NORCOTT, J., with whom AURIGEMMA, J., joins, concurring. I agree with the majority's resolution of the issues presented by this appeal, but wish to elaborate on part IV of the majority opinion, which concludes that the decision of the named defendant, the inland wetlands commission of the town of Orange (commission), to approve the application of the defendant Stew Leonard's Orange, LLC (Stew Leonard's), was not supported by substantial evidence. I write separately to: (1) emphasize that inland wetlands agencies have the authority under General Statutes § 22a-42a (d) (1)[1] to impose conditions on the approval of permits to conduct regulated activities, and that such conditions may well be necessary to direct compliance with the applicable environmental standards, without incurring the financial or temporal costs attendant to the denial of an application; and (2) ensure that our conclusion, directing the trial court to sustain the appeal filed by the plaintiff intervenors,[2] is informed by an independent review of the record, instead of just on an assumption, however well-founded, about whether the plan as conditionally approved complies with the relevant regulatory scheme. A review of the record leads me to determine that Stew Leonard's application either lacked an erosion and sedimentation control plan (erosion control plan), or included one whose failure to comply with the relevant regulatory scheme could not be addressed by reasonably specific conditions of approval. Accordingly, I agree with the majority's conclusion that the commission's decision was not supported by substantial evidence.

I begin by noting my general agreement with the majority's statement of the relevant facts and procedural history. I do, however, find it necessary to develop further the factual background behind the erosion control plan condition that forms the basis for the majority's decision in this case, which demonstrates that Stew Leonard's application, filed in July, 2004, included two alternative stormwater management schemes, one that utilizes the pond on the site for runoff discharge (pond plan), and the other that does not (no pond plan). The pond plan included an erosion control plan that had been prepared in accordance with the 2002 version of the Connecticut Erosion and Sedimentation Guidelines (guidelines),[3] but the subsequently filed no pond plan was submitted without an erosion control plan. During the proceedings, the town's inland wetlands officer requested assistance from the Southwest Conservation District (district),[4] which reviewed the application, and noted, inter alia, that the proximity of the project to the wetlands and the extensive cuts and fill required "warrants the use of enhanced erosion and sedimentation controls," because of a "moderate" to "severe ero-

sion hazard" due to the types of soil present. The district indicated further that the erosion control plan submitted by Stew Leonard's still had to be revised in accordance with the guidelines. Subsequently, James Rotondo, Stew Leonard's engineer, responded to those concerns by indicating his intent to obtain permits from the state department of environmental protection, consider the addition of more sediment basins and stabilize soil stockpiles stored for more than thirty days with vegetative cover.[5] In response to questions from Commissioner Lou Gherlone, Rotondo further assured the commission that the plan would be modified to indicate that the silt fences, as well as erosion control hay bales, were in place and satisfied state specifications. After further discussion, John Fallon, counsel for Stew Leonard's, emphasized that it anticipated and welcomed the addition of these more detailed erosion and sediment control plans as conditions of approval that would need to be satisfied, in the discretion of the town's inland wetlands officer, prior to the issuance of a permit.

As the proceedings continued into November, 2004, erosion controls remained a concern, as expressed by Robert Sonnichsen, the engineer with Delta Environmental Services (Delta), who had been retained by the commission to perform an independent review of the application. Indeed, Commissioner Diana Ross pointed out that no erosion control plan had been filed for the no pond plan. Indeed, in further discussion of that alternative, Ross noted that the silt fences would be located differently under the no pond plan, which would require the submission of a new erosion control plan. In response, Rotondo again assured the commission that the proper erosion control plan would be developed for the no pond plan. Fallon then again emphasized the availability of a conditional approval and oversight by the town's enforcement officer, particularly given the impending statutory deadline for action on the application. See General Statutes § 22a-42a (c) (1) (inland wetlands hearings "shall be held in accordance with the provisions of subsection [c] of [General Statutes §] 8-7d"); see also General Statutes § 8-7d (a) ("All decisions on such matters shall be rendered within sixty-five days after completion of such hearing, unless a shorter period of time is required under this chapter, chapter 126 or chapter 440. The petitioner or applicant may consent to one or more extensions of any period specified in this subsection, provided the total extension of all such periods shall not be for longer than sixty-five days, or may withdraw such petition, application, request or appeal.").

Thereafter, the commission approved, by a divided vote, Stew Leonard's application pursuant to § 381-43 of the Orange inland wetlands and watercourses regulations,[6] subject to twenty conditions, five of which, as noted by the majority and the trial court, were substantive in nature, and required Stew Leonard's to submit:

(1) a "[r]evised and updated erosion control plan that implements all [s]tate [r]egulations"; (2) "[a]dditional detailed information" with respect to "the silt fence and hay bales"; (3) "[a] plan that addresses the placement of eco stone pavers and the winter sanding issues"; (4) a revised storm drainage plan addressing "[a]ny and all conflicts with soil, pipes, inverts and any other problems"; and (5) "a phasing plan [designed by its engineer] to minimize large disturbed areas and design the project to be constructed as practical[ly] as possible without leaving large areas open for erosion." The commission, as stated by Frederick O'Brien, its chairman, viewed its vote approving the application as "a finding that the [plaintiffs] had not carried their burden of proving the application would [cause] unreasonable damage to the wetlands."

I agree with the majority's statement of the relevant standard of review of decisions made by inland wetlands commissions, namely, that, "[i]n challenging an administrative agency action, the plaintiff has the burden of proof. . . . The plaintiff must do more than simply show that another decision maker, such as the trial court, might have reached a different conclusion. Rather than asking the reviewing court to retry the case de novo . . . the plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision. . . .

"In reviewing an inland wetlands agency decision made pursuant to the [Inland Wetlands and Watercourses Act], the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given. . . . The evidence, however, to support any such reason must be substantial; [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . ." (Internal quotation marks omitted.) *Tarullo* v. *Inland Wetlands & Watercourses Commission*, 263 Conn. 572, 584, 821 A.2d 734 (2003); accord *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 587–88, 628 A.2d 1286 (1993); see also *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, 269 Conn. 57, 71, 848 A.2d 395 (2004) ("[e]vidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence").

Furthermore, "it is improper for the reviewing court to reverse an agency decision simply because an agency failed to state its reason for its decision on the record. The reviewing court instead must search the record of the hearings before that commission to determine if there is an adequate basis for its decision. . . . In reaching this conclusion, we analogized cases and statutory language governing planning and zoning agencies to those governing inland wetland agencies and found the two statutory schemes to be either identical or extremely similar. . . . We also determined that public policy reasons make it practical and fair to have a trial court on appeal search the record of a local land use body . . . composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate."[7] (Citations omitted; internal quotation marks omitted.) *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 588–89.

I agree with the majority's emphasis on the degree of the application's regulatory compliance,[8] because "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under [the Connecticut Environmental Protection Act], whether the conduct is unreasonable under [that act] will depend on whether it complies with that scheme." *Waterbury* v. *Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002); see also *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 293, 933 A.2d 256 (2007) ("a determination that the work was required to be, but was not, in compliance with the substantive provisions of the applicable inland wetlands regulations could support a finding that it constituted unreasonable pollution under [the Connecticut Environmental Protection Act]").

Moreover, it is clear that the applicable statutory and regulatory scheme authorizes local inland wetlands agencies, such as the commission, to condition the approval of an application on the satisfaction of specific conditions that "may include any reasonable measures which would mitigate the impacts of the regulated activity and which would (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources." General Statutes § 22a-42a (d) (1); see also Orange Inland Wetlands and Water Courses Regs., § 381-47 (same).[9] Indeed, in *Gardiner* v. *Conservation Commission*, 222 Conn. 98, 105–106, 608 A.2d 672 (1992), we recognized inland wetlands commissions' statutory authority to attach such conditions of approval, and rejected a constitutional challenge on fair hearing grounds by intervenors to conditions that required the submission of

further information by the applicant after approval, noting that they afford "additional protection of the public interest"; id., 106; and that adoption of that view "would inhibit an inland wetlands agency in imposing such conditions as it deemed necessary to safeguard against the risk of pollution in the light of concerns raised during its deliberations." Id. Indeed, I agree with the majority's assessment of the conditions imposed in *Gardiner* as appropriately directed to the correction of particular deficiencies in the application.[10] Thus, the commission had the general authority pursuant to § 22a-42a (d) (1) to facilitate the progress of applications that otherwise would fail to comply with the comprehensive environmental regulatory scheme by conditioning their approval on the implementation of measures to cure those deficiencies.

Although I agree with the trial court's assessment of the approval process before the commission as cautious and thorough,[11] some of the conditions imposed by the commission in this case fail to illuminate or cure specific deficiencies in Stew Leonard's application, and leave me wondering about the extent to which the application complies with the applicable regulations. Like the majority, I begin specifically with the first substantive condition, which requires Stew Leonard's to submit a "[r]evised and updated erosion plan that implements all [s]tate [r]egulations." The majority assumes, based on the language of the condition, that the erosion control plan that had been submitted by Stew Leonard's necessarily did not comply with the relevant state regulations, and therefore, the commission's decision to approve the plan could not have been supported by substantial evidence. I am reluctant to rest my decision solely on this assumption given our long-standing deference to land use commissions' technical decisions, as well as our well rooted understanding that these commissions frequently are composed of legal laypersons, whose technical expertise lies in areas beyond legal procedure. See, e.g., *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 588–89. Thus, like the trial court, I recognize the need to go beyond this assumption and to conduct an independent review of the record, despite the commission's failure to state the reason for its approval of the application; see id.; to determine whether it was supported by substantial evidence.

Having conducted that review of the record, I conclude that there are two reasons to conclude that the commission's decision was not supported by substantial evidence. First, although Stew Leonard's application, at least with respect to the pond plan, professes to have an erosion control plan designed in accordance with the guidelines, the district and Delta both requested that the plan be revised to conform to those same guidelines, and there is no indication that the commission found that the specific revisions made by Stew Leonard's in response were in fact compliant,

especially given the language of the condition as noted by the majority. Moreover, it is clear that the no pond plan lacked an erosion control plan, which was subsequently to be submitted by Stew Leonard's after approval of the application. Finally, the broad condition poses significant difficulties for reviewing courts because it did not identify specific deficiencies to be remedied, a flaw exacerbated by the commission's failure to explain to this court how the plan as approved complies with the technical specifications contained in the voluminous guidelines, which are more than 350 pages in length.[12] Reading the record, I am convinced that the commission effectively "punted" review of the erosion control plan in light of the looming statutory deadline, a subject that was a significant topic of discussion during the hearings. Accordingly, there is no way that I can conclude that the commission's decision was supported by substantial evidence, and I concur with the majority's decision to that effect.

[1] General Statutes § 22a-42a (d) (1) provides: "In granting, denying or limiting any permit for a regulated activity the inland wetlands agency, or its agent, shall consider the factors set forth in section 22a-41, and such agency, or its agent, shall state upon the record the reason for its decision. *In granting a permit the inland wetlands agency, or its agent, may grant the application as filed or grant it upon other terms, conditions, limitations or modifications of the regulated activity which are designed to carry out the policy of sections 22a-36 to 22a-45, inclusive.* Such terms may include any reasonable measures which would mitigate the impacts of the regulated activity and which would (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources. No person shall conduct any regulated activity within an inland wetland or watercourse which requires zoning or subdivision approval without first having obtained a valid certificate of zoning or subdivision approval, special permit, special exception or variance or other documentation establishing that the proposal complies with the zoning or subdivision requirements adopted by the municipality pursuant to chapters 124 to 126, inclusive, or any special act. The agency may suspend or revoke a permit if it finds after giving notice to the permittee of the facts or conduct which warrant the intended action and after a hearing at which the permittee is given an opportunity to show compliance with the requirements for retention of the permit, that the applicant has not complied with the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application. The applicant shall be notified of the agency's decision by certified mail within fifteen days of the date of the decision and the agency shall cause notice of their order in issuance, denial, revocation or suspension of a permit to be published in a newspaper having a general circulation in the town wherein the wetland or watercourse lies. In any case in which such notice is not published within such fifteen-day period, the applicant may provide for the publication of such notice within ten days thereafter." (Emphasis added.)

[2] The plaintiffs are George L. Finley, Barbara K. Schmidt and Vincent P. Schmidt, who intervened in these proceedings pursuant to General Statutes § 22a-19 (a).

[3] General Statutes § 22a-328, which is part of the Soil Erosion and Sediment Control Act, requires the Council on Soil and Water Conservation (council); see General Statutes § 22a-315 (c); to "develop guidelines for soil erosion and sediment control on land being developed. The guidelines shall outline methods and techniques for minimizing erosion and sedimentation based on the best currently available technology. Such guidelines shall include, but not be limited to, model regulations that may be used by municipalities to comply with the provisions of sections 22a-325 to 22a-329, inclusive. The Commissioner of Environmental Protection and the soil and water conservation districts shall make the guidelines available to the public."

The council describes the guidelines as "a useful reference for projects that require erosion and sediment control planning, design and implementa-

tion," and states that they "may be designated as a primary guiding document, or as the foundation and minimum requirements for development of best management practices for construction activities for a number of programs beyond the original intent of the legislation that required the creation of this document," including inland wetlands and watercourses. 2002 Connecticut Guidelines for Soil Erosion and Sediment Control, p. 1-1. Although intended to be authoritative statements of the best possible implementations of the applicable laws, the guidelines state that they do not themselves have the force of law, as "the use of the [g]uidelines does not relieve the user of the responsibility of complying with laws and regulations that cite the [g]uidelines." Id., p. 1-4.

[4] The district is a nonprofit conservation agency that works "with other public and private agencies, as specified under [No. 74-325 of the 1974 Public Acts], for the protection of land and water resources to improve the quality of life for all in the Fairfield and New Haven County area." Southwest Conservation District, "About the Southwest Conservation District," at http://www.conservect.org/southwest/aboutus.shtml (last visited September 30, 2008). The district works in cooperation with federal, state and local environmental protection agencies to "identify and remedy soil erosion, sediment control and water conservation concerns . . . ." Id. Part of this assistance includes the provision of technical services to municipalities, including reports funded by the state department of environmental protection, site visits and site plan reviews, to assess concerns with soil erosion and sediment control, as well as water quality, wetland and stormwater issues. See Conservation Districts of Connecticut, "Assistance to Municipal Land Use Commissions and Staff," at http://www.conservect.org/assistance to municipal land use commissions.shtml (last visited September 30, 2008). The plaintiffs in this appeal encouraged the participation and endorsed the report of the district.

[5] In August, 2004, Stew Leonard's engineers filed a best management practices plan that also proposed to use vegetation for permanent erosion control.

[6] Section 381-43 of the Orange inland wetlands and watercourses regulations provides: "In carrying out the purposes and policies of Sections 22a-36 to 22a-45, inclusive, of the Connecticut General Statutes, and pursuant to [General Statutes § 22a-41 (d)] a municipal inland wetlands agency shall deny or condition an application for a regulated activity in an area outside wetlands or watercourses on the basis of an impact or effect on aquatic, plant, or animal life unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses, including matters relating to regulating, licensing and enforcing of the provisions thereof, the [c]ommission shall consider all relevant facts and circumstances in making its decision on any application for a permit, including but not limited to the following:

"A. The environmental impact of the proposed regulated activity on wetlands or [watercourses].

"B. The applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or [watercourses].

"C. The relationship between the short-termed and long-term impacts of the proposed regulated activity on wetlands or [watercourses] and the maintenance and enhancement of long-term productivity of such wetlands or [watercourses].

"D. Irreversible and irretrievable loss of wetland or [watercourse] resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, and any mitigation measures which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to:

"(1) Prevent or minimize pollution or other environmental damage;

"(2) Maintain or enhance existing environmental quality; or

"(3) In the following order of priority: restore, enhance and create productive wetland or [watercourse] resources.

"E. The character and degree of injury to, or interference with, safety, health, or the reasonable use of the property which is caused or threatened by the proposed regulated activity.

"F. Impacts of the proposed regulated activity on wetlands or [watercourses] outside the area for which the activity is proposed and future activities associated with, or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and

which may have an impact on wetlands or [watercourses]."

[7] The determination of "[w]hether the substantial evidence test was applied properly by the trial court in its review of the [commission's] decision is a question of law over which our review is plenary." *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, supra, 269 Conn. 70.

[8] Citing *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 933 A.2d 256 (2007), the majority concludes that, "[i]t is clear . . . that if the wetlands agency has not made a determination, supported by substantial evidence, that the applicant's proposal complied with applicable statutes and regulations, a decision approving the permit cannot be sustained on appeal, regardless of whether the plaintiff has affirmatively established that the proposal will cause harm to the wetlands. We conclude . . . that an intervenor pursuant to [General Statutes] § 22a-19 can prevail on appeal not only by proving that the proposed development likely would cause harm to the wetlands, *but also by proving that the commission's decision was not based on a determination, supported by substantial evidence, that the development complied with governing statutes and regulations and would not cause such harm*." (Emphasis added.) Noting the importance of erosion control to the protection of wetlands, the majority then determines that the plaintiffs have met this burden because "[i]t is implicit in the condition of approval requiring Stew Leonard's to submit a '[r]evised and updated erosion control plan that implements all [s]tate [r]egulations' that the commission had not determined that the existing erosion control plan met state regulations when it rendered its decision."

[9] Section 381-47 of the Orange inland wetlands and watercourses regulations provides in relevant part: "The [c]ommission . . . may grant the application . . . upon such terms, conditions, limitations or modifications necessary to carry out the purposes of the [Inland Wetlands and Watercourses Act] . . . . Such terms may include any reasonable measures which would mitigate the impacts of the regulated activity and which would prevent or minimize pollution or other environmental damage, maintain or enhance existing environmental quality, or, in the following order of priority: restore, enhance and create productive wetland or [watercourse] resources. . . ."

[10] In *Gardiner*, the commission had imposed conditions "requiring a subsurface investigation of the location proposed for one detention basin because of its proximity to a landfill and a special design of that basin," a precautionary water monitoring program, and "the submission of engineering calculations to substantiate the structural integrity of the basins." *Gardiner* v. *Conservation Commission*, supra, 222 Conn. 105–106.

[11] In concluding that "there was substantial evidence to support everything that the [commission] has allowed" in "the form of a concern, which was apparently assuaged or alleviated by the responses, or change of intention, or change of design," the trial court noted the professional backgrounds of the commission's members, as well as the fact that it had hired Delta, an engineering firm, as its own independent consultant. Accordingly, the trial court stated that its review of the record left it "with the overriding impression of a rather thoroughly vetted panoply of issues with an abundance of expertise presenting and residing in the [commission] itself."

[12] The commission argues that "the [concern] with regard to the condition that a revised and updated erosion control plan be submitted is baseless since it was proper for the commission to impose such a condition to insure that the approved site activities conducted were in compliance with the regulations." The commission also contends that the imposition of this and other conditions was the result of the "plaintiffs' own input during the public hearing process," and that "the conditions of approval . . . were ministerial in nature being the intention of the commission that the additional information would be submitted for review in a further effort to insure further safeguards against any risk of impairment or pollution associated with the contemplated activities." Although further safeguards are a proper condition to impose, as worded, the condition at issue herein directs compliance with an entire regulatory scheme, which indicates that it is more than just a further safeguard or "housekeeping" task.