IN THE MATTER OF	:	*ORDER NO. WC-5199*
TOWN OF BROOKFIELD	:	*MARCH 26, 2003*

FINAL DECISION

I
SUMMARY

This is an appeal of a community pollution problem order that was issued by the commissioner of environmental protection to the Town of Brookfield. This order was the result of the failure of the subsurface sewage treatment and disposal systems at three condominium complexes located in Brookfield: Cedarbrook Owners, Inc. (Cedarbrook); Whisconier Village Condominium Association (Whisconier); and Stony Hill Village Associates (Stony Hill). According to the order, the failure of these septic systems was allowing partially treated domestic sewage to discharge onto the surface of the ground, causing pollution to the waters of the state. The order found that a community pollution problem existed and directed the respondent to take actions to remedy the problem. The Town of Brookfield (respondent) requested a hearing to appeal the order.

In a Proposed Final Decision released on October 9, 2002, the hearing officer concluded that a preponderance of the substantial evidence indicated that a community pollution problem exists in Brookfield. He also found that the order is the most prudent solution to solving this pollution problem and that its requirements are reasonable and fully supported by the record. He therefore recommended that the final decision affirm the order "in its entirety with one minor modification".

The parties filed exceptions to the proposed decision and requested oral argument, which was held on January 23, 2003. Regs., Conn. State Agencies §22a-3a-6(y)(3). I affirm the recommendation of the Proposed Final Decision. However, in response to the parties' exceptions, issues raised in oral argument, and upon a review of the record in this matter, this Final Decision modifies the Proposed Final Decision to clearly articulate those findings of fact and conclusions of law that support an affirmation of the community pollution problem order. General Statutes §4-179(b). This Final Decision will also clarify the recommendation of the Proposed Final Decision that the order be affirmed "in its entirety with one minor modification".

II

CLARIFICATIONS TO PROPOSED FINAL DECISION

These corrections and clarifications to the proposed decision are necessary to support the findings of fact and conclusions of law in this final decision. They include changes requested by the parties.

A
FINDINGS OF FACT

Page 4, FF A. 4. The parenthetical statement in the first bullet is revised as follows. "(The DEP considers ~~this~~ **hydraulic site constraint** to be the most important **single issue and a critical** factor in determining ~~permit issuance~~ **whether a site like Stony Hill can receive a permit.)"** The citation is revised as follows. (Ex. DEP-8; test. R. May, 11/17/97, pp. ~~116,117,~~ **119-120; test. M. Bartos, 11/17/97, p. 125**.)

Pages 5 and 6, FF A. 9. The third sentence of the second bullet is revised to read: "When sanitary sewers are near the condominiums, the **lower** cost to lay a sewer line may make this alternative ~~less~~ **more** viable."

Page 6, FF A. 11. The reference to "Findings of Fact No. 10 or 11" is changed to "Findings of Fact **No. 9 or 10**".

Page 7, FF A. 12. The FF and citation are modified to read: "Based upon years of experience in reviewing subsurface sewage **systems** problems, staff had serious concerns about the technical feasibility to solve the sewage problem **on** site. (Test. R. Smith, 11/17/97, pp. 74**-78.**)"

Page 7, FF B. A. 1. The second sentence of the FF and the citation are revised to read: "~~The complex generates an~~ **In April 1995, the** average daily flow of **sewage at the complex was reported as** approximately 5400 gallons ~~of sewage~~." (Ex**s.** DEP-**10,** 14; test. J. Perry, **10/27/97, p. 26,** 11/6/97, Part I, p. ~~46~~ **48.**)

Page 7, FF B. A. 2. The FF is changed to read: "Cedarbrook is one-quarter of a mile from Whisconier and about two miles from Stony ~~Brook~~ **Hill**".

Page 8, FF B.A. 3. The FF and citation are corrected as follows: "In 1994, staff received complaints from residents regarding septic odors and standing water. DEP staff Jennifer Perry, a ~~licensed~~ sanitary engineer, conducted an on-site investigation **in August 1994** and confirmed ~~a~~ septic breakout**s** next to the most southerly septic field **and near a condominium building**. ~~Based on that inspection, she concluded that the system was failing.~~ **These breakouts were evidence of system failure. Perry inspected the site in October 1994 and twice in January 1995. She found that the initial breakouts still existed and determined that three septic fields were actively failing.** (Exs. DEP-3, **13**; test. J. Perry, 3/9/00, **pp**. **5**, 13-~~14~~**19.**)

Page 9, FF A. 7. The second sentence of the FF is revised as follows. "Currently, Cedarbrook has neither obtained **approval** of **the** contract plans and specifications **it submitted**, nor implemented the **ultimate** recommendations of the CCA report." The citation is revised as follows. (Ex**s**. DEP- **14**, 16; test. J. Perry, 10/27/97, pp. 42-45; 7/27/00, pp. **31-**34. ~~, 36~~.)

Page 10, FF B.B. 2. The reference to "March 21, 1999" in the FF is changed to "March 21, **1996**". The citation is revised as: (Ex. DEP-19; test. J. Perry, 3/9/00, p**p.** 26**-27**, ~~8/9/00, pp~~. 30-31.)

Page 12, FF B.B. 7. The FF and citation are modified as follows. "The requirements of the order have not been fulfilled, **but the condominium has been aware of problems with its septic system for some time and submitted a report prior to this order proposing a possible solution.** Whisconier did not appeal the order. ~~and the order became final insofar as Whisconier's involvement in the proceeding of March 9, 2000~~. (**Test. 11/18/97, E. McCaffrey, pp. 4-16;** test. J. Perry, 11/18/97, p**p.** 21- ~~22~~**, 3/9/00, pp. 32-33.**)

Page 12, FF B.C. 3. The FF and the citation are corrected as follows. "On nine occasions between April 21, 1993 through May ~~16~~ **15**, 1996…." (**Exs. DEP-22, 23, 24, 25**; test. J. Perry, 3/9/00, pp. ~~6-35~~, **6-7, 11-13, 33-41**.)

Page 12, FF B.C. 4. The following modification is made to the FF and the citation. "In February of 1996, staff took samples from Stony Hill's ~~groundwater~~ **ponded effluent,** which indicated the presence of fecal bacteria." (Test. J. Perry, 10/27/97, pp. **2 -**18.)

Page 13, FF B.C. 6. The FF is modified as follows. "Stony Hill's consultant …determined that the cause was that the ~~leaching galleries were~~ **groundwater table was** close to or above the leaching galleries in some areas."

Page 13, FF B.C. 8. The FF is revised to state: "The DEP ~~will~~ **can**not **reissue** ~~renew~~ Stony Hill's discharge permit because its septic system is failing." The citation is modified as follows. (**Test. R. Smith 11/17/97, p. 106;** test. J. Perry, 3/9/00, pp. 35-37.)

Page 14, FF B.C. 11. The FF is revised as follows. "Based upon its years of experience in reviewing ~~sub-sewage problems~~ **subsurface sewage disposal systems**, DEP staff had serious concerns about the technical feasibility of fixing the sewage problems on site.**"** The citation is corrected as follows. (Test. R. Smith, 11/17/97, ~~p. 74~~ **pp. 73-79.**)

B
CONCLUSIONS OF LAW

The Proposed Final Decision concludes: "The order contains these required essential elements and fully complies with this provision of General Statutes §22a-428, where applicable." (Proposed Final Decision, p. 15.) This sentence is revised as follows. **"The order contains a time schedule and fully complies with §22a-428 of the General Statutes."**

The Proposed Final Decision recommends that the final decision-maker affirm the order "in its entirety with one minor modification". This statement is later clarified: "I recommend that the final decision-maker *affirm* Order No. WC-5199, and direct staff to adjust all schedules or timeframes in the order commencing with the date of issuance of a final decision in this matter." This adjustment is the "minor modification" referred to in the proposed decision.

III
FINAL DECISION

A
FINDINGS OF FACT

1
Procedural Background

1. While this matter was pending, the intervenor Cedarbrook moved to reopen the hearing to offer evidence of its current water conservation practices and maintenance, and to provide new evidence on its present capacity to borrow money to fund possible repairs of its septic system. Cedarbrook argued that this evidence would provide a more current record. The respondent objected, arguing that this case was its appeal of its order, not Cedarbrook's appeal of its own order. The hearing officer issued a ruling denying the motion with no discussion.[1]

2. In its post-hearing brief, the DEP declares that it "withdraws from [the order] paragraph A.5. and thus from consideration in this hearing". Paragraph A.5 finds: "At least one of the condominium developments has been refused financing for the construction of a subsurface sewage treatment and disposal system repair". The Proposed Final Decision includes this finding.[2]

[1] These pleadings are public documents and are included in the files of the Office of Adjudications.

[2] This brief and the Proposed Final Decision are public documents and are included in the files of the Office of Adjudications.

2
The Brookfield Condominiums

3. Cedarbrook, Whisconier and Stony Hill are all located in the Town of Brookfield. Cedarbrook and Whisconier are both on Whisconier Road (Route 25) and are approximately one-quarter of a mile of each other. Stony Hill is located on Stony Hill Road, and is less than two miles south of the other two condominiums. These three condominiums have a total of 235 dwelling units. (Exs. DEP-6,7,14,18; test. J. Perry, 3/9/00, pp. 7-8, 48-50.)[3]

4. The three condominiums have septic systems for on-site sewage treatment and subsurface disposal of more than 5,000 gallons of sewage per day. Systems of this size require a permit from the DEP, which are issued after the DEP evaluates the system design according to its criteria that include system size, site hydraulics and pollutant renovation. Permits specify a design flow or average daily flow for the system, and require monitoring, inspection, and maintenance. Permittees must submit discharge monitoring reports (DMRs) to the DEP according to a schedule set out in the permits. (Exs. DEP-8, 21; test. J. Perry, 3/9/00, pp. 8-11, 13, 34; test. M. Bartos, 11/17/97, pp. 125-126.)

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[3] The hearing began on October 27, 1997. Because of a recording problem, the first of three tapes of the proceedings on that day was not transcribed. It was therefore necessary to re-create the direct testimony and cross-examination of DEP staff witness Jennifer Perry from that hearing date. This was done on March 9 and July 27, 2000, and the transcripts of those dates reflect that re-creation. In addition, there are two transcripts for the hearing held on November 6, 1997. References to Part I of that transcript refer to the first part of the hearing; Part II refers to the transcript for the rest of the day's proceedings. **The order of the transcribed hearing proceedings is therefore as follows. March 9, 2000, July 27, 2000, October 27, 1997, November 6, 1997(Part I), November 6, 1997(Part II), November 17, 1997, November 18, 1997 and April 27, 2001.**

5. Septic system failures are indicated in two principal ways. The first failure is indicated by evidence of groundwater contamination, which is demonstrated by the presence of pathogenic bacteria, viruses, or elevated nitrogen compounds in sampled groundwater. Breakout of untreated or partially treated effluent indicates the second type of failure. This is evidenced by the presence of features such as effluent on top of a leaching system, noxious odors, or a grayish fungal growth in any water ponded on the system. (Ex. DEP-9; test. J. Perry, 3/9/00, pp.11-13.)

6. The DEP found evidence of groundwater contamination and/or surface breakout at all three condominium sites. As a result of on-site investigations and testing at the sites and review of documents including DMRs submitted by at least one condominium, DEP staff concluded that at least one septic system failure had occurred at each condominium site. Thereafter, the Commissioner issued orders to each condominium to abate the discharges and resulting pollution to the waters of the state. (Exs. DEP-10, 13, 17-20, 22-26; test. J. Perry, 3/9/00, pp. 13- 20, 25-40; test. W. Hogan, 11/6/97 Part II, pp. 134-138, 141-146, 11/17/97, pp.65-66.)

7. The Town of Brookfield owns and operates a sanitary sewerage system, which discharges treated sanitary sewage to the City of Danbury sewerage system under the terms and conditions of Danbury's NPDES permit. (Ex. DEP-1.)

(a)
Cedarbrook Condominium

8. Cedarbrook appealed the issuance of the order against it, and eventually entered into a consent order with the DEP. As required by the consent order, Cedarbrook submitted a report prepared by its consultant that identified the system failures and proposed alternative remedial actions. This sanitary system study suggested the alternative of constructing a new on-site septic system. This system would have to be placed in fill because the existing soils did not have adequate hydraulic capacity and the existing groundwater table was very shallow. The study also proposed a sewer connection as a possible solution, but noted that more information from the municipality was needed to develop a cost estimate. (Exs. DEP-11, 12, 14; test. J. Perry, 3/9/00, pp. 20-23, 7/27/00, pp. 29-30, 40-45.)

9. Following DEP approval of the study, Cedarbrook performed the investigation outlined in its scope of study and submitted contract plans and specifications as required by the consent order. Cedarbrook never obtained DEP approval of these plans and specifications and never applied for any water discharge permits or any other required approvals to carry out the recommended remedial actions. Cedarbrook explained that its inaction was because it was unable to pay for any repairs to its failed systems, and, as proof, submitted a written statement outlining its unsuccessful efforts to obtain loans or make other financing arrangements such as the implementation of member assessments. (Exs. DEP-15,16; test. J. Perry, 3/9/00, pp. 24-25, 7/27/00, pp. 29-46, 10/27/97, pp. 45-53, 57-58.)

(b)
Whisconier Village Condominium

10. Whisconier did not appeal the order issued to it and did not intervene in this matter. The order directed Whisconier to submit an updated version of a 1992 report prepared by an engineer hired by the condominium association that identified the sewage problems at the condominium and recommended a possible solution. The order directed Whisconier to submit plans and specifications for the approved remedial action and to file an application for a discharge permit following DEP approval of the updated report. At the time of the order to Brookfield, Whisconier was in compliance with its order because its order was issued after Brookfield's order and the dates for its compliance had not yet arrived. As of October 27, 1997, Whisconier had not submitted the amended report. (Exs. DEP-18, 20; test. J. Perry, 3/9/00, pp. 28-33.)

(c)
Stony Hill Village Condominium

11. Stony Hill did not appeal the order issued to it, but was granted intervenor status in this proceeding. Its order directed Stony Hill to submit a scope of study for the investigation of the existing systems and to perform an investigation of those systems. The scope of study was timely submitted and approved by the DEP. Stony Hill prepared and submitted a report of its investigation, which DEP rejected because it did not present a septic system design that met the criteria for permitted systems. The DEP informed the condominium of the problem and gave a deadline for provision of the additional information. A new design plan has not been submitted, but DEP believes that theoretically, an approvable design would repair the system on site. (Ex. DEP-26; test. J. Perry 3/9/00, pp.40-41, 11/6/97, pp. 11-17, 36-42.)

3
The Community Pollution Problem Order

(a)
The Decision-Making Process: Factors Considered by the DEP

12. When deciding whether to recommend the issuance of a community pollution order, DEP staff considers whether the municipality or municipalities in which the pollution is located can best abate that pollution. The particular factors staff evaluates to make this determination include the following.

- The size of the geographic area and the number of pollution problems within it. Staff also considers the number of dwelling units that are in the area and the flow rates that are involved. These factors allow staff to decide whether an order should be issued to a particular person or property, or whether the number of problems in the area is such that the problems are best addressed as a community pollution problem. The areas need not be contiguous, but are usually in a similar geographic area of the community.
- The cost of possible solutions, and the general ability of any respondent to reasonably afford certain potential alternative solutions. This includes the consideration that a municipality may be in a better position to pay for a project. For example, a town may be able to assess residents or obtain funding from the Clean Water Fund. However, the question of who might pay, and how, are not considered when deciding whether to issue an order. Details of affordability are considered following the issuance to the order during the investigation of alternatives as part of the engineering report produced as directed by an order when a goal is to find the most cost effective solution.

- A potential respondent's ability to enter into contracts to carry out possible alternative solutions, including execution and management of large-scale construction contracts and contracts with other municipalities, especially where facilities such as sanitary sewer systems are shared. All these responsibilities are generally easier for a municipality to fulfill; it is not always possible, and may be impossible, for a private entity to do the same.
- If a possible solution could require the acquisition of property, whether this would be by purchase or condemnation. A municipality "may…take and hold by purchase, condemnation or otherwise…real property…which it determines is necessary or desirable for use in connection with any sewerage system…."§7-247. Private entities do not have power to obtain property through condemnation.
- The technical feasibility of possible solutions, and the ability of a respondent to implement those solutions that would provide long-term reliability. This includes an assessment of the respondent's technical skills or resources. Generally, as admitted by the respondent, a municipality is better able to construct and operate a sewer system than a private entity such as an individual condominium.
- If the residents of a particular area have indicated that they want to handle a pollution problem themselves, staff considers whether this would be possible. Staff considers the problem to be addressed, assesses the technical viability of the solution, and considers the resources that the residents would need to implement the solution. However, a situation may still be defined as a community pollution problem and an order issued as a result, regardless of the actual implementation or preferred alterative that ultimately resolves the problem.

- Whether the circumstances of the pollution at issue are similar to other instances where a community pollution problem exists. Since the Clean Water Act was passed by the state in 1967, DEP has issued approximately 900 orders to municipalities. Most of these orders have been for community pollution problems.
- The significant experience and expertise of staff with such problems and the results and recommendations following technical and legal reviews to support a decision of the Commissioner who has sole discretion to determine whether a pollution problem is best abated by the action of the municipality and whether a community pollution problem order should be issued.

(Ex. DEP-27; test. W. Hogan, 11/6/97 Part II, pp. 48-50, 57- 68, 77-120, 138-139, 147-150, 11/17/97, pp. 52-53, 56, 59-62, 4/27/01, pp. 15-19, 21-22; test. R. Smith, 11/17/97, pp. 82-94.)

13. In deciding whether to issue this community pollution order, staff, relying on its experience and professional judgment, specifically considered the following factors. All were evaluated equally evaluated; no one factor was given more consideration.

- The three condominium sites represent a large number of dwelling units with active septic system failures that are causing pollution to the waters of the state. The failures at these three clusters of housing are causing a pollution problem in the same geographic area.
- All three sites are within approximately one-half mile to a mile from sewer connections. The DEP considers this to be a reasonable distance. If these distances were confirmed, connecting to the sewer system could be a viable alternative.

- The three septic systems involved all have problems that present questions as to the technical feasibility of fixing the problems on site and ensuring that any fix would provide long-term reliability. DEP guidelines for engineering standards for septic systems are considered when assessing this possibility. Site constraints present a challenge; each site will require substantial amounts of fill. Filled systems are not conventional fixes where new trenches are constructed in existing soil. Costs are also estimated to be relatively high.
- In addition to all the factors (outlined above) that can place a municipality in the best position to abate the pollution, public monies could be available to the respondent from the Clean Water Fund.
- Issuing this order to the respondent would legally obligate the municipality to participate in the solution to the pollution problem.
- The experience, expertise and professional judgment of all staff involved in this process supported the issuance of the order to the respondent.

(Exs.DEP-27; test. W. Hogan, 11/6/97 Part II, pp. 66- 68, 81-88, 127-134, 146-153, 11/17/97, pp. 62-67, 69; test. R. Smith, 11/17/97, pp. 75-79, 83-85, 93-95, 101-107, 113-114.)

14. The following procedure is typical for decisions to issue an order and was followed in this case. After assessment of the criteria for issuance of a community pollution problem order, a staff member discusses his or her conclusions with his or her immediate and more experienced supervisor. This supervisor submits a draft of the order to his superior for review. In-house legal counsel also reviews the draft. Following these reviews, the order goes to the Bureau Chief for concurrence.

Following the approval of the Deputy Commissioner, the order is given to the Commissioner for his consideration and signature. Orders are also discussed in regular staff meetings, and the experience and knowledge of all staff members are considered. Staff also consults with supervisors throughout the process, seeking advice and input. Staff also relies on the experience and expertise of staff from other areas in the Department who contribute their own experience and judgment. (Test. W. Hogan, 11/6/97 Part II, pp. 74-77, 96- 100; test. R. Smith, 11/17/97, pp. 75, 78-81.)

(b)
The Terms of the Order

15. The requirements of the order are defined and described. The respondent could also seek input from the DEP; the name and address of a staff contact person is noted in the order. In a typical case, consultants for a municipality would work with DEP staff to develop a common understanding as to what needs to be in a particular report or study to comply with an order. For example, to avoid duplication of effort, the respondent would be advised to submit a scope of study that takes into account the studies done or due from the three condominiums as a result of the orders issued to them. Drafts are typically submitted to the DEP for review and comment, and negotiations often take place to agree on final terms of a required document before it is submitted for “review and approval” pursuant to the terms of an order. Guidance as to contents of documents and reports are also found in readily accessible sources such as guidelines in the DEP Clean Water Fund regulations or through a request to the DEP for information. (Ex. DEP-1; test. W. Hogan, 11/17/97, pp. 7-25, 27-48; test. R. Smith, 11/17/97, pp. 98-101.)

16. The time frames for actions the respondent must take are typical for an order of this kind, and the schedules of actions the respondent must take to comply with the order reflect standard procedures and practices. It is typical for respondents to request extensions of time in fulfilling the requirements of an order. If the requested period of additional time is reasonable and the circumstances of the request warrant an extension, the DEP would probably grant some extension of time for compliance. Although the specific dates for compliance have passed, the DEP believes the same amount of time between actions would be reasonable if the order is affirmed and modified by this decision. (Ex. DEP-1; test. W. Hogan, 11/6/97 Part II, pp. 68-74, 154-164, 11/17/97, pp. 4-6, 25-27, 44-45, 11/17/97, pp. 70-71.)

17. The DEP has no plans to revoke any of the there orders issued to the individual condominiums, but also has no present plans to enforce the orders beyond the production of engineering reports that would describe at least one alternative to solve the septic system problems. The DEP will continue to proceed with the community pollution problem order and work with the respondent on developing and evaluating other possible solutions. It is the respondent's responsibility to ultimately remediate this pollution problem. The reports produced by the three condominiums will be used as a base of information on which to have this municipality build a broader investigation and consider other possible alternatives. (Test. R. Smith, 11/17/97, pp. 81, 96-114.)

B

CONCLUSIONS OF LAW

1
Proposed Final Decision

The hearing officer did not err in denying Cedarbrook's motion to reopen the hearing to take evidence that it argued would provide a more current record. After a hearing, new evidence is only admitted if it is relevant and material and there was good cause for the failure to offer it previously. Regs., Conn. State Agencies §22a-3a-6(w). Evidence of the intervenor's current water conservation practices and maintenance, as well as new evidence on its present capacity to borrow money to fund possible repairs to its septic system, was irrelevant and immaterial to this appeal of the order issued to the respondent Town of Brookfield.

2
The Community Pollution Problem Order

(a)
DEP Decision-Making Process

The State's *Water Pollution Control Act* is found at General Statutes §§22a-416 through §22a-484. Section 22a-428 provides that if the Commissioner finds that a community pollution problem exists, he may issue an order to a municipality to abate the pollution. A "community pollution problem" is defined in §22a-423 as "the existence of pollution which, *in the sole discretion of the commissioner*, can best be abated by the action of a municipality." (Emphasis added.)

Many of the water pollution control statutes expressly require the development of standards or the promulgation of regulations to implement their objective. For example, §22a-426 directs the Commissioner to adopt water quality standards. Section 22a-430 requires the establishment of "procedures, criteria and standards" for water discharge permits. Section 22a-430b(b) provides that a general permit for certain categories of water discharges shall be issued, modified, revoked or suspended "in accordance with the standards and procedures specified for an individual permit".

Section 22a-428 does not require the adoption of standards or the promulgation of regulations to govern the issuance of community pollution problem orders. The statute explicitly provides that if the Commissioner determines that a community pollution problem exists, he may issue such an order to a municipality. This determination, based on whether pollution exists that can best be abated by the action of a municipality, is within "the sole discretion of the commissioner". §22a-423. No language in any part of either statute circumscribes the Commissioner's clear discretionary authority to decide and act.

"Statutes are to be construed to carry out the intent of the legislature. The intention of the legislature, expressed in the language it uses, is the controlling factor…." (Internal citations omitted.) *Aaron v. Conservation Commission*, 183 Conn. 532, 548 (1981). It is clear that the legislature has left the decision to the Commissioner as to whether pollution can best be abated by a municipality. As his agents, DEP staff has the task of reviewing pollution problems to determine whether a community pollution problem exists and recommending a decision to the Commissioner.

Section 22a-428 was enacted in 1967 and codified as §25-54g. Since then, the only significant amendment to its provisions actually provided the language that enhanced the Commissioner's discretion to decide whether to issue a community pollution problem order. In 1973, Public Act 73-665 replaced "shall" to "may" in the following provision of the statute: "If the commissioner finds that…a community pollution problem exists…he ***may*** issue…an order to abate pollution". Since that time, the legislature has not seen the need to modify this statute to further define, eliminate or otherwise restrict this grant of case-by-case discretion.

Of course, as with any administrative agency, actions by the DEP cannot be "arbitrary or capricious or characterized by abuse of discretion". §4-183(j)(6). These terms are necessarily vague; they reflect the authority that the legislature has vested in administrative agencies. *Wasfi v. Department of Public Health*, 60 Conn. App. 775 (2000). The ultimate duty of a reviewing court is to determine whether, in view of all the evidence, the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343 (2000). This standard of judicial review guides this administrative decision to assure that this agency's issuance of the community pollution problem order was within these limits on its discretionary authority.

DEP staff provided extensive testimony as to its decision-making process, the criteria it evaluates to establish whether a community pollution problem exists, and the specific criteria that were the basis for its recommendation to the Commissioner. This evidence demonstrates that the DEP did not act unreasonably in deciding to issue this order to the respondent. Its

decision was also neither arbitrary nor an abuse of the legislature's grant of sole discretion to the Commissioner to determine when a pollution problem is best abated by a municipality.

The respondent argues that the DEP has failed to articulate reasonably consistent standards by which it determines that a community pollution problem exists, and has not demonstrated how those factors logically apply to the order in dispute. The respondent claims that an agency must consider all relevant factors in making its decision and must provide a reasoned explanation for its action that does not run counter to the evidence before it. The case law cited by the respondent to support its allegation of arbitrariness cites precedent for how the federal courts examine federal law to evaluate agency decisions. *Sinclair Broadcast Group, Inc. v. Federal Communication Commission*, No. 01-1079 (D.C.Cir., April 2, 2002.) Significant to this analysis, that decision notes "where issues involve 'elusive' and 'not easily defined' areas … our review is considerably more deferential, according more broad leeway to the Commissioner's … determinations."

A review of the record, particularly the transcripts of the hearing, reveals a lengthy and clear explanation by experienced DEP staff as to the standards generally evaluated and the specific standards assessed in this case. The numerous factors evaluated by staff demonstrate, contrary to the argument of the respondent, that not every problem would be a community pollution problem. Quite simply, there will be cases where the Commissioner could decide that the municipality is not in the best position to abate a pollution problem. These criteria have served as the basis for decisions since the DEP began to deal with community pollution problems under §22a-428 when it was first passed in 1967.

This decision did not contradict the evidence before DEP. The DEP decision-making process relies on the experience and expertise of its senior staff; that same staff trains less experienced staff in evaluating cases. In addition to reliance on experts, these decisions are not unsupported; they are based on experienced judgments that include evaluations of technical and scientific data. It is well established that "[a]n agency may rely on its own expertise in evaluating evidence within that area of its expertise." *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580, 593 (1991).

A community pollution problem is defined by its remedy. §22a-423. To serve this statutory standard, the various factors involved in making such a decision and their interaction require experienced judgment calls and decisions. The legislature gave the Commissioner the "sole discretion" to decide whether a certain municipality can best abate a particular problem. Although based on DEP criteria, experience, and conclusions drawn from objective studies and investigations, given the variability between contaminated sites and the consequent differences between situations, the legislature recognized that the Commissioner needs the authority and ability to decide whether to issue these orders on a case-by-case determination through an exercise of discretion. The legislature clearly intended that the Commissioner have this discretion and has not moved to restrict or further define this responsibility . Remedial in nature, §§22a-423 and 22a-428 should be liberally construed. See *Knight v. F.L. Roberts Co. Inc.,* 241 Conn. 466 (1997).

The respondent argues that when standards are arbitrary and capricious, the regulated community cannot anticipate possible liability. The respondent maintains an agency must have standards that "are as reasonably precise as the subject matter requires and are reasonably adequate and sufficient to …enable those affected to know their rights and obligations." *Smith v. Zoning Board of Appeals*, 227 Conn. 71, 94 (1993). In addition, the respondent argues, "Although some standards may be general, the regulation must be reasonably sufficient to identify the criteria to be evaluated in …enforcement." Id. The standards that the DEP uses to determine whether a community pollution problem exists are as reasonably precise as the subject matter requires and are reasonably adequate and sufficient to permit municipalities to know their rights and obligations.

Municipalities should be aware of the presence of septic systems within their boundaries. Section 22a-416(c) provides that the Commissioner may delegate to municipalities the authority to review and approve plans and specifications for the design and construction of sanitary sewers in their community. It is not unreasonable to assume that municipalities such as the respondent understand that leaking septic systems at several locations in a town would cause pollution, and that such pollution could be designated as a community pollution problem. One of the responsibilities of municipal water pollution control authorities is to prepare and periodically update a water pollution control plan for the municipality. This plan "shall…describe the means by which municipal programs are being carried out to avoid community pollution problems." §7-246(b). It therefore seems a bit disingenuous for municipalities to argue that they would have no notice of the types of problems that could lead to the issuance of a community pollution problem order.

The record demonstrates that the decision of the DEP to issue the order to the respondent was well reasoned and was arrived at after an established decision-making process. There was no abuse of the legislative grant of discretion to the DEP to evaluate and act on community pollution problems.

(b)
Terms of the Order:
Financial Finding

The DEP has declared that it is withdrawing Paragraph A. 5 (financial finding) from the order and from consideration in this hearing. This paragraph states: "At least one of the condominium developments has been refused financing for the construction of a subsurface sewage treatment and disposal system repair".

In effect, DEP staff is seeking a modification of the order. If the order is upheld without this paragraph, the order is deemed valid without a finding as to the financial resources of at least one of the condominiums that has a failed septic system.

The evidence presented on this issue at the hearing was not sufficient to establish that the DEP was able to corroborate the truth of this matter. Even if confirmed, there was no evidence that senior staff relied on this claim in deciding whether to issue the order. In any event, staff need not have. Evidence of the specifics of how a respondent might pay is relevant to decisions as to implementation of the order, particularly as to alternatives that may be considered. The decision to issue an order such as the order to the respondent needs no finding as to the ability of a condominium to pay for a possible solution. The order is valid without Paragraph A. 5.

(c)
Terms of the Order: Reasonableness

The respondent maintains that the terms of the order are unreasonable, arbitrary and capricious because they either impose unreasonable obligations or because they fail to adequately explain what the DEP requires for compliance. These arguments are unpersuasive. An examination of the order and its terms, and consideration of staff testimony at the hearing, show that the requirements of the order are reasonable and adequately define the obligations of the respondent.

The time frames for actions the respondent must take are typical for an order of this kind and reflect standard procedures and practices. The requirements of the order are adequately defined and described as necessary to put the respondent on notice as to its terms for compliance to find solutions to this community pollution problem.

In addition, as noted in testimony of DEP staff, the respondent could also seek input from the DEP. In fact, it is likely that the respondent and its consultants will work with DEP staff on compliance issues such as required reports or studies. Due process requires that the respondent have adequate notice of the terms of the order and be able to ascertain what it needs to do to comply with the order. This order provides due process to the respondent.

C
MODIFICATIONS TO THE ORDER

Order No. WC 5199 is modified as follows.

Section A. 5. is omitted.

Section B-1-a. orders the respondent to "retain one or more qualified consultants acceptable to the Commissioner to prepare the documents and implement or oversee the actions required by this order" and to identify this consultant or consultants within approximately two months of the date of issuance of the order. As suggested by DEP staff, this time period is revised to "**three months of the date of issuance of this final decision".**

Section B-1-f. directs the respondent to submit contract plans and specifications for the approved remedial actions "on or before ninety (90) days after approval of the [engineering] report described in [section B-1-e.]." As suggested by DEP staff, this deadline is modified to "on or before **180 days** after approval…".

All other deadlines are modified to reflect deadlines calculated from the date of the issuance of this final decision.[4]

[4] The proposed decision recommends that the final decision-maker affirm the order and direct staff to adjust all schedules or timeframes in the order commencing with the date of issuance of a final decision in this matter. This adjustment of schedules is the "minor modification" to the order noted by the hearing officer earlier in that decision.

D

CONCLUSION

The Commissioner did not abuse the sole discretion granted to him under the express authorization of §22a-428 in acting to abate this community pollution problem. The evidence in the record clearly demonstrates that staff used well-established criteria and followed practiced decision-making to arrive at a reasonable recommendation that this pollution problem was best abated by the respondent municipality and therefore qualified as a community pollution problem. §22a-423. The order is valid without the paragraph A.5 regarding the potential inability of one of the condominiums to obtain financing for a solution. All of its remaining terms, as modified above, are reasonable and provide adequate notice to the respondent.

As recommended by the Proposed Final Decision, Order No. WC 5199, as modified herein, is *affirmed*.

March 26, 2003
Date

/s/ David K. Leff
David K. Leff
Deputy Commissioner

P A R T Y   L I S T

Final Decision in the matter of Town of Brookfield, Order No. WC-5199

PARTY	*REPRESENTED BY*
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