**SOCIETY FOR WOMEN ENVIRONMENTAL PROFESSIONALS**
**CONNECTICUT CHAPTER**

**Comments to Proposed Environmental Use Restriction Regulations**
**Released for Public Comment September 27, 2019**

The following comments and recommendations were prepared by members of the Connecticut Chapter of the Society for Women Environmental Professionals (CT-SWEP) in response to our review of the draft proposed language for the Environmental Use Restriction Regulations C.G.S. Sections 22a-133q-1 to 22s-133q-9.

## Preamble

CT-SWEP finds the revised process outlined in the draft proposed EUR Regulations to be overly burdensome, challenging and time-consuming for both the regulated community trying to close out environmentally contaminated properties using EURs and the limited DEEP EUR staff working to timely review and approve the many EUR applications received each year. The review and approval of EURs have become a major delay in closing out regulated sites, frustrating all involved, especially when there are contingent financing deadlines and intervening transfers of the subject property prior to receiving a final approval. Both applicants and staff would benefit from efforts to streamline the process, rather than adding more steps, costs and requirements to an already challenging process.

For example, the obligation to obtain subordinations from prior interest holders is the single largest obstacle in getting an ELUR approved. In Massachusetts, subordinations from prior interest holders are not required. Instead, the Massachusetts regulations require that all interest holders be given 30 days prior notice before an Activity and Use Limitation (AUL), similar to the ELUR in Connecticut, is recorded. Utility companies, which hold the process up the most in Connecticut, pay close attention to notices of AUL's in Massachusetts and, as a matter of employee safety, abide by the AUL's once they are recorded. The AULs' typically permit emergency work to be performed on utilities, so the utility companies are able to access their lines in the event of an outage. This process is successful and utility companies are not up in arms about it. In Connecticut, the requirement to obtain subordinations is statutory, so the General Assembly must get involved to change that requirement. The same goes for NAUL's (the statute requires that holders of prior interests that interfere with an NAUL to actually sign the NAUL). We understand that DEEP cannot change this requirement on its own, but we would ask that DEEP recommend a change to the General Assembly.

Further complicating the process is the fact that by the time many sites are ready to submit an EUR application, the Certifying Party preparing the application may no longer own and control the subject property. CT-SWEP is concerned that some of the proposed revisions will add

unnecessary additional pressures to an already challenging relationship. These will be further addressed in the comments.

CT-SWEP also wants to note that although there are very clear timeframes set forth for the EUR applicants, the revisions are silent as to review and approval timeframes of the Application by DEEP so there continues to be uncertainty on when an Applicant would receive an Approval of the EUR.

Finally, it has long been our understanding that the addition of the statutory NAUL was intended to simplify and streamline the remediation process by allowing self-implementing restrictions for low risk uses, eliminating the subordination agreement requirements (when appropriate), reduce the review time by and burden on the agency, reduce the cost to the owner, allowing quicker Verifications to be issued on lower risk sites. The changes being proposed are unfortunately not consistent with this goal for the reasons stated below.

**General Comments**

**22a-133q-2(b)(3) and 22a-133q-3(b)(3) – Survey**
The language requiring a survey be "sealed not more than 90 days prior" is unduly burdensome. There is no reason to have the survey "sealed" when DEEP will continue to have comments on the survey as the application oftentimes goes through multiple revisions until it is finally approved. This adds an additional burden (and cost) on the applicant to have the surveyor seal the survey instead of leaving it in draft form prior to approval and recording. It is also questionable whether a surveyor will actually seal a draft survey. We strongly recommend maintaining the current process of submission of draft surveys.

**22a-133q-2(b)(5) – Attorney Report**
It is unclear whether this is a new "report" or the current evaluation that an attorney does on the interests and the current form that an Attorney signs. It would appear that the regulation describes providing a Certificate of Title both with the application and upon recoding, which is duplicative both in efforts and costs without necessarily providing any benefit for review. If this is not the intention, then it would be helpful to review the form an attorney will need to sign to determine whether they can make the evaluation and certification that DEEP is requesting. There are other less costly standard industry title evaluations used in commercial real estate practice that should be considered, which evaluations will provide the necessary information for staff's review without the additional cost and burden to the owner.

**22a-133q-2(b)(6) – Binding Agreement with Interest Holders**
As stated above, the process of obtaining subordinations is the most time consuming and largest obstacle in relation to an EUR. The burden of having to obtain a signed agreement in addition to a signed subordination once the EUR is recorded is unnecessarily burdensome and duplicative. We recommend that this be revised to only require providing notice, if necessary, to the interest holders when the draft EUR is submitted to DEEP to be followed by the actual subordination

agreement later, or simply providing the draft subordination agreement with the draft EUR application for review by DEEP.

**22a-133q-2(b)(7) – Owner Affidavit Executed**
This affidavit is more burdensome and requires the owner to conduct its own due diligence, which is unrealistic and redundant. Part of the Affidavit is based on owner's personal inquiry of the surveyor and the attorney. However, oftentimes the owner is not the client of the surveyor or the attorney, making this unworkable.

**22a-133q-2(b)(10), 22a-133q-2(f)(1)(E), 22a-133q-3(c)(1)(v), 22a-133q-3(e)(3)(ix), 22a-133q-7(c)((1)(B) – Fees**
The fees add to the overwhelming costs of cleaning up contaminated properties in Connecticut. The legal and LEP fees alone, associated with obtaining an EUR plus the costs of obtaining many of the utility and lender subordinations from third parties, are already significant especially for the smaller sites where the only option to reach closure is to use an EUR. We would encourage the reconsideration of imposing said application fees where there is no perceived benefit and potential economic harm, except for instance, in the case where the fee would be associated with an expedited EUR application review.

**22a-133q-2(c)(2)(A)(ii) – 180 days for subordination**
This is an unrealistic timeframe. There should be no timeframe for obtaining subordinations. Many subordinations require significant timeframes to both locate the appropriate party possessing the interest, and negotiate the terms of granting the subordination. If nothing else, we recommend adding a meaningful extension provision to this timeframe.

**22a-133q-2(e)(2) – change of timeframe from 60 days to 14 days to sign approved ELUR**
14 days to obtain signature from owner and final survey is not realistic or workable and will only result in a disapproval and resubmission of an otherwise approved application. The current deadline of 60 days is challenging, but manageable, given the requirements that need to be met between an approval and final recording. Given the fact that there are no timeframes for issuance of an approval, it is impossible to predict when an approval will be received, and consequently will be impossible to satisfy the post-approval requirements in such a short time period, even with the best preparation already in place.

**22a-133q-2(g)(1) – DEEP can Release ELUR**
It is unclear under what conditions DEEP would need to release an ELUR after the ELUR has already gone through the entire process of review and approval. If this requirement is needed, there should be, at a minimum, some notice to the owner, certifying party and LEP about the issue that is uncovered and an opportunity to address DEEP's concern and correct any problems, if necessary, prior to releasing the ELUR. This could pose further challenges if the certifying party, LEP or original grantor are no longer available.

**22a-133q-4 – Surveys**
The survey revisions have added many different layers of requirements to now be noted on the map. It is infeasible to include all of this information on the face of a map making the EUR maps difficult to read. EUR maps are the visual component of an EUR and serve a valuable role in ensuring clarity for understanding the impact on a property subject to an EUR. We asked surveyors to take a look at these new requirements and they found them to be extremely complicated and inconsistent with the current survey requirements, which are pretty straight forward. Further, it is unclear what scenario or situation a "simplified survey" would be used. The overall boundary survey can be a compilation plan, but the EURs still need to be defined to an A-2 standard.

CT-SWEP strongly recommends that the survey requirements be reviewed in detail by the Connecticut Association of Land Surveyors or a similar organization. The level of detail required on maps is excessive, redundant with the EURs and requiring the proposed level of detail as well as elevation data will significantly increase the cost of the EUR surveys, likely by 50 to 100%.

**22a-133q-4(a)(7) – Boundaries of Each Subject Area**
In addition to the comment above, the boundaries for each subject area will add significant additional text to the face of the map for properties with multiple subject areas, and sub-subject areas. Currently this is not required due to boundaries being easily identifiable through property markings. If the subject areas are unclear, DEEP requires that pins be placed on the property to depict the subject areas.

**22a-133q-4(a)(17) – Simplified Survey reference**
This language seems to indicate that a simplified survey is required even when a more detailed survey is also required. The purpose of this simplified survey requires clarification.

**22a-133q-4(e) – Simplified Survey**
It is unclear when a simplified can and should be used and the benefits.

**22a-133q-6(a) – Temporary Allowable Disturbances**
This seems restrictive. Property owners tend to do multiple construction projects at the same time to save costs. We do not recommend limiting this section to a singular project. The requirement for LEP supervision is a cost burden on the landowner. We recommend that the LEP supervision be changed to TEP supervision in this case. The restriction on the excavation of more than 250 cubic yards and not to exceed 500 square feet seems arbitrary, particularly if much of the excavation is for impacts that are marginally above RSR criteria. The restriction on PCB soil should be clarified as PCB soil above RSR criteria.

**22a-133q-6(d)(4) – Excavated Soils and Stockpiles**
This section requires fencing, 25-feet from public roads and sidewalks and signage visible from at least 25-feet. If a disturbance is to occur within a single day or over a short duration, signage, separation distances, etc. do not make sense. Also, for some EURs, stockpile separation distances cannot be met where the activities to be conducted are at or near the property line. We suggest

setting a more reasonable and workable duration such as a disturbance that lasts more than three working days.

**22a-133q-8 - Inspections**
Overall comment – unduly burdensome on prior owners who have already recorded an ELUR.

**22a-133q-8(a)(2) – Five Year Inspection Requirement**
This requires that LEPs are now involved indefinitely after Verification. The five-year comprehensive inspection by an LEP creates logistical and financial burdens on the property owner. Typically, the EUR is recorded in association with a property sale and the new owner most often does not engage the previous owner's LEP. Therefore, the new owner has to hire a new LEP and the new LEP has to review the data and the ELUR.

**22a-133q-8(c) – LEP Notification**
This creates a burden on the LEPs and the property owner. It is not feasible for a LEP to know all EUR non-compliance issues with past recorded EUR's. The property owner of a site with a recorded ELUR is not likely to engage a LEP after the EUR is recorded. Also, as written this section could be read too broadly to apply to any LEP. For example, if an LEP with no affiliation with an Owner knows (perhaps anecdotally) that there is an EUR on a property to prevent residential usage and happens to drive by the property and sees that a day care is on the property, is that LEP the obligated to notify the Owner? The legal burden of enforcing and ensuring compliance with the EUR is on the property owner. The agency should consider revisions that support the property owner's enforcement capabilities, rather than shifting that obligation to a third party, who is not a party to the EUR.

**22a-133q-9(a) – Posting**
Unacceptable. In order for the general public to be able to see the sign and not just invitees on the property, this posting will need to be the same size as a remediation posting sign. This will cause the perception that these properties are dirty, when in fact the state has determined that these properties met the requirements of the remediation standards and therefore are protective of human health and the environment. The general public is not at risk from the contamination and this posting requirement will not reduce any human health concerns. Rather, it only serves to induce fear for an appropriate approved risk-based closure approach. How can posting a sign that a No Dig ELUR is present beneath a building provide any protection against visitors and occupants? How can notification of a No Residential Use ELUR protect an industrial or commercial worker entering a restricted property? And what affect would a notification have on a property with an ELUR for volatilization issues and an appropriately designed and approved vapor mitigation system besides causing undo fear and potential lawsuits and suspicion every time someone who works at or visits a property gets sick? This section needs to be deleted.

**22a-133q-9(b) – Health and Safety Notification**
While this section might be workable for future EURs, where an EUR Fact Sheet has been developed as part of the EUR development and recording, it unduly burdensome to be imposed retroactively. The extent of the applicability of said notification to "any work being performed",

does not make sense. For example, as written, if a painter is painting a building, would they need to receive a copy of the ELUR and EUR Fact Sheet? This section needs to be deleted or significantly scaled back/clarified/limited.

**22a-133q-9(d) – Transfer of an interest in a parcel subject to EUR**

There is no need for this requirement. The notification is in the EUR being recorded, which will be identified in any standard title search conducted by the potential purchaser. The requirement to provide said notice within the stated timeframes is unworkable in most commercial transactions and would be confusing. The requirement to notify the Commissioner of the transfer does not serve any human health or environmental protection purpose. The EUR runs with the land and information on current ownership is readily available on-line for most if not all municipalities.