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Venables

HOUSE OF REPRESENTATIVES

143rd GENERAL ASSEMBLY

HOUSE BILL NO. 294

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO THE TRANSFER OR CLOSURE OF
HAZARDOUS SUBSTANCE ESTABLISHMENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 7 of the Delaware Code by adding thereto a new chapter 92 to read as follows:

"CHAPTER 92 – TRANSFER OR CLOSURE OF HAZARDOUS SUBSTANCE ESTABLISHMENTS

§9201. Definitions.

The following definitions apply to this chapter.

(1) 'Applicable state and federal requirements' means all state and federal environmental laws and regulations, such as those relating to cleanup levels, standards of control, and other environmental protection requirements, criteria, or limitations promulgated under state or federal law, that specifically address a hazardous substance, cleanup action, location, or other circumstances at a hazardous substance establishment.

(2) 'Certifying party' means:

a. in the case of a Form I or Form II, a transferor of an establishment who signs the certification on a Form I or II;

b. in the case of a Form III or Form IV, a party associated with the transfer of an establishment who signs a Form III or Form IV and who agrees to:

1. investigate the parcel in accordance with prevailing standards and guidelines; and
2. remediate pollution caused by any release at the establishment in accordance with the remediation standards.

(3) 'Continuous business operation' means a hazardous substance establishment that has, or any series of substantially similar establishments that have, operated continuously or with only brief interruption on the same parcel, either with a single owner or successive owners.

20 (4) 'Corporate reorganization not substantially affecting the ownership of a hazardous substance establishment' means
21 implementation of a business plan to restructure a corporation through a merger, spin-off, or any other plan or reorganization under
22 which the owner of the establishment does not change.

23 (5) 'Department' means the Department of Natural Resources and Environmental Control.

24 (6) 'Environmental condition assessment form' means a form prescribed and provided by the Secretary and prepared
25 under the supervision of a qualified environmental professional, which describes the environmental conditions at a parcel and which
26 is executed by the owner of the parcel or a certifying party pursuant to this chapter.

27 (7) 'Establishment' or 'Hazardous substance establishment' means a business operation or a facility which is required to
28 report a total of 1,000,000 pounds or more, based on the combined maximum amounts, of any combination of hazardous chemicals
29 under 16 Del. C. §6306 for any one or more of the most recent 5 calendar years, and/or a parcel in which the owner and/or operator
30 has, in the preceding twelve months, generated hazardous substances in quantities greater than 1000kg/month, and/or has notified
31 the Department pursuant to Chapter 63 of this title that the owner and/or operator is a generator of hazardous waste in quantities
32 greater than 1000 kg/month.

33 (8) Flammables.

34 a. 'Flammable aerosol' means an aerosol which results in a positive test result for flammability when using any
35 of the following test methods:

- 36 1. Using the Bureau of Explosives' Flame Projection Apparatus, the flame projects more than 18 inches
37 beyond the ignition source with valve opened fully, or the flame flashes back and burns at the valve
38 with any degree of valve opening;
- 39 2. Using the Bureau of Explosives' Open Drum Apparatus, there is any significant propagation of
40 flame away from the ignition source;
- 41 3. Using the Bureau of Explosives' Closed Drum Apparatus, there is any explosion of the vapor-air
42 mixture in the drum.

43 b. 'Flammable gas' means any material which is a gas at 68° F or less and 14.7 psi of pressure (any material
44 which has a boiling point of 68°F or less at 14.7 psi) which (i) is ignitable at 14.7 psi when in a mixture of
45 13 percent or less by volume with air; or (ii) has a flammable range at 14.7 psi with air of at least 12 percent,
46 regardless of the lower limit.

47 c. 'Flammable liquid' means a liquid having a flash point of not more than 141°F, or any material in a liquid
48 phase with a flash point at or above 100°F.

- d. 'Flammable solid' means a solid, other than a blasting agent or explosive as defined in 29 CFR 1910.109(a), that is liable to cause fire through friction, absorption, or processing, or which can be ignited readily and, when ignited, burns so vigorously and persistently as to create a serious hazard. The term 'flammable solid' includes self-reacting materials, self-heating materials, pyrophoric materials, and dangerous-when-wet materials as described in 49 CFR 173.124. A chemical is considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.
- e. 'Flash point' means the minimum temperature at which a liquid gives off vapor within a test vessel in sufficient concentration to form an ignitable mixture with air near the surface of the liquid, determined by using one of the methods specified in 49 CFR 173.120(c)(i).
- f. 'Combustible liquid' means a liquid that has a flash point above 141°F and at or below 200°F.

(9) 'Form I' means a written certification by the transferor of a hazardous substance establishment, on a form prescribed and provided by the Secretary and based on an investigation, approved by the Department, of the parcel on which the establishment is located, that determines that no release of a hazardous substance has occurred at the establishment.

(10) 'Form II' means a written certification by the transferor of a hazardous substance establishment, on a form prescribed and provided by the Secretary, that the parcel on which the establishment is located has been investigated in accordance with HSCA and that:

- a. any release of a hazardous substance at the establishment has been remediated in accordance with the remediation standards; or
- b. the Secretary has determined in writing that no remedial action is necessary to achieve compliance with the remediation standards; or
- c. a Form III previously has been submitted to the Secretary and, since the date of the submission of the Form III, no release of a hazardous substance has occurred at the establishment, based on an investigation of the parcel in accordance with HSCA.

(11) 'Form III' means a written certification by one or more certifying parties, on a form prescribed and provided by the Secretary, which states, and is accompanied by documentation demonstrating, that a parcel on which a hazardous substance establishment is located has been investigated in accordance with Chapter 91 of this title and that:

- a. there has been a release of a hazardous substance at the parcel; and

- 77 b. all remedial actions required by Chapter 91 of this title have been performed to remediate any releases at the
78 parcel in accordance with the remediation standards, except for operations and maintenance and monitoring
79 activities; and
- 80 c. any certification of completion of remedy or other approval by the Secretary pursuant to Chapter 91 of this
81 title has been appended to Form III; and
- 82 d. each person signing the certification agrees, in accordance with the representations made in the form, to
83 conduct operations and maintenance and monitoring activities in accordance with the approved final plan
84 under Chapter 91 of this title; and that if the Secretary determines that further investigation and remediation
85 are necessary to protect public health and the environment, each person agrees to perform an investigation of
86 the parcel in accordance with Chapter 91 of this title and to remediate the parcel in accordance with the
87 remediation standards, as approved by the Secretary.

88 (12) 'Form IV' means a written certification, signed by one or more certifying parties on a form prescribed and provided
89 by the Secretary, which states that:

- 90 a. a release of a hazardous substance has occurred at the parcel and no remedy under Chapter 91 of this title has
91 occurred or that the environmental conditions at the parcel are unknown, and
- 92 b. each person signing the certification agrees to enter into an agreement to perform:
- 93 1. an investigation of the parcel in accordance with Chapter 91 of this title, as approved by the
94 Secretary; and
- 95 2. any required remedial action deemed necessary by the Secretary under Chapter 91 of this title to
96 remediate any release of a hazardous substance from the parcel in accordance with the remediation
97 standards, as approved by the Secretary.

98 (13) 'Hazardous substance' means the term as defined in Chapter 91 of this title or in the regulations promulgated
99 pursuant thereto, or a petroleum product or by-product for which the Secretary has promulgated remediation standards.

100 (14) 'HSCA' means the Delaware Hazardous Substance Cleanup Act pursuant to Chapter 91 of this title.

101 (15) 'Owner or operator' means:

- 102 a. a person owning, operating, or otherwise controlling activities at a hazardous substance establishment or part
103 of an establishment; or
- 104 b. a person who owned, operated, or otherwise controlled activities at a hazardous substance establishment or
105 part of an establishment.

106 (16) 'Parcel' means piece or tract of land which contains an establishment, as defined in subsection (6) of this section, or
107 on which is or was located any continuous business operation which contains or contained an establishment.

108 (17) 'Party associated with the transfer of an establishment' means:

- 109 a. the present or past owner or operator of the establishment;
- 110 b. the owner of the parcel on which the establishment is located;
- 111 c. the transferor, transferee, lender, guarantor, or indemnitor of the establishment; or
- 112 d. the State, or any political subdivision thereof.

113 (18) 'Person' means any individual, trust, firm, joint stock company, partnership, consortium, joint venture, commercial
114 entity, corporation (including a government corporation or authority), limited liability company, association, federal government,
115 federal agency, state, municipality, commission, school district, conservation district, Indian tribe, political subdivision of a state, an
116 interstate body, or any other legal or commercial entity.

117 (19) 'Regulated substance' means petroleum, any flammable substance, any hazardous substance as defined in Chapter 91
118 of this title or in the regulations promulgated pursuant thereto, or polychlorinated biphenyls in concentrations greater than 50 parts
119 per million.

120 (20) 'Remedy' means any remedial activity as defined in Chapter 91 of this title.

121 (21) 'Release' (of a hazardous substance, pollutant, or contaminant) means the term as defined in Chapter 91 of this title.

122 (22) 'Remediation standards' means the regulations, guidances, policies, and procedures adopted by the Secretary
123 governing the remediation of hazardous substances under Chapter 91 of this title. If a release of a hazardous substance is also
124 regulated by another statute or program administered by the Secretary, the Secretary may determine that the standards or procedures
125 used by the other statute or program satisfy the requirements of an investigation and remediation pursuant to HSCA.

126 (23) 'Secretary' means the Secretary of the Department of Natural Resources and Environmental Control.

127 (24) 'Transfer an establishment' means a transaction or proceeding through which there is a change in ownership of an
128 interest in an establishment, but does not mean:

- 129 a. the conveyance or extinguishment of an easement;
- 130 b. the conveyance of an establishment through a foreclosure or the conveyance of a deed in lieu of foreclosure
131 to a lender;
- 132 c. the conveyance of a security interest;
- 133 d. a change in ownership approved by the Register of Wills;

- e. a devolution of title to a surviving joint tenant, or to a trustee, executor, or administrator under the terms of a testamentary trust or will, or by intestate succession;
- f. a corporate reorganization not substantially affecting the ownership or operation of the establishment;
- g. the issuance of stock or other securities of an entity which owns or operates the establishment;
- h. the transfer of stock, securities or other ownership interests representing less than twenty-five per cent of the ownership of the entity that owns or operates the establishment;
- i. the conveyance of an interest in an establishment where the transferor is one or more of the following: the sibling, spouse, child, parent, grandparent, the child of a sibling, or the sibling of a parent of the transferee;
- j. the conveyance of an interest in an establishment to a trustee of an inter vivos trust created by the transferor solely for the benefit of one or more of the following: the sibling, spouse, child, parent, grandchild, the child of a sibling, or the sibling of a parent of the transferor;
- k. the conveyance of an establishment which has been developed solely for residential use and that use has not changed;
- l. the conversion of a general or limited partnership to a limited liability company;
- m. the transfer of general partnership property held in the names of all of the general partners to another general partnership which includes as general partners immediately after the transfer all of the same persons that were general partners immediately prior to the transfer;
- n. the transfer of general partnership property held in the names of all of the general partners to a limited liability company which includes as members immediately after the transfer all of the same persons that were general partners immediately prior to the transfer; or
- o. the acquisition of an establishment by any governmental or quasi-governmental condemning authority.

§9202. Transfer of hazardous substance establishments; filing procedures; certification of cleanup.

(a) A person may not transfer a hazardous substance establishment except in accordance with the provisions of this chapter.

(b) (1) Prior to the transfer of a hazardous substance establishment, the transferor shall submit to the transferee a completed Form I or Form II and, no later than 150 days, or less if approved by the Secretary, prior to the transfer, shall submit a copy of the completed Form I or Form II to the Secretary. The Secretary shall notify

the transferor no later than 90 days after the submission of Form I or Form II if the Secretary considers the form incomplete.

(2) If the transferor is unable to submit a Form I or Form II to the Secretary and the transferee prior to the transfer of a hazardous substance establishment, a completed Form III or Form IV prepared and signed by one or more of the certifying parties must be submitted to the Secretary and the transferee no later than 180 days, or less if approved by the Secretary, prior to the transfer. No later than 90 days after receipt of a Form III or Form IV, the Secretary shall notify the certifying party if the form is approved or if review and approval of remediation by the Secretary is required.

(3) If no one associated with the transfer of a hazardous substance establishment prepares and signs a Form III or Form IV as a certifying party, the transferor must prepare and sign the proper form.

(4) The Secretary may consider any information contained in Forms I through IV to be privileged or confidential pursuant to 29 Del. C. 10002(g) (2).

(c) A certifying party shall:

(1) prior to the transfer of a hazardous substance establishment, provide to the Secretary copies of all technical plans, reports, and other supporting documentation relating to the investigation of a parcel or remediation of the parcel and/or the establishment necessary to accurately represent the environmental condition of the parcel and establishment; and

(2) simultaneously submit, with the submission of Form I, II, III, or IV to the Secretary, a completed environmental condition assessment form, and shall certify to the Secretary, in writing, that to the best of the certifying party's knowledge and belief, the information contained in the form is correct and accurately represents the environmental condition of the parcel and establishment.

(d) If the Secretary notifies a certifying party of the investigation of a parcel, and remediation of the parcel and/or the establishment located on the parcel has not been approved in accordance with Chapter 91 of this title, the certifying party shall sign an agreement with the Secretary to:

(1) investigate and remediate the parcel and/or the establishment in accordance with Chapter 91 of this title; and
(2) provide public notice of the remediation prior to the initiation of the remediation in accordance with Chapter 91 of this title.

(e) The Secretary may issue an order to any person who fails to comply with any provision of this chapter, including but not limited to any person who fails to file a form, or files an incomplete or incorrect form, or to any person who fails to carry

190 out any activities to which that person agreed in a Form III or Form IV. If no form is filed or if an incomplete or incorrect form is
191 filed relating to a transfer of a hazardous substance establishment, the Secretary may issue an order to the transferor, the transferee,
192 or both, requiring a filing. The Secretary may also bring an action in the Court of Chancery to enjoin the transfer of the
193 establishment by a person who fails to comply with any provision of this chapter, including but not limited to failing to file a form,
194 improperly filing a Form I, Form II, Form III, or Form IV, failing to certify a Form III or Form IV, or failing to take the necessary
195 action to prevent or abate any pollution or contamination from hazardous substances at, or emanating from, the establishment.

196 (f) Nothing contained in this chapter may be construed to create an innocent-landowner defense pursuant to
197 §9105(c)(2) of this title.

198 (g) The transferor of a hazardous substance establishment shall notify the transferee if any form required by this chapter
199 has ever been submitted to the Secretary.

200 (h) Failure of the Secretary to notify a party in accordance with the provisions of this chapter does not limit the
201 authority of the Secretary to enforce the provisions of this chapter.

202 §9203. Damages.

203 Failure of the transferor of a hazardous substance establishment to comply with the provisions of this chapter entitles the
204 transferee to recover damages from the transferor, and renders the transferor of the establishment strictly liable, without regard to
205 fault, for all remediation costs and for all direct and indirect damages related to any environmental condition existing at the time of
206 the transfer.

207 §9204. Authority of the Secretary; regulations.

208 (a) The provisions of this chapter do not affect the authority of the Secretary under any other statute or regulation to
209 issue any order to the transferor or transferee of a hazardous substance establishment.

210 (b) The Secretary may adopt regulations to implement the provisions of this chapter.

211 §9205. Penalty.

212 A person who violates a provision of this chapter or of the regulations issued in accordance with the provisions of this
213 chapter may be assessed a civil penalty of up to \$10,000 per day for each day of a violation. For purposes of determining a civil
214 penalty, the period of violation is deemed to begin on the day that the Secretary determines non-compliance with the provision of
215 this chapter and to continue until full compliance with the terms of any order of the Secretary is achieved.

216 §9206. Cost recovery.

217 (a) The Department may recover, pursuant to Chapter 91 of this chapter, all costs associated with the oversight or
218 performance of remedies conducted at the parcel and/or the hazardous substance establishment located on the parcel necessary to
219 comply with the remediation standards of Chapter 91 of this title, whether or not the costs were incurred in connection with the
220 performance of remedial activities required by this chapter.

221 §9207. Transfer of hazardous substance establishments; withdrawal of forms.

222 A person who has submitted a Form I, Form II, Form III, or Form IV to the Secretary pursuant to this chapter may petition
223 the Secretary to withdraw the form. The petitioner shall notify by certified mail the transferor, the transferee, and any certifying
224 parties of the petition to withdraw. The petitioner shall make every reasonable effort to obtain the addresses of the transferor,
225 transferee, and any certifying parties. The transferor, transferee, and any certifying parties have thirty days to submit to the
226 Secretary written objections to the petition. The Secretary may grant the petition if it demonstrates to the Secretary's satisfaction
227 that the property or business to be transferred is not or was not a hazardous substance establishment, that the transaction did not
228 constitute a transfer of a hazardous substance establishment at the time the form was submitted, that the transaction for which the
229 form was submitted did not take place, or for any other valid reason consistent with the purposes of this chapter. If the Secretary
230 grants the petition, no further action is required by the transferor, the transferee, or any certifying parties with respect to obligations
231 under the form, but the form and the fee will not be returned.

232 §9208. Termination of operations or filing for bankruptcy at a hazardous substance establishment; procedures.

233 (a) Not later than the date of termination of all business or other activities at a hazardous substance establishment or the
234 date of filing for reorganization or liquidation under the federal Bankruptcy Code, the owner or operator of the establishment shall
235 file a notice with the Secretary which must include information regarding the person or persons employed by the establishment who
236 will be responsible for providing information regarding compliance with this section.

237 (b) Not later than 90 days after the termination of all business or other activities at a hazardous substance establishment,
238 the owner or operator of the establishment, or a trustee if the owner or operator is in bankruptcy, shall:

- 239 (1) submit to the Secretary a list of every stationary storage vessel located at the establishment. If a storage
240 vessel contains a regulated substance, the contents of the vessel must be identified;
- 241 (2) drain, remove, or otherwise dispose of all regulated substances in accordance with applicable law;
- 242 (3) submit the applicable form to the Secretary pursuant to §9202 of this chapter;
- 243 (4) post warning signs around any parcel where the soil is contaminated with a hazardous substance; and

(5) submit a certification to the Secretary with regard to whether regulated substances have been removed from the parcel and disposed of in accordance with applicable law.

(c) Following receipt of the required submittals under subsection (b) of this section, the Secretary shall, within 30 days, conduct an inspection of the parcel and/or the hazardous substance establishment to determine compliance with this section.

§9209. Financial assurance regulations.

The Secretary shall, after notice and public hearing pursuant to 29 Del. C. §10113, promulgate regulations requiring any owner and/or operator of a hazardous substance establishment to produce assurances of financial responsibility for costs which may be incurred for identifying and completing remedies under this chapter."

SYNOPSIS

This bill provides that any party seeking to transfer a hazardous substance establishment must first submit one of four forms to the Department of Natural Resources and Environmental Control. A "hazardous substance establishment" is defined as a facility reporting a cumulative total of 1,000,000 pounds or more of any combination of hazardous chemicals or substances under 16 Del. C. §6302 and/or one that is classified as a large quantity generator of hazardous wastes under Chapter 63 of Title 7. Prior to a transfer, the seller or other certifying party must submit to the Department a form which states one of the following: (1) that a diligent investigation has confirmed that there is no contamination from a regulated substance at the establishment (Form I); (2) that any contamination at the establishment has been remediated (Form II); (3) that there has been a release of a hazardous substance at the establishment, and that all required remedial work is complete, except post-remediation monitoring or the recording of an environmental land use restriction, and that the certifying party commits to doing such work (Form III); or (4) that there has been a release of a hazardous substance, or it is unknown if there has been such a release, but that the certifying party signing the form commits to remediating the release (Form IV).

The bill further provides that upon the closure of a hazardous substance establishment, regardless of whether or not the closure is a part of a bankruptcy, the owner or operator of the establishment must: (1) submit to the Department a list of all tanks at the establishment and the contents thereof; (2) drain, remove, or otherwise dispose of all regulated substances in accordance with any applicable law; (3) submit the applicable form to the Secretary; (4) post warning signs; and (5) submit a certification to the Department with regard to whether regulated substances have been removed and disposed of in accordance with applicable law. The bill also authorizes the Department to promulgate regulations requiring that owners or operators of hazardous substance establishments provide financial assurances for cleanup actions.