August 8, 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 Members of Subcommittee 10 on Draft Regulatory Language on PEPs

Dear Graham,

This letter has been prepared by the undersigned members of Subcommittee 10 (Roles and Qualifications of Non-LEP Environmental Professionals). We thank the Department for its serious consideration of the ideas raised in the Subcommittee 10 concept paper, as evidenced by the draft regulatory language setting forth the Department's thinking on Permitted Environmental Professionals (PEPs),[1] i.e., non-LEP professionals, as circulated on July 10, 2023 and as discussed during the July 11, 2023 Working Group meeting. In particular, we applaud the Department for sharing a proposal for actual regulatory language, as that permits a much more focused and nuanced discussion of the critical issues. That said, the undersigned members of Subcommittee 10 have a number of comments and suggestions.

Fundamental Priorities

In order to place our recommendations in context, we draw the attention of the Working Group and DEEP to the four priorities related to non-LEP professionals shared by DEEP during the February 14, 2023 meeting of the Working Group:

1. Creating a level playing field: Responsible Parties (RPs) may not want to utilize LEPs if they (LEPs) are required to report discoveries that non-LEPs would not be required to report, or if non-LEPs would not be held accountable in the same way that LEPs are. Under Conn. Gen. Stat. § 22a-134rr, the responsibility to report rests with the creator/maintainer and consultants working on their behalf, whether or not they are LEPs.
2. Qualifications determined by complexity of release: Qualifications for non-LEP environmental professionals must be appropriate for the complexity of the release. It will be possible for non-LEPs to close out lower-risk scenarios, but LEPs will be required for other scenarios.
3. Certainty of closure: Ensure that a cleanup certification has a standard meaning regardless of the qualified professional who certified. 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

[1] While the Subcommittee 10 paper used the term "Technical Environmental Professional" or TEPs, for the sake of clarity we will discuss our recommendations using the "PEP" terminology suggested by DEEP.

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.[2]

In an effort to better conform the regulatory concepts to DEEP's four priorities and the recommendations of Subcommittee 10, the undersigned members of Subcommittee 10 share the following comments and suggestions.

PEPs Should Be Responsible For A More Limited Category of Releases

As DEEP articulated as the second of its four priorities, the qualifications for non-LEP professionals must be appropriate to the complexity of the release. By the same token, the complexity of the release determines the level of training and experience required for DEEP, the public, the marketplace, and other stakeholders to be comfortable with PEP Certification. The draft regulatory language would permit PEPs to Certify releases of much greater complexity than envisioned by Subcommittee 10. The undersigned members of Subcommittee 10 urge DEEP to entrust PEPs with a smaller category of less-complex releases.

Releases that impact groundwater should be Verified by an LEP

Subcommittee 10 was in concurrence that "Certification by [PEPs] would be limited to interior releases wholly contained within a building or releases to pavement or soil only, with no impacts to other environmental media."[3] In particular, Subcommittee 10 reached consensus that "any release that impacted groundwater would require an LEP for final sign-off" whether through Verification or new mechanism.[4] The proposed regulatory language that would permit PEPs to Certify releases of oil or petroleum to groundwater (under certain circumstances where a persistent impact has not occurred). The challenge here is determining if there is a persistent impact and whether PEPs have the expertise and training to make such a professional judgement, which can very often require knowledge beyond what would be needed by a PEP to certify interior releases or limited releases to soil only. We believe that expanding the realm of releases that can be certified by a PEP to media other than soil is contrary to Subcommittee 10's recommendations and would have the potential to result in unacceptable risk to human receptors or the environment.

In particular, the proposed means of determining that there have not been persistent impacts to groundwater calls for professional judgement that PEPs may not have. The draft regulatory language provides that a release shall be determined to have caused a persistent impact to groundwater if there is an observable sheen after three attempts over 24 hours of groundwater extraction from the excavation or monitoring wells, or if one or more substances is detected in a properly constructed and developed well not more than five feet downgradient of the excavation.[5] Groundwater can be free of sheen and still have dissolved-phase constituents at high

[2] *See* Subcommittee 10 Paper (Mar. 3, 2023) at 1-2.
[3] *Id.* at 10.
[4] *Id.*
[5] DRAFT for discussion - PEP Cleanup Standards Provisions - July 11, 2023 Release-Based Working Group meeting, § (d)(1).

concentrations, and therefore we do not believe this method is protective of human health and the environment. Installation and sampling of a well five feet downgradient of an excavation requires professional judgement on where to place the well, and all PEPs may not have the training or expertise to make these judgements. Furthermore, determination of what constitutes "downgradient" requires multiple wells and an understanding of local conditions (e.g. tidal influences). The placement of a well "downgradient" of the excavation requires professional judgement that PEPs might not have. PEPs would also need to have the knowledge and expertise to install monitoring wells that are designed and constructed properly to accumulate separate-phase product and the understanding of how to sample a monitoring well to detect the presence of a sheen or separate-phase product.

If a PEP makes the judgement that there is no persistent impact and there is any question that a release impacted groundwater, then LEPs will be reluctant to rely on a Certification and may feel compelled to confirm that groundwater was not impacted and/or that additional remediation was not required. This undermines certainty of closure (priority #3).

There should be a limit on the volume of releases subject to Certification

Subcommittee 10 recommended that there be volume limits on the releases that may be Certified by PEPs.[6] While the proposed regulatory language includes a requirement that remediation should be "commenced" within two hours of discovery (though that directive should be clarified as discussed below), there is no requirement that remediation be completed in any particular period of time. Large releases can continue to spread even after remediation has commenced, and the larger the volume and longer a release has been spreading the more complex the task of characterization and cleanup becomes. Furthermore, as noted elsewhere in this letter, questions remain regarding the means for determining that there has not been an impact to groundwater, and documenting that all impacted soil has been removed. These questions become much easier to answer if there is a reasonable volume limit on the releases subject to Certification.

Several Subcommittee 10 members endorsed the Massachusetts approach, under which a Limited Removal Action (which does not require an LSP to be involved) is allowed for up to 100 cubic yards of petroleum-contaminated soil and 20 cubic yards of soil contaminated with hazardous waste.[7] Alternately, since the proposed regulatory language specifies that the volume of the release must be known, it would be possible to impose a volume limit. For example, less than 15 gallons of petroleum product to soil cleaned to background within twenty-four hours with the caveat that that the laboratory results do not have to be available within the twenty-four hours.

Releases that impact surface water should be Verified by an LEP

Due to complexities associated with pollutant migration within surface water bodies and the potential for impacts due to both dissolved and separate-phase product and their interactions with sediment and adjacent wetland and upland soil, we do not believe PEPs should Certify releases that reach surface water bodies. If the Department elects to move forward with allowing PEPs to

[6] Subcommittee 10 Paper, at 10-11.
[7] *Id.*

Certify releases to surface water bodies, they should be limited in volume and time period to remove the released material from the surface water (e.g., less than twenty-five gallons of petroleum to a storm sewer where all impacts are removed in twenty-four hours).

The proposed regulatory text seems to assume that the severity of releases to surface water will be visually apparent, and will not be serious if the substance released is soluble or has a specific gravity of less than 1. The approach fails to recognize odorless, colorless liquids or solutions with dissolved-phase contaminants (e.g., certain plating solutions). Many chemicals would not be visible and are miscible in water (either partially or completely) or are already solutions. In that case, it would be extremely difficult to gauge the significance of a release or confirm that it was remediated without sampling. The risk from such substances would make timing of cleanup even more critical (whether in surface water or elsewhere), since infiltration from would occur at the rate of water infiltration and dissolution could occur rapidly into soil water in the vadose zone or if precipitation reaches the release in soil or on pavement.

Additional Suggestions:

- We understand and assume that the Certification concept is meant to apply to contemporaneous releases rather than historical releases and suggest that it be stated clearly.
- We suggest deleting the word "approximate" from section (a)(1) and adding the words "and documented" after "known."[8] In order for the streamlined procedures set forth to be appropriate, the location and volume of the release should be known with a fairly high degree of certainty. The exact degree of certainty can be discussed further in regulation. For example, we assume that identifying spill volume as "at least 30 gallons" will suffice. That said, including the word "approximate" in the regulation suggests a lower degree of certainty than appropriate. We also suggest that the spill location and volume be documented before remediation commences rather than simply known. This documentation could be as simple as a photograph of the scene at the time the release occurred or was discovered showing the container and the material released. If that basic information is not documented before remediation commences then it will be much more difficult to subsequently document and opportunities for stakeholder review (and DEEP audit) will be much more limited.
- We strongly suggest that it be specifically stated in the regulations that any release that encounters bedrock is not suitable for certification by a PEP. How a determination that bedrock could be impacted would need to be addressed in the regulation, but encountering bedrock during excavation of impacted soil would be one such condition. It might be possible for a PEP to certify that the impacted soil has been remediated, but an LEP would then be needed to evaluate whether bedrock had been impacted, and an LEP would then continue with follow-up investigation and remediation as needed.
- We suggest clarifying what it means for remediation to "commence." Section (5) includes a requirement that "[r]emediation is commenced within the time specified by section 22a-134tt-5." As discussed in the Working Group meeting on July 10, 2023, we understand that DEEP intends for that to mean that there are actual shovels in the ground. We note, however, that Conn. Gen. Stat. § 22a-134pp(7) defines "remediation" to include

[8] I.e., we suggest that section (a)(1) read "The location and volume of such release was known and documented at the time remediation was commenced."

"determining the nature and extent of a release, in accordance with prevailing standards and guidelines…" Under that definition, characterization of the release is a component of remediation, and certain facts relevant to characterization would be apparent from the moment a release occurs, so it would be difficult to identify when remediation has "commenced" as an event distinct from discovery. One suggestion is to use the phrase "removal shall commence" since that connotation implies actions taken to actually reduce the presence of contamination from the release location (though this would call for a definition of "removal" and integration with IRA concepts).

- Much more detail is required to flesh out how PEPs and LEPs are supposed to determine that "soil impacted by the release has been removed for proper disposal." If mechanisms are developed for closing low-risk releases without sampling, as suggested by Subcommittee 6, then such mechanisms should be set forth with precision and referenced in this section of the regulations. For cases where such mechanisms are not appropriate, the regulatory language should specify that soil sampling is required and specify what it means for all impacted soil to have been removed.
- Additional clarity is needed on the regulatory endpoints for spills that do not impact environmental media, or impact environmental media only modestly. As discussed in the Subcommittee 10 Concept Paper, we assume that the RSRs will be amended to include regulatory endpoints for releases that do not necessarily reach environmental media (for example, releases to pavement associated with a motor vehicle accident). Depending upon the specifics of these endpoints are to be documented, we may have additional suggestions for Certification requirements.
- Additional work, including consideration of amendments to the LEP regulations, is required to ensure that LEPs and PEPs are operating on a level playing field (priority #1), closure documentation is equally certain whether prepared by an LEP or PEP (priority #3) and accountability measures are appropriate (priority #4). While DEEP may consider the terms Certify and Verify interchangeable, marketplace stakeholders may not, which may work against the "level playing field" concept and might prompt unnecessary re-work. A possible solution may be to define a universe of low-risk releases eligible for Certification and use the same word to describe the closure documentation whether a PEP or LEP signs off. This may require that the LEP regulations be modified to specify that LEPs are automatically authorized to act as a PEP for the purposes of the new program and to Certify releases under whatever regulatory section discusses the requirements for PEP-eligible releases. It may also require the LEP regulations be modified to provide that a LEP stamp is not required for a Certification (so that a Certification is the same regardless of who is providing it).

Open Issues

We reserve the right to offer additional suggestions on this regulatory language once other related provisions are further developed. For example, we assume that the Immediate Removal Action (IRA) concept discussed by Subcommittee 4 will be fleshed out to envision a role for Permitted Spill Response Contractors and/or PEPs and LEPs. Depending upon the specifics of the IRA concept as it is fleshed out, we might have additional suggestions for the draft regulatory language that is the subject of this letter. In addition, as discussed in the Subcommittee 10 Concept Paper, the questions of who should be designated PEPs (i.e., credential requirements)

and what such PEPs should be allowed to do are tightly interrelated. As the PEP permitting scheme is further developed and the who becomes clearer, we might have additional comments on what they should do.

Thank you again for this opportunity to comment, and we look forward to future productive discussions.

Members of Subcommittee 10:

Gail Batchelder

Plato Doundoulakis

Deborah Motycka Downie

Michael Lawlor, Jr.

Matt Hackman

Sam Haydock

Brent Henebry

Robert Kovach

Douglas Pelham

Emilee Scott

Amy Velazquez