

Remediation Reform: What Form Will The Transformation Take?

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Take a moment to remember the 1980s. That was a glorious time of new inventions, where people of good conscience debated as to whether VHS or Betamax would be the television recording medium of the future, where experts agreed that 10 megabytes of RAM was all a computer hard drive would ever need and where the Transfer Act was hailed as the future of environmental regulation in Connecticut.

Fast-forward nearly 30 years, and those pronouncements about our technological achievements look fairly dated. Unfortunately, in today's modern iPad world, Connecticut's environmental remediation programs look as dated as an Apple IIc computer.

The General Assembly, particularly the Commerce Committee, and the Connecticut Department of Energy and Environmental Protection (DEEP) have recognized that Connecticut is overdue for an overhaul of its remediation programs. This transformation process began during the last legislative session when Public Act 11-141, An Act Concerning Brownfield Remediation and Development as an Economic Driver, was passed overwhelmingly by both the House and Senate. The new act expanded the reach of the state's brownfield programs and provided significant liability reforms for qualified entities that were willing to remediate contaminated properties.

More importantly, however, Section 6 of PA 11-141 required the DEEP to "commence a comprehensive evaluation of the property remediation programs and the provisions of the general statutes that affect property remediation." DEEP undertook this comprehensive evaluation of Connecticut's remediation programs, involving a broad cross-section of environmental stakeholders, and reported its findings to the General Assembly and the Governor.

From there, things took a fairly interesting turn in that members of the DEEP began a barnstorming tour through the fourth quarter of 2011 to discuss remediation transformation and what such a process might look like for the state of Connecticut. Representatives of the DEEP indicated that they wanted to provide a new, comprehensive statute that would address historic contamination, spills and releases, brownfields and the remediation of all of these issues in one broad statutory package. Unfortunately, as one peels the onion back on Connecticut's remediation statutes and regulations, one soon realizes that there is no quick fix available.

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One of the chief reasons for that is that Connecticut is a bit of a statistical outlier when it comes to its remediation programs. The key component of Connecticut's remediation programs lies in the implementation of the Transfer Act (Connecticut General Statutes §22a-134 et seq.), which provides for a party to the sale of a business or commercial real estate to provide for the clean-up of an "establishment" immediately after the transfer of that establishment. When environmental remediation statutes were still in their infancy, this law was groundbreaking. It forced the parties to a transaction to conduct environmental due diligence, allocate who would clean up the site, and allowed for that cleanup to happen when money would be most likely to be available – at the closing of a sale of the business or real estate.

The reality now, however, is that the Transfer Act has outlived its usefulness, and only a handful of states use similar processes. Parties to commercial transactions know to conduct environmental due diligence and to allocate environmental responsibilities as part of the deal. More importantly, the state has realized that many of the "establishments" covered by the Transfer Act have no real environmental issues, while many properties that do not meet the definition of establishments remain contaminated and the DEEP can do little to address those sites. In addition to problems with the Transfer Act, many individuals have complained over the years that Connecticut's Remediation Standard Regulations are also not up to the task of efficiently remediating contaminated sites.

Recognizing this, the DEEP attempted to gather support for a transformation of Connecticut's remediation programs, with a goal of having a major re-write of the entirety of Connecticut's remediation statutes. As this year's legislative session began, however, it became readily apparent that such a significant overhaul of the remediation programs would need more time and thought. In order to keep their feet to the fire, the DEEP submitted language this session that culminated in HB 5343 – "An Act Concerning Economic Development Through Streamlined and Improved Brownfield Remediation Programs," which would require DEEP to further evaluate remediation programs in the state and develop suggestions for overhauling Connecticut's remediation programs.

This has the potential to be good news, particularly given DEEP's characterization of what it intends to do with this mandate. Put simply, DEEP recognizes that the old system may be in need of repair, and wants to ensure that any new system provides for remediation of unreasonable environmental harm and risk, but does so in a way that the regulated community can readily understand. In order for any transformation of Connecticut's remediation programs to be successful, however, DEEP must adhere to three major concepts.

'Wide Net, Large Holes'

First, DEEP appears to be looking to "cast a wide net, with large holes" in developing its remediation program, meaning that a new program will involve more sites than traditionally has been the case, but sites that present little environmental risk will not spend a great deal of time in the program. There is no argument that problematic properties should be addressed, but in crafting its new program, the DEEP will need to make certain that properties that have completed testing and/or remediation have a clear regulatory exit. In other

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words, once the problem is fixed, the property owner should be free of further regulatory burdens.

To that end, DEEP's focus should not only be on crafting a new statutory scheme, but also making sure that the Remediation Standard Regulations work the way they are supposed to. Under the current version of the regulations, properties are tied up for too long trying to prove compliance with standards, and clear paths of exit from the program are difficult to find. The regulations need to be updated contemporaneously with any new statutory programs. If the new program is to be successful, one cannot happen without the other.

Finally, DEEP needs to make sure it has sufficient resources to implement this program. The DEEP staff works as hard as possible to make sure that the sites in the system are adequately reviewed, and the licensed environmental professional (LEP) program augments the agency's capabilities significantly. Nonetheless, thousands of additional sites may be placed into remediation programs, depending on the breadth of the changes DEEP wants to see. If that happens, LEPs are going to need to be given additional autonomy to make decisions on remediation (without undue fear of adverse repercussions for differences of reasonably informed opinions), or DEEP will have to double or triple its staff (unlikely in this current budget climate). Put simply, today's resources are inadequate to staff the program of the future.

Granted, no one likes to see regulatory upheaval, but the reality is that Connecticut has put off this day of reckoning for as long as it can. If the DEEP and the legislature follow these recommendations, Connecticut can have a state-of-the-art program that improves our environmental track record while providing business with clear-cut pathways to complete required remediation. Unlike the great Betamax-VHS debate, that is something which everyone should be able to agree on.

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