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November 18, 2016

Commissioner Robert Klee
Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

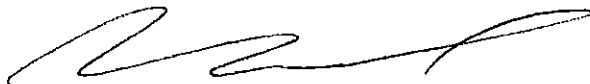
Re: **Petition for Declaratory Ruling to DEEP**

Dear Commissioner Klee:

Attached hereto is a petition for declaratory ruling being submitted on behalf of Antea USA Inc. related to certain interpretations of the Remediation Standard Regulations, RCSA Section 22a-133k-1 et seq. (the "RSRs"). Also attached are a copy of the notice sent to the Environmental Professionals' Organization of Connecticut and an affidavit from Antea related to such notice.

Please feel free to contact me with any questions regarding the petition.

Very truly yours,



Richard M. Fil

Attachments

RECEIVED
DEC 15 2016
CT DEPT OF ENERGY &
ENVIRONMENTAL PROTECTION
COMMISSIONER'S OFFICE

STATE OF CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

IN RE:

A PETITION OF ANTEA USA INC. FOR A
DECLARATORY RULING ON THE
INAPPLICABILITY OF CERTAIN CRITERIA
AND ANALYTICAL METHODS UNDER
THE REMEDIATION STANDARD
REGULATIONS AND THAT THE
CONNECTICUT DEPARTMENT OF
ENERGY AND ENVIRONMENTAL
PROTECTION DID NOT COMPLY WITH
THE ADMINISTRATIVE PROCEDURES ACT

PETITION NO. ____

NOVEMBER 18, 2016

PETITION FOR A DECLARATORY RULING:
INAPPLICABILITY OF CERTAIN CRITERIA AND ANALYTICAL METHODS UNDER
THE REMEDIATION STANDARD REGULATIONS AND THAT THE CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION
DID NOT COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT

I. Introduction

Pursuant to Connecticut General Statutes ("CGS") § 4-176 and Section 22a-3a-4 of the Regulations of Connecticut State Agencies ("RCSA"), Antea USA Inc. ("Antea") hereby petitions the Connecticut Department of Energy and Environmental Protection ("DEEP") for a declaratory ruling ("Petition") regarding the following questions:

A. Do the Remediation Standard Regulations as presently promulgated at RCSA Section 22a-133k-1 et seq. (the "RSRs"):

1. Establish or require meeting numeric criteria for extractable petroleum hydrocarbons ("ETPH") with respect to the surface water protection criteria ("SWPC") or volatilization criteria ("VC")?

2. Require the evaluation of, or meeting numeric criteria for, “additional polluting substances” (as that term is defined or used in the RSRs) (“APS”) with respect to SWPC or VC?

3. Require the use of “alternative criteria” (as that term is defined or used in the RSRs) (“AC”) or, in the alternative, meeting background conditions for certain constituents for which numeric criteria are not specifically established in the RSRs?

B. Did DEEP comply with the Administrative Procedures Act, CGS § 4-166 et seq. (“APA”), in requiring and enforcing the use of certain analytical methods or associated numeric criteria not promulgated in the RSRs, including but not limited to those with respect to extractable petroleum hydrocarbons (“EPH”), volatile petroleum hydrocarbons (“VPH”), and air-phase petroleum hydrocarbons (“APH”)?

C. To the extent more than one analytical method for a given constituent is allowed and used, would the RSRs be satisfied by meeting one of the relevant criteria rather than meeting all of them?

D. Would revising the RSRs to adopt the Wave 2 Concepts (as defined herein) provide an adequate remedy with respect to the issues raised in this Petition?

E. May the LEP Regulations (as defined herein) be used to impose more stringent or expansive requirements on licensed environmental professionals (“LEPs”) in implementing and satisfying the RSRs as presently promulgated?

Antea respectfully requests that a hearing be held on this Petition so that other interested parties might provide testimony, submittals and comments related to these issues.

II. Factual Background

After closely reviewing and analyzing the relevant Connecticut legislation and

regulations, Antea entered into an agreement in February 2011 with Alliance Energy LLC (“Alliance”) under which Antea agreed to investigate and remediate a total of 87 sites in exchange for certain payments. In order to perform under the Agreement, Antea has engaged Mr. Matthew Hackman, LEP, LSP, PE, CHMM, and Mr. Greg Gardner, LEP. One of the environmental consequences of the Agreement has been to bring certain sites into a DEEP remediation program that might otherwise not have been addressed. Certain “verifications” for these sites have been submitted to DEEP under the Connecticut Property Transfer Act, CGS § 22a-134 *et seq.* (the “Transfer Act”). DEEP has indicated that certain of these would not be acceptable, based on DEEP’s interpretation of the RSRs and/or purported additional obligations of LEPs under the LEP Regulations that are above and beyond the requirements specified in the RSRs.

The RSRs were originally promulgated in March 1996 (the “1996 RSRs”). Since that time, the RSRs have been revised only once in accordance with the APA, with an effective date of June 27, 2013 (this version of the RSRs, which are the most recently promulgated and presently applicable, are referred to herein as either the “2013 RSRs,” or simply the “RSRs”). The 1996 RSRs included requirements for the use of APS with respect to specific criteria, namely, the groundwater protection criteria (“GWPC”), direct exposure criteria (“DEC”), and pollutant mobility criteria (“PMC”) (*see, e.g.*, RCSA Sections 22a-133k-3(h), 2(b)(5), and (c)(6)). However, the 1996 RSRs make no reference to APS with respect to SWPC or VC, and no relevant changes were made through the 2013 RSRs in these respects.

The 2013 RSRs did add criteria for ETPH (to replace a criterion for total petroleum hydrocarbon (or “TPH”) based on the discontinuation of the TPH method because of its use of Freon), but again those only applied to the GWPC, DEC and PMC, and not to the SWPC or VC.

No other criteria were added or changed in the 2013 RSRs other than to provide additional units in milligrams per cubic meter for certain VC and to change the residential DEC for lead. Page 19-20 of the Hearing Officer's report dated March 11, 2013 for the 2013 RSRs explicitly stated that numeric criteria for ETPH for SWPC and VC were proposed but withdrawn and not adopted. "The Department will take under further advisement the ETPH criteria for volatilization criteria (VC) and for surface water protection criteria (SWPC), and will not amend the RSRs to add such criteria at this time."

To bring the analysis current, on April 5, 2016, DEEP issued its so-called "Wave 2" draft conceptual revisions to the RSRs (the "Wave 2 Concepts"). As of the date hereof, the Wave 2 Concepts have not been proposed by DEEP as revisions to the RSRs. The 2013 RSRs are the applicable standards for purposes of this Petition. (Other conceptual revisions were issued by DEEP on August 7, 2016, but those are not relevant here.) The Wave 2 Concepts include redlined revisions to existing language in the 2013 RSRs to readily identify the language anticipated by DEEP to be inserted or deleted.

The Wave 2 Concepts reinforce Antea's reading of the 2013 RSRs in that they would propose to add ETPH criteria for SWPC and VC, and would apply APS to SWPC and VC. The Wave 2 Concepts also include a "grandfather clause" that would allow the potential use of the 2013 RSRs for a period of two years after the RSRs are revised for any sites where remediation has been initiated (*see* Wave 2 Concepts at Section 22a-133k-1(i)).

The 2013 RSRs do not include any reference to EPH, VPH, or APH, nor do they make any reference to criteria to be met based on the use of any of those methods. We again note that DEEP has not gone through the notice and comment rulemaking process to revise the RSRs to require the use of any of these methods or to establish criteria. Instead, DEEP has issued

guidance and otherwise had those staff members overseeing cleanups require the use of the EPH, VPH and/or APH methods and to impose numeric criteria based on those methods. Upon information and belief, DEEP has issued guidance since at least as far back as November 2011 regarding the use of the EPH, VPH and APH methods and criteria, but DEEP did not include such provisions in the 2013 RSRs. To the contrary, DEEP has required that the criteria based on the EPH/VPH/APH methodologies must be approved by it on a site by site basis.

VI. Discussion

DEEP's interpretations of certain provisions of the RSRs, as well as its not revising the RSRs based on the notice and comment rulemaking as required by the APA, have undermined transactions reliant on the current law and regulations and resulted in unnecessary and significant additional costs, delays, and uncertainty. More broadly, DEEP's practices discourage the use of certain analytical methods, create impediments to more timely (but still protective) remediation outcomes, result in second-guessing of closed sites, risk legislative interventions that could be unpredictable for the regulated community and/or unfavorable to DEEP, and encourage challenges to DEEP's rulemaking efforts, legal interpretations, and the use of guidance in lieu of regulation. Beyond this, such practices have a chilling effect on risk transfer agreements conducive to a cleaner Connecticut.

The RSRs are substantive rules, in that they are issued pursuant to statutory authority under CGS § 22a-133k and have the force and effect of law. Revisions to the RSRs are subject to the APA and its notice and comment requirements. Failing that, they are invalid. The interpretations of the RSRs by DEEP as set forth in this Petition are not mere interpretive rules, general statements of policy, clarifications, or simple gap filling based on current regulations, but instead are inconsistent with the provisions of the RSRs in effect. *See, e.g., Salmon Brook*

Convalescent Home, Inc. v. Commission on Hospitals & Health Care, 177 Conn. 356, 417 A.2d 358, 1979 Conn. LEXIS 758 (Conn. 1979); Sams v. Department of Environmental Protection, 308 Conn. 359, 63 A.2d 953, 2013 Conn. LEXIS 119 (Conn. 2013); Appalachian Power Co. vs. Environmental Protection Agency, 208 F.3d 1015 (D.C. Cir. 2000). Changes to well-established policies or interpretations, such as is the case here, are also subject to notice and comment rulemaking. *See, e.g.*, Alaska Professional Hunters Ass'n v. Federal Aviation Administration, 177 F.3d 1030 (D.C. Cir. 1999); Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579 (D.C. Cir. 1997); Shell Offshore, Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001); Croplife America v. Environmental Protection Agency, 329 F.3d 876 (D.C. Cir. 2003).

Beyond DEEP's procedural approaches, it is also important to note that a standard rule for interpreting regulations is to first look at the plain language and applying usual and ordinary meanings of words to discover the original intent (unless otherwise defined in the regulations). Other standard rules are to avoid absurd results (such as not interpreting different words in different places to mean the same thing), favoring interpretations to reflect internal consistency rather than ignoring certain words or deeming them superfluous, understanding certain language being in one section but not another as reflecting purposeful and intentional drafting, presuming that certain language in a proposed regulation that is deleted prior to promulgation reflects an intended deletion, and recognizing that courts may reasonably interpret ambiguous provisions and require an agency to abide by the court's interpretations. We also note that a court need not give as broad deference to an agency's interpretation of its own regulations as it might for a statute as in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). To the extent some lesser degree of deference may be provided to an agency's interpretation of its own regulations, such deference would need to be based on (among other

factors) the validity of the agency's reasoning and its consistency with earlier and later pronouncements. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Even less deference (if any) is afforded to mere guidance.

A. ETPH Criteria Do Not Apply to SWPC or VC

The 2013 RSRs clearly establish ETPH criteria for GWPC, DEC and PMC, but not for SWPC or VC. *See* 2013 RSRs Appendices A (ETPH criteria specified for DEC), B (ETPH criteria specified for PMC), and C (ETPH criterion specified for GWPC), and contrast those with Appendices D (no ETPH criterion specified for SWPC), E (no ETPH criterion specified for VC for groundwater), and F (no ETPH criterion specified for VC for soil vapor). As noted above, the Hearing Officer's report for the 2013 RSRs explicitly stated that ETPH criteria for SWPC and VC were withdrawn and not promulgated. As such, there are no ETPH standards for SWPC or VC established in the 2013 RSRs. The Wave 2 Concepts include minor revisions to the definition of ETPH, but they do not appear to indicate the proposed addition of ETPH criteria for SWPC or VC.

B. APS Do Not Apply to SWPC or VC

The language addressing the applicability of APS to GWPC, DEC and PMC, and the inapplicability of APS to SWPC or VC, remains the same in the 2013 RSRs. The provisions related to GWPC, DEC, and PMC each include specific language related to APS under the heading "Additional Polluting Substances." For example, for DEC, "With respect to a substance at a release area for which a direct exposure criterion is not specified . . . , the Commissioner may . . . approve in writing a direct exposure criterion to apply to such substance . . ." (*see* RCSA Section 22a-133k-2(b)(5)). Similar APS provisions for GWPC and PMC are in RCSA Sections

22a-133k-3(h) and 22a-133k-2(c)(6), respectively. There are no such headings or language with respect to SWPC or VC, except under certain narrow circumstances as noted below. As such, it is only necessary to satisfy numeric criteria for SWPC or VC that are specified in the RSRs, and not for every constituent that may be present. This makes sense. Under most circumstances, the SWPC and VC (but not the GWPC) will typically apply in GB areas, while the GWPC (which includes APS language) would not apply. GB areas are known or suspected to have more degraded groundwater conditions and the numeric criteria in the RSRs are typically less stringent.

DEEP's own Wave 2 Concepts, published just a few months ago, clearly document and support our reading of the 2013 RSRs. The Wave 2 Concepts would make certain revisions to the APS provisions for GWPC, DEC and PMC, and they include the heading of "CURRENT LANGUAGE" for each of these criteria as well as redlined revisions to the text. In contrast, pages 102-103 of the Wave 2 Concepts include only "PROPOSED LANGUAGE" for APS for SWPC and VC, because APS do not currently apply to SWPC or VC. The Wave 2 Concepts would also revise the definitions for each of the GWPC, DEC, PMC, SWPC, and VC to explicitly refer to "any additional polluting substance." While the revisions to these definitions under the Wave 2 Concepts might be considered "clarifications" solely with respect to GWPC, DEC and PMC because those criteria already include references to APS elsewhere in the 2013 RSRs (albeit not expressly in the definitions for those criteria), the additions of APS language with respect to SWPC and VC, and to include reference to APS in those definitions, would clearly constitute substantive changes and not mere clarifications. As such, DEEP must go through notice and comment rulemaking to effectuate the addition of APS for SWPC and VC because they do not exist in the 2013 RSRs.

That said, there is one narrow set of circumstances under which certain other criteria might apply to SWPC (but not VC), but this primarily serves to support our reading of the RSRs. For discharges to wetlands or intermittent streams, or for a plume that is more than 0.5% of the upstream drainage basin, RCSA Section 22a-133k-3(b)(2) provides that “each substance therein” must be remediated to the “applicable aquatic life criteria” or “an alternative water quality criterion adopted by the Commissioner in accordance with section 22a-426 of the General Statutes and paragraph 12b of the Water Quality Standards effective May 15, 1992.” Under these limited circumstances, the reference to “each substance therein” might be considered as being somewhat analogous to the APS provisions for GWPC (*see* RCSA Section 22a-133k-3(a)(2)), DEC (*see* RCSA Section 22a-133k-2(5)), and PMC (*see* RCSA Section 22a-133k-2(c)(6)); otherwise, such language is not included in the 2013 RSRs with respect to SWPC or VC, and as such, establishing or meeting APS is not required.

The RSRs also include language relative to DEEP’s authority to require additional remediation of soil or groundwater notwithstanding the express provisions of the RSRs. For example, RCSA Section 22a-133k-3(i) provides that “Nothing in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies shall preclude the Commissioner from taking any action necessary to prevent or abate pollution, or to prevent or abate any threat to human health or the environment. If the presence of any substance impairs the aesthetic quality of any ground water which is or can reasonably be expected to be a source for drinking or other domestic use, additional remediation shall be conducted in order to reduce the concentration of such substance to a concentration appropriate for such use.”

This language does not allow the more detailed provisions of the RSRs to be disregarded. First, it is unlikely that a source of drinking water would be in a GB area such that the GWPC

would apply; if it did, then APS would already be captured by the express GWPC provisions in the RSRs related to such circumstances. APS would otherwise continue to not apply to SWPC or VC. Second, and more importantly, the RSRs were promulgated to ensure some degree of certainty and predictability. There must be some level of threat posed, as reasonably determined by DEEP, to invoke this authority. There is a high standard of proof, resting solely on DEEP, to demonstrate that a site in compliance with the RSRs would somehow still pose an unacceptable risk for which additional remediation would be required. Third, we are not aware of DEEP's prior citation of such provisions in the RSRs to support its contention that APS apply to SWPC or VC; rather, its guidance has primarily referred to the general provisions of RCSA Section 22a-133k-3(a)(1), which other, more specific provisions of the RSRs indicate a different outcome.

C. The Use of AC or Meeting Background Are Not Necessarily Required for Constituents Without Promulgated Criteria

The RSRs also do not require securing approval of AC for constituents that do not have established criteria in the RSRs, nor in the alternative must background conditions be met. An "alternative" criterion means just that: an "alternative" to a criterion established in the RSRs. If a criterion does not exist in the RSRs, then there is no criterion to meet, at least with respect to SWPC and VC. The 2013 RSRs make this clear. For example, RCSA Section 22a-133k-2(d)(2) provides in relevant part that "With respect to a substance except PCB for which a direct exposure criterion is specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, the Commissioner may approve an alternative direct exposure criterion . . ." (emphasis added). Contrast this with RCSA Section 22a-133k-2(b)(5), which provides in relevant part that "With respect to a substance at a release area for which a direct exposure criterion is not specified in sections 22a-133k-1 through 22a-133k-3, inclusive,

of the Regulations of Connecticut State Agencies, the Commissioner may . . . approve in writing a direct exposure criterion to apply to such substance . . .” (emphasis added). Refer also to the definitions for GWPC, DEC, PMC, SWPC and VC in RCSA Section 22a-133k-1(a).

The purported ability or need to use AC cannot be used to bootstrap the applicability of APS to SWPC and VC where it does not exist in the RSRs. It is also not necessary to meet background for constituents without established criteria in the RSRs. The “General” provisions of RCSA Section 22a-133k-3(a)(1), and the use of “or” rather than “and,” do not provide a sufficient basis for concluding that one must meet background for all unspecified constituents for SWPC and VC; note also that such a reading would directly contradict any suggestion that APS apply to SWPC and VC. Requiring background conditions to be met or the use of AC for SWPC or VC for those constituents without promulgated criteria would result in more conservative regulation of these criteria than provided for under the RSRs. To the extent such requirements are to be imposed, the RSRs would first need to be revised accordingly through notice and comment rulemaking.

D. DEEP Cannot Require the Use of EPH/VPH/APH or Meeting Related Criteria Without Going Through the Notice and Comment Rulemaking Process

DEEP has acknowledged that it is establishing remediation criteria on a “case by case” basis, instead of undertaking notice and comment rulemaking as required under the APA. DEEP’s Technical Support Document: Recommended Numeric Criteria for Common Additional Polluting Substances and Certain Alternative Criteria, dated December 10, 2015 (revised March 8, 2016) (“APS/AC Guidance”) states at page 4 that “DEEP committed to evaluating and updating remediation criteria in the RSRs. However, this process will take some time. In the meantime, the Department recognizes that case by case development of remediation criteria will

need to continue until the criteria review and updating process is completed and a regulatory process accomplished.” As noted above, DEEP issued guidance related to the use of the EPH/VPH/APH methods and criteria at least two years before the RSRs were revised in 2013, yet no revisions to the RSRs were made in these respects at that time or since. It remains unknown how or to what extent DEEP might continue the informal use of guidance and discretion in lieu of rulemaking with respect to EPH/VPH/APH, or perhaps some other analytical method or methods. While the use of criteria in the APS/AC Guidance is purportedly “voluntary,” this provides no viable or reasonably good choice. A regulated entity must either accept generic criteria offered by DEEP (for a method not provided for in the 2013 RSRs, but indicated to a limited extent in the Wave 2 Concepts), or risk the delays, costs, and uncertainties associated with asking DEEP to develop a site-specific criterion.

The Wave 2 Concepts acknowledge this by virtue of new definitions for EPH, VPH and APH being included. Unfortunately, the Wave 2 Concepts do not include numeric criteria to be used for such analytical methods, nor do they appear to provide a manner in which to avoid the potential need to meet two standards for the same constituent identified using two different analytical methods. There are also significant questions as to the appropriateness of the risk assessment methods used by DEEP in establishing criteria for EPH/VPH/APH, including the use of certain conservative assumptions and attenuation factors, not more fully taking into account the attenuation of petroleum constituent concentrations and potential risks through biodegradation and other processes (as recognized by the United States Environmental Protection Agency), the use of certain modeling in a manner that may overestimate petroleum concentrations, and the use of conservative, generic factors while also requiring case by case approvals. Certain criteria established by DEEP when evaluating EPH/VPH/APH analytical

results may also be based on a surrogate constituent within a given range of carbon atoms that may not actually be present.

As noted above, there has been some confusion and disagreement as to whether more than one criterion must be met if more than one analytical method is used for a given sample location. For example, the RSRs may specify a numeric criterion for a given constituent (say, using EPA Method 8260) while the DEEP may also have published (but not promulgated) a criterion for that same constituent based on a VPH analysis. The results for that one constituent might be above one criterion but not the other. DEEP's 2012 guidance entitled "Analytical Methods Used to Characterize Petroleum Releases" (the "Analytical Guidance") generally indicates that LEPs may select among various analytical method to be used. For example, a gasoline release may be analyzed using EPA Method 8260, or VPH (carbon ranges and target compounds), or VPH (carbon ranges only) and EPA Method 8260. As a result, if the LEP analyzed a sample using VPH (but not 8260) and the relevant criteria were met, then that location would meet the applicable criteria for the relevant constituents. The same result should hold true if the LEP used only 8260 but not VPH, and the applicable criteria were met. Difficulties have arisen when both 8260 and VPH were run, and a given constituent is above a criterion established for 8260 but below that for VPH, or vice versa. Presumably each of the relevant standards that DEEP establishes is sufficiently protective of human health and the environment regardless of which analytical method the LEP used. If this were not the case, then DEEP would not have allowed the option of selecting the analytical approach in the first place. In this light, it is not satisfactory to suggest that LEPs are "stuck" with the results if both analyses are used; this would be contrary to DEEP's own guidance and discourage LEPs from using a particular analytical method. DEEP updated its Analytical Guidance in draft form in June 2015, in which it

qualified the “or” language to indicate in a footnote that “The word ‘or’ is used to present acceptable alternative analytical approaches which may be used. It is important to note that some analytical methods may analyze for different analytes or suites of constituents that are not reported by another analytical method. Therefore, the environmental professional should recognize that the results from the alternative analytical approaches may not be comparable or interchangeable.” However, this qualification (still in the form of draft guidance) has no bearing with respect to the same constituent that may be identified using two different analytical methods.

Our understanding also makes sense in the context of APS, as and to the extent applicable, under the RSRs with respect to DEC, PMC and GWPC. For example, RCSA Section 22a-133k-2(c)(6) provides in relevant part: “. . . the Commissioner may approve a pollutant mobility criterion, a dilution or dilution and attenuation factor, and a method for determining compliance with such criterion to apply to such substance at a particular release area, provided the Commissioner finds that such criterion will ensure that soil water at such release area does not exceed, in a GA area, the ground-water protection criterion, or in a GB area the ground-water protection criterion multiplied by a dilution factor of 10” (emphasis added).

The ability of LEPs to exercise professional judgment in the selection of appropriate analytical methods that can each identify relevant constituents, each of which would utilize a protective standard, should be encouraged to allow more sites to get through the regulatory process and productively used.

E. Revising the RSRs to Adopt the Wave 2 Concepts Would Not Provide an Adequate Remedy

The adoption of the Wave 2 Concepts, including but not limited to DEEP's proposed additions of ETPH numeric criteria and APS requirements for SWPC and VC, would not provide an adequate remedy to address the ongoing imposition of requirements that are not provided for in the RSRs. First, the timeline for revising the 2013 RSRs is uncertain. Notwithstanding optimistic timeframes that may be offered, DEEP has revised the RSRs only once in the 20 years since they were originally promulgated. While rulemaking can be a difficult and time-consuming task requiring significant resources, that does not justify not complying with the APA. Second, the Wave 2 Concepts do not sufficiently address a number of the issues raised in this Petition. Third, the Wave 2 Concepts anticipate the "grandfathering" of the 2013 RSRs for a period of two years. This is appropriate and necessary because not providing such a period would create significant uncertainty and disruption to the regulated community, not to mention undermining the legal construct under which a countless number of transactions occurred. Planning investigations and remediation work takes a significant amount of time, expense and effort. Even if the RSRs were revised tomorrow as contemplated in the Wave 2 Concepts, the regulated community would be able to utilize the 2013 RSRs for an additional two years. To the extent and for so long as the 2013 RSRs remain in effect or may be utilized, they should be properly interpreted and applied. Finally, and most importantly, the continued use of discretionary, site by site standards even after the 2013 RSRs are revised would continue such APA deficiencies. A fundamental purpose of the RSRs is to provide some degree of certainty around which site investigation and remediation work, often taking years to complete, can be planned and proceed in a reasonably predictable manner.

Prior instances of the use of guidance in lieu of regulations, or even proposed regulations in lieu of promulgated regulations, have occurred. DEEP previously issued draft proposed revisions to the RSRs in March 2003 (the "2003 Proposed RSRs"). The 2003 Proposed RSRs included certain numeric criteria which were lower than those promulgated at the time. While the 2003 Proposed RSRs were never promulgated, DEEP indicated that such criteria were applicable and enforceable while still in proposed form. This position appeared to be clarified on or about April 9, 2010, seven years after the 2003 Proposed RSRs were issued, through a notice that the 1996 RSRs remained the applicable standards until such time as they are revised through notice and comment rulemaking and formally adopted by DEEP.

We are concerned that DEEP may continue to enforce requirements that do not exist, either purportedly under the 2013 RSRs and/or as those may be amended based on the Wave 2 Concepts. DEEP must comply with the requirements for notice and comment rulemaking in order to legally enforce relevant and applicable regulatory standards. As noted in the APS/AC Guidance, "DEEP committed to evaluating and updating remediation criteria in the RSRs." This is the time to do so.

F. The LEP Regulations Cannot be Used to Impose More Stringent or Expansive Requirements on LEPs With Respect to the RSRs

The regulations related to the conduct of LEPs are set forth at RCSA Section 22a-133v-1 et seq. (the "LEP Regulations"). DEEP has indicated that the LEP Regulations impose additional obligations on LEPs to satisfy certain remediation objectives that are above and beyond those set forth in the RSRs. While the LEP Regulations impose certain standards of knowledge and conduct on LEPs in providing services to clients, they do not provide a legal basis for LEPs to

conduct site remediation in a manner that is more stringent or expansive than what the RSRs require.

RCSA Section 22-133v-6(c)(1) provides that “a licensee shall act with reasonable care and diligence and shall apply the knowledge and skill of a licensee in good standing in the applicable field at the time such services are performed.” RCSA Section 22a-133v-6(d)(2)(C) provides in relevant part that “In rendering professional services, a licensee shall at all times: . . . Make a [sic] good faith and reasonable efforts to identify and obtain the relevant data and other information evidencing conditions at a parcel and identify and obtain such additional data and other information as necessary to discharge such licensee’s obligations” under the voluntary cleanup and Transfer Act programs, the LEP Regulations, and statutory and regulatory requirements related to environmental land use restrictions. This language reasonably requires certain standards of conduct and professional competency in conducting investigations and remediation work. However, this language has been asserted as a basis for imposing on LEPs additional obligations beyond satisfying the RSRs as promulgated.

As an example, assume that a site is located in a GB area where a gasoline release occurred, and there are no uses of groundwater for potable use. For groundwater, only the SWPC and VC would apply, and APS would not apply for those criteria (i.e., only the promulgated numeric standards would apply, even if other constituents were present). As a result, the LEP would need to collect sufficient data to characterize the groundwater in order to satisfy the SWPC and VC. There is no requirement in the RSRs, and the LEP Regulations cannot be used to impose a requirement, to meet APS, background or other standards for constituents for which promulgated numeric standards do not exist for SWPC or VC (e.g., trimethylbenzene or ETPH). Similarly, it is not necessarily even required to analyze groundwater samples for those

constituents if there are no applicable numeric criteria. The LEP Regulations relate to standards of conduct and competency, and require a certain skill set even if certain of those skills might not be needed for a given site in order to meet the RSRs. The LEP Regulations do not, and cannot be used to, impose additional or more stringent remediation criteria beyond what is specified in the RSRs.

In this context, the use of guidance in establishing standards of LEP conduct and competency has also been used to impose additional regulatory requirements in lieu of notice and comment regulation. For example, the DEEP has issued guidance related to reasonable confidence protocols ("RCPs"). Such guidance purportedly supplements what the DEEP would consider to be necessary with respect to the conduct and competency of LEPs through the LEP Regulations, which in turn would impose on LEPs additional investigation and remediation efforts beyond those required in the RSRs. For example, the RCP guidance might require running the full range of constituents within a given laboratory method (e.g., EPA Method 8260). If a constituent does not have a numeric criterion is specified in the RSRs but there is a DEEP-published APS (for potential use in other scenarios), then DEEP might assert that such APS criterion must be met even if APS do not apply in a given situation, such as in the GB area example above. Beyond an even more straightforward use of guidance in lieu of regulation, this effectively takes guidance related to laboratory analyses, applies it to the LEP Regulations regarding the conduct and competence of LEPs, and then further applies it another step to impose additional or more stringent remediation criteria that do not exist in the RSRs. Such use of guidance is not consistent with the APA's requirements.

It must also be recognized that the LEP program did not fully delegate the remediation program to LEPs. LEPs must still get approval for a number of reasons under the RSRs,

including but not limited to certain alternative criteria and APS, and modifications to groundwater monitoring requirements. LEPs are subject to verification reviews and audits. For sites where DEEP retains oversight (which are typically of greater environmental concern), DEEP's interpretations of the RSRs and LEP Regulations might result in sites that are ultimately remediated to a less stringent standard. With these considerations in mind, LEPs cannot be held to a higher and more protective standard than DEEP itself.

We are also concerned about how certain good faith, professional differences in opinion in interpreting the RSRs may be expressed. It is necessary to reasonably balance the two critical needs of reasonably protecting human health and the environment while at the same time doing so in a reasonable and predictable manner in accordance with applicable law. The LEP Regulations provide in relevant part that "In the rendering of professional services, a licensee shall, at all times, hold paramount the health, safety and welfare of the public and the environment." RCSA Section 22a-133v-6(d)(1). In the abstract, this may be considered a reasonable and appropriate requirement. More specifically, to the extent the RSRs are satisfied as promulgated, then the "hold paramount" standard has been met. The Analytical Guidance states that "The criteria in Appendices A through F of the RSRs are used to determine if a potential risk to human health or the environment may exist. The results of analyses performed on environmental media are used to determine if remediation is needed based on comparison to these criteria." Beyond that, LEPs are not required to satisfy what might be some other requirement based on unknown, subjective, or evolving perceptions of risk. When LEPs have balked at having their clients incur the unnecessary costs, delays and uncertainties in meeting standards that go beyond what the RSRs require, certain of them have heard that disapprovals, verification audits and/or referrals to the State Board of Examiners of Environmental

Professionals (“LEP Board”) might occur based on a purported breach of the “hold paramount” standard of care, which may actually be based on no more than a good faith and reasonable difference in regulatory interpretation, technical opinion, and/or proper interpretation of the RSRs and/or LEP Regulations. This situation may be worsened by differences in the judgments of individual DEEP staff members and/or DEEP guidance or pronouncements that may conflict with the RSRs. This poses a chilling effect on LEPs and threatens the purpose of the LEP program.

VII. Conclusion

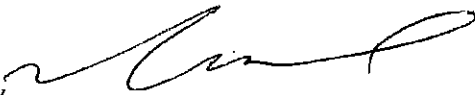
Based on the above considerations, Antea respectfully requests that DEEP conduct a hearing on this Petition and issue a declaratory ruling with respect to the following:

1. The RSRs as presently promulgated:
 - a. Do not establish or require meeting numeric criteria for ETPH with respect to the SWPC or VC;
 - b. Do not require the evaluation of, or meeting numeric criteria for, APS with respect to SWPC or VC;
 - c. Do not require the use of AC or background conditions for certain constituents for which numeric criteria are not specifically established in the RSRs;
2. DEEP must revise the RSRs through the APA’s notice and comment rulemaking to appropriately implement the specify analytical methods and associated numeric criteria, including but not limited to those with respect to EPH, VPH and APH;
3. Confirm that to the extent more than one analytical method for a given constituent is appropriately allowed and used, then the RSRs would be satisfied by meeting one of the relevant criteria, as determined by the LEP, rather than having to meet all of them;

4. Confirm that the LEP Regulations do not impose additional or more stringent standards or requirements beyond those promulgated in the RSRs;
5. Implement a process through which LEPs and other members of the regulated community may, in good faith and on an expedited basis, challenge DEEP's interpretations of the RSRs; and
6. Such other relief as DEEP deems appropriate.

Respectfully submitted,

ANTEA USA INC.

By 

Richard M. Fil, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
(860) 275-8200
Its Attorneys

Petitioner's address and telephone number: 400 Donald Lynch Boulevard, Suite 104,
Marlborough, MA 01752; (651) 639-9449

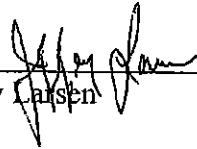
**STATE OF CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION**

AFFIDAVIT

STATE OF CONNECTICUT)
)
COUNTY OF HARTFORD) ss. HARTFORD

Jeffrey Larsen, being duly sworn, deposes and states that:

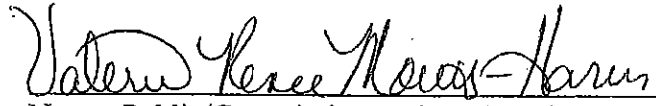
1. I am over the age of 18 and understand the obligation of making statement under oath.
2. I am a Consultant employed directly by Antea USA Inc. ("Antea").
3. On the date hereof, Antea submitted a petition for declaratory ruling ("Petition") to the Commissioner of the Connecticut Department of Energy and Environmental Protection ("DEEP").
4. The Environmental Professionals' Organization of Connecticut, Inc. ("EPOC") represents that it was formed to represent the interests of Connecticut's Licensed Environmental Professionals ("LEPs") and provides information, training, and updates regarding the LEP program in Connecticut.
5. On the date hereof, pursuant to RCSA Section 22a-3a-4(a)(3), notice of the substance of the Petition, and of the opportunity to file comments and to request intervenor or party status under RCSA Section 22a-3a-4(c)(1), was sent by Antea's legal counsel by U.S. First Class Mail to Seth Molofsky, Executive Director of EPOC, at P.O. Box 176, Amston, CT 06231-0176.
6. Mr. Molofsky is known by Antea to have an interest in the subject matter of the Petition, and as Executive Director may advise other members of EPOC (to the extent interested) regarding the Petition.
7. A copy of such notice to Mr. Molofsky is attached hereto and made a part hereof.



Jeffrey Larsen

Subscribed and sworn to before me
this 18th day of November, 2016

VALERIE RENEE MORRIS HARRIS
NOTARY PUBLIC
MY COMMISSION EXPIRES MAY 31, 2020



Notary Public/~~Commissioner of the Superior Court~~

Attachment

RICHARD M. FIL

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Hartford, CT 06103
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Also admitted in Rhode Island,
New York and Pennsylvania

Via U.S. First Class Mail

November 18, 2016

Mr. Seth Molofsky
Executive Director
Environmental Professionals' Organization of Connecticut, Inc.
P.O. Box 176
Amston, CT 06231-0176

Re: Notice of Petition for Declaratory Ruling to DEEP

Dear Mr. Molofsky:

Pursuant to RCSA Section 22a-3a-4(a)(3), you are being provided with notice of a petition for declaratory ruling ("Petition") submitted to the Connecticut Department of Energy and Environmental Protection ("DEEP"). As the Executive Director of the Environmental Professionals' Organization of Connecticut, Inc. ("EPOC"), you are known by the petitioner, Antea USA Inc., to have an interest in the subject matter of the Petition. A copy of the Petition is attached hereto. You and other interested persons have the opportunity to file comments and to request intervenor or party status in this matter under RCSA Section 22a-3a-4(c)(1).

Please feel free to contact me with any questions regarding the Petition.

Very truly yours,



Richard M. Fil

Attachment

STATE OF CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

IN RE: :
: :
A PETITION OF ANTEA USA INC. FOR A : PETITION NO. ____
DECLARATORY RULING ON THE :
INAPPLICABILITY OF CERTAIN CRITERIA :
AND ANALYTICAL METHODS UNDER :
THE REMEDIATION STANDARD :
REGULATIONS AND THAT THE :
CONNECTICUT DEPARTMENT OF :
ENERGY AND ENVIRONMENTAL :
PROTECTION DID NOT COMPLY WITH : NOVEMBER 18, 2016
THE ADMINISTRATIVE PROCEDURES ACT :

PETITION FOR A DECLARATORY RULING:
INAPPLICABILITY OF CERTAIN CRITERIA AND ANALYTICAL METHODS UNDER
THE REMEDIATION STANDARD REGULATIONS AND THAT THE CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION
DID NOT COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT

I. Introduction

Pursuant to Connecticut General Statutes (“CGS”) § 4-176 and Section 22a-3a-4 of the Regulations of Connecticut State Agencies (“RCSA”), Antea USA Inc. (“Antea”) hereby petitions the Connecticut Department of Energy and Environmental Protection (“DEEP”) for a declaratory ruling (“Petition”) regarding the following questions:

- A. Do the Remediation Standard Regulations as presently promulgated at RCSA Section 22a-133k-1 et seq. (the “RSRs”):
1. Establish or require meeting numeric criteria for extractable petroleum hydrocarbons (“ETPH”) with respect to the surface water protection criteria (“SWPC”) or volatilization criteria (“VC”)?

2. Require the evaluation of, or meeting numeric criteria for, "additional polluting substances" (as that term is defined or used in the RSRs) ("APS") with respect to SWPC or VC?

3. Require the use of "alternative criteria" (as that term is defined or used in the RSRs) ("AC") or, in the alternative, meeting background conditions for certain constituents for which numeric criteria are not specifically established in the RSRs?

B. Did DEEP comply with the Administrative Procedures Act, CGS § 4-166 *et seq.* ("APA"), in requiring and enforcing the use of certain analytical methods or associated numeric criteria not promulgated in the RSRs, including but not limited to those with respect to extractable petroleum hydrocarbons ("EPH"), volatile petroleum hydrocarbons ("VPH"), and air-phase petroleum hydrocarbons ("APH")?

C. To the extent more than one analytical method for a given constituent is allowed and used, would the RSRs be satisfied by meeting one of the relevant criteria rather than meeting all of them?

D. Would revising the RSRs to adopt the Wave 2 Concepts (as defined herein) provide an adequate remedy with respect to the issues raised in this Petition?

E. May the LEP Regulations (as defined herein) be used to impose more stringent or expansive requirements on licensed environmental professionals ("LEPs") in implementing and satisfying the RSRs as presently promulgated?

Antea respectfully requests that a hearing be held on this Petition so that other interested parties might provide testimony, submittals and comments related to these issues.

II. Factual Background

After closely reviewing and analyzing the relevant Connecticut legislation and

regulations, Antea entered into an agreement in February 2011 with Alliance Energy LLC (“Alliance”) under which Antea agreed to investigate and remediate a total of 87 sites in exchange for certain payments. In order to perform under the Agreement, Antea has engaged Mr. Matthew Hackman, LEP, LSP, PE, CHMM, and Mr. Greg Gardner, LEP. One of the environmental consequences of the Agreement has been to bring certain sites into a DEEP remediation program that might otherwise not have been addressed. Certain “verifications” for these sites have been submitted to DEEP under the Connecticut Property Transfer Act, CGS § 22a-134 *et seq.* (the “Transfer Act”). DEEP has indicated that certain of these would not be acceptable, based on DEEP’s interpretation of the RSRs and/or purported additional obligations of LEPs under the LEP Regulations that are above and beyond the requirements specified in the RSRs.

The RSRs were originally promulgated in March 1996 (the “1996 RSRs”). Since that time, the RSRs have been revised only once in accordance with the APA, with an effective date of June 27, 2013 (this version of the RSRs, which are the most recently promulgated and presently applicable, are referred to herein as either the “2013 RSRs,” or simply the “RSRs”). The 1996 RSRs included requirements for the use of APS with respect to specific criteria, namely, the groundwater protection criteria (“GWPC”), direct exposure criteria (“DEC”), and pollutant mobility criteria (“PMC”) (*see, e.g.*, RCSA Sections 22a-133k-3(h), 2(b)(5), and (c)(6)). However, the 1996 RSRs make no reference to APS with respect to SWPC or VC, and no relevant changes were made through the 2013 RSRs in these respects.

The 2013 RSRs did add criteria for ETPH (to replace a criterion for total petroleum hydrocarbon (or “TPH”) based on the discontinuation of the TPH method because of its use of Freon), but again those only applied to the GWPC, DEC and PMC, and not to the SWPC or VC.

No other criteria were added or changed in the 2013 RSRs other than to provide additional units in milligrams per cubic meter for certain VC and to change the residential DEC for lead. Page 19-20 of the Hearing Officer's report dated March 11, 2013 for the 2013 RSRs explicitly stated that numeric criteria for ETPH for SWPC and VC were proposed but withdrawn and not adopted. "The Department will take under further advisement the ETPH criteria for volatilization criteria (VC) and for surface water protection criteria (SWPC), and will not amend the RSRs to add such criteria at this time."

To bring the analysis current, on April 5, 2016, DEEP issued its so-called "Wave 2" draft conceptual revisions to the RSRs (the "Wave 2 Concepts"). As of the date hereof, the Wave 2 Concepts have not been proposed by DEEP as revisions to the RSRs. The 2013 RSRs are the applicable standards for purposes of this Petition. (Other conceptual revisions were issued by DEEP on August 7, 2016, but those are not relevant here.) The Wave 2 Concepts include redlined revisions to existing language in the 2013 RSRs to readily identify the language anticipated by DEEP to be inserted or deleted.

The Wave 2 Concepts reinforce Antea's reading of the 2013 RSRs in that they would propose to add ETPH criteria for SWPC and VC, and would apply APS to SWPC and VC. The Wave 2 Concepts also include a "grandfather clause" that would allow the potential use of the 2013 RSRs for a period of two years after the RSRs are revised for any sites where remediation has been initiated (*see* Wave 2 Concepts at Section 22a-133k-1(i)).

The 2013 RSRs do not include any reference to EPH, VPH, or APH, nor do they make any reference to criteria to be met based on the use of any of those methods. We again note that DEEP has not gone through the notice and comment rulemaking process to revise the RSRs to require the use of any of these methods or to establish criteria. Instead, DEEP has issued

guidance and otherwise had those staff members overseeing cleanups require the use of the EPH, VPH and/or APH methods and to impose numeric criteria based on those methods. Upon information and belief, DEEP has issued guidance since at least as far back as November 2011 regarding the use of the EPH, VPH and APH methods and criteria, but DEEP did not include such provisions in the 2013 RSRs. To the contrary, DEEP has required that the criteria based on the EPH/VPH/APH methodologies must be approved by it on a site by site basis.

VI. Discussion

DEEP's interpretations of certain provisions of the RSRs, as well as its not revising the RSRs based on the notice and comment rulemaking as required by the APA, have undermined transactions reliant on the current law and regulations and resulted in unnecessary and significant additional costs, delays, and uncertainty. More broadly, DEEP's practices discourage the use of certain analytical methods, create impediments to more timely (but still protective) remediation outcomes, result in second-guessing of closed sites, risk legislative interventions that could be unpredictable for the regulated community and/or unfavorable to DEEP, and encourage challenges to DEEP's rulemaking efforts, legal interpretations, and the use of guidance in lieu of regulation. Beyond this, such practices have a chilling effect on risk transfer agreements conducive to a cleaner Connecticut.

The RSRs are substantive rules, in that they are issued pursuant to statutory authority under CGS § 22a-133k and have the force and effect of law. Revisions to the RSRs are subject to the APA and its notice and comment requirements. Failing that, they are invalid. The interpretations of the RSRs by DEEP as set forth in this Petition are not mere interpretive rules, general statements of policy, clarifications, or simple gap filling based on current regulations, but instead are inconsistent with the provisions of the RSRs in effect. *See, e.g., Salmon Brook*

Convalescent Home, Inc. v. Commission on Hospitals & Health Care, 177 Conn. 356, 417 A.2d 358, 1979 Conn. LEXIS 758 (Conn. 1979); Sams v. Department of Environmental Protection, 308 Conn. 359, 63 A.2d 953, 2013 Conn. LEXIS 119 (Conn. 2013); Appalachian Power Co. vs. Environmental Protection Agency, 208 F.3d 1015 (D.C. Cir. 2000). Changes to well-established policies or interpretations, such as is the case here, are also subject to notice and comment rulemaking. *See, e.g.*, Alaska Professional Hunters Ass'n v. Federal Aviation Administration, 177 F.3d 1030 (D.C. Cir. 1999); Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579 (D.C. Cir. 1997); Shell Offshore, Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001); Croplife America v. Environmental Protection Agency, 329 F.3d 876 (D.C. Cir. 2003).

Beyond DEEP's procedural approaches, it is also important to note that a standard rule for interpreting regulations is to first look at the plain language and applying usual and ordinary meanings of words to discover the original intent (unless otherwise defined in the regulations). Other standard rules are to avoid absurd results (such as not interpreting different words in different places to mean the same thing), favoring interpretations to reflect internal consistency rather than ignoring certain words or deeming them superfluous, understanding certain language being in one section but not another as reflecting purposeful and intentional drafting, presuming that certain language in a proposed regulation that is deleted prior to promulgation reflects an intended deletion, and recognizing that courts may reasonably interpret ambiguous provisions and require an agency to abide by the court's interpretations. We also note that a court need not give as broad deference to an agency's interpretation of its own regulations as it might for a statute as in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). To the extent some lesser degree of deference may be provided to an agency's interpretation of its own regulations, such deference would need to be based on (among other

factors) the validity of the agency's reasoning and its consistency with earlier and later pronouncements. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Even less deference (if any) is afforded to mere guidance.

A. ETPH Criteria Do Not Apply to SWPC or VC

The 2013 RSRs clearly establish ETPH criteria for GWPC, DEC and PMC, but not for SWPC or VC. *See* 2013 RSRs Appendices A (ETPH criteria specified for DEC), B (ETPH criteria specified for PMC), and C (ETPH criterion specified for GWPC), and contrast those with Appendices D (no ETPH criterion specified for SWPC), E (no ETPH criterion specified for VC for groundwater), and F (no ETPH criterion specified for VC for soil vapor). As noted above, the Hearing Officer's report for the 2013 RSRs explicitly stated that ETPH criteria for SWPC and VC were withdrawn and not promulgated. As such, there are no ETPH standards for SWPC or VC established in the 2013 RSRs. The Wave 2 Concepts include minor revisions to the definition of ETPH, but they do not appear to indicate the proposed addition of ETPH criteria for SWPC or VC.

B. APS Do Not Apply to SWPC or VC

The language addressing the applicability of APS to GWPC, DEC and PMC, and the inapplicability of APS to SWPC or VC, remains the same in the 2013 RSRs. The provisions related to GWPC, DEC, and PMC each include specific language related to APS under the heading "Additional Polluting Substances." For example, for DEC, "With respect to a substance at a release area for which a direct exposure criterion is not specified . . . , the Commissioner may . . . approve in writing a direct exposure criterion to apply to such substance . . ." (*see* RCSA Section 22a-133k-2(b)(5)). Similar APS provisions for GWPC and PMC are in RCSA Sections

22a-133k-3(h) and 22a-133k-2(c)(6), respectively. There are no such headings or language with respect to SWPC or VC, except under certain narrow circumstances as noted below. As such, it is only necessary to satisfy numeric criteria for SWPC or VC that are specified in the RSRs, and not for every constituent that may be present. This makes sense. Under most circumstances, the SWPC and VC (but not the GWPC) will typically apply in GB areas, while the GWPC (which includes APS language) would not apply. GB areas are known or suspected to have more degraded groundwater conditions and the numeric criteria in the RSRs are typically less stringent.

DEEP's own Wave 2 Concepts, published just a few months ago, clearly document and support our reading of the 2013 RSRs. The Wave 2 Concepts would make certain revisions to the APS provisions for GWPC, DEC and PMC, and they include the heading of "CURRENT LANGUAGE" for each of these criteria as well as redlined revisions to the text. In contrast, pages 102-103 of the Wave 2 Concepts include only "PROPOSED LANGUAGE" for APS for SWPC and VC, because APS do not currently apply to SWPC or VC. The Wave 2 Concepts would also revise the definitions for each of the GWPC, DEC, PMC, SWPC, and VC to explicitly refer to "any additional polluting substance." While the revisions to these definitions under the Wave 2 Concepts might be considered "clarifications" solely with respect to GWPC, DEC and PMC because those criteria already include references to APS elsewhere in the 2013 RSRs (albeit not expressly in the definitions for those criteria), the additions of APS language with respect to SWPC and VC, and to include reference to APS in those definitions, would clearly constitute substantive changes and not mere clarifications. As such, DEEP must go through notice and comment rulemaking to effectuate the addition of APS for SWPC and VC because they do not exist in the 2013 RSRs.

That said, there is one narrow set of circumstances under which certain other criteria might apply to SWPC (but not VC), but this primarily serves to support our reading of the RSRs. For discharges to wetlands or intermittent streams, or for a plume that is more than 0.5% of the upstream drainage basin, RCSA Section 22a-133k-3(b)(2) provides that “each substance therein” must be remediated to the “applicable aquatic life criteria” or “an alternative water quality criterion adopted by the Commissioner in accordance with section 22a-426 of the General Statutes and paragraph 12b of the Water Quality Standards effective May 15, 1992.” Under these limited circumstances, the reference to “each substance therein” might be considered as being somewhat analogous to the APS provisions for GWPC (*see* RCSA Section 22a-133k-3(a)(2)), DEC (*see* RCSA Section 22a-133k-2(5)), and PMC (*see* RCSA Section 22a-133k-2(c)(6)); otherwise, such language is not included in the 2013 RSRs with respect to SWPC or VC, and as such, establishing or meeting APS is not required.

The RSRs also include language relative to DEEP’s authority to require additional remediation of soil or groundwater notwithstanding the express provisions of the RSRs. For example, RCSA Section 22a-133k-3(i) provides that “Nothing in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies shall preclude the Commissioner from taking any action necessary to prevent or abate pollution, or to prevent or abate any threat to human health or the environment. If the presence of any substance impairs the aesthetic quality of any ground water which is or can reasonably be expected to be a source for drinking or other domestic use, additional remediation shall be conducted in order to reduce the concentration of such substance to a concentration appropriate for such use.”

This language does not allow the more detailed provisions of the RSRs to be disregarded. First, it is unlikely that a source of drinking water would be in a GB area such that the GWPC

would apply; if it did, then APS would already be captured by the express GWPC provisions in the RSRs related to such circumstances. APS would otherwise continue to not apply to SWPC or VC. Second, and more importantly, the RSRs were promulgated to ensure some degree of certainty and predictability. There must be some level of threat posed, as reasonably determined by DEEP, to invoke this authority. There is a high standard of proof, resting solely on DEEP, to demonstrate that a site in compliance with the RSRs would somehow still pose an unacceptable risk for which additional remediation would be required. Third, we are not aware of DEEP's prior citation of such provisions in the RSRs to support its contention that APS apply to SWPC or VC; rather, its guidance has primarily referred to the general provisions of RCSA Section 22a-133k-3(a)(1), which other, more specific provisions of the RSRs indicate a different outcome.

C. The Use of AC or Meeting Background Are Not Necessarily Required for Constituents Without Promulgated Criteria

The RSRs also do not require securing approval of AC for constituents that do not have established criteria in the RSRs, nor in the alternative must background conditions be met. An "alternative" criterion means just that: an "alternative" to a criterion established in the RSRs. If a criterion does not exist in the RSRs, then there is no criterion to meet, at least with respect to SWPC and VC. The 2013 RSRs make this clear. For example, RCSA Section 22a-133k-2(d)(2) provides in relevant part that "With respect to a substance except PCB for which a direct exposure criterion is specified in sections 22a-133k-1 through 22a-133k-3, inclusive, of the Regulations of Connecticut State Agencies, the Commissioner may approve an alternative direct exposure criterion . . ." (emphasis added). Contrast this with RCSA Section 22a-133k-2(b)(5), which provides in relevant part that "With respect to a substance at a release area for which a direct exposure criterion is not specified in sections 22a-133k-1 through 22a-133k-3, inclusive,

of the Regulations of Connecticut State Agencies, the Commissioner may . . . approve in writing a direct exposure criterion to apply to such substance . . .” (emphasis added). Refer also to the definitions for GWPC, DEC, PMC, SWPC and VC in RCSA Section 22a-133k-1(a).

The purported ability or need to use AC cannot be used to bootstrap the applicability of APS to SWPC and VC where it does not exist in the RSRs. It is also not necessary to meet background for constituents without established criteria in the RSRs. The “General” provisions of RCSA Section 22a-133k-3(a)(1), and the use of “or” rather than “and,” do not provide a sufficient basis for concluding that one must meet background for all unspecified constituents for SWPC and VC; note also that such a reading would directly contradict any suggestion that APS apply to SWPC and VC. Requiring background conditions to be met or the use of AC for SWPC or VC for those constituents without promulgated criteria would result in more conservative regulation of these criteria than provided for under the RSRs. To the extent such requirements are to be imposed, the RSRs would first need to be revised accordingly through notice and comment rulemaking.

D. DEEP Cannot Require the Use of EPH/VPH/APH or Meeting Related Criteria Without Going Through the Notice and Comment Rulemaking Process

DEEP has acknowledged that it is establishing remediation criteria on a “case by case” basis, instead of undertaking notice and comment rulemaking as required under the APA. DEEP’s Technical Support Document: Recommended Numeric Criteria for Common Additional Polluting Substances and Certain Alternative Criteria, dated December 10, 2015 (revised March 8, 2016) (“APS/AC Guidance”) states at page 4 that “DEEP committed to evaluating and updating remediation criteria in the RSRs. However, this process will take some time. In the meantime, the Department recognizes that case by case development of remediation criteria will

need to continue until the criteria review and updating process is completed and a regulatory process accomplished.” As noted above, DEEP issued guidance related to the use of the EPH/VPH/APH methods and criteria at least two years before the RSRs were revised in 2013, yet no revisions to the RSRs were made in these respects at that time or since. It remains unknown how or to what extent DEEP might continue the informal use of guidance and discretion in lieu of rulemaking with respect to EPH/VPH/APH, or perhaps some other analytical method or methods. While the use of criteria in the APS/AC Guidance is purportedly “voluntary,” this provides no viable or reasonably good choice. A regulated entity must either accept generic criteria offered by DEEP (for a method not provided for in the 2013 RSRs, but indicated to a limited extent in the Wave 2 Concepts), or risk the delays, costs, and uncertainties associated with asking DEEP to develop a site-specific criterion.

The Wave 2 Concepts acknowledge this by virtue of new definitions for EPH, VPH and APH being included. Unfortunately, the Wave 2 Concepts do not include numeric criteria to be used for such analytical methods, nor do they appear to provide a manner in which to avoid the potential need to meet two standards for the same constituent identified using two different analytical methods. There are also significant questions as to the appropriateness of the risk assessment methods used by DEEP in establishing criteria for EPH/VPH/APH, including the use of certain conservative assumptions and attenuation factors, not more fully taking into account the attenuation of petroleum constituent concentrations and potential risks through biodegradation and other processes (as recognized by the United States Environmental Protection Agency), the use of certain modeling in a manner that may overestimate petroleum concentrations, and the use of conservative, generic factors while also requiring case by case approvals. Certain criteria established by DEEP when evaluating EPH/VPH/APH analytical

results may also be based on a surrogate constituent within a given range of carbon atoms that may not actually be present.

As noted above, there has been some confusion and disagreement as to whether more than one criterion must be met if more than one analytical method is used for a given sample location. For example, the RSRs may specify a numeric criterion for a given constituent (say, using EPA Method 8260) while the DEEP may also have published (but not promulgated) a criterion for that same constituent based on a VPH analysis. The results for that one constituent might be above one criterion but not the other. DEEP's 2012 guidance entitled "Analytical Methods Used to Characterize Petroleum Releases" (the "Analytical Guidance") generally indicates that LEPs may select among various analytical method to be used. For example, a gasoline release may be analyzed using EPA Method 8260, or VPH (carbon ranges and target compounds), or VPH (carbon ranges only) and EPA Method 8260. As a result, if the LEP analyzed a sample using VPH (but not 8260) and the relevant criteria were met, then that location would meet the applicable criteria for the relevant constituents. The same result should hold true if the LEP used only 8260 but not VPH, and the applicable criteria were met. Difficulties have arisen when both 8260 and VPH were run, and a given constituent is above a criterion established for 8260 but below that for VPH, or vice versa. Presumably each of the relevant standards that DEEP establishes is sufficiently protective of human health and the environment regardless of which analytical method the LEP used. If this were not the case, then DEEP would not have allowed the option of selecting the analytical approach in the first place. In this light, it is not satisfactory to suggest that LEPs are "stuck" with the results if both analyses are used; this would be contrary to DEEP's own guidance and discourage LEPs from using a particular analytical method. DEEP updated its Analytical Guidance in draft form in June 2015, in which it

qualified the “or” language to indicate in a footnote that “The word ‘or’ is used to present acceptable alternative analytical approaches which may be used. It is important to note that some analytical methods may analyze for different analytes or suites of constituents that are not reported by another analytical method. Therefore, the environmental professional should recognize that the results from the alternative analytical approaches may not be comparable or interchangeable.” However, this qualification (still in the form of draft guidance) has no bearing with respect to the same constituent that may be identified using two different analytical methods.

Our understanding also makes sense in the context of APS, as and to the extent applicable, under the RSRs with respect to DEC, PMC and GWPC. For example, RCSA Section 22a-133k-2(c)(6) provides in relevant part: “. . . the Commissioner may approve a pollutant mobility criterion, a dilution or dilution and attenuation factor, and a method for determining compliance with such criterion to apply to such substance at a particular release area, provided the Commissioner finds that such criterion will ensure that soil water at such release area does not exceed, in a GA area, the ground-water protection criterion, or in a GB area the ground-water protection criterion multiplied by a dilution factor of 10” (emphasis added).

The ability of LEPs to exercise professional judgment in the selection of appropriate analytical methods that can each identify relevant constituents, each of which would utilize a protective standard, should be encouraged to allow more sites to get through the regulatory process and productively used.

E. Revising the RSRs to Adopt the Wave 2 Concepts Would Not Provide an Adequate Remedy

The adoption of the Wave 2 Concepts, including but not limited to DEEP's proposed additions of ETPH numeric criteria and APS requirements for SWPC and VC, would not provide an adequate remedy to address the ongoing imposition of requirements that are not provided for in the RSRs. First, the timeline for revising the 2013 RSRs is uncertain. Notwithstanding optimistic timeframes that may be offered, DEEP has revised the RSRs only once in the 20 years since they were originally promulgated. While rulemaking can be a difficult and time-consuming task requiring significant resources, that does not justify not complying with the APA. Second, the Wave 2 Concepts do not sufficiently address a number of the issues raised in this Petition. Third, the Wave 2 Concepts anticipate the "grandfathering" of the 2013 RSRs for a period of two years. This is appropriate and necessary because not providing such a period would create significant uncertainty and disruption to the regulated community, not to mention undermining the legal construct under which a countless number of transactions occurred. Planning investigations and remediation work takes a significant amount of time, expense and effort. Even if the RSRs were revised tomorrow as contemplated in the Wave 2 Concepts, the regulated community would be able to utilize the 2013 RSRs for an additional two years. To the extent and for so long as the 2013 RSRs remain in effect or may be utilized, they should be properly interpreted and applied. Finally, and most importantly, the continued use of discretionary, site by site standards even after the 2013 RSRs are revised would continue such APA deficiencies. A fundamental purpose of the RSRs is to provide some degree of certainty around which site investigation and remediation work, often taking years to complete, can be planned and proceed in a reasonably predictable manner.

Prior instances of the use of guidance in lieu of regulations, or even proposed regulations in lieu of promulgated regulations, have occurred. DEEP previously issued draft proposed revisions to the RSRs in March 2003 (the "2003 Proposed RSRs"). The 2003 Proposed RSRs included certain numeric criteria which were lower than those promulgated at the time. While the 2003 Proposed RSRs were never promulgated, DEEP indicated that such criteria were applicable and enforceable while still in proposed form. This position appeared to be clarified on or about April 9, 2010, seven years after the 2003 Proposed RSRs were issued, through a notice that the 1996 RSRs remained the applicable standards until such time as they are revised through notice and comment rulemaking and formally adopted by DEEP.

We are concerned that DEEP may continue to enforce requirements that do not exist, either purportedly under the 2013 RSRs and/or as those may be amended based on the Wave 2 Concepts. DEEP must comply with the requirements for notice and comment rulemaking in order to legally enforce relevant and applicable regulatory standards. As noted in the APS/AC Guidance, "DEEP committed to evaluating and updating remediation criteria in the RSRs." This is the time to do so.

F. The LEP Regulations Cannot be Used to Impose More Stringent or Expansive Requirements on LEPs With Respect to the RSRs

The regulations related to the conduct of LEPs are set forth at RCSA Section 22a-133v-1 et seq. (the "LEP Regulations"). DEEP has indicated that the LEP Regulations impose additional obligations on LEPs to satisfy certain remediation objectives that are above and beyond those set forth in the RSRs. While the LEP Regulations impose certain standards of knowledge and conduct on LEPs in providing services to clients, they do not provide a legal basis for LEPs to

conduct site remediation in a manner that is more stringent or expansive than what the RSRs require.

RCSA Section 22-133v-6(c)(1) provides that “a licensee shall act with reasonable care and diligence and shall apply the knowledge and skill of a licensee in good standing in the applicable field at the time such services are performed.” RCSA Section 22a-133v-6(d)(2)(C) provides in relevant part that “In rendering professional services, a licensee shall at all times: . . . Make a [sic] good faith and reasonable efforts to identify and obtain the relevant data and other information evidencing conditions at a parcel and identify and obtain such additional data and other information as necessary to discharge such licensee’s obligations” under the voluntary cleanup and Transfer Act programs, the LEP Regulations, and statutory and regulatory requirements related to environmental land use restrictions. This language reasonably requires certain standards of conduct and professional competency in conducting investigations and remediation work. However, this language has been asserted as a basis for imposing on LEPs additional obligations beyond satisfying the RSRs as promulgated.

As an example, assume that a site is located in a GB area where a gasoline release occurred, and there are no uses of groundwater for potable use. For groundwater, only the SWPC and VC would apply, and APS would not apply for those criteria (i.e., only the promulgated numeric standards would apply, even if other constituents were present). As a result, the LEP would need to collect sufficient data to characterize the groundwater in order to satisfy the SWPC and VC. There is no requirement in the RSRs, and the LEP Regulations cannot be used to impose a requirement, to meet APS, background or other standards for constituents for which promulgated numeric standards do not exist for SWPC or VC (e.g., trimethylbenzene or ETPH). Similarly, it is not necessarily even required to analyze groundwater samples for those

constituents if there are no applicable numeric criteria. The LEP Regulations relate to standards of conduct and competency, and require a certain skill set even if certain of those skills might not be needed for a given site in order to meet the RSRs. The LEP Regulations do not, and cannot be used to, impose additional or more stringent remediation criteria beyond what is specified in the RSRs.

In this context, the use of guidance in establishing standards of LEP conduct and competency has also been used to impose additional regulatory requirements in lieu of notice and comment regulation. For example, the DEEP has issued guidance related to reasonable confidence protocols ("RCPs"). Such guidance purportedly supplements what the DEEP would consider to be necessary with respect to the conduct and competency of LEPs through the LEP Regulations, which in turn would impose on LEPs additional investigation and remediation efforts beyond those required in the RSRs. For example, the RCP guidance might require running the full range of constituents within a given laboratory method (e.g., EPA Method 8260). If a constituent does not have a numeric criterion is specified in the RSRs but there is a DEEP-published APS (for potential use in other scenarios), then DEEP might assert that such APS criterion must be met even if APS do not apply in a given situation, such as in the GB area example above. Beyond an even more straightforward use of guidance in lieu of regulation, this effectively takes guidance related to laboratory analyses, applies it to the LEP Regulations regarding the conduct and competence of LEPs, and then further applies it another step to impose additional or more stringent remediation criteria that do not exist in the RSRs. Such use of guidance is not consistent with the APA's requirements.

It must also be recognized that the LEP program did not fully delegate the remediation program to LEPs. LEPs must still get approval for a number of reasons under the RSRs,

including but not limited to certain alternative criteria and APS, and modifications to groundwater monitoring requirements. LEPs are subject to verification reviews and audits. For sites where DEEP retains oversight (which are typically of greater environmental concern), DEEP's interpretations of the RSRs and LEP Regulations might result in sites that are ultimately remediated to a less stringent standard. With these considerations in mind, LEPs cannot be held to a higher and more protective standard than DEEP itself.

We are also concerned about how certain good faith, professional differences in opinion in interpreting the RSRs may be expressed. It is necessary to reasonably balance the two critical needs of reasonably protecting human health and the environment while at the same time doing so in a reasonable and predictable manner in accordance with applicable law. The LEP Regulations provide in relevant part that "In the rendering of professional services, a licensee shall, at all times, hold paramount the health, safety and welfare of the public and the environment." RCSA Section 22a-133v-6(d)(1). In the abstract, this may be considered a reasonable and appropriate requirement. More specifically, to the extent the RSRs are satisfied as promulgated, then the "hold paramount" standard has been met. The Analytical Guidance states that "The criteria in Appendices A through F of the RSRs are used to determine if a potential risk to human health or the environment may exist. The results of analyses performed on environmental media are used to determine if remediation is needed based on comparison to these criteria." Beyond that, LEPs are not required to satisfy what might be some other requirement based on unknown, subjective, or evolving perceptions of risk. When LEPs have balked at having their clients incur the unnecessary costs, delays and uncertainties in meeting standards that go beyond what the RSRs require, certain of them have heard that disapprovals, verification audits and/or referrals to the State Board of Examiners of Environmental

Professionals (“LEP Board”) might occur based on a purported breach of the “hold paramount” standard of care, which may actually be based on no more than a good faith and reasonable difference in regulatory interpretation, technical opinion, and/or proper interpretation of the RSRs and/or LEP Regulations. This situation may be worsened by differences in the judgments of individual DEEP staff members and/or DEEP guidance or pronouncements that may conflict with the RSRs. This poses a chilling effect on LEPs and threatens the purpose of the LEP program.

VII. Conclusion

Based on the above considerations, Antea respectfully requests that DEEP conduct a hearing on this Petition and issue a declaratory ruling with respect to the following:

1. The RSRs as presently promulgated:
 - a. Do not establish or require meeting numeric criteria for ETPH with respect to the SWPC or VC;
 - b. Do not require the evaluation of, or meeting numeric criteria for, APS with respect to SWPC or VC;
 - c. Do not require the use of AC or background conditions for certain constituents for which numeric criteria are not specifically established in the RSRs;
2. DEEP must revise the RSRs through the APA’s notice and comment rulemaking to appropriately implement the specify analytical methods and associated numeric criteria, including but not limited to those with respect to EPH, VPH and APH;
3. Confirm that to the extent more than one analytical method for a given constituent is appropriately allowed and used, then the RSRs would be satisfied by meeting one of the relevant criteria, as determined by the LEP, rather than having to meet all of them;

4. Confirm that the LEP Regulations do not impose additional or more stringent standards or requirements beyond those promulgated in the RSRs;
5. Implement a process through which LEPs and other members of the regulated community may, in good faith and on an expedited basis, challenge DEEP's interpretations of the RSRs; and
6. Such other relief as DEEP deems appropriate.

Respectfully submitted,

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