

Managing Potential Liability under Chapter 21E

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Chapter 21E was amended in 1998 with three goals in mind:

- Ensure Cleanup
- Encourage Redevelopment
- Preserve Green Space

How do we accomplish these goals?

- Liability Relief
- Financial Incentives

Who's Eligible for Liability Relief?

- Eligible Person
- Eligible Tenant
- Municipalities
- Others

Why is this important?



What Do You Get?

- Liability Endpoint for Eligible Persons
- Exemptions and/or Defenses for others
- Contribution Protection
- Brownfields Covenant Not to Sue

Who is an Eligible Person?

- Current Owner or Operator
- Who did not cause or contribute to the contamination
- Who did not own or operate the site at the time of the release

Who is an Eligible Tenant?

- Operators
- Did not cause or contribute to the contamination
- Tenancy starts after the release is reported

When is a Municipality Eligible?

- Took the property for taxes
- Acts diligently to divest itself of ownership or possession of the site

Liability Relief for Eligible Persons

- Liability Endpoint – c. 21E, § 5C
 - when cleanup is complete, your liability ends
 - to the Commonwealth under 21E
 - to 3rd parties for 21E liability and common law property damage claims
 - liability relief extends to subsequent owners
- Does not apply to new releases

Exemptions & Defenses as Liability Relief Apply to:

- Eligible Tenants
- Municipalities
- Certain downgradient property owners
- Secured Lenders
- Redevelopment Authorities
- Holders of Certain Restrictions

Exemptions & Defenses to Liability are Conditional

Ongoing Requirements:

- Notify of new releases
- Allow access
- Prevent exposure/access to existing contamination
- Imminent Hazards must be addressed
- Contain further releases from on-site sources
- Comply with the MCP in response actions

Contribution Protection

c. 21E, § 3A(j)(2)

Purpose is to provide incentives to owners & operators for voluntary cleanups

- Protection from claims for contribution, response actions and equitable share in a settlement with the state
- Notice of the settlement & an opportunity to comment
- The settlement applies to “matters addressed” in it, and those must be defined

Brownfields Covenant Not to Sue

c. 21E, §3A(j)(3)

Purpose:

- Provide liability relief beyond what 21E provides, for the more complex sites
- Promote economic redevelopment & physical revitalization of the community

Brownfields Covenant Not to Sue

Available to:

- Causally Responsible Parties
 - Must achieve & maintain permanent solution or remedy operation status
- Eligible Person
 - If they can not achieve an endpoint
 - Must achieve & maintain temporary solution
- Applicable regulation is at 940 CMR 23.00

Brownfields Covenant Not to Sue

What do they get?

- Protection from the Commonwealth:
 - response action costs
 - natural resource damages
 - contribution claims
- Protection from third parties for:
 - contribution
 - response action costs
 - property damage under common law

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