



STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION



HEARING REPORT

Proposed Amendments to Section 22a-174-23

Control of Odors

Background Information

Since June of 1972, the Department of Environmental Protection (DEP) has enforced section 22a-174-23 (formerly 19-508-23) of the Regulations of Connecticut State Agencies concerning control of odors. (Prior to that the DEP and the Air Pollution Control Section of the Connecticut Health Department which preceded the DEP, enforced section 19-13-G29 of the regulations of the Clean Air Commission.) The current regulation is centered upon a determination by a DEP inspector that an odor is objectionable after he or she has taken into consideration its nature, concentration, location and duration.

Odor complaints make up the majority of citizen complaints received by the DEP's Bureau of Air Management (BAM). Due to the transient nature of odor situations it is difficult for a BAM inspector to verify a complaint; even when an odor is detected and the company identified, the actual source or operation may not be known. The number of State orders issued solely for odor violations is correspondingly small. Due to the nature of the problem, resolution of an odor situation has sometimes been a long and involved process. Reviews of the DEP's files on odor complaints were performed by the Connecticut Fund for the Environment (CFE) and the Legislative Program Review and Investigations Committee (Program Review). CFE's review was used as background information for a Petition for Rulemaking to amend section 22a-174-23. Program Review's audit was performed to develop findings and recommendations concerning the BAM's management, enforcement activities, complaint processing, air testing and inspections. Both Program Review and CFE noted that there have been instances where complaints about odors from specific sources were received over a period of several years.

In one example a company controlled one operation, such as a curing oven, only to find that another portion of its facility, such as a resin impregnating operation, was also causing a problem. This resulted in a series of enforcement actions and the Department was not able to resolve the situation as quickly as affected citizens would have desired. Representatives of environmental groups representing affected citizens (such as the CFE and the Milford/Stratford Citizens for a Better Environment) have asked that the DEP review odor regulation programs in other States to determine if improvements could be made to Connecticut's program.

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On the advice of, and with the assistance of, the Office of the Attorney General, the DEP reviewed its record of odor complaints, Connecticut's current odor regulation program and the odor regulation programs used by other States and local air pollution control agencies. Working directly with representatives of Connecticut environmental groups and affected industries, the Department has proposed changes in the program which will better enable the DEP to determine when a violation exists and to develop an appropriate enforcement response.

In conformance with the administrative rulemaking process, DEP published a Notice of Intent to Amend Regulations, describing the changes and announcing the public hearings on the regulation, in the Connecticut Law Journal on November 7, 1989. The public hearings were conducted on December 7, 1989. Carl S. Pavetto, Chief of the Bureau of Air Management, was designated as the Hearing Officer by Commissioner Leslie Carothers. In addition, the DEP provided for an extended comment period to accept written comments.

Outline of the Proposed Amendments

Under the current regulation a representative of the Commissioner must make a subjective determination that an odor is considered to be "objectionable". The proposed amendments are intended to make the odor regulation more specific, more objective and more easily enforceable. In general, the amendments would do the following:

1. Under the amendments, there would be three ways that violations of the odor regulation could be determined.
 - A. The regulation incorporates the concept of nuisance in that a source would be in violation of the regulation if it emits an odor which unreasonably interferes with a third party's enjoyment of life or use of his or her property.
 - B. A measuring device such as a scentometer can be used to determine a violation. (A scentometer is a hand held device which allows clean odor free air to be combined with a sample of ambient air to determine the number of dilutions needed to provide an odor free result.) Under the proposed change, any sample which is not odor free after seven dilutions would be considered a violation.
 - C. Ambient concentration levels are set for certain materials and a measurement above any of those concentrations would be a violation.
2. The DEP could use air quality modeling to estimate ambient concentrations and determine if a violation exists. DEP would use modeling, however, only if there are a significant number of citizen complaints.
3. In addition, the amendments specify that if the DEP finds a violation of the odor regulation but is unable to determine which of

several sources caused that violation, DEP may order the suspected sources to investigate whether they have caused or contributed to the violation and to make necessary corrections.

4. Finally, the regulation would continue to exempt mobile sources, private dwellings and under certain conditions agricultural activities.

Outline of this Report

As required by 4-168 of the Connecticut General Statutes (CGS), (this statutory provision sets forth the requirements which agencies must follow in the adoption of regulations), this report discusses the final wording of the proposed amendment, the principal reasons in support of the final amendment, and the principal considerations raised in opposition to the amendment along with the Department's reasons for rejecting such considerations. The following describes the content of each portion of the regulation as proposed for the hearing, summarizes the issues raised by commentors, provides a response from the Department which describes the actions taken by the Department and the reasons for the changes and provides the final regulation recommended in this report. The list of individuals who provided comments is provided at the end of this report.

SUBSECTION (a), USE OF THE NUISANCE CONCEPT TO CONTROL ODORS

1. The general provisions of subdivision (a)(1) were proposed to read as follows:

NO PERSON SHALL CAUSE OR PERMIT THE EMISSION OF ANY SUBSTANCE OR COMBINATION OF SUBSTANCES WHICH CREATES OR CONTRIBUTES TO AN ODOR, BEYOND THE PROPERTY BOUNDARY OF THE SOURCE, THAT CONSTITUTES A NUISANCE.

Summary of Comments: For subdivision (a)(1), there were concerns that:

the term "person" was not defined;

odors are not considered "air pollution" under 22a-170 CGS;

the proposed regulation may preempt local authority;

the use of nuisance as a public rather than a private problem may cause confusion;

there are potential problems in determining property boundaries when deciding where a violation exists; and

the words "or contributes to" in the phrase "No person shall cause or permit the emission of any substance ... which creates or contributes to an odor..." lacks a minimum standard for determining a violation.

Response

The terms "person" and "air pollution" are defined in the General Statutes. Under 22a-170 CGS and section 22a-174-1 of the Regulations, the term "person" is defined as "every individual, firm, partnership, association, syndicate, company, trust, corporation, municipality, and any other legal entity". Under 22a-170 CGS, the term "air pollution" refers to an "air pollutant" which under 22a-174-1 means "... odorous substances, or any combination thereof...".

The existing regulation and the proposed amendment are not intended to preempt local authority. Under Sec. 22a-185 CGS (Municipal districts for control of air pollution) "Any municipality ... may adopt ordinances or regulations for the control of air pollution" In addition, the statute provides that "... nothing contained in this section shall prohibit a municipal ordinance or regulation from imposing stricter controls than the regulations promulgated hereunder" (i.e. section 22a-174-23). It should also be noted that section 22a-2a-1 of the Department's regulations also permit the delegation of the authority to enforce this regulation to a municipal Director of Health.

Use of the concept of "nuisance" has been a successful enforcement tool in other areas of the country for the resolution of odor problems. Thus, the nuisance concept helps to define a situation in which an odor is not just detectable but, in fact, is objectionable. Adding the criterion of nuisance to assist the DEP in determining a violation was one of the primary purposes for the proposed amendment. The use of this term in these regulations will not have an impact on an individual's ability to bring a private nuisance action.

In order to properly define the location where an odor would constitute a violation, the term "beyond the property boundary" in the proposed regulation has been replaced with "into the ambient air" throughout the regulation. The term "ambient air" is defined in section 22a-174-1 and means "that portion of the atmosphere, external to buildings, to which the general public has access".

The phrase "or contributes to" is used in other provisions of the existing air pollution regulations. The Department must be able to address any contribution to an odor problem since there are often cases in which an odor problem would not exist except for the contribution of several sources. The relative impact of the source is taken into consideration in determining the appropriate enforcement action taken against the source and in determining the actions which the source must then take.

2. The nuisance standards used in subdivision (a)(2) were proposed to read as follows:

AN ODOR CONSTITUTES A NUISANCE IF PRESENT WITH SUCH INTENSITY, CHARACTERISTICS, FREQUENCY AND DURATION THAT:

- (A) IT IS, OR CAN REASONABLY BE EXPECTED TO BE, INJURIOUS TO PUBLIC HEALTH OR WELFARE, OR
- (B) IT UNREASONABLY INTERFERES WITH THE ENJOYMENT OF LIFE OR THE USE OF PROPERTY, CONSIDERING THE CHARACTER AND DEGREE OF INJURY TO, OR INTERFERENCE WITH, THE HEALTH, GENERAL WELFARE, PROPERTY, OR USE OF PROPERTY OF THE PEOPLE AFFECTED, AND THE LOCATION OF THE POLLUTION SOURCE AND CHARACTER OF THE AREA OR NEIGHBORHOOD AFFECTED. WHETHER THE SOURCE OF THE EMISSIONS WAS PRESENT IN THE LOCATION FIRST SHALL NOT BE A CONSIDERATION.

Summary of Comments: Several commentors were concerned with using nuisance as a factor in determining a violation of the odor regulations. There were comments that the phrase "unreasonably interferes with the enjoyment..." is too subjective. In addition, several commentors expressed concern that the amendment specifically excluded using the fact that the source of the emissions was present in the location first as a consideration in determining a violation.

Response

The terms used to define a nuisance are consistent with the common law provisions regarding nuisance and provide that the Department must determine that an odor is having a certain impact on people in the area. As part of that finding the Department is required to take into consideration the following issues:

- (1) the character and degree of injury to, or interference with, health, welfare or the enjoyment of life or use of property; and
- (2) the location of the pollution source and character of the affected area.

In all cases the commissioner exercises a wide discretion in weighing the equities involved and the advantages and disadvantages to the residents of the area and to any lawful business, occupation or activity resulting from requiring compliance with the specific requirements of any order or regulation. This includes consideration of the social and economic value of the activity involved and the practicality of reducing or eliminating the discharge resulting from such activity. Although this is a case-by-case determination, it is less subjective than the present standard that the odor be "objectionable". This type of a determination will provide greater guidance to the source and the Department about what impacts cause a finding of a violation.

In general, the defense of "coming to the nuisance" (i.e. that the source was in operation before the affected party moved into the area) is not available in Connecticut and this is made explicit in the regulation. The character of neighborhoods necessarily changes as do the types of operations performed by a company and the kinds of materials used. A company should not have free rein to pollute beyond its property boundary just because it happened to be there first, and all Connecticut citizens should have the right to live without significant odor problems.

3. Information used to determine a violation was specified in subdivision (a)(3) which was proposed to read as follows:

EXCEPT AS PROVIDED IN SUBSECTION (b) OF THIS SECTION, IN DETERMINING WHETHER AN ODOR CONSTITUTES A NUISANCE THE COMMISSIONER SHALL REVIEW INFORMATION GATHERED FROM ANY SOURCE, INCLUDING BUT NOT LIMITED TO CITIZEN COMPLAINTS AND SITE INSPECTIONS OR SURVEYS.

Summary of Comments: Several commentators were concerned about the use of citizen complaints in determining a violation and that the term "source" was not clear in the context in which it is used.

Response

The purpose of this subdivision is to permit the Department to use any available information to assist in its investigation and to not be limited solely to the results of its own inspections. Citizen complaints are only one of the available sources of information. The fact that citizen complaints have been received is only one of the factors used to determine if a violation exists. The Department need not take an enforcement action solely on on the basis of a citizen complaint nor does there need to be a citizen complaint prior to the Department's finding that a violation exists. To clarify the term "source" in this subdivision the words "of information" have been added to show the context in which it is used.

RECOMMENDED FINAL WORDING OF SUBSECTION (a)

In subdivision (1), change the phrase "beyond the property boundary" to "into the ambient air". No changes to subdivision (2). In subdivision (3), add the words "of information" after the word "source". The final wording of subsection (a) should be:

(a)(1) NO PERSON SHALL CAUSE OR PERMIT THE EMISSION OF ANY SUBSTANCE OR COMBINATION OF SUBSTANCES WHICH CREATES OR CONTRIBUTES TO AN ODOR, IN THE AMBIENT AIR, THAT CONSTITUTES A NUISANCE.

(2) AN ODOR CONSTITUTES A NUISANCE IF PRESENT WITH SUCH INTENSITY, CHARACTERISTICS, FREQUENCY AND DURATION THAT:

(A) IT IS, OR CAN REASONABLY BE EXPECTED TO BE, INJURIOUS TO PUBLIC HEALTH OR WELFARE, OR

(B) IT UNREASONABLY INTERFERES WITH THE ENJOYMENT OF LIFE OR THE USE OF PROPERTY, CONSIDERING THE CHARACTER AND DEGREE OF INJURY TO, OR INTERFERENCE WITH, THE HEALTH, GENERAL WELFARE, PROPERTY, OR USE OF PROPERTY OF THE PEOPLE AFFECTED, AND THE LOCATION OF THE POLLUTION SOURCE AND CHARACTER OF THE AREA OR NEIGHBORHOOD AFFECTED. WHETHER THE SOURCE OF THE EMISSIONS WAS PRESENT IN THE LOCATION FIRST SHALL NOT BE A CONSIDERATION.

(3) EXCEPT AS PROVIDED IN SUBSECTION (b) OF THIS SECTION, IN DETERMINING WHETHER AN ODOR CONSTITUTES A NUISANCE THE COMMISSIONER SHALL REVIEW INFORMATION GATHERED FROM ANY SOURCE OF INFORMATION, INCLUDING BUT NOT LIMITED TO CITIZEN COMPLAINTS AND SITE INSPECTIONS OR SURVEYS.

SUBSECTION (b), THE DETECTION OF ODORS IN THE AMBIENT AIR

Subsection (b) was proposed to read as follows:

ODOR BEYOND THE PROPERTY BOUNDARY OF A SOURCE SHALL BE DEEMED TO CONSTITUTE A NUISANCE IF A REPRESENTATIVE OF THE COMMISSIONER OR AT LEAST FIFTY PERCENT OF ANY GROUP OF REPRESENTATIVES OF THE COMMISSIONER DETERMINES, BASED UPON AT LEAST THREE SAMPLES OR OBSERVATIONS IN A ONE HOUR PERIOD, THAT AFTER A DILUTION OF SEVEN PARTS CLEAN AIR TO ONE PART SAMPLED AIR, THE ODOR IS EQUAL TO OR GREATER THAN THE ODOR DETECTION THRESHOLD. EACH OF THE THREE OR MORE SAMPLES OR OBSERVATIONS SHALL BE SEPARATED BY AT LEAST FIFTEEN MINUTES. THE BURDEN OF REBUTTING THE PRESUMPTION OF NUISANCE CREATED BY THIS SUBSECTION SHALL BE ON THE OWNER OR OPERATOR OF THE SOURCE.

Summary of Comments: There were comments regarding:

the definition of property boundary;

the types of sampling and measurement methods required;

the clean air to sample dilution used;

the length of the sampling period;

the ability to determine the offending source;

training for Department inspectors;

changing the requirement that at least 50% of a group must detect an odor to more than 50%; and

the provisions for a company to rebut the finding of nuisance under this subsection and how a company could take samples at the same time as the Department.

Response

In order to properly define the location where an odor would constitute a violation, the term "beyond the property boundary" in the proposed regulation has been replaced with "into the ambient air" throughout the regulation. The term "ambient air" is defined in section 22a-174-1 and means "that portion of the atmosphere, external to buildings to which the general public has access".

In regards to the methods used to determine if a violation exists, the regulation does not specify the exact method or equipment to be used. Rather, the regulation allows the Department to use whichever methods are appropriate for the situation. It will be possible to use a device in the field which provides the necessary dilution ratios or to use a sampling method which gathers a sample for analysis at a later time.

The standard of seven parts clean air to one part sampled air (7-1) is used by other air pollution control agencies. Information from other agencies and equipment manufacturers indicates that odors above this standard are likely to cause citizens to complain. This appears to be the level at which an odor is not just detectable, but in fact is a source of interference with the normal activities of an individual. In order to check the reasonableness of the 7-1 standard, we reviewed the ratios used in other States. Of the 20 odor regulating programs reviewed, 5 had 7-1, 2 had 8-1, 2 had sliding scales of 4-1 to 16-1 depending on the zoning of the affected area and the others used a general prohibition regulation.

The regulation requires that samples be taken with at least a fifteen minute separation. Although this may limit the use of this regulation when there is a short-term or accidental release of a material. The primary purpose of this regulation, however, is to ensure the control of operations where the repeated release of odors may occur.

The Department will continue to provide training for the technical staff. It is unnecessary for the regulation to specify the level of training that is necessary for a Department inspector before he or she is legally able to determine that an odor violation exists. A source may still argue that the inspector in a given case incorrectly determined that a violation existed because the inspector was inadequately trained.

The requirement that at least 50% of the testers need to determine that a nuisance exists should not be changed. The regulation allows one inspector to make such a determination on his or her own. In a situation where two Department inspectors were present, changing the wording from "at least" to "more than" 50% would prohibit the same inspector from making a determination if the second inspector did not agree.

The language permitting the rebuttal of the nuisance finding was included at the suggestion of industry to make it clear that the determination that a nuisance exists could be challenged.

Under current practices the Department performs two types of inspections, scheduled and unannounced. If the Department schedules an inspection for the purposes of taking a sample, the source can do simultaneous testing if it wants or can be provided with a copy of the results of the BAM's analysis. However, many inspections performed to determine the presence of odors are necessarily unannounced and in those cases the source would be unable to do simultaneous testing. In addition, many odor complaints (and inspections) occur during non-business hours and the inspector may not be able to get in contact with plant personnel. In the event that the inspector does determine that an odor is present at a seven to one dilution, the Department will provide the company with information about the test results as soon as practicable.

RECOMMENDED FINAL WORDING OF SUBSECTION (b)

Change the phrase "beyond the property boundary" to "in the ambient air". The term "nuisance created by this subsection" should be changed to "nuisance under this subsection". The final wording of this subsection (b) should be:

ODOR IN THE AMBIENT AIR SHALL BE DEEMED TO CONSTITUTE A NUISANCE IF A REPRESENTATIVE OF THE COMMISSIONER OR AT LEAST FIFTY PERCENT OF ANY GROUP OF REPRESENTATIVES OF THE COMMISSIONER DETERMINES, BASED UPON AT LEAST THREE SAMPLES OR OBSERVATIONS IN A ONE HOUR PERIOD, THAT AFTER A DILUTION OF SEVEN PARTS CLEAN AIR TO ONE PART SAMPLED AIR, THE ODOR IS EQUAL TO OR GREATER THAN THE ODOR DETECTION THRESHOLD. EACH OF THE THREE OR MORE SAMPLES OR OBSERVATIONS SHALL BE SEPARATED BY AT LEAST FIFTEEN MINUTES. THE BURDEN OF REBUTTING THE PRESUMPTION OF NUISANCE UNDER THIS SUBSECTION SHALL BE ON THE OWNER OR OPERATOR OF THE SOURCE.

SUBSECTION (c) CONCENTRATIONS IN THE AMBIENT AIR

Subsection (c) refers to substances on Table 23-1. This subsection and Table were proposed to read as follows:

NO PERSON SHALL CAUSE OR PERMIT THE EMISSION OF ANY SUBSTANCE OR COMBINATION OF SUBSTANCES WHICH RESULTS IN OR CONTRIBUTES TO A

CONCENTRATION, BEYOND THE PROPERTY BOUNDARY OF THE SOURCE, IN EXCESS OF ANY CONCENTRATION STATED IN TABLE 23-1 OF THIS SECTION.

TABLE 23-1

ODOR LIMIT VALUE IN PARTS PER MILLION, FIFTEEN-MINUTE AVERAGE

<u>COMPOUND</u>	<u>CONCENTRATION</u>
<u>CHLORINE</u>	<u>0.0240</u>
<u>ETHYLACRYLATE</u>	<u>0.00037</u>
<u>ETHYL MERCAPTAN</u>	<u>0.00040</u>
<u>FORMALDEHYDE</u>	<u>2.49</u>
<u>HYDROGEN SULFIDE</u>	<u>0.0045</u>
<u>METHYL ETHYL KETONE</u>	<u>17.0</u>
<u>METHYL MERCAPTAN</u>	<u>0.0010</u>
<u>METHYL METHACRYLATE</u>	<u>0.34</u>
<u>PERCHLOROETHYLENE</u>	<u>71.0</u>
<u>PHENOL</u>	<u>0.12</u>
<u>STYRENE</u>	<u>0.15</u>
<u>TOLUENE</u>	<u>11.0</u>

Summary of Comments: For this subsection there were concerns about:

- the selection of the substances and concentrations;
- the methods to be used to determine the concentration;
- how the phrase "or contributes to an odor" would be used; and
- the relationship of this regulation to the Hazardous Air Pollutant Control Program;

Response

The substances were selected after a review of the Department's records for complaints received. These compounds or an odor which corresponds to these compounds were the most common causes of odor complaints in Connecticut. The concentrations proposed are the "recognition threshold" or the level at which the substance can be recognized (i.e., identified as that particular substance). This threshold is above the "detection threshold" where an individual can

smell something, but cannot identify the particular substance. The concentrations selected were based upon a report prepared for the American Industrial Hygiene Association. The report was reviewed by Department staff, the Department of Health Services, representatives of the business and industry community and representatives of citizen groups, all of which assisted the Department in the development of the proposed regulation. Although these representatives could not reach a full consensus on the final numbers, with some thinking they were too low and others too high, the Department discussed and considered the views of all and decided that these numbers represent the best available information. It should be noted that when compared to the values used in the current regulation, eight of the twelve odor limit values in the new regulation are larger (i.e. less stringent) than the odor limit values in the existing regulation. In addition, the current regulation has no minimum sampling time period.

As suggested by several representatives of industry at the hearings, these number should only represent the levels at which a nuisance is presumed to exist. That this presumption is rebuttable under the regulation should be made clear so that a company may rebut the finding of the existence of a nuisance situation.

The regulation purposely does not specify a test method to be used to determine the ambient concentration. Sampling protocols will vary from situation to situation. In some instances it may be more appropriate to perform in-stack sampling rather than ambient monitoring. The regulations allow the necessary flexibility to use procedures which are appropriate for the circumstances under which the individual test is performed.

As stated in the response to subdivision (a)(1) above, the phrase "or contributes to" is used in other provisions of the air pollution regulations. The Department must be able to address any contribution to an odor problem. The relative impact of the source is taken into consideration in determining the appropriate enforcement action taken against the source and in determining the actions which the source will then take.

A comparison of the Odor Limit Values (OLVs) from Table 23-1 and the Hazard Limiting Values (HLVs) used in section 22a-174-29 (Hazardous Air Pollutants) shows that there is no direct relationship between the values. For some compounds the OLV is greater than the HLV and for other compounds the OLV is smaller than the HLV. These two programs are intended to operate independently of each other. The OLV is used to determine if an emission of a compound is causing an odor problem. The purpose of the HLV is to reduce the public health risk from the emission of that compound.

In addition, as in other portions of the regulation, in order to clarify the location where an odor would constitute a violation, the term "beyond the property boundary" in the proposed regulation has been replaced with "into the ambient air" throughout the regulation. The "ambient air" means that portion of the atmosphere, external to buildings to which the general public has access.

RECOMMENDED FINAL WORDING OF SUBSECTION (c) AND TABLE 23-1

Keep the Odor Limit Values as they were proposed. In subsection (c): delete the words NO PERSON SHALL CAUSE OR PERMIT THE EMISSION OF; add the words ODOR IN THE AMBIENT AIR SHALL BE DEEMED TO CONSTITUTE A NUISANCE IF ; delete the words "WHICH RESULTS IN OR CONTRIBUTES TO; add the words "IS PRESENT AT"; delete the phrase "beyond the property boundary of the source"; and add the sentence THE BURDEN OF REBUTTING THE PRESUMPTION OF NUISANCE CREATED BY THIS SUBSECTION SHALL BE ON THE OWNER OR OPERATOR OF THE SOURCE. . The final wording of subsection (c) should be:

(c) ODOR IN THE AMBIENT AIR SHALL BE DEEMED TO CONSTITUTE A NUISANCE IF PRESENT AT A CONCENTRATION IN EXCESS OF ANY CONCENTRATION STATED IN TABLE 23-1 OF THIS SECTION. THE BURDEN OF REBUTTING THE PRESUMPTION OF NUISANCE CREATED BY THIS SUBSECTION SHALL BE ON THE OWNER OR OPERATOR OF THE SOURCE.

SUBSECTION (d), INDEPENDENCE OF THE GENERAL NUISANCE PROVISION

Subsection (d) was proposed to read as follows:

THE COMMISSIONER MAY DETERMINE THAT AN AMBIENT ODOR WHICH DOES NOT EXCEED THE LIMITS SET FORTH IN SUBSECTIONS (b) OR (c) OF THIS SECTION NEVERTHELESS CONSTITUTES A NUISANCE UNDER SUBSECTION (a) OF THIS SECTION.

Summary of Comments: There was concern that this subsection would prevent a company from rebutting a measured or calculated violation under subsection (c) or a sampled violation under subsection (b).

Response

The purpose of this provision is to make it clear that a violation of any of the three preceding subsections could be the basis for the Department to take action. The term "nuisance under" will be changed to "violation of" to clarify the issue. In addition, subsection (c) was modified (see above) to show that the presumption of a nuisance created by subsection (c) if the odor limit values in Table 23-1 are exceeded can be rebutted by the source.

RECOMMENDED FINAL WORDING OF SUBSECTION (d)

THE COMMISSIONER MAY DETERMINE THAT AN AMBIENT ODOR WHICH DOES NOT EXCEED THE LIMITS SET FORTH IN SUBSECTIONS (b) OR (c) OF THIS SECTION NEVERTHELESS CONSTITUTES A VIOLATION OF SUBSECTION (a) OF THIS SECTION.

SUBSECTION (e), REQUIREMENTS FOR INVESTIGATIONS

Subsection (e) was proposed to read as follows:

IF THE COMMISSIONER FINDS THAT A VIOLATION OF THIS SECTION HAS OCCURRED AND REASONABLY SUSPECTS THAT A CERTAIN SOURCE HAS CAUSED OR CONTRIBUTED TO SUCH VIOLATION, THE COMMISSIONER MAY ISSUE AN ORDER REQUIRING THE OWNER AND/OR OPERATOR OF SUCH SOURCE TO INVESTIGATE WHETHER IT HAS CAUSED OR CONTRIBUTED TO SUCH VIOLATION AND TO TAKE SUCH ACTION AS THE COMMISSIONER DEEMS NECESSARY TO CORRECT OR REMEDY THE VIOLATION. THE COMMISSIONER MAY SUSPECT THAT A SOURCE HAS CAUSED OR CONTRIBUTED TO A VIOLATION BASED UPON ONE (1) OR MORE OF THE FOLLOWING: CITIZEN COMPLAINTS; COMPARISONS OF ODORS UPWIND AND DOWNWIND OF THE SOURCE; MATERIAL HANDLING AND STORAGE PRACTICES; METHODS OF OPERATION; OR ACTUAL OR ESTIMATED STACK EMISSIONS, FUGITIVE EMISSIONS OR AMBIENT POLLUTANT CONCENTRATIONS.

Summary of Comments: The concerns on this subsection addressed what would happen if the required investigation determined that the suspected source was not the cause of the odor problem, and suggested expanding the list of factors taken into consideration in suspecting that a particular company is the source of the odor problem.

Response

The purpose of requiring that an investigation be conducted is to obtain additional information to determine the source of a problem and correct it. Information developed by the company will be used to determine what actions should be taken. A list of additional factors to be considered was suggested and those additional factors should be added to this subsection.

RECOMMENDED FINAL LANGUAGE FOR SUBSECTION (e)

To the list of factors, add site inspections, surveys and information gathered from any other source. The final wording of subsection (e) should be:

IF THE COMMISSIONER FINDS THAT A VIOLATION OF THIS SECTION HAS OCCURRED AND REASONABLY SUSPECTS THAT A CERTAIN SOURCE HAS CAUSED OR CONTRIBUTED TO SUCH VIOLATION, THE COMMISSIONER MAY ISSUE AN ORDER REQUIRING THE OWNER AND/OR OPERATOR OF SUCH SOURCE TO

INVESTIGATE WHETHER IT HAS CAUSED OR CONTRIBUTED TO SUCH VIOLATION AND TO TAKE SUCH ACTION AS THE COMMISSIONER DEEMS NECESSARY TO CORRECT OR REMEDY THE VIOLATION. THE COMMISSIONER MAY REASONABLY SUSPECT THAT A SOURCE HAS CAUSED OR CONTRIBUTED TO A VIOLATION BASED UPON ONE (1) OR MORE OF THE FOLLOWING: CITIZEN COMPLAINTS; COMPARISONS OF ODORS UPWIND AND DOWNWIND OF THE SOURCE; MATERIAL HANDLING AND STORAGE PRACTICES; METHODS OF OPERATION; SITE INSPECTIONS; SURVEYS; INFORMATION GATHERED FROM ANY OTHER SOURCE OF INFORMATION; OR ACTUAL OR ESTIMATED STACK EMISSIONS, FUGITIVE EMISSIONS OR AMBIENT POLLUTANT CONCENTRATIONS.

SUBSECTION (f), AIR QUALITY MODELING

Subsection (f) was proposed to read as follows:

(f)(1) THE COMMISSIONER MAY USE AIR QUALITY MODELING TECHNIQUES TO ESTIMATE AMBIENT POLLUTANT CONCENTRATIONS.

(2) THE COMMISSIONER SHALL NOT USE AIR QUALITY MODELING RESULTS AS THE SOLE BASIS FOR FINDING A VIOLATION OF THIS SECTION. HOWEVER, AIR QUALITY MODELING MAY BE USED IN CONJUNCTION WITH WRITTEN COMPLAINTS, RECEIVED WITHIN NINETY (90) CONSECUTIVE DAYS, FROM TEN OR MORE SEPARATE HOUSEHOLDS AS A BASIS FOR FINDING A VIOLATION OF SUBSECTION (c) OF THIS SECTION.

Summary of Comments: There were concerns that:

air quality models are inaccurate and/or overly conservative;

certain types of sources, such as landfills, cannot be modeled;
and

it is not clear when the 90-day period starts and ends or when modeling would be required.

Response

Air quality models have been used in other portions of Connecticut's air pollution control program to determine if a source is causing or contributing to a violation. Under the proposed regulations, when the specified number of complaints is received but a DEP inspector is unable to confirm the odor, the Department could perform modeling to help determine if an odor problem exists. This is necessary because although there may be a severe odor problem that must be corrected, the problem may not be apparent at the particular time that an inspector arrives. The 90-day time period for complaints is a continuous running time period. This is intended to ensure that if the Department is to rely on complaints, a sufficient number is received in a given time period to indicate that a problem truly exists.

FINAL RECOMMENDED LANGUAGE FOR SUBSECTION (f)

The two proposed subdivisions should be combined into one and the language should be rephrased for clarification. The final wording of subsection (f) should be:

THE COMMISSIONER MAY USE AIR QUALITY MODELING TECHNIQUES TO CALCULATE AMBIENT POLLUTANT CONCENTRATIONS. THE COMMISSIONER SHALL NOT USE AIR QUALITY MODELING RESULTS AS THE SOLE BASIS FOR FINDING A VIOLATION OF THIS SECTION, UNLESS THE COMMISSIONER HAS RECEIVED TEN OR MORE WRITTEN COMPLAINTS WITHIN NINETY (90) CONSECUTIVE DAYS FROM SEPARATE HOUSEHOLDS.

SUBSECTION (g), SAMPLING, MEASURING AND AIR QUALITY MODELING TECHNIQUES

Subsection (g) was proposed to read as follows:

ANY PERSON WHO IS REQUIRED TO UNDERTAKE AN INVESTIGATION OR REMEDIATION PURSUANT TO THIS SECTION SHALL ASSURE THAT ALL SAMPLES AND MEASUREMENTS TAKEN IN ANY INVESTIGATION AND REMEDIATION ARE REPRESENTATIVE OF THE ACTIVITY REQUIRED TO BE SAMPLED. IN ESTIMATING AMBIENT AIR QUALITY IMPACTS, SUCH PERSON SHALL USE APPLICABLE AIR QUALITY MODELS, DATA BASES OR OTHER TECHNIQUES APPROVED IN WRITING BY THE COMMISSIONER FOR THE SUBJECT SOURCE AND ANY OTHER SOURCE WHICH IS INCLUDED IN THE ANALYSIS.

Summary of Comments: There was a question of why other sources or companies needed to be included in the analysis.

Response

This subsection does not require that other sources be included; it only requires that for any source included in the analysis the information and methods used must be approved by the Commissioner.

RECOMMENDED FINAL LANGUAGE FOR SUBSECTION (g)

Change the term "estimate" to "calculate" so that subsection (g) says:

ANY PERSON WHO IS REQUIRED TO UNDERTAKE AN INVESTIGATION OR REMEDIATION PURSUANT TO THIS SECTION SHALL ASSURE THAT ALL SAMPLES AND MEASUREMENTS TAKEN IN ANY INVESTIGATION AND REMEDIATION ARE REPRESENTATIVE OF THE ACTIVITY REQUIRED TO BE SAMPLED. IN CALCULATING AMBIENT AIR QUALITY IMPACTS, SUCH PERSON SHALL USE APPLICABLE AIR QUALITY MODELS, DATA BASES OR OTHER TECHNIQUES APPROVED IN WRITING BY THE COMMISSIONER FOR THE SUBJECT SOURCE AND ANY OTHER SOURCE WHICH IS INCLUDED IN THE ANALYSIS.

SUBSECTION (h), COMPLIANCE DETERMINATION NOT NEEDED FOR PERMIT REVIEW

Subsection (h), was proposed to read as follows:

NOTWITHSTANDING THE PROVISIONS OF SUBSECTION 22a-174-3(c) OF THE REGULATIONS OF CONNECTICUT STATE AGENCIES, IN ACTING ON AN APPLICATION FOR A PERMIT TO CONSTRUCT, THE COMMISSIONER NEED NOT DETERMINE THAT A PROPOSED SOURCE WILL OPERATE IN COMPLIANCE WITH SUBSECTION (c) OF THIS SECTION.

Summary of Comments: There was a question regarding Public Act 89-225 and whether or not it would require a compliance review before a permit to construct could be issued.

Response

Public Act 89-225 requires that in acting on a permit application the Commissioner must determine the existing operations at the source conform with all the air pollution control regulations. This subsection concerns the requirements for the review of new sources. Although the Department will not require that modeling be performed to demonstrate compliance with subsection (c), the Department will take into consideration the potential of a source to cause an odor problem and continue to place appropriate requirements in any permit.

RECOMMENDED FINAL WORDING OF SUBSECTION (h)

No changes are needed and the final language should be the same as the proposed. Subsection (h) should read as follows:

NOTWITHSTANDING THE PROVISIONS OF SUBSECTION 22a-174-3(c) OF THE REGULATIONS OF CONNECTICUT STATE AGENCIES, IN ACTING ON AN APPLICATION FOR A PERMIT TO CONSTRUCT, THE COMMISSIONER NEED NOT PERFORM OR REVIEW MODELING TO DETERMINE THAT A PROPOSED SOURCE WILL OPERATE IN COMPLIANCE WITH SUBSECTION (c) OF THIS SECTION.

SUBSECTION (i), PERMITS FOR SOURCES WHICH VIOLATE THIS SECTION

Subsection (i) was proposed to read as follows:

THE COMMISSIONER MAY REQUIRE ANY PERSON WHO WOULD NOT OTHERWISE BE REQUIRED BY LAW TO OBTAIN A PERMIT AND WHO VIOLATES ANY PROVISION OF THIS SECTION TO OBTAIN A PERMIT TO OPERATE THE SOURCE WHICH CAUSED OR CONTRIBUTED TO SUCH VIOLATION.

Summary of Comments: This provision is burdensome and unnecessary. It may be impossible for a source to receive a permit if it is in violation of a regulation.

Response

This provision repeats the Commissioner's authority under 22a-174(c)(5) CGS and is not necessary. As such, this subsection should be eliminated and the other subsections renumbered.

RECOMMENDED FINAL WORDING FOR SUBSECTION (i)

Subsection (i) should be eliminated and the other subsections renumbered.

SUBSECTION (j), GENERAL COMPLIANCE

Note: There were no comments on this subsection. The final language should be the same as the proposed. Subsection (j) should be renumbered as (i) and should read:

NOTHING IN THIS SECTION SHALL PERMIT EMISSION OF ANY POLLUTANT IN VIOLATION OF ANY OTHER SECTION, AND COMPLIANCE WITH ANY OTHER SECTION SHALL NOT CONSTITUTE COMPLIANCE WITH THIS SECTION.

SUBSECTIONS (k) & (l), EXEMPTIONS

Subsections (k) & (l) were proposed to read as follows:

(k) AN AGRICULTURAL OR FARMING OPERATION SHALL BE EXEMPT FROM THE PROVISIONS OF THIS SECTION TO THE EXTENT PROVIDED BY SECTION 19a-341 OF THE GENERAL STATUTES.

(l) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO MOBILE SOURCES OR SOURCES WHICH ARE INSTALLED OR USED ONLY FOR STRUCTURES WHICH ARE OCCUPIED SOLELY AS A DWELLING AND CONTAIN SIX OR FEWER DWELLING UNITS.

Summary of Comments: There were concerns that the exemption for agricultural activities is being tightened under this proposal.

Response

The present regulation does not define "agricultural activities." The purpose of this new language is to be consistent with Section 19a-341 CGS. This statute provides an exemption for agricultural activities as follows:

"Notwithstanding any ... regulation pertaining to nuisance to the contrary, no agricultural or farming operation, place, establishment or facility, or any of its appurtenances, or the operation thereof, shall be deemed to constitute a nuisance, either public or private, due to objectionable (1) odor from livestock, manure, fertilizer or feed, ...".

RECOMMENDED FINAL LANGUAGE FOR SUBSECTIONS (k) & (l)

For subsection (k) the final wording should be the same as the proposed. For subsection (l) a minor change is suggested to describe sources used solely as dwellings by deleting the term "or sources which are installed or used only for" and adding the word "to" just before "structures". These subsections should be renumbered as (j) and (k) respectively, and should read as follows:

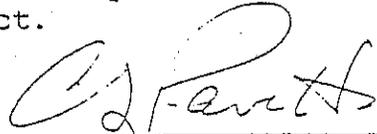
(j) AN AGRICULTURAL OR FARMING OPERATION SHALL BE EXEMPT FROM THE PROVISIONS OF THIS SECTION TO THE EXTENT PROVIDED BY SECTION 19a-341 OF THE GENERAL STATUTES.

(k) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO MOBILE SOURCES OR TO STRUCTURES WHICH ARE OCCUPIED SOLELY AS A DWELLING AND CONTAIN SIX OR FEWER DWELLING UNITS.

FINAL RECOMMENDATION

Based upon a review of the proposed regulation and the comments received at the public hearings along with those submitted in writing, I recommend that the final regulation be adopted in accordance with the Uniform Administrative Procedure Act.

July 18, 1990
Date



Carl S. Pavetto
Hearing Officer

INDIVIDUALS WHO PROVIDED COMMENTS

1. Archer, Tom, American Cyanamid, Wallingford
2. Campaigne, Richard, Upjohn, 410 Sackett Point Rd., North Haven
3. Connecticut Clean Air Coalition, no certain address
4. Connecticut Fund for the Environment, 150 Temple St., New Haven
5. Donlon, Patrick, 205 North Shore Drive, Dayville
6. Duffee, Richard, Odor Science and Engineering, 57 Fishfry St., Hartford
7. Hanson, Francis and Geist, Mark, Steuler International Corporation, Mertztown, PA
8. Holmes, Brian, Connecticut Construction Industries Association, Inc., 912 Silas Deane Hwy., Wethersfield
9. Johnston, Kenneth, Frito-Lay, Inc., Killingly
10. Lear, Carol, Pepe and Hazard, One Corporate Center, Hartford
11. Levine, Jerry, Neighborhood Cleaners Assoc., 116 E. 27th St., New York
12. Miller, Richard, Connecticut Business and Industry Association, 370 Asylum, Hartford
13. Mushinsky, Mary., Representative to the General Assembly, 188 S. Cherry St., Wallingford
14. Petroni, Elizabeth, Department of Agriculture, 165 Capitol Ave., Hartford
15. Paddock, Joseph, The Society for the Plastics Industry, 1275 K St NW, Washington, DC
16. Sparer, Judy, Yale University School of Medicine, Occupational Medicine, 33 Cedar Street, New Haven
17. Weiss, James, Golden Hill Farm, Pomfret Center
18. Wright, Robert, Connecticut Resources Recovery Authority, 179 Allyn St., Hartford

