

June 13, 2023

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By email: [Graham.Stevens@ct.gov](mailto:Graham.Stevens@ct.gov)

**RE: Comments by Members of Tiers Subcommittee on Draft Tiering Checklist**

Dear Graham,

This letter has been prepared by the undersigned members of the Tiers Subcommittee (Subcommittee 5). We appreciate the Department's continuing effort to flesh out key concepts of the release-based program, and in particular its recent work on the concepts studied by the Tiers Subcommittee. As we reviewed the Draft Tiering Checklist discussed at the May 9, 2023 Working Group Meeting, we recognized many of our suggestions, and we are encouraged that the Department and Working Group appear to share many common goals and ideas.

From Working Group discussions over the years, we understand that the Department, the regulated community and other stakeholders all expect that the majority of releases will be investigated and remediated under the supervision of an LEP rather than DEEP, subject to streamlined pathways for releases that may be addressed by non-LEP professionals. This is consistent with the present Transfer Act regime, under which the default position is for investigation and remediation efforts be LEP-led (though DEEP may notify the Certifying Party that DEEP approval is required).<sup>1</sup> LEPs should remain the cornerstone of the remediation scheme. That said, as we reviewed the Draft Tiering Checklist, we became concerned that, as presently drafted, it could lead to releases being subject to a higher level of DEEP oversight than warranted or expected by stakeholders. The comments below offer specific suggestions for addressing those concerns.

***By organizing the Draft Tiering Checklist to focus on the highest-risk sites first, too many releases will get stuck in Tier 1A.***

As presently drafted, the first page of the Draft Tiering Checklist concerns the most serious releases (Tier 1A) and each subsequent page addresses less serious releases. Specifically, the first page of the Draft Tiering Checklist requires the responsible party to affirm the truth of three statements before concluding that Tier 1A does not apply:

- If the release qualifies as a Significant Existing Release requiring Immediate Action, the Immediate Action requirements have been met.
- "Receptors are known and documented"
- "Release characterization is complete (soil and groundwater)"

If the Responsible Party cannot answer "yes" to all three of the above statements and instead checks "no" to one or more then the release is considered a Tier 1A release and is subject to the

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<sup>1</sup> Conn. Gen. Stat. § 22a-134a(e).

highest level of DEEP oversight. The subsequent pages in turn present additional questions or statements for the Responsible Party to answer or affirm, flagging which answers will confirm the applicability of a specified tier.

We are concerned that this format will cause Responsible Parties to get stuck on the first page and classify many more sites as Tier 1A than necessary or intended. We assume that in the final version of the form, Part II will be populated with certifications attesting to the truth and completeness of the information proved. In that context, to the extent that there is any doubt or ambiguity about the correct answer, a cautious Responsible Party will hesitate to answer “yes” to the three questions that would allow them to proceed to the second page. As a result, we expect that the number of releases classified as Tier 1A according to this form will be surprisingly large, and will overwhelm DEEP’s ability to adequately supervise them. As discussed below, the broad and vague formulation of two of the Tier 1A classification statements will only exacerbate this problem.

***The Tier 1A classification statements are overly broad.***

While we are suggesting above the use of a different format, if the Department were to retain the present format of the Draft Tiering Checklist and begin the analysis with the highest-risk releases, the first page of the form must be modified to capture fewer releases as Tier 1A releases subject to the highest level of oversight. As presently drafted, the statements are overly broad and will capture releases not intended to be releases in Tier 1A and also more releases than the Department can practically handle. We agree that Significant Environmental Hazard-like conditions should be subject to the greatest level of oversight and, subject to further definition, agree that Tier 1A should include Significant Existing Releases for which immediate actions are required but not yet completed. We are concerned, however, that the other two questions on page 1 are formulated in a way that will trap less-serious releases in the Tier 1A category.

The second statement on page 1 of the Draft Tiering Checklist is “Receptors are known and documented.” We understand and assume that the purpose of this question is to identify releases that might have impacted drinking water supplies or otherwise present an immediate human exposure risk. We are concerned that this statement calls for a more in-depth analysis than realistic (or necessary) in the first year. A full analysis of all receptors (human and environmental) is a time-consuming process most efficiently undertaken after sufficient characterization (as discussed below). Furthermore, it is possible to achieve confidence that drinking water supplies are not impacted (and that there would not be any other immediate human exposure risks) without fully documenting all receptors. We suggest modifying this statement to something to the effect of “no known or suspected human exposure pathways.”

The third statement on page 1 of the Draft Tiering Checklist is “Release characterization is complete (soil and groundwater).” We are concerned that this statement is broad enough to require a level of characterization that would not be realistic or necessary in the first year. It should be possible to demonstrate that the condition is unlikely to cause serious concern (e.g., urban fill) and therefore full characterization would not be required to determine that the release should not be Tier 1A. Furthermore, characterization is inherently an iterative process and might

not be truly “complete” until remediation work is complete (for example, post-excavation soil sampling to verify that remaining soil is compliant with the RSRs).<sup>2</sup>

As the Characterization Subcommittee (Subcommittee 3) noted in its concept paper:

The level of characterization required may depend on the degree of risk to human health or the environment that a specific situation poses. This concept overlaps with the Tiers Subcommittee, as remediation of a higher-risk situation may involve more comprehensive characterization while lower-risk situations may need only minimal characterization.... Evaluating whether “sufficient” characterization has been conducted should be done using the conceptual site modeling process. For releases that require cleanup, supplemental characterization may be needed to establish and/or design the cleanup approach.<sup>3</sup>

Subcommittee 3 further suggested that the regulations should “specify the information that must [be]considered when characterizing the nature and extent of a release and its impact upon human health and the environment, as well as when determining what, if any, remedial action should be taken to address the release.”<sup>4</sup>

Characterization need not be “complete” in order to document that the release should not be subject to Tier 1A review. We suggest that the Department modify the third Tier 1A classification statement to reflect refined guidelines as to the level of characterization required at what time for each type of release, as envisioned by Subcommittee 3. If the level of characterization required to determine that a release is not Tier 1A is more precisely defined, then Responsible Parties will be able to appropriately document that such characterization has been completed and appropriately classify anything but the highest risk sites as something other than Tier 1A.

***Additional refinement will be required once the differences between Tiers 1B and 2 are more precisely identified.***

As noted above, as presently drafted the Draft Tiering Checklist flows from the most serious releases to the least. Similar to the issues discussed above with respect to overly broad or vague statements trapping a release in Tier 1A when that is not necessary or intended, overly broad or vague statements elsewhere on the form could trap other releases in a higher category than necessary.

Furthermore, the Tier 1B classification statements include milestones that might not be necessary or realistic in the first year (i.e., before the Draft Tiering Checklist is completed). For example, as a practical matter, a scoping level ecological risk assessment would not necessarily occur in the first year. As another example, the Draft Tiering Checklist would have sites for which a

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<sup>2</sup> See Subcommittee 3 Concept Paper, at 14 (“Confirmatory sampling of a release area following remediation is a form of characterization in that the data is used to characterize the soil remaining in place after remediation has been conducted.”)

<sup>3</sup> Subcommittee 3 Concept Paper (available at: [https://portal.ct.gov/-/media/DEEP/site\\_clean\\_up/comprehensive\\_evaluation/Release-Based/Characterization-of-a-Discovered-Release-Concept-Paper.pdf](https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Characterization-of-a-Discovered-Release-Concept-Paper.pdf)), at 9.

<sup>4</sup> *Id.*

remedial action plan has not yet been prepared be classified as Tier 1B rather than Tier 2. It is common for urban/brownfield sites to be remediated as part of redevelopment, with the specific remedial strategy informed by specific development plans. For a site that is otherwise well controlled, a remedial action plan waiting for the overall development plan to take shape should not warrant enhanced oversight.

We will likely have additional comments once the distinction between Tier 1B and Tier 2 (both LEP-led) becomes clearer as well as when there are refinements to the Draft Tiering Checklist (and related documentation). We had envisioned that Tier 1B releases would be a relatively small segment, with the majority of releases designated Tier 2.<sup>5</sup> We also suggested that Tier 1B sites be remediated or reclassified to a lower tier within three years after reporting, while we suggested that Tier 2 sites be remediated within six years after reporting. That said, the difference in closure documentation and level of oversight between Tier 1B and Tier 2 sites has not yet been fully defined and requires further refinement. Once the difference becomes clearer, we may have additional or different comments on the factors that should lead to a classification as Tier 1B versus Tier 2.

Thank you for your consideration. We look forward to further productive discussions in the months ahead.

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<sup>5</sup> See, e.g., Tiers Concept Paper at 8 (identifying Tier 2 as the “default” tier).