



DECLARATORY RULING

Pursuant to Conn. Gen. Stat. § 4-176 and R.C.S.A. § 22a-3a-4, on December 15, 2016, Antea USA Inc., (“the Petitioner”) submitted a Petition for Declaratory Ruling (“the Petition”) to the Commissioner of Energy and Environmental Protection (“the Commissioner”). The Petition seeks a number of rulings regarding the state’s Remediation Standard Regulations, R.C.S.A. § 22a-133k-1 et seq., (“RSRs”) as well as the regulations that govern Licensed Environmental Professionals (“LEPs”), R.C.S.A. § 22a-133v-1 et seq.

The parties to this proceeding are the Petitioner and the staff of the Department of Energy and Environmental Protection.

I. The Petition

The Petition states the questions for which rulings are sought as follows:

- A) Do the RSRs as presently promulgated:
1. Establish or require meeting numeric criteria for extractable petroleum hydrocarbons (“ETPH”) with respect to the surface water protection criteria (“SWPC”) or volatilization criteria (“VC”);
 2. Require the evaluation of, or meeting numeric criteria for, “additional polluting substances” (as that term is defined or used in the RSRs) with respect to SWPC or VC?
 3. Require the use of “alternative criteria” (as that term is defined or used in the RSRs) or, in the alternative, meeting background conditions or constituents for which numeric criteria are not specially established in the RSRs?
- B) Did the Department of Energy and Environmental Protection comply with the Administrative Procedures Act, Conn. Gen. Stat. § 4-166 et seq., in requiring and enforcing the use of certain analytical methods or associated numeric criteria not promulgated in the RSRs, including but not limited to those with respect to extractible

petroleum hydrocarbons, volatile petroleum hydrocarbons, and air-phase petroleum hydrocarbons?

- C) To the extent more than one analytical method for a given constituent is allowed and used, would the RSRs be satisfied by meeting one of the relevant criteria rather than meeting all of them?
- D) Would revising the RSRs to adopt the Wave 2 Concepts (as defined in the Petition) provide an adequate remedy with respect to the issues raised in this Petition?
- E) May the Licensed Environmental Professional (“LEP”) Regulations, (as defined in the Petition) be used to impose more stringent or expansive requirements on LEPs in implementing and satisfying the RSRs as presently promulgated?

A copy of the Petition was sent to Staff. Notice of the Petition and of the opportunity to file comments and request intervenor or party status was also sent to Mr. Seth Molofsky, Executive Director of the Environmental Professionals’ Organization of Connecticut (“EPOC”), an organization formed to represent the interest of LEPs.¹

The Department of Energy and Environmental Protection (“the Department”) received one comment on the Petition. On June 6, 2017, Evan Glass, sent an email with a comment to Robert Bell, Assistant Director of the Department’s Remediation Division. Mr. Glass, who is a current member of EPOC’s Board, was presumably aware of the Petition in December 2016 when EPOC received a copy of the Petition. Mr. Glass’ comments, however, were untimely, coming just a few weeks before the rulings in this matter were due and well after the thirty day period to provide comments specified in R.C.S.A. § 22a-3a-4(c)(2). Mr. Glass did not offer any explanation for why his comments were provided so late. As such, in issuing the foregoing

¹ An LEP is a person who, after authorization by the State Board of Examiners of Environmental Professionals (“the Board”), has been issued a license by the Commissioner to engage in activities associated with the investigation and remediation of pollution and sources of pollution including the rendering or offering to render to clients professional services in connection with the investigation and remediation of pollution and sources of pollution. In addition, the Board, which is authorized under Conn. Gen. Stat. § 22a-133v to oversee the licensing and conduct of LEPs, has been and is aware of the Petition. The Petition was briefly discussed by the Board at its December 2016 meeting and was on the agenda at the Board’s January 2017 meeting. The Board did not submit any comments regarding the Petition.

rulings, Mr. Glass' comments have not been considered. The Department did not receive any other comments on the Petition.

II. Facts

1. Alliance Energy LLC., ("Alliance") has submitted to the Commissioner filings under Conn. Gen. Stat. § 22a-134 et seq., ("the Transfer Act") for a number of sites in Connecticut. The Transfer Act addresses the discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste or a hazardous substance at sites covered by the act when those sites undergo a transfer, such as a change in ownership. Investigation and remediation of these sites may be required by the Transfer Act.

2. In February 2011, the Petitioner entered into an agreement with Alliance under which, in return for certain payment, the Petitioner agreed to investigate and remediate sites owned or operated by Alliance.

3. The Petitioner asserts that the Department "has indicated" that it would not accept certain verifications submitted to the Department by the Petitioner.² The Petitioner has provided no documents or evidence of any kind, or frankly *any* context, such as the conditions at specific sites, regarding these asserted "indications" by the Department. As such, the issues raised in the Petition are not limited to the facts or conditions at any specific site, nor limited to any type of site, such as those for which a verification was submitted by the Petitioner.

4. Because petroleum is made up of many separate chemical compounds, the investigation and remediation of sites polluted with releases of petroleum is often conducted

² A verification is 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 regarding the investigation and clean-up of a site. Conn. Gen. Stat. § 22a-134(19). As of the date of this ruling, the Petitioner has submitted 16 verifications to the Department. To date, none have been rejected as a result of the issues raised in the Petition.

using sampling results produced by a variety of analytical methods which detect target compounds or collective fractions of hydrocarbon compounds that are components of petroleum. Some of the available methods are discussed in the Petition, including the EPH, VPH, APH and ETPH analytical methods.

5. EPH means a method that identifies and quantifies, in water, soils and sediments, both target polynuclear aromatic hydrocarbons (“PAH”) analytes and method-defined aliphatic and aromatic hydrocarbon fractional ranges, substances found in petroleum. As a method, it quantifies extractable aliphatic hydrocarbons within two specific carbon ranges: C₉ through C₁₈, and C₁₉ through C₃₆, quantifies extractable aromatic hydrocarbons within the C₁₁ through C₂₂ carbon range and may also be used to identify and quantify specific target PAH analytes, including diesel PAH analytes. Petroleum products suitable for evaluation by this method include kerosene, fuel oil #2, fuel oil #4, fuel oil #6, diesel fuel, jet fuels, and certain petroleum-based lubricating oils.

6. VPH means a method that identifies and quantifies, in water, soils and sediments, both target analytes and method-defined aliphatic and aromatic hydrocarbon fractional ranges, substances found in petroleum. As a method, it quantifies volatile aliphatic hydrocarbons within two specific carbon ranges: C₅ through C₈ and C₉ through C₁₂, quantifies volatile aromatic hydrocarbons within the C₉ to C₁₀ carbon range, and may also be used to identify and quantify benzene, toluene, ethylbenzene, xylenes, naphthalene, and methyl-tert-butylether as target analytes. Petroleum products suitable for evaluation by the VPH method include gasoline, mineral spirits, and certain petroleum naphthas.

7. APH means a method that identifies and quantifies, in air and soil gas samples, the gaseous-phase concentrations of volatile aliphatic hydrocarbons and aromatic petroleum

hydrocarbons, substances found in petroleum. As a method, it quantifies volatile aliphatic hydrocarbons within two carbon number ranges: C5 through C8 and C9 through C12, quantifies volatile aromatic hydrocarbons within the C9 to C10 carbon range, and may also be used to directly quantify the individual concentrations of the target air-phase petroleum hydrocarbon analytes 1,3-butadiene, methyl-tert-butylether, benzene, toluene, ethylbenzene, m- & p-xylenes, o-xylene and naphthalene. Petroleum products suitable for evaluation by this method include gasoline, as well as the volatile fractions of mineral spirits, kerosene, fuel oil #2, diesel fuel, jet fuels, and certain petroleum naphthas.

8. ETPH means a method that measures, in soils, sediments and water, diesel range petroleum hydrocarbons within the carbon range C9 thru C36, substances often found in petroleum products. Petroleum products suitable for evaluation by this method include kerosene, jet and diesel fuels, fuel oils #2 and #6, and motor oil. ETPH can also refer to certain contaminants often found in petroleum.

9. Beginning in August 2013, the Department made available “public discussion drafts” on various discrete issues as part of an assessment of potential future changes to the RSRs. The following eleven drafts have been made available by the Department:

- Fate and Transport Interim Update for Volatilization Criteria
- Surveys for Environmental Use Restrictions
- Potential Changes to RSRs: Urban Soil
- Notice of Activity and Use Limitation Regulations and Additions to ELUR Regulations
- Direct Exposure Criteria for Passive Recreation
- Alternative Pollution Mobility Criteria Options
- Potential Institutional Control Changes to RSRs and EUR Regulations
- Potential Changes to RSRs: Sediment
- Alternative Groundwater Protection Criteria Concept
- Monitored Natural Attenuation Concept
- Self-Implementing Concept for Engineered Controls

10. In addition to eleven “public discussion drafts” on various topics, as a precursor to any proposed amendments to the RSRs, on or about April 5, 2016, the Department made available “RSR Wave 2 Conceptual Language.”³ This document contained both concepts and draft language regarding potential revisions to the RSRs. The preliminary and informal nature of these concepts and draft language was noted on the first page of the document, which stated:

[t]his concept document is preliminary and informal; it is not a final draft, does not start the formal rulemaking process pursuant to CGS section 4-168, and does not reflect any decisions or approval by [the Department] or other parts of state government regarding the amendments that may be proposed. Therefore, some concepts presented in this document might not be included in the future proposed amendments. Also, the concepts presented in this document may continue to change or may appear differently when [the Department] proposes amendments to the RSRs through the formal process. [The Department] will begin the formal public process for adopting revisions to the RSRs at a later date.

11. On or about August 7, 2016, the Department made available revisions to the April 5, 2016 RSR Wave 2 Conceptual Proposal in a document entitled “Revised Wave 2 RSR Conceptual Language.” Building upon the April 2016 draft and informed, in part, by public feedback and further internal review, the revised conceptual draft also contained concepts and draft language regarding potential revisions to the RSR. Like the April 5, 2016 conceptual proposal, the first page of August draft stated that:

Prior to beginning the formal regulation amendment process, the Connecticut Department of Energy and Environmental Protection (DEEP) is presenting revised proposed concepts in this “Revised RSR Wave 2 Conceptual Language” document. Based on the external comments provided to DEEP and internal review on the April 2016 RSR Wave 2 Conceptual Language document, revised language was generated. This concept document is preliminary and informal; it is not a final draft, does not start the formal rulemaking process pursuant to CGS section 4-168, and does not reflect any decisions or approval by DEEP or other parts of state government regarding the amendments that may be proposed. Therefore, some concepts and

³ The RSRs were last revised in June 2013. Being the first “wave” of revisions to the RSRs, these revisions were known as “Wave 1.” The Department continues to work on additional revisions to the RSRs. This second wave of revisions has been called “Wave 2.”

language presented in this document might not be included in the future proposed amendments. Also, the concepts presented in this document may continue to change or may appear differently when DEEP proposes amendments to the RSRs through the formal process....

III. Framework for Rulings

A. The Policy of the State Regarding Pollution: The RSRs and the issues raised in this Petition concern the remediation of pollution. The General Assembly has established the policy of this state regarding pollution, a policy that given the nature of the issues raised in the Petition, must inform the rulings sought by the Petitioner.

The General Assembly has found and declared:

[t]hat the pollution of the waters of the state is inimical to the public health, safety and welfare of the inhabitants of the state, is a public nuisance and is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and that the use of public funds and the granting of tax exemptions for the purpose of controlling and eliminating such pollution is a public use and purpose for which public moneys may be expended and tax exemptions granted, and the necessity and public interest for the enactment of this chapter *and the elimination of pollution is hereby declared as a matter of legislative determination.*

(Emphasis added). Conn. Gen. Stat. § 22a-422; see also, *Comm'r of Env'tl. Prot. v. Underpass Auto Parts Co.*, 319 Conn. 80, 98 (2015) (primary purpose of the Water Pollution Control Act is the elimination of pollution). In addition, the Connecticut Supreme Court has recently noted that Conn. Gen. Stat. § 22a-133k mandates that the Commissioner adopt regulations “setting forth standards for the remediation of environmental pollution at hazardous waste disposal sites and other properties which have been subject to a spill, as defined in section 22a-452c.” *Underpass*, supra, at 98. Section 22a-133k requires that any such standards “*shall fully protect health, public welfare and the environment.*” (Emphasis added). The standards implementing this statutory directive are known as the RSRs.

B. RSRs Overview: The RSRs “apply to any action taken to remediate polluted soil, surface water or a ground-water plume at or emanating from a release area which action is required pursuant to Chapter 445, 446k or section 22a-208a(c)(2) of the General Statutes....” R.C.S.A. § 22a-133k-1(b).⁴ Our Supreme Court has held, in a case where pollution to the waters of the state was documented, that pollution must be remediated to the standards required by the RSRs. Failure to do so undermines “not just the technical formalities of the statutory permitting scheme, but also the fundamental and overriding purpose of the Water Pollution Control Act—to eliminate water pollution.” *Underpass*, supra, at 99.

Generally speaking, the RSRs define when remediation of a substance in pollution is no longer needed; they define the end points for a clean-up. There are standards for two broad categories in the RSRs: standards for remediation of soil, R.C.S.A. § 22a-133k-2, and standards for remediation of groundwater, R.C.S.A. § 22a-133k-3.

As will be discussed further below, unless the RSRs specify otherwise, for both soil and groundwater, the RSRs require clean-up to background or to a criterion, whether that criterion is specified in the RSRs or is approved by the Commissioner under the provisions of the RSRs. R.C.S.A. §§ 22a-133k-2(a)(for soil) and 22a-133k-3(a)(for groundwater). There are also additional requirements for remediation of a groundwater plume; a plume located in an area classified as GAA or GA under the state’s water quality standards⁵ must be remediated to background, unless under R.C.S. A. § 22a-133k-3(d), remediation to a groundwater protection

⁴ The term release area is defined as “the land area at and beneath which polluted soil is located as a result of a release.” R.C.S.A. § 22a-133k-1(a)(56). Release is defined as “any discharge, spillage, uncontrolled loss, seepage, filtration, leakage, injection, escape, dumping, pumping, pouring, emitting, emptying, or disposal of a substance.” R.C.S.A. § 22a-133k-1(a)(55).

⁵ The state’s water quality standards set the overall policy for management of Connecticut’s surface and ground waters in accordance with the directives in Conn. Gen. Stat. § 22a-426 and Section 303 of the Federal Clean Water Act. The water quality standards are codified at R.C.S.A. § 22a-426-1 et seq.

criteria is permitted. Remediation of a plume located in an area classified as GB under the state's water quality standards must ensure that the plume does not interfere with any existing uses of groundwater.

The RSRs contain clean-up criteria for eighty-eight substances, pollutants commonly found in releases in Connecticut. These criteria are specified in the Appendices to the RSRs. (Unless the context provides otherwise, this ruling refers to such criteria as the criteria specified in the RSRs). In some instances, with the approval of the Commissioner, even though there is a criterion specified in the RSRs, the Commissioner can approve the use of a different or alternative criterion for a substance. R.C.S.A. §§ 22a-133k-2(d)(for soils), 22a-133k-3(b)(3)(for surface water protection), and 22a-133k-3(c)(4) (volatilization).

The criteria in the RSRs address different environmental risks. For soil direct exposure criteria address risks from direct exposure and pollutant mobility criteria address leaching of pollutants from soil to groundwater. R.C.S.A. §§ 22a-133k-2(b) and 22a-133k-2(c). For groundwater, surface water protection criteria (sometimes referred to in this Ruling as "SWPC") address groundwater that flows to surface water and volatilization criteria (sometimes referred to in this Ruling as "VC") address vapors emanating from polluted groundwater. R.C.S.A. §§ 22a-133k-3(b) and 22a-133k-3(c). Also, for groundwater, in certain situations, groundwater protection criteria (sometimes referred to in this Ruling as "GWPC") protect the State's current and future drinking water sources. R.C.S.A. § 22a-133k-3(d).

The RSRs were drafted with the recognition that there are substances, beyond the eighty-eight criteria specified in the RSRs, capable of causing pollution in Connecticut. When remediation is required for a substance for which there is no criterion specified in the Appendices of the RSRs, the RSRs contain provisions allowing the Commissioner to approve the

use of a clean-up criterion for such a substance or alternatively remediation to background is required. For soils, if there is no numeric criterion specified in the RSRs for a substance, two subdivisions with the heading “additional polluting substances” or APS, R.C.S.A. §§ 22a-133k-2(b)(5) and 22a-133k-2(c)(6), allow the Commissioner to approve a direct exposure criterion and pollutant mobility criterion for such substance. For groundwater while the term “additional polluting substances,” is not used, R.C.S.A. §§ 22a-133k-3(b)(3) and 22a-133k-3(c)(4) allow the Commissioner to approve a surface water protection criterion and volatilization criterion for a substance for which there is no numeric criteria specified in the RSRs.⁶ These provisions are in the groundwater standards section of the RSRs that allow the Commissioner to approve an alternative criteria.

C. RSR Revisions

Since the last revisions in June 2013, the Department has sought public input regarding the next “wave” of RSR revisions. From August 2013 to April 2016, eleven draft public discussion documents were released by the Department seeking feedback on discrete issues. On or about April 5, 2016, the Department released, for public discussion, a draft with possible RSR revisions, called “RSR Wave 2 Conceptual Language.” This April draft was revised, and in August 2016 the Department released another draft for public discussion called “Revised RSR Wave 2 Conceptual Language.”

The Petition defines the term “Wave 2 Concepts” as the Department’s April 5, 2016, RSR Wave 2 Conceptual Language, (Petition, II, p. 4.) and makes a number of arguments in

⁶ The one exception to this is groundwater protection criteria. When a clean-up involves the use of GWPC and there is no numeric criterion specified in the RSRs for a substance, the title of the subdivision authorizing the Commissioner to approve the use of a criterion for any such substance is “additional polluting substances.” R.C.S.A. § 22a-133k-3(h)(1).

reliance on these Wave 2 Concepts.⁷ While discussed further in Section IV, D below, I note here that such arguments are misplaced.

The documents released by the Department regarding possible Wave 2 revisions by no means represents the Department's final position on potential changes to the RSRs. Rather, the numerous and varied documents made available by the Department sought feedback from the public on potential ideas. Using such informal, non-final documents to support a legal position is dubious at best.

The release of a document with potential Wave 2 changes does not represent or even imply a gap in or need to change the RSRs. The Department may or may not make changes to the RSRs for a variety of reasons.

For the Wave 2 Concepts relied upon by the Petitioner, the Department has been very clear. The top of the very first page noted that the Wave 2 Concepts were preliminary and informal, may continue to change and did not reflect any final decisions or approval by the Department regarding the amendments that may be proposed. (See Findings of Fact 11 and 12.)

In sum, the fact that the Department sought feedback on concepts and draft language as part of potential Wave 2 revisions proves little to nothing about the current RSRs. For the reasons set forth below, the plain language of the RSRs coupled with their purpose and the state policy regarding pollution is sufficient to resolve the issues raised in the Petition. Even if this were not the case, reference to draft provisions released for public discussion, still undergoing revision, that have not even gone to public notice for comment, is no place to search for the

⁷ I also note that the Petition does not cite or use the latest Wave 2 Concepts. The Wave 2 Concepts, as defined in the Petition, refers to the Department's April 2016 draft. This draft, has been superseded by revised Wave 2 Concepts made available in August 2016 before the Petition was submitted. In addition to the reasons noted above, it is obviously problematic for the Petitioner to rely upon draft Wave 2 Concepts that have been superseded by a later draft.

meaning of the RSRs. As such, I reject the Petitioner's arguments that rely upon Wave 2 Concepts, as defined in the Petition, as a source for interpreting the RSRs.

IV. Rulings⁸

A.1. *With respect to the surface water protection criteria and volatilization criteria specified in the Appendices of the RSRs, there is no numeric criterion established⁹ for extractable total petroleum hydrocarbons ("ETPH").¹⁰*

The terms surface water protection criteria and volatilization criteria are defined in the RSRs as the concentrations identified in certain Appendices of the RSRs or any alternative criteria calculated or approved by the Commissioner under the groundwater section of the RSRs.¹¹ By the use of the term "establish" in the Petitioner's question and given the argument in the Petition, see the Petition, VI,A., p. 7, I understand the Petitioner's question to focus on the first part of the definition of surface water protection criteria and volatilization criteria, namely,

⁸ In the introductory portions of the Discussion section in the Petition (the Discussion section is labeled VI, even though it is preceded by section II) the Petitioner makes a number of strident allegations about the adverse consequences resulting from the Department's interpretations of the RSRs. While the Petitioner is certainly entitled to its opinion, suffice it to say that the Department strongly disagrees with these assertions.

⁹ While the Petitioner's question posed was a compound question: do the RSRs, in the context of SWPC or VC, "establish or require" numeric criteria for ETPH, the discussion of this issue in the Petition is limited to whether the RSRs establish such criteria, see the Petition, VI,A., p. 7. Following this lead, the ruling in section is limited to whether, in the context of SWPC or VC, the RSRs establish or have specified a numeric criteria for ETPH in Appendices D, E, or F of the RSRs. As for whether, in the context of surface water protection and volatilization, the RSRs require clean-up to a numeric criteria for ETPH, the discussion below would apply to this question.

¹⁰ While on page 1 the Petition defines ETPH as "extractable petroleum hydrocarbons" this is an error. This error is manifest since on page 2 the Petition also defines EPH as "extractable petroleum hydrocarbons." ETPH means extractable *total* petroleum hydrocarbons, while EPH means extractable petroleum hydrocarbons, that is the meaning of those terms used in the Petition.

¹¹ Surface water protection criteria is defined in the RSRs as "the concentrations identified in Appendix D to sections 22a-133k-1 through 22a-133k-3 of the Regulations of Connecticut State Agencies or any alternative surface-water protection criteria calculated or approved by the Commissioner in accordance with subdivision 22a-133k-3(b)(3) of the Regulations of Connecticut State Agencies." R.C.S.A. § 22a-133k-1(a)(69). Volatilization criteria is defined as the concentrations identified in Appendix E and Appendix F to sections 22a-133k-1 through 22a-133k-3 of the Regulations of Connecticut State Agencies or alternative criteria approved by the Commissioner pursuant to subdivision 22a-133k-3(c)(4) of the Regulations of Connecticut State Agencies." R.C.S.A. § 22a-133k-1(a)(74).

whether the surface water protection criteria and volatilization criteria specified in the Appendices of the RSRs contain a criteria for ETPH. The Petitioner answers this question in the negative. Petition, VI,A., p. 7.

I agree with the Petitioner. The surface water protection criteria and volatilization criteria specified in the Appendices of the RSRs are in Appendices D, E and F. There is no numeric criteria for ETPH specified in these Appendices. However, as is discussed further below, even though there is no numeric criteria for ETPH specified in these Appendices, the RSRs do require clean-up of ETPH either to background or to an alternative surface water protection criterion and volatilization criterion approved by the Commissioner under R.C.S.A. §§ 22a-133k-3(b)(3)(for SWPC) and 22a-133k-3(c)(4)(for VC).

A.2. With respect to surface water protection criteria and volatilization criteria, the RSRs do not require the evaluation of or meeting criteria for additional polluting substances, although this does not mean that there is no requirement to remediate such substances.

There is no definition of the term additional polluting substance in the RSRs. The term is used as a heading or title for three subdivisions in R.C.S.A. §§ 22a-133k-2(b)(5)(direct exposure criteria), 22a-133k-2(c)(6)(pollutant mobility criteria), and 22a-133k-3(h)(1)(groundwater protection criteria). These subdivisions authorize the Commissioner to approve clean-up criterion for a substance when there is no clean-up criterion specified in the RSRs.¹²

For example, with respect to direct exposure in soil, R.C.S.A. § 22a-133k-2(b)(5)(A) provides that

[w]ith respect to a substance at a release area for which a direct exposure criterion is not specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, the Commissioner may, after consultation with the Commissioner of Public

¹² In other provisions, the RSRs simply authorize the Commissioner to approve the use of a criterion for a substance for which no clean-up criterion is specified in the RSRs. R.C.S.A. §§ 22a-133k-3(b)(3) and 22a-133k-3(c)(4).

Health, approve in writing a direct exposure criterion to apply to such substance at a particular release area.

There is similar language in R.C.S.A. § 22a-133k-2(c)(6) authorizing the Commissioner to approve a pollutant mobility criterion,¹³ and when applicable, R.C.S.A. § 22a-133k-3(h)(1) authorizes the Commissioner to approve a ground-water protection criterion.¹⁴ What is notable about these provisions is the explicit reference in each of them to the fact that there is a substance at a release area for which there is no criterion specified in the RSRs. The headings of these subdivisions are the only places where the term APS appears in the RSRs.

The surface water protection criteria and volatilization criteria provisions of the RSRs do not contain subdivisions with the heading APS. Accordingly, when a substance requires remediation and there is no surface water protection criteria and volatilization criteria specified in the RSRs, the authorization for the Commissioner to approve a criterion for such substance is found in other subdivisions, not in a subdivision titled APS. So to the extent that the Petitioner's question is whether the RSRs require the evaluation of or meeting surface water protection criteria and volatilization criteria under the provisions of the RSRs that authorize the Commissioner to approve criteria for APS, the answer is no. The provisions of the RSRs titled APS do not apply to surface water protection criteria and volatilization criteria.

¹³ R.C.S.A. § 22a-133k-2(c)(6) states that “[w]ith respect to any substance for which a pollutant mobility criterion is not specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, the Commissioner may approve a pollutant mobility criterion, a dilution or dilution and attenuation factor, and a method for determining compliance with such criterion to apply to such substance at a particular release area....”

¹⁴ R.C.S.A. § 22a-133k-3(h)(1) states that “[w]ith respect to a substance in ground-water for which a ground-water protection criterion is not specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, the Commissioner may approve in writing a ground-water protection criterion to apply to such substance.....”

While there is agreement on this narrow technical point, this agreement does not extend to the Petitioner's argument about its significance. Even if not under the provisions for APS, the RSRs still require remediation of substances for which there are no surface water protection criteria and volatilization criteria specified in the RSRs.

The Petitioner claims otherwise, asserting that because the RSRs do not make provision for the approval of a surface water protection criterion or volatilization criterion for the substances identified in the APS provisions of the RSRs, there is no requirement to remediate such substances at all. Petition, VI.B., p. 8. No justification for this assertion is offered. It certainly does not follow from the language of the provisions of the RSRs regarding APS. These provisions say nothing about the Commissioner's authority to criteria under other provisions of the RSRs.

Put differently, just because the Commissioner can approve a criterion for an APS in certain circumstances, but not in others, does not mean that the only constituents in groundwater that need to be remediated are those for which a surface water protection criteria and volatilization criteria are specified in the RSRs. The subdivisions titled APS do not modify the requirement to remediate polluted groundwater. Every substance in a groundwater plume must be remediated, whether the substance has a surface water protection criteria or volatilization criteria specified in the RSRs or not. R.C.S.A. § 22a-133k-3(a).

While the consequences of the Petitioner's view are discussed further in the next section of this Ruling, I note here that if it were true that only those pollutants in groundwater for which there are surface water protection criteria and volatilization criteria specified in the Appendices of the RSRs would require remediation, substances causing pollution, however extreme, for which there are no SWPC or VC, could presumably remain in place regardless of the risks such

pollutants pose to human health or the environment. Not only does the Petitioner's view ignore the plain and unambiguous language of a number of provisions of the RSRs, it is irreconcilable and inconsistent with the General Assembly's declaration regarding the public interest in the elimination of pollution and indeed, the very purpose of the RSRs. Statutes and regulations should not be construed "in a manner that will not thwart its purpose or lead to absurd results."¹⁵

Turner v. Turner, 219 Conn. 703, 712 (1991); see also *State v. Spears*, 234 Conn. 78, 92 (1995).¹⁶

¹⁵ While the questions raised in the Petition require not only the construction of statutes, but also the construction of regulations, the Connecticut Supreme Court has stated that the rules of statutory construction apply equally to regulations as well as statutes. See *Allen v. Comm'r of Revenue Servs.*, 324 Conn. 292, 307 (2016); *Fullerton v. Dep't of Revenue Servs., Gaming Policy Bd.*, 245 Conn. 601, 608 (1998); *Sarrazin v. Coastal, Inc.*, 311 Conn. 581, 603–04 (2014).

¹⁶ In this section of the Petition, in addition to asserting that with respect to SWPC and VC, clean-up is only required for substances for which there are criteria specified in the Appendices of the RSRs, the Petitioner also asserts that the omnibus provision in the groundwater standards section of the RSRs could not apply to substances remaining in groundwater. Petition, VI.C., p. 9-10. Specifically, the Petitioner argues that remediation of substances for which there are no SWPC or VC specified in the Appendices of the RSRs cannot be required under R.C.S.A. § 22a-133k-3(i).

Section 22a-133k-3(i), entitled "Additional Remediation of Ground Water" provides, in pertinent part, that:

Nothing in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies shall preclude the Commissioner from taking any action necessary to prevent or abate pollution, or to prevent or abate any threat to human health or the environment....

The Petitioner asserts that this regulation does not allow the more detailed provisions of the RSRs to be disregarded and that the regulation imposes on the Department, "a high standard of proof" to demonstrate that some level of threat is posed before additional remediation can be required.

Without specifics – and the Petitioner does not provide any – there is no basis for the Petitioner to conclude that section 22a-133k-3(i) would or would not apply. The Petitioner has posited that groundwater present at a site may be polluted with substances for which there is no SWPC or VC specified in the RSRs and that no remediation of such substances has occurred. In such a case, for the reasons set forth in this ruling, such substances must be cleaned-up to background or to alternative criteria approved by the Commissioner under the RSRs. If remediation of such substances were not already required, I note that section 22a-133k-3(i) does not require a "high standard of proof." While it is not clear what the Petitioner means by this term when section 22a-133k-3(i) is invoked, the standard remains unchanged; the only question would be whether the unremediated presence of pollutants in groundwater is sufficient for the Commissioner to take action to prevent or abate pollution or any threat to human health and the environment. While no ruling is needed or can be given at this point in time, I suspect that the pollution from unremediated groundwater would be a sufficient predicate for the Commissioner to take action under section 22a-133k-3(i).

For the reasons set forth above, I conclude that the RSR APS provisions do not require the evaluation of or meeting numeric surface water protection criteria or volatilization criteria. I do not, however, agree with the Petitioner that as a consequence, substances in groundwater for which there are no specific numeric SWPC or VC do not have to be remediated.

A.3. *With respect to certain substances for which there are no criteria specified in the RSRs, clean-up to background is required, although clean-up to a different criteria approved by the Commissioner is permitted.*

In the previous sections of the Petition, the Petitioner's questions concerned only surface water protection criteria and volatilization criteria. The next question did not contain this limitation and apparently applies to both the soil and the groundwater sections of the RSRs. The question posed by the Petitioner concerns two discrete issues, namely, for substances for which there are no criteria in the RSRs, do the RSRs require the use of alternative criteria or compliance with background. Each is discussed separately.

The starting point, of course, is the language of the RSRs. For soils, R.C.S.A. § 22a-133k-2(a) states that

[u]nless otherwise specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, *polluted soil at a release area shall be remediated to a concentration which meets (1) (A) the direct exposure criteria set forth in subsection (b) of this section or alternative direct exposure criteria established in accordance with subdivision (2) or subdivision (7) of subsection (d) of this section; and (B) the pollutant mobility criteria set forth in subsection (c) of this section or alternative pollutant mobility criteria established in accordance with subdivision (3) or (5) of subsection (d) of this section; or (2) the background concentration for soil.*

(Emphasis added). The plain language of section 22a-133k-2(a) requires polluted soil to be remediated to a criteria, whether specified in the RSRs or approved by the Commissioner under a provision referred to in section 22a-133k-2(a). Alternatively, polluted soil can be remediated to

background.¹⁷ This includes all substances, regardless of whether there are criteria specified in the RSRs for that substance.¹⁸

The plain language of the groundwater remediation section is similar. R.C.S.A. § 22a-133k-3(a)(1) states that:

*Remediation of a ground-water plume shall result in the attainment of: (A) the requirements concerning surface water protection set forth in subsection (b) of this section and the requirements concerning volatilization set forth in subsection (c) of this section; or (B) the background concentration for ground water for each substance in such plume.*¹⁹

¹⁷ R.C.S.A. §§ 22a-133k-1(a)(5) and (a)(6) define background for groundwater and for soils as follows:

"Background concentration for ground water" with respect to a particular release means the concentration of a substance in ground water (A) at the nearest location upgradient of and unaffected by the release; or (B) if such release occurred at or created a ground-water divide, at the nearest location representative of ground water quality unaffected by any release.

"Background concentration for soil" means the representative concentration of a substance in soil of similar texture and composition outside the subject release area and in the general geographic vicinity of such release area, but not within any other release area.

¹⁸ For substances for which criteria are specified in the RSRs, the reference in subparagraph (1)(A) of R.C.S.A. § 22a-133k-2(a) includes direct exposure criteria specified in the RSRs and to the Commissioner's approval of an alternative direct exposure criteria under R.C.S.A. § 22a-133k-2(d). For substances for which criteria are not specified in the RSRs, the reference in subparagraph (1)(A) of R.C.S.A. § 22a-133k-2(a) includes the Commissioner's approval of a direct exposure criteria under R.C.S.A. § 22a-133k-2(b)(5). With respect to pollutant mobility criteria, for criteria specified in the RSRs, subparagraph (1)(B) of R.C.S.A. § 22a-133k-2(a) refers to such criteria and the Commissioner's approval of an alternative pollutant mobility criteria under R.C.S.A. § 22a-133k-2(d). For substances for which criteria are not specified in the RSRs, subparagraph (1)(B) of R.C.S.A. § 22a-133k-2(a) refers to the Commissioner's approval of a pollutant mobility criteria. As an alternative, remediation to background is required.

¹⁹ As was noted above, additional remediation of groundwater may also be required depending on the location of the plume. R.C.S.A. § 22a-133k-3(a)(2) and (3) state that:

(2) Remediation of a ground-water plume in a GA area shall also result in the reduction of each substance therein to a concentration equal to or less than the background concentration for ground water of such substance, except as provided in subsection (d) of this section.

(3) Remediation of a ground-water plume in a GB area shall also result in the reduction of each substance therein to a concentration such that such ground-water plume does not interfere with any existing use of the ground water.

(Emphasis added). Similar to soils, section 22a-133k-3(a) requires a groundwater plume²⁰ to be remediated so that the criteria applicable to surface water protection and volatilization requirements, whether specified in the Appendices of the RSRs or approved under the provisions referred to in section 22a-133k-3(a), are attained. Alternatively, a groundwater plume can be remediated to background. This includes all substances, regardless of whether there are criteria specified in the Appendices of the RSRs for a substance.²¹ Indeed, section 22a-133k-3(a) states that it applies “to each substance in such [groundwater] plume.”

Despite what appears to be the plain language and meaning of the regulations, the Petitioner asserts that section 22a-133k-3(a), and the use of “or” not “and,” does not provide a “sufficient basis” for concluding that clean-up to background or to an alternative criteria is required for substances for which there are no surface water protection criteria or volatilization criteria specified in the RSRs. Petition, VI.C., p. 11. It is not clear why the Petitioner asserts that the plain language of the regulation fails to provide a “sufficient basis” for requiring clean-up to background. The argument about “and” versus “or” is seemingly a red-herring. Section 22a-133k-3(a) uses the term “or” and no argument has been put forth – nor is one needed – that “or” should somehow be read as meaning “and.” In this context the term “or” is adequate. When it comes to clean-up of a plume of pollution in groundwater, section 22a-133k-3(a)

²⁰ A “Ground-water plume” means ground water which has been polluted by a release and in which ground water one or more substances from such release is present at a concentration above the analytical detection limit. R.S.C.S.A. § 22a-133k-1(a)(28).

²¹ For substances for which criteria are specified in the RSRs, the reference in subparagraph (1)(A) of R.C.S.A. § 22a-133k-3(a) includes the surface water protection criteria and the volatilization criteria specified in the RSRs, or the Commissioner’s approval of an alternative to such criteria under R.C.S.A. §§ 22a-133k-3(b)(3) and § 22a-133k-3(c)(4). For substances for which criteria are not specified in the RSRs, the reference in subparagraph (1)(A) of R.C.S.A. § 22a-133k-3(a) includes the Commissioner’s approval of an alternative – in this case an alternative to background - under R.C.S.A. §§ 22a-133k-3(b)(3) and § 22a-133k-3(c)(4). As an alternative, remediation to background is required.

requires clean-up to surface water protection criteria and volatilization criteria, including, as is discussed below, alternative surface water protection criteria and alternative volatilization criteria *or* to background. If there is no SWPC or VC specified in the RSRs, a substance must be remediated to background, unless, as is discussed below, the Commissioner approves the use of an alternative criterion.

While not mentioned in the Petition, the implications of the Petitioner's argument should not go unnoticed. The Petitioner claims, despite the language of R.C.S.A. § 22a-133k-3(a), that it can clean-up a groundwater plume to a criteria, even if the substance in question was one for which there is no surface water protection or volatilization criteria specified in the RSRs and, for which, the argument goes, no remediation is required. The Petitioner would claim compliance with the RSRs, despite the facts that pollutants potentially posing extreme risks to both human health and the environment remain in groundwater. This would leave a gaping hole in the RSRs, and leaving the public and environment exposed to the very risks that the RSRs were enacted to prevent.

The Petitioner does not attempt to explain how its argument comports with either the plain language of the regulation, the purpose of the RSRs, and the clearly articulated legislative policy of the state regarding pollution. The General Assembly has declared “[t]hat the pollution of the waters of the state is inimical to the public health, safety and welfare of the inhabitants of the state, is a public nuisance and is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water.” Conn. Gen. Stat. § 22a-422. The mandate for the Commissioner in promulgating the RSRs, is that the remediation standards “shall fully protect health, public welfare and the environment.” Conn. Gen. Stat. § 22a-133k. The argument advanced by the Petitioner and its implications for

human health and the environment would result in clean-ups that are antithetical to these purposes. If, for no other reason, I reject the Petitioner's approach since it is contrary to the state's policy regarding pollution, would thwart the purposes of the RSRs and lead to absurd results. *Turner v. Turner*, 219 Conn. 703, 712 (1991); see also *State v. Spears*, 234 Conn. 78, 92 (1995).

Other than the off-hand comment about the use of "or" not "and" in section 22a-133k-3(a)(1), the only rationale offered by the Petitioner to support its view is the speculative assertion that requiring background concentrations be met when surface water protection criteria or volatilization criteria are not specified in the RSRs would result in "more conservative regulation of these criteria than provided for under the RSRs." Petition, VI.C., p. 11. This of course is pure speculation, the Petitioner has not provided any facts to support this assertion. Moreover, it ignores the actual language of the RSRs, the policy of the state regarding pollution, the fact that the RSRs allow the Commissioner to approve an alternative criteria, in this case to serve as an alternative to background, and the fact that the default requirements for remediation of a groundwater plume in GAA or GA areas is background.

The Petitioner may have overlooked the fact that sections R.C.S.A. §§ 22a-133k-3(b)(3) and 22a-133k-3(c)(4) in the groundwater standards section of the RSRs allow the Commissioner to approve an alternative criteria, as an alternative to background, since the term "alternative criteria" means something different in these sections than when the term is used in the soils remediation standards section of the RSRs. This difference in meaning derives from the language of the RSRs. For soils, "Alternative Soil Criteria" is its own subsection, R.C.S.A. § 22a-133k-2(d). What is common to all of these subdivisions is the language that provides a mechanism whereby an alternative *to a criteria already specified in the RSRs* can be approved by

the Commissioner. For example, in R.C.S.A. § 22a-133k-2(d)(2), the provision allowing for an alternative direct exposure criteria states that “[w]ith respect to a substance...for which a direct exposure criterion is specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, the Commissioner may approve an alternative direct exposure criterion....”²²

The language of the RSRs regarding alternative criteria for surface water protection and volatilization is different. Unlike soils, these provisions make no mention of a criteria already specified in the RSRs. What is common, and unique, to these alternative criteria provisions for groundwater is that they apply to *any* substance, regardless of whether a criteria for that substance is, or is not, specified in the RSRs. For example, in R.C.S.A. § 22a-133k-3(b)(3)(B), the provision allowing for an alternative surface-water protection criterion states that “[t]he Commissioner may approve an alternative surface-water protection criterion *to be applied to a particular substance at a particular release area...*”²³ (Emphasis added). The rule providing for an alternative volatilization criterion is similar. R.C.S.A. § 22a-133k-3(c)(4)(B), states that “[t]he Commissioner may approve an alternative volatilization criterion for ground water or for soil vapor *to be applied to a substance at a particular release area.*” (Emphasis added).

²² There is similar language in the other provisions allowing the Commissioner to approve alternative pollutant mobility criteria for both GA and GB areas and alternative dilution and attenuation factors for both GA and GB areas when a pollutant mobility criteria is specified in the RSRs. R.C.S.A. §§ 22a-133k-2(d)(3); 22a-133k-2(d)(4); and 22a-133k-2(d)(6), respectively. R.C.S.A. § 22a-133k-2(d)(7) allows the Commissioner to approve an alternative direct exposure criterion to the criterion specified in the RSRs for PCBs.

²³ An alternative surface water protection criterion can also be “calculated for a substance in Appendix D of the [state’s] most recent Water Quality Standards.” R.C.S.A. § 22a-133k-3(b)(3)(A). This provision does not make reference to and is not limited to any criterion already specified in the RSRs. (I also note here that the Appendix D of the state’s water quality standards has been replaced by and is now Table 3 of R.C.S.A. § 22a-426-9 of the state’s water quality standards).

Clearly the language of the alternative criteria section in soils is different than groundwater. While in the soils standards section of the RSRs, alternative criteria may be approved by the Commissioner for substances with numeric criteria specified in the RSRs. However, in the groundwater standards section, alternative criteria are not limited to the surface water protection criteria and the volatilization criteria specified in the RSRs, but may also be alternatives to background as well.²⁴

Notwithstanding the foregoing, the Petitioner erroneously claims that an “alternative criteria” means an alternative to existing criteria, so that alternative criteria can be approved by the Commissioner only for criteria already specified in the RSRs. Petition, VI.C., p. 10. As a consequence, with respect to surface water protection and volatilization, the Petitioner argues that if a criterion does not exist in the RSRs, no alternative criterion can be approved by the Commissioner. *Id.* The Petitioner makes these claims despite the fact that the Petition did not examine or analyze all of the language of the RSRs regarding alternative criteria. Instead, the Petitioner compared two provisions in the soil section of the RSRs, the provisions regarding alternative direct exposure criteria with the provisions for direct exposure criteria for an additional polluting substance. This is, however, the wrong comparison. The Petitioner’s analysis completely disregards the provisions in the groundwater section of the RSRs that address alternative criteria.

²⁴ The definitions of surface water protection criteria and volatilization criteria confirm this conclusion. These definitions include the criteria in the Appendices of the RSR (Appendix D for SWPC) and (Appendix E and F for VC) or *any* alternative criteria calculated or approved by the Commissioner under the groundwater standards provisions of the RSRs that provide for an alternative criteria. There is no language in these definitions indicating that alternative criteria are limited to and can be approved by the Commissioner only for criteria already specified in the RSRs.

Any examination of the term “alternative criteria” would need to include a comparison of the provisions that use that term in both the soils and the groundwater standards sections of the RSRs. A review of the language used in these sections would reveal the differences in wording that lead to differences in meaning. The alternative criterion section in the soils standards section of the RSRs clearly contain a limitation, alternative criteria can be approved by the Commissioner only for criteria already specified in the RSRs. No such limitation appears in the language of the groundwater standards section of the RSRs regarding alternative criteria. The difference then, in meaning of “alternative criteria” in the soil and groundwater standards sections of the RSRs arises from the differences in language that are clear and unmistakable.

Finally, while alternative criteria can be approved by the Commissioner for pollutants either in soil and groundwater as noted above, the Petition asks whether the RSRs *require* the use of such criteria when numeric criteria are not specified in the RSRs. Petition, I, p. 2. In response, I note that whether it be soil or groundwater, the use of alternative criteria is not required by the RSRs. Obtaining an alternative criterion is a choice. For soils, it is a choice to seek a criterion different than that specified in the RSRs. For groundwater, relative to surface water protection and volatilization, it is a choice to seek a criterion different than that specified in the RSRs or if there is no such criterion, to seek a criterion as an alternative to background.

For all the reasons noted above, I rule that unless the RSRs specifically provide otherwise, the RSRs require that all substances be remediated to a criterion, either a criterion specified in the RSRs or approved by the Commissioner pursuant to the RSRs, or to background. One or the other is required, not neither. I also rule that while an alternative criterion can be approved by the Commissioner for substances either in soil and groundwater, obtaining and using an alternative criterion is optional and is not required by the RSRs. I also note, however,

that if an alternative criterion is not obtained, clean-up to a criterion specified in the RSRs or background, as applicable, is required.

B. The RSRs require that all analytical results be used in determining whether a clean-up requirement has been met, unless otherwise specified in the RSRs or the Commissioner approves a different method for determining compliance.

The Petitioner next asks whether all analytical results must be used to determine whether a clean-up criterion has been met if more than one analytical method is used for a given sample location. Petition, VI.D., p. 13. The Petitioner posits a hypothetical in which the same substance is analyzed by a laboratory using two different analytical methods. The results of one test method show the substance above the applicable criterion, while the results of the other test method show the substance below the applicable criterion. According to the Petitioner, in this situation there has been disagreement and confusion about whether the result showing the substance as being below the applicable criterion can be used, while the result showing the substance above the applicable criterion can simply be disregarded. Petition, VI.D., p. 13-14.

The RSRs should help dispel any confusions and resolve any disagreement. There are provisions in both the groundwater and soil sections of the RSRs that address how to determine compliance with an applicable criterion. R.C.S.A. §§ 22a-133k-2(e) and 22a-133k-3(g). While the provisions provide certain options, unless the RSRs specifically provide otherwise or the Commissioner has approved another method for determining compliance, the RSRs require that the results from all analytical methods be used to determine compliance with a criterion.

For example, when determining compliance with a direct exposure criterion, R.C.S.A. § 22a-133k-2(e)(1) states that

[u]nless an alternative method for determining compliance with a direct exposure criterion has been approved by the Commissioner in writing, compliance with a direct exposure criterion is achieved when (A) the ninety-five percent upper confidence level of the arithmetic mean *of all sample*

results of laboratory analyses of soil from the subject release area is equal to or less than such criterion or (B) *the results of all laboratory analyses* of samples from the subject release area are equal to or less than the applicable direct exposure criterion.

(Emphasis added). The same is true for determining compliance with a pollutant mobility criterion, R.C.S.A. § 22a-133k-2(e)(2)(*all sample results of laboratory analysis* must be used to determine compliance with pollutant mobility criteria),²⁵ with a surface water protection or volatilization criterion, R.C.S.A. § 22a-133k-3(g)(2)(C)(*all sample results* representative of the groundwater plume must be used to determine compliance with SWPC) and R.C.S.A. § 22a-133k-3(g)(D)(*results of all laboratory analysis of samples* must be used to determine compliance with volatilization criteria),²⁶ and with background and a groundwater protection criterion,

²⁵ Section 22a-133k-2(e)(2), the section for applying the pollutant mobility criteria states:

(2) Unless an alternative method for determining compliance with a pollutant mobility criterion for a particular substance has been approved by the Commissioner in writing, compliance with a pollutant mobility criterion for such substance is achieved when:

(A) (i) a representative sampling program consisting of not less than twenty samples of soil located above the water table has been used to characterize the distribution and concentration of such substance at the subject release area or remaining at the subject release area following remediation, and (ii) the ninety-five percent upper confidence level of the arithmetic mean of all the sample results of laboratory analyses of soil from the subject release area for such substance is equal to or less than the applicable pollutant mobility criterion or the results of all laboratory analyses of samples from the subject release area are equal to or less than the applicable direct exposure criterion; or

(B) (i) a representative sampling program consisting of less than twenty samples of soil located above the water table has been used to characterize the distribution and concentration of substances remaining at the subject release area following remediation and (ii) the results of all laboratory analysis of samples from the subject release area for such substances are equal to or less than such pollutant mobility criterion.

²⁶ Sections 22a-133k-3(g)(2)(C) and (D), the sections regarding applying the surface water protection criteria and volatilization criteria state that:

(C) Compliance with Surface-water Protection Criteria.

Compliance with a surface-water protection criterion for a substance in ground water is achieved when the sampling locations are representative of the subject ground-water plume and (i) the ninety-five percent upper confidence level of the arithmetic mean of all sample results representative of the subject ground water plume is equal to or less than such criterion; or (ii) the concentration of such substance in that portion of such plume which is immediately upgradient of the point at which such ground-water discharges to the receiving surface-water body is equal to or less than the applicable surface-water protection criterion.

(D) Compliance with Volatilization Criteria.

A volatile substance may be remediated to a concentration as specified in either subdivision (2)(D)(i) or subdivision (2)(D)(ii) of this subsection.

(i) Compliance with volatilization criteria in ground water.

R.C.S.A. § 22a-133k-3(g)(2)(B)(analytical results at *all* sampling locations must be used or if a representative sampling program is used, *all results of laboratory analysis must be used* to determine if background or groundwater protection criteria are met).²⁷ In short, regardless of whether it is soil or groundwater, unless the RSRs specially provide otherwise or the Commissioner has approved another method for determining compliance, the RSRs make repeated reference to the fact that *all* sample results, including the results from all laboratory analytical methods, must be used when determining whether a criterion has been met.²⁸

The Petitioner does not cite, analyze or address these provisions of the RSRs, but nevertheless still argues that since an LEP selects the analytical method to be used when a clean-up is conducted, if any single analytical method, the results of which are valid, shows that a substance is below a criterion, an LEP should be free to “select” that analytical method for use

Compliance with a volatilization criterion for a substance in ground water is achieved when the sampling locations are representative of the subject ground-water plume and the results of all laboratory analyses of samples for such substance are equal to or less than the applicable volatilization criterion as determined by subsection (c) of this section.

(ii) Compliance with volatilization criteria in soil vapor.

Compliance with a volatilization criterion for a substance in soil vapor is achieved when the sampling locations and frequency are representative of the subject soil vapor, including seasonal variability, and the results of all laboratory analyses of samples for such substance are equal to or less than the applicable volatilization criterion.

²⁷ Section 22a-133k-3(g)(2)(B), the sections regarding applying the ground water protection criteria states that:

(B) Compliance with Ground-water Protection Criteria or Background.

Compliance with the ground-water protection criterion for a substance in ground water or background concentration for ground water for such substance is achieved when the sampling locations are representative of the subject ground-water plume and (i) the analytical results for such substance at all such sampling locations are equal to or less than either the ground-water protection criterion for such substance or the background concentration for ground water, whichever is applicable, as determined by subsection (d) of this section or (ii) a representative sampling program consisting of not less than twelve consecutive monthly samples from each such sampling location has been used to characterize the ground-water plume and the ninety-five percent upper confidence level of the arithmetic mean of all results of laboratory analyses of such samples for such substance are equal to or less than the criterion for such substance.

²⁸ It is worth noting that requiring the use all of sample results does not mean that sample results can never be disregarded. To the contrary, if an LEP realizes that a test result is an anomaly, the subject of laboratory interference or should be disregarded for some other scientifically valid reason, an LEP remains free to explain why certain sample results should be disregarded. LEPs may not, however, simply disregard otherwise valid sample results based solely on the fact that another test method yields a different result. This is not an adequate explanation for disregarding a sample result.

and disregard the results from any other analytical method of a sample from the same location that shows a substance above an applicable criterion.

It is not clear whether the Petitioner is asserting that if two analytical methods are used for multiple substances, that an LEP is free to “cherry-pick” the results on a substance-by-substance basis from either analytical method, or whether an LEP would simply disregard all of the results from one analytical method in favor of the results from the other analytical method. In the final analysis, both approaches miss the mark.

There is clearly a difference between being able to select an analytical method and being able to selectively accept or reject the results from an analytical method, once chosen. While LEPs may well be charged with choosing an appropriate method, having chosen to use more than one analytical method, an LEP is not free to use results from one analytical method and simply ignore the results from the other method. As was noted above, doing so would not be compliant with the RSRs which, unless otherwise specified in the RSRs or approved by the Commissioner, require that the results from all analytical methods be used when determining whether a criterion has been met.

In short, I reject the Petitioner’s claim that when two analytical methods are used for samples at a given location, an LEP can choose certain sample results from one analytical method – those showing compliance with a criterion and disregard sampling results from the other analytical method – those showing non-compliance with an applicable criterion. Rather, I conclude that the RSRs require that the results from all analytical methods be used to determine whether a clean-up criterion has been met, unless the RSRs specifically provide otherwise, or the Commissioner has approved another method for determining compliance.

C. *Guidance of the Department recommending the use of certain test methods and clean-up criteria for EPH, VPH and APH, similar to guidance of the Department for other test methods or criteria, does not violate the state's Uniform Administrative Procedures Act.*

With the benefit of more than twenty years of administering the RSRs, the Department has made available suggestions or recommendation for those trying to choose an appropriate analytical method or a criterion for a substance not specified in the RSRs. The Department has made these suggestions and recommendations known, including for extractable petroleum hydrocarbons ("EPH"), volatile petroleum hydrocarbons ("VPH") and air-phase petroleum hydrocarbons ("APH"), through the issuance of guidance. Such guidance clearly does not have the force of law, it is, as the name implies, suggestions and recommendations for those looking for help.

The Petitioner claims otherwise and asserts that the Department *has established* analytical methods and clean-up criteria for EPH, VPH and APH in violation of the state's Uniform Administrative Procedures Act ("UAPA"), Conn. Gen. Stat. § 4-166 et seq.^{29/30} Petitioner does not seem to complain about the fact the Commissioner, when acting pursuant to the provisions of the RSRs, approves criteria for APS or alternative criteria. Indeed, when approving such criteria for use there is no question that the Commissioner is acting pursuant to duly promulgated regulations. Rather, the Petitioner claims that the Department is using its guidance to establish

²⁹ The terms EPH, VPH and APH can refer to an analytical method or to the concentration of certain substances measured by the use of such methods. The meaning of these terms is determined by the context in which they are used in a sentence.

³⁰ While the question posed by the Petitioner states that it includes, *but is not limited to*, EPH, VPH and APH, these are the only pollutants specifically mentioned in the Petitioner's question and in that portion of the Petition that discusses this question. Petition, VI, D. Page 11-12. Without more, the Petitioner has not provided any facts to support its allegations or conclusions regarding the Department's alleged lack of compliance with the UAPA for pollutants other than EPH, VPH or APH. Although the discussion below could apply to additional pollutants, it is focused on EPH, VPH and APH, the pollutants cited in the Petition.

clean-up criteria for EPH, VPH and APH without complying with the notice and comment requirements of the UAPA.

The starting point in considering the Petitioner's claims is the UAPA itself, which defines a regulation as:

[e]ach agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, (B) declaratory rulings issued pursuant to section 4-176, or (C) intra-agency or interagency memoranda.

Conn. Gen. Stat. § 4-166. The UAPA prescribes a method for the adoption of a regulation.

Conn. Gen. Stat. §§ 4-168, 4-169, 4-170 and 4-172. In determining whether the criteria recommended by the Department must be promulgated as a regulation, in a related context, the Connecticut Supreme Court has noted that “[t]he central issue is: Were the so-called “guidelines” actually used as a “regulation” as that term is defined in the UAPA.” *Salmon Brook Convalescent Home, Inc., v. Commission on Hospital and Health Care*, 177 Conn. 356, 362 (1979). A review of how the Department's recommended criteria are used makes clear that they are not regulations.

For those seeking a numeric criterion for EPH, VPH or APH, the Department's guidance provides recommendations. It bears emphasizing, however, that use of the Department's recommended criteria is completely voluntary; no one is *required* to use these recommendations. Anyone is free to seek approval of the criterion for EPH, VPH and APH recommended by the Department or a different criterion.³¹

³¹ Of course, the need to seek approval of a criteria to use can also be avoided altogether by choosing to clean-up to background.

The technical guidance document containing such recommendations makes this clear. The guidance states unambiguously that “[u]se of the recommended remediation criteria is voluntary. Site managers may choose to use these criteria or elect to derive their own site-specific criteria in accordance with existing regulatory provisions....” Technical Support Document: Recommended Numeric Criteria for Common Additional Polluting Substances and Certain Alternative Criteria, page 4.

In a case where our Supreme Court found that an agency’s guidelines had violated the UAPA, the guidelines were used in a completely different manner than the Department’s recommended criterion. In *Salmon Brook, supra*, the plaintiff, the operator of a nursing home, filed an application seeking approval of certain rate increases from the Commission on Hospitals and Health Care. The Commission, as it had in other cases, applied certain “guidelines” to the plaintiff’s application. Based upon the application of those guidelines, the Commission denied certain rate increases requested by the plaintiff. In that case, the Supreme Court found that the Commission was using its guidelines as substantive standards that served as rules, and as such, were required to be promulgated under the UAPA.³²

That is not the case here. When an application seeking approval to use a criterion for EPH, VPH or APH is submitted to the Department, that application is evaluated on the basis of

³² It is axiomatic that regulations are rules of “general applicability.” Conn. Gen. Stat. § 4-166. The criteria recommended by the Department are not rules of general applicability because they do not apply to all releases, only to those releases where the person remediating the site chooses to use the recommended criteria. Contrast this guidance with the “guidelines” at issue in *Salmon Brook*, where the entire regulated community was subjected to the Commission’s guidelines. In that case, the “guidelines” applied mechanically to all applications; no alternative path was provided. Because a person conducting remediation may choose whether to use the recommended criteria or seek a different clean up criteria, and this must be approved by the Commissioner on a release specific basis, the criteria recommended for use by the Department are not rules of general applicability requiring promulgation as a regulation.

the facts and circumstances presented by a specific release in light of the applicable provision of the RSRs. Those seeking approval to use a criteria for an APS or an alternative criteria can choose to use the recommend criteria or a different criteria. This was not the case in *Salmon Brook*, where applicants had no choice; every application was evaluated under the guidelines developed by the Commission.

Also, unlike the plaintiff in *Salmon Brook*, the Petition does not allege that the Department has used its recommended criteria as a standard to deny a request to approve the use of a criteria for EPH, VPH or APH that differs from the recommended criteria. While the use of the Department's recommended criteria may help expedite the review of an application for approval of a criterion for APS or an alternative criteria, the Petitioner has alleged no facts and provided no evidence that the Department applies its recommended criteria for as a standard when considering a request to approve the use of any other criteria. So while the Department has recommended criteria and these criteria were not promulgated as rules, the Petitioner has not demonstrated that the Department is using these recommended criteria as substantive standards, or as rules.

The Petitioner appears to recognize as much, but complains that the "voluntary" criteria recommended for use as an APS or an alternative criteria is not viable or a reasonably good choice. Petition, VI,D., p. 12. However, while the Petitioner might not like the criteria recommended by the Department, that does not mean that by making its recommendations known the Department is violating the UAPA.³³ If the Petitioner does not like the criteria

³³ The Petitioner also complains that the Department formulated its recommendations regarding criteria for EPH, VPH and APH before the most recent revisions to the RSRs, yet failed to codify these criteria. However, there is no requirement – and the Petitioner has not cited one – that the Department codify such recommendation in the RSRs whether it is for EPH, VPH, APH or for any other pollutant.

recommended by the Department, the Petitioner always remains free to remediate to background or to seek approval of a different criteria.

The Petitioner's claims regarding an alleged violation of the UAPA concerning guidance the Department has provided regarding EPH, VPH or APH as analytical methods fails for similar reasons. As was the case with criteria for EPH, VPH and APH, the Department has issued guidance regarding their use as an analytical method. The Department makes such guidance available largely in response to a request from those undertaking clean-ups. As long as there is interest the Department expects that it will continue to provide such guidance.³⁴

The Petitioner has neither asserted any facts nor provided any evidence to support the conclusion that the Department *requires* the use of the EPH, VPH or APH analytical methods or has denied the use of other test methods because it does not conform to the Department's guidance. The fallacy in the Petitioner's argument is that the Department mandates the use of the EPH, VPH and APH analytical methods specified in the Department's guidance. To the contrary, those undertaking clean-ups are free to select which analytical methods to use, provided of course that chosen analytical method is appropriate for the situation. This is the case regardless of whether such method is suggested in the Department's guidance.

For all of the reasons noted above, I reject the Petitioner's claim the Department has violated the UAPA in suggesting analytical methods or recommending clean-up criteria for EPH, VPH or APH. These suggestions and recommendations do not impose any substantive

³⁴ The Transfer Act, which is applicable to all of the sites in Connecticut covered by the Petition, requires that a site be investigated in accordance with "prevailing standards and guidelines." Conn. Gen. Stat. § 22a-134a. In this context, where the General Assembly is requiring compliance with "prevailing standards and guidelines" guidance from the Department as to what that might mean, seems particularly apt.

requirements, but remain an option. They do not function as rules for those undertaking a clean-up.

D. While no remedy is needed, the Petitioner has failed to demonstrate why revisions to the RSRs cannot provide an adequate remedy with respect to the issues raised in the Petition.

It is not clear whether this question is really one for which a ruling is sought, or an argument as to why, pursuant to Conn. Gen. Stat. § 4-176(e)(4), initiating rule-making based on Wave 2 Concepts is not an adequate response to the Petition. In either event, I note at the outset that since the Petitioner has failed to provide the facts necessary to evaluate this issue, without such facts there is no basis for the Petitioner's conclusion that rule-making will not provide "an adequate remedy" for the issues raised in the Petition.

Moreover, this section of the Petition assumes that a "remedy" of some kind is in fact needed to address the issues raised in the Petition. The Petitioner cites the proposed addition of numeric ETPH and APS requirements for surface water protection criteria and volatilization criteria as if these were intended to remedy some flaw in the RSRs or in their application. The Petitioner's question, however, is based on a false premise, namely that a remedy for alleged violations of the UAPA is needed. Since no rule-making is necessary to fix or remedy any of the issues raised in this Petition, there is no merit to the Petitioner's claim that rule-making is incapable of providing such a fix.

The Petitioner argues that the Wave 2 Concepts do not sufficiently address a number of the issues raised in this Petition.³⁵ Petition, VI.,E., p. 15. Why this is the case is not stated.

³⁵ The Petitioner's citation to and reliance on a two-year grandfathering provision in the Wave 2 Concepts as support for its argument is mistaken. Until the Department goes through the rule-making process, it remains unclear whether the grandfathering provisions noted in the Petition will be enacted. No assurance was provided that the Department will seek adoption of *any* of the Wave 2 Concepts, or even if a proposal is retained, that the language will be the same as appeared in the Wave 2 Concepts. Indeed, the two-year grandfathering provision cited by the Petitioner was changed and no longer appears in the Department's August 2016 Revised Wave 2 Concepts. As such, this grandfathering provision does not and really cannot provide any support for the Petitioner's claim.

What issues, what Wave 2 Concepts and why a regulatory change would not address whatever the issue is, is left unsaid. I also know of no reason why – and the Petitioner has not provided one – if the Wave 2 Concepts proposal did not provide the regulatory relief sought by the Petition, that a proposal providing adequate relief could not be substituted.³⁶

The Petitioner asserts that the timeline for revising the RSRs is uncertain, but that the resource intensive nature of rule-making does not justify “not complying with APA.” Petition, VI.E., p. 15. If, however, the complaint is that the Department is not complying with the UAPA because it has not engaging in rule-making, would not engaging in rule-making remedy the defect?

The answer appears to be the gravamen of the Petitioner’s complaint; rule-making will not provide an “adequate remedy,” because, according to the Petitioner, the Department will, regardless of any rule-making, continue to violate the UAPA. The Petitioner complains about “the on-going imposition of requirements that are not provided for in the RSRs” and writes that “continued use of discretionary, site by site standards *even after* the 2013 RSRs are revised would *continue* such APA deficiencies.” (Emphasis added). Petition, VI.E., p. 15. After a number of gratuitous unproven assertions about events occurring between seven and fifteen years ago, the Petitioner concludes that regardless of what regulations are in place, “DEEP may continue to enforce requirements that do not exist.” *Id.*, at p.16.

There is a bit of irony here. Throughout the Petition, the Petitioner alleges that the Department has failed to engage in rule-making. Yet, now, the Petitioner asserts that even if the

³⁶ As has been noted in this Ruling, nothing prevented the Department from modifying the Wave 2 Concepts made available for review. Indeed, learning where modifications might be made was one of the reasons for seeking and obtaining public input.

Department were to engage in rule-making, the Department would continue to violate the UAPA.

I reject both the premise of the Petitioner's assertions and its conclusion. This includes the Petitioner's assertions that the Department is violating the UAPA. Moreover, as a premise for asserting that revising the RSRs will not provide the Petitioner with an adequate remedy, I further reject the claim that regardless of what rules are in place what the Department will continue violating the UAPA.

For all of these reasons, I reject the Petitioner's claim that revising the RSRs will not provide the Petitioner with an adequate remedy.

E. Regardless of whether or not a site is in compliance with the RSRs, the LEP Regulations are separate and distinct from the RSRs and impose separate and distinct requirements; solely because a site has achieved compliance with the RSRs does not mean that an LEP has satisfied its obligations under the LEP Regulations, the LEP Regulations may require more.

In this section of the Petition, the Petitioner identifies more rules that it argues cannot be used to require clean-up of pollution. Here, however, the focus is on the meaning of the regulations concerning LEPs and their relationship to the RSRs. Specifically, the Petitioner asserts that the regulations that govern LEPs cannot be used to require clean-up beyond that specified in the RSRs.

After authorization by the State Board of Environmental Professionals, a person may be issued a license by the Commissioner and become an LEP. LEP may engage in activities associated with the investigation and remediation of pollution and sources of pollution including the rendering or offering to render to clients professional services in connection with the investigation and remediation of pollution and sources of pollution. Conn. Gen. Stat. § 22a-133v. The regulations governing LEPs are found at R.C.S.A. §§ 22a-133v-1 through 22a-133v-8

(the “LEP Regulations”). The LEP Regulations include licensing as well as other rules, including certain rules of professional conduct. These rules of professional conduct require, among other things, that an LEP, “rendering professional services . . . hold paramount the health, safety and welfare of the public and the environment.” R.C.S.A. § 22a-133v-6(d).

It is clear that the LEP Regulations do not, in and of themselves, impose standards to which releases of pollutants must be remediated. That is the purpose of the RSRs and other laws. The LEP Regulations govern, among other things, the licensing and conduct of LEPs. The question then is whether an LEP can say that his or her obligations under the LEP Regulations have been fulfilled solely because the RSRs have been satisfied. The Petitioner would have me answer that question in the affirmative. I cannot agree.

Given that the Petition provides no specific factual circumstance within which to consider the interrelationship of the LEP Regulations and the RSRs, there is no context or basis for the Petitioner’s conclusion that satisfying the RSRs means satisfying an LEP’s obligations under the LEP Regulations. Without specific facts concerning an LEP’s activities in investigating, planning and remediating specific pollutants on a specific contaminated site, the conditions at a site, including, but not limited to, what pollutants are present, etc., there simply is no basis for the Petitioner’s conclusions.

More significantly, there is no support for the Petitioner’s conclusions in the language of the LEP Regulations – and none is cited by the Petitioner. No provision of the LEP Regulations states that an LEP satisfies his or her obligations under the LEP Regulations once a site has achieved compliance with the RSRs.

Indeed, the only place the RSRs are mentioned in the LEP Regulations is in R.C.S.A. § 22a-133v-6(d)(2)(B). This subparagraph states that

(2) In rendering professional services, a licensee shall at all times:

(B) Follow the requirements and procedures set forth in the applicable provisions of sections 22a-133o, 22a-133x, 22a-133y and 22a-134a of the Connecticut General Statutes, sections 22a-133k-1 through 22a-133k-3, inclusive, sections 22a-133v-1 through 22a-133v-8, inclusive, and 22a-133q-1 of the Regulations of Connecticut State Agencies, and any other statute, regulation, permit or other license, approval, or order of the Board or the Commissioner;

An LEP must abide by a number of requirements: the RSRs; a variety of other remediation statutes, regulations, permits, licenses, and, orders of the Commissioner, or the State Board of Examiners of Environmental Professionals. This includes, but is not limited to Conn. Gen. Stat. § 22a-422, which articulates the policy of the state that pollution is inimical to public health, safety and welfare and is a public nuisance. To claim then, as the Petitioner does, that an LEP's obligations start and stop with satisfaction of the RSRs ignores the plain language of the LEP Regulations and the statutory and regulatory schemes incorporated therein.³⁷

The Petitioner posits a hypothetical question, premised on the assumption that groundwater polluted with a substance for which there is no surface water protection criteria or volatilization criteria specified in the RSRs need not be remediated. Petition, VI.F., p.17-18.

³⁷ The Petitioner makes two other claims in support of its view, both of which are unavailing for similar reasons.

The Petitioner claims that R.C.S.A. §§ 22a-133v-6(c)(1) and 22a-133v-6(d)(6) have been cited as a basis for imposing on LEPs additional obligations beyond satisfying the RSRs. Petition, VI.F., p. 17. Yet, the Petitioner makes this claim without attribution. The Petitioner fails to identify who made this supposed assertion, to whom, in what context, for what purpose and as a basis for requiring what action. Lacking such basic facts, the claim stands as little more than an unsupported assertion, something I clearly cannot base a ruling upon.

In another example the Petitioner claims that “[the Department] might assert,” based on guidance, that a substance must be remediated, even if according to the Petitioner, remediation is not required by the RSRs. According to this argument, the Department will rely on certain guidance, apply it to the LEP Regulations and then use it all to require what the RSRs do not. The Petitioner ends by noting that the Department's use of such guidance is not consistent with the UAPA. Petition, VI.F., p. 18. However, the question in this section of the Petition is about the LEP Regulations, not the Department's alleged misuse of guidance. Moreover, I cannot base a ruling on what “the Department *might assert*.” The Petitioner has failed to provide even the basic information in which to evaluate the Petitioner's assertions. Lacking such information neither the Petitioner, nor I, can reach any conclusions about the Department's alleged use of guidance to say nothing of an LEP's obligations under the LEP Regulations.

The Petitioner claims that if no clean-up standard exists in the RSRs, the LEP Regulations cannot be used to require remediation of polluted groundwater. I have already rejected the Petitioner's understanding of the RSRs which underlies this argument and need not repeat that analysis here. However, the Petitioner's hypothetical does help illustrate that the RSRs and the LEP Regulations are separate and distinct and impose independent requirements.

If I did rely on the assumptions in the Petitioner's hypothetical, and remediation of pollutants in groundwater was not required when certain numeric clean-up criteria are not specified in the RSRs, it is certainly possible that such pollutants would remain in groundwater unaddressed where they may pose a threat to human health and the environment, even if it were claimed that the RSRs had been satisfied. In such a situation, if, in the professional judgment of an LEP, the pollutants left behind could pose a threat to health, safety and welfare of the public and the environment, an LEP could not rely upon compliance with the RSRs to assert that all of the obligations imposed by the LEP Regulations have been fulfilled.

The LEP Regulations are separate and distinct from the RSRs and impose separate and distinct requirements. The rules of professional conduct for LEPS were enacted

[i]n order to establish and maintain a high standard of integrity, skills and practice in the environmental profession and to safeguard the environment and the health, safety, property, and welfare of the public....

R.C.S.A. § 22a-133v-6(b)(1). The LEP Regulations also require that "[i]n the rendering of professional services, a [licensed environmental professional] shall, at all times, hold paramount the health, safety and welfare of the public and the environment." R.C.S.A. § 22a-133v-6(d). While, the LEP Regulations do not set out specific criterion for the remediation of pollutants, they clearly do place upon an LEP a burden to exercise professional judgment aimed at

safeguarding the environment and the health, safety, property, and welfare of the public. These obligations remain independent and distinct, even if the RSRs have been satisfied at a site.

Despite the plain language of the LEP Regulations, the Petitioner makes the sweeping claim that “it is necessary to reasonably balance the two critical needs of reasonably protecting human health and the environment while at the same time doing so in a reasonable and predictable manner” and suggests that somehow, requiring that LEPs adhere to the hold paramount provision cited above will upset this balance. There is no basis for this claim. No statute or regulation, including the LEP Regulations, requires the “balance” cited by the Petitioner. The LEP Regulations require that LEPs shall, at all times, hold paramount the health, safety and welfare of the public and the environment, period. The LEP Regulations do not call for balancing.³⁸

Despite the *requirement* in the regulations that LEPs hold paramount human health, safety and welfare and the health of the environment, the Petitioner characterizes this an abstraction, stating that when specifics are considered this abstraction is satisfied when a site achieves compliance with the RSRs. Petition, VLF., p. 19. According the Petitioner’s logic, this would true regardless of the conditions present at a site. To support this claim the Petitioner argues that “LEPs are not required to satisfy what might be some other requirement based on unknown, subjective, or evolving perceptions of risk.” *Id.* Again, the Petitioner’s understanding of the “hold paramount” provision has no support in the language of the LEP Regulations.

³⁸ In fact in *Underpass* our Supreme Court held that, although cost could be considered by the Superior Court when ordering remediation under the standards set out in the RSRs as a remedy for the violation of environmental statutes, it cautioned that, “[w]hen considering the cost of remediation in crafting a remedy, however, the trial court’s primary goal should be to maximize the prevention and elimination of pollution, not to minimize the economic impact on the defendant.” *Underpass*, supra, at 105. This statement, that prevention and elimination of pollution is to be considered before other factors, is just as true in the context of the Petitioner’s question as it is in the Supreme Court’s decision.

Indeed, as was noted above, LEPs are required to satisfy numerous requirements beyond the RSRs. R.C.S.A. § 22a-133v-6(d)(2)(B). While an LEP may not be required to satisfy unknown, subjective or evolving perceptions of risk, an LEP is required to exercise professional judgment consistent with the requirements of the LEP Regulations at all times.³⁹

If the drafters of the LEP Regulations intended to place upon LEPs only the burden of achieving compliance with the RSRs they would have done so. They did not. Instead, the LEP Regulations impose additional obligations. It may well be that in most cases, when a site has achieved compliance with the RSRs, an LEP's obligations under the LEP Regulations are also fulfilled. However, that is not necessarily the case. If, for example, as suggested by the Petitioner it is possible to achieve compliance with the RSRs yet potentially leave gross levels of pollutants behind, it may be that achieving compliance with the RSRs has not satisfied an LEP's obligations under the LEP Regulations.

For all these reasons, I conclude that the LEP Regulations and the RSRs are separate and distinct and impose separate and distinct requirements; solely because a site has achieved compliance with the RSRs does not mean that an LEP has satisfied its obligations under the LEP Regulations, the LEP Regulations may require more.

V. Conclusion

For all the reasons noted above, I rule as follows:

A.1. With respect to the surface water protection criteria and volatilization criteria specified in the Appendices of the RSRs, there is numeric criterion for extractable total petroleum hydrocarbons.

³⁹ If an LEP is reminded of these obligations, as the Petitioner asserts some LEPs have heard, this hardly poses what the Petitioner characterizes as a "chilling effect" or "threatens the purpose of the LEP program." Petition, VI.F., p. 19-20. If anything, it is a reminder of the professional judgment expected of LEPs.

A.2. With respect to surface water protection criteria and volatilization criteria, the RSRs do not require the evaluation of or meeting criteria for additional polluting substances, although this does not mean that there is no requirement to remediate such substances.

A.3. With respect to certain substances for which there are no criteria specified in the RSRs, clean-up to background is required, although clean-up to a different criteria approved by the Commissioner is permitted.

B. The RSRs require that all analytical results be used in determining whether a clean-up requirement has been met, unless otherwise specified in the RSRs or the Commissioner approves a different method for determining compliance.

C. Guidance of the Department recommending the use of certain test methods and clean-up criteria for EPH, VPH and APH, similar to guidance of the Department for other test methods or criteria, does not violate the state's Uniform Administrative Procedures Act.

D. While no remedy is needed, the Petitioner has failed to demonstrate why revisions to the RSRs cannot provide an adequate remedy with respect to the issues raised in the Petition.

E. Regardless of whether or not a site is in compliance with the RSRs, the LEP Regulations are separate and distinct from the RSRs and impose separate and distinct requirements. Solely because a site has achieved compliance with the RSRs does not mean that an LEP has satisfied its obligations under the LEP Regulations, the LEP Regulations may require more.

6/27/17
Date

Robert E. Kaliszewski
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Deputy Commissioner
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Protection