Rhode Island waters”. Said letter included an attachment entitled “Information Desired in Regard to Weaver's Cove Energy LNG Application April 6, 2007”. RIDEM alleges that this attachment reflected a meeting between RIDEM and WCE. Item 4 of said attachment states:

“A separate document specific to Rhode Island that addresses the proposed water quality monitoring program that will be performed during dredging in Rhode Island waters. This monitoring will be required regardless of whether or not exceedances are observed. Of specific concern are metals exceedances of copper and zinc during dredging. Some information on monitoring has been reviewed by RIDEM, however, the monitoring program for Rhode Island Waters needs some improvement and must address metal exceedances. It is anticipated that a mixing zone will be required for copper and zinc. This document must be approved as part of the review process for compliance with our regulations.”

WQR Rule 7 definition states:

“Mixing Zone” means a limited area or volume in the immediate vicinity of a discharge where mixing occurs and the receiving surface water quality is not required to meet applicable standards or criteria provided the minimum conditions described in Rule 8.D1.e and 8.D.1.f. of these regulations are attained.

The Applicant has advised RIDEM in its “updated application” that discharge of the dredge materials will not take place in Rhode Island. (Exhibit #43) The site of disposal is “located in Federal waters approximately 13 miles from the entrance to Narragansett Bay”.

It is not clear from the arguments of the RIDEM why a “Mixing Zone” is required within the State of Rhode Island if the dredge material is to be disposed of in Federal waters. I find therefore that the Applicant is not required to file with RIDEM a “Mixing Zone” plan.

3. Water Quality Monitoring Plan

The Director denied the Application, in part, because the Applicant failed to provide scientifically probative evidence on the issue of Water Quality Monitoring Plan. In its May 30, 2006 letter (Exhibit #48) to the Applicant RIDEM makes the following request: “Please detail the aspects of the proposed monitoring/sampling program that would occur during dredging of Rhode Island waters”. The response of WCE in its letter dated June 29, 2006 (Exhibit #50) advised that WCE “does not propose to dispose of any dredged material in Rhode Island waters, therefore the reference monitoring plan for Rhode Island is not specifically required” (p. 10).

RIDEM argues that the Water Quality Monitoring Plan is necessary for any dredge related activity. The Applicant did not, after request from RIDEM, submit a Water Quality Monitoring Plan even though it indicated that it would at a later date. In Exhibit #52 WCE states “If the dredge work were to begin at the south end of the channel [so-called Dredge Element #1 in the Water Quality Monitoring Plan], we would begin the program with biweekly monitoring in Rhode Island waters”.

WCE acknowledges the necessity of a Water Quality Monitoring Plan but did not respond to RIDEM's continued request for details. I find that the Applicant has not met its burden of proof by a preponderance of the evidence that it has provided a complete Application on the issue of a Water Quality Monitoring Plan. The Director properly denied the Application for failure of the Applicant to comply with QWR Rule 14 (A)(4).

4. LNG Vessel Transit

The Director determined that WCE failed to advise RIDEM of their change of plans regarding the size of LNG Vessels and the frequency of transit in Narragansett Bay. WCE argues that the issue of size and frequency of transit of the LNG Vessels is not pertinent to the Application for dredging. They argue that RIDEM is acting beyond its jurisdiction and outside the parameters of the Application.

RIDEM argues that the frequency of LNG Vessel transit is relevant to the water quality certification especially as it impacts the use of Rhode Island waters as established by use classifications.

The Applications before RIDEM for Dredging and Water Quality Certification does not extend to the nature and frequency of vessels which may travel through Narragansett Bay once the dredging project has been completed. The Applications are limited to a project which proposes to remove by dredging “approximately 140,000 cubic yards of in-site sediment from within the Rhode Island portion of the federal channel”. The project begins and ends with the dredging. RIDEM has the authority and responsibility to protect the water quality as affected by the dredging project. RIDEM does not have authority under this application process to regulate the size or frequency of travel of vessels using Rhode Island waters after this project has been completed. I find that the Director acted in excess of his authority in requesting information regarding the size and frequency of LNG Vessels which may be the beneficiaries of their dredging project. The Applicant is, therefore, not in violation of WQR Rule 14(A)(4) for failure to provide data relating to prospective LNG Vessel transit.

III. REASON THREE FOR DENIAL

“Weaver's Cove Application is invalid for failure to adequately define the scope of the final project. The scope of the Weaver's Cove project has substantially changed as demonstrated by Department Findings No. 18, 19 and 21. Pursuant to Rule 14C of the Rhode Island Water Quality Regulations, where Applicant has failed ‘to support any changes in the scope of the proposed project actual, or anticipated, [it] shall constitute valid cause for denial of the Application’.”

A. Department Findings

Department Findings No. 18 states:

“Applicant's May 3, 2007 submission, reported that the size of the proposed LNG ship will be reduced to accommodate a capacity of 55,000 cubic meters resulting in approximately 120 to 130 deliveries per year (240 to 260 roundtrips per year).”

Department Findings No. 19 states:

“In a letter dated **May 9, 2007**, the United States Coast Guard notified Weaver's Cove that upon review of Applicant's proposal to use smaller LNG tankers that the waterway may not be suitable for the type and frequency of LNG marine traffic.”

Department Findings No. 21 states:

“In a letter dated **June 19, 2007**, the Department advised Waver's Cove that it was continuing review of their Application, including their June 12, 2007 submissions; as well as of the

Department's intent to consider and review, as part of Weaver's Cove Application, all applicable findings of the U.S. Coast Guard as described in their May 9, 2007 letter.”

B. Regulations

OWR Rule 14C states:

“Failure of the applicant to submit information deemed necessary by the Department in order to fully assess the impact of the proposed project on waters of the State or to support any changes in the scope of the proposed project, actual or anticipated, shall constitute valid cause for denial of the Application.”

1. Smaller LNG Vessels

The allegation by the Director in his Decision at Reason Three differs from the previous two reasons in that he asserts that the Applicant “has not demonstrated” that the activities will not violate antedegradation. The previous reasons for denial are based on the fact that the Application is “insufficient/incomplete” in violation of Rule 14 A(6) and Rule 15 C(3)(e) of the Water Quality Regulations. In the instance of Reason Three it is necessary to address the merits and sufficiency of the Applicant's submissions.

The Director alleges that the Applicant has failed to adequately define the scope of the final project. The Department Findings all relate to issue of the size and frequency of LNG Vessel Transit. The Application presented by WCE is for a dredging permit which is dependent upon the issuance of a Water Quality Certification. The issues brought forth by these applications involve the method of dredging, the mitigation of damage to water quality as a result of the dredging and the disposal of dredged materials. The applications do not relate to what type or size of vessel may subsequently travel in the waters of the State of Rhode Island.

The Applicant is not required to advise RIDEM of its plans for the size and frequency of vessel transit as part of its application. Although RIDEM may be rightfully concerned with the affect of frequent and disruptive transit of LNG Vessels through Narragansett Bay, it cannot influence that fact through the Application for Dredge Permit. The Water Quality Certification relates to the Dredging Project and does not extend to any subsequent nondredge activities which the Applicant may plan to carry on.

2. Coast Guard Letter

The Director points to the letter from the United States Coast Guard to WCE dated May 9, 2007 (Exhibit #84) as a reason for the denial of the Application. The Coast Guard letter was sent to Applicant in response to its announcement that it intended to change its plan for size and frequency of LNG transit. Applicant announced that it would use smaller vessels and this would result in an increase of deliveries from an originally estimated number of 50 to 70 to deliveries of approximately 120 to 130. The increase of deliveries is anticipated to have a greater disruptive influence on the quality of use of Narragansett Bay both recreationally and commercially.

The Director acted beyond the scope of his authority in dismissing the Application for failure to provide documentation on the issue of the size and frequency of LNG Vessel transit. The change in anticipated size and frequency of LNG Vessel transit does not change the scope of the project.

IV. REASON FOUR FOR DENIAL

“Weaver's Cove, as demonstrated by Department Findings No. 13 and 17 has not demonstrated that the proposed activities will not violate the antedegradation standards pursuant to Rules 9C and 18 of the Water Quality Regulations.”

A. Department Findings

Department Finding No. 13 states:

“Applicant proposed dredge window fails to address the effects on fish species other than winter flounder. Additionally, Applicant has failed to demonstrate the need to dredge outside of Rhode Island's standard dredge window.”

Department Finding No. 17 states:

“Narragansett Bay and Mount Hope Bay provide significant opportunities for recreational boating and fishing. An estimated 60,000 recreational boaters use these waters every year. The Applicant failed to provide adequate documentation of the effect that increased LNG (smaller) vessel transit will have on the designated uses of Class SA, SB and SB1 waters, including secondary contact recreational activities.”

B. Regulations

QWR Rules 9C and 18 read as follows:

Rule 9C states:

“Activities Shall Not Violate Antidegradation - No person shall discharge pollutants into any waters of the State, or perform any activities alone or in combination which the Director determines will likely result in a violation of the Antidegradation provisions of these regulations (Rule 18).”

Rule 18 states:

“Antidegradation of Water Quality Standards

A. Purpose - The State Antidegradation Regulations are based on the Federal Antidegradation Policy requirements (40 CFR 131.12) and have as their objective the maintenance and protection of various levels of surface water quality and uses. Antidegradation applies to all projects or activities subject to these regulations which will likely lower water quality or affect existing or designated water uses, including but not limited to all Water Quality Certification reviews and any new or modified RIPDES permits. For the disposal of dredged or fill material into the waters of the state, 40 CFR Part 230 Section 404(b)(1) guidelines shall be followed in the evaluation of 40 CFR 131.12(a)(1) and the Antidegradation Policy. The Antidegradation regulations consist of four (4) tiers of water quality protection.

B. Tier 1 - Protection of Existing Uses - Any existing in-stream water uses and level of surface water quality necessary to protect the existing uses, shall be maintained and protected.

C. Tier 2 - Protection of Water Quality in High Quality Waters - With the exception of Outstanding National Resource Waters, in surface waters where the existing water quality exceeds levels necessary to support propagation of fish and wildlife and recreation in and on the water, that quality shall be maintained and protected, except for insignificant changes in water quality as determined by the Director and in accordance with the Antidegradation Implementation Policy, as amended. An exception to this level of protection may only be allowed if it can be proven to the Director by a preponderance of clear and scientifically valid evidence having a probative value, and the Director finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the RI Continuing Planning Process, that allowing significant water quality degradation is necessary to accommodate important economic and social benefit in the area in which the receiving waters are located. In allowing such significant degradation or lower water quality, the Director shall assure water quality adequate to fully protect existing and designated uses. In allowing a change in water quality, significant or insignificant, all reasonable measures to minimize the change shall be implemented. Adequate scientifically valid documentation shall be provided to the Director demonstrating that designated and existing uses, water quality to protect those uses, and all applicable water quality standards,

will be fully protected. Further, the highest statutory and regulating requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control shall apply.

D. Tier 2 1/2 - Protection of Water Quality for SRPWs - Where high quality waters constitute a SRPW, there shall be no measurable degradation of the existing water quality necessary to protect the characteristic(s) which cause the waterbody to be designated as an SRPW. Notwithstanding that all public drinking water supplies are SRPWs, public drinking water suppliers may undertake temporary and, short term activities within the boundary perimeter of a public drinking water - supply impoundment for essential maintenance or to address emergency conditions in order to prevent adverse effects on public health or safety, provided that these activities comply with the requirements set forth in Rule 18.B. (Tier 1 Protection of Existing Uses) and Rule 18.C. (Tier 2 Protection of Water Quality in High Quality Waters).

E. Tier 3 -Protection of Water Quality for ONRW - Where high quality waters constitute an Outstanding National Resource, as defined in Rule 7, that water quality shall be maintained and protected. The State may allow some limited activities that result in temporary and short-term changes in the water quality of an ONRW. Such activities must not permanently degrade water quality or result in water quality lower than that necessary to protect the existing uses in the ONRW.

F. Implementation - The Antidegradation provisions shall be implemented in accordance with the Antidegradation Implementation Policy (Appendix C), as amended.”

1. Antidegradation

Antidegradation standards specifically governs the discharge of pollutants or the performance of any activities above or in combination which the Director determines will likely result in a violation of the antidegradation provisions of the Water Quality Regulations. The activities which the Director has determined will result in degradation are three fold: (1) the failure to address the effects on fish species other than winter flounder; (2) the need to dredge outside of Rhode Island's standard dredge window and (3) the effect that increased LNG Vessel transit will have on designated uses.

A. Other Species

In analyzing the first reason for the denial of Application it was determined that the Application was incomplete/insufficient due to failure to provide information or the issue of impact on water quality, specifically adverse affects on native shellfish. The burden is on the Applicant to prove by a preponderance of the evidence that the proposed discharge will not likely result in a violation of the antidegradation provisions of the regulations under Rule 18 of the Water Quality Regulations. It is clear that if the Applicant has been found to have filed an incomplete Application on this issue it cannot meet the greater burden. I find that the Applicant has not proven by a preponderance of the evidence that the dredging operation will not adversely affect fish species other than winter flounder.

B. Dredge Window

The Applicant has been found in the analysis of the first reason for denial that its Application was insufficient/incomplete on the issue of evidence establishing the need to dredge outside the standard dredge window. In having found that the Applicant's Application is incomplete/insufficient I find that the Applicant has not met its burden by a preponderance of the evidence that dredging outside the standard dredge window will not adversely affect the surface water quality and uses under Rule 18 of the Water Quality Regulations.

C. LNG Vessels

The last issue raised by the Director on the issue of antidegradation is the use of smaller LNG Vessels and the increase of trips to the terminal. I have found previously that the issue of size and transit of vessels that may use the dredged channel is not relevant to the pending Application. The subject matter of WCE's Application is a dredging project. The Applicant has no burden of proof in this regard.

V. REASON FIVE FOR DENIAL

“Upon consideration of Department Findings No. 18, 19, 21, 22, and 23, Weaver's Cove actions failed to comply with the requirements under the Clean Water Act and specifically the purposes of Section 401 of the Clean Water Act at 33 U.S.C. § 1341(a)(1), the Marine Waterways and Boating Facilities Act of 2001, at RI Gen. Laws Chapter 46-6.1 (1956), and the purposes of Rhode Island's Dredging Regulations Rule 1.2. Applicant failed to provide adequate information to enable the Department to determine the nature of its project(s); and failed to explain how the project(s) are viable in light of the United State's Coast Guard's May 9, 2007 letter; Applicant substantially changed the project(s); and Applicant continues to provide additional information to the Department regarding the project(s). These laws, rules and regulations are designed to balance the need to prevent environmental degradation with the need to prevent undue delay in the planning permitting and implementation of dredging projects.”

A. Department Findings

Department Findings No. 18 states:

“Applicant's **May 3, 2007** submission, reported that the size of the proposed LNG ship will be reduced to accommodate a capacity of 55,000 cubic meters resulting in approximately 120 to 130 deliveries per year (240 to 260 roundtrips per year).”

Department Findings No. 19 states:

“In a letter dated **May 9, 2007**, the United States Coast Guard notified Weaver's Cove that upon review of Applicant's proposal to use smaller LNG tankers that the waterway may not be suitable for the type and frequency of LNG marine traffic.”

Department Findings No. 21 states:

“In a letter dated **June 19, 2007**, the Department advised Weaver's Cove that it was continuing review of their Application, including their June 12, 2007 submissions; as well as of the Department's intent to consider and review, as part of Weaver's Cove Application, all applicable findings of the U.S. Coast Guard as described in their May 9, 2007 letter.”

Department Findings No. 22 states:

“After having been advised that the Department was continuing its review of their Application, on **June 27, 2007** Applicant filed a Petition for Review of Inaction of the Rhode Island Department of Environmental Management, Pursuant to the Energy Policy Act of 2005, with the U.S. Court of Appeals for the D.C. Circuit. No. 07-1235.

Department Findings No. 23 states:

“After filing a petition with the U.S. Court of Appeals for the D.C. Circuit alleging inaction of the Department, on **July 18, 2007** Applicant submitted additional information for the Department to review as part of its Application, specifically, Weaver's Cove Energy ‘Response to May 9, 2007 United States Coast Guard Letter’ and Response to May 9, 2007 United States Coast Guard Letter, Exhibits”.

The Director's fifth reason for denial of the Applications seems to be based on issues involving the LNG Vessels and the Coast Guard Letter dated May 9, 2009. The Director states that the "Applicant failed to provide adequate information" and "substantially changed the project(s)". In reading the "Departmental Findings" I cannot determine any issue, except the Coast Guard Letter of May 9, 2009, that has not already been addressed. The Coast Guard Letter of May 9, 2007 is in response to the submission of WCE to use smaller vessels with more trips. In so far as I have already found that the size and frequency of vessel transit is not part of the Applications filed, I find that the Coast Guard Letter of May 9, 2007 is irrelevant to the Applications. I find by a preponderance of the evidence that the Director acted beyond his discretion in denying the Applications for the reasons stated in Reason five (5) of his Decision.

VI. APPLICANT'S REQUEST TO GRANT APPLICATIONS

In addition to Appellant's Appeal from the Director's Decision denying the Applications the Applicant has requested the Hearing Officer to issue a ruling which would grant the Applications. The Applicant is requesting that a dredging permit and water quality certification be issued. The standard review for an Appellant for reversal of a denial of a dredging permit is found in Rule 13.5.3 of the Dredging Regulations. The Appellant must demonstrate by clear and convincing evidence that:

"13.5.3.1 A literal enforcement of the regulations will result in unnecessary hardship.

13.5.3.2 That the dredging project proposed in the Application complies with R.I. General Laws, Chapter 46-6.1; and

13.5.3.3 That the issuance of a permit will not be contrary to the public interest, public health and the environment."

Rule 13(3)(b) of the Water Quality Regulations provides that projects involving dredging and disposal of dredging materials must apply for and receive a Water Quality Certification. In order for the Hearing Officer to find that the Applicant is entitled to a dredging permit, it must first be determined that the Applicant is entitled to a Water Quality Certification.

The standard of proof for the granting of a Water Quality Certification is proof by a preponderance of the evidence that it has complied with the Water Quality Regulations. I have determined that the Applicant has failed to meet its burden of proof by a preponderance of the evidence that it has filed a sufficient/complete Application. I have also determined previously in this Decision that the Applicant has not met its burden of proof by a preponderance of the evidence that it is in compliance with the standards of the Water Quality Regulations in several critical areas.

I deny Applicant's request that a Water Quality Certification be issued on the grounds stated previously in this Decision. I deny Applicant's request that a dredge permit be issued on the grounds that it has not established its entitlement to a Water Quality Certification.

CONCLUSION

I find that the Director properly denied the Applications on several issues and improperly denied the Applications on several issues.

The first two reasons given for the Director's denial alleged that the Applications were "insufficient/incomplete" because WCE failed to provide information on the following issues: adverse affects on species other than winter flounder; the need to dredge outside the standard dredge window; turbidity; Mixing Zone, Water Quality Monitoring Plan and the LNG Vessels. I have determined that the Director acted beyond his authority under the circumstances for denying the Applications as "insufficient/incomplete" on the issues of Mixing Zone and LNG Vessels. I have determined that the Director acted properly and within his authority for denying the Applications as "insufficient/incomplete" for failure to provide documentation on the issues of

adverse affects on other species, need to dredge outside the standard dredge window, Turbidity and Water Quality Monitoring.

The third, fourth and fifth reasons for the Director's denial were based on the failure of the Applicant to prove that its Application met the requirements of the Water Quality Regulations. Reason three is found to be improper in that it is directed at the LNG Vessels and the United States Coast Guard Letter of May 9, 2007 (Exhibit #84). I have determined that the issue of the size and frequency of LNG Vessel transit is outside the purview of RIDEM on the Applications. The Director acted beyond his authority in dismissing the Applications on the issue of the LNG Vessels.

In reason four for Denial of the Applications the Director addressed the issue of violation of antidegradation standards of the Water Quality Regulations. I find that the Director properly exercised his authority in dismissing the Application for failure to prove that the dredging activity would violate antidegradation on the issues of adverse effects on other species and the need to dredge outside the standard dredge window. I find that the Director acted improperly and in excess of his authority on dismissing the Application for failure to prove the LNG Vessels would not violate antidegradation standards. The size and frequency of the LNG Vessels is not part of the appreciation for dredging permit or its relative Water Quality Certification.

In reason five for his Denial the Director alleges that the Applicant has failed to comply with the Clean Water Act and the Marine Waterways and Boating Facilities Act of 2001. I find that the facts relied upon by the Director for this reason for denial are irrelevant to the pending Application. Once again the Director focuses on the issue of the LNG Vessels which I have already determined are not relevant to the pending dredging Application.

Finally, on the request of the Applicant that its Applications be granted and the Decision of the Director be reversed, I find it is without merit. I have determined on several points that the Applications are insufficient/incomplete and on several points that the Applicant has not met its burden of proof.

For the reasons stated previously in this Decision, I uphold and affirm the Decision of the Director as indicated. The Applicant's Appeal is denied.

FINDINGS OF FACT

After review of all documentary evidence, exhibits and stipulated facts, I make the following findings of fact:

1. Those certain facts contained in a document entitled "Appellant and Appellee's Agreed Statement of Facts" filed on June 6, 2008 and annexed here to and made a part hereof as.
2. On August 10, 2009 RIDEM Director Dr. W. Michael Sullivan issued a Decision denying without prejudice the Applications of WCE.
3. On August 30, 2007 WCE filed a timely Appeal of the Director's Decision.
4. The Decision contained twenty three (23) Departmental Findings.
5. The Decision contained five (5) reasons for the Denial.
6. Reasons one (1) and two (2) allege that the Application is "insufficient/incomplete" based on the Water Quality Regulations.
7. Reasons three (3), four (4) and five (5) of the Decision allege that the Application violated the Water Quality Regulations.
8. The Applicant has failed to prove by a preponderance of the evidence that its Application is sufficient/complete on the issue of effects of dredging on species other than winter flounder.
9. The Department repeatedly requested documentation from Applicant of the effects of dredging on species other than winter flounder.
10. The Applicant has failed and refused to provide documentation of the effects of dredging on shellfish in the dredge area.

11. The Director properly dismissed the Application as insufficient/incomplete for failure to file scientifically probative evidence on the issue of the affects on species other than winter flounder.
12. At the time of the filing of the original Application on July 19, 2004, the standard dredge window was from November 1 through December 31.
13. At the time of the filing of its Amended Application on January 31, 2006, the standard dredge window was form October 15th through January 15th.
14. The Applicant proposed in its Application that it intended to conduct its dredging operation outside the standard dredge window from June 1st through January 14th.
15. The Applicant has failed to prove by a fair preponderance of the evidence its need to dredge outside the standard dredge window.
16. The Director properly dismissed the Application as insufficient/incomplete for failure to file scientifically probative evidence of the need to dredge outside the standard dredge window.
17. The Department has proven by a preponderance of the evidence that the Applicant failed and refused to provide the Department with documentation on the issue of turbidity.
18. The Department requested documentation on turbidity on several occasions including on March 7, 2006 (Exhibit #30).
19. The Applicant has taken the position that documentation on turbidity was not necessary and that their modeling on TSS is better evidence.
20. The Applicant has failed and refused to provide documentation on a "Mixing Zone".
21. The Department has repeatedly requested documentation on the Applicant's "Mixing Zone".
22. The Applicant has advised that it has been approved and plans to dispose of the dredge material thirteen (13) miles out to sea.
23. I find that the regulations do not require the Applicant to provide a "Mixing Zone" when it is disposing of dredge materials in the ocean outside Rhode Island jurisdictional boundaries.
24. The Director acted beyond his authority when he dismissed the Applications for failure to provide documentation on a "Mixing Zone".
25. The Applicant has failed and refused to provide sufficient/complete documentation on the issue of a Water Quality Monitoring Plan.
26. The Department repeatedly requested the Applicant to provide documentation to demonstrate its Water Quality Monitoring Plan.
27. A Water Quality Monitoring Plan is necessary and required by the Water Quality Regulations for dredging projects.
28. The Director properly dismissed the Application as insufficient/incomplete for failure to provide documentation on the issue of Water Quality Management Plan.
29. The Director dismissed the Application on insufficient/incomplete due to failure to provide documentation on the issue of size and transit of LNG Vessels.
30. I find as a fact that the Applications are for dredging and water quality certification on the issue of dredging and water quality certification on the issue of dredging and that the size and transit of LNG Vessels is not within the purview of RIDEM through the pending Applications.
31. The Director exceeded his authority and improperly dismissed the Application for failure to provide sufficient/complete documentation on the issue of size and transit of LNG Vessels.
32. The Director denied the Applications for failure to adequately define the scope of the final project.
33. The size and transit of the LNG Vessels is not a part of the scope of the project.
34. The position of the United States Coast Guard on Applications proposed LNG Vessels is not relevant to the pending Applications
35. The Director improperly dismissed the Applications on the grounds that the Applicant had not adequately defined the cope of the final project.
36. The Director dismissed the Applications because the Applicant did not demonstrate that the proposed activities would not violate the antidegradation standards of the Water Quality Regulations.

37. The Application does not adequately address the adverse effects that the dredge project will have on fish species other than winter flounder.

38. The Application does not adequately demonstrate the need to dredge outside the standard dredge window.

39. The Director acted within his authority and properly denied the Application to adequately address the facts stated in findings numbered 37 and 38.

40. The Director dismissed the Applications for failure to demonstrate that the increased LNG Vessel transit will not violate the antidegradation standards pursuant to the Water Quality Regulations.

41. The issue of the size and frequency of LNG Vessels is not relevant to the pending Applications for dredging.

42. The Director exceeded his authority and improperly denied the Application on the issue of size and frequency of LNG Vessel transit.

CONCLUSIONS OF LAW

After review of all documentary and stipulated evidence, I conclude the following as a matter of law:

1. The matter has been conducted in accordance with the Rules of the Administrative Adjudication Division for Environmental Matters, Section 401 of the Clean Water Act, the Water Quality Regulations and the Rules and Regulations for Dredging and the Management of Dredged Materials;

2. The Administrative Adjudication Division for Environmental Matters has jurisdiction over this matter pursuant to R.I.G.L. § 42-17.1 et seq.

3. An Application for dredging permit requires the issuance of a Water Quality Certification.

4. The Director denied the Application for Water Quality Certification in accordance with Section 401 of the Clean Water Act and the Rhode Island Water Quality Regulations.

5. The Applicant has not met its burden of proof by preponderance of the evidence that the Director improperly denied its Application for Water Quality Certification.

6. The Application has not met its burden of proof by clear and convincing evidence that the dredging project proposed in the Application complies with R.I.G.L. § 46-6.1

7. The Applicant has not met its burden of proof by clear and convincing evidence that the issuance of a permit will not be contrary to the public interest, public health and the environment. Therefore it is hereby

ORDERED

The Applicant's Appeal is **DENIED**.

Entered as an Administrative Order this ___ day of _____, 2009 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins

Acting Chief Hearing Officer

Entered as a Final Agency Order this ___ day of _____, 2009.

Terrence Gray

Assistant Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI Gen. Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30)

days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms