



# COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

## Coming Soon: MassDEP's Interim Policy on Reclamation Soils

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**Robert D. Cox, Jr.** – There is pressing [need for soil disposal options](#) within Massachusetts. Construction projects in urban areas have been hampered by the limited locations for the disposal or reuse of excavated soils. The good news is that MassDEP and stakeholders are working together to find solutions to the State's soil disposal crisis. MassDEP has recently completed a series of public sessions focused on establishing “regulations, guidelines, standards or procedures” for the use of reclamation soils as fill material by June 30, 2015, as directed by [Section 277 of the FY2005 budget](#). Last week, MassDEP announced that by early 2015 it will have an “interim policy” that will guide soil reclamation receiving locations for big projects: those greater than 100,000 cubic yards.

The interim policy is expected to describe what the big soil reclamation projects will need to do to gain MassDEP's approval. Proposals will need to describe the soils to be delivered, the receiving location, and any nearby sensitive environmental areas. Proposals must also include a soil management plan, evidence that any required local permitting (e.g., an order of conditions under the Wetlands Protection Act, zoning or home rule bylaw approval) has been obtained, as well as written approval from the Chief Municipal Officer. The “permitting” of these projects, at least on an interim basis, will be through MassDEP issued Administrative Consent Orders.

While it is great to see MassDEP tackle this topic and do so in a transparent and expeditious fashion, there are some fundamental concerns. First, the interim policy, as directed under Section 277, will address soils that contain concentrations of oil or hazardous material well below MassDEP's conservative risk-based levels. In some cases, contaminants found in the soils are naturally occurring. But for those communities that will receive reclamation soils, there is often a heightened, and many times misplaced, concern over health and environmental risks associated with re-used soils.

Because of its expertise with contaminated media and associated risks, MassDEP is uniquely qualified to educate the receiving location communities, and their public officials, on risks associated reclamation soils. But left out of the interim policy discussion has been the educational gap and role that MassDEP could provide to fill it. The regulatory process for reuse of soil is complicated and highly technical. MassDEP is in the best position to explain to impacted

communities the regulatory process, risk assessment practices, and, when applicable, inform the receiving communities that the reclamation soils pose no significant risk of harm to health, safety, public welfare or the environment. The interim policy should include a role for MassDEP to explain to the receiving communities in lay terms how they may safely receive soil that meets MassDEP's conservative risk-based standards.

Second, for the parties "generating" soil, there remains a lingering concern about liability in the event that oil or hazardous material might be found in the soils, even where naturally occurring. For now, MassDEP is suggesting that the Administrative Consent Order will address those concerns on the theory that any "release" that may occur at the receiving location would be "permitted" under the Order. That carve-out from liability, and MassDEP's authority to provide it, is hardly clear under existing law.

While the interim policy on reclamation soils will satisfy the requirement for MassDEP to establish "guidelines" by June 30, 2015 as mandated by Section 277, MassDEP still hopes to have a regulation adopted by that date. That is an ambitious goal. The interplay between M.G.L. c. 21E, M.G.L. c. 111, Section 150A (solid waste), and home rule, make legal authority for the movement and ultimate resting ground for reclaimed soil very complicated. If the new administration latches onto this issue, it may perhaps move forward with the speed at which MassDEP has approached it to date. But absent a push from the corner office, we are likely only to see the interim policy in 2015, rather than a full regulatory package for reclamation soils. Stay tuned.