

## BROWNFIELD DEVELOPMENT IN CONNECTICUT: OVERCOMING THE LEGAL AND FINANCIAL OBSTACLES

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## INTRODUCTION

Historically a hub of manufacturing and industry, Connecticut serves as home to a significant number of abandoned or partially used industrial properties.<sup>1</sup> Plagued or stigmatized by either real or perceived

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1. By 2008, the Connecticut Brownfields Redevelopment Authority listed 199 brownfield sites as eligible for redevelopment funding under its programs. *See* Conn. Brownfield Redevelopment Auth., <http://www.ctbrownfields.com/sites/search.asp> (last visited May 19, 2008). Further, as of November 30, 2004, the Connecticut Department of Environmental Protection had identified 281 brownfield sites in Connecticut, although “many more sites may exist within the state that meet the definition of a brownfield site.” Conn.

environmental contamination, these legacy properties constitute Connecticut's "brownfields." Factories and mills throughout the state that once made clocks, pins, thread, hats, guns, tools, and other products now lay idle and unused, suffering from the specter of environmental contamination. Converting and restoring these generally undervalued properties presents a significant economic opportunity for private developers. Such development also serves the important public functions of remediating historic environmental contamination, alleviating hazards to human health, preserving prized undeveloped "greenfields," revitalizing towns and cities, and expanding the state's economic base. Private sector brownfield development, therefore, has the potential to meet needs that the public sector currently lacks the resources to address. It follows that encouraging and facilitating brownfield development can harness the profit motive to promote the public good.

The enactment of favorable state legislation in 2006 and 2007 may spur brownfield development in Connecticut. Brownfield projects, however, require substantial capital for both remediation and construction phases, and introduce the possibility of extensive liability under strict environmental laws. New projects raise questions about whether and how Connecticut and the federal government will provide financial support and liability relief to stimulate brownfield development. This Article aims to answer these questions by consolidating wide-ranging materials concerning the legislative, regulatory, and financial assistance tools available for brownfield development in Connecticut.

Part I presents a brief overview of the subject of brownfield development. This overview includes a definition of brownfield properties and a description of the liability scheme created by federal and state statutes that substantially contributed to the under-utilization and boarding up of these sites. In the final section of Part I, we discuss the recent legislative trend to provide relief from that liability scheme and encourage brownfield development.

Part II presents a thumbnail description of Connecticut laws governing brownfield remediation and development, opening with a discussion of recently enacted legislation that creates a new framework for brownfield redevelopment. We then turn to pre-existing laws and programs, as amended, which figure prominently in undertaking

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Dep't of Env'tl. Prot., *Brownfield Sites in Connecticut* (Nov. 30, 2004), *available at* [http://www.ct.gov/dep/lib/dep/site\\_clean\\_up/brownfields/brownfieldsinventory.pdf](http://www.ct.gov/dep/lib/dep/site_clean_up/brownfields/brownfieldsinventory.pdf).

brownfield development in Connecticut. These include the Connecticut Property Transfer Act (Transfer Act),<sup>2</sup> which requires buyers and/or sellers to report the environmental condition of every qualifying transferred property, and to investigate and remediate the property as necessary. Part II also examines legislative incentives to remediate contaminated properties, including voluntary remediation programs, covenants not to sue, and restrictions on third party suits against innocent landowners.

Parts III and IV, respectively, discuss state and federal sources of financial assistance available for brownfield projects in Connecticut.

## I. OVERVIEW

In this overview, we explain what brownfields are and discuss the liability scheme that challenges brownfield development projects. We also explain the background of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)<sup>3</sup> and how that statute unwittingly contributed to the under-use and boarding up of brownfields nationwide. We close this overview with a discussion of programs for the remediation and redevelopment of brownfields.

### A. *What are Brownfields?*

Federal law defines a “brownfield site” as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance,<sup>4</sup> pollutant, or contaminant.”<sup>5</sup> In a more practical sense, a brownfield consists of any

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2. CONN. GEN. STAT. §§ 22a-134 to -134e (2007).

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 to 9675 (2000).

4. CERCLA defines “hazardous substances” to include pollutants defined in a litany of other federal statutes but to exclude petroleum and related products. 42 U.S.C. § 9601(14) (defining “hazardous substance” to exclude “petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)”).

5. Like “hazardous substances,” “pollutants or contaminants” exclude petroleum and related products. 42 U.S.C. § 9601(33) (defining “pollutant or contaminant” to include, but not be limited to, “any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral

real property which, due to actual or suspected environmental contamination at or near the site, may lie idle, unoccupied, underutilized, or unused. Brownfield sites include industrial, commercial, agricultural, and even residential properties in urban, suburban, ex-urban, or rural settings. The contamination at a brownfield site may stem from activities that took place or conditions that arose before current ownership and operation of the property, and often as a result of lawful non-negligent conduct. In many, if not most, instances neither the U.S. Environmental Protection Agency (EPA) nor a state environmental agency will have undertaken an active investigation, remediation, or enforcement action at a brownfield site. In the early 1990s, there were an estimated 600,000 brownfields nationwide;<sup>6</sup> currently, there are approximately 450,000.<sup>7</sup>

### *B. The Liability Scheme*

Liability for the cleanup of brownfields arises under the federal CERCLA (otherwise known as “Superfund”),<sup>8</sup> enacted in 1980, and similar state statutes.<sup>9</sup> For any site that experiences a release or threatened release of a hazardous substance, CERCLA imposes liability for cleanup costs on every person or entity that: (1) currently owns or operates the property; (2) owned or operated the property at the time of the disposal of hazardous substances; (3) arranged for the disposal, treatment, or transportation of hazardous substances; or (4) accepted hazardous substances for transport to the site.<sup>10</sup> These parties constitute the so-called “potentially responsible parties” (PRPs) for any given

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abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring, except that the term ‘pollutant or contaminant’ shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas)”).

6. ENVTL. PROT. AGENCY (EPA), PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS 2 (2007), *available at* <http://www.epa.gov/swerrims/docs/grants/epa-oswer-obcr-07-09.pdf>.

7. *See* EPA, About Brownfields, <http://www.epa.gov/brownfields/about.htm> (last visited May 19, 2008).

8. The “Superfund” is the trust fund established by CERCLA to finance cleanup of sites subject to the statute and for legal action to force responsible parties to clean up these sites. 42 U.S.C. § 9611; 26 U.S.C. § 9507 (2000).

9. *See, e.g.*, CONN. GEN. STAT. §§ 22a-133 to -133ee, 22a-451 to -451b (2007).

10. 42 U.S.C. § 9607(a).

contaminated site. Any entity, whether governmental or private, that incurs costs to investigate and clean up a site which has experienced a release or threatened release of a hazardous substance may sue any CERCLA PRP in “cost recovery” litigation.<sup>11</sup>

CERCLA imposes on PRPs *joint, several, strict,*<sup>12</sup> and *retroactive liability*.<sup>13</sup> “Joint and several” liability means that every PRP must shoulder the burden for the entire cost incurred for investigation and cleanup rather than just its proportional share. Thus, if one PRP who contributed 99% of the contamination at the site has dissolved or otherwise cannot pay its share, but two other financially viable PRPs remain, each of whom contributed only 0.5% of the contamination, joint liability imposes on those two viable parties the responsibility to pay not a combined 1%, but 100% of the cleanup cost. (These parties, however, may argue with one another over how to split that cost).

“Strict” liability means that the manner in which the PRP conveyed the hazardous substance to the site or the way it operated or managed the site makes no difference in determining liability. One need not have acted negligently nor have intended to cause a release of contamination in order to be subject to liability. Thus, the mere fact that a release occurred from a property which required cleanup makes all connected parties responsible for the cleanup cost.

“Retroactive” means that the obligations and liabilities created by a law apply to conduct that took place or status that existed before enactment of the law. CERCLA applies to sites that operated before the statute’s 1980 passage. CERCLA also applies to management activity at these sites even if it was entirely lawful and consistent with practices that were generally accepted at that time. Although the Constitution prohibits the enactment of “ex-post facto” laws that impose retroactive consequences on previously lawful conduct or status,<sup>14</sup> the U.S. Supreme Court ruled early in its jurisprudence that the prohibition applies only to penal or criminal, rather than civil laws.<sup>15</sup> Nonetheless,

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11. See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161-62 (2004); see generally 42 U.S.C. § 9607; *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007).

12. See, e.g., *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007); *Morrison Enter. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002).

13. See, e.g., *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters Inc.*, 240 F.3d 534, 551-52 (6th Cir. 2001).

14. U.S. CONST. art. I, § 9, cl. 3.

15. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

courts usually consider retroactive laws to be unconstitutional.<sup>16</sup> CERCLA does not expressly provide for retroactive application, but courts have held that Congress intended to impose retroactive liability in the statute. In doing so, courts have agreed with the government's argument that CERCLA's retroactivity further withstands constitutional scrutiny because CERCLA is a "remedial" statute.<sup>17</sup>

Further, the CERCLA liability scheme imposes potentially vast financial exposure. In 2001, one Congressional source estimated that the average cost of a cleanup initiated by the EPA under CERCLA amounted to about \$30 million,<sup>18</sup> and a non-governmental report projected that Superfund cleanups for fiscal years 2000-2009 will total \$14 billion to \$16.5 billion.<sup>19</sup> A 2004 EPA report projected that the cleanup cost for 235,000 to 355,000 contaminated sites (Superfund National Priority sites along with other types of contaminated sites)<sup>20</sup> from 2004 to 2033 could range from \$170 billion to \$250 billion.<sup>21</sup> Not surprisingly, such huge amounts of liability often lead to expensive and protracted litigation in which PRPs seek cost recovery<sup>22</sup> or equitable contribution<sup>23</sup> from each other.

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16. In *Union Pacific Railroad, Co. v. Laramie Stockyards, Co.*, 231 U.S. 190 (1913), the Supreme Court determined that

the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . . The rule has been expressed in varying degrees of strength, but always of one import, that a retroactive operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

*Id.* at 199 (internal quotation marks omitted); see generally *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992).

17. See, e.g., *Franklin County*, 240 F.3d at 551-52 (collecting cases).

18. Anne Claire Broughton, *Superfund Reformers Remain Hopeful*, RECYCLING TODAY, Aug. 16, 2001.

19. Resources for the Future, *Asarco, Superfund Tied in Liability Cliffhanger; Grupo Mexico SA de CV Faces Environmental Cleanup Liabilities Charges* (Mar. 12, 2002), <http://www.rff.org/rff/News/Coverage/2002/March/Asarco-Superfund-tied-in-liability-cliffhanger.cfm>.

20. These additional sites are underground storage tank sites, federal agency sites (Departments of Defense and Energy, and civilian agencies), Resource Conservation and Recovery Act sites, and state and private sites.

21. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS 3 (2004), available at <http://www.clu-in.org/download/market/2004market.pdf>.

22. 42 U.S.C. § 9607 (2000).

23. *Id.* § 9613. The Supreme Court, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), held that a potentially responsible party (PRP) may not sue other PRPs for contribution pursuant to CERCLA Section 113(f)(3) [42 U.S.C. § 9613(f)] in the absence

### C. *The CERCLA Story*

The enactment of CERCLA and its liability scheme derive in large part from the hazardous waste disaster at the Love Canal in western New York State during the late 1970s. From 1942 through 1954, the Hooker Chemicals and Plastics Company had filled an old, abandoned, clay-lined, hydro-electric canal with hazardous plant waste,<sup>24</sup> and sealed the site with several layers of compacted dirt and a clay cap.<sup>25</sup> In 1953, the company sold the property to the local school board, which Hooker believed would otherwise take the property through its exercise of eminent domain.<sup>26</sup> The school board broke the cap, contrary to the advice of Hooker employees and despite a warning in the deed conveying the property that the site had been filled with chemical waste products from its manufacturing process. The deed also included a disclaimer absolving Hooker of any future liability.<sup>27</sup> Breaking the cap inexorably released, over a period of time, a witches' brew of chemicals into the basements of houses surrounding the canal.<sup>28</sup> By 1978, the residents of those homes experienced high levels of cancer and other diseases arguably related to exposure to the chemicals released from the Love Canal.<sup>29</sup> At that time, no federal statute existed to redress contamination emanating from the historical use of industrial facilities. Congress reacted to the Love Canal incident with the passage of CERCLA.<sup>30</sup>

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of a pending or completed civil action against the plaintiff PRP under CERCLA Sections 106 or 107(a). See Barry J. Trilling, Sharon R. Siegel, & Robert G. Huelin, *A CERCLA Cause of Action for Voluntary PRPs After Cooper v. Aviall*, 37 BUREAU OF NAT'L AFF. (BNA) ENV'T REP. 22 (2006). In the aftermath of *Cooper*, the question arose as to whether a voluntary PRP has a cause of action under Section 107 of CERCLA against other PRPs. *Id.* The Supreme Court addressed this question in *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007), holding that this cause of action remains viable.

24. See *United States v. Hooker Chems. & Plastics Corp.*, 850 F. Supp. 993, 1007 (W.D.N.Y. 1994).

25. NICHOLAS BRYAN, *LOVE CANAL: POLLUTION CRISIS* 17 (2004).

26. *Hooker Chems. & Plastics Corp.*, 850 F. Supp. at 1021; see also Eric Zuesse, *Love Canal: The Truth Seeps Out*, REASON, Feb. 1981, available at <http://www.reason.com/news/show/29319.html>.

27. *Hooker Chems. & Plastics Corp.*, 850 F. Supp. at 1027.

28. Lois M. Gibbs, *Learning from Love Canal: A 20th Anniversary Retrospective*, ORION AFIELD, Spring 1998.

29. See, e.g., Michael H. Brown, *Love Canal and the Poisoning of America*, ATLANTIC MONTHLY, Dec. 1979, available at <http://www.theatlantic.com/issues/79dec/lovecanal1.htm>.

30. See, e.g., *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 826-27 (7th Cir. 2007); *Morrison Enter. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002).



This well-motivated statute had the unintended consequence of property owners boarding up their contaminated properties.<sup>31</sup> CERCLA's draconian liability scheme inhibited property owners from putting brownfield properties on the market for development out of a reasonable fear that they would face massive financial exposures. CERCLA similarly inhibited purchasers from acquiring and developing these properties for fear of inheriting the previous owners' liability.<sup>32</sup>

#### *D. Programs to Remediate and Develop Brownfields*

Recent developments in federal and state law, as well as creative transactional lawyering, have enabled the cleanup and redevelopment of brownfields in ways that protect "innocent" parties from these onerous potential liabilities.

##### *1. State Programs*

In the late 1980s, states became more aware of the brownfields problem created by CERCLA's liability scheme. In an effort to address this problem, states started enacting measures, such as voluntary remediation programs, to encourage the development of these environmentally impaired properties.<sup>33</sup> Currently, every state in the United States has adopted, at least to some extent, one or more programs

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31. U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: BARRIERS TO BROWNFIELDS REDEVELOPMENT (1996), available at <http://www.gao.gov/archive/1996/rc96125.pdf> (concluding that CERCLA's liability provisions serve as an obstacle to development and discourage lenders, developers, and property owners from participating in renewal projects); see also *Superfund Reform and Authorization: Hearing on S.8 Before the S. Comm. on Env't and Pub. Works*, 105th Cong. 108-114 (1997) (statement of Mayor James P. Perron, Elkhart, Ind., on behalf of the U.S. Conference of Mayors), available at <http://www.gpoaccess.gov/cheatings/105scat1.html> (scroll down to "SUPERFUND REFORM AND REAUTHORIZATION," select "TEXT" or "PDF"); Flannery P. Collins, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303 (2003); John H. Vogel, Jr. & Mark Geall, *Brownfields: New Regulations, New Opportunities and New Glitches* (course materials for "Real Estate"), No. 1-0093, TUCK SCHOOL OF BUSINESS, DARTMOUTH COLLEGE (2005), available at <http://mba.tuck.dartmouth.edu/pdf/2005-1-0093.pdf>.

32. See, e.g., S. REP. NO. 107-002, at 1 (2001); Sean T. McAllister, *Unnecessarily Hesitant Good Samaritans: Conducting Voluntary Cleanups of Inactive and Abandoned Mines Without Incurring Liability*, 33 ELR 10245 (2003), available at <http://www.restorationtrust.org/goodsam.pdf>.

33. See, e.g., Pennsylvania Land Recycling and Environmental Remediation Standards Act (1995) (codified at 35 PA. CONS. STAT. ANN. § 6026.101 to 107 (West 2008)).

for the voluntary remediation of brownfield properties to state-specific standards.<sup>34</sup>

According to the National Brownfield Association, “[m]ost state programs have common components: a definition of a brownfield, eligibility requirements, financial incentives, and some degree of liability relief.”<sup>35</sup> These programs generally also provide binding government approvals which clarify future obligations, at least to some extent, and allow parties in real estate and commercial transactions to quantify risk.<sup>36</sup> Many programs facilitate the sale and redevelopment of brownfields by allowing cleanups based on site-specific use and risk-based standards in lieu of an inflexible, “one size fits all” standard which may be technologically or financially infeasible.<sup>37</sup> State programs vary with respect to the scope of eligible properties and the degree of state oversight.<sup>38</sup> Some states also have multiple, overlapping regulatory programs.<sup>39</sup>

State funding is a key component in establishing and sustaining these programs. This Article discusses Connecticut’s brownfield programs and laws in Part II, and the state’s available brownfield funding in Part III.

## 2. Federal Developments

Taking its cue from the states, Congress tackled the brownfields issue with the enactment, in January 2002, of the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Revitalization Act).<sup>40</sup> This Act amended CERCLA by providing significant liability protection for brownfield developers, including prospective purchasers, innocent landowners, and owners of contiguous properties. Like the state programs, the Brownfields Revitalization Act

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34. NAT’L BROWNFIELD ASS’N, WHAT WORKS: AN ANALYSIS OF STATE BROWNFIELD AND VOLUNTARY CLEANUP PROGRAMS (2005), *available at* [http://www.brownfieldassociation.org/portals/0/pdf/NBA\\_Program\\_Analysis.pdf](http://www.brownfieldassociation.org/portals/0/pdf/NBA_Program_Analysis.pdf) (recommending an outline of workable elements for state voluntary remediation programs).

35. *Id.* at 2.

36. *Id.* at 1.

37. *Id.* at 2.

38. NAT’L BROWNFIELD ASS’N, *supra* note 34, at 1-2.

39. *Id.* at 2.

40. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended in scattered sections of 42 U.S.C. §§ 9601 to 75).

seeks to promote brownfield redevelopment by mitigating the legal risks associated with brownfield projects.<sup>41</sup>

In its most significant change to the system of joint, several, strict, and retroactive liability, the Brownfields Revitalization Act exempts “bona fide prospective purchasers” of contaminated properties (and their tenants) from CERCLA liability. This exemption applies so long as the purchaser “does not impede the performance of a response action or natural resource restoration.”<sup>42</sup> The Act also provides similar protections to qualified owners of properties contiguous to contaminated sites.<sup>43</sup> To benefit from this liability exemption, both the prospective purchaser and the contiguous property owner must have conducted pre-closing “all appropriate inquiries” (AAI) regarding a facility’s previous ownership and uses.<sup>44</sup> On November 1, 2005, the EPA promulgated regulations that define the requirements of “all appropriate inquiries.”<sup>45</sup> Prospective purchasers and contiguous property owners must also take “reasonable steps” to stop any continuing release of hazardous substances, prevent any future release, and prevent or limit exposures to persons or the environment.<sup>46</sup>

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41. One appellate court conceptualizes the goal of the Brownfields Revitalization Act in economic terms. *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294, 302 n.8 (3d Cir. 2005) (“The principal goal of the Amendments is to balance the interest in cost recovery under CERCLA’s liability provisions with the economic interest in a liquid market for ‘brownfield’ assets.”), *cert. denied*, 127 S. Ct. 41 (2006).

42. 42 U.S.C. § 9607(r)(1) (Supp. V 2005); *see also id.* § 9601(40).

43. *Id.* § 9607(q).

44. *Id.* § 9601(35)(B)(i).

45. *See* Standards and Practices for All Appropriate Inquiries, Final Rule, 70 Fed. Reg. 66069 (proposed Nov. 1, 2005) (codified at 40 C.F.R. pt. 312). The EPA will recognize compliance with the American Society of Testing Materials (ASTM) E1527-05 Standard for Phase I Environmental Site Assessments as equivalent to meeting the regulatory criteria. Phase I assessments are non-invasive studies of sites to determine the presence of “recognized environmental conditions.” According to ASTM Standard E1527-05, Phase I assessments include: a site reconnaissance of the physical site; interviews with individuals knowledgeable about the site and with a local official; environmental database searches and reviews; user-provided information; a review of maps and historical sources; and an analysis of current and past uses, pertinent geological features, and data gaps. The E1527-05 standard updates the E1527-00 standard.

46. 42 U.S.C. § 9601(35)(B)(i)(II). Some outstanding issues remain with regard to these liability exemptions. For example, if a bona fide prospective purchaser (BFPP) completes part of the investigation and then transfers the property, and the subsequent investigation demands remediation that was not anticipated at the time of sale, must the BFPP remediate to retain its exemption? Alternatively, if a BFPP transfers the property and contracts that the buyer remediate as required, but the buyer does not meet its obligations, is the BFPP exempt from liability? These outstanding issues highlight the importance of protective contracts, discussed below.

The Brownfields Revitalization Act also clarifies the existing “innocent landowner” defense in CERCLA.<sup>47</sup> This clarification allows current owners to rely on the AAI process before they purchase a property where the previous owner did not disclose—and the buyer did not otherwise discover—the release or threatened release of a hazardous substance. If a current owner later discovers a release or threatened release, he or she must also undertake the “reasonable steps,” as described above, to qualify for the defense.<sup>48</sup> In addition, parties—even current owners—who are not “innocent” but who clean up contaminated sites under state programs qualify under the Brownfields Revitalization Act for protection from further federal enforcement actions.<sup>49</sup>

To complement the new liability exemptions and other protections, the Brownfields Revitalization Act created funding programs to support brownfield projects. The Act authorizes: (1) the brownfield site characterization and assessment grant program,<sup>50</sup> and (2) grants and loans for brownfield remediation, which include direct remediation grants and capitalization grants for Revolving Loan Funds.<sup>51</sup> We discuss these EPA funding programs in Part IV of this Article. While funds from these programs are available to specified state, local, and tribal governments, agencies, and quasi-governmental agencies,<sup>52</sup> secondary loans from Revolving Loan Funds are available to private parties.<sup>53</sup>

CERCLA authorized a \$200 million ceiling for these programs for each fiscal year from 2002 to 2006.<sup>54</sup> In 2007, the EPA awarded \$70.7

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47. *Id.* § 9607(b)(3).

48. *Id.* §§ 9601(35)(A), (B)(i).

49. *Id.* § 9628(b)(1).

50. 42 U.S.C. § 9604(k)(2).

51. *Id.* § 9604(k)(3).

52. *Id.* § 9604(k)(1) (“The term ‘eligible entity’ means-- (A) a general purpose unit of local government; (B) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government; (C) a government entity created by a State legislature; (D) a regional council or group of general purpose units of local government; (E) a redevelopment agency that is chartered or otherwise sanctioned by a State; (F) a State; (G) an Indian Tribe other than in Alaska; or (H) an Alaska Native Regional Corporation and an Alaska Native Village Corporation as those terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 and following) and the Metlakatla Indian community.”).

53. *Id.* § 9604(k)(3)(B)(i).

54. 42 U.S.C. § 9604(k)(12)(A). Fiscal year 2008 applications were due in October 2007. See EPA, Funding Information, <http://www.epa.gov/swerosps/bf/applicat.htm> (last visited May 20, 2008).

million for the Brownfields Revitalization Act programs<sup>55</sup> (189 assessment grants totaling \$36.8 million; ninety-two cleanup grants totaling \$17.9 million; and thirteen revolving loan fund grants totaling \$16 million).<sup>56</sup> In every fiscal year since the passage of the Act, the EPA has awarded comparable levels of funding.<sup>57</sup> Since 1995 (beginning prior to the passage of the Brownfields Revitalization Act), the EPA has awarded 1,067 assessment grants totaling \$262 million, 217 revolving loan fund grants totaling \$201.7 million, and 336 cleanup grants totaling \$61.3 million.<sup>58</sup> Various other federal agencies also offer financial assistance that private parties can use for brownfield redevelopment, as discussed in Part IV.

### 3. *Transactional Mechanisms*

Brownfield developers that choose not to participate in state voluntary cleanup programs or that do not qualify for federal liability protections manage the liabilities associated with contaminated properties using traditional transactional risk shifting mechanisms. These include appropriate contractual provisions such as indemnifications, as well as insurance products.<sup>59</sup>

## II. CONNECTICUT LAW GOVERNING BROWNFIELD REMEDIATION AND DEVELOPMENT

In this Part, we discuss legislation enacted in 2006 and 2007 intended to facilitate and promote brownfield remediation and redevelopment in Connecticut, and we touch on the February 2007

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55. See EPA, Grant Announcements, [http://www.epa.gov/swerosps/bf/pilot\\_grants.htm](http://www.epa.gov/swerosps/bf/pilot_grants.htm) (last visited May 20, 2008).

56. See Roxanne Smith, EPA, *EPA Awards \$71 Million to Help Brownfields Bloom into Productivity* (May 14, 2007), <http://www.epa.gov/newsroom/newsreleases.htm> (click "Superfund and Brownfields," click "Earlier Releases"; articles sorted by date, then by title).

57. The EPA awarded \$73.1 million in fiscal year 2003; \$75.4 million in fiscal year 2004; \$76.7 million in fiscal year 2005; \$69.9 million in fiscal year 2006. See EPA, Pilot/Grant Announcement Archive, [http://www.epa.gov/brownfields/archive/gannounce\\_arch.htm](http://www.epa.gov/brownfields/archive/gannounce_arch.htm) (information divided by fiscal year) (last visited May 20, 2008).

58. See Smith, *supra* note 56.

59. See, e.g., David B. Farer, *Transaction-Triggered Environmental Laws*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: FROM BROWNFIELDS TO GREEN BUILDINGS 77, 77-96 (James B. Witkin ed., 3d ed. 2004); see also ELIZABETH GLASS GELTMAN, SHIFTING ENVIRONMENTAL RISK, A GUIDE TO DRAFTING CONTRACTS AND STRUCTURING TRANSACTIONS (1999).

Report of the State of Connecticut Task Force on Brownfields Strategies. We also examine ongoing programs and legal considerations directly impacting brownfield projects in Connecticut. These include the Transfer Act, voluntary remediation programs, covenants not to sue, and third party liability protections.

*A. Recent Developments Affecting Brownfields*

In June 2006, the Connecticut legislature enacted the Act Concerning Brownfields (Brownfields Act),<sup>60</sup> which was amended by the Act Implementing the Recommendations of the Brownfields Task Force (Task Force Act) in June 2007.<sup>61</sup> Also in June 2006, the legislature enacted the Act Concerning Personal Watercraft and Children, Revisions to Environmental Protection Statutes, Lake Patrolmen and the Appointment of Special Conservation Officers (the Watercraft Act).<sup>62</sup> Both the Task Force Act and the Watercraft Act amended the Transfer Act to the benefit of brownfield developers. Section B, below, describes these amendments as part of a broader discussion of the Transfer Act.

Section 11 of the Brownfields Act created a nine-member State of Connecticut Task Force on Brownfields Strategies to help guide the legislature with regard to long-term brownfield issues. Task force members, appointed by various legislative officials and the Commissioner of Environmental Protection,<sup>63</sup> are required to have expertise in brownfield development. The Brownfields Act charged the Task Force with submitting a report of its findings and recommendations to the General Assembly by January 1, 2007. In February 2007, the Task Force submitted its Report of the State of Connecticut Task Force on Brownfield Strategies.<sup>64</sup>

This report set forth three sets of recommendations geared toward developing a comprehensive and integrated brownfield program in

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60. 2006 Conn. Acts 184 (Reg. Sess.).

61. 2007 Conn. Acts 233 (Reg. Sess.).

62. 2006 Conn. Acts 76 (Reg. Sess.).

63. Two are appointed by the Governor, one is appointed by the president pro tempore of the Senate, one by the speaker of the House of representatives, one by the majority leader of the Senate, one by the majority leader of the House of Representatives, one by the minority leader of the Senate, one by the minority leader of the House of Representatives, and one sits as a representative of the DEP.

64. See CONN. DEP'T OF ECON. & CMTY. DEV., REPORT OF THE STATE OF CONNECTICUT TASK FORCE ON BROWNFIELDS STRATEGIES 5-11, 41, 61-62 (2007), available at <http://www.ct.gov/ecd/cwp/view.asp?Q=332192&A=1101>.

Connecticut. These recommendations cover organizational coordination and expansion, new funding mechanisms, and additional regulatory incentives and liability relief. The Task Force proposed to create three new grant and loan programs, eliminate two existing programs, and capitalize these programs in a partially revolving fund with \$75 million initially and an additional \$25 million annually for five years. Although the General Assembly adopted in the Task Force Act a few of the Task Force's recommendations, it did not adopt these funding proposals.

The 2006 Brownfields Act and the 2007 Task Force Act combine to promote brownfields development in Connecticut by (1) establishing a sub-agency dedicated solely to brownfields; (2) funding a pilot program (Brownfield Pilot Program) for municipalities or economic development agencies to remediate brownfield sites; (3) creating liability exemptions for entities that enter the Brownfield Pilot Program or purchase brownfield sites remediated under this Brownfield Pilot Program; and (4) establishing a financial assistance program via a separate, non-lapsing Brownfield Remediation and Development Account.<sup>65</sup> In October 2007, the General Assembly approved a \$14 million bond initiative over two years, of which \$9 million will fund the new Brownfield Pilot Program and \$5 million will fund the financial assistance program.<sup>66</sup> The General Assembly apparently intended for these new organizational, legal, and funding mechanisms to facilitate the process of remediating and redeveloping brownfields in Connecticut. In particular, the General Assembly's effort was apparently geared toward promoting a collaborative culture for governmental agencies, minimizing environmental liabilities, and making funding directly available without the need to use the state's cumbersome bonding process.

The 2007 Task Force Act also recommissioned the State of Connecticut Task Force on Brownfields Strategies, albeit with eleven members,<sup>67</sup> and required that the Task Force submit to the General

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65. For a discussion of the Brownfields Act passed in 2006, see Sharon R. Siegel & Barry J. Trilling, *Connecticut Expands Opportunities for Brownfields Redevelopment*, CONN. LAWYER, Nov. 2006, at 3, 14.

66. S.B. 1502, June Spec. Session, §§ 13(f)(2)-(3); 32(f)(2)-(3) (Conn. 2007) (signed by Governor Rell Nov. 2, 2007).

67. The two new members are representatives of the Department of Economic and Community Development and the Office of Policy and Management.

Assembly by February 1, 2008 a new report on recommendations and findings.<sup>68</sup>

*1. Office of Brownfield Remediation and Development*

Section 1 of the Brownfields Act establishes an Office of Brownfield Remediation and Development (OBRD) within Connecticut's Department of Economic and Community Development (DECD). The Connecticut Department of Environmental Protection (DEP), the Connecticut Development Authority, and the Department of Public Health are required to designate one or more staff members as liaisons to the OBRD.<sup>69</sup> The OBRD may also recruit two knowledgeable volunteers from the private sector.<sup>70</sup> The OBRD for the first time brings under one roof the four agencies with authority to set the pace of brownfields development in Connecticut. To ensure their coordination, these four agencies must enter into a memorandum of understanding regarding their respective responsibilities toward the OBRD.<sup>71</sup>

The Brownfields Act, as amended by the Task Force Act, charges the OBRD to: develop procedures to streamline the brownfield remediation and development process; identify existing and potential funding sources and expedite the funds' release; establish an office to provide assistance and information about brownfield-related programs; "[p]rovide a single point of contact for financial and technical assistance from the state and quasi-public agencies"; develop a common application for brownfield assistance from all state and quasi-public entities; identify and prioritize brownfield development opportunities; and develop a communication and outreach program to educate about state policies and procedures for brownfield remediation.<sup>72</sup>

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68. 2007 Conn. Acts 233 § 15 (Reg. Sess.). Other provisions of the Task Force Act establish a pilot program to identify and evaluate brownfield sites in "priority funding areas" under CONN. GEN. STAT. § 16a-35c; clarify that a factor in determining whether to approve an exemption to the floodplain constraints is that a project is subject to the environmental remediation standard regulations; and allow for a reduction in the appraised value of contaminated properties with respect to property taxes if the owner enters into a voluntary remediation agreement that is recorded on the land records and develops a remedial action plan (although the property value may rise post-remediation). 2007 Conn. Acts 233 §§ 8-9, 11 (Reg. Sess.).

69. CONN. GEN. STAT. § 32-9cc(d) (2007).

70. *Id.*

71. *Id.*

72. *Id.* § 32-9cc(b).



## 2. *Brownfield Pilot Program*

The Brownfields Act, as amended by the Task Force Act, requires the DECD to implement a Brownfield Pilot Program by designating five Connecticut municipalities—four of varying sizes and one without regard to population—with brownfields that hinder economic development and providing these municipalities with grants. The Act requires that the DEP review these brownfield sites on a priority basis. After a municipality or economic development agency investigates and remediates a Brownfield Pilot Program property, it must submit a verification report from a Licensed Environmental Professional (LEP). An LEP is a professional who investigates and/or remediates pollution under a DEP license which enables this individual to function, under specified circumstances, as a DEP designee.<sup>73</sup> Within ninety days after this submission, the DEP determines whether the remediation is complete and whether additional measures are necessary. After remediation is complete, a municipality or economic development agency may transfer the Brownfield Pilot Program property to anyone who is not otherwise liable under state environmental law.<sup>74</sup>

## 3. *Liability Exemptions*

Section 3 of the Brownfields Act exempts municipalities from application of the Transfer Act when they acquire tax-delinquent properties enrolled in the Brownfield Pilot Program with the intent of selling them for back-taxes at tax warrant sales. This exemption extends to when the municipalities later transfer those properties to other parties. Generally, the Transfer Act requires a “certifying party” who is the seller or buyer of an “establishment” (that is, a property or business as defined in the statute) either to certify that the “establishment” is clean or to investigate and remediate it as the statute specifies.<sup>75</sup> The exemption from these requirements therefore functions as an incentive to enter into the Brownfield Pilot Program. Under Section 4 of the Brownfields Act, municipalities and economic development agencies receiving grants

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73. See generally CONN. GEN. STAT. § 22a-133v (2007).

74. *Id.* § 32-9cc(c). Liable parties seeking to acquire title or an interest in a property remediated under the pilot program must reimburse all investigatory and remedial costs plus 18% interest. 2006 Conn. Acts 184 § 6.

75. See generally CONN. GEN. STAT. § 22a-134.

under the Brownfield Pilot Program qualify as “innocent parties” and therefore are exempt from state environmental liability.<sup>76</sup>

Section 6 of the Brownfields Act shields from liability eligible purchasers of properties remediated under the Brownfield Pilot Program. This shield applies so long as the purchaser does not cause or contribute to the discharge and is not in any way related to or affiliated with the liable party.<sup>77</sup> The DEP must waive fees and provide the purchaser with a covenant not to sue. Section 7 of the Brownfields Act, on the other hand, prohibits certain persons who are liable or otherwise responsible under Connecticut’s environmental laws (or affiliated with the liable party or the property) from acquiring a property remediated under the Brownfield Pilot Program.<sup>78</sup>

#### 4. *Funding*

Sections 3 and 4 of the Task Force Act authorize the DECD, in consultation with the DEP, to provide financial assistance for the assessment, remediation, and development of a brownfield. Specifically, this assistance consists of “grants, extensions of credit, loans or loan guarantees, [or] participation interests” in DECD loans to “eligible applicants.”<sup>79</sup> According to Sections 3 and 5 of the Task Force Act, “eligible applicants” for this financial assistance include “any municipality, a for-profit or nonprofit organization or entity, a local or regional economic development entity acting on behalf of a municipality or any combination thereof.”<sup>80</sup> Section 5(d) of the Task Force Act describes the wide range of activities eligible for financial assistance, including site investigation and planning; acquisition of property (not to exceed fair market value as if the property were clean); infrastructure construction related to remediation; and demolition, asbestos abatement, hazardous waste and PCB removal, and related infrastructure remedial activities.<sup>81</sup> Other eligible activities described in Section 5(d) of the Task Force Act include remediation and groundwater monitoring (including natural attenuation monitoring and the cost of filing an environmental land use restriction); environmental insurance; and “other

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76. *Id.* § 32-9ee(a).

77. *Id.* § 32-9dd. There is no such innocent purchaser protection in the Transfer Act. *See infra* Part II.B.

78. *Id.* § 32-9ee(c).

79. 2007 Conn. Acts 233 § 3(5) (Reg. Sess.).

80. *Id.* § 3(4).

81. *Id.* § 5(d).

reasonable expenses the [DECD] determines are necessary or appropriate” for brownfield projects.<sup>82</sup>

Section 5 of the Task Force Act provides that financial assistance may not exceed 50% of a project’s total cost, although a 90% cap applies for (1) planning or site evaluation projects, and (2) any projects in targeted investment communities. Upon DECD approval, specified non-cash contributions may satisfy non-state shares of total project costs. The DECD may attach terms and conditions to the funding, such as assurances that applicants will fulfill their obligations and security for the financial assistance. Section 2 of the Task Force Act requires the DECD to consider the following in determining what funds should be available for an “eligible brownfield remediation”: resulting economic development opportunities; the project’s feasibility; the project’s environmental and health benefits; and potential contributions to the municipal tax base.<sup>83</sup>

Section 6 of the Task Force Act establishes a separate, non-lapsing Brownfield Remediation and Development Account (Brownfield Account)<sup>84</sup> from which the DECD, with the approval of the Office of Policy and Management, may provide the financial assistance described above. The statute requires the deposit of the following in the Brownfield Account: bond proceeds that the state issues for deposit into this Account and use in connection with brownfields; repayment of assistance under the Special Contaminated Property Remediation and Insurance Fund;<sup>85</sup> interest or other earned income from Brownfield Account funds; recoupments from parties responsible for pollution at brownfield sites receiving financial assistance; and all other funds as the law requires. The Brownfield Account also accepts federal, private, or other funds that the state receives in connection with brownfield sites.<sup>86</sup>

On November 2, 2007, Governor Rell signed into law a bond initiative for the next two years. This initiative includes \$9 million to fund the Brownfield Pilot Program<sup>87</sup> and \$5 million to fund the

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82. *Id.*

83. CONN. GEN. STAT. § 32-9ee(b).

84. Note that the account that Section 12 of the 2006 Brownfields Act established is called the “Connecticut brownfields remediation account,” CONN. GEN. STAT. § 32-9ff, and that Section 6 of the Task Force Act establishes a “Brownfield Remediation and Development Account” apparently without amending the pre-existing statutory provision.

85. *See infra* Part III.A.2.f.

86. With the approval of the Governor and the Bond Commission, proceeds from the sale of Urban Action Bonds, CONN. GEN. STAT. § 4-66c (2007), may be used to capitalize funds in the Brownfield Account.

87. *See supra* Part II.A.2.

Brownfield Account and, therefore, the Task Force Act's financial assistance program.<sup>88</sup>

*B. The Connecticut Property Transfer Act*

The Transfer Act imposes requirements for site investigation, remediation, and reporting which substantially affect the potential for brownfield development in the state. The Transfer Act requires a "certifying party," who is the seller or buyer of an "establishment" (a property or business as defined in the statute and explained below in Section B.1.a), either to certify that the property is clean or to investigate and remediate it according to the statute's specifications.<sup>89</sup> The Transfer Act therefore creates liability, under specified circumstances, for the remediation of contaminated properties for the buyer, seller, or other related party upon a property's transfer. The Transfer Act "protect[s] purchasers of property from being liable for the subsequent discovery of hazardous waste on the property"<sup>90</sup> and facilitates the clean-up of contaminated properties.

As of August 2007, Connecticut is one of only two states (the other is New Jersey)<sup>91</sup> that mandates property assessment and clean up, as necessary, triggered by a qualifying property's transfer from a seller to a buyer.<sup>92</sup> The Transfer Act is therefore a distinctive feature of the Connecticut legal regime directly impacting brownfield projects.

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88. S.B. 1502, Jun. Spec. Sess., §§ 13(f)(2)-(3); 32(f)(2)-(3) (Conn. 2007). Section 13 of the 2006 Brownfields Act authorizes the DECD and DEP to administer this Act within available appropriations and any funds allocated pursuant to three existing funding programs: Urban Action Bonds, CONN. GEN. STAT. § 4-66c; the Urban and Industrial Site Reinvestment Program, § 32-9t; and the Special Contaminated Property Remediation and Insurance Fund (SCPRIF), § 22a-133t. The effect of this provision is unclear although potentially insignificant as a practical matter. Another intricacy is that Section 9 of the Brownfields Act, § 32-9gg, provides eligibility to the owners of Connecticut manufacturing facilities designated as brownfield sites to apply for any available remediation funds, subject to various conditions, including that the applicant owners did not cause environmental contamination. While it does not say so explicitly, this provision apparently applies to the Brownfield Account and financial assistance available under the Task Force Act.

89. See generally *Visconti v. Pepper Partners Ltd. P'ship*, 77 Conn. App. 675, 676, 825 A.2d 210, 211 (2003).

90. *Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship*, 272 Conn. 14, 40-41, 861 A.2d 473, 490 (2004).

91. See David B. Farer, *Transaction-Triggered Environmental Laws, Transfer Notice Laws and Super Liens* 1-16 (Aug. 15, 2007) (citing N.J. STAT. ANN. § 13:1K-6), available at <http://www.farerlaw.com/library/library.asp>.

92. For an outline of state environmental laws triggered by property transactions, see *id.* at 1-54. Oregon, Indiana, New Hampshire, Minnesota, and Michigan have various disclosure

This Section outlines pertinent aspects of the Transfer Act, including the statutory triggers, applicable forms and fees, the DEP process that follows filing the forms, the effect of this process on enforcement, and the results of failing to comply with the Act.

### *1. Transfer Act Forms I, II, III, and IV*

The Transfer Act sets forth the conditions under which an owner may transfer a property or business operation at which hazardous waste was generated on or after November 19, 1980. The Transfer Act ensures, upon transfer of the property or business operation, the identification of contamination and the allocation of responsibility for remediation. The Act requires the owner of an “establishment” (as defined in the Transfer Act and discussed immediately below) to submit one of several property transfer “Forms” that disclose to the transferee and the DEP the environmental condition of the property or business operation. The choice of Form depends upon the environmental status of the establishment.

If the establishment has experienced a release of a hazardous waste or hazardous substance,<sup>93</sup> the parties to the transaction designate a “certifying party.” This party must certify that it agrees to investigate the property and remediate pollution caused by any release of a hazardous waste or hazardous substance from the establishment.<sup>94</sup> The certifying party is responsible for the property’s remediation until it meets Transfer Act specifications. The DEP will look to this party to complete the remediation, which is often a lengthy process.

Either a buyer or seller can serve as the “certifying party” for a transaction. This determination usually results from a negotiation between the parties and reflects the balance of interests between the parties. For example, a purchaser who needs the property immediately or a seller who is eager to dispose of a property is likely to assume the risks associated with being the “certifying party.” It follows that the

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requirements triggered by property transfer. *Id.* at 33-39, 41-48. In New Hampshire, owners of developed waterfront properties with septic disposal systems must conduct a site assessment and disclose the results to the buyer. *Id.* at 40-41. Property transfers in Iowa require the approval of the Department of Natural Resources. *Id.* at 16.

93. For definitions of “hazardous waste” and “hazardous substance,” see *infra* note 96.

94. This includes the cleanup of off-site property where a release from the establishment has migrated. See Conn. Dep’t of Env’tl. Prot., Policy on Upgradient Contamination (Aug. 28, 1997), [http://www.ct.gov/dep/cwp/view.asp?a=2715&q=324960&depNav\\_GID=1626](http://www.ct.gov/dep/cwp/view.asp?a=2715&q=324960&depNav_GID=1626) (last visited May 20, 2008).

purchase and sale contract often will state which party to the transaction is the “certifying party.” Such contractual provisions, like all others, are susceptible to common law claims such as fraudulent misrepresentation or non-disclosure.<sup>95</sup>

Four fundamental questions arise when considering the Transfer Act: (a) Does the property or business operation constitute an “establishment”? (b) Does the transaction constitute a “transfer”? (c) Which Form does the transaction require? (d) Who must submit or sign the Form?

*a. Does the Property or Business Operation Constitute an “Establishment”?*

An establishment consists of real property at which, or a business operation from which, (1) one hundred kilograms of hazardous waste<sup>96</sup> was generated in any one month on or after November 19, 1980; (2) hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported, or disposed of; (3) dry cleaning or furniture stripping was conducted on or after May 1,

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95. *Visconti*, 77 Conn. App. at 681-86, 825 A.2d at 214-16 (holding that plaintiff purchaser who agreed to bear the potential liability and remediation costs associated with environmental contamination did not assert sufficient facts to support his claims of fraudulent misrepresentation and non-disclosure against defendant seller with regard to the environmental status of the property).

96. “Hazardous waste” means any waste which is (A) hazardous waste identified in accordance with Section 3001 of the Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 9601 et seq., (B) hazardous waste identified by regulations adopted by the commissioner of environmental protection, or (C) polychlorinated biphenyls in concentrations greater than fifty parts per million except that sewage, sewage sludge and lead paint abatement wastes shall not be considered to be hazardous waste for the purposes of this section and sections 22a-134a to 22a-134d, inclusive. CONN. GEN. STAT. § 22a-134(4) (West 2007).

Although the Transfer Act conditions its applicability with regard to the generation of “hazardous waste,” its requirements for the four certifying Forms described in Part II.B.1.c also refer to “hazardous substances.” *Id.* § 22a-134(10)-(13). “Hazardous substance” means “hazardous substance as defined in Section 101 of [CERCLA], 42 U.S.C. 9601, or a petroleum by-product for which there are remediation standards adopted pursuant to section 22a-133k or for which remediation standards have a process for calculating the numeric criteria of such substance.” CONN. GEN. STAT. § 22a-134(24). *See also* *Colonnade One at Old Greenwich Ltd. P’ship v. Electrolux Corp.*, 767 F.Supp. 1215, 1217-18 (D. Conn. 1991) (noting that “hazardous waste” triggers the Transfer Act even when defendants did not intend for the hazardous waste to leak into the environment).

1967; or (4) a vehicle body repair facility was located on or after May 1, 1967.<sup>97</sup>

Legal actions brought to allocate the costs of assessing and, sometimes, remediating properties according to Transfer Act requirements often turn on the threshold question of whether the property qualifies as an “establishment.” In *Flynn v. Polemis*,<sup>98</sup> for example, after plaintiff Flynn sold a property in 2004 to a third party, she learned that the property, which she had purchased in 2000 from defendant Polemis, qualified as an establishment. Accordingly, Flynn became a certifying party on the 2004 transaction and incurred Transfer Act compliance costs. She then sued Polemis for his failure to comply with Transfer Act requirements in 2000. Polemis denied that the property constituted an establishment and the parties filed cross-motions for summary judgment. Flynn’s basis for alleging the property constituted an establishment rested on her buyer’s discovery of a “Notification of Waste Activity” indicating “100 to 1,000 kg/month” as well as a “Hazardous Waste Manifest” for five hundred pounds of hazardous waste prepared during Polemis’s ownership of the property. Polemis based his cross motion on the affidavit of a Licensed Environmental Professional stating that the discovered documents did not provide adequate evidence of requisite hazardous waste activity, and that the property did not qualify as an establishment. The court denied each party’s motion on the substantive question, holding that the materials presented for decision raised a question to be decided by the trier of fact.<sup>99</sup> Connecticut cases also have examined whether a site contaminated with polychlorinated biphenols (PCBs) constitutes an establishment,<sup>100</sup> and whether a particular property generated over one hundred kilograms of hazardous waste in any single month.<sup>101</sup>

If a property or business operation qualifies as an establishment, the parties to the transaction must move to the next inquiry.

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97. CONN. GEN. STAT. § 22a-134(3).

98. *Flynn v. Polemis*, No. FBTCV054010079S, 2006 WL 3492069, at \*1 (Conn. Super. Ct. Nov. 17, 2006).

99. *Id.* at \*2-\*5. The court ultimately held that the claim is barred by a three-year statute of limitations for torts which was triggered when defendant sold plaintiff the property without complying with the Transfer Act. *Id.* at \*6-\*8.

100. *Colonnade*, 767 F.Supp. at 1217-18.

101. *Hart v. Schwartz*, No. CV 920331912S, 1997 WL 625467, at \*8 n.5 (Conn. Super. Ct. Sept. 30, 1997).

*b. Does the Transaction Constitute a “Transfer”?*

The Transfer Act defines “transfer” to mean “any transaction or proceeding through which an establishment undergoes a change in ownership,” subject to a lengthy list of specific exempted transactions.<sup>102</sup> A “transfer” of an “establishment” does *not* include, among other things, a corporate reorganization not substantially affecting the ownership of the establishment; the issuance of stock or other securities of an entity which owns or operates an establishment; the transfer of stock, securities, or other ownership interests representing less than 40% of the ownership of the entity that owns or operates the establishment; or the termination of a lease and conveyance, assignment, or execution of a lease for a period less than ninety-nine years (including the conveyance, assignment, or execution of a lease with options or similar terms that will extend the period of the leasehold to ninety-nine years).<sup>103</sup>

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102. CONN. GEN. STAT. § 22a-134(1).

103. *Id.* The Act *excludes* the following from the definition of “transfer”:

- conveyance or extinguishment of an easement;
- conveyance of an establishment through a foreclosure, foreclosure of a municipal tax lien, a tax warrant sale (i.e., when individuals acquire tax delinquent properties that they intend to sell for back taxes at tax warrant sales), or, provided the establishment is within the Brownfields Act pilot program, a subsequent transfer by a municipality that has foreclosed municipal tax liens or has acquired title to the property through a tax warrant sale;
- conveyance of a deed in lieu of foreclosure to a lender;
- conveyance of a security interest;
- termination of a lease and conveyance, assignment or execution of a lease for a period less than ninety-nine years, including conveyance, assignment or execution of a lease with options or similar terms that will extend the period of the leasehold to ninety-nine years;
- any change in ownership approved by the Probate Court;
- devolution of title to a surviving joint tenant, or to a trustee, executor, or administrator under the terms of a testamentary trust or will, or by intestate succession;
- corporate reorganization not substantially affecting the ownership of the establishment;
- the issuance of stock or other securities of an entity which owns or operates an establishment;
- the transfer of stock, securities, or other ownership interests representing less than forty per cent of the ownership of the entity that owns or operates the establishment;
- any conveyance of an interest in an establishment where the transferor is the sibling, spouse, child, parent, grandparent, child of a sibling, or sibling of a parent of the transferee;
- any conveyance of an interest in an establishment to a trustee of an *inter vivos* trust created by the transferor solely for the benefit of the transferor’s sibling, spouse, child, parent, grandchild, child of a sibling, or sibling of a parent;



Section 3 of the Brownfields Act<sup>104</sup> adds two exemptions from the Transfer Act requirements. It exempts transactions in which (1) municipalities acquire tax delinquent properties that they intend to sell for back taxes at tax warrant sales, or (2) municipalities transfer the

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- any conveyance of a portion of a parcel upon which portion no establishment is or has been located and upon which there has not occurred a discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste, provided either the area of such portion is not greater than fifty per cent of the area of such parcel, or written notice of such proposed conveyance and an environmental condition assessment form for such parcel is provided to the DEP sixty days prior to such conveyance;
  - conveyance of a service station;
  - any conveyance of an establishment which, prior to July 1, 1997, had been developed solely for residential use and such use has not changed;
  - any conveyance of an establishment to any entity created or operating under CONN. GEN. STAT. §§ 8-124 *et seq.*, 8-186 *et seq.*, an urban rehabilitation agency as defined in CONN. GEN. STAT. § 8-292, a municipality under CONN. GEN. STAT. § 32-224, or the Connecticut Development Authority or any subsidiary of the Authority;
  - any conveyance of a parcel in connection with the acquisition of properties to effectuate the development of the overall project;
  - The conversion of a general or limited partnership to a limited liability company under CONN. GEN. STAT. § 34-199;
  - the transfer of general partnership property held in the names of all of its general partners to a general partnership which includes as general partners, immediately after the transfer, all of the same persons as were general partners immediately prior to the transfer;
  - the transfer of general partnership property held in the names of all of its general partners to a limited liability company which includes as members, immediately after the transfer, all of the same persons as were general partners immediately prior to the transfer;
  - acquisition of an establishment by any governmental or quasi-governmental condemning authority;
  - conveyance of any real property or business operation that would qualify as an establishment solely as a result of (i) the generation of more than one hundred kilograms of universal waste in a calendar month, (ii) the storage, handling or transportation of universal waste generated at a different location, or (iii) activities undertaken at a universal waste transfer facility, provided any such real property or business operation does not otherwise qualify as an establishment, that there has been no discharge, spillage, uncontrolled loss, seepage or filtration of a universal waste or a constituent of universal waste that is a hazardous substance at or from such real property or business operation and that universal waste is not also recycled, treated, except for treatment of a universal waste pursuant to 40 C.F.R. 273.13(a)(2) or (c)(2) or 40 C.F.R. 273.33 (a)(2) or (c)(2), or disposed of at such real property or business operation; and
  - conveyance of a unit in a residential common interest community in accordance with CONN. GEN. STAT. § 22a-134i.

*Id.* Note that while conveyance through foreclosure is excluded from the definition of “transfer,” the transfer of foreclosed property by a mortgagee is not exempt. *Stahl v. Webster Bank Nat’l Ass’n*, No. CV044005592S, 2007 WL 611197, at \*1 (Conn. Super. Ct. Feb. 2, 2007).

104. See *supra* Part II.A.3.

acquired “establishment” subsequent to taking title through a municipal tax lien foreclosure or a tax warrant sale. The latter exemption applies only if the “establishment” is enrolled in the Brownfield Pilot Program, discussed above.

Additional specialized exemptions to the Transfer Act lie buried deep within the Watercraft Act.<sup>105</sup> First, Sections 11 and 12 of the Watercraft Act exempt from the Transfer Act the sale of individual residential condominium units constructed on property with ongoing remediation, so long as the building’s developer remains the “certifying party”<sup>106</sup> for the overall project and secures a surety bond or other financial assurance.<sup>107</sup> This bond must cover the cost of remediation, but the required amount may decrease as remediation is completed. A condominium seller must notify a prospective purchaser about the building’s environmental condition, the status of the remediation, and any environmental land use restrictions (ELURs).<sup>108</sup> An ELUR is “a binding agreement between a property owner and the [DEP] which is recorded on the land records.”<sup>109</sup> Its purpose “is to minimize the risk of human exposure to pollutants and hazards to the environment by preventing specific uses or activities at a property or portion of a property.”<sup>110</sup> A typical ELUR might consist of a prohibition on excavation of soils or the use of the property as a school or day care center. In this way, “the remedial goals for a property [are] depend[e]nt on the exposure risk associated with its use.”<sup>111</sup>

In addition, Section 14 of the Watercraft Act exempts from the Transfer Act a property or business that would qualify as an “establishment” solely by virtue of its activities involving “universal waste.”<sup>112</sup> Universal waste includes particular types of batteries, pesticides, thermostats, lamps, and used electronics and is generally subject to more lenient requirements than hazardous waste. As a practical matter, this provision exempts, for example, certain office

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105. 2006 Conn. Acts 76 (Reg. Sess.).

106. *See infra* Part II.B.1.d.

107. CONN. GEN. STAT. § 22a-134(1)(W) (2007). More specifically, this exemption applies to the conveyance of units in “the residential common interest community” (which include condominium units in apartment buildings) if the community’s “declarant” (generally, the building’s developer) acts as the certifying party and secures financial assurance.

108. *Id.* § 22a-134i.

109. *See* Conn. Dep’t of Env’tl. Prot., Environmental Land Use Restrictions Fact Sheet (2007), <http://www.ct.gov/dep/cwp/view.asp?a=2715&q=325002> (last visited May 20, 2008).

110. *Id.*

111. *Id.*

112. CONN. GEN. STAT. § 22a-134(26) (defining “universal waste”).

buildings. This exemption requires that there is no discharge or seepage of universal waste qualifying as a hazardous substance, and that the universal waste is not recycled, treated, or disposed of at the property or business.<sup>113</sup>

If an “establishment” undergoes a “transfer,” then the transferor (the seller) must answer the next question.

*c. Which Form Does the Transaction Require?*

The Transfer Act requires the transferor of an establishment to submit to the transferee (the buyer) and file with DEP one of four distinctive forms setting forth the environmental condition of the site.<sup>114</sup> This duty is non-delegable.<sup>115</sup> The forms cover environmental conditions ranging from no pollution to completed remediation. In all transfers, the Transfer Act requires an investigation of the parcel in accordance with prevailing standards and guidelines in order to determine the condition of the property.

*Form I* applies in two instances.<sup>116</sup> In the first, no release of a “hazardous waste”<sup>117</sup> or “hazardous substance”<sup>118</sup> has occurred at the establishment. In the second, no release of a hazardous waste has occurred at the establishment, but any release of a hazardous substance that has occurred has been remediated in accordance with Connecticut’s Remediation Standard Regulations (RSRs).<sup>119</sup>

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113. *Id.* § 22a-134(1)(V).

114. For electronic versions of the Forms, see Conn. Dep’t of Env’tl. Prot., Land Use Permits and General Permits, [http://www.ct.gov/dep/cwp/view.asp?a=2709&q=324222&depNav\\_GID=1626#PropertyTransferProgram](http://www.ct.gov/dep/cwp/view.asp?a=2709&q=324222&depNav_GID=1626#PropertyTransferProgram) (last visited May 20, 2008). There are eight versions; each of the four Forms is available for real estate and for business operations.

115. *Hartt v. Schwartz*, No. CV 920331912S, 1997 WL 625467, at \*5 (Conn. Super. Ct. Sept. 30, 1997) (finding that a transferor may seek indemnification from a third party of this non-delegable duty only if the transferor entrusted performance of this duty to that third party).

116. CONN. GEN. STAT. § 22a-134(10) (defining “Form I”).

117. See *supra* note 96 for the definition of “hazardous waste.”

118. See *supra* note 96 for the definition of “hazardous substance.”

119. CONN. AGENCIES REGS. §§ 22a-133k-1, 22a-133k-3 (1997). In addition to providing cleanup standards under the Transfer Act, the RSRs provide detailed guidance for remedial actions, including voluntary remediation. See *infra* Part II.C. As of June 2008, the DEP has prepared a draft of proposed revisions to the RSRs. When the DEP finalizes these proposed revisions, it will open them for public review and comment.

One of the other three Forms applies when “a discharge, spillage, uncontrolled loss, seepage, or filtration of hazardous waste or a hazardous substance has occurred” at the establishment.<sup>120</sup>

*Form II* applies when cleanup has been completed and the DEP has approved, or an LEP has verified, that it was performed in accordance with the RSRs.<sup>121</sup>

*Form III* applies when the contamination has not been fully remediated, or when the environmental conditions at the establishment are unknown. The certifying party for a Form III agrees to investigate the parcel and to remediate the pollution in accordance with the RSRs. The statute does not require completion of the remediation before the transfer of the establishment.<sup>122</sup>

*Form IV* applies when all remedial actions are complete in accordance with the RSRs except for post-remediation monitoring, natural attenuation monitoring, or the recording of an environmental land use restriction.<sup>123</sup> The certifying party for a Form IV must agree to perform these remaining activities. This party also must certify that, if further investigation and/or remediation is necessary, he or she will investigate in accordance with prevailing standards and/or remediate in accordance with the RSRs.<sup>124</sup>

An Environmental Condition Assessment Form (ECAF) must accompany all four Forms. An ECAF requires an environmental assessment and information pertaining to site and waste management history, the environmental setting, and contaminants in the environment. An ECAF also requires supporting documents and a certification.<sup>125</sup>

*d. Who Must Submit or Sign the Form?*

Forms I and II each constitute a “Negative Declaration”<sup>126</sup> with regard to contamination at an establishment. For establishments that

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120. CONN. GEN. STAT. §§ 22a-134(11), 22a-134(12), 22a-134(13).

121. *Id.* § 22a-134(11) (defining “Form II”).

122. *Id.* § 22a-134(12) (defining “Form III”).

123. *See supra* Part II.B.1.b.

124. CONN. GEN. STAT. § 22a-134(13) (defining “Form IV”).

125. *Id.* § 22a-134(17) (defining “environmental condition assessment form”). ECAFs must be prepared under LEP supervision. *See* Conn. Dep’t of Env’tl. Prot., Land Use Permits and General Permits, *supra* note 114.

126. “Negative Declaration” was the section heading title for CONN. GEN. STAT. § 22a-134a prior to an amendment effective in 1997. “Negative Declaration” continues to describe accurately a Form I or Form II filing. *See Visconti v. Pepper Partners Ltd. P’ship*, 77 Conn. App. 675, 676, 825 A.2d 210, 211 (2003).

meet the eligibility requirements for filing a Form I or Form II, the *transferor* of that establishment must submit and certify Form I or Form II to the transferee before the transfer, and to the DEP within ten days after the transfer. If the establishment does not meet the criteria for a Negative Declaration, however, the Transfer Act requires the *transferor* to submit to the transferee prior to the transfer and to file with the DEP within ten days after the transfer “a complete Form III or Form IV prepared and *signed by a party associated with the transfer to the transferee.*”<sup>127</sup> This signatory party may include one or more of the following entities: present or past owner of the establishment; owner of the real property on which the establishment is located; transferor, transferee, lender, guarantor, or indemnitor; business entity which operates or operated the establishment; or the state.<sup>128</sup> The statute provides, however, that “[i]f no other party associated with the transfer of an establishment prepares and signs the proper Form as a certifying party, the transferor shall have the obligation for such preparation and signing.”<sup>129</sup>

The *certifying party* to the transaction must “simultaneously submit with the submission of a Form I, Form III or Form IV to the [DEP]” a completed ECAF and certify that the ECAF is correct and accurate. Upon the DEP’s written request, the certifying party to any of the four Forms also must provide the DEP with technical plans, reports, and other supporting documentation.<sup>130</sup>

#### *e. Filing Fees*

The Transfer Act requires the certifying party<sup>131</sup> to pay certain fees associated with the filing of the four Forms.<sup>132</sup> The fees for filing Forms I and II are flat—\$300 and \$1,050 respectively.<sup>133</sup> Upon filing with the DEP either a Form III or Form IV, the party applying for certification (as discussed in more detail below) pays an initial fee of \$3,000. If an LEP verifies the remediation and the DEP does not indicate that it will require a further written approval of the remediation, then no additional fee is required. If, however, DEP informs the certifying party that it will

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127. CONN. GEN. STAT. § 22a-134a(c) (emphasis added).

128. *Id.* § 22a-134(7).

129. *Id.* § 22a-134a(c).

130. *Id.* § 22a-134a(d).

131. CONN. GEN. STAT. § 22a-134e(j).

132. *See generally id.* § 22a-134e(j).

133. *Id.* § 22a-134e(b).

require a written approval, then the balance of the “total fee” becomes due before DEP issues its final approval of the remediation.<sup>134</sup> The “total fees” for filing Forms III and IV depend on the final cost of remediation of the establishment.<sup>135</sup>

## *2. Transfer Act Process and DEP Response*

The DEP must notify the transferor whether it will accept a Form I or Form II within ninety days after receipt of the Form from the transferor.<sup>136</sup> The DEP may decline to accept these Negative Declarations at face value and then require the follow-up submission of a Form III.

Upon receiving a Form III or Form IV, the DEP has thirty days to notify the party who filed the Form whether the Form is complete or incomplete. The Task Force Act’s amendments to the Transfer Act provide the “default” position that an LEP will verify the site investigation and remediation unless the DEP, within seventy-five days after receiving the Form III or IV, notifies the certifying party in writing that the remediation will require DEP review and approval.<sup>137</sup> The DEP considers the risks to human health and the environment, the degree of the investigation, the complexity of the environmental condition, among other factors, in determining whether to require DEP oversight.<sup>138</sup>

### *a. Licensed Environmental Professional Oversight*

For the typical case where an LEP oversees the remediation process (that is, when the DEP has not provided notice that it will oversee the remediation), the Transfer Act provides that, within seventy-five days of receiving the DEP’s notice that the Form is complete (or later if the DEP specifies), the certifying party must submit to the DEP a schedule for investigating and remediating the establishment.<sup>139</sup> This schedule must provide that investigation of the establishment will be completed within two years after the date of receipt of the notice and that remediation will be initiated within three years after the date of the receipt of the notice.

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134. *Id.* § 22a-134e(m).

135. CONN. GEN. STAT. §§ 22a-134e(n), (o).

136. *Id.* § 22a-134a(c).

137. *Id.* § 22a-134a(e).

138. *See generally id.* § 22a-134a(f) (listing factors in DEP’s determination of whether an LEP may verify remediation).

139. CONN. GEN. STAT. § 22a-134a(g)(1).

The certifying party also must provide the DEP with a schedule for providing public notice of the remediation prior to the start of the remediation.<sup>140</sup>

Within two years after receipt of the notice that the Form III or IV is complete, the certifying party must submit to the DEP documentation, approved by an LEP, that the investigation is complete in accordance with the RSRs. Within three years after receipt of the notice that the Form III or IV is complete, the certifying party must notify the DEP that remediation has begun and submit a remedial action plan approved by the LEP. The certifying party must investigate and remediate the establishment according to the submitted schedule, but the DEP has the discretion to change the schedule and/or timeframes for investigation and remediation.<sup>141</sup>

Once the certifying party has completed the remediation in accordance with the RSRs, it must submit to the DEP a final verification by an LEP.<sup>142</sup> This verification, on a DEP Form, consists of an opinion “that an investigation of the parcel has been performed in accordance with prevailing standards and guidelines and that the establishment has been remediated in accordance with the remediation standards.”<sup>143</sup>

Sections 13 and 15 of the Watercraft Act<sup>144</sup> amend the Transfer Act to permit LEPs to verify the remediation of a portion of an “establishment” when the remainder is not yet clean. In this way, the amendment allows certifying parties to satisfy their Transfer Act responsibilities as to that portion. The final verification for an entire establishment may include and rely on a verification for a portion of this establishment.<sup>145</sup>

*b. Department of Environmental Protection Oversight*

In the event that the DEP determines that it will oversee the investigation and remediation of the property, the certifying party has thirty days from the receipt of the notice to provide the DEP with a schedule. This schedule must include projected dates for investigating the establishment, submitting reports to the DEP, and providing public notice prior to the start of the remediation. When the DEP approves this

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140. *Id.*

141. *Id.*

142. *Id.* § 22a-134a(g)(1).

143. CONN. GEN. STAT. § 22a-134(19).

144. 2007 Conn. Acts 233 (Reg. Sess.).

145. CONN. GEN. STAT. §§ 22a-134a(g)(2), (h)(2).

schedule, the certifying party must submit various reports (as the schedule requires) to the DEP for its review and approval and then implement the course of action set forth in the reports. The DEP may determine at any time in the process that DEP review and approval is required in lieu of LEP verification.<sup>146</sup>

### 3. *Effect of Completion of Site Remediation on Enforcement*

When the DEP oversees the site's remediation, the DEP should send a "no further action letter" to the transferor when the remediation is complete. This letter should indicate that the DEP will not pursue the parties with regard to liability associated with this site.

When an LEP oversees the site's remediation, the LEP's verification that the parties receive at the remediation's completion should be tantamount to a DEP "no further action" letter since the LEP has delegated authority to act on behalf of the DEP. As a practical matter, however, a certifying party remains potentially liable until the time has elapsed for DEP to conduct an audit of the LEP's verification. Under the 2007 Task Force Act, the DEP may audit a verification for any reason within three years after its receipt of the verification, but may not audit a verification after three years unless there are circumstances, as set forth in the statute, that justify the later review.<sup>147</sup> The statute does not provide a timeframe for completion of the audit.

By contrast, the statutory voluntary remediation program of Connecticut General Statutes (hereinafter Conn. Gen. Stat.) Section 22a-133y, discussed in more detail below in Section C, provides closure more quickly and definitely. Under this program, an LEP issues a "final

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146. *Id.* § 22a-134a(h).

147. 2007 Conn. Acts 233 § 10 (codified at CONN. GEN. STAT. § 22a-134a(g)(3)(A)). The DEP reserves the right to audit a verification even after the close of this three-year period under the following circumstances: (1) the DEP has reason to believe that the verification was obtained through the submission of erroneous or misleading information or that there were misrepresentations in connection with the verification's submission; (2) the verification is submitted pursuant to a DEP order to comply with the Transfer Act; (3) the certifying party has not done post-verification monitoring or operations and maintenance; (4) the verification relies on an environmental land use restriction, discussed *supra* in Part II.B.1.b, which is not recorded on the land records as required; (5) the DEP determines there has been a violation of the Transfer Act; or (6) the DEP "determines that information exists indicating that the remediation may have failed to prevent a substantial threat to public health or the environment." *Id.* In addition, if the DEP requests additional information during an audit and does not receive it within ninety days of this request, the DEP may suspend the audit, thereby extending the three-year timeframe until a final verification, or may complete the audit before requesting additional information. *Id.*



remedial action report” which “shall be deemed approved unless, within sixty days of such submittal,” DEP issues notice that it will conduct an audit. The statute does not provide any exceptions to this time limit. Further, the DEP must conduct the audit within six months of its notice to do so.<sup>148</sup> The Transfer Act, on the other hand, authorizes the DEP to audit a verification within three years of its submission and possibly longer (due to a long list of exceptions), with no mandatory time limit for completing the audit. This looming possibility of a DEP audit discourages, to some extent, the transfer of environmentally complex properties in Connecticut.<sup>149</sup>

#### 4. *Failure to Comply*

The DEP may issue an order to any person who fails to comply with the provisions of the Transfer Act, including any person who fails to file a Form or who files an incomplete or incorrect Form.<sup>150</sup> Any person who violates any provision of the Transfer Act may be assessed a civil penalty or fined not more than \$25,000 for each offense (\$50,000 per day per violation for knowingly violating the provisions of the Transfer Act).<sup>151</sup> Additionally, if no Form is filed for a transfer, the DEP may issue an order to the transferor, the transferee, or both, requiring a filing.<sup>152</sup> The DEP may also ask the Attorney General to bring an action in Superior Court against any person who fails to comply with the Transfer Act, including any person who fails to file a Form.<sup>153</sup> In one such case, a court imposed a penalty of \$100,000 (the maximum at the time) on the buyer of a property for not filing a Transfer Act Form.<sup>154</sup> One court held, however, that an individual corporate officer was not personally liable for a corporation’s Transfer Act violations, *i.e.*,

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148. CONN. GEN. STAT. § 22a-133y(c).

149. Nor does the Transfer Act contain a “prospective purchaser” exception from liability such as the exception under CERCLA described above. As discussed *supra* in Part II.A.1.c, the Brownfields Act erects a barrier to liability for eligible purchasers if a property is remediated under the Act’s Brownfield Pilot Program.

150. CONN. GEN. STAT. § 22a-134c.

151. *Id.* §§ 22a-134d; 22a-438(a), (c).

152. *Id.* § 22a-134a(j).

153. *Id.*

154. *Holbrook v. Cadle Props., Inc.*, No. CV970567429, 2000 WL 1872041, at \*6, \*16 (Conn. Super. Ct. Dec. 4, 2000).

that the so-called “responsible corporate officer doctrine” did not apply under these circumstances.<sup>155</sup>

If the certifying party is the transferor and fails to comply with any provision of the Transfer Act, then the transferee is entitled to recover damages from the transferor.<sup>156</sup> The transferor is strictly liable for all remediation costs and all “direct and indirect damages,”<sup>157</sup> which at least one court has held include attorneys’ fees.<sup>158</sup>

Judicial application of this statutory damages provision has yielded varying results. In *Brancato v. Kaye*,<sup>159</sup> a court upheld a jury verdict for no damages despite the finding that defendant seller did not file Transfer Act Forms where contamination was subsequently discovered due to defendant’s spill. By contrast, in *K&S Nam, LLC v. Corso*,<sup>160</sup> a court awarded a pre-judgment remedy of \$1.435 million (the value of the estimated cost of environmental remediation less the amount of the debt the buyer owed the seller) where the seller’s attorney was aware of environmental contamination and of the Transfer Act, but the contract represented that there was no contamination and no forms were filed. The *Brancato* court emphasized that the Transfer Act remedy requires proximate causation; the damages must result from the transferor’s failure to provide a form to the transferee and the DEP (and not from mismanagement of a business or failure to mitigate costs).<sup>161</sup> The *Nam* court, with a different procedural posture, simply found that plaintiffs had “shown probable cause that judgment [would] be rendered in the

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155. *Rocque v. Schiavone*, No. CV030825384, 2005 WL 1434812, at \*1 (Conn. Super. Ct. May 24, 2005).

156. CONN. GEN. STAT. § 22a-134b; *E. Greyrock, LLC v. OBC Assoc., Inc.*, No. X08CV044002173S, 2006 WL 416302, at \*3-\*5 (Conn. Super. Ct. Feb. 7, 2006) (holding that a § 22a-134b cause of action is available only against the party who transferred the property to the plaintiff and not against any previous transferor); *Alcoa Composites, Inc. v. BTI Tech.*, No. CV000093208, 2003 WL 22206238, at \*7 (Conn. Super. Ct. Sept. 11, 2003) (holding that only the transferor, and not a “certifying party” more generally, can be strictly liable under § 22a-134b).

157. CONN. GEN. STAT. § 22a-134b.

158. *Alcoa Composites, Inc. v. Bonded Techs., Inc.*, No. CV000093208, 2002 WL 1134548, at \*3 (Conn. Super. Ct. May 2, 2002).

159. *Brancato v. Kaye*, No. X08CV984002302S, 2007 WL 865561, at \*3-\*4 (Conn. Super. Ct. Feb. 28, 2007).

160. *K & S Nam, LLC v. Corso*, No. CV075002376S, 2007 WL 1413358, at \*1 (Conn. Super. Ct. Apr. 26, 2007).

161. *Brancato*, 2007 WL 865561, at \*3, \*4; *see also* *Hartt v. Schwartz*, No. CV 920331912S, 1997 WL 625467, at \*5 (Conn. Super. Ct. Sept. 30, 1997) (noting that plaintiff purchaser claimed that its damages resulted from the defendant seller’s failure to provide a Transfer Act form and not from the property’s contamination, which occurred prior to the conveyance).

matter in the plaintiffs' favor in the amount of" the estimated remedial costs.<sup>162</sup>

There is no statutory remedy for a transferor when the certifying party is a transferee who fails to comply with the Transfer Act. In addition, the party to a transfer who is not the certifying party generally has no potential liability under the Transfer Act. At least one court has held, however, that parties can contractually apportion the responsibility for site investigation and remediation that would otherwise attach to the certifying party.<sup>163</sup>

Regardless of which party has signed as the certifying party, both transferor and transferee may be liable under other statutes, as the Transfer Act does not affect the DEP's authority under any other statute or regulation, including but not limited to issuing orders to either of them.<sup>164</sup> Therefore, if either the transferor or the transferee directly or indirectly causes the contamination, causes an emergency due to a spill, or owns certain types of hazardous wastes that the DEP has removed, the Attorney General, on the request of the DEP, may sue for the DEP's costs and expenses in investigating and remediating the contamination.<sup>165</sup> If the DEP incurs costs under a contract for the containment or remediation of contamination where the party causing the contamination does not act immediately or is unknown or where the federal government does not assume these costs, the Attorney General may sue to recover these contractual costs.<sup>166</sup>

Both transferor and transferee can also sue and be sued for common law causes of action arising from failure to disclose information about the environmental status of the property.<sup>167</sup> Finally, Connecticut courts

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162. *K & S Nam, LLC*, 2007 WL 1413358 at \*4.

163. *Alcoa Composites, Inc. v. BTI Tech.*, No. CV000093208, 2003 WL 22206238, at \*5, \*7 (Conn. Super. Ct. Sept. 11, 2003).

164. CONN. GEN. STAT. § 22a-134c (2007). *See, e.g.*, *Holbrook v. Cadle Props., Inc.*, No. CV970567429, 2000 WL 1872041, at \*16, \*17 (Conn. Super. Ct. Dec. 4, 2000) (imposing a penalty of \$100,000 for violation of the Transfer Act and a penalty of \$2,043,000 for violation of a DEP order pursuant to § 22a-431).

165. CONN. GEN. STAT. § 22a-451(a). A party that negligently causes contamination may be liable for damages of one and a half times the incurred costs and expenses, and a party that willfully causes contamination may be liable for damages twice the incurred costs and expenses. Recoverable damages include administrative costs, calculated as the statute specifies. *Id.*

166. *Id.* § 22a-451(c).

167. *See, e.g.*, *Hart v. Schwartz*, No. CV 920331912S, 1997 WL 625467, at \*9 (Conn. Super. Ct. Sept. 30, 1997) ("[A]n allegation of failing to disclose a 'known fact' when the law created an obligation to disclose it [in the Transfer Act], states a claim on which relief may be

have upheld contractual provisions allocating environmental risks, including “as is” clauses in some instances,<sup>168</sup> to encompass Transfer Act liability.

### *C. Connecticut Voluntary Remediation Programs*

Connecticut has two Voluntary Remediation Programs administered by the DEP’s Bureau of Water Management, Division of Permitting, Enforcement, and Remediation. Unlike the Covenants Not to Sue, discussed below in Part II.D, even parties responsible for contamination at a site (and those affiliated with such responsible parties) may participate in and take advantage of these programs. Voluntary cleanups completed under these programs will qualify the owner of an establishment to make a Negative Declaration with a Form II filing under the Transfer Act.<sup>169</sup>

#### *1. Program Under Connecticut General Statutes Section 22a-133x*

The first Voluntary Remediation Program, found at Conn. Gen. Stat. Section 22a-133x, applies to owners of sites that are (1) municipally-owned; (2) defined as “establishments” under the Transfer Act; (3) on the inventory of hazardous waste disposal sites maintained pursuant to Conn. Gen. Stat. Section 22a-133c; or (4) located in areas where groundwater is classified as GA or GAA (designations denoting that groundwater is known or presumed to be suitable for drinking without treatment).<sup>170</sup>

To participate in the Section 22a-133x program, owners of eligible contaminated sites must submit to the DEP an ECAF and a \$3,000

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granted as a matter of law. To do so as a matter of fact, however, there must be evidence upon which the trier of fact could conclude that the fact was known at the time of the duty.”).

168. See, e.g., *Visconti v. Pepper Partners Ltd. P’ship*, 77 Conn. App. 675, 676, 825 A.2d 210, 211 (2003); *Chase ex rel. Wilson v. Smith*, No. CV030080383, 2006 WL 2556632, at \*1 (Conn. Super. Ct. Aug. 15, 2006); cf. *Holly Hill Holdings v. Lowman*, 226 Conn. 748, 756, 628 A.2d 1298, 1302-03 (Conn. 1993) (holding that an “as is” clause where the parties had actual knowledge of underground storage tanks on the property bars sellers’ counterclaim and special defenses predicated on buyer’s failure to provide notification required by applicable regulations); but see *Colonnade One at Old Greenwich Ltd. P’ship v. Electrolux Corp.*, 767 F. Supp. 1215, 1217 (D. Conn. 1991) (rejecting seller’s argument that buyer is bound by an “as is” clause due to a post-litigation settlement and the operation of the newly-passed Transfer Act).

169. CONN. GEN. STAT. §§ 22a-133x(d), 22a-133y(d).

170. *Id.* § 22a-133x(a).

fee.<sup>171</sup> Within thirty days after receipt of an ECAF, the DEP notifies the owner in writing whether (1) the owner may employ an LEP to verify that the site's investigation and remediation is consistent with the RSRs, or (2) the DEP will oversee the site's investigation and remediation.<sup>172</sup>

If the DEP allows for LEP oversight, within ninety days of this notification, owners must submit a statement of proposed actions for site investigation and remediation and a schedule. The DEP may also require the submission of technical plans and reports (this submission is mandatory if a third party requests the information). Owners must notify the DEP of schedule changes and, when the remediation is complete, must submit to the DEP an LEP verification.<sup>173</sup> For sites requiring DEP oversight, within thirty days of this notification (or by a different date, at the DEP's discretion), owners must submit to the DEP for its review and written approval a proposed schedule. As the work progresses, owners must submit to the DEP for its review and written approval technical plans, technical reports, and progress reports, and undertake the work specified in these submissions. The DEP may approve modifications and may allow for LEP oversight.<sup>174</sup> For both LEP- and DEP-led sites, owners must undertake specified notification requirements prior to beginning remedial action.<sup>175</sup> Owners may use written DEP approvals or LEP verifications that the site has been remediated in accordance with the RSRs as the basis for submitting a Form II under the Transfer Act.<sup>176</sup>

## *2. Program Under Connecticut General Statutes Section 22a-133y*

A second Voluntary Remediation Program, found at Conn. Gen. Stat. Section 22a-133y, applies to sites with hazardous waste spills. To qualify for this program, such sites must be (1) located in an area with GB or GC groundwater designations (denoting groundwater known or

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171. *Id.* § 22a-133x(e).

172. *Id.* § 22a-133x(a).

173. CONN. GEN. STAT. § 22a-133x(b).

174. *Id.* § 22a-133x(c).

175. Site owners must (1) publish notice of the remedial action in a local newspaper of substantial circulation in the town where the property is located; and (2) notify the municipal director of health. In addition, a site owner must (3) either (a) for at least thirty days, put on the property a sign (at least 4 feet x 6 feet in size), clearly visible from the public highway, that reads "ENVIRONMENTAL CLEAN-UP IN PROGRESS AT THIS SITE. FOR FURTHER INFORMATION CONTACT: \_\_\_\_" and include a telephone number for an office from which any interested person may obtain additional information about the remedial action, or (b) mail notice of the remedial action to each owner of record of abutting property. *Id.* § 22a-133x(g).

176. *Id.* § 22a-133x(d).

presumed unsuitable for drinking without treatment and underlying waste disposal and surrounding areas) and (2) not subject to a DEP order, consent order, or stipulated judgment regarding a spill.<sup>177</sup>

To participate in the program, site owners must, following a Phase II assessment or Phase III investigation,<sup>178</sup> submit to the DEP an LEP-prepared Phase III remedial action plan<sup>179</sup> and comply with specified public notice requirements.<sup>180</sup> The DEP may review the plan and advise owners about the plan's adequacy. The DEP will expedite the process for securing any required permits. When remediation is complete, the responsible LEP must submit a final remedial action report to the DEP for review, possible audit, and approval.<sup>181</sup>

As mentioned above, a final remedial action report is deemed approved unless, within sixty days of the report's submission, the DEP determines an audit is necessary. The DEP must conduct the audit within six months of this determination. After completion of an audit, the DEP may disapprove the report, subject to judicial appeal. Prior to approval, the DEP may enter into a memorandum of understanding regarding additional remediation or monitoring.<sup>182</sup> Upon approval, the property owner must record an environmental land use restriction<sup>183</sup> unless an LEP demonstrates that it is not necessary and the DEP agrees in writing.<sup>184</sup> Owners may rely on approval of a final remedial action report to file a Transfer Act Form II.<sup>185</sup>

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177. CONN. GEN. STAT. § 22a-133y(a).

178. Phase II assessments, under ASTM Standard E1903-97 (reapproved 2002), investigate the recognized environmental conditions identified in a Phase I assessment, *see supra* note 45, using invasive testing such as soil sampling or groundwater monitoring, and determine whether there is, in fact, contamination. Phase III site assessments generally aim to delineate the physical extent of contamination based on recommendations made in Phase II assessments. Phase III site assessments may involve intensive testing, sampling, and monitoring, "fate and transport" studies and other modeling, and the design of feasibility studies for remediation and remedial plans. CONN. GEN. STAT. § 22a-133w (2) defines "Phase III investigation" more specifically as "an investigation to ascertain the extent of a spill on or at a parcel of real property in accordance with the provisions of the Transfer Act Site Assessment Guidance Document published by the Department of Environmental Protection [Sept. 2007]."

179. CONN. GEN. STAT. § 22a-133w (3) defines a "Phase III remedial action plan" as "a written plan prepared subsequent to a Phase III investigation . . . ."

180. Site owners must comply with the notification requirements set forth *supra* in note 175. CONN. GEN. STAT. § 22a-133y(b).

181. CONN. GEN. STAT. § 22a-133y(b).

182. *Id.* § 22a-133y(c).

183. *See* discussion *supra* at Part II.B.1.b.

184. CONN. GEN. STAT. § 22a-133y(d).

185. *Id.*

*D. Covenants Not to Sue*

Connecticut General Statutes Sections 22a-133aa and 22a-133bb provide two distinct types of Covenants Not to Sue for parties that are “innocent” and have no connection with a property’s contamination. These covenants are legally binding assurances that the DEP will not require present or future owners to undertake additional cleanup at a site once it has been remediated to current standards. The DEP may enter into covenants not to sue with: (1) prospective purchasers of contaminated property, (2) current owners of contaminated property, and (3) lending institutions to which owners or prospective owners have conveyed a security interest in contaminated property.<sup>186</sup>

For a Covenant Not to Sue under Section 22a-133aa, the DEP (rather than an LEP) must approve the applicant’s remediation plan, a final remedial action report, or a brownfield investigation plan and remediation schedule (that would precede a remediation plan or final remedial action report, as discussed immediately below).<sup>187</sup> This Covenant is transferable to a successor owner. It also requires payment of a fee equivalent to 3% of the value of the property, based on an appraisal of the property as if it were uncontaminated.<sup>188</sup>

The Covenant Not to Sue under Section 22a-133bb requires either DEP or LEP approval of a remediation plan or a final remedial action report, or an LEP remediation verification (and, as appropriate, the covenanting party’s certification that there has been no new contamination).<sup>189</sup> Unlike its counterpart, this type of Covenant is not transferable to a successor owner. Owners and prospective purchasers therefore may choose between the less expensive and more easily obtained non-transferable Covenant under Section 22a-133bb, or the more expensive but more valuable transferable Covenant under Section 22a-133aa.

To obtain either type of Covenant Not to Sue, prospective or current owners must demonstrate to the DEP’s satisfaction that (1) the

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186. *Id.* §§ 22a-133aa(a), 22a-133bb(a), 22a-133bb(c).

187. *Id.* § 22a-133aa(a).

188. CONN. GEN. STAT. § 22a-133aa(c). The following are not subject to this fee requirement: successors in interest to covenant holders; covenant holders in connection with remediation projects under the Urban Sites Remedial Action Program, *id.* § 22a-133m, and municipalities, municipal economic development agencies, and nonprofit economic development corporations funded in part by a municipality and the corporation’s officers and directors. *Id.* § 22a-133aa(c).

189. *Id.* § 22a-133bb(a).

site has been remediated pursuant to the RSRs,<sup>190</sup> (2) the covenanting party did not cause contamination at the site<sup>191</sup> and is not affiliated with any party that did so,<sup>192</sup> and (3) the covenanting party will continue to use the property productively or will redevelop the property for productive use.<sup>193</sup> There is no deadline by which the DEP must approve or disapprove the remediation plan.

Section 12 of the Task Force Act<sup>194</sup> has made the Section 22a-133aa Covenant Not to Sue more amenable to brownfield sites. The Act enables brownfield owners and operators to benefit from a Covenant Not to Sue prior to beginning any investigation or remediation. In requesting a Covenant Not to Sue, brownfield owners and operators may submit only a brownfield investigation plan and remediation schedule if they so choose, rather than the remediation plan or final remedial action report required under prior law (either of which they may also choose to submit).<sup>195</sup> The DEP must approve, as appropriate, the brownfield investigation plan, the remediation plan, or the final remedial report.<sup>196</sup> Nonetheless, LEPs have an expanded role in that the amended Transfer Act authorizes the DEP to delegate to LEPs the preparation of brownfield investigation plans.<sup>197</sup> By contrast, prior law included no

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190. These provisions differ significantly from CERCLA's "prospective purchaser" exemption, discussed *supra* in Part I.C. Under CERCLA, a prospective purchaser can be shielded from liability even if the property is contaminated, provided that the purchaser conducts all appropriate inquiries and takes "reasonable steps." 42 U.S.C. §§ 9601(40), 9607(r)(1) (2000). The prospective purchaser need not remediate the property to CERCLA program standards to obtain liability protection. By contrast, Connecticut covenants-not-to-sue require cleanup to state RSRs.

191. This requirement is that the covenanting party "did not establish or create a facility or condition at or on such property which reasonably can be expected to create a source of pollution to the waters of the state for purposes of section 22a-432." CONN. GEN. STAT. §§ 22-133aa(a), 22a-133bb(b). The following also applies to all parties under Section 22a-133aa, and only to lending institutions under Section 22a-133bb: the party "has not maintained any such facility or condition at such property for purposes of said section, and such purchaser is not responsible pursuant to any other provision of the general statutes for any pollution or source of pollution on the property." *Id.* §§ 22-133aa(a), 22a-133bb(c).

192. In particular, an owner or purchaser may not be "affiliated with any person responsible for such pollution or source of pollution through any direct or indirect familial relationship or any contractual, corporate or financial relationship other than that by which such purchaser's interest in such property is to be conveyed or financed." *Id.* §§ 22-133aa(a), 22a-133bb(b). This requirement does not apply to lending institutions.

193. *Id.*

194. 2007 Conn. Acts 233 (Reg. Sess.). See *supra* Part II.A for a discussion of this Act.

195. 2007 Conn. Acts 233 § 12 (Reg. Sess.) (codified at CONN. GEN. STAT. § 22a-133aa (3)).

196. CONN. GEN. STAT. § 22a-133aa(a)(1) - (3).

197. *Id.* § 22a-133aa(f).



role for LEPs who generally expedite and streamline the remediation and approval processes. A final advantage for brownfield owners and purchasers is that the DEP is authorized to approve a schedule for payment of the fee for 3% of the property's value.<sup>198</sup>

Although Covenants Not to Sue bar the DEP from ordering further remediation at a site for contamination predating the Covenant, they do not relieve owners from responsibility for contamination occurring after the Covenant's effective date,<sup>199</sup> nor do they protect against potential liability from third-party damage claims. In addition, Covenants Not to Sue do not eliminate the possibility of additional required remediation according to the results of continued monitoring that the DEP may require.<sup>200</sup>

The statute lists the types of non-compliance by the covenant holder that may result in the covenant's ineffectiveness,<sup>201</sup> as well as the circumstances under which the DEP may take further action.<sup>202</sup> While the statute requires the DEP to issue a Covenant Not to Sue under Section 22a-133bb within forty-five days of receipt of certifications and other documents,<sup>203</sup> there is no such requirement under Section 22a-133aa.

#### *E. Third-Party Liability for Contaminated Property*

As mentioned immediately above, Covenants Not to Sue provide protection from DEP suits but not from third-party suits. Signed into law in June 2005, "An Act Concerning Third Party Liability for Contaminated Property" (the Third Party Liability Act)<sup>204</sup> bars third-party actions against innocent landowners, as defined below, for costs or damages from pollution predating the landowners' taking title.<sup>205</sup> The State of Connecticut, other states, and the federal government are exempt from this bar.<sup>206</sup> In addition, this statute protects only those innocent landowners who assume title on or after October 1, 2005, the effective date of the Third Party Liability Act.

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198. *Id.*

199. *Id.* §§ 22a-133aa(b), 22a-133bb(d).

200. CONN. GEN. STAT. §§ 22a-133aa(d), 22a-133bb(e).

201. *See id.* §§ 22a-133aa(b), 22a-133bb(d).

202. *Id.* §§ 22a-133aa(e), 22a-133bb(f).

203. *Id.* § 22a-133bb(g).

204. 2005 Conn. Acts 90 (Reg. Sess.) (codified at CONN. GEN. STAT. § 22a-133ee).

205. *See* Kathryn Cyr & Barry J. Trilling, *Statutory Relief in Connecticut*, BROWNFIELD NEWS, Aug. 2005, at 25.

206. CONN. GEN. STAT. § 22a-133ee(a).

The Third Party Liability Act provides relief against third-party actions for developers who purchase properties with known contamination that they had no responsibility for creating, and who are not “affiliated” with any person responsible for the pollution. “Affiliation” with polluters includes familial, contractual, and corporate or financial relationships.<sup>207</sup> A developer who meets these conditions must notify the owners of adjoining properties, by certified mail, of the intent to initiate a site investigation. The developer must also engage an LEP to conduct a site investigation in accordance with the RSRs, submit the investigation report to the DEP, and receive the DEP’s written approval. The statute does not specify a time period within which DEP needs to approve the investigation report. In addition, the developer must send to the owners of adjoining properties, by certified mail, a copy of the site investigation reports and remedial action plans, if remediation is necessary. Finally, the developer must remediate the property, as necessary, under the direction of an LEP, and obtain DEP approval of an LEP-prepared final remedial action report demonstrating that the remediation is complete in compliance with the RSRs. The statute does not specify a time period within which DEP must review the final remedial action report.<sup>208</sup> The Act presumes that the landowner will place an environmental land use restriction (ELUR)<sup>209</sup> on the property.<sup>210</sup> Failure to record the ELUR and comply with its provisions, or failure to obtain a variance from the ELUR, invalidates the Act’s third-party liability relief.<sup>211</sup>

The statute provides for a civil penalty of \$100,000 or the cost of remediating the pollution or its source, whichever is greater, against parties who improperly claim not to be affiliated with a responsible party. Worded awkwardly, this provision refers to “an owner of real property . . . found to be liable under this section . . . ,”<sup>212</sup> although the “section” does not create any liability. This provision does not authorize state or third party action against a party affiliated with a responsible party. Rather, it is a penalty provision that applies in connection with fraudulent attempts to claim the Act’s protection.

The Third Party Liability Act works in conjunction with the “innocent landowner” provisions of Conn. Gen. Stat. Sections 22a-432

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207. *Id.* §§ 22a-133ee(a)(1), (2).

208. *Id.* § 22a-133ee(a)(3).

209. *See supra* Part II.B.1.b.

210. *See* CONN. GEN. STAT. § 22a-133o; CONN. AGENCIES REGS. § 22a-133q-1 (1997).

211. CONN. GEN. STAT. § 22a-133ee(b).

212. *Id.* § 22a-133ee(c).

and 22a-452d. Under these provisions, the DEP may not hold liable an “innocent landowner” of contaminated property for remediation costs or under a DEP order, except through the imposition of a lien against the property.<sup>213</sup>

### III. STATE FINANCIAL ASSISTANCE PROGRAMS FOR BROWNFIELDS

In this Part, we focus on available state and federal funding for brownfield projects in Connecticut. The discussion on state funding incorporates legislation enacted in 2006 and 2007 concerning brownfields.

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213. The statute defines “innocent landowner” as:

(A) A person holding an interest in real estate, other than a security interest, that, while owned by that person, is subject to a spill or discharge if the spill or discharge is caused solely by any one of or any combination of the following:

- (i) An act of God;
- (ii) an act of war;
- (iii) an act or omission of a third party other than an employee, agent or lessee of the landowner or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the landowner, unless there was a reasonably foreseeable threat of pollution or the landowner knew or had reason to know of the act or omission and failed to take reasonable steps to prevent the spill or discharge, or
- (iv) an act or omission occurring in connection with a contractual arrangement arising from a published tariff and acceptance for carriage by a common carrier by rail, unless there was a reasonably foreseeable threat of pollution or the landowner knew, or had reason to know, of the act or omission and failed to take reasonable steps to prevent the spill or discharge; or

(B) a person who acquires an interest in real estate, other than a security interest, after the date of a spill or discharge if the person is not otherwise liable for the spill or discharge as the result of actions taken before the acquisition and, at the time of acquisition, the person

- (i) does not know and has no reason to know of the spill or discharge, and inquires, consistent with good commercial or customary practices, into the previous uses of the property;
- (ii) is a government entity;
- (iii) acquires the interest in real estate by inheritance or bequest; or
- (iv) acquires the interest in real estate as an executor or administrator of a decedent's estate.

*Id.* § 22a-452d.

Despite a property's ownership by an “innocent landowner,” any amount that the DEP expends “to contain and remove or mitigate the effects of a spill or to remove any hazardous waste shall be a lien against the real estate on which the spill occurred or from which it emanated or against real estate where no spill occurred but from which hazardous waste was removed provided such hazardous waste did not enter such real estate through surface or subsurface migration.” *Id.* § 22a-452a(a).

Brownfield sites raise issues with regard to contamination, government regulation, and community relations, among other areas of concern, not encountered at “greenfield” sites. It thus comes as no surprise that programs designed specifically for use at brownfield properties address financial requirements unique to these properties. Only properties stigmatized by real or perceived contamination require the expense of undertaking invasive site assessments, preparing remedial plans, and implementing cleanup. In addition, the cost of financing brownfield sites commonly exceeds that for other sites because investors and lenders believe they assume a higher risk that justifies a higher return.<sup>214</sup> Lenders therefore commonly require at least a 25% equity investment in a brownfield project.<sup>215</sup>

Recognizing the need to “level the playing field” for brownfield properties, both the State of Connecticut and the United States government offer grant and loan programs for brownfield site assessment, remediation, and development. State programs include those administered by the Connecticut Brownfields Redevelopment Authority (CBRA), the Connecticut Department of Economic and Community Development (DECD), and the Department of Environmental Protection (DEP). Federal programs, which this Article discusses in detail in the next Part, include those administered by the Environmental Protection Agency (EPA), the United States Department of Housing and Urban Development (HUD), and the Economic Development Administration (EDA) of the United States Department of Commerce. While the State of Connecticut opens many of its programs to for-profit owners and developers, most federal funding sources limit eligibility to municipalities, quasi-governmental organizations, and, on occasion, non-profit entities. For-profit entities can sometimes receive

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214. Peter B. Meyer & H. Wade VanLandingham, *Reclamation and Economic Regeneration of Brownfields* 9 (E.P. Systems Group, Aug. 2000), available at <http://www.eda.gov/PDF/meyer.pdf> (“In fact, the *risks* associated with brownfield redevelopments are generally understood. The major problem encountered in such projects involves *uncertainty* over the likelihood that the potential costs will arise and the amount of money they may involve. Investors can accommodate risk, provided it can be quantified: they simply accept only those projects that promise higher, ‘risk-adjusted’ returns on their investments. If, however, reliable quantification of risk is not possible, then determination of the needed risk-adjusted rate of return is impeded. Not having firm numbers, investors may simply abandon projects – or only pursue those with truly exceptional returns.” (citations omitted)).

215. CHARLES BARTSCH & BARBARA WELLS, NORTHEAST-MIDWEST INST., FINANCING STRATEGIES FOR BROWNFIELD CLEANUP AND REDEVELOPMENT 1 (2003), available at <http://www.nemw.org/BFinancingredev.pdf>.

loans that derive from grants to governmental entities, including loans from a state or municipal revolving loan fund capitalized by a federal grant.

Despite the specialized needs of brownfield developers, financial assistance for brownfield projects is available under a wide range of programs and governmental agencies. This Part and the next, therefore, demonstrate the severe fragmentation currently plaguing brownfield funding sources in Connecticut. As discussed above, however, 2007 legislation has established a new Brownfield Remediation and Development Account in Connecticut, which, with its \$5 million infusion, may serve as a first step toward consolidation for state funding.

Connecticut, through the CBRA, DECD, and DEP, has reached out to property owners, for-profit developers, and municipalities interested in redeveloping the state's brownfield sites with the various programs described in this Part. The new and revised programs under the 2006 and 2007 brownfields legislation, discussed below, demonstrate Connecticut's interest in remediating and redeveloping brownfields, although the funding levels to date are low.

#### *A. Connecticut Brownfields Redevelopment Authority (CBRA)<sup>216</sup>*

CBRA is a wholly-owned subsidiary of the Connecticut Development Authority (CDA), a quasi-public organization dedicated to expanding Connecticut's business base by providing financing to stimulate business growth and target for-profit developers and property owners. CBRA focuses exclusively on brownfield redevelopment by administering funding programs for these projects. To assist developers in locating appropriate sites, CBRA has compiled an inventory of Connecticut brownfields awaiting redevelopment.<sup>217</sup> As discussed in more detail below, CBRA administers both grant and loan programs.

##### *1. Tax Increment Finance Grants for Brownfields Redevelopment*

These redevelopment grants constitute the core of CBRA's brownfield financing program. A developer may use the proceeds from a redevelopment grant for any expenses directly related to the

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216. See generally CONN. GEN. STAT. § 32-23zz (2007) (authorizing CDA bonds).

217. See Conn. Brownfield Redevelopment Auth. (CBRA), CT Brownfield Property Locator, <http://ctbrownfields.com/sites/default.asp> (last visited May 20, 2008). CBRA does not restrict its programs to these listed sites. As this list may be somewhat dated, CBRA recommends contacting the Authority directly with questions about particular sites.

remediation, redevelopment, and improvement of a brownfield site, including the cost of environmental insurance. While applicants are not required to contribute matching funds for a redevelopment grant, CBRA insists on a demonstration of sufficient financing to complete a proposed development exclusive of cleanup costs. There is no minimum redevelopment grant amount and CBRA may award redevelopment grants of up to \$10 million.<sup>218</sup>

CBRA's redevelopment grants employ a TIF model where (1) CBRA's parent, CDA, issues bonds to finance a redevelopment project, and (2) the municipality in which a project is located assigns to CBRA a portion of the anticipated increase in tax revenues from the redevelopment. Once financing is in place, CBRA uses these assigned tax revenues to pay bondholders and, where possible, to finance new redevelopment projects. By implementing this method, redevelopment grants may largely sustain themselves.<sup>219</sup>

CBRA has used the following example to illustrate how the redevelopment grant program operates. If a developer proposes a project that a municipal assessor determines should generate \$200,000 in new tax revenues annually, that municipality could decide to dedicate 50% of future projected taxes to CBRA for the next ten years. Under this scenario, CBRA would then provide an up-front redevelopment grant to the developer of \$1 million dollars (based on an anticipated annual payment stream of \$100,000 over ten years). Because CDA issues agency bonds to finance redevelopment grants, municipalities where redevelopment sites are located are not saddled with additional redevelopment-related debt.<sup>220</sup>

Consistent with the TIF model, a developer may not apply for a redevelopment grant until the municipal assessor has calculated the anticipated increase in property taxes that the proposed redevelopment should generate. This amount of increased property taxes is the primary limitation on funding based on the TIF model. The municipality must then determine the percentage of this future increase in annual taxes that it is willing to assign to CBRA in exchange for an up-front grant from

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218. CONN. DEP'T OF ECON. & CMTY. DEV., *supra* note 64, at 21.

219. See generally Conn. Brownfield Redevelopment Auth. (CBRA), Grants, <http://www.ctbrownfields.com/Content/Grants.asp> (last visited May 20, 2008); Conn. Brownfield Redevelopment Auth., About Brownfields, [http://ctbrownfields.com/Content/About\\_Brownfields.asp](http://ctbrownfields.com/Content/About_Brownfields.asp) (last visited May 20, 2008).

220. See Conn. Dev. Auth., Brownfields Redevelopment, [http://www.ctcda.com/CMSLite/Default.asp?CMSLite\\_Page=21&Info=Brownfields+Redevelopment](http://www.ctcda.com/CMSLite/Default.asp?CMSLite_Page=21&Info=Brownfields+Redevelopment) (last visited May 20, 2008).

CBRA to the developer. The municipality makes this determination based on consultations with the developer, who explains the financial requirements of the project. The developer and the municipality then can apply to CBRA for a grant in the amount of the present value of the anticipated increase in tax revenues that the municipality agreed to assign to CBRA. Prior to contacting a municipality, a developer is well-advised to contact CBRA to verify eligibility and facilitate the process. Parties who contributed to environmental contamination at the subject site may not participate in this program.

If estimates for a project prove too optimistic and future tax revenues fall short, CDA—and not the municipality or the private developer—bears the risk. To compensate, however, CBRA may place a tax lien on the subject property on an annual basis in the amount of the shortfall. CBRA may also extend the duration of payments where incremental tax revenue projections have exceeded actual returns.

As redevelopment grants are associated with significant fees (including legal fees), CBRA redevelopment grants, as a practical matter, are generally workable for projects exceeding \$500,000 and no less than \$350,000. Also as a practical matter, the CBRA has not provided these redevelopment grants for residential projects or mixed use projects with significant residential components.<sup>221</sup> Section 13 of the Task Force Act, however, has included residential and mixed use projects in the definition of the “remediation projects” for which the CDA issues bonds that, in turn, enable the CBRA’s remediation grants.<sup>222</sup> While this statutory change may result in CBRA’s looking more favorably at such projects, it remains unclear if this change will have any further result.

Major projects to receive CBRA redevelopment grants include the University of Hartford’s Performing Arts Center and a new train station complex in Fairfield. Using a CBRA redevelopment grant in conjunction with other public and private funding, the University of Hartford’s Hartt School is constructing a new Performing Arts Center. The new center is located on the 7.2-acre site of the former Thomas Cadillac distributorship, built in 1929 by architect Louis Kahn. The new Fairfield train station project, which will add a new stop to the Metro North commuter rail line, will transform an abandoned industrial site into a 1.3 million square-foot office, hotel, and restaurant complex,

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221. CONN. DEP’T OF ECON. & CMTY. DEV., *supra* note 64, at 22.

222. CONN. GEN. STAT. § 32-23d(ii); *see also id.* § 32-23zz.

alongside a new station and a 1200-space parking facility. This substantial project is expected to cost approximately \$2.5 million.

## *2. Direct Loans*

CBRA also facilitates the CDA's Direct Loan program for brownfield projects.<sup>223</sup> Under this program, CDA provides subsidized, low interest loans or equity-equivalent investments of \$250,000 to \$5 million to businesses or developers based on the projected viability of the project. The loan amount for brownfield projects depends upon the cost of cleanup, not the cost of the redevelopment following remediation.<sup>224</sup> CBA's largest loan to date under this program amounted to \$300,000. These loans have a maximum duration of twenty years for repayment, with borrowers making personal guarantees. Direct Loan borrowers, both for brownfield projects and otherwise, may couple CDA loans or investments with financing from other public or private sources.

While direct loans specific for brownfields are generally not available for purely residential projects, they are available for mixed use projects, irrespective of whether the owner intends to occupy the property. These loans are also available for retail projects.

To date, CDA Direct Loans have resulted in one completed brownfield project, where a developer remediated an old metal company site in Southington and redeveloped the site for use in light assembly operations. A few additional projects appear to have begun in Hartford and New Haven.

## *3. Loan Guarantees*

The CDA also provides loan guarantees, which have not been used to date for brownfield projects. Each loan guarantee generally requires a bank loan (frequently unavailable for brownfield projects) and a high fee. Section 14 of the Task Force Act, however, aims to incentivize these loans by authorizing the CDA to establish a loan guarantee program, to a maximum of 30% of a given loan, to lenders who provide

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223. See Conn. Dev. Auth., Direct Loans, [http://www.ctcda.com/CMSLite/default.asp?CMSLite\\_Page=48&Info=Direct+Loans](http://www.ctcda.com/CMSLite/default.asp?CMSLite_Page=48&Info=Direct+Loans) (last visited May 20, 2008). The information on this web page applies to CDA loans generally. Some of this information does not apply to brownfield projects since the CBRA separately administers loans for these projects.

224. By contrast, for non-brownfield projects, the primary criterion is the creation and maintenance of employment in Connecticut. *Id.*



financing to “eligible developers” or “eligible property owners.” While Section 14 refers to Section 3 of the Task Force Act for definitions of these terms, Section 3 inexplicably contains no such definitions. The effect of this authorization remains to be seen.

*B. Department of Economic and Community Development (DECD)*

DECD implements policies and programs for the enhancement and development of communities, businesses, and housing within Connecticut. While the quasi-governmental CDA focuses on expanding Connecticut’s business base particularly through financing programs, the DECD, a state agency, serves a broader constituency. The DECD’s mission is not only to attract and retain businesses and jobs, but also to revitalize neighborhoods and communities, ensure quality housing, and foster development in Connecticut’s cities and towns.<sup>225</sup>

As we discussed in Part II.A, the DECD administers the new brownfields financial assistance program that the Task Force Act established in June 2007.<sup>226</sup> The DECD also administers several other programs, discussed in this Part, that may be appropriate for some brownfield projects: (1) the Urban Sites Remedial Action Program (USRAP), which commits public funds for remediation at sites in particularly distressed communities in Connecticut; (2) the Dry Cleaning Establishment Remediation Fund; (3) the Urban Site Investment Tax Credit Program, which provides corporate tax credits for brownfield investments; and (4) the Special Contaminated Property Remediation and Insurance Fund (SCPRIF), which furnishes loan assistance for environmental investigation and remediation. The Task Force Act, however, by directing repayment of SCPRIF funds to the new Brownfield Account, will effectively allow the SCPRIF program to phase out.<sup>227</sup> A final program that the DECD administers is Connecticut’s State Administered (or Small Cities) Community Development Block Grant (CDBG) program, funded by the U.S. Housing and Urban Development Administration. This program may have limited, potential use for brownfields projects.

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225. See Conn. Dep’t of Econ. and Cmty. Dev., About the Agency, <http://www.ct.gov/ecd/cwp/view.asp?a=1095&q=249632> (last visited May 20, 2008).

226. See *supra* Part II.A.

227. See *supra* Part II.A.

### *1. New Brownfields Financial Assistance Program and Brownfield Pilot Program*

The DECD, in consultation with the DEP, is authorized to provide “grants, extensions of credit, loans or loan guarantees, [and] participation interests” in DECD loans<sup>228</sup> toward a wide range of brownfield-related activities.<sup>229</sup> Eligible applicants include for-profit entities, non-profit organizations, and municipalities (or economic development entities acting on their behalf).<sup>230</sup> The DECD, with the approval of the Office of Policy and Management, provides this financial assistance via the new Brownfield Remediation and Development Account,<sup>231</sup> funded, in part, by earmarked bond proceeds.<sup>232</sup> On November 2, 2007, Governor Rell signed into law a bond initiative for the next two years which infuses \$5 million into the Brownfield Account and allocates \$9 million for the new Brownfield Pilot Program available to municipalities.<sup>233</sup> We discuss this program in more detail in Part II.A above.

### *2. Urban Sites Remedial Action Program*

The Urban Sites Remedial Action Program<sup>234</sup> may use bond funds which the program pays directly “to identify, evaluate, plan for and undertake the remediation of polluted real property.”<sup>235</sup> The DECD, in consultation with the DEP, selects sites for evaluation and remediation based on a list of factors.<sup>236</sup> Two types of projects qualify for the Urban Sites Remedial Action Program.<sup>237</sup> In both cases, the DECD first must identify a site as a potentially contaminated property that is significant to the state’s economy.

The first project type, the “Economic Development Initiative” (Type 1), encompasses contaminated properties with owners and

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228. 2007 Conn. Acts 233 § 3(5) (Reg. Sess.); *see id.* § 4.

229. *See supra* Part II.A.4 for a more detailed discussion.

230. 2007 Conn. Acts 233 § 3(4) (Reg. Sess.); *see id.* § 5.

231. *Id.* § 6(a).

232. *Id.* § 6(a)(1).

233. S.B. 1502, June Spec. Session, §§ 13(f)(2)-(3); 32(f)(2)-(3) (Conn. 2007) (signed by Governor Rell Nov. 2, 2007).

234. *See generally* CONN. GEN. STAT. § 22a-133m (2007).

235. *Id.* § 22a-133m(a).

236. *Id.* § 22a-133m(b).

237. *See* Conn. Office of Brownfield Remediation & Dev., Urban Sites Remedial Action Program, <http://www.ctbrownfields.gov/ctbrownfields/cwp/view.asp?a=2620&q=319334> (last visited May 20, 2008).

developers who are willing and able to investigate and remediate these sites with DEP oversight.<sup>238</sup> Type 1 projects do not involve the expenditure of public funds for site clean up and development. There are no limitations on eligibility to apply as a Type I project, and there is no formal application process for Urban Sites funds. For these projects, DECD first identifies and selects a property based on the determinations that (1) the owners or developers are willing to remediate, and (2) the property is significant to the state's economy. After the DECD selects a Type 1 property, the DEP expedites the review, inspection, and approval of the remedial investigation, planning, and implementation for that property.<sup>239</sup>

Currently, there are fewer applications for DEP's Type 1 assistance than in the past.<sup>240</sup> This decreased interest is likely due to the creation of the voluntary remediation programs, under which LEPs manage and complete projects according to individually negotiated contractual timetables and other constraints.<sup>241</sup>

The Type 1 designation nonetheless is useful for complex or specialized projects requiring DEP's hands-on involvement. One such project is ongoing at 205 McGee Avenue in Stamford. While the upland portion of the property is slated for economic redevelopment, the remaining portion will be donated to the City of Stamford for a public walkway along wetlands and has undergone wetlands restoration. These specialized considerations require ongoing DEP involvement, and an LEP may not have been able to handle this project in an efficient manner.

For the second type of Urban Sites Remedial Action project, the "Unwilling or Unable Party" (Type 2),<sup>242</sup> the DECD also selects properties that it deems significant to the state's economy. In the case of

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238. CONN. GEN. STAT. § 22a-133m(h). The DECD apparently has expanded Type 1 projects to encompass all municipalities statewide. The statute provides that these projects must be in a distressed municipality, a targeted investment community, "*or in such other municipality as the Commissioner of Economic and Community Development may designate.*" *Id.* (emphasis added).

239. See Conn. Office of Brownfield Remediation & Dev., *supra* note 237.

240. From 1993, when the statute was enacted, until 1996, the DEP oversaw redevelopment efforts at nine publicly funded sites and twenty-five cleanups funded privately by responsible parties. Elizabeth Collaton & Charles Bartsch, *Industrial Site Reuse and Urban Redvelopment – an Overview*, CITISCAPE – A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH, Sept. 1996, at 17. According to the February 2007 Report of the Brownfields Task Force, "over the fifteen years of this program, only 19 sites have been redeveloped or developed . . . ." CONN. DEP'T OF ECON. & CMTY. DEV., *supra* note 64, at 19.

241. See *supra* Part II.C.

242. CONN. GEN. STAT. §§ 133m(a), (g).

Type 2 projects, however, the state is unable to identify the property owners, or the owners are unwilling or unable to remediate the properties, and the state may expend public funds to do so. Consequently, the DEP itself investigates these sites and, if necessary, remediates them. The state reserves the right to seek the recovery of expended public funds.<sup>243</sup>

Unlike Type 1 sites, “Unwilling or Unable Party” sites must be located either in “distressed municipalities”<sup>244</sup> pursuant to U.S. Department of Housing and Urban Development criteria, or in “targeted investment communities”<sup>245</sup> (unless the site is proposed for acquisition). Further, the DECD must find “that the state owns the site or otherwise has or obtains the power to approve the type of development which first occurs on the site after remediation.”<sup>246</sup>

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243. *Id.* § 22a-133m(d). The statute further authorizes the DECD, in consultation with the DEP, or regional economic development entities, to “acquire polluted commercial or industrial property for the purpose of remediation of the pollution and for the lease or sale of such property in order to promote business growth or expansion through the reuse or redevelopment of such property.” *Id.* § 22a-133m(e). To date, the DECD has not acquired property pursuant to this provision.

244. The “distressed municipalities” in Connecticut are: Hartford, New Britain, Bridgeport, Waterbury, New Haven, Windham, East Hartford, New London, Meriden, Ansonia, West Haven, Winchester, Derby, Torrington, Naugatuck, Bristol, Norwich, Plainville, Killingly, Plymouth, Sprague, Putnam, Enfield, East Windsor, and Stafford. *See* Conn. Office of Brownfield Remediation & Dev., *supra* note 237. The following are three alternative definitions for “distressed municipality”:

- “[A]ny municipality in the state which, according to the United States Department of Housing and Urban Development meets the necessary number of quantitative physical and economic distress thresholds which are then applicable for eligibility for the urban development action grant program under the Housing and Community Development Act of 1977, as amended, or any town within which is located an unconsolidated city or borough which meets such distress thresholds” (with an alternative definition if these federal “distress thresholds” change);
- “[A]ny municipality adversely impacted by a major plant closing, relocation or layoff, provided the eligibility of a municipality shall not exceed two years from the date of such closing, relocation or layoff”; or
- “[T]he portion of any municipality which is eligible for designation as an enterprise zone[.]”

CONN. GEN. STAT. § 32-9p(b).

245. The “targeted investment communities” in Connecticut are: Bridgeport, Bristol, East Hartford, Groton, Hamden, Hartford, Meriden, Middletown, New Britain, New Haven, New London, Norwich, Plainfield, Plainville, Putnam, Sprague, Stratford, Thompson, Torrington, Waterbury, Winchester, Windham and Windsor Locks. *See* Conn. Office of Brownfield Remediation & Dev., *supra* note 237. The statutory definition of a “targeted investment community” is “a municipality which contains an enterprise zone designated pursuant to section 32-70.” CONN. GEN. STAT. § 32-222(v). *See infra* note 273 for the definition of “enterprise zone.”

246. CONN. GEN. STAT. § 22a-133m(b).

There are no dedicated funds for the Urban Sites program (either Type 1 or Type 2 projects); rather, funding for each project must go before the State Bond Commission after meeting DECD and DEP criteria.<sup>247</sup> The General Assembly authorized \$10 million for Type 2 projects for Fiscal Years 2000 and 2001.<sup>248</sup> As of July 31, 2006, the DECD allocated \$3.6 million of the authorized \$10 million for the four projects discussed below; \$6.4 million therefore remained unallocated.

The funding process includes the DECD's identifying a project as a priority, DEP concurrence, the DEP's application to the Bond Commission, a DEP/DECD memorandum of understanding for fund administration, and the Attorney General's review and approval. The Attorney General's office drafts an Assistance Agreement when the applicant requests funding.<sup>249</sup>

The DECD deposits any monies received from selling, leasing, or otherwise providing a use for a remediated property into the Urban Site Remediation Fund. The statute authorizes the DEP to use these funds to assess and remediate properties that the DECD acquires. The statute also authorizes the DECD to pay local property taxes for these properties and to administer the Urban Sites Remedial Action Program. Finally, the DECD may allocate these funds to regional economic development entities organized to remediate contaminated properties.<sup>250</sup>

By 2006, nineteen sites had been redeveloped with Urban Site Remediation Fund monies, and \$38.5 million had been spent since the program's inception as a pilot in 1992. While ongoing projects remain within the program, as of April 2007, there were no pending applications for funds, and in 2005 and 2006 the program provided no funding to new projects.<sup>251</sup>

### 3. *Dry Cleaning Establishment Remediation Fund*

The DECD provides grants from the Dry Cleaning Establishment Remediation Fund<sup>252</sup> to business owners and operators of "eligible dry cleaning establishments" and to owners of property occupied by these establishments (collectively, "eligible applicants") for the containment and removal or mitigation of environmental pollution resulting from

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247. CONN. DEP'T OF ECON. & CMTY. DEV., *supra* note 64, at 19.

248. 1999 Conn. Acts 242 §§ 13(b)(4), 32(b)(6) (Reg. Sess.).

249. CONN. DEP'T OF ECON. & CMTY. DEV., *supra* note 64, at 19.

250. CONN. GEN. STAT. § 22a-133m(f).

251. CONN. DEP'T OF ECON. & CMTY. DEV., *supra* note 64, at 19.

252. *See generally* CONN. GEN. STAT. § 12-263m (2007).

discharges at these sites or for preventive measures that the DEP approves.<sup>253</sup> The statute defines “eligible dry cleaning establishments” as “any place of business engaged in the cleaning of clothing or other fabrics using tetrachlorethylene, Stoddard solvent<sup>254</sup> or other chemicals or any place of business that accepts clothing or other fabrics to be cleaned by another establishment using such chemicals.”<sup>255</sup>

Grants may not exceed \$300,000 per dry cleaning establishment,<sup>256</sup> and grant beneficiaries must bear all remediation costs that are less than \$10,000.<sup>257</sup> From the program’s inception in 1994 through 2007, the DECD approved \$5.5 million in grants and disbursed \$3.34 million.

A surcharge on gross receipts from dry cleaning services within the state finances the program.<sup>258</sup> From July 1, 2005 through June 30, 2006, the Connecticut Department of Revenue Services collected \$615,000, and from July 1, 2006 through February 2007, it collected \$497,000. The Department of Revenue Services transfers these funds to the DECD which, in turn, administers the program.

To be eligible for program funds, applicants must demonstrate to the DEP’s satisfaction that: (1) the dry cleaning establishment is using or has previously used chemicals for the purpose of cleaning clothes or other fabrics; (2) the establishment has been doing business at the site for at least one year prior to the submission date or approval date of the application for funds; and (3) the establishment is not in arrears for any state or local tax or the dry cleaning surcharge.<sup>259</sup> Further, the applicant must provide documentation that “the services for which payment is sought have been or will be completed[]”<sup>260</sup> and “documentation supporting the need for the grant.”<sup>261</sup> The DECD’s application requires documentation that two conventional financing sources have turned down the applicant.<sup>262</sup>

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253. *Id.* §§ 12-263m(a)(3), 12-263m(d).

254. Commonly used as a dry cleaning solvent, Stoddard solvent is a petroleum distillate comprised of 44% naphthenes, 39.8% paraffins, and 16.2% aromatics.

255. CONN. GEN. STAT. § 12-263m(a)(1).

256. *Id.* § 12-263m(e).

257. *Id.*

258. *Id.* § 12-263m(b).

259. CONN. GEN. STAT. § 12-263m(d).

260. *Id.* § 12-263m(e).

261. *Id.* § 12-263m(f).

262. *See* State of Connecticut, Dry Cleaning Establishment Remediation Fund, Instructions and Application, <http://www.ct.gov/ecd/cwp/view.asp?a=1101&q=249816> (click “Instructions and Application”) (last visited July 1, 2008).

Establishments that unlawfully or intentionally discharge or spill any chemical liquids, solids, or gaseous products or hazardous wastes are not eligible for grants.<sup>263</sup> Any funds disbursed as a grant may not be attached to satisfy any judgment against the recipient in any civil action.<sup>264</sup>

#### 4. *Urban and Industrial Site Reinvestment Tax Credits*

Designed to encourage private investment in brownfield development and urban rehabilitation and to attract capital investments to the state, the Urban and Industrial Site Reinvestment Tax Credit Program (Urban Reinvestment Program) provides corporate tax credits for private brownfield investments, among other types of investments.<sup>265</sup> Within certain limitations, these tax credits become gradually available beginning in the fourth year following the investment to a cumulative maximum of 100% of the investment in the tenth year, subject to a ceiling of \$100 million. Generally, the Urban Reinvestment Program targets very large urban projects with multi-million dollar direct investment criteria or indirect investment by funds with multi-million dollar asset values.<sup>266</sup> Beneficiary projects also must be revenue-positive to the state. Key information requested in applications for funding includes the number of created or retained jobs, physical infrastructure created or preserved, and projected state and local revenues from the project.<sup>267</sup>

The Urban Reinvestment Program provides tax credits for two types of projects. The first type is an “eligible industrial site investment project.” Such a project targets environmentally contaminated properties, as statutorily defined,<sup>268</sup> “that, if remediated, renovated or demolished . . . and used for business purposes, will add significant new economic activity and employment in the municipality in which the investment is to be made, and will generate additional tax revenues to

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263. CONN. GEN. STAT. § 12-263m(g).

264. *Id.* § 12-263m(d).

265. *See generally id.* § 32-9t (2007).

266. *See id.* § 32-9t(c) (“No project shall be deemed an eligible project unless such project shall, in the judgment of the [DECD], be of sufficient size, by itself or in conjunction with related new investments, to generate a substantial return to the state economy.”).

267. CONN. GEN. STAT. § 32-9t(e).

268. *Id.* § 32-9t(a)(2)(A) (defining “eligible industrial site investment project” to encompass real properties that (1) have been subject to a “spill” as defined in CONN. GEN. STAT. § 22a-452c, (2) are “establishments” as defined in the Transfer Act, CONN. GEN. STAT. § 22a-134(3), or (3) are “facilities” as defined in CERCLA, 42 U.S.C. § 9601(9)).

the state.”<sup>269</sup> The program also requires that: (1) the tax credits are necessary to attract private investment to the project; (2) the project is economically viable and beneficial, as defined in the statute; and (3) the project is consistent with the state and municipality’s economic development priorities.<sup>270</sup> An applicant for an “eligible industrial site investment project” must demonstrate how the project will meet the Connecticut RSRs.<sup>271</sup>

The second type of project, the “eligible urban reinvestment project,” need not address environmentally contaminated properties. Rather, this type of project must “add significant new economic activity in the eligible municipality in which the project is located, and [must] generate significant additional tax revenues to the state or the municipality.”<sup>272</sup> The statute defines “eligible municipality” as a municipality that: (1) is an “enterprise zone,”<sup>273</sup> (2) is a “distressed municipality,”<sup>274</sup> (3) has a population exceeding 100,000, or (4) the DECD has determined “is connected to the relocation of an out-of-state operation or the expansion of an existing facility that will result in a capital investment by a company of not less than fifty million dollars.”<sup>275</sup> In addition to these requirements, the DECD must determine that involvement in the program is necessary to attract private investment to the municipality, and that the project is economically viable, has economic benefits outweighing the project’s costs, and is consistent with state and municipal strategic economic development priorities.<sup>276</sup>

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269. *Id.* § 32-9t(a)(2)(B).

270. *Id.* §§ 32-9t(a)(2)(C) to -9t(a)(2)(E).

271. CONN. GEN. STAT. § 32-9t(e).

272. *Id.* § 32-9t(a)(3)(A).

273. The “enterprise zones” in Connecticut are: Bristol, Bridgeport, East Hartford, Groton, Hartford, Hamden, Meriden, Middletown, New Britain, New Haven, New London, Norwalk, Norwich, Southington, Stamford, Waterbury, and Windham. *See* Conn. Dep’t of Econ. & Cmty. Dev., Enterprise Zone Guide, <http://www.ct.gov/ecd/cwp/view.asp?a=1099&q=249762> (last visited May 20, 2008).

To qualify as an enterprise zone, a census tract must meet at least one of the following criteria: a poverty rate of 25%, an unemployment rate of two times the state average, or at least 25% of the tract’s population receives public assistance. The DECD may include a census tract that is contiguous to a designated enterprise zone if this contiguous tract has “significant job creation potential” and meets one of the following criteria: a poverty rate of 15%, an unemployment rate of at least 1.5 times the state average, or at least 15% of the tract’s population receiving public assistance. CONN. GEN. STAT. § 32-70(a).

274. *See supra* note 244.

275. CONN. GEN. STAT. § 32-9t(a)(12).

276. *Id.* §§ 32-9t(a)(3)(B) to -9t(a)(3)(E).



The overall program has a \$500 million ceiling.<sup>277</sup> The state calculates the anticipated additional tax revenue for a particular project by relying on an econometric model to estimate economic and fiscal impacts of the project. The projected tax revenues must exceed project-specific target thresholds, and the total credits allowed may not exceed the cumulative increase in tax revenue.

Within these limitations, both types of eligible projects may receive a tax credit of 10% of approved investments in the third full income year after the year of the investment and the following three years, and a tax credit of 20% of approved investments in the seventh year and two following years. Each project thus qualifies for tax credits on a yearly basis over a seven year period, beginning with the fourth year following the investment, of up to 100% of its investment subject to a ceiling of \$100 million.<sup>278</sup> Applicants may request credits exceeding these limits, and the DECD will evaluate the request and make a recommendation for legislative amendments as appropriate.<sup>279</sup> If a project fails to meet its projected tax revenue targets, the DECD will reduce the credit to assure that the state remains in a revenue-positive position.

A taxpayer may invest funds directly in an Urban Reinvestment Program project or may do so indirectly through an investment fund.<sup>280</sup> “Community development entities,” as defined in the statute, may also make investments.<sup>281</sup> Direct investments, either alone or in conjunction with other investments in an eligible project, generally must equal or exceed \$5 million. A threshold of \$2 million applies, however, for projects preserving a historic facility and redeveloping it for mixed uses, including at least four housing units. Eligible investment funds must have a minimum asset value of \$60 million in the income year for which the initial credit is taken. A registered fund manager must manage these

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277. *Id.* § 32-9t(i)(1).

278. *Id.* A taxpayer may not claim this tax credit in addition to the 25% corporate tax credit available under the enterprise zone program. *See* Conn. Office of Brownfield Remediation & Dev., *supra* note 237 (citing CONN. GEN. STAT. § 12-217e); *see also supra* note 273. A taxpayer, however, may carry over any credit not used in the applicable income year to the five immediately succeeding income years until the full credit is allowed. CONN. GEN. STAT. § 32-9t(p). An “industrial site investment” property may also be eligible to receive a 50% property tax abatement on the amount of tax attributable to the increased value of the redeveloped property. This abatement is available only if the property does not qualify for any other property tax abatement. *See* Conn. Office of Brownfield Remediation & Dev., *supra* note 237.

279. CONN. GEN. STAT. § 32-9t(i)(2).

280. *Id.* §§ 32-9t(d), 32-9t(j).

281. *Id.* §§ 32-9t(j), 32-9t(a)(17).

funds. Further, these funds must have at least three investors who are not related to each other “or to any person in which any investment is made other than through the fund at the date the investment is made.”<sup>282</sup> There is no minimum investment threshold for indirect investments made through an eligible investment fund.

Taxpayers receiving credits under the Urban Reinvestment Program may assign the credits for a given year to one or more other taxpayers. These recipients, in turn, may use such credits only in the year for which the DECD granted them and may not assign the credits further.<sup>283</sup>

Connecticut’s first Urban Reinvestment Program project entailed a grant of \$40 million in tax credits to the United Kingdom-based liquor giant Diageo. These credits were based on a total development cost of \$107.1 million, the retention of 700 jobs, and the creation of 300 jobs.<sup>284</sup> Diageo agreed to move its United States headquarters from Stamford to Norwalk, rather than moving to Westchester County, New York, as the company had threatened. Based on controversy involving this headquarters relocation, the Connecticut General Assembly passed legislation requiring the DECD to submit requests for credits over \$20 million to the legislature for review.<sup>285</sup>

Since the Diageo deal, four companies have entered the Urban Reinvestment Program. In 2004, the DECD agreed to provide Lowe’s Home Centers, Inc. \$20 million in tax credits for a Plainfield project with a total cost of \$80 million, and to grant FactSet Research Systems, Inc. \$7 million in tax credits for a project in Norwalk with a total cost of \$36,050,000. In 2005, the DECD agreed to provide Eppendorf Manufacturing Corporation tax credits worth \$5 million for a project in Enfield with a total cost of \$23.1 million.<sup>286</sup> Most recently, in 2006, the DECD closed a deal with the Royal Bank of Scotland to receive \$100 million in tax credits, the statutory limit, for a project in Stamford with a capital investment exceeding \$200 million. The project expects to retain 700 jobs and create at least 1,300 jobs.

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282. *Id.* § 32-9t(j).

283. CONN. GEN. STAT. § 32-9t(n).

284. CONN. DEP’T OF ECON. AND CMTY. DEV., ANNUAL REPORT FOR FISCAL YEAR 2005-2006, at 99 (2007), *available at* <http://www.ct.gov/ecd/cwp/view.asp?a=1105&q=251248>.

285. CONN. GEN. STAT. § 32-9t(q).

286. CONN. DEP’T OF ECON. & CMTY. DEV., *supra* note 284, at 99-100, App. A-5.

*5. The Special Contaminated Property Remediation and Insurance Fund (SCPRIF)*

The purpose of the Special Contaminated Property Remediation and Insurance Fund<sup>287</sup> is “to provide financial assistance to investigate the environmental conditions of a site, remediate the site, and ultimately encourage property redevelopment that is beneficial to the community.”<sup>288</sup> Using funds from the SCPRIF, the DECD provides low-interest loans with five-year spans to municipalities, individuals, and firms for Phase II Site Assessments and Phase III Investigations.<sup>289</sup> These loans also cover “the costs of demolition, including related lead and asbestos removal or abatement costs or costs related to the remediation of environmental pollution, undertaken to prepare contaminated real property for development subsequent to any Phase III investigation . . . .”<sup>290</sup>

The 2007 Task Force Act directs funds that the DECD receives in repayment for SCPRIF loans to be deposited into the new Brownfield Account.<sup>291</sup> The SCPRIF, therefore, will eventually phase out. Nonetheless, as of April 2007, the SCPRIF had an unallocated balance of \$400,000, and, in January 2007, the DECD funded two brownfield projects with SCPRIF funds, as described below.

Applicants typically consist of the site’s current owner, the site’s prospective owner or developer, or the municipality in which the site is located. Generally, applicants must demonstrate that they have access to the property and that they have the financial and technical capabilities to investigate, remediate, and redevelop the site. Applicants generally must provide a personal guarantee as well. Applicants who are site owners must demonstrate “that they did not willfully or knowingly create a source of pollution or negligently violate any provision of Chapter 446k of the Connecticut General Statutes [Water Pollution Control provisions].”<sup>292</sup>

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287. See generally CONN. GEN. STAT. §§ 22a-133t, 22a-133u.

288. See Conn. Office of Brownfield Remediation & Dev., SCPRIF Program Summary Page, <http://www.ctbrownfields.gov/ctbrownfields/cwp/view.asp?a=2620&q=319332> (last visited May 20, 2008).

289. See *supra* note 178 for an explanation of Phase II and Phase III activities.

290. CONN. GEN. STAT. § 22a-133u(b); see also Conn. Dep’t of Econ. & Cmty. Dev., SCPRIF Program Summary, <http://www.ct.gov/ecd/cwp/view.asp?a=1101&q=249840> (last visited May 20, 2008).

291. 2007 Conn. Acts 233 §§ 6-7 (Reg. Sess.). See *supra* Part II.A for a more detailed discussion.

292. See Conn. Office of Brownfield Remediation & Dev., *supra* note 288.

The funds received from the DECD under this program constitute a lien against the property at issue, unless the borrower is a municipality.<sup>293</sup> An applicant must demonstrate that the property owner will consent to the placement of this lien (unless the applicant is a municipality and the site is abandoned or tax delinquent).<sup>294</sup> The lien is valid only if a certificate of lien is filed on the land records and the DECD mails a copy of this certificate to all parties having an interest of record in the property. The statute authorizes the Attorney General to bring foreclosure actions as appropriate.<sup>295</sup>

The DECD sets the repayment schedule. The principal is due upon the sale or lease of the property, the sale or release of municipal liens on the property, or the DEP's approval of a final remedial action report pursuant to the Voluntary Remediation Program under Conn. Gen. Stat. Section 22a-133y.<sup>296</sup> The DECD may require the repayment of the loan amortized over a maximum of five years from the time the principal is due. If the remediation or the sale or lease of a property is infeasible due to the cost of remediation, no repayment is required except for the interest from the time that the loan was issued. The DECD may require partial repayment only if it is economically feasible to do so. Interest on the loan may vary depending on whether the borrower is a municipality or a private entity.<sup>297</sup>

The SCPRIF received funding of \$5 million from the issuance of revenue bonds in 1995 and general obligation bonds in 1996. In 2004, however, the General Assembly reduced the fund's level to \$3 million. Although the fund is revolving,<sup>298</sup> borrowers generally only pay back the fund when they sell remediated properties. Since the 2007 Task Force Act directs repayment of the SCPRIF to the new Brownfield Account, SCPRIF will probably not receive any future funding.

Since its inception in 1995, SCPRIF has funded seventeen projects with a total of \$1.9 million.<sup>299</sup> Most recently, in January 2007, the DECD awarded a \$215,300 loan to a project in Willimantic and a

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293. CONN. GEN. STAT. § 22a-133u(d).

294. See Conn. Office of Brownfield Remediation & Dev., *supra* note 288.

295. CONN. GEN. STAT. § 22a-133u(d).

296. See *supra* Part II.C.

297. CONN. GEN. STAT. § 22a-133u(c).

298. A revolving loan fund generally consists of a capital fund established for loans in which the lender uses repayments of principal to lend to other qualified borrowers. See EPA, REVOLVING LOAN FUND ADMINISTRATIVE MANUAL (2004), available at [http://www.epa.gov/swerosps/bf/pubs/toc\\_rlf.pdf](http://www.epa.gov/swerosps/bf/pubs/toc_rlf.pdf).

299. CONN. DEP'T OF ECON. & CMTY. DEV., *supra* note 64, at 19-20.

\$60,000 loan to a project in Winsted. Both are expected to include environmental investigation and remediation. At least two funded projects have repaid the fund, including one in Manchester at the former Morlan Valve property on Tolland Turnpike, which received an \$82,000 loan in the late 1990s.

#### 6. State Administered Community Development Block Grant (CDBG) Program

Connecticut's State Administered (Small Cities) CDBG program<sup>300</sup> provides funding and technical support to municipalities with populations numbering fewer than 50,000<sup>301</sup> (more than 150 Connecticut municipalities qualify)<sup>302</sup> "for projects that achieve local community and economic development objectives."<sup>303</sup> The U.S. Department of Housing and Urban Development (HUD) funds and the DECD administers this

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300. See generally 42 U.S.C. §§ 5301 to 5306 (2000); 24 C.F.R. §§ 570.480 to 570.497; U.S. Dep't of Housing and Urban Dev., State Administered CDBG, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/stateadmin> (last visited May 20, 2008); Conn. Office of Brownfield Remediation & Dev., DECD Cmty. Dev. Block Grant: Small Cities, <http://www.ct.gov/ecd/cwp/view.asp?a=1098&Q=249736> (last visited May 20, 2008); see 42 U.S.C. § 5306(d) (allocating funds for non-entitlement areas).

301. See Conn. Office of Brownfield Remediation & Dev., *supra* note 300. More specifically, HUD grants funds to states, "units of general local government" (which include any city, county, town, and village, among other entities, 42 U.S.C. § 5302(a)(1), and Indian tribes in so-called "non-entitlement areas," *id.* § 5303).

"Entitlement areas" include "metropolitan cities" or part of "urban counties." 42 U.S.C. §§ 5302(a)(4), 5302(a)(6)(C); see also U.S. Dep't of Housing and Urban Dev., Cmty. Dev. Block Grant Entitlement Cmty. Grants, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/entitlement/> (last visited May 20, 2008). A "metropolitan city" is a central city of a metropolitan area as defined by the federal Office of Management and Budget, or a city within a metropolitan area with a population exceeding 50,000. 42 U.S.C. § 5302(a)(4). Among other specialized definitions, see *id.* §§ 5302(a)(6)(C), 5302(a)(6)(D), an "urban county," generally, has either (1) a population exceeding 200,000 (excluding "metropolitan cities"), or (2) a population exceeding 100,000 and a population density of at least 5,000 per square mile. *Id.* § 5302(a)(6)(A).

"Non-entitlement areas" are defined as *not* "metropolitan cities" or part of "urban counties." *Id.* § 5302(a)(7); see also U.S. Dep't of Housing and Urban Dev., Cmty. Dev. Block Grant (CDBG) Programs, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/> (last visited May 20, 2008). "Non-entitlement areas" in Connecticut *exclude* the following: Bridgeport, Bristol, Danbury, Hartford, Meriden, Middletown, New Britain, New Haven, New London, Norwalk, Norwich, Stamford, Waterbury, West Haven, East Hartford, Fairfield, Greenwich, Hamden, Manchester, Milford, Stratford, and West Hartford. See U.S. Dep't of Housing and Urban Dev., CDBG Contacts: Conn., <http://www.hud.gov/local/ct/community/cdbg/index.cfm#cities> (last visited May 20, 2008).

302. See Conn. Dep't of Econ. & Cmty. Dev., CDBG – Eligible Conn. Towns, [http://www.ct.gov/ecd/lib/ecd/eligible\\_towns.doc](http://www.ct.gov/ecd/lib/ecd/eligible_towns.doc) (last visited May 20, 2008).

303. See Conn. Office of Brownfield Remediation & Dev., *supra* note 300.

program, which represents a slice of HUD's extensive CDBG federal assistance program.<sup>304</sup>

Eligible activities under the State Administered CDBG program which are potentially applicable to brownfield projects include: economic development assistance to for-profit businesses; acquisition or disposal of property; reconstruction and rehabilitation of buildings; construction and improvement of public facilities; and energy efficiency or conservation projects.<sup>305</sup> While the DECD reports that it has not awarded State Administered CDBG monies for the specific purpose of environmental remediation, the DECD comments that such use is apparently permitted.

There are substantial constraints that may limit application of State Administered CDBG funds to brownfield projects: (1) municipalities may provide subgrants or loans only to non-profit "Community Based Development Organizations" (CBDOs);<sup>306</sup> (2) as a practical matter, all but one of the eight CDBG grants between August and November 2007 were slated for senior centers or senior housing projects (the other was for housing rehabilitation);<sup>307</sup> (3) uses are subject to the requirement of meeting at least one of three national objectives: benefiting low and moderate-income persons, eliminating slum and blight, and addressing an urgent need;<sup>308</sup> (4) new construction of permanent residential structures is generally ineligible for funds;<sup>309</sup> and (5) states must award at least 70% of their CDBG funds toward activities benefiting low- and moderate-income individuals.<sup>310</sup>

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304. See *infra* Part IV.B for a discussion of the CDBG Program.

305. See Conn. Dep't of Econ. & Cmty. Dev., Eligible Activities, [http://www.ct.gov/ecd/lib/ecd/Outreach\\_3.doc](http://www.ct.gov/ecd/lib/ecd/Outreach_3.doc) (last visited May 20, 2008).

306. See Conn. Dep't of Econ. & Cmty. Dev., Eligible Applicants, [http://www.ct.gov/ecd/lib/ecd/eligible\\_activities.doc](http://www.ct.gov/ecd/lib/ecd/eligible_activities.doc) (last visited May 20, 2008). A CBDO is "any non-profit organization serving the development needs of the communities of non-entitlement areas." *Id.* See *supra* note 301 for a definition of "non-entitlement areas."

307. Conn. Dep't of Econ. & Cmty. Dev., Small Cities CDBG Press Releases, <http://www.ct.gov/ecd/cwp/view.asp?a=1098&Q=378978&PM=1> (last visited May 20, 2008).

308. See Conn. Dep't of Econ. & Cmty. Dev., Nat'l Objectives, [http://www.ct.gov/ecd/lib/ecd/National\\_Objectives.doc](http://www.ct.gov/ecd/lib/ecd/National_Objectives.doc) (last visited May 20, 2008).

309. See Conn. Dep't of Econ. & Cmty. Dev., *supra* note 305. With prior approval, a CBDO may perform otherwise ineligible activities including new housing construction. See Conn. Dep't of Econ. & Cmty. Dev., *supra* note 306.

310. 42 U.S.C. § 5301(c) (2000). This means an "area benefit (e.g. streets and sidewalks)," "limited clientele (e.g. seniors or handicapped persons)," or "direct benefit (e.g. housing rehab and job creation)." Conn. Dep't of Econ. & Cmty. Dev., *supra* note 308.

In fiscal year 2007-2008, the DECD had \$13,230,987 available, \$500,000 of which was for urgent projects.<sup>311</sup>

*C. Department of Environmental Protection – Underground Storage Tank Petroleum Clean Up Account*

The DEP administers the Underground Storage Tank (UST) Petroleum Clean Up Account (the Account), a funding program with direct application to brownfield development.<sup>312</sup> The Account reimburses parties that have incurred costs as a result of a release or suspected release from a UST, including investigation and remediation costs, where the parties have been “determined not to have been liable for any such release.”<sup>313</sup> Parties can apply initially and then submit supplemental applications as new costs accrue. Parties also have the option of securing a private third-party to pay investigation and remediation costs upfront and then assigning the reimbursement back to this third-party.<sup>314</sup> (Third-parties generally charge a percentage of the reimbursement for their services.) This option enables parties to maintain financial liquidity and opens the UST Account program to parties lacking the resources to make upfront payments for UST investigation and remediation.

This program can be a useful tool in a brownfield context where, in the course of redeveloping a site, a non-labile owner remediates contamination due to leaking USTs. Brownfield developers may find that these UST reimbursements free up financial resources that developers can then use where they are needed most for the overall project. The DEP recommends that brownfield developers maintain separate accounting for UST expenditures to facilitate applications for reimbursements from the Account.

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311. STATE OF CONN., 2007-08 ACTION PLAN FOR HOUSING AND COMMUNITY DEVELOPMENT 16 (2007), *available at* [http://www.ct.gov/ecd/lib/ecd/housing\\_plans/2007\\_action\\_plan.pdf](http://www.ct.gov/ecd/lib/ecd/housing_plans/2007_action_plan.pdf).

312. *See generally* CONN. GEN. STAT. §§ 22a-449a to -449p (2007); CONN. AGENCIES REGS. § 22a-449e-1 (1997). This subsection describes how the program works for new applicants only.

313. CONN. GEN. STAT. § 22a-449f(a); *see also id.* §§ 22a-449a(3), 22a-449c(a)(2). Subject to statutory requirements, the UST Account can also make payments to third parties for claims of bodily injury, property damage, and natural resource damages subject to certain notice requirements. *Id.* §§ 22a-449c(a)(2), 22a-449f(a). In a twist on this third-party option, the Town of Brookfield applied for and received funds as a third-party to conduct a feasibility study for an intersection with gas stations on all four corners.

314. *Id.* § 22a-449c(a)(2).

Costs eligible for reimbursement include those incurred “as a result of releases, and suspected releases [and] costs of investigation and remediation of releases and suspected releases.”<sup>315</sup> The Account, however, does not cover remedial costs which are less than \$10,000 or more than \$1 million.<sup>316</sup> As of December 2005, the DEP had awarded \$141 million under the program.<sup>317</sup> While the average reimbursement per site was \$155,689 as of December 2005,<sup>318</sup> individual reimbursements vary widely as they cover sites of all sizes throughout the state in both urban and rural areas.

The Account is potentially available to “responsible parties,” that is, parties currently or formerly owning, leasing, using, or having an interest in a leaking UST or property with a leaking UST. The Account covers both releases and suspected releases from USTs. In addition, the Account is available regardless of when the release or suspected release occurred, whether or not the party had an interest in the property or UST at the time of the release or suspected release, and whether or not the party used the UST. Those affiliated with potential applicants through a familial, contractual, corporate, or financial relationship are also eligible to apply for reimbursement.<sup>319</sup>

The Underground Storage Tank Petroleum Clean-Up Account Review Board (the Board) determines whether to reimburse applicants from Account funds. This Board consists of fourteen individuals, each of whom a designated executive or legislative leader appoints.<sup>320</sup>

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315. CONN. GEN. STAT. § 22a-449c(a)(2). The regulations provide examples of activities that are eligible for reimbursement. These include: mitigating emergency situations; preparing and submitting a proposed investigative scope of study; conducting an investigation to characterize the contamination; preparing and submitting an engineering report; preparing contract plans and specifications for remediation; conducting remediation; performing studies and monitoring programs; and paying third party claims for bodily injury, property damage, and natural resource damages. CONN. AGENCIES REGS. § 22a-449e-1(d) (1997).

316. CONN. GEN. STAT. § 22a-449c(a)(3). Applicants must notify the Board if they receive or expect to receive reimbursement from any source other than the Account, and must repay the Account within thirty days of receiving any such reimbursement. *Id.* § 22a-449c(e)(2).

317. See Conn. Dep’t of Env’tl. Prot., UST Clean-up Account Program 41, [http://www.ct.gov/dep/cwp/view.asp?a=2717&q=325322&depNav\\_GID=1652](http://www.ct.gov/dep/cwp/view.asp?a=2717&q=325322&depNav_GID=1652) (click “Overview of Underground Storage Tank Petroleum Clean-up Account Program”) (last visited Aug. 14, 2008).

318. *Id.* at 42.

319. CONN. GEN. STAT. § 22a-449a(3).

320. *Id.* § 22a-449d(b). For a list of current Board members, see Conn. Dep’t of Env’tl. Prot., UST Petroleum Clean-up Account Review Bd. Members, [http://www.ct.gov/dep/cwp/view.asp?a=2717&q=396894&depNav\\_GID=1652](http://www.ct.gov/dep/cwp/view.asp?a=2717&q=396894&depNav_GID=1652) (last visited May 20, 2008). The Board consists of representatives of: the DEP; the Department of



Applicants must complete and submit application forms to the Board, and the Board must receive these applications no later than one year after the applicant completes (or substantially completes) all of the work necessary to prepare the plan or report.<sup>321</sup> The Board meets monthly to vote on submitted claims.<sup>322</sup> There is an appeals process for parties dissatisfied with the Board's decisions,<sup>323</sup> but parties may not resubmit denied applications.<sup>324</sup>

Among other requirements, an application must include a compliance summary of any USTs dispensing petroleum on the property where the release occurred. For this summary, an independent consultant must evaluate these USTs within 180 days before the application's submission and must assess recordkeeping and periodic monitoring or testing requirements for the one-year period ending within

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Revenue Services; the Office of Policy and Management; the State Fire Marshal; the Connecticut Petroleum Council, appointed by the speaker of the House of Representatives; the Service Station Dealers Association, appointed by the majority leader of the Senate; the public, appointed by the majority leader of the House of Representatives; the Independent Connecticut Petroleum Association, appointed by the president pro tempore of the Senate; the Gasoline and Automotive Service Dealers of America, Inc., appointed by the minority leader of the House of Representatives; a municipality with a population greater than 100,000, appointed by the Governor; a municipality with a population of less than 100,000, appointed by the minority leader of the Senate; and a small manufacturing company with fewer than seventy-five employees, appointed by the speaker of the House of Representatives. The remaining members, appointed by the president pro tempore of the Senate, are individuals experienced in the delivery, installation, and removal of residential USTs and the remediation of UST contamination; and an LEP experienced in investigating and remediating UST contamination, appointed by the Governor.

321. CONN. GEN. STAT. § 22a-449f(3). For electronic versions of the application forms, see Conn. Dep't of Env'tl. Prot., UST Clean-up Account Program, <http://www.ct.gov/dep/cwp/view.asp?a=2717&q=325322> (last visited May 20, 2008). There are forms for both responsible parties (initial and supplemental applications) and third parties. See also CONN. AGENCIES REGS. § 22a-449e-1(e)(1) (1997) (specifying the records required in an application).

322. For the current calendar of meeting dates, see Conn. Dep't of Env'tl. Prot., UST Petroleum Clean-up Account Review Bd. Meeting Dates for 2008, [http://www.ct.gov/dep/cwp/view.asp?a=2717&q=396308&depNav\\_GID=1652](http://www.ct.gov/dep/cwp/view.asp?a=2717&q=396308&depNav_GID=1652) (last visited May 20, 2008); see also CONN. AGENCIES REGS. § 22a-449e-1(b) (1997).

323. CONN. GEN. STAT. § 22a-449g. Dissatisfied applicants (and the DEP) may request a hearing before the Board within twenty days of the Board's decision, and the Board either affirms or modifies its initial decision. Parties may appeal decisions of the Board to the superior court for the judicial district of New Britain within twenty days after the decision issues.

324. *Id.* § 22a-449f(h). Although the statute requires the Board to render a decision within ninety days of receiving an initial application, or within forty-five days for a supplemental application, there is currently a backlog of applications, creating an average waiting period of three to six months for an initial application. The DEP expects to eliminate this backlog by the close of 2008.

180 days before the application's submission.<sup>325</sup> The summary must also include a description of planned and implemented corrective actions. Reimbursements are barred if the compliance evaluation summary reveals a violation of specified tank and piping construction requirements or of release reporting requirements, and the party does not fully correct the violation prior to submitting an application. If a party, prior to submitting an application, fails to correct violations relating to cathodic protection, spill prevention, overfill prevention, or release detection, the statute requires a 75% reimbursement reduction.<sup>326</sup> The Board may also reduce reimbursements, at its discretion, for any other violation of the laws pertaining to owning or operating a UST.<sup>327</sup>

The Board is required to reimburse costs expended by responsible parties for the remediation of contamination due to a leaking UST if these costs meet ten statutory requirements.<sup>328</sup> Some of these include:

- The responsible party demonstrates and the Board determines that the responsible party has completed a "milestone" that entails the submission of a specified LEP-approved (or for some, DEP-approved) report describing release responses, investigations, or remedial actions;<sup>329</sup>
- A responsible party was or would have been required to demonstrate financial responsibility under federal UST

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325. *Id.* § 22a-449f(d)(1). For the DEP compliance summary form for LEPs, see Conn. Dep't of Env'tl. Prot., Underground Storage Tank Petroleum Clean-up Account (USTPCA) Compliance Evaluation Form, <http://www.ct.gov/dep/lib/dep/USTCleanUpAccount/ComplianceEvaluationForm.doc> (last visited May 20, 2008).

326. CONN. GEN. STAT. § 22a-449f(e)(1).

327. *Id.* § 22a-449f(e)(1).

328. *Id.* § 22a-449f(c). This section also sets forth the requirements for reimbursement of third-party claims for bodily injury, property damages, or natural resource damages.

329. *Id.* § 22a-449p. These reports are: release response reports; interim remedial action reports; investigation reports and remedial action plans; soil remedial action reports; groundwater remedial action progress reports (eligible for submission only after completing all necessary construction and operating the remedial actions for one year); annual groundwater remedial action progress reports; and final remedial action reports. For the DEP milestone form for LEPs, see Conn. Dep't of Env'tl. Prot., Underground Storage Tank Petroleum Clean-up Account Licensed Env'tl. Prof'l (LEP) Milestone & Approval Form, [http://www.ct.gov/dep/lib/dep/USTCleanUpAccount/LEP\\_Milestone\\_Form.doc](http://www.ct.gov/dep/lib/dep/USTCleanUpAccount/LEP_Milestone_Form.doc) (last visited May 20, 2008). For the DEP's "Investigation and Remediation Milestones Fact Sheet," see Conn. Dep't of Env'tl. Prot., Underground Storage Tank Clean-up Account Program, <http://www.ct.gov/dep/cwp/view.asp?a=2717&q=325322> (last visited May 20, 2008).

regulations<sup>330</sup> for the leaking UST (regardless of whether these requirements applied when the release occurred);

- The applicant demonstrates that it does not have insurance or a reimbursement contract or agreement, it has insurance but the claim has been denied or is insufficient to cover expenditures, or a contract is unable or insufficient to cover costs;
- At the time a party submits an application, there is no UST dispensing petroleum on the property where the release occurred which is subject to federal financial responsibility requirements; and
- The responsible party notified the Board, as soon as practicable, about the release and any third-party claim.<sup>331</sup>

The cost of LEP services in connection with the remediation of UST contamination generally is eligible for Account reimbursement.<sup>332</sup> In addition, an applicant can receive up to \$1,000 (and potentially more under certain circumstances) to reimburse the cost of preparing a compliance summary for the application.<sup>333</sup>

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330. 40 C.F.R. § 280.90-.116 (2008). This requirement does not apply when the state is the responsible party.

331. The other five statutory requirements are as follows:

- The costs were incurred after July 5, 1989;
- After the release, if any, the responsible party incurred costs for investigation, cleanup, or settled or adjudicated third-party claims resulting from a release;
- The Board determines that the expenditures are reasonable, the party did not knowingly and intentionally fail to submit a UST notification, and the release did not occur from a UST that does not comply with a DEP or judicial final order;
- The Board determines what, if any, reductions to take from the amount sought based upon compliance evaluations;
- The applicant demonstrates that the remediation (including monitoring) is not more stringent than the RSR requirements (unless the DEP has directed for a clean up more stringent than the RSRs); and
- For (1) current or former owners or operators of a UST at the time of release (2) where there is no UST subject to the federal financial responsibility requirements which is dispensing petroleum on the property where the release or suspected release occurred, this owner or operator demonstrates that non-compliance with UST statutes and regulations was not a proximate cause of the release or suspected release.

CONN. GEN. STAT. § 22a-449f(c). This final requirement does not apply to applications “concerning a release of an underground storage tank system that was reported to the [DEP] in September, 2003 where such system was owned or operated by a municipality or other political subdivision of the state at the time of the release and such system was removed on or before April 1, 2005.” *Id.* The final requirement also does not apply for reimbursements for annual groundwater remedial actions. *Id.* § 22a-449f(d)(5).

332. *Id.* § 22a-449f(b)(2).

333. CONN. GEN. STAT. § 22a-449f(d)(3).

The Account does not reimburse for the following expenditures: costs related to remediating to standards more stringent than the RSRs, diminution of property value, attorneys' fees above \$5,000 for responsible parties and \$10,000 for other eligible parties, and all attorneys' fees for defending third-party claims.<sup>334</sup>

Parties may submit initial claims and then follow up with supplemental claims as additional costs accrue in the course of investigation and remediation.<sup>335</sup> Parties must submit supplemental claims within five years after submitting the initial claim (regardless of whether the cost accrued within this window).<sup>336</sup> This five-year window does not apply to annual groundwater remedial actions, including the preparation of a groundwater remedial action progress report.<sup>337</sup> The five-year window encourages parties to investigate and remediate sites expeditiously, with the exception of groundwater remediation and monitoring which often require a longer timeframe.

If the total costs do not exceed \$250,000, then either an LEP or the DEP must approve all services and activities prior to submission for reimbursement. If the total costs exceed \$250,000, then the DEP must approve the services and activities, or it may delegate this task to an LEP.<sup>338</sup>

The Account receives \$3 million every three months. These funds derive from the taxes collected from companies that refine or distribute petroleum products in Connecticut, or import petroleum products into Connecticut.<sup>339</sup> The relative stability of this funding should work to the benefit of brownfield developers in negotiating terms with lenders.

#### IV. FEDERAL FINANCIAL ASSISTANCE PROGRAMS FOR BROWNFIELDS

A wide range of federal government agencies administer more than twenty programs that provide financial assistance for various aspects of brownfield development.<sup>340</sup> Only a handful of these programs, however,

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334. *Id.* § 22a-449c(a)(3).

335. CONN. AGENCIES REGS. § 22a-449e-1(e)(4) (1997).

336. CONN. GEN. STAT. § 22a-449c(d)(2). If the Board does not act on an application within six months of its submission, the DEP may extend this five-year window by six months or to a maximum of two years. *Id.* § 22a-449c(d)(3).

337. *Id.* § 22a-449c(d)(4).

338. *Id.* § 22a-449f(b)(1).

339. CONN. GEN. STAT. § 22a-449b (citing § 12-587).

340. *See* BARTSCH & WELLS, *supra* note 215, at 11. The diverse federal programs include:

including those discussed below, deal directly with brownfields; the others have purposes and contain elements, such as general economic and environmental improvement, that lend themselves to brownfield development. The programs of most general applicability to brownfields are those of the EPA, HUD, and the EDA,<sup>341</sup> which this Part discusses.

These agencies make financial assistance for brownfield projects available, in the first instance, to governmental and quasi-governmental entities. Under certain programs, these entities, in turn, extend loans to private parties using the federal grants that they have received. These programs include revolving loan funds capitalized by EPA grants under the Comprehensive Environmental Response, Compensation, and Liability Act and under the Clean Water Act, as well as revolving loan funds that the EDA grants capitalize under the Economic Adjustment Assistance Program. In addition, municipalities receiving HUD Section 108 and Brownfield Economic Development Initiative funds may, in turn, lend (or grant) these funds to private parties for specified types of projects.

Even absent these “secondary” loans, private parties may benefit indirectly from the enhanced receptivity of brownfield projects in a municipality or region receiving federal funding. Municipalities or regions that have taken the first step toward revitalization with their own

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- Loans – U.S. Department of Housing and Urban Development CDBG loans and “floats”; HUD Section 108 loan guarantees; U.S. Environmental Protection Agency capitalized brownfield revolving loan funds; EPA capitalized clean water revolving loan funds; Small Business Administration (SBA) microloans; SBA Section 504 development company debentures; SBA Section 7(a) and Low-Doc programs; and Economic Development Administration (EDA) of the U.S. Department of Commerce Title IX (capital for local revolving loan funds).
  - Grants – HUD Brownfield Economic Development Initiative (BEDI); HUD CDBG (for locally determined projects); EPA assessment pilot grants; EDA Title I (public works) and Title IX (economic adjustment) disbursements; U.S. Department of Transportation (DOT) transportation and community system preservation (TCSP) pilot grants; DOT disbursements (various system construction and rehabilitation programs); and Army Corps of Engineers disbursements (cost-shared services).
  - Equity Capital (for SBA Small Business Investment Companies).
  - Tax incentives and tax-exempt financing (historic rehabilitation tax credits; low-income housing tax credits; and industrial development bonds).
  - Tax-advantaged zones – HUD/U.S. Department of Agriculture (USDA) Empowerment Zones (various incentives), and HUD/USDA Enterprise Communities (various incentives).

*Id.*

341. *Id.* at 12-20. See generally EPA, Funding and Financing for Brownfields, <http://www.epa.gov/brownfields/mmatters.htm> (last visited May 20, 2008) (containing a broad collection of materials on federal sources of brownfield funding).

projects are more likely to welcome private projects that constitute part of the “upward spiral” effect. In addition, public sector brownfield projects financed by federal monies in a municipality or region may cut costs for subsequent private projects that will take advantage of the infrastructure or services resulting from that funding.

*A. United States Environmental Protection Agency*

Pursuant to CERCLA, the EPA administers Brownfields Assessment Grants, Brownfields Cleanup Revolving Loan Fund (RLF) Grants, and Brownfields Cleanup Grants, as discussed below. These programs have wide-ranging applicability to brownfield projects, although only the RLF loans are available to for-profit entities. By contrast, only a handful of states—not including Connecticut—utilize brownfield projects funds from the Clean Water State Revolving Loan Funds set up in every state pursuant to the federal Clean Water Act, as discussed below. Each state sets its own priorities for the use of these funds. Applicable only to the water components of a project, the Clean Water Act fund nonetheless has vast potential for brownfields projects to the extent that more states, including Connecticut, would elect to use them for this purpose.

*1. Comprehensive Environmental Response, Compensation, and Liability Act Grants*

The brownfield redevelopment grants that the EPA offers under CERCLA<sup>342</sup> (as amended by the 1986 Superfund Amendments and Reauthorization Act,<sup>343</sup> and the 2002 Small Business Liability Relief and Brownfields Revitalization Act)<sup>344</sup> utilize the following statutory definition of “brownfield site”: “[R]eal property, the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant.”<sup>345</sup> The term

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342. See 42 U.S.C. § 9604(k); see also EPA, PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS, *supra* note 6, at 1; EPA, BROWNFIELD GRANT GUIDELINES FREQUENTLY ASKED QUESTIONS 1 (2007), available at [http://www.epa.gov/brownfields/fy08\\_grantfaq\\_final.pdf](http://www.epa.gov/brownfields/fy08_grantfaq_final.pdf) [hereinafter BROWNFIELD GRANT FAQs].

343. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

344. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

345. 42 U.S.C. § 9601(39)(A). See also *supra* Part I.A; notes 4 & 5.

“brownfield site” *excludes* those facilities that are undergoing a planned or ongoing removal action under CERCLA; listed (or proposed for listing) on the National Priorities List (NPL);<sup>346</sup> or are subject to unilateral administrative orders, court orders, administrative orders on consent, judicial consent decrees, and other specified orders<sup>347</sup> under CERCLA or various other federal environmental laws. The statute also excludes facilities that are permitted under various federal environmental laws; subject to the jurisdiction, custody, or control of the United States government (except for land held in trust for an Indian tribe); and where a portion of the site has a PCB release subject to remediation under the Toxic Substances Control Act.<sup>348</sup> The statute, however, authorizes the EPA to consider funding otherwise ineligible properties on a case-by-case basis.<sup>349</sup>

CERCLA excludes petroleum and petroleum-related products from its definition of “hazardous substances” and “pollutants or contaminants.”<sup>350</sup> It follows that the definition of “brownfield site”—which in turn identifies those sites that are eligible for federal brownfield funding under CERCLA—does not include sites contaminated by petroleum or petroleum-related products. The statute specifically, however, *includes* sites which, among other criteria: (1) meet the general definition of “brownfield site,” above; (2) are determined, either by the EPA or the appropriate state, to pose relatively low risk compared to the state’s other “petroleum-only” sites; (3) have no viable responsible party

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346. The NPL is the EPA’s annually updated list of the most serious uncontrolled or abandoned hazardous waste sites in the United States identified for possible long-term cleanup under CERCLA. *See generally* EPA, National Priorities List, <http://www.epa.gov/superfund/sites/npl/> (last visited May 20, 2008).

347. These include: (1) facilities that are subject to corrective action under the Solid Waste Disposal Act, 42 U.S.C. §§ 6924(u), 6928(h), and “to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures”; and (2) land disposal units for which a closure notification has been submitted under the Solid Waste Disposal Act, *id.* §§ 6921 to 6939e, and closure requirements have been specified in a closure plan or permit, *id.* §§ 9601(39)(B)(v) to (vi).

348. *Id.* § 9601(39)(B). The Toxic Substances Control Act is found at 15 U.S.C. §§ 2601 to 2692 (2000).

349. 42 U.S.C. § 9601(39)(C). The EPA may authorize financial assistance upon a finding that this assistance “will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.” *Id.*

350. *See supra* notes 4 and 5 for the definitions of “hazardous substance” and “pollutant or contaminant.” “Waste petroleum,” such as used motor oil, however, can constitute a hazardous substance under certain circumstances. *See, e.g., City of New York v. Exxon Corp.*, 766 F. Supp. 177, 185-88 (S.D.N.Y. 1991).

and will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleanup; and (4) are not subject to a corrective action under the federal Resource Conservation and Recovery Act<sup>351</sup> for petroleum releases from underground storage tanks.<sup>352</sup> CERCLA, as amended by the Brownfields Revitalization Act, requires the EPA to make available to petroleum-contaminated sites \$50 million or, if the total amount of available funds is less than \$200 million, 25% of total funding.<sup>353</sup>

EPA grants and loans for brownfield redevelopment are available, in the first instance, to “eligible entities,” which include specified state, local, and tribal governments, agencies, and quasi-governmental agencies.<sup>354</sup> EPA funding is generally available for (1) assessment,<sup>355</sup> and (2) brownfield remediation which includes the Revolving Loan Fund and direct remediation grants,<sup>356</sup> as discussed further below.<sup>357</sup> While these grants are available only to public sector “eligible entities,” the loans from the RLFs are available directly to private businesses. Even the assessment and remediation grants to public entities, however, can reduce start-up costs and create a welcoming environment for private brownfield projects in a recipient municipality or region.

351. 42 U.S.C. § 6991b(h) (referenced in *id.* § 9601(39)(D)(ii)(II)(cc)).

352. *Id.* §§ 9601(39)(D)(i), (ii)(II). Also included in the definition of “brownfield site” are sites which meet the general definition of “brownfield site” and are either (1) contaminated by a “controlled substance,” 21 U.S.C. § 802 (2000), or (2) mine-scarred land, 42 U.S.C. §§ 9601(39)(D)(i), 9601(39)(D)(ii)(I) & (III).

353. 42 U.S.C. § 9604(k)(12)(B).

354. *Id.* § 9604(k)(1). These “eligible entities” are as follows:

(A) a general purpose unit of local government; (B) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government; (C) a government entity created by a State legislature; (D) a regional council or group of general purpose units of local government; (E) a redevelopment agency that is chartered or otherwise sanctioned by a State; (F) a State; (G) an Indian Tribe other than in Alaska; or (H) an Alaska Native Regional Corporation and an Alaska Native Village Corporation as those terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 and following) and the Metlakatla Indian community.

*Id.*

355. *Id.* § 9604(k)(2).

356. 42 U.S.C. § 9604(k)(3).

357. The EPA awards grants based on consideration of ten “ranking criteria.” *Id.* § 9604(k)(5)(C). EPA brownfield assistance is subject to specified limitations and may not be used for payment of fines or penalties or for payment of response costs where the recipient is liable under Section 107 of CERCLA. *Id.* § 9604(k)(4)(B). Eligible entities, however, may use up to 25% of funds to satisfy the requirements of a “bona fide prospective purchaser.” *Id.* § 9604(k)(4)(B)(iii).



CERCLA authorized a ceiling of \$200 million for these programs for each fiscal year from 2002 to 2006.<sup>358</sup> Since 1995 (including brownfield funding prior to the 2002 passage of the Brownfields Revitalization Act), EPA has awarded 1,255 assessment grants totaling \$298.6 million, 426 remediation grants totaling \$78.7 million, and revolving loan fund grants totaling \$217.7 million.<sup>359</sup> In fiscal year 2008, EPA awarded over \$74 million in brownfield grants<sup>360</sup> (194 assessment grants totaling \$38.7 million; 108 remediation grants totaling \$19.6 million; and 12 revolving loan fund grants totaling \$15.7 million).<sup>361</sup> In fiscal year 2007, over 800 applicants competed for funding, and EPA awarded 294 grants to 202 applicants.<sup>362</sup> In previous years, EPA has awarded approximately \$70 million each year.<sup>363</sup>

*a. Brownfield Assessment Grants (BAGs)*

The EPA awards grants “to inventory, characterize, assess, and conduct planning related to brownfield sites” and to “perform targeted site assessments at brownfield sites”<sup>364</sup> according to the “all appropriate inquires” (AAI) standard.<sup>365</sup> Eligible entities—which do not include for-profit entities or non-profit organizations—may apply for up to \$200,000 (or \$350,000 if the EPA grants a waiver) per site<sup>366</sup> and must perform

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358. 42 U.S.C. § 9604(k)(12)(A). Fiscal year 2008 applications were due in October 2007. EPA, Brownfields Funding Information, <http://www.epa.gov/swerosps/bf/applicat.htm> (last visited May 20, 2008).

359. EPA, Brownfields and Land Revitalization: FY 2008 Information, [http://www.epa.gov/brownfields/pilot\\_grants.htm](http://www.epa.gov/brownfields/pilot_grants.htm) (last visited May 20, 2008).

360. *Id.*

361. Press Release, EPA, \$74 Million in Grants to Give New Life to Old Properties (Apr. 7, 2008), available at <http://yosemite.epa.gov/opa/admpress.nsf/dc57b08b5acd42bc852573c90044a9c4/25bc0a233654d2898525742400613cf4!OpenDocument> [hereinafter EPA FY 2008 Press Release].

362. *Id.*; BROWNFIELD GRANT FAQs, *supra* note 342, at 5.

363. More specifically, the EPA awarded \$70.7 million in fiscal year 2007, \$69.9 million in fiscal year 2006; \$76.7 million in fiscal year 2005; \$75.4 million in fiscal year 2004; and \$73.1 million in fiscal year 2003. EPA, Grant Announcement Information Archive, [http://www.epa.gov/brownfields/archive/gannounce\\_arch.htm](http://www.epa.gov/brownfields/archive/gannounce_arch.htm) (last visited May 20, 2008).

364. 42 U.S.C. § 9604(k)(2)(A).

365. *Id.* § 9601(35)(B); see *supra* note 45 and accompanying text for a discussion of AAI.

366. 42 U.S.C. § 9604(k)(4)(A)(i).

assessments within two years.<sup>367</sup> No entity may apply for more than \$700,000 in BAG funding.<sup>368</sup>

In 2007, the City of New Haven received a \$200,000 EPA BAG for a property on River Street.<sup>369</sup> The EPA explains, “The River Street Municipal Development Plan calls for redevelopment and reuse of historic buildings, development of a waterfront park, and improvement of public infrastructure.”<sup>370</sup> In 2005, New Haven received another \$200,000 BAG for the Brewery Building on Grand Avenue.<sup>371</sup> The facility, which dates back to the 1800s, had been used as a railroad facility, a smelting operation, a power company site, and finally as a brewery.<sup>372</sup> The City of Meriden also received an EPA BAG in 2007.<sup>373</sup> According to the EPA, “Cleanup of the Cooper and Butler Street sites will allow the city to create a linear park, eliminate significant flooding problems, and improve the health and safety of neighborhood residents.”<sup>374</sup>

#### *b. Brownfields Cleanup Revolving Loan Fund Grants*

Remediation funding includes grants to governmental “eligible entities” to capitalize revolving loan funds.<sup>375</sup> The maximum amount for grants to eligible entities to fund RLFs is \$1 million per entity with the option for subsequent grants based on the consideration of statutory

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367. See EPA, Brownfields Assessment Pilots/Grants, [http://www.epa.gov/swerosps/bf/assessment\\_grants.htm](http://www.epa.gov/swerosps/bf/assessment_grants.htm) (last visited May 20, 2008).

368. See *id.*; EPA, BROWNFIELDS FEDERAL PROGRAMS GUIDE 27 (2005), available at [http://www.epa.gov/swerosps/bf/partners/2005\\_fpg.pdf](http://www.epa.gov/swerosps/bf/partners/2005_fpg.pdf) [hereinafter EPA BROWNFIELDS FEDERAL PROGRAMS GUIDE]; EPA, PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS 20-25 (2006), available at <http://www.epa.gov/oswer/docs/grants/epa-oswer-obcr-07-01.pdf> [hereinafter EPA PROPOSAL GUIDELINES] (detailing threshold criteria for BAG applications).

369. See EPA, Waste Site Cleanup and Reuse in New England (City of New Haven Brownfields Program), [http://yosemite.epa.gov/r1/npl\\_pad.nsf/51dc4f173ceef51d85256adf004c7ec8/3DCA6FAEAC0CADA585256C0E004C41B1](http://yosemite.epa.gov/r1/npl_pad.nsf/51dc4f173ceef51d85256adf004c7ec8/3DCA6FAEAC0CADA585256C0E004C41B1) (last visited, June 8, 2008).

370. See EPA, 2007 Fact Sheet, New Haven, CT, [http://www.epa.gov/swerosps/bf/07arc/r01\\_ct\\_newhaven.htm](http://www.epa.gov/swerosps/bf/07arc/r01_ct_newhaven.htm) (last visited, June 8, 2008).

371. See EPA, Brownfields 2005 Grant Fact Sheet, New Haven, CT, [http://www.epa.gov/region1/brownfields/pdfs/grants-fs-05/r01\\_ct\\_newhaven.pdf](http://www.epa.gov/region1/brownfields/pdfs/grants-fs-05/r01_ct_newhaven.pdf) (last visited June 8, 2008).

372. See EPA, 2007 Fact Sheet, Meriden, CT, [http://www.epa.gov/brownfields/07arc/r01\\_ct\\_meriden.htm](http://www.epa.gov/brownfields/07arc/r01_ct_meriden.htm) (last visited June 8, 2008).

373. *Id.*

374. *Id.*

375. 42 U.S.C. § 9604(k)(3)(A).

factors. In addition, “[c]oalitions of eligible entities may apply together under one recipient for up to \$1,000,000 per eligible entity.”<sup>376</sup> As with BAGs, neither non-profit corporations nor for-profit entities may apply for RLF funds directly from the EPA. Eligible entities must pay a 20% matching share (which may be labor, material, or services) from non-federal funding, unless the EPA determines that this requirement would cause undue hardship.<sup>377</sup>

Using revolving loan funds, however, eligible entities must provide, in turn, for purposes of brownfield remediation, (1) one or more loans to other eligible entities, private site owners or developers, or others, or (2) one or more grants to eligible entities or non-profit organizations.<sup>378</sup> Grants to eligible entities or non-profit organizations are based on consideration of specified statutory factors.<sup>379</sup> Typically, loans from RLFs, including those for the private sector, are low-interest or no-interest, and grants from RLFs do not require repayment. Grantees must perform RLF grant activities within five years.

In 1999, the City of Stamford received an RLF grant of \$500,000 from the EPA.<sup>380</sup> A few years later, the funding was increased to \$750,000. The City of Stamford was the first recipient of an RLF grant to make a loan commitment with this money and did so thirty days after receiving the funds; Stamford also made the third such loan. Through the RLF, the city was able to issue a loan to help finance the cleanup of several dilapidated properties on Pacific Street in Stamford’s South End. This loan has been repaid, and the funds currently are available. Due in part to the RLF program, a new Harley-Davidson showroom now operates on the site.<sup>381</sup>

Using funds from an RLF, the City of Bridgeport loaned \$350,000 to the Bridgeport Economic Development Corporation for the

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376. EPA BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 28.

377. 42 U.S.C. § 9604(k)(9)(B)(iii).

378. *Id.* § 9604(k)(3)(B).

379. *Id.* § 9604(k)(3)(C). For the threshold criteria for RLF capitalization fund applications, see EPA PROPOSAL GUIDELINES, *supra* note 368, at 31-34.

380. See EPA, EPA Brownfields Cleanup Revolving Loan Fund Pilot Fact Sheet, Stamford, CT, <http://epa.gov/brownfields/html-doc/rlf/stamsucc.htm> (last visited June 8, 2008).

381. See Robert W. Varney, Brownfield Cleanups A Boon for the Environment and the Economy; New Legislation Should Mean More Cleanups and Funding for CT, [http://www.epa.gov/region1/ra/column/archive/2002/brownfields\\_ct\\_112202.html](http://www.epa.gov/region1/ra/column/archive/2002/brownfields_ct_112202.html) (last visited June 8, 2008).

redevelopment of the Seaview Avenue Development Park.<sup>382</sup> This redevelopment was a joint project between federal and state agencies to clean up environmental contamination and construct new buildings at this industrial park. The funds functioned as a bridge loan to enable the project to keep moving forward. This loan is currently outstanding. In addition, in August 2007, the City of Bridgeport received an EPA RLF grant for \$1.3 million which the City then loaned to 1558 Barnum Avenue, LLC, for the cleanup and revitalization of that five acre site.<sup>383</sup> Upon closing, this loan would be the single largest RLF grant in New England (EPA Region 1).<sup>384</sup> The 1558 Barnum Street site had been used as an illegal scrap yard and had accumulated millions of dollars in back taxes before the City of Bridgeport foreclosed on this property.<sup>385</sup>

Finally, the Regional Growth Partnership based in New Haven received a \$1 million RLF grant in 2003<sup>386</sup> and has used half of these funds.<sup>387</sup>

### *c. Brownfield Cleanup Grants*

EPA remediation funding includes not only money to capitalize RLFs, but also grants to “eligible entities” or non-profit organizations for the direct remediation of brownfield sites owned by the grant recipient.<sup>388</sup> As with the other direct EPA grants discussed above, for-profit entities are not eligible for these brownfield cleanup grants. Applicants must either own the site at the time of application or by September 30th of the following year. Grant applicants must also

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382. EPA, Seaview Industrial Park – Bunnell Block, Blighted Neighborhood Makeover: Revamping Industry in the City of Bridgeport, BROWNFIELDS AT A GLANCE, EPA-560-F-06-030, Aug. 2006, *available at* [http://www.epa.gov/brownfields/success/bridgeport\\_ct\\_BRAG.pdf](http://www.epa.gov/brownfields/success/bridgeport_ct_BRAG.pdf).

383. Press Release, City of Bridgeport, EPA Awards City \$1.3 Million Brownfields Loan, *available at* [http://ci.bridgeport.ct.us/\\_\\_documents/news/press%20release%20--%20epa.doc](http://ci.bridgeport.ct.us/__documents/news/press%20release%20--%20epa.doc).

384. *Id.*

385. *Id.*

386. See EPA, Brownfields 2003 Grant Fact Sheet: Regional Growth Partnership, South Central CT, [http://www.epa.gov/swerosps/bf/03grants/southcen\\_ct.htm](http://www.epa.gov/swerosps/bf/03grants/southcen_ct.htm) (last visited June 8, 2008).

387. “On December 27, 2006 RGP closed its first EPA Brownfields Revolving Loan Fund (RLF) loan. The \$500,000 loan was to the owners of 290 Pratt Street, Meriden and will fund remediation of hazardous substances.” Regional Growth Partnership, News and Events, Mar.2007, [http://www.rgp-ct.org/rgp/index.php?option=com\\_content&task=blogcategory&id=14&Itemid=55](http://www.rgp-ct.org/rgp/index.php?option=com_content&task=blogcategory&id=14&Itemid=55) (last visted June 8, 2008).

388. 42 U.S.C. § 9604(k)(3)(A).

complete, at a minimum, a Phase I Site Assessment,<sup>389</sup> prior to submitting a proposal.<sup>390</sup> Grants for direct remediation will not exceed \$200,000 per site,<sup>391</sup> and recipients must perform the remediation activities within two years after the grant's award.<sup>392</sup> No entity may apply for funding at more than five sites.<sup>393</sup> Like those receiving money to capitalize an RLF, eligible entities receiving direct remediation funds must pay a 20% matching share (which may be labor, material, or services) from non-federal funding, unless the EPA determines that this requirement would cause undue hardship.<sup>394</sup>

In 2005, the EPA awarded a \$200,000 Brownfield Cleanup Grant for the Town of Redding's Georgetown Redevelopment Project.<sup>395</sup> Also in 2005, the EPA awarded a Cleanup Grant of \$25,500 for the Seaboard Equities Building, 1 Dock Street in Stamford, and \$200,000 for a project at 114 Manhattan Street in Stamford.<sup>396</sup>

## 2. *Clean Water Act – State Revolving Funds*

The Clean Water Act authorizes the EPA to make grants to states to capitalize Clean Water State Revolving Funds (CWSRFs) in each state.<sup>397</sup> There are currently CWSRFs in every state and in Puerto Rico.<sup>398</sup> With its mission of promoting water quality,<sup>399</sup> the CWSRF

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389. *See supra* note 45.

390. EPA BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 27.

391. 42 U.S.C. § 9604(k)(3)(A).

392. EPA BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 27.

393. EPA, Brownfields Cleanup Grants,

[http://www.epa.gov/swerosps/bf/cleanup\\_grants.htm](http://www.epa.gov/swerosps/bf/cleanup_grants.htm) (last visited May 20, 2008).

394. 42 U.S.C. § 9604(k)(9)(B)(iii). *See* EPA PROPOSAL GUIDELINES, *supra* note 368, at 43-50 (threshold criteria for cleanup grant applications).

395. In January 2006, the DECD awarded a \$600,000 State Administered CDBG to the Town of Redding for the demolition of buildings at the Gilbert and Bennett Wire Mill Site, which is part of the Georgetown Redevelopment Project. *See generally supra* Part IV.A.1.c. *See* Nancy Doniger, *Redding Project Nearer to Reality*, N.Y. TIMES, Dec. 18, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9901E1D61630F93BA25751C1A9639C8B63>.

396. *See* EPA, Waste Site Cleanup and Reuse in New England (City of Stamford Brownfields Program), [http://yosemite.epa.gov/r1/npl\\_pad.nsf/701b6886f189ceae85256bd20014e93d/0840c26f9c54233e85256c0e005549ba!OpenDocument](http://yosemite.epa.gov/r1/npl_pad.nsf/701b6886f189ceae85256bd20014e93d/0840c26f9c54233e85256c0e005549ba!OpenDocument) (last visited June 8, 2008).

397. *See generally* 33 U.S.C. §§ 1381 to 1387.

398. *See* EPA, THE CLEAN WATER STATE REVOLVING FUND PROGRAM 1 (1999), available at <http://www.epa.gov/owm/cwfinance/cwsrf/cwsrf.pdf> [hereinafter CWSRF INFORMATION]; EPA, How the CWSRF Program Works, <http://www.epa.gov/owm/cwfinance/cwsrf/basics.htm> (last visited May 20, 2008) [hereinafter How the CWSRF Program Works].

399. CWSRF INFORMATION, *supra* note 398.

program has the statutory purpose of providing assistance to: (1) municipal, inter-municipal, inter-state, or state agencies for constructing publicly owned treatment works; (2) states for implementing management programs for non-point sources (that is, run-off contamination that the Clean Water Act generally does not govern); and (3) states for developing and implementing estuary conservation and management plans.<sup>400</sup> The federal government provided state CWSRFs with more than \$5 billion in 2006<sup>401</sup> and over \$65 billion to date.<sup>402</sup> As with CERCLA remediation grants, states must deposit into their CWSRFs state funds equaling at least 20% of the EPA capitalization funds.<sup>403</sup>

States, in turn, may use their CWSRF funds to make low-interest or no-interest loans to a broad range of potential recipients, including communities, municipalities, individuals, companies, citizen groups, and non-profit organizations.<sup>404</sup> States earmark CWSRF monies for various types of projects including building or improving wastewater treatment plants; controlling agricultural, rural, and urban run-off; improving estuaries; controlling stormwater and sewer overflow; reusing and conserving water; and protecting groundwater and wetlands.<sup>405</sup> These loans generally have flexible repayment terms (such as starting repayment up to one year after the project start-up date)<sup>406</sup> and

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400. 33 U.S.C. § 1381(a); *see also id.* § 1383(c).

401. EPA, CLEAN WATER STATE REVOLVING FUND PROGRAMS ANNUAL REPORT 2 (2006), *available at* <http://www.epa.gov/owm/cwfinance/cwsrf/2006-annual-report.pdf> [hereinafter 2006 CWSRF ANN. REP.] .

402. How the CWSRF Program Works, *supra* note 398.

403. 33 U.S.C. § 1382(b)(2).

404. *Id.* §§ 1383(c), (d)(1)(A); EPA, Clean Water State Revolving Funds, <http://www.epa.gov/owmitnet/cwfinance/cwsrf/> (last visited May 20, 2008); CWSRF INFORMATION, *supra* note 398, at 1; *see generally*, United States ex rel. McElmurray v. Consol. Gov't of Augusta-Richmond County, 464 F. Supp. 2d 1327, 1335-36 (N.D. Ga. 2006), *aff'd sub nom.* McElmurray v. Consol. Gov't of Augusta-Richmond County, 501 F.3d 1244 (11th Cir. 2007) (describing how the EPA made capitalization grants to a state environmental agency which, in turn, made three loans to a county government); United States v. Michigan, 781 F. Supp. 492, 494-95 (E.D. Mich. 1991) (describing the history of the current CWSRF program).

405. CWSRF INFORMATION, *supra* note 398, at 1.

406. EPA, BROWNFIELD REMEDIATION THROUGH THE CLEAN WATER STATE REVOLVING FUND 2 (2001), *available at* [http://www.epa.gov/owm/cwfinance/cwsrf/brownfield\\_studies.pdf](http://www.epa.gov/owm/cwfinance/cwsrf/brownfield_studies.pdf) [hereinafter BROWNFIELD REMEDIATION THROUGH CWSRF]; *see also* 33 U.S.C. § 1383(d)(1)(B).

repayment periods of up to twenty years or more.<sup>407</sup> CWSRFs have provided over 20,700 low-interest loans to date.<sup>408</sup>

This program provides states with the flexibility and discretion to set their own priorities for water quality projects and to use their CWSRF monies accordingly.<sup>409</sup> While states may use CWSRF monies to address water quality issues in the context of brownfield projects, only a few states such as New Mexico, New York, Ohio, Wisconsin, Maryland, and Pennsylvania have done so or are planning to do so.<sup>410</sup> Connecticut neither uses these funds for brownfield projects nor provides financial assistance to private parties. Instead, Connecticut directs all of its CWSRLF funds, through its Clean Water Fund,<sup>411</sup> to municipalities (as well as municipal partnerships and regional authorities) for “more traditional” public works projects. Such projects include: improving water treatment plants, addressing combined sewer overflow, conducting denitrification, rebuilding aging sewage treatment

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407. 33 U.S.C. § 1383(d)(1)(B); 2006 CWSRF ANN. REP., *supra* note 401, at 2.

408. EPA, Clean Water State Revolving Funds, <http://www.epa.gov/owmitnet/cwfinance/cwsrf/> (last visited May 20, 2008).

409. CWSRF INFORMATION, *supra* note 398, at 1; BROWNFIELD REMEDIATION THROUGH CWSRF, *supra* note 406, at 2.

410. BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 28. See BROWNFIELD REMEDIATION THROUGH CWSRF, *supra* note 406, at 3-4, for case studies of brownfield projects that CWSRLF monies have funded or are expected to fund. Ohio was the first state to use the CWSRLF to finance brownfield remediation. From 1996 to 2001, Ohio’s Voluntary Action Program assisted eleven brownfield projects to secure CWSRLF loans of more than \$10 million. *Id.* at 3. While not mentioned in the Brownfields Federal Programs Guide, Pennsylvania has established the Pennvest Brownfields Remediation Loan Program (jointly administered by the Pennsylvania Infrastructure Investment Authority (Pennvest) and the Pennsylvania Department of Environmental Protection), which funds projects requiring the remediation of contamination at former industrial and commercial sites. See Pennvest, News and Updates: Brownfields Remediation Loan Program Guidelines, <http://www.pennvest.state.pa.us/pennvest/cwp/view.asp?Q=183816> (last visited June 8, 2008). In FY 2004 alone, over \$9.5 million was approved under this program for specific Pennsylvania brownfield projects. EPA, State Clean Water Loans Flow to Brownfields, [http://www.epa.gov/region3/revitalization/newsletter/fall-2005/clean\\_water\\_loans.htm](http://www.epa.gov/region3/revitalization/newsletter/fall-2005/clean_water_loans.htm) (last visited June 8, 2008). In April 2008, Pennvest awarded a CWSRF loan of \$11 million to the City of Philadelphia to help fund a brownfield remediation project that will facilitate the development of a world-class food distribution center and create three hundred new jobs. *Governor Rendell Announces \$72 Million in Water Infrastructure Investments*, REUTERS, April 14, 2008, available at <http://www.reuters.com/article/pressRelease/idUS174035+14-Apr-2008+PRN20080414>.

411. The Clean Water Fund is comprised of five separate accounts, one of which is the federal CWSRLF. STATE OF CONN., CLEAN WATER FUND 2007 ANN. REP. 16 (2007), available at <http://www.state.ct.us/ott/debtreports/2007cleanwater.pdf>; see also Conn. Dep’t Env’tl. Prot., Connecticut’s Clean Water Fund, [http://www.ct.gov/dep/cwp/view.asp?a=2719&q=325578&depNav\\_GID=1654](http://www.ct.gov/dep/cwp/view.asp?a=2719&q=325578&depNav_GID=1654) (last visited May 20, 2008).

plants, and designing sewers.<sup>412</sup> Connecticut received a federal capitalization grant of \$10.7 million for its CWSRF for fiscal year 2007.<sup>413</sup>

Despite the current under-utilization of CWSRFs by Connecticut and other states for brownfield projects, the potential for such use is vast. CWSRF loans may finance the activities within a brownfield project which may “correct or prevent water quality problems.”<sup>414</sup> Generally, these activities may include polluted run-off abatement, stormwater run-off control, groundwater contamination remediation, and petroleum contamination remediation.<sup>415</sup> Some specific qualifying activities may include Phase I, II, and III site assessments (with water quality impacts); excavation, removal, and disposal of contaminated soil and sediments; underground storage tank excavation and remediation; remediation of stormwater run-off (including constructed wetlands); soil capping and well capping and abandonment; and monitoring groundwater or surface water for contaminants.<sup>416</sup>

Another advantage of the CWSRF program is that private parties are eligible to receive loans (although municipalities appear to be the most common recipient). For example, the Grant Realty Company in Ohio, a private company, received a CWSRF loan of \$1.6 million with a 4.12% interest rate to remediate contaminated soil and groundwater in preparing the site for commercial reuse.<sup>417</sup>

Finally, brownfield projects, like other projects, require a state-approved revenue stream with which to repay loans. The EPA recommends that brownfield projects do not rely on the speculative success of a real estate development project. Rather, the agency suggests other potential repayment sources including fees paid by developers on other lands; recreational fees; dedicated portions of local, county, or state taxes or fees; stormwater management fees; and

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412. CONN. DEP’T ENVTL. PROT., CLEAN WATER FUND FINANCIAL ASSISTANCE PROGRAMS, MUNICIPAL WATER POLLUTION CONTROL, STATE FISCAL YEARS 2008 AND 2009, at 10 (2007), *available at* [http://www.ct.gov/dep/lib/dep/water/municipal\\_wastewater/cwfdraftprlist0809.pdf](http://www.ct.gov/dep/lib/dep/water/municipal_wastewater/cwfdraftprlist0809.pdf); CONN. CLEAN WATER FUND ANN. REP., *supra* note 411, at 8, 13.

413. EPA, CLEAN WATER SRF FEDERAL CAPITALIZATION GRANTS, BY FEDERAL FISCAL YEAR OF AWARD, BY STATE (2007), *available at* <http://www.epa.gov/owm/cwfinance/cwsrf/cwnims/pdf/capfedst.pdf>.

414. BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 28.

415. *See generally* BROWNFIELD REMEDIATION THROUGH CWSRF, *supra* note 406, at 1.

416. *Id.*; *see also* BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 28; BROWNFIELD REMEDIATION THROUGH CWSRF, *supra* note 406, at 2.

417. BROWNFIELD REMEDIATION THROUGH CWSRF, *supra* note 406, at 3.



wastewater user charges.<sup>418</sup> For example, the Grant Realty Company in Ohio relied on the income stream from a tank cleaning operation, with a personal loan guarantee and a second position mortgage as collateral.<sup>419</sup>

In sum, although Connecticut does not currently offer CWSRF funds for brownfield redevelopment, the potential for such use exists. The EPA encourages states “to choose projects that address the greatest remaining environmental challenges[,]”<sup>420</sup> one of which is arguably brownfields.

*B. United States Department of Housing and Urban Development: Community Development Block Grant Program*

The purpose of the federal grants and other assistance under the CDBG program is “to develop viable urban communities by providing decent housing and a suitable living environment, and by expanding economic opportunities, principally for low- and moderate-income persons.”<sup>421</sup> At least 70% of these funds must support activities benefiting people with low- and moderate-incomes.<sup>422</sup>

The CDBG program encompasses the following:

- Entitlement Communities Program,<sup>423</sup> which allocates annual grants for “entitlement areas,” which include “metropolitan cities” and “urban counties”;<sup>424</sup>
- State administered (Small Cities) CDBG Program,<sup>425</sup> where states award grants for “non-entitlement areas,” which *exclude* “metropolitan cities” and “urban counties”

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418. BROWNFIELDS FEDERAL PROGRAMS GUIDE, *supra* note 368, at 62.

419. BROWNFIELD REMEDIATION THROUGH CWSRF, *supra* note 406, at 3.

420. CWSRF INFORMATION, *supra* note 398, at 2.

421. See HUD, Community Development,

<http://www.hud.gov/offices/cpd/communitydevelopment/index.cfm> (last visited May 20, 2008); 42 U.S.C. § 5305(a) (providing a detailed description of eligible activities for these grants).

422. 42 U.S.C. § 5301(c).

423. See generally *id.* §§ 5301 to 5306.

424. “Entitlement” cities and towns in Connecticut are as follows: Bridgeport, Bristol, Danbury, Hartford, Meriden, Middletown, New Britain, New Haven, New London, Norwalk, Norwich, Stamford, Waterbury, West Haven, East Hartford, Fairfield, Greenwich, Hamden, Manchester, Milford, Stratford, and West Hartford. See HUD, CDBG Contacts: Connecticut, <http://www.hud.gov/local/ct/community/cdbg/index.cfm#cities> (last visited May 20, 2008).

425. See generally 42 U.S.C. §§ 5301 to 5306. See *supra* note 301 for definitions of “entitlement areas,” “metropolitan cities,” and “urban counties.” For a discussion of this program, see *supra* Part III.B.6.

(this program generally covers municipalities with populations below 50,000);<sup>426</sup>

- Section 108 Loan Guarantee Program,<sup>427</sup> which provides loans guaranteed by future CDBGs for entitlement areas, as well as for CDBG non-entitlement communities provided that the state pledges the CDBG funds necessary to secure the loan;<sup>428</sup>
- Brownfields Economic Development Initiative (BEDI),<sup>429</sup> which is a competitive grant program to assist in brownfields development and which must be used in conjunction with Section 108 loan guarantees; and
- Economic Development Initiative (EDI),<sup>430</sup> which is a competitive grant program to secure Section 108 loan guarantees subject to similar restrictions as the BEDI grants (Congress has not appropriated funding for this program since approximately 2004, and the program therefore currently is not accepting applications).

Only states, “units of general local government” (which include any city, county, town, and village, among other entities),<sup>431</sup> and Indian tribes may apply for grants under the Entitlement Communities Program and the State Administered CDBG Programs,<sup>432</sup> and only “units of general local government” (explicitly including those in non-entitlement areas) may apply for Section 108 loans and BEDI (and EDI) grants.<sup>433</sup> Government entities awarded Section 108 loan guarantees and/or BEDI grants, however, may transfer these funds to for-profit or non-profit entities for specified types of projects, as discussed below.<sup>434</sup> These two

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426. See Conn. Dep’t of Econ. & Cmty. Dev., Eligible Connecticut Towns, [http://www.ct.gov/ecd/lib/ecd/eligible\\_towns.doc](http://www.ct.gov/ecd/lib/ecd/eligible_towns.doc) (last visited May 20, 2008) (listing the 150 qualifying Connecticut municipalities). See *supra* note 301 for definitions of “non-entitlement areas,” “metropolitan cities,” and “urban counties.”

427. See generally 42 U.S.C. § 5308.

428. See *id.* §§ 5308(a) and (d)(2).

429. See generally *id.* § 5308(q). There are no regulations governing this program. HUD’s annual Notice of Funding Availability (NOFA), published in the Federal Register, is the primary source for BEDI requirements. See, e.g., Notice of HUD’s Fiscal Year 2007 Notice of Funding Availability, 72 Fed. Reg. 2396 (Jan. 18, 2007).

430. See generally 42 U.S.C. § 5308(q).

431. *Id.* § 5302(a)(1) (defining “unit of general local government” broadly).

432. *Id.* § 5303.

433. *Id.* § 5308(o) (defining “eligible public entity” as “any unit of general local government, including units of general local government in nonentitlement areas”).

434. See HUD, Brownfields Frequently Asked Questions,

programs therefore constitute the focus for HUD funding for brownfield developers.

### *1. Section 108 Loan Guarantees*

As mentioned above, future CDBG funding guarantees Section 108 loans for municipalities. These loans thus function as “advances” on forthcoming CDBG allocations from the federal government (either entitlements to entitlement communities or grants to states under the State Administered Program). To this end, both entitlement communities and states that participate in the Section 108 program must pledge as security for the loan guarantees any grants for which they “may become eligible,” (that is, future entitlements or future state grants under the State Administered program, respectively).<sup>435</sup> HUD, at its discretion, may require entitlement communities to furnish additional security, such as “increments in local tax receipts generated by [financed] activities” or “disposition proceeds from the sale of land or rehabilitated property.”<sup>436</sup> While entitlement communities pledge this security for loans that they receive, states pledge security for the benefit of non-entitlement communities that receive the loans.

Section 108 loans have a maximum 20-year repayment period<sup>437</sup> and may not exceed an amount equal to five times the municipal borrower’s CDBG allotment (either an entitlement for entitlement communities, or the state grant for non-entitlement communities).<sup>438</sup> This loan program, to date, has not entailed a competition among applicants. HUD may not deny a guarantee on the basis of the repayment period unless this period exceeds twenty years or HUD determines that the period poses an unacceptable financial risk.<sup>439</sup> Generally, HUD raises the funds for these loans by issuing bonds, and municipalities pay back note holders directly.

Municipal applicants must specify the project for which they intend to use the Section 108 loan. These loans enable municipalities to

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<http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bfieldsfaq.cfm> (last visited May 20, 2008) (under the question “Who is eligible to apply for Brownfields Economic Development Initiative grants?”).

435. 42 U.S.C. §§ 5308(d)(1)(B) and (d)(2); *see also* HUD, Section 108 Loan Guarantee Program, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/108/index.cfm> (last visited May 20, 2008) [hereinafter Section 108 Loan Guarantee Program].

436. 42 U.S.C. § 5308(d)(1)(C).

437. *Id.* § 5308(a).

438. *Id.* § 5308(b); *see also* Section 108 Loan Guarantee Program, *supra* note 435.

439. 42 U.S.C. § 5308(a).

“extend” their CDBG entitlement funding to enable the financing of large neighborhood revitalization projects.<sup>440</sup> Municipalities may use Section 108 loans to finance specified projects, including but not limited to the following:

- acquisition of real property or the rehabilitation of real property owned by a governmental entity;
- housing rehabilitation;
- construction of housing by nonprofit organizations for homeownership under specified federal programs;
- acquisition, construction, reconstruction, or installation of certain public facilities;
- assistance, including loans and grants, for the acquisition, construction, reconstruction, rehabilitation, or installation of public facilities and commercial/industrial structures by public or private non-profit entities;
- assistance to neighborhood-based nonprofit organizations, local development corporations, and specified nonprofit organizations toward neighborhood revitalization, community economic development, energy conservation, and other projects; and
- assistance to private, for-profit entities to carry out economic development projects that, while minimizing the displacement of existing businesses and jobs, accomplish the following: create or retain jobs for people with low or moderate incomes, prevent or eliminate slums and blight, meet urgent needs, create or retain businesses owned by community residents, assist businesses that provide goods or services for low- and moderate-income residents, or provide technical assistance for these activities.<sup>441</sup>

This final category of allowable assistance authorizes municipalities receiving Section 108 loans and BEDI funding, in turn, to lend or grant these funds to businesses and other private, for-profit entities to work on the types of economic development projects specified

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440. See Section 108 Loan Guarantee Program, *supra* note 435.

441. 42 U.S.C. § 5308(a) (referencing *id.* § 5305(a)(14), (15), (17)). Section 108 loan guarantees require that “the grantee has made efforts to obtain such financing without the use of such guarantee and cannot complete such financing consistent with the timely execution of the program plans without such guarantee.” *Id.*

in this category.<sup>442</sup> Municipalities typically prefer lending funds in order to allow for a return on the funds. When lending funds to private parties, municipalities typically select one beneficiary per project and tend not to assume the role of general contractor for a project. Alternatively, a municipality may use Section 108 and BEDI funds to acquire a brownfield property and convey this property to a private party at a price that is lower than the original purchase price.<sup>443</sup>

Although the Section 108 program substantially benefits brownfield efforts both in Connecticut and nationwide, the program nonetheless imposes structural limitations which restrict the use of this funding for brownfield redevelopment. First, tying the cap of Section 108 funds to five times the municipal CDBG allotment (either an entitlement or state grant) significantly limits the availability of these funds. In particular, smaller municipalities suffer from this limitation since they receive relatively small CDBG allotments (generally, under the State Administered Program). Another difficulty is that, since Section 108 funding functions as an “advance” on CDBG allotments, entitlement communities and states (under the State Administered Program) are often reluctant to “expend” their allocation for Section 108 funding. In particular, non-entitlement communities receive Section 108 loans only if the state pledges the future CDBG grants necessary to secure the loans. States, however, are often reluctant to take on this responsibility, particularly since they do not benefit directly from their pledge. The result is that smaller municipalities are often denied the benefit of Section 108 loans. Brownfield developers and other private parties, in turn, often cannot secure loans from Section 108 funds to finance their projects.<sup>444</sup>

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442. See HUD, Brownfields Economic Development Initiative (BEDI), <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm> (last visited May 20, 2008) [hereinafter Brownfields Economic Development Initiative].

443. See HUD, BEDI Quick Facts, <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bedifacts.cfm> (last visited May 20, 2008) [hereinafter BEDI Quick Facts].

444. See Statement of Charles Bartsch, Senior Policy Analyst for Economic Development/Brownfields, Northeast-Midwest Institute, “Using HUD’s BEDI Program to Enhance Brownfield Financing Opportunities,” before the U.S. House of Representatives, Financial Services Committee, Subcommittee on Housing and Community Opportunity, Mar. 6, 2002, available at <http://www.nemw.org/houseHUDtestimony.pdf>.

## 2. *Brownfields Economic Development Initiative*

BEDI is a highly competitive grant program targeted toward municipalities involved in brownfield projects. The program's purpose is to assist municipalities with the "redevelopment of brownfield sites in economic development projects and the increase of economic opportunities for low- and moderate-income persons as part of the creation or retention of businesses, jobs and increases in the local tax base."<sup>445</sup> The program is not meant for land acquisition or remediation unless such projects involve redevelopment.<sup>446</sup> In 2006, Congress appropriated \$10 million for the BEDI program, and grants are generally \$1 million each.

BEDI funding is inextricably linked to Section 108 loans. Municipalities must use BEDI grants only for projects and activities funded by Section 108 loan guarantees and in conjunction with these loans.<sup>447</sup> It follows that municipalities receiving BEDI funding, in turn, may lend (or grant) these funds to businesses and other private, for-profit entities for the same specified economic development projects for which Section 108 funds are available to for-profit entities as discussed above. In addition, the purpose of BEDI grants is to enhance the security of Section 108 financed projects beyond the pledge of CDBG funds backing the Section 108 loans and to improve the viability and mitigate the risk of these projects.<sup>448</sup> A request for a new Section 108 loan guarantee, therefore, must accompany every BEDI application.<sup>449</sup> In particular, a municipality may not apply for a BEDI grant in an amount that exceeds the municipality's available Section 108 loan guarantee funding.<sup>450</sup> These various requirements linking BEDI grants to Section 108 loans have come under scrutiny. Some argue that these requirements may be stifling the BEDI program and limiting its effectiveness toward brownfield redevelopment.

Other limitations apply to BEDI grants, as well. BEDI funds may not immediately repay the principle of a Section 108 loan, nor may applicants use these funds to enable public or private entities to remediate contamination caused by their own actions. Applicants also

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445. See Brownfields Economic Development Initiative, *supra* note 442.

446. *Id.*

447. 42 U.S.C. § 5308(q)(2); see also BEDI Quick Facts, *supra* note 443.

448. See Brownfields Economic Development Initiative, *supra* note 442; BEDI Quick Facts, *supra* note 443.

449. See Brownfields Economic Development Initiative, *supra* note 442.

450. See BEDI Quick Facts, *supra* note 443.

may not propose as subjects for BEDI grants any sites listed or proposed for listing on EPA's National Priority List; any sites subject to unilateral administrative orders, court orders, administrative on consent, or judicial consent decrees under CERCLA; and any facilities that are subject to the jurisdiction, custody, or control of the federal government. HUD also cautions against proposing sites where contamination has not been sufficiently investigated or which are the subject of ongoing litigation or enforcement actions.<sup>451</sup>

*C. Economic Development Administration of the U.S. Department of Commerce – Investments*

The EDA provides public entities, institutions of higher education, and non-profit organizations (in conjunction with public entities) a wide range of financial assistance or “investments”<sup>452</sup> which are targeted to “distressed communities”<sup>453</sup> nationwide. The goal of these funds is to promote innovation and competitiveness<sup>454</sup> and to create jobs. In this vein, the EDA must find that “demand is, or at least will be, sufficient to employ the efficient capacity of existing competitive enterprises before financial assistance may be granted.”<sup>455</sup> The EDA also promotes regional cooperation and long-term planning by requiring public entities to spend the bulk of these funds according to long-term comprehensive economic development strategies (CEDs) formulated by regional planning organizations.<sup>456</sup>

Brownfield redevelopment fits easily into EDA's scope since brownfields often exist in distressed areas and their redevelopment can spur overall regional economic improvement. EDA funding nicely complements EPA funding in that the EPA focuses on remediating sites (the “front end”) and the EDA focuses on subsequently redeveloping

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451. *Id.*

452. *See generally* 42 U.S.C. §§ 3121 to 3234; 13 C.F.R. §§ 300 to 315 (2006); Economic Development Administration Reauthorization Act of 2004 Implementation, 71 Fed. Reg. 56658 (Sept. 27, 2006) (final rule promulgating EDA regulations).

453. *See* 13 C.F.R. § 300.1 (2006); *see also id.* § 301.3 (setting forth criteria to determine economic distress levels).

454. *Id.* § 300.1; *see also* 42 U.S.C. § 3121(b) (providing declarations of Congress regarding EDA).

455. *In re Oliver M. Elam, Jr., Co., Inc.*, 771 F.2d 174, 181 (6th Cir. 1985) (interpreting 42 U.S.C. § 3212).

456. *See generally* 13 C.F.R. § 303.7 (2006). “CEDs are designed to bring together the public and private sectors in the creation of an economic roadmap to diversify and strengthen Regional economies.” *Id.* § 303.7(a).

these sites with buildings, infrastructure, new businesses, training opportunities, and the like (the “back end”).<sup>457</sup> It follows that EDA financial assistance is generally not available for soil, groundwater, and other types of environmental remediation. Recipients may, however, use EDA funding for the limited exception of “incidental” remediation such as the removal of asbestos and lead paint to the extent it is integral to building construction and redevelopment.

The EDA’s National Brownfield Coordinator promotes the use of EDA investments for brownfield projects.<sup>458</sup> Apparently recognizing the EDA’s role in brownfield projects, the EPA funds this EDA position.

Eligible applicants for EDA financial assistance generally include cities or other political subdivisions of states as specified, states, institutions of higher education, public or private non-profit organizations acting in cooperation with officials of a political subdivision of a state, district organizations, and Indian tribes.<sup>459</sup>

The EDA generally does not provide funds directly to private brownfield developers or other private parties. The EDA nonetheless aims “to help create an environment in which the private sector is more willing to invest its capital in brownfield projects that enhance job creation and overall community revitalization.”<sup>460</sup> The EDA therefore uses its funding of public entities as a catalyst to encourage market-driven redevelopment efforts which, in turn, result in jobs, investments, and an expanded tax base.<sup>461</sup> Private developers therefore can benefit indirectly from EDA funds. For example, involvement in an EDA-funded project, or even in a region with EDA-funded projects, may present fewer “start-up” challenges such as decaying infrastructure or lender uneasiness, and may encourage regions to become more receptive to private brownfield redevelopment.

Four types of EDA investments are available for brownfield projects. Approximately 80% of EDA funding used toward brownfield projects derives from Public Works and Economic Development Program and the Economic Adjustment Assistance Program. The remaining 20% comes from the Planning and Local Technical Assistance Programs.

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457. U.S. Dep’t of Commerce, Economic Development Administration, Brownfields Redevelopment, <http://www.eda.gov/Research/Brownfields.xml> (last visited May 20, 2008) [hereinafter Brownfields Redevelopment].

458. David R. Ives is the EDA’s National Brownfield Coordinator.

459. 13 C.F.R. § 300.3 (2006) (defining “Eligible Recipient”).

460. Brownfields Redevelopment, *supra* note 457.

461. *See id.*



The Public Works and Economic Development Program<sup>462</sup> funds so-called “brick and mortar” projects, that is, the construction or rehabilitation of public infrastructure and facilities (for example, industrial parks, ports, water and sewer facilities, and vocational skill centers).<sup>463</sup> An aim of this funding is “to help the nation’s most distressed communities revitalize, expand and upgrade their physical infrastructure to attract new industry, encourage business expansion, diversify local economics and generate or retrain long-term private sector jobs and investments.”<sup>464</sup> The Public Works and Economic Development Program provides funds, consistent with a CEDS, for brownfield redevelopment, “eco-industrial development,” the construction of “incubator facilities,” and the acquisition and rehabilitation of publicly owned and operated development facilities, among other projects.<sup>465</sup>

The Economic Adjustment Assistance Program<sup>466</sup> provides a wide range of technical, planning, and infrastructure assistance for regions affected by “adverse economic changes that may occur suddenly or over time.”<sup>467</sup> These changes include, in particular, dramatic problems such as those caused by mass layoffs (due to military base closures, defense contractor reductions, or loss of a major community employer, etc.), or natural disasters (such as hurricanes or flooding).<sup>468</sup> The purpose of this funding is “to enhance a distressed community’s ability to compete economically by stimulating private investment in targeted economic sectors.”<sup>469</sup> In conformance with a CEDS, projects may include capitalizing a revolving loan fund and providing business or infrastructure financing, among other activities.<sup>470</sup> RLF loans may be available to private parties, such as brownfield developers, subject to

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462. See generally 13 C.F.R. §§ 305.1 to .14 (2006).

463. Catalog of Federal Domestic Assistance, § 11.300 Investments for Public Works and Economic Development Facilities, [http://12.46.245.173/pls/portal30/CATALOG.PROGRAM\\_TEXT\\_RPT.SHOW?p\\_arg\\_names=prog\\_nbr&p\\_arg\\_values=11.300](http://12.46.245.173/pls/portal30/CATALOG.PROGRAM_TEXT_RPT.SHOW?p_arg_names=prog_nbr&p_arg_values=11.300) (last visited May 20, 2008) [hereinafter Catalog of Federal Domestic Assistance].

464. 13 C.F.R. § 305.1; see also 42 U.S.C. § 3141 (setting forth a general description and statutory criteria for these grants).

465. Catalog of Federal Domestic Assistance, *supra* note 463.

466. See generally 13 C.F.R. §§ 307.1 to .22 (2006).

467. *Id.* § 307.1.

468. *Id.*

469. *Id.* § 307.2(a).

470. 13 C.F.R. § 307.3 (2006).

specific regulatory restrictions.<sup>471</sup> Another example of an eligible brownfield project is the development of a business incubator on a contaminated site.

EDA Planning Investments<sup>472</sup> support “the development, implementation, revision or replacement of [Regional CEDS], and for related short-term Planning Investments and State plans designed to create and retain higher-skill, higher-wage jobs, particularly for the unemployed and underemployed in the nation’s most economically distressed Regions.”<sup>473</sup> A regional organization might use funding in the range of \$50,000 toward brownfield issues. This amount might, for example, fund the salary of one brownfield planner.

The Local Technical Assistance Program<sup>474</sup> funds a broad range of site-specific studies, as well as economic development and information dissemination activities.<sup>475</sup> Investments under this Program, for example, enable decision-makers to conduct impact analyses or feasibility studies for brownfield sites. While the regulations disallow using these funds for starting or expanding a private business,<sup>476</sup> they authorize the EDA to enter into contracts with private entities to provide technical assistance.<sup>477</sup>

The EDA does not have a separate source of funds for brownfield projects. Even so, the EDA directs approximately 10-12% of its investments to brownfield projects. In the last six years, the EDA has invested approximately \$225.3 million in 210 brownfields redevelopment projects, with an average investment of approximately \$1.1 million. In fiscal year 2006, the EDA invested over \$40 million in twenty-seven brownfield-related efforts, with an average investment of \$1.5 million. The EDA has made approximately 29% of the investments

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471. The regulations restrict borrowers from “acquiring an equity position in a private business”; “subsidizing interest payments on an existing RLF loan”; “providing for borrowers’ required equity contributions under other federal loan programs”; enabling borrowers to acquire a business interest through either stock purchases or acquiring assets, unless there is “sufficient justification” (defined to include “acquiring a business to save it from imminent closure or to acquire a business to facilitate a significant expansion or increase in investment with a significant increase in jobs”); investing in interest bearing accounts, certificates of deposit, or other investments unrelated to the RLF; and refinancing existing debt. *Id.* § 307.17(b).

472. *See generally id.* §§ 303.1 to 303.9.

473. *Id.* § 303.1.

474. *See generally* 13 C.F.R. §§ 306.1 to 306.7.

475. *See id.* § 306.1 (describing ten areas that Local and National Technical Assistance Investments may support).

476. *Id.* § 306.1(b).

477. *Id.* § 306.1(d)(3).

in rural communities. The EDA estimates that its efforts have yielded more than \$5.8 billion of private sector investments in brownfield projects.<sup>478</sup>

More generally, while there is no minimum for EDA assistance,<sup>479</sup> the EDA grants can range to a maximum of 50% of a project or up to 80% based on regional “relative needs,” which takes into consideration unemployment rates, per capita income, out-migration, and other factors.<sup>480</sup> Recipients of EDA assistance generally must contribute a “matching share” (either cash or “in-kind contributions”)<sup>481</sup> to cover the project costs remaining after receipt of an EDA grant.<sup>482</sup>

One example of an EDA-funded brownfield project in Connecticut is the redevelopment of the Fafnir Ball Bearing Plant into an industrial park in downtown New Britain. The EDA provided two Public Works and Economic Development grants toward this project. The first grant, which went toward building demolition, totaled \$1,825,000. The EDA provided the grant in 1995, and this phase of the project was completed in 2001. The EDA provided a follow-on grant of \$875,000 in 2000 for the redevelopment of roads, sewers, and other infrastructure. The project was completed in 2005.

Another example of a Connecticut project is a \$1 million EDA grant in 1998 for the redevelopment of the Veeder Root plant in Hartford. This project was completed in 2003.

## CONCLUSION

We have presented a study of legal and financial tools that the federal and Connecticut governments have assembled to promote the remediation and development of brownfields. This study demonstrates

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478. Brownfields Redevelopment, *supra* note 457.

479. 13 C.F.R. § 301.4(a).

480. *Id.* § 301.4(b)(1). EDA contributes a maximum of 80% of project costs if it determines that there is a “special need” in a particular region. *Id.* § 301.4(b)(2). The regulations define “special need” as “a circumstance or legal status arising from actual or threatened severe unemployment or economic adjustment problems resulting from severe short-term or long-term changes in economic conditions . . . .” *Id.* § 300.3.

481. 13 C.F.R. § 301.5; *see also id.* § 300.3 (defining “local share or matching share”). “In-kind contributions” may include “space, equipment, services and assumptions of debt.” *Id.*

482. EDA investments extend only to a maximum “investment rate.” *See* 13 C.F.R. § 301.4(b); *see also id.* § 300.3 (“Investment Rate means . . . the amount of the EDA Investment in a particular Project expressed as a percentage of the total Project costs.”). Recipients must demonstrate that this matching share is committed and unconditionally available to the project. *Id.* § 301.5.

the progression, both on federal and state levels, from an unforgiving environmental liability structure to one providing brownfield liability exemptions and funding.

CERCLA, enacted in 1980 and amended in 1986, provided a mechanism to achieve the cleanup of contaminated properties by either polluters or the federal government and, in either event, ultimately to hold polluters responsible for the cost of clean up. CERCLA's draconian liability scheme, however, ironically encouraged—and in some cases, resulted in—the boarding up and abandonment of historically contaminated properties due to the fear that purchasing these properties would result in entanglement in the tightly-woven web of liability. These properties constitute the brownfields that are the subject of this study. In response to this situation, Congress enacted in 2002 the Brownfields Revitalization Act, which established significant protections from CERCLA liability for brownfield developers.

A similar dynamic of establishing environmental liability and then carving out liability exemptions to promote brownfield redevelopment occurred in Connecticut. Connecticut enacted laws with the purpose of achieving environmental cleanup, including the Connecticut Property Transfer Act which is triggered by the purchase of property. For every transaction involving a hazardous waste “establishment,” the law requires a statement of the property's environmental condition and, if the property is contaminated, an environmental investigation and remediation. Connecticut also developed an array of “carrot” programs to complement the Transfer Act's “stick.” These include programs for “voluntary remediation” open both to responsible parties and innocent purchasers, “covenants not to sue” available to innocent purchasers only, and relief from “third party liability” for innocent landowners who have undertaken site remediation.

Although the Transfer Act resulted in initiating the remediation of some marketable properties, neither that law nor those providing for voluntary remediation and covenants not to sue resulted in alleviating the problem of Connecticut brownfields that no one wanted to purchase. This problem persisted due to, in part, the absence of a liability shield for those satisfying their Transfer Act obligations and the lack of cohesion among all of the programs. To address these languishing properties, the Connecticut General Assembly enacted brownfield legislation in 2006 and 2007. This legislation created an Office of Brownfields Remediation and Development, a Brownfield Pilot Program for brownfield remediation by municipalities, liability exemptions for

program participants or purchasers of these properties, and a Brownfield Account.

These patch-work efforts, however, are probably insufficient to remedy significantly the plight of brownfields. Significant reform will likely require bringing unity and consistency to each of the pre-existing environmental programs that together form the legal backbone for brownfield development in Connecticut. The Connecticut General Assembly should address, for example, the glaring inconsistency that parties remediating properties outside the rubric of the Transfer Act are eligible for DEP covenants not to sue and third-party liability exemptions, whereas innocent parties purchasing properties remediated under the Transfer Act are not eligible for these benefits. Another inconsistency requiring resolution is that voluntary remediation programs mandate time limits on DEP approval of remedial actions, but the Transfer Act does not.

Even a consistent and unified brownfield program, however, is unlikely to have any meaningful effect unless the state provides the funding to actualize it. Accordingly, we have reviewed the various funding sources that may be available from an array of federal and Connecticut agencies. The EPA has granted approximately \$70 million per fiscal year since the passage of the Brownfields Revitalization Act in 2002 and has capitalized Clean Water State Revolving Loan Funds in every state (although Connecticut does not use CWSRF funds for brownfield remediation). The U.S. Department of Housing and Urban Development likewise devotes resources to brownfield redevelopment, as does the Economic Development Administration of the Department of Commerce to a somewhat lesser extent. On the other hand, Connecticut has just begun allocating resources specifically to brownfields. In 2007, the General Assembly approved a \$14 million bond initiative over two years, of which \$9 million will fund the new Brownfield Pilot Program, and \$5 million will fund the financial assistance program. While this amount is small—substantially less than the \$75 million that the Brownfields Task Force recommended—it may represent a starting point for a considerably larger funding stream.

An astounding range of agencies provide funding with the potential for brownfield use, and the variety of funding mechanisms is impressive. At the same time, however, this panoply of agencies and funding mechanisms results in severe fragmentation. The effect of this fragmentation is not only a lack of consistency and transparency, but also the need for expert (and often expensive) guidance to access

available brownfield funding. This need, in turn, could discourage potential beneficiaries from applying for these funds. In discussing and consolidating information about these brownfield funding programs, we have tried to make this process easier for lawyers, private developers, environmental consultants, affected communities, non-profit organizations, and other stakeholders in the brownfield remediation and development process. It remains the task of government, however, to alleviate this fragmentation by reaching out to these interested parties and providing them with succinct, comprehensive, and user-friendly information to promote and facilitate brownfield development.

To this end, Connecticut's Office of Brownfields Remediation and Development (OBRD) provides a model with much potential. The OBRD is an inter-agency entity that functions as a "one stop shop" for brownfield developers. Legislation passed in 2006 and 2007 charges the OBRD with streamlining the brownfield remediation and development process, identifying funding sources and brownfield opportunities, expediting the release of funds, and providing "a single point of contact" for financial and technical assistance, among other tasks. This legislation also requires the four cooperating agencies to enter into a memorandum of understanding to formalize this collaborative effort. These four agencies provide the comprehensive expertise in the areas of economic development, environmental protection, and public health that multi-disciplinary brownfield projects require.

The current trend in the states is toward this "one stop shop" model. In this model, one entity would provide a developer with all the necessary information and guidance to get a project off the ground and see it through to completion. In this respect, the federal government lags behind some of the more enterprising states. Implementing this model in its totality in the federal government, however, would be substantially more arduous and complex than doing so in a smaller state such as Connecticut. It might be more appropriate for the federal government to expand the model of the EDA's Brownfield Coordinator, a position funded by the EPA, whose aim is to publicize the EDA's role in brownfield development and to provide information to facilitate the application process. Even a handful of liaisons from the various federal agencies with a role to play in brownfield redevelopment—along with publicity and outreach—would go a long way in helping a stakeholder navigate the maze of federal bureaucracy to secure brownfield funding and other assistance.

The “one stop shop” model could be taken one step further by establishing regional councils where federal and state agencies can provide their collective information at one time to developers and other stakeholders. It would be particularly useful to create councils for metropolitan “regions” that encompass more than one state, such as the Tri-State New York metropolitan area (New York, northern New Jersey, and southwestern Connecticut) and the Hartford, Connecticut / Springfield, Massachusetts corridor. These “mega-one-stop-shops” would infuse clarity and efficiency into the brownfield development process in metropolitan areas where the brownfield problem is most acute.

Because of the innate complexity of multi-disciplinary brownfield projects, maximizing simplicity is the best way to facilitate the widespread remediation and redevelopment of brownfields nationwide. Only by increasing the scale and pace of brownfield projects do we stand a chance in changing the landscape from brown to green.