



ENVIRONMENTAL LAW

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Life After the Connecticut Transfer Act: A Future Worth Waiting For...Maybe

Life after the Connecticut Transfer Act is going to be great! At least that's what we've been told. What post-Transfer Act life is going to look like and when it will begin are still a bit of a mystery, however. That said, certain aspects of the post-Transfer Act world are coming into focus and it's time for anyone involved in owning, managing, leasing, selling, buying, lending or investing in real estate in Connecticut to start thinking about how the Department of Energy & Environmental Protection's eventual implementation of the Release-Based Cleanup Regulations (RBCRs) (which will automatically sunset the Transfer Act when formally adopted) will impact them and their business.

For example: if you are looking to buy or sell a property or business in Connecticut that would trigger the requirements of the Transfer Act if sold today, does it make sense to do the deal now or wait until after the RBCRs are in effect? Similarly, instead of buying or selling now, would it make more (and good business) sense to lease a property to avoid triggering the Transfer Act but include a purchase option that can be triggered when the RBCRs are implemented? Also, could an owner/seller limit its liability by performing or allowing environmental sampling on its property before the RBCRs are adopted (particularly when it comes to emerging contaminants like per- and polyfluoroalkyl substances, "PFAS") rather than after, when the sampling would be much more likely to trigger a reporting obligation? Not surprisingly, the answer to these and similar questions is: it depends.

How Did We Get Here?

As anybody who has dealt with the Transfer Act will tell you, compliance with the Transfer Act is onerous, time consuming and expensive. We often refer to the Transfer Act as "Hotel California" because you can try to check out any time you like, but you can never really leave – at least not without spending a lot of money. Suffice it to say the Transfer Act is not a user-friendly program and has long stifled economic development. It also arguably doesn't do a great job of getting sites cleaned up. In fact, DEEP recently reported that approximately 3,000 Transfer Act filings have been made over the years but only approximately 300 have achieved closure.

After decades of discontent with the Transfer Act (and many statutory amendments to try and fix it), the Connecticut legislature in 2020 passed Public Act 20-9 (now codified at CGS §§ 22a-134pp to 134xx), providing the framework for a new release based cleanup program and a mechanism to sunset the Transfer Act. Pursuant to PA 20-9, the new release-based cleanup program is being created through implementation of the RBCRs being developed by DEEP with input from a legislatively created "Work Group" consisting of environmental lawyers (including from Shipman), real estate professionals, environmental consultants and other stakeholders, including the Connecticut Department of Economic and Community Development.

Once the RBCRs are formally adopted, no subsequent transfers of properties or businesses that would have been considered “establishments” pursuant to the Transfer Act will trigger the Act. Notably, however, any sites in the Transfer Act at that time will still be subject to the requirements of the Transfer Act and be required to complete any remaining investigation and remediation needed to achieve final “verification” (i.e., no further action) or certification from the DEEP that the “establishment” has been investigated in accordance with prevailing standards and guidelines and is in compliance with applicable cleanup standards, i.e., the Remediation Standard Regulations (“RSRs”). DEEP also has noted that it will continue to have (and use) enforcement discretion when it comes to potential missed Transfer Act filings associated with transactions that closed prior to the adoption of the RBCRs.

The Release-Based Cleanup Regulations – DEEP’s First Draft

DEEP, the Work Group and other stakeholders have collectively spent thousands of hours on the development of the draft RBCRs since 2020. In December 2023, DEEP released to the Work Group its initial draft for review and comment. In March 2024, the Work Group (along with other members of the public) provided hundreds of pages of comments back to DEEP in response to the initial draft.

While DEEP’s issuance of the next iteration of the draft RBCRs is likely a few months away (expected this Spring), we now have a good understanding of what the new program will likely look like. Below are a few key concepts we fully expect will be part of the new program.

- The RBCRs will apply to all properties in Connecticut (not just “establishments” as defined by the Transfer Act), including residential properties.
- If historic contamination is identified on a property after the adoption of the RBCRs, it could trigger a requirement to perform further investigation, remediation and possibly reporting to DEEP, even if identified at relatively low concentrations. That said, there will be exceptions to what would be required to be reported.
- The RBCRs will be triggered only upon discovery of a release after the implementation of the regulations, e.g., the receipt of sampling data generated after the formal adoption of the RBCRs, not data that already existed. That is, there will not be any requirement to “search the file cabinet” or report conditions that were known prior to the RBCRs coming into effect.
- If a “Significant Existing Release” is identified that potentially creates an imminent risk to human health or the environment, the person that discovered the release would be required to notify the property owner within a few hours who would then be required to notify DEEP.
- If a release is discovered under the RBCRs, there will be a regulatory requirement to investigate the release and clean it up within established timeframes and, depending on the type of release, using appropriately licensed professionals (although not necessarily a Connecticut Licensed Environmental Professional) and ultimately confirm that the release is cleaned up in accordance with the applicable criteria.
- There will be record keeping requirements even if the release is not required to be reported to DEEP.
- DEEP will establish fees for reporting releases based on the perceived risk of the discovered release (i.e., higher fees for higher risk issues), which fees are likely to be annual and increase over time (but lower than the fees required in Massachusetts).
- The RBCRs will include a revised version of the existing RSRs with some additional flexibility and new options for achieving compliance with certain cleanup criteria, including additional risk-based exposure scenarios, e.g., for managed multifamily properties and passive recreation areas.

- The revised RSRs also will include a permit-by-rule approach/option to address historically impacted material (i.e., historic fill) in certain situations, which should be less onerous and costly than the current Environmental Use Restriction (“EUR”) options under existing law.
- DEEP will have multiple opportunities to audit submittals to the agency, not just at the end when a final completion report is submitted.
- “No audit” determinations by DEEP may be available but could require a specific request and an associated fee.

Looking Ahead

While the timing is still a bit uncertain, Governor Lamont and DEEP each announced that successful adoption of the RBCRs is a top priority. In fact, formal adoption of the RBCRs is the number one goal of DEEP’s recently announced “20-By-26” initiative, whereby DEEP identified specific goals for how to improve the agency through increased predictability, efficiency and transparency by 2026. However, it’s not a slam dunk that the program will be in effect by 2026 as there are still wrinkles to be ironed out and disagreement among stakeholders with respect to certain aspects of the program. That said, there does seem to be enough momentum and political will to make it happen on schedule.

To that end, here are a few key issues for anyone involved in Connecticut real estate to think about:

- **Market forces will dictate the scope (and, in the short term, timing) of environmental due diligence investigations even more than they do today.**
 - Rather than environmental sampling being done primarily to satisfy the requirements of the Transfer Act, whether sampling will be done (e.g., in connection with a refinance, new loan, buyer’s due diligence) will be determined more so by the risk tolerance of the parties involved.
 - Also, in the short term, the impending changes will provide opportunities for the regulated community to benefit from both the existing regime and the future RBCRs by timing certain activities. For example, for sites subject to the Transfer Act that could benefit from the anticipated permit-by-rule approach to addressing historically impacted material/fill under pavement, a parking lot or building, which currently would require an EUR, waiting until the revised cleanup standards in the RBCRs go into effect could be prudent.
- **Real estate negotiations and deal documents (e.g., purchase and sale agreements, access agreements, environmental remediation and escrow agreements) will look different.**
 - Since environmental sampling will be more likely to trigger a requirement for further investigation, remediation and reporting than prior to the adoption of the RBCRs, sellers may not be as willing to allow potential buyers to perform invasive due diligence, or sellers may simply decide they don’t want to know the results (to potentially avoid triggering affirmative obligations associated with a “discovery”).
 - To that end, how parties to a transaction contractually allocate the responsibility for reporting, investigation and cleanup, if required, will need to be evaluated and addressed through a new lens. We expect more sellers may require that a potential buyer performing invasive due diligence on their property affirmatively agree to not share the results of the sampling, unless specifically requested by the seller or to the extent required by law.

- **Lenders and investors will need to reevaluate how they assess environmental risk.**
 - As with the rest of the regulated community, there will be a learning curve with respect to how the RBCRs will work in practice, what the benefits of the new program will be and where there may be added hurdles and expenses.
 - For lenders/investors in particular, understanding the new program will be important in terms of not only evaluating what due diligence will be required of borrowers under the new regime (e.g., whether or not to require Phase II sampling based on historic information and/or an updated Phase I) but also what the risk might be for the lender/investor in the event of a foreclosure or taking a deed in lieu.
- **Owners, tenants and property managers will need to manage new responsibilities and potential liabilities under the RBCRs.**
 - Considering the RBCRs will apply to discovered releases at any property, including residential, and regardless of whether the property is subject to a transaction, anyone that owns a property or “maintains” the release (e.g., a tenant or property manager, potentially) could have responsibility and liability under the program.
 - As a result, owners, tenants and property managers should not only understand how the RBCRs could impose new regulatory responsibilities and liabilities, but also how to appropriately contractually allocate those responsibilities and liabilities in leases and other agreements.

While the RBCRs are not yet final, we do know that anyone involved in real estate in Connecticut will be subject to the new regulations when they are adopted. The good news is, while the RBCRs will cast a much wider net than the Transfer Act, the requirements for addressing discovered releases should be (fingers crossed) more user friendly and less costly than what is currently required for those sites subject to the Transfer Act.

For those that could be impacted by the new program, now is not too early to think about what can be done before the RBCRs go into effect and how to possibly take advantage of the impending change in the environmental regulatory landscape in Connecticut. These next few months (or maybe a little more...) also represent an opportunity for interested stakeholders to get up to speed on the issues, become involved in the continued development of the draft regulations (e.g., by participating in the public Work Group meetings or providing comments on the next draft) and get ahead of the game in terms of being ready for what’s next.

Questions or Assistance

As always, reach out to a Shipman environmental lawyer today with any questions.

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