

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN RE: ROBERT FROST  
Application 67-12-1

DECISION AND ORDER

This matter is before the Hearing Officer pursuant to Title 46, Chapter 12 and section 42-35-9 of the General Laws of Rhode Island as amended, the Water Quality Regulations for Water Pollution Control (hereinafter "Water Quality Regulations") and Administrative Rules of Practice and Procedure for the Department of Environmental Management (hereinafter "Administrative Rules and Regulations").

The applicant, Robert Frost, submitted a request for a water quality certification to the Division of Water Resources, Rhode Island Department of Environmental Management for the construction of a one hundred (100) foot long by eight (8) foot wide pier, to dredge a channel six hundred (600) feet long and to dispose of the dredge materials on shore. The applicant sought a certification that its project would not violate applicable water quality standards for the area. Such water quality certification is a requirement before a project is submitted to the Coastal Resources Management Council by that council's regulations and the application was deferred until the Division of Water Resources rendered a decision.

After first denying the water quality certification on September 27, 1984, the Division of Water Resources convened a meeting on January 10, 1985. Present at the meeting, in addition to the Division of Water Resources personnel, were the attorneys and technical experts representing the applicant and opponents to the project. On March 6, 1985, the Division of Water Resources again denied the issuance of a water quality

certification. The applicant appealed the decision of the Division on March 15, 1985 and chose not to have a hearing but rather to submit the existing record and briefs to a Hearing Officer for decision.

There were several intervenors, Save-the-Bay, the Kickamuit River Council and the Town of Warren. Only the attorney for the Kickamuit River Council (hereinafter "KRC") submitted a brief. The applicant's attorney and the attorney for the Division of Water Resources each submitted briefs as well as reply briefs and reply and rebuttal briefs.

It is undisputed that the water quality designation in the area of the proposed project is SA, the highest quality designation for salt water, and consequently, in order to obtain a certification the applicant must show that the project as proposed will not degrade the water quality.

The fundamental argument of the KRC is that the applicant's project is a marina and therefore is not approvable under the Division of Water Resources water quality regulations. The definition of a marina in the Water Quality Regulations for Water Pollution Control (hereinafter "WQR") is a structure "...that may accommodate over four vessels." [emphasis added] The Coastal Resources Management Program of March 1978 as amended January 23, 1982 defines marina as a structure that "...services five or more recreational boats..."

Within the context of these definitions the applicant's project must be considered a marina under the WQR and may be considered one under the Coastal Resource Management Program.

The assertion of the KRC that the application should be deemed a request for "a down grading of the subject area water classification..." is germane since the Food & Drug Administration requires the conditional (or temporary) closure of waters adjacent to marinas for the purposes of

shellfishing. In addition, no provisions currently exists for new marina construction in Class SA waters since section 7.4 of the WQR specifically prohibits "wastes resulting from concentrations of vessels such as might be found in marinas."

KRC argues that the Division of Water Resources should not have proceeded beyond the point of declaring this project to be a marina. KRC argues that in addition to the legal definition of a marina the very size of the project clearly identifies the project as a marina. Mr. Fester of the Division of Water Resources alludes to the size of the project by quoting Chapman's Seamanship and Small Boat Handling. KRC asserts that the applicant intends, and that applicable zoning of the land allows for the use of the property for a marina.

It is undisputed that the dredging and dredge spoil disposal would have some impact on the salt marsh and the adjacent waters. The parties disagreed on the magnitude of those impacts and whether they would or would not degrade the water quality, and affect fish and shellfish resources.

#### FINDINGS OF FACT

I find the arguments of the KRC to be persuasive. While a great deal of the argument of the applicant and the Division centers upon the effects of the dredging and disposal of the dredge spoil, comparatively little discussion, other than that of the KRC, involves the scale of the project. The combination of the width and length of the pier and the width, length and depth of the dredged channel give the strongest indication, notwithstanding applicant's assertions, of a marina.

I find as fact that the project as proposed may accommodate more than four vessels.

Applicant argues that the Division of Water Resources may modify the project and that the applicant would be willing to abide by the requirements of a permit or suffer enforcement

actions by the Department. Assuming the best intentions of the applicant, the property may pass from his hands and subsequent owners, through ignorance or other motives might refuse to abide by the permit requirements. New owners may reasonably assume that a prudent regulatory agency would not allow the construction of a project that looked like a marina if it had not intended that the project could be utilized as a marina.

Both the regulations, and common sense, dictate that the applicant's project be considered a marina and it is therefore not permissible under the WQR of the Department of Environmental Management. Allowing the project to be considered a private dock despite its size would mean that the Department would be responsible thereafter for enforcing any restrictions placed on the applicant, his heirs or assigns. Such an enforcement responsibility might well not have a high priority given the many responsibilities of the Department.

CONCLUSIONS OF LAW

1. Applicant's proposed project is a marina as defined by the WQR. New marinas are prohibited in class SA waters.

2. Because the project is considered a marina the question of the impact of the dredging on the adjacent waters need not be decided.

It is hereby

ORDERED

That applicant Frost's appeal from the denial of the water quality certification is hereby denied.

20 January 1986  
Date

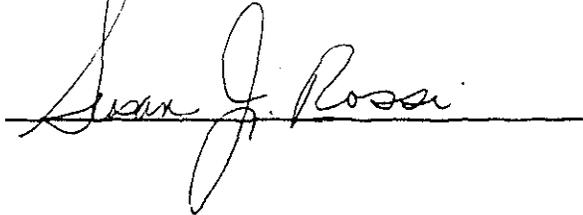
Stephen G. Morin  
Stephen G. Morin  
Hearing Officer

26 Feb 1986  
Date

Robert L. Bendick, Jr.  
Robert L. Bendick, Jr., Director

CERTIFICATION

I hereby certify that a true and accurate copy of the attached DECISION AND ORDER has been mailed first class mail postage prepaid to Jay Goodman, Esq., 11 Park Row, Providence, Rhode Island, Thomas Hogan, Esq., Hogan & Hogan, 201 Waterman Avenue, East Providence, Rhode Island, J.M. Keating, Esq., Save-the-Bay, 154 Francis Street, Providence, Rhode Island, Thomas E. Wright, Esq., Warren Town Hall, Main Street, Warren, Rhode Island. A copy was also sent interdepartmental mail to Howard M. Cohen on this 21<sup>st</sup> day of February 1986.

  
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