DOCKET NO. CV 21-6031071-S	:	SUPERIOR COURT
ROBERT L. DOANE, JR. WETLANDS ENFORCEMENT OFFICER OF THE TOWN OF ESSEX	:	JUDICIAL DISTRICT OF MIDDLESEX
VS.	:	at MIDDLETOWN
TERRY LYNN McDONALD and DUSTIN L. ALIANO	:	MARCH 13, 2024

MEMORANDUM OF DECISION

The plaintiff, Robert L. Doane, Jr., the wetlands enforcement officer (WEO) of the town of Essex (the "Town") has brought this action seeking to enforce several cease and desist orders issued to the defendants, Terry Lynn McDonald and Dustin L. Aliano, to discontinue violations of the Essex Wetlands Regulations ("Wetlands Regulations") on their property at 32 Birch Mill Trail, Essex, Connecticut (the "Property").

The court conducted a four-day hearing on the matter and heard from the plaintiff, Robert L. Doane, Jr., Fred DeCrescentis, Michelle Ford, the defendant, Terry Lynn McDonald, and George Logan. The parties submitted posttrial briefs.

FINDINGS OF FACT

The court makes the following findings of fact.

The defendants, Terry Lynn McDonald and Dustin L. Aliano[1] are the co-owners of property known as 32 Birch Mill Trail, Essex, Connecticut. The Property is part of the Southwind Homeowners' Association ("Association"), and slopes down to a small body of water known as Birch Mill Pond (the "Pond"). The Property is located on inland wetland or watercourse and is subject to the Wetlands Regulations under the jurisdiction of the Essex Inland

[1] Defendant Dustin L. Aliano (son of Ms. McDonald) did not participate in the trial.

Wetlands and Watercourses Commission ("Commission"). It abuts property owned by the Association, whose property includes open space to the east of the Property and Birch Mill Pond to the southeast of the property. Both areas are subject to the Wetlands Regulations and the jurisdiction of the Commission.

During the summer of 2020, Ms. McDonald designed an upper patio, lower patio, and steps leading down to the Pond, using existing stone from the Property. Ms. McDonald performed the construction herself, with the assistance of family and friends. As part of the project, the defendants removed leaves and sticks, as well as large stones from the hillside and edge of the pond, utilizing a mini excavator to aid in the removal.

On or about October 21, 2020, Ms. McDonald was approached by Joe Budrow, who was the Wetlands Enforcement Officer of the town at that time. He had observed the Property and discovered the construction of a hardscapes project on the Property consisting of an upper patio and steps leading down to a terrace and patio within the regulated area of the edge of Birch Mill Pond. He also observed the removal of large stones from the regulated area extending within 100 feet of the edge of the Pond. Budrow informed Ms. McDonald that she should have sought a permit from the Commission for the project. After the conversation, Ms. McDonald, a real estate agent by profession, testified that she had no knowledge of the necessity of a permit from the Commission prior to initiating this project. She wanted to construct a few more steps, but after her discussion with Budrow, she ceased any work related to the project and has not resumed any to the date of the hearing.

Shortly thereafter, on October 23, 2020, Budrow sent the defendants a cease and desist order, ordering them to cease and desist: (1) "The continued construction of a hardscape project consisting of steps, raised terrace and a patio [;] and (2) The removal of large stones from within

an upland review area of Birch Mill Pond." Pl.'s.' Exh. 14. The order further required the defendants to appear for a show cause hearing on November 2, 2020.

After the October 2020 order, the defendants placed small solar lights on her Property near the steps leading to the patio. The lights did not require any digging, filling, or installation of any underground cable.

The November 2, 2020, show cause hearing was held via "Zoom." In attendance was the plaintiff, the Commission, and Ms. McDonald.[2] Photos were presented, and Ms. McDonald was permitted to testify. She acknowledged the hardscaping and removal of the large stones. The Commission acknowledged that the defendants had ceased all work and ordered Ms. McDonald to obtain an application and site plan. Ms. McDonald wanted to know what she had to do and was willing to do whatever she needed to correct the situation. She then retained David Annino as a surveyor and Richard Snarski as a soil scientist to assist in the preparation of the application. She also retained Joe Wren as an engineer and the Pond and Lake Connection for assistance with the Pond in preparation of the application. The Commission scheduled a site visit to take place on November 5, 2020, in order for the plaintiff – in his capacity as Town Engineer – to make necessary recommendations for erosion and sediment measure control and look at the wall and determine its stability.

After Annino prepared an initial survey for the defendants, the defendants learned that a portion of the Property that they believed they owned was actually owned by the Association. Part of the lower patio and terrace Ms. McDonald had constructed was on land owned by the Association. The survey also indicated that an inland wetland or watercourse was located on the property and that a portion of the Property is subject to the Town's Inland Wetlands and

[2] The plaintiff, a private civil engineer and surveyor at Doane Engineering, as well as the Town's Engineer, began taking over as the WEO for the Town.

Watercourses Regulations including the lower patio which was installed within 100 feet of the edge of the Pond and thus subject to the Wetlands Regulations.

On November 5, 2020, the plaintiff inspected the property with his predecessor WEO, Ms. McDonald, and the defendants' retained wetlands scientist, Richard Snarski. During the inspection, the plaintiff looked at the soil material on the bank and picked up a "clump," finding it highly organic. Based upon his training and his observation of the void of vegetation along the shoreline, he determined that the pond had been dredged.[3]

After an unscheduled site visit on December 4, 2020, the plaintiff issued a letter on December 18, 2020, stating that the Commission had not received an application from the defendants, and it was the Commission's intent to initiate legal action in the Superior Court. The plaintiff stated that subsequent site inspection revealed additional regulated activity of the installation of lights and electrical conduit and the removal of leaves on the hillside into the wetland area. Pl.'s Exh. 15.[4]

On or about January 26, 2021, the plaintiff, Ms. McDonald, and Mr. Snarski met to discuss the submission of an application to the Commission. After the meeting, they all went back to the property at the request of the plaintiff to conduct another site visit. Ms. McDonald provided the plaintiff with several copies of a survey prepared by Annino and the Commission application form signed by her, but the required information left blank. She was given the

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[3] An inordinate amount of time was spent on the issue of the "clumps" and whether the defendants had "dredged" the pond. On February 2, 2021, the plaintiff sent a letter to the defendants titled "Order," which stated that he had "observed that there had been an area within the pond which had been dredged to an approximate depth of 2 feet for a length of approximately 20 feet, and for a significant distance along the shoreline of the pond." Pl.'s Exh. 16. Since no appeal was taken of the Commission's affirmance of the cease and desist order, these findings remain. The court heard the evidence regarding this issue in order to determine the extent of the relief that may be given.

[4] Although the letter had the subject matter of "Re: Cease and Desist Order," there was no indication in the letter of a second cease and desist order.

application back with instructions on what information was necessary. Despite the request and assistance provided in order to complete the application and proposed remediation, the defendants did not file the application or remediation plan.

Shortly after the January 26 meeting, the plaintiff issued another cease and desist order (the "February 2021 order"). Pl.'s Exh. 49. The order reiterated the observations made by the plaintiff of the regulated activities on the Property, which activities extended onto the property of Southwinds Association Inc., and to the Pond. The Order informed the defendants that these activities and work:

a. constitute a regulated activity under the Wetland Regulations;

b. the Wetlands Regulations require that a permit be obtained prior to conducting regulated activities affecting the inland wetlands and watercourses;

c. the work has been done without a permit; and

d. the work has been conducted in violation of the law. Id.

The defendants in the February 2021 order were ordered to:

a. cease any of the foregoing activities described above, or other activities within the wetlands or watercourses on the Property or any adjacent property;

b. file an application with respect to the foregoing activities, which application should be for a permit or for remediation, as the defendants and their wetlands scientist consultant Richard Snarski shall determine;

c. provide as part of the application materials, the survey that had been prepared by the defendants' surveyor David Annino showing not only the existing conditions, but the areas of disturbance within the Pond as identified on site by Richard Snarski on January 26, 2021;

d. provide as part of the application materials, the report and/or recommendations from their consultant Richard Snarski; and

e. have the application and materials filed in the Land Use office no later than noon on February 9, 2021. Id.

The February 2021 order also notified the defendants that a show cause hearing would be held February 9, 2021, to provide them with an opportunity to show cause why the order should not remain in effect. At the hearing, neither the defendants nor any representative appeared or communicated with the plaintiff or the Commission. At the conclusion of the hearing, in which the plaintiff testified regarding his personal observations and communications with Ms. McDonald and her surveyor and soil consultant, the Commission voted to affirm the February 2021 order, but also voted to continue the show cause hearing until March 9, 2021, and to notify the defendants to give them yet *another* opportunity to file the requested Application prior to the commencement of an enforcement action. Pl.'s Exh. 19.

The Commission conducted the continued show cause hearing on March 9, 2021, again providing the defendants an opportunity to address the activities. Neither the defendants nor any representative appeared or communicated with the plaintiff or the Commission. Notice of the decision by the Commission confirming that the February 2021 order remained in effect was mailed to the defendants by certified mail on March 10, 2021. Pl.'s Exh. 17. Notice of the Commission's decision was published in the Hartford Courant on March 17, 2021.

The defendants did not appeal the action of the Commission in affirming the February 2, 2021, order and the defendants have admitted as such.

In an effort to assist the defendants, the plaintiff sent an email to Ms. McDonald filling out the application with the generic information. He also completed and transmitted the

mandatory Department of Energy and Environmental Protection (DEEP) Request for Natural Diversity Data Base state listed species review. Pl.'s Exh. 38. A response was provided by DEEP. Pl.'s Exh. 39.

No further action was taken until some eighteen months after the initial cease and desist order. The plaintiff met with the defendants' engineer, Joe Wren, for the purpose of going over the application. On September 16, 2022, the defendants submitted a Land Use Application void of the required information. Pl.'s Exh. 27. The "Application" indicated it was signed on November 24, 2020.

On September 21, 2022, the plaintiff, Ms. McDonald, Mr. Wren, and Ms. McDonald's attorney met at the Property, the purpose of which was to go over the Application, the plans and proposed remediations. After, the plaintiff sent the defendants a list articulating the omissions in the Application and reiterating what the defendants needed to do to comply. Pl.'s Exh. 34. The letter could not have been clearer. Nevertheless, despite the woefully lacking Application, the Commission scheduled a special meeting for September 28, 2022, to receive the Application.[5] During that meeting, the Commission scheduled a site walk for October 4, 2022, and a public hearing for October 11, 2022, which hearing was continued to November 10, 2022, and then again to December 13, 2022. The Commission began deliberations, which were continued to January 10, 2023, wherein it issued a limited approval of the application, effective February 14, 2023. The approval was limited to the retention of the upper patio, and conditioned said approval on the removal of the lower patio and stairs, among other conditions. Defs.' Exh. K.

[5] All of this was taking place on the eve of trial, scheduled for October 26, 2022. The trial was continued several times, and took place starting April 25, 2023.

DISCUSSION

A. The court has jurisdiction to adjudicate an enforcement action pursuant to General Statutes § 22a-44 (b)

The Commission is the agency designated to regulate Inland Wetland and Watercourses within the borders of Essex. Pl.'s Exh. 1, § 1.4. The Essex Inland Wetlands and Watercourses Regulations (EIWWR) were adopted by the Commission in accordance with General Statutes §§ 22a-36 through 22a-45. Id. Section 6.1 of the EIWWR provides: "No person shall conduct or maintain a regulated activity without first obtaining a permit for such activity from the Commission." Pl.'s Exh. 1. Section 6.2 provides: "Any person found to be conducting or maintaining a regulated activity without the prior authorization of the Agency, or violating any other provision of these regulations, shall be subject to the enforcement proceedings and penalties prescribed in Section 14 of these regulations and any other remedies as provided by law." Id. According to § 2.2, a "Regulated Activity" "means any operation within or any use of an inland wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution of such inland wetland or watercourse, and any activity occurring within one hundred (100) feet of an inland wetland or watercourse including intermittent watercourses involving: (a) Installation or enlargement of a subsurface sewage disposal system (or part thereof); (b) Sewage discharge or overflow; (c) Removal or deposition of any material; (d) Placement, construction, enlargement, or moving of any structure or building; (e) Clear-cutting of trees; or (f) Any other activity or change deemed by the Commission to be detrimental to wetlands or watercourses, except as otherwise indicated in Section 3 of these Regulations." Id.

A wetlands enforcement officer may bring a civil action pursuant to General Statutes § 22a-44 (b)[6] when an inland wetland regulation is violated to seek injunctive relief, penalties, and costs. In *Conservation Commission* v. *Price*, 193 Conn. 414, 429-30, 479 A.2d 187 (1984) our Supreme Court instructed that "the legislature expressly provided in the act that the superior court, in an action brought by the commissioner, municipality, district or any person, shall have jurisdiction to restrain a continuing violation of said sections, to issue orders directing that the violation be corrected or removed and to impose fines pursuant to [General Statutes § 22a-44]." (Internal quotation marks omitted.); see also *Inland Wetlands & Watercourses Commission* v. *Andrews*, Superior Court, judicial district of New Haven, Docket No. CV-10-5033404 (January 23, 2012), aff'd, 139 Conn. App. 359, 56 A.3d 717 (2012) ("General Statutes § 22a-44 permits an inland wetlands agency to issue cease and desist orders where a property owner violates inland wetland regulations, and to bring actions in Superior Court to issue orders restraining a continuing violation, orders directing that the violation be corrected and to assess civil penalties").

Here, the plaintiff, a wetlands enforcement officer, brought a civil action pursuant to § 22a-44 to restrain a continuing violation of the Wetlands Regulations, as well as to issue orders to correct the violation and assess appropriate fees. Thus, the court has jurisdiction to adjudicate the enforcement action pursuant to § 22a-44.

In light of these regulations and the issues presented in the present matter, it is prudent to keep in mind that "[t]he purpose of the Inland Wetlands and Watercourses Act is to provide an orderly process in which the rights of landowners to use or develop their land can be balanced

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[6] General Statutes § 22a-44 (b) provides in relevant part "The Superior Court, in an action brought by the commissioner, municipality, district or any person, shall have jurisdiction to restrain a continuing violation of said sections, to issue orders directing that the violation be corrected or removed and to assess civil penalties pursuant to this section. . . ."

with the need to protect the invaluable public resource of wetlands. See General Statutes § 22a–36. The statute, and the regulations adopted to implement it, provide for an application and hearing process through which these competing interests are balanced. See General Statutes § 22a– 42a." (Footnote omitted.) *Woodburn* v. *Conservation Commission*, 37 Conn. App. 166, 170, 655 A.2d 764, cert. denied, 233 Conn. 906, 657 A.2d 645 (1995).

B. The defendants' failure to exhaust administrative remedies, i.e., not appealing the cease and desist order(s), precludes the defendants from challenging a claim that they did not violate the regulation, however, the defendants do not challenge the validity of the orders.

The plaintiff argues that the defendants may not contest the validity of the orders in this enforcement action because they failed to appeal the orders. The plaintiff further argues that because the defendants failed to exhaust their administrative remedies, this precludes the court from reviewing any evidence or testimony offered by the defendants regarding the enforcement action. The defendants counter that any evidence presented is not an attempt to challenge the validity of the cease and desist orders but rather to address the issue at hand, which is "*what needs to be done to rectify the violation now that a violation has been established.*" (Emphasis added.) Defs.' Post Trial Br., p.10.

"The exclusive remedy to object to a cease and desist order is an administrative appeal to . . . Superior Court . . . A property owner must exhaust his administrative remedies before he will be allowed to use an injunction to resolve the dispute . . . . When a party has a statutory right of appeal of an administrative officer or agency, *he may not contest the validity of the order if the [Commission] officials seek its enforcement in the trial court after the alleged violator has failed to appeal.* . . . . the defendants [in the case at bar] chose to ignore both the order [of the

Commission] and the proper channel for appealing that order, despite notice that they were violating the [town] regulations. . . . It is not the task of this court to retry the findings and orders made by the plaintiff in their initial (unappealed) orders." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Inland Wetlands & Watercourses Commission* v. *Andrews*, supra, Superior Court, Docket No. CV-10-5033404.

"This does not end the court's inquiry, however. Since the plaintiff is requesting injunctive relief, the court must still consider the equities of the case in deciding if the plaintiff is entitled to the relief it requests, and what that relief shall be." (Internal quotation marks omitted.) *Inland Wetlands & Watercourses Commission* v. *Andrews*, supra, Superior Court, Docket No. CV-10-5033404. See *Roxbury* v. *Grebla*, Superior Court, judicial district of Litchfield, Docket No. CV-23-5015224-S (December 1, 2023) citing *Conservation Commission* v. *Price*, supra, 193 Conn. 430 ("every violation of such a statute does not trigger automatic injunctive relief. . . a trial judge is not mechanically obligated to grant an injunction for every violation of law" [citation omitted; internal quotation marks omitted]).

Here, the plaintiff seeks a temporary and permanent injunction against the performance of any regulated activities or significant activities, without proper authorization, a temporary and permanent injunction requiring remediation, and for the court to assess any appropriate costs, fees, and civil penalties. The defendants did not appeal the action of the Commission in affirming the February 2, 2023 order, nor did they appeal the limited approval of the application, which was effective February 14, 2023. Since the defendants did not exhaust their administrative remedies, they are precluded from challenging a claim that the regulation was not violated. Then again, "the defendants are not attempting to challenge the validity of the cease and desist orders." See Defs.' Post Trial Br., p. 10. Thus, since the jurisdiction of the court is proper pursuant to the

plaintiff's § 22a-44 claim, it is of no consequence that the defendants failed to exhaust the administrative appeal process. Correspondingly, the court may hear evidence because it is within the court's discretion to consider the equities and determine what relief is appropriate.

C. Temporary and Permanent Injunction pursuant to General Statutes § 42a-44

The plaintiff seeks a mandatory injunction requiring the defendants to cease any regulated activities or significant activities on the Property and on Southwinds' Property. Additionally, the plaintiff seeks an injunction requiring extensive remediation with respect to the regulated activities. The defendants argue that the evidence does not support the extent of remediation requested by the plaintiff as necessary to protect the wetlands and proposes that the injunctive order be limited to the removal of the flat portion of the lower patio.

Our Supreme Court has instructed that when "seeking an injunction pursuant to [a zoning statute] the town is relieved of the normal burden of proving irreparable harm and the lack of an adequate remedy at law . . . The town need prove only that the statutes or ordinances were violated. . . ." (Citations omitted; internal quotation marks omitted.) *Gelinas* v. *West Hartford*, 225 Conn. 575, 588, 626 A.2d 259 (1993), cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001). "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . .

"The authority for the injunctive relief in the present case [concerning a wetlands violation] does not originate from the common law. . . . [W]here a statute authorizes a municipality or public entity to seek an injunction in order to enforce compliance with a local zoning ordinance, but says nothing about the injury caused, the municipality is not required to

show irreparable harm or unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the ordinance. . . . Nevertheless, the trial court is not mechanically obligated to grant an injunction for every violation of law. . . . Put another way, [the Appellate Court] [does] not view the statutory grant of jurisdiction as destroying the discretion of a trial court in every case . . . ." (Citations omitted; internal quotation marks omitted.) *Conservation Commissioner* v. *Red 11, LLC*, 119 Conn. App. 377, 389-90, 987 A.2d 398, cert. denied, 295 Conn. 924, 991 A.2d 566 (2010).

The defendants' actions clearly violated the town's Wetland Regulations. Section 6.1 requires that an application be submitted to the Commission for any regulated activities. Section 2.2 defines a Regulated Activity as "any operation within or any use of an inland wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution of such inland wetland or watercourse, and any activity occurring within one hundred (100) feet of an inland wetland or watercourse including intermittent watercourses . . . ." Joe Budrow, the original WEO that discovered the violation, observed the Property, and discovered the construction of a hardscapes project on the Property consisting of an upper patio and steps leading down to a terrace and patio within the regulated area of the edge of Birch Mill Pond. He also observed the removal of large stones from the regulated area extending within 100 feet of the edge of the Pond. Here, the plaintiff need only prove that the defendants conducted regulated activities within the prescribed area subject to Wetland Regulations.

Thus, the defendants were in violation of the EIWWR, when activities were performed within 100 feet of the wetlands without the required permit, and the plaintiff is entitled to injunctive relief.

i. Scope of Injunctive Relief

Once a violation has been established, however, the court does not simply stamp its approval and blindly issue the relief requested. Rather, it is incumbent of the court to determine the scope of relief to be granted. So, evidence pertaining to the actions of the defendants' conduct, particularly the extent of any dredging of the pond, the extent of the damage to the wetlands, including the pond as a whole, as well as the various proposals to restore the wetlands is appropriate. As noted in *Gelinas*, our Supreme Court instructed that "proof of violations does not, however, deprive the court of discretion and does not obligate the court mechanically to grant the requested injunction for every violation. . . . discretion is to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Citations omitted; internal quotation marks omitted.) *Gelinas* v. *West Hartford*, supra, 225 Conn. 588.

Moreover, "a court's power to order equitable relief is broad and flexible. [C]ourts exercising their equitable powers are charged with formulating *fair* and *practical* remedies appropriate to the specific dispute . . . In doing equity, [a] court has the power to adapt equitable remedies to the particular circumstances of each particular case . . . [E]quitable discretion is not governed by fixed principles and definite rules . . . Rather, implicit therein is *conscientious judgment directed by law and reason and looking to a just result.*" (Emphasis in original; internal quotation marks omitted.) *Madison Land Conservation Trust, Inc.* v. *Suppa*, Superior Court, judicial district of New Haven, Docket No. CV-16-5037477-S (May 4, 2018), quoting *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 754, 159 A.3d 666 (2017).

To illustrate, in *Conservation Commissioner* v. *Red 11, LLC*, the Appellate Court affirmed where "[a witness testified that he was] retained by the defendant to develop a

restoration plan for the Redding Road wetlands. This plan encompassed sedimentation and erosion control, a storm water management plan, and a wetland nursery plan. The [trial] court accepted the plan . . . subject to certain modifications." *Conservation Commissioner* v. *Red 11, LLC*, supra, 119 Conn. App. 388. Additionally, the trial court rejected a "restoration plan that called for the creation of a cranberry bog and [the] installation of an extensive piping system." (Internal quotation marks omitted.) Id., 384. "The [trial] court heard evidence that construction of the cranberry bog would require a substantial amount of nonwetlands soil to be brought onto the property." Id., 390. Finally, "[t]he [trial] court further found that restoration was possible, and that the purpose of said restoration was to put the property back into the condition it was before the violations. It also found that the cranberry bog was not a restoration. It is axiomatic that the credibility of witnesses is the sole province of the trial court." (Internal quotation marks omitted.) Id., 391.

The Appellate Court concluded that "[i]t is clear from our review of the record that the [trial] court weighed the equities of the situation in ordering the injunctive relief to achieve restoration of the property. Specifically, it considered the actions and course of conduct of the defendants in causing the harm to the wetlands, as well as the various proposals of restoration. The court, after hearing evidence, credited the [expert's] plan [that took the most] appropriate approach to restore the wetlands on the defendant's property." Id., 391. Upon a challenge by the defendant- as to the court's reliance on an expert's testimony in an enforcement action pursuant to § 22a-44, our Appellate Court instructed that "[t]he acceptance or rejection of the opinions of expert witnesses is a matter peculiarly within the province of the trier of fact and its determinations will be accorded great deference by this court. . . . In its consideration of the testimony of an expert witness, the trial court might weigh, as it sees fit, the expert's expertise,

his opportunity to observe the defendants and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions which he drew from them. . . . It is well settled that the trier of fact can disbelieve any or all of the evidence proffered." (Internal quotation mark omitted.) *Yorgensen* v. *Chapdelaine*, 150 Conn. App. 1, 20, 90 A.3d 305, cert. denied, 314 Conn. 904, 99 A.3d 634 (2014). See also *Welsch* v. *Groat,* 95 Conn. App. 658, 664, 897 A.2d 710 (2006) ("It is an abiding principle of our jurisprudence that [t]he sifting and weighing of evidence is peculiarly the function of the trier [of fact]. [N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony . . . . The trier has the witnesses before it and is in the position to analyze all the evidence. The trier is free to accept or reject, in whole or in part, the testimony offered by either party" [internal quotation marks omitted]); *Madison Land Conservation Trust, Inc.* v. *Suppa*, supra, Superior Court, Docket No. CV-16-5037477-S (same).

Here, the balance of the equities is in favor of the plaintiff. The defendants' unpermitted activities have caused at least some damage to the inland wetlands and were conducted in violation of the EIWWR. The defendants were issued a cease and desist order on October 23, 2020; however, additional activities took place and no attempts to remediate were made. In addition, despite an abundance of opportunities given by the Commission to submit an application, an application with the required information was not submitted until early 2023—on the brink of trial. As a result, issuing an injunction is necessary to achieve compliance with the inland wetland regulations, prevent any additional harm, and begin mitigation to place the inland wetland area affected back into the position it was in before the defendants initiated the violation and caused the harm.

Be that as it may, the purpose of the Wetlands Regulations is to protect and preserve the wetlands, but also to strike a balance with the rights of the landowners to use or develop their land. See *Woodburn* v. *Conservation Commission*, supra, 37 Conn. App. 170 ("[t]he purpose of the Inland Wetlands and Watercourses Act . . . is to provide an orderly process in which the rights of landowners to use or develop their land can be balanced with the need to protect the invaluable public resource of wetlands" [footnote omitted]). Although Ms. McDonald perpetrated these violations, and her sheer disregard to rectify the violations is inexcusable, particularly the unduly delay in submitting a completed application, it is clear; however, that her intent was to use and develop her land as a landowner. Moreover, the defendants do not dispute that remediation is appropriate to the extent of what is necessary to protect the wetlands.

A point of contention is whether the defendants dredged the pond and if so, to what extent. The defendants, in the Amended Project Description submitted, stated: "Past activity includes the removal of leaves, organic sediment, and sticks (the "Materials") submerged on the edge of Birch Millpond. . . . After the Materials were removed from the pond, they were spread on to the soil approximately 2-6 feet from the water. The excavator was used to remove approximately 1 to 2 feet from the top of the pond down into the Materials accumulated in Birch Millpond. The excavator was used to remove Materials from the edge of Birch Millpond extending approximately 2 feet outward into the pond. Such activity was performed for an approximate distance of 100 feet running along the shore of Birch Millpond." Pl.'s Exh. 29.

Upon cross-examination, George Logan was asked if the "five-inch difference between the area in front of 32 Mill Trail [on the edge of the pond] versus the average in the rest of the pond" (Tr. 5/4, 8:18-20) "that that difference is an indication that something was done in the area of 32 Birch Mill Pond." Tr. 5/4, 8:22-24. Mr. Logan answered in the negative (Tr. 5/4, 8:25) and

explained, "All it tells me is that these two numbers are too close together to tell me that there's not a statistical difference really based on the amount of data." Tr. 5/4, 9:24-26. Upon further soliloquy between Logan and counsel during the trial: Q "So when you say there wasn't any evidence of dredge spoils you mean the sandy stuff?" Tr. 5/4, 19:1-2.

A "That is correct or a tremendous amount of evidence. Obviously, when I talk about the three to four eight inches that was mostly decomposed, that didn't mean it didn't have a little bit of a mineral but it was mostly characterized as more of an organic type of deposition." Tr. 5/4, 19:3-7.

Q "Consistent with the muck in a pond?" Tr. 5/4, 19:8.

A "Yes" Tr. 5/4, 19:9.

Michelle Ford testified that "my opinion based on the information presented and the conditions visible at the site walk was that material was removed from the pond." Tr. 4/26, 167: 13-15. Upon her site visit she observed, "There's some microtopographic changes, if you will. So just small scale landscape features that aren't consistent with a naturalized pond." Tr. 4/26, 168: 2-4. "There appeared to be some manipulation in the water vegetation, right, that emergent vegetation that is rooted in the water and grows above water, some of the woody stems." Tr. 4/26, 169:18-21. Although Ms. Ford opined that the allegedly sandy material found in the infamous clumps would be consistent with excavating a pond (Tr. 4/26, 170-72), she ultimately recommended that "[t]rying to reintroduce anything, trying to further manipulate it, I don't recommend doing that. I think let it be. The system will kind of naturalize. The vegetation is re-establishing. And any further actions would likely -- or have the potential to cause more harm to the wetlands system. So that was my recommendation, is just let it be." Tr. 4/26, 173:11-17.

Thus, based on the foregoing and the totality of evidence presented from the expert witnesses, Michelle Ford and George Logan, the court orders the injunctive relief as outlined at the conclusion of this memorandum.

ii. The court has the authority to mandate the Association to allow remediation of the wetlands area. If the Association does not consent, however, they would be considered in violation of "maintaining" the violation. Due to previous reluctance of the Association in allowing the defendants to conduct remediation, consent should be clarified, as a Homeowners' Association, consent may necessitate enlisting the Southwinds Association rules.

The plaintiff argues that Fred DeCrescentis, a former president of the Association, gave consent by way of testimony for the defendants to enter the land to conduct remediation, which is enough to proceed. The defendants caution that Mr. DeCrescentis may not have the appropriate authority to consent to the remediation on behalf of the Association, and that any properly authorized consent should be in writing.

"[There is a] venerable line of state cases providing for the in rem enforcement of injunctions against the maintenance of nuisances or other statutory violations is consistent with federal case law applying rule 65 (d) of the Federal Rules of Civil Procedure, which is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in privity with them, represented by them or subject to their control." (Footnote omitted; internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *Farricielli*, 307 Conn. 787, 809, 59 A.3d 789 (2013). "*The law is clear that a person may be bound by the terms of an injunction, even though not a party to the action, if he has notice or knowledge of the order and is within the class of persons whose*

conduct is entitled to be restrained or who acts in concert with such persons." (Emphasis in original; internal quotation marks omitted.) Id., 803.

"Moreover, the United States Supreme Court has recognized that District Courts' equitable authority to enforce injunctions against nonparties under rule 65 (d) of the Federal Rules of Civil Procedure is broader in furtherance of the public interest than . . . when only private interests are involved." (Internal quotation marks omitted.) Id., 810. "This public interest extends to the environment, as the United States District Court . . . observed that it has broad discretion to fashion remedies that will protect and effectuate its judgments, particularly when the public interest is involved. . . . Persons who were not parties to the original action may be enjoined from interfering with the implementation of court orders which establish and protect public rights." (Citation omitted; internal quotation marks omitted.) Id., 811.

For example, in *Preston* v. *Rabon*, Superior Court, jurisdiction of New London, Docket No. CV-13-6019210 (February 26, 2016) an abutting landowner (Rabon) was ordered by the court to consent and cooperate with a remediation order, which was issued by the Wetlands Commission for a violation committed by the adjacent landowners, the Benjamins, pursuant to § 22a-44. Similar to the present matter, a cease and desist order was issued to the Benjamins following activities conducted within 100 feet of wetlands without a permit. Id. An issue presented when it was discovered that a portion of the violation extended to Rabon's property. Id. This was further complicated by certain land rights in dispute between the Benjamins and Rabon. Id. Ultimately, the Commission was informed by the Benjamins that an enforcement order against Rabon may be necessary in order to conduct the remediation. Id.

The court in *Preston* found that "[a]s to wetlands violations, the holding in *Starr* v. *Commissioner of Environmental Protection* [226 Conn. 358, 627 A.2d 1296 (1993)], remains

good law, and the 'maintenance' of the violation by Rabon is itself a violation of the law and exposes him to liability and costs of remediation." Id. The court informed that "[u]nlike title to land, wetlands and wetlands violations are not limited by property lines." Id. Moreover, "[a]n inland wetlands and watercourses commission's authority is a statutory one and is set out in Section 22a-42 et seq. of the Connecticut General Statutes. That authority is limited to enforcing regulations which a commission promulgated through enabling legislation. There is no statutory authority granted to such a commission to decide or determine contested ownership rights in the land, such as the right of way which is at issue between the plaintiff and the Benjamins." *Rabon* v. *Preston Inland Wetlands & Watercourses Commission*, Superior Court, jurisdiction of New London, Docket No. CV-13-5014592 (December 16, 2014). Accordingly, the court in *Preston* found that "the Commission, once it became aware of the violations on Rabon's land, [it] had a basis to order the Benjamins to remediate both properties. . . . the Commission had the power and discretion to make that order." (Citation omitted.) *Preston* v. *Rabon*, supra, Superior Court, Docket No. CV-13-6019210. Further, "[i]n its approval, the Commission noted that 'Approval by the Inland Wetlands and Watercourses Commission in no way endorses any boundary markings or rights of ways as depicted in the drawing'"; id; so as not to make any determinations about boundary disputes. Id.

"By refusing to cooperate with the Commission's order, Rabon has perpetuated the violation originally committed by the Benjamins, thus placing himself at risk of facing a remedial order together with fines and costs." Id. Rabon was ordered by the court to "consent to and cooperate with the order of the Commission requiring the Benjamins to remediate the wetlands on Rabon's property." Id. In *Preston*, Rabon was also offered an alternative, which was to submit his own remediation plan, however, it would be at his own cost, with the right reserved

to seek any available damages. Id. Finally, the court warned that if Rabon did not follow through with either of the options to initiate remediation within a set number of days, fines would be imposed on him. Id.

Here, similar to *Preston*, there is minimally a question of whether consent or proper authorization has been given by the Association for the defendants to conduct remediation on any portion of the Association land. In the normal course of a violation, and subsequent order for remediation by the Commission, consent would not be a necessary step, as the wetlands and wetlands violations are not limited by property lines. In a situation where, like in *Preston*, consent was contested and remediation was not possible without consent, an order may be necessary. Consequently, by refusing to cooperate, the Association would essentially be perpetuating the violation originally committed by the defendants.

A Homeowners' Association falls under the Common Interest Ownership Act. See General Statutes § 47-243. Pursuant to this Act, "[a] person 'controls' a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty per cent of the voting interest in the declarant . . . ." General Statutes § 47-202 (1) (A). Moreover, the Association is subject to certain powers and duties. See General Statutes § 47-243. Further, "Unit owners shall be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association . . . ." General Statutes § 47-250 (a) (4).

Here, Mr. DeCrescentis was, at the time of trial, not sitting in a position as an officer of the Association. Therefore, whether the Association consents cannot be assured by his testimony.

It is within the authority of the Commission to order remediation where a violation has occurred, and this is not limited by property lines. Due to previous occurrences of the Association refusing to permit the defendants to perform remediation unless certain conditions were assured, however, the Association has placed itself in a position of having to allow the defendants to implement the approved plan. Since the court is not privy to the specific regulations of the Southwind Homeowners' Association, to error on the side of caution, consent should be obtained according to any applicable Southwind Homeowners' Association rules or regulations. Should consent not be granted, the Southwind Homeowners' Association may be subject to action by the Commission and/or Town.

iii. As previously ruled during the trial, the testimony regarding the statements of defendants' agents is inadmissible.

The plaintiff argues that notwithstanding the ruling made by the court during the course of trial that certain evidence that was precluded should be admissible, namely, evidence of statements by the defendants' agents. The defendants respond that the court properly sustained the defendants' objection as improper hearsay.

"The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored . . . [When] a matter has previously been ruled [on] interlocutorily, the court . . . may treat that [prior] decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance . . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge . . . ." (Internal quotation marks omitted.) *State* v. *Sebben*, Superior Court,

judicial district of Hartford, Docket No. CV-15-5039364-S (March 15, 2019, *Noble, J.*) (reprinted at 243 A.3d 365), aff'd, 201 Conn. App. 376, 243 A.3d 365 (2020).

Here, the court declines to depart from its ruling as to the admissibility of the evidence presented.

D. Costs and Fees pursuant to General Statutes § 22a-44 (b)

The plaintiff requests an award of costs, fees, and expenses in connection with pursuing this action against the defendants pursuant to § 22a-44 (b). The defendants request that any costs and fees be limited to costs directly associated with this lawsuit.

"[T]he court has the authority pursuant to § 22a-44 (b) to impose penalties that the local inland wetlands agency does not have statutory authority to impose." *Wilcox* v. *American Materials Corp.*, Superior Court, judicial district of Hartford, Docket No. CV-01-0809603 (April 3, 2002, *Lavine, J.*). "The test to be applied by the court in assessing costs and fees . . . is . . . to restore the affected wetlands or watercourses to their condition prior to the violation, whenever possible, and to place the financial burden of restoration upon the violator." (Citation omitted; internal quotation marks omitted.) *Conservation Commission* v. *Price*, 5 Conn. App. 70, 75, 496 A.2d 982 (1985).

The plaintiff is seeking the following in costs:

- Unpaid fees associated with the Application of a $10 application fee and
- $310 Public Hearing Fee
- $2850 - third party review cost to Michelle Ford
- $1653.17 – third party review cost for trial testimony and preparation to Michelle Ford

- $20,090 – to the plaintiff, Robert Doane as engineer and wetlands enforcement officer of the Town of Essex

The defendants argue that they should not be held responsible for paying litigation fees, or the plaintiff's own fees of $20,090. They contend that if the plaintiff's true objective was to protect the wetlands, he would have "worked collaboratively with the defendants" rather than making false allegations of extensive dredging and meeting the defendants with a level of resistance. . ." Defs.' Post Trial Br., p. 27. This cuts both ways. The defendants were given ample opportunity, as well as assistance, in order to file the requisite application. Approximately eighteen months went by without any activity.

The plaintiff's own fees included site inspections, cease and desist orders, application review and Commission meeting, which are related to the general functions of a wetlands enforcement officer. The court agrees with the defendants that the statutory goals provided in § 22a-44 (b) do not provide for *all* costs associated with the functions of the wetlands enforcement officer. Moreover, the supporting documentation by way of billing statements do not provide the court with an adequate basis to determine an accurate amount of time spent on this enforcement action or an accurate amount of fees.

Based on the foregoing, the court orders the costs and fees as outlined at the conclusion of this memorandum.

Attorney's fees pursuant to General Statutes § 22a-44 (b)

The plaintiff also requests attorney's fees pursuant to § 22a-44 (b). The defendants contend that an award of attorney's fees is discretionary.

Section 22a-44 (b) provides in relevant part: "All costs, fees and expenses in connection with such action shall be assessed as damages against the violator together with reasonable

attorney's fees which *may* be allowed . . . ." (Emphasis added.) See *Conservation Commission* v. *Price*, supra, 5 Conn. App. 74 ("[A]n assessment of attorney's fees is discretionary with the court, by the statute's express terms").

"It is well established that a trial court calculating a reasonable attorney's fee makes its determination while considering the factors set forth under rule 1.5 (a) of the Rules of Professional Conduct . . . A court utilizing the factors of rule 1.5 (a) considers, *inter alia*, the time and labor spent by the attorneys, the novelty and complexity of the legal issues, fees customarily charged in the same locality for similar services, the lawyer's experience and ability, relevant time limitations, the magnitude of the case and the results obtained, the nature and length of the lawyer-client relationship, and whether the fee is fixed or contingent. . . .

"[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on a litigation times a reasonable hourly rate . . . The courts may then adjust this lodestar calculation by other factors. . . .

"It is axiomatic, however, that the determination of reasonableness of attorney's fees appropriately takes into consideration a range of factors, among which the time and labor expended is but one consideration." (Citations omitted; internal quotation marks omitted.) *Madison Land Conservation Trust, Inc.* v. *Suppa*, supra, Superior Court, Docket No. CV-16-5037477-S.

In *Madison*, the plaintiff brought an action seeking equitable relief, for among other things, a violation of the Inland Wetlands & Watercourses Act. The amount of attorney's fees requested in that case was $74,754.13. Based on the guidance[7] provided in the preceding

[7] See *Madison Land Conservation Trust, Inc.* v. *Suppa*, Superior Court, judicial district of New Haven, Docket No. CV-16-5037477-S (May 4, 2018, *Wilson, J.*) for assessment of attorney's fees, as the court in *Madison* discusses this issue in further detail.

paragraphs, in conjunction with the court's expertise, as well as in consideration of the evidence submitted, the court in *Madison* awarded reasonable attorney's fees of $26,000. Id.

In the present matter, the court did a careful review of the invoice submitted by the plaintiff's counsel. Counsel spent over 130 hours on trial preparation alone for a trial which lasted approximately 22.5 hours. The issues in this case were not novel or complex. Both parties acknowledged that the case boiled down to simply the determination of what relief is to be granted. The defendants argue that the plaintiff declined to "work collaboratively" with the defendants and instead "aggressively [pursued] an enforcement action," resulting in large sums of time and money.

The court has carefully reviewed the billing statements based upon its general knowledge of what occurred, the complexity of the issues in this case, the magnitude of the case, the results obtained, and presided over the court trial. The plaintiff is seeking $61,501.60 in attorney's fees and costs. The court finds, based upon the evidence submitted, and the above stated factors that a fee of $35,000 is appropriate. In addition, the court awards expenses of $1800.17.

E. Civil Penalties pursuant to General Statutes §§ 22a-44 (b) and (c)

Finally, the plaintiff is seeking civil penalties pursuant to §§22a-44 (b) and (c).

Generally, in the absence of any specific guidance from the legislature, a civil penalty provision vests wide discretion in the court to determine a fair and proper penalty. See *Carothers* v. *Capozziello*, 215 Conn. 82, 103, 574 A.2d 1268 (1990).

Section 22a-44 (b) provides that a civil penalty shall be assessed of not more than one thousand dollars for each offense, and each violation is considered a separate and distinct offense. "[I]n the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense." The plaintiff provided the court with a calculation of the

statutory exposure of appropriate penalties that the court could impose of $2000 per day for 7,360 days against the defendants for continuing and wilful violations of the Wetlands Regulations.[8] The plaintiff in his reply brief requested penalties of at least $10 per day totaling $77,870. The defendants contend that upon receiving the cease and desist orders, the behaviors at issue immediately ceased. Moreover, the defendants immediately hired several different specialists to secure a proper remediation plan.

Section 22a-44 (c) provides in relevant part "Any person who wilfully or knowingly violates any provision of sections 22a-36 to 22a-45, inclusive, shall be fined not more than one thousand dollars for each day during which such violation continues or be imprisoned not more than six months or both. For a subsequent violation, such person shall be fined not more than two thousand dollars for each day during which such violation continues or be imprisoned not more than one year or both. . . ."

An action was commenced against the defendant in *Rocque* v. *Nowinski*, Superior Court, judicial district of Hartford, Docket No. CV-01-0807406-S (August 13, 2004) for allegedly dredging a channel[9] through shellfish beds in violation of an environmental statute. Accordingly, the Commissioner plaintiff proposed a civil penalty of $1000 per day for each of the four offenses, for a total of $200,000.

"In *Carothers* v. *Cappozziello,* 215 Conn. 82, 103-04, 574 A.2d 1268 (1990), our Supreme Court stated that in exercising its discretion as to the amount of a civil penalty resulting from a violation of environmental statutes, the court should consider, but not be limited to the

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[8] This would total $14,720,000.

[9] "[The defendant] dug a channel through the tidal wetlands of his island, approximately 150 feet long, 30 feet wide and 7 to 9 feet deep. His purpose was to provide an easier access for his sick female companion who was confined to a wheelchair." *Rocque* v. *Nowinski*, Superior Court, judicial district of Hartford, Docket No. CV-01-0807406-S (August 13, 2004).

following factors: (1) the size of the business involved; (2) the effect of the penalty or injunctive relief on its ability to continue operation; (3) the gravity of the violations; (4) the good faith effort made by the business to comply with the applicable statutory requirements; (5) any economic benefit gained by the violations; (6) deterrence of future violations; and (7) the fair and equitable treatment of the regulated community." *Rocque* v. *Nowinski*, supra, Superior Court, Docket No. CV-01-0807406-S.

The court in *Rocque* applied these factors, dismissing the first two, as the matter did not involve a business. Id. The court concluded that although there was some damage due to the dredging, the offense was not serious. Id. Further, "[e]ven though [the defendant] knowingly undertook the work on his property without the requisite permits, as soon as he was accused of the violations, he hired the necessary professionals. . . to make [the necessary] applications." Id. His permit was successful. Id. The court went on to say that "the most critical factor here applicable is deterrence, which our Supreme Court recognizes as one of the primary purposes of the imposition of civil penalties for violation of environmental statutes." *Rocque* v. *Nowinski*, supra, Superior Court, Docket No. CV-01-0807406-S. See *Keeney* v. *L & S Construction*, 226 Conn. 205, 218, 626 A.2d 1299 (1993).

Ultimately, the court in *Rocque* concluded that "[t]aking into account all the factors stated in *Carothers* and, on the one hand, seeking to protect the environment, and on the other, to be fair to [the defendant] . . . an appropriate civil penalty to be imposed is $40,000." Id. Of note, the court refused to make an order to fill the channel as it would "serve no purpose and would cause more environmental damage than it is worth . . . [and further refused to order] remediation of the damage to the vegetation . . . because it is already starting to grow back in." Id.

In *Kelly* v. *Thweatt*, Superior Court, judicial district of Tolland, Docket No. CV-19-5013098-S (January 21, 2021) an inland wetlands agent "observed disturbed soil, excavated upland review area, unauthorized filling, and parked, heavy construction equipment in the regulated area . . . . [which is a] regulated activity . . . but [the defendants] had [not] applied for or had been granted a permit for such activity." Even though the enforcement officer was granted access through a temporary injunction, the defendants denied her access on two occasions. Id. "Through further court intervention, the plaintiffs were finally granted access to inspect the property . . . . Upon initial observation of the property, Officer Kelly noted that additional regulated activity had occurred . . . ." Id. An inspection to examine the soil was conducted and "[i]t was determined that the regulated activity had substantially degraded and in some places *destroyed the inland wetlands*, upland review area and the known watercourse on the property." (Emphasis added.) Id.

Upon assessment of whether civil penalties were appropriate, the court imposed $1000 for each incidence of denied access to the plaintiff for inspection, as well as an additional $3920 "as a result of the continued violation of the regulations from the date of the temporary injunction to the date of trial." Id.

Here, the defendants contend that they were not aware of any regulations or permits required to begin this construction project. Although the court is sympathetic to the defendants' claim that they merely wished to increase the enjoyment of their land, particularly in the midst of a global pandemic, the court simply cannot ignore the fact that one of the defendants is a professional real estate agent by trade and surely has some general awareness of certain permits as necessary for construction projects near or on wetlands, or the importance of complying with town regulations once a violation is substantiated. Unlike *Kelly*, the defendants did cease the

activity requested and promptly enlisted professional expertise to manage the remediation plan. The follow through, however, particularly in regard to submitting the basic application, was abysmal.

Similar to *Rocque,* the first two *Carothers* factors are inapplicable here. The totality of the damage is not serious, as the experts note that the pond is recovering appropriately, and it is best to leave it alone. As noted, the permit process was unduly delayed, but "the most critical factor here applicable is deterrence, which our Supreme Court recognizes as one of the primary purposes of the imposition of civil penalties for violation of environmental statutes." See *Rocque* v. *Nowinski*, supra, Superior Court, Docket No. CV-01-0807406-S citing *Keeney* v. *L & S Construction*, supra, 226 Conn. 218. Thus, the court concludes that an appropriate civil penalty to be imposed is $5000.[10]

CONCLUSION

Based on the foregoing, the court ORDERS a mandatory injunction requiring the defendants to:

1. Remove the flat portion of the lower patio terrace.

[10] The plaintiff cites also to General Statutes § 22a-44 (c) which provides that "a defendant who wilfully or knowingly violates any provision *shall* be fined not more than $1,000 for each day during which such violation continues." (Emphasis added.) There was no evidence presented to substantiate a claim that the defendants – most particularly, Ms. McDonald – *wilfully or knowingly* violated the provisions. Moreover, this section creates criminal and not civil sanctions.

Furthermore, § 22a-44 (b) provides that: "[a]ll penalties collected. . . shall be used solely by the Commissioner of Energy and Environmental Protection (1) to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible, (2) to restore other degraded wetlands or watercourses, (3) to inventory or index wetlands and watercourses of the state, or (4) to implement a comprehensive training program for inland wetlands agency members." Since the cost of the restoration will be borne by the defendants, the court finds the amount awarded as penalties to be sufficient to follow the intent of the statute.

2. Restore the grade to its original condition, to the extent possible as determined by the contractor performing the work, after the flat portion of the lower patio terrace is removed.
3. Monitor exposed and/or restored areas in order to prevent establishment by non-native, invasive vegetation, such as Japanese silt grass and Asiatic bittersweet and remove such invasive vegetation by hand for a period of three years.
4. Provide a report to the Essex Inland and Wetlands and Watercourse Commission at the end of each calendar year, for a period of three years, from an environmental professional, documenting invasive species monitoring and removal activities.
5. Allow access to the Wetlands Enforcement Officer (WEO) for inspection and confirmation of compliance so long as the WEO provides a minimum of five business days' notice for any such inspection. The parties shall take reasonable measures to schedule such inspections at times mutually agreeable to both the WEO and the defendants. Consent is deemed granted absent written communication to the WEO if no response is provided to the WEO within five business days. The defendants shall owe the Town no fees for such inspections. George Logan, or another technical representative designated by Ms. McDonald shall be present for any inspection made pursuant to this paragraph. The defendants shall bear the cost of any professional hired by them to attend a site inspection with the WEO.
6. Refrain from disrupting native vegetation within 20 feet of Birch Mill Pond so that the area can naturalize, and the wetland buffer functions and values can be restored, unless specifically permitted.

7. Produce a bond or surety to the WEO/EIWWC to ensure the completion of the referenced removal, restoration, and plantings in the amount of $50,000. Upon the defendants' failure to comply with said Orders: (i) such bond is forfeited; and (ii) the EIWWC, the town of Essex, and/or its agents shall complete the herein referenced removal and restoration.
8. Pay the following fees:
    a. $10 application fee;
    b. $310 public hearing fee;
    c. $2850 third party review cost; and
    d. $4125 – Robert Doane, contract engineer and wetlands enforcement officer.
9. Abide by the following conditions of removal/restoration:
        a. All removal and/or restoration shall be performed by a licensed and insured contractor.
        b. All work authorized herein shall be done in accordance with the protection measures presented in NDDB Determination 202104876.
        c. An eighteen-inch silt sock shall be installed in accordance with the recommendations made by George Logan.
        d. The defendants shall be permitted to confer with Roger Wolfe, Wetlands Restoration Biologist at the Connecticut Department of Energy and Environmental Protection and confer with the WEO to incorporate his suggestions as prudent and mutually agreeable.
        e. No removal and/or restoration authorized herein shall occur before May 1, 2024, absent prior written approval from the EIWWC, pursuant to the

Wetlands Regulations. All removal and restoration shall be completed by October 1, 2024.

f. All removal and/or restoration shall be performed by a licensed and insured contractor, familiar with proper sedimentation and erosion control measures, construction best management practices, site stabilization and restoration methods.

g. All work authorized herein shall be done by the least invasive measures possible so as to cause the least disturbance to the regulated area; removal shall be by hand truck where possible.

Judge Cynthia K. Swienton