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## **OLR Bill Analysis**

### **sHB 6526**

#### ***AN ACT CONCERNING BROWNFIELD REMEDIATION AND DEVELOPMENT AS AN ECONOMIC DRIVER.***

#### **SUMMARY:**

This bill makes many changes to the laws and programs governing how parties may clean up and redevelop contaminated property (i.e., brownfields). Parties undertaking such projects may be liable for contamination that existed before they acquired the property. The bill provides more protection from that liability. It:

1. requires the Office of Brownfield Remediation and Development (OBRD) to establish a program protecting property owners from liability to the state and third parties if they remediate a brownfield according to Department of Environmental Protection (DEP) standards;
2. explicitly limits the party (known as the certifying party) responsible under the Transfer Act to investigating and remediating only the contamination that existed on the property before it was transferred or the required DEP forms were filed, whichever is later; and
3. allows more property to qualify for liability protection under a Department of Economic and Community Development (DECD) program and opens it to municipalities and specific types of developers acting on their behalf.

The bill also makes changes to the regulatory requirements for remediating brownfields. It:

1. exempts parties from paying various DEP fees when remediating these sites with state funds,

2. gives developers another device for imposing use restrictions on remediated property (i.e., Notice of Activity and Use Limitation), and
3. creates a framework for reviewing and revising remediation standards and surface and ground water classifications and evaluating policies and programs affecting the property owners' ability to clean up and redevelop brownfields.

The bill makes permanent two brownfield funding programs; makes structural changes to OBRD; and extends the Brownfield Working Group's term, increases its membership, and makes the DECD and DEP commissioners its co-chairpersons.

EFFECTIVE DATE: Upon passage, except for the provisions concerning OBRD's structure, the new liability protection program, the existing brownfield funding programs, and the fee exemptions, which take effect July 1, 2011.

## **§ 17 — NEW LIABILITY PROTECTION PROGRAM**

### ***Purpose***

The bill requires OBRD to establish a program protecting owners from liability when remediating and developing brownfields. OBRD may accept up to 20 properties per year, but must add more during a year if a property drops out of the program or its owner finishes remediating it. OBRD is a unit of DECD.

The bill's program protects owners and their successors from liability to the state and third parties for any contamination at the property that others caused. But this protection does not prevent the DEP commissioner from requiring any remedial action if:

1. the owner provided false information about the property or failed to implement the remediation plan,
2. additional contamination was uncovered at the property after OBRD accepted it into the program, and

3. exposure levels increased to the point threatening human health or the environment.

### ***Eligibility***

The program is opened to innocent landowners (i.e., owners who did not cause the pollution on their property), people and entities interested in purchasing a contaminated property (i.e., bona fide prospective purchasers), municipalities, economic development agencies, and people who own property next to a brownfield. The entities qualify only if they did not contaminate the property and are unaffiliated with those that did.

A party may participate in the program if its property is significantly contaminated (based on the bill's criteria) and its remediation will create jobs, increase the municipality's tax base, and address specific land use planning goals, including smart growth and transit oriented development. It also qualifies if the property is being remediated under a DEP program. But the party does not qualify if the property is on the federal government's national priorities list of contaminated property or must be remediated under a state or federal order.

The bill also allows municipalities and economic development agencies to nominate property for participation and requires OBRD to accept these nominations. But it does not prescribe the nomination process.

The bill specifies that acceptance into the program does not prevent an owner from seeking funds under other federal, state, and local programs.

### ***Application***

Property owners must apply to OBRD to have their property accepted into the program. An owner must include a title search, environmental condition assessment form, and other documents the bill specifies. The applicant must certify that the information in the application is correct and accurate to the best of the applicant's

knowledge.

Applicants other than municipalities and economic development agencies must pay a \$10,000 application fee, which DEP may use only to prevent pollution from the participating properties from contaminating other property. The bill imposes an additional \$5,000 fee on all applicants when they transfer property.

**Process**

The bill contemplates a seven-step process for providing liability protection.

1. OBRD must determine if an application is complete within 30 days after receiving it and notify the applicant about its decision. The application is automatically considered complete if OBRD misses this deadline.
2. Within 60 days after notifying the applicant that its application is complete, OBRD must decide whether to accept the property into the program. The property is automatically accepted if OBRD misses this deadline. Once the property is accepted, the bill protects its owner from liability to the state or any third party for pollution released at or from the property, unless the owner caused or contributed to it or exacerbated conditions that caused the pollution release. The owner must investigate and remediate only the contamination within the property according to DEP standards. The owner is not required to address contamination beyond the property unless the owner caused or contributed to it.
3. Within 180 days after OBRD determines that the owner's application is complete, the owner must prepare and submit to OBRD and DEP a plan and schedule to remediate the property, signed and stamped by a licensed environmental professional (LEP). The plan and schedule must provide for the property's remediation within eight years after the application's approval date. During the 180-day period, the owner must notify the

public about the plan and schedule and give 30 days for public comment on them. Within 60 days of notifying the public, the owner must submit its response to the public's comments to OBRD and DEP.

4. DEP has 60 days from receiving the owner's response to the public comments on the plan and schedule to approve or reject it. The plan is automatically approved if DEP misses this deadline. If DEP rejects the plan in whole or in part, DEP must explain its reasons to the owner, who then has 30 days to respond. This process may continue until DEP approves the plan or the owner withdraws from the process.
5. After DEP approves the plan and schedule, the owner may begin remediating the property after notifying the public in the affected town and its health director and posting a notice at the property. An LEP must supervise the work and submit a report to OBRD that includes a verification or interim verification stating that the clean-up met DEP standards. DEP may extend the eight-year deadline if the owner makes reasonable progress toward investigating and remediating the property, but circumstance beyond the owner's control delay the work.
6. DEP has 90 days to approve the report or require the work to be audited. The report is automatically approved if DEP misses this deadline. If DEP requires an audit, the audit must be conducted within six months after DEP required it. The audit report must go to the applicant, the OBRD director, and the LEP. The audit may approve or disapprove the report and state the reasons for the disapproval. The owner may address these reasons using the process the bill provides.
7. After DEP approves the final remedial report, the commissioner must issue a notice indicating that the work is completed and that no further action is needed. The notice must state the scope of the owner's protections, which do not include relief from any liability imposed on the owner under federal and state

environmental protection laws. The DEP commissioner may require an audit 90 days after the LEP submitted the final report if the commissioner believes the report was based on inaccurate, erroneous, or misleading information or the actions the bill specifies are not being taken.

### ***Transfers***

The bill allows owners to transfer the property, along with the protections from liability, during or after its remediation. The party acquiring the property must meet the bill's criteria and it or the previous owner must pay a \$5,000 transfer fee to the commissioner. This requirement applies to property municipalities and economic development agencies transfer for redevelopment, but not to property they acquire after remediation. The fee revenue may be used only to address contamination spreading beyond properties in the program. The bill exempts transfers from the Transfer Act.

### ***Regulations***

The bill allows the OBRD director to adopt implementing regulations.

## **REGULATORY CHANGES**

### ***§ 4 — Certifying Party's Responsibility under the Transfer Act***

The bill limits the certifying party's responsibility under the Transfer Act. Parties involved in the sale or transfer of a potentially contaminated property must complete and submit a Form III, which notifies DEP about the transaction, their knowledge about the property, and the party who will investigate and remediate it (i.e., certifying party). After the certifying party remediates the property, it must complete and submit a Form IV to DEP, certifying that the property was remediate according to state standards.

The bill specifies that the certifying party does not have to investigate or clean up any real or potential contamination that occurs after the transfer date or the date when the parties filed the Form III or IV with the commissioner, which ever is later.

**§ 9 — Fee Exemptions**

The bill exempts entities receiving state brownfield clean-up and redevelopment funds from paying DEP fees for environmental condition assessment forms; covenants not to sue; Transfer Act forms; and for searching, duplicating, and reviewing records requested under the Freedom of Information Act. The exemption applies to new and pending applications.

The bill similarly exempts state agencies from paying the required fees when investigating or remediating a brownfield for siting a state facility.

**§§ 10-12 — Abandoned Brownfield Cleanup (ABC) Program**

The bill makes several changes to this DECD program, which protects developers from liability for investigating and remediating contamination that spread from the property before they acquired it. It extends eligibility for protection to (1) municipal agencies and (2) nonprofit organizations and non-stock and limited liability companies acting on a municipality's behalf.

The bill also extends eligibility to more types of brownfields. Under current law, a brownfield qualifies for the program only if it has been unused or significantly underused since October 1, 1999. Under the bill, property qualifies if has been in either condition for at least five years before the developer applied for the program.

The bill extends additional protections and benefits to developers and municipalities whose brownfields were accepted into the program. It exempts them from filing the required Transfer Act forms and paying the covenant not to sue fee. It also designates them "innocent parties" and specifies conditions exempting them from liability to the DEP commissioner and or other parties implementing abatement orders under the statutes or common law. This exemption does not extend to negligent or reckless actions that exacerbated the contamination.

**§11—Transfer Act Exemptions**

The bill makes a corresponding change to the Transfer Act exempting brownfields participating in the ABC program from the act's requirements. It also exempts title transfers from a municipality or bankruptcy court to a nonprofit organization.

**§§ 13 & 14 — Notice of Activity and Use Limitation (NAUL)**

The bill authorizes the use of NAULs in addition to environmental land use restrictions. Like these restrictions, NALUs are notices in the land records alerting a prospective purchaser about a property's environmental conditions and restrictions placed on its use. But they can only be enforced against the owner or his or her successors, not lenders and other parties with an interest in the property.

The bill allows owners to record a NAUL to ensure compliance with specified environmental remediation standards and controls. Owners must notify parties with an interest in the property by certified mail at least 60 days before recording the notice. The owner must begin implementing and complying with the notice's requirements once he or she records it. The owner must also comply with the bill's recording requirements.

Lastly, the bill extends the attorney general's and the DEP commissioner's power to enforce environmental land use restrictions to NAULs.

**FUNDING**

**§ 8 — Brownfield Remediation Grant and Loan Program**

DECD operates separate grant and loan programs for remediating brownfields that use common definitions and terms. The bill makes it easier for contaminated property to qualify for funding under both programs. It extends eligibility to abandoned or underutilized property where real or potential contamination requiring investigation or remediation may complicate redevelopment, reuse, or expansion. Under current law, a property is eligible for funding only if real or potential contamination prevents it from being redeveloped and reused.

**§ 1 — *Municipal Brownfield Program***

The bill makes permanent and expands the Municipal Brownfield Pilot Program under which DECD provides grants to municipalities for investigating and remediating brownfields. Current law authorizes the commissioner to fund brownfield projects in five municipalities, four based on population criteria and one without regard to population.

In making the program permanent, the bill allows the commissioner to fund more projects, but requires her to do so in separate funding rounds, which the bill does not describe. The bill allows her to fund projects in six municipalities per round, two without regard to the population criterion.

By law, DEP or a licensed environmental professional must supervise the investigation and clean-up. When an LEP supervises the work, current law requires DEP to determine that the work is complete if the LEP submits a report to that effect. The bill gives the DEP commissioner the option to determine that he will not audit the work.

In acknowledging that a project is completed, current law allows the commissioner to indicate that the remedial actions have been taken and that no more action is needed, except onsite monitoring or recording an environmental land use restriction on the property. The bill limits the exceptions to onsite monitoring and allows LEPs, as well as the commissioner, to indicate when the project is completed and no additional remedial action is needed.

**§ 18 — *CDA Tax Increment Bond Financing***

The bill eliminates the July 1, 2012, sunset date for funding new projects under the Connecticut Development Authority's (CDA) tax increment financing program. Under this program, CDA issues bonds on behalf of a municipality and backs them with the new or incremental property tax revenue the completed project generates. The law allows CDA to issue these bonds for (1) cleaning up and redeveloping brownfield projects anywhere in the state and (2) financing information technology projects in economically distressed

municipalities.

## **REGULATORY REVISIONS**

### **§ 5 — Remediation Standards**

The bill requires the DEP commissioner periodically to review standards for remediating contaminated property and recommend changes. He must complete the first review three years after the bill takes effect and every five years after that. He must initiate the five-year reviews by holding a public hearing on the standards' adequacy and revise them if necessary to ensure that the regulations fully protect the health, welfare, and the environment.

In revising the standards, the commissioner must consider (1) how they affect the remediation and redevelopment of brownfields and other contaminated property and (2) the regulations' feasibility and their consistency with the best scientifically available information and federal standards and methods.

### **§ 6 — Surface and Ground Water Reclassification**

The bill allows the DEP commissioner to reclassify surface and ground water beginning March 1, 2011, consistent with the state's water quality standards and applicable federal requirements. The bill's procedures for reclassifying water vary depending on whether the commissioner initiates a reclassification or a person requests it.

If the commissioner initiates reclassification, he must hold a hearing on the proposal, providing separate notice of the hearing's time, date, and place to the public (by newspaper) and municipal officials in the area the proposed reclassification affects. The bill specifies that the hearing does not constitute a contested case, one where a government agency must determine a person's legal rights, duties, or privileges after he or she was heard. After the hearing, the commissioner must provide notice of his decision in the *Connecticut Law Journal* and to the chief elected officials and public health directors in the municipalities the reclassification affects.

People requesting a reclassification must apply to the commissioner

and provide any information he requests. The commissioner must notify the public about the hearing at the applicant's expense. The notice must identify the applicant and the affected waters, indicate the commissioner's tentative decision about the proposed reclassification, and provide the other information the bill requires. The notice must be mailed to the chief executive officers and the public health directors in the affected municipalities at least 30 days before the hearing.

Unlike the hearings held on the commissioner's proposals, the bill is silent on whether this hearing is a contested case. After the hearing, the commissioner must provide notice of his decision the same way he provides notice of the reclassifications he initiates.

**§ 7 — Remediation Programs Evaluation**

The bill requires the DEP commissioner to begin evaluating the state's brownfield remediation programs and the laws that affect this activity within seven days after the bill takes effect. He must report his findings to the governor and the Commerce and Environment committees by February 12, 2012. The commissioner must do this within available appropriations and address these points:

1. factors that influence the time it takes to investigate and remediate a brownfield;
2. the number of properties that enter each remediation program, the rate at which they do so, and the number that complete each program's requirements;
3. the use of LEPs in expediting the remediation process;
4. verification audits LEPs complete;
5. statutory programs providing liability relief to existing and potential landowners;
6. comparison of existing remediation programs to states with a single program;
7. the commissioner's use of studies and other resources available

from various organizations; and

8. recommendations to address the report's issues or streamline or expedite the remediation process.

## **ADMINISTRATIVE CAPACITY**

### **§ 1 — Office of Brownfield Remediation and Redevelopment**

The bill explicitly authorizes the OBRD to promote and encourage people and organizations to clean up and develop or redevelop brownfields. It updates OBRDs statutory duties. It also requires the commissioner to appoint a director to oversee OBRD with the staff, money, and other resources the office needs to fulfill its mission. The bill requires the director to report directly to the commissioner.

The bill requires the Office of Policy and Management to designate at least one staff person to serve as its liaison to OBRD and execute a memorandum of understanding with OBRD in which the two offices specify their respective responsibilities. Current law imposes these requirements on the departments of Environmental Protection and Public Health and the Connecticut Development Authority.

### **§ 16 — Brownfields Working Group**

The bill extends the term of the working group to February 15, 2012, from January 15, 2011, and adds two more members, both appointed by the governor. The group was formed under PA 10-135 to study how the state's brownfields were being cleaned up and remediated. It includes the DECD and DEP commissioners, whom the bill designates as the group's co-chairpersons. Under current law, the members appoint the chairpersons.

## **BACKGROUND**

### ***Related Bills***

HB 6221 and sHB 6527 (File 410) eliminate the July 1, 2012, sunset for funding projects with CDA bonds backed by incremental property tax revenue. The Commerce Committee favorably reported HB 6221 to the Finance Committee on February 15 and sHB 6527 to the floor on March 22.

**COMMITTEE ACTION**

Commerce Committee

Joint Favorable Substitute

Yea 19 Nay 0 (03/22/2011)