

Statutory Relief in Connecticut

By Kathleen A. Cyr and Barry J. Trilling

On June 7, 2005, Connecticut Governor Jody Rell signed into law Public Act 05-90 (formerly Senate Bill 795). This legislation creates a statutory bar to lawsuits against innocent landowners for costs or damages to third parties for pollution existing prior to taking title to a property on and after October 1, 2005.

This act fills an important gap in the scheme of laws designed to encourage voluntary remediation of contaminated properties. The Covenant Not to Sue issued by the Connecticut Department of Environmental Protection (DEP) to bona fide innocent purchasers and innocent owners who had no connection with the contamination of the property does not provide protection from suits filed by third parties. It only provides protection from suits against these parties by the DEP.

Public Act 05-90 will now provide relief against these third-party actions to 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 the polluter includes direct or indirect familial relationship, contractual relationship, corporate relationship or financial relationship.

Once an applicant clears the polluter affiliation hurdle he or she must take the following steps:

1. Notify the owners of adjoining properties, by certified mail, of the intent to initiate a site investigation.
2. Engage a licensed environmental professional (LEP) to conduct an adequate site investigation in accordance with prevailing standards and guidelines. The investigation report must be submitted to and approved, in writing, by DEP.
3. 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.

4. Initiate and complete, under the direction of the LEP, any required remediation. The LEP must then complete a final remedial action report that demonstrates remediation was completed in compliance with the Connecticut's Remediation Standards Regulations (RSRs). This report must also be submitted to and approved by DEP.

The Act presumes that, as part of remediation, an environmental land use restriction (ELUR) will be placed on the property. Failure to place the ELUR and comply with its provisions, or failure to obtain a variance from the ELUR, would invalidate the third-party relief.

By following these steps, the owner of the remediated property will avoid liability for any costs or damages to any person other than the State of Connecticut, any other state, or the federal government "with respect to any pollution or source of pollution on or emanating from such owner's real property that occurred or existed prior to such owner taking title to such property." Plus, the potential costs to the state may be limited by "innocent landowner" provisions of Connecticut General Statute § 22a-432.

Section 3 (c) of the Act provides for a civil penalty of \$100,000 or the cost of remediating the pollution or source of the pollution, 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," although the "section" does not create any liability.

Section 3 should not be read to provide any new cause of action by the

state or a third party against a party who happens to be affiliated with a responsible party. Rather it should be read as a "penalty" provision to apply in connection with fraudulent attempts to claim the protection of this statute.

For the third-party liability protection of Public Act 05-90 to be truly available, DEP must allocate the time and resources needed to review and approve investigation reports and remedial action reports in a timely manner. The property owner must anticipate that the required approvals will take time — weeks to months, or more — to obtain.

Given the essential cooperation of DEP, one can maintain high hopes for the effective use of the new law. **BFN**

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There is now relief from third-party actions against innocent landowners.

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