



Environmental Due Diligence Guide

REPORT

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An Insider's Perspective

New Connecticut Brownfields Law is a Breakthrough for the State

Legislation passed June 7 expanding Connecticut's brownfields program to encourage the remediation and redevelopment of contaminated properties does a very good job of allowing what works in the current framework to continue and the less effective measures to die of their own weight, a lawyer told BNA June 8.

According to Barry Trilling, a partner with the Connecticut law firm Wiggin and Dana LLP, the legislation (H.B. 6526) establishes a program that for the first time provides liability relief to parties investigating and remediating brownfields from actions brought by the state or third parties. Parties eligible to participate in the program include bona fide purchasers (BFPs), innocent landowners, and contiguous property owners who did not contaminate the property, Trilling said. The measure awaits the signature of Gov. Daniel P. Malloy (D).

Protection is Immediate

Applicants receive liability protection immediately upon acceptance into the program that continues after remediation of the site. Among other beneficial provisions, participants do not have to address offsite contamination, sellers are re-

lieved of liability from property that is the subject of the cleanup (though they remain liable for offsite contamination), and properties remediated under the program are exempt from the burdensome requirements of the Connecticut Transfer Act, Trilling said.

Applicants accepted into the program must pay the Department of Environmental Protection a fee equal to five percent of the brownfield's assessed value as of the municipality's most recent grand list. The first installment is due within 180 days of approval of the application by the Department of Economic and Community Development, and the second payment is due four years later. Trilling noted there are generous provisions that potentially cut the cost of participating. First, if the site investigation is completed with 180 days of the application's approval, DEP must reduce the amount of the first installment by 10 percent. Second, if the party completes remediation within four years, the second payment is eliminated. The second payment also may be reduced if the participant investigates contamination that migrated offsite.

The fee provisions "provide a good incentive for getting the cleanup done quickly and for parties to investigate offsite contamination," Trilling added.

He also said the legislation does a good job of addressing public notice requirements. "This is missing in a lot of other programs," he said. Under the law, the applicant must give

notice of the remediation plan and schedule via publication in a local newspaper and respond to any community concerns.

Patchwork of Programs

The new legislation will supplement the current patchwork quilt of programs addressing brownfields, including the Abandoned Brownfields Program, which was created three years ago and has had no applicants; a covenant-not-to-sue program; the Transfer Act; and the voluntary cleanup program. He believes the current laws "will continue to operate but eventually die at their own pace."

Under the new legislation, if the brownfield is subject to the Transfer Act, and the seller is the certifying party, the seller continues to be the certifying party, Trilling said. "Those obligations will not go away until the subject property is cleaned up under the new program, at which time the property is no longer subject to the Transfer Act unless a new owner or operator triggers its operation with a pollution event. Realistically, if the BFP has its application accepted, then everything the certifying party was doing will potentially transfer to the party doing work under Section 17."

The site investigation and cleanup obligations spelled out in the new legislation are almost identical to those in the Transfer Act. The property must be assessed within two years, remediation must start within three years, and reme-

diation must be complete within eight years.

“Under current Transfer Act practice, if a certifying party sells to a party who agrees to take on Transfer Act obligations as a new certifying party, DEP allows the new party to complete its work without looking back to the former owner to complete the work,” Trilling said. Because of the ambiguity surrounding the transfer of those obligations, DEP should come up with an administrative procedure to address and clarify what happens in this situation.

Problems Remain

Despite the obvious benefits of the new legislation, Trilling said significant problems remain. The single biggest problem is that the legislation does not provide for automatic admission to the program for eligible parties but instead limits participation to 32 properties per year. This means the program only is open to parties who have completed the purchase of a site, not to bona fide prospective purchasers (BFPP). Hence, a BFPP must take the chance that its application will not be accepted when it buys the property. In this circumstance, the BFPP most likely will in-

sist the seller retain its cleanup obligations until the BFPP is accepted into the program or void the transaction if the application fails, Trilling explained. This will entail a cumbersome process requiring expensive lawyer time. He also said that because the program is limited to 32 sites, he regrets the bill was not changed to allow parties contemplating purchase, i.e., qualified BFPPs, to enter the program before the completion of a transaction.

BY MARY ANN GRENA MANLEY

The bill is available at <http://www.cga.ct.gov/>.