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Connecticut Transfer Act Update

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Excerpt from Chapter Five:
Matters Affecting Business and Real Estate

Author:

John E. Wertam
jwertam@goodwin.com
(860) 251-5813

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The Connecticut Transfer Act: Matters Affecting Business and Real Estate

5.2.1 The History of the Transfer Act

The Connecticut Transfer Act applies to the transfer of establishments at which hazardous waste is or was generated, at which hazardous waste from a different location was brought, or certain defined business operations (*e.g.* , sites on which the process of dry cleaning occurred).[1] The Transfer Act requires that, at the time of transfer, the transferor notify both the transferee and the Department of Energy & Environmental Protection ("DEEP") whether a release of hazardous waste or hazardous substances has occurred from the establishment, and if such a release has occurred, one of the parties to the transaction must commit to clean it up.[2] Only transfers of real property or business operations defined as "establishments" are subject to the statute.[3]

The Transfer Act was initially adopted by the legislature in 1985.[4] At the time of its initial passage, no one could have envisioned the implications that the Transfer Act might have on transferring business operations or real property in Connecticut.[5] However, due to various problems with earlier versions of the Act, by December of 1994, the future of the Act appeared to be in jeopardy.[6]

1. Conn. Gen. Stat. § 22a-134 *et seq*. as amended . *See also*, DEEP's *Environmental Program Fact Sheet: Property Transfer Program*, DEP-PERD-PTP FS-200 (Revised 10/28/09) and related DEEP instructions for completing various forms and the Environmental Condition Assessment Form (http://www.ct.gov/deep/cwp/view.asp?A=2715&Q=325006).
2. *Id*. Changes made by Public Act 01-204 draw a distinction between "establishment" and "parcel," and requires remediation of releases only from the establishment. This distinction is important if the establishment, for instance, is a dry cleaner in a mall that does not occupy the entire parcel.
3. Conn. Gen. Stat. § 22a-134(3). The definition of an "establishment" is discussed in greater detail below.
4. Public Act 85-568.
5. *See* John E. Wertam, *Connecticut Environmental Law Handbook* (3rd ed. 1992) (discussing the legislative history of the Transfer Act).
6. *See Hartford Courant Articles*, December 23, 1994.

Seizing the opportunity to address what was perceived to be an important site remediation program, the Commissioner of the Department of Environmental Protection (later changed to the Department of Energy and Environmental Protection, or "DEEP") assembled a working group to develop amendments to the Transfer Act. The group's effort, along with legislative amendments, resulted in passage of Public Act 95-183, "An Act Concerning Revisions to the Hazardous Waste Establishment Transfer Act and Hazardous Waste Site Remediation."[7] This revision redefined key terms of the Transfer Act, established a voluntary remediation program, and created a "licensed environmental professional" program to assist the Commissioner in evaluating and cleaning up certain sites.[8] Revisions effective on October 1, 2001 significantly expanded the compliance effort required under the Transfer Act, while providing clarification to other elements of the law.[9]

Revisions to the Transfer Act have been made almost annually since the 2001 amendments, mostly by adding exemptions to its applicability. Interpretations under the Transfer Act are generally accomplished by experience with the program; there are no regulations promulgated under the Transfer Act, and legislative history on this Act is sparse and not terribly useful. The following sections highlight important elements of the Transfer Act.[10]

5.2.2 Definition of Establishment

The Transfer Act only applies to "establishments," defined as "any real property at which or any business operation from which (A) on or after November 19, 1980, there was generated, except as the result of remediation of polluted soil, groundwater or sediment or the removal or abatement of building materials, more than one hundred kilograms of hazardous waste in any one month . . . ." An establishment also includes property or a business operation where "hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported or disposed of . . ." without regard to amount generated or found on the site.[11] Finally, the statute creates "automatic" establishments, regardless of the amount of hazardous waste generated.[12] These "automatic" establishments include real property at which or business operations from which: 1) the process of dry-cleaning was conducted on or after May 1, 1967; 2) furniture stripping was conducted on or after May 1, 1967; and 3) a vehicle[13] body repair facility was located on or after May 1, 1967.[14]

Some observations regarding the definition of establishment:

- Polluted soil, groundwater, sediment or removal or abatement of building materials generated as a result of remediation are not included when calculating hazardous waste generated to meet the 100kg threshhold;

- The generation of 100 kilograms of hazardous waste need occur only "in any one month," as opposed to in consecutive months or on a regular basis[15];

7. Public Act 95-183 (codified as amended in Conn. Gen. Stat. § 22a-134 *et seq.*).
8. *See* Conn. Gen. Stat. §§ 22a-134 (redefining terms); 22a-133x (establishing voluntary remediation program); 22a-133v (creating a licensed environmental professional (LEP) program).
9. *See* Connecticut Public Act 01-204, §§ 15 to 21.
10. Through October, 2014.
11. Conn. Gen. Stat. § 22a-134(3) as amended including Public Act 14-88.
12. *Id.*
13. "Vehicle" means any motorized device for conveying persons or objects except for an aircraft, boat, railroad car or engine, or farm tractor. Public Act 01-204, § 15(20). Certainly automobiles and trucks are included—the most obvious target for this definition. Experience will dictate just what else may come within this definition.
14. Conn. Gen. Stat. § 22a-134(3) as amended.
15. Research on this fact based determination must relate back to November 19, 1980 for real property transfers, and back to the origin of the business operation on the parcel, if only the business operation is being transferred. In addition, "averaging" hazardous waste generation over a period of time is not generally accepted by DEEP unless contemporaneous documentation of monthly generation rates can be produced. Therefore, the cleaning out of a laboratory, or the gradual accumulation of hazardous waste manifested off site all at one time, may trigger the applicability of the Act.

- The definition of "establishment" is tied to the date when hazardous waste became regulated under federal law (November 19, 1980), or May 1, 1967 for certain "automatic" establishments;

- Establishments can be either real estate or business operations, and business operations can be transferred separately from the real estate;

- Federal hazardous waste laws were amended in 1995 to include "universal wastes," and Connecticut regulations incorporate such program by reference, and include "Used Electronics."[16] However, while used electronics, spent fluorescent light bulbs, used batteries and thermostats are considered hazardous waste, they are not counted against the 100 kilogram threshold[17];

- 100 kilograms (or 220 lbs) is a low threshold, representing approximately one half of a fifty-five gallon drum of liquid solvent waste.

5.2.3 Transfer of Establishment

A "transfer of establishment" means "any transaction or proceeding through which an establishment undergoes a change in ownership," unless specifically excluded.[18] Selected exclusions are briefly set forth below:

(a) *Conveyance or extinguishment of an easement.*
In effect, easements are not covered even if such easement is located on a parcel constituting an establishment.

(b) *Conveyance of an establishment through foreclosure as defined in § 22a-452f(b) Conn. Gen. Stat., including municipal tax liens and exercise of condemnation or eminent domain by a municipality or under various provisions of the general statutes. Note: Municipalities may, under certain conditions, subsequently transfer establishments foreclosed under this exemption, without the need to comply with the Transfer Act.*

The above exemption (b), along with a few others, were advanced by the lending community and municipalities so that at least when acquiring property, the foreclosing entity would not be required to comply with the Transfer Act.[19] Brownfield legislation now extends the exemption for transferring the property from a municipality to a third party, provided compliance with the Transfer Act is assured. See also Section 22a-452f Conn. Gen. Stat. which is Connecticut's equivalent of the federal lender liability rule.

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16. Used Electronics are defined as "a device or component thereof that contains one or more circuit boards or a cathode ray tube and is used primarily for communication, data transfer or storage, or entertainment purpose, including but not limited to, desk top and lap top computers, computer peripherals, monitors, copying machines, scanners, printers, radios, televisions, camcorders, video cassette recorders ("VCRs"), compact disc players, digital video players, MP3 players, telephones, including cellular and portable telephone, and stereos." *See* § 22a-449(c)-113 R.C.S.A., effective June 27, 2002.
17. *See* Conn. Gen. Stat § 22a-134(3), exempting the generation of Universal Waste from being counted against the definition of Establishment under the Transfer Act. See §22a-449(c)-113, R.C.S.A., incorporating by reference, with modifications, 40 CFR 273, effective October 31, 2001, and June 27, 2002. Because the definition of Hazardous Waste in the Transfer Act referred to the federal definition, such wastes were covered under the Transfer Act since at least 1995 (See 60 FR 25542, as amended in 1999 by 64 FR 36488) until 2006. *See* the Connecticut Hazardous Waste Management Regulations, effective June 27, 2002, amending § 22a-449(c)-113 R.C.S.A. Office buildings, warehouses, schools and other non-hazardous type operations are now exempt under the Act, provided they otherwise do not generate Hazardous Waste or release elements of Universal Waste.
18. Conn. Gen. Stat. § 22a-134(1), as amended including through Public Act 14-88. Each exemption is not hereafter cited. Similar exemptions have been grouped together, and therefore the letters preceding these headings (which in some cases have been paraphrased) do not correspond to the statutory citation.
19. Note that Public Act 03-218 clarified the exemption to include municipal tax lien foreclosures, which were inadvertently excluded from the definition found in § 22a-452f(b) Conn. Gen. Stat.

(c) *Conveyance of a deed in lieu of foreclosure to a lender...that qualifies for the secured lender exemption pursuant to § 22a-452f(b), Conn. Gen. Stat.; and*

(d) *Conveyance of a security interest as defined in § 22a-452f(b)(7) Conn. Gen. Stat.*

Exemptions (c) and (d) clearly reflect lenders' interests in avoiding the Transfer Act when making foreclosure decisions, or when taking a mortgage as security. Amendments in 2001 made the exemption consistent with lender liability rules under CERCLA and state law. Again, there is no exemption for transferring the site out of ownership of the lender.

(e) *Termination of a lease, conveyance, assignment or execution of a lease for a period less than ninety-nine years including conveyance, assignment or execution of a lease with options or similar terms that will extend the period of the leasehold to ninety-nine years, or from the commencement of the leasehold, ninety-nine years, including conveyance, assignment or execution of a lease with options or similar terms that will extend the period of the leasehold to ninety-nine years, or from the commence of the leasehold.*

The lease exemption was extended in 2001 to cover leases only for a period exceeding (including options to extend) ninety-nine years. This revision is more consistent with the common law notion of transfers tantamount to the sale of real property. Note: termination of a ninety-nine (or longer) lease also triggers the Act.

(f) *Any change in ownership approved by the Probate Court;*

(g) *Devolution of title to a surviving joint tenant, or to a trustee, executor, or administrator under the terms of a testamentary trust or will, or by intestate succession;*

(h) *Corporate reorganization not substantially affecting the ownership of the establishment;* and

(i) *Issuance of stock or other securities of an entity which owns or operates an establishment.*

Of all the exemptions under the Transfer Act, exemption (h) above and the following exemption (paragraph (j) below), receives the most analysis and is subject to the most interpretation. Changes in 2001 added the definition of "Corporate Reorganization not substantially affecting the ownership of an establishment."[20] The intended result of the 2001 amendments was to clarify practice and policy by excluding transfers of parent corporations or holding companies when the direct ownership of the establishment does not otherwise change. However, caution must be exercised, and each transaction must be carefully evaluated and analyzed before drawing a conclusion that this exemption applies to a particular transaction. Note further that a change in the ownership of the establishment itself is exempted when transferring less than forty percent of its ownership, as noted below.

(j) *The transfer of stock, securities or other ownership interests representing less than forty percent of the ownership of the entity that owns or operates the establishment.*

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20. Public Act 01-204 § 15(22). "Corporate reorganization not substantially affecting the ownership of an establishment" means implementation of a business plan to restructure a corporation through a merger, spin-off or other plan or reorganization under which the direct owner of the establishment does not change;

Changes to the Transfer Act in 2001 created a "bright line" test in the context of changes in ownership of business operations that are establishments. Transfers of assets alone (not including the real property, of course) don't appear to trigger the definition of "Transfer of Establishment."[21]

> *(k) Any conveyance of an interest in an establishment where the transferor is the sibling, spouse, child, parent, grandparent, child of a sibling or sibling of a parent of the transferee;* and
>
> *(l) Conveyance of an interest in an establishment to a trustee of an inter vivos trust created by the transferor solely for the benefit of one or more of the sibling, spouse, child, parent, grandchild, child of a sibling or sibling of a parent of the transferor.*

These exemptions cover transfers occurring within families, or by way of estate devise. However, even though compliance with the Transfer Act may not be necessary to receive the property, such property may still be subject to the Transfer Act upon sale of the property to a third party (or a transfer out of the estate to, for example, a limited liability company). Changes made to the Transfer Act in 2003 exempt persons appointed by a court to sell, convey or partition real property, or a person appointed as a trustee in bankruptcy, from being deemed a party associated with a transfer of an establishment, and therefore such persons are not required to comply with provisions of the Act.[22] Moreover, no "innocent landowner defense" under Section 22a-452d of the General Statutes can be asserted, even though compliance with the Connecticut Transfer Act is not required.[23]

> *(m) Any conveyance of a portion of a parcel upon which portion no establishment is or has been located and upon which there has not occurred a discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste, provided either the area of such portion is not greater than fifty percent of the area of such parcel or written notice of such proposed conveyance and an environmental assessment form for such parcel is provided to the Commissioner sixty days prior to such conveyance.*

This exemption allows the transfer of clean portions of real property upon which an establishment exists, even if the parcel to be conveyed is greater than 50% of the establishment's land area, provided notice is given to DEEP. Of course, DEEP may become involved on its own accord after receiving notice.[24]

> *(n) Conveyance of a service station, as defined by § 22a-134(5).*

This exception was created in 1996 to clarify that gasoline releases from service stations (which are not considered releases of hazardous wastes) would not trigger requirements of the Transfer Act.[25] A service station is defined as "a retail operation involving the resale of motor vehicle fuel including, but not limited to, gasoline, diesel fuel and kerosene and which operation does not otherwise meet the definition of an establishment."[26] It was generally believed that remediation of such releases would be subject to other programs administered by DEEP. With the

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21. It's not clear how many assets of a company may be transferred without triggering the Act. If the entire Business Operation as an asset is transferred as a unit, the Act is likely triggered. If certain machinery and equipment is sold, but the Business Operation survives, the Act is likely not triggered. Transactions litigated in the context of the federal Superfund law may be evaluated for guidance. For example, some courts have held certain asset transfers were tantamount to mergers, thereby holding the acquiring company liable for acts of the seller of the assets.
22. *See* Public Act 03-82.
23. Conn. Gen. Stat. § 22a-134a(k); as amended by Public Act 01-204.
24. *See* Conn. Gen. Stat. § 22a-432. *See also SHW Incorporated vs. Emhart Industries, Inc.*, Super. Ct., J.D. Hartford, No. CV-341320, Sept. 11, 1990 (a portion of the facility was conveyed without complying with the Connecticut Transfer Act).
25. Public Act 96-113.
26. Conn. Gen. Stat. § 22a-134(5).

2001 amendments, if a service station otherwise meets the definition of an establishment, (for example, parts cleaning solvents generated as hazardous waste in quantities enough to trigger the Act) , then remediation of petroleum releases at the establishment is required.

(o) *Any conveyance of an establishment which, prior to July 1, 1997, had been developed solely for residential use and such use has not changed.*
This exception was added in 1997,[27] applying to, for instance, former textile mill conversions to residential use.

(p) *Any conveyance of an establishment to any entity created or operating under chapter 130 or 132, or to an urban rehabilitation agency, as defined in section 8-292, or to a municipality under section 32-224, or to the Connecticut Development Authority or any subsidiaries of the authority;*

(q) *Any conveyance of a parcel in connection with the acquisition of properties to effectuate the development of the overall project, as defined in section 32-651;*[28]

(r) *The Conversion of a general or limited partnership to a limited liability company (See Public Act 12-32);*

(s) *The transfer of general partnership property held in the names of all of its general partners to a general partnership which includes as general partners immediately after the transfer all of the same persons as were general partners immediately prior to the transfer;* and

(t) *The transfer of general partnership property held in the names of all of its general partners to a limited liability company which includes as members immediately after the transfer all of the same persons as were general partners immediately prior to the transfer.*

The foregoing exemptions were added to facilitate conversions of partnerships and other corporate forms made available under the General Statutes.

(u) *The acquisition of an establishment by any governmental or quasi-governmental condemning authority.*

The legislature created this exemption as part of a broader effort to expand municipal power to control or acquire contaminated properties. Under this provision, any property conveyed to (or condemned by) an applicable municipal or state agency is exempt from the requirements of the Transfer Act. This exemption is intended to facilitate the remediation and redevelopment of contaminated properties in urban areas.

(v) *Conveyance of any real property or business operation that would qualify as an establishment solely as a result of (i) the generation of more than one hundred (100) kilograms of universal waste in a calendar month, (ii) the storage, handling or transportation of universal waste generated at a different location, or (iii) activities undertaken at a universal waste transfer facility, provided any such real property or business operation does not otherwise qualify as an establishment, that there has*

27. Conn. Gen. Stat. § 22a-134(1)(O).
28. Conn. Gen. Stat. § 22a-134(1)(Q).

been no discharge, spillage, uncontrolled loss, seepage or filtration of a universal waste or a constituent of universal waste that is a hazardous substance at or from such real property or business operation and that universal waste is not also recycled, treated, except for treatment of a universal waste pursuant to 40 CFR 273.33 (a)(2) or (c)(2) (and 40 CFR 273.13), or disposed of at such real property or business operation;[29]

The General Statutes define "universal waste" as "batteries, pesticides, thermostats, lamps and used electronics regulated as a universal waste under regulations adopted pursuant to subsection (e) of section 22a-449. 'Universal waste' does not mean (A) batteries, pesticides, thermostats and lamps that are not covered under 40 CFR Part 273, or (B) used electronics that are not regulated as a universal waste under regulations adopted pursuant to subsection (c) of section 22a-449."

Furthermore, the 2006 revisions to the Transfer Act also defined "universal waste transfer facility" as "any facility related to transportation, including loading docks, parking areas, storage areas and other similar areas where shipments of universal waste are held during the normal course of transportation for ten days for less."[30]

(w) Conveyance of a unit in a residential common interest community in accordance with the Transfer Act

This exemption provides that a conveyance of a unit in a residential common interest community that is an Establishment is exempt from the Transfer Act as long as the declarant for the community of which the unit is a part, is a certifying party as defined by 22a-134, and that individual provides the CTDEEP Commissioner a surety bond or other form of acceptable financial assurance.[31] Thereafter, notice of the status of remediation on the site is required to be provided as between buyers and sellers of units within the common interest community.

The revisions made by Public Act 11-141, § 10, (X), (Y) and (Z), and Public Acts 12-32, 12-188 and 13-308 included exemptions for sites considered "Brownfields" under the legislation, but see Public Act 11-211, which may have created a discrepancy in when such provisions become effective.

5.2.4 Other Selected Definitions

The Transfer Act applies to the transfer of facilities that generate "hazardous waste," a term defined to mean waste identified as hazardous waste under RCRA,[32] waste identified by regulation promulgated by the CTDEEP, and material that contains PCBs in concentrations greater than 50 parts per million.[33] Sewage sludge and lead paint abatement wastes, even if hazardous waste, are exempt from the definition of hazardous waste under the Transfer Act.[34]

The Transfer Act also defines "certifying party" and "party associated with the transfer of an establishment."[35] A "certifying party" is "a person associated with the transfer of an establishment who signs a Form III or Form IV[36]

29. Conn. Gen. Stat. § 22a-134(1)(V).
30. Public Act 06-76.
31. *Id.*
32. Resource Conservation and Recovery Act of 1976, codified at 42 U.S.C. 6901 *et seq.*
33. Conn. Gen. Stat. § 22a-134(4).
34. *Id.*
35. Conn. Gen. Stat. § 22a-134(6), (7).
36. See discussion in following section regarding the filing of Transfer Act forms.

and who agrees to investigate the parcel in accordance with prevailing standards and guidelines and to remediate pollution caused by any release at the establishment . . . ."[37] A "party associated with a transfer of an establishment" includes either "(a) present or past owner or operator of the establishment, (b) the owner or operator of the real property on which an establishment is located, (c) the transferor, transferee, lender, guarantor or indemnitor, (d) the business entity which operates the establishment, or (e) the state."[38] The distinctions between these terms is important when filing a Form III or IV because the DEEP looks to every certifying party for compliance with the Transfer Act, until a site is verified, a position which is nowhere mentioned in the Transfer Act or supported by legislative history.

5.2.5 Procedure for Filing Transfer Act Forms[39]

(a) General Use of New Forms.

The transfer of an establishment requires specific DEEP forms be completed and filed with DEEP. Because business operations can be transferred separately from real property, DEEP has established two sets of each type of form: one for use when only a business operation is transferred, and the other for when real property, or both real property and the business operations are transferred.[40]

(b) Form I Filing.

A "Form I" is used when a transfer under the Transfer Act occurs, but where there has been no release of hazardous waste or hazardous substances[41] at the establishment.[42] The certification must be based on a written investigation of the parcel in accordance with prevailing standards and guidelines, which in Connecticut generally means consistent with DEEP site assessment guidance. In other words, DEEP expects a site to be fully characterized, including collection of soil and, as necessary, groundwater samples, before making a certification that no such releases have occurred. Given the broad range of materials constituting a release (for which there is no *"Deminimus"* exception), even clean operations may be precluded from filing a Form I because petroleum products (oil or lubricants dripping from automobiles) have been released to an on-site parking lot.[43] The practical result of changes made to the Transfer Act in 2001 and 2003 is to significantly increase the cost and time necessary to make an applicability determination as to which form to file under the Act, and diminish the practical availability of using a Form I. Therefore, most initial forms filed after October 1, 2001, have been "Form IIIs," as described below, thus making innumerable sites go through an expensive and time consuming process, only to conclude at the end, that no remediation was necessary. Only the transferor may file a Form I, which must be provided to the transferee prior to the transfer, and thereafter filed with the DEEP within 10 days after the transfer.[44]

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37. § 22a-134(6), as amended. For a Form I and II, only the transferor may sign the forms. In 1999, amendments sought to force DEEP to create regulations to guide the evaluation of sites, but the 2001 amendments deleted that provision. The DEEP "Site Characterization Guidance Document" revised to December 2010, has been developed and is widely used to evaluate Transfer Act sites. The concern of the consulting community is DEEP's tendency to regulate by policy or guidance document not subject to public scrutiny.
38. *Id.* § 22a-134(7), as amended, exempting court appointed trustees and bankruptcy trustees.
39. Transfer Act forms are available from the Commissioner of the DEEP, or from DEEP's website: http://deep.state.ct.us
40. *Id.*
41. "Hazardous Substances" are broadly defined to include CERCLA hazardous substances and petroleum products and by-products. P.A. 01-204, § 15(24).
42. Public Act 06-76, embodied in section 22a-134 of the Connecticut statutes effective October 1, 2006, modified the definition of Form I to require, where the commissioner or a licensed environmental professional issues the form to verify that hazardous waste has been remediated, the form must also verify that "since any such written approval or verification, including any approval or verification for a portion of an establishment, no discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste or hazardous substances has occurred at any portion of the establishment." This language also now applies to Form II filings.
43. Public Act 03-218. The determination that hazardous substance has been remediated to prevailing standards and guidelines must be in writing.
44. Conn. Gen. Stat. § 22a-134a(c), as amended.

(c) Form II Filing.

A Form II can be filed when there is a transaction within the meaning of the Transfer Act, and hazardous waste or hazardous substances have been released from the establishment, and such release has been remediated to the written satisfaction of the DEEP or a Licensed Environmental Professional in accordance with applicable standards, or when no remediation is necessary to achieve compliance with the remediation standards.[45] A Form II may also be filed after a Form IV verification is filed, and no additional discharges have occurred at the establishment since such verification.[46] Only the transferor may file a Form II, which must be provided to the transferee prior to the transfer, and thereafter filed with the DEEP within 10 days after the transfer.[47]

(d) Form III Filing.

A Form III can be filed when a "transfer of establishment" occurs and hazardous waste or hazardous substances have either been released at the establishment, or the environmental condition of the establishment is unknown.[48] With a Form III, the "certifying party" agrees to investigate the entire parcel, and remediate any release identified from the establishment in accordance with the remediation standards.[49] As mentioned above, this is likely the most common form to be filed after October 1, 2001. It bears noting that changes made to the Act in 2001 provide relief for certifying parties having to remediate an entire parcel, when a business operation is an establishment and occupies only a portion thereof. While the entire parcel is evaluated for releases, only those attributed to the business operations that are an establishment and are being transferred, require remediation. Otherwise, for real property transfers, the entire parcel is the establishment and must be fully evaluated and remediated.

For a Form III, the transferor is responsible for completing the form, and such form must be executed by both parties prior to the transfer, and filed by the transferor with DEEP within 10 days after the transfer.[50] If no party to the transfer prepares and signs the Form III as a certifying party, the transferor is obligated to do so.[51]

(e) Form IV Filing.

A Form IV can be filed by a "certifying party" (or parties) when a "transfer of establishment" occurs and when remedial actions at the establishment have been completed, but post-remediation or natural attenuation monitoring is required or is on going.[52] The certifying party agrees to continue the post-remediation monitoring and, if necessary, undertake additional remedial actions if required by the Commissioner as a result of the post-remediation monitoring program.[53]

For a Form IV, the transferor is responsible for completing the form, and such form must be executed by

45. As verified or determined in writing by an LEP or the Commissioner. Conn. Gen. Stat. § 22a-134(11), as amended. *See also*, note 41, *supra*.
46. Conn. Gen. Stat. § 22a-134(11), as amended.
47. Conn. Gen. Stat. § 22a-134a(c), as amended.
48. Conn. Gen. Stat. § 22a-134(12), as amended.
49. *Id.*
50. Conn. Gen. Stat. § 22a-134a(c), as amended.
51. Conn. Gen. Stat. § 22a-134a(c), as amended.
52. Conn. Gen. Stat. § 22a-134(13), as amended. Note it is DEEP's interpretation that, under the RSR's, one year of quarterly groundwater monitoring must first occur ("compliance monitoring"), before a Form IV is available for use.
53. *Id.*
54. Conn. Gen. Stat. § 22a-134a(c).

both parties prior to the transfer, and filed by the transferor with DEEP within 10 days after the transfer.[54] If no party to the transfer prepares and signs the Form IV as a certifying party, the transferor is obligated to do so.[55]

(*f*) *ECAF Filing.*

With the exception of a Form II, all forms filed under the Transfer Act must be simultaneously accompanied by a completed "Environmental Condition Assessment Form" or "ECAF."[56] Completion of this form requires detailed information about the site and the site's environmental condition. A licensed environmental professional is required to complete or supervise completion of the ECAF,[57] and the certifying party must sign the document.[58] Furthermore, the Commissioner may request all supporting documentation regarding compliance under the Transfer Act,[59] and requires it by virtue of the Forms and instructions prepared by CTDEEP. [60]

5.2.6 Commissioner's Response to Filing Forms

The statute requires the Commissioner to respond to the certifying party within certain time frames.[61] In addition, certain sites are delegated a "licensed environmental professional to manage the investigation and remediate the site."[62] Certain sites may also undertake voluntary remedial efforts under the statutes.[63] Voluntary Remediation programs are discussed in other sections of the Handbook.

For a Form I or Form II filing, the Commissioner shall notify the transferor no later than ninety days after submittal of the form, if the Commissioner deems the form incomplete.[64]

The Commissioner has thirty days to determine whether a Form III or Form IV is complete or incomplete.[65] If a Form III was filed prior to October 1, 1995 (when ECAFs did not exist), the owner may also submit an ECAF to the Commissioner for a determination.[66] Upon the receipt of a completed Form III, Form IV or ECAF, where appropriate, the Commissioner will issue a letter acknowledging receipt and completeness of the filing and an establishment is automatically delegated to a licensed environmental professional if the Commisioner does not otherwise retain oversight of the establishment.[67] The Transfer Act establishes elements for evaluating the ECAF to determine if the site will qualify for review by the licensed environmental professional.[68]

Except as provided by the Transfer Act, the certifying party must submit a schedule to the DEEP for investigating

55. *Id.*
56. Conn. Gen. Stat. § 22a-134a(d) as amended by Public Act 03-218.
57. The ECAF is defined under Conn. Gen. Stat. § 22a-134(17), as amended.
58. Conn. Gen. Stat. § 22a-134a(c), as amended.
59. *Id.*
60. *See* Transfer Act Forms and Instructions on CTDEEP website.
61. Conn. Gen. Stat. § 22a-134a(c) and (e) as amended.
62. *Id.* at §22a-134a(e). Note that Public Act 07-81, "An Act Concerning Licensed Environmental Professionals," makes use of licensed environmental professionals standard procedure for site remediations and cleanups, unless the Commissioner chooses otherwise.
63. Conn. Gen. Stat. § 22a-133x. A general discussion regarding voluntary remedial actions is found in later Sections of the Handbook.
64. Conn. Gen. Stat. § 22a-134a(c) as amended. Note: While practice may dictate the Commissioner also notify the transferor if the filing is complete, the statutes do not require him to do so.
65. Conn. Gen. Stat. § 22a-134a(e), as amended by Public Act 01-204.
66. *Id.*
67. Public Act 07-233. Note that prior to the 2007 Transfer Act Amendments, the Commissioner had forty-five days to determine whether to retain responsibility for a site or delegate to a licensed environmental professional.
68. Conn. Gen. Stat. § 22a-134a(f), as amended by Public Act 07-233.
69. DEEP has issued guidance indicating that such schedule should be submitted within seventy-five days of receiving the notice of completion letter. Conn. Gen. Stat. § 22a-134a(g), as amended by Public Act 07-233.

and remediating the establishment on or before seventy-five days after receiving notice that its form was complete.[69] The schedule must provide that the investigation of the parcel be completed within two years of the date that DEEP determines a LEP may evaluate the site, and the remediation must be initiated within three years of the date of receipt of such notice.[70] Verification by an LEP that the remediation is complete must be filed with the Commissioner within eight years of filing, but exceptions are available.[71]

The Transfer Act provides that the Commissioner may conduct an audit of any verification, but shall not conduct an audit of a final verification of an entire establishment after three years from receipt of such final verification. Upon completion of an audit, the Commissioner shall send written findings to the certifying party and licensed environmental professional who verified the site. These provisions only apply to final verifications received after October 1, 2007. The Commissioner may request additional information during an audit, and if that information is not provided within ninety days of the request – or any longer time period the Commissioner may determine in writing – the Commissioner may suspend the audit or complete the audit based upon provided information. The Commissioner's suspension of the audit shall suspend the running of the three-year time frame until the Commissioner receives the additional information. It has been the practice for the Commissioner to issue "no audit letters" for verifications it screens and believes to be acceptable, although still reserving the right to return to the verification within the three-year time period, if circumstances so dictate.

The Commissioner shall not conduct an audit after the three-year time frame unless one of six exceptions applies: (1) verification obtained through submittal of materially inaccurate, erroneous, or misleading information, or misrepresentations made; (2) verification submitted pursuant to an Order issued under the Transfer Act; (3) any post-verification monitoring is required but has not been done; (4) an environmental land use restriction has not been properly recorded; (5) the Commissioner determines there has been a violation of the Transfer Act; or (6) the Commissioner determines that the remediation failed to prevent a substantial threat to the public heath or the environment.

If the Commissioner retains jurisdiction over remediation of the parcel, then the certifying party must submit to him a schedule for review and approval.[72] The schedule, however, may be revised and approved in writing.[73]

An important element of the above schedule is that the certifying party must publish notice in a local newspaper prior to initiating remediation, and notify the Director of Health of the municipality where the parcel is located.[74] In addition, the certifying party must either erect and maintain a six foot by four foot sign on site for thirty days, or mail notice of the remediation to each owner of record abutting the parcel.[75]

Orders may be issued by the Commissioner to any person not complying with the Transfer Act, including to either the transferor or transferee, or both.[76]

If a parcel has been fully remediated under a Form III or IV, or a Form I or Form II has been filed after October 1, 1995, then the Transfer Act provides an exemption for subsequent Transfer Act filings.[77] However, this exemption

70. Conn. Gen. Stat. § 22a-134a(g)
71. *Id.*
72. Conn. Gen. Stat. § 22a-134a(h), as amended by Public Act 01-204.
73. *Id.*
74. Conn. Gen. Stat. § 22a-134a(i), as amended by Public Act 01-204.
75. Public Act 03-218.
76. Conn. Gen. Stat. § 22a-134a(j), as amended by Public Act 01-204. Violations can include failure to file, or incorrect or incomplete filings, and the Commissioner may refer the matter to the Attorney General for enforcement.
77. Conn. Gen. Stat. § 22a-134a(l), as amended by Public Act 01-204.

only exists provided that the remediation has been completed and approved in writing by the Commissioner or verified by a licensed environmental professional, and that no subsequent activities have occurred on the site after the Commissioner approval or verification that would thereafter qualify it as an establishment.[78] An important clarification to the extent of a verification was made by Section 4 of Public Act 11-141 in 2011. That section provides that a certifying party is responsible to verify a site's environmental condition as of the filing of the Form III or IV, or completion of a Phase II, whichever is later, thus eliminating the DEEP's previous interpretation that a site's environmental condition must be evaluated, remediated and updated as of the filing date of the verification.

5.2.7 Damages and Penalty for Noncompliance

A private remedy for damages under the Transfer Act has survived various legislative revisions. A transferee is entitled to recover damages from the transferor and render the transferor strictly liable without regard to fault, for remediation costs and all direct and indirect damages.[79] And, as of October 1, 2001, the Commissioner has the ability to assess a civil penalty of up to $25,000 per day, per violation, for violating any provision of the Transfer Act.[80]

5.2.8 Fees

The fee schedule established for Form III's under the Transfer Act that are not delegated to an LEP are tied to the "cost of remediation," which includes the total costs related to investigating the on and off site pollution, evaluating remedial alternatives, designing and implementing the approved remediation, and operating and maintaining the remedial effort, including post-remediation monitoring.[81] The fee for filing a Form I is $300, the fee for filing a Form II is $1,050, except when an approval of such remedial efforts was obtained within three years of the transfer, then the scale utilized for filing a Form III applies.[82] The initial fee for filing a Form III or IV is $3,000.[83] If the site qualifies for review by a licensed environmental professional, then no further fee shall be required.[84] If the DEEP retains jurisdiction over the site, prior to issuing a final approval of the remediation, the following total fees for a Form III shall be due:[85]

COST OF REMEDIATION	TOTAL TRANSFER ACT FEE (Note: The initial $3,000 filing fee is deducted from these figures)
Equal to or greater than $1,000,000	$34,500
Equal to or greater than $500,000 but less than $1,000,000	$30,000
Equal to or greater than $100,000 but less than $500,000	$21,000
Equal to or greater than $50,000 but less than $100,000	$6,700
Equal to or greater than $25,000 but less than $50,000	$4,000
Less than $25,000	$3,000

Fees for Form IV are 50% of the Form III fees, with the exception that, for all remediation less than $50,000, the Transfer Act fee is $3,000.[86] As mentioned above, if a Form II or Form IV is filed within three years of receiving

78. *Id.*
79. Conn. Gen. Stat. § 22a-134b.
80. Conn. Gen. Stat. § 22a-134d, as amended.
81. Conn. Gen. Stat. § 22a-134e(a).
82. Conn. Gen. Stat. § 22a-134e(b), and (m), as amended by June 30 Special Session, Public Act 03-6, Section 119.
83. Conn. Gen. Stat.. § 22a-134e(m), as amended by June 30 Special Session, Public Act 03-6, Section 120.
84. *Id.*
85. Conn. Gen. Stat. § 22a-134e(n), as amended by June 30 Special Session, Public Act 03-6, Section 120.
86. Conn. Gen. Stat. § 22a-134e(o), as amended by June 30 Special Session, Public Act 03-6, Section 120.

final approval from the Commissioner pursuant to 22a-133x of the statutes, and a transfer occurs within that time period, then the Form III schedule of fees applies.[87] The initial $3,000 Form III or Form IV filing fee is not required if a voluntary filing was made under § 22a-133x, if a Transfer Act filing is made within three years.[88]

5.2.9 Withdrawal from the Transfer Act

Any certifying party who has submitted a Form III or Form IV to the DEEP prior to October 1, 2001 may comply, after providing notice to the transferor, transferee and, if different, the owner of the parcel, with the requirements under the revised law, as opposed to what was in effect prior to October 1, 2001.[89]

In addition, any person who has submitted a Form I, Form II, Form III or Form IV to the DEEP, may petition the Commissioner to withdraw such form.[90] Such petition shall notify the transferor, the transferee and the certifying party by certified mail. The petitioner shall make every reasonable effort to identify the address of such transferor, transferee and certifying party. The transferor, transferee and certifying party shall have thirty days to submit to the Commissioner written objections to such petition. The Commissioner may approve the petition if it demonstrates to the Commissioner's satisfaction that the property or business was not an establishment or the transaction was not a transfer at the time the form was submitted. If the Commissioner approves the petition, no further action is required by the certifying party with respect to its obligations under the form, but the form and the fee shall not be returned.[91]

87. Conn. Gen. Stat. § 22a-134e(p).
88. Conn. Gen. Stat. § 22a-133x(e).
89. Public Act 01-204 § 21(a), as codified at § 22(a)-134h(a).
90. Public Act 01-204 § 21(b), as codified at § 22(a)-134h(b).
91. *Id.* Of course not. . . .

About the Author

John E. Wertam
jwertam@goodwin.com
(860) 251-5813

John Wertam is a Partner in the Firm's Real Estate, Environment, Energy and Land Use Practice Group. He has extensive counseling experience in all areas of environmental law. He practices primarily in the areas of hazardous waste management, wastewater discharge permitting, site assessment and risk evaluation, permitting, enforcement defense and lender liability. He also has broad experience negotiating environmental issues in business and real estate transactions.

John has lectured for over thirty years on environmental topics including the Connecticut Transfer Act, and is author of all five editions of the *Connecticut Environmental Law Handbook*. He brings a unique background and extensive experience to the practice of environmental law and the resolution of environmental issues. His experience with the Connecticut Transfer Act and Connecticut Remediation Standard Regulations allows him to effectively counsel clients on the risks and liabilities associated with transferring property or business operations in Connecticut.

If you have any questions about the Connecticut Transfer Act or any other environmental matters, please feel free to contact John.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1875 K Street NW - Suite 600
Washington, DC 20006-1251
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

www.shipmangoodwin.com