Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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DECLARATORY RULING

Pursuant to Conn. Gen. Stat. § 4-176 and § 22a-3a-4 of the Regulations of Connecticut State Agencies, on November 18, 2016, Peter C. White ("the Petitioner") submitted a Petition for Declaratory Ruling ("the Petition") to the Commissioner of Energy and Environmental Protection ("the Commissioner"). The Petition seeks two rulings on how Conn. Gen. Stat. § 22a-42a(c)(1) applies to an application submitted to the Commissioner by 2772 BPR, LLC ("BPR") seeking a permit under the Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §§ 22a-36 through 22a-45, inclusive ("the Act").

The parties to this proceeding are the Petitioner and staff of the Department of Energy and Environmental Protection ("Staff").

A. Facts

1. BPR is proposing to construct a bulk propane storage facility consisting of two 30,000 gallon tanks and associated improvements at 40 Ciro Road, North Branford ("the Site").

2. There are two wetlands on the Site, one in the eastern and one in the western portion of the Site. On August 14, 2014, BPR submitted an application to the North Branford Conservation and Inland Wetlands and Watercourses Agency, ("the NBCIWWA") seeking authorization to conduct certain activities in the wetland located in the western portion of the Site. Specifically, BPR was proposing to discharge stormwater into an existing detention basin in the wetland. This detention basin had already been constructed, by someone other than BPR, for the purpose of accepting stormwater as part of a project that was previously approved by the

NBCIWWA. BPR was also proposing to remove invasive species and replant other plant species in the western wetland. No activities were to be conducted in the wetland located in the eastern portion of the Site.

3. The application was first raised by the NBCIWWA at its August 27, 2014 meeting. The minutes of this meeting reveal that the NBCIWWA heard a presentation from BPR, asked questions regarding the application and scheduled a site walk to occur before the NBCIWWA's next meeting on September 24, 2014.

4. It is not clear whether the site walk occurred on September 24, 2014;[1] regardless, BPR's application was taken up again at the NBCIWWA's September 24, 2014 meeting. The minutes from the September 24th meeting indicate that the NBCIWWA tabled any action on the application until the NBCIWWA's next meeting on October 22, 2014.

5. At its October 22, 2014 meeting[2] it was announced that two members of the NBCIWWA had recused themselves from acting on BPR's application. This left the NBCIWWA with only two members to vote on BPR's application. A question was raised about whether two members were adequate to vote on BPR's application and the NBCIWWA decided to seek legal assistance regarding this issue. The NBCIWWA approved a motion to set a Special Meeting on October 29, 2014 to address BPR's application.

6. The NBCIWWA did not hold a Special Meeting on October 29, 2014.[3] The Petitioner asserts that the meeting did not occur due to a lack of a quorum. Petition, p. 2. The NBCIWWA never made a decision to approve or deny BPR's application.

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[1] While the Petition notes that a site walk was scheduled, it does not indicate whether the site walk occurred. Similarly, the minutes of the NBCIWWA do not indicate whether the site walk occurred.

[2] The October 22, 2014 meeting was denominated a Special Meeting, although the minutes from the meeting do not indicate why this was considered a Special Meeting.

[3] There are no minutes of the NBCIWWA indicating why the October 29, 2014 Special Meeting did not occur.

7. Under Conn. Gen. Stat. § 22a-42a(c)(1), unless an applicant grants an extension of time or a public hearing is held, a local inland wetlands agency ("LIWA") has sixty-five days from the date of receipt to act on an application. Since a public hearing was not held and BPR did not grant any extensions, the sixty-five day time period for the NBCIWWA to act on BPR's application expired on October 31, 2014.[4]

8. Under Conn. Gen. Stat. § 22a-42a(c)(1), if a LIWA fails to act within the time prescribed by that law, an applicant may file its application with the Commissioner who shall review and act on the application. By letter dated November 19, 2014, BPR contacted the Department of Energy and Environmental Protection ("the Department") inquiring about how it could exercise its right under section 22a-42a(c)(1) and submit its application to the Commissioner. In a response dated January 9, 2015, the Department, among other things, outlined how BPR could submit its application to the Commissioner.

9. On March 25, 2015, pursuant to Conn. Gen. Stat. § 22a-42a(c)(1), BPR submitted its application to the Commissioner ("the Application"). Following the directions contained in the Department's letter dated January 9, 2015, the Application was submitted on forms prescribed by the Department, including the attachments required by those forms. The Application sought a permit to conduct the same regulated activities for which a permit was sought from the NBCIWWA.

10. Staff reviewed the Application. As part of that review, the Department issued two Notices of Insufficiency to BPR. BPR responded to both by providing the Department with

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[4] Under Conn. Gen. Stat. § 22a-42a(c)(1), the date of receipt of an application is determined in accordance with Conn. Gen. Stat. § 8-7d(c). Section 8-7d(c) states, in pertinent part, that the date of receipt of an application "shall be the day of the next regularly scheduled meeting of" in this case, the NBCIWWA, immediately following the day of submission of BPR's application to the NBCIWWA or thirty-five days after such submission, whichever is sooner. Applying this provision, the date of receipt of BPR's application was August 27, 2014. Sixty-five days from August 27, 2014 is October 31, 2014.

additional information. Additional supplementary information was also provided to the Department by BPR in response to e-mails from Staff dated August 4, 2015 and September 18, 2015.

11. On April 21, 2016, the Department issued a Notice of Tentative Determination ("NTD") to approve the Application.

12. After publication of the NTD, the Department received a petition signed by twenty-five or more persons regarding the Application and, as required by Conn. Gen. Stat. § 22a-42a(c)(1), held a hearing on the Application. The hearing was held on September 8, 2016 and on September 15, 2016. While the Petitioner, pursuant to Conn. Gen. Stat. § 22a-19, sought status as an intervening party in the hearing, its motions were denied by the Hearing Officer.

13. On November 18, 2016, before a final decision was rendered on the Application, the Petitioner filed its Petition with the Department.

14. On January 17, 2017, the Hearing Officer issued a Proposed Final Decision recommending that the Commissioner issue a permit to BPR. On February 10, 2017, a Final Decision was issued approving issuance of the permit to BPR. The permit was issued on March 6, 2017.

Any additional facts, as needed, will be set forth in this ruling.

B. <u>The Petition</u>

The Petition seeks a ruling on two questions.

1. Did the NBCIWWA "act" on the Application within the prescribed sixty-five (65) day period, thereby depriving the Commissioner of jurisdiction regarding the Application?
2. Since the Application submitted to the Department was not the same application as that submitted to the NBCIWWA, should the Commissioner have dismissed the Application for lack of jurisdiction?

A copy of the Petition was provided to Staff and to counsel for BPR. In addition, notice of the Petition and of the opportunity to file comments and request intervenor or party status was provided to the Town of North Branford and the NBCIWWA and was published in the New Haven Register, The Shoreline Times and The Sound. BPR provided comments in opposition to the Petition. The Department did not receive any other comments on the Petition.

C. <u>Rulings</u>

1. The Commissioner has Jurisdiction Over the Application Since the NBCIWWA Failed to Act.

Once a municipality adopts regulations regarding inland wetlands and watercourses, a person seeking to conduct a regulated activity upon an inland wetland or watercourse must submit an application with the LIWA in the town where the inland wetland or watercourse is located.[5] Conn. Gen. Stat. § 22a-42a(c)(1). Once an application is submitted, the LIWA is provided a certain amount of time "to act" on the application. If a LIWA fails to act within the time prescribed by section 22a-42a(c)(1), including any extension granted by the applicant, an applicant can file its application with the Commissioner who shall review and act on the application.[6]

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[5] A "regulated activity" is defined as any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses, but shall not include the specified activities in Conn. Gen. Stat. § 22a-40. Conn. Gen. Stat. § 22a-38(13).

[6] Conn. Gen. Stat. § 22a-42a(c)(1) provides in pertinent part that:

> … Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland or watercourse shall file an application with the inland wetlands agency of the town or towns wherein the wetland or watercourse in question is located….The date of receipt of an application shall be determined in accordance with the provisions of subsection (c) of section 8-7d….If the inland wetlands agency, or its agent, fails to act on any application within thirty-five days after completion of a public hearing or in the absence of a public hearing within sixty-five days from the date of receipt of the application, or within any extension of such period, as provided in section 8-7d, the applicant may file such application with the Commissioner of Energy and Environmental Protection who shall review and act on such application in accordance with this section.

In this case, the Petitioner asserts that the NBCIWWA did "act" on BPR's application. Specifically, the Petitioner asserts that the NBCIWWA considered BPR's application at meetings and conducted a site walk.[7] This, the Petitioner asserts, is sufficient to conclude that the NBCIWWA acted on BPR's application. Since section 22a-42a(c)(1) only allows an applicant to file an application with the Commissioner if a LIWA fails to act, according to the Petitioner, the Commissioner had no jurisdiction over BPR's application. I cannot agree.

The issue raised by the Petitioner concerns the meaning of the term "act" as used in section 22a-42a(c)(1). The fundamental objective when interpreting statutes "is to ascertain and give effect to the apparent intent of the legislature....The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." *Tuxis Ohr's Fuel, Inc. v. Administrator Unemployment Compensation Act*, 309 Conn. 412, 421 (2013), citing *Fullerton v. Administrator, Unemployment Compensation Act,* 280 Conn. 745, 755 (2006) and Conn. Gen. Stat. § 1-2z. It is also a fundamental tenet of statutory construction that statutes should be construed "in a manner that will not thwart its purpose or lead to absurd results." *Turner v. Turner,* 219 Conn. 703, 712 (1991); see also *State v. Spears,* 234 Conn. 78, 92 (1995).

I understand the term "act," as used in section 22a-42a(c)(1), to mean making a decision to either grant or deny an application. This is consistent with the dictionary definition of the term. Merriam-Webster defines "act" to mean "a decision or determination of a sovereign, a legislative council or a court of justice." This understanding also implements what I understand to be the purpose of section 22a-42a(c)(1), namely requiring a LIWA to render a decision within prescribed timeframes and providing an applicant with a remedy when a LIWA fails to render a

[7] While it would not change or affect the outcome of my ruling in this matter, I note that it is unclear whether or not a site walk was actually conducted by the NBCIWWA.

decision. The fact that the sentence containing these timeframes also refers to a LIWA acting after completion of public hearing, if one is held – when the only thing remaining is for the LIWA to render a decision on an application – is further confirmation of this understanding.

A number of courts have come to this same conclusion. In *Ambrose v. Commissioner of Environmental Protection, et al.,* No. CV020512642S, 2003 WL 1477782 (N.B. Sup. Ct. March 7, 2003), an application was filed with the inland wetlands commission ("IWC") for the Town of Seymour in April 1999. While the application was discussed at the IWC's May, July and August meetings, the IWC took no final action on the application. *Ambrose*, p.*1. While *Ambrose* was ultimately decided on other grounds, the court did note that the Commissioner would have had jurisdiction over the application since the IWC did not act on the application. *Ambrose*, p.*5, n. 10.

In *Meehan Builders, LLC v. Town of Brooklyn,* No. CV064004499S, 2008 WL 590820 (Windham Sup. Ct. February 6, 2008), an application was submitted to the Brooklyn Inland Wetlands and Watercourses Commission ("BIWWC"). While the BIWWC held a hearing on the application, it did not render a decision within 35 days after the conclusion of the hearing as required by section 22a-42a(c)(1). The plaintiff then submitted its application to the Commissioner. After the statutory timeframe to render a decision on the plaintiff's application had expired and the plaintiff had submitted its application to the Commissioner, the BIWWC published a notice denying the application. In that case, given that the BIWWC failed to render a decision on the plaintiff's application in a timely manner, its attempt to deny the application was futile; the plaintiff's subsequent filing of its application with the Commissioner precluded any exercise of jurisdiction by the BIWWC. *Meehan Builders,* p.*2. See also *Lowe v. Meriden Inland et al.,* No. CV 970256830S, 1998 WL 599571 (Sup. Ct. September 1, 1998) (Tie vote of commission results in a failure to act under section 22a-42a(c)(1)); *Diamond 67, LLC et al., v.*

Vernon Inland Wetlands Commission, No. CV054002775, 2005 WL 2009525 (Tolland Sup. Ct. August 3, 2005)(Section 22a-42a(c)(1) provides a specific remedy where the local agency has not acted on an application within the statutory time frame).

If, as the Petitioner urges, "act" meant simply the taking up of an application at a meeting, the purpose of the statute would be thwarted; an applicant would have no remedy in the event a LIWA took up, but never rendered a decision on an application. A LIWA could "act" on an application by holding meetings indefinitely, never providing an applicant with a decision and forever preventing an applicant from seeking judicial review of a LIWA's actions or inaction. The Petitioner offers no support for this position. Moreover, the Petitioner's position clearly runs counter to the rule of construction requiring that statutes be construed in a manner to "avoid a consequence which fails to attain a rational and sensible result which bears most directly on the object which the legislature sought to obtain." *Peck v. Jacquemin,* 196 Conn. 53, 63-64 (1985).

For all of the reasons noted above, I conclude that in this case the NBCIWWA failed to "act" since it did not render a decision on BPR's application within the time period prescribed by section 22a-42a(c)(1). As such, in this circumstance, the Commissioner correctly asserted jurisdiction over BPR's application.

2. The Commissioner Was Correct in Not Dismissing BPR's Application, Even Though the Application was Not an Exact Duplicate of the Application Before the NBCIWWA.

The Petitioner next argues that under section 22a-42a(c)(1), the Commissioner had no choice but to reject the Application because the application submitted to, reviewed and acted upon by the Commissioner was not identical to the application before the NBCIWWA. It should be noted that this is *not* a case where the Petitioner is asserting that either the nature or scope of regulated activities in the application submitted to the Department was different from those in the application submitted to the NBCIWWA, and for that reason constituted a new application. No

such claim has been made. Here, the Petitioner does not assert that the nature or scope of regulated activities for which BPR sought approval changed when the application before the NBCIWWA is compared to the application submitted to the Department. Rather, as is discussed below, the Petitioner claims only that the information available to and considered by the Department was not exactly the same as that before the NBCIWWA.

The Petitioner's argument is based on the language of section 22a-42a(c)(1) which provides, in pertinent part, that:

> [i]f the inland wetland agency, or its agent, fails to act on any application within the prescribed time period the applicant may file *such application* with the Commissioner of Energy and Environmental Protection who shall review and act on *such application.*

(Emphasis added.) The Petitioner argues that the term "such application" in section 22a-42a(c)(1) means the application before the LIWA, which in this case would require that the application submitted to and reviewed and acted by the Commissioner would have to be an exact duplicate of the application before the NBCIWWA.

In considering the Petitioner's claim I again start with the same rules of statutory construction noted above. The fundamental objective when interpreting statutes "is to ascertain and give effect to the apparent intent of the legislature....The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." *Tuxis Ohr's Fuel, Inc. v. Administrator Unemployment Compensation Act*, 309 Conn. 412, 421 (2013), citing *Fullerton v. Administrator, Unemployment Compensation Act,* 280 Conn. 745, 755 (2006) and Conn. Gen. Stat. § 1-2z. Statutes should be construed "in a manner that will not thwart its purpose or lead to absurd results." *Turner v. Turner,* 219 Conn. 703, 712 (1991); see also *State v. Spears,* 234 Conn. 78, 92 (1995).

I understand the term "such application," as used in section 22a-42a(c)(1), to refer to the seeking of permission to conduct specific regulated activities, those specified in the application submitted to the LIWA. This is what BPR submitted to the NBCIWWA – an application for permission to conduct specific regulated activities. An application to conduct these same regulated activities was submitted to the Commissioner. This understanding comports with the fundamental purpose of the statutory language cited by the Petitioner, namely to provide an applicant with a remedy when a LIWA fails to render a timely decision on an application. The purpose of this language is not to prescribe with particularity the details of how that remedy must be exercised.

If the Petitioner's understanding of section 22a-42a(c)(1) was correct it would lead to absurd and unworkable results. For example, an applicant submitting an application to the Commissioner would be prohibited from using the forms prescribed by the Commissioner for that very purpose. Instead, according to the Petitioner, an applicant exercising its right under sections 22a-42a(c)(1) could only file duplicates of the submission before the LIWA, including the LIWA's application forms. The Petitioner has offered no justification, legal or otherwise, for prohibiting the information on an application submitted to a LIWA from being copied or transferred onto forms used by the Department. I simply cannot agree that section 22a-42a(c)(1) dictates the form in which an application has to be submitted to the Commissioner.

The difficulty with the Petitioner's argument extends further. Under section 22a-42a(c)(1), the Commissioner must "review and act" upon the application submitted. The nature of the permit process, whether before the NBCIWWA or the Department, is iterative. An application is filed and when it is reviewed it is common for issues to arise that require the submission of additional information by an applicant. As the Petitioner understands the term "such application," the Commissioner cannot receive any information that was not before a

LIWA since receipt of such information would make the application before the Department different from, or not the same as, the application before the NBCIWWA.[8]

This cannot be a correct understanding of section 22a-42a(c)(1). Given the nature of the permitting process, for the discharge of the Commissioner's responsibilities under section 22a-42a(c)(1), to "review and act" on an application, Staff must be able to obtain information to respond to issues that arise during Staff's technical review. If Staff deemed certain information necessary to its review, but could not obtain that information because it had not been submitted to a LIWA, Staff would not be able to carry out its function. This is clearly unworkable and is in conflict with the Commissioner's statutory obligation "to review and act" on an application.

In addition to its unworkability, the Petitioner's interpretation leads to bizarre results. When a LIWA undertakes to review and act on an application, no statute or regulation prevents the LIWA from requesting relevant information it deems necessary. Yet, according to the Petitioner, the Commissioner must receive the information submitted to a LIWA and nothing else. The result would be radically different rules for how a LIWA and for how the Commissioner review and act upon an application under section 22a-42a(c)(1), differences that find no support in the statute. While a LIWA could obtain whatever relevant information it deemed necessary to make a decision, not so for the Commissioner. Regardless of what information has been submitted to a LIWA, or what information was lacking, the Commissioner would be prohibited from obtaining anything beyond the information submitted to a LIWA.

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[8] The Petitioner's argument also extends to information before the NBCIWWA that was not before the Commissioner. For example, in this case, it appears that the NBCIWWA received certain information that was not submitted to the Commissioner. This included information on the lighting and security systems to be employed by BPR. If such information was not submitted to the Commissioner or requested by Staff, the only conclusion to be drawn is that the Department, unlike the NBCIWWA, did not deem the information necessary to make a decision on the Application. The Petitioner's position would require that the Commissioner obtain information not necessary to make a decision. This would serve no useful purpose.

Nothing in section 22a-42a(c)(1) justifies such differential treatment of a LIWA and the Commissioner.

The Petitioner's interpretation would clearly prejudice applicants who find it necessary to exercise their right under section 22a-42a(c)(1) and file their application with the Commissioner. Unlike an applicant before a LIWA, an applicant before the Commissioner could not respond to issues or concerns that arise during Staff's review of an application. Unable to obtain information necessary for the issuance of a permit, the Commissioner may have no choice but to deny an application.[9] This could not have been the intent of the General Assembly. The General Assembly could not have intended to provide applicants with a remedy for a LIWA's failure to take timely action on an application, only to make the exercise of that remedy so extremely disadvantageous.

I reject the Petitioner's proffered interpretation of section 22a-42a(c)(1) since it violates the fundamental rule of statutory construction that statutes not be construed in a manner that is unworkable or that leads to absurd consequences or bizarre results. *State v. Spears,* 234 Conn. 78, 92 (1995). As noted above, the better understanding of "such application" is that it refers to the nature and scope of the regulated activities for which permission was sought from a LIWA. This understanding not only conforms to the purpose of the statute, but provides a result that is workable in contrast to the results occasioned by the Petitioner's interpretation of section 22a-42a(c)(1). Provided the nature and scope of the regulated activities remain the same, the particular form of the application submitted to the Commissioner when compared to that submitted to a LIWA is unimportant. Moreover, to "review and act" upon an application, the

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[9] This problem could be worse depending upon when in the application process a LIWA failed to take any action on an application. If, according to the Petitioner, the Commissioner must review and act on an application based solely on the information before a LIWA, an applicant before a LIWA that takes no action of any kind after an application is submitted could be worse off than an applicant before a LIWA that fails to act after a hearing.

permitting process dictates that the Commissioner have the flexibility to seek additional information from an applicant, regardless of whether that information had been submitted to a LIWA.

For all the reasons noted above, I conclude that BPR correctly submitted the Application to the Commissioner and that in this case, in order for the Commissioner to "review and act" upon the Application, section 22a-42a(c)(1) does not require that the information submitted to the Commissioner be identical to that before the NBCIWWA.

D. Conclusion

For all the reasons noted above, I decline to issue the rulings sought by the Petitioner and rule instead that the Commissioner was correct in not dismissing BPR's application since: 1) the NBCIWWA failed to act on BPR's application; and 2) when exercising the option of submitting its application to the Commissioner, section 22a-42a(c)(1) does not require that BPR submit an exact duplicate of the application before the NBCIWWA.

May 16, 2017
Date

Robert E. Kaliszewski
Deputy Commissioner
Department of Energy and Environmental Protection