

An Initial Evaluation of a Licensed, Third-Party Approach to Site Remediation in Rhode Island

Prepared by the Rhode
Island Department of
Environmental Management in
Consultation with the
Rhode Island Economic
Policy Council

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Executive Summary

Brownfields are real property where the redevelopment, reuse, or expansion of use may be complicated by the actual or potential presence of a hazardous substance, pollutant, or contaminant. Until they are cleaned up these sites burden local economies and present environmental and public health threats.

Parties interested in cleaning up and reusing Brownfields in Rhode Island work with the State Department of Environmental Management and the Rhode Island Economic Development Corporation, working together as the Brownfields team, to structure and implement an effective plan to bring the property back to productive use.

Within DEM, Brownfields and other contaminated sites are addressed through the site remediation programs, which have experienced a combination of increased workload and staff vacancies and turnover. These issues have combined to produce a significant, and growing, backlog of sites pending evaluation by the DEM staff.

The Rhode Island General Assembly created a Special House Commission on Brownfields to look at this, and other issues related to Brownfields. Throughout the spring of 2001, the Commission met several times to discuss options for improving the effectiveness of Rhode Island's program. This discussion built on earlier efforts on this topic by GrowSmart RI and DEM's own program-streamlining workgroup. The commission produced a legislative proposal that was introduced to the General Assembly and extensively debated last session. Ultimately, a portion of that proposal was passed into law. One of the requirements of that statute was for the DEM and the Rhode Island Economic Policy Council (EPC) to prepare and submit a joint report to the General Assembly evaluating the costs and benefits of establishing a licensed environmental professional program in Rhode Island.

Based on our analysis of this issue and the results of the surveys provided by outside stakeholders, we do not believe the Rhode Island site remediation program should be converted to the third-party licensed professional approach adopted by Connecticut and Massachusetts. Our recommendation is based on three major points. The mandate from the legislation required an analysis of the costs and benefits of transitioning to this new program model and, after conducting that analysis, we do not think that the costs of transitioning to, and subsequently operating, an LSP-type program are justified given the benefits that would be achieved. Additionally, we do not think that a licensed, third party approach is appropriate for waste site clean given the high level of community interest and involvement in many projects and the expectations of State involvement and oversight by both the general public and elected officials. Third, we are not sure how we could strike an appropriate balance between the level of detail, and precriptiveness, of the new regulations and still allow the flexibility that we feel is necessary to continue to effectively implement the site remediation program in this State.

We recommend that the State authorize the addition of 3-4 new staff to the existing program. Once new staff are added, the program will undertake further regulatory reform to improve the process and develop specific budgetary performance measures to track timeliness and management of the caseload.

It is important to note this analysis is preliminary in nature and only meant to address major topics. DEM and EPC discussed several alternatives for conducting the research to develop

this report. Ultimately, the two agencies decided to conduct a survey of a broad spectrum of interested parties to seek their response on some key questions. The survey was distributed to the DEM Environmental and Business Roundtables and both GrowSmart RI and the Rhode Island Society of Environmental Professionals (RISEP) agreed to extend distribution through their mailing lists. The Rhode Island Chapter of the Environmental Business Council (RIEBC) also aided in distribution. The same survey was also distributed internally to DEM employees in the site remediation programs.

The first part of the survey presented six general questions on the potential objectives; benefits and limitations of developing and implementing a third-party, privatized clean up program in Rhode Island. The second part of the survey asked people to explain the pros and cons of working in the Massachusetts, Connecticut and Rhode Island programs as they currently work.

Distribution was done electronically through e-mail. An initial e-mail explained our approach and informed stakeholders of the upcoming survey that was sent on November 12, 2002. A second e-mail, with the actual survey attached, was distributed on November 20, 2002. An initial deadline for response was set at December 6, 2002 but an extension was issued until December 13, 2002. A total of thirty-two stakeholders, outside of DEM, responded to the survey. Additionally, nine members of the DEM site remediation staff also responded. An open public meeting was held on December 17, 2002 at DEM Headquarters to discuss the preliminary results of the survey and provide a forum for further discussion. Fifteen individuals attended the meeting. This group was predominantly made up of environmental consultants.

Section 1: Purpose, Background and Introduction

Brownfields are real property where the redevelopment, reuse, or expansion of use may be complicated by the actual or potential presence of a hazardous substance, pollutant, or contaminant. Until they are cleaned up these sites burden local economies and present environmental and public health threats.

Parties interested in cleaning up and reusing Brownfields in Rhode Island work with the State Brownfields team to structure and implement an effective plan to bring the property back to productive use. The team consists mainly of the Rhode Island Department of Environmental Management (DEM) and the Rhode Island Economic Development Corporation (EDC). DEM works with the parties to address the environmental challenges associated with the site while EDC supports the business development and financial issues.

Within DEM, Brownfields are addressed through the site remediation program. This site remediation program has three main elements: a program addressing sites under federal authorities, such as Superfund; a program addressing sites under State authorities, where most Brownfields are addressed; and a program focusing on leaking underground storage tanks. An increase in the number of sites needing investigation and clean up in most programs began to become serious in 1998. The additional differential between the number of sites identified and the number of completed projects is shown in Figure 1. The growing backlog of unresolved sites is shown in Figure 2.

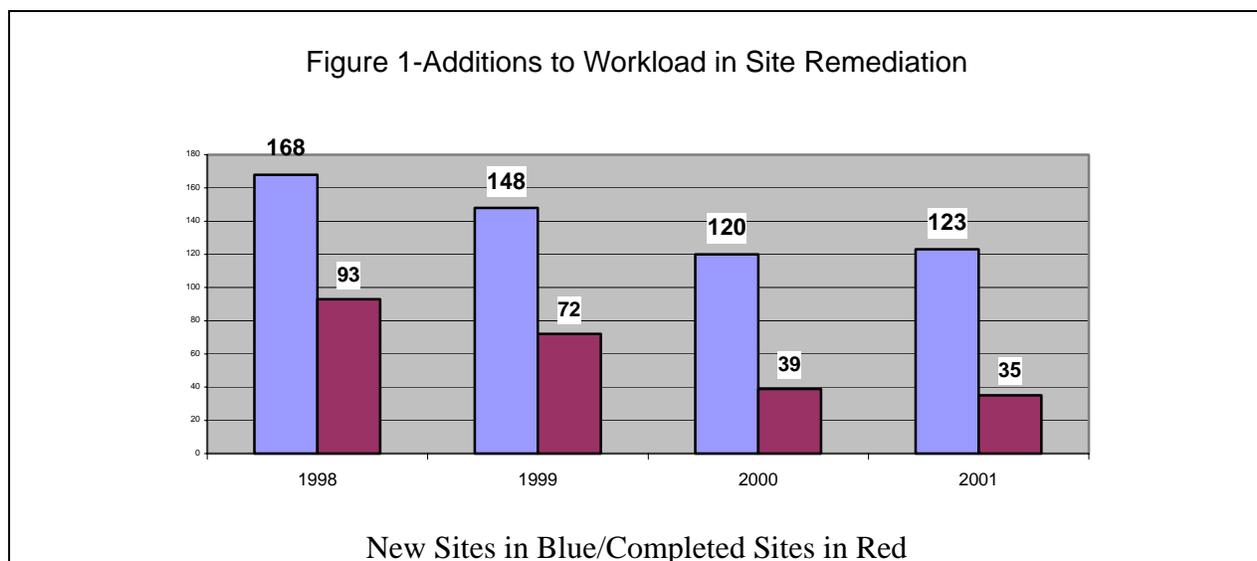
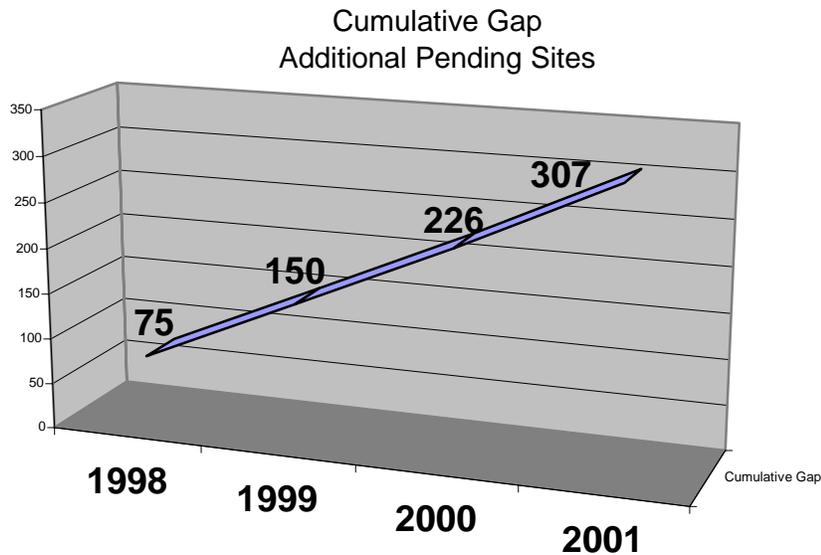


Figure 2-Additions to Backlog of Sites



This was particularly evident in the site remediation program (Figure 3), which we believe was driven by increased development activities, and the leaking tank program (Figure 4), which was driven by a federal deadline to upgrade underground tanks. Fortunately, the growing backlog was somewhat offset by progress in the federal program, where sites are older and have been mainly addressed over the past two decades. Also, the number of new leaking tank sites has decreased significantly since the 1998 deadline for upgrade. The number of new sites under the state program remains constant.

During this same 1999 time period demand for Brownfields sites and staffing issues within DEM collided to slow the review and decision process for clean ups. Many more sites were being investigated and reported to the Department than could be effectively processed and decided on. This created a significant increase in the number of sites being processed within the program and a growing backlog of unresolved cases. That backlog has grown steadily since that time to its current size of several hundred unresolved sites. Staff within DEM are being asked to manage between eighty to one hundred active sites per person and keeping projects that have environmental, financial, and societal benefits on-track is becoming an increasing challenge.

Figure 3-Workload in State Site Remediation Program

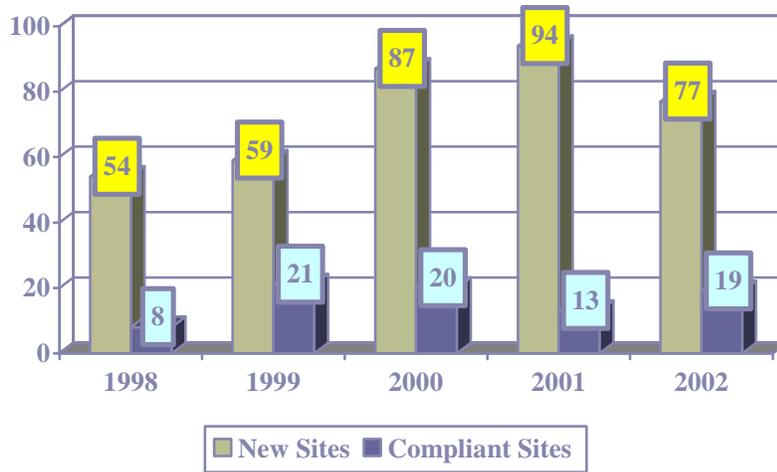
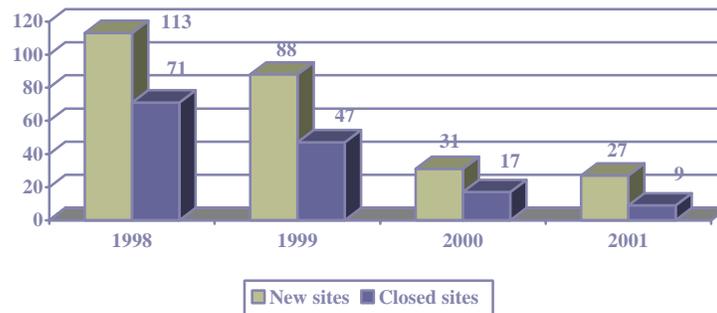


Figure 4-Workload in Leaking Underground Storage Tank Program



This has led to frustration for all the parties involved in the process. DEM staff are stressed and frustrated that they cannot always give their best effort to support these projects. Stakeholders, including developers, environmental attorneys, and consultants have also become frustrated as the environmental issues migrate to the critical path of their projects and complicate the planning, financing, and construction of these projects.

Several efforts were initiated under the leadership of various groups to try and solve this problem. GrowSmart RI worked with a graduate student from Harvard University's John F. Kennedy School of Government to investigate this issue, as well as others in the Brownfields program. GrowSmart RI convened a one-day conference on the program in February 2001 and subsequently published their recommendations for improving the program. One suggestion that was raised in this dialogue was for Rhode Island to consider the use of licensed environmental professionals to make decisions on clean up projects, removing these sites from the DEM backlog through privatization. This approach has been employed in both Massachusetts and

Connecticut to address similar program overload situations. The GrowSmart RI report Revitalizing Brownfields: How Can Rhode Island do more? Is available on-line¹.

DEM also convened a stakeholder group to study ways to improve the site remediation program in spring of 2001. That group met several times and focused on the Brownfields program, streamlining regulatory review for sites contaminated with arsenic, which is naturally occurring throughout the State, and addressing lower risk sites. The group came up with some meaningful products and recommendations for improving the program. A final report of this group is available on-line². This group did discuss the option of developing a third-party licensed professional approach. However, the consultants in the work group did not support the concept and the issue was dropped from further consideration.

The Rhode Island General Assembly created a Special House Commission on Brownfields chaired by Representatives Gordon Fox and Peter Ginaitt. Throughout the spring of 2001, the Commission met several times to discuss options for improving the effectiveness of Rhode Island's program. This discussion built on earlier efforts on this topic by GrowSmart RI and DEM's own program-streamlining workgroup. The commission produced a legislative proposal that was introduced to the General Assembly and extensively debated last session. Ultimately, a portion of that proposal was passed into law.

One component of these amendments read: "(b) The department of environmental management and the Rhode Island economic policy council shall prepare and submit a joint report to the general assembly no later than December 1,2002, evaluating the costs and benefits of establishing a licensed environmental professional program in Rhode Island. The report should include an assessment of the time that would be required to develop and implement such a program. In researching the report, the department and the Rhode Island economic policy council should consult the Rhode Island society of environmental professionals and other appropriate bodies. "

It is important to note this analysis is preliminary in nature and only meant to address major topics. DEM and EPC discussed several alternatives for conducting the research to develop this report. Ultimately, the two agencies decided to conduct a survey of a broad spectrum of interested parties to seek their response on some key questions. The survey was distributed to the DEM Environmental and Business Roundtables and both GrowSmart RI and the Rhode Island Society of Environmental Professionals (RISEP) agreed to extend distribution through their mailing lists. The Rhode Island Chapter of the Environmental Business Council (RIEBC) also aided in distribution. The same survey was also distributed internally to DEM employees in the site remediation programs. The results of the survey are outlined in Chapter 5 of this report.

Section 2: Summary of Massachusetts LSP program³

On October 1, 1993, Massachusetts fundamentally changed their program for cleaning up contaminated sites by privatizing most of the decision-making. Massachusetts adopted this approach to enable and compel the private sector to take more responsibility for remedial

¹ <http://www.growsmartri.com/pdfs/brownfields.pdf>

² <http://www.state.ri.us/dem/programs/ombuds/pstream/waste/pdfs/finrep01.pdf>

³ "THE PRIVATIZED WASTE SITE CLEANUP PROGRAM",
<http://www.state.ma.us/dep/nero/bwsc/files/privatiz.htm>

obligations, and to free up agency staff to address the most pressing public health and environmental threats.

Massachusetts was the first state to adopt such an approach for contaminated sites. The rationale in developing this model was to use limited government resources in a manner that achieves the greatest environmental benefit. Three important elements constitute the underpinnings of this program:

- ***Comprehensive Regulations*** - Detailed procedures and requirements on how to clean up sites in the privatized system are contained in the Massachusetts Contingency Plan (MCP). These rules specify the process that should be followed to evaluate and document site conditions and needed remedial activities. Because DEP is not overseeing response actions at most sites, a number of documentation and submittal "check in" points have been stipulated, so that all will be aware of the progress that is being made (or not being made) at every site. There are also extensive requirements on when and how to notify local officials and the public on conditions and actions of particular concern, including opportunities and mechanisms for the public to become more involved in any site by requesting a Public Involvement Plan. It is important to note, however, that while the regulations specify how clean a site needs to be, they do not specify how to demonstrate or achieve this level of cleanliness - this is something that must be decided on a case-by-case basis by Licensed Site Professionals, in conformance with the performance standards specified in the MCP, and subject to possible future audit by DEP.
- ***Licensed Site Professionals (LSPs)*** - Just as most building codes require the use of a Registered Professional Engineer to interpret, apply, and document compliance with structural design standards, the Massachusetts Contingency Plan requires the use of Licensed Site Professionals (LSPs) to evaluate and oversee the remediation of contaminated sites. Similar to Professional Engineers, LSPs are licensed and policed by a state board (independent from DEP). To qualify and practice as an LSP, a person must possess a minimum number of years experience and/or specialized training and education in environmental assessment and/or cleanup, and must abide by specified standards of practice. The required use of LSPs attempts to ensure a minimum level of competence, ethical conduct, and professional accountability in a privatized process.
- ***DEP Audit and Oversight Programs*** - While the Massachusetts DEP has delegated considerable authority to the private sector to oversee the cleanup of contaminated sites, it has by no means removed itself from the process, nor absolved itself from the responsibility of ensuring that all contaminated sites in Massachusetts are adequately assessed and cleaned up. To meet its obligations in this regard, DEP performs four important oversight functions:
 - *Oversight of Immediate Response Actions* – DEP Staff perform limited, short-term oversight of emergency and/or time-critical pollution situations. Once the site has been sufficiently stabilized, further assessment and cleanup actions may then be delegated solely to a Licensed Site Professional.
 - *Tier IA Oversight* - The sites that pose the worst, long term threats to people and the environment are classified as Tier IA sites, and DEP continues to exercise direct, day-to-day oversight and approval of all assessment and cleanup actions.
 - *Audits* - To "keep people honest", the agency performs both random and targeted inspections and audits on assessment and cleanup activities at sites being addressed by the private sector without direct DEP oversight. The nature of these

- audits range from cursory and/or focused reviews, to formal, detailed, and comprehensive evaluations of conducted activities.
- *Enforcement* - In cases where responsible parties have failed to meet their assessment and cleanup obligations, DEP undertakes a variety of enforcement actions to penalize past performance, and ensure adequate responses in the future. These actions range from the issuance of a Notice of Non Compliance to the issuance of orders and/or penalties, and for particularly egregious cases, seeking imprisonment and criminal penalties.

According to the Massachusetts DEP⁴, the changes to the cleanup program yielded immediate results. Within the first two years of the new program, there were more than 3,200 permanent site cleanups – including 700 at sites that had languished under the old rules with no clear way out of the cleanup process.

According to a program review conducted in 2001, between 1983 and June 30, 2001, nearly 26,000 contaminated sites were reported to, or identified by, DEP. Most of these sites involved releases of oil to commercial or industrial properties, affecting soil and /or groundwater.

Since October 1993, approximately 17,000 of these 24,000 sites (70%) have been closed (see Figure 3), meaning that they have been permanently cleaned up, that no cleanup is necessary, or that temporary solutions have been reached that eliminate any substantial hazard to human health or the environment. An average of 2,300 sites per year have been closed, with sites requiring an average of 22 months to achieve closure. The remaining 30% of sites have not yet reached a permanent or temporary solution. However, 85% of all sites have had at least some cleanup activity reported. Many more have begun the site investigation necessary to prepare for cleanup⁵.

Figure 5-Site Closures Under the Massachusetts LSP Program



⁴ The Massachusetts Waste Site Cleanup Program, Measures of Program Performance, 1993-2001, Appendix A, <http://www.state.ma.us/dep/bwsc/files/mos/mopp-App.pdf>

⁵ The Massachusetts Waste Site Cleanup Program, Measures of Program Performance, 1993-2001, <http://www.state.ma.us/dep/bwsc/files/mos/mopp.pdf>

Section 3: Summary of Connecticut LEP program

The Connecticut Licensed Environmental Professional program was established in 1995 and, in some ways, parallels the Massachusetts program. There are significant differences, however. Probably the biggest difference involves the scope of the program.

In 1998, it was reported that Connecticut had 3029 known or suspected contaminated sites. Of that total, 668 were identified as needing attention and 453 of those were undergoing some type of cleanup⁶. Comparatively, in February 1999 MA DEP reported that they had received notifications for over 10,000 jurisdictional releases and more than 9,500 risk reductions had been implemented in response to those releases⁷.

In Connecticut, the enabling legislation gives the Department of Environmental Protection (DEP) discretion to allow licensed environmental professionals to investigate and remediate contaminated sites that are defined as "establishments". The Property Transfer Program within DEP requires the disclosure of environmental conditions when certain real properties and/or businesses ("establishments") are transferred.

Connecticut State law 22a-134 defines an establishment as any real property at which or any business operation from which (A) on or after November 19, 1980, there was generated, except as the result of remediation of polluted soil, more than one hundred kilograms of hazardous waste in any one month, (B) hazardous waste generated at a different location by another person or municipality was recycled, reclaimed, reused, stored, handled, treated, transported or disposed of, (C) the process of dry cleaning was conducted on or after May 1, 1967, (D) furniture stripping was conducted on or after May 1, 1967, or (E) a vehicle body repair shop or vehicle painting shop is or was located on or after May 1, 1967⁸.

Connecticut General Statute 22a-133x created a voluntary remediation program for owners of sites which are (1) owned by a municipality, or (2) establishments or (3) on the State inventory of hazardous waste disposal sites, or (4) located in a GA or GAA groundwater area. The CT DEP Commissioner may approve the use of a licensed environmental professional to verify that a parcel has been investigated in accordance with prevailing standards and guidelines and remediated in accordance with the remediation standard regulations. The license is not required for those environmental professionals engaged in the business of providing other environmental consulting services relating to the investigation and remediation of most other contaminated sites.

In Connecticut, an investigation of the parcel is required in accordance with prevailing standards and guidelines are required for all property transfers. When transferring a business that meets the definition of establishment, any pollution caused by any release of a hazardous waste or a hazardous substance from the business operation must be considered. When transferring an establishment where there has been a release of a hazardous waste or a hazardous substance, the party signing the Property Transfer Form certification required by the CT regulations agrees to investigate the parcel and remediate pollution caused by any release of a hazardous waste or hazardous substance from the establishment.

⁶ An Analysis of State Superfund Programs; 50-State Study, 1998 Update, Environmental Law Institute.

⁷ Final Generic Environmental Impact Report, MA DEP, <http://www.state.ma.us/dep/bwsc/files/geirf12.pdf>

⁸ Connecticut State Law 22a-134, <http://www.cga.state.ct.us/2001/pub/Chap445.htm#sec22a-134.htm>

Connecticut's Remediation Standard Regulations (RSR's) provide detailed guidance and standards that may be used at any site to determine whether or not remediation of contamination is necessary to protect human health and the environment. The RSR's do not create in and of themselves a requirement that remediation be undertaken (this apparently is set by the commitment made on the Property Transfer Form), nor do they specify a time frame for completing remediation.

Generally, the RSR's apply to any action taken to remediate polluted soil, surface water or a groundwater plume at or emanating from a release area, provided the remedial action is required pursuant to Chapter 445 (Hazardous Waste) or 446k (Water Pollution Control) of the Connecticut General Statutes, or the voluntary remediation program.

The RSR's contain numeric standards for the remediation of soil and groundwater. The remediation of a polluted property must consider the criteria for both these environmental media. Factors that may effect the degree of remediation at a polluted site include the groundwater quality classification of the site, the land use of the site, and proximity to sensitive receptors of the contamination.

Under specific circumstances, an Environmental Land Use Restriction (ELUR) may be considered as an alternative to remediating contamination to a concentration that is consistent with specific criteria of the RSR's. The purpose of an ELUR is to prevent certain types of uses of a property, or limit specific activities on a contaminated property or in order to minimize the risk of exposure to the pollutants. For example, an ELUR may prohibit the destruction of a building located above contaminated soil to prevent the contamination from being exposed. An ELUR must be recorded on the municipal land records. The option of using an ELUR is at the discretion of the property owner⁹.

Section 4: Brief overviews of other state privatized programs

In February 2001, the Association of State and Territorial Waste Management Officials (ASTSWMO) published a report titled "State Privatized Cleanup Program Survey Results, February, 2001"¹⁰. The results of that survey showed that six States nationally had implemented a privatized clean up program. Arizona, California, North Carolina, and Ohio had implemented this approach in addition to Massachusetts and Connecticut. Wisconsin, Florida, and Indiana reported that they have considered a privatized approach to clean up but have not implemented such a program.

Of these six States, Arizona and California both put significant restrictions on the types of sites that are eligible for management within the privatized program. Both states exclude sites with groundwater contamination. Arizona also excludes sites where a violation of permit conditions has occurred, where administrative or criminal enforcement actions are pending, or where the site remediation expenses may be reimbursed from the State's leaking underground storage tank reimbursement fund. In addition to sites with groundwater contamination, California

⁹ Remediation Standard Regulations - Fact Sheet, CT DEP, <http://dep.state.ct.us/wtr/regs/remediation/rsrfactsheet.htm>

¹⁰ State Privatized Cleanup Program Survey Results, February, 2001, Association of State and Territorial Waste Management Officials, <http://www.astswmo.org/Publications/pdf/cerclaprivsurvey.PDF>

excludes sites to be used for residential uses or schools, daycares, hospitals, or sites adjacent to these land uses.

Ohio's Voluntary Action Program (VAP) was created in September 1994 with the passage of Senate Bill 221. Final administrative rules, governing all the administrative and technical aspects of the program, were adopted in December 1996. The program is very similar to the Massachusetts model in that it approves Certified Professionals and Laboratories. However, when a certified professional believes that a site has been investigated and, if necessary, cleaned up to the standards contained in the program rules (OAC Chapter 3745-300), he or she can prepare what is called a No Further Action Letter (NFA).

This document, which must be submitted in a prescribed format developed by the VAP, describes the environmental problems found at the site, how those environmental problems were investigated and how the site was cleaned up. Somewhat a misnomer, the NFA "letter" is actually a thick document full of very detailed information about the site. When Ohio EPA receives an NFA, technical staff reviews the document to determine if all of the standards (i.e. investigation and cleanup rules contained in OAC Chapter 3745-300) have been met and accordingly issues or denies the covenant not to sue.

Currently, Ohio EPA assists volunteers with any questions they have regarding their participation in the VAP. Since the VAP relies on user fees to help support the program, volunteers must pay for the Agency's assistance. Agency staff also consults with certified professionals to resolve technical questions about a specific rule requirement. They also conduct comprehensive document reviews of all aspects of the investigation and cleanup. Although some volunteers receiving technical assistance submit NFA letters, many volunteers conduct work in accordance with Ohio EPA's advice but do not submit an NFA, making a business decision that the covenant not to sue is not necessary¹¹.

Section 5: Summary of Survey Results

Moving to a privatized approach to clean up in Rhode Island would be a significant change to the way we currently do business. In order to effectively evaluate further consideration of this approach, it was critical to gauge stakeholder interest in this topic. To get this input, a two-part survey was developed. The first part of the survey presented six general questions on the potential objectives; benefits and limitations of developing and implementing a third-party, privatized clean up program in Rhode Island. The second part of the survey asked people to explain the pros and cons of working in the Massachusetts, Connecticut and Rhode Island programs as they currently work. A copy of the survey is attached to this report as Appendix A.

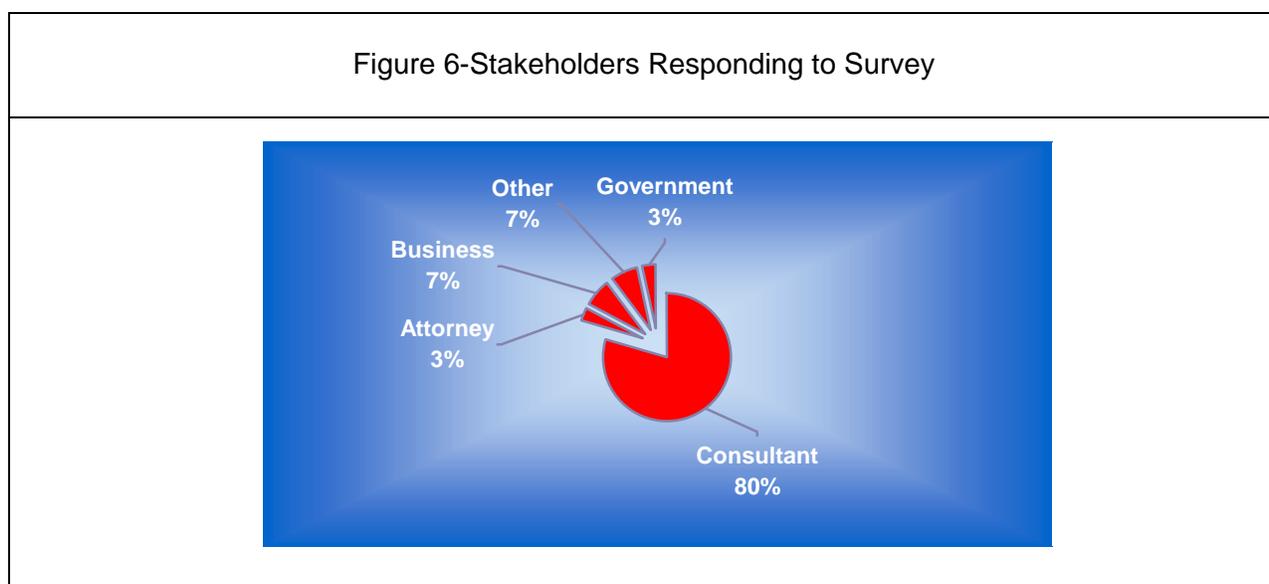
Surveys were distributed to members of DEM's Environmental and Business Roundtables, EPC stakeholders with experience in the development of the Connecticut program, members of the Rhode Island Society of Environmental Professionals (RISEP), members of the Rhode Island Chapter of the Environmental Business Council (EBC), and stakeholder who worked with GrowSmart Rhode Island. The survey was also distributed internally to DEM site remediation staff. All responses were treated as confidential.

¹¹Ohio's Voluntary Action Program, Fact Sheet, Ohio EPA,
<http://www.epa.state.oh.us/derr/vap/factsheets/fact1.pdf>

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An open public meeting was held on December 17, 2002 at DEM Headquarters to discuss the preliminary results of the survey and provide a forum for further discussion. Fifteen individuals attended the meeting. This group was predominantly made up of environmental consultants.

A total of thirty-two stakeholders, outside of DEM, responded to the survey. Additionally, nine members of the DEM site remediation staff also responded. The affiliation of the stakeholders responding to the survey is presented in Figure 6 below. The response from the staff will be presented separately in Section 6 of this report.



The first question presented in the survey asked about the appropriate objectives for developing and implementing a third-party clean up approach in Rhode Island. The stakeholders responded by identifying the need to streamline the program and make it operate more efficiently as the number one objective, followed closely by the need to speed up the process. Many also identified a need to make the investigation and remediation of contaminated sites more cost effective as an objective. Finally, many listed program improvements designed to allow DEM staff to focus on the most serious sites as an objective for developing this new approach.

It seems in this area, speed and efficiency are the major goals of outside stakeholders. Backlogs in the current program are often cited as the primary reason clean up projects have slowed down. Consultants have also expressed frustration because they cannot provide clients with reliable schedules or target dates due to the workloads of DEM staff. This uncertainty may be a powerful disincentive on some Brownfields projects. These objectives are very similar to the driving forces for both Massachusetts and Connecticut for their adoption of this approach.

The second question presented in the survey asked about alternative approaches to the third-party, privatized approach that could be implemented to meet the same objectives. Mainly, outside stakeholders did not identify any alternative approaches.

In past discussions, stakeholders have presented a fee-for-services approach to support the necessary level of effort for sustaining the program at a level to provide timely and effective project feedback. Unfortunately, with the severe limitations on restricted receipt accounts imposed in recent years, the Department cannot direct funds received back to the program. Administrative limitations on staffing levels also limit the Department's ability to maintain staffing levels in the program, which would be necessary for sustainability under this type of model. Without a guarantee that the fees would be directly linked to the services required, stakeholders have not been willing to advocate further for this type of alternative approach.

The third question was very similar to the first question and asked the benefits that would be achieved by adopting the third party, privatized approach. Benefits identified include more timely resolution of site issues, more cost effective management of contaminated sites, and more consistency in decision-making. Stakeholders also felt that shifting to a third-party approach could shift more costs of the clean up process to responsible parties and could stimulate Brownfields, because developers would have contractual control over the schedules and deadlines for the environmental assessment and clean up activities.

The fourth question in the survey involved potential problems with adopting a third-party approach in Rhode Island. The stakeholders identified three main problems. First, and clearly foremost, the stakeholder recognized that our current regulations are too general for pure independent decision-making. DEM's Site Remediation regulations were developed to provide flexibility in implementation. Both DEM staff and stakeholders in that process agreed to this approach to allow negotiation on implementation. Unfortunately, that flexibility has compounded the workload of DEM staff and may be a root cause of some of the delays and backlog now present in the program. There is a core process laid out in those regulations, designed to provide an expedited pathway. Consultants rarely elect to follow that pathway, instead seeking DEM guidance and feedback throughout the process to gain certainty on approvals later. The other states that have adopted a privatized program have very prescriptive regulations and processes established to provide clear guidance to the regulated community and their consultants. Moving from our current regulations to a more prescriptive approach would be a significant undertaking.

Stakeholders identified a potential lack of consistency among licensed professionals as a potential problem with this approach. More defined guidance and regulations could help ensure more consistency, as would a disciplined licensing process.

Going hand in hand with this concern, is an issue over the competence, negligence, and ethics of licensed professionals. A strong disciplinary component in the licensing process could serve as both a deterrent and a corrective measure for these types of problems. More difficult is the issue of ethics. Massachusetts has adopted an ethical code as part of its LSP licensing process and such a component would also be necessary in Rhode Island.

Stakeholders were asked what types of sites would be the best candidates for a privatized program and which types of sites would be poor candidates for such an approach. Most stakeholders thought that the third-party approach would be best applied to less complicated, low risk sites. There was some disagreement in the stakeholder community on this issue;

however, a group of respondents did say that the approach would work best for complex, higher risk sites as well. Some respondents provided some specific guidance on the types of sites to focus on, including sites with localized contamination (no offsite migration), sites with soil contamination only, and sites in areas with the underlying groundwater classified as GB.

The majority of stakeholders stated that they believed there was no specific class of sites where this approach would not be appropriate. Those that did identify some types of sites where a third-party approach may be difficult or inappropriate listed sites with EPA involvement, sites in high priority aquifers (underlying groundwater classification of GAA or GA or located in a wellhead protection area), and sites where an immediate threat may be present as potentially problematic.

In the second portion of the survey, respondents were asked to identify the pros and cons of the Massachusetts, Connecticut and Rhode Island programs based on their personal experiences in each State.

There was significant feedback about the Massachusetts program. On the positive side, respondents identified the predictability and the comprehensiveness as major advantages of working in that program. Other positives were that the MCP/LSP process allows responsible parties to clean sites up quicker, there is a clear path to resolution with clear end points, and it is conservative, leading to good remedies. On the negative side, stakeholders felt that Massachusetts has not sufficiently regulated LSPs, the program is not consistently applied statewide, the forms and paperwork requirements are burdensome, costs for clean up have increased, and input/feedback from DEP comes only after the remedy has been implemented.

Stakeholders provided less feedback on the Connecticut program. Unfortunately, there was not consensus on the pros and cons of this program. Stakeholders identified many issues as both pros and cons. The degree of detail in the Connecticut regulations, the need for fewer submittals (and, correspondingly, less opportunities for feedback from DEP), and the limited applicability to certain classes of sites was both cited as positives and negatives in the survey responses. Other positives included standardized site evaluations, consistent statewide implementation, and flexibility. Stakeholders also felt that the Connecticut program is not fully privatized. Some respondents expressed the opinion that DEP staff continues to be involved in virtually every site. They also felt this was necessary in most cases due to the level of guidance and detail in the Connecticut regulations, as compared to the MCP.

Some stakeholders also provided feedback on the existing Rhode Island program. The flexibility of the program, accessible staff and more personal feedback, and the clean up standards were all identified as positives. The lack of detail in some areas of the regulations, unpredictable timelines, inconsistency of decision-making, and overloading of the program were identified as major negatives. It was also noted that site owners who cooperate and work within the system are often overlooked while uncooperative parties who resist staff feedback, or go around staff to upper management, are often "rewarded" with expedited processing.

These results were presented at an open meeting held on December 17, 2002 at DEM headquarters. Approximately fifteen stakeholders attended the meeting. The group was mostly environmental consultants with two representatives from non-governmental, non-profit environmental groups. Preliminary results of the survey were presented to the group and then an open discussion was held on the topic.

In the open discussion, several interesting ideas were put forward. One topic that motivated serious discussion was related to policing LSPs. Many felt that Massachusetts had been inconsistent about this over the years. Consultants raised concern about inexperienced auditors who focus on checklists and miss the overall performance of the remedy at a site.

Suggestions included the development of a site ranking system that establishes a cut-off point where less serious sites could be delegated to third-party professionals and/or developing a process where removal of contaminated soil could be conducted without DEM review and approval. It was suggested that DEM explore the use of consultants to assist in the transition process by drafting regulations, developing guidance or policy, or reviewing sites while DEM staff were redirected to policy work. One individual suggested that DEM simply adopt the Massachusetts program by reference. However, many felt that the MCP may be overkill for Rhode Island and valued some of the flexibility inherent in the existing program. Furthermore, many were concerned that the MCP does not distinguish between responsible parties and voluntary parties.

There was also concern about keeping the community knowledgeable and involved in the investigation and clean up of contaminated sites. Some felt that public participation would suffer if portions of the program were delegated to third party professionals.

Section 6: DEM Perspective on a Privatized Program

The Department is exploring many areas where we can achieve greater reach, broader compliance, and more effective use of our resources by relying more on competent, third party professionals. We have re-engineered our permitting process for individual septic disposal systems (ISDS) to rely on licensed designers and installers, with a varying degree of success. We are evaluating various industry sectors and regulated activities, including auto body repair facilities, dry cleaners, and operators of underground storage tank systems, to provide more specific guidance on compliance, along with more directed checklists, and requiring independent third-party or self inspections to verify compliance, subject to audit by department inspectors.

Staff responses to the survey provided valuable information. When identifying what the objectives of a privatized program should be, staff focused on the three core areas; the need to continue to produce protective remedies, the need to ensure consistent application and decision-making throughout the program, and the need to establish strong processes for oversight and monitoring of licensed professionals. Staff also agreed with the main recommendations of the stakeholders, which were to strive for faster more streamlined processes and more cost effective investigations and clean ups, but stressed that this should not be achieved at the expense of the core objectives identified above.

In responding to the survey, staff were very concerned that the program would not include strong authorities to police the third-party professionals. Program components focusing on training and education of professionals, auditing, enforcement and discipline would have to be a major part of the licensing program.

DEM staff also raised several issues related to transitioning into a new program. Most agreed that a substantial rewrite of the site remediation regulations would be necessary. More specific and detailed guidance would also have to be developed. There was significant concern that

redirecting staff efforts toward these program initiatives would significantly slow down the existing program.

With respect to alternative proposals to privatization, staff identified the fee for services model and a potential graduated program with presumptive remedies. Such a graduated program would theoretically simplify easier sites, develop some comprehensive presumptive remedies for classes of sites (such as removal or containment of contaminated soils), and allow more independence from the DEM review and approval process. This was the intent of the Marginal Risk Policy developed out of the Site Remediation Streamlining Workgroup that met earlier in 2002¹².

DEM is very concerned about the ethics and abilities of several consultants doing business in Rhode Island and the potential negative implications of empowering those individuals with independent decision-making authority. Ethically, some consultants are very clear that their main objective is to use any gap or perceived loophole in the regulations to limit the costs for their client. While cost control is understood and clearly necessary, this must be balanced with a scientifically sound, protective clean up.

Section 7: Summary and Conclusions

Clearly, the application of a privatized approach to waste site clean up causes strong reaction both inside DEM and out. One side of the argument pushes for privatization to streamline and expedite the investigation and clean up of contaminated sites and to provide control and predictability in the schedule for environmental clean up as part of the overall property management and/or transfer. Conversely, there are strong concerns that relying on third-parties will lead to inconsistency, incomplete investigations, endpoints that are not protective of human health or the environment, and property owners exposed to residual liabilities due to incomplete, or inappropriate, work.

This is not an argument limited to those inside DEM versus those outside DEM. DEM staff recognize that existing timelines are unacceptable and need to be improved. Stakeholders outside DEM recognize the inconsistencies in the performance and approaches taken by consultants and the dangers in these differences. Clearly, something needs to be done to improve the rate of investigation and clean up of contaminated properties and remove administrative barriers to reuse and redevelopment of Brownfields. These are goals common to all involved.

With respect to timeliness, the Massachusetts DEP has reported that sites take an average of twenty-two months to reach an end-point. We are continuing to research the average time it takes to reach an end-point in the Rhode Island program but believe setting a performance goal like this will better define the options for program improvement and the potential transition costs to meet such a goal. DEM will develop these performance goals and include them in our 2003-2004 program work plan.

Based on our analysis of this issue and the results of the surveys provided by outside stakeholders, we do not believe the Rhode Island site remediation program should be converted to the third-party licensed professional approach adopted by Connecticut and Massachusetts.

¹² DEM Marginal Risk Policy and Checklist,
<http://www.state.ri.us/dem/programs/ombuds/pstream/waste/pdfs/simpstrw.pdf>

Our recommendation is based on three major points. The mandate from the legislation required an analysis of the costs and benefits of transitioning to this new program model and, after conducting that analysis, we do not think that the costs of transitioning to, and subsequently operating, an LSP-type program are justified given the benefits that would be achieved. Additionally, we do not think that a licensed, third party approach is appropriate for waste site clean given the high level of community interest and involvement in many projects and the expectations of State involvement and oversight by both the general public and elected officials. Third, we are not sure how we could strike an appropriate balance between the level of detail, and precriptiveness, of the new regulations and still allow the flexibility that we feel is necessary to continue to effectively implement the site remediation program in this State.

Issue 1: Costs of transitioning to, and subsequently operating, an LSP-type program are not justified given the benefits that would come from migrating to this new model

In order to do a preliminary cost-benefit analysis of the adoption of an LSP approach in Rhode Island, DEM estimated the minimum costs expected to develop and implement such a program. Transition costs would primarily be borne by DEM with respect to refining and supplementing the site remediation regulations. Based on our initial estimate of that level of effort, we believe that three experienced staff members would have to be assigned full-time to this project for a period of two years. In salary costs, this would total approximately \$400,000 and would also result in a thirty-five percent decrease in program productivity during that transition period. The decrease in productivity comes from taking these experienced staff people and assigning them regulatory and policy development work in place of project management duties. Some of this decrease in productivity could be overcome by using consultants to assist in the regulatory development or site review work, but that would likely add to the transition cost.

In addition, some governing body, or Board, would have to be created to develop and oversee the licensing process. This could be a unit within DEM or an independent agency. We expect it would take a minimum of one year to develop a process, develop and promulgate regulations, and get ready for the initial round of license applications. We anticipate that this process would require 2 full-time equivalents (FTEs) at a cost of \$200,000 per year. This estimate is based on FY2003 budget request for the Rhode Island Board of Design Professionals, which totaled almost \$400,000 for four FTEs.

An additional cost to operate the program would be from the auditing function. Either DEM or an independent licensing organization, or both could conduct project auditing. The costs for auditing are presently undefined, but a strong auditing and enforcement program was identified as a MUST by both DEM staff and external stakeholders. Costs will be directly proportionate to the comprehensiveness of the auditing program and may be somewhat offset by the decrease in direct project management by DEM staff as the LSP program was established.

Most licensing programs offset their expenses through fees. DEM examined the fee structure of the Massachusetts LSP program. In Massachusetts, an applicant is assessed a \$245 application fee. If the application is accepted, the applicant is then charged a \$275 fee to take the exam. Applicants who pass the exam become a Licensed Site Professional for a three-year period. Subsequent three-year renewals of the license are subject to a \$100 fee.

We have estimated a minimal transition cost of \$500,000 and an annual operating cost of at least \$200,000 for a Rhode Island LSP program, absent the auditing function. Using the Massachusetts fee schedule, in order for the program to break even we estimate the State would have to license approximately 1000 consultants. We estimate that approximately 50-100

consultants currently do site remediation work in the State and do not believe that the program would be financially sustainable.

We believe that the most cost-effective approach would be to invest in additional staff for the program, coupled with further regulatory reform and the establishment of specific budgetary performance measures on timeliness and management of the caseload.

Based on our evaluation, an additional three to four scientists or engineers in the site remediation program would eliminate the backlog of sites within two to three years and enable DEM to respond to future sites more effectively. The cost of this addition would be approximately \$250,000 per year.

Costs in the program could be offset in two ways. First, DEM expects significant new federal funding as a result of the enactment of federal Brownfields legislation in 2002. Rhode Island is eligible for up to one million dollars in new funding which should be available by June 2003. Since the application process is just beginning, it is unclear exactly how much new funding Rhode Island will get. However, based on recently released grant guidance, the funds can be used for supplemental staff to work on sites being investigated and cleaned up under State site remediation authorities.

In addition to new federal money, DEM believes that the program should also be supplemented with fees. Currently, the only fee assessed is \$1000 fee for the Remedial Action Work Plan. This fee does not cover the cost of reviewing and overseeing the investigation and clean up of most sites, meaning that State tax dollars are subsidizing the work of some responsible parties. In addition, in 2002 DEM established a fee on the generation of hazardous waste to stabilize the finances of the current program.

As part of a further regulatory review of the site remediation program, we would propose to review the fee structure with a goal of holding responsible parties accountable for all costs of the clean up, including the costs of State staff regulating their activities. Time intensive reviews of site-specific Method II and Method III risk assessment would be assessed higher fees.

Also, the fee structure, and regulatory structure, could encourage more permanent and protective remedies. Responsible Parties proposing the removal of contaminated soil could be subject to limited oversight, perhaps under to a simple registration process, with minimal, or no, fees. Parties proposing containment, with long-term controls and oversight duties, may be assessed a separate property stewardship fee to compensate for the future risks and responsibilities from this approach.

Obviously, a more comprehensive fee schedule could not present any additional barriers to redevelopment or reuse of Brownfields. This would interfere with the goal of the program. Bona Fide Prospective Purchasers could be exempted from fees provided there is a purchase and sales agreement in place. Responsible parties preparing their properties for reuse could take advantage of reduced fees if they sell, or redevelop, their property in the near future.

Finally, DEM proposes to use our Technical Assistance Contract (TAC) to supplement staff on project reviews and management. Parties seeking an expedited, and predictable, timeline could negotiate a time schedule and fee assessment to either pay for the TAC to conduct a preliminary review of their project or for the TAC to take on other sites while an experienced DEM project manager focuses on expediting their project.

With this additional staff, we would also undertake further regulatory reform to expedite the overall process and improve effectiveness. There are two areas that are “flash points” causing friction, disputes and delays in site reviews. First, in order to provide more independence on soil removals, we would improve our policy, guidance and regulations on sampling to confirm the clean up is complete. We also will provide additional guidance and regulation on the investigation of groundwater classified as GB, typically underlying our urban communities. Any regulatory reform would be subject of an open stakeholder discussion, most likely building off the program streamlining efforts undertaken by DEM in 2002. We would consider other areas of improvement raised in that forum.

Issue 2: We do not think that a licensed, third party approach is appropriate for waste site clean up given the high level of community interest and involvement in many projects and the expectations of State involvement and oversight by both the general public and elected officials.

It has been our experience that parties working within the site remediation program want finality from the state, either in the form of a Letter of Compliance, a Brownfields Settlement Agreement, or a letter requiring No Further Action. Some programs even produce letters, on request, that confirm that situations are not jurisdictional under DEM rules. Under a licensed third-party approach, finality would come from that party, not the State. Our experience in delegating the design and installation of ISDS systems has not been positive. Citizens expect the State to be there to ensure these activities are done correctly and have not been satisfied with a process that relies mainly on independent professionals.

Finality has different meanings for different parties. For consultants, finality typically involves formal validation of their approach, often at several stages throughout the process, to verify the project is on track for compliance and no new issues will be raised in the future. In a third party approach, the consultant would run the site without validation from the State and would run the risk of redoing some, or all, of the work as a result of an audit. Discussions on streamlining the regulatory process for sites contaminated with arsenic and sites presenting a marginal risk to the public initially included proposals for more independent decision-making by consultants. This approach was dropped from those discussions because consultants showed little interest in actually making final decisions on these sites.

For property owners, finality is an end to their liability for clean up costs. Currently, they get this finality, with limited reopeners, from the State in writing at the end of a project. Under a licensed third party approach, the LSP determines when the project is compliant. If an audit finds otherwise, the property owner is responsible for corrective measures and it is their option to recover the costs against the LSP or their insurance carrier. This would be a significant financial hardship, and exposure to future financial risks, for some property owners.

For citizens, finality is a complete and safe remedy. It has been our experience that a relatively small group of citizens can drive a major public review of sites in their community. The expectation of the public and their elected officials is for DEM to oversee the clean ups in their communities and ensure their safety. Quite honestly, DEM does not feel that we will be able to delegate sites that raise community concern, even if the contamination appears to present minimal risk and there are only a few concerned citizens. We will, and arguably should, be drawn into these projects in great detail. Given these expectations, the benefit of moving to a third party program is minimal.

Issue 3: We are not sure how we could strike an appropriate balance between the level of detail, and prescriptiveness, of the new regulations and still allow the flexibility that we feel is necessary to continue to effectively implement the site remediation program in Rhode Island.

Traditionally, Rhode Islanders have expected a flexible program, with good guidelines but relatively accessible staff to deal with complications or site-specific issues. Regulatory programs that have met these criteria have gotten strong feedback on customer satisfaction. Unfortunately, programs that set rigid, inflexible guidelines, with the intention of ensuring consistency and protectiveness, often come to gridlock because they cannot respond to unforeseen circumstances. The rigidity of the Massachusetts Contingency Plan was a major issue identified by stakeholders as a drawback of the LSP program. In the current Rhode Island regulations, there are areas that need tightening, but our opinion is that moving to a third-party approach would involve locking in a very stringent process to ensure compliance. We are very concerned about this, in that it would remove flexibility, which is a major benefit (as identified by stakeholders) of our existing approach. We are not sure whether it is even possible to maintain an appropriate level of regulatory flexibility and still provide enough guidance and direction for strong decision-making and adequate protection from liability for licensed third party professionals at virtually any type of site.

In summary, we do not believe the Rhode Island site remediation program should be converted to the third-party licensed professional approach adopted by Connecticut and Massachusetts. Our recommendation is based on three major points; it is not cost-effective, it would not satisfy public expectations for oversight of clean up projects, and we do not know how we could strike an appropriate balance between the level of detail, and prescriptiveness, of the new regulations and still allow the flexibility that we feel is necessary to continue to effectively implement the program in this State. We recommend that the State authorize the addition of 3-4 new staff to the program. Once new staff are added, the program will undertake further regulatory reform to improve the process and develop specific budgetary performance measures to track timeliness and management of the caseload.

Appendix A

Rhode Island Department of Environmental Management
Survey on Potential Privatized Site Remediation Program
November 2002

Pursuant to RIGL 23-19.14-5.1(b), the Rhode Island Department of Environmental Management is studying the potential development of a privatized site remediation program, potentially similar to the Licensed Environmental Professional program in Connecticut and the Licensed Site Professional program in Massachusetts. This survey solicits initial feedback from Rhode Island stakeholders on the privatized approach to site remediation, hereafter referred to as an LSP approach. For those with experience in either the Massachusetts or Connecticut program or who would like to comment on the pros and cons of Rhode Island's current program, please also fill out page 2. Thank you for your comments.

1. What should be the prime objectives in considering an LSP approach in Rhode Island?
2. Do you feel there are any alternative models, other than the LSP approach, which should be considered to meet those objectives?
3. What benefits do you see from adopting an LSP approach in Rhode Island?
4. What potential problems would you see from adopting an LSP approach in Rhode Island?
5. Is there any type of site that you feel an LSP approach would be most appropriate for?
6. Is there any type of site that you feel an LSP approach would be inappropriate for?
7. As a stakeholder to the Rhode Island site remediation program, how would you best characterize your role (choose one)?

Environmental Consultant
 Environmental Attorney
 Business Manager/Owner
 Other (Explain)

Other Government Partner
 Environmental Interest Group/NGO
 Real Estate Developer
 Unaffiliated Citizen

Please return completed surveys to either Traci Lima (tlima@dem.state.ri.us) or Thomas Getz (tgetz@dem.state.ri.us) at the DEM Director's Office by **December 6, 2002** by e-mail, mail, or fax (222-6802). Responses will be kept confidential on request and will only be reported in aggregate. An open presentation of the results and continued discussion will be held from 10:00-12:00 on **December 17, 2002** in Conference Room A on the 4th Floor at the DEM Offices at 235 Promenade Street in Providence.

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Supplemental Section for those with experience with either the Massachusetts or Connecticut Privatized Programs

<i>Connecticut Licensed Environmental Professional Program</i>	
<i>Pros</i>	<i>Cons</i>

<i>Massachusetts Licensed Site Professional Program</i>	
<i>Pros</i>	<i>Cons</i>

<i>Current Rhode Island Site Remediation Program</i>	
<i>Pros</i>	<i>Cons</i>