2012

BROWNFIELD DEVELOPMENT IN CONNECTICUT, A NEW CHAPTER: LIABILITY RELIEF FOR PURCHASERS AND SELLERS OF CONTAMINATED SITES IN THE 2011 ACT CONCERNING BROWNFIELD REMEDIATION AND DEVELOPMENT AS AN ECONOMIC DRIVER

Anika Singh Lemar
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation


http://digitalcommons.law.yale.edu/fss_papers/4911

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
BROWNFIELD DEVELOPMENT IN CONNECTICUT, A NEW CHAPTER: LIABILITY RELIEF FOR PURCHASERS AND SELLERS OF CONTAMINATED SITES IN THE 2011 ACT CONCERNING BROWNFIELD REMEDIATION AND DEVELOPMENT AS AN ECONOMIC DRIVER

Barry J. Trilling* and Anika Singh Lemar**

I. INTRODUCTION

This article comprises a follow-up to the 2008 publication of Brownfield Development in Connecticut: Overcoming the Legal and Financial Obstacles,¹ co-authored by Barry J. Trilling and Sharon Siegel. That article sought to answer questions about "whether and how Connecticut and the federal government will provide financial support and liability relief to stimulate brownfield development."² That article covered developments in the law through 2007. Among other things, the article summarized the liability scheme governing contaminated real estate in Connecticut and, in particular, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)³ and Connecticut statutes intended to address to what extent "innocent landowners" are liable for clean-up costs and impacts of contamination on third parties.⁴ Since 2007, and up until the legislative session ending

* Barry J. Trilling chairs the Environmental Practice and the Climate Change and Sustainable Development group at Wiggin and Dana LLP. He is a graduate of UCLA and of Boalt Hall, the law school at the University of California, Berkeley, and is admitted to practice in Connecticut, New York, Massachusetts, Pennsylvania, Virginia, the District of Columbia, and California.

** Anika Singh Lemar is an Associate in the Real Estate, Environmental and Energy department at Wiggin and Dana LLP. She received her J.D. from New York University School of Law and her B.A. from Yale University.

2. Id. at 921.
4. See generally Trilling & Siegel, supra note 1.
in June 2011, the Connecticut General Assembly enacted few bills dealing with both the financing of and liability attendant to brownfield remediation and development. With the exception of the Abandoned Brownfields Cleanup ("ABC") program enacted in 2009, discussed in more detail below, no significant legislative changes had been made to ease the liability of prospective purchasers of contaminated properties either by the Connecticut General Assembly or the United States Congress.

Nonetheless, the issue of liability for purchasers of brownfield properties has remained central to the ability for those sites to be cleaned up and redeveloped. Owners and developers of contaminated properties face, in addition to clean-up costs, potential liability to individuals harmed by waste and contamination and to Connecticut state and the federal government under statutory schemes intended to curb pollution. Under Connecticut law, even a purchaser with no knowledge of prior contamination can be held responsible for remediation costs incurred by the state or a third party. Developers consider the risk of future liability to third parties to be a significant cost factor when considering whether to undertake a brownfield remediation project. In one study, real estate developers indicated that, when considering whether to undertake a brownfield redevelopment project, "protection from third-party liability for environmental damage claims from site occupants, workers, and neighbors" had a value of almost $1 million, while "cleanup liability

7. See infra notes 81-99 and accompanying text.
8. As noted by Lavea Brachman, Executive Director of "Greater Ohio" and a Non-Resident Senior Fellow at the Brookings Institution:

Contrary to general public misperceptions, the primary obstacle to brownfield redevelopment today is not environmental contamination per se, even though the prior use and associated environmental conditions of these properties distinguish them from other underutilized properties. The primary obstacle to redevelopment remains the threat of liability that by statute arises from acts that cause or contribute to contamination and/or to those with an ownership interest in the property.


9. CONN. GEN. STAT. ANN. §§ 22a-451, 22a-452, 22a-452d (West 2011); see also Trilling and Siegel, supra note 1, at 923.
protection” (i.e., insurance against changes in regulations that would require additional remediation at a later date) was worth over $700,000. As the authors note, it is unlikely that the private sector will step in to provide the level of security sought by developers:

The environmental insurance industry, for example, can provide a range of products that address cleanup and third-party liability. However, the 100 percent liability protection . . . that developers valued so highly is not available in the market—it unrealistically would require assurance that the insurer would accept every claim and would never impose an upper limit on the payoff—and other insurance remains unaffordable or unavailable for small sites.

Accordingly, if remediation and repurposing of contaminated sites is a public policy objective, some liability relief provided by the government will further that goal.

States across the country offer a variety of incentives, including cash assistance, tax relief, regulatory relief, public investments in infrastructure, and liability relief, in an attempt to encourage redevelopment and reuse of contaminated properties. With the passage of An Act Concerning Brownfield Remediation and Development as an Economic Driver (or “Brownfield Economic Driver Act”), signed into law by Governor Dannel Malloy on July 8, 2011, Connecticut has moved into the vanguard of states with programs designed to mitigate the liability for property purchasers, which served as a primary disincentive to the remediation and redevelopment of these properties.

The new legislation will supplement and eventually supplant the current patchwork of programs that address brownfields, including the voluntary cleanup program, the covenant-not-to-sue program, and provisions of the Connecticut Property Transfer Act, with regard to

11. Id. at 363.
14. CONN. GEN. STAT. ANN. §§ 22a-133x–133y (West 2011).
15. Id. §§ 22-133aa–133b.
16. Id. §§ 22-134–134d.
properties remediated under the new legislation. Most notably, Section


<table>
<thead>
<tr>
<th>Authority</th>
<th>Statutory Reference</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pollution or discharge of waste prohibition</td>
<td>Conn. Gen. Stat. § 22a-427</td>
<td>1967</td>
</tr>
<tr>
<td>Commissioner’s authority to issue an order to require person to correct potential source of pollution</td>
<td>Conn. Gen. Stat. § 22a-432</td>
<td>1967</td>
</tr>
<tr>
<td>Commissioner’s authority to issue Orders to a landowner, or municipality</td>
<td>Conn. Gen. Stat. §§ 22a-433, 428, respectively</td>
<td>1967</td>
</tr>
<tr>
<td>Commissioner’s authority to respond to and mitigate spills and releases</td>
<td>Conn. Gen. Stat. § 22a-449(a)</td>
<td>1969</td>
</tr>
<tr>
<td>Potable Water Program - DEP authorized to provide short-term water to residents/schools if they are served by a contaminated private well, to investigate for the source of such contamination, and to issue orders to either the responsible party (or if such party not known, to municipality) to supply safe drinking water</td>
<td>Conn. Gen. Stat. § 22a-471</td>
<td>1982</td>
</tr>
<tr>
<td>Commissioner’s authority to issue order to abate pollution</td>
<td>Conn. Gen. Stat. § 22a-430(d)</td>
<td>1982</td>
</tr>
<tr>
<td>Underground Storage Tanks</td>
<td>Conn. Gen. Stat. § 22a-449(d)-(h), RCSA 22a-449d-106</td>
<td>1983</td>
</tr>
<tr>
<td>Property Transfer Act - If and when certain properties defined as “establishments” are transferred, they must be investigated by a party to the transfer and then remediated</td>
<td>Conn. Gen. Stat. § 22a-134</td>
<td>1985</td>
</tr>
<tr>
<td>Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.; “RCRA”) Corrective Action regulations</td>
<td>RCSA 22a-449(c)-105(h)</td>
<td>2002</td>
</tr>
</tbody>
</table>
17 of the Brownfield Economic Driver Act extends liability protection to the purchasers of contaminated property who did not cause, exacerbate or contribute to the property’s contamination and to the parties from whom they purchased the brownfield property. This Article (i) examines the new Section 17 liability protection program, administered jointly by the Department of Economic and Community Development (DECD) and the Department of Energy and Environmental Protection (DEEP); (ii) reviews the Section 9 expansion of the existing ABC program; and (iii) briefly notes various other provisions that will affect municipalities and property owners. In Section II, this Article explains how Section 17 of the Brownfield Economic Driver Act will work. In Section III, we consider revisions to the ABC Program and compare that program to Section 17. In Section IV, we consider whether the Act will effectively address liability concerns that hamper brownfield redevelopment and propose tweaks to the Act that may further encourage remediation and redevelopment projects in Connecticut.

II. BROWNFIELD REMEDIATION AND REVITALIZATION PROGRAM

Section 17 of the Brownfield Economic Driver Act establishes a program protecting parties who investigate and remediate brownfields from liability to the state and third parties. Parties eligible to participate in the program include bona fide prospective purchasers (BFPPs), innocent land owners, and contiguous property owners who did not themselves contaminate the property. Provided these parties otherwise meet the program criteria, properties that are already under investigation pursuant to an existing brownfield program (e.g., the state voluntary cleanup programs and the covenant-not-to-sue programs) may also participate in the Section 17 program. A property currently

18. An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17. This form of liability protection follows closely the “bona fide prospective purchasers” provision in the federal Comprehensive Environmental Response, Liability, and Compensation Act (“CERCLA” or “Superfund”), 42 U.S.C. §§ 9601, 9607(r)(1) (2006), but extends the protection further to the seller of a property if the purchaser completes its remedial obligations under the program.
20. Id. § 17(b).
22. CONN. GEN. STAT. ANN. §§ 22a-133aa–133bb (West 2011).
23. An Act Concerning Brownfield Remediation and Development as an Economic
the subject of an enforcement action by DEEP or the United States Environmental Protection Agency is not eligible for inclusion in the program. Properties that either would be subject to the terms of the Transfer Act or which are already undergoing characterization and remediation under the Transfer Act, however, are not excluded from participation. Also, upon subsequent conveyance, properties remediated under the program are exempt from the filing requirements of the Transfer Act. This allows the owner to avoid the cost, time, obligations, and uncertainty associated with a future Transfer Act filing.

The Section 17 program is open to people, businesses, nonprofit organizations, municipalities, public and private municipal economic development agencies, and state agencies. Parties wishing to participate in the program make application to DECD which, using


24. Id. § 17(b). This section excludes from eligibility any property:

Currently the subject of an enforcement action, including any consent order issued by the Department of Environmental Protection or the United States Environmental Protection Agency under any current Department of Environmental Protection or Environmental Protection Agency program, listed on the national priorities list, listed on the State of Connecticut Superfund Priority List, or subject to corrective action as may be required by RCRA [the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (2006)].

As enacted, the list of exclusions does not include properties listed in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database which thus appear eligible unless otherwise excluded. Id.

25. An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(o). The question may arise at some point whether a party who has been accepted into the program, and whose property may avoid future Transfer Act liability, could sometime in the future be ruled to have been ineligible to participate by virtue of a later review of its status as a Bona Fide Prospective Purchaser at the time it applied for admission to the program. In Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., the U.S. District Court for the District of South Carolina ruled that a purchaser of a contaminated property who claimed protection from liability under CERCLA as a BFPP lost that protection by not following recommendations for subsequent investigation by its environmental consultant and because its relationship with the property’s seller as its indemnitor, in connection with which it urged the state environmental agency not to prosecute the former owner for its environmental releases. 746 F.Supp. 2d 692 (D. S.C. 2010). But see 3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA, 2010 WL 5464296, at *11 (C.D. Cal. Dec. 29, 2010) (rejecting a contention that the current property owner failed to take reasonable steps to stop any continuing release or to prevent any threatened releases of hazardous substances at the subject property). A finding, even after completion of remediation, that a Section 17 participant was not a proper BFPP could arguably result in loss of its liability protections.

26. See discussion infra at note 63.

certain state-wide "portfolio criteria" intended to assure that the program extends to a wide geographic and demographic range of sites, may admit up to thirty-two applicants per year to the program.\textsuperscript{28} Applicants accepted to the program receive liability protections immediately upon acceptance.\textsuperscript{29} Those protections continue after remediation of the site.\textsuperscript{30} Particularly important are the protections against liability afforded to the BFPP for properties remediated under the program, which extend as well to the party from whom the BFPP acquired the brownfield, even if that party does not meet the eligibility requirements of the program.\textsuperscript{31} Significantly, however, although the BFPP does not have to address off-site contamination, the prior owner will retain liability for any such migration off-site.\textsuperscript{32} Further, program participants will remain liable for contaminating the property or contributing to pre-existing contamination.\textsuperscript{33} After DECD selects which applicants may enter the program, administration shifts to DEEP, which will monitor and may audit the remediation of properties in the program.\textsuperscript{34}

A participant must clean up the property to meet DEEP standards by using a Licensed Environmental Professional (LEP),\textsuperscript{35} within 180 days after DECD has approved the program application, the participant must submit a brownfield investigation plan and remediation schedule that is signed and stamped by the LEP.\textsuperscript{36} The plan and schedule must

\begin{itemize}
  \item \textsuperscript{28} Id. § 17(b)-(c).
  \item \textsuperscript{29} Id. § 17(j), (k)(1)(B), (n)(1).
  \item \textsuperscript{30} Id. § 17(n)(1)-(2).
  \item \textsuperscript{31} An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(n)(6).
  \item \textsuperscript{32} Id. In Wisconsin, the Voluntary Party Liability Exemption law allows Certificates of Completion (COC) to be issued for sites where there is contamination on a property that has migrated from off-site, if the voluntary party is exempt from liability under the off-site exemption. Wis. Stat. Ann. §§ 292.13–292.15 (West 2011). In New York, the innocent purchaser also need not chase contamination off-site. The concept is built into the definition of a "volunteer" who is only responsible for remediating the site while "participants" have the responsibility to remediate the off-site contamination. N.Y. Envtl. Conserv. Law § 27-1405(l)(a)-(b) (McKinney 2011).
  \item \textsuperscript{33} An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(j), (n)(1).
  \item \textsuperscript{34} Id. at § 17(h). As such, the Section 17 Program is not self-executing such as in Pennsylvania, where a party seeking to obtain relief from liability for many, if not most, cleanups may do so without first applying to a state agency to participate in any program. See infra note 129.
  \item \textsuperscript{36} An Act Concerning Brownfield Remediation and Development as an Economic
include a timeframe for notifying specified parties and the public before
the remediation begins.\textsuperscript{37} The public has thirty days from the last notice
provided by the participant to comment on the proposed remediation.\textsuperscript{38}
Section 17 implicitly requires the participant to respond to the public
comments by allowing the participant to start cleaning up the property
only after it submits those comments and its responses to the DEEP
Commissioner.\textsuperscript{39}

Applicants must pay a fee equal to five percent of the brownfield’s
assessed value as of the municipality’s most recently completed “grand
list” (of taxable properties in the municipality),\textsuperscript{40} to be paid in two equal

---

\textsuperscript{37} Id. § 17(k)(2).

\textsuperscript{38} Id. § 17(k)(4).

\textsuperscript{39} Id. A 1990s United States Government Accounting Office survey disclosed that
half of the state brownfield and voluntary remediation programs studied at that time did not
include opportunities for public participation. U.S. GOV’T ACCOUNTABILITY OFFICE,
GOA/RCED-97-66, SUPERFUND: STATE VOLUNTARY PROGRAMS PROVIDE INCENTIVES TO
ENCOURAGE CLEANUPS 43–45 (1997) [hereinafter GAO Report]. The public participation
element of Section 17 recognizes the importance of integrating input from the communities
where the site remediation and redevelopment will take place. As noted in the GAO Report,
this is an element that has received insufficient attention in many state brownfield and
voluntary remediation programs. GAO Report, at 43–45. As one academic commenter has
noted even more recently, “Byzantine regulatory processes rarely facilitate public
participation by politically marginalized communities.” Jonathan H. Adler, Reforming our
Wasteful Hazardous Waste Policy, 17 N.Y.U. ENVTL. L.J. 724, 744 (2008); see also Michael
P. Healy, The Sustainable Development Principle in United States Environmental Law, 2
GEO. WASH. J. ENERGY & ENVTL L. 19, 36 (2011) (“State voluntary cleanup programs . . . do
not require much input from the local communities that would be affected by the cleanup
and redevelopment of the property.”). However, in a 2007 article titled, Legislative Update: State
Brownfields Law, Melissa A. Orein and Ellie B. Word state:

All states have public record or notice requirements for their voluntary cleanup
programs . . . [such as ] publication in the state registrar or in newspapers and the
posting of signs on the property. Thirty-eight states require public comment
periods to allow citizens to voice concerns about proposed developments. Over
half the states even require hearings or meetings for Brownfield redevelopment,
giving local residents a chance to interact and collaborate with developers and local
officials.

Melissa A. Orein & Ellie B. Word, Legislative Update: State Brownfields Law, 27 CONSTR.
L. 38, 39 (2007) (citations omitted). The mandatory public participation process of Section 17
falls within those state programs that favor public access and contribution, is straightforward,
and should be “user friendly.”

\textsuperscript{40} The “grand list” is published annually by each Connecticut municipality pursuant to
section 12-55 of the Connecticut General Statutes. According to the statute:

Each such grand list shall contain the assessed values of all property in the town,
reflecting the statutory exemption or exemptions to which each property or property
owner is entitled, and including, where applicable, any assessment penalty added in
accordance with section 12-41 or 12-57a for the assessment year commencing on
the October first immediately preceding.
installments.41 The participant must pay the first installment within 180 days after the DECD Commissioner approves the application and the second within four years after that date.42 Ameliorating this exaction, however, Section 17 also sets conditions for reducing or eliminating the fee.43 Thus, when a participant finishes investigating the property within 180 days after the DECD Commissioner has approved its application, the DEEP Commissioner must reduce the first installment by ten percent.44

Section 17 gives participants up to two years to investigate the property, three years to commence remediation, and eight years to finish the cleanup.45 As an additional possible fee reduction, the DEEP Commissioner must eliminate the second installment when a participant cleans up the property within four years after the application’s approval date.46 As a third possible fee reduction, when a participant voluntarily investigates contamination that migrated from the property, the DEEP Commissioner must reduce the installment or give the participant a refund “in an amount equal to twice the reasonable costs of such investigation” of off-site contamination, up to the installment amount.47 A subsequent party that acquires a property in the program must pay a $10,000 transfer fee to obtain the program’s protections.48 As a final amelioration, Section 17 exempts municipalities and municipal economic development agencies from paying this fee when any of them acquire property in the program, but it requires such an entity to collect and remit the fee to DEEP if the entity later transfers the property to another party.49

Following completion of the remediation, the LEP must submit a final remedial action report to both the Commissioners of DECD and DEEP.50 The report must include verification by the LEP that the
remediation took place in accordance with Connecticut’s Remediation Standard Regulations, Sections of the Regulations of Connecticut State Agencies (RCSA). The report is subject to approval by the DEEP Commissioner who may, for any reason within sixty days after receipt of the report, decide to conduct an audit of the LEP’s verification or interim verification and so notify the participant. The DEEP Commissioner may also audit a remediation if he requests information from the participant and receives no response. The DEEP Commissioner must conduct his audit within 180 days after the participant has submitted the remedial action report and the verification or interim verification. The Commissioner may audit the remediation more than 180 days after receiving the verification or interim verification, however, if the Commissioner believes the verification was based on inaccurate, erroneous, or misleading information, or the Commissioner determines that post-verification monitoring and other actions have not been taken. The Commissioner may also audit the remediation after 180 days if an environmental land use restriction was not recorded in the land records.

51. Id.
52. Id. § 17(k)(8)(A).
54. Id. § 17(k)(8)(A).
55. Id. § 17(k)(8)(C)(i)-(ii). This provision should avoid the problem that arises in the LEP audit procedure under the Transfer Act. That procedure has resulted in uncertainty that has inhibited the sale of brownfield properties, as stated in Trilling & Siegel, supra note 1, at 949–50:

When an LEP oversees the site’s remediation [under the Transfer Act], the LEP’s verification that the parties receive at the remediation’s completion should be tantamount to a DEP “no further action” letter since the LEP has delegated authority to act on behalf of the DEP. As a practical matter, however, a certifying party remains potentially liable until the time has elapsed for DEP to conduct an audit of the LEP’s verification. Under . . . [current law], the DEP may audit a verification for any reason within three years after its receipt of the verification, but may not audit a verification after three years unless there are circumstances, as set forth in the statute, that justify the later review. The [Transfer Act] does not provide a timeframe for completion of the audit.

the law was violated with regard to verification, the remediation may not be preventing a substantial threat to the environment and public health. Within fourteen days after completing the audit, the Commissioner must send the audit findings to the participant, the LEP, and the DECD Commissioner. In doing so, the DEEP Commissioner may approve or disapprove the remedial action report and, if the latter, the Commissioner must explain why. If the Commissioner rejects the report, the participant has an opportunity to cure any deficiencies. A decision to approve the remedial action, although not so entitled, will amount to the Connecticut equivalent of a “No Further Action” letter issued by other states. In addition, the property will no longer be subject to the requirements of the Transfer Act.

The liability protection provided by the statute does not preclude the DEEP Commissioner from taking any appropriate action to require additional remediation of the subject property where the Commissioner has determined that (a) the participant knew or should have known that it provided false or misleading information to the Commissioner; (b) new information confirms previously unknown contamination; (c) the participant fails to complete the remediation described in the schedule or fails to comply with monitoring, maintenance, operating or environmental land use restriction requirements; or (d) there are changes in exposure conditions (e.g., a change from nonresidential to residential

---

57. Id. § 17(k)(8)(C)(iv).
58. Id. § 17(k)(8)(C)(v).
59. Id. § 17(k)(8)(A).
61. Id. § 17(l).
62. Id. § 17(n)(2). See generally VOLUNTARY RESPONSE PROGRAMS, supra note 13; DAVIS, supra note 13.
63. An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(o). Removing a site from the strictures of the Transfer Act should definitely increase its marketability. The Transfer Act’s cumbersome requirements have impeded such transactions that trigger its requirements without having resulted in a significant record of approved final cleanups. See Trilling and Siegel, supra note 1, at 938–53. As reported by “Workgroup #1,” appointed by DEEP in the Summer of 2011 to study specific aspects of the government/private-sector relationship concerning property remediation, “[a]lthough there are in excess of 3700 sites in the Transfer Act program (since 1986), only slightly more than 390 have been confirmed to achieve full compliance with the RSRs. With nearly 260 new sites entering the Transfer Act program each year, the process imbalance is evident.” REPORT TO CONN. DEP’T OF ENVIRONMENTAL PROTECTION, EVALUATION OF CONNECTICUT’S CLEANUP PROGRAMS—CURRENT STATE (2011), available at http://www.ct.gov/dep/lib/dep/site_clean_up/comprehensive_evaluation/workgroup1_currentstate.pdf.
The interim protections from liability that an applicant receives upon acceptance into the program become permanent once the DEEP Commissioner notifies the participant that DEEP will not audit the use of the property. 64

64. An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(n)(4)(A)-(D). Nearly every state brownfield and voluntary remediation program utilizes "reopeners" that allow the government to require additional remediation or to demand payment for additional cleanup of a site. The reopeners in Section 17 are typical of those found throughout the nation. See, e.g., Mississippi (MISS. CODE ANN. § 49-35-15(5) (West 2011)), North Carolina (N.C. GEN. STAT. ANN. § 130A-310.33(c) (West 2011)), Pennsylvania (35 PA. STAT. ANN. § 6026.505 (West 2011)). In Covenants Not to Sue issued by the U.S. Environmental Protection Agency (EPA) for cases arising under CERCLA, EPA may require additional response action from a party who has a Covenant Not to Sue "if information is received after entry of the consent decree regarding previously unknown site conditions or new scientific determinations, and such information indicates there is an imminent and substantial endangerment to public health or the environment." Superfund Program; Covenants Not to Sue, 52 Fed. Reg. 28,038, 28,038 (July 27, 1987). Further, CERCLA provides that EPA may also reopen state approved cleanups on sites with regard to which federal enforcement authority has been limited, if:

(i) the State requests that the President provide assistance in the performance of a response action;

(ii) the Administrator determines that contamination has migrated or will migrate across a State line, resulting in the need for further response action to protect human health or the environment, or the President determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property;

(iii) after taking into consideration the response activities already taken, the Administrator determines that—

(I) a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; and

(II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release; or

(iv) the Administrator, after consultation with the State, determines that information, that on the earlier of the date on which cleanup was approved or completed, was not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, has been discovered regarding the contamination or conditions at a facility such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health or welfare or the environment. Consultation with the State shall not limit the ability of the Administrator to make this determination.

42 U.S.C.A. § 9628(b)(1)(B) (West 2011). Cf. David A. Dana, State Brownfield Programs as Laboratories of Democracy?, 14 NYU ENVTL. L.J. 86, 94–96 (2005) (arguing that reopeners are unlikely to occur and referring to a 2003 study by Cleveland State University that only 0.1% of completed Brownfield cleanups had been reopened as of the date of that study). See also Robert A. Simons, et al., Quantifying Long-term Environmental Regulatory Risk for Brownfields: Are Reopeners Really an Issue? 46 J. ENVTL. PLAN. & MGMT. 257, 266 (2003) (reporting that "[t]o date the gross incidence of reopeners . . . for the programmes contacted and participating was 12/11,497, or just over 0.1%").
process or that the DEEP audit findings have been addressed.\textsuperscript{65} The permanent liability protection for the participant and for the immediate prior owner also begins if the Commissioner fails to act on a remedial action report and the accompanying verifications within 180 days after receiving them.\textsuperscript{66} Under both outcomes, neither the participant nor the prior owner has liability to the state or third parties for the costs incurred to remediate the contamination identified in the plan.\textsuperscript{57} Nor are they liable for the costs relating to equitable relief or damages resulting from the contamination.\textsuperscript{68} The liability protections for the BFPP, innocent land owner, and contiguous property owner also apply to historical off-site impacts, including deposition, waste disposal, the effects on sediments, and damage to natural resources.\textsuperscript{69} Those protections, however, do not extend to the prior owner.\textsuperscript{70}

Completion of a remediation under Section 17 should also provide protection from federal judicial or administrative enforcement against the BFPP\textsuperscript{71} under Section 106(a) of CERCLA\textsuperscript{72} or cost recovery actions under Section 107(a)\textsuperscript{73} by virtue of CERCLA Section 128(b).\textsuperscript{74} That section precludes such enforcement where “a person is conducting or has completed a response action\textsuperscript{75} regarding the specific release that is addressed by the response action that is in compliance with the state program that specifically governs response actions for the protection of public health and the environment . . . \textsuperscript{76} Section 17 would comprise

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{65} An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(n)(2).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id. § 17(n)(2), (6).
\item \textsuperscript{68} Id. The drafters of the liability relief provisions of § 17(n)(2) borrowed substantially here from the liability relief provision of the Georgia Redevelopment Act. See GA. CODE ANN. § 12-8-207(a) (West 2011) (stating that a prospective purchaser “shall not be liable to the state or any third party for costs incurred in the remediation of, equitable relief relating to, or damages resulting from the preexisting release” of regulated substances from the property).
\item \textsuperscript{69} An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(n)(2).
\item \textsuperscript{70} Compare id. § 17(n)(6) with id. § 17(n)(2).
\item \textsuperscript{71} See infra note 77 and accompanying text.
\item \textsuperscript{72} 42 U.S.C. § 9606(a) (2006).
\item \textsuperscript{73} Id. § 9607(a).
\item \textsuperscript{74} Id. § 9628(b).
\item \textsuperscript{75} This language arguably precludes the seller from “riding along” on the protection afforded to the BFPP by CERCLA Section 128(b) unless the seller has actually participated in the conduct of the response action.
\end{itemize}
\end{footnotesize}
such a state program.\textsuperscript{77}

The Section 17 program will likely include many sites that currently meet the definition of an "establishment" under the Transfer Act and for which the seller already occupies the position of a "certifying party" under that legislation. For such a property, the seller's formal obligations as the certifying party will continue, as a matter of law, until completion of the subject property's remediation pursuant to the Section 17 program. In practical effect, however, once the BFPP's application has been accepted, the seller's remedial activities will be taken over by the Section 17 participant, and it would be prudent for the parties to recognize this practical shift in remediation responsibility in the purchase and sale agreement for the property. The Section 17 site investigation and cleanup obligations track those for the certifying party in the Transfer Act (e.g., the property must be assessed within two years, remediation must start within three years, and remediation must be complete within eight years).\textsuperscript{78} Upon completion of the Section 17 remediation, the property will no longer be subject to the Transfer Act unless a new pollution event triggers its renewed applicability to the site.\textsuperscript{79}

### III. Section 9 Changes to the Abandoned Brownfield Cleanup (ABC) Program

Originally enacted in 2009, the ABC program in its initial form extended liability protection only to contaminated sites that had been abandoned (unused or underused) after October 1, 1999.\textsuperscript{80} A prospective property owner interested in the ABC Program's liability protection provisions must apply to the DECD Commissioner.\textsuperscript{81} In the

\textsuperscript{77} For the Section 17 program to so qualify, the State would have to:

[M]aintain, update not less than annually and make available to the public a record of sites . . . at which response actions have been completed in the previous year and are planned to be addressed under the State program . . . . The public record shall identify whether or not the site, on completion of the response action, will be suitable for unrestricted use and, if not, shall identify the institutional controls relied on in the remedy.

Id. § 9628(b)(1)(C).


\textsuperscript{79} This is clearly of interest to the seller of the property who may have taken on the obligation of a certifying party under the Transfer Act. See discussion infra at Section IV.


\textsuperscript{81} Id. § 32-9ll(a).
more than two years since enactment of the ABC program, however, not a single application has been submitted. Section 9 of the Brownfield Economic Driver Act seeks to encourage ABC Program applications by expanding the program to sites that (i) have been abandoned for at least five years before a party seeks admission to the program or (ii) the Commissioner of Economic and Community Development otherwise determines are eligible. The Act also expands program eligibility to municipalities.

After DECD has accepted a site into the program, the participant will not be held responsible to investigate or remediate “any pollution or source of pollution that has emanated from the property” before the participant took title, nor will the participant be liable to the state or any third party for the release of any regulated substance that took place at or from the property before it took title, provided, however, that the participant (i) remains in the voluntary remediation program, (ii) investigates existing pollution, and (iii) eliminates future emanation or migration of pollutants from the property.

Selection of a property for the ABC program exempts the property from the Transfer Act and entitles the participant to a covenant not to sue from the DEEP Commissioner without fee. The covenant not to sue is transferable to subsequent owners. An eligible applicant designated by the ABC program is considered an innocent landowner and is not liable to the DEEP Commissioner for preexisting site conditions provided the person did not establish, cause, or exacerbate the contamination, and complies with applicable reporting requirements.


84. Id.

85. Id.

86. Id.


The ABC Program, like Section 17, provides a pathway to liability relief for purchasers of contaminated properties who are not responsible for that contamination. Like Section 17, the ABC Program imposes various eligibility criteria limiting participation in the program. And, as is the case with the Section 17 criteria, the ABC criteria are unfortunately nebulous. A prospective purchaser can make some attempt to evaluate its ability to take advantage of the program because there is no cap on the number of participants and because some of the ABC Program criteria can be determined with certainty. A prospective purchaser will know, for example, whether a property has been abandoned for at least five years, a key criterion for admission to the ABC Program. Under Section 17, on the other hand, a prospective purchaser is less likely to know whether the DEEP Commissioner and DECD Commissioner will determine that the property meets the “sustainability,” “readiness to proceed,” “consistency,” and “smart growth” standards established in the that section’s “portfolio factors.” The ABC Program, however, also allows the DECD Commissioner to impose “any other criteria” she deems necessary. This provision allows the state great flexibility in meeting policy goals, but provides no certainty to a prospective redeveloper whose primary concern is avoiding the uncertainty associated with environmental liability. In this sense, taking advantage of the ABC Program will require that private parties, including municipalities, negotiate allocation of the risk that a property will not be accepted into the program. If, however, the property is truly abandoned, there may be no prior owner with whom to negotiate.

Once a property is accepted into the ABC Program, it must “enter and remain in the voluntary remediation program,” investigate pollution on such property in accordance with prevailing standards and guidelines and remediate pollution on such property in accordance with regulations, and eliminate further emanation or migration of any pollution from such property.” The person or municipality accepted into the program is not responsible for investigating or remediating any emanation from the property that occurred before it took title to the

90. Id. § 17(c).
91. See id. § 9(b)(7).
92. Established in CONN. GEN. STAT. § 22a-133x(a).
property. In addition, effective July 1, 2011, the owner is not liable to a third party, including the state, for a release that occurred prior to the owner taking title unless the owner caused or contributed to the release. As noted above, following acceptance into the ABC Program, a property owner enters and remains in the voluntary remediation program set forth at Section 22a-133x of the Connecticut General Statutes. The voluntary remediation program allows a property owner to remediate its property under the direction of a Licensed Environmental Professional unless the DEEP Commissioner, in its discretion, chooses to oversee the cleanup. The completed remediation "may be used as the basis for submitting a Form II pursuant to sections 22a-134 to 22a-134e inclusive of [the Transfer Act]." Because the DEEP Commissioner can choose to require that DEEP approve all of the technical plans and reports related to the investigation and remediation, the voluntary remediation program can entail an entirely separate application process, even after a property and its owner have been accepted into the ABC Program. Accordingly, it is imperative that a property owner meet with DEEP and address any concerns raised by the agency with respect to the technical aspects of the proposed remediation, even before submitting an application to the ABC Program to DECD.

Another key difference between the ABC Program and Section 17 is that Section 17 grants liability relief to prior owners while the ABC Program does not. The availability of seller relief may discourage abandonment in the first instance and instead encourage owners of contaminated properties to transfer properties to redevelopers.

IV. EVALUATING CHANGES TO CONNECTICUT'S LIABILITY FRAMEWORK

Section 17 and the ABC Program, as amended, are significant improvements to Connecticut's previous brownfield liability framework. Previous legislation to protect purchasers of contaminated property consisted of piece-meal efforts that fell well short of insulating property redevelopers from liabilities arising from past uses of the property.

95. Id. § 9(a).
96. See supra note 92.
97. Id.
98. Id.
These statutes had overly narrow restrictions on eligibility or were unduly cumbersome in implementation. In 2005’s *An Act Concerning Third-Party Liability for Contaminated Property*, for example, the Connecticut legislature created a statutory bar to lawsuits brought by third parties, other than the state, against innocent landowners who remediated their property in accordance with an investigatory report approved by the Department of Environmental Protection and for which a Licensed Environmental Professional has prepared a final report with regard to pollution existing prior to taking title to a property. However, it also subjected the landowner to a penalty of $100,000 or more if it is determined that he or she “is affiliated with the person responsible for the pollution or source of pollution” which he or she remediated. In the following year, the Connecticut General Assembly enacted the very generically titled *An Act Concerning Brownfields*, which, among other accomplishments, (i) created the Office of Brownfield Remediation and Development within the Department of Environmental Protection, dedicated to studying and developing procedures to streamline brownfield remediation, and (ii) established a state-funded pilot program to identify brownfield remediation opportunities in four Connecticut municipalities and to exempt the municipal grant recipients from liability. The original ABC Program was just such an incremental change to liability policy. It extended liability protection only to sites that had been abandoned after an arbitrary date, October 1, 1999, for which there was no viable responsible party, and where the property had a regional or municipal economic development benefit. Section 17 is a significant improvement over this patchwork of liability relief provisions, all with different entry criteria, different remediation requirements, and different scopes of liability relief. First, Section 17 establishes a pathway to remediation, redevelopment and liability relief that is, in theory, open to any property in the state. Further, it encourages owners of contaminated properties to sell to buyers who will remediate and reuse those lands. Regrettably, notwithstanding the many advantages of Section 17 and the ABC Program to program participants, those provisions’ reliance on agency discretion detract from their utility to developers and the towns

---

100. *Id.* § 1(c).
102. *See supra* note 82 and accompanying text.
and cities that would like to see contaminated properties put to good use.

The first step in redeveloping a contaminated property is typically conveyance to a buyer uninvolved in the original contamination. Inherent in the sale of a contaminated property is the risk that a future user, whether the buyer or a third party, will look to the seller for relief if a claim related to the environmental condition of the property arises. There are multiple examples in Connecticut case law of sellers who have faced lawsuits where a purchaser discovers contamination that had not been known to the seller\(^\text{103}\) or even when, before selling a property, the seller disclosed the full scope of a property’s contamination.\(^\text{104}\) Even where the seller ultimately prevails based on the contractual allocation of liability, the threat and uncertainty associated with future litigation can discourage an owner of contaminated property from entertaining the possibility of a sale. In this situation, discontinuing activities at the property and boarding it up—effective abandonment—may make business sense. Although preventing future reuse of the site may ensure that the current owner who decides to do so will not face a claim for cleanup costs or damages from a governmental entity, a future owner, or site occupant, such claims avoidance conduct frequently results in blight, such as that found in the Connecticut communities that have numerous fallow brownfield sites. This conduct also strains municipal resources suffering from lost property tax revenues that could result from cleanup, development, and reuse of sites which are often located close to existing infrastructure, including transportation.

Other than providing direct subsidies or tax credits that might reduce the sting of trailing liability,\(^\text{105}\) the greatest incentive to allow development of brownfield properties is to provide protection against

\(^{103}\) See, e.g., 24 Leggett St. Ltd. P’ship v. Beacon Indus., Inc., 239 Conn. 284, 685 A.2d 305 (1996) (turning in part on a contractual indemnity from the purchaser in favor of the seller). But see ATC P’ship v. Coats N. Am. Consol., Inc., 248 Conn. 537, 552–54, 935 A. 2d 115, 125–26 (2007) (holding that there is no common law indemnification by a seller in favor of a purchaser of contaminated property and that a purchaser must rely on the Transfer Act, Conn. Gen. Stat. Ann. § 22a-452(a), and contractual obligations to seek relief for damages related to contamination from the entity or person from which it purchased the contaminated property).


\(^{105}\) For example, a taxpayer who has entered into a Brownfield Cleanup Agreement (BCA) with New York’s Department of Environmental Conservation may be eligible for tax credits relating to the cleanup and redevelopment of a brownfield site. See Brownfield Cleanup Program (“BCP”), N.Y. Envtl. Conserv. Law § 27-1401, et seq. (McKinney 2011).
such trailing liability for owners who would otherwise pursue detrimental claims avoidance conduct. We are not aware of any other State program that provides direct liability protection to the seller arising from the remedial activities of the purchaser, except to the extent that the seller participates in the remediation. This protection for the seller addresses concerns that subsequent purchasers will engage in more restrictive cleanups than performed by the buyer and seek to recover their costs of doing so against a previous owner who has no such protection. This seller protection should remove a major disincentive for property owners who would otherwise not place their sites on the market and leave them "boarded up" rather than face the potential trailing liability.

In addition, a property that completes a Section 17 remediation is no longer subject to the strictures of the Transfer Act. Removal of the property from the applicability of the Transfer Act will effectively (and should, as a matter of law) dissolve any further obligation of the prior certifying party. This is clearly of interest to the seller of the property who may have taken on the obligation of a certifying party under the Transfer Act. The certifying party's obligations continue as long as the property is subject to that statute; those obligations remain with a certifying party notwithstanding a subsequent transfer of the property by a subsequent holder who may also become a certifying party, or the existence of a pre-existing certifying party from a prior transaction.

This potential glut of certifying properties, all who have strict liability obligations with regard to the property, has led to much confusion as to who must continue a cleanup if the certifying party who has an obligation to conduct an investigation or remediation fails or is unable to continue to do so. For example, in Commissioner of Environmental Protection v. Sergy Co., LLC, Sergy Company, LLC ("Sergy"), the current owner of a contaminated site, obtained the property from Magnetek, Inc. ("Magnetek") which, in 2001, signed off

---

106. See, e.g., 35 PA. STAT. ANN. § 6026.501(a)(1) (West 2011) (containing § 501(a)(1) of Pennsylvania's Land Recycling and Environmental Remediation Standards Act ("Act 2"), which extends liability protection to "the current or future owner of the identified property or any other person who participated in remediation of the site").

107. See, e.g., Sergy Co., 2010 WL 1508465; see also Festival Realty, Inc. v. William Prym, Inc., No. HHDCV0850205955, 2010 WL 3448046 (Conn. Super. Ct. Aug. 5, 2010) (holding that Festival's submission of a Form III and agreement to hold Prym harmless from all liabilities, losses, costs and expenses arising out of or in connection with environmental laws when Festival sold a contaminated property to Prym did not require Festival to resubmit a Form III when the Prym later resold the property).
as a certifying party under the Transfer Act.\textsuperscript{108} DEP sued both Sergy and Magnetek.\textsuperscript{109} In 2002, DEP informed Magnetek that it was required to submit the proposed schedule to investigate and remediate the property required by the Transfer Act.\textsuperscript{110} Not only had Magnetek failed to file this schedule, but due to a dispute arising between the parties, a groundwater PCB treatment system for the property ceased operating, resulting in PCB contamination.\textsuperscript{111} DEP sought an order requiring Magnetek to comply with the Transfer Act and to pay a civil penalty not to exceed $25,000 per day pursuant to section 22a-134b of the Connecticut General Statutes.\textsuperscript{112} In response, Magnetek alleged that there had been a prior certifying party from a 1986 transfer of the property who had performed a cleanup under DEP’s supervision and that DEP should look to the 1986 certifying party to complete the outstanding obligations of the Transfer Act remediation.\textsuperscript{113}

In its answer to DEP’s complaint, Magnetek asserted a special defense of common-law apportionment to DEP’s claim.\textsuperscript{114} The court granted DEP’s motion to strike Magnetek’s special defense of apportionment on the grounds that the harm giving rise to DEP’s action was Magnetek’s own failure to comply with the Transfer Act, a harm that could not be apportioned with the prior certifying party.\textsuperscript{115} Although the court in this matter noted that DEP’s allegations of wrongdoing involved Magnetek’s own failure to submit the required schedule to comply with Magnetek’s Transfer Act duties, rather than any failed obligation of the prior certifying party,\textsuperscript{116} the case implicitly recognizes that where there has been more than one certifying party in a chain of transfers of a single property, DEP may choose to bring an enforcement action against any one of those certifying parties.

Although the alleviation of trailing liability concerns and the removal of qualifying properties from the applicability of the Transfer Act comprise significant improvement to Connecticut’s liability framework, Section 17 is not a panacea. Real estate developers, including those who redevelop contaminated properties, do so only if the

\textsuperscript{108} Sergy Co., 2010 WL 1508465, at *1.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Sergy Co., 2010 WL 1508465, at *1.
\textsuperscript{113} Id. at *1–2.
\textsuperscript{114} Id. at *2.
\textsuperscript{115} Id. at *4–5.
\textsuperscript{116} Sergy Co., 2010 WL 1508465, at *4.
projected revenues exceed the projected costs. Limiting a developer’s liability itself limits the developer’s risk and uncertainty, thus reducing unquantifiable costs. To the extent that the costs include unquantifiable liabilities, redevelopment is at best a risky venture and, at worst, a non-starter. Thus, to the extent that Section 17 fails to bring certainty into the redevelopment process, it fails to further the goals of remediation and redevelopment. By limiting the number of properties that can participate in the program and by imposing nebulous “portfolio factors,” Section 17 fails to provide redevelopers the certainty they may require in order to undertake a remediation project. The ABC Program, as described above, includes similarly opaque criteria.

The use of the portfolio criteria described above represented a compromise between bill proponents who sought to have the Section 17 program operate on a self-implementing basis (i.e., every applicant who certified that both the participant and the subject property met the statutory criteria would gain entry to the program) and those who sought to have the program be more selective, with a government agency deciding which few applicants would enter the program each year. The co-author of this Article, Barry Trilling, was among the authors of the original version of Section 17 and was among those who participated in discussions with representatives from the agencies that would administer the program (i.e., the Department of Economic and Community Development and the Department of Energy and Environmental Protection, as well as representatives of the environmental activist community). The agency representatives expressed concern that a program with unlimited admissions would overwhelm their administrative capacity. The environmental activists expressed a strong preference for a “pilot program” to demonstrate that the liability reforms would not result in broad environmental degradation.

compromise was reached in which no more than thirty-two applicants would be accepted into the program in any one year. Although applicants would continue to “self-certify” with regard to the eligibility criteria (with evidence of eligibility criteria), the honing down of applicants to thirty-two would be accomplished by DECD’s reviewing the applications for meeting the state-wide portfolio criteria. These criteria were designed to assure that, in addition to incentivizing innocent purchasers to develop brownfield properties, the state may be able to achieve certain planning and policy goals in a demographically and geographically balanced manner.

The portfolio factors are: (1) job creation and retention; (2) sustainability; (3) readiness to proceed; (4) geographic distribution of projects; (5) population of the municipality where the property is located; (6) project size; (7) project complexity; (8) length of time and degree to which the property has been unused or underused; (9) projected increase to the municipal grand list; (10) consistency of the


120. See, e.g., E-mail from Eric Brown, CBIA Legislative Counsel, to ad hoc group (Feb. 3, 2011, 10:24 PM) (on file with the Quinnipiac Law Review) (conveying e-mail exchange with DEEP Commissioner designate Dan Esty concerning, inter alia, limiting number of participants in program); see also E-mail from Barry Trilling to ad hoc group (March 14, 2011, 2:29 PM) (on file with the Quinnipiac Law Review) (concerning same).

121. An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 17(c). The wording and context of Section 17(c) are ambiguous. We read the section to mean that, if the eligibility criteria for the applicant as a bona fide prospective purchaser and the site as a Brownfield are met, and there are more than thirty-two applications, DECD will then consider certain “portfolio” factors to assure a diversity of projects throughout the state in order to winnow them down to thirty-two. One could plausibly argue, however, that the portfolio factors apply to every application, regardless of the number received, although doing so could result in an application and selection process that would amount to a form of “beauty pageant,” pitting applicants against one another for the selecting agency to choose the most politically attractive project, a throwback to the byzantine process that Section 17 aims to supplant.

property as remediated and developed with municipal or regional planning objectives; and (11) the proposed development’s support for and furtherance of principles of smart growth or transit.123 As such, the program arguably meets the objectives stated by some academic commentators on state brownfield and voluntary remediation programs that these programs ought to move “toward a development-centered approach to brownfields, not one that caters specifically to developers.”124

Notwithstanding the many advantages of Section 17 to program participants, its limitation to only thirty-two sites in any one year makes the purchase of eligible properties less attractive because of the speculative nature of admission to the program. Why, a prospective purchaser may ask, should it go through the expense of qualifying for and applying to DECD for admission when there is no guarantee that DECD will accept its application to the program and thus no assurance of relief from liability if it meets the program’s obligations? The answer may lie in politics: until the Section 17 program becomes entirely self-implementing, at least with regard to acceptance into the program, prospective purchasers and developers will devote their attention only to those properties that are all but certain to be admitted into the program because DECD, DEEP, or local authorities believe they are most important to their own objectives—not necessarily the objectives of a free market.

An interesting wrinkle in Section 17 may allow a municipality or an economic development agency to nominate a site that comprises the subject of an uncompleted transaction.125 In most instances, however, when a party who contemplates entering the Section 17 program buys a property, it must assume the risk that its application will not be accepted among the thirty-two that DECD may select in any given year.

The parties to a brownfield transaction, however, may find a contractual mechanism to overcome this barrier. For example, the purchase and sale agreement for the site could require the seller to retain its cleanup obligations until the purchaser is accepted into the program with an amount placed in escrow by the buyer that reflects the projected

cleanup cost. If the purchaser is then accepted into the program, the escrow would be refunded to the buyer to cover its projected cleanup costs. If the DECD rejects the application, the transaction might proceed with the escrow distributed to the seller if it agrees to assume cleanup of the site (which might be required by the Transfer Act) or the parties could void the transaction with a return of all deposits. This will entail a cumbersome process requiring the service of a lawyer experienced in brownfield transactions. It is also possible that DEEP could devise an administrative process whereby it would enter a “buyer-seller agreement” similar in fashion to the Pennsylvania agreement described in the note below in the form of an agreement among itself, the current owner, and a BFPP that would be subject to DECD’s approval of the BFPP’s application to the Section 17 program.

The Section 17 program would be more likely to draw applicants and to meet with success if it were self-executing, such as in Pennsylvania, where a party seeking to obtain relief from liability for many, if not most, cleanups may do so without first applying to a state agency to participate in any program. Rather, the Pennsylvania process requires the party who wishes to engage upon a voluntary cleanup

---


127. Pennsylvania’s “Model Buyer-Seller Agreement” comprises a three-way agreement in the form of a Consent Order and Agreement among the buyer, the seller, and the Pennsylvania Department of Environmental Protection (PADEP), under which the seller agrees to remediate the property in accordance with Act 2 and attain one or a combination of the Act 2 remediation standards. Mitchell E. Burack. Pennsylvania Innocent Purchaser Agreements for Brownfield Sites, PEPPER HAMILTON LLP (Apr. 1 1999), available at http://www.pepperlaw.com/publications_article.aspx?ArticleKey=108. PADEP gives the buyer a Covenant Not to Sue at the time the agreement is signed. Id. The Agreement provides, however, that it “shall be null and void if the Buyer does not buy the Property” within an agreed to number of days after execution of the Agreement. Id. In the Connecticut context, the seller would agree to enter one of the state’s voluntary remediation programs under CONN. GEN. STAT. §§ 22a-133x and 133y, or the Covenant Not to Sue programs of CONN. GEN. STAT. §§ 22a-133aa and 133bb if DECD should turn down the buyer’s application to the Section 17 program. As with the Pennsylvania Buyer-Seller Agreement, this Connecticut Agreement would also be null and void if the buyer does not purchase the property within a designated number of days.

128. Recognizing how Section 17 functions differently from Pennsylvania’s self-executing Act 2 program, the Connecticut Buyer-Seller Agreement proposed here would become null and void if DECD were to decide not to accept the buyer’s application to the Section 17 program.
resulting in liability relief that will attain a "Background" or "Statewide Health Standard" to file with the Pennsylvania Department of Environmental Protection (PADEP) a "notice of intent to initiate remediation" and to submit its final report demonstrating attainment of the standard "to the municipality in which the remediation site is located and published in a newspaper of general circulation serving the area and in the Pennsylvania Bulletin."\textsuperscript{129} Using the Site-Specific Standard requires PADEP approval of a remediation plan before embarking on the cleanup activity, as well as submission of a notice of intent to remediate to PADEP and to the municipality in which the site is located, and publication of the notice in a newspaper of general circulation serving the area in which the site is located.\textsuperscript{130} These are not political decisions, however, but technical decisions based on the likelihood of the applicant's proposed remediation to meet its cleanup goals. Both Section 17 and the ABC Program require application to a state agency and permit that state agency to act in its unfettered discretion when determining whether to admit a property into the applicable program.

V. OTHER ACT PROVISIONS

The Brownfield Economic Driver Act includes other provisions of note to municipalities and property owners:

- It makes permanent an existing pilot program that provides funding and liability protection to municipalities for investigating and remediating brownfield sites, contingent on funding availability.\textsuperscript{131}

- It relieves certifying parties who submit a Form III or Form IV pursuant to the Transfer Act from the requirement to investigate or clean up contamination that occurs after the later of either completion of a Phase II investigation or submission of the Form III or Form IV.\textsuperscript{132}

\begin{thebibliography}{9}
\bibitem{129} 35 PA. STAT. ANN. §§ 6026.302(e), 303(h) (West 2011).
\bibitem{130}  \textit{Id.} § 6026.304(l)–(m).
\bibitem{131} An Act Concerning Brownfield Remediation and Development as an Economic Driver, 2011 Conn. Pub. Acts No. 11-141, § 1 (codified as amended at CONN. GEN. STAT. § 32-9cc(c)).
\bibitem{132}  \textit{Id.} § 4. As explained in the Bill Analysis prepared by the Connecticut Office of Legislative Research concerning Section 4:

The bill exempts certifying parties under the Transfer Act from investigating and
• It requires the DEEP Commissioner to issue a comprehensive evaluation of all brownfield remediation programs and legislation by December 15, 2011.133

• It broadens the definition of the term "brownfield" to include properties where site expansion (in addition to redevelopment or reuse) is affected by contamination.134 The definition will also now include sites that require environmental investigation as well as those requiring remediation of those sites.135

• It exempts projects that receive financial assistance from the state for the purpose of investigation or remediation from the payment of certain fees.136

• It extended the term of the existing Brownfield Working Group, charged with examining the remediation and development of brownfield in Connecticut, to January 15, 2012.137 It also created two new gubernatorial appointees on the group.138

• It makes permanent the tax increment financing program administered by the Connecticut Development Authority.139 This

---

134. Id. § 1.
135. Id.
136. Id. § 8.
138. Id. § 15.
139. Id. § 16.
program permits the Connecticut Development Authority to issue bonds backed by incremental property tax revenue expected to be generated by a redevelopment program that includes either information technology programs in economically distressed areas or for brownfield remediation.140

VI. CONCLUSION

The Brownfield Economic Driver Act, and particularly Section 17 of the Act, creates a new world of opportunity for the remediation, redevelopment, and revitalization of Brownfield properties in Connecticut. The Act moves the state to the forefront of those who have recognized that achieving those objectives requires a realistic reassessment of liability for site cleanup volunteers. As yet in its infancy, complications and difficulties are likely to arise in its administration and implementation.

140. CONN. GEN. STAT. ANN. § 32-23zz (West 2011).