

To: PA 20-9 Working Group

From: Department of Energy and Environmental Protection

Date: January 11, 2022

Re: Second Phase Subcommittees and Massachusetts Method 3 Risk Characterization

Summary: A Method 3 Risk Characterization like approach, similar to Massachusetts, is not consistent with the release-based cleanup statutory framework, is outside the Department's authority, and is not necessary to the success of the release-based cleanup program. The Department therefore requests that the subcommittees focus their valuable, volunteered effort on other, more productive topics. While the Department does not intend to align its resources to support this type of risk assessment, it remains committed to ensuring cleanups achieve protective endpoints as efficiently as possible.

Discussion:

As the second phase subcommittees begin their work, questions regarding the charge to those subcommittees have been identified and discussed. In particular, both subcommittees 6 and 7 have expressed an interest in understanding the relationship between the issues those subcommittees are charged with evaluating and the type of release-specific risk assessment in use in Massachusetts, known there as a Method 3 Risk Characterization ("Method 3")¹.

Consistent with the request from the Working Group for clear and direct feedback, the Department of Energy and Environmental Protection ("Department") is providing this memo to ensure that the subcommittees develop advice and feedback that fits within the adopted statutory framework. For that reason, it is necessary that the Department address the ongoing discussions concerning Method 3 now, at the beginning of the second phase subcommittee process.

Public Act 20-9, now codified as Chapter 445b of the Connecticut General Statutes creates the framework for Connecticut's release-based cleanup program and does not require creation of a Method 3-like approach. General Statutes 22a-134tt provides authorization to the Department to adopt regulations implementing the release-based cleanup program, and subsection (f) of that section specifies that such regulations should include cleanup standards. When establishing cleanup standards for this new program, Subsection 22a-134tt(f)(3) requires the Department to "provide flexibility, when appropriate, for licensed environmental professionals to establish and implement risk-based alternative cleanup standards developed in consideration of site use, exposure assumptions, geologic and hydrogeologic conditions and physical and chemical properties of each substance that comprise a

¹ A Method 3 Risk Characterization includes four distinct assessments: the risk to safety, the risk to human health, risk to public welfare, and the risk to the environment, and are used as a tool to determine required cleanup levels on certain eligible release sites as specified by the Massachusetts Contingency Plan.

release . . .” General Statutes § 22a-134tt(f)(3). However, the flexibility to be provided to licensed environmental professionals (“LEPs”) to implement risk-based criteria is not equivalent to Method 3.

Indeed, Method 3 risk assessment is not performed by licensed site professionals, the equivalent of LEPs in Massachusetts; instead a separate class of professionals, risk assessors, is required to prepare, and to evaluate, Method 3 risk assessments. The clear intent of General Statutes § 22a-134tt(f)(3) is to create a tool which can be implemented by LEPs, not require an entirely new class of professionals.

Furthermore, General Statutes § 22a-134tt(f)(3) is specific about those factors that should be considered when implementing alternative cleanup standards: “site use, exposure assumptions, geologic and hydrogeologic conditions and physical and chemical properties of each substance that comprise a release.” While Method 3 includes assessment of the toxicology and cancer risk of a release, such topics are absent from the list of factors found in General Statutes § 22a-134tt(f)(3). For these reasons, including Method 3 in the cleanup standards to be adopted for the new program is not consistent with General Statutes § 22a-134tt(f)(3).

The Department is also limited in its authority to enact a broad release-specific, risk-based tool for developing cleanup criteria. In fact, General Statutes § 22a-1i provides that the Department of Public Health, and not the Department, “shall be the lead agency responsible for the risk assessment of human health regarding toxic substances identified in all environmental media, including, but not limited to, food, drinking water, soil and air” and further requires all “[r]isk assessments” to be “conducted or reviewed by the Department of Public Health after the need for such risk assessment has been established by the state agency responsible for the regulation of the given contamination.” General Statutes §§ 22a-1i(b) and 22a-1i(c). The authorization to adopt regulations including cleanup standards found in 22a-134tt(f) does not supersede the requirements of this section.² The legislature has delegated this role to DPH and DEEP is not authorized to dictate through its release-based regulations how DPH implements this authority. The approval of release-specific cleanup criteria derived from a risk assessment is beyond the Department’s authority and therefore cannot be enacted in the regulations on which this workgroup is tasked with providing advice and feedback.

Finally, a Method 3-like tool is not necessary for the success of the release-based cleanup program. The Department has indicated a strong willingness to create early exits and additional remedial approaches for lower risk releases in the cleanup standards to be adopted. The Department is also committed, and in fact required, to provide increased flexibility to LEPs to calculate alternative criteria when appropriate. These additional exits and approaches, and this increased flexibility, will create a faster, less expensive, and frankly better cleanup program.

Identifying in concept these new early exits and additional remedial approaches and developing the conceptual framework for providing LEPs increased flexibility to calculate criteria is the task of subcommittees 6 and 7, respectively. These are significant undertakings that will require all the

² There are other statutory and regulatory schemes – both state and federal – that prevent use of a Method 3 like program. For example, criteria for remediation of groundwater, surface water, and sediment must be consistent with Connecticut’s Water Quality Standards.

creativity and expertise of the stakeholders working on those subcommittees and are deserving of the undivided attention of each subcommittee.

This working group and its subcommittees are tasked with providing the Department with advice and feedback on regulations to be adopted under the existing statutory framework. The Department encourages everyone volunteering their time in this effort to focus on concepts that can be implemented by the Department.

Thank you all for your continued hard work and dedication to this project, and for the great ideas that have come and will continue to come out of your efforts.