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Mass.' hazardous site clean-up program reforms should streamline property transactions

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MassDEP's long-awaited Regulatory Reform Initiative was recently made public and includes ambitious revisions to the Commonwealth's hazardous waste site clean-up program implemented pursuant to M.G.L. c. 21E and the Massachusetts Contingency Plan, 310 CMR 40.0000. This article focuses upon three critical changes, which should result in more site closures and smoother financing of property transfers and redevelopment.

First, the proposal eliminates existing permit categories and replaces them with two classifications designed to focus on risk. Currently, when a release of oil or hazardous material is discovered, it must be "classified" and permitted as Tier IA, IB, IC, or Tier II if it is not cleaned-up within a year of notification. Classification starts with analysis under the Numerical Ranking System (NRS), which is used to develop a site-specific score, based upon factors such as contaminant characteristics, site location, and potential exposure pathways. While not the only consideration in determining Tier Classification, the NRS score is used to support the permit category.

The proposed regulations would eliminate the existing NRS and Tier Classified Permitting. Instead, they would direct more rigorous scrutiny through classification alone on those sites that typically pose the most significant risk, including potential impacts to groundwater, drinking water, indoor air, or Imminent Hazards, such as high contaminant levels or uncontrolled exposure pathways. Licensed Site Professionals (LSPs), who currently direct clean-up and assess overall risks, would review four criteria that cover these potential impacts. Sites posing the most significant potential risks would be classified as Tier I and the less significant risks as Tier II. These changes should reduce the time and money spent by the applicant on the process of classification and permitting, and reportedly allows MassDEP to better leverage its oversight resources.

Second, Activity and Use Limitations (AULs) are streamlined. Contrary to current practice, the proposed regulations would dispense with the requirement for a separate AUL Opinion. Instead, details about the location and nature of residual contamination would be included in the AUL itself, making it easier for the reader to understand the basis for the AUL. Recognizing that the Registry of Deeds has improved electronic access to records, the proposal would also eliminate the requirement for submitting a copy certified by the Registry of Deeds. In addition, MassDEP has asked for comment on whether to eliminate the requirement that the parcel metes and bounds description be included in the AUL, whether to instead require a certification that it is accurate, or both. The regulations currently require inclusion in the AUL of the parcel metes and bounds and reference to a recorded survey plan. AULs that cover only a portion of a parcel would continue to require a specific metes and bounds description.

Third, the multiple "response action outcome" categories that now exist would be replaced by clear

clean-up endpoints. Documenting when a clean-up is finished and closed out would also be clearer under these proposals. At present, there are 9 categories of Response Action Outcome (RAOs), documents prepared by an LSP that detail how the cleanup was completed and how it is protective for the intended property use. The slight differences between these categories no longer seem relevant to the desired outcome of achieving closure and often leave owners and lenders alike scratching their heads over what they mean and whether they impact continued property use.

The proposal would replace these nine categories with three more informative outcomes: Permanent Solution with No Conditions, Permanent Solution with Conditions, and Temporary Solutions. These terms are more reflective of the statutory terminology that requires permanent solutions where feasible, or where not feasible, temporary solutions. Whereas temporary solutions are deemed acceptable for addressing exposure risks under limited circumstance, the ultimate requirement is to achieve a permanent solution.

Not only are these categories understandable, they are more accurate because they tell the owner, the lender and the public what it means that a particular site is "closed." This proposal is particularly relevant to sites that have addressed vapor intrusion with active sub-slab depressurization systems. Such sites would be taken out of limbo and achieve a Permanent Solution with Conditions, using an AUL to address future operation of the system.

Once adopted, these three changes proposals should improve the regulatory process and reduce transaction costs. Public hearings will be held in April and the comment period is open until May 17, 2013.

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