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Cyr discusses how new law changes the end game for sellers and Connecticut's LEPs

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In the last hours of the 2011 legislative session, many environmental practitioners in Connecticut were encouraged by the passage of H.B. 6526, An Act Concerning Brownfield Remediation and Development As An Economic Driver, As amended by House Amendment Schedule A, LCO7473. This bill was unanimously passed by both the House and Senate (at 11:26 p.m. on June 7, 2011). The bill contains a number of revisions to environmental and brownfield regulations that have the potential for wide-spread repercussions in the way we do business.

The bill has twenty sections, which I hope have been reviewed in detail by a wide base of the potentially affected stakeholders. Review of all the sections is well beyond the scope of this article but I am highlighting one of the sections that I, as a Licensed Environmental Professional (LEP), think has the potential to be most beneficial to a wide variety of my clients, whether they be developers, industrial clients, municipalities or other parties responsible for remediating impacted property. Others may certainly see sections of the bill of more relevance to their specific situation, of course, but - I'm the one writing the article so I get to pick my personal favorite.

Section 4 of the bill provides a much needed and more appropriate time limit for a Certifying Party's (CP's) responsibility for a remediation project's verification by a LEP under the Connecticut Transfer Act (CGS 22a-134), referred to here as the TA. The TA, originally enacted in the mid-1980s and altered substantially over time, affects properties and businesses at which: a) more than 100 kilograms (about 220 pounds) has been generated in any single month since November 19, 1980 except for remediation waste; or b) the property/business was used for the purposes of dry cleaning, furniture stripping, or vehicle body repair on or after May 1, 1967; or c) hazardous waste from another location was stored, handled, treated, or otherwise managed. These properties / business are defined to be "Establishments" under the TA. Upon transfer, the Establishment becomes subject to the TA and a CP must investigate the property in accordance with prevailing guidelines and standards and remediate releases from the Establishment (the property, business or both, depending on the circumstances of the transfer) in accordance with the Connecticut remediation standards regulations.

The identity of the CP is determined as part of the business deal between the buyer and seller of the business, the property or both. The CP's obligations are complete when it submits a verification by a LEP that the investigation and remediation meet the TA criteria. What the TA has never stated is the actual time frame for which the CP is responsible. Since investigations and remediation frequently take many years to complete, a lengthy time frame for verification by a LEP can be costly and

litigious. Why? Until Section 4 of Schedule A, LCO 7473 becomes effective (upon passage), the CTDEP has taken the position that the CP is responsible until the day the verification is filed with CTDEP. If the CP is the owner of the land and operator of the business, this is not really a big deal since logically, the owner should be responsible for release that it owns. If however, the CP sold the property or business, this "to be determined" verification date may become a very big deal. Imagine being responsible for cleaning up new releases that happen years after you sold the property!

The uncertainty and fundamental unfairness has driven more than a few sellers to swear off doing future business in the state. And even more detrimental to progress, this lack of an end game put many TA remediation obligations into limbo.

So - at last a fix! Section 4 of the subject bill explicitly states that "the execution of a Form III or a Form IV shall not require a certifying party to investigate or remediate any release or potential release of pollution at the parcel that occurs after the completion of a Phase II investigation, as defined in the Connecticut Department of Environmental Protection's Site Characterization Guidance Document, or from and after the date such Form III or Form IV was filed with the commissioner, whichever is later."

Clearly this provision will apply to future transactions. But will it apply retroactively? I hope so but fear it is a question for the legal community to sort out. Is this a clarification of the original intent of the TA or a sea change?

Kathleen Cyr, PE, PG, LEP is a senior vice president with GZA GeoEnvironmental, Fairfield, Conn.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540