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Environmental Matters Alert

CHANGES TO THE CONNECTICUT TRANSFER ACT | OCTOBER 2020

BACKGROUND

Connecticut has passed into law Bill No. 7001, which authorizes a sunset to the Connecticut Transfer Act, effective upon the issuance of new regulations implementing a new spill reporting law. It still will take a few years for the regulations to be adopted in final form. A summary of the new law is included below.

THE TRANSFER ACT

Since 1987, Connecticut has been one of the few states with a law that requires a party to a transfer of certain businesses or real property to file documents with the Connecticut Department of Energy and Environmental Protection ("DEEP") obligating such party to conduct an investigation of environmental conditions post-closing, and to clean up any contamination to meet objective criteria. The law is known as the Transfer Act ("TA") and it applies to businesses that generated more than 100 kg of hazardous waste in any one month since November 1980, or which handled, stored, treated or disposed of any amount of hazardous waste generated by another person. It also applies to dry cleaners, furniture strippers and vehicle body repair shops. For many reasons, the Transfer Act has not worked well. It has added substantial costs and risks to business and real property deals, often causing deals to fail.

BILL NO. 7001

REVISIONS TO CONNECTICUT TRANSFER ACT DURING SEPTEMBER 2020 SPECIAL SESSION

Sunset Provision for the Transfer Act

The Transfer Act will end at such time as the DEEP adopts regulations under a newly created spill reporting law (see below). Thus, the State has decided to require compliance with new risk-based cleanup standards in connection with the discovery of a release by a person who caused or created the release, instead of requiring compliance with the current non-risk based standards (RSRs) in connection with the transfer of property or a business that constituted an establishment.

Until the TA sunsets, the following substantive changes have been made:

- The change in name of an LLC will not trigger the TA.
- The DEEP previously interpreted the TA to require an investigation of the whole property for a transfer of real property, and with respect to the transfer of a business, the DEEP required an investigation of only those portions of the property where the business operated. Now, if there is a single business operation leasing the property, the transfer of that business requires an investigation or remediation of the whole property.
- The TA previously did not adequately address the transfer of shopping centers where an establishment such as a dry cleaner may have operated. Now, where there is a transfer of property which "is or has been leased to two or more tenants," establishment means the areas on which the business operation is or was located. So, only the dry cleaning operation requires investigation and remediation. The same concept applies to industrial condominiums. The establishment is limited to the unit that generated the waste or which otherwise meets the definition of establishment and those limited common elements and common areas of the condominium used by that unit owner.
- The TA has required that investigations be completed

within two years after filing the forms; that remediation be initiated within three years; and that remediation be completed within eight years. Over the last few years the DEEP has been keeping track of these time frames and has sent out reminder letters and Notices of Violation for noncompliance. Language has been added to the new law that makes it easier for the DEEP to track compliance and it makes it more difficult for certifying parties to request an extension of these time frames. The message is that certifying parties will be held accountable for failure to meet the statutory deadlines.

- The new law changes the requirements for the transfer of residential condominium units.

Spill Reporting Law

The Spill Reporting Law is to become effective after the passage of implementing regulations.

- **New Section 16.** "No person shall create or maintain a release to the land and water of the state in violation of any provision of sections 17 to 21, inclusive, of this Act."
- **New Section 17.** Any person who **creates or maintains** a release of oil or petroleum or chemical liquids or solids, liquid gaseous products or hazardous waste, on or after the date that the DEEP adopts regulations implementing this section, "**upon discovery** of such release," must (a) report the release and (b) remediate it in accordance with the regulations. [Note: The new law requires that the regulation "specify tiers of releases based on risk . . . and that, based on the tier to which such release is assigned, certain releases may be remediated under the supervision of a licensed environmental professional . . . . The general feeling is that the DEEP will move toward a regulatory program similar to the Massachusetts Contingency Plan.]

  With respect to the discovery of "historic spills," the law provides that, "a release shall not be deemed discovered if the only evidence of such release is data available or generated before the date when the regulations are adopted." Also, the law applies only to those persons who created or maintained the release.

  Specific provisions are included for releases on sites that are or were subject to the TA or sites that are in the State's brownfield program.
- **New Section 18.** If the DEEP determines that a release occurred after the regulations were adopted, the DEEP can issue an order to the person who created or maintained the release to take action under this new law. Persons who receive an order have a right to a hearing provided a request for hearing is filed within 30 days. If two or more persons receive an order for the same release, such persons are jointly and severally liable. Failure to comply with the spill reporting and remediation statute or any order issued thereunder can result in an action for injunctive relief and penalties.

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