

**CT DEEP RELEASE-BASED REMEDIATION OF HAZARDOUS WASTE PROGRAM REGULATIONS
TRANSITIONS GROUP REPORT
October 12, 2021**

The Transitions Group¹ (the “Group”) has continued its efforts to identify transition issues related to the new proposed Release-Based Remediation program. As indicated in the Group’s June 2021 Recommendations, the Group reviewed the five Working Group Subcommittees’ concept papers and, thereafter, met with each Working Group Subcommittee’s co-chairs. The intent was to facilitate the identification of issues that may inhibit or complicate the creation of a uniform, streamlined release-based program that furthers and supports the State’s economic development interests while also being protective of human health and the environment.

During the discussions with the Working Group Subcommittees’ co-chairs, significant transition issues were identified. We heard a number of commonly-held concerns. The participants are earnest in moving a released-based program forward but raised significant concerns about how the new program fits into, complements or replaces existing established programs. To the Group, it appears that the ambiguities, gaps and/or uncertainties we heard present challenges that were universally communicated as needing to be addressed and resolved prior to the effective date of any new released-based program.

The common themes raised to the Transition Group by the co-chairs include:

1. Significant Environmental Hazard (“SEH”) program – a state statutory program (C.G.S. Section 22a-6u). The SEH program is release-based and includes at a minimum a short-term remedy component. How will this integrate? It may/may not be consistent with the concepts of an “immediate response” or “tiering” that are to guide action inextricably associated with or even driven by the seriousness of the risk presented. Should the SEH program remain? Will it be replaced by an “immediate response”? Or does it roll into it? Should it remain until the release is assigned to a tier? Concerns were clearly raised that there would be a dual regulatory structure with dueling requirements that will leave the regulated community quite confused as to what program/requirements to follow. General sentiment is that there should not be two separate reporting programs. Statutory changes are needed given that the SEH program is an existing, stand-alone statutory program.
 - a. Tiers. The “tiers” concept – proposed to provide alternate paths. Can you move between or among the tiers? What are the exit ramps? Until you enter a path, is the SEH program the option?
2. The Underground Storage Tank requirements – a state statutory program (C.G.S. Section 22a-449 et seq.). The federal and state programs are already confusing, and regulation already exists on each level. Single family residential tanks are currently excluded. Are they to be included in the new release-based program? Should releases from all USTs be outside the release-based program and continue to be stand-alone?

¹ The Transitions Group includes Attorneys Beth Barton, Ann Catino, Franca DeRosa, and Nancy Mendel and LEP Tim Whiting.

3. Integration with C.G.S. Section 22a-450 and the new Spill Regulations. If there is an immediate spill/release, what regulations will control? Will the new release-based regulations be combined with the new spill regulations? Can immediate response actions developed pursuant to the release-based program be used to address immediate releases as well as historic releases? Is Spill reporting just reporting? If yes, will there be two reports? Need to address duplication, redundancy and inevitable confusion. If the new spill regulations are enacted prior to the pending RBP regulations, how will spill response and closure be guided and accomplished?
4. Transfer Act – a state statutory program (C.G.S. Section 22a-134). How will historical unknown releases be addressed if these releases were missed or otherwise not specifically addressed during the Transfer Act/RSR process? What if a new release is discovered prior to verification? What program applies? Only one program should apply (the Transfer Act? Or can it be closed out under the new program? Can there be an option?).
5. CERCLA/AAI, RCRA, TSCA, Federal PCB programs. How will consistency with the federal programs be achieved? And, also with other state programs? Will a single report of a release be allowed, or will the same release have to be reported multiple times on multiple forms? Is the “innocent landowner defense,” a stalwart of the federal program and also codified in Connecticut (C.G.S Sections 22a-452d and 22a-452e) eliminated? Are the other statutes providing immunity similarly rendered a nullity (e.g., C.G.S. Section 22a-133ee)? How will the covenants not to sue programs (C.G.S. Sections 22a-133aa and 22a-133bb) be affected? Overall, there is a clear need for unifying existing statutes, DEEP regulations and programs PRIOR to the new regulations taking effect. Also, before the new regulations take effect, there needs to be clarity regarding integration of the new release-based program with the federal programs. What happens to the Memorandum of Agreement between DEEP and EPA Region I?
6. Logistics.
 - a. Implementation. How will all of this be implemented? Will DEEP have a “concierge” to call? A liaison to make sure it is all coordinated? Does DEEP have the staff? Does DEEP and DOH have the risk assessors in numbers and experience to administer, implement, and support the process? If DEEP intends to rely on the LEPs, the requirements should be clearly articulated to facilitate implementation.
 - b. Tracking System. Will DEEP implement a unified online searchable database tracking system for reported releases and respective status, accessible to the public?
 - c. Definition of “Site” and Future of “Site-Wide” approaches. Can/should/how do site wide approaches remain? What is a “site” under the new program? Is it the entire property? How is the site/entire property distinguished from the site of a release area? How is “site” used?
 - d. RSRs. Will the RSRs be replaced, supplemented or otherwise revised by these new regulations?
 - e. Guidance/Forms – The clear consensus is that ALL RELEVANT GUIDANCE AND FORMS HAVE TO BE DEVELOPED AND AVAILABLE PRIOR TO THE TIME THE REGULATIONS GO INTO EFFECT.

- i. The existing Sitewide Characterization Guidance document needs to be re-written and/or rendered inapplicable. Or is it still applicable and, if yes, to what? What about the ASTM standards – are they applicable any longer? How does the ASTM approach fit with the new release-based approach?
 - ii. Alternatively, another guidance document needs to be written (a “Release Characterization Guidance Document”) to make clear expectations under the new release-based program. This needs to be available before any program becomes final and takes effect, otherwise no one (including perhaps most notably LEPs) will know what the expectations are and it will all be case-by-case. Questions need to be addressed so that the process, milestones, and end points are known and clear (*e.g.*, if an isolated release triggers reporting and it is commingled with fill or another plume, what do you do?) Do the changes to the end points (and is the ultimate end point the RSR compliance?) affect characterization? How? Or is it an entirely different approach based upon the risk assessed by the LEP?
 - iii. Several groups identified the need for clear, streamlined forms for all releases before the effective date, and an ability to complete and submit reports online.
- f. LEPs - ROLE OF THE LEP HAS TO BE CLEARLY DEFINED BY THE TIME THE REGULATIONS GO INTO EFFECT. What is the role of the LEP? Will the LEP regulations change? Will there be other licensing requirements? What work can or has to be done by an LEP versus a non-LEP (*e.g.*, a qualified environmental professional)? What type of additional training will there be? How will non-LEPs be held accountable? What type of information can LEPs rely upon (if work is done by non-LEPs)? What can an LEP stamp or certify? The RBP program should not effectively exclude LEPs from performing due diligence work as has been the case in NJ.
- g. Impact on Municipalities. This issue of municipal impact was raised by some groups and this Group believes it is significant. On a site foreclosed or to be foreclosed (which site may/may not be entered into a brownfield program), can a municipality simply make a site “safe” and await a buyer/developer, and if so how? What are the off ramps for municipalities?
- h. Residential Properties. The issue of requirements that apply to releases on residential properties was raised by several Subcommittees interviewed. The Group understands that it is currently being reviewed by one of the Ad Hoc groups. Should the RBP include distinctions between owner-occupied residential properties (*i.e.*, one- and two-family housing units) and multi-tenant residential rental properties?

The Transition Group agrees with the observations above (which are illustrative at this point of an overarching concern about coordination and clarity and not necessarily exhaustive). In particular, if a unified program is the goal, considerable work needs to be done to revise and integrate statutes (likely, at least, all 30 statutes identified in the Group’s June 2021 report), and to develop new regulations (beyond simply the release-based regulations) and guidance documents. Otherwise, the goal of achieving a clear path forward to foster and support economic development in the State will likely not be achieved. Confusion, with overlapping and potentially conflicting programs, will result. Releases will not be remediated. There will be more questions than answers. All statutory conflicts and

inconsistencies should be addressed before any new program is in effect. The role of the LEP must be understood and all necessary guidance clearly needs to be in place. Forms also need to be in place before any new program becomes effective. The recent experience, backlog and delay associated with the sunsetting of the ELUR forms while the EUR forms were under development needs to be avoided at all costs. Without a clear path forward, the legislature's goals will not be achieved.