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Common Sense, a Camel, and Further Discussion: Connecticut Amends the Transfer Act

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The environmental law everyone loves to hate? In Connecticut, no contest: the Transfer Act, Conn. Gen. Stat. §22a-134 *et seq.,* which requires a regulatory filing and exhaustive site investigation and remediation whenever hazardous waste "establishments" change ownership.

The Transfer Act serves commendable purposes: it assures that environmental conditions will be disclosed, and that someone will take responsibility for assessing and addressing them. But there is no question that it complicates covered transactions. It has been widely criticized for casting too broad a net, consigning transaction parties to years of uncertainty and expense, and stifling redevelopment of historically industrial properties.

Connecticut Public Act 19-75 makes some welcome common-sense changes– limiting the time for the Connecticut Department of Energy and Environmental Protection to audit verifications by Connecticut Licensed Environmental Professionals, and exempting properties where the 100 kg "establishment" threshold has been exceeded only once. These significant calibrations that will streamline the operation of the law and limit its reach. The new amendments include other changes to the "establishment" definition that are likely to be more limited in effectiveness due to problematic qualifications and ambiguities. And the need for further Transfer Act reform is reflected by a mandate for a "working group" – assuring that discussion will continue about a law that seems satisfactory to no one.

Public Act 19-75: What It Does

New and Expanded "Establishment" Exceptions. Section 1 amends the core "establishment" definition, Conn. Gen. Stat. §22a-134(3), by adding the new one-time generation exception, and by enlarging the list of "categorical" exceptions – those involving waste generation in specific scenarios.

The first of these exceptions provides that the term "establishment" does not include any property or business operation where more than 100 kg of hazardous waste was generated as a result of "one-time generation of hazardous waste in any one month … either the first time such waste was generated or … since

the last time a [Transfer Act form] was required to be submitted."

The categorical exceptions now total four, any one or more of which is available in lieu of the one-time generation exception. They are:

- Remediation of polluted soil, groundwater or sediment (no change) ("remediation waste");
- Removal or abatement of building materials (no change) ("building materials") or removal of materials used for maintaining or operating a building (new) ("building and maintenance materials");
- Removal of unused chemicals or materials as a result of emptying or clearing out a building, provided such removal is supported by facts reasonably established at the time of such removal ("building cleanout"); or
- Complete cessation of a business operation, provided the waste is removed not later than ninety days after such cessation and such cessation is supported by facts reasonably established at the time of such cessation ("business cessation").

Shortened Verification Audit Period. Section 2 provides that for verifications submitted on or after October 1, 2019, DEEP will have one year to commence audits, and three years to complete them Under current law, DEEP has three years to commence audits and has no time limit to complete them. The amended time limitations remain subject to existing exceptions, which include situations where a verification is based on materially inaccurate, erroneous or misleading information, or where post-remediation monitoring has not been completed or an Environmental Land Use Restriction necessary to achieve compliance has not been recorded.

Transfer Act "Working Group." Section 3 creates a working group "to examine and develop recommendations regarding potential legislative changes" to the Transfer Act, to be reported to the Commerce and Environment Committees no later than February 1, 2020.

Sections 1 and 2 take effect as of October 1, 2019. Section 3 is effective upon passage.

What It Means: Observations and Questions

As useful as it may be to expand the list of "establishment" exceptions and shorten the verification audit period, the structure and language of PA 19-75 leave significant areas of ambiguity. The changes – and the commitment to explore further improvements – are significant enough to merit extended consideration of how it all will work.

Common Sense: Shortened Verification Audit Period

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Section 2, narrowing the "audit window," is a welcome example of common sense in Transfer Act reform. For most sites, a Licensed Environmental Professional's "verification" concludes the certifying party's obligations. While DEEP responds to many verifications with reasonably prompt "no audit" letters, the potential for an audit is a significant loose end in the Transfer Act structure. The need to address it complicates transactional negotiations, and the potential of a three-year (or longer) wait for the last word magnifies the complications.

This issue was the centerpiece of the bill as initially proposed and as reported out of committee in March. But as problematic as the three-year audit window has been, the initial proposal veered to the other extreme: it would have cut the audit period to a mere sixty days following DEEP receipt of a verification. DEEP was justifiably concerned that such a radical reduction would materially impair oversight of LEP verifications. Delegation of approval authority to LEPs is critical to the success of the state's remediation programs, but it works because LEPs operate within a network of regulations defining site characterization, remediation standards, and licensure and discipline of the LEPs themselves. The audit mechanism is integral to this framework.

A one-year audit window is a reasonable middle ground between the practical needs of transaction parties and the viability of the LEP verification framework. The shortened audit window created by PA 19-75 improves the operation of the Transfer Act without upsetting this balance.

A Camel: The One-Time Generation and Cleanout/Closure Exceptions

While the three-year audit period has been an inconvenient loose end, the Transfer Act has been a particular source of frustration to parties who find themselves within its coverage due to a one-time instance of waste disposal above the 100 kg per month "establishment" threshold, or due to isolated episodes of non-operational waste generation.

The notion of a "hazardous waste establishment" implies routine generation of handling of hazardous waste. But the statute speaks in terms of generation over that level "in any one month," making no distinction between regular generation and situations where the 100 kg threshold is exceeded only irregularly, or even just once. Does that promote the objectives of assuring full disclosure and assuring responsibility for site evaluation? Technically, yes. But it is fair to ask whether it makes sense to actuate the Transfer Act machinery for properties with limited histories of waste generation – especially in a state where many properties have long histories of unrelated prior industrial uses and attendant environmental consequences that are swept up by a Transfer Act filing.

One-time generation is the most extreme example of Transfer Act "bycatch," so the new exception for that profile provides welcome relief for future transactions. But this change leaves an obvious question unanswered: if as a matter of legislative and environmental policy we have now decided one-time generation sites don't belong in the Act, why should we keep sites in the Act that previously got into it for that reason?

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There's no evident logical reason to do so. The illogic will be particularly painful for certifying parties still working toward verification at one-time generation sites that transfer again after PA 19-75 takes effect: those transfers will not trigger the Transfer Act, but the prior filer(s) will be left to toil away at unmodified obligations.

The expansion of the categorical exceptions responds to the same impetus, addressing the part of the generation spectrum involving occasional disposal associated with routine, recurring scenarios. However well-intended, these provisions bring to mind the maxim that a camel is a horse designed by a committee. Whether because of haste in drafting or vicissitudes of compromise, these potentially useful changes are hobbled by complex qualifications and ambiguous language.

One such qualification involves the interface of the one-time generation exception and the others. PA 19-75 provides that "establishments" do not include properties or business operations where the 100 kg threshold is exceeded "*solely* as a result of" *either* one-time generation, *or* any one or more of the four categorical exceptions. Combining "solely" with the either/or structure of the exceptions, however, the implication seems to be that a property can benefit from one or the other(s) but not both. Does that mean a property eligible for *both* the one-time generation exception *and* any of the others is disqualified for all exceptions and therefore treated as an "establishment?" That might make sense if you conclude that a property or business operation with a history of multiple instances of generation within diverse exceptions presents a higher risk profile. Or perhaps the concept is that a given property or business operation gets one bite at the exception apple. But neither of those explanations would be consistent with the four categorical exceptions, which are all ("one or more") available, and moreover are not restricted (or at least not expressly restricted) to "one time" generation. Perhaps the "solely as a result of A or B" structure means a party must choose one branch of the exception provision or the other – but if as a matter of policy all are exceptions, what would that choice accomplish?

An important qualification on the "building cleanout" and "business cessation" exceptions is that they apply only if supporting facts are "reasonably established at the time" of the qualifying events. With all due respect to the arcana of evidence law, these criteria rival the most inscrutable mysteries of the hearsay rule. Does a party claiming the benefit of these exceptions bear the burden of proving ("reasonably establishing") their applicability – or of rebutting a presumption that they do not apply? If that were the intent, the usual nomenclature for those familiar concepts would have been clearer. There is also a temporal component: the necessary facts must be established "at the time" of the qualifying events. Can such events *before the effective date of these amendments* be "reasonably established at the time" by retrospectively marshaling supporting evidence? Or does "at the time" effectively mean that only proof specifically tailored to these new exceptions will support their application? Here too, prospective application would have been easy enough to specify by referring to qualifying events "on or after the effective date of this act." Absent such language, there is no apparent obstacle to relying on historical information from "the time" that "reasonably

establishes" the predicates for these exceptions. Unfortunately, the amendment does nothing to make this conclusion clear.

A qualification specific to the "building cleanout" exception is that it applies only to virgin materials ("unused chemicals or materials"), not waste. In most building cleanout scenarios, however, there is almost always some quantity of waste on hand. Obviously "unused" materials would become waste as a result of the cleanout, but the language seems to imply that the exception would not apply if any of the material cleaned out was already waste. Or would the portion of the cleanout material consisting of "unused chemicals or materials" simply not count toward the 100 kg threshold? That would depend on how far the preceding "solely" reaches into the categorical exceptions.

The "building cleanout" exception is also singular: it applies to emptying or clearing out "a building." What if multiple buildings are cleaned out, as is often the case? It shouldn't make a difference: a Transfer Act "establishment" may be a whole property or the "business operation" conducted on it, and "establishment" status is not tested on a building-by-building basis. The language again is ambiguous: "a building" could mean "one building but not more," or "any building."

In these respects, the new and modified exceptions have the potential to eliminate some Transfer Act "bycatch." The one-time generation exception is both the most welcome and the clearest. The others? Steps in the right direction, hobbled by imprecise, obscure language and unnecessarily complicated collateral criteria.

Further Discussion: Transfer Act "Working Group"

If Section 1's "establishment" exceptions evoke the adage about camels and committees, Section 3 illustrates the equally hoary maxim that there's never time to do it right, but there's always time to do it over. In this case, "time to do it over" means "thirty-four years and counting." In preparing this article, the author has worked from a copy of PA 19-75 that now resides in a large looseleaf binder of Public Acts making significant changes to the Transfer Act from 1995 (two), 1996, 2001, 2006, and 2009. Since its initial adoption in 1985, the Act has been the subject of virtually continuous efforts to make it less intractable.

The legislative journey of PA 19-75 is a case study in the difficulties these efforts present. Public hearing testimony from individuals involved with commercial real estate included extensive markups (such as this example) touching on a numerous other recurring Transfer Act problems including treatment of residential and industrial/commercial condominium units, "establishments" consisting of leased portions of larger parcels, and successive filings where a transfer occurs before a prior certifying party has completed work. The very limited initial response to this wish list, as noted above, was an initial bill touching only on the audit period. While the one-time generation exception is a success story, the other exceptions in PA 19-75 exhibit the unmistakable scars and splices of compromise drafting.

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The difficulty of compromise is structural. A broader Transfer Act promotes the environmental and transactional benefits of disclosure, investigation and remediation. A narrower Transfer Act fosters a market in historically industrial properties for redevelopment and reuse. It is difficult to define, let alone balance, such disjunct policy imperatives. To date, they have met most in collision: the burden of compliance kills transactions and the salutary purposes of the law are left unachieved. In such a fraught arena, the agreement to take one-time generation out of the Act is a remarkable achievement.

The End, Except It's Never Over

PA 19-75 makes consequential changes that will reduce the number of properties subject to the Transfer Act and expedite final verification of those that remain. An agreement to continue the discussion is welcome, and the results of the session just completed give reason to hope for solutions to other difficult problems.

The new working group could serve the General Assembly as well, or better, by taking the opportunity to appraise the objectives, benefits and costs of the Transfer Act, on its own and in relation to the needs of the Connecticut cities and towns where underutilized industrial properties are located. Perhaps most elusive is a clear sense of whether and to what extent the resources invested in this law – both in compliance and in lost opportunities – are justified by benefits to transaction parties, human health and the environment. That, not just another round of piecemeal revision, could constitute real progress.