

# AGENDA

PART 201 DISCUSSION GROUP  
Brownfield Work Group  
Michigan Department of Environmental Quality, Lansing, Michigan  
November 9, 2006

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9:00–9:05 AM	Welcome and Introduction	Bill Rustem
9:05–9:20 AM	Purpose statement <b>Draft:</b> To promote and facilitate the revitalization, redevelopment, and reuse of certain property that is contaminated (real or perceived), blighted, or functionally obsolete.	
9:20–10:00 AM	Conceptual approval	Grant Trigger/Jim Tischler
10:00–10:40 AM	Scoping meeting	Ann Couture
10:40–11:20 AM	Brownfield grants and loans criteria	Susan Erickson
11:20–11:50 AM	Other issues: State agency partnerships Brownfield facilitators	John Czarnecki/All
11:50–Noon	Next steps and assignments	Bill Rustem

# MEMO

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November 3, 2006

TO: William R. Rustem, Public Sector Consultants

FROM: Kevin Andrew Johnson, SEMCOG

SUBJECT: Summary Points from SEMCOG Workshop on Brownfield Redevelopment

SEMCOG conducted a workshop earlier this year that brought key brownfield stakeholders together for dialogue on this important issue, including state officials, users of the state brownfield program, and interested parties. Over 90 people attended this event on February 8, 2006 at the SEMCOG offices in Detroit. A panel of representatives from local government, banking, environmental consulting, and legal services provided comments and suggestions for improving the brownfield program. The following reflects some of the issues identified by stakeholders and is not a comprehensive list.

- The feasibility of many projects has become less certain, due to uncertainties regarding whether projects will be permitted to capture school taxes for tax increment financing (TIF). As a result, projects may not be submitted to the state for school tax capture. This can result in a great strain on local funds as the project timeline is extended.
- The length of time and cost needed to work a project through the state's pipeline for approvals and determination of funding eligibility has killed projects. This underscores the common perception that it is easier for a project to build on a greenfield than a brownfield. Moreover, simply "leveling the playing field" is not enough to draw development away from the greenfields – the state needs to expand the use of already existing financial incentives, and to create new funding mechanisms to encourage brownfield development.
- Communities not designated as being "core communities" still have portions of their communities that are effectively "core areas." As such, these non-core communities need to have additional incentives to redevelop their brownfields. On the other hand, if "core community" incentives were to be extended to non-core communities, the benefit of being a "core community" would be diminished. This is a conundrum we must address.
- The state needs to expand the definition of "eligible activities" for use of tax increment financing on brownfield sites to include demolition and asbestos and lead paint abatement.

## Summary Points from SEMCOG Workshop on Brownfield Redevelopment

- Local governments would be able to more fully utilize the brownfield program if they were able to capture more funds for administrative activities. Currently, administrative expenses are limited to a statutory cap of \$75,000, with additional salaries and administrative costs being subsidized elsewhere, typically by the general fund. This capped amount is inadequate for communities with a growing brownfield program requiring greater resources in administration.
- There is a perception in the marketplace that the MDEQ's approval process for Category S BEAs and for Section 7A Compliance Analyses (Due Care Plans) is too burdensome and unpredictable. The market's reaction has been to expedite the development process by not submitting projects for a determination of adequacy – which is not necessarily the most prudent decision. (On a related note, the Part 201 Complexity Group has commented that there is a need for an “80/20” Division of Process to advance a majority of projects that unnecessarily utilize numerous resources. The brownfield program would be improved if more resources were focused on the truly complex projects and less on the simpler ones. Generally about 80% of the projects probably would fall into a less complex category while the other 20% belong in a more complex one. Screening tools or questionnaires should be developed to provide a mechanism that would expedite the process.)

## Conceptual Framework For Changing to An Environmental Cleanup Permit Program

### Overview

- Retain liability standard
- Retain ordinary transaction due diligence standards
- Require permits as controlling documents
- Permits replace BEA and due care plans, and portions of RAP, interim response, and IRDC plan components.
- Permits contain O&M requirements
- Permit requirements replace institutional control requirements for property covered by permit.
- Permit identifies the relevant criteria and performance standards.
- Five year renewable permits
- Permits can be transferable.
- Two types of permits: Remediation Permit and Use/Occupancy permit. Remediation permits are for cleanups. Use/Occupancy covers due care and use restrictions. Use includes owning fee or land contract interest.
- Allow general permits/certificate of coverage methodology for appropriate recurring situations. (such as small spill cleanups)
- Enforcement
  - Civil Penalty for failure to get permit / permit violations
  - Cost recovery still available against liable parties
- Any interests in property that are not “use or occupancy” would NOT require a permit... eliminates “lender” liability. Upon foreclosure, a lender would have to obtain an assignment of existing permit or get its own permit related to use upon foreclosure.
- Provides more compatible framework for working with requirements from air/water permit programs.
- Emphasis on performance instead of plans

### Liability Scheme

*Liable Parties:* The liability of a person can still be determined in the same was as current law (responsible for an activity causing a release). Liable parties are liable: (1) for response activity costs incurred by the State or any other person; and (2) for obtaining

a remediation permit. Failure to apply for a Remediation Permit would subject the liable party to fines or penalties. Compliance with an RP would bar cost-recovery and obviously would shield against civil fines and penalties.

*Non-liable parties:* A Use/Occupancy Permit (“UOP”) will generally be required of any non-exempt person who uses or occupies a “facility” (except possibly in the case of migrating groundwater). Use or occupancy will need to be defined, but the intent is that every tenant or owner of a facility should be covered by a UOP permit. Failure to apply for a UOP permit would subject the person to fines and penalties. A UOP can include additional response activities if the permittee wishes to eliminate some permit conditions pertaining to use. Compliance with a UOP would be a shield against civil fines and penalties. Some consideration should be given as to whether to require a UOP in situations where the only issue is the migration of contaminated groundwater. Currently, persons in that position are not liable for response costs nor for due care (26(4)(c)) Because of the property rights at issue, it is probably better to make a UOP optional in that case. Possible exemptions to the UOP requirement include residential users (similar to 26(3)(f) and owners of certain types of easements (for transportation, etc).

*Cost Recovery:* “Response activity” needs to be redefined so as to be limited to response activities done pursuant to permit. After these changes come into effect, response activities that are not done pursuant to a permit are not recoverable under the statute.

*Grandfather:* A transition must be made to the new program. Permits should be required within a specified time frame (perhaps one year) for any ongoing response activities except for those that meet the current definition of “complete” before the permit requirement kicks in. An exception might be needed for response activities that are governed by consent judgments or that are otherwise under court supervision.

*Due diligence:* The liability structure regarding innocent purchasers and due diligence should remain. A person who does the appropriate environmental due diligence under the current standards, and who is an innocent purchaser, would not be subject to fines or penalties for failure to get a UOP. However, if it is subsequently determined that the property is a facility, the permit requirement would kick in at that time. We should also conform the existing due diligence scheme to CERCLA “all appropriate inquiry” so that “one size fits all” for transaction screening studies. If due diligence shows the property is a facility, the person will be subject to the UOP requirements (including fines and penalties for failure to get a UOP).

*Notice on Transfer:* Permits (and statute) can include a provision that any permittee provide notice and a copy of permit to transferee. UOP permit should be transferable with an affidavit that uses will be consistent.

## **Permit Application**

The information required in the application should be sufficient to establish general and specific permit conditions. The level of information and detail required will be different for each type of permit.

### *Remediation Permit Application(RP)*

- Five year renewable permit
- Required for all liable parties; optional for any one else
- Identify list of contaminants of concern (anything above generic residential criteria). Certify that at time of application, no other known contaminants present.
- Identify type of land-use, and conditions needed to protect users. Permit must be consistent with current land use.
- Identify relevant exposure pathways.
- Identify any other permits already in place for the facility.
- Identify any interim response issues known at time of application (abandoned drums, imminent hazards, fire or explosion hazards)
- Include any reports or data available regarding contamination.
- Propose conceptual response plan (so appropriate permit conditions can be drafted). For example, pump and treat plus containment for groundwater, capping, etc. Note: The idea is to have enough information to draft conditions that must be met in the permit, not to “approve” the selection of an approach.

## **Permit Content**

### *Emergency Response Permit (ERP)*

- Special, limited permit intended to allow streamlined or general permit for immediately addressing emergency situations, such as spill response, fire or explosion hazards, or immediate dangers.
- Should be a general permit that can be obtained through a certificate of coverage.
- Should be able to file certificate of coverage AFTER taking actions as allowed under general permit (can have required time frame).
- General conditions: Allow taking of appropriate actions to eliminate or mitigate threat.
- Does not substitute for or eliminate need for RP or UOP.

### *Remediation Permit*

- List of chemicals of concern and applicable criteria for the facility
- Obligation to implement conditions and requirements of the permit to meet applicable criteria.
- For soils, performance standards should be elimination of pathway or attaining criteria by removal, treatment in place, or barriers.
- For groundwater, performance standards can be halting migration and/or meeting criteria through pump and treat, in place treatment, attenuation, or barriers and use restrictions. Impacted water supplies must be replaced by permittee.
- Deadlines to demonstrate through an approved performance monitoring plan that the applicable criteria are met. This deadline can be amended if during the permit term a different deadline is proposed and accepted by DEQ. Deadlines should be established like BAT – based on professional judgment of how long it should take based on the identified conditions. For example, short deadlines may be appropriate for capping a soils only problem or where a remedy is going to rely primarily on observance of permit conditions related to use of property. Long deadlines may be appropriate for groundwater remedies.
- Compliance is measured by:
  - Timely submittal of deliverables.
  - Completion of response activities on schedule identified in permit.or approved deliverable
  - Attaining criteria as listed in the front of the permit and as shown in performance monitoring report(s).
- Interim Response Assessment / Implementation Schedule (if needed)
  - If assessment is needed, require assessment and report within \_\_\_ days.
  - Require construction of appropriate interim response measures (as per Rule 526(2)) within \_\_\_ days.
  - Require interim response implementation report within \_\_\_ days.
- Response Activities permitted: The permit should contain conditions (can be general) that permits response activities at the facility intended to meet criteria identified in the first part of the permit.
- Performance Monitoring Report: This is the report that should show the identified criteria have been met, along with any applicable permit conditions regarding use restrictions etc. A PMP that demonstrates that generic residential criteria are met can terminate a permit and the need for anyone else to get or hold one. Otherwise, even if no active remediation is required, a permit will be needed to require the conditions related to use and operation and maintenance be observed. After the PMP, it may only be necessary to file response activity reports if remedy is in the O&M plus use restrictions phase.

- Response Activity Report: (like DMRs) – periodic report (quarterly?) of response activities taken to meet criteria and permit conditions. Note that response activity report should be required to be submitted by the person performing response activities, and a certification for whom the response activities were performed. . The report would include: new response activities undertaken (if any), monitoring results, new data, and/or operation and maintenance activities, inspection reports, etc.

#### *User/Occupancy Permit*

- Identify contaminants of concern and applicable criteria
- Sets forth the conditions for meeting due care obligations. Removing drums, closing USTs, installing barriers, prohibiting or restricting use of groundwater, and general description of allowed (or prohibited) uses consistent with due care.
- Notification of off-site migration (as per rule) to be provided by Licensee to DEQ.
- Response Activity Report: (annually?) documents monitoring and maintenance of permitted due care activities (inspection reports, etc).
- Additional Response Activities: Licensee can apply for additional response activities if desired, either with initial application or as an amendment. Additional Response Activities may lead to the addition to the permit of a PMP.

### **Special Situations**

#### *What should happen if there is more than one liable party?*

Permits are required for each party. If one liable party has already obtained a permit, the same permit should issue to each other liable party that applies. The requirements of the permit are enforceable against each liable party. A liable party that does not perform the permitted response activities: (1) is liable for cost recovery from the party that did perform the activities, and (2) is subject to fines, penalties and enforcement from DEQ for failure to meet permit requirements. The Response Activity Report should make it clear which liable parties have done the work.

In order to handle multiparty sites and disputes, the following process could be followed:

- If only one liable party applies for a permit, that liable party gets cost recovery against other non-participating liable parties, and a judicial claim for fines and civil penalties against them.

- If more than one liable party applies for a permit for the same facility, then the permit issued to each should be the same, with a default provision in each permit that specifies a proposed cost allocation (per capita). This allocation can be reviewed and adjusted in a contested case proceeding. The final allocation can be used to adjust past costs in a settlement or if needed, after judicial action on a cost recovery claim.
- Permit conditions are jointly and severally enforceable against any liable party permittees without regard to the proposed allocation.
- There should be a general permit and buy-out provision for “de minimis” liable parties. Once a de minimis party has “bought out” of a site, the general permit and de minimis buy out provisions should immunize that party from cost recovery or further action regarding that site. The general permit would continue until the site was cleaned up.

*What should happen if the liable party is not the owner, or is not the only owner or occupant of a facility?*

A facility can have both a UOP (for non-liable parties) and a RP (for liable parties). A UOP will include general provisions that require access be provided to the DEQ or an RP to perform response activities under an RP. An RP will include general provisions that protect the property rights of persons using/occupying the property. Conflicts should not be significant unless there is a change in use. In this case, there are two solutions. One is that whoever obtains the first permit obtains the right to continue a permit consistent with that use. So, if an RP is established for a facility, which is then sold/occupied by another, that person’s UOP will identify the prior RP and use restrictions as applicable.

*What should happen for off-site contamination?*

The RP should cover the entire facility, regardless of property lines. Every parcel within the facility will need a UOP unless an exemption applies.

*Is there still a role for institutional controls?*

Probably. Institutional controls, especially ordinances, may be needed to cover facilities that are exempt from the permit requirements.

## **Review**

- Permits would be reviewed under APA contested case procedures.
- Court action could be sought to enforce obligation to obtain permit or for fines or civil penalties.
- Court action available for cost recovery claims.

## **Public Involvement**

FOR DISCUSSION ONLY  
Prepared for Part 201 Discussion Group  
Liability Committee  
Rev. 1.0, Date: October 5, 2006  
Prepared by Alan D. Wasserman

- RP should have some comment procedure as draft NPDES permit
- UOP should not need public involvement.

**Enforcement**

Fines and penalties should be different for RP and UOP. Fines should be stiff for RP to induce liable parties to apply for one. Fines for UOP should be large enough to induce compliance, but not so large as to be punitive.

Liability Committee

Issue	Reference	Discussion
BEA/Due Care Process	Liability (10/19)	A permit replaces “BEA” for liability protection, and specifies in an enforceable way, with notice, the continuing due care obligations.
Notice of brownfield activities to Liable Parties	Liability (10/19)	Permits would be subject to general notice provisions as are other permits. Specific notice can and should be required to Liable Parties if known, at time a Use/Occupancy permit is obtained.
Notice of Institutional Controls	Liability (10/19)	A permit would provide the notice and organic provisions that a permittee must comply with. This would provide notice and ongoing compliance duty
Intervening non-liable owners	Liability (10/19)	Would not have to obtain a permit once it transacted the property. No continuing obligation, since those would be shared between current permit holder and liable parties (if any)
Continued review of BEA by DEQ	Liability (10/19)	DEQ would have a role in any permit, and a permit replaces the BEA. A “general permit” may have less site-specific review.
Disclosure MDEQ during transaction	Liability (10/19)	There would be no more undisclosed sites. Any site that needs a permit would be in the permit system, and can be identified during a transaction screen.
Liable Party v. Brownfield and State owned sites cleanup standards	Liability 10/19	Remediation Permit would contain more requirements than a Use/Occupancy permit. Non-liable parties can elect to get an RP, but it would not be required. UOP is due care, not remediation.
Are Due Care obligations appropriately defined?	Liability 10/19	A shift to a permit paradigm allows for a change in the way due care is defined, but the topic of what is appropriate “due care” STILL NEEDS TO BE NAILED DOWN.
Long term performance of due care	Liability 10/19	Permit provides for specific and continuous method for assuring due care is identified and that the right person knows what he or she must do. These obligations will continue through subsequent permits.
How to handle previous determinations?	Liability 10/19	Can be converted to UOP permit.
Section 14 duties	Liability 10/19	If a new site is created or discovered, the permit obligation for and RP commences. If a permit is obtained, the conditions in the permit can address

		each of the affirmative obligations in Section 14.
Compliance – use of fines and penalties	Attachment B 1(b)	Enforcement of the obligation to obtain a permit and then for failure to meet permit obligations is more straightforward. Can and should incorporate fines and penalties to secure compliance. Focus is on Liable Parties to do work rather than on cost recovery
Compliance – site identification	Attachment B 1(b)	Permit requirement for all sites of contamination plus existing transaction screen process will provide notice to DEQ of all sites subject to permit.
Compliance – reduction in time and resources needed to identify LP	Attachment B 1(b)	Permit requirement changes complicated cost recovery action into something simpler, does not require expenditure of resources to recover costs. Permit system can include ability of any person to enforce (like under CWA or CAA).
Compliance – reporting/disclosure	Attachment B 1(b)	Permit system includes reporting obligations. By setting objectives and criteria, permit requirements can be somewhat self-implementing.
Compliance – Use of CERCLA	Attachment B 1(b)	Not addressed by permit paradigm
Compliance – what is “diligently pursue”	Attachment B 1(b)	Permit specifies requirements and time frames. Removes ambiguity.
Finality – Need to assure continuous response is balanced with finality	Attachment B 1(c)	Permit becomes the “finality” endpoint. Once you have a permit, not subject to fines and penalties as long as in compliance. Ongoing response activities are covered by permit. On-going permit requirement can terminated upon “completion” of response activities. Long-term controls (barriers, use restrictions) will be carried in future permits.
Finality – Liability Release for completed cleanups	Attachment B 1(c)	The permit requirement terminates when the criteria identified have been met. On-going maintenance/use restrictions would be the obligation of the current owner/operators. Does this help the problem?
Balance of risk-sharing between regulated parties and the public	Attachment B 1(c)	Permit model protects public through response activities and due care. Liable party must do response activity and maintain it, users have to have a permit that establishes due care. Public is protected against residual risk.
Eliminate RAP? Replace with ?	Attachment B 1(c)	Remediation permit replaces RAP.

Brownfield Committee

Issue	Reference	Discussion
Partnerships	Brownfields 10/16	Unclear if permit process offers opportunity to improve interagency coordination
Unified Application Format	Brownfields 10/16	A permit system simplifies <i>some</i> of the problems, but only as they relate to the elements that must be met to obtain a permit. However, a permit application and or permit can have some use in standardizing environmental information transmitted to various agencies.
Response Time	Brownfields 10/16	Permit system can (if done correctly) reduce the time it takes for development of a document regarding environmental compliance issues. Simple environmental projects can qualify for general permits.
Staff Training	Brownfields 10/16	Permit system will probably complicate staff training.
MDEQ Facilitators	Brownfields 10/16	None
Eligible Activities	Brownfields 10/16	Permit system can allow permit conditions to specify brownfield eligible activities on a site-specific basis, thus allowing more flexibility if desired. What is eligible can be defined in the permit as well (or instead of) by statute.
Work Plans	Brownfields 10/16	UOP or RP would replace need for work plan. Use of general permits can eliminate log jams. Permits would encompass all requirements in one document, and would not be piece meal.

Complexity

Issue	Reference	Discussion
Number of cleanup criteria and exposure pathways	Attachment B 2(a)	Issue not directly addressed; however, permit conditions can be used as “off-ramps” so that specific criteria would not apply provided that condition is maintained. For example, no foundations or ordinary construction vapor barriers may remove indoor air pathway from permit.
Probabilistic risk assessment	Attachment B 2(b)	Issue not directly addressed; however conditions used to do a PRA can be reflected in permit conditions.
GSI Pathway	Attachment B 2(c)	Not addressed.
ARARs	Attachment B 2(d)	Not addressed
Improvement of use of air criteria	Attachment B 2(e)	A permit might be used to establish use conditions that obviate the need for the permittee to assess or address these criteria.
Goal of regulation and guidance	Attachment B 2(f)	Use of rules and guidance could follow formulas used in other permit programs (this does not necessarily solve the complexity problem)

Program Administration

Issue	Reference	Discussion
Make relation between parties more of a partnership	Attachment B 3(a)	Permit paradigm changes the relationship two applicant / permit writer. This may or may not solve or improve this issue, but it changes things.
Balance between regulatory and service functions	Attachment B 3(a)	Permit paradigm, with different types of permits, actually unifies the role of DEQ. Service and regulation is provided through the same product. However, different types of products can allow for distinctions between the customers.
Reinforce distinction between liable and non-liable parties	Attachment B 3(a)	Permit distinctions can clearly delineate between what is expected of liable parties and others. The paradigm actually proposes that a liable party must get an RP. Other permits available for other types of customers.
Project scoping meetings?	Attachment B 3(b)	For site-specific permits, communications with the applicant can be made part of the process. This is done in other permit programs. Also, draft permit stage allows for applicant input (and public input).

FOR DISCUSSION ONLY  
Prepared for Part 201 Discussion Group  
Liability Committee  
Rev. 1.0, Date: October 16, 2006  
Prepared by Alan D. Wasserman

### **List of References**

Brownfields 10/16: Brownfields Work Group (Draft 10/16/2006) questions and observations for discussion on October 16 (Amy Spay).

Liability 10/19: Liability/Compliance Workgroup -- Background and Proposed Discussion Topics (October 19 Meeting)(Mark Coscarelli)

Attachment A: Part 201 Discussion Group: DEQ Issue List for Phase II (Distributed September 29, 2006)

Attachment B: Part 201 Discussion Group: Summary , Recommendations to Subcommittees, and Process Description (January 2006)

## MDEQ Letterhead

Date

Re: Act 381 Work Plan

Dear Owner:

MDEQ staff has received and reviewed the 381 Work Plan for the New City project dated February 1, 2007. That Work Plan requested approval of site investigation and remedial activities totaling \$2,500,000, consistent with the draft Brownfield Plan dated January 1, 2007 for the proposed redevelopment project.

Based on MDEQ's review of the work plan and related information, we hereby approve the expenditure of \$2,500,000 subject to the following conditions:

1. New City Brownfield Redevelopment Authority review and approval of all expenditures consistent with the scope of work defined in the work plan.
2. Technical work plans describing the field investigation work be provided to MDEQ district staff and reviewed and approved in advance of field implementation.
3. Remedial activities be described in more detail to MDEQ staff prior to field implementation and be reviewed and approved by MDEQ staff prior to implementation.
4. Any significant modifications and remedial activities, scope, or techniques be reviewed by MDEQ staff prior to implementation.
5. That a final project completion report be filed with MDEQ summarizing the work performed consistent with Part 201 requirements.

If you have any questions with respect to the review and approval of these conditions, please do not hesitate to contact MDEQ staff. In the meantime, you may contact Bob Jones for any follow-up review, comments or questions or any modifications to the scope of work.

MDEQ staff commit to providing 90 day turnaround review of any work plans or modifications to remedial activities consistent with the activities of this approval. Please note that any expenditure in excess of the \$2,500,000 will not qualify for school tax capture unless Brownfield Plan and work plan are modified accordingly and submitted to MDEQ for approval.

Sincerely,

MDEQ

















