

# **Brownfields Covenant Not to Sue Agreements**

**REPORT ON THE 2007 REVIEW OF THE  
ATTORNEY GENERAL'S BROWNFIELDS COVENANT PROGRAM**



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# I. EXECUTIVE SUMMARY

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The Attorney General enters into Brownfields Covenant Not to Sue Agreements, commonly called Brownfields Covenants, with people who agree to clean up and redevelop abandoned or underutilized contaminated properties known as “brownfields.” Brownfields are an unfortunate byproduct of the Commonwealth’s rich industrial history. Former mills, factories, and other industrial and commercial properties contaminated with oil or hazardous materials are found throughout Massachusetts, concentrated in once-thriving urban centers that are struggling to redevelop. The liability that attaches to owners and operators of contaminated property, while useful for forcing responsible parties to clean up contaminated property and deterring future pollution, can act as a disincentive for people to buy and redevelop these parcels. Brownfields Covenants are among the tools created by the Brownfields Act of 1998 to attract development to brownfields and accomplish both environmental cleanup and economic revitalization of the communities surrounding contaminated properties. Most brownfields are redeveloped with the benefit of liability protections that operate automatically by Massachusetts General Laws, Chapter 21E, the state waste site cleanup law (where the liability protections of the Brownfields Act were codified), 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 Attorney General’s Office conducted a review of the Brownfields Covenant Program in 2007 in an effort to update the program to deal with the realities of brownfields redevelopment today. The current Brownfields Covenant Regulations were nearly a decade old, having been adopted in 1999. While the program has supported the redevelopment of properties across the Commonwealth, the time was right to build on these successes and improve the Attorney General’s ability to encourage the redevelopment of contaminated property.

After inviting written comments in April 2007, the Attorney General’s Office held roundtable discussions and meetings throughout the Commonwealth to listen to the perspectives of developers, communities, environmental professionals, and others interested in the cleanup and redevelopment of contaminated land. The comments from these brownfields stakeholders reflect general satisfaction with the key Commonwealth brownfields redevelopment tools, but provided suggestions for improvements in two principal areas: making Brownfields Covenants and other brownfields tools

more timely and predictable as further incentive for developers to choose contaminated properties over clean ones; and applying some new approaches to planning, technical assistance, and financing to target the properties that have been left behind.

As a result of this effort, the Attorney General's Office is updating the Brownfields Covenant Program in several areas:

- Proposing changes to its Brownfields Covenant Regulations to address timeliness and predictability without sacrificing the Commonwealth's cleanup standards or other environmental goals;
- Issuing new guidance to help people make best use of Brownfields Covenants to solve liability problems;
- Expanding outreach to help identify the Commonwealth's best opportunities for cleanup, economic development and community revitalization; and
- Working with the other Commonwealth agencies to develop coordinated brownfields policy, development priorities, and targeted technical assistance.

These updates are intended to improve the ability of the Brownfields Covenant Program to resolve liability concerns at the most difficult sites, but not as a substitute for the automatic liability protections available to those who clean up sites in compliance with state regulations. The Attorney General's Office expects that the automatic liability protection provisions of Chapter 21E will continue to provide sufficient liability protection for most brownfields redevelopment. Where Brownfields Covenants are necessary to resolve liability concerns, however, the proposed amendments will help maximize the Attorney General's ability to serve property owners, developers and communities interested in cleaning up brownfields.

## II. INTRODUCTION TO THE BROWNFIELDS COVENANT PROGRAM

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The Attorney General's current Brownfields Covenant Program was created by the 1998 Brownfields Act.<sup>1</sup> The Legislature recognized that the broad scope of liability for owners and operators of contaminated property, while useful for forcing responsible parties to clean up contaminated property and deterring future pollution, could act as a disincentive for people to buy and redevelop contaminated property. The 1998 Brownfields Act gave eligible persons, those not responsible for causing the contamination, a liability endpoint if they cleaned up a site consistent with the Commonwealth's cleanup regulations, the Massachusetts Contingency Plan (MCP).<sup>2</sup> This would give developers the comfort that if they took on a contaminated site and cleaned it up in accordance with state standards, they could develop it and not face liability in the future. For the sites at which this mechanism does not apply or is not enough to resolve liability hurdles, the Legislature authorized the Attorney General to enter into Brownfields Covenant Not to Sue Agreements, or Brownfields Covenants, with property owners and developers who promise to clean up a site and redevelop it in a way that "will contribute to the economic or physical revitalization of the community in which it is located." The Attorney General's authority was codified at M.G.L. c. 21, s. 3A(j)(3).

The Attorney General's Office adopted regulations in 1999, found at 940 CMR 23.00, and entered into its first agreements in 2000.

Brownfields Covenants are negotiated on a site-by-site basis, resolving the liability issues that are getting in the way of redevelopment. A Brownfields Covenant offers relief from claims by third parties and/or the Commonwealth for contribution, cost recovery, or property damage under Chapter 21E, as well as property damage under the common law. They may also cover claims for natural resource damages when requested and the Secretary of Energy and Environmental Affairs agrees. Several aspects of Brownfields Covenants make them powerful tools that can apply to a broad array of sites: they are available to any current or prospective owners or operators, particularly those who caused or contributed to the contamination or otherwise do not qualify as "eligible persons" under Chapter 21E; they are available for projects anywhere in the Commonwealth, not just Economically Distressed Areas (EDAs)<sup>3</sup>; they are available to support a wide variety of projects; and they are available to eligible persons when only a temporary solution may be feasible and the statutory liability relief is not available to them.

In order to qualify for the Brownfields Covenant Program, an applicant must: (1) commit to the cleanup of a site in accordance with Massachusetts Department of Environmental Protection (MassDEP) regulations; and (2) meet the criteria of an “Eligible Brownfields Project” by demonstrating that a proposed project adds to economic or physical revitalization by:

- creating new, permanent jobs;
- resulting in affordable housing benefits;
- preserving historic buildings;
- creating or revitalizing open space; or
- providing some other public benefit to the community in which the site is located.

The Attorney General’s Office works with MassDEP to determine if a cleanup plan is reasonable based on site conditions and a proposed project, recognizing that remedial plans may not be complete when the project site needs more assessment. We work with the city or town in which a project is proposed to determine if a proposed project will help revitalize the community.

In addition to negotiating Brownfields Covenants, the Attorney General devotes a substantial amount of time to educating property owners, developers, municipalities, and others about the liability relief options available to them under Chapter 21E. The Office embraces its role as a liability problem-solver, working with property owners, developers and communities at all stages of cleanup and project planning to answer questions, use the brownfields tools, and navigate the regulatory programs for cleanup and development. In some instances, the Attorney General’s role has included explaining when a Brownfields Covenant is not necessary to resolve liability concerns. The Attorney General has, when doing so would help a project, written a letter explaining that people interested in a covenant qualified for liability protection under some other provision of Chapter 21E.

In the first several years of the program, the Office entered into approximately three agreements per year, matching a modest inflow of applications. The first groups of applicants were developers, public and private, who may have qualified for a statutory liability endpoint after completion of a cleanup, but were facing a long cleanup or otherwise needed the security of up-front relief to convince lenders, investors, development partners, or their own organizations to take the leap into buying a contaminated property.

Applications, and agreements, have increased in recent years. Seven agreements were executed in each of 2006 and 2007.

Brownfields Covenants have led to commercial and industrial development, housing and parks all over the Commonwealth: there have been four agreements for sites in western Massachusetts, nine in central Massachusetts, ten in northeastern Massachusetts, eight in southeastern Massachusetts, and three in Greater Boston (i.e., within Route 128). They have been used for large and small projects, from corporate campuses to refurbished gas stations. **Appendix A** contains summaries of all completed Brownfields Covenants.

With more agreements has come experience with a wider variety of circumstances in which Brownfields Covenants are used. In addition to entering into agreements with eligible persons looking for up-front relief, we have entered into agreements with:

- parties who caused the contamination or otherwise do not qualify as eligible persons;
- developers taking over a site midway through cleanup;
- developers acquiring sites not completely assessed before purchase;
- property owners and developers working together, splitting cleanup and development responsibilities; and
- municipalities who want to take charge of a property, clean it up and get it development-ready before soliciting requests for proposals to redevelop.

This experience has given the Attorney General's Office exposure to the kinds of liability issues faced at the Commonwealth's brownfields. It also has allowed the Office to apply its experience to updating its regulations and policies. In 2007, the Attorney General's Office began a review of the program to see how well the Office was fulfilling its authority under Chapter 21E to create incentives for cleanup and redevelopment.



### III. PROCESS OF GATHERING COMMENTS ON THE BROWNFIELDS PROGRAM

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On April 2, 2007, Attorney General Coakley sent a letter to people and organizations around the Commonwealth that are involved in brownfields issues. The letter, attached as **Appendix B**, asked people to share their comments on the Attorney General's Brownfields Covenant Program and their broader experience managing liability and facing the other challenges of brownfields redevelopment.

We followed the letter with regionally-focused roundtable discussions in Springfield, Worcester and Lawrence to ensure that we were gathering perspectives from around the Commonwealth. These groups represented many different perspectives within each region, and were assembled through recommendations by locally-active private and public sector brownfields stakeholders. The aim was not to gather a comprehensive group of brownfields stakeholders in a region, but to gather a representative sample of people who could contribute to the discussion from many angles. Throughout the process, we held additional meetings and telephone calls with organizations and individuals that are interested and active in brownfields redevelopment.

We also met with officials in many of the state and federal agencies that have primary responsibilities for regulating the cleanup and redevelopment of brownfields: the Executive Office of Energy and Environmental Affairs (EEA), MassDEP, the Massachusetts Development Finance Agency (MassDevelopment), and the United States Environmental Protection Agency.

To get ideas from other states and perspectives on the trends and broader themes of brownfields redevelopment nationally, we also studied other states' programs and current literature on brownfields, planning and development.



## IV. SUMMARY OF COMMENTS RECEIVED DURING THE PROGRAM REVIEW

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### A. COMMENTS ON THE ATTORNEY GENERAL'S BROWNFIELDS COVENANT PROGRAM

#### I. GENERAL COMMENTS

Brownfields Covenant Not to Sue Agreements are seen as useful and powerful tools for many situations, but one that can be unattractive for a developer who is in a hurry or does not want a public process to complicate a deal.

For developers who can afford environmental liability insurance, insurance can be a quicker alternative that may also cover a developer for liabilities a Brownfields Covenant will not. Insurance, however, is too expensive for many small- and medium-sized development projects.

For property owners who do not qualify as eligible persons (e.g., those responsible for site contamination), Brownfields Covenants provide a welcome opportunity to resolve liability, because Chapter 21E provides no automatic mechanism for a liability endpoint for such parties. For eligible persons, Brownfields Covenants are attractive in several situations: when completion of cleanup is too far into the future (or unknown) to be comfortable with the automatic liability protections under Section 5C that would eventually come; when the security of a written promise from the government is necessary at difficult sites to convince lenders, investors or development partners to join a project; when sites with complex cleanup histories leave developers nervous; when marketing a property, especially of a residential development, to end-users who will buy before the end of cleanup and are likely to have questions about liability.

## 2. PROCESS: APPLICATION, NOTICE AND COMMENT

Some commenters appreciated the flexible approach the Attorney General's Office has taken to the program, allowing parties to join in situations where it helps resolve all the liability issues surrounding a site. Another commenter noted that the Attorney General's role can be a lynchpin in negotiations between buyer and seller, keeping parties at the table to resolve issues.

Many people who have been through the process of applying for a Brownfields Covenant comment, however, that the notice and comment provisions can be burdensome and, at least when an applicant is an eligible person, too long. Some say they have avoided Brownfields Covenants because there are too many unknowns in the process, e.g., how long it will take to get a signed agreement, and who may participate in the process along the way. In situations where a developer needs a deal to happen quickly, these unknowns may convince a developer to look elsewhere.

More specifically, several people commented that the notice provisions are burdensome in two ways: (1) the requirement that applicants go back 50 years to find all previous owners of a site, an effort that reveals many defunct entities and people without an obvious current address; and (2) the requirement to give in-hand/certified mail notice to abutters to the "site" when the site extends off-property, a situation that leads to an expansive service list of people potentially at a distance from the source of the contamination. Several people felt that the burdens of these aspects of the notice provisions are out of proportion with their benefits, i.e., that they do not appear to be necessary to alert those most likely to have their legal rights affected by a Brownfields Covenant. It should be noted that the 50-year title search requirement reflects title examination standards for real estate transactions published by the Real Estate Bar Association<sup>4</sup>, and was chosen by the Legislature as the standard for notice to property owners within the site in the non-brownfields liability settlement provisions at M.G.L. c. 21E, s. 3A(j)(2).

Several people commented the 90-day public comment period is unnecessarily long when the applicant is an eligible person. While a 90-day comment period may be appropriate for property owners who caused the contamination, it is argued that there is little gained when the applicant is an eligible person, against whom third parties are unlikely to have claims. Because the 90-day comment period is longer than a typical 45-day negotiation period between a Purchase and Sale Agreement and closing (when responsibility for managing liability may be clarified), Brownfields Covenants appear to be impossible to complete in time for a deal to close. A related comment is that, under the current scheme, people have no realistic sense from the Brownfields Covenant regulations when, even if they follow all the rules and file a complete application, they will have a Brownfields Covenant in hand. It is not clear from the regulations when the 90-day comment period starts and ends (because, among other things, an applicant has substantial control of the process), and the regulations say nothing about when an applicant can expect a completed agreement after the public comment period closes.

Another unknown in the process is the degree to which abutters and other interested parties may participate in the negotiation of an agreement. Following the language of Chapter 21E, the regulations give affected third parties "notice of an opportunity to join the covenant not to

sue agreement,” but do not describe what joining really means or the circumstances in which it would be allowed. As a result, there is fear among some in the development community that an application would open up a process of potentially unlimited public involvement. At the same time, some commenters note that it is important to address legitimate concerns of abutters or others affected by a site in order to address adequately the liability issues surrounding a site.

One commenter, responding to the possibility of regulatory amendments to address timing and notice provisions, gave a cautionary note that streamlining the process for eligible persons to secure a brownfields covenant too much may have the unintended consequence of causing eligible persons who would now rely on the automatic liability endpoint under M.G.L. c. 21E, s. 5C to begin to turn to Brownfields Covenants, and this change may undermine the privatized cleanup program and Section 5C, by which most liability concerns under Chapter 21E are managed. It would remain the Attorney General’s policy, however, to ensure that Brownfields Covenants are limited to those projects not addressed by the automatic liability provisions.

### **3. SCOPE AND LANGUAGE OF BROWNFIELDS COVENANTS**

Two termination provisions in the standard Brownfields Covenant Not to Sue Agreement have drawn concern. Some applicants have expressed displeasure with the provision that the agreement “shall be in effect unless and until the statutory protections available to the [applicant] or Subsequent Owners and/or Operators pursuant to M.G.L. c. 21E, s. 5C are in effect.” Section 5C gives a liability endpoint (the same protections that a Brownfields Covenant provides, except that Section 5C does not cover natural resource damage claims) to eligible persons who achieve and maintain a permanent solution or remedy operation status; the purpose of the provision is to allow the language of Chapter 21E to take over as the source of liability protection as soon as possible. In these cases, the eligible person pursues a Brownfields Covenant because he or she is not comfortable with the burden of liability before completion of the cleanup (which may be years away), and the Brownfields Covenant acts as a bridge to the safe ground of a liability endpoint under Section 5C. The problem, from some applicants’ perspectives, is that they are not sure when exactly the protections in Section 5C become effective (e.g., when a permanent solution is achieved) and under what circumstances those protections may disappear (e.g., when a permanent solution is not maintained). The benefit of greater certainty that a Brownfields Covenant gives is therefore, to these critics, diluted to some degree. Brownfields Covenants are not intended, however, to give greater long-term (post-cleanup) certainty to eligible persons than Section 5C provides. The maintenance of a permanent solution is done in accordance with the MCP as part of the privatized cleanup program, which the Brownfields Covenant Program is intended to complement, not supersede.

A second termination provision which drew concern from one commenter is the provision that says the Commonwealth and third parties cannot sue an applicant “so long as” the applicant’s cleanup “meets the Standard of Care” under Chapter 21E. The concern is that it is not always clear when the Standard of Care has been violated, and therefore the provision creates uncertainty and may give an unfair opening for third parties to claim that an agreement is no longer effective.

A suggested solution was to have the Attorney General control the termination for failure to meet the standard of care (a separate termination clause in the Attorney General's power already exists); that way it would be unambiguous when a Brownfields Covenant terminates. This suggestion would, however, upset the general approach to cleanup at Chapter 21E sites, which is to have applicants clean up through private action, with reference to the MCP.

Several commenters noted that they would like to see Brownfields Covenants cover contamination that is unknown at the time of the agreement; they would like the Covenant to say, in essence, that an applicant is exempt from liability for whatever contamination it finds and cleans up. Currently, we require that a site already be in MassDEP's system (i.e., a Release Tracking Number be issued) before entering into a Brownfields Covenant. We also allow Covenants to cover only releases that have a Release Tracking Number (RTN) applied to them. Because it is common for contaminated sites to be less than perfectly assessed (and sometimes not assessed at all), it is not unusual for a developer to buy a site and find previously unknown releases. If Brownfields Covenants were available in situations where someone is willing to take on a site no matter whether the extent of contamination has been completely assessed, they would create an incentive for people to take on the more difficult sites. On the other hand, others point out that the Commonwealth needs to have enough information to judge whether an applicant has a reasonable remedial plan for the site and the proposed redevelopment, and that a lack of information about a release may make it impossible for the Commonwealth to judge the merits of a remedial plan in advance. Furthermore, third parties affected by a release unknown at the time of application but covered in a Brownfields Covenant may not have an opportunity to comment or participate.

One commenter said that Brownfields Covenants should cover toxic tort/personal injury claims, because this is an area that many developers are concerned about. This is not, however, one of the protections the Legislature enumerated in its authorizing language for the Brownfields Covenant Program.

#### **4. OUTREACH**

Several people commented that more and different kinds of outreach and education would be useful. First, several people said that the Attorney General's Office should provide more public information about completed agreements on its website. It is important for people to be able to read previous agreements and understand the context for them in order to judge whether a Brownfields Covenant would be appropriate in other circumstances. This is especially so because people are not always free to call the Attorney General's Office and describe their project (for example, sellers may forbid the buyer from telling anyone about a pending deal).

Second, even though our program is well understood by sophisticated environmental counsel and developers in Boston and other Massachusetts cities, there is a segment of the real estate market that likely does not understand it. Targeting local Real Estate Boards and other real estate professionals may be helpful in getting to those who know the property owners and the

developers in local markets, where many smaller brownfields languish in part because of lack of access to state tools. Relatedly, because small businesses are particularly unlikely to have the resources to understand and use Brownfields Covenants and other brownfields tools, guidance and other outreach aimed at attracting small-scale property owners and developers would help tap unused potential for site redevelopment.

Several commenters suggested that the Attorney General be more aggressive in helping to solve liability issues at “problem properties” – the ones that languish for years abandoned, mothballed, or used for some minimal use like parking or storage. The basic problem common to all of these properties is a property owner who is afraid, cannot afford, or is simply unwilling to assess or clean up the property or let someone else take it over. The property owner will often not allow testing on his or her property, because of fear that whatever is found, if reported to MassDEP, will start the clock ticking on MCP responsibilities and may lead to cleanup costs, Commonwealth enforcement, and claims from third parties. A large purchase price would likely overcome a property owner’s worries about selling, so the problem properties tend to be in areas seen as more marginal for redevelopment potential. Among the suggestions were: to do more to let people know that those responsible for contamination and other non-eligible persons are eligible for Brownfields Covenants; to offer some liability protection to property owners willing to have their properties assessed; and to offer a Brownfields Covenant as part of a Commonwealth effort to attract developers to sites the Commonwealth has prioritized for redevelopment.

One commenter noted that Brownfields Covenants would benefit from increased cooperation with other state economic development, planning and environmental agencies in determining if a project contributes to economic or physical revitalization. Relying on municipalities alone for such determinations leaves the danger that abutting municipalities may disagree, and ignores the regional and statewide impacts of a project. A more explicit statewide brownfields policy would allow the Attorney General to tap into planning expertise of other agencies, and help both the Attorney General and the regulated community know what projects are to be encouraged.

These comments on outreach and agency coordination tie into comments we received about brownfields redevelopment strategies in general, elaborated upon at greater length in the last paragraphs of **Section B**, immediately below.

## **B. COMMENTS ON THE STATE OF BROWNFIELDS REDEVELOPMENT IN GENERAL**

In the course of our public outreach, the Attorney General’s Office invited brownfields stakeholders to provide comments on their experiences with brownfields redevelopment in general, so that we could understand how Brownfields Covenants fit into the overall picture of brownfields redevelopment. Discussion of Brownfields Covenants as liability management tools necessarily leads to a discussion of other liability management tools and how they are being used in different situations, as Brownfields Covenants are intended to fill the gap when other tools do not apply. Furthermore, understanding how a property owner or developer approaches the other brownfields

challenges, including site assessment, planning, cleanup and financing, helps the Attorney General's Office determine how best to provide assistance and work with other agencies.

The picture that evolves from the dozens of comments on all aspects of brownfields redevelopment is one of general satisfaction with the key Commonwealth brownfields redevelopment tools, and great appreciation for the Legislature's recent changes that have re-capitalized the Brownfields Redevelopment Fund, created a pilot program for financing asbestos and lead paint remediation, and expanded tax credits for remediation expenses. A partial list of Commonwealth (and national) brownfields tools, incentives and programs is included as **Appendix D**, adapted from MassDEP's "Brownfields Redevelopment Toolbox: A Guide for Massachusetts Communities." At the same time, some stakeholders suggested that the Commonwealth pay attention to certain areas of brownfields policy and adopt some new approaches to maximize the potential for brownfields revitalization and help crack the "problem properties." Many of the suggestions strike two themes similar to those of comments on Brownfields Covenants, i.e., that creating more clarity and timeliness for existing brownfields tools will better enable property owners and developers to choose brownfields over uncontaminated land, and that outreach and technical assistance are necessary to effectively focus on more difficult sites.

Some commenters expressed concerns with regard to the Commonwealth's cleanup programs for contaminated sites, including questions about the timing and outcome of site audits, enforcement against eligible persons for MCP deadline violations caused by prior owners, challenges of dealing with urban fill, and the timing of cost recovery settlements. We have forwarded these comments to MassDEP, as these are more appropriately addressed by that agency. MassDEP has a standing MCP Advisory Committee that meets monthly and other processes for gathering public comment on its programs. We also note that MassDEP has long been aware of some of these areas of concern and has taken steps to address them, including a formal amendment of its regulations, known as the "white knight" provision that resets cleanup deadlines for eligible persons new to a site. MassDEP also has a stakeholder group to study "urban fill" or "historic fill" and to explore how to streamline the handling of such material under the MCP.

Another category of comments included broader suggestions about new programs or approaches that the Attorney General's Office and other Commonwealth agencies should consider. These comments fall into two topics: tools for municipalities, and Commonwealth agency coordination.

We mention these comments here because they have informed, in a general way, the Attorney General's approach to brownfields. However, it is important to note the limitations of these comments. Because the Attorney General's program review was not an effort to examine comprehensively the status of Chapter 21E and waste site cleanup in the Commonwealth, the comments cannot be used as detailed analysis of how brownfields programs in other agencies are working. The Attorney General's Office will not be inviting comment on issues unrelated to Brownfields Covenants in the upcoming formal comment period on proposed amendments to the Brownfields Covenant Regulations. People interested in non-Covenant brownfields issues should address any further comments to other appropriate agencies, e.g., MassDEP for waste site cleanup, MassDevelopment for the Brownfields Redevelopment Fund, the Executive Office of Housing and Economic Development for other development matters.

## I. TOOLS FOR MUNICIPALITIES

Local governments clearly play a key role in brownfields redevelopment. Municipalities can tap federal assessment and cleanup funding. Their authority to take ownership of properties for failure of owners to pay taxes can be an important tool for cities and towns to take over abandoned or underutilized properties. Their power to abate back taxes for a contaminated property creates a good incentive for a new private owner to take over a site. They also control planning and permitting for properties and therefore play a large role in deciding what gets built. The separate powers of redevelopment authorities, housing authorities and economic development and industrial corporations give municipalities a variety of tools for taking control of properties and redeveloping them.

Many comments suggest that while the Commonwealth's individual brownfields tools are helpful to municipalities, cities and towns need more active help from the state or federal government to solve the most challenging problems. Some larger cities have brownfields coordinators among their planning staff to manage all of the brownfields tools at a municipality's disposal, create brownfields inventories and prioritize sites for redevelopment. These cities, however, are few, and even these cities cannot master all of the technical, legal and financial aspects of brownfields development.

Brownfields are clustered in those municipalities that are having the most difficult time with attracting economic development more generally. The particular development challenges facing the small-to-medium size cities of the Commonwealth with long industrial histories (tagged variously as "Forgotten Cities," "Gateway Cities," and "Middle Cities"), have been the focus of several studies in recent years.<sup>5</sup> These studies have emphasized the limited capacity of many local governments to attract and manage redevelopment proposals for the contaminated and out-of-date industrial and commercial lands and buildings.<sup>6</sup> While brownfields are a major challenge for municipalities struggling to revitalize their older urban areas, they also offer great opportunities for redevelopment that can be realized if developers and investors are confident in municipal capacity.<sup>7</sup> These studies suggest that targeted technical assistance from the Commonwealth, with proper planning and prioritizing, can help these cities overcome their capacity deficits and create some successes.<sup>8</sup> These suggestions should apply to towns as well as cities, although the scale of the problem may differ.

All Commonwealth brownfields agencies, alone or together, already provide technical assistance to municipalities on a project-specific basis, but not in a comprehensive manner to implement a municipal brownfields plan.<sup>9</sup>

Funding is an important issue for municipalities. Several people mentioned that there is not enough money available for municipalities interested in assessing or cleaning up contaminated properties. In smaller cities and towns, especially those far from Greater Boston, there can be little or no market demand for contaminated properties until they are cleaned up. It generally falls to municipalities in these areas to get properties cleaned up and therefore marketable, and cities and towns rarely have available funds for cleanup. In Massachusetts, the Brownfields

Redevelopment Fund makes money available for assessment and cleanup, but is generally available only for developers who have a development plan. The U.S. EPA does provide money to municipalities for assessment and cleanup, but in what was a very successful year for Massachusetts applicants, fewer than half the municipalities who applied for EPA funding in the last year were awarded EPA money. (There were 66 requests, and 32 were given awards.) MassDEP reviewed the applications and determined that all of the proposed projects had merit, so projects with good potential have been slowed by lack of assessment and cleanup funding.

One commenter also noted that there is no money for planning especially aimed to dealing with brownfields, e.g., conducting community and development studies to help create redevelopment strategies. One model for combining technical assistance with planning is New Jersey's Brownfields Development Area (BDA) program. The State of New Jersey provides funding and technical assistance to communities affected by multiple brownfields to design and implement remediation and reuse plans for all of its contaminated properties.

## **2. COMMONWEALTH AGENCY BROWNFIELDS COORDINATION**

Some commented that the Commonwealth could benefit from more coordinated brownfields planning among its environmental and economic development agencies, in addition to increased brownfields outreach and technical assistance. As the Metropolitan Area Planning Council has found in developing its recent MetroFuture plan for eastern Massachusetts, brownfields will be an increasingly important planning issue in the coming years, as more intensive development in already-built areas will steer more building on contaminated land as a consequence of both market demand and a planning emphasis on "smart growth" near established town centers, public transportation, and other infrastructure. The local chapter of the National Brownfield Association, a group of developers, environmental professionals and municipal officials, has also suggested Commonwealth planning that ties smart growth principles to brownfields coordination.

One commenter suggested that Commonwealth agencies also develop coordinated plans to market their brownfields programs to out-of-state businesses which might come to Massachusetts if they knew more about our programs.

## V. CONCLUSIONS AND RECOMMENDATIONS

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Since the 1998 Brownfields Act, the redevelopment of brownfields has become a more mainstream part of private real estate development and municipal efforts to revitalize neighborhoods and create economic growth. Many contaminated sites are being cleaned up using the tools and incentives from the 1998 Brownfields Act and complementing federal programs. Lenders are increasingly comfortable lending at contaminated sites. A national trade group with a Massachusetts chapter, the National Brownfield Association, reflects a mature industry of environmental and development professionals. More than 7,000 people attended the national EPA-sponsored national Brownfields 2006 Conference in Boston, the highest attendance for this annual national conference.

Statistics from three important Commonwealth brownfields programs provide some measure of the activity at Massachusetts brownfields. Between 1999 and 2006, MassDevelopment issued 426 assessment or remediation awards (loans and grants) from the Brownfields Redevelopment Fund to support projects in more than 90 communities across the Commonwealth. The projects developed from these financing deals included 4,850 new housing units and 3,500 new jobs. In roughly the same period, the subsidized environmental insurance program run by MassBusiness has aided more than 300 sites in the Commonwealth, leveraging more than \$5 million in subsidies to cause \$200 million in environmental cleanups and \$3 billion in private-sector expenditure on redevelopment of these sites. Finally, MassDEP has counted approximately 600 contaminated sites in the Commonwealth for which someone has approached the department with requests for assistance or information relating to potential redevelopment.

There remain, however, areas for the Commonwealth's attention. Continued effort should be given to encouraging the private market in brownfields redevelopment by making brownfields tools more predictable and timely. In order for a contaminated site to be more attractive than a clean one, the additional issues a developer faces with a contaminated site – cleanup, liability management, and other assorted costs – have to be as comprehensible as the factors in generic real estate development.

When the costs and schedules associated with contaminated property are unknown, development planning can be difficult. The Commonwealth should continue looking for ways to maintain current standards for environmental protection while clarifying cleanup and redevelopment rules and tools to give developers more incentives to choose polluted rather than pristine sites for their projects.

Despite success stories involving the turnaround of contaminated properties all over the Commonwealth, a group of problem properties seem not to be getting addressed by the current tools available to private parties or the approaches employed by state or local government. Part of the problem is tied to location; they tend to be in the most marginal areas for redevelopment potential. Part of the problem is their ownership; owners are afraid to assess or sell their properties for fear of liability to the Commonwealth for cleanup and to others for injuries. A third factor is the limited capacity of many municipalities to take over or attract others to these sites. Attention needs to be paid to these factors, and new approaches employed.

For its part, the Attorney General's Office will respond to these challenges in three ways.

First, we will update the Brownfields Covenant Program to give developers as much clarity as possible regarding the process to secure a Brownfields Covenant. Brownfields Covenants have been unattractive to many who need a deal to happen quickly, or who simply cannot predict what the process would entail. Changes to the process for applying for a Brownfields Covenant should make negotiation of an agreement more efficient and take much of the mystery away, allowing prospective applicants to better fit a Brownfields Covenant into a deal. The Attorney General's Office will pursue process-related changes to its Brownfields Covenant Regulations, including:

- Shortening the public comment period when applicant did not cause or contribute to the contamination;
- Amending notice provisions to focus on giving notice to those Affected Third Parties most likely to be affected by a site and a Brownfields Covenant; and
- Clarifying public comment deadlines and the rights of affected third parties, to give both applicants and third parties better expectations.

Second, the Attorney General's Office will work to improve its outreach and guidance to make program information better available to the public. These efforts will include:

- Developing our website to give more public information about completed agreements to explain how they work in different scenarios;
- Developing guidance documents to answer frequently asked questions and explain our procedural and substantive approach to Brownfields Covenants in ways that are not addressed by the regulations; and
- Targeting small-scale property owners and developers to help tap unused potential for site redevelopment.

Third, the Attorney General's Office will increase its coordination with other Commonwealth agencies to offer better technical assistance to municipalities and contribute to Commonwealth brownfields planning and policy development. Among these activities, it will:

- Work with municipalities to identify development priorities and problem brownfields that require focused attention;
- Work with state, regional and local planning efforts to identify economic development opportunities and priorities for the Commonwealth; and
- Further develop coordinated technical assistance to municipalities, property owners, and developers with state environmental and economic development agencies.



## ENDNOTES

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1. Chapter 206 of the Acts of 1998.
2. The liability endpoint for eligible persons was codified at M.G.L. c. 21E, s. 5C.
3. The program is required by the Brownfields Act to give first priority to projects in the 15 cities of the Commonwealth with the highest poverty rates and second priority to projects in EDAs, but has the authority to support projects everywhere, and has never been required by limited resources to decline an application in a non-EDA area.
4. Arthur L. Eno, Jr., and William V. Hovey, *Real Estate Law with Forms*, 4th Ed., Massachusetts Practice Series, Vol. 28B, p. 249 (West, 2004).
5. Five prominent ones, starting with the most recent, are:
  - Lorlene Hoyt and Andre Leroux, “Voices from Forgotten Cities: Innovative Revitalization Coalitions in America’s Older Small Cities,” PolicyLink, CHAPA, and the Massachusetts Institute of Technology School of Architecture and Planning, Massachusetts, 2007. Available at:  
[http://www.policylink.org/documents/forgottencities\\_final.pdf](http://www.policylink.org/documents/forgottencities_final.pdf)
  - Mark Muro, John Schneider, David Warren, Eric McLean-Shinaman, Rebecca Sohmer, and Benjamin Forman, “Reconnecting Massachusetts Gateway Cities: Lessons Learned and an Agenda for Renewal,” Massachusetts Technology Collaborative and SBLI, Massachusetts, 2007. Available at:  
[http://www.massinc.org/fileadmin/researchreports/gateway\\_cities/gateway\\_cities\\_full.pdf](http://www.massinc.org/fileadmin/researchreports/gateway_cities/gateway_cities_full.pdf)
  - Jim Stergios, “Rehabbing Urban Development,” Center for Economic Opportunity Working Paper, Pioneer Institute for Public Policy Research, Boston, Massachusetts, February 2007. Available at:  
[http://www.pioneerinstitute.org/pdf/07\\_urban\\_development.pdf](http://www.pioneerinstitute.org/pdf/07_urban_development.pdf)

- “The State of the Cities: Revitalization Strategies for Smaller Cities in Massachusetts,” Citizens’ Housing and Planning Association (CHAPA) and the Massachusetts Association of Community Development Corporations (MACDC), Massachusetts, 2006. Available at: <http://www.chapa.org/pdf/SmallCities.pdf>
- David Soule, Joan Fitzgerald, and Barry Bluestone, “The Rebirth of Older Industrial Cities: Exciting Opportunities for Private Sector Investment,” The National Association of Industrial and Office Properties Research Foundation, The Massachusetts Chapter of the National Association of Industrial and Office Properties, NSTAR, Pioneer Valley Planning Commission, and Merrimack Valley Planning Commission, Boston, Massachusetts, April 2004. Available at: <http://www.curp.neu.edu/pdfs/Final%20Report%20PDF.pdf>

6. For example, MassINC’s “Gateway Cities” report:

State and local regulatory and administrative processes remain convoluted and slow-moving even as capital flows accelerate. Local project recruitment, review, decisionmaking, and site preparation too often takes too long – and needs to be clarified and accelerated. For its part, the Legislature took a giant step forward in July 2006 with the passage of legislation to streamline and expedite the state’s permitting and appeals process. But more can be done, especially at the local level, to erase the barriers or “deal breakers” that must be overcome if older industrial cities are to compete successfully for private sector investment and economic development.

MassINC and the Brookings Institution, “Reconnecting Massachusetts Gateway Cities” at p. 42.

7. Hoyt and Leroux, “Voices from Forgotten Cities” at p. 28.

8. CHAPA and MACDC recommend that the Commonwealth give municipalities assistance in identifying assets, developing economic development strategies, and helping cities in weaker markets focus on redeveloping vacant eyesores and key properties as a catalyst for revitalization. They also argue for greater cooperation between municipalities, more regional planning and assistance to municipalities on planning. CHAPA and MACDC, “The State of the Cities,” pp. 45-48. The Stergios article from the Pioneer Institute argues that “Middle Cities” need special state government attention, and recommended that the governor establish a point person to help these cities develop a strategic plan, then work with state agencies to deliver on the plan. Stergios, “Rehabbing Urban Development,” at pp. 38-43. “The transportation, environmental, housing, and economic development agencies should work together to provide technical assistance to help articulate the city’s appeal as a place to live and do business.” *Id.* at pp. 40-41.

9. The staff of the Commonwealth agencies involved in brownfields share information, frequently join one another for outreach, and hold monthly “Brownfields Partners” meetings with staff from federal agencies to coordinate their efforts.

# APPENDIX A. EXECUTED BROWNFIELDS COVENANT NOT TO SUE AGREEMENTS

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The following are summaries of Brownfields Covenant Not To Sue Agreements executed from 2000 to 2007 as part of the Attorney General's Brownfields Covenant Program.

## 2007

### **CHELSEA: FORBES PARK CONDOMINIUM DEVELOPMENT AT FORBES LITHOGRAPHIC SITE**

Developers Forbes Park LLC and Seawall Realty LLC applied for a Brownfields Covenant after buying but before beginning cleanup and their planned redevelopment of the 18-acre former Forbes Lithographic Company property at 1 Forbes Street in Chelsea. The developers plan to turn the old factory and warehouse buildings on the property, largely abandoned in recent years, into 225 “eco-loft” condominiums (with future development stages to include more condo units and commercial space). The project has numerous sustainable development and community-friendly features, including a stormwater canal system to capture rainwater and support restored wetlands, energy-efficient building design features, a wind turbine to provide some of the condos’ electricity needs, and a public walkway along the Chelsea River.

### **LAWRENCE: ARCHITECTURAL HERITAGE FOUNDATION HOUSING DEVELOPMENT AT FORMER WASHINGTON MILLS BUILDING**

Developers Architectural Heritage Foundation and Banc of America Community Development Corporation partnered to transform the historic former Washington Mills Building #1 at 270 Canal Street into 155 loft-style apartments, with 10 percent of the units reserved for lower income renters. The project is in the North Canal Historic District, close to the City center and one-quarter mile from the McGovern commuter rail and bus station, and is a Certified Historic Rehabilitation that conforms to the U.S. Secretary of the Interior’s standards for renovation of historic buildings.

**LAWRENCE: LAWRENCE GATEWAY PARKING DEVELOPMENT AT GENCORP SITE**

GenCorp, the owner of a 8.6-acre former plastics manufacturing plant in the Gateway area of former mill buildings in Lawrence received a Brownfields Covenant to support the cleanup and redevelopment of its property into a landscaped lot of approximately 1,000 parking spaces. The owner is completing the cleanup and cooperating with the City of Lawrence and the Merrimack Valley Regional Transit Authority to acquire the property and then build and manage the parking facility to support businesses in the surrounding area. The project, together with the redevelopment of the abutting Oxford Paper Mill property into a public park along the Spicket River, will make the surrounding buildings and the whole area more inviting to businesses, their customers, and the public.

**NATICK: CONDOMINIUM DEVELOPMENT AT FORMER DOWNTOWN AUTO BODY SHOP**

The Downtown Natick Development Company used a Brownfields Covenant to buy and redevelop a former auto body shop at 20 South Avenue in downtown Natick, two blocks from a commuter rail stop, and turning it into 24 condominiums, five of them meeting criteria for affordable housing.

**PITTSFIELD: REFURBISHMENT OF COLONIAL THEATRE**

The property-owning affiliate of the Colonial Theatre Association purchased contaminated property abutting the historic but long-shuttered Colonial Theatre at 109-111 South Street in downtown Pittsfield in its effort to refurbish and reopen the theater. A Brownfields Covenant protects the theater and its predecessor owner from liability in exchange for cleaning up historic contamination and reopening the theater, which has brought jobs and cultural and economic revitalization to the downtown area.

**SANDWICH: COMMERCIAL/RESIDENTIAL REDEVELOPMENT OF ROUTE 6A RESTAURANT/GAS STATION**

A Cape Cod developer is using a Brownfields Covenant to buy and turn a small commercial building and former gas station at 109 Route 6A in Sandwich, which was contaminated with oil and diesel, into a refurbished multi-use commercial/residential development.

**SPRINGFIELD: ASTRO CHEMICAL REDEVELOPMENT OF HAMPDEN COLOR & CHEMICAL SITE**

Astro Chemicals, Inc., a Springfield business looking to update and expand its chemical distribution business, cleaned up and redeveloped the abandoned 8-acre former Hampden Color and Chemical Company property at 126 Memorial Drive in Springfield. The property was owned by the City of Springfield after a tax foreclosure. A Brownfields Covenant allowed Astro Chemicals to limit its liability when purchasing the property (through its property-owning affiliate) from the City before taking over site remediation. Astro Chemicals has turned the property into a refurbished facility for its chemical distribution business.

## 2006

### **ANDOVER: TOWN OF ANDOVER REDEVELOPMENT OF REICHOLD CHEMICAL SITE INTO CONSERVATION LAND AND PLAYING FIELDS**

The Town of Andover secured a Brownfields Covenant to turn the site of a former Reichhold Chemical manufacturing plant at 77 Lowell Junction Road in Andover into conservation land and playing fields. Reichhold Chemical, a co-applicant, performed the necessary cleanup. The agreement ensures that 46 acres of open space, including over a mile of riverfront along the Shawsheen River, will be available for public use.

### **ATTLEBORO: REDEVELOPMENT OF TEXAS INSTRUMENTS CORPORATE CAMPUS**

Preferred Real Estate Investments, Inc., is redeveloping the 261-acre Texas Instruments property in Attleboro, a multi-building campus of manufacturing and office facilities which has been a major part of the Attleboro economy for decades, into a modern business park of corporate offices, commercial and research facilities. The project is expected to create at least 1,250 new jobs and attract new tenants and owners to the property.

### **FOXBOROUGH: CLUSTER HOUSING REDEVELOPMENT OF FORMER BENTLEY PORTER WASTE DISPOSAL SITE**

Developer Foxborough Land Partners LLC used a Brownfields Covenant to purchase and clean up the 100-acre former location of the Bentley Porter Pumping and Disposal Company on Cocasset Street in Foxborough to redevelop it into cluster housing with significant open space retained.

### **HUDSON: VILLAGE-STYLE RESIDENTIAL PROJECT AT FORMER WOOL PROCESSING FACILITY**

Developer Thorndike Development Corporation is cleaning up a 42-acre site contaminated with chemicals from a former wool processing facility, and building a village-style residential community on the site with open space and pedestrian-friendly amenities, while preserving 17 acres as protected open space that will be open to the public.

### **LAWRENCE: NINA SCARITO PARK AT FORMER INDUSTRIAL LAUNDRY SITE**

DBT Corp., an affiliate of Bank of America, secured a Brownfields Covenant to clean up and redevelop an abandoned 3-acre former industrial property at 44R Brook Street in Lawrence before contributing to the development of a public park along the Spicket River and transferring ownership to the City.

### **MARLBOROUGH: REDEVELOPMENT OF THE FORMER FRYE BOOT MANUFACTURING SITE INTO ELDERLY HOUSING**

The City of Marlborough received a Brownfields Covenant in exchange for its promise to clean up the abandoned former Frye Boot manufacturing property and redevelop it into at least 57 units of housing for the elderly and physically challenged, with forty percent of the units meeting the Commonwealth's standards for affordability. The City brought in a private developer to build the housing after cleaning up.

**PLYMOUTH: REDEVELOPMENT OF THE REVERE COPPER AND BRASS MANUFACTURING SITE INTO CONDOMINIUMS**

The Plymouth Redevelopment Authority used a Brownfields Covenant to take over the 1.5-acre former Revere Copper and Brass manufacturing facility at 216 Water Street in the downtown harbor district of Plymouth, and turn it into housing, including affordable units. The agreement included the owner at the time, an affiliate of the manufacturer Revere Copper, and was amended to add abutting property owners who were contributing to the cleanup of the overall site. It was amended a second time to change the affordable housing component of the project.

**2005**

**FALMOUTH: HATEM ENTERPRISES PROJECT AT FORMER SOUSA'S TEXACO**

A Covenant Agreement helped Hatem Enterprises Acapesket Road LLC clean up and redevelop the former Sousa's Texaco gas station located at 121 East Falmouth Highway in Falmouth. Hatem Enterprises agreed to clean up the property and renovate the former gas station so that it is suitable for at least one one-bedroom affordable housing rental unit and at least two one-bedroom rental units.

**NORTH ANDOVER: REDEVELOPMENT OF FORMER LUCENT FACILITY**

Developer Ozzy Properties, Inc., redeveloped the 169-acre former Lucent Technologies' property, also known as the Merrimack Valley Works building, at 1600 Osgood Street in North Andover. The Property contains approximately 55 manufacturing, warehouse and/or office buildings, with over 1.9 million square feet of floor space. Ozzy has redeveloped it as a multi-use industrial, R&D and office space in an effort to bring back the 4,000 jobs that were lost when Lucent shut down most of its operations there.

**PALMER: QUABOAG EAST PROJECT AT STANDEX INTERNATIONAL PROPERTY**

A Covenant Agreement is helping Quaboag East LLC clean up and redevelop a 5.31-acre parcel of land and reuse the 91,000 square foot building to establish its distribution center for its HVAC parts and equipment business at the property. Quaboag expects the redevelopment to bring approximately 35 full-time employees to the property.

**2004**

**LOWELL: MANCHESTER STREET RESIDENTIAL DEVELOPMENT**

A Brownfields Covenant allowed the expansion of a small residential development with an affordable housing component.

#### **NEW BEDFORD: THE NORSEMAN PROPERTIES PROJECT**

Developer Norseman Properties LLC is using a Brownfields Covenant to help the preservation and renovation of a 100-year-old mill building to make it suitable for several businesses, including a regional trucking operation, a surplus equipment supplier, warehouses and storage facilities and a national-brand clothing manufacturer. The project is expected to create 75 to 85 new, permanent jobs and preserve 125 to 155 jobs.

#### **WESTBOROUGH: BAY STATE COMMONS PROJECT**

A Brownfields Covenant Agreement with developer Westborough CC, LLC, helped the cleanup and redevelopment of a 57-acre parcel of formerly industrial land in Westborough into a 200,000 square foot community retail center that will include large and small retail stores and restaurants, as well as public walkways and a public park. Several dilapidated industrial buildings will be demolished and removed. This project is expected to generate approximately 750 new and permanent jobs. The Brownfields Covenant was amended to add the former owner, who contributed significantly to the project.

### **2003**

#### **BURLINGTON: THE FILTER SALES PROJECT**

A Brownfields Covenant with Filter Sales, Inc., facilitated the reuse of a vacant former manufacturing facility located at 15 Adams Street at the junction of Routes 3 and 128 in Burlington. Filter Sales relocated its air filter manufacturing operations to Burlington, expecting to create 30 to 40 new, permanent jobs.

#### **LYNN: THE 395 LYNNWAY PROJECT**

A Brownfields Covenant helped the cleanup and reuse of an idle property on the Lynnway in Lynn. This project involved two new buildings to provide commercial and retail space for two Massachusetts companies in the flooring manufacturing and contracting business.

### **2002**

#### **BROCKTON: THE CHAMPION CITY PROJECT**

A Brownfields Covenant with Boxer Realty Redevelopment LLC, Champion City Recovery LLC, and New England Waste LLC assisted in the cleanup and redevelopment of the former Hercules Wrecking Co. site, a 10-acre parcel in Brockton, located at 138 Wilder Street in Brockton. Champion and New England agreed to clean up the Site and construct a state-of-the-art construction and debris management facility.

**LOWELL: THE MANCHESTER STREET PROJECT**

A Brownfields Covenant with a developer in Lowell resulted in site cleanup and the construction of a small residential development with an affordable housing component.

**2001**

**BOSTON: THE URBAN EDGE HOUSING CORPORATION PROJECT**

A Brownfields Covenant with the UED Corporation, a subsidiary of Urban Edge Housing Corporation (Urban Edge) allowed the revitalization of a Washington Street property in Roxbury by razing a 24,000 square foot building formerly used as an auto body repair shop, and constructing a new mixed use building with retail stores, UED Corporate offices and 30 affordable housing units.

**GREENFIELD: THE GREENFIELD TAP AND DIE PLANT PROJECT**

To accommodate the complex needs of both public and private parties, the Attorney General collaborated with the DEP to provide liability relief in the form of an Administrative Order on Consent among responsible parties at the site, the Town of Greenfield, and the Commonwealth. The cleanup of the former Greenfield Tap and Die Plant site, long vacant and blighted, will allow the 14-acre property to be redeveloped for commercial, light industrial, and/or housing.

**LOWELL: THE UAE POWER PROJECT**

The Attorney General's agreement with UAE Power provided liability relief for a project that would provide a state-of-the-art electric generating facility for the Merrimack Valley Region. The agreement was later terminated because the developers decided not to pursue the project.

**2000**

**FITCHBURG: THE FITCHBURG REDEVELOPMENT AUTHORITY PROJECT**

The Fitchburg Redevelopment Authority (FRA) used a Brownfields Covenant to redevelop a 14-acre former General Electric manufacturing facility with nearly 300,000 square feet of office and manufacturing space in the downtown business district. The FRA has redeveloped the site into industrial and office components, creating hundreds of new jobs for the City. The redevelopment is also linked to the creation of open space (including a river walk) and the incorporation of other public benefits into the Urban Redevelopment Plan for the City of Fitchburg.

**LOWELL: THE LOWELL REGIONAL TRANSIT AUTHORITY PROJECT**

A Brownfields Covenant helped the Lowell Regional Transit Authority (LRTA) redevelop an abandoned industrial site on Hale Street in Lowell into a bus maintenance and operations center. This project was part of the LRTA's larger plan to upgrade the Gallagher Intermodal Transportation Center, which is the third largest transportation hub after Boston's North and South Stations, an effort expected to bring approximately 120 new jobs to Lowell that would generate more than \$3.8 million a year in new payroll dollars. Moreover, by using the site to maintain and service its bus fleet, LRTA has been able to move its fixed route bus service out of the Paige Street area of downtown Lowell to the Gallagher Terminal area. This relocation provides the added benefits of fuel savings, reduced traffic congestion, improved air quality, and increased on-time performance for the transportation system.

**NEWBURYPORT: THE FULTON STREET PROJECT**

A Brownfields Covenant with real estate developer Fulton Street Realty Trust (FSRT) to clean up a former electroplating facility in a residential area. The M&V Electroplating Company operated the plant from the 1950's until 1995, when the company went into bankruptcy. The abandoned site soon became blighted and vandalized and maintained a stigma of urban decay and economic decline for nearby residents. After demolition and removal of deteriorated industrial buildings and cleanup of the site, the 38,000 square foot parcel now boasts eight residential condominium units in three separate buildings that are consistent with the style and character of the surrounding neighborhood. In addition, the City of Newburyport was paid back real estate taxes, back sewer fees and fines.



**APPENDIX B. APRIL 2, 2007,  
LETTER FROM ATTORNEY  
GENERAL COAKLEY**

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THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108-1598

MARTHA COAKLEY  
ATTORNEY GENERAL

(617) 727-2200  
[www.ago.state.ma.us](http://www.ago.state.ma.us)

April 2, 2007

Dear Brownfields Stakeholder:

The Attorney General's Brownfields Covenant Program was created by the 1998 Brownfields Act to foster cleanup and redevelopment at sites where liability concerns are getting in the way of good projects. Working closely with MassDEP, this office has helped turn contaminated sites throughout Massachusetts into businesses, housing and parks by solving liability issues through Brownfields Covenant Not to Sue Agreements. I have asked my staff to review this program so we can build on our successes, improve our program, and do more to encourage cleanup and redevelopment. We invite you to participate in our review by letting us know about your experiences with Brownfields Covenant Not to Sue Agreements and with the challenges of brownfields redevelopment in general.

We look forward to hearing from property owners, developers, communities, licensed site professionals and everyone else involved in cleanup and redevelopment of brownfield sites. Please share your experiences, your questions and your ideas with us. Tell us what has been working and not working to manage liability and to be sure projects are completed. Tell us what we need to keep in mind as we work toward the dual goals of cleanup and redevelopment.

Brownfields redevelopment is an important part of both economic development and environmental policy. It allows us to grow and improve our communities by creating jobs, housing and other benefits while at the same time making our communities cleaner and safer. We know, however, that it brings enormous challenges, and that Chapter 21E liability continues to be a concern for buyers, developers and lenders. We will keep working to ease the challenges and solve these concerns.

Please submit written comments addressed to the Office of the Attorney General, Brownfields Unit, One Ashburton Place, Boston, MA 02108 by May 18, 2007. For additional information about the Brownfields Covenant Program, please visit our website, [www.ago.state.ma.us](http://www.ago.state.ma.us). We look forward to hearing from you.

Cordially,

*Martha Coakley*





# APPENDIX C. PROPOSED CHANGES TO REGULATIONS, 940 CMR 23.00

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## SUMMARY OF PROPOSED 2008 AMENDMENTS TO THE ATTORNEY GENERAL'S BROWNFIELDS COVENANT REGULATIONS, 940 CMR 23.00

### I. CHANGING THE NOTICE PROVISIONS TO FOCUS ON PROPERTIES MOST LIKELY TO BE AFFECTED

We ease and clarify the notification requirements, now found at 940 CMR 23.04(2), without sacrificing effective notice to those most likely to be affected by a site and have legal rights affected by a Brownfields Covenant. When pollution migrates from a source property onto other properties, the “site” for Chapter 21E purposes is wherever the pollution goes. Actual notice (either in-hand or by certified mail) to the owners of all properties within the site is critical. We amend the regulations to make clear that, where the site encompasses more properties than the property at which the redevelopment project is proposed (the “Project Property”), additional actual notice to abutters of properties that are within the site but that are not the Project Property is not necessary, unless these properties have a significant chance of being within the site in the future (e.g., downgradient properties which are likely to be affected by a moving plume of contaminated groundwater before response actions can begin). We expect that an applicant will rely on a Licensed Site Professional to determine, based on contaminant properties and site conditions (e.g., groundwater or surface water flow), if there are any such properties with a significant to become part of the site in the future. In addition to these notice requirements based on the known and expected site boundaries, we retain the other actual notice requirements, including notice to all abutters of the Project Property, whether they are suspected of being directly affected or not, as an extra protective mechanism to ensure those most likely to be affected are notified. We also retain the requirements for newspaper and Environmental Monitor notice so that the community in general and other interested parties are put on notice.

## 2. SHORTENING PUBLIC COMMENT PERIOD WHEN APPLICANT IS ELIGIBLE PERSON

Experience suggests that the current 90-day comment period, although appropriate in other circumstances, is unnecessarily long when an applicant meets the definition of “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). There are three main purposes served by the comment period: (1) an opportunity for those who have claims against the applicant to come forward before their legal rights are cut off; (2) an opportunity for someone to request to join the agreement; and (3) an opportunity for general comment on a proposed project. When the applicant is an eligible person, there are unlikely to be meritorious third party claims that need to be considered, and 30 days is likely adequate for people to assess and raise their other interests to our attention. This does not mean that negotiation of a Brownfields Covenant will necessarily be completed at the end of the 30-day comment period; meritorious third party requests to join, or deal-related issues out the Attorney General’s control, may require more time. We also retain the ability to have additional public input beyond the 30 days when necessary. The change will, however, allow for earlier completion than 90 days in the appropriate cases.

We propose three changes in 940 CMR 23.04 related to the comment period: (1) we shorten the comment period for applications by eligible persons to 30 days, while retaining a 90-day comment period for non-eligible persons; (2) we shorten the period after application for the applicant to perform the notice requirements; and (3) we make the comment period a fixed period running from the time of application, as opposed to a period running from the time notice is given, in order to make it easier for applicants and third parties to know how long the comment period lasts.

## 3. CLARIFYING WHO MAY PARTICIPATE IN COVENANT NEGOTIATIONS

Because the regulations currently give no explanation for what roles third parties may play in the process, there is some fear of the unknown among the development community, and confusion among those who might comment. Following the language of Chapter 21E, the regulations give affected third parties “notice of an opportunity to join the covenant not to sue agreement,” but do not describe what joining means or the circumstances in which it would be allowed. The regulations also do not expressly address the other two main purposes served by the comment period: an opportunity for those who have claims against the applicant to come forward before their legal rights are cut off; and an opportunity for general comment on a proposed project. The proposed changes to the regulations spell out how each type of comment will be handled.

In practice, it is rare for public comments to slow down the negotiation of a Brownfields Covenant. This is because there are often few comments, and because it has been the Attorney General’s policy to limit active involvement in the negotiation process to those who have a legal right directly affected by a proposed agreement. It is our policy to respond to all commenters in some way, but this often requires simply explaining the program and answering questions.

The proposed changes to 940 CMR 23.06(3) try to make clear that there are two circumstances when an affected third party’s rights should be considered in negotiation of the agreement: when

a third party steps forward with a site-related claim against the applicant; and when a third party requests to join the agreement to have its own potential site-related liability limited. The former is likely to happen only if the applicant is a current owner who does not qualify as an eligible person. The Attorney General's approach is to encourage the claimant and the applicant to resolve the matter outside of the agreement during the covenant negotiation period; if this is not possible, the Attorney General may determine that the third party's rights should be protected in the agreement, either through allowing the party to join in some manner or by making sure that the claimant's rights are not cut off by the agreement.

The Attorney General has also allowed parties to join an agreement when they contribute to the cleanup or redevelopment in a significant enough way that they qualify for the same protections, upon the same terms, as the applicant. The proposed changes make this explicit.

#### **4. ALLOWING COVENANTS TO VEST IMMEDIATELY WHEN THE REMEDIAL PLAN INCLUDES THE POSSIBILITY OF A TEMPORARY SOLUTION**

Chapter 21E allows for Brownfields Covenants when a temporary solution is necessary at a site "if the person to whom such covenant is provided is an eligible person as defined in Section 2, and such person can demonstrate that it is not feasible to achieve a permanent solution for the site." M.G.L. c. 21E, s. 3A(j)(3)(a)(ii). Currently the Brownfields Covenant Regulations, at 940 CMR 23.08(7), say that liability relief will not vest with respect to a site where only a temporary solution will be achieved prior to the submittal of an opinion by a Licensed Site Professional that a permanent solution is not feasible. The decision about whether a Permanent Solution is feasible, however, may be impossible until a significant time after an applicant takes ownership and performs further appropriate site assessment. The proposed change allows liability relief to vest right away when a temporary solution may be necessary. The change is intended as an incentive for eligible persons to tackle the most technically complicated sites. It will be the Attorney General's policy to require permanent solutions or remedy operation status in all agreements unless we receive some specific information that a Temporary Solution may be necessary.

#### **5. ELIMINATING THE REQUIREMENT THAT A RELEASE TRACKING NUMBER ALREADY EXIST FOR A SITE**

The current requirement that a site have a Release Tracking Number (RTN) issued by the Department of Environmental Protection before the Attorney General will enter into a Brownfields Covenant poses no obstacle to applicants in most cases, because sites that have been assessed adequately for development plans typically have an RTN. This is not true in all cases, however. There may be circumstances in which applicants who do not have control of the site of the proposed project cannot force a proper release notification to occur, and yet are able to assess the site enough to prepare a remedial and project plan. For these reasons, we propose eliminating the RTN requirement from the prerequisites for entering into agreements at 940 CMR 23.03(1). The Attorney General will still be looking for RTN information if it exists and, whether an RTN exists

or not, enough information for each release that will be addressed by the Brownfields Covenant to review a proposed project adequately. This change does not mean that Brownfields Covenants will address releases that are unknown at the time of the agreement.

#### **6. INCORPORATING SEVERAL OTHER CHANGES TO PROMOTE CLARITY**

- (a) Making express the long-held policy that a project is presumed to contribute to the economic or physical revitalization of the community, and therefore be an Eligible Brownfields Project, if it has the support of the municipality in which the project is located.
- (b) Eliminating reference to settlement of liability under M.G.L. c. 21E s. 3A(j)(2). References to Section 3A(j)(2), which allows people another method of resolving certain site-related liability, were included in order to consider requests for liability protection under both Sections 3A(j)(2) and 3A(j)(3) as efficiently as possible. There is not, however, an easy procedural fit between Brownfields Covenants and agreements under Section 3A(j)(2), which require public notice after, not before, an agreement is negotiated. The Attorney General has also not been presented with circumstances in which a request under Section 3A(j)(2) was an appropriate alternative to a Brownfields Covenant. For these reasons, we propose to eliminate the reference to Section 3A(j)(2).
- (c) 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 and avoid having applicants miss the notice requirements.
- (d) Adding a reference in 940 CMR 23.08(1) to possible protections for natural resource damages, in order 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.
- (e) Changing the description of the protections available to applicants to match the statutory language: "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." This is not a substantive change in available protections; it is solely an effort to use consistent language.

## 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](#)

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### 23.01: Scope and Purpose

Chapter 206 of the Acts of 1998, [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.” The Act 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 the Act giving direct relief provide](#) an extra push to help turn around the sites that the market comes close to turning around on its own. The Act [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. [Section 3A\(j\)\(3\) of M.G.L. c. 21E, inserted by the 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 the Act. These regulations are designed to spell out when the Commonwealth can and should enter into such agreements.](#)

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**Deleted:** § 3A(j)(3) into c. 21E. This new provision

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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 opportunity to join a Brownfields Covenant Not to Sue Agreement pursuant to 940 CMR

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23.06.

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.

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.

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:

- (a) new, permanent jobs;
- (b) affordable housing benefits;
- (c) historic preservation;
- (d) the creation or revitalization of open space; or
- (e) some other public benefit to the community in which the Site that includes the project is located, as determined by the Attorney General.

A project that provides any of the benefits listed in (a) through (d) of this definition 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.

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

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.

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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 23.06(1) 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) the

(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(2);

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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

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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 its 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; and

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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.

(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:

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(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) whether the

(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 and suspected 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

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

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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.¶  
 ¶  
 (3)

(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

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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.

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(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.

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(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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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.

(2) Public Notice. An Applicant 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, shall provide notice of this intent as follows:

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(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 state the date of application, identify the property that is the subject of the proposed Agreement, 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 seek to comment on the Application or join the Agreement by contacting the Attorney General in a specified manner. If the Applicant is an Eligible Person, the notice shall state that the notice period closes 30 days after the date of application. If the applicant is not an Eligible Person, the notice shall state that the notice period closes 90 days after the date of application.

(b) no later than 5 days after submitting an 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 for all property currently within the Site; all current owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for property not currently within the Site but with a significant chance to be part of the Site in the future;

(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 property to be owned or operated by the Applicant that is the subject of the proposed Agreement; 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

(5) 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; and

(d) no later than 15 days after submitting his or her 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 this paragraph.

### 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 third priority to all other Sites. The identification of the fifteen 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.

### 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.

(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:

(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

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. (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 ... [1]

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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:

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. (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 pr ... [2]

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

#### 23.07: Public Input

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

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

(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

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

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(3) 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.

(4) 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

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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 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. 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);

(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);

(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;

(d) the Applicant's taking reasonable steps: (i) to prevent the Exposure of people to Oil or Hazardous Materials by fencing or otherwise preventing access to the Site or portion of the Site under the Applicant's control; and (ii) 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;

(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.

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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Author

- (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.



# APPENDIX D. BROWNFIELDS TOOLS, INCENTIVES, PROGRAMS

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This list of selected Massachusetts and federal brownfields programs is adapted from the MassDEP document, “Brownfields Redevelopment Toolbox: a Guide for Massachusetts Communities,” published in December 2007. The complete guide is available for download on the MassDEP website, at:

<http://www.mass.gov/dep/cleanup/bftool.pdf>

OFFICE OF THE ATTORNEY GENERAL

**Brownfields Covenant Not to Sue Program.** The Brownfields Covenant Program provides liability protection for projects where the liability protections available automatically under M.G.L. c. 21E do not apply.

**CONTACT**

Office of Attorney General Martha Coakley  
One Ashburton Place  
Boston, MA 02108  
(617) 727-2200  
[www.mass.gov/ago](http://www.mass.gov/ago)  
Benjamin Ericson, Brownfields Unit Chief  
[benjamin.ericson@state.ma.us](mailto:benjamin.ericson@state.ma.us)

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION (MassDEP)

**Privatized Waste Site Cleanup Program and Technical Assistance.** The privatized Waste Site Cleanup Program in Massachusetts streamlines the cleanup process by allowing cleanup activities to be overseen by Licensed Site Professionals (LSPs). This program has greatly expedited the rate of cleanup at brownfields and other contaminated properties by allowing parties to undertake cleanup activities at their own pace. The privatized cleanup program also allows parties to take the planned future reuses of properties into consideration during cleanup design, which can result in significant savings in time and costs. MassDEP has established brownfields points of contact in its Boston and regional offices to help address technical issues related to these projects, and connect parties with financial and liability incentives that can be critical to their success.

**Funding.** Limited funding is available through MassDEP for brownfields-related activities.

**Clean Water State Revolving Fund (SRF).** The SRF Program provides subsidized interest (2 percent) 20-year term loans for projects that protect or improve water quality. Any Massachusetts municipality may apply and compete for this financing, during the annual solicitation period, which normally runs from June through mid-August. Brownfield remediation projects are eligible for CWSRF financing, provided that the municipal proponent can demonstrate an anticipated water quality benefit to the work.

**Assessment/Cleanup Grant of Service.** MassDEP has limited funding through EPA to perform site assessments and cleanups at brownfield properties on behalf of municipal and nonprofit entities. MassDEP uses state contractors to do this work rather than granting this funding directly to the community or nonprofit.

**Technical Assistance Grants.** MassDEP offers grants of up to \$10,000 that are competitively awarded to selected communities and citizen groups to provide expert advice and public

education about hazardous waste site cleanup activities. Typically these grants are used by communities to monitor cleanup activities being conducted by private parties.

**CONTACT**

Department of Environmental Protection  
One Winter Street  
Boston, MA 02108  
(617) 556-1138  
<http://www.mass.gov/dep/cleanup/brownfie.htm>  
Catherine Finneran, Brownfields Coordinator  
[Catherine.Finneran@state.ma.us](mailto:Catherine.Finneran@state.ma.us)

**MASSACHUSETTS DEVELOPMENT FINANCE AGENCY (MassDevelopment)**

**Brownfield Redevelopment Fund (BRF).** The Massachusetts Brownfield Act (1998) established the BRF to provide low interest loans for site assessment and cleanup to public and private sector parties. Administered by MassDevelopment, available funding includes:

- Site assessment funding up to \$100,000
- Remediation funding up to \$500,000
- Remediation and site assessment funding up to \$2 million for projects designated as “Priority Projects”

To qualify for BRF funding, a project has to be located in an Economically Distressed Area and the applicant must be an “eligible person.”

**CONTACT**

MassDevelopment  
160 Federal Street  
Boston, MA 02110  
(800) 445-8030  
[http://www.massdevelopment.com/financing/lg\\_brownfields.aspx](http://www.massdevelopment.com/financing/lg_brownfields.aspx)

**MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT (DHCD)**

**Community Development Block Grant (CDBG) Program.** This program, by which DHCD administers U.S. Department of Housing and Urban Development (HUD) funds, serves cities and towns with populations under 50,000. Larger communities are served directly by HUD. The CDBG Program funds activities that will benefit low and moderate income persons, prevent slum and blight or respond to urgent/critical community needs. There are three components of the CDBG Program that can be used for brownfields projects.

**Community Development Fund.** Provides grants to municipalities for planning, pre-development studies, property acquisition, site assessment, cleanup, demolition, and other activities.

**Mini-Entitlement Program.** Provides grants to municipalities designated as “Mini-Entitlements” for activities including planning, pre-development studies, property acquisition, site assessment, cleanup and demolition.

**Economic Development Fund.** Provides grants to municipalities to support job creation. Eligible activities include: planning, pre-development studies, property acquisition, site assessment, cleanup, demolition and other activities. Businesses can be eligible for loans or grants through municipalities for real estate acquisition, and other related activities.

**Community Development Action Grant.** CDAG provides funding for publicly owned or managed projects that will have a significant impact on the economic condition of a city or town, including activities that will leverage significant private investment and generate or retain long term employment, as well as projects that will significantly improve the conditions of low and moderate income persons through the support of workforce housing production and/or the preservation of public housing. CDAG can be used in a variety of ways, including installation, improvement, construction, repair, rehabilitation or reconstruction of publicly owned or managed buildings or other structures, facades, streets, roadways, thoroughfares, sidewalks, rail spurs, utility distribution systems, water and sewer lines, for site preparation and improvements, demolition of existing structures, and relocation assistance.

**Priority Development Fund.** Planning Assistance Grants: Provides grants up to \$50,000 to assist municipalities with planning, zoning, education and outreach leading to housing production. Many communities use these funds to hire consultants to prepare exciting plans in an effort to spark the development of housing. Priority is given to strategies that encourage housing production on city or town center, brownfields, underutilized commercial or industrial land, or part of a transit-oriented development.

#### **CONTACT**

Department of Housing and Community Development  
100 Cambridge Street, Suite 300  
Boston, MA 02114  
(617) 573-1360  
[www.mass.gov/dhcd](http://www.mass.gov/dhcd)  
Elaine Wijnja  
[elaine.wijnja@ocd.state.ma.us](mailto:elaine.wijnja@ocd.state.ma.us)

#### **EXECUTIVE OFFICE OF TRANSPORTATION (EOT)**

**Public Works and Economic Development (PWED).** The PWED Program promotes economic development through improvements to streets, sidewalks and other specified infrastructure. Eligible

activities include design, construction and/or reconstruction or existing and/or newly relocated streets, sidewalks and related infrastructure.

**Transit Oriented Development (TOD) Program.** The TOD Program offers capital grants to design and build four types of projects within one-quarter mile of a transit station: housing, parking, pedestrian improvements and bicycle facilities. Twenty-five percent of the units in any housing project must be affordable. The Program also makes awards for preliminary design (25 percent) of bicycle and/or pedestrian facilities. Applicants must be public entities but may involve public-private partnerships.

**CONTACT**

Executive Office of Transportation  
10 Park Plaza, Suite 3170  
Boston, MA 02116  
(617) 973-7000  
[www.mass.gov/eot](http://www.mass.gov/eot)

**EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (EOEEA)**

**Self Help/Urban Self Help Grants.** Self Help grants provide financial assistance to city and town conservation commissions to acquire critical open space. The open space must be used for conservation or passive recreation purposes. Urban Self Help grants assist cities and towns in acquiring, developing and renovating park and outdoor recreation facilities.

**CONTACT**

Executive Office of Energy and Environmental Affairs  
100 Cambridge Street, Suite 300  
Boston, MA 02114  
(617) 626-1026  
[www.mass.gov/envir](http://www.mass.gov/envir)  
Janet Curtis  
[janet.curtis@state.ma.us](mailto:janet.curtis@state.ma.us)

**MASSACHUSETTS DEPARTMENT OF REVENUE (DOR)**

**Underground Storage Tank (UST) Program.** The DOR Underground Storage Tank (UST) Program offers limited funding to cities and towns for activities related to leaking USTs, closure of fuel storage tanks, and other activities.

**Brownfield Tax Credit Program.** The program offers a tax credit of up to 50% of cleanup costs in the tax year after a cleanup is completed, and 25% for a cleanup that uses an Activity and Use

Limitation (AUL). The party taking the credit must be an eligible person and the project must be located in an Economically Distressed Area. In 2006, the deadline for eligible cleanup costs was extended to January 1, 2012. In addition, the tax credit may now be transferred, sold or assigned to another eligible person or to a nonprofit organization.

**Municipal Tax Abatement Program.** The program allows municipalities to negotiate back taxes, including interest, with developers undertaking brownfield projects. A municipality must adopt a by-law before negotiating agreements with developers.

#### CONTACT

Massachusetts Department of Revenue  
100 Cambridge Street, 7th Floor  
Boston MA 02114  
(617) 626-2600  
[www.mass.gov/dor](http://www.mass.gov/dor)

Dan Seferian (Tax Programs)  
(617) 626-3293  
[daniel.seferian@state.ma.us](mailto:daniel.seferian@state.ma.us)

#### EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT (EOHED)

**MORE Program.** EOHED's Massachusetts Opportunity Relocation and Expansion (MORE) program offers competitive grants to municipalities that partner with private developers to improve infrastructure for projects that create jobs. Although site assessment cannot be funded through MORE, site remediation and preparation work that is tied to infrastructure improvements is eligible for funding.

**Chapter 43D Program.** The Chapter 43D Program creates a transparent and efficient process for municipal permitting by guaranteeing local permitting decisions on priority development projects within 180 days. The law is a local option, and in order to be effective must be authorized by a majority vote by Town Meeting or City/Town Council. Once local approval is granted municipalities can offer grants up to \$100,000 for staffing assistance and consulting services.

**Economic Development Incentive Program (EDIP).** EDIP offers tax and other incentives to attract new businesses in targeted areas. The following benefits are available under this program:

- 5% Investment Tax Credit
- 10% Abandoned Building Tax Deduction
- Local real estate tax incentives such as Tax Increment Financing (TIF) or Special Tax Assessment (STA)

Eligible sites must be located in a state designated Economic Target Area (ETA).

## CONTACT

Executive Office of Housing and Economic Development

One Ashburton Place, Suite 2101

Boston, MA 02108

(617) 788-3636

[www.mass.gov/eohed](http://www.mass.gov/eohed)

Nayenday Thurman, Director of Economic Development Programs (MORE Program)

[nayenday.thurman@state.ma.us](mailto:nayenday.thurman@state.ma.us)

Massachusetts Permit Regulatory Office

One Ashburton Place, Room 2101

Boston, MA 02108

(617) 788-3667

April Anderson Lamoureux, Permitting Ombudsman (43D Program)

[april.a.anderson@state.ma.us](mailto:april.a.anderson@state.ma.us)

Massachusetts Office of Business Development

One Ashburton Place, Suite 2101

Boston, MA 02108

(617) 788-3638

Lauren E. Jones, Project Manager (Economic Development Incentive Program)

[lauren.jones@state.ma.us](mailto:lauren.jones@state.ma.us)

## MASSACHUSETTS HISTORICAL COMMISSION

**Historic Rehabilitation Tax Credit.** A 20 percent tax credit is available for projects on the state Register of Historic Places that meet eligibility requirements. Brownfields such as old mills may qualify.

## CONTACT

Secretary of the Commonwealth

Massachusetts Historical Commission

220 Morrissey Boulevard

Boston, MA 02125-3314

(617) 727-8470

[mhc@sec.state.ma.us](mailto:mhc@sec.state.ma.us)

<http://www.sec.state.ma.us/mhc/mhctax/taxidx.htm>

## MASSACHUSETTS BUSINESS DEVELOPMENT COMPANY (MASSBUSINESS)

**Brownfield Redevelopment Access to Capital Program (BRAC).** The Brownfield Act of 1998 created the BRAC Program, which backs loans with state subsidized, volume discounted environmental insurance. The BRAC Program offers Cleanup Cost Cap, Pollution Legal Liability, and Secured Creditor coverage that provide protection for the borrower against unanticipated costs that arise in a brownfield cleanup project.

Massachusetts subsidizes the premium of this insurance up to 50 percent. ACE, AIG, Chubb and XL are the selected insurance carriers.

### CONTACT

Massachusetts Business Development Corp.  
500 Edgewater Drive, Suite 555  
Wakefield, MA 01880  
(781) 928-1106  
[www.mass-business.com](http://www.mass-business.com)

Thomas J. Barry, Senior Vice President, Director MassBRAC  
[tbarry@mass-business.com](mailto:tbarry@mass-business.com)

## U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

**Brownfields Assessment Grant Program.** Assessment Grants provide funding for public entities to inventory, characterize, assess, and conduct planning and community involvement related to brownfield sites. Grants are for up to \$200,000 to address sites contaminated by hazardous substances, pollutants, or contaminants (including hazardous substances co-mingled with petroleum) and up to \$200,000 to address sites contaminated by petroleum. Up to \$200,000 can be used per site and up to \$350,000 with a waiver based on anticipated levels of contamination, size, or ownership of the site.

**Targeted Brownfields Assessment (TBA) Program.** EPA Targeted Brownfields Assessments are conducted by an EPA contractor on behalf of a public entity or nonprofit who partners with a public entity. Services include site assessments, cleanup options and cost estimates, and community outreach. Services are for an average of \$100,000.

**Brownfields Cleanup Grant Program.** Cleanup Grants provide funding for a public entity or nonprofit who partners with a public entity to carry out cleanup activities at brownfields sites that they own. An eligible entity may apply for up to \$200,000 per site to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants (including hazardous substances co-mingled with petroleum). Cleanup grants require a 20 percent cost share, which may be in the form of a contribution of money, labor, material, or services, and must be for eligible costs. A cleanup grant recipient may request a waiver of the 20 percent cost share based on hardship. An eligible entity must own the site for which it is requesting funding in order to qualify. Sites must

have a Phase I environmental assessment completed and a Phase II environmental assessment underway or completed.

**Brownfields Cleanup Revolving Loan Fund (RLF) Program.** RLF Grants provide funding for public entities to capitalize a revolving loan fund and to provide subgrants to carry out cleanup activities at brownfields sites. Grants are up to \$1,000,000 to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants (including hazardous substances co-mingled with petroleum). An RLF grant recipient must use at least 60 percent of the awarded funds to capitalize a revolving loan fund. Revolving loan funds generally are used to provide no-interest or low-interest loans for brownfields cleanups. An RLF grant recipient may also use up to 40 percent of the awarded funds to provide subgrants to other eligible entities, including nonprofit organizations, for brownfields cleanups on sites owned by the subgrantee. A grant recipient cannot subgrant to itself.

**Brownfields Job Training Program.** Job Training Grants provide funding to public entities or non-profit organizations to help the community take advantage of jobs created by the assessment and cleanup of brownfields. The Job Training Grant Program's goals are to prepare trainees for future employment in the environmental field and to facilitate cleanup of brownfields sites contaminated with hazardous substances. Grants are for up to \$200,000. Recipients must serve a community that currently receives or has received financial assistance from EPA for brownfields assessment, revolving loan fund or cleanup grants.

#### CONTACT

EPA New England  
Brownfields Section  
One Congress Street, Suite 1100  
Boston, MA 02114-2023  
(888) 372-7341  
<http://www.epa.gov/region1/brownfields/index.htm>

#### U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)

**Community Development Block Grant Program (CDBG).** The HUD-administered CDBG Program provides an annual grant to municipalities with populations over 50,000 or identified central cities of metropolitan areas ("entitlement communities"). These funds are awarded on a formula basis and may be used for brownfields-related activities such as site assessment, remediation, demolition, rehabilitation and construction. Non-entitlement communities may access these funds through Massachusetts DHCD.

**Section 108 Loan Program.** This program provides entitlement communities receiving CDBG funds through HUD with up to five times their annual CDBG allocation in guaranteed loans for brownfields redevelopment activities. Non-entitlement communities submit joint applications with Massachusetts DHCD.

Brownfields Economic Development Initiative (BEDI). BEDI provides competitive grant funding to communities for activities related to the redevelopment of brownfields sites.

**CONTACT**

Department of Housing and Urban Development  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, 3rd Floor  
Boston, MA 02222-1092  
(617) 994-8352  
[www.hud.gov](http://www.hud.gov)

Cedric Kam, Economic Development Specialist  
[Cedric\\_C.\\_Kam@hud.gov](mailto:Cedric_C._Kam@hud.gov)





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