Report to the Connecticut Department of Energy and Environmental Protection

on

# The Draft Proposed Program Outline for a Transformed Cleanup Program

## Topic: Liability

November 20, 2012

Submitted to Support the Transformation of Connecticut's Cleanup Program

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# Introduction

The Department of Energy and Environmental Protection (DEEP or Department) is working to improve Connecticut's cleanup program through an interactive stakeholder process. As part of the transformation of the statutory and regulatory components of the cleanup program, DEEP solicited volunteers for and formed six transformation workgroups. DEEP asked these workgroups to comment on and make recommendations regarding certain aspects of the transformation, as summarized in the Draft Proposed Program Outline for a Transformed Cleanup Program.

This transformation workgroup was asked to provide DEEP with comments and recommendations regarding Liability.

Comments and recommendations contained in this report are the opinions of the workgroup members. Care was taken to identify areas where consensus was not reached among workgroup members.

# Workgroup Membership

Summarize workgroup membership and populate the table below indicating the co-leads.

**Liability**

| Participant | Representing |
|---|---|
| Robert Robinson (co-lead) | DEEP |
| Pamela Elkow (co-lead) | Robinson & Cole, LLP |
| John Albrecht | AECOM |
| Jeff Chandler | DEEP |
| Adam Duskocy | ENVIRON International Corporation |
| Gregory Hencir | AECOM |
| Dave Hurley | Fuss & O'Neill Inc. |
| Dot Kelly | Shearwater Design Inc. |
| Lucas Meyer | Carmody & Torrance, LLP |
| Jean Perry Philips | Pullman & Comley, LLC |
| Lauren Savidge | Connecticut Fund for the Environment |
| Lorella Struzzi | Promold Plastics |
| John Wertam | Shipman & Goodwin LLP |
| Mitch Wiest | Roux Associates Inc. |

# Workgroup Meetings

The Liability Workgroup (Workgroup) met on October 17, 24, and 31, 2012, and on November 14, 2012. An interim summary of our discussions was presented on November 7, 2012 during an overall workgroup forum.

Due to the recognized inter-relation of all six transformation workgroup topics, the singular goal of addressing "Liability" was challenging. Consequently, the Workgroup identified two main sub-headers: 'Responsibility' and 'Liability'.

Responsibility was then categorized into subtopics of:

1. Who is responsible for reporting a reportable release;
2. Who must report to whom;
3. Who is responsible for investigating and remediating the release; and
4. What is the "responsible party" expected to complete.

Liability was discussed in subtopics of:

1. Remove any liability of environmental professionals for reporting mandates;
2. Who is liable for the condition of the release; and
3. How can liability of Innocent Landowners be minimized;

Throughout the discussions, it became apparent that the definition of "reportable release" and the means by which a responsible party may exit the program were relevant qualifiers. There was general consensus with respect to the obligations to report and remediate "current releases", referred to as a "reportable quantities" in the DEEP outline. Most of the discussion focused on "historic releases", also referred to as "reportable concentrations," and the who, what, when, and liability for such release.

# Background

The foundation of responsibility and liability for the proposed "Unified" or "Transformation" program were established in the December 15, 2011 report titled, "Evaluation of Pollution Responsibility and Liability Relief Provisions", drafted by Workgroup #5; and in the Department's "Draft Proposed Program Outline for a Transformed Cleanup Program", and dated September 27, 2012.

The discussions of the Workgroup confirmed the positions and recommendations of the aforementioned reports.

# Recommendations

The Workgroup reached a consensus that responsibilities and liabilities associated with current releases are usually not an issue. However, the knowledge, discovery, and reporting requirements associated with historic releases present many concerns related to responsibilities of reporting and remediating, and especially related to the liability for the release.

The Workgroup reached consensus on three main recommendations. (1) As presented in the December 15, 2011 report, the "polluter" should be the primary responsible party, and the conceptualized Unified Cleanup Program should enforce this approach with provisions that strengthen the rights of private citizens to pursue polluters or persons that exacerbate the pollution; (2) The universe of entities required to report historic releases and new releases to DEEP, as set out below, and the need for liability protection for environmental professionals for any requirements or repercussions resulting from their legal obligations to report a release; and (3) There must be liability protection for "Innocent Landowners" for historic releases, together with a robust definition of "innocent landowner" that does not dis-incentivize investigations and a 'Disclosure Law' that preserves the buyer protection goal of the current Transfer Act by ensuring that the prospective purchaser is provided certain information that the seller may have about the known environmental condition of the property; the goal is to allow for due diligence to occur without creating a "chilling effect" on proposed transactions. The exact nature of the information required and the form would need to be determined.

# Discussion

Reporting

The Workgroup agreed with the reporting requirements presented in Section III. b. of the September 2012 Draft Proposed Outline, with the exception that an environmental professional, in addition to notifying his/her client, should also notify the property owner if the client is not the property owner. This recommendation is based on the fact that, if the environmental professional's client is not the property owner, that client might not have an obligation to report the release. One proposed exception to that rule is that environmental professionals would be required to report releases that constitute an "imminent hazard," a tern which was is yet defined. There was discussion, though not consensus, on whether this obligation of the environmental professional should only occur if the property owner or operator did not report.

The Workgroup also agreed that for purposes of reporting, "environmental professional" should include more than licensed environmental professionals or even "technical environmental professionals," as defined in CGS 22a-6u. The working definition we came up

with was: "An individual who has specific education, training, and experience necessary to exercise sound professional judgment to develop conclusions regarding conditions indicative of a release or potential release." The intent was to include in the category of "environmental professional" individuals or entities such as tank removal companies, hazardous materials or waste transporters, and other similar businesses that are in a better position based on experience to "see" or have "knowledge" of a release than a property owner.

There was consensus in the Workgroup that the Department should create a "Reportable Release Notification Form," to be completed by the environmental professional and provided to the client and property owner. Use of a form would ensure that the information provided to clients/property owners was uniform among environmental professionals. There was also consensus that the form would be completed by the environmental professional if, in the course of providing professional services, the environmental professional obtains knowledge of a reportable release. Examples of such knowledge are observation of a leaking tank at the time of removal, or obtaining laboratory results that exceed reportable concentrations. The "Release Notification Form" would be signed by the environmental professional as having prepared it, and the receiving party, as having been notified. The environmental professional is to retain a copy of the release notification form for some period of time, perhaps not less than seven (7) years. There was a suggestion, though not a consensus, that environmental professional should retain copies of such forms for some period of time, and upon written request from the Commissioner, the obligated to provide a copy.

There was a majority consensus in the Workgroup that the obligation to report a historic release should be prospective, specifically that the "obtaining knowledge of a release" should be "knowledge," that is, obtaining new data, that occurs after the effective date of any new legislation. The responsibility and liability to report historic releases or an obligation to mine files to determine all conditions that met the definition of "reportable concentration" is onerous and unworkable. This concern was applicable to not only the environmental professionals, but also to the property owner. It should be noted that historic "knowledge" of an environmental condition or the potential knowledge of a release that may have been documented in old files was contentious; the point was made that knowledge was knowledge, and an arbitrary date to mandate reporting was of concern to some. However, the general consensus was that the market forces, together with the disclosure form discussed above, will bring historic conditions that are required to be reported to light. It was agreed that a tight definition of "knowledge" is critical.

It was clear throughout our discussion that it was difficult to agree to more reporting if the exits were not made easier. Put simply: without "fixing" the RSRs and otherwise making it easier to be "done," any statutory program that results in more sites requiring remediation would be unacceptable. It was noted frequently that, the cost to investigate and remediate, loss of property value, and the potential liability for an historic release discourages property owners

from investigating their property and finding historic releases which will require reporting, absent clear and cost-effective exits. There was a split consensus that in order to incentivize investigating and discovery of historic releases, an Innocent Landowner should not be obligated to remediate the historic release; however, there was greater consensus that remediation to address exposure risks from the historic release was appropriate. The issue is amplified if the "polluter" cannot be identified or is no longer viable. One suggestion, though not discussed in great detail, was a fund for the remediation of such sites.

There was unanimous consensus that any release that posed an imminent risk to human health– regardless of when it occurred – should be reported. There was recognition that this was similar to the current Significant Hazard Notification requirements, and there was consensus that these requirements should continue in some form, whether incorporated into the conceptualized unified program, or independently. In addition, any change in statutes should make it clear that a historic failure to report a "release" under 22a-450 or a Significant Environmental Hazard under 22a-6u is still a failure to report, and the responsible party remains liable for that failure.

Disclosure

The Workgroup reached a consensus that "innocent landowners" and "innocent purchasers" should be provided some sort of liability protection for historic releases, but neither current property owners nor prospective owners should be incentivized to hide known conditions or avoid investigations. Therefore, in order to preserve the "buyer protection" goal of the Transfer Act and support the minimized or avoided liability of property owners for historic releases, there should be a "Disclosure Law". At the time of transfer of real estate, the seller should disclose certain information concerning known releases and the environmental condition of the property to the buyer. The Workgroup did not determine the exact nature of the information to be disclosed.

While not discussed in detail, there should be some sort of right for a buyer to recover damages from a seller that failed to comply with the disclosure obligations.

There was belief among the Workgroup that the requirement by the seller to disclosure to the buyer environmental conditions that may exist or that may indicate a reportable release would likely result in a buyer performing an investigation that would then confirm the presence of a "reportable release."

The Workgroup felt that market forces (such as lending institutions and environmental insurance vendors) already create a fairly high standard for due diligence; lenders don't want to lend on property with unknown conditions, and insurers want data to underwrite their insurance policies. The Workgroup identified that there should be limited liability for lending institutions in order to minimize their need for additional site investigations just to ensure no

unknown releases are present on site. This would mitigate the need to "prove the negative". The Workgroup also identified that environmental insurance underwriters are concerned about site history and potential for environmental harm.

Innocent Landowner and Bona Fide Purchaser

The concept of an Innocent Landowner is already in state statute [22a-452d]. There was agreement that the concept remains valid, but may need to be updated to reflect current understanding of appropriate inquiry, similar to CERCLA. Similarly, there was a general consensus that investigations and therefore disclosures of conditions are incentivized by protecting those who actually discover conditions during due diligence and yet still purchase the property. (Innocent landowners by definition have looked but not found adverse environmental conditions). While we did not get the opportunity to discuss details, there was general consensus that a provision similar to the "bona fide prospective purchaser" concept found in CERCLA would incentivize investigations and disclosures, and not disencentivize the transfer of real estate. If the current property owner does not provide full disclosure of the environmental conditions of the property and the prospective purchaser proceeds with the property transfer, or if prospective purchaser doesn't complete their due diligence, there will be no Innocent Landowner credentials

The seller disclosure obligation would be a component of and inform the "appropriate inquiry" conducted by the prospective purchaser.

Liability Relief

The workgroup had unanimous consensus that Innocent landowners should have limited liability as a responsible party. This position is in line with the current statute CGS 22a-133ee: "Liability Of Owner Of Real Property For Pollution That Occurred Or Existed Prior To Taking Ownership".

There was also consensus that the concept of Covenant Not to Sue, as presented in current statute CGS 22a-133aa and bb, should be modified to apply to release-based liability relief (in lieu of the current site-based language), and to be easier to obtain.

The Workgroup pondered whether a Covenant Not to Sue would still be warranted if remediation of a release has been completed. There was consensus, however, that if a release has been remediated to a Class A closure, the responsible party should not be liable to any third-party based on the condition of the release. There was discussion, but no consensus on whether similar third-party protection should apply to Class B or Class C closures, perhaps with a caveat that has been compliance with all land use restrictions and engineering controls.

Other Issues

The Workgroup member that represented property owner interests conveyed great concern about any retroactive application for reportable releases, especially in the case of an innocent landowner in which the previous land owner (and potentially the polluter) is no longer viable and therefore the current land owner is stuck with the responsibility to investigate and remediate the release and the liability for the condition of the release. It is therefore imperative that the Unified Cleanup Program defines an appropriate standard for "Disclosure" and for "Due Diligence". To further incentivize the investigation and reporting of releases discovered by "innocent landowners", serious consideration should be given to the establishment of a fund for remediation or a subsidized insurance program to which owners could contribute.