
In the Matter of a *
Petition for Declaratory Ruling By *
*
Elsie Patton *
*

Declaratory Ruling

Elsie Patton, (the Petitioner), as an individual, submitted a Petition for a Declaratory Ruling on June 28, 2015. The Petition seeks a ruling that the definition of the term “engineered control” adopted by the Department of Energy and Environmental Protection (DEEP/Department) as part of the Regulations of State Agencies at RCSA § 22a-133k-1(16) is invalid because it was not adopted in substantial compliance with Conn.Gen.Stat. § 4-168. As explained in the following ruling, I decline to adopt the Petitioner’s position and find that the definition of the term engineered control was adopted in substantial compliance with the Uniform Administrative Procedure Act (UAPA) and more specifically Conn.Gen.Stat. § 4-168.¹

Procedural History

The Petitioner filed a Petition for a Declaratory Ruling on June 29, 2015. I acknowledged receipt of the Petition on July 27, 2015 and followed that acknowledgement with a Notice of Intent to Issue a Declaratory Ruling on August 27, 2015. In the Notice of Intent to Issue a Declaratory Ruling, I extended the period for comment until October 11, 2015 and specified that the same period was open to the Petitioner and members of DEEP staff to submit comment or other information for my consideration. No additional comment or information was received. I advised the Petitioner that I reserved the right to rely on any publicly available information, including, but not limited to information within DEEP’s administrative record or on the Legislative Regulation Review Committee’s website.

Findings of Fact

1. The Department published a Notice of Intent to Adopt Regulations and to Hold a Public Hearing (Notice of Intent) in the Connecticut Law Journal on August 21, 2012. The Notice of Intent governed a set of amendments to the Department’s Remediation Standards Regulations (RSRs). Among the proposed amendments to the existing RSRs described in the Notice of Intent, it was indicated that the regulatory amendments

¹ References to the UAPA and its specific sections, including §4-168, will reference the version of the statute that existed at the time the Notice of Intent was published and throughout the review of the regulations at issue in this ruling. Substantial changes to the UAPA, particularly the sections that control the regulation adoption process, were passed by the legislature and made effective as of July 1, 2013, after the effective date of the regulations in question.

included “increasing the flexibility of engineered controls by tailoring such controls to the applicable DEC [Direct Exposure Criteria] or PMC [Pollutant Mobility Criteria] demonstration.” The Notice of Intent provided that a public hearing on the regulatory proposal would be held on October 25, 2012. At the time of the Notice of Intent the Department made available a fiscal note, a small business impact statement, and regulatory flexibility analysis. Exhibits 1 and 2.²

2. On October 25, 2012, the Department held a hearing administered by Robert E. Bell of the Remediation Division of DEEP’s Bureau of Water Protection and Land Reuse. In a Hearing Officer’s Report dated March 11, 2013, the Department summarized the public comments received, including those submitted in writing and provided a response to all comments and suggestions for changes to the regulatory language. The hearing officer’s report also provided notice of the agency’s intended action to proceed with the regulations and provided the final wording of the regulations. Exhibit 2.
3. The Department submitted the regulations for approval to the Office of the Attorney General on March 11, 2013 and the Office of the Attorney General approved the proposed regulations as to legal sufficiency on March 14, 2013. Exhibit 3.
4. The Department submitted the final regulation package for approval to the Legislative Regulation Review Committee (the Committee) on April 1, 2013. The proposed regulations were on the Committee’s agenda for its May 28, 2013 meeting as item 2013-010. At this meeting, the proposed regulations were considered by the Committee and rejected without prejudice. The Committee adopted the recommendation of the Legislative Commissioners’ Office (LCO) to revise the regulations in accordance with a memorandum from that office dated May 28, 2013. The LCO recommended a series of substantive and technical amendments to the proposed regulations. Exhibits 4, 5, and 6.
5. Among the technical corrections identified in the May 28, 2013 memorandum, the LCO advised the Committee that the Department should define the term “engineered control” for clarity in the proposed regulations. Exhibit 4.
6. In accordance with the LCO memorandum, DEEP revised the regulations and resubmitted its final regulation with the definition of “engineered control” to the Committee on June 4, 2013 along with a memorandum explaining the changes made since the initial meeting of May 28, 2013.³ The Committee posted the regulations on its website on June 5, 2013 as 2013-010A. Additional supporting documents, including a summary of revisions were posted on June 6, 2013. The Committee reviewed the revised regulations at its meeting on June 25, 2013 and again adopted the report of the LCO. The LCO recommended that the regulations be approved with technical corrections. The

² A list of the exhibits is provided with this ruling as Attachment A. All exhibits can be made available upon request and will be posted electronically with this ruling at www.ct.gov/deep/declaratoryruling.

³ The definition of engineered control included in the resubmission was: “Engineered control” means any physical barrier, system, technology or method, that permanently renders pollution in soil environmentally isolated or inaccessible, when combined with appropriate long-term inspection, maintenance or monitoring.

Committee informed the Department of the approval in a letter dated June 26, 2013 and indicated that the regulations could be filed the Secretary of the State as soon as the technical corrections were made in accordance with the LCO memorandum. Exhibit 7, 8, 9, 10, 11, 12, 13.

7. The regulations were filed with the Secretary of the State on June 27, 2013. The effective date of the regulations was June 27, 2013. Exhibit 14.
8. Regulations on the Committee's agenda are identified on the Committee's website. The regulations to be reviewed are posted along with related supporting documents. The regulations resubmitted to the Committee on June 4, 2013 were identified for review by the Committee prior to the June 26, 2013 Committee meeting and were posted on the Committee's website with all supporting documents. Exhibits 15 and 16.

Conclusions of Law and Analysis

1

Compliance with Uniform Administrative Procedure Act

The Department substantially complied with the requirements of Conn.Gen.Stat. § 4-168. Beginning with the publication of the Notice of Intent and based on all the procedural steps taken after the Notice of Intent was published, as outlined in Findings of Fact numbered 1 to 6 above, the agency guided the regulations through the required process, including holding a public hearing and issuing a response to comments. In the body of her petition, the Petitioner acknowledges that the Department complied with Conn.Gen.Stat. § 4-168 up to a point, but argues that the definition of "engineered control" is invalid because it was not included with the version of the regulations attached to the Hearing Officer's Report, which also served as the notice of the Department's intended action to proceed with the regulations in accordance with § 4-166(d). Without citing a statute or providing a legal basis for this opinion, the Petitioner maintains that the agency was required to notify the public of this definition's inclusion in the regulations prior to its adoption as part of the final regulation. One can infer from the Petition that the Petitioner maintains that this additional notice is required by § 4-168(d). In pertinent part, § 4-168(d) requires the Department to mail notice of the action that the Department intends to take regarding a proposed regulation to those that commented or otherwise requested notice and make the Department's final wording of the regulations and other supporting documents available upon request. This notice must be provided prior to the submission of the regulation to the Committee. Such notice was provided for these regulations but the final wording of the regulations made available at that time lacked the definition of "engineered control" that was in the final regulations when the Department filed them with the Secretary of the State.

Unfortunately, the Petition fails to acknowledge or ignores critical facts regarding the Department's addition of the definition of "engineered control" that provide the basis and legal support for the definition's insertion and, therefore, its validity. The Department only defined that term after the initial Committee meeting because it was required to define it by the Committee's decision to reject the initial regulatory submittal without prejudice. The Department did not send a notice of that particular change or any other changes required by the Committee's decision to those members of the public that had commented on the regulation or

requested notice regarding the regulation prior to the resubmission to the Committee on June 4, 2013. However, it was not required to do so. The final review of revised regulations, including the definition of “engineered control”, was governed by the process outlined in § 4-170.

The regulation adoption process in Connecticut is complicated and multi-layered. It involves the executive agencies that propose the regulations, two constitutional officers, and the Connecticut General Assembly acting through the Committee. The adoption process is controlled not only by § 4-168 but also by other requirements within the UAPA and applies equally to new regulations and amendments of existing ones. Any review of whether a regulation was adopted in accordance with the law must examine not only the notice provisions of 4-168, but also all the applicable provisions of the UAPA. “We interpret statutory terms by reading them in context and not in isolation.” *Lieberman v. Reliable Refuse Co.*, 212 Conn. 661, 669 (1989). In fact, § 4-168 specifically references additional requirements, including approvals by the Office of the Attorney General and the Committee. Conn.Gen.Stat. § 4-168(e). The requirements for the interplay between the agency proposing the regulation and the public is identified to some extent in § 4-168, yet there is also a role for the legislature acting through the Committee as mandated by § 4-170. Section 4-170 requires a thorough review of the regulations by the Committee. It includes a separate approval process and deadlines, may include a public hearing, and always involves final action on a regulatory proposal at the regularly scheduled Committee meeting on the fourth Tuesday of every month.⁴ Conn.Gen.Stat. § 4-170(c). Attorneys from the Legislative Commissioner’s Office (LCO) perform a detailed legal analysis of each regulation submitted to the Committee by any state agency and recommend approval or rejection of the regulation.

Section 4-170 clearly indicates and places the public on notice that changes may be required for the Committee’s approval. If the Committee rejects a proposal without prejudice in whole or in part, it shall notify the agency of the reasons for the rejection and “the agency shall *resubmit* the regulation in *revised* form if the adoption of such regulation is required by the general statutes ... or may so *resubmit* any other regulation in the same manner as provided in this *section* for the initial submission with a summary of revisions identified by paragraph.” Conn.Gen.Stat. § 4-170(e) (emphasis added). Regulations mandated by statute must be resubmitted by a set deadline while others are required to be resubmitted in accordance with the requirements of § 4-170 but on a timeline subject to the agency’s discretion. The Committee must issue a decision on any resubmission within thirty-five days of its submission, regardless of whether it is a mandatory or discretionary regulation. Conn.Gen.Stat. § 4-170(e). For any resubmission, an additional publication of notice in the Connecticut Law Journal under § 4-168 is not required. Conn.Gen.Stat. § 4-170(e). In this particular instance, the Committee notified DEEP that it rejected the regulation without prejudice and adopted the recommended changes of the LCO, which, among other changes, required the insertion of a definition for the term “engineered control” for clarity. DEEP had the discretion whether to resubmit the regulation with the required revisions; however, any resubmission was required to comply with § 4-170. DEEP exercised its discretion to “so resubmit” to the Committee and met the requirements of § 4-170 when it resubmitted the revised regulation and provided the required summary of revisions in accordance with § 4-170(e). The revised regulations and supporting documents were posted

⁴ The Christmas holiday typically requires the December meeting to be held on the third Tuesday. Advance notice of the Committee’s meeting schedule is on the Committee’s website.

to the Committee's website within days of their submission and scheduled for review at the monthly Committee meeting on June 26, 2013.

The statutory process for resubmitting to the Committee with revisions specifies that the remaining review and approval of the regulation is to be completed in accordance with § 4-170. As a result, the Committee's place in the process must be considered when determining the validity of the portion of the regulations in question. "A court must interpret a statute as written... and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation." *Connecticut Resources Recovery Authority v. Planning & Zoning Commission*, 46 Conn. App. 566, 571 (1997); *Vivian v. Zoning Board of Appeals*, 77 Conn. App. 340, 350 (2003). The public in general is notified that an agency intends to adopt regulations by virtue of the Notice of Intent's publication. After the period for public comment is provided, the agency is required to communicate directly to those members of the public that have previously commented on the regulation or requested specific notice under § 4-168 that the agency intends to submit a final version of the regulations for approval. Conn.Gen.Stat § 4-168(d). This requirement does not impose an additional requirement to keep certain members of the public notified regarding the status of review by the Committee. Instead, the Committee in effect notifies the public of its actions by posting the proposed regulations, supporting documents, agendas, and meeting minutes electronically. The public may address its concerns about a set of regulations directly to the Committee. The law does not place any additional public notice requirements on the agency when resubmitting a revised regulation to the Committee in accordance with a rejection without prejudice. This is logical given that it is the Committee that is required to act on the regulations at this step in the process. Any member of the public concerned about alterations of the regulations required by the Committee for resubmittal can direct those concerns to the Committee. In this case, it was the Committee that required a definition for "engineered control" and issued a final approval of the proposed regulations that included that definition.

By virtue of the language in the UAPA, the legislature has elected to avoid the circular path a regulation could take after the Committee requires revisions. First, the statute specifically relieves the agencies of any requirement to publish a new notice of intent under § 4-168 when resubmitting a revised regulation to the Committee. Conn.Gen.Stat. § 4-170(e). Second, the legislature identifies different requirements for regulations being submitted to the Committee versus revised regulations being resubmitted in accordance with a rejection without prejudice. In § 4-168, an agency "at least twenty days before *submitting* the proposed regulations to the standing legislative regulation review committee shall mail ... notice that it has decided to take action on the proposed regulation..." Conn.Gen.Stat. § 4-168(d) (emphasis added). In § 4-170, the legislature describes the requirements for resubmission of a regulation revised in accordance with a rejection without prejudice and in the case of such a resubmission only refers to the requirements of § 4-170. The distinction between a submission and resubmission is important. "The use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" [internal quotation marks omitted]; *Moon v. Zoning Board of Appeals*, 291 Conn. 16, 22, 966 A.2d 722 (2009). The legislature does not require an agency to provide any additional notice prior to resubmitting a revised regulation to the Committee after a rejection without prejudice. Section 4-168 requires this notice prior to "submission" only and not also prior to its resubmission to the Committee.

By failing to take the process under § 4-170 into account in the Petition, the Petitioner mistakenly assumes that the public had no means to be aware of the changes submitted to the Committee after the Committee's rejection of the initial submittal without prejudice. Petitioner states: "The first time that the definition of an engineered control was made available to the public was in the public notice of the final adopted regulations effective June 27, 2013." Petition 6/28/15, p. 2. This statement is not true. The original rejection without prejudice and the LCO report detailing the required substantive and technical changes were posted on the Committee's publicly accessible website. All proposed regulations are provided a number and tracked through the Committee process once submitted to the Committee. This includes posting the actual language of the regulation as well as all supporting documentation. In this instance, the revised regulation with the definition of "engineered control" was resubmitted to the Committee on June 4, 2013 and by June 6, 2013, the regulation as well as all supporting documentation was posted on the Committee's website. The Petition ignores these facts.

Although not the same public process as that provided by the Department in accordance with § 4-168, the Committee's process under § 4-170 is a public process established by law and does provide an opportunity for an interested member of the public to follow the regulation and its language through the final step in the approval process, which includes the regularly scheduled Committee meeting on the fourth Tuesday of every month and at the Committee's discretion, may include a public hearing. This particular regulation as revised, including the definition of "engineered control", and the explanation and description of all the changes required by the Committee's rejection without prejudice was made publicly available on the Committee's website prior to the Committee meeting at which the resubmission was reviewed. The Committee approved the revised regulations at its regular meeting with some additional technical changes. There was a public process involving the insertion of the definition of "engineered control" and it was conducted in accordance with § 4-170. The petitioner and any other member of the public could have reviewed the suggested changes and offered any concerns regarding the proposed definition of "engineered control" before it was considered and approved by the Committee.

If the legislature intended for a notice to be issued prior to the resubmission to the Committee, it could have indicated so explicitly by using both terms, submission and resubmission within § 4-168(d). The legislature chose not to act this way and clearly intended for a resubmission to be submitted directly to the committee. "It is an axiom of statutory construction that legislative intent is to be determined by an analysis of the language actually used in the legislation." Internal citations omitted; *Gelinas v. Town of W. Hartford*, 65 Conn. App. 265, 275 (2001). The legislature imposes one set of requirements for the submission to the Committee and another set of requirements for the resubmission of regulations revised in accordance with the rejection without prejudice. This distinction avoids a circular path for those regulations requiring revision by the Committee. The legislature has assumed by statute and constitutional amendment the role of final reviewer of proposed regulations and relies on the legal advice from the LCO when taking action on a set of regulations. Conn.Gen.Stat. § 4-170; Conn. Const., Art. II. If there are any issues the petitioner wants to raise with the legislature's role in the process, then it should raise those issues with the legislature directly. The legislature and the Committee control that process, not DEEP. The agency followed the process required by law and acted in substantial compliance with § 4-168 and the additional requirements referenced

in that section, including §§ 4-169 (approval as to legal sufficiency by the Attorney General) and 4-170 (approval by the Committee). The final version of the regulation, including the definition of “engineered control,” was adopted in substantial compliance with § 4-168 and is valid.

2

Petitioner’s Interpretation of Engineered Control Definition

The Petitioner’s only question concerned the validity of the term “engineered control” based on whether it was adopted in substantial compliance with § 4-168. The Petitioner explains her concern about the definition of “engineered control” in the body of the Petition, but incorrectly assumes that the definition of engineered control incorporates the terms “environmentally isolated soil” and “inaccessible soil” defined at RCSA §§ 22a-133k-1(18) and 22a-133k-1(32) respectively. On its face, the definition of “engineered control” does not do that. It uses modifying language to describe the impact of an engineered control on pollution. The language used to describe the effect of an engineered control on pollution is similar to the defined terms highlighted by the Petitioner. However, in this particular instance, the descriptive language did not incorporate the defined terms, or, therefore the assumed limiting impact of those terms that concerned the Petitioner.⁵

For these regulations, the statement of purpose in the original regulation proposal indicated, in general, that the purpose of the amendments to the RSRs was to aid site cleanup and redevelopment without compromising the protection of public health and environmental quality by providing creative new directions and opportunities, clarifying regulatory language, and addressing concerns expressed by the regulated community. More specifically, the statement of purpose indicated that the changes would increase the flexibility of engineered controls. The subdivision regarding the criteria for the review and approval of a request to use an engineered control remains intact except for the changes proposed and adopted to tailor such controls to the applicable direct exposure criteria (DEC) or pollutant mobility criteria (PMC) demonstration.⁶

Given the purpose of the regulatory changes and the existence of the review and approval criteria, the definition of the term “engineered control” cannot be read in isolation to impose the limiting effect assumed by the Petitioner. “It is an accepted principle of statutory construction that, if possible, the component parts of a statute should be construed harmoniously in order to render an overall reasonable interpretation. *Shelby Mutual Ins. Co. v. Della Ghelfa*, 200 Conn. 630, 637 (1986).” *Galvin v. FOIC*, 201 Conn. 448, 456 (1986). A regulation should be read in the same manner. I reject the Petitioner’s interpretation that the definition limits the use of an engineered control to certain soils. Such an interpretation violates the principle of harmonizing the definition with the existing language governing the review and approval of a proposed engineered control and is inconsistent with the stated purpose of the regulatory changes to increase flexibility for the remediation program.

⁵ In fact the Petitioner identified the terms as “environmentally isolated” and “inaccessible”. These are not defined terms but “environmentally isolated soil” and “inaccessible soil” are.

⁶ See RCSA § 22a-133k-2(f)(2) and Statement of Purpose.

Conclusion

The definition of “engineered control” made effective at RCSA § 22a-133k-1(16) is valid. I conclude that it was adopted in substantial compliance with § 4-168 and all other applicable requirements of the UAPA.

A handwritten signature in blue ink that reads "Robert Klee". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Klee, Commissioner

December 28, 2015
Corrected, January 4, 2016
Date

List of Exhibits

- | | |
|------------|--------------------------------------------------------------------------------------|
| Exhibit 1 | Notice of Intent to Adopt Regulations and Hold a Public Hearing – August 2012 |
| Exhibit 2 | Hearing Officer Report – March 2013 |
| Exhibit 3 | Certification page – March 2013 |
| Exhibit 4 | Legislative Commissioner’s memo – May 2013 |
| Exhibit 5 | 2013 Regulation review meeting minutes – May 2013 |
| Exhibit 6 | LRRC letter to DEEP – May 2013 |
| Exhibit 7 | DEEP cover letter for resubmission |
| Exhibit 8 | Certification page – June 2013 |
| Exhibit 8 | DEEP summary of revisions |
| Exhibit 9 | Regulations with Engineered control definition |
| Exhibit 10 | LRRC meeting agenda |
| Exhibit 11 | LCO memo – June 2013 |
| Exhibit 12 | Regulation review committee minutes – June 2013 |
| Exhibit 13 | LRRC approval letter to agency |
| Exhibit 14 | Secretary of State - letter to LRRC – July 2013 |
| Exhibit 15 | E-mail from LRRC indicating posting dates of documents related to initial submission |
| Exhibit 16 | E-mail from LRRC indicating posting dates of documents related to resubmission |