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<b>Title:</b>	Massachusetts Brownfields Revitalization Ordinance
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### ***Abstract***

Brownfield redevelopment in Massachusetts is regulated and overseen by the state under chapter twenty-one E, the “Massachusetts Oil and Hazardous Material Release Prevention Act.” Section (b)(3) of this chapter requires the state to provide technical assistance to municipalities, redevelopment authorities, redevelopment agencies, community development corporations, economic development and industrial corporations, and other persons interested in redeveloping brownfields. State brownfields program incentives are available to buyers, and sometimes sellers, of contaminated property provided there is a commitment to cleanup and redevelopment.

### ***Resource***

MASS. GEN. LAWS ch. 21E, § 19 (2004)

§ 19. Office of Brownfields Revitalization; Creation; Function.

(a) There is hereby created an office of brownfields revitalization, under the direct supervision and control of the governor. Said office of brownfields revitalization shall, in consultation with the departments of housing and community development, environmental protection, economic development, public health, the Massachusetts Development Finance Agency, and other entities as appropriate, coordinate development and implementation of a Massachusetts brownfields strategy for cleanup and redevelopment of contaminated sites in economically distressed areas of the commonwealth. Such strategy shall: (1) promote the redevelopment and reuse of sites that are located in economically distressed areas and are contaminated by oil or hazardous material, and (2) to the maximum extent feasible, reap the combined benefits of environmental protection and economic redevelopment for the commonwealth.

(b) In implementing such brownfields strategy, the office of brownfields revitalization shall:

(1) with respect to each brownfields covenant not to sue agreement implemented under section 3A consult with the new attorney general;

(2) provide assistance to the advisory group established in section 29A of chapter 23G in the development of advisory recommendations for funding projects;

(3) in conjunction with the departments of economic development, housing and community development, and environmental protection, provide technical assistance to municipalities, redevelopment authorities, redevelopment agencies, community development corporations, economic development and industrial corporations and other persons interested in redeveloping brownfields;

(4) serve as liaison with local, state and federal agencies on development issues affecting response actions performed pursuant to this chapter and regulations promulgated hereunder; and

(5) ensure that the commonwealth realizes all possible benefits of federal and private Assistance for the brownfields redevelopment efforts.

(c) The governor is hereby authorized to appoint a director of the office of brownfields revitalization established by this section, who shall serve as brownfields ombudsman. The governor shall choose from among three candidates nominated by the brownfields advisory group established by section 29A of chapter 23G. Candidates for the position of ombudsman shall have extensive experience or expertise in two or more of the following:

- (i) environmental discover, containment and remediation;
- (ii) economic development in urban areas of the commonwealth;
- (iii) commercial or industrial property development;
- (iv) property or environmental law.

(d) Such office is hereby authorized to employ three staff, one of whom shall be a waste site cleanup professional licensed by the commonwealth pursuant to sections 19 to 19J, inclusive, of chapter 21A, one of whom shall be a specialist in urban redevelopment with particular experience in bringing together community and development interests to implement specific projects, and one of whom shall provide administrative support to such office.

MASS. GEN. LAWS ch. 21E, § 2 (2004)

## § 2. Definitions

As used in this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings: --

"Activity and use limitation", a restriction, covenant or notice concerning the use of real property which is imposed upon real property by a property owner or the department

pursuant to and in accordance with this chapter and regulations promulgated hereunder.

"Assess" and "Assessment", such investigations, monitoring, surveys, testing, and other information gathering activities to identify: (1) the existence, source, nature and extent of a release or threat of release of oil or hazardous materials; (2) the extent of danger to the public health, safety, welfare and the environment; and (3) those persons liable under section five. The term shall also include, without limitation, studies, services and investigations to plan, manage and direct assessment, containment and removal actions, to determine and recover the costs thereof, and to otherwise accomplish the purposes of this chapter.

"Act of God", an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. A natural disaster is unanticipated when it is of a type unexpected given the area, the season, and the past history of conditions.

"CERCLA", the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, [42 USC Sec. 9601](#) et seq.

"Chief municipal officer," the city manager in any city having a city manager, the mayor in any other city; the town manager in any town having a town manager, the board of selectmen in any other town.

"Commissioner", the commissioner of the department of environmental protection.

"Community Development Corporation", a community development corporation created and operated in accordance with the provisions of chapter 40F.

"Condition of substantial release migration", a release of oil or hazardous material that is likely to be transported through environmental media where the mechanism, rate or extent of transport has resulted in or, if not promptly addressed, has the potential to result in: (a) health damage, safety hazards or environmental harm; or (b) a substantial increase in the extent or magnitude of the release, the degree or complexity of future response actions, or the amount of response costs. This section shall be further defined in regulations promulgated by the department. Any person required to notify pursuant to section 7 of this chapter shall notify the department of such condition upon obtaining knowledge thereof, and shall take any appropriate and feasible response actions as may be required by the department.

"Contain" or "Containment", actions taken in response to a release or threat of release of oil or hazardous material into the environment to prevent or minimize such release so that it does not migrate or otherwise cause or threaten substantial danger to present or future public health, safety, welfare or the environment. The term shall also include security measures, including, without limitation, the building of fences for the purpose of limiting and

restricting access to a site or vessel where there has been a release or there is a threat of a release of oil or other hazardous materials.

“Department”, the department of environmental protection.

"Disposal site," any structure, well, pit, pond, lagoon, impoundment, ditch, landfill or other place or area, excluding ambient air or surface water, where uncontrolled oil or hazardous material has come to be located as a result of any spilling, leaking, pouring, abandoning, emitting, emptying, discharging, injecting, escaping, leaching, dumping, discarding or otherwise disposing of such oil or hazardous material. The term shall not include any site containing only oil or hazardous materials which: are lead-based paint residues emanating from a point of original application of such paint; resulted from emissions from the exhaust of an engine; are building materials still serving their original intended use or emanating from such use; or resulted from a release of source, byproduct or special nuclear material from a nuclear incident, as those terms are defined in [42 USC Sec. 2014](#), if such release was subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under [42 USC Sec. 2210](#).

"Economic development and industrial corporation", a corporation created and operated in accordance with the provisions of chapter 121C or any other special acts, including, without limitation, chapter 1097 of the acts of 1971.

"Economically distressed area", an area or municipality that has been designated as an economic target area, or that would otherwise meet the criteria for such designation pursuant to section 3D of chapter 23A, or the site of a former manufactured gas plant or the site of a former Massachusetts Bay Transportation Authority right-of-way in which the municipality has acquired an interest for purposes of the installation, operation, maintenance and use of a rail-trail as defined in the definition of Owner or Operator.

"Eligible person", an owner or operator of a site or a portion thereof from or at which there is or has been a release of oil or hazardous material who:

(i) would be liable under this chapter solely pursuant to clause (1) of paragraph (a) of section 5; and

(ii) did not cause or contribute to the release of oil or hazardous material from or at the site and did not own or operate the site at the time of the release.

"Eligible tenant", a person who acquires occupancy, possession or control of a site, or a portion thereof, after a release of oil or hazardous material from or at such site has been reported to the department, who did not cause or contribute to the release and who would not otherwise be liable pursuant to clauses (2) to (5), inclusive, of paragraph (a) of section 5.

"Environment", waters, land, surface or subsurface strata, or ambient air of the commonwealth.

"Exposure," any contact, ingestion, inhalation or assimilation of or with oil or hazardous materials, including irradiation.

"Fiduciary", a person (a) who is acting in any of the following capacities: an executor or administrator as defined in section one of chapter one hundred ninety-seven, including a voluntary executor or a voluntary administrator; a guardian; a conservator; a trustee under a will or inter vivos instrument creating a trust under which the trustee takes title to, or otherwise controls or manages, property for the purpose of protecting or conserving such property under the ordinary rules applied in the courts of the commonwealth; a court-appointed receiver; a trustee appointed in proceedings under federal bankruptcy laws; an assignee or a trustee acting under an assignment made for the benefit of creditors pursuant to sections forty through forty-two of chapter two hundred and three; or a trustee, pursuant to an indenture agreement or similar financing agreement, for debt securities, certificates of interest of participation in any such debt securities, or any successor thereto, and (b) who holds legal title to, controls, or manages, directly or indirectly, any site or vessel as a fiduciary for purposes of administering an estate or trust of which such site or vessel is a part.

"FWPCA", the Federal Water Pollution Control Act, [33 USC Sec. 1251](#) et seq.

"Hazardous material", material including but not limited to, any material, in whatever form, which, because of its quantity, concentration, chemical, corrosive, flammable, reactive, toxic, infectious or radioactive characteristics, either separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare, or to the environment, when improperly stored, treated, transported, disposed of, used, or otherwise managed. The term shall not include oil. The term shall also include all those substances which are included under [42 USC Sec. 9601](#)(14), but it is not limited to those substances.

"Household hazardous waste collection", the collection of hazardous materials from households under a program sponsored by a municipality.

"Imminent hazard," a hazard which poses a significant risk of harm to health, safety, public welfare, or the environment if it were present even for a short period of time.

"Indicia of ownership primarily to protect a security interest", only those interests in real or personal property typically acquired and held as security or collateral for payment or performance of an obligation. Such interests shall include, without limitation, a mortgage, deed of trust, lien, security interest, assignment, pledge, or other right or encumbrance against real or personal property, including those security interests which have a contingent interest component, which are furnished by the owner thereof to assure repayment of a financial obligation; and contractual participation rights in such interest; provided, that the contract conferring such rights confers no other interest in the site or vessel.

Such interests shall not include the following:- those to protect any interest in property owned or held for investment purposes; a lease or a consignment which may not be considered a secured transaction under applicable principles of commercial law; interests of

a person acting as a trustee of property or of a business; and any interest other than one created as a bona fide security interest in real or personal property.

"Offshore oil facility", any oil facility of any kind located in, on, or under any submerged land within the jurisdiction of the commonwealth including, without limitation, the territorial sea; provided, however, that it shall not include a vessel.

"Oil", insoluble or partially soluble oils of any kind or origin or in any form, including, without limitation, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils. The term shall not include waste oil, and shall not include those substances which are included in [42 USC Sec. 960](#) (14).

"Oil facility", any structure, group of structures, equipment, or device, including a public vessel but not including any other type of vessel, that is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This definition shall include, without limitation, any motor vehicle, rolling stock, or pipeline used for one or more of the purposes set forth in the preceding sentence.

"Oil Pollution Act", the Oil Pollution Act of 1990, P.L. 101 380.

"Onshore oil facility", any oil facility of any kind located in, on, or under any land within the jurisdiction of the commonwealth other than submerged land. This definition shall include, without limitation, motor vehicles and rolling stock.

"Owner", or "Operator", (a) (1) in the case of a vessel, any person owning, operating or chartering by demise such vessel, (2) in the case of a site, any person owning or operating such site, (3) in the case of an abandoned site, any person who owned, operated, or otherwise controlled activities at such site, vessel, onshore oil facility, offshore oil facility, deepwater port, or pipeline, any person who owned, operated or otherwise controlled activities at such site immediately prior to such abandonment, except that, in the case of an onshore oil facility or offshore oil facility, this definition shall not include an agency or political subdivision of the federal government or the commonwealth, or any interstate body, that owned an onshore oil facility or offshore oil facility and that, as the owner, transferred possession and right to operate the onshore oil facility or offshore oil facility to another person by lease, assignment, or permit, immediately prior to such abandonment, (4) in the case of an onshore oil facility, other than a pipeline, any person owning or operating the onshore oil facility, except that this definition shall not include an agency or political subdivision of the federal government or the commonwealth, or any interstate body, that owns an onshore oil facility and that, as the owner, transfers possession and right to operate the onshore oil facility to another person by lease, assignment, or permit, (5) in the case of an offshore oil facility, other than a pipeline or a deepwater port licensed under the U.S. Deepwater Port Act of 1974, the lessee or permittee of the area in which the offshore oil facility is located or the holder of a right of use and easement granted under an applicable law of the commonwealth or the U.S. Outer Continental Shelf Lands Act, for the area in which the offshore oil facility is located if such holder is a different person from lessee or permittee; provided, however, that this definition shall not include an agency or political subdivision of the federal government or

the commonwealth, or any interstate body, that owns an offshore oil facility and that, as the owner, transfers possession and right to operate the offshore oil facility to another person by lease, assignment, or permit, (6) in the case of a deepwater port licensed under the U.S. Deepwater Port Act of 1974, the licensee, (7) in the case of a pipeline, any person owning or operating the pipeline, (8) when a fiduciary who is not an owner or operator pursuant to this definition has title or control or management of a site or vessel, the grantor or settlor of the estate or trust in question, to the extent the assets of the estate or trust are insufficient to pay for liability pursuant to this chapter, (9) when a secured lender who is not an owner or operator pursuant to this definition has ownership or possession of a site or vessel, any person who owned or operated such site or vessel immediately prior to such secured lender obtaining ownership or possession of such site or vessel, (10) when a city or town which is not the owner or operator pursuant to this definition, has ownership or possession of a site or vessel, any person who owned or operated such site or vessel immediately prior to such city or town obtaining ownership or possession of such site or vessel except in the case of a discontinued Massachusetts Bay Transportation Authority right-of-way of which a city or town has ownership or possession for rail-trail purposes under clause (1) of subparagraph (d), any person who owned or operated the site or vessel immediately before the Massachusetts Bay Transportation Authority obtaining ownership or possession of the site or vessel, and (11) after a redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation which is not an owner or operator pursuant to this definition takes ownership or possession of a site or a portion thereof, any person who owned or operated such site or portion thereof immediately prior to such redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation acquiring ownership or possession of the site or portion thereof, except where such immediate previous owner or operator meets the criteria as an eligible person who has achieved a liability endpoint pursuant to section 5C. The term shall include any estate or trust of which the site or vessel is a part. The term shall not include the commonwealth to the extent the commonwealth holds or held any right, title, or interest in a site or vessel solely for the purpose of implementing or enforcing the commonwealth's rights or responsibilities pursuant to this chapter, unless the commonwealth caused or contributed to the release or threat of release; provided, that nothing in this definition or in this chapter shall be construed to waive any immunity that public employers or public employees may have pursuant to chapter two hundred fifty-eight. The term shall not include a fiduciary or secured lender who meets the requirements set forth in this definition. The term "operator" shall not include a hazardous waste site cleanup professional solely because he is acting in his professional capacity as a hazardous waste site cleanup professional with regard to the site or vessel.

(b) A fiduciary shall not be deemed an owner or operator if all of the following requirements are met:

(1) No act of the fiduciary causes or contributes to the release or threat of release or causes the release or threat of release to become worse than it otherwise would have been.

(2) After acquiring title to or commencing control or management of the site or vessel, the fiduciary satisfies all of the following conditions:

(A) the fiduciary notifies the department immediately upon obtaining knowledge of a release or threat of release for which notification is required pursuant to, and in compliance with, section seven or regulations promulgated pursuant thereto,

(B) the fiduciary provides reasonable access to the site or vessel to employees, agents, and contractors of the department to conduct response actions, and to other persons intending to conduct necessary response actions,

(C) the fiduciary notifies the department immediately upon obtaining knowledge or reasonable basis for believing that there are not sufficient assets available in the estate or trust to satisfy one or more of the conditions set forth in subclause (D) of clause (2) of this subsection of this definition.

(D) upon obtaining knowledge of a release or threat of release of oil or hazardous material, and to the extent that assets are available in the estate or trust,

(i) the fiduciary undertakes reasonable steps to (a) prevent the exposure of persons to oil or hazardous materials by fencing or otherwise preventing access to the site or vessel, and (b) contain the further release or threat of release of oil or hazardous materials from a structure or container, and

(ii) if there is significant evidence of an imminent hazard to public health, safety, welfare, or the environment from oil or hazardous materials at or from the site or vessel, the fiduciary takes action to control the potential for health damage, human exposure, safety hazards, and environmental harm through appropriate short term measures,

(E) if the fiduciary elects to voluntarily undertake a response action or portion of a response action at the site or vessel, the fiduciary conducts such response action or portion of a response action in compliance with the requirements of this chapter and the Massachusetts Contingency Plan, and

(F) in the case of a fiduciary who is acting pursuant to an assignment made for the benefit of creditors, the fiduciary notifies the department in writing of the assignment immediately upon his acceptance thereof.

A fiduciary who takes any action described in subclauses (A) to (E), inclusive, of paragraph (2) of subsection (b) of this definition shall not be deemed an owner or operator solely because said fiduciary took such action.

Nothing in this chapter shall preclude claims against a fiduciary solely in the fiduciary's representative capacity.

Nothing in clause (b) (2) (D) of this definition shall require a fiduciary to utilize any funds other than the assets of the estate or trust to satisfy the conditions set forth in clause (b) (2) (D) of this definition, provided that all of the conditions of clause (b) of this definition are met.

For purposes of this chapter, the assets of the estate or trust shall include: (i) any assets in the estate or trust of which the site or vessel is a part (hereafter "the estate or trust"); (ii) any assets that are, at or subsequent to the time the fiduciary obtained knowledge of a release or threat of release, placed in any other estate or trust by action of or on behalf of a settlor or grantor of the estate or trust of which the site or vessel is a part when such settlor or grantor is or was an owner or operator of the site or vessel, if such other estate or trust is or was controlled or managed by the fiduciary of the estate or trust of which the site or vessel is a part; and (iii) any assets that are at or subsequent to the time the fiduciary obtained knowledge of a release or threat of release, transferred by the fiduciary out of the estate or trust of which the site or vessel is a part for less than full and fair consideration, as determined by the fiduciary in good faith.

Nothing in this definition shall affect the liability, responsibilities, or rights of a grantor or beneficiary of an estate or trust, or of any person other than a fiduciary acting solely in his representative capacity, pursuant to this chapter or any other law.

(c) A secured lender shall not be deemed an owner or operator with respect to the site securing the loan if the applicable following requirements are met:

(1) A secured lender who meets all of the requirements of this paragraph, as applicable, shall be excluded from the definition of owner or operator only with respect to releases and threats of release that first begin to occur before such secured lender acquires ownership or possession of the site or vessel. Nothing in this definition shall relieve a secured lender of any liability for a release or threat of release that first begins to occur at or from a site or vessel during the time that such secured lender has ownership or possession of such site or vessel for any purpose.

(2) Notwithstanding any other provision of this definition, a secured lender shall be deemed an owner or operator of an abandoned site or vessel if such secured lender owned, operated, or held ownership or possession of such site or vessel immediately prior to such abandonment.

(3) No act of the secured lender, or of the secured lender's employees or agents, causes or contributes to a release or threat of release of oil or hazardous materials or causes the release or threat of release to become worse than it otherwise would have been.

(4) Neither the secured lender nor the secured lender's employees or agents compel the borrower to: (i) undertake an action which causes a release of oil or hazardous material; or (ii) violate any law or regulation regulating the use or handling of oil or hazardous materials.

(5) After acquiring ownership or possession of a site or vessel the secured lender satisfies all of the following conditions:--

(A) the secured lender notifies the department, in compliance with this chapter and regulations promulgated thereto, upon obtaining knowledge of a release or threat of release

of oil or hazardous material for which notification is required pursuant to this chapter and regulations promulgated thereto,

(B) the secured lender provides reasonable access to the site or vessel to employees, agents, and contractors of the department for all purposes authorized by this chapter, and to other persons for the purpose of conducting response actions pursuant to this chapter and regulations promulgated thereto, upon obtaining knowledge of a release or threat of release of oil or other hazardous material,

(C) the secured lender takes reasonable steps (i) to prevent the exposure of people to oil or hazardous material by fencing or otherwise preventing access to the site or vessel, and

(ii) to contain any further release or threat of release of oil or hazardous material from a structure or container, upon obtaining knowledge of a release or threat of release of oil or hazardous material,

(D) if the secured lender undertakes a response action at the site or vessel, the secured lender conducts such response action in compliance with the requirements of this chapter and regulations promulgated thereto,

(E) if there is an imminent hazard to public health, safety, welfare, or the environment, or if there is a condition of substantial release migration from oil or hazardous material at or from the site or vessel, the secured lender shall take response actions necessary to abate such conditions in compliance with this chapter and regulations promulgated thereto, and

(F) the secured lender acts diligently to sell or otherwise to divest itself of ownership or possession of the site or vessel. Whether the secured lender is acting or has acted diligently to sell or otherwise to divest itself of ownership or possession of the site or vessel shall be determined as follows:

(i) during the first 36 months after the secured lender first acquired ownership or possession of the site or vessel, whichever occurs earlier, there shall be a presumption that the secured lender is acting diligently to sell or otherwise to divest itself of ownership or possession of the site or vessel; this presumption may be rebutted by a preponderance of the evidence;

(ii) if the secured lender has not divested itself of ownership or possession of the site or vessel after the expiration of said 36-month period specified in subclause (i), then the burden of proof shall thereafter rest on said secured lender to demonstrate by a preponderance of the evidence that said secured lender is acting diligently to sell or otherwise to divest itself of ownership or possession of the site or vessel;

(iii) in determining whether or not the secured lender is acting diligently to sell or otherwise to divest itself of ownership or possession of the site or vessel, the following factors shall be considered:

(a) the use or uses to which the site or vessel was put or is being put during the period in question,

(b) market conditions,

(c) the extent of contamination of the site or vessel and the effects of such contamination on marketability of the site or vessel,

(d) the applicability of, and compliance by such secured lender with, federal and state requirements relevant to sale or to divestment of property in which such secured lender holds or formerly held a security interest.

(e) legal constraints on sale or divestment of ownership or possession, and

(f) whether commercially reasonable steps necessary to render the site or vessel in a marketable condition have been taken.

(6) If the secured lender has knowledge of a release or threat of release of oil or hazardous material at or from a site or vessel against which it has commenced foreclosure proceedings, the secured lender shall notify:

(A) the department pursuant to this chapter and regulations promulgated thereto, but in no event later than the commencement of the public foreclosure auction; and

(B) prospective bidders at the time and place of the public foreclosure auction.

(7) A secured lender whose property has been the site of a release of oil or hazardous material for which the department has incurred costs for assessment, containment, or removal actions pursuant to sections 3A, 4, 5A, 5B, 8, 9, 10, 11, 12, 13, or 14, in responding to an imminent hazard or a condition of substantial release migration, that occurred after the secured lender first acquired ownership or possession, shall be liable to the commonwealth only to the extent of the value of the property following the department's response actions, less the total amount of costs reasonably paid by said secured lender for carrying out response actions in responding to the imminent hazard or the condition of substantial release migration in compliance with this chapter and regulations promulgated thereto.

(d) A city or town shall not be deemed an owner or operator if all of the following requirements are met:

(1) The city or town has purchased or taken the site for nonpayment of taxes under section forty-three or fifty-three or chapter sixty, respectively or has acquired an interest in the site by fee, easement, lease, license or otherwise, from the Massachusetts Bay Transportation Authority for purposes of the installation, operation, maintenance and use of a rail-trail, defined as a property converted from former use as a railroad right-of-way to a revitalized use as a publicly owned, improved and maintained corridor for bicycle, pedestrian, and other non-motorized public transportation, recreation and associated purposes.

(2) No act of the city or town, or of its employees or agents, causes or contributes to the release or threat of release or causes the release or threat of release to become worse than it otherwise would have been.

(3) After acquiring title to or commencing control or management of the site or vessel, the city or town satisfies all of the following conditions:

(A) the city or town notifies the department immediately upon obtaining knowledge of a release or threat of release for which notification is required pursuant to, and in compliance with, section seven or regulations promulgated pursuant thereto;

(B) the city or town provides reasonable access to the site or vessel to employees, agents, and contractors of the department to conduct response actions, and to other persons intending to conduct necessary response actions;

(C) the city or town undertakes reasonable steps to (i) prevent the exposure of persons to oil or hazardous materials by fencing, paving, installing geo-textile membrane, or otherwise suitably preventing access to the site or vessel or to the oil or hazardous materials present at the site (ii) contain the further release or threat of release of oil or hazardous materials from a structure or container;

(D) if there is significant evidence of an imminent hazard to public health, safety, welfare, or the environment from oil or hazardous materials at or from the site or vessel, the city or town takes action to control the potential for health damage, human exposure, safety hazards, and environmental harm through appropriate short term measures;

(E) if the city or town elects to voluntarily undertake a response action or portion of a response action at a site or vessel, the city or town conducts such response action in compliance with the requirements of this chapter and the Massachusetts contingency plan; and

(F) the city or town acts diligently to sell or otherwise divest itself of ownership or possession of the site or vessel or, in the case of a site acquired from the Massachusetts Bay Transportation Authority for purposes of the installation, operation, maintenance and use of a rail-trail, the city or town acts diligently to develop the rail-trail for its intended purpose.

Whether the city or town is acting or has acted diligently to sell or otherwise divest itself of ownership or possession of the site or vessel shall be determined by considering the same criteria applicable to secured lenders set forth in subclause (iii) of subparagraph (F) of clause (5) of paragraph (c). Whether the city or town is acting or has acted diligently to develop the rail-trail for its intended purpose shall be determined by considering all pertinent circumstances of municipal financing, bidding, and construction of the rail-trail project, and of the availability of and rules governing the applicable state or federal funding program therefor, in light of the discovery of the release or threat of release of oil or hazardous materials at issue.

A city or town which takes any action referred to in clause (3) shall not be deemed an owner or operator solely because said city or town took such action.

A city or town which meets all of the requirements set forth in the provisions of this paragraph shall be excluded from the definition of owner or operator only with respect to releases and threats of release that first begin to occur before the city or town acquires ownership or possession. Notwithstanding any other provision of this definition, a city or town shall be deemed an owner or operator with respect to any release or threat of release that first begins to occur at or from the site or vessel during the time that the city or town has ownership or possession of it for any purpose.

(e) (1) An eligible tenant after acquiring occupancy, possession or control of a site or portion of a site from or at which there is or has been a release of oil or hazardous material shall not be deemed an operator if all of the following requirements are met on the site or portion of the site occupied, possessed or controlled by the eligible tenant:

(A) no act or failure of duty of the tenant or of its employee or agent causes or contributes to the release, causes the release to become worse than it otherwise would have been, or causes a new exposure to the release;

(B) the tenant notifies the department in compliance with this chapter and regulations promulgated thereto, upon obtaining knowledge of a release or threat of release on or from the site or portion of the site under its occupancy, possession or control;

(C) the tenant provides reasonable access to the site or portion of the site under its occupancy, possession or control to employees, agents, and contractors of the department for all purposes authorized by this chapter, and to other persons for the purpose of conducting response actions pursuant to this chapter and regulations promulgated thereto;

(D) if the tenant uses oil or hazardous material similar to those which have been released, the tenant demonstrates by a preponderance of the evidence that it has not contributed to the release;

(E) the tenant takes reasonable steps (i) to prevent the exposure of people to oil or hazardous material by fencing or otherwise preventing access to the portion of the site under its control, (ii) to contain any further release or threat of release of oil or hazardous material from a structure or container under its control, and (iii) if there is an imminent hazard at or from the site or portion of the site under its control, the tenant controls the potential risk to public health, safety, welfare, or the environment by taking immediate response actions at the site or portion of the site under the control of the tenant; and

(F) any response action voluntarily conducted or required by this section is conducted in compliance with this chapter and regulations promulgated thereto;

(2) Nothing in this section shall relieve a tenant of liability for a release or threat of release of oil or hazardous material which first begins to occur at or from the site or portion of the

site occupied, possessed or controlled by such tenant during such tenant's occupancy, possession or control.

(3) Merely ceasing to occupy, possess or control a site or portion of a site shall not cause an eligible tenant to be liable for a release or threat of release of oil or hazardous material at or from such a site or such a portion of a site.

(4) An eligible tenant shall not be liable for property damage resulting from a release or threat of release at or from a portion of the site not under its occupancy, possession or control for which it would not otherwise be liable pursuant to this chapter.

(f) A redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation shall not be deemed an owner or operator if all of the following requirements are met:

(1) the redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation has acquired its portion of the site in accordance with the provisions of chapter 40F, chapter 121B or chapter 121C or any applicable special acts;

(2) no act or failure of duty of the redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation or of any employee or agent thereof, caused or contributed to, or exacerbated any release or threat of release of oil or hazardous material at or from the site;

(3) the redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation satisfies all of the following conditions:

(A) notifies the department in compliance with this chapter and regulations promulgated thereto upon obtaining knowledge of a release or threat of release of oil or hazardous material for which notification is required pursuant to this chapter and regulations promulgated pursuant thereto;

(B) provides reasonable access to the site or portion of the site under its control to employees, agents and contractors of the department for all purposes authorized by this chapter, and to other persons for the purpose of conducting response actions pursuant to this chapter and regulations promulgated thereto;

(C) takes reasonable steps (i) to prevent the exposure of people to oil or hazardous material by fencing or otherwise preventing access to the portion of the site under its ownership or possession, and (ii) to contain any further release or threat of release of oil or hazardous material from a structure or container under its ownership or possession;

(D) if there is an imminent hazard at or from the portion of the site under its control, controls the potential risk to public health, safety, welfare, or the environment at or from the

site by taking immediate response actions at the portion of the site under its ownership or possession, in compliance with this chapter and regulations promulgated thereto;

(E) conducts any response action undertaken at the site in compliance with this chapter and regulations promulgated thereto; and

(F) acts diligently to sell or otherwise to divest itself of ownership or possession of its portion of the site in accordance with the provisions of chapter 40F, chapter 121B or chapter 121C, or any applicable special acts. Whether the redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation is acting or has acted diligently to sell or otherwise to divest itself of ownership or possession of its portion of the site shall be determined by considering the same criteria applicable to secured lenders set forth in subclause (iii) of subparagraph (F) of clause (5) of paragraph (c).

(4) if the redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation acquired ownership or possession of a site or portion of a site prior to the effective date of this act, the redevelopment authority, redevelopment agency, community development corporation or economic development and industrial corporation notifies the department of any releases of oil or hazardous material of which it has knowledge in accordance with section 7 and the regulations promulgated thereunder, and shall meet the requirements in clause (3) of this paragraph relative to such releases within six months of being notified by the department of the requirements in this paragraph.

"Person", any agency or political subdivision of the federal government or the commonwealth, any state, public or private corporation or authority, any interstate body, foreign nation, individual, trust, firm, joint stock company, partnership, association or other entity, and any officer, employee, or agent of such person, and any group of persons.

"Priority disposal site", a disposal site which constitutes a substantial hazard to public health, safety, welfare, or the environment, including but not limited to a disposal site which is located within five hundred feet of a building being used as a school and which causes an increased risk of exposure to children from contamination in air, soil or water.

"Public vessel", a vessel of any kind that is owned, or a bareboat that is chartered and operated, by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

"Redevelopment authority" or "redevelopment agency", an authority or agency created and operated in accordance with the provisions of chapter 121B and an economic development authority created and operated in accordance with the provisions of chapter 22 of the acts of 1995.

"Release", any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment, but excludes: (1) emissions

from the exhaust of an engine, (2) release of source, by product, or special nuclear material from a nuclear incident, as those terms are defined in [42 USC Sec. 2014](#), if such release is subject to requirements with respect to final protection established by the Nuclear Regulatory Commission under [42 USC Sec. 2210](#), (3) the normal application of fertilizer, and (4) the application of pesticides consistent with their labelling.

"Remedy operation status", a response action that has eliminated a condition of any substantial hazard to public health, safety, welfare or the environment and relies upon active operation and maintenance for the purpose of achieving a permanent solution.

"Remove" or "Removal", the cleanup or removal of released oil or hazardous materials from the environment, such actions as may be necessarily taken in the event of the threat of release of oil or hazardous materials into the environment, the disposal of removed oil or hazardous material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health, safety, welfare or the environment, which may result from a release or threat of release.

"Respond" or "Response" or "Response action", assess, assessment, contain, containment, remove and removal.

"Response action contract", any contract relating to the provision of services to assess, contain or remove oil or hazardous material which is entered into on or after the effective date of this definition between the commonwealth or any agency thereof, and a response action contractor.

"Response action contractor" or "contractor", an individual, partnership, corporation, association, joint venture or other commercial entity which enters into a response action contract with the commonwealth or any agency thereof and includes any such entity acting as a subcontractor to the primary response action contractor where such entity is performing services relating to the response action contract.

"Secured lender", (1) a person who holds indicia of ownership in a site or vessel primarily to protect that person's security interest in said site or vessel;

(2) two persons when one holds indicia of ownership in a site or vessel primarily to protect the other person's security interest in that site or vessel if the person holding the indicia of ownership is (a) wholly owned by the person holding the security interest, or (b) an affiliate of the person holding the security interest and both are wholly-owned, directly or indirectly, by the same person; and

(3) persons who hold contractual participation rights in a security interest, and any of the following which hold indicia of ownership in a site or vessel primarily to protect that security interest: a wholly owned subsidiary of any such person; an affiliate of any such person if both are wholly-owned, directly or indirectly, by the same person; and any entity formed among such persons, subsidiaries, or affiliates.

"Site", any building, structure, installation, equipment, pipe or pipeline, including any pipe into a sewer or publicly-owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any other place or area where oil or hazardous material has been deposited, stored, disposed of or placed, or otherwise come to be located. The term shall not include any consumer product in consumer use or any vessel.

"Standard of care", the degree of care that a reasonable and diligent waste site cleanup professional licensed pursuant to sections 19 to 19J, inclusive, of chapter 21A shall exercise when rendering a waste site cleanup activity opinion pursuant to said sections 19 to 19J, inclusive.

"Statement of claim" or such site or vessel and their residential addresses, to the extent known to the commissioner, and declaring a lien upon the property of such person or persons for the payment of amounts due or to become due from such person or persons to the commonwealth under the provisions of this chapter; provided, however, that neither failure to state any such address nor the designation of an incorrect address shall invalidate such statement; and provided further, that successive statements, naming other persons so deemed to be liable, may be issued; and provided further, that if the property in question is owned or possessed by a fiduciary, city or town or secured lender, who is not liable under this chapter with respect to the site or vessel in question, the mention of the fiduciary, city or town or secured lender in the statement as a person who owns or possesses the site or vessel shall not constitute a finding or evidence that such person is liable under this chapter, and the lien shall only be on the property in question and not upon all property of such fiduciary, city or town or secured lender.

"Substantial hazard," a hazard which would pose a significant risk of harm to health, safety, public welfare, or the environment if it continued to be present for several years.

"Threat of release", a substantial likelihood of a release which requires action to prevent or mitigate damage to the environment which may result from such release.

"Trade secret", anything tangible which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production, or management information, design, process, procedure, formula, invention or improvement.

"Vessel", every description of watercraft of other artificial contrivance used, or capable of being used, as a means of transportation on water.

"Waters of the commonwealth", all waters within the jurisdiction of the commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, coastal waters and groundwaters. The term shall not include impoundments of chemical wastes.

Mass. Gen. Laws ALM GL ch. 21E, § 3 (2004)

§ 3. Securing of Benefits of FWPCA, CERCLA, etc.; Massachusetts Contingency Plan; Promulgation of Necessary Regulations.

(a) The department shall take all action appropriate to secure to the commonwealth the benefits of FWPCA, CERCLA and other pertinent federal laws including the Oil Pollution Act.

(b) For the purpose of implementing this chapter, FWPCA, CERCLA, and other pertinent federal laws and regulations, the department is authorized and directed to prepare and from time to time update a Massachusetts Contingency Plan which, as nearly as the department deems appropriate and practicable, shall comport with and complement the National Contingency Plan prepared under the authority of [33 USC Sec. 1321](#)(c) and [42 USC Sec. 9605](#). In preparing said plan the department shall consider and take into account regionally and locally developed contingency plans.

(c) The department shall promulgate such regulations as it deems necessary for the implementation, administration and enforcement of this chapter, FWPCA, CERCLA and other pertinent laws. Such regulations may include provisions waiving or limiting the applicability of this chapter as to any matter which the department determines to be adequately regulated by another program or government agency. The department shall integrate its implementation and enforcement of this chapter with other programs established for the protection of the public health, safety, welfare and the environment.

(d) The department shall adopt and from time to time amend or repeal regulations establishing classes or categories of persons or response actions or sites or vessels, or any combination of the foregoing, so that such persons may carry out such response actions at such sites or vessels only after prior issuance of a permit issued by the department; and establishing classes or categories of persons or response actions or sites or vessels, or any combination of the foregoing, so that such persons may carry out such response actions at such sites or vessels without prior issuance of a permit issued by the department.

The department shall adopt and from time to time amend or repeal regulations establishing one or more classes or categories of permits for carrying out response actions in those cases for which a permit is required.

In adopting, amending, and repealing all regulations pursuant to this subsection, the department shall consider at least the following:-

(1) the existence, source, nature, and extent of a release or threat of release of oil or hazardous materials.

(2) the nature and extent of danger to public health, safety, welfare, and the environment,

(3) the magnitude and complexity of the actions necessary to assess, contain, or remove the oil or hazardous material in question.

(4) the extent to which there are legally enforceable standardized methods and criteria for the class or category of response action in question,

(5) the extent to which the department needs to be persuaded, or is persuaded, or both, that persons who would obtain permits, or who would be allowed to carry out a response action without a permit, have demonstrated that they are able and willing to carry out the response actions in question in compliance with the provisions of this chapter, all regulations adopted pursuant to this chapter, and all other applicable statutes and regulations, and

(6) the extent to which department oversight is necessary to ensure compliance with this chapter.

Persons may carry out any response action without the prior issuance of a permit issued by the department for such response action if such response action is otherwise in compliance with the provisions of this chapter, all regulations promulgated pursuant to this chapter, and all other applicable statutes and regulations until all of the following have occurred: (a) licenses have been issued to hazardous waste site cleanup professionals pursuant to sections nineteen through nineteen J of chapter twenty-one A, and (b) standards and requirements for the class or category of permit and response action in question have been promulgated by the department and are in effect.

Except as otherwise provided in this chapter, no person shall carry out any response action without the prior issuance of a permit issued by the department for such response action, or in any manner not in conformity with the terms and conditions of such permit.

By no later than July first, nineteen hundred and ninety-three, the department shall promulgate in accordance with section two of chapter thirty A, and shall submit to the state secretary for publication in the Massachusetts Register in accordance with sections five and six of chapter thirty A, regulations, standards, and requirements required by this subsection. By no later than January first, nineteen hundred and ninety-three, the department shall submit to the state secretary for publication in the Massachusetts Register, and the state secretary shall publish in the Massachusetts Register, in accordance with sections five and six of chapter thirty A, the notice required by section two of chapter thirty A and a draft of the regulations, standards, and requirements described in the preceding sentence. After the initial promulgation of regulations, requirements, and standards required by this subsection (d), the department may amend or repeal them, or adopt additional ones, in accordance with all applicable requirements of chapter thirty A.

(e) The department shall adopt and from time to time amend or repeal regulations establishing classes or categories of response actions or sites or vessels, or any combination of the foregoing, so that persons who carry out such response actions at such sites or vessels shall be required to cause to be rendered a waste site cleanup activity opinion, as that term is defined in section nineteen of chapter twenty-one A. Without

limiting the generality of the foregoing, said regulations (1) shall set requirements for reasonable documentation to support such opinions, and (2) shall set requirements for the availability of such opinions to the department and to other persons, and (3) may authorize one or more of the opinions described in clauses (1) through (5) of the definition of waste site cleanup activity opinion, as that term is defined in section nineteen of chapter twenty-one A, to be rendered by persons who are not in possession of a valid license issued pursuant to sections nineteen through nineteen J of chapter twenty-one A, and (4) may establish classes or categories of response actions or sites or vessels, or any combination of the foregoing, for which a waste site cleanup activity opinion need not be rendered. The department may impose terms and conditions on the applicability of such regulations.

**Current as of: December 4, 2004**