

CONNECTICUT ENVIRONMENTAL LAW HANDBOOK

—FIFTH EDITION—

EXCERPTS FROM: CHAPTER FIVE
MATTERS AFFECTING BUSINESS
AND REAL ESTATE

REVISED AND UPDATED
THROUGH OCTOBER 1, 2010

BY JOHN E. WERTAM, ESQ.



HARTFORD, CT 06103
(860) 251-5000

2000[©] and 2010[©] Government Institutes, Inc.

**EXCERPT FROM *THE CONNECTICUT ENVIRONMENTAL LAW HANDBOOK*,
Fifth Edition
Revised and updated through October 1, 2010**

2000© AND 2010© GOVERNMENT INSTITUTES, INC.

JOHN E. WERTAM, ESQ.
SHIPMAN & GOODWIN LLP

5.2 THE CONNECTICUT TRANSFER ACT

5.2.1 The History of the Transfer Act

The Connecticut Transfer Act applies to the transfer of establishments at which hazardous waste is or was generated, at which hazardous waste from a different location was brought, or certain defined business operations.¹ The Transfer Act requires that, at the time of transfer, the transferor notify both the transferee and the DEP whether a release of hazardous waste or hazardous substances has occurred from the establishment, and if such a release has occurred, one of the parties to the transaction must commit to clean it up.² Only real property or business operations defined as "establishments" are affected by the statute.³

The Transfer Act was initially adopted by the legislature in 1985.⁴ At the time of its initial passage, no one could have envisioned the implications that the Transfer Act

¹ Conn. Gen. Stat. §22a-134 *et seq.* as amended by Public Acts 01-204 and 03-218. *See also*, DEP's *Environmental Program Fact Sheet: Property Transfer Program*, DEP-PERD-PTP FS-200 (Revised 10/01/01) and related DEP instructions for completing various forms and the Environmental Condition Assessment Form.

² *Id.* Changes made by Public Act 01-204 draw a distinction between "establishment" and "parcel," and requires remediation of releases only from the establishment. This distinction is important if the establishment, for instance, is a dry cleaner in a mall that does not occupy the entire parcel.

³ Conn. Gen. Stat. §22a-134(3). The definition of an "establishment" is discussed in greater detail below.

⁴ Public Act 85-568.

might have on transferring business operations or real property in Connecticut.⁵ However, due to various problems with earlier versions of the Act, by December of 1994, the future of the Act appeared to be in jeopardy.⁶

Seizing the opportunity to address what was perceived to be an important program, the Commissioner of the Department of Environmental Protection assembled a working group to develop amendments to the Transfer Act. The group's effort, along with legislative manipulations and amendments, resulted in passage of Public Act 95-183, "An Act Concerning Revisions to the Hazardous Waste Establishment Transfer Act and Hazardous Waste Site Remediation."⁷ This revision redefined key terms of the Transfer Act, established a voluntary remediation program, and created a "licensed environmental professional" to assist the Commissioner in evaluating certain sites.⁸ Revisions effective on October 1, 2001 significantly expanded the compliance effort required under the Transfer Act, while providing clarification to other elements of the law.⁹

It seems annual revisions to the Transfer Act will continue to be made, mostly by adding exemptions to its applicability. Interpretations under the Transfer Act are generally accomplished by experience with the program: there are no regulations promulgated under the Transfer Act, and legislative history on this Act is sparse and not terribly useful. The following sections highlight important elements of the Transfer Act.¹⁰

⁵ See John E. Wertam, *Connecticut Environmental Law Handbook* (3rd ed. 1992) (discussing the legislative history of the Transfer Act).

⁶ See *Hartford Courant* Articles, December 23, 1994.

⁷ Public Act 95-183 (codified as amended in Conn. Gen. Stat. §22a-134 *et seq.*).

⁸ See Conn. Gen. Stat. §§ 22a-134 (redefining terms); 22a-133x (establishing voluntary remediation program); 22a-133v (creating a licensed environmental professional (LEP) program).

⁹ See Connecticut Public Act 01-204, §§ 15 to 21.

¹⁰ As of July 25, 2008.

5.2.2 Definition of Establishment

The Transfer Act only applies to "establishments," defined as "any real property at which or any business operation from which (A) on or after November 19, 1980, there was generated, except as the result of remediation of polluted soil, groundwater or sediment, more than one hundred kilograms of hazardous waste in any one month" An establishment also includes property where "hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported or disposed of" ¹¹ Finally, the statute creates "automatic" establishments, regardless of the amount of hazardous waste generated. ¹² These "automatic" establishments include real property at which or business operations from which 1) the process of dry-cleaning was conducted on or after May 1, 1967; 2) furniture stripping was conducted on or after May 1, 1967; and 3) a vehicle ¹³ body repair facility was located on or after May 1, 1967. ¹⁴

Some observations regarding the definition of establishment:

- Polluted soil, groundwater or sediment generated as a result of remediation are not counted against the definition of hazardous wastes;
- The generation of 100 kilograms of hazardous waste need occur only "in any one month," as opposed to in consecutive months or on a regular basis ¹⁵;

¹¹ Conn. Gen. Stat. § 22a-134(3) as amended by Public Act 01-204.

¹² *Id.*

¹³ "Vehicle" means any motorized device for conveying persons or objects except for an aircraft, boat, railroad car or engine, or farm tractor. Public Act 01-204, § 15(20). Certainly automobiles and trucks are included—the most obvious target for this definition. Experience will dictate just what else may come within this definition.

¹⁴ Conn. Gen. Stat. § 22a-134(3) as amended by Public Act 01-204.

¹⁵ Research on this fact based determination must relate back to November 19, 1980 for real property transfers, and back to the origin of the business operation on the parcel, if only the business operation (defined in Public Act 01-204, § 15(21) is being transferred. In addition, "averaging" hazardous waste generation over a period of time is not generally accepted by DEP unless contemporaneous documentation of monthly generation rates can be produced. Therefore, the cleaning out of a laboratory, or the gradual accumulation of

- The definition of "establishment" is tied to the date when hazardous waste became regulated under federal law (November 19, 1980), or May 1, 1967 for certain "automatic" establishments;
- Establishments can be either real estate or business operations, and business operations can be transferred separately from the real estate;
- While federal hazardous waste laws were amended in 1995 to include "universal wastes," amendments to Connecticut regulations incorporate such program by reference, and expand the definition to include "Used Electronics."¹⁶ However, while Used Electronics, spent fluorescent light bulbs, used batteries and thermostats are considered hazardous waste but are not longer counted against the 100 kilogram threshold¹⁷;
- 100 kilograms is a low threshold, representing approximately one half of a fifty-five gallon drum of liquid solvent waste, or 220 lbs.

hazardous waste manifested off site all at one time, may trigger the applicability of the Act.

¹⁶ Used Electronics are defined as "a device or component thereof that contains one or more circuit boards or a cathode ray tube and is used primarily for communication, data transfer or storage, or entertainment purpose, including but not limited to, desk top and lap top computers, computer peripherals, monitors, copying machines, scanners, printers, radios, televisions, camcorders, video cassette recorders ("VCRs"), compact disc players, digital video players, MP3 players, telephones, including cellular and portable telephone, and stereos." See §22a-449(c)-113 R.C.S.A., effective June 27, 2002.

¹⁷ See RA06-76, exempting the generation of Universal Waste from being counted against the definition of Establishment under the Transfer Act. See §22a-449(c)-113, R.C.S.A., incorporating by reference, with modifications, 40 CFR 273, effective October 31, 2001, and June 27, 2002. Because the definition of Hazardous Waste in the Transfer Act referred to the federal definition, such wastes were covered under the Transfer Act since at least 1995 (See 60 FR 25542, as amended in 1999 by 64 FR 36488) until 2006. See the Connecticut Hazardous Waste Management Regulations, effective June 27, 2002, amending §22a-449(c)-113 R.C.S.A. Office buildings, warehouses, schools and other non-hazardous type operations are now exempt under the Act, provided they otherwise do not generate Hazardous Waste or release elements of Universal Waste.

5.2.3 Transfer of Establishment

A "transfer of establishment" means "any transaction or proceeding through which an establishment undergoes a change in ownership," unless specifically excluded.¹⁸ The exclusions are briefly set forth below:

(a) Conveyance or extinguishment of an easement.

In effect, easements are not covered even if such easement is located on a parcel constituting an establishment.

(b) Conveyance of an establishment through foreclosure as defined in §22a-452f(b) Conn. Gen. Stat., including municipal tax liens.

This exemption, along with a few others, were advanced by the lending community and municipalities so that at least when acquiring property, the foreclosing entity would not be required to comply with the Transfer Act.¹⁹ However, there is no exemption for transferring the property from the foreclosing entity to a third party. Section 22a-452f Conn. Gen. Stat. is Connecticut's equivalent of the federal lender liability rule.

(c) Conveyance of a deed in lieu of foreclosure to a lender as defined in and that qualifies for the secured lender exemption pursuant to §22a-452f(b), Conn. Gen. Stat.; and

(d) Conveyance of a security interest as defined in §22a-452f(b)(7) Conn. Gen. Stat.

These two exemptions clearly reflect lenders' interests in avoiding the Transfer Act when making foreclosure decisions, or when taking a mortgage as security. Amendments in 2001 made the exemption consistent with lender liability rules under

¹⁸ Conn. Gen. Stat. §22a-134(1), as amended by Public Act 01-204, §15. Each exemption is not hereafter cited. Similar exemptions have been grouped together, and therefore the letters preceding these headings (which in some cases has been paraphrased) do not correspond to the statutory citation.

¹⁹ Note that Public Act 03-218 clarified the exemption to include municipal tax lien foreclosures, which were inadvertently excluded from the definition found in §22a-452f(b) Conn. Gen. Stat.

CERCLA and state law. Again, there is no exemption for transferring the site out of ownership of the lender.

- (e) Termination of a lease, 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, or from the commencement of the leasehold, 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, or from the commence of the leasehold.**

The lease exemption was extended in 2001 to cover leases only for a period exceeding (including options to extend) ninety-nine years. This revision is more consistent with the common law notion of transfers tantamount to the sale of real property. Note: termination of a ninety nine (or longer) lease triggers the Act.

- (f) Any change in ownership approved by the Probate Court;**
- (g) 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;**
- (h) Corporate reorganization not substantially affecting the ownership of the establishment; and**
- (i) Issuance of stock or other securities of an entity which owns or operates an establishment.**

Of all the exemptions under the Transfer Act, this one, and the following exemption (paragraph (j) below), receive the most analysis and are subject to the most interpretation. Changes in 2001 added the definition of "Corporate Reorganization not substantially affecting the ownership of an establishment."²⁰ The intended result of the 2001 amendments was to clarify practice and policy by excluding transfers of parent corporations or holding companies when the direct ownership of the establishment does

²⁰ Public Act 01-204 §15(22). "Corporate reorganization not substantially affecting the ownership of an establishment" means implementation of a business plan to restructure a corporation through a merger, spin-off or other plan or reorganization under which the direct owner of the establishment does not change";

not otherwise change. However, caution must be exercised, and each transaction must be carefully evaluated and analyzed before drawing a conclusion that this exemption applies to a particular transaction. Note further that a change in the ownership of the establishment itself is exempted when transferring less than forty percent of its ownership, as described below.

- (j) The transfer of stock, securities or other ownership interests representing less than forty percent of the ownership of the entity that owns or operates the establishment.**

Changes to the Transfer Act in 2001 created a "bright line" test in the context of changes in ownership of business operations that are establishments. Transfers of assets alone (not including the real property, of course) don't appear to trigger the definition of "Transfer of Establishment."²¹

- (k) 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; and**
- (l) Conveyance of an interest in an establishment to a trustee of an inter vivos trust created by the transferor solely for the benefit of one or more of the sibling, spouse, child, parent, grandchild, child of a sibling or sibling of a parent of the transferor.**

These exemptions cover transfers occurring within families, or by way of estate devise. However, even though compliance with the Transfer Act may not be necessary to receive the property, such property may still be subject to the Transfer Act upon sale of the property to a third party. Changes made to the Transfer Act in 2003 exempt persons appointed by a court to sell, convey or partition real property, or a person

²¹ It's not clear how many assets of a company may be transferred without triggering the Act. If the entire Business Operation is transferred as a unit, the Act is likely triggered. If certain machinery and equipment is sold, but the Business Operation survives, the Act is likely not triggered. Transactions litigated in the context of Federal Superfund Law may be evaluated for guidance. For example, some courts have held certain asset transfers were tantamount to mergers, thereby holding the acquiring company liable for acts of the seller of the assets.

appointed as a trustee in bankruptcy, from being deemed a party associated with a transfer of an establishment, and therefore such persons are not be required to comply with provisions of the Act.²² Moreover, no "innocent landowner defense" under Section 22a-452d of the General Statutes can be asserted, even though compliance with the Connecticut Transfer Act is not required.²³

- (m) **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 percent of the area of such parcel or written notice of such proposed conveyance and an environmental assessment form for such parcel is provided to the Commissioner sixty days prior to such conveyance.**

This exemption allows the transfer of clean portions of real property upon which an establishment exists, even if the parcel to be conveyed is greater than 50% of the establishment's land area, provided notice is given to DEP. Of course, DEP may become involved on its own accord after receiving notice.²⁴

- (n) **Conveyance of a service station, as defined by §22a-134(5).**

This exception was created in 1996 to clarify that gasoline releases from service stations (which are not considered releases of hazardous wastes) would not trigger remediation under the Transfer Act²⁵. A service station is defined as "a retail operation involving the resale of motor vehicle fuel including, but not limited to, gasoline, diesel fuel and kerosene and which operation does not otherwise meet the definition of an establishment."²⁶ It was generally believed that remediation of such releases would be subject to other programs administered by DEP. With the 2001 amendments, if a service

²² See Public Act 03-82.

²³ Conn. Gen. Stat. §22a-134a(k); as amended by Public Act 01-204.

²⁴ See Conn. Gen. Stat. §22a-432. See also *SHW Incorporated vs. Emhart Industries, Inc.*, Super. Ct., J.D. Hartford, No. CV-341320, Sept. 11, 1990 (a portion of the facility was conveyed without complying with the Connecticut Transfer Act).

²⁵ Public Act 96-113.

²⁶ Conn. Gen. Stat. §22a-134(5).

station otherwise meets the definition of an establishment, remediation of petroleum releases at the establishment will now be required.

- (o) Any conveyance of an establishment which, prior to July 1, 1997, had been developed solely for residential use and such use has not changed.**

This exception was added in 1997,²⁷ applying to, for instance, former textile mill conversions to residential use.

- (p) Any conveyance of an establishment to any entity created or operating under chapter 130 or 132, or to an urban rehabilitation agency, as defined in section 8-292, or to a municipality under section 32-224, or to the Connecticut Development Authority or any subsidiaries of the authority;**
- (q) Any conveyance of a parcel in connection with the acquisition of properties to effectuate the development of the overall project, as defined in section 32-651²⁸**
- (r) The Conversion of a general or limited partnership to a limited liability company under section 34-199;**
- (s) 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; and**
- (t) 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.**

These exemptions were added to facilitate conversions of partnerships and other corporate forms made available under the General Statutes.

- (u) The acquisition of an establishment by any governmental or quasi-governmental condemning authority.**

The legislature created these exemptions as part of a broader effort to expand municipal power to control or acquire contaminated properties. Under this provision,

²⁷ Public Act 97-218, §1(1)(O), codified at Conn. Gen. Stat. §22a-134(1)(O).

²⁸ Public Act 06-76

any property conveyed to (or condemned by) an applicable municipal or state agency is exempt from the requirements of the Transfer Act. This exemption is intended to facilitate the remediation and redevelopment of contaminated properties in urban areas. Once again, however, reconveyance of the property to a third party is not exempted from the Transfer Act.

- (v) **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 (100) 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 CFR 273.33 (a)(2) or (c)(2), or disposed of at such real property or business operation;²⁹ or**

Public Act 06-76 defines “universal waste” as “batteries, pesticides, thermostats, lamps and used electronics regulated as a universal waste under regulations adopted pursuant to subsection (e) of section 22a-449. ‘Universal waste’ does not mean (A) batteries, pesticides, thermostats and lamps that are not covered under 40 CFR Part 273, or (B) used electronics that are not regulated as a universal waste under regulations adopted pursuant to subsection (c) of section 22a-449.”

Furthermore, the 2006 revisions to the Transfer Act also defined “universal waste transfer facility” as “any facility related to transportation, including loading docks, parking areas, storage areas and other similar areas where shipments of universal waste are held during the normal course of transportation for ten days or less.”³⁰ Added this definition, the concept for which was derived from hazardous waste transfer station

²⁹ Public Act 06-76.

operation seems unnecessary, and appears internally inconsistent with the concept to exempt storage and handling of Universal Wastes.

(w) Conveyance of a unit in a residential common interest community in accordance with section 12 of this act

Section 12 became effective October 1, 2006, and provides that a conveyance of a unit in a residential common interest community is exempt from the Transfer Act as long as the declarant for the community of which the unit is apart, is a certifying party as defined by 22a-134, and that individual provides the Commissioner of Environmental Protection a surety bond or other form of acceptable financial assurance.³¹ Thereafter, notice of the status of remediation on the site is required to be provided as between buyers and sellers of units within the common interest community.

5.2.4 Other Selected Definitions

The Transfer Act applies to the transfer of facilities that generate "hazardous waste," a term defined to mean waste identified as hazardous waste under RCRA³², waste identified by regulation promulgated by the DEP, and material that contains PCBs in concentrations greater than 50 parts per million.³³ Sewage sludge and lead paint abatement wastes, even if hazardous waste, are exempted from the definition of hazardous waste under the Transfer Act.³⁴

The Transfer Act also defines "certifying party" and "party associated with the transfer of an establishment."³⁵ A "certifying party" is "a person associated with the

³⁰ Id.

³¹ Id.

³² Resource Conservation and Recovery Act of 1976, codified at 42 U.S.C. 6901 *et seq.*

³³ Conn. Gen. Stat. §22a-134(4).

³⁴ *Id.*

³⁵ Conn. Gen. Stat. §22a-134(6), (7).

transfer of an establishment who signs a Form III or Form IV³⁶ and who agrees to investigate the parcel in accordance with prevailing standards and guidelines and to remediate pollution caused by any release at the establishment"³⁷ A "party associated with a transfer of an establishment" includes either "(a) present or past owner or operator of the establishment, (b) the owner or operator of the real property on which an establishment is located, (c) the transferor, transferee, lender, guarantor or indemnitor, (d) the business entity which operates the establishment, or (e) the state."³⁸ The distinctions between these terms is important when filing a Form III or IV because the DEP will look to the certifying party for compliance with the Transfer Act, except as noted below.

5.2.5 Procedure for Filing Transfer Act Forms³⁹

a. General Use of New Forms.

The transfer of an establishment requires specific DEP forms be completed. Because business operations can be transferred separately from real property, DEP has established two sets of each type of form: one for use when only a business operation is transferred, and the other for when real property, or both real property and the business operations are transferred.⁴⁰

³⁶ See discussion in following section regarding the filing of Transfer Act forms.

³⁷ §22a-134(6), as amended by Public Act 01-204. For a Form I and II, it is the transferor signing the forms. In 1999, amendments sought to force DEP to create regulations to guide the evaluation of sites, but the 2001 amendments deleted that provision. To date, a "Transfer Act Site Assessment Guidance Document" revised to November, 1991, and a draft "Site Characterization Guidance Document" dated June 12, 2000, have been developed and are widely used. The concern of the consulting community is DEP's tendency to regulate by policy or guidance document not subject to public scrutiny.

³⁸ *Id.* §22a-134(7), as amended by Public Act 01-204, and Public Act 03-82, exempting court appointed trustees and bankruptcy trustees.

³⁹ Transfer Act forms are available from the Commissioner of the DEP, or from DEP's website: <http://dep.state.ct.us> The most recent forms were revised October 1, 2001.

⁴⁰ *Id.*

b. Form I Filing.

A "Form I" is utilized when there is a transfer, but where no release of hazardous waste or hazardous substances⁴¹ have occurred at the establishment.⁴² The certification must be based on a written investigation of the parcel in accordance with prevailing standards and guidelines, which in Connecticut generally means consistent with DEP site assessment guidance. In other words, DEP expects a site to be fully characterized, including collection of soil and, as necessary, groundwater samples, before making a certification that no such releases have occurred. Given the broad range of materials constituting a release (for which there is no "DeMinimus" exception), even ostensibly "clean" operations (i.e., office buildings considered establishments by virtue of spent fluorescent bulb generation) may be precluded from filing a Form I because petroleum products (oil or lubricants dripping from automobiles) have been released to an on-site parking lot. A Form I may also be used where no release of hazardous waste or hazardous substance has occurred and is still available if releases of hazardous substances (but not hazardous wastes) are remediated in accordance with the RSRs.⁴³ Of course, to verify such remediation, at least one year of groundwater monitoring is required. The practical result of changes made to the Transfer Act in 2001 and 2003 is to significantly increase the cost and time necessary to make an applicability determination on the form to file under the Act, and diminish the practical availability of using a

⁴¹ "Hazardous Substances" are broadly defined to include CERCLA hazardous substances and petroleum products and by-products. P.A. 01-204, §15(24).

⁴² Public Act 06-76, embodied in section 22a-134 of the Connecticut statutes effective October 1, 2006, modified the definition of Form I to require, where the commissioner or a licensed environmental professional issues the form to verify that hazardous waste has been remediated, the form must also verify that "since any such written approval or verification, including any approval or verification for a portion of an establishment, no discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste or hazardous substances has occurred at any portion of the establishment." This language also now applies to Form II filings.

⁴³ Public Act 03-218. The determination that hazardous substance has been remediated to prevailing standards and guidelines must be in writing.

Form I. Therefore, most initial forms filed after October 1, 2001, will be "Form IIIs," as described below, thus making innumerable sites go through an expensive and time consuming process, only to conclude at the end, that no remediation was necessary. Only the transferor may file a Form I, which must be provided to the transferee prior to the transfer, and thereafter filed with the DEP within 10 days after the transfer.⁴⁴

c. Form II Filing.

A Form II is filed when hazardous waste or hazardous substances have been released from the establishment, and such release has been remediated to the written satisfaction of the DEP or a Licensed Environmental Professional in accordance with applicable standards, or when no remediation is necessary to achieve compliance with the remediation standards.⁴⁵ A Form II may also be filed after a Form IV verification is filed, and no additional discharges have occurred at the establishment since such verification.⁴⁶ Only the transferor may file a Form II, which must be provided to the transferee prior to the transfer, and thereafter filed with the DEP within 10 days after the transfer.⁴⁷

d. Form III Filing.

A Form III is filed when a "transfer of establishment" occurs and hazardous waste or hazardous substances have either been released at the establishment, or the environmental condition of the establishment is unknown.⁴⁸ With a Form III, the "certifying party" agrees to investigate the entire parcel, but remediate only such releases from the establishment in accordance with the remediation standards.⁴⁹ As mentioned

⁴⁴ Conn. Gen. Stat. §22a-134a(c), as amended by Public Act 01-204.

⁴⁵ As verified or determined in writing by an LEP or the Commissioner. Conn. Gen. Stat. §22a-134(11), as amended by Public Acts 01-204 and 03-218. See also, note 41, *supra*.

⁴⁶ Conn. Gen. Stat. §22a-134(11), as amended by Public Act 03-218.

⁴⁷ Conn. Gen. Stat. §22a-134a(c), as amended by Public Act 01-204.

⁴⁸ Conn. Gen. Stat. §22a-134(12), as amended by Public Act 01-204.

⁴⁹ *Id.*

above, this is likely the most common form to be filed after October 1, 2001. It bears noting that changes made to the Act in 2001 provide relief from certifying parties having to remediate an entire parcel, when a business operation is an establishment and occupies only a portion thereof. While the entire parcel is evaluated for releases, only those attributed to the business operations that are an establishment and are being transferred, require remediation. Otherwise, for real property transfers, the entire parcel is the establishment and must be evaluated and remediated.

For a Form III, the transferor is responsible for completing the form, and such form must be executed by both parties prior to the transfer, and filed by the transferor with DEP within 10 days after the transfer.⁵⁰ If no party to the transfer prepares and signs the Form III as a certifying party, the transferor is now obligated to do so.⁵¹

e. Form IV Filing.

A Form IV is filed by a "certifying party" (or parties) when remedial actions at the establishment have been completed, but post-remediation or natural attenuation monitoring is required or is on going.⁵² The certifying party agrees to continue the post-remediation monitoring and, if necessary, undertake additional remedial actions if required by the Commissioner as a result of the post-remediation monitoring program.⁵³

For a Form IV, the transferor is responsible for completing the form, and such form must be executed by both parties prior to the transfer, and filed by the transferor with DEP within 10 days after the transfer.⁵⁴ If no party to the transfer prepares and signs the Form IV as a certifying party, the transferor is now obligated to do so.⁵⁵

⁵⁰ Conn. Gen. Stat. §22a-134a(c), as amended by Public Act 01-204.

⁵¹ Conn. Gen. Stat. §22a-134a(c), as amended by Public Act 01-204.

⁵² Conn. Gen. Stat. §22a-134(13), as amended by Public Act 01-204. Note it is DEP's interpretation that, under the RSR's, one year of quarterly groundwater monitoring must first occur ("compliance monitoring"), before a Form IV is available for use.

⁵³ *Id.*

⁵⁴ Conn. Gen. Stat. §22a-134a(c), as amended by Public Act 01-204.

⁵⁵ *Id.*

f. ECAF Filing.

With the exception of a Form II, all forms filed under the Transfer Act must be simultaneously accompanied by a completed "Environmental Condition Assessment Form" or "ECAF."⁵⁶ Completion of this form requires detailed information about the site and the site's environmental condition. A licensed environmental professional is required to complete or supervise completion of the ECAF⁵⁷, and the certifying party must sign the document.⁵⁸ Furthermore, the Commissioner may request all supporting documentation regarding compliance under the Transfer Act,⁵⁹ and requires it by virtue of the Forms and instructions he has prepared.⁶⁰

5.2.6 Commissioner's Response to Filing Forms

There are two elements of the Transfer Act which are used to expedite a review of Transfer Act filings. First, the statute requires the Commissioner to respond to the certifying party within certain time frames.⁶¹ Second, certain sites may be available to be administered under the guidance of a "licensed environmental professional."⁶² In addition, certain sites may undertake voluntary remedial efforts under the statutes.⁶³ Voluntary Remediation programs are discussed in other sections of the Handbook.

⁵⁶ Conn. Gen. Stat. §22a-134a(d) as amended by Public Act 03-218. Note, the 2001 amendments inadvertently deleted the requirement to file an ECAF with a Form III filing and included the requirement to file an ECAF for a Form II. This oversight was rectified by legislative amendment by Public Act 03-218.

⁵⁷ The ECAF is defined under Conn. Gen. Stat. §22a-134(17), as amended by Public Act 01-204.

⁵⁸ Conn. Gen. Stat. §22a-134a(c), as amended by Public Act 01-204.

⁵⁹ *Id.*

⁶⁰ See Transfer Act Forms and Instructions.

⁶¹ Conn. Gen. Stat. §22a-134a(c) and (e) as amended by Public Act 01-204.

⁶² *Id.* at §22a-134a(e). Note that Public Act 07-81, "An Act Concerning Licensed Environmental Professionals," makes use of licensed environmental professionals standard procedure for site remediations and cleanups, unless the Commissioner chooses otherwise.

⁶³ Conn. Gen. Stat. §22a-133x. A general discussion regarding voluntary remedial actions is found in later Sections of the Handbook.

For a Form I or Form II filing, the Commissioner shall notify the transferor no later than ninety days after submittal of the form, if the Commissioner deems the form incomplete.⁶⁴

The Commissioner has thirty days to determine whether a Form III or Form IV is complete or incomplete.⁶⁵ If a Form III was filed prior to October 1, 1995 (when ECAF's did not exist), the owner may also submit an ECAF to the Commissioner for a determination.⁶⁶ Upon the receipt of a completed Form III, Form IV or ECAF, where appropriate, the Commissioner will issue a letter acknowledging receipt and completeness of the filing and may automatically delegate the matter to a licensed environmental profession.⁶⁷ The Transfer Act establishes elements for evaluating the ECAF to determine if the site will qualify for review by the licensed environmental professional.⁶⁸

Except as provided by subsection (h) of Public Act 07-233 (_____), the certifying party must submit a schedule to the DEP for investigating and remediating the establishment on or before seventy-five days after receiving notice that their form was complete.⁶⁹ The schedule must provide that the investigation of the parcel be completed within two years of the date that DEP determines a LEP may evaluate the site, and the remediation must be initiated within three years of the date of receipt of

⁶⁴ Conn. Gen. Stat. §22a-134a(c) as amended. Note: While practice may dictate the Commissioner also notify the transferor if the filing is complete, the statutes do not require him to do so.

⁶⁵ Conn. Gen. Stat. §22a-134a(e), as amended by Public Act 01-204.

⁶⁶ *Id.*

⁶⁷ Public Act 07-233. Note that prior to the 2007 Transfer Act Amendments, the Commissioner had forty-five days to determine whether to retain responsibility for site or delegate to a licensed environmental professional.

⁶⁸ Conn. Gen. Stat. §22a-134a(f), as amended by Public Act 07-233.

⁶⁹ DEP has issued guidance indicating that such schedule should be submitted within seventy-five days of filing the forms. Conn. Gen. Stat. §22a-134a(g), as amended by Public Act 07-233.

such notice.⁷⁰ Verification by an LEP that the remediation is complete must be filed with the Commissioner.⁷¹

Public Act 07-233 provides that the Commissioner may conduct an audit of any verification, but shall not conduct an audit of a final verification of an entire establishment after three years from receipt of such final verification. Upon completion of an audit, the Commissioner shall send written findings to the certifying party and licensed environmental professional who verified the site. These provisions only apply to final verifications received after October 1, 2007. The Commissioner may request additional information during an audit, and if that information is not provided within ninety days of the request – or any longer time period the Commissioner may determine in writing – the Commissioner may suspend the audit or complete the audit based upon provided information. The Commissioner’s suspension of the audit shall suspend the running of the three-year time frame until the Commissioner receives the additional information.

The Commissioner shall not conduct an audit after the three-year time frame unless one of six exceptions applies: (1) verification obtained through submittal of materially inaccurate, erroneous, or misleading information, or misrepresentations made; (2) verification submitted pursuant to an Order issued under the Transfer Act; (3) any post-verification monitoring is required but has not been done; (4) an environmental land use restriction has not been properly recorded; (5) the Commissioner determines there has been a violation of the Transfer Act; or (6) the Commissioner determines that the remediation failed to prevent a substantial threat to the public health or the environment.

⁷⁰ *Id.*

⁷¹ *Id.*

If the Commissioner retains jurisdiction over remediation of the parcel, then the certifying party must submit to him a schedule for review and approval.⁷² The schedule, however, may be revised in writing.⁷³

An important element of the above schedule is that the certifying party must publish notice in a local newspaper prior to initiating remediation, and notify the Director of Health of the municipality where the parcel is located.⁷⁴ In addition, the certifying party must either erect and maintain a six foot by four foot sign on site for thirty days, or mail notice of the remediation to each owner of record abutting the parcel.⁷⁵

Orders may be issued by the Commissioner to any person not complying with the Transfer Act, including to either the transferor or transferee, or both.⁷⁶

If a parcel has been fully remediated under a Form III or IV, or a Form I or Form II has been filed after October 1, 1995, then the Transfer Act provides an exemption for subsequent Transfer Act filings.⁷⁷ However, this exemption only exists provided that the remediation has been completed and approved in writing by the Commissioner or verified by a licensed environmental professional, and that no subsequent activities have occurred on the site that would thereafter qualify it as an establishment.⁷⁸

5.2.7 Damages and Penalty for Noncompliance

A private remedy for damages under the Transfer Act has survived various legislative revisions. A transferee is entitled to recover damages from the transferor and

⁷² Conn. Gen. Stat. §22a-134a(h), as amended by Public Act 01-204.

⁷³ *Id.*

⁷⁴ Conn. Gen. Stat. §22a-134a(i), as amended by Public Act 01-204.

⁷⁵ Public Act 03-218.

⁷⁶ Conn. Gen. Stat. §22a-134a(j), as amended by Public Act 01-204. Violations can include failure to file, or incorrect or incomplete filings, and the Commissioner may refer the matter to the Attorney General for enforcement.

⁷⁷ Conn. Gen. Stat. §22a-134a(l), as amended by Public Act 01-204.

⁷⁸ *Id.*

render the transferor strictly liable without regard to fault, for remediation costs and all direct and indirect damages.⁷⁹ And, as of October 1, 2001, the Commissioner has the ability to assess a civil penalty of up to \$25,000 per day, per violation, for violating any provision of the Transfer Act.⁸⁰

5.2.8 Fees

The fee schedule established for filing the forms under the Transfer Act are tied to the "cost of remediation," which includes the total costs related to investigating the on and off site pollution, evaluating remedial alternatives, designing and implementing the approved remediation, and operating and maintaining the remedial effort, including post-remediation monitoring.⁸¹ The fee for filing a Form I is \$300, the fee for filing a Form II is \$1,050, except when an approval of such remedial efforts was obtained within three years of the transfer, then the scale utilized for filing a Form III applies.⁸² The initial fee for filing a Form III or IV is \$3,000.⁸³ If the site qualifies for review by a licensed environmental professional, then no further fee shall be required.⁸⁴ If the DEP retains jurisdiction over the site, prior to issuing a final approval of the remediation, the following total fees for a Form III shall be due:⁸⁵

Cost of Remediation

Total Transfer Act Fee

(Note: The initial \$3,000 filing fee is deducted from these figures.)

- | | |
|----------------------------------------------------------------------------------------|-----------------|
| <ul style="list-style-type: none"> • equal to or greater than 1,000,000 | <p>\$34,500</p> |
|----------------------------------------------------------------------------------------|-----------------|

⁷⁹ Conn. Gen. Stat. §22a-134b.

⁸⁰ Conn. Gen. Stat. §22a-134d, as amended by Public Act 01-204.

⁸¹ Conn. Gen. Stat. §22a-134e(a).

⁸² Conn. Gen. Stat. §22a-134e(b), and (m), as amended by June 30 Special Session, Public Act 03-6, Section 119.

⁸³ Conn. Gen. Stat. §22a-134e(m), as amended by June 30 Special Session, Public Act 03-6, Section 120.

⁸⁴ *Id.*

⁸⁵ Conn. Gen. Stat. §22a-134e(n), as amended by June 30 Special Session, Public Act 03-6, Section 120.

- equal to or greater than \$500,000, but less than \$1,000,000 \$30,000
- equal to or greater than \$100,000, but less than \$500,000 \$21,000
- equal to or greater than \$50,000, but less than \$100,000 \$6,700
- equal to or greater than \$25,000, but less than \$50,000 \$4,000
- less than \$25,000 \$3,000

Fees for Form IV are 50% of the Form III fees, with the exception that, for all remediation less than \$50,000, the Transfer Act fee is \$3,000.⁸⁶ As mentioned previously, if a Form II or Form IV is filed within three years of receiving final approval from the Commissioner pursuant to 22a-133x of the statutes, and a transfer occurs within that time period, then the Form III schedule of fees applies.⁸⁷ The initial \$3,000 Form III or Form IV filing fee is not required if a voluntary filing was made under §22a-133x, if a Transfer Act filing is made within three years.⁸⁸

5.2.9 Withdrawal from the Transfer Act

Any certifying party who has submitted a Form III or Form IV to the DEP prior to October 1, 2001 may comply, after providing notice to the transferor, transferee and, if different, the owner of the parcel, with the requirements under the revised law, as opposed to what was in effect prior to October 1, 2001.⁸⁹

In addition, any person who has submitted a Form I, Form II, Form III or Form IV to the DEP, may petition the Commissioner to withdraw such form.⁹⁰ Such petition shall notify the transferor, the transferee and the certifying party by certified mail. The petitioner shall make every reasonable effort to identify the address of such transferor, transferee and certifying party. The transferor, transferee and certifying party shall have thirty days to submit to the Commissioner written objections to such

⁸⁶ Conn. Gen. Stat. §22a-134e(o), as amended by June 30 Special Session, Public Act 03-6, Section 120.

⁸⁷ Conn. Gen. Stat. §22a-134e(p).

⁸⁸ Conn. Gen. Stat. §22a-133x(e).

⁸⁹ Public Act 01-204 §21(a), as codified at §22(a)-134h(a).

⁹⁰ Public Act 01-204 §21(b), as codified at §22(a)-134h(b).

petition. The Commissioner may approve the petition if it demonstrates to the Commissioner's satisfaction that the property or business was not an establishment or the transaction was not a transfer at the time the form was submitted. If the Commissioner approves the petition, no further action is required by the certifying party with respect to its obligations under the form, but the form and the fee shall not be returned.⁹¹

313479 v.08

⁹¹ *Id.* Of course not. . . .