IN THE MATTER OF UNIVERSITY OF CONNECTICUT BOLTON/HILLSIDE ROAD CONNECTOR	: :	APPLICATION No. IW2000-111 JUNE 7, 2002

FINAL DECISION ON RECONSIDERATION

I. INTRODUCTION

On January 11, 2002, DEP staff filed a *Petition for Reconsideration* of the December 28, 2001 *Final Decision* in the above-captioned matter. General Statutes § 4-181a (a)(1); Regs., Conn. State Agencies § 22a-3a-6 (z)(1). No objections to that petition were filed. On February 1, 2002 based upon review of the petition and the relevant portions of the record, I granted the *Petition for Reconsideration* without the need to conduct additional proceedings

This matter involves a permit application by the University of Connecticut, filed pursuant to General Statutes § 22a-36 through 22a – 45 of the *Inland Wetlands and Watercourses Act* (IWWA), to fill 0.11 acres of wetlands on the Storrs Campus. The two wetlands areas that will be affected are located along the proposed alignment of a new roadway.

At the outset, let me clearly affirm that both the hearing officer in issuing the August 23, 2001 *Proposed Decision*, and the final decision-maker, in issuing the December 28,2001 *Final Decision*, correctly concluded that the subject permit should be issued.

II. PRELIMINARY ISSUES

In rendering this *Final Decision on Reconsideration*, I have reviewed the petition for reconsideration, the relevant portions of the record and both the hearing officer's

Proposed Decision and the decision-maker's *Final Decision.* [1] It is within my authority as Commissioner to render a decision on a petition for reconsideration. The Regulations of Connecticut State Agencies § 22a-3a-6 (z) (1) provides that the Commissioner may "reconsider, reverse, modify or correct a final decision in accordance with section 4-181a of the General Statutes." That statute provides that reconsideration may be granted on several grounds, including "an error of fact or law" that should be corrected.

The petition for reconsideration asks that I revisit two items: the final decision-maker's legal interpretation of § 22a-41(a)(5) of the IWWA to consider whether air quality impacts are a factor in issuing this permit; [2] and the final decision-maker's use of evidentiary materials in the hearing record that deal with alleged air quality impacts resulting from vehicles traveling on the road to be constructed as a result of this permit. The following represents those sections of the *Final Decision* that I am reconsidering and modifying.

A. Consideration of Air Quality Impacts under § 22a-41(a)(5) of IWWA

The petition for reconsideration asks that I revisit the final decision-maker's legal interpretation of § 22a-41(a) (5) of the IWWA to consider whether air quality impacts are a factor in issuing this permit. The Commissioner is vested with the authority to interpret statutes consigned to his supervision and to do so in a common sense manner; the standard is one of reasonableness. *Sweetman v. State Elections Enforcement Commission,* 249 Conn. 296, 306-307 (1999).

As found in the *Final Decision,* air quality impacts may be relevant to the evaluation of a permit pursuant to § 22a-41 factors and the discussion of feasible and prudent alternatives. Even under the most restrictive statutory interpretation of subdivision (5) of 22a-41 (a) of the IWWA, health and safety impacts that could arise and that could be directly related to the activity affecting the wetlands and watercourses could be considered. Staff, on a case-by-case basis, need to use a reasonable, common sense approach in considering or analyzing whether the health and safety impacts are

[1] The Commissioner's delegation of authority to Deputy Commissioner Leff was to "take evidence and render a final decision in the above-cited matter." Conn. Gen. Stat. ξ 22a-2 (b)(2) The Commissioner did not delegate his authority to reconsider the final decision. Regs., Conn. State Agencies ξ 22a-3a-(6)(z)(1).

[2] Subdivision (5) of Section 22a-41(a) reads as follows: " The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity[.]"

reasonably related or proximate to the proposed regulated activity in or on the wetlands or watercourses. The extent to which staff consider health and safety impacts of the proposed project on the wetlands or watercourses raised during the permit review process must necessarily depend first on staff's own experience and expertise and then on the submission of reliable and probative evidence. In sum, it is a matter of discretion whether and to what extent a specific and attenuated alleged health effect is considered by the Department under the IWWA. The exercise of such discretion must be based on reliable and probative evidence.

In the *Proposed Decision* the hearing officer raised the opportunity for certain evidence pertaining to air quality issues to be considered under the liberally construed statutory language of § 22a – 19, which requires the intervenor to prove "unreasonable pollution." The hearing officer found that the intervenor did not present sufficient evidence to prove that the proposed project would have unreasonable environmental effects. In other words, the intervenor did not meet its burden of proof. The air quality evidence was not given any weight in the hearing process and found it to be immaterial. The intervenor failed to demonstrate with credible, probative evidence that the construction of the roadway as aligned would result in an increase in emissions due to traffic and would have a detrimental effect on the health of the children at the nearby day care facility. *Proposed Decision* at 18.

Since the evidence offered failed to prove "unreasonable pollution," it would necessarily fail to prove health and safety consequences under the more narrowly defined § 22a – 41(a)(5) of the IWWA. In the *Final Decision* the decision-maker did consider the evidence of air quality impacts under the IWWA, specifically § 22a-41(a)(5), and reached the same conclusion of the hearing officer in the *Proposed Decision* that the evidence was "speculative and insufficient to support the contention that the emissions… resulting from traffic using the proposed road will have unreasonable impacts on the children at the Child Labs." *Final Decision* at 11. Therefore, neither the *Proposed Decision* nor the *Final Decision* ignored the evidence of air quality impacts. In somewhat different ways, they both determined that such evidence was not credible or probative evidence and, as a result, did not prove any adverse air quality impacts. The conclusion reached in each regarding this issue should stand.

B. Use of Evidentiary Materials Regarding Air Quality Impacts

The petition for reconsideration questions the final decision-maker's use of evidentiary materials in the hearing record that deal with anticipated air quality impacts resulting from vehicles traveling on the proposed road construction project. Having reviewed the record, I agree with the hearing officer that the evidence related to the impact of PM 2.5 was not probative or credible. Finding of fact #17.a. as it relates to PM 2.5 was derived from testimony that was given by a witness who stated that "…in the literature there is a tremendous weight of evidence that PM 2.5 is an aggravator of asthma and is also know to have adverse health effects." (Test. Perkins 4/18/01, p.30) The testimony is uncorroborated hearsay and outside the scope of the witness' expertise. The witness did not specifically study the effects of PM 2.5 on asthma and there was no other evidence in the record to support his testimony.

Finding of fact # 17.a. of the *Final Decision* states that PM (particulate matter) 2.5 is more readily inhalable into the lungs than PM 10 and that PM 2.5 is an aggravator of asthma and is known to have adverse health effects. This overstates the case and leaves misimpressions as to any standard of review. First, PM 10 and not PM 2.5 is currently the standard for assessing air quality in the evaluation of air permit applications. Second, the issue of PM 2.5 and its health impacts are currently the subject of scientific study. Finally, even if PM 2.5 was a proven aggravator of asthma, there is not enough credible and probative evidence in this record to prove that it causes any adverse health consequence.

Although the portion of finding of fact #17.a. as it relates to the modeling of anticipated carbon monoxide (CO) emissions at the Child Labs does not suffer the same lack of attendant credibility as the PM 2.5 evidence, the hearing officer found the evidence immaterial as an issue of a potential adverse impact due to the applicant's proposed construction of a roadway. The hearing officer ruled that since applicant's air quality analysis report "concerns a collateral effect of the proposed project and the findings and conclusions state that the collateral effect will result in no adverse impact on air quality….[the report] provides no probative value regarding the claim that the location of the road to be constructed is reasonably likely to cause unreasonable pollution." (*UCONN Ruling,* April 17, 2001 at 3).

As stated by the hearing officer in the *UCONN Ruling* at 4, "although a report on air quality analysis might have been found to be relevant in this matter" due to the lack of probative value, the evidence related to CO emissions was deemed immaterial in the *Proposed Decision.* As a result, I find that the evidence related to CO emissions did not need to be reached nor reflected in the *Final Decision.* For the such reasons, finding of fact #17.a. should be deleted.

II. FINDINGS OF FACT

Except as noted below, I adopt the findings of fact set forth in the *Proposed Final Decision* dated August 23, 2001 and in the *Final Decision* dated December 28, 2001.

Finding of Fact 17.a. is deleted.

III. ANALYSIS

I adopt the analyses set forth in the *Proposed Final Decision* dated August 23, 2001 and in the *Final Decision* dated December 28, 2001.

IV. CONDITIONS

I authorize the issuance of the subject permit consistent with this *Final Decision on Reconsideration* and subject to the Special Conditions set forth in the *Final Decision* dated December 28, 2001.

V. CONCLUSION

I adopt the conclusion of the *Final Decision* dated December 28, 2001.

June 7, 2002
Date

/s/ Arthur J. Rocque, Jr.
Arthur J. Rocque, Jr.
Commissioner