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2020 Environmental Legislative Update No. 2: "Be Careful What You Wish For" - The End of the Transfer Act?

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by Christopher P. McCormack

Welcome to our Environmental Legislative Updates.

Throughout Connecticut's legislative session, these updates highlight developments concerning environmental law and policy. The author prepares updates as Legislative Liaison of the Connecticut Bar Association's Environmental Law Section. Pullman & Comley is pleased to offer them in this format to a wider audience.

As the session proceeds, early updates will alert readers to proposals on a broad range of issues concerning the environment, narrowing focus over time on bills that continue to progress, and concluding with a post-session wrap-up of bills that pass as well as noteworthy also-rans. Along the way they'll summarize and challenge arguments pro and con, examine the policy and science behind proposals, and occasionally cast a side glance at the vicissitudes and vagaries of the process. The views expressed will be the author's own, not necessarily those of Pullman & Comley LLC.

Questions, comments, requests and suggestions are always welcome. Please email me at cmccormack@pullcom.com.

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There have been a fair number of environmental bills thus far in the session, and your Legislative Liaison has a full update in the metaphorical typewriter. We have some big news, however, and it's time sensitive, so we're going to focus on two

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bills that deserve extended discussion.

Two major environmental bills have come forward on the Senate side. One, proposing changes to the Transfer Act, is largely what might have been expected from the working group created by PA 19-175 to study further improvements to that law. But one of the changes is dramatic – in effect, to phase out the Transfer Act for transfers after July 1, 2022 – and is tied to an equally dramatic shift to an overall "release-based" reporting and remediation framework for releases that occur or are discovered after that date. The second bill replicates the provisions for a "release-based" system as a stand-alone proposal.

With the Commerce and Environment Committees having scheduled a joint public hearing on "the Transfer Act" on March 5, 2020, we'll devote this update to detailed review of these two significant proposals. We must emphasize that what follows reflects the initial versions of these bills. Legislative proposals rarely run without amendments, and there is no reason to expect otherwise here. In this instance, however, we understand DEEP may have further proposals in the works, and they may even have something out in advance of the March 5 hearing. So consider all of this "as initially proposed" and what can be said "as of this writing."

The bill we might have expected from the PA 19-175 working group process is SB 281, "An Act Concerning Various Revisions to the Property Transfer Law." Or at least Sections 1 through 5 of SB 281 focus on the kinds of incremental adjustments we have come to expect of near-annual Transfer Act bills. Thus, in Sections 1 and 2:

"Transfer" definition: expanded exception for "acquisition and all subsequent transfers" of properties in the abandoned brownfields cleanup program or brownfield remediation and revitalization program, or by a Connecticut brownfield land bank, provided in each case that the transferor is in compliance with the requirements of those programs.

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- "Transfer" definition: clarification of exception for transfers ordered or approved by a bankruptcy court.
- "Transfer" definition: new exception for change of name of an LLC as an amendment to its certificate of organization.
- "Establishment" definition: for leased portions of property, limited to a business operation's leased premises and non-leased areas where the business managed hazardous waste.
- "Establishment" definition: for commercial or industrial condominium units, limited to the unit, limited common elements under exclusive control of unit owner, and common areas where the owner managed

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hazardous waste.

- "Establishment" definition: new language concerning universal waste.
- "Establishment" definition: clarification that Act does not apply if "establishment" activities have not taken place since the date a "verification" specifies as its effective date.

Section 3 proposes extensive changes to Conn. Gen. Stat. §22a-134i to address the vexed issue of residential condominium transfers. The revised version retains the essence of the existing structure, which links the unit transfer to the condominium declarant's Transfer Act certification and financial assurance. The proposed revision would permit certification and financial assurance by the declarant's immediate predecessor in title as well as the declarant. The proposal would also require recording of a notice on the land records to alert potential buyers that the condominium is subject to investigation and remediation, and to provide a cross-reference to any recorded environmental use restriction. Sections 4 and 5 make conforming changes to statutes governing mandatory notices by condominium unit owners and in public offering statements, the latter in greater detail.

If this were an ordinary year, Transfer Act aficionados would view all that as a worthy batch of incremental improvements, knock off early, and head for the local watering hole to hoist a few in honor of the Working Group.

The hint that this is not an ordinary year comes in Section 1 of SB 281, which proposes to amend the familiar "transfer" definition ("any transaction or proceeding through which an establishment undergoes a change in ownership") by adding the clause, "on or before July 1, 2022, or the date regulations are adopted pursuant to section 10 of this act, whichever is earlier."

With that modest phrase, SB 281 proposes the end of the Transfer Act.

Sections 6 through 10 of the bill outline what would replace it: a global release-based remediation program. These provisions correspond to the entirety of the second bill, SB 293, which proposes the release-based program as a stand-alone proposition.

Students of environmental regulation in Connecticut (or veterans, or historians, or survivors) will recall that between 2011 and 2013, extensive effort went into exploring alternatives to the state's existing patchwork of remediation programs. The results remain available on DEEP's web site ("The Stakeholder Process and Transformation Materials (2011-present)"), including the reports of six stakeholder groups DEEP convened to consider specific issues and challenges in getting from where we are/were to where we should be. A through line can be traced, with varying degrees of specificity, from that effort to initiatives under way now, not the least of which is the extensive "Wave 2" revisions to the Remediation Standard Regulations proposed in July of 2019. A consistent theme, again with varying degrees of specificity, has been the notion of a release-based

reporting and remediation framework along the lines of the Massachusetts model. Sections 6 through 10 of SB 281, and the equivalent provisions of SB 293, provide a complete statement of such a framework. Because the former bill is the one that links it to the Transfer Act, we will refer to its section numbering here.

Section 6 lays the foundation with a series of fundamental concepts that are familiar but different in crucial respects. "Land and waters of the state" are defined sweepingly to include surface and subsurface waters of all kinds, as well as improved or unimproved surfaces. "Release" adapts existing statutory language (adding an exception for "application of fertilizer or pesticides consistent with their labeling") and incorporates the "land and waters of the state" definition. "Remediation" and "verification" are also defined in familiar terms, but in each case relate to "a release" as earlier redefined, and both speak in terms of characterization and remediation "in accordance with prevailing standards and guidelines."

Perhaps most importantly, the definition of "person" has been expanded to include not only corporations, limited liability companies, partnerships and the like, but also, "any officer or governing or managing body of any partnership, association, firm or corporation or any member or manager of a limited liability company." This definitional change could have far-reaching substantive consequences, significantly altering the circumstances under which liability can reach past an entity to individuals, parent companies, and the like. It would not be unreasonable to believe that this change would have the potential effectively to undo the jurisprudence of *U.S. v. Bestfoods*, among other things.

Section 7 combines these concepts in the core substantive prohibition: no person may create or maintain a release to the land or waters of the state in violation of the proposed act, and any such release "shall be deemed a public nuisance." Notably, the public nuisance clause opens an important new door to use existing common-law tools to deal with releases.

The consequences of a release are detailed in Section 8:

- Subsection (a): Any person who creates or maintains a release "shall report and remediate" it, at risk of incurring liability for costs of doing so – and not only those of the state, but also those of "any other person who contains or removes or otherwise mitigates the effects of such release." The latter provision seems to fill a much-lamented gap by creating a private right of action against responsible parties without having to demonstrate negligence, albeit apparently applicable only to those who "create or maintain" such releases within the parameters of this proposed act – i.e. on or after July 1, 2022.
- Subsection (b): On or after July 1, 2022, or the effective date of regulations, anyone who creates or maintains a release shall, upon discovery, (1) report, subject to exceptions including non-reportable releases to be defined in regulations, and (2) remediate "as soon as technically practicable" to standards that will be stated in new regulations, or until such regulations are adopted, in accordance with the RSRs. The obligation to remediate "shall only be satisfied" by DEEP approval or verification, unless those

forthcoming regulations exempt, limit or modify the obligation.

- Subsection (c): Crucially, a release “shall not be deemed discovered if the only evidence of such release is data available or generated before July 1, 2022,” or before the adoption of future regulations, whichever is earlier. (We understand this could become a “whichever is later” proposition, but as noted above, we are dealing here with what is in the current bill.) This would limit the release-based program “trigger” to new and newly-discovered releases, as well as known releases as to which new data become available.

Section 9 provides for familiar enforcement options – unilateral administrative orders, cease-and-desist orders, referral to the Attorney General for actions in Superior Court, civil penalties, criminal sanctions, and enhanced penalties for knowing violations. The “persons” subject to criminal sanctions and enhanced penalties include “any responsible corporate officer or municipal official” – in light of the corporate officer and affiliate language of the proposal’s “person” definition, noted above, another indication of potentially expanded liability.

Section 10 concludes the proposal with a broad mandate to adopt implementing regulations, on subjects that “may include” reporting, remediation deadlines and procedures, remediation and use restriction standards, verification and DEEP audits of remediation, supervision of remediation in light of release characteristics and the imminence of harm. And oh yes, fees.

Section 10 specifies only general concepts for the implementing regulations. These include the notion that releases can be classified into “tiers” based on risk, and some releases can be remediated without reporting, some can be remediated without DEEP involvement, and some can be remediated without verification. Subsection 10(c) requires DEEP to consider remediation standards in light of a preference for permanent remedies, other “appropriate” factors including groundwater classification, and less stringent criteria for GB and GC groundwater areas and historically industrial or commercial property in conjunction with appropriate environmental use restrictions. DEEP's one-page conceptual description of this framework, with a few illustrative examples, is appended to this report.

So. If you’ve been pining for the Transfer Act to go away, you may be thrilled. If you’ve had some trepidation about what a release-based alternative would be, you may be inclined to trepidate further.

We scarcely know where to begin, but with a joint hearing on both bills coming up, we have to begin somewhere so we can hit “send” on this update. Let’s try these big-picture observations.

First. One of the Big Ideas from the 2011-2013 process was a “unified” release-based system for all “programs” – not just the Transfer Act, but at least conceptually all the other miscellaneous response authorities such as the UST program, the significant environmental hazard program, and what not. SB 281 sketches a fairly clean transition under the Transfer Act, but as currently drafted does not address other programs. We understand DEEP is examining how other programs will be affected, or superseded, or left in

place, but nothing in the proposed bills as of now addresses this subject. The effect of legislation along these lines is particularly important in relation to our state's brownfields programs, which are site-based – as is the case even in states with release-based reporting and remediation systems.

Second. The bill does not address the substantial existing backlog of Transfer Act filings. We understand DEEP would prefer to have those filings work their way through the verification process under the old regime, and apply the new standards only for new or newly-discovered releases. That was more or less the conclusion of the 2011-2013 stakeholder process. Now as then, however, the obvious question is why, if a release-based system is better, it should not apply to those properties as well?

Third. It's unclear how the remediation obligation could be limited in the case of newly discovered historical releases. Contamination frequently presents as a muddle of disparate substances with murky provenance. Once you find some contamination, the obligation to characterize it would tend to lead to "new discovery" of more. When you tug at the thread, the fabric tends to unravel. The result in practice could be exactly the kind of "full characterization" and property-wide remediation that a release-based system is supposed to avoid.

Fourth. The scope of the regulations needed to implement a "release-based" framework is extraordinary in terms of both the detail required to fully realize the statutory generalities, and what the new regulations would replace. The Massachusetts program, for example, contains over a thousand pages of regulations, whereas Connecticut's RSRs consist of only 69 pages, including regulations for ELURs. Section 10 describes characteristics of a release-based program, but only at the highest level of generality. If there are to be "tiers," for example, what risk criteria would differentiate one tier from another? If different levels of regulatory oversight and formality are to be defined for releases, on what basis? Virtually all existing guidance documents and regulations would have to be reworked, not least because they currently deal with investigation and remediation of all releases at a given site, starting with an initial phase of hunting for releases associated with "areas of concern." All those materials would have to be reconsidered – although if the voluntary remediation program were to remain in effect, the existing materials would remain valid for anyone who wants to pursue that kind of "clean bill of health." The bills leave the details entirely to the rulemaking process. It may be too much to ask the General Assembly to fill in all the blanks, but there are so many, and of such magnitude, that a mandate to DEEP to make a detailed legislative recommendation for a release-based alternative might make more sense.

Fifth. The provisions surrounding the effective date of the new system (per Section 1 of SB 281, July 1, 2022) and the concept of new or newly discovered releases (Section 10(c)) would create an interesting dynamic. Owners of existing "establishments" would tend to defer transfers until after the effective date and would also tend to avoid developing new information about environmental conditions – even those currently known – so as to avoid triggering obligations under the new system. Such sites could then be transferred without giving rise to any obligations. And the transfers would not even require investigation or disclosure of

site conditions, arguably the most salutary feature of the Transfer Act.

We are reliably informed that discussions continue between DEEP and various stakeholders, though not on the scale or with the formality of the 2011-2013 stakeholder process, and apparently not, or not all, within the bounds of the PA 19-175 “working group” structure. Those discussions may yield more details about how a new release-based system would work, or at least how DEEP contemplates making it happen. We also understand DEEP may put additional information on line. We’ll do our best to keep you updated.

We would be remiss if we did not doff our metaphorical hat to the architects of these bills and those who continue to labor over them. No one can accuse them of failing to think big.

Comments, questions, corrections and expressions of astonishment all welcome as usual.

DEEP Conceptual Description of Proposed Tiered Cleanup Program

Tier 1 Cleanup Examples

- Spills that can be cleaned up quickly with no impact to groundwater or surface water or very limited impact to groundwater
- Historical releases of petroleum or metals that haven't impacted groundwater or surface water

Tier 2 Cleanup Examples

- Spills that cannot be fully cleaned up quickly or that needs further investigation after initial risk reduction (e.g., large tanker truck release that requires longer-term investigation/cleanup)
- Historical releases that do not pose an immediate risk to receptors (people and sensitive ecosystems) and that can be cleaned up using default approaches (e.g., numeric standards, EURs, LEP-approved variances/ alternatives)

Tier 3 Cleanup Examples

- Spills that cannot be fully cleaned up quickly or that needs further investigation after initial risk reduction and that pose significant risk to human health or sensitive ecosystems
- Historical releases that pose an immediate risk to receptors (people and sensitive ecosystems) and cleanups that rely very heavily on Commissioner-approved variances/alternatives

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Source: Connecticut Department of Energy and Environmental Protection — February 27, 2020.)