

DEEP Feedback on PA 20-9 Working Group/Second Phase Subcommittee Concept Papers

The following is the Department of Energy and Environmental Protection's ("Department" or "DEEP") feedback on concepts papers concerning the development and implementation of a release-based clean-up program pursuant Chapter 445b of the Connecticut General Statutes ("Chapter 445b"). Concept papers were prepared by three "second phase" topical subcommittees of the larger working group, convened pursuant to General Statutes § 22a-134tt. A "charge," setting out the scope of each subcommittee may be found on DEEP's release-based remediation [web page](#). The second phase subcommittee process comprised subcommittees that considered:

- modification of clean-up standards for lower-risk release ("subcommittee 6");
- LEP-implemented, risk based alternate clean-up standards ("subcommittee 7"); and
- clean-up completion documentation, verifications, and audit frequency and timeframes ("subcommittee 8").

The following feedback is provided to assist the working group as it reviews the concepts presented. Certain topics on which the Department provides feedback cut across several of the subcommittees, other comments are specific to concepts proposed by a specific subcommittee.

The feedback is intended to focus on those topics which have a significant impact on the development of regulations to implement Chapter 445b and is not intended to cover every detail provided in the concept papers. Overall, DEEP believes that many of the concepts provide a solid foundation upon which regulations can be drafted.

Feedback Applicable to Several Subcommittees

- **A Method 3 Risk Characterization like approach, similar to Massachusetts**
(subcommittee 6, subcommittee 7)

The concept papers submitted by subcommittee 7, and to a significantly lesser extent subcommittee 6, contain a substantial discussion of the "method 3" approach to risk characterization – including the use of release-specific and risk-based, cumulative clean-up endpoints – as are used in Massachusetts – and the recommendation that such an approach be implemented in Connecticut. This discussion closely tracks the discussions of the subcommittee, as subcommittee 7 dedicated a significant portion of its meetings to evaluating the Massachusetts method 3 approach. In previous written feedback, and in discussions at the working group, the Department has indicated that the time and energy expended on this topic was misspent.

While the Department has agreed to a further evaluation of this topic, it has consistently indicated that such discussion is not responsive to the charge of the subcommittees working in this phase; requires an expanded group of stakeholders not present in the subcommittee process, including the Department of Public Health; and does not fit easily into the structure of Connecticut's state government – not

impacted by the adoption of Chapter 445b – which allocates separate responsibilities to the Department and the Department of Public Health in a way different than in Massachusetts.

While the Department will take under advisement the discussion of a method 3-like approach found in the concept papers, it is only after the additional evaluation – outside of this subcommittee process and with a more comprehensive group of stakeholders – that the Department has agreed to undertake, that it will be able to provide any feedback on such concepts.

➤ **Identification of Other Qualified Professionals**
(subcommittee 6, subcommittee 7, subcommittee 8)

Each second phase subcommittee identified the need for qualified professionals – other than Licensed Environmental Professionals (“LEPs”) -- to play a role in the release-based cleanup program. A similar need was identified by the first phase subcommittees. In response to the first phase subcommittee concept papers, the Department agreed that there was a need to identify this group of professionals but clarified that it would not create a new professional licensing program. Instead, the Department intends to rely on some combination of existing license and permit programs, relevant experience, and third party training and certification.

However, before definitively determining the qualifications necessary, it is important to understand the full range of activities that the identified professional will be asked to undertake. When considering the many and varied tasks identified by each subcommittee, it is also possible that more than one set of task-specific qualifications may be needed. It is first necessary to identify all the tasks that such professionals will undertake before qualifications can be determined. As it evaluates the tasks identified in these concept papers, and revisits those tasks identified in the first phase concept papers, the Department has committed to seeking further advice and feedback from the working group on this topic. The Department will also work internally to determine those qualifications it believes are necessary for professionals engaged in the identified tasks and make suggestions regarding required training and the process for verifying credentials.

The Department also recognizes that the professional conduct of LEPs is held to a high standard, and that there is a need to ensure that others engaged in this work are also held accountable so that the release-based cleanup program is protective of human health and the environment and can be relied on by users of the program. The Department looks forward to future discussion of these topics.

Feedback Specific to Subcommittee 6

➤ **Focus on Charge**

Subcommittee 6 indicated that they did not believe changes to existing numeric criteria, or the fast track alternative and alternative polluting substances criteria were within the scope of their charge. Subcommittee 6 also indicated that they failed to reach consensus on what constituted a “lower risk” release.

The Department finds that the concepts prepared by subcommittee 6 are responsive to the charge the subcommittee was provided. Although consensus may not have been reached on all issues, even some

viewed as foundational, the subcommittee identified understandable and workable concepts that addressed relevant topics.

➤ **Categories of Risk**

Subcommittee 6 created a hierarchy of releases, based on risk, and identified certain remedies to be made available for releases assigned to each category.

The categories identified are useful in conceptualizing the approach advocated by the subcommittee. For instance, those releases assigned to “category 1” and the cleanup approach identified for such releases align well with the inclusion of new releases into the release-based cleanup program and the requirement that such releases be remediated to a known standard.

While as a whole, the Department believes that the conceptual approach is workable and beneficial, in drafting regulations, the Department may reevaluate the assignment of certain releases to certain categories, and may reconsider into which category certain releases are placed. In addition, while the categories are helpful to understanding the conceptual approach, when drafting regulations, it may be necessary to specify eligibility criteria – similar to the “conditions” identified by the subcommittee - rather than incorporate the categories themselves.

Finally, the Department notes that a Massachusetts method 3-like approach was suggested for those releases allocated to category 4. As discussed above, a method 3-like approach will be evaluated in a process separate from the current subcommittee process that has more specific objectives and a broader array of stakeholders.

➤ **Timeframes for Cleanup**

For certain types of releases, subcommittee 6 suggested that certain remedies only be made available if a release is removed from the land and waters of the state before the time specified for reporting in the Release Reporting Regulations, Regs., Conn. State Agencies §§ 22a-450-1 to 22a-450-6. The Department will evaluate whether certain suggested remedies should be available even if enough time has passed to require a release to be reported. While the Department realizes that this time period should not be significantly expanded, it is possible that the addition of a short, defined period of time may create additional flexibility while still protecting human health and the environment. The Department looks forward to further conversation about the use of the conceptual remedies proposed as it works to incorporate these provisions into regulation.

➤ **Polluted Fill**

Subcommittee 6 made certain suggestions regarding the treatment of polluted fill under the release-based cleanup program. The Department notes that polluted fill has also been discussed by other subcommittees in the first and second phases, and by an ad hoc team created by the working group to consider the topic. It has been the Department’s consistent position that it is open to the creation of a special path for releases that consist of historical polluted fill. However, it is necessary to first put in place the “routine” path most releases will follow before evaluating how a special path may vary from a routine one. This work, and discussions on this topic, will be ongoing.

➤ **Direct Exposure Criteria at Different Depths**

The concepts proposed by subcommittee 6 include changing the depth to which strict compliance with the existing numeric criteria for direct exposure is required. The Department notes that the subcommittee expressed an interest of using multiples of the numeric direct exposure criteria at different depth intervals, allowing pollution to remain at a higher level at depths of, for example, 4 feet to 8 feet, and even higher levels from 8 feet to 12 feet. The concept paper did not suggest specific multipliers, or provide a scientific basis for such calculation.

The Department understands the appeal of this concept, but believes that further consideration of its workability is required. Coordination with the Department of Public Health will be necessary to further pursue the concept. Additional consideration of restrictions on the use of the area impacted by the release, and the appropriate institutional controls to formalize those restrictions is required. Such controls may require provisions to lock in exposure assumptions and for future soil management. While the Department is willing to consider this concept, additional work is needed to conceptualize the necessary regulatory framework and to evaluate the utility of the concept given such framework.

➤ **Additional Exposures**

Subcommittee 6 suggests, and the Department is willing to consider, additional categories of exposure assumptions. Such assumptions will require additional work, including determining what institutional controls are necessary for their implementation, what criteria will be used to determine releases in such scenarios no longer pose a threat to human health and the environment, and to secure the concurrence of the Department of Public Health. Some of this discussion may come during the process of evaluating a method 3 risk characterization-like approach, as that approach relies heavily on considering different types of exposures. The Department supports further consideration of this concept, but notes that additional details are needed.

Feedback Specific to Subcommittee 7

➤ **LEP Approval for Existing Commissioner Approved Remedies**

Subcommittee 7 indicated that certain remedies currently found in the Remediation Standards Regulations that require approval by the Commissioner may be suitable for LEP approval, including, for example, use of alternative groundwater protection criteria. The subcommittee indicates that the process for issuing these approvals is already quite prescriptive, making it amenable to approval by an LEP. The Department agrees that there are additional opportunities for LEP approval of certain remedies. While the concept paper submitted by subcommittee 7 is neither comprehensive nor adequately specific in its consideration of this concept, the Department will further evaluate the concepts provided, and work internally to identify additional options for further discussion.

➤ **Pollutants Requiring Commissioner Oversight**

The subcommittee reasonably indicates that certain substances, such as emerging contaminants, and releases of significant size, will require oversight by the Commissioner. The Department appreciates this acknowledgment that, despite the shared goal of expanding the self-implementing tools available to LEPs, the Commissioner will still play an important role in overseeing the clean-up of certain releases, particularly those that present an unknown or substantial risk to human health and the environment.

➤ **Possible Expansion of LEP Approved Engineered Controls, LEP-Approved Notices of Activity and Use Limitations and Other Authorizations**

The Department notes that the subcommittee's concept paper does not suggest an expansion of the number and type of LEP-approved engineered controls, nor does it suggest that additional purposes should be specified to expand the use of LEP approved Notices of Activity and Use Limitations. The Department believes additional opportunities for LEP implemented remedies exist in these areas and will work to bring suggestions and concepts to the working group for consideration.

In addition, the Department believes other authorizations, such as the temporary authorizations required for certain remediation techniques under a general permit, may also present opportunities for LEP implementation. The Department will work to provide suggestions and concepts to the working group on this topic.

Subcommittee 8

➤ **Smart Forms**

The Department agrees that the creation of smart forms would be to the benefit of the future program. The Department notes that creation of an electronic filing system using smart forms requires a significant investment of personnel and financial resources. While the Department will work to implement the conceptual approach suggested by the subcommittee, it can not firmly commit at this time.

➤ **Verifications**

It is evident that there is confusion regarding both use of the term "verification" in Chapter 445b and in future regulations. This is likely because in current law, the term has different meanings when used in different contexts, and the chapter 445b definition is different than either current use of the term. Some members of the working group are most familiar with the term in the context of the Transfer Act, where verification is defined as follows:

'[v]erification' means the rendering of a written opinion by a licensed environmental professional on a form prescribed by the commissioner that an *investigation of the parcel* has been performed in accordance with prevailing standards and guidelines and that *the establishment has been remediated* in accordance with the remediation standards;

Emphasis added. General Statutes § 22a-134(19). In many instances, particularly before recent changes to the Transfer Act, satisfying this definition meant that an LEP was required to certify that an entire parcel had been investigated and remediated.

Other members of the working group, particularly LEPs, may also be familiar with the definition in the context of the LEP regulations. There, verification is defined to mean:

verification as defined in section 22a-134 of the Connecticut General Statutes or any written opinion which a licensed environmental professional is authorized by law to render (i) regarding an investigation, remediation, environmental land use restriction or (ii) pursuant to sections 22a-133o, 22a-133x, 22a-133y, and 22a-134a of the Connecticut General Statutes, sections 22a-133k-1 through 22a-133k-3, inclusive, and 22a-133q-1 of

the Regulations of Connecticut State Agencies, or any other law, regulation, order, permit, license or approval.

Regs., Conn. State Agencies § 22a-133v-1(dd). This more expansive definition applies to many actions performed by an LEP other than, or in addition to, verifying that an entire parcel has been investigated and remediated.

Chapter 445b contains its own definition of the term, at General Statutes § 22-134pp(9). This definition is different than either of the current definitions. Here, “verification” is defined to mean:

the written opinion of a licensed environmental professional on a form prescribed by the commissioner that the remediation of a release satisfies the standards established in regulations adopted pursuant to section 22a-134tt.

So, using this definition, when Chapter 445b discusses “verification,” it does not require investigation or cleanup of an entire parcel. Instead, it remains focused on individual releases. Indeed, the term is primarily used to distinguish between those releases where cleanup requires the supervision of an LEP and those releases that do not. See, for example, General Statutes §22a-134tt(d), which states . . . “certain releases may be remediated under the supervision of a licensed environmental professional, without the supervision of the commissioner, and may be remediated without being verified.” So, some releases require final sign off by an LEP – a verification – while others do not. That does not mean that closure documentation is not required for those other releases, only that they do not need to be “verified” by an LEP. But nothing in this paragraph, or elsewhere in Chapter 445b, requires an entire parcel to be investigated and remediated in order for the required cleanup of a release to be verified.

➤ **Documentation that a Cleanup is Complete**

The Department acknowledges that “verification” is a Connecticut-specific term for the completion of a cleanup, and that such term may present challenges when working with purchasers and lenders from other states. The Department will work to identify new terminology that will provide additional clarity regarding the completion of a cleanup and will not conflict or overlap with terminology used by other Department programs. As terminology is developed, it will be shared with the working group for advice and feedback.

When regulations implementing this program require clean-up completion documentation to be prepared by an LEP, such documentation will have a specific section for the LEP’s verification, evidenced by their signature and seal, but the entire document need not be called a “verification” in the new program. We believe this concept is an improvement over the Transfer Act terminology, and will continue to work with the working group and other stakeholders on its implementation.