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March 7, 2024

To: CT DEEP – Release-Based Cleanup Program Working Group
Sent via Email to: DEEP.Cleanup.Transform@ct.gov
Re: EPOC Comments on first draft of the RBCRs

The Environmental Professionals Organization of Connecticut (EPOC) would like to thank the Department of Energy & Environmental Protection (DEEP; the Department) for all the hard work the Department has conducted over the last three years to bring about a release-based clean-up program in Connecticut. We would also like to thank Graham Stevens and Brendan Schain for their willingness to present the first draft of the proposed Release-Based Cleanup Regulations (RBCRs) to various groups of stakeholders, take questions, and consider revisions as they have done over the past two months since the first draft of the RBCRs was released on December 29, 2023.

The EPOC Board, which includes several current Release Based Working Group members, has reviewed the first draft of the RBCRs and provides the following comments for your consideration. We note that the comments contained herein are consistent with, and in many instances expand upon, our previously provided comments and questions that were prepared and submitted throughout the Working Group engagement process. For this submittal, we consider all previously provided comments and questions to be part of this response. Copies of our previous submittals are attached for reference. We consider both this response and its attachments, collectively, as our ongoing advice and counsel pursuant to Connecticut Public Act 20-09.

As you are aware, Licensed Environmental Professionals (LEPs), who have been deputized by DEEP since 1997 to manage the investigation, remediation and closure of contaminated properties, will be the primary implementors of the RBCRs and will work hand-in-hand with DEEP staff, legal counsel, and the regulated community to implement them. LEPs are obligated to hold human health and the environment paramount, and we take that obligation seriously. EPOC agrees that the concepts presented in and the framework of the RBCRs will be protective of human health and the environment. Consistent with the existing Remediation Standard Regulations (RSRs), the RBCRs rely on risk-based cleanup approaches developed to address risks based on the presence or lack thereof of sensitive receptors and the current and potential future use of a parcel where a release occurs. However, as described below, we have concerns regarding the ability of DEEP, LEPs and the regulated community to effectively implement the proposed RBCRs as they are currently written. In addition, we are also concerned with the extent to which the regulations will place Connecticut at an economic disadvantage compared to other states in our region and across the United States.

Regarding the implementation of the RBCRs, based on our collective experience of investigating and remediating releases since before the LEP program was initiated in 1996, it is clear to us that the RCBRs, as currently drafted, will inevitably lead to unintended or unmanageable

consequences. These unintended consequences could, in fact, have the opposite effect of the intended purpose of the RBCRs, and if overly conservative, burdensome or unimplementable, will deter, rather than promote, the discovery, investigation and clean-up of releases in Connecticut.

Regarding the impact of the proposed regulations on future economic activity, specifically real estate transactions and investment, one of the main goals of Public Act 20-09 was to incentivize economic development, while still protecting human health and the environment. Connecticut's current regulatory framework, and particularly the Transfer Act, is known to have discouraged investment in Connecticut by investors, commercial businesses, and industry. The sunsetting of the Transfer Act with the adoption of the RBCRs is meant to reverse that and encourage investment in Connecticut. To emphasize this, during the press conference held in Waterbury on March 1st, the Governor along with the Commissioners of the DEEP and Department of Economic and Community Development (DECD) confirmed that one of the main goals of developing the RBCRs is to incentivize economic development. It is a fact that most investigation and remediation work is conducted when commerce and economic activity occurs. Due diligence investigations associated with business or real property transfer, financing, and redevelopment are currently the main drivers for the identification and remediation of Existing Releases, and the RBCRs were crafted with the intent to use this activity to allow for the discovery of Existing Releases for reporting and clean up purposes.

Below are several examples that we, as LEPs, have collectively identified as circumstances where implementation of the RBCRs as proposed in the December 29, 2023 draft, could result in unintended consequences and/or negatively impact economic activity:

A. Release Discovery: The discovery requirements, particularly the constructive knowledge requirements, are difficult to understand and cannot be applied consistently without unintended consequences. In addition, the presented multiple lines of evidence may result in over reporting due to their common occurrence in some settings and subjectivity. For example, staining which a gasoline station owner could observe routinely would provide them with constructive knowledge that can only be rebutted with sampling (proving the negative). After long and spirted discussions, the EPOC Board has concluded that the constructive knowledge concept is overly subjective, and we recommend its removal from the program. We also believe the use of multiple lines of evidence, including two or more findings, is difficult to implement in a release identification process as there are instances where a release will be present and only one significant line of evidence will be evident.

   We are also concerned, as discussed below, that since the draft RBCRs define an Existing Release as a laboratory report "indicating concentrations of such substances above the laboratory detection limit" a very substantial number of releases, that do not and will not present an unacceptable risk to human health and/or the environment, will require delineation and characterization diluting the Department's resources and having a negative impact on economic activity in Connecticut. We understand that the Discovery Subcommittee has reengaged conversations with the Department and that revisions are

anticipated. We look forward to reviewing those changes and future discussions on this topic.

B. Characterization of Any Detection: Within the current draft of the RBCRs there is a requirement to characterize any Existing Release discovered via laboratory analysis, regardless of the concentration detected at time of discovery. For Existing Releases where the compound is detected at concentrations less than two times the applicable cleanup standard, the release must be reported and tiered within 365 days of discovery if full characterization is not completed, and the release has not been demonstrated to satisfy the cleanup standards. Characterization of Existing Releases consisting of any detection of a compound above laboratory reporting limits is not required by surrounding states and will result in unnecessary increases in characterization work and associated costs for the regulated community in Connecticut. We had requested to learn more about how the Department planned to address this in our February 13, 2023 comment letter regarding the Roadmap to the *First Year After Discovery* presentation, but DEEP did not provide a response. Characterization of substances that are reported at concentrations just above analytical detection limits and that do not pose meaningful risk will tie up resources for LEPs and the Department and will distract from efforts associated with releases that have meaningful impact on human health and the environment. Subcommittee 2 provided recommendations on how best to establish a lower bound for Existing Releases using reportable concentrations similar to those employed by the Massachusetts Contingency Plan[1] which we endorse and request the Department consider. We previously provided this recommendation in our December 12, 2022, comment letter regarding the *Thresholds for Reporting Historic Releases presentation.*

C. Requirement to fully characterize releases to non-detect concentrations: The definition of *"full characterization"* requires identification of the extent of the release laterally and vertically to non-detect concentrations and the proposed requirements for LEP verification or PEP certification requires full characterization to reach these milestones. In urban areas with more than 100 years of commercial/industrial history, characterizing to non-detect concentrations is typically not possible as multiple regulated compounds exist in the environment via anthropogenic sources not related to site specific releases. Characterization to non-detect is not required in surrounding states and will result in a significant increase in unnecessary characterization work and costs for the regulated community in Connecticut with little or no incremental benefit to the environment. Based on recent discussions, we understand that the Department is willing to reconsider and revise the definition of full characterization. Our thoughts on how to craft language to address this is to modify the definitions of *conceptual site model* to final conceptual model and *full characterization* as presented below:

[1] EPOC notes that the Massachusetts definition of a release provided in 310 CMR 40.0006 is very similar to the definition of a release provided in Section 22a-134pp(6) of the Connecticut General Statutes. The establishment of the "lower bound" was a policy decision by Massachusetts to remove the requirement to characterize and investigate detections of compounds at concentrations below their "lower bound". In Massachusetts, these detections of compounds below the "lower bound" are referred to as "Releases That Do Not Require Notification".

> *(23) "Final Conceptual model" means a representation in three dimensions of environmental conditions at a release area that is developed through a multi-phased investigative approach which validates such representation with information about, including, but not limited to, a substance's release, fate and transport, and pathway to human and environmental receptors;*
>
> *(48) "Full characterization" means characterization of a release such that (A) the nature, extent and magnitude of the release has been satisfactorily determined with a final conceptual model, or (B) to the extent where the release is either (i) no longer detected at concentrations greater than background concentrations and/or (ii) no longer detected above the laboratory detection limit.*

Defining the conceptual model concept by removing the word site to be release specific and tying it to a validated set of facts so that it is final provides a definition that is consistent with current practice and requirement for LEPs under existing regulatory programs.

We also understand that the characterization subcommittee has been reconvened and we have been part of those discussions. We look forward to continued discussions on this topic.

D. Human Health Risk Assessment: We were encouraged by the Department's acceptance of the use of human health risk assessment in a more meaningful way. We also appreciate that the less prohibitive and more focused EUR restrictions associated with the managed residential exposure scenario will be beneficial. However, we ask the Department and the Connecticut Department of Public Health to consider revisiting the exposure scenarios for both Managed Residential and Passive Recreation. Currently, these scenarios incorporate some very conservative risk exposure assumptions. For example, it is assumed that a passive recreator will be performing trail maintenance two days per week, 52 weeks per year. A re-evaluation of these assumptions will result in more usable criteria, while still being protective of human health and the environment.

E. Commissioners Discretion: The draft RBCRs defer a number of substantive topics (e.g., qualifications for non-LEP environmental professionals, characterization of releases, performance standards for releases that do not reach the environment, documentation that a release is complete) to guidance documents and forms to be developed at DEEP's discretion at some future time. This approach is not consistent with the Uniform Administrative Procedures Act ("UAPA") which requires public notice, and approval by the legislature.

F. Significant Existing Releases: A significant increase in reporting of significant hazards (known as significant existing releases in the RBCRs) is anticipated in combination with unachievable and unmanageable timeframes to report and address the hazards. Regarding increases in reporting, we previously stated our concerns on this in our April 11, 2023 comments on the *Significant Existing Releases (SERs) and their Associated Triggers*

presentation. Regarding timeframes, one of several examples of unachievable timeframes is one hour reporting requirements for cascading parties when an SER is discovered by someone not working or authorized directly by a creator/maintainer.

G. Administrative and Fee Burden for parcels with multiple releases*:* As drafted in the RBCRs, the proposed fees are per release. It is not uncommon for parcels to have multiple releases found at different times. Managing the requirements and paying fees on a per release basis could become administratively burdensome and costly for both the Department and the regulated community and seem excessive when compared to requirements in other surrounding states. The use of tiering and annual fees is consistent with the Massachusetts Contingency Plan (MCP) program. However, in Massachusetts multiple releases on the same parcel can be linked at the time of Tier Classification. Once the releases are linked, milestones, fee structures and schedules can be tracked through the system more easily. We understand that the Department is considering modifying this part of the regulations and look forward to learning more about how the Department proposes this program will work.

H. Applicability to Single Family Residences*:* The RBCRs will be applicable to all properties in the State, including single family residences, and not just the subset of industrial/commercial properties that are subject to the Property Transfer Act. EPOC understands and agrees that residential settings are one of the most sensitive land uses and acknowledge that contamination on residential property cannot be ignored, but we are concerned about unintended consequences to property owners and to the residential real estate market. We applaud the Department for developing a special pathway for releases from fuel oil storage tanks, which is the most common source of residential releases currently reported to the Department. However, we are concerned about the burden associated with reported small emergent releases as well as the presence of historically impacted materials, which consist of fill containing ash, coal, or asphalt fragments that are ubiquitous in our urban areas and suburban centers. The impact of regulating these low-risk releases and historical fill materials in residential settings under the proposed regulations in the same manner as commercial/industrial properties, may have unintended consequences requiring owners of single-family residences to demonstrate compliance with the Residential Direct Exposure Criteria at their home, which may include recording EURs on the parcels land records. We previously provided our thoughts on these concerns in our November 14, 2023 comments on historically impacted fill. Alternatively, addressing these types of materials as anthropogenic background, in a manner similar to the MCP, would relieve homeowners of addressing the presence of compounds that are not related to a site-specific release. We are hopeful that the Department can add other mechanisms to the regulations to ease the burden on homeowners, similar to the Waiver of Fees and Financial Inability program that exists in the MCP.

In addition to the concerns listed above, based on our review, EPOC believes that the RBCRs are not complete, and the following terms and concepts will need to be addressed before the formal regulatory adoption process can begin. Examples include:

A. Definitions: Definition of several important terms (e.g., *Creator, Maintainer, Creating, Maintaining, Discovery, Satisfy, Impacted, Contaminated, Toxic Air Contaminant)* need to be provided. For example, how do the terms creator/maintainer relate not only to real property owned and occupied by businesses and residences but those leased where the owner does not maintain control? Just as importantly, who is the maintainer of transportation rights-of-way for which there are no recorded land title records and where releases may occur daily due to motor vehicle accidents?

B. Exceptions: An exception for spills reported pursuant to 22a-450 prior to the effective date of the RBCRs or knowledge obtained prior to effective date of RBCRs in addition to existing laboratory data. We conclude that providing a definition for *data* along the line of that presented below will meet the Statutory intent of not requiring reporting for any information obtained prior to the effective date of the regulations:

> *(xx) data means any written documentation, including but not limited to laboratory analysis reports, field sampling notes, field screening results, previously completed reports, photographs, files at regulatory agencies including but not limited to spill reports, inspections, notices of violations or orders to abate pollution"*

C. Requirements for PEPs: Specifics about the training, experience, licensing, and accountability of proposed Permitted Environmental Professionals (PEP) are absent from the regulations and should be included in the regulations. Significant concern remains in the LEP community regarding the types of releases PEPs can address, especially those that impact surface or groundwater. Our most recent thoughts on PEPs were provided in our March 31, 2023, comments on the Subcommittee 9 and 10 concept papers and our August 8, 2023, comments on the Certifications by Non-LEP Professionals presentation. More details on **who** a PEP is and **what** a PEP can do in the regulations could help to address these concerns. Subcommittee 10 has reconvened and has recently submitted proposed text to the Department for PEP education and experience requirements, training, and professional conduct provisions, which EPOC and representatives of legal community, utilities, municipalities and spill contractors have endorsed.

D. Performance Standards: Performance standards and/or cleanup criteria for releases that do not reach environmental media are not clear. The currently proposed standard of removal to the *maximum extent practicable* for emergent releases as an Immediate Action requirement needs to be better defined. For example, does that mean cutting out the portion of the concrete slab or bituminous concrete surface cover that has oil staining after the recoverable liquid is removed and disposing of that material? This activity is not current practice but certainly is practicable.

E. Site-Wide Approach: Inclusion of a site-wide approach to address properties. Specific alternatives provided in the cleanup sections require site-wide investigation and remediation. Even if not required, many responsible parties may prefer to address all releases on a site-wide basis, rather than per release. The approach for site-wide

investigation and remediation and its impact on discovery, tiering, timetables, and fees should be spelled out as part of this regulation process, and quite frankly, should be encouraged as it will lead to better clean-up outcomes.

F. Timeframes for Commissioner Approval: Timeframes need to be provided and should not be contingent on available resources if annual fees and/or fines are going to be imposed. If timeframes are not met, annual fees should be suspended until formal approval or disapproval is provided, or presumptive approval periods should be provided within the regulations.

G. Interplay with existing Statutes and Regulations: We defer further comments on this issue to the Transition Advisory Group (TAG) group and their prior submissions to the Department identifying all of the potential unintended conflicts that the RBCRs may have with existing statutes and regulations, including federal programs such as RCRA Corrective Action and EPA Brownfields funding. It is essential that the Department identifies and addresses these potential conflicts with the legislature and EPA, prior to the implementation of the RBCRs.

H. Resources: Given the exponential increase in the number of properties that will be affected by this new program, orders of magnitude more than the 4,000 Transfer Act Properties that are reported to be in a remedial program by DEEP it is evident to EPOC and all of the other stakeholders, that the Department will need to ensure to the regulated community as well as the legislature via the Regulations Review Committee that it has the appropriate resources, in staff and electronic programs, to properly and efficiently manage this new program from the very first day it becomes effective. This issue is key to a successful program, without which the Department and the regulated community risk incurring unintended delays and costs.

In closing, EPOC appreciates the opportunity to be a part of the Working Group and remains committed to developing a successful release-based clean-up program for Connecticut. We truly appreciate all the effort the Department and other stakeholders have put into this process and are in agreement with the general framework of the proposed regulations. However, more work is needed to clarify and refine the details of that framework to ensure the RBCR program is implementable and protective of human health and the environment, while being economically beneficial to Connecticut.

EPOC believes that it is time for the Department to sit down with members of the regulated community, and in particular the implementors (LEPs), to work through and assist the Department with integrating the advice and counsel received from the Working Group over the past three years, into the next draft of the RBCRs. We believe there is a lack of inclusion of the extensive and invaluable advice and counsel the Working Group was tasked with providing the Department under Public Act 20-09 in this first draft of the RCBRs. The Department has a unique opportunity to engage with the stakeholders who submitted many pages of comments to every concept presented by the Department at its monthly Working Group Meetings, who worked on multiple sub and ad hoc committee reports, and carefully thought through hundreds of

questions, many of which that remain unanswered. EPOC and other stakeholders have given the Department their undivided attention in listening to each and every presentation the Department has made for the past three years. The Department now has the unique opportunity, if it so chooses, to work directly with EPOC and other stakeholders, including environmental advocates and attorneys, the latter of which have also been providing comments and questions. After three years of meetings, the community of stakeholders are more than willing to sit down, and help the Department draft the next draft of RBCRs to ensure that the program is successful, with a better chance that it will be supported by the regulated community when submitted to legislature via the Regulations Review Committee with the goal that the Department, LEPs and the regulated community can:

1. protect human health & the environment
2. implement the program with as few unintended consequences as possible, and
3. place Connecticut on a level playing field for economic activity with the states in our region and across the country.

ATTACHMENTS

EPOC Submittals to the Release-based Working Group

1. EPOC comments on Topical Subcommittee Concept Papers released for public comment on June 14, 2021 – submitted 7/6/21
2. EPOC Comments on second phase of Topical Subcommittee Concept papers released for public comment on April 8, 2022 – submitted 5/9/22
3. EPOC SEH framework comments – submitted 10/18/22
4. EPOC comments on the discussion of Thresholds for Reporting Historical Releases – submitted 12/12/22
5. EPOC comments on Roadmap to First Year After Discovery – submitted on 2/14/23
6. EPOC Comments on the third phase of Topical Subcommittee Concept papers – submitted on 3/31/23
7. EPOC comments on Significant Existing Releases (SERs) and their associated triggers – submitted on 4/11/23
8. EPOC comments on Tiers Checklist and Immediate Actions – submitted on 9/12/23
9. EPOC Questions/Clarifications on BACKGROUND FOR RELEASE DETERMINATION (NATURAL METALS IN SOIL) as presented by CT DEEP staff on 9/12/23 – submitted on 9/19/23
10. EPOC Questions/Clarifications on IMMEDIATE ACTIONS PART 2 as presented by CT DEEP staff on 9/12/23 – submitted on 9/19/23
11. BACKGROUND FOR RELEASE DETERMINATION (NATURAL METALS IN SOIL) – submitted on 10/11/23
12. Questions on IMMEDIATE ACTIONS III: ENDPOINTS – submitted on 10/17/23
13. Questions on HISTORICALLY IMPACTED MATERIAL – submitted on 10/17/23
14. EPOC Additional Comments on HISTORICALLY IMPACTED MATERIAL – submitted on 11/14/23
15. EPOC Questions: SPECIAL PATH FOR RESIDENTIAL HEATING OIL - submitted on 11/21/23
16. EPOC Questions: SOIL BENEATH ROADS, PARKING LOTS, AND BUILDINGS - submitted on 11/21/23
17. EPOC Questions: NEW EXPOSURE SCENARIOS - submitted on 11/21/23
18. EPOC additional comments on the topics of Special Path for Residential Heating Oil, Soil Beneath Roads, Parking Lots, & Buildings, and New Exposure Scenario - submitted on 12/11/23
19. EPOC questions on Release Documentation, Audits of Release Records, and Fees – submitted on 12/18/23
20. EPOC questions on draft RBCRs – submitted on 2/6/24
21. Additional questions on draft RBCRs – submitted on 2/7/24

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July 6, 2021

To: CT DEEP – Release-Based Cleanup Program Working Group
Sent via Email to: DEEP.Cleanup.Transform@ct.gov

The Environmental Professionals Organization of Connecticut (EPOC) is pleased to submit these comments on the Topical Subcommittee Concept papers released for public comment on June 14, 2021. This document provides our general comments to the five concept papers as follows: Discovery of Historical Releases, Reporting Newly-Discovered Historical Releases, Characterization of a Discovered Release, Immediate Removal Actions, and Tiers.

We first wish to recognize and applaud the efforts of all the subcommittee members who worked on these papers over the past several months. We acknowledge the difficult task each workgroup undertook in a brief period to address the multitude of complex issues that must be evaluated as we embark on a transition to a new release-based cleanup program in Connecticut. We strongly urge as we move forward in this process that the Department continue to engage in a collaborative effort with both the workgroup members and the general public to ultimately develop a set of regulations that we can all implement.

General Comments:

1. The transition to a released-based system is an opportunity to unify and possibly simplify a number of currently separate DEEP programs (e.g., Spill Reporting, Significant Environmental Hazard, USTs, etc.). Connecticut has many overlapping environmental statutes, regulations, and programs; fewer statutes and regulations would be an improvement to our regulatory scheme. Less is better.

   Transition to the new program and avoiding unintended consequences will be key to its success. Conflict with other regulations and programs will only increase uncertainty. Special attention will need to be paid to how the new program works in concert with, and not in conflict to, other existing regulatory programs.

2. Several of the papers reference the Massachusetts Contingency Plan (MCP). This release-based clean-up program has many good attributes and has stood the test of time, being in place since 1993 and resulting in the cleanup of over 34,000 sites. We support using as many elements of this program as possible while working within Connecticut's Regulatory framework.

3. We understand that the new program will rely heavily on Licensed Environmental Professionals, whom EPOC represents. To that end, we request that EPOC and LEPs have input commensurate with our leading role in the implementation of the program. EPOC and LEPs want to help DEEP ensure that the program that is developed can be effectively implemented, limiting unintended consequences.

4. The topics of how to handle non-point anthropogenic sources and historical urban fill are found throughout the papers. Based on the ubiquitous nature of these sources, special attention will be required on how to address these items as part of a release-based system. We should look towards other states programs to see how this issue is addressed.

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5. The topic of how to handle releases at residential properties was brought up in some of the papers. Exceptions and/or exemptions to some of the requirements of the new program specific to residential owners should be considered that reduce the financial burden of compliance while still protecting human health and the environment.

6. The concept of "tiering" releases based on both the timeliness of the response action and by using a risk-based approach is supported by EPOC. EPOC supports creating incentives in the tiering process to aggressively cleanup releases and achieve compliance.

   EPOC supports use of risk assessment as a key component in achieving compliance with the RSRs. The ability to use a site-specific quantitative risk assessment (similar to the MCP Method 3 Risk Characterization), would be an important mechanism for demonstrating RSR compliance, particularly for more complex sites.

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May 9, 2022

To: CT DEEP – Release-Based Cleanup Program Working Group
Sent via Email to: DEEP.Cleanup.Transform@ct.gov

The Environmental Professionals Organization of CT (EPOC) is pleased to submit these comments on the second phase of Topical Subcommittee Concept papers released for public comment on April 8, 2022. This document provides our overall comments to the three concept papers as follows (links provided to posted papers):

- Topical Subcommittee 6: Modification of Clean-up Standards for Lower-Risk Releases Concept Paper
- Topical Subcommittee 7: LEP-Implemented, Risk-Based Alternative Cleanup Standards
- Topical Subcommittee 8: Clean-up Completion Documentation, Verifications, and Audit Frequency and Timeframes

General Comments:

We recognize and applaud the efforts of all the subcommittee members who worked on these papers over the past several months. We acknowledge the difficult task each workgroup undertook in a brief period to address the multitude of complex issues that must be evaluated as we embark on a transition to a new release-based cleanup program in CT. In summary, EPOC agrees with the conclusions and recommendations from each report and offers the following more specific comments on the topics we find most pertinent and challenging for the development of this new program.

Comments on Papers:

Topical Subcommittee 6: Modification of Clean-up Standards for Lower-Risk Releases Concept Paper

1. EPOC understands that the subcommittee did not find consensus on defining "low-risk" releases. We believe that for the program to be successful, it is imperative that some releases be defined and documented as low risk, so that they can achieve an early exit from the program. This will relieve the burden on the program and the unnecessary use of resources and associated costs to implement the program. Low risk should be defined based on the amount of information known about the release, its nature, extent and magnitude and its potential to impact receptors.
2. The second challenge addressed by this committee is addressing who can ultimately sign off on the closure of low-risk releases once they are defined. LEPs certainly have the training and expertise to complete this task, but consensus has not been reached on whether this task should be limited to CT DEEP staff and LEPs or if another class of

professionals should be considered. EPOC believes that the new program and the marketplace will be best served by only granting closure authority for reported releases to LEPs.

3. Subcommittee 6 has laid out a framework for closing low-risk releases in some cases with no sampling or confirmatory laboratory analysis, and in other cases with limited sampling and analysis. The ability to close low-risk releases quickly and cost-effectively will be critical to the success of the future regulations and we wish to emphasize the importance of development of additional details and protocols for closing the lowest risk releases.

Topical Subcommittee 7: LEP-Implemented, Risk-Based Alternative Cleanup Standards

1. EPOC believes expanding the existing self-implementing options for LEPs with regards to risk-based cleanups is imperative to implement a successful program.
2. We support the creation of a new subcommittee within the Released-based Workgroup to evaluate the use of self-implementing comprehensive risk assessment that relies on time tested US EPA risk assessment guidance under certain circumstances. Such a risk assessment option is an important foundational tool for understanding, evaluating, and advancing often complex environmental sites toward closure. This option requires the development of a rigorous site-specific human health and/or ecological risk assessment that incorporates an intensive examination of all levels of risk and potential existing and future exposure scenarios at a site. This level of risk assessment incorporates the use of the most current scientific and toxicological information, which is then applied to actual site-specific conditions. As a result, this risk assessment creates a focusing lens which identifies what elements of a site pose significant real-world risks, and where remedial efforts need to be directed. Similarly, it also identifies those aspects of a site where options such as institutional controls, long-term monitoring, and/or land use restrictions are most appropriate, or alternatively, where no actions are needed. Since this level of risk assessment entails a comprehensive evaluation process, it can be a lengthy and costly option. However, when completed, this type of risk characterization yields both a rigorous and defensible examination of complex sites and identifies a pathway to closure which is both practicable and protective of human health and the environment. Utilization of this type of risk assessment in Connecticut will provide a very important tool to move currently implacable environmental sites toward closure.
3. We agree with the assertion that LEPs are qualified to direct the development of risk-based alternative cleanup criteria in certain situations due to their qualifications, experience, and oversight, and/or their ability to incorporate the work of other professionals with specific risk assessment expertise.
4. We agree with the recommendation that sufficient continuing education on topics related to risk characterization be expected of LEPs who intend to submit verifications or other closure documents that rely on a risk-based alternative that involves those risk

characterization elements that are addressed following identification of receptors and exposure point concentrations.

Topical Subcommittee 8: Clean-up Completion Documentation, Verifications, and Audit Frequency and Timeframes

1. With regards to Credentials/Qualifications for Individuals with Sign-Off Authority, we believe LEPs should be responsible for all sites (Tiers) which require reporting to CT DEEP. LEPs are qualified by their education, experience, and licensure, and are accountable for their work by the audit process and oversight by the LEP Board with their capacity to issue disciplinary actions.
2. With regards to establishing a Public Facing Database, we believe this is a critical component to the program and should be in place and operational by the effective date of any new release-based regulations. This is critical to allow for transparent sharing of environmental data and to allow for business transactions to occur in an efficient manner.

In conclusion, EPOC supports the efforts being made to develop the new Release-Based Cleanup Regulations. We believe that the topics for the eight subcommittees that have been established to date lay out the framework for the new regulatory scheme from discovery of releases and historical releases through investigation, remediation, and preparation of appropriate closure documentation. As noted with the comments provided above and as noted frequently during the Workgroup meetings, there are a large number of important issues that remain to be thought through including but not limited to whether there will be a second class of licensed or trained professionals, specific requirements for historical fill, applicability to releases at residential properties, the ability to close releases with site-specific risk assessment tools, and the need to revise or eliminate other statutes and regulations. In addition, there are many details that need to be added to the framework to create implementable regulations. As the group of private professionals that will be most responsible for the success of the new regulations, we stand ready to assist with this effort.

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October 18, 2022

Graham Stevens, Bureau Chief
Bureau of Water Protection and Land Reuse
CT DEEP
Sent via Email to: DEEP.Cleanup.Transform@ct.gov, graham.stevens@ct.gov

Dear Graham,

EPOC is pleased to submit the following comments on the discussion of the Significant Environmental Hazard (SEH) framework for the proposed Release-Based Remediation Program presented by DEEP staff during the monthly meeting of the Release-based Working Group on October 11, 2022. We wish to thank the department for initiating "Substantive Conversations" as part of the monthly meetings, as we believe that sharing the agency concepts and proposals on issues and allowing for feedback from stakeholders and workgroup members will ultimately lead to a better final regulation.

Based on the information presented, here are our initial comments:

- We support the merging of the SEH requirements into the Release-Based Remediation Program regulations and the repeal of Section 22a-6u of the Connecticut General Statutes (CGS). We consider one of the major goals of moving to a new release-based regulatory program is to create a unified program which can be clearly implemented and understood by environmental professionals and stakeholders. Incorporating the SEH statute provisions into the new program is one step in this process.
- While we appreciate the concepts and overview that was presented, to more completely evaluate how the SEH provisions will work with the other elements of the new program, we will need more details on several issues which include, but are not limited to, the following:
    - What constitutes discovery of a historical release,
    - Who is obligated to report, and
    - How will the SEH reporting requirements align with those for contemporaneous releases under CGS 22a-450.

  As more details emerge on the specifics of the SEH requirements and how they fit into the overall regulation, we would expect to have additional comments on this topic.
- We believe the one-week comment period on these important topics is too short and suggest comments be accepted until the next monthly workgroup meeting, at a minimum.
- We hope that all received comments are posted on the DEEP website and that there will be time allotted for future discussion at subsequent workgroup meetings.
- Because many of these topics are complicated, it would also be helpful to review the regulation/statute language that is being drafted as part of these reviews.
- Finally, we suggest that the details of future topics to be addressed be provided ahead of time so that participants can be prepared and provide more thoughtful comments and questions during the discussion period.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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December 12, 2022

Graham Stevens, Bureau Chief
Bureau of Water Protection and Land Reuse
CT DEEP
Sent via Email to: DEEP.Cleanup.Transform@ct.gov, graham.stevens@ct.gov

Dear Graham,

EPOC is pleased to submit the following comments on the discussion of *Thresholds for Reporting Historical Releases* for the proposed Release-Based Remediation Program presented by DEEP staff during the monthly meeting of the Release-based Working Group on November 8, 2022.

Based on the information presented, here are our initial comments:

- Conceptual Quantitative Reporting Threshold of 2x Cleanup Standards (RSR Criteria):
  We have serious concerns with the proposal to establish quantitative reporting thresholds of two times the RSR cleanup criteria. We are not aware of a scientific basis for establishing this multiplier. Additionally, we are concerned that implementation of these quantitative reporting thresholds will create significant uncertainties and confusion in the regulated community and the general public regarding what the cleanup obligations will be for constituents from a historical release which are above the RSR criteria, but less than the 2x multiplier. Our belief is that the new regulations should establish clearly defined rules and standards, and this proposal does not achieve that goal.

- The concept paper as prepared by Subcommittee 2 – Reporting Newly-Discovered Historical Releases dated June 11, 2021, included recommendations regarding using the framework from the Massachusetts Contingency Plan (MCP) for reporting newly discovered historical releases. We support this proposal and recommend that it be considered. The report states in part:

  The Massachusetts Contingency Plan (MCP) provides a useful framework for reporting NDHRs and should be relied upon as a framework for developing the release-based reporting program to be created pursuant to PA 20-9, in part because there are benefits to developing a system similar to that of a neighboring state in order to provide for regional consistency and competitive balance with respect to economic development. In addition, the MCP contains elements that are consistent with Connecticut's current approach to identifying and addressing environmental risks.

  Quantitative reporting criteria should be developed using appropriate risk assessment and risk management processes that are consistent with the U.S. EPA approaches to human and ecological risk assessment. These criteria may not necessarily be the same as the default numeric criteria in the Connecticut Remediation Standard Regulations, RCSA §§ 22a-133k-1 et seq., (the "RSRs") or any future remedial endpoint/criteria to be established as part of the RSRs or otherwise.

Adopting the Massachusetts List of Reportable Quantities and Concentrations, included in the Massachusetts Contingency Plan at 310 CMR 40.1600, will also alleviate the need for over-reporting of constituents for which there are no current Department of Health approved toxicity references, which we understand under your current proposal would require reporting at any detection. The Massachusetts list includes reporting concentrations for thousands of chemicals for exposure scenarios that are very similar to those incorporated into the RSRs. The development of a single list of threshold concentrations that, if exceeded, would constitute a historical release that would need to be addressed under the Release Based Regulations, would provide significant clarity to the general public, the regulated community and the environmental professional community.

- It is difficult to provide further comments on this topic without the knowledge of how other parts of the proposed regulations will fit together (for example: will the regulations incorporate a period of time between the discovery of a historical release and regulatory reporting to allow responsible parties to remediate smaller releases prior to reporting?). Accordingly, we reserve further comments until such time as details become available.

- Because many of these topics are complicated, it would also be helpful to review the regulation/statute language that is being drafted as part of these reviews.

- We hope that all received comments are posted on the DEEP website and that there will be time allotted for future discussion at subsequent workgroup meetings.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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February 13, 2023

Graham Stevens, Bureau Chief
Bureau of Water Protection and Land Reuse
CT DEEP
Sent via Email to: DEEP.Cleanup.Transform@ct.gov, graham.stevens@ct.gov

Dear Graham,

EPOC is pleased to submit the following comments on the discussion of the *Roadmap to the first year after discovery* for the proposed Release-Based Remediation Program presented by DEEP staff during the monthly meeting of the Release-based Working Group on January 10, 2023.

Based on the information presented, here are our initial comments:

- We look forward to hearing more about your thoughts on closure documentation, There was some discussion in the meeting that there would be instances where submittal of closure documentation to the Department would not be required. An example of this is in Lane 1, where it appears that for non-reportable spills closure documentation would not need to be submitted to the Department but records of the spill and spill response would be required to be kept at the property. This may be problematic for public right of ways or roadways, as an example, and result in no record of the spill or the response and should be considered further.

- We also look forward to further discussion on the concepts presented in Lane 4. First, as we have commented before, we believe that the remediation standards and the reporting standards should be one and the same, such that there is no confusion regarding the need for remedial action. This will result in a stronger regulatory program with better outcomes for responsible parties, environmental consultants, and the State of Connecticut. Second, under scenarios where no clean-up standards exist, as is the case with many routinely detected PFAS compounds, reporting any detection not consistent with background will result in over reporting. Learning more about how detections below reporting criteria will be addressed is paramount to us. Specifically, will the regulations include an affirmative requirement to characterize the extent of a release above background and to provide subsequent documentation in the event that the characterization confirms that reporting is not required? This could become very burdensome if all detections not consistent with background require characterization and submittal of closure documentation.

As we have routinely stated, it is challenging for us to provide further comments on this topic without the knowledge of how other parts of the proposed regulations will fit together and further details about each component of the Roadmap. We understand that at future monthly workgroup meetings you will be expanding on the elements of the Roadmap. Accordingly, we reserve further comments until such time as details become available.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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April 11, 2023

Graham Stevens, Bureau Chief
Bureau of Water Protection and Land Reuse
CT DEEP
Sent via Email to: DEEP.Cleanup.Transform@ct.gov, graham.stevens@ct.gov

Dear Graham,

EPOC is pleased to submit the following comments on the discussion of the concept of *Significant Existing Releases (SERs) and their associated triggers* for reporting under the proposed Release-Based Remediation Program presented by DEEP staff during the monthly meeting of the Release-based Working Group on March 14, 2023.

As you are aware, several of the Working Group subcommittees and the two drafting teams have raised the existing Significant Environmental Hazard (SEH) statute (CGS 22a-6u) as one of the many existing statutes that will need to be revised or terminated upon adoption of the Release-Based Remediation regulations. EPOC agrees with this sentiment and with the incorporation of similar or modified concepts into the new regulations. We appreciate that DEEP has raised this issue as one of the substantive topics for discussion now.

Based on the information presented, here are our initial comments:

- The SER triggers address risks associated with impacted groundwater used or potentially used for drinking water, impacted groundwater discharging to surface water, exposure to contaminated soil, exposure to vapor from VOCs in groundwater and now in soil, and exposure to VOCs in indoor air. We appreciate that the presence of one or more of these conditions at elevated concentrations may in fact represent a significant risk to human health or the environment that has to be mitigated promptly. At the same time, we are concerned that several of the new SER triggers may result in over-regulation, as well as unintended consequences and/or financial burden to the regulated community.

- The new SER triggers and revisions to the current SEH criteria have been presented as a means to simplify the identification of a condition or conditions that require reporting. Under the existing SEH statute, professional judgement and experience characterizing contaminants in the environment allow a Technical Environmental Professional to determine if a SEH exists and requires reporting. The new SER triggers appear designed to roll back the evaluation of potential risk and to eliminate professional judgement in the reporting scheme.

- The proposed SER triggers have the potential to greatly increase the number of releases identified as significant hazards due to the new broader criteria as well as revised criteria that is more conservative than under the current SEH statute, including
    - Requiring reporting for contamination above laboratory reporting limits within 500 feet of a drinking water well, regardless of groundwater flow direction,
    - New requirements for reporting of NAPL or contamination 10 times the SWPC within 500 feet of a surface water body,
    - New threshold criteria for VOCs in soil vapor and indoor air, and
    - The reduction in threshold DEC criteria at industrial/commercial properties from 30 times the applicable DEC to 15 times the applicable DEC.

- We understand that it is DEEP's intent that SERs will be remediated to a point where they comply with the RSRs, unlike the current SEH program where SEHs are addressed to a point where a significant hazard no longer exists. We assume that SERs will be addressed on a more compressed timetable. It is unclear if once the SER condition no longer exists, the release will be able to be addressed as if it was a typical release that did not have an SER trigger.

As we have routinely stated, it is challenging for us to provide further comments on this topic without the knowledge of how other parts of the proposed regulations will fit together. Accordingly, we reserve further comments until such time as details become available.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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March 31, 2023

To: CT DEEP – Release-Based Cleanup Program Working Group
Sent via Email to: DEEP.Cleanup.Transform@ct.gov

The Environmental Professionals Organization of CT (EPOC) is pleased to submit these comments on the third phase of Topical Subcommittee Concept papers released for public comment on March 15, 2023. This document provides our overall comments to the two concept papers as follows (links provided to posted papers):

- Topical Subcommittee 9: Cumulative Risk and Risk-Based Alternative Approaches
- Topical Subcommittee 10: Role and Qualifications of Non-LEP Environmental Professionals

General Comments:

We recognize and applaud the efforts of the subcommittee members who worked on these papers over the past several months. We acknowledge the difficult task each workgroup undertook in a brief period to address the multitude of complex issues that must be evaluated as we embark on a transition to a new release-based cleanup program in CT.

Comments on Papers:

Topical Subcommittee 9: Cumulative Risk and Risk-Based Alternative Approaches

EPOC agrees that a cumulative risk and risk-based alternative should be included in the new regulations. Cumulative risk assessment is a well-established process for understanding the risk posed by environmental contamination to human and environmental receptors. These processes have been successfully implemented as part of the federal program and have been used in several states. EPOC specifically supports the following concepts presented in the Concept Paper:

- The cumulative risk assessment approach should be a self-implementing option for Licensed Environmental Professionals (LEPs);
- The cumulative risk approach can be used to both document that a condition of no significant risk exists at a release site post-remediation and to assess risk pre-remediation to allow subsequent remedial actions to target the risk drivers at a release site;
- The Department, in coordination with the Department of Health, should adopt the following cumulative risk standards:
    - A cumulative excess lifetime cancer risk (ELCR) of 1 x10-6 for exposure to an individual carcinogen and an ELCR of 1x10-5 for multiple carcinogens.
    - A non-cancer hazard index of 1 (allowing for summation of non-cancer risk by target organ);

- The new regulations should include a provision for the use of Short Form risk calculators for assessing cumulative risk in Connecticut; and
- The incorporation into the new regulations of the other components necessary to complete an evaluation of risk posed by contamination at a release including provisions for assessing ecological risk and the incorporation of maximum allowable contaminant levels.

The experience of our members who practice in other states or under the federal program indicates that cumulative risk assessment is an effective tool for addressing complex, contaminated sites.

Topical Subcommittee 10: Role and Qualifications of Non-LEP Environmental Professionals

EPOC agrees that there can be another group of professionals that sign-off on low volume, low toxicity contemporaneous releases (having occurred in a period not longer than 24 hours) where no impact to environmental media has occurred. EPOC would also be willing to entertain sign-off of low volume, low toxicity contemporaneous releases (having occurred in a period not longer than 24 hours) by non LEPs in instances where the only environmental medium impacted is soil. The Department will need to determine the meaning of low risk and low toxicity and the standard of care to be used to demonstrate that only soil has been impacted by a release.

Clean-up of spills routinely requires that professional judgement and experience be exercised. Therefore, we agree with the white paper that non-LEPs should:

- Have relevant experience and training;
- Be required to document activities so that the spill response actions and closure determinations can be easily understood in the future;
- Be subject to Department review and, when deficiencies are found, required to complete additional work or retain an LEP to close out the incident; and,
- Be subject to additional consequences if Department reviews identify deficiencies on several occasions for a single individual.

With regard to LEP closures, EPOC strongly believes that any release that has the potential to or impacts groundwater needs to be addressed and closed by an LEP. Similarly, due to the requirement to use professional judgement and the conceptual modeling process, nearly all historical releases should also be addressed and closed by an LEP, with a possible exception for low volume, low toxicity releases that just impact soil.

With regard to the Subcommittee 10 deliberations, it became clear that there are currently two standards of care in Connecticut to close releases. The conservative LEP verification process which requires proof of no impact and/or compliance, monitoring, use of administrative and

engineering controls, approval of additional polluting substances, etc. In contrast, spill and UST closures are typically not as well documented and typically do not result in RSR compliance, as these releases are often addressed only to the point that an imminent hazard does not remain but are not taken all the way through the process such as recording administrative restrictions, applying for additional polluting substance clean up criteria, or performing compliance groundwater monitoring. Public Act 20-9 requires that the new Release Based Program address all releases equally.

We also note that nearly every work group has discussed this concept and that none have been able to reach a consensus. As DEEP is the ultimate decision maker, we conclude that DEEP needs to revise the RSRs and/or the 22a-450 spill regulations to develop clean-up procedures and/or standards for lower volume, lower toxicity releases that don't reach the environment. With this information in hand, but likely not until then, a determination of the types of lower-risk releases and non LEP professionals that can close them will be appropriate and obtainable.

EPOC continues to support the Department's effort to move towards a release-based program. Ten subcommittees, two Ad hoc groups and two drafting teams have completed their work. EPOC concludes that it is now time for DEEP to begin writing and sharing portions of the regulations for Task Force advice and feedback.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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September 12, 2023

Graham Stevens, Bureau Chief
Bureau of Water Protection and Land Reuse
CT DEEP

Sent via Email to: DEEP.Cleanup.Transform@ct.gov, graham.stevens@ct.gov

Dear Graham,

EPOC is pleased to submit the following initial comments on the discussion of the *Tiers Checklist and Immediate Actions* as presented by CTDEEP staff during the monthly meeting of the Release-based Working Group on August 8, 2023.

Release Tiering

The EPOC Board supports the concept of tiering releases that have not been Verified prior to one year from discovery and understands that tiering meets the following objectives:

- Allows for CTDEEP, and in turn, the public, to be notified when certain milestones are reached;
- Allows CTDEEP to identify and intervene at releases that are not moving through the process, especially higher risk releases which will need to tier at the CTDEEP oversight level (Tier 1A), one year following discovery;
- Allows CTDEEP to implement a prescribed schedule for the investigation and remediation of releases that cannot be closed one year following discovery; and
- Forms the basis for a fee structure.

As you heard during the meeting on August 8, there is concern in the regulated community that the current draft Tiers Checklist will capture too many releases in Tier 1A (CTDEEP oversight) because the first page addresses the requirements to move from Tier 1A (CTDEEP oversight) to Tier 1B (LEP oversight).The EPOC Board does not share this concern because one year will have passed since the release discovery and a significant number of releases will either already be closed or have met the requirements to be able to initially tier at an LEP oversight tier (1B, 2, or 3).

We appreciate CTDEEP's willingness to form an Ad hoc committee to further evaluate the Tiers Checklist and we are encouraged by CTDEEP technical staff's open willingness to work with LEPs, environmental legal counsel, and environmental advocates to address the potential for

unintended consequences. Although not perfect, we believe that the adjustments that were made will help to address the main concern that too many releases would get captured by Tier 1A and that CTDEEP would not have the resources to address all those releases. We also appreciate CTDEEP's stated willingness to continue to work on the wording of the Tiers Checklist in the future.

With that said, we believe the following items need additional clarification and discussion:

- CTDEEP introduced the concept of tier characterization, which is the amount of characterization required to be comfortable that the impacts of a release have been sufficiently evaluated to move from Tier 1A (CTDEEP oversight) to Tier 1B, 2 or 3 (LEP oversight). The EPOC Board understands that CTDEEP is proposing that an investigation has achieved characterization for the purpose of completing the tiers evaluation when the horizontal and vertical extent of a release has been determined to one-half applicable clean-up standard, the detection limit (if that is higher than one-half the standard), or background to meet the tier characterization threshold with certain exemptions for specific cases. We understand that CTDEEP's intention with establishing numeric thresholds was to limit the subjectiveness inherent in professional judgment and the conceptual modeling process, as well as to recognize that delineation to non-detect is not required for the tiering process.

  To avoid unintended consequences with the tier characterization definition, we recommend that additional discussions focus on exemptions and/or exceptions. The following possible exceptions to tier characterization were discussed:

  - Presence of residual concentrations of pesticides which can be present site-wide and in some instances have extremely low clean up criteria,
  - Presence of historic fill, that can be present site wide,
  - PFAS in groundwater due to widespread presence and parts per trillion clean up criteria. Similar situation for some common chlorinated VOC breakdown products.

  Representatives of the EPOC Board would be happy to meet with you to discuss further.

- We understand that LEPs will be required to stamp the tier form and be subject to audit. We further understand that CTDEEP does not intend to review and approve each tier form, similar to current LEP verifications, but will audit some portion of the submitted forms.

- We also understand that a tier fee structure will be developed by CTDEEP and implemented for each tier checklist submittal. We hope that the tiers fee structure will be introduced soon. On the one hand, we hope that tier fees are reasonable. On the other hand, we believe that the requirement to tier a release should be an incentive to completing cleanups and closing releases prior to the one-year anniversary from discovery.

- We understand that there was discussion regarding a formal process to correct or amend an incorrect tier classification and we encourage further discussion on this.

- There was discussion at the August 8 meeting regarding sites with multiple releases that may be going through a site-wide closure and how tiering would apply to these sites. We believe there should be further discussion on this issue.

Emerging Reporting Releases (ERR) and Immediate Actions (IA)

Thank you for your presentation on ERRs and associated IAs. We provide the following comments below, organized by presentation page and slide title:

Presentation Page 8, Slide "The World of Releases"

The EPOC Board was surprised to see that 1,236 reports of historical releases that do not require reporting under 22a-450 are actually reported annually.

Presentation Page 9, Slide "What is Immediate Action"

This slide indicates that it is CTDEEP's position that removal of a release is required by a permitted spill contractor within 2 hours of reporting. The regulated community requests additional discussion on this topic. Is it two hours from discovery? Two hours from reporting? Is a permitted spill contractor required for all releases, even smaller ones?

Presentation Page 10, Slide "Types of Releases for Which IA is Required"

The Department has developed a new term (ERR) for those spills that were referred to as "contemporaneous" in the past. As stated on the slide the term ERR means:

1. a release to the land and water of the state
2. discovered by an observed change in condition
3. that is required to be reported by the regulations adopted pursuant to Section 22a-450 of the Connecticut General Statutes.

Regarding item 2, "observed change in condition" is a broad and abstract idea and additional clarification and discussion is required. Is an "observed change in condition" just something seen visually or does it include other senses? "Change" can mean many things, as well as "condition" to different people in different settings and situations. We understand the need for a definition but want to avoid unintended consequences.

The CTDEEP has also developed a definition for Significant Existing Release (SER) as:

1. a release to the land and waters of the state
2. discovered pursuant to section 22a-134tt-2 of the Regulations of Connecticut State Agencies

3. that is present in the location identified by or creating one or more of the impacts to public health or the environment identified in, subsection [placeholder] of this section.

We understand the SERs will be a subset of what we have come to identify as historical releases over the past several years. We believe that the difference between a contemporaneous/emerging release and a historical release, including the subset of ERRs, can be better articulated for clearer understanding. In Massachusetts, what we are now referring to as an emergent release is known as a sudden, continuous or intermittent release that has or is likely to have occurred in a period of 24 consecutive hours or less. The Massachusetts Contingency Plan (MCP) requires reporting for these sudden, continuous, or intermittent releases based on the quantity of material released and, in specific circumstances, if certain receptors are impacted by the release even if the volume is smaller than reportable quantities. The MCP requires that these releases be reported to the Massachusetts Department of Environmental Protection (MassDEP) within 2 hours of discovery. What we now refer to as a historical release is reportable in Massachusetts based on the concentration present in soil or groundwater samples collected from the release area. These releases must be reported to MassDEP within 120 days of discovery. The difference between the two is based on whether the release likely occurred in a period of 24 consecutive hours or less and whether the releases impacted certain, specific receptors (such as surface water). (See the MCP at 310 CMR 40.0311 and 40.0315). This 24-hour rule is well defined, easily understood and has worked for decades. We recommend CTDEEP consider something similar.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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EPOC Questions/Clarifications on
BACKGROUND FOR RELEASE DETERMINATION (NATURAL METALS IN SOIL)
as presented by CT DEEP staff on 9/12/23

1. Can the Department provide the raw data and calculations for review?

2. Please confirm the statistical parameter used to calculate the statewide background ranges. We assume that is a 95% Upper Confidence Level of the Mean and if so....

   a. Is the Department aware that this statical parameter measures the central tendency of the data set with approximately 50% of the values falling below and 50% falling above the calculated statistic with 95% confidence and is not a measurement of the upper end of the range of background concentrations?

   b. The Interstate Technolgy Regulatory Council (ITRC) has an extensive soil background guidance document. In chapter 11 they discuss statistical analysis. They state that a 95% UCL of the Mean is not appropriate for determining background threshold values (BTV)…

   ....since the mean is a measure of the central tendency of a dataset, UCL of the mean should not, under all but select circumstances, be used as a BTV because the result would be excessive false positive results.

   Does the Department not agree with this observation?

   c. Massachusetts used the 90 to 95 percentiles to calculate their BTVs. ITRC states

   Estimates of upper percentiles are reliable (not prone to over- or underestimation) if the background dataset is adequately large and representative of a single population.

   Did the Department consider the use of upper percentiles for calculation of background threshold values?

   d. The ITRC document also discusses upper tolerance limits (UTL)....

   The UTL is the UCL of an upper percentile of the observed values...For example, the 99-95 UTL represents the 95% upper confidence level (95% UCL) of the 99th percentile value....The 95-95 UTL has become the most common measure of BTV in practice.

   Did the Department consider the use of upper tolerance limits using a 95% confidence level for calculation of Connecticut's background threshold values?

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3. The Brown & Thomas data used by the Department is a robust data set from undeveloped public owned lands including parks and State forests. According to the paper, sample locations were selected to represent background conditions and collection was avoided within 200 meters of a major highway, within 50 meters of a rural road, within 100 meters of a building or structure, and within 5 kilometers downwind of major industrial activity. The study also included the collection of samples from three different statistical populations including:
    I. 100 results from surface soil less than 5 centimeters deep
    I. a slightly deeper data set of organic material containing A horizon soil (86 samples)
    II. a deeper set of non-organic material containing C horizon soil (79 samples).

a. Why did the Department choose just the C horizon data for their evaluation?

b. The Surface and A horizon soil data has the highest potential to be impacted by minor anthropogenic sources. Also, as this soil contains the highest proportions of organic matter, which many metals tend to bind to, higher concentrations of metals are typically present at these shallow depths when compared to samples free of organic matter from deeper depths. The Brown & Thomas paper states the following:

> Element concentrations in C-horizon soils in CT were compared with those in samples collected from shallower depths. Concentrations of most major elements were highest in C-horizon soil samples, including Al, Ca, Fe, K, Na, and Ti, but element concentrations showed a relatively similar pattern in A-horizon and surficial soil samples among the underlying geologic provinces. Trace element concentrations, including Ba, W, Ga, Ni, Cs, Rb, Sr, Th, Sc, and U, also were higher in C-horizon soil samples than in overlying soil samples. Concentrations of Mg, and several trace elements, including Mn, P, As, Nb, Sn, Be, Bi, Hg, Se, Sb, La, Co, Cr, Pb, V, Y, Cu, Pb, and Zn were highest in some A-horizon or surficial soils, and indicate possible contributions from anthropogenic sources. Because element concentrations in soils above the C horizon are more likely to be affected by anthropogenic factors, concentration ranges in C-horizon soils and their spatially varying geologic associations should be considered when estimating background concentrations of elements in CT soils.

Did the Department consider a background data set for 0–2-foot below grade soil that would be used for surficial releases and a sperate set for soil greater than two feet that could be used for subsurface releases?

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EPOC Questions/Clarifications on
IMMEDIATE ACTIONS PART 2
as presented by CT DEEP staff on 9/12/23

1. Slide 8: SERs – Drinking Water Wells: the slide indicates that identification and sampling of drinking water wells on adjacent parcels is required within 2 days of discovery. Identification of drinking water wells on adjacent parcels within 2 days is achievable, however, any sampling that requires the completion of a legal access agreement is unlikely to be completed within 2 days. Has DEEP made any provisions for this circumstance?
2. Slide 8: SERs - Drinking Water Wells: the slide indicates drinking water wells on adjacent parcels must be identified and sampled within 2 days and then drinking water wells within 200 feet of the impacted well and within 500 feet downgradient must be identified and sampled. Isn't the latter requirement duplicative? Is there a scenario in which the sampling required within 2 days wouldn't include wells that would be included within the sampling required within 15 days?
3. Slide 9: Immediate Action Plan for Drinking Water Well: The slide indicates that an appropriate treatment system must be installed within 15 days or a connection to a public water supply must be completed within 30 days. Similar to the previous question, any installation that requires a legal access agreement may not be completed in 15 days. Has DEEP made any provision for this circumstance?
4. Similar questions apply to Slide 10: SERs Near Drinking Water Wells.
5. There are no timeframes included on the SERs: Vapor Intrusion Slide. Have timeframes for this SER response been established?
6. There are no timeframes listed on the SERs – Surface Water slide. Have timeframes for this SER response been established?
7. Slide 12: SERs – Soil: the slide indicates that within 90 days the impacted soil would need to be remediated to the applicable DEC. If the intent of the proposed regulation is to eliminate the significant hazard, shouldn't the required level of cleanup be less than 15 times the DEC (the SER trigger concentration) rather than the more stringent DEC value? Requiring cleanup within 90 days to the DEC seems contrary to DEEP's proposed Tiering system, which would allow up to one year to meet RSR standards before a site is tiered.

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October 11, 2023

Sent via Email: deep.cleanup.transform@ct.gov

EPOC would like to thank the Department for addressing our questions on background metals calculations at the September 26, 2023, Release-Based Working Group Meeting.

We are pleased that DEEP is willing to consider a Statewide data set of background concentrations for naturally occurring metals like other States. We also agree with the use of the tiered system of options that include a statewide baseline for use with no site-specific sampling and higher concentrations using site-specific sampling with non-LEP, LEP and DEEP approval thresholds depending on risk.

We understand that as a policy decision the DEEP has elected to set soil background values using the 95% UCL of the mean on deeper C horizon soil that 1) typically does not contain organic matter which metals tend to bind to or 2) is likely not influenced from surface deposition from anthropogenic sources. EPOC concludes that using a central tendency statistic with sample results from a data set where the lowest background concentrations would be anticipated will result in an overly conservative set of statewide background numbers.

From an implementation standpoint, EPOC is most concerned that the concentrations calculated and presented underestimate background conditions when sampling to characterize surficial releases, with the metal lead being the primary concern. A review of the data from the surface background samples shows that nearly 100% of the background surficial samples collected as part of the Brown & Thomas study would exceed the DEEPs lower background threshold of 18 mg/kg and nearly 95% would exceed the upper background threshold of 27 mg/kg. This means at nearly all the surficial background locations it likely will not be possible to characterize to background without hiring an LEP to conduct additional sampling and develop a site-specific background value.

EPOC believes there is a solution for the challenge posed by lead built into public act 20-9, which exempts pollution from automotive exhaust as being identified as a release.

"Release" does not include automotive exhaust or the application of fertilizer or pesticides consistent with their labeling…

Since a portion of the lead detected in surficial soil is associated with the historic use of leaded gasoline and the fact that this contribution is not easily definable, the Department could elect to address lead differently than other metals. From a risk perspective, the Residential Direct Exposure Criteria for lead is 400 mg/kg. Establishing background limits at 50 mg/kg (12.5% of the Res DEC) for Statewide use and 100 mg/kg (25% of the Res DEC) for use when three background samples are collected is a policy decision that EPOC believes is valid and will help prevent unnecessary time and cost that would result from the over characterization of lead in soil. We note that 100 mg/kg level was chosen by Massachusetts as their default background value for "Natural Soil"[1].

[1] The Massachusetts "Natural Soil" background value represents the 90th percentile value of a data set comprised of 141 samples collected from "c.21E sites [release sites] located in non-urban areas". The data was gathered via a review of MassDEP files by Department personnel.

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Finally, in addition to the technical issues discussed above, we further believe that DEEP should carefully consider developing regulations that are more conservative than regulations in surrounding states and the potential impact that overly conservative standards with no potential additional benefit to human health or the environment could have on the State's goal of increased economic development.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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EPOC Questions/Clarifications on
IMMEDIATE ACTIONS III: ENDPOINTS
as presented by CT DEEP staff on October 10, 2023

1. Slide 2: EPOC has previously commented that the definition of an emergent reportable release based on an "observed change in condition" is subjective and is difficult to implement. Can the Department provide more information on how they see this being implemented?
2. Slide 4: if you reach a year and need to tier why do you need an Immediate Action Endpoint report?
3. Slide 5: There are many areas of the state where public water service is not available, why would you replace the well in all these instances?
4. Slide 6: For threatened groundwater, in most cases remediating groundwater is not possible in one year. If nearby potable wells are sampled and clean why would you tier in at Tier 1A DEEP lead if the release has not been remediated to cleanup standards in one year?
   Does the Tiers checklist need to be modified to account for this?
5. Slide 7: In the Departments opinion what does maximum extent practicable mean, tear down buildings to access contamination, remove roadways to access contamination,…?
6. Slide 9: For soil vapor SERs, why was nine consecutive months selected? You will miss a season.
7. How do you propose to address background conditions associated with VOCs from everyday products used in buildings and residences?

Similar questions for all the SER slides (11-14)

8. Slide 19: Please confirm that there are no volume restrictions on releases that PEPs can certify.
9. Does requiring an LEP to verify releases discovered through laboratory analysis of samples provide an incentive to not sample?
10. There are many complicated alternatives to the baseline numeric clean-up criteria in the RSRs that do not specifically require an LEP, will PEPs be able to use all of these?

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EPOC Questions/Clarifications on
HISTORICALLY IMPACTED MATERIAL
as presented by CT DEEP staff on October 10, 2023

1. Historically impacted fill, known in the marketplace as historic or urban fill, is commonplace in areas where multiple generations of development have occurred including all the State's urban areas and suburban centers. Historically impacted fill is ubiquitously present at both residential and industrial/commercial settings because in many cases it is not the result of industrial/commercial activities rather our history as a society of burning wood and coal for heat and power and using asphalt paving for roadways and the subsequent use of materials generated from these processes for fill. It is likely that 90% or more of the parcels present in our urban areas and suburban centers will ultimately have to address historically impacted fill at some point in the future as routine maintenance and redevelopment requires excavation of soils. Is the Department prepared to handle and manage the number of notifications that it will receive?
2. How will historically impacted fill be handled in transportation rights of way or other State and municipal owned properties where the filing of an affidavit on the land records is not possible?
3. What constitutes discovery?, observation?, or laboratory analysis?
4. If just laboratory analysis, are you providing an incentive to not sample and not find SERs?
5. How will the Tier Checklist address historically impacted fill and the proposed exemption from characterization in one year?
6. Can the Department provide an exemption in Tier Characterization Definition?
7. Can the Department provide an updated Tier checklist and updated definition of tier characterization for evaluation?
8. More detail is required to evaluate the permit by rule concept, can the Department provide:
   a. The permit text that will be part of the regulations?
   b. The Department's opinion of what "not prudent to remediate means"?
   c. The type of information the notification will require?
   d. The type of information the Affidavit of Facts will require?
   E. Will a title search and notice to interest holders be required?
   f. Will there be a fee for notification?
   g. Will the five-year inspection require reporting to DEEP?
   h. How will the Department police compliance with the permit.
9. What level of characterization will the Department require to confirm SERs do not exist?
10. Has the Department considered how historically impacted fill is addressed in other New England states and whether this approach is consistent with those?

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November 14, 2023

Sent via Email: deep.cleanup.transform@ct.gov

EPOC would like to thank the Department for addressing our questions on *Historically Impacted Material* at the October 31, 2023, Release-Based Working Group Meeting.

As we presented in our Questions document, which is attached, historically impacted fill is ubiquitously present in both residential and industrial/commercial settings because in many cases it is not the result of industrial/commercial activities rather our history as a society of burning wood and coal for heat and power, using asphalt paving for roadways and the subsequent use of materials generated from these processes for fill. It is likely that 90% or more of the parcels present in our urban areas and suburban centers will ultimately have to address historically impacted fill at some point in the future as routine maintenance and redevelopment requires excavation of soils.

One central question that we have is what constitutes discovery, is it visual observation of fill materials with ash, coal, asphalt, analytical testing that shows typical historical fill impacts in absence of evidence of petroleum or chemical contamination, or both independent of each other? From the follow up presentation on October 31st, it appeared that it will be both, independent of each other, with the caveat that analytical data could be used to refute visual observation. If an excavation contractor identifies historically impacted material, they are not responsible to report it, but do they have an obligation to tell the property owner that does?

Another outstanding question is how do you propose to address historically impacted materials on residential properties? Applying EURs to residential parcels is costly and the number that could be required would be significant. We look forward to hearing and commenting on your proposed approaches to residential properties.

Lastly, transportation corridors, especially active and current rail corridors, like many inactive ones owned by DEEP, were constructed with historically impacted fill materials. An understanding of how the Department plans to address transportation corridors is needed for a complete evaluation.

In summary, from an implementation standpoint, requiring historically impacted material to be reported and addressed will impact a large number of properties, both industrial/commercial and residential, as it is common to find historically impacted materials on all parcels in our urban and suburban centers that have been developed for 100s of years with multiple generations of development. The potential impact to the real estate market, especially residential parcels in urban settings is a concern as evaluation for historically impacted materials will likely become common as part of due diligence activities for purchase or refinancing with historically impacted material being identified routinely.

We welcome the opportunity to continue to participate in the development of the Release-Based Remediation Program.

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EPOC Questions/Clarifications on
SPECIAL PATH FOR RESIDENTIAL HEATING OIL
as presented by CT DEEP staff on November 14, 2023

1. Is it typically easily ascertainable as to who's responsibility a leak is (e.g., fuel oil delivery or installation contractor vs homeowner)?
2. Has the department considered potential delays to Immediate Actions (IA) in the event that there is a dispute or disagreement in responsibility for the release?
3. Please confirm that non-emergent releases found based on physical observation or laboratory analysis of soil samples at residential properties with less than four units cannot use this special path.
4. Does use of this special path discharge all future liability to the State for the heating oil release for the current and future owners?
5. The Special Path requires excavation to the extent "prudent". Can DEEP provide a preliminary definition of "prudent"?
6. Will there be guidance regarding determining the "extent prudent"?
7. To use the Special Path, must groundwater conditions be background, or can residual contamination be present if below applicable RSR criteria?
8. Is the Completion Report the only documentation that will be required under the Special Path or will something need to be filed on the land records?
9. If groundwater is impacted (either above background or in excess of RSR criteria), is there consideration for allowing pursuit of the special pathway once groundwater compliance is achieved?
10. If soil contamination has been removed to the extent "prudent" but contamination remains at concentrations greater than RSR criteria, will any other notice (other than the Completion Report) be required?

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EPOC Questions/Clarifications on
SOIL BENEATH ROADS, PARKING LOTS, AND BUILDINGS
as presented by CT DEEP staff on November 14, 2023

1. Are transportation corridors in residential areas assumed to be industrial/commercial land use?
2. Transportation corridors often include portions that are covered with pavement and other portions that are not. If pollution is discovered in unpaved portions of a transportation corridor, will it need to be addressed to meet the DEC or can the permit by rule be used?
3. Why are soils contaminated with VOCs in excess of the DEC excluded from the Permit-by-Rule? (Presuming that site characterization activities have already determined that no risk of vapor intrusion exists).
4. Does the definition of VOC include both volatile organic substance (VOS) and volatile petroleum substance (VPS) as those terms are currently defined in the RSRs?
5. Were human health risk calculations used to justify the requirements that:
    a. Soils less than or equal to both the industrial DEC and 15x the applicable DEC need not be remediated if under pavement, road or concrete building foundation?
    b. Soil containing concentrations greater than the I/C DEC must be at least one foot below the pavement, road, or concrete building foundation?
    c. If so, will the DEEP make those calculations available to the public?
6. Are any other contaminant types, such as PCBs, excluded from the permit-by-rule?
7. How does permit-by-rule conform with TSCA?
8. Will DEEP define or provide guidance regarding “managing the polluted soil properly” when the bituminous concrete or concrete is being repaired or work is being performed on underlying infrastructure?
9. Does DEEP intend that responsible parties prepare and execute a written soil management plan for repairs or infrastructure work?

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EPOC Questions/Clarifications on
NEW EXPOSURE SCENARIOS
as presented by CT DEEP staff on November 14, 2023

1. Can the Department provide any information on how they plan to modify the residential exposure scenarios for these new exposure scenarios? I.e., will it be a multiplier of existing values or separate individual criteria?
2. Are Passive Recreation and Managed Residential the only new exposure scenarios to be included in the new regulations?
3. Has the DEEP considered establishing a construction worker exposure scenario?
4. For the Managed Residential scenario, was there any consideration given to establishing areas for active residential using a soil cap or other similar structure that is not an Engineered Control?
5. As CT DEEP moves forward with CT DPH on these new exposure scenarios, will there be opportunities to provide additional comments?

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December 11, 2023

Sent via Email: deep.cleanup.transform@ct.gov

EPOC would like to thank the Department for reviewing, considering, and addressing our questions on *Special Path for Residential Heating Oil*, *Soil Beneath Roads, Parking Lots, & Buildings*, and *New Exposure Scenarios* at the November 28, 2023, Release-Based Working Group Meeting.

We have the following additional comments on these substantive topics:

Special Path for Residential Heating Oil

EPOC supports the use of a special path for residential home heating oil releases due to financial hardships these releases subject individual homeowners to. From an administrative and liability perspective, we request that the regulations clearly state that the use of the special path will release the current and future homeowners of future investigation and remediation obligations. In other words, the use of the special path will discharge homeowners of their liabilities to the State for the heating oil release. Additionally, what occurs if a residential parcel with four units or less comes into ownership by a commercial entity via sale or foreclosure after the special path is used? We believe this scenario requires further discussion. Will that entity also be released from future investigation and remediation obligations based solely on the fact that it is residential property with less than four units?

Soil Beneath Roads, Parking Lots, & Buildings

The application of the permit by rule concept to soil with Direct Exposure Criteria (DEC) exceedances beneath roads, parking lots, and buildings is also supported by EPOC. We believe this will be helpful for some portion of the universe of releases. In some situations, releases extend beyond the footprints of buildings and hardscaped surfaces and will require remediation via excavation, the recording of an ELUR to render soil greater than four feet inaccessible, or the use of an engineered control, also requiring an ELUR. Has the Department considered scenarios in which properties will be managed under the permit by rule and ELURs?

New Exposure Scenarios

EPOC supports the development of new exposure scenarios and classes of criteria for the DEC that consider less stringent risk assumptions and result in less stringent clean up criteria than the baseline residential DEC for recreational properties and managed residential properties. We believe there are other exposure scenario categories that would be beneficial as well and wonder if regulatory language can be added that would permit the Commissioners of Public Health and Energy & Environmental Protection to approve the use of additional classes in the future, following a formal public comment and response period?

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EPOC Questions/Clarifications on
Release Documentation, Audits of Release Records, and Fees
as presented by CT DEEP staff on December 12, 2023

Release Documentation

1. Does the Department have a definition for "remediation commenced within 2 hours of the release's occurrence" and how will CTDEEP measure and enforce that requirement for PEP Certifications?
2. Will the Department consider revising the concept/language to "remediation commenced within 2 hours of the ***discovery*** of the release"?
3. Will the use of RCPs and DQA/DUE evaluations be required for closure reports where analytical data are collected, including Certifications by PEPs?
4. Are releases to surface water available for PEP certification? Slide 8 discusses soil and groundwater but not surface water.
5. The Conceptual Site Model is a key component of current LEP verifications, will demonstration of a final Conceptual Model be required in a Release Remediation Closure Report under the RBP?

Audits of Release Records

1. The presentation contained % goals for audits in the tier categories but did not include any goal for releases closed before tiering. Are IA Reports and Release Remediation Closure Reports filed prior to Tier Classification subject to audit? If so, does the Department have a percentage goal for auditing these submittals?
2. Time frames for audits are lengthy, taking into account that they will be for single releases not whole sites. Can the time frames be shortened for single release situations?
3. Can the DEEP define a "substantial threat to public health or the environment"?

Fees

1. For comparison, what does the DEEP collect annually for Property Transfer Law and 22x-133x entry fees?
2. Is the fee structure being developed to be comparable to the prior fees under the Property Transfer Law and 22x-133x entry fees? If not, what is the rationale for increasing or decreasing the overall anticipated receipt of fees by DEEP?
3. Are fees release specific or site specific? i.e., if more than one release is present at a site and they are discovered at different times, do you have to pay separate fees for each release?
4. Would it be possible to exempt single family residences from paying fees like non-profits and State agencies?
5. Will the draft regulations include the specific fee amounts?

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Release Based Clean-up Regulation Questions
February 6, 2024

22a-134tt-1 – Definitions and Miscellaneous Provisions

(a) Definitions

EPOC Board Questions:

General Questions*:*

As the regulations require an affirmatory obligation for the parties listed below, which are subject to penalties, can you provide a definition for both:

- *Creator/creating*?
- *Maintainer/maintaining*?

The Statute and proposed regulations require that *the remediation of a release satisfies the standards* in the definition of *verification* in both cases, and *certification* for the latter. Can *satisfies* be defined? Also, can the language *satisfies the standards* be used to replace all other locations where the terminology *in compliance with* is used?

Can *data* be defined as "any written documentation, including but not limited to laboratory analysis reports, field sampling notes, field screening results, previously completed reports, photographs, files at regulatory agencies including but not limited to spill reports, inspections, notices of violations or orders to abate pollution"? Defining data in this way will meet the Statutory intent of not requiring reporting for "data" obtained prior to the effective date of the regulations.

Line 33 (13): Does the definition of "background concentrations" intentionally exclude anthropogenic constituents such as PFAS? Part B of the definition includes language that background concentrations must either be naturally occurring or minimally affected by human influences at concentrations equal to or less than criteria specified in the RBCRs. As an example, PFAS do not have criteria specified in the RBCRs, and if they did, it is not certain that background concentrations would be at or below those values. Can this definition be reworded to account for the fact that PFAS (and potentially other constituents) will likely be detected at anthropogenic background concentrations that exceed criteria calculated for these substances?

Line 124 (46): Does the definition of existing release need to be modified so it is consistent with Section 22a-134tt-2 – Discovery of a Release?

Line 128: (48) Full Characterization: Please provide intent for defining full characterization to require delineation to non-detect concentrations? This may be difficult, costly, or impossible to achieve. In the case of a well-developed conceptual site model, delineation to ND is unnecessary. We are not aware of any other State requiring this level of characterization. The current Site Characterization Guidance document does not require delineation to non-detect, but instead a valid conceptual model of the nature, magnitude and extent of a release. Could this concept be used in the definition instead of delineation to non-detect? Or could we have it both ways, that is characterized to a point where a valid conceptual release model is obtained OR non detect/background?

Line 159 (61): Can the definition of Historically Impacted Material be expanded and made clearer as to what is and is not Historically Impacted Material?

Line 174 (67): Based on the definition of Impervious Surface, is bituminous concrete now acceptable to render soil environmentally isolated or for use as an engineered control to prevent infiltration?

Line 273 (95): Under the definition of Parcel-wide investigation, the SCGD is referenced. Is this the existing SCGD or a yet to be written SCGD?

Line 462: Will the definition of "Verification" under CGS 22a-134 need to be revised accordingly as it currently relates to TA sites?

Line 462 (158) Verification: Please describe the definition of Verification as its use seems to differ from an LEP Verification filing after a site has been fully investigated and remediated per the Site Characterization Guidance Document. For example, an LEP now files a "Verification" for a Tier Assignment filing (which is an administrative process, not a cleanup).

<u>EPOC Member Questions</u>:

Line 226 (79): Will the concept of "managed multifamily" create an environmental justice issue? Just last month, the city of East Hartford was unable to locate a "professional property management company" in order fix a boiler in a building that had been without heat for several days.

Line 352 (125): Why did this definition change from the previous "*containment, removal, mitigation or abatement of pollution, a potential source of pollution or a substance which poses a risk to human health or the environment and includes but is not limited to reduction of pollution by natural attenuation."*

Line 358 (127): Can DEEP clarify where colleges and universities fall under these definitions? What are the spacial limits of a "dormitory?"

Line 358 (127): Public Roadway Definition – does this include Private Roadways, i.e., for instance in developments or private neighborhoods where Town or State does not own/maintain the roadway? Note that these could also include condominiums or similar).

(b) Construction of Regulations

EPOC Member Questions:

Line 491: (b) Construction of Regulations:
The proposed regulations lack a section which addresses applicability. The current RSRs address this in section 22a-133k-1(b). Given the contentious issues that have arisen in the past regarding the "applicability " question - which ultimately spurred the Department to issue its "Affirmative Responsibility to Clean up Pollution in Connecticut" notice- the proposed RBCRs need a section which explicitly addresses applicability in such a manner that the applicability of the RBCRs are clear and unambiguous.

(c) Use of Form Prescribed by the Commissioner

EPOC Board Questions:

Line 512: Can the term "certification" used for materials provided on forms be changed to avoid confusion with a PEP certification?

(d) General Requirements for Analytical Data

No Questions

(e) Significant Existing Releases

EPOC Board Questions:

Lines 636 & 638: Can the term *contamination* be defined or could a defined term be used in its place.

Line 654: Can *toxic air contaminant* be defined? Confirm any detection associated with releases is reportable as a SER?

Line 654: Did the Department intend to limit potential sources of indoor air contaminants to industrial settings only? Sources of indoor air contaminants are also found in commercial and/or residential settings.

Line 654: Should there be a provision distinguishing background substances in indoor from storage of chemicals, gasoline, suits freshly back from the dry-cleaner, etc.?

General Questions: The SER requirements are more stringent than the existing SEH requirements. Does the Department have the resources to handle a significant increase in reporting?

For example:

- *Line 637:* Any detection exceeding the GWPC within 500 feet of a potable well requires reporting. This previously was 500 feet up gradient and 200 feet in any other direction.

- *Line 640*: Industrial/commercial surficial soil reduced from 30 times to 15 times the DEC.

- *Line 652*: The detection of any VOC in soil vapor at a concentration exceeding the applicable standard

- *Line 654*: The detection of any toxic indoor contaminant associated with a release

- *Line 657:* The detection of a release in groundwater at a concentration exceeding 10 times the SWPC or NAPL at any location within 500 feet of surface water.

(f) Criteria and Land Uses

EPOC Board Questions:

Lines 660-665: Please provide the intent for this section? Why does there need to be a distinction between *current use of land* versus determining applicable criteria for soil remediation? Also why is just soil remediation referred to?

(g) Licensing of Permitted Environmental Professionals

EPOC Board Questions:

Line 666: Why would you not place the requirements for PEPs in regulation to be public noticed and approved by the legislature as part of the formal regulatory review process?

EPOC Member Questions:

Line 666: (g) Licensing of Permitted Environmental Professionals
Can an entity that creates and/or manages a release use its own internal personnel to act as a PEP? Note that current LEP regulations do not allow this practice as it is considered a potential conflict of interest.

Can an LEP act as a PEP, i.e., can an LEP submit a certification in situations where a PEP may certify? If an LEP can do this and the certification is subsequently found by the commissioner to be deficient, is there any impact on the LEPs license since the document submitted was a certification and not a stamped LEP verification?

Line 666: Why are PEP's not required to take any continued education credits or classes to confirm their knowledge is still relevant to changes in prevailing standards?

22a-134tt-2 – Discovery of Releases

(a) Discovery of an Existing Release

EPOC Board Questions:

Line 684: Can the Department insert a framework to better define how commonly used industry categorizations under the ASTM Phase I standard (e.g. Recognized Environmental Conditions [RECs], Controlled RECs, Historical RECs, and de-minimis conditions) fit into the concept of discovery of a release?

Line 686: Can *created or is maintaining* be defined as these actions lead to an affirmative obligation that is subject to penalties?

Line 688: To help avoid confusion can the words *data available or obtained before* be replaced with a*ctual or constructive knowledge available or obtained before*? Alternatively, can data be defined to include all materials generated associated with investigating and remediating releases. The fact that actual knowledge is defined as " the results of laboratory analysis" suggests there are more types of data than just laboratory analytical data.

Line 703: Would a homeowner have constructive knowledge of a release if they were to discover buried bricks, ash, or similar non-native materials while digging a hole to install a fencepost? What if they discovered paint chips in an area adjacent to their house? What if they had a fire on their property or a backyard fire pit? Would the homeowner in any of these situations be required to perform analytical testing to rebut the presumption that a release has occurred?

Line 704: This is very subjective, who interprets this - DEEP?, the courts?

Line 708: For reference, Line 248 defines *multiple lines of evidence as* t*wo or more observable facts*. At line 708, constructive knowledge is defined as *multiple lines of evidence indicate* and then lists examples. Based on the definition, if any two multiple lines of evidence exist does the person have constructive knowledge? If only one line of evidence exists, do they not have constructive knowledge?

EPOC Member Questions:

Line 690: Road salt is a legitimate concern in parts of the State. Would the owner of a home or business, under the draft language as written, have actual knowledge of a release if they applied road salt to their property?

Are road salts an incidental source required for the maintenance of roadways and use of vehicles and therefore not subject to discovery or reporting?

22a-134tt-2(a)(1) Discovery of an Existing Release: The language states that "a release shall not be deemed discovered if the only evidence of such release is data available or generated before the date when regulations are first adopted". Does this mean that if new data is generated to further characterize a release known under this condition it would then become "discovered" and subject to these regulations?

(b) Existing Releases Discovered by the Commissioner or Other Persons

Line 762: Why is this constructive knowledge and not actual knowledge? Lab data is actual knowledge.

(c) Discovery of a Significant Existing Release

No Questions

(d) Existing Releases from Regulated Underground Storage Tank Systems

No Questions

(e) Discovery of Emergent Reportable Releases

EPOC Member Questions:

Are there any releases that do not have to be reported under the new regulations? If so, what ones and which regs indicate same?

Are there any releases for which testing of soil or water is not required? If so, what ones, and which regs indicate same?

Are there any releases that a professional is not required for a response, whether a PEP or LEP?

(f) Naturally Occurring Metals at the Time of Discovery

EPOC Board Questions:

Line 794: If you collect three samples and the concentrations for metals fall between the low and high values provided what is the actual background value? Is it the high value in the table or the value detected in the site background sample?

Line 799: Same as above except is the background concentration the highest value detected in the five soil samples?

Line 806: Same as above, except is the background concentration the highest value detected in the seven soil samples?

Line 837: Look up numbers in table for lead are too low for surficial soil samples collected in developed areas. Can lead be addressed separately from other metals due to the exemption for remediation from motor vehicle exhaust?
EPOC Member Questions:

Line 802: Outlier analysis
What is the allowed method for performing a valid "outlier analysis"? Is a simple tabular sorting or graphical presentation of data adequate or is a more rigorous statistical method required? The requirement for demonstrating an outlier needs to be clarified/specified.

22a-134tt-3 – Reporting Newly Discovered Existing Releases

(a) Report Required, Discovery By a Creator or Maintainer

EPOC Board Questions:

Line 852: Please confirm that the 72-hour clock begins when the creator/maintainer obtains actual or constructive knowledge?

Line 858: Please confirm that the imminent risk for 2-hour reporting is limited to the presence of NAPL in the potable well? Also is it just the presence of a constituent with a GWPC or does the concentration have to exceed the GWPC?

Line 864: Can you explain the intent of requiring 2-hour reporting for any SER within 500 feet of a residence. For example, if there is a soil vapor exceedance at a commercial property 400 feet away from a residence, why should there be a decrease in reporting time? Similarly, if 10 times the SWPC is exceeded at a commercial property within 500 feet of a surface water body, why should the reporting time be shortened to 2 hours if there is a residence 400 feet away.

Line 865: Can the *and* be changed to *or* to avoid confusion?

Line 867: Can examples of imminent risk to a surface water body be better defined or could examples be provided?

Line 876: Please confirm no reporting requirements for soil vapor, indoor air or surface water?

Line 876: Can applicable numeric clean-up criteria be better defined. For example, is it the current existing use that applies for the DEC?

Lind 897: Please confirm that it is the Department's intent that no matter how low a concentration of a constituent is detected it will require characterization and verification and if not characterized/verified, reporting at 366 days following discovery?

Line 907: Would it make more sense to have all the exemptions in one spot, that is include the less than 2 cubic yards of petroleum exemption with these.

Line 913: How does the Department propose to address the application of road salt or other deicing chemicals? Is application in accordance with guidelines not a release?

Line 917: Please describe the Department's intent for this exemption? Does this include lead paint and PCB impacted building materials?

EPOC Member Questions:

How would the RBCRs handle a situation where a due diligence Phase I/II/III was completed for a prospective purchase/sale, and say 25 release areas of a variety of flavors were identified in the process?

Would each one follow an individual track according to its flavor, or is there a way to combine/group the follow-on characterization and remediation work for all the release areas of the same flavor? Or for example, could the owner enter the site in a VRP and do a site-wide characterization and remediation, similar to a PTA site?

Are there any releases that do not have to be reported under the new regulations? If so, what ones and which regs indicate same?

(b) Report contents and process

No Questions

(c) Reports of Significant Existing Releases When the Person Who Discovers Such Release Did Not Create And Is Not Maintaining The Release

EPOC Board Questions:

Lines 1026, 1030 and 1037: One hour reporting will be difficult to implement. Is this one hour no matter what time of day or day of week? Can notify be better defined? Email, phone call, knock on door, or all of the above? Does the person have to confirm notice was received?

Line 1039: Is two-hour reporting for the creator/maintainer even possible if there are two one-hour reporting requirements before they get notified?

Line 1046: Is there enough time under the two-hour reporting scenario for the original discoverer to obtain confirmation if there are two one-hour reporting times before the creator/maintainer is even notified?

Line 1046: What happens if a person who discovered a significant existing release cannot contact or cannot get hold of the creator or maintainer within the one-hour timeframe for reporting the

condition? Based on the short reporting timeframe, it may be a relatively common outcome. Some work may occur in remote areas and/or during non-standard times. The person who discovered the significant existing release may need to track down information for the creator or maintainer. Finally, the creator or maintainer may not be immediately available.

If this section remains as written, DEEP will routinely get two to three notifications for the same release, is that efficient?

EPOC Member Questions:

Line 1003: should "designed" actually be "designated"

Line 1020: (2) Is the one-hour time frame intended to be during business hours? For instance, if a junior employee checks their email on a Saturday afternoon and opens a laboratory report indicating soil concentrations exceeding 15-times the DEC, would the one-hour requirement start immediately? Or at the start of the Monday business day?

Line 1046: In the situation of a person who discovers and subsequently reports a release to the person who created or is maintaining a release (aka "the responsible party"), what is the burden (i.e., what effort) for this first person to determine if the responsible party actually did make a report to the commissioner - particularly if this first person is an LEP or a PEP? What specific effort(s) are required? and What would be the consequences to this first person if they did not pursue whether or not the responsible party made the required notification?

Line 1046: (4) How would the person who "discovers" but does not "maintain" a release confirm that an SEH notification was made? Should an LEP be required to keep track of and confirm that a property owner has fulfilled their obligations?

Line 1046: Does this section mean that an LEP is obligated to report a release? If so, within a time period of less than 2 hours (if the release isn't report in one hour or less)?

(d) Reports of Existing Releases Discovered on Transfer Act Site

EPOC Member Questions:

Line 1074: (2) To which party does the liability to address the release fall (regardless of whether it's done under the Transfer Act or RBCR)? The certifying party or the maintainer?

22a-134tt-4 – Characterization of Discovered Releases

(a) Requirement to Characterize Nature and Extent of a Release

EPOC Board Questions:

Line 1094: Please confirm that the Department will require the characterization of any detection of "polluted soil" or a "groundwater plume", with no lower bound for this requirement? Note

that the definition of both terms only requires the presence of a substance above its laboratory reporting limit. We are aware of no other State or Federal regulatory program that has this requirement.

Confirm that when a release is discovered by constructive knowledge sampling must be conducted to confirm a release has occurred and if so, it must be characterized?

Lines 1113 and 1127: Can the commissioner specify prevailing standards? Are prevailing standards a legal term? LEPs are held to prevailing standards for liability purposes.

Is it appropriate for the Commissioner to set prevailing standards without going through the official regulatory review process including public comment?

Line 1113: Is Commissioner approval required for determining when characterization has been achieved, provided that delineation has not been performed to ND in all directions? When would this approval be granted? Is DEEP going to have the resources to review investigation reports to make this determination?

Lines 1114 and 1117: Can the Department identify their intent? When are there situations where full characterization would not be required and why is full characterization not required for PEP closure?

Line 1121: This section says no verification or certification can be completed without full characterization, but directly above it says PEP's do not need to characterize. Are these in conflict with each other?

EPOC Member Questions:

Would DEEP consider changing the definition of "Full characterization" of a release from "to the points at which it is no longer detected" to "to the degree necessary for remedial decision making and demonstrating compliance with the remediation standards for soil and groundwater"?

Line 1093 (a): This section indicates that the commissioner can identify releases for which a full characterization is not required, but then indicates that no closure report can be verified/certified without a full characterization. Can the DEEP clarify its intent?

(b) Identification of Prevailing Standards and Guidelines

EPOC Board Questions:

Line 1136: Will CT DEEP require that guidance documents from other organizations (other states, federal agencies, industry groups) be submitted for approval as prevailing standards and guidelines? It seems that this will create a lot of work for CT DEEP, especially for methods that are rapidly evolving (e.g. PFAS).

Line 1156: At this point there is another PEP characterization requirement, Is this in conflict with those mentioned above?

EPOC Member Questions:

Line 1156: re: "a release remediation closure report certified by a PEP shall contain only such characterization necessary...
The language here suggests that the requirements of a PEP's closure report for those situations identified in section 22a-134tt-8 may be less stringent than those required to be submitted by an LEP for the same situations. Both the PEP and the LEP should be held to the same standard in these situations, i.e., there should not be a higher bar for an LEP.

22a-134tt-5 – Immediate Actions

(a) Immediate Action Required

No Questions

(b) Emergencies and Exigent Conditions

No Questions

(c) Time to Begin Required Immediate Actions

No Questions

(d) Required Immediate Actions

EPOC Board Questions:

Line 1234: Does removing an emergent release from the land and waters of the state to the maximum extent practicable include:

- Removal and replacement of oil-soaked asphalt or concrete that remains after treatment with absorbent material?
- Removal of all impacted soil or sediment to the point that background concentrations are achieved?

Line 1254: "complete characterization" is not defined can this be changed to full characterization?

Line 1256: Immediate response actions are required, in some cases as soon as practicable and in other cases within specified timeframes upon discovery of an emergent reportable release or a significant existing release. What should a creator or maintainer do in a hypothetical situation

where they do not know if or how they can afford to pay for those actions? It may take time to work out those details (e.g. working with insurance company, etc.). This could be especially difficult for homeowners.

EPOC Member Questions:

In Section 22a-134tt-5(d)(2) – page 36 – "Full characterization" (which is a defined term) and "complete characterization" (which is not a defined term) are both used in the same paragraph. Are they different, or did you intend to use "full characterization" both times? If different, please add a definition for "complete characterization".

(e) Required Immediate Actions for an Emergent Reportable Release

EPOC Board Questions:

Lines 1267 and 1272: What is the intent of having two paragraphs can these be made into 1 paragraph

Lines 1316 & 1471: Can impacting groundwater be defined? Any detection?

Line 1349: Can emergent releases be remediated to numeric clean-up criteria, or do they need to be remediated to background? If remediated to clean-up criteria does an LEP have to verify?

EPOC Member Questions:

22a-134tt-5(E)(3) & (5)A: does a phone call to a remediation contractor or perhaps to other persons constitute initiating remediation within 2 hrs.?

Please Clarify 22a-134tt-5(e)(1-5) Emergent Reportable Release and Significant Existing Releases Timeframes for actions to be taken. In this section it reads like:

1) Release identified in Potable Well above GWPC, then install a treatment system within 15 days or connect to public water no other choice

2) Groundwater monitoring well above GWPC within 500 feet of a public or private well, then install a physical barrier to prevent migration of release (sheet piling, interceptor trench, slurry wall?)

3) 2 hours after discovery of release initiate remediation (assume dig it up) to applicable Direct Exposure Criteria

4) Release of VOCs within 30 feet of building, then install SSDS or SVE system

It reads like there is no choice but to do these things. Is that really the case?

Line 1269: In practice, identifying AND sampling AND submitting samples within a 36-hour time frame may not be attainable in many circumstances. A 72-hour time period would be may realistic. The use of the 36-hour requirement in other related sections of the RBCRs should also be reviewed for implementability.

(f) Required Immediate Actions for a Significant Existing Release

EPOC Board Questions:

Line 1509: Can applicable direct exposure criterion be defined. Is this based on current use or use for remediation?

Line 1540: Is there a typo here?

Line 1548: Can toxic air substance be defined?

EPOC Member Questions:

22a-134tt-5(f)(3)(B)(ii) - page 42: Is an EUR a "relevant provision" that must be met within 90 days?

(g) Certification by a PEP or Verification by an LEP

EPOC Board Questions:

Line 1589: Can the Department elaborate on what they mean by "satisfy the standards specified in the clean-up standards and such clean-up standards require LEP verification? Are these the baseline clean-up criteria or any of the self implementing options that do not require commissioner approval?

Line 1594: Does this prohibit facility staff, municipal fire responders, can no longer address releases on their own without obtaining a 22a-454 permit?

EPOC Member Questions:
22a-134tt-5(g)(1): can "persistent groundwater impact" be added to the definitions?

(h) Immediate Action Transition-Points

No Questions

(i) Remediation of Remaining Substances Released

No Questions

(j) Immediate Action Plan

No Questions

(k) Immediate Action Report

22a-134tt-5(k)(1): middle of page 48 – typo? Emergency should be emergent?

22a-134tt-6 – Tiers

(a) Requirement to Tier Releases

No Questions

(b) Establishment of Cleanup Tiers

No Questions

(c) Tier Assignment

EPOC Member Questions:

22a-134tt-6 and Tier 1A form: Are all Tier 1As for VOC impacts at a minimum? If not, then for a no-VOC release, one would check "No" for 1c, and then the releases would be tiered as 1A, when it may not need to be.

Based on the way the Tiers structure is written, it appears that Tier 1A will become a default and a significant number of releases will end up here, was this the DEEP's intent? Additionally, the draft Tier Checklist form indicates that a number of characterization activities must occur, otherwise the release is a Tier 1A, is it the DEEP's intent to require extensive characterization for even small/low risk releases?

(d) Cleanup Oversight

No Questions

(e) Deadlines for Remediation

EPOC Board Questions:

Line 1889: Are the deadlines for remediation or tier reassignments universally realistic? Some of the remediation deadlines will be significantly shorter than those in the Transfer Act. This may create a situation where a lot of deadline extensions are requested (some of which will require CT DEEP review and approval).

EPOC Member Questions:

Lines 1883 & 1886: "qualified professional"
What/Who is a "qualified professional". Needs to be defined in the definition section. Is DEEP intending to create a third level of professional - PEP, LEP, QEP?

(f) Fees

EPOC Board Questions:

Line 1929: Some remediation projects may have a lot of individual releases. Will the department create a mechanism to bundle releases to avoid or reduce the need to pay multiple fees for one property? Bundling releases would also allow for consolidation of submittals and communication.

22a-134tt-7 – General Cleanup Standards Provisions

(a) Time-frames for Issuance of Approvals by the Commissioner

EPOC Board Questions:

Section Questions*:*

Annual fees and timetables for completion are being proposed by the Department. If there are going to be annual fees and timetables for completion for moving from one tier to the next, can the regulations include timetables for issuance of approvals and if that time frame is not met, annual fees and timetables for completion will be suspended until approval or disapproval is provided?

Does the Department have plans for adding resources to promote the success of this program?

EPOC Member Questions:

22a-134tt-7(a) Timeframes. DEEP allows for its timeframes that DEEP "shall make best efforts within available resources… and take into account available resources and the complexity.." Can DEEP consider using this type of language also for LEP and Creator/Maintainer timeframes? Some of the very short time frames will be very hard to meet in some or many circumstances (e.g., immediate, 1 hr., 2 hr., etc..).

(b) Environmental Use Restrictions

No Questions

(c) Financial Assurance

No Questions

(d) Public Participation

EPOC Member Questions:
Line 2094: This section suggests that a public notice of remediation needs to be made for EACH release assigned a tier? This seems overly burdensome and could lead to public confusion at complex sites where multiple individual releases are present and are being remediated simultaneously. There should be a provision allowing such sites to make a single public notice which could list out the specific locations/releases that are undergoing remediation.

(e) Other Requirements (mislabeled as "d" in the draft regs)

EPOC Member Questions:

Li*ne 2157*: (d) Other Requirements
The designation should be (e) Other Requirements

22a-134tt-8 – Releases Certified as Closed by a Permitted Environmental Professional

(a) Emergent Reportable Releases Certified as Closed by a Permitted Environmental Professional

EPOC Board Questions:

Line 2166: Is a PEP required to investigate a release in accordance with prevailing standards and guidelines, and/or perform delineation to a specified level (e.g. ND) prior to providing a certification?

Line 2168: Can the word *approximate* be removed? It means different things to different people in different situations.

Line 2174: Is the Department comfortable with releases of oil to a surface water body being certified by PEPs if the release has the potential to impact soil or wetlands adjacent to the surface water body if the spill is of sufficient volume to reach the edge of the surface water body or travel to the edge with the current?

Line 2185: What is the performance standard for soil being removed and properly disposed? Is it all impacted soil, i.e. to background? Or removal until a baseline clean-up criteria is reached?

EPOC Member Questions:

22a-134tt-8(a)(1)(C)(ii) & D – page 62: how soluble is soluble? be more descriptive as to how a PEP would know if a release has or has not contacted surface water, and be clear as to when an LEP would be required to make that determination.

(b) Releases of Home Heating Fuel on Residential Properties

EPOC Member Questions:

22a-134tt-8(b)(1)(A)(iii) – bottom of page 63: If the owner or occupant hired the oil company that caused the release, did the owner or occupant cause the release? Can clarifying text be added?

22a-134tt-8(b)(1)(B) – define dwelling units. House?, garage? Shed?. What about limited access due to trees, walkways, utilities, property boundaries, etc..?

22a-134tt-8(b)(1)(C) – groundwater remediation by homeowners for leaking fuel oil USTs? OK, but very expensive for homeowners, and have you told the Governor?

22a-134tt-8(b)(1)(A)(iii) Releases of Home Heating Fuel on Residential Properties: The language states that "A release shall be determined to have been created by the owner of such a parcel…if the release would not have occurred but for the actions or inactions of such person or if such person owns, leases, or is otherwise in possession of the equipment that causes the release". Does this language mean that if a contractor is performing or performed work on equipment owned by a homeowner and thus causes a release that this release is deemed created by the owner? Even though it was the actions of the contractor?

Line 2224: As written, this section seems to imply that it is the resident/owner who is the responsible party when in reality – it is usually the fuel company or tank company who is responsible. How is this addressed when it is the fuel company who created the release?

22a-134tt-9 – Cleanup Remediation Standards for Soil

(a) Soil Criteria

EPOC Member Questions:

22a-134tt-9(a)(5) (pg, 81) – can an LEP calculate a risk-based alternative DEC *for just one* substance?

(b) Direct Exposure Criteria

EPOC Member Questions:
Line 2385: "...free of gaps or cracks..."
Even the most well-maintained parking lots or roadways will have gaps or cracks, which often develop surprisingly shortly after installation. To be entirely "free" of gaps or cracks is an

unrealistic standard. Suggest the use of "predominantly free" or some other more appropriate language.

22a-134tt-9(b)(3)(C): A requirement of using the “permit-by-rule” inaccessible soil for compliance is that the VOCs do not exceed the applicable DEC within 30 feet of a building and pollutants may not exceed the I/C DEC and 15 times the applicable DEC if such soil is less than 1 foot in depth. In determining if soil exceeds these criteria, do individual sample results need to be considered, or can a 95% UCL be utilized to establish soil is less than the required DEC criteria?

(c) Pollutant Mobility Criteria

No Questions

(d) Alternative Soil Criteria and Alternative Dilution or Dilution Attenuation Factor

No Questions

(e) Determining Compliance with the Soil Criteria

No Questions

(f) Soil Criteria Variances

No Questions

(g) Non-aqueous Phase Liquids

No Questions

(h) Use of Polluted Soil and Reuse of Treated Soil

No Questions

(i) Additional Remediation of Polluted Soil

No Questions

(j) Conditional Exemption for Historically Impacted Material

<u>EPOC Member Questions:</u>

22a-134tt-9(j) and (j)(1)– page 94: “Historically impacted material” is defined as material that will be managed in accordance with this section, and this section does not further explain what this material is, but says e.g., that it has been determined through tier characterization that

historically impacted material is present. Is this circular? Is DEEP's intention to allow ANY type of material to be managed in accordance with this section. If not, please clarify.

22a-134tt-9(j)(5) refers to "polluted material. Is this supposed to be the same as or different than "Historically impacted material"?

22a-134tt-9(j): Conditional Exemption for Historically Impacted Material: Does this "permit-by-rule provide relief from the requirements to meet the DEC and PMC to achieve compliance with the RBCRs for "Historically Impacted Material". If so, does this relief apply to all depths? Understanding no SERs can exist.

22a-134tt-9(j): While this section is a great addition to the regulations, is it still applicable to sites that are currently in the CTA or subject to the RSRs? Section 22a-134tt-9(j)(1)(B) states that "it has been determined, through tier characterization, there is historically impacted material on the parcel and it is not prudent to remove such material". Can only sites that go through Tier Characterization utilize this exemption?

General Questions:

Why does the condition prohibit relocation of historic polluted fill to a different parcel?

Is it the intent of this provision to prohibit relocation of historic polluted fill to a different parcel in all cases or just through the use of permit by rule?

Relocation of historic polluted fill to multiple parcels happens all the time on Brownfields redevelopment project through the use of soil management and design techniques to take excess soil generated by construction activities in one area and relocate it to different areas often on multiple parcels that comprise Brownfields redevelopment sites. It is a cost savings option that uses the capping solutions that exist in the current regulations to achieve regulatory requirements. If excess historic polluted soil on Brownfields projects can no longer be reused on adjacent parcels or other parcels to raise grades and must be disposed of off-site at permitted facilities, many Brownfields projects in urban and environmental justice areas will be cost prohibitive and remain undeveloped.

(k) Conditional Exemption for Dredge Spoils

EPOC Member Questions:

General Questions***:***

Please explain the requirements associated with a DEEP issued permit to allow upland placement of sediment to occur.

What is the anticipated level of effort associated with permit preparation?
What are the anticipated post construction obligations of the permittee after the sediment has been placed?

22a-134tt-10 – Cleanup Standards for Groundwater

(a) Groundwater Criteria

No Questions

(b) Alternative Surface-Water Protection Criteria

No Questions

(c) Volatilization Criteria

No Questions

(d) Groundwater Protection Criteria

No Questions

(e) Technical Impracticability Variance

No Questions

(f) Conditional Exemption for Incidental Sources

No Questions

(g) Conditional Exemption for Groundwater Polluted with Pesticides

No Questions

(h) Applying the Groundwater Criteria

No Questions

(i) Additional Polluting Substances

No Questions

(j) Additional Remediation of Groundwater

No Questions

22a-134tt-11 – Certification and Verification

(a) Release records requiring Certification or Verification

EPOC Member Questions:

Line 4631: PEP certification
Is it possible for a PEP to certify a release and clean-up without taking analytical samples to establish the extent of the release and/or confirm the remediation? If that is possible, then an LEP doing this same work should also be able to certify or verify this clean-up without taking samples, i.e., the LEP should not be held to a higher standard than a PEP in these situations.

(b) Form of Certification or Verification

No Questions

22a-134tt-12 – Release Remediation Closure Report

EPOC Member Questions:

The first sentence of 22a-134tt-12 (and perhaps other places too) refers to "a release to the land AND waters of the state..", meaning here that the release strictly had to impact BOTH the land *and* the waters for the requirement to apply, when I think DEEP may mean in this context "a release to the land AND/OR waters of the state.." Also, should State be capitalized, since the reference is strictly to the State of Connecticut?

22a-134tt-12(5) pg 123 – Unless WHAT is rejected? Please clarify

Line 4667: Release Remediation Closure Report
This section is very bare-bones as it currently exists. Throughout the RBCRs there is reference to the importance of the remediation closure report. In DEEP's public presentations on the draft RBCRs, they have indicated that much will ride on this report. Accordingly, this section needs to be significantly bolstered so that the requirements of the closure report are clear. Although subsequent guidance could be issued to provide more detailed information, the depth and breadth of the closure report needs to be made clear within in the RBCRs.

Line 4673: "subsection (c)" of this section
Where is "subsection (c)" of THIS section?

22a-134tt-13 – Audits

(a) Audit of Release Records

EPOC Member Questions:

22a-134tt-13(a)(1)(b) pg 125: more than 180 days after submission *of a release record*?

22a-134tt-13(g)(2) pg 129 Does this mean there is no end to the timeframe that DEEP can audit a release record? That's fine if that's what DEEP is saying, just checking what DEEP is saying so I can tell the creators and maintainers and the purchasers and the bankers, etc.

22a-134tt-13: Audits: Will the department issue "Letters of No Audit" prior to the 180 days deadline to commence either a focused or full audit if they determine they don't intend to audit a Verification?

Line 4727: (a) If an LEP will "verify" individual documents, will there still be the concept of an LEP-of-record for the overall release? How would the audit process work if multiple LEPs verified documents used to document a release-based cleanup?

Line 4727: Will the audit regulations be applicable to a release record that was not required to be submitted per 22a-134tt-12?

General Questions:

Why do the Audits (Screening, Focused, Full) include long 180-day timeframes by which DEEP can perform an audit? Is there any mechanism by which an interested party (buyer or seller) can know if a release record is deemed compliant by DEEP? Absence of shorter timeframes will lead to uncertainty, which could negatively impact property transfer and economic conditions particularly in urban and environmental justice areas where conditions often are more complicated because of the presence of historic fill and widespread impacted groundwater plumes.

(b) Screening Audit

No Questions

(c) Focused Audit

No Questions

(d) Full Audit

No Questions

(e) Reopened Verifications and Certifications

No Questions

(f) Verification Necessary After Rejection

No Questions

(g) Frequency of Audits

No Questions

Appendices

1 - Tier Checklist

EPOC Member Questions:

Will the requirement to perform a Scoping Level Eco Risk Assessment as part of every release, pretty much come to the conclusion that there could be risk and therefore the majority of the releases will be subject to performing a site specific eco risk assessment for most every release?

What is the department's current and anticipated future capacity to review/process/evaluate what looks like a major increase in Ecological Risk Assessments (Scoping, Screening, Site Specific) risk assessments with one or more of these risk assessments essentially mandated to occur as a result of the Tier selection process for every release? Will the department acknowledge that the current capacity to review eco risk assessments is currently "slow" and often an issue for moving cleanup progress on sites forward?

Follow up question. Emerging contaminant requirements in the future will drive more sampling for PFAS. As PFAS are detected in different media, given extremely low detection and cleanup limits how will incorporating PFAS into eco risk assessments not quickly become cost prohibitive for the many municipalities, non profits, private residential homeowners, etc. that will be subject to these regulations?

Tier Classification: A Tier 1A indicator is the completion of a Scoping level ecological risk assessment, drinking water receptor survey and vapor intrusion receptor survey. If any of these are determined to not be warranted based characterization data, is there exemption to complete them to not be Tier 1A classified?

Tier Classification: Tier 1B indicators include "compliance" with volatilization criteria or GWPC when a vapor intrusion or drinking water receptor pathway is present. Does compliance in this instance mean compliance established through 4 quarters of GW monitoring in accordance with 22a-134tt-10(h)? Or that characterization data indicates Vol. criteria and GWPC criteria are not exceeded.

2 - Direct Exposure Criteria for Soil

No Questions

3 - Pollutant Mobility Criteria for Soil

No Questions

4 - Groundwater Protection Criteria

No Questions

5 - Surface Water Protection Criteria for Substances in Groundwater

No Questions

6 - Volatilization Criteria for Groundwater

No Questions

7 - Volatilization Criteria for Soil Vapor

No Questions

8 - Equations, Terms, and Values for Calculating Release-Specific Direct Exposure Criteria, Pollutant Mobility Criteria, Groundwater Protection Criteria, Surface Water Protection Criteria, and Volatilization Criteria, for Additional Polluting Substances and Alternative Volatilization Criteria.

No Questions

9 - Equations, Terms, and Values for Calculating Release-Specific Alternative Pollutant Mobility Criteria

No Questions

10 - Potential Alternative Groundwater Protection Criteria Map, dated December 22, 2020

No Questions

11/12 - Managed Multifamily Residential & Passive Recreation Direct Exposure Criteria for Soil

EPOC Member Questions:

Line 5470: Appendix 11 Managed Multifamily Residential Direct Exposure Criteria for Soil
Line 5474: Appendix 12 Passive Recreation Direct Exposure Criteria for Soil

In a number of instances, the criteria proposed for both of these new exposure situations are LOWER than or equal to the current Residential DEC. This seems counter-intuitive to the intent of creating these new criteria to address these lower-exposure and/or less sensitive exposure situations. Particularly concerning are the lower criteria for benzene and benzo(a)pyrene which are commonly clean-up drivers for VOC releases and state-wide sites impacted by SVOCs, and the proposed criteria for lead and arsenic which are unchanged and are common drivers for cleaning up urban sites.

Also, the Multifamily DEC for hexavalent chromium is listed as "0". It is not possible to obtain a lab report that indicates a value of "0" for any analytical constituent. A numerical standard >0 needs to be provided.

Non Section Specific Questions

EPOC Board and Member Questions:
Why are the Fast Track Additional Polluting Substances for already established constituents not incorporated into these regulations, so they could be promulgated into the regulations and therefore the practice of separately apply for the APS as a separate process could stop?

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Additional Questions Received from EPOC Members
February 6, 2024
(Listed by line item of proposed regulations from DEEP's website)

- 1 - 22a-134tt-1 – Stature should be 22a, not 2a.

- 84 - (31) "DEC" – Why isn't 22a-134tt-9(d)(5) "LEP-calculated DEC" referenced in this definition?

- 99 - (35) "Drinking water supply well" – Why is this definition so broad, and include irrigation, agricultural, and industrial supply wells? A "public drinking water supply well" (118) is clearly defined as servicing multiple dwellings.

- 112 - (40) "Environmentally Isolated Soil" – Why doesn't his definition include provisions to apply to the seasonal low in a GA groundwater classification area.

- 124 - (46) "Existing release" – This definition seems contrary to the CT DEEP stance that samples collected during due diligence prior to the promulgation of the new regulations would not constitute the discovery of a release. Should it read "a release discovered after the promulgation of the RBCRs or something similar?

- 200 - (73) "I/C DEC" – Why isn't 22a-134tt-9(d)(5) "LEP-calculated DEC" referenced in this definition?

- 277 (96) would passive recreation include beaches, lakes, and ponds without housing structures.

- 284 - (99) "PEP" – The draft regulations indicate PEP means a person authorized by a permit issued pursuant to Section 22a-454; however, recent training by CT DEEP staff have indicated a PEP would be a licensed individual, not a "permitted" individual. CT DEEP had previously indicated they were opposed to creating a new license. Which is it, a license or a permit?

- 292 - (103) "PMC" – This section specifically lists an LEP-calculated PMC, whereas the DEC definitions do not. This should be rectified.

- 358 - (127) "Residential activity" – Why has this definition been updated to specifically exclude passive outdoor recreation areas?

- 364- (128) "RDEC" – Why isn't 22a-134tt-9(d)(5) "LEP-calculated DEC" referenced in this definition?

- 374 - (131) “Screening level ecological risk assessment” – Why does this definition indicate “confirmed pathway from a release to ecological receptors through results of laboratory analysis of representative samples.” What if the samples discount a pathway? Shouldn’t the word “confirmed” be changed to “evaluated, or just include an evaluation if ecological receptors are present, and then a Site-specific ecological risk assessment include the results of laboratory samples?” Would a Sensitive Receptor Survey qualify as a “screening level ecological risk assessment”? Does the Department plan for a Guidance Document to fully describe specifically what should be conducted for both levels of risk assessment?

- 431 - (152) “Tier Characterization” – Does the Department feel that this definition is consistent with the definition of “Characterization” (19) which is defined as determining the nature and extent of a release in accordance with prevailing standards and guidelines. Why is the definition of “Characterization” so vague and reference a Guidance Document not yet developed?

- 462 - (158) “Verification” This definition points back to the LEP regulations to mean the written opinion of an LEP on a form prescribed by the Commissioner. In Section 22a-134tt-1(c)(I), it indicates” a signed certification by the person submitting the form, and, if provided on the form, a certification by an LEP. Which is it? Are LEPs “certifying” of “verifying”? Is a PEP supposed to be listed here as well?

- 666-667 (g) Licensing of Permitted Environmental Professionals
  We suggest to use the term “Permit” or “Certificate” as the credential for the PEP, rather than licensing, to avoid confusion with "Licensed" Environmental Professional.

- 667 (1) Do you anticipate these credentials will change based on who is in office as the commissioner? Why not define the credentials in the regulations like the LEP requirements?

- 672 (A) what level of training and education will be required for a PEP license? Will there be continuing education requirements?

- 678 (3) Will a board be established, similar to the LEP board to monitor activities of the PEP and insure they are maintaining the appropriate credentials for the permit?

- 703 - (3)(A) “Constructive Knowledge” – Can the Department please elaborate on how Phase II-level soil and groundwater data, collected as commissioned by the potential buyer of a parcel, will not be considered “discovered” by the “creator” or “maintainer” (the property owner) as these data are typically shared and used for the basis on liability transfers and depreciation of value from the purchase price. This ambiguity appears to be asking for legal challenges and a lot of administrative burden.

- 773 - (d) “Existing Releases from USTs” – What happens if petroleum hydrocarbons are detected in soil or groundwater from a petroleum UST site, but other sources of potential

releases of petroleum (i.e. waste oil ASTs, bay drains, septic field). How is the LEP to differentiate if this is a release from a UST regulated under 22a-449(d) or the RBCRs?

- 773 (d) Existing Releases from Regulated Underground Storage Tank Systems.
  This section states that if the source of a historic release was from a "UST system" regulated by 22a-449(d) (UST Regulations), such a release shall not be considered as "discovered" (and therefore not subject to the requirements of the RBCRs). What is the mechanism/process to be able to utilize the RBCRs at a UST release site?

- 799 - (3)(f)(1)(C) and (D) -"Outlier analysis" – Will the Department be developing specific guidance on how to perform an "Outlier analysis?" Shouldn't the statistical method be outlined in the regulation?
- 808 (D) What type of outlier analysis will be acceptable to CT DEEP?

- 813 - (3)(f)(1)(E) – It appears the CT DEEP did not revise the reference "background concentrations for metals", as proposed by EPOC. These values do not represent true background conditions for shallow soils (0-1 foot below ground surface), which represent a "worst case" sample for surficial releases. These background values are likely to have numerous "releases" discovered, and money spent, only to document the detected concentrations are truly representative of site-specific background and did not represent a release. Does the Department expect a large volume of reported releases based solely on metals concentrations in soil samples only to have no remediation required? What is an LEP to do if low level metals are detected in groundwater? Report everything over the minimum laboratory reporting limit as a release? This section seems to be extremely problematic and should be revisited, and not approved as written. Will the CT DEEP be establishing exactly what metals are required to be assessed for specific AOCs? What happens when you have an 8,000 square foot service station and AOCs basically cover the Site and there are not locations absent a potential release?

- 837 - There are many metals on this list that don't have established criteria or APS criteria. Is CT DEEP planning on establishing criteria? Are they planning on creating a list of industry operations they expect to see these analyzed in?

- 837 (f) Naturally Occurring Metals at the Time of Discovery
  The proposed range for background metals values for arsenic are between 3 mg/kg and 6 mg/kg. Naturally occurring arsenic in soil can range from 0.1 mg/kg to 40+ mg/kg. The Residential Direct Exposure Criteria is 10 mg/kg. It is suggested that the naturally occurring background concentrations subject to the RBCRs not be set below current RSR criteria.
  Secondly, why were groundwater values for naturally occurring metals not included in this section?

- 874 - (2)(A)(i) – What is a "reportable concentration?" 2 cubic yards is a very small quantity of soil. What type of evidence is required to demonstrate < 2 cubic yards?
  884 - Can you provide a definition for "subsurface structure" listed under 22a-134tt-3(2)(ii)?

- 884 (ii) Please define "subsurface structures".

- 887 - (2)(A)(iii) – What if a VOC compound is detected in soil that would not be considered a Constituent of Concern for the Site?

- 892 - (2)(B) – Why is only an LEP listed and not both an LEP and PEP?

- 892 - (2)(B) – Does the <2 cubic yard threshold in (2)(A)(i) apply here as well? Should a PEP also be referenced in addition to an LEP?

- 987 (ii) Is CT DEEP anticipating that a "Receptor Survey" will be conducted in 7 days? Sometimes it takes several weeks to gather all of the data included in a survey.

- 1023 (A) Please clarify. Will the LEP be required to report the SER is the owner/maintainer do not?

- 1084-1090 (d) Reports of Existing Releases Discovered on Transfer Act Site.
  For releases covered under the Transfer Act and any newly discovered existing releases on the site, since it appears they will not be subject to the RBCRs, will there be a Tiering requirement and any associated fees for Transfer Act Sites?

- 1160-1808, 22a-134tt-5 – Immediate Actions.
  Will this section be the replacement for the Significant Environmental Hazard (SEH) Program?

- 1256-1579 (e) Required Immediate Actions for an Emergent Reportable Release and (f) Required Immediate Actions for a Significant Existing Release.
  It is suggested that the distances to potable wells that require immediate action (sampling) should remain consistent in all scenarios listed in this section, and in line with the current SEH requirements (i.e. 200 feet in any direction and 500 feet downgradient). For instance:
  1272-1273 (e)(1)(C) specifies 200ft/500ft distances;
  1267-1268 (e)(1)(B) does not specify distances;
  1316-1317 (e)(2) specifies 500ft in any direction;
  1324-1325 (e)(2)(B) does not specify distances;
  1428 (f)(1)(B) specifies within 500ft;
  1437 (f)(1)(D) specifies 200ft/500ft;
  1464 (f)(1)(E)(iv) specifies within 200ft;
  1476 (f)(2)(A) specifies within 500ft;
  1481 (f)(2)(B) specifies 200ft/500ft;
  1494-1495 (f)(2)(D)(ii) (typo - should say (iii)) Specifies 200ft/500ft.

- 1269, 1274, 1326, 1429, 1477 - It is often difficult to gain access to to sample private wells. Certain immediate actions in these subsections require sampling within strict timeframes (2 days, 3 days, etc.). What is the process if access to those properties cannot

be obtained within those timeframes? If access is denied for sampling, will CT DEEP compel the property owners to allow access for sampling?

- 1826 (c) Tier Assignment.
  If two or more separate releases are assigned to a Tier and impact the same areas (i.e. very close AOCs, comingled soil and gw impacts), can comingled Tiered releases be combined and remediated together in accordance with the RBCRs?
  Can the smaller (extent and magnitude) of a comingled release be closed out with the rationale that the smaller release will be remediated with the larger (extent and magnitude) release?

- 1929-1962 (f) Fees.
  The Tier assignment fees are reasonable, but charging the same amount each year as an Annual Fee or extension requests seems excessive. It is suggested to eliminate Annual Tier Fees, unless it is a DEEP-led site.
  If two or more separate releases are assigned to a Tier and impact the same areas (i.e. very close AOCs, comingled soil and gw impacts), does EACH release require a separate Annual Fee?

- 1952-1954 subsection (f)(3)(A) – Typo? The subsections referenced here should be (e)(6)(A) and (e)(6)(B) rather than (e)(6)(i) and (e)(6)(ii).

- 1955-1956 subsection (f)(3)(B) – Typo? The subsections referenced here should be (e)(6)(C) rather than (e)(6)(iii).

- 2046-2051 (c)(2) Financial Assurance.
  Suggest to add a "Self Insured" option as an instrument to satisfy the financial assurance requirements of this subsection.

- 2380-2432 subsection (b)(3)(C) in Conditional Exemptions for Inaccessible Soil.
  Instead of requiring 5 year inspections under the Permit by Rule, it is suggested that the owner is required to report only if there are any changes to the relevant site conditions, in addition to the Affidavit of Facts.

- 2388-2394 subsection (b)(3)(D)(i)(IV) in Conditional Exemptions for Inaccessible Soil.
  As currently proposed in the DRAFT RBCRs, can the owner complete the required 5-year inspections, or do the inspection forms require certification by an LEP/PEP?

- 2362-2432 subsection (b)(3)(C) in Conditional Exemptions for Inaccessible Soil.
  For sites currently in the Transfer Act, can the Permit by Rule for Conditional Exemptions for Inaccessible Soil be utilized as part of the Transfer Act Verification Process once the RBCRs are adopted?

- 3587-3679 (j) Conditional Exemption for Historically Impacted Material.
  How does Conditional Exemption of Historically Impacted Material differ from the

Widespread Polluted Fill Variance in section 22a-134tt-9(f)(1)? Is Historically Impacted Material considered fill or related to historical releases onsite?

- 3587-3678 (j) Conditional Exemption for Historically Impacted Material.
  Instead of requiring 5 year inspections under the Permit by Rule, it is suggested that the owner is required to report only if there are any changes to the relevant site conditions, in addition to the Affidavit of Facts.

- 3610-3611 (j)(2)(A)(ii) Conditional Exemption for Historically Impacted Material.
  As currently proposed in the DRAFT RBCRs, can the owner complete the required 5-year inspections, or do the inspection forms require certification by an LEP/PEP?

- 3587-3679 (j) Conditional Exemption for Historically Impacted Material.
  For sites currently in the Transfer Act, can the Permit by Rule for Historically Impacted Material be utilized as part of the Transfer Act Verification Process once the RBCRs are adopted?

- 4751-4765 (b) Screening Audit
  If a Screening Audit is conducted, it is suggested that the RP will be notified if the Screening Audit is Accepted by DEEP, so that the RP may close out the project.

- 4934 - Can you indicate the percentages of audits that will be conducted on PEPs? The presentation material offered by the CT DEEP at various organization's meetings listed the percentages of audits for LEP submitted documents, but was curiously absent any numbers for PEPs. One would think it would be a very high percentage to test out this proposed new role.

- Why aren't the APS being incorporated/adopted into the RCBRs?

Comments to Draft Release Based Cleanup Regulations

2a-134-1 Definitions and Miscellaneous Provisions

1. Line 6: (2) This definition is too broad and encompassing.
2. Line 8: (3) See above. Is this meant to include O&M on caps and EURs, and passive SSDS?
3. Line 28: (11) This seems to suggest that Immediate Action Reports and Tiers checklists are not subject to Audit.

4. Line 128: (48) The standard for Full Characterization to "no longer detected" is not practicable in many scenarios due to background conditions from natural sources and other human impacts, commingled releases from third-parties, infrastructure, and structures. Characterization should be determined by the environmental professional or commissioner. Perhaps the term should be "sufficient" instead of "full".

5. Line 169: (66) Immobilization may also be achieved by other means, such as reducing contaminant mass, introducing amendments to increase the retardation factor, or capping.

6. Lines 223-225: (78) "Managed multifamily residential activity" is defined as being managed by an association or professional property management company. What was the rationale behind only including associations or professional property management companies, and no other management or property owner types? The definition should refer to the DCP regulations for consistency, add "…an association with a registered manager", remove "professional…", add "…company with a real estate broker's license".

7. Line 232: (81) Consider including "…practices and in consideration to preserve public health and safety or residential occupancy and without…". Interruption of utility services results in other immediate public safety risks and should take priority. After the first-response action is completed, service must be restored and maintained, especially to critical infrastructure. Days later from laboratory data, impacts from a release may be found to extend to areas that would require service interruptions to cleanup.

8. Lines 329-332: (117) "Public Water Supply Distribution System" is defined in the proposed regulation as "…or twenty-five (25) or more persons daily….". As defined in CGS 25-32a "…or twenty-five (25) or more persons on a *regular basis*…". Additionally, pursuant to CGS 25-32a, a public water supply distribution would include, in addition to pipes, tanks, and pumps; any pond, lake, reservoir, *well*, stream or distributing plant or system that supplies water.

9. Lines 333-334: (118) "Public Drinking Water Supply Well". This definition could be removed from the regulation, and only "Public Water Supply Distribution System" used, as it is all-encompassing.

10. Line 521: (d)(1)(A)(i). Regarding waste characterization or samples used to manage soil and fill for disposal, since those samples are not collected for compliance with the RBCR's, this section does not apply. Suggest a provision for that clarifies that waste characterization sampling cannot be used for compliance, and does not need to meet this section, and that results for waste characterization sampling does not by itself constitute discovery or a release.

11. Line 525: (d)(1)(A)(ii)This provision may directly conflict with an LEP's professional judgement and undermines that role.

12. Lines 666-68: (g) Licensing of Permitted Environmental Professionals. Specific descriptions, or examples, of requirement of PEP certification (training, education, professional experience, credentials/licensing) should be included. PEPs *cannot* be considered the same as businesses permitted under CGS Section 22a-454 but are individuals. Full definition of the permit(s) and qualifications needed to gain this title should be included.

    The regulation should be explicit regarding whether PEP's need to be an independent third-party or can be an employee of the creator/maintainer (preferred).

    LEP should be allowed to serve as PEP and included in the definition. Add subparagraph (4)"An

    LEP meets the definition of a PEP and may serve in such role and provide PEP certifications".

22a-134tt-2 Discovery of Releases

1. Based on feedback during the Working Group meetings, I understand this section will be subject to changes and therefore, comments provided at this time have been limited.

2. Line 688: add "…data available or generated, or field observations made, conditions reported before the date… "

3. Lines 690-699: (a)(2) Includes "Actual knowledge of a release shall include, ***but not be limited to***, knowledge of a release on the basis of either…" and is followed by only two examples. If actual knowledge is ***not limited*** to the two provisions listed. Further examples should be included and/or expanded on, this provision is open-ended. Suggest removing "not".

    (A). Suggest the threshold for discovery at 0.5 of the cleanup standard rather than the detection limit, whichever is higher. Use of the detection limit seems overly conservative and will continue to result in the current often challenge of showing that no remedial action is needed for de minimis conditions. This alternative threshold may allow for several conditions that are either natural or common background to avoid unnecessary characterization.

4. Lines 700-702: This paragraph is confusing and needs further clarification. It seems to suggest that someone who is presumed to have discovered a release is considered a creator or maintainer.

5. Line 764: (c) Suggest adding an exception for utility and other public works for discovery or limiting discovery during these activities to certain SERs, such as explosion hazards and NAPL.

6. Lines 786-841: (f)(1). There are numerous technical issues with this section and unintended consequences that may result. Option 1 Theoretically, this Option should not occur and if so, it may indicate placement of artificial fill. Option 2 Several of the values in the able are too low to be helpful. The concept seems to ignore the contribution and naturally occurring levels in hardpan and from the various bedrock (including weathered rock) formations throughout the state resulting in levels of arsenic, cadmium, chromium, nickel, zinc well above Option 2, and below the RDEC, GA PMC. These levels may be misapplied for characterization of backfill, essentially prohibiting the use of quarried rock in the state as clean fill, which has been the industry practice for decades. This complicated matter can be avoided by using a different threshold other than the detection limit, such as one-half the cleanup standard.

7. There is opportunity in this section to address Urban Fill or historically industrialized areas and provide background concentration levels in those areas. This approach has been used in several other states that have release-based cleanup programs.

22a-134tt-3 – Reporting Newly Discovered Existing Releases

1. Further guidance within this section is needed for those authorized by creators/maintainers to complete sampling for construction purposes and associated waste characterization, or other like activities, and requirements (if any) of reporting a release other than an SER *to* the creator or maintainer.

2. Lines 1046-1050: (c)(4) Specification on what "confirmation" from the maintainer to the person who discovered the release should be considered, perhaps written and/or electronic/digital confirmation. Without guidance on what "confirmation" looks like, the Department may receive double reporting for SERs.

3. Further clarification on who may bear the financial fine(s) associated with not reporting an SER in the time required by the draft regs is needed (Creator/maintainer, release discoverer, or both?)

4. Line 1013: (c). SERs represent serious concerns. The complicating issue is that this provision may result in numerous unnecessary receptor surveys being performed by what are essentially third-parties performing public works or other utility work adding substantial unforeseen costs to projects that may not be recoverable. Suggest limiting the SER reporting obligations for those employees and person hired, retained, authorized for the industries and businesses that are

frequently working in the ROWs and at residential properties for public roadwork, utility (storm sewer, water, power, gas, communications, etc.) connections and repairs, also including residential on-site sewage disposal systems permitted by the local authority. SER reporting for these activities could be limited to imminent risk of explosion, NAPL, and other imminent risk to receptors known at the time the condition is identified and the owner shall be responsible to identify potential receptors within the vicinity.

22a-134tt-4 Characterization of Discovered Releases

1. An overall exemption for releases to indoor impervious surfaces, secondary containments, or contained within other containment systems such as oil-water-separators or stormwater pollution prevention structures/sumps should be considered.

2. Lines 1127-1132: (b)(1) Is there any intent to post changes or additional methods/protocols of the current standards and guidelines, following finalization of this regulation? Will there be a public notice period prior to posting?

3. For utility, transportation and other public works stakeholders of this draft regulation, there are many projects that include miles of easements. These easements may include industrial, commercial, or residential facilities. Clarification on characterization of discovered releases for easements is necessary. Consider implementing exemptions.

22a-134tt-5 – Immediate Actions

1. Line 1234: (d)(1)(A). add “from the land surface and surface waters of the state to the extent prudent, an emergent…”.

2. Lines 1420-1506: (f)(1) Consider changing language within this subsection from “private or public drinking water supply well” to “private well or public water supply distribution system” to encompass any pond, lake, reservoir, stream, or system that supplies drinking water, pursuant to CGS 25-32a.

3. Line 1611: (h)(1)(A) Caution that the four quarters of data for a drinking water system may not be sufficient to a evaluate a point of exposure, perhaps this acceptable for a transition point.

4. Line 1632-33: (h)(1)(C). Suggest changing to “…to the extent prudent and/or the mitigation of the risk…”

5. Line 1648: (h)(1)(E) Sources of sheen may be in sediment and this regulation does not cover sediment, or does it? The use of the term “maximum extent practicable” should not be used to define transition points.

6. Line 1651: (h)(2) Similar comment above apply to this subsection.

22a-134tt-6 – Tiers

1. Lines 1882-1883, lines 1886-1888: “other qualified professional” should be clarified or changed to PEP.

2. There are several Environmental Justice Communities within Connecticut. Exceptions, waivers, or reduced fees for Tier assignments, annual fees, or extensions should be considered for creators/maintainers within these communities, to benefit low-income and minority groups fairly and equitably. Other considerations for exceptions, waivers, or reduced fees for Tier assignments, annual fees, or extensions should be considered for creators/maintainers that are underprivileged geographically.

3. The Tier Checklist for 1A requires some clarifications:

    a. ecological risk assessments may not be required to meet cleanup goals
    b. Drinking water surveys should only be required where groundwater contamination is identified.
    c. Vapor intrusion surveys should only be required for VOC releases.

    The current draft would have most releases/sites enter as a Tier 1A.

22a-134-7 – General Cleanup Standards Provisions

1. Line 2141: (c)(2)(C)(i)(III). The Department should consider limiting and/or identifying remediation project types and/or scopes where a public meeting would be required by the Commissioner, specify the threshold of “significant public interest”.
2. Line 2145: (c)(2)(C)(i)(III). Public meetings are essential in certain circumstances and must be conducted with careful planning and coordination with the DEEP and local authorities to establish trust. These meetings may also result in confusion, fear, misinterpretation, or *significant* aggression by the public or the press/media through a lack of general knowledge of environmental standards and cleanup, especially when the messaging is not endorsed by local leaders and the DEEP/DPH. Participation or at a minimum representation of DEEP and the local authority must be included in this provision.
3. Lines 2157-2160: (d). This first part of this provision is too broad and encompassing, regulations may conflict. The typical hierarchy of federal, state, local should be maintained. For example, what if meeting the federal standards under 40CFR761 requires a building be demolished and the local government’s historical code requires it be maintained. This provision is not consistent with CERCLA.

22a-134tt-8 Releases Certified as Closed by a Permitted Environmental Professional

1. Lines 2165-2166: Consider adding “or LEP” following “Releases Certified as Closed by A PEP”

2. Clarification on why a PEP cannot certify releases of home heating fuel on residential properties caused by contractor error. The current draft only includes certification if the release was created by the owner of a parcel.

22a-134tt-9. Cleanup Standards for Soil (formerly 133k-2)

1. Implementation of a background standard (separate from naturally occurring background metal concentrations) for urbanized fill, or other areas subject to historical human impacts, relating to certain metals and low-level PAHs commons to these areas should be considered. Such standards may vary geographically.

2. Implementation of a standard for dry and/or exposed, sediments should be considered.

3. Lines 2311-2012: (b)(2)(C) The addition of owners leasing housing under the Housing Choice Vouchers Program or within an Environmental Justice Community should be considered.

   There are potential workarounds of managed residential provisions that would undermine its intent and allow for essentially single-family home type conditions.

22a-134tt-10. Cleanup Standards for Groundwater (formerly 133k-3)

1. Implementation of a standard, technical impracticability variance, and/or incidental sources for metals (separate from naturally occurring background metal concentrations) with causation from urbanized fill should be considered.

2. Implementation of a standard for submerged sediments should be considered.

22a-134tt-11 – Certification and Verification

1. Line 4938: (g)(1)(A). Tier 1A is being overseen by CT DEEP. The Audit is essentially on-going throughout the project. This goal is irrelevant and should be set at zero or 100%.

2. Although audit goals for non-Tiered site is not required by the statute, goals should be set for Immediate Action Reports and any other closure reports, certification, verifications produced prior to tiering given how integral these documents are in the process. If the concept of these types of early phase compliance reports occurring prior to tiering was known at the time the statute was developed, the statute would likely have required an audit frequency. Not having a goal for these reports seems inconsistent with the intent of the statute.

   Alternatively, all releases requiring reporting could automatically enter as a Tier 1 and then the proposed Tiering System would shift by 1 and revise accordingly.

_____

Avangrid

Eric J. Boswell

Project Manager / Projects / Remediation Group

Internal Use

Loureiro
Engineering • Construction • EH&S • Energy
Waste • Facility Services • Laboratory

VIA E-Mail

March 7, 2024

Department of Energy and Environmental Protection
Bureau of Water Protection and Land Use
79 Elm Street
Hartford, Connecticut 06106-5127

Attn: Graham J. Stevens and Brendan Schain, CTDEEP
DEEP.Cleanup.Transform@ct.gov

RE: Written Comments on Proposed Release Based Cleanup Regulations

Dear Mr. Stevens and Mr. Schain:

Loureiro Engineering Associates (LEA) was founded in 1975 in Plainville, Connecticut, and provides engineering, environmental health and safety, energy, and waste management services to organizations throughout North America. Our staff includes 9 Licensed Environmental Professionals (LEPs) who assist the regulated community in Connecticut.

LEA has reviewed the Draft Regulation Package released by Connecticut Department of Energy and Environmental Protection (CTDEEP) on December 29, 2023 (inclusive of the following individual documents: *Draft Proposed Release Based Regulations (RBCRs), Draft Proposal for Risk Based Cleanup Standard Calculators, RBCRs – Other Proposed Regulatory Adjustment, Draft Multifamily and Recreational Risk Based Criteria TSD,* and *Questions to DEEP on the Draft Regulatory Package)* and appreciates the opportunity to provide comments to the CTDEEP on the proposed regulations. Having worked with the Connecticut Remediation Standard Regulations since their inception and having had the opportunity for some of our LEPs to participate on Workgroups and Subcommittees during the development of these draft regulations, we appreciate the goal of these new regulations to reduce the burden on the regulated community while being protective of human health and the environment and recognize the massive undertaking development of these new regulations represents. However, we would like to offer the following comments and questions for your consideration.

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Comments and Questions on Draft Proposed Release Based Cleanup Regulations

1. Section 22a-134tt-1(a) - Definitions
   a. (13) "Background concentration", Pages 1-2 [Lines 33-39]: This definition excludes anthropogenic background that is present across much of Connecticut due to the extensive industrial history of the state. It fails to recognize the presence of substances, such as PFAS and PAHs which may be present for reasons unrelated to activities on a Site. We urge the department to consider an approach similar to MADEP's *Technical Update on Background Levels of Polycyclic Aromatic Hydrocarbons and Metals in Soil.*
   b. (48) "Full characterization", Page 4 [Lines 128-129]: We strongly urge the department to remove the requirement to delineate to not detected from this definition. The requirement to delineate to not detected is counter to existing prevailing standards and guidelines (e.g., Site Characterization Guidance Document). Furthermore, delineating to not detected would be costly, and in some cases, impossible to achieve. Instead, we believe that delineation should be tied to a validated conceptual site model.
   c. (57) "Groundwater plume", Page 5 [Lines 144-146]: Inclusion of laboratory reporting limits in the definition of groundwater plume. This could be problematic for some naturally occurring substances or when background groundwater has detectable levels of other substances. Perhaps incorporate background into the definition ("above laboratory reporting limits, or background, whichever is higher"
   d. (92) "Oil or petroleum", Page 8 [Lines 264-267]: Please clarify whether this would include oils derived from plant material (e.g., vegetable oil).
   e. (95) "Parcel-wide investigation", Page 8 [Lines 273-276]: Is this definition intended to encompass all parcels which comprise a site? If not we recommend establishing a "site-wide investigation" for sites which are comprised of multiple parcels.
   f. (125) "Remediation", Page 10 [Lines 352-386]: We believe the inclusion of the concept of characterization in the definition of remediation is confusing and could be problematic. For example, Section 22a-134tt-7(d)(2) which requires public notice of remediation. If characterization is part of the definition of remediation, does that mean that public notice would be required for characterization activities? Would a characterization work plan need to be made available to the public? We believe that the language in Section 22a-134tt-4(a)(1) is sufficient and suggest that "determining the nature and extent of a release, in accordance with prevailing standards and guidelines, and" is removed from the definition of remediation.
   g. (136) "Semi-volatile organic substance", Page 11 [Lines 385-386] and (162) "Volatile organic substance", Page 14 [Lines 476-477]: These definitions are both subjective, with semi-volatile being defined in relation to volatile (e.g., higher molecular weight and higher boiling point), but with no quantitative metrics for volatile (e.g., high vapor pressure and low boiling point at room temperature). For clarity, we suggest that some quantitative metrics be included in one or both definitions.

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h. (152) "Tier characterization", Pages 12-13 [Lines 431-446]:

   i. Please clarify whether "applicable standards" are the standards appropriate for the current use of the parcel (e.g., Industrial/Commercial) or whether an EUR would need to be in place prior to tier classification in order to use those criteria.

   ii. For substances without promulgated criteria, could the "fast-track" APS criteria be used without submitting an APS request to the department for approval?

   iii. The term "delineated" is not defined. Is it the intention that substances would need to be "delineated" to the point where the substances is detected at or below 50 percent of the cleanup standard, or to not detected?

i. (165) "Water quality criteria", Page 14 [Lines 483-484]: We request the department reconsider this definition. There are many circumstances where there are no human health pathways; but this definition compels compliance with the human health criteria as well when only the aquatic life criteria would be more appropriate. Perhaps the definition could be modified to: "Water quality criteria" means the lower of the human health or aquatic life criteria, as applicable, contained in Table 3 of the Water Quality Standards."

2. Section 22a-134tt-2 - Discovery of Releases

   a. Section 22a-134tt-2(f), Page 22 [Lines 786-841]: We support the development of statewide background values that can be used in facilitating release determinations and appreciate the inclusion of different options for demonstrating that something is consistent with background. However, we have two concerns with the table of background values.

      i. The placement of the table within section 22a-134tt-2(f)(2) which begins with "Soil samples shall be collected and analyzed as follows:" appears to suggest that ALL the metals included in the table must be analyzed. More than half of the listed metals have no promulgated or APS criteria and many would be constituents of concern at a very limited number of sites/releases. We recommend clarification that only metals which are constituents of concern for the release need to be analyzed.

      ii. We strongly encourage the Department to consider other, more appropriate, methods for calculating background values. The background values included in the draft RBCRs were developed based on a measure of the central tendency of the background dataset (e.g., the 95% UCL). There are other statistical methods available (and included in the ProUCL software) to calculate background threshold values. By using the 95% UCL instead of background threshold values that more accurately reflect the upper range of background we expect that many, if not most, places where metals are analyzed will be flagged as a "release" using either Option 1 or Option 2 values and will impose characterization requirements that are not necessary.

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3. Section 22a-134tt-3 – Reporting Newly Discovered Existing Releases

    a. Section 22a-134tt-3(c)(4), Page 26 [Lines 884-850]: This provision creates an obligation for environmental professionals to report certain releases, specifically Significant Existing Releases, to the department if the creator/maintainer does not report the release to the department within the specified period. This could create problems for environmental professionals when there are contractual requirements for confidentiality.

    b. Section 22a-134tt-3(a)(2)(D)(iii), Page 27 [Lines 907-908 and 917-919]: "The following releases are exempt from the requirement to report: (iii). Releases resulting or emanating from piers, pilings, and other building foundation structures and other building materials..."

    Does this statement imply that PCBs, lead, and/or other contaminants present in building materials are exempt from reporting?

    c. Section 22a-134tt-3(d)(2)(B), Page 31 [Lines 1084-1090]: Please clarify the language regarding deadlines. Does the language "without extension of such deadline" mean that deadline extensions would not be allowed?

4. Section 22a-134tt-4 – Characterization of Discovered Releases

    a. Section 22a-134tt-4(b), Pages 32-33 [Lines 1126-1132]: This statement implies the removal of professional judgment by LEPs as to what other documents may constitute prevailing standards and guidelines. It would be appropriate to require PEPs to submit other methods and protocols to the department for approval, but LEPs should be allowed more flexibility to rely on professional judgment went identifying other methods or protocols as prevailing standards and guidelines. Please clarify what would be required if the department does not post guidance on a particular topic (for example, logging soils).

5. Section 22a-134tt-5 – Immediate Actions

    a. Section 22a-134tt-5(e)(1)(C), Page 36 [Lines 1274-1275] and Section 22a-134tt-5(f)(1)(B), Page 40 [Lines 1427-1430]: The 36 hour and 2 day periods in which to collect samples from drinking water wells on adjacent parcels is not realistic for much of the regulated community. State and municipal entities may be able to complete the sampling within this period, but in our experience, it takes much longer than this for private companies to gain access to properties for sampling.

    b. Section 22a-134tt-5(e)(1)(F), Page 37 [Lines 1285-1290] and Section 22a-134tt-5(f)(1)(E)(iii), Pages 41-42 [Lines 1455-1461]: We maintain that the 15 day period for installation of a treatment system and 30-day period for connection to an unimpacted public drinking water supply system may not be feasible. So long as a potable water supply (e.g., bottled water) is being provided to the property(s), a more realistic schedule should be allowed.

c. Section 22a-134tt-5(e)(5)(B), Page 39 [Lines 1397-1402]: The 48 hour allowance for collecting sediment samples may not be feasible if town or other permits are required to collect such samples (i.e. work in inland wetlands).

d. Section 22a-134tt-5(f)(3)(B), Page 42 [Lines 1520-1522]: Recording an EUR, which is one of the provisions required to render soil inaccessible, is likely not feasible within 90 days under the current EUR application process.

e. Section 22a-134tt-5(h)(1)(D)(ii), Page 45 [Lines 1642-1643]:
   i. What is the logic behind the requirement for the collection of 9 consecutive indoor air samples?
   ii. Do concentrations in each of the 9 consecutively collected samples need to be 10 times below the respective Target Air Concentration?

6. Section 22a-134tt-6 - Tiers

   a. Section 22a-134tt-6(d)(4), Page 53 [Line 1886]: Please provide clarification on what constitutes a "qualified professional" as it is not defined within the RBCRs.

   b. Section 22a-134tt-6(e)(C), Page 54 [Lines 1913-1928]:
      i. Would an extension be granted if the plume is stable and the environment is supportive of natural degradation, but the plume is not significantly diminishing in state?
      ii. We recommend the addition of an option to allow for an LEP to establish and submit a schedule for remediation of groundwater consistent with the conceptual site model for Commissioner Approval that would supersede stated requirements for granting 5-year extensions as currently written.

7. Section 22a-134tt-8 – Permitted Environmental Professionals

   a. 22a-134tt-8(a)(1)(C)(ii), Page 62 [Lines 2174-2175]: Additional clarification is needed to identify whether the "migration" is due solely to overland flow or would include migration with groundwater.

8. Section 22a-134tt-9 – Cleanup Standards for Soil

   a. Section 22a-134tt-9(b)(2)(C)(iii)(I), Page 66. We recommend rephrasing as "gardening with subsurface material" to clarify that container or raised bed gardening with imported clean material would be acceptable.

   b. Section 22a-134tt-9(d)(5)(ii), Page 81. The LEP calculated risk based alternative direct exposure criteria described in this section is based on requirements that risk posed by a substance does not exceed "(I) A cumulative excess lifetime cancer risk of 10-5 for 2 or more carcinogenic substances; (II) A cumulative hazard index of 1 for non-carcinogenic substances with the same target organ."

      The current process under the RSRs for Commissioner Approval of Alternative Release Specific Direct Exposure Criteria, which is restated on p 79 of the RBCRs under Section 22a-134tt-9(d)(2)(A) includes a requirement that risks posed by substances do not exceed "(iii) For a release area polluted with ten (10) or more carcinogenic

substances, the cumulative excess lifetime cancer risk for all carcinogenic substances in such soil with the same target organ is equal to or less than 1 x 10^{-5}; and (iv) For a release area polluted with ten (10) or more non-carcinogenic substances, the cumulative hazard index is equal to or less than 1 for non-carcinogenic substances in such soil with the same target organ." Similar language appears in Section 22a-134tt-9(i)(3)(A), page 94.

We recommend that the language Section 22a-134tt-9(d)(2)(A), Section 22a-134tt-9(i)(3)(A), and any other instances of this language be revised to match the new language in Section 22a-134tt-9(d)(5)(ii).

c. 22a-134tt-9(j)(1)(C), Page 94 [Lines 3599-3600]: Can the department provide some clarification on the requirement that "each significant existing release has been identified". By nature, historically impacted material is likely heterogeneous, and it would be virtually impossible to determine that every significant existing release has been identified. We suggest removing this item or include guidance indicating what level of certainty is needed (e.g., a sampling program that would identify a hotspot larger than a certain number of feet).

d. Section 22a-134tt-9(k). We support the ability to dispose of dredge spoils as described without requiring compliance with the Direct Exposure Criteria and Pollutant Mobility Criteria.

9. Section 22a-134tt Appendix 1 – "Tier Checklist"

   a. Part III: Tier Determination – Tier 1A Item 1c: There should be a "not applicable option" for the vapor intrusion receptor survey. If the release is not of a volatile organic substance, there would be no need to identify vapor intrusion receptors.

Comments on Draft Proposal for Risk-Based Cleanup Standard Calculators

1. Cumulative Risk Calculator / Approach / Bullet 1 states "Cumulative risk calculator must consider all releases at a parcel, all chemicals present in the environment whether or not they are from the release, and all potential current and future exposure pathways associated with the parcel."

   Please clarify whether this statement means that all detected concentrations of metals (whether or not they were determined to be consistent with naturally occurring background and not associated with a release according to the methods described in the new RBCRs) need to be included in the cumulative risk calculator.

2. Cumulative Risk Calculator / Additional Polluting Substances. We support the ability to use a calculator for the development of Additional Polluting Substances in order to standardize this process and result in an overall faster approval process.

3. Cumulative Risk Calculator / Additional Exposure Scenarios. We support the ability to use a calculator for alternate exposure scenarios, however we would suggest that the CTDEEP refers to the existing Massachusetts Department of Environmental Protection Method 3

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Risk Assessment Shortforms to guide the development of the calculators for the Trespasser and Construction Worker exposure scenarios.

Comments on Draft Managed Multifamily Residential and Passive Recreational Risk Based Criteria

1. We note that certain Managed Multifamily Residential and Passive Recreational direct exposure criteria (DEC) for certain compounds, in particular those for benzo(a)pyrene, are lower than the current Residential DEC within the RSRs, despite assumptions of less intensive and frequent exposures within those two scenarios. We acknowledge that updated toxicity information (in particular the mutagenicity of benzo(a)pyrene) and updated body weights were used in the development of the draft Managed Multifamily Residential and Passive Recreational direct exposure criteria and drives some of the variance between these values. However, the DEEP should consider either revising the Residential DEC such that the toxicity information is consistent across exposure scenarios, or reconsider the calculations for Multifamily and Recreational direct exposure criteria.

2. The ingestion rates used to derive criteria within the Managed Multifamily Residential exposure scenario are based on the Indoor Settled Dust ingestion rates within Chapter 5 of the United States EPA *Exposure Factors Handbook (EFH)* (updated 2017). However, the studies used in the development of the ingestion rates within the EFH were not limited to those with exposure scenarios that match the Managed Multifamily exposure scenario and therefore the resulting Indoor Settled Dust ingestion rates within the EFH may be higher than would be expected under the Managed Multifamily Residential exposure scenario, resulting in overly conservative criteria.

   For example, the Managed Multifamily Residential exposure scenario requires the active management of the property, including ensuring that garden beds are properly mulched and lawns are maintained with a dense grass cover. As a result, the level of indoor dust attributable from outdoor soil would be expected to be lower under this exposure scenario than at a typical single family residential home or multifamily complex with accessible and non-maintained soil.

   The studies used in the development of the EFH ingestion rates include multiple types of residential scenarios and were not limited to those where soil surrounding a residential building was stabilized and managed, or urban areas. We recommend that CTDEEP and the Connecticut Department of Public Health (DPH) review additional sources of indoor ingestion rates that would more closely align with the Multifamily Exposure scenario and revise ingestion rates and derivation of criteria as appropriate.

3. For the Managed Multifamily Residential exposure scenario, the exposure frequency for residents is assumed to be 365 days per year. The derivation of Massachusetts Department of Environmental Protection (MADEP) S-1 criteria and Method 3 Risk Assessment Shortform calculator (updated December 2023) assumes a 5 day per week, 30 weeks per year exposure frequency for a Residential exposure scenario. We recommend the DPH

provide justification for the exposure frequency chosen for the Managed Multifamily exposure scenario.

4. As a minor editorial note, on page 39 we noted that the title of Table 5-1 is referenced as sourced from the 2011 EFH not the updated 2017 EFH, but content is consistent with the 2017 EFH.
5. Overall we support the development of the Managed Multifamily Residential and Passive Recreational Exposure scenarios to allow for the redevelopment of areas that may currently be abandoned or underutilized. However, we recognize that the promulgation of these criteria may lead to a perceived need for revision of the current Residential and Industrial Direct Exposure Criteria in the RSRs. We offer that use of a risk calculator similar to the Massachusetts Method 3 Risk Assessment shortforms for the calculation of risk under the Managed Multifamily Residential and Passive Recreational Exposure scenarios, as opposed to promulgation of criteria, may provide a more streamlined way to make risk-based cleanup decisions for these types of properties.

We hope that you will consider these comments on the draft proposed RBCRs. In addition, we have attached a page with potential errata for your use. Finally, we note that there are various documents and forms referenced in the regulations which are not yet available for review. We encourage the department to make these documents available for comment before the RBCRs are published for public notice

Sincerely,

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Possible Errata and General Comments

There is inconsistent use of days vs hours and whether digits or spelled out numbers are used.

Page 31 [Line 1086] Change “From VI verification” to “Form VI verification”
Page 52 [Lines 1855 and 1861]: Change “RBCRss” to “RBCRs”?
Page 57 [Line 1999]: Change “RBCRss” to “RBCRs”?
Page 59 [Line 2098]: Change “undertake” to “undertaken”?
Page 95 [Line 3628]: Change “RBCRss” to “RBCRs”?
Page 179 [Line 5438]: is “Appendices C, D, and E” the correct citation?
Page 63 [Line 2200] “coating are identified; **and**” should there be a (2)(C)? [a and b but no c]
Page 64 [Line 2250 | line 2252] should (i) end with “;” and (ii) end with “; and” – (iii) seems to be left hanging.
Page 67 22a-134tt-9(b)(3)(D)(i) should be (I) (II) (III) and (IV) not (I) (III) (IV) and (V); remove “shall” from start of lines 2388 and 2395 because (i) [line 2383 ends with “shall:”
Page 81 22a-134tt-9(b)(5): should (i) (ii) (iii) (iv) be (A)(B)(C)(D) and should (I)(II)(III) be (i)(ii)(iii)?

Comments of Environmental Transactional Lawyers on Draft Release-Based Cleanup Regulations

March 7, 2024

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EXECUTIVE SUMMARY

These comments to the draft Release-Based Cleanup Regulations ("RBCRs") have been prepared by environmental lawyers who are members of the Public Act 20-09 Working Group and/or interested observers and practitioners. These comments draw upon hundreds of years of collective experience helping clients navigate Connecticut's various remediation programs, statutes and regulations.

Public Act 20-09 was passed with a goal of fostering economic development, as stressed by the Governor in a press conference just last week. As presently drafted, the proposed regulations fall far short of that goal. If promulgated as currently drafted, they will have significant negative consequences for Connecticut's businesses, municipalities, lenders, landowners (including owners of industrial, commercial, residential, and public properties), and the general public.

We urge the Department to continue working with the Working Group until a number of critical flaws are fixed. While there are other issues with the draft RBCRs, the most significant flaws include:

- A failure to set reasonable requirements for investigating contamination, and requiring that businesses and landowners (including residential landowners) delineate minute concentrations of contamination inconsistent with prevailing standards.
- A failure to set a lower bound defining which releases are reportable, and which reportable releases are subject to remediation requirements, and (as written now) requiring businesses and landowners (including residential landowners) to hire specifically-permitted contractors to close out releases that they easily could handle themselves without incident today.
- A failure to provide closure certainty by extending audit deadlines past statutory authority and failing to provide "no audit" confirmation notifications upon which stakeholders rely.
- A failure to adequately define who is eligible to participate in a new class of environmental professionals (not currently provided for by statute) that will be relied upon to close many releases.
- A failure to define one of the most critical concepts used (i.e., who is "maintaining" a release) and expecting businesses and landowners (and other non-lawyers) to refer to and interpret 30-year-old case law.

We stand ready to continue to work with the Department to improve these regulations. Significant work is required.

1. INTRODUCTION

The signatories to this paper are all environmental transactional attorneys. A number of us are members of the legislatively-created Working Group convened by the Department of Energy and Environmental Protection ("DEEP" or the "Department") and the Department of Economic and Community Development ("DECD") pursuant to Public Act 20-09 (the "Working Group").

In formulating our comments, we have drawn upon hundreds of years of collective experience, and thousands of hours of collective time donated to the Working Group and/or the RBCR development process. We have donated so much of our time because we believe that a workable set of release and risk-based remediation regulations will benefit the people and businesses of Connecticut and because we believe such a regulatory package is achievable, but only if the Department, DECD and stakeholders roll up their sleeves and work together. We stand ready to donate more of our time to ensure that the draft RBCRs are the best that they can be (and avoid unintended consequences) before they are released for public comment as part of the formal legislative regulation review process, and before they are implemented.

Just last week, Governor Lamont announced that significant progress had been made to develop the draft RBCRs and that approval is projected in 2025.[1] The Governor emphasized that the RBCRs "will unlock these [brownfield] properties and spur redevelopment in our communities."[2] Interim DECD Commissioner O'Keefe said that "[b]usinesses in the state are looking for predictability and stability" and that the new regulations will give "businesses the confidence to know they can invest in a more predictable regulatory environment."[3] Commissioner Dykes thanked Department and DECD staff and working group members for the "thousands of hours" invested in this process.[4]

All of that effort will be wasted if critical changes outlined below (and by the Environmental Professionals Organization of Connecticut, and other stakeholders) are not implemented. In particular, as presently drafted, the RBCRs would create a remediation program even more confusing, time consuming, frustrating, expensive and difficult to implement than the Transfer Act.[5] Without significant changes, these regulations, and their economic development aims are certain to fail. Indeed, at the March 5, 2024 meeting of the General Assembly's Brownfields Working Group, concern was expressed that the RCBRs, as currently drafted, may result in more brownfields (i.e., abandoned or underutilized properties) being created in our state.

Further development and refinement of the RBCRs are necessary to ensure that new brownfield sites are not created due to a desire to avoid this new program because of the ambiguities, infirmities, liabilities and challenges presented at this time. DEEP's position that, once the

[1] Press Release: Governor Lamont Announces Progress on Release-Based Cleanup Program To Spur Remediation of Blighted Properties (Mar. 1, 2024) (available at: https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2024/03-2024/Governor-Lamont-Announces-Progress-on-Release-Based-Cleanup-Program).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Conn. Gen. Stat. § 22a-134 *et seq.*

RBCRs are adopted, the "effective date" of the RBCRs will be "delayed" until critical changes are made (including forms, guidance and statutory revisions) is not an acceptable solution.

(a) Context

Connecticut is virtually unique[6] among the states in using a transaction-triggered law, the Transfer Act, as a primary driver of site investigation and remediation. The Transfer Act requires certain filings, and potentially environmental investigation and remediation, upon the "transfer of establishment" as defined by the Transfer Act. Pursuant to intentional legislative design and policy, unless the Department affirmatively assumes oversight of the remediation, efforts under the Transfer Act culminate with a "verification," i.e., a "written opinion by a licensed environmental professional [("LEP")] 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."[7] Critically, the Transfer Act can (and often does) require investigation and remediation of an ***entire parcel*** in order to achieve a verification.

The Transfer Act's requirement that Certifying Parties engage in a site-wide investigation effectively requires them to prove a negative (i.e., prove that no contamination exists above regulatory standards). The signatories to these comments anecdotally report advising their clients that it can easily cost $100,000 to prove that a perfectly "clean" site is, in fact, in compliance with the current cleanup standards to support a verification. This is partly due to the pressure LEPs are under to support their conclusions, and partly due to the inherent logical impossibility of proving a negative.

Public Act 20-09 was passed in the 2020 September Special Session with the goal of pivoting Connecticut away from the Transfer Act and toward a release-based remediation regime like we see in virtually every other state. The legislative history of Public Act 20-09 makes it clear that economic competitiveness was a critical goal. For example, in an October 1, 2020 floor debate, Senator Cohen stressed that the new release-based framework "will protect our environment and public health as well as promote economic development by providing for expeditious cleanups that require *less government involvement* and funding and cost less for property owners."[8] (Emphasis supplied.)

(b) Procedural Recommendations

We expect that the Department will receive dozens (perhaps hundreds) of pages of feedback on the draft RBCRs. We also expect that some of the suggestions the Department receives will be contradictory. Even when only considering the recommendations set forth by the formal Working Group Subcommittees, ad hoc teams and Transition Advisory Group and/or highlighted

[6] New Jersey has the Industrial Site Recovery Act ("ISRA"), N.J.S.A. 13:1K-6 *et seq.*
[7] Conn. Gen. Stat. § 22a-134(19) (emphasis added).
[8] Legislative History of 2020 September Special Session – PA 9 – Emergency Certified HB 7001 – An Act Revising Provisions of the Transfer Act and Authorizing the Development and Implementation of a Release-Based Remediation Program. Vol. 63, Part 3, 1229-1728 ("Legislative History"), at 1148-49.

in this paper, we recognize some tensions must be reconciled. Upcoming Working Group meetings should be devoted to discussing and resolving the tensions highlighted by the recommendations that have been made and seeking the Working Group's input on how to resolve them.

The Department should also continue to engage with Working Group members and other stakeholders on a more granular level to actually roll up sleeves and draft alternate text. Those of us who participated in calls with Department staff regarding the tier checklist, or alternate text developed by Subcommittees, report that such calls were constructive and collaborative. The text achieved at the end of those conversations was clearer than it would have been had either camp been working in isolation. As past experience has shown, the Department and regulated community can productively work together to craft solutions. In particular, the Department should immediately convene an ad hoc team to work on definitions of "creator," "maintainer," and any other key definitions that have not yet been supplied or, as discussed further below, warrant serious further consideration and modification (e.g., "full characterization" and "tier characterization").

Now that the proposed regulations are published and all stakeholders can view them in context, the Department should continue to work collaboratively with the stakeholders and Working Group to solve the issues that have been flagged. We request the Department to allow sufficient time upon the issuance of the second draft RBCRs for the Working Group and stakeholders to meaningfully review and collaborate as discussed in this comment letter, prior to posting a notice of intent to adopt the RBCRs. For three years, the Working Group has provided the Department with concepts. Until the release of the draft RBCRs at the end of December 2023, the Department had revealed very little of its thinking on how specific sections of the RBCRs were to be reconciled to form the whole and how the overall program was going to work. Instead of rushing to an arbitrary finish line, the Department should take the time to engage in real dialog on the draft RBCRs.

2. GLOBAL COMMENTS

As we reviewed the draft RBCRs, it was evident that the Department has incorporated some of the concepts proposed by the topical Subcommittees. It was evident that the Department takes its mission to protect human health and the environment very seriously. It was also evident that this first draft of the RBCRs requires reworking, and engagement with DECD and the private sector, to ensure that they fulfill the economic development goals envisioned for Public Act 20-09. Our comments highlight the following themes in furtherance of these economic development goals:

(a) Uncertainty kills deals and discourages investment.

When the requirements associated with environmental investigation and remediation are clear and predictable, and capable of being implemented and monetized, environmental conditions become just another property condition (like the need for a new roof, or a freshly paved parking lot) subject to negotiation in a real estate transaction. When the regulatory clean-up requirements are unclear and potentially unimplementable, or the finality of regulatory closure is

uncertain, costs (which include time frames) become unpredictable. For example, as discussed below, the RBCRs as presently drafted would require a characterization effort to delineate each constituent down to non-detect in every direction. This is such an enormous undertaking that it is difficult to predict the cost in advance. Even worse, the draft RBCRs provide that the Department can change its characterization standards at will with a post to its website.[9] If the Department can arbitrarily change characterization standards, it will be impossible to predict the scope and extent of any characterization and how much characterization will cost.

For another example, the possibility for successive audits of increasing intensity to stretch well beyond the date a release remediation closure report is submitted, and refusal to provide "no audit" letters, will mean that parties will not be certain that remediation is complete and escrow funds can be released. This uncertainty and unpredictability cannot be priced into deals, and deals fail as a result.

Uncertainty also discourages re-investment in Connecticut and can drive away job-creating businesses. Connecticut's manufacturers take environmental compliance seriously. As environmental counsel to businesses large and small, we work every day to help businesses understand and comply with their obligations under environmental law. As Interim DECD Commissioner O'Keefe emphasized last week, businesses crave regulatory predictability. If the draft RBCRs as written are ambiguous and lead to absurd requirements (e.g. requiring a grocery store to hire a contractor as discussed below) and such requirements are not uniformly enforced, there will be uncertainty as to what the standard actually is. The Department owes it to the people of Connecticut to provide clear, workable and understandable requirements.

As currently drafted, the RBCRs do not provide the clarity and certainty necessary to encourage investment in Connecticut. As noted throughout our comments, the scope, vagueness, and breadth of the RBCRs creates uncertainty regarding what is required of landowners, business owners, tenants, and homeowners—and what lenders may be required to implement in the event they have to foreclose on a property. In many cases, the proposed requirements raise more questions than they answer—and fail to define key terms that clarify who bears responsibility.

(b) The proposed requirements are overly and unnecessarily burdensome.

In various Working Group meetings and other public settings, Department staff have stressed that they intend for the RBCRs to be streamlined and cost-effective relative to the current Remediation Standard Regulations ("RSRs").[10] Unfortunately, in a number of respects, the draft RBCRs are more burdensome than the current requirements. For example, the reporting deadline for a soil hotspot within 500 feet of a residential use, park or school is 90 days under the existing Significant Environmental Hazard statute[11] but only two hours under the draft RBCRs.[12]

[9] Draft RBCRs § 22a-134tt-4(b).
[10] RCSA § 22a-133k-1 *et seq.*
[11] Conn. Gen. Stat. § 22a-6u(d)(1).
[12] Draft RBCRs § 22a-134tt-3(a)(1)(B)(iii).

Furthermore, the draft RBCRs have failed to set a lower bound that defines which releases require action under the RBCRs. As presently written, the RBCRs burden even grocery store owners with the costs of hiring an LEP or permitted environmental professional ("PEP") to document the appropriate clean-up of two gallons of dish soap to the vinyl floor of aisle 5. Similarly, for existing releases, any detection, at any Connecticut property subject to the RBCRs (which reaches every property in the State, including residential properties), of a constituent above laboratory detection limits will trigger a costly and time-consuming process of investigation. As noted above, one of the significant cost drivers relative to the Transfer Act is the obligation to prove a negative (i.e., prove that there is no contamination present above the relevant regulatory criteria). Anything that requires regulated entities to spend extra money performing unnecessary work to prove a negative is contrary to the purpose of Public Act 20-09. As discussed below, both the definition of "release" and the fundamental characterization framework rely on the detection of ***any*** constituent at ***any*** level. Chasing minute quantities of constituents below levels that pose a risk to human health or the environment (and which may well be naturally occurring or related to filling decades ago) has no practical value and wastes resources better deployed elsewhere.

These overly burdensome regulations will not just cost money for the private sector, they will be an enormous drain on the Department's resources. The Department will expend valuable resources processing and indexing reports capturing historical conditions that may not present meaningful environmental risk and/or health hazards or are merely *de minimis*. Based on the low threshold of the reporting requirement, the universe of potential reports could far exceed the volume of filings the Department handles today.

We do not believe that this is a worthwhile focus of agency resources, let alone limited tax dollars. Furthermore, the Department has indicated that it expects these regulations to reduce, rather than increase, the burden on government resources. As drafted, we have every reason to believe the opposite to be the case. As far as we are aware, the Department has made no preparations to staff up in advance of the deluge of questions, filings, and reports that will be required under this program. As presently staffed, the Department simply does not have the resources to implement the program that it has proposed.

(c) Too many substantive standards are deferred to forms and guidance and/or the Commissioner's discretion.

The draft RBCRs defer a number of substantive topics (e.g., qualifications for PEPs, characterization of releases, documentation that remediation of a release is complete) to guidance documents and forms to be developed at DEEP's discretion at some future time and subject to change at DEEP's sole discretion and without notice. There are a number of problems with this approach.

First, if DEEP attempts to enforce these as-yet unavailable guidance documents it will run afoul of the Uniform Administrative Procedures Act ("UAPA"). A "regulation" is "each 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."[13] "Whether administrative action is a regulation does not depend on the label the agency attaches to it or on the procedure giving rise to it."[14] In other words, even if the Department calls a document the "Release Characterization Guidance Document", it is properly considered a regulation if it is generally applicable and implements, interprets, or prescribes law or policy.[15] Regulations must be adopted pursuant to the notice and comment provisions of the UAPA in order to be enforceable.

Second, as numerous stakeholders (and many of the signatories to this letter) have been emphasizing throughout this process, the various topics covered by the draft RBCRs are tightly interrelated. Focus on any one part of the regulation (or any one form) in isolation will not provide a complete picture. As we and other stakeholders have said from the beginning, we reserve the right to provide further comment on any topic until we have had a chance to review the entirety of the regulatory regime the Department is proposing, including guidance documents. If there are still big pieces missing (e.g., sufficient details on how release characterization must be conducted), then any time spent attempting to finalize other provisions may be wasted.

Finally, if the Department can change critical documents (e.g., guidance, forms) at will, then stakeholders will not truly be able to rely on them and will not be as comfortable investing in cleanups. As noted above, uncertainty kills deals. This approach increases the harmful uncertainty discussed above. The recent shifting landscape around PFAS has dramatically illustrated the extent to which uncertain standards chill deals and chill investment in remediation. The more the Department leaves to uncertain and unstable forms and guidance and/or the Commissioner's discretion, the more the regulated community will feel like they are gambling.

(d) Homeowners are at risk.

The Transfer Act only applies to "establishments," which generally include certain industrial properties and businesses involved in hazardous waste generation; hazardous waste treatment, storage or disposal; auto body repair, furniture stripping, or dry cleaning.[16] The RBCRs, by contrast, would apply to ***each and every property in the state***, including residences. While remediation at residential properties with releases (most commonly home heating oil) have generally been performed with reference to the current RSRs (which has included, sometimes inconsistently, DEEP's direction over the years), the RBCRs will impose on residential properties much of the same formalities as currently exist for "establishments" pursuant to the Transfer Act. Similarly, the new mandates and formal compliance procedures would now apply immediately to everyone everywhere—municipalities and small businesses that own or lease commercial properties and to historic conditions that may have been in the ground for decades, posing very little risk. This is a seismic shift, and one that must be undertaken with great care.

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[13] Conn. Gen. Stat. § 4-166(16).
[14] *Eagle Hill Corp. v. Comm'n on Hosps. & Health Care*, 2 Conn. App. 68, 76 (1984) (citing *Walker v. Commissioner*, 187 Conn. 458, 462, (1982)).
[15] See, Legislative Commissioner's Office, State of Connecticut Manual for Drafting Regulations (Jan. 2024) (available at: https://www.cga.ct.gov/lco/pdfs/regulations_drafting_manual.pdf) at 10.
[16] Conn. Gen. Stat. § 22a-134(3).

The draft RBCRs would define "releases" and impose related reporting, investigation and remediation obligations so broadly, without *de minimis* exemptions or thresholds, that extremely common and low risk conditions would be swept into these formal regulatory programs. For example, as presently drafted, the draft RBCRs would identify every backyard fire pit as a release area, because multiple lines of evidence lead to the conclusion that constituents like polycyclic aromatic hydrocarbons (PAHs) would be present. As further discussed below, costly requirements to investigate and remediate a release would attach even for trivial releases.

Department staff have represented in question-and-answer sessions that the Department does not intend to use its enforcement power against homeowners with fire pits. This is not a predictable or reliable enough response, however. Now is the time to make such common-sense regulatory applications part of the regulations. This is a clear opportunity to provide "off ramps" as the Department so often refers to them. We should not begin a new process with known holes in the program that DEEP today says they will simply "agree not to enforce."

Lenders demand certainty. A bank will not issue a mortgage based on a buyer's assurance that the Department will not exercise its enforcement discretion against a homeowner. If the RBCRs are implemented as drafted, the consequences will be especially confusing, frustrating and damaging to homeowners and the residential real estate market. As Sen. Minor emphasized in the October 1, 2020 floor debate on Public Act 20-09, even at the time, impacts on residential real estate had not been fully considered.[17] Sen. Fasano similarly emphasized that it was critical that stakeholders be "vigilant to ensure [the new program] is not too onerous" on non-industrial landowners who had not been subject to the Transfer Act.[18] Once the global problems highlighted in these comments are solved, focused attention will be required to confirm that unintended consequences are not imposed on residents and residential landowners.

(a) The RBCRs must be harmonized with existing law.

As the Working Group and the Transition Advisory Group ("TAG") have stressed in its prior comments, there are numerous statutory programs that reference the existing remediation standard regulations.[19] Careful review and coordinated revisions to the current programs are required to avoid unintended consequences and conflicts. In particular, the existing brownfields programs rely on a site-wide voluntary remediation approach. If the existing brownfield programs are to retain their value, the site-wide approach must be preserved. Given the Governor's emphasis on brownfields,[20] and the tragedy of letting so much of our land remain polluted and underutilized, it would be a cruel irony if these regulations further discouraged

[17] Legislative History, at 1169 ("But through all the discussion that we've had publicly and I know the Senate Chair of the Environment Committee and I have spoken about this, I don't ever remember anybody having an open dialogue about its impact on residential real estate.")
[18] *Id.* at 1182.
[19] CT DEEP Release-Based Remediation of Hazardous Waste Program Regulations, Transition Group Recommendations (June 2021) (available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Transition-Group-Recommendations---June-11-2021.pdf).
[20] Mar. 1, 2024 Press Release.

brownfield redevelopment or, alternatively, if new brownfields are created due to the infirmities and costs identified in this analysis.

The current draft of the RBCRs, if implemented, will allow for agency action and impose obligations not currently authorized by or consistent with existing laws. For example, the draft RBCRs expand DEEP permitting and licensing authority (i.e., licensing of a new class of environmental professionals) and would allow for enforcement (i.e., stipulated penalties and absence of appeal procedures) not authorized by Public Act 20-09 or other existing statutory provisions. In addition, the draft RBCRs largely incorporate existing statutory programs, which begs the question of who is proposing what. The significant environmental hazard program was carefully drafted by the legislature. It does not appear to be clearly within the scope of Public Act 20-09 and the legislature's intent to now delegate the balance struck in that program wholly to Department rulemaking through the development of significant existing release ("SER") regulations to replace the significant environmental hazards statute.[21] Many of the changes proposed in the draft do not complement the existing statutory framework for a number of programs as the TAG has illustrated and more work needs to be done to achieve a variety of workable programs that achieve the goals of the RBCR program. Further, it remains unclear as to how the sunsetting of the Transfer Act and its replacement with the RBCR program will align with and be accepted by EPA under RCRA Corrective Action, RCRA Closures, USEPA Brownfield funding and other federal programs and statutes.

3. SUGGESTED SUBSTANTIVE REVISIONS

(a) Creating and maintaining a release

The draft RBCRs specify that responsibility for reporting, characterizing, and remediating a release rests with the person who "created" or is "maintaining" such release. While the draft RBCRs include one hundred and sixty-seven (167) defined terms, the current draft does not define these two critical terms or otherwise explain which factual circumstances would lead to a conclusion that any particular person is creating or maintaining a release. Instead, in public meetings since the draft RBCRs were released, DEEP personnel have indicated that the terms should be interpreted with reference to existing case law.

One of the goals of the pivot from the Transfer Act to the RBCRs is to encourage economic development by improving clarity, consistency and user friendliness of the regulations. A user-friendly and consistent regulatory program, understandable by property owners and others who will encounter it (including investors coming to Connecticut from other jurisdictions), cannot rely on decades-old caselaw (which could apply to a specific fact situation and/or could be further impacted by future court cases) for critical definitions, particularly since the caselaw interprets the term as it is used in a different chapter of the General Statutes. In fact, one of the cases relied upon by the Department makes the point that "[u]nless we consider who is maintaining what and for what purpose, the word 'maintain' has no fixed, abiding, or useful meaning."[22] We suggest that DEEP add common-sense definitions for "creator" and

[21] Conn. Gen. Stat. § 22a-6u.
[22] *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 375 (1993).

"maintainer" or, in the alternative, use the terminology utilized in federal and other states' statutes and regulations. For most jurisdictions that use release-based reporting and remediation, that means defining a release and defining the parties who are responsible for a release.[23]

(i) Creators

While the word "create" is well-understood in common parlance, the "creator" of a release is subject to many responsibilities under the draft RBCRs and we suggest that a definition be supplied. We submit that developing a clear definition of creator will not be easy, but it is necessary. As the Department looks to draft such a definition, we suggest that some fact patterns could lead to multiple creators of a release. For example, if an above-ground tank at a facility is punctured by a forklift operated by a contractor working on behalf of a developer who is not the site owner, the owner of the material in the tank, the developer and the contractor could each be considered creators. Situations like this should be considered and well-defined for purposes of compliance with the RBCRs.

(ii) Maintainers

In public meetings following the release of the draft RBCRs, reference has been made to *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358 (1993) and the subsequent line of cases[24] as the source of the Department's understanding of what maintaining/maintainer should mean. In *Starr*, which it is worth noting is over 30 years old and deals with a specific fact scenario, the Connecticut Supreme Court reversed the trial court and upheld the Department's interpretation of the word "maintaining" under Conn. Gen. Stat. § 22a-432, regarding orders to correct potential sources of pollution. The Department had determined that the owner of a hazardous waste disposal site "had created or was maintaining a condition on her property that could reasonably be expected to create a source of pollution to the state's waters" and issued an order directing the owner to investigate and remediate the pollution.[25] Through a series of hearings and appeals, the Department argued that no knowledge or fault was required for a landowner to be "maintaining" pollution,[26] while the owner argued (and trial court agreed) that the term "maintaining" required some affirmative conduct.[27]

The Court reversed the trial court's decision, concluding that it had not afforded sufficient deference to the Department's interpretation of statutory terms,[28] and that the dictionary definitions of "maintain" do not require that the owner of polluted land take any affirmative action.[29] The Court also stressed that the statute was intended to give the Department "broad powers…to issue orders necessary to correct existing and potential sources of pollution and to

[23] Given the widespread acknowledgement that a legislative fix package is warranted, the legislature should consider replacing the clunky "creator" and "maintainer" framework with the "responsible party" framework used elsewhere.
[24] *E.g., Vorlon Holding, LLC v. Comm'r of Energy & Env't Prot*., 161 Conn. App. 837 (2015).
[25] *Starr*, 226 Conn. at 361.
[26] *Id.* at 363.
[27] *Id.* at 366.
[28] *Id.* at 371-75.
[29] *Id*. at 375.

achieve the remedial purposes of the act."[30] Drawing on the common law of nuisance, the Court cautioned, however, that ownership of contaminated property is not necessarily sufficient to impose "maintainer" liability on a landlord not actually in possession of the property.[31]

Defining "maintainer" is critical to the ability to advise businesses. Resorting to case law that presents a fact-specific scenario before a court does not provide the necessary clarity. Further questions are raised: What is the reach to a tenant who is in possession if the release was pre-existing? Will lenders become maintainers notwithstanding the lender liability protections? It will also be critical to clarify that "maintainer" status ends when the landowner sells to a new owner (i.e., a new maintainer). Because this issue is so critical, we suggest that the Department immediately convene a small group to draft a proposed definition right away and ask that small group to present at the April meeting of the Working Group.

(b) Discovery

Under the draft RBCRs, the obligation to investigate/characterize, and potentially remediate, an existing release does not exist until such existing release is discovered. As such, the concept of "discovery" is critically important; it is the gateway to the new RBCR program. For that reason, there should be no uncertainty as to when a release is discovered. The language that has been proposed by DEEP includes many of the key concepts proposed by Subcommittee 1 (Discovery of Historical Releases). As drafted, however, the proposed language will cause confusion as to when discovery that requires further evaluation has occurred. One observation is key here: the language should not be written in such a way that only lawyers understand it. Regulatory language should be clear and unambiguous, allowing anyone to understand the meaning and intent of the words on the page.

The draft RBCRs distinguish between "actual knowledge" of a release and "constructive knowledge" of a release.[32] The discussion of "constructive knowledge" is problematic because it appears to affirmatively require sampling to prove the absence of a release (essentially to turn suspicion into "actual knowledge"). That is not what "constructive knowledge" means. Constructive knowledge is in fact knowledge, as a legal construct, and occurs when someone "should have known" something occurred. This impetus to convert constructive knowledge to actual knowledge also has the potential to cause confusion with respect to the reporting deadlines (i.e., when the "knowledge" attaches and begins the 120-day clock).

We suggest that the Department seriously consider the revisions proposed by Subcommittee 1, which have been provided to DEEP under separate cover. Subcommittee 1 suggests collapsing "actual knowledge" and "constructive knowledge" into one "knowledge" concept that will be easier for the regulated community to understand.

The proposed revision put forth by Subcommittee 1 retains the concept from the existing draft RBCRs that any detection of contamination above reporting limits constitutes a release (unless

[30] *Id.* at 382.
[31] *Id.* at 387.
[32] Draft RBCRs § 22a-134tt-2(a)(2) and (3).

subject to exemptions, like for background metals and pesticides). If this concept is retained in the final regulations then it will be especially critical that the reporting and characterization concepts are refined so that low risk releases do not needlessly burn resources on excessive characterization efforts delineating every discovered release down to non-detect. If a conceptual site model would indicate that no further investigation is needed to determine that a discovered release does not need remediation or reporting to protect human health or the environment, then the analysis should stop there.

(c) Reporting

Subcommittee 2 (Reporting Newly-Discovered Historical Releases) made a number of constructive recommendations in its original Concept Paper[33] which were not followed by the Department in the development of the draft RBCRs. For example, Subcommittee 2 recommended that "[w]here limited or incomplete data is available, the … program should favor reporting and provide a simple self-implementing mechanism to amend or withdraw a report as additional and/or more reliable information becomes available."[34] Contrary to this recommendation, the draft RBCRs include a list of information that a report "shall contain."[35] The use of "shall contain," without any exception for information that is not reasonably available or obtainable, would set well-intentioned persons up for enforcement, non-compliance, or threats of the same for failing to provide information that simply was not known or available at the time of reporting. The qualification that owner mailing address, etc. be supplied "if such information is known"[36] should apply to all of the information required, with provisions for updating the report as more information becomes available. There should also be a mechanism for withdrawing reports made in error, or reports that further characterization have revealed to be unnecessary. Once again, while the Department may believe in good faith that it will exercise its enforcement discretion in such instances, such a position does not provide certainty, predictability, or confidence to the regulated community.

As the Department revises the draft RBCRs, we hope that it will again review and consider the various recommendations of Subcommittee 2, a number of which are reiterated in the comment letter provided under separate cover. In the meantime, we identify a few revisions critical to the overall success of the program.

(i) Low-Level Releases

As discussed above (with respect to discovery) and below (with respect to low-risk releases) the draft RBCRs as presently written would cause an enormous amount of money and time to be wasted on efforts that have no discernable value related to the protection of human health or the environment. The reporting provisions related to low-level exceedances of remedial criteria are another example. When constituents are discovered at more than twice the remedial criteria, the

[33] Subcommittee 2 – Reporting Newly-Discovered Historical Releases, Concept Paper (June 11, 2021) (available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Reporting-Newly-Discovered-Historical-Releases-final-concept-paper---6-11-21.pdf).
[34] Subcommittee 2 Concept Paper, at 2.
[35] Draft RBCRs § 22a-134tt-3(b)(1).
[36] Draft RBCRs § 22a-134tt-3(b)(1)(A)(vii).

release must be reported within 120 days, unless the condition has been remediated to achieve compliance with the regulations and a release remediation closure report has been certified by an LEP before the reporting deadline.[37] This is consistent with the recommendations of Subcommittee 2.[38]

For less-serious releases, however, the path is less clear and the draft RBCRs fail to set a lower bound that defines which releases do not require reporting. Specifically, an existing release with concentrations of substances in soil and groundwater less than twice the remedial criteria must be reported no more than 365 days after discovery unless "such release has been remediated to the standards in the cleanup standards sections and a release remediation closure report has been verified by an LEP pursuant to section 22a-134tt-12 of the RBCRs."[39] This reporting requirement does not only apply to releases with constituents present ***above*** remedial criteria, but to ***any release with constituents present at all*** (and less than double the criteria). If a release is discovered at concentrations only slightly above the laboratory detection limit, the draft RBCRs would consider that detection to signal a release (*see* sec. 3(b) above). As discussed in sec. 3(d) below, the draft RBCRs would require that detection be delineated down to non-detect in every direction (i.e., "full characterization" as it is presently defined). If widespread low-level contamination makes it difficult to complete that "full characterization" task in the first year, the creator/maintainer would be required to report the condition to the Department. That is hardly an efficient use of resources for responsible parties or the Department and has the potential to significantly (and negatively) impact real estate transactions and economic development across the state. The next draft of the RBCRs should clarify the "characterization" concept as discussed below and set a lower bound threshold to clarify that reporting (and further investigation/remediation) is not required if there is no reason to believe (after an appropriate amount of characterization) that applicable remedial standards are exceeded.

(ii) Significant Existing Releases

Reporting would be required within 2 hours after discovery for significant existing releases ("SERs") considered "imminent hazards."[40] No definitions are provided for such key concepts as "imminent hazard" and "significant risk of harm"[41] and these concepts should be explicitly defined in the RBCRs. That said, some of the conditions that require two-hour reporting under the draft RBCRs do not seem to constitute an actual imminent hazard as the term is commonly understood. For example, a soil hot spot that constitutes an SER under the current draft of the RBCRs "within 500 feet of a residential activity, playground, recreation area or park" would require reporting within two hours.[42] In a state like Connecticut, with extensive urban and suburban development, many locations might meet these parameters. Under the current statutorily-defined Significant Environmental Hazard requirements, such conditions are subject

[37] Draft RBCRs § 22a-134tt-3(a)(2).
[38] [CITE]
[39] Draft RBCRs § 22a-134tt-3(a)(2)(C).
[40] Draft RBCRs § 22a-134tt-3(a)(1)(B). This is consistent with the two-hour reporting requirement in Massachusetts. *See* 310 CMR §§ 40.0311(7), 40.0321(1).
[41] Draft RBCRs § 22a-134tt-3(a)(1)(B).
[42] Draft RBCRs § 22a-134tt-3(a)(1)(B)(iii).

to a 90-day reporting period.[43] The Department has not supplied any rationale for dramatically shortening reporting periods for certain SERs.

When an SER is discovered by someone other than the creator/maintainer (for example, by or on behalf of a potential purchaser performing due diligence—notably the reporting obligation of non-creators/maintainers is much more broad than just TEPs under the SEH framework), the two-hour reporting timeline begins upon discovery by that other person.[44] From there, there are successive obligations to notify others (the discoverer notifies its client, the client notifies the owner) within one hour each. It is not clear what constitutes notice (e.g., whether a voicemail or email would suffice) and what constitutes "receiving" the message e.g., the message being available in the recipient's voicemail or email, or the recipient actually hearing or reading it). If the person who discovered the release is not satisfied that a timely report has been made, they must report it themselves,[45] but due to the confusing timelines/requirements it will be difficult for such person to determine when their obligation is triggered. These notice provisions should be streamlined and clarified.

Under the draft RBCRs, an SER has been "discovered" when any person obtains knowledge of such SER, which could include lawyers upon reviewing laboratory reports (even before such reports have been reviewed for quality control).[46] The person who "discovered" the SER is required to report it to the Department unless they timely receive confirmation that someone else has done so.[47] The draft RBCRs should be clear that professionals will not be expected to report conditions to the Department if it violates ethical duties of confidentiality owed to clients. Lawyers may not violate the duty of confidentiality owed to their clients absent very limited and specific circumstances.[48] If lawyers and clients think that lawyers may have an obligation to report detection of an SER directly to DEEP, then some lawyers will avoid obtaining knowledge of SER conditions, thus inhibiting their ability to provide adequate legal guidance and clients will cut lawyers out of the site characterization and compliance assessment process. This will deprive clients of legal counsel regarding their obligations to report and address SERs. There are important public policy considerations militating in favor of lawyers and clients candidly sharing information and advice under the protection of attorney-client privilege, and the RBCRs should not threaten or upend this longstanding principle.

(d) Characterization

The draft RBCRs include a definition of full characterization, as follows: "'Full characterization' means characterization of a release such that the horizontal and vertical extent of such release is delineated to the points at which it is no longer detected."[49] For releases that must be closed through the RBCRs, "[n]o release remediation closure report shall be verified by an LEP or

[43] Conn. Gen. Stat. § 22a-6u(d)(1).
[44] Draft RBCRs § 22a-134tt-3(c).
[45] Draft RBCRs § 22a-134tt-3(c)(4).
[46] Draft RBCRs § 22a-134tt-2(b).
[47] Draft RBCRs § 22a-134tt-3(c)(4).
[48] Connecticut Rules of Professional Conduct, Rule 1.6.
[49] Draft RBCRs § 22a-134tt-1(48).

certified by a PEP until full characterization of a release is complete."[50] In other words, the draft RBCRs (with a few minor exceptions) require that every single release subject to the RBCRs must be delineated down to non-detect for every constituent in every direction.

This is an excessively conservative requirement that will grossly inflate costs borne by the regulated community for no discernable benefit, as further discussed in Subcommittee 3's comment letter which is provided under separate cover. The definition of Conceptual Site Model ("CSM") appropriately captures prevailing standards and guidelines, in that it contemplates the validation of the release, fate and transport, and pathway to human and environmental receptors without regard to specific concentrations of contaminants. A valid CSM does not necessarily require sampling of a release area to non-detect. Furthermore, here in the industrial northeast, there is a long history of human activity, e.g., burning wood and fossil fuels, that has left its mark (often at low levels) everywhere. As the Governor said so eloquently, "We should be celebrated for our industrial past, not penalized by it."[51]

It might not even be possible to find the edge of a release before it begins to blend into the next release. Ubiquitous emerging contaminants like PFAS make the task even harder. Given the economic development goal of Public Act 20-09, DEEP should not be requiring the regulated community to do extra work that has no discernable value. We must start with the premise that not every molecule of potential contamination associated with a potential release will be (or needs to be) evaluated in order to adequately protect human health and the environment.

Tying characterization to data collection sufficient to formulate a valid CSM would allow the Department to delete provisions that create inconsistency between PEPs and LEPs. At present, two subsections are in conflict with one another:

> "No release remediation closure report shall be verified by an LEP or certified by a PEP until full characterization of a release is complete." (Draft RBCRs § 22a-134tt-4(a)(4)).
>
> "Notwithstanding the requirements of this section, a release remediation closure report certified by a PEP shall contain only such characterization necessary to demonstrate compliance with the applicable provisions of section 22a-134tt-8 of the RBCRs." (§ 22a-134tt-4(b)(4)).

As various stakeholders have made clear throughout this process, for the PEP concept to have value PEPs and LEPs must operate on a level playing field. That said, the level of effort required to achieve "full characterization" should vary with the complexity of the release and not the person performing it, and it is to be expected that because PEPs will handle lower-risk releases a lower level of effort would be required to achieve an appropriate level of characterization. It is appropriate that some releases (especially new or low-risk releases) will have straightforward conceptual site models that require less data to develop and support. The requirements for characterization should recognize this reality.

[50] Draft RBCRs § 22a-134tt-4(a)(4).
[51] Mar. 1, 2024 Press Release.

(e) Immediate Removal Actions

We recognize the necessity and appropriateness of the immediate removal action ("IRA") concept and recognize the Department's effort to incorporate the recommendations of Subcommittee 4 into the draft RBCRs. As lawyers, we defer to the LEPs and other technical professionals on the technical appropriateness of the specific IRA requirements.

As a global comment, we note that the timelines for action are often shorter than the timelines presently required under the Significant Environmental Hazard statute (Conn. Gen. Stat. § 22a-6u) and might not be realistic. For example, when a drinking water well is impacted by an emergent reportable release ("ERR") [52] or SER, the draft RBCRs provide that an appropriate treatment system must be installed within 15 days after discovery that such well has been impacted, or the well must be replaced with a connection to an unimpacted public water supply system within 30 days.[53] It is not clear to us how these timelines were chosen, but they do not seem realistic. Delays are often inevitable due to dependency on third parties (e.g., a water company), permits may be required, supply chain issues may exist, or it may just take time to find a clean source of water supply.

We understand that it is important that exposure pathways be interrupted as soon as possible, but it takes time to design and install an appropriate treatment system or alternate water supply. Rushing these processes can lead to poor results, high costs, or both. The exposure pathway can be interrupted by allowing the responsible party to provide bottled water within an appropriately short period of time while allowing for a longer-term solution to be developed and implemented. Time frames that are not reasonably achievable lead to noncompliance at best and can foster a culture to not look because failure is inevitable. In addition, failure to comply with a required timeline that is practically unachievable creates liability not only as between the regulated person and the Department, but also potentially between the person and its lender and/or other third parties. As a general comment, in order to facilitate the legislature's goal of developing RBCRs that promote economic development, we encourage the Department to be mindful of unintended consequences of creating regulatory requirements that may be impossible for the regulated community to satisfy.

Over much of 2023, the Department used a First Year Flowchart to guide discussions of various reporting and remediation scenarios during Working Group meetings.[54] The top row of the flowchart addresses emergent releases that need not be reported, and the second row addresses ERRs. Both rows include action to address the release, which includes "cleanup to standard within 2 hours" for non-reportable releases and "immediate actions" (as described in draft RBCRs § 22a-134tt-5) for ERRs. Both rows end with "closure documentation" which we assume should mean the release remediation closure report.

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[52] "Emergent reportable release" means a release to the land and waters of the state discovered by an observed change in conditions that is required to be reported by regulations adopted pursuant to section 22a-450 of the Connecticut General Statutes." Draft RBCRs § 22a-134tt-1(36).
[53] Draft RBCRs §§ 22a-134tt-5(e)(1)(G); 22a-134tt-5(f)(1)(E)(iii).
[54] Available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/RB-Program-First-Year-flow-chart.pdf.

When there has been a release to soil or groundwater, the RBCRs provide numerical standards against which analytical data can be compared to document that remediation is complete.[55] There are no equivalent standards for a release to concrete or other improved surface. Subcommittee 6 (Modification of Clean-up Standards for Lower-Risk Releases) was clear in its recommendations that the lowest-risk releases should be closed without requiring analytical data, or with only limited analytical data.[56] It is not clear how the Department intends creators/maintainers to document that, for example, a release to the surface of a parking lot has been adequately addressed. The draft RBCRs state that a release should be removed "from the land and waters of the state to the maximum extent practicable"[57] but not what that means or how it is to be documented for releases to improved surfaces. If the Department intends for soil samples to be collected even when there is no reason to believe that the release impacted soil, then this would lead to unnecessary expense that is contrary to the goals of Public Act 20-09.

(f) Tiers

The Department has followed many of the recommendations of Subcommittee 5 (Tiers) in preparing the draft RBCRs. We also applaud the Department for releasing the draft Tier Checklist several months ago, and for convening an ad hoc team of the Working Group to engage in detailed discussions with Department staff over a period of several weeks to improve the Tier Checklist. We recognize that the Department took many of the stakeholder comments to heart, and as discussed elsewhere in these comments, we suggest, as many of us have over the last three years, that the Department convene additional small groups to work through some of the thorny issues that remain.

That said, we flag a few lingering concerns, and we urge the Department to keep these concerns in mind as the draft regulatory package is revised. First, we are concerned that by organizing the Tier Checklist with Tier 1A releases (i.e., releases that present the highest risk and are subject to direct DEEP oversight) on the first page, we are essentially saying that every release is in Tier 1A by default. Even if a typical release is only in Tier 1A for the 30 seconds necessary to complete the first page of the form, the option that requires the most cost (from both DEEP and the creator/maintainer) should not be the default classification. Furthermore, in the event of any confusion or ambiguity, persons completing the Tier Checklist would not be confident that they could answer in a manner to move on from page 1, and therefore we could see a greater number of releases than intended get "stuck" on the first page and therefore remain in Tier 1A.[58]

We understand that the Department feels strongly that the first page of the Tier Checklist should be Tier 1A. In this context, it becomes especially critical that the questions on the first page (and every page) of the Tier Checklist be carefully crafted to avoid classifying releases in a more

[55] Draft RBCRs §§ 22a-134tt-9 and 10.
[56] Subcommittee 6, Final Concept Paper, Modification of Clean-up Standards for Lower-Risk Releases (Mar. 31, 2022) (available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Modification-of-Clean-up-Standards-for-Lower-Risk-Releases-Concept-Paper.pdf), at 4-6.
[57] Draft RBCRs § 22a-134tt-5(d)(1)(A).
[58] See Comments by Members of Tiers Subcommittee on Draft Tiering Checklist (June 13, 2023) (available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Comments-by-Tiers-Subcommittee-Members-61323.pdf), at 1-2.

stringent oversight tier than necessary. If the Tier Checklist is to serve its intended purpose, only the most serious releases should remain in Tier 1A.

As the concepts in the draft RBCRs are refined in response to Working Group, DECD, and other stakeholder comments, the Department should carefully consider all the terms used in the Tier Checklist to ensure that it is appropriately calibrated. For example, as the characterization concepts are further refined, the Department should reconsider the need for a "tier characterization" definition. If the characterization concept is reworked to require sufficient data to support development of a valid conceptual site model (and not delineation down to non-detect in every direction) then it might not be necessary to include a separate "tier characterization" concept. We suggest that the Department convene a group of stakeholders to review the remaining concerns regarding the current Tier Checklist as well as changes that may become appropriate in light of the refinements that the Department intends to make in other areas.

(g) Lower-Risk Releases

As presently drafted, the draft RBCRs appear to suggest that all releases reported under Conn. Gen. Stat. § 22a-450, no matter how trivial, must be closed by a PEP or LEP. This would be an enormous, unnecessary burden on the regulated community and must be corrected if the draft RBCRs are to succeed. Such an approach would run counter to all of the publicly stated goals and intentions of the Governor, DEEP, and DECD for the RBCRs.

By way of background, the RBCRs set forth requirements for the discovery and reporting of historical/existing releases, and for characterization, remediation and closure of all releases, but reporting of contemporaneous/emergent releases is governed by the spill regulations (e.g., RCSA § 22a-450-1 *et seq.*). With some specified exemptions, reporting is required under the spill regulations when there has been a release of five gallons or more of petroleum or 1.5 gallons of a reportable material other than oil or petroleum (and for quantities below these thresholds if not removed by "trained personnel," a highly qualified individual as specifically defined in the spill regulations).[59] Under the draft RBCRs, any release "to the land and waters of the state required to be reported" under the spill regulations at RCSA § 22a-450-1 *et seq*. "shall be considered to be discovered and shall be subject to the requirements of the RBCRs" unless an exemption applies.[60] The statutory definition of "release" used by the RBCRs likewise includes only releases to the "land and waters of the state."

The statutory definition of "land and waters of the state" is "all waters, as defined in section 22a-423, and any land surface, including improved or unimproved surfaces, soils or subsurface strata."[61] Because "land and waters of the state" includes "improved surfaces" it clearly includes surfaces beyond just the natural land surface, and might include a concrete pad, asphalt-paved parking lot, or indoor vinyl floor. In other words, even a release of a low-risk substance like dish soap (a "chemical liquid" and therefore a "reportable substance"), at a low quantity (1.5 gallons) to an improved surface (a type of "land and waters of the state") would be subject to the RBCRs.

[59] RCSA § 22a-450-2.
[60] Draft RBCRs § 22a-134tt-2(e).
[61] Conn. Gen. Stat. § 22a-134pp(3).

The draft RBCRs also specify that a release remediation closure report shall be prepared for each release to the land and waters of the state once remediation to the applicable standards has been completed.[62] All releases subject to the RBCRs must be closed by a PEP or LEP,[63] even releases that pose little or no risk. Notably, there is no mechanism for a member of the general public, or a facility or utility company employee who is not a PEP, to independently document closure of a low or no-risk release subject to the RBCRs.

Given the fact that the reporting threshold for non-petroleum substances is only 1.5 gallons, we are concerned that the draft RBCRs will require businesses and landowners to incur the unnecessary expense of hiring a PEP even for releases that essentially pose no risk at all. As presently drafted, the RBCRs would require a grocery store to hire a PEP if there is a spill of two gallons of dish soap to the vinyl floor on aisle 5. This would be an absurd result contrary to the economic development aims of Public Act 20-09. Through the course of several meetings that Department staff have had with the Working Group and stakeholder groups, it has become clear that the Department does not intend this result and recognizes that clarification is warranted. Subcommittee 6 (Modification of Clean-up Standards for Lower-Risk Releases) offers suggested revisions in its comment letter which is provided under separate cover.

We also stress that more clearly stated exemptions might be required. Assuming that the Department does indeed clarify that certain reportable releases are not to the "land and waters of the state" and therefore not subject to the RBCRs, such releases will therefore not be closed through the release remediation closure report contemplated by the RBCRs. We strongly urge the Department to develop a clear and user-friendly means of documenting that such releases are closed. Subcommittee 8 (Clean-up Completion Documentation, Verifications, and Audit Frequency and Timeframes) has also offered similar recommendations. Clear confirmation and documentation of closure becomes vitally important in business transactions, especially in the context of financing and negotiating environmental liabilities.

(h) Closure documentation and audits

Just as "discovery" is an absolutely critical concept because it is the gateway into the RBCRs, "closure" is a critical concept because it is the gateway out. Without clear and durable closure documentation that a creator/maintainer can take to its investor, lender and/or prospective buyer, parties may elect to end a deal, expensive additional or duplicative work may be required, and/or unnecessary and timely negotiations may become necessary. Subcommittee 8 (Clean-up Completion Documentation, Verifications, and Audit Frequency and Timeframes) has prepared a comment letter providing specific recommendations on the closure related topics it discussed. We also have the following comments.

(i) Release Remediation Closure Report

The draft RBCRs create the concept of a "release remediation closure report" as the document required to demonstrate satisfaction of applicable standards/closure of a release. The draft

[62] Draft RBCRs § 22a-134tt-12.
[63] Draft RBCRs § 22a-134tt-12(2).

RBCRs provide (1) parameters for the basic contents of a release remediation closure report (e.g., name and contact information for creator/maintainer, dates when release was discovered and certain other milestones occurred), (2) that a release remediation closure report must be verified by an LEP or certified by a PEP, (3) when such a report must be submitted (i.e., for all ERRs and releases required to be reported), (4) how such reports are to be maintained, (5) the conclusions required to be contained in such report (i.e., the release has been remediated / no further action is required), and lastly (6) that the Commissioner may issue a release remediation closure report.[64]

The RBCRs require the release remediation closure report be prepared using a form prescribed by the Commissioner, though no sample form has been provided and very little substantive detail is available except for the items listed above. Subcommittee 8, which considered closure documentation questions and raised various suggestions, recommended implementing an on-line dynamic fillable form for ease of use and adaptability to varying scenarios. It is not clear whether the Department will be exploring this or intends to use a form(s) similar to those that currently are required for a "verification" pursuant to the Transfer Act.

Subcommittee 8 also recommended requiring less burdensome closure documentation for lower risk releases. For example, in the case of less complex, low risk releases, a very lean report (similar to a transmittal form) could be appropriate. Yet, it is not clear how the singular "release remediation closure report" will be appropriately circumscribed based on the nature and severity of a release. Subcommittee 8 suggested that the closure documentation for a minor release that is quickly addressed and certified by a PEP could differ from that required for a serious and complex release managed by an LEP over several years. We agree that low-level releases should not require the same level of documentation as a very complex release.

Subcommittee 8 further suggested that the Department commit to maintaining a public-facing database of all reports and release records to ensure availability and access and support an institutional knowledge base. We agree. We also stress that such a database should have a very clear and firm confirmation that releases deemed not to have reached the land and waters of the state (see sec. 3(g) above) are closed and do not require action under the RBCRs.

(ii) Audits

Public Act 20-09, now codified at CGS § 22a-134pp *et seq.*, provides that the "timeframes for commencing audits . . .shall be no later than one year after verification . . . "[65] Contrary to this clear statutory language, the RBCRs create a framework that extends the Department's authority to commence audits beyond this timeframe, creates numerous "bites at the apple," and casts a wide net of uncertainly over when an audit may be commenced. For example, commencement of any of the three types of audits (screening, focused, full) within 180 days of a verification's submission would provide DEEP with 18 months to carry out the audit, even allowing subsequent types of audits to be commenced beyond 1 year after "verification."[66] Furthermore,

[64] Draft RBCRs § 22a-134tt-12(1).
[65] Conn. Gen. Stat. § 22a-134tt(g)(5).
[66] Draft RBCRs § 22a-134tt-13(c)(1).

while the RBCRs provide for screening audits, focused audits, and full audits, it is not clear what purpose is served by the different types of audits. It is clear, however, that the various "flavors" of audits would confuse the regulated community further.

Worse still, while a Full Audit must be commenced within 6 months following submission of a release remediation closure report, there is currently no timeline for completion of this audit. We understand Department staff has clarified that a two-year deadline for completion of a Full Audit was intended to be included in the regulations, and we agree it is critical to include an endpoint. Lack of such an endpoint would be a total regression from the progress made under the Transfer Act related to certainty of outcomes and would likely have negative impacts on real estate transactions.

Finally, the RBCRs provide that if no audit is commenced, no notification will be provided.[67] This is also a disappointing regression from current practice, as well as contrary to the goals of the RBCR to facilitate economic development. If the Department reviews the documentation in order to make the determination that it is sufficient and they will not audit, they should provide a no-audit stamp or letter (as they do today) so the creator/maintainer (and anyone else impacted by the remediation) can move on with certainty. Likewise, if the Department reviews documentation and finds it sufficient today, a public record in the form of a notice to the submitter should be created. We cannot stress enough how important it is to the regulated community to have a letter or notation of no audit or no further remediation statements for future owners, lenders and tenants. Such letters serve to stimulate economic development and transactions. Without such an affirmative statement there is no certainty, which should be a hallmark of this new program.

While the RBCRs provide an opportunity for a submitter to respond to questions and provide additional requested information, the Commissioner has a unilateral ability to ultimately reject a submission and retain any fee associated with the same. The draft RBCRs do not provide any opportunity to appeal or challenge a rejection. Provisions should be incorporated to afford such due process opportunities, and minimize avoidable financial burdens associated with needing to refile reports/records. Such provisions should anticipate, among other things, how fees will be treated for rejections that are reversed. Due process and the ability to challenge decisions under the UAPA is an important feature of all regulatory programs and should be integrated into the RBCRs. Leaving it to the Consent Order process, which does not afford notice, the opportunity to be heard before a hearing officer and other rights under the UAPA should be built into this program that has such widespread effect.

The reopener provisions also appear problematic in certain respects. First, the catchall category gives the Commissioner the ability to commence an audit at any time if s/he "determines that information exists indicating that the remediation may have failed to prevent a substantial threat to public health or the environment."[68] This is too broad and could arguably be interpreted to justify commencing an audit well after prescribed timeframes for issues regarding constituents

[67] Draft RBCRs § 22a-134tt-13(a)(1).
[68] Draft RBCRs § 22a-134tt-13(e)(1)(F).

like emerging contaminants that were not a constituent of concern ("COC") at the time of the original release reporting.

Second, a verification may be reopened when "any post-verification monitoring, or operations and maintenance, is required as part of a verification and which has not been completed."[69] This broad category could allow the Commissioner to commence a focused or full audit on any release record submitted decades ago (for example, a record submitted in connection with a release that has received a Technical Impracticability Variance that includes post-verification monitoring). This is compounded by the provision in the draft RBCRs that in a reopener scenario an audit may be commenced "at any time." Clarification and more specificity are required with respect to reopeners in order to provide more certainty to the regulated community.

(i) Non-LEP Professionals

We recognize that a number of the Subcommittees (including Subcommittees 6, 8 and10) envisioned a role for non-LEP environmental professionals, even if not all Working Group members are in favor of the concept. To the extent that PEPs are utilized, documents certified by PEPs will only gain market acceptance if PEPs have a well-defined scope of practice and robust credentials suitable for that scope of practice. Furthermore, to ensure an even playing field between PEPs and LEPs, and provide market participants the assurance that PEPs can be trusted, PEPs must be subject to a code of conduct akin to the one governing LEPs. The draft RBCRs proposing PEPs provide virtually no detail as to the level of required training and education, experience, and credentials for PEPs, are not supported by a clear enabling statute and defer detail on the application process to a form subject to the Commissioner's discretion.

In addition to our general concern that too much is left to guidance and forms (see Section 2(c)) and/or future legislative amendment, we have specific concerns about the draft RBCRs' lack of specificity related to PEPs. The draft RBCRs include a subsection on "licensing of permitted environmental professionals" but it includes few specifics on how such persons will be licensed or monitored. Specifically, the proposed language indicates that the Department will consider the following factors in determining whether to authorize a person to serve as a PEP:

> (A) Such person's training and education;
> (B) The duration and nature of such person's professional experience; and
> (C) Any credentials or licenses held by such person.[70]

The draft language does not provide any detail whatsoever on what appropriate training, education, experience or credentials might be, and it is apparently creating the opportunity for a PEP to obtain a license or permit pursuant to a statute that was not passed with this category of individual in mind. At this stage, when it comes to PEPs, all is left to future determination at the Department's discretion.

[69] Draft RBCRs § 22a-134tt-13(e)(1)(C).
[70] Draft RBCRs § 22a-134tt-1(g)(1).

As Subcommittee 10 (Role and Qualifications of Non-LEP Environmental Professionals) stressed in its Addendum and Response to Comments, the concepts of "***who***" the PEPs are and "***what***" tasks they will be authorized to undertake (or which releases they will be authorized to certify) are tightly interconnected.[71] The Department has defined which releases PEPs are authorized to certify in draft RBCRs § 22a-134tt-8. Contrary to the recommendations of Subcommittee 10,[72] the Department proposes allowing PEPs to certify releases that impact groundwater, provided that such impacts are not "persistent" over 24 hours.[73] In order for a PEP to ascertain whether there is a persistent impact to groundwater they must install "a properly constructed and developed groundwater monitoring well located immediately downgradient from the approximate location of the release and not more than 5 feet from the edge of the area excavated…"[74] Because the Department has not provided any information on the training, education, experience, or credentials of the PEPs, stakeholders are unable to fully assess whether this is an appropriate scope of responsibility for PEPs.

In addition to the lack of specificity on PEP credentials, there is little information on PEP oversight or discipline. The draft RBCRs state that the potential PEP's training, education, experience, and credentials will be considered "in determining whether the commissioner is satisfied that" issuing a license to operate as a PEP "will not result in pollution, contamination, emergency or the violation of the RBCRs or a violation of any regulation adopted under" several specified environmental statutes. While we recognize that this language is directly adapted from Conn. Gen. Stat. § 22a-454(a), "will not result in pollution, contamination, emergency or [a] violation", is an incredibly low bar that hardly inspires confidence in a new program and a new class of environmental professionals "deputized" to protect human health and the environment.

Revisions suggested by Subcommittee 10 are provided under separate cover. Specifically, Subcommittee 10 suggests that the Department specifically set forth the levels of education and experience required for an individual to be considered for licensure as a PEP. They also suggest that the Department start up a training and continuing education program for PEPs, or partner with another appropriate group to do so. If PEPs are to be authorized to certify closure of releases, including releases with non-persistent impact to groundwater, such persons must be appropriately trained.

We also suggest that PEPs be subject to a code of professional conduct analogous to (and adapted from) the code of conduct applicable to LEPs. For PEPs to be accepted in the marketplace on an even basis with LEPs, they must be held to equivalent ethical standards.

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[71] Subcommittee 10, Addendum and Response to Comments, Roles and Qualifications of Non-LEP Environmental Professionals (May 3, 2023) (available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Subcommittee-10-Concept-Paper-ADDENDUM.pdf), at 2.

[72] "Subcommittee 10 reached consensus that any release that impacted groundwater would require an LEP for final sign-off, whether that be a verification or some other formal LEP closure mechanism."

[73] Draft RBCRs §§ 22a-134tt-8(a)(1)(D)(ii), (a)(4). Note that draft RBCRs § 22a-134tt-8(a)(1)(D)(ii) states that the standard for identifying a "persistent impact to groundwater" is to be found in "subsection (c) of this section." There is no subsection (c) of draft RBCRs § 22a-134tt-8, and the standard for identifying a "persistent impact to groundwater" is instead found in draft RBCRs § 22a-134tt-8(a)(4).

[74] Draft RBCRs § 22a-134tt-8(a)(4)(B).

4. MISCELLANEOUS SUGGESTED REVISIONS

In addition to the substantive comments above, we have the following additional suggested revisions:

(a) Definitions and Miscellaneous Provisions (Draft RBCRs § 22a-134tt-1)

- Line 1 references "2a-134tt-1 when it should be 22a-134tt-1."

- "Active remediation" is defined at Line 8 as "remediation other than monitored natural attenuation." No definition of "remediation" is supplied, so we assume the statutory definition will be used: Conn. Gen. Stat. § 22a-134pp(7) defines "remediation" as "determining the nature and extent of a release, in accordance with prevailing standards and guidelines, and the containment, removal and mitigation of such release, and includes, but is not limited to, the reduction of pollution by monitored natural attenuation." Because this definition includes "determining the nature and extent of a release, in accordance with prevailing standards and guidelines" (i.e., characterization) those characterization activities are also included in the proposed definition of "active remediation." We suggest that this definition be modified to more closely relate to how the term is used in common parlance.

- The term "groundwater divide" is defined but not used in the draft RBCRs. The term "accessory uses of land" is defined and not used, but "accessory uses" is used once, in draft RBCRs § 22a-133tt-1(f)(1).

- No definition is supplied for "release remediation closure report" and the Department should consider adding one (e.g., "a report prepared pursuant to section 22a-134tt-12 documenting that the release has been remediated in accordance with the RBCRs.").

- The following terms are defined in Conn. Gen. Stat. § 22a-134pp and separately defined in the RBCRs: Commissioner, Remediation, Report. The RBCRs should not provide their own definition but simply reference the statutory definition to avoid any inconsistency.

(b) Reporting Newly Discovered Existing Releases (Draft RBCRs § 22a-134tt-3)

- We reiterate the concern previously expressed in connection with comments to the spill regulations that it will become increasingly difficult to determine whether a release is an Existing Release or an Emergent Reportable Release, because the distinction is one simply of whether the release in question occurred before or after March 4, 2022. Even now, two years after this date, it is already difficult, and soon will become virtually impossible, to say with

certainty whether detection of contamination is reportable under, and whether the appropriate immediate action is conducted pursuant to, the spill regulations or the RBCRs.

- Section 22a-134tt(a)(2)(C) requires that an existing release shall be reported within 365 days if there is a numeric cleanup standard or an APS criteria can be calculated for each substance and a laboratory result indicates a concentration of such substance less than twice the applicable cleanup standard or APS criteria. This requirement is too prescriptive and may inundate DEEP with reports capturing historical conditions that may not present meaningful environmental and/or health hazards. It also may chill environmental due diligence for real estate, as attorneys will be required to inform clients about the possibility that a Phase II site assessment will trigger the 365-day report.

- Section 22a-134tt(a)(2)(D) identifies five (5) releases and threats of releases that do not require notification. DEEP should add other releases to this list. Massachusetts, in contrast, identifies 23 types of releases that do not require notification. See 310 CMR 40.0317.

(c) Characterization of Discovered Releases (Draft RBCRs § 22a-134tt-4)

- Draft RBCRs § 22a-134tt-4(a)(3) (lines 1119-20) provides that "Tier characterization of a release shall be completed as soon as practicable, but not later than 1 year after discovery of such release." Requiring tier characterization as soon as practicable (i.e., money is no object) is inconsistent with the requirements set forth in § 22a-134tt-6 (i.e., requiring tier classification when the tier assignment is made, one year after the release occurs or is discovered), and departs from the economic goal of devoting resources to remediation so that tiering is unnecessary.

- At § 22a-134tt-4(b)(4) (lines 1156-58) the draft RBCRs say that "[n]otwithstanding the requirements of this section, a release remediation closure report certified by a PEP shall contain only such characterization necessary to demonstrate compliance with the applicable provisions of section 22a-134tt-8 of the RBCRs." LEPs and PEPs must be on a level playing field. This should be changed to hold both LEPs and PEPs to the same standard for releases eligible for certification by PEP, even if such release is verified by an LEP.

(d) Immediate Actions (Draft RBCRs § 22a-134tt-5)

- Draft RBCRs § 22a-134tt-5(c)(1) state that immediate actions for an ERR should begin immediately upon discovery "if practicable" while draft RBCRs § 22a-134tt-5(c)(2) state that for existing releases immediate actions should being immediately upon discovery "or as soon as is practicable." Unless the

Department intends for there to be different timing standards for immediate actions for new and existing releases, the standards should be phrased in the same way.

- "Upon discovery of an emergent reportable release or a significant existing release, each person who created or is maintaining such release shall take immediate action to investigate, stabilize, contain, mitigate, remediate, remove, or monitor such release…"[75] It could be impractical for each party to take action all at once to address conditions and it is appropriate for there to be a division of labor and for one particular party to control the work. This should be clarified to provide that if there is insufficient action then enforcement can be pursued against any of the creators/maintainers, while not requiring chaotic action by all at the same time.

- It appears that the "and" in line 1668 should be an "or" (draft RBCRs § 22a-134tt-5(h)(2)(ii)(II)). Requiring both installation of a treatment system *and* connection to a public water supply is unnecessary, as either action would interrupt the exposure pathway.

- For ERRs, an immediate action report must be submitted upon the earlier of 1) the release's assignment to a tier, or 2) submission of the remediation closure report. For SERs, the immediate action report must be submitted upon the earlier of 1) a deadline specified by the Commissioner (when?); 2) not more than 60 days after completion of the immediate actions; or 3) "not more than 1 year following discovery of an emergent reportable release or a significant existing release [i.e., the tiering deadline]." (Draft RBCRs § 22a-134-5(k)(1), lines 1752-63). It would be clearer and simpler to have the immediate action report be due as part of the remediation closure report or tier checklist (whichever comes first) for both types of releases.

- The differentiation between whether a release is an Existing Release (occurred before March 4, 2022) or an Emergent Reportable Release (occurred after March 4, 2022) impacts the analysis of whether § 22a-134tt-5 applies, because Existing Releases are not addressed under this section. As stated above, it is already difficult and soon will become virtually impossible to make this determination and therefore advise clients whether this section is even applicable.

(e) Tiers (Draft RBCRs § 22a-134tt-6)

- Considering the lack of timelines/deadlines applicable to the Department, the Department must ensure that the regulated community is not stuck paying recurring (and increasing) annual fees when it is the Department who is slow to respond or has not responded at all.

[75] 22a-134tt-5(d)

(f) General Cleanup Standards Provisions (Draft RBCRs § 22a-134tt-7)

- Contrary to the practice in almost every other state (even now New Jersey) and the federal government, the Department continues to not allow the use of surety bonds. The use of Payment and/or Performance Bonds should be allowed. If the Department continues to refuse to allow the use of bonds, then draft RBCRs § 22a-134tt-7(c)(3)(B) should be deleted.

- The language in draft RBCRs § 22a-134tt-7(c) comes from the Wave 2 RSRs, which have been in place for two years. However, the Department's website for Engineered Control Variances still lacks approved templates for a Certificate of Insurance and a Trust Agreement or Trust Fund.

- The language in 22a-134tt-7(c)(4) is cribbed from 40 CFR 264.142 (or similar CFR section), but leaves out crucial language that explains how to calculate the inflation factor. In the CFR (and every other state), this is done by dividing the latest published annual Deflator by the Deflator for the previous year. In section (4) it appears to require "multiplying the latest adjusted surety estimate for the site by that 5-year inflation factor". However, (1) it is not clear what a "surety estimate" is, especially as the Department does not allow the use of surety bonds; (2) the use of the term "site" is no longer appropriate for the RBCRs (thought if the Department intends to still reference these financial assurance sections for use under the Transfer Act, universal or inclusive language will need to be incorporated); and (3) there is no indication what "that 5-year inflation factor" means, how it is calculated, and where it comes from.

- Draft RBCRs § 22a-134tt-7(c)(4)(B) includes a reference to "subsection (g) of this section", which is left over from the RSRs.

- Draft RBCRs § 22a-134tt-7(d) requires that a sign must be erected and maintained whenever (broadly speaking) remediation is taking place. However, due to the inclusion of characterization in the statutory definition of "remediation," this would require that persons order, acquire, and erect a sign when they begin investigating (e.g., characterizing) a release, which in some instances must start within 2 hours of discovery. This is clearly impossible, and rushing to put up a sign at the beginning of characterization is a waste of resources. The Department should clarify these timelines and requirements to make it clear that they are triggered only by active remediation rather than characterization.

- Draft RBCRs § 22a-134tt-7(d) (the second (d)) states that no further remediation of a release is required under this Section 7 if that release has been remediation and that remediation has been "approved in writing by the commissioner," but it is not clear when written approval would be provided

by the Commissioner. For example, § 22a-134tt-12(5) just says that unless rejected by the Department, no further action is required. The Department should provide the regulated community with clear, written confirmation that remediation has been accepted and completed, especially if such documentation will be required later.

(g) Releases Certified as Closed by a Permitted Environmental Professional (Draft RBCRs § 22a-134tt-8)

- The Home Heating Fuel exemption in § 22a-134tt-8(b) appears to apply only to instances where the homeowner was the creator. And, what about past/pre-existing releases? Also, a significant number of these releases are caused by the fuel delivery company, which means that this provision is unavailable as a quick exit but yet the homeowner, as the "maintainer" will have to go through the more rigorous closure as set forth elsewhere in the RBCRs. This provision must be available to all homeowners.

(h) Cleanup Standards for Soil (Draft RBCRs § 22a-134tt-9)

- In discussing the "managed multifamily direct exposure criteria" the more general term "common interest community"[76] should be used rather than "condominium." Frequently what appears to be a condominium project is legally configured as a "planned community" in which common elements are owned by the homeowners/unit owners association.

- We suggest further engagement with real estate attorneys and title companies to ensure that the "affidavit of facts" contemplated will not lead to unintended consequences.

(i) Audits (Draft RBCRs § 22a-134tt-13)

- Draft RBCRs § 22a-134tt-13(e) uses the term "environmental land use restriction" but this should probably be "environmental use restriction." In addition, because this is the only place "environmental land use restriction" appears, that definition can be deleted.

- Draft RBCRs § 22a-134tt-13(g): the frequency of audits only references releases which have been assigned to a tier, creating a lack of clarity regarding frequency of audits the regulated community can anticipate with respect to release records / release remediation closure reports submitted prior to tiering.

(j) Penalties (proposed RCSA § 22a-6b-8(c)(5))

[76] See Conn. Gen. Stat. § 47-202(a)(9) for definition of "common interest ownership."

- A proposed penalty schedule is provided for violations of the RBCRs. These penalties would apply to "each distinct violation" of the RBCRs. Given the transition from a site-wide regime to a release-based regime, we note that these penalties would stack up very quickly and could become much higher than penalties under the current regime. Due process rights (notice and an opportunity for a hearing under the UAPA) as referenced above, should be incorporated into the RBCRs.

5. CONCLUSION

We thank Department staff for their willingness to engage with us on these topics over the last three years. We urge the Department to continue the engagement process and work through these suggested revisions and identified shortcomings with the appropriate Working Group Subcommittees, the TAG group, DECD, EPOC and other stakeholder groups. We implore the Department to allow sufficient time upon the issuance of the revised draft RBCRs for the Working Group and stakeholders to meaningfully review and collaborate as suggested in this comment letter, ***prior*** to posting a notice of intent to adopt the RBCRs. While there has already been significant time expended on this process, and we are all eager to see it conclude, our work will go to waste if the process does not culminate in a workable set of regulations that ultimately can be promulgated and implemented.

The timeline the Department has shared with the Working Group and the public is extremely aggressive. In order to have the best possible chance of implementing workable regulations in the short term, we suggest, at a minimum, the following steps:

- Immediately convene an ad hoc group to develop definitions of "creator," "maintainer" and any other definitions not yet supplied or warrant serious further consideration and modification (e.g., "full characterization", "tier characterization").

- Share revised draft regulatory text with the Working Group as soon as possible (in sections if necessary) so there is time for review and comment before the public notice period starts.

- Schedule meetings with stakeholders across subcommittees and ad hoc teams to ensure that feedback from various groups can be integrated and reconciled.

Additional time refining the details, addressing critical concepts and ensuring that the best possible product is issued for formal public comment will only make that process smoother.

We thank the Department for considering these comments and we look forward to continued work together.

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March 7, 2024

VIA ELECTRONIC MAIL
Graham Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

Re: Working Group Comments Related to Release-Based Cleanup Regulations ("RBCRs")

> *He also told them a parable: 'No one tears a piece from a new garment and sews it on an old garment; otherwise the new will be torn, and the piece from the new will not match the old. And no one puts new wine into old wineskins; otherwise the new wine will burst the skins and will be spilled, and the skins will be destroyed. But new wine must be put into fresh wineskins.*
>
> The Book of Luke – Chapter 5, verses 36-38

Dear Mr. Schain and Mr. Stevens:

The Department faces a daunting task, and one which it has taken on well thus far. When the General Assembly enacted Public Act 20-09, it did so with several goals in mind, including, but not limited to, modernizing environmental remediation, spurring economic development, and eliminating the Transfer Act so that Connecticut would be more like other states in how it addresses the triggers for remediation. In short, the General Assembly asked the Department, as well as the Department of Economic and Community Development, to develop an entirely new remediation program in Connecticut. While the RBCRs are a good first step towards that goal, the current draft's reliance on both old and new elements of Connecticut's remediation programs may well render the new regulations unworkable.

The simple fact of the matter is that since at least 1985, Connecticut has viewed the remediation of hazardous substances and pollutants through the lens of addressing entire sites. That is why, for example, Connecticut has the *Site Characterization Guidance Document* rather than the *Release Characterization Guidance Document.* In making the necessary regulatory changes, the RBCRs begin to embrace the shift from a site-based program to a release-based program, but the

regulations do not make the clean break from the old program to the new program. Thus, the Department is, in effect, putting new wine into old wineskins.

An example of this comes into view when one looks at the use of the terms "creator" or "maintainer" in the RBCRs. It is perplexing as to why the Department chose not to define these two key terms anywhere in the RBCRs. They are not commonplace terms used in other remediation programs based on releases, so they will not be known to others outside of Connecticut. Indeed, most of our sister states define what a release is and then define clearly who is considered a "responsible party" who would be responsible for the remediation of such a release. It is in this direction that Connecticut must go unless it wants to be seen, yet again, as an environmental outlier.

I realize that the Department is using the terms "creator" and "maintainer" because Conn. Gen. Stat. § 22a-432 references the creation and/or maintaining of facilities or conditions that can be expected to create sources of pollution to the waters of the state. The statute then grants the Department power to issue an order to such creators or maintainers to remediate such pollution. While the Department will still undoubtedly have such power once the RBCRs are enacted, that will not be the chief means that releases are remediated under the new program.

Under the new program, investigation and remediation requirements will chiefly be triggered in two ways. First, an exigent release or spill will occur, will be reported to the Department, and will be contained and cleaned up. If necessary, additional remedial activities will occur as a result of that spill, if the spill damaged the surrounding environment. Similarly, for historical releases, an entity will undertake environmental testing, will have discovered evidence of a historical release of contaminants, will report that release to the Department and will undertake a more complete investigation, and if necessary, remediation, of that historical release. Those are fairly commonplace remediation triggers under federal law as well as various states' laws, so Connecticut will be achieving its goal of moving its remediation programs to be more like those of other jurisdictions.

Massachusetts, by way of example, makes who is a responsible party a statutorily and regulatorily defined term. Connecticut would benefit from such a wholly new (to it) approach towards remediation responsibilities. In Massachusetts, under 310 CMR 40.006, Potentially Responsible Parties and Responsible Parties are defined rather simply:

Potentially Responsible Party and PRP each means a person who is potentially liable pursuant to M.G.L. c. 21E.

Responsible Party and RP each means a person who is liable under M.G.L. c. 21E to the Commonwealth, or to any other person, for any costs or damages.

Obviously, the key is to then look to M.G.L. c. 21E to ascertain who is a Responsible Party. That answer can be found in Section 5 of Chapter 21E. Unfortunately, Section 5 is rather lengthy, so I have included it in its entirety for your review as Attachment A to this letter. However, as you can see, by clearly defining Responsible Party, Massachusetts has accomplished several key objectives that the RBCRs in their current form do not. This includes: making it clear who is or is not responsible for the remediation of a release without introducing new vocabulary, since the Massachusetts program loosely tracks federal standards under CERCLA; it exempts innocent homeowners from being responsible for paying for the remediation of a release, provided they did not actively cause the release; and allows for individuals identified as "Eligible Persons"[1] or "Eligible Tenants"[2] to be exempted from many of the remediation requirements otherwise mandated by Massachusetts.

The elegance of this solution cannot be overstated. By clearly defining who is or is not a responsible party, entities in Massachusetts have certainty as to whether they are required to remediate of a release. Stakeholders wishing to invest in property in Massachusetts have similar certainty without having to resort to case law searches or guidance documents. The RBCRs have no such certainty. Put simply, the definition of a responsible party is found in the federal remediation programs and most of the remediation programs of the various states. Connecticut began down this path because it did not want to be a statistical outlier as it is under the Transfer Act. We should not have spent all of this time to get rid of an anomaly that is specific to Connecticut, only to replace it with another anomaly in the form of what constitutes a "maintainer."

Others may suggest that the Department define "maintainer," and that may be sufficient. However, I think that the Department will be hard-pressed to come up with a definition that is clear, concise and brings in all of the parties the Department wishes to hold responsible while freeing parties such as "white knight" brownfield redevelopers and innocent homeowners from the requirements of the RBCRs. I am concerned that without a definition that clearly exempts brownfield redevelopment from the possibility of "maintaining" a release, our state's vaunted brownfield programs will also suffer. Given these risks, rather than try to graft an antiquated term into a new program, I would submit that the Department would be better served to fully break with the past and embrace a system similar to what most other states are doing.

In proceeding down such a path, the Department will not lose the powers over remediation that it already possesses, with or without the RBCRs. Assuming the statute does not change, the

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[1] Eligible Person means an owner or operator of a site or a portion thereof from or at which there is or has been a release of oil or hazardous material who:
(a) would be liable under M.G.L. c. 21E, § 5(a)(1) solely; and (b) did not cause or contribute to the release of oil or hazardous material from or at the site and did not own or operate the site at the time of the release. 310 CMR 40.006

[2] Eligible Tenant means a person who acquires occupancy, possession or control of a site, or a portion thereof, after a release of oil or hazardous material from or at such site has been reported to the department, who did not cause or contribute to the release and who would not otherwise be liable pursuant to M.G.L. c. 21E, § 5(a)(2) through (5).310 CMR 40.006

Department will still have the ability under Conn. Gen. Stat. § 22a-432 to issue an order to creators or maintainers of pollution to force those entities to remediate pollution. That will not change. The simple fact of the matter, though, is that the Department rarely issues such orders. Most remediation is done as a result of transfers triggering the Transfer Act, not the issuance of orders. We need to look to what the new trigger will be once the RBCRs are enacted to ascertain what is truly important when designing this program.

When we do that, what we see is that without definition around who is a responsible party, a member of the regulated community will have to guess as to what constitutes maintaining a release when it reviews the RBCRs. Will the owner of a site who discovers contamination that it never caused be responsible for cleanup under the RBCRs? Should they be? Does that analysis change if the contamination is coming from an offsite, upgradient source? Should it? Does that analysis change if the owner of the property is a "white knight" brownfield redeveloper who will improve the property? Shouldn't those individuals be explicitly excluded from the RBCRs if they are engaged in brownfield redevelopment? Will a municipality be responsible for remediating a release of oil or automotive fluid on a town-owned road? Will homeowners be responsible for release remediation if an oil company overfills a home heating oil tank?

Certainly, the Department may argue that it can exercise enforcement discretion to ensure that some of the less desirable outcomes will not come to pass. However, such discretion will not satisfy lenders looking to make a loan on loft apartments for workforce housing, nor will such discretion allow for businesses to be certain as to what their responsibilities are. Massachusetts has resolved the questions in the paragraph above by specifically excluding brownfield redevelopers, homeowners with petroleum contamination and others from liability provided that they meet certain requirements. The RBCRs, as currently drafted, have no such exclusions because they do not have definitions as to who is liable and who is not. Without adequate definitions, the hallmark of the RBCRs will be questions, not certainty. This will not be an auspicious start to Connecticut's new regulatory program.

As you review all of the comments you receive, including this letter, I implore you to think about how release-based remediation is handled in other jurisdictions and use those jurisdictions as your guideposts. Such an approach will cause you to develop a wholly new remediation program. But a paradigm shift is what is called for if Connecticut is to join other states in how remediation issues are addressed.

Thank you for your consideration of this matter.

Sincerely,

Lee D. Hoffman

Attachment A
Section 5 of M.G.L. c. 21E

Section 5. (a) Except as otherwise provided in this section, (1) the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil or hazardous material; (2) any person who at the time of storage or disposal of any hazardous material owned or operated any site at or upon which such hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material; (3) any person who by contract, agreement, or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from or at which there is or has been a release or threat of release of hazardous material; (4) any person who, directly, or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels or sites from or at which there is or has been a release or threat of release of such material; and (5) any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site, shall be liable, without regard to fault, (i) to the commonwealth for all costs of assessment, containment and removal incurred pursuant to sections three A, four, five A, five B, and eight to fourteen, inclusive relative to such release or threat of release, (ii) to the commonwealth for all damages for injury to and for destruction or loss of natural resources, including the costs of assessing and evaluating such injury, destruction or loss, incurred or suffered as a result of such release or threat of release, (iii) to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release, and (iv) to any person for any liability that another person is relieved of pursuant to the fourth paragraph of section four. Except as provided in paragraphs (b) and (k), such liability shall be joint and several.

(b) Any person otherwise liable for any costs or damages set forth in subclauses (i), (ii), (iii) and (iv) of paragraph (a) who establishes by a preponderance of the evidence that only a portion of such costs or damages is attributable to a release or threat of release of such oil or hazardous material for which he is included as a party under clauses (1), (2), (3), (4) or (5) of said paragraph (a) shall be required to pay only for such portion.

No person who is liable solely pursuant to clause (1) of paragraph (a) and who did not own or operate the site at the time of the release or threat of release in question and did not cause or contribute to such release or threat of release shall be liable to any person who is liable pursuant to clauses (2), (3), (4), or (5) of said paragraph, except that any such person liable solely pursuant to clause (1) of paragraph (a) shall be liable to the commonwealth as set forth in paragraph (d).

(c) Subject to the limitation provided in paragraph (d), there shall be no liability under paragraph (a) for a person otherwise liable who can establish by a preponderance of the evidence, (A) that the release or threat of release of oil or hazardous material and the damages resulting therefrom were caused by:

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the person, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly, with the person, except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail, if the person establishes by a preponderance of the evidence that he exercised due care with respect to the oil or hazardous material, that he took precautions against forseeable acts or omissions of any third party and the consequences that could forseeably result from such acts or omissions, and that he complied with all notification requirements of section seven; or

(4) any combination of the foregoing paragraphs, or (B) with respect to liabilities under subclauses (i) and (ii) of paragraph (a), that the substance or amount thereof released or threatened to be released does not represent a long or short term danger to the public health, safety, welfare or the environment.

(d) Any person whose property has been the site of a release of hazardous material for which the department has incurred costs for assessment, containment or removal pursuant to sections three A, four, five A, five B, eight, nine, ten, eleven, twelve, thirteen or fourteen, and who can establish by a preponderance of the evidence that he is otherwise eligible for the defenses set forth in paragraph (c) shall be liable to the commonwealth only to the extent of the value of the property following the department's assessment, containment and response actions, less the total amount of costs reasonably paid by said person for carrying out assessment, containment and response actions in compliance with the Massachusetts Contingency Plan and all other applicable requirements of this chapter.

(e) All persons liable pursuant to this section who are liable for a release or threat of release for which the commonwealth incurs costs for assessment, containment and removal shall be liable, jointly and severally, to the commonwealth for their liability as set forth in this section.

In an action for recovery by the commonwealth of the costs it incurs for assessment, containment and removal, for the purpose of inducing the party in question and others to voluntarily and without delay participate in carrying out and paying for response actions, and not for the purpose of imposing a penalty, the commonwealth shall have the right to seek and recover more than the actual costs it incurs for assessment, containment and removal, subject to the following provisions.

In cases where the department has issued an order pursuant to sections nine and ten to a person liable pursuant to this chapter and such person has unreasonably or in bad faith failed or refused to comply with such order, the court shall award the commonwealth not less than two times nor more than three times the full amount of its response costs, plus litigation costs and reasonable attorneys' fees, against such liable person. In such an action, the burden of proof shall be on such person to persuade the court by a preponderance of the evidence that it acted reasonably and in good faith in failing or refusing to comply with the department's order. If such person so persuades the court, such person's liability to the commonwealth for response action costs in that action shall be only the department's actual recoverable response costs, plus litigation costs and reasonable attorneys' fees.

In all cases not provided for in the preceding paragraph, the court may award the commonwealth up to three times the full amount of its response costs, plus litigation costs and reasonable attorneys' fees, against a person liable pursuant to this chapter. In such an action, the burden of proof shall be on the commonwealth to persuade the court by a preponderance of the evidence that such person acted unreasonably or in bad faith in not carrying out a response action or actions for which the commonwealth is seeking recovery of more than its actual response costs, aside from litigation costs and reasonable attorneys' fees. If the commonwealth so persuades the court, the court shall use its equitable discretion to determine the appropriate multiple of response costs, not to exceed three times the response costs, which shall be awarded to the commonwealth against such liable person, plus litigation costs and reasonable attorneys' fees. If the commonwealth does not so persuade the court, such person's liability to the commonwealth for response costs in that action shall be only the department's actual recoverable response costs, plus litigation costs and reasonable attorneys' fees.

Without limiting the generality of the foregoing, solely for the purpose of determining whether the commonwealth's recovery may exceed its actual response costs, plus litigation costs and reasonable attorneys' fees, and not for any other purpose, the court shall find that a person against whom the commonwealth seeks such recovery has reasonable grounds and a good faith basis for failing or refusing to perform or pay for a response action for which the commonwealth is seeking such recovery if, within a reasonable time after first being notified by the department that the department wants said person to perform or pay for such response action or actions, said person asserts and demonstrates that performing or paying for such response action or actions was beyond his technical, financial or legal abilities, or that he was not given adequate notice and reasonable opportunity to perform or pay for such response action or actions.

(f) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or site or from any person who may be liable for a release or threat of release of oil or hazardous material under this section, to any other person the liability imposed under this section. Nothing in this paragraph shall bar any agreement

to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(g) If a person is not otherwise liable for a release or threat of release of oil or hazardous material pursuant to this chapter, such person shall not become liable solely by the mere act of either retaining or paying for the retention of a waste site cleanup professional licensed pursuant to sections nineteen through nineteen J of chapter twenty-one A to conduct a response action or portion of a response action at or for a site or vessel; provided, the response action or portion of a response action is conducted in compliance with this chapter and the Massachusetts Contingency Plan.

(h) Any person who owns a one- to four-family residence that is a site at which the department has incurred costs for response actions shall not be liable to the department for those costs if he can establish by a preponderance of the evidence that:—

(1) he is not a person described in clauses (2), (3), (4), or (5) of paragraph five (a); and

(2) the site was being used exclusively as a one- to four-family residence throughout his ownership and he claimed permanent residency at the site; and

(3) he immediately notified the department of the release of the oil or hazardous material upon the site as soon as he had knowledge of it.

The defense established by this subsection shall not apply (1) if the department can establish by a preponderance of the evidence that said owner knew or had reason to know of the release when he became the owner of the residence or (2) to the cost of any response action necessitated by the leakage of oil from leaking underground storage tanks used to contain oil and underground pipes ancillary thereto or ancillary to above ground storage tanks at the site unless the owner can establish by a preponderance of the evidence that such tanks and pipes were not located on the site at the time of, or installed after the acquisition of the site, and he did not know or have reason to know of the release at the time he acquired ownership or possession of the site. In no event shall said owner be deemed to have had reason to know of the release of oil or hazardous material on the site unless a reasonable inquiry would have disclosed such presence at the time when the site was acquired by said owner, so long as the purchase price paid by said owner bore a reasonable relationship to the value of the site in the absence of oil or hazardous material. For the purposes of this paragraph, a reasonable inquiry shall mean visually inspecting the site for obvious signs of the release of oil or hazardous material. Should such visual inspection indicate that oil or hazardous material had been released at the site, a reasonable inquiry shall also include a further assessment to be performed by or under the supervision of a registered professional engineer, hydrogeologist or other qualified scientist with expertise in such matters. The defense established by this paragraph shall apply to all outstanding claims for costs by the department for

response actions conducted or maintained since March twenty-fourth, nineteen hundred and eighty-three.

(i) Notwithstanding any other provision of this chapter, no person who is otherwise liable for a release or threat of release of oil or hazardous material pursuant to this chapter shall avoid, reduce or postpone such liability or such person's ability to pay for such liability, or be allowed to avoid, reduce or postpone such liability or such person's ability to pay for such liability, by (1) establishing any form of estate or trust if such estate or trust is intended to be a device to avoid, reduce or postpone such liability or such person's ability to pay for such liability, or (2) by establishing indicia of ownership to protect what purports to be a bona fide security interest but what is intended to be a device to avoid, reduce or postpone such liability or such person's ability to pay for such liability, or (3) by any conveyance or transfer of ownership or control of property or assets of any kind that purports to be bona fide transaction but that is intended to avoid, reduce or postpone such liability or such person's ability to pay for such liability, or (4) by any other means that purport to be bona fide but that are intended to avoid, reduce, or postpone such liability or such person's ability to pay for such liability.

(j) An agency of the commonwealth and a public utility company that owns a right of way that is a site at which the department has incurred costs for response actions shall not be liable to the commonwealth for those costs if the agency or public utility company, respectively, can establish by a preponderance of the evidence that:

(1) it is not the owner or operator of any building, structure, installation, equipment, pipe or pipeline, including any pipe into a sewer or publicly-owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft from which the release or threat of release has occurred;

(2) it is not a person or the successor to a person described in clauses (2), (3), (4) or (5) of paragraph (a);

(3) no act of the agency or public utility company, or of the agency's or public utility company's employee or agent, caused or contributed to the release or threat of release or caused the release or threat of release to become worse than it otherwise would have been;

(4) it notified the department immediately upon obtaining knowledge of a release or threat of release for which notification is required pursuant to, and in compliance with, section seven or regulations promulgated pursuant thereto;

(5) it provided reasonable access, including moving utilities or disrupting service, to the site or vessel to employees, agents and contractors of the department to conduct response actions, and to other persons intending to conduct necessary response actions;

(6) if it has undertaken a response action or portion of a response action at the site, the public utility company conducted such response action or portion of a response action in compliance with the requirements of this chapter and the Massachusetts Contingency Plan; and

(7) it did not know or have reason to know of the presence of oil or hazardous material on the site when it came into possession of the right of way.

For purposes of this subsection, the phrase "public utility company" means the Massachusetts Municipal Wholesale Electric Company established pursuant to chapter seven hundred and seventy-five of the acts of nineteen hundred and seventy-five, or any successor thereto, Massachusetts municipal light departments organized under chapter one hundred and sixty-four or any other special law, and Massachusetts gas and electric companies made subject to the jurisdiction of the department of telecommunications and energy by any provision of law except chapter one hundred and ten A of the General Laws and chapter six hundred and fifty-one of the acts of nineteen hundred and ten, as amended.

(k) In any action under this chapter, the liability of a municipality when sponsoring and conducting a household hazardous waste collection for injury or loss of property or personal injury or death shall be limited to acts or omissions of the municipality or its agents or employees, during the course of the household hazardous waste collection which are shown to have been the result of negligence or reckless, wanton or intentional conduct; provided, however, that persons conducting a household hazardous waste collection for a municipality on a volunteer basis shall not incur any personal liability except for acts or omissions which are shown to have been the result of reckless, wanton or intentional conduct.

(l) Any governmental body or charitable corporation or trust which holds a conservation restriction, agricultural preservation restriction, watershed preservation restriction or affordable housing restriction pursuant to section 32 of chapter 184 shall not be deemed to be an owner or operator if all of the following requirements are met:

(1) no act or failure of duty of the governmental body or charitable corporation or trust, or of its employee or agent, caused or contributed to the release or threat of release or caused the release or threat of release to become worse than it otherwise would have been;

(2) it did not control activities at the site except to the extent that it implemented and enforced its rights under the restriction;

(3) it is not the owner or operator of any building, structure, equipment, storage container, motor vehicle, rolling stock or aircraft from or at which the release or threat of release occurred;

(4) it notified the department, in compliance with this chapter and regulations promulgated thereto, upon obtaining knowledge of a release or threat of release for which notification is required pursuant to this chapter and regulations promulgated thereto; and

(5) if it undertakes a response action at the site, it conducts such response action in compliance with the requirements of this chapter and regulations promulgated thereto.

(m) Notwithstanding any other provision of this chapter, the commonwealth shall not be liable under this chapter for response actions taken or arranged by the department to implement or enforce the commonwealth's rights or responsibilities pursuant to this chapter.

TRANSITION ADVISORY GROUP

Elizabeth Barton | Ann Catino | Franca DeRosa | Nancy Mendel | Tim Whiting

March 7, 2024

VIA ELECTRONIC MAIL

Graham J. Stevens, Office Director *(Graham.Stevens@ct.gov)*
Brendan Schain, Hearing Officer *(Brendan.Schain@ct.gov)*
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

Re: TAG Comment Letter

Dear Graham and Brendan,

The Transition Advisory Group (TAG) appreciates the opportunity to provide additional comment on DEEP's draft of the proposed Release-Based Cleanup Regulations (RBCRs). We again acknowledge and are grateful for the significant commitment you and others at DEEP have clearly demonstrated in getting us to this point. However, because we do not believe TAG's specific issues and concerns that have been shared with DEEP have yet been addressed, in lieu of repeating TAG's specific issues and concerns here, TAG is sharing those issues and concerns by incorporating by reference our prior communications to DEEP. These prior communications include TAG's letter of February 6, 2024 (copy attached), which TAG submitted in response to DEEP's request for questions regarding the draft of the proposed RBCRs.

By way of relevant but brief recap, TAG's February 6, 2024 letter attached TAG's earlier submittals which outlined key issues for which to date (to TAG's knowledge and at least in the context of the Working Group and TAG process) there is not even a draft resolution to these critical concerns most, if not all, of which would require legislative action. Early in the Working Group process, TAG provided a listing of approximately thirty (30) current laws which require some level of legislative amendment or repeal (and, in at least one instance, need for documentation of an agreement or formal understanding with the United States Environmental Protection Agency). Without intending to prioritize these foundational issues we have been raising with you, we cite to two examples of current statutory schemes we understand you have agreed will require statutory amendment before any form of the draft RBCRs can be implemented.

These are the current Significant Environmental Hazard law and the statutory provisions creating Connecticut's existing Voluntary Remediation programs (which are essential to, for example, Brownfield redevelopment in Connecticut). And, having now reviewed the close to 200 pages of the draft RBCRs released on December 29, 2023, we believe it is likely there will also need to be revisions to Public Act 20-09 before implementing the program it

appears DEEP presently envisions, including potentially those aspects that must define the scope and extent of liability under the new program.

As has been conveyed, the TAG Group remains very concerned about unresolved statutory conflicts, inconsistences and duplications that have yet to be dealt with by DEEP, including those which, to DEEP's credit, DEEP has openly acknowledged they are still exploring. TAG members have been and continue to be supporters of the new program and available to work with DEEP on a resolution. But this support cannot ignore the fact that, in the words of former Deputy Commissioner Betsey Wingfield, this new program is a "sea change." Indeed, it will affect close to every Connecticut property, including current and former property owners and related entities and individuals.

Per the website of the Connecticut Legislative Regulation Review Committee (the LRRC), "[i]t is the responsibility of the Legislative Regulation Review Committee to review regulations proposed by state agencies and approve them before regulations are implemented. This position was adopted since all regulations have the force of law, and *it is important that regulations do not contravene the legislative intent, or conflict with current state or federal laws, or state or federal constitutions*." TAG respectfully submits that, while the drafting of the proposed RBCRs can, should and must continue, it is at best premature and ill-advised for DEEP to commence the LRRC proceeding without having worked through the resolution of specific issues and concerns TAG (as well as others) has identified for DEEP.[1]

Sincerely,

TRANSITION ADVISORY GROUP

Elizabeth Barton
Ann Catino
Franca DeRosa
Nancy Mendel
Tim Whiting

[1] We believe you have suggested that, like with the as yet unavailable guidance and other interpretative and implementation-related documents DEEP has referenced throughout the Working Group process, the issue of required statutory amendments should be resolved after the RBCRs move through the LRRC proceeding and are adopted as law, with an effective date until some undefined and, in fact, undefinable point in the future. TAG strongly urges that this is not an acceptable or viable solution, particularly as relates to statutory provisions and statutorily created programs that are pertinent to the foundation of the RBCRs, including aspects of the RBCRs that may not currently have been authorized by the legislature. There is confidence within TAG, and we believe the regulated community in general, that this approach will not result in an implementable program and it will not further either the protection of human health and the environment or economic development and the business climate in Connecticut.

TRANSITION ADVISORY GROUP

Elizabeth Barton, Ann Catino, Franca DeRosa, Nancy Mendel and Tim Whiting

February 6, 2024

Via E-Mail

Graham J. Stevens
Brendan Schain, Esq.
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

Re: Comments on Draft Release-Based Cleanup Regulations

Dear Graham and Brendan,

The Transition Advisory Group (TAG) appreciates you recently meeting with us to discuss the Draft Release-Based Cleanup Regulations (RBCRs). We acknowledge the hard work that you and others at DEEP have dedicated to drafting the RBCRs, released on December 29, 2023, and to speaking to many interest groups and responding to questions. Your flexibility and willingness to address the concerns by various interest groups will ensure a better set of RBCRs that will enable them to be applied in a more successful manner.

We have heard many references in the Working Group meetings and other group meetings to the TAG Team "working on" or "dealing with" some key issues. However, some of the key issues that we have outlined in previous memos we submitted to you (for example, see list of issues in the attached October 12, 2021 memo and the April 18, 2023 voluntary remediation memo) are not resolved and we are using this opportunity to outline what we have identified at this point as some of the more significant issues below for further discussion and resolution.

1. Conflicts between the Draft Release-Based Cleanup Regulations and existing environmental statutes and regulations – We previously provided you with a list of some of the statutes and regulations that require changes. Having these revisions wait until after the (RBCRs) are promulgated is not effective or reasonable. We submit this timeline/sequencing will undermine the success of the (RBCRs). This presents circumstances analogous to the EUR regulations that were passed without corresponding forms and applications, which effectively shut down the EUR process for more than six months. Question: Has the Department begun to identify the various statutes and regulations that will require revision and, if so, can you please provide us with a list of same (as well as any draft language if available)?

2. Compatibility with the Transfer Act – In our previous discussions, we were told that the sites in the Transfer Act program prior to the implementation of the RBCRs would remain in the Transfer Act program. It now appears that new releases or newly discovered historic releases discovered at Transfer Act sites after the effective date of the RBCRs will be subject to the Transfer Act and the Release-Based Cleanup Regulations. Transfer Act sites with these releases would require compliance with the revised RSRs in the RBCRs, involve multiple verifications/certifications (as well as other filings), and trigger the potential for

multiple audits. Not a more efficient or streamlined process. Additionally, it is not clear whether existing Transfer Act sites will be afforded the option to use the new compliance methods introduced in the proposed RBCRs, which is a topic the TAG members discussed with you. Our strong recommendation is that the regulations be revised to confirm that the new releases or newly discovered historic releases discovered at Transfer Act sites after the effective date of the RBCRs be reported but be allowed to be closed out exclusively under the Transfer Act program. Question: Would the Department be willing to implement this option to facilitate, rather than complicate, the closure of existing Transfer Act sites?

3. RSRs – Based on our recent discussions, we understand that, upon implementation of the RBCRs, the RSRs included in the RBCRs (including some edits) will be the controlling cleanup regulations. The old RSR sections will exist only to cross reference their correlating sections in the RBCRs. Questions: How will the Department handle sites currently being remediated to the existing RSRs upon the adoption of the new RBCRs? Has the Department evaluated the potential for statutory or regulatory conflicts resulting from the revisions to the RSRs under the RBCRs' program including the revised applicability provision in the RBCRs?

4. Voluntary Programs – It is unclear how CT DEEP intends to deal with the Voluntary Programs. See our attached April 18, 2023, memo on the importance of these programs. Further, it has become clear from a review of the draft regulations that, without the option/ability to opt out of the RBCRs and enter a Voluntary Program, which Voluntary Program would cover multiple releases on a property under a single program/filing/REM ID#, under the RBCRs, that same site with 10 historic releases (for example) would require 10 reports/filings and10 initial and recurring fees, create the potential for 10 penalty assessments, and involve multiple timelines and multiple tiers /tiering processes, not to mention the implementation cost impacts. Again, not a more efficient, cost effective and streamlined process, and not a process that would encourage more comprehensive, site-wide remediation efforts. Also, it is discouraging to note that, relative to a site-/parcel-/property-wide investigation and remediation approach or option, CT DEEP's Winter 2024 RBCR slide presentation states on slide #12 "Voluntary parcel-wide investigation and cleanup option planned." Questions: Will this approach/option be included in the RBCRs? When and how will it be defined and implemented?

5. "Maintainer" Status – The "maintainer" status provisions in the RBCRs are particularly troublesome and lacking in definition. There are provisions that allow CT DEEP to unilaterally to determine that a property owner (as well as a tenant?) is a maintainer of a release, including without, for example, any deference to the existing "upgradient contamination" policy. These provisions do not state any right to appeal by the claimed maintainer, which violates existing administrative law and/or creates a new strict liability standard. Question: Will the Department be sharing for comment a clear definition of "Maintainer" and provide for a right to appeal?

6. RCRA Closure – Questions: Has the EPA approved the RBCRs? When and how will the EPA RCRA authorization documents with CT DEEP (including the Memorandum of Understanding between CT DEEP and EPA Region 1) be revised?

7. Audits – As we discussed, the CT DEEP's current determination of "no audit" for verification has great value for transactions and for assuring lenders that an endpoint has been reached in the remediation process. As indicated, this is a reference point in many existing transactional documents. We proposed that a "no audit" feature be added to the RBCRs. Further, the extended period in the draft RBCRs for CT DEEP audits will necessarily have a detrimental effect on transactions in Connecticut. During our discussion, you raised the issue of resource concerns and burdens on the Department as a rationale. Questions: Will the Department revisit these two issues, both the need for a "no audit" notification and firm reasonable timelines? Has the Department conducted a review of the extra resources that will be needed to be able to implement and manage this new RBCR program successfully? If yes, what actions will be needed to ensure there are sufficient resources and support (including those that are technology-based) in place prior to the adoption of the regulations?

Thank you for your consideration of these issues (as well as others we have raised). We remain willing and able to assist the Department with resolving these as part of the next turn of the regulations.

Sincerely,

TRANSITION ADVISORY GROUP

Elizabeth Barton
Ann Catino
Franca DeRosa
Nancy Mendel
Tim Whiting

PREVIOUS TAG MEMOS

CT DEEP RELEASE-BASED REMEDIATION OF HAZARDOUS WASTE PROGRAM REGULATIONS
TRANSITION GROUP RECOMMENDATIONS
JUNE 2021

The members of the Transition Group include Beth Barton, Ann Catino, Franca DeRosa, Nancy Mendel and Tim Whiting. Tim is a CT LEP and the remaining members are environmental attorneys.

The Transition Group has been meeting twice a month with Graham Stevens of CT DEEP since February 2021 to discuss transition issues related to the new proposed Release-Based Remediation of Hazardous Waste Program Regulations, as required by Public Act 20-9, which has been codified at C.G.S. Section 22a-133pp, et seq. Brendan Schain, Esq. of CT DEEP participated on one of our video conferences and we understand he will continue to be involved with our group. We are not a formal Working Group or Working Group Subcommittee created by CT DEEP; we were formed in response to the identification of a void or gap regarding transition from and integration with existing programs, including the statutes and regulations relating to those programs (as well as, in some respects, reporting and remediation in general).

Our primary goal is to identify the potential impacts the new release-based program and regulations will have on the existing CT DEEP programs and make suggestions on how to properly and practically integrate them to: (i) minimize uncertainty and provide clarity when and/or where overlap of programs may exist; (ii) support consistency and predictability; and (iii) provide clear guidelines to achieve finality and closure with no unintended consequences. Accordingly, to date, our focus has been on the Transfer Act and the RSRs, particularly since there are approximately 4,500 sites currently in the Transfer Act program (with others still being added daily) that need to achieve closure. We recognize that we will also need to look at other state and federal programs and statutes, including but not limited to, Brownfields, the Voluntary Program, Underground Storage Tanks, Significant Environmental Hazard reporting, RCRA Closures, USEPA Brownfield Funding Programs, and Municipal Liability statutes, and also review certain categories of regulatory documentation, such as Covenants Not to Sue and Stewardship Permits.

We believe it is important to document our recommendations to guide CT DEEP's development of the Release-Based Remediation of Hazardous Waste Program. We recognize that some of our recommendations may require statutory or regulatory changes. This is necessarily a dynamic document and the Transition Group will continue to update its recommendations as appropriate.

Recommendations:

1. Maintain the RSRs. We believe it is critical for the RSRs to remain in place and not be replaced or eliminated by the Release-Based Remediation of Hazardous Waste

Program Regulations. Everyone agrees that the RSRs are "released-based" and "risk-based" standards. The RSRs are referenced either directly or indirectly in 30 existing environmental statutes, which involve 26 legislatively created programs. The attached table shows the various statutory programs that refer to the RSRs as the basis for the remedial activities and/or liability relief. The RSRs set the standards for each of these programs and have provided the roadmap to closure relied upon by the regulated community and other constituents.

If the RSRs are eliminated or replaced, the impact on each of these programs needs to be considered. Each program either needs thoughtful modification through legislation to reflect integration with the new release-based remediation program or the statutory program may need to be repealed to eliminate confusion and/or dual or duplicative regulation.

For the Transfer Act, the RSRs (as amended) are the standards that used and relied on since 1996 to assess and remediate properties; they have formed the basis for legal documents and negotiations allocating environmental obligations, liabilities, and risk. Certainly, for the 4500 sites in the Transfer Act or the numerous sites in any of the Brownfields Programs, the Voluntary Program, RCRA Closures, USEPA Brownfield Funding Programs (or other statutes or programs that comprise the list of 30), we cannot change the requirements mid-stream without creating chaos, negatively impacting the path to regulatory closure, and adversely impacting various immunities and liability protections that currently exist and may have been relied upon by property owners, municipalities, and lenders, among others.

The vision is that whenever a site or a release area needs to be investigated and remediated, the RSRs should be the standards used for assessment and remediation to achieve closure of the site or the release area. The point of entry may be the Transfer Act, the Voluntary Programs, Brownfields, UST, or the Remediation of Hazardous Waste Program Program Regulations, but once you are in one of the programs, the release or the site (as applicable) should use the RSRs for assessment, remediation, monitoring, and closure.

2. Allow use of the Alternatives in the Release-Based Remediation Program Regulations. Although the RSRs should remain in place, the options and compliance mechanisms under the Release-Based Remediation of Hazardous Waste Program Regulations should be accessible to those in other programs. So, for example, if the Release-Based Remediation of Hazardous Waste Program Regulations allow for the use of risk assessments to close out a release area, that option should be available to close out releases on Transfer Act or other programs sites.

3. Standard of Care. Currently, the regulated community uses the Site Characterization Guidance Document (SCGD), dated September 1, 2007 and revised December 2010, as the standard of care for characterization of sites. It is necessary to either supplement and update this technical guidance document for future use for the Release-Based Remediation of Hazardous Waste Program Regulations or incorporate new standards

of care directly into the Release-Based Remediation of Hazardous Waste Program Regulations.

4. Assessment of Incorporating Existing Programs into the Release-Based Remediation of Hazardous Waste Program Regulations. As part of any transition, existing regulations and programs should be assessed to determine whether it is appropriate/necessary to integrate them into the new regulations. The attached table identifies the existing statutory programs that rely upon the RSRs and each statutory program should be assessed to determine affirmatively how it fits - or whether it fits - into the Release-Based Remediation of Hazardous Waste Program Regulations Release-Based Remediation Program. For example, we believe the Significant Environmental Hazard ("SEH") statute should be incorporated into the new regulations. This would ensure consistency in reporting requirements and help the regulated community determine next steps that may be required for a SEH site. We are, however, interested in the perspectives of the various subgroups. Thereafter, we may be in a better position to provide recommendations as to statutory integration.

5. Overlap with Release Reporting Regulations. CT DEEP is in the process of finalizing the proposed Release Reporting Regulations (C.G.S. §§22a-450-1 to 22a-450-6). There is a concern that there is not consistency with, or clear integration between, those proposed regulations and the "yet to be drafted" Release-Based Remediation of Hazardous Waste Program Regulations, which will include regulatory provisions relating to the reporting of releases. Without clear integration, once a release is reported, owners and responsible parties will be left with uncertainty as to what steps to take or which program will govern further compliance.

6. Staffing and Resources. A thorough review and evaluation of CT DEEP staff resources (present and future) are critical with the addition of new release locations/sites under the Release-Based Remediation of Hazardous Waste Program to the already 4500+ sites that CT DEEP staff is currently overseeing under the Transfer Act (not to mention the current and continuing commitment of CT DEEP staff resources to, for example, auditing and the review and approval of Environmental Use Restrictions).

   This analysis is especially needed against the backdrop of the reality of many recent and additional projected CT DEEP staff retirements and the greater demand for CT DEEP staff with risk-assessment experience. As noted in the June 9, 2021 Connecticut Law Tribune article:

   "By 2022, retirements at the Department of Energy and Environmental Protection (DEEP) will result in the loss of 44% of the staff in its Environmental Quality Division, and more than 30% department wide."

   "DEEP has been struggling to find ways to mitigate the effects of this impending loss of human resources, but it has not been—and will not be—easy. The CREATES report identified, for example, that DEEP has an extremely high attrition rate with younger

employees, many staying less than five years and making successional planning a 'pain-point.'"

"The immense human resources problem at DEEP is the imminent challenge and our sustainability and resiliency as a state is dependent upon our success in solving it."

Based on this reduction in staff, it is important to understand what happens to all the Transfer Act sites if limited existing remediation staff is reassigned to dealing with the new Release-Based Remediation of Hazardous Waste Program releases and/or sites? The Transfer Act sites will still need CT DEEP staff attention to close them out and make each of these sites marketable. With the Transfer Act sites, CT DEEP staff is typically dealing with one entire site and releases at that entire site at one time, under one remediation ID number. When the Release-Based Remediation Program begins, will the same CT DEEP staff be dealing with individual releases under that program, which could mean there will now be multiple releases, each assigned a remediation ID number, at a site, not just (although perhaps in some instances in addition to) the entire site being handled under the Transfer Act approach? All stakeholders want the Release-Based Remediation Program to be successful, but it will only be successful if there are appropriate staffing and resources.

7. Transition Group as Facilitators. The Transition Group intends to continue to make recommendations relating to the integration of the Release-Based Remediation Program and the programs identified on the attached table, including when and where legislative changes are needed and/or recommended. We also understand that there is concern that the new program may be overly broad, with potential to impact all residential properties in the State, which may be overwhelming and economically detrimental to the State and its citizens. To be most effective, the Transition Group proposes to review the concept papers submitted by each of the formal Working Group Subcommittees. After that review, we would plan to meet with representatives of each Working Group Subcommittee to discuss transition issues, with a focus on a comprehensive, deliberate, and effective strategy to handle the transition issues, and to identify where gaps may exist that would not serve the State's economic development interests, while also being protective of human health and the environment.

Programs that Directly Refer To RSRs CGS 22a-133k	Statute	Compliance Reference
Significant Environmental Hazard	22a-6u	RSRs provide thresholds for reporting and/or further action and remediation
Clean up of hazardous waste disposal sites	22a-133a	Final remedial action for a haz waste disposal site is a remedy consistent with RSRs
Environmental Use Restrictions / NAUL	22a-133o	References compliance with RSRs
EUR invalidity	22a-133r	If EUR is void, remediation is to RSRs
LEP licensing	22a-133v	LEP test tests applicant's knowledge of investigation & remediation IAW RSRs
Voluntary site remediation program in GB & GC areas	22a-133w	Requires compliance to RSRs
Voluntary Investigation & remediation of contaminated real property	22a-133x	"Release area" is defined per 22a-133k regulations & remediation must follow RSRs
Voluntary site remediation program in GB & GC areas	22a-133y	Requires compliance to RSRs
Covenant Not to sue prospective purchasers with Commissioner's approval of remediation plan	22a-133aa	Requires compliance to RSRs
Covenant Not to sue prospective purchasers with LEP's approval of remediation plan	22a-133bb	Covenant not to sue between DEEP and proposective purchaser based upon a remediation plan "of the property" per 22a-133k regulations & entry into 22a-133x or 22a-133y program or TA or verification
New Property owner's immunity from Third Party liability for conditions that existed prior to taking title	22a-133ee	Requires compliance to RSRs
Transfer Act	22a-134	Requires compliance to RSRs
Ownership of Unpermitted Solid Waste Disposal Facility	22a-208a(c)	Requires owner to submit a closure plan and provide public notice of such plan in a manner set forth in 22a-133k or remediate such disposal area IAW a remediation plan approved by DEEP or LEP pursuant to 22a-133x, 22a-133y or TA
UST Fund & clean up program	22a-449c, 22a-449f, 22a-449m and 22a-449p	RSRs create threshold cleanup standards
Certification of activity affecting floodplain	25-68d	Provides an exemption for mills from floodplain certification if remedial activity is subject to RSRs
DECD Brownfield Programs (Chapter 588gg) that rely upon applicants entering into a program, e.g., 22a-133x, which ultimately directs them to the RSRs either directly or through definition of remediation found in 22a-134, which refers to 22a-133k		
Brownfield Grant Program	32-763	Grant recipient must be in TA or enter into 22a-133x, 22a-133y, 32-768 or 32-769
Brownfield Loan Program	32-765	Loan recipient must be in TA or enter into 22a-133x, 22a-133y, 32-768 or 32-769
ABC Program	32-768	ABC requires entry into 22a-133x; note that it requires investigation of such property in accordance with prevailing standards and guidelines & remediation in accordance with regs "established for remediation" adopted by DEEP)
BRRP Program	32-769	Investigation of release or threatened release is to "prevailing standards and guidelines", remediation is for entire property; reference is to "remediation standards" as defined in 22a-134, which refers to 22a-133k; and LEP must provide a verification/interim verification
Municipal Tax Abatement for Brownfields	12-81r	Munie & prospective owner enter into an agreement for tax abatement, provided owner entres into 22a-133x, 22a-133y, 32-768 or 32-769 or be in Transfer Act
CT Brownfield Redevelopment Authority	32-11e	CBRDA (or its subsidiary) authority relating to funds necessary property acquisition & disposition, property improvement and compliance with 12-81r, 22a-133m(h), 22a-133x(b), 22a-133aa, 22a-133bb, 22a-133dd, the TA, 22a-452f, 32-7e, & 32-23pp to 32-23rr
Liability Waiver for Pre-Existing Conditions	32-764	Provides grant recipients with liability relief provided recipient is in TA or enter into 22a-133x, 22a-133y, 32-768 or 32-769 (& includes successors) & provided remediation is per 22a-133k
Other Statutes / Concepts for Transition Discussion		
Innocent Landowner Defense	22a-452d & 22a-452e	Innocent landowners not liable for pre-existing conditions
Lender Liability	22a-452f	Lender exemption from liability
Role of LEP v. Non LEP	22a-133v	LEP licensing & responsibility to protect human health & the environment
Municipal Brownfield Liability Relief program	22a-133ii	Provides liability relief for pre-existing conditions to Municipalities, other municipal entities and land banks

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

The Transitions Group[1] (the "Group") has continued its efforts to identify transition issues related to the new proposed Release-Based Remediation program. As indicated in the Group's June 2021 Recommendations, the Group reviewed the five Working Group Subcommittees' concept papers and, thereafter, met with each Working Group Subcommittee's co-chairs. The intent was to facilitate the identification of issues that may inhibit or complicate the creation of a uniform, streamlined release-based program that furthers and supports the State's economic development interests while also being protective of human health and the environment.

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

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

1. Significant Environmental Hazard ("SEH") program – a state statutory program (C.G.S. Section 22a-6u). The SEH program is release-based and includes at a minimum a short-term remedy component. How will this integrate? It may/may not be consistent with the concepts of an "immediate response" or "tiering" that are to guide action inextricably associated with or even driven by the seriousness of the risk presented. Should the SEH program remain? Will it be replaced by an "immediate response"? Or does it roll into it? Should it remain until the release is assigned to a tier? Concerns were clearly raised that there would be a dual regulatory structure with dueling requirements that will leave the regulated community quite confused as to what program/requirements to follow. General sentiment is that there should not be two separate reporting programs. Statutory changes are needed given that the SEH program is an existing, stand-alone statutory program.
    a. Tiers. The "tiers" concept – proposed to provide alternate paths. Can you move between or among the tiers? What are the exit ramps? Until you enter a path, is the SEH program the option?

2. The Underground Storage Tank requirements – a state statutory program (C.G.S. Section 22a-449 et seq.). The federal and state programs are already confusing, and regulation already exists on each level. Single family residential tanks are currently excluded. Are they to be included in the new release-based program? Should releases from all USTs be outside the release-based program and continue to be stand-alone?

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

3. Integration with C.G.S. Section 22a-450 and the new Spill Regulations. If there is an immediate spill/release, what regulations will control? Will the new release-based regulations be combined with the new spill regulations? Can immediate response actions developed pursuant to the release-based program be used to address immediate releases as well as historic releases? Is Spill reporting just reporting? If yes, will there be two reports? Need to address duplication, redundancy and inevitable confusion. If the new spill regulations are enacted prior to the pending RBP regulations, how will spill response and closure by guided and accomplished?

4. Transfer Act – a state statutory program (C.G.S. Section 22a-134). How will historical unknown releases be addressed if these releases were missed or otherwise not specifically addressed during the Transfer Act/RSR process? What if a new release is discovered prior to verification? What program applies? Only one program should apply (the Transfer Act? Or can it be closed out under the new program? Can there be an option?).

5. CERCLA/AAI, RCRA, TSCA, Federal PCB programs. How will consistency with the federal programs be achieved? And, also with other state programs? Will a single report of a release be allowed, or will the same release have to be reported multiple times on multiple forms? Is the "innocent landowner defense," a stalwart of the federal program and also codified in Connecticut (C.G.S Sections 22a-452d and 22a-452e) eliminated? Are the other statutes providing immunity similarly rendered a nullity (e.g., C.G.S. Section 22a-133ee)? How will the covenants not to sue programs (C.G.S. Sections 22a-133aa and 22a-133bb) be affected? Overall, there is a clear need for unifying existing statutes, DEEP regulations and programs PRIOR to the new regulations taking effect. Also, before the new regulations take effect, there needs to be clarity regarding integration of the new release-based program with the federal programs. What happens to the Memorandum of Agreement between DEEP and EPA Region I?

6. Logistics.
    a. Implementation. How will all of this be implemented? Will DEEP have a "concierge" to call? A liaison to make sure it is all coordinated? Does DEEP have the staff? Does DEEP and DOH have the risk assessors in numbers and experience to administer, implement, and support the process? If DEEP intends to rely on the LEPs, the requirements should be clearly articulated to facilitate implementation.
    b. Tracking System. Will DEEP implement a unified online searchable database tracking system for reported releases and respective status, accessible to the public?
    c. Definition of "Site" and Future of "Site-Wide" approaches. Can/should/how do site wide approaches remain? What is a "site" under the new program? Is it the entire property? How is the site/entire property distinguished from the site of a release area? How is "site" used?
    d. RSRs. Will the RSRs be replaced, supplemented or otherwise revised by these new regulations?
    e. Guidance/Forms – The clear consensus is that ALL RELEVANT GUIDANCE AND FORMS HAVE TO BE DEVELOPED AND AVAILABLE PRIOR TO THE TIME THE REGULATIONS GO INTO EFFECT.

i. The existing Sitewide Characterization Guidance document needs to be re-written and/or rendered inapplicable. Or is it still applicable and, if yes, to what? What about the ASTM standards – are they applicable any longer? How does the ASTM approach fit with the new release-based approach?

ii. Alternatively, another guidance document needs to be written (a "Release Characterization Guidance Document") to make clear expectations under the new release-based program. This needs to be available before any program becomes final and takes effect, otherwise no one (including perhaps most notably LEPs) will know what the expectations are and it will all be case-by-case. Questions need to be addressed so that the process, milestones, and end points are known and clear (*e.g.*, if an isolated release triggers reporting and it is commingled with fill or another plume, what do you do?) Do the changes to the end points (and is the ultimate end point the RSR compliance?) affect characterization? How? Or is it an entirely different approach based upon the risk assessed by the LEP?

iii. Several groups identified the need for clear, streamlined forms for all releases before the effective date, and an ability to complete and submit reports online.

f. LEPs - ROLE OF THE LEP HAS TO BE CLEARLY DEFINED BY THE TIME THE REGULATIONS GO INTO EFFECT. What is the role of the LEP? Will the LEP regulations change? Will there be other licensing requirements? What work can or has to be done by an LEP versus a non-LEP (*e.g.,* a qualified environmental professional)? What type of additional training will there be? How will non-LEPs be held accountable? What type of information can LEPs rely upon (if work is done by non-LEPs)? What can an LEP stamp or certify? The RBP program should not effectively exclude LEPs from performing due diligence work as has been the case in NJ.

g. Impact on Municipalities. This issue of municipal impact was raised by some groups and this Group believes it is significant. On a site foreclosed or to be foreclosed (which site may/may not be entered into a brownfield program), can a municipality simply make a site "safe" and await a buyer/developer, and if so how? What are the off ramps for municipalities?

h. Residential Properties. The issue of requirements that apply to releases on residential properties was raised by several Subcommittees interviewed. The Group understands that it is currently being reviewed by one of the Ad Hoc groups. Should the RBP include distinctions between owner-occupied residential properties (i.e., one- and two-family housing units) and multi-tenant residential rental properties?

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

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

Release-Based Regulations - Transition Advisory Group
Notes from February 28, 2022 Meeting

Attendees: Beth Barton, Day Pitney
Ann Catino, Halloran Sage
Franca DeRosa, Brown Rudnick
Nancy Mendel, Winnick Ruben Hoffnung Peabody & Mendel
Tim Whiting, Ramboll
Collectively the Transition Advisory Group ("TAG")

Graham Stevens, CT DEEP
Brendan Schain, CT DEEP

On February 28, 2022, TAG had a video conference with Graham Stevens and Brendan Schain, Esq. of CT DEEP to discuss: (1) what activities TAG should be undertaking at this time; and (2) the timeline for those activities. There was consensus that TAG should continue to focus on the impact of the proposed release-based regulations on existing statutes and regulations and the need for revisions (through legislation, regulations, or otherwise). With regard to timeline, it was agreed that since the regulations have not been drafted, it is premature to develop strategies and solutions for provisions that conflict or need modification. Please note that, in the TAG recommendations memorandum of June 21, 2021, TAG already outlined the statutes and regulations that will require some modification or other consideration.

During our discussion, the following baseline assumptions were discussed. TAG believes it would be helpful to share these assumptions with the Working Group:

(1) It is CT DEEP's intent to share at least sections of the proposed regulations with the Working Group for review and comment prior to submission for regs review. Per CT DEEP, it's expected that this will be an iterative process with comments and revisions constantly ongoing.

(2) CT DEEP's current estimate is that the release-based regulations will be submitted later this year for public comment. It is CT DEEP's goal to build consensus among the Working Group members and other interested constituents prior to formal submittal of the draft regulations for public comment.

(3) It is CT DEEP's intent to create a new task force soon to review and propose solutions to the LEP requirements and implementation issues.

(4) CT DEEP has tried to get non-LEPs involved (like remediation contractors) who can sign off on small releases with lower risk. To date, that constituency has not been actively involved, but CT DEEP will continue to encourage their involvement.

(5) Once the regulations are enacted, CT DEEP indicated that CTDEEP has the flexibility to decide an effective date that may be later than Public Act 20-9's passage date or October 1 of the operative year. A later date could provide flexibility to address other statutes and regulations that require modification and to draft and finalize any forms that may be needed.

Release-Based Remediation Regulations/Voluntary Remediation Programs
TAG Team Overview
April 18, 2023

Overview:

There are currently two Voluntary Remediation Programs in Connecticut: Connecticut General Statutes §22a-133x and §22a-133y. We were asked by CT DEEP to consider whether these programs should be eliminated and merged into the Release-Based Remediation Program and the regulations that are currently being drafted to further CT DEEP's goals of: (1) moving towards one comprehensive remediation program in Connecticut; and (2) eliminating unlimited/establishing set timeframes for achieving regulatory closure at sites being investigated and remediated under the Voluntary Remediation Programs.

Conclusion:

As more fully discussed below, we believe it is imperative that Connecticut retain the Voluntary Remediation Programs as stand-alone statutes as an option for *site-wide* cleanups, with opportunities available, if desired, that would allow for: (1) the transitioning of a site that is already in a Voluntary Remediation Program to the Release-Based Remediation Program; (2) sites where there are releases within the Released-Based Remediation Program to opt into one of the Voluntary Remediation Programs; and (3) sites in the Voluntary Remediation Programs to utilize or implement any newly created or revised options or methods within the Release-Based Remediation Program to attain regulatory compliance, including where doing so would be quicker or more cost effective.

Discussion:

Reportedly, there are currently 8,000 sites in the Voluntary Remediation Programs. For many of these sites, enrollment in the §22a-133x Voluntary Remediation Program was associated with involvement in the Brownfield Remediation & Liability Relief Funds Programs, for example, the Abandoned Brownfield Cleanup Program. Entry into the §22a-133x Voluntary Remediation Program is a regulatory prerequisite to applying for and obtaining both DECD and EPA Brownfield funds under these programs.

It is critical to the successful redevelopment of these sites that there be maximum flexibility (consistent with protection of human health and the environment) and no set time frame for regulatory closure. The funding for these sites may not be applied for or received all at one time. When accepted into any of the brownfield funding programs, the funds are often times disbursed over a lengthy period of time and/or based on or tied to the specific or designated use of the funds (i.e., investigation, remediation, types of contamination). The timing of various rounds for the application for and awarding of funds, as well as the general availability of both state and federal funds, is often unpredictable. The disbursement of funds may not be triggered until the viable redevelopment stage of the sites (so-called "shovel-ready sites"); getting to this stage can take years of development-related and permitting activity, which may be accomplished in phases.

Presently brownfields sites enrolled in the brownfields programs are specifically exempted from regulation under the Release-Based Remediation Program pursuant to CGS §22a-134vv(a). It is strongly recommended that sites otherwise in either of the two state Voluntary Remediation Programs also should be similarly exempted.

There are also sites enrolled in the Voluntary Remediation Programs in order to: utilize an otherwise unavailable remedial strategy that is not self-implementing, for example, engineered controls and Environmental Use Restrictions; have the certainty of a CT DEEP or LEP verification that the entire property has been fully remediated in accordance with the RSRs; ensure a site-wide clean-up of properties for future marketing and anticipated transactions; and/or obtain liability relief (which may be transferable). With the advent of the Release-Based Remediation Program, some of these site owners may have adequate incentive to transition from a Voluntary Remediation Program to the Release-Based Remediation Program. For example, the Release-Based Remediation Program would not require investigation and remediation of the entire parcel, but rather only discrete release areas. This transition would result in release-specific remediation that is subject to set timelines for its completion, which has been pointed to by CT DEEP as a goal. But eliminating the existing Voluntary Remediation Programs and moving all sites into the Release-Based Remediation Program, thereby imposing timelines that do not currently exist within the Voluntary Remediation Programs, would remove one of the key incentives for site-wide clean-ups in the Voluntary Remediation Programs. Imposing such deadlines, particularly when there is not a significant risk to human health or the environment, could create unintended impediments to ensuring the continuation of robust site-wide brownfield remediation.

The TAG Team recommends: (1) that the Release-Based Remediation Regulations currently being drafted include provisions and/or mechanisms to: a) allow, but not require, sites in the Voluntary Remediation Programs to transition to the Release-Based Remediation Program voluntarily; and b) allow sites in the Release-Based Remediation Program to opt into one of the Voluntary Remediation Programs, particularly if site-wide investigation and remediation is the goal; (2) revision of CGS §22a-134pp(2) to include specific reference to both Voluntary Remediation Programs (CGS §22a-133x and §22a-133y); and (3) enabling sites in the Voluntary Remediation Programs to utilize or implement any newly created or revised options or methods within the Release-Based Remediation Program to attain regulatory compliance, including when such option or method is quicker or more cost effective.

Connecticut Society For Women Environmental Professionals

March 7, 2024

Graham Stevens & Brendan Schain
Connecticut Department of Energy and Environmental Protection
DEEP.Cleanup.Transform@ct.gov

Re: SWEP-CT Comments on the CTDEEP draft RBCP Regulations

Graham & Brendan:

SWEP-CT, by and through its undersigned members, as members of the Release-Based Regulations Working Group, and with the support of the Co-Chairs and undersigned members of SWEP-CT, submits for your consideration the enclosed comments on the draft Release-Based Cleanup Regulations issued on December 29, 2023.

Thank you for your consideration.

Respectfully submitted:

Nancy Mendel, Esq. – Working Group Member

Beth Barton, Esq. – Working Group Member

Emilee Mooney Scott – Working Group Member

Sam Haydock, LEP – Working Group Member

With the support of:

Joy Kloss, LEP, CHMM (SWEP-CT Co-Chair)

Deborah Brancato, Esq. (SWEP-CT Co-Chair)

Elizabeth Fortino, Esq.

Jon Schaefer, Esq.

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Holly Winger, Esq.

SWEP-CT Comments on the December 29, 2023 Draft Proposed Release-Based Cleanup Regulations
March 7, 2024

Preamble

The above-signed members of the Society for Women Environmental Professionals-CT (SWEP-CT) are pleased to provide the following comments on the Connecticut Department of Energy and Environmental Protection's (CTDEEP) draft Release-Based Cleanup Regulations ("RBCRs") issued on December 29, 2023. SWEP-CT is a Chapter of a national non-profit professional association of varied individuals involved across numerous environmental disciplines, including law, science, business, and policy. Our members include attorneys, consultants, regulators, in-house environmental personnel, governmental employees, academics, contractors, lab technicians and others. Members of SWEP-CT offer these comments to provide valuable perspectives from a variety of environmental practitioners who will be affected by the State's transition to the RBCRs.

SWEP-CT appreciates CTDEEP's commitment to public participation since providing the initial draft of the RBCRs, and in particular, for taking the time to present to and answer questions from SWEP-CT members on February 1, 2024. Members of SWEP-CT submitted a set of questions to CTDEEP on the draft RBCRs on February 6, 2024. Based on the discussions during CTDEEP's presentation to CT-SWEP, as well as CTDEEP's presentation at the monthly Working Group meeting convened thereafter on February 13, 2024 to respond globally to public feedback, we understand CTDEEP has been working on revisions to the draft RBCRs in light of comments it has received to date. SWEP-CT is encouraged by this iterative process and appreciates CTDEEP's willingness to listen and respond to comments and concerns.

The draft RBCRs as initially conceived and issued require numerous clarifications and revisions, as discussed further below, to address critical concerns that would result in the new program being excessively and unnecessarily burdensome, expensive, time-consuming, and potentially unworkable. This outcome would run contrary to the intended goal of transitioning to a release-based regulatory framework, including to create a more user-friendly, streamlined approach to remediating contaminated properties in Connecticut in a manner that is both protective of human health and the environment *and* promotes economic development (the latter being the key driver for replacing the expensive, unduly burdensome, and complicated Transfer Act). As currently implemented by the draft RBCRs, the released-based program will burden a far broader range of economic activity than the Transfer Act ever did, and, with all the uncertainties identified below, will hold back economic activities unless and until its operation is well-defined. It must be recognized that the release-based program will affect and require compliance by all homeowners, not just businesses, so clarity and simplicity will be essential if the new program is to operate fairly and efficiently for Connecticut's citizens.

The draft RBCRs rely heavily on the use of "Commissioner discretion," as well as forms and guidance that will be prepared and available, and subject to change at any time, in the future. It is highly problematic that the forms and guidance that will be critical part of program implementation are not available now to be reviewed, considered, and put in perspective *while* proposed program requirements are being developed. It is further problematic that by virtue of various regulation provisions allowing CTDEEP to post guidance on

its internet website at any time, that essentially, critical guidance can be altered in the future at CTDEEP's whim. Some specific examples are discussed further in the comments below.

Further, it remains far from clear how a variety of current statutes and programs will be changed and or repealed to create consistency and a smooth transition to the new release-based program. For example, nowhere do the RBCRs address what will become of sites already/currently in a voluntary remediation program. CTDEEP has acknowledged that a "legislative fix" package will be needed in connection with implementing the new program. We agree that careful attention must be given to statutory changes that will be required in tandem with and prior to the start of the release-based program.

Members of SWEP-CT offer the following comments to highlight concerns and reiterate various changes needed to ensure the new program will be successful, with the hopeful understanding that CTDEEP is considering much of this as it revises the current draft.

Comments

RCSA § 22a-tt-1: Definitions:

The new program places responsibility on those persons/entities etc. that "created" or "are maintaining" such "release." However, neither "creator" or "maintainer" is defined. It is critical that these terms be defined in order to create certainty as to who exactly incurs responsibility for discovered releases.

RCSA § 22a-tt-1(36): an "Emergent Reportable release" means a "release to land and waters of the state discovered by an observed change in conditions. . . ." "Observed change in conditions" could be subject to varying interpretation, so a separate definition of this term is recommended to clarify what this means exactly.

RCSA § 22a-tt-1(45): the definition of "Exigent Condition" reads entirely discretionary since it is tied to a condition that the "commissioner determines, in the commissioner's sole discretion" is one that requires immediate response/abatement. More definitive language should be added to frame the Commissioner's use of this discretion, so that the average citizen can understand what to do to comply.

RCSA § 22a-tt-1(125): the definition of "remediation," includes the concept of characterization ("determining the nature and extent of a release"). This is problematic and likely to lead to confusion. For example: notice signage is required for any "active remediation" and "remediation" of any ERR; since "remediation" includes concept of characterization, this would appear to require public notice signage prior to any investigation/characterization. This is inconsistent with current practice, thus, clarification appears needed to this definition (and also potentially to the notice/signage provisions). Since the regulatory definition of "remediation" appears to stem from the statutory definition of "remediation" in Chapter 445b, a revision to the statute planned as part of the statutory adjustments may be needed.

RCSA § 22a-tt-2: Discovery:

Discovery of a release is the operative mechanism through which the new program will function, so clarity regarding what constitutes "discovery" is essential. However, as currently drafted, what constitutes discovery is potentially confusing, particularly when applied to historical releases, and at best subject to widely varying interpretations. Further refinements of the "discovery" provisions are needed to set clear expectations for the regulated community about when obligations arise.

For example, the exclusion from discovery for when the "only evidence of such release is data available or generated before the date when regulations were first adopted" requires clarification to more definitively spell out circumstance that do *not* give rise to "discovery". CTDEEP staff has made clarifying remarks and comments in this regard during public meetings, and based on same, we recommend that definitions of "only evidence" and/or "data" be added to highlight typical scenarios that would *not* constitute discovery, such as (though not limited to): (i) delivery of environmental reports to any person investigating/inquiring about the parcel generated prior to the date when regulations are first adopted; (ii) identification of an ASTM REC, CREC, or HREC in a Phase I prepared after the date when regs first adopted, which is based solely upon facts/data generated prior the date when regs first adopted; or (iii) when a lender asks for information before issuing a mortgage.

Section 22a-134tt-2(a)(3)(B) includes a rebuttable presumption provision that would allow only use of analytical data to refute a presumption that a release has been discovered. We are concerned that this does not afford adequate due process to the regulated community, and suggest that CTDEEP considers providing a forum/opportunity to be heard where counter-evidence can be presented. This requirement also means that money must be spent and an environmental professional hired to oversee sampling for virtually every release, an economic burden far broader than the Transfer Act.

Lastly, we are concerned about the lack of clarity about what actions need to be taken and by who, if a release is discovered during waste characterization sampling for a public roadway/bridge project, particularly where releases may not reside under pavement.

<u>RCSA § 22a-tt-3: Reporting</u>:

The reporting provisions of the RBCRs set forth requirements for both "significant existing releases" (SERs)—the new corollary to significant environmental hazards (SEHs)—and "other" existing releases. With respect to SERs, the RBCRs appear to contain various changes and more stringent timeframes and requirements than are currently applicable for SEHs. It is not clear that these changes are justified or that they can all be reasonably achievable in all instances. We recommend that flexibility/allowances be included, consistent with current SEH requirements as applicable, to provide the regulated community with more realistic short-term response obligations and expectations, and prevent unavoidable non-compliance issues.

Some of the notification timeframes appear particularly challenging, for example, the requirement that a discoverer notify the creator/maintainer within 1 hour. More details are required to create certainty about when this and other strict time requirements are met (e.g., what constitutes sufficient notice here?). Concepts of reasonableness should be incorporated to account for practical realities and circumstances. Again, DEEP needs to consider whether and how the average homeowner would be able to comply, given the breadth and reach of the new program.

RCSA § 22a-tt-3(d) sets forth requirements for reporting newly discovered releases at Transfer Act sites. However, as drafted, the options and expectations are not clear. CTDEEP has clarified its intention at public meetings, however, CTDEEP needs to amend the draft regulations to clearly chart the required or potential paths forward. Further, if the creator/maintainer has the option to handle a release under the Transfer Act, extension of overall schedule under same may be appropriate and should not be wholly disallowed without exception (as currently drafted).

RCSA § 22a-tt-4 Characterization:

RCSA § 22a-tt-4(a)(4) requires "full characterization" for every release before it can be verified by an LEP or certified by a PEP. The definition of "full characterization" requires delineation to non-detect. This extent of characterization is not consistent with current industry standards, is decidedly unnecessary to prevent risk to human health and the environment, and economically burdensome without documented benefit. We thus submit that including this in the regulations is unduly burdensome and would result in very costly, unnecessary obligations. We think this provision should be removed from the regulations in favor of more flexible concepts that match consistency with industry standards and risk, and appropriately take into account site-specific Conceptual Site Modeling considerations.

The RBCR characterization provision further provides that the commissioner may specify at any time, by posting on CTDEEP's website, what constitutes current "prevailing standards and guidelines" for characterization. This is highly problematic and does not create certainty that the regulated community deserves, nor make it easy for the average homeowner to comply. Firstly, protocols for characterization should employ the concept "industry standards." Second, characterization guidance needs to be available and reviewed now, in tandem with development of the RBCRs, to ensure appropriate and consistent standards and expectations and to be able to incorporate feedback from the expert consultant community that will tasked with conducting characterization under the new program.

We understand that CTDEEP is working to refine characterization requirements and develop guidance based on concerns raised to date, and we agree this will be a critical component of a successful transition to the release-based framework. We respectfully request that DEEP withhold from releasing the draft regulations to formal public comment until these core concerns are fully vetted.

RCSA § 22a-tt-5: Immediate Actions:

Certain timeframes for "Immediate Actions" may not be reasonably achievable despite best efforts. For example, for Emergent Reportable Releases, the RBCRs impose a 15-day requirement to install a treatment system, and a 36-hour timeframe to ensure sampling of all potential wells, among other stringent/aggressive timeframes. While we can agree in an ideal situation, quick actions are best, there are practical limitations that can be expected to be encountered in carrying out Immediate Actions. Thus, we recommend that concepts of reasonableness/good faith efforts/feasible methods of contact/time allowances for unforeseen delays, and the like, be added to account for such outcomes, and prevent unavoidable non-compliance, particularly for the broad range of property owners to whom the new program applies

RCSA § 22a-tt-6: Tiers:

Various initial and annual fees will be implemented under the RBCP, as set forth in the Tiers provisions. However, in RCSA § 22a-tt-7(1), CTDEEP is only required to "make best efforts within available resources to process in a timely manner any . . ." request made under the (to be transplanted) RSRs. It does not seem fair that the responsible party may be required to pay annual fees if they are waiting on a response from CTDEEP to proceed. While resource limitations are understandable and sure to happen, the responsible party should not be penalized as a result. A tolling or stay provision on the "fee clock" should be incorporated if delay is caused by lack of CTDEEP resources to review in timely manner. Alternatively or additionally, the regulations should set time limits for a response by DEEP, after which time fees or penalties cannot be imposed.

RCSA § 22a-tt-12: Closure Report:

The proposed closure documentation provisions of the RBCRs create a singular framework for closing out a release. More details / variation should be added to account for varying scenarios and provide efficient approaches based on specific circumstances. For example, nuanced/reduced requirements for no-risk releases should be included. Further, a bundling concept should be incorporated to create efficiency and reduce burden if a responsible party is managing multiple releases on varying but parallel tracks.

Applicability to Residential Properties

In a massive shift from the Transfer Act framework to the new release-based framework, the new program will apply to all properties in the state, including residential. It does not appear that sufficient thought and consideration has been given to the potentially substantial impact that this will have to homeowners. While CTDEEP has stated in public meetings that it does not generally intend to change its enforcement discretion against residential homeowners, this does not provide reliability, and the actual regulations should match and reflect CTDEEP's intention regarding releases discovered at residential properties. Provisions affording allowances (e.g., reduced requirements, extended timelines, financial support programs, compliance assistance programs, etc.) need to be incorporated in order to ensure that the transition does not have unintended consequences on the residential portions of the state. The lending community is unlikely to take comfort and assume that CTDEEP will withhold from enforcement when it assesses whether to issue a mortgage for a residential property that is not fully compliant. The same for future buyers of Connecticut homes. This uncertainty may significantly impair future home sales.

The RBCRs include a "special path" for home heating oil at §22a-134tt-8(b) that essentially puts into practice current guidance to homeowners dealing with home heating oil tank leaks. Additional "special paths" should be added to mitigate against potential burdensome obligations that could now arise at residential sites. For example, if a homeowner finds an unexpected contaminant in their drinking water well, immediate response (as would be required under the SEH statute now, or as an SER under the new program) remains appropriate; however, obligations thereafter that would require a residential homeowner to investigate, characterize, and remediate could very quickly become unwieldy and unreasonable. For example, if PFAS above drinking water criteria are detected, aside from immediate abatement responses to ensure protection of human health, it does not seem reasonable that a homeowner will be expected to monitor indefinitely, enter a tier, pay annual fees, and achieve compliance for a ubiquitous state-wide problem they did not cause. Obligations under the RBCRs applicable to residential homeowners need to be reasonably circumscribed.

Low-Risk Releases

As currently drafted, the RBCRs do not appear to contain any lower threshold for releases requiring closure/certification by an LEP or PEP. They would require closure by an LEP or PEP of all, including even the most minor "releases" to "land and waters of the state" (a very broadly defined term). This is unnecessarily burdensome, and exemption(s) and/or clarifications are needed to create a mechanism that will allow for quick resolution of minor releases that pose no risk to human health or the environment in a cost-effective, efficient manner. CTDEEP has indicated it has been drafting revisions to address this concern. We support this, and submit the following for consideration as CTDEEP works to clarify the intended scope of the program requirements:

- Minor, no-risk releases to the environment that do not result in any impacts to soil and groundwater and which are removed/addressed quickly should not be subject to the requirements of the RBCRs.
- Flexibility should be afforded to allow a homeowner or onsite staff/personnel/owner, etc. at businesses (i.e., non-PEPs/non-LEPs) to address these types of scenarios without need for PEP or LEP certification/verification, otherwise the economic burden of the program will be broad with little benefit to the environment.
- Any releases "exempted" in this manner should still be afforded a mechanism in the RBCRs to create certainty that such situations are "closed" in manner that has meaning and significance.
- CTDEEP should consider explicit exemptions for typical/minor household residential scenarios, so that its expectation expressed during public meetings—e.g., DEEP doesn't expect/want reports of the carwash soap spills in the gravel driveway—is more clearly reflected in the regulations.

Penalties

CTDEEP proposes a new penalty schedule to be set forth at RCSA § 22a-6b-8(c). Clarity within the RBCRs is needed to appropriately limit involved parties' liability (e.g., LEPs, attorneys) for such penalties. Further, the penalty provisions as drafted would appear to be a foregone conclusion for every potentially liable person as to any and every potential release for alleged violations. Given the lack of clarity in the regulations as currently drafted, and the broader impact of the new program, this penalty structure is particularly unfair. The regulations should include a process to challenge any penalty assessment.

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Conclusion

Members of SWEP-CT appreciate the opportunity to provide these comments and CTDEEPs commitment to engaging the regulated community to provide critical feedback and help shape the draft program regulations prior to the start of the formal legislative regulation review process. Given CTDEEP's stated efforts at revision drafting based on comments it has received to date, we highly recommend that the anticipated updated draft of the RBCRs be provided to the Release-Based Regulations Working Group and interested stakeholders for another meaningful round of review and feedback ***before*** proceeding with formal notice of intent to publish the draft regulations. More refinement and responsiveness to the issues raised to date on the draft regulations will only serve to make the formal regulation adoption process more efficient, and more quickly bring on board the effective, smoothly operating release-based program that all hoped for with the passage of Public Act 20-9, making Connecticut a more attractive environment in which to live and do business.
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March 7, 2024

Graham J. Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

Re: **COMMENTS: Release-Based Cleanup Regulations ("RBCR") – Criteria for Managed Multifamily Residential**

Dear Graham and Brendan:

This letter has been prepared by the undersigned attorneys who practice in the area of real estate and in particular land use and common interest communities. We have provided these comments for your consideration in connection with the development of the RBCRs. Please note that no comments are offered on the technical aspects of criteria analysis or development.

I. General Overview

-A major concern for any apartment complex or common interest community would be the costs associated with carrying out the requirements imposed by the proposed regulations.

-Apartment complexes and common interest communities tend to operate on very tight budgets. Significant increases in operating expenses would very likely result in homeowners having difficulty paying their share of budgeted expenses. Additionally, apartment complexes and common interest communities tend to be fungible and significant increases in operating expenses would adversely affect the marketability of the housing units when compared to other similarly situated housing units.

-The first question would be… "is there any further ongoing remediation required or are there any ongoing testing obligations required?"

-If the answer to the question above is "yes" the regulations could pose a significant hardship to homeowners and occupants living in the subject apartment building or common interest community.

-With regard to new developments, if the answer to the question above is "yes" the regulations should be revised to place the financial burden on the developer who presumably will be profiting on renting apartments or selling housing units in the common interest community. In this regard, RSCA § 22a-134tt-7(c) covering "financial assurance" should also be expanded to include surety bonds as an option for the party providing financial assurance.

-Existing developments would pose more difficulties as the developer may be long gone and there may be no party to pass ongoing remediation and testing costs to other than the resident homeowners.

II. Specific Comments

-First, with regard to references to condominiums:

1. The more generic term "common interest community"[1] should be used rather than condominium. The form of condominium ownership involves the common elements (all portions of the property other than the individually owned units) being owned by all unit owners as tenants in common. Frequently what appears to be a condominium project is legally configured as a "planned community" in which common elements are owned by the homeowners/unit owner's association.[2]

2. Limitations and restrictions on the property should be placed in the declaration which is the organic document which creates the common interest community. The bylaws (often confused with the declaration) typically govern only the corporate operation of the unit owners association. They are only infrequently recorded on the land records and as such are not usually in the chain of title. Similarly, leases are transient and non-uniform and drafters are apt to neglect to include the required language.

3. A distinction should be considered between new construction and existing communities (including those that have unbuilt future phases).

    a. New construction:
        i. Inclusion of the "restricted area" and the terms and conditions of the restrictions (e.g., prohibition on activities that involve soil contact) and requirements for "active management" (i.e., appropriate grounds care to maintain the integrity of the property and grounds) can be included in the Declaration when originally recorded.
        ii. For reasons noted below, a robust signage requirement should be included to give notice to unit owners and other users of the property of the restrictions.
        iii. A requirement could be established for the restriction in the Declaration to be enforceable by DEEP and not amendable except with the consent of DEEP.
        iv. There could be a requirement of disclosure of environmental matters in the public offering statement as called for in §47-264(a)(22). If included that section might need to be revised to conform to the revised risk-based statute.
        v. There could be a requirement as in §47-270(a)(19) (disclosure of environmental restriction) for a specific description of the restriction and the restricted area in the resale certificate that is to be provided to subsequent purchasers of units.
        vi. The restrictions should also be included in a separate environmental restriction recorded prior to the Declaration so that its terms will survive a termination of the community. The restriction should refer to a recorded map that shows the restricted area and the nearby structures and paved areas.[3] If not, then the mapping requirements of §47-228 could be revised to require the inclusion of that information.

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[1] See §47-202(a)(9) for definition of "common interest ownership."

[2] This is frequently done to avoid the more onerous underwriting requirements imposed by lenders for condominiums.

[3] A copy of a restriction created by the declarant (developer) and the related map would necessarily be included in the public offering statement.

vii. A program to educate members of the real estate bar should be implemented with regard to these restrictions as there is a tendency for practitioners to replicate forms. The Connecticut Community Associations Institute (CAI) (and its Lawyers Council), CBA Real Property Section could be resources for that education.

b. Existing construction (including where development rights allow construction of additional buildings and units):
   i. Inclusion of restrictions in the Declaration presents an issue because amendments generally require a 67% vote of unit owners.[4] That percentage is typically difficult to achieve and involves not only effort but expense. This is why Declaration amendments by unit owners are rare and reserved for major changes. This inertia might be ameliorated where the community is built out and then the impact is discovered so there would be an incentive for the community to be able to take advantage of reduced remediation requirements if a restriction were in place.
   ii. Because the rights reserved for addition of units to a community is almost exclusively limited to creation of units and common elements and adjustments of allocated interests, a declarant (developer) would not have the right unilaterally to amend the Declaration to include the restrictions.
   iii. As a general principle, a unit owner or homeowner's association, acting by its board of directors, has the right to grant easements[5]. Standard documents do not limit that right. So, use of an environmental restriction in that situation could suffice to impose the restriction without the need to amend the Declaration.

4. There are concerns about the expectations of DEEP that require "active management" of properties by an association or property manager. Restrictions are not self-executing, and one should not assume that even the most meticulous professional manager will be aware of or inclined to do more than oversee general grounds care and maintenance. Although one could expect that the manager would see to it that the grounds are maintained to the standard required by the community. The level of care in any community will be driven in large part by the annual budget approved by the board of directors and unit owners of the community. While it can be assumed that grounds care and maintenance will be adequate as it impacts values of units, consideration might be given to a right of DEEP to inspect the restricted property for conformance to the requirements of the restriction, with a right to cure non-compliance at the expense of the property owner.

5. There are many, usually small, communities which are self-managed. It might not be appropriate to assume that the same attention would be paid to the property by a part-time non-professional manager as a professional manager. One size probably does not fit all.

6. Multifamily properties other than common interest communities.

   a. Leasing agreements could require that tenants and other occupants observe the restrictions. That alone is not enough. The restrictions should be recorded on the land records to bind the owner and subsequent owners of the property. Especially with regard to proper grounds care and maintenance.

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[4] CIOA §47-236 (a)
[5] CIOA §47-244(a)(9)

b. As noted above, a robust signage program should be required to give as much notice to the occupants as possible because, as a practical matter, not all of the occupants will be aware of the lease terms.

7. The multifamily rental property would have the same drawbacks with regard to "active management" as the common interest community – e.g., the level of active management by the owner or third-party property manager and the level of funding provided for grounds care and maintenance.

8. RCSA § 22a-134tt-1(a)(10) should include references to chapters 400b, 825, and 828 of the General Statutes for community association managers, condominium associations, and unit owners' associations.

9. It is not clear whether the intent of § 22a-134tt-1(a)(94) is to include units in a common interest community in the definition. If not, a more detailed definition of a parcel containing land and a specific exclusion of units that do not contain land are needed.

10. It probably will be preferable to refer to unit in a condominium or other common interest community in § 22a-134tt-1(a)(127).

11. The reference in § 22a-134tt-9(b)(2)(C)(iii) should be to a declaration for any common interest community under the CT Common Interest Ownership Act and to declaration or bylaws for any condominium under chapter 125 of the General Statutes, whether the Unit Ownership Act of 1963 or the Condominium Act of 1976.

12. Responsibilities of a unit owners' association or condominium association under the documentation should be set forth in detail in the declaration or bylaws, as applicable. It is too likely that volunteer boards will not be aware of these requirements if they are not in the governing documents.

13. We had serious doubts as to whether residential homeowner/unit owners' associations will have the resources to discharge their new obligations under the statute and these regulations, and unit owners may reject budgets and special assessments that impose the costs of compliance on them. A provision such as Subsection 47-253(e) of chapter 828 is necessary for the statute and regulations. A revised version could read:

    " No member of the executive board or officer of the association shall be subject to criminal liability for an alleged violation of the Fire Safety Code, the State Building Code, chapter 445b of the General Statutes, regulations promulgated under chapter 445b, or a municipal health, housing or safety code when, pursuant to subsection (b) of section 47-261e, the executive board of an association proposes a special assessment to cover the cost of the repairs necessary to ensure compliance with the terms of such codes and the special assessment is rejected by a vote of the unit owners."

14. For reference, resale certificates must provide limited disclosures of matters under chapter 445. Under subsection (a) of section 47-270 of CIOA, a resale certificate must contain:

    a. a copy of any notice recorded on land records pursuant to applicable municipal land records of any environmental use restriction, as defined subsection (a) of section 22a-134i; and

    b. a statement that provides the volume and page number from the in section 22a-133n, that encumbers the parcel or any portion of the parcel on which the common interest community is located.

Respectfully submitted,
Christopher K. Leonard, Esq.
Gregory W. McCracken, Esq.
Douglas S. Pelham, Esq.
James Zimmer, Esq.

Comments of Released-based Working Group Subcommittee 1 (Discovery)
on Draft Release-Based Regulations
March 5, 2024

Under the draft proposed Released-Based Cleanup Regulations ("RBCRs"), the obligation to investigate/characterize, and potentially remediate, an existing release does not exist until such existing release is discovered. As such, the concept of "discovery" is critically important; it is the gateway to the new RBCR program. For that reason, there should be no uncertainty as to when a release is discovered.

The language that has been proposed by the Department of Energy and Environmental Protection ("DEEP") includes many of the key concepts proposed by Subcommittee 1. As drafted, however, we believe the proposed language will cause confusion as to when discovery that requires further evaluation has occurred. As discussed further below, we recommend that DEEP accept the revised text we have prepared, attached.

We recognize that there has been much discussion around the impact of "discovery" of a release, but also recognize that the framework is intended to only require reporting and/or remediation when discovered releases meet certain criteria – such as exceeding specified concentrations or revealing the presence of non-aqueous phase liquid. Therefore, to ensure that "discovery" is better defined, we are comfortable with language that results in a release being "discovered," as long as the requirements to characterize a release are more appropriately tailored and do not require extensive sampling to "prove the negative," which was the most frequent criticism of the Transfer Act; if a conceptual site model would suggest that no further investigation is needed to determine that a discovered release does not need remediation or reporting, then the program has worked. It is with that disclaimer that we are comfortable with the proposed changes to the "discovery" provisions of the RBCR.

(i) Proposed Language

The proposed RBCRs distinguish between "actual knowledge" of a release and "constructive knowledge" of a release.[1]

Specifically, "actual knowledge" is deemed to exist when the creator or maintainer of the release "know[s] of the presence of substances in or on the land or waters of the state" as evidenced by the results of laboratory analysis "indicating concentrations of such substances above the laboratory reporting limit" or "the observed presence of non-aqueous phase liquid" provided that such substance is not present because it is "naturally occurring, or is a result of automotive exhaust or the application of fertilizer or pesticides consistent with their labeling," because these circumstances are not "releases".[2]

[1] Draft RBCRs § 22a-134tt-2(a)(2) and (3).
[2] Draft RBCRs § 22a-134tt-2(a)(2).

The proposed description of when a "creator" or "maintainer" has "constructive knowledge" is also problematic. It appeared to affirmatively require sampling to prove the absence of a release – essentially to turn suspicion into "actual knowledge". That is not "constructive knowledge." Constructive knowledge is in fact knowledge, legally, and occurs when someone "should have known" something occurred – but it is still knowledge.

In taking the time to work through the concepts of actual and constructive knowledge, the Subcommittee wanted to ensure that willful blindness by a "creator" or "maintainer" did not allow that person to claim they did not "know" about a release. While we appreciate the Department's effort to try to capture in the regulatory language the concepts of "actual" and "constructive" knowledge discussed at length by the members of the Subcommittee to address this concern, we found that trying to put that distinction into definitions difficult at best. For example, the idea that sampling would turn "constructive knowledge" into "actual knowledge" is inconsistent with how those legal terms are generally understood. Both "constructive knowledge" and "actual knowledge" are knowledge – the basis for the knowledge is just different. To that end, we think it is simpler to just define "knowledge" and to be specific about which circumstances or conditions constitute knowledge.

This actual/constructive distinction is also shown to be problematic when considering potential reporting deadlines. The proposed draft regulations separately define actual and constructive knowledge and provide a mechanism (sampling) whereby constructive knowledge becomes actual knowledge. However, the trigger for deadlines for reporting is specified as actual knowledge; this creates a scenario whereby a deadline could have passed before someone obtained "actual knowledge," a nonsensical scenario. Eliminating the distinction between the two corrects this situation.

We do note that, echoing Conn. Gen. Stat. § 22a-134rr(b), the draft RBCRs specify that "a release shall not be deemed discovered if the only evidence of such release is data available or generated before the date when regulations are first adopted pursuant to section 22a-134tt."[3] As we have redefined "knowledge" in the attached, "data" should be understood to include not just numerical data from laboratory tests, but also information gleaned from the number of sources that, together, could constitute knowledge. For example, newly observed stains may be one of several multiple lines of evidence that amount to knowledge, but an old report noting staining would not.

(ii) Suggested Revisions

We suggest that the Department seriously consider the revisions proposed, which have been provided to DEEP under separate cover and are attached hereto. We firmly believe that these revisions will address the concerns with the "actual knowledge" / "constructive knowledge" described above. To the extent that the Department does not adopt these revisions, we suggest that the Department schedule additional discussions with Subcommittee 1 to develop acceptable alternate language.

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[3] Draft RBCRs § 22a-134tt-2(a)(1), lines 687-89. Conn. Gen. Stat. § 22a-134rr(b) provides that "[a] release shall not be deemed discovered if the only evidence of such release is data available or generated before the date when regulations are first adopted pursuant to section 22a-134tt."

Section 22a-134tt-2 Discovery of Releases

(a) Discovery of an Existing Release

(1) ~~Except as provided in subsection (b) of this section, d~~Discovery of a release ~~to the land and waters of the state~~ occurs when a person who created or is maintaining a release has ~~actual~~ knowledge ~~or constructive knowledge~~ of such release, except that a release shall not be deemed discovered if the only evidence of such release is data available or generated before the date when regulations are first adopted pursuant to section 22a-134tt.

(2) A person who created or is maintaining a release has ~~actual~~ knowledge of a release if they become aware of~~they know of the presence of substances in or on the land and waters of the state. Actual knowledge of a release shall include, but shall not be limited to, knowledge of a release on the basis of either~~:

(A) The results of laboratory analysis of soil, groundwater, sediment, or soil vapor~~, obtained by or at the direction of the person who created or is maintaining the release or the commissioner,~~ indicating concentrations of such substances above the laboratory reporting limit; or

(B) The observed presence of non-aqueous phase liquid; or

~~provided such substance is not present because it has been authorized under Title 22a of the Connecticut General Statutes, is naturally occurring, or is a result of automotive exhaust or the application of fertilizer or pesticides consistent with their labeling.~~

~~(3) A person who shall be presumed to have discovered a release if such person, when taking into account any specialized knowledge or training, has actual or constructive knowledge of a release and, if such release exists, would be considered to have created or be maintaining such release.~~

~~(A) Such a person shall be considered to have constructive knowledge when:~~

~~(i) a reasonable person, with similar knowledge, experience or training, exercising a reasonable degree of care a person would exercise in the same or similar circumstances, would have discovered a release; or~~

~~(B)~~(C) multiple lines of evidence indicating ~~a release exists~~~~the presence of oil or petroleum or chemical liquids or solids, liquids, or gaseous products or hazardous waste, as defined in section 22a-448 of the Connecticut General Statutes, in or on the land and waters of the state~~. Such evidence may include, but shall not be limited to:

(I) information about the use of a particular geographic area, including anecdotal reports of historical disposal or releases, aerial photographs, and maps;

(II) the results of field screening indicating the presence of volatile organic compounds, petroleum hydrocarbons, or metals;

(III) observed staining of soil, concrete floors, or pits;

(IV) organoleptic evidence, including odors;

(V) indoor air samples indicating the intrusion of soil vapors; or

~~(V)~~(VI) the observed presence of asphalt, coal slag, solid waste, ash, or other non-native materials in or on the land and waters of the state ; ~~or~~

~~such person has been notified, pursuant to subsection (b)(2) of this section, that characterization of a release has identified the source of such release, and such source is under the control of a person who created or is maintaining such release.~~provided such substance is not present because it has been authorized under Title 22a of the Connecticut General Statutes, is naturally occurring, or is a result of automotive exhaust or the application of fertilizer or pesticides consistent with their labeling.

~~(C) A person with constructive knowledge of a release, and who would be considered to have created or be maintaining such release, shall bear the burden of rebutting the presumption that a release has been discovered.~~

~~(i) The presumption that a release has been discovered shall only be rebutted when a person with constructive knowledge obtains laboratory analytical data, based on the collection of samples from representative locations, which demonstrates that any substance reasonably likely to have been released in the geographic area identified is not present in or on the land and waters of the state in the identified geographic area. Such data shall be collected and analyzed pursuant to sections 22a-134tt-1(d) and 22a-134tt-4 of the RBCRs.~~

~~(ii) If the presumption that a release has been discovered is not rebutted, the release shall be considered discovered on the day the person who created or is maintaining such release first had constructive knowledge of the release and shall be subject to the requirements of the Release-Based Cleanup Regulations.~~

(b) Existing Releases Discovered by the Commissioner or Other Persons

~~(1) If the commissioner determines a release exists in a certain geographic area on the basis of the results of laboratory analysis of soil, groundwater, sediment, or soil vapor indicating concentrations of substances above the laboratory reporting limit, and provides such data to the person who created or is maintaining the release, such person will be considered to have actual knowledge of the release, pursuant to subsection (a)(2) of this section.~~

~~(2)~~(1) If characterization of a release performed pursuant to the requirements of section 22a-134tt-4 of the RBCRs has identified the source of such release, and information regarding such characterization, including the results of laboratory analysis of soil, groundwater, sediment, or soil vapor, indicating concentrations of such substances above the laboratory reporting limit, is provided to any person who would be considered to have created or be maintaining a release by the person performing such characterization, the person who would be considered to have created or be maintaining a release shall have constructive knowledge of such release pursuant to subsection (a)(3) of this section.

(c) Discovery of a Significant Existing Release

In addition to the provisions of subsection (a) of this section, a significant existing release is discovered

when any person~~, taking into account any specialized knowledge or training possessed by such person, authorized or otherwise permitted by the person who created or is maintaining a release to access a specific area for any purpose,~~ obtains ~~actual~~ knowledge~~, pursuant to the standards identified in subsection (a)(2) of this section, or constructive knowledge, pursuant to the standards identified in subsection (a)(3) of this section,~~ of a significant existing release ~~requiring immediate action~~.

~~subsection (a)(2) of this section, or constructive knowledge, pursuant to the standards identified in subsection (a)(3) of this section, of a release requiring immediate action.~~

(d) Existing Releases from Regulated Underground Storage Tank Systems

If the source of a release is or was an underground storage tank system regulated by the underground storage tank system regulations adopted pursuant to section 22a-449(d) of the Connecticut General Statutes, such release shall not be considered to have been discovered for the purposes of the RBCRs.

(e) Discovery of Emergent Reportable Releases

Any release to the land and waters of the state required to be reported by regulations adopted pursuant to section 22a-450 of the Connecticut General Statutes shall be considered to be discovered and shall be subject to the requirements of the RBCRs, unless otherwise exempted from discovery by subsection (d) of this section.

(f) Naturally Occurring Metals at the Time of Discovery

(1) If the laboratory analytical results of soil samples identify the presence of one or more metals listed in the following table, each metal shall be considered naturally occurring if:

(A) the concentration of such metal in each sample analyzed is less than or equal to the low value listed in the following table that corresponds to such metal;

(B) Not less than 3 samples of soil have been analyzed and the concentration in any 1 or more samples analyzed is greater than the low value listed in the following table that corresponds to such metal but the concentration in each sample analyzed is less than or equal to the high value in the following table that corresponds to such metal;

(C) Not less than 5 samples of soil have been analyzed and the concentration in any 1 or more samples analyzed is greater than the high value listed in the following table that corresponds to such metal but the concentration in each sample analyzed is less than or equal to the residential direct exposure criteria for such metal, provided an outlier analysis has been performed and any sample determined to be an outlier is evaluated to determine whether such sample has resulted in the discovery of a release;

(D) Not less than 7 samples of soil have been analyzed and the concentration in any 1 or more samples analyzed is greater than the residential direct exposure criteria for such metal, provided an outlier analysis has been performed and the results of the laboratory analysis of all soil samples analyzed is provided to the commissioner, and the commissioner determines in writing that, in the commissioner's sole discretion, the identified metal is naturally occurring; or

(E) The identified metal is determined to be background using a method other than the methods specified in this subsection, provided such method is submitted to the commissioner in writing and the commissioner, in the commissioner's sole discretion, approves of the use of such method.

March 7, 2024

Graham Stevens
Brendan Schain
Connecticut Department of Energy & Environmental Protection
79 Elm Street
Hartford, CT 06106

Re: <u>Subcommittee 2: Comments on Reporting Newly Discovered Existing Releases</u>

Dear Graham and Brendan:

On behalf of the undersigned members of "Subcommittee 2," we appreciate your and many others countless hours and continued commitment to developing what we all hope will be an effective and workable release-based cleanup program (RBCP) through the eventual implementation of the release-based cleanup regulations (RBCRs).[1] We also appreciate that several of the concepts discussed in our "*Reporting Newly-Discovered Historical Releases Concept Paper*," dated June 11, 2021, were incorporated into DEEP's initial draft of the RBCRs.

That said, certain key concepts and suggestions included in our paper do not appear to have been incorporated into § 22a-134tt-3 of the draft regulations. To further assist DEEP and DECD in realizing the legislature's goal (pursuant to PA 20-9) for the RBCP to both (i) adequately protect human health and the environment and (ii) facilitate economic development, we respectfully request DEEP reconsider all the concepts and recommendations discussed (in some instances in detail) in our paper. While the below is not an exhaustive list of the relevant issues, we highlight the below key points.

Please note that considering the interrelatedness of the regulatory provisions (particularly with respect to discovery, reporting and characterization), we have not endeavored to provide proposed revisions to the current draft of § 22a-134tt-3. However, we remain willing and committed to continue working with DEEP, DECD, the Working Group and other stakeholders to help develop workable regulations addressing the reporting of newly discovered existing releases (NDERs). To that end, we are available to discuss revisions to the draft language as the process moves forward.

<u>Refine reportable concentrations</u>

We encourage DEEP to incorporate a clearly defined lower bound quantitative criteria such that if contamination was identified through sampling of environmental media below that lower bound, no reporting or further characterization would be required. We propose that providing a "floor" would provide more certainty (and thereby help facilitate economic development and put Connecticut on more equal footing with other states, like Massachusetts) without unduly negatively impacting the RBCP's ability to protect human health and the

[1] We also appreciate DEEP's development of many new three- and four-letter acronyms ("TLAs" and "FLAs," respectively) that we all can now work into our regular parlance. 😊

environment. In short, not every sample result above a laboratory reporting limit should trigger further investigation.

While we acknowledge that a sample result indicating a low level of contamination (e.g., above a default RSR cleanup criteria but less than 2X the relevant criteria) may be the "edge of a release," similar to other neighboring state programs, the entire RBCP is premised on the concept that market forces (e.g., buyers performing due diligence, lender requirements, owner's desiring to perform cleanups pursuant to a brownfield program) will drive investigations and uncover material environmental conditions that would, once identified, be required to be cleaned up pursuant to the RBCP. Accordingly, we suggest that the same concept apply to discoveries of what could be (and often are) de minimis conditions that do not pose a material risk to human health or the environment.

That is, the market can and, for the most part, should drive whether additional investigation would be appropriate in the event contamination is identified below a particular reportable concentration (that is tied to risk).[2] Otherwise, requiring further investigation/characterization of *any* contamination at *any* concentration above the default RSRs or APS (or potentially simply above laboratory detection limits) would create the risk of institutionalizing (once again) a situation where the regulated community would be required to "prove the negative," which many believe is one of (if not the) biggest faults in the Transfer Act. Said another way, requiring the regulated community to spend thousands of dollars (potentially hundreds of thousands of dollars) to chase low levels of contamination that are often ultimately determined to not be a risk to human health or the environment should be avoided.

Scope of two-hour reportable SERs

We suggest that DEEP reconsider the scope of what would be considered a two-hour reportable SER to be focused specifically and narrowly on those releases that really would be considered an imminent hazard or create a significant risk to human health or the environment and to align with our neighboring states. As proposed under the current draft of the RBCRs, too many scenarios could arise that would trigger a two-hour reportable SER condition without an appropriately corresponding benefit to human health and the environment, including situations that would not currently require a report within two hours under Conn. Gen. Stat. § 22a-6u (the existing Significant Environmental Hazard statute).

Reporting two-hour SERs

We request DEEP reconsider the requirements, timing and process for satisfying reporting requirements associated with two-hour reportable SERs when discovered by a person that is not the maintainer or creator. We recognize DEEP's effort to appropriately allow for third

[2] While there may continue to be disagreement between certain members of the regulated community and DEEP, we understand that DEEP's stated position is that owners of properties have cleanup liability for any condition at or migrating from their site above the default cleanup standards in the RSRs. Incorporating a clearly defined "floor" for requiring further investigation under the RBCRs would not itself provide owners (or anyone else for that matter) with an affirmative release from liability associated with that condition so should not be in conflict with DEEP's stated position.

parties (including LEPs) to notify their client rather than be required to report directly to DEEP. However, the mechanics of the reporting requirements as drafted in § 22a-134tt-3(c) are "clunky" (which we appreciate DEEP may already recognize). The reporting requirements also could be impossible to achieve within the allotted timeframes proposed in the current draft.

To that end, we suggest DEEP consider revising the relevant provisions to at least provide flexibility for persons that are unable to notify the appropriate party within the allotted time frame, assuming the obligated party uses commercially reasonable efforts under the circumstance to do so. That is, we propose DEEP provide language in the regulations that provides the regulated community with assurance/comfort that failure to make a notification or report within an allotted time frame would not result in a de facto violation of the law that could subject the person to DEEP enforcement, including potential fines/penalties.

Opportunity to correct, retract and update reported information

As discussed in our concept paper, where limited/incomplete data or information is available, the RBCP should still allow for reporting and provide simple, self-implementing mechanisms to amend or withdraw a report as additional and/or more reliable information becomes available. Other than with respect to 2-hour reportable SER conditions (in § 22a-134-tt-3(b)(1)(B)), this concept appears to be absent from the current draft of the proposed regulations. The regulations should account for the inevitability of situations where not all information is available at the time of the relevant reporting deadline, including with respect to 72-hour reportable conditions, or even 120 or 365-day reportable NDERs.

To that end, we suggest the regulations include language that provides the regulated community with assurance/comfort that failure to provide all relevant information after commercially reasonable efforts are made would not result in a de facto violation of the law that could subject the person to DEEP enforcement, including potential fines/penalties

Professional ethical obligations/limitations regarding confidentiality

While we understand from recent discussions with DEEP that the intent of the reporting obligations is not to require an attorney, LEP or other licensed professional to violate any professional rules or ethical obligations vis-à-vis its client (or generally), as drafted, the language could be interpreted to create a conflict between the duty of confidentiality owed to clients by attorneys, in particular, and notification obligations associated with certain SERs. We understand this issue already is on DEEP's radar and request that the issue be more squarely addressed and resolved in the next draft of the proposed RBCRs.

NDERs on Transfer Act Sites

The last line in § 22a-134-tt-3(d)(2)(B) seems to say that NDERs identified on Transfer Act sites that have not yet been verified can be addressed through the Transfer Act program (as part of a final verification), but that doing so would foreclose the opportunity to request an extension of the default statutory schedule for achieving verification under the Transfer Act. Transfer Act sites often take more than 8 years to achieve verification and schedule extension

requests can be necessary and appropriate to avoid potentially being in violation of the Transfer Act's default deadlines. Persons that choose to address an NDER as part of an ongoing sitewide Transfer Act driven investigation/remediation should not be penalized for doing so by being foreclosed from the opportunity to request an extension of time to meet the default deadlines under the Transfer Act.

Respectfully submitted,

The below members of Subcommittee 2:

Aaron D. Levy, Esq., Shipman & Goodwin LLP, alevy@goodwin.com
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March 7, 2024

Graham Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm St.
Hartford, CT 06106

RE: Comments by Members of Subcommittee 3 on Characterization

Dear Graham and Brendan,

This letter has been prepared by the undersigned members of Subcommittee 3 (Characterization). While we appreciate the efforts of Department staff and numerous stakeholders to date, we note that the proposed characterization requirements set forth in Section 4 of the draft release-based cleanup regulations ("RBCRs") depart from existing prevailing standards and guidelines, as promulgated by the department pursuant to the Site Characterization Guidance Document. Notably, the concept of "full characterization," which contemplates sampling of a release area to the point of non-detection, is not only uneconomical but unnecessary and, in some instances, practically impossible.

In addition to the comment above regarding full characterization, set forth on Attachment A are our comments related to characterization requirements in Section 4 of the RBCRs. We understand from various discussion meetings that the Department is willing to depart from the requirement of "full characterization" as currently set out in the draft RBCRs. We are happy to hear that, as a more practical definition is critical to the success of the program.

Once the Department has reviewed our suggested revisions, we would like to discuss them with you in order to get a fuller understanding of each other's perspectives. We note that some of the recommendations in our concept paper that we thought were important were not captured in the RBCRs (two in particular being consideration of potential risk that a release may or may not pose and references to background, especially anthropogenic background). Therefore, we would like an opportunity to revisit a few of those recommendations. We also note that many of us have participated in the comment process of other subcommittees, some of which contemplate changes that will in turn cause some of our comments to be rendered inapplicable, and some of which may lead to new comments depending on what the Department accepts. Accordingly, we look forward to continuing productive discussions.

Respectfully submitted, the undersigned members of Subcommittee 3:

Gail L. Batchelder, LEP (Co-chair)
Emily C. Deans, Esq.
Douglas S. Pelham, Esq. (Co-chair)
Jonathan H. Schafer, Esq.
Andrew R. Zlotnick, LEP

c: Katie Dykes, Commissioner
Emma Cimino, Deputy Commissioner

Attachment A: Table of Comments to § 22a-134tt-4
Characterization of Discovered Releases

Comments to 22a-134tt-4 Characterization of Discovered Releases

Section[1]	Comment	Proposed revision
1(a)(48)	Modify to state that this means characterization necessary to validate a conceptual site model. This is not necessarily delineation of a release to the point at which it is no longer detected, but instead sufficient characterization to distinguish consistently declining trends to values that are sufficiently below the standard to illustrate that that criteria will not be exceeded outside the limits of the sampled area. Furthermore, in some circumstances characterization to non-detect will be impossible, e.g. in cases where contamination is present due to widespread polluted fill, historical coal ash contamination, and/or historical pesticide application. We note however that the definition of Tier Characterization contains exceptions for pesticides and historically impacted material.	Replacement definition: "completion of a conceptual site model for that release, except . . ." [add exceptions from Tier Characterization; add exception for widespread polluted fill and coal ash?]; NB: the definition of "conceptual site model" includes the concept of validated three-dimensional release, fate and transport, and pathway to receptors.
1(a)(152)	Consider eliminating the concept of Tier Characterization and just have one characterization endpoint as described in the last comment. Characterization to a concentration of 50% of the applicable standard is arbitrary and may be unnecessary when a valid conceptual site model is nonetheless achieved, and impossible in some circumstances as set forth above. Furthermore, the applicable standard is, by default, the most stringent cleanup standard unless an EUR or other institutional control is in place, which is rarely the case at the time characterization is being performed. Therefore Tier Characterization could lead to unnecessary expense.	Require characterization to be completed in the first year after discovery of the release. This eliminates a complexity in the regulation. Possibly add an extension for characterization for complex releases such as chlorinated solvents in bedrock.
4(a)(1)	Delete the second sentence. The third sentence more aptly captures the requirement. Characterization and determination of the appropriate remedial action do not necessarily proceed linearly, and the second sentence is therefore gratuitous and unnecessary. For example, in an immediate removal action, the focus is likely to be upon mitigation and remediation, with characterization occurring after an immediate action transition point as set forth in §5(h).	N/A

4(a)(2)(A)	Add recognition of the need to reference background to the list of items to be evaluated, including anthropogenic impacts.	(vii) Review of CT DEEP published naturally occurring and anthropogenic background concentrations of substances.
4(a)(2)(B)	Delete the clause "shall identify those releases for which a full characterization is not required and". This is inconsistent with §4(a)(4) and suggests that a corner is being cut. The last part of the language of §4(a)(2)(B) more aptly captures the requirement: the Commissioner can specify the extent of information necessary, which may be less in some circumstances, but nonetheless is still adequate to develop and validate the conceptual site model.	N/A
4(a)(3)	Delete. This is an unnecessary statement because it's more fully described in §6 . See also comment above regarding the need for Tier Characterization.	N/A
(4)(b)(1)	This provision is potentially in conflict with the requirements of the administrative procedures act because it allows the department to dictate requirements without the benefit of notice and comment. Therefore at a minimum a notice and comment period should be allowed.	Add: Before posting materials on the website, the department shall provide for a notice and comment period of not fewer than thirty (30) days regarding such materials, and shall make appropriate revisions based on comments received.
4(b)(4)	This provision seems contrary to §4(a)(4) with regard to characterization by a PEP. Which governs PEPs, §4(a)(4) or §4(b)(4)?	N/A
[1]All references are to 22a-134tt		

March 7, 2024

Graham Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm St.
Hartford, CT 06106

RE: Subcommittee 6 Comments on Draft Release-Based Regulations

Dear Graham and Brendan,

This letter has been prepared by the undersigned members of Subcommittee 6 (Modifications of Clean-Up Standards for Lower-Risk Releases). We thank Department staff for taking the time to meet with some of the signatories to this letter on February 27, 2024 and for engaging in a productive conversation on the topics we cover in this letter. We look forward to continuing productive engagement with the Department as these concepts and others as the draft release-based cleanup regulations ("RBCRs") are further refined.

The existing draft RBCRs do not contain a clear definition of which reportable releases are subject to the RBCRs and which are not. Any release "to the land and waters of the state required to be reported" under the spill regs at RCSA § 22a-450-1 et seq. "shall be considered to be discovered and shall be subject to the requirements of the RBCRs" unless an exemption applies.[1] The statutory definition of "land and waters of the state" is "all waters, as defined in section 22a-423, and any land surface, including improved or unimproved surfaces, soils or subsurface strata."[2] Since "land and waters of the state" includes "improved surfaces" it clearly includes surfaces other than the natural land surface, and might include a concrete pad, asphalt-paved parking lot, or indoor vinyl floor.

In other words, under the draft RBCRs, even a release of a low-risk substance like dish soap (a "chemical liquid"[3] and therefore a "reportable substance"), at a low quantity (1.5 gallons) to an improved surface ("land and waters of the state") is subject to the RBCRs. Since all releases that must be closed under the RBCRs must be closed by a PEP or LEP, this would require even our dish soap example (which poses essentially no risk) to be closed by an LEP or PEP. This would be an enormous burden on the regulated community. We also understand from various question-and-answer sessions that Department staff have held that the Department does not intend this result.

A potential solution would be to define the term "improved surface" to make it clear that some improved surfaces (like the vinyl floor of the local supermarket) are not considered "land and

[1] Draft RBCRs § 22a-134tt-2(e).
[2] Conn. Gen. Stat. § 22a-134pp(3).
[3] "'Reportable material' means any of the following: a chemical liquid, a solid, liquid or gaseous product, hazardous waste, or oil or petroleum, in any form, i.e., solid, liquid, semi-solid or gaseous. 'Reportable material' does not include radioactive materials, potable water or water vapor." RCSA § 22a-450-1(35). "'Chemical liquid' means any chemical, chemical solution or chemical mixture in liquid form." RCSA § 22a-450-1(2).

waters of the state" and therefore certain releases would not be subject to the RBCRs. We do not favor this approach, however, because no flooring system is perfectly impermeable, and we have all worked on sites with significant contamination caused by releases indoors. If "improved surface" is defined to exclude anything indoors, for example, then some potentially high-risk releases would be excluded from the RBCRs. In that context, we have prepared proposed revisions, which are attached hereto as Attachment A. Instead of defining "improved surface" the proposed language identifies which releases reportable under the spill regs are deemed not to have reached the "land and waters of the state" through a clarification to the "discovery" provisions of draft RBCRs § 22a-134tt-2(e) (which serves as the funnel from the spill regs into the RBCRs).

As a related topic, we note that our charge included a directive to discuss modifications of clean-up standards for lower-risk releases. In our paper, we suggested that PEPs and LEPs should be able to close some releases with no analytical sampling,[4] or minimal analytical sampling.[5] We note that § 22a-134tt-5(d)(1) (required immediate actions) requires the immediate actions to include "removing from the land and waters of the state…an emergent reportable release." We suggest that the Department build upon that section to make it clear how one is to document that a release has been "removed" especially in those situations where such removal will be enough to fully address the release.

Once these and other concepts are further developed, we reserve the right to comment further. Thank you for your consideration.

Members of Subcommittee 6:

Scott Burrus
John Ellis
Marilee Gonzalez
George G. Gurney
Sam Haydock
Matthew E. Hackman
David Mark Lis
Emilee Mooney Scott
Amy Velasquez
Tim Whiting
David Williams

[4] Subcommittee 6 Concept Paper (Mar. 31, 2022), at 4-5.
[5] *Id.* at 6.

Attachment A: Revisions to § 22a-134tt-2(e) Discovery of Emergent Reportable Releases

Any release to the land and waters of the state required to be reported by regulations adopted pursuant to section 22a-450 of the Connecticut General Statutes shall be considered to be discovered and shall be subject to the requirements of the RBCRs, unless otherwise exempted from discovery by subsection (d) 784 of this section. Releases required to be reported by regulations adopted pursuant to section 22a-450 of the Connecticut General Statutes shall be deemed not to be releases to the land and waters of the state, and shall not be subject to the requirements of the RBCRs, if:

(A) The release occurs to the air, or

(B) The release:

(i) occurs to the interior of a structure and does not come into contact with soil, or occurs to a properly functioning secondary containment system; and

(ii) Substantially all of the material released is removed from any surface(s) to which it was released within two hours after discovery.

March 7, 2024

Graham Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106

Re: Subcommittee 8: Comments/Recommendations on Draft Release-Based Cleanup Regulations

Dear Graham and Brendan,

The undersigned members of Subcommittee 8—Clean-up Completion Documentation, Verifications, and Audit Frequency and Timeframes—are pleased to provide the following comments and recommendations on pertinent sections of the draft release-based cleanup regulations ("RBCRs"). We thank Department staff for taking the time to convene with some of the signatories to this letter on February 29, 2024 and for engaging in a productive conversation on the topics we cover herein. We look forward to continuing productive engagement with the Department on these concepts and others as the draft RBCRs are further refined.

22a-134tt-11 – Certification and Verification

Subcommittee 8's Concept Paper suggested considering the ability of a property owner/qualified site personnel or representatives, or first responders to certify to certain types of release scenarios, i.e., a different/less burdensome option for low risk/quickly addressed releases. The Department has introduced the Permitted Environmental Professional ("PEP") concept and indicated that this is intended to cast a wide net over who can certify to releases, and clarified that one must be a permitted PEP in order to certify under the RBCRs (i.e., no other person associated with the operations / property will be authorized to make a certification/address a release unless they obtain a PEP permit pursuant to C.G.S. § 22a-454). The Department has further indicated that to limit requirements for no risk/contained/quickly addressed releases ("no risk releases"), it intends to clarify certain definitions and concepts so that certain releases will not be considered "releases to land and waters of the state" and thus, will not be subject to the RBCRs, and only the spill reporting regulations adopted under C.G.S. § 22a-450 (the "spill regulations"). While we support and agree that the intended clarifications will be helpful, we provide the following comments:

- Excluding no risk releases from the RBCRs, but which are still subject to the spill regulations will create a disconnect and not solve the current experience of having a "closed" spill record that lacks meaning. While we agree site operators/owners (i.e., non-PEPs/LEPs) should be able to address and close these situations, consider whether provisions should be added to clarify the finality/sufficiency of actions taken for such releases that may still be reportable under the spill regulations.

- For no risk releases that will not be subject to the investigation/remediation requirements of the RBCRs, it may still be advisable to clarify who the appropriate responders can be (non-22a-450-permitted site operator/owner) and what actions will give rise to meaningful and affirmative "closure." Notably, we believe this can be achieved in harmony with important revisions being suggested by Subcommittee 6, which will exclude certain releases reportable under the spill regulations from the RBCRs. To supplement and enhance these clarifications, we suggest the RBCRs include provision(s) regarding this category of "excluded" releases insofar as to create a "closure" framework the regulated community can rely upon. By way of a suggested starting point, such provision could provide a closure mechanism/filing, reiterate the parameters required for such scenarios, and provide that submission of same documenting required steps were taken shall mean that "no further action shall be required."

- The Department should consider the role an in-house LEP (e.g., at a utility company) can play in certifying release closure. It seems counterintuitive that an in-house PEP can certify closure of releases caused by a company, but an in-house LEP, with superior credentials, cannot.

22a-134tt-12 – Release Remediation Closure Report

Subcommittee 8's Concept Paper had suggested varying/less burdensome closure documentation requirements for lower risk categories of releases, as well as an on-line dynamic fillable form for ease of use and adaptability to varying scenarios. The RBCRs create a "release remediation closure report" concept with basic content provisions and expectations for same. The Department has clarified to Subcommittee 8 that it intends to add more specificity regarding contents of the release remediation closure report, and that the varying requirements based on type and severity of release will be dictated by the applicable substantive (transplanted) RSR provisions. The Department has further clarified that it will include release remediation closure report references in the substantive RSR provisions to more clearly link and identify the closure documentation requirements. Lastly, the Department has clarified that it envisions the "release remediation closure report" to be a "cover" type form (akin to current Verification forms) to collect basic / succinct information and be adaptable, requiring different degrees of information and attachments based on the nature and situation of the release. A "light touch" is intended for less complicated releases.

Subcommittee 8 agrees with and supports the Department's intended clarifications, and to this end supports adding more specificity to §22a-134tt-12, as well as appropriate references within the transplanted RSR sections, to create clearer expectations for required closure documentation. Subcommittee 8 further agrees that a "light touch" will be appropriate for lower risk/less complicated releases, and clarifications specifying this lighter touch should be made accordingly.

Subcommittee 8 recommends the release remediation closure report form(s) be provided as early in the process as feasible during the regulation drafting/adoption process so that more substantive and meaningful stakeholder review can be conducted.

Subcommittee 8's Concept Paper recommended that the Department maintain a public-facing database of all report / release records to ensure availability and access, including an electronic file room, GPS search functionality, and a mobile / web app. The Department has indicated it is aligned with these goals, though cannot commit based on resource concerns. Subcommittee 8 continues to recommend, at minimum, that the Department require all release records be available in the CTDEEP online portal or such other easily accessible electronic document repository, with appropriate tagging/search functionality.

Subcommittee 8's Concept Paper had recommended that records retention be required of the site owner, responsible party, as well as the consultant, and also that retention can be electronic without the need for physical copies. Subcommittee 8 therefore recommends the following specific clarifications to the draft RBCRs (suggested addition emphasized):

> 22a-134tt-12(4): "Be retained by the person who created or maintained such release***, and the parcel owner if different from such person,*** for not less than 10 years, and, if not submitted previously to the commissioner, be submitted to the commissioner not more than 30 days following a request in writing for submission***. The release remediation closure report may be retained electronically***; . . ."

Additionally, Subcommittee 8 recommends that records maintenance apply to any and all final release records generated as a result of the requirements of the RBCRs.

22a-134tt-13 – Audits

Subcommittee 8 offers the following comments/suggestions on the RBCR audit section:

1) Requirement(s) for "No Audit" notifications are critically needed

RBCR section 22a-134tt-13(a) provides that "[i]f no audit is conducted, no notification will be provided." The Department explained to Subcommittee 8 that it has resource concerns associated with providing "no audit" communications for every release record that could be subject to an audit, but appreciates that a degree of certainty and finality is needed to facilitate real estate transactions, escrow administrations etc. We agree: a determination of "no audit" or "no further action" is an essential element for real estate transactions, particularly when parties are not from Connecticut, where such tools are standard and expected practice. While resource strain is a valid concern, a short form process that can be automated would greatly reduce uncertainty for the public that will be navigating the RBCRs.

Subcommittee 8 believes it is critical that the Department provide notice *if* a determination is made to not conduct an audit (of any / all kinds) on a release remediation closure report, consistent with current practice for verifications filed under the Transfer Act. A "no audit" (or perhaps a "no further action") notice is a key milestone to provide finality at the earliest possible juncture, not only to avoid transaction delays and enable escrow termination, but also to provide a tangible governmental "blessing" that obviates the need for a remediating party to obtain a legal opinion to satisfy lenders, prospective purchasers etc., that obligations are completed because the regulatory deadline for an audit has lapsed without any notice. Thus, Subcommittee

8 requests the Department consider the following suggested revisions (suggested deletion stricken; suggested addition emphasized):

> 22a-134tt-13(a)(1) The commissioner may conduct an audit of any release record verified by an LEP or certified by a PEP to determine compliance with Chapter 445b of the Connecticut General Statutes and the RBCRs. Such audit may be a screening audit, a focused audit, or a full audit. [~~If no audit is conducted, no notification will be provided.~~]
> . . .
> 22a-134tt-13(a) ***(3) If the commissioner makes a determination to not conduct an audit of a release remediation closure report, the Commissioner shall provide notification to the submitter and responsible party of a "no audit determination" within 180 days of submission.***

We further recommend that the Department also consider "no audit" determination notifications for pre-release remediation closure report release records considered for focused audits, in order to facilitate early identification of issues/disagreements the Department may have, which will streamline the closure process. The Department has indicated to Subcommittee 8 that including a process for "no audit" determination notifications in a "right-sized" approach is appropriate. We agree and encourage the Department to implement such a process for focused audits.

2) Clarification on audit commencement timing is needed

The RBCRs provide that any of the three types of audits (screening, focused, full) will be commenced within 180 days of submission. However, if a focused audit is commenced, and the Department has 18 months to carry it out, a subsequent full audit may be commenced beyond 1 year after verification, which is prohibited under the enabling statute. Since a full audit is a wholly different audit, the Department should be required to hold to the 1-year deadline to commence same.

Accordingly, Subcommittee 8 suggests the Department revise / clarify the timing of commencement of the varying types of audits, to prohibit tolling of any review time periods in a manner that would be inconsistent with the outside timeframe authorized by statute of no later than 1 year after verification to commence an audit. This includes, but is not necessarily limited to the following (suggested deletion stricken; suggested addition emphasized):

> Section 22a-134tt-13(d)(1): "Not more than 180 days following the submission of a release remediation closure report, or, if a focused audit has been initiated pursuant to subsection (c)(1)(A) of this section, ***not more than one (1) year following the submission of a release remediation closure report,*** [~~at any time before such focused audit reaches an outcome specified in subsection (c)(1)(D) of this section~~], the commissioner may a commence a full audit of the remediation of such release by providing a written notice of audit. . . ."
>
> Section 22a-134tt-13(g)(2) " [such audit] . . . (C) May be conducted after the submission of a release remediation closure report, or may be conducted [~~at any time~~] following the submission of a certified or verified release record regarding such release, ***within the***

timeframes prescribed in subsections (b), (c), and (d) of this section as applicable, subject to the commissioner's authority to commence an audit pursuant to subsection (e) of this section.

Lastly, Subcommittee 8's Concept Paper had recommended shorter periods of time to commence an audit for lower risk/tiered releases. Subcommittee 8 continues to recommend shorter audit commencement deadlines for lower risk and tiered releases, which will help incentivize quicker investigation/remediation efforts. Subcommittee 8 recommends a 120-day commencement timeframe for release records that are not tiered, or are placed initially in tier 3.

3) A deadline for the Department to achieve a final outcome for a full audit is needed

Subcommittee 8 understands that the Department is committed to achieving an outcome on any full audit within 2 years. As no such deadline is included in the current draft RBCRs, this needs to be added. This will provide certainty to responsible parties and property owners. Because the Department will have layered and multiple audit opportunities as a system of checks and balances under the new program, we agree that the audit period can be less than the current three years afforded under the singular audit framework of the Transfer Act, and that two years is appropriate. Additionally, the Department has clarified that its intention is to complete all or varying auditing efforts, as applicable, within such 2-year period (so commencing different types of audits is not intended to extend out the outside deadline to achieve an audit outcome). Thus, Subcommittee 8 suggests the following sentence be added to the first paragraph of subjection (1) of Section 22a-133tt-13(d):

"A full audit shall result in an outcome specified by subparagraph (D) of this subdivision not more than 24 months after submission of the release remediation closure report. If a release record is the subject of different kinds of audits, this shall in no way toll the period afforded to the commissioner to achieve an outcome as prescribed herein.

4) Reduce the broad nature of the catchall reopener provision

Under the RBCRs, the commissioner may reopen a verification/certification for the reasons consistent with the same reopeners described under the Transfer Act, including if "(F) the commissioner determines that information exists indicating that the remediation may have failed to prevent a substantial threat to public health or the environment." In the context of a release-specific program as opposed to a holistic site remediation under the Transfer Act, for the avoidance of doubt, this catchall would benefit from clarification, to ensure it could not be interpreted too broadly. Subcommittee 8 suggests the following:

22a-134tt-13(e)(1)(F): [Commissioner may at any time commence audit if] "(F) the commissioner determines that information exists indicating that the remediation ***of the release that is the subject of the release record for which an audit is commenced,*** may have failed to prevent a substantial threat to public health or the environment."

5) Audit frequency clarification

The draft RBCRs set forth the frequency of audits (Section 22a-134tt-13(g)), which only references releases which have been assigned to a tier. This creates a lack of clarity regarding frequency of audits the regulated community can anticipate with respect to release records / release remediation closure reports submitted prior to tiering. Subcommittee 8 recommends clarification to address this.

The audit frequency provision further identifies that Tier 1B releases will be the target of the highest percentage of audits. Subcommittee 8's Concept Paper recommended (and we reiterate now) that the highest risk releases should be the subject of the highest percentage of audits.

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Once the above comments are considered and RBCR provisions further developed, we reserve the right to comment further.

Thank you for your consideration.

Members of Subcommittee 8:

Deborah L. Motycka Downie, LEP (Chair)
Alfred Smith, Esq. (Chair)
Michael Granata, LEP (Chair)
Deborah R. Brancato, Esq.
Douglas Pelham, Esq.
Scott F. Martin, LEP
Lee Hoffman, Esq.
Kevin King, LEP
Ann Catino, Esq.
Cindy Karlson, Esq.
Eric Boswell, LEP
Frank Hird
Ashley Zane, CBIA
Thomas Salimeno, LEP
David G. Austin, LEP
Kimberly Walsh, LEP
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March 7, 2024

Graham Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm St.
Hartford, CT 06106

RE: Comments by Members of Subcommittee 10 on Draft Regulatory Language on PEPs

Dear Graham and Brendan,

This letter has been prepared by the undersigned members of Subcommittee 10 (Roles and Qualifications of Non-LEP Environmental Professionals). We appreciate that the Department has done a lot of hard work to weave the concepts developed by all of the various subcommittees and ad hoc groups into the draft release-based cleanup regulations ("RBCRs"). That said, a significant amount of work remains to be done with respect to Permitted Environmental Professionals ("PEPs").

As we emphasized in our Concept Paper and August 8, 2023 comment letter, Subcommittee 10 agrees with the Department that four fundamental priorities should guide the Department's definition of the scope of practice suitable for PEPs and standards applicable to them:

1. Creating a level playing field: Creators/maintainers of a release and parties conducting due diligence may not want to utilize LEPs if non-LEPs would not be held accountable in the same way that LEPs are.
2. Qualifications determined by complexity of release: Qualifications for non-LEP environmental professionals must be appropriate for the complexity of the releases they would be qualified to certify. LEPs should be required for higher-risk scenarios.
3. Certainty of closure: A release remediation closure report must have equal value regardless of the qualified professional who certified/verified it. A certification by a non-LEP that a release has been cleaned up should have the same weight as a release verified by an LEP. LEPs should not need to re-examine releases that have already been certified by a non-LEP.
4. Ensuring certification and accountability: There is a need to ensure that non-LEP professionals can be held accountable. Third-party certifications (e.g., CHMM, PE) could be leveraged to demonstrate that the non-LEP professional has relevant qualifications. Non-LEPs could "self-certify" and attest that they meet qualification requirements, with enforcement for improper certifications.[1]

The draft RBCRs do not include any information whatsoever about the qualifications PEPs must hold or the standard of conduct to which they will be held. We have attached proposed language

[1] *See* Subcommittee 10 Concept Paper (Mar. 3, 2023) at 1-2; Subcommittee 10 Letter re Draft Regulatory Language on PEPs (Aug. 8, 2023), at 1-2.

as Attachment A. We stress that if PEP certifications are to be accepted in the marketplace, PEPs must have appropriate qualifications and experience. If LEPs and PEPs are to operate on a level playing field, PEPs must be held to ethical standards equivalent to those governing LEPs. We also suggest that the Department revise the LEP rules to harmonize them with the new release-based regime and, among other things, permit LEPs to sign off on PEP-eligible releases on behalf of their employers.[2]

We are frustrated that the RBCRs do not seem to include any of our feedback on the draft regulatory language (circulated on July 10, 2023) that became section 22a-134tt-8(a) of the draft release-based regulations ("RBCRs"). As such, we reiterate all of our recommendations from our August 8, 2023 comment letter.[3]

We are aware that Subcommittee 1 (Discovery), Subcommittee 3 (Characterization), and Subcommittee 6 (Lower-Risk Releases), are all submitting suggested revisions to the draft RBCRs. The concepts covered by those other subcommittees all set the foundation for the program that the PEPs will be operating in and the work they will be tasked with doing. Therefore, Subcommittee 10 requests an opportunity to speak with Department staff ***after*** you have fully considered the recommendations of these other subcommittees.

Thank you again for this opportunity to comment, and we look forward to future productive discussions.

Members of Subcommittee 10:

Gail Batchelder, Ph.D., PG, LEP
Plato Doundoulakis, LEP, CHMM
Matthew E. Hackman, P.E., CHMM
Samuel R. Haydock, MS, LEP
Brent Henebry, LEP
Sally Kropp
Douglas S. Pelham, Esq.
Emilee Mooney Scott, Esq.
Amy Velasquez, CHMM

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[2] The provisions of RCSA § 22a-133v-6(b) (LEP rules apply to all services rendered by an LEP, even if an LEP license is not required) and RCSA § 22a-133v-6(e)(7) (LEPs can't be compensated if their employer has a financial interest) would prevent an LEP from signing off on a PEP-level release. Therefore, as it stands now we get to the absurd result that the more qualified person is prohibited from certifying.

[3] Attached hereto as Attachment B and available at: https://portal.ct.gov/-/media/DEEP/site_clean_up/comprehensive_evaluation/Release-Based/Subcommittee-10-comment-letter-re-PEPs.pdf.

Attachment A: Proposed Revisions to Draft RBCRs § 22a-134tt-1(g)

(g) Permitting of Permitted Environmental Professionals

~~(1) In determining whether the commissioner is satisfied that issuing a license pursuant to section 22a-454 of the Connecticut General Statutes to a person to act as a permitted environmental professional will not result in pollution, contamination, emergency or the violation of the RBCRs or a violation of any regulation adopted under sections 22a-30, 22a-39, 22a-116, 22a-347, 22a-377, 22a-430, 22a-449, 22a-451 and 22a-462 of the Connecticut General Statutes, the commissioner shall consider:~~

~~(A) Such person's training and education;~~

~~(B) The duration and nature of such person's professional experience; and~~

~~(C) Any credentials or licenses held by such person.~~

(1) The Commissioner shall develop a program for permitting Environmental Professionals as individuals in accordance with Statutory Authority provided in Section 22a-454 of the Connecticut General Statutes strictly to provide certification of closure reports for certain releases to the land and waters of the State as described in Section 22a-134tt-8 of the RBCRs**.** As part of an application submitted for permit authorization as a Permitted Environmental Professional, the commissioner may request any information necessary to comply with the requirements of the RBCRs or Section 22a-454 of the Connecticut General Statutes.

~~(2) As part of an application submitted pursuant to section 22a-454 of the Connecticut General Statutes, the commissioner may request any information necessary to comply with the requirements of this subsection.~~

~~(3) No license authorizing a person to act as a PEP shall~~ (2) Permit Period: : A permit shall be valid for two years, with no limit on renewals provided that a permit authorizing an individual to act as a Permitted Environmental Professional shall not be renewed if the commissioner determines that the activities of the potential permittee have not met any requirements of the RBCRs and/or resulted or will result in pollution, contamination, or an emergency.

(3) In addition to any requirements provided in Section 22a-454, Permitted Environmental Professionals must meet the following criteria and conditions for permit authorization.

(A) Training: Evidence of the completion of a commercially available Permitted Environmental Professional Basic Training Program as described in Section (5) of this subsection. The Permitted Environmental Professional Basic Training shall be successfully completed and documented prior to each license renewal period as a continuing education opportunity.

(B) Moral Character: No permit shall be issued to an individual unless such applicant demonstrates to the satisfaction of the Commissioner that such applicant possesses good moral character. Evidence of a lack of such character may include conviction in any jurisdiction of a felonious act, the submission of false or incomplete information on any application, acts involving dishonesty, fraud or deceit which have substantial connection to the responsibilities of a permitted environmental professional, or engaging in professional misconduct.

(C) Education & Experience: The matrix below provides minimum education and experience

requirements for permitting an individual as a PEP:

Education	**Experience***
Baccalaureate or advance degree in a related science or engineering field	4 years
Associate degree in a related science or engineering field, or baccalaureate degree in any major	6 years
High school diploma or GED	8 years
(*) Experience must include a demonstration of duties and tasks associated with release identification, response, characterization, and remediation	

(4) Professional Conduct: In order to establish and maintain a high standard of integrity, skills and practice in the environmental profession, provide consistency with the licensed environmental professional program, and to safeguard the environment and the health, safety, property, and welfare of the public, the following rules of professional conduct shall apply to every Permitted Environmental Professional. The Commissioner may conduct investigations regarding the professional conduct of any Permitted Environmental Professional.

(A) In the rendering of professional services, a Permitted Environmental Professional shall, at all times, hold paramount the health, safety and welfare of the public and the environment.

(B) In rendering professional services, a Permitted Environmental Professional shall at all times:

(i) Exercise professional judgment;

(ii) Follow the requirements and procedures set forth in the RBCRs; and

(iii) Make a good faith and reasonable effort to identify and obtain the relevant data and other information evidencing conditions associated with a release and identify and obtain such additional data and other information as necessary to discharge such permit obligations pursuant to the RBCRs.

(C) If after rendering professional services at a parcel, a Permitted Environmental Professional learns that a condition at such parcel, relevant data or other information which existed at the time such services were rendered, leads to a conclusion or recommendation contrary to, or significantly different from, the one previously expressed by such Permitted Environmental Professional, such Permitted Environmental Professional shall promptly:

(i) Notify his or her client in writing of such, and

(ii) Notify the Commissioner if such conclusion or recommendation was expressed to the Commissioner in document certified by that Permitted Environmental Professional.

(D) A Permitted Environmental Professional shall not allow the use of their name by, or associate in a business venture with, any person or firm which such licensee knows or reasonably should know is engaging in fraudulent business or professional practices.

(E) A Permitted Environmental Professional shall not, whether orally or in writing, falsify, omit or misrepresent relevant facts concerning such Permitted Environmental Professional's:

(i) Past accomplishments or the academic or other qualifications of such permit; and

(ii) Employers, employees, associates, joint ventures and their past accomplishments or academic or professional qualifications.

(F) A Permitted Environmental Professional or applicant shall cooperate fully in an investigation conducted by the Commissioner

(G) No Permitted Environmental Professional whose permit has expired, and any other individual who does not have a license, shall render or offer to render professional services or represent himself as being a Permitted Environmental Professional.

(H) If the activities of a ~~PEP~~ Permitted Environmental Professional do not meet the requirements of the RBCRs or result in pollution, contamination, or emergency, the commissioner may take any applicable enforcement action at any time as authorized by Sections 22a-454 or 22a-134ss of the Connecticut General Statutes.

(5) Permitted Environmental Professional Training Program Requirements:

(A) A Permitted Environmental Professional training program shall be approved in writing by the commissioner. The commissioner shall approve a program if after submittal of the training curriculum and instructor's qualifications to the commissioner for review, the commissioner finds that the program meets the following minimum training requirements:

i. Familiarization with applicable federal, state, and local law regarding release reporting, record keeping, and significant environmental releases
ii. Familiarization with basic conceptual site modeling as it pertains to a release
iii. Familiarization with analysis for sensitive receptors
iv. Importance of Documentation of Release Extent and Cleanup Activities Performed
v. Familiarization with required performance metrics or best management practices available to PEPs to determine that release abatement/remediation is complete
vi. Familiarization with soil sampling protocols and prevailing standards
vii. Recognizing relevant hydrogeologic characteristics
viii. Familiarization of groundwater sampling protocols and prevailing standards
ix. Review of PEP Release Closure Report requirements

As these are minimum requirements, the Commissioner may at their discretion add additional topics to the training requirements in the future to address evolving changes in release identification, sampling, and remediation protocols or technological advancements.

(B) Upon completion of the Permitted Environmental Training Program by an individual, the instructor shall provide documentation as evidence of successful completion of the program to the individual and maintain records of the program date, attendees, and documentation of successful completion for a period of five years from the date of the program.

EVERSOURCE

107 Selden Street
Berlin, CT 06037

March 7, 2024

Dear DEEP Cleanup Transformation Team:

Eversource Energy Service Company on behalf of The Connecticut Light and Power Company and Yankee Gas Services Company each dba Eversource Energy (Eversource) previously offered several questions (see attached) regarding the draft Release Based Cleanup Regulations (RBCRs) in early February and in addition to those question provides more focused comments on specific issues in recognition of distinct pressures these requirements will place on Eversource as a regulated public service company responsible for the transmission and distribution of electricity and the distribution of natural gas to individual customers. The primary focus of these comments is on requirements related to immediate actions in response to emergent reportable releases, the Permitted Environmental Professionals, and the lack of a provision for work in utility corridors.

1. **Emergent reportable releases and immediate action requirements**

Eversource utilizes fluid-filled equipment in its electric transmission and distribution equipment. This equipment is impacted by casualty events such as motor vehicle accidents, storms, and fallen trees. Eversource maintains a dedicated in-house team for emergency and field response and contractual relationships with numerous spill-response contractors with significant experience addressing spills from electrical equipment often under challenging circumstances. Eversource also maintains a healthy working relationship with DEEP's Spill Response Team and PCB group. It looks forward to continuing this relationship and shaping these new regulations to ensure that they continue to foster swift, safe, and effective cleanups of emergent releases from this equipment without having unintended impacts on company operations and electric and gas customers for little environmental gain.

A. Characterization Requirements for Cleanups to be Certified as Complete by PEPs

Section 22a-134tt-8(a)(1) of the RBCRs provide that certain cleanups can be certified as complete by PEPs if (in part):

> (D) The release:
> (i) consists of a substance or substances other than oil or petroleum and has not contacted groundwater; or
> (ii) consists only of oil or petroleum, is not within 500 feet of a drinking water well, and has not caused a persistent impact to groundwater as determined by subsection (c) of this section;

These draft regulations seem to imply that a well receptor survey will have to be performed for every emergent reportable release of mineral oil from a transformer. Given that the Eversource Emergency Field Response team manages over 500 spills annually in CT, this could be a massive burden. What if soil removal actions indicate that no oil or petroleum contacted groundwater? What if the release was removed from pavement? What level of investigation is CT DEEP expecting to determine the presence/absence of drinking water wells within a 500-foot radius of a release? A typical drinking water receptor survey, as currently performed by LEPs, is a time-consuming process involving researching well drilling permits/completion reports on file at CT DEEP, in addition to researching other resources. Are there specific tools that can be used by responders to have a rebuttable presumption that there would be no impact to wells? Is there GIS mapping available with sufficient data that would satisfy this review or is a formal well receptor survey anticipated? Additional on-site sampling may not be an issue for

these spills but determining private well use within 500 feet of the release may be challenging in some more remote areas especially if the material flows along the surface of a roadway. Given nearly immediate response to casualty events that include source control, containment, and cleanup, it is Eversource's experience that well contamination would be highly unlikely.

Eversource is concerned about the significant amount of effort that may be needed to prove a negative and believes there need to be indications that there has been an impact to groundwater as provided for in 22a-134tt-8(a)(1)(D)(i) before such research into well receptors is necessary.

Eversource sees a potential for confusion regarding characterization of emergent reportable releases. Section 22a-134tt-5(d)(2) of the RBCRs indicates that a full characterization of the nature and extent of a release does not have to be completed prior to starting an immediate action. However, 22a-134tt-5(d)(2) requires a "complete characterization" pursuant to 22a-134tt-4 when an emergent reportable release is cleaned up in accordance with the cleanup standards sections, which would include, by definition, section 22a-134tt-8. In addition, Section 22a-134tt-4(a)(4) provides that a PEP cannot certify a release remediation report until "full characterization is complete." The confusion comes in because § 22a-134tt-4(a)(2)(B)(i) states that a release that can be closed by a PEP, i.e. by meeting the standards outlined in 22a-134tt-8, satisfies the characterization requirements of section 22a-134tt-4. Do requirements to perform a complete/full characterization in accordance with 22a-134tt-4 implicate the exemption provided to PEP-certified cleanups? In other words, would satisfying the requirements for the exemption be deemed "complete characterization" or "full characterization"? Assuming this is the intent, please consider addressing the confusion caused by requirements for full/complete characterization in PEP-certified cleanups by adding the underlined language below to 22a-134tt-4(a)(4):

> (4) No release remediation closure report shall be verified by an LEP or certified by a PEP until full characterization of a release is complete <u>or until a determination is made that the cleanup can be certified as complete by a PEP</u>" or <u>"until a determination that the release meets the requirements of 22a-134tt-8.</u>"

In addition, section 22a-134tt-5(d)(2) could be amended to clarify this point as follows:

> "(2) Full characterization of the nature and extent of a release shall not be required before commencing an immediate action. Characterization of the nature and extent of the release shall be performed at the same time as the required immediate actions to ensure that such required actions are sufficient and successful. At a minimum, characterization sufficient to demonstrate that an immediate action transition-point specified by subsection (h) of this section has been achieved shall be developed during the timeframe specified for achieving an immediate action transition-point, except that should the actions performed include remediation to a standard specified in the cleanup standards sections, a complete characterization of such release pursuant to <u>or deemed satisfactory in accordance with</u> section 22a-134tt-4 of the RBCRs shall be required."

The vast majority of the transformer releases, many of which are caused by incidents such as motor vehicle accidents would fall under the emergent reportable release category. Eversource would not support a requirement that all releases (no differentiation made between emergent reportable and existing releases) for which remediation is performed to achieve a standard specified in the cleanup standards sections will require characterization pursuant to 22a-134tt-4. This level of characterization would be excessive for the vast majority of Eversource transformer spills that occur in or adjacent to public roadways.

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B. Timing of commencement of remediation for Immediate Action on releases to soil

For Immediate Action on Emergent Reportable Releases, § 22a-133tt-5(e)(3) of the RBCRs requires that, for releases discovered in soil, one must initiate remediation of such impacted soil within two hours of discovery. First, Eversource suggests clarification on when the clock starts, is it the discovery of the impact to the soils or the discovery of the release itself? Next, utility release responses are often complicated by the need to deenergize equipment and restore power at least temporarily before any remediation work can safely commence. Although some form of containment, e.g. booms, absorbent pads, etc. may be placed more immediately, the need to address downed wires and energized equipment could delay efforts to excavate and dispose of impacted soils for safety reasons unlike at other emergent release sites not involving active electrical equipment. Does commencing remediation in the context of immediate actions include initial removal of leaking or damaged equipment and spill containment to control any further impact to soils? In other parts of the subsection e,g, regarding timing of remediation of groundwater, the timeframes are qualified with phrases like "if practicable" but not for soils so understanding what is considered commencement of remediation of impacted soils could be critical in shaping response actions. To ensure activities are conducted safely, Eversource would suggest that the timeframe for remediation of soils also be qualified in a similar manner by adding the phrase "if practicable" as with the remediation of groundwater.

2. **Permitted Environmental Professionals**

The RBCRs propose to allow the use of Permitted Environmental Professionals (PEPs) in some circumstances in recognition that not all releases and their cleanup require intervention from Licensed Environmental Professionals (LEPs). Eversource is familiar with companies being recognized under Conn.Gen.Stat. § 22a-454 as licensed spill contractors. The use of these companies is critical to the success Eversource sees in responding to and cleaning up an average of 500 releases every year that would fall into the category of emergent reportable releases. However, Eversource is not familiar with the use of § 22a-454 to permit individuals to act under the circumstances identified and provide individual certification that a cleanup is complete. Will § 22a-454 be specifically amended to lay out the licensure process and required credentials needed for individuals to be permitted to act as PEPs or will regulations be adopted? Eversource seeks clarity regarding the use of PEPs. How will PEP's be licensed under § 22a-454?

While § 22-454 appears to recognize the difference between those on the scene of an accident as part of company operations and those acting specifically to cleanup a spill and manage the associated wastes as part of their principal business, the lines can become blurred at an accident scene. Eversource responders may act to mitigate releases immediately by placing spill pads or absorbent materials to mitigate the release. How does § 22a-454 impact those providing Eversource's immediate response at the scene of an emergent reportable release? Do they need to be issued a permit to do so? Will individuals be authorized to act under a company's permit provided they meet certain training requirements? Eversource maintains that issuance of individual permits to those working within a

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company that has environmental field response as part of their regular duties or are otherwise trained to mitigate spills should be expressly incorporated in the regulations

3. **Provisions for Linear Utility Corridors and Roadway Projects**

When utility lines are being installed, or replaced in a public roadway, Eversource often comes across impacted/polluted soil which is managed or disposed of in accordance with applicable protocols. In many cases we do not know the source of the impacts. Eversource recommends a specific provision addressing utility corridors and roadway projects that streamlines the requirements for notice, response, and remediation such as the Massachusetts URAM program (310 Code of Massachusetts Regulations 40.0460 et seq.).

Thank you for your attention to these comments. Eversource looks forward to continued engagement on these important issues.

Sincerely,

EVERSOURCE

Marc Richards, PE, LSP
Vice President – Sustainability & Environment

CTDEEP Release Based Regulations

Questions/Comments from Eversource Energy

1. Soil is generated and stockpiled at our substations related to trenching for conduit installation, replacement of various equipment (transformers, breakers, etc.), or other projects that require soil excavation. All active and decommissioned substation projects that can't be cleaned up in 120 days will be Tier sites and will require characterization (under proposed RCBR). It is not feasible to completely delineate impacts within an active substation. Are any exceptions being considered for the investigation, remediation, and reporting of releases at active utilities?

2. Even if cleaned up in 120 days, under the proposed RCBRs, we are now required to submit a "Release Remediation Closure Report" verified by an LEP. Will this pull this site into the Voluntary Remediation Program?

3. What percentage of New/Historic Release Reports will be audited?

4. During significant storm events, the Utilities handle a large number of spills (sometimes hundreds in a 24 hour period). Will all of these need to be reported, regardless of quantity? Can we have an in house PEP handle the reporting?

5. What are the requirements to be a PEP?

6. We are concerned about gaining access to properties during due diligence for property transfers, or even for off-site delineation of plumes. During the CTDEEP presentation, this subject was mentioned and it was suggested that the requirement to report a "new/historic release" would depend on how the access was written up. Can you clarify?

7. When gas lines are being installed, or replaced in a public roadway, we often come across impacted/polluted soil. In many cases we do not know the source of the impacts. Will the utility be exempt from reporting every waste characterization sample with detections above background? To report every waste characterization of a miles long line install/replacement is not realistic.

8. Regarding the PEP provision, DEEP has stated that this will apply to individuals including inhouse staff. As it is currently proposed this is tied to a CGS 22a-454 permit/license, which is more applicable to companies. Please provide specific requirements for obtaining individual PEP authorization, including any minimum education, training or experience qualifications.

9. Will there be any minor or incidental releases that do not require PEP or LEP review and signoff?

10. Are there any requirements for new releases that are not considered an "emergent reportable release"?

11. Are there any considerations for limiting need for well analysis when releases are limited to roadway and cleaned in 12-24 hour window? Or for emergent releases under certain quantities?

12. Are full well receptor surveys viewed as necessary for determining wells within 500 feet of release? Are there mapping tools sufficient for this exercise?

CBIA ENERGY & ENVIRONMENT COUNCIL

CBIA Energy and Environment Council Comments

Proposed Release-Based Clean Up Regulations

March 7, 2024

On behalf of the Connecticut Business and Industry Association (CBIA) Energy and Environment (E2) Council, we would like to thank the Connecticut Department of Energy and Environmental Protection (DEEP or the Department) for the work DEEP has put into the proposed Release-Based Clean Up Regulations (RBCRs) to date. Throughout the process, DEEP has engaged the talents of many outside experts in engineering, geology, law, and economic development to create the draft regulations. It is in this spirit of cooperation that the E2 Council hopes these comments are received.

DEEP has indicated that it intends to provide a revised draft of these regulations for review by the Release-Based Cleanup Working Group prior to moving forward with the formal regulation adoption process. CBIA urges DEEP to "stay the course" with the Working Group process by providing the opportunity for the Working Group to comment and further refine the draft regulations before commencing the formal regulation adoption process. We believe that continuing to collaborate with the Working Group will result in a more robust and practical set of RBCRs.

The CBIA's E2 Council and Economic Development Under Public Act 20-09

The CBIA's E2 Council is a dynamic group of business leaders working collaboratively to drive sound public policy involving energy and environmental issues that ensures more competitive business conditions and a healthier bottom line for Connecticut companies.

CBIA and members of our E2 Council have been part of the working group for the last three years, contributing to the formulation of the regulations as members of subcommittees, participating in meetings and providing feedback throughout the process. These members provided their expertise to the RCBR working group because they believe that the goal of improving Connecticut's environmental infrastructure while also spurring economic development is critical to Connecticut's future.

The RBCRs were the direct outgrowth of the passage of Public Act 20-09 which sought to sunset the Connecticut Transfer Act once a new regulatory regime could be enacted. The idea, which was brought to the General Assembly jointly by DEEP and the Department of Economic and Community Development, was that environmental protection would work best when it also encouraged economic development. The legislative history of PA 20-09 shows that "economic development" or "economic growth" was mentioned as a reason for the passage of PA 20-09 at least two dozen times during the course of debate. Economic growth was a clear goal of PA 20-09, but somehow between the passage of PA 20-09 and the development of the draft RCBRs,

we have lost sight of the fact that economic development was to be a co-equal goal of environmental protection, not an afterthought.

More than anything related to environmental compliance, our members crave regulatory certainty. Our members want to know that if they take certain steps and meet certain standards, they can assure their management, their lenders, their investors, their customers, and their stakeholders that they are complying with environmental laws and regulations. As currently drafted, the RBCRs have too many exceptions, holes, or reliance on agency discretion to allow businesses to know that they are fully compliant with environmental regulation.

In addition, the regulations need to appropriately balance the need to protect human health and the environment with the ability to conduct business. No one is suggesting that the RBCRs should have weaker standards than the current Remediation Standard Regulations or spill regulations, however, the RBCRs as drafted are significantly more stringent, will apply to more businesses, and will be invoked in more situations than what occurs in the current regulatory environment. The E2 Council's concern is that this will make Connecticut a statistical outlier. When one looks to examples of the regulatory systems in place at the federal level, as well as neighboring states such as Pennsylvania, New York and Massachusetts, the proposed RBCRs are far more stringent than the requirements imposed by the federal or nearby state governments, which will place Connecticut at a significant disadvantage. Moreover, our concern is that by applying the regulations to *de minimis* releases, DEEP will not be able to focus on the larger environmental issues that should rightfully occupy its efforts. To this end, a goal of PA 20-09 was to "focus on high risk" properties and "speed up" the clean-up process. We do not believe the proposed RBCRs achieve this goal.

The proposed draft regulations represent a first step in creating a framework designed to clean up contamination and promote economic development, however, we believe that additional components need to be addressed before fully supporting the implementation of these regulations. Our concerns can be sorted into six broad categories. While there are other concerns, these are the chief concerns we wish to bring to DEEP's attention at this time.

The Lack of Minimum Reportable Quantities for Both Current and Historic Releases Will Result in Overreporting

As currently drafted, the RBCRs address both current/contemporaneous releases (i.e., spills), and the discovery of historic contamination that may have been the result of a release that occurred decades earlier. In both cases, however, the RBCRs do not provide a meaningful minimum standard for when reports to DEEP need to be made.

For spills, it would appear that the release of any contaminant into the environment in an amount greater than 1.5 gallons would constitute a release that would need to be reported to DEEP under the draft RBCRs. This is a stark contrast to the requirements under federal law. Under Part 302 of the Code of Federal Regulations, the reportable quantities necessary to require reporting to federal agencies vary widely depending on the substance in question,

however, for many substances that threshold is as high as 5,000 pounds. In other words, a spill of some substances need not be reported unless more than two and a half tons of that substance is spilled.

It should be noted that since releasing the draft RBCRs, DEEP staff has taken great pains to do stakeholder outreach to discuss the impacts of these draft regulations. During several of these outreach sessions, questions have been asked of the DEEP's staff as to whether releases that occur indoors or are contained within sealed, outdoor containment systems will be subject to the RBCRs. According to DEEP's answers during these question-and-answer sessions, such spills will *not* be subject to the RBCRs. We believe that this is the correct position for the Department to take on this matter, however, that position is not articulated in the current draft of the RBCRs. The draft RBCRs should be amended to explicitly exempt releases to indoor areas or sealed outdoor containment areas from the RBCRs.

Finally, the E2 Council has a similar concern with what occurs when historic contamination is discovered. As the draft RBCRs are currently written, any detection of contaminants must be reported to DEEP and addressed by the responsible party, even if the level of detection is below cleanup standards. This point is best illustrated by a real-world example. For this example, we will use petroleum contamination, which has a direct exposure criteria contaminant level of 500 parts per million (ppm) in soil for residential properties. Under the current regulatory regime, if a soil boring is dug and that soil is found to contain contamination of 300 ppm of petroleum, no further action is required. Under the draft RBCRs, however, further action would be required. As the draft RCBRs currently stand, this further action would be in the form of additional characterization, but as of this writing, the regulated community cannot ascertain what level of additional characterization will be required. This is going to result in the same problem that befalls the Transfer Act on a regular basis – businesses will need to "prove the negative" in order to remove themselves from a regulatory program. This approach will not lead to expeditious clean-up of releases.

Put another way, in the hypothetical example in the paragraph above, a party will need to, at a minimum, conduct additional testing (and bear that expense) to prove that there is no contamination near that 300-ppm petroleum soil sample. This will result in significant expense to business owners but is unlikely to have significant positive benefits to the environment. Massachusetts has addressed this issue successfully, by allowing its licensed site professionals (LSPs) to document why they selected certain areas to be tested. If those LSPs are satisfied that their testing protocols were sufficiently protective of the environment, no further work needs to be undertaken. There is no such similar principle at work in the RBCRs. Connecticut would gain a great deal of program certainty if it adopted a model that is closer to that of Massachusetts or other jurisdictions.

Fewer Issues Should Be Left to the Discretion of the Department; They Should Be Placed in the New Regulations

The current draft RBCRs are replete with areas where the Department will develop guidance on certain issues, rather than have those issues directly addressed in the regulations themselves. For example, under the current regulatory program, the DEEP's Site Characterization Guidance Document has become a *de facto* regulation as any deviation from the Guidance Document in the course of an investigation is frowned upon by regulators. Since that Guidance Document operates more like regulation than a suggestion for how to proceed, one can assume that future guidance documents will operate similarly. Rather than proceeding down that path, the Department should focus its efforts to place such contemplated guidance into the body of the RBCRs, rather than relying on a compendium of separate guidance documents.

This will allow for greater regulatory certainty, particularly for those companies outside the state of Connecticut who may be looking at investing in the state. Guidance documents don't always show up on regulatory searches, and outsiders may not be familiar with how such guidance documents are treated by the Department or the regulated community. Regulations, however, are clearly available, and it is well understood what non-compliance with regulations will result in. Accordingly, placing as much of the requirements into the RBCRs, rather than in one-off guidance documents will greatly enhance regulatory certainty.

In addition, there are several instances in the RBCRs where decisions on enforcement will be left to the discretion of the Commissioner. While we appreciate that this is the case on many levels, there should be fewer instances where the RBCRs rely on such discretion. Banks do not lend money to business enterprises based on the likely outcome of regulatory discretion; they make their decisions on what the regulations do or do not allow. Even if there is a "common practice" that may address concerns, if that common practice is not written into a regulation, outsiders seeking regulatory clarity will discount the efficacy of such a practice. It should be the over-arching goal of the RBCRs that wherever possible, clear regulatory language will govern rather than commissioner discretion or guidance documents.

The Role of Permitted Environmental Professionals Is Unclear

CBIA's E2 Council is concerned about the introduction of a new class of environmental professionals, namely the Permitted Environmental Professional (PEP), which will be distinguishable from the Licensed Environmental Professional (LEP) under the new regulations. Under the existing standards, LEPs are permitted to verify that sites have been adequately investigated and/or remediated and submit those verifications to DEEP, among other things. As the E2 Council understands it, PEPs will have a lesser role than LEPs, but will be permitted to document that spills have been adequately cleaned up and that no further action is required.

The E2 Council takes no position on whether a new classification of environmental professional is needed or is a good idea. However, if a new classification of environmental professional is created, the regulations around the qualifications and permitted duties of a PEP should be more

thoroughly addressed in the RBCRs. Moreover, several of the E2 Council's members have asked whether a company's internal spill response professionals may be licensed as PEPs. The E2 Council believes that this change should be explicitly made to the RBCRs, since internal spill response professionals are often the best options to document successful spill response.

There Are Costs that Are Hidden in the RBCRs

The imposition of various fees and costs will impact the CBIA's members both directly and indirectly. The fee structure that is proposed on page 54 of the drafted regulations is but one example. Under the RBCRs, the reporting of each release will require a payment to DEEP to cover DEEP's administrative costs. However, many times multiple releases will be found in a single round of testing at a single site. For example, a real estate redeveloper may be considering redeveloping a contaminated parcel. As it undertakes its due diligence, it may discover through environmental testing that there were two different leaking underground storage tanks, several spills of various solvents, a floor drain that did not drain to a proper waste treatment system and contamination around the facility's dumpster. This could result in ten to twelve releases being identified at the same site, which would likely be remediated at the same time.

Under the draft RBCRs, each of those releases would require payment to DEEP, at a cost of up to $3,000 per release. This can result in a substantial increase in costs for an entity that is properly seeking to remediate that has multiple releases on its property. In the example in the paragraph above, it is possible that ten to twelve releases would be identified in that scenario. That would mean a potential cost of $30,000-$36,000, depending on the severity of the releases. Other states recognize that having multiple releases on the same piece of property calls for a different payment structure, particularly in light of the lesser administrative burdens dealing with multiple releases on the same site present. The RBCRs should reflect that as well. Otherwise, property redevelopment of contaminated sites could be adversely impacted. To ensure that Connecticut can remain economically competitive, CBIA recommends that the Department consider a cap for a site that has multiple releases or reduce the fee per release in such situations to ensure economic competitiveness.

The E2 Council would also like to note that indirect cost impacts resulting from the RBCRs may have an adverse effect on the E2's members. It is clear from some of the questions that DEEP has received on the RBCRs to date that the new regulations will have a significant impact on municipal budgets. A release to town property could significantly impact a municipality's budget resulting in higher property taxes. This unintended consequence would impact our members and their ability to recruit and retain talent and business development plans. The Department needs to think long and hard about the impacts its new regulatory scheme will have on Connecticut's municipalities, and how those impacts might be passed onto Connecticut's businesses.

Impacting Residential Property Owners Will Make It More Difficult to Attract Talented Workers to Connecticut

We are concerned that explicitly including residential properties as part of these regulations could be putting an increased burden on homeowners in Connecticut. CBIA has stated multiple times that creating affordable homeownership opportunities for our residents is key in growing the state's economy. The regulations as currently drafted are placing an additional burden on homeowners to remediate releases on their property which could potentially impact the sale of a residential property. For example, if residential well water is tested and found to be contaminated, will that contamination need to be reported to DEEP as a release under the RBCRs? Under the current regulatory programs, the contamination would need to be addressed under CGS 22a-6u, but source investigation and remediation would not be required. Thus, the well contamination scenario could be addressed, for example, with a filtration system, but no investigations or remediation would necessarily be required. CBIA recommends removing residential properties from these drafted regulations as it was not within the scope of this legislation to examine residential property.

The Proposed Regulations Will Place an Undue Burden on DEEP's Resources

Additionally, the business community is concerned about the increased administrative burden that these drafted regulations would place on DEEP. As noted above, there is no minimum threshold for most releases that will be discovered. As a result, we anticipate that the number of releases, both in terms of spills and also historic releases will drastically increase. We have heard concerns from several members that given the current structure of the drafted regulations, DEEP's capacity to review releases would be overwhelmed in a matter of days. CBIA believes that DEEP will need to significantly increase its staff to be able to review these releases and foster timely economic development. However, we see no planned efforts to do so, or even any analysis of what the increased workload is anticipated to be.

The Path Forward

As stated above, the Department has had any number of listening sessions, which has generated a significant number of questions for the Department. Many questions remain unanswered. As the new program comes into sharper focus, the E2 Council would ask that the Department publish not only the questions (which were recently re-added to the Department's website), but also the Department's answer as to how those questions would be addressed by the RBCRs. While we continue to maintain that as much detail and certainty should be put into the regulations as possible, we acknowledge that not everything will be anticipated. Thus, a living FAQ document may be a good way to allow the public to understand the Department's thinking on a particular aspect of the new regulatory program.

In addition, the E2 Council would note that there are many documents and forms that will need to be changed or developed in connection with the adoption of the RBCRs. It is *imperative* that

the Department develop such documents and forms *before* the RBCRs become final. When the Department made changes to the land use restriction process, not all of the forms were in place before the changes became effective. The delay that ensued was inconvenient, but not devastating, owing to the small number of sites that needed use restrictions prior to the finalization of forms. Given the large number of releases that are anticipated under the new RBCR program, a failure to learn from the past will be crippling, both to the environment as well as to economic development. The worst thing that could happen to a new regulatory program is for it to have to shut down because complying with its requirements becomes a logistical impossibility.

Conclusion

As stated above, the legislative intent of the PA 20-9 was for DEEP to work in partnership with the Department of Economic and Community Development to ensure the regulations accomplished two goals: the cleanup of properties and ensuring Connecticut remains economically viable. The regulations as written do not add clarity nor efficiencies that would promote economic growth in the state. Given their overly broad nature, we are not sure that they will even do an effective job at prioritizing those sites that bear the greatest environmental risk, allowing DEEP to focus on the high-profile targets and compete for jobs and economic development. With neighboring states like Massachusetts that have a successful remediation program, the E2 council urges DEEP to look at what its sister states have already done successfully. We would also implore DEEP to lean into the comments and questions posed by the regulated community, particularly those professionals that have been assisting DEEP in this work every step of the way through DEEP's Release-Based Cleanup Working Group.

While the draft RBCRs are a starting point for an extended discussion about what a new regulatory framework should look like, the E2 Council has significant concerns about the impact that the RCBRs, as drafted, will have on both Connecticut's economy and its environment. We believe improvements to the draft RCBRs need to be made for any such regulatory program to work as intended.

In conclusion, CBIA appreciates the efforts made by DEEP, however, CBIA remains focused on creating regulations that provide stability, predictability, and fosters a competitive economic environment for all businesses. We urge DEEP to provide the Working Group a further opportunity to comment upon a revised set of regulations before proceeding with the formal regulation adoption process. We hope the Department will be able to make the necessary changes to the draft regulations and we urge the Department to continue to work in a collaborative fashion. CBIA is committed to working together with the Department on a path forward that addresses the issues and concerns of our members.

March 7, 2024

Graham Stevens, Bureau Chief
Bureau of Water Protection and Land Reuse
Connecticut Department of Energy & Environmental Protection

Sent via Email to: DEEP.Cleanup.Tranform@ct.gov, graham.stevens@ct.gov

Dear Graham:

Please find below questions and comments provided by the University of Connecticut Environmental Health & Safety Department (UConn EHS) on the Draft Release-Based Cleanup Regulations (RBCR) prepared by the Connecticut Department of Energy & Environmental Protection (DEEP) and recently posted for public comment. Our comments are referenced to the Sections of the Draft RBCR and PDF document line numbers noted in the Draft RBCRs you previously circulated to the RBCR Working Group on Saturday, January 13, 2024.

1. 22a-134tt-1(a); **Line 52**: Definition #20 for "Solid, liquid, or gaseous product" appears to be out of order. Others are alphabetical by first letter of the term being defined.
2. 22a-134tt-1(c)(1); **Line 497**: Will all forms required by the regulations be available at the time the regulations are promulgated? If not, please make provisions for submittal using some kind of alternate cover sheet that DEEP provides and notes that certain submittal forms are "pending".
3. 22a-134tt-1(c)(1)(B); **Line 501**: I recommend adding the word "known" to this sentence, so it reads: "A description of the known distribution and concentrations…". At the time of the submittal the full degree and extent of impacts is not likely defined.
4. 22a-134tt-1(c)(1)(D); **Line 504**: I recommend changing "all release areas" to "all previously reported and currently known release areas". Also, why do other form requirements read "subject release area", and this section appears to be open ended by using the text "all release areas"?
5. 22a-134tt-1(d)(2)(A); **Line 548**: Can DEEP and/or DPH establish an active list of compounds (which could be periodically updated, as needed) that have a standard laboratory method which yields results at detection limits that meet, or are lower than, applicable criteria? Previous experience has shown that applicable criteria for some compounds cannot be achieved by standard laboratory procedures and it would be very helpful to have a list of those compounds.
6. 22a-134tt-1(e)(1); **Line 636**: The phrase "causing contamination" is not defined. How is one to know when one is "causing contamination"? Also, are qualified results from a laboratory (results that are flagged as estimates, or detected below quantification limits) considered evidence of a chemical "causing contamination"?
7. 22a-134tt-1(f); **Line 662 to 663**: What if the parcel is very large and any residential portions of the property are not near a historical release area?
8. 22a-134tt-2(b)(2); **Line 756 and following**: Should there be a provision for withdrawal of a report of "Significant Existing Release" if new information is discovered or existing

information is determined to be faulty (e.g., problems with laboratory analyses in an existing report)? Could an owner offer a rebuttal of a Significant Existing Release if another party reported it, but the owner has information or data that contradicts the report submitted by another party other than the owner?

Thank you for the opportunity to comment on the Draft regulations.
Sincerely,

James Hutton, LEP
Environmental Compliance Professional
University of Connecticut
Environmental Health & Safety, Environmental Programs

March 7, 2024

Via Electronic Mail
Graham Stevens
Brendan Schain
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106

Re: Comments/Recommendations on Draft Release-Based Regulations Section 22a-134tt-9(k)

Dear Graham and Brendan,

On behalf of the Connecticut Marine Trades Association, we are providing the following comments and suggestions regarding draft Section 22a-134tt-9(k) of the draft release-based cleanup regulations ("RBCRs") as such relates to dredged materials. As you are aware, CMTA has been seeking assistance from the State to provide Connecticut waterfront stakeholders with a more straightforward, cost-effective approval process for dredging and disposal, especially when it involves upland placement of dredged materials. These stakeholders include recreational, commercial, industrial, fishing, energy, and defense operations. However, several impediments have thwarted that effort. CMTA is pleased that the Department acknowledges this issue and has offered to provide some aid by way creating a pathway for upland placement of dredged materials. We appreciate the time you have spent discussing this matter with us. While we understand that the Department is in the process of revising the draft RBCRs and some of what we offer below may have already been modified, we are including same for completeness sake.

#1. Correction of use of "materials" versus "spoils"
The term "spoils" is not consistent with the overall regulation of dredged sediments. USEPA and the Army Corps of Engineers use the term "dredged material". For example, with regard to upland deposition of the materials or some form of beneficial reuse, USEPA does not refer to the material as a "spoil" or "waste." Since the proposed language is relating to the upland deposition of dredged sediment, we request that the term "material" should replace the use of "spoils."

#2. Consider modifying requirement for upgradient location of placement
The provision states "Dredged spoils are disposed of in a **location upgradient of the water body from which such dredge spoils have been removed**. This language presents a practical challenge. The majority of dredged projects do not have sufficient upland (adjacent or upgradient) land to place the dredged materials. Instead, the reality is that these dredged materials will be sent to a variety of locations in Connecticut and not necessarily upgradient. We suggest that this language is modified to reflect that the dredge materials are moved to a "suitable" or "acceptable" location.

Additionally, as the final placement location of the dredged material slated for upland relocation is rarely known at the time of permit application, we believe it would be a benefit to allow permits to be issued for the dredging activities with a contingent post-approval submittal to DEEP for final location. This would allow applicants to best assess relocation options based on the sediment chemical and mechanical properties as determined through the application process, as well as consider the most viable disposal options based on the availability upland locations at the time of permit issuance / project performance.

#3. Consider streamlining approval process for dredging projects

To better streamline the approval process for a dredging project which seeks to utilize upland placement, consider creating a new "one stop" permit. The current draft regulations appear to require multiple approvals from varying divisions (e.g., solid waste, hazardous waste and land and water resources programs). A single approval process could be in the form of an "acceptable use determination" and once the dredging work is completed the engineer could submit detailed plans on "where the materials were placed." The review process for dredging projects, even those seeking upland placement of dredged materials, should not include a review from the solid waste group as sediments/soils are regulated under the RSRs.

#4. Clarification on which programs within DEEP have jurisdiction with regard to dredging project approvals.

The Department could provide guidance with regard to explaining the distinction between sediment/soils versus solid waste when it comes to dredged materials. Dredged materials should not be regulated as a special waste as they currently are. The draft regulations provide an alternative method to regulate these materials. Placement of dredged materials can and should be managed under one program within the Remediation Division and not the Solid Waste Division. Recognizing that these provisions will not only apply to materials removed from open rivers and Long Island Sound but will also include dam removal as well, it is important to have clarity with regard to upland adjacent placement of dredged materials.

We understand that the Department is in the process of revising the draft RBCR provisions provided on December 29, 2023 and, therefore, we reserve the right to comment further. We look forward to continuing to work with the Department on a full resolution of the dredging issue and sincerely appreciate this first step. Thank you for your efforts, time and consideration.

Submitted on behalf of the Connecticut Marine Trades Association by:

Tasha Cusson	Brent Henebry (Working Group Member)
Bob Petzolds	John Casey
Ted Sailer	Cindy Karlson
Devin Santa	