STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Gina McCarthy
Commissioner

IN THE MATTER OF	:	*APPLICATION NO. 200401781*
LEYLAND ALLIANCE LLC	:	
(Madison Landing)	:	*September 23, 2008*

FINAL DECISION

This final decision addresses the exceptions of the intervening parties, Dr. William B. McCullough and Carol Altieri ("Intervenors"), and the exceptions of the staff of the Department of Environmental Protection ("DEP" or "Department") in response to the hearing officer's proposed final decision. This decision affirms such proposed decision except as expressly provided herein, and adopts, with additional modifications, the hearing officer's recommendation to issue the draft permit to the applicant Leyland Alliance, LLC ("Applicant"). This discharge permit will allow the Applicant to construct and operate an on-site, advanced wastewater treatment and renovation system ("Zenon system") to treat domestic waste water generated by its residential development for discharge to the ground water in the South Central Shoreline watershed.

Each of the Intervenors' exceptions to the hearing officer's proposed final decision is either unsupported by the law or by the evidence in the record which includes the remanded proceeding. The Applicant has agreed to the Department's exceptions, which are addressed herein.

The evidence in the record shows that this application complies with the applicable statutory and regulatory criteria. General Statutes §§ 22a-98, 22a-430; Regs., Conn. State Agencies §§ 22a-430-1 through 22a-430-8. By meeting such criteria, the Applicant has met its burden of proving that, if constructed and operated as proposed, the wastewater treatment and renovation system will protect the waters of the state from pollution. The Applicant has also demonstrated that its proposed activities are consistent with the applicable goals and policies of the Coastal Management Act, and that such activities incorporate all reasonable measures mitigating any adverse impacts on coastal resources. The evidence also shows that the Intervenors have not met their burden of proving that if the application for a permit were granted that the likely result would be unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources. General Statutes § 22a-19(a).

I. Procedural History

The staff of the DEP's Bureau of Materials Management and Compliance Assurance, Water Permitting and Enforcement Division gave notice of its tentative determination to approve this application on or about December 13, 2006. A public hearing was requested in January 2007; Dr. McCullough and Ms. Alteri became intervening parties in February 2007; and the first public hearing on the permit application was held in Madison on April 11, 2007. Thereafter, eight days of hearing occurred in Hartford between May 9, 2007 and June 1, 2007. After the hearing proceedings closed, the Applicant, the Intervenors and Department staff filed proposed findings of fact and conclusions of law. The Intervenors also filed a post-hearing legal brief. The hearing officer issued her proposed final decision on January 16, 2008, recommending that the permit be granted.

On January 31, 2008, the Intervenors and DEP staff filed exceptions to the proposed decision. The Intervenors also requested oral argument before the Commissioner. On February 4, 2008, Connecticut Fund for the Environment, Inc. ("CFE"), requested permission to file an amicus curiae brief and to participate in oral argument for the purpose of supporting the Intervenors' arguments. This request was denied by the Commissioner on February 21, 2008, because the Intervenors had counsel to advocate on their behalf and sufficiently protect their interests.

The parties presented oral argument before the Commissioner on March 13, 2008.[1] On March 18, 2008, the Commissioner instructed the hearing officer to reopen the hearing on the permit application to allow the Intervenors the opportunity to present the testimony and exhibits of their wastewater treatment systems witness, Dr. Susan Peterson. Dr. Peterson had previously been precluded from testifying on the basis of relevance. The Commissioner issued additional instructions to the hearing officer on April 1, 2008. She directed the hearing officer, while the proceeding was reopened, to admit into evidence the updated Zenon Performance Appraisal that was published by the Department on March 12, 2008, and to allow the parties to cross examine the authors of the report.

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[1] At oral argument, the Commissioner invited the parties to respond to the Updated Zenon Performance Appraisal that had been issued by the DEP on March 12, 2008. The Applicant and the Intervenors filed their responses on March 28, 2008. The Intervenors opined that the updated appraisal was "relevant to the proceedings," and analyzed existing similar systems and their field performance. Intervenors' Statement Regarding Updated Zenon Performance Appraisal, at 1. They also stated that the appraisal was "an update of a previously admitted exhibit...and thus represents the best information regarding that exhibit ... [t]hough not necessarily the 'best scientific information available.'" *Id.* In its filing, the Applicant saw "no harm or prejudice to any party that would result from admitting the Updated Performance Appraisal." Correspondence from Mr. Thomas Cody to the Commissioner, at 1. The Applicant requested that if the updated report were allowed as evidence, it be allowed to respond to the report in accordance with the DEP Rules of Practice, including questioning the authors of the report. *Id.*

On March 28, 2008, the Intervenors requested that a new hearing officer be assigned to the proceeding, alleging that they had been deprived of a fair and impartial proceeding. The Applicant filed an objection to this request on March 31, 2008. On April 1, 2008, being unpersuaded that the Intervenors had been deprived of a fair and impartial proceeding, the Commissioner denied the Intervenors' request for a new hearing officer.

The reopened hearing commenced on April 10, 2008. The Intervenors' witness, Dr. Susan Peterson testified, as did the authors of the Zenon Performance Appraisal. Post-hearing legal memoranda were filed by the parties on May 2, 2008. The hearing officer filed a Ruling on Remand on May 21, 2008, which concluded that Dr. Peterson's testimony was not relevant as to whether the Applicant's proposed treatment system would protect the waters of the state, and that the relevant facts in relation to the updated performance appraisal had already been taken into account in regard to the previously submitted performance appraisal. Consequently, the hearing officer left intact her proposed final decision.

On May 30, 2008, the Intervenors filed exceptions to the hearing officer's ruling and requested another oral argument. The Applicant filed a response on June 12, 2008. On July 30, 2008, the Commissioner found no compelling reason to hold a second round of oral argument given the extensive administrative record of this permit application proceeding.

II. The Intervenors' Exceptions

A. Two Burdens of Proof are Required in this Application: The Applicant Met its Burden of Proof; the Intervenors Did Not

At issue here is the interplay of two burdens of proof: (1) the Applicant's burden to show that its proposed system will protect the waters of the state from pollution; and (2) the Intervenors' burden to show that, if the Applicant's application is granted, unreasonable pollution, impairment, or destruction of the public trust in the air, water or other natural resources will likely result.

Applicant's burden of proof is set forth in Regs., Conn. State Agencies § 22a-3a-6(f), which places "the burden of going forward with evidence and the burden of persuasion with respect to each issue which the Commissioner is required by law to consider" on the Applicant. The Applicant is also required to show that its proposed system will protect the waters of the state from pollution pursuant to General Statutes § 22a-430 and its corresponding regulations, Regs., Conn. State Agencies §§ 22a-430-1 through 22a-430-8. In addition, the Applicant must demonstrate that its proposed activities are consistent with all applicable goals and policies of the Coastal Management Act and that such activities incorporate all reasonable measures mitigating any adverse impacts on coastal resources. General Statutes § 22a-98. The Applicant must meet its burden in accordance with these statutes and regulations before the

Commissioner will approve of the application. See *Town of Newtown v. Keeney*, 234 Conn. 312, 322 (1995) (applicant bore the burden of proof throughout the DEP proceedings on its application).

The Intervenors' burden is required by the Connecticut Environmental Protection Act of 1971 ("CEPA"), General Statutes §§ 22a-14 through 22a-20, as interpreted by the Supreme Court in *Manchester Envtl. Coal. v. Stockton*, 184 Conn. 51, 57-8 (1981). The Court further clarified its decision in *City of Waterbury v. Town of Washington*, 260 Conn. 506, 549-550 (2002). In that case, the Court held that "'unreasonable impairment [or pollution or destruction]' must be evaluated through the lens of the entire statutory scheme, if any, that the legislature has created to regulate the conduct underlying the impairment [or pollution or destruction]." Here, the legislature via General Statutes § 22a-430 *has* created a statutory scheme to regulate the conduct at issue in this final decision: whether a proposed system will protect the waters of our state from pollution.[2]

Based on the evidentiary record: (1) Applicant met its burden of proof by providing substantial evidence showing that the state's waters will be protected from pollution by the treatment of the discharge from its proposed system (see, e.g., Proposed Final Decision, paras. 65-90 at pp. 24 to 33) and the Intervenors provided no real evidence to rebut this (see, *id.*, paras. 33-37 at pp. 14 to 16, and also pp. 45-48); (2) Applicant also provided substantial evidence that its proposed activities are consistent with the applicable goals and policies of the Coastal Management Act, and that such activities incorporate all reasonable measures mitigating any adverse impacts on coastal resources, and the Intervenors were unable to rebut Applicant's evidence (see, *id.*, paras. 71-81 at pp.26-30); and (3) the Intervenors did not meet their burden of proof because they failed to make a prima facie case of unreasonable pollution.[3] Because the Intervenors failed to establish a prima facie case, the hearing officer did not have to consider feasible or prudent alternatives to the proposed treatment system. Moreover, since the Applicant met its own burden of proof, even if the Intervenors had made a prima facie case, there was substantial evidence in the record showing that the discharge from

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[2] Conn. Gen. Stat. § 22a-19 does not override existing administrative procedures or existing statutes. Instead, this section simply adds to the DEP's existing statutes governing discharges to waters of the state; thus, both burdens of proof apply in this application. *Nizzardo v. State Traffic Comm'n*, 259 Conn. 131, 155 (2002), citing to Black's Law Dictionary, notes that a "supplemental act" such as CEPA "adds to or completes, or extends that which is already in existence *without changing or modifying the original*. Act designed to improve an existing statute by adding something thereto *without changing the original text*." Black's Law Dictionary (6th ed. 1990) (emphasis in *Nizzardo*; internal quotations omitted); see also General Statutes § 22a-20 (CEPA "shall be supplementary to existing administrative and regulatory procedures provided by law...").

[3] *Quarry Knoll II Corp. v. Planning & Zoning Comm'n*, 256 Conn. 674, 736 n. 33 (2001) (unless the intervenor had made the requisite showing under § 22a-19(a), i.e., provided some evidence to make out a prima facie case, the commission had no obligation to consider alternatives to the proposed application pursuant to § 22a-19(b)); *see also* General Statutes § 22a-17 (prima facie showing by plaintiff/intervenor).

the Applicant's proposed system would not unreasonably pollute, impair or destroy the public trust in the water and natural resources of the state.[4]

B. Intervenors' Exceptions

1. Impacts to Protected Species and Nearby Marsh Habitat (Exceptions 1-3)

a. The Applicability of the Endangered Species Act

The Intervenors claim that the hearing officer should not have deemed abandoned their claims of a violation of the Connecticut Endangered Species Act. Dr. William B. McCullough and Carol Altieri's Exceptions to Proposed Final Decision and Request for Hearing, dated January 31, 2008 ("Intervenors' Exceptions"), Exception No. 1; see also Proposed Final Decision at p. 45, fn 42. Intervenors maintain that the record is replete with their references to the applicability of the Endangered Species Act to this proceeding[5] and that it was "most uncharitable" to interpret their lack of discussion of the Endangered Species Act in the post-hearing brief as an abandonment of their position. Intervenors' Exceptions, at 2.

The abandonment argument aside, it is especially difficult to assert a violation of the Endangered Species Act given the facts surrounding this particular application. The two species Intervenors take issue with—the salt marsh sharp-tailed sparrow and the seaside sparrow—are neither endangered nor threatened species; rather, they are species of special concern. See Proposed Final Decision at 45; Regs., Conn. State Agencies § 26-306-6. As species of special concern, they are not afforded the same treatment as endangered and threatened species under General Statutes § 26-310. So to the extent that state permitting activities may constitute "state action" under section 26-310, the state is obliged to "conserve endangered and threatened species and their essential habitats" and to "ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless...granted an exemption...." Nowhere in section 26-310 are species of special concern explicitly addressed; under the rules of statutory construction, it is therefore assumed that the legislature intended to address only endangered and threatened species. See, e.g., *American Promotional Events, Inc. v. Blumenthal,* 285 Conn. 192 (2008) (presumption of purpose behind every sentence, clause or phrase and no part of a

[4] The water to be discharged from the Applicant's facility would be of the highest quality, suitable for drinking. Proposed Final Decision, at pp. 39-41.

[5] In support of this argument, Intervenors cite to the following references: Intervenors' Stipulations on Proposed Findings of Fact and Conclusions of Law, dated July 13, 2007; Intervenors' Pre-Hearing Disclosure of Witnesses and Exhibits, dated March 19, 2007, at 2; Objection to the Department's Preclusion of Expert Witnesses, dated May 9, 2007, at 3-8; and Hearing Transcript, May 11, 2007, at 368.

statute is superfluous). Thus, for the Intervenors to suggest that the Department's issuance of a wastewater discharge permit to the Applicant would somehow violate section 26-310 of the Endangered Species Act (see, e.g., Hearing Transcript, May 9, 2008, at 21-23), such argument would fall short given that the species at issue are special concern and neither endangered nor threatened.

Turning to the issue of abandonment, the problem is this: the Intervenors did not mention the Endangered Species Act in their post-hearing legal brief. The hearing officer should not have to create the Intervenors' argument for them. She had already informed the parties that she had not found the *Animals Rights Front v. Jacques*[6] case to be dispositive of the facts before her. *Id.*, at 34-35. Consequently, had the Intervenors wanted to pursue their Endangered Species Act argument, they could have presented their argument in their post-hearing pleadings; instead, the salt marsh sharp-tailed sparrow is merely referenced periodically in their pleading. Dr. William B. McCullough and Carol Altieri's Post-Hearing Brief, dated June 29, 2007 ("Intervenors' Post-Hearing Brief, Part I"), Proposed Findings of Fact Nos. 3, 4, 13-17, 21 and 29.[7]

The Rules of Practice do not address this circumstance. This issue can, however, be resolved on well-settled procedures, i.e., "[w]here a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." *Comm. to Save Guilford Shoreline v. Guilford Planning and Zoning Comm'n,* No. CV030483939S, 2005 Conn. Super LEXIS 922, at *50 (April 14, 2005), citing *Conn. Light & Power Co. v. DPUC,* 266 Conn. 108, 120 (2003). It is telling that the Intervenors did not raise their abandonment claim at the March 13, 2008 oral argument.

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[6] Found at 273 Conn. App. 358, *cert denied* 273 Conn. 941 (2005).

[7] The only tangential references made by the Intervenors to the alleged violations of the Endangered Species Act were their proposed findings stated in nos. 3 (agency goal is to protect all state listed species found in the Hammonasset Natural Area Preserve); 4 ("salt marsh sharp-tailed sparrow is a species of special concern"); 13 and 14 ("nitrogen would unreasonably impair and destroy the habitat" of the salt marsh sharp-tailed sparrows and encroachment of phragmites would impair their habitat); 15 (government and Audubon have funded research to assess the "status of the salt marsh sharp-tailed sparrow in the salt marshes" in the vicinity of the Hammonasset Natural Area Preserve); 16 (the state "has listed the salt marsh sharp-tailed sparrow as a species of special concern"); 17 ("the salt marsh sharp-tailed sparrow is a species of wildlife and is a 'natural resource'" for CEPA purposes); 21 (phragmites control program would negatively impact the habitat of the salt marsh sharp-tailed sparrow); 29 (the salt marshes are "essential wildlife habitat for a number of species including the salt marsh sharp-tailed sparrow"); and 31 (conversion of tidal salt marsh to fresh marsh by the discharge of effluent reasonably likely to impair the "habitat of the salt marsh sharp-tailed sparrow...as a species of special concern").

b. The Impact of Freshwater on the Nearby Marsh and the Habitat for the Sharp-Tailed Sparrow

The Intervenors' second exception is to the following conclusions of the hearing officer which they claim are factually incorrect and improperly shift the burden of proof under CEPA and the Endangered Species Act: (1) "there is no evidence of the actual amount of freshwater that will discharge to the marsh" (Proposed Final Decision, at p. 45); (2) "there is no evidence of what increase is sufficiently significant to eliminate the high marsh habitat of the sharp-tailed sparrow" (*Id.* at p. 46); and (3) "there is no persuasive evidence that the applicant's phragmites control program will fail to protect or provide habitat for the species." (*Id.)*

Relative to the first point, as the Intervenors themselves acknowledge in their own exceptions, none of the witnesses were able to ascertain how much freshwater will discharge to the marsh, although Prof. Brian Howes, Prof. Scott Warren and Robert Schreiber provided estimates which varied from witness to witness. Relative to all three points, during the hearing, the Intervenors had Dr. Christopher S. Elphick describe the habitats of the salt marsh sharp-tailed sparrow and the seaside sparrow. Hearing Transcript, May 11, 2007, at 361-370. Much discussion focused on the impacts of additional water and the spread of phragmites. There was no testimony, however, as to how much the resultant additional groundwater flow would and could extend the spread of phragmites. The Intervenors also recognize that "it is true that no witness was able to specify the relationship of the increase of Phragmites colonization per gallon of freshwater flow, there was significant, unrebutted testimony that the additional flow would impair the habitat." Intervenors' Exceptions, at 4. There was no persuasive evidence, however, that the Applicant's phragmites control program would be ineffective.

Intervenors argue that that they met their burden of a prima facie case of reasonably likely impairment, thereby shifting the burden to the applicant to show that the impact is not likely to occur. The record does not support this argument.

c. Statutory Scheme Directed Specifically to Impacts of Freshwater on Tidal Marshes

The Intervenors object to the conclusion of law that stated that no statutory scheme existed that was directed specifically to the impacts of freshwater and nitrogen on tidal marshes. Intervenors' Exceptions, at 4. They argue that objective standards applicable to this location exist by which unreasonable pollution under CEPA may be measured. More particularly, they reference the Department's July 11, 2000 Management Plan for the Hammonasset Salt Marsh and the Department's goal in protecting all state listed (endangered, threatened and special concern) species found in the natural area preserve located within

Hammonasset Beach State Park and any activity that is "contrary to statutory objectives or the specific goals of this Preserve shall not be allowed." App. Exh. 79, at 4.

The hearing officer's proposed conclusion of law is part of the analysis set forth in the Connecticut Supreme Court decision, *City of Waterbury*, 260 Conn. at 549. The Court determined that the term "unreasonable" as used in CEPA is defined by a determination of whether the proposed conduct is consistent with the governing statutory scheme, if any. In the absence of such a scheme, the Intervenors are required to make a prima facie case of unreasonable pollution. *Stockton*, 184 Conn. at 57-58. There is no provision for "objective standards" in this analysis. Thus, the Intervenors' objection is without merit.

2. Nitrogen Loading and Impacts on Eelgrass (Exceptions 4, 7 and 9)

a. Presence of Eelgrass and Effects of Nitrogen Loads to the Estuary

The Intervenors' fourth exception concerns what they term "inconsistent" findings of fact regarding whether eelgrass is present in the Clinton Harbor estuary, nitrogen's effects on eelgrass and the extent to which nitrogen adversely impacts eelgrass. Intervenors' Exceptions, at 5; see also Proposed Final Decision, para. 16 and fn 11 at p. 8, and para. 86 at p. 32.

The Applicant's expert testified that nitrogen favors the development of algae which can shade and smother the eelgrass. Hearing Transcript, May 17, 2007, at 567-569. Department staff stated that most researchers attribute the decline in eelgrass colonies to excess levels of nitrogen in near shore waters but that the "threshold above which eelgrass is impacted by this nitrogen or other factors...has yet to be defined." Oral Argument Transcript, March 13, 2008, at 20; see also Hearing Transcript, May 22, 2007, at 1181. Department staff also testified that it "should be noted that the department is unaware of any current significant colonies of eelgrass in Clinton Harbor or the Hammonasset River." *Id.* at 1476-77; see also Hearing Transcript, May 17, 2007, at 567.

Other than Intervenors' counsel stating at the March 13, 2008 oral argument that he "happen[s] to know if you go out [to the estuary], you can grab handfuls of eelgrass" and an eight-year old map depicting eelgrass in the estuary, the record evidence clearly shows that the Department is no longer aware of the existence of current significant colonies of eelgrass in Clinton Harbor or the Hammonasset River.

b. Nitrogen Renovation

In Exception No. 7, the Intervenors take issue with Finding of Fact No. 69 in the proposed decision, which states that "...[w]etland soils, high in organic content, contain denitrifying bacteria that promote further renovation of nitrogen as it passes through the

natural soils between the leach fields and the marsh." The Intervenors claim that the soils between the leach field and the marsh are "not wetland soils and are not high in organic content and there is no evidence in the record to the contrary." Intervenors' Exceptions, at 6. The sentence in the proposed decision which precedes the one cited by the Intervenors, however, must be noted for proper context: "Infiltration of precipitation into the pervious soils of the uplands provides some dilution of the remaining nitrogen."

Looking to the hearing record, Lee Dunbar, an employee of the Department, testified, in relevant part:

> ...the actual load [of nitrogen] that will reach the Hammonasset River ... will be much lower as a result of the attenuation that will take place as ... the discharge passes through the groundwater system [from the leachfield] on its way to the surface water [the marsh and river]. This conclusion is primarily based on the fact that wetland soils, in particular, are known to provide habitat ... to complete high densities of denitrifying bacteria because of the high organic content in the soils and the load-dissolved oxygen that is present.

Hearing Transcript, May 22, 2007, at 1174. Another witness, Mr. John Whitcomb, testified nitrogen loads could be spread out into the soil in the time it took water to leave the site. *Id.*, May 11, 2007, at 348. Another Department employee, Warren Herzig, testified that the travel time for effluent off the site was between 21 and 51 days. *Id.*, May 24, 2007, at 1634.

In reference to this exception claimed by the Intervenor, the Applicant stated the following at the March 13, 2008 oral argument:

> What the Hearing Officer said is that infiltration of precipitation into the pervious soils of the uplands provides some dilution of the remaining nitrogen. Wetland soils high in organic content contain bacteria that promote further renovation of nitrogen as it passes through the natural soils between the leach field and marsh. This finding does not say that all of the soils between the leach field and the marsh are wetland soils. That's clearly not what this says. What it says is that there is a series of soil types through which the discharge will move, and since the Intervenors' experts agreed that one component of the flow would have been either through the marsh or beneath the marsh, I think it is a perfectly reasonable and supportable finding to say that there would be further attenuation of nitrogen in those.

Oral Argument Transcript, March 13, 2008 at 35-36.

The Applicant's interpretation of Finding of Fact No. 69 is reasonable and the hearing officer's finding shall remain intact.

c. Nitrogen Loading

The Intervenors take exception to Finding of Fact No. 79 of the Proposed Final Decision, which offsets nitrogen load impacts in the watershed from the Applicant's proposed discharge with reductions by off-site sources. In particular, the Intervenors take exception regarding this offset in nitrogen load because it fails "to take into account potential increases from other sources offsite." Intervenors' Exceptions, at 7. The Intervenors claim that "[t]he way this offset has been credited, one could repeatedly justify additional nitrogen loading by comparison to these as-yet-unrealized reductions because one never has to account for the cumulative total nitrogen load." *Id.* The Intervenors conclude that it "would seem unreasonable to apply a reduction credit from an order recently issued." *Id.*

Department staff testified that legally enforceable orders issued to known dischargers and the associated reductions in nitrogen loading to Clinton Harbor will more than offset the nitrogen load that will result from the proposed discharge. Hearing Transcript, May 22, 2007, at 1175-1177, 1218-1223. Staff considered a number of factors, including the offset, to determine the impact of the nitrogen load from the proposed discharge on surface waters. *Id.* at 1173-1177. Staff also considered the percent increase from the discharge over the existing nitrogen load, whether the load was consistent with water quality standards anti-degradation policy and whether the discharge would impede the ability to attain the total maximum daily load ("TMDL") for Long Island Sound. *Id.* at 1177-1181. Staff also noted that there was no requirement that offsets to nitrogen loading be considered; rather, staff attempted to put the discharge "into context with regard to the relative magnitude of various things that are going on in the watershed." *Id.* at 1226.

The record supports Finding of Fact No. 79 of the Proposed Final Decision.

3. Effects of the Disposal of Medications into the Waste Stream

(Exceptions 5 and 6)

The Intervenors take exception to Findings of Fact Nos. 46 and 66 of the proposed decision. More specifically, they object to the hearing officer's findings that the Department endorsed Best Management Practices ("BMPs") include a permit condition prohibiting the discharge of specific toxic chemicals and that the discharge will meet drinking water quality standards at the point of environmental concern. The Intervenors' objection is based primarily on the potential impacts of disposal of prescription and over-the-counter medications in the waste stream and note that the Department has recognized that such medications can cause

water pollution. The Intervenors conclude that the Applicant has not met its burden of proving that "this environmental threat will be addressed." Intervenors' Exceptions, at 5-6.

Department staff testified that prescription drugs and personal care products are pollutants of emerging environmental concern with much research underway. Hearing Transcript, May 24, 2007, at 1664, 1669-70. Staff also testified that such items are not currently considered in reviewing a discharge permit application and that the Department expects that individuals will follow published guidance on the disposal of such items. *Id.* at 1664-1670.

At the March 13, 2008 oral argument, while the Department represented that it was not aware of medications contributing to the nonperformance of wastewater treatment facilities, it nonetheless recommended that the draft permit "be amended to include a prohibition of disposing of outdated, unused medications into the subsurface sewage disposal system." Oral Argument Transcript, March 13, 2008, at 19-20. Moreover, the Applicant agreed to a modification of section 4B of the draft permit to include a prohibition on the disposal of prescription medications. The Intervenors stated that while the prohibition on unused medications was "certainly positive" in terms of a modification to the draft permit, it was "practically naively an unenforceable provision." *Id.* at 39.

There was very little evidence presented in the record of the proceeding with regard to the effects of medications on subsurface sewage disposal systems, certainly not enough to support the Intervenors' claim that medications passing through the system would have a reasonable likelihood of causing environmental harm. In addition, given that the effects of over-the-counter and prescription medications into the waste stream involve emerging environmental issues, the Department is reluctant to impose a standard upon the Applicant that is not recognized within the scientific community. What is clear from the record of this proceeding is that the Applicant has agreed to prohibit the disposal of outdated, unused medications into the subsurface sewage disposal system. The draft permit is being modified accordingly. Taking into account the Intervenors' concerns that the disposal activities of residents will not be monitored and that there will be no testing conducted to ascertain whether prohibited substances are being discharged, the Applicant is strongly urged to be proactive in notifying residents of the prohibition of the disposal of medicines into the wastewater stream. It would behoove the Applicant to undertake an effort to educate the residents and provide them with periodic reminders of this prohibition.

4. Compliance Assurance and Performance Appraisal (Exception 8)

The Intervenors take exception to Finding of Fact No. 61 of the Proposed Final Decision regarding the Class III operator's duties to ensure compliance with the inspection and monitoring requirements of the draft permit and ensure quality control through various

inspections and effluent testing. They claim that the Applicant's engineer testified that composite sampling would "render a more accurate picture of the quality of the influent and effluent ... than the grab sampling regime proposed in the draft permit...." Intervenors' Exceptions, at 6. They also state that DEP staff testified that an "automated data management system needs to be in place at the CT DEP in order to track permit compliance...." *Id.*

The Applicant's engineer testified that the quality of the samples would both be the same (composite or grab) and subject to the same tests. Hearing Transcript, May 11, 2007, at 292. The witness testified that he assumed that a continuous sampling regime would be a more accurate representation of the average flow for the day but would miss the effect of the peak flows. *Id.* at 293-297.

The Intervenors at oral argument made the point that if composite sampling is feasible, it should be done, especially if it is more accurate and less susceptible to manipulation. Oral Argument Transcript, March 13, 2008, at 15. The Department recommended that Table 8 of the draft permit be amended to change from a grab sampling regime to a daily composite. *Id.* at 22. The Applicant agreed to perform daily composite sampling. *Id.* at 29.

Insofar as the automated data management system to track permit compliance is concerned, staff testified that the need for a data management system was noted in a preliminary draft of a fact sheet. *Id.*, May 24, 2007, at 1684-1690. Staff also acknowledged that the need for an automated data management system was not included in the actual permit, however, staff also testified that having an enhanced capacity to track compliance with permit terms and conditions would be beneficial to the Department. See, *id.* Staff clearly wishes to see an automated data management system in place, however, the testimony was that having the automated system was not an appropriate permit condition because it would go to the Department's ability to track compliance. *Id.* at 1687-1688; see also April 10, 2008, at 2107.

It is worth noting that the Department will be utilizing an automated data management system to enhance its ability to track permit compliance in the foreseeable future. Section 22a-430-3(j)(11)(A) of the Regulations of Connecticut State Agencies requires that all permittees, such as the Applicant, submit monitoring reports "in accordance with this subsection and the terms and conditions of the permit..." The monitoring reports "shall be submitted on forms provided or approved by the commissioner" and "failure to use forms required by the commissioner" is "considered an act of noncompliance." Regs., Conn. State Agencies § 22a-430-3(j)(11)(B). Because the Department's automated data management system is expected to be in effect by the time the Applicant's discharge system is constructed and operational, the Commissioner will require the Applicant to file its Discharge Monitoring Reports ("DMRs") electronically with the Department.

5. Testimony of Dr. Susan Peterson and Peer Review (Exceptions 10-13 and 15)

a. Significance of Dr. Susan Peterson's Testimony and Exhibits

Intervenors' Exceptions 10 through 13 relate to the hearing officer's initial preclusion of their witness, Dr. Susan Peterson. More particularly, the Intervenors claim that they were unfairly denied the opportunity to: (1) make an offer of proof (Exception 12), (2) present Dr. Peterson's testimony (Exception 10), and (3) have Dr. Peterson's exhibits admitted into evidence (Exception 11). The Intervenors also allege in Exception 13 that the exclusion of their expert, her exhibits and the denial of a proper offer of proof also violated Regs., Conn. State Agencies § 22a-3a-6(d)(1), which states, "The hearing officer shall conduct a fair and impartial proceeding, assure that the relevant facts are fully elicited, adjudicate issues of law and fact, and prevent delay and harassment."

At the March 13, 2008 oral argument, Intervenors stated that they "felt fundamentally we had a witness who had something to bring to the table that was relevant...there wasn't a question [for which] she wasn't qualified...We only brought in a couple of witnesses and she was one." Oral Argument Transcript, March 13, 2008, at 16. Applicant's response at oral argument was that Dr. Peterson's testimony was not relevant to the proceeding: "Dr. Peterson was going to address Massachusetts data that at this point is four to five years old. It did not relate to this specific technology at hand in this application, did not relate to the Connecticut environment and did not relate to the Connecticut program." *Id.* at 37. In addition, the Applicant pointed out that Dr. Peterson's own article stated that the article should not be used for the "purpose of drawing conclusions about environmental impacts." *Id.*

The Intervenors' claim that they were denied the opportunity to present the testimony and exhibits of Dr. Peterson was compelling. Following oral argument, the matter was therefore remanded to the hearing officer for a reopening of the proceeding to allow the Intervenors to qualify their witness and to make an offer of proof. Correspondence from the Commissioner to the Parties, dated March 18, 2008.

Dr. Peterson testified on April 10, 2008.[8] A few days later, the hearing officer asked the parties to brief whether the evidence presented through, *inter alia*, Dr. Susan Peterson's testimony and exhibits was relevant to the legal issues for which the Applicant has the burden of persuasion, including the issues raised by the requirements of Conn. Gen. Stat. § 22a-430 and all relevant implementing regulations, including Regs., Conn. State Agencies § 22a-430-4(c)(13). Post-Hearing Directive, dated April 14, 2008.

[8] The Intervenors attempted to substitute Dr. Peterson with another witness on March 25, 2008, by filing a Request to Substitute Witness on Remand, however, Dr. Peterson testified as planned. The Intervenors' substitution request was mooted.

The parties filed their post-hearing legal briefs on May 2, 2008, as directed by the hearing officer. The Intervenors characterized Dr. Peterson's testimony as follows:

> Dr. Susan Peterson addressed the matters disclosed during the earlier hearings: (1) the consistent failure to meet permit limitations of the Zenon system and AT systems in general as observed in Massachusetts due to improper design, operation and maintenance and a lack of adequate regulatory oversight and management, and (2) the elements of a proper oversight and management system to ensure compliance.
>
> Such matters are intuitively relevant to these proceedings since the permit limitations are presumably set to protect the waters of the state and a failure to meet those limitations poses a reasonable likelihood of a failure to protect water resources.

Intervenors' Post-Hearing Brief, dated May 2, 2008, at 2.

Staff for the Department stated that Dr. Peterson discussed that "the management of small ATT systems is fragmented, that usually one group is responsible for the design, another group building the system, another group operates and maintains the facility, and most of this is driven by cost. Furthermore, discharge monitoring and reporting and compliance assurance may be lacking." DEP's Post-Hearing Brief, dated May 2, 2008, at 1. Department staff, however, also noted that Dr. Peterson "supported the additional terms and conditions that the Department has already incorporated within its approval and permitting process that address the issues raised in her testimony." *Id.*[9]

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[9] More specifically, staff identified the particularities of the permitting and approval process, which include that the certified operator of the system review the design plans prior to DEP's involvement; that there be a certification that the system has been installed in substantial compliance with the approved plans and specifications; and that the system operator review the operation and maintenance manual and provide written concurrence that the manual's content ensures the proper operation and maintenance of the wastewater treatment facility. DEP's Post-Hearing Brief, dated May 2, 2008. In addition, the Applicant is specifically required to submit a Discharge Monitoring Report for permit violations and the identification and timing of corrective actions; be subject to a compliance audit every two years; and provide written verification within three months after permit issuance that the alternative treatment technology is operating in accordance with the approved plans and specifications and is achieving compliance with permit limits and conditions. *Id.* at 2. In terms of compliance monitoring, Dr. Peterson expressed her preference for daily composite sampling over grab sampling, and the Applicant has agreed to daily composite monitoring as a permit term. *Id.* Insofar as groundwater sampling is concerned, after staff explained the normal operating procedure for such sampling, Dr. Peterson agreed that such methodology would result in having a representative groundwater sample. *Id.*

Following the remand, the Applicant had no objection to the admission to the record of the testimony and documents of Dr. Peterson concerning her research in Massachusetts. Applicant's Post-Remand Memorandum, dated May 2, 2008, at 2. The Applicant expected that Dr. Peterson's testimony and exhibits would be given "the appropriate weight that they deserve...portions of Dr. Peterson's testimony were only marginally relevant to this proceeding, since they focused on broad matters of public policy, legislation and regulation-making." *Id.*

The Applicant pointed out that Dr. Peterson is not an engineer, a chemist or a licensed operator of wastewater treatment systems, and that Dr. Peterson's testimony was of limited relevance because she lacked knowledge or familiarity with Connecticut's wastewater discharge application requirements and permit conditions, and with the specifics of the application at issue and the previously permitted Zenon systems in Connecticut. *Id.* at 2-3, citing the Hearing Transcript at 1964 (no knowledge of Connecticut effluent sampling requirements), 2001 (did not review application), 2003 (no knowledge of systems in the Updated Performance Appraisal), 2005 (had not seen the data tables in the Updated Performance Appraisal), 2011-2012 (no knowledge of Connecticut permit standard for nitrogen in groundwater), 2017 (unaware of how total nitrogen discharge limit in draft permit is calculated), 2019-2020 (unaware of new permit conditions based on Zenon Performance Appraisal).

The Applicant then highlighted those portions of Dr. Peterson's testimony that supported its position. The Applicant pointed out that, according to Dr. Peterson, alternative wastewater treatment systems, in general, when "properly designed, constructed, operated, and maintained, they are effective." Applicant's Post-Remand Memorandum at 3, citing Hearing Transcript at 1946. The Applicant also pointed out that Dr. Peterson's experience in Massachusetts was that "Zenon systems perform 'quite well.'" *Id.*, citing the Hearing Transcript at 1958. The Applicant noted, among other things, that alternative wastewater treatment system failures were typically due to people, not the equipment. *Id.* at 4, citing the Hearing Transcript at 1996. In addition, Dr. Peterson had no opinion about the design of the Applicant's system and had no reason to believe that it was inadequately designed. *Id.*, citing the Hearing Transcript at 2013. The Applicant acknowledged Dr. Peterson's preference for alternative wastewater treatment systems that were designed, built and operated by the same company for smoother operation, oversight and accountability, but, as also mentioned by the Department in its May 2, 2008 brief, Dr. Peterson admitted that conditions in the draft permit that require "integration between the manufacturer, designer, and operator, are good steps to address her concerns." *Id.*, citing the Hearing Transcript at 1951, 2031, 2038, and 2052. Dr. Peterson was concerned with the permitting of alternative wastewater treatment systems related to regulatory oversight. *Id.*, citing the Hearing Transcript at 2025. However, Dr. Peterson acknowledged that "the Applicant and future applicants should not be denied permits

due to lack of enforcement action against other non-compliant systems or whether an automated data reporting system is in use at the DEP." *Id.*, citing the Hearing Transcript at 2039-2040.

The hearing officer issued her Ruling on Remand on May 21, 2008, finding Dr. Peterson's testimony was not relevant to the application at issue. The hearing officer primarily found that there was "no basis upon which [Dr. Peterson] could form an opinion of the applicant's system." Ruling on Remand, dated May 21, 2008, at 5.

Most telling, the hearing officer said, was Dr. Peterson's testimony that she:

- Had reviewed the draft permit, but had not conducted a site visit or reviewed the application or supporting engineering reports;
- Had no opinion about the design of the particular system at issue or reason to believe that the system would be inadequately designed or improperly installed, or that the technology would be unreliable;
- Was unaware of the system's remote monitoring capability or the applicant's agreement to do composite effluent sampling;
- Was unfamiliar with any required modifications to sewage treatment plants or stormwater systems in Connecticut that discharge to waters for which a Total Maximum Daily Load has been established;
- Had no detailed information about the twelve Zenon systems permitted in Connecticut nor did she know how permit limits in Connecticut were calculated;
- Was unaware of the requirements or standards for groundwater monitoring in Connecticut; and
- Was unaware that the permit approval and compliance requirements identified in the Connecticut Zenon Performance Appraisal had been imposed in this particular application.

Id. at 5-6.

From the hearing officer's perspective, Intervenors' witness provided essentially "no direct evidence on the issue of whether the applicant's proposed system to treat the discharge from its development will protect the waters of the state from pollution." *Id.* at 6. The hearing officer further stated that the Intervenors, as the proffering parties, bear the burden of establishing the relevance of their expert's testimony. *Id.*, citing *Drea v. Silverman*, 55 Conn. App. 107, 109-110 (1999). She found that they fell short in their attempts to "establish the relevance of Dr. Peterson's testimony by arguing that the applicant's system will fail to meet permit standards because other [alternative wastewater treatment] systems have failed to do

so," given that "Dr. Peterson specifically stated that she did not have an opinion on the efficacy of the applicant's proposed system." *Id.* at 6-7.

Insofar as the goals and policies of the Coastal Management Act, Regs., Conn. State Agencies § 22a-430-4(c)(13), are concerned and the bearing that Dr. Peterson's testimony might have relative to those goals and policies, the hearing officer again took issue with the relevance of Dr. Peterson's testimony. The hearing officer found that Dr. Peterson did "not discuss or in any way connect her testimony [on the cumulative impacts of non-compliant wastewater treatment systems on the coastal environment and the efforts of regulators to attain TMDLs in areas where such standards have been developed] to the applicant's discharge." *Id.* at 8. Consequently, the hearing officer found "nothing in Dr. Peterson's testimony that will aid in the determination of whether the proposed discharge that is the subject of this proceeding is consistent with the goals and policies" of the Coastal Management Act. *Id.* at 9. She held that the intervenors had not established the relevance of Dr. Peterson's testimony in relation to the Coastal Management Act.

The hearing officer's ruling makes sense; Dr. Peterson provided no real evidence relative to whether the *Applicant's proposed system* to treat the discharge from its development will protect the waters of the state from pollution and is consistent with the goals and policies of the Coastal Management Act. It was appropriate, however, to have Dr. Peterson's testimony included in the record of this proceeding, as she did provide insight relative to alternative treatment systems generally.

Dr. Peterson professed a preference for systems that integrated design, installation and operation in order to provide for smoother operation, oversight and accountability. Hearing Transcript, April 10, 2008, at 1951, 2052. She offered assurance that when alternative wastewater treatment systems are properly designed, constructed, operated and maintained, they are effective. *Id.* at 1946, 2014. She expressed a concern in relation to the regulatory monitoring and oversight of these systems, however, as she also acknowledged, applicants like Leyland should not be denied permits simply due to difficulties associated with regulatory enforcement of permit conditions or the lack of an automated data reporting system. *Id.* at 2039-2040.

Here, the permit requires that the certified operator be familiar with the design of the system, written assurance that the system was installed in substantial compliance as it was designed, and written assurances relating to the operation and maintenance of the wastewater treatment facility. Dr. Peterson's testimony seems to support these permit conditions. Dr. Peterson expressed a preference for a daily composite sampling over a grab sampling. Daily composite sampling is now a permit condition. Dr. Peterson also agreed that the methodology utilized for sampling groundwater would result in an appropriate representative sample. Dr.

Peterson's testimony, while limited insofar as the Applicant's particular system was concerned, was helpful in relation to alternative treatment systems generally.

b. Peer Review

Intervenors take exception to proposed Finding of Fact No. 32 with regard to the description of the "independent review" by Leggette, Brashears & Graham ("LBG") on the hydrogeologic investigation and modeling. Intervenors maintain that the modeling process was "repeatedly described by the Applicant and Department Staff as 'peer review' which it was not." Intervenors' Exceptions at 9. Intervenors maintain that the "allegedly independent review was performed by a company whose identity was known to the Applicant and Applicant's other consultants and which was paid for its review." *Id.*

The representative of LBG testified regarding what he termed "peer review" and the nature and scope of the review requested by the Applicant. Hearing Transcript, May 11, 2007, at 992-993 and May 21, 2007 at 1028-1031. In addition, the hearing officer noted on the record that if she were to give consideration to witnesses paid for their work and testimony, that standard would have to apply to all such witnesses, including the primary witness for the Intervenors, Mr. Schrieber. *Id.*, May 31, 2007 at 1540.

At the March 13, 2008 oral argument, Intervenors did not touch upon this exception. Department staff, however, said the following:

> You know, whether this is deemed peer review or independent review, the fact remains that the Department staff reviewed the work of both the Applicant's consultants, the Intervenors' consultants, and came to the conclusion that the site has sufficient hydraulic capacity to support the design flow from the proposed system as hydraulic reserve capacity and will be able to meet the Department's criteria for separating distance from the mounded seasonal high-water table to the bottom of leaching structures, and the time of travel required from the leaching bed to the point of environmental concern is back.

Id., March 13, 2008, at 22-23.

The Applicant had this to say at oral argument on the issue of the Intervenors' "independent review" exception:

> The hearing officer was very careful to use the terminology that they did an independent review and the term peer review was not used in the finding. It is a red herring. The fact is: The Department considered all of the evidence. The

Hearing Officer considered all of the evidence. Whether we call it a peer review or not, I don't think it matters.

Id. at 38.

The terminology utilized by the hearing officer has no bearing on the outcome of this proceeding. Thus, Finding of Fact No. 32 will remain intact.

6. References to Save Griswold Over Development

The Intervenors take exception to Findings of Fact No. 4 and footnote 5, which reference the citizens group, Save Griswold Over Development ("SGOD"). Intervenors' Exceptions at 9. Intervenors claim that such references and certain testimony regarding SGOD were in contravention of the hearing officer's February 15, 2007 order. This exception was not addressed by the parties at the March 13, 2008 oral argument.

The February 15, 2007 order of the hearing officer was intended to provide clarity as to the status and obligations of the Intervenors. The order specifically states that "any aspect of this proceeding should reflect the consolidation of the intervenors' individual cases and should not include any references to or on behalf of SGOD." Hearing Officer's Order, dated February 15, 2007. The brief references to SGOD in the Proposed Final Decision were provided by way of background information and in no way prejudice the Intervenors.

III. Exceptions of Department Staff

Staff filed nine exceptions to the Proposed Final Decision. Staff's Exceptions to Proposed Final Decision, dated January 31, 2008 ("Staff's Exceptions"). Eight of the exceptions related to minor technical corrections to the record. The remaining exception concerned a request for a thorough explanation of the requirements for assurances from the Madison Water Pollution Control Authority before the Applicant's plans could receive final Department approval. Also, staff requested a detailed explanation of the balance of the permitting process including the additional materials and verifications that would have to be submitted by the Applicant before the permit could be issued.

At oral argument on March 13, 2008, the Applicant agreed to all of the exceptions identified by the Department. Oral Argument Transcript , March 13, 2008, at 28-29. The Intervenors did not comment on staff's exceptions.

A. Exceptions to the Summary Contained within the Proposed Final Decision

Department staff recommended that the final paragraph of the Summary section on page two be changed, with the proposed modifications italicized, as follows: "I recommend

that the applicant be authorized to submit, *for the review and approval by Department staff,* plans and specifications for its proposed treatment system. Upon *verification that the system has been installed in full compliance with the approved plans and specifications and any conditions therein,* I recommend that *staff be authorized to prepare the discharge permit (Attachment A) for the Commissioner's signature."* Staff provided support for the change. This substitute language is reasonable and is hereby adopted.

B. Exceptions to Proposed Findings of Fact

1. Technical Change to Paragraph No. 9

Staff recommended a correction in paragraph no. 9 as follows, again with the new language in italics: "...to the *north* by land developed for commercial uses...." Staff provided support for the change (Staff's Exceptions at 2), which is reasonable and is hereby adopted.

2. Rewrite of Paragraph No. 11

Staff proposed that paragraph no. 11 be rewritten for the sake of clarity. They proposed that paragraph 11 read as follows:

> The segment of the Hammonasset River adjacent to the property has a surface water classification of SB by the Connecticut Water Quality Standards. Since the Department has determined that lower Hammonasset River is not meeting the uses designated for class SB waters by the Connecticut's Water Quality Standards, as required by the Federal Clean Water Act, the lower Hammonasset River is included in the DEP list of impaired waters.

Staff's Exceptions at 3.

The reasoning provided by staff supports the rewrite of paragraph no. 11, however, a few additional technical changes should be made as well. The apostrophe "s" in the word "Connecticut's" in line four should be deleted and the hearing officer's proposed footnotes (9 and 8, respectively) should be kept intact following the references to the "Connecticut Water Quality Standards" in line two and "uses designated" in line 4. Footnote 10 will also remain intact, as proposed by DEP staff.

3. Technical Change to Paragraph No. 21

Staff proposed that paragraph no. 21 be revised to clarify that the soils discussed are wetland soils that are approximately ten to twenty feet deep. *Id.* at 3. The request is reasonable and the revision suggested by staff is hereby adopted.

4. Technical Change to Paragraph No. 24

Staff recommended a change to paragraph no. 24 from "...in the evaluation of the effectiveness of the leach field to meet specific permit limits..." to "...in the evaluation of the effectiveness of the proposed leaching field...." *Id.* The reason for the recommendation was to avoid any confusion associated with the specific permit limits. Staff's proposed revision is reasonable and I hereby adopt it.

5. Technical Change to Paragraph No. 29

Staff identified an erroneous reference in paragraph no. 29 to "unsaturated" soils that should have instead read "saturated" soils. *Id.* at 4. The suggested revision is appropriate and is hereby adopted.

6. Technical Change to Paragraph No. 35

For the sake of clarity, staff identified a need to revise paragraph no. 35, to should read, "...typically is not found in deltaic fluvial stratified drift..." as opposed to "...typically is not found in stratified glacial drift....." *Id.* The suggested change is reasonable and is hereby adopted.

7. Technical Change to Paragraph No. 71

Staff suggested a change to paragraph no. 71 to clarify the meaning of the term coastal boundary and recommended that the statement "...because the site is located within a coastal boundary" be changed to "...because the site is located within a coastal boundary as that term is defined in Conn. Gen. Stat. §§ 22a-93(3) and 94(b)." *Id.* Staff's proposed substitute language is reasonable and is hereby adopted.

C. Exceptions to Proposed Conclusions of Law

Staff wishes to insert the following additional conclusions of law:

> The proposed wastewater renovation system is a community sewerage system. See Conn. Gen. Stat. § 7-245. As such, the local water pollution control commission must ensure the effective management of the system. Conn. Gen. Stat. §7-246 (b)(6). If the Commissioner issues a final determination to issue the permit, the applicant must submit, for the review and approval of the Department, construction plans and specifications. Conn. Agencies Regs. §§ 22a-430-4(i) and 4(d). Prior to approving such plans, the applicant must provide:

1) a letter from the local water pollution commission stating that they will ensure effective management of the system;

2) copies of any contracts or agreement between the applicant and the Madison Water Pollution Control Authority; and

3) a letter from the counsel for the Madison Water Pollution Control Authority stating that such contract or agreement is legally enforceable.

Conn. Agencies Regs. §§ 22a-430-4(c)(20)(C)(i)(e) and 22a-430-4(c)(20)(G).

Furthermore, as part of the review of the plans and specifications, the Department will require that a licensed operator review the proposed design plans and ensure that they are "operator friendly." This should help ensure that the treatment system is capable of being operated as designed. Upon receipt of such documentation, the Department's staff can proceed with review, and if satisfactory, the approval of the construction plans and specifications. If the plans and specifications are approved, the Department's staff must verify that the treatment system has been installed in accordance with the approved plans and specifications and meets all conditions of any such approval. Such verification shall also include a certification by both the design engineer and the technology provider. In addition as a condition of the approval, an operation and maintenance manual for the treatment system that is installed shall be submitted and signed off by the licensed operator. Based upon this verification, the Commissioner can then issue the permit to discharge. Conn. Agencies Regs. § 22a-430-4(n). If the permit is issued, it will require that the local water pollution control authority receive a copy of the permit and copies of discharge monitoring reports as well as the audit required by the permittee that shall be conducted every two years. Finally, the permit requires that on or before three months after permit issuance the permittee shall verify in writing to the Commissioner that the alternative treatment technology is operating in accordance with the approved plans and specifications and is achieving compliance with all permit limits and conditions. (test. W. Herzig 5/24/07, pp. 1641, 1642 and test. W. Herzig 5/21/07, pp. 1107, 1108.)

Staff Exceptions at 4-5.

There is ample support for these suggestions in the record of the proceeding. The revisions proposed by staff make for an improved alternative wastewater treatment system. Staff's proposed revisions to the conclusions of law are hereby adopted.

IV. Intervenors' Exceptions to Ruling on Remand and the Applicant's Response Thereto

The Ruling on Remand, which left intact the Proposed Final Decision, was released on May 21, 2008. On May 30, 2008, the Intervenors filed their exceptions to the Ruling on Remand and requested another oral argument. See Dr. William B. McCullough and Carol Altieri's Exceptions to Ruling on Remand, dated May 30, 2008 ("Intervenors' May 30 Exceptions"). The Applicant objected to the Intervenors' exceptions and request for oral argument on June 12, 2008. See Applicant LeylandAlliance LLC's Response to Intervenors' Exceptions to Ruling on Remand, Dated June 12, 2008 ("Applicant's Response to Intervenors' May 30 Exceptions"). On July 30, 2008, after careful consideration, the Commissioner issued a ruling that the Department's Rules of Practice contemplate the filing of exceptions and requests for oral argument in response to proposed final decisions. Here, the Proposed Final Decision was left intact following the remand, the parties had the opportunity to file exceptions and present oral argument, and the Commissioner found no compelling need, given the extensive administrative record, to hold another oral argument. Commissioner's Letter to the Parties, dated July 30, 2008.

The Intervenors filed the following six exceptions: (1) that the hearing officer took a much too-limited approach on remand and more particularly did not consider the protection of resources protected by the Coastal Management Act; (2) that the prohibition on the disposal of medication into the wastewater treatment system was not responded to properly by the hearing officer; (3) with the weight, or lack thereof, the hearing officer afforded Dr. Susan Peterson's testimony; (4) that the Department should carry the burden of demonstrating that it has adequate ability to ensure effective operation of alternative wastewater treatment systems prior to permitting these systems, and similarly, that the Department should carry the burden of demonstrating that its own activity of permitting these systems is consistent with the Coastal Management Act; (5) the hearing officer's statement that "the intervenors do not point to any aspect of the CMA that requires consideration of the type of regulatory oversight and management discussed by Dr. Peterson"; and (6) that the Department's ability—or lack thereof, in the Intervenors' estimation—to monitor the systems such as the one proposed by the Applicant for discharge permit compliance will, in fact, compromise the ability of the proposed treatment system at issue to protect the waters of the state. Intervenors' May 30 Exceptions at 1-5.

A. Exceptions 1 and 2

Intervenors maintain that the disposal of medications through the wastewater treatment system has a reasonable likelihood of harming natural resources, to include the adjacent coastal marshes. *Id.* at 1-2. The Intervenors had already raised exceptions regarding the disposal of medications in their January 31, 2008 exceptions. See Intervenors' Exceptions at

5-6. The Commissioner's response to those exceptions is found herein at section II.B.3 at 10-11. There was no evidence in the April 10, 2008 proceeding that would support the Intervenors' claim that any medications passing through the wastewater treatment and renovation system would have a reasonable likelihood of harming natural resources; the April 10 testimony of Department staff was consistent with the testimony submitted prior to the remand.

B. Exception 3

Intervenors take issue with the hearing officer's conclusion that Dr. Peterson's testimony provided "no basis upon which she could form an opinion of the applicant's system." Intervenors' May 30 Exceptions at 2-3, citing Ruling on Remand, dated May 21, 2008, at 5. As stated earlier (see section II.B.5 at 13-18 herein), while Dr. Peterson's testimony was not ultimately dispositive relative to the particular application that is the subject of this proceeding, Dr. Peterson's testimony was useful in relation to alternative treatment systems generally.

C. Exceptions 4 and 5

Intervenors claim that the Department has the burden of demonstrating that it "has adequate ability to ensure effective operation of the systems it permits where the evidence shows that a lack of adequate oversight and management invariably leads to poor permit compliance," and that the Department's own permitting activity must be consistent with the Coastal Management Act. Intervenors' May 30 Exceptions at 3-4. They also disagree with the hearing officer's statement that "the intervenors do not point to any aspect of the CMA that requires consideration of the type of regulatory oversight and management discussed by Dr. Peterson." *Id.* at 4, citing Ruling on Remand at 9.

The Intervenors' argument is unpersuasive for several reasons. First, a review of the record does not lead to the conclusion that DEP's oversight and management of systems like the one proposed by the Applicant is inadequate. Second, as pointed out by the Applicant in its response to the Intervenors' May 30 Exceptions, Dr. Peterson did not testify that poor permit compliance is inevitable where there is a lack of adequate oversight and management. Applicant LeylandAlliance LLC's Response to Intervenors' Exceptions to Ruling on Remand, dated June 12, 2008 ("Applicant's June 12 Response"). Finally, even Dr. Peterson testified that the Applicant should not be denied a permit based on a lack of enforcement action against those out of permit compliance or whether automated report systems are being utilized by the DEP. See Hearing Transcript, April 10, 2008 at 2039-2040.

Insofar as the Intervenors claim that DEP carries the burden of demonstrating its own consistency with the Coastal Management Act, the Intervenors are incorrect. As mentioned herein at section II.A, the burden of proving consistency is on the Applicant. In addition, the Coastal Management Act addresses the activity to be permitted, not the agency's act of permitting the activity. The Intervenors have simply not met their burden of proving a prima facie case of unreasonable pollution.

D. Exception 6

The Intervenors take exception to the following statement:

> Even a complete failure of the DEP's compliance monitoring system will not, on its own, compromise the ability of the proposed treatment system to protect the waters of the state. Any facts related to the department's ability to monitor compliance have no 'logical tendency' to aid in the determination of the issues that fall within the scope of this proceeding and are therefore irrelevant.

Intervenors' May 30 Exceptions, citing Ruling on Remand at 10. They argue that the combination of Dr. Peterson and Warren Herzig's testimony leads one to conclude otherwise. The Intervenors are not characterizing the witnesses' testimony in a fair light.

As addressed herein at section II.B.5, Dr. Peterson, while espousing concerns relating to monitoring, reporting and compliance assurance, also expressed her support for permit terms and conditions incorporated by DEP staff and agreed to by the Applicant. Dr. Peterson's testimony is also discussed rather exhaustively in section II.B.5 herein. In addition, as mentioned in section IV.C above, Dr. Peterson acknowledged that the Applicant and future applicants should not be denied permits due to a lack of enforcement action against other non-compliant systems or whether an automated data reporting system is utilized by the Department. Hearing Transcript, April 10, 2008, at 2039-2040. The record simply does not support the argument made by the Intervenors for which they carry the burden of proof.

V. Conclusion

The record of this permit proceeding supports the hearing officer's proposed final decision. The proposed decision is therefore adopted except as expressly provided herein. Also adopted is the hearing officer's recommendation, with additional modifications, to issue the draft permit to the Applicant. All modifications noted herein should be included in the final permit to be issued.

9/23/08

Date

Gina McCarthy, Commissioner
Department of Environmental Protection

PARTY LIST

Final Decision in the matter of LeylandAlliance, LLC (Madison Landing)
Application #200401781

PARTY	REPRESENTED BY
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