OFFICE OF ADJUDICATIONS

IN THE MATTER OF	***:***	***CASE #02-101 LEP LICENSE #104***
RUSSELL BARTLEY	***:***	***OCTOBER 13, 2005***

FINAL DECISION

I SUMMARY

The State Board of Examiners of Environmental Professionals (Board) issues licenses and governs the licensing program for environmental professionals.[1] General Statutes §22a-133v(b). The respondent Russell Bartley, a licensed environmental professional (LEP), timely filed a request for hearing following his receipt of a *Notice of the Proposed Revocation or Suspension of a License* from the Board. This Notice was the result of a complaint filed with the Board by the Department of Environmental Protection (DEP) and an investigation into the respondent's professional conduct in connection with his verifications of conditions at three industrial sites: Mark Eyelet and Stamping Corporation in Wolcott; J.C. Boardman and Company in Wallingford, and Aerospace Metals, Inc. in Hartford. The parties to this proceeding are the respondent and the investigative arm of the Board (referred to by the parties and herein as "claimant'').

Numerous issues were raised in this matter and evidence presented by both parties was extensive. In a Proposed Final Decision dated May 3, 2005, Hearing Officer Jean Dellamarggio found that the claimant had sustained its burden of proving by a preponderance of the evidence that the respondent has committed professional misconduct. The Hearing Officer recommended that the respondent's license be suspended for a period that is sufficient to preserve the integrity and standards of the LEP profession and that reflects the serious nature of his misconduct. In addition, the Hearing Officer suggested that the respondent should be reminded of his obligations

[1] An "environmental professional" is someone who is qualified, by reason of his knowledge and training, to engage in activities "associated with the investigation and remediation of pollution and sources of pollution"… General Statutes §22a-133v(a)(1).

as an LEP and the responsibility of the DEP to assure that LEPs perform their duties in compliance with the requirements of the Transfer Act.

The parties filed exceptions to the Proposed Final Decision and oral argument was requested. Oral argument was held on August 25, 2005.

II
THE HEARING PROCESS AND STANDARD OF REVIEW

The Board may suspend or revoke any LEP license for cause, after notification and hearing pursuant to General Statutes§22a-133v(g). A license may be suspended or revoked if the licensee has engaged in professional misconduct by violating any provision of that section, other statutes and applicable regulations. The Board, as claimant, has the burden of proving that cause exists to suspend, revoke or otherwise place conditions on the respondent's license.

The Board or its designee[2] is authorized to conduct hearings in accordance with §22a-133v-7 of the Regulations of Connecticut State Agencies and the Uniform Administrative Procedures Act (UAPA). General Statutes §§4-166 through 4-189. The hearing officer makes factual findings to determine whether there is sufficient evidence to show cause for discipline and to make a recommendation to the Board. In doing so, the hearing officer determines the credibility of witnesses and the weight to be given specific testimony and draws reasonable inferences from the evidence. The hearing officer is free to contrast conflicting versions of events and determine which are more credible and is not required to believe any witness, even an expert, or required to use materials presented during the hearing in any particular way. *Huck v. Inland Wetlands and Watercourses Agency*, 203 Conn. 525, 540-42 (1987).

As the final decision-maker, the Board reviews the proposed final decision and either accepts it and issues a final decision that affirms the facts, conclusions and recommendations as proposed; modifies it to reflect additional or alternate findings and conclusions; or remands the decision to the hearing officer for further review or to take additional evidence. Upon its acceptance of a proposed final decision, the Board is authorized to permanently or temporarily revoke or suspend a respondent's license, and/or to impose conditions on the renewal of a respondent's license. General Statutes §22a-133v(g); Regs., Conn. State Agencies §22a-133v-7(gg)(D). Based on our review of the record, the exceptions taken to the Proposed Final

[2] The Office of Adjudications conducts administrative hearings for the Board. §22a-133v(g).

Decision and the arguments presented on the exceptions, we modify the following numbered paragraphs in the Findings of Fact in the Proposed Final Decision: #3, 10, 17, 21, 30, 31, 36, 42, 48, 50, 51, 53, 61, 69, 70, 71, 73, 77, 78, and the second #78, and footnotes 6, 14 and 35, and we further modify the Conclusions of Law and the recommendation of the Hearing Officer. Because the modifications to the Proposed Final Decision both in its findings of fact and conclusions of law are substantial, we attach hereto a red line/strike out version of the Proposed Final Decision showing all the modifications made to the Proposed Final Decision. This red line/strike out version of the Proposed Final Decision will be filed with this Final Decision in the Office of Adjudications and provided to the parties in this proceeding.

III
DECISION

A
Findings Of Fact

1
The Transfer Act and Licensed Environmental Professionals

1. Section 22a-134 of the General Statutes, known as the Transfer Act, provides that upon the transfer to a new owner of certain real property on which hazardous waste has been treated, stored or otherwise generated, a written certification of the condition of that property must be filed with the Commissioner no later than ten days after the change in ownership.[3] A person associated with the transfer must sign and submit a Form III, which is a written certification to the Commissioner that conditions at the establishment are unknown or which describes any known or potential releases of hazardous substances that have occurred on the site. §22a-134(12). This certifying party agrees to investigate the site and remediate pollution in accordance with Remediation Standard Regulations (RSRs) and pursuant to a schedule approved by the DEP. §§22a-134(6), 22a-134a. (Ex. HO-1; test. R. Frigon, 7/15/03, pp. 166-167.)

2. An environmental condition assessment form (ECAF) must accompany Form III. §22a-134a(d). The ECAF provides details of particular hazards or contaminants and the known

[3] Real property or business operations that generate more than one hundred kilograms of hazardous waste in any one month are "establishments" and subject to the provisions of the Transfer Act. §22a-134 (3).

areas of concern[4] on the site. The ECAF does not necessarily provide an exhaustive account of the releases on the site. It is intended to give a basic understanding of the nature of pollution that may be present, subsurface conditions and any other pertinent facts known about the site. Based on the information provided in the ECAF, the DEP determines whether it will retain oversight of the site investigation and remediation activities or, as provided in the Transfer Act, delegate those duties to an LEP. (Ex. HO-2; test. R. Frigon, 7/15/03, pp. 170, 174-175, 178, 7/16/03, pp. 253-256.)

3. The legislation creating the LEP licensing program and the Transfer Act provisions that authorize the Commissioner to delegate site remediation approval to an LEP were enacted in 1995. The LEP Regulations became effective on June 2, 1997. Under the Transfer Act, an LEP is responsible for verifying that a site has been investigated in accordance with prevailing standards and guidelines and remediated in accordance with the RSRs. §§22a-134(19) and 22a-134a(e). The effective date of the RSRs is January 30, 1996. (Test. R. Frigon, 7/16/03, p. 259.)

2

Site Investigation Standards and Verification Procedures

4. The *Transfer Act Site Assessment Guidance Document* (TASA) was specifically developed by the DEP to provide a framework for investigating sites that are subject to the Transfer Act. Its use is voluntary and intended to be applied in combination with the experience and judgment of an LEP, however, the DEP expects an LEP to conduct a site assessment that is consistent with the TASA guidance. The DEP also considers the investigative standards published by the American Society for Testing and Materials (ASTM) and professional skills, experience and judgment part of the "prevailing standards and guidelines" for site investigations. (Ex. DEP-49; test. R. Frigon, 7/16/03, pp. 212-213; test. E. Patton, 9/4/03, pp. 1420-1422, 9/24/03, pp. 1997 - 2008.)

5. Expert opinion varies on the level of guidance provided by TASA. TASA is considered by some environmental professionals to provide a site assessment process at an elementary level, not detailed guidance. TASA does not provide the necessary detail for such investigation decisions as the sampling methods to be used, the areas on site to be sampled or the specific constituents to be analyzed. These decisions are left to the LEP. (Test. 9/23/03, R.

[4] Locations on the site where contaminants may have been used, handled or stored or where activities are conducted

Bartley, pp. 1847-1854, E. Patton, pp. 2003-2006; test. S. Holtman, 10/23/03, pp. 2678-2679, 2731-2733; test. J. Peronto, 10/24/03, pp. 2846-2848.)

6. A three-phase approach to site investigations is common in the industry. Phase I involves a visual inspection of the property as well as an historical investigation and records search to identify the potential areas of concern on the site. Phase II is an investigation into the areas identified by Phase I through soil and groundwater testing and an attempt to determine if there was a release at any area of concern. Phase III involves further testing to define the extent of contamination that may have been identified as a result of Phase II. The reports and appendices submitted with the respondent's three verifications are organized in a way that reflects this standard approach. (Ex. DEP-26; exs. RESP-14, 348; test. R. Robinson, 8/20/03, pp. 989-990; test. T. Walles, 9/22/03, p. 1682, 10/20/03, pp. 2254 - 2256; test. R. Bartley, 10/22/03, pp. 2593-2595.)

7. From the time when the first of the respondent's verifications that are the subject of this proceeding was received by the DEP in January 1997 through the first quarter of 2000, the DEP audited and rejected a significant percentage of verifications.[5] The DEP identified common problem areas such as insufficient Phase I assessments to identify potential areas of concern and insufficient Phase II investigation of levels of contaminants in excess of applicable criteria. During the relevant time period, there was no consensus among LEPs and DEP staff regarding the requirement for groundwater compliance monitoring.[6] There was also apparent confusion over the requirements for post-remediation groundwater compliance monitoring, which the RSRs do not require if remediation is determined to be unnecessary.[7] (Ex. RESP-166; test. R. Robinson, 8/26/03, pp. 1182 - 1183; test. R. Bartley, 9/23/03, pp. 1957-1959; test. S. Holtman, 10/23/03, pp. 2692, 2744-2746.)

3
The DEP

8. The Commissioner is authorized to issue licenses to any environmental professional who is deemed qualified by the Board. Issuance of the license is evidence that the licensee is

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that have the potential for environmental impact. (Test. R. Frigon, 7/15/03, p. 171.)

[5] From the start of the LEP program through the first quarter of 2000, forty verifications had been filed with the DEP. Thirty-two were property transfer verifications and of those, twenty-one were audited and fifteen were rejected. (Exs. RESP-2A, 166; test. R. Robinson, 8/18/03, pp. 933-934, 8/26/03, pp.1167-1170.)

[6] The RSRs provide for four consecutive quarters of groundwater monitoring to determine compliance with the groundwater protection criteria for groundwater. §22a-133k-3(f).

entitled to the rights and privileges of an LEP so long as the license has not been revoked or has not expired. §22a-133v(f).

9. LEP verifications are filed with the Commissioner and screened by DEP staff for accuracy, investigation deficiencies and compliance with the RSRs. The Commissioner can audit any action an LEP is authorized to perform. §22a-133v(g). As part of the audit process, the LEP and DEP staff will meet or confer by phone to discuss the issues identified in the initial screening of a verification. During the conference, the LEP may provide additional supporting information and explain his or her thought process. To confirm a conclusion, an LEP may return to a site to collect additional samples. If any issues remain unresolved after the audit is complete, the verification is rejected. The LEP must oversee additional investigation and/or remediation as necessary to resolve the outstanding issues and submit another verification. 22a-133v(g). (Test. R. Robinson, 8/18/03, pp. 924-932, 11/24/03, pp. 3246-3249.)

4
The Board

10. The State Board of Examiners of Environmental Professionals recommends to the Commissioner issuance of licenses to LEPs and governs the licensing program. The eleven-member Board is chaired by the Commissioner or the Commissioner's designee and consists of six LEPs and four other members. §22a-133v(b).

11. The Board is responsible for administering the licensing program, including an examination of a prospective licensee's knowledge applicable to the investigation and remediation of polluted sites in accordance with the RSRs. The Board is authorized to investigate the conduct of any LEP and to take appropriate disciplinary action when necessary. §22a-133v(e), (g) and (h).

5
The Respondent

12. The respondent has more than twenty-five years' experience in site investigations, including RCRA[8] sites. His work history includes positions with the US EPA and such environmental consulting firms as TRC Environmental and Roy F. Weston, Incorporated. Prior

[7] Section 22a-133k-3(g).
[8] Resource Conservation and Recovery Act, 42 U.S.C. §§6901 - 6992.

to the administration of the first LEP examination, the respondent was one of a number of qualified environmental professionals who were identified in mid-1996 and authorized to perform the duties of an LEP on an interim basis. The respondent was issued a license in 1997. (Exs. DEP-60-62; ex. RESP-432; test. R. Bartley, 9/23/03, pp. 1817-1818, 1822-1845.)

6
Transfer Act Establishments[9]

(a)
Mark Eyelet and Stamping Corporation

13. The Mark Eyelet site encompasses 0.9 acres in an industrial-zoned area of Wolcott. At the time of the verification, the premises were within the preliminary boundaries of a superfund site designated under CERCLA[10] as the Nutmeg Valley Superfund Site[11]. Groundwater conditions at the site were classified as GA/GB.[12] A former residence used for office space, a garage, a manufacturing building (main building) and a wooden storage shed cover a major portion of the site. The remainder of the premises consists primarily of asphalt-covered parking lots with some grassy areas. A small stream is located in the northeast corner of the site. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1860-1861, 1892.)

14. The company manufactures electrical connecters. Operations include metal stamping, assembly, cleaning, heat-treating, chemical cleaning and tumbling. Water soluble and oil-based lubricants are used in the metal stamping process. Freon-TMS was originally used as a cleaner for metal drawing operations until 1993. An electroplating operation was conducted in the basement of the main building until 1975. Other operations have not changed since the facility opened in the 1960s. (Ex. RESP-14; test. R. Bartley, 9/23/03, p. 1868.)

(b)
J. C. Boardman and Company

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[9] See fn. 3, supra.
[10] Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§9601 - 9675.
[11] The soil contamination within this 155-acre Superfund site was characterized as heavy metals, cyanide and volatile organic compounds (VOCs). Groundwater contamination was characterized as VOCs and cyanide. The US EPA suggested that the Mark Eyelet site might be a source of contamination, specifically organic compounds. (Ex. RESP-14.)
[12] The State of Connecticut Water Quality Standards describe a GA groundwater classification as water that is suitable for human consumption without treatment. A GB classification connotes groundwater that the DEP assumes is degraded due to pollution. A GA/GB classification indicates an area with contaminated groundwater with a classification GA goal because the water is used or could be used as a private supply source. (Ex. RESP-14; test. R. Bartley, 9/23/03, p. 1912.)

15. The site of the former J.C. Boardman company is 2.17 acres on South Turnpike Road in Wallingford. The company was established in 1962 for the manufacture of pewter, sterling and brass metal gift hollowware. Initially, operations included casting, spinning, grinding, pressing, soldering, buffing, polishing and packaging. Waste generated by these operations consisted primarily of scrap metals and waste buffing compounds. An electroplating process and wastewater treatment system were added in 1986; hazardous waste associated with that process was transported offsite. No other processes were conducted on the site until operations ceased in 1991. The facility remained idle until 1997 when it was purchased and renovated to accommodate Oakdale Self-Storage, LLC. (Ex. RESP-348; test. R. Bartley, 9/23/03, pp. 1915-1916.)

16. The site consists of a manufacturing building, and paved parking and grassy areas. Groundwater on site is classified as GA. The facility was connected to the Wallingford municipal sanitary sewer system in 1973 when connections to the onsite septic system were closed. Process wastewater was discharged to the municipal sewer system under a NPDES[13] permit. The Quinnipiac River is located approximately 500 feet east of the site. (Ex. RESP-348.)

(c)
Aerospace Metals, Inc.

17. Aerospace Metals, Inc. (AMI) is located at 500 Flatbush Avenue in Hartford, situated on approximately thirty acres in an industrialized area. AMI is a metal recycling and processing facility. For more than thirty-five years, operations at the site have included handling, separating, cutting, crushing, shredding and recycling various scrap metals including iron, steel and high temperature alloys. A variety of hazardous substances and petroleum products have been present at the site, including oils containing polychlorinated biphenyls (PCB). (Exs. RESP-211, 211A; ex. HO-2.)

18. The property is bounded to the east by an Amtrak railroad corridor and the Flatbush Avenue exit ramp for Interstate 84. An elevated section of Interstate 84 crosses over the site in an east-west direction and divides the property into north and south parcels (North or South Yard), which are connected by a right of way that passes under the highway. The land beneath

[13] Permits for discharges to surface waters are known as National Pollution Discharge Elimination System (NPDES) permits. Regs., Conn. State Agencies §22a-430-3(a).

and adjacent to the interstate is owned by the Connecticut Department of Transportation. (Ex. HO-2; exs. DEP-27B, 27C; exs. RESP-211,211A, 446.)

19. Six buildings, several storage areas and large process equipment (e.g., overhead crane, crusher) are situated on the property along with grassy, wooded or vegetated areas and paved driveways and parking areas. Several railroad sidings are present on the site and a small stormwater detention basin is located along the eastern portion of the property. The site is surrounded by a perimeter fence and on the western portion of the property there is a double fence between the property and the adjacent railroad corridor. Access to the site is restricted to the guarded main entrance located at the southern end of the property along Flatbush Avenue. (Ex. HO-2; exs. DEP-27B, 27C; exs. RESP - 211, 211A, 446; test. T. Walles, 9/5/03, pp. 1616-1617.)

20. The groundwater in the vicinity of the site is classified as GB; there are no known uses of groundwater on the site or on nearby properties. The site is abutted by commercial and industrial facilities including the former Hanson-Whitney Company, Rome Recycling, and, across the railroad tracks, the site of the former Heublein, Inc. distillery, now a movie theater (for which a building permit had been issued on January 28, 1999). A Stop & Shop grocery store and other commercial businesses are located to the west of the site. Patent Scaffolding Company is adjacent to the southwestern portion of the site; a former housing project no longer in use is located across Flatbush Avenue to the south of the site. (Exs. DEP-57, 58; ex. RESP-211.)

21. The facility holds a NPDES permit for the discharge of wastewater generated from metal chip washing operations to a sanitary sewer system and a General Permit for the discharge of storm water associated with industrial activity. The permits require the site owner/operator to monitor stormwater, implement best management practices, and to ensure against soils and stormwater contamination. Stormwater outfalls must be sampled with results sent to the DEP. The DEP Bureau of Water Management Permitting and Enforcement Division inspects the site to ensure that the facility complies with the permits' terms. (Test. W. Oros, 7/15/03, pp. 18-19, 146-148; test. R. Frigon, 8/6/03, pp. 512-515.)

7

The DEP Complaint and Board Action

22. In a February 14, 2002 letter, the DEP referred a complaint to the Board that alleged potential violations of the rules of professional conduct with respect to the respondent's verification of the AMI site.[14] The DEP requested that the Board investigate and take disciplinary action as appropriate. At a regular February 14, 2002 meeting, the Board authorized an investigation into the complaint. LEP Jeffery J. Loureiro volunteered and was designated to conduct the investigation. §22a-133v(g); Regs., Conn. State Agencies §22a-133v-(b)(1). The investigation lead to additional allegations now concerning the respondent's professional conduct regarding the Mark Eyelet and J.C. Boardman sites. In a March 28, 2002 letter, the respondent was advised of the DEP complaint and the results of the investigation. A compliance conference was scheduled and held on April 5, 2002.[15] (Exs. DEP-2, 2b; exs. RESP-165, 513; test. R. Robinson, 8/20/03, pp. 1036-1038, 1040, 1053-55.)

23. At the next regular Board meeting on April 11, 2002, Mr. Loureiro reported that the respondent had not shown compliance at the conference and recommended that the Board issue a *Notice of the Proposed Revocation or Suspension of a License*. The Board unanimously approved the recommendation and issued the Notice to the respondent on November 12, 2002. An amendment to the Notice as to AMI was issued on February 20, 2003.[16] (Exs. DEP-2a, 4 - 6; test. R. Robinson, 8/20/03, p. 1056.)

24. The respondent filed his response to the Notice and request for a hearing on December 2, 2003. The respondent generally denied the allegations that he violated the rules of professional conduct and specified his grounds for contesting the specific charges relating to the three sites. (Ex. DEP-5.)

8

Site Specific Charges Against the Respondent

(a)

[14] The complaint included representations that an active remediation system was in operation as required by a consent order still in effect. It was later determined that this consent order had been certified as in compliance on October 24, 1994. The respondent has repeatedly pointed out that this fact was not reported to the Board. (Exs. DEP-2B, 15, 16; test. E. Patton, 9/24/03, pp. 2022-2023.)

[15] The respondent was not afforded an opportunity to discuss his conduct at the Mark Eyelet or J.C. Boardman sites during this meeting. However, in a February 9, 2004 ruling, I concluded that this procedural defect did not cause the respondent to suffer substantial prejudice or violate his due process rights.

[16] The amended Notice adds allegations that the respondent misused his LEP seal and failed to hold paramount the health, safety and welfare of the public. Regs., Conn. State Agencies §§22a-133v-5(b)(2) and 22a-133v(6(d)(1).

Mark Eyelet
(i)
Notice

25. The Notice charges the respondent with the following professional misconduct.

a. At the time the respondent verified, all potential release areas located at the site had not been investigated in accordance with prevailing standards and guidelines;

b. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the Pollutant Mobility Criteria (PMC)[17] *as required by §22a-133k-2(a) of the RSRs; and*

c. At the time the respondent verified, post remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs.

(Ex. DEP-4.)

(ii)
Background

26. In 1995, the site owner, AMP, Incorporated, retained Roy F. Weston, Inc. to assess the condition of the site in connection with the sale of the property. In its 1996 *Environmental Assessment Report* (ME Report), Weston incorporated site assessment data from previous site investigations it had conducted as well as those by other environmental consultants. These investigations include a site-wide screening conducted in 1985 and a groundwater baseline investigation conducted in 1994. AMP filed a Form III and ECAF with the DEP on September 30, 1996. (Ex. RESP-14.)

27. The respondent was retained to verify the site, specifically to review the investigations and conclusions contained in the ME Report and to determine if the data sufficiently demonstrated that the site was in compliance with the requirements of the RSRs or if further investigation was necessary. The respondent submitted his verification to the Commissioner on March 11, 1997, with the ME Report and a supplemental soil investigation report as his supporting documentation. (Ex. DEP-9; ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1854-1856.)

[17] The pollutant mobility criteria represent maximum acceptable concentration levels for specific contaminants in a particular groundwater classification area. Contaminants that exceed the criteria have the potential to leach from the soil to the underlying groundwater. (Test. R. Frigon, 8/6/03, pp. 440-443.)

28. The Mark Eyelet facility was the third site to be verified under the State's LEP program and the verification was the second to be audited. The audit meeting was held on November 13, 1997 to discuss the issues identified during the preliminary screening of the verification.[18] AMP and the respondent were advised on November 21, 1997, that the verification had been rejected. (Exs. DEP-35, 38; test. R. Robinson, 8/18/03, pp. 941, 946-949; test. R. Bartley, 9/23/03, p. 1855.)

(iii)
The Respondent's Investigation and Verification

29. The respondent reviewed the Phase I and II investigation methods and results outlined in the ME Report, including the historic site assessment data, and supplemented the ME Report with soil analyses he conducted from a process wastewater leachfield. He concluded that the contaminants detected at the site were below levels that would require remediation in accordance with the RSRs based on the data in the ME Report and the additional soil analyses. (Ex. DEP-9; ex. RESP-184; test. R. Bartley, 9/23/03, pp. 1875-1876.)

30. The Phase I investigations described in the ME Report do not specifically identify loading docks, scrap metal storage areas, virgin and waste chemical storage areas, dumpsters and stormwater catch basins as potential areas of concern. The respondent did not indicate that he identified and assessed these areas in his supplemental materials. He also did not indicate whether he assessed the location of groundwater monitoring wells used in the previous investigations in relation to some of these areas. (Exs. DEP-35, 37, 38; ex. RESP-14; test. R. Robinson, 8/18/03, pp. 955-957.)

31. The respondent noted during the hearing that the ME Report does contain copies of building permit documents for an addition to the main building on the site, including a new receiving area. The respondent testified that he concluded from this information that the original loading dock for the main building had been eliminated in 1984 when the addition was constructed. No further investigation was possible because the new foundation eliminated or covered the former loading area. The respondent did not specifically identify the new receiving area as a potential area of concern. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp.1870-1873.)

[18] The claimant presented evidence that includes issues that were discussed and resolved at the audit meeting. My findings are limited to facts that pertain to issues that were not resolved during the audit process.

32. The ME Report also notes that empty barrels kept in the wooden shed were brought into the manufacturing building to store scrap metal that was later shipped offsite. The ME Report indicates that soil samples taken in the area of the shed in 1995 showed that no metals were present. Acetone, a volatile organic compound (VOC), was present at a level significantly below the Pollutant Mobility Criteria (PMC) for GA classified groundwater. Based on the ME Report data, the respondent testified that he concluded that scrap metal was stored in the manufacturing building and not in the wooden shed. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1864, 1875.)

33. The "Information Survey" section of the ME Report and an attached emergency response plan discuss virgin and waste chemical storage areas. In both references, chemicals were reported to be stored in the "oil storage room" and the "cleaning room", two secure rooms with concrete floors and without floor drains. The respondent explained during his testimony that he concluded that because scrap metals and chemicals were not stored in the wooden shed, further investigation of the area was unnecessary. The respondent's conclusion was not included in the documents he submitted to the DEP in support of his verification. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1867, 1873.)

34. A 1980 DEP inspection report included in the ME Report refers to a dumpster and a storm drain located near the former loading dock. The DEP investigator noted that the dumpster was leaking oil onto pavement, which then entered the stream through the storm drain. The respondent explained that because this area was covered by the addition to the manufacturing building and he concluded that the leaks did not discharge to soils or groundwater, he did not need to investigate this seventeen-year old release. The respondent's assessment of this area was not included in the documents he submitted in support of his verification. These documents also did not contain other specific references to dumpsters or storm drains as potential areas of concern. (Exs. DEP-37, 38; ex. RESP-14; test. R. Robinson, 8/20/03, p. 1069; test. R. Bartley, 9/23/03, p. 1871.)

35. The ME Report indicates that groundwater at the site was sampled through four wells in 1985. Low levels of VOCs, copper, nickel and zinc were detected. Two of the four wells were resampled in 1994. Concentrations of the VOC tetrachloroethylene (PCE) were detected in one well at a level in excess of the applicable standard. Minor levels of TPH and metals were also present, and lead exhibited at slightly elevated levels. Four new wells were installed and

sampled once in 1995. VOCs were not present, TPH was non-detect and metals were all below the applicable RSR criteria. It was not determined whether the contaminants detected were discharged with the facility's process wastewater or migrated onto the site as a result of the Superfund contamination. The respondent testified that he concluded that the latter was most likely the case and did not conduct further sampling of the groundwater to confirm the 1995 sampling results or the source of the contaminants. (Exs. DEP-35, 37, 38; exs. RESP-14, 452; test. R. Bartley, 9/23/03, pp. 1903-1904; test. R. Robinson, 11/24/03, pp. 3198-3199.)

36. The respondent concluded that the groundwater was in compliance with the RSRs based on the previous Phase II investigations. (Exs. DEP-35, 37, 38; ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1903-1904; test. R. Robinson, 11/24/03, pp. 3198-3199.)

37. An underground waste oil storage tank (UST) and associated oil/water separator were excavated and removed from the site in 1995. At the time of the excavation, the RSRs had been drafted but were not in effect. The concentrations of lead in the tank grave soils were within the existing regulatory standards but exceeded the draft RSR criteria. Four of five soil samples from the tank grave analyzed by the Toxicity Characteristic Leaching Procedure (TCLP) exhibited lead at levels that exceeded the GA PMC, however, a TCLP analysis can produce results that overestimate the amount of lead in soils in natural conditions. The respondent did not conduct any additional soil sampling in the area of the UST. (Ex. DEP-38; ex. RESP-14; test. R. Robinson, 8/20/03, p.1084; test. R. Bartley, 9/23/03, pp. 1881-1883.)

38. A 1985 groundwater analysis showed solvents in the vicinity of the UST in samples from a down-gradient monitoring well, which was subsequently abandoned due to questionable integrity. In 1995, a new monitoring well was installed fifty to seventy-five feet cross-gradient to the UST area at the end of the leach field. Only one round of groundwater sampling and analysis was conducted on the new well in 1995. The respondent did not conduct additional groundwater monitoring in the area of the UST. (Exs. DEP-35, 38; ex. RESP-14; test. R. Robinson, 8/20/03, pp. 1005-1006.)

39. Although the TCLP analysis showed lead in the grave soils at levels in excess of the draft RSR criteria at the time the tank was removed, the area was not remediated and the grave was backfilled after consultation with DEP staff. The respondent assumed, but did not verify, that a lead analysis of the tank grave soils using the Synthetic Precipitation Leaching Procedure

(SPLP)[19] would have shown that the soils were in compliance with the applicable PMC. (Test. R. Bartley, 9/23/03, pp. 1884-1885, 1889-1890; 11/21/03, pp. 3018-3025; test. J. Peronto, 10/24/03, pp. 2875-2876.)

40. The ME Report indicates that the concentration of lead in the tank contents was lower than the highest TCLP result and that no significant levels of TPH were present in the grave soils. Weston field personnel reported that there were no visible leaks; the soil was clean at the time of excavation. The respondent concluded that there had been no release from the underground storage tank and that the RSRs did not apply to the tank grave area.[20] (Exs. DEP-35-38; ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1884-1885.)

41. Process wastewater from the UST discharged to a leachfield until 1973 when the facility's disposal systems were connected to the municipal sanitary sewer system. The respondent identified the leachfield as a potential area of concern and conducted soil analyses of the area in January 1997. Two borings were installed and two samples collected from each boring were screened for VOCs and tested for TPH to determine if oils had bypassed the oil/water separator and discharged to the leachfield. Results indicated that VOCs were either not present or were at very low levels, and TPH levels were below the applicable regulatory criteria. The respondent concluded that a release either had not occurred in the area or contaminants had degraded to insignificant levels. (Exs. DEP-35, 38; exs. RESP-14, 184; test. R. Bartley, 9/23/03, pp. 1876-1878.)

42. Two other leach fields used for the disposal of domestic sanitary waste were identified in the ME Report and were investigated. . The respondent explained during the hearing that two monitoring wells installed in 1995 and located down gradient from these leach fields would have detected any contaminants released in the area.. (Ex. RESP-14; test. R. Bartley, 9/23/04, pp. 1895-1896.)

43. The respondent testified that he determined from the previous site assessments that the wooden storage shed area, the garden soils, and the electroplating vent discharge area had

[19] The SPLP method was designed to test for contaminants under simulated conditions that are more representative of natural conditions. The analysis is an acceptable alternative to the TCLP method for purposes of determining compliance with the PMC. Regs. Conn. State. Agencies §22a-133k-2(c). (Test. R. Robinson, 8/20/03, pp. 1083-1084.)

[20] Although subsequent SPLP testing of the tank grave soils after the audit meeting showed that the soils were in compliance with the RSRs, the respondent had not confirmed this prior to submitting his verification. (Ex. DEP-37; test. R. Robinson, 8/20/03, pp. 1083-1089; test. R. Bartley, 9/23/03, pp. 1910-1911; test. J. Peronto, 10/24/03, pp. 2875-2876.)

been identified and assessed. The former loading dock had been investigated by groundwater sampling from down gradient monitoring wells. Also, there had been no report of staining on the pavement in the areas of the former or the existing loading docks. Soils from the waste oil tank grave had been sampled and backfilled. The surface water had been analyzed. Three long-term employees had been interviewed and did not report any releases. There was no evidence of a release reported in accordance with the law or with the facility's emergency response plan. From this information and the respondent's assessment of the process wastewater leachfield, he concluded that the site was properly investigated and remediation was not necessary. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1875-1906.)

(b)
J.C. Boardman & Company

(i)
Notice

44. The Notice charges the respondent with the following professional misconduct.

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines; and

b. At the time he verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RCSA.

(Ex. DEP-4.)

(ii)
Background

45. The new owner of the J.C. Boardman property, Oakdale Self-Storage, filed a Form III and ECAF with the DEP on August 13, 1997. The respondent was then retained to verify the site and submitted his verification and his *Environmental Site Investigation and Remedial Report* on March 3, 1998. (Exs. DEP-40, 41; ex. RESP-348; test. R. Robinson, 8/20/03, p. 1010.)

46. The respondent's verification was audited, and, at the April 21, 1998 audit meeting, a number of the issues identified during the initial screening of the verification were addressed and resolved.[21] The DEP and the respondent agreed that he could resolve the remaining issues by limited additional soil and groundwater sampling (post-audit investigation). If the post-audit

investigation results showed concentrations of contaminants below the RSR criteria, the respondent could request discontinuance of further sampling and monitoring and resubmit his verification. (Exs. DEP-41, 42; ex. RESP-348; test. R. Robinson, 8/20/03, pp. 1032-1033; test. R. Bartley, 9/23/03, pp. 1961-1962.)

47. The DEP agreed to the limited post-audit investigation based on factors known about the site. The manufacturing operations had ceased in 1991 and remnants of the operations had been removed. The data in the respondent's report indicated that the potential impact of the operations on the environment was minimal. The respondent submitted the results of the post-audit investigation in a September 2, 1998 amendment to his report. The respondent received DEP authorization to discontinue groundwater monitoring and the DEP accepted his second verification in December 1998. No remediation was performed at the site. (Ex. DEP-42; ex. RESP-2; test. R. Bartley, 9/23/03, p. 1963; test. R. Robinson, 11/24/03, pp. 3218-3219, 3221.)

(iii)
The Respondent's Investigations and Verifications

48. To prepare his initial report, the respondent relied on a series of prior Phase I and II site investigations conducted by various environmental companies and consultants from 1991 through 1997. These investigations include: a site-wide contamination assessment and subsurface investigations conducted in 1991; a site-wide subsurface investigation conducted in 1993; a 1995 report of post-closure cleanup and decontamination services; a 1996 subsurface investigation in the areas of a septic tank, leach field and water treatment plant; and an additional subsurface investigation of the detention basin conducted in 1997. The Respondent also conducted additional subsurface investigations in 1997 and 1998 at the site. (Ex. DEP-40; ex. RESP-348; test. R. Bartley, 9/23/03, pp. 1913-1914, 1917-1931.)

49. The respondent's report provides a summary of these past environmental investigations and current conditions at the site. From this information, he initially concluded that the operations at the site were known and investigations of all areas of concern were complete; he took no further action. The prior investigations of soils and groundwater showed minor contamination at levels below the applicable remediation standards. Lead and cadmium had been detected in two locations at levels above background but within regulatory standards.

[21] See fn. 17, supra.

On the basis of the past screening results and current conditions, the respondent concluded that remediation was not necessary at the site. (Ex. RESP-348; test. R. Bartley, 9/23/03, pp. 1936-1937.)

50. The environmental reports on which the respondent relied referenced uncovered, 55-gallon drums containing spent pumice abrasive located on asphalt on the northwest portion of the site. The respondent did not investigate the area for potential releases given the contents of the drums, as any metals combined with the pumice were fairly insoluble and would have to travel through the asphalt. Samples from the monitoring wells located down-gradient of the drum storage area would have been tested for the metal wastes contained in the drums during prior investigations. The respondent testified that the previous environmental consultants had also determined that sampling below the asphalt was not warranted. As part of his post-audit investigations, the respondent sampled the soil below the asphalt for known metals related to site operations. The concentrations of metals detected were determined to be within applicable regulatory criteria. (Ex. DEP-41; ex. RESP-348; test. R. Robinson, 8/20/03, pp. 1020-1021; test. R. Bartley, 9/23/03, pp. 1939-1944.)

51. VOCs were detected in the 1991 investigations; concentrations of copper were also present at levels in excess of the SWPC. Years later only one round of sampling for these contaminants was conducted. Also, 1991 soil samples detected low levels of copper, and lead and cadmium at levels in excess of the GA PMC. Subsequent investigations only focused on lead and cadmium. (Exs. DEP-41, 42; test. R. Robinson, 8/20/03, pp. 1023-1024.)

52. In preparation for the audit meeting and during the post-audit investigations, the respondent sampled the groundwater for VOCs from two monitoring wells in the area of the loading dock. VOCs were not detected in either sampling event. He also sampled two monitoring wells for dissolved copper and antimony[22] and another well for dissolved copper prior to the audit meeting. Results showed that dissolved concentrations of copper and antimony were below the relevant regulatory criteria. After discussing the sampling results at the audit meeting, the respondent sampled three additional monitoring wells for dissolved copper with these same results. (Exs. DEP-41, 42; test. R. Bartley, 9/23/04, p.1963; test. R. Robinson, 11/24/03, pp. 3218-3219.)

[22] The presence of antimony on the site had not been previously assessed even though antimony is a component of brass. (Exs. DEP-35-38.)

53. The respondent's initial verification of the site was based on his subsurface investigation and his determination that the historic investigations were extensive. Also, the site had been idle since 1991; he concluded that conditions were not likely to change from one period to the next. The respondent also had not interpreted the regulations to require four consecutive quarters of groundwater monitoring in such circumstances. (Test. R. Bartley, 9/23/03, pp. 1916, 1945, 1957-1961.)

(c)
Aerospace Metals, Inc.

(i)
Notice

54. The Notice and amended Notice charge the respondent with the following professional misconduct.

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines;

b. At the time the respondent verified, the extent and degree of groundwater pollution resulting from releases was not defined in accordance with prevailing standards and guidelines;

c. At the time the respondent verified, light non-aqueous phase liquid[23] *had not been removed to the maximum extent practicable as required by §22a-133k-2(g) of the RSRs;*

d. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the direct exposure criteria as required by §22a-133k-2(a) of the RSRs;

e. At the time the respondent verified, groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs (post-remediation groundwater monitoring).

f. At the time the respondent verified, pollutants were present at the site which posed an unacceptable risk to human health; and

g. At the time the respondent used his seal, his verification did not comply with the applicable provisions of the RSRs.[24]

(Ex. DEP-4, 6.)

(ii)

[23] Light non-aqueous phase liquid is not soluble in water and has a density equal to or less than water at twenty degrees Celsius. Regs., Conn. State Agencies §§22a-133k-1(33), (36).

[24] An LEP is required to affix a seal to his or her verification or to other documents related to a verification. Regs., Conn. State Agencies §22a-133v-5.

Background

55. AMI transferred the business to Metal Management Aerospace, Inc. (Metal Management), in January 1998. The real property was retained by AMI, now known as the Danny Corporation. On January 30, 1998, the DEP received the Form III and ECAF filed by AMI, the certifying party. Roy F. Weston, Inc. was retained to investigate and remediate the property. The respondent was retained to oversee those activities. (Ex. DEP-7.)

56. The AMI site has been the subject of a number of voluntary and DEP-mandated environmental investigations. Reports prepared in connection with these investigations are identified in the ECAF as Phase I, Phase II and Phase III field investigations and environmental assessments. The ECAF also provides a history of the known releases on site and state and federal environmental enforcement actions, which are described as "in compliance and closed." (Ex. HO-2; ex. RESP-211; test. R. Bartley, 9/23/03, pp. 1965-1966.)

57. Two DEP enforcement actions were initiated to address soil and groundwater contamination on and off the site and were resolved by consent orders. AMI's predecessor, Suisman and Blumenthal, Inc. (Suisman), removed a capacitor containing polychlorinated biphenyls (PCBs), and investigated the site for PCB contamination in response to an order issued by the DEP in 1984, and prior to entering into a consent order in 1986.[25] Suisman also prepared and implemented a plan, including a number of best management practices, for chemical storage, handling, and disposal. (Exs. DEP-11, 12.)

58. Suisman excavated PCB-contaminated soil in an area adjacent to the south corner of the main building in the South Yard and around a catch basin in the North Yard as required by the consent order. The consent order also required composite soil sampling at the base of the excavation areas, which demonstrated that the levels of PCBs remaining in the soil were at or below the standard of 35 parts per million (ppm) approved by the DEP and the US EPA. Soil samples were also taken around the North Yard shredder with results indicating PCB levels below the actionable standard; however, soils were excavated from one discrete area. Suisman was certified to be in compliance with the consent order on September 22, 1994. (Exs. DEP-12, 13, 14; ex. RESP-211; test. R. Frigon, 8/6/03, pp. 408-413.)

[25] The 1986 consent order specifically provided that Suisman "complied with the Order by retaining the services of a qualified consultant to investigate the extent and degree of PCB contamination on the property and had "performed extensive sampling for PCBs to determine the extent and degree of PCB contamination on the property in compliance with the Order." (Ex. DEP-12.)

59. A second consent order issued in 1990 addressed potential off-site migration of contaminated groundwater and required improvements in materials recycling procedures, stormwater runoff controls, and maintenance procedures to minimize or eliminate the discharge of oily waste to ground or surface water. AMI prepared a spill prevention plan and a best management practices plan (BMP Plan) to address the discharge issues. The consent order provided that the BMP plan was to be referenced in the AMI NPDES permit and that any violation of the provisions of the BMP plan would be considered an enforceable violation of the permit. (Ex. DEP-15; exs. RESP-229, 442; test. R. Frigon, 8/6/03, pp. 524-525; test. T. Walles, 9/6/03, pp. 1594 - 1599.)

60. Following a DEP-approved investigation and characterization of site conditions, two localized areas of oily water seepage were identified along the eastern boundary. Hydrogeologic information indicated that the site consists of a layer of artificial fill, two to twenty feet deep, over thick strata of low permeability, fine-grained silt and clay lakebed deposits. Groundwater travels horizontally in channels along the irregular surface of the clay deposits. (Ex. RESP-211; test. T. Walles, 9/5/03, pp. 1598, 1601-1609; test. R. Bartley, 9/23/03, pp. 1968-1969.)

61. An interceptor trench system was proposed as the most effective approach to mitigate the seepage of oily water given the unique subsurface conditions in the area. Following DEP approval, the system was installed in January 1991. Since the installation of the trench system, AMI has surveyed the entire eastern boundary of the property twice annually and has reported to the DEP that no other oily seepage has been found. The DEP Commissioner acknowledged in writing full compliance with Consent Order # 4921 on October 24,1994. (Exs. RESP-215 - 218, 398, 442 - 448; test. T. Walles, 9/5/03, pp. 1636-1637, 1642-1644, DEP-16.)

62. Subsequent investigations were initiated by AMI to evaluate environmental conditions on the entire site, further evaluate the site hydrogeology, and develop operating changes that would limit environmental impacts in the future. Reports of those investigations were prepared in 1991, 1995, and 1996 and are referenced in the ECAF. (Exs. RESP-211A, 211B; test. T. Walles, 9/22/03, pp. 1673-1705.)

63. The respondent supervised investigation and remediation activities on the site over several months from late 1998 through June 1999, including the removal of over 28,000 tons of contaminated soils containing approximately 80,000 gallons of oil. The respondent did not return to the site after the major remedial activities were completed in early 1999. The

respondent filed his investigation and remediation report (AMI report) in October 1999 and submitted his verification on April 17, 2000. During the interval between submission of the report and the verification, the respondent prepared an environmental land use restriction (ELUR)[26], including the requisite survey and subordination agreements. The DEP reviewed the ELUR and issued it in March 2000 for recording on the City of Hartford Land Records. (Exs. HO-2, 3; ex. RESP-211; test. G. Stevens, 8/7/03, pp. 606-621; test. E. Patton, 10/21/03, pp. 2344-2345; test. R. Bartley, 10/21/03, pp. 2370, 2411-2413, 11/24/03, p. 3189.)

64. Staff determined that an audit of the respondent's verification was necessary and an audit meeting was held on July 13, 2000. After review of all information provided to the DEP, staff concluded that the site investigation was insufficient and the remediation was not in compliance with the RSRs; the verification was rejected. (Ex. DEP-33; test. R. Frigon, 7/16/03, pp. 353-355.)

(iii)
The Respondent's Investigation and Verification

65. The respondent identified several remediation areas on the site based on data from a number of the previous Phase I, II, and III investigations conducted over a period of twelve years. He oversaw the excavation of soils from the container storage yard, the west yard along the main building, north of the CBS building, and in the vicinity of the overhead crane. The respondent required confirmation soil sampling to determine the effectiveness of the remediation and compliance with the remediation standards. (Exs. RESP-211, 219A - 219H, 219J - 219M, 219O, 219R - 219V; test. T. Walles, 9/22/03, pp. 1740, 1748 - 1771.)

66. The respondent used the applicable Industrial/Commercial Direct Exposure Criteria (I/C DEC) and GB PMC for all contaminants, including PCBs, to demonstrate compliance with the soil remediation standards. With regard to the I/C DEC, the respondent determined that the perimeter fence and guard station limited access to the site to employees and visitors. He prepared an ELUR and decision document, and characterized the entire site as an "other restricted access location"[27]. (Ex. HO-3; ex. RESP-211.)

[26] An environmental land use restriction is an instrument that identifies certain real property and limits its use or prohibits certain activities on that property in order to minimize the risk of human exposure to pollutants and other environmental hazards. General Statutes §22a-133n; Regs. Conn. State Agencies §22a-133q-1.

[27] An area that is at least 0.1 kilometers from a residential/commercial area and limited by man-made barriers (e.g. fences and walls). Regs., Conn. State Agencies §22a-133k-2(b)(2)(B); 40 C.F.R. §761.123.

67. The ELUR notes that residential use of the site is not permitted and activities that pose a risk of migration of pollutants or a disturbance of the integrity of environmental controls are prohibited. The ELUR decision document[28] indicates that pollutants in the soil exceed the Residential DEC in various locations but are below the I/C DEC. The document notes that the ELUR is necessary for TPH and PCBs site-wide, and certain other compounds present at a specified location. (Ex. HO-3.)

68. The respondent characterized the site as an "other restricted access location" after consultation with DEP staff to determine that Flatbush Avenue provided a sufficient barrier to the former housing project south of the site. Weston field staff reported that the site was at least 0.1 kilometers from other commercial or residential areas. The respondent did not verify the field staff determinations prior to submitting his verification or investigate the proposed commercial use of the former Heublein, Inc. distillery. Subsequently, the respondent determined that the Stop & Shop supermarket was within 0.1 kilometers of a portion of the AMI site. (Exs. DEP-57, 58; test. R. Bartley, 11/21/03, pp. 3147 - 3148; test. R. Frigon, 11/24/03, pp. 3339-3341.)

69. Soil sampling locations were concentrated in areas that were considered by the respondent most likely to be contaminated and more broadly dispersed throughout the remainder of the site. To confirm that soils were below the GB PMC, the respondent compared total or mass analyses for each compound to the applied criteria and leachable compounds, analyzed by either TCLP or SPLP, to ten times the Groundwater Protection Criterion. When total or mass analytical results exhibited compounds at levels in excess of the PMC, the respondent conducted additional soil analyses using the SPLP. (Ex. RESP-211.)

70. The respondent determined that the site was in compliance with the RSRs by characterizing the entire site a release area for the purpose of calculating the required ninety-five percent upper confidence level. (Ex. RESP-211; test. R. Bartley, 10/21/03, pp. 2403-2405.)

71. Soils were remediated in two areas on site in response to the 1986 Consent Order. The cleanup standard at the time was significantly higher than the standard[29] currently required by the RSRs. The respondent did not require any remediation in the areas excavated in the 1980s

[28] A written description of the type and location of pollutants present in soils or groundwater on the site, any limitations on the use of the parcel and a description of the reason for the ELUR. Regs., Conn. State Agencies §22a-133q-1(f).

[29] The RSR GB PMC is 0.005 mg/l and I/C DEC is now 10mg/kg.

nor does it appear from the AMI Report that he evaluated those areas to assess the current levels of PCB contamination in light of the historic cleanup goal. The respondent concluded that the RSRs do not apply to PCBs on this site based on the activities required by the 1986 consent order. (Exs. RESP-211, 211A, 211B; test. R. Bartley, 10/21/03, pp. 2487-2488.)

72. The respondent's AMI Report notes that groundwater was not sampled historically due to the transient nature of perched water that appears to flow in an easterly direction through channels or troughs in the clay layer. Groundwater was characterized as flowing in an easterly direction in the South Yard and in a portion of the North Yard, and in a westerly direction in another portion of the North Yard. The respondent oversaw the advancement of thirty-three soil borings in December 1998 to further evaluate the clay layer and to determine where perched groundwater may be located. The specific goal of this sampling program was to collect groundwater without regard to the relationship of the sampling area to potential or known areas of concern. (Ex. DEP-23; ex. RESP-211.)

73. Microwells were installed in the five locations where groundwater was found; four samples contained sufficient amounts of water to be filtered for silt and analyzed for PCBs, VOCs, and metals. The analytical results were compared to the SWPC and the Industrial/Commercial Volatilization Criteria. PCBs were not detected in the samples. Concentrations of VOCs were below the criteria, however, concentrations of arsenic were found at levels above the criteria. The respondent considered arsenic to be naturally occurring, however, he used a model[30] to assess the migration potential of arsenic that is not accepted by the DEP. The results indicate that the concentrations of arsenic do not exceed the SWPC. (Ex. RESP-211.)

74. The respondent considered the groundwater collected from the four locations representative of site conditions. He concluded that a groundwater plume does not exist on site, rather the water is present in distinct, isolated areas. At the time of the AMI investigation, the respondent was aware that the DEP interpreted the RSRs to require compliance monitoring in accordance with §22a-133k-3(f) to confirm that the groundwater is in compliance with the applicable criteria. The respondent testified that he determined that the SWPC did not apply to groundwater on this site because the interceptor trenches were collecting groundwater before it

could enter the surface water. (Ex. DEP-23; ex. RESP-211; test. R. Bartley, 10/21/03, pp. 2395-2396.)

75. During routine compliance inspections conducted in July 1999, and in February 2000, DEP staff observed such conditions as oily material in paved and unpaved areas, piles of nickel sludge with water-soluble oil pooled around the piles, open drums containing scrap metals in uncovered areas including drums that were punctured, crushed or overturned, metal chips on the ground site-wide, and dark staining around stormwater outfalls. Because these site conditions were the result of facility operations, the DEP issued a Notice of Violation of the water discharge permit to Metal Management on April 13, 2000.[31] The respondent did not identify or investigate these conditions. (Exs. DEP- 30, 46, 47A - 47I; test. W. Oros, 7/15/03, pp. 21, 23-38, 56, 68, 72-73, 83-86, 141-147.)

76. During a June 30, 2000 site visit, DEP staff noted that some of the previously observed conditions had been corrected, however, other serious conditions were present on the site. Staff observed contaminated water in a detention pond on the southwest portion of the site, staining on the concrete walls and sediment soils at two of seven storm drainage outfalls, a three-foot deep trench exhibiting a smear zone[32] of oil product, and significant cracks in a concrete waste oil containment area. The respondent did not identify or investigate these conditions in his verification. The 1999 Report also did not identify or discuss the floor drains in the main operations building and in an aluminum tunnel area that were observed during the June 2000 site visit. (Exs. DEP-33, 48A - 48I; test. W. Oros, 7/15/03, pp. 134, 152; test. R. Frigon, 7/16/03, pp. 285-299, 309-310, 317-320, 332-335, 338, 573-584.)

77. Maintenance and inspection of the detention pond, the stormwater outfalls, the interceptor trenches, the south pad, the aluminum tunnel and the storage tank containment area were required under the BMP plan developed in response to the 1990 consent order. The DEP

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[30] The respondent developed an analytical solute transport model, which is a mathematical demonstration of the anticipated attenuation of a constituent flowing with groundwater from a specific location to a surface water body. (Test. R. Frigon, 8/6/03, pp. 450-451.)

[31] Violations listed in the Notice included a failure to "maintain practices, procedures, and facilities designed to prevent, minimize, and control spills, leaks, or other unplanned releases from loading docks, metals storage areas, nickel sludge storage and outdoor metal storage; failure to maintain good housekeeping practices are required by the general permits; and a failure to "provide chemical container containment and to cover all dumpsters" in accordance with the general permit. The Notice of Violation required Metal Management to revise its Stormwater Pollution Plan to address the issues and to improve materials handling, including maintenance of the discharge swale, particularly at the discharge points. (Ex. DEP-30; test. W. Oros , 7/15/03, pp 142-146.)

enforces the BMP plan as part of the enforcement of the Stormwater permit. (Ex. RESP-229; test. R. Frigon, 8/6/03, p. 528; test. R. Bartley, 9/23/03, pp. 1979-1980.)

78. The interceptor trench system was installed in 1994 and was still operating in June, 2000, collecting approximately 180,000 gallons of groundwater per year (Ex. Resp. 205). Approximately 100 gallons of oil is separated from this groundwater each year by treatment. The oil separated from the groundwater contains 200-300 parts per million of PCBs. The respondent did not evaluate the continued effectiveness of the system for preventing off-site migration of contaminated groundwater. Although the respondent was aware that the collection data indicated that there may be a declining trend in the amount of oily water collected in the trenches, he did not monitor the liquid collected in the system to determine the effectiveness of the 1998-1999 remediation activities, which included the areas he believed to be the original source of the free-product present on the site. (Test. R. Frigon, 8/6/03, pp. 407, 446-447; test. T. Walles, 10/20/03, pp. 2252-2253; test. R. Bartley, 10/21/03, pp. 2371, 2392-2393.)

78a. A number of potential areas of concern were identified and, in many cases, sampled during the Weston 1996 investigation but were not identified in the AMI Report. A former vapor degreaser unit, a maintenance garage and vehicle refueling area with associated underground storage tanks, a former small parts degreasing operation, an area identified as the boiler blowdown area, and the area around a concrete containment pad labeled crusher metal turnings were not identified as areas of concern in the AMI report. (Exs. DEP-48B, 48D; ex. RESP-211B; test. R. Frigon, 7/16/03, pp. 292-294, 309-310, 315-316, 341-344, 402-403, 530-531, 533, 8/7/03, pp. 533-534, 11/24/03, pp. 3283 - 3309.)

79. The respondent did not require groundwater monitoring to determine the effectiveness of the historical or recent remediation efforts. He concluded that post-remediation groundwater monitoring would not be effective or provide adequate data to meet the requirements of the RSRs given the unique subsurface conditions at the site. The respondent included a request for a waiver of the post-remediation groundwater requirements in the October 1999 AMI Report. The respondent verified the site without waiting for a decision on his request for a waiver of the post-remediation groundwater requirements. (Ex. RESP-211; test. R. Frigon, 8/6/03, pp. 446-447; test. R. Bartley, 10/21/03, pp. 2501-2502.)

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[32] The rise and fall of the groundwater table raises and lowers the oil material creating a thick uniform zone of contamination in the subsurface. (Test. R. Frigon, 7/16/03, pp. 319-320.)

III
CONCLUSIONS OF LAW

A
Jurisdiction/Notice

1
Adequacy of Notice to the Respondent

An environmental professional's license is a property right once it has been issued. See *Burton v. Mottolese,* 267 Conn. 1 (2003) (license to practice law). General Statutes §22a-133v(g) and due process provide that this right cannot be revoked except for cause after notice and an opportunity to be heard. Section 4-182(c) of the General Statutes provides that prior to instituting proceedings, an agency must give a licensee notice of the facts or conduct that warrant revocation or suspension, and the licensee must be given an opportunity to show compliance with all lawful requirements for the retention of his license. Id. at 18-19. Section 4-177(b) describes reasonable notice under the Uniform Administrative Procedures Act.

A licensee must be given adequate notice and a meaningful opportunity to be heard. Notice is adequate when charges are sufficiently described to enable a licensee to produce relevant evidence at the hearing, to cross-examine witnesses, and to offer rebuttal evidence. (Citations omitted.) *Burton v. Mottolese,* supra, 267 Conn. 19, citing *Briggs v. McWeeney,* 260 Conn. 296, 318 (2002); *Grimes v. Conservation Commission,* 243 Conn. 266, 273 (1997). See also *Jarvis Acres, Inc. v. Zoning Commission,* 163 Conn. 41, 47 (1972) (notice allows parties to prepare intelligently for the hearing). Due process is a flexible concept and is evaluated with regard to the facts of a case that require these procedural protections. *Burton v. Mottolese,* supra, 267 Conn. 19, citing *Thalheim v. Greenwich,* 256 Conn. 628, 648 (2001).

The respondent claims that the Notice was inadequate because it did not specify that he would be subject to discipline under General Statutes §22a-133v(c) for professional misconduct at the Mark Eyelet site.[33] The respondent argues that because the Notice was inadequate, the Board lacks jurisdiction to bring charges against him related to the Mark Eyelet site. The

[33] During the hearing, the respondent claimed that his professional conduct at the Mark Eyelet facility could not be evaluated in accordance with the LEP regulations because they were not in effect at the time he verified the site. In a February 9, 2004 ruling, I concluded that the LEP regulations did not apply, however, General Statutes §§22a-133v(c) and 22a-133v(g) were in effect at the time and, as an interim LEP, the respondent's conduct could be evaluated in accordance with those provisions.

respondent's claim ignores the facts that show that he was fully informed of the conduct that would be the subject of the hearing, he was given an opportunity to be heard on that conduct and he was able to fully participate in the hearing.

The respondent was informed of the investigation into his conduct at the Mark Eyelet establishment when he was notified of the outcomes of the Board's investigation and of the April 5, 2002 compliance meeting. The Notice advised the respondent of the specific charges of misconduct regarding his duties at the Mark Eyelet site. The respondent specifically denied the charges and presented evidence and expert opinion at the hearing regarding the performance of his duties at the Mark Eyelet site. The respondent understood the issues he faced with respect to his verification of the site.

At a minimum, due process requires adequate notice of the facts and conduct that will be the subject of a hearing. If the potential outcome of the hearing is the suspension or revocation of a professional license, "the notice must also fairly indicate the legal theory under which such facts are claimed to constitute a violation of the law." *Jutkowitz v. Dept. of Health Services,* 220 Conn. 86, 93 (1991). The respondent was advised of the facts and conduct that would be the basis of the hearing. The Notice indicated that the respondent was alleged to have committed professional misconduct at three sites, including the Mark Eyelet site. He presented relevant evidence at the hearing, cross examined witnesses and offered rebuttal evidence. Moreover, the respondent has not demonstrated that he has suffered any material prejudice as a result of this procedural deficiency. *Hart Twin Volvo Corporation v. Commissioner of Motor Vehicles,* 165 Conn. 42, 47 (1973). The respondent's argument does not support a conclusion that he was unfairly denied due process to his detriment.

2
Waiver

The respondent claims that action on his license cannot be based on any alleged misconduct occurring prior to the date his license was issued. He argues that by authorizing his license, the Board waived any prior claims of misconduct or, in the alternative, acknowledged that he did not commit professional misconduct when he verified the Mark Eyelet site. The record and the law do not support such a conclusion.

It is well established that waiver requires knowledge of and intent to relinquish a right, claim or privilege. To conclude that the Board waived its right to discipline the respondent for professional misconduct, I must find that the Board had knowledge of the audit findings of the Mark Eyelet verification and chose not to act on that information. *Hanover Insurance Co. v. Firemen's Fund Insurance Co.,* 217 Conn. 340, 351 (1991). There is no evidence that the Board was aware that the Mark Eyelet verification had been audited or rejected at the time it authorized the respondent's license or that it had official notice of any misconduct on the part of the respondent. Therefore, there is no basis for a conclusion that the Board expressly or impliedly waived its right to pursue any future claim of misconduct by authorizing the respondent's license. In addition, the respondent has not cited nor have I found any legal support for the proposition that issuance of a license constitutes an acknowledgement of no prior violation of the applicable rules of conduct.[34]

3
Legal Sufficiency of Charges

The respondent claims that the LEP regulations do not specifically authorize the Board to take action on his license for failure to properly investigate a site. He argues that the regulations are unconstitutionally vague and ambiguous if interpreted to authorize such action.

A regulation is vague if it does not provide a person a reasonable opportunity to know what is prescribed or provide explicit standards that protect against arbitrary enforcement.

[34] In his brief, the respondent argues that his claims of waiver extend to the Commissioner as the issuer of his license. The Commissioner has no authority to issue, suspend or revoke the respondent's license absent express authorization from the Board. General Statues §22a-133v(g); Regs., Conn. State Agencies §22a-133v-4. Therefore, the Commissioner has no right, claim or privilege that can be subject to a claim of waiver in this circumstance.

Connecticut Building Wrecking Co. v. Carothers, 218 Conn. 580, 590-91 (1991). The regulations authorize the Board to suspend or revoke a license if it finds that an LEP has engaged in professional misconduct. Regs., Conn. State Agencies §22a-133v-4(b)(1). Professional misconduct includes an act or omission that violates *any* statute or regulation relevant to the activities of the LEP. §22a-133v-4(b)(3)(A).

There are numerous references in the Transfer Act to the LEP's duty to verify that a site has been investigated in accordance with prevailing standards and guidelines. General Statutes §§22a-134(19); 22a-134a(e) and (l). It is undisputed that these requirements are relevant to the respondent's activities. Moreover, the respondent was aware of the conduct on which this action was based and provided no evidence that he was unaware that an improper investigation could result in Board action against his license. Also, the evidence he presented demonstrates that he knew of the requirement that a site be investigated properly. The respondent has not alleged or demonstrated that he did not have adequate notice that an improper investigation constitutes professional misconduct or that the LEP regulations have been applied to him in an arbitrary or discriminatory manner. *Connecticut Building Wrecking Co. v. Carothers,* supra, 218 Conn. 590-591. There is no basis for a conclusion that the regulations are vague and ambiguous regarding proper site investigations or the potential for sanctions for failure to investigate properly.

The respondent also argues that TASA cannot be used as a basis for revoking or suspending his license because the guidelines are actually "regulations" as defined under the Uniform Administrative Procedures Act (UAPA). General Statutes§§4-166 through 4-189. The respondent argues that because TASA was not duly promulgated as regulations, it cannot be used to determine whether his verifications are acceptable. This argument misrepresents the relevance of TASA in these proceedings.

As previously discussed, the Transfer Act specifically provides that an LEP must ensure that a site is investigated in accordance with prevailing standards and guidelines. The claimant has offered expert testimony that TASA and the ASTM standards represent the prevailing standards for site investigations to be used in combination with professional judgment and experience, which allows for discretion on the part of the LEP. TASA is a description of commonly accepted professional practices and provides some criteria for measuring the quality or acceptability of the respondent's site investigations. The applicable statutes and regulations that govern his professional conduct will determine the respondent's rights and obligations as to

his license. TASA is not a regulation and there is no merit to respondent's argument that the charges against him are legally insufficient.

B
Prevailing Standards and Guidelines for Site Investigations

The Transfer Act provides that an LEP must verify that the certifying party has investigated an establishment in accordance with "prevailing" standards and guidelines. General Statutes §§22a-134 (6), (12), (19); 22a-134a (e). As it is commonly used, the term "prevailing" means generally current or predominant conditions that exist at a certain time. The American Heritage Dictionary 1038 (New College Edition, 1979); General Statutes §1-1. The prevailing standards and guidelines for site investigations are therefore those that are used predominantly at a particular point in time.

The testimony of credible witnesses reflects conflicting opinions among the experts regarding the prevailing standards and guidelines for site investigations in Connecticut. The DEP reviews the adequacy of a Transfer Act site investigation in accordance with the criteria outlined in the TASA guidance, but considers other guidance such as the ASTM standards. Regardless of the particular source, it is obvious from the record that at all times relevant to these proceedings, the predominant practice in the state involved a multi-phased investigation where each phase is an integral component of a site assessment, and where professional judgment and experience are essential to the process. This is evident from the testimony, the historical reports in evidence, and the reports submitted with the respondent's verifications.

It can reasonably be inferred from the record that a thorough Phase I investigation is vital as it provides the basis for the balance of the site assessment activities. Phase II is a focused investigation that is predicated on the potential areas of concern and contaminants of concern identified during Phase I. The sufficiency of the Phase II investigation hinges on the Phase I information. The thoroughness and accuracy of the Phase I investigation is therefore critical to the reliabililty of a verification.

Phase II requires a balance of professional judgment and skill, site investigation techniques, and an understanding of the applicability of the RSRs to the investigation process. Phase II requires sampling in areas most likely to be contaminated and testing for the contaminants likely to be present. Sampling plans are site specific and based on professional

expertise, judgment, and the RSR criteria used to determine whether hazardous substances exist at levels that warrant a Phase III investigation.

A Phase III investigation must be based on Phase II information to adequately characterize the extent of a release, identify its source or probable source, assess any risk of harm to the public and the environment and determine the need for remedial action. Phase III is the precursor to remediation, which can only be effective if the data gathered throughout the investigation process is reliable. Given the purpose and goals of each investigation phase, it is evident that the result of an error or omission at any phase is that it will be compounded throughout the balance of the investigation process.

The investigation report must be complete and be accompanied by or reference all of the information and supporting documentation that is necessary for the DEP, other environmental professionals, and the public to evaluate the adequacy of the site assessment. It is undisputed that the DEP must review LEP verifications and supporting documentation. The record shows that the site investigation report is the primary source of information available to DEP staff to determine if the verification of a site is appropriate. As the record also shows, the data contained in these reports are often relied on for subsequent investigations. The report, once filed, becomes a public document and is part of the site history. For these reasons, the investigation report is a key component of the site investigation process.

It is obvious that the report must clearly demonstrate that the site investigation was comprehensive, and was designed and implemented in accordance with prevailing standards and relevant statutes and regulations. The report must also provide sufficient details and a reasoned analysis of the investigation findings to demonstrate that the LEP's interpretations and conclusions are supported by the information gathered.

It is reasonable to infer from the evidence that a certifying party will rely on the conclusions drawn from a site assessment to demonstrate its compliance with the requirements of the Transfer Act and to define the limits of its responsibility under the Act. It is also reasonable to assume that institutional lenders and insurers will rely on site assessments that are required by the Transfer Act and reviewed by the DEP. The prevailing standards for Transfer Act site investigations require a comprehensive and conclusive multi-phased investigation and a sufficiently detailed report that adequately demonstrates that the site is in compliance with the Act.

C
Standard of Proof

The respondent argues that the standard of proof for a determination of misconduct regarding his verification of the Mark Eyelet site is clear and convincing evidence. He argues that the UAPA does not specify the standard of proof as to disciplinary hearings and that the LEP regulations establishing a preponderance of the evidence standard were not in effect at the time of the Mark Eyelet verification.

The respondent's argument is premised on the fact that the state Supreme Court has adopted a clear and convincing standard in attorney disciplinary proceedings, which are conducted in accordance with the rules of the Superior Court. However, the present matter is governed by the UAPA and the standards that apply to an examining board created by the legislature. "Executive boards subject to the UAPA may both legally and constitutionally employ the preponderance of the evidence test." *Roger Sylvestre, D.C. v. Connecticut State Board of Chiropractic Examiners*, 2001 Conn. Super. LEXIS 390, Superior Court, judicial district of New Britain, Docket No. CV990498888S (February 2, 2001) citing *Michael Swiller, D.C. v. Commissioner of Public Health and Addiction Services, et al.,* 1995 Conn. Super. LEXIS 2844, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 705601 (October 10, 1995)(15 Conn. L. Rptr. 532). Therefore, the standard to be applied to all charges made against the respondent, including those pertaining to the Mark Eyelet verification, is proof by a preponderance of the evidence.

D
Site Specific Charges

1
Mark Eyelet

a. At the time the respondent verified, all potential release areas located at the site had not been investigated in accordance with prevailing standards and guidelines.

It is alleged that the respondent's verification of the site was unreliable because the investigation of the site was insufficient and inconclusive. Specifically, the investigation failed to identify all potential areas of concern on the site, did not thoroughly assess the environmental impact of the underground waste oil tank, and failed to sufficiently assess the contaminants previously identified in the groundwater.

There is no evidence that the respondent identified all potential areas of concern on the site. He relied on historical soil and water sampling plans and analytical results and there is no evidence that he determined that those investigations involved samples taken from all areas most likely to be contaminated.

The respondent did not perform a thorough assessment of environmental impacts of the underground waste oil tank. He did not require additional soil sampling in the area of the tank and there is no evidence that he determined whether the more recent groundwater analyses in the area produced results that were reliable and consistent with previous analyses, particularly when the recent samples were drawn from a new well located cross-gradient rather than down-gradient of the area of concern. He also did not require an SPLP analysis to support his conclusion that there had been no release from the UST.

The respondent argues that he had adequate information to use his professional judgment to determine that a release had not occurred at the tank and notes that a subsequent investigation of the UST area confirmed his conclusion. A subsequent investigation of the area established and documented that a release had not occurred.

The respondent did not sufficiently assess the contaminants previously identified in the groundwater. He surmised but did not conclusively demonstrate that the VOCs and other contaminants detected in the previous groundwater investigations migrated onto the site from the Superfund contamination. The respondent again relied on dated information and inconsistent sampling results to reach his conclusions that the groundwater was in compliance with the RSRs.

The prevailing site investigation standards required a thorough and well-documented investigation of this site before it could be verified. The respondent relied on investigations that were inconsistent with the standard and customary practices. The Phase II investigation described in the ME Report was insufficient given that all areas of concern were not identified during Phase I. The additional omissions from the Phase II investigation compounded the problem. There is sufficient evidence in the record to conclude that the respondent did not ensure that the site was investigated in accordance with prevailing standards and guidelines; his verification was therefore unreliable in this regard.

b. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the Pollutant Mobility Criteria as required by §22a-133k-2(a) of the RSRs.

The respondent is alleged to have improperly verified the site when the results of the TCLP analyses of the UST tank grave soils indicated the presence of lead at levels that exceeded the applicable PMC. The respondent concluded that remediation of the area was not necessary, however, the sampling results submitted in support of his verification demonstrated that the tank grave soils may not have been in compliance with the RSRs. The respondent also did not require an SPLP soil analysis or demonstrate the likelihood that results of such an analysis would show concentrations of lead within acceptable limits. Whether the results of the TCLP analyses were evidence of a release from the waste oil tank or the results of an aggressive analytical procedure, a thorough investigation requires that the respondent address the issue with conclusive data. Based on the information available at the time, the record shows that the respondent rendered his verification while there remained the possibility that soils on the site were not in compliance with the RSRs.[35]

c. At the time the respondent verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs.

Groundwater monitoring is required after remediation of a site to determine the effectiveness of that remediation in preventing groundwater pollution, eliminating health or safety risks, and achieving compliance with the RSRs. It is undisputed that this post-remediation groundwater monitoring requirement does not apply to circumstances where remediation is not necessary.

The record shows that the respondent did not conduct remediation at the Mark Eyelet site. Also, there is no record of remediation in the historical data referenced in the ME Report. Therefore, I cannot conclude that the respondent was required to conduct post-remediation groundwater monitoring at this site.

[35] The record indicates that a subsequent investigation by another consultant confirmed the respondent's conclusions that there had been no release to the tank grave soils.

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines.

It is alleged that the respondent improperly verified the site without ensuring that at least one potential area of concern had been assessed or that contaminants previously detected in the soils and groundwater were thoroughly evaluated. The previous investigations that provided the information on which he based his verification did not assess the area where uncovered drums of spent buffing materials had been stored. The respondent also did not follow up on prior concentrations of copper in the groundwater that were in excess of the applicable RSR criteria.

A proper Phase II investigation requires sampling in areas identified during Phase I as areas most likely to be contaminated. The respondent assumed, based on references to the uncovered drums in previous investigation reports, that the area where the drums had been stored was considered and dismissed as a potential area of concern. However, there is no evidence that prior investigations specifically identified the area as a potential area of concern or that it was properly assessed and excluded from further investigation. Even if the respondent correctly determined that it was not necessary to sample the soils beneath the asphalt in the area, he made no reference to the drums or to his decision to forgo a soil analysis, which would have demonstrated that he diligently investigated the site and supported the reliability of his verification.

The previous soil and groundwater investigations on which the respondent relied were inconsistent. For example, copper was detected in the soils and groundwater in 1991 but not considered in subsequent investigations. VOCs were present in the groundwater in 1991. Combined, the investigations conducted over a period of six years do not represent a thorough and comprehensive site investigation.

The respondent again relied on limited soil and groundwater analyses to arrive at his conclusions that further investigation was not warranted at the site. The Phase I and Phase II investigations were incomplete and inconclusive at the time the respondent submitted his first verification of the site. The respondent did not investigate the site in accordance with prevailing standards and guidelines.

b. At the time the respondent verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g).

As noted, supra, post-remediation groundwater monitoring is not required in circumstances where remediation is not necessary. The record shows that the respondent did not conduct remediation at the J. C. Boardman site and the DEP accepted his verification that remediation was not necessary. Therefore, there is no basis for a conclusion that the respondent was required to conduct post-remediation groundwater monitoring at this site.

3
AMI

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines.

The respondent is alleged to have submitted an unreliable and unsupportable verification of the AMI site based on an insufficient and inconclusive site investigation. It is alleged that the investigation did not include the potential for releases based on the site conditions observed by DEP staff during the February and June, 2000 site inspections; did not assess the interceptor trench system or the areas on the site related to the 1986 and 1990 consent orders; and failed to address all potential areas of concern on the site including areas that are included in the BMP plan required by the 1990 consent order.

During the February and June 2000 DEP site inspections, DEP staff observed areas on the site where releases had actually occurred or where conditions created the potential for releases to the soils and groundwater. It is undisputed that the respondent did not ensure that these conditions observed by the DEP were properly investigated and remediated prior to filing his verification with the DEP. The issue to be decided is whether, under the Transfer Act, the respondent was required to ensure that AMI revisit and investigate the site for new releases that may have occurred after remediation activities ended and prior to submitting his verification.

The Transfer Act permits the ownership of an establishment to change hands prior to any cleanup of pollution. The certifying party has until ten days *after* the transfer to submit the appropriate form and ECAF notifying the Commissioner of the transfer. §22a-134a (c) and (d).

This allows for a situation, such as in the present case, where the transferee is already in possession of the establishment prior to the site assessment by the certifying party.

AMI was required under the Transfer Act to inform Metal Management of pollution or the possibility of pollution at the site prior to the transfer and to assume the obligation to investigate and remediate pollution at the site. §22a-134a(c). However, there is nothing in the Transfer Act that specifically defines the scope of the certifying party's obligations.

A review of the language of the act and its legislative history provides little guidance on the issue beyond the fact that the purpose of the act was to protect the unwary purchaser from liability, to ensure the cleanup of contaminated establishments, and to ensure that the burden of cleanup would be borne by one or more parties to the transfer. See 28 S. Proc., Pt. 6, 1985 Sess., p. 1802, remarks of Senator Benson, (Transfer Act was enacted "to protect purchasers of property from being liable for the subsequent discovery of hazardous waste on the property…"); 28 H. R. Proc., Pt. 28, 1985 Sess., p. 11969; remarks of Representative Tiffany (If the seller cannot provide assurances that the site is clean of releases at time of transfer; one party to transaction must certify to the other and to DEP that someone will assume responsibility for cleanup). However, there is no indication that the legislature ever contemplated circumstances that might obligate a certifying party to assume the liability for pollution that could be caused by the transferee and not the seller of the property.

The remediation activities at AMI were completed in June 1999. The respondent filed his remediation report with the DEP four months later in October 1999. After preparation and DEP approval of the ELUR, the respondent submitted his verification on April 17, 2000, ten months after remediation activities ended. At all relevant times, Metal Management was in charge of facility operations and considered by DEP to be responsible for the cleanup of the conditions observed during the February inspections.[36]

There is no evidence that the delay between the completion of the remediation and the respondent's verification violated any express provision of the Transfer Act. There is no evidence that the respondent or AMI violated any provision of the Transfer Act for having failed to return to the site to investigate any condition created by the transferee, Metal Management. There is also no evidence that AMI agreed to undertake such an obligation. Therefore, I cannot

conclude that the respondent's decision to verify the site without returning to investigate conditions was unreasonable under the circumstances.

The respondent is also alleged to have failed to ensure that areas addressed by the 1986 and 1990 DEP consent orders were properly investigated and remediated. The respondent argues that the Commissioner approved the remediation required by the consent orders and further remediation is not required.

The RSRs include an exclusion provision that applies to remedial action that has been approved by the Commissioner. Specifically, §22-133k-1(b) provides that where remedial action has been taken and approved in writing by the Commissioner, further remediation is not required unless ordered by the Commissioner. The respondent argues that the excavation of PCB contaminated soils and the collection of contaminated groundwater in the interceptor trenches constitute remediation that has been approved by the commissioner. Therefore, he concludes further investigation and remediation of PCB contamination on the site, assessment of the effectiveness of the trenches or further investigation of groundwater on the site is excluded from the requirements of the RSRs.

Remediation is defined in the RSRs as "the containment, removal, mitigation, or abatement of pollution …." §22a-13k-1 (52). PCB-contaminated soils were removed in two areas on the site in response to the 1986 consent order and the Commissioner approved the remediation. There is no evidence that the Commissioner took any action to require additional remediation in the excavation areas. The respondent reasonably concluded that the RSRs did not require any further remediation of the PCB contaminated soils in the excavation areas that were the subject of the 1986 consent order. However, to the extent that the respondent concluded that the exclusion provision of the RSRs eliminated the need for an investigation of the area for subsequent releases, his reliance on that provision is misplaced.

The interceptor trenches were installed in response to the 1990 consent order. The record shows that the trench system was reviewed and approved by the DEP prior to installation; annual reports of conditions in the area of the trenches have been filed with the DEP and the DEP has not required any additional remedial measures in the area. The interceptor trenches contain the flow of contaminated groundwater and are therefore remedial in effect. The respondent's

[36] The record shows that the DEP considered the site conditions observed on February 8 and 14, 2000, to be the result of facility operations. As a result, the DEP issued a Notice of Violation to Metal Management. By June 30,

conclusion that he was not required to assess the effectiveness of the trench system or to oversee additional remediation in the area of the trenches is not entirely unreasonable.

However, the scope of the remedial benefits of the trench system is unknown. The system was installed in 1991 to contain contaminated groundwater that was present on the site at the time. The exclusion provision may eliminate the need for any further remediation of that contaminated groundwater, but it does not eliminate the need for a proper investigation of potential post 1994 releases on site not covered by the two consent orders.

It is also alleged that the respondent failed to investigate such areas of concern as the detention pond, stormwater outfalls, the aluminum tunnel and the south pad. The respondent argues that these operational areas were included in the remediation required by the 1990 consent order, addressed by the BMP plan, approved by the Commissioner, and are not subject to the RSRs. He also argues that staff observed conditions in these areas that were created after the AMI investigation and remediation activities, and are the responsibility of the transferee, Metal Management.

The respondent's argument is a misinterpretation of the exclusion provision of the RSRs. The provision explicitly excepts from further remediation any *release* that has been remediated to the satisfaction of the Commissioner. In this instance, the respondent is not alleged to have failed to remediate a release that is covered by the exclusion provision. Rather, he is charged with having failed to identify and investigate specific areas of concern. Also, the inspection and maintenance requirements of these operational areas are addressed in the BMP plan, which was intended to minimize or eliminate discharges of oily waste to the groundwater or surface water on the site. Moreover, even if the transferee is required to implement the inspection and maintenance provisions of the BMP plan, that requirement does not take the place of a thorough investigation of the site.

The prevailing standards required a thorough investigation of the potential post 1994 releases on site not covered by the two consent orders before it could be verified. The exclusion provision of the RSRs does not except from this requirement potential post 1994 releases on site not covered by the two consent orders. On that basis, there is sufficient evidence to conclude that respondent improperly verified that the site was investigated in accordance with prevailing standards and guidelines.

2000, Metal Management had addressed a number of the issues raised in the Notice of Violation.

b. At the time the respondent verified, the extent and degree of groundwater pollution resulting from releases was not defined in accordance with prevailing standards and guidelines.

It is alleged that the respondent's verification is improper in that he failed to ensure that the site investigation included a determination of the impact of releases on the groundwater. Specifically, the investigation did not address the conditions observed by DEP staff in the February and June 2000 site inspections, did not determine the source of the PCB contaminated oils collected in the interceptor trenches, and did not sufficiently investigate the groundwater to determine whether the site was in compliance with the groundwater remediation standards.

As previously discussed, there is insufficient evidence in the record for me to conclude that the respondent was required to revisit and investigate the site prior to submitting his verification. However, in his investigation, the respondent concluded that a groundwater plume did not exist on the site and further investigation was not necessary after one round of samples was successfully drawn from four of thirty-three borings, which were intended primarily for the purpose of locating groundwater rather than to demonstrate compliance with the RSRs. The respondent considered the four samples representative of the groundwater conditions throughout the thirty-acre site and concluded that the site was in compliance with the SWPC and the Industrial/Commercial Volatilization Criteria.

The record shows that conventional groundwater monitoring techniques might not provide sufficient information to determine the quality of the groundwater on site. However, groundwater was known to flow in an easterly direction in the South Yard and in a portion of the North Yard, and in a westerly direction in another portion of the North Yard. Contaminated groundwater has been collected in the interceptor trenches for more than a decade. Even if the subsurface conditions at the site made it unlikely that traditional investigative techniques would provide sufficient information to determine the extent and degree of any groundwater pollution, the record demonstrates that groundwater exists on the site and can be sampled.

For potential post 1994 releases not covered by the two consent orders, any resultant groundwater plumes must be shown to be compliant with the SWPC and the Volatilization Criteria. Regs., Conn. State Agencies §22a-133k-3(a)(1). The record shows that at the time of the site investigation, the respondent was aware that the DEP required application of the groundwater monitoring requirements of the RSRs to demonstrate compliance with the

applicable criteria. However, the respondent argues that the SWPC does not apply to groundwater at the site because all groundwater in the South Yard flows to the interceptor trenches and does not discharge to a surface water body. The respondent also argues that the previous site investigation conducted in response to the 1990 consent order determined the extent and degree of groundwater pollution, and the Commissioner's approval of the investigations and remedial actions at that time constitute a determination that the groundwater at the site has been properly investigated.

The record does not support a conclusion that all groundwater flows to the interceptor trenches. There is no evidence that groundwater flows from the North Yard to the interceptor trenches. There is also no evidence that the interceptor trench system was intended to replace subsequent investigations of the groundwater on the site.

The respondent's argument that because the Commissioner approved the investigation and installation of the interceptor trenches, the RSRs do not require further groundwater investigation or evaluation of the trench system is also not supported by the evidence. There is no evidence that the system was intended to remediate all groundwater for all releases regardless of when the release occurred. Even if the trench system serves to remediate groundwater pollution in the South Yard, its effectiveness can only be determined by a full understanding of the substances present in the groundwater and by an evaluation of the substances collected in the trenches.

There is no evidence that the respondent required any investigation of the groundwater collected in the interceptor trenches. The record shows that the AMI investigation of groundwater on the site consisted of four samples collected after soil remediation from wells placed in areas likely to produce groundwater, not areas most likely to be contaminated.

The AMI investigation did not adequately define the extent and degree of groundwater pollution on the site. It is therefore reasonable to conclude that the respondent verified the site without ensuring that the groundwater was adequately investigated.

c. At the time the respondent verified, light non-aqueous phase liquid had not been removed to the maximum extent practicable as required by §22a-133k-2(g) of the RSRs.

The respondent is alleged to have improperly verified that the site was remediated in accordance with the RSRs. Specifically, the remediation activities did not include the removal of

light, non-aqueous phase liquid (LNAPL) from the surface, subsurface soils, and in the groundwater collected in the interceptor trenches, and LNAPL, or free product, must be removed from soil and groundwater to the maximum extent practicable using techniques that are appropriate to the hydrogeologic conditions at the site. Regs., Conn. State Agencies §§22a-133k-2(g) and 22a-449(d)-106(f).

Evidence of the existence of free product at the site is based, in part, on the site conditions observed by DEP staff during the February and June 2000 inspections and is undisputed. However, there is insufficient evidence to conclude that the specific conditions observed by staff were present at the time that the AMI remediation activities ended. As previously discussed, it was not unreasonable for the respondent to have verified the site without returning to ensure that additional releases had not occurred.

There is also no dispute that oily groundwater has been collected in the interceptor trenches since 1991. There is no basis for a determination that the oil in the groundwater is exclusively the result of the releases addressed by the 1990 consent order. The history of site operations and the respondent's own conclusions regarding the presence of contamination throughout the site would suggest that the presence of free product in the collected groundwater may be the result of releases that have occurred since the installation of the trenches.

The respondent argues that the trenches collect all groundwater and therefore LNAPL is contained in the trenches, which satisfies the requirements of §§22a-449 (d)-106(f) and 22a-133k-2 (g). There is no basis for a conclusion that the trenches collect and contain all LNAPL that may have been present on the site. There is sufficient evidence to conclude that the respondent did not ensure that LNAPL from potential post 1994 releases not covered by the two consent orders was removed from the site in accordance with the RSRs.

d. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the direct exposure criteria as required by §22a-133k-2(a) of the RSRs.

This charge is based primarily on allegations that the respondent's use of the Industrial/Commercial Direct Exposure Criteria (I/C DEC) for PCBs was inappropriate for this site, that he mischaracterized the site as an "other restricted access location" for purposes of applying the I/C DEC for PCBs, and that he improperly considered the entire thirty-acre site a

"release area" for purposes of calculating the ninety-five percent upper confidence level of the soil sampling results for PCBs.

The established remediation standards for soil include the DEC and the PMC. §22a-133k-2(a). The DEC addresses the risk of soil contamination to human health through contact. §22a-133k-2(b)(4)(B). The PMC determines the mobility of contaminants in soil that may enter the groundwater. §22a-133k-2(c). The Residential DEC (RDEC) is applicable in all circumstances except where access to the establishment is limited to workers or visitors to the site and a properly prepared ELUR is recorded on the land records. In such cases, the I/C DEC may be used to demonstrate compliance with the RSRs. RCSA §22a-133k-2(b)(2)(A). In order to apply the I/C DEC to accessible PCB contaminated soils, the site must also qualify as "other restricted access location", i.e., the site must be located at least 0.1 kilometers from a residential/commercial area, and limited by man-made barriers. 40 CFR §761.123 (2003); §22a-133k-2(b)(2)(B). Residential/commercial areas are areas where people live or work in other than manufacturing or farming industries. 40 CFR §761.123 (2003).

The respondent considered the I/C DEC the appropriate soil remediation standard for all contaminants known to be present on the site, including PCBs. Access to the site is restricted by the perimeter fence and guarded entrance. The certifying party and real property owner, AMI, agreed to restrict the use of the site to industrial activities by filing an ELUR, which was approved by the DEP. The issue to be decided is whether the respondent properly determined the site was at least 0.1 kilometers from a residential/commercial area.

The evidence shows that there is at least one known residential/commercial area, the Stop & Shop premises, located within 0.1 kilometers of the AMI site. There is also evidence that construction of a movie theater was planned on the site of the former industrial Heublein facility, which is also located within 0.1 kilometers of the AMI site.

The respondent relied initially on measurements taken by Weston field staff to reach his conclusion that the AMI site met the distance requirements for an "other restricted access location". The respondent is permitted, in part, to rely on the advice of qualified and experienced individuals provided that reliance is "consistent with the common and accepted practice of a licensed environmental professional." Regs., Conn. State Agencies Section §22a-133v-6(c)(2).

The soil remediation standards indicate that PCB contamination is subject to more stringent controls than other contaminants. It is only PCB contamination that requires the additional access restriction, beyond man-made barriers, to insure against direct exposure to concentrations of PCBs at levels above the RDEC. Therefore, even though the respondent may have relied on the Weston field staff measurements, the responsibility for determining the appropriate DEC to be applied to the PCB contaminated soils rests with him.

Soils may be shown to be in compliance with the I/C DEC when the 95% UCL of soil analyses from a *release area* is equal to or less than the I/C DEC provided concentrations of contaminants in any one sample may not exceed two times the applicable direct exposure criterion. §22a-133k-2(e)(1). A release area is defined as "the land area at and beneath which polluted soil is located as a result of a release." §22a-133k-1(51).

The respondent considered the entire site a release area for PCBs in order to apply the 95% UCL. The record shows that AMI investigated soils based on sampling locations that were concentrated in areas *most likely to be contaminated* based on site history and more broadly dispersed throughout the remainder of the site.

e. At the time the respondent verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs.

The RSRs require a plan of groundwater monitoring after remediation of a release or groundwater plume in a GB area to determine "(A) the effectiveness of soil remediation in preventing further pollution of groundwater… (B) the effectiveness of any remediation taken to eliminate or minimize identified health or safety risks associated with such a release; (C) whether applicable groundwater protection criteria, surface-water protection criteria, and volatilization criteria have been met; and (D) whether the groundwater plume interferes with any existing use of the groundwater." §22a-133k-3(g) (2). The regulations specifically provide that groundwater monitoring must be conducted for any remediation that was conducted to achieve compliance with §§22a-133k -1 through 22a-133k-3, which would include soil remediation. §22a-133k-3(g).

There is no dispute that the respondent did not require post-remediation groundwater monitoring at the site in accordance with §22a-133k-3(g)(2). In his brief, the respondent argues that the installation of the interceptor trenches to contain the migration of contaminated

groundwater and the groundwater monitoring by subsequent biannual inspections of the area along the eastern boundary of the site was approved by the Commissioner and satisfies the requirements of §22a-133k-3(g)(3)(B). This section provides that groundwater monitoring in a GB area may be discontinued two years after groundwater or soil remediation if the SWPC and volatilization criteria have been met. The record shows that the respondent included in his October 1999 report a request for a waiver of the §22a-133k-3(g) requirements due to the unique subsurface conditions at the site, but verified the site before his request was granted.

Section 22a-133k-3 (g) clearly provides for post-remediation groundwater monitoring to determine the effectiveness of the remediation of a release area or a groundwater plume. The respondent's argument that the interceptor trenches and site inspections satisfy these requirements ignores the fact that soil remediation activities have occurred at the site since the installation of the interceptor trenches. The record shows that over 28,000 tons of TPH and PCB contaminated soils were removed from the site under the respondent's supervision. The record also shows that, although PCBs have been investigated and remediated at the site, the source of the PCB contamination has not been determined. Based on the respondent's conclusions that groundwater flows in the direction of the interceptor trenches, monitoring the levels of PCB contamination in the oily water collected in the trenches is one way to determine if the remediation was effective.

At a minimum, the respondent had access to the groundwater that was collected in the interceptor trenches to determine the effectiveness of the remediation conducted under his oversight. There is evidence that attempts to access groundwater were successful during the December 1998 site assessment. It is evident that groundwater monitoring may have been difficult; however, it was possible. The respondent failed to conduct post remediation groundwater monitoring as required by the RSRs.

f. At the time the respondent verified, pollutants were present at the site which posed an unacceptable risk to human health and, therefore, the respondent did not hold paramount the health, safety and welfare of the public.

It is alleged that, having failed to properly investigate and remediate the site, the respondent's verification demonstrates his disregard for the welfare of the public. This allegation is premised on the fact that the respondent verified the site while the interceptor

trenches were collecting oily water containing high concentrations of PCBs, and while PCBs and TPH were present in the soils at levels that exceeded the applicable DEC.

There is no evidence that specifically points to the respondent's lack of concern for the public welfare. Therefore, I must rely on circumstantial evidence to determine whether the respondent carried out his duties while considering the health, safety and welfare of the public. Evidence of the respondent's conduct may provide the basis for a reasonable inference concerning his regard for the public, however, my conclusions must not be the result of speculation and conjecture. *Service Road Corporation v. Quinn*, 241 Conn. 630, 647 (1997). It is as reasonable to infer from the evidence that the respondent believed his determinations were correct and that he made the welfare of the public his primary concern, as it is to infer that he did not consider the health and safety of the public. I therefore cannot conclude that at the time the respondent verified the site, he did not hold paramount the health, safety and welfare of the public.

g. At the time the respondent used his seal, his verification did not comply with the applicable provisions of the RSRs.

The LEP regulations provide that the respondent may use his seal to attest or affirm that in his professional judgment, his verification and the professional services he rendered in connection with the verification comply with the provisions of the Transfer Act, the RSRs and the LEP regulations. §22a-133v-5(b)(2). The regulations prescribe the use of a seal in the event the respondent does not have a valid license or has a financial interest in the property other than professional fees. §22a-133v-5(b)(1) and (5). The respondent may not affix his seal to any document that is not a verification. §§22a-133v-5(b) (1). The respondent is expressly prohibited from affixing, or allowing his "seal to be affixed, to any verification or any other document in any manner other than is provided for" in the LEP regulations regarding the design and use of the seal. §22a-133v-5(b)(6).

There is no evidence that the respondent had not been issued a valid license at the time he used his seal, or that he has any financial interest in the AMI site beyond the fees for his professional services. There is no evidence that he used his seal on any document other than his verification. There is also no evidence to demonstrate that the respondent did not believe, based on his professional judgment, at the time he used his seal that the verification complied with the

applicable provisions of the RSRs. There is no evidence that the respondent used his seal in any manner not provided for by the applicable regulations.

E
Violations of Standards of Professional Conduct

1
Mark Eyelet

As a licensee, the respondent has an affirmative obligation to understand and comply with the laws and regulations that govern the privilege of obtaining and maintaining his license. Prior to the effective date of the LEP regulations, the respondent was required to perform his duties in accordance with the standard of care applicable to environmental professionals engaged in similar work. §22a-133v(c). These requirements were in place at the time the respondent was identified as an interim environmental professional and when he rendered his verification of the Mark Eyelet site. These are the appropriate standards by which to evaluate the respondent's professional conduct at the time of his verification of the Mark Eyelet site.

To qualify as an interim environmental professional, the respondent had to demonstrate that he had sufficient training and experience in investigating and remediating releases of hazardous waste. §22a-133v(h). It is not unreasonable to conclude that, having qualified as an interim environmental professional, the respondent would be expected to be aware of the industry standards for hazardous waste site investigations.

Even though the Mark Eyelet site assessment was one of the first to be verified under the LEP program and in accordance with the RSRs, it is evident that it was customary practice for environmental professionals to conduct a thorough, multi-phased site investigation. There is substantial evidence on the record that the Phase I and II investigations that provided the basis for the respondent's verification were not totally sufficient and conclusive. The evidence in the record is not sufficient to establish, by a preponderance of the evidence, that the respondent committed professional misconduct with respect to his verification of the Mark Eyelet establishment in violation of §22a-133(c) of the General Statutes.

2
J.C. Boardman/AMI

The general charges in the Notice allege that the respondent committed misconduct in the performance of his duties at the J. C. Boardman and AMI site by having violated several

provisions of the LEP Rules of Professional Conduct. Regs., Conn. State Agencies §22a-133v-6. Specifically, the respondent is alleged to have failed to apply the knowledge and skill of an environmental professional and in so doing failed to act with reasonable care and diligence. The respondent is also charged with having failed to exercise professional judgment; failed to follow the requirements and procedures set forth in the applicable statutes and regulations; and failed to make a good faith effort to identify and obtain the relevant data and other information necessary to discharge his obligations under the applicable statutes and regulations. §§22a-133v-6(c)(1), 22a-133v-6(d)(2)(A) through (C).

The LEP Rules of Professional Conduct establish the standards reasonable care and diligence. The State Appellate Court has addressed the meaning of diligence and reasonableness. "Diligence, [is] defined by Webster's Third New International Dictionary as "persevering application: devoted and painstaking application to accomplish an undertaking," and as "the attention and care required of a person." "Reasonableness . . . is an objective standard, involving an analysis of what a person with ordinary prudence would do given the circumstances…. Reasonableness involves a determination of how "a person of ordinary prudence in such a situation [would] have behaved, not how the [respondent] behaved." *Michelle Phillipe v. Francis J. Thomas*, 3 Conn. App. 471, 474-475, (1985). [R]easonable efforts means doing everything reasonable, not everything possible." *In re Eden F.*, 48 Conn. App. 290, 312 (1998).

The record amply demonstrates that the respondent did not at all times perform his duties diligently and reasonably. For example, he relied on or supervised investigations that were not conducted in accordance with the standards commonly employed by environmental professionals. All areas of concern were not identified and assessed at either the Boardman site or the AMI site. He failed to adequately assess groundwater conditions, at the AMI site, but determined by field investigation that groundwater monitoring was impracticable and requested a waiver of groundwater monitoring from the Commissioner. But the waiver request had not been acted upon by the date of the verification . He improperly excluded from his investigation areas on the AMI site that had previously been remediated years before but may have been subject to post 1994 releases.

The respondent has argued throughout the proceedings and in his brief that many of his conclusions and decisions were based on his professional judgment, which is a component of the

prevailing standards and guidelines for site investigations. Professional judgment is essential to a proper investigation but it does not replace professional responsibility, including the responsibility to conduct a thorough and conclusive investigation and to apply the appropriate remediation standards to specific conditions. Professional judgment also cannot be justified through the lens of hindsight.

The investigation and remediation standards provide the framework for the professional opinion of an LEP. Although that opinion is expressed in light of his professional judgment, it follows from a proper investigation of a site and a thorough understanding of the circumstances that exist at the time. The record demonstrates that the respondent's decisions and conclusions were not always thoroughly documented and for the AMI site did not sufficiently demonstrate compliance with the RSRs for potential post 1994 releases not covered by the two consent orders.

The respondent verified that the Boardman and AMI establishments were investigated in accordance with the prevailing standards and guidelines. In the case of AMI, he also verified that the site had been remediated in accordance with the RSRs. The record shows otherwise. For example, the respondent did not ensure that the investigation of either complied with prevailing investigation practices.

Also, as previously discussed, the record demonstrates that the respondent did not at all times exercise professional judgment or perform his duties at the Boardman or AMI eablishments with reasonable care and diligence. The respondent did not document compliance with the requirements of the Transfer Act or the applicable provisions of the RSRs, or conform his conduct to the standards set forth in the relevant provisions of the LEP regulations. §22a-133v-6(d)(2)(B).

The respondent did not properly assess the environmental conditions at either site. For example, he did not identify and investigate all areas of concern. He did not conduct sufficient soil and groundwater analyses including potential post 1994 releases at the AMI site not covered by the two consent orders.

Even though the respondent did not make reasonable efforts to obtain the information necessary to discharge his duties under the Transfer Act and the RSRs, I cannot make a similar conclusion regarding his good faith. Good faith ordinarily describes a state of mind denoting

honesty of purpose, a lack of intent to defraud, and faithful to one's duty or obligation. "The determination of good faith involves an inquiry into the [respondent's] motive and purpose as well as actual intent." *Phillipe v. Thomas,* supra, 3 Conn. App. 476. There is no evidence that the respondent's conduct stemmed from any intent to mislead or from a dishonest purpose.

To the extent that a determination that the respondent's efforts were unreasonable may be used to demonstrate an improper motive, the record does not support such a conclusion. However, for many of the reasons previously discussed, the record does support a conclusion that the respondent's efforts fell short of those required of an LEP responsible for conducting a site investigation in accordance with the provisions of the Transfer Act.

The claimant has not demonstrated, by a preponderance of the evidence, that the respondent committed professional misconduct with respect to his verification of the Boardman and AMI establishments in violation of the LEP Rules of Professional Conduct. Regs., Conn. State Agencies §22a-133v-6. With respect to the subject sites, rejection of the verification or requiring further documentation could have resolved these issues.

The State Board of Examiners of Environmental Professionals by:

/s/ John Adams_____
John Adams

/s/ Russell Slayback_____
Russell Slayback

/s/ Dennis Unites_____
Dennis Unites

/s/ Kelly Meloy_____
Kelly Meloy

/s/ David Askew_____
David Askew

APPENDIX A

P A R T Y L I S T

Proposed Final Decision
In the matter of Russell Bartley, Case #02-101/LEP License #104

PARTY	REPRESENTED BY
Respondent	Russell Bartley 37 Bald Hill Road Tolland, CT 06084 Andrew W. Krevolin, Esq. Krevolin, Roth & Connors, LLC 433 South Main Street, Suite 303 West Hartford, CT 06110
State Board of Examiners of Licensed Environmental Professionals 79 Elm Street Hartford, CT 06106	Patricia Horgan, AAG 55 Elm Street Hartford, CT 06106

Attachment A

OFFICE OF ADJUDICATIONS

IN THE MATTER OF	***:***	***CASE #02-101***
		LEP LICENSE #104
RUSSELL BARTLEY	***:***	***AUGUST 26, 2005***

~~***PROPOSED***~~ *FINAL DECISION*

I
SUMMARY

The State Board of Examiners of Environmental Professionals (Board) issues licenses and governs the licensing program for environmental professionals.[1] General Statutes §22a-133v(b). The respondent Russell Bartley, a licensed environmental professional (LEP), timely filed a request for hearing following his receipt of a *Notice of the Proposed Revocation or Suspension of a License* from the Board. This Notice was the result of a complaint filed with the Board by the Department of Environmental Protection (DEP) and an investigation into the respondent's professional conduct in connection with his verifications of conditions at three industrial sites: Mark Eyelet and Stamping Corporation in Wolcott; J.C. Boardman and Company in Wallingford, and Aerospace Metals, Inc. in Hartford. The parties to this proceeding are the respondent and the investigative arm of the Board (referred to by the parties and herein as "claimant'').

Numerous issues were raised in this matter and evidence presented by both parties was extensive. ~~I have considered all of this evidence, however, the findings of fact set forth in this proposed decision are only those essential to my decision and necessary to support my conclusions and recommendations~~In a Proposed Final Decision dated May 3, 2005, Hearing Officer Jean Dellamarggio found ~~. For the reasons set out herein, I find~~ that the claimant has~~d~~ sustained its burden of proving by a preponderance of the evidence that the respondent has committed professional misconduct. ~~Based on this evidence, I~~The Hearing Officer

[1] An "environmental professional" is someone who is qualified, by reason of his knowledge and training, to engage in activities "associated with the investigation and remediation of pollution and sources of pollution"… General Statutes §22a-133v(a)(1).

recommended that the respondent's license be suspended for a period that is sufficient to preserve the integrity and standards of the LEP profession and that reflects the serious nature of his misconduct. In addition, the Hearing Officer suggested that the respondent should be reminded of his obligations as an LEP and the responsibility of the DEP to assure that LEPs perform their duties in compliance with the requirements of the Transfer Act.

The parties filed exceptions to the Proposed Final Decision and oral argument was requested. Oral argument was held on August 25, 2005.

II
THE HEARING PROCESS AND STANDARD OF REVIEW

The Board may suspend or revoke any LEP license for cause, after notification and hearing pursuant to General Statutes§22a-133v(g). A license may be suspended or revoked if the licensee has engaged in professional misconduct by violating any provision of that section, other statutes and applicable regulations. The Board, as claimant, has the burden of proving that cause exists to suspend, revoke or otherwise place conditions on the respondent's license.

The Board or its designee[2] is authorized to conduct hearings in accordance with §22a-133v-7 of the Regulations of Connecticut State Agencies and the Uniform Administrative Procedures Act (UAPA). General Statutes §§4-166 through 4-189. The hearing officer makes factual findings to determine whether there is sufficient evidence to show cause for discipline and to make a recommendation to the Board. In doing so, the hearing officer determines the credibility of witnesses and the weight to be given specific testimony and draws reasonable inferences from the evidence. The hearing officer is free to contrast conflicting versions of events and determine which are more credible and is not required to believe any witness, even an expert, or required to use materials presented during the hearing in any particular way. *Huck v. Inland Wetlands and Watercourses Agency*, 203 Conn. 525, 540-42 (1987).

As the final decision-maker, the Board reviews the proposed final decision and either accepts it and issues a final decision that affirms the facts, conclusions and recommendations as proposed; modifies it to reflect additional or alternate findings and conclusions; or remands the decision to the hearing officer for further review or to take additional evidence. Upon its acceptance of a proposed final decision, the Board is authorized to permanently or temporarily

[2] The Office of Adjudications conducts administrative hearings for the Board. §22a-133v(g).

revoke or suspend a respondent's license, and/or to impose conditions on the renewal of a respondent's license. General Statutes §22a-133v(g); Regs., Conn. State Agencies §22a-133v-7(gg)(D).

Based on our review of the record, the exceptions taken to the Proposed Final Decision and the arguments presented on the exceptions, we modify the following numbered paragraphs in the Findings of Fact in the Proposed Final Decision: #3, 10, 17, 21, 30, 31, 36, 42, 48, 50, 51, 53, 61, 69, 70, 71, 73, 77, 78, and the second #78, and footnotes 6, 14 and 35, and we further modify the Conclusions of Law and the recommendation of the Hearing Officer~~.~~. Because the modifications to the Proposed Final Decision both in its findings of fact and conclusions of law are substantial, we attach hereto a red line/strike out version of the Proposed Final Decision showing all the modifications made to the Proposed Final Decision. This red line/strike out version of the Proposed Final Decision will be filed with this Final Decision in the Office of Adjudications and provided to the parties in this proceeding.

III
DECISION

A
Findings Of Fact

1
The Transfer Act and Licensed Environmental Professionals

1. Section 22a-134 of the General Statutes, known as the Transfer Act, provides that upon the transfer to a new owner of certain real property on which hazardous waste has been treated, stored or otherwise generated, a written certification of the condition of that property must be filed with the Commissioner no later than ten days after the change in ownership.[3] A person associated with the transfer must sign and submit a Form III, which is a written certification to the Commissioner that conditions at the establishment are unknown or which describes any known or potential releases of hazardous substances that have occurred on the site. §22a-134(12). This certifying party agrees to investigate the site and remediate pollution in accordance with Remediation Standard Regulations (RSRs) and pursuant to a schedule approved by the DEP. §§22a-134(6), 22a-134a. (Ex. HO-1; test. R. Frigon, 7/15/03, pp. 166-167.)

2. An environmental condition assessment form (ECAF) must accompany Form III. §22a-134a(d). The ECAF provides details of particular hazards or contaminants and the known areas of concern[4] on the site. The ECAF does not necessarily provide an exhaustive account of the releases on the site. It is intended to give a basic understanding of the nature of pollution that may be present, subsurface conditions and any other pertinent facts known about the site. Based on the information provided in the ECAF, the DEP determines whether it will retain oversight of the site investigation and remediation activities or, as provided in the Transfer Act, delegate those duties to an LEP. (Ex. HO-2; test. R. Frigon, 7/15/03, pp. 170, 174-175, 178, 7/16/03, pp. 253-256.)

3. The legislation creating the LEP licensing program and the Transfer Act provisions that authorize the Commissioner to delegate site remediation approval to an LEP were enacted in 1995. The LEP Regulations became effective on June 2, 1997. Under the Transfer Act, an LEP is responsible for ~~ensuring and~~ verifying that a site has been ~~properly i~~investigated in accordance with prevailing standards and guidelines and remediated in accordance with the RSRs. §§22a-134(19) and 22a-134a(e). The effective date of the RSRs is January 30, 1996. (Test. R. Frigon, 7/16/03, p. 259.)

2

Site Investigation Standards and Verification Procedures

4. The *Transfer Act Site Assessment Guidance Document* (TASA) was specifically developed by the DEP to provide a framework for investigating sites that are subject to the Transfer Act. Its use is voluntary and intended to be applied in combination with the experience and judgment of an LEP, however, the DEP expects an LEP to conduct a site assessment that is consistent with the TASA guidance. The DEP also considers the investigative standards published by the American Society for Testing and Materials (ASTM) and professional skills, experience and judgment part of the "prevailing standards and guidelines" for site investigations. (Ex. DEP-49; test. R. Frigon, 7/16/03, pp. 212-213; test. E. Patton, 9/4/03, pp. 1420-1422, 9/24/03, pp. 1997 - 2008.)

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[3] Real property or business operations that generate more than one hundred kilograms of hazardous waste in any one month are "establishments" and subject to the provisions of the Transfer Act. §22a-134 (3).

[4] Locations on the site where contaminants may have been used, handled or stored or where activities are conducted that have the potential for environmental impact. (Test. R. Frigon, 7/15/03, p. 171.)

5. Expert opinion varies on the level of guidance provided by TASA. TASA is considered by some environmental professionals to provide a site assessment process at an elementary level, not detailed guidance. TASA does not provide the necessary detail for such investigation decisions as the sampling methods to be used, the areas on site to be sampled or the specific constituents to be analyzed. These decisions are left to the LEP. (Test. 9/23/03, R. Bartley, pp. 1847-1854, E. Patton, pp. 2003-2006; test. S. Holtman, 10/23/03, pp. 2678-2679, 2731-2733; test. J. Peronto, 10/24/03, pp. 2846-2848.)

6. A three-phase approach to site investigations is common in the industry. Phase I involves a visual inspection of the property as well as an historical investigation and records search to identify the potential areas of concern on the site. Phase II is an investigation into the areas identified by Phase I through soil and groundwater testing and an attempt to determine if there was a release at any area of concern. Phase III involves further testing to define the extent of contamination that may have been identified as a result of Phase II. The reports and appendices submitted with the respondent's three verifications are organized in a way that reflects this standard approach. (Ex. DEP-26; exs. RESP-14, 348; test. R. Robinson, 8/20/03, pp. 989-990; test. T. Walles, 9/22/03, p. 1682, 10/20/03, pp. 2254 - 2256; test. R. Bartley, 10/22/03, pp. 2593-2595.)

7. From the time when the first of the respondent's verifications that are the subject of this proceeding was received by the DEP in January 1997 through the first quarter of 2000, the DEP audited and rejected a significant percentage of verifications.[5] The DEP identified common problem areas such as insufficient Phase I assessments to identify potential areas of concern and insufficient Phase II investigation of levels of contaminants in excess of applicable criteria. During the relevant time period, there was no consensus among LEPs and DEP staff regarding the requirement for groundwater compliance monitoring.[6] There was also apparent confusion over the requirements for post-remediation groundwater compliance monitoring, which the RSRs do not require if remediation is determined to be unnecessary.[7] (Ex. RESP-166; test. R.

[5] From the start of the LEP program through the first quarter of 2000, forty verifications had been filed with the DEP. Thirty-two were property transfer verifications and of those, twenty-one were audited and fifteen were rejected. (Exs. RESP-2A, 166; test. R. Robinson, 8/18/03, pp. 933-934, 8/26/03, pp.1167-1170.)

[6] The RSRs provide for four consecutive quarters of groundwater monitoring to determine compliance with the ground-water protection criteria for groundwater. §22a-133k-3(f).

[7] Section 22a-133k-3(g).

Robinson, 8/26/03, pp. 1182 - 1183; test. R. Bartley, 9/23/03, pp. 1957-1959; test. S. Holtman, 10/23/03, pp. 2692, 2744-2746.)

3
The DEP

8. The Commissioner is authorized to issue licenses to any environmental professional who is deemed qualified by the Board. Issuance of the license is evidence that the licensee is entitled to the rights and privileges of an LEP so long as the license has not been revoked or has not expired. §22a-133v(f).

9. LEP verifications are filed with the Commissioner and screened by DEP staff for accuracy, investigation deficiencies and compliance with the RSRs. The Commissioner can audit any action an LEP is authorized to perform. §22a-133v(g). As part of the audit process, the LEP and DEP staff will meet or confer by phone to discuss the issues identified in the initial screening of a verification. During the conference, the LEP may provide additional supporting information and explain his or her thought process. To confirm a conclusion, an LEP may return to a site to collect additional samples. If any issues remain unresolved after the audit is complete, the verification is rejected. The LEP must oversee additional investigation and/or remediation as necessary to resolve the outstanding issues and submit another verification. 22a-133v(g). (Test. R. Robinson, 8/18/03, pp. 924-932, 11/24/03, pp. 3246-3249.)

4
The Board

10. The State Board of Examiners of Environmental Professionals recommends to the Commissioner ~~issues~~issuance of licenses to LEPs and governs the licensing program. The ~~twelve~~eleven-member Board is chaired by the Commissioner or the Commissioner's designee and consists of six LEPs and f~~ive~~our other members. ~~business professionals, including representatives of the banking and insurance industries.~~ §22a-133v(b).

11. The Board is responsible for administering the licensing program, including an examination of a prospective licensee's knowledge applicable to the investigation and remediation of polluted sites in accordance with the RSRs. The Board is authorized to investigate the conduct of any LEP and to take appropriate disciplinary action when necessary. §22a-133v(e), (g) and (h).

5
The Respondent

12. The respondent has more than twenty-five years' experience in site investigations, including RCRA[8] sites. His work history includes positions with the US EPA and such environmental consulting firms as TRC Environmental and Roy F. Weston, Incorporated. Prior to the administration of the first LEP examination, the respondent was one of a number of qualified environmental professionals who were identified in mid-1996 and authorized to perform the duties of an LEP on an interim basis. The respondent was issued a license in 1997. (Exs. DEP-60-62; ex. RESP-432; test. R. Bartley, 9/23/03, pp. 1817-1818, 1822-1845.)

6
Transfer Act Establishments[9]

(a)
Mark Eyelet and Stamping Corporation

13. The Mark Eyelet site encompasses 0.9 acres in an industrial-zoned area of Wolcott. At the time of the verification, the premises were within the preliminary boundaries of a superfund site designated under CERCLA[10] as the Nutmeg Valley Superfund Site[11]. Groundwater conditions at the site were classified as GA/GB.[12] A former residence used for office space, a garage, a manufacturing building (main building) and a wooden storage shed cover a major portion of the site. The remainder of the premises consists primarily of asphalt-covered parking lots with some grassy areas. A small stream is located in the northeast corner of the site. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1860-1861, 1892.)

14. The company manufactures electrical connecters. Operations include metal stamping, assembly, cleaning, heat-treating, chemical cleaning and tumbling. Water soluble and

[8] Resource Conservation and Recovery Act, 42 U.S.C. §§6901 - 6992.
[9] See fn. 3, supra.
[10] Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§9601 - 9675.
[11] The soil contamination within this 155-acre Superfund site was characterized as heavy metals, cyanide and volatile organic compounds (VOCs). Groundwater contamination was characterized as VOCs and cyanide. The US EPA suggested that the Mark Eyelet site might be a source of contamination, specifically organic compounds. (Ex. RESP-14.)
[12] The State of Connecticut Water Quality Standards describe a GA groundwater classification as water that is suitable for human consumption without treatment. A GB classification connotes groundwater that the DEP assumes is degraded due to pollution. A GA/GB classification indicates an area with contaminated groundwater with a classification GA goal because the water is used or could be used as a private supply source. (Ex. RESP-14; test. R. Bartley, 9/23/03, p. 1912.)

oil-based lubricants are used in the metal stamping process. Freon-TMS was originally used as a cleaner for metal drawing operations until 1993. An electroplating operation was conducted in the basement of the main building until 1975. Other operations have not changed since the facility opened in the 1960s. (Ex. RESP-14; test. R. Bartley, 9/23/03, p. 1868.)

(b)
J. C. Boardman and Company

15. The site of the former J.C. Boardman company is 2.17 acres on South Turnpike Road in Wallingford. The company was established in 1962 for the manufacture of pewter, sterling and brass metal gift hollowware. Initially, operations included casting, spinning, grinding, pressing, soldering, buffing, polishing and packaging. Waste generated by these operations consisted primarily of scrap metals and waste buffing compounds. An electroplating process and wastewater treatment system were added in 1986; hazardous waste associated with that process was transported offsite. No other processes were conducted on the site until operations ceased in 1991. The facility remained idle until 1997 when it was purchased and renovated to accommodate Oakdale Self-Storage, LLC. (Ex. RESP-348; test. R. Bartley, 9/23/03, pp. 1915-1916.)

16. The site consists of a manufacturing building, and paved parking and grassy areas. Groundwater on site is classified as GA. The facility was connected to the Wallingford municipal sanitary sewer system in 1973 when connections to the onsite septic system were closed. Process wastewater was discharged to the municipal sewer system under a NPDES[13] permit. The Quinnipiac River is located approximately 500 feet east of the site. (Ex. RESP-348.)

(c)
Aerospace Metals, Inc.

17. Aerospace Metals, Inc. (AMI) is located at 500 Flatbush Avenue in Hartford, situated on approximately thirty acres in an industrialized area. AMI is a metal recycling and processing facility. For more than thirty-five years, operations at the site have included handling, separating, cutting, crushing, shredding and recycling various scrap metals including iron, steel and high temperature alloys. A variety of hazardous substances ~~or~~and petroleum products have

[13] Permits for discharges to surface waters are known as National Pollution Discharge Elimination System (NPDES) permits. Regs., Conn. State Agencies §22a-430-3(a).

been ~~used~~present at the site, including oils containing polychlorinated biphenyls (PCB). (Exs. RESP-211, 211A; ex. HO-2.)

18. The property is bounded to the east by an Amtrak railroad corridor and the Flatbush Avenue exit ramp for Interstate 84. An elevated section of Interstate 84 crosses over the site in an east-west direction and divides the property into north and south parcels (North or South Yard), which are connected by a right of way that passes under the highway. The land beneath and adjacent to the interstate is owned by the Connecticut Department of Transportation. (Ex. HO-2; exs. DEP-27B, 27C; exs. RESP-211,211A, 446.)

19. Six buildings, several storage areas and large process equipment (e.g., overhead crane, crusher) are situated on the property along with grassy, wooded or vegetated areas and paved driveways and parking areas. Several railroad sidings are present on the site and a small stormwater detention basin is located along the eastern portion of the property. The site is surrounded by a perimeter fence and on the western portion of the property there is a double fence between the property and the adjacent railroad corridor. Access to the site is restricted to

the guarded main entrance located at the southern end of the property along Flatbush Avenue. (Ex. HO-2; exs. DEP-27B, 27C; exs. RESP - 211, 211A, 446; test. T. Walles, 9/5/03, pp. 1616-1617.)

20. The groundwater in the vicinity of the site is classified as GB; there are no known uses of groundwater on the site or on nearby properties. The site is abutted by commercial and industrial facilities including the former Hanson-Whitney Company, Rome Recycling, and, across the railroad tracks, the site of the former Heublein, Inc. distillery, now a movie theater (for which a building permit had been issued on January 28, 1999). A Stop & Shop grocery store and other commercial businesses are located to the west of the site. Patent Scaffolding Company is adjacent to the southwestern portion of the site; a former housing project no longer in use is located across Flatbush Avenue to the south of the site. (Exs. DEP-57, 58; ex. RESP-211.)

21. The facility holds a NPDES permit for the discharge of wastewater generated from metal chip washing operations to a sanitary sewer system and a General Permit for the discharge of storm water associated with industrial activity. The permits requires the site owner/operator to monitor stormwater, implement best management practices, and to ensure against soils and stormwater contamination. Stormwater outfalls must be sampled with results sent to the DEP. The DEP Bureau of Water Management Permitting and Enforcement Division inspects the wastewater treatment systemsite to ensure that the dischargefacility complies with the permits' terms. (Test. W. Oros, 7/15/03, pp. 18-19, 146-148; test. R. Frigon, 8/6/03, pp. 512-515.)

7

The DEP Complaint and Board Action

22. In a February 14, 2002 letter, the DEP referred a complaint to the Board that alleged potential violations of the rules of professional conduct with respect to the respondent's verification of the AMI site.[14] The DEP requested that the Board investigate and take disciplinary action as appropriate. At a regular February 14, 2002 meeting, the Board authorized an investigation into the complaint. LEP Jeffery J. Loureiro volunteered and was designated to conduct the investigation. §22a-133v(g); Regs., Conn. State Agencies §22a-133v-(b)(1). The

[14] The complaint included representations that an active remediation system was in operation as required by a consent order still in effect. It was later determined that this consent order had been certified as in compliance on October 24, 1994. The respondent has repeatedly pointed out that this fact was not reported to the Board, however, he has not demonstrated any material prejudice as a result. (Exs. DEP-2B, 15, 16; test. E. Patton, 9/24/03, pp. 2022-2023.)

investigation lead to additional allegations now concerning the respondent's professional conduct regarding the Mark Eyelet and J.C. Boardman sites. In a March 28, 2002 letter, the respondent was advised of the DEP complaint and the results of the investigation. A compliance conference was scheduled and held on April 5, 2002.[15] (Exs. DEP-2, 2b; exs. RESP-165, 513; test. R. Robinson, 8/20/03, pp. 1036-1038, 1040, 1053-55.)

23. At the next regular Board meeting on April 11, 2002, Mr. Loureiro reported that the respondent had not shown compliance at the conference and recommended that the Board issue a *Notice of the Proposed Revocation or Suspension of a License*. The Board unanimously approved the recommendation and issued the Notice to the respondent on November 12, 2002. An amendment to the Notice as to AMI was issued on February 20, 2003.[16] (Exs. DEP-2a, 4 - 6; test. R. Robinson, 8/20/03, p. 1056.)

24. The respondent filed his response to the Notice and request for a hearing on December 2, 2003. The respondent generally denied the allegations that he violated the rules of professional conduct and specified his grounds for contesting the specific charges relating to the three sites. (Ex. DEP-5.)

8
Site Specific Charges Against the Respondent

(a)
Mark Eyelet
(i)
Notice

25. The Notice charges the respondent with the following professional misconduct.

a. At the time the respondent verified, all potential release areas located at the site had not been investigated in accordance with prevailing standards and guidelines;

[15] The respondent was not afforded an opportunity to discuss his conduct at the Mark Eyelet or J.C. Boardman sites during this meeting. However, in a February 9, 2004 ruling, I concluded that this procedural defect did not cause the respondent to suffer substantial prejudice or violate his due process rights.

[16] The amended Notice adds allegations that the respondent misused his LEP seal and failed to hold paramount the health, safety and welfare of the public. Regs., Conn. State Agencies §§22a-133v-5(b)(2) and 22a-133v(6(d)(1).

b. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the Pollutant Mobility Criteria (PMC)[17] as required by §22a-133k-2(a) of the RSRs; and

c. At the time the respondent verified, post remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs.
(Ex. DEP-4.)

(ii)
Background

26. In 1995, the site owner, AMP, Incorporated, retained Roy F. Weston, Inc. to assess the condition of the site in connection with the sale of the property. In its 1996 *Environmental Assessment Report* (ME Report), Weston incorporated site assessment data from previous site investigations it had conducted as well as those by other environmental consultants. These investigations include a site-wide screening conducted in 1985 and a groundwater baseline investigation conducted in 1994. AMP filed a Form III and ECAF with the DEP on September 30, 1996. (Ex. RESP-14.)

27. The respondent was retained to verify the site, specifically to review the investigations and conclusions contained in the ME Report and to determine if the data sufficiently demonstrated that the site was in compliance with the requirements of the RSRs or if further investigation was necessary. The respondent submitted his verification to the Commissioner on March 11, 1997, with the ME Report and a supplemental soil investigation report as his supporting documentation. (Ex. DEP-9; ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1854-1856.)

28. The Mark Eyelet facility was the third site to be verified under the State's LEP program and the verification was the second to be audited. The audit meeting was held on November 13, 1997 to discuss the issues identified during the preliminary screening of the verification.[18] AMP and the respondent were advised on November 21, 1997, that the

[17] The pollutant mobility criteria represent maximum acceptable concentration levels for specific contaminants in a particular groundwater classification area. Contaminants that exceed the criteria have the potential to leach from the soil to the underlying groundwater. (Test. R. Frigon, 8/6/03, pp. 440-443.)
[18] The claimant presented evidence that includes issues that were discussed and resolved at the audit meeting. My findings are limited to facts that pertain to issues that were not resolved during the audit process.

verification had been rejected. (Exs. DEP-35, 38; test. R. Robinson, 8/18/03, pp. 941, 946-949; test. R. Bartley, 9/23/03, p. 1855.)

(iii)
The Respondent's Investigation and Verification

29. The respondent reviewed the Phase I and II investigation methods and results outlined in the ME Report, including the historic site assessment data, and supplemented the ME Report with soil analyses he conducted from a process wastewater leachfield. He concluded that the contaminants detected at the site were below levels that would require remediation in accordance with the RSRs based on the data in the ME Report and the additional soil analyses. (Ex. DEP-9; ex. RESP-184; test. R. Bartley, 9/23/03, pp. 1875-1876.)

30. The Phase I investigations described in the ME Report do not specifically identify loading docks, scrap metal storage areas, virgin and waste chemical storage areas, dumpsters and stormwater catch basins as potential areas of concern. The respondent did not indicate that he identified and assessed these areas in his supplemental materials. He also did not indicate whether he assessed the location of groundwater monitoring wells used in the previous investigations in relation to some of these ~~potential~~ areas~~. of concern.~~ (Exs. DEP-35, 37, 38; ex. RESP-14; test. R. Robinson, 8/18/03, pp. 955-957.)

31. The respondent noted during the hearing that the ME Report does contain copies of building permit documents for an addition to the main building on the site, including a new receiving area. The respondent testified that he concluded from this information that the original loading dock for the main building had been eliminated in 1984 when the addition was constructed. No further investigation was possible because the new foundation eliminated or covered the former loading area. The respondent did not ~~support his verification with these facts or~~ specifically identify the new receiving area as a potential area of concern. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp.1870-1873.)

32. The ME Report also notes that empty barrels kept in the wooden shed were brought into the manufacturing building to store scrap metal that was later shipped offsite. The ME Report indicates that soil samples taken in the area of the shed in 1995 showed that no metals were present. Acetone, a volatile organic compound (VOC), was present at a level significantly below the Pollutant Mobility Criteria (PMC) for GA classified groundwater. Based on the ME Report data, the respondent testified that he concluded that scrap metal was stored in the

manufacturing building and not in the wooden shed. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1864, 1875.)

33. The "Information Survey" section of the ME Report and an attached emergency response plan discuss virgin and waste chemical storage areas. In both references, chemicals were reported to be stored in the "oil storage room" and the "cleaning room", two secure rooms with concrete floors and without floor drains. The respondent explained during his testimony that he concluded that because scrap metals and chemicals were not stored in the wooden shed, further investigation of the area was unnecessary. The respondent's conclusion was not included in the documents he submitted to the DEP in support of his verification. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1867, 1873.)

34. A 1980 DEP inspection report included in the ME Report refers to a dumpster and a storm drain located near the former loading dock. The DEP investigator noted that the dumpster was leaking oil onto pavement, which then entered the stream through the storm drain. The respondent explained that because this area was covered by the addition to the manufacturing building and he concluded that the leaks did not discharge to soils or groundwater, he did not need to investigate this seventeen-year old release. The respondent's assessment of this area was not included in the documents he submitted in support of his verification. These documents also did not contain other specific references to dumpsters or storm drains as potential areas of concern. (Exs. DEP-37, 38; ex. RESP-14; test. R. Robinson, 8/20/03, p. 1069; test. R. Bartley, 9/23/03, p. 1871.)

35. The ME Report indicates that groundwater at the site was sampled through four wells in 1985. Low levels of VOCs, copper, nickel and zinc were detected. Two of the four wells were resampled in 1994. Concentrations of the VOC tetrachloroethylene (PCE) were detected in one well at a level in excess of the applicable standard. Minor levels of TPH and metals were also present, and lead exhibited at slightly elevated levels. Four new wells were installed and sampled once in 1995. VOCs were not present, TPH was non-detect and metals were all below the applicable RSR criteria. It was not determined whether the contaminants detected were discharged with the facility's process wastewater or migrated onto the site as a result of the Superfund contamination. The respondent testified that he concluded that the latter was most likely the case and did not conduct further sampling of the groundwater to confirm the 1995

sampling results or the source of the contaminants. (Exs. DEP-35, 37, 38; exs. RESP-14, 452; test. R. Bartley, 9/23/03, pp. 1903-1904; test. R. Robinson, 11/24/03, pp. 3198-3199.)

36. ~~The Phase II investigations described in the ME Report did not include the program of groundwater monitoring for at least four consecutive quarters to determine compliance with the Groundwater Protection Criteria (GWPC) required by the RSRs, which became effective after the ME Report but before the respondent's verification. The respondent did not address this requirement in his investigation.~~ The respondent concluded that the groundwater was in compliance with the RSRs based on the previous Phase II investigations. (Exs. DEP-35, 37, 38; ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1903-1904; test. R. Robinson, 11/24/03, pp. 3198-3199.)

37. An underground waste oil storage tank (UST) and associated oil/water separator were excavated and removed from the site in 1995. At the time of the excavation, the RSRs had been drafted but were not in effect. The concentrations of lead in the tank grave soils were within the existing regulatory standards but exceeded the draft RSR criteria. Four of five soil samples from the tank grave analyzed by the Toxicity Characteristic Leaching Procedure (TCLP) exhibited lead at levels that exceeded the GA PMC, however, a TCLP analysis can produce results that overestimate the amount of lead in soils in natural conditions. The respondent did not conduct any additional soil sampling in the area of the UST. (Ex. DEP-38; ex. RESP-14; test. R. Robinson, 8/20/03, p.1084; test. R. Bartley, 9/23/03, pp. 1881-1883.)

38. A 1985 groundwater analysis showed solvents in the vicinity of the UST in samples from a down-gradient monitoring well, which was subsequently abandoned due to questionable integrity. In 1995, a new monitoring well was installed fifty to seventy-five feet cross-gradient to the UST area at the end of the leach field. Only one round of groundwater sampling and analysis was conducted on the new well in 1995. The respondent did not conduct additional groundwater monitoring in the area of the UST. (Exs. DEP-35, 38; ex. RESP-14; test. R. Robinson, 8/20/03, pp. 1005-1006.)

39. Although the TCLP analysis showed lead in the grave soils at levels in excess of the draft RSR criteria at the time the tank was removed, the area was not remediated and the grave was backfilled after consultation with DEP staff. The respondent assumed, but did not verify, that a lead analysis of the tank grave soils using the Synthetic Precipitation Leaching Procedure

(SPLP)[19] would have shown that the soils were in compliance with the applicable PMC. (Test. R. Bartley, 9/23/03, pp. 1884-1885, 1889-1890; 11/21/03, pp. 3018-3025; test. J. Peronto, 10/24/03, pp. 2875-2876.)

40. The ME Report indicates that the concentration of lead in the tank contents was lower than the highest TCLP result and that no significant levels of TPH were present in the grave soils. Weston field personnel reported that there were no visible leaks; the soil was clean at the time of excavation. The respondent concluded that there had been no release from the underground storage tank and that the RSRs did not apply to the tank grave area.[20] (Exs. DEP-35-38; ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1884-1885.)

41. Process wastewater from the UST discharged to a leachfield until 1973 when the facility's disposal systems were connected to the municipal sanitary sewer system. The respondent identified the leachfield as a potential area of concern and conducted soil analyses of the area in January 1997. Two borings were installed and two samples collected from each boring were screened for VOCs and tested for TPH to determine if oils had bypassed the oil/water separator and discharged to the leachfield. Results indicated that VOCs were either not present or were at very low levels, and TPH levels were below the applicable regulatory criteria. The respondent concluded that a release either had not occurred in the area or contaminants had degraded to insignificant levels. (Exs. DEP-35, 38; exs. RESP-14, 184; test. R. Bartley, 9/23/03, pp. 1876-1878.)

42. Two other leach fields used for the disposal of domestic sanitary waste were identified in the ME Report and were ~~but were not~~ investigated. ~~further~~. The respondent explained during the hearing that two monitoring wells installed in 1995 and located down gradient from these leach fields would have detected any contaminants released in the area~~,. however, he did not provide this information in the documents submitted in support of his verification~~. (Ex. RESP-14; test. R. Bartley, 9/23/04, pp. 1895-1896.)

[19] The SPLP method was designed to test for contaminants under simulated conditions that are more representative of natural conditions. The analysis is an acceptable alternative to the TCLP method for purposes of determining compliance with the PMC. Regs. Conn. State. Agencies §22a-133k-2(c). (Test. R. Robinson, 8/20/03, pp. 1083-1084.)

[20] Although subsequent SPLP testing of the tank grave soils after the audit meeting showed that the soils were in compliance with the RSRs, the respondent had not confirmed this prior to submitting his verification. (Ex. DEP-37; test. R. Robinson, 8/20/03, pp. 1083-1089; test. R. Bartley, 9/23/03, pp. 1910-1911; test. J. Peronto, 10/24/03, pp. 2875-2876.)

43. The respondent testified that he determined from the previous site assessments that the wooden storage shed area, the garden soils, and the electroplating vent discharge area had been identified and assessed. The former loading dock had been investigated by groundwater sampling from down gradient monitoring wells. Also, there had been no report of staining on the pavement in the areas of the former or the existing loading docks. Soils from the waste oil tank grave had been sampled and backfilled. The surface water had been analyzed. Three long-term employees had been interviewed and did not report any releases. There was no evidence of a release reported in accordance with the law or with the facility's emergency response plan. From this information and the respondent's assessment of the process wastewater leachfield, he concluded that the site was properly investigated and remediation was not necessary. (Ex. RESP-14; test. R. Bartley, 9/23/03, pp. 1875-1906.)

(b)
J.C. Boardman & Company

(i)
Notice

44. The Notice charges the respondent with the following professional misconduct.

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines; and

b. At the time he verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RCSA.

(Ex. DEP-4.)

(ii)
Background

45. The new owner of the J.C. Boardman property, Oakdale Self-Storage, filed a Form III and ECAF with the DEP on August 13, 1997. The respondent was then retained to verify the site and submitted his verification and his *Environmental Site Investigation and Remedial Report* on March 3, 1998. (Exs. DEP-40, 41; ex. RESP-348; test. R. Robinson, 8/20/03, p. 1010.)

46. The respondent's verification was audited, and, at the April 21, 1998 audit meeting, a number of the issues identified during the initial screening of the verification were addressed and

resolved.[21] The DEP and the respondent agreed that he could resolve the remaining issues by limited additional soil and groundwater sampling (post-audit investigation). If the post-audit investigation results showed concentrations of contaminants below the RSR criteria, the respondent could request discontinuance of further sampling and monitoring and resubmit his verification. (Exs. DEP-41, 42; ex. RESP-348; test. R. Robinson, 8/20/03, pp. 1032-1033; test. R. Bartley, 9/23/03, pp. 1961-1962.)

47. The DEP agreed to the limited post-audit investigation based on factors known about the site. The manufacturing operations had ceased in 1991 and remnants of the operations had been removed. The data in the respondent's report indicated that the potential impact of the operations on the environment was minimal. The respondent submitted the results of the post-audit investigation in a September 2, 1998 amendment to his report. The respondent received DEP authorization to discontinue groundwater monitoring and the DEP accepted his second verification in December 1998. No remediation was performed at the site. (Ex. DEP-42; ex. RESP-2; test. R. Bartley, 9/23/03, p. 1963; test. R. Robinson, 11/24/03, pp. 3218-3219, 3221.)

(iii)
The Respondent's Investigations and Verifications

48. To prepare his initial report, the respondent relied on a series of prior Phase I and II site investigations conducted by various environmental companies and consultants from 1991 through 1997. These investigations include: a site-wide contamination assessment and subsurface investigations conducted in 1991; a site-wide subsurface investigation conducted in 1993; a 1995 report of post-closure cleanup and decontamination services; a 1996 subsurface investigation in the areas of a septic tank, leach field and water treatment plant; and an additional subsurface investigation of the detention basin conducted in 1997. The Respondent also conducted additional subsurface investigations in 1997 and 1998 at the site. (Ex. DEP-40; ex. RESP-348; test. R. Bartley, 9/23/03, pp. 1913-1914, 1917-1931.)

49. The respondent's report provides a summary of these past environmental investigations and current conditions at the site. From this information, he initially concluded that the operations at the site were known and investigations of all areas of concern were complete; he took no further action. The prior investigations of soils and groundwater showed

[21] See fn. 17, supra.

minor contamination at levels below the applicable remediation standards. Lead and cadmium had been detected in two locations at levels above background but within regulatory standards. On the basis of the past screening results and current conditions, the respondent concluded that remediation was not necessary at the site. (Ex. RESP-348; test. R. Bartley, 9/23/03, pp. 1936-1937.)

50. ~~The respondent's report does not describe a potential area of concern on the site.~~ The environmental reports on which the respondent relied referenced uncovered, 55-gallon drums containing spent pumice abrasive located on asphalt on the northwest portion of the site. The respondent did not investigate the area for potential releases given the contents of the drums, as any metals combined with the pumice were fairly insoluble and would have to travel through the asphalt. Samples from the monitoring wells located down-gradient of the drum storage area would have been tested for the metal wastes contained in the drums during prior investigations. The respondent testified that the previous environmental consultants had also determined that sampling below the asphalt was not warranted. As part of his post-audit investigations, the respondent sampled the soil below the asphalt for known metals related to site operations. The concentrations of metals detected were determined to be within applicable regulatory criteria. (Ex. DEP-41; ex. RESP-348; test. R. Robinson, 8/20/03, pp. 1020-1021; test. R. Bartley, 9/23/03, pp. 1939-1944.)

51. ~~The respondent did not conduct a Phase II program of groundwater monitoring for four consecutive quarters in order to determine compliance with the GWPC and Surface Water Protection Criteria (SWPC) prior to submitting his first verification.~~ VOCs were detected in the 1991 investigations; concentrations of copper were also present at levels in excess of the SWPC. Years later only one round of sampling for these contaminants was conducted. Also, 1991 soil samples detected low levels of copper, and lead and cadmium at levels in excess of the GA PMC. Subsequent investigations only focused on lead and cadmium. ~~Soils on site were not analyzed for VOCs although they were detected in the earlier groundwater analyses.~~ (Exs. DEP-41, 42; test. R. Robinson, 8/20/03, pp. 1023-1024.)

52. In preparation for the audit meeting and during the post-audit investigations, the respondent sampled the groundwater for VOCs from two monitoring wells in the area of the loading dock. VOCs were not detected in either sampling event. He also sampled two

monitoring wells for dissolved copper and antimony[22] and another well for dissolved copper prior to the audit meeting. Results showed that dissolved concentrations of copper and antimony were below the relevant regulatory criteria. After discussing the sampling results at the audit meeting, the respondent sampled three additional monitoring wells for dissolved copper with these same results. (Exs. DEP-41, 42; test. R. Bartley, 9/23/04, p.1963; test. R. Robinson, 11/24/03, pp. 3218-3219.)

53. The respondent's initial verification of the site was based on his subsurface investigation and his determination that the historic investigations were extensive. Also, the site had been idle since 1991; he concluded that conditions were not likely to change from one period to the next. The respondent also had not interpreted the regulations to require four consecutive quarters of groundwater monitoring in such circumstances. (Test. R. Bartley, 9/23/03, pp. 1916, 1945, 1957-1961.)

(c)
Aerospace Metals, Inc.

(i)
Notice

54. The Notice and amended Notice charge the respondent with the following professional misconduct.

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines;

b. At the time the respondent verified, the extent and degree of groundwater pollution resulting from releases was not defined in accordance with prevailing standards and guidelines;

c. At the time the respondent verified, light non-aqueous phase liquid[23] had not been removed to the maximum extent practicable as required by §22a-133k-2(g) of the RSRs;

d. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the direct exposure criteria as required by §22a-133k-2(a) of the RSRs;

e. At the time the respondent verified, groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs (post-remediation groundwater monitoring).

[22] The presence of antimony on the site had not been previously assessed even though antimony is a component of brass. (Exs. DEP-35-38.)

f. At the time the respondent verified, pollutants were present at the site which posed an unacceptable risk to human health; and

g. At the time the respondent used his seal, his verification did not comply with the applicable provisions of the RSRs.[24]

(Ex. DEP-4, 6.)

(ii)
Background

55. AMI transferred the business to Metal Management Aerospace, Inc. (Metal Management), in January 1998. The real property was retained by AMI, now known as the Danny Corporation. On January 30, 1998, the DEP received the Form III and ECAF filed by AMI, the certifying party. Roy F. Weston, Inc. was retained to investigate and remediate the property. The respondent was retained to oversee those activities. (Ex. DEP-7.)

56. The AMI site has been the subject of a number of voluntary and DEP-mandated environmental investigations. Reports prepared in connection with these investigations are identified in the ECAF as Phase I, Phase II and Phase III field investigations and environmental assessments. The ECAF also provides a history of the known releases on site and state and federal environmental enforcement actions, which are described as "in compliance and closed." (Ex. HO-2; ex. RESP-211; test. R. Bartley, 9/23/03, pp. 1965-1966.)

57. Two DEP enforcement actions were initiated to address soil and groundwater contamination on and off the site and were resolved by consent orders. AMI's predecessor, Suisman and Blumenthal, Inc. (Suisman), removed a capacitor containing polychlorinated biphenyls (PCBs), and investigated the site for PCB contamination in response to an order issued by the DEP in 1984, and prior to entering into a consent order in 1986.[25] Suisman also prepared and implemented a plan, including a number of best management practices, for chemical storage, handling, and disposal. (Exs. DEP-11, 12.)

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[23] Light non-aqueous phase liquid is not soluble in water and has a density equal to or less than water at twenty degrees Celsius. Regs., Conn. State Agencies §§22a-133k-1(33), (36).

[24] An LEP is required to affix a seal to his or her verification or to other documents related to a verification. Regs., Conn. State Agencies §22a-133v-5.

[25] The 1986 consent order specifically provided that Suisman "complied with the Order by retaining the services of a qualified consultant to investigate the extent and degree of PCB contamination on the property and had "performed extensive sampling for PCBs to determine the extent and degree of PCB contamination on the property in compliance with the Order." (Ex. DEP-12.)

58. Suisman excavated PCB-contaminated soil in an area adjacent to the south corner of the main building in the South Yard and around a catch basin in the North Yard as required by the consent order. The consent order also required composite soil sampling at the base of the excavation areas, which demonstrated that the levels of PCBs remaining in the soil were at or below the standard of 35 parts per million (ppm) approved by the DEP and the US EPA. Soil samples were also taken around the North Yard shredder with results indicating PCB levels below the actionable standard; however, soils were excavated from one discrete area. Suisman was certified to be in compliance with the consent order on September 22, 1994. (Exs. DEP-12, 13, 14; ex. RESP-211; test. R. Frigon, 8/6/03, pp. 408-413.)

59. A second consent order issued in 1990 addressed potential off-site migration of contaminated groundwater and required improvements in materials recycling procedures, stormwater runoff controls, and maintenance procedures to minimize or eliminate the discharge of oily waste to ground or surface water. AMI prepared a spill prevention plan and a best management practices plan (BMP Plan) to address the discharge issues. The consent order provided that the BMP plan was to be referenced in the AMI NPDES permit and that any violation of the provisions of the BMP plan would be considered an enforceable violation of the permit. (Ex. DEP-15; exs. RESP-229, 442; test. R. Frigon, 8/6/03, pp. 524-525; test. T. Walles, 9/6/03, pp. 1594 - 1599.)

60. Following a DEP-approved investigation and characterization of site conditions, two localized areas of oily water seepage were identified along the eastern boundary. Hydrogeologic information indicated that the site consists of a layer of artificial fill, two to twenty feet deep, over thick strata of low permeability, fine-grained silt and clay lakebed deposits. Groundwater travels horizontally in channels along the irregular surface of the clay deposits. (Ex. RESP-211; test. T. Walles, 9/5/03, pp. 1598, 1601-1609; test. R. Bartley, 9/23/03, pp. 1968-1969.)

61. An interceptor trench system was proposed as the most effective approach to mitigate the seepage of oily water given the unique subsurface conditions in the area. Following DEP approval, the system was installed in January 1991. Since the installation of the trench system, AMI has surveyed the entire eastern boundary of the property twice annually and has reported to the DEP that no other oily seepage has been found. The DEP Commissioner acknowledged in writing full compliance with Consent Order # 4921 on October 24,1994. (Exs. RESP-215 - 218, 398, 442 - 448; test. T. Walles, 9/5/03, pp. 1636-1637, 1642-1644, DEP-16.)

62. Subsequent investigations were initiated by AMI to evaluate environmental conditions on the entire site, further evaluate the site hydrogeology, and develop operating changes that would limit environmental impacts in the future. Reports of those investigations were prepared in 1991, 1995, and 1996 and are referenced in the ECAF. (Exs. RESP-211A, 211B; test. T. Walles, 9/22/03, pp. 1673-1705.)

63. The respondent supervised investigation and remediation activities on the site over several months from late 1998 through June 1999, including the removal of over 28,000 tons of contaminated soils containing approximately 80,000 gallons of oil. The respondent did not return to the site after the major remedial activities were completed in early 1999. The respondent filed his investigation and remediation report (AMI report) in October 1999 and submitted his verification on April 17, 2000. During the interval between submission of the report and the verification, the respondent prepared an environmental land use restriction (ELUR)[26], including the requisite survey and subordination agreements. The DEP reviewed the ELUR and issued it in March 2000 for recording on the City of Hartford Land Records. (Exs. HO-2, 3; ex. RESP-211; test. G. Stevens, 8/7/03, pp. 606-621; test. E. Patton, 10/21/03, pp. 2344-2345; test. R. Bartley, 10/21/03, pp. 2370, 2411-2413, 11/24/03, p. 3189.)

64. Staff determined that an audit of the respondent's verification was necessary and an audit meeting was held on July 13, 2000. After review of all information provided to the DEP, staff concluded that the site investigation was insufficient and the remediation was not in compliance with the RSRs; the verification was rejected. (Ex. DEP-33; test. R. Frigon, 7/16/03, pp. 353-355.)

(iii)
The Respondent's Investigation and Verification

65. The respondent identified several remediation areas on the site based on data from a number of the previous Phase I, II, and III investigations conducted over a period of twelve years. He oversaw the excavation of soils from the container storage yard, the west yard along the main building, north of the CBS building, and in the vicinity of the overhead crane. The respondent required confirmation soil sampling to determine the effectiveness of the remediation

[26] An environmental land use restriction is an instrument that identifies certain real property and limits its use or prohibits certain activities on that property in order to minimize the risk of human exposure to pollutants and other environmental hazards. General Statutes §22a-133n; Regs. Conn. State Agencies §22a-133q-1.

and compliance with the remediation standards. (Exs. RESP-211, 219A - 219H, 219J - 219M, 219O, 219R - 219V; test. T. Walles, 9/22/03, pp. 1740, 1748 - 1771.)

66. The respondent used the applicable Industrial/Commercial Direct Exposure Criteria (I/C DEC) and GB PMC for all contaminants, including PCBs, to demonstrate compliance with the soil remediation standards. With regard to the I/C DEC, the respondent determined that the perimeter fence and guard station limited access to the site to employees and visitors. He prepared an ELUR and decision document, and characterized the entire site as an "other restricted access location"[27]. (Ex. HO-3; ex. RESP-211.)

67. The ELUR notes that residential use of the site is not permitted and activities that pose a risk of migration of pollutants or a disturbance of the integrity of environmental controls are prohibited. The ELUR decision document[28] indicates that pollutants in the soil exceed the Residential DEC in various locations but are below the I/C DEC. The document notes that the ELUR is necessary for TPH and PCBs site-wide, and certain other compounds present at a specified location. (Ex. HO-3.)

68. The respondent characterized the site as an "other restricted access location" after consultation with DEP staff to determine that Flatbush Avenue provided a sufficient barrier to the former housing project south of the site. Weston field staff reported that the site was at least 0.1 kilometers from other commercial or residential areas. The respondent did not verify the field staff determinations prior to submitting his verification or investigate the proposed commercial use of the former Heublein, Inc. distillery. Subsequently, the respondent determined that the Stop & Shop supermarket was within 0.1 kilometers of a portion of the AMI site. (Exs. DEP-57, 58; test. R. Bartley, 11/21/03, pp. 3147 - 3148; test. R. Frigon, 11/24/03, pp. 3339-3341.)

69. Soil sampling locations were concentrated in areas that were considered by the respondent most likely to be contaminated and more broadly dispersed throughout the remainder of the site. To confirm that soils were below ~~actionable levels for~~ the GB PMC, the respondent compared total or mass analyses for each compound to the applied~~cable~~ criteria and leachable compounds, analyzed by either TCLP or SPLP, to ten times the ~~applicable~~ Groundwater

[27] An area that is at least 0.1 kilometers from a residential/commercial area and limited by man-made barriers (e.g. fences and walls). Regs., Conn. State Agencies §22a-133k-2(b)(2)(B); 40 C.F.R. §761.123.

~~Pollution~~Protection Criterion. When total or mass analytical results exhibited compounds at levels in excess of the PMC, the respondent conducted additional soil analyses using the SPLP. (Ex. RESP-211.)

70. The respondent determined that the site was in compliance with the RSRs~~, however, he~~ by characterize~~ding~~ the entire site a release area for the purpose of calculating the required ninety-five percent upper confidence level. ~~However, TPH concentrations slightly in excess of the applicable I/C DEC were present in one location and PCB concentrations in two locations exceeded the applicable I/C DEC. Analytical results of TPH in one location and VOCs in a different location indicated concentrations of each substance that exceeded the PMC.~~ (Ex. RESP-211; test. R. Bartley, 10/21/03, pp. 2403-2405.)

71. Soils were remediated in two areas on site in response to the 1986 Consent Order. The cleanup standard at the time was significantly higher than the standard[29] currently required by the RSRs. The respondent did not require any remediation in the areas excavated in the 1980s nor does it appear from the AMI Report that he evaluated those areas to assess the current levels of PCB contamination in light of the historic cleanup goal. The respondent concluded that the RSRs do not apply to PCBs on this site based on the ~~remediation~~ activities required by the 1986 consent order. (Exs. RESP-211, 211A, 211B; test. R. Bartley, 10/21/03, pp. 2487-2488.)

72. The respondent's AMI Report notes that groundwater was not sampled historically due to the transient nature of perched water that appears to flow in an easterly direction through channels or troughs in the clay layer. Groundwater was characterized as flowing in an easterly direction in the South Yard and in a portion of the North Yard, and in a westerly direction in another portion of the North Yard. The respondent oversaw the advancement of thirty-three soil borings in December 1998 to further evaluate the clay layer and to determine where perched groundwater may be located. The specific goal of this sampling program was to collect groundwater without regard to the relationship of the sampling area to potential or known areas of concern. (Ex. DEP-23; ex. RESP-211.)

73. Microwells were installed in the five locations where groundwater was found; four samples contained sufficient amounts of water to be filtered for silt and analyzed for PCBs,

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[28] A written description of the type and location of pollutants present in soils or groundwater on the site, any limitations on the use of the parcel and a description of the reason for the ELUR. Regs., Conn. State Agencies §22a-133q-1(f).

[29] The RSR GB PMC is 0.005 mg/l and I/C DEC is now 10mg/kg.

VOCs, and metals. The analytical results were compared to the SWPC and the Industrial/Commercial Volatilization Criteria. PCBs were not detected in the samples. Concentrations of VOCs were below the ~~applicable~~ criteria, however, concentrations of arsenic were found at levels above the ~~applicable~~ criteria. The respondent considered arsenic to be naturally occurring, however, he used a model[30] to assess the migration potential of arsenic that is not accepted by the DEP. The results indicate that the concentrations of arsenic do not exceed the SWPC. (Ex. RESP-211.)

74. The respondent considered the groundwater collected from the four locations representative of site conditions. He concluded that a groundwater plume does not exist on site, rather the water is present in distinct, isolated areas. At the time of the AMI investigation, the respondent was aware that the DEP interpreted the RSRs to require compliance monitoring in accordance with §22a-133k-3(f) to confirm that the groundwater is in compliance with the applicable criteria. The respondent testified that he determined that the SWPC did not apply to groundwater on this site because the interceptor trenches were collecting groundwater before it could enter the surface water. (Ex. DEP-23; ex. RESP-211; test. R. Bartley, 10/21/03, pp. 2395-2396.)

75. During routine compliance inspections conducted in July 1999, and in February 2000, DEP staff observed such conditions as oily material in paved and unpaved areas, piles of nickel sludge with water-soluble oil pooled around the piles, open drums containing scrap metals in uncovered areas including drums that were punctured, crushed or overturned, metal chips on the ground site-wide, and dark staining around stormwater outfalls. Because these site conditions were the result of facility operations, the DEP issued a Notice of Violation of the water discharge permit to Metal Management on April 13, 2000.[31] The respondent did not identify or investigate these conditions. (Exs. DEP- 30, 46, 47A - 47I; test. W. Oros, 7/15/03, pp. 21, 23-38, 56, 68, 72-73, 83-86, 141-147.)

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[30] The respondent developed an analytical solute transport model, which is a mathematical demonstration of the anticipated attenuation of a constituent flowing with groundwater from a specific location to a surface water body. (Test. R. Frigon, 8/6/03, pp. 450-451.)

[31] Violations listed in the Notice included a failure to "maintain practices, procedures, and facilities designed to prevent, minimize, and control spills, leaks, or other unplanned releases from loading docks, metals storage areas, nickel sludge storage and outdoor metal storage; failure to maintain good housekeeping practices are required by the general permits; and a failure to "provide chemical container containment and to cover all dumpsters" in accordance with the general permit. The Notice of Violation required Metal Management to revise its Stormwater Pollution Plan to address the issues and to improve materials handling, including maintenance of the discharge swale, particularly at the discharge points. (Ex. DEP-30; test. W. Oros , 7/15/03, pp 142-146.)

76. During a June 30, 2000 site visit, DEP staff noted that some of the previously observed conditions had been corrected, however, other serious conditions were present on the site. Staff observed contaminated water in a detention pond on the southwest portion of the site, staining on the concrete walls and sediment soils at two of seven storm drainage outfalls, a three-foot deep trench exhibiting a smear zone[32] of oil product, and significant cracks in a concrete waste oil containment area. The respondent did not identify or investigate these conditions in his verification. The 1999 Report also did not identify or discuss the floor drains in the main operations building and in an aluminum tunnel area that were observed during the June 2000 site visit. (Exs. DEP-33, 48A - 48I; test. W. Oros, 7/15/03, pp. 134, 152; test. R. Frigon, 7/16/03, pp. 285-299, 309-310, 317-320, 332-335, 338, 573-584.)

77. Maintenance and inspection of the detention pond, the stormwater outfalls, the interceptor trenches, the south pad, the aluminum tunnel and the storage tank containment area were required under the BMP plan developed in response to the 1990 consent order. The DEP enforces the BMP plan as part of the enforcement of the ~~NPDES~~Stormwater permit. (Ex. RESP-229; test. R. Frigon, 8/6/03, p. 528; test. R. Bartley, 9/23/03, pp. 1979-1980.)

78. ~~The interceptor trench system was installed in 1994 and still operating in June, 2000, collecting oily liquid containing PCBs at concentration levels of 200-300 parts per million.~~The interceptor trench system was installed in 1994 and was still operating in June, 2000, collecting approximately 180,000 gallons of groundwater per year (Ex. Resp. 205). Approximately 100 gallons of oil is separated from this groundwater each year by treatment. The oil separated from the groundwater contains 200-300 parts per million of PCBs. The respondent did not evaluate the continued effectiveness of the system for preventing off-site migration of contaminated groundwater. Although the respondent was aware that the collection data indicated that there may be a declining trend in the amount of oily water collected in the trenches, he did not monitor the liquid collected in the system to determine the effectiveness of the 1998-1999 remediation activities, which included the areas he believed to be the original source of the free-product present on the site. (Test. R. Frigon, 8/6/03, pp. 407, 446-447; test. T. Walles, 10/20/03, pp. 2252-2253; test. R. Bartley, 10/21/03, pp. 2371, 2392-2393.)

[32] The rise and fall of the groundwater table raises and lowers the oil material creating a thick uniform zone of contamination in the subsurface. (Test. R. Frigon, 7/16/03, pp. 319-320.)

78a. A number of potential areas of concern were identified and, in many cases, sampled during the Weston 1996 investigation but were not identified in the AMI Report. A former vapor degreaser unit, a maintenance garage and vehicle refueling area with associated underground storage tanks, a former small parts degreasing operation, an area identified as the boiler blowdown area, and the area around a concrete containment pad labeled crusher metal turnings were not identified as areas of concern in the AMI report. (Exs. DEP-48B, 48D; ex. RESP-211B; test. R. Frigon, 7/16/03, pp. 292-294, 309-310, 315-316, 341-344, 402-403, 530-531, 533, 8/7/03, pp. 533-534, 11/24/03, pp. 3283 - 3309.)

79. The respondent did not require groundwater monitoring to determine the effectiveness of the historical or recent remediation efforts. He concluded that post-remediation groundwater monitoring would not be effective or provide adequate data to meet the requirements of the RSRs given the unique subsurface conditions at the site. The respondent included a request for a waiver of the post-remediation groundwater requirements in the October 1999 AMI Report. The respondent verified the site without waiting for a decision on his request for a waiver of the post-remediation groundwater requirements. (Ex. RESP-211; test. R. Frigon, 8/6/03, pp. 446-447; test. R. Bartley, 10/21/03, pp. 2501-2502.)

III
CONCLUSIONS OF LAW

A
Jurisdiction/Notice

1
Adequacy of Notice to the Respondent

An environmental professional's license is a property right once it has been issued. See *Burton v. Mottolese*, 267 Conn. 1 (2003) (license to practice law). General Statutes §22a-133v(g) and due process provide that this right cannot be revoked except for cause after notice and an opportunity to be heard. Section 4-182(c) of the General Statutes provides that prior to instituting proceedings, an agency must give a licensee notice of the facts or conduct that warrant revocation or suspension, and the licensee must be given an opportunity to show compliance with all lawful requirements for the retention of his license. Id. at 18-19. Section 4-177(b) describes reasonable notice under the Uniform Administrative Procedures Act.

A licensee must be given adequate notice and a meaningful opportunity to be heard. Notice is adequate when charges are sufficiently described to enable a licensee to produce relevant evidence at the hearing, to cross-examine witnesses, and to offer rebuttal evidence. (Citations omitted.) *Burton v. Mottolese,* supra, 267 Conn. 19, citing *Briggs v. McWeeney,* 260 Conn. 296, 318 (2002); *Grimes v. Conservation Commission,* 243 Conn. 266, 273 (1997). See also *Jarvis Acres, Inc. v. Zoning Commission,* 163 Conn. 41, 47 (1972) (notice allows parties to prepare intelligently for the hearing). Due process is a flexible concept and is evaluated with regard to the facts of a case that require these procedural protections. *Burton v. Mottolese,* supra, 267 Conn. 19, citing *Thalheim v. Greenwich,* 256 Conn. 628, 648 (2001).

The respondent claims that the Notice was inadequate because it did not specify that he would be subject to discipline under General Statutes §22a-133v(c) for professional misconduct at the Mark Eyelet site.[33] The respondent argues that because the Notice was inadequate, the Board lacks jurisdiction to bring charges against him related to the Mark Eyelet site. The respondent's claim ignores the facts that show that he was fully informed of the conduct that would be the subject of the hearing, he was given an opportunity to be heard on that conduct and he was able to fully participate in the hearing.

The respondent was informed of the investigation into his conduct at the Mark Eyelet establishment when he was notified of the outcomes of the Board's investigation and of the April 5, 2002 compliance meeting. The Notice advised the respondent of the specific charges of misconduct regarding his duties at the Mark Eyelet site. The respondent specifically denied the charges and presented evidence and expert opinion at the hearing regarding the performance of his duties at the Mark Eyelet site. The respondent understood the issues he faced with respect to his verification of the site.

At a minimum, due process requires adequate notice of the facts and conduct that will be the subject of a hearing. If the potential outcome of the hearing is the suspension or revocation of a professional license, "the notice must also fairly indicate the legal theory under which such facts are claimed to constitute a violation of the law." *Jutkowitz v. Dept. of Health Services,* 220 Conn. 86, 93 (1991). The respondent was advised of the facts and conduct that would be the

[33] During the hearing, the respondent claimed that his professional conduct at the Mark Eyelet facility could not be evaluated in accordance with the LEP regulations because they were not in effect at the time he verified the site. In a February 9, 2004 ruling, I concluded that the LEP regulations did not apply, however, General Statutes §§22a-

basis of the hearing. The Notice indicated that the respondent was alleged to have committed professional misconduct at three sites, including the Mark Eyelet site. He presented relevant evidence at the hearing, cross examined witnesses and offered rebuttal evidence. Moreover, the respondent has not demonstrated that he has suffered any material prejudice as a result of this procedural deficiency. *Hart Twin Volvo Corporation v. Commissioner of Motor Vehicles,* 165

133v(c) and 22a-133v(g) were in effect at the time and, as an interim LEP, the respondent's conduct could be evaluated in accordance with those provisions.

Conn. 42, 47 (1973). The respondent's argument does not support a conclusion that he was unfairly denied due process to his detriment.

2
Waiver

The respondent claims that action on his license cannot be based on any alleged misconduct occurring prior to the date his license was issued. He argues that by authorizing his license, the Board waived any prior claims of misconduct or, in the alternative, acknowledged that he did not commit professional misconduct when he verified the Mark Eyelet site. The record and the law do not support such a conclusion.

It is well established that waiver requires knowledge of and intent to relinquish a right, claim or privilege. To conclude that the Board waived its right to discipline the respondent for professional misconduct, I must find that the Board had knowledge of the audit findings of the Mark Eyelet verification and chose not to act on that information. *Hanover Insurance Co. v. Firemen's Fund Insurance Co.,* 217 Conn. 340, 351 (1991). There is no evidence that the Board was aware that the Mark Eyelet verification had been audited or rejected at the time it authorized the respondent's license or that it had official notice of any misconduct on the part of the respondent. Therefore, there is no basis for a conclusion that the Board expressly or impliedly waived its right to pursue any future claim of misconduct by authorizing the respondent's license. In addition, the respondent has not cited nor have I found any legal support for the proposition that issuance of a license constitutes an acknowledgement of no prior violation of the applicable rules of conduct.[34]

3
Legal Sufficiency of Charges

The respondent claims that the LEP regulations do not specifically authorize the Board to take action on his license for failure to properly investigate a site. He argues that the regulations are unconstitutionally vague and ambiguous if interpreted to authorize such action.

[34] In his brief, the respondent argues that his claims of waiver extend to the Commissioner as the issuer of his license. The Commissioner has no authority to issue, suspend or revoke the respondent's license absent express authorization from the Board. General Statues §22a-133v(g); Regs., Conn. State Agencies §22a-133v-4. Therefore, the Commissioner has no right, claim or privilege that can be subject to a claim of waiver in this circumstance.

A regulation is vague if it does not provide a person a reasonable opportunity to know what is prescribed or provide explicit standards that protect against arbitrary enforcement. *Connecticut Building Wrecking Co. v. Carothers,* 218 Conn. 580, 590-91 (1991). The regulations authorize the Board to suspend or revoke a license if it finds that an LEP has engaged in professional misconduct. Regs., Conn. State Agencies §22a-133v-4(b)(1). Professional misconduct includes an act or omission that violates *any* statute or regulation relevant to the activities of the LEP. §22a-133v-4(b)(3)(A).

There are numerous references in the Transfer Act to the LEP's duty to verify that a site has been investigated in accordance with prevailing standards and guidelines. General Statutes §§22a-134(19); 22a-134a(e) and (l). It is undisputed that these requirements are relevant to the respondent's activities. Moreover, the respondent was aware of the conduct on which this action was based and provided no evidence that he was unaware that an improper investigation could result in Board action against his license. Also, the evidence he presented demonstrates that he knew of the requirement that a site be investigated properly. The respondent has not alleged or demonstrated that he did not have adequate notice that an improper investigation constitutes professional misconduct or that the LEP regulations have been applied to him in an arbitrary or discriminatory manner. *Connecticut Building Wrecking Co. v. Carothers,* supra, 218 Conn. 590-591. There is no basis for a conclusion that the regulations are vague and ambiguous regarding proper site investigations or the potential for sanctions for failure to investigate properly.

The respondent also argues that TASA cannot be used as a basis for revoking or suspending his license because the guidelines are actually "regulations" as defined under the Uniform Administrative Procedures Act (UAPA). General Statutes§§4-166 through 4-189. The respondent argues that because TASA was not duly promulgated as regulations, it cannot be used to determine whether his verifications are acceptable. This argument misrepresents the relevance of TASA in these proceedings.

As previously discussed, the Transfer Act specifically provides that an LEP must ensure that a site is investigated in accordance with prevailing standards and guidelines. The claimant has offered expert testimony that TASA and the ASTM standards represent the prevailing standards for site investigations to be used in combination with professional judgment and experience, which allows for discretion on the part of the LEP. TASA is a description of commonly accepted professional practices and provides some criteria for measuring the quality

or acceptability of the respondent's site investigations. The applicable statutes and regulations that govern his professional conduct will determine the respondent's rights and obligations as to his license. TASA is not a regulation and there is no merit to respondent's argument that the charges against him are legally insufficient.

B
Prevailing Standards and Guidelines for Site Investigations

The Transfer Act provides that an LEP must verify that the certifying party has investigated an establishment in accordance with "prevailing" standards and guidelines. General Statutes §§22a-134 (6), (12), (19); 22a-134a (e). As it is commonly used, the term "prevailing" means generally current or predominant conditions that exist at a certain time. The American Heritage Dictionary 1038 (New College Edition, 1979); General Statutes §1-1. The prevailing standards and guidelines for site investigations are therefore those that are used predominantly at a particular point in time.

The testimony of credible witnesses reflects conflicting opinions among the experts regarding the prevailing standards and guidelines for site investigations in Connecticut. The DEP reviews the adequacy of a Transfer Act site investigation in accordance with the criteria outlined in the TASA guidance, but considers other guidance such as the ASTM standards. Regardless of the particular source, it is obvious from the record that at all times relevant to these proceedings, the predominant practice in the state involved a multi-phased investigation where each phase is an integral component of a site assessment, and where professional judgment and experience are essential to the process. This is evident from the testimony, the historical reports in evidence, and the reports submitted with the respondent's verifications.

It can reasonably be inferred from the record that a thorough Phase I investigation is vital as it provides the basis for the balance of the site assessment activities. Phase II is a focused investigation that is predicated on the potential areas of concern and contaminants of concern identified during Phase I. The sufficiency of the Phase II investigation hinges on the Phase I information. The thoroughness and accuracy of the Phase I investigation is therefore critical to the reliabililty of a verification.

Phase II requires a balance of professional judgment and skill, site investigation techniques, and an understanding of the applicability of the RSRs to the investigation process.

Phase II requires sampling in areas most likely to be contaminated and testing for the contaminants likely to be present. Sampling plans are site specific and based on professional expertise, judgment, and the RSR criteria used to determine whether hazardous substances exist at levels that warrant a Phase III investigation.

A Phase III investigation must be based on Phase II information to adequately characterize the extent of a release, identify its source or probable source, assess any risk of harm to the public and the environment and determine the need for remedial action. Phase III is the precursor to remediation, which can only be effective if the data gathered throughout the investigation process is reliable. Given the purpose and goals of each investigation phase, it is evident that the result of an error or omission at any phase is that it will be compounded throughout the balance of the investigation process.

The investigation report must be complete and be accompanied by or reference all of the information and supporting documentation that is necessary for the DEP, other environmental professionals, and the public to evaluate the adequacy of the site assessment. It is undisputed that the DEP must review LEP verifications and supporting documentation. The record shows that the site investigation report is the primary source of information available to DEP staff to determine if the verification of a site is appropriate. As the record also shows, the data contained in these reports are often relied on for subsequent investigations. The report, once filed, becomes a public document and is part of the site history. For these reasons, the investigation report is a key component of the site investigation process.

It is obvious that the report must clearly demonstrate that the site investigation was comprehensive, and was designed and implemented in accordance with prevailing standards and relevant statutes and regulations. The report must also provide sufficient details and a reasoned analysis of the investigation findings to demonstrate that the LEP's interpretations and conclusions are supported by the information gathered.

It is reasonable to infer from the evidence that a certifying party will rely on the conclusions drawn from a site assessment to demonstrate its compliance with the requirements of the Transfer Act and to define the limits of its responsibility under the Act. It is also reasonable to assume that institutional lenders and insurers will rely on site assessments that are required by the Transfer Act and reviewed by the DEP. The prevailing standards for Transfer Act site investigations require a comprehensive and conclusive multi-phased investigation and a

sufficiently detailed report that adequately demonstrates that the site is in compliance with the Act.

C
Standard of Proof

The respondent argues that the standard of proof for a determination of misconduct regarding his verification of the Mark Eyelet site is clear and convincing evidence. He argues that the UAPA does not specify the standard of proof as to disciplinary hearings and that the LEP regulations establishing a preponderance of the evidence standard were not in effect at the time of the Mark Eyelet verification.

The respondent's argument is premised on the fact that the state Supreme Court has adopted a clear and convincing standard in attorney disciplinary proceedings, which are conducted in accordance with the rules of the Superior Court. However, the present matter is governed by the UAPA and the standards that apply to an examining board created by the legislature. "Executive boards subject to the UAPA may both legally and constitutionally employ the preponderance of the evidence test." *Roger Sylvestre, D.C. v. Connecticut State Board of Chiropractic Examiners*, 2001 Conn. Super. LEXIS 390, Superior Court, judicial district of New Britain, Docket No. CV990498888S (February 2, 2001) citing *Michael Swiller, D.C. v. Commissioner of Public Health and Addiction Services, et al.,* 1995 Conn. Super. LEXIS 2844, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 705601 (October 10, 1995)(15 Conn. L. Rptr. 532). Therefore, the standard to be applied to all charges made against the respondent, including those pertaining to the Mark Eyelet verification, is proof by a preponderance of the evidence.

D
Site Specific Charges

1
Mark Eyelet

a. At the time the respondent verified, all potential release areas located at the site had not been investigated in accordance with prevailing standards and guidelines.

It is alleged that the respondent's verification of the site was unreliable because the investigation of the site was insufficient and inconclusive. Specifically, the investigation failed to identify all potential areas of concern on the site, did not thoroughly assess the environmental

impact of the underground waste oil tank, and failed to sufficiently assess the contaminants previously identified in the groundwater.

There is no evidence that the respondent identified all potential areas of concern on the site. He relied on historical soil and water sampling plans and analytical results and there is no evidence that he determined that those investigations involved samples taken from all areas most likely to be contaminated.

The respondent did not ~~ensure~~perform a thorough assessment of ~~all~~ environmental impacts of the underground waste oil tank. He did not require additional soil sampling in the area of the tank and there is no evidence that he determined whether the more recent groundwater analyses in the area produced results that were reliable and consistent with previous analyses, particularly when the recent samples were drawn from a new well located cross-gradient rather than down-gradient of the area of concern. He also did not require an SPLP analysis to support his conclusion that there had been no release from the UST.

The respondent argues that he had adequate information to use his professional judgment to determine that a release had not occurred at the tank and notes that a subsequent investigation of the UST area confirmed his conclusion. ~~However, it took a~~A subsequent ~~and thorough~~ investigation of the area ~~to~~ established and documented that a release had not occurred. ~~That the respondent's conclusions were borne out by a subsequent investigation does not relieve him of the obligation to ensure that an adequate investigation was conducted before he verified the site.~~

The respondent did not sufficiently assess the contaminants previously identified in the groundwater. He surmised but did not conclusively ~~determine~~ demonstrate that the VOCs and other contaminants detected in the previous groundwater investigations migrated onto the site from the Superfund contamination. The respondent again relied on dated information and inconsistent sampling results to reach his conclusions that the groundwater was in compliance with the RSRs.

The prevailing site investigation standards required a thorough and well-documented investigation of this site before it could be verified. The respondent relied on investigations that were inconsistent with the standard and customary practices. The Phase II investigation described in the ME Report was insufficient given that all areas of concern were not identified during Phase I. The additional omissions from the Phase II investigation compounded the problem. There is sufficient evidence in the record to conclude that the respondent did not

ensure that the site was investigated in accordance with prevailing standards and guidelines; his verification was therefore unreliable in this regard.

b. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the Pollutant Mobility Criteria as required by §22a-133k-2(a) of the RSRs.

The respondent is alleged to have improperly verified the site when the results of the TCLP analyses of the UST tank grave soils indicated the presence of lead at levels that exceeded the applicable PMC. The respondent concluded that remediation of the area was not necessary, however, the sampling results submitted in support of his verification demonstrated that the tank grave soils ~~were~~may not have been in compliance with the RSRs. The respondent also did not require an SPLP soil analysis or demonstrate the likelihood that results of such an analysis would show concentrations of lead within acceptable limits. Whether the results of the TCLP analyses were evidence of a release from the waste oil tank or the results of an aggressive analytical procedure, a thorough investigation requires that the respondent address the issue with conclusive data. Based on the information available at the time, the record shows that the respondent rendered his verification while there remained the possibility that soils on the site were not in compliance with the RSRs.[35]

c. At the time the respondent verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs.

Groundwater monitoring is required after remediation of a site to determine the effectiveness of that remediation in preventing groundwater pollution, eliminating health or safety risks, and achieving compliance with the RSRs. It is undisputed that this post-remediation groundwater monitoring requirement does not apply to circumstances where remediation is not necessary.

The record shows that the respondent did not conduct remediation at the Mark Eyelet site. Also, there is no record of remediation in the historical data referenced in the ME Report.

[35] The record indicates that a subsequent investigation by another consultant confirmed the respondent's conclusions that there had been no release to the tank grave soils. ~~This does not alter the fact that the respondent's investigation and report did not adequately address this issue before he rendered his verification.~~

Therefore, I cannot conclude that the respondent was required to conduct post-remediation groundwater monitoring at this site.

2
J. C. Boardman

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines.

It is alleged that the respondent improperly verified the site without ensuring that at least one potential area of concern had been assessed or that contaminants previously detected in the soils and groundwater were thoroughly evaluated. The previous investigations that provided the information on which he based his verification did not assess the area where uncovered drums of spent buffing materials had been stored. The respondent also did not follow up on prior ~~detections of VOCs, and~~ concentrations of copper in the groundwater that were in excess of the applicable RSR criteria.

A proper Phase II investigation requires sampling in areas identified during Phase I as areas most likely to be contaminated. The respondent assumed, based on references to the uncovered drums in previous investigation reports, that the area where the drums had been stored was considered and dismissed as a potential area of concern. However, there is no evidence that prior investigations specifically identified the area as a potential area of concern or that it was properly assessed and excluded from further investigation. Even if the respondent correctly determined that it was not necessary to sample the soils beneath the asphalt in the area, he made no reference to the drums or to his decision to forgo a soil analysis, which would have demonstrated that he diligently investigated the site and supported the reliability of his verification.

The previous soil and groundwater investigations on which the respondent relied were inconsistent. For example, copper was detected in the soils and groundwater in 1991 but not considered in subsequent investigations. VOCs were present in the groundwater in 1991~~, but soils were not assessed for VOCs in later investigations.~~ Combined, the investigations conducted over a period of six years do not represent a thorough and comprehensive site investigation.

The respondent again relied on limited soil and groundwater analyses to arrive at his conclusions that further investigation was not warranted at the site. The Phase I and Phase II investigations were incomplete and inconclusive at the time the respondent submitted his first verification of the site. The respondent did not investigate the site in accordance with prevailing standards and guidelines.

b. At the time the respondent verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g).

As noted, supra, post-remediation groundwater monitoring is not required in circumstances where remediation is not necessary. The record shows that the respondent did not conduct remediation at the J. C. Boardman site and the DEP accepted his verification that remediation was not necessary. Therefore, there is no basis for a conclusion that the respondent was required to conduct post-remediation groundwater monitoring at this site.

3
AMI

a. At the time the respondent verified, all potential release areas had not been investigated in accordance with prevailing standards and guidelines.

The respondent is alleged to have submitted an unreliable and unsupportable verification of the AMI site based on an insufficient and inconclusive site investigation. It is alleged that the investigation did not include the potential for releases based on the site conditions observed by DEP staff during the February and June, 2000 site inspections; did not assess the interceptor trench system or the areas on the site related to the 1986 and 1990 consent orders; and failed to address all potential areas of concern on the site including areas that are included in the BMP plan required by the 1990 consent order.

During the February and June 2000 DEP site inspections, DEP staff observed areas on the site where releases had actually occurred or where conditions created the potential for releases to the soils and groundwater. It is undisputed that the respondent did not ensure that these conditions observed by the DEP were properly investigated and remediated prior to filing his verification with the DEP. The issue to be decided is whether, under the Transfer Act, the

respondent was required to ensure that AMI revisit and investigate the site for new releases that may have occurred after remediation activities ended and prior to submitting his verification.

The Transfer Act permits the ownership of an establishment to change hands prior to any cleanup of pollution. The certifying party has until ten days *after* the transfer to submit the appropriate form and ECAF notifying the Commissioner of the transfer. §22a-134a (c) and (d). This allows for a situation, such as in the present case, where the transferee is already in possession of the establishment prior to the site assessment by the certifying party.

AMI was required under the Transfer Act to inform Metal Management of pollution or the possibility of pollution at the site prior to the transfer and to assume the obligation to investigate and remediate pollution at the site. §22a-134a(c). However, there is nothing in the Transfer Act that specifically defines the scope of the certifying party's obligations.

A review of the language of the act and its legislative history provides little guidance on the issue beyond the fact that the purpose of the act was to protect the unwary purchaser from liability, to ensure the cleanup of contaminated establishments, and to ensure that the burden of cleanup would be borne by one or more parties to the transfer. See 28 S. Proc., Pt. 6, 1985 Sess., p. 1802, remarks of Senator Benson, (Transfer Act was enacted "to protect purchasers of property from being liable for the subsequent discovery of hazardous waste on the property…"); 28 H. R. Proc., Pt. 28, 1985 Sess., p. 11969; remarks of Representative Tiffany (If the seller cannot provide assurances that the site is clean of releases at time of transfer; one party to transaction must certify to the other and to DEP that someone will assume responsibility for cleanup). However, there is no indication that the legislature ever contemplated circumstances that might obligate a certifying party to assume the liability for pollution that could be caused by the transferee and not the seller of the property.

The remediation activities at AMI were completed in June 1999. The respondent filed his remediation report with the DEP four months later in October 1999. After preparation and DEP approval of the ELUR, the respondent submitted his verification on April 17, 2000, ten months after remediation activities ended. At all relevant times, Metal Management was in

charge of facility operations and considered by DEP to be responsible for the cleanup of the conditions observed during the February inspections.[36]

There is no evidence that the delay between the completion of the remediation and the respondent's verification violated any express provision of the Transfer Act. There is no evidence that the respondent or AMI violated any provision of the Transfer Act for having failed to return to the site to investigate any condition created by the transferee, Metal Management. There is also no evidence that AMI agreed to undertake such an obligation. Therefore, I cannot conclude that the respondent's decision to verify the site without returning to investigate conditions was unreasonable under the circumstances.

The respondent is also alleged to have failed to ensure that areas addressed by the 1986 and 1990 DEP consent orders were properly investigated and remediated. The respondent argues that the Commissioner approved the remediation required by the consent orders and further remediation is not required.

The RSRs include an exclusion provision that applies to remedial action that has been approved by the Commissioner. Specifically, §22-133k-1(b) provides that where remedial action has been taken and approved in writing by the Commissioner, further remediation is not required unless ordered by the Commissioner. The respondent argues that the excavation of PCB contaminated soils and the collection of contaminated groundwater in the interceptor trenches constitute remediation that has been approved by the commissioner. Therefore, he concludes further investigation and remediation of PCB contamination on the site, assessment of the effectiveness of the trenches or further investigation of groundwater on the site is excluded from the requirements of the RSRs.

Remediation is defined in the RSRs as "the containment, removal, mitigation, or abatement of pollution …." §22a-13k-1 (52). PCB-contaminated soils were removed in two areas on the site in response to the 1986 consent order and the Commissioner approved the remediation. There is no evidence that the Commissioner took any action to require additional remediation in the excavation areas. The respondent reasonably concluded that the RSRs did not

[36] The record shows that the DEP considered the site conditions observed on February 8 and 14, 2000, to be the result of facility operations. As a result, the DEP issued a Notice of Violation to Metal Management. By June 30, 2000, Metal Management had addressed a number of the issues raised in the Notice of Violation.

require any further remediation of the PCB contaminated soils in the excavation areas that were the subject of the 1986 consent order. However, to the extent that the respondent concluded that the exclusion provision of the RSRs eliminated the need for an investigation of the area for subsequent releases, his reliance on that provision is misplaced.

The interceptor trenches were installed in response to the 1990 consent order. The record shows that the trench system was reviewed and approved by the DEP prior to installation; annual reports of conditions in the area of the trenches have been filed with the DEP and the DEP has not required any additional remedial measures in the area. The interceptor trenches contain the flow of contaminated groundwater and are therefore remedial in effect. The respondent's conclusion that he was not required to assess the effectiveness of the trench system or to oversee additional remediation in the area of the trenches is not entirely unreasonable.

However, the scope of the remedial benefits of the trench system is unknown. The system was installed in 1991 to contain contaminated groundwater that was present on the site at the time. The exclusion provision may eliminate the need for any further remediation of that contaminated groundwater, but it does not eliminate the need for a proper investigation of potential post 1994 releases on site not covered by the two consent orders. ~~the groundwater on the site.~~

It is also alleged that the respondent failed to investigate such areas of concern as the detention pond, stormwater outfalls, the aluminum tunnel and the south pad. The respondent argues that these operational areas were included in the remediation required by the 1990 consent order, addressed by the BMP plan, approved by the Commissioner, and are not subject to the RSRs. He also argues that staff observed conditions in these areas that were created after the AMI investigation and remediation activities, and are the responsibility of the transferee, Metal Management.

The respondent's argument is a misinterpretation of the exclusion provision of the RSRs. The provision explicitly excepts from further remediation any *release* that has been remediated to the satisfaction of the Commissioner. In this instance, the respondent is not alleged to have failed to remediate a release that is covered by the exclusion provision. Rather, he is charged with having failed to identify and investigate specific areas of concern. Also, the inspection and maintenance requirements of these operational areas are addressed in the BMP plan, which was intended to minimize or eliminate discharges of oily waste to the groundwater or surface water

on the site. ~~The BMPs are preventative, not remedial.~~ Moreover, even if the transferee is required to implement the inspection and maintenance provisions of the BMP plan, that requirement does not take the place of a thorough investigation of the site.

The prevailing standards required a thorough investigation of the potential post 1994 releases on site not covered by the two consent orders ~~areas of concern at this site~~ before it could be verified. The exclusion provision of the RSRs does not except from this requirement potential post 1994 releases on site not covered by the two consent orders ~~the areas of concern that were present at the site at the time of the AMI investigation~~. On that basis, there is sufficient evidence to conclude that respondent improperly verified that the site was investigated in accordance with prevailing standards and guidelines.

b. At the time the respondent verified, the extent and degree of groundwater pollution resulting from releases was not defined in accordance with prevailing standards and guidelines.

It is alleged that the respondent's verification is improper in that he failed to ensure that the site investigation included a determination of the impact of releases on the groundwater. Specifically, the investigation did not address the conditions observed by DEP staff in the February and June 2000 site inspections, did not determine the source of the PCB contaminated oils collected in the interceptor trenches, and did not sufficiently investigate the groundwater to determine whether the site was in compliance with the groundwater remediation standards.

As previously discussed, there is insufficient evidence in the record for me to conclude that the respondent was required to revisit and investigate the site prior to submitting his verification. However, in his investigation, the respondent concluded that a groundwater plume did not exist on the site and further investigation was not necessary after one round of samples was successfully drawn from four of thirty-three borings, which were intended primarily for the purpose of locating groundwater rather than to demonstrate compliance with the RSRs. The respondent considered the four samples representative of the groundwater conditions throughout the thirty-acre site and concluded that the site was in compliance with the SWPC and the Industrial/Commercial Volatilization Criteria.

The record shows that conventional groundwater monitoring techniques might not provide sufficient information to determine the quality of the groundwater on site. However, groundwater was known to flow in an easterly direction in the South Yard and in a portion of the

North Yard, and in a westerly direction in another portion of the North Yard. Contaminated groundwater has been collected in the interceptor trenches for more than a decade. Even if the subsurface conditions at the site made it unlikely that traditional investigative techniques would provide sufficient information to determine the extent and degree of any groundwater pollution, the record demonstrates that groundwater exists on the site and can be sampled.

~~The groundwater at an establishment must comply~~For potential post 1994 releases not covered by the two consent orders, any resultant groundwater plumes must be shown to be compliant with the SWPC and the Volatilization Criteria. Regs., Conn. State Agencies §22a-133k-3(a)(1). The record shows that at t~~at t~~he time of the site investigation, the respondent was aware that the DEP required application of the groundwater monitoring requirements of the RSRs to demonstrate compliance with the applicable criteria. However, the respondent argues that the SWPC does not apply to groundwater at the site because all groundwater in the South Yard flows to the interceptor trenches and does not discharge to a surface water body. The respondent also argues that the previous site investigation conducted in response to the 1990 consent order determined the extent and degree of groundwater pollution, and the Commissioner's approval of the investigations and remedial actions at that time constitute a determination that the groundwater at the site has been properly investigated.

The record does not support a conclusion that all groundwater flows to the interceptor trenches. There is no evidence that groundwater flows from the North Yard to the interceptor trenches. There is also no evidence that the interceptor trench system was intended to replace subsequent investigations of the groundwater on the site.

The respondent's argument that because the Commissioner approved the investigation and installation of the interceptor trenches, the RSRs do not require further groundwater investigation or evaluation of the trench system is also not supported by the evidence. There is no evidence that the system was intended to remediate all groundwater for all releases regardless of when the release occurred. Even if the trench system serves to remediate groundwater pollution in the South Yard, its effectiveness can only be determined by a full understanding of the substances present in the groundwater and by an evaluation of the substances collected in the trenches.

There is no evidence that the respondent required any investigation of the groundwater collected in the interceptor trenches. The record shows that the AMI investigation of

groundwater on the site consisted of four samples collected after soil remediation from wells placed in areas likely to produce groundwater, not areas most likely to be contaminated.

The AMI investigation did not adequately define the extent and degree of groundwater pollution on the site. It is therefore reasonable to conclude that the respondent verified the site without ensuring that the groundwater was adequately investigated.

c. At the time the respondent verified, light non-aqueous phase liquid had not been removed to the maximum extent practicable as required by §22a-133k-2(g) of the RSRs.

The respondent is alleged to have improperly verified that the site was remediated in accordance with the RSRs. Specifically, the remediation activities did not include the removal of light, non-aqueous phase liquid (LNAPL) from the surface, subsurface soils, and in the groundwater collected in the interceptor trenches~~.~~, and~~–~~ LNAPL, or free product, must be removed from soil and groundwater to the maximum extent practicable using techniques that are appropriate to the hydrogeologic conditions at the site. Regs., Conn. State Agencies §§22a-133k-2(g) and 22a-449(d)-106(f).

Evidence of the existence of free product at the site is based, in part, on the site conditions observed by DEP staff during the February and June 2000 inspections and is undisputed. However, there is insufficient evidence to conclude that the specific conditions observed by staff were present at the time that the AMI remediation activities ended. As previously discussed, it was not unreasonable for the respondent to have verified the site without returning to ensure that additional releases had not occurred.

There is also no dispute that oily groundwater has been collected in the interceptor trenches since 1991. ~~However, the source of this groundwater has not been determined.~~ There is no basis for a determination that the oil in the groundwater is exclusively the result of the releases addressed by the 1990 consent order. The history of site operations and the respondent's own conclusions regarding the presence of contamination throughout the site would suggest that the presence of free product in the collected groundwater may be the result of releases that have occurred since the installation of the trenches.

The respondent argues that the trenches collect all groundwater and therefore LNAPL is contained in the trenches, which satisfies the requirements of §§22a-449 (d)-106(f) and 22a-133k-2 (g). ~~However, it has already been shown that the groundwater investigation was~~

~~insufficient.~~ There is ~~therefore~~ no basis for a conclusion that the trenches collect and contain all LNAPL that may have been present on the site. There is sufficient evidence to conclude that the respondent did not ensure that LNAPL f~~o~~rom potential post 1994 releases not covered by the two consent orders was removed from the site in accordance with the RSRs.

d. At the time the respondent verified, polluted soil was not remediated to a concentration that meets the direct exposure criteria as required by §22a-133k-2(a) of the RSRs.

This charge is based primarily on allegations that the respondent's use of the Industrial/Commercial Direct Exposure Criteria (I/C DEC) for PCBs was inappropriate for this site, that he mischaracterized the site as an "other restricted access location" for purposes of applying the I/C DEC for PCBs, and that he improperly considered the entire thirty-acre site a "release area" for purposes of calculating the ninety-five percent upper confidence level of the soil sampling results for PCBs.

The established remediation standards for soil include the DEC and the PMC. §22a-133k-2(a). The DEC addresses the risk of soil contamination to human health through contact. §22a-133k-2(b)(4)(B). The PMC determines the mobility of contaminants in soil that may enter the groundwater. §22a-133k-2(c). The Residential DEC (RDEC) is applicable in all circumstances except where access to the establishment is limited to workers or visitors to the site and a properly prepared ELUR is recorded on the land records. In such cases, the I/C DEC may be used to demonstrate compliance with the RSRs. RCSA §22a-133k-2(b)(2)(A). In order to apply the I/C DEC to accessible PCB contaminated soils, the site must also qualify as "other restricted access location", i.e., the site must be located at least 0.1 kilometers from a residential/commercial area, and limited by man-made barriers. 40 CFR §761.123 (2003); §22a-133k-2(b)(2)(B). Residential/commercial areas are areas where people live or work in other than manufacturing or farming industries. 40 CFR §761.123 (2003).

The respondent considered the I/C DEC the appropriate soil remediation standard for all contaminants known to be present on the site, including PCBs. Access to the site is restricted by the perimeter fence and guarded entrance. The certifying party and real property owner, AMI, agreed to restrict the use of the site to industrial activities by filing an ELUR, which was approved by the DEP. The issue to be decided is whether the respondent properly determined the site was at least 0.1 kilometers from a residential/commercial area.

The evidence shows that there is at least one known residential/commercial area, the Stop & Shop premises, located within 0.1 kilometers of the AMI site. There is also evidence that construction of a movie theater was planned on the site of the former industrial Heublein facility, which is also located within 0.1 kilometers of the AMI site.

The respondent relied initially on measurements taken by Weston field staff to reach his conclusion that the AMI site met the distance requirements for an "other restricted access location". The respondent is permitted, in part, to rely on the advice of qualified and experienced individuals provided that reliance is "consistent with the common and accepted practice of a licensed environmental professional." Regs., Conn. State Agencies Section §22a-133v-6(c)(2).

The soil remediation standards indicate that PCB contamination is subject to more stringent controls than other contaminants. It is only PCB contamination that requires the additional access restriction, beyond man-made barriers, to insure against direct exposure to concentrations of PCBs at levels above the RDEC. Therefore, even though the respondent may have relied on the Weston field staff measurements, the responsibility for determining the appropriate DEC to be applied to the PCB contaminated soils rests with him.

Soils may be shown to be in compliance with the I/C DEC when the 95% UCL of soil analyses from a *release area* is equal to or less than the I/C DEC provided concentrations of contaminants in any one sample may not exceed two times the applicable direct exposure criterion. §22a-133k-2(e)(1). A release area is defined as "the land area at and beneath which polluted soil is located as a result of a release." §22a-133k-1(51).

The respondent considered the entire site a release area for PCBs in order to apply the 95% UCL. The record shows that AMI investigated soils based on sampling locations that were concentrated in areas *most likely to be contaminated* based on site history and more broadly dispersed throughout the remainder of the site. ~~The respondent's conclusion that the entire site constituted a release area is inconsistent with that soil sampling strategy. By including soil sample results from all areas of the site in the 95% UCL calculation, PCB concentrations were sufficiently "diluted" to allow the respondent to conclude that soils were in compliance with the I/C DEC.~~

~~The record shows that PCB contamination exists on the site in the areas formerly remediated to a level of 35 ppm, in the oily water collected in the interceptor trenches, in soils in~~

~~excess of the RDEC and, in two known areas, in excess of the I/C DEC. An LEP with the experience of the respondent could certainly appreciate the hazards that were present on the site particularly when he concluded that he was not required to further remediate those conditions that were addressed by the consent orders. Based on the known conditions at the site, the respondent reasonably could be expected to conduct an investigation consistent with his theory that the entire site represented a release area and to confirm that all of the requirements for the use and application of the I/C DEC were satisfied before verifying that the site was in compliance with the RSRs. Having failed to do so, the respondent's verification is insufficient.~~

e. At the time the respondent verified, post-remediation groundwater monitoring had not been conducted in accordance with §22a-133k-3(g) of the RSRs.

The RSRs require a plan of groundwater monitoring after remediation of a release or groundwater plume in a GB area to determine "(A) the effectiveness of soil remediation in preventing further pollution of groundwater… (B) the effectiveness of any remediation taken to eliminate or minimize identified health or safety risks associated with such a release; (C) whether applicable groundwater protection criteria, surface-water protection criteria, and volatilization criteria have been met; and (D) whether the groundwater plume interferes with any existing use of the groundwater." §22a-133k-3(g) (2). The regulations specifically provide that groundwater monitoring must be conducted for any remediation that was conducted to achieve compliance with §§22a-133k -1 through 22a-133k-3, which would include soil remediation. §22a-133k-3(g).

There is no dispute that the respondent did not require post-remediation groundwater monitoring at the site in accordance with §22a-133k-3(g)(2). In his brief, the respondent argues that the installation of the interceptor trenches to contain the migration of contaminated groundwater and the groundwater monitoring by subsequent biannual inspections of the area along the eastern boundary of the site was approved by the Commissioner and satisfies the requirements of §22a-133k-3(g)(3)(B). This section provides that groundwater monitoring in a GB area may be discontinued two years after groundwater or soil remediation if the SWPC and volatilization criteria have been met. The record shows that the respondent included in his October 1999 report a request for a waiver of the §22a-133k-3(g) requirements due to the unique subsurface conditions at the site, but verified the site before his request was granted.

Section 22a-133k-3 (g) clearly provides for post-remediation groundwater monitoring to determine the effectiveness of the remediation of a release area or a groundwater plume. The respondent's argument that the interceptor trenches and site inspections satisfy these requirements ignores the fact that soil remediation activities have occurred at the site since the installation of the interceptor trenches. The record shows that over 28,000 tons of TPH and PCB contaminated soils were removed from the site under the respondent's supervision. The record also shows that, although PCBs have been investigated and remediated at the site, the source of the PCB contamination has not been determined. Based on the respondent's conclusions that groundwater flows in the direction of the interceptor trenches, monitoring the levels of PCB contamination in the oily water collected in the trenches is one way to determine if the remediation was effective.

At a minimum, the respondent had access to the groundwater that was collected in the interceptor trenches to determine the effectiveness of the remediation conducted under his oversight. There is evidence that attempts to access groundwater were successful during the December 1998 site assessment. It is evident that groundwater monitoring may have been difficult; however, it was possible. The respondent failed to conduct post remediation groundwater monitoring as required by the RSRs.

f. At the time the respondent verified, pollutants were present at the site which posed an unacceptable risk to human health and, therefore, the respondent did not hold paramount the health, safety and welfare of the public.

It is alleged that, having failed to properly investigate and remediate the site, the respondent's verification demonstrates his disregard for the welfare of the public. This allegation is premised on the fact that the respondent verified the site while the interceptor trenches were collecting oily water containing high concentrations of PCBs, and while PCBs and TPH were present in the soils at levels that exceeded the applicable DEC.

There is no evidence that specifically points to the respondent's lack of concern for the public welfare. Therefore, I must rely on circumstantial evidence to determine whether the respondent carried out his duties while considering the health, safety and welfare of the public. Evidence of the respondent's conduct may provide the basis for a reasonable inference concerning his regard for the public, however, my conclusions must not be the result of

speculation and conjecture. *Service Road Corporation v. Quinn*, 241 Conn. 630, 647 (1997). It is as reasonable to infer from the evidence that the respondent believed his determinations were correct and that he made the welfare of the public his primary concern, as it is to infer that he did not consider the health and safety of the public. I therefore cannot conclude that at the time the respondent verified the site, he did not hold paramount the health, safety and welfare of the public.

g. At the time the respondent used his seal, his verification did not comply with the applicable provisions of the RSRs.

The LEP regulations provide that the respondent may use his seal to attest or affirm that in his professional judgment, his verification and the professional services he rendered in connection with the verification comply with the provisions of the Transfer Act, the RSRs and the LEP regulations. §22a-133v-5(b)(2). The regulations prescribe the use of a seal in the event the respondent does not have a valid license or has a financial interest in the property other than professional fees. §22a-133v-5(b)(1) and (5). The respondent may not affix his seal to any document that is not a verification. §§22a-133v-5(b) (1). The respondent is expressly prohibited from affixing, or allowing his "seal to be affixed, to any verification or any other document in any manner other than is provided for" in the LEP regulations regarding the design and use of the seal. §22a-133v-5(b)(6).

There is no evidence that the respondent had not been issued a valid license at the time he used his seal, or that he has any financial interest in the AMI site beyond the fees for his professional services. There is no evidence that he used his seal on any document other than his verification. There is also no evidence to demonstrate that the respondent did not believe, based on his professional judgment, at the time he used his seal that the verification complied with the applicable provisions of the RSRs. There is no evidence that the respondent used his seal in any manner not provided for by the applicable regulations.

E
Violations of Standards of Professional Conduct

1
Mark Eyelet

As a licensee, the respondent has an affirmative obligation to understand and comply with the laws and regulations that govern the privilege of obtaining and maintaining his license. Prior to the effective date of the LEP regulations, the respondent was required to perform his duties in accordance with the standard of care applicable to environmental professionals engaged in similar work. §22a-133v(c). These requirements were in place at the time the respondent was identified as an interim environmental professional and when he rendered his verification of the Mark Eyelet site. These are the appropriate standards by which to evaluate the respondent's professional conduct at the time of his verification of the Mark Eyelet site.

To qualify as an interim environmental professional, the respondent had to demonstrate that he had sufficient training and experience in investigating and remediating releases of hazardous waste. §22a-133v(h). It is not unreasonable to conclude that, having qualified as an interim environmental professional, the respondent would be expected to be aware of the industry standards for hazardous waste site investigations.

Even though the Mark Eyelet site assessment was one of the first to be verified under the LEP program and in accordance with the RSRs, it is evident that it was customary practice for environmental professionals to conduct a thorough, multi-phased site investigation. There is substantial evidence on the record that the Phase I and II investigations that provided the basis for the respondent's verification were not totally ~~in~~sufficient and ~~in~~conclusive. ~~Therefore, it is reasonable to conclude that the respondent did not perform his duties in accordance with the standard of care applicable to professionals in his field.~~ The evidence in the record is not sufficient to establish, by a preponderance of the evidence, that the respondent committed professional misconduct with respect to his verification of the Mark Eyelet establishment in violation of §22a-133(c) of the General Statutes.

2
J.C. Boardman/AMI

The general charges in the Notice allege that the respondent committed misconduct in the performance of his duties at the J. C. Boardman and AMI site by having violated several provisions of the LEP Rules of Professional Conduct. Regs., Conn. State Agencies §22a-133v-6. Specifically, the respondent is alleged to have failed to apply the knowledge and skill of an environmental professional and in so doing failed to act with reasonable care and diligence. The respondent is also charged with having failed to exercise professional judgment; failed to follow

the requirements and procedures set forth in the applicable statutes and regulations; and failed to make a good faith effort to identify and obtain the relevant data and other information necessary to discharge his obligations under the applicable statutes and regulations. §§22a-133v-6(c)(1), 22a-133v-6(d)(2)(A) through (C).

The LEP Rules of Professional Conduct establish the standards reasonable care and diligence. The State Appellate Court has addressed the meaning of diligence and reasonableness. "Diligence, [is] defined by Webster's Third New International Dictionary as "persevering application: devoted and painstaking application to accomplish an undertaking," and as "the attention and care required of a person." "Reasonableness . . . is an objective standard, involving an analysis of what a person with ordinary prudence would do given the circumstances…. Reasonableness involves a determination of how "a person of ordinary prudence in such a situation [would] have behaved, not how the [respondent] behaved." *Michelle Phillipe v. Francis J. Thomas*, 3 Conn. App. 471, 474-475, (1985). [R]easonable efforts means doing everything reasonable, not everything possible." *In re Eden F.*, 48 Conn. App. 290, 312 (1998).

The record amply demonstrates that the respondent did not at all times perform his duties diligently and reasonably. For example, he relied on or supervised investigations that were not conducted in accordance with the standards commonly employed by environmental professionals. All areas of concern were not identified and assessed at either the Boardman site or the AMI site. He failed to adequately assess groundwater conditions, ~~particularly~~ at the AMI site, but determined by field investigation that groundwater monitoring was impracticable and requested a waiver of groundwater monitoring from the Commissioner. B~~b~~ut the waiver request had not been acted upon by the date of the verification ~~despite the presence of significant hazards~~. He improperly excluded from his investigation areas on the AMI site that had previously been remediated years before but may have been subject to -post 1994 releases. ~~The respondent failed to do everything reasonable to determine the effect of the remediation at the AMI site. The respondent's conduct at the Boardman and AMI sites failed to conform to the standards of reasonable care and diligence required of LEPs. §22a-133v-6(c)(1).~~

The respondent has argued throughout the proceedings and in his brief that many of his conclusions and decisions were based on his professional judgment, which is a component of the prevailing standards and guidelines for site investigations. Professional judgment is essential to

a proper investigation but it does not replace professional responsibility, including the responsibility to conduct a thorough and conclusive investigation and to apply the appropriate remediation standards to specific conditions. Professional judgment also cannot be justified through the lens of hindsight.

The investigation and remediation standards provide the framework for the professional opinion of an LEP. Although that opinion is expressed in light of his professional judgment, it follows from a proper investigation of a site and a thorough understanding of the circumstances that exist at the time. The record demonstrates that the respondent's decisions and conclusions~~, at the time he made them,~~ were not always thoroughly documented and for the AMI site did not sufficiently demonstrate compliance with the RSRs for potential post 1994 releases not covered by the two consent orders. ~~based on a proper investigation or a thorough understanding of the conditions that existed at a site.~~

~~Reviewing the respondent's conduct in the context of the time he verified the Boardman and AMI sites, the record shows that the respondent relied on investigation data that was incomplete and inconclusive. He also relied extensively on the plans and outcomes of previous investigations for AMI even though a number of those investigations were conducted years ago and site operations had continued in the interim. The respondent bypassed opportunities to evaluate the effectiveness of remediation at the AMI site before he verified the site. Evidence of such conduct amply supports a conclusion that the respondent did not, at all times, exercise professional judgment. §22a-133v-6(d)(2)(A).~~

The respondent verified that the Boardman and AMI establishments were investigated in accordance with the prevailing standards and guidelines. In the case of AMI, he also verified that the site had been remediated in accordance with the RSRs. The record shows otherwise. For example, the respondent did not ensure that the investigation of either complied with prevailing investigation practices. ~~The investigation of the AMI site is inconsistent with the respondent's own characterization of the site as a release area. The remediation of pollution at the AMI site is inconsistent with the applicable RSR criteria.~~

Also, as previously discussed, the record demonstrates that the respondent did not at all times exercise professional judgment or perform his duties at the Boardman or AMI eablishments with reasonable care and diligence. The respondent did not document compliance with ~~follow~~ the requirements of the Transfer Act or the applicable provisions of the RSRs, or

conform his conduct to the standards set forth in the relevant provisions of the LEP regulations. §22a-133v-6(d)(2)(B).

~~The respondent is also required to make a good faith and reasonable effort to identify and obtain the data and other information he needed to fully understand the environmental conditions at each site. §22a-133v-6(d)(2)(C). The record shows that the respondent verified the sites without doing everything that was reasonable to obtain all of the data available to him to demonstrate that the Boardman and AMI sites complied with the requirements of the Transfer Act.~~

The respondent did not properly assess the environmental conditions at either site. For example, he did not identify and investigate all areas of concern. He did not conduct sufficient soil and groundwater analyses including potential post 1994 releases at the AMI site not covered by the two consent orders. ~~He did not investigate the AMI site in a manner consistent with his determination that the entire site constituted a release area. He did not investigate areas at the AMI site where approved remediation activities had previously occurred and he did not use the information available to him to confirm the effectiveness of the AMI remediation activities.~~

Even though the respondent did not make reasonable efforts to obtain the information necessary to discharge his duties under the Transfer Act and the RSRs, I cannot make a similar conclusion regarding his good faith. Good faith ordinarily describes a state of mind denoting honesty of purpose, a lack of intent to defraud, and faithful to one's duty or obligation. "The determination of good faith involves an inquiry into the [respondent's] motive and purpose as well as actual intent." *Phillipe v. Thomas,* supra, 3 Conn. App. 476. There is no evidence that the respondent's conduct stemmed from any intent to mislead or from a dishonest purpose.

To the extent that a determination that the respondent's efforts were unreasonable may be used to demonstrate an improper motive, the record does not support such a conclusion. However, for many of the reasons previously discussed, the record does support a conclusion that the respondent's efforts fell short of those required of an LEP responsible for conducting a site investigation in accordance with the provisions of the Transfer Act.

The claimant has not demonstrated, by a preponderance of the evidence, that the respondent committed professional misconduct with respect to his verification of the Boardman and AMI establishments in violation of the LEP Rules of Professional Conduct. Regs., Conn.

State Agencies §22a-133v-6. With respect to the subject sites, rejection of the verification or requiring further documentation could have resolved these issues.

~~*IV*~~
~~*RECOMMENDATION*~~

~~As an LEP, the respondent is in the business of rendering opinions on environmental conditions based on what must be professionally competent site investigations and remediation activities. The LEP program is a key component of the Transfer Act, the goals and purposes of which depend on professionally competent LEPs. The Rules of Professional Conduct for LEPs are designed specifically to "establish and maintain a high standard of integrity and dignity" in the LEP practice. §22a-133v(c). For these reasons, misconduct warrants sanctions in order to preserve the standards of practice and the integrity of the LEP program.~~

~~The respondent's misconduct with respect to the Mark Eyelet and J.C. Boardman sites is mitigated somewhat by the fact that, at the time, LEPs lacked familiarity with the RSRs and an understanding and appreciation of how various provisions of the RSRs would be interpreted and applied by the implementing agency, the DEP. Further, there is no evidence to support the conclusion that the respondent acted out of bad faith, or with a disregard for the safety of the public and the environment. However, by the time the respondent verified the AMI site, he knew what was expected. An environmental professional with the skills and experience of the respondent certainly should have appreciated the nature of the operations at the AMI site and the significant hazards that resulted from those operations. It is primarily on this basis that I recommend that the Board sanction the respondent.~~

~~The range of sanctions available to the Board includes the permanent or temporary revocation of the respondent's license, suspension and/or the imposition of conditions on his license. In this case, I do not recommend that the Board permanently or temporarily revoke the respondent's license. A permanent revocation of his license could foreclose his opportunity to return to the practice and meet the expected professional standards of conduct. Also, a temporary revocation of his license, regardless of the length of time, could possibly have the effect of a permanent revocation given the possibility that the respondent could be refused a license on the grounds that he was found to have violated any provision of the LEP Program. §22a-133v(g).~~

~~However, the respondent's misconduct is serious and the Board must impose a disciplinary sanction of sufficient measure to preserve the integrity of the profession and reflect the serious nature of the respondent's misconduct. Accordingly, I recommend a reasonable period of suspension combined with the imposition of appropriate conditions on the respondent's license at the time of renewal. As a governing body, comprised in part of environmental professionals, the Board is in the best position to determine the period of suspension that would best reflect an appropriate sanction for the respondent's misconduct, the impact of this administrative process and any other relevant factors. The Board is also the best authority to establish the proper conditions on the respondent's license that would allow him to return to practice prepared to meet the standards of professional conduct expected in his field.~~

~~The respondent should be strongly advised to remain cognizant of his obligations under his license. He should be advised to remember that, regardless of the specific source of the standards for site investigations, the DEP is responsible for implementing the programs that are designed to protect the environment and public health and safety, including the Transfer Act. The respondent should also remember that the Commissioner, not the LEP community, was authorized to adopt the LEP Rules of Professional Conduct and the Remediation Standard Regulations. Finally, the LEP profession is not self-policing; the Commissioner is charged with auditing the actions of an LEP and with ensuring that the provisions of the Transfer Act have been satisfied.~~

~~May 3, 2005~~ ~~/s/ Jean F. Dellamarggio~~
~~Date~~ ~~Jean F. Dellamarggio, Hearing Officer~~

The State Board of Examiners of Environmental Professionals by:

John Adams

Russell Slayback

Dennis Unites

Kelly Meloy

David Askew

APPENDIX A

P A R T Y L I S T

Proposed Final Decision
In the matter of Russell Bartley, Case #02-101/LEP License #104

PARTY	REPRESENTED BY
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