Chapter 48

Massachusetts

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Introduction

The Commonwealth of Massachusetts has been working to encourage the cleanup and redevelopment of brownfield sites since the early 1990s. This chapter provides an overview of the Massachusetts brownfields program, which is based on two cornerstones: a "privatized" regulatory scheme that streamlines the cleanup process, and the Massachusetts Brownfields Act, which provides a package of liability protections and financial incentives designed to encourage innocent prospective purchasers, tenants, and lenders to become interested in and involved with previously contaminated sites.

Summary of Major Provisions

In 1993, the Massachusetts regulations that govern response actions concerning releases of oil and hazardous materials were substantially revised to streamline and privatize the process. This regulatory program, known as the Massachusetts Contingency Plan (MCP), provides the regulated community with a detailed blueprint for addressing releases of oil and/or hazardous materials without significant government involvement. Instead of overseeing every phase of a cleanup, the Massachusetts Department of Environmental Protection (DEP) now relies on private environmental consultants, known as Licensed Site Professionals or LSPs, to determine whether the appropriate risk-based cleanup standards have been met.

The Massachusetts Brownfields Act, which was enacted in 1998, complements the MCP process. This statute protects many types of "innocent" parties from liability under Mass. Gen. Laws ch. 21E, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act (Chapter 21E).[1] The Brownfields Act also provided new tax credits and two new funding vehicles to stimulate the redevelopment of brownfield sites. This package of liability protections and financial incentives makes brownfields redevelopment in Massachusetts more appealing to many parties.

Understanding the Massachusetts Superfund Statute

The Liability Scheme

Chapter 21E, originally enacted in 1983 and extensively amended in 1992, is patterned closely after the federal Superfund statute, known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Chapter 21E imposes liability on several classes of "potentially responsible parties" or PRPs, including:

owners and operators of sites where there has been a release of oil or hazardous material;

past owners or operators of sites at which hazardous material (but not oil) was released;

any person who arranged for the transportation, disposal, storage, or treatment of hazardous material;

any person who transported any hazardous material to a site from or at which there has been a release of that material; and

any person who "otherwise caused or is legally responsible for" a release of oil or hazardous material.[2]

It is important to note that Chapter 21E provides causes of action for both private parties and the Commonwealth.[3]

Liability under Chapter 21E is joint, several, and without regard to fault.[4] However, liability for releases of oil falls only on current owners and operators and those who have "otherwise caused" such releases or threats of release.[5] In other words, former owners and former operators cannot be held liable for a release of oil unless it can be proven that they "otherwise caused or are legally responsible for" the release.[6] In contrast, liability for releases of hazardous material is notably broader because it is a status liability, which falls on both current and former owners and operators.[7]

Recoverable Damages

Liability under Chapter 21E can be much broader than liability under CERCLA because, as noted above, Chapter 21E expressly permits the recovery of damages associated with petroleum contamination. In addition, Chapter 21E establishes rights of action both for "response costs," which are costs incurred in assessing and cleaning up releases of oil or hazardous materials, and for "property damage."[8]

Under section 5 of Chapter 21E, damages for the diminution in a property's market value may be awarded where a property cannot be fully remediated.[9] Courts have also held that the measure of recovery for property damage under Chapter 21E is identical to the measure of recovery at common law for damages to real or personal property. Accordingly, damages for lost use or lost rental value appear to be recoverable under Chapter 21E; however, the property owner must prove that the injury to property is not reasonably curable in order to recover under section 5 for diminution in property value. If the injury is reasonably curable (e.g. by a response action), the proper action is for reimbursement of response costs under section 4.[10]

In addition, in order to obtain reimbursement for incurred response costs, a property owner must show that the response costs are "reasonable" and "necessary and appropriate" response costs.[11] This does not mean, however, that the response costs must be in strict compliance with the MCP.[12]

Finally, Chapter 21E provides a cause of action for the Commonwealth to recover for damages to natural resources.[13]

Environmental Liens

Chapter 21E provides for environmental liens for cleanup costs incurred by the Commonwealth against all real and personal property owned by liable parties.[14] The lien is a first priority or "super" lien as to the site where the cleanup was conducted. [15] Property other than the site that may be held by the liable parties and sites which are occupied primarily by single or multi-family housing are not subject to the super lien provision.[16]

Attorney Fees

Chapter 21E also provides for the recovery of attorney fees. Section 15 of Chapter 21E provides that courts "may award costs, including reasonable attorney and expert witness fees, to any party . . . who advances the purposes of [Chapter 21E]."[17] In addition, Chapter 21E also provides for the award of attorney fees against parties who take unreasonable or bad faith negotiating positions in connection with the prelitigation dispute resolution process that is mandated by section 4A of the statute.[18] Finally, attorneys fees which can be categorized as necessary and appropriate management costs of the response action are recoverable under section 4. [19]

Statute of Limitations

Actions for property damage under section 5 of Chapter 21E are subject to a three-year statute of limitations, which runs from the date on which (i) the person seeking recovery first suffers the damage, or (ii) the person seeking recovery discovers or reasonably should have discovered that the defendant is a liable person, whichever is later.[20] In cases of groundwater contamination, where the contamination is not immediately obvious, it is sometimes difficult to determine when the statute has been triggered. The Massachusetts Supreme Judicial Court has clarified this point by holding that even if a property owner suspects that a known release on neighboring property may have migrated onto his or her property, the owner is under no duty to conduct an independent investigation, and therefore the statute cannot begin to run until the property owner is in receipt of test results confirming migration from the neighboring property.[21]

In contrast, the statute of limitations for response cost actions under section 4 of Chapter 21E is much more lenient, in that a suit must be commenced within three years after: (i) the date on which the plaintiff first discovered or reasonably should have discovered that the defendant is a person liable; (ii) the date on which the plaintiff first learned of a material violation of an agreement reached pursuant to the dispute resolution procedures set out in section 4A of Chapter 21E; (iii) the date on which the plaintiff incurs all response costs at a site (i.e., completes all response actions); or (iv) the date on which the person seeking recovery sent notice to a defendant pursuant to section 4A of Chapter 21E, whichever is latest.[22]

The statute of limitations for actions brought by the Attorney General for the Commonwealth of Massachusetts for recovery of response costs requires that all actions be commenced within five years from the date on which the Commonwealth incurs all response costs at a site, or five years from the date on which the Commonwealth discovers that the person against whom the action is being brought is a person liable for a release or threat of release on account of which the Commonwealth has incurred response costs, whichever is later.[23] The statute of limitations for recovery of natural resource damages by the Commonwealth requires actions to be commenced within three years from the date of discovery of the damage or loss and its

connection to the release in question, or within three years after the date the Commonwealth discovers that the person against whom the action is being brought is liable, or within five years from the date the Commonwealth discovers that the defendant is liable for a site at which the Commonwealth has incurred response costs, whichever is later. [24]

Contractual Allocation of Liability

Private agreements can be used to allocate environmental liabilities under Chapter 21E between and among private parties. Private agreements cannot, however, serve to protect a party from liability to the Commonwealth. Specifically, section 5(f) of Chapter 21E provides:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or site or from any person who may be liable for a release or a threat of release of hazardous material under this section, to any other person the liability imposed under this section. Nothing in this paragraph shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.[25]

Apportionment of Response Costs

Under Chapter 21E, an owner of contaminated property who did not own or operate the site at the time of the release in question, and did not cause or contribute to such release, can be held liable to the Commonwealth but not to any other party that contributed to the subject release or owned the property at issue at the time of the release.[26] Chapter 21E does, however, expressly contemplate the equitable apportionment of response costs between and among responsible parties. Section 4 of Chapter 21E provides as follows:

If two or more persons are liable . . . for such release or threat of release, each shall be liable to the others for their equitable share of the costs of such response action.[27]

Among other equitable factors, courts will take into consideration a property owner's knowledge of the contamination prior to purchasing the property in allocating response costs.[28]

Safe Harbors for Eligible Persons, Eligible Tenants, Secured Lenders, and Downgradient Owners and Operators

Under Chapter 21E, as modified by the Brownfields Act, a number of different types of "innocent" parties have been provided specific liability protection to encourage these parties to take on brownfield sites. They include so-called "eligible persons" (partially defined as owners or operators who did not cause the relevant release, and did not own or operate the site at the time of the release); "eligible tenants" (defined as persons who acquire occupancy, possession, or control of a site after a release has been reported to DEP and who did not cause or contribute to the release); secured lenders (also a defined term under Chapter 21E); and owners and operators of property located downgradient of an off-site source of contamination.[29]

Eligible Persons

Eligible persons are given liability relief under Chapter 21E and under common law with respect to response action costs and property damage claims (but not personal injury claims) arising at sites after a cleanup has been performed. [30] Specifically, site closure under the MCP must have been achieved through either a "permanent solution" or "remedy operation status," as those terms

are defined in Chapter 21E and the MCP. [31] If a release affected soil only, the relevant party must achieve such a cleanup standard only for the property that person owns or operates. [32] If groundwater contamination is involved, then the cleanup must be performed for the entire MCP site (including, potentially, beyond the property lines of the parcel owned or operated by the relevant eligible person). [33] The liability relief is afforded to an eligible person that transfers the property to another eligible person in the middle of a cleanup so long as the eligible person that transfers the site is in compliance with the cleanup regulations and the eligible person that acquires the site achieves regulatory closure.[34] In addition, the same liability protections are granted to eligible persons that acquire the site after regulatory closure has been achieved.[35]

Eligible Tenants

Significant liability protections have been made available for eligible tenants to encourage new tenants to enter leases at brownfield sites and provide the owner with an income stream with which to fund a cleanup. Specifically, eligible tenants will not be considered potentially liable owners/operators under Chapter 21E for releases of oil or hazardous materials that DEP has notice of *before* the eligible tenant enters into the lease. [36] In addition, to enjoy the protection, eligible tenants must (i) prevent exposure to contamination at the portion of the site under their control, and (ii) take immediate action to control the risk associated with any "imminent hazard" (a defined term under the MCP). [37] Also, if the tenant uses oil or hazardous materials similar to those identified at the site, the tenant will need to show that it has not contributed to the contamination.[38] In sum, in order to take advantage of this potentially valuable protection, tenants should investigate property carefully (including making sure DEP has notice of all known releases) before signing a lease.

Secured Lenders

Pursuant to the Brownfields Act, secured lenders are not liable under Chapter 21E unless they: (i) cause or contribute to a release; (ii) make the release worse in some manner; or (iii) require a borrower to take any action that causes a release.[39] Not surprisingly, a lender is also not relieved of liability for releases that first begin to occur after the lender has ownership or possession of a site. [40]

There are several additional requirements that lenders must satisfy to qualify for liability protection. If a lender has knowledge of a release at a site on which it intends to foreclose, the lender must notify DEP no later than the commencement of the public foreclosure auction, and the lender must notify prospective bidders at the foreclosure auction. [41] After acquiring ownership or taking possession, the lender must: (i) notify DEP if there has been a release and provide reasonable site access; (ii) take reasonable steps to prevent exposure of people to the release, including containing releases and threatened releases from structures and containers; and (iii) if an imminent hazard or a "condition of substantial release migration" (MCP-defined terms) is present, take those actions that are necessary under the MCP to address the situation. [42] In addition, in order to maintain liability protection, lender-owners or lenders-in-possession must act diligently to sell or otherwise divest themselves of these properties. [43]

Downgradient Owners and Operators

Liability protection is also provided for so-called downgradient owners and operators, provided they did not cause or contribute to the relevant release.[44] If the offsite source of the contamination is known, the downgradient owner or operator is exempt from liability.[45] If the

source is unknown, a liability defense is provided. The idea is that the burden of proof shifts depending on the situation. Whether or not the off-site source is known, in order to qualify for liability protection, downgradient owners and operators must prevent human exposure to the contamination on the property they own or operate, and they must take "immediate response actions" with respect to any imminent hazards found there.[46]

Memorandum of Understanding

Currently, Massachusetts does not have a Memorandum of Understanding with the United States Environmental Protection Agency (EPA). Therefore, persons or entities cleaning up a site in accordance with the requirements of the MCP, at least theoretically, could be subject to federal liability under CERCLA even after an appropriate MCP Response Action Outcome (described more fully below) has been achieved. Nonetheless, EPA's current enforcement position does not contemplate taking enforcement actions with respect to sites that are in compliance with the MCP. In addition, PRPs may seek "comfort letters" from EPA's Region 1 office or, in some limited circumstances, enter into Prospective Purchaser Agreements with the federal government to minimize the threat of liability under CERCLA.

Understanding the Massachusetts Contingency Plan

Introduction

The regulations known as the Massachusetts Contingency Plan or the MCP govern response actions concerning contaminated sites in Massachusetts.[47] The MCP is designed to encourage the cleanup and redevelopment of brownfield sites by: providing private parties with clear rules about reporting obligations; providing the regulated community with flexibility in determining the appropriate pace of most cleanups; and allowing responsible parties to use a risk-based approach to take the planned future uses of a site into account when determining whether a cleanup is necessary.[48]

The DEP has often described the MCP program as a highway system with fast and slow lanes and a variety of entrance and exit points. Continuing that analogy, the MCP establishes minimum and maximum speeds for moving through the waste site cleanup process (i.e., performance standards) as well as a variety of different "off-ramps," which give PRPs and other parties flexibility in determining when and how they will meet the applicable cleanup standards in order to exit the system.

The Role of Licensed Site Professionals

At the center of the MCP process is a now not-so new-type of private sector environmental professional, known as a Licensed Site Professional or an LSP. These environmental experts are hired by private parties and charged with ensuring that cleanup efforts at individual sites comply with the requirements of the MCP. In order to become an LSP, an environmental professional must pass an examination and meet specific standards for technical competence, decision-making experience, and ethical practice.[49]

Now, instead of relying on its own limited resources to oversee and approve every phase of the assessment and cleanup process at every site, the DEP has shifted a significant amount of decision-making responsibility to the LSPs. In many cases, the MCP allows private parties to

avoid the need for DEP oversight by retaining an LSP to determine whether a cleanup is necessary and, if so, how that cleanup should proceed. Simply put, the use of an LSP allows private parties in most cases to avoid what had been the time-consuming and often frustrating experience of waiting for the DEP to focus on a particular site.

While the MCP does not require DEP's direct involvement at most sites, it does require LSP opinions at several key junctures as sites move through the MCP process. At each of these key points, an LSP needs to prepare a special DEP form, sign it, and affix his or her LSP certification stamp to it indicating that the actions described in the submittal were conducted under the LSP's professional oversight, in a manner consistent with good professional practice and in a manner consistent with the requirements of the MCP. For most sites regulated under the MCP, an LSP is required for the following actions:

developing plans for assessment and cleanup;

disposal of contaminated soils or debris; and

preparing Response Action Outcome Statements (in English, MCP completion statements, as discussed below, indicating that no further cleanup work is required). [50]

Notification Requirements

The MCP includes a list of reportable concentrations (RCs) for many specifically identified compounds. These reportable concentrations are specific thresholds for determining whether contaminant levels in soil and/or groundwater must be reported to the DEP. If a release is discovered at a site and the applicable RC is not exceeded, no notice to DEP is required and the site does not need to go through the MCP process. Conversely, an appropriate notice must be submitted to DEP if the published RC for a specific oil or hazardous material constituent is exceeded at a site.[51]

Under the MCP there are three types of reportable releases: releases that require notice to DEP within 2 hours, 72 hours, or 120 days, respectively. These time frames are triggered when an owner or operator obtains knowledge that a release has occurred. The two-hour notice requirement applies to the most serious releases. Examples include a release involving the presence of oil and/or hazardous material in a private drinking water well at concentrations greater than the applicable reportable concentration, and a release in any quantity or concentration that results in an imminent hazard.[52] An example of a release requiring 72-hour notification is one that involves the presence of a subsurface nonaqueous phase liquid in the form of oil and/or hazardous material.[53] Generally, 120-day releases include the presence of oil and/or hazardous materials in soil or groundwater in an amount equal to or greater than the applicable RC.[54]

As noted above, a release is "reportable" under the MCP only if the measured concentration of the relevant contaminant is equal to or greater than the applicable RC. These RCs are listed in the Massachusetts Oil and Hazardous Materials List, which is part of the MCP.[55]

The Massachusetts Oil and Hazardous Materials List separates RCs into two soil categories (RCS-1 and RCS-2) and two groundwater categories (RCGW-1 and RCGW-2). Briefly, the

RCS-1 and RCGW-1 categories apply to more sensitive environmental areas, based on the current use and other characteristics of the site that are specified in the regulations. Categories RCS-2 and RCGW-2 apply to sites that are not in the more sensitive categories (e.g., no nearby drinking water sources), somewhat as default provisions. The regulations contain specific provisions regarding which RC categories apply to a particular site for notification purposes.[56]

Limited Removal Actions

The MCP contains provisions concerning "limited removal actions" (LRAs), which are preliminary remedial response actions that can be completed before notice to the DEP is required. LRAs are designed to allow private parties to quickly remediate minor releases without needing to report the contamination to the DEP or enter the MCP system. It should be noted, however, that LRAs are not allowed for groundwater contamination.

Limited removal actions include the excavation and offsite recycling, reuse, treatment, and/or disposal of not more than 100 yards of soil contaminated by oil and not more than 20 cubic yards of soil contaminated by hazardous material.[57] As these parameters demonstrate, LRAs are restricted in nature, reflecting the continuing tension between the DEP's objective of enabling private parties to deal with MCP sites quickly and its concern over allowing too much freedom with respect to those sites.

Preliminary Response Actions

If notice to DEP is required, and performing an LRA does not eliminate the need to give that notice, "preliminary response actions" are the next steps that must be taken under the MCP. Once these preliminary measures have been completed, it is possible to exit the MCP process if adequate results have been achieved.[58]

Preliminary response actions may include the following activities:

Initial Site Investigation Activities. Initial site investigation activities are just what their name implies. The objective of these investigations is to obtain preliminary information about a site, which may be used to support a response action outcome statement, described more fully below, or as the basis for a more detailed investigation.[59]

Immediate Response Actions. Immediate response actions are measures that are required to be taken to address imminent hazards, which involve serious threats to human health, safety, public welfare, and/or the environment. A licensed site professional must be used, and DEP approval of some kind is generally required to perform these actions unless the delay in obtaining that approval would substantially increase the problem.[60]

Release Abatement Measures. Release abatement measures (RAMs) are intended to allow the voluntary implementation of certain accelerated remedial actions, but they are limited in scope and complexity. The idea is that if a fairly simple remediation effort can solve the problem, then there is no need for the site to go through the complete MCP process. The MCP requires that an LSP be retained when performing a release abatement measure, and that written notification of the relevant release be given to DEP before the RAM is performed. Once DEP has received a written RAM Plan, DEP approval to conduct the RAM is not required unless the DEP notifies

the party conducting the RAM in writing.[61]

Tier Classification and the Numerical Ranking System

If the preliminary response actions outlined above do not result in the site being able to exit the MCP process, private parties are required to classify the site using a detailed numerical ranking system, which is based on the toxicity of the detected contaminants and the characteristics of the disposal site at issue. Generally, each site that has not exited the system within one year of the initial notification to DEP of a release must "tier classify" and pay the applicable tier classification fee. Here, the MCP has intentionally been designed to encourage private parties to undertake response actions as soon as possible in order to avoid the fees and costs associated with tier classification.

A site is classified as either a Tier I or a Tier II site. Tier I sites are those with more significant contamination problems. Prior to performing more in-depth response actions at Tier I sites, a party must submit a Tier I permit application to DEP. A Tier I permit application is presumed approved without conditions 36 days from the date a complete application is received by DEP, unless DEP notifies the applicant prior to that time that it has denied the application, approved the application with conditions, or extended the review period.[62] No such permit application is required at Tier II sites. In addition, Tier I sites are subject to higher annual compliance fees and an increased level of DEP oversight.[63]

It is also necessary as part of the tier classification process to submit to DEP either a Phase II Scope of Work or a Conceptual Scope of Work.

The MCP was recently amended to allow eligible persons, a defined term under both Chapter 21E and the MCP, who acquire a site not in compliance with the MCP (as well as other persons) to reset applicable filing deadlines without being assessed penalties. The purpose behind these amendments was to create a process through which parties, who are not otherwise liable for response actions at a site, could voluntarily conduct response actions and bring an out-of-compliance site back into MCP compliance, and do so on a more reasonable schedule.[64]

Comprehensive Response Actions and Risk Characterizations

Once a site has been classified using the tier classification system, it is possible to proceed with comprehensive response actions, which may include relatively significant remedial efforts and/or more detailed site assessment studies or risk characterizations. Risk characterizations are used to determine whether detected contaminants pose a threat to human health or the environment and whether further comprehensive response actions are required. Comprehensive response actions are primarily used to reduce or eliminate unacceptable levels of risk associated with contaminants that are present at a particular site.[65]

The MCP recognizes two basic approaches to risk categorization. The first is a contaminant-specific approach, which compares site concentrations for specific substances in soil and groundwater to published regulatory clean-up standards.[66] The DEP has expended considerable effort in developing these contaminant-specific numerical standards, so that private parties and their LSPs can determine whether significant risks are present simply by comparing a published number with the contaminant concentrations present at a particular site. Note, however, that the

DEP has intentionally made these standards somewhat conservative because of the "cookbook" manner in which they may be used at most sites. The second risk characterization approach is a much more detailed cumulative risk approach, which involves comparing site-specific information to cumulative cancer risk and other health risk information.[67]

The MCP sets forth three specific methods to use in characterizing risks at a site. Method 1 relies on the numerical standards described above. To use Method 1, there must be a promulgated Method 1 standard for each contaminant of concern at the site. If no such standard has been promulgated, the party conducting the risk characterization may develop a site-specific standard using Method 2. Methods 1 and 2 may be used only if contaminants are only present in soil and/or groundwater.[68]

If contaminants are present in other environmental media (e.g., indoor air or sediments), a Method 3 Risk Assessment must be used. Method 3 may also be used when a private party would like to modify the generic Method 1 cleanup standards based on site-specific information. Frequently, the use of a site-specific approach results in less conservative cleanup standards. In other words, a Method 3 Risk Characterization may be used to demonstrate that the presence of a particular contaminant at levels that may exceed the published Method 1 standard will not pose a threat to human health or the environment at a particular site.[69]

As is the case with RCs, the Method 1 soil and groundwater categories reflect the sensitivity of an area from an environmental perspective. Groundwater category GW-1 applies to groundwater located within a Current Drinking Water Source Area or within a Potential Drinking Water Source Area, which are specified in detail in the MCP. Category GW-2 applies to groundwater located within thirty feet of an occupied building in an area where the average depth to groundwater is fifteen feet or less, the idea being that this type of contamination could be a potential source of vapors to indoor air. Category GW-3 is designed to address potential impacts to surface water. In addition, this category is also somewhat of a default category because Category GW-3 must be used in each Method 1 Risk Characterization regardless of whether the other two groundwater categories apply. Similarly, soil is separated into three categories, S-1, S-2, and S-3. Category S-1 soils are associated with the highest potential for exposure, while category S-3 soils have the lowest potential for exposure.[70]

Response Action Outcomes

A response action outcome (RAO) is the regulatory endpoint that must be achieved before a site is considered clean enough to exit the MCP system. The MCP provides a number of places throughout the process where an RAO may be achieved.[71]

Several types of RAOs are provided for in the regulations. Class A RAOs apply to sites where a level of no significant risk has been achieved through the implementation of response actions. Class B RAOs apply to sites where a level of no significant risk has been demonstrated, but response actions (other than site assessments) were not necessary. Class C RAOs apply to disposal sites where a level of no significant risk has not been achieved, but all substantial hazards have been eliminated. Unlike the permanent solutions that are documented through Class A and B RAOs, a Class C RAO is a temporary solution that must be reevaluated every five years to evaluate whether conditions have changed or whether new technologies have been

developed which could result in achieving a permanent solution.[72] In addition, at disposal sites where Class C RAOs require post-RAO operation, maintenance and/or monitoring of the response action, status reports must be submitted to DEP every six months.[73]

Sites at which a Class A or Class B RAO has been attained may give rise to eligible person liability protection because a permanent solution has been achieved. In contrast, sites at which a Class C RAO has been attained do not give rise to such protection because the solution to contamination is temporary. Notwithstanding this fact, a site that requires a remedial system with active operation and maintenance (and thus does not qualify for a Class A or a Class B RAO) may still give rise to eligible person liability protection if the site meets a set of MCP requirements known as remedy operation status.[74] Remedy operation status is achieved by designing and operating a remedial system in compliance with the MCP, eliminating or controlling each source of oil and/or hazardous material, eliminating all substantial hazards, and submitting a status report to DEP every six months.[75]

Activity and Use Limitations

An activity and use limitation (AUL) is a recorded environmental deed restriction that can be filed as part of achieving both Class A and Class B RAOs to notify parties that contamination exists at a property. The implementation of an AUL generally allows the owner of a contaminated site to apply a less stringent cleanup standard in exchange for agreeing to limit the future use of the site and the associated potential for human contact with, and/or exposure to, existing contamination. In other words, if only certain specified safe uses are permitted (and, conversely, other uses are prohibited), less demanding cleanup standards apply.[76]

In fact, the MCP mandates that an AUL must be implemented whenever an RAO is based on the restriction or limitation of future activities and/or uses at a site or the elimination of an "exposure pathway" (i.e., a means by which human or environmental receptors could come in contact with oil or hazardous material). In addition, an AUL must be implemented if a Method 1 Risk Characterization is performed and S-1 soil standards (i.e., residential standards) have not been satisfied.[77]

The implementation of an AUL is an attractive option at many sites because significant cost savings can be realized when less stringent cleanup standards are applied. An AUL may still have a negative effect on the perceived value of a property, particularly depending on the specific terms of the AUL, and so property owners must carefully consider on a case-by-case basis whether the implementation of a particular AUL makes sense. In addition, thirty days' prior written notice must be given to all current record interest holders before recording an AUL.[78] This requirement can cause objections to the AUL to be raised, and may delay an expedited closing or similar transaction that depends on site closure having been reached. In addition, notice of the AUL must be given in all future instruments which convey an interest in and/or right to use the property subject to the AUL. This includes, without limitation, future leases.[79] Finally, as discussed in the following section, sites closed out with an AUL are required by statute to be audited by DEP.

Audit Procedures

While the current MCP generally allows private parties to move through the system without DEP oversight, that does not mean that LSPs and the private parties that employ them are free to do what they please. Generally, the DEP has the ability to audit an LSP's work at a particular site for a period of two to five years; however, there is no time limit for auditing AULs. Further, the DEP is required by statute to conduct random audits of response actions at 20 percent of the sites in the waste site cleanup program on an annual basis. The DEP also conducts specifically targeted audits when compliance problems are anticipated or encountered at particular sites.[80]

It is important to note that the Brownfields Act includes a provision that requires DEP to audit all sites at which an AUL has been implemented. Even sites where an AUL was put in place before the Brownfields Act was passed are required to be audited as part of this program.[81] As of this writing, most if not all of DEP's audits of previous AULs have been completed. More recently, DEP has focused a considerable amount of its audit attention on potential vapor intrusion issues.

Covenants-Not-to-Sue

The Brownfields Act provides the Commonwealth of Massachusetts with discretion to enter into a Brownfields Covenant-Not-To-Sue (CNTS) Agreement with any current or prospective owner or operator of contaminated property. Persons who obtain such a covenant are not to be held liable to the Commonwealth, or to any other person who has received notice of an opportunity to join the covenant-not-to-sue agreement, for claims for contribution, response action costs, or property damage, except for liability assumed by contract. The Commonwealth may enter into the covenant only when the proposed redevelopment or reuse of the property will:

■ contribute to the economic or physical revitalization of the community in which it is located; and

■ provide one or more of the following public benefits:

■ new, permanent jobs;

■ affordable housing benefits;

■ historic preservation;

■ the creation or revitalization of open space; or

■ some other public benefit to the community, as determined by the attorney general.

Moreover, all parties, except eligible persons, entering into a CNTS with the Commonwealth must agree to achieve and maintain a permanent solution or remedy operation status at the site. Eligible persons may instead demonstrate that a permanent solution is not feasible and that a temporary solution has been achieved and appropriately maintained. As of October 17, 2008, the Massachusetts Attorney General's Office revised its CNTS regulations, with the stated goal of streamlining the process for redeveloping brownfields sites. The changes include reducing the public comment period from ninety to forty-five days for applicants who did not cause or contribute to the contamination, and alleviating procedural barriers to covenants for sites

requiring the most difficult cleanups (those that may need temporary solutions).[82]

While covenants are available for property located anywhere in the Commonwealth, priority is given to sites located in the fifteen Massachusetts cities with the highest poverty rates. Second priority is given to sites in all other municipalities located within certain "economically distressed areas" (as defined in Mass. GEN. Laws. ch. 21E, § 2). When available, a CNTS can be a useful tool to close a transaction. It can provide an extra measure of security to purchasers and lenders that may have difficulty getting comfortable with a particularly challenging set of environmental circumstances. However, as of the writing of this chapter, only thirty such covenants have been finalized and signed in the ten-year history of the program.

Available Economic Incentives

Businesses that are expanding, relocating, or building new facilities on a brownfield site and creating permanent jobs within any of the areas in Massachusetts that have been designated as economic opportunity areas (EOAs) may be able to take advantage of a number of economic incentives, including a 5 percent state investment tax credit, a 10 percent abandoned building tax reduction, and priority status for state capital funding. In addition, municipalities in Massachusetts are now authorized to offer two types of local real estate tax incentives—either a "special tax assessment" or "tax increment financing."[83]

The special tax assessment is a five-year program covering both the existing and new value of contaminated real estate in an EOA. In year one, the tax is 0 percent of the existing and new assessed value of the real estate. In year two, up to 25 percent of the assessed value is taxed. In year three, up to 50 percent of the assessed value is taxed, and so on. This program is specifically designed to allow property owners to offset cleanup and other development costs associated with urban/industrial sites.

The Massachusetts Tax Increment Financing program (TIF) allows municipalities to provide targeted tax incentives to stimulate brownfields development. Under the TIF program, a municipality can take steps to significantly reduce a property owner's tax liabilities during the years when remediation costs will be incurred by providing a tax exemption based on a percentage of the value added through new construction.

In addition, the Brownfields Act created three vehicles to provide funding for brownfield sites. The first, the Redevelopment Access to Capital Program (BRAC), is intended to encourage private sector lending on contaminated sites by subsidizing a portion of the costs of environmental insurance purchased to facilitate a financing. There are four designated participating insurance providers with whom approved borrowers (there is a simple application process) are able to negotiate the best available premium. Approved borrowers can receive a subsidy of a portion of the cost of the environmental insurance, up to a maximum subsidy of $50,000 for private owners and $150,000 for public and quasi-public owners. As the maximum subsidy amount is subject to change over time, interested borrowers should confirm this amount by reviewing the BRAC website, www.mass-business.com or, better, by contacting the Program Director, Tom Barry, at 781-928-1100, x106.

The second principal vehicle for brownfields funding in Massachusetts is the

$30,000,000 Brownfields Redevelopment Fund. This program provides targeted financial assistance for site assessments and cleanups in "economically distressed areas" (as defined in Mass. GEN. Laws. ch. 21E, § 2). Applicants must meet a number of criteria, and most projects are subject to a $500,000 limit for cleanups and a $100,000 limit for site assessment work. Both grants and loans are available, grants being available only to municipalities, redevelopment authorities, community development corporations, and the like. This program is available to all entities borrowing in connection with brownfields redevelopment, not just eligible persons, as long as the Massachusetts Office of Business Development determines that such a loan is not otherwise available to the borrower on commercially reasonable terms.

The third and final principal vehicle created by the Brownfields Act is the availability of tax credits for eligible persons. There are many details in the statute concerning these credits, but the general concept is that they apply to cleanup costs for properties in so-called "economically distressed areas" (as defined in Mass. GEN. Laws. ch. 21E, § 2). The credit is for a maximum of 50 percent of those costs if the MCP cleanup has been completed and does not involve the use of an AUL; if an AUL is used to achieve MCP closure, then the credit is for 25 percent of the cleanup costs. A newly added provision is that the tax credits may be transferred or sold in whole or in part. The Massachusetts Department of Revenue has prepared several Technical Information Releases relevant to the Brownfield Tax Credit, which should be consulted concerning some of the relevant details here.[84]

A very useful resource for information concerning the Massachusetts Brownfields Program is Catherine Finneran, MA DEP Brownfields Coordinator (617-556-1138; Catherine.Finneran@state.ma.us). Also, the DEP website (www.mass.gov/dep/cleanup/brownfie.htm) provides a number of helpful policy guidance documents and fact sheets.

Conclusion

A number of economic and public policy objectives have led to increased private and public sector interest in redeveloping brownfield sites in Massachusetts. As a result of this interest, a number of state programs are now available. In particular, the Massachusetts Contingency Plan has become a national model in the effort to privatize the waste site cleanup process. In that regard, the MCP was selected by the Council of State Governments as one of its Innovations Award winners. The addition of the protections and incentives offered by the 1998 Brownfields Act are encouraging further brownfields redevelopment in Massachusetts. Many sites that were previously written off now represent real opportunities.

NOTES:

[1] 1998 Mass. Acts 206.
[2] Mass. Gen. Laws, ch. 21E, § 5(a).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *See e.g.*, Marenghi v. Mobil Oil Corp., 416 Mass. 643, 647 (1993) (proof of causation, not site ownership, is needed to impose liability under ch. 21E, § 5(a)(5)), *see also* 420 Mass. 371 (1995); Griffith v. New England Tel. & Tel. Co., 414 Mass. 824, 830 (1993) (fact that site was contaminated by oil brought onto site by defendant not sufficient to prove causation), *see also*, 420 Mass. 365 (1995). *Accord* Wellesley Hill Realty Trust. v. Mobil Oil Corp., 747 F. Supp. 93, 96 (D. Mass. 1990) (plaintiff's § 5(A)(5) allegations sufficient to survive motion to dismiss, but "something more than mere ownership is required to make a past owner of an oil contaminated property liable").
[7] Mass. Gen. Laws ch. 21E, § (5)(a)(1)–(5).
[8] *Id*. §§ 4 and 5.
[9] *See* Black v. Coastal Oil New England, Inc., 45 Mass. App. Ct. 461, 465–67 (1998).
[10] *See* Hill v. Metropolitan District Comm., 439 Mass. 266, 273-274 (2003) *(*appropriate measure of recovery for damage to [a property owner's] real or personal property under ch. 21E, § 5(a)(iii), is either (a) the permanent diminution in market value or (b) if the property is reasonably curable by repairs or remediation, the expense of repairs, if less than the diminished market value)); *see also* Guaranty First Trust Co. v. Textron, Inc., 416 Mass. 332, 336–37 (1992); Black v. Coastal Oil New England, Inc., 45 Mass. App. Ct. 461, 466 (1998).
[11] Mass. Gen. Laws. ch. 21E, § 4.
[12] Bank v. Thermo Elemental Inc., 451 Mass. 638, 659 (2008).
[13] Mass. Gen. Laws. ch. 21E, § 5(a).
[14] Mass. Gen. Laws. ch. 21E, § 13.
[15] *Id.*
[16] *Id.*
[17] Mass. Gen. Laws ch. 21E, § 15. *See also* Sanitoy, Inc. v. Ilco Unican Corp., 413 Mass. 627, 631–33 (1992).
[18] Mass. Gen. Laws ch. 21E, § 4A(d) and (f). *See also* Scott v. NG U.S. 1, Inc., 450 Mass. 760, 773 (2008); Hill v. Metropolitan District Comm., 439 Mass. 266, 278 (2003*)*; Buddy's Inc. v. Town of Saugus, 62 Mass. App. Ct. 262-263 (2004).
[19] Bank v. Thermo Elemental Inc., 451 Mass. 638, 660 (2008).
[20] Mass. Gen. Laws ch. 21E, § 11A(4).
[21] Taygeta v. Varian Assocs., Inc., 436 Mass. 217, 227-228 (2002)
[22] Mass. Gen. Laws. ch. 21E, § 11A(2). Arguably, the drafting of the statute suggests that the statute of limitations could be extended indefinitely by delaying the service of a so-called "4A letter." In Massachusetts, private parties are required to send demand letters (pursuant to Mass. Gen. Laws Ch. 21E, $ 4) to potentially responsible parties and engage in a dispute resolution process prior to bringing a suit to recover cleanup costs. The exception to that requirement is that a person who is joined as a party in any civil action may, but shall not be required to, carry out the "4A letter" procedures prior to filing a third-party claim, cross-claim or counterclaim.
[23] *Id.* § 11A(1) and (3).
[24] *Id.* § 11A(3).
[25] *Id.* § 5(f). *See also* Atlas Tack Corporation v. Crosby, 41 Mass.App.Ct. 429 (1996); Griffith v. New England Tel. & Tel. Co., 32 Mass. App. Ct. 79, 84 (1992); Hays v. Mobil Oil Corp., 736 F. Supp. 387, 393 (D. Mass 1990) ("Indemnification clauses are still permitted to allocate the burdens of risks and costs among otherwise liable parties.").
[26] "Innocent" owners (or "Eligible Persons," as described below) are also exempt from liability to the Commonwealth if they close out known contamination and comply with certain other requirements. Mass. Gen. Laws. ch. 21E, § 5C.
[27] *Id*. § 4.

[28] Mystic Landing, LLC v. Pharmacia Corp., 443 F.Supp. 2d 97, 105-106 (D. Mass. 2006)
[29] "Eligible person," "eligible tenant" and "secured lender" are defined in 1998 Mass. Acts 206, § 9 and §13, which amends Mass. Gen. Laws ch. 21E, § 2. The specific requirements and protections of downgradient owners and operators may be found at 1998 Mass. Acts 206, § 25, which amends Mass. Gen. Laws ch. 21E by, *inter alia,* creating § 5D.
[30] Mass. Gen. Laws. ch. 21E, § 5C.
[31] *Id*. In addition, the MCP defines "permanent solution" and "remedy operation status" at CMR 40.0006 and 40.0893, respectively.
[32] *Id*.§ 5C(b)(1).
[33] *Id*.§ 5C(b)(2).
[34] *Id*.§ 5C(d). In such a case, the liability exemptions become effective at such time that the subsequent owner or operator achieves appropriate regulatory closure.
[35] *Id*.§ 5C(e).
[36] Mass. Gen. Laws. ch. 21E, § 2(e).
[37] *Id*.§ 2(e)(1)(E).
[38] There are several comparatively minor access and compliance requirements as well.
[39] Mass. Gen. Laws. ch. 21E, § 2(c).
[40] *Id*.§ 2(c)(1).
[41] *Id*.§ 2(c)(6).
[42] *Id*.§ 2(c)(5).
[43] *Id*.§ 2(c)(1).
[44] Mass. Gen. Laws. ch. 21E, § 5D(a) and (b).
[45] The definition of "known" has been provided as part of a broader revision to the MCP, which was effective October 29, 1999.
[46] Mass. Gen. Laws. ch. 21E, § 5D(a) (4).
[47] The Massachusetts Contingency Plan, Mass. Regs. Code tit. 310, §§ 40.0000 *et seq*.
[48] Effective October 29, 1999, the MCP was revised, *inter alia,* to comply with the Brownfields Act.
[49] Mass. Gen. Laws ch. 21A, §§ 19–19J; Mass. Regs. Code tit. 309 § 4.00.
[50] *See e.g*., 310 CMR §§ 40.0318(8), 40.0411(2), 40.0441(5), 40.0484(2), 40.0510(2), 40.1056.
[51] *See* 310 CMR, §§ 40.0300–40.0371.
[52] *Id*. §§ 40.0311–40.0312.
[53] *Id*. §§ 40.0313–40.0314.
[54] *Id*. § 40.0315.
[55] *Id*. § 40.1600.
[56] *Id*. §§ 40.0360–40.0362.
[57] *Id*. § 40.0318.
[58] *Id*. § 40.0406.
[59] *Id*. § 40.0405(1).
[60] *See id*. §§ 40.0405(2) and 40.0411–40.0429.
[61] *See id*. §§ 40.0405(3) and 40.0440–40.0448.
[62] 310 CMR 40.0720 (4)
[63] *See id*. §§ 40.0510–40.0590.
[64] *Id*. § 40.0570.
[65] *See id*. §§ 40.0810–40.0996.
[66] 310 CMR § 40.0972.
[67] *See id*. §§ 40.0990-40.0996.
[68] *See id* §§ 40.0972-40.0988.
[69] *See id*. §§ 40.0900-40.0996.
[70] *See id*. §§ 40.0930-40.0933.
[71] *See id*. § 40.1003.
[72] *See id*. §§ 40.1030–40.1050.
[73] *Id*. § 40.898(1).
[74] *See* Mass. Gen. Laws ch. 21E, § 5C.
[75] *See* 310 CMR § 40.0893.
[76] *See id*. §§ 40.1070–1099.

[77] *Id*.
[78] *See id*. §§ 40.1074.
[79] *See* Cummings Properties, LLC v. Massachusetts General Physicians Organization, 23 Mass. L. Rep. 205, 209 (Mass. Super. Ct. 2007).
[80] *See* 310 CMR §§ 40.1101–40.1190.
[81] Unlike other circumstances, there is no time limit on DEP's right to audit a site for which an AUL has been imposed. 310 CMR § 40.1110.
[82] *See* 940 CMR 23.00.
[83] Information on all available economic incentives can be obtained from the Massachusetts Office of Business Development, One Ashburton Place, Room 2101, Boston, Massachusetts 02108, and the Massachusetts Governor's Office for Brownfields Revitalization, Ten Park Plaza, Suite 3720, Boston, MA 02116.
[84] See, e.g., Massachusetts Department of Revenue TIR 06-16, TIR 04-7, TIR 00-9 and TIR 99-13.