STATE OF CONNECTICUT

COUNCIL ON ENVIRONMENTAL QUALITY

December 20, 2013

The Honorable Daniel C. Esty
Commissioner of Environmental Protection
79 Elm Street
Hartford, CT 06106

SUBJECT: Outdated Regulations

Dear Commissioner Esty:

As you will be conducting a review of your department's regulations pursuant to Executive Order Number 37, the Council is writing to you to respectfully recommend five for detailed review. All are outdated, insufficient or ineffective. Most of these were discovered during the Council's investigation of citizen complaints.

In most cases, the Council would state that it is better to remove a regulation entirely than to leave in place a misleading or unenforceable regulation. It is very frustrating for any citizen to read in a regulation that a particular activity is prohibited or restricted only to be told that, in reality, there is nothing that prohibits or regulates that activity in practice.

1. Abatement of air pollution (1): CSR 22a-174-16.[1] This antiquated regulation rewards facilities for burning highly-polluting fuels. Specifically, it allows a plant that burns a fuel other than natural gas or residual or distillate oil to emit twice as much particulate pollution as a natural gas-fired unit and about 50 percent more than a plant burning residual oil (calculated as an emission rate per unit of energy input). A modern regulation would provide incentives for burning clean fuel, not dirty fuel.

2. Abatement of air pollution (2): CSR Section 22a-174-18,[2] which prohibits gasoline-powered vehicles from emitting visible pollution, is outdated and insufficient. It is the Council's understanding, based on information received while following up a citizen complaint, that the Department has no authority to identify the owner or operator of a vehicle even when the registration number is reported by citizens or observed directly by DEEP staff. As a consequence, this section cannot be enforced. The Council recommends that the Department seek statutory changes, if needed, to provide DEEP with necessary enforcement tools and to amend the regulation accordingly.

3. Connecticut Environmental Policy Act (CEPA): CSR Sections 22a-1a-1 through 22a-1a-10 are outdated in the extreme. The regulations became effective 35 years ago last month and have never been amended. They do not reflect the significant amendments to the Act adopted in 2002. The process outlined by these regulations bears little resemblance to the process by which agencies are implementing CEPA in 2013. Mandatory scoping, publication in the *Environmental Monitor*, post-scoping notices or "off-ramps" as described in Environmental Classification Documents – none of these is mentioned in the regulations, while the nonexistent Finding of No Significant Impact has its own section (22a-1a-10). Woe to the citizen who reads these regulations hoping to understand the process by which state agencies evaluate environmental impacts.

There is another major deficiency in the CEPA regulations as they pertain to public-private partnerships, a type of state action that was not common when the regulations were adopted. As you know, the heart of NEPA and CEPA is the evaluation and comparison of alternatives. Increasingly the Council finds itself reviewing scoping notices and environmental impact evaluations where the sponsoring agency (usually the Department of Economic and Community Development) evaluates *no* alternatives. The DECD has stated to this Council that there are no alternatives when the project is a grant to a private-sector project. The CEPA regulations are a complete mismatch to public-private partnerships. The regulations should be amended in a way that requires project developers who seek substantial state funds and the sponsoring agency to evaluate realistic alternatives. Otherwise there is little point to the evaluation exercise.

4. Rules of Practice: CSR Section 22a-3a-6 is outdated and potentially burdensome. The Council regards public participation as an important component of good environmental decision making and is encouraged by reports that the Department is preparing to upgrade its website to encourage more and better participation. The Rules of Practice also could be updated and improved to make the process more clear to interested citizens who are not legal experts.

The Council has learned repeatedly that citizens who submit detailed comments on permit applications expect their comments to be given some weight. Certainly, DEEP hearing officers pay attention to written and spoken comments from the public and often use such comments to question applicants and other parties for more information, which then becomes evidence in the hearing record. But that use of the public's comments, while laudable, is indirect and is not described in the regulations or the public notices.

A typical public notice published by DEEP in a newspaper says,

> "All interested persons are invited to express their views on the tentative determination concerning this application. Written comments on the application should be directed to…[insert name of the DEEP staff person conducting the review (not the hearing officer)],"

or, if the public hearing already has been scheduled,

> "Written comments will be accepted in person at the evening hearing and if received by the Office of Adjudications via e-mail…fax…or mail…by the close of business on [date]."

The reader – often a citizen who is not familiar with the legal intricacies of the comment and hearing process – might not realize that if a public hearing is scheduled then his or her comments cannot be considered as evidence by the hearing officer unless the comments are made under oath and the person is available for cross-examination. The same is largely true for spoken comments as well. According to the regulations,

> "Any person who is not a party or intervenor nor called by a party or intervenor as a witness may make an oral or written statement at the hearing. Such a person shall be called a speaker. *If the hearing officer is going to consider a speaker's statement as evidence or if the speaker wants his statement to be considered as evidence, the hearing officer shall require that the statement be made under oath or affirmation* and shall permit the parties and intervenors to cross-examine the speaker and to challenge or rebut the statement. A speaker may decline to be cross-examined, but *the hearing officer shall strike from the record any comments by such speaker relating to the subject on which he declines to be cross-examined*." [Emphasis added]

To communicate more accurately to the reader, the public notice in the newspaper should perhaps go on to explain that,

> "If a public hearing is held, then neither your spoken nor written statement will be considered as evidence by the hearing officer unless your statement is made under oath and you are prepared to be cross-examined. Cross-examination might be scheduled for another date or dates. If your statement is not made under oath, the hearing officer still might put your information to good use."

While perhaps more honest, the hypothetical statement above would not convey the ideal attitude toward citizen input. The regulations and (especially) the notices should clearly convey the advantages and disadvantages of submitting comments sworn or not sworn. We acknowledge that any citizen could in theory be prepared to swear an oath and be cross-examined, but such cross-examination might not occur until the hearing's second day (or later) which makes the commitment of time impossible or impractical, especially for busy people who are actual experts in their fields. We are not certain what the ideal amendment and public notice would say, but it should not leave the impression that detailed written comments from the public will be given great consideration when they might in fact be given relatively little.

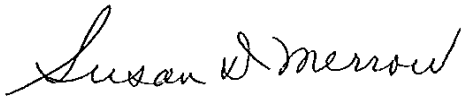
Another alternative would be to put into the rules the current practice of asking the applicant to address all substantive matters raised by speakers who are not sworn.

When the regulations are amended, then the public notice templates should be changed accordingly.

5. Inland Wetlands and Watercourses: CSR Sections 22a-39-1 through 22a-39-13 are outdated in several areas. Largely unchanged since 1974, the regulations do not reflect current practices and can be misleading to the public. Virtually none of Section 22a-39-11, which describes a process by which DEEP reviews and judges municipal regulations for conformance, depicts reality. The sections pertaining to public participation are not consistent with comment and hearing procedures dictated by the Uniform Administrative Procedures Act. There also are holes in the regulations: since 2003, DEEP and the Attorney General have been advising municipalities to incorporate language in their regulations to address the results of the 2003 Prestige Builders, LLC court case; while more than 100 municipalities have adopted such language, DEEP has not. With relatively little effort, DEEP could modify and adopt the model inland wetlands regulations that it has successfully provided to municipalities across the state.

We hope that you will find these comments to be useful. If you or your staff have any questions, please do not hesitate to contact us through our Executive Director, Karl Wagener. Thank you for your consideration of these recommendations.

Sincerely,



Susan D. Merrow
Chair

Footnotes

1. CSR Section 22a-174-16: (e) Particulate matter emission standards for fuel-burning equipment.
(2) The owner or operator of fuel-burning equipment subject to former section 22a-174-2 of the Regulations of Connecticut State Agencies shall emit no more than the following particulate matter levels:

(A) 0.14 pounds of particulate matter per million BTU of heat input if the fuel burned is residual oil (No. 4 or No. 6 oil);
(B) 0.12 pounds of particulate matter per million BTU of heat input if the fuel burned is distillate oil (No. 2 oil);
(C) 0.10 pounds of particulate matter per million BTU of heat input if the fuel burned is natural gas; or
(D) 0.20 pounds of particulate matter per million BTU of heat input for any other fuel burned.

2. CSR Section 22a-174-18: Control of particulate matter and visible emissions.
(3) Mobile sources. Except as provided in subsection (j) of this section, no person shall cause or allow: (A) Any visible emissions from a gasoline powered mobile source for longer than five (5) consecutive seconds;