



MARTHA COAKLEY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL  
ENVIRONMENTAL PROTECTION DIVISION  
ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

(617) 727-2200  
(617) 727-4765 TTY  
[www.mass.gov/ago](http://www.mass.gov/ago)

**Brownfields Covenant Program**

**Frequently Asked Questions from Prospective Applicants**

**1.) How long will it take to secure a Brownfields Covenant?**

Negotiation for a Brownfields Covenant should be completed by the end of the public comment period, unless an application poses novel legal or technical challenges, or is delayed by amendments to the application or by project-related concerns that are out of the Attorney General's control. Meritorious third party claims or requests to join the agreement can also be a cause of delay, but may be dealt with through carve-outs and amendments to meet an applicant's deal-driven deadline. Overall, we make every effort, within the limits of our authority, to see that the negotiation of a Brownfields Covenant does not hold up your project.

There are many things an applicant can do before an application is submitted to increase the likelihood that the negotiation process will go smoothly and quickly. Applicants should especially consider the following:

- discuss a draft version of the application with the Attorney General's Brownfields Unit to determine what the likely issues of negotiation are going to be and whether any additional information in the application would be helpful;
- let us know the deal deadline by which you need to have the Brownfields Covenant in hand;
- discuss a proposed cleanup plan with the appropriate Massachusetts Department of Environmental Protection (MassDEP) regional office;
- discuss the project with the City or Town to determine if zoning or permitting hurdles exist;
- discuss cleanup plans with any abutting properties known to be affected by the contamination; and
- prepare the service list for notice recipients ahead of time.

**2.) Can I get a Brownfields Covenant for releases of oil or hazardous materials that do not yet have Release Tracking Numbers issued by MassDEP?**

Yes, if sufficient site information is provided to allow the Commonwealth to evaluate a proposed development and remedial plan. It is expected that the vast majority of releases at sites that are the subject of applications for Brownfields Covenants will have a Release Tracking Number (RTN) issued by MassDEP. This is because MassDEP's waste site cleanup regulations, the Massachusetts Contingency Plan (MCP), require that owners and operators of waste sites (and certain others) report all discovered

releases above certain reporting thresholds. We understand, however, that there are situations when notices of releases have not been properly submitted to MassDEP, but a prospective purchaser of the property has been able to assess the contamination enough to plan the purchase and redevelopment project.

### **3.) Am I eligible for a Brownfields Covenant if I want to clean up only to the property boundaries?**

For those who meet the definition of “eligible person” under Chapter 21E (that is, those who did not cause or contribute to the contamination, or own or operate when the contamination occurred), the answer is yes if the contamination at the property targeted for redevelopment has affected only soil, and not groundwater or surface water. If the groundwater or surface water is contaminated, the “site” to be cleaned up under a Brownfields Covenant is typically defined as the area where oil or hazardous material has come to be located as a result of releases at or from the property to be redeveloped. That means that a Brownfields Covenant for groundwater or surface water contamination will normally require an applicant to clean up the entire site, including the contamination that has flowed off the property. The Attorney General’s Office will view applications for Brownfields Covenants in circumstances where the applicant is not proposing to clean up the off-property groundwater or surface water contamination as extraordinary, and will expect explanations for how the off-property contamination will be addressed, how the public health, safety and the environment are otherwise to be protected, and whether public benefits from the proposed project are substantial enough to outweigh the standard expectation that an owner or operator of a waste site clean up the entire site.

### **4.) Can I get a Brownfields Covenant if there is a Permanent Solution or Remedy Operation Status in place at a site?**

In most circumstances, the answer is no. If you are a new or prospective owner who did not cause or contribute to the contamination, you should be adequately protected under the automatic liability protections for “eligible persons” in Chapter 21E, Section 5C. These automatic protections apply as long as, among other requirements, you maintain the Permanent Solution or Remedy Operation Status (“ROS”). If your redevelopment project will require cleanup work beyond what was required to get the site to a Permanent Solution (for example, you want to put a commercial/residential development on a site that has an Activity and Use Limitation restricting site to industrial uses), the MCP makes provision for further work that is consistent with maintaining a Permanent Solution (by, for example, maintaining condition of no significant risk during further site work). You may want to refer to the MCP at 310 CMR 40.1067 (Remedial Actions After a Response Action Outcome has been Submitted to the Department) and 310 CMR 40.1080 (Changes in Site Activities and/or Uses or Other Site Conditions After a Response Action Outcome with an Activity and Use Limitation Has Been Filed). We do not, however, discount the possibility that there may be situations the regulations and statutory protections do not cover. If in doubt, call the AG’s Brownfields Unit to discuss the matter.

### **5.) Under what terms can I receive a Brownfields Covenant if I caused the contamination or otherwise do not qualify as an “eligible person” under Chapter 21E?**

People who do not qualify as eligible persons receive Brownfields Covenants with the same terms as eligible persons, with two substantive differences: (1) Brownfields Covenants for non-eligible persons are effective upon completion of the cleanup (achievement of a Permanent Solution or ROS), instead of upon signing the agreement; and (2) Brownfields Covenants are not available to non-eligible persons who plan to achieve only a temporary solution.

**6.) Can I get a Brownfields Covenant if I intend to sell my property and let someone else redevelop it?**

Yes, as long as you contribute significantly to an overall cleanup and redevelopment project. Any current or prospective owners or operators, or combination of them, who commit to cleanup and redevelopment of contaminated property, are eligible for a Brownfields Covenant. For example, the Attorney General's Office has entered into agreements in which the current owner commits to the cleanup and a developer commits to build the project.

**7.) Can I get a Brownfields Covenant if my redevelopment plan may change in the future?**

Yes. We understand, especially when a lengthy cleanup stands between you and the groundbreaking for your project, that project plans may change in the future. As long as you are willing to commit to a plan that will contribute to the economic or physical revitalization of the community, we can enter into an agreement, and will try to make the project commitments broad enough to allow project changes while still ensuring appropriate public benefits. We have also agreed to amend Brownfields Covenants when project proponents changed their plans, in situations where the changed plans would still contribute to the physical or economic revitalization of the community.

**8.) What will the Attorney General determine is, and is not, an Eligible Brownfields Project?**

The Attorney General needs to determine whether a proposed project will contribute to the economic or physical revitalization of the community in which the project is located. If a proposed project meets the definition of an Eligible Brownfields Project on its face (i.e., it will provide jobs, open space, affordable housing, historic preservation, or some other public benefit), the Attorney General's Office will presume that the project will contribute to the economic or physical revitalization of the community, and will discuss the project with the city or town in which the project is proposed to confirm whether the project is appropriate for its location, given local zoning and other land use requirements. For the vast majority of applications, an indication of support by the city or town is all the Attorney General's Office will require to determine that a project will contribute to the economic or physical revitalization of the community. If the community in which the project is located spans more than one city or town, the Attorney General's Office will contact all relevant cities and towns.

If there would be regional or Commonwealth-wide impacts from a project, or if state permits or questions of state policy are significant factors in the viability of a project, it may be appropriate to discuss the project with regional or state officials to aid in determining whether the project contributes to the economic or physical revitalization of the community. Where regional or statewide effects are relevant, the Attorney General's Office will consider whether a project: meets some or all of the Commonwealth's Sustainable Development Principles, as published by the Executive Office of Energy and Environmental Affairs; is a priority economic development project as designated by the Executive Office of Housing and Economic Affairs; or is otherwise consistent with the economic development objectives of the Commonwealth.

**9.) Why do Brownfields Covenants terminate when the statutory liability protections of Chapter 21E are in effect?**

The agreement provision that allows Section 5C of Chapter 21E to take over as the source of liability protection for "eligible persons" is intended to provide continuity of protection for applicants while supporting the Commonwealth's goal of having, in the most circumstances possible, the automatic liability protections of Chapter 21E govern liability at brownfields.

Section 5C of Chapter 21E protects eligible persons from the same claims (i.e., claims for cleanup costs and property damage) as a Brownfields Covenant, except for claims for natural resource damage, which Section 5C does not address but some Brownfields Covenants do. Eligible persons come to the Attorney General's Office for liability protection because Section 5C does not give them protection until the end of the cleanup, which may be years away for many projects. Brownfields Covenants act as a gap filler – a bridge of protection to get eligible persons to the safe ground of protections under Section 5C. Once there, the conditions for maintaining protection under Section 5C are nearly identical to the conditions imposed on applicants in Brownfields Covenants.

It is the Commonwealth's policy to have Section 5C of Chapter 21E govern brownfields liability whenever possible because it is the most efficient mechanism for maintaining liability relief. Reliance on the privatized system for achieving protections under Chapter 21E (i.e., by complying with cleanup regulations and the Chapter 21E standard of care, achieving a Permanent Solution or ROS, and maintaining that status after the cleanup) has been effective in giving liability endpoints which support hundreds of brownfields developments throughout the Commonwealth.

Keep in mind:

- We intend for protection from natural resource damage claims, in those Brownfields Covenants that include it, to survive even when the other protections of the agreement are superseded by the protections of Section 5C.
- For those Brownfields Covenants that give protection for Temporary Solutions, the agreement survives filing of a Response Action Outcome (“RAO”) Statement for a Temporary Solution, because Section 5C does not offer protections in that circumstance.