



STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION



<i>IN THE MATTER OF</i>	:	<i>APPLICATION NOS.:</i>
<i>PLAINFIELD RENEWABLE ENERGY, LLC</i>	:	<i>DIV-200603081 (Diversion)</i>
	:	<i>200602249 (Solid Waste)</i>
	:	<i>200602226 (Air)</i>
	:	<i>200702055 (Discharge)</i>
<i>April 13, 2009</i>	:	<i>200800492 (Discharge)</i>

Decision on Request for Reconsideration

The intervening party, Friends of the Quinebaug River ("FQR"), has filed a timely motion asking the Commissioner to reconsider her final decision of March 2, 2009. The applicant, Plainfield Renewable Energy, LLC ("PRE") has objected to FQR's motion.¹ In accordance with the Uniform Administrative Procedure Act and this agency's Rules of Practice, a party may request reconsideration of a decision on the ground that an error of fact or law should be corrected, new evidence has been discovered which materially affects the merits of the case and was not presented in the agency proceeding for good reason, or other good cause has been shown. General Statutes § 4-181a, Regs., Conn. State Agencies § 22a-3a-6(z). FQR has based its motion on each of these factors.

¹ The applicant indicates in its objection that the hearing officer expressly disallowed testimony by the witnesses offered by FQR on matters raised in its motion, affirmatively concluding that such witnesses were not qualified as experts with respect to such matters. This is incorrect and misrepresents the numerous opportunities provided to FQR at the hearing to present evidence. At no time did the hearing officer make any determination on the qualifications of FQR's witnesses other than one finding based on Dr. Parasiewicz's admission that he had no background in power plant design or operation. A review of the record shows that FQR was presented with an opportunity to call witnesses on various topics at appropriate times in the hearing and elected not to present those witnesses.

Background

FQR was a full participant in the hearing as a party. It was provided with the full opportunity to discover evidence, present exhibits, cross-examine witnesses, and to put on its own witnesses. During the course of the hearing, FQR called two witnesses who did not provide specific evidence that PRE's proposed activity would cause unreasonable pollution. In addition, FQR opted not to participate in cross examination of PRE's final two witnesses. FQR was advised by the hearing officer that several of its proposed exhibits were not admitted as evidence, but rather were marked for identification purposes only; in fact, FQR never attempted to have these documents admitted into the record. The majority of information presented by FQR was submitted after the close of the hearing in the form of a comment from an individual. While FQR filed exceptions to the proposed final decision, it neither requested oral argument before the Commissioner nor sought to submit a brief in support of its position.

Errors of Fact or Law

FQR alleges two errors of fact or law. The first relates to alleged inconsistencies between PRE's Quality Assurance/Quality Control document entitled, "Operating, Sampling & Testing Requirements, Volume Reduction/Facilities Generating C&D Wood Chips for Delivery to PRE," dated January 18, 2008 ("CA/QC document"), that was incorporated into the solid waste permit and whether PRE can operate the facility in compliance with the Solid Waste Regulations while utilizing the QA/QC measurements. The second alleged error concerns PRE's preferred cooling system.

The First Alleged Error of Fact or Law

FQR alleges that if PRE were to utilize the acceptance limits set forth in the table located on page 9 of PRE's QA/QC document (DEP-SW-1, Tab N, Exh. 1), then PRE could not be in compliance with General Statutes § 22a-209a and PRE's solid waste permit. FQR argues that it has data which supports its position. Notably, FQR did not present this data or even pursue this argument during the underlying proceeding. Consequently, FQR cannot now allege an error of fact or law on this basis.

From the beginning of this permit proceeding, it was well known that PRE's fuel supply would include construction and demolition ("C&D") wood. FQR had access to PRE's QA/QC document and the proposed solid waste permit throughout the proceeding, and thus had the opportunity to argue that the QA/QC document was incongruous with the solid waste regulations and the proposed solid waste permit. FQR has not, until now, argued that it would

be problematic for PRE to utilize its QA/QC table and still comply with solid waste requirements. In reviewing FQR's motion, it appears that the information relied upon by FQR was available at the time of the underlying proceeding and was not pursued.

Nevertheless, a review of the record reveals that PRE has complied with statutory and regulatory requirements. PRE needs a number of permits to operate its facility, including both solid waste and air permits. In accordance with its solid waste permit, PRE is obliged to comply with General Statutes § 22a-209a, which involves sorting the C&D wood to remove, among other things, wood containing creosote, pesticides or hazardous substances. PRE's QA/QC document is replete with references to its commitment to a rigorous screening and sorting process to remove wood treated with or containing creosote, pesticides and hazardous substances. This commitment is evidenced by its training of personnel and use of equipment and technologies to effectively screen, sort and segregate acceptable wood fuel sources from unacceptable materials in the C&D waste stream, and monitoring, sampling, testing and reporting of materials to ensure the acceptability of the material. In addition, the Commissioner requires that PRE retain the services of an independent fuel management monitor as an additional means in which to ensure PRE's compliance with its solid waste permit.

The acceptance limits set the maximum allowable level of contaminate the wood fuel can contain. PRE acknowledges in its QA/QC document that the acceptance limits are subject to change. PRE is required to comply with Regs., Conn. Stat. Agencies § 22a-174-29 and must demonstrate compliance for each hazardous air pollutant emitted from its facility, which includes the substances identified by FQR. In addition, an annual stack test will be required for all the hazardous air pollutants identified in part VI of PRE's air permit. Consequently, adjustments to the wood fuel characteristics will need to be made if air emissions stack testing shows that PRE falls out of compliance with its air permit.

In order to operate, PRE must be in compliance with its permits. The interface of both the solid waste and air permits ensures that the Department has the necessary safeguards in place to protect public health and the environment.

The Second Alleged Error of Fact or Law

As previously raised in its exceptions, FQR claims the alternative of air cooling is the only method of cooling that truly avoids or minimizes the impacts to Hinckley soils. FQR cites to the blue binder submitted after the hearing as evidence of a feasible and prudent alternative. Portions of this binder submitted by Mr. Noiseux represent exhibits that were marked for

identification purposes only but were never fully admitted into evidence. There is substantial evidence in the record that PRE explored the air cooling alternative and eliminated it because of its impacts and cost. Substantial evidence also indicates that there are impacts associated with air cooling that are never addressed by FQR.

There is no error of fact or law found here. The hearing officer effectively weighed the limited evidence that FQR provided on the impacts of the diversion and discharge against the substantial evidence that the proposed diversion and discharge met the statutory and regulatory requirements and determined that there was no unreasonable pollution. FQR has not demonstrated that these particular findings, inferences and conclusions are erroneous in view of the substantial evidence in the entirety of the record. Rather, FQR simply asserts its own view and position as to how these findings of fact should be drawn from the evidence. The authority to assess the credibility of witnesses and right to believe or disbelieve the evidence presented by any witness are within the province of an administrative agency. *Briggs v. State Employees Retirement Commission*, 210 Conn. 214, 217 (1989).

New Information is Available to the Public

FQR cites to a recent decision by the U.S. Fish & Wildlife Service relating to the removal of an obstruction to fish passage in the Moosup River for a restoration project as evidence that the discharge will have an unreasonable impact on anadromous species in the Quinebaug River. The report, detailing the project in the Moosup River, mentions the possible fish passage at the Aspinook Dam that will bring anadromous species to this part of the Quinebaug and into the Moosup. This possibility is referenced in the evidence. Ex. DEP-DIV-17, 31L, Tab K; DEP-DIS-27.

The diversion permit includes a smaller sized intake screen since anadromous species are more susceptible to entrainment. PRE will also be required to conduct an impingement and entrainment study upon notice that anadromous species are provided with passage at the Aspinook Dam. The existence of the fish passage will not change the characteristics of this resource area. It is still mainly a ponded area and the species in the area will remain unaffected by the thermal plume.

In addressing thermal impacts, PRE indicated that free swimming fish will avoid an area of higher temperature. PRE also addressed the impacts to spawning anadromous fish coming upstream. The limited size of the thermal plume allows a sufficient cross section of the river to allow for the passage of spawning anadromous fish. The National Academy of Science recommends at least 33% of the cross section be available for passage. The impacts from PRE's thermal discharge at their maximum are less than 5% of the cross section of this portion of the

river. FQR offered no rebuttal to this evidence. Ex. DEP-DIV-31L, Tab K, Environmental Impacts Report, pp. 24-25.

FQR contradicts itself by stating that the possibility of an unreasonable impact on anadromous species in the Quinebaug River exists, then acknowledges DEP's awareness of the possible fish passage at the Aspinook Dam. There was testimony in the hearing about this potential fish passage and it is part of the discharge permit and other supporting documents. This is not new information; FQR should have presented any evidence to support its position at the time of the hearing.

Other Good Causes for Reconsideration

First Reason

FQR cites its belief that it can independently sue to stop these permits as an "other good cause." This is not a compelling reason to reconsider a decision based on substantial record evidence. Furthermore, FQR misstates the standard of "unreasonable" provided by the Connecticut Supreme Court in *Waterbury v. Washington*, 260 Conn. 506 (2002). The Court held that "unreasonable" does not mean anything more than a *de minimis* impact. In other words, the impact has to be more than just beyond *de minimis*; there must be a violation of a statutory standard. The findings throughout the Proposed Final Decision that the impact is *de minimis* are indicative of the fact that FQR has not made a prima facie case of unreasonable pollution.

Second Reason

FQR cites to concerns about the impact of the development on the environmental remedy for the Gallup's quarry site as a reason to stop the permitting. FQR offers no reason why information about the Gallup's Quarry superfund site was not presented during the hearing. It was understood that this was a superfund site and that the remedy for the site includes monitoring, natural attenuation and land use controls. FQR cites to the 2007 five-year review of the remedy, a document clearly available prior to the start of the hearing. The evidence presented in the hearing indicated that PRE's efforts will have no impact on the remedy. The EPA's only concern in the record about use of the site related to the effect of pumping groundwater from the site for cooling water. As a result of EPA's concern, this cooling water alternative was not chosen. There was no evidence presented on this issue at the hearing and it is not new information.

Third Reason

FQR again cites to the information in the blue binder submitted by Mr. Noiseux for the notion that the Department should have considered the binder's contents in reference to the choice of cooling technology. FQR says that it was error to decline to consider the contents. Including this information as evidence after the close of the hearing would instead have violated the due process rights of the applicant by taking away its right to object to the inclusion of the evidence or to cross examine witnesses.

Denial of Intervening Party's Due Process

FQR argues that its due process rights were violated because the Commissioner did not address the exceptions of Margaret Miner, a non-party. In accordance with the Rules of Practice, pleadings must be signed by a party or someone authorized to appear on behalf of a party. Regs., Conn. State Agencies § 22a-3a-6(b). It was never clear that Ms. Miner's comments were to be considered as a pleading from FQR. Ms. Miner's comments on the proposed final decision were nonetheless reviewed closely. The fact that they were not specifically addressed in the final decision is not good cause to reconsider the final decision. It is certainly not a violation of due process.

Conclusion

FQR's Motion for Reconsideration of the Commissioner's Final Decision is hereby denied. The Commissioner's Final Decision dated March 2, 2009, remains intact.

4/13/09
Date

Nicole M. Lugli

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