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CLIENT ALERT

NEW REQUIREMENTS FOR PROPERTY OWNERS, LESSORS, LESSEES, AND LENDERS FOR PROPERTIES SUBJECT TO EXISTING AND FUTURE ENVIRONMENTAL LAND USE RESTRICTIONS

March 17, 2021

IMPORTANT TAKEAWAYS:

Starting February 16, 2021, new regulations impose new requirements for:

- **Property Inspections**
- **Preparing and filing reports**
- **Notices**
- **Transfers of ownership**

of any property or business operations covered by an Environmental Land Use Restriction (“ELUR”).

These new requirements apply **now** to all **owners** of these properties, unless a lease or contract assigns responsibilities for property management to someone else, who then may be required to comply.

Banks and other Lenders who foreclose on property interests must review and comply with these rules.

Although the Transfer Act may be sunseting, these regulations impose ***new responsibilities when transferring an interest in a property or business with operations subject to an ELUR.***

When leasing a property, consider the costs of compliance and which party should bear those costs, and include language in the lease to address these new requirements. For existing leases, review them to see which party has responsibility for compliance, and send notification to the responsible party to ensure that it is aware of its new responsibilities, and prepares the proper documentation. If the responsible party is not the owner, it should be directed to supply the owner with copies.

Details. In the past, ELURs presented what was normally a cheaper way to achieve compliance with environmental statutes and regulations when contamination was widespread, and would require removal, and payment for treatment or disposal of large quantities of contaminated soil. Now:

- increased filing fees for ELUR applications
- the cost of preparing newly required exhibits to support ELUR applications and
- these new inspection, reporting, and notification requirements

may change the analysis of whether an ELUR is still a cheaper remedy.

On February 16, 2021, new regulations which govern Environmental Land Use Restrictions (ELUR) and Notice of Activity and Use Limitations (NAUL) became effective. These new regulations impose significant new requirements for inspecting, reporting, and record keeping, to document compliance with new **and old ELURs and NAULs.**

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Inspections. The new regulations require that properties with an ELUR be inspected annually between April 1 and July 31, with a report confirming compliance with the ELUR submitted to DEEP. Every five years, a Licensed Environmental Professional (“LEP”) must be hired to do a “Comprehensive Inspection” and submit a report to DEEP, under the LEP’s seal, and signed by the property owner.

If an annual inspection report for the particular year is not timely submitted, DEEP may order the owner to retain an LEP to conduct a “Comprehensive Inspection,” and prepare the more extensive and expensive report for what would normally be the LEP inspection conducted only every five (5) years.

ELUR inspections include: (i) inspection of the area covered by the ELUR, to make certain that it remains in compliance with the requirements of the ELUR; (ii) a review of records, including analytical data, to verify compliance with the ELUR requirements; (iii) review of the ELUR Fact Sheet previously prepared, which describes the restrictions and affirmative obligations and conditions regarding each area covered by the ELUR. If the inspector finds that the ELUR Fact Sheet does not properly describe the requirements of the ELUR, a new Fact Sheet that does so must be prepared.

ELUR Fact Sheets. As indicated, an ELUR Fact Sheet must be prepared and displayed in a public place or provided to the persons responsible for maintenance and operation of the property, which may include a ground tenant or any other tenants or a property manager. The Fact Sheet must be posted publicly, or provided to any persons who manage the property or portions covered by the ELUR, during the pendency of the ELUR.

Whenever any work is performed on a property which might affect an area covered by an ELUR, prior to the work proceeding, a Fact Sheet must be provided to the person overseeing the health and safety of the person(s) performing the work.

Transferring Ownership of a Property or Business with an ELUR.

Sale. At least thirty (30) days *before* transfer of an interest in a parcel or business operations on a property which is subject to an ELUR, the owner must provide to any recipient of an interest in the parcel or business affected by the ELUR a copy of the ELUR and ELUR Fact Sheet, along with copies of all previous annual and Comprehensive Inspection reports. The transferee must keep a copy of all those records in perpetuity.

Within thirty (30) days *after* the transfer, the transferor of any interest subject to an ELUR must notify DEEP of the transfer.

Foreclosures. The new regulations treat foreclosures and condemnations similarly to transfers of ownership interests. They specify that a foreclosing/condemning entity must secure the records regarding the ELUR from the party whose interest is being foreclosed/condemned, and thereafter supply them to any entity to which the foreclosing/condemning entity may sell the property; or retain the ELUR records, if the foreclosed interest is not transferred.

Record Retention Requirements. Additionally, the regulations require that any documentation prepared or required by these new ELUR regulations be retained in perpetuity, unless the interest covered by the ELUR is transferred, after which transfer the transferee must retain the records in perpetuity. This requirement applies to ELURs recorded before and after the regulations take effect.

The regulations direct that documents be submitted on “forms prescribed by the Commissioner”. The new regulations require forty (40) new forms. The Commissioner has yet to prepare these forms. DEEP has issued no guidance on how to comply before the Commissioner “prescribes” the new forms.