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## LAND USE & ENVIRONMENTAL LAW

### Beware Of Big Brother in Your Backyard

**BUSINESSES THREATENED BY 'POLLUTION-RELEASE' INVENTORY-BASED REGULATORY SYSTEM**

By **BARRY J. TRILLING**

*Editor's Note: This article was accidentally omitted from the recent Land Use & Environmental Law special section that appeared in the April 9 Law Tribune. Because it pertains to a matter that has been before the General Assembly, we are publishing the article now rather than waiting for the next Environmental Law section later this year.*

Do you remember from your high school or college 20th-century literature course the character of "BigBrother," the dictator of Oceania, the totalitarian state in George Orwell's novel Nineteen Eighty-Four? In Oceania the state wields total power, in part by keeping everyone under "24-7-365" surveillance through the use of "telescreens" and spies, and the population is kept aware of this by signs everywhere that proclaim "BigBrother is Watching You."

In this article I suggest that it may be useful to keep in mind author Orwell's warning about government over-scrutiny with regard to any portion of the recent "Transfor-

mation Process," announced by the Connecticut Department of Energy and Environmental Protection (DEEP), which would impose a comprehensive "pollution-release-based" inventory, its so-called "Release/ Report/ Remediate" (or "R3") program. DEEP had attempted to do just this in proposing Section 1(b) of RB 5343, which was introduced Feb. 29, 2012.

Happily, on March 27, 2012, after receipt by the legislature of many negative comments on Section 1(b), a "Proposed Substitute Bill No. 5343 (LCO No. 2708)" was introduced that removed the language that could have resulted in imposition of the R3 program. Regrettably, however, the R3 idea apparently survives in the aspirations both of its proponents at DEEP and in the environmental activist community.

RB 5343, a bill entitled "An Act Concerning Economic Development Through Streamlined and Improved Brownfields Remediation Programs," arises out of and



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in response to the job assigned to the DEEP by the legislature in last year's P.A. 11-141 to make recommendations for changes to regulatory programs that will result in "a more streamlined or efficient remediation process." This bill has commendable aspects, such as Section 1(a) which requires the DEEP Commissioner to consider how the impact of any such changes

in the regulatory process may facilitate both remediation and economic development. The commissioner's consideration of these factors are consistent with statements made by DEEP Commissioner Dan Esty that his agency might more appropriately be called "DEEEP" adding another "E" for the economy.

Section 1(b) of the bill, as introduced on Feb. 29, 2012, on the other hand could have resulted in putting BigBrother in every property owner's back yard. That section of RB 5343 would have required DEEP to conduct a study that included a recommendation relating to "reporting of threatened, new and historical releases by owners of property, operators or associated parties." While this language may appear neutral, or even benign, persons dissatisfied with

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the current system of reporting releases of pollutants that endanger public health and the environment (both within DEEP and in the environmental activist community) might have argued that the language mandates the creation of an entirely new system that would require the reporting, investigation, and remediation of all releases in the state. As noted, DEEP previewed its vision of a comprehensive R3 program in its recent "Transformation Process." The R3 program would require all property owners or operators to report every pollutant release at their sites through an all-encompassing new "on-ramp" to the regulatory process. The properties so enrolled would then have multiple new "off-ramps" from the program once DEEP becomes satisfied the release has been appropriately characterized and, if necessary, remediated. (See "Report to the Governor and the Joint Standing Committees on Environment and Commerce on the Comprehensive Evaluation of the Connecticut Cleanup Program and Proposal for Transformation," Dec. 21, 2011. [www.ct.gov/dep/lib/dep/site\\_clean\\_up/comprehensive\\_evaluation/cleanup\\_transformation\\_report.pdf](http://www.ct.gov/dep/lib/dep/site_clean_up/comprehensive_evaluation/cleanup_transformation_report.pdf).)

### Property Value Impact

This new regulatory approach would impose a new, complex, and costly system of reporting, investigating, and remediating even incidental and immaterial spills and releases of pollutants, including those that occurred many years in the past, and that do not pose any danger to human health and the environment. (Section 22a-6u of the Connecticut General Statutes already requires the owner of property which is the source or location of pollution causing a significant environmental hazard to notify DEEP after they become aware of such conditions.) In other words, "use the new on-ramp to tell all to DEEP, regardless of importance, effect, and potential injury

and DEEP will decide when you can use an off-ramp."

Philosophical arguments aside, such a system would unnecessarily and adversely affect property values, impose costly administrative burdens on innocent land owners, and would discourage property owners from investigating their own sites lest they discover immaterial contamination that would require them to enroll their sites into a new bureaucratic program. Further, while the now removed language of Section 1(b) would arguably have mandated recommendation for a new system, it did not similarly mandate any recommendation with regard to counterbalancing considerations, such as evaluating the need for a new system, how it would affect economic development, or the burdens it would place on the regulated community.

We should applaud the legislature's exercise of good judgment in having rejected any mandatory imposition of DEEP's R3 program, but we remain wary lest it be in-

bona fide prospective purchasers of contaminated sites and the entities from whom they acquire those sites. The legislature has decided to consider adjustments to the program enacted in Public Act 11-141 in this session's Proposed Substitute Bill 5342 (LCO 2846), An Act Concerning Revisions To The State's Brownfield Remediation And Development Statutes.

In considering any revision to the General Statutes that may arise out of the DEEP Transformation process, however, the legislature should clearly consider how any changes that would include the creation of an inventory of historical releases, whether or not they have undergone cleanup under Section 17 or any of Connecticut's other remedial programs, would further stigmatize those properties by adding them to a new list of properties that are challenged in the eyes of the market.

I do not mean to suggest that the Connecticut Department of Energy and Environmental Protection intends to launch

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produced in other proposed bills. Imposition of the R3 program was inapposite in a bill that purported to deal with brownfields, i.e., the properties that lie either unused or underutilized because the fear of environmental contamination by those who might otherwise purchase and clean them up. The now removed language did not explicitly address the subject of brownfields at all. The legislature effectively dealt with allaying fears of brownfields liability while protecting human health and the environment with its enactment of Section 17 of Public Act 11-141 last year. That law provides a system for protection from liability for

a diabolical scheme to destroy individual liberty; on the other hand, it doesn't take much hyperbole to get an inkling in the R3 program of an uncalled for invasion of property rights and the imposition of a new regulatory regimen that would require mandatory reporting, investigation, and remediation of all releases, regardless of their adverse impact on human health and the environment. Even though section 1(b) of Proposed Substitute Bill No. 5343 no longer contains reference to DEEP's R3 program we should nonetheless remain vigilant lest the DEEP Transformation Process produce any similar legislative proposals.