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The Connecticut Transfer Act - Is it alive and well?

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Much like the oft-quoted phrase attributed to Mark Twain that the "reports of my death are greatly exaggerated," so too are the reports on the demise of the Connecticut Transfer Act. The Connecticut Transfer Act legally requires the owner of an "establishment" to file a form with the Connecticut Department of Energy and Environmental Protection (DEEP) when such a property or business undergoes a change in ownership. That form essentially requires one of the parties to the transaction to "certify" to the DEEP that it will be responsible for the investigation and cleanup of the property. In brief, an establishment is: any real property or business operation from which on or after November 19, 1980, there was generated 100 kilograms of hazardous waste in any one month; a location where hazardous waste generated at a different location was recycled, stored, treated or disposed of; or a location where on or after May 1, 1967, a furniture stripping operation, dry cleaner or vehicle repair facility existed.

Since its inception in 1985, compliance with the Transfer Act has been blamed for oppressively complicating real estate deals. Nonetheless, for over 25 years, thousands of sales have occurred and filings have been made with DEEP, with multiple filings for the same property. It has been amended, revised, interpreted, and restated. But, contrary to rumor, it has not yet been repealed.

Connecticut DEEP has heard concerns from property owners, developers, lenders, lawyers, and consultants. Working groups were formed as part of the DEEP's comprehensive evaluation of its remediation programs. But, before the Transfer Act can disappear, certain questions require answers - What will replace it? What will happen to properties currently in the Transfer Act? Will a transition period exist and what will it be? Answers are evolving. What is known is that in September 2012, DEEP released a draft outline for a transformed cleanup program and proposed a "release" based system that covers certain releases regardless of the date of the release and unrelated to the sale of property. Several remediation "exit ramps" are proposed depending upon the level of risk. However, that program remains under development.

What is also known is that during the recently concluded session of the Connecticut General Assembly, a 113 page bill was passed, enacted as Public Act 13-308. Largely devoted to brownfield redevelopment initiatives (for example, streamlining the state's financial assistance programs, clarifying municipal liability relief and authorizing a new institutional control), the Act provides the seeds for a new program contemplated for the years ahead. For example, to take effect on July 1, 2015, the cleanup response under the existing significant environmental hazard reporting for drinking water is modified; the threshold for reporting heavy metal and PCB contamination in soil is lowered as is the threshold for volatilization of certain compounds in groundwater. The law also specifies the type of cleanup required, which is called "mitigate". Mitigate is defined as actions that reasonably prevent exposure. DEEP has called this to "make safe" the property until another form of remediation occurs. This approach is consistent with DEEP's overall paradigm shift to a

release-based system with tiered remedial responses.

While these changes were crafted, long awaited amendments to the state's remediation standard regulations (RSRs) took effect on June 27. These amendments provide greater self-implementation by licensed environmental professionals and include long awaited changes to the analytical test method for petroleum hydrocarbons, a wood and coal ash exemption for fill in certain circumstances, greater flexibility for ground water monitoring, and additional changes necessary to achieving compliance with the standards.

While such RSR changes are largely welcome to the regulated community, the new program and transition away from the Transfer Act remains a work in progress. Questions remain - particularly those relating to the cleanup, and the flexibility to achieve risk-based compliance. Indeed, these concerns led to a statutory requirement in Public Act 13-308 that DEEP engage independent experts to evaluate risk-based decision-making related to remediation. This evaluation must identify best practices in ecological and human health risk assessment and risk management according to the National Academy of Sciences, among other regulatory agencies. This report is due by October 1, 2014.

In the meantime, what does a transactional attorney, buyer, seller, and lender do? How do we do a deal? For now, the Transfer Act applies. No changes to the significant environmental hazard reporting statutes have taken effect. It's business as usual, except for the changes in the RSRs which should make business as usual a bit easier.

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