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# *Liability Relief for Purchasers of Contaminated Sites: Connecticut's New "Act Concerning Brownfield Remediation and Development as an Economic Driver"*

An Act Concerning Brownfield Remediation and Development as an Economic Driver, PA 11-141 (or "Brownfield Economic Driver Act"), signed into law by Governor Dannel Malloy on July 8, 2011, makes significant changes to brownfield redevelopment law and policy in Connecticut. The new legislation will supplement and eventually supplant the current patchwork quilt of programs that address brownfields, including the voluntary cleanup program of CGS 22a-133x and 133y, the covenant-not-to-sue program of CGS 22a-133aa and 133bb, and the provisions of the Connecticut Property Transfer Act, CGS 22a-134 to 22a-134d (Transfer Act), with regard to properties remediated under the new legislation. Most notably, Section 17 of the Act extends liability protection to the purchasers of contaminated property who did not cause, exacerbate or contribute to the property's contamination and to the parties from whom they purchased the brownfield property. This article (i) examines the new Section 17 liability protection program, administered jointly by the Department of Economic Community Development (DECD), and the Department of Energy and Environmental Protection (DEEP), (ii) reviews the Section 9 expansion of the existing Abandoned Brownfield Cleanup program, and (iii) briefly notes various other provisions that will affect municipalities and property owners.

## BROWNFIELD REMEDIATION AND REVITALIZATION PROGRAM

In short, Section 17 of the Act establishes a program protecting parties who investigate and remediate brownfields from liability to the state and third parties. Parties eligible to participate in the program include bona fide prospective purchasers (BFPPs), innocent land owners, and contiguous property owners who did not themselves contaminate the property. Provided they otherwise meet the program criteria, properties that are already under investigation pursuant to an existing brownfield program (the state voluntary cleanup programs and the covenant not to sue programs) may also participate in the Section 17 program. A property currently the subject of an enforcement action by DEEP or the United States Environmental Protection Agency is not eligible for inclusion in the program. Properties that either would be subject to the terms of the Transfer Act or which are already undergoing characterization and remediation under the Transfer Act, however, are not excluded from participation. Also, upon subsequent conveyance, properties remediated under the program are exempt from the filing requirements of the Transfer Act.

The Section 17 program is open to people, businesses, nonprofit organizations, municipalities, public and private municipal economic development agencies, and state agencies. Parties wishing to participate in the program make application to DECD which, using certain state-wide "portfolio criteria" intended to assure that the program extends to a wide geographic and demographic range of sites, may admit up to 32 applicants per year to the program. Applicants accepted to the program receive liability protections immediately upon acceptance. Those protections continue after remediation of the site. Particularly important, the protections against liability afforded to the BFPP for properties remediated under the program extend as well to the party from whom the BFPP acquired

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the brownfield, even if that party does not meet the eligibility requirements of the program. Significantly, however, although the BFPP does not have to address off-site contamination, the prior owner will retain liability for any such migration off-site. Further, program participants will remain liable for contaminating the property or contributing to pre-existing contamination. After DECD selects which applicants may enter the program, administration shifts to the DEEP which will monitor and may audit the remediation of properties in the program.

Using a Licensed Environmental Professional (LEP), a participant must clean up the property to meet DEEP standards; it must characterize, abate, or remediate the contamination on the property according to a Brownfields Investigation Plan and Remediation Schedule (BIPRS) that its LEP must submit to DEEP within 180 days after DECD has approved the program application. The plan and schedule must include a timeframe for notifying specified parties and the public before the remediation begins. The public has 30 days from the last notice provided by the participant to comment on the proposed remediation. Section 17 implicitly requires the participant to respond to the public comments by allowing the participant to start cleaning up the property only after it submits those comments and its responses to the DEEP Commissioner.

Applicants must pay a fee equal to 5% of the brownfield's assessed value as of the municipality's most recently completed "grand list" (of taxable properties in the municipality), to be paid in two equal installments. The participant must pay the first installment within 180 days after the DECD Commissioner approves the application and the second within four years after that date. Ameliorating this exaction, however, Section 17 also sets conditions for reducing or eliminating the fee. Thus, when a participant finishes investigating the property within 180 days after the DECD Commissioner has approved its application, the DEEP Commissioner must reduce the first installment by 10%.

Section 17 gives participants up to two years to investigate the property, three years to commence remediation, and eight years to finish the cleanup. As an additional possible fee reduction, the DEEP Commissioner must eliminate the second installment when a participant cleans up the property within four years after the application's approval date. As a third possible fee reduction, when a participant voluntarily investigates contamination that migrated from the property, the DEEP Commissioner must reduce the installment or give the participant a refund for the reasonable costs it incurred for investigating the off-site contamination, up to the installment amount. A subsequent party that acquires a property in the program must pay a $10,000 transfer fee to obtain the program's protections. As a final amelioration, Section 17 exempts municipalities and municipal economic development agencies from paying this fee when any of them acquire property in the program, but it requires such an entity to collect and remit the fee to DEEP if the entity later transfers the property to another party.

Following completion of the remediation, the LEP must submit a final remedial action report to both the Commissioners of DECD and DEEP. The report must include verification by the LEP that the remediation took place in accordance with Connecticut's Remediation Standard Regulations, Sections 22a-133k -1 through 3 of the Regulations of Connecticut State Agencies (RSCA). The report is subject to approval by the DEEP Commissioner who may, for any reason within sixty days after receipt of the report, decide to conduct an audit of the LEP's verification or interim verification and so notify the participant. The DEEP

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Commissioner may also audit a remediation if he requests information from the participant and receives no response. The DEEP Commissioner must commence his audit within 180 days after the participant has submitted the remedial action report and the verification or interim verification, and the Commissioner must complete the audit within 180 days after receiving the documents. The Commissioner may not audit the remediation more than 180 days after receiving the verification or interim verification unless the Commissioner believes the verification was based on inaccurate, erroneous, or misleading information, or the Commissioner determines that post verification monitoring and other actions have not been taken.

The Commissioner may also audit the remediation after 180 days if an environmental land use restriction was not recorded in the land records, the law was violated with regard to verification, or the remediation may not be preventing a substantial threat to the environment and public health. Within 14 days after completing the audit, the Commissioner must send the audit findings to the participant, the LEP, and the DECD Commissioner. In doing so, the DEEP Commissioner may approve or disapprove the remedial action report and, if the latter, explain why. If the Commissioner rejects the report, the participant has an opportunity to cure any deficiencies. A decision to approve the remedial action, although not so entitled, will amount to the Connecticut equivalent of a "No Further Action" letter issued by other sates. In addition, the property will no longer be subject to the requirements of the Transfer Act.

The liability protection provided by the statute does not preclude the DEEP Commissioner from taking any appropriate action to require additional remediation of the subject property where the Commissioner has determined that (a) the participant knew or should have known that it provided false or misleading information to the Commissioner; (b) new information confirms previously unknown contamination; (c) the participant fails to complete the remediation described in the schedule or fails to comply with monitoring, maintenance, operating or environmental land use restriction requirements; or (d) there are changes in exposure conditions, for example, a change from nonresidential to residential use of the property.

The interim protections from liability that an applicant receives upon acceptance into the program become permanent once the DEEP Commissioner notifies the participant that DEEP will not audit the process or that the DEEP audit findings have been addressed. The permanent liability protection for the participant and for the immediate prior owner also begins if the Commissioner fails to act on a remedial action report and the accompanying verifications within 180 days after receiving them. Under both outcomes, neither the participant nor the prior owner has liability to the state or third parties for the costs incurred to remediate the contamination identified in the plan. Nor are they liable for the costs relating to equitable relief or damages resulting from the contamination. The liability protections for the BFPP, innocent land owner, and contiguous property owner also apply to historical off-site impacts, including deposition, waste disposal, effects on sediments, and damage to natural resources. Those protections, however, do not extend to the prior owner.

The Section 17 program will likely include many sites that currently meet the definition of an "establishment" under the Transfer Act and for which the seller already occupies the position of a "certifying party" under that legislation. For such a property the seller's formal obligations as the certifying party will continue, as a matter of law, until completion of

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the subject property's remediation pursuant to the Section 17 program. In practical effect, however, once the BFPP's application has been accepted, the seller's remedial activities will be taken over by the Section 17 participant, and it would be prudent for the parties to recognize this practical shift in remediation responsibility in the purchase and sale agreement for the property. The Section 17 site investigation and cleanup obligations track those for the certifying party in the Transfer Act; *e.g.*, the property must be assessed within two years, remediation must start within three years, and remediation must be complete within eight years. Upon completion of the Section 17 remediation the property will no longer be subject to the Transfer Act unless a new pollution event triggers its renewed applicability to the site. Removal of the property from the applicability of the Transfer Act will effectively (and should, as a matter of law) dissolve any further obligation of the prior certifying party.

Notwithstanding the many advantages of Section 17 to program participants, its limitation to only 32 sites in any one year makes the purchase of eligible properties less attractive because of the speculative nature of admission to the program. Why, a prospective purchaser may ask, should it go to the expense of qualifying for and applying to DECD for admission when there is no guarantee that DECD will accept its application to the program and thus no assurance of relief from liability if it meets the program's obligations? An interesting "wrinkle" in Section 17 may allow a municipality to nominate a site that comprises the subject of an uncompleted transaction. In most instances, however, when a party who contemplates entering the Section 17 program buys a property, it must assume the risk that its application will not be accepted among the 32 that DECD may select in any given year. The parties to a brownfield transaction, however, may find a contractual mechanism to overcome this barrier. For example, the purchase and sale agreement for the site could require the seller to retain its cleanup obligations until the purchaser is accepted into the program with an amount placed in escrow by the buyer that reflects the projected cleanup cost. If the purchaser is then accepted into the program the escrow would be refunded to the buyer to cover its projected cleanup costs. If the DECD rejects the application the transaction might proceed with the escrow distributed to the seller or the parties could void the transaction with a return of all deposits. This will entail a cumbersome process requiring the service of a lawyer experienced in brownfield transactions. It is also possible that DEEP could devise an administrative process whereby it would enter a "prospective purchaser agreement" that shifts cleanup responsibility from seller to purchaser, such as found in some other states, in the form of an executory agreement among itself, the current owner, and a BFPP that would be subject to DECD's approval of the BFPP's application to the Section 17 program.

### Section 9 Changes to the Abandoned Brownfield Cleanup (ABC) Program

Originally enacted in 2009, the ABC program in its original form extended liability protection only to contaminated sites that had been abandoned (unused or underused) after October 1, 1997. A prospective property owner interested in the ABC Program's liability protection provisions must apply to the DECD Commissioner. In the more than two years since enactment of the ABC program, however, not a single application has been submitted. Section 9 of the Brownfield Economic Driver Act seeks to encourage ABC Program applications by expanding the program to sites that (i) have been abandoned for at least five years before a party seeks admission to the program or (ii) the Commissioner of Economic and Community Development otherwise determines are eligible. The Act also expands program eligibility to municipalities.

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After DECD has accepted a site into the program the participant will not be held responsible to investigate or remediate "any pollution or source of pollution that has emanated from the property" before the participant took title, nor will the participant be liable to the state or any third party for the release of any regulated substance that took place at or from the property before it took title, provided, however, that the participant (i) remains in the voluntary remediation program, (ii) investigates existing pollution, and (iii) eliminates future emanation or migration of pollutants from the property.

Selection of a property for the ABC program exempts the property from the Transfer Act and entitles the participant to a covenant not to sue from the DEEP Commissioner without fee. The covenant not to sue is transferable to subsequent owners. An eligible applicant designated by the ABC program is considered an innocent landowner and is not liable to the DEEP Commissioner for preexisting site conditions provided the person did not establish, cause, or exacerbate the contamination, and complies with applicable reporting requirements.

## Other Act Provisions

The Brownfield Economic Driver Act includes other provisions of note to municipalities and property owners:

- It makes permanent an existing pilot program that provides funding and liability protection to municipalities for investigating and remediating brownfield sites, contingent on funding availability.
- It relieves certifying parties who submit a Form III or Form IV pursuant to the Transfer Act from the requirement to investigate or clean up contamination that occurs after the later of either completion of a Phase II investigation or submission of the Form III or Form IV.
- It requires the DEEP Commissioner to issue a comprehensive evaluation of all brownfield remediation programs and legislation by December 15, 2011.
- It broadens the definition of the term "brownfield" to include properties where site expansion (in addition to redevelopment or reuse) is affected by contamination. The definition will also now include sites that require environmental investigation as well as those requiring remediation of those sites.
- It exempts projects that receive financial assistance from the State for the purpose of investigation or remediation from the payment of certain fees.
- It extends the term of the existing Brownfield Working Group, charged with examining the remediation and development of brownfield in Connecticut, to January 15, 2012. It also creates two new gubernatorial appointees on the group.
- It makes permanent the tax increment financing program administered by the Connecticut Development Authority. This program permits the Connecticut Development Authority to issue bonds backed by incremental property tax revenue expected to be generated by a redevelopment program that includes either information technology programs in economically distressed areas or for brownfield remediation.

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The Brownfield Economic Driver Act, and particularly Section 17 of the Act, creates a new world of opportunity for the remediation, redevelopment, and revitalization of brownfield properties in Connecticut. The Act moves the state to the forefront of those who have recognized that achieving those objectives requires a realistic reassessment of liability for site cleanup volunteers. As yet in its infancy, complications and difficulties are likely to arise in its administration and implementation. The brownfield lawyers here at Wiggin and Dana LLP are ready to assist any party interested in taking advantage of this new program.