July 1, 2011

# Connecticut Stepping Up Its Brownfields Game

Public Act No. 11-141, *An Act Concerning Brownfield Remediation and Development as an Economic Driver,* awaits the signature of Connecticut Governor Dannel Malloy. This act should significantly step up Connecticut's game in the brownfields arena. Section 17 of this act creates a new brownfields remediation and revitalization program to be implemented by the Connecticut Department of Economic and Community Development (DECD) with the involvement of the Connecticut Department of Environmental Protection (DEP). As a consequence of other recent legislation providing for a merger of agencies, DEP is now known as the Connecticut Department of Energy and Environmental Protection (DEEP). House Bill No. 6526 passed the House by a vote of 146-0 and, on the day before the end of the regular session, it passed the Senate by a vote of 36-0. The new brownfields program looks to position Connecticut to attract increased economic investment in the return of more of the state's brownfields to productive reuse.

**Liability Relief, Not Public Funding**

To incentivize the expedited development of sustainable projects on Connecticut's brownfields, the Section 17 program offers benefits that can be even more enticing, particularly longer term, than often scarce public money. And Section 17 projects can still pursue public funding under other state programs of DECD, DEEP and also the Connecticut Brownfields Redevelopment Authority (CBRA) within the Connecticut Development Authority (CDA). Expediency and liability relief, not public funding, are the focus of this new and innovative program.?

If DECD accepts a brownfield property as one of up to 32 properties added annually to the Section 17 program's portfolio, an eligible applicant may be relieved of liability to the state and third parties for off-site contamination. To be eligible, an applicant cannot be a party already responsible for existing contamination. In addition, after July 1, 2011, the effective date of the act, the transfer of a Section 17 site is not required to comply with Connecticut's existing, and for many often frustrating, Transfer Act. The Transfer Act is otherwise triggered when there is a transfer of an establishment, which includes sites where there have been defined hazardous waste-related activities. Any existing Certifying Parties on prior Transfer Act filings must still comply with the Transfer Act.?

In selecting sites to participate in the Section 17 program, DECD is charged with ensuring "geographic distribution and a diversity of projects." The statute lists the factors DECD is to consider as part of the application process. Sites that are the subject of an enforcement action or a consent order, on the federal or the state Superfund list, or subject to corrective action under the federal Resource Conservation and Recovery Act are ineligible.

So long as there is continuing compliance with the project's Section 17 brownfield investigation plan and remediation schedule, including applicable public notice requirements, the eligible party is relieved from liability under state law for releases at and from the Section 17 site. This plan and schedule submittal, which is prepared by a Licensed Environmental Professional, must include a completion date not later than five years from the date it is filed with DEEP unless a later completion date is agreed to by DEEP. Although an applicant can elect to do otherwise, the statute does not require that the applicant's plan and schedule submittal include investigation and remediation of contamination beyond the Section 17 site's boundaries, even when the historical source of the contamination is located on the Section 17 site. All applications for any permits required to implement the applicant's brownfield investigation plan and remediation schedule are submitted to DECD's permit ombudsman.?

An applicant accepted into the Section 17 program pays, in two installments, a fee equal to 5 percent of the assessed value of the land. The first installment is due within six months of notification of acceptance, and the second installment is payable within four years of acceptance. The amount of the first installment will be reduced by 10 percent if the investigation is completed within six months, and the second installment will be eliminated if investigation and remediation are completed within four years. The second installment can also be reduced by twice the cost voluntarily incurred by the applicant to investigate the nature and extent of contamination beyond the Section 17 site's boundaries, up to the amount of the second installment. There is no fee for municipal applicants, who can also nominate brownfield sites for inclusion in the Section 17 program's portfolio. Even where the municipality is not the applicant, it may request that DECD waive all or a portion of the applicant's fee. Fees will be deposited into an existing state remediation fund. With payment of an additional fee of $10,000, subsequent owners of all or a portion of a Section 17 site that has been remediated, who?meet the program's applicant eligibility requirements, can also obtain the liability relief afforded the original applicant.

Significantly, Section 17 does not foreclose the participation of eligible sites with viable or potentially viable responsible parties. Site "abandonment" is not a prerequisite to application or acceptance. Although responsible parties do not qualify as eligible applicants, once a Section 17 site is remediated under the program, an immediate prior owner of the site falling within the definition of a responsible party is relieved of any liability to the state and any third parties for further investigation and remediation of releases at the Section 17 site. If the immediate prior property owner is a responsible party, however, that owner is not relieved of any liability for the investigation and remediation of any contamination beyond the Section 17 site's boundaries that is attributable to the release at the Section 17 site.

**"Connecticut Is Open for Business"**

The goal of Section 17 of Public Act No. 11-141 is a site portfolio that will encourage sustainable projects, create and retain jobs, increase municipal grand lists, further smart growth and transit-oriented development, be consistent with municipal or regional planning objectives, and reflect diversity in size and geographic distribution. Although there is surely room for improvement going forward, the Section 17 program is notably a product of input from, and had the support of, a broad spectrum of public and private sector brownfields stakeholders. This program cannot alone overcome the many and continuing challenges to economic recovery in Connecticut, but hopes are high that the Section 17 program, with its liability relief and provisions geared to expedite redevelopment, will give Connecticut's brownfields an edge in the marketplace.

**And More on Public Act No. 11-141**

In the 56 pages of Public Act No. 11-141, there are other provisions also impacting brownfields redevelopment in Connecticut. Sections 4 and 10, for example, revise the Transfer Act. In an effort to better define the extent and scope of a Certifying Party's obligations under the act, Section 4 states that the Certifying Party is not required to investigate or remediate releases or potential releases occurring after the completion of a Phase II investigation or the date of the filing of the Transfer Act form, whichever is later. So, should parties wish to allocate environmental cleanup responsibilities based upon the date of a property transfer, they will need a completed Phase II investigation coincident with that transfer and the prompt filing of the Transfer Act form. Section 5 details the procedures for seeking a groundwater or surface water reclassification consistent with the Water Quality Standards. Section 6 directs DEEP to undertake "a comprehensive evaluation of the property remediation programs and provisions of the general statutes that affect property remediation" and then file a report documenting the evaluation with the legislature by December 15, 2011. Section 9 amends certain provisions relating to DEEP's existing abandoned brownfield cleanup program. Section 12 authorizes DEEP, under specified circumstances, to waive the statutory requirement of a subordination agreement in connection with the granting of an Environmental Land Use Restriction. Section 15 extends the term of the legislatively created working group on brownfields, with certain changes including a requirement that the group report to the Governor and the General Assembly by January 15, 2012.

For a copy of Public Act No. 11-141, click here.