IN THE MATTER OF	:	APPLICATION NO. 201103241
	:	
	:	
MSW ASSOCIATES, LLC	:	NOVEMBER 28, 2016

FINAL DECISION

This proceeding concerns an application ("the Application") submitted by MSW Associates, LLC ("the Applicant") to construct and operate a new combined transfer station and volume reduction plant at 14 Plumtrees Road, Danbury, Connecticut ("the Property"). Currently, there is an auto body shop on the Property which the Applicant proposes to remove and replace with the proposed transfer station/volume reduction plant ("the Proposed Facility"). Staff of the Department of Energy and Environmental Protection ("Staff") reviewed the Application, published a Notice of Tentative Determination to approve the Application, and prepared a Draft Permit ("the Draft Permit"). The City of Danbury ("the City") and the Housing Authority of the City of Danbury ("the Housing Authority") oppose granting the Application.

The first portion of the hearing in this matter, to receive public comment, was held in May 2014. The evidentiary portion of the hearing was held in June, July and August of 2014 and reopened in June 2015. The parties to this hearing are the Applicant, the City, and Staff.[1] The Housing Authority participated as an intervenor. On August 13, 2015, the Hearing Officer issued a Proposed Final Decision ("PFD") recommending issuance of the Draft Permit with three additional conditions. PFD, at p. 52-53. The City, the Housing Authority and Staff filed

[1] The Housatonic Resource Recovery Authority ("HRRA") is also a party to this proceeding, but after reaching an agreement with the Applicant and having certain terms added to the Draft Permit the HRRA withdrew from participation in this matter.

exceptions to the PFD.[2] Oral argument was held before the Commissioner of Energy and Environmental Protection's designee on December 10, 2015.

For the reasons set forth below, I concur with the Hearing Officer, the permit sought by the Applicant shall be issued consistent with this Final Decision, including the revisions to the Draft Permit noted herein. In issuing this Final Decision, I hereby incorporate the Findings of Fact in the PFD. In issuing this Final Decision, I hereby incorporate the Conclusions of Law, except as such Conclusions are discussed and modified by this Final Decision.

A. The Draft Permit is Not Conditioned on Any Local Approval

The City asserts that the Hearing Officer erred by recommending issuance of the Draft Permit when the record contains no evidence that the Applicant will be able to obtain local approval for the Proposed Facility. According to the City, "[b]y law and pursuant to the requirements of the Draft Permit" such local approval must be obtained before the Applicant can construct and operate the Proposed Facility. The City argues that this approval will not be forthcoming because in the location of the Proposed Facility, neither a transfer station nor a volume reduction plant is a permitted use under Danbury's zoning ordinances. As such, according to the City, the Hearing Officer committed legal error by recommending issuance of the Draft Permit with a condition that the Applicant cannot satisfy, namely a condition that requires the Applicant obtain local approval before it can construct and operate the Proposed Facility. Given its view that such a condition is legally impermissible, since local approval for the Proposed Facility will not be given, the City argues that the Commissioner of Energy and Environmental Protection ("the Commissioner") has no choice but to deny the Application.

[2] The Housing Authority joins with and incorporates the City of Danbury's Brief on Exceptions. Unless otherwise specified in this Final Decision, for simplicity, I refer to the positions of both as that of the City.

I reject the City's argument for a number of reasons. First and foremost is the City's apparent misunderstanding of the Draft Permit. Simply put, there is no provision in the Draft Permit - and the City does not cite one - that requires the Applicant to obtain local approval before it can construct and operate the Proposed Facility. The City's argument is premised upon an alleged condition in the Draft Permit that simply does not exist.

While there are provisions in the Draft Permit that clarify the relationship between the permit and other federal, state or local laws, no provision of the Draft Permit states that the Proposed Facility cannot be constructed or operated until all required local approvals have been obtained or requires obtaining such local approval.

For example, section C.19 of the Draft Permit states that:

> [t]his Permit is subject to and in no way derogates from any present or future property rights or other rights of powers of the State of Connecticut and conveys no property rights in real estate or material nor any exclusive privileges, and is further subject to, any and all public and private rights and to any federal, state or local laws or regulations pertinent to the Facility or activity affected thereby.

This provision clarifies that the Draft Permit, and whatever is authorized under the Draft Permit, remains subject to other governmental requirements. So, for example, if the hours of operation under the Draft Permit authorized operation during certain times, these hours remain subject to the requirements of another governmental entity. Section C.19 is a recognition that different governmental entities may have different requirements and that the permit issued by the Department co-exists with any such requirement. See *Bauer v. Waste Management of Conn., Inc.*, 234 Conn. 221, 257 (1995)(local zoning regulation limiting landfill height to 90 feet did not contradict terms of Department permit, which allowed greater height; local regulation was "complimentary regulation" to the Department's permit).

Section C.19 of the Draft Permit acknowledges that while there may be concurrent or overlapping jurisdiction exercised by the Department and other governmental entities, such as local governments, each remain free to operate in their respective separate spheres. While addressing the relationship between the Draft Permit and other governmental requirements, this condition clearly does not say nor require that all required local approvals be obtained before the Proposed Facility can be constructed or operated. *See Davenport v. Carothers*, 1991 WL 204474 (Conn. Super. Ct., October 2, 1991)(dredging permit issued by the Department removed legal obstacles the Department might have to permitted activity, without overriding rights anyone else might have).

Another provision of the Draft Permit, Section C.21 states that nothing in the permit "shall relieve the Permittee of other obligations under applicable federal, state and local laws." This provision prevents the Applicant from asserting that the permit itself satisfies or *relieves* it of compliance with some other federal, state or local requirement. Notably, this provision does not condition issuance of the Draft Permit on any such approval being obtained. Finally, Section C.7.f. of the Draft Permit requires the Permittee to "operate the Facility in a safe manner so as to control fire, odor, noise spills, vectors, litter and dust emissions in continuous compliance with all applicable requirements, including OSHA...." This provisions concerns the safe operation of the Facility. Nothing in Section C.7.f requires local approval before the Proposed Facility can be constructed or operated.

Not only is there no condition in the Draft Permit requiring that local approval be obtained before the Proposed Facility can be constructed or operated, the City fails to cite any legal authority that, in this case, prevents the Commissioner from exercising the authority to issue the Draft Permit until local approval for the Proposed Facility had been obtained. In fact,

the General Assembly is very clear when it wants to constrain the Commissioner's authority and require that local approval be obtained before the Commissioner can issue a permit for a state solid waste facility. Under Conn. Gen. Stat. § 22a-208b(a), the Commissioner "may issue a permit to construct a facility for the land disposal of solid waste...provided the applicant submits to the Commissioner a copy of a valid certificate of zoning approval, special permit, special exception or variance, or other documentation, establishing that the facility complies with the zoning requirements adopted by the municipality in which the facility is located..." In short, when the General Assembly wants to ensure that local approval must be obtained before the Commissioner can take action on a solid waste permit the legislature knows how to do so. Notably, the legislature has not done so in this case. Section 22a-208b(a) applies to a permit for the land disposal of solid waste, such as a landfill. It does not apply to the type of facility in this case, namely a combination transfer station/volume reduction plant that does not involve the land disposal of solid waste.

Indeed, acceptance of the City's argument would make a local zoning ordinance, which the City asserts prohibits the Proposed Facility, binding upon the Commissioner. In this case, involving an Application for a transfer station/volume reduction plant, there simply is no legal basis for this position and the City cites none.

It may be true that local approval of the Proposed Facility is required.[3] It may also be true that the Proposed Facility is not a permitted use under Danbury's zoning ordinances and for

[3] In footnote 1 to its brief, the City included Conn. Gen. Stat. § 22a-208a(b) in support of its claim that local approval of the Proposed Facility is required. City of Danbury's Brief on Exceptions, footnote 1, p. 2. Section 22a-208a(b) prohibits any person from operating a solid waste facility without having first obtained a permit from the Commissioner. Nothing in this law mentions, to say nothing of requires, an applicant to obtain local approval before constructing or operating a solid waste facility. There is also nothing in section 22a-208a(b) that would prevent the Commissioner from taking action on the Application in this case, independent from and regardless of what action is taken at a local level.

that reason local approval of the Proposed Facility will not be obtained. That, however, is a matter between the Applicant and the City, not the Department. Absent some statutory or regulatory provision - and the City cites none - the need for the Applicant to obtain local approval for the Proposed Facility does not constrain the Commissioner's authority or prohibit the Commissioner from approving the Application.

The City argues that the Hearing Officer's PFD is contrary to controlling case law, citing Vaszauskas v. Zoning Board of Appeals, 215 Conn. 58 (1990). *Vaszauskas* involved a decision by a zoning board of appeals to grant a variance. In granting the variance, the board included a condition that the applicant obtain a soil extraction permit from the local planning commission even though, due to the particular facts in *Vaszauskas*, the issuance of such a permit was beyond the planning commission's authority. The Superior Court found the condition to obtain a soil extraction permit invalid, but concluded that without the offending condition, the variance was otherwise valid. *Id.* at pp. 61-62. The Connecticut Supreme Court agreed that the condition in question was invalid, but determined that the condition was such an integral part of the decision to grant a variance that without the condition the variance could not stand. *Id.* at pp. 66-67.

Vaszauskas does not help the City. In *Vaszauskas*, an invalid permit condition had been identified and the question was what effect this invalid condition would have on the remainder of the permit. That is not the case here. Here, no invalid condition has been identified. The absence of an invalid condition renders *Vaszauskas* inapplicable.

The City also relies on a Superior Court decision, Dauti Construction, LLC v. Planning and Zoning Commission, 2009 Conn. Super LEXIS 1505, *aff'd on other grounds*, 125 Conn. App. 655 (2010), *cert. den.*, 300 Conn. 924 (2011) ("*Dauti*"). *Dauti* involved an application to a planning and zoning commission ("PZC") seeking approval for construction of an affordable

housing development pursuant to Conn. Gen. Stat. § 8-30g. The record showed that the local Water and Sewer Authority ("WSA") would not approve the sewers necessary for the project. The PZC denied the application, in part, on the grounds that sewers would not be available for the project *Dauti*, p. 4. In a related companion case, the WSA's denial of the developer's sewer application was also appealed.

While the Superior Court did state that the PZC's denial, based on the input from the WSA, was legally supportable, this discussion is dicta since the court overturned the PZC's decision to deny the application based on the court's decision to overturn the sewer authority's denial of the developer's sewer application in the companion case.[4]

The City argues that *Dauti* is analogous to this case, but it is not. *Dauti* involved an application for an affordable housing development under Conn. Gen. Stat. § 8-30g. The statutory scheme in the affordable housing context is fundamentally different from the statutory scheme at issue here, and as such provides little guidance for this proceeding. Also, *Dauti* involved approvals at the municipal level only. This case involves approval by the Department at the state level and, per the City, approval at the local level. This is significant not only because nothing in *Dauti* discusses, or even mentions, what effect, if any, the purported disapproval at a local level would have on a state level proceeding. Absent a specific statutory authorization, such as Conn. Gen. Stat. § 22a-208b(a), allowing the outcome of a local approval to dictate the outcome of state permit proceedings, such as the present one, would amount to the state abdicating its statutorily assigned responsibility for making permit decisions.

[4] The City is simply incorrect when in its brief it argues that the court upheld the PZC decision. See the City of Danbury's Brief on Exceptions, p. 4.

The City has pointed to nothing that would require - or even allow - the Department to deny a transfer station/volume reduction plant application because local approvals had not been obtained.[5] As noted above, the General Assembly has been specific in identifying when an applicant must obtain local approval before the Commissioner may issue a solid waste permit and that instance is when a permit for a land disposal facility is sought. Conn. Gen. Stat. § 22a-208b(a). This case does not involve that type of facility.

Moreover, putting the Department into the position of having to determine if local approval will or will not be given for any facility is both untenable and unworkable. For example, even in this case, while the Proposed Facility is apparently not permitted under the applicable zoning ordinance, even the City acknowledges the possibility that local approval of the Proposed Facility could be obtained. City of Danbury's Brief on Exceptions, p. 4-5. There is no way for the Department to know whether a variance or other form of approval could or would be obtained at the local level for the Proposed Facility.

In short, there are many situations where a particular activity is subject to regulation by both the Department and local authorities. In these cases, the regulatory authorities co-exist - applicants must obtain approval from both levels of government - but there is no requirement that the Department must deny an application, even if a facility is not likely to or does not obtain local approval. See, e.g., *Lawrence v. Department of Energy and Environmental Protection*, 2016 WL 5339427 (Conn. Super. Ct., July 18, 2016)(appropriate for Commissioner to issue permit to construct dock even though approval from holders of restrictive covenants might need

[5] The City's argument also fails to recognize that in *Dauti*, the PZC was clearly authorized to use insufficient sewage capacity as a basis for its decision. Here, the City argues that since the Proposed Facility will not be approved by the City of Danbury, the Commissioner must deny the Application. However, unlike the PZC in *Dauti* who under Conn. Gen. Stat. § 8-30g clearly could use the lack a sewer capacity as a basis for its decision, the City cites no authority for me to utilize the likelihood of local disapproval as a basis to deny the Application.

to be obtained);[6] *DiPietro v. Planning and Zoning Bd. of the City of Milford*, 1997 WL 15420 (Conn. Super. Ct., Jan. 8, 1997)(having obtained permit from the Department, applicant had to get planning and zoning permit); *Davenport v. Carothers*, (Conn. Super. Ct., October 2, 1991) (applicant obtained dredging permit from the Department; also required local permit).

For these reasons, I reject the City's claim that the Application must be denied because the Draft Permit is allegedly conditioned upon the Applicant obtaining local approval for the Proposed Facility, a condition that the Applicant cannot satisfy. The Draft Permit does not contain any such condition and the cases cited by the City are inapplicable. In reaching this conclusion, however, I note that nothing in this decision is intended to intrude on any prerogative of the City or prevent the City from implementing its authority as the City sees fit. The exercise of any such authority, however, remains a matter between the City and the Applicant and has no bearing upon the Commissioner's authority to act in this case.

B. Conn. Gen. Stat. § 22a-208c Does Not Apply to This Case

Conn. Gen. Stat. § 22a-207 defines different types of solid waste facilities, including transfer stations, volume reduction plants, wood burning facilities, and solid waste disposal areas, to name a few. The statutory and regulatory requirements for each type of facility may also be different. For example, under Conn. Gen. Stat. § 22a-208a(a), different considerations apply depending upon the type of facility at issue. For a new transfer station, section 22a-208a(a) requires that the Commissioner consider "whether such transfer station will result in disproportionally high adverse human health or environmental effects." For a solid waste land disposal facility or landfill, section 22a-208a(a) requires that the Commissioner consider "the character of the neighborhood in which such facility is located" and specifically allows

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[6] *Lawrence* is on appeal to the Appellate Court, A.C. 39496.

imposition of requirements "for hours and routes of truck traffic, security and fencing and for measures to prevent the blowing of dust and debris and to minimize insects, rodents and odors." For construction of an ash residue disposal area, section 22a-208a(a), requires consideration of "any provision which the applicant shall make for a double liner, a leachate collection or detection system and the cost of transportation and disposal of ash residue at the site under consideration." There are additional requirements for each type of solid waste facility in the Department's Solid Waste Management Regulations, R.C.S.A. §§ 22a-209-1 through 22a-209-17.

The City argues that with respect to section 22a-208a(a) the Hearing Officer improperly limited his consideration to that portion of section 22a-208a(a) regarding new transfer stations, namely "disproportionately high adverse human health or environmental effects." According to the City, Conn. Gen. Stat. § 22a-208c makes applicable here all of the considerations in section 22a-208a, not just those applicable to new transfer stations. I cannot concur with this reading of section 22a-208c.

Section 22a-208c provides that

> [n]o person shall receive, dispose of or process solid waste or transport solid waste for disposal or processing at any solid waste facility, volume reduction plant, solid waste disposal area, recycling center, transfer station, or biomedical waste facility unless such facility, plant, area, center or station complies with the provisions of section 22a-208a.

The statute prohibits a person from receiving, disposing of or processing solid waste at a facility, or transporting solid waste for disposal or processing at a solid waste facility "unless such facility, plant, area, center or station complies with the provisions of section 22a-208a."

In considering the City's claim I note that section 22a-208a(a) specifies considerations to be used when making a decision on an application. Rather than specifying permit considerations, section 22a-208c contains a prohibition; it prohibits persons from engaging in

certain solid waste management activities at facilities that are not in compliance with section 22a-208a, such as an unpermitted facility. As such, section 22a-208c has no application to what the Commissioner must or can consider when deciding to issue a permit for a transfer station, volume reduction plant or any other solid waste facility.

My rejection of the City's claim that under section 22a-208c, that I am *required* to take into account all of the considerations in section 22a-208a(a), such as truck traffic and its effect on the neighborhood when deciding whether or not to issue permit for a transfer station or a volume reduction plant, does not mean that I am prohibited from evaluating such considerations. Conn. Gen. Stat. § 22a-208 states that:

> [t]he commissioner shall administer and enforce the planning and implementation requirements of the chapter of the general statues regarding solid waste management. He shall examine all existing or proposed solid waste facilities and provide for their proper planning, design, construction, operation, monitoring, closure and post-closure maintenance in a manner which ensures against pollution of the waters of the state, prevents the harboring of vectors, prevents fire and explosion and minimizes the emission of objectionable odors, dust or other air pollutants so that the health, safety, and welfare of the people of the state shall be safeguarded and enhanced and the natural resources and environment of the state may be conserved, improved and protected....

This provision requires that Commissioner provide for the proper planning, design, construction, operation, monitoring, closure, and post-closure maintenance of solid waste facilities.

The Department's regulations also provide broad authority to request and consider information relevant to a permitting decision. Under R.C.S.A. § 22a-209-4(b)(4) I can consider "all relevant facts and circumstances" and under R.C.S.A. § 22a-209-4(d)(2) "all factors" which the Commissioner "deems relevant." See also R.C.S.A. § 22a-209-4(b)(2)(B)(v), an application for a transfer stations, resources recovery facilities, volume reduction plants and biomedical

waste treatment facilities must include "any other information which the Commissioner deems necessary."

Previous final decisions of the Department have recognized that the proper planning for a transfer station or volume reduction plant is not limited solely to the technical aspects of a facility itself, but can also include issues such as site suitability or how truck traffic might impact the area in the immediate vicinity of a facility. *In the Matter of Yaworski, Inc.*, Final Decision (December 23, 1994)(hereinafter *Yaworski)*; *In the Matter of Town of Canterbury*, Final Decision (March 16, 2000)(hereinafter *Canterbury)*; *In the Matter of Circle of Life, L.L.C.,* Final Decision (May 7, 2003)(hereinafter *Circle of Life)*.

Indeed, notwithstanding the City's argument about section 22a-208a(a), the title of section II.B.2 of the PFD Traffic Safety and Congestion and even a cursory review of the headings comprising this section, Traffic Volume, Sight Distance, Driveway Geometry, and Truck Routes, and reveal that truck traffic *was* thoroughly considered in this matter. Similarly, the findings and conclusions including, but not limited to, traffic congestion and safety, impacts on local roads, environmental justice and noise, reveal that the effect of the Proposed Facility on the surrounding area was likewise considered. As such, the City has no justification for asserting that the Hearing Officer improperly limited the applicability of section 22a-208a(a).

The City asserts, however, that when considering the impact of the Proposed Facility on truck traffic or the surrounding area, the Hearing Officer was incorrect in determining only whether such impacts would have "disproportionately high adverse human health or environmental effects." The City asserts that it was an error for the Hearing Officer to use this as the standard by which to evaluate such impacts.

The disproportionately high adverse human health or environmental effects analysis used by the Hearing Officer originates in a 2004 amendment to Section 22a-208a(a). See May Sp. Sess. Public Act 04-2, section 50. This amendment requires the Commissioner to consider whether a new transfer station "will result in disproportionately high adverse human health or environmental effects." This is the first opportunity the Department has had, in the context of a Final Decision, to construe this amendment, in particular its relationship to other statutory provisions. The amendment came after the Final Decisions in *Yaworski, Canterbury* and *Circle of Life,* which explains why this provision was not cited in any of those decisions. The Hearing Officer used "disproportionately high adverse human health or environmental effects" in gauging the evidence regarding truck traffic. See Section II.B.2 of the PFD, p. 28.

The Department has previously exercised its authority under section 22a-208 and the Department's solid waste regulations. Nothing in the 2004 amendment to section 22a-208a(a) modified or changed the Department's existing authority. The 2004 amendment is clearly a new consideration, something I am required to take into account when deciding whether or not to issue a permit for a new transfer station. I note that this consideration is not limited to traffic, or the impacts to areas surrounding a facility, but encompasses the overall effects of a new transfer station. It is not, however, the sole standard by which evidence must be measured.

Section 22a-208a(a) did not change or affect the underlying requirement in section 22a-208 that the Commissioner provide for the proper planning, design, construction, and operation of solid waste facilities. In performing this function, as was the case in the past, the Commissioner must be satisfied that a solid waste facility:

> ensures against pollution of the waters of the state, prevents the harboring of vectors, prevents fire and explosion and minimizes the emission of objectionable odors, dust or other air pollutants so that the health, safety, and welfare of the people of the state shall be safeguarded and enhanced

and the natural resources and environment of the state may be conserved, improved and protected.

To the extent evidence regarding a new transfer station is presented under section 22a-208, it must be considered under section 22a-208a(a) and section 22a-208. None of the considerations in section 22a-208a(a) for a solid waste land disposal facility or an ash residue disposal area override section 22a-208 or provide the sole standard against which an application should be measured. Rather, section 22a-208a(a) specifies considerations that, depending upon the type of facility, I must evaluate when deciding whether or not to issue a permit.[7]

For that reason, I agree with the City that to the extent that evidence regarding truck traffic or any other matter was considered under section 22a-208 as part of the proper planning, design, and operation of the Proposed Facility, that such evidence should not have been considered only under section 22a-208a(a), but should also have been considered under the criteria set forth in section 22a-208, as specified above.

Having reached this conclusion, I still affirm the Hearing Officer's decision. The Hearing Officer considered whether traffic, including truck traffic, was unsafe, an analysis that is appropriate under the criteria of section 22a-208. The Hearing Officer's meticulous findings – some of which are discussed below – are well supported by the evidence in the record. As such, as is further discussed in this Final Decision, taking traffic and other potential effects of the Proposed Facility into consideration, I conclude that the issuance of the Draft Permit still allows for safeguarding the health, safety, and welfare of the people of the state.

This case bears little resemblance to *Yaworski,* where under section 22a-208 the proposed location for a transfer station was deemed unsuitable when access to the transfer station relied

[7] In addition, Conn. Gen. Stat. § 22-208a(a) says the Commissioner may issue a permit "under such conditions as he may prescribe upon submission of such information as he may require…."

upon a substandard residential street and raised concerns about traffic, noise, dust, and exhaust. See *Yaworski*, at p. 13-16. In this case, while there is a public housing complex close by, the Proposed Facility is located in an industrial area where truck traffic has been and still is common. The Proposed Facility is near a sewage treatment plant, a facility that collects and processes waste wood, an asphalt plant, an auto wrecking facility, a rock and gravel mining operation, and a regional fire training facility, and is directly across the street from the now-closed Danbury Landfill. This setting alone distinguishes this case from *Yaworski.*

Moreover, in this case, unlike *Yaworski,* there are no residences located along the roads providing primary access to the Proposed Facility and no pedestrians will be put at risk by trucks going to or from the Proposed Facility. In this case, the evidence indicates that the primary routes used by trucks to service the Proposed Facility currently function at a satisfactory level of service and there is expected to be a minimal delay or minimal increase due to traffic associated with the Proposed Facility. In this case, it is clear that the Proposed Facility is in a suitable location and taking into account the general considerations set forth in section 22a-208, including the matters discussed in this Final Decision, the Draft Permit can be issued.

In short, while I conclude that section 22a-208c does not apply to this matter, the Hearing Officer nevertheless, had the discretion to and did consider the impact of the Proposed Facility on truck traffic and on the areas in the vicinity of the Proposed Facility. In considering such evidence, section 22a-208a(a) does not provide the sole standard that I must use when making a decision about whether or not to issue a permit. Finally, in light of the Hearing Officer's findings and conclusions – and the evidence supporting them – the potential impacts from the Proposed Facility, including, but not limited to, on truck traffic and on the areas in the vicinity of the Proposed Facility, satisfy the considerations under both Conn. Gen. Stat. §§ 22a-208 and

22a-208a(a) and the location of the Proposed Facility is suitable for the activities to be authorized.

C. <u>The Applicant's Burden of Proof</u>

In three places, when weighing or evaluating evidence, the Hearing Officer concludes that the Applicant has met its burden by a "preponderance of substantial evidence." See the PFD, pp. 28, 46 and 48. The City argues that these references in the PFD reflect the application of an incorrect burden of proof. According to the City, the burden of proof in this action is the "preponderance of the evidence" and that by using a different standard the Hearing Officer erroneously lowered the Applicant's burden of proof allowing the Applicant to introduce less evidence than what was needed for the Applicant to satisfy its burden.

I agree with the City that the burden of proof in this case is the preponderance of evidence standard. This derives from R.C.S.A. § 22a-3a-6(f) of the Department's Rules of Practice, entitled "Burdens of Proof." This provision states, in pertinent part, that

> [i]n a proceeding on an application, the applicant and other proponents of the application shall have 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 in deciding whether to grant or deny the application. *Each factual issue in controversy shall be determined upon a preponderance of evidence.*

(Italics added for emphasis). Pursuant to this rule, "preponderance of evidence" is the standard for the resolution of factual issues in this matter. *See also* <u>*Goldstar Medical Services, Inc., et al v. Department of Social Services*</u>, 288 Conn. 720, 818-20 (2008).

The next question is whether the Applicant has satisfied this standard; for while I agree with the City that the "preponderance of substantial evidence" is not the correct articulation of the burden of proof in this matter, this does not mean that the Applicant has not met the correct preponderance of evidence standard.

In considering this question, I note that other than its conclusions to the contrary, the City has not provided any analysis of how it believes the Hearing Officer held the Applicant to lesser standard of proof. Indeed, the City's argument focuses solely on the terminology used in the three places in the PFD; absent is any analysis of the actual evidence itself and how the Hearing Officer allegedly applied a lessened burden of proof.

Having reviewed the evidence in the record and the Findings of Fact in the PFD, I find no support for the City's assertion that the Hearing Officer erroneously lowered the Applicant's burden of proof. I find no basis for concluding that the Hearing Officer made a finding based on something less than a preponderance of the evidence. So while admittedly the terminology chosen by the Hearing Officer was not ideal, a review of the evidence and the PFD reveals that the PFD did not use a lower standard of proof.

D. Traffic

The City raises a number of wide-ranging concerns about the traffic to be generated by the Proposed Facility.

1. The Credibility of the Applicant's Traffic Expert: The City questions the credibility of the Applicant's traffic expert, Michael Galante. The Hearing Officer accepted Mr. Galante's testimony and found it to be credible. While Mr. Galante testified about a number of traffic related issues, ultimately, he concluded that slight increase in traffic as a result of the Proposed Facility, estimated to be two percent above current traffic levels, would not materially increase the volume or congestion of traffic or create safety problems.

The City did not introduce any expert evidence to rebut Mr. Galante's opinions about the effect of the Proposed Facility on traffic.[8] Rather, the City had two lay witnesses testify, Mssrs. Saadi and Knickerbocker, both local officials, about their experience with roads in the vicinity of the Proposed Facility.

In urging rejection of Mr. Galante's testimony, the City first argues that when comparing the traffic that might be generated by the Proposed Facility to the traffic generated by the automobile body shop that the Applicant currently operates on the site of the Proposed Facility ("the automobile body shop"), Mr. Galante did not independently verify data given to him by the Applicant regarding the current trips per day to his automobile body shop. However, since Mr. Galante did not rely upon this allegedly flawed "comparative analysis" in rendering his opinions about the impacts the Proposed Facility might have on traffic, I find that any alleged flaws in this analysis do not affect the credibility of his opinions.

Mr. Galante's opinions were based on traffic counts performed on Plumtrees Road, Newtown Road, and Shelter Rock Road, the roads that are expected to be used by traffic going to and from the Proposed Facility. Mr. Galante used these traffic counts to determine a "no-build" condition, namely the traffic traveling on these roads if the Proposed Facility is not built. The traffic to be generated by the Proposed Facility was then added to this "no-build" condition, to arrive at the expected traffic if the Proposed Facility was constructed, the "build condition." No part of this analysis was based upon any information provided by the Applicant.[9]

[8] The City did have an expert, David Sullivan, a traffic engineer, testify but Mr. Sullivan's testimony was limited to the potential impact of the elimination of a proposed turning lane and did not concern the general effect the Proposed Facility might have on traffic.

[9] The expected traffic to be generated from the Proposed Facility came from another of the Applicant's experts, David Brown, who based on the nature of the Proposed Facility estimated the expected truck traffic that it would generate.

Indeed, when explaining his methodology, it became apparent that Mr. Galante may have actually *over-estimated* the amount of traffic when rendering his opinions since the traffic counts used by Mr. Galante included vehicles that currently go to the automobile body shop. Because the automobile body shop will be removed if the Proposed Facility is constructed, Mr. Galante could have subtracted from the traffic counts the number of vehicles going to and from the automobile body shop when calculating the "build" and "no-build" conditions.

In trying to quantify this over-estimation, Mr. Galante received information on how many vehicles go to and from the automobile body shop from the Applicant. Mr. Galante did not independently verify this information. This is the information that the City alleges was flawed and that Mr. Galante erroneously relied upon. Yet, no independent verification was needed; Mr. Galante's opinion that the roads were capable of handling whatever incremental increase in traffic there may be from the Proposed Facility was based on traffic counts that included the vehicles going to and coming from the automobile body shop. The extent of this over-estimation did not change any of his underlying opinions. As such, contrary to the City's assertion, Mr. Galante's reliance on the information provided by the Applicant had no effect on Mr. Galante's opinion or his credibility.

The City next argues that statements Mr. Galante made in a 2007 proceeding before the Danbury Planning Commission regarding a potentially smaller 500 ton per day transfer station at the same site contradicted statements Mr. Galante made in this proceeding. However, Mr. Galante's statements in a different proceeding, before a different commission, for a different facility, being reviewed under a different set of statutory and regulatory criteria, and potentially for different reasons, are not reasons to reject his testimony. Ultimately, while the City may disagree, the Hearing Officer is in the best position to assess the evidence presented, especially

the demeanor of each witness, including expert witnesses. It is well established that "[t]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible." (Internal quotations marks omitted). *Melillo v. New Haven*, 249 Conn. 138, 151 (1999); *Windels v. Environmental Protection Commissioner*, 284 Conn. 268, 291 (2007).

The City also asserts that Mr. Galante's testimony was contradicted by the two lay witnesses the City called to testify, both of whom had years of personal experience with the roadways in the vicinity of the Proposed Facility. Here, the City's argument amounts to little more than a disagreement with the Hearing Officer about which testimony to credit. Certainly, lay witnesses may testify about existing road conditions and the existing volume of traffic, but the issues that the City complains about go further and require expert testimony, such as the potential for traffic congestion or safety based upon traffic that may be generated from the Proposed Facility. Similarly, crediting Mr. Galante's testimony that trucks are most likely to use the most direct route to and from the Proposed Facility is well within the province of the Hearing Officer.

As such, I find no error in the Hearing Officer's reliance on Mr. Galante's expert testimony. Again, it is well established that "[t]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible." *Id.*

The City also questions the enforceability of the Applicant's assurances that trucks exiting the Proposed Facility will turn left, unless scrap metal is being brought to a facility that requires a right hand turn when exiting the Proposed Facility. The Applicant has pointed out that

it can actively manage the direction trucks travel when exiting the Proposed Facility, for example, through its contracts. MSW Associates, LLC.'s Brief in Response to Exception, p. 8. There also seems to be little reason for trucks to turn right, since for trucks returning to Interstate 84, turning right results in a longer route back to the highway. In any event, the Applicant's assurances notwithstanding, this issue has nothing to do with the credibility of Mr. Galante's testimony.

For all of these reasons, I reject the City's arguments regarding Mr. Galante's credibility and conclude, as the Hearing Officer did, that Mr. Galante's testimony and opinions are credible.

2. The Nature of the Traffic Associated with the Proposed Facility – The City next argues that the Hearing Officer failed to consider the nature of the truck traffic that would be generated by the Proposed Facility. Specifically, the City contends that the Proposed Facility will result in "several hundred large trucks hauling tons of garbage in and out of the site every day on roads of inadequate width, narrow curves, poor sight distances and steep grades." City of Danbury's Brief on Exceptions, p. 19. The City relies on the Superior Court's decision in *Strategic Commercial Realty, Inc. v. Canterbury Planning & Zoning Commission*, 2013 Conn. Super. LEXIS 820 (2013) ("*Strategic*"), to support its argument that the nature of this traffic compels denial of the Application.

The Hearing Officer specifically addressed this argument and in particular the *Strategic* decision in the PFD.

> In Strategic, trucks servicing a proposed gravel mining operation were to use a road between sixteen and nineteen feet wide. Id. at 11. The trucks servicing the gravel mining operation were to be nine feet wide, when measured to include their mirrors. Id. Cars would not be able to pass these trucks without difficulty and school buses would not be able to pass these trucks at all. Id. at 15. The record in this matter does not reveal any comparable traffic safety issue. Trucks regularly travel without incident to other facilities on Plumtrees Road such as Dell's Auto Wrecking, Ferris

> Mulch and the Tilcon asphalt plant. There is no indication in the record that Plumtrees Road, or any surrounding road, is too narrow to allow these trucks to pass passenger cars, school buses, or other trucks servicing the proposed facility. The majority of the trucks servicing the proposed facility will be single unit trucks, such as trash collector trucks designed to travel on residential streets.
>
> It is true that the proposed facility will generate an increased volume of traffic on Plumtrees Road and other nearby roads, and that much of this volume will be single unit or larger trucks. However, the increase in traffic volume will be incremental, and the roadway system is capable of handling the types of vehicles that will service the proposed facility.

PFD, p. 32-33. Based on the PFD, the facts in *Strategic* are clearly distinguishable from the present case. Moreover, the Hearing Officer *did* consider the nature of the traffic that might be generated by the Proposed Facility and found it similar to the truck traffic that routinely travels on the roads that will be used to go to and from the Proposed Facility. In addition, the Applicant's expert testified that the roads used by trucks going to and from the Proposed Facility were capable of handling the traffic, including the incremental increase in traffic associated with the Proposed Facility. Contrary to the City's claim, there was ample justification for the Hearing Officer to conclude that the roads were capable of handling the truck traffic associated with the Proposed Facility.

The Proposed Facility will be located on Plumtrees Road in Danbury. There are a number of industrial businesses along Plumtrees Road that currently attract truck traffic. The Proposed Facility is close to Interstate 84 ("I-84"); coming from I-84, the Proposed Facility is 1.2 miles from the east-bound off-ramp and 1.5 miles from the west-bound off-ramp. Going to I-84 from the Proposed Facility, it is 1.3 miles to the east-bound on-ramp and 1.9 miles to the west-bound on-ramp. It is estimated that seventy-five to eighty percent of the vehicles going to the Proposed Facility will arrive from I-84, where, except for a curve on Plumtrees Road, the roads are flat, straight and easily travelable.

Twenty to twenty-five percent of the trucks expected to go to the Proposed Facility may arrive from the south where, in comparison to the approach from the north, some of the roads are windier and steeper. However, while trucks could use such roads to get to the Proposed Facility, there is no evidence that they will. In fact, it is just as plausible that the hazards noted by the City will result in trucks avoiding such roads. Even if, however, trucks traveled on such roads, the roads are currently open to truck traffic. While these roads may have certain grades, slopes or curves, when weighed against the evidence offered by the Applicant, the City offered no evidence to support its assertions that due to peculiarities in road conditions trucks going to the Proposed Facility on such roads would not be able to do so safely.

Contrary to the City's assertions, the nature of the traffic associated with the Proposed Facility was considered. I conclude, as did the Hearing Officer, that based on the evidence the roads should be able to accommodate the truck traffic associated with the Proposed Facility.

3. The Width of Plumtrees Road - The City argues that the Hearing Officer should have considered whether the alleged narrow roads surrounding the Proposed Facility are safe, especially to local residents, given the potential increase in truck traffic on such roads from the Proposed Facility. In making this argument, the City relies upon the Final Decision in *Yaworski.*

In *Yaworski*, the Commissioner denied an application for a transfer station based on the applicant's history of non-compliance, but also on the ground, pursuant to Conn. Gen. Stat. § 22a-208, that the proposed location was unsuitable for a transfer station. In Ya*worski*, a large regional transfer station was to be located in a residential neighborhood. *Yaworski*, pp. 3-4 and 13-16. The projected volume of traffic in that neighborhood would constitute not only a safety hazard, but an unacceptable source of noise, dust, litter, and auto exhaust. *Id.* Ultimately, the

Commissioner concluded that the proposed transfer station would be inimical to the welfare of the people living in proximity to the facility. *Id.* at p. 16.

The facts in the present case bear little resemblance to *Yaworski*. In this case the Proposed Facility is in the middle of an industrial area located on a road that is presently used by a number of trucks. There is no evidence that noise, dust, or exhaust from vehicular traffic going to and from the Proposed Facility would be inimical to any residents. Here, as was noted above, uncontradicted expert testimony supports the findings that the existing road infrastructure can accommodate the incremental increase in traffic associated with the Proposed Facility.

The City argues that in *Yaworski* the Hearing Officer considered the narrowness of a local road that would be used to travel to the proposed transfer station. In the City's view, based upon *Yaworski*, the Applicant in this case had a burden to provide calculations of the width of the Plumtrees Road or other roads to demonstrate that such roads can accommodate the truck traffic associated with the Proposed Facility. This burden, the City asserts, the Applicant failed to satisfy.

In considering this argument, it is clear that no solid waste statute or regulation administered by the Commissioner specifies a minimum road width for roads that will be used to travel to a transfer station or volume reduction plant. There is no such requirement. Moreover, *Yaworski* did not establish that an applicant for a transfer station or volume reduction plant must establish that roads in the vicinity of a proposed facility must be a certain width.

In *Yaworski*, the Commissioner noted that trucks and cars headed to and from the proposed transfer station would have to traverse a local road in Canterbury that was a two-lane, 21 foot-wide street that did not meet standards of the American Association of State Traffic Officials even for the then existing levels of traffic. *Id.* at p. 14. The Final Decision in *Yaworski*

cited the fact that the applicant's expert never considered residential uses of the local Canterbury road, even though residents lived along this roadway. *Id.* at p. 15. According to the applicant's expert in *Yaworski*, despite the residential setting, pedestrians should not be using the travel portion of the local road, which led the Commissioner to remark that the applicant was not entitled to preempt the use of such road to the exclusion of normal pedestrian use by local residents. *Id.*

None of these aspects of *Yaworski* is present in this case. The Proposed Facility is not located in a residential area; there is no issue about the Proposed Facility pre-empting normal pedestrian use of Plumtrees Road. (There are no residences on Plumtrees Road in the vicinity of the Proposed Facility). In this case the roads in the vicinity of the Proposed Facility have been used for and remain open to truck traffic consistent with an industrial area. In short, not only did the Applicant have no specific burden of proof regarding the width of roads in the vicinity of the Proposed Facility, but whatever concerns that may have given rise to the width of the roads in *Yaworski* are simply not present in this matter.

The City's other claim, that the Applicant failed to introduce any evidence as to whether roads can accommodate truck traffic, has been discussed above and requires little further discussion. Not only did the Applicant provide such evidence, but as has been discussed above, there is no dispute that trucks already travel and have traveled for years on Plumtrees Road as well as other roads that will be used to go to and from the Proposed Facility. As such, for all of these reasons, I reject the City's claim about the width of roads in this matter.

4. The Use of Local Roads - The City makes a series of claims that the Hearing Officer gave insufficient consideration to current uses of local roads in considering whether projected traffic associated with the Proposed Facility would present a danger. Citing *Yaworski*

the first claim is that the Applicant's traffic expert failed to consider that vehicles going to and from the Proposed Facility would use roads where pedestrians and residences are located, in particular Shelter Rock Road and Payne Road. The City asserts these roads will be used by vehicles going to and from the Proposed Facility and the Applicant's traffic expert, Michael Galante, improperly dismissed the dangers that such trucks pose to pedestrians.

However, as was noted above, seventy-five to eighty percent of the expected vehicular traffic associated with the Proposed Facility is expected to traverse on Newtown Road to Plumtrees Road, not Shelter Rock Road or Payne Road and on the portion to be traveled to the Proposed Facility there are no residences along either Newton Road or Plumtrees Road. Thus, three quarters or more of the expected vehicular traffic associated with the Proposed Facility will not be on roads with residences or where pedestrians are expected. For this reason alone, the City's reliance on *Yaworski* is misplaced.

Moreover, even acknowledging that some trucks associated with the Proposed Facility may travel on Shelter Rock Road or Payne Road, that pedestrians use both of these roads, and that there are sidewalks on only a portion of these roads, this does not mean that the situation is dangerous. Similarly, the fact that school buses pick up children along Payne Road and that vehicular traffic associated with the Proposed Facility could also use Payne Road, does not mean that there is a problem.

Despite the City's assertions, the fact remains that Applicant's traffic expert included information about the following when formulating his opinion:

- The likely routes to be used for vehicles going to and from the Proposed Facility;
- Impacts to current traffic during peak hours;
- Traffic counts;

- Impacts at signalized intersections;
- Estimates of expected traffic to and from the Proposed Facility; and,
- Analysis of accident data on Plumtrees Road, Newtown Road, Payne Road and Shelter Rock Road.

Evaluation of such information is certainly sufficient to support his opinion that the incremental increase in traffic occasioned by the Proposed Facility is not cause for concern and satisfy the Applicant's burden of proof.

The Hearing Officer found Mr. Galante's opinion credible and it is well established that "[t]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible." (Internal quotations marks omitted). *Melillo v. New Haven*, 249 Conn. 138, 151 (1999); *Windels v. Environmental Protection Commissioner*, 284 Conn. 268, 291 (2007).

The City also argues that the increase in vehicular traffic associated with the Proposed Facility poses a danger to other vehicles on Newtown Road and Plumtrees Road. Again, acknowledging that some incremental increase in traffic will occur, does not make such increase dangerous.

Finally, the City asserts that the Applicant failed to satisfy its burden to show that it will not be dangerous for trucks traversing to and from the Proposed Facility to travel on local roads. For example, the City argues that the Applicant's traffic expert failed to estimate the actual number of accidents that might occur in light of the potential increase in traffic resulting from the Proposed Facility.

However, to the extent that the impact on local roads may be within the ambit of Conn. Gen. Stat. § 22a-208 or the site suitability issues noted in *Yaworski*, I am also mindful that the

Department is not the state traffic commission or local planning and zoning commission where traffic matters are routinely considered. The solid waste statutes and regulations administered by the Commissioner for transfer stations or volume reduction plants do not require any particularized showing that the Applicant must make regarding vehicles traversing local roads. I am satisfied in this case, that the Applicant, especially through its expert, has presented the evidence necessary to conclude that the roads in the vicinity of the Proposed Facility are adequate to support the Facility. As such, even if the Applicant did not present certain specific information such as an estimate of the number of accidents that might occur due to the incremental increase in traffic from the Proposed Facility, or an assessment of what, if any, impact the Proposed Facility might have on a particular local road, given the information that the Applicant did provide, including, but not limited to the Applicant's expert testimony, there is ample justification to conclude that the Applicant has satisfied its burden of proof.

For these reasons, I reject the City's arguments that the Application should be denied based upon the traffic impacts the Proposed Facility might have on local roads.

E. Off-Site Queueing - The Proposed Facility is located near a C-shaped winding curve on Plumtrees Road. Depending on the presence of trucks already at the Proposed Facility, trucks arriving at the Proposed Facility may have to wait on the travel portion of Plumtrees Road. Such a situation would be especially problematic since waiting on Plumtrees Road near the curve could pose a significant safety hazard. Certain issues regarding the potential for such off-site queueing were raised in this proceeding.

1. The Likelihood of Off-Site Queueing - The City takes issue with what it asserts is the Hearing Officer's reliance on the opinion of the Applicant's traffic expert that off-site queueing is not likely and will not present a safety hazard to other vehicles traveling on

Plumtrees Road. In attacking this expert's credibility, the City points to a statement he made that it was "possible" that five or six trucks could be queued off-site on Plumtrees Road and that he was not familiar with whether collector trucks often queue up outside the gates of a solid waste facility. According to the City, these statements call into question the opinion of the Applicant's traffic expert that off-site queueing would not be a problem at the Proposed Facility.

Contrary to the City's assertions, the Hearing Officer's conclusion that off-site queueing at the Proposed Facility is unlikely was not based solely upon the opinion of the Applicant's traffic expert. To address the potential for off-site queueing, the Applicant made changes to the site configuration more than doubling the number of trucks (from four-five to eleven-thirteen) that can queue in the driveway of the Proposed Facility. Both parties also had experts testify about this issue. The City's expert, David Sullivan, P.E., indicated that off-site queueing would be a problem, but could not assign a probability as to whether it would occur. The Applicant had another expert, David Brown, with years of experience in permitting, developing and operating solid waste facilities, who testified that the Applicant can control the timing that vehicles arrive at the Proposed Facility through communication with truck company dispatchers and can redirect vehicles if there is no room to accommodate them at the Proposed Facility. According to Mr. Brown, off-site queueing was not a problem and could be easily managed. The Department's Staff also testified that the Applicant would be in position to be aware of and manage any issues associated with off-site queueing. In short, the Hearing Officer's conclusion that off-site queueing was unlikely was based not only on the opinion of the Applicant's traffic expert, but also on the Applicant's solid waste expert, the inability of the City's expert to assign a probability as to the likelihood of off-site queueing and the site configuration changes made by the Applicant.

The City argues that even with the site reconfigured to allow more trucks to queue on the driveway of the Proposed Facility, the Applicant's Operations and Maintenance Plan ("O & M Plan") reveals that off-queueing remains a problem. According to the City, the Applicant's revised O & M Plan (Exhibit DEEP 20-C, p. 30) shows that up to twenty-two vehicles may arrive at the Proposed Facility from the north between 6 a.m. and 7 a.m.[10] Even if eleven vehicles can queue on-site, this, according to the City still leaves another eleven vehicles that could end up queueing on Plumtrees Road, creating a significant traffic hazard.

There is little merit to this claim. The Applicant originally proposed 6 a.m. as the starting time when waste could be off-loaded from vehicles into the Proposed Facility. This starting time was changed to 7.a.m. when the Applicant made changes to its site configuration. The City's argument is based on the Applicant's original O & M Plan (Exhibit DEEP 1M, p. 18) that did show sixty "Waste In/Out" trips and twelve automobile trips to the Proposed Facility between 6 a.m. and 7 a.m. However, this original O & M Plan was superseded by a revised O & M Plan (Exhibit DEEP 20C, p. 21) that shows twelve automobiles and no trucks arriving at the Proposed Facility between 6 a.m. and 7 a.m. As such, the City is simply incorrect when it argues that the Applicant's revised O & M Plan shows twenty-two trucks arriving at the Proposed Facility between 6 a.m. and 7 a.m.

It may be that despite moving back the starting time to 7 a.m., the City believes that trucks will nevertheless arrive at the Proposed Facility between 6 a.m. and 7 a.m. Any such assumption would seem unwarranted. If a vehicle cannot off-load until 7 a.m., there is little

[10] The City arrived at twenty-two trucks by taking seventy-five percent of the total number of vehicles expected to arrive at the Proposed Facility, since that is the number of vehicles expected to arrive from that direction.

reason to believe that such a vehicle would arrive at the Proposed Facility at 6 a.m. and wait for an hour.

The Hearing Officer did recognize that the potential for off-site queueing is greater in the morning when the Proposed Facility first opens. PFD (Finding 93), p. 20. Under its Revised O & M Plan, the Applicant *estimates* that there could be as many as sixty-five Waste In/Out Trips between 7 a.m. and 8 a.m. These are, of course, just estimates; the Proposed Facility has yet to be built, so there is some uncertainty about how many vehicles will actually arrive at the Proposed Facility between 7 a.m. and 8 a.m. Even in this scenario, however, there would be approximately 32.5 trucks arriving from 7 a.m. and 8 a.m. There is space for five trucks at the bays of the Proposed Facility, as well as space for eleven to thirteen to queue at the Proposed Facility, or room for close to eighteen trucks on site at one time. Moreover, there is no reason to believe that all of the trucks coming between 7 a.m. and 8 a.m. will all arrive at the same time. Finally, if there is no space to queue at the Proposed Facility, as was noted above, the Applicant, through contact with truck company dispatchers, can control when trucks arrive at the Proposed Facility and can redirect trucks away if there is no room to accommodate them at the Proposed Facility.

In sum, I agree that given the proximity of the Proposed Facility to the curve on Plumtrees Road, off-site queueing may be a concern. The evidence indicates, however, that off-site queueing is unlikely and that the Applicant has means of ensuring that it does not occur. As such, I reject the City's argument that due to the potential for off-site queueing the location of the Proposed Facility unsuitable and that the Application should be denied.

2. <u>When Can Trucks Begin to Queue at the Proposed Facility</u> - Under Condition C.3.a of the Draft Permit, waste cannot be off-loaded from trucks until 7 a.m. (The bay doors of

the Proposed Facility cannot open until 7 a.m.). The Hearing Officer noted that the potential for off-site queueing was greater in the morning when trucks are arriving but the waste on such trucks cannot be off-loaded. To help ensure that off-site queueing does not occur at this time, the Hearing Officer proposed a change to the Draft Permit that would allow trucks to arrive and queue at the Proposed Facility beginning at 6:45 a.m. PFD, at p. 35.[11]

The City takes exception to this change and asserts that it will not help resolve the off-site queueing problem posed by trucks arriving before waste can be off-loaded from such vehicles. The issues raised by the City were addressed in the previous section of this Final Decision.

Staff also took exception to the Hearing Officer's proposed change. It was apparently Staff's intent to require that the gates to the Proposed Facility remain closed during the hours that waste cannot be received at the Proposed Facility.[12] From Staff's perspective, this will help prevent the off-loading of waste when doing so is not authorized. If the gates are closed, however, trucks cannot queue at the Proposed Facility.

In balancing Staff's concerns about trucks off-loading outside the hours specified in the Draft Permit with the potential safety concerns associated with off-site queueing, the Hearing Officer recommended allowing trucks to queue on Proposed Facility's driveway beginning at 6:45 a.m. Through this condition, the Hearing Officer sought to utilize the space available for on-site queueing through a minor (15 minute) adjustment to when the gates to the Proposed Facility could open.

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[11] The Hearing Officer recommend that the following be added to Section C.3 of the Draft Permit:

> Trucks delivering waste may arrive at the Facility no earlier than 6:45 AM. Trucks arriving between 6:45 AM and 7:00 AM must queue in the space available on the Facility driveway. No backing by trucks equipped with backing alarms is permitted before 7:00 AM.

[12] While it may have been Staff's intent, there is no provision of the Draft Permit that specifically addresses when the gates to the Proposed Facility shall remain closed.

Staff argues that allowing trucks to queue at 6:45 a.m. will only put more pressure on the Applicant to off-load waste from vehicles outside the permitted hours. In addition, according to Staff, allowing on-site queueing earlier may exacerbate any queueing issues since the earlier time will encourage trucks to arrive earlier to ensure a spot at the front of the queue. Finally, while the Hearing Officer's recommended condition would have prohibited trucks with back-up alarms from backing up before 7 a.m. (see footnote 11), Staff points out that such alarms are required for safety reasons and must be used if a truck equipped with an alarm has to back up. The Applicant, while not necessarily agreeing with Staff's arguments, recommends adopting Staff's view in reliance on Staff's expertise. MSW Associates, LLC.'s Brief in Response to Exceptions, p. 34.

Staff's exception implicates two separate issues. One, involves ensuring that the Applicant receives waste only during the hours that doing so is authorized by the Draft Permit. The other involves safety and maximizing the use of the driveway available at the Proposed Facility to prevent off-site queueing, especially during the early morning when a greater number of trucks are expected to arrive at the Proposed Facility. I conclude that both issues can be addressed without the additional condition recommended by the Hearing Officer.

The Draft Permit contains two separate prohibitions regarding the receipt of waste at the Proposed Facility. Condition C.3.a specifies the hours when waste can be received at the Proposed Facility. Additionally, Condition C.3.d. requires the bay doors to the tipping floor and the load-out bays to be closed at 6 p.m. and during overnight operations at the Proposed Facility.[13] Closing the bay doors to the tipping floor and load-out bays will also prevent waste

[13] I understand the reference to "overnight operations" at the Proposed Facility to mean the processing of waste inside the Proposed Facility from 6 p.m. to 7 a.m. with the bay doors and load-out doors closed. See Condition C.3.c defining the terms overnight hours. (In the revisions to the Draft Permit see Section K below, I have also clarified that this also includes Sunday, since that is also a time when waste cannot be received at the Facility.)

from being received at the Proposed Facility. I recognize that requiring the gates to the Proposed Facility to remain locked during the hours when waste cannot be received at the Proposed Facility would provide a third layer of protection. But there is no information in the record that would lead me to conclude that the Applicant will not comply with the prohibitions in section C.3 of the Draft Permit regarding when waste can be received, even if the Applicant is permitted to have the gates to the Proposed Facility open at all times. See *Waste Management v. New Milford Zoning Commission*, 1994 Conn. Super Lexis 1064 at 7 (Commission may not assume that a permit holder will act in violation of a permit).

In addition, requiring that the gates to the Proposed Facility remain locked when waste cannot be received will eliminate any ability for trucks to queue on-site at the Proposed Facility during these times. It would render much less effective the revisions to the site configuration made by the Applicant, revisions, in response to concerns expressed by the City, that were specifically intended to provide additional space for queueing at the Proposed Facility and preventing off-site queueing. It would make the additional space for queueing at the Proposed Facility unavailable during the time that it is needed most, namely early in the morning. Any putative benefit from keeping the gates to the Proposed Facility locked when waste cannot be received is more than offset by maximizing the ability of trucks with waste to queue on-site. Indeed, the Hearing Officer's conclusion, with which I agree, that off-site queueing is unlikely, assumed this ability for trucks to queue on site at the Proposed Facility. PFD, p. 35.

I also see no reason to prohibit queueing at the Proposed Facility before 6:45 a.m. The times that trucks with waste will arrive at the Proposed Facility and wait for the bay doors to open will be self-regulating. I simply do not think it necessary to specify when trucks can arrive at the Proposed Facility.

Accordingly, I conclude that under the Draft Permit the Applicant is *not* required to keep the gates to the facility locked thereby preventing trucks from queueing on-site at the Proposed Facility. This includes times that waste cannot be received at the Proposed Facility.[14] Given that the gates to the Proposed Facility are not required to be locked, the condition recommended by the Hearing Officer is no longer necessary and need not be added to the Draft Permit.[15]

3. Preventing versus Mitigating Off-Site Queueing – The Hearing Officer recommended an additional change to the Draft Permit aimed at preventing off-site queueing. Condition C.11 of the Draft Permit states that:

> [t]he Permittee shall: (a) control all traffic related to the operation of the facility in such a way as to *mitigate* queuing of vehicle off-site and excessive or unsafe traffic impact in the area where the Facility is located...(Italics added for emphasis).

The Hearing Officer recommended replacing the word "mitigate" with the word "prevent," so that as modified the Draft Permit would require the Applicant to prevent, not mitigate, off-site queueing. PFD, p. 34-35. Staff objects to this change on the grounds that the Applicant does not have sufficient control over trucks arriving at the Proposed Facility and therefore may be unable to prevent off-site queueing.

In this circumstance, Staff's concern appears unwarranted. Significantly, the Applicant did not take exception to this recommended change. Indeed, in its Brief in Response to Exceptions, the Applicant cited the testimony of its expert David Brown that "the permit is clear that off-site queueing is not allowed" and that this is a "manageable situation that the facility can

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[14] Nothing in the foregoing discussion is intended to or should be construed as preventing the Applicant from choosing to keep the gates to the Proposed Facility locked for security or other reasons. This is the Applicant's choice. However if the Applicant chooses to lock the gates to the Proposed Facility, safety remains the overriding concern and the Applicant is required, at all times, to prevent off-site queueing on Plumtrees Road.

[15] I have added language to the Draft Permit to ensure that the Applicant plows the space available for trucks to queue on-site at the Proposed Facility, so such queueing can occur in the winter.

prevent from occurring." MSW's Associates LLC.'s Brief in Response to Exceptions, p. 10, citing September 4, 2014 Transcript, p. 1477. Also, in its Brief in Response to Exceptions, the Applicant has noted its ability to communicate with truck company dispatchers to temporarily redirect vehicles if needed. *Id.* In short, the modification recommended by the Hearing Officer makes the permit clearer and meets the concern of the City by making the Permittee responsible for preventing unsafe conditions on Plumtrees Road. For all of these reasons, I accept the modification to Condition C.11 recommended by the Hearing Officer.

F. The Character of the Neighborhood - Under Conn. Gen. Stat 22a-208a(a), the Commissioner must consider the character of the neighborhood when deciding whether or not to issue a permit for a solid waste land disposal facility. Because this case involves a transfer station/volume reduction plant, not a land disposal facility, that specific statutory requirement does not apply here.[16]

However, even if that requirement did apply I would still reject the City's argument about the impact on the character of the neighborhood. The Proposed Facility is in an industrial area that is zoned for industrial uses. To its north on Plumtrees Road there is the City's sewage treatment plant, a commercial mulching operation, the City Dog Pound and an asphalt plant. The treatment lagoons for the City's sewage treatment plant are located near the property line shared

[16] The Final Decision in *In the Matter of Town of Canterbury* (March 16, 2000), could be read to mean that under section 22a-208a(a), the Commissioner must consider "the character of the neighborhood" and the imposition of requirements "for hours and routes of truck traffic," in the context of an application for a transfer station. See *Canterbury,* at p. 23 and p. 28. Under section 22a-208a(a) these are mandatory considerations, but only in the context of an application for a solid waste land disposal facility, not a transfer station. When such considerations are not mandated by section 22a-208a(a), they could nevertheless arise in the context of an application for a transfer station or volume reduction plant under section 22a-208 or R.C.S.A §§ 22a-209(b)(4) or 22a-209-(d)(2).

I also note that the City's citation to *In the Matter of the Applications of Wheelabrator Putnam, Inc.* (August 6, 1997) in support of its position is inapposite. Wheelabrator involved an application for an ash residue disposal area, a type of solid waste land disposal facility, so any citation in that case to that portion of section 22a-208a(a) applicable to solid waste land disposal facilities was proper and clearly distinguishable from the present case.

with the Proposed Facility. To the south, there is an auto wrecking facility, a gravel pit and a fire training school. Across the street is the City's now closed multi-acre landfill.

Despite this highly industrialized setting, the City argues that the Proposed Facility will be highly detrimental to the character of nearby residential areas. In making this claim, the City catalogues some of the changes to the area that have occurred on Plumtrees Road, as well as a number of residential developments that have been built to the south and southwest of the Proposed Facility. From this, the City argues that the Proposed Facility, with its alleged attendant negative effects, "would be highly detrimental to the character of the neighborhood." City of Danbury's Brief on Exceptions, at p. 24.

However, while the City identifies how certain activities on Plumtrees Road have changed and that new residential development has been constructed south and southwest of Plumtrees Road, the City fails to identify the alleged negative effects of the Proposed Facility that would impact such areas. Such effects cannot be assumed. In fact, the Draft Permit contains a number of conditions aimed at minimizing such effects.

In addition, the City's arguments would have me construe the term "neighborhood" expansively across different areas that are used for different purposes. "Character of the neighborhood" should, however, be accorded its plain ordinary meaning. In this case, the industrial corridor on Plumtrees Road is a distinct "neighborhood" with a discernible boundary between the industrial area and the newly constructed residential development to the south and southwest of the Proposed Facility. Despite these newly constructed residential developments, the fact remains that Plumtrees Road in the area around the Proposed Facility is highly industrial. The Proposed Facility is squarely within and in keeping with the other industries located on

Plumtrees Road. As such, the new residential developments to the south and southwest of the Proposed Facility provide no reason to deny the Application.

For all of these reasons, I reject the City's arguments about the impact of the Proposed Facility on the character of the neighborhood.

G. Noise - The Hearing Officer, relying largely upon the uncontradicted testimony of an expert for the Applicant, David Brown, concluded that the Applicant had met its burden regarding the potential noise from the Proposed Facility. PFD, p. 48-51. The City challenges the Hearing Officer's reliance on this testimony, in particular that the Applicant will be able to comply with the requirements of the Draft Permit and keep noise levels below those established by the City's noise ordinance. Since Mr. Brown was not a noise expert the City asserts that his testimony regarding noise was "speculative and based on no analysis or data." City of Danbury's Brief on Exceptions, at p. 34. To further support its claim that Mr. Brown's testimony should be disregarded, the City notes that Mr. Brown did not have a detailed understanding of Danbury's noise ordinance and did not know much about the potential noise from back-up alarms on trucks at the Proposed Facility.

There is no question that Mr. Brown is not a noise expert. He is, however, an expert in solid waste facilities, with thirty-five years of experience in the permitting, development and operation of such facilities. Contrary to the City's claims, Mr. Brown's testimony was not speculative or based on no analysis or data. Rather, given Mr. Brown's experience with solid waste facilities he was certainly qualified to offer his opinion about noise from the Proposed Facility. The Hearing Officer was, of course, free to rely upon or reject Mr. Brown's testimony since "[t]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever

testimony he reasonably believes to be credible." (Internal quotations marks omitted). *Melillo v. New Haven*, 249 Conn. 138, 151 (1999); *Windels v. Environmental Protection Commissioner*, 284 Conn. 268, 291 (2007).

Mr. Brown's testimony was based on years of experience with solid waste facilities and I find no fault with the Hearing Officer's decision to credit and ascribe weight to this testimony. Nor is the fact that Mr. Brown did not have a detailed understanding of the City's noise ordinance or particular knowledge of the decibel levels of back-up alarms on trucks a reason to discount his otherwise credible testimony. Mr. Brown's experience with other solid waste facilities, which would include knowledge of the noise from such facilities, was sufficient to provide a basis for his opinion that the Proposed Facility would remain compliant with the City's noise ordinances.

It is also worth noting that the Hearing Officer's conclusions that the Applicant met its burden regarding the potential noise from the Proposed Facility was not based solely on the testimony from Mr. Brown. To limit impacts from noise, the Applicant configured the Proposed Facility so that the bays where waste will be off-loaded from vehicles are all angled approximately 90 degrees away from the Eden Drive housing complex. In addition, while waste can be stored outside of the Proposed Facility, the processing of waste at the Proposed Facility, the likely greatest source of noise, must occur indoors, not outdoors. And while waste at the Proposed Facility can be processed after 6:00 p.m., if that occurs, the bay doors to the Proposed Facility must be closed, again limiting any impacts from noise. Finally, trucks bringing waste to the Proposed Facility cannot idle for more than three minutes. In short, the Hearing Officer's conclusions that the Applicant met its burden of proof was based not only on the testimony from

David Brown, but also took into account these other factors aimed at lowering the potential noise from the Proposed Facility. PFD, at 49.

The City also notes that even if the Proposed Facility has no outdoor stationary sources of noise emissions, the Proposed Facility is still located approximately 250 feet from a low-income housing complex on Eden Drive. Despite this proximity, the City argues that the Applicant failed to conduct any studies concerning noise from activities that will be conducted outside of the Proposed Facility - such as the back-up alarms used on the trucks or from the movement of trucks at the Proposed Facility - to demonstrate what effect such noise might have on the residents of the Eden Drive complex or how such noise might compare to the existing level of noise from vehicles on Plumtrees Road.

While the Commissioner can certainly take noise into account when deciding whether or not to issue a permit,[17] the solid waste statutes and regulations do not specify a maximum decibel level or an acceptable range for either a transfer station or a volume reduction plant. See, for example, R.C.S.A. §§ 22a-209-9 and 22a-209-10. Since no particularized showing is required by the solid waste statutes and regulations, the question regarding noise in this matter is based on more general considerations. In a similar situation, where no specific decibel level was applicable, but a Zoning Commission was authorized to take noise into account in deciding whether or not to issue a permit, at least one Connecticut court has made clear that noise is not technically complicated but rather is something that everyone encounters daily and did not require expert testimony. Swaim v Norwalk Zoning Commissioner, 1998 WL 234840, 3 (Conn. Super. Ct., May 5, 1998). Similarly, here, given the evidence noted above including the design

[17] Noise is within the general considerations the Commissioner may take into account under section 22a-208, or part of the disproportionately high adverse human health effects under Conn. Gen. Stat. § 22a-208a(a). It may also be a potentially "relevant fact and circumstance" under R.C.S.A. § § 22a-209(b)(4) and 22a-209-4(d)(2). See also, *Yaworski*, at p. 14-16.

of the Proposed Facility, with noise angled away from Eden Drive, the operating limitations in the Draft Permit and Mr. Brown's testimony, the Hearing Officer was justified in relying upon this evidence and did not need further studies in order to approve the Application.

Based on the proximity of the Proposed Facility to the Eden Drive housing complex, the City contends that the Hearing Officer's attempt to distinguish this case from *Yaworski* is unpersuasive. But as has been discussed above, in *Yaworski*, the truck traffic was going to go directly through a residential neighborhood using a substandard road causing problems with noise, traffic safety, dust, exhaust, and litter for the residents on a local road. None of that is the case here. In this case, no truck traffic will be directed through Eden Drive. Unlike *Yaworski,* the Proposed Facility will pose no traffic safety, dust, exhaust, and litter issues for the residents on Eden Drive. Moreover, even if there is an incremental increase in the truck traffic on Plumtrees Road from the Proposed Facility, from a noise perspective for the residents on Eden Drive, it will be no different than the current traffic that already travels on Plumtrees Road. While the City may not agree, *Yaworski* is clearly distinguishable from the present case.

The City asserts that the Applicant submitted no proof to support Mr. Brown's testimony that the Proposed Facility would be able to comply with the City's noise ordinance. While the City does not say specifically, presumably, it is referring to the need for some kind of noise study. However, similar to the discussion above, there was no requirement for the Applicant to submit such a study. Moreover, it is incorrect to say that there was no proof to support Mr. Brown's testimony, the support comes from his status as an expert, his thirty-five years of experience in the permitting, development and operation of solid waste facilities. Additional support for his testimony comes from the evidence regarding the design of the Proposed Facility, with noise angled away from Eden Drive as well as the operating limitations in the Draft Permit.

The City, however, takes little solace in the fact that Section B.3 of the Draft Permit contains a condition, requiring compliance with the City's noise ordinance, saying that this condition is no substitute for a "factual showing" that the Applicant can comply with the ordinance. However, there is no basis for the City's assertion – and none is cited – that the Applicant had to make some type of specific "factual showing" when it comes to noise. The Applicant is obviously free to present its case as it sees fit and as has been discussed above, in this case presented sufficient evidence to satisfy its burden of proof. In addition, Section B.3 of the Draft Permit serves as a back stop, to prescribe a level at which noise becomes a problem. Should that eventuality occur, the Applicant can consider a variety of corrective measures, it can alter its waste management practices, add noise dampeners, or take other measures to achieve compliance.

Finally, the City argues that not only did the Applicant fail to meet its burden of proof regarding noise, but that the Hearing Officer erroneously shifted the burden of proof to the City to show that noise levels will be unacceptable. There is simply no merit to this claim. As has been noted above, there was sufficient evidence in the record for the Hearing Officer to determine that the Applicant has satisfied its burden of proof. No burden was shifted to the City. For all these reasons, I agree with the Hearing Officer's conclusion that the Applicant satisfied its burden of proof regarding the potential impact of noise emissions from the Proposed Facility.

H.[18] Screening and 16 Plumtrees Road – R.C.S.A. § 22a-209-9(e) requires that "[s]creening from view shall be provided for a transfer station located within 500 feet of a residence." (There is no similar regulatory requirement for a volume reduction plant). The Applicant then, is required to screen the Proposed Facility from the view of residences within 500 feet, including

[18] Items H and I of this Final Decision address issues raised only by the Housing Authority.

the residents of the Eden Drive housing complex, home to approximately 58 families, that is located approximately 250 feet from the Proposed Facility.

The Proposed Facility will be located on 14 Plumtrees Road. In between the Proposed Facility and the Eden Drive housing complex is a heavily wooded and steeply sloped parcel of land at 16 Plumtrees Road. Both 14 Plumtrees Road and 16 Plumtrees Road are owned by Putnam Properties, LLC.

The land at 16 Plumtrees Road is steeply sloped with thick vegetation. From the boundary of the Proposed Facility the land runs upwards to the boundary of the Eden Drive housing complex. The topography combined with the vegetation on 16 Plumtrees Road provide the Proposed Facility with screening that satisfies the requirement in R.C.S.A. § 22a-209-9(e). The Housing Authority is concerned that since 16 Plumtrees Road is not on the property of the Proposed Facility it could be developed at any time, including changes to the topography and vegetation that now provide the necessary screening for the Proposed Facility. As such, the Housing Authority points out that the Applicant has no ability to ensure compliance with the screening requirement in R.C.S.A. § 22a-209-9(e).

The Housing Authority's proposed solution is the inclusion of a condition in the Draft Permit requiring that 16 Plumtrees Road remain undeveloped so it can continue to serve as screening for the Proposed Facility. To support this recommendation, the Housing Authority notes that there is a "mutuality of interest" between Putnam Properties, LLC, owner of both 14 Plumtrees Road and 16 Plumtrees Road and MSW Associates, LLC, the Applicant. Joseph Putnam is the sole member of Putnam Properties, LLC, and is also a member of the Applicant. Given this "mutuality of interest" the Housing Authority argues that even though 16 Plumtrees Road is not part of the Application and not on the same parcel as the Proposed Facility, that the

Hearing Officer should have included a condition requiring that 16 Plumtrees Road remain undeveloped so that the screening provided by 16 Plumtrees Road will remain undisturbed.

The problem with the Housing Authority's argument is that even if the topography or vegetation on 16 Plumtrees Road is removed or disturbed, it is certainly possible that the Applicant could satisfy the screening requirement through other means. Use of the 16 Plumtrees Road property is not the sole means by which the Applicant can comply with the screening requirements of R.C.S.A. § 22a-209-9(e).

Nevertheless, it was the Applicant's choice to locate the Proposed Facility on 14 Plumtrees Road and rely upon the screening provided by 16 Plumtrees Road. Even the Hearing Officer noted that "[s]hould the topography or vegetation on 16 Plumtrees Road be modified at some point in the future, the adequate screening of the proposed facility may need to be reassessed…." PFD, p. 41, footnote 24.

Since the Applicant currently meets the screening requirements in R.C.S.A. § 22a-209-9(e), the Draft Permit can be issued. The Applicant is on notice, however, that it is the Applicant's responsibility to continuously maintain compliance with the screening requirements in section 22a-209-9(e), regardless of what changes occur on 16 Plumtrees Road and regardless of whether the Applicant is aware or unaware of such changes. Should any changes occur at 16 Plumtrees Road, in response to any changes or even before any changes occur, to ensure continued compliance with section 22a-209-9(e), the Applicant may need to seek a permit modification. The modification process should provide the residents of Eden Drive with an opportunity to both evaluate and comment upon the Applicant's continued compliance with the screening requirements of section 22a-209-9(e).

In sum, I conclude that imposing a requirement that the 16 Plumtrees Road property remain undeveloped is currently unwarranted. However, having chosen to rely upon the topography and vegetation on property that is not part of the Proposed Facility, the Applicant has put itself in a position where changes to 16 Plumtrees Road could affect the Applicant's compliance with the screening requirements of section 22a-209-9(e).

I. Environmental Justice Issues

1. The Applicability of Conn. Gen. Stat. § 22a-208aa - Conn. Gen. Stat. § 22a-208aa provides, in pertinent part that:

> [t]he Commissioner of Energy and Environmental Protection shall not issue a permit for the construction or operation of a solid waste facility located or proposed to be constructed on a parcel of real property, the boundary of which such parcel is located within one hundred fifty feet of a parcel of property containing a housing development owned by a housing authority, unless the Commissioner of Energy and Environmental Protection determines that the proposed facility does not pose a threat to the environment of the surrounding geographic area or to public safety.

Section 22a-208aa applies to a solid waste facility, whose boundary is located within 150 feet of a parcel of property containing a housing development owned by a housing authority. The statute prohibits me from issuing a permit for such a facility unless I find that the facility "does not pose a threat to the environment of the surrounding geographic area or to public safety."

The Housing Authority recognizes that the boundary of the Proposed Facility is located more than 150 feet from the parcel of property on which the Eden Drive Housing complex is located. Nevertheless, the Housing Authority contends that the Department should have conducted a "heightened review" of the Application, based on the Housing Authority's understanding of the legislative intent underlying section 22a-208aa, namely providing special

protection for a housing development owned by a housing authority, like the Eden Drive Housing complex.

I decline to conduct this "heightened review" for a number of reasons. First and foremost, doing so would be beyond my authority. All parties agree that based upon the plain language, in particular the 150 foot limit, that section 22a-208aa does not apply to this matter. Given the plain meaning of section 22a-208aa, ascertained from the text of the statute, there is no reason to look to legislative history to understand how to apply the statute in this case. Conn. Gen. Stat. § 1-2z. Moreover, the Housing Authority cites no actual legislative intent to support its claim that in this case I should conduct a "heightened review" of the Application. Finally, it is not at all clear what a "heightened review" means, how such a "heightened review" would be conducted or how such a review would differ from the review actually conducted in this matter.

For all of these reasons, I decline the Housing Authority's invitation to conduct a "heightened review" of the Application.

2. The Department's Environmental Equity Policy - The concept of environmental equity means that all people should be treated fairly under environmental laws regardless of race, ethnicity, culture or economic status. As evidence of its commitment to this principle the Department issued a policy on environmental equity in December, 1993. The Department's Environmental *Equity Policy* provides, in pertinent part, that

> [n]o segment of the population should, because of its racial or economic makeup, bear a disproportionate share of the risks and consequences of environmental pollution or be denied access to environmental benefits....

The Housing Authority argues that issuance of the Draft Permit would violate the Department's policy, since the residents of the Eden Drive housing complex, most of whom have incomes that are below 200 percent of the federal poverty standard, will bear a disproportionate share of the negative effects of the Proposed Facility when compared to other nearby residents.

According to the Housing Authority, unlike other residents who may live near the Proposed Facility, due to their low incomes the residents of Eden Drive are unable to move away from the Proposed Facility. As such, the Housing Authority argues, the residents living in the Eden Drive housing complex will disproportionally bear the risks posed by the Proposed Facility.

However, the Department's Directives serve as internal guides for Departmental personnel. The Policy does not create substantive rights for non-Departmental personnel such as the Housing Authority.

In addition, the Housing Authority's argument lacks evidentiary support. The Housing Authority suggests that the purported impacts from the Proposed Facility fall disproportionately upon the residents of the Eden Drive housing complex, because those residents are not able to move. There is, however, no evidence to support this claim. There is no evidence in the record regarding the extent to which the residents of the Eden Drive housing complex or other nearby communities do or do not move, would like to move, or the reasons for any such movement or non-movement. In short, there is no support for the Housing Authority's claim that the residents of the Eden Drive housing complex would like to move as a result of the Proposed Facility, but due to their incomes are unable to do so or that that other residents, who have the means, would exercise their ability to move as a result of the Proposed Facility.

Ironically, the evidence introduced by the City makes clear that the opposite is occurring. The City detailed the substantial increase in residential development occurring in the area. More and more housing has been built in the vicinity of the Proposed Facility. If anything, then, it appears that whatever risks may be posed by the Proposed Facility, or the other industries near the Proposed Facility, such risks are being shared by a greater number of residents moving to the

area. This undermines the Housing Authority's claim that a disproportionate share of such purported risks are being borne by the residents of the Eden Drive housing complex.

In addition, the Housing Authority has failed to identify the risks and consequences of environmental pollution from the Proposed Facility that it asserts the residents of the Eden Drive housing complex will disproportionately bear. Such risks and consequences cannot be assumed and are critical to identifying what population may be affected from the Proposed Facility. This failure prevents any meaningful assessment of, and requires rejection of, the Housing Authority's argument.

For these reasons, I reject the Housing Authority's argument that the Application should be denied based on the Department's Environmental Equity Policy or that due to their economic circumstances the residents of the Eden Drive housing complex are being asked to bear a disproportionate share of whatever risks and consequences there may be from the Proposed Facility.

J. Site Plan Resubmission - As required by R.C.S.A. § 22a-209-4(b)(2)(B), the Applicant submitted site plans for the Proposed Facility to the Department. These plans were dated January 30, 2014. The Applicant submitted a set of revised site plans the day before the evidentiary hearing in this matter was scheduled to begin. The revised site plans were dated May 31, 2014. In the revised site plans the driveway for the Proposed Facility was relocated allowing more trucks to queue on the site and a deceleration lane running along Plumtrees Road was proposed for trucks going to the Proposed Facility. Ultimately, the Hearing Officer concluded that the Applicant lacked standing to construct the proposed deceleration lane.[19] No new site plans were submitted, however, reflecting the elimination of the proposed deceleration lane. In

[19] No party took exception to this ruling, so this is not an issue for purposes of this Final Decision.

the PFD the Hearing Officer recommended as a condition of approval that the Applicant submit a new set of revised site plans that would otherwise be identical to the May 31, 2014 revised site plans, but eliminating the proposed deceleration lane. PFD. p, 53.

Staff takes exception to the Hearing Officer's recommendation that a condition be added to the Draft Permit requiring the Applicant to submit new site plans eliminating the proposed deceleration lane. Staff does not object to the Applicant updating its site plans, but from a procedural point of view, Staff objects to issuing a permit based on site plans that are not correct and require further revision. Instead, Staff recommends that the Application be remanded to Staff, that the Applicant be required to submit revised site plans, that Staff be afforded an opportunity to review the revised site plans, and provided the revised site plans are acceptable, the permit can then be issued based on site plans that require no revision.

Staff's exception is well taken. I agree that Staff must have a full opportunity to review the site plans for a facility and make its views known and that this must occur before a permit can be issued. In this case, Staff had that opportunity during the hearing process. Staff has reviewed and has raised no objection to the May 31, 2014 revised site plans, including the elimination of the proposed deceleration lane. All that remains is essentially a ministerial act, the submission of revised site plans with a very specific omission that is well known to all of the parties. In this limited circumstance, especially since Staff has reviewed and has no objection to the May 31, 2014 revised site plans, minus the proposed deceleration lane, I see little risk in adding a condition to the Draft Permit allowing the Applicant to submit a revised site plan to conform to the ruling of the Hearing Officer. In reaching this conclusion I emphasize my understanding and expectation that this is simply a matter of resubmitting the May 31, 2014 revised site plan, minus the proposed deceleration lane. No other revisions need be or should be

made. Should the Applicant or Staff determine that other, even minor changes should be made, such changes can occur after the permit is issued, through the permit modification process.

To ensure that this matter is addressed expeditiously, and partly to address Staff's concerns, I will add a condition that does not allow construction of the Proposed Facility, unless and until Staff has had the opportunity to review and approve the revised site plan.[20] A new Condition B.1 should be added to the permit as follows:

1. a. The Permittee shall not commence construction of the Facility until:

   i. The Permittee has submitted to the Commissioner a revised site plan for the Facility that is identical to the May 31, 2014 site plan submitted to the Commissioner by the Applicant, except for the omission of the proposed right-turn deceleration lane; and

   ii. The Commissioner has reviewed and approved, in writing, the revised site plan submitted under section B.1.a of this Permit.

(The remaining provisions of section B of the Draft Permit should accordingly be renumbered).

K. Revisions to the Draft Permit: There are a number of revisions that need to be made to the Draft Permit. Most, noted below, are self-explanatory. I have provided an explanation regarding a change, if one was necessary.

1. Page 1, introductory provisions, after PERMITTEE, replace "MSW Associates" with "MSW Associates, LLC" and on the fourth line of the first paragraph, add "Transfer Station and" before Volume Reduction Plant, so it is clear that the permit is for both a transfer station and a volume reduction plant.

2. Page 2, Section A.2:

   - Consistent with the Applicant's O & M Plan, add the following definitions:

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[20] I mention here that there is often a brief period of time between the issuance of a final decision and the issuance of a permit based on that final decision. Given the minor nature of the change to the site plans, there is no reason that the Applicant cannot or should not utilize this time for submission of the revised site plan, thereby allowing Staff to ensure that any permit that is issued is based on a site plan that does not require any further revision. Should this occur, new Condition B.1 noted above can be omitted and Staff can make any adjustment it deems necessary to Section A.1 of the Draft Permit regarding a listing of the documents and specifications incorporated into and upon which the permit was based.

"Construction and Demolition Wood Fuel" or "C & D Wood Fuel" means the wood portion of construction and demolition waste to be used a fuel which has been sorted to remove plastics, plaster, gypsum wallboard, asbestos, asphalt shingles, regulated wood fuel and wood which contains creosote or to which pesticides have been applied or which contain substances defined as hazardous waste under Conn. Gen. Stat. § 22a-115.

"Regulated Wood Fuel" means processed wood from construction and demolition activities to be used as a fuel which has been sorted to remove plastics, plaster, gypsum wallboard, asbestos, asphalt shingles and wood which contains creosote or to which pesticides have been applied or which contain substances defined as hazardous waste under Conn. Gen. Stat. § 22a-115.

"Fuel" means a substance containing combustibles used for producing heat, light, power or energy.

(These terms are used in section C.4 of the Draft Permit, but were not defined).

3. Page 3, Section A.6, add to the very beginning of this section, "Provided a permit modification is not required under Section 22a-208(d)(1) of the CGS" and at the end of this section replace "Section 22a-208 of the CGS" with "Section 22a-208a of the CGS."

4. Page 3, Section B, add new condition B.1 as specified in page 52 of this Final Decision and renumber the remaining provisions of section B.

5. Page 5, Section C.3

   - In Section C.3.c replace the parenthetical "(i.e. 6.p.m. through 7 a.m. or "overnight hours")" with "(i.e., 6 p.m. to 7.a.m., Monday through Saturday or "overnight hours" and all day Sunday)"

   - In paragraph d, replace "overnight operations of the Facility" with "overnight hours and all day Sunday"

6. Page 5, Section C.4.b – first sentence, replace "a total" with "a combined total" and in the Facility Total line of the Table entitled "Maximum Daily Processing Capacity" change "800D" to "800TPD"

7. Pages 6-8, Section C.5

   - In the Table entitled "Maximum Facility Storage," add a notation that "cy" means cubic yards.

- In section C.5.b., delete the following sentence – "Outside storage of solid waste shall be in containers that are watertight and covered at all times and shall occur only in the areas designated on the facility plan referenced in Condition A.1.a, as above."

- In section C.5.f., replace "Piles of unprocessed clean wood" to "Piles of unprocessed clean wood inside the facility" and replace "piles of processed clean wood chips shall: have a maximum height of fifteen (15) feet, be stored in containers if stored outside…" with "Piles of processed clean wood chips stored inside shall not exceed a height of fifteen (15) feet. Processed clean wood chips stored outside in containers shall be stored…"

- In section C.5.i, delete the last sentence of this section

  (This changes to Sections C.5.b., C.5.f and C.5.i., will ensure that these sections conform to the requirements in the Table entitled "Maximum Facility Storage" in Section C.5, page 6).

8. Page 8, Section C.6.a., add "No later than thirty (30) days after their receipt" to the beginning of the sentence that starts "The Permittee shall hire a licensed contractor…"

9. Page 9, Section C.7.e, in the second paragraph, in (i) replace "be immediately conveyed" with "immediately provided," in addition, replace "incident; (ii) verified" with "incident, provided" and renumber "(iii)" and "(iv)" as "(ii)" and "(iii)" respectively.

10. Page 11, Section C.7, add a new subdivision m as follows:

    The Permittee shall ensure, whenever the Facility is open, that the area identified in the Solid Waste Permit Plan, dated April 11, 2011, as travel lanes for vehicles is plowed and otherwise kept free from obstructions at all times to allow for the movement or the queueing of vehicles.

11. Page 13, In Section C.11(a) replace "mitigate" with "prevent."

12. Page 13, Section C.12

    - Replace "Section 22a-209-10(13) of the RCSA and Sections 22a-208e and 22a-220 of the CGS" ' with "Sections 22a-209-9(p) and 22a-209-10(13) of the RCSA."

    - At the end of the section add the following sentence "The Permittee shall also comply with all applicable recordkeeping requirements of sections 22a-208e and 22a-220 of the CGS."

13. Page 14, Section C.14.

    - In the initial paragraph replace "effective date" with "issuance date" and delete "in conjunction with the general requirements of section 22a-209-4(i) of the RCSA"

- Replace "The Permittee shall acknowledge and accept the following" with "The Permittee acknowledges and shall ensure that it complies with the following:"

- In Section C.14.b replace – "The financial assurance instruments shall follow" with "The financial assurance instrument used by the Permittee to comply with section C.14 of this Permit shall comply with"

- In Section C.14.c.ii add "Bond" after "Performance"

- In Section C.14.e add "establishment of the" before the second occurrence of the term "instrument" and delete "the requirements of."

14. Pages 15-17, Section C.15

- In Section C.15.b.(iii) add "and" at the end of this provision and delete "and" at the end of Section C.15.b.(iv).

- In Section C.15.b – make (v) a separate paragraph, so it is not part of paragraphs (i) to (iv). Also, replace "originally identified" with "approved by the Commissioner" and add "the Permittee shall" before "notify"

- In section C.15.c.(iii) – replace "The compliance auditor shall include in the compliance audit" with "Include"

- In section C.15.d.(iv) – replace "Describe in detail" with "An evaluation and detailed description of"

- In section C.15.d.(v) – replace "Identify" with "An identification of"

- In section C.15.d. (vii) – replace "Include findings regarding the inspections conducted in accordance with this condition" with "The findings of the compliance auditor regarding the inspections conducted in accordance with Section C.15.c. of this Permit"

- In section C.15.d. (viii) – replace "Describe the" with "A detailed description of all"

- In Section C.15.e, delete "and consultant"

- In Section C.15.e. (i) replace "inspection" with "auditing"

- In Section C.15.e (ii) replace the first occurrence of "P.E. or consultant" with "compliance auditor" and replace "The P.E. or consultant shall also" with "The Permittee shall" and replace the two occurrences of "inspection" with "compliance audit."

- In Section C.15.e (iii) add "under Section C.15.e.ii of this Permit" after "the notification date."

- In Section C.15.e (iv) replace the first sentence with the following: "The Permittee shall ensure that no later than fifteen (15) days after a compliance audit, a compliance report that meets the requirements of Section C.15. of this Permit, is submitted to the Commissioner."

- In Section C.15.f, add to the beginning of this condition, "In addition to any other sanction authorized by law," replace "inspection(s)" with "compliance audit(s)" and at the end of this section add "The Commissioner may seek a similar sanction for any other violation of this Permit."

15. Page 18, Section C.18

- Delete "or action" and "or performed"

16. The following editorial/typographical changes should be made:

- Quotation marks should be replaced with an apostrophe in the following Sections: B.1.a, B.1.c, B.1.k, B:4,C.5.b, C.5.c, C.7.1, C.8.b, C.14, C.14.d, C.15.a, C.15.b, C.15.c, C.15.d.iv, C.15.d.ix, C.15.e and anywhere else where this revision should be made.

- Throughout the Draft Permit, the term "of this Permit" should be added, when reference is being made to a condition of this permit. For example, replace "condition A.1.a" with "Condition A.1.a of this Permit." In addition, references to condition numbers should contain the full citation to the appropriate section of the permit, so, for example, "Condition No. 7.k.v" should be changed to "Condition C.7.k.v"

- Page 8, Section C.6.a. replace "(10 with "(10)"

- Throughout the Draft Permit, the terms "VRP," "VRP Building" and "operations building" should be replaced by the term "Facility."

Michael J. Sullivan
Deputy Commissioner
Department of Energy and Environmental Protection

S E R V I C E   L I S T

In the matter of MSW Associates, LLC – Permit to Construct and Operate a Volume Reduction Plant
Application No.: 201103241

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