Transitions from Existing Programs

DEEP Cleanup Program Transformation Workgroup 4

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TRANSFER ACT

Transition Issues

- What happens to properties with outstanding Transfer Act filings?
- SCGD requires full site characterization by AOC. Unified program will be release-based. Should Transfer Act site characterization transition to release-based approach?
- Retain Transfer Act requirement to "hunt for releases" not currently "known"?
- Fairness of upsetting settled business expectations by altering or reducing current Transfer Act obligations.

TRANSFER ACT

Transition Issues

- **Is "verification" under existing system same as release area compliance under new system?**
- **What Schedule requirements will be required for**
  - **sites where schedules apply but are not being met.**
  - **sites where no schedules currently apply.**
- **What happens to rights of transferees? 22a-134d says nonperforming transferor is strictly liable for all costs of remediation and damages.**

VOLUNTARY REMEDIATION (22a-133x and 22a-133y)

Transition Issues

- Sites in voluntary program may not have progressed to point where available information would trigger reporting under unified program "knows or should have known" of RQ, RC.
- Current program imposes no deadlines or requirements to complete work. Continuing to verification is voluntary. Some sites may have proposed schedules that differ from unified program time lines.
- Benefits/incentives for those in the program to clean up site will change

UNDERGROUND STORAGE TANKS

Transition Issue

- **What to do with sites that have prior releases from regulated USTs that have not been formally closed.**
- **Current UST regulations would need to be revised to conform to unified program; EPA would need to approve the resulting changes**

SPILLS PREVIOUSLY RECORDED

Transition Issue

What to do with records of ~ 100k spill reports most without formal "closure."

- **Including all spill reports as reportable or excluding all as already addressed are two extremes.**

Some possible screening criteria for excluding spill reports from the new program:

- **age (date cutoff or earliest availability of electronic spill report database)**
- **de minimis threshold - type or quantity of release (5 gallons, etc.)**
- **de minimis threshold - hazard or risk**
- **sites subject to other existing programs or under active DEEP oversight**
- **spill reports lacking sufficient information for followup (e.g. no reported addresses)**
- **vehicles on public roads**
- **transformer spills**
- **sites not operational**

RCRA CORRECTIVE ACTION

Transition Issue

- **Corrective action regulations will require renegotiate with EPA**
- **Are RCRA CA sites already subject to and performing corrective action exempt from reporting existing and new release if already reporting under CA?**
- **Should RCRA sites subject to CA but CA obligation not yet triggered (TSDFs) or ordered (other RCRA facilities) report releases as they are discovered?**

SIGNIFICANT ENVIRONMENTAL HAZARDS

Transition Issue

- **Long term effect on existing sites that have already filed SEH notices.**
- **Sites that have been certified as abated but still have contamination.**
- **SEH at sites regulated under other programs that are continuing or will have extended phase-out period (Transfer Act, UST, RCRA corrective action)**

POTABLE WATER

Transition Issue

- What is a ”site” in potable water context? Effect on e.g. drinking water well may be observed by innocent party, with link to “release” and responsible party, site of origin to be determined

CONSENT ORDERS

Transition Issue

- **Will requirements of unified program affect obligations under outstanding consent orders?**

- **If consent order signatory is not the current owner, does the current owner become subject to the new reporting requirements?**

CROSS-PROGRAM ISSUES/CRITICAL QUESTIONS

Transition Issue/Question

- Site investigation will be tied to Releases not AOCs
- Is new reporting required for existing releases found at sites already in a program?
- Are there DEEP staff available to handle all these transitions?
- For sites already covered by an existing program, DEEP will need to provide detailed notice of how transition to the unified program will be managed
- Transition will bring influx of new and revived sites, placing significant demands on administrative staff and private parties

DEEP REMEDIATION TRANSFORMATION WORKGROUP
RE: PROGRAM TRANSITION

SUMMARY TABLE – REVISION OF NOVEMBER 5, 2012

TRANSFER ACT

Transition Issue	Option(s) for Transition	Comments	Recommendation
What happens to properties with outstanding Transfer Act filings? Current framework means no "exit" until whole site is characterized, addressed and verified.	1. Continue to verification under current program including SCGD investigation. 2. Complete SCGD investigation but close out confirmed releases one at a time under new program. 3. Terminate existing program and transfer site entirely to new program.	DEEP "Outline" states that existing Transfer Act obligations will not be affected.	TBD
Transfer Act sites are at varying stages of progress from just filed to mid-stream to near verification. Should state of progress affect classification?	1. No distinction. 2. Verification status • Fully verified • Partially verified • Interim verification • No verification	See below re schedule and active/inactive site distinction.	TBD
SCGD requires full site characterization by AOC. Unified program will be release-based. Should Transfer Act site characterization transition to release-based approach?	1. Retain SCGD AOC approach for current Transfer Act sites. 2. Integrate any revised RQ or RC criteria for Transfer Act sites with outstanding obligations.	Coordinate with Release Reporting Workgroup. Workgroup 4 leans toward interpretation that SCGD/AOC approach is "what filers signed up for," and therefore should be retained.	TBD

Transition Issue	Option(s) for Transition	Comments	Recommendation
Retain Transfer Act requirement to "hunt for releases" not currently "known".	1. Yes, for current Transfer Act sites. 2. Retain only to extent consistent with investigation obligation under new program.	Unified report will apply to releases about which responsible party knows or should know (constructive knowledge). Need guidance on how far constructive knowledge approach will drive investigation. Coordinate with release reporting work group?	TBD
Fairness of upsetting settled business expectations by altering or reducing current Transfer Act obligations.	1. Preserve business expectations by retaining all aspects of current system for outstanding Transfer Act certifiers. 2. Not an objection -- regulatory changes often alter expectations.		TBD
Is "verification" under existing system same as release area compliance under new system?	1. New system should require full site verification. 2. Retain current options for full or partial verification if desired. 3. Adopt release approach under unified program.		TBD
Schedule A. Sites where schedules apply but are not being met. --- Schedule B. Sites where no schedules currently apply.	1. New fees, new penalties for not proceeding. 2. No change -- retain existing enforcement tools. 3. Start over under new program. --- 1. No change. 2. Impose schedule. 3. Start over under new program.	--- Many open TA filings are/were subject to no or limited schedule requirements. Can new law add or alter schedule terms that applied when filings were made?	TBD --- TBD
Sites with multiple certifying parties.	1. No change. 2. Define priorities. 3. Adopt priorities defined by new program.	No current law/rule. Will new program allow for and prioritize multiple responsible parties?	TBD

Transition Issue	Option(s) for Transition	Comments	Recommendation
Non-viable certifying party other than current owner.	1. No change. 2. Allow current owner to proceed voluntarily under new program.	Will reporting requirement apply to non-certifying owner? If so, will new program automatically impose obligations owner does not now have?	TBD
What happens to rights of transferees? 22a-134d says nonperforming transferor is strictly liable for all costs of remediation and damages.	1. Retain with performance measure adapted to whatever ongoing obligations certifying parties will have after transition. 2. Retain with performance measure defined by requirements in place at time of transfer	This is another manifestation of the business expectations issue (above).	

VOLUNTARY REMEDIATION (22a-133x and 22a-133y)

Transition Issue	Option(s) for Transition	Comments	Recommendation
Sites in voluntary program may not have progressed to point where available information would trigger reporting under unified program "knows or should have known" of RQ, RC.	1. Volunteer's option to continue investigation. 2. Volunteer proceeds in accordance with any schedule already proposed (see next issue) 3. Excuse reporting obligation under unified program for properties where volunteer elects to continue to verification.	Unified program will not have any requirement to investigate if information to trigger report does not yet exist.	TBD
Current program imposes no deadlines or requirements to complete work. Continuing to verification is voluntary. Some sites may have proposed schedules that differ from unified program time lines.	1. Proceed with any schedule already proposed (or accepted by commissioner) 2. Require new schedule for commissioner's approval. 3. Conform to schedules defined by unified program 4. Give volunteer option to select 1, 2 or 3.	For sites with known "releases" subject to regulation under unified program but without proposed or approved schedules, unified program schedule may be default	TBD
Sites in voluntary program currently have the right to proceed, slow down or withdraw.	1. Sites without knowledge of releases (see first issue above) can stop. 2. Sites with knowledge of releases either continue under schedules already proposed or unified program schedules (see preceding issue)	Knowledge threshold for reporting under unified program logically displaces any ability to slow down or stop under current voluntary program. Ability to control pace or stop provides incentive to undertake investigation, however.	TBD
Benefit of current program: full-site verification after SCGD Ph. I/II/III ESA	1. Proceed with full site characterization. 2. Proceed on release-specific approach	Will unified program preserve option for "verification" of whole site, vs. release-specific response? That benefit provides an incentive to enroll in voluntary program.	TBD
Benefits/incentives for those in the program to clean up site will change		Major benefit/incentive at risk: genuinely voluntary nature of program. Absent SEH or enforcement action, volunteer can stop at any time.	TBD

UNDERGROUND STORAGE TANKS

Transition Issue	Option(s) for Transition	Comments	Recommendation
What to do with sites that have prior releases from regulated USTs that have not been formally closed.	1. No change, but incorporate unified program end points, presumptive remedies, etc. 2. Phase in unified program using tiered approach depending on the level of study and remediation that has occurred at the time that the new regulations are in place.	Details of phase-in parameters (categories, timetable) would need to be defined. See also below re previously reported spills: non-closed UST sites present similar concerns re number of sites, burden of bringing large number of "sleeping dogs" back to life at once. Hardly any LUST sites have full DEP/DEEP signoff. Inactive but not formally closed UST release/response situations will be reactivated and add to administrative case load.	TBD
Same: Responsible parties at some UST sites think they are "done" following initial spill response, but have not achieved compliance.	Communicate new unified program requirements, set time frame to self report status and/ or to demonstrate compliance under unified program or willingness to proceed under new program		TBD
Current UST regulations would need to be revised to conform to unified program; EPA would need to approve the resulting changes	Revise regulations and gain EPA input and approval	Pertinent portions of UST regulations will also need to be revised in tandem with RSR revisions and unified program development.	TBD

SPILLS PREVIOUSLY REPORTED

Transition Issue	Option(s) for Transition	Comments	Recommendation
State has backlog of ~ 100k "spill reports" most without formal "closure" or "no further action" determination. All non-closed "spill reports" could be deemed reportable under unified program and would have to be revisited. At the opposite extreme, all previously reported spills could be deemed already addressed (an artificial assumption) and not subject to further or renewed examination. "Options for transition" lists alternatives between these extremes.	1. DEEP reviews historical spill reports and exempts some based on screening criteria to be determined. Possible: • age (date cutoff or earliest availability of electronic spill report database) • de minimis threshold - type or quantity of release (5 gallons, etc.) • de minimis threshold - hazard or risk • sites subject to other existing programs • spill reports lacking sufficient information for followup (e.g. no reported addresses) • vehicles on public roads • transformer spills • sites not operational • spills under active DEEP oversight • spills within UST program 2. Include only reported spills where RQ/RC under unified program is still present at site. 3. Include only reported spills where RQ under unified program was released 4. Include all spills where original spill report meets unified program RQ/RC reporting threshold. 5. Redefine "spill" under the statutes?	Transitioning previously reported spills presents enormous logistical challenges. Bringing 100,000 spill reports "back to life" is not a viable option. Even to review and screen the backlog would be a tremendous undertaking. Nor is it satisfactory to ignore reported spills that may not have been fully addressed. It is difficult to know where to draw the line. In practical terms, the subset of spill reports that are formally closed or currently active could be interpreted as an implied determination of what is worth the expenditure of private and public resources, and thus what ought to remain active after transition. But this interpretation disregards the reality that administrative resource constraints influence decisions. Some spills (many? most?) do not present substantial environmental concerns that would justify further attention. Transition of reported spills to a unified program will require balancing of cost and benefit. If only 1/10 of spill report list were selected for further investigation, at ~ $10,000 each, cost = $100 million. DEEP Spills Division needs to provide input.	1. Limit consideration to spill reports in electronic database (1996 to date). 2. Omit: • Spills under other programs (including operational gas stations) • Motor vehicle incidents • Transformer spills • Sites with previous active DEP/DEEP oversight, with or without formal closure or NFA determination • Reports with sufficient information to classify release as below unified program RQ threshold • Reports with incomplete information. 3. Rank by some qualitative criteria available in database and rationally related to risk (volume of release, type of material) 4. Select subset (top 100, 500?) for further review under unified program, depending on available resources. 5. Distribute notice to all other spill reporters in database concerning new unified program and leave it to them to respond, or to risk not reporting and incurring enforcement liability (if appropriate; see below re new reporting requirements).

Transition Issue	Option(s) for Transition	Comments	Recommendation
	6. Terminate further obligations under existing spills program and leave further attention on previously reported spills to future transactional due diligence.	Even if it is impractical to re-open all prior spill reports, any alternative involving review or screening to select a subset of reports for renewed attention will consume significant public and private resources. Assuming that all prior spill reports have received some level f administrative scrutiny, if only in the limited sense of deciding not to take further administrative action, it could be rational to rely on future due diligence activities to revisit old sites and identify those for needing reporting under the unified system. As a practical matter, this would merely formalize the existing status quo in which old spill reports are getting no private or administrative attention., and thus represents no additional sacrifice in protectiveness. For those spills that present significant ongoing concerns, private tort remedies and public enforcement authorities will remain available.	
Initial response has occurred but the site was not fully studied.	1. See above. 2. Deem sites with initial response "closed."		TBD
What are the new reporting requirements for spills already reported under current program?	1. No new report. 2. Start over under new program 3. Hybrid: no new report for some current spills identified as warranting continued attention, with notice to remainder re new program.	Need to coordinate with spill reporting group	TBD

RCRA CORRECTIVE ACTION

Transition Issue	Option(s) for Transition	Comments	Recommendation
Corrective action regulations will require renegotiate with EPA	Same as for UST/LUST regulations		TBD
RCRA CA sites already subject to and performing corrective action	• Continue with investigation and corrective action, including site-wide investigation for 22a-449(c)-105(h) land disposal facilities. • Sites are already "reported" and do not need new report under unified program – continue under current program. • Any new releases at active CA sites: roll into CA process, EXCEPT that significant environmental hazard reporting obligation should continue to apply. • Incorporate revised RSR requirements and exit options as permitted under revised CA regulations to be negotiated with EPA.		
RCRA sites subject to CA but CA obligation not yet triggered (TSDFs) or ordered (other RCRA facilities)	1. Site generally subject to new unified reporting requirements for new releases, known RC conditions – no exemption for CA sites. 2. Proceed with CA under revised regulations when CA obligation is triggered		

SIGNIFICANT ENVIRONMENTAL HAZARDS

Transition Issue	Option(s) for Transition	Comments	Recommendation
Long term effect on existing sites that have already filed SEH notices.	1. Delegate follow up to LEP. 2. Treat as any other reportable release site.	All SEH sites are likely over 30 days and therefore will fall into "long term" category of unified program.	TBD
Sites that have been certified as abated but still have contamination.	Further followup follows unified program as with any other release.		TBD
Pending SEH notices	Give a time frame to self report their status *and/ or* to demonstrate that they are in compliance with revised RSR criteria or are willing to enter the new program		TBD
SEH at sites regulated under other programs that are continuing or will have extended phase-out period (Transfer Act, UST, RCRA corrective action)	1. Retain SEH concept and accelerated abatement as provided under unified program. 2. Address under continuing or phase-out framework as applicable (see above)	SEH now is independent of other programs. Concept seems valuable in transition period and under new program, but unified program treatment of what we now call SEH should be implemented.	
New "SEH" situations	Under unified program – phase out current SEH framework		

POTABLE WATER

Transition Issue	Option(s) for Transition	Comments	Recommendation
What is a ”site” in potable water context? Effect on e.g. drinking water well may be observed by innocent party, with link to “release” and responsible party, site of origin to be determined	1. DEEP retain enforcement responsibility (22a-471) for identifying source, including investigation orders to possible sources. (Essentially: no change)	Unified program release reporting concepts need to distinguish properties where effect of offsite release is observed. Report option should be available for impacted owner or user distinct from responsible parties under unified program. Upgradient contamination policy should continue to apply.	TBD
What happens to sites that are currently under a municipal verbal agreement to sample water supply wells in a community.	1. Continue existing agreements, with 22a-471 enforcement authority backup.		
Potable water situations under outstanding orders	Continue under existing orders. See below re “consent orders.”		

CONSENT ORDERS

Transition Issue	Option(s) for Transition	Comments	Recommendation
Will requirements of unified program affect obligations under outstanding consent orders?	Consent order modification requires judicial approval. Statutory and regulatory changes will not automatically apply; DEEP and signatories will need to negotiate and resolve on a case-by-case basis.		TBD
If consent order signatory is not the current owner, does the current owner become subject to the new reporting requirements?	1. No. 2. Yes. 3. Yes only if CO signatory is not performing.	Option of imposing new obligations on current owner, whether or not conditioned on CO signatory's performance status, presents a moral hazard dilemma.	TBD

SITES IN MULTIPLE PROGRAMS

Transition Issue	Option(s) for Transition	Comments	Recommendation
Can all current programs be consolidated into one "unified program" as the conceptual outline contemplates?	1. Yes, mostly. 2. Some State programs (Transfer Act, voluntary remediation) present transition issues that will require phase-out period. Unified program elements, especially remediation and compliance options, should be integrated as fully as possible. 3. Some State programs are delegated under federal authority (UST, RCRA CA) and will have to continue under whatever negotiated regulations the State works out with EPA.	RSR revision presents an opportunity to bring State remediation requirements into compliance with RCRA CA and UST requirements. To maximize goal of "unifying" remediation programs, can RCRA CA and UST requirements be integrated into the RSRs so all applicable regulations, even if different to some degree, are located in one place? Those parts of the UST regulations that do not relate to remediation will not be affected and can remain separate.	TBD

CROSS-PROGRAM ISSUES/CRITICAL QUESTIONS

Transition Issue/Question	Option(s) for Transition	Comments	Recommendation
Site investigation will be tied to Releases not AOCs	1. Revise SCGD or successor guidance/rule to reflect "release based" approach of unified program – e.g. Phase I address "releases" rather than AOCs, Phase II address releases and possible/likely releases, Phase III continue with identified releases.	Will release-based approach differ materially from SCGD approach? Will some contexts (e.g. a future voluntary investigation program or future full-site verification option) effectively require what SCGD now requires, but oriented around "releases" rather than AOCs? Will "reasonable confidence about maximum degree" for RC purposes require more or less than current SCGD delineation of extent?	TBD
Is new reporting required for existing releases found at sites already in a program?	1. No. Manage transition on program-specific basis. 2. Yes. Require transition report including (a) what program site/condition is currently in, and (b) site information pertinent to new unified program.	Requires decision about whether burden of reclassifying sites will fall on DEEP or regulated parties.	TBD
Are there DEEP staff available to handle all these transitions?	1. Staff up to meet transition demands 2. Define transition demands within limits achievable with existing departmental resources		TBD
For sites already covered by an existing program, DEEP will need to provide detailed notice of how transition to the unified program will be managed	DEEP will need to develop a notice protocol that provides clear guidance to regulated parties and orderly transition to unified program		

Transition Issue/Question	Option(s) for Transition	Comments	Recommendation
Transition will bring influx of new and revived sites, placing significant demands on administrative staff and private parties	1. Define grace/transition period for regulated parties to submit certification that site (in whatever program) is in compliance with RSRs as revised. a. After grace period, all sites roll over to new unified program. b. After grace period, program-specific transition as defined above. 2. Stagger implementation or effective date by program, priority or screening criteria to be determined.	Transition planning needs to account not only for implementation of new program for newly reported sites, but also for sites in existing programs that may not currently be getting administrative or private-party attention. The "surge load" of the turnover needs to be understood before the "transformation" can proceed.	