

Department of Environmental  
Protection  
Office of the Commissioner

# Memo

To: Jane K. Stahl, Deputy Commissioner  
From: Arthur J. Rocque, Jr., Commissioner  
Date: 03/14/02  
Re: Cross Sound Cable Memorandum of Decision

I have reviewed the requests for hearing on the Cross Sound Cable Company's project in New Haven together with relevant portions of the existing public record on same and hereby conclude that additional public comment through an agency hearing process is not required. I reach this conclusion, the basis of which is outlined below, with due consideration of both the pending application and the commentary on the application before this agency as well as the extensive hearing record previously created by the Connecticut Siting Council. My review suggests that an agency hearing would produce little, if any, additional information pertinent to the standards under which we are required to evaluate such an application. On the other hand, to delay both the federal and state permitting process by providing additional hearing opportunities would significantly disadvantage the applicant, perhaps to the point of causing the project to be abandoned. In light of the fact that the long-term impacts to coastal resources for a project of this magnitude have been judged by staff to be both negligible and mitigatable, the permit should be issued with appropriate conditions in accordance with the staff's tentative determination.

Before speaking to the merits of the petitioner's requests, let me address the actual impacts of the project. Considering the nature and scale of projects for structures and dredging that previously have been evaluated and permitted by both federal and state agencies for Long Island Sound in general and in New Haven harbor in particular, this project is both small in scale and insignificant in impacts. Were this agency to decide that impacts of a scale that can be expected from a project of this nature to be unacceptable, I fear that conclusion would not be sustainable in a court of law. Projects with far greater short and long-term environmental impacts have been found acceptable for the same area and permitted under the same statutes.

Also, were the agency to find such minimal impacts unacceptable, we would be in danger of establishing such a low threshold of impact that virtually any future project would be precluded in Long Island Sound. For example, maintenance dredging of the federal navigational channel in New Haven which periodically has been permitted would be clearly unacceptable under such a new threshold. Routine activities that don't trigger the need for permits, such as maintenance and harvesting of oyster beds in New Haven harbor, suspend far more sediment for longer periods and at a time of year when organisms are more vulnerable than will the placement of this cable. Further, findings of unacceptable impact for this project under the conditions present in New Haven harbor would significantly jeopardize our ability to permit replacement of the CL&P/LILCO cable at Norwalk. That cable, long past its design life and chronically leaking, traverses more sensitive resources; its replacement has been the subject of protracted agency regulatory action dedicated to protecting those very resources.

I believe that our public comment period, initiated by published public notice late last year, has provided an adequate forum for interested parties to submit pertinent information for consideration. Not only is there evidence in the record that such commentary was received, there is a substantial body of public commentary that exists from the Siting Council's deliberations. This project has been neither obscure nor unknown to the public. The fact that it is subject to DEP and the U.S. Army Corps of Engineers' permits has been well known. In fact, through the Siting Council's public hearing process, the original application was found unacceptable in part because of avoidable and unacceptable impacts to coastal resources and resulted in the revised application which was subsequently found acceptable by the Siting Council and is before us now.

The revised application also underwent an extensive process of public debate and hearing before the Siting Council at which many of the issues raised are directly relevant to factors we must consider. Having reviewed that most recent Siting Council record, I find no compelling evidence that would suggest either that pertinent information has been overlooked or that the information offered at hearing would indicate that there are avoidable, unacceptable environmental impacts to the degree that a permit should not be issued. For these reasons, I see little to be gained by repeating the opportunity for the same commentary to be offered where the only tangible result would be delay.

"Public Trust" arguments have been raised by some in relation to this project. Insofar as the DEP's permitting process under the police powers of the state is the manifestation of the granting of tidelands title for coastal development activities, I see no conflict with our public trust responsibilities by issuance of the permit. To wit, there is no long-term diminishment of the state's *jus publicum* title in our public tidelands from this project. Issues related to the public benefit of this use of trust lands are more appropriately handled through the Siting Council determination of need. In its deliberations and subsequent approval, the Council affirmed the need and the benefit to the citizens of the State of Connecticut from this project.

Questions have also been raised regarding the impact of this project on future harbor development projects. Placing the cable at a depth of no less than 48 feet within the federal navigational channel as recommended by staff, however, will not preclude foreseeable harbor projects that would likely meet standards for permit approval. I would note, for example, that deepening of the federal channel to 45 feet would not be precluded by the construction of the cable at the proposed depth of 48 feet. Yet a 45 foot deepening of the channel would result in the direct loss of over 30 acres of shellfish beds adjacent to and seaward of the existing channel and would require the relocation of two existing sewer outfalls by itself. All of these consequences and their associated impacts on coastal resources are many magnitudes greater than any associated with the cable project. The acceptability of placing the cable within the channel boundaries then becomes not a matter of environmental impact but rather one of project compatibility. Such an evaluation is more appropriately the responsibility of the Corps given their unique relationship with the authorized channel.

I do believe, however, that there is merit to evaluating and planning for potential future utility crossings of Long Island Sound. While one might argue that such an evaluation would have been useful decades ago, there is currently legislation pending in the General Assembly to initiate that process for the future. In my mind, the denial or postponement of construction projects for the purpose of such evaluation best comes from the state's legislative body with specific statutory criteria to define it rather than from an executive branch agency on a case by case basis. The latter approach is even more problematic given the acceptability of the environmental impacts associated with this project.

Petitions for hearing in this matter were received from a number of petitioners requesting hearing under a variety of different statutory authorities. Briefly below is a summary of my view on each.

- I. Section 22a-361, C.G.S. - There is no provision for a public hearing under this section. Subpart (b) provides for public comment on an application but the statute is silent regarding hearings. Historically, few hearings have been granted under this statute with the few exceptions being reserved for those applications for which there was significant expressed public interest and no other mechanism for expression. That is not the case with this application given the extensive hearings conducted by the Siting Council.
- II. Section 22a-361(d)(1), C.G.S. - This section and its subparts pertains to general permits and is not applicable to this application.
- III. Section 22a-430(b), C.G.S. - This statute pertains to permits for water discharges which are also not relevant to this project. Never has the agency required or considered such an authorization to be required or relevant for dredging, excavation or in water disposal of dredged

marine sediments. The water quality implications of such projects have historically been evaluated under federal authority.

- IV. Section 22a-90, et. Seq., C.G.S. – This statute, the state Coastal Management Act, is implemented through the provisions of Section 22a-359, et. seq. Sec.22a-90 et. seq. have no provisions for either discretionary or mandatory hearings.
- V. Several petitioners cited general concerns regarding the public interest and public input as a rationale for a hearing. I am sympathetic to such argument but believe that that concern was adequately covered in the extensive public process offered by the Siting Council and need not be duplicated here.

For the reasons enumerated above, it is my conclusion that the permit, with appropriate conditions, should be issued and that additional public comment is not required. By copy of this memo, I am directing Ms. Jan Deshais to notify petitioners accordingly and Mr. Charles Evans to finalize issuance of the permit. If you have any questions, please let me know.

AJR/mi

cc: Jan Deshais

Charlie Evans