Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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OFFICE OF ADJUDICATIONS

IN THE MATTER OF	***:***	***SPILL CASE No.: 0094-02874***
CAROL AND ALBINO SIMEONE	***:***	***SEPTEMBER 8, 2014***

FINAL DECISION

I
SUMMARY

On April 29, 2008, acting pursuant to General Statutes § 22a-452a, the Commissioner of Energy and Environmental Protection ("Commissioner") issued a Notice of Intent to File a Certificate of Lien against real property known as 1239 Farmington Avenue, Berlin owned by Carol and Albino Simeone (Property or Site). The lien serves as a mechanism to require reimbursement of money paid to clean-up a spill of gasoline and diesel fuel from underground storage tanks serving the filling station located on the Property. A hearing was held pursuant to General Statutes § 22a-452a(c)(2) to determine if probable cause supported the filing of the certificate of lien. On September 17, 2008, the hearing officer issued a final decision finding probable cause for the filing of the Certificate of Lien (lien)[1]. On December 24, 2008 the lien was filed on the land records of the Town of Berlin. A request for hearing pursuant to § 22a-452a(e) was filed on January 22, 2009, initiating this hearing process.

[1] "Ruling on Threshold Issues and Probable Cause Determination," Dellamarggio, J. (Appendix A). It is clear that this was a final decision. "Under § 4-166 (3), the term "'final decision' means (A) the agency determination in a contested case . . . . The term does not include a preliminary or intermediate ruling or order of an agency, or a ruling of an agency granting or denying a petition for reconsideration." (Internal quotation marks omitted.) *Town of Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 369 (1996). Nothing about the earlier ruling was preliminary or intermediate, it was a final determination that probable cause for the placement of the lien existed.

The parties to this matter agreed that no testimony was required and instead stipulated to exhibits and filed briefs between May and July of 2009. This matter was held in abeyance during ultimately unsuccessful settlement discussions. On June 27, 2014, supplemental briefs were filed and the parties were provided an opportunity to argue their briefs on the record on August 7, 2014[2].

I have reviewed the record in this matter, including the documentary evidence, and the relevant law. Following this review, for the reasons set out below, I conclude that the amount of the $325,642.63 lien should not be reduced and should not be discharged in its entirety.

II
DECISION

A
FINDINGS OF FACT

I incorporate the facts found in the September 17, 2008 final decision as findings of fact in this decision.[3] I also find the following additional facts, which are undisputed:

1. The lien was filed on the land records of the Town of Berlin on December 29, 2008 and is recorded at Volume 611, Page 556.
2. On August 15, 2002, the Commissioner sought and received partial reimbursement, in the amount of $166,663.30, for funds expended by the Department to clean-up the spill on the Property from the Underground Storage Tank Petroleum Clean-Up Account (UST fund).[4]

[2] A recording of this argument is available by contacting the Office of Adjudications.

[3] See Appendix A, pp. 2-3.

[4]Subsequent legislative changes renamed the Underground Storage Tank Petroleum Clean-Up Program.

B
CONCLUSIONS OF LAW

The contested issue in this matter, as clarified by the parties' supplemental briefs and verbal representations at oral argument, is a narrow legal one. The Simeones argue that the lien is invalid and should be discharged because the Commissioner has abused his discretion by choosing to place the lien prior to, or instead of, seeking additional reimbursement for his expenses from the UST fund. The Commissioner disagrees, and argues that the placement of a lien is one of many options available to him to recover money expended by the Department to clean up the Simeones' Property. I conclude, for the reasons set forth below, that the Commissioner's actions were either required or a lawful exercise of discretion within his statutory authority; therefore, the lien is valid and should not be discharged.

1
SCOPE OF HEARING

A hearing such as this one, held pursuant to General Statutes § 22a-452a(e) is "limited to the issues of a reduction in the amount of the lien or a discharge of the lien in its entirety." The scope of this hearing under this provision logically permits a factual dispute on the amount of money expended by the Department to clean up a spill, using a standard of proof more stringent than probable cause. It is not entirely clear that a legal dispute regarding the validity of the lien is within the scope of this hearing as contemplated by the legislature. It remains possible, however, that the phrase "discharge of the lien in its entirety" could be interpreted to include the discharge of a lien due to a legal deficiency. Because my research reveals this is appears to be the first hearing held pursuant to §22a-452a(e) and the question would be one of first impressions before our courts, I consider the Simeones' arguments, and do not reject them as outside the scope of the hearing and my jurisdiction in this matter.

2
STANDARD OF REVIEW

There was much discussion in the parties' briefs and at argument, partly at my direction, of the applicable standard of proof in this matter, which appears to be a question of first impression. Because there are no facts in dispute, I need not determine the appropriate standard of proof under which facts must be established. Instead, I am left to consider only a question of law, which is primarily a question of statutory construction.

When construing a statute, "[t]he meaning shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z. "[C]ommon sense must be used and courts will assume that the legislature intended to accomplish a reasonable and rational result. . . . When two constructions are possible, courts will adopt the one which makes the statute effective and workable, and not one that leads to difficult and possibly bizarre results." *Red Hill Coalition, Inc. v. Town Planning and Zoning Commission*, 212 Conn. 727, 737-38 (1989). "[W]e presume that laws are enacted in view of existing relevant statutes ... and that [s]tatutes are to be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law." (Citations and internal quotation marks omitted.) *Conway v. Wilton*, 238 Conn. 653, 664 (1996). "We are obligated, furthermore, to read statutes together when they relate to the same subject matter." *Felia v. Westport*, 214 Conn. 181, 187 (1990).

When construing environmental statutes, it is necessary to be mindful that "[e]nvironmental statutes are remedial in nature and should be construed liberally to accomplish their purposes." *McManus v. Commissioner of Env. Protection,* 229 Conn. 654, 663 (1994).

3

EXHAUSTION OF ADMINISTRATIVE REMEDIES AND COLLATERAL ATTACKS

At the outset, it is important to note that the Simeones' argument in this matter was made, and decided in the final decision issued in the earlier probable cause hearing (see Appendix A.) In that matter, the final decision summarizes the Simeones' claim, stating that "[t]hey argue that filing the lien would be arbitrary and capricious and a violation of due process because the department has sufficient security for its expenses from the funds allocated to the site from the UST Clean-UP Account." (Appendix A, p.6) This argument was rejected by the Hearing Officer, in part because "[t]he Commissioner is clearly authorized to secure the recovery of public funds used to contain or remediate pollution on private property without consideration of the source of funds that may ultimately satisfy the state's claim." *Id.* In addition, "the Commissioner's compliance with a legislative mandate to file a certificate of lien on a finding of probable cause is not arbitrary or capricious." *Id.* This decision was appealed to Superior Court, but that appeal was withdrawn. As a result of that withdrawal, a significant question of whether all available remedies relevant to legal arguments made in that decision have been exhausted. It is possible that, having failed to appeal the earlier decision, the Simeones are bound by it, and cannot collaterally attack it by raising the same legal

arguments already decided in this proceeding.[5] If this were the case, it would deprive me of subject matter jurisdiction over those arguments already raised, preventing me from deciding them again in this matter. However, because I agree with the conclusions reached in the prior decision, and because the circumstances surrounding that withdrawal are not entirely clear from this record, I continue in my analysis and reach the conclusions of law set out in the remainder of this decision.

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[5] During legal argument, each party was asked to address this issue. Both parties argued that the Simeones were not precluded from pursuing a line of legal argument in this proceeding that was adjudicated in the earlier proceeding. Counsel for Department Staff indicated that he believed that this proceeding and the earlier proceeding were actually one proceeding that was bifurcated. I disagree. Nothing in General Statutes § 22a-452a indicates that, in order to proceed to a hearing on the amount of discharge of the lien pursuant to § 22a-452a(e), one must first request a hearing on probable cause, pursuant to § 22a-452a(c)(2). It is not hard to imagine a scenario where a party believes that there is probable cause for the placement of the lien, but disputes the Department's proof of the amount of money it expended. In that instance, there may only be one hearing.

"When a party has a statutory right of appeal from a decision of the administrative agency, he may not, instead of appealing, bring an independent action to test the very issues which the [administrative] appeal was designed to test." (Internal quotation marks omitted.) *Housing Authority v. Papandrea*, 222 Conn. 414, 423 (1992). This is, essentially, what the Simeones' seek to do in this proceeding. Asserting the same legal argument that has been previously adjudicated may represent a failure to exhaust administrative remedies.

By requesting this second proceeding and seeking to raise issues previously decided, Simeones' are engaged in an impermissible collateral attack on that earlier decision. "[A] direct attack on a judgment or decree is an attempt, for sufficient cause, to have it annulled, reversed, vacated, corrected, declared void, or enjoined, in a proceeding instituted for that specific purpose, such as an appeal, writ of error, bill of review, or injunction to restrain its execution; distinguished from a collateral attack, which is an attempt to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose." *Lewis v. Planning & Zoning Comm'n*, 49 Conn. App. 684, 688 (Conn. App. Ct. 1998). The purpose of this matter is limited to determining whether the lien should be reduced in amount or discharged in its entirety. General Statutes § 22a-452a(e). It is, at best, unclear if the statutory language regarding discharge of the lien presents a forum to argue about the validity of the Commissioner's actions, instead of simply the amounts expended in the clean-up of a spill. It is clear, however, that an appeal of the final decision in the earlier proceeding would have provided a forum in which the Simeones' argument could have been litigated.

Note that a distinction can be drawn between factual issues and legal issues raised in these proceedings. If facts were found under the probable cause standard, it would mean that the hearing officer had found reasonable grounds to support filing of the lien. Allowing those factual questions to be raised again at this second proceeding would mean that those facts were reviewed under a higher standard of proof, such as preponderance of the evidence or clear and convincing evidence (see Section II.B.1 above). Questions of law, however, are not decided using a different standard in this proceeding; the law is the law.

As stated above, given that the record provides only limited information regarding the withdrawal, that I reach the same conclusion as the final decision in the earlier proceeding, and that there is sufficient ambiguity regarding the scope of a hearing held pursuant to § 22a-452a(e), it is not necessary that my decision turn on this point alone and I set out additional conclusions of law.

4

VALIDITY OF THE LIEN AND ABUSE OF DISCRETION

In their briefs, the Simeones argue that the statutes concerning the UST fund, General Statutes §§ 22a-449a through 22a-449q, provide a specific statutory scheme regarding the reimbursement of funds expended in cleaning petroleum spilled from leaky underground storage tanks as opposed to the more general statutory framework for the clean-up of all types of spills set out by §§ 22a-451 through 22a-452f. They contend that the because of the relationship between these specific and more general statutory schemes, the Commissioner is obligated to seek reimbursement from the more specific UST Fund first, before pursuing other, more general mechanisms which may be available to provide reimbursement and that failure to proceed in this order would be an abuse of his discretion. During argument, counsel for the Simeones presented a slight variation on this argument, stating that the Commissioner, having sought and received reimbursement from the UST fund once already for work performed on this site, abused his discretion by not returning to the UST fund for reimbursement and that until he is denied reimbursement from the fund, he is not free to pursue the other mechanisms for reimbursement. The Commissioner argues that he may seek reimbursement from the UST fund, but is not required to do so. I agree with the Commissioner.

The plain language of § 22a-449f(i) states, in relevant part, that "[w]henever the Commissioner determines that as a result of a release . . . clean-up is necessary . . . *the commissioner may undertake such actions using not more than one million dollars*, within available resources, for each release . . . from an underground storage tank or an underground storage tank system . . . for which the responsible party was or would have been required to demonstrate financial responsibility. . . ." (Emphasis added.) The word

"may" indicates that this language provides the Commissioner with the option to use money from the UST Fund, not that he is required to do so. "[T]he word 'may,' unless the context in which it is employed requires otherwise, ordinarily does not connote a command. Rather, the word generally imports permissive conduct and the conferral of discretion. . . . Therefore, when the legislature opts to use the words 'shall' and 'may' in the same statute, they must then be assumed to have been used with discrimination and a full awareness of the difference in their ordinary meanings." (Citation Omitted; internal quotation marks omitted.) *Lostritto v. Cmty. Action Agency of New Haven, Inc*., 269 Conn. 10, 20 (2004). There is no context which indicates that the word "may," or the Commissioners ability to use money from the UST fund, is anything but permissive and discretionary. See *Beacon Point Marine, Inc. v. McCarthy*, 2007 Conn. Super. LEXIS 1029 * 12 (2007) (Word "may" generally imports conferral of discretion).

This language contrasts the mandatory language of General Statues § 22a-452a which states, in relevant part, that money expended by the Commissioner to clean up a spill, "shall be a lien on the real estate on which the spill occurred or from which it emanated . . . ." Mandatory language can also be found in General Statutes § 22a-451(c), which states, in relevant part, "[w]henever the Commissioner incurs contractual obligations pursuant to subsection (b) of this section and the responsible [entity] does not assume such contractual obligations, the Commissioner shall request the Attorney General to bring a civil action . . . to recover the costs and expenses of such contractual obligations." These statutory provisions must be read to together to create a consistent body of law. *Conway v. Wilton , supra*, 238 Conn. 664. When read together, these provisions present the Commissioner with a variety of tools to handle releases, some which are purely discretionary and others which are mandatory.

The statutes are silent on the order in which those tools must be deployed. Despite their contention that the Commissioner must first pursue reimbursement from the UST fund, the Simeones fail to cite any

statutory language containing such a requirement. Instead, the Simeones argue that the Commissioner has abused his discretion. I find no evidence, however, that the Commissioner has acted arbitrarily or capriciously.[6] The facts reveal that the Simeones stopped the clean-up of the site and the Commissioner stepped in and completed the work.[7] It is predictable and reasonable that when the Commissioner expends State money to clean up a private site, he will seek reimbursement of those funds, using the tools available to him.

The Simeones argue that by taking over the clean-up of the site and then placing a lien instead of seeking reimbursement from the UST fund, the Commissioner denied them the protections of the UST fund, into which they paid tax dollars in exchange for which the UST fund would provide financial assurance in the event of a spill. This action was not an abuse of the Commissioner's discretion. The Simeones' obligation to clean-up the site was absolute and independent of any right to be reimbursed. When the Simeones stopped work on the site before the clean-up was complete, the Commissioner was well within his statutory mandate to take over the clean-up. It is not the Commissioners actions which deprived the Simeones the protections of the UST fund, it is their own. Had the Simeones continued the clean-up, they could have sought reimbursement.

[6] Arbitrary means "founded on prejudice or preference rather than on reason or fact." Capricious means unpredictable or "contrary to the evidence or established rules of law." Black's Law Dictionary (7th Ed. 1999).

[7] The Simeones argue that they stopped the clean-up of the site because they stopped receiving timely reimbursement from the UST fund. Questions of the proper administration of the UST fund are properly raised using the review mechanisms contained in the UST fund statutes, General Statutes §§ 22a-449a through 22a-449q, and cannot be adjudicated in this hearing. It is clear, however, that regardless of whether funds were being reimbursed by the UST fund, the Simeones obligation to clean-up the spill on their property was absolute and independent of any reimbursement.

Once State funds have been expended to clean up a spill, the placement of the lien is mandatory. The Commissioner only exercises discretion pursuant to General Statutes § 22a-449f(i) in determining whether or not to also seek reimbursement from the UST fund. The Commissioner is not obligated to seek reimbursement from the fund initially, and, after having sought reimbursement from the fund once, is not obligated to continue to do so. No statute or case law indicates otherwise.

III

Conclusion

A reduction in the amout of the lien, or a discharge of the lien in its entirety, is not approriate given the undisputed facts in this record. The lien in the amount of $325,642.63 is valid.

Brendan Schain, Hearing Officer

SERVICE LIST

In the matter of Carol and Albino Simeone – Spill Case No.: 0094-02874

PARTY	REPRESENTED BY
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STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF ADJUDICATIONS

IN THE MATTER OF	:	*SPILL CASE NO. 0094-02874*
CAROL AND ALBINO SIMEONE	:	*SEPTEMBER 17, 2008*

RULING ON THRESHOLD ISSUES AND PROBABLE CAUSE DETERMINATION

I
RULING

A
Background

This matter involves a determination of whether probable cause exists for the filing of a certificate of lien by the Department of Environmental Protection as a claim for amounts paid by the Commissioner pursuant to General Statutes §22a-452a(a)[1]. The parties to this matter are Carol and Albino Simeone and the DEP Environmental Cleanup Cost Recovery Unit.

On April 29, 2008, the department issued notice of its intent to file a certificate of lien on property located at 1239 Farmington Avenue, Berlin (property/site). The purpose of the lien is to secure a claim for expenses and costs in the amount of $325,642.63 paid by the Commissioner to investigate, contain, remove, monitor and/or mitigate the effects of pollution and contamination originating on the site. General Statutes §22a-451(b).

The Simeones, owners of the site, timely filed a request for hearing. §22a-452a(c)(2)[2]. A hearing was scheduled for July 17, 2008, with a prehearing conference to be conducted

[1] Section 22a-452a(a) provides, in pertinent part, that "any amount paid by the Commissioner ... to contain and remove or mitigate the effects of a spill ... shall be a lien against the real estate on which the spill occurred or from which it emanated...."

[2] Section 22a-452a(c)(2) authorizes the owner or other person of record to request a hearing, which is limited to determining whether there is probable cause to file the lien.

immediately prior to the start of the hearing. During the prehearing conference, the parties stipulated to the admission of all proposed exhibits for the limited purpose of the probable cause portion of this proceeding[3]. The department objected to the Simeones' list of legal issues regarding the existence of probable cause and the parties requested an opportunity to brief these threshold issues. Briefs were filed on August 4, 2008. In light of the following ruling on the threshold issues, I have proceeded to the determination of probable cause.

B
Relevant Facts

For the purposes of this ruling and probable cause determination, the following facts are undisputed:

1. For all times relevant to this proceeding, the Simeones have owned the site and operated Simeone's Mobil. In 1994, gasoline contaminated soils were found at the site during excavation conducted by the Department of Transportation to widen Farmington Avenue. The owners' consultant, Advanced Environmental Interface, confirmed in 1995 that an extensive plume of separate phase gasoline and diesel originated at the site and migrated off-site to the adjacent property owned by Horbal Brothers, Inc., and located at 1241 Farmington Avenue. (Ex. DEP-145.)

2. The Simeones applied to the Underground Storage Tank Petroleum Clean-Up Account Review Board (UST Clean-Up Account) in late 1995 and were approved for reimbursement up to $1,000,000.00 for expenses related to "site #428", specifically for costs to construct a system to recover the pollution on both properties. This recovery system was shut down in late 1999 due to the Simeones' inability to pay their contractors. The department assumed the remediation, including the restart of the recovery system, in January 2000. (Exs. DEP-143, 145, exs. PET[4]-1, 3.)

[3] Subsections 22a-452a(c) and (e) provide for a hearing to determine whether probable cause exists to file the lien and, if a hearing is requested within thirty days after filing of the lien, to then determine whether the lien should be reduced or discharged in its entirety.
[4] The Simeones' exhibits.

3. The department continued to manage and incur expenses associated with the ongoing remediation of the site and adjacent property from January 2000 until 2006 when it was determined that the pollution on the adjacent property had been removed except along the Simeone property line. As of June, 2008, part of the remediation system was still in operation. Approximately $1,000,000.00 has been expended for remediation of the two properties since January 2000. (Ex. DEP-145.)

4. At various times, the Simeones, Horbal Brothers, Inc., and the DEP applied for reimbursement from the UST Clean-Up Account funds allocated to site #428. Apparently, claims from the three parties exceeded the $1,000,000.00 cap for site #428 by March 2003. In 2006, a portion of the funds originally claimed for site #428 were reimbursed to the Simeones from an additional $1,000,000.00 allocation from the UST Clean-Up Account for "site #1132."[5] The balances remaining from the UST Clean-Up Account allocations for sites #428 and #1132 are $386,598.22 and $604,218.53 respectively. (Ex. PET-1.)

5. The Notice of Intent to File a Certificate of Lien claims "expenses in the total amount of $325,642.63, all of which is principal costs and expenses." The notice further states that the department incurred the expenses for operating and maintaining the remediation system at the site since February 2000. The Notice provides the time for requesting a hearing and indicates service of the Notice to owners, mortgagees or lien holders of record, specifically, the Simeones, Horbal Brothers, Inc., and Earth Technology, Inc.

[5] The Underground Storage Tank Petroleum Clean-Up Account Review Board is authorized to award reimbursement of expenses for costs incurred as a result of a release or suspected release, including the costs of third parties. General Statutes §22a-449f. Presumably, the Board authorized reimbursement for each property or for two distinct, eligible releases from the site.

C
Discussion

1
Threshold Issues

The Simeones have raised three threshold issues, which they claim demonstrate that probable cause to file the Certificate of Lien does not exist. First, they argue that because the department has adequate security from the funds allocated to the site from the UST Clean-Up Account, the department's decision to seek a lien on their property is arbitrary and capricious and a violation of due process. Next, they argue that §22a-452a is unconstitutional because it is part of a statutory scheme that provides for the collection of a debt while denying the Simeones their constitutional right to a jury trial. Finally, the Simeones maintain that I have the discretion to decide that the department should seek recovery from the UST Clean-Up Account before it pursues its remedy under §22a-452a.

2
Relevant Statutes

The Connecticut Water Pollution Control Act (CWPCA) [6] sets forth a comprehensive statutory scheme enacted for the purpose of protecting the waters of the state from pollution. The Commissioner is charged with the responsibility to supervise, administer and enforce the CWPCA. §22a-424. As part of those duties, the Commissioner must "to the extent possible, immediately, whenever there is discharge, spillage, uncontrolled loss, seepage or filtration of oil or petroleum . . . upon any land or into any of the waters of the state . . . which may result in damage to . . . private property . . . cause such discharge, spillage, uncontrolled loss, seepage or filtration to be contained and removed or otherwise mitigated by whatever method [the] [C]ommissioner considers best and most expedient under the circumstances." The Commissioner is also required to determine the person, firm or corporation responsible for causing the pollution. §22a-449(a).

If the responsible party does not act immediately to contain or remediate the pollution to the Commissioner's satisfaction, the Commissioner is authorized to do so by engaging the

[6] General Statutes §§22a-416 through 22a-527.

services of licensed contractors. §22a-451(b). Any person or entity that directly or indirectly caused the spill is liable for the Commissioner's "costs and expenses incurred in investigating, containing, removing, monitoring or mitigating" the pollution and for legal and court fees, administrative costs, and interest. §22a-451(a). If the responsible party fails to assume the Commissioner's costs and expenses, the Commissioner is required to sue to recover them. §22a-451(c). Where the Commissioner has expended funds to contain or remediate pollution, such expenses must be secured by a lien against the affected property. §22a-452a(a).

3

Issue 1: Alternate Source of Funds

The Simeones claim that the Commissioner has broad discretion in determining whether to file a certificate of lien on their property. They argue that filing the lien would be arbitrary and capricious[7] and a violation of due process because the department has sufficient security for its expenses from the funds allocated to the site from the UST Clean-UP Account.[8] They also argue that filing the lien will cause a substantial deprivation of their property and will not provide the department with "any additional, meaningful security."

The Connecticut legislature has specifically provided that when the Commissioner acts to contain or remediate a site under the authority of §22a-451(b), the amounts paid in carrying out that responsibility *shall* be a lien against the affected real estate. §22a-452a(a). The Commissioner's duty under this section is to take the necessary steps to perfect the lien. Those steps include filing the lien on the municipal land records and complying with the due process requirements of pre-filing notice and an opportunity for hearing. §22a-452a(b), (c) and (e). The Commissioner's discretion is limited under this section to a decision to authorize or deny the lien or modify the amount of the lien, upon consideration of the evidence of probable cause presented at the hearing. §22a-452a(d). Therefore, the Commissioner's decision to file the lien could only be arbitrary or capricious if it ran contrary to the evidence.

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[7] Arbitrary means "founded on prejudice or preference rather than on reason or fact." Capricious means unpredictable or "contrary to the evidence or established rules of law." Black's Law Dictionary (7th Ed. 1999).

[8] The Simeones compare this lien process to that necessary to obtain a prejudgment remedy and argue that when alternative sources of funds are available, a prejudgment remedy would not issue. The Simeones specifically refer to General Statutes §52-278d, which provides that the court may consider whether "payment of any judgment that may be rendered against the defendant is adequately secured by insurance..." in its determination of probable cause.

The goal of §22a-452a is not limited to securing the recovery of state funds expended to remediate private property. It is also intended to establish the priority of the Commissioner's claim over other encumbrances. Subsection (f) of §22a-452a specifically provides that the Commissioner's lien "shall take precedence over all transfers and encumbrances recorded on or after June 3, 1985, in any manner affecting such interest in such real estate or any part of it on which the spill occurred or from which the spill emanated...." Contrary to the Simeones' argument, this priority status would indeed provide the Commissioner with meaningful security. Given the express intent of the legislature to put the state's claim ahead of other encumbrancers, it would be illogical to read into this cost recovery scheme a requirement that the Commissioner exhaust all possible sources of recovery before perfecting her claim to the affected property.

Based on the clear and unambiguous language of §22a-452a, when read in the context of the CWPCA, the Commissioner's compliance with a legislative mandate to file a certificate of lien on a finding of probable cause is not arbitrary and capricious. In addition, the Simeones are afforded ample due process by their right to a hearing to contest the existence of probable cause and/or to dispute the amount of the lien once probable cause is established. The Commissioner is clearly authorized to secure the recovery of public funds used to contain or remediate pollution on private property without consideration of the source of funds that may ultimately satisfy the state's claim. The determination of probable cause does not turn on the possibility that funds may be available from the UST Clean-Up Account. The department's objection to this threshold issue is therefore sustained.

4

Issue 2: Right to Jury Trial

The Simeones claim that this cost recovery action is an effort to collect a debt and as such, they are entitled to a trial by jury pursuant to the constitution of Connecticut, article first, §19 (amended art. IV). This section, which provides that the "right to a trial by jury shall remain inviolate",

> guarantees a jury trial in all cases for which there was a right to a trial by jury at the time of the adoption of [that] provision, which was 1818.... Article first, § 19, also provides the right to a jury trial in cases that are substantially similar to cases

> for which the right to a jury trial existed at common law....Accordingly, in determining whether a party has a right to a trial by jury under the state constitution . . . the court must ascertain whether the action being tried is similar in nature to an action that could have been tried to a jury in 1818 when the state constitution was adopted. This test requires an inquiry as to whether the course of action has roots in the common law, and if so, whether the remedy involved was one in law or equity. (Citations omitted, internal quotation marks omitted.)

Cmnsr. of Envtl. Protection v. Conn. Bldg. Wrecking Co., 227 Conn. 175, 182 (1993).

Section 22a-452a does not specify whether this lien action preserves the right to a jury trial. However, the state and federal courts have provided guidance on this issue. The Connecticut District Court considered the defendants' right to a jury trial in a recovery action brought pursuant to §22a-452. Although the court acknowledged that the issue would be decided under federal law, it noted that article first, §19, of the constitution of Connecticut requires the same analytical approach and further noted that the right to a jury trial under this section "does not include a right to a jury trial in an equitable action." *Innis Arden Golf Club v. Pitney Bowes, Inc., et al.*, 541 F. Supp. 2d 480, 483 (Dist. Ct. 2008). The court acknowledged that environmental statutes should be liberally construed and although the plaintiff was seeking money damages, "the 'broad remedial purpose' of [§22a-452] is a remedy akin to restitution, an equitable form of relief." Id. at 484.

The court explained further that "in addition to the recognition of restitution as an equitable remedy under federal law,...the Connecticut Supreme court has observed that environmental action[s]...cannot, consistently with Connecticut's common law history, be considered substantially similar to an action in debt, for which a state constitutional right to a jury trial would exist." (Citations omitted, internal quotation marks omitted.) Id. The court concluded that "because the legislative goal of protecting the environment...[is] a dominant goal in this and other environmental actions[,]...this goal is restitutionary, or equitable in nature, so that environmental enforcement actions under our state's environmental statutes are primarily equitable. [A]s is well established, the jury right does not extend to actions in equity. (Citations omitted, internal quotation marks omitted.) Id.

In a Superior Court action for violations of §22a-454(a), the Commissioner sought to recover costs incurred in investigating and abating pollution pursuant to §22a-6a[9]. The court relied on the test established by the Supreme Court in *Cmnsr. v. Conn. Bldg. Wrecking,* supra, 227 Conn. 175 and determined that "[t]he essential right being asserted is equitable in nature and although the [Commissioner] is seeking damages, the whole action is one in equity and there is no right to a jury trial." *Rocque v. Sound Mfg., Inc.,* 2002 Conn. Super. LEXIS 1819 (Conn. Super. Ct., May 22, 2002). Similarly, in an action to recover costs incurred by the Commissioner pursuant to §22a-451, the court denied defendant's claim for a jury trial and held that §22a-451 "allows the state to seek *restitution* for costs spent to remedy pollution on another's property." *Conn. Cmnsr. of Envtl. Protection v. James Grosso,* 1993 Conn. Super. LEXIS 1791 (Conn. Super. Ct., July 14, 1993) (Emphasis added).

It is clear that the courts consider actions brought pursuant to the recovery provisions of the CWPCA to be equitable, not legal. Although there is no case that specifically addresses the recovery provisions of §22a-452a, well established rules of statutory construction require an interpretation of that section that is consistent with the entire statutory scheme, of which it is a part. The goal of this action is restitutionary or equitable in nature. As such, this action does not entitle the Simeones to a jury trial. Therefore, there is no basis for their claim that they are being denied their constitutional right to such a trial. The department's objection to this threshold issue is sustained.

5

Issue 3: Hearing Officer's Discretion to Deny Lien

The Simeone's final issue is that even if probable cause is found to exist, I have the discretion to deny the lien. They argue that because this proceeding does not provide the type of procedural safeguards associated with a prejudgment attachment, I should preserve those safeguards through the exercise of my discretion and disallow the lien. The Simeones provide no authority for their claim other than their persistent argument that this matter should be decided based on the established process for procuring a prejudgment remedy. Notwithstanding the

[9] Section 22a-6a provides in pertinent part that persons responsible for violating environmental statutes shall be "liable to the state for the reasonable costs and expenses of the state in restoring ... natural resources,...to their former condition." The section also acknowledges that a suit may be instituted to recover such costs.

obvious distinction between the prospective nature of a prejudgment remedy and this action to secure the recovery of public funds, the legislative mandate of §22a-452a is clear. The amounts paid by the Commissioner shall be a lien on the Simeones' property. The department's objection is therefore sustained.

II

PROBABLE CAUSE DETERMINATION

Section 22a-452a(c)(2) provides, in part, that upon a request for hearing, the Commissioner must first establish that there is probable cause to sustain the validity of the lien before it can be filed. Probable cause is not defined in the CWPCA. However, in deciding the existence of probable cause in analogous circumstances such as mechanics liens, the courts have held that "[t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." (Citations omitted.) *Pero Bldg. Co. Inc., v. Donald H. Smith,* 6 Conn. App. 180, 183 (1986).

For the purposes of this probable cause determination, the undisputed facts are that pollution existed on the site and on the adjacent property and that the Commissioner expended funds for, among other things, the repair, maintenance and monitoring of the system installed to contain and abate that pollution pursuant to §22a-451. The amounts paid by the Commissioner total at least $325,642.63. On the basis of these essential facts, I find that probable cause exists to sustain the validity of the Commissioner's lien and authorize filing of the Certificate of Lien on the Town of Berlin land records.[10]

Jean F. Dellamarggio, Hearing Officer

[10] The Commissioner has delegated her authority to issue a decision in this matter.