

Dear Graham and Brendan:

First off, I disagree with the Working Group's suggestion about inviting or soliciting public commentary. I think it's a recipe for disaster should others like myself be out there looning in the dark somewhere.

I have no allegiances or alliances or conflicts of interests with anyone attached. I attach Sam and Emily because I listen when they speak and I'm not going to attach everyone in those meetings. Give me someone neutral or an impartial go-between and I'll attach no one. But if I just send it to DEEP Cleanup Transform, well, we know what happens.

2023 is not the year. It could be, but not likely. Here is why.

The Department understands that it is necessary for contractors and consultants who are not Licensed Environmental Professionals to respond to certain types of releases, and that those contractors and consultants may perform certain activities to be required by regulation. The Department does not support creating a second formal licensing program, similar to the LEP program, for another tier of licensed professionals. Instead, the Department will seek to identify those specific tasks which can be undertaken without supervision of a Licensed Environmental Professional, and the specific persons permitted to complete them, without creating a second licensing program. Consideration will be given to the scope of work to be performed by contractors and consultants who are not LEPS, and the records that must be produced and retained regarding such work. DEEP anticipates an ongoing dialogue about which tasks must be reserved for LEPs and which tasks can be completed by other contractors and consultants.

- **Who is responsible for determining the nature and cause of the release? Who is responsible for determining the proximity of the release to sensitive environmental areas?**

The responsibility to make each of these determinations rest with a “person required to report a release.” However, such determinations do not ultimately bind DEEP, and should DEEP respond or otherwise take action with regard to a release, DEEP may ultimately reach its own conclusions regarding cause and responsibility.

Question: What is the investigative-scientific methodology that DEEP uses in a Emergency Response Situation to reach conclusions regarding such determinations as cause, responsibility, exposure pathways, sensitive receptors, etc? It is well understood that DEEP will exercise its discretionary authority [enforcement discretion] to take enforcement action, determine the nature of a release, the cause, and proximity to sensitive receptors. My question is, where and when does science enter the site and accountability begin? In a scenario where the report of a release is made to DEEP and

DEEP responds, exercises its discretionary authority to reach its own conclusions regarding cause, responsibility, potential impact to groundwater and threats to sensitive receptors, etc, activates the Cost Recovery Fund, contracts with a CT Licensed Spill Contractor to immediately mitigate further impacts of the release, who is the accountable?

During the early portion of today's presentation, DEEP proposed expanding the class of individuals responsible for reporting contemporaneous spills to include employees of spill contractors. The hypothetical "Clean Harbor Employee" scenario was introduced by a Working Group Member in response to the Department's presentation. In the "Clean Harbor Employee" scenario, it is assumed the employee is already on site, mitigating or remediating some quantity of release for which the services of a Licensed Contractor (Clean Harbor) are required. The employee then observes a new contemporaneous release apart from the original reportable release, or the employee witnesses (or participates in) a new reportable spill which stems from the original reportable release. Without going further into scenarios (Transport truck rollover? Recovery system failure?) it is hard to imagine the employee as any responsible/accountable party. For Cost Recovery Fund cases in particular (90 days max till close of individual case fund pending further authorization from Commissioner?), is DEEP not the Supervising Authority on site? In what cases might "The Clean Harbor Employee" be the person or party responsible to report and/or document a spill? Is there a situation where the Clean Harbor Employee has an obligation to report where CT DEEP and/or the CT LICENSED SPILLED CLEAN-UP CONTRACTOR do not have this primary responsibility and obligation? The employee is a scapegoat. SEE 14PSX0344

47. Contractor Responsibility.

(b) The Contractor shall exercise all reasonable care to avoid damage to the State's property or to property being made ready for the State's use, and to all property adjacent to any work site. The Contractor shall promptly report any damage, regardless of cause, to the State.

SECTION 1: Scope of Services

B. Tier 2 Emergency Response Services

Tier 2 emergencies involve land or water based hazardous material releases that contain combustible waste oily liquids with or without separate phase free product, non-hazardous wastewater, asbestos related waste and any contaminated soil and/or waste material associated with the release noted in this section and any other Client Agency characterized wastes. It also includes gasoline if spilled due to a motor vehicle accidents or in quantities of no more than 25 gallons. Contractors called to clean-up blood and or body fluid shall have a Bio-Waste Transporters Permit as stipulated by CT General Statutes §22a-454. A Contractor may also be required to provide expert advice to the Client Agency regarding the Services described above and/or provide testimony in an administrative, arbitration or judicial proceeding regarding any or all aspects of the emergency response Services or domestic preparedness activities and actions requested and or Performed by the Contractor.

C. Subsurface Investigation and Remediation

Both Tier 1 and Tier 2 Services may include subsurface investigation and environmental remediation Services when necessary as part of the initial emergency response. This type of work will require but not be limited to the following: (SEE CONTRACT 14PSX0344 for complete list)

SECTION 4: Contract Implementation

B. Conflict of Interest

Before providing any response activities at a site, a Contractor shall determine if it is or may be potentially liable, under Connecticut General Statute §22a-451 or any other State or Federal law, for the pollution or contamination at the site. If the Contractor learns or becomes aware of their real or potential liability for any contamination at the site they shall inform the Client Agency official before undertaking any response activities at the site.

"A release would be considered properly mitigated when mitigation in accordance with best management practices promulgated by the commissioner and published on its internet website, or another method of mitigation approved by the commissioner upon request of a person reporting a release."

Can or should the information required to be included in a follow up report be specified in the Proposed Regulations?

The process for requesting a follow-up report, and the contents of such report, are specified in the Proposed Regulations at Sec. 22a-450-4(b)(1).

COMMENT AND RESPONSE DOCUMENT | October 13, 2021 | Proposed Adoption of the Regulations of Connecticut State Agencies, Sections 22a-450-1 through 22a-450-6

- **The definition of “properly trained personnel” is subjective. Also, Class A, B, and C UST operators should be designated as “properly trained personnel.”**

The definition of “properly trained person” references specific training requirements set out in federal law. These training requirements are not subjective. It is important for individuals responding to releases to have this specific training to avoid injury to themselves or others, as well as to ensure that their actions do not make a release more dangerous to human health or more impactful to the environment. While it is true that competence with the procedures and equipment specified in the definition may vary from individual to individual, the types of equipment and mitigation required to respond to a release will also vary based on the type, nature, and size of release. With regards to identifying Class A, B, and C UST operators as “properly trained personnel,” DEEP disagrees. Class A, B, and C UST operator training is specialized training specific to the UST regulations and UST compliance, not release reporting or response.

Q: Can DEEP explain the qualifications of "properly trained persons" in an open forum discussion?

- Aside from Brendan and Graham, who else at The Department has a clear understanding of the specific training requirements set out in Federal Law regarding "properly trained personnel"? Who can speak fluently on the topic?
- **There should be an exemption from the training requirements in the term "properly trained personnel" if the responsible party is self-performing the spill cleanup.**

There is nothing in the definition that prevents internal personnel from responding to releases. However, those performing these activities, whether they are internal personnel or outside contractors, must be appropriately trained to protect themselves, others, and the environment. The risk of injury or environmental impacts from untrained internal personnel responding to a release is not appreciably different than the risks from untrained outside contractors responding

- **The undefined phrase "potential threat to human health and the environment" is ambiguous, and that ambiguity could lead to over or under reporting of releases. A definition of that phrase is suggested.**

Because the circumstance in which a release occurs, and the nature of the release itself, will vary significantly, whether a release presents a potential threat to human health or the environment is an inherently fact-specific question. Such questions are difficult to resolve in definitions, and almost always require some exercise of appropriate judgment. At its most basic, a potential threat to human health means a condition which creates a possibility of illness or harm to humans. Potential threats to the environment are toxic conditions which may impact soil, water, or terrestrial/aquatic organisms. If the release has the potential to harm to kill something, then it is reportable. The word "imminent" has been added to the phrase to clarify that releases that present immediate risks- not risks from long term exposure - must be reported.

Q: If a release has the potential to harm or kill something, then isn't it reasonable to assume an LEP should respond to a site to assess certain criteria before certain mitigation and/or remediation activities are undertaken?

Is more than one person responsible for reporting a release? If one person reports the release, do others who may be required to report also have to make a report?

More than one person may be required to report a release. For example, both the operator of a site, where a release occurs, and a third party making a delivery to the site whose actions cause a release may have the obligation to report. It is critical that reportable releases be reported by at least one person who meets the definition of "person required to report a release," and imposing the requirement to report more broadly helps ensure a report will be made. DEEP will

exercise its discretionary authority to take enforcement action against others who had an obligation to report based on consideration of the factual circumstances surrounding a release, and the report made, and whether the failure to report by others created significant risk to human health and the environment. This exercise of enforcement discretion is consistent with how the current reporting requirements found in Conn. Gen. Stat §§ 22a-450 have been implemented.

Q: Is the "Clean Harbor Employee" susceptible to enforcement actions at DEEP's discretion in this scenario?

Who is responsible for determining the nature and cause of the release? Who is responsible for determining the proximity of the release to sensitive environmental areas?

The responsibility to make each of these determinations rest with a "person required to report a release." However, such determinations do not ultimately bind DEEP, and should DEEP respond or otherwise take action with regard to a release, DEEP may ultimately reach its own conclusions regarding cause and responsibility.

Q: If DEEP creates, causes, or maintains a spill, does the agency still hold discretionary authority to reach its own conclusions regarding cause and responsibility? To take it a step further, if a spill is reported to DEEP, and DEEP responds only to learn there is a Conflict of Interest, who does the agency report to?

Comment regarding DEEP notification to water companies: Proposed Regulations should require DEEP to provide timely notification to affected water companies concerning any reported releases within a public water supply watershed or Aquifer Protection Area For the purpose of enabling water companies to consider immediate short-term system operational actions (e.g., closing diversions, using alternate sources, monitoring) until the threat has passed.

The Emergency Planning and Community Right-to-Know Act (EPCRA) requires the State Emergency Response Commission (administered by CT DEEP) to notify the CT Department of Public Health ("DPH") of spills of certain substances. DPH is then required to notify private and municipal operators of water systems in the affected area. Specifically, Section 2018 of the America's Water Infrastructure Act, enacted on October 23, 2018, amended the EPCRA to explicitly require that community water systems receive emergency notification of any reportable release of an EPCRA extremely hazardous substance or a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substance that potentially affects their source water. Additionally, pursuant to Conn. Gen. Stat. § 22a-449(a), DEEP sends notice, in writing, to the chief executive officer and the local director of health of the municipality in which a reported release has occurred, which should ensure municipal water companies receive notice of releases.

Comment: This statement can only be rebutted by incidents where DEEP has failed to send notice, in writing, to the chief executive officer and the local director of health of the municipality in which a reported release has occurred (pursuant to Conn Gen. Stat 22a -449(a))

- **Reporting Redundancies (Subcommittee: Reporting)**

The Department appreciates the reporting subcommittee's emphasis on reducing redundant reporting of releases, and agrees that, where possible, reporting should be streamlined. The Department also acknowledges that existing State and Federal law may mean that not all releases will be reported pursuant to Chapter 445b, or that some releases may be required to be reported under two separate programs. Where possible, the Department will work to consolidate reporting under Chapter 445b. When that is not possible, the Department will consider where exemptions from the reporting requirements in Chapter 445b are appropriate.

Comment: According to Flowchart Presentation, releases are only reported once.

- **Data Collection and Sampling Methodology (Subcommittees: Discovery, characterization, immediate removal actions, tiers)**

In the discovery concept paper, the subcommittee indicates that if there are multiple lines of evidence that a release has occurred, it should be presumed that a release has been discovered. That presumption can only be rebutted by analytical data indicating no release has occurred.

- **Professional Licensing (Subcommittees: Immediate Removal Actions, Tiers)**

The Department understands that it is necessary for contractors and consultants who are not Licensed Environmental Professionals to respond to certain types of releases, and that those contractors and consultants may perform certain activities to be required by regulation. The Department does not support creating a second formal licensing program, similar to the LEP program, for another tier of licensed professionals. Instead, the Department will seek to identify those specific tasks which can be undertaken without supervision of a Licensed Environmental Professional, and the specific persons permitted to complete them, without creating a second licensing program. Consideration will be given to the scope of work to be performed by contractors and consultants who are not LEPS, and the records that must be produced and retained regarding such work. DEEP anticipates an ongoing dialogue about which tasks must be reserved for LEPs and which tasks can be completed by other contractors and consultants.

Q: *If the Department does not support creating a second formal licensing program, then when will the Department start seeking to identify those specific tasks which can be undertaken without the supervision of an LEP? The Department has contributed a flowchart and a Powerpoint. I do not necessarily believe it is due to a lack of transparency on the part of The Department. I think Brendan and Graham would be the only ones capable of contributing anything meaningful and impactful and there time is limited. That is why everyone who "presents" for DEEP appears to be on the verge of some major anxiety/panic attack. DEEP needs to continue hosting these discussions over ZOOM because in-person would look and feel much like an EMERGENCY RESPONSE TRAINING DRILL. These people are legitimately terrified of*

the Stakeholders on the other side of the screen and for good reason--THEY ARE LICENSED ENVIRONMENTAL PROFESSIONALS and ENVIRONMENTAL TRANSACTION ATTORNEYS. The only people who should be speaking are Brendan Schain and Graham Stevens. Send the Powerpoints and Flowcharts ahead of the meetings. Everyone can read.

- **Incentives to Clean Up Quickly (Subcommittees: Immediate Removal Actions, Tiers)**

The Department believes that it is important to incentivize the quick cleanup of newly discovered historical releases. The concepts proposed by the immediate removal action subcommittee identify certain actions which would be voluntary. This is consistent with the tiers subcommittee, which recommended that a one-year period for characterization and cleanup before a release is placed in a tier. However, if immediate removal action is voluntary, and there are not otherwise significant incentives to cleanup a release during the one-year period before it is placed in a tier, the Department is concerned that cleanups will not be undertaken with sufficient urgency.

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

In response to the first phase subcommittee concept papers, the Department agreed that there was a need to identify this group of professionals but clarified that it would not create a new professional licensing program. Instead, the Department intends to rely on some combination of existing license and permit programs, relevant experience, and third party training and certification.

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

- **Direct Exposure Criteria at Different Depths**

The Department understands the appeal of this concept, but believes that further consideration of its workability is required. Coordination with the Department of Public Health will be necessary to further pursue the concept. Additional consideration of restrictions on the use of the area impacted by the release, and the appropriate institutional controls to formalize those restrictions is required. Such controls may require provisions to lock in exposure assumptions

and for future soil management. While the Department is willing to consider this concept, additional work is needed to conceptualize the necessary regulatory framework and to evaluate the utility of the concept given such framework.

Comment: The "double criteria exposure limit whatever" presentation by DEEP a few meetings ago. Today was the "Clean Harbor Employee." I see the attempt but no, sorry.

- **Pollutants Requiring Commissioner Oversight**

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

Q: Who is the Commissioner exactly? CT DEEP? The Supervising Emergency Response Coordinator (SERC)? The Emergency Response Coordinator (ERC)? Lori Saliby? What binds on these people and roles to the Commissioner other than a Code of Ethics which touts a standard of "judgement beyond reproach."

- **Verifications**

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

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