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April 3, 2024

The Honorable Michael J. Rodrigues, Chair
Senate Committee on Ways and Means
State House, Room 2
24 Beacon Street
Boston, MA 02133

Subject: S. 511, *An Act relative to liability for release of hazardous materials*

Dear Senator Rodrigues:

The LSP Association (LSPA) is submitting this letter regarding S. 511, *An Act relative to liability for release of hazardous materials*, which was recently reported favorably to your committee from the Joint Committee on Natural Resources and the Environment. As the bill is currently written, the LSPA opposes it.

The LSP Association

The LSPA is the non-profit association for Licensed Site Professionals (LSPs) and related practitioners. LSPs are the scientists, engineers, and public health specialists licensed by the Commonwealth to work on behalf of property owners and other involved parties to oversee the assessment and cleanup of oil and hazardous materials released to the environment. These sites include multi-acre urban brownfields, roadside spills, “mom and pop” gas stations and dry cleaners, home heating oil spills, and everything in between.

The LSPA has approximately 800 members. Our members are consultants who work with institutional, non-profit, government, and private clients to remediate contaminated sites so these properties can be placed back into active and productive use. Together with the Massachusetts Department of Environmental Protection (“MassDEP”) and the Board of Registration of Hazardous Waste Site Cleanup Professionals, LSPs are the third “arm” of an innovative, privatized program, created by the legislature in 1993. In adherence with the hazardous waste site cleanup regulations at 310 CMR 40.0000, also known as the Massachusetts Contingency Plan (MCP), LSPs have helped bring over 40,000 sites to a condition where they safely meet regulatory standards for business, commercial/retail, industrial, institutional, open space or housing.

LSPA History With This Bill

In June 2023, the LSPA wrote to the Joint Committee on Natural Resources and the Environment in opposition to the bill as it was written. We were concerned then, as we are now, about Sections 1 and 2 of the bill, which modified the definitions of two important MCP terms, “Condition of Substantial Release Migration” and “Critical Exposure Pathways.” The proposed definition of “Condition of Substantial Release Migration” specifically precluded MassDEP

from altering that definition (*see* the last sentence of Section 1, which states, “Notwithstanding any general or special law to the contrary, the department shall not use any other definition”). The LSPA cannot support including a highly technical and scientific regulatory definition in a statute and then tying the hands of the regulatory authority with the specialized expertise to promulgate and implement its own regulations for the protection of the environment and public health, safety, and welfare. This would then require further legal changes to address any future relevant scientific advances.

Late in 2023 we were contacted by Representative Margaret Scarsdale of Pepperell who told us that the bill would be revised to exclude Sections 1 and 2 where these two terms were redefined. Subsequently, on December 7, 2023, the LSPA wrote to the Joint Committee on Natural Resources and the Environment that we no longer opposed the bill. We supported the exclusion of these redefined terms because we believe that proposed changes to regulatory definitions should lie within the province of MassDEP, not the legislature.

Current Status and Request for Amendment

When the bill was reported favorably from the Joint Committee we were disappointed to learn that the two redefined MCP terms, in Sections 1 and 2, were still included. We urge the Senate Committee on Ways and Means to amend the bill to exclude Sections 1 and 2. If that were to occur, the LSPA would no longer oppose the bill.

Remaining Concerns About the Bill

We commend Representative Scarsdale for raising concerns about MassDEP’s interpretation of certain liability exemptions in Mass. Gen. Laws c. 21E, sec. 5C. The Brownfields Act was intended to provide liability relief and financial incentives to encourage investment in environmentally impaired properties while ensuring that MassDEP’s environmental cleanup standards were met. Section 5C of the Act encourages private parties to purchase, clean up, and redevelop contaminated properties in the Commonwealth.

On the whole, we feel that the Brownfields Act has largely achieved its goal by promoting the cleanup of many distressed properties. We believe that the statute is unambiguous as to who qualifies for “eligible person” status, providing certain entities or persons with liability protection, and under what circumstances. However, perhaps MassDEP’s interpretation of the statute is different from what we had previously understood. Consequently, there may be specific situations when the liability status of eligible persons could be threatened.

In the case of an MCP site in Pepperell of concern to Representative Scarsdale, an eligible person cleaned up the site, achieved a Permanent Solution without Conditions (*i.e.*, unrestricted permanent site closure with MassDEP), “passed” a MassDEP Level 3 audit, and developed the property. Years later, a change in a toxicity/Imminent Hazard standard created a situation that negated the prior Condition of No Significant Risk (which is the standard for site closure under a Permanent Solution without Conditions) at the site and at downgradient properties.

In that situation, there are (at least) two innocent parties involved – the eligible person and the impacted downgradient property owner, both of whom themselves did nothing to cause the release of contaminants. Indeed, both parties are entitled to health, safety, and environmental

protections on their property under the law. The eligible person is entitled to liability protections under Section 5C, and the downgradient property owners are likely eligible for other liability protections under Section 5D.

S. 511 proposes an approach to further clarify eligible party liability protections. We agree that clarification is needed but suggest that this be achieved without statutory changes. To address the unintended consequences for innocent parties, the LSPA recommends that, through regulation, guidance, and/or policy, MassDEP provide clarification of M.G.L. c. 21E, sec. 5C which provides liability protection for a “...*site for which a permanent solution or remedy operation status exists and is maintained or has been achieved and maintained in accordance with such opinion, provided that all of the requirements of this section are met.*” This clarification should include a working definition of “maintained,” as well as a discussion of how “maintenance” is impacted by, and must address, changing health and safety standards.

The bill also does not address another potential issue - that of eligible persons and/or innocent downgradient property owners who are required to take action to adequately protect themselves from residual contaminants at a site that are found to be more harmful than previously understood and for which more stringent regulatory standards are subsequently adopted due to new toxicological information/studies, particularly when this occurs after a Remedy Operation Status (an MCP cleanup milestone) or Permanent Solution has already been achieved. This is an issue for MassDEP and/or the legislature to explore and study. One possibility might be to allocate state funding for the protection of the public health of impacted innocent third parties.

If Sections 1 and 2 were to be removed from the bill, as it was previously understood they would be, the LSPA would not oppose the amended bill. After serious reflection and discussion, we believe that to address this otherwise seemingly intractable situation, it is incumbent upon MassDEP to take regulatory action to further clarify the liability protections of eligible persons under M.G.L. c. 21E, sec. 5C, which would obviate the need for legislation.

We very much appreciate being consulted on bills related to the MCP and other issues of importance to the practice of waste site cleanup, such as this one. Please do not hesitate to contact us with questions or for further information.

Respectfully,
THE LSP ASSOCIATION, INC.



Charles P. Young, LSP, President



Wendy Rundle, Executive Director

cc:
Senator Edward J. Kennedy
Representative Margaret R. Scarsdale
Commissioner Bonnie Heiple, MassDEP