

August 9, 2023

Graham Stevens
Connecticut Department of Energy and Environmental Protection
79 Elm St.
Hartford, CT 06106
By email: Graham.Stevens@ct.gov

RE: Comments by Environmental Attorneys on July 2023 Release-Based Working Group Meeting

Dear Graham,

The undersigned environmental attorneys provide the following initial comments on the concept and the draft language proposed by the Department regarding a new category of environmental professionals, called Permitted Environmental Professionals (PEPs), as circulated on July 10, 2023 and as discussed during the July 11, 2023 Working Group meeting.

We submit these comments in our individual capacities and not as representatives of our firms or any other groups with which we may be affiliated.

Developing a new category of professionals with the scope of responsibilities as proposed in July is a significant undertaking. Consideration of this broad category of PEPs requires careful evaluation to assure that there is not confusion and unintended consequences. Clarity between the roles of the Licensed Environmental Professionals (LEPs) and the proposed PEPs (and the role of the permitted spill response contractor (“PSRC” under CGS § 22a-454) is necessary to developing a streamlined program. The regulated community needs to understand clearly who it can hire, the person hired needs to be qualified to do the job, and his/her role must be clearly identified (and insurable) according to an industry standard.

The concept of a PEP likely evolved in response to the recommendations of many working groups proposing that another level of professional be identified to address releases based upon the severity or significance of the discovered release and the level of expertise required to evaluate and address a particular release. Many subcommittees certainly contemplated a role for another type of professional based upon the release risk level: Subcommittee 3 (on Characterization), 4 (Immediate Removal Actions), 5 (Tiers), 6 (Modification of Standards for Lower Risk Releases), and 5 (Clean-up Completion Documentation). Subcommittee 10 then was formed to evaluate the Roles and Qualifications of Non-LEP Professionals. A common theme permeating each of these groups was to allow lesser risk/smaller releases to be handled in a more streamlined manner that is readily understood and implementable by the regulated community in a protective but cost-effective manner. Not every release would require a LEP to be involved; but LEPs at some point may have to rely upon the response action so it does need to be documented. Obtaining buy-in through compliance that is readily achievable will ultimately protect the environment.

Based upon our review of the July 11 Draft regulations circulated, we believe that more work is needed before the new “PEP” is introduced. We have the following initial concerns based upon the draft.

First, what releases is a PEP to respond to? As a threshold matter, can PEPs respond to historical releases that are known or are they really intended to address only current releases (which overlaps to some degree with PSRCs)?

Second, the breadth of the types of releases that PEPs can address appears to be overly broad and not what the working groups (based upon the working group reports) were recommending. The LEP alternative was to address smaller and low risk releases. The role of the PEP, as expressed, is considerably broader and can lead to overlap between a LEP and a PEP, creating untenable and counterproductive confusion. The LEPs have the highest degree of licensing, training and skill and only LEPs should be investigating, characterizing, and overseeing the remediation of any release to surface or groundwater. These releases should remain within the sole domain of an LEP, who has the training, experience, responsibility, liability and license to do so. Accordingly, the types of releases that a PEP can address should be limited to specific types of low-risk releases that are clearly defined. For example, the types of releases identified in the proposed regulation relating to a release to a secondary containment system would be the type of release where a PEP may be appropriately called on to respond. But, this also relates to the first issue – what types of releases are within the purview of a PEP?

Third, we also see the creation of a new program of environmental professionals through the PSRC program as problematic from a legal and technical perspective. If the role of the PSRC is to be expanded and PSRC retain PEPs, who will provide the appropriate training and oversight of PSRCs who may be performing more like LEPs under these regulations. Typically, the PSRCs are the first responders to an immediate release; but have a far more limited role as to historical releases when LEPs are in charge. The regulated community must have a level of trust and acceptance of a PEP (or PSRC) if the PEP is to close out a release. Right now, that level of trust is with the LEPs who are licensed, insured, accountable, and have the necessary oversight.

Fourth, we are concerned over who will be a PEP. Would the license be obtained by a firm such as is the case with PSRCs, or by an individual, similar to an LEP? What is the training and expertise that firm provides to its employees? Will there be standards developed? What will the enforcement mechanism be? Will the owners of the firm be trained as to the training it has to provide to its employees?

Fifth, we note that it was mentioned several times during the Working Group Meeting that guidance could be used to complement and clarify the regulations with further details, if needed. As discussed in the past, successful implementation of these regulations will be highly dependent on clarity and ability to be implemented. Guidance documents do not undergo the same level of vigorous legal review required when promulgating regulations. We caution the Department not to rely upon guidance as a supplement or complement to these regulations (*i.e.*, regulate through guidance) and recommend drafting the regulations with as much specificity and clarity as possible.

While the regulated community is ultimately responsible, it is looking for greater clarity, and not confusion. And, certainly on how to address the lesser risk releases. As a threshold matter, the new release-based program will be brand new and the regulatory program should be fully understood before a new category of environmental professionals are developed with the type of authority that is proposed. While we believe DEEP's goals are laudable in so far as this is an attempt to provide the regulated community with more options and it acknowledges the comprehensive nature of the new program, it appears that the proposal could create ambiguity as opposed to clarity. And, the standards may not be uniformly exercised or applied. More analysis is clearly required before this proposal moves forward.

Finally, as we've noted before, it is challenging to provide comments on isolated sections and concepts that will ultimately form the release-based remediation regulations without having the full regulations to review, so that the interplay between the various sections and concepts can be analyzed. Accordingly, the comments set forth above may not reflect all of the issues that surround the PEP concept.

Respectfully Submitted:

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