STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of	)	**Application No.**
	)	**18623**
APPLICATION OF	)	
PHOENIX SOIL, LLC	)	

FINAL DECISION

Following my decision remanding this matter for the taking of additional evidence, the Hearing Officer held another hearing and issued an amended proposed decision on October 20, 1998. The amended proposed decision comprehensively describes the history of this application, and I need not repeat it here.

The intervenors have taken exception to certain findings of the Hearing Officer and, more generally, to her recommendation that the permit be granted. I understand these exceptions to be as follows: (1) In deciding whether to recommend permit issuance, the Hearing Officer should have considered the intervenors' allegation that the facility's stack is higher than allowed by the Town of Waterbury's zoning regulations; (2) the applicant failed to demonstrate that the facility's air pollution control system is the best available control technology ("BACT") for sulfur; and (3) the applicant failed to demonstrate that operation of the facility will not cause violations of the regulatory maximum allowable stack concentrations ("MASCs") for certain

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metals, namely, aluminum, antimony, cobalt, iron, magnesium, thallium, and tin. I will address these exceptions in order.

Zoning. There is no legal support for the intervenors' claim that the Hearing Officer should have considered the lawfulness of the facility's stack height under Waterbury's zoning regulations; indeed, the intervenors conceded as much during oral argument. During oral argument the intervenors elaborated their argument somewhat. There they stated that Waterbury is presently litigating the stack height issue and that as a result of that litigation the applicant may be compelled to lower the stack. Since a lower stack would violate the proposed Department permit, which requires that it be maintained at at least its present height of 115 feet, the intervenors argue that the Hearing Officer should not have recommended permit issuance without having determined whether the stack height complies with Waterbury's zoning regulations.

When issued, the Department's permit will authorize the applicant to operate a soil-burning facility at its present location only if certain conditions are met--among them, the condition that the facility's stack rise to at least 115 feet. If for whatever reason the applicant could not maintain the stack at that height, the applicant would no longer be authorized to operate the facility and would continue to do so only at its peril.[1] Waterbury's stack height limitations are, as a legal matter, irrelevant to this proceeding and the Hearing Officer correctly refused to consider them.

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[1]The statutory penalty for violating an air emissions permit is up to $25,000 for each day during which the violation continues. Conn. Gen. Stat. sec. 22a-180.

BACT for sulfur. The evidence supports the Hearing Officer's finding that as of the date of the hearing the applicant's air pollution control system was BACT for sulfur emissions. The intervenors have pointed to nothing in the record indicating otherwise.[2]

MASCs. The applicant has not conducted stack testing to determine whether emissions from the facility of aluminum, antimony, cobalt, iron, magnesium, thallium, or tin which may be present in treated soils will meet the applicable MASCs. Because "United States Geological Survey (USGS) data indicate that extremely low concentrations of these metals are found in the soils of the eastern United States" (amended proposed decision at 15), the Hearing Officer found that facility emissions would meet the MASCs. The intervenors object to this finding. Because there is nothing in the record to cast doubt on the credibility of the USGS data referred to, I must agree with the Hearing Officer.

I have two additional concerns. First, the Hearing Officer found that chlorides in the facility's exhaust gas bind with lime and thereby interfere with the ability of the lime injection system to control sulfur emissions. (Amended proposed decision at 14, n. 6) The proposed

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[2]The applicant argues that the intervenors are not even entitled to criticize the evidence concerning BACT because they offered no expert testimony to rebut the applicant's and staff's expert on that subject. In agreeing with the Hearing Officer here, I should not be understood as subscribing to this argument. The hearing officer accepted the applicant's and staff's expert opinions not because they were unrebutted but because, in the context of the entire record, they were credible. It should be kept in mind that an agency is not required to believe an expert witness. *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 480, 593 (1991); *Feinson v. Conservation Commission,* 180 Conn. 421, 427-28 (1980). If the opinions of the applicant's and staff's experts had not been persuasive, whether because those opinions lacked foundation or were inconsistent with established facts or for any other reason, the Hearing Officer would have been required to reject them even in the absence of rebutting evidence from an opposing expert.

permit, however, does not require that the applicant analyze soils for chlorine levels. When asked why not, the staff replied during oral argument that facility monitoring and stack tests will indicate whether the lime injection system is functioning as hoped. This answer is unsatisfactory, since the Department's objective is to prevent excess sulfur emissions before they occur. Therefore, the permit issued hereunder shall require that the applicant:

1) Either

   a) analyze each load of soil delivered to the facility for combustion to determine the concentration therein of chlorinated hydrocarbons reported as chlorine or

   b) determine the locational origin of each load of soil delivered to the facility for combustion and the event(s) or condition(s) which led to its contamination; maintain a written record of that information; provide such record to the Commissioner upon his request; assure that each entry in such record identifies, and is signed by, the individual who made it and precisely describes how that individual acquired the information; and, if there are reasonable grounds to believe that a load of soil became contaminated as a result of dry cleaning, degreasing, or any other activity involving the use or handling of chlorinated hydrocarbons or originated at a facility or area where such an activity is likely to be or have been conducted, analyze the soil to determine the concentration therein of chlorinated hydrocarbons reported as chlorine; and

2) Assure that soil is not combusted if the concentration of chlorine therein is greater than 50 parts per million or five pounds per hour at a feed rate of 50 tons of soil per hour.

Second, the amended proposed decision indicates that without visual inspection, it will be impossible to detect corrosion of that portion of the stack above the location of the continuous emission monitoring equipment. During oral argument the applicant stated that it would be willing to visually inspect that portion of the stack. Therefore, the permit issued hereunder shall require that at least quarterly the applicant inspect the stack above the location of the continuous emission monitoring equipment and report the findings of each such inspection to the staff.

Conclusion

For the reasons set out in the amended proposed decision, I hereby grant the subject application and authorize issuance of the permit sought, subject to the modifications recommended by the Hearing Officer and those required herein.

3/11/99
DATE

DAVID K. LEFF
ASSISTANT COMMISSIONER

APPENDIX A

Final Decision on Remand concerning Phoenix Soils, LLC
Application No. 18623

PARTY LIST

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