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## OLR Bill Analysis

### sSB 1082

#### ***AN ACT CONCERNING BROWNFIELD REDEVELOPMENT, INSTITUTIONAL CONTROLS AND SIGNIFICANT ENVIRONMENTAL HAZARD PROGRAMS.***

#### **SUMMARY:**

This bill establishes a new brownfield liability relief program administered by the Department of Energy and Environmental Protection (DEEP) to assist municipalities with brownfield redevelopment. The bill (1) sets eligibility and other requirements for applicants and brownfields, (2) deems applicants owning brownfields in the program to be “innocent parties,” and (3) exempts participating brownfields from the Transfer Act.

The bill makes many changes to the law’s notification requirements when certain contamination is discovered. Often, notice must be provided to the client of the technical environmental professional who discovers it, the property owner, and the DEEP commissioner. Among other things, the bill:

1. extends the time by which certain notifications must be made;
2. decreases the concentration threshold, from 30 times to 10 times the pollution criterion, that requires notification of certain types of contamination;
3. requires notice for certain contamination involving a nonaqueous phase liquid; and
4. requires additional actions after notification, such as conducting evaluations and sampling and providing the commissioner with proposals for future action.

It also applies a \$100 per day civil penalty that currently applies only to owners who fail to post a certain notice, to anyone who violates

the contamination notification laws.

The bill also requires, instead of allows, recording an environmental land use restriction under certain circumstances, and creates a new “notice of activity and use limitation” to be used for specific types of contaminated properties. The bill establishes the process for preparing and recording the notice and describes its effect once recorded. It also applies current law’s enforcement provisions for environmental use restrictions to these notices.

The bill also makes technical and conforming changes.

EFFECTIVE DATE: October 1, 2013, except the liability relief program is effective July 1, 2013 and the provision requiring notice of certain contamination and well sampling is effective July 1, 2015.

## **§ 1 — BROWNFIELD LIABILITY RELIEF PROGRAM**

### ***Purpose***

The bill requires the DEEP commissioner to (1) administer a brownfield liability relief program and (2) accept eligible brownfields into the program (see below). The program assists applicants with redeveloping eligible brownfields and relieves them of liability for these properties.

If a brownfield is accepted into the program, applicants and others may seek funding for the property from grant or loan programs administered by the Department of Economic and Community Development (DECD), the Connecticut Brownfield Redevelopment Authority (CBRA), or DEEP (see BACKGROUND).

### ***Eligible Applicants***

The program is open to:

1. municipalities;
2. municipal economic development agencies or entities;
3. nonprofit economic development corporations established to promote a municipality’s common good, general welfare, and

economic development, that are partly funded directly or through in-kind services by a municipality; and

4. nonstock corporations or limited liability companies that a municipality or municipal economic development agency or entity establishes or controls.

### ***Eligible Brownfields***

Brownfields are abandoned or underutilized sites where groundwater or soil contamination or pollution in buildings on the site requiring investigation or remediation discourages their redevelopment, reuse, or expansion.

Under the bill, a brownfield is eligible if the DEEP commissioner determines the:

1. property is a brownfield;
2. applicant intends to acquire title to redevelop the brownfield or facilitate its redevelopment;
3. applicant did not create a facility or condition at or on the property that can be reasonably expected to pollute state waters;
4. applicant has no contractual, corporate, or financial relationship with anyone responsible for the property's pollution or pollution sources, other than municipal police, regulatory, or taxing powers, or a contractual relationship to convey or finance the property;
5. applicant is not obligated by law, order or consent order, or stipulated judgment to remediate pollution on or from the property; and
6. brownfield and applicant meet any other criteria he determines necessary.

### ***Application and Acceptance Process***

The bill allows applicants to apply to the commissioner for relief, on

a form he prescribes, before acquiring a brownfield. It requires the DEEP commissioner to determine if an application is complete. If so, and the applicant and brownfield meet the eligibility criteria, the commissioner must notify the applicant of the brownfield's acceptance into the program.

Once a brownfield is accepted into the program and an applicant takes title to it, the bill requires the applicant to:

1. submit a plan and schedule to minimize risk to public health and the environment from the brownfield and the conditions and materials located there and
2. continue helping to investigate, remediate, and redevelop the brownfield.

***Liability Protection***

Once a brownfield is accepted into the program and an applicant takes title to it, the applicant is relieved from liability for the release of a regulated substance at or from the site that occurred before the applicant took title. But the applicant remains liable to the extent it (1) caused or contributed to the release being remediated or (2) negligently or recklessly exacerbated the brownfield's condition.

The bill specifies that applicants owning a brownfield accepted into the program are deemed "innocent parties" and generally not liable for (1) causing water pollution or land contamination, (2) discharging without a permit, (3) maintaining a facility or condition that can be expected to create water pollution, (4) reimbursement for others' containment or removal costs, or (5) any common law theory for the brownfield's prior existing condition as of the date the applicant takes title.

But an applicant is liable if it:

1. established, caused, or contributed to the discharge, spillage, uncontrolled loss, seepage, or filtration of a hazardous substance, material, waste, or pollution;

2. exacerbated any such brownfield condition;
3. failed to comply with the law's reporting and abatement requirements for significant environmental hazards (see below);  
or
4. failed to make good faith efforts to minimize the risk to public health and the environment from the brownfield and its conditions or materials.

If an applicant exacerbates the brownfield's conditions, the applicant's liability is limited to responding to contamination exacerbated by negligence or recklessness.

### ***Transfer Act Exemption***

The bill exempts brownfields accepted into the program that are also "establishments" under the Transfer Act, from the act's requirements.

By law, the Transfer Act governs the sale or other conveyance of certain property where hazardous waste was generated, used, or stored. It regulates "establishments," which include certain businesses, and property where (1) more than 100 kilograms (220 pounds) of hazardous waste was generated in a calendar month or (2) hazardous waste was recycled, reclaimed, reused, stored, handled, treated, transported, or disposed of. Among other things, the act requires anyone transferring an establishment to complete and submit to the DEEP commissioner one or more of four different forms, depending on the presence of hazardous waste or hazardous substances and the status of investigation and remediation.

## **§§ 2 & 3 — CONTAMINATION NOTICE AND FURTHER ACTION**

### ***Property Owner and TEP Notification Requirements (§ 2)***

The law establishes specific notice requirements for certain situations when a technical environmental professional (TEP), by investigating or remediating pollution, determines that pollution is on or coming from a property and it is causing or has caused contamination. Often, notice must be provided to the client of the TEP

who discovers it, the property owner if such owner can be reasonably identified, and the DEEP commissioner. By law, TEPs collect soil, water, vapor, or air samples to investigate and remediate pollution sources.

Most situations requiring notice are based on a substance's concentration levels compared to applicable criteria in the Remediation Standard Regulations (RSRs), such as direct exposure, groundwater protection, and volatilization criteria. The RSRs provide specific standards for remediating soil and groundwater (see BACKGROUND).

***Drinking Water Well Contamination Above RSR Criterion.***

Under current law, when a TEP determines that a substance with a RSR groundwater protection criterion is causing or has caused contamination of a drinking water well at a concentration over the criterion, the TEP must notify his or her client and the property owner about the contamination. The bill also requires the TEP to provide notice if the drinking well water is contaminated with a nonaqueous phase liquid (NAPL). NAPLs are liquids that do not dissolve easily in water (e.g., gasoline or trichloroethylene).

The bill subjects the NAPL contamination to existing law's notice requirements. It requires the TEP to notify the client and property owner within 24 hours after learning of the contamination. The owner has seven days to notify the commissioner, and must provide evidence to the client that he or she did so. If the owner fails to notify the commissioner, the client must provide the notice.

By law, a property owner must notify the commissioner if he or she knows a contamination source that exists on his or her property is causing or has caused drinking water well contamination by a substance at a concentration over the substance's RSR groundwater criterion. The notice must be provided orally within one business day after learning of the contamination and in writing within five days after the oral notice. The bill requires property owners to provide the same notice for contamination caused specifically by a NAPL.

The bill requires a property owner, within 30 days after learning of the contamination, to (1) determine if there are other water supply wells within 500 feet of the polluted well by using a receptor survey and (2) seek access to all drinking water supply wells within 100 feet of the polluted well for sampling. If access is granted, the owner must (1) sample and analyze the wells' water quality and (2) report the results to the commissioner with any proposals for further action.

***Drinking Water Well Contamination Below RSR Criterion.*** The bill increases, from seven to 30 days, the time a property owner has to notify the commissioner in writing when he or she learns of pollution on the property that is causing or has caused drinking water well contamination by (1) a substance with an RSR groundwater protection criterion at a concentration below the criterion or (2) any other substance that was part of the release that caused the pollution.

The bill requires the property owner, within 30 days after learning of the contamination, to sample the well to confirm the pollution. He must then report to the commissioner on the sampling and provide any proposals for further action. If the sampling shows a concentration above the RSR groundwater protection criteria for the substance, the owner must provide the oral and written notice described above.

***Contamination within Two Feet of the Ground Surface.*** Under current law, if soil pollution is determined to be within two feet of the surface of a property in industrial or commercial use and containing a substance, other than a total petroleum hydrocarbon, at a concentration of at least 30 times its RSR industrial and commercial direct exposure criteria, the TEP must notify his or client and the property owner within seven days after finding the contamination. The bill decreases the contamination threshold for requiring notice to 10 times the direct exposure criteria.

The law exempts a TEP from providing the above notice if the property's land use is not residential and the substance involved is one of 28 listed substances. Under the bill, a TEP is also exempt from giving notice if data shows the soil within two feet of the ground

surface is not polluted at or over the lower threshold.

By law, an owner generally must notify the commissioner in writing within 90 days after learning of the contamination, but an owner is exempt if the contaminated soil is properly treated or discarded. The bill applies this exemption to owners of property at the reduced threshold.

The bill requires the property owner, also within 90 days, to (1) evaluate the extent of the contaminated soil that exceeds 10 times the direct exposure criteria; (2) prevent exposure to it; and (3) report to the commissioner on the evaluation and prevention with any proposals for further action, including maintenance and monitoring of interim controls.

***Groundwater Contamination by a Volatile Organic Substance.***

The bill also decreases the notification threshold, from 30 to 10 times the industrial and commercial volatilization criteria for groundwater, when a polluting substance is causing or has caused groundwater up to 15 feet under an industrial or commercial building to be contaminated with a volatile organic substance. As under existing law, the TEP must notify the client and property owner within seven days of learning of the contamination and the owner must notify the commissioner within 30 days of learning of the contamination. The bill exempts the owner from the notice requirement if the substance's concentration is at or under 10 times, instead of 30 times, the RSR (1) soil vapor volatilization criterion for the property or (2) site-specific volatilization criteria for groundwater.

Existing law also exempts the owner if the groundwater volatilization criterion for the property and substance is 50,000 parts per billion or the owner initiates an indoor air monitoring program within 30 days after learning of the contamination. By law, the indoor air monitoring program samples the indoor air immediately over the contaminated groundwater and analyzes the samples for volatile organic substances that exceed the allowed threshold of the volatilization criteria. The bill (1) reduces the allowed threshold from

30 times to 10 times the volatilization criteria and (2) makes a corresponding change regarding DEEP notification.

***Groundwater Contamination Discharging to Surface Water.***

Current law requires a TEP to notify his or her client and the property owner within seven days of determining that (1) pollution is causing or has caused groundwater contamination that is discharging to surface water and (2) the groundwater is contaminated with a substance that has an acute aquatic life criterion listed in DEEP's water quality standards and the substance's concentration is over 10 times the (a) criterion or (b) criterion multiplied by a site specific dilution factor from the RSRs.

The bill also requires the TEP to notify the client and property owner when the groundwater is contaminated with a NAPL and requires him to notify both parties within 30 days, instead of seven, after learning of any contamination. The bill makes a corresponding change in the timeframe for owners to notify the commissioner in writing and continues to exempt them from notice if they know the polluted discharge at the same concentration was reported to the commissioner in writing during the prior year. The bill requires property owners, when dealing with a NAPL, to notify the commissioner both orally (within one business day) and in writing (within 30 days of providing oral notice) after learning of the contamination. Owners who know the polluted discharge in the same physical state was reported in writing to the commissioner during the prior year are exempt.

When NAPL discharges to surface water, owners must (1) immediately act to mitigate and abate the discharge and (2) report to the commissioner about the mitigation measures taken and a plan for further action within 30 days after the date the owner must notify him in writing about the pollution. Owners of property with contamination by a substance over 10 times the acute aquatic life criterion must also provide the commissioner with a proposed abatement and mitigation plan.

***Groundwater Contamination Near Certain Drinking Water Wells.***

Under current law, when a TEP determines that (1) pollution is causing or has caused groundwater contamination within 500 feet upgradient from a drinking water well and (2) the groundwater is contaminated with a substance at a concentration of at least the RSR groundwater protection criterion, the TEP must notify the client and property owner within seven days after finding the contamination. The property owner must notify the commissioner in writing within seven days of learning of the contamination. The bill requires the TEP and property owner to also provide this notice (and take the sampling and mitigation steps described below) if the pollution is causing or has caused contamination within a 200-foot radius of a drinking water well. It also gives them 30 days, instead of seven, to provide the required notices.

The bill requires the property owner to, within 30 days of learning of the contamination, (1) determine if there are other water supply wells within 500 feet by using a receptor survey and (2) seek access to all drinking water supply wells within 100 feet for sampling. If access is granted, the owner must (1) sample and analyze the wells' water quality and (2) report the results to the commissioner with any proposals for further action.

***DEEP Commissioner Responsibilities***

***Remediation Plan or Report.*** Current law requires the commissioner to acknowledge, in writing, the receipt of a written notice of contamination or condition within 10 days after receiving it. The acknowledgement must include a (1) statement informing the property owner that he or she has up to 90 days to provide a plan for remediating or abating the contamination or condition or (2) directive that provides the steps required to take such action. It requires the commissioner to prescribe action if a plan is not submitted or approved. After the commissioner approves a submitted plan and actions implementing it are completed, he must issue a certificate of compliance. Instead of a plan, an owner may provide, for the commissioner's approval, a report detailing actions already taken to mitigate the contamination or condition.

The bill instead allows the acknowledgement to contain any information the commissioner considers appropriate. It continues to require the property owner to submit the remediation information to the commissioner. And it requires the commissioner to also issue a certificate of compliance when he receives a report, stamped and sealed by a licensed environmental professional (LEP), demonstrating that the release was remediated according to the RSRs.

***Electronic Notice.*** By law, the commissioner must forward a copy of any written notice about the discovery of contamination by a TEP to certain officials, including the chief elected official of the municipality where the pollution was discovered; state senator and representative representing such area; and the labor commissioner where the Division of Occupational Safety and Health within the Department of Labor has authority over the employers, employees, and places of employment on such property. The bill requires these notices to be forwarded by electronic methods.

#### **§§ 4-7 — ENVIRONMENTAL LAND USE RESTRICTION**

##### ***Required Recording***

The bill requires, instead of allows, land owners to execute and record an environmental land use restriction (ELUR), in the municipal land records if (1) the DEEP commissioner has adopted standards for remediating contaminated land (RSRs, see BACKGROUND) and regulations for ELURs; (2) the commissioner, or a LEP supervising certain voluntary clean ups, determines it is consistent with the purposes of the ELUR law and regulations and the remediation standards; and (3) the restriction will effectively protect human health and the environment.

ELUR appears to have the same meaning as current law's "environmental use restriction," which, by law, is an easement a property owner records in the municipal land records prohibiting specific uses or activities at a property that could harm human health or the environment. The bill replaces "environmental use restriction" with an ELUR.

**ELUR Types**

The bill specifies that an ELUR may be in the form of current law's restriction or a new "notice of activity and use limitation" (NAUL) that the bill establishes. It permits the DEEP commissioner to include in regulations provisions for a NAUL's form, content, fees, monitoring and reporting, and filing procedures, among other things.

**Current Law.** The law prohibits an owner from recording a restriction unless other parties with an interest in the property accept it. The owner must record documents to that effect when he or she records the restriction (subordination agreements). The commissioner may waive this requirement if the party's interest is so minor that it is unaffected by the restriction. He must waive the requirement that the owner obtain subordination agreements from the parties whose interests in the land, if acted upon, would not create conditions the restriction prohibits. This restriction (1) runs with the land and binds the owner and his or her successors and assigns and (2) survives foreclosure of a mortgage, lien, or other encumbrance.

The law further requires the owner, within seven days after executing the restriction and receiving the commissioner's or LEP's signature, to (1) record the restriction and subordination documents in the municipal land records and (2) submit a certificate of title to the commissioner that certifies each interest in the land is subordinated to the restriction. The law permits permanent or temporary releases from the restriction if approved in writing by the commissioner. A release must be recorded in the municipal land records, but the commissioner may waive this requirement under certain circumstances. A permanent release is approved only if the owner shows that the land has been remediated or is unaffected by the release.

**Notice of Activity and Use Limitation.** The bill establishes a new NAUL for certain releases remediated according to the RSRs and the restriction regulations. The bill allows this restriction to be used and recorded for:

1. achieving compliance with the RSRs' industrial or commercial

- direct exposure, groundwater volatilization, and soil vapor criteria, by preventing residential activity and use of the area affected by the restriction if the property is (a) zoned to exclude residential use and (b) not used for any regulatorily defined residential purpose;
2. preventing disturbance of polluted soil that exceeds the direct exposure criteria, is inaccessible, and complies with the RSRs, if the pollutant concentrations do not exceed 10 times the direct exposure criteria;
  3. preventing disturbance of an engineered control used only to eliminate exposure to polluted soil exceeding the direct exposure criteria, if the pollutant concentrations do not exceed 10 times the direct exposure criteria;
  4. preventing the demolition of a building or permanent structure that makes polluted soil environmentally isolated if the (a) pollutant concentrations do not exceed 10 times the direct exposure criteria and the pollutant mobility criteria or (b) total soil volume is 10 cubic yards or less; or
  5. any other purpose the commissioner prescribes by regulation.

***Decision Document***

The bill requires the NAUL to be prepared on a form the DEEP commissioner prescribes. The NAUL must refer to, and be recorded with, the “decision document” signed by the commissioner or signed and sealed by a LEP. The decision document must explain why the NAUL is appropriate to achieve and maintain compliance with the RSRs. It must also state the:

1. activities and uses that are inconsistent with maintaining compliance;
2. permitted activities and uses;
3. obligations and conditions needed to meet the NAUL’s

objectives; and

4. nature and extent of pollution that is the basis for the NAUL, with a list of contaminants and their concentrations and horizontal and vertical extent.

Similar to ELUR requirements, the bill prohibits an owner from recording a NAUL in the municipal land records unless he or she provides 60 days written notice to each person with an interest in the land. The notice must be sent by certified mail, return receipt requested, and must indicate the (1) pollution's existence and location and (2) terms of the proposed activity and use limitation. The interest holders can agree in writing to waive the notice period. The NAUL is effective upon recording.

Under the bill, a recorded NAUL must be implemented and adhered to (1) by the property owner and his or her successors and assigns, interest holders in the property, and people licensed to use the property or (2) when conducting remediation on the property. The bill requires a property owner, property lessee, or person with a right to subdivide or sublease the property to incorporate the NAUL into all future deeds, easements, leases, mortgages, licenses, occupancy agreements, or other transfer instruments. This can be done in full or by reference, but must done upon the transfer of any interest in or right to use the property. Under the bill, a NAUL survives foreclosure of a mortgage, lien, or other encumbrance.

The bill applies current law's enforcement provisions for ELURs to NAULs. It:

1. requires the attorney general to bring a civil action in Superior Court at the commissioner's request (a) for injunctive or other equitable relief to enforce a NAUL or (b) to enforce a civil penalty the commissioner imposes for a NAUL violation;
2. allows the commissioner to issue orders, such as cease and desist orders, to enforce a NAUL;

3. allows any person to intervene in administrative or civil enforcement proceeding instituted by DEEP;
4. subjects a land owner or lessee of property who is part of a civil or administrative action to enforce a NAUL, to strict liability for violations and makes him or her jointly and severally liable to abate the pollution; and
5. subjects a land owner or lessee of property with a NAUL to a civil fine of up to \$25,000 for violations of the NAUL or the law and regulations on environmental use restrictions.

It also provides that if a court finds a NAUL is void or without effect, the owner must promptly abate the pollution on the land to the standard for residential or recreational purposes.

## **BACKGROUND**

### ***DECD and CBRA Programs***

DECD, through its Office of Brownfield Remediation and Development Assistance, administers several programs to assist with brownfield remediation and redevelopment, such as the Brownfield Municipal Grant Program, Urban Sites Remedial Action Program, Abandoned Brownfield Cleanup Program, Targeted Brownfield Development Loan Program, and Brownfield Remediation and Revitalization Program. The programs provide participants with financial assistance and liability protection.

The Connecticut Brownfield Redevelopment Authority, a subsidiary of the Connecticut Development Authority, also provides financial assistance for brownfields remediation and redevelopment through direct loans, loan guarantees, and tax increment financing.

### ***Remediation Standard Regulations***

The Remediation Standard Regulations (RSRs) provide guidance and standards to determine if remediation of contamination is necessary to protect human health and the environment. They contain numeric and narrative standards for remediating soil and water. To remediate soil, two remediation criteria must be met: direct exposure

and pollutant mobility. To remediate a groundwater plume, three criteria apply: groundwater protection, surface water protection, and volatilization criteria.

The RSRs apply to certain actions to remediate polluted soil, surface water, or a groundwater plume at or coming from a release area, but they do not create a requirement for remediation or specify a time-frame to complete it.

***Related Bill***

sHB 6651, favorably reported by the Commerce Committee, makes many programmatic and technical changes to DECD's brownfield remediation and development programs.

**COMMITTEE ACTION**

Environment Committee

Joint Favorable Substitute

Yea 17 Nay 12 (03/27/2013)