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**Summary of 2008 Amendments to the  
Attorney General's Brownfields Covenant Regulations, 940 CMR 23.00  
and Response to Public Comments**

**I. Background**

The Attorney General enters into Brownfields Covenant Not to Sue Agreements, commonly called Brownfields Covenants, with people who are willing to clean up and redevelop contaminated land, but, in order to do so, need protection from the broad scope of liability that attaches to owners and operators of contaminated land under Chapter 21E, the Commonwealth's waste site cleanup law. Most brownfields are redeveloped with the benefit of liability protections that operate automatically by Chapter 21E, upon compliance with the Commonwealth's cleanup regulations; Brownfields Covenants were intended to be used for the exceptional, difficult cases that need site-specific agreements to resolve liability concerns. The authority to enter into Brownfields Covenants was provided by Chapter 206 of the Acts of 1998, known as the Brownfields Act, and codified at M.G.L. c. 21E, s. 3A(j)(3). The Attorney General adopted the Attorney General's Brownfields Covenant Regulations, 940 CMR 23.00, in 1999 to create procedures and substantive criteria for obtaining Brownfields Covenants, and began entering into Brownfields Covenants in 2000.

In April 2008, Attorney General Coakley proposed amendments to the Brownfields Covenant Regulations. The proposed amendments were designed to build on the success of the Brownfields Covenant Program in its first nine years by making the application process more efficient, clarifying the rules, and expanding the circumstances in which Brownfields Covenants would be useful. The goal was to increase the number of properties that could be turned around with the aid of a Brownfields Covenant without sacrificing the Commonwealth's cleanup standards or other environmental goals. Specifically, the amendments, as proposed in April 2008, would:

- amend public notice requirements to clarify the rules and ease the burden for applicants;
- shorten the public comment period on applications for Brownfields Covenants when an applicant is an "eligible person" under Chapter 21E (i.e., did not cause or contribute to the contamination and did not own or operate the site at the time of the contamination);
- clarify what role third parties can play in commenting on applications or participating in Brownfields Covenant negotiations;

- allow Brownfields Covenants to vest immediately when the remedial plan includes the possibility of a temporary solution, instead of at the later date of when a temporary solution is employed;
- clarify what qualifies as an eligible brownfields project; and
- amend several other provisions to create an efficient process for application and negotiation.

Notice of the amendments and opportunity to comment was published in Massachusetts Register Number 1102 on April 18, 2008, and notice of public hearings was published in *The Boston Globe*. Attorney General Coakley held public hearings in Worcester on May 2, 2008, Lynn on May 5, 2008, and Boston on May 7, 2008. Written comments were accepted until May 21, 2008.

Twenty-four people provided comments through testimony at public hearings, and seven more provided written comments. Comments came from a wide range of stakeholders from public and private sectors, including developers, environmental and land use attorneys, environmental consultants, environmental and community development organizations, and state and local elected officials. The public can review the comment letters and transcripts of the public hearings by contacting: Office of the Attorney General, Brownfields Unit, One Ashburton Place, Boston, MA 02108.

We thank everyone who participated in this valuable process. The Attorney General's Office has reviewed and considered all public comments received in response to the proposed amendments to the Brownfields Covenant Regulations. Based on these comments, the Attorney General has modified the regulations to add greater clarity and improve the Brownfields Covenant Program's ability to help redevelopment of contaminated property.

## **II. Summary of Public Comments and Responses**

### **Purpose and Expected Effect of the Amendments**

Commenters almost universally supported the purpose of the amendments, welcoming efforts to clarify and streamline the application process as efforts that would attract more developers to brownfields, and aid economic and community development. Some noted that Brownfields Covenants can be particularly helpful in encouraging investment in urban areas, which is important for supporting sustainable economic development in Massachusetts. Several commenters mentioned that Brownfields Covenants may be increasingly important for brownfields development, given their purpose of solving liability problems at the most complicated sites. With ten years of redevelopment since the 1998 Brownfields Act, both public and private stakeholders said that the more difficult sites are the ones that remain.

### **Streamlining of Notice Provisions and Comment Period**

Many people expressed support for our proposal to reduce the public comment period from 90 days to 30 days on applications by eligible persons, arguing that the reduction would be helpful in encouraging developers. Two commenters argued further for a 30-day comment period for all

applicants. By contrast, several commenters expressed concern that the proposed reduction in time to comment would hinder the participation of the general public, which is important for creating Brownfields Covenants that are protective for applicants while appropriately tailored to the proposed site and project. Others suggested that a comment period of slightly longer than 30 days, and some procedural safeguards for affected third parties, would achieve a better balance of efficiency and opportunity for participation by third parties. We have chosen, in the final regulations, a 45-day public comment period for applications by eligible persons, an approach that substantially reduces the comment period while addressing the competing needs described by the comments. For applications by non-eligible persons, who by definition caused or contributed to the contamination or owned or operated at the time of release, we have preserved the 90-day public comment period to reflect the greater likelihood that applicants will face third parties with affected legal rights. We have also made more explicit an existing due process protection for affected third parties who do not receive notice when an applicant is a non-eligible person.

Our effort to reduce the notice burden on applicants was similarly met with comments that will help us to clarify the rule, eliminate unnecessary notice, and still provide notice that is targeted to reach those who are likely to be affected. The proposed rule intended to focus notice requirements on those whose property was in the site now or would be in the future, but comments indicated that this was less clear than focusing on current owners and abutters. Comments also indicated that, with regard to required notice to past owners, notice to those who owned before the contamination was unnecessary. We also adopted the suggestion of one commenter that applicants provide proof of compliance with the notice provisions; this should provide confidence that the effectiveness of a Brownfields Covenant is not in doubt because of a possible failure to follow notice rules.

### **Defining Eligible Brownfields Projects and Municipal Involvement**

The proposed amendments made express the long-held policy of the Attorney General's Office to rely, in the first instance, on a municipality's input in analyzing whether a proposed project contributes to the economic or physical revitalization of the community. The change was intended to encourage applicants to work with municipalities early to define their projects, an effort that would make negotiation of Brownfields Covenants more efficient. While some commenters expressed support for the proposed change, a few expressed concern that the presumption in favor of projects with municipal support devalued public input. We responded to this concern by making clear that public input is welcome and that the presumption is rebuttable.

### **Comments on Other Brownfields Topics**

We also received helpful suggestions on ways, in addition to amending the regulations, the Attorney General's Office could improve or expand the Brownfields Covenant Program, including: improvements to Brownfields Covenant language; additional brownfields tools to fill gaps in current programs; and particular types of contaminated sites that would benefit from special attention from the Commonwealth. We appreciate those comments and, with the amendments to the regulations now complete, will focus our attention on other efforts to help revitalize the Commonwealth's brownfields.

### **III. Final Regulations**

The final regulations, which reflect many of the suggestions we received from commenters, are attached, in a version showing the changes from the original regulations adopted in 1999. The principal changes from the original 1999 regulations:

#### **Notice Requirements**

- Placing the public notice requirements in 940 CMR 23.04, the same section as the application requirements, in order to put all procedural requirements together;
- Clarifying which abutters are required to receive notice by hand or registered mail;
- Eliminating the requirement to notify past site owners who owned before the contamination was caused;
- Requiring that applicants submit proof of compliance with notice provisions, to reduce possibility of that effectiveness of Brownfields Covenants will be in doubt because of possible failure to follow notice rules.

#### **Public Comment Period**

- Reducing the comment period for applications by eligible persons from 90 days to 45 days;
- Beginning the comment period upon date of application;
- Requiring earlier public notice;
- Adding details to give more clarity on public comment period, including defining date of application (when comment period starts), and explaining time computation; and
- Clarifying what role affected third parties, and members of the general public, can play in commenting on applications or participating in Brownfields Covenant negotiations;

#### **Protections Available in a Brownfields Covenant**

- Allowing Brownfields Covenants to vest immediately when the remedial plan includes the possibility of a temporary solution, in order to attract developers to the most challenging sites;
- Adding a reference to possible protections for natural resource damages, to make explicit the Attorney General's long-standing policy of adding these protections to an agreement where appropriate and where the Secretary of Energy and Environmental Affairs agrees;
- Changing the description of the protections available to applicants to match the statutory language more precisely ("claims for contribution, response action costs or for property damage pursuant to [M.G.L. c. 21E] or for property damage under the common law") without changing the substantive protections; and
- Clarifying that non-eligible persons are protected from claims by only those affected third parties who receive notice by hand or registered mail, a limitation that previously existed only as a function of the definition of Affected Third Party.

**Other changes**

- Amending the definition of Eligible Brownfields Project to create rebuttable presumption that projects with the support of the chief executive officer of the municipality in which they are located will contribute to the economic or physical revitalization of the community; and
- Eliminating references to settlement of liability under M.G.L. c. 21E, s. 3A(j)(2), which is separate from the authority for Brownfields Covenants, to eliminate confusion.

940 CMR 23.00: Brownfields Covenant Not to Sue Agreements

Section

23.01: Scope and Purpose

23.02: ~~Definitions~~

23.03: Criteria for When to Execute Brownfields Covenant Not to Sue Agreements

23.04: ~~Procedures: Application and Public Notice~~

23.05: Priorities

23.06: Rights of Affected Third Parties

23.07: Public Input

23.08: Liability Relief Obtained

23.09: Termination for Cause

~~23.10: Severability~~

~~23.11: General Provisions~~

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23.01: Scope and Purpose

~~St. 1998, c. 206, known as the Brownfields Act, was designed to encourage the cleanup and re-use of contaminated and under-utilized properties, which are commonly known as "brownfields." St. 1998, c. 206 modified the liability rules of M.G.L. c. 21E to help prevent the liability attaching to owners and operators of contaminated property from acting as a disincentive to buying, assessing, cleaning up, and redeveloping these sites. The Brownfields Act created some exemptions from liability which operate automatically by the terms of M.G.L. c. 21E. The provisions of St. 1998, c. 206 giving direct relief provide an extra push to help turn around the sites that the market comes close to turning around on its own. St. 1998, c. 206 created another tool for limiting liability, Brownfields Covenant Not Sue Agreements, out of recognition that there may be situations where it is appropriate for the Commonwealth to provide additional liability relief as an incentive to spur the cleanup and re-use of brownfields. M.G.L. c. 21E, s. 3A(j)(3), inserted by the Brownfields Act, authorizes the Commonwealth to enter into Brownfields Covenants Not to Sue Agreements to provide current or prospective owners and operators with individually tailored liability relief that goes beyond that provided directly by St. 1998, c. 206. 940 CMR 23.00 is designed to spell out when the Commonwealth can and should enter into such agreements.~~

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23.02: Definitions

~~Activity and Use Limitation shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.~~

~~Affected Third Parties means those Persons with potential claims against an Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, who have received notice and an~~

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opportunity to join a Brownfields Covenant Not to Sue Agreement pursuant to 940 CMR 23.04(2), provided that, with respect to an Applicant who is not an Eligible Person, a Person shall not be considered an Affected Third Party for purposes of determining whether his or her rights to bring a claim for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law have been affected by a Brownfields Covenant Not to Sue Agreement unless he or she has received notice in hand or by registered mail, return receipt.

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Applicant means a Person seeking to enter into a Brownfields Covenant Not to Sue Agreement with the Commonwealth.

Attorney General means the Attorney General or his or her designee.

Brownfields Covenant Not to Sue Agreement or Agreement means an agreement authorized by M.G.L. c. 21E, s. 3A(j)(3), entered into between the Commonwealth and a current or prospective Owner or Operator of a Site.

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Date of Application means the date of delivery of an application to enter into a Brownfields Covenant by mail or hand to the Office of the Attorney General.

Development Plan means a plan submitted in accordance with 940 CMR 23.04(2).

Downgradient Property Status shall have the same meaning as that used in 310 CMR 40.0180.

Economically Distressed Area shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

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Eligible Brownfields Project means a development project on a Site or portion of a Site that will contribute to the economic or physical revitalization of the community in which the Site is located by providing one or more of the following public benefits:

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(a) new, permanent jobs;

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(b) affordable housing benefits;

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(c) historic preservation;

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(d) the creation or revitalization of open space; or

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(e) some other public benefit to the community in which the Site that includes the project is located, as determined by the Attorney General.

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A project that provides any of the benefits listed in 940 CMR 23.02: Eligible Brownfields Project (a) through (d) will be presumed to contribute to the economic or physical revitalization of the community in which it is located. A project that has support from the chief executive officer of the municipality in which the project is located will be presumed to contribute to the economic or physical revitalization of the community in which it is located.

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Eligible Person shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

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Eligible Person Certification means a certification made on a form prescribed by the Attorney General that is designed to provide the Attorney General with a basis for evaluating whether an Applicant who wishes to be considered an Eligible Person is an Eligible Person. The certification shall describe the periods of the Applicant's ownership or operation of the Site that is the subject of the Agreement, the nature of the Applicant's activities at the Site, and the use that the Applicant made of Oil or Hazardous Materials at the Site, and it shall provide such other information deemed by the Attorney General to be relevant in evaluating whether the Applicant is an Eligible Person. The certification shall be signed under pains and penalties of perjury by the Applicant's employee(s) with the most knowledge of the issues that are the subject matter of the certification.

Environmental Monitor means the publication of that name issued by the MEPA Unit of the Massachusetts Executive Office of Energy and Environmental Affairs.

Exposure shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

Feasible shall have the same meaning as that used in 310 CMR 40.0860.

Hazardous Material shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2,~~ and in 310 CMR 40.0006.

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Licensed Site Professional means a waste site cleanup professional licensed pursuant to M.G.L. c. 21A, ~~s. 19~~ through 19J.

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MCP means the regulations promulgated by the Department of Environmental Protection that are known as the Massachusetts Contingency Plan, and that appear at 310 CMR 40.0000.

Notice of Responsibility shall have the same meaning as that set forth in 310 CMR 40.0006.

Notice of Rights of Affected Third Parties means the notice form that Applicants must complete and distribute pursuant to 940 CMR 23.04(2) if they are seeking liability protection against third party claims ~~for contribution, Response Action costs or for property damage~~ pursuant to M.G.L. c. 21E or ~~for property damage under~~ the common law.

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Oil shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2,~~ and in 310 CMR 40.0006.

Operator shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2.~~

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Owner shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2.~~

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Permanent Solution shall have the same meaning as that set forth in 310 CMR 40.0006.

Person shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2~~, and in 310 CMR 40.0006.

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Proposed Remediation Status means the level of remediation proposed by an Applicant for the Site that is the subject of the Brownfields Covenant Not to Sue Agreement, including a Permanent Solution, Remedy Operation Status, or Temporary Solution.

Release shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2~~, and in 310 CMR 40.0006.

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Release Tracking Number shall have the same meaning as that set forth in 310 CMR 40.0006.

Remedy Operation Status shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2~~, and used in 310 CMR 40.0893.

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Response Action shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

Secretary of Energy and Environmental Affairs means the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs or his or her designee.

Site shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2~~, and in 310 CMR 40.0006.

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Standard of Care shall have the same meaning as that set forth in M.G.L. c. 21E, ~~s. 2~~.

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Subsequent Owner or Operator means a Person who first begins ownership or operation of the property that is subject to a Brownfields Covenant Not to Sue Agreement subsequent to execution of that Agreement.

Temporary Solution shall have the same meaning as that set forth in 310 CMR 40.0006.

Threat of Release shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

### 23.03: Criteria for When to Execute Brownfields Covenant Not to Sue Agreements

(1) The Commonwealth may enter into a Brownfields Covenant Not to Sue Agreement only if all of the following criteria are met:

(a) the Applicant is a current or prospective Owner or Operator of the Site or portion of the Site that is the subject of the proposed Agreement;

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(b) the proposed future use of the Site or portion of the Site that is the subject of the proposed Agreement is an Eligible Brownfields Project;

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(c) a Development Plan describing the proposed use of the Site or portion of the Site that is the subject of the proposed Agreement and the proposed public benefits that such use would bring has been submitted in accordance with 940 CMR 23.04(1)(b);

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(d) a Permanent Solution or Remedy Operation Status has been or will be achieved and maintained in accordance with the terms of M.G.L. c. 21E and the MCP (310 CMR 40.0000) for the Site or portion of the Site that is subject to the proposed Agreement; or, if the Applicant is an Eligible Person, a Temporary Solution has been or will be achieved and maintained for the Site or portion of the Site that is subject to the Agreement, if achieving a Permanent Solution is not Feasible pursuant to the provisions of 310 CMR 40.0860;

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(e) a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire portion of a Site that is, or will be, owned or operated by the Applicant;

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(f) there is a substantial likelihood that the proposed Eligible Brownfields Project would not occur without it being the subject of a Brownfields Covenant Not to Sue Agreement;

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(g) the Applicant has negotiated a settlement of costs incurred by the Commonwealth in responding to a Release or Threat of Release at or from the Site that is the subject of the proposed Agreement, and for which the Applicant is potentially liable pursuant to M.G.L. c. 21E, s. 5, provided, however, that in the negotiation of an appropriate settlement, the Commonwealth has considered all relevant factors, including but not limited to: the ability of the Applicant to pay such costs; whether the Applicant is an Eligible Person; and the economic benefits to the community that the Eligible Brownfields Project will bring, including but not limited to future jobs gains and economic revitalization;

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(h) the Applicant has agreed that any liability relief obtained as a result of its entering into a Brownfields Covenant Not to Sue Agreement is subject to the Applicant's being bound by the terms of 940 CMR 23.08 and by any specific terms set forth in the Agreement;

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(i) an applicant who is not an Eligible Person and who is seeking liability protection against Affected Third Parties has adequately accommodated any bona fide third party claims for contribution, Response Action costs or for property damage, pursuant to M.G.L. c. 21E or for property damage under the common law; and

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(j) an applicant seeking liability protection against Affected Third Parties has filed

proof of compliance with notice requirements in accordance with 940 CMR 23.04(2)(e).

(2) The Attorney General will enter into a Brownfields Covenant Not to Sue Agreement upon determining that the criteria set forth in 940 CMR 23.03(1) have been met and that entering into the Agreement will likely further the public interest.

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(3) Whether the Commonwealth should enter into a Brownfields Covenant Not to Sue Agreement is subject to the discretion of the Attorney General, and the Attorney General reserves the right to deny an application for such an Agreement on any legally permissible grounds. In exercising his or her discretion on whether to enter into a Brownfields Covenant Not to Sue Agreement, the Attorney General may consider the following factors:

(a) whether the plans for the proposed project have ripened to the point that the project is amenable to review;

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(b) the likelihood that the proposed project will actually be undertaken;

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(c) the extent to which a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project is located. Applications filed by Applicants who are not Eligible Persons will be presumed not to qualify for a Brownfields Covenant Not to Sue Agreement when a Permanent Solution or Remedy Operation Status has been proposed for less than the entire Site;

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(d) the extent of the public benefits offered by the Eligible Brownfields Project, and whether such benefits are commensurate with the liability protection being requested;

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(e) for an Applicant who has requested to be considered an Eligible Person, the extent to which that Applicant has demonstrated that he or she is an Eligible Person;

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(f) whether the Applicant has adequately accommodated, or the proposed Agreement adequately accommodates, the rights of Affected Third Parties, as appropriate under 940 CMR 23.06; and

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(g) whether an Applicant has provided the Attorney General with information that the Attorney General has determined is necessary or appropriate for the Attorney General to complete his or her review.

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23.04: Procedures: Application and Public Notice

(1) Applications.

(a) Each Applicant shall submit to the Attorney General an application to enter into a Brownfields Covenant Not to Sue Agreement on forms prescribed by the Attorney General.

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(b) Each application shall include a Development Plan that contains, in sufficient detail to allow the Attorney General to conduct an adequate review of the application, a description of the following aspects of the Applicant's proposal:

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1. the property that is the subject of the proposed Agreement, described in a clear and concise manner sufficient to identify it to the general public, including a map of the property that is the subject of the proposed Agreement (and, if different, for the Site as a whole);

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2. a reference to the most recent deed or certificate of title for the property that is the subject of the proposed Agreement, including the book and page number at the relevant Registry of Deeds or the Land Court Registration number;

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3. the Proposed Remediation Status for the property that is the subject of the proposed Agreement (and, if different, for the Site as a whole), and a description of how such remediation will be achieved, with reference to all known Releases at the Site, the date that any Releases were reported to the Department of Environmental Protection, and any Release Tracking Number(s) for the Site;

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4. the proposed use of the property that is the subject of the proposed Agreement (and, if different, the use of the Site as a whole) after the Proposed Remediation Status has been achieved;

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5. how the proposed use of the property that is the subject of the proposed Agreement will contribute to the economic or physical revitalization of the community in which it is located, focusing on how the proposed project will create new, permanent jobs, result in affordable housing benefits, provide historic preservation, create or revitalize open space, or provide some other public benefit;

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6. how the proposed use of the property that is the subject of the proposed Agreement complies or will comply with applicable zoning and land use permitting requirements;

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7. the public outreach that has been done to date, the current level of community support for, or opposition to, the Applicant's proposed project (with specific references to all local officials, community groups, and abutters who have been contacted), and plans for any future outreach;

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8. the current status of the Applicant's proposed project and a schedule setting forth specific milestones for bringing the project to fruition; and

9. the current status of the funding for the Applicant's proposed project and how full funding of the project will be achieved.

(c) An Applicant shall specify what liability relief he or she is seeking, why that request is justified, and why the liability relief provided directly by statute is not sufficient.

(d) An Applicant who wants to be considered an Eligible Person shall so specify in his or her application and shall include with such application an Eligible Person Certification on a form prescribed by the Attorney General; provided, however, that an Applicant who can demonstrate that he or she first began or will begin his or her ownership or operation at the Site after a Release at such Site was reported to the Department of Environmental Protection need not include such certification, unless so requested by the Attorney General. An Eligible Person Certification is intended to be used solely for deciding under what conditions the Attorney General should enter into Brownfields Covenant Not to Sue Agreements, and neither such a certification nor the Attorney General's use of it shall be considered evidence of whether a Person is an Eligible Person in any other proceeding.

(e) An Applicant who is an Eligible Person and who is proposing a Temporary Solution at the Site or portion of the Site that is the subject of the proposed Agreement shall include with his or her application an opinion issued by a Licensed Site Professional pursuant to 310 CMR 40.0860 stating with particularity the basis on which he or she believes that a Permanent Solution is not Feasible or shall explain when such an opinion will be provided to the Department of Environmental Protection.

(f) An Applicant who is an Eligible Person and who is proposing a cleanup plan which may, but will not necessarily, include a Temporary Solution at the Site or portion of the Site that is the subject of the proposed Agreement shall state in the Application that he or she is not able to determine at the time of application whether a Permanent Solution is Feasible, and shall explain, to the degree it is known, when such a determination will be made.

(g) An Applicant who is proposing a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, for less than the entire Site shall explain why his or her request for a Brownfields Covenant Not to Sue Agreement is nevertheless appropriate.

(h) An Applicant should also specify whether he or she is seeking liability protection against claims brought by third parties, claims brought by the Commonwealth, or both.

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 . (k) a map of the property that is the subject of the proposed Agreement (and, if different, for the Site as a whole); and¶  
 . (l) the date that the Release(s) at issue were reported to the Department of Environmental Protection.¶  
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Deleted: shall so specify in his/her application. In lieu of, or in addition to, seeking liability protection against third party claims pursuant to M.G.L. c. 21E, § 3A(j)(3), and 940 CMR 21.08(2), an Applicant may pursue contribution protection pursuant to M.G.L. c. 21E, § 3A(j)(2), but only if the Applicant so specifies in his/her Application

(i) An Applicant shall provide such further information as the Attorney General deems necessary or appropriate in his or her discretion.

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(2) Public Notice. If an Applicant is seeking protection against third party claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, the Applicant shall provide public notice of this intent, and a public comment period shall follow the application. The public comment period for applications by Eligible Persons closes 45 days after the Date of Application. The public comment period for applications by non-Eligible Persons closes 90 days after the Date of Application. The public comment period for applications by multiple parties closes 90 days after the Date of Application if any of the parties is not an Eligible Person. The Applicant shall provide public notice as follows:

(a) the Applicant shall complete a Notice of Rights of Affected Third Parties on forms provided by the Attorney General and shall submit a completed form to the Attorney General appended to his or her application. The notice shall include:

1. the Date of Application;
2. the date the notice period closes;
3. identification of the property that is the subject of the proposed Agreement and the Site and Releases at issue; and
4. a summary of the terms of the application.
5. a description of how and where copies of the application may be obtained; and
6. a statement that any persons who choose to do so may seek to comment on the Application or join the Agreement by contacting the Attorney General in a specified manner.

(b) no later than 5 days after the Date of Application, the Applicant shall provide a copy of the application together with his or her completed Notice of Rights of Affected Third Parties form either in hand or by registered mail, return receipt, to:

1. all owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for the preceding 50 years of all property currently within the Site, except, in the case of Sites with Releases known to have occurred less than 50 years ago, those whose ownership ended before any storage or disposal of Oil or Hazardous Materials that led to the occurrence of any Releases at the Site. If the exception in this paragraph is used by the Applicant as a basis for not providing notice to a former owner of property within the Site, the

Applicant shall, at the time proof of compliance is submitted pursuant to 940 CMR 25.03(2)(e), demonstrate to the Attorney General the basis for reliance on the exception;

2. all Persons who have received a Notice of Responsibility for the Site from the Department of Environmental Protection pursuant to M.G.L. c. 21E, s. 4;

3. any Person who has filed for Downgradient Property Status with respect to the Site pursuant to 310 CMR 40.0180;

4. all owners of record of land abutting the properties currently within the Site that is the subject of the proposed Agreement;

5. any Person who has notified the Applicant that he or she has a potential claim against the Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law; and

6. any Person who the Applicant has reason to believe has a potential claim against the Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law;

(c) the Applicant shall cause the Notice of Rights of Affected Third Parties to be published in the next available Environmental Monitor after the Date of Application;

(d) no later than 15 days after the Date of Application, the Applicant shall cause the Notice of Rights of Affected Third Parties to be published in a newspaper published in the municipalities in which the Site lies once per week for two successive weeks. If no newspaper is published in such municipalities, notice may be published in a newspaper with general circulation where the Site is located. A newspaper which by its title page purports to be printed or published in such municipalities, and having a circulation therein, shall be sufficient for the purpose of providing notice by publication pursuant to 940 CMR 23.04(2)(d); and

(e) by the end of the public comment period, the Applicant shall provide the Attorney General with proof of compliance with all notice requirements. The proof of compliance shall be considered part of the application.

### 23.05: Priorities

In entering into Brownfields Covenant Not to Sue Agreements, the Commonwealth shall give first priority to Sites located in the 15 cities with the highest poverty rate in the Commonwealth, second priority to Sites located in an Economically Distressed Area, and

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third priority to all other Sites. The identification of the 15 cities with the highest poverty rate will be determined using United States census data compiled by the Donahue Institute's Economic and Public Policy Research Unit at the University of Massachusetts at Amherst.

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### 23.06: Rights of Affected Third Parties

(1) Before executing a Brownfields Covenant Not to Sue Agreement with an Applicant who is seeking liability relief against claims brought by third parties, the Attorney General will provide Affected Third Parties an opportunity to **comment on the Application or** join **the** Agreement as appropriate under the specific circumstances presented.

**Deleted:** An Applicant seeking liability protection against claims for response action costs or contribution brought by third parties pursuant to M.G.L. c. 21E, or for third party claims brought pursuant to that chapter or the common law for property damage, shall provide notice of this intent as follows:¶

· (a) the Applicant shall complete a Notice of Rights of Affected Third Parties on forms provided by the Attorney General and shall submit such completed form to the Attorney General appended to his/her application. Said notice shall identify the Site and Releases at issue, contain a summary of the terms of the application, state how and where copies of the application may be obtained, and state that any persons who choose to do so may, within 90 calendar days, seek to join that Agreement by contacting the Attorney General in a specified manner; ¶

· (b) within ten (10) business days of submitting his/her application, the Applicant shall provide a copy of the application together with his/her completed Notice of Rights of Affected Third Parties form either in hand or by registered mail, return receipt, to:¶

(1) all owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for the preceding fifty (50) years for all property within the Site;¶

· (2) all Persons who have received a Notice of Responsibility from the Department of Environmental Protection pursuant to M.G.L. c. 21E, § 4; ¶

· (3) any Person who has filed for Downgradient Property Status from the Department of Environmental Protection pursuant to 310 CMR 40.0180;¶

· (4) all owners of record of land abutting the Site that is the subject of the ... [1]

(2) Any Affected Third Party may provide comments, during the comment period, to the Attorney General on an Applicant's proposed project.

(3) If an Affected Third Party demonstrates to the Attorney General within the comment period that he or she has the basis for a bona fide claim against an Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law that is related to the Site that is the subject of a proposed Agreement, the Attorney General may ask an Applicant to accommodate or otherwise respond to this claim or may make an Agreement not applicable to this claim.

(4) The Attorney General may allow an Affected Third Party to join an Agreement when he or she finds that:

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**Deleted:** (3) In determining the nature and extent of the opportunity that Affected Third Parties will have to join an Agreement, the Attorney General may consider the following factors:

**Deleted:** · (a) the degree of liability relief that the Applicant is seeking;¶

· (b) the extent to which the remediation that will be achieved will be a Permanent Solution;¶

(c) whether a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved ... [2]

(a) the Affected Third Party has contributed, or will contribute, significantly to Site remediation or the proposed Eligible Brownfields Project, and the Affected Third Party agrees that any liability relief obtained as a result of its entering into an Agreement is subject to the Affected Third Party's being bound by the terms of 940 CMR 23.08 and by any specific terms set forth in the Agreement; or

(b) allowing the Affected Third Party to join the Agreement will otherwise resolve Site-related liability and is likely to further the public interest.

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### 23.07: Public Input

(1) Any member of the public may provide comments during the comment period to the Attorney General on an Applicant's proposed project.

(2) In addition to the **notice requirements in** 940 CMR 23.04(2), the Attorney General may require whatever additional public **comment** process, if any, he **or she** deems appropriate under the specific circumstances presented.

(3) In determining what additional public comment process, if any, is appropriate, the Attorney General may consider:

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(a) the degree of liability relief that the Applicant is seeking;

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(b) the extent that the remediation that will be achieved will be a Permanent Solution;

(c) whether a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project is located;

(d) whether the Applicant is an Eligible Person;

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(e) the scope of the likely impacts of the Applicant's proposed project;

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(f) the extent to which there are other available processes through which the public will have an opportunity to comment; and

(g) any other factor the Attorney General deems appropriate.

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(4) The Attorney General will presume that no public process in addition to that prescribed in 940 CMR 23.04(2) will be required where the Applicant is an Eligible Person, the proposed remediation is a Permanent Solution for the entire Site, and the Eligible Brownfields Project has the expressed support of the chief executive officer of the municipality in which the project is located.

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(5) In order to prevent duplication, the Attorney General will seek to coordinate any public process required pursuant to 940 CMR 23.07(1) with other available public comment processes to the extent possible.

23.08: Liability Relief Obtained

(1) A Person who has entered into a Brownfields Covenant Not to Sue Agreement with the Commonwealth shall not be liable to the Commonwealth for claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, with respect to matters and properties expressly addressed by said Agreement, provided, however, that the Agreement shall not affect any liability established by contract. A Brownfields Covenant Not to Sue Agreement may also cover claims for natural resource damages, if an applicant so requests and the Secretary of Energy and Environmental Affairs agrees to become a signatory to the Agreement. A Brownfields Covenant Not to Sue Agreement shall not relieve any Person of liability with respect to any matter or property not expressly addressed by the Agreement. Nothing in this paragraph is intended to limit the Commonwealth's ability to provide additional liability relief through a Brownfields Covenant Not to Sue Agreement to the extent otherwise authorized by law.

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(2) A Person who has provided notice in accordance with 940 CMR 23.04(2) and entered into a Brownfields Covenant Not to Sue Agreement with the Commonwealth shall not be liable to Affected Third Parties for claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, with respect to matters and properties expressly addressed by the Agreement, provided, however, that the Agreement shall not affect any liability established by contract, and that an Applicant who is not an Eligible Person shall be protected from claims by only those Affected Third Parties who received notice in hand or by registered mail, return receipt. A Brownfields Covenant Not to Sue Agreement shall not relieve any Person of liability with respect to any matter or property not expressly addressed by the Agreement.

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Deleted: Nothing in this paragraph is intended to foreclose a Person who has entered into a Brownfields Covenant Not to Sue Agreement from asserting that s/he is entitled to the protection from certain third party claims available pursuant to M.G.L. c. 21E, § 3A(j)(2), so long as such Person has complied with the requirements of 940 CMR 23.04(7).

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(3) The liability protection offered by each Brownfields Covenant Not to Sue Agreement shall be subject to the following conditions:

(a) the Applicant's compliance with the Release notification provisions established by M.G.L. c. 21E and the MCP (310 CMR 40.0000);

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(b) the Applicant's providing reasonable access to the portion of the Site owned or operated by the Applicant to employees, agents, and contractors of the Department of Environmental Protection for all purposes authorized by M.G.L. c. 21E, and to other persons intending to conduct Response Actions pursuant to that chapter and the MCP (310 CMR 40.0000);

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(c) the Applicant's responding in a reasonably timely manner to any request made by the Department of Environmental Protection or the Attorney General to produce information as required pursuant to M.G.L. c. 21E;

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(d) the Applicant's taking reasonable steps:

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1. to prevent the Exposure of people to Oil or Hazardous Materials, such as by fencing or otherwise preventing access to the Site or portion of the Site under the Applicant's control; and

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2. to contain any further Release or Threat of Release of Oil or Hazardous Material from a structure or container under the Applicant's control, upon obtaining knowledge of a Release or Threat of Release of Oil or Hazardous Material;

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(e) the Response Actions that the Applicant conducts at the Site being done in accordance with the MCP (310 CMR 40.0000);

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(f) a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, being achieved and maintained at the Site or portion of the Site that is subject of the Agreement within the deadlines set forth in the MCP (310 CMR 40.0000), or within such other deadlines as are specified in the Agreement;

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(g) the Response Actions taken at the Site or portion of the Site that is subject to the Agreement meeting the appropriate Standard of Care; and

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(h) such other terms as agreed to by the Applicant in the Agreement.

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(4) No Brownfields Covenant Not to Sue Agreement shall relieve the Applicant of any potential liability the Applicant may have for a Release or Threat of Release of Oil or Hazardous Material:

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(a) that first begins to occur after the Commonwealth's covenant not to sue the Applicant included within said Agreement vests;

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(b) from which there is a new Exposure that results from any action or failure to act by the Applicant pursuant to M.G.L. c. 21E during its ownership or operation of the Site; or

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(c) that violates or is inconsistent with an Activity and Use Limitation established pursuant to M.G.L. c. 21E and the MCP (310 CMR 40.0000).

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(5) Each Brownfields Covenant Not to Sue Agreement that has been entered into with an Applicant who has asserted in his or her application that he or she is an Eligible Person will so indicate, and the liability relief provided by said Agreement shall be subject to the Applicant's being an Eligible Person unless the Agreement expressly states otherwise.

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(6) Each Brownfields Covenant Not to Sue Agreement shall state whether and the extent to which a Subsequent Owner or Operator will be able to make use of the liability relief provided by the Agreement. The liability relief available to a Subsequent Owner or Operator shall be subject to the same terms and conditions as those that apply to the Applicant. Liability relief that is available to an Applicant who has asserted in his or her application that he or she is an Eligible Person shall not be available to a Subsequent Owner or Operator who is not an Eligible Person, unless the Agreement expressly states otherwise.

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(7) Each Brownfields Covenant Not to Sue Agreement shall state when liability relief provided by the Agreement will vest. In no event shall liability relief that would bar claims brought by Affected Third Parties against an Applicant who is not an Eligible Person vest prior to the achievement of a Permanent Solution or Remedy Operation Status for the Site or portion of the Site that is the subject of the Agreement.

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Deleted: In no event shall liability relief vest with respect to a Site or portion of a Site where only a Temporary Solution will be achieved prior to the submittal of an opinion by a Licensed Site Professional pursuant to 310 CMR 40.0860 that a Permanent Solution is not Feasible.

(8) The liability protection offered by each Brownfields Covenant Not to Sue Agreement shall be subject to termination for cause in accordance with 940 CMR 23.09, and each such Agreement will so state.

### 23.09: Termination for Cause

(1) In the event that the Attorney General determines that an Applicant submitted materially false or misleading information as part of his or her application, the Attorney General may terminate the liability protection offered by said Agreement in accordance with 940 CMR 23.09(3). A statement made by an Applicant regarding the anticipated benefits or impacts of the proposed project will not be considered false or misleading for purposes of 940 CMR 23.09(3) if such statement was asserted in good faith at the time it was made.

(2) In the event that the Attorney General determines that an Applicant or a Subsequent Owner or Operator has violated the terms and conditions of an Agreement, the Attorney General may terminate the liability protection offered by said Agreement in accordance with 940 CMR 23.09(3). In the event that the liability protection is terminated solely because of a violation of one or more of the conditions set forth in 940 CMR 23.08(3)(a) through (d), ~~by a Subsequent Owner or Operator, such termination shall affect only the liability protection applicable to such Subsequent Owner or Operator.~~

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(3) Before terminating the liability relief provided by an Agreement, the Attorney General will provide the Applicant or Subsequent Owner or Operator, as appropriate, written notice of the proposed basis for, and a 60-day opportunity to comment on, the proposed termination. The notice from the Attorney General may provide a reasonable period of time for the Applicant or Subsequent Owner, as appropriate, to cure an ongoing violation in lieu of termination of the liability relief provided by an Agreement.

(4) Nothing in 940 CMR 23.09, or in any notice issued pursuant to this section, shall bar or limit the Attorney General, the Department of Environmental Protection, or other Person from seeking any judicial or administrative enforcement of a term or condition of an Agreement.

(5) Termination of liability relief pursuant to 940 CMR 23.09 shall not affect any defense that the Applicant or Subsequent Owner or Operator might otherwise have pursuant to M.G.L. c. 21E, except to the extent that in entering into an Agreement, the Applicant has expressly agreed to waive such defense even in the event of termination of the liability relief provided in such Agreement.

### 23.10: Severability

If any provision of 940 CMR 23.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 23.00 and the applicability of such provision to other persons or circumstances shall not be affected.

### 23.11: General Provisions

(1) Effect of Presumptions. All presumptions explicitly described in these regulations are rebuttable. Whether a presumption has been rebutted is a determination made by the Attorney General in his or her discretion.

(2) Time Computation. In computing any period of time prescribed by these regulations, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. "Legal holidays" are those days specified in M.G.L. c. 4, § 7 and any other day appointed as a holiday by the President or the Congress of the United States or designated by the laws of the Commonwealth.

REGULATORY AUTHORITY

940 CMR 23.00: M.G.L. c. 21E, ~~s.~~ 3A(j)(3)(e).

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An Applicant seeking liability protection against claims for response action costs or contribution brought by third parties pursuant to M.G.L. c. 21E, or for third party claims brought pursuant to that chapter or the common law for property damage, shall provide notice of this intent as follows:

(a) the Applicant shall complete a Notice of Rights of Affected Third Parties on forms provided by the Attorney General and shall submit such completed form to the Attorney General appended to his/her application. Said notice shall identify the Site and Releases at issue, contain a summary of the terms of the application, state how and where copies of the application may be obtained, and state that any persons who choose to do so may, within 90 calendar days, seek to join that Agreement by contacting the Attorney General in a specified manner;

(b) within ten (10) business days of submitting his/her application, the Applicant shall provide a copy of the application together with his/her completed Notice of Rights of Affected Third Parties form either in hand or by registered mail, return receipt, to:

(1) all owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for the preceding fifty (50) years for all property within the Site;

(2) all Persons who have received a Notice of Responsibility from the Department of Environmental Protection pursuant to M.G.L. c. 21E, § 4;

(3) any Person who has filed for Downgradient Property Status from the Department of Environmental Protection pursuant to 310 CMR 40.0180;

(4) all owners of record of land abutting the Site that is the subject of the Agreement;

(5) any Person who has notified the Applicant that s/he has a potential claim against the Applicant pursuant to M.G.L. c. 21E seeking response action costs or contribution, or a claim brought pursuant to that chapter or the common law for property damage; and

(6) any Person who the Applicant has reason to believe has a potential claim against the Applicant pursuant to M.G.L. c. 21E seeking response action costs or contribution, or a claim brought pursuant to that chapter or the common law for property damage;

(c) within 30 days of submitting his or her application, the Applicant shall cause Notice of Rights of Affected Third Parties to be published in the Environmental Monitor; and

(d) within 45 days of submitting its application, the Applicant shall cause the Notice of Rights of Affected Third Parties to be published in a newspaper published in the municipalities in which the Site lies once per week for three successive weeks. If no newspaper is published in such municipalities, notice may be published in a newspaper with general circulation where the Site is located. A newspaper which by its title page

purports to be printed or published in such municipalities, and having a circulation therein, shall be sufficient for the purpose of providing notice by publication pursuant to 940 CMR 23.06(1)(d).

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- (a) the degree of liability relief that the Applicant is seeking;
- (b) the extent to which the remediation that will be achieved will be a Permanent Solution;
- (c) whether a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project will be located;
- (d) whether the Applicant is an Eligible Person;
- (e) whether the Applicant, if not an Eligible Person, has accommodated any potentially viable claims that an Affected Third Party may have for property damage; and
- (f) any other factor that the Attorney General deems appropriate in his discretion.