STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF CONNECTICUT	:	DEPARTMENT OF ENVIRONMENTAL PROTECTION
v.	:	ORDER NO. MT96-01
BEC CORPORATION, IRVIN A. SHINER and MICHAEL SHINER	:	DECEMBER 19, 1997

FINAL DECISION

INTRODUCTION

On June 6, 1996 the Commissioner of Environmental Protection issued Order No. MT96-01 to BEC Corporation, Irvin Shiner and Michael Shiner (the respondents). BEC Corporation is the owner of a parcel of land in West Haven which has been used for heating oil storage and distribution. Irvin and Michael Shiner are, respectively, BEC Corporation's president and vice-president.

The order alleges, *inter alia*, that the respondents have created or are maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, and requires the respondents to undertake certain actions to correct that pollution. The respondents filed a timely appeal from the order and I conducted public hearings on that appeal on November 20, November 22, December 10, and December 13, 1996, and January 10, January 24, and January 31, 1997. In response to the staff's Motion to Reopen, I conducted and additional day of hearing on October 1, 1997.

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A number of oil releases have occurred at the site during the last three decades. These releases have created a condition at the site which has polluted, and which reasonably can be expected to pollute, groundwaters and surface waters at and in the vicinity of the site. Because all three respondents have created and maintained this condition, and the remedial actions required by the order are a reasonable means of correcting such condition, I confirm the order.

FINDINGS OF FACT

A. Procedural History.

1. On June 6, 1996, the Commissioner of Environmental Protection (Commissioner) issued Order No. MT96-01 to BEC Corporation, Irvin Shiner and Michael Shiner (the respondents) pursuant to, *inter alia*, Conn. Gen. Stat. §§22a-432.[1] (Ex. DEP-1[2]) BEC Corporation (BEC), a Connecticut corporation, owns real property at 101-105 Water Street in West Haven (the site). (Respondent's Answer, Docket Item 3; Exs. DEP-2 and -3) Irvin Shiner is BEC's president and director, and his son, Michael Shiner, is its vice-president and secretary. (*Id.*)

2. The order alleges that the respondents have created or are maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state. The order requires the respondents to prevent further pollution at the site, to investigate existing and potential pollution at the site, to undertake remedial actions to correct such pollution based on the results of that investigation, and to monitor the effectiveness of those remedial

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[1]Section 22a-432 authorizes the Commissioner to issue an order to correct a potential source of pollution if he finds that "any person has established a facility or created a condition ..., or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state ..."

[2]In response to two applications by the respondents (Docket Items 2 and 12), the staff provided a more definite and detailed statement as to certain allegations in the order (Docket Items 7 and 16). As used herein, the term "order" refers to Ex. DEP-1, as modified by Docket Items 7 and 16.

actions. (Ex. DEP-1)

The respondents filed a timely appeal of the order on September 6, 1996. (Docket Item 3) I conducted public hearings on that appeal on November 20, November 22, December 10, and December 13, 1996, and January 10, January 24, January 31 and October 1, 1997. The parties to this proceeding are the respondent and the staff of the Waste Management Bureau of the Department of Environmental Protection (staff).

B. The Site.

The site is bordered on the west by Water Street, on the east by the confluence of the West River and New Haven Harbor (which is part of Long Island Sound), and on the north and south by private property. (Exs. DEP-2, -33 and -55) BEC or its corporate predecessors operated an oil storage and distribution business at the site from at least 1944 to about May 15, 1995. (Ex. DEP-23; Docket Items 3 and 6)

The site contains a barge docking facility for the unloading of oil barges, five above-ground oil storage tanks, three loading racks for loading oil from these tanks into oil tanker trucks, piping to carry oil from the barge docking facility to the oil storage tanks and from the storage tanks to the loading racks, an office building with an attached warehouse and garage, and several small outbuildings. (Ex. DEP-33; *see* map from Ex. DEP-57 attached hereto as Attachment 1)

4. The five storage tanks sit on pilings in a row in the northwest corner of the site

near Water Street. (Ex. DEP-33; test. of I. Shiner, 11/20/96; test. of M. Shiner, 11/22/96; test. of T. Melin, 12/13/96) Tanks 1 through 4 have the capacity to hold 15,000 barrels of oil each and tank 5, 5,000 barrels. (A barrel is equivalent to 42 gallons.) (Ex. DEP-33) The tanks are surrounded by a concrete dike and the concrete foundation of a structure on the neighboring property. (*Id.*; test. of I. Shiner, 11/20/96; test. of P. Criscio, 11/20/96; test. of M. Shiner, 11/22/96; site visit of 11/13/96) (The five tanks, the dike and foundation surrounding the tanks and the unpaved floor underneath the tanks and within the diked-in area are referred to hereinafter collectively as the tank farm.) An intermittent spring runs through the tank farm and the floor of the tank farm is always wet and frequently covered in water from both the spring and precipitation. (Test. of P. Criscio, 11/20/96; test. of M. Shiner, 11/22/96; test. of T. Melin, 12/13/96) The water in the tank farm is drained by a manually-operated pump which empties into an oil/water separator.[3] (Ex. R-4; test. of P. Criscio, 11/20/96; test. of T. Melin, 12/13/96)

5. Another tank farm (referred to hereinafter as the former tank farm) and a loading rack were previously located on the southeast corner of the site. The former tank farm consisted of five above-ground oil storage tanks on concrete slabs and a surrounding concrete dike. Three of the tanks had the capacity to hold 15,000 barrels of oil each and the remaining two tanks, 20,000 barrels each. (Exs. DEP-7 and -51; test. of M. Shiner, 11/22/96; test. of T. Melin, 12/13/96; *see* map from Ex. DEP-42B attached hereto as Attachment 2) The floor of the former tank farm was unpaved and the tank closest to the West River was surrounded by several inches

[3]An oil/water separator is a tank into which water contaminated with oil is pumped or drained. The tank has a system of baffles which remove the oil from the water and allow the cleansed water to drain from the bottom of the tank. The remaining oil is then removed, usually by being pumped into another receptacle. (Test. of B. Emanuelson, 1/10/97)

of water during high tide. (Ex. DEP-6) The former tank farm was removed around 1988 and its location was paved over and converted to a dry-docking facility which BEC rents to another entity unconnected with these proceedings. (Test. of P. Criscio, 11/20/96)

6. The spring in the tank farm, the wet floor of the tank farm and former tank farm, and the site's proximity to the West River indicate that the site has a high water table.[4] (Test. of J. Porter, 12/13/96; test. of A. Green, 1/24/97[5]) Because of the site's proximity to New Haven Harbor the groundwater underlying the site is subject to tidal influences. (Exs. DEP-33, -55; test. of A. Green, 1/24/97; test. of B. Coss, 1/31/97)

C. Corporate History.

7. A corporation known as The Connecticut Refining Company (CRC) purchased the site on or about December 29, 1944. (Ex. DEP-2) Pursuant to Conn. Gen. Stat. §33-367, CRC merged with another corporation, Benzoline Energy Co. (Benzoline), on December 3, 1996. The surviving corporation retained the name Benzoline Energy Co. (Oral Stipulation, 11/20/96; Ex. DEP-35) Pursuant to Conn. Gen. Stat. §33-360, Benzoline changed its name to BEC Corporation (BEC) on May 9, 1995. (Ex. DEP-36) On or about May 9, 1995 BEC terminated all of its employees and sold all of its assets, with the exception of the real property at

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[4]The water table is the top of the saturated zone of subsurface soil. The water table flows downgradient until it connects with a receiving surface water body. (Test. of A. Green, 1/10/97)

[5]Mr. Green has a Master of Science degree in hydrogeology and a Bachelor of Science degree in geology. He has been employed as a hydrogeologist at DEP since 1992. (Ex. DEP-29; *see also* test. of A. Green, 1/10/97)

101-105 Water Street, the tank farm and the on-site buildings, to Alliance Energy Corporation (Alliance). (Ex. DEP-49; Oral Stipulation, 12/10/96) Alliance leased the office building on the site from BEC but did not operate an oil terminal at the site. (*Id.*; test. of B. Lassman, 12/13/96) Sometime in 1997, Alliance sold its business operation at the site to Heating Oil Partners, Inc. (Test. of J. Porter, 10/1/97)

8. Irvin Shiner was president of CRC from at least 1968 until its merger with Benzoline. (Exs. DEP-41, -42 and -43; test. of I. Shiner, 11/20/96) He was president of Benzoline prior to its merger with CRC and remained so until Benzoline's name changed to BEC in 1995. He has been BEC's president since then and owns or co-owns 100% of its voting stock. (Docket Items 3 and 6; test. of I. Shiner, 11/20/96; test. of B. Lassman, 12/13/96) Irvin Shiner supervised the day to day operations of CRC and Benzoline, and made most, if not all, of the major decisions regarding their operations; he has done the same for BEC. (Ex. DEP-34; test. of I. Shiner, 11/20/96; test. of P. Criscio, 12/10/96; test. of B. Lassman, 12/10/96) Generally, Irvin Shiner has been at the site five days a week since 1968. (Test. of I. Shiner, 11/20/96; test. of T. Melin, 12/13/96)

9. Michael shiner served as vice-president and secretary of CRC and then Benzoline from approximately 1975 to May 9, 1995. (Test. of I. Shiner, 11/20/96) He has been the vice-president and secretary of BEC since then. (*Id.*; Docket Items 3 and 6; test. of M. Shiner, 11/22/96) In these capacities he has reported directly to Irvin Shiner and has run those companies in Irvin Shiner's absence. (Test. of I. Shiner, 11/20/96) Starting in the late 1980s, Michael Shiner assumed more responsibility for supervising the day to day operations at the site,

although Irvin Shiner remained involved in major corporate and operational decisions. (Test. of P. Criscio, 12/10/96; test. of T. Melin, 12/13/96)

From approximately 1973 to the present, Michael Shiner oversaw BEC's (and its predecessor corporations') environmental compliance. (Ex. DEP-34; test. of I. Shiner, 11/20/96 and 12/10/96; test. of P. Criscio, 12/10/96; test. of B. Lassman, 12/10/96; test. of T. Melin, 12/13/96) He coordinated the preparation of the spill prevention control and countermeasure plans (SPCCs)[6] for those corporations (Exs. DEP-41, -42A, -42B, -43, -44 and -45), communicated with governmental agencies such as the Department of Environmental Protection (DEP) and the United States Coast Guard (test. of I. Shiner, 11/20/96; test. of P. Criscio, 11/20/96; test. of M. Shiner, 11/22/96), and routinely accompanied government employees on their inspections of the site (test. of I. Shiner, 11/20/96; test. of M. Shiner, 11/22/96; test. of M. Williamson, 1/10/97; test. of J. Porter, 1/24/97).

10. Since the early 1970s, it was the policy of CRC (and then Benzoline), that its employees notify either Irvin or Michael Shiner of oil releases at the site. Although Michael Shiner usually coordinated the response to those spills, Irvin Shiner was at the site within twenty-four hours of every oil release since 1970, except for a release in 1992 when he was away on vacation. (Ex. DEP-41; test. of I. Shiner, 11/20/96 and 11/22/96; test. of M. Shiner, 11/22/96 and 12/10/96)

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[6]The SPCCs prepared by Michael Shiner listed him as the "designated person" accountable for oil spill prevention. (Exs. DEP-41, -42A, -42B, and -44; test. of M. Shiner, 11/22/96)

D. History of Oil Releases at the Site.

11. In March of 1995, Irvin and Michael Shiner decided to have the tanks in the tank farm removed from the site. (Test. of M. Shiner, 11/22/96; test. of I. Shiner, 12/10/96) To facilitate the removal of the remaining oil in the tanks, and to allow prospective removal contractors to view the insides of the tanks, Michael Shiner asked Paul Criscio (a former BEC employee then employed by Alliance) to have the manway covers removed from each of the tanks.[7] (Test. of M. Shiner, 11/22/96; test. of T. Melin, 12/13/96; Oral Stipulation, 12/10/96) Paul Criscio asked Thomas Melin (also a former BEC employee then employed by Alliance) to remove the manway covers and Mr. Melin did so in March of 1995. (Test. of T. Melin, 12/10/96) After the manway covers were removed and the useable oil in each tank was pumped out, approximately 7,000 gallons of sludge (the solids and sediments in oil) and an additional amount of a mixture of oil and water remained in each tank.[8] (Test. of M. Shiner, 11/22/96; test. of J. Porter, 1/24/97) Both Irvin and Michael Shiner knew that the tanks contained this sludge and oil/water mixture. (Test. of M. Shiner, 11/22/96; test. of I. Shiner, 12/10/96)

12. Thomas Melin informed Michael Shiner in April of 1995 that the manually-operated pump which drains the accumulated water in the tank farm (*see* FF-4) needed to be operated to keep the tank farm from filling with water. Although Michael Shiner assured

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[7]The manways are round openings on the sides of each tank located about two feet above the base of the tank. When their covers are removed, the manways provide access to the inside of the tank. (Test. of M. Shiner, 11/22/96)

[8]Tanks 1 and 2 alone contained approximately 74,000 gallons of this oil/water mixture at the time. (Test. of J. Porter, 12/13/96 and 1/24/97)

Thomas Melin that the pump would be turned on, Michael Shiner neither turned the pump on himself nor requested anyone else to do so after the manway covers were removed. (Test. of T. Melin, 12/13/96)

13. On April 21, 1996, following heavy rains, the water level in the tank farm rose above the level of the open manways, allowing approximately 20,000 gallons of the oil/water mixture in the tanks to escape onto the water-covered floor of the tank farm. (Ex. DEP-25; test. of J. Porter, 1/24/96) Thomas Melin reported the release to DEP's Oil and Chemical Spills Response Division (OCSRD) at approximately 8:45 A.M. on the day of the release. (Ex. DEP-25) When the OCSRD arrived at the site at approximately 9:45 A.M., the water level in the tank farm was still above the level of the open manways. (Ex. DEP-25; test. of M. Shiner, 11/22/96 and 12/10/96; test. of J. Porter, 12/13/96; test. of J. Aceto, 1/10/97)

The OCSRD, after consulting with Irvin Shiner at the site that morning, contacted a private environmental contractor, American environmental Technologies (AET), to clean up the site. (Ex. DEP-25) AET arrived at the site by noon and, under OCSRD's supervision, removed over 90% of the liquid from the floor of the tank farm by the end of the day. (The removed liquid included both the water already inside the diked area of the tank farm and the oil/water mixture which had escaped from the tanks.) The next day, AET removed the remaining liquid from the tank farm floor and began draining the pipes which led from the barge area to the tanks and from the tanks to the loading racks (*see* FF-3). Between April 23, 1996 and May 6, 1996, AET drained the remaining contents of the pipes and tanks and reinstalled the manway covers. (Ex. DEP-25; test. of J. Porter, 12/13/96 and 1/24/97; test. of J. Aceto, 1/10/97)

After the liquid was removed from the diked area, oil stains remained on the inside of the dike wall, indicating, in the uncontroverted opinion of the OCSRD staff, that the oil/water mixture had saturated the dike wall and had seeped into the soils within the tank farm. (Test. of J. Aceto, 1/10/97) Neither AET, the OCSRD, nor the respondents analyzed any of the soils within or immediately outside the tank farm for potential contamination after the April 21, 1996 release, or undertook any remediation of the area after AET's cleanup.[9] (Test. of I. Shiner, 11/20/96; test. of M. Shiner, 11/22/96; test. of J. Aceto, 1/10/97)

14. On or about December 26, 1992, a valve on one of the tanks froze and cracked, causing 35,000 to 40,000 gallons of oil to spill onto the floor of the tank farm. (Exs. DEP-19A and -19B; test. of P. Criscio, 12/10/96; test. of J. Aceto, 1/10/97; test. of B. Emanuelson, 1/10/97) The OCSRD was notified of this spill the same day and when staff from OCSRD arrived at the site they observed six to twelve inches of oil covering the floor of the tank farm. (Test. of J. Aceto, 1/10/97) Oil from this release penetrated the soils of the tank farm. (Test. of B. Emanuelson, 1/10/97)

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[9]When the OCSRD is called to the site of an oil release its role is to ensure that the "gross contamination" at the site is controlled and remediated. Gross contamination, in this context, refers to free-flowing oil or oil-saturated soil which constitutes an immediate threat to the public health or the environment. (Test. of A. Green, 11/20/96; test. of J. Porter, 12/13/96; test. of M. Williamson, 1/10/97; test. of J. Aceto, 1/10/97) Although removal of some contaminated soils may be part of the cleanup of gross contamination, the OCSRD does not conduct, or require others to conduct, comprehensive subsurface soil investigations or remediations of the remaining soils. (Test. of J. Aceto, 1/10/97; test. of J. Porter, 1/24/97) The OCSRD's departure from the site of an oil discharge, therefore, does not indicate that a site has been totally remediated or that no additional cleanup is necessary. (Test. of B. Coss, 11/20/96; test. of M. Williamson, 1/10/97; test. of J. Aceto, 1/10/97)

On the day of the release, Michael Shiner contracted a private contractor, National Oil (National), to clean up the release. National pumped out the oil/water mixture within the diked area of the tank farm later that day, and removed and replaced some of the soils within the tank farm two or three weeks later. (Test. of P. Criscio, 12/10/96; test. of J. Aceto, 1/10/97; test. of M. Williamson, 1/10/97) No one analyzed the soils remaining in the tank farm for potential contamination or performed any additional remediation of the release after National completed its cleanup. (Test. of P. Criscio, 12/10/96; test. of T. Melin, 12/13/96; test. of J. Aceto, 1/10/97)

After National had completed its cleanup of the site, Benzoline employees noticed that the water pumped out of the tank farm (*see* FF-4) had an oily sheen. Benzoline then installed an oil/water separator outside of the tank farm to remove that oil on a continuous basis (*see* FF-4). (Test. of T. Melin, 12/13/96)

15. On or about December 2, 1984, the tank closest to the West River in the former tank farm overflowed during the unloading of an oil barge. This incident resulted in the release of approximately 400 gallons of oil, with some of the oil spilling into and immediately outside of the former tank farm and the remainder spraying into the West River. (Exs. DEP-13; -14, -41, -47, -48 and -54; Ex. R-8; test. of M. Shiner, 11/22/96; test. of P. Criscio, 12/10/96)

Michael Shiner was called to the site by CRC employees and he contacted a private contractor, East Coast Environmental (East Coast), to clean up the spill. East Coast removed some of the surface soils from in and around the former tank farm and used a boom (a floating containment barrier used to contain floating oil), to contain the oil which had sprayed into the

West River. (Ex. DEP-14; test. of M. Shiner, 11/22/96) No one analyzed or remediated any of the soils in the vicinity of the spill after East Coast's cleanup was completed. (Test. of M. Shiner, 12/10/96; *see also*, test. of P. Criscio, 12/10/96)

16. In August of 1977, oil was observed leaching into the West River from the vicinity of the bulkhead[10] in the northeast corner of the site. (Exs. DEP-8 and -9) Michael Shiner hired a private contractor to locate the source of the discharge and to clean it up. The contractor installed a boom to contain and remove the oil that had leached into the river, and installed an oil collection system landward of the bulkhead to collect the oil in the soils and to prevent additional oil from leaching into the West River. (Exs. DEP-10A and -12; test. of M. Shiner, 11/22/96) After determining that the leaching oil was coming from a leaking underground pipe, the contractor closed off the pipe, replaced it with an above-ground pipe, and removed some oil-soaked soils from the vicinity of the leak. (Ex. DEP-10A)

Despite the actions taken by the contractor, oil continued to leach into the West River. (*Id.*) The contractor then enlarged and expanded the oil collection system, but the leaching continued. (Ex. DEP-53D; test. of P. Criscio, 12/10/96) In October of 1978, the United States Coast Guard (USCG) determined that the efforts of CRC were not preventing oil from leaching into the West River and took over the cleanup efforts. (Exs. DEP-53C, -53D and -53G) The USCG collected the oil leaching into the West River, pumped out the collection pits dug by the

[10]The bulkhead is a wooden structure approximately 26' high, 4' side, and 40' long which separates the site from the West River. Its purpose is to stabilize the shoreline and protect the site's soils from being eroded by the river. (Exs. DEP-61(1), -61(2) and -61(2); test. of J. Porter, 10/1/97; test. of A. Giordano, 10/1/97)

contractor, and dug a series of test pits which revealed large amounts of oil in the area of the former tank farm. (Ex. DEP-53D) On October 6, 1978 the USCG discovered that the source of that oil was a leaking underground pipe near the former tank farm's loading rack.

From October 5 to October 16, 1978 the USCG recovered more than 2,832 gallons of oil from the site. (*Id.*) After discovery of the second leak, CRC replaced the remaining underground piping at the site at the direction of the USCG and DEP, but conducted no additional sampling or investigation of the soils in the vicinity of the two leaks. (Test. of M. Shiner, 11/22/96 and 12/10/96)

17. On or about October 5, 1971, approximately 900 gallons of oil spilled onto the floor of the former tank farm when one of its tanks overflowed during the unloading of an oil barge. (Ex. DEP-6) The former tank farm was being leased at that time from CRC by Metropolitan Petroleum Company (Metropolitan). (*Id.*, test. of I. Shiner, 11/22/96; test. of M. Shiner, 11/22/96) The oil on the floor of the former tank farm was collected by employees of either Metropolitan or Wellen Oil Company (the company delivering the oil) using absorbent material and a vacuum truck, but no soils were analyzed or remediated. (*Id.*)

E. Oil Migration.

18. Oil released onto an earthen floor will penetrate the ground and enter the subsurface soils. (Test. of A. Green, 1/10/97) Once oil enters the subsurface soils it will travel downward and outward in an inverse conical pattern. (*Id.*; Ex. DEP-37) Some of the released oil

may become trapped between the soil surface and the water table, some of it may be absorbed by soil particles, some of it may reach the groundwater and flow downgradient to the receiving surface water body, and some of it may migrate through the groundwater to the underlying soil. (Test. of A. Green, 1/10/97 and 1/24/97) Oil absorbed by subsurface soil particles or trapped among them will remain there until either it is chemically degraded by microorganisms or it evaporates. (*Id.*)

Oil released directly into the subsurface soils (for example, from a leaking underground pipe) will migrate underground in the same manner as an above-ground release that has entered the subsurface soils through an earthen surface. (Test. of A. Green, 1/10/97)

Once in the subsurface soils, an oil release will continue to spread outward and downward over time. The amount of oil in the soil, however, will decrease as a result of degradation (by microorganisms) and/or evaporation. (Test. of A. Green, 1/24/97) Soil contamination resulting from more recent spills will, therefore, tend to be more concentrated and localized than soil contamination resulting from an older spill of an equivalent amount of oil released under similar conditions. (Test. of A. Green, 1/24/97)

19. In general, the greater amount of oil released, the larger the area of soil contamination which will result. (*Id.*)

20. Oil discharged into a surface water body, such as the spring in the tank farm (*see* FF-4), will reach the water table faster, and thus travel further, than oil released onto dry ground.

Oil spilled or leaked onto the ground in an area with a high water table, such as the site (*see* FF-6), will also travel faster and further than a spill or leak in an area with a lower water table. Tidal influences, such as those at the site (*see* FF-6), can reverse groundwater flows; an oil release in a location subject to tidal influences will therefore have a more extensive and complicated pattern of soil contamination than a similar oil release in an area without tidal influences. (Ex. DEP-38; test. of A. Green, 1/10/97 and 1/24/97)

21. Because water is denser than oil, oil released into a water body will tend to float if the water body is calm. However, oil does dissolve in water, and that dissolution process begins immediately upon the release of the oil into the water. The more the water body is disturbed (*e.g.*, by wind, tides or cleanup activities), the faster the oil will dissolve. (Test. of A. Green, 1/10/97 and 1/24/97)

22. The staff offered unrebutted expert testimony, and I so find, that a hydrogeologic investigation[11] is the only way to determine the extent and nature of soil and water contamination at a site with a history of oil releases. (Test. of A. Green, 1/10/97 and 1/24/97)

[11]A hydrogeologic investigation examines geologic, ground water and surface water conditions to determine the nature and extent of soil and water pollution at a specific location. (Test. of A. Green, 1/10/97)

F. Evidence from Reopened Hearing, October 1, 1997.

23. On July 25, 1997 OCSRD received two reports of an oil sheen[12] in the vicinity of the site. One of those reports was filed by an attorney representing BEC who indicated that BEC accepted financial responsibility for cleaning up the sheen. (Ex. DEP-56)

John Porter, a staff member of the OCSRD, arrived at the site on the morning of July 25, 1997 and observed that the bulkhead in the northeast corner of the site (*see* FF-16, f.n. 10) had partially collapsed, that the water from the West River had entered the site behind the collapsed bulkhead, and that an oil sheen comprising less than ten gallons of oil had formed on both sides of the collapsed bulkhead. (Exs. DEP-61(2), -61(3), -62(3), -64(4), -62(8), -62(12) and -62(14); test. of J. Porter, 10/1/97) Shortly after John Porter arrived at the site he was met by Irvin Shiner. Irvin Shiner then called Michael Shiner who arrived at the site soon thereafter. After consulting with John Porter, Michael Shiner arranged for a private contractor to clean up the sheen.

The OCSRD determined, and I so find, that the sheen resulted from contaminated soils behind the bulkhead coming into contact with the waters of the West River after the bulkhead's collapse. Its determination was based on the location of the sheen, the newly exposed soils bordering that location, the absence of reports of other oil releases in the vicinity at that time, the

[12]An oil sheen is a film of oil floating on the surface of a waterbody. (Test. of J. Porter, 10/1/97; test. of A. Green, 1/10/97)

outward direction of the tide at the time the OCSRD staff observed the sheen,[13] the hydrogeologic conditions of the site (*see* FF-4 and -6), and the history of previous unremediated oil releases at the site (*see* FF-13 through -17).[14] (Exs. DEP-61(2), -61(3), -63(3), -62(4), -62(8) and -62(12); test. of J. Porter, 10/1/97; test. of A. Green, 10/1/97)

[13]The outward direction of the tide indicates that the sheen didn't originate in the West River and then drift in toward the site. (Test. of J. Porter, 10/1/97)

[14]Although the respondents suggested other possible sources for the sheen, they offered no evidence that any of the suggested alternatives were actually the sheen's source.

CONCLUSIONS

A. Section 22a-432 provides that if the Commissioner "finds that any person has ... created a condition ..., or is maintaining any ... condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution." The respondents argue that to prevail in this appeal the staff must prove[15] that it is more likely than not that the condition of the site has polluted the waters of the state. The staff argues that such proof is not required for me to affirm the order and I agree.

When one construes a statute, its intent "is to be first sought in the language used, and if that is unambiguous we need not resort to other aids to interpretation." *Klapproth v. Turner*, 156 Conn. 276, 280 (1963). "A statute does not become ambiguous solely because the parties disagree as to its meaning." *Commissioner v. Freedom of Information Commission*, 204 Conn. 609, 620 (1987). Section 22a-432 is not ambiguous. By its express language, the statute requires only that the condition which forms the basis of the order be one which "reasonably can be expected" to create a source of pollution to the waters of the state. I therefore conclude that to prevail in this appeal, the staff need only demonstrate that the respondents have created or maintained a condition which is reasonably likely to pollute the waters of the state, and not that the respondents have created or maintained a condition which has, in fact, polluted such waters.

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[15]Because this is a proceeding on an order to enforce a statute, the staff bears the burden of persuasion. RCSA §22a-3a-6(f).

See Starr v. Commissioner of Environmental Protection, 226 Conn. 358, 382 (1993) (section 22a-432 grants to the commissioner "broad powers under this act to issue orders necessary to correct existing and potential sources of pollution" [*emphasis added*]).

B. From 1971 through April 1996, there have been at least five separate releases, involving several thousands of gallons of oil in total, at several locations at the site. Some of these releases were directly into the waters of the state and others were onto unpaved dirt surfaces or below ground. (Findings of Fact [FF]-13 through -17) Based on the nature and extent of these releases, the respondents' failure to thoroughly investigate or remediate[16] them, the known hydrogeologic characteristics of the site (FF-4 and -6), and the characteristics of subsurface oil migration (FF- 18 through -22), it is reasonable to expect that these releases have polluted or will pollute the waters of the state. The only remaining question is whether the named respondents have created and/or maintained this condition.

C. BEC, or its corporate predecessors (CRC and Benzoline), owned the site when all of the oil releases which are the subject of this order occurred. (FF-7) With the exception of the minor leak in 1971, when part of the site was being leased by Metropolitan Petroleum Company

[16]The record does not support the respondents' argument that the DEP's supervision of the cleanup of some of the on-site releases is evidence that those releases have been fully remediated. The OCSRD's role when it supervises the cleanup of an oil release is to ensure only the removal of gross contamination, not the complete remediation of the site. (FF-13 n. 8) The OCSRD's supervision of the emergency response to several of the on-site releases, therefore, did not relieve the respondents of their on-going obligation to comply with the requirements of Connecticut's water pollution control statutes. As the events of July 25, 1997 demonstrate, one or more of the releases at the site have not been fully remediated and thus constitute a potential source of pollution to the waters of the state.

(E.D.N.C. 1989), aff'd., 978 F. 2d 832, 837 (4th Cir. 1992) (personal liability premised on authority to control operations and failure to abate violation); *Kelly v. Arco Industries*, 723 F. Supp. 1214, 1219 (W.D. Mich. 1989) (personal liability premised on control over operations, and failure to prevent violation and abate its impacts).

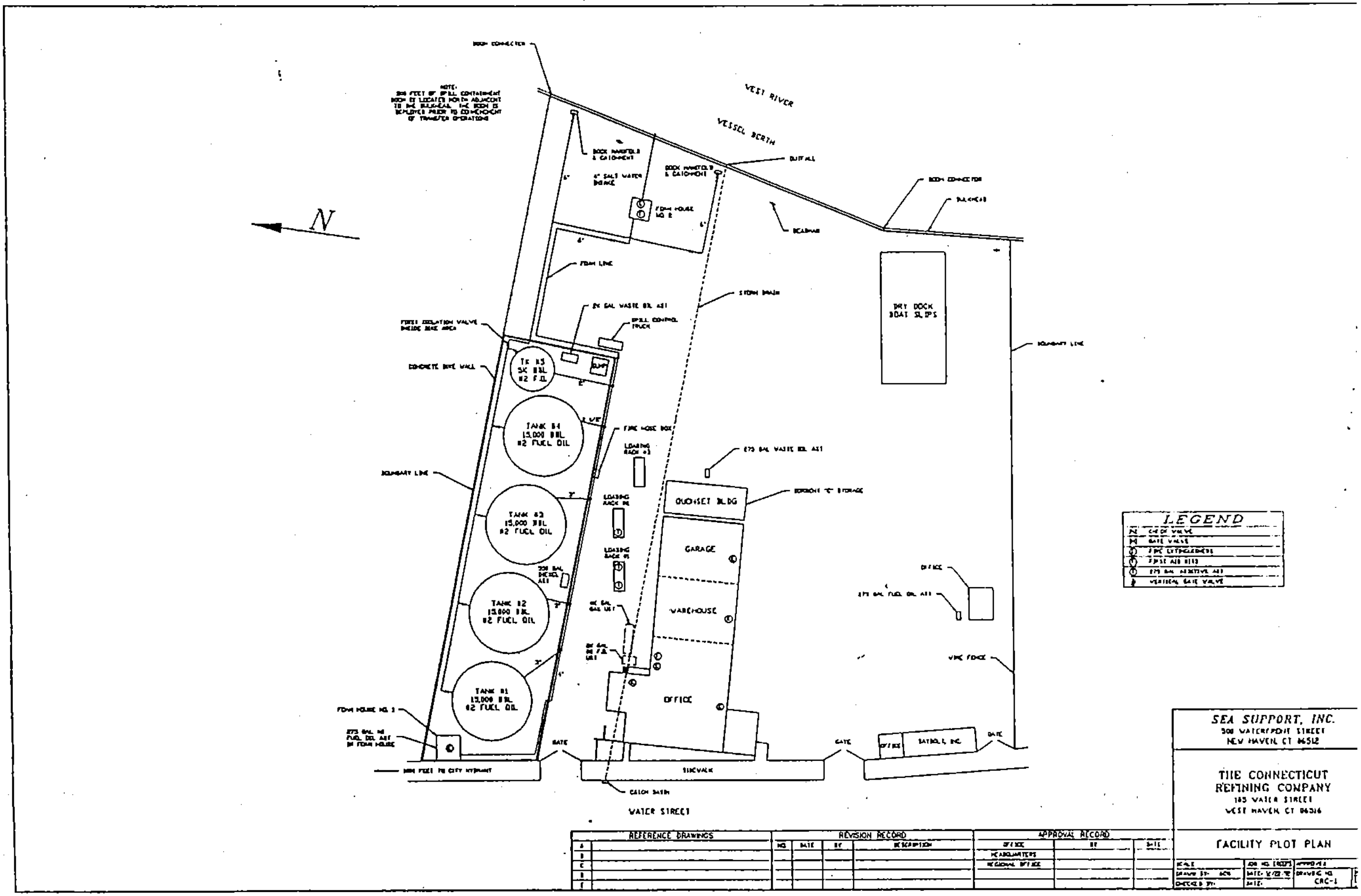
Irvin Shiner and Michael Shiner supervised, participated in, and/or authorized the activities which caused the various oil releases at the site over the last twenty-eight years. Both Irvin Shiner and Michael Shiner had notice of each release and the authority to ensure that those releases were fully investigated and remediated--but they failed to exercise that authority. I therefore conclude that both Irvin and Michael Shiner are liable for creating and maintaining the condition at the site which has polluted, and which can reasonably be expected to further pollute, the waters of the state.

E. The remedial provisions of an administrative order must bear a reasonable relationship to the alleged substantive violations set forth in that order. *Connecticut Building Wrecking*, 218 Conn. at 605. The order at issue here requires the respondents to investigate existing and potential pollution at the site and, based on the results of that investigation, propose and undertake remedial actions to correct such pollution. (FF-2)

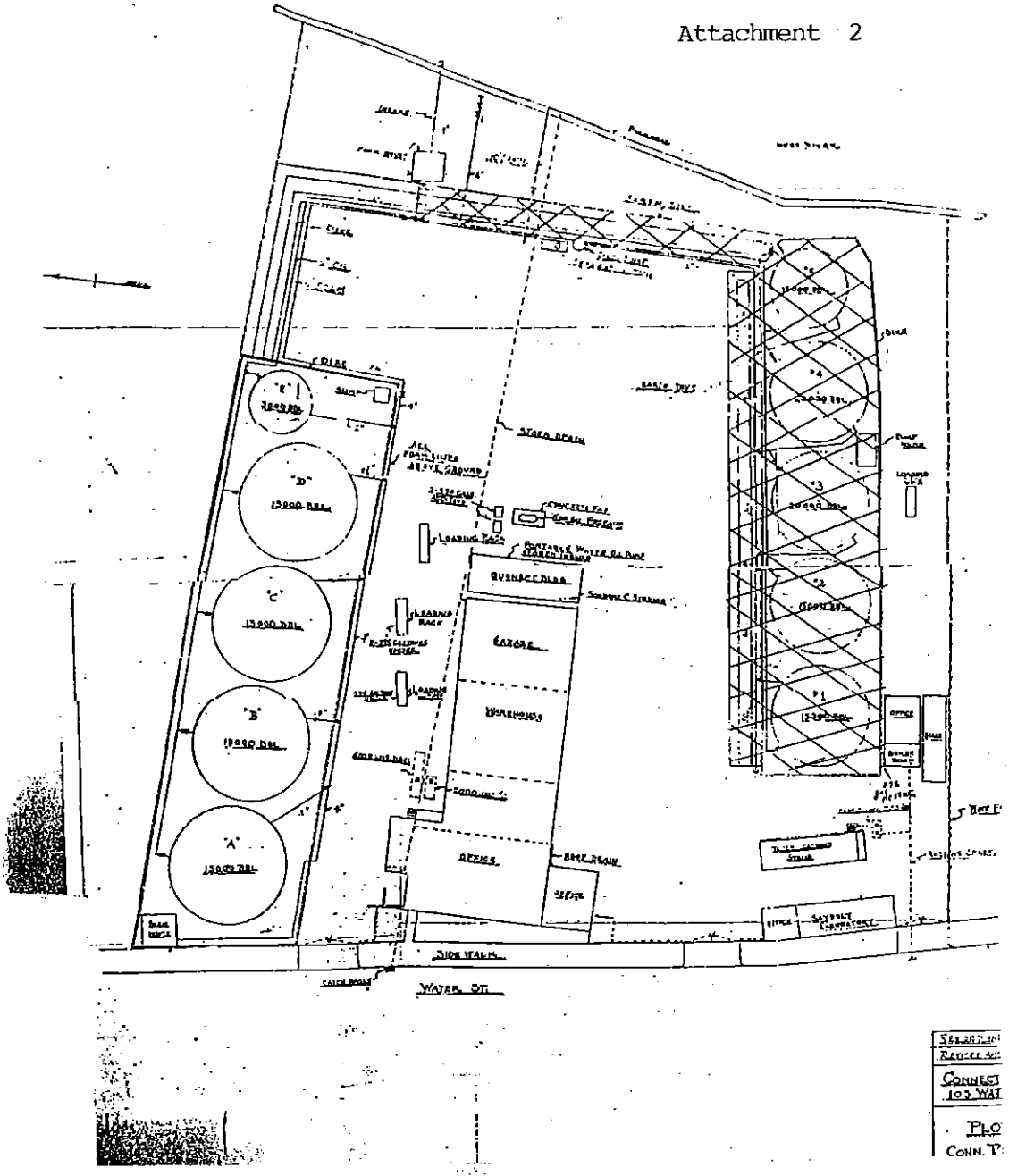
As concluded above, the oil releases at the site have polluted, and will likely further pollute, the waters of the state. (*See* Conclusion, Part B) Because a hydrogeologic investigation of the site is the only definitive means of determining the extent of such pollution (FF-22), the provisions of the order which require such an investigation are both reasonable and necessary. If that investigation reveals no present or potential pollution of the waters of the state, the respondents need do nothing further. However, if such pollution is uncovered, the order requires the respondents to propose and implement a remedial plan to correct that pollution. I therefore conclude that the remedial provisions of the order are reasonably related to correcting the substantive violations established and are necessary and appropriate to correct them.

CERTIFIED TO BE
A TRUE COPY

ATTACHMENT 1



Attachment 2



APPENDIX A

Proposed Final Decision concerning Order No. MT96-01 issued to BEC Corporation, Irvin A. Shiner and Michael Shiner.

PARTY LIST

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