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Laws, Regulations and Policies Relating to Connecticut Licensed Environmental Professionals (“LEP”)

*Presented by
EPOC*

and chaired by

*John E. Wertam, Esq.
Shipman & Goodwin LLP
February 26, 2009*

A. Introduction and Connecticut Environmental Programs Affecting Licensed Environmental Professionals (LEPs)

John E. Wertam, Esq., Shipman & Goodwin LLP

- The Laws
- The Regulations
- The Policies
- Overview of Connecticut's LEP Program



B. LEP Board and Licenses: Overview

John E. Wertam, Esq., Shipman & Goodwin LLP

Denise Ruzicka, DEP and LEP Board Chair

- LEP Board Operation and Jurisdiction (Denise)
- Overview of LEP Regulations (John)
- License Use and Revocation (John)
- LEP Board Decisions (John)



LEP Board Operation and Jurisdiction

Denise Ruzicka, DEP and Chair of LEP Board



Overview of LEP Regulations

John E. Wertam, Shipman & Goodwin LLP

- License Use and Revocation
- Rules of Professional Conduct
 - Professional Competency
 - Professional Conduct
- Contingent Fees
- Conflicts of Interest



License Use and Revocation

Regs. Conn. State Agencies § 22a-133v-4

- The Board shall authorize the Commissioner to issue a license to each applicant with a passing score on the examination and who otherwise satisfies the requirements of licensure.

***Note:** A license is a property right, the revocation of which is subject to a hearing and appeal.*

- Any person may file a written complaint with the Board concerning the conduct of any applicant or licensee, and the Board may investigate such complaint.



License Use and Revocation

Regs. Conn. State Agencies § 22a-133v-4

- For the purposes of denying an application or revoking a license, the terms **“professional misconduct”** shall include an action which:
 - Violates any statute, regulation, permit, or other license relevant to the activities for which such licensee is responsible;
 - Endangers or may endanger human health, safety, welfare or the environment;
 - Fails to comply with request by the Board for any information relevant to any application, license, report or other documents submitted to the commissioner or the Board;
 - Demonstrates a lack of good moral character → conviction in any jurisdiction of a felonious act, the submission of false or incomplete information on any application, acts involving dishonesty, fraud or deceit



License Use and Revocation

Regs. Conn. State Agencies § 22a-133v-5

- Use of LEP Seal
 - In connection with verifications or other documents pertaining to verifications
 - To attest that in the LEP's **professional judgment**, the verification, and services rendered in connection with such verification comply with the Regulations of Connecticut State Agencies.
 - Cannot affix seal to any document other than a verification or other document pertaining to a verification.



License Use and Revocation

Regs. Conn. State Agencies § 22a-133v-5

- Use of LEP Seal
 - Keep sufficient records for 6 years pertaining to verifications that have been sealed to support the basis of the verification, including alternatives considered
 - Cannot affix seal on any verification for a parcel in which the LEP's employer has a financial interest



Rules of Professional Conduct – General Regs. Conn. State Agencies § 22a-133v-6

- Rules of Professional Conduct apply to LEP's in order to establish and maintain a high standard of integrity, skill, and practice and to safeguard the health, safety, property, and welfare of the public
- LEP's are deemed to be familiar with Rules
- Rules apply to all professional services provided by a licensee in Connecticut.



Professional Competency

Regs. Conn. State Agencies § 22a-133v-6(c)

- Licensee shall act with reasonable care and diligence and shall apply the **knowledge and skill of a licensee in good standing**
- Licensee may perform professional services only when qualified by education or experience



Professional Conduct

Regs. Conn. State Agencies § 22a-133v-6(d)

- Licensee shall at all times hold paramount the health, safety and welfare of the public and the environment
- Licensee shall exercise professional judgment at all times
- Licensee shall make a good faith effort to identify and obtain the relevant data and other conditions at a parcel and identify and obtain additional data as necessary to discharge the licensee's obligations



Professional Conduct

Regs. Conn. State Agencies § 22a-133v-6(d)

- Licensee shall not allow the use of his name by, or associate in a business venture with, any person or firm which such licensee knows or reasonably should know is engaging in fraudulent business or professional practices.
- Licensee shall not falsify, omit or misrepresent relevant facts concerning: (1) licensee's past accomplishments or academic qualifications; and (2) licensee's past employers, employees, associates, joint ventures and their past accomplishments or academic qualifications.



Professional Conduct

Regs. Conn. State Agencies § 22a-133v-6(d)

- Licensee shall cooperate fully in an investigation conducted by the Commission or the Board.
- No licensee shall offer or render professional services or represent himself as being an LEP if his license has expired.



Conflicts of Interest

Regs. Conn. State Agencies § 22a-133v-6(e)

- Licensee shall not accept monetary or other compensation or render professional services, pertaining to a parcel, from persons having or potentially having conflicting interests, unless licensee discloses to each person the conflict or potential conflict and each person agrees in writing to waive the conflict and utilize the services of the licensee.
- Licensee shall not permit any person, other than an employer, partner, employee, or associate in a professional firm, to share in fees for professional services he renders, unless the fee splitting arrangement has been fully disclosed and agreed to in writing by the client engaging the services of the licensee.



Conflicts of Interest

Regs. Conn. State Agencies § 22a-133v-6(e)

- Licensee shall avoid a conflict or potential conflict of interest with his client, but when unavoidable, licensee shall immediately upon learning of the conflict, fully disclose in writing to the client the nature and source of the conflict. If the conflict is irresolvable, the licensee shall terminate the rendering of professional services to the client.
- Licensee shall not attempt to influence the making of a decision by a public body on which the licensee serves regarding any work such licensee or licensee's firm has been retained to perform.



Conflicts of Interest

Regs. Conn. State Agencies § 22a-133v-6(e)

- Licensee shall not solicit or accept a gift, loan or other benefit other than a fee from any person if such benefit: (1) influences or reasonably gives the appearance that it could influence the judgment or findings of such license; (2) could give rise to the appearance of a conflict or impropriety.
- Licensee shall not solicit or accept a contract to render professional services for or from a public body on which he or she serves as a member, employee, or advisor. Licensee shall not participate as a member, advisor, or employee of a public body with respect to actions or deliberations which pertain to services provided to such body by such licensee.



Conflicts of Interest

Regs. Conn. State Agencies § 22a-133v-6(e)

- Licensee shall not affix his seal on a verification for a parcel in which his or her employer has a financial interest, exclusive of professional services fees.
- Licensee shall not offer to give a person, except to a full-time employee of such licensee or of such licensee's employer, or a public body any commission, political contribution, loan, gift, or other consideration in order to secure work.



Contingent Fees

Regs. Conn. State Agencies § 22a-133v-6(f)

- Licensee shall not solicit, offer or render professional services pursuant to any contingent fee arrangement.



LEP Board Decisions

- One decision:
In the matter of “Mr. X” (October 13, 2005)
- One resolved by consent order
- One resolved by “agreement” to allow license to expire
- Detailed excerpts provided later in program



C. Remediation Programs

(Where verification or LEP stamp required)

John E. Wertam, Esq., Shipman & Goodwin LLP

- Remediation Standard Regulations
- Property Transfer
- Voluntary Remediation
- Brownfields/Urban Sites
- RCRA Corrective Action
- Policy on Verification of a Portion of an Establishment
- Environmental Condition Assessment Form (ECAAF)
- Covenants Not To Sue



Remediation Standard Regulations

(Regs. Conn. State Agencies § 22a-133k-1)

- Connecticut's Remediation Standard Regulations (RSRs) provide detailed guidance and standards that may be used at any site to determine whether or not remediation of contamination is necessary to protect human health and the environment.
- The RSRs apply to any action taken to remediate polluted soil, surface water or a groundwater plume at or emanating from a release area, provided the remedial action is required pursuant to Chapter 445 or 446k of the Connecticut General Statutes (CGS), or voluntary remediation pursuant to Section 22a-133x or 22a-133y of the CGS.



Voluntary Remediation

Conn. Gen. Stat. § 22a-133x

- Investigation and remediation of contaminated real property.
- CGS Section 22a-133x creates a voluntary remediation program for sites which are (1) owned by a municipality, or (2) establishments or (3) on the inventory of hazardous waste disposal sites maintained pursuant to CGS Section 22a-133c or (4) as of 10/1/98 located within a GA or GAA ground water area.
- Delegation to an LEP: LEP shall verify a site unless commissioner notifies owner otherwise. LEP verifications relating to a contaminated parcel shall be based on an investigation **in accordance with prevailing standards and guidelines** and remediated in accordance with the Remediation Standard Regulations
- Commissioner delegates within 30 days after submission, and within 90 days the owner submits a statement of proposed action



Voluntary Remediation

Conn. Gen. Stat. § 22a-133y

- Voluntary site remediation in GB and GC areas: selected procedures.
- Pursuant to a voluntary site remediation, an LEP may conduct a Phase II environmental site assessment or a Phase III remedial action plan, supervise remediation or submit a final report to the Commissioner of Environmental Protection **in accordance with the standards provided for remediation in the regulations.**
- Any Phase III remedial action plan prepared for purposes of a voluntary site remediation shall be prepared by an LEP **in accordance with the standards for such property adopted by the commissioner under 22a-133K.**



Voluntary Remediation

Conn. Gen. Stat. § 22a-133w

- LEP performing services pursuant to C.G.S. § 22a-133y shall act with **reasonable care and diligence and shall apply the knowledge and skill ordinarily required of a professional in good standing practicing in that field at the time the services are performed.**
- LEP performing services pursuant to C.G.S. § 22a-133y shall not have a business association or financial interest which is **substantial enough to create an impression** of influencing his judgment in connection with the performance of such services.
- No LEP shall offer or render such services under a contingent fee arrangement **based on desired results.**
- LEP violating these provisions shall be subject to a civil penalty of not more than \$25,000.00.



Voluntary Remediations System Established

- Within 30 days of submitting an ECAF (for sites under §22a-133x), DEP will determine if LEP or DEP will review site
 - i. If LEP reviews, schedule required
 - ii. If DEP reviews, schedule required
 - iii. If LEP certifies site is clean, then Form II may be filed upon subsequent transfers
- Notice required under both programs prior to initiating remediation (note: § 22a – 133 X (g) notice requires that if mailing notice (rather than posting a sign), such notice goes to each record owner of property on the last completed grand list % the municipality, not just abutters).



Environmental Land Use Restrictions – Selected Elements

Conn. Gen. Stat. § 22a-133o-133s

- Availability (See Remediation Standard Regulation and §22a-133o)
- Notice Requirements
- Decision Document/Commissioner Determination
- Subordination Agreements Required of all encumbrances, provided Commissioner may waive such requirement if he finds that the interest is so minor as to be unaffected by the ELUR
- Title certificate required to show subordination agreements recorded.



Environmental Land Use Restrictions – Selected Elements (cont.)

- For a voluntary remediation under § 22a-133y, LEP may approve in writing an ELUR provided:
 - Public comments considered
 - The restriction will adequately protect human health and the environment from pollution at or emanating from the subject release area
 - Remediation is consistent with RSR's, and
 - all documentation



Brownfields / Urban Sites

- Public Act No. 06-184: An Act Concerning Brownfields
- Public Act No. 07-233: An Act Implementing The Recommendations Of The Brownfields Task Force.
- Commissioner of Economic and Community development shall identify five pilot municipalities in which untreated brownfields hinder economic development and shall make grants under such pilot program to effectuate a significant economic development benefit for the designated municipalities.
- Brownfield sites identified for funding under the pilot program, shall be investigated **in accordance with prevailing standards and guidelines** and remediated in accordance with the regulations established for the remediation of such site adopted by the Commissioner of Environmental Protection.



- The Commissioner may conduct Audits of any verification for up to three years from the submittal of a verification (unless certain circumstances are found as provided in the Act PA. 07-233, then bets are off!).



RCRA Corrective Action

Section 22a-449(c)-105(h)

- RCRA Corrective Action applies to permitted sites where hazardous waste was treated, stored or disposed after 1980. It requires companies to investigate and clean up releases of both hazardous and non-hazardous waste to the environment at those sites.
- This rule provides a mechanism other than a permit or an order to implement corrective action at RCRA interim status land disposal facilities (LDFs).
- **The Department may delegate the oversight of the investigation and remediation to a Licensed Environmental Professional (LEP).**
- Investigation and Remediation by LEP: The owner or operator of a disposal facility shall submit to the commissioner **an independent verification by a licensed environmental professional that the disposal facility has been investigated in accordance with prevailing guidelines and standards and remediated in accordance with the Remediation Standard Regulations.**



Policy on Verification of a Portion of an Establishment

(The Transfer Act, C.G.S. 22a-134a(g), amended by Public Act 06-76)

- If a certifying party completes the remediation for a portion of an establishment, such party may submit a verification by a licensed environmental professional for any such portion of an establishment.
- For a “portion” of the establishment to be verified as having been **investigated in accordance with prevailing standards and guidelines**, and remediated in accordance with the remediation standards, the portion must be *accurately delineated*.
- Verification rendered for a “portion” of an establishment must be based on complete characterization of such portion **in accordance with prevailing standards and guidelines**, and the certifying party and the LEP must demonstrate that such portion is in full compliance with the Remediation Standard Regulations.



Policy on Verification of a Portion of an Establishment

(The Transfer Act, C.G.S. 22a-134a(g), amended by Public Act 06-76)

- Subsequent verifications for another portion of the establishment, or the entire establishment, may incorporate the previous verification(s) rendered for a portion of the establishment
 - certifying party and the LEP must specifically identify the physical and environmental relationship of each portion to all other portions.
- The LEP's final conceptual site model must discuss the portion of the establishment which has been previously verified in proper context to the environmental setting.



Portions of Establishments May Be Verified

- Verification of “Portions” (undefined) of establishments
- LEP may use and rely on verifications of portions of an establishment, to verify an entire establishment
- Notice to Commissioner required for transfer of a portion of an establishment that is not otherwise covered by the Act, not later than thirty days from the transfer conveyance or change in ownership.



Environmental Condition Assessment Form (ECAAF)

- Available at:
http://www.ct.gov/dep/lib/dep/site_clean_up/property_transfer_program/ecaf/ecaf_app.pdf
- Purpose of the form is to provide basic site characterization to the DEP regarding a site for which (1) a filing has been submitted to the Property Transfer Program or (2) a request had been submitted under the Voluntary Remediation Program.
- DEP will determine whether an LEP may verify that an investigation has been performed in accordance with prevailing standards and guidelines and the remediation has been performed in accordance with the Remediation Standard Regulations.
- Must be signed by an LEP (but not sealed)



Covenants Not To Sue

(§ 22a-133bb Conn. Gen. Stat.)

Covered later in program



Additional Considerations Regarding Remediation Programs

- Final Site Characterization Guidance Document
- Policy on Upgradient Contamination
- Verification Report Guidance Document



Connecticut's Transfer Act Program (22a-134 et. Conn. Gen. Stat.)

John E. Wertam, Esq., Shipman & Goodwin LLP

So You're Transferring a Business or Real Estate in Connecticut? Don't they have something called a Transfer Act?

- The Transfer Act Applicability

- Definition of "Transfer of Establishment"

- All transfers of real property or business operations, except for the following selected exemptions (see statute for all exemptions and exact language):

- Judicial and municipal foreclosures
- Deed in lieu of foreclosure



- ❑ Corporate Reorganizations not substantially affecting the ownership of the Establishment
- ❑ Transfer of stock, securities or other ownership interests representing less than forty percent of the ownership of the entity that owns or operates the Establishment
- ❑ Conveyance, assignment or termination of a Lease for a period of less than 99 years from the date of such conveyance, etc., including options or extensions of such period



- ❑ Subdivisions where less than 50% of land area is conveyed, and no spills, or DEP is notified by filing an ECAF 60 days prior to such conveyance
- ❑ Conveyance of a service station not otherwise an establishment
- ❑ Conveyance of an establishment which, prior to July 1, 1997, had been developed solely for residential use and such use has not changed



- A site on which only universal waste is generated, and not otherwise an establishment: Conveyance of any real property or business operation that would qualify as an establishment solely as a result of (i) the generation of more than one hundred kilograms of universal waste in a calendar month, (ii) the storage, handling or transportation of universal waste generated at a different location, or (iii) activities undertaken at a universal waste transfer facility, provided any such real property or business operation does not otherwise qualify as an establishment that there has been no discharge, spillage, uncontrolled loss, seepage or filtration of a universal waste or a constituent of universal waste that is a hazardous substance at or from such real property or business operation and that universal waste is not also recycled, treated, except for treatment of a universal waste pursuant to 40 CFR 273.13(a)(2) or (c)(2) or 40 CFR 273.33 (a)(2) or (c)(2), or disposed of at such real property or business operation; or



- ❑ Conveyance of a unit in a residential common interest community in accordance with section 12 of Public Act 06-76
 - Financial assurance approved by DEP
 - Declarant in Certifying Party
 - Notice of status environmental condition, remediation, and ELURs provided every time a seller conveys a unit



Definition of “Establishment”

- After Nov. 19, 1980, more than 100 kg of hazardous waste generated
- In any **one** month (Do not “average” waste generation “rate.”)
- Except for "Remediation of polluted soil, groundwater or sediment"
- "Automatic" establishments (dating back to May 1, 1967)
 - The process of dry cleaning
 - Furniture stripping
 - Vehicle body repair facility ("vehicle" defined, but excludes descriptions of some vehicles).
- Any facility that accepts hazardous waste generated at a different location in any amount



Definition of "Establishment"

- "Automatic" establishments (dating back to May 1, 1967)
 - The process of dry cleaning
 - Furniture stripping
 - Vehicle body repair facility ("vehicle" defined, but excludes aircraft, boats, railroad cars or engines and farm tractors).
- Any facility that accepts hazardous waste generated at a different location in any amount



Definition of “Hazardous Waste”

- RCRA and DEP defined
- PCB's over 50 ppm
- Except sewage sludge and lead paint abatement wastes
- Note: Waste petroleum from UST cleaning removal that is recycled, is exempt under RCRA and therefore does not trigger the transfer act, even if a hazardous waste manifest is used to transport the material



Definition of “Hazardous Substance”

- CERCLA hazardous substance and petroleum products or by-products where a standard is established under the RSR’s
- “Universal Waste” defined: reference to hazardous waste regulations



Other Elements to Consider

- Environmental Condition Assessment Form ("ECAAF")
 - Required for Forms I, III and IV “in accordance with prevailing standards and guidelines.”
- Certifications and verifications need to be “in accordance with prevailing standards and guidelines.”



Procedure Established

- Filing of Form I and II (Only Transferor can execute and deliver)
 - Prior to transfer - with transferee
 - Within 10 days after transfer to DEP
 - Form I requires a written certification by LEP that no release of hazardous wastes or hazardous substances has occurred (and/or that hazardous substance remediated to prevailing standards and guidelines).
 - Form I requires ECAF Filing



Procedure Established (Cont.)

- Filing of Form I and II (Only Transferor can execute and deliver)
 - Form II requires written determination of Commissioner or LEP that site is investigated and remediated to prevailing standards and guidelines
 - Form II when the Commissioner or an LEP verifies that no remediation is necessary under the RSR's
 - Form II when a Form IV verification has previously been filed and no further releases have occurred on site.



Filing of Form III and IV

- For sites where releases of hazardous wastes or hazardous substances have occurred
- Not later than 10 days after transfer, to DEP (technically, Transferor obligation to file documents)
- Prior to transfer with other party (Transferor obligation)
- If no one else signs and files, Transferor obligated to do so
- Forms III and IV must be accompanied by an ECAF
- Unless DEP determines otherwise, within 75 days of filing (or DEP acknowledgement of completeness of filing) site is automatically delegated to an LEP
- Schedule of investigation and remediation submitted within 75 days of filing (or DEP acknowledgement).

(Note: to be conservative, file schedule within 75 days of Form Filing)



Filing of Form III and IV (Cont.)

- If LEP reviews, schedule submitted for investigation and cleaning up parcel
 - » 2 years to complete investigations
 - » 3 years to initiate cleanup (and file Remedial Action Plan) approved by an LEP on a form prepared by the Commissioner.
 - » Notice of clean up required
- If DEP reviews, then schedule to be submitted for review and approval
- Notice required for clean ups
 - » Newspaper and
 - » Sign, or
 - » Abutter notice



For Real Property Being Transferred Where:

- Form I or II filed with DEP after October 1, 1995 or
 - Form III or IV filed and LEP verifies in writing that investigation and remediation has been performed in accordance with prevailing standards and guidelines or approved in writing by DEP, that site complies with RSR's, and
 - Site has not been an establishment since Form I or II filed or verification approval issued;
- Then compliance with Transfer Act waived



Conveyance of a unit in a Residential Common Interest Community may be exempt, provided the declarant is a certifying party and a surety bond or other form of financial assurance is posted to cover the costs of remediation

- Bond can be reduced based on reduced remediation costs
- Seller to provide notice to Purchaser of status of environmental condition for every sale of individual units, which includes descriptions of:
 - Investigation or remedial activities
 - ELURs
- Notice requirement applies to all conveyances



Other Issues To Consider Under The Transfer Act

- New Transmittal Forms
- Environmental Land Use Restrictions
- Verification of Establishments when not coextensive with real estate
- Certifying Party: joint and several liability until site verified?
- New releases by non-certifying party after transfer



Underground Storage Tank Reimbursement Program

Jacques Gilbert, Supervising Environmental Analyst, DEP



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F. General Permits Requiring LEP Certifications and the Dry Cleaning Establishment Fund

John E. Wertam, Esq., Shipman & Goodwin LLP

- General Permit for the Discharge of Groundwater Remediation Wastewater to Sanitary Sewer
- General Permit for the Discharge of Groundwater Remediation Wastewater Directly to Surface Water
- Dry Cleaning Establishment Fund
 - LEP involvement not mandatory, but recommended



General Permit for the Discharge of Groundwater Remediation Wastewater to Sanitary Sewer

(Permit issued under the authority of C.G.S. § 22a-430b)

- Available at:
http://www.ct.gov/dep/lib/dep/Permits_and_Licenses/Water_Discharge_General_Permits/gwsewer_gp.pdf
- This general permit applies to discharges of groundwater remediation wastewater generated during the process of investigating and remediating ground water and soil.
 - Authorizations Under this General Permit
 - Screening Requirements
 - Registration Requirements
 - Conditions of This General Permit
 - General Conditions
 - Commissioner's Powers



General Permit for the Discharge of Groundwater Remediation Wastewater to Sanitary Sewer

(Permit issued under the authority of C.G.S. § 22a-430b)

- LEP Certification - Registration Form
 - “I certify that **in my professional judgment**, proper operation and maintenance of any system installed to treat the discharges which are the subject of this registration will ensure that all effluent limitations and other conditions in the *General Permit for the Discharge of Groundwater Remediation Wastewater to a Sanitary Sewer* will be met. This certification is based in part on my review of the information contained in the Screening Form completed for the discharges and attached to this registration and, if applicable, a review of the historic land use of the site, and on any other water analyses associated with the discharges, and on engineering and/or hydrogeologic reports and/or plans and specifications describing (1) the proposed activities and (2) any proposed treatment facilities for the wastewater to be discharged. **I am aware that there are significant penalties for false statements in this certification, including the possibility of fine and imprisonment for knowingly making false statements.**”



General Permit for the Discharge of Groundwater Remediation Wastewater to Sanitary Sewer

(Permit issued under the authority of C.G.S. § 22a-430b)

- LEP Certification – Recording and Reporting Violations
 - “I certify that **in my professional judgment** that appropriate modification and/or additions have been made to the system designed to treat the discharges of groundwater remediation wastewater at the site, and that **all discharges of groundwater remediation wastewater at the site comply with all conditions of said permit**, including but not limited to all effluent limitations in Sections 6(a) and 6(b) and Appendix A of the General Permit ,for the *Discharge of Groundwater Remediation Wastewater to a Sanitary Sewer*, and proper operation and maintenance of any system installed to treat such discharges **will insure that all effluent limitations and other conditions in such general permit are met**, or if there is no treatment system for such discharges, that appropriate modifications have been made to the operations at the site and the discharges will meet all effluent limitations and conditions of such general permit without treatment. **I am aware that there are significant penalties for false statements in this certification, including the possibility of fine and imprisonment for knowingly making false statements.**”



General Permit for the Discharge of Groundwater Remediation Wastewater to Directly to Surface Water

(Permit issued under the authority of C.G.S. § 22a-430b)

- Available at:
http://www.ct.gov/dep/lib/dep/Permits_and_Licenses/Water_Discharge_General_Permits/gwsurface_gp.pdf
- This general permit applies to discharges of groundwater remediation wastewater generated during the process of investigating and remediating groundwater and soil, and other related wastewaters, directly to a surface water, either through a dedicated conveyance, or through any other conveyance system that the permittee is authorized to utilize.
 - Authorization Under this General Permit
 - Registration Requirements
 - Conditions of this General Permit
 - Commissioner's Powers



General Permit for the Discharge of Groundwater Remediation Wastewater Directly to Surface Water

(Permit issued under the authority of C.G.S. § 22a-430b)

- LEP Certification – Registration Form
 - “I certify that, in my professional judgment, proper operation and maintenance of the treatment facility installed to treat the wastewater which is the subject of this registration will ensure that the discharge of such wastewater meets all effluent limitations and other conditions in the department’s *General Permit for the Discharge of Groundwater Remediation Wastewater Directly to Surface Water* and, if no such treatment facility has been installed, such wastewater will meet all such conditions. **This certification is based in part on my review of the results of the screening analysis of such wastewater included with this registration,** and on any other laboratory analyses of representative samples of such wastewater, **my review of past and current uses of the site at which such wastewater is generated,** and on my review of detailed and reliable information about (i) **the remedial measures which will generate such wastewater and (ii) any planned treatment facility for such wastewater.** I understand that any false statement in this certification is punishable as a criminal offence under Section **53a-157b** of the General Statutes and under any other applicable law.”



General Permit of the Discharge of Groundwater Remediation Wastewater Directly to Surface Water

(Permit issued under the authority of C.G.S. § 22a-430b)

- LEP Certification - Duty to Correct, Record, and Report Violations
 - “I certify that in my professional judgment the discharge which is the subject of this report, as well as any other authorized discharges generated at the subject site, comply with all effluent limitations and other conditions of the general permit for the Discharge of Groundwater Remediation Wastewater to a Surface Water, and that proper operation and maintenance of any equipment or system to treat each discharge will ensure that all such conditions are met or, if there is no such equipment or system, each such discharge will meet all such conditions without treatment. **This certification is based in part on my review of chemical analyses of at least three grab samples collected, handled, and analyzed in accordance with 40 CFR 136**, which samples were representative of such discharge during routine operating conditions and were taken **at least one week apart following the implementation of measures to correct any violations of the requirements of this general permit.** I understand that a false statement made in this report, including all attachments thereto, or in this certification may, pursuant to Section 22a-6 of the General Statutes, be punishable as a criminal offense under Section 53a-157b of the General Statutes, and may also be punishable under Section 22a-438 of the General Statutes and any other applicable law.”



Dry Cleaning Establishment Remediation Fund

- Available at:

<http://www.ctbrownfields.gov/ctbrownfields/cwp/view.asp?a=2620&q=319328>

- Provides grants to eligible dry cleaning business owners, operators and landlords for the assessment, clean-up, containment, or mitigation of pollution resulting from releases of tetrachloroethylene, stoddard solvent, or other chemicals used for dry cleaning. The grants may also be used for measures undertaken to prevent such pollution, and for providing potable drinking water when necessary.
- Grant applications are evaluated based on the following: risk to public health, magnitude of the problem, effectiveness of proposal (cost and environmental effectiveness), date of application and availability of program funds.
- The “hook” – Dry Cleaner Establishment must comply with the Transfer Act in order to qualify for funds.



Spills Reporting/Historical Contamination

Peter Zack, DEP Oil and Chemical Spills Division

John E. Wertam, Esq., Shipman & Goodwin, LLP

- Current obligations
- Status of Proposed Spill Reporting Regulations
- Significant Environmental Hazard reporting
- Civil Engineering Code of Conduct
- Ethical Considerations – Use LEP Regulations and standards as a guide.



Status of Proposed Spill Reporting Regulations

Peter Zack, DEP Oil and Chemical Spills Division



Significant Environmental Hazard Reporting

John E. Wertam, Esq., Shipman & Goodwin LLP

- Applies to “Technical Environmental Professionals” which means LEP’s, and anyone else collecting soil, water, vapor or air samples for purposes of investigating or remediating sources of pollution to soil or waters of the state.
- Seven established reporting events
- Reporting obligation is to client and owner (if possible), and client may have obligation to notify DEP if the owner does not (if different from client)



Civil Engineering Code of Conduct

Ethical Considerations



Covenants Not to Sue

(C.G.S. § 22a-133bb as amended by Public Act 07-81)

John E. Wertam, Esq., Shipman & Goodwin LLP

- Commissioner shall enter into a covenant not to sue with any prospective purchaser or owner of contaminated real property provided among other considerations that:
 - A detailed written plan for remediation of the property in accordance with such regulations has been approved by an LEP; or
 - An LEP has verified that the property has been remediated in accordance with such standards and the person requesting a covenant certifies that there has been no discharge after the date of such approval; or
 - An LEP has approved a final remedial action plan and the person requesting a covenant certifies that there has been no discharge after the date of such approval.



Covenants Not to Sue

(C.G.S. § 22a-133bb as amended by Public Act 07-81)

- No LEP shall approve a detailed written plan for remediation for a final remedial action report unless such professional certified that the property **has been investigated in a thorough manner** and the licensed environmental professional has investigated the property **using reasonable care and diligence applying the knowledge and skill ordinarily required** of a professional in good standing practicing in the field at the time investigation was undertaken.



Overview of Cases in Connecticut Related to LEP's Professional Liability

Joseph P. Williams, Esq., Shipman & Goodwin LLP



Other Issues of Note

- Financial Conflicts of Interest
- LEP Verifications: August 2008 Guidance and Forms
- What Does “All Applicable Regulations” Mean in Regulation?
- What Does “Holding Human Health Paramount” Mean?
- Standard of Care: What are “Current and Prevailing Practices”



Financial Conflicts of Interest

- Review of Regulatory Provisions
- Analogy to Lawyer's Professional Code of Conduct



LEP Verification: August 2008 Forms and Guidance

A Few Things to Consider:
Thanks to an assist from a watchful LEP



Verification Report Guidance Document – August 1, 2008

- Objective
 - What DEP expects to see in a Verification Report
 - Form IV Verifications
 - Final Verifications
- Prescribed Report Format



Form, Policy, or Guidance?

- Clarification of ambiguities and gaps in regulations
- However, no formal adoption process
- “Form” may have created a standard of care



Examples in Forms Verification Report worth considering:

P. 2 “Upon review of the Verification Report, if CTDEP identifies obvious or apparent violations of applicable statutes or regulations or appropriate surveys/assessments have not been completed...

Notice of Audit*

Rejection of Verification*

Other Legal Action (?)”

*If V.R. is “incomprehensible” for Final Verifications



P. 3 “The first few boxes in the Checklist must be marked...”



- P. 4 “A discussion of the regulatory program under which the verification was rendered...
 - Property Transfer
 - Voluntary Remediation
 - RCRA Closure
 - UST Release Response
 - Covenant Not to Sue
 - Orders
 - Etc.”



- P. 4 “The final CSM must support the LEP’s conclusion that the investigation was completed in accordance with prevailing standards and guidelines, including the 2007 Site Characterization Guidance document.” Note: Form Referencing Guidance
- P. 5 Phase I Conclusions
 - “A discussion on the temporal relationship and the continued applicability of the Phase I (not ASTM) to the time of verification.” (But see LEP Board “Mr. X” Decision. Have we changed verification timeline?)



- Receptor Assessments
 - P. 7 “the verification report must include
 - A discussion of sensitive receptor land uses in the vicinity
 - A data comparison to the Significant Environmental Hazard Threshold Criteria
 - A summary of any ecological risk assessment (ERA) conducted, including the results of the scoping-level, screening-level and site-specific risk assessments...”



- P. 8 “The following information must be included in the V.R.
 - The publication date of the Public Notice of Remediation, including comments received and associated responses for active remediation, natural attenuation groundwater monitoring and ELUR’s.”



- P. 10 “The Demonstration of Compliance (not Form IV’s) must include....
 - A discussion of how compliance with statutory and regulatory requirements relevant to the verification were demonstrated.
 - Property Transfer
 - Voluntary Remediation
 - RCRA Closure
 - Covenant Not to Sue
 - Brownfields Orders
 - UST Release Response
 - Permits”



- P. 10
 - “A discussion that the Aquifer is no longer subject to transient effects in hydraulic head and any geochemistry changes attributable to active groundwater remediation...”
 - Compliance with Criteria for Groundwater & Soil Vapor
 - (A) (i) (bb) the Aquifer is no longer subject to the transient effects on hydraulic head attributable to withdrawal from, or injection to, groundwater for the purpose of remediation
 - (A) (i) (cc) any changes to the geochemistry, induced by remedial actions....”

Note: Taken from page 82 (100) of 200 of proposed RSR’s still going through formal adoption



Other Issues of Note
Excerpts from In the Matter of “Mr. X”
Case No. 02-101
October 13, 2005

- ***Prevailing Standards and Guidelines for Site Investigations***
- The Transfer Act provides that an LEP must verify that the certifying party has investigated an establishment in accordance with "prevailing standards and guidelines." General Statutes §§22a-134 (6), (12), (19); 22a-134a (e). As it is commonly used, the term "prevailing" means generally current or predominant conditions that exist at a certain time. The American Heritage Dictionary 1038 (New College Edition, 1979); General Statutes §1-1. The prevailing standards and guidelines for site investigations are therefore those that are used predominantly at a particular point in time.
- The testimony of credible witnesses reflects conflicting opinions among the experts regarding the prevailing standards and guidelines for site investigations in Connecticut. The DEP reviews the adequacy of a Transfer Act site investigation in accordance with the criteria outlined in the TASA guidance, but considers other guidance such as the ASTM standards. [In Re “Mr. X” at pg. 31.]

Note: Significant additional “guidance” now exists



Groundwater Monitoring

Groundwater monitoring is required after remediation of a site to determine the effectiveness of that remediation in preventing groundwater pollution, eliminating health or safety risks, and achieving compliance with the RSRs. **It is undisputed that this post-remediation groundwater monitoring requirement does not apply to circumstances where remediation is not necessary.” [Id. at 35.]**



Transfer Act: Certifying Party Obligations (And Scope of Verification)

- “X” was required under the Transfer Act to inform “Y” of pollution or the possibility of pollution at the site prior to the transfer and to assume the obligation to investigate and remediate pollution at the site. §22a-134a(c). However, there is nothing in the Transfer Act that specifically defines the scope of the certifying party's obligations.
- A review of the language of the act and its legislative history provides little guidance on the issue beyond the fact that the purpose of the act was to protect the unwary purchaser from liability, to ensure the cleanup of contaminated establishments, and to ensure that the burden of cleanup would be borne by one or more parties to the transfer. See 28 S. Proc., Pt. 6, 1985 Sess., p. 1802, remarks of Senator Benson, (Transfer Act was enacted "to protect purchasers of property from being liable for the subsequent discovery of hazardous waste on the property..."); 28 H. R. Proc., Pt. 28, 1985 Sess., p. 11969; remarks of Representative Tiffany (If the seller cannot provide assurances that the site is clean of releases at time of transfer; one party to transaction must certify to the other and to DEP that someone will assume responsibility for cleanup). However, there is no indication that the legislature ever contemplated circumstances that might obligate a certifying party to assume the liability for pollution that could be caused by the transferee and not the seller of the property. [Id. at 38.]



Transfer Act: Verification Obligations

There is no evidence that the respondent or “X” violated any provision of the Transfer Act for having failed to return to the site to investigate any condition created by the transferee. There is also no evidence that agreed to undertake such an obligation.

Therefore, I cannot conclude that the respondent's decision to verify the site without returning to investigate conditions was unreasonable under the circumstances. **[Id at 38, 39.]**



Transfer Act: Verification Obligations

As previously discussed, it was not unreasonable for the respondent to have verified the site without returning to ensure that additional releases had not occurred. **[Id at 43.]**



Holding Paramount the Health, Safety and Welfare of the Public

There is no evidence that specifically points to the respondent's lack of concern for the public welfare. Therefore, I must rely on circumstantial evidence to determine whether the respondent carried out his duties while considering the health, safety and welfare of the public. Evidence of the respondent's conduct may provide the basis for a reasonable inference concerning his regard for the public, however, my conclusions must not be the result of speculation and conjecture. *Service Road Corporation v. Quinn*, 241 Conn. 630, 647 (1997). It is as reasonable to infer from the evidence that the respondent believed his determinations were correct and that he made the welfare of the public his primary concern, as it is to infer that he did not consider the health and safety of the public. I therefore cannot conclude that at the time the respondent verified the site, he did not hold paramount the health, safety and welfare of the public. **[Id at 47.]**



Professional Judgment (and use of LEP Seal)

There is also no evidence to demonstrate that the respondent did not believe, based on his professional judgment, at the time he used his seal that the verification complied with the applicable provisions of the RSRs. **There is no evidence that the respondent used his seal in any manner not provided for by the applicable regulations. [Id at 48.]**



Standards of Professional Conduct

As a licensee, the respondent has an affirmative obligation to understand and comply with the laws and regulations that govern the privilege of obtaining and maintaining his license. Prior to the effective date of the LEP regulations, the respondent was required to perform his duties in accordance with the standard of care applicable to environmental professionals engaged in similar work. §22a-133v(c). These requirements were in place at the time the respondent was identified as an interim environmental professional and when he rendered his verification of the “Z” site. These are the appropriate standards by which to evaluate the respondent's professional conduct at the time of his verification of the “Z” site. **[Id at 48.]**



Professional Misconduct

The evidence in the record is not sufficient to establish, by a **preponderance of the evidence**, that the respondent committed professional misconduct with respect to his verification of the “Z” establishment in violation of §22a-133(c) of the General Statutes. **[Id at 48.]**



Reasonableness

The LEP Rules of Professional Conduct establish the standards reasonable care and diligence. The State Appellate Court has addressed the meaning of diligence and reasonableness. “Diligence, [is] defined by Webster’s Third New International Dictionary as “persevering application: devoted and painstaking application to accomplish an undertaking,” and as “the attention and care required of a person.” “Reasonableness ... is an objective standard, involving an analysis of what a person with ordinary prudence would do given the circumstances.... Reasonableness involves a determination of how “a person of ordinary prudence in such a situation [would] have behaved, not how the [respondent] behaved.” *Michelle Phillippe v. Francis J. Thomas*, 3 Conn. App. 471, 474-475, (1985). [R]easonable efforts means doing everything reasonable, not everything possible.” *In re Eden F.*, 48 Conn. App. 290, 312 (1998). [Id at 49.]



Professional Judgment

The respondent has argued throughout the proceedings and in his brief that many of his conclusions and decisions were based on his professional judgment, which is a component of the prevailing standards and guidelines for site investigations. Professional judgment is essential to a proper investigation but it does not replace professional responsibility, including the responsibility to conduct a thorough and conclusive investigation and to apply the appropriate remediation standards to specific conditions. Professional judgment also cannot be justified through the lens of hindsight. [Id at 49, 50.]



Professional Judgment

The investigation and remediation standards provide the framework for the professional opinion of an LEP.

Although that opinion is expressed in light of his professional judgment, it follows from a proper investigation of a site and a thorough understanding of the circumstances that exist at the time. **[2d at 50.]**



Good Faith

Good faith ordinarily describes a state of mind denoting honesty of purpose, a lack of intent to defraud, and faithful to one's duty or obligation. "The determination of good faith involves an inquiry into the [respondent's] motive and purpose as well as actual intent." *Phillipe v. Thomas*, supra, 3 Conn. App. 476. There is no evidence that the respondent's conduct stemmed from any intent to mislead or from a dishonest purpose. **[Id at 50, 51.]**



Standard of Evidence/ Professional Misconduct

The claimant [DEP] has not demonstrated, by a **preponderance of the evidence**, that the respondent, committed professional misconduct with respect to his verification of the LEP Rules of Professional Conduct. Regs., Conn. State Agencies §22a-133v-6. **With respect to the subject sites, rejection of the verification or requiring further documentation could have resolved these issues. [2d at 51.]**



Please join Shipman & Goodwin LLP
Post-Seminar Reception
5:00 pm - 6:00 pm
Grand Ballroom Foyer

