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ENVIRONMENTAL LAW
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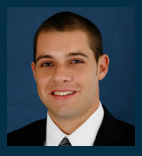

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# Connecticut Legislature Passes Key Amendments to the Connecticut Transfer Act

During the last week of the 2019 Connecticut legislative session, the General Assembly passed Senate Bill 1030 (SB 1030) amending one of the most onerous Connecticut environmental laws on the books, the Connecticut Transfer Act, C.G.S. §§ 22a-134 *et seq.* (the "Transfer Act").

Assuming it is signed into law by Governor Lamont (expected within the next few weeks), the changes to the Transfer Act will take effect on October 1, 2019. While the amendments fall short of a complete overhaul of the Transfer Act (as many would argue is appropriate and necessary), they are a step in the right direction by affirmatively excluding the transfer of certain properties and businesses (that have historically been snared by the broad Transfer Act liability net) from the requirements of the Transfer Act, including, for example, the "one time" hazardous waste generators.[1]

## What is the Transfer Act?

The Transfer Act applies to the "transfer of an establishment." In order for the Transfer Act to apply, therefore, two questions must be answered in the affirmative. First, is the property or business being transferred an "establishment"? Second, is the transaction a qualifying "transfer of establishment"? If the answer to both questions is "yes," then the transaction would trigger the Transfer Act and certain filings (i.e., a Form I, II, III or IV) must be made with the Connecticut Department of Energy & Environmental Protection ("DEEP") within ten (10) days of the transfer, along with supporting technical documentation (and, of course, a DEEP filing fee!).

Depending on the required form filing, potentially significant, costly and time-consuming post-closing environmental investigations and remediation of the site may be required. As a result, the Transfer Act, which is unique to Connecticut (although there is a similar "cousin" statutory program in New Jersey), has a direct and negative impact on real estate and business transactions in the state.

While the Transfer Act is, in part, intended to ensure: (a) a seller discloses to a buyer (and to DEEP) the environmental status of a property and/or business; and (b) that a party take responsibility to investigate and, if required, clean up the property after closing (referred to as the "Certifying Party"), the Transfer Act has historically cast a wide net, impacting parties

1 Given the negative impacts to real estate and business transactions in Connecticut, we often refer to the Transfer Act, with a nod to the Eagles rock band, as "Hotel California," as "you can [try and] check out anytime you like, but you can never leave [or else it costs a real lot and takes a very long time]."

and transactions not intended to be subject to the law.[2] The amendments to the Transfer Act are intended to help shrink the liability net to exclude such properties and businesses and, hopefully, spur economic development by allowing more deals to close without triggering the requirements of the Transfer Act, thereby saving parties from otherwise expensive and time-consuming post-closing environmental investigations that provide limited (and in some cases, zero) environmental benefit.

As is generally the case, however, the devil is in the details and time will tell how the regulated community and DEEP (and the environmental consultants and lawyers that deal with the Transfer Act every day) interpret these amendments and apply them to real world real estate and business transactions.

## The New Exceptions to an "Establishment"

Pursuant to the Transfer Act, an "establishment" includes any real property at which or business operation from which, on or after November 19, 1980, there was generated more than 100 kilograms (220 pounds, or roughly half of a 55-gallon drum of liquid) of hazardous waste in any one month, except as a result of the remediation of polluted soil, groundwater, or sediment, or the removal or abatement of building materials.[3]

SB 1030 amends the definition of "establishment" to specifically exclude any real property or any business operations from which more than 100 kilograms of hazardous waste was generated in any one month solely as a result of:

- The one-time generation of hazardous waste as a result of either the first time such waste was generated or the first time such waste was generated since the last Transfer Act filing was made with DEEP;
- The removal of materials used to maintain or operate a building;
- The removal of unused chemicals or materials as a result of the emptying or clearing out of a building, provided such removal is supported by facts reasonably established at the time of such removal; and
- The complete cessation of a business operation, provided the hazardous waste is removed not later than ninety days after such cessation and such cessation is supported by facts reasonably established at the time of such cessation.

## DEEP's Audit Period Shortened

In addition, SB 1030 also shortens the period of time that DEEP has to audit the final close out report (known as a "Verification") submitted by a party performing Transfer Act required work. Currently, DEEP may audit a Verification submitted by a Licensed Environmental

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2 Two (all too) common examples, include: (1) a property owner who has never generated hazardous waste on site wakes up one morning to find that someone has left a 55-gallon drum of hazardous waste on its property (i.e., the "midnight dumper scenario") could make the site an "establishment" by appropriately sending the waste offsite for disposal as hazardous waste and, therefore, be required to comply with the Transfer Act upon a sale of the property; and (2) a "big box" retail store that accepts returns from customers of household products (e.g., aerosol cans, paint) and appropriately ships the returned and expired products from the site as hazardous waste also could be considered an "establishment" under the Transfer Act for having "generated" more than 100 kilograms of hazardous waste on site within one month simply by accepting returned household products and appropriately transporting and disposing of the material offsite as hazardous waste in a single monthly event.

3 "Establishments" also include any real property at which or business operations from which: hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported or disposed of; the process of dry cleaning was conducted on or after May 1, 1967; furniture stripping was conducted on or after May 1, 1967; or a vehicle body repair facility was located on or after May 1, 1967. C.G.S. § 22a-134(3).

Professional ("LEP")[4] on behalf of the party performing the required Transfer Act investigation/remediation work within three (3) years after the Verification is submitted to DEEP. In another attempt to appease the regulated community (without sacrificing protection of human health and the environment), SB 1030 shortens the time period DEEP has to initiate and complete an audit by requiring that (absent extenuating circumstances) any audit be initiated within one (1) year of submittal of the Verification and completed within three (3) years.

## Further Changes to the Transfer Act Possible in 2020

Recognizing that there is more work to be done, SB 1030 also requires that the Commerce and Environment Committee chairpersons create a working group to further examine the Transfer Act and recommend further legislative changes by February 1, 2020. So, stay tuned!

## In the Meantime…

While the amendments to the Transfer Act include changes helpful to the regulated community, it is not yet clear how the new exceptions to the "establishment" definition will be applied in practice and what the standard of care will (or should be) for establishing facts to support them. It also remains to be seen how the shortened period for initiating an audit will play out given the budget and personnel constraints at DEEP. While certain types of transactions that previously triggered the Transfer Act no longer will (assuming Governor Lamont signs the bill and after the changes become effective), the Transfer Act is still a very broad-reaching and impactful Connecticut statute, and its potential applicability should be evaluated in connection with most (if not all) real estate and business transactions involving Connecticut properties and businesses. As a result, parties dealing with the potential applicability of the Transfer Act are best served when working with qualified and knowledgeable environmental consultants and lawyers.

## Questions or Information:

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4 LEPs are persons specifically qualified to engage in activities associated with the investigation and remediation of contaminated properties and licensed by the State Board of Examiners of Environmental Professionals to render verifications regarding such remediation. C.G.S. § 22a-133v.



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