

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-2570-22

IN THE MATTER OF DENIAL OF
THIRD PARTY HEARING
REQUEST OF P.T. JIBSAIL
LIMITED PARTNERSHIP FILE NO.
1515-06-0012.1 WFD 170001; WFD
18001; OFFICE OF LEGAL
AFFAIRS FILE NO. 19-06

Civil Action

On Appeal From:
New Jersey Department of
Environmental Protection

BRIEF OF APPELLANT JANINE MORRIS TRUST

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PRELIMINARY STATEMENT

The instant matter is an appeal of two decisions by Respondent, New Jersey Department of Environmental Protection (“NJDEP”). The first decision being appealed is the NJDEP’s denial of an adjudicatory hearing request filed by Appellant, Janine Morris Trust (“Appellant” or “Trust”) challenging the issuance of a Waterfront Development (“WFD”) permit modification to Respondent, P.T. Jibsail Family Limited Partnership (“Jibsail”). The second decision being appealed is the issuance of the WFD permit modification to Jibsail.

Following the initial 2017 grant of a WFD permit to Jibsail, along with an associated tidelands license, Jibsail constructed an over 167-foot extension of its previously existing 128-foot dock at its residential property, which now extends approximately 295 feet offshore of West Point Island, in Lavallette, New Jersey, and interferes with the safe use of the adjacent waterfront facilities owned by Appellant. As a result of Jibsail’s extended dock, Appellant has had several near miss boat collisions with the extended dock while simply trying to approach Appellant’s own dock. This situation is exacerbated by the prevailing winds and water currents. Jibsail’s extended dock also hinders Appellant’s ability to access the navigable channel of Barnegat Bay. Quite simply, Appellant’s ingress and egress to and from the channel has been substantially

impaired. Moreover, the dock, as extended, serves as an extremely dangerous and unsafe condition for boaters, kayakers, paddle boarders, and other users navigating the channel. Despite Appellant's written objections to Jibsail's WFD permit in 2017, the NJDEP approved the project.

After construction, the NJDEP discovered that Jibsail's dock was not built in accordance with the approved plans. Thus, a modified WFD permit and a new tidelands license had to be approved by the NJDEP and Tidelands Resource Council ("TRC"), respectively. Appellant renewed its objection to the modified application, but the NJDEP ultimately granted the permit modification and subsequently rejected Appellant's adjudicatory hearing request.

Notwithstanding the NJDEP's denial, Appellant has clearly demonstrated a particularized property interest sufficient to qualify for an adjudicatory hearing before the Office of Administrative Law. In addition, the record reflects that Jibsail failed to satisfy two critical components of the Recreational Docks and Piers Rule set forth in the Coastal Zone Management Rules. First, Jibsail did not demonstrate that the need for the WFD permit and associated modification could not be satisfied by then existing waterfront facilities. Jibsail had an existing dock that extended approximately 128 feet and was capable of docking a boat. Second, Jibsail's extended dock hinders Appellant's navigation and access. Despite the lack of credible evidence in the record to support these two

requirements, and the ample evidence refuting the criteria, the NJDEP nonetheless approved the permit modification.

For these reasons and the reasons set forth in detail below, the NJDEP's decisions were arbitrary, capricious, and unreasonable, lacked substantial credible evidence in the record, and must be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

On or about March 28, 2017, Charles E. Lindstrom, P.E. ("Lindstrom") on behalf of Jibsail, applied to the NJDEP for a WFD individual permit for a 185-foot pier dock extension and two open type boat lifts at 83 Pershing Boulevard, Lavallette, New Jersey ("Jibsail Property").² [Aa22-Aa87.] On the same day, Lindstrom sent notices to neighbors within 200 feet of the project and applied to the NJDEP Bureau of Tidelands Management for a modified riparian license. [Aa41.] Appellant owns the property at 85 Pershing Boulevard, Lavallette, New Jersey, which is immediately adjacent to the Jibsail Property. [Aa48.]

On or about April 3, 2017, Appellant submitted a public comment to the NJDEP opposing the installation of the 185-foot pier dock at 83 Pershing

¹ The Procedural History and Statement of Facts are inextricably interwoven and, therefore, are presented together herein.

² Jibsail's application requested a 185-foot dock extension. [Aa39.] However, the NJDEP approved a 167.3-foot dock extension. [Aa1.]

Boulevard, Lavallette, NJ. [Aa167.] Other neighbors also submitted public comments in opposition to the application. The Jibsail extended dock is almost twice as long as other docks in the area. [Aa149; Aa150; Aa167; Aa188; Aa291-Aa295.] The Jibsail extended dock is also angled in a manner that interferes with Appellant's use and enjoyment of Appellant's dock and results in significant safety and navigational issues. These issues are evident based on a simple review of photographs and other documentary evidence in the record. [Aa149; Aa150; Aa152; Aa153; Aa188; Aa291-Aa295; Aa297; Aa298; Aa303.]

As required by the Coastal Zone Management ("CZM") Rules, N.J.A.C. 7:7-1, et seq., a policy compliance statement was filed by Jibsail with its 2017 WFD permit application. [Aa30.] Among other regulations, Jibsail was required to comply with the Recreation Docks and Piers Rule at N.J.A.C. 7:7-12.5. As part of its compliance statement, Jibsail attempted to demonstrate a need for the new waterfront facilities that cannot purportedly be satisfied by existing facilities by stating that "this is a private lot and the proposed construction will allow the property owner mooring and access for the use of pleasure crafts." [Aa36.] Jibsail further stated that "[t]he proposed pier dock extension structure and proposed open type boat lifts will not hinder navigation or access to adjacent water area." [Aa37.] Jibsail ultimately asserted that its WFD permit application

met “the intent and the policies of the State of New Jersey, Department of Environmental Protection.” [Aa38.]

On May 19, 2017, the NJDEP issued WFD permit No. 1515-06-0012.1 to Jibsail for a 167.3-foot dock extension and two open-type boat lifts. [Aa1-Aa5.] The dock extension was constructed in the Spring of 2018. [Aa149; Aa151.] On December 12, 2017, the TRC issued a ten-year tidelands license to Jibsail for the dock extension. Appellant subsequently discovered the extension after it had already been approved and constructed. Upon discovering that the dock had been built on or about April 28 and April 29, 2018, Plaintiff wrote to the Lavallette Planning Board, the US Army Corps of Engineers, and the NJDEP’s Bureau of Coastal and Land Use Compliance and Enforcement regarding the dock extension at the Jibsail Property. [Aa179-Aa181.]

On June 26, 2018, the NJDEP issued a notice of violation to Jibsail pursuant to N.J.A.C. 7:7-27.2(c)8. [Aa118.] Specifically, the NJDEP advised Jibsail that it had constructed the dock extension in a manner that did not comply with the approved plans and was not within the limit of Jibsail’s tidelands license. [Aa119.] As such, a modification of the WFD permit and tidelands license was required.

By letter dated October 30, 2018, Jibsail filed an application to modify its WFD permit. [Aa94.] The permit modification application noted that the

previously approved and constructed pier dock extension was mislocated to the east by 1.7 feet. [Aa101.] The modification also requested approval for the installation of an open rail jet ski lift in place of one of the two boat lifts previously approved in 2017. [Aa101.]

Similar to the 2017 WFD permit application, the modification application contained a policy compliance statement. [Aa102.] To demonstrate a need for the new waterfront facilities that cannot purported by satisfied by existing facilities, Jibsail stated that “this is a private lot and the two proposed boat lifts will allow the property owner mooring and access for the use of pleasure crafts.” [Aa106.] Jibsail again stated that the proposed waterfront facilities “will not hinder navigation or access to adjacent water areas.” [Aa107.] Again, Jibsail ultimately asserted that its WFD permit application met “the intent and the policies of the State of New Jersey, Department of Environmental Protection.” [Aa109.]

On March 20, 2019, the NJDEP approved a permit modification for WFD permit No. 1515-06-0012.1 WFD170001 to Jibsail over the objection of Appellant. [Aa89.] By letter dated April 23, 2019, Appellant filed an adjudicatory hearing request concerning the WFD individual permit. [Aa349-Aa382.] In its hearing request, Appellant argued, among other things, that Jibsail failed to demonstrate a need for the extended dock that cannot be satisfied by

existing waterfront facilities and the 2017 WFD permit and 2019 WFD permit modification hinders navigation and access to Appellant's waterfront facilities. [Aa351-Aa353.] On May 31, 2019, Jibsail filed an objection to Appellant's adjudicatory hearing request. [Aa429-Aa455.]

The 2019 WFD permit modification required Jibsail to obtain a modified tidelands license. [Aa89.] The NJDEP advised Appellant that it was reviewing Appellant's adjudicatory hearing request but would not render a decision until the TRC reached a decision on the modified tidelands license.

While outside the scope of this appeal, it should be noted that on March 4, 2020, the TRC held a hearing on the Jibsail tidelands license application. [Aa322.] As part of the hearing process, Appellant submitted forty-nine exhibits to the TRC, which are also part of this record in this matter. [Aa139-Aa303.] Appellant also submitted a post-hearing brief, which set forth in detail its legal arguments concerning Jibsail's tidelands license application. [Aa322-Aa344.] Following additional argument before the TRC on September 14, 2022, the TRC voted to approve Jibsail's application. This decision is currently the subject of an appeal filed by Appellant entitled In the Matter of P.T. Jibsail Family Limited Partnership Tidelands License No. 1515-06-0012.1 TDI190001, Docket No.: A-000699-22.

On March 14, 2023, the NJDEP denied Appellant’s adjudicatory hearing request. [Aa132-Aa136.] This appeal follows.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

Agency factual findings enjoy a presumption of correctness if they are “supported by substantial credible evidence” in the record as a whole. In re Authorization for Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004); Bd. Of Educ. Of Englewood Cliffs v. Bd. Of Educ. Of Englewood, 257 N.J. Super. 413, 456 (App. Div. 1992), *aff’d o.b.*, 132 N.J. 327, cert. denied, 510 U.S. 991 (1993). An appellate court applies these standards to avoid substituting its own judgment for the agency’s exercise of expertise. In re Distribution of Liquid Assets, 168 N.J. 1, 10 (2001).

The presumptive validity of administrative actions requires that those challenging the decision have the burden of proving that the decision is reversible. Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 45 (1986); McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); In re Aetna Cas. & Sur. Co., 248 N.J. Super. 367, 376 (App. Div. 1991), cert. denied, 126 N.J. 385 (1991), cert. denied, 502 U.S. 1121 (1992). The administrative action is not sustainable without substantial credible evidence to support the decision.

To reverse an agency’s decision, the court must find: “(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record.” Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep’t of Env’tl. Prot., 191 N.J. 38, 48 (2007). “While we must defer to the agency’s expertise, we need not surrender to it.” N.J. Chapter of Nat’l Ass’n of Indus. & Office Parks v. N.J. Dep’t of Env’tl. Prot., 241 N.J. Super. 145, 165 (App. Div. 1990), certif. denied, 122 N.J. 374 (1990).

Appellant submits that the NJDEP’s denial of Appellant’s adjudicatory hearing request was arbitrary, capricious, and unreasonable, and not based on substantial credible evidence. Moreover, for the reasons set forth herein, Appellant respectfully submits that the NJDEP’s grant of the modified WFD permit to Jibsail in 2019 was also arbitrary, capricious, and unreasonable, and not based on substantial credible evidence. As such, these decisions should be reversed.

II. THE NJDEP’S DENIAL OF APPELLANT’S ADJUDICATORY HEARING REQUEST WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AND SHOULD BE REVERSED. [Aa132-Aa136.]

The Administrative Procedure Act (“APA”) recognizes that “[p]ersons who have particularized property interests or who are directly affected by a

permitting decision have constitutional and statutory rights and remedies.” N.J.S.A. 52:14B-3.1. The APA affords hearing rights to persons “who has a particularized property interest sufficient to require a hearing on constitutional or statutory grounds.” N.J.S.A. 52:14B-3.2. Clearly, the APA recognizes that someone other than the applicant has a right to obtain an adjudicatory hearing based on a “particularized property interest.” The APA does not limit a person’s rights to appeal a permit decision directly to the Appellate Division and affords an adjudicatory hearing to provide complete facts to those that qualify under the Act. N.J.S.A. 52:14B-3.3; R. 2:2-3(a)(2). An adjudicatory hearing enhances agency decision-making and can result in more effective judicial review in the event of an appeal to the Appellate Division.

Appellant acknowledges that an aggrieved application has the primary right to qualify for an adjudicatory hearing. The NJDEP relies heavily upon the Court’s quote that “third parties generally are not able to meet...this rigorous review standard [particularized property interest].” In re NJDPES No. NJ0025241, 185 N.J. 474, 482 (2006). However, the factual situation presented herein is distinguishable from the case law cited by the NJDEP in its decision. Moreover, as discussed in more detail below, the NJDEP incorrectly focuses on

the need for a particularized property interest of “constitutional significance” while ignoring the plain language of the APA.³

Appellant’s dock is adjacent to Jibsail’s dock and extends approximately 105 feet into Barnegat Bay. [Aa167; Aa297; Aa298; A372-Aa375.] The 2017 WFD permit issued to Jibsail authorized the construction of a 167.3-foot extension to Jibsail’s already existing approximately 128-foot dock. [Aa1-Aa5.] The 2019 WFD permit modification legalized the as-built location of the dock. [A89-91.] Jibsail’s dock extension angles in a westerly direction, thereby cutting across Appellant’s access to the navigable channel of Barnegat Bay. [Aa149; Aa150; Aa152-Aa153; Aa188; Aa291-Aa295; Aa297; Aa298.] The photographs and other documentary evidence in the record demonstrate the navigational hazard presented by the dock extension. [Aa149; Aa150; Aa152; Aa188; Aa291-Aa295; Aa297; Aa303.]

³ Assuming *arguendo* that Appellant was required to establish a particularized “constitutionally protected property interest,” Appellant notes that such a property interest exists by virtue of the fact that the dock in question traverses Appellant’s riparian right to freely navigate to and from the channel without obstruction. The statutory scheme established under N.J.S.A. 12:3-23 set forth a notice provision when this type of situation occurs. Appellant submits that failure to abide by this established process is akin to a Fifth Amendment taking claim and as such the riparian interest is a protected particularized property interest which triggers a right to an adjudicatory hearing. This fact alone distinguishes this case from those cited by the NJDEP.

While Appellant stated in its objection letters to the NJDEP and other governmental entities that a general navigational and safety hazard to boaters, kayakers, and paddle boaters would be created by the dock extension, Appellant focused on the particular navigational issues faced solely by Appellant. [Aa380-Aa382.] In sum, Appellant is unable to safely maneuver its watercrafts in or out of its waterfront facilities due to the extension. [Aa380-Aa382.] Again, this objection is supported by the documentary evidence in the record. [Aa149; Aa150; Aa152; Aa188; Aa291-Aa295; Aa297; Aa303.]

The NJDEP cites to Spalt v. N.J. Dep't of Env'tl. Prot., 237 N.J. Super. 206 (App. Div. 1989), In re Riverview Development, LLC, Waterfront Development Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409 (App. Div. 2010), and In re AMICO/Tunnel Carwash, 371 N.J. Super. 199 (App. Div. 2004) in its decision in an effort to explain why Appellant does not have a particularized property interest. [Aa135.]

In Spalt, the Court held that close residency, fear of resultant injury to property, damage to recreational interest, or shared generalized property rights are not particular property rights. Spalt, 237 N.J. Super. at 212. In re Riverview Dev. held that general claims of adverse aesthetic and traffic impacts did not create sufficient property interests to entitle neighboring homeowners to a

hearing. In re Riverview Dev., 411 N.J. Super. at 437-38. The Court in In re AMICO stated that

simply because some of the plaintiffs reside close to the... site and are fearful of resultant injury to their property, does not mean that they are entitled to an adjudicatory hearing. Fear of damage to one's...generalized property rights shared with other property owners is insufficient to demonstrate a particularized property right.

In re AMICO, 371 N.J. Super. at 212.

Each of these decisions bases the lack of a particularized property interest on the fact that the potential harm faced by the party requesting a hearing is general in nature. In contrast, Appellant's request for a hearing is grounded in a factual navigational harm that has uniquely impacted Appellant. [Aa349-Aa382.] In sum, the NJDEP's finding that "[Appellant] alleges only generalized property rights, indistinguishable from those shared by other neighboring property owners" is not based on the evidence in the record. [Aa135; Aa351-Aa353; Aa380-Aa382.]

Moreover, in its decision, the NJDEP incorrectly narrows the meaning of particularized property interest to a matter "of constitutional significance," thereby placing an additional requirement to qualify for an adjudicatory hearing not contained in the APA. Id.; N.J.S.A. 52:14B-3.2. The NJDEP's requirement that Appellant demonstrate "a constitutionally protected individual property

interest” is a legal error. [Aa135.] A court is never bound by an agency’s determination of a purely legal issue. In re Stream Encroachment Permit, 402 N.J. Super. 587, 597 (App. Div. 2008). When “the issue involves the interpretation of statutes and regulations, it is purely a legal issue, which we consider de novo.” Klawitter v. City of Trenton, 395 N.J. Super. 302, 318 (App. Div. 2007).

In its May 31, 2019 letter, Jibsail states that “[Appellant’s] claimed right to a hearing would have merit only if her claims that Jibsail’s dock will materially interfere with the ability to navigate to and from the [Appellant’s] dock were valid and substantial.” [Aa432.] While Jibsail goes on to state its position that Appellant’s navigation claim is not valid and substantial, the statement recognizes that a navigation claim particular to Appellant would be justification for a hearing.

The NJDEP decision states that Jibsail’s permit application does not hinder navigation or access to adjacent water areas simply because the end of the dock is approximately 163 feet from the nearest authorized navigation channel. [Aa135.] First, this conclusion is made without any support in the record. Moreover, the decision completely fails to account for the navigation and access issues suffered by Appellant when navigating from its waterfront facilities to the navigational channel referenced by the NJDEP. This

navigational issue was a reason why Appellant objected to the permit and associated modification and support for its entitlement to an adjudicatory hearing.

Finally, it should also be noted that Appellant is appealing the TRC's grant of the tidelands license to Jibsail in a separate pending appeal with Docket No.: A-000699-23. While outside the scope of this appeal, the arguments presented in the tidelands appeal are set forth in the record in this matter at Aa322-Aa344. Appellant submits that the tidelands instrument, which is required under the WFD permit and modification, was issued in error and should be reversed.

For the reasons set forth herein, Appellant submits that it has a particularized property interest sufficient to entitle it to an adjudicatory hearing. As such, the NJDEP's decision to deny Appellant's adjudicatory hearing request was arbitrary, capricious, and unreasonable and should be reversed.

III. THE NJDEP'S ISSUANCE OF THE WATERFRONT DEVELOPMENT PERMIT MODIFICATION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE, LACKS SUBSTANTIAL CREDIBLE EVIDENCE TO SUPPORT THE DECISION, AND SHOULD BE REVERSED. [Aa89-Aa91.]

In Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465 (App. Div. 2023), this Court set forth the well settled principle that "[e]xhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle. This principle requires exhausting available

procedures, that is, 'pursuing them to their appropriate conclusion and, correlatively...awaiting their final outcome before seeking judicial intervention.'" Id. at 478 (quoting Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 558-59 (1979)(internal citations omitted)). The Court held that a NJDEP determination does not become final for purposes of a judicial appeal until the NJDEP denied the petitioner's request for an adjudicatory hearing. Id. at 479. As Appellant filed a timely adjudicatory hearing request of Jibsail's 2019 WFD permit modification, and subsequently filed a timely notice of appeal of the NJDEP's March 14, 2023 denial of its adjudicatory hearing request, Appellant also challenges the merits of the NJDEP's grant of Jibsail's WFD permit modification in this appeal. [Aa132-Aa136; Aa532-Aa539.]

New Jersey takes a liberal approach to standing with regard to the review of administrative actions, affording it to anyone who is affected or aggrieved in fact by that decision. In re Issuance of Access Conforming Lot Permit No. A-17-N-N040-2007, 417 N.J. Super. 115, 126 (App. Div. 2010). Thus, "owners of other properties in the vicinity of a property for which a permit or other land use approval has been granted may appeal the approval." Id. Here, Appellant alleges that its property and associated riparian rights will be negatively impacted by the NJDEP's grant of the 2019 WFD permit modification. Therefore, Appellant has standing to appeal that decision. [Aa89-Aa91.]

The standard of review, which is set forth in detail in Point I, can be summarized as follows. The Appellate Division has exclusive jurisdiction to review any action or inaction of a state administrative agency. Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976). The review of administrative actions is limited. In re Proposed Xanadu Redev. Project, 402 N.J. Super. 607, 640 (App. Div. 2008). However, the Appellate Division "may reverse an agency decision if it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013). For the reasons set forth below, the NJDEP's grant of the 2019 WFD permit modification was arbitrary, capricious, and unreasonable and not based on substantial credible evidence. As such, the NJDEP's decision should be reversed, and the permit modification should be rescinded.

A. Jibsail did not demonstrate a need for the WFD permit and modification that cannot be satisfied by existing waterfront facilities.
[Aa89-Aa91.]

The Recreational Docks and Piers Rule within the CZM rules at N.J.A.C. 7:7-12.5 requires that the applicant demonstrate a "need that cannot be satisfied by existing facilities." N.J.A.C. 7:7-12.5(b)1. In its March 27, 2017 policy compliance statement, which was part of its WFD permit application, Jibsail attempts to satisfy this requirement by summarily stating that "[i]n this case, this is a private lot and the proposed construction will allow the property owner

mooring and access for the use of pleasure crafts.” [Aa36.] This analysis is continued in Jibsail’s October 23, 2018 policy compliance statement, which was part of its WFD permit modification application, where Jibsail states that the demonstrated need is satisfied because “[i]n this case, this is a private lot and the two proposed boat lifts will allow the property owner mooring and access for the use of pleasure crafts.” [Aa106.] This analysis is fatal for the following reasons.

First, it appears that the record for the 2017 WFD permit and 2019 WFD permit modification is barren of any further demonstration of need besides the summary conclusion that the approvals will allow Jibsail to use its vessels. No further analysis is advanced by Jibsail for the NJDEP’s consideration of why its then existing waterfront facilities were inadequate. More importantly, there is no analysis in the record concerning how the NJDEP concluded that the evidence in the record satisfied N.J.A.C. 7:7-12.5(b)1.

Second, pertaining specifically to the 2019 WFD permit modification, Jibsail’s blanket statement that the required need was demonstrated does not comment on, or otherwise reference, the location of the dock at issue in the modification application. [Aa106; Aa101.] While Jibsail will argue that the modification is only requesting an approved relocation of 1.7 feet to the east,

Jibsail is still required to demonstrate need, particularly considering that it failed to do so in its 2017 permit application.

The NJDEP's factual findings enjoy a presumption of correctness if they are "supported by substantial credible evidence" in the record as a whole. In re Authorization for Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004). However, in this instance, the record does not contain any support for the position that Jibsail had demonstrated a need for the 2017 WFD permit and 2019 WFD permit modification as required by N.J.A.C. 7:7-12.5(b)1. As such, the NJDEP's decision was arbitrary, capricious, and unreasonable, not based on substantial credible evidence, and should be reversed.

B. Jibsail did not demonstrate that its dock will not hinder navigation or access to adjacent water areas. [Aa89-Aa91.]

The Recreational Docks and Piers Rule also requires that the applicant demonstrate that "[t]he proposed structure and associated mooring piles do not hinder navigation or access to adjacent water areas." N.J.A.C. 7:7-12.5(b)9. This requirement goes on to state that "[a] hazard to navigation will apply to all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers." Id.

In its March 27, 2017 policy compliance statement, which was part of its WFD permit application, Jibsail attempts to satisfy this requirement by summarily stating "[t]he proposed dock extension structure and proposed open

type boat lifts will not hinder navigation or access to adjacent water area.” [Aa37.] While a site plan was included with its submission, Jibsail provides no further justification for how Appellant’s navigation and access to and from its waterfront facilities and the navigational channel in Barnegat Bay will not be hindered. Jibsail echoes this statement in its October 23, 2018 policy compliance statement by stating “[t]he proposed open type boat lifts will not hinder navigation or access to adjacent water areas.” [Aa0107.] Again, while a site plan was included with its submission, Jibsail provides no additional support for how Appellant’s navigation and access to and from its waterfront facilities and the navigational channel in Barnegat Bay will not be hindered.

The 2017 WFD permit and 2019 WFD permit modification applications are barren of any further demonstration that Appellant’s navigation and access will not be negatively impacted aside from the summary conclusions that the navigation and access condition is met. Furthermore, there is no analysis in the record concerning how the NJDEP concluded that the evidence in the record satisfied N.J.A.C. 7:7-12.5(b)9, aside from one sentence in the NJDEP’s decision to deny Appellant’s adjudicatory hearing request, which was issued approximately four years after the 2019 WFD permit modification was granted. [Aa135; Aa89-Aa91.]

Again, pertaining specifically to the 2019 WFD permit modification, Jibsail's blanket statement that navigation or access will not be hindered does not comment on, or otherwise reference, the location of the dock at issue in the modification application. [Aa106; Aa101.] Simply stated, the location of the dock in which Jibsail sought approval with the permit modification application does in fact hinder Appellant's ability to navigate to and from its waterfront facilities and the navigational channel in Barnegat Bay.

In contrast, the record is replete with Appellant's assertions, supported by documents, that the location of Jibsail's dock inhibits Appellant's ability to safely navigate to and from its dock and effectively access the navigational channel in the bay. [Aa351-Aa353; Aa380-Aa382.] A simple review of the photographs in the record demonstrates these navigational issues. [Aa149; Aa150; Aa152; Aa153; Aa188-Aa192; Aa291-Aa298; Aa302; Aa303.] Particularly instructive is the site plan that clearly depicts Jibsail's dock blocking Appellant's access to the navigation channel. [Aa298.]

The record in this matter does not contain any support for the position that Jibsail's extended dock will not hinder Appellant's navigation or access to and from its waterfront facilities and the navigational channel in the bay as required by N.J.A.C. 7:7-12.5(b)9. As such, the NJDEP's decision was arbitrary,

capricious, and unreasonable, not based on substantial credible evidence, and should be reversed.

CONCLUSION

For the reasons set forth herein, Appellant respectfully submits that this Court should reverse the NJDEP's March 14, 2023 denial of its adjudicatory hearing request so that a full record can be established before the Office of Administrative Law. Moreover, Appellant respectfully submits that the NJDEP's grant of the 2019 WFD permit modification to Jibsail should be reversed and the permit modification should be rescinded.

Respectfully submitted,

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Attorneys for Appellant Janine Morris Trust

Dated: January 19, 2024

/s/Michael G. Sinkevich
Michael G. Sinkevich, Esq.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

DOCKET NO. A-002570-22

**IN THE MATTER OF DENIAL OF
THIRD PARTY HEARING
REQUEST OF P.T. JIBSAIL
FAMILY LIMITED
PARTNERSHIP FILE NO. 1515-06-
0012.1 WFD 170001; WFD 180001;
OFFICE OF LEGAL AFFAIRS
FILE NO. 19-06.**

Civil Action

**ON APPEAL FROM FINAL ACTION
OF:
NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

**BRIEF OF RESPONDENT P.T. JIBSAIL FAMILY
LIMITED PARTNERSHIP**

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Respondent P.T. Jibsail Family Limited Partnership (“Jibsail”) in connection with an appeal of the decision of the New Jersey Department of Environmental Protection (“NJDEP”) denying the request of a third-party objector, Appellant Janine Morris Trust (“Appellant”), for an administrative hearing seeking to challenge the issuance of a May 19, 2017 Waterfront Development Permit (“2017 WFD Permit”) and March 20, 2019 Permit Modification (“2019 Permit Modification”) to Jibsail.

Jibsail is the owner of a single-family home located at 83 Pershing Boulevard in the Borough of Lavallette, Ocean County, New Jersey. Appellant owns an adjacent home. Both homes front on Barnegat Bay, and both have recreational piers. The 2017 WFD Permit approved the construction by Jibsail of an extension to the then existing pier. Appellant and other third parties, having received public notice of the application (as required by NJDEP’s regulations), submitted comments to NJDEP objecting to the length of the dock. However, Appellant never filed a third-party administrative hearing request or an appeal challenging the issuance of the 2017 WFD Permit within the required timeframes.

Upon receipt of the 2017 WFD Permit, Jibsail constructed the dock. The work was completed in the Spring of 2018. Following NJDEP’s inspection of the as-built dock, it was determined that the dock extension was located 1.7 ft. to the south from

the approved location, as a consequence of which NJDEP required Jibsail to apply for a permit modification to reflect *de minimis* error. The length of the as-built dock was the same as the dock length approved by the 2017 WFD Permit. NJDEP determined after further inspection that the dock met all applicable NJDEP rules and regulations and issued the 2019 Permit Modification to Jibsail.

It was only following the issuance of the 2019 Permit Modification that Appellant filed a third-party administrative hearing request challenging the 2019 Permit Modification. Appellant also belatedly attempted to include the 2017 WFD Permit in that request, despite that fact that it had been issued two years before. On March 14, 2023, NJDEP denied Appellant's request for a third-party administrative hearing. Appellant now appeals that decision.

Appellant, having failed to address or challenge the issuance of NJDEP's denial of its third-party administrative hearing request for the 2017 WFD Permit in its brief, appears to have abandoned that challenge. Appellant also improperly attempts to expand this appeal to include, for the first time, a direct appeal of the 2019 Permit Modification. Appellant's Notice of Appeal to this Court does not identify the 2019 Permit Modification as the decision being appealed. Furthermore, although Appellant does not specifically seek to include a direct appeal of the 2017 WFD Permit in its brief, Appellant conflates the components of Jibsail's dock approved by the 2017 WFD Permit and the 2019 Permit Modification. Appellant's

objection to the dock is based on its alleged impacts to navigability due to its length. However, it was the 2017 WFD Permit and *not* the 2019 Permit Modification that approved the length of the dock. Appellant did not appeal the 2017 WFD Permit, and NJDEP properly determined in its March 14, 2023 decision that Appellant's hearing request for the 2017 WFD Permit was out of time. Appellant's attempt to expand the scope of this appeal at this late juncture should be rejected outright. Appellant should not be permitted to circumvent the law so as to obtain multiple bites at the apple to the detriment of, and prejudice to, Jibsail.

The record is clear that Jibsail strictly followed all pertinent NJDEP rules and regulations in obtaining the required NJDEP approvals, and constructed the dock at the length and location required by NJDEP, and incurred substantial costs by doing so. In fact, NJDEP approved docks on properties immediately adjacent to Jibsail's which were not only of similar length to Jibsail's, but which also dictated the configuration of Jibsail's dock.

Jibsail respectfully submits that the NJDEP properly denied Appellant's third-party hearing request and properly approved the 2017 WFD Permit and 2019 Permit Modification, and that the factual findings in the record support those decision. This Court should, therefore, reject the Appellant's request that this Court reverse NJDEP and grant a hearing or otherwise redress the NJDEP's underlying approvals.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

On March 28, 2017, Charles E. Lindstrom, P.E., of Lindstrom, Diessner & Carr, P.C., Jibsail’s engineer, submitted a Waterfront Development permit application to NJDEP for the construction of a 4 ft. x 185 ft. pier dock extension outshore of Jibsail’s property situated on Barnegat Bay with two 12 ft. x 12 ft. open type boat lifts to be located at the end of that extension. (Aa0022-Aa0050) ². Appellant received legal notification of Jibsail’s Waterfront Development Permit application. (Aa0041-Aa0042).

The Policy Compliance Statement filed in support of the Jibsail’s Waterfront Development Permit application and prepared by Charles E. Lindstrom, P.E. directly addressed Jibsail’s dock’s compliance with NJDEP’s Coastal Zone Management Rules, N.J.A.C. 7:7 (CZM Rules). (Aa0030-Aa0038). Specifically, Mr. Lindstrom addressed N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers), concluding that Jibsail’s proposed pier dock extension will not affect or hinder navigation and access to adjacent water areas. (Aa0035-Aa0037). The Compliance Statement also concluded that in accordance with N.J.A.C. 7:7-9.6 (Submerged Vegetation Habitat), due to mapped submerged

¹ The facts and procedural history are combined herein for the sake of clarity.

² “Aa” refers to Appellant’s Appendix. “JRa” refers to Respondent P.T. Jibsail Family Limited Partnership’s Appendix.

vegetation habitat, there is no alternative mooring area for a boat which would have less impact on submerged aquatic vegetation and confirmed that no dredging will be performed. (Aa0034). The former dock constructed by Jibsail's predecessor in 2006 did not meet the CZM Rules as the mooring would have impacted submerged aquatic vegetation and dredging is no longer permitted by NJDEP. (Aa0033; Aa0021 (dark area in the photograph partially depicts the SAV impacting the area outside of Jibsail's property); Aa0052; Aa00196). Jibsail's dock extension was extended in order to meet the NJDEP required 4 ft. water depth for the mooring area at the very end of the dock. (Aa0033).

In response to Jibsail's Waterfront Development Permit application, neighboring property owners on West Point Island submitted comments objecting to Jibsail's dock. (Aa0019). NJDEP acknowledged the objections submitted on behalf of Vic Ronchetti, President of the West Point Island Civic Association, and confirmed that his and other concerns are taken into consideration by NJDEP. (Aa0006). Similar objections were made by Appellant before the 2017 WFD Permit was issued and NJDEP considered prior to issuing the 2017 WFD Permit to Jibsail. (Aa0378; Aa0379).

At NJDEP's request, on April 7, 2017, Jibsail's engineer, Charles E. Lindstrom, P.E., submitted a revised Waterfront Development Permit plan to NJDEP reducing the size of Jibsail's dock extension to 167.3 ft. from 185 ft. (Aa0020-

Aa0021). NJDEP also requested additional minor revisions in line with the 299 ft. dock previously approved for the property at 79 Pershing Boulevard which is adjacent to Jibsail's property and owned by KJN Builders, LLC. (Aa007-Aa008; Aa0016-Aa0017; Aa0020).

On May 19, 2017, NJDEP issued Waterfront Development Permit No. 1515-06-0002.1 WFD to Jibsail pursuant to the Waterfront Development Act (WFDA), N.J.S.A. 12:5-3 and the CZM Rules. (Aa0001-Aa0005). Rather than approving the 185 ft. pier dock extension originally applied for, the 2017 WFD Permit authorized Jibsail's construction of a 167.3 ft. pier dock extension. (Aa0001). Based on NJDEP's review of available data, NJDEP found that Jibsail's dock extension met N.J.A.C. 7:7-9.6(b)(6)(vi), NJDEP's Submerged Vegetation Habitat Rule which requires a minimum water depth of four feet at Mean Low Water in the area where boats will be moored, at a length of only 167.3 ft. Therefore, NJDEP reduced the length of Jibsail's proposed dock by nearly 18 ft. and issued the 2017 WFD Permit reflecting the same. (Aa0001-Aa0005; Aa0088). The language in the 2017 WFD Permit confirms that it is authorized under and in compliance with the CZM Rules. (Aa0001). The 2017 WFD Permit included two permanent mooring areas at the end of the dock where the required 4 ft. requirement was met and specifically prohibited dredging activities in the tidewaters adjoining Jibsail's upland property. (Aa0002, Special Conditions, Number 4). The length of Jibsail's is solely and exclusively

dictated by the CZM Rules and not the size of the boat to be moored at Jibsail's boat. The 2017 WFD Permit decision was published in the June 7, 2017 NJDEP Bulletin.

On August 17, 2017, the structures covered by the 2017 WDP Permit were approved by the U.S. Army Corps of Engineers. (Aa0175-Aa0178). On August 17, 2017, the U.S. Army Corps of Engineers also approved KJN Builders, LLC's 299 ft. dock for the property adjacent to Jibsail. (Aa0504-Aa0507).

Prior to the issuance of the 2017 WFD Permit, docks similar in length had been approved by NJDEP for the properties adjacent to the Jibsail property and elsewhere along the shore. (Aa0017)(Jibsail's dock is the first dock on the left and the dock approved for KJN Builders, LLC at the adjacent property is the shaded dock in the middle); (Aa0018)(NJDEP approved survey/plan depicting a similar-sized dock for the property adjacent to that owned by KJN Builders, LLC). In addition to the CZM Rules, the neighboring docks approved for Lots 22 and 23, and the curve in the shoreline, impacted the location of Jibsail's dock at Lot 21. (Aa0017; Aa0021). The NJDEP approved plan for the adjoining property at 79 Pershing Boulevard depicts Jibsail's dock to the left of the shaded dock. (Aa0017). Appellant's dock is immediately to the left of Jibsail's dock. (Aa0088; JRa003). As the plan approved as part of the 2017 WFD Permit depicts, Jibsail's dock is located closer to the dock at 79 Pershing Boulevard, Lot 22, than to Appellant's dock. Id.

There is no dock associated with the property on the other side of Appellant's property. Id.

After the issuance of the 2017 WFD Permit, Appellant did not file a Third-Party Adjudicatory Hearing Request and did not appeal the 2017 WFD Permit decision. Appellant and others continued to submit opposition to NJDEP, the U.S. Army Corps of Engineers and the municipality asserting that Jibsail's dock was unnecessary and dangerous to surrounding residents and boaters. (Aa0380-Aa0382; Aa0182-Aa0183; Aa0346; Aa0347).

After the completion of the construction of Jibsail's dock in 2018 and to further review the basis of third-party objections, NJDEP and the U.S. Army Corps of Engineers inspected Jibsail's dock and related structures. (Aa0110-Aa0112; Aa0119-Aa0120). Specially, NJDEP met with Appellant in August 2018 to view Jibsail's dock from Appellant's property. (Aa0477). In connection with NJDEP's compliance evaluation, it was determined that the contractor inadvertently placed the dock *1.7 ft.* to the south (away from Appellant's property) from the location shown on the survey/plan approved by the 2017 WFD Permit. (Aa0088; Aa0119a-Aa0121). The modification survey/plan approved by NJDEP depicts the minor revision. (Aa0091; JRa003). The dotted line along the left side of the shaded Jibsail dock shows the location where the Jibsail dock was to be located pursuant to the 2017 WFD Permit. (Aa0091). The length of the dock did not change between the

2017 WFD Permit and the 2019 Permit Modification. (Aa0088; Aa0091; JRa003). In fact, the constructed Jibsail dock was placed farther away from the Appellant's property. (Aa0091; JRa003). On October 30, 2018, Jibsail filed an application with NJDEP to modify the 2017 WFD Permit to reflect this minor modification. (Aa0094-Aa0109; JRa003).

The Explanation of the Proposed Change prepared and submitted by Charles E. Lindstrom, P.E., in support of Jibsail's modification application denotes that the length of the as-built dock did not require a permit modification because it was consistent with the length approved in the 2017 WFD Permit. (Aa0101). Jibsail's modification application and the resulting 2019 Permit Modification covers only the 1.7 ft. mislocated dock extension as well as a boat lift, jet ski lift and dock extension to boat lift. (Aa0089-Aa0091; JRa003). All other conditions including, the length of the dock approved by the 2017 WFD Permit (167.3 ft.) and the requirement to place photocell lights and reflectors along the dock and on mooring piles, remained in effect. (Aa0001-Aa0005; Aa0089-Aa0091).

The Policy Compliance Statement prepared by Charles E. Lindstrom, P.E., and filed in support of Jibsail's application to modify the 2017 WFD Permit, once again directly addressed compliance with N.J.A.C. 7:7-9.6 (Submerged Vegetation Habitat), N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers) with regard to the elements of the dock included in

the modification application. (Aa0105-Aa0109). The approved plans for the 2017 WFD Permit and the 2019 Permit Modification establish that the dock extension is suitably 163 feet from the navigational channel and more than 8 feet from the Appellant's dock. (Aa0088; Aa0091; JRa003).

On March 7, 2019, NJDEP staff, Eric Virostek, the same NJDEP Case Manager that met with Appellant in August 2018, confirmed that Jibsail's dock is not located within the 50 ft. limit from the navigation channel. (Aa0092-Aa0093). Jibsail's dock is located 163 ft. from the navigational channel. (Aa0115; Aa0091). Mr. Virostek's report also noted that Jibsail's property is within a highly developed area, that boat slips are at the required water depth of four feet and that the application is in compliance. (Aa0092; Aa0300 (photograph of similar docks in the area)).

On March 20, 2019, NJDEP issued the 2019 Permit Modification approving Jibsail's dock as constructed and in the condition that it remains today. (Aa0089-Aa0091). The 2019 Permit Modification provided all other conditions in the 2017 WFD Permit remain in effect. (Aa0089). NJDEP provided Appellant with a copy of the 2019 Permit Modification on May 20, 2019. (Aa0476). On January 3, 2019, U.S. Army Corps of Engineers approved the modifications to Jibsail's dock that are the subject of the 2019 Permit Modification. (Aa0471-Aa0475).

On April 23, 2019, Appellant filed a Third-Party Adjudicatory Hearing Request for the 2019 Permit Modification and also sought to include the 2017 WFD Permit despite the fact that the thirty (30) day time period to request an adjudicatory hearing for the 2017 WFD Permit had expired on June 18, 2017. (Aa0349-Aa0382; Aa0456-Aa0461). Jibsail opposed that request and copied Appellant's counsel on its opposition papers. (Aa0389-Aa0415; Aa0383a-Aa0384; JRa004-JRa011). Jibsail also submitted videos to NJDEP showing that Jibsail's dock does not hinder access or navigation. (JRa004-JRa011 and the thumb drive submitted to the Appellate Division herewith containing the videos served on the NJDEP with that document).

During the course of the NJDEP's review of Appellant's April 23, 2019 hearing request, another matter related to the 2019 Permit Modification was also pending before NJDEP and the Tidelands Resource Council. In accordance with the 2017 WFD Permit, Jibsail obtained a Tidelands License from the Tidelands Resource Council. Appellant did not appeal that decision or file a third-party adjudicatory hearing request with regard to that decision. Following the issuance of the 2019 Permit Modification, Jibsail filed an application for a Modified Tidelands License to reflect the changes approved by the 2019 Permit Modification. Appellant challenged Jibsail's application for a Modified Tidelands License and sought participation by other third parties in Appellant's efforts to oppose who whose

usage/view is impacted. (Aa0424-Aa0428). Appellant and other third parties submitted opposition to the NJDEP and appeared before the Tidelands Resource Council to testify and present evidence for consideration. (Aa0304-Aa0308). Jibsail addressed this opposition. (Aa0416-Aa0455; Aa0309-Aa0321; JRa004-JRa011 and the thumb drive submitted to the Appellate Division herewith containing the videos served on the NJDEP with that document).

On October 6, 2022, the Tidelands Resource Council approved Jibsail's Modified Tidelands License. That case is referenced here as the information presented to NJDEP and the Tidelands Resource Council as part of the review of Jibsail's application for Modified Tidelands License was provided to NJDEP for review a part of Appellant's subject April 23, 2019 Third-Party Adjudicatory Hearing Request. During the underlying waterfront development permit review process, and in conjunction with Jibsail's Modified Tidelands License and Appellant's April 23, 2019 Third-Party Adjudicatory Hearing Request, NJDEP considered extensive evidence and properly concluded that Jibsail's dock met CZM Rules and does not: hinder or pose a safety hazard to navigation; impair the ability of Appellant to use its own dock; or interfere with Appellant's property rights.

On March 14, 2023, the NJDEP's Office of Legal Affairs denied Appellant's third-party adjudicatory hearing request for the 2017 WFD Permit and 2019 Permit Modification. (Aa0132-Aa0136). NJDEP concluded that Appellant did not file a

timely request with regard to the 2017 WFD Permit, lacked standing because Appellant did not have a statutory right to a hearing, and failed to demonstrate a "particularized property interest of constitutional significance that [was] directly affected by [DEP's] permitting decision" establishing a right to a hearing. (Aa0132-Aa0136). NJDEP also confirmed that, even if Appellant had standing, Appellants' objections were meritless because NJDEP found that Jibsail's dock does not pose a hazard to navigation, minimized impacts to shellfish habitat to the maximum extent practicable, and complied with the required depths for the submerged aquatic vegetation habitat rule. (Aa0132-Aa0136). NJDEP determined that there is adequate room to navigate. (Aa0135).

On April 28, 2023, Appellant filed a Notice of Appeal with the Appellate Division challenging the March 14, 2023 final decision of the NJDEP Commissioner denying Appellant's third-party adjudicatory hearing request only. (Aa0532-Aa0535). Appellant did not appeal the NJDEP's 2017 WFD Permit or 2019 Permit Modification decisions directly to the Appellate Division. However, in Appellant's brief, Appellant seeks to incorporate a challenge of the 2019 Permit Modification for the first time. See Appellant's Brief, Point III.

This appeal is one of three that have been filed with this Court by Appellant challenging Jibsail's approvals for a dock that was constructed in 2018 in accordance with all applicable NJDEP rules and regulations. In a May 8, 2024 unpublished

opinion, this Court affirmed the Tidelands Resource Council's issuance of the Modified Tidelands License to Jibsail for its subject dock on October 6, 2022 in In the Matter of P.T. Jibsail Family Limited Partnership Tidelands License No. 1515-06-0012.1 TDI190001, Docket No. A-000699-22. In that decision, this Court confirmed that the underlying 2017 WFD Permit and 2019 Permit Modification were issued by NJDEP to Jibsail in accordance with the CZM Rules. Appellant has also filed an appeal of NJDEP's denial of a third-party adjudicatory hearing for the October 6, 2022 Modified Tidelands License approved by the Tidelands Resource Council. That matter is captioned In the Matter of Denial of Third Party Hearing Request of P.T. Jibsail Family Limited Partnership Tidelands License File No. 1515-06-0012.1; TDI190001; Office of Legal Affairs File No. T22-0227, Docket No. A-002096-23.

LEGAL ARGUMENT

POINT I

THE NJDEP'S MARCH 14, 2023 FINAL DECISION DENYING APPELLANT'S THIRD-PARTY HEARING REQUEST IS CONSISTENT WITH ALL APPLICABLE LAW AND SUPPORTED BY THE EVIDENTIARY RECORD (Aa546-Aa555)

NJDEP's March 14, 2023 decision denying Appellant's third-party hearing should be afforded considerable deference. An administrative agency's action is afforded a "strong presumption of reasonableness" on review. Aqua Beach

Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 16 (2006). Reviewing courts afford substantial deference to the agency's decision particularly when it involves the agency's special expertise and knowledge. In re Stallworth, 208 N.J. 182, 194-95 (2011). The court should not overturn an agency's decision unless "(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record." University Cottage Club of Princeton N.J. v. N.J. Dep't of Env'tl. Prot., 191 N.J. 38, 48 (2007).

In this case, this Court should reject the claim that Appellant has a right to an adjudicatory hearing for both the 2017 WFD Permit and 2019 Permit Modification and affirm NJDEP's March 14, 2023 decision. NJDEP's decision was based on established law. Appellant failed to demonstrate a statutory right or a constitutional right to a hearing. See In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 210 (App. Div. 2004); Spalt v. DEP, 237 N.J. Super. 206, 212 (App. Div. 1989); In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 482 (2006). Furthermore, NJDEP's March 14, 2023 decision is supported by substantial, credible, and undisputed evidence in the record demonstrating that the decision was not arbitrary, capricious, or unreasonable.

A. APPELLANT HAS NO RIGHT AS A THIRD-PARTY OBJECTOR TO AN ADJUDICATORY HEARING.

A third-party objector's right to an administrative hearing is defined and circumscribed by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-3.1 and 3.3. The APA provides that “state agencies are prohibited from granting third party hearing rights through promulgation of a regulation unless a hearing right exists as a matter of federal law or state statute.” In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 482 (2006)(citing N.J.S.A. 52:14B-3.1(d)). Thus, NJDEP is precluded from granting an administrative hearing unless Appellant has a statutory right to a hearing, or a constitutionally protected property interest affected by the permit. See In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 210 (App. Div. 2004); Spalt v. DEP, 237 N.J. Super. 206, 212 (App. Div. 1989). Appellant has neither.

The Waterfront Development Act (WFDA), N.J.S.A. 12:5-3 does not provide a statutory right to a hearing for persons who are not permit applicants. Thus, Appellant has no statutory right to an adjudicatory hearing. See In re Waterfront Development Permit, 244 N.J. Super. 426, 437 (App. Div. 1990); see also In re Riverview Development, LLC, Waterfront Development Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409 (App. Div. 2010). Therefore, to establish a constitutional right to a hearing, Appellant must demonstrate "a particularized property interest of constitutional significance

that is directly affected by [DEP's] permitting decision." In re NJPDES Permit No. NJ0025241, 185 N.J. at 482; see also N.J.S.A. 52:14B-3.1(b).

Appellant has not presented a constitutionally protected individual property interest. Appellant alleges that the ability to navigate to Appellant's property from the navigational channel in a particular direction is a constitutionally protected interest. However, Appellant cites to no authority suggesting that New Jersey law recognizes a protected property interest in the manner in which one navigates to a bayfront home. Appellant does not allege that it is unable to navigate to its property. In an attempt to support Appellant's argument that an impact to navigability somehow provides Appellant a right to a third-party hearing, Appellant asserts that its request for a hearing is grounded in a factual navigational harm that is uniquely impacting Appellant rather than potential harm. Videos submitted to NJDEP establish that Appellant's boating efforts are not impaired. (JRa004-JRa011 and the thumb drive submitted to the Appellate Division herewith containing the videos served on the NJDEP with that document). Aerial photographs also establish that there is ample room for Appellant to navigate to its dock and property. (Aa0291-Aa0292). Jibsail's dock is 163 ft. from the navigational channel. (JRa003).

Appellant's claim is based on speculative interference only and is based on self-serving statements and overhead photographs that do not show the docks

approved by NJDEP to the east of Jibsail's property and adjacent to Jibsail's dock. (Aa0017-Aa0018; Aa0091). Appellant failed to provide any evidence, by an expert or otherwise, to dispute the conclusions of Jibsail's Professional Engineer and NJDEP that Jibsail's dock met the CZM Rules including, NJDEP's Recreational Docks and Piers rule, which states, in part:

The proposed structure and associated mooring piles do not hinder navigation or access to adjacent water areas. A hazard to navigation will apply to all potential impediments to navigation, including access to adjacent moorings, water areas, docks and piers. N.J.A.C. 7:7-12.5(b)9.

The record reflects that Jibsail and NJDEP made every effort to ensure compliance. Appellant's assertion that Jibsail's dock was wrongfully permitted is unsupported and Appellant has presented no evidence to support that there was any alternative location for the dock which would have met NJDEP's 4 ft. requirement for the mooring area at the end of the dock.

In connection with Jibsail's application for the 2017 WFD Permit, NJDEP reviewed and addressed navigability and compliance with N.J.A.C. 7:7-12.5(b)9 and found, after reducing the size of Jibsail's dock by nearly 18 ft., that Jibsail's dock met all of the CZM Rules. (Aa0001-Aa0005). Appellant fails to address NJDEP's decision to reduce the size of the dock in the 2017 WDF Permit. Jibsail's dock's compliance with the CZM Rules was later affirmed by NJDEP in connection with NJDEP's further review of the dock as part of the application

process for the 2019 Permit Modification and NJDEP's review of Appellant's third-party hearing request.

In addition, Appellant fails to demonstrate how Appellant's claim that the proposed pier would hinder navigability is particular to Appellant. See In re Freshwater Wetlands Statewide General Permits, 185 N.J. 452, 470 (2006). Indeed, other property owners have made similar allegations, and, thus, Appellant's claim is not particularized. Appellant also specifically objected to Jibsail's dock on the basis that it is dangerous to surrounding residents and boaters not just Appellant seeking the participation of third parties in Appellant's opposition efforts by posting about Jibsail's dock and setting up a website. (Aa0380-Aa0382; Aa0424-Aa0428). Appellant has presented no regulatory property setback that applies to its property and other docks with similar dimensions have been approved by NJDEP for this area and all along the New Jersey shoreline. (Aa0300). Aerial photographs also establish that there is ample room for Appellant and other surrounding residents and boaters to navigate to its dock and property. (Aa0291-Aa0292).

Appellant's attempt to distinguish this matter from Spalt v. DEP, 237 N.J. Super. 206 (1989) fails. Appellant asserts that its interest is "particular" because its property adjoins the Jibsail property. In doing so, Appellant asserts nothing more than generalized claims that Jibsail's dock damage its recreational interests.

Appellant's claims are based on potential harm and Jibsail's dock does not encroach on Appellant's property rights. Spalt v. New Jersey Dept. of Environmental Protection, 237 N.J. Super. 206 (1989)(fear of damage to recreational interest or generalized property rights shared with other property owners were insufficient to demonstrate particularized property right or other special interest). Proximity to the dock and a general fear is insufficient to trigger a right to an adjudicatory hearing. See In re Thomas Orban/Square Props., LLC, 461 N.J. Super. 57, 61 (App. Div. 2019)(adjacent property owners had no right to an adjudicatory hearing to contest a freshwater-wetlands general permit that allowed the property to be commercially developed). Appellant's interest is "recreational" and Appellant's damages are speculative. See In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 473 (speculative damages to neighboring properties do not amount to a particularized interest conferring a right to an administrative hearing).

As addressed in the matter of In the Matter of P.T. Jibsail Family Limited Partnership Tidelands License No. 1515-06-0012.1 TDI190001, Docket No. A-000699-22, Appellant's first appeal regarding Jibsail's dock, Appellant has no property interest beyond Appellant's property line. The State of New Jersey alone owns the tidelands offshore of Appellant's property line and controls the use and occupancy of those tidelands. This was also confirmed in NJDEP's decision denying Jibsail's hearing request of the Tidelands Resource Council's

approval of Jibsail's Modified Tidelands License that is the subject of Appellant's third appeal in In the Matter of Denial of Third Party Hearing Request of P.T. Jibsail Family Limited Partnership Tidelands License File No. 1515-06-0012.1; TDI190001; Office of Legal Affairs File No. T22-0227, Docket No. A-002096-23.

In light of the foregoing, NJDEP properly concluded based on applicable law and the record that Appellant does not have a statutory right to a hearing and Appellant's interest does not reach to the level of particularity that is constitutionally required in order to obtain an adjudicatory hearing. Therefore, Appellant's third-party adjudicatory hearing request was properly denied by NJDEP.

B. APPELLANT'S BELATED ATTEMPT TO SEEK AN ADJUDICATORY HEARING FOR THE 2017 WFD PERMIT FAILS BECAUSE IT IS UNTIMELY AND THE COURT'S REVIEW OF NJDEP'S MARCH 14, 2023 DECISION SHOULD BE LIMITED TO THE DENIAL OF APPELLANT'S THIRD PARTY HEARING REQUEST FOR THE 2019 PERMIT MODIFICATION.

In Appellant's brief, Appellant fails to address the NJDEP's denial of the hearing request for the 2017 WFD Permit surrendering that aspect of this appeal. NJDEP's denial was based, in part, on the fact that Appellant did not file a hearing request for the 2017 WFD Permit within the thirty (30) day time period as required by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31 and

the CZM Rules at N.J.A.C. 7:7-28.1. (Aa0132-Aa0136). Appellant's hearing request was not filed before Appellant incorporated it into the hearing request for the 2019 Permit Modification on April 23, 2019, nearly two years after the 2017 WFD Permit was issued to Jibsail. Therefore, the Court should affirm NJDEP's March 14, 2023 decision as it relates to Appellant's belated attempt to include the 2017 WFD Permit in its hearing request and limit the review of NJDEP's March 14, 2023 decision to whether NJDEP properly denied Appellant's hearing request for the 2019 Permit Modification. On that basis, and due to the limited scope of the 2019 Permit Modification, it is clear that Appellant has not established a particularized property interest. (JRa001-JRa003). Appellant has presented no evidence to support that the 1.7 ft. angle of the end of Jibsail's dock away from Appellant's property, which is the only aspect regarding the location of the dock that the 2019 Permit Modification addresses, impacted Appellant's property rights or navigability. Id. Rather, Appellant's arguments related to navigability are inapplicable and solely based on the length of Jibsail's dock which was approved by the 2017 WFD Permit not the 2019 Permit Modification. (Aa0001-Aa0005; Aa0089-Aa0091). Appellant conflates the 2017 WFD Permit and 2019 Permit Modification in order to support and expand its arguments made in this appeal. The dock was constructed after receipt of the 2017 WFD Permit and the length has remained unchanged since construction in 2018. Appellant failed to appeal the 2017

WFD Permit or file a timely third party hearing request of that approval. (Aa0132-Aa0136). Appellant should not be provided an opportunity to challenge to the 2017 WFD Permit when Jibsail complied with the law under NJDEP's direction and supervision.

In the event that this Court considers NJDEP's reasons for the denial of Appellant's hearing request for the 2017 WFD Permit decision beyond the fact that Appellant's hearing request was out of time, for the reasons set forth in Point I(A) above and as addressed at length by NJDEP in that decision, Appellant does not have a right as a third-party objector to a hearing request. (Aa0132-Aa0136). Additionally, for the reasons set forth in Point II, the 2017 WFD Permit and the 2019 Permit Modification were issued pursuant to NJDEP's authority and complied with the CZM Rules.

POINT II

APPELLANT'S BELATED ATTEMPT TO INCORPORATE A DIRECT APPEAL OF THE 2017 WFD PERMIT AND 2019 PERMIT MODIFICATION SHOULD BE REJECTED BECAUSE IT IS UNTIMELY AND THE 2017 WFD PERMIT AND 2019 PERMIT MODIFICATION SHOULD BE AFFIRMED AS THEY WERE ISSUED PURSUANT TO NJDEP'S AUTHORITY AND IN COMPLIANCE WITH THE WATERFRONT DEVELOPMENT LAW AND THE CZM RULES (Aa0001-Aa0005; Aa0089-Aa0091; Aa546-Aa555).

In Appellant's merits brief, Appellant seeks to challenge not only the denial of Appellant's third-party hearing request, but also the 2019 Permit Modification. See Appellant's Brief, Point II. Appellant's Notice of Appeal does not designate the 2017 WFD Permit or the 2019 Permit Modification as the decisions from which the appeal is taken and Appellant does not directly challenge the 2017 WFD Permit in its brief. (Aa0532-Aa0535). Therefore, the 2017 WFD Permit and 2019 Permit Modification are not within the scope of the appeal and should not be addressed. R. 2:5-1(f)(3)(i); see also 30 River Court East Urban Renewal Co. v. Capogrosso, 383 N.J. Super. 470, 474 (App. Div. 2006)(citing R. 2:5-1(f)(3)(i)) and Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 460-62 (App. Div. 2002)).

In addition, Appellant has presented no legal basis to support that Appellant is entitled to a relaxation or waiver of the New Jersey Court Rules to the detriment of, and prejudice to Jibsail, who constructed the subject dock in accordance with the Waterfront Development Law, the CZM Rules and NJDEP approvals. Appellant's time to appeal the 2017 WFD Permit and the 2019 Permit Modification expired long ago. R. 2:4-1(b) requires appeals of final agency decisions to be taken within forty-five days of the decision. It is undisputed that Appellant did not appeal the 2017 WFD Permit or the 2019 Permit Modification within forty-five days or any time after. Moreover, Appellant has not sought leave to include a challenge to the 2017 WFD Permit or the 2019 Permit

Modification in this appeal. (Aa0532-Aa0535). As a result, Appellant's challenge here should be limited to the March 14, 2023 decision denying Appellant's adjudicatory hearing request. R. 2:4-1(b).

In the event that this Court considers Appellant's belated attempt to appeal of the 2019 Permit Modification, it is clear that Appellant's challenge has no merit. NJDEP had authority to issue the 2017 WFD Permit and the 2019 Permit Modification upon finding, as the record reflects, that Jibsail's dock complied with the Waterfront Development Law and the CZM Rules. In connection with NJDEP's review of Jibsail's initial Waterfront Development Permit application, NJDEP determined that Jibsail could reduce the dock by 18 ft. and still meet the CZM Rules and in particular, the Submerged Aquatic Vegetation Rule, N.J.A.C. 7:7-9.6(b)(6)(i). Appellant has put forth no evidence to dispute the location of the dock on that basis. NJDEP also inspected Jibsail's dock and considered the objections of Appellant and other third parties in issuing the 2017 WFD Permit and 2019 Permit Modification. A review of the record, and in particular, Appellant's photographs from its dock, reveal that the true basis for Appellant's challenge is Appellant's view. (Aa0152). Appellant also posted about the impact of Jibsail's dock on the view from Appellant's location online. (Aa0424). Additional fact-finding is not necessary as NJDEP previously determined on multiple occasions that Jibsail's dock was constructed in

accordance with all applicable laws and that the objections thereto were without merit. Furthermore, this Court has already held that Jibsail's dock met the CZM Rules in its May 8, 2024 unpublished opinion issued in In the Matter of P.T. Jibsail Family Limited Partnership Tidelands License No. 1515-06-0012.1 TDI190001, Docket No. A-000699-22.

A. APPELLANT FAILED TO TIMELY APPEAL THE 2017 WFD PERMIT AND THE 2019 PERMIT MODIFICATION AND SHOULD NOT BE PERMITTED TO CHALLENGE THOSE DECISIONS OUT OF TIME TO THE DETRIMENT OF, AND PREJUDICE TO, JIBSAIL WHO COMPLIED WITH THE LAW.

In support of Appellant's belated attempt to now include the 2019 Permit Modification in this appeal, Appellant relies solely on this Court's decision in Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465 (App. Div. 2023), issued after Appellant filed its Notice of Appeal. The facts of that case are distinguishable from the current appeal. First, that case deals with a Flood Hazard Area Verification for purposes of future development and not a Waterfront Development Permit wherein, the construction of Jibsail's dock was previously completed after relying on a decision from NJDEP finding that all applicable rules were met. Additionally, in Musconetcong Watershed Ass'n, unlike here, after filing a timely appeal from the NJDEP's denial of the adjudicatory hearing request, the appellant simultaneously moved for leave to appeal the underlying NJDEP determination. Musconetcong Watershed Ass'n v.

N.J. Dep't of Env't Prot., 476 N.J. Super. 465 (App. Div. 2023). The Court affirmed the NJDEP's denial of the third-party hearing request and reversed its initial decision denying the appellant's motion for a leave to amend the appeal to include a direct appeal of the underlying Flood Hazard Area Verification. The Court held that NJDEP's underlying decision did not become final until NJDEP issued the decision denying the appellant's third-party hearing request and the appellant had sought leave to appeal the underlying decision within forty-five (45) days of NJDEP's denial. Id.

In this case, it is undisputed that Appellant has not filed a direct appeal of the 2017 WFD Permit or the 2019 Permit Modification. (Aa0532-Aa0535). Furthermore, contrary to the facts in Musconetcong Watershed Ass'n, Appellant has not sought leave in this appeal to do so. Rather, Appellant first elects to challenge the 2019 Permit Modification only - but not the 2017 WFD Permit - in its brief. See Appellant's Brief, Point II.

R. 2:4-1(b) required Appellant to file an appeal of the 2019 Permit Modification or the 2017 WFD Permit within 45 days of those decisions becoming final. Appellant appears to be requesting the Court to find based on Musconetcong Watershed Ass'n that the 2019 Permit Modification was not deemed final until March 14, 2023, the date of NJDEP's denial of Appellant's hearing request. Even assuming, *arguendo*, that was the case, Appellant's deadline to appeal the 2019

Permit Modification would have been April 28, 2023. Appellant has never filed a direct appeal of the 2017 WFD Permit or 2019 Permit Modification. Appellant also did not seek leave in this appeal following the issuance of the decision in Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465 (App. Div. 2023) or otherwise. Appellant waited until the filing of its brief in this appeal to challenge the appeal of the 2019 Permit Modification.

In light of the foregoing, this Court should not permit Appellant to expand this appeal to include a direct appeal of the 2019 Permit Modification or the 2017 WFD Permit. Jibsail's dock was already built before Appellant filed the third party adjudicatory hearing request which is the subject of this matter. Appellant shall not be entitled to now expand its appeal to include the 2017 WFD Permit or 2019 Permit Modification and benefit from its delay to the detriment of, and prejudice to, Jibsail who obtained State and Federal approvals and proceeded on that basis. See Rosenstein v. State, Dep't of Treasury, Div. of Pension & Benefits, 438 N.J. Super. 491, 498 (App. Div. 2014)(the exhaustion doctrine "is not absolute and '[e]xceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision"). Appellant received notice and availed itself of the opportunity to participate in the permit process for both the 2017 WFD Permit and 2019 Permit Modification. Further, as enumerated in Point II(B)

below, Appellant's efforts are futile as the 2017 WFD Permit and the 2019 Permit Modification were properly issued by NJDEP in accordance with the Waterfront Development Law and the CZM Rules. The U.S. Army Corps of Engineers also affirmed that Jibsail's dock presented no issues related to navigation.

THE 2017 WFD PERMIT AND 2019 PERMIT MODIFICATION COMPLIED WITH ALL APPLICABLE NJDEP RULES AND APPELLANT'S ATTEMPT TO CONFLATE THE TERMS OF THE 2017 WFD PERMIT AND 2019 PERMIT MODIFICATION IN ORDER TO EXPAND ITS CHALLENGE SHOULD BE REJECTED.

Appellant bears the burden of making a clear showing that the 2019 Permit Modification decision is arbitrary, capricious, and unreasonable in order for this Court to overturn it. Lavezzi v. State, N.J. 163, 171 (2014). Appellant has failed to do so in this case as NJDEP's approval was correct based on the facts and evidence in the record confirming that Jibsail's dock met all pertinent NJDEP rules and regulations.

NJDEP's decisions with respect to Jibsail's dock are entitled to a presumption of validity. In re Tideland's License 96-0114-T, 326 N.J. Super. 209 (App. Div. 1999); see also N.J.S.A. 12:3-10 and N.J.S.A. 13:1B-13. Due to NJDEP's expertise and knowledge, a final decision is reviewed with deference. In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005); In re Herrmann, 192 N.J. 19, 28 (2007); see also In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004)(quoting Newark v. Nat. Res.

Council, Dep't of Env'tl. Prot., 82 N.J. 530, 540 (1980)(deference is even stronger when the agency, like NJDEP “has been delegated discretion to determine the specialized and technical procedures for its tasks”) and In re Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020)(“Wide discretion is afforded to administrative decisions because of an agency's specialized knowledge”).

Given the above, the Court’s review of NJDEP’s actions is severely limited. In Re Carter, 191 N.J. 474, 482 (2007)(citing Aqua Beach Condo Association v. Department of Community Affairs, 185 N.J. 5, 15-16, 2006); see also Mazza v. Bd. of Trs., Police & Firemen’s Ret. Sys., 143 N.J. 22, 25 (1995). An Appellate Court must afford a “strong presumption of reasonableness” to an administrative agency’s exercise of its statutorily delegated responsibilities. Lavezzi v. State, 219 N.J. 163, 171 (2014)(quoting City of Newark v. Natural Resource Council, Department of Environmental Protection, 82 N.J. 530, 539, 1980). An agency decision will not be overturned unless there is “a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence.” In Re Carter, 191 N.J. 474 at 482; see also Saccone v. Bd. Of Trs., Police & Firemen’s Ret. Sys., 219 N.J. 369, 380(2014)(quoting Russo v. Bd. of Trs., Police & Firemen’s Ret. Sys., 206 N.J. 14, 27 (2011))(an agency’s determination of the merits will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record).

To determine whether an agency decision “is arbitrary, capricious or unreasonable,” the appellate court must determine:

- (1) Whether the agency’s action violates express or implied legislative policies, that is, did the agency follow the law;
- (2) Whether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) Whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018)(quoting In re Stallworth, 208 N.J. 182, 194 (2011)); see also Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env'tl. Prot., 191 N.J. 38, 48 (2007)(citing In re Taylor, 158 N.J. 644, 656 (1999)) and In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013).

The CZM Rules constitute the substantive standards by which the NJDEP regulates activities regarding the use and development of coastal resources. N.J.A.C. 7:7-1.4. They are the basis for which NJDEP reviews applications for coastal permits, including for the construction of docks under the Waterfront Development Law. N.J.A.C. 7:7-1.1. The CZM Rules are founded on eight broad coastal goals and policies including, the “protection, enhancement and restoration of healthy coastal ecosystems” and the “effective management of ocean and estuarine

resources.” N.J.A.C. 7:7-1.1(c). To that end, the CZM Rules “. . . are enforceable policies of the New Jersey Coastal Management Program as approved under the Federal Coastal Zone Management Act, [16 USC 1451 et seq.] ...”.

NJDEP ensured that Jibsail’s dock satisfied all of the applicable requirements. Jibsail’s application for both the 2017 WFD Permit and 2019 Permit Modification included Policy Compliance Statements prepared by Jibsail’s engineer that set forth, in detail, how Jibsail’s dock met the polices of the NJDEP promulgated in the CZM Rules. (Aa0094-Aa0109; Aa0512-Aa0530). NJDEP determined, after detailed review, that Jibsail’s dock satisfied the CZM Rules at its current length, location, and configuration. (Aa0001-A0005; JRa001-JRa004). The U.S. Army Corps of Engineers concurred. (Aa0175-Aa0178; Aa0471-Aa0473).

1. The Length and Location of Jibsail’s Dock Was Dictated by N.J.A.C. 7:7-9.6(b)(6)(i)(Submerged Aquatic Vegetation Habitat Rule) and N.J.A.C. 7:7-9.2(d)(Shellfish Habitat Rule) and the Record Contains Substantial Evidence Which Supports NJDEP’s Finding That Jibsail’s Dock Complied With Both.

Appellant does not claim that Jibsail or NJDEP violated N.J.A.C. 7:7-9.6(b)(6)(i)(Submerged Aquatic Vegetation Habitat Rule), which governs the placement of the dock and mooring area in a Submerged Aquatic Vegetation habitat, or N.J.A.C. 7:7-9.2(d)(Shellfish Habitat Rule), which governs dock size in a Shellfish habitat. Appellant challenges the 2019 Permit Modification on the basis that Jibsail failed to show a need for the dock without

citing to any legal authority. However, Appellant's primary objection to the dock arises out of the length of the dock as approved by the 2017 WFD Permit not the 2019 Permit Modification. The 2019 Permit Modification concerned only a de minimis change to the location of the dock. Nevertheless, the record is clear that CZM Rules set forth the requirements that Jibsail was required to meet in order to obtain NJDEP approval of the dock. Specifically, the Submerged Aquatic Vegetation Habitat Rule and the Shellfish Habitat Rule dictated the necessary length and location of the dock in order for Jibsail to be able to moor a boat. Appellant presents no evidence or technical support for the argument that there was an alternative length or location of the dock that complied with the Submerged Aquatic Vegetation Habitat Rule and the Shellfish Habitat Rule.

The Submerged Aquatic Vegetation Habitat Rule requires a dock located in areas mapped as Submerged Vegetation Habitat to be permitted only if "[t]here is no alternative mooring area at the site that would have less impact on the submerged aquatic vegetation". N.J.A.C. 7:7-9.6(b)(6)(ii). The Submerged Aquatic Vegetation Habitat Rule requires that a minimum of four feet of depth at mean low water be present in areas where boats will be moored. Id. This requirement means that docks must extend out into the water to at least four feet of depth at Mean Low Water to protect Submerged Aquatic Vegetation Habitat from boat propellers. N.J.A.C. 7:7-

9.6(e). NJDEP's requirement that impacts to Submerged Aquatic Vegetation be minimized is mandatory with no exception.

NJDEP properly determined in issuing the 2017 WFD Permit that Jibsail's dock substantially complied with the Submerged Aquatic Vegetation Habitat Rule and required design corrections to the dock in compliance with this rule. (Aa0020-Aa0021). Specifically, NJDEP confirmed that Jibsail's approved plan showed the mooring area at a water depth of greater than four feet, which is required by the rule to protect Submerged Aquatic Vegetation from boating propeller impacts, unauthorized dredging, and turbidity, which would be unlikely at those depths. N.J.A.C. 7:7-9.6(b)(6)(vi). (Aa0020-Aa0021). The entire mooring area must be within 4 ft. of water and in connection with Jibsail's Waterfront Development Permit application, the approved dock was reduced at NJDEP's request before approval. There was no practicable or feasible way to further reduce the length of the dock and still satisfy the 4 ft. depth requirement for the mooring area at the very end of the dock. There is no other area that NJDEP would permit Jibsail to moor a boat and there is only one boat mooring area where the depth is 4 ft. despite the length of the dock. (JRa003). The permitted dock could be no shorter because it would violate the Submerged Aquatic Vegetation Habitat Rule. The dock constructed by a former owner of the Jibsail property was not an alternative as it did not meet the CZM Rules

and dredging of Submerged Aquatic Vegetation Habitat is not authorized by NJDEP. Any suggestion by Appellant to that end is not based in fact or law.

Appellant presents no evidence to dispute NJDEP's finding that Jibsail's dock met the Submerged Aquatic Vegetation Habitat Rule or technical support for the argument that the dock should or could be shortened. NJDEP properly concluded that that the length of Jibsail's dock, as approved by the 2017 WFD Permit, complied with the Submerged Aquatic Vegetation Habitat Rule. There was no change in the length of the dock between the 2017 WFD Permit and the 2019 Permit Modification. (JRa001-JRa003). Nevertheless, NJDEP again reviewed the dock's compliance with the CZM Rules and inspected the dock as part of the application process for the 2019 Permit Modification. (Aa0092-Aa0093; Aa0119-Aa0120).

Jibsail's dock also complies with the Shellfish Habitat Rule. NJDEP properly concluded after reviewing and approving the Waterfront Development Permit plan submitted in support of Jibsail's 2017 WFD Permit that the dock as no more than four-feet wide to minimize adverse impact to the shellfish area. N.J.A.C. 7:7-9.6(b)(6)(ii). To further minimize impacts, and as required by the rule, NJDEP also required that the pier "be constructed of non-polluting materials and no dredging will take place during construction" of the project. (Aa0001; JRa001-002). There was no change in the width of the dock or the additional restrictions related to the

Shellfish Habitat Rule between the 2017 WFD Permit and the 2019 Permit Modification. (Aa0001-Aa0005; Aa0089-Aa0091; JRa001-JRa003).

2. The Record Contains Substantial Evidence Which Supports the Finding by NJDEP That Jibsail's Dock Complied With N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers).

NJDEP also properly concluded that Jibsail's dock substantially complied with N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers). The Navigational Channels Rule, N.J.A.C. 7:7-9.7 prohibits development which would result in the loss of navigability and the placement of structures within 50 feet of any authorized navigation channel. The Recreational Docks and Piers Rule, N.J.A.C. 7:7-12.5(b)(9), requires that a proposed structure not hinder navigation or access to adjacent moorings, water areas, docks and piers.

The focus of Appellant's challenge here is the length of Jibsail's dock. Appellant claims that Jibsail's dock will unreasonably interfere with the ability to navigate to and from Barnegat Bay contrary to N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers). The record reflects that it does not. (JRa004-JRa011 and the thumb drive submitted to the Appellate Division herewith containing the videos served on the NJDEP with that document).

As previously noted above, Appellant conflates the elements of the 2017 WFD Permit and the 2019 Permit Modification to bolster its challenge to the 2019

Permit Modification. The 2019 Permit Modification concerned only a de minimis change in the location of Jibsail's dock not the overall length of the dock and the Court's review should be limited to that de minimis change alone. On that basis, it is clear that the 2019 Permit Modification met the requirements of N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers). The 2017 WFD Permit did as well.

Appellant claims that NJDEP disregarded Appellant's comments during the permit review process. The record is clear that Appellant and other third parties had an opportunity to submit objections, photographs, data, views or arguments, orally or in writing, to NJDEP for consideration as part of the approval process for Jibsail's dock and other docks in the area. Appellant and other third parties availed itself of that opportunity and the record reflects the numerous submissions of Appellant. In response, NJDEP performed an inspection, considered the comments, and engaged in fact-finding. (Aa0092-Aa0093; Aa0119-Aa0120).

In support of the application for the 2017 WFD Permit, Jibsail's professional engineer concluded, among other things, that the navigability of Barnegat Bay and access to adjacent water areas will not be affected by Jibsail's dock constructed at the length required to meet the Submerged Aquatic Vegetation Habitat Rule and in order for the property owner to moor a boat. Jibsail's dock does not prohibit navigability at 163 ft. from the navigational channel and does not hinder navigation

or access. (Aa0091). See N.J.A.C. 7:7-9.7 (Navigational Channels). Initially, not only did NJDEP consider comments submitted in connection with the 2017 WFD Permit, NJDEP reduced the size of the originally proposed dock. NJDEP found that Jibsail's dock complied with the requirements of N.J.A.C. 7:7-9.7 (Navigational Channels) and N.J.A.C. 7:7-12.5 (Recreational Docks and Piers) and issued the 2017 WFD Permit.

In addition, despite the issuance of the 2017 WFD Permit, in connection with the 2019 Permit Modification NJDEP again extensively examined the alleged impacts of Jibsail's dock on navigability and access to adjacent water areas prior to issuing the 2019 Permit Modification. NJDEP determined after careful review that Appellant's concern over the ability to safely navigate to and from Appellant's property and dock was without merit. Based on a review of the submitted information and field observations, NJDEP made the determination that Jibsail's dock met the CZM Rules and specifically, did not interfere with navigation or access. This determination was based on the rules in effect, the site conditions, and the proposed activities as of the date of issuance of the 2017 WFD Permit and 2019 Permit Modification. The U.S. Army Corps also did not identify any issues related to navigability and concurred.

In light of the foregoing, NJDEP's determination to issue the 2017 WFD Permit and 2019 Permit Modification to Jibsail was correct based on the facts and

evidence in the record confirming that Jibsail's dock met the Waterfront Development Law and the CZM Rules. Appellant has not established that the 2017 WFD Permit or 2019 Permit Modification violate any NJDEP rule or that the issuance of those decisions was arbitrary, capricious, and unreasonable. The 2017 WFD Permit and 2019 Permit Modification were sufficiently and soundly grounded and both of those decisions should be affirmed.

CONCLUSION

For all of the foregoing reasons, Respondent P.T. Jibsail Family Limited Partnership respectfully submits that NJDEP's Final Decision denying Appellant's Third-Party Adjudicatory Hearing Request should be affirmed and if the Court elects to consider the untimely challenge to the 2017 WFD Permit or the 2019 Permit Modification, that both of those final decisions should be upheld.

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P.T. Jibsail Family Limited Partnership

Dated: May 20, 2024

By: /s/ Amie C. Kalac
Amie C. Kalac, Esq.

IN THE MATTER OF DENIAL : SUPERIOR COURT OF NEW
OF THIRD PARTY HEARING : JERSEY, APPELLATE DIVISION
REQUEST OF P.T. JIBSAIL :
FAMILY LIMITED : DOCKET NO. A-002570-22
PARTNERSHIP FILE NO.1515- :
06-0012.1 WFD 170001; :
WFD180001; OFFICE OF LEGAL : Civil Action
AFFAIRS FILE NO. 19-06 :
: On Appeal from New Jersey
: Department of Environmental
: Protection
:
:

BRIEF AND APPENDIX ON BEHALF OF RESPONDENTS

Dated: May 28, 2024

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2. DEP's March 20, 2019 approval of WFD permit modification application to Jibsail, DEP permitting file number 1515-06-0012.1 TDI180001. (Aa89 – Aa91).

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PRELIMINARY STATEMENT

Appellant, Janine Morris Trust (Trust), and the P.T. Jibsail Family Limited Partnership (Jibsail) own neighboring waterfront properties. In 2017, the Department of Environmental Protection issued Jibsail a permit to construct a recreational dock extension. However, Jibsail built the extension several inches outside the scope of its permit. Therefore, Jibsail applied for and was in 2019 granted a minor technical permit modification to “legalize” the mis-location.

The Trust requested an adjudicatory hearing regarding the 2019 technical modification permit, and in the same request sought to challenge the approval of Jibsail’s 2017 initial dock extension. DEP denied both. Ultimately, the DEP permitted the dock extension as-built. Those decisions were correct and should be affirmed.

The DEP properly denied the Trust’s request for an adjudicatory hearing because the Trust lacked a statutory or constitutional right to a hearing. The DEP also correctly rejected the Trust’s challenge to the original 2017 permit because it was untimely and is outside the scope of this appeal.

Notwithstanding these points, DEP’s underlying decision to grant the modification permit was proper because the alternative solution of requiring Jibsail to move and resecure its dock to bring it within the scope of the 2017 permit would have caused environmental disturbances in the environmentally

sensitive subaquatic vegetation habitat without any discernable benefit to the applicant or the general public.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

The DEP regulates development on “any waterfront upon any navigable water” pursuant to the Waterfront Development Act. N.J.S.A. 12:5-1 to -11. Development on the waterfront and in the coastal area requires a DEP permit, N.J.S.A. 12:5-3(a) unless a statutory or regulatory exemption applies. The Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7-1.1 to -29.10, include the Recreational Docks and Piers Rule (Docks Rule) which regulates structures used for recreational fishing or mooring boats or jet skis that are supported on pilings, floating on the water surface or cantilevered over the water, such as the structures here. N.J.A.C. 7:7-12.5(a). The CZM Rules also includes the Submerge Vegetation Habitat Rule which generally prohibits development in mapped submerged vegetation special water areas with some exceptions including, relevant here, certain proposed pier or dock projects. N.J.A.C. 7:7-9.6(a), (b) (7).

On March 28, 2017, Jibsail applied for a waterfront development individual permit to construct a “4’ x 185’ pier dock extension from an existing

¹ The Procedural History and Counterstatement of Facts are inextricably interwoven and, therefore, are presented together herein.

permitted 128’ pier dock” and to “install two 12’ x 12’ open-type boat lifts and remove one boat lift . . . located at the end of the (current) pier dock” (“2017 Proposed Permit Modification”). (Aa39-40; 22-29).² The existing dock and proposed extension are in a portion of the Barnegat Bay that contains submerged aquatic vegetation, a sensitive coastal ecosystem that can be readily damaged by boats and boat motors. Recreational docks in that area must meet at least four feet of water depth.

Jibsail’s application included a survey, with subsequent revisions, showing the proposed location and a calculation of the square footage of the Jibsail dock and other pertinent information. (Ra1). On March 28, 2017, Jibsail sent a notice to the Trust detailing the proposed application and attached a copy of the survey. (Aa41, 166). DEP has no record of the Trust filing an objection to the application.

On April 7, 2017, DEP required a revision to Jibsail’s Initial Extension WFD Permit application shortening the dock to keep the mooring area in line with the CZM Rules requirement that there be a minimum water depth of four-feet to establish a new dock mooring area in Barnegat Bay (Aa20). The aim of that water depth requirement is to protect the submerged aquatic vegetation and

² “Aa” refers to Appellant’s appendices; “Ab” refers to Appellant’s merits brief; “Ra” refers to Co-Respondent DEP’s appendix.

to minimize additional impacts to other aquatic resources where the dock extended beyond that depth. On May 5, 2017, DEP required another revision to the Jibsail 2017 Modification Permit application. (Ra2). In total, DEP's required revisions resulted in a reduced overall length of the proposed dock by about twenty feet. (Id.; Aa20-21).

On May 19, 2017, DEP approved the Jibsail 2017 Modification Permit allowing a 4' x 163.7' dock extension, two 12' x 12' open-type boat lifts and removal of the existing boat lift "as shown on the plans referenced on the last page of the permit," with conditions detailed in the permit approval and referencing the approved plans ("Jibsail 2017 Modification Permit"). (Aa1-5; Ra1). The 2017 Permit Modification required Jibsail as a condition precedent to "obtain() a Department of the Army Corps of Engineers permit." (Aa1). Jibsail's 2017 Permit Modification included notice of how any person aggrieved by the decision could "request an adjudicatory hearing within 30 calendar days after public notice of the decision is published in the DEP Bulletin." (Aa5). On June 7, 2017, DEP published notice of approval of the Initial Jibsail Dock Extension Application in DEP Bulletin, Volume 41, Issue 11.³

³ This Court can take judicial notice of past DEP Bulletins as official government records, the archives of which can be found at <https://dep.nj.gov/bulletin/archive/#2017>. The Bulletin incorrectly states that the approved permit allows a "4x185 pier dock extension," when the approved permit was actually for a "4' x 167.3' dock extension." (Ra2-6).

On August 17, 2017, the United States Army Corps of Engineers (“Army Corps”) approved Jibsail’s 2017 Permit Modification. (Aa209-212).⁴ Sometime during the winter of 2017 or spring of 2018, Jibsail constructed the dock extension subject to the Jibsail 2017 Modification Permit.

On June 26, 2018, DEP issued a notice of violation to Jibsail because Jibsail’s constructed dock was outside the approved square footage of the Jibsail 2017 Modification Permit; DEP noted other minor unauthorized structures and deviations from the permit. (Aa119-120). On July 12, 2018, the Army Corps conducted an inspection and identified the same deficiencies. (Aa112-120). Both DEP and the Army Corps required Jibsail to either bring the structure into compliance with the Jibsail 2017 Modification Permit conditions or apply for a permit modification to legalize the as-built structure. (Aa110-120).

On October 30, 2018, Jibsail applied for a minor technical modification to legalize a 1.7-foot mis-location under the Jibsail 2017 Modification Permit, approve unauthorized structures, and replace a boat lift with two jet ski lifts (the “Jibsail 2018 Modification Application”). (Aa94-118; 478-495). In support, Jibsail submitted a policy compliance statement, prepared on October 23, 2018, essentially stating that the proposed minor, technical modification was

⁴ On December 6, 2017, Jibsail received a ten-year tidelands license from the Tidelands Resource Council consistent with the approved plan in the 2017 Permit Modification.

consistent with, and had no additional impact on, Jibsail's compliance with various DEP regulations. N.J.A.C. 7:7-12.5; N.J.A.C. 7:7-9.6; N.J.A.C. 7:7-9.7. Those regulations included the Submerged Vegetation Habitat Rule ("SVH Rule") requiring that mooring areas evidence sufficient water depths to protect subaquatic vegetation, N.J.A.C. 7:7-9.6, the Navigational Channels Rule which prohibits development within fifty feet of navigational channels to protect those channels and keep them clear for general recreational and commercial use, N.J.A.C. 7:7-9.7, and the Docks Rule which provides a series of general requirements related to new recreational dock construction or modifications in the State's waters, N.J.A.C. 7:7-12.5. (Aa102-109).

Jibsail explained that it complied with the SVH Rule and that no feasible alternatives were available, and that "boat lifts are beneficial to the Submerged Aquatic Vegetation Habitat." (Aa104). To evidence compliance with the SVH Rule, Jibsail stated that "in the area of the proposed moorings the water depth is a 4' minimum measured at mean low tide." (Aa105). Finally, to show that "(t)here is no alternative mooring area at the site that would have less impact on the submerged aquatic vegetation," Jibsail noted that "(t)he entire site is mapped [as SVH] and there is no alternative mooring area which would have less impact on the submerged aquatic vegetation." (Id.).

Regarding the Navigational Channels Rule, Jibsail indicated that the policy was met because “the two proposed open type boat lifts are located suitably away from the marked navigation area of Barnegat Bay,” and that “[n]avigability of the Barnegat Bay will not be affected by allowing the two boat lifts to be constructed.” (Aa106). Finally, regarding the Docks Rule, Jibsail indicated that “(t)he proposed open type boat lifts will not hinder navigation or access to adjacent water areas.” (Aa107). On March 11, 2019, DEP notified the Trust that it would be approving the Jibsail 2018 Modification Application. (Aa476). On March 20, 2019, DEP approved the Jibsail Technical Modification Permit and forwarded a copy of the approved Jibsail 2019 Modification Permit to the Trust. (Aa476).

DEP published the Jibsail Technical Modification Permit in the April 3, 2019, edition of the DEP Bulletin, Volume 43, Issue 7.

On April 23, 2019, the Trust filed an adjudicatory hearing request regarding the Jibsail Technical Modification Permit. (Aa349-382).

On March 14, 2023, DEP’s Office of Legal Affairs denied the Trust’s request for two separate adjudicatory hearing requests: the 2017 Permit Modification, and the Technical Modification Permit, and forwarded a copy of that decision to the Trust and Jibsail. (Aa132). In that decision, DEP determined that the Trust lacked standing to demand an adjudicatory hearing regarding the

initial Jibsail 2017 Modification Permit and the Technical Modification Permit. (Aa135). It rejected the Trust’s claim that it had a navigation right entitling the Trust to an adjudicatory hearing. (Aa135). The DEP found that the Trust “allege[d] only generalized property rights, indistinguishable from those shared by other neighboring property owners, which do not provide constitutional standing;” that Jibsail’s permit “application adequately addresses [the requirement that the proposed permit not hinder navigation] because the end of the approved pier is approximately 163 feet from the nearest authorized navigation channel used to access the neighboring docks and Barnegat Bay; and that “there is adequate room to navigate and access adjacent water areas.” (Id.). DEP also denied the Trust’s right to an adjudicatory hearing request regarding the 2017 Permit Modification because the Trust did not substantially comply with the procedures to request a hearing, as the request was submitted “several years” after DEP issued and publicly noticed that decision. (Id.).

On April 28, 2023, the Trust appealed that decision.⁵

⁵ The Trust brought a separate appeal to challenge the Tidelands Resource Council’s (“TRC’s”) licensing determination regarding the same structure in “In the Matter of P.T. Jibsail Family Limited Partnership Tidelands License No. 1515-06-0012.1 TDI190001, Appellate Division Docket Number A-000699-22.” On May 8, 2024, the Appellate Division rejected that appeal and affirmed the licensing determination of the TRC.

LEGAL ARGUMENTS

POINT I

THE COURT SHOULD AFFIRM DEP'S DECISION TO DENY THE TRUST AN ADJUDICATORY HEARING REGARDING THE 2017 PERMIT MODIFICATION AS UNTIMELY. (RESPONDING TO APPELLANT'S POINT II).

The Trust's appeal of the 2017 Permit Modification was untimely, thus the court should dismiss the Trust's appeal of the 2017 Permit Modification.

An appellate court has "no jurisdiction to decide the merits" of an untimely appeal. Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (quoting In re Hill, 241 N.J. Super. 367, 372 (App. Div. 1990)). Final agency action must be appealed within forty-five days of service or notice of a decision. R. 2:4-1(b). Only a motion to extend the time to appeal by thirty days can enlarge the 45-day period. R. 2:4-4(a). With the extension, the "outer limit for filing the appeal" is seventy-five days from notice of the decision. In re Hill, 241 N.J. Super. at 371. Alternatively, a reconsideration application tolls the time to appeal. R. 2:4-3(b).

DEP correctly determined that the Trust's "request for an adjudicatory hearing on the May 19, 2017 Permit is time barred by N.J.A.C. 7:7-28.1(b) and thus mandatorily denied." (Aa134). The Jibsail Initial Extension WFD Permit decision was final on or about June 3, 2017 and yet the Trust took no steps to

challenge the decision at that time. Accordingly, this court does not have jurisdiction to hear the Trust's challenge to Jibsail's 2017 Permit Modification WD Permit.

The Trust's April 23, 2019, request for an adjudicatory hearing regarding DEP's decision to approve initial dock extension—the Jibsail 2017 Modification Permit—was about a year and ten months after DEP published its decision in the DEP Bulletin. That decision was undoubtedly a final, appealable decision. In re CAFRA Permit No. 87-0959-5, 152 N.J. 287, 301 (1997). The permit decision itself contained “adequate factual and legal conclusions,” unmistakable notice of its finality, describes “the right to appeal within the agency and the time limits for filing such an appeal,” and ultimately authorizes Jibsail to commence the initial dock extension. (Aa1-5). In re CAFRA Permit No. 87-0959-5, 152 N.J. at 299 (citing DeNike v. Bd. Of Trs., Employees Ret. Sys., 34 N.J. 430, 435 (1961)). The Trust was required to appeal that decision within forty-five days, R. 2:4-1(b).⁶ The Trust did not do so. Therefore, the Trust unambiguously failed to substantially comply with the statutory requirements

⁶ There is no evidence that the Trust even sought a 30-day extension establishing the outer limit of the time to appeal at 75 days after the decision. R. 2:4-4(a). The time to appeal was never tolled. Furthermore, DEP determined that there is no evidence that the Trust sought a reconsideration of the permit under DEP's CZM Rules. Compare N.J.A.C. 7:7-28.1 to -28.4 (requesting an adjudicatory hearing under the CZM Rules) with N.J.A.C. 7:7-19.2 (reconsidering application of a CZM Rule).

for an adjudicatory hearing, N.J.A.C. 7:7-28.1, and the DEP was correct to deny the Trust's hearing request. (Aa136).⁷

For the foregoing reasons, DEP denied the Trust's request for an adjudicatory hearing regarding the Jibsail Initial Extension WFD Permit as a matter of course, the time to appeal was not tolled, and the Trust's request for a hearing regarding the 2017 Initial Dock Extension WFD Permit is barred from review in this appeal.

POINT II

**THE COURT SHOULD AFFIRM DEP'S
DECISION TO DENY THE TRUST AN
ADJUDICATORY HEARING REQUEST
BECAUSE IT DOES NOT POSSESS A
STATUTORY OR CONSTITUTIONAL RIGHT TO
A HEARING. (RESPONDING TO APPELLANT'S
POINT II).**

DEP's decision to deny the Trust an adjudicatory hearing regarding the Jibsail Technical Modification Permit was correct because the Trust does not possess a statutory or constitutional right to an adjudicatory hearing.

⁷ In its request for an adjudicatory hearing, the Trust argued that it submitted objection letters, dated March 23, 2017, and April 3, 2017, respectively, and attached copies of those letters as exhibits. (Aa378-79). DEP has no evidence of having received the April 3, 2017 letter, and in any event it met none of the requirements of an adjudicatory hearing request; and the March 23, 2017 letter for which Appellant later submitted a fax confirmation does not pertain to or mention the Jibsail 2017 Modification Permit application and pre-dates that application. (Aa301).

The court’s review of agency decisions is limited. Capital Health Sys., Inc. v. N.J. Dep’t of Banking & Ins., 445 N.J. Super. 522, 535 (App. Div. 2016). (citing In re Stallworth, 208 N.J. 182, 194 (2011)). A final agency decision is entitled to “substantial deference” and should not be overturned unless “(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record.” Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep’t of Env’tl. Prot., 191 N.J. 38, 48 (2007) (citing In re Taylor, 158 N.J. 644, 656 (1999)); N.J. Highlands Coal. v. N.J. Dep’t of Env’tl. Prot., 456 N.J. Super. 590, 602 (App. Div. 2017). Thus, DEP’s adjudicatory hearing denial is owed substantial deference.

Due process is a “flexible and fact-sensitive concept.” In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 467 (2006). It is a “firmly settled” rule that a “trial-type adjudicatory hearing is not allowed . . . except to an appellant who can show a statutory right or a constitutionally protected property interest.” In re Riverview Dev., 411 N.J. Super. 409, 434 (App. Div. 2010). In fact, the Administrative Procedure Act (“APA”) prohibits state agencies from promulgating “any rule or regulation that would allow a third

party to appeal a permit decision” unless “specifically authorized to do so by federal law or State statute.” N.J.S.A. 52:14B-3.1 and -3.3(a).

Here, the WFD Act does not provide the Trust a right to an adjudicatory hearing. N.J.S.A. 12:5-1 to 12:5-11; Spalt v. New Jersey Dep’t of Env’tl Prot., 237 N.J. Super. 206, 212 (App. Div. 1989). The CZM Rules also do not give third parties rights to an adjudicatory hearing to challenge a permitting decision. N.J.S.A. 52:14B-3.3; N.J.A.C. 7:7-28.1(e).

Nor does the Trust have a constitutional right to a hearing. Third parties to permitting decisions “generally are not able to meet the stringent requirements for constitutional standing in respect of an adjudicatory hearing.” In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 482 (2006). There are two tests that determine whether an agency’s administrative procedures are “constitutionally sufficient.” The first examines if the petitioner has a “particularized property right.” The second considers the three-part analysis set forth by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1975); In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. at 467. The Trust’s hearing request fails both tests.

A. DEP Correctly determined that the Trust does not have a particularized property interest

Landowners generally do not have a particularized property interest warranting an adjudicatory hearing when neighboring property is proposed for

development. In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. at 470. Nor do associated interests shared with other property owners provide third-party objectors to meet these rigorous standards requiring a particularized property interest. In re NJPDES No. NJ0025241, 185 N.J. 474, 482 (2006); see also In re Freshwater Wetlands, 185 N.J. at 464, 470; Normandy Beach Improvement Ass'n v. Comm'r, Dep't of Env't'l Prot., 193 N.J. Super. 57 (App. Div. 1983) (quality of life concerns not sufficient to establish particularized property interest); In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 211 (App. Div. 2004) (adverse aesthetic impacts and traffic impacts are generalized and insufficient to establish particularized property interest); See Spalt, 237 N.J. Super. at 212 (close residency, fear of resultant injury to property, damage to recreational interest or shared generalized property rights are not particular property rights); In re Riverview Dev., 411 N.J. Super. at 437-38 (general claims of adverse aesthetic and traffic impacts did not create sufficient property interest to entitle neighboring homeowners to hearing). "[S]imply because some of the plaintiffs reside close to the . . . site and are fearful of resultant injury to their property, does not mean that they are entitled to an adjudicatory hearing. Fear of damage to one's . . . generalized property rights shared with other property owners is insufficient to demonstrate a particularized property right." Amico, 371 N.J. Super. at 212.

Instead, establishing a particularized property right requires a landowner to show that its “legal rights, duties, obligations, privileges, benefits or other legal relations . . . are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to [the landowner] or disposing of their interests, after opportunity for an agency hearing” N.J.S.A. 52:14B-2(b). There is no particularized right to navigation. Instead, either navigation is prevented, or it is not, as a result of proposed development. In its navigation argument, the Trust pursues the same faulty logic advanced in Spalt, where appellant shell fishermen argued that their fundamental right to gainful employment was harmed because DEP approved a specific construction permit at a specific location, potentially preventing the shell fishermen from renewing their one-year shell fishing leaseholds at a particular site. Spalt, 237 N.J. Super. at 213. The court reasoned “that the right to pursue a particular job as opposed to the right to gainful employment, is not a fundamental right. . . at most, it is deprivation of the right to work at a particular job site.” Id. (citing Greenberg v. Kimmelman, 99 N.J. 552, 573-74 (1985)). By analogy to Spalt, the Trust’s right to navigate is not hindered simply because the Trust may not be able to use the same path to get the channel in perpetuity.

The Trust claims to have a particularized property interest in the State’s land hundreds of feet from its dock because it uses a particular path to access and use of its existing facilities for purposes of navigation. But the Trust’s alleged “navigational harms faced solely by Appellant”, (Ab12), are speculative because the Trust’s alleged harm—that the Jibsail Technical Modification Permit merely requires the Trust to change its navigation path hundreds of feet from where the Trust launches or parks its boat, and that the resultant changed navigation patterns cause the Trust’s boat to scrape bottom, then that is a harm caused likely by the natural conditions of the waterway, i.e. water depths, and is no more than “fear of damage to one’s recreational interests.” In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 470 (2006) (citing Spalt, 237 N.J. Super. at 212-13). The right to freely pilot one’s boat in the State’s waterways is no more than the generalized interests had by all watercraft operators and members of the general public. Spalt, 237 N.J. Super. 206, 212 (App. Div. 1989) (citing Hills Development Co. v. Bernards Tp., 229 N.J. Super. 318, 335 (App. Div. 1988); In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 211 (App. Div. 2004) (finding that adverse aesthetic impacts and traffic impacts are generalized and insufficient to establish particularized property interest).

The Trust claims its interest is not general and that its “request for a hearing is grounded in a factual navigational harm that has uniquely impacted Appellant.” (Ab12-13). However, as the DEP found, the Jibsail Technical Modification Permit was located a sufficient distance from other structures and the marked navigational channel so as to not hinder navigation. (Aa135). DEP correctly determined that the Trust was unable to establish a statutory entitlement to a hearing.

B. The Trust received constitutionally due process and is not entitled to a hearing

The Trust also had no due process right to a hearing. Whether an agency provided adequate due process is determined by way of a three-factor test set forth in Mathews v. Eldridge, 424 U.S. at 335; In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. at 467. The three factors that the court considers under Mathews are:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and
- (3) the Government’s interest, including the function involved and the fiscal and administrative burdens

that the additional or substitute procedural requirement would entail.

[Mathews v. Eldridge, 424 U.S. at 335.]

The record reveals that these factors weigh overwhelmingly in favor of DEP's determination to deny Appellant's hearing request.

The first Mathews factor favors DEP because the private interest that the Trust has identified is, as discussed, no different than the rights of all of the other surrounding property owners and members of the public. The Trust failed to show any private interests that were implicated by the Jibsail Technical Modification Permit. The Trust argues that DEP's approval of the Jibsail Technical Modification Permit, and DEP's denial of the Trust's adjudicatory hearing request, ignored a factual navigational harm that is unique to Appellant and which is sufficient to establish a particularized property interest. But as applied to the Trust's interests, DEP found no rights were implicated or affected. (Aa135). DEP responded that navigation is a generalized consideration, akin to traffic concerns, that may result from adjacent development. (Id.). DEP likens navigation impacts to traffic impacts, where private development can increase burdens on the general public—even disproportionately to those in the immediate vicinity of the proposed development—but the impacts are nonetheless general in nature and do not give private parties individual standing for an adjudicatory hearing on the permit. In re Amico, 371 N.J. Super. at 211.

(Immediately adjacent neighbor to a proposed permitted site for a car wash failed to establish a particularized property interest for purposes of an adjudicatory hearing based on anticipated traffic impacts).⁸ DEP correctly found that the Trust has nothing more than general interests shared with other nearby landowners and that Jibsail's dock structure was sufficiently distanced from the navigational channel. (Aa135).

The second Mathews factor also favors DEP because the Trust did have meaningful opportunities to prevent the erroneous deprivation of the interests it purports to have. "The minimum requirements of due process are notice and an opportunity to be heard." Filgueiras v. Newark Pub. Schs., 426 N.J. Super. 449, 473 (App. Div. 2012) (quoting Doe v. Poritz, 142 N.J. 1, 106 (1995)). DEP met those requirements.

DEP's waterfront development permitting process provides third party objectors⁹ the opportunity to submit public comments that are considered by

⁸ Nor do waterfront development permits "convey any property rights or any exclusive privilege" or "relinquish the State's" ownership of the tidelands interests. (Aa3). Permits represent preliminary permissions for development. Because the permitted activity in this case is on State-owned tidelands, it is undisputed that the State owns all of the lands of Barnegat Bay outside of the Trust's permit area and Jibsail's permit area.

⁹ The APA defines a third party as anyone other than the permit applicant, the State agency required to take official action on the permit application, or one with a particularized property interest. N.J.S.A. 52:14B-3.2.

DEP permitting personnel—the state official designated to take official action on permit applications—prior to any official action on the application.¹⁰ Here, the Trust had actual notice of Jibsail’s Technical Modification Permit¹¹ and made public comments objecting to that application while that permit application was pending, and those comments were considered by DEP personnel prior to permitting staff taking official action on the then-pending application. (Aa477).¹²

The Trust received the benefit of the opportunities that the APA affords interested persons such as a “reasonable opportunity to submit data, views or arguments, orally or in writing, during any proceedings involving a permit decision.” N.J.S.A. 52:14B-3.1(a). Those public comments provide an “effective and efficient means for third-party objectors to voice their concerns

¹⁰ The permit preparer in this case was Ryan Anderson, and the Permit Supervisor was Eric Virostek, with whom Janine Morris from the Trust met with personally. (Aa477).

¹¹ Even though Jibsail was not required to provide the Trust with written notice of the Technical Modification Permit, the Trust was on actual notice of that permit application because DEP permitting personnel provided the Trust with real-time updates from DEP’s permitting personnel, and DEP personnel also met with the Trust at the site. (Aa477). See N.J.A.C. 7:7-24.1(c)(7): An applicant is not required to provide public notice for...an application for an administrative or minor technical modification pursuant to N.J.A.C. 7:7-27.5(c) or (d), respectively.”

¹² The Trust’s objection focused on the existing mis-located structure approved in 2017, not the proposed modification and permitting of that as-built structure. (Aa477).

with the State officials who will make the ultimate permitting decision.” In re Riverview Dev., 411 N.J. Super. at 425. Neither the WFD Act nor the CZM rules include any further provisions regarding procedures DEP must follow in considering public comments. In re Issuance of Access Conforming Lot Permit No. A-17-N-N040-2007, 417 N.J. Super. 115, 127 (App. Div. 2010). The Trust “voice[d its] concerns with the State officials ultimately making the permitting decision.” N.J.S.A. 52:14B-3.1(a); In re Riverview Dev., 411 N.J. Super. at 425. DEP considered, but ultimately rejected the Trust’s objections when it approved the Technical Modification Permit. Using its technical expertise to decide on the appropriateness of a permit application is the primary function of DEP permitting staff, even when that means to disagree with stated objections. Disagreement, as evidenced by the permit approval, is not evidence of shortcomings in DEP’s procedures.

Here, the DEP permitting staff considered the Trust’s public comments alleging its navigational interest would be harmed, and DEP’s Office of Legal Affairs (OLA) also considered the Trust’s request for an adjudicatory hearing. The sufficiency of that process to prevent the erroneous deprivation of the Trust’s rights is evidenced by the fact the Trust does not propose any viable substitute or additional processes; rather, they simply do not like the outcome of the process they received. Accordingly, the second Mathews factor weighs

heavily in DEP's favor because DEP's process adequately serves objectors, like the Trust, to the extent allowable by the Legislature. N.J.S.A. 52:14B-3.1.

The third Mathews factor also weighs heavily in favor of DEP. The Legislature unequivocally prevents DEP from "promulgat[ing] any rule or regulation that would allow a third party to appeal a permit decision." N.J.S.A. 52:14B-3.1. Objectors must first overcome the threshold question of whether the objector is a "third-party" or whether the objector has a statutory or constitutional right to a hearing, N.J.S.A. 52:14B-3.2, otherwise the Legislature forbids such appeals in the interest of maintaining the efficient function of the government, and to reduce administrative burdens. N.J.S.A. 52:14B-3.1. In the words of the Legislature, third party appeals "would give rise to a chaotic unpredictability and instability that would be most disconcerting to New Jersey's business climate and would cripple economic development in our State." N.J. Stat. § 52:14B-3.1. If the Trust advocates for a substitute or additional procedure here—and DEP argues the Trust does not clearly articulate any such standard—that process would necessarily be functionally indistinguishable from a public hearing during the permitting process—a hearing before the hearing. Introducing such uncertainty and chaos into DEP's permitting process or its adjudicatory hearing process would harm the government's interest in maintaining efficient processes and would increase

administrative burdens. Accordingly, the third Mathews factor weighs in favor of DEP.

Thus, the Trust was not entitled to an adjudicatory hearing.

SUBSTANTIAL EVIDENCE IN THE RECORD SHOWS DEP APPROPRIATELY APPLIED THE DOCKS RULE AND APPROVED THE 2019 PERMIT MODIFICATION. (RESPONDING TO APPELLANT’S POINT III)

The DEP’s decision to issue the 2019 permit modification should be affirmed because it followed the Act and CZM regulations and is supported by substantial credible evidence in the record. Tlumac v. High Bridge Stone, 187 N.J. 567, 573 (2006); In re N.J. Dep’t of Env’tl. Prot. Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013).

The court “will not reverse the ultimate determination of an agency unless the court concludes that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies expressed or implied in the act governing the agency.” In re Orban/Square Props., 461 N.J. Super. 57, 71-72 (App. Div. 2019) (quoting In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005)). Final agency decisions receive “substantial deference.” Univ. Cottage Club of

Princeton N.J. Corp., 191 N.J. at 48. The court defers to an agency’s regulatory interpretation unless it is “plainly unreasonable.” In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016). This deference is “even stronger when the agency [] has been delegated discretion to determine the specialized and technical procedures for its tasks.” In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004). (quoting Newark v. Nat. Res. Council, Dep’t of Env’tl. Prot., 82 N.J. 530, 540 (1980)). When DEP’s expertise is a factor, the court defers to that expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004). DEP is the agency with the expertise and authorization to regulate waterfront development through its CZM regulations. Tumino v. Long Beach Tp., 319 N.J. Super. 514, 523 (App. Div. 1999) (citing Last Chance Dev. P’ship v. Kean, 119 N.J. 425, 429-37 (1990)). Thus, DEP’s permitting decision warrants great deference.

DEP regulates waterfront development pursuant to the CZM Rules, which, among other things, endeavor to protect “the coastal ecosystem, an area rich in natural features and a vital component of the State’s tourist industry.” Tumino v. Long Beach Tp., 319 N.J. Super. 514, 524-25 (App. Div. 1999) (citing 22 N.J.R. 1193 (April 16, 1990)).

Proposed in-water dock development is governed by the Docks Rule, a general water area rule which regulates fixed and floating structures “used for

recreational fishing or the mooring of boats or jet skis used for recreation and fishing.” N.J.A.C. 7:7-12.5. The Docks Rule considers “recreational docks . . . conditionally acceptable” provided the proposed dock development: demonstrates “a need that cannot be satisfied with existing facilities;” complies with “the submerged vegetation habitat rule, N.J.A.C. 7:7-9.6;” “minimizes adverse environmental impact to the maximum extent feasible;” and “do(es) not hinder navigation.” N.J.A.C. 7:7-12.5. These four factors balance ecologically sensitive areas with water use.

For instance, the “need” portion of the Docks Rule can sometimes depend on whether other rules such as the SAV Rule are also applicable. In certain coastal areas like Barnegat Bay, DEP enforces “longstanding rules protect(ing) the special areas known as submerged aquatic vegetation (SAV)” areas. 54 N.J.R. 277(a).

SAV grows primarily in partially enclosed, shallow tidal areas with water depths at or below three feet, three inches. 54 N.J.R. 277(a). SAV serves several important ecological and environmental functions, and is especially vulnerable to human disturbances, most notably boat traffic scraping through shallow areas. When boats “resuspend solids” by piloting through shallow waters, sunlight cannot reach the SAV, causing water temperatures to increase and water to evaporate, leading to eutrophication, which has a compounding negative effect

on SAV and water quality. Ibid. Thus, per the SAV Rule, a dock may only be constructed or extended if “a minimum water depth of four feet at mean low water (is present) in the area where the boats will be moored” (“Water Depth Requirements”). N.J.A.C. 7:7-9.6(b)(6)(vi); see also N.J.A.C. 7:7-9.6(b)(7)(similar).

While there is no obligation for DEP’s prior permittees to bring a prior approved WD permit into compliance with current Water Depth Requirements, DEP encourages existing permittees to extend their docks for purposes of establishing a mooring area that meets or exceeds Water Depth Requirements where water depth “needs” that are protective of SAV cannot be met by “existing facilities.” N.J.A.C. 7:7-9.6(b)(7). In short, sufficient water depths protects SAV. Thus the “need” requirement in the Docks Rule can be satisfied through the SAV Rule to allow the dock to meet the four foot depth requirement and to the extent these rules conflict, the SAV rule “supersedes the rules governing other areas or other uses.” N.J.A.C. 7:7-9.1.

The Docks Rule also requires applicants to demonstrate their project will not impact navigation. N.J.A.C. 7:7-12.5(b)(9). DEP’s primary considerations regarding navigation are to maintain sufficient water depths—namely mooring areas—and ensure that private development does not encroach on navigational channels. N.J.A.C. 7:7-12.5(g). (“Docks and piers constructed in water with

insufficient water depth causes increased turbidity resulting in an adverse impact to special areas and water quality.”). The Docks Rule incorporates these purposes. DEP’s long-standing interpretation is that “navigation” in the Docks Rule therefore references impacts to navigation channels. Hall Harbor Yacht Basin v. Department of Env. Prot., 1987 ENV LEXIS 117 at *7 (Oct. 19, 1987). (where DEP considered the distance from the navigational channel in response to questions about hinderance to navigation); Misiak v. Walker, Department of Env. Prot., 1994 N.J. AGEN LEXIS 1109 at *13-14 (Nov. 9, 1994). (where DEP reviewed water depths in mooring area in response to allegation of hinderance to navigation).

The record demonstrates DEP applied these long-standing regulatory interpretations here. First, DEP’s notice of violation established a “demonstrated need” for Jibsail’s mislocated dock to meet the basic permit requirement that a permittee’s activity must be taking place within the permitted area. N.J.A.C. 7:7-27.2. DEP reasonably found that a technical modification was the appropriate way to rectify the deviation because it entailed “a change in the design or layout of a project, including any associated change to an approved site plan or other document, which [did] not result in new or additional impacts to any special area.” N.J.A.C. 7:7-27.5(d). (emphasis added). Given the less than two-foot difference between the originally permitted activity—which is not

before this court—and the modified permit, DEP appropriately determined there were no new impacts and approved the permit. (Aa123-128). DEP previously approved the dock extension to a length to meet the four-foot minimum water depth requirement, therefore satisfying both the SAV Rule and the “need” requirement. (Aa466-470). Finally, DEP included a determination that the proposed development in this “highly developed area” was not within fifty feet of a navigational channel. (Aa93).

Appellant challenges DEP’s decision on grounds that the Trust “is unable to safely maneuver its watercrafts in or out of its waterfront facilities due to the location” of the Jibsail Technical Modification Permit. (Ab12). This argument necessarily claims that the Trust has some defined or definable navigation rights in the State’s land outside of the Trust’s permit area, and that the Jibsail Technical Modification Permit infringes on those rights. In support of its claim, the Trust submits myriad photographic evidence showing the location of the Jibsail Technical Modification Permit from the vantage point of the Trust’s existing facilities as well as aerial photography. (Id.). The Trust contends that the location of Jibsail’s dock creates “a factual navigational harm uniquely impact[ing] Appellant.” (Ab12, 15). But as explained further below, the Trust has “not articulated any claim of a constitutionally protected individual property interest affected thereby.” (Ab135).

DEP is not obligated to analyze navigation in the manner proposed by Appellant and That argument is also contradicted by the record, because while the Trust contends it should have unrestricted use of a straight-line path from its mooring area out to the navigational channel—based on some theory of rights to that path—the Trust provides no evidence of why it should be entitled to that path, or why that particular path is necessary for the Trust’s safe navigation. “The Department determined there is adequate room to navigate and access adjacent water areas,” and that contention remains undisputed in this record. (Ab135).

In this appeal, the Trust renews its argument presented to the agency that the Docks Rule requires DEP to determine that the Trust’s navigation is not changed as a result of the Jibsail Technical Modification Permit. That is not the standard, is contradicted by DEP’s specific analysis in this case as well as DEP’s longstanding interpretation that hinderances to navigation apply to navigational channels. According to Jibsail’s survey, the structures in Jibsail’s proposed development were 163 feet from the marked navigational channel. (Aa91). DEP’s “Navigation” considerations noted that the proposed development did not include structures “within 50 feet of a navigational channel.” (Aa93). N.J.A.C. 7:7-9.7(b)(4). DEP explained these findings in its adjudicatory hearing request denial. (Aa135). This directly aligns with DEP’s long-standing interpretation

that the focus of the navigation requirement is protecting navigation channels. Tumino v. Long Beach Tp., 319 N.J. Super. 514, 517-18 (App. Div. 1999) (approving dock extension because it would not interfere with navigation channels); Hall Harbor Yacht Basin v. Department of Env. Prot., 1987 ENV LEXIS 117 at *7 (Oct. 19, 1987); Misiak v. Walker, Department of Env. Prot., 1994 N.J. AGEN LEXIS 1109 at *13-14 (Nov. 9, 1994). Appellant simply disagrees with DEP's application of its regulations to the facts in this case and has failed to advance any viable claims that the Jibsail dock encroaches on the marked navigational channel.

Furthermore, DEP's interpretation that the "navigation" portion of the Recreational Docks and Piers Rule references navigational channels makes sense. Specifically, focusing on state and navigational channels makes the best use of DEP's limited resources and provides the kind of "comprehensive regulation of the State's coastal areas" the Legislature charged DEP to undertake. Last Chance Dev. P'ship v. Kean, 119 N.J. 425, 430 (1990). Conversely, interpreting the navigation rule as requiring DEP to consider navigational impacts to each and every private dock owner based on their neighbor's particular navigational use would be arbitrary, because DEP is not in the business of dictating specific navigation paths to its permittees. Here, DEP's decision that the Jibsail 2019 Permit Modification met the rule because the

structure did not interfere with an authorized navigational channel was based on a reasonable long-standing regulatory interpretation that is owed deference. In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016).

Appellant also claims that the Docks Rule required Jibsail to demonstrate need for the Technical Modification Permit that cannot be met with existing facilities – an argument that fares no better because it is obvious that DEP and Jibsail have a need to ensure that the recorded survey work for the structure represents the facts on the ground of the as-built structure. Furthermore, this contention ignores SAV Rule compliance. N.J.A.C. 7:7-12.5(b)(1). As explained above, one way applicants frequently demonstrate need—including here—is by showing compliance with special water area rules, including the SAV Rule which protects sensitive aquatic vegetative habitat. Here, the 2019 Jibsail Permit Modification meets at least two needs. First, Jibsail needed to legalize the dock structure as erected and legalizing the structure as built rather than relocating the dock made sense to avoid potentially disturbing more SAV habitat in the process. Second, Jibsail’s dock extension removes the need for Jibsail to pilot through waters below Water Depth Requirements, and DEP specifically provides for such modifications of existing dock structures in the CZM Rules. N.J.A.C. 7:7-9.6(b)(7). The Trust’s bare attacks on Jibsail’s application fails to consider the existing regulatory requirements and the

procedural posture here. (Br. 17-19). The Trust accordingly has not met its heavy burden to demonstrate DEP's decision here was arbitrary or capricious.

CONCLUSION

For the forgoing reasons, DEP's approval of the Jibsail 2019 Permit Modification, and DEP's denial of Appellant's request for an adjudicatory hearing regarding the Jibsail 2017 Modification Permit and Jibsail 2019 Permit, should be affirmed.

Respectfully submitted,

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By: /s/ W. Conor Kennedy
W. Conor Kennedy
Deputy Attorney General (ID: 294762019)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-2570-22

IN THE MATTER OF DENIAL OF
THIRD PARTY HEARING
REQUEST OF P.T. JIBSAIL
LIMITED PARTNERSHIP FILE NO.
1515-06-0012.1 WFD 170001; WFD
18001; OFFICE OF LEGAL
AFFAIRS FILE NO. 19-06

Civil Action

On Appeal From:
New Jersey Department of
Environmental Protection

REPLY BRIEF OF APPELLANT JANINE MORRIS TRUST

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1. Decision of the New Jersey Department of Environmental Protection denying the third-party adjudicatory hearing request of the Janine Morris Trust on March 14, 2023. [Aa132-Aa136.]
2. Modification of Waterfront Development Individual Permit No. 1515-06-0012.1 WFD 180001 dated March 20, 2019 [Aa89-Aa91].

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant, Janine Morris Trust (“Appellant” or “Trust”) relies on the procedural history and statement of facts set forth in its initial brief.

LEGAL ARGUMENT

I. THE NJDEP’S DENIAL OF APPELLANT’S ADJUDICATORY HEARING REQUEST WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AND SHOULD BE REVERSED. [Aa132-Aa136.]

As noted in Appellant’s initial brief, the Administrative Procedure Act (“APA”) recognizes that “[p]ersons who have particularized property interests or who are directly affected by a permitting decision have constitutional and statutory rights and remedies.” N.J.S.A. 52:14B-3.1. The APA affords hearing rights to persons “who has a particularized property interest sufficient to require a hearing on constitutional or statutory grounds.” N.J.S.A. 52:14B-3.2. The APA recognizes that a party other than the applicant has a right to obtain an adjudicatory hearing based on a “particularized property interest.” The APA does not limit a person’s rights to appeal a permit decision directly to the Appellate Division and affords an adjudicatory hearing to provide complete facts to those that qualify under the Act. N.J.S.A. 52:14B-3.3; R. 2:2-3(a)(2).

Appellant’s dock is adjacent to the dock of Respondent, P.T. Jibsail Family Limited Partnership (“Jibsail”). [Aa167; Aa297; Aa298; A372-Aa375.] The 2017 WFD permit issued to Jibsail authorized the construction of a 167.3-

foot extension to Jibsail's already existing approximately 128-foot dock. [Aa1-Aa5.] The 2019 WFD permit modification legalized the as-built location of the dock. [A89-91.] Jibsail's dock extension angles in a westerly direction, thereby cutting across Appellant's access to the navigable channel of Barnegat Bay. [Aa149; Aa150; Aa152-Aa153; Aa188; Aa291-Aa295; Aa297; Aa298.]

The photographs and other documentary evidence in the record demonstrate the navigational restraint to Appellant presented by the dock extension. [Aa149; Aa150; Aa152; Aa188; Aa291-Aa295; Aa297; Aa303.] Appellant is unable to safely maneuver its watercrafts in or out of its waterfront facilities due to the extension. [Aa380-Aa382.] This factual situation is supported by the documentary evidence in the record. [Aa149; Aa150; Aa152; Aa188; Aa291-Aa295; Aa297; Aa303.]

Jibsail acknowledged in its May 31, 2019 letter that "[Appellant's] claimed right to a hearing would have merit only if her claims that Jibsail's dock will materially interfere with the ability to navigate to and from the [Appellant's] dock were valid and substantial." [Aa432.] This statement recognizes that a navigation claim particular to Appellant would be justification for a hearing.

Jibsail argues in its brief that "Appellant's claim is based on speculative interference only and is based on self-serving statements and overhead

photographs...” [Jb17.]¹ Jibsail goes on to state that “Appellant failed to provide any evidence, by an expert or otherwise, to dispute the conclusions of Jibsail’s Professional Engineer and NJDEP that Jibsail’s dock met the CZM Rules...” [Jb18.] As set forth above, Appellant did in fact provide evidence regarding non-compliance with the Coastal Zone Management (“CZM”) Rules and the specific and unique impact to Appellant. However, this purported factual dispute concerning the navigation impediment faced by Appellant is the exact type of situation that would benefit from an adjudicatory hearing, which would allow further factual development and expert testimony. The result of the hearing would be a more fully developed record that, at the end of the day, would result in more effective judicial review in the event of an appeal to the Appellate Division.

As noted in Appellant’s initial brief, the factual situation presented in this matter is distinguishable from the case law cited by Respondents, New Jersey Department of Environmental Protection (“NJDEP”) and Jibsail, in their briefs and relied upon by the NJDEP in the underlying decision. In Spalt v. N.J. Dep’t of Env’tl. Prot., 237 N.J. Super. 206 (App. Div. 1989), the Court held that close residency, fear of resultant injury to property, damage to recreational interest, or shared generalized property rights are not particularized property rights.

¹ “Jb” refers to Jibsail’s appellate brief.

Spalt, 237 N.J. Super. at 212. In re Riverview Development, LLC, Waterfront Development Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409 (App. Div. 2010), held that general claims of adverse aesthetic and traffic impacts did not create sufficient property interests to entitle neighboring homeowners to a hearing. In re Riverview Dev., 411 N.J. Super. at 437-38. The Court in In re AMICO stated that

simply because some of the plaintiffs reside close to the... site and are fearful of resultant injury to their property, does not mean that they are entitled to an adjudicatory hearing. Fear of damage to one's...generalized property rights shared with other property owners is insufficient to demonstrate a particularized property right.

In re AMICO/Tunnel Carwash, 371 N.J. Super. 199, 212 (App. Div. 2004).

Each of these decisions bases the lack of a particularized property interest on the fact that the potential harm faced by the party requesting a hearing is general in nature. In contrast, Appellant's request for a hearing is grounded in a navigational harm that has uniquely impacted Appellant. [Aa349-Aa382.] In sum, the NJDEP's finding in the underlying hearing request denial that "[Appellant] alleges only generalized property rights, indistinguishable from those shared by other neighboring property owners" is not based on the evidence in the record. [Aa135; Aa351-Aa353; Aa380-Aa382.]

Finally, this Court's decision in In the Matter of P.T. Jibsail Family Limited Partnership Tidelands License No. 1515-06-0012.1 TDI190001, Docket No. A-000699-22,² did not hold that Appellant has no property interest beyond Appellant's property line. [Ara12-Ara35.]³ To be sure, the State of New Jersey owns in fee simple all lands under tidewater below the high-water mark. In re Tideland's License 96-0114-T, 326 N.J. Super. 209, 212 (App. Div. 1999). However, Tidelands licenses are at issue in this matter, which convey to licensees the right to use land under the water contained within the area set forth in the license. [Ara32.] While not property ownership, this right clearly provides the licensee with a property interest.

For the reasons set forth herein, Appellant submits that it has a particularized property interest sufficient to entitle it to an adjudicatory hearing. As such, the NJDEP's decision to deny Appellant's adjudicatory hearing request was arbitrary, capricious, and unreasonable, and should be reversed.

II. APPELLANT TIMELY APPEALED THE 2019 WATERFRONT DEVELOPMENT PERMIT MODIFICATION.

Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465 (App. Div. 2023), settled an open issue concerning appellate practice

² Appellant filed a petition for certification with the New Jersey Supreme Court concerning this decision on June 21, 2024, which is currently pending with Docket No. 089547.

³ "Ara" refers to Appellant's reply appendix.

in New Jersey. Specifically, a party wishing to challenge a final agency action was often forced to file a request for an adjudicatory hearing with the pertinent agency while simultaneously filing an appeal with the Appellate Division to ensure it did not lose the ability to challenge the merits of the final agency action if the hearing request was denied. However, in Musconetcong Watershed Ass'n, this Court held that an agency decision, which in that case was a flood hazard area (“FHA”) determination by the NJDEP, became a final agency decision subject to appeal when the NJDEP denied a third-party’s request for an adjudicatory hearing to challenge the FHA determination. Id. at 471.

In so holding, this Court set forth the well settled principle that “[e]xhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle. This principle requires exhausting available procedures, that is, ‘pursuing them to their appropriate conclusion and, correlatively...awaiting their final outcome before seeking judicial intervention.’” Id. at 478 (quoting Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 558-59 (1979)(internal citations omitted)). “The exhaustion-of-administrative-remedies doctrine is ‘designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts.’” Musconetcong Watershed Ass'n, 476 N.J. Super. at 478 (internal citations omitted).

Ultimately, the Court held as follows:

Applying these principles to the DEP's February 23, 2017 FHA Determination, we hold that the determination became final for purposes of a judicial appeal when the DEP denied MW Association's request for an adjudicatory hearing. When the DEP received the request for a hearing, it had to determine if MW Association had a statutory right or a particularized property interest entitling it to a hearing. Until the NJDEP made that determination, MW Association's administrative remedies were not exhausted because it might be accorded a hearing.

Id. at 479.

The FHA regulatory scheme with regard to adjudicatory hearings is analogous to the CZM Rules, which govern the issuance of the Waterfront Development Permit ("WFD") and modification at issue in this matter. Specifically, the FHA regulations provide "[t]o contest a Department decision on an application under this chapter, a person shall submit an adjudicatory hearing requesting within 30 calendar days after public notice of the decision is published in the DEP Bulletin." N.J.A.C. 7:13-23.1(b). The FHA regulations go on to state "[t]he Department shall notify the requester that the request for hearing is granted or denied. If the hearing request is denied, the denial shall provide the reason(s) for the denial. If the hearing request is granted, the Department shall refer the matter to the Office of Administrative Law for a contested case hearing in accordance with the Administrative Procedure Act,

N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.” N.J.A.C. 7:13-23.1(f).

The CZM Rules state “[t]o contest a Department decision on a coastal permit, a person shall submit an adjudicatory hearing request within 30 calendar days after public notice of the decision is published in the DEP Bulletin. If a person submits the adjudicatory hearing request after this time, the Department shall deny the request.” N.J.A.C. 7:7-28.1(b). The CZM Rules go on to state “[t]he Department shall notify the requester that the request for hearing is granted or denied. If the hearing request is denied, the denial shall provide the reason(s) for the denial. If the hearing request is granted, the Department shall refer the matter to the Office of Administrative Law for a contested case hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.” N.J.A.C. 7:7-28.1(f).

The process to request an adjudicatory hearing under the FHA regulations and the CZM Rules is identical. As such, the holding in Musconetcong Watershed Ass’n applies to this appeal. As Appellant filed a timely adjudicatory hearing request of Jibsail’s 2019 WFD permit modification, and subsequently filed a timely notice of appeal of the NJDEP’s March 14, 2023 denial of its adjudicatory hearing request, Appellant also challenges the merits of the

NJDEP's grant of Jibsail's WFD permit modification in this appeal.⁴ [Aa132-Aa136; Aa532-Aa539.]

III. THE NJDEP'S ISSUANCE OF THE WATERFRONT DEVELOPMENT PERMIT MODIFICATION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE, LACKS SUBSTANTIAL CREDIBLE EVIDENCE TO SUPPORT THE DECISION, AND SHOULD BE REVERSED. [Aa89-Aa91.]

The Appellate Division has exclusive jurisdiction to review any action or inaction of a state administrative agency. Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976). The review of administrative actions is limited. In re Proposed Xanadu Redev. Project, 402 N.J. Super. 607, 640 (App. Div. 2008). However, the Appellate Division "may reverse an agency decision if it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013). For the reasons set forth below, the NJDEP's grant of the 2019 WFD permit modification was arbitrary, capricious, and unreasonable and not based on

⁴ It should be noted that Musconetcong Watershed Ass'n was decided approximately six months after Appellant filed its appeal. In Appellant's Case Information Statement filed with its Notice of Appeal, Appellant listed as one of the proposed issues to be raised on appeal "[t]he NJDEP's issuance of the... Permit Modification [was] arbitrary, capricious, and unreasonable." [Aa537.] Appellant also advised Respondents that it would be challenging the merits of NJDEP's permitting decision in its October 24, 2023 motion to settle the record. [Ara4.]

substantial credible evidence. As such, the NJDEP's decision should be reversed, and the permit modification should be rescinded.

A. Jibsail did not demonstrate a need for the WFD permit and modification that cannot be satisfied by existing waterfront facilities. [Aa89-Aa91.]

The Recreational Docks and Piers Rule within the CZM rules at N.J.A.C. 7:7-12.5 (“Docks Rule”) requires that the applicant demonstrate a “need that cannot be satisfied by existing facilities.” N.J.A.C. 7:7-12.5(b)1. The NJDEP and Jibsail argue that the “need” competent of the Docks Rule was satisfied because the Jibsail's dock now complies with the Submerged Aquatic Vegetation Habitat Rule at N.J.A.C. 7:7-9.6 (“SAV Rule”). However, as the NJDEP specifically stated, there is “no obligation for DEP's prior permittees to bring a prior approved WD permit into compliance with current Water Depth Requirements” of the SAV Rule. [Db26.]⁵

It is uncontroverted that Jibsail had a prior-approved dock of approximately 128 feet at the time of its 2017 WFD permit application. [Db2-3.] Jibsail was under no obligation to extend its existing 128-foot dock to comply with the SAV Rule. To the contrary, in 2017, Jibsail was required to comply with the SAV Rule because it sought to extend its pre-existing dock. Similarly, in 2019, Jibsail was required to comply with the SAV Rule because it sought a

⁵ “Db” refers to the NJDEP's appellate brief.

permit modification. As such, Jibsail cannot claim that the “need” element required to satisfy the Docks Rule was met by satisfying the SAV Rule.⁶ Moreover, while NJDEP’s regulatory policy encourages minimizing impact to submerged aquatic vegetation habitat, the regulations do not state the extending a previously approved and existing dock satisfy the required “need” element.

Jibsail’s March 27, 2017 policy compliance statement within its WFD permit application attempts to satisfy this requirement by summarily stating that “[i]n this case, this is a private lot and the proposed construction will allow the property owner mooring and access for the use of pleasure crafts.” [Aa36.] This analysis is continued in Jibsail’s October 23, 2018 policy compliance statement within its WFD permit modification application by stating “[i]n this case, this is a private lot and the two proposed boat lifts will allow the property owner mooring and access for the use of pleasure crafts.” [Aa106.]

The applications do not contain any further demonstration of need besides the summary conclusion that the approvals will allow Jibsail to use its vessels. No further analysis is advanced by Jibsail for the NJDEP’s consideration of why its then existing waterfront facilities were inadequate. More importantly, there

⁶ The same analysis applies to the Shellfish Habitat Rule at N.J.A.C. 7:7-9.2

is no analysis in the record concerning how the NJDEP concluded that the evidence in the record satisfied N.J.A.C. 7:7-12.5(b)1.

Moreover, pertaining specifically to the 2019 WFD permit modification, Jibsail's general statement that the required need was demonstrated does not comment on, or otherwise reference, the location of the dock at issue in the modification application. [Aa106; Aa101.] While Jibsail will argue that the modification is only requesting an approved relocation of 1.7 feet to the east, Jibsail is still required to demonstrate need, particularly considering that it failed to do so in its 2017 permit application.

Finally, while insufficient to satisfy need, it should be noted that there is no statement within either of these applications that asserts need is satisfied by way of complying with the SAV Rule.

The NJDEP's factual findings enjoy a presumption of correctness if they are "supported by substantial credible evidence" in the record as a whole. In re Authorization for Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004). However, in this instance, the record does not contain any support for the position that Jibsail had demonstrated a need for the 2017 WFD permit and 2019 WFD permit modification as required by N.J.A.C. 7:7-12.5(b)1. As such, the NJDEP's decision was arbitrary, capricious, and unreasonable, not based on substantial credible evidence, and should be reversed.

B. Jibsail did not demonstrate that its dock will not hinder navigation or access to adjacent water areas. [Aa89-Aa91.]

The Docks Rule also requires that Jibsail demonstrate that “[t]he proposed structure and associated mooring piles do not hinder navigation or access to adjacent water areas.” N.J.A.C. 7:7-12.5(b)9. This requirement goes on to state that “[a] hazard to navigation will apply to all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers.” Id.

The Respondents’ analyses concerning the navigation requirement within the Docks Rule, in particular the NJDEP’s position that its review is limited to navigational channels, is contrary to the plain language of the Docks Rule. The language in this subsection clearly states that it applies to “access to adjacent moorings, water areas and docks and piers.” Id. Appellant’s adjacent waterfront facilities fall within this definition.

As noted in Appellant’s initial brief, the 2017 WFD permit and 2019 WFD permit modification applications only include summary conclusions that the navigation and access condition is met. [Aa37 and Aa107.] Furthermore, there is no analysis in the record concerning how the NJDEP concluded that the evidence in the record satisfied N.J.A.C. 7:7-12.5(b)9, aside from one sentence in the NJDEP’s decision to deny Appellant’s adjudicatory hearing request,

which was issued approximately four years after the 2019 WFD permit modification was granted. [Aa135; Aa89-Aa91.]

Again, pertaining specifically to the 2019 WFD permit modification, Jibsail's general statement that navigation or access will not be hindered does not comment on, or otherwise reference, the location of the dock at issue in the modification application. [Aa106; Aa101.] Simply stated, the location of the dock in which Jibsail sought approval with the permit modification application does in fact hinder Appellant's ability to navigate to and from its waterfront facilities and the navigational channel in Barnegat Bay as evidenced by the record. [Aa351-Aa353; Aa380-Aa382.]

The record in this matter does not contain any support for the position that Jibsail's extended dock will not hinder Appellant's navigation or access to and from its waterfront facilities and the navigational channel in the bay as required by N.J.A.C. 7:7-12.5(b)9. As such, the NJDEP's decision was arbitrary, capricious, and unreasonable, not based on substantial credible evidence, and should be reversed.

CONCLUSION

For the reasons set forth herein, Appellant respectfully submits that this Court should reverse the NJDEP's March 14, 2023 denial of its adjudicatory hearing request so that a full record can be established before the Office of Administrative Law. Moreover, Appellant respectfully submits that the NJDEP's grant of the 2019 WFD permit modification to Jibsail should be reversed and the permit modification should be rescinded.

Respectfully submitted,

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Dated: July 3, 2024

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