Wiggin & Dana

Environmental Advisory

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The Wiggin & Dana Environmental Advisory is a periodic newsletter designed to inform clients and other interested parties about recent developments in the field of environmental law. Nothing in the Wiggin & Dana Environmental Advisory constitutes legal advice, which can only be obtained as the result of a personal consultation with an attorney. The information published herein is believed to be accurate at the time of publication but is subject to change and does not purport to be a complete statement of all relevant issues. If you are interested in being added to the distribution list for the Wiggin & Dana Environmental Advisory, please contact Joan Burchard at 203.498.4420.

Underground Storage Tank Upgrade Deadline Approaching

If you have not already done so, underground storage tanks must be upgraded, replaced or properly closed by December 22, 1998 in order to meet the requirements of federal regulations that take effect that day. The U.S. Environmental Protection Agency ("EPA") set the deadline 10 years ago to give tank owners plenty of time to comply with the then new environmental regulations. This deadline applies only to tanks that are not used for the storage of heating oil for on-site consumption or otherwise exempt from upgrade requirements.

Under EPA regulations that took effect in December of 1988, tanks installed before that date and which are not protected against corrosion, spills, and overfills must be upgraded, replaced, or properly closed by December 22, 1998. Given the environmental damage which can result from leaking underground storage tanks and considering that the EPA set the December 22nd deadline ten years ago, we anticipate aggressive enforcement of the new regulations including stiff penalties.

There are about 17,000 regulated underground storage tanks in Connecticut alone, an estimated 10 percent of which need to be upgraded. The New England States and the EPA are planning to work together in aggressively enforcing state and federal requirements for upgrading, replacing or removing bare steel, commercial underground storage tanks.

Underground storage tanks that are considered to be in compliance must have at a minimum: (1) corrosion protection on the tank and piping; (2) a method of leak detection; (3) catchment basins to contain spills from delivery hoses; and (4) overfill protection such as an automatic shutoff device.

Costs to bring tanks into compliance with the 1998 requirements vary widely, depending on the size and nature of a tank, local labor rates, and other factors. As we approach December 1998, these costs could rise due to increased customer demands and finding available contractors to do the work by the deadline may be difficult.

Reporting of Significant Environmental Hazards

Public Act 98-134, which recently became effective, concerns the reporting of certain significant environmental hazards by owners of contaminated property. The Act requires, in certain situations, that a technical environmental professional – an individual who collects soil, water, vapor or air samples for purposes of investigating and remediating sources of pollution – and the owner of the property notify the Connecticut Department of Environmental Protection ("DEP") of pollution at the property being investigated or remediated.

Specifically, the Act requires the technical environmental professional to notify his or her client and the property owner, within set periods

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Spill Reporting

The newly enacted provisions concerning significant contamination reporting join section 22a-450 of the General Statutes of the State of Connecticut, which creates a broad requirement to report to the DEP spills or releases of a wide variety of substances. Enacted in 1969, section 22a-450 has never been the subject of implementing regulations or guidance. Confusion within the regulated community as to what constitutes a reportable spill has ensued and, understandably, has caused anxiety and possibly over-reporting. In 1995, the statute was amended to require reporting only for spills that "pose[] a potential threat to human health or the environment." While conceptually reducing the universe of reportable spills, the amendment added the notoriously vague concept of a "*potential threat*" to human health or the environment, and, therefore, did little to clarify the requirements of the statute.

In 1996, in an attempt to clear up the confusion over spill reporting, the DEP Waste Management Bureau Advisory Committee set up a Spill Notification Regulations Subcommittee, comprised of members of the regulated and regulating community (the "Subcommittee") to advise the DEP on a strategy for spill reporting in Connecticut. Earlier this year, the Subcommittee produced a report recommending a spill reporting strategy that, among other things, seeks to clarify terms where they are vague; creates reporting exceptions, carve-outs, and thresholds; and allows for reporting flexibility for certain qualified facilities.

Essentially, the strategy recommends a risk-based, common sense approach to spill reporting. Contained or confined spills, or spills of substances that by their chemical nature are not dangerous would not need to be reported, nor would insignificant quantities of admittedly harmful substances. In addition, the strategy allows for certain facilities with expertise in the handling of hazardous substances to set up their own written spill reporting protocol subject to DEP approval.

The strategy contains helpful concepts and even some detail (e.g. proposing reportable quantities for chemicals, petroleum, and extremely hazardous substances). It does not suggest a preference for implementing the strategy through legislation, regulation, or guidance. Nevertheless, the strategy sets forth a reasoned, risk-based approach that should go a long way toward clarifying the duty to report under section 22a-450.

Brownfields and Connecticut's

Over the last few years, both the federal government and many state governments have attempted to facilitate the redevelopment of brownfield sites. EPA has defined *brownfields* as "abandoned, idle or underused industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination that can add cost, time or uncertainty to a redevelopment project." President Clinton announced the Administration's Brownfields Initiative in 1993, and the EPA brought the initiative to life in 1995 with the Brownfields Action Agenda. Under the Brownfields Action Agenda; the EPA, among other things, has reduced the number of sites on its Superfund database, issued guidance that indicates that lenders will not be pursued under Superfund unless the lender "actively participates" in the day-to-day management of the property, and funded several Brownfields Pilots that provide funds to municipalities for use in the investigation, remediation and redevelopment of brownfield sites.

Many states have enacted legislation aimed at creating incentives for the redevelopment of brownfields. The State of Connecticut first addressed the issue of brownfields in 1992 with the Urban Sites Remedial Action Program (the "Urban Sites Program"). The Urban Sites Program is a program of somewhat limited scope in which the Connecticut Department of Economic and Community Development ("DECD") can acquire polluted sites in order to facilitate the redevelopment of the sites. Only sites located in distressed communities or in an "enterprise zone" with economic and development potential as determined by the DECD are eligible for the program.

In 1995, Connecticut created a voluntary cleanup program with wide applicability (the "Voluntary Remediation Program"). Under the Voluntary Remediation Program, owners or prospective purchasers may remediate certain contaminated sites and receive a covenant not to sue from the Connecticut Department of Environmental Protection ("DEP").

Together, the Urban Sites Program and the Voluntary Remediation Program have not sparked the redevelopment of a significant number of brownfield sites. Therefore, the Connecticut General Assembly passed, at the end of the 1997 legislative session, a brownfields bill: H.B. 5430 "An Act Concerning Brownfields Redevelopment and Recycling." On June 8, 1998, H.B. 5430 became Public Act 98-253 (the "Act"). The Act, which became effective on October 1, 1998, creates a comprehensive set of inducements to owners and potential purchasers of brownfields to remediate and redevelop brownfield properties. Through the Act, the State hopes to turn the potential of its various brownfield initiatives into redeveloped properties. The following describes the significant sections of the Act.

New Legislation to Spur Redevelopment

Abatement of Municipal Real Estate Taxes.
The Act provides that municipalities may allow owners of "environmentally impacted sites" to abate property taxes due during the period in which the property is remediated and redeveloped and that municipalities may forgive delinquent taxes and interest for the benefit of anyone, including a prospective purchaser of the property, who agrees to undertake an investigation and remediation of the property.

Hiring of Professionals by Municipalities.
The Act provides that municipalities may hire professionals to undertake environmental site assessments on property within the municipality in the following circumstances: (1) the owner of the property cannot be located; (2) the property is encumbered by a lien for taxes due the municipality; (3) the property is part of the municipality's redevelopment plan; (4) the property is abandoned property; or (5) the municipality determines that the property presents an imminent and substantial endangerment. The Act indicates that professionals hired under these circumstances are protected from liability, but the Act does not define or describe the type or extent of liability from which the professionals are to be protected.

Amendment of Definition of Transfer of Establishment.
The Act exempts from the Connecticut Transfer Act: (i) transfers of certain residential properties; (ii) transfers of property to an Urban Rehabilitation Agency; (iii) certain transfers to a municipality; and (iv) transfers to the Connecticut Development Authority or any subsidiary of the Authority. Freeing these transfers from the burden of Transfer Act compliance will not insulate owners and purchasers from potential liability for remediation of the transferred sites, but will possibly allow owners and purchasers more flexibility in controlling the timing and scope of the remediation process.

Lender Liability.
The Act provides lenders a level of comfort that they will not be held liable for contamination they did not cause. Generally, the act provides that lenders whose interest in contaminated property is primarily to protect a security interest in the property will not be held liable by the State for the remediation of the property, either before or after foreclosure, if the lender does not participate in the management of the property.

Expansion of Urban Sites Program.
The Act expands the Urban Sites Program so that it covers not only those sites "deemed vital to the economic development needs of the state," but also smaller, less strategic sites to be known as "urban community sites" defined as "property that is abandoned, vacant or underutilized but is suitable for development for community-oriented uses, including, but not limited to, commercial, retail or medical establishments, small industrial or manufacturing facilities, neighborhood services or public uses including parks or open space."

Expansion of Right to Perform Voluntary Remediation.
Before the Act, voluntary remediations were permitted only by municipalities or by owners of Transfer Act establishments and sites listed on the State inventory of hazardous waste sites. The Act expands the right of owners and municipalities to perform voluntary remediations to include, in addition to listed sites and Transfer Act establishments, any site where ground-water is classified as GA or GAA, which are groundwater classifications for supplies of water that are deemed suitable for drinking without treatment.

Expansion of Covenants Not to Sue.
The Act amends provisions concerning the covenants not to sue that DEP is authorized to enter into with certain owners and prospective purchasers of contaminated property. Prior to the Act, the DEP could enter into: (i) a transferable covenant not to sue with prospective purchasers of contaminated property (at a fee consisting of 3 percent of the value of the property); and (ii) a non-transferable covenant not to sue with an owner of a contaminated property (at a fee of $5,000). Both covenants required the submittal of a DEP-approved remedial action plan. The Act provides that owners and prospective purchasers are to be eligible for both the transferable and non-transferable covenants currently available. Further, the Act provides that DEP must enter into non-transferable covenants in appropriate circumstances, whereas current law provides that DEP may enter into non-transferable covenants. Also, the Act provides that in addition to DEP, Licensed Environmental Professionals ("LEPs") may approve remediations that form the basis of a non-transferable covenant. The Act allows owners and prospective purchasers to choose between the less expensive and easier to obtain non-transferable covenant and the potentially more expensive but more valuable transferable covenant.

Connecticut Development Authority Subsidiaries and Revolving Funds
The Act provides that the Connecticut Development Authority may establish subsidiaries "to stimulate, encourage and carry out the remediation, development and financing of contaminated property... in coordination with [DEP], and to provide financial, development and environmental expertise to others including, but not limited to, municipalities interested in or undertaking such remediation, development or financing which are determined to be public purposes for which public funds may be expended." We understand that the Authority is in the process of forming such a subsidiary.

The Act also amends the statute that provides for the creation of the Environmental Assistance Revolving Loan Fund (the "Revolving Fund"). Before the Act, the Revolving Fund, administered by the Connecticut Development Authority, allowed the Authority to provide loans, lines of credit or loan guarantees to businesses for certain enumerated environmental projects. The Act provides that the Authority

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Brownfields and Connecticut's New Legislation to Spur Redevelopment

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or any subsidiary (such as a subsidiary created pursuant to the Act as discussed above) may also provide grants as well as loans, lines of credit or loan guarantees, and expands the scope of permissible uses of Revolving Fund monies to include the remediation of contaminated property, as well as the other environmental projects as set forth in the original statute.

The Act also establishes a "Regional Economic Development Assistance Revolving Fund." From this fund, the DECD may provide loans or grants to regional entities, who in turn may provide loans to nonprofit businesses or communities, not to exceed $250,000 per loan for regional economic development activities.

Reporting of Significant Environmental Hazards

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of time: (1) where discovered pollution is causing or has caused significant contamination of (a) a public or private drinking water source; (b) soil within two feet of the ground surface; (c) groundwater within fifteen feet beneath an industrial or commercial building; (d) groundwater which is being discharged to surface waters; (e) ground water within 500 feet in an up-gradient direction of a private or public drinking water well; or (2) where vapors emanating from polluted soil, groundwater or free product may represent an explosion threat. Once notified by the technical environmental professional of the contamination or vapors, the owner of the property must then notify the DEP. In some circumstances, if the owner fails to notify the DEP, the client of the technical environmental professional (where the client is not the owner) and the technical environmental professional may have to give the notice.

For each situation where a notification is to be given by the technical environmental professional or the property owner, specific timeframes are established. The reporting timeframes can be as great as 90 days in the case of an owner reporting to the DEP the pollution of soil within two feet of the ground surface to as short as two hours in the case of an owner reporting to the DEP the presence of vapors in soil or water which pose an explosion threat.

The Act sets forth the type of information which is to be included in the notice. The DEP is required to acknowledge receipt of the notice and that acknowledgement will include a statement that the owner of the property has up to 90 days to submit a plan to remediate or abate the contamination or condition. Alternatively, the DEP may issue a directive setting forth the required action.

The requirements of the Act became effective on October 1, 1998. Determinations by a technical environmental professional as of that date can have far-reaching and unanticipated consequences.

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