

# BROWNFIELDS DEVELOPMENT IN MASSACHUSETTS THROUGH PRIVATIZED CLEANUP: ONE STATE'S SOLUTION

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**ABSTRACT:** As an example of an innovative Brownfields program, the Massachusetts regulatory framework, together with its Clean Sites Initiative, creates a mechanism through a variety of elements that facilitates the cleanup and redevelopment of contaminated properties. The specific components of the Massachusetts program include a privatized regulatory framework for waste site cleanup, risk-based standards that correlate to the nature of the contaminants and the property use, and a means to limit liability exposure associated with redeveloping contaminated sites through covenant not to sue (CNS) agreements with the state.

## INTRODUCTION

Having received an Innovations Award from the Council of State Governments in 1995, the Massachusetts Contingency Plan (MCP) is recognized as one of the most successful privatized waste site cleanup programs in the country. The basic framework of the MCP, that is, a privatized program requiring certification of the regulatory requirements by a licensed site professional (LSP) rather than through direct state oversight in most cases, coupled with specific programs designed to promote the revitalization of contaminated properties, makes Massachusetts a state that encourages and facilitates Brownfields redevelopment.

While a universal definition for Brownfields properties has not yet evolved, these properties are essentially abandoned or underutilized sites, typically industrial, which are environmentally contaminated and often located in urban and economically depressed areas. Massachusetts alone has more than 7,000 state listed hazardous waste sites, not including those sites that are former landfills or solid waste landfill units.

Brownfields sites have recently received a considerable amount of attention from state and local governments and from the U.S. EPA. This attention can primarily be attributed to the nature of these properties: on the one hand, they may be abandoned or underutilized, acting as a continuing source of contamination to neighboring properties, possibly increasing risks to public health, and inhibiting the redevelopment of neighboring properties. Simultaneously, however, many of these properties were initially developed because of their prime real-estate locations, and many still retain significant redevelopment potential because of their proximity to large numbers of people and readily available infrastructure. Redeveloping these properties can lead to solutions being achieved for the problems described, while taking advantage of the already existing attributes these properties possess. In addition, the general view is that by increasing Brownfields redevelopment, fewer "Greenfields" sites will be developed. Some of the anticipated benefits are that less traffic and air pollution will be generated by the same development dollars, and more open space in rural and suburban communities will be retained.

## MASSACHUSETTS MODEL FOR BROWNFIELDS REDEVELOPMENT

### Massachusetts Contingency Plan

In 1983, Chapter 21E of the Massachusetts General Laws was enacted, as essentially the state equivalent to CERCLA.

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The MCP was promulgated as the body of regulations pursuant to Chapter 21E. However, in 1992 and 1993 Chapter 21E and the MCP, respectively, were significantly revised to privatize most aspects of the Massachusetts hazardous waste site cleanup program. Under this new program, instead of having to obtain oversight from the Massachusetts Department of Environmental Protection (DEP) to obtain regulatory closure, a property owner, tenant, lender, or other interested person can turn to their LSP. LSPs are licensed by an independent state board to issue recommendations regarding how to proceed at specific sites and render opinions regarding cleanup endpoints pursuant to the MCP. As a result, DEP became able to focus its limited resources on the most significant sites, on site discovery efforts, and on policy issues; parties conducting cleanup activities no longer have to wait for agency approval at each step of the process.

The 1993 MCP revisions also implemented several means by which to exit the regulatory process once a disposal site has been reported to DEP. At essentially any point in the regulatory process, once the applicable risk-based cleanup standards are achieved, irrespective of whether any remediation has been conducted, a completion statement executed by an LSP can be filed with DEP. This action will conclude cleanup responsibilities under the MCP. In addition, several financial incentives are built into the regulations, creating several advantages to using these exit options as soon as possible.

The 1993 MCP revisions have also made it easier to determine when a property falls within the regulatory process and thus becomes a disposal site. Under the previous regulations, essentially any level of contamination was reportable, regardless of the nature of the detected contamination and the nature of the property. The revised MCP substituted for this absolute rule "reportable concentrations" and "reportable quantities," which are available for a long list of hazardous materials and petroleum products. In addition, the revisions created different reporting standards for different locations based on the sensitivity of the area and the relevant potential sensitive environmental receptors.

One other benefit of the revised MCP, which is particularly helpful for Brownfields redevelopment, is the shift to risk-based cleanup standards. The MCP no longer requires all disposal sites to be cleaned up to residential standards. Instead, three different types of risk characterizations can now be used to assess the level of risk at the site. Under the easiest but most conservative approach, contaminant levels are compared against "cookbook" numerical standards, which are set forth in specific regulatory provisions. The second and slightly less conservative method of risk characterization allows modification of the numerical standard used in the first method, based on site-specific information. And lastly, the third method, which involves a much more involved process than the other two methods, is based entirely on risk characterization data derived from site specific information. This last method is used

most widely when the levels of contaminants are not likely to satisfy the two other more simple risk characterization approaches.

Deed restrictions, termed activity and use limitations (AULs) are another innovative tool of the revised MCP that promote Brownfields redevelopment. AULs are a voluntary way to restrict the use of a site and can be used as an alternative to remediating the site to residential cleanup standards. AULs provide notice of the existence and location of contamination at the property, as well as the use restrictions required in the opinion of an LSP based on the nature and location of the contamination at the site. Although at the outset, both property owners and lenders were reluctant to use AULs, they have gained popularity as familiarity with this new option grows. According to DEP statistics, as of March, 1997, approximately 350 AULs have been implemented.

### Clean Sites Initiative

Independent of, but complementary to, the MCP, Massachusetts has implemented a pilot Brownfields redevelopment program known as the Clean Sites Initiative. This program was developed a little more than two years ago by several state agencies, including the Executive Offices of Economic Affairs and Environmental Affairs, DEP, and the Office of the Attorney General, all working together with a number of private sector representatives. The initiative was designed to encourage the redevelopment of contaminated property located in economically distressed areas by limiting potential liability under Chapter 21E by means of a covenant not to sue (CNS).

Under the initiative, the applicant must agree to assess and remediate all known contaminants in accordance with the MCP. Once this requirement has been met, the state agrees not to sue the applicant if more contamination is subsequently found. This agreement is referred to as a CNS. Note, however, that the CNS does not bar claims brought by third parties other than the commonwealth, nor does the CNS relieve the applicant from responsibility for new releases that occur after the initial cleanup has been completed and the CNS has taken effect.

The Clean Sites Initiative is currently only available to those applicants who are prospective owners or tenants who have no potential liability for the existing environmental contamination on the property. Further, the initiative is only available for those redevelopment projects located in economic target areas that have been designated by the Massachusetts Economic Assistance Coordinating Council. A project not located within a designated economic target area may nonetheless be eligible for the initiative if the Secretary of Economic Affairs determines that the project presents an exceptional economic development opportunity. In the past, this standard has been fairly easy to satisfy, with the number of jobs created being the primary consideration.

The proposed project must also involve the redevelopment of contaminated property for either commercial or industrial uses to be eligible for a CNS. As such, residential projects are currently not eligible.

Once an application has been approved, the Office of the Attorney General will issue a CNS as part of a form agreement. In addition, DEP will issue a certificate of completion upon receipt of an LSP certification that a permanent solution under the MCP has been achieved, referred to as the response action outcome (RAO) statement.

The CNS covers only those releases that are addressed in the RAO statement. The CNS becomes void if any false state-

ments or certifications are contained in the application or if the applicant fails to perform any obligations contained in the RAO statement. In addition, the protections afforded to the applicant under the CNS can be withdrawn if DEP determines that the cleanup has not been, or is not being, conducted in substantial and material compliance with the MCP.

### Proposed Improvements to MCP and Clean Sites Initiative

In an effort to further improve Massachusetts' efforts to promote and facilitate Brownfields development, several statutory and regulatory changes are currently in progress. With respect to relief from liability under Chapter 21E, three Brownfields proposals are before the Massachusetts legislature. These proposals have been submitted by a state representative, the Weld-Cellucci Administration and the State's Attorney General.

The bills proposed by one of the state representatives and the Weld-Cellucci Administration are similar in many respects. Both create funds to cover assessment and cleanup costs and additional funds to provide loan guarantees. To further address the financing challenges presented by Brownfields redevelopment, both bills provide tax credits for certain properties that have undergone remediation.

Both bills also provide liability relief from Chapter 21E to promote cleanups and clarify long-term risk. For example, similar to the protections provided in the CNS already described, these bills envision a liability carve out for future owners and operators who conduct an adequate cleanup of the property, but, unlike the CNS, the carve out will be automatic by operation of law. Both bills also provide improvements with respect to lender liability concerns and contribution protection.

The third bill, submitted by the State's Attorney General, focuses on revamping the current CNS program; it does not propose any statutory reform. For this reason, many commentators describe the Attorney General's bill as being complementary to the bills proposed by a state representative and the Weld-Cellucci Administration. In essence, the Attorney General's bill provides an additional mechanism for case specific agreements, designed for those Brownfields projects that do not meet the specific eligibility requirements of the current CNS program.

In addition to these proposed statutory changes, the audit provision of the MCP was recently amended. Prior to these revisions, DEP had the authority to audit a site for up to five years after the site had reached closure, leaving a great deal of uncertainty regarding potential regulatory reopeners for both developers and lenders. The new change decreased the audit window to two years, allowing final closure significantly sooner.

### CONCLUSION

The Massachusetts chapter 21E program, coupled with the Clean Sites Initiative, provides innovative ways of enabling and promoting Brownfields redevelopment. The MCP has privatized a great majority of the cleanup efforts in the state, implemented risk-based standards that correlate to the nature of the contaminants and the property use, and created incentives to take early action. In addition, the Clean Sites Initiative provides liability protections for those innocent purchasers and tenants of Brownfields properties so as to lessen potential barriers to redevelopment. Further, Massachusetts may see additional liability relief and perhaps financial incentives for Brownfields redevelopment, depending on the success of the three bills currently pending before the legislature.