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STATE LAGS IN BROWNFIELD REMEDIATION

'Patchwork' programs frustrate environmental officials and developers

By LEE D. HOFFMAN

In recent public discussions, state Department of Environmental Protection Commissioner Gina McCarthy and other DEP staffers have referred to the "patchwork quilt" that constitutes the remediation program in Connecticut. Indeed, McCarthy has gone so far as to suggest that the state needs to undertake a thorough review of all of the state's remediation programs, particularly the Transfer Act (Conn. Gen. Stat. § 22a-134 *et. seq.*) to ensure that the state is making the most of its remediation programs.

CONNECTICUT NEEDS TO COME TO GRIPS WITH THE FACT THAT BROWNFIELD REDEVELOPMENT SHOULD BE DIVORCED FROM THE TRADITIONAL CONCEPTS OF REMEDIAL PROGRAMS.

Such a review would undoubtedly be worthwhile, but it is unlikely to alleviate the frustration with Connecticut's remedial programs. This frustration stems from two overarching issues. First, the DEP is frustrated that it can never be sure that it has appropriate authority over all remedial sites in Connecticut. For example, many sites with historic contamination are outside the scope of the DEP's remedial authority, unless the DEP takes the step of issuing an order requiring the clean-up of a particular site. In addition, for those sites which are required to go through the DEP's spill-reporting process, it is still an open question as to whether those sites must be remediated in accordance with the Remediation Standard Regulation or whether different standards apply.

This regulatory uncertainty is difficult enough, but the frustration is compounded in that contaminated sites are not moving through the regulatory process as planned. The backlog of sites in the various remediation programs may be a source of frustration for the DEP, but it clearly frustrates those in the private sector who are trying to close out their sites so that they can move on with business operations. Something must be done to clear the logjam.

The DEP has stated publicly that it would prefer one comprehensive remedial program that would address all contaminated sites in Connecticut. This would require an overhaul of many, if not all, of the remedial statutes on Connecticut's books, particularly the Transfer Act. Indeed, to avoid the "patchwork" effect that currently governs remediation programs, the Transfer Act would likely need to be abandoned in favor of a program based on releases of hazardous materials, regardless of when the release occurred. The merits of various proposals can, and should, be debated in an open forum, and this article cannot do justice to the various issues that such a debate would encompass.

Worsening Backlog

Regardless of the outcome of the debate, one thing becomes abundantly clear: if the DEP develops a remediation program that encompasses historic release sites that are not currently subject to DEP regulation, the backlog of sites at DEP will get significantly worse.

Adding to these problems is the fact that Connecticut has literally thousands of brownfield sites that are not being redeveloped. According to individuals who testified before the General Assembly's Task Force on Brownfields Strategies, a key reason for this limited redevelopment is the lack of regulatory certainty a redeveloper of contaminated parcels will confront when remediating a site in Connecticut. Put another way, Connecticut lags behind its

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peers when it comes to liability reform for brownfield redevelopment.

Fortunately, there is a way to address this liability issue, regardless of whether Connecticut continues with its patchwork approach to remediation or creates a new remediation program out of whole cloth. Put simply, Connecticut needs to come to grips with the fact that brownfield redevelopment should be entirely divorced from the traditional concepts of remedial programs, and needs to be treated in an entirely different manner. Failure to do so will ensure that Connecticut remains awash in brownfield sites, with no discernable end in site.

The traditional bedrock of liability for environmental contamination can be found in the phrase "the polluter pays." When the remedial statutes were put into place at both the federal and state level, the decision was made that the entities responsible for the contamination ought to be the ones responsible for cleaning up that contamination. To make certain that all "polluters" were encapsulated in this definition, the current owner of a particular site was also included in the definition of a responsible party.

However, in Connecticut, the "polluter pays" concept means that any developer who wants to buy a parcel of potentially contaminated property must prove that there is no contamination on the property and no contamination emanating from the property to adjacent sites, or the developer must agree to undertake the remediation of any contamination on the site or on properties affected by the offsite migration of pollutants to adjacent parcels.

In other words, even though the new buyer had *nothing* to do with the contamination of the site, that buyer is responsible for the remediation of all contaminants on the subject property and any adjacent parcels impacted from off-site migration of pollution.

Limited Liability

Most of Connecticut's peers have realized the inherent difficulty this liability scheme foists onto developers of contaminated parcels. For example, many states, including Pennsylvania, New York and New Jersey, have specific brownfield programs where liability is statutorily limited or eliminated for developers of contaminated parcels. Even federal Superfund law provides statutory liability protections for "bona fide prospective purchasers" of contaminated parcels.

These statutory programs have spurred development of contaminated properties because developers have reasonable assurances, up front, as to what their prospective liabilities will be if they develop a particular site. While Connecticut's patchwork of programs currently allow developers to enter into covenants not to sue, it is not clear from a statutory perspective as to exactly how much protection will be afforded to the developer. As a result, developers favor sites in other jurisdictions or that are unaffected by environmental contamination.

The General Assembly and the governor's office are taking a stand and favoring responsible growth and sustainable development as the principles that will guide development in Connecticut through the 21st century. The redevelopment of brownfields is one of the cornerstones of such responsible growth. As the DEP, and eventually the General Assembly, tackle the issues associated with the remediation programs in Connecticut, they would do well to recognize that brownfields are properly left to a world of their own; a world where bona fide purchasers can limit their liability for contamination they never caused. ■