

# BANKER & TRADESMAN

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## Clearing The Air

*Massachusetts  
DEP Program  
Has Become An  
'Indoor Air Jihad'*

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SPECIAL TO BANKER & TRADESMAN

It's hard to beat the ancient Greeks at turning a phase. Hippocrates, the Father of Medicine, once said "Man is an obligate aerobe." In modern terms, no breath, no life. So the Massachusetts Department of Environmental Protection should care, and care deeply, about the quality of the air we all must breathe to live. At the same time, good health – economic as well as physical and psychological – depends on balance. And sad to say the 21E program at MassDEP now appears to be profoundly out of balance.

Over the course of the last 18 months, the 21E program at MassDEP has re-opened hundreds of closed 21E cases across the Commonwealth, many involving projects long since sold and redeveloped, in an attempt to address what the agency believes to be possible indoor air-quality issues. Long-filed Permanent Solution Response Action Outcomes which met applicable standards at the time of filing and were supposed to perfect owners' liability shields under the 1998 Brownfields Act are being invalidated. MassDEP has changed standards after the fact, and is applying new standards retroactively. In the process, owners are facing audits and notices of non-compliance.

### Common Complaint

Well-respected Licensed Site Professionals (LSPs), who fill a role under the 21E cleanup program equivalent to that of auditors and tax preparers under accounting standards and the tax code, have referred to the new MassDEP approach as the "indoor air jihad." Some have even speculated that the effort amounts to an attempt to de-facto repeal the award-winning, privatized 21E cleanup program.

At the demand of MassDEP property owners are being told they must now conduct perpetual indoor air testing in a wide range of offices, retail stores, restaurants and residential space, often at a cost of tens of thousands of dollars per sampling round – even if one or more rounds of test results do not reveal indoor air contaminants.

Owners are being required to sample in occupied spaces, and to take "soil gas" samples through building slabs, including in occupied spaces. Owners are being required to post no-

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tice of such testing at entrances and other conspicuous public places in their buildings. Owners are being instructed to demand their tenants warn employees of such testing and test results. Such notices are sometimes worded in a manner that delivers more upset than information to laypeople.

MassDEP has ordered owners to put notice of such long-term testing obligation at the Registry of Deeds, in the form of "activity and use limitations" (aka deed restrictions) on property. MassDEP has ordered owners to gain access to and test neighboring commercial and residential properties (and to provide all of the notices mentioned above to their neighbors, and neighbors' tenants and neighbor's tenants' employees).

MassDEP has compounded the potential harm of its approach by requiring that indoor air samples be analyzed for a long list of potential air contaminants even if only a handful of such compounds were ever present in soil or groundwater.

It is well known in the scientific and consulting community that the volatile organic compounds (VOCs for short) at the heart of the MassDEP campaign are literally "in the fabric" of modern, urban society. They occur in the building materials, petroleum products, degreasing and cleaning products, and even mattresses we all use on a daily basis in our homes and workplaces. They are present in clothes brought home from the dry cleaners. They are, as real-world data clearly show, released to the atmosphere by dry cleaners and others through unregulated processes, often at levels many times higher than the thresholds under the new MassDEP standards. It is impossible to tell the difference between VOCs from these sources and VOCs coming into indoor air from soil or groundwater (which is all DEP gets to regulate under the 21E program).

## Chaos

Having required property owners to prove a negative, MassDEP then requires "multiple lines of evidence" (i.e., soil and groundwater results as well as indoor air and outdoor air control results) to sort out the confounding problem of what part of VOCs in indoor air is coming from soil or groundwater versus other sources.

The new MassDEP approach then goes on to require emergency-response timing to address the presence of very low levels of dry cleaning solvent in indoor air, in multi-family as well as single-family residences (even where there are



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only a few millionths of a gram per cubic meter of air). Until recently, MassDEP agreed that background levels of VOCs in indoor air from unregulated sources was greater than these levels.

Based on this approach, one might conclude there is an enormous threat to public health. In fact, the situation is more akin to the self-generated weather of television anchors anticipating the first snow of the season.

For example, in the case of the dry cleaning solvent that has generated the most attention from MassDEP, the approach is founded on very conservative assumptions about how to project onto humans the results of toxicology studies on species that have very different metabolism, and on unreasonably conservative assumptions about the length of time people occupy a space. How many people really spend 24 hours a day, seven days a week, for 30 straight years, in their basements? In fact even within MassDEP there is disagreement about how far the approach should be taken, with the predictable result of different treatment of similar cases, depending on the luck of the draw of location, regional office and case officer.

For the most part, property owners and MassDEP had been on the same page. If there's a scientifically unacceptable level of a contaminant

in indoor air, the vast majority of property owners want to do the right thing and clean it up. At some point we need to draw a rationally-based line concerning the grounds for continued testing and the frequency with which testing should occur. There are important reasons to value certainty in legal standards, property transactions, financing and economic life, and to value the adaptive re-use of smart growth, urban and suburban properties, as well.

Without much fanfare, MassDEP and representatives of the LSP community have been meeting as part of an Indoor Air Workgroup to review and discuss evolving MassDEP guidance concerning indoor air impacts from releases of oil and hazardous materials to soil and groundwater. A revised, draft guidance is in the works now.

Reportedly, MassDEP will issue a draft guidance for public comment in December. Perhaps if senior administration officials hear from property owners and the lending and business communities about the enormous damage being done to the 21E program and the resulting regulatory, legal and economic uncertainty, at precisely the time more certainty is called for, MassDEP may yet act in a more balanced way. Otherwise, don't hold your breath. ■

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