SOCIETY FOR WOMEN ENVIRONMENTAL PROFESSIONALS

COMMENTS to Proposed Remediation Standards Regulations Released for Public Comment July 8, 2019

The following comments and recommendations were prepared by members of the Society for Women Environmental Professionals (SWEP) in response to our review of the draft proposed language for the Remediation Standards Regulations Sections 22a-133k-1 to 22a-133k-3 inclusive.

Preamble

Several years ago, DEEP presented to the regulated community a vision for revisions to the Remediation Standards Regulations ("RSRs"), with three (3) stated goals:

- Provide further clarity to offer greater certainty to the regulated community and improve its ability to plan when addressing environmental contamination
- Provide more "off ramps," i.e. workable, efficient remedies, to decrease the growing backlog of properties working their way through the Connecticut Property Transfer Program
- Provide more "self-implementing" remedies, relying more heavily on the skills of Licensed Environmental Professionals ("LEP"), because DEEP had already experienced significant downsizing and needed to expand resources to make existing environmental laws and regulations work.

A careful review of the proposed, DEEP "Wave 2" revisions to the RSRS, leads members of the Connecticut Society for Women Environmental Professionals ("SWEP") to conclude that the stated goals may not be advanced by the proposed revisions. In fact, SWEP members submit these Comments to voice their concern that portions of the proposed, Wave 2 Revisions work against these stated goals. Because of its history of partnering with DEEP to evaluate environmental concerns, educate the environmental bar, consultants and other professionals, and protect Connecticut's environment, SWEP presents specific concerns regarding the Wave 2 revisions, along with recommendations to address those concerns. SWEP hopes that DEEP will seriously consider these concerns and incorporate these recommendations into the final Wave 2 RSRs that DEEP presents for final approval by the Connecticut Legislative Review Committee. SWEP members remain available to answer questions about these comments and work with DEEP to address the concerns that SWEP has raised.

Comments provided below are keyed to page numbers in the red/blue version of the draft RSRs.

General Comments:

"Including but not limited to" is used thirty times in the proposed RSRs, the vast majority of which are new additions. The problem with this language is that it is non-specific and is an

opener for anything the commissioner decides is relevant in the future regardless of current regulation. This does not provide clarity nor promote certainty within the regulations as written or to the regulated public. Clearly the most problematic use of this language occurs in the **Applicability section (22a-133-1(b)** (page 12) where "including but not limited to" can increase the applicability of the RSRs at the commissioner's sole discretion without any prior public notification, comment or appropriate legislative review, to virtually any property in Connecticut including residential properties where someone might have spilled a bit of gasoline while filling a lawn mower. This is a clear instance where "including but not limited to" should be removed but there are many other places the language is used and creates uncertainty. SWEP recommends every instance of this usage should be reviewed and reconsidered as to its value vs. creating uncertainty.

22a-133k-1(a)(5)(B)(ii) Definition of Background Concentration (page 2)

Definition 3. Background. The term "minimally affected by humans" in the definition of background concentration is a bit arbitrary. SWEP recommends that language be clarified to refer to levels of oil and hazardous materials which would be present at a site in the absence of a release and constituents which are ubiquitous and consistently present in the environment at and in the vicinity of the disposal site of concern, and are attributable to geologic or ecological conditions or other ubiquitous conditions caused by anthropomorphic conditions such as vehicle emissions, (non-site) industrial emissions and the like.

Section 22a-133k-1(a) Definitions # 62 (page 8) AND Section 22a-133k(2)(c)(5)(B) (page 43)

Definition 62 "polluted material" is a new definition that is solely used in Section 22a-133k(2)(c)(5)(B) and only applies if the polluted material is used as fill to provide a conditional exemption to pollutant mobility criteria when the material contains coal ash, wood ash, coal fragments, coal slag, coal clinkers and/or asphalt fragments. Previously polluted fill containing these materials had a conditional exemption. Practically speaking, proving whether polluted material was placed as fill or the materials were mixed into soil, say for example by rototilling the material into soil, is wasted effort. Whether polluted material is placed as fill or not, it is the same material with the same contaminants and should be managed the same. SWEP strongly recommends the wording in Section 22a-133k(2)(c)(5)(B) "used as fill" be deleted. Failing to do so provides no additional protection to public health or the environment. But deleting the requirement to have been placed as "fill" will be a positive improvement to the RSRs and a positive step toward improving the ability to remediate historically impacted properties.

22a-133k-1(d) Public Participation (pages 14-15)

Subpart (1) – The first sentence of this subpart appears to prohibit remedial action without a formal RAP and public notice. SWEP suggests deleting the requirement for a formal RAP from this subpart as to allow for public notice of a proposed remediation being sufficient to allow said remediation to proceed so long as the public notice provides the brief description as set forth in

(B)(vii). The statement "Except as provided …, if prohibited by law no remediation shall commence …" is confusing. Is this specifically referring to public notice requirements of the Transfer Act, voluntary remediation programs under CGS Sections 22a-133x and 133y and the Brownfield Remediation and Revitalization Program under CGS Section 32-769.? SWEP suggests modifying the language to state "When public notice is required by law, no remediation shall commence …" Alternately Subsection (4) (page 17) could be moved and integrated into subpart (1). If DEEP intended this section to apply to other programs, what would they be? And if this is intended to apply more broadly, a waiver from this section would be needed so that emergency situations could be addressed, such as responding to significant environmental hazards, UST releases found during tank removals and spills.

Subpart (1)(B)(ii) re remediation ID number – listing this may be fine for sites under CGS Sections 22a-133x & 133y,and 22a-134, but a remediation ID number may not be available under all circumstances (for example for a UST site or when public notice of remediation is provided prior to receipt of a REM ID #, or under CGS Section 32-769). This requirement in the public notice has little value and should be deleted.

Subpart (2)(D)(ii) states that that the commissioner can revise the written summary and response document and direct the person responsible for remediation to send the revised documents to each person submitting comments. If the commissioner substantially revises the summary and response document, the revision should be on the department's letterhead as the original author would no longer have control of the document.

Subpart (3)(A) the qualifier "include but not be limited to" for providing examples of substantial change is an example of creating uncertainty as to when additional notification may be required. Since this is a new burden with a potential for delaying an ongoing site development due to the timeframes involved, this qualifier should be removed from this section and clearer direction provided for making this determination.

Subpart (3)(B) the two-year timeframe is too short, limiting, and overly burdensome, especially for large multiphase site development that may encounter non-environmental delays, that don't change the remedial approach but rather the project timeline. The two-year limit should either be removed in its entirety, extended to five or more years, or replaced with a simple renewal notification published without the requirement for a comment period for those remediations where nothing has changed since the original public notice was issued.

Former Section 22a-133k-1(e) – Periodic Review has been removed from the proposed RSRs. SWEP believes that a periodic review of the regulations to ensure that their implementation is successfully protecting public health and the environment from the hazards of pollution is important. This periodic review is instrumental in assisting DEEP with achieving their goal of increasing the predictability, efficiency, and transparency of the state regulatory processes. As such, SWEP requests that the periodic review section be re-inserted into the proposed RSRs.

Proposed Section 22a-133k-1(e) Environmental Use Restrictions (page 17)

There are multiple scenarios within the proposed revisions that refer an LEP to adhere to or comply with the EUR regulations. These revised EURs were only released for public review a few days ago. As DEEP has confirmed that the EUR regulations will be provided with a comment period and that portions of the revised RSRs applicable to the EURs will be re-open to comment, SWEP reserves the right to comment on those portions of the proposed RSRs.

22a-133k-1(f) Financial Assurance (page 19)

Subsection (2) states in part "One or more of the following instruments, and no others, shall be used". By limiting the way in which financial assurance can be provided does not allow for changes over time in mechanisms offered by financial institutions, insurance companies and the like and will likely become an unintended hinderance in the future. SWEP recommends deleting the wording "and no others" and adding *(2)(D) "Any other instrument approved by the commissioner."*

22a-133k-2(h)(3) Polluted Soil Reuse (page 62)

This subpart applies to reuse of any polluted soil and requires prior notice or request for approval depending on the circumstances, accompanied by a map showing the proposed location and depth of placement. **(3)(A)** applies to soil in a GB area, used on the same site that is polluted at concentrations BELOW applicable RSR criteria. It prohibits VOCs other than petroleum substances being placed below buildings (apparently at any concentration) and prohibits reuse of soil impacted with PCBs – even though compliant with RSR criteria. This section does not allow reuse of polluted soil in a Class GA area even if compliant with the RSRs and is unreasonably restrictive with respect to compliant soil in a GB area. These limitations for soil that complies with RSR criteria are unreasonable, will significantly impact the cost of development and serve no good purpose. Essentially all excavated polluted soil in a GA area would require off-site disposal and development in a GB area would be unreasonably constrained. SWEP recommends that (3)(A) be deleted.

3(B) requires commissioner approval for reuse on the same parcel, an abutting parcel or a different parcel affected by the same release (and therefore likely abutting to be affected by the same release). This section seems to require commissioner approval without any time frame for issuing said approval before polluted soil can be reused on the same parcel to render it inaccessible and/or isolated. Under the current RSRs, soils can be moved on-site and rendered inaccessible or isolated without prior approval, so long as it is documented after said remedial action by an ELUR which is already subject to extensive commissioner approval. Site developments are fluid and imposing a requirement to seek commissioner approval in the event of a change in soil management of polluted soil, would result in unnecessary delays and costs to a project without any clear environmental benefit. For soil containing VOCs, to be used under

a building, the soil must meet GA PMC regardless of groundwater classification, which hinders the ability to make VOC impacted soil environmentally isolated with (if necessary) vapor controls in place. Further, soil with apparently any concentration of PCBs, would have to be placed under an engineered control per 22a-133k-2(f)(2), which makes no sense. SWEP recommends that subpart (3)(B) be reconsidered and the requirements for added approvals for on-site reuse of polluted soils, and the requirements for VOCs and PCBs be rethought and the section rewritten to provide reasonable flexibility. It is noteworthy that as written reuse on the same or abutting parcels is in many ways more restrictive than (3)(C) reuse on a different parcel.

(3)(C) contains a limitation that the cumulative depth of all reused soil does not exceed four feet. There is no environmental benefit that we are aware of that would call for any depth limitation and four feet seems arbitrary and capricious. At a minimum, SWEP recommends significantly increasing the allowable depth and does not believe there should be a depth limit to fill placement.

22a-133k-3 Groundwater (page 66)

General comment: "may not"- this term is used in several locations where achievement of certain RSR groundwater criteria is not required if certain conditions are met (for example achieving groundwater volatilization criteria <u>is not</u> required if soil vapor data complies with RSR criteria but the draft RSRs says may not). In many places "may" should be replaced with "is". SWEP recommends that the use of may be reviewed in every context it is used and should be changed where appropriate (such as but not limited to the example provided above.

22a-133k-3(h)(4) Upgradient Groundwater Plume (page 148)

Currently, the DEEP website's published "Policy on Upgradient Contamination" states that, "a downgradient property owner is not responsible for remediating groundwater contamination flowing onto his or her property from another site, as long as the contamination is present solely as a result of the off-site source(s)."

Additionally, Conn. Gen. Stat. §22a-452(2) limits the right of a downgradient property owner to recover clean-up costs for substances migrating onto their property to only those circumstances where the wastes, "resulted from the negligence or other actions of such persons."

Thus, currently, once a property owner demonstrates that its own operations did not contaminate its property with a particular substance, documents the groundwater flow direction, and shows by testing at the upgradient property line that the contaminating substance came onto the property from the upgradient property, the subject property owner has no responsibility for remediating that contamination, except where necessary to protect human health.

The language in the Wave 2 RSRs that DEEP presents as simply documenting the existing Upgradient Policy goes well beyond that policy as stated. Rather than creating a new off-ramp, it complicates and limits the existing off-ramp set forth in the current, Upgradient Policy on the DEEP website.

- In the opening paragraph of subsection (A) and in subparagraph (i) under (A), DEEP adds soil remediation requirements for impacts caused by the upgradient source, which are not present in the stated Upgradient Policy. These additions complicate rather than accelerate an "off-ramp."

- Subparagraph (B)(ii) imposes responsibilities on the owner of the subject property which are contrary to Connecticut law. It establishes new responsibilities on the owner of the subject property to remediate a neighboring downgradient property, even when the natural groundwater flow, rather than any negligence on the part of the subject property owner, carries contamination onto that neighboring property that is further down gradient. Conn. Gen. Stat. 22a-452(2) requires proof of negligence by the subject property owner before requiring payment of remediation costs. The new language creates new burdens, not more off-ramps.

- Additionally, Subparagraph B appears to add further complications and confusion to application of the Upgradient Policy by adding a new requirement to submit a new form to give notice that the subject property relies on the Upgradient Policy. Currently, an LEP simply checks a box on the Verification form and explains the basis for the use of the Upgradient Policy in the Verification Report which accompanies the Verification, as part of the Conceptual Site Model developed for the property. The new language does not identify the specific form that must be submitted, or the specific information required to be captured to "demonstrate compliance with this section". Thus, no one can actually understand whether the form itself may add additional requirements for documentation or how much it will cost to prepare.

In sum, this new language in no way meets any of the goals that DEEP stated for the Wave 2 RSRs: 1) more self-implementation; 2) more off-ramps; or 3) more clarity and certainty. Because the new regulation's language moves so far beyond the stated Upgradient Policy from the DEEP website that it was intended to implement, no simple fix can be proposed.