

October 11, 2022

Brian Anderson, Chief
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Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
11545 Rockville Pike
Rockville MD, 20852-2738
via e-mail to brian.anderson@nrc.gov

Re: Open Legal Issues – Agreement State

Dear Mr. Anderson,

Connecticut is working diligently to put in place the necessary legal authorities to become an “Agreement State.” As a part of that effort, the Radiation Division of Bureau of Air Management at the Connecticut Department of Energy and Environmental Protection (the “Department”) has worked with the Nuclear Regulatory Commission (“NRC”), through a series of discussions and review letters, to identify open issues that must be addressed. The purpose of this letter is to provide additional clarification on issues concerning the Department’s authority to issue cease and desist orders, the process for judicial review of regulations promulgated by the Department, and the Department’s authority to manage cash and other financial instruments provided as financial assurance.

Cease and Desist Orders

The Department’s authority to issue Cease and Desist Orders is found in Conn. Gen. Stat. § 22a-7, which provides, in relevant part, that

[t]he commissioner, whenever he finds after investigation that any person is causing, engaging in or maintaining, or is about to cause, engage in or maintain, any condition or activity which, in his judgment, will result in or is likely to result in imminent and substantial damage to the environment, or to public health within the jurisdiction of the commissioner under the provisions of [chapter 446a,] or whenever he finds after investigation that there is a violation of the terms and conditions of a permit issued by him that is in his judgment substantial and continuous and it appears prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, or whenever he finds after investigation that any person is conducting, has conducted, or is about to conduct an activity which will result in or is likely to result in imminent and substantial damage to the environment, or to public health within the jurisdiction of the

commissioner under the provisions of [chapter 446a] for which a license, as defined in section 4-166, is required under the provisions of [chapter 446a] without obtaining such license, may, without prior hearing, issue a cease and desist order in writing to such person to discontinue, abate or alleviate such condition or activity.

Note that statutes relevant to the implementation of agreement state are found in Conn. Gen. Stat. chapter 446a, and are therefore subject to enforcement using the above cited authority.¹ There are two remaining open questions regarding this authority: 1) whether such order takes effect immediately; and 2) the meaning of “after investigation,” and the impact of the inclusion of that qualifier on the Department’s ability to act with sufficient urgency.

Subsection (c) of Conn. Gen. Stat. § 22a-7 provides, in relevant part that “[u]pon receipt of such order such person shall immediately comply with such order.” That subsection further provides the Attorney General authority to institute an action “to enjoin any person from violating a cease and desist order issued pursuant to this section and to compel compliance with such order.” There are no conditions precedent to the effectiveness of a cease and desist order found in § 22a-7, the order is immediately effective upon receipt.

Subsection (a) of Conn. Gen. Stat. § 22a-7 requires that the Department make one of three possible factual showings when issuing a cease and desist order. The Department must have information that: (1) the nature of an activity “will result in or is likely to result in imminent and substantial damage to the environment, or to public health”; (2) the terms of a license or permit are being violated; or (3) an activity that requires a license or permit is, or will be, conducted without obtaining the necessary authorization. The term “after investigation” is used to clarify that the Department must have the information necessary to make the requisite factual showing *before* issuing a cease and desist order. Put another way, the Department cannot issue a speculative cease and desist order as a means to discover information about an activity; the Department can issue a cease and desist order to stop an activity it knows is occurring.

Note that neither the term “after investigation” nor the word “investigate” are defined terms in this statutory context. There is no other statute or regulation that provides relevant definitions of these terms, nor is there any statute or regulation that prescribes and process required to constitute an “investigation.” Investigation, in this context, means only the identification of the information necessary to make the factual showing required by Conn. Gen. Stat § 22a-7(a). Once the necessary information is in hand, the Department can act immediately to issue an order; the phrase “after investigation” adds no specific burden – or additional time – to this process. The urgency of such information gathering is conducted commensurate with the potential risk, in

¹ See also Conn. Gen. Stat. §§ 22a-158a and 22a-158b, found in chapter 446a, which explicitly incorporate the cease and desist authority referenced above.

consideration of the likelihood and severity of potential harm posed by the potential violation. The radiation division maintains personnel on-call 24/7 with emergency response vehicles that can respond to incidents anywhere in the state.

Judicial Review of Regulations

The process for adopting regulations in Connecticut is unique among states. After notice and an opportunity to comment is provided by a state agency, regulations are reviewed by a committee of the General Assembly. This legislative committee considers many issues commonly considered by courts in other states, such as whether proposed regulations fit within the scope of a statutory authorization.

Despite these significant procedural differences, Connecticut also provides for judicial review of the validity of regulations. Subsection (a) of Conn. Gen. Stat. § 4-176 provides, in relevant part, that “[a]ny person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation” Subsection (a) of Conn. Gen. Stat. § 4-175 provides that, after complying with the requirements of Conn. Gen. Stat. § 4-176, “[a person] may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question”

Financial Assurance

Connecticut will incorporate NRC regulations related to financial surety (10 CFR parts 30.35, 40.36, and 70.25) by reference. As stated in these NRC regulations, any financial surety must be held in a trust account acceptable to the Department or in the form of a surety bond, letter of credit, insurance or other guarantee method. Such mechanisms and accounts are held separately from the general fund, are readily available to the Department for use in decommissioning, and are not subject to appropriation. Any letters of credit or other such financial instrument will be held directly by the Department.

Conclusion

I appreciate the opportunity to provide these additional clarifications regarding existing legal authorities and the Department’s path forward. If you have any questions, or if there is any other information that would be useful in your evaluation, please contact me.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "BS", with a long, sweeping underline.

Brendan Schain, Esq.
Legal Director, Environmental Quality Branch