

OFFICE OF LEGISLATIVE RESEARCH  
PUBLIC ACT SUMMARY



**PA 13-308**—sHB 6651

*Commerce Committee*

*Planning and Development Committee*

*Finance, Revenue and Bonding Committee*

**AN ACT IMPLEMENTING THE RECOMMENDATIONS OF THE  
STATE OF CONNECTICUT BROWNFIELD WORKING GROUP AND  
CONCERNING BROWNFIELD LIABILITY RELIEF, NOTIFICATION  
REQUIREMENTS FOR CERTAIN CONTAMINATED PROPERTIES  
AND THE USE OF NOTICE OF ACTIVITY AND USE LIMITATIONS**

**SUMMARY:** This act makes various changes to the programs for assessing and remediating contaminated property administered by Department of Economic and Community Development (DECD) and the Department of Energy and Environmental Protection (DEEP).

The act consolidates and reorganizes the laws governing DECD brownfield cleanup programs, making many programmatic and technical changes. It consolidates all DECD brownfield funds into a separate nonlapsing account and specifies the types of funds that must be deposited in the account. The programmatic changes include authorizing brownfield loans for reducing blight, narrowing the eligibility criteria for liability relief, and exempting private developers receiving financial assistance under the brownfield grant and loan programs from the statutory penalties for (1) relocating out of Connecticut within 10 years after receiving assistance and (2) failing to create or retain the number of jobs stipulated in the assistance agreements.

The act expands the requirements for notifying DEEP and other parties about different types of environmental hazards and provides new tools for addressing them. It creates a new program providing liability relief to municipal entities investigating and remediating such hazards and allows property owners to execute and record in local land records a notice of activity and use restrictions (NAUL), a legal tool used to minimize exposure to contamination by controlling the kind of activity that can occur on contaminated property. The act sets conditions under which the DEEP commissioner must shorten his deadline for deciding whether he will audit a remediated site and requires him to evaluate DEEP's methods for assessing the risks environmental hazards pose.

The act also makes technical and conforming changes.

EFFECTIVE DATE: July 1, 2013, unless otherwise stated.

**§§ 3-6, 8, 27, & 37 — CONSOLIDATED BROWNFIELD REMEDIATION  
AND DEVELOPMENT ACCOUNT**

The act eliminates two separate, nonlapsing accounts for funding brownfield projects and transfers their balances to a new, nonlapsing account it creates for

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depositing all brownfield funds. The eliminated accounts are the (1) Connecticut Brownfield Remediation account, which the legislature created in 2006 to fund the original Municipal Brownfield Pilot Program the legislature also created that year, and (2) Brownfield Remediation and Development account, which the legislature created in 2007 to fund the brownfield grant and loan program the legislature also created that year.

The new account is also called the Brownfield Remediation and Development account, and the funds that must be deposited in the account include those that had to be deposited in the original 2007 account. The funds are:

1. Urban Action bond proceeds issued for economic development programs and earmarked by the governor and State Bond Commission for the account;
2. principal and interest payments on loans made under the loan program and DECD's Special Contaminated Property Remediation and Insurance Fund, which provide loans for assessing and demolishing contaminated property;
3. principal and interest payments of loans made with grant proceeds;
4. money the attorney general recovers from the parties that polluted properties cleaned up under a state remediation program;
5. proceeds from any state bonds issued specifically for the loan and grant program and, if the Office of Policy and Management (OPM) secretary approves, any federal or private dollars provided for a project assisted under these programs;
6. interest or other income the fund's investments earn; and
7. other funds that, by law, must be deposited in the account.

The act makes several programmatic changes affecting the disposition of funds generated under the grant and loan programs, requiring that they be deposited in the consolidated account. It (1) requires grant and loan recipients to reimburse the state when they receive cleanup funds from other sources and (2) directs these funds to be deposited into the account. It also requires the proceeds generated from any activity conducted under the programs to be deposited in the fund, including the principal and interest a borrower must immediately repay if he or she sells the remediated property before the period for repaying the loan ends.

The act allows the commissioner to use the account for the same purposes as the grant and loan programs' account under prior law. She can use the account to provide financial assistance through the separate grant and loan programs and cover administrative costs.

But the act changes the basis for determining the amount of funds she may use to cover these costs. Under prior law, she could use up to 4% of any funds available for grants or loans to (1) cover the programs' staffing, marketing, and website development costs and (2) fund DECD's Office of Brownfield Remediation and Development's (OBRD) administrative costs. Prior law also allowed her to use up to 5% of a grant's proceeds, including proceeds a grant recipient lends, to cover reasonable administrative expenses. Under the act, she may use up to 5% of the account's funds to cover administrative costs.

The act allows the commissioner to use the account to fund activities outside the loan and grant programs. These activities include the steps property owners

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take to mitigate contamination they discover on their property.

The act eliminates the criteria the commissioner had used to determine the source for funding a brownfield project. Under prior law, she had to consider the project's feasibility and its environmental and public health benefits, spillover economic opportunities, and contribution to the municipal tax base. Besides eliminating these requirements, the act also eliminates the requirement that the commissioner obtain the OPM secretary's approval before tapping the grant and loan program account to fund a project.

Lastly, the act allows the commissioner to use any remaining bond proceeds for an inoperative program to fund brownfield grants and loans. The program is the Regional Infrastructure Grant Program, which the legislature created in 1993 to fund infrastructure projects benefiting regions.

### §§ 1, 2, 4, 5, 19, & 20 — MUNICIPAL BROWNFIELD GRANT PROGRAM

#### *Program Consolidation*

The act consolidates DECD's brownfield grant programs, making technical and programmatic changes in the process. Under prior law, DECD ran two grant programs — (1) a program established in 2006 as a pilot to clean up and redevelop brownfields in towns meeting statutory criteria and (2) a combined grant and loan program established in 2007, which was initially open to municipalities and private developers but subsequently changed to limit the grants to municipal entities. The act eliminates obsolete provisions and makes technical changes in the laws governing OBRD.

#### *Eligibility*

*Recipients.* The act expands the range of eligible recipients to include regional entities, specifically regional economic development commissions or corporations, regional councils of governments, regional councils of elected officials, and nonprofit economic development corporations formed to promote a region's economic development. Prior law limited eligibility to municipalities; municipal economic development agencies; nonprofit economic development corporations formed to promote a municipality's economic development; and for-profit entities that municipalities, the economic development agencies, or nonprofit corporations control.

*Projects.* The act narrows the range of eligible projects to those assessing the extent to which a property is contaminated (i.e., brownfield assessment projects) and cleaning up the contamination (i.e., brownfield remediation projects). Prior law allowed the grants to be used for any development project and its associated assessment and remediation costs. The act eliminates foreclosure as a type of brownfield project.

The act allows grant recipients to use up to 5% of the grant amount to cover a project's reasonable administrative costs.

*Costs.* The act limits a project's eligible costs to investigating, assessing, remediating, and developing brownfields, including:

1. investigating soil, groundwater, and infrastructure;

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2. assessing, remediating, and abating contamination;
3. disposing of hazardous material or waste;
4. monitoring groundwater or natural attenuation measures;
5. imposing environmental land use restrictions, activity and use limitations, and other forms of institutional control;
6. retaining lawyers, planners, engineers, and environmental consultants; and
7. addressing building and structural issues, including demolition, asbestos abatement, polychlorinated biphenyls removal, contaminated wood or paint removal, or other remedial remedies.

The act eliminates some of the costs that prior law allowed, such as those incurred to foreclose on a property or purchase environmental insurance. It also eliminates the commissioner's authority to allow recipients to cover other expenses she determines are reasonable or necessary to start, implement, and complete a project.

Grant recipients can still lend the grant proceeds to brownfield redevelopers, as prior law allowed, but the act changes some of the requirements and conditions for doing so (see below).

### *Application Requirements*

*Content.* Municipalities and other eligible grant recipients must still apply to the commissioner for grants, providing mostly the same information as before. At a minimum, the application must:

1. describe the project and provide its budget,
2. explain how the project's expected benefits promote the grant program's objectives, and
3. provide information about the applicant's financial and technical capacity to implement the project.

The act narrows one of the requirements imposed under prior law, conforming to the distinction the act makes between assessment and remediation projects. Under prior law, the application had to describe the property's condition, including the results of any environmental assessment on the property. Under the act, the application must include this description only if the grant will be used to remediate the property. The act requires that the description include the results of an environmental assessment if the applicant has or can obtain it.

The act eliminates the requirement that applicants identify parties liable for remediating the property.

*Approval Criteria.* Prior law specified the criteria the commissioner must use to approve, reject, or modify grant applications. The act retains these criteria and adds new ones. As under prior law, the commissioner must base her decision on:

1. the available funds;
2. the estimated assessment and remediation costs, if known;
3. the relative economic condition of the municipality where the brownfield is located;
4. the project's relative need for financial assistance;
5. the degree to which a grant is needed to start the project;
6. the project's public health and environmental benefits;

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7. the project's relative benefits to the municipality, region, and state, including how much it will contribute to the municipality's tax base and retain or create jobs;
8. the timeframe during which the contamination occurred;
9. the applicant's relationship to the party that caused the contamination;
10. how long the brownfield has been abandoned;
11. the taxes owed on the property and projected revenue that may be restored to the community; and
12. any other criteria the commissioner establishes to fulfill the grant program's purpose.

The act also requires the commissioner to consider (1) whether the project will reduce blight among its potential benefits to the municipality, region, and state and (2) the relative need to assess the property for contamination within the municipality or region.

*Application Cycle.* The commissioner must continue awarding grants by requesting and approving applications at least once every year, but the act pushes back the request deadline, from June 1 to October 1, annually. As under prior law, she can request and approve applications more frequently depending on the number of applicants and available funds.

Also as under prior law, the commissioner may award grants for up to \$4 million. But the act eliminates prior law's authorization for her to request or seek funding from other sources when a project's eligible costs exceed the \$4 million limit.

### *Grant Limits*

*Limits.* The act allows the commissioner to make up to \$4 million in grants, regardless of a project's location. Under prior law, the grant could not exceed this amount or a specified percentage of the cost, whichever was less. The percentage varied depending on the project's scope of work or location. If the scope involved only project planning or site evaluation, the grant could cover up to 90% of the costs. If the scope involved other activities, the grant could cover up to 90% of the cost for projects in the state's 17 municipalities with enterprise zones (i.e., targeted investment communities (TICs)) and (2) up to 50% of the cost for those in other municipalities. In all of these cases, prior law allowed grant recipients to make up the difference between the grant amount and the project's total cost with federal funds; private contributions; or noncash contributions, including a property's value.

The act also eliminates the provision allowing municipalities to cover the difference between the grant amount and the grant limit with funds from federal or other sources or noncash contributions, such as the property's value.

*Terms and Conditions.* As under prior law, the commissioner has general authority to set terms and conditions for making grants. She may impose terms and conditions that include assurances that the recipient will perform its duties in connection with the project and secure the grant with a letter of credit, lien on real or personal property, or other security. The act also allows her to impose terms requiring recipients to reimburse the state if they receive funds from other

sources.

*Selling Remediated Property*

The act allows a recipient to keep the sales proceeds when it remediates, redevelops, and sells the property. As under prior law, recipients may remediate and sell the property or lend the grant funds to a redeveloper for remediation. But prior law imposed different rules for handling the proceeds from a sales transaction. The rules varied depending on the funding source.

If DECD funded the grant under the 2006 grant program, the recipient kept 20% of the sales proceeds and remitted the balance (80%) to OBRD for deposit in the program's account. If it funded the grant under the 2007 program, the recipient had to remit to that program's account an amount equal to the grant, minus 20% to cover its administrative and development costs and, if applicable, lost tax revenue. (The recipient kept the difference between the amount remitted to the account and the sales price.)

*Lending Grant Proceeds*

*Requirements.* As mentioned above, recipients may continue lending grant proceeds to private redevelopers, presumably to fund the same types of eligible costs recipients could cover when they assess or remediate a project themselves. But the act changes the requirements for doing so. Under prior law, the recipient could lend the proceeds if the redeveloper co-applied for the grant, the co-applicants entered into an agreement, and the brownfield's future reuse was known. As under prior law, the act does not specify who qualifies as a redeveloper.

Under the act, co-applicants can apply for the grant first and enter into an agreement later, but within 90 days after receiving the grant. The agreement must be in writing and identify the property's post remediation use.

Prior law required the redeveloper to participate in a DEEP voluntary cleanup program. Under the act, a redeveloper can participate in DEEP's cleanup program or one of DECD's liability protection programs (i.e., The Abandoned Property Cleanup Program or the Liability Protection Program).

*Repaying Loan Principal and Interest Payments.* As under prior law, grant recipients must remit principal and interest payments to DECD, except for 20% of the principal. DECD must deposit the payments in the new consolidated account. As under prior law, recipients may require security for the loan by placing a state or municipal lien on the property.

*Liability Protections*

The act continues the liability protections prior law afforded to grant recipients under the prior programs and extends these protections to liability under the law banning persons and municipalities from polluting the state's waters or discharging treated or untreated waste into those waters (CGS § 22a-427). The protections apply to contamination that existed before recipients acquired or took control of the property. The contamination could have happened in the past or exist when the recipient acquires or takes control of the property.

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As under prior law, recipients generally enjoy these protections if they (1) did not cause, contribute to, or exacerbate the contamination and (2) comply with DEEP reporting requirements for significant environmental hazards.

### *Disposing of Remediate Property*

The act allows grant recipients to transfer property they remediate, specifies the conditions under which they may do so, and affords liability protection to the party acquiring the property (i.e., transferee).

*Conditions for Transfer.* The act sets conditions under which grant recipients may transfer remediated property and other parties may acquire it. Recipients may transfer property if:

1. DEEP approved the remediation or it was done under the Transfer Act, DEEP's voluntary remediation program, or DECD's liability protection programs and
2. the transferee is not liable to DEEP for causing or contributing to the contamination.

The act continues prior law's conditions for holding, possessing, maintaining, or acquiring title to a remediated property, including one remediated under the 2006 grant program. A party may not do these things if it:

1. owns, operates, or leases the property;
2. directly or indirectly contaminated it;
3. is otherwise liable to the DEEP commissioner for the contamination; or
4. is a successor to the liable party or directly or indirectly affiliated with or related to it.

As under prior law, any party that acquires title under these conditions must reimburse the state and the grant recipient for any costs they incurred to invest and remediate the property, plus 18% interest.

*Liability Protections.* The act mostly continues prior law's liability protections. It continues to protect transferees from liability from orders DEEP may issue regarding water and ground contamination and the cost of investigating and remediating the property. The act extends this protection to liability for violating the general prohibition against polluting the state's waters.

A transferee receives this protection only if it did not cause or contribute to the contamination and is not related to or affiliated with the party that did. The act expands the grounds under which the transferee receives the protection by including remediation specifically done under DEEP's voluntary cleanup program, the Transfer Act, or DECD's liability protection programs.

In addition, the transferee must continue to receive a covenant not to sue without having to pay the statutory fee. (A covenant is an agreement between DEEP and the transferee that protects it from liability to the state for contamination that occurred before the covenant was signed.)

The act continues to protect the grant recipient and the transferee from liability under the Transfer Act, but changes two requirements the property must meet to receive this protection. The Transfer Act allows a potentially contaminated property to be sold only after the owner indicates its environmental condition and, if the property is contaminated, a party agrees to clean it up.

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Prior law required the property to be remediated under a DEEP remediation order or voluntary cleanup program. Under the act, the property also qualifies for protection if it was remediated under a DECD liability protection program.

The second change concerns the remediated property's use. Under prior law, the property qualified for the protection regardless of its post remediation use. Under the act, the property qualifies only if it will not be used as an "establishment," which is any use that generates hazardous waste, generally receives such waste generated at another location, conducts dry cleaning, strips furniture, or repairs auto bodies (CGS § 22a-134 (3)).

### *Transfer Act Exemption*

The act (1) exempts from the Transfer Act any property grant recipients acquire under the grant program and (2) continues the prior law's exemption for property they acquired under the 2006 grant program.

EFFECTIVE DATE: July 1, 2013, except for a technical change that takes effect January 1, 2014.

### §§ 4&6 — BROWNFIELD LOAN PROGRAM

Besides consolidating the municipal grant programs, the act separates the loan program from the consolidated grant program and revamps the loan program. In doing so, the act makes many technical and substantive changes.

### *Eligible Projects*

Under the act, the loan program is available for the eligible costs of remediating contaminated property. The costs, which are the same for the grant program, include costs associated with investigating and assessing a property's condition as well as those associated with remediating the site, including abating contamination, disposing of hazardous waste and material, implementing long-term and natural attenuation monitoring, and imposing environmental land use restrictions and other institutional controls. They do not include foreclosure costs, which prior law allowed.

### *Eligible Applicants*

The act consolidates the criteria DECD must use to determine eligible applicants. As under prior law, the act recognizes three types of eligible applicants—potential brownfield purchasers, existing owners of manufacturing facilities (i.e., manufacturers), and all other existing property owners. Prior law extended manufacturers' eligibility for brownfield assistance beyond the loan program to any brownfield assistance program. The act (1) limits manufacturers' eligibility for brownfield assistance to the loan program, (2) revamps the criteria applicable only to manufacturers, and (3) eliminates a criterion that applies to all existing property owners.

*Manufacturers.* Under prior law, manufacturers qualified for brownfield assistance if they could show that they:

1. did not cause hazardous substances or petroleum to be released on the

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- property,
2. did not knowingly cause injury to human health or the environment by disposing of the substances or petroleum, and
  3. were never found guilty of knowingly or willfully violating an environmental law.

In addition, the agency administering the assistance had to consider if a manufacturer could pay for some or all of the cleanup cost. After the agency determined a manufacturer's eligibility, it could require the manufacturer to:

1. keep the property for up to 10 years,
2. reimburse the state if the manufacturer got cleanup funds from another source, and
3. continue employing Connecticut residents at the property for at least 10 years.

The act eliminates these criteria and requirements. Under the act, a manufacturer qualifies for a loan if it or any of its subsidiaries or affiliates:

1. are not liable for a DEEP cleanup order on the property,
2. are not responsible for the contamination,
3. are not affiliated with the party responsible for the contamination, and
4. have not been found guilty of knowingly or willfully violating any environmental law.

*All Existing Owners.* The act eliminates the requirement that manufacturers and other existing property owners show that:

1. the cost of investigating and remediating the property keeps them from retaining or adding jobs,
2. they cannot afford to investigate and remediate the property on their own, and
3. they are in good standing with DEEP's regulatory programs.

They and potential purchasers must show that they are not liable for the contamination and intend to reduce blight on the property or develop it for industrial, commercial, residential, or mix use purposes. Under prior law, potential purchasers had to show only that they were not liable for the contamination.

### *Eligible Projects and Performance Requirements*

The act expands the range of projects eligible for brownfield assistance to include reducing blight. Potential purchasers and existing owners can still use the loans to redevelop brownfields for industrial, commercial, residential and mix use purposes.

The act repeals specific performance requirements prior law placed on redevelopment projects that existing owners and potential purchasers proposed. Under prior law, commercial, industrial, and mix use projects qualified for loans if they retained or added jobs during the loan's term, unless DECD and the state's other economic development agencies agreed otherwise. Residential projects qualified if they developed affordable housing for first-time homebuyers, recent college graduates, or current workers.

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### *Eligible Costs*

The act narrows the range of eligible costs that borrowers can incur with loan proceeds. Under prior law, they could use the proceeds for any purpose, including current and past costs incurred to:

1. investigate, assess, or remediate a brownfield;
2. abate contamination or dispose of hazardous waste and material;
3. implement groundwater or natural attenuation monitoring;
4. hire and retain attorneys, planners, engineers, and environmental consultants; and
5. address building and structural issues, including demolishing structures, abating asbestos, removing polychlorinated biphenyls and other substances, and implementing other infrastructure remedial activities.

As explained above, the act limits eligible costs to those associated with these activities.

As with grant recipients, borrowers can no longer use the loan proceeds to acquire or foreclose on a property or purchase environmental insurance. Nor can the commissioner allow them to use the proceeds to cover other expenses she otherwise determines are reasonable or necessary to start, implement, and complete the project.

### *Application Requirements*

*Content.* As under prior law, eligible applicants must apply to the commissioner for loans. At a minimum, the application must:

1. describe the project;
2. explain how the project's expected benefits promote the loan program's objectives;
3. provide information about the applicant's financial and technical capacity to implement the project;
4. provide its budget; and
5. describe the brownfield's condition, including the results of any environmental assessment the applicant has or can obtain.

The act eliminates the following application requirements:

1. a list of the people liable for remediating the property;
2. for loans over \$50,000, a redevelopment plan describing how the property will be reused, create jobs, and stimulate private investment; and
3. for residential developments, an agreement that the project will be affordable to first-time homebuyers, workers, and recent college graduates looking to remain in Connecticut.

*Approval Requirements.* As under prior law, the commissioner must approve applications based on the:

1. project's merit and viability;
2. economic and community development opportunity it presents;
3. degree to which the municipality supports it;
4. extent to which it contributes to the municipality's tax base; and
5. applicants' past experience, compliance history, and ability to pay.

The act eliminates the requirement that she also consider the number of jobs

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associated with the project.

### *Eligible Assistance*

The act limits the types of loans the commissioner may provide under the program to direct loans, eliminating her authority to purchase interest in a loan made by Connecticut Innovations, Inc, the state's quasi-public development financing agency.

### *Loans*

*Limits.* Under prior law, loan amounts were subject to the same limits as grants. The act eliminates the limit based on a project's location. Consequently, the commissioner can make loans of up to \$2 million per year, for up to two years, without reducing that amount if it exceeds the 90% cost limit for projects in TICs or 50% for those in the other municipalities. It also allows her to make loans up to the act's dollar limit for planning projects or evaluating their sites.

The act makes a conforming technical change, eliminating the provision allowing municipalities to cover the difference between the grant amount and the grant limit with funds from federal or other sources or noncash contributions, such as the property's fair market value.

The act's \$2 million per year cap applies only to assistance under the loan program. If a project needs additional funds, the act allows the commissioner to recommend funding under the other programs she administers. Prior law allowed her to recommend additional funding through the State Bond Commission.

As under prior law, the commissioner can set the loan repayment period for up to 20 years.

*Terms and Conditions.* As under prior law, the act gives the commissioner general and specific authority to set the loan terms and conditions. The general authority is the same for making grants. The act eliminates some of the specific requirements that had to be included in a loan's terms and conditions.

As under prior law, the commissioner may impose loan terms and conditions based on the criteria she uses to (1) determine an applicant's eligibility and (2) approve loans. But the act eliminates the requirement that the terms and conditions must include performance requirements and a commitment to maintain or retain jobs or provide a specified number of affordable housing units.

The act also eliminates the requirement that loan repayments coincide with the brownfield's restoration to a productive use or the completion of an expansion. But, if the borrower sells the property before repaying the loan, the act continues to require the borrower to repay it upon closing, unless the commissioner agrees otherwise. Alternatively, as allowed under prior law, the commissioner can carry the loan forward as an encumbrance to the purchaser under the same terms and conditions as the original loan.

For loans made to municipalities, economic development agencies, regional entities, and other organizations otherwise eligible for grants, the commissioner may, as under prior law, forgive principal and interest payments or delay such payments if she determines that doing so is in the state's best interest.

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### *Remediation Requirements*

Borrowers exempted from the Transfer Act must, under the act, enter a DEEP voluntary cleanup program or participate in a DECD liability protection program, as the DECD commissioner determines. Under prior law, all existing property owners had to enter a DEEP voluntary cleanup program, and brownfield purchasers had to comply with the Transfer Act or enter such a program if the loan exceeded \$30,000 or they intended to use the proceeds to conduct a Phase II environmental investigation (i.e., one that uses chemical analyses to identify hazardous substances or petroleum hydrocarbons).

### §§ 9 & 10 — DECD’s LIABILITY PROTECTION PROGRAMS

#### *Regulated Substance*

The act adopts stricter criteria for determining whether a substance constitutes a regulated substance and applies them to DECD’s Abandoned Brownfield Cleanup (ABC) and Liability Relief programs. Under prior law, a regulated substance was any element, compound, or material that alters the physical, chemical, biological, or other characteristics of air, water, soil, or sediment when mixed with the substance. Under the act, a regulated substance is petroleum, any flammable substance, any substance the federal government defines as “hazardous” or “extremely hazardous,” or polychlorinated biphenyls in concentrations greater than 50 parts per million.

(Polychlorinated biphenyls are chemicals that were formerly used in hydraulic fluids, plasticizers, adhesives, fire retardants, way extenders, de-dusting agents, pesticide extenders, inks, lubricants, and cutting oils. They were also used in heat transfer systems and carbonless paper reproduction.)

The act extends these criteria to the ABC Program, which exempts developers from investigating and remediating contamination that emanated from a property before they acquired it and limits their liability to the state and third parties for anything they do to cause or contribute to the contamination or negligently or recklessly exacerbate it. The Liability Relief Program protects developers from liability to the state and third parties for remediating a property according to the law’s requirements.

### § 26 — BROWNFIELD WORKING GROUP

The act adds three members to the Brownfield Working Group, increasing its membership from 13 to 16, and extends the group’s reporting deadline by two years, from January 15, 2013, to January 15, 2015. By law, the group must report its findings and recommendations on the state’s brownfield remediation and development programs to the governor and Commerce and Environment committees.

The act adds the public health commissioner to the group (or her designee) as an ex officio member and gives the Senate president pro tempore and the House speaker each an additional appointment. In doing so, it requires that at least one of the Senate president pro tempore’s two appointments include a representative of

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the Connecticut Conference of Municipalities and at least one of the House speaker's appointments include a representative of an environmental organization.  
EFFECTIVE DATE: Upon passage

### § 28 — RISK-BASED DECISION MAKING

The act requires the DEEP commissioner to (1) evaluate the risk-based decision making process for assessing brownfields and (2) recommend applicable statutory and regulatory changes. In doing so, he must consult with the public health commissioner and, within existing resources, engage independent risk-based assessment experts with broad national experience.

The experts must conduct the evaluation and prepare a report that assesses the existing risk-based decision making process and the tools used to assess and manage risk in a way that protects the public, general welfare, and environment. The report must also identify best practices for assessing and managing ecological and human health risks used by the U.S. Environmental Protection Agency and other regulatory agencies and published by the National Academy of Sciences. While evaluating the process, the DEEP commissioner must allow the public to review and comment on it.

After completing the evaluation and report, the commissioner must consider the results and recommend statutory and regulatory changes to the risk-based decision making process, including those provisions triggering notifications and assessments when a licensed environment professional (LEP) discovers contaminated soil and groundwater. The commissioner must do this by October 1, 2014.

EFFECTIVE DATE: Upon passage

### § 29 — FINAL VERIFICATION AUDITS

The act requires the DEEP commissioner to shorten the deadline for making certain decisions when adopting regulations to implement a unified program for cleaning up sites where oil, hazardous substances, or other releases have occurred. The deadlines are those by which he must (1) decide whether to audit the final verification of a site's remediation and (2) indicate if additional remediation is required. The requirement to shorten the deadline applies (1) only to final verifications submitted by an LEP or another authorized person and (2) regulations adopted on or after July 1, 2014.

EFFECTIVE DATE: Upon passage

### § 30 — LIABILITY RELIEF PROGRAM

The act establishes a DEEP liability relief program for municipal developers that remediate contamination that previously existed or currently exists on a property they acquire. As mentioned above, DECD's ABC Program also provides liability relief to municipal and other developers for investigating and remediating contamination that existed on a property before they acquired it, as long as they do not exacerbate the contamination (CGS § 32-911). DEEP also provides liability

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protection under certain conditions to “innocent landowners” (CGS § 22a-452d, et seq.).

### *Eligibility*

The act specifies eligibility criteria for the property and developers. A property must be one that has not been redeveloped or reused because it is contaminated or potentially contaminated (i.e., brownfield). The contamination (1) could be in the groundwater, soil, or buildings and (2) must be investigated, assessed, and cleaned up while the property is being redeveloped, reused, or expanded or before these activities can occur. The property must also meet any other criteria the commissioner deems necessary.

The program is open to municipalities, economic development agencies, nonprofit corporations a municipality forms and supports to promote its economic development, and nonstock or limited liability companies formed and controlled by these entities (municipal developers).

These municipal developers may apply to have a property admitted into the program before they acquire it. The commissioner must admit the property if the municipal developer:

1. intends to acquire it for redevelopment;
2. did not establish or create a facility or condition at or on the property that could reasonably be expected to pollute water;
3. is unaffiliated with the party responsible for the pollution or its source through any direct or indirect familial, contractual, corporate, or financial relationship other than through its regulatory, police, or tax powers or the relationship through which the property is conveyed or financed; and
4. is not required by law, a stipulated judgment, or a DEEP order or consent order to remediate the contamination on or emanating from the property.

### *Application Requirements*

The commissioner must determine if a municipal developer’s application is complete and the property meets the act’s eligibility criteria. If it is, he must notify the applicant that he admitted the property into the program. This decision does not preclude the applicant or another party (presumably a developer that acquires the property from the municipal developer) from seeking funding under the state’s other brownfield programs.

After the commissioner admits the property into the program and the municipal developer acquires it, the developer must submit a plan and schedule outlining how it intends to facilitate the property’s investigation, remediation, and redevelopment. The developer must also continue minimizing the contamination and the environmental and public health risks it poses.

### *Liability Protection for Municipal Developers*

The program’s liability protection begins after the commissioner admits the property into the program and the municipal developer acquires title to it. The program protects the developer from liability to the state or any person for contamination that happened before it acquired the property. But the developer is

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liable for any contamination it causes. In these cases, it is liable to the extent its negligent or reckless actions exacerbated the contamination.

Further, the program protects the developer from liability for previously existing or current conditions on the property. The protection applies to water pollution laws; pollution abatement orders; and investigation, remediation, and abatement costs, including those others incur. The developer receives this liability relief only if it:

1. did not establish, cause, or contribute to the discharge, spillage, or uncontrolled loss, seepage, or filtration of the hazardous substance, material, waste, or pollution;
2. does not exacerbate the conditions;
3. complies with all statutory reporting and mitigation or abatement requirements; and
4. makes good faith efforts to minimize the brownfield's environmental and public health risks.

The developer is not relieved from addressing any preexisting conditions it exacerbates through negligent or reckless actions.

### *Transfer Act Exemption*

The act exempts municipal developers from filing the required Transfer Act forms for property otherwise subject to the act (i.e., an establishment used to generate or handle hazardous waste, dry clean material, strip furniture, or repair motor vehicles).

## §§ 31-32 — ENVIRONMENTAL HAZARD NOTIFICATION REQUIREMENTS

### *Context*

The act generally expands some of the requirements for notifying DEEP about environmental hazards, changes some notification deadlines, and imposes new reporting requirements. These changes take effect on or after July 1, 2015.

The notification and reporting requirements and the deadlines are part of a framework and process the law establishes for notifying DEEP and other parties about specific types of environmental hazards. Together they consist of contamination thresholds triggering notification, parties required to give or receive notice, and deadlines for providing these notices. The thresholds are based on the extent to which a contaminant is concentrated in soil or water and whether that concentration exceeds a contamination standard for that contaminant.

Notifications are triggered when a technical environmental professional (TEP) or a property owner finds contamination threatening the public welfare and environment. TEPs must notify their clients, who, in turn, must notify the affected property owners. The property owners must notify DEEP when they receive this notice or become aware of the contamination through other means. The deadlines for providing these notices vary depending on the hazard.

### *Drinking Water*

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By law, the notification requirements for contamination found near public or private drinking water wells depend on the level of contamination or, with respect to contaminated groundwater, its proximity to such wells.

*Contamination Exceeding Groundwater Protection Criterion.* The law sets different notification requirements for substances contaminating groundwater, based on whether their concentration exceeds DEEP's regulatory groundwater protection criterion. The act requires notification when a TEP or property owner discovers a nonaqueous phase liquid (i.e., one that does not readily dissolve in water), regardless of whether it exceeds the criterion.

Under the act, the TEP must follow the same procedure for giving notice about other contaminants that exceed the criterion. He or she must notify his or her client and the property owner (if TEP can reasonably identify the owner) within 24 hours of the discovery. The owner has seven days to notify the commissioner and provide proof of providing the notification to the TEP's client. If the owner fails to do this, the client must notify the commissioner.

Existing law imposes notification requirements on property owners when they become aware of contamination exceeding the criterion. An owner must verbally notify the commissioner within one business day after discovering the contamination and again, in writing, within five days after becoming aware of the contamination. The act also imposes this notification requirement on owners when they become aware of a nonaqueous phase liquid.

The act also imposes an investigation requirement on a property owner when he or she finds out, from the TEP or through other means, about contamination exceeding the criterion or the presence of nonaqueous phase liquids. Within 30 days after becoming aware of the contamination, he or she must determine if there are other wells within 500 feet of the polluted well. The owner must do this by (1) determining if there are people and organisms near the contaminated well that are particularly sensitive to the contamination (i.e., receptor survey) and (2) analyzing water samples from wells on adjacent property within 500 feet of the polluted well, if the owner of the contaminated property can access them. The owner must report the finding to the commissioner and propose further steps for identifying the contaminants and eliminating exposure to them on a continuing basis.

*Contamination below Groundwater Protection Criterion.* The act also changes the notification requirements for contaminants below the groundwater protection criterion. By law, the TEP must notify his client and the property owner about the contamination within seven days after discovering it. The owner must notify the commissioner about the contamination after learning about it from the TEP or on his or her own. The act extends the owner's deadline for notifying the commissioner from seven to 30 days.

The act imposes a similar requirement on owners when they learn about a concentration of contaminants below their groundwater protection criterion or a substance being investigated and remediated on the property. The owner must sample the well within 30 days after learning about the contamination, but must report the results to the commissioner only if he or she learned about the contamination from a TEP. In this case, the owner must submit the report to the commissioner within 30 days of the TEP's notice and include proposals for

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identifying the contaminants and eliminating exposure to them on a continuing basis. If the sample shows a concentration above the applicable groundwater protection criterion, the owner must follow the procedures outlined above for reporting contamination above that criterion.

### *Groundwater*

The act (1) reduces the thresholds triggering the notification requirements for contaminated groundwater near a residential or industrial or commercial building and (2) expands the area where the threshold applies. Under prior law, TEPs had to report if the contaminated groundwater was (1) beneath a residential building or (2) within 15 feet beneath an industrial or commercial building. Under the act, TEPs must report contamination anywhere within 15 feet of these buildings in any direction. But the act also reduces the reporting threshold from 30 to 10 times DEEP's regulatory volatilization criterion.

The act makes a parallel change regarding the reporting thresholds for owners who discover such contamination. But it also exempts them from reporting on contamination affecting:

1. occupied commercial or industrial buildings where federally regulated volatile organic compounds are being used and
2. unoccupied buildings until they are occupied, unless the concentration of contaminants subsequently falls below the applicable threshold.

The act exempts reporting when the contaminant concentration is below 10 times the volatilization criterion and makes conforming technical changes.

It also lowers the notification threshold for owners reporting groundwater contaminating indoor air from concentrations at or above 30 times the volatilization criterion to concentrations at or above 10 times the criterion.

The act continues to require reporting of contaminated soil vapor beneath residential and commercial or industrial buildings, but lowers the triggering threshold from concentrations at or above 30 times the applicable volatilization criterion to concentrations at or above 10 times the criterion. Existing law exempts reporting on groundwater contamination when:

1. the volatilization criterion for the affected land use is 50,000 parts per billion and
2. a monitoring program sampling the indoor air immediately over the contaminated groundwater is started within 30 days after the contamination's discovery.

Lastly, the act requires owners who must notify the commissioner about groundwater contamination to submit plans to mitigate exposure to the contamination or permanently abate it. These owners must do this within 30 days after becoming aware of the contamination.

### *Contaminated Groundwater Plume*

The law imposes notification requirements when a contaminated groundwater flows up gradient within 500 feet of a private or public drinking well (i.e., upgradient direction). As with other types of contamination, TEPs must report this contamination to their clients and the affected property owners within seven

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days after discovering the contamination. The act also requires TEPs to notify these parties when they discover a contaminated groundwater flow within 200 feet of a public or private drinking well in any direction.

The act extends, from seven to 30 days after becoming aware of the contaminated groundwater, the deadline by which affected property owners must notify the commissioner in writing about the contamination. The act also gives these owners 30 days to identify any water supply wells within 500 feet of the contaminated groundwater and determine how it could affect humans and other organisms. An owner must seek access to those wells on adjacent property and, if they gain access, obtain and analyze water samples.

The owner must include a report on his or her findings with the notice to the commissioner. The report must include any necessary proposals to identify and eliminate exposure to the contaminants on an ongoing basis.

### *Ground Surface*

The law requires TEPs to notify their clients and affected property owners when they discover contaminated soil on commercial or industrial property within two feet of the ground surface. Under prior law, TEPs had to provide this notice if the concentration exceeded 30 times the residential or industrial and commercial direct exposure criterion, as applicable.

The act reduces the threshold to concentrations at or above 15 times the industrial and commercial direct exposure criterion for specified metals and other substances found on such property located within 300 feet of a residence, school, park, playground, or daycare facility. The substances are antimony, arsenic, barium, beryllium, cadmium, chromium, copper, cyanide, lead, mercury, nickel, selenium, silver, thallium, vanadium, zinc and polychlorinated biphenyls, but not arsenic or lead used in lawful pesticide applications. The act maintains the current threshold if the contaminated area is fenced off from the public or covered with pavement maintained in such a way as to keep the area covered. It also reduces the threshold for contamination found on residential property, from concentrations at or above 30 times the residential direct exposure criterion for all regulated concentrations to at or above 15 times that criterion.

By law, property owners must notify the commissioner about the contamination within 90 days after they become aware of it, unless certain conditions apply. The act expands those conditions. Under existing law, owners do not have to notify him if the soil is inaccessible, being remediated, or being treated and disposed as the law and regulations require. The act additionally exempts owners from providing notice of lead contamination on residential property being abated under a local health department lead abatement program.

The act allows some of these exempted owners to obtain a certificate of completion from DEEP if they voluntarily notified the commissioner about the contamination, which they may do at any time. The certificate is available if an owner remediates the soil according to DEEP's regulatory standards or treats or disposes of the soil exceeding the applicable criterion according to all applicable laws and regulations. DEEP must wait 90 days before posting the owner's notice on its website.

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Owners who must notify the commissioner within 90 days after learning about the contamination must also do other things within that timeframe. At a minimum, they must determine the extent to which the contamination exceeds the applicable criterion and prevent exposure to the soil. They must also report on the evaluation and prevention measures they took and recommend other necessary actions, including maintaining and monitoring interim controls preventing exposure to contamination exceeding the applicable criterion. They must submit the report with the notification.

### *Surface Water*

The act requires TEPs to notify their clients and the affected property owners when they discover nonaqueous phase liquid-contaminated groundwater discharging into surface water. The TEPs must do this within seven days after discovering the contamination. The law already requires them to provide notice when a contaminant's concentration exceeds:

1. 10 times the acute aquatic life criterion for that substance or
2. a threshold determined by multiplying that criterion by a site-specific dilution factor, which must be calculated according to DEEP regulations.

By law, property owners must notify the commissioner about the contamination unless it was already reported to him at these levels within the preceding year. The act also exempts them from reporting if the contamination's physical state was reported to the commissioner within the preceding year.

The act requires property owners to notify the commissioner about contamination caused by a nonaqueous phase liquid unless it was already reported to him as the law and regulations require. An owner must report twice—verbally, within one business day after becoming aware of the contamination and in writing, within 30 days after becoming aware of the contamination.

The act pushes back the deadline for reporting other contaminants, from seven to 30 days after becoming aware of the contamination. Lastly, it requires owners subject to the 30-day reporting deadline to prepare monitoring, abatement, or mitigation plans.

### *General Administrative Requirements*

The act makes several changes in the rules for preparing, submitting, and distributing the soil and water contamination notices and reports. It requires property owners to submit contamination notices to DEEP's Remediation Division instead of the Water Management Bureau and allows the commissioner to provide any information he deems appropriate in his acknowledgement of these notices. It also gives owners more options for documenting the property's environmental status, including abatement or mitigation that already occurred.

The act also eliminates the requirement that the acknowledgements inform owners that they have up to 90 days to submit a remediation or abatement plan. It instead details the information owners must provide when they submit the plans and documents discussed above. In doing so, it distinguishes between mitigation, remediation, and abatement plans. Mitigation plans must describe how the contamination will be monitored and controlled to minimize exposure,

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remediation plans describe how the contamination or the contaminated conditions will be cleaned up, and abatement plans must describe how the contamination or contaminated condition will be reduced.

The act also specifies the contents of the documents owners must submit confirming that mitigation or abatement occurred. Documents confirming mitigation must show (1) how the contaminants or the contaminated condition are being mitigated, (2) that no pathways from the contamination have been left exposed, and (3) how the mitigation measures will be maintained. Documentations confirming abatement must show how the contamination or contaminated condition was reduced. The act specifies that owners may submit these plans and documents with the required notices.

Lastly, the act eliminates several parties to whom the commissioner must forward copies of the contamination notices he receives. Under prior law, he had to forward them to:

1. the chief elected official of the affected municipality;
2. the state senator and representative in whose district the contaminated property is located;
3. the labor commissioner if the Labor Department's Division of Occupational Safety and Health has jurisdiction over the employers, employees, and facilities on the affected property;
4. employee representatives requesting such copies; and
5. federal Occupational Health and Safety Administration.

The act instead requires the commissioner to send copies to the affected municipality's chief elected official and the local or regional health director. It also allows him to electronically forward copies to these officials.

Lastly, the act requires the commissioner to remove a notice he posted on DEEP's website after the condition that triggered the posting was mitigated or permanently abated. By law, the commissioner must maintain a list of such notices on the website.

EFFECTIVE DATE: July 1, 2015

### §§ 33-36 — NOTICE OF ACTIVITY AND USE LIMITATIONS

#### *Overview*

As an alternative to environmental land use restrictions (ELURs), the act allows property owners to execute and record a notice of activity and use limitations (NAUL) in municipal land records. Like ELURs, NAULs are legal instruments used to prohibit activities that could increase the risk of people being exposed to contamination.

Property owners may execute and record ELURs in the land records for the same reasons as NAULs—to minimize human exposure to environmentally contaminated property—but the law allows them to execute and record ELURs for broader reasons. By law, property owners may execute and record an ELUR in the land records to (1) prevent contaminated property from being used for homes, schools, or other types of land use that could increase the risk of exposure or, like NAULs, (2) prohibit certain (unspecified) activities there.

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NAULs differ from ELURs in several respects. By law, property owners cannot record an ELUR unless each person holding an interest in the property irrevocably subordinates their interest in it. Under the act, a property owner can record a NAUL without the interest holders agreeing to subordinate their interest, but must notify them before recording a NAUL.

Another difference between ELURs and NAULs concern the extent to which their provisions bind the owner and his or her successors or assigns (i.e., the party to whom the owner assigns his or her rights, interests, or title). By law, an ELUR's provisions are enforceable, regardless of whether the successors or assigns have a legal right to use or benefit from the land. The act does not impose this condition on NAULs.

Unlike ELURs, property owners may not use NAULs in conjunction with a covenant not to sue. Another difference concerns recording deadlines. By law, property owners must record an ELUR within seven days after its execution. The act imposes no deadline on recording NAULs. Lastly, foreclosures, by law, do not extinguish ELURs, while such actions, under the act, extinguish NAULs.

Although the act establishes NAULs as a different kind of land use control, some of the conditions and requirements that applied only to ELURs under prior law could tacitly apply to NAULs under the act. This appears to be the case because the act describes both instruments as "environmental use restrictions." Under prior law, this term law applied only to ELURs. Consequently, if a statute use the generic "environmental uses restrictions" instead of ELUR or NAUL, the conditions and requirements that apply to ELURs may also apply to NAULs.

### *Conditions for Using NAULs*

The act allows property owners to execute and record NAULs under mostly the same conditions that apply to executing and recording ELURs. Consequently, an owner may execute and record a NAUL if:

1. its restriction will effectively protect the public and the environment from the contamination;
2. the DEEP commissioner has adopted regulatory standards for remediating contamination; and
3. the commissioner or an LEP signed off on the NAUL, signifying that it is consistent with applicable laws and regulations.

The act's conditions for using NAULs differ from those for using ELURs in one respect. A property owner can execute and record an ELUR under a LEP's signature only if the property (1) is located in an area where DEEP classified the ground water as unsuitable for human consumption and (2) will be remediated under a DEEP voluntary program. The owner can execute and record a NAUL signed by the commissioner or a LEP regardless of the groundwater's classification.

### *Authorized Purposes*

The act allows property owners to execute and record NAULs to prevent actions that could potentially disturb or disrupt steps being taken to remediate contamination. They may use NAULs to:

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1. comply with regulatory criteria for minimizing exposure to contaminated groundwater or soil vapor on industrial or commercial property that cannot be used for residence (i.e., the property is zoned only for industrial or commercial uses and no holder of interest in the property, except the owner, has a right to use it for residential purposes);
2. prevent low concentrations of polluted but inaccessible soil from being disturbed (i.e., concentrations below 10 times the applicable direct exposure criteria);
3. prevent an engineering control used to eliminate exposure to highly contaminated soil from being disturbed (i.e., concentrations exceeding 10 times the applicable direct exposure criteria);
4. prevent the demolition of a building or structure that isolates contaminated soil if (a) its contamination level does not exceed 10 times the applicable direct exposure and the pollutant mobility criteria or (b) the total volume of the isolated soil that exceeds 10 times these criteria is less than or equal to 10 cubic yards; or
5. fulfill any regulatory purpose.

A NAUL cannot be used for any of these purposes in an area if a prior holder of interest in the property holds an interest (1) permitting an activity that interferes with the NAUL's purpose or (2) allowing intrusions into the contaminated soil.

The act allows the commissioner to adopt regulations governing NAULs. As with ELURs, the regulations may specify NAULs' form and contents, require fees and financial surety, impose monitoring and reporting requirements, and specify filing and release procedures.

### *Notice Requirements*

Property owners must notify specified parties before recording a NAUL. At least 60 days before doing so, a property owner must give written notice to each person holding an interest in all or part of the property. The property owner must send the notice by certified mail, return receipt requested to these persons, including mortgagees, lessees, lienors, and encumbrancers. The notice must (1) identify the contamination, (2) indicate where on the property it is located, and (3) specify the limited activities and uses. Owners may record the NAUL without giving an interest holder 60-days notice if he or she waives this right in writing.

### *Recording Requirements*

Owners may record only NAULs prepared on a DEEP-prescribed form. Each NAUL must reference the document the commissioner or the LEP used to approve the NAUL (i.e., decision document), and that document must be recorded with the NAUL. The decision document must be signed by the commissioner or signed and sealed by an LEP.

The decision document must specify:

1. why the NAUL is appropriate for achieving and maintaining DEEP remediation standards;
2. the activities and uses inconsistent with this purpose;

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3. the permitted uses and activities;
4. the obligations and conditions necessary to achieve the NAUL's objectives; and
5. the nature and extent of the contamination the NAUL addresses, including a list of the contaminants and their concentrations and how they are distributed below and across the property.

### *Compliance*

A NAUL takes effect once the property owner records it in the land record. At that point, it must be implemented and adhered to by the property owner, the owner's successors or assigns, interest holders, and any other person licensed to use or remediate the property. Similar provisions apply to ELURs.

### *Transferring, Extinguishing, or Terminating NAULs*

The act specifies the (1) requirements for transferring property subject to a NAUL and (2) conditions under which it may be extinguished or terminated. A NAUL must be included in full or by reference in the documents transferring all or part of the property to another party, but it can still be enforced if it is not included in those documents. Transfer documents include deeds, easements, mortgages, leases, and occupancy agreements. The act's recording requirement applies to the property owner or lessee or any person who has the right to subdivide or sublease the property.

If a foreclosure, mortgage lien, or other encumbrance extinguishes a NAUL, the owner must remediate the contamination consistent with DEEP's standards. If the action is a foreclosure, the property owner must remediate the contamination within one year of the foreclosure, unless the commissioner agrees in writing to a different schedule. If the commissioner is not notified about the foreclosure, the owner must notify him in writing within 30 days after the foreclosure. The property owner must do so by certified mail, return receipt requested, providing his or her name, the property's address, and NAUL's identification.

Property owners may terminate a NAUL if they remediate the subject property according to DEEP's remediation standards and comply with DEEP's requirements for remediating the contamination.

### *Enforcement*

The act allows NAULs to be enforced the same way as ELURs. As under the existing law governing ELURs, the attorney general and the commissioner can act to enforce NAULs. The attorney general must bring a civil action upon the commissioner's request, and the commissioner can issue cease and desist and other orders. When the commissioner starts an administrative or civil proceeding to enforce any order, any person may intervene as a matter of right.

As with ELURs, property owners and lessees subject to a NAUL are strictly liable for any violation of its limitations and jointly and severally liable for abating them. They are also liable for a civil penalty of up to \$25,000 for each offense, which is in addition to any injunctive or other equitable relief.

EFFECTIVE DATE: October 1, 2013

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OLR Tracking: JR:KLM:VR:ts