

Addressing Renewable Energy Development at Contaminated Properties in Massachusetts – Managing Chapter 21E Liability

MassDEP’S WASTE SITE CLEANUP PROGRAM MassDEP, through its Bureau of Waste Site Cleanup (BWSC), administers the program for cleaning up contaminated property or property where there has been a release of oil or hazardous materials to the environment. This program was established under MGL Chapter 21E (Chapter 21E) and its implementing regulations, the Massachusetts Contingency Plan (the MCP). Cleanups required by this program are typically performed by private parties, and subject to MassDEP audit. In general, this means that property owners or developers hire Licensed Site Professionals (professionals experienced in the field of waste site assessment and cleanup licensed by the Commonwealth) to oversee cleanups and evaluate whether site reuse is consistent with cleanups, with limited agency involvement.

For further information on MassDEP’s Waste Site Cleanup Program and program contacts, please visit our website at: <http://www.mass.gov/dep/cleanup/>

MassDEP/DOER CLEAN ENERGY RESULTS PROGRAM In 2011, the Massachusetts Department of Energy Resources (DOER) and MassDEP established the Clean Energy Results Program (CERP) to advance the development of clean energy projects in the Commonwealth. In coordination with DOER, MassDEP provides direct technical and regulatory assistance to persons developing renewable energy and energy efficiency projects in Massachusetts. CERP fosters the creation of clean energy sources that qualify under the State’s Renewable Energy Portfolio Standards (RPS) and Alternative Energy Portfolio Standards (APS). Potentially qualifying clean energy sources include: solar photovoltaic and wind energy; hydropower; landfill methane and anaerobic digester gas driven power sources; tidal/hydrokinetic, geothermal, and eligible biomass fuel projects; and combined-heat-and-power (CHP) technologies.

For further information on CERP and program contacts, please visit our website at: <http://www.mass.gov/dep/cleanenergy.htm>

MANAGING POTENTIAL LIABILITY UNDER CHAPTER 21E For renewable energy project developers interested in contaminated properties, Chapter 21E provides a number of statutory liability protections associated with contamination at the property for qualifying persons. The liability protections most likely to be used by renewable energy developers are:

Liability Protection Provisions

Chapter 21E Reference

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| • Eligible Tenant | Section 2 (definition of “Eligible Tenant”);
Section 2, subsection (e)(1) of definition of “Owner or Operator” (liability protection provisions) |
| • Eligible Persons | Section 2 (definition of “Eligible Person”);
Section 5C (liability protection provisions) |

For a complete list of protections, please refer to the “Massachusetts Oil and Hazardous Material Release Prevention and Response Act”, Chapter 21E at:

<http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter21E>

Massachusetts “Eligible Tenant,” Chapter 21E, Section 2: This provision is intended to exclude certain tenants from the statutory liability they may otherwise have merely as current operators at a contaminated site.¹ In particular, this provision excludes a current tenant, who is not otherwise liable under Chapter 21E, from the definition of an “operator” under Chapter 21E (this exclusion is found in subparagraph (e) (1) under the definition of “operator” in Section 2). A tenant who falls within the meaning of “eligible tenant” (including satisfying certain additional requirements, discussed below), by definition, cannot be liable as an operator of a Chapter 21E site.

Chapter 21E requires that to be an eligible tenant, the tenancy must have begun after the oil or hazardous material release at the site was reported to MassDEP, and the eligible tenant cannot have caused or contributed to the contamination. Chapter 21E also requires that additional requirements must be met for an eligible tenant to be deemed not an operator with respect to the site or portion of the site the tenant occupies:

- the tenant or its employee or agent must not cause or contribute to the release, cause the release to become worse than it otherwise would have been, or cause a new exposure to the release;
- the tenant must notify MassDEP upon obtaining knowledge of any new release or threat of release at the site;
- the tenant must provide reasonable access to the site to employees, agents, and contractors of MassDEP for conducting response actions, if necessary;
- if the tenant uses oil or hazardous material similar to those which have been released, the tenant must demonstrate that it has not contributed to the release;
- the tenant must take reasonable steps (i) to prevent the exposure of people to oil or hazardous material, (ii) to contain any further release or threat of release of oil or hazardous material from a structure or container under its control, and (iii) if there is an imminent hazard at or from the property, to control the potential risk to public health, safety, welfare, or the environment by taking immediate response actions; and
- Should the tenant voluntarily undertake any response action to address contamination, that work must be conducted in compliance with Chapter 21E and the MCP.

In addition, in the event that the eligible tenant ceases to occupy, possess or control the site, he/she will not be liable for the contamination at or from the site.

Entering a “Ground Lease”: Developers of renewable energy facilities commonly enter into a type of long-term lease of property, known as a ground lease.

Under Chapter 21E, the question arises as to whether a ground lessee would qualify as an “eligible tenant” for purposes of liability under Chapter 21E. Although, to date,

¹ This provision does not address the potential statutory liability of current owners of a contaminated site; for that issue, please see the discussion of “eligible person,” below.

Massachusetts courts have not addressed this issue, MassDEP's position is that ground lessees who otherwise meet the eligible tenant criteria under Chapter 21E would not be viewed as owners or operators, except possibly in extreme cases in which a lessee's indicia of ownership are so extensive that the owner retains title in name only.

Any developer who is interested in meeting the criteria for an eligible tenant under Chapter 21E and is considering a ground lease arrangement or similar arrangement in lieu of ownership, is advised to seek independent legal advice to assist in evaluating its status under Massachusetts law.

Massachusetts "Eligible Persons," Chapter 21E, Sections 2 and 5C: Owners and operators who did not cause or contribute to contamination at the site and who meet other statutory requirements receive liability protection upon the completion of a cleanup. The protection covers both Commonwealth claims for response action costs (subject to settlement of any outstanding costs) and third party claims for property damage or reimbursement for cleanup costs. This liability protection extends to future property owners who maintain the property's cleaned up status or any ongoing cleanup remedy.

Brownfields Covenants Not To Sue: If a property owner or developer does not qualify for a liability endpoint as an eligible tenant or eligible person, he or she may still qualify for liability relief under a "Brownfields Covenant Not to Sue Agreement" (Brownfields Covenant) through a program administered by the Attorney General's Office. This is an agreement between the owner or developer and the Commonwealth which provides the owner or developer with liability relief from Commonwealth and third party claims. To be eligible, the developer must have a project that will contribute to the economic or physical revitalization of the community in which the brownfields property is located.

A Brownfields Covenant provides liability protection for the more complicated projects not covered directly under the statute. For example, in some circumstances, it is possible that a Brownfields Covenant can be offered to a causally responsible party who partners with a developer interested in cleaning up and redeveloping a brownfields site. Protection may also be offered to an eligible person who can reach only a temporary solution and not the permanent solution or remedy operation status required by Chapter 21E for statutory liability endpoint protection. Liability relief is offered to applicants as an incentive towards, and in return for, cleanup and redevelopment at the site.

In most circumstances, a Brownfields Covenant is not available for a closed site to a new or prospective owner who did not cause or contribute to the contamination. For a closed site, such a person would instead have the option of seeking to address any remaining liability concerns via private agreements between the parties to the transaction, private insurance, etc. The statutory protections apply as long as, among other requirements, a person maintains a qualifying liability endpoint status.

Brownfields Covenants are intended to apply to help developers when other liability protection methods do not apply. If in doubt, contact the Attorney General's Office Brownfields Unit. For further information on the Brownfields Covenant Program, please visit: <http://www.mass.gov/ago/doing-business-in-massachusetts/economic-development/brownfields-covenant-program>

FOR MORE INFORMATION

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