Report to the Connecticut Department of Energy and Environmental Protection

on

The Draft Proposed Program Outline for a Transformed Cleanup Program

Transitions from Existing Programs

November 20, 2012

Submitted to Support the Transformation of Connecticut's Cleanup Program

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Introduction

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

This transformation workgroup (the Workgroup) was asked to provide DEEP with comments and recommendations regarding transition from existing programs.

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

Workgroup Membership

Participant	Representing
Claire Foster (Co-Lead)	DEEP
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Russell Bartley	R.W. Bartley & Associates, Inc.
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Workgroup Meetings

The Workgroup met at the offices of DEEP in Hartford on October 11, 18 and 25 and on November 1, 7 and 15. Members unable to attend in person had the opportunity to call in.

To track topics discussed, the Workgroup developed a table of transition issues, options, comments and recommendations. This working document evolved into a checklist of issues and options from which we developed the statements of issues and recommendations set forth in this Report. An interim version of the table was the basis for our presentation at the public information session on November 7, 2012, and was posted on the DEEP's transformation process web site along with presentation slides from that session. Interested readers will find that version of the table here. We refer to this working document for information only; it is superseded in its entirety by this Report.

Background

The question of transition to a new cleanup program presents distinct and unique challenges for virtually every existing program that implicates site remediation. At one extreme, transition could be accomplished by simultaneously terminating as many pending programs as possible, restarting all currently-regulated properties on day one under the new program. The Workgroup touched on this approach as an option overall and for certain individual programs, but it did not generate serious discussion. We mention it here to define one end of the spectrum of options available to the State in shifting to a new program.

The Workgroup's ability to identify transition issues and make recommendations was constrained by the lack of clarity concerning the new program. We sought guidance in DEEP's "Draft Proposed Program Outline for a Transformed Cleanup Program" (Sept. 27, 2012) ("DEEP Outline"), but we often found that details relevant to transition issues remained undefined and were being developed in parallel by other workgroups. This Report, including especially our recommendations, must therefore be considered a preliminary analysis of issues to be addressed in transition and options available to address them.

Program-Specific Discussion and Recommendations

A. Overarching or Common Issues

The Workgroup identified two issues that apply to the entire spectrum of transition topics.

1. Resource Constraints. If sites in current cleanup programs will continue under the new program, transition will place significant demands on public and private resources not only to reprocess current sites, but also to address sites that will come under regulatory control for the first time by reason of the new program's proposed requirement to report existing contamination exceeding a "reportable concentration" threshold. The new program must therefore be carefully designed to function with available administrative resources. With regard to DEEP staffing, "available" means resources currently available or made available and funded by legislation creating the new program. If resources and requirements are not

balanced, the new program will be impaired by bottlenecks much like those that have affected existing programs. Whether to achieve balance by limiting program applicability or requirements or by appropriating funds is a political question we did not address. Nevertheless, we view the resource question as a significant transition challenge the new program must acknowledge and meet if it is to succeed. We further believe that before any new program is proposed as legislation, DEEP should evaluate its function and resource demands by working through case studies representative of real-world site investigation and remediation scenarios. Such "beta test" simulations will clarify implementation needs and minimize unanticipated consequences that could consume limited public and private resources.

2. Site Characterization Guidance. The conceptual framework for current remediation programs involves investigation in accordance with prevailing standards and guidelines, a concept expressly stated in some enabling statutes but integral to site characterization in Connecticut. Among such "prevailing standards and guidelines" is the "Site Characterization Guidance Document" (December 2010) ("SCGD" or "current SCGD"), which plays an important part both in guiding site work and defining the "standard of care" by which DEEP evaluates Licensed Environmental Professionals (LEPs). The current SCGD focuses on possible or suspected releases, as reflected in the "area of concern" construct. Because release reporting under the proposed new program "will be based on the discovery or knowledge of a release or a potential release" (DEEP Outline at 1), "standards and guidelines" will have to evolve to define a corresponding approach to investigation. It will also be crucial to clarify when a given "release" has been adequately characterized for purposes of the new program. For these reasons, the Workgroup views SCGD revision as a transition task equal in importance to revision of the Remediation Standard Regulations (RSRs). The Workgroup also notes that after implementation of the new program, the current SCGD will remain useful for specific purposes; those situations are noted in the discussion below about specific programs.

B. Program-Specific Issues and Recommendations

1. Transfer Act. The Workgroup took it as a given that "[p]arties currently in the Property Transfer Program will retain their current obligations" (DEEP Outline at 13).

A majority of the Workgroup endorsed the following transition concepts for "outstanding" Transfer Act properties, i.e. properties where Transfer Act Form III or IV certifications have been filed but verification has not yet been reached.

a. Certifying parties should complete investigation and proceed to verification using the existing SCGD, but should be able to (i) verify *either* by portions of the property in accordance with current practice *or* by "release" as that concept is defined under the new program, (ii) make "interim verifications" even if the program did not permit such verifications at the time of filing, and (iii) use any revised RSR criteria.

b. Transfer Act sites that do not now have schedules should be placed on either schedules consistent with the new program, or schedules like those that have been required for certifications since 2009, i.e. to complete investigation and initiate and complete remedial action and achieve compliance with RSRs or at least RSRs for soil by dates certain.

c. Certifying parties not meeting applicable schedules should be subject to fees or penalties.

d. The notion of "retaining current obligations" should also include the strict liability of transferor to transferee as set forth in Conn. Gen. Stat. §22a-134d.

e. The notion of "retaining current obligations" should also include the distinction between the whole property and the "establishment," where the transfer of business operations rather than real property affects the certifying party's obligations.

f. If we "retain current obligations" while implementing a new program, we create the possibility that a current owner of a Transfer Act property may become liable under the new release-based program because an existing Transfer Act certifying party is (or becomes) non-viable. The Workgroup viewed this outcome as unfair to an owner who likely relied on the Transfer Act process as an integral element of transactional risk allocation. At the same time, the Workgroup recognized that any Transfer Act site implicitly carries a risk that a certifying party will prove nonviable. Accordingly, a majority of the Workgroup (six of those in attendance and voting when the question was considered) endorsed the solution of requiring DEEP to take enforcement action against a nonperforming certifying party first, with the current owner subject to the new program if and only if such action is taken but fails to prompt action by or on behalf of the certifying party. The other options the Workgroup considered were to place the current owner under the new program (one vote) and to impose the obligations of the certifying party on the current owner (one vote).

g. A similar problem arises where a certifying party is obligated to remediate only conditions associated with transferred "business operations." In that scenario, the certifying party must investigate and characterize unrelated AOCs, but has no obligation to remediate them. The property owner, who currently has no obligation to remediate, would presumably learn information from the certifying party's investigation that would create an obligation to report and follow up under the new program. Although this scenario also implicates the expectations of transaction parties, the burden on the owner is no different from that imposed on all owners of properties with historical contamination not currently subject to remediation requirements. The Workgroup could see no reason to exempt the property owner from the new program, so the "transition" would consist simply of making clear to such property owners that the new program will apply to them.

It should be noted that the Workgroup discussed whether the current Transfer Act program should be retained to any degree, or instead simply terminated with a requirement for

certifying parties to proceed under the new program. Some Workgroup members were firmly of the view that Transfer Act certifying parties committed to abide by certain obligations and their transaction partners often relied on that commitment; other Workgroup members disagreed that any certifying parties would have done so but for the legal compulsion of a program that used to be superseded by a new unified program. No more than a few members of the Group ever advocated the "clean break" option, and we ultimately deemed it foreclosed by the DEEP Outline. It is noted here because it represents a significant policy choice that may deserve further consideration, if only because maintaining the Transfer Act and current SCGD framework in parallel with a new program will add to the complexity of transition.

The Workgroup also discussed the problem of priority among multiple certifying parties on Transfer Act sites that have not reached verification. Since the DEEP Outline expressly says current obligations will be retained, the Workgroup concluded that this is not a transition issue because the obligations of multiple certifying parties for a site will necessarily also be "retained." Some in the Workgroup view the problem as a significant one that should be addressed in any comprehensive restructuring.

2. Voluntary Remediation Programs. The Workgroup considered the voluntary remediation concept worth preserving in a new program. It offers "volunteers" a mechanism to achieve full verification, which they may wish to pursue in order to enhance the value and marketability of property.

An important element of that mechanism, however, is the full-site assessment and investigation framework of the current SCGD, which as noted above will have to be adapted to the new program's release-based orientation. We recommend allowing volunteers have the option to proceed to full-site verification under the current SCGD, or verify that all reportable releases as defined under the new program have been compliantly closed out (e.g., using a revised release reporting based SCGD providing a path to full verification).

The current program also offers volunteers the options of proceeding at their own pace or stopping short of full verification. The new program does not appear compatible with this option: once a "voluntary" investigation produces information that triggers a report, the "volunteer" will have no choice but to proceed and the release area will no longer be "voluntary."

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For "voluntary" programs, the Workgroup recommends the following:

a. For sites now in a voluntary program, but where available information would not trigger reporting under the new program, current "volunteers" should have the option, but not the obligation, to continue investigation.

b. New program reporting obligations will apply to voluntary sites. For current "voluntary" sites, like currently unregulated sites, new program requirements will become applicable if and when a reporting obligation is triggered by available information, whether developed by ongoing voluntary investigation or otherwise.

c. For sites now in a voluntary program where investigation has produced information sufficient to support release reporting under the new program, release reports should be filed by appropriate parties when the new program becomes effective and the requirements of the new program should thereafter be implemented.

d. For sites with known releases now in a voluntary program and with proposed schedules, "volunteers" should have the option of submitting a schedule for site-wide investigation and remediation to DEEP for review and approval, and then proceeding on the approved schedule in lieu of filing notices for individual releases under the new program. New RSR criteria and "exits" should apply to existing voluntary sites that proceed on this basis.

e. Full-site verification represents a value some owners may wish to pursue. The new program should incorporate the option to pursue such verification.

f. The new program should retain a voluntary path that provides other incentives to undertake site-wide assessment, such as schedule control or covenants not to sue.

3. Significant Environmental Hazard Reporting. SEH reporting currently results in response short of full characterization and remediation. The Workgroup assumes that any SEH site not in compliance with revised RSR criteria will come under the new program if and to the extent known site conditions trigger a reporting obligation. SEH sites will become subject to the new program in that manner and at that time and will not otherwise require "transition." Going forward, the "significant hazard" reporting concept will be subsumed within the new program.

4. Underground Storage Tanks. The Workgroup concentrated primarily on regulated UST systems and on transition of outstanding (i.e. not formally closed) leaking UST situations reported to DEP/DEEP.

a. At leaking UST sites without formal closure, responsible parties technically have outstanding remediation obligations even if initial response actions are complete. These sites should be handled under the new program. Responsible parties will need to evaluate information about site conditions and past mitigation or remediation work in light of new program reporting obligations and "exits," then proceed accordingly.

b. To the extent the State program operates under Federal delegation, implementation of the new program may require EPA review and approval. DEEP LUST staff reports that while Connecticut incorporates certain federal UST regulations by reference, Region 1 has approved UST regulations that do not. The Workgroup did not have the benefit of input from UST operators on this subject and therefore was not able to ask whether consistency of requirements across state lines is a factor for them.

c. The UST program also presents a distinction between property owners and responsible third parties. The problem of a nonviable responsible party may arise here and should be dealt with as recommended under the Transfer Act (B.1.f.).

The Workgroup felt that releases from residential USTs should continue to be addressed on a case-by-case basis in the exercise of enforcement discretion insofar as DEEP perceives a threat to public health or the environment.

5. Spills Previously Reported. The Workgroup struggled with the problem of handling the backlog of tens of thousands of previous release reports that were never formally closed. We unanimously agreed that it is not a viable option to revive all such reports under the new program; this conclusion comports with the statement in the DEEP Outline that in general, "[s]pill notifications made to DEEP [sic] prior to the effective date of the new program will not be required to comply with the new program" (DEEP Outline at 13-14). We considered screening alternatives to reduce the list but also concluded that historical Departmental response practices provide high degree of confidence that DEP/DEEP have effectively triaged spill reports and responded to those that needed attention. DEEP Spills Division staff also reported to the Workgroup that DEEP has not seen any pattern of missed consequences associated with previously reported spills.

Balancing the cost of re-examination against the potential to achieve meaningful environmental benefit, the Workgroup concluded that the inventory of historical spills should not be re-examined as part of the transition. Contemporaneous administrative evaluation of spill reports resulted either in Departmental response or a real-time decision that such response was not needed. We judge this practice to have been reliable enough to support the conclusion that wholesale re-evaluation of the spill list would not yield meaningful benefits, and would not justify the public and private cost of review. We do not discount the value of giving previously reported spills appropriate attention, but we conclude that due diligence and existing response authorities will adequately address any residual concerns posed by previously reported spills. We recommend:

a. The reporting requirements of the new unified program should apply to previously reported spills only insofar as available information about the concentration of contaminants remaining at the site of a spill after spill response activities triggers reporting.

b. When the new program is presented to the regulated community, DEEP should explain that old spills do not necessarily need to be re-reported as "releases," but that parties should evaluate available information to determine whether reporting is appropriate.

6. RCRA Corrective Action Sites. RCRA corrective action is integrated with federal requirements, so as with UST regulations (above), implementing a new Connecticut program will require coordination with overlapping federal jurisdiction. The Workgroup concentrated on the question of how new program release reporting and remediation requirements would apply at *current* RCRA corrective action sites.

a. Continue with investigation and corrective action, including site-wide investigation for 22a-449(c)-105(h) land disposal facilities, at current RCRA corrective action sites.

b. Because RCRA corrective action sites are already "reported" and subject to investigation and remediation obligations, new reporting should not be required under a new program. The same is true for sites that enter enforceable RCRA corrective action in the future.

c. Any new releases at active RCRA corrective action sites should be handled under the corrective action process and exempted from separate reporting and response under the new program, except that the significant environmental hazard reporting obligation or its equivalent under the new program should apply.

d. As soon as possible after the new program becomes effective, revised RSR requirements and exit options should be integrated into the corrective action Memorandum of Understanding between DEEP and the Environmental Protection Agency.

The foregoing recommendations apply to sites where RCRA corrective action requirements apply *and* have become effective under relevant regulations pursuant to an enforceable schedule. The Workgroup distinguished RCRA sites that *will* be subject to RCRA corrective action but *have not yet reached* the corrective action stage. Until such sites are actually in RCRA corrective action, the new program requirements to report and follow up on releases or known "reportable concentrations" should apply. Revised RCRA corrective action regulations will need to provide for future transitions of such sites from the new program to the RCRA corrective action framework. If potential RCRA corrective action sites come under the new program, however, the new program should avoid duplication of effort either by providing for remediation on terms that satisfy RCRA corrective action requirements, or by permitting deferral of remediation until the corrective action phase is reached.

7. Potable Water Remediation/Abatement. The Workgroup discussed how a new program might apply to contamination observed in private drinking water wells but often not related to any identifiable release or responsible party. Some Workgroup members felt that a new reporting system should extend to well contamination, in order to make it easier for

property buyers to learn of known contamination, and to increase the likelihood that offsite impacts will be linked to known releases. Other Workgroup members firmly opposed this idea.

Further discussion resulted in a consensus that any existing shortcomings in the handling of potable water supply contamination reports do not present transition issues as such. The Workgroup concluded that the proposed new program does not address the question, so there will be no change from the current "program."

Some members of the Workgroup wished to mention that DEEP's Potable Water Program is effective at mitigating unacceptable risk precisely because it is resource intensive, soundly managed, and exercises substantial professional discretion at the Supervisor level.

8. Outstanding Orders (Administrative, Consent). Some remediation currently proceeds under administrative or judicial orders that cannot be altered without supplemental administrative or judicial action on a case-by-case basis. The Workgroup concluded that statutes and rules implementing a new program will not affect existing orders, so the requirements of any new program will have to be implemented, if at all, by further negotiation of the parties confirmed by new orders from the appropriate forum.

The outstanding order scenario presents the problem of the non-viable responsible party, as discussed above with respect to non-viable Transfer Act certifying parties. The problem again is that a current owner who has no obligations under a consent or administrative order may have knowledge that would trigger reportable concentration reporting under the new program. The Workgroup recommends that such owners be subject to the new program if and only if DEEP first exhausts efforts to get the party obligated on the outstanding order to perform, as we recommend above with respect to comparable situations arising under the Transfer Act (B.1.f.).

9. Sites in Multiple Programs. The Workgroup addressed the problem that a given site may fall within multiple programs. For example, one site may be subject in whole or in part to RCRA Corrective Action, Significant Environmental Hazard reporting, the Transfer Act, underground storage tank requirements, voluntary remedial action, and an outstanding consent order. The Workgroup recognizes that one objective of the current "transformation" process is to develop a single "unified" program. But as discussed above, certain remediation processes may be defined in part by federal requirements, or subject to outstanding consent order requirements that cannot be unilaterally altered, or may be within the "retained obligations" of outstanding Transfer Act certifying parties. The Workgroup therefore remains concerned that the multiple-program problem will persist despite efforts to "unify" the remediation program. In a sense, transition of such sites will present the particularly difficult challenge of moving from one set of overlapping or conflicting requirements to another. To the extent possible, there should at least be a unified cleanup standard (the RSRs) that applies to all sites to minimize conflict among multiple regulatory requirements.

This was an area in which this Workgroup's ability to define problems and frame recommendations was materially limited by the extent to which the new program remains undefined. Our best recommendation is the general one that public outreach, education and compliance assistance will be particularly crucial in helping affected parties – including the Department itself – make the transition to the new program.