Connecticut Department of

ENERGY &
ENVIRONMENTAL
PROTECTION

ENVIRONMENTAL PROTECTION
OFFICE OF ADJUDICATIONS

IN THE MATTER OF	***:***	***ORDER NOS. SRD-182, 191***
JOYCE SCHILBERG, AS EXECUTRIX OR FIDUCIARY OF THE ESTATE OF BENJAMIN C. SCHILBERG	***:***	***SEPTEMBER 23, 2011***

FINAL DECISION

I

INTRODUCTION

This is an appeal of a pollution abatement order issued by the Commissioner to Benjamin Schilberg and the Estate of Benjamin Schilberg regarding property located north of Rt. 44 in Willington and related to activities performed at that property over a one-year period by Mr. Schilberg between 1967 and 1972. The order required Mr. Schilberg and now his estate to investigate, remediate, and monitor for pollution or a threat of pollution to the waters of the state, namely groundwater resources in the vicinity of this property.

The parties to this matter are the Department of Energy and Environmental Protection[1] (DEEP/department) and the Estate of Benjamin Schilberg (Respondent).[2] The hearing on this appeal began on April 29, 2008 and concluded on April 21, 2011. The hearing was suspended

[1] The successor agency to the Department of Environmental Protection, See Public Acts 2011, No. 11-80.

[2] The original order, SRD-182, was issued to Mr. Schilberg as an individual. Mr. Schilberg passed away before the hearing on that order was concluded. A substitute order, SRD-191, was issued to Mr. Schilberg's estate on August 13, 2008. A significant portion of the hearing record was established regarding SRD-182 before Mr. Schilberg's death. By my ruling of April 14, 2011, I consolidated the hearing on the two orders into one proceeding because they both involve identical facts and legal issues. I had also ruled previously that Mr. Schilberg's estate assumed the role as respondent to SRD-182 pursuant to General Statutes § 52-599.

at the request of the parties to provide them with an opportunity to mediate their dispute outside of the hearing process and due to ongoing remediation activity led by the U.S. Environmental Protection Agency (EPA). Efforts at settlement were unsuccessful.

The respondent challenges the assertion that it or Mr. Schilberg maintained or is maintaining a condition that is polluting or has the potential to pollute the waters of the state. The respondent has also posed several legal challenges to the order and its scope, including the assertion that the order is an unconstitutional violation of due process rights.

I have reviewed the evidence presented by the parties, including all documentary exhibits and oral testimony. I have also reviewed legal briefs filed by the parties at my request. Mr. Schilberg had stipulated to a set of facts that include an acknowledgement that at some time over a one-year period between 1967 and 1972 he performed activities at the site that included the burning of insulated wire for the recovery of copper. Based on the substantial evidence on the record, I find that this activity caused or had the potential to cause pollution to the waters of the state. As a result, I affirm the order.

II
DECISION
A
FINDINGS OF FACT
1
Procedural History

1. The department issued the original order, SRD-182, to Benjamin Schilberg on June 19, 2007. The order alleges that he had created or was maintaining a facility or condition at the site which reasonably can be expected to create a source of pollution to the waters of the state. The order required Mr. Schilberg, *inter alia*, to investigate the existing and potential extent and degree of soil, ground water and surface water pollution on or emanating from the site, to undertake remedial actions to abate such pollution, and to monitor the effectiveness of those remedial actions. (Exs. DEP-1, 60.)

2. A timely answer and request for hearing was received by the department on July 13, 2007.[3] The initial hearing was held in 2008 on April 29 and 30 and May 7 and 23. Mr. Schilberg passed away on May 25, 2008. The estate of Mr. Schilberg was substituted for the decedent. The department issued a new order, SRD-191, to the Estate of Mr. Schilberg on August 13, 2008, which made the same allegations. The estate filed a timely answer and request for hearing on September 12, 2008. The hearing was continued until April 21, 2011 and concluded on that date. (Ex. DEP-60; test. B. Schilberg[4] 4/30/08.)

1

Background

3. Mr. Schilberg leased approximately 10,000 square feet of a vacant parcel of land from Thomas Nigro between 1967 and 1972. This parcel is located off of Route 44 in Willington and is identified as Lot 11 on Map #6 of the Willington tax assessor's office. The leased area is approximately one quarter of a mile north of Route 44. (Stipulation of facts, 4/29/08; exs. DEP-3, 6; test. B. Schilberg, 4/30/08.[5])

4. Mr. Schilberg used the leased area as part of his metals recovery business known as Schilberg Iron and Metals Company. Mr. Schilberg arranged for employees of his business to burn insulated wire on the leased area for the purpose of recovering copper and reselling it to metal brokers. Unused, defective, or otherwise unmarketable insulated wire was collected from wire manufacturers. Approximately once per week during the period Mr. Schilberg had access to the leased area, a truckload of drums containing insulated wire was taken to the leased area. The insulated wire was placed in a pile and ignited using paper and approximately one gallon of kerosene as a liquid accelerant. The remaining copper was raked into piles and taken back to

[3] All documents pertaining to the procedural history that are not specifically cited as exhibits are contained in the docket file maintained by the Office of Adjudications and are part of the administrative record in this matter. General Statutes §4-177(d).

[4] Bernard Schilberg, son of Benjamin Schilberg, provided fact testimony about his father's business because his father was too ill to attend the hearing and testify on his own. DEP-6 is Mr. Schilberg's deposition in a related superior court matter and contains sworn testimony regarding his activities at the site and business operations.

[5] The testimony and proceedings in this matter were recorded. No written transcript has been prepared. The audio recording of this hearing is on file with the Office of Adjudications and is the official record of this proceeding.

Mr. Schilberg's company where it was sold on the scrap metal market. Mr. Schilberg only paid for the copper actually recovered from the wire. The ash from the burning process was kept on the leased area for a period of time up to two months. When enough ash accumulated to load a truck, it was removed from the leased area and sold to a copper smelter for the recovery of the copper remaining in the ash. (Stipulation of facts; ex. DEP-6; test. B. Schilberg.)

5. The burning activity was primarily conducted by Angelo Chiarizia and Felix Rios, employees of Mr. Schilberg. Mr. Schilberg personally observed the burning operation on occasion but did not regularly supervise it. (Stipulation of facts; ex. DEP-6.)

6. Mr. Schilberg did not have a permit from the department to conduct the wire burning and ash removal activity. Mr. Schilberg ceased the wire-burning activity on the leased area approximately one year after he began. He removed all of the ash from the site at the conclusion of his use. The leased area continued to be used to store solid waste items such as automobiles, truck trailers, and white goods. (Stipulation of facts; ex. DEP-6; test. D. Fitting, 4/29/08, 5/7/08, M.McDaniel, 4/29/08.)

7. Wire insulation found on the site contains varying amounts of lead. Lead and copper can remain present in the ash that was left on-site and exposed to the elements after the wire was burned. The use of a liquid accelerant to ignite the insulated wire contaminated underlying soil. Wire burning on the site using kerosene, a petroleum-based accelerant, and the temporary deposit of ash from wire-burning activities caused a release of contaminants to the environment. Those contaminants remained present on the site at the time the department issued its initial order in 2007. (Exs. DEP-26, 27; test. H. Hurd, 4/29/08, M. McDaniel, 4/29/08, 4/30/08, 5/7/08, W. Warzecha, 4/30/08, 5/23/08.)

8. Groundwater at the site is classified as GA and GAA pursuant to the Connecticut Water Quality Standards. Residences in the vicinity of the site rely on groundwater resources for drinking water as there is no public drinking water supply. Groundwater eventually discharges to the Mansfield Reservoir, which provides drinking water for the city of Willimantic. (Test. W. Warzecha, 4/30/08, 4/21/11.)

9. Soil at the site has been sampled numerous times by various entities. Soil samples were analyzed for compliance with two primary criteria, direct exposure criteria (DEC) and pollution mobility criteria (PMC). The values for residential direct exposure criteria are the levels of a contaminant that presents a risk to human health from exposure to the contaminated soil through contact with the skin or ingestion. The values for the pollution mobility criteria represent the levels at which contaminants become a risk to contaminate groundwater by leaching out of soil into groundwater. Contaminants can leach out of soil through contact with infiltrating rainwater, which is naturally acidic and can cause mobilization of contaminants in soil to the groundwater. High groundwater levels can also cause groundwater to come into contact with contaminated soil. The Connecticut Remediation Standards Regulations (RSRs) require polluted soil to be remediated to meet the applicable DEC and PMC. (Exs. DEP-16, 17, 28, 49, 50, 53; test. M. McDaniel, 4/29/08, 4/30/08, 5/7/08, 5/23/08.)

10. The Department sampled soil from the site on December 17, 1991 and January 10 and 21, 1992 and analyzed those samples for the presence of lead, copper, zinc, barium, and cadmium. The samples were collected from an area of the site where wire-burning activities were conducted. The soil in this location was tinted blue-green in color. This color is indicative of copper oxidation and is a result of the copper recovery activity conducted by Mr. Schilberg. The results of this analysis showed levels of lead, copper, and zinc that exceeded the residential DEC and levels of lead, copper, zinc, barium, and cadmium that exceeded the PMC for areas with groundwater classified as GA. (Exs. DEP-28, 29 49; test. M. McDaniel, 4/29/08, 4/30/08.)

11. In 1993, as part of a property transfer, Rizzo Associates collected soil samples and installed five groundwater monitoring wells on the site. Analysis of the soil samples revealed elevated levels of lead and other metals. Lead levels in soil samples exceeded the standard for hazardous materials. Groundwater samples were analyzed for total petroleum hydrocarbons (TPHs) and metals. TPHs were detected in four of the groundwater monitoring wells. (Exs. DEP-28, 50, 53; test. M. McDaniel, 4/29/08, 4/30/08.)

12. The U.S. Environmental Protection Agency (EPA) also investigated the contamination at the site. In response to a referral from the department, EPA collected soil samples and analyzed groundwater samples. EPA found stockpiled soil on site that presented an unacceptable risk for human exposure due to elevated lead levels beyond the hazardous standard. EPA prepared to conduct a time critical removal action (TCRA) to remove the previously excavated and stockpiled soil and to excavate and remove materials in the area of blue-green stained soil where wire-burning activity occurred. A TCRA is intended only to alleviate the human health risk from direct exposure to the contaminated material. It will not necessarily remove the risk for material to leach out of soil and contaminate groundwater. (Exs. DEP-16, 17; test. M. McDaniel, 4/29/08, 4/30/08, 5/7/08, 5/23/08.)

13. EPA completed its TCRA in August 2009. EPA's contractor removed approximately 3700 cubic yards of waste material from the site; 2422 cubic yards of this material were classified as hazardous waste. Pre-removal soil samples taken in the area of blue-green soil indicated exceedances of the DEC for lead, copper, antimony, arsenic, silver, and zinc. The same samples also indicated exceedances of the PMC for lead and barium. (Ex. DEP-65; test. W. Warzecha, 4/21/11.)

14. The EPA removal action brought remaining soil into compliance with these criteria for the contaminants of concern. Some requirements of the order were "satisfactorily fulfilled" by the respondent and EPA's removal action, including paragraphs B.1. B.2.a. B.2.b., B.2.d., and B.2.h, except for required compliance and post remediation groundwater monitoring. Antimony detected as part of EPA's soil sampling efforts in the wooded wetland area of the site has been adequately addressed by the respondent through confirmatory sampling. The two detections of antimony in this location were below the applicable standards in the RSRs. There is no need for the respondent to conduct additional removal actions in the wooded wetlands. The RSRs require the monitoring of groundwater for a minimum of four quarters to confirm that the soil removal has addressed any potential for the contamination of the groundwater and that the groundwater is satisfactory for the uses intended under GA and GAA classification. No additional remediation will be required unless the groundwater monitoring discloses an ongoing source of pollution. There is no direct evidence that groundwater at the site is polluted because EPA's action likely

eliminated the risk for groundwater contamination. (Exs. DEP-76, 77, 78, 79, 80; test. W. Warzecha and M. Casslar, 4/21/11.)

15. The respondent has filed an acceptable plan to monitor groundwater for four quarters for the necessary contaminants of concern. DEEP has approved the groundwater monitoring plan submitted by the respondent. Groundwater monitoring must continue over a span of four quarters to ensure that seasonal fluctuations in the groundwater table are accounted for. One groundwater sampling round provides only a snapshot of groundwater quality at that time and is insufficient to provide an overall impression of groundwater quality for a given location. The respondent has not yet completed the required four quarters of groundwater compliance monitoring and must do so to comply with the outstanding portions of the order. (Exs. DEP 79, 80; test. W. Warzecha, 4/30/08, 4/21/11, M. Casslar, 4/21/11.)

B

CONCLUSIONS OF LAW

If the Commissioner finds that any person has created a condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to that person to take the necessary steps to correct the potential source of pollution. General Statutes § 22a-432. This order may require such investigation, study, data gathering or monitoring as the commissioner deems appropriate to assure that the violation, condition, or pollution is abated, corrected, or remedied. General Statutes § 22a-5a.

Mr. Schilberg, by virtue of conducting the wire-burning operation on the leased area created a condition, namely soil pollution, which the DEEP could reasonably expect to be a source of pollution to the waters of the state based on objective criteria. The burning process conducted in open conditions using a petroleum-based accelerant and the ash left uncovered on the property served to mobilize the metals in the wire, its insulation and pollutants in the

accelerant in a manner that contaminated the underlying soil.[6] The pollution was found at levels in the soil that present a risk for groundwater contamination based on objective standards within the RSRs. This risk will only be addressed by removing or otherwise remediating the contaminated material. Although the EPA did remove the offending material, the Commissioner has clear authority to require further monitoring to affirm that EPA's removal action has adequately addressed the risk for groundwater contamination and that no actual groundwater contamination is present. General Statutes §22a-5a, Regs., Conn. State Agencies §22a-133k-3(g).

DEEP staff agreed that substantial portions of the order are fulfilled by virtue of the EPA TCRA and subsequent sampling activity for antimony in the wooded wetlands performed by the respondent's consultant. The remaining groundwater monitoring and sampling is necessary to demonstrate that the soil contamination did not impact groundwater and that groundwater can be used according to its classification for drinking water purposes. The record shows there is no direct evidence currently available to indicate the groundwater is polluted and EPA's action likely alleviated the risk for groundwater contamination. However, this opinion does not relieve the respondent of its obligation to perform the confirmatory sampling required by the RSRs.

The fact that no current risk is likely to exist does not counteract the fact that contaminated soil from wire-burning activities was left on-site for more than forty years exposed to the elements thus presenting an unacceptable risk for groundwater contamination. It is reasonable and in accord with statutory authority for the Commissioner to require final sampling and monitoring to confirm the groundwater was not contaminated and that no further risk for contamination exists. General Statutes §22a-5a; Regs., Conn. State Agencies §22a-133k-3(g).

In disputing this order, the respondent focuses on the uncertainty that exists if some level of contamination in the groundwater is detected as a result of the sampling and monitoring

[6] The respondent argues that it conducted its operation professionally and neatly and removed all debris from the site at the conclusion of its use. The statute, however, makes no exception for activities that cause pollution because the respondent was neater than others that later used the property. Further, as stated by Mr. Schilberg in his deposition, the fact that he only paid for the actual copper recovered from the wire, reasonably leads me to conclude that the motivation for his employees to remove every scrap of wire would not have been economically based. It is likely that even Mr. Schilberg's operation left wire behind on the site.

protocol approved by DEEP. If such contamination is detected, the order allows DEEP to require further sampling, monitoring, investigation, or remediation the scope of which is yet to be determined. The respondent argues that the Commissioner lacks the authority to unilaterally order these follow-up steps without providing the opportunity to the respondent to be heard; without an express provision for a hearing, the respondent argues its constitutional due process rights would be violated.

The controversy the respondent envisions has not occurred and may never occur. The respondent is speculating that possible disagreements may arise over the necessary steps that may be required to address contamination that has yet to be discovered; I am unwilling to let the entire order fail or remain open based on a possibility. In addition, it is a "well established common-law principle that administrative agencies lack the authority to determine constitutional questions." *Cumberland Farms v. Town of Groton*, 262 Conn. 45, 64 (2002). The impact of the order on the constitutional right to due process is such a question that cannot be administratively determined.

Courts with clear jurisdiction to hear constitutional claims will also refuse to hear claims regarding agency action if the claim is premature because there are other administrative means to address those issues. See *Concerned Citizens of Sterling et al. v. Town of Sterling* 204 Conn. 551, 562-63 (1987). The respondent cannot choose to ignore an alternative procedure that can provide an adequate remedy and have its constitutional concern reviewed at a time when it is not ripe and based on speculation. Id. Exceptions may be made for constitutional or jurisdictional claims but not when there is an administrative remedy to pursue that can provide the relief sought.

A remedial order and its implementation cannot exceed the authority of the Commissioner under the RSRs. The respondent can seek a declaratory ruling to address any attempt by the department to exceed that authority during the respondent's attempt to comply with the final order. Rather than continually reopening an administrative hearing on the order itself each time there is a disagreement about the application of the underlying regulations to the order's implementation, the declaratory ruling process outlined in General Statutes § 4-176

provides the respondent with an adequate avenue to address the potential controversy of concern.[7] Given the availability of this process, I cannot and will not provide relief from the order based on the mere possibility of a potential constitutional claim.

Moreover, in order to prove a claim that someone's due process rights have been violated there must be a showing that the individual or entity was denied an opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 US 319 (1975); *Flamenco v. Independent Refuse Service, Inc. et al.*, 130 Conn. App. 280, 283 (2011). The respondent has been provided every opportunity to participate fully in the hearing it requested. This included ample opportunity to participate in discovery, shape the scope of the hearing, challenge DEEP's direct evidence, cross-examine all of DEEP's witnesses, offer evidence of its own, and brief legal issues post-hearing. There is no persuasive argument fathomable that the respondent was not provided an opportunity to be heard in a meaningful manner.

The respondent was also given the opportunity for a hearing at a meaningful time. The hearing must be provided in a timely fashion so the pollution at issue can be addressed and so the respondent can provide a defense to the underlying order without undue delay. Moreover, the appeal rights of the respondent do not require the remediation envisioned in the order to be put permanently on hold. The remedial nature of the statute requires its liberal interpretation to accomplish its purpose. *McManus v. Commissioner of Env. Protection*, 229 Conn. 654, 663 (1994). A liberal interpretation of the RSRs is likewise required. The Commissioner has broad authority to issue remedial orders and mandate steps necessary to implement them. These statutory authorities would serve no purpose if the hearing was delayed until all actions are taken and all steps are identified. The hearing in this matter was properly delayed for a significant period to allow EPA's TCRA to occur. Now, however, there is no need for further delay to determine that the respondent is legally responsible under a final order for the remaining steps at the site. The need to have this hearing in a swift manner to allow the agency some level of

[7] This process can provide the necessary relief the respondent seeks at a more appropriate time by addressing the application of the statutes and regulations, namely the RSRs, and therefore the application of the Commissioner's authority, to the particular factual (rather than potential) circumstances. Although the Commissioner maintains the discretion whether or not to issue such a ruling, the failure or refusal of the Commissioner to issue a ruling can be appealed directly to the Superior Court. General Statutes § 4-175.

closure on the final monitoring requirements coupled with the broad statutory authority of the Commissioner to order the necessary remedy substantiates that this opportunity has been presented at a meaningful time to the respondent and the respondent has taken full advantage of it.

This hearing determined that the findings or allegations in the order were supportable by the facts, which resulted in a determination that the respondent is legally obligated to remediate the site in accordance with the RSRs. The hearing did not lead to a determination on the scope of the remediation required even though there is evidence that some satisfactory remedial steps have been taken by the EPA and the respondent. The determination whether the remediation conducted is sufficient will be made when adequate monitoring results demonstrate that the threat of pollution no longer exists.

If the groundwater monitoring results indicate that contamination is present at unacceptable levels, it would be reasonable to conclude that the remediation activities performed to date are insufficient. The facts of this case will not change, and this order will remain in effect until additional remediation or groundwater monitoring results demonstrate that the requirements of the order have been completely satisfied. There is nothing in this process that would give rise to a new set of facts or activities that would warrant the issuance of another order, from which the respondent could appeal.

The legislature has granted the Commissioner the authority to order the respondent to take the necessary steps to address pollution, including the specific steps he deems fit. General Statutes §§ 22a-432 and 22a-5a; Regs. Conn. State Agencies §22a-133k-1 et seq. The law says that courts must "if possible construe a law so that it is effective." *Northeast Savings F.A. v. Sirvart K. Hintlian et al.* 241 Conn. 269, 274 (1997); *Fleming v. Garnett* 231 Conn. 77, 88 (1994). If I were to adopt the respondent's argument, the authority granted to the Commissioner to issue a remedial order would be largely ineffective. The department could not order the respondent to perform the necessary and required compliance monitoring because the respondent is speculating that disputes *may* arise over the necessary steps that *may* be required to address pollution that *may* be detected by the groundwater monitoring activities.

In construing a statute, common sense must be used and courts will assume that the legislature intended to accomplish a rational and reasonable result. The courts will adopt the construction that makes the statute effective and workable and not one that leads to difficult and possibly bizarre results. *Red Hill Coalition, Inc. v. Town Planning and Zoning Commission*, 212 Conn. 737-38 (1989). The respondent envisions a revolving door of appeals to resolve the potential discrepancies that may occur. The legislature never intended such a bizarre result in allowing the respondent the opportunity to appeal an order and this decision will not sponsor such a result.

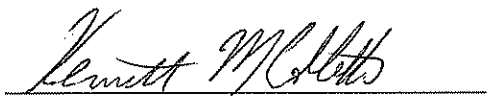
The necessary determinations in this matter are whether Mr. Schilberg conducted activities that could have caused the pollution at the site and whether that pollution presented a risk for groundwater contamination. DEEP has met its burden and demonstrated that Mr. Schilberg's activity caused soil contamination on the site and that this contamination was at levels that put the groundwater at risk for contamination. This is of special concern given the groundwater's classification as GA and GAA. Additional causes of pollution may exist but do not relieve the respondent of its duty to remedy the property in accordance with the RSRs. [8] The pollution present at the site consists of metals and petroleum hydrocarbons attributable to the respondent's wire-burning activities. The order's final and necessary requirements must be addressed through the respondent's groundwater sampling and monitoring plan approved by the DEEP staff.

CONCLUSION

The DEEP met its burden of proof under the statute that the respondent created a condition that posed a risk for groundwater contamination. The respondent's wire-burning activity resulted in contamination of the soil at levels that posed a threat to the groundwater of the state. The Commissioner has the authority to order the remediation, investigation and monitoring necessary to assure this threat is averted. The implementation of the final

[8] I acknowledge the possibility that the pollution caused by this activity could have mingled with pollution from other known activities at the site, including illegal dumping, disposal of drums and other solid waste, and perhaps even from later attempts at wire burning. However, the respondent has not presented any evidence regarding other sources of pollution or that the pollution caused by Mr. Schilberg can be segregated in any fashion from other potential sources of pollution that occurred before and after his activity in the area.

groundwater monitoring plan required by the order and approved by DEEP staff is necessary to assure no groundwater contamination occurred and that the groundwater may be used according to its GA and GAA classification. Therefore, the order is affirmed.



Kenneth M. Collette, Hearing Officer

PARTY LIST

In the matter of
Joyce Schilberg as Executrix or Fiduciary of the Estate of Benjamin C. Schilberg
Order Nos. SRD-182, 191

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