

Mr. John Hankins

June 29, 2015, Delivered in Person

President, Environmental Professionals of Connecticut

146 Hartford Road

Manchester, Ct 06040

Dear Mr. Hankins;

I am providing a copy of a petition for a declaratory ruling that you and your organization may have an interest in. The petition for a declaratory ruling as to whether the Section 22a-133k-1(a)(16) of the regulations of Connecticut state agencies (RCSA) is a valid regulation. At issue is whether the definition for an engineered control was made available for public comment in accordance with the Uniform Administrative Procedures Act, more specifically Section 22a-168 of the Connecticut general statutes.

Please be advised that you, or your organization have the opportunity to file comments and to request intervener or party status under Section 22a-3a-4(c)(1) RCSA.

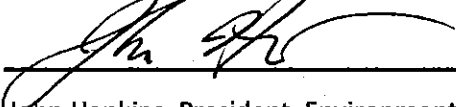
By your signature below on a copy of this letter please acknowledge that you have received this letter and a copy of the June 29, 2015 petition which was delivered in person by me, Elsie Patton.

Respectfully,



Elsie Patton

I have received in person a copy of this letter and the June 29, 2015 petition for a declaratory ruling at 2:30 PM on June 29, 2015.



John Hankins, President, Environmental Professionals of Connecticut

6/29/2015 2:43 PM

Date and Time

Commissioner Robert Klee
Department of Energy and Environmental Protection
79 Elm Street
Hartford, Connecticut 06106

June 29, 2013
Delivered in Person

RECEIVED

JUN 29 2015

CT DEPT OF ENERGY &
ENVIRONMENTAL PROTECTION
COMMISSIONER'S OFFICE

Dear Commissioner Klee;

This letter is a petition for a declaratory ruling as to whether the definition "engineered control" in Section 22a-133k-1(a)(16) of the regulations of Connecticut state agencies (RCSA) is a valid regulation. On June 27, 2013 amendments to the Remediation Standard Regulations (RSRs), Section 22a-133k-1 through Section 22a-133k-3 RCSA, including a new definition of "engineered control" became effective. The issue that is the subject of this petition is whether Section 22a-133k-1(a)(16) RCSA, the definition of "engineered control", was adopted by the Department of Energy and Environmental Protection in substantial compliance with the Uniform Administrative Procedures Act and in particular Section 22a-4-168 of the Connecticut General Statutes (CGS).

Section 22a-4-168 CGS spells out the requirements for providing public notice prior to action on a regulation. CGS Section 4-168(a) requires an agency to, among other things, post public notice of its intended action, identify a public comment period, and provide a description of the issues and subjects involved in the proposed regulations. That section also requires that the agency post a copy of the proposed regulations. Section 22a-4-168(d) requires that after the close of the public comment period the agency must post, among other things, a notice that provides the wording of the final regulations, a statement of the principle reasons in support of the action and a statement of the principle considerations in opposition of to its intended action and the agency's reasons rejecting such considerations.

These provisions of the Uniform Administrative Procedures Act ensure that the public has an opportunity to inspect the proposed regulations, and to have a reasonable opportunity to submit comments and arguments on the proposed regulations for the Agency's consideration.

In fact, the DEEP did provide the public notice of the intent to adopt regulations, it did provide a description of the issues and subjects involved in the proposed amendments to the RSRs, and it did post a copy of the proposed regulations. In addition, after the close of the public comment period the DEEP did post a hearing report that included the final wording of the regulations, and the statement of principle reasons in support of the intended action, and a statement of the principle considerations in opposition to the proposed amendments as well as the agency's reasons for rejecting such considerations.

However, nowhere in that documentation of the rule-making process was there any discussion of the reason for adding a new definition of the term "engineered control". Such a definition was not included in the copy of the proposed regulations. There was no identification of the definition of an engineered control in the description of the issues and subjects involved in the proposed amendments. There was no discussion in the hearing report in support of or in opposition to a definition of engineered control since none had been proposed. Finally there was no definition of engineered control in the final wording of the regulations which were attached as an appendix to the Hearing Report. 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.

Clearly, the definition of "engineered control" in RCSA Section 22a-133k-1(a)(16) was not adopted in substantial compliance with CGS Section 22a-4-168. The public had no opportunity to review the definition or to express support or opposition to the definition.

The definition that was added to the RSRs after the final wording of the amendments was public noticed creates a substantive new requirement and is not simply a clarification or technical amendment to the RSRs adopted in 1996. Section 22a-133k-2(f)(B) of the RSRs adopted in 1996 provided that an engineered control was to be designed and constructed to physically isolate polluted soil and to minimize the migration of liquids through the polluted soil. Even Section 22a-133k-2(f)(B) as amended in 2013 provides the same language as to the purpose of an engineered control; that is that an engineered control to address the direct exposure criteria must be designed to physically isolate polluted soil, and an engineered control to address exceedances of the pollutant mobility criteria must be designed to minimize the migration of fluids through soil. However the definition of "engineered control" which was added to the 2013 amendments provides that an engineered control is any physical barrier, technology or method that permanently renders pollution in soil environmentally isolated or inaccessible, when combined with appropriate long term inspection maintenance and monitoring. This new definition incorporates the terms environmentally isolated and inaccessible which are defined in Sections 22a-133k-1(a)(18) and 22a-133k-1(a)(32) RCSA respectively. The term "environmentally isolated", in effect, limits the use of an engineered control to soil that is beneath a building or other permanent structure which the Commissioner has determined in writing would prevent the migration of pollutants, and is not a volatile organic substance unless such substance has been remediated to the maximum extent prudent. Nowhere in the 1996 RSRs is there a provision that prohibits an engineered control for soil contaminated with volatile organic substances even if remediated to the maximum extent prudent. Consequently the definition of engineered control is substantively different from the 1996 regulations and that substantive requirement was adopted without the opportunity for public comment.

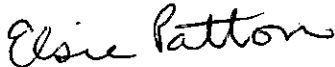
For the above reasons I am requesting that the Commissioner rule that the definition of "engineered control" Section 22a-133k-1(a)(16) RCSA, effective June 27, 2013, is not valid. The UAPA Section 22a-4-168 CGS provides that no regulation is valid unless adopted in substantial compliance with that section. Further Section 22a-4-176 CGS provides that no agency regulation is enforceable against any person or party, nor may it be invoked by the

agency for any purpose until, among other things, it has been made available for public inspection as provided in Section 22a-4-168.

I request that the Commissioner accept this petition as a timely request for declaratory ruling. Section 22a-4-168(i) CGS requires that a proceeding to contest any regulation on the ground of non-compliance with that section be commenced within two years from the effective date of the regulation. For the regulation at issue the effective date was June 27, 2013, however the two year period after that effective date concluded on June 27, 2015 which date falls on a Saturday. In accordance with the DEEPs rules of practice, specifically Section 22a-3a-3(d) RCSA, I am submitting this request on the first Monday following that date.

Finally, I am submitting this petition as a private citizen and am not submitting this on behalf of any party. However, I have attached an acknowledgment that I have provided notice today, June 29, 2015, to the President of the Environmental Professionals of Connecticut, John Hankins at 146 Hartford Road, Manchester, Connecticut, 06040. That organization represents Licensed Environmental Professionals who, by regulation, are obligated to comply with the RSRs when providing professional services and are therefore likely to have an interest in the subject matter affected your decision on this petition.

Respectfully,



Elsie Patton

435 Coleman Road

Middletown, Ct 06457

Telephone 860 347-7177