

FINAL DECISION
RE: STEVEN WHITTLE, RONALD CHICK, JIM CONANT,
JOHN MERSHON, ARLENE BAKER, ET AL.
ORDERS NUMBERS 044-V, 044-V-2, 044-V-3, 044-V-4, AND 044-V-5

After a through and comprehensive review of the entire record of a public hearing held on May 2, 1989 in Hartford and in consideration of all relevant laws and regulations, including CGS §§22a-359 et seq. and 22a-430, the following facts have been established:

FINDINGS OF FACT

1. This adjudicative proceeding concerns appeals of Removal and Restoration Orders issued by the Commissioner of Environmental Protection to Steven Whittle, et al. (No. 044-V; January 13, 1989), John Mershon, et al. (No. 044-V-2; April 5, 1989), Ronald Chick,* et al. (No. 044-V-4; April 5, 1989), Jim Conant, et al. (No. 044-V-5; April 5, 1989), and Arlene Baker, et al. (No. 044-V-3; April 5, 1989), regarding the allegedly unlawful placement and maintenance of several floating homes** at a docking facility in the Mystic River. All appeals have been joined for single adjudication.

Pursuant to CGS §22a-2, the Commissioner has delegated to this hearing officer the authority to issue final decisions (see Appendix A); Department of Environmental Protection (DEP) adjudicators routinely issue final decisions in cases involving appeals of administrative orders. All parties were apprised on the record of my intention to issue a final--not a proposed--decision in this case.

2. Arlene Baker owns waterfront property known as 19½ School Street, West Mystic (Groton). The Mystic River, adjoining the site, is a tidal, coastal, and/or navigable water of the State (Exs. 3 and 4).

Mrs. Baker has owned and maintained a small docking facility at this site for approximately thirty years, at times leasing or permitting the use of individual slips, at other times leasing the entire facility. The facility itself appears to be in compliance with all applicable state and municipal regulatory requirements (Testimony of Mark Tebbetts, Tape 4; testimony of Baker, Tape 8; see also Ex. 23).

* Incorrectly spelled "Chic" in the order.

** Also referred to in testimony and in documents as "houseboats" (e.g., Exs. 8, 15, 17, 19).

3. On or about May 1, 1988, Arlene Baker leased the site and the docking facility to Steven Whittle for a period of one year. (No written lease--if any was executed--was offered into evidence and no lease terms were disclosed). During that time, and with Mrs. Baker's knowledge (testimony of Baker), Mr. Whittle placed and/or allowed to be placed several floating homes waterward of the high tide line and affixed to the docks. Respondents Conant, Chick, and Mershon each own a floating home and originally came to the site as sub-lessees of Whittle.
4. Since the expiration of the one-year lease, Messrs. Conant, Chick, and Mershon have kept their floating homes at the site at the sufferance of Mrs. Baker. No lease or other similar agreement presently exists and Mrs. Baker testified that she is accepting no money for rent or use and occupancy. She has, however, continuously provided them with electricity, water, and upland toilet facilities, likewise without accepting payment.

Mrs. Baker indicated that the outcome of this adjudication will determine her future course of action regarding the owners of the floating homes; that is, if the floating homes are allowed to remain, she will likely enter into formal agreements for rental of the docking space.

5. In response to a complaint filed by a West Mystic resident, Mary-Beth Gadzik of the DEP Coastal Resources Management Division (CRMD) conducted several site investigations. On August 2, 1988, she observed eight floating homes with no visible means of self-propulsion; her follow-up report acknowledged that all were registered with the Department of Motor Vehicles (DMV) as "vessels" and indicated that they were "apparently not yet in compliance with a cease and desist order issued by town sanitarian" (Ex. 13). Ms. Gadzik observed no discharge from any boat at that time (Testimony, Tape 2). She also noted that the boats "bottom out" at low tide (Ex. 13; see also, testimony of Tebbetts, Tape 4), although the record does not indicate the nature of the bottom substrate or what impacts, if any, result from such occurrence.
6. During a second visit (January 5, 1989) Ms. Gadzik and Marshall Hoover, a field inspector with the DEP Water Compliance Unit, performed a "dye test" on one of the floating homes. By pouring dye into the sink and almost immediately observing a color change in the outflow into the river, the two concluded that this floating home was illegally discharging "graywater."* (At that time, Ms.

* "Graywater" is defined at 33 USC §1322 as "galley, bath, and shower water." No definition appears in Connecticut statutes or regulations; however, the parties have all evinced a similar understanding of the term.

Gadzik and Mr. Hoover believed all eight floating homes belonged to Mr. Whittle and, without further testing, extended their conclusion to the other seven).

7. On January 13, 1989, the Commissioner issued Order No. 044-V, finding *inter alia* that Mr. Whittle was unlawfully maintaining structures or encroachments waterward of the high tide line in violation of CGS §22a-359 et seq., and was discharging effluent into the waters of the state in violation of §22a-430. The order required cessation of the discharge, removal of the floating homes, and restoration of the site (Ex. 1).
8. Sometime in March or early April 1989, the CRMD staff learned that not all of the floating homes belonged to Mr. Whittle. Consequently, on April 5, 1989, the Commissioner issued Removal and Restoration Orders to owners Conant, Chick, and Mershon (Exs. 5, 7, 11). The Commissioner also issued a Removal and Restoration Order to Mrs. Baker, implying that as owner of the property and by her actions she participated in and is responsible for the maintenance of unlawful activities at the subject site. All five respondents contested the respective orders and have come before me for relief.
9. Ms. Gadzik took several photographs during her third visit on April 25, 1989 (Ex. 14). One photograph shows effluent emanating from one of the floating homes into the water, but its nature or content was not discussed on the record. Ms. Gadzik and Mr. Hoover did not, in fact, testify that they observed Conant, Chick, or Mershon discharging graywater.
10. By the time the public hearing began on May 2, 1989, Steven Whittle had removed his floating homes. The CRMD staff indicated its satisfaction with Whittle's compliance and chose not to proceed further against him. While the staff did not officially withdraw the particular order, the parties agreed and I indicated that I would direct this decision only to the remaining respondents.*
11. James Conant owns a 12' x 28' floating home which has been docked in the marina at 19½ School Street since June 1988 when Conant subleased dock space from Steven Whittle. Mr. Conant and his wife use and occupy this floating home as a dwelling unit (testimony of Mrs. Conant); it is secured to the dock and not used for navigation; in fact, the Conants own several other boats for recreational purposes. This floating home can be, but is not, equipped with an outboard motor.

* The CRMD also did not pursue a Removal and Restoration Order (Ex. 9) issued, along with the others, to Larry Devine.

A hookup to an on-shore source provides the Conants with electrical current; similarly, their water is obtained via a connection to a hose on the dock. Although they own a chemical toilet, they claim to use exclusively the on-shore facilities provided by Mrs. Baker. However, Mrs. Conant unequivocally acknowledged their discharge of sink and shower water into the Mystic River.

Respondent Conant's floating home is registered as a vessel with the Connecticut Department of Motor Vehicles (DMV) pursuant to CGS §15-144; the DEP has issued no permits for this floating home.

12. Ronald Chick owns an 18' x 50' floating home which has been docked in the marina at 19½ School Street since October or November 1988 when Chick subleased dock space from Whittle. Chick uses the floating home as both a dwelling unit and a commercial business office; it is secured to the dock and not used for navigation. It can be, but is not, equipped with an outboard motor.

A hookup to an on-shore source provides Chick with electrical current; similarly his water is obtained via a connection to shore. The floating home is also equipped with a phone line. Chick owns and uses a Coast-Guard approved marine sanitation device called "Lectra-San" which macerates and disinfects sewage prior to discharge. At present, Chick discharges the treated effluent (including treated graywater) into the harbor; the device can be adapted, however, for discharge into a sewage system.

Respondent Chick's floating home is registered as a vessel with the DMV pursuant to CGS §15-144; the DEP has issued no permits for the floating home.

13. John Mershon owns a 12' x 32' floating home which has been docked in the marina at 19½ School Street since July 1988 when Mershon subleased dock space from Whittle. Mershon uses and occupies this floating home as a dwelling unit; it is secured to the dock and not used for navigation. This floating home can be, but is not, equipped with an outboard motor.

A hookup to an on-shore source provides Mershon with electrical current; a phone line has also been installed in the floating home. Mershon claims to empty an on-board "porta-potty" into the bathroom facilities on shore. He claims the ability to discharge no wastewater, not even graywater, pumping all water ashore instead.

Respondent Mershon's floating home is registered as a vessel with the DMV pursuant to CGS §15-144; the DEP has issued no permits for this floating home.

14. All of the houseboats are located waterward of the high tide line.
15. Although the floating homes are registered as vessels under CGS Title 15, they are nonetheless designed and used as stationary dockside homes. The Mershon, Chick, and Conant floating homes all resemble typical on-shore dwellings: rectangular shape, shallow pitched roof, four exterior walls with framed windows, framed walk-through doors, fixed antennas (Ex. 14).
16. Michael Harder, an Assistant Director of the DEP Water Compliance Unit, testified (Tape 6) that all discharges into the waters of the state, including discharges of graywater, fall within the purview of Chapter 446K (Water Pollution Control) of our statutes. He alluded to, without elaboration, potential health problems related to untreated graywater discharges and outlined several types of treatments which would allow such discharges to conform to regulatory limits. Mr. Harder conceded, however, that his Unit had never before been involved in regulating discharges from houseboats.
17. Pursuant to CGS §19a-227, on April 17, 1989 the Director of Health for the Town of Groton (which includes the West Mystic subject property) issued a directive designating in the town's navigable waters limits within which houseboats or other vessels used as dwellings shall not be moored or anchored (Ex. 15). The directive was to have taken effect October 10, 1989. Nothing in its language suggests that it will be subject to review by any other municipal official or agency.

The Respondents contend that their vessels are permitted to remain due to the following language in the directive:

Mooring of houseboats or other vessels used by owners or possessors thereof as dwelling places will be allowed at docks or other facilities. These facilities shall be equipped to provide physical connections, from the houseboats or other vessels used by the owners or possessors thereof as dwelling places, to the Town of Groton sewage collection system.

DISCUSSION AND CONCLUSIONS

ALLEGED VIOLATION OF §§22a-359, ET SEQ.

- A. The predominant issue in this case is whether the Respondents' floating homes are considered to be "structures" or "encroachments" subject to regulation under what is colloquially known as the "Structures and Dredging Act," CGS §§22a-359 through 22a-363. The DEP Coastal Resources Management Division staff argues that the Respondents' floating homes do fall under the purview of, and lack the requisite permits required by, the statutes, which provide in pertinent part:

The commissioner of environmental protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the high tide line.* Any decisions made by the commissioner pursuant to this section shall be made with due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.
(22a-259)

. . .

No person, firm or corporation, public, municipal or private, shall dredge or erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person, firm or corporation has submitted an application and has secured from said commissioner a certificate or permit for such work and has agreed to carry out any conditions necessary to the implementation of such certificate or permit.
(22a-361)

* No party disputes the fact that the floating homes are located waterward of the high tide line.

- B. The Respondents claim that their floating homes are not "structures," but "vessels," registered as such with the Commissioner of Motor Vehicles pursuant to CGS §15-144. Section 15-141 defines "vessel" as "every description of watercraft, other than a seaplane on water, used or capable of being used as a means of transportation on water . . ."* The term has been construed liberally to include houseboats for purposes of admiralty jurisdiction and under the Maritime Lien Act, 46 USC §§971 et seq., Miami River Boat Yard, Inc. v. 60' Houseboat, 390 F.2d 596 (5th Cir. 1968), Hudson Harbor 79th St. Boat Basin v. Sea Casa (S.D.N.Y., 1979). Given such a broad definition, subject to liberal construction, I agree with the Respondents that their floating homes are capable of transportation--although such use obviously has not been contemplated since their arrival at the Baker site--and that they are correctly designated "vessels" which must comply and have complied with state licensing requirements.
- C. However, while compliance with vessel licensing requirements affords the Respondents lawful use of state waters,** and aids the state in its control over such use, status as "vessels" under one regulatory framework does not preclude different legal characterization under another; see, e.g. Bass River Associates v. Mayor, Township Commissioner, 743 F.2d 159, 161, 162 (3d Cir. 1984), United States v. Boyden, 696 F.2d 685, 687 (9th Cir. 1983) (discussed within).

I agree with the CRMD's reliance upon Corning v. Town of Ontario, 121 NYS2d 288 (1953) for a revelatory analogy. A mobile home traveling along a highway is, like any other vehicle, subject to traffic and safety laws; while in motion, it is "not subject to zoning regulations, but that does not mean it may not become subject to such regulations when occupied as a residence at a fixed location." Id., p. 292. (See also Smith v. Anchorage Associates, 501 N.Y.S.2d 751 (1986), in which the court uses the Corning analogy to find that houseboats used as permanent residences are properly the subject of zoning regulation.) I conclude that while these floating homes are lawfully registered vessels, they need not be considered "vessels" under other regulation; the issue then becomes whether they are "structures" for purposes of the Structures and Dredging Act.

* The operative phrase "used or capable of being used as a means of transportation on water" is consistent with that in numerous federal definitions, e.g., 1 USC §3 (General Provisions), 46 USC §§1451 et seq. (Federal Boat Safety Act), 33 USC §§1601 et seq. (International Regulations for Preventing Collisions at Sea).

** Section 15-142 defines "use" as "launching, mooring or operation of a vessel."

- D. Neither the Structures and Dredging Act nor any other Connecticut environmental statute defines the word "structure." However, where a statute or regulation does not define a term, "it is appropriate to focus upon its common understanding as expressed in the law and upon its dictionary meaning"; Builders Service Corp. v. Planning & Zoning Commission, 208 Conn. 267, 276 (1988).

In common parlance, a structure is simply something "constructed or built," Webster's Third New International Dictionary, or "made up of a number of parts that are held or put together in a particular way," American Heritage Dictionary. Black's Law Dictionary, 5th Ed., similarly defines the term as "[a]ny construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind."

In the same vein, numerous cases (not otherwise relevant here) use the generic term "structure" with reference to a houseboat; e.g. Lake Berryessa Tenants' Council v. United States, 588 F.2d 267 (9th Cir. 1978) ("houseboat or any other floating structure"); Prudente v. Nechanicky, 84 Idaho 42, 367 P.2d 568 (1961); Commercial Waterway District No. 1 v. C.J. Larson, 26 Wash.2d 219, 173 P.2d 531 (1946).

While lacking a statutory definition, Connecticut courts have considered water-related edifices such as docks, piles, ramps, piers, and floats to be "structures" under the Act; Lovejoy v. Water Resources Comm., 165 Conn. 224 (1973), Hotchkiss Grove Association, Inc. v. Water Resources Commission, 161 Conn. 50 (1971), Bloom v. Water Resources Comm., 157 Conn. 528 (1969), Szestowski v. Water Resources Comm., 21 Conn. Sup. 407 (1959).

- E. Statutes and cases in many jurisdictions support the notion that houseboats or floating homes may be deemed, as a matter of law, something other than vessels in various contexts. Under the Connecticut Penal Code, all watercraft are considered "buildings"--clearly "structures"--for purposes of defining the crimes of burglary, criminal trespass, and arson, among others, §53a-100, et seq. See also, for example, Article 465 of the Louisiana Code of Criminal Procedure which refers to burglary of houseboats "or other structure" [emphasis added], State v. Henson, 361 So.2d 1169 (1977); Land v. Florida Dept. of Revenue, 510 So.2d 606 (1987) (houseboat considered "floating structure," not a "boat," for purposes of tax assessments); National Electric Code, which purports to view houseboats as "floating buildings," i.e., structures, Article 553-2, Article 100 (Ex. 16; testimony of Mark Tebbetts, tapes 4 and 5).
- F. More relevant to the matters before me are those cases which find that floating homes may be, or, in fact, are "structures" specifically for purposes of applying environmental laws.

United States v. Boyden, 696 F.2d 685 (9th Cir. 1983), involved the appellees' ownership of two houseboats, comprising living quarters constructed upon pontoon-buoyed platform decks. Both included mountings for outboard motors, were moored to a dock with tie lines, and utilized electrical, telephone, fresh water, and sewerage hookups which could be disconnected with the use of tools. The U.S. Army Corps of Engineers sought removal of these houseboats from navigable waters of the United States claiming they lacked the requisite permits. The Court noted that although the houseboats met the definition of "vessel" under 1 USC §3,* they could also be considered "structures" under a separate section, Boyden at 687. Section 10 of the Rivers and Harbors Appropriations Act, 33 USC §403, regulates, *inter alia*, the placement of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures outside established harbor lines. "Structures," in turn, include "permanently moored floating vessels," according to 33 CFR §322.2(b)(1981), Id. at 688. The Court held that the houseboats were indeed subject to Section 10 if the facts so warranted, denied cross motions for summary judgment, and remanded the matter for a determination as to whether the houseboats were in fact "permanently moored floating vessels." No District Court decision has been published further addressing this matter.

The court in Bass River Associates v. Mayor, Township Commissioner, 743 F.2d 159 (3rd Cir. 1984) upheld a municipal ordinance excluding floating homes (including those of the appellants) from specific waters in Bass River Township, a sparsely populated, ecologically fragile area, and indicated that the appellants' federal pleasure vessel licenses did not preclude municipal regulation. Similarly, in Smith v. Anchorage Associates, 501 N.Y.S.2d 751 (1986), the Court held that "[d]ue to their nature and the owners' intentions to occupy them as permanent residences, houseboats or floating homes, like house trailers or mobile homes, are clearly structures which are properly the subject of local zoning regulation," Id. at 755 (see Conclusion C, above). All three cases amply support the basic premise argued by the CRMD: while floating homes may be licensed for one purpose as "vessels," they may still be deemed "structures" under other legal frameworks and regulated accordingly.**

* See Conclusion B, above, and footnote thereto.

** See also Leslie Salt Co. v. San Francisco Bay Conservation and Development Commission, 153 Cal. App.3d 605, 200 Cal. Rptr. 575 (1984). The Government Code, §§66610 and 66632, requires a party to obtain a permit from the commission for placement of fill on land subject to tidal action and within 100 feet of the shoreline band; the term "fill" is broadly defined to include "structures floating at some or all times and moored for extended periods, such as houseboats and floating docks."

Bass River and Smith--and indirectly, Boyden--highlight a distinction between those houseboats not designed primarily for residential use and those used, designed, or occupied as permanent dwelling units. The Bass River ordinance labels the first "houseboats," the second "floating homes," banning only the latter. The Smith case recognizes the distinction between those with occasional (although sometimes continuous) occupancy and those used on a 24-hour, year-round occupancy. As a starting point for the ensuing comments I conclude that, based on the cases discussed above, those floating homes which are permanently moored waterward of the high tide line are subject to CGS §§22a-359, et seq.

The mobile home analogy in Smith, the need for further factfinding in Boyden, and the houseboat/floating home distinction in both Smith and Bass River all lead to the final question in this analysis: do these floating homes exhibit sufficient indicia of permanence to warrant regulation under the Structures and Dredging Act? I believe they do. The record amply describes houseboats designed for year-round living (see Bass River Associates v. Mayor at 160), with physical appearances consistent with on-shore dwellings. None of the houseboats is presently equipped with a motor (see Smith at 755). Hookups to basic on-shore services, while removable, connote permanence (just as the docks themselves are permanent structures under the Act; see Conclusion D) (see United States v. Boyden at 686). Sewage and graywater are generated in quantities comparable to those of inland structural dwellings. The respondents appear to have no other on-shore residences and, quite simply, they have evinced no intention of using their floating homes for anything but permanent dockside occupancy (see Smith at 755).

Like the housetrailer, the houseboats' capability of motion remains; however, their metamorphosis into relatively long-term fixed residences is underscored by the above physical factors and most particularly, the respondents' implicit yet obvious intention of using their houseboats not as something routinely mobile but as permanently moored floating structures.

- G. The term "encroachment" also has no statutory definition. In the case of Hartford Electric Light Co. v. Water Resources Commission, 162 Conn. 89 (1971) the Supreme Court relied upon dictionary definitions, analogy to highway cases, and a common law tenet that an intrusion into public waters or harbors without permission was an encroachment (Weber v. Board of Harbor Commissioners, 85 U.S. 57, 65), in concluding that transmission lines strung across (and more than 100 feet above) a navigable river were "encroachments" under §25-7d (a predecessor to the present Structures and Dredging Act). An interpretation so broad as to include wires above a river should likewise include a houseboat in navigable waters where such houseboat is for all intents and purposes "permanent" (as discussed above).

H. In light of the above, I conclude that Respondents' floating homes are unequivocally structures and encroachments which require permits pursuant to the Structures and Dredging Act.* The reason for regulatory scrutiny of the floating homes is no different than for any other structures: the potential for harm in an environmentally sensitive area. Clearly such review is crucial in this case where evidence suggests the potential for adverse impacts to water quality (the discharges) or to benthic organisms (low-tide bottoming out), two among many of the criteria to be considered. Ultimately, I draw no conclusions as to the propriety or advisability of issuing permits, as such a review goes beyond the scope of this proceeding. My conclusion here is simply that the unpermitted presence of the three floating homes within a regulated area justifies upholding Orders Nos. 044-V-2, 044-V-4, and 044-V-5.

I. As argued by Respondents, Connecticut General Statutes §19a-227 does indeed authorize a municipal director of health to "designate limits within the navigable waters of the state, . . . within which limits houseboats or other vessels used by owners or possessors thereof as dwelling places shall not, while so used and occupied as dwelling places, be anchored or moored . . ." Exhibit 15, the April 7, 1989 directive from Groton's Director of Health, purports to designate just such limits and, accordingly, would not force the removal of the houseboats at issue, provided they are appropriately connected to the town's sewage system. Without addressing the CRMD's challenge to the validity or applicability of the directive, I conclude simply (A) that the director of health can only exercise such powers as are consistent with his statutory authority to enforce state statutes or local health code provisions "relating to the preservation and improvement of the public health and preventing the spread of diseases therein," CGS §19a-200, including, for example, the power to examine "nuisances and sources of filth" and cause the abatement or removal of same, §19a-206, and (B) that the environmental concerns of the Structures and Dredging Act, and, for that matter, the Coastal Area Management Act, are far beyond the limited, health-related (i.e., sewage treatment and collection) scope of the director's authority. Accordingly, whatever limited approval the directive may give to the houseboats at issue, it does not preclude the need for review and approval under the State's environmental statutes.

ALLEGED VIOLATION OF §22a-430

J. According to CGS §22a-430, "No person . . . shall initiate, create, originate or maintain any discharge of water,

* Permit applications would also have to demonstrate consistency with the applicable goals and policies articulated in §22a-92 of the Coastal Management Act, §§22a-90 et seq.

substance or material into the waters of the state without a permit for such discharge issued by the commissioner." The operative word "discharge" is defined at §22a-423 as "the emission of any water, substance or material into the waters of the state, whether or not such substance causes pollution . . ." (emphasis added). The breadth of these definitions encompasses, in the present case, the discharge of the domestic waste known as graywater.

Although Marshall Hoover's dye test on one of the floating homes not at issue here carries no weight, the preponderance of the evidence supports a conclusion that both Conant and Chick indeed discharge graywater into the waters of the state, Conant's untreated and Chick's following passage through a system approved for treatment of sewage aboard boats. Such treatment does not per se allow Chick to bypass the statutory requirements;* our laws amply underscore the need for approval of treated discharges as well, e.g., §§22a-416, 22a-427, 22a-430(b). Both of these discharges require, yet lack, a permit from the DEP pursuant to §22a-430.

Mr. Mershon, with specific treatment devices and a self-contained system, intends to cease--and is capable of ceasing--his graywater discharges, but the record is not clear whether or not he had curtailed the discharge at the time of the hearing. It suffices to note that if any discharges still occur, they too, as discussed above, are unlawful without a permit.

By the plain language of the applicable definitions (above), the CRMD, which bears the burden of proof in this case, need not demonstrate that the discharge causes or constitutes pollution. In fact, the scant record would not support such a conclusion. Clearly, Michael Harder's testimony regarding graywater's potential impacts upon water quality suggests the need for further analysis,** but even absent such assertions, it is required that all discharges into the waters of the state be evaluated by the DEP through its permitting process, in order for the department to determine if the

* Section 1322 of the Federal Water Pollution Control Act, governing marina sanitation devices, requires on-board treatment of sewage but not of graywater, 33 USC §1322. Section 1322(f)(1) explicitly preempts state legislation "with respect to the design, manufacture, or installation or use of any marine sanitation device," but the statute makes no reference to other kinds of pollution-control measures; Bass River Associates at 165n.

** Any adverse impacts from graywater discharges would likely be greater here than from recreational vessels used with considerably less frequency.

discharges should be authorized--untreated, or treated in a specific fashion--or forbidden.

The permit process and DEP scrutiny are particularly warranted here, as the relative permanence of the floating homes suggests greater and more frequent discharges than those from ordinary recreational vessels. I therefore concur with the Coastal Resources Management Division and conclude that, lacking any permits from the DEP, the Conant, Chick, and Mershon discharges violate CGS §22a-430 and should cease as required by the respective administrative orders.

PUBLIC TRUST ISSUE

K. In its brief, the Coastal Resources Management Division contends that the placement of the floating homes is inconsistent with public trust doctrine (Ex. 21, pp. 23-24). I agree that public trust concerns may be raised outside of the permitting process. However, I am confident that the issue would be given a more substantial analysis in any subsequent application proceeding initiated by one or more of these Respondents (rather than the few allusions in this record). For this reason, and specifically because the above conclusions are dispositive of the present appeals, I shall not address such concerns here.

CLAIMS OF ARLENE BAKER

L. Arlene Baker claims no responsibility for the other Respondents' floating homes because they entered the docking facility while it was leased to Steven Whittle. Such disclaimer cannot be borne out by the facts presented. Simply, Mrs. Baker has always been the permittee of the subject property. Furthermore, she acknowledged her awareness of Mr. Whittle's intentions and made no objection to the presence of houseboats moored for long-term dockside dwelling; she maintained basic services for them during the leasehold and has continued to do so ever since. She likely has been aware of graywater discharges as well, yet has made no attempts to curtail them or ameliorate their potential impacts. Although at the hearing she claimed that she presently was receiving no money from the Respondents for rent or services, I presume that she did receive payment from Whittle pursuant to the lease and that Whittle did not invite the Respondents to dock their floating homes for free.

The decision in Leslie Salt Co. v. San Francisco Bay Conservation and Development Commission, 153 Cal. App. 3d 605, 200 Cal. Rptr. 575 (1984), illuminates this matter. In Leslie Salt, a landowner was found to have violated a California statute governing the unauthorized placement of fill in a statutorily regulated area (wetland marsh), even though the fill was placed by a third party without the

landowner's permission or knowledge, and even in the absence of express legislative direction to make such a finding. Arlene Baker knew of and acquiesced to the placement, and assisted in the maintenance of, the floating homes; it is both logical and appropriate in the present case to direct the enforcement actions to the willing landowner as well as to the perpetrators. Environmental statutes are remedial in nature and should be liberally construed to effectuate their purposes, Manchester Environmental Coalition v. Stockton, 184 Conn. 51, 57 (1981). I believe the logic in Leslie Salt applies here and, accordingly, landowner Baker should, along with the other Respondents, bear responsibility for the ordered remediation, and Order No. 044-V-3 should be upheld for this reason alone.

- M. The department's jurisdiction over regulated parcels does not cease upon issuance of a permit to one conducting regulated activities. A permit holder is obligated to adhere to the terms of her permit and to operate the permitted facility in a manner consistent with all legal requirements and proscriptions. Such responsibility implicitly (if not explicitly) arises upon permit issuance, since such issuance is predicated upon the actual proposals an applicant has placed before the commissioner or other reviewing agency staff. Mrs. Baker's state permit (Ex. 23, Certificate dated October 8, 1957) contains no prohibitions of specific uses; in fact, the documents do not even appear to control the number or location of the vessels moored or docked there. However, the certificate specifically notes:

. . . nor does [this certificate] authorize any infringement of federal, state or local laws or regulations.

I conclude, in light of the above, that Arlene Baker has violated this most basic of permit terms by allowing three unauthorized structures in her marina and by assisting in their maintenance. However, the DEP/CRMD has neither alleged nor sought relief for permit violations and, given Mrs. Baker's apparent unawareness of wrongdoing under the Act, as well as her apparent willingness to sever ties with the other Respondents if this decision so requires, I see no reason to pursue any relief beyond what is ordered herein.

- N. Mrs. Baker alleged at the onset of the proceeding, and reiterated in her post-hearing memorandum, that a conflict of interest existed insofar as the orders were issued by the DEP and their appeal was to be adjudicated by an officer of the same agency (i.e., this hearing officer) (Tape 1; Ex. 22). Despite my invitation to do so, the Respondent provided no legal support for this position.

Certainly a fair hearing by an unbiased trier of facts is essential in an administrative adjudicatory process, NLRB v.

Phelps, 136 F.2d 562, 563-564 (5th Cir. 1943), but the combination of adjudicative and investigative functions within the same agency--or even in one person--does not per se constitute a risk of bias; see Withrow v. Larkin, 421 US 35, 46-54 (1974); Local 1303, et al, v. FOIC, 191 Conn. 173 (1983); see generally 73A C.J.S. Public Administrative Law and Procedure §138c. The Connecticut Uniform Administrative Procedure Act, §§4-166 et seq., in fact envisions a system wherein a hearing officer is or may be a member of the agency involved in the pending action. Respondent Baker has proffered nothing to demonstrate or even suggest actual bias or prejudice and, accordingly, her challenge must fail.

FINAL DECISION AND ORDER

In light of the foregoing, I hereby confirm and uphold the Commissioner's findings in Orders Nos. 044-V-2, 044-V-3, 044-V-4, and 044-V-5 as written, with the following exception:

Paragraph 8, consistent with the evidence presented and the apparent understanding of the parties, is hereby modified in each Order to state:

8. Said unauthorized structure is discharging graywater into the waters of the State without a permit in violation of Section 22a-430 of the Connecticut General Statutes.

I hereby uphold the aforementioned Orders of the Commissioner as follows:

As to Respondents Conant, Chick, and Mershon and their agents, servants, employees, and those in active concert or participation with them:

- A. Upon the effective date of this order, Respondents shall immediately cease discharging graywater and domestic sewage into the waters of the State without a permit.
- B. Within 45 days of the effective date of this order (final decision), Respondents shall remove, from the waters of the State, the said unauthorized structures and encroachments located waterward of the high tide line.
- C. Within 48 days of the effective date of this order, Respondents shall restore the site to the condition existing prior to the placement of the said unauthorized structures and encroachments waterward of the high tide line.
- D. Respondents shall notify the DEP in writing that they have complied with B and C above within 24 hours of such compliance.

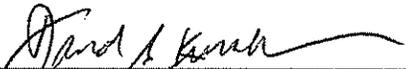
As to Respondent Baker:

- A. After 45 days from the effective date of this order (final decision), Respondent shall cease to provide electrical, water, and telephone services to any other Respondent who has not removed his unauthorized structure or

encroachment from the waters of the State, waterward of the high tide line, unless the latter has obtained all permits required by the DEP.

- B. Respondent shall allow no other floating homes or similar structures in her marina, waterward of the high tide line, unless such structures have obtained all permits required by the DEP.

This order does not preclude any other enforcement remedies available by law, although state enforcement actions are stayed in accordance with the applicable time frames provided in this order. This order does not purport to stay any municipal actions not otherwise stayed by law.



David S. Knishkowy, Director
Adjudications Unit

Entered as a Final Decision and
Order of the Commissioner on

8 November 1989