

May 1, 2011

Margaret Shaw, Esq.  
Bureau of Waste Site Cleanup  
Massachusetts Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

RE: Massachusetts LSP Association Comments  
Guidance on Implementing Activity and Use Limitation (Policy #WSC 11-300)  
December 2010 Public Review Draft

Dear Ms. Shaw:

The LSP Association, a professional non-profit association of over 900 LSPs and other environmental professionals, respectfully submits the following comments and suggestions related to the Public Review Draft Guidance on Implementing Activity and Use Limitations (AULs) published electronically by the Massachusetts Department of Environmental Protection (MassDEP) and dated December 2010. This draft will hereinafter be referenced as the Revised Draft.

The LSP Association (LSPA) recognizes the significant effort that MassDEP has put into a streamlined and current Revised Draft. We find the following revisions particularly helpful:

- Relegation of the little-used Grant of Environmental Restriction to Appendix J, allowing for greater focus in the main body of the document on Notice of Activity and Use Limitations;
- Incorporation of Appendix D, which provides much needed clarification of the signatory authority;
- Clarification of the steps to follow and requirements for AULs on registered vs. unregistered land; and
- The combination of forms 113 and 113A and revision of the AUL checklist.

The LSPA's key concerns and detailed comments are organized in two distinct categories:

A) Those that represent updates of the 1999 guidance to ensure that it is consistent with the current MCP and to clarify the current practice of preparing, processing, recording, and maintaining AULs, and

B) Those addressing draft revisions that raise more complex questions and broader issues that go beyond the current MCP, and which require further consideration by all stakeholders.

Our key concerns are described below and more detailed comments are provided in Attachment I.

### **A) Updating Guidance to Clarify and Ensure Currency**

- Overlapping AULs: The revised draft should include discussion and provide guidance on cases where a new release requires implementation of an AUL overlapping or coincident with an AUL from a previous release.
- Case Studies: Case studies such as those that appear in the current Guidance should be retained in the revised draft. Examples dealing with issues arising from the current regulations would be helpful as part of this revised draft.
- Greater clarity is needed concerning certain issues, such as:
  - What response actions must be completed (and where) before an AUL can be completed.
  - The need for clean utility corridors despite implementation of an AUL.
  - The standard assumptions supporting the construction worker exposure period.
  - Certain administrative procedures.

### **B) Identifying Issues for Future Discussion and Thorough Vetting**

It is our understanding from recent comments by MassDEP officials that the agency will defer developing and/or revising guidance on situational and/or still-evolving issues until additional stakeholder input can be solicited and thoroughly vetted. The LSPA strongly supports convening a workgroup drawn from stakeholders, including MassDEP, practicing LSPs, environmental attorneys and the regulated community.

We consider the following issues to go beyond what is provided for by the existing regulations. Nonetheless, we have commented on these issues in anticipation of future consideration and debate.

- Planned Use: The Revised Draft redefines current use under the MCP and risk assessment process to include planned use. This blurs the bright line between current and future use, and does not account for the possible stages and variations of what constitutes planned use.
- Foreseeable Future Use: The Revised Draft allows residential use to be eliminated as a foreseeable future use where the property is wetlands. This same strategy should be applied to properties where other existing regulatory institutional controls would prohibit future residential development, such as port areas, coastal zones, deeded open space, permanent zoning restrictions, and others.
- The Gardening Pathway: The Revised Draft does not present a clear new approach to addressing the gardening pathway.
- Vapor Intrusion Issues: The Revised Draft leaves some of these most significant AUL-related issues unaddressed.
- AULs at Sediment Sites: The Revised Draft does not fully address new AUL applications, such as those needed at sediment sites.

## **Conclusion**

MassDEP's Public Review Draft Guidance on Implementing AULs provides much needed clarity in several areas and serves to refresh the 1999 document to bring it into better alignment with the MCP. The LSPA supports finalizing this document and making it available as soon as possible to the regulated community.

The Revised Draft document, however, also leaves unaddressed several major AUL-related areas that will require a more thorough review prior to developing comprehensive guidance. We have presented an initial list of the issues the LSPA feels are most critical. We look forward to working with MassDEP on these important areas in the near future.

Thank you for the opportunity to comment on the Public Review Draft AUL Guidance.

Sincerely,

**LSP Association**

James S. Young  
President

Wendy L. Rundle  
Executive Director

Cc: Janine Commerford, Assistant Commissioner, BWSC

Attachment I: Detailed Comments by Section

## **Attachment to LSP Association Cover Letter**

### **Attachment I: Detailed Comments by Section Guidance on Implementing Activity and Use Limitation (Policy #WSC 11-300) December 2010 Public Review Draft**

The LSP Association has organized its detailed comments in two distinct categories:

A) Those that represent updates of the 1999 guidance to ensure that it is consistent with the current MCP and to clarify the current practice of preparing, processing, recording, and maintaining AULs, and

B) Those addressing draft revisions that raise more complex questions and broader issues that go beyond the current MCP, and which require further consideration by all stakeholders.

Comments in both categories are provided below.

#### **A) Updating Guidance to Clarify and Ensure Currency**

##### **General Comments**

1. The Revised Draft should address overlapping AULs and AULs placed on a single property to address two different releases. These situations occur and are frequently the result of releases separated by time with different owners, different LSPs, different constituents of concern and different PRPs. We recommend a Case Study to illustrate a second release/AUL on top of a site with an existing AUL.
2. The Revised Draft interchangeably uses the terms “parcel” and “property;” we recommend either defining the terms to further clarify the differences or choosing to use just one.
3. In Sections 1 and 2, the meanings of the terms “unforeseen” and “unpredictable” are vague as they are used in discussing “reasonably foreseeable uses.”
4. The case studies in the existing guidance should not be eliminated. A review of the existing case studies can be undertaken to see if specific examples need to be revised.

##### **Section 1: Introduction**

- 1.4 AUL, §§ 1.4 & 1.5. These sections indicate that an AUL should not be implemented until all response actions necessary to achieve “No Significant Risk” have been completed. Please clarify that in some circumstances, such as when discrete soil areas or different media are affected by contaminants of concern, only those response actions relating to

the area/medium to which the AUL will apply need to be completed prior to implementing the AUL. In such cases, a partial RAO may be appropriate.

- 1.6 AUL, § 1.6. The last two paragraphs of this section relate to available mechanisms for notifying people of an AUL. These do not relate to the topic of Section 1.6, which is entitled “Use of Deed Notices, Restrictions, or Other Measures that are Not AULs.” We recommend re-locating these and also clarifying that these public notice measures are not required by the MCP but should be considered by the PRP and may be appropriate in certain circumstances.

## **Section 2: AULs and Risk Characterization**

- 2.5. AUL, §§ 2.5.3 & 2.6.1. In these sections, MassDEP is setting forth the principle that an AUL can, in many circumstances, be used to achieve closure when the risk assessment shows significant risk. We suggest clarifying that further remediation is also an option, as follows:

§ 2.5.3. Please consider revising the third sentence to read: “When using a Method 3 risk characterization, an AUL (or remediation) is required any time No Significant Risk is not demonstrated ...”

§ 2.6.1. Please consider revising the 4th sentence of the third paragraph to read: “Whenever the Exposure Point Concentrations are equal to or less than the applicable S-2 (Method 1 or 2) standards, but exceed the S-1 standards, an AUL (or remediation) is required.”

- 2.7 AUL, § 2.7.2. This section should clearly note that for existing utilities in which a Significant Risk to a utility worker has been identified, a “clean utility corridor” shall be established. For foreseeable future use that includes a utility corridor, it should be noted that emergency utility repairs (including electric & gas service connections and equipment) cannot be restricted under the AUL. AUL requirements should include a statement that it is the “owner’s” responsibility to post an AUL warning sign (language as prescribed by MassDEP) along utility easements. Because utility corridors are often coincident with rail and highway rights of way, the guidance should suggest a mechanism for notice to utility easement interest holders for property that would have been subject to an AUL were it not for being an ROW.

While it is acknowledged that current practice typically conforms with the concept that an existing utility corridor that might be subject to emergency repair must present No Significant Risk to a utility worker (i.e., risk to a utility worker cannot be eliminated with an AUL as a ‘future’ use), the requirement to notify record holders such as utility-easement holders suggests that this was not the original intent of guidance or regulation. If current practice is to remain consistent with the concept that AULs cannot be used to eliminate utility worker risk, then it would seem logical to eliminate the requirement to notify utility easement holders of the AUL.

AUL, § 2.7.3. In the situation where a human health risk assessment indicates that the construction worker scenario demonstrates No Significant Risk, thus eliminating the need for an AUL to reference the requirement of a Health and Safety Plan (HASP) to address risk, it would be worthwhile to include the assumed period of time that MassDEP guidance provides for the construction worker scenario (e.g., six months). This may assist practitioners in completing human health risk assessments and provide clearer information about the need (or lack thereof) for HASPs in AULs.

### **Section 3: AUL Types and Elements**

- 3.5. AUL, § 3.5. It would be helpful if there were more details concerning Exhibit A-2 in this section. We understand the difference between registered and unregistered land; however, we suggest a clearer description of Exhibit A-1, and especially Exhibit A-2, in this section.

Exhibit A-2 is not included in Appendix A: Table of Requirements for AUL Submittals and the Flow Chart in Exhibit B.

### **Section 4: Preparing an AUL**

- 4.3. AUL, § 4.3.2. The inclusion of “(Exhibit A)” and “(Exhibits A-1 and A-2)” in the titles of these sections are confusing because the sections deal with survey plans, and Exhibits A and A-1 are written legal descriptions. As noted in the guidance, the survey plans are independently filed with the local Registry of Deeds and referenced in the appropriate “Whereas” clause (and not attached as Exhibits A or A-1). We recommend removing the parenthetical references to exhibits in the titles of these sections.

### **Section 5: AUL Recording and Processing Requirements**

- 5.2. AUL, § 5.2, paragraph 2. This paragraph indicates that an RAO that relies on an AUL is not effective until the MassDEP receives a Registry-certified copy of the AUL. This is not consistent with 310 CMR 40.1070(3), which states clearly that an AUL is effective upon filing at the Registry of Deeds. As such this should be struck from the Guidance.
- 5.3. AUL, § 5.3. This section discusses notice to record interest holders. Please consider providing guidance here on how to handle a number of circumstances that we believe to be fairly common, including:
- a. Please clarify that a newspaper notice is appropriate when it is not possible or is nearly impossible to identify the current beneficiaries of a right granted in a deed. This may occur when an ancient deed grants rights to a named individual and his or her heirs, and these heirs cannot now be identified.
  - b. Please clarify the content of the written “AUL Notice” to easement holders, particularly in the case where the subject easement carries subsurface utilities. We recommend that the notice include:

1. RTN

2. Identification and concentration of contaminants of concern (COC)
  3. Description of impacted media and depth
- 5.4. AUL, § 5.4. In addition to Confirmatory AULs already noted in this section, it may be worthwhile to also point out public notice requirements for AUL Amendments and Terminations, if different.

#### **Appendix D**

Appendix D states that a portion of an LLC's Certificate of Organization should be included as an exhibit to document the signatory's authority to execute the AUL. A Certificate of Good Standing obtained from the Secretary of State's Office should also be an acceptable exhibit for this purpose.

Perhaps it is worth explaining that when an AUL requires the signatures of a multi-party ownership group such as a Board of Selectman, not all signatures are required as long as a quorum is met.

### **B) Identifying Issues for Future Discussion and Thorough Vetting**

#### **Section 2: AULs and Risk Characterization**

- 2.3 AUL, § 2.3.1. The guidance states that "*Planned uses* are considered current uses ...." The 1999 AUL guidance stated on page 7: "Planned uses are certainly "foreseeable" and should be explicitly evaluated in the risk characterization."

While we agree that planned uses are important, we do not understand why a future planned use - which may only be a concept in the landowner's mind without financial backing or necessary permitting - needs to be considered as a current use. Perhaps some planned uses are sufficiently ripe to be considered current uses, such as when a building permit has been issued.

Current use should remain as described in the existing guidance as "actually occurring" or "probable and consistent with surrounding land uses." The current use of a site should be limited to the existing conditions at the site at the time the risk characterization is completed, and future use, including any planned future use, should be potentially subject to AULs. Planned uses should be considered foreseeable future uses.

- 2.6 AUL, § 2.6.2. The Revised Draft leaves some of these most significant AUL-related issues unaddressed. The LSPA recommends that specific AUL language and case studies in the final Vapor Intrusion Guidance document should also be included in the Revised Draft AUL Guidance document.

AUL, § 2.6.3. The Revised Draft does not fully address new AUL issues and procedures such as those needed at sediment sites.

AUL, § 2.6.3. There should be a case study on application of an AUL to subtidal and intertidal sediment.

AUL, § 2.6.3. MassDEP appears to advocate for flexibility in site-specific determinations as to whether AULs are appropriate at sites where residual sediment contamination exists beneath subaqueous caps. MassDEP correctly notes that federal and state riparian rights preempt and effectively negate a primary purpose of AULs - to control changes in activities and uses that could present unacceptable exposures to residual contamination - since fishing, swimming, navigation, and other recreational activities and uses are protected. The institution of AULs within wetlands and waterways poses many legal complications and offers no benefit regarding ecological exposures, facts that MassDEP acknowledges.

Local, state, and federal waterway/wetland statutes and regulations already effectively and permanently control any changes in current or future activities and uses within the Commonwealth's wetlands and waterways. The rigorous scrutiny afforded by the public process for all such applications by local, state, and federal agencies has clearly established the fact that a protective, enforceable, and transparent regulatory alternative to AULs is in full force and effect under the existing waterway/wetland regulations. The implementation of AULs for this purpose poses legal and administrative complications without improving the protection, enforceability, transparency, and/or certainty of subaqueous cap remedies already provided under the wetland and waterway statutes and regulations.

2. 7 AUL, § 2.7.1. The Revised Draft allows residential use to be eliminated as a foreseeable future use where the property is wetlands. This same strategy should be applied to properties where other existing regulatory institutional controls would prohibit future residential development, such as port areas, coastal zones, deeded open space, permanent zoning restrictions, and others.

AUL, § 2.7.1 The Revised Draft does not present a clear new approach to addressing the gardening pathway. In addition, a revised definition of gardening is needed. We await MassDEP's draft Technical Update. Similar reconciliation will be required of the new Vapor Intrusion Guidance, and (further in the future) the LNAPL Policy.

I have agreed to provide an attorney's perspective on the department's draft revised aul guidance.

And as an attorney, i always want to start with the statutory and regulatory framework that governs an administrative agency's pronouncements.

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The key provision of chapter 21e for current purposes is section 3a, which indicates that we have a permanent solution at a disposal site when we have achieved a condition of no significant risk considering the current and reasonably foreseeable future uses of the site and the surrounding environment. Under section 6 of the statute, auls are available to eliminate or restrict site uses or activities that are inconsistent with a condition of no significant risk, or a condition of no substantial hazard in the temporary solution context.

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Pursuant to the 1998 brownfields statute, dep must audit all sites with auls. And the mcp provides (section 40.0020) that property owners/operators and prps must notify the department of uses that are inconsistent with auls that could increase exposure unless there has been an appropriate lsp evaluation and/or additional response actions as necessary to maintain a condition of nsr. Noncompliance with these provisions can lead to enforcement action.

General laws chapter 21a, § 16 provides for a civil penalty of up to \$25,000 per day per violation for failing to comply with an aul. And, under chapter 21e, §§ 3a and 5c, if you violate an aul you lose the protection of a covenant not to sue and the liability protection of eligible person status under the brownfields provisions. For all of these reasons, auls need to be approached carefully and taken very seriously.

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The draft revised aul guidance contains some proposed revisions to the current guidance document, issued in 1999, with respect to both current site use and foreseeable future site use. These revisions involve sections 2.3.1 and 2.3.2 of the current and revised guidance dealing with auls and risk characterization.

Under the current guidance, “current use” includes activities that are “actually occurring” or “probable and consistent with surrounding land uses.” And under the mcp, the department’s risk assessment guidance, and the current aul guidance (although the last is a bit confusing on the point), once an aul is effective, it helps define the current site use. In other words, you can implement an aul listing as an inconsistent site activity or restricting an activity that would otherwise be considered probable and consistent with the disposal site and surrounding land uses, and then submit a risk assessment that relies on that aul in supporting a determination of nsr.

In addition, under the current aul guidance, a planned use is considered a reasonably foreseeable future use, not a current use. And so, of course, auls are now available to restrict planned uses.

In discussing how you determine a site’s current uses, the current guidance provides a couple of examples, the relevance of which will become apparent when i discuss the proposed guidance revisions. One example involves an undeveloped lot adjacent to a residential neighborhood and indicates that a probable current use of the site is recreation (e.g., an “impromptu ballfield”). The second example involves an inactive industrial facility in or near a residential area, for which you are advised to consider trespassing as a current use.

There is no discussion of gardening in the current aul guidance, although the risk assessment guidance treats it as a current activity for any residential use unless an aul says otherwise. Under the mcp, on the other hand, gardening should be considered a current use only if it is actually ongoing or “to be expected” at a residential site.

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The draft revised aul guidance says that planned uses will now be considered current uses, rather than foreseeable future uses.

Undeveloped property and inactive industrial property are to be evaluated as if “occupied and in use.” This language is confusing, however. It does not seem to mean

that you must treat undeveloped property as developed or an inactive industrial facility as active, because the examples i mentioned previously are unchanged. The examples still indicate that the undeveloped lot adjacent to a residential neighborhood should be viewed as an impromptu ballfield and the inactive industrial facility should be considered a site of trespassing.

Under the draft revised guidance, gardening is now to be considered a “current use” for all developed residential properties except where space limitations preclude, although as you’ve heard the department’s position on this issue may be undergoing further change.

And it appears based on the deletion of certain language that auls may no longer be available to define the current site uses/activities. It is not entirely clear to me that this change is intended. But

If it is, then the department seems to be suggesting that you should no longer eliminate or restrict with an aul an activity that is deemed probable and consistent with disposal site and surrounding uses (such as gardening on residential property) even though it is not ongoing. This would also mean that the department does not want you to restrict a planned use (e.g., a future residential use) by means of an aul so that any restrictions you depend on for your condition of nsr would have to appear in your plans and be part of your planned use, rather than being addressed in an aul. It’s not clear to me that this change, if it is intended, really serves anyone’s purposes, including the department’s, since future owners may be much less focused on the details of a prior owner’s plans than on the terms of an aul.

In any event, we appear to have some blurring of the lines here between current use and foreseeable future use, with some language that’s unclear and hard to apply. We also appear to have a bit of a “slippery slope,” with dep suggesting that what are now at most foreseeable future uses that can be addressed with auls are to be viewed as current uses that cannot be addressed with auls.

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The draft revised guidance also proposes some changes to the language of the current guidance with respect to “foreseeable future use.” The current guidance provides that, “as a *starting point*, the regulations presume unrestricted use,” but “the mcp affords property owners wide latitude in identifying the foreseeable use of their property, considered within the context of the surrounding community.”

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Thus, “the reasonably foreseeable use(s) of property [are] *determined by the owner*” and “the universe of future uses of a site may be narrowed, usually based upon a specific planned use of the property, a belief that the current use is likely to continue into the future or some other information. Past use and the land use of the surrounding area are usually good indicators of reasonably foreseeable use.”

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The current guidance contains an example of a vacant former manufacturing facility abutting an industrial area and several homes, where there is no specific redevelopment plan for the site. The guidance indicates that one should “consider the uses allowed by current zoning or the building’s former use, as well as development consistent with the character of the surrounding neighborhood” in determining the reasonably foreseeable uses of the site.

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As you can see from this next slide, all of the language in the current guidance narrowing the universe of potential future site uses that must be considered is deleted. The references to property owners having “wide latitude” and to foreseeable uses “determined by the owner” have been deleted, as has the discussion of narrowing the universe of future uses based on various factors.

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In addition, *new* language is added, indicating that the reasonably foreseeable uses now include “any possible activity or use that could occur in the future” unless eliminated through an aul. An example indicates that at an active manufacturing plant, the “current and reasonably foreseeable future use of the site is identified as manufacturing” and yet an “aul prohibits all activities and uses that would result in greater exposure.”

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Similarly, there is new language indicating that “when a method 3 risk characterization determines nsr for exposure scenarios like recreation [or construction work] as the most sensitive reasonably foreseeable use at the site, all more sensitive scenarios must be prohibited by the aul.”

There is also new language specifically providing that “residential use must be considered a current or reasonably foreseeable [use] at almost all sites.” The only exception appears to be “sites situated in wetlands.”

I know that at least the attorneys in the room will want to evaluate these proposed changes to the guidance and their implications for clients, and may want to consider submitting comments on these proposed revisions to dep.

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There are a couple of additional proposed revisions to section 2 of the guidance worthy of brief comment.

The draft revisions indicate that there are to be no auls requiring maintenance of a fence to eliminate safety risks in connection with permanent solutions.

And there is a new section 2.6.3 regarding auls related to sediment caps, indicating that it may be appropriate for an aul to document the presence of the sediment cap, require its retention, and specify monitoring and maintenance obligations. But auls may *not* restrict access to surface water.

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There are some proposed revisions to section 4 of the guidance that appear designed to address common problems that arise in preparing auls. My principal advice on this score, advice which also appears in the draft revisions, is to involve counsel in the preparation and implementation of auls. These are legal documents, with possible title issues and very detailed registry and/or land court requirements (with significant differences between the two and with both general registry recording requirements and registry-specific requirements).

You've also got very detailed dep requirements, including for instance very specific requirements with respect to the proper signatories to auls and necessary documentation of their signing authority. This is an area that parties and lps have had difficulty with in the past and it cries out for attorney involvement. The revised guidance contains a new section 4.8 and appendix d spelling out these requirements in considerable detail, which is quite helpful. Among the points emphasized are that a ground lessee may not sign an aul, and that an lsp may not sign on behalf of the property owner without first obtaining a power of attorney, which must be recorded in conjunction with the aul.

As if that all were not enough, there are also significant drafting considerations with respect to trying to minimize the need for amendments and enforcement risks. And it may make sense for there to be formal agreements with others holding interests in the subject property documenting their knowledge of and agreement to comply with aul terms.

In short, this is work that necessitates the involvement of lawyers and paralegals.

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Attorneys and lps both will want to help clients weigh various considerations in scoping out and preparing auls. If you restrict the entire parcel, you may decrease the functionality and/or value of the property unnecessarily. On the other hand, there are additional requirements and costs (e.g., one or more additional survey(s)) associated with restricting only portion(s) of a parcel.

There are also options to be considered with respect to the aul language. You want to describe the consistent activities broadly enough so that future amendments/enforcement actions are avoided, if possible. So, e.g., you want to indicate that *any* commercial or industrial use of a site is appropriate, assuming that's true, rather than limiting that description to the specific current use. You also want to take into account any planned construction or reconstruction activities, such as the

expected addition of a structure. But you want to describe *inconsistent* uses and activities as *narrowly* as possible so as not to be overly restrictive (e.g., “no excavation below 3’,” not “no excavation at all”).

With respect to the description of obligations and conditions, you want a clear list of the measures to be undertaken and continued, so as to minimize the risk of future noncompliance. But you don’t want to be so specific that you’re inviting enforcement action or amendments. So, e.g., if you have barriers consisting of both a building foundation and pavement, you don’t necessarily want to specify that the building footprint has to remain the same. And with respect to pavement, you may not want to specify inspection frequency or specific measures to be taken in response to inspection findings, but rather say something more general like “paved areas to be maintained in good condition.” Also, these portions of the aul opinion and the aul form describing the aul obligations/conditions should read identically.

If you want to avoid the risk of an amendment, you need to be in strict compliance with the mcp with your aul terms. I am aware, e.g., of an aul that was filed listing as an inconsistent use using groundwater as a drinking water source even though there was no need for the groundwater to meet drinking water standards to achieve a permanent solution. I am told that this language was added in an effort to be extra protective of human health. But dep nonetheless required an aul amendment deleting this provision because the mcp prohibits the use of auls to restrict the use of groundwater, even though i would argue that really only applies where the restriction would be necessary to achieve a permanent solution.

I have also seen auls that speak in terms of “no risk” rather than “no significant risk,” which obviously goes beyond the prps’ obligations under the law and is not advisable.

Finally, there are strategic considerations with respect to whether to reference existing regulations and/or guidance documents in an aul. On the one hand, that can provide (at least for the moment) both a good amount of detail regarding future obligations and

some comfort that dep will view the aul provisions kindly. On the other hand, both regulations and guidance can change and guidance is only one way to achieve compliance with regulations. So you are perhaps unnecessarily restricting future actions and leaving yourselves vulnerable to the need to amend the aul or even to enforcement action should the regulations/guidance be changed in the future. In general it may be safer to phrase conditions in terms of the future involvement and guidance of an lsp, rather than referencing specific, current regulatory provisions or guidance.

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Sections 5 and 6 of the draft revised guidance address common problems with aul implementation as well as post-implementation issues. As you can see, these sections include a discussion of the different procedures for registered land and the procedures with respect to identifying and notifying record interest holders. The guidance observes that you should use counsel or a title examiner to conduct title searches and identify record interest holders, and emphasizes the need to incorporate auls into future deeds. There is also a helpful new table (table 6-1) on correcting errors in auls, which clarifies the distinctions among confirmatory auls, amendments, and terminations.

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By way of wrap-up, from my perspective we've got a bit of a mixed bag here. We have some helpful additional detail and clarification. But we also have some provisions of real concern that are worthy of consideration and comment, especially with respect to the identification of current and reasonably foreseeable future uses.

I think it would be helpful for dep to form a work group to address some of the outstanding issues with the draft revisions. And i suspect that it would be very helpful to many of us for the work group and the department to develop and reinstate in the guidance case studies addressing some of these issues in a more concrete fashion. The exercise of developing those case studies may also help identify some language to use for the more general concepts that would be clearer and more user friendly.

## Section 2: AULS AND RISK CHARACTERIZATION

### 2.4 Summary of When AULs Are/Are Not Required [310 CMR 40.1012]

*While the MCP carves out some exceptions, an AUL is generally required any time the Exposure Point Concentrations of OHM left on site exceed a level of No Significant Risk for unrestricted use of the site. **Even when such contamination is at depth and therefore no exposure is currently likely**, an AUL is necessary to prevent activities in the future that would result in the uncontrolled excavation of and human exposure to, contaminated soils.*

The depth of contamination requiring an AUL should be clarified. In accordance with 310 CMR 40.1012 (b), an AUL is not required for soil contamination at or below Upper Concentration Limits (UCLs), located greater than 15 feet below ground surface. In addition, 310 CMR 40.0924(2)(b)(4) requires that only 0 – 15 feet below ground surface need be evaluated, under Method 3, for potential future exposure during excavation/building construction. Therefore, in accordance with the MCP, a condition of No Significant Risk (NSR) may not exist for exposure to soil with concentrations below UCLs, located greater than 15 feet below ground surface, and an AUL would not be required.

Section 2.4.2 correctly identifies that an AUL is not required where “OHM remains in soil at levels at or below the UCLs only at a depth greater than 15 feet below the ground surface”. This Section also correctly identifies that “AULs are not required in situations where contamination (at concentrations below the UCLs) is located at a depth greater than 15 feet below the ground surface because future exposure and excavation to that depth is considered unlikely.”

The language in Section 2.4 should be revised to be consistent with the language in Section 2.4.2.

### 2.5 Method 1 [310 CMR 40.0970]

*...By selecting Method 1 to characterize risks at the site, a party accepts the exposure and other assumptions used in the development of the Method 1 Standards, such as the assumption that soil at a residential property is considered S-1 to a depth of 15 feet below grade (**unless under a permanent structure**).*

This language should be expanded. In accordance with 310 CMR 40.0933(9), soil under a permanent structure would not be categorized as S-1 under current conditions. However, if soil beneath a permanent structure exceeds S-1 Method 1 standards, and is located less than 15 feet below ground surface, an AUL would be required to maintain the permanent structure or a comparable barrier, to prevent potential future soil exposure as a result of redevelopment. The presence of a permanent structure does not eliminate the need for an AUL if soil contamination exceeds a level of NSR beneath the structure. Section 2.7.1 of the guidance addresses this.

The current language seems to suggest that soil beneath a permanent structure to a depth of 15 feet below grade does not need to meet S-1 soil standards to achieve a condition of NSR, which is not the case.

### **2.5.3 Method 3 [310 CMR 40.0990]**

*Regardless of the risk characterization method selected, a level of No Significant Risk must exist or be achieved for a site to meet the requirements of a Class A or B RAO. **When using Methods 1 or 2, a level of No Significant Risk can be demonstrated by meeting the applicable soil and groundwater standards.***

This is inaccurate, and should be clarified. NSR is demonstrated by evaluating current and reasonably foreseeable use. “Applicable” soil standards are representative of current site use. For example, the applicable soil categories for a site may be S-2 and S-3 based on current use. If soil EPCs are below S-2 and S-3 standards, but exceed S-1 standards, a condition of NSR has not been demonstrated for hypothetical future residential use, and an AUL would be required restricting future residential use to achieve a Class A or B Response Action Outcome (RAO).

## **Section 4: PREPARING AN AUL**

### **4.1.1 Recorded Land**

*The Registry of Deeds will return the original of the recorded AUL to the property owner with the assigned book and page number. **MassDEP requests that the property owner forward the book and page number to the appropriate MassDEP regional office upon receiving this information.** The property owner should retain the original AUL for his or her records.*

This is not a realistic request where the property owner is not a Responsible Party (RP) or Potentially Responsible Party (PRP), and the owner is not the person submitting the AUL. For example, when a disposal site occupies a portion of an additional property that is not owned by the RP or PRP, the RP or PRP typically takes responsibility for recording the AUL and submitting the AUL to MassDEP as “the person submitting the AUL”, while the owner of the additional property does little more than sign the Notice of AUL and associated MassDEP transmittal form (BWSC113).

In addition, in accordance with the MCP [310 CMR 40.1074(4)], a Certified Registry copy of the AUL must be submitted to MassDEP within 30 days of recording, and the Certified Registry copy identifies the book and page number. The additional request of the property owner to submit the book and page number to the appropriate MassDEP regional office seems unnecessary, especially when the owner of a property is not the person making the submittal.

This request should be deleted from the guidance, or revised to reflect this potential ownership issue and the existing requirement set forth in 310 CMR 40.1074(4).

### **4.3.2 Survey Plan of Area Subject to the AUL (Exhibit A-1 or A-2)**

*Recorded Land. If the land is recorded land, then this survey must be recorded with the plan department of the Registry of Deeds independently of the AUL and before the AUL is recorded. **The recorded plan is then attached to the AUL as Exhibit A-1 and the recording information for this plan must be referenced in the third “Whereas” clause of the AUL before the AUL is recorded.***

## GEI COMMENTS

This is inaccurate. The metes and bounds description of the portion of the parcel subject to the AUL, which can be obtained from the survey plan, is included in Exhibit A-1. A copy of the survey plan is not included in Exhibit A-1. The survey plan is recorded with the Registry of Deeds, and referenced in the Form 1075, 3<sup>rd</sup> whereas clause. Section B in Table 4-1 of the guidance correctly identifies the survey plan recording and referencing process.

This language in Section 4.3.2 should be revised for consistency with Table 4-1 of the guidance.

## **REBA COMMENTS ON MASSDEP'S PROPOSED AUL GUIDANCE REVISIONS**

MassDEP's draft revised AUL Guidance proposes revisions to its current guidance document with respect to the determination of both current and reasonably foreseeable future site uses and activities. While proposed changes to other provisions of the AUL Guidance provide helpful additional detail and clarification, the revisions relating to current and foreseeable future site uses are of considerable concern. Certain of these proposed changes are inconsistent with governing law and would impose improper costs and burdens on Massachusetts property owners. Other changes introduce uncertain and inconsistent language that will be difficult to apply and will lead to unintended results.

### **I. THE PROPOSED CHANGES REGARDING FORESEEABLE FUTURE USES ARE INCONSISTENT WITH THE GOVERNING STATUTORY STANDARD.**

Section 2.3.2 of the Department's current AUL Guidance provides that, "[a]s a starting point, ... the regulations presume unrestricted use," but "[t]he MCP affords property owners wide latitude in identifying the foreseeable use of their property, considered within the context of the surrounding community." Thus, "the reasonably foreseeable use(s) of the property *determined by the owner* and evaluated in the risk assessment must be described in an AUL unless the property will be clean enough for unrestricted use." (Emphasis supplied)

In short, under the current Guidance, "[t]he universe of future uses of a site may be narrowed, usually based upon a specific planned use of the property, a belief that the current use is likely to continue into the future or some other information. ... [P]ast use and the land use of the surrounding area are usually good indicators of reasonably foreseeable use." An example indicates that in the case of a vacant former manufacturing facility abutting an industrial area and several homes, where there is no specific redevelopment plan for the site, one should "consider

the uses allowed by current zoning or the building's former use in the risk characterization, as well as development consistent with the character of the surrounding neighborhood.”

The existing Guidance constitutes the Department's current, official interpretation of the MCP. The Guidance makes it clear that current zoning and current and historic land use at the site and in the vicinity all are relevant factors permitting a landowner to narrow the universe of potential future uses to those that are reasonably foreseeable for purposes of site and risk assessment, response actions, and implementation of AULs.

The Department's proposed revisions to the AUL Guidance would delete all of the language in Section 2.3.2 about narrowing the universe of potential future site uses. This is inconsistent with the Department's current official interpretation of the MCP. Specifically, the references to property owners having “wide latitude” and to foreseeable uses “determined by the owner” are proposed for deletion, as is the direct discussion of narrowing the universe of future uses based on various factors.

In addition, the proposed revised Guidance includes new language in Section 2.3.2 indicating that the reasonably foreseeable future uses of a site are now to include “any possible activity or use that could occur in the future” unless eliminated through an AUL. An example indicates that at an active manufacturing plant, the “current and reasonably foreseeable future use of the site is identified as manufacturing” and yet an “AUL prohibits all activities and uses that would result in greater exposure.” Similarly, new language proposed for inclusion in Section 2.6.1 of the AUL Guidance indicates that “when a Method 3 risk characterization determines No Significant Risk for exposure scenarios like recreation [or later, “like construction work”] as the most sensitive reasonably foreseeable use at the site, all more sensitive scenarios must be prohibited by the AUL.”

There is also new proposed language (in the new Section 2.7.1 regarding Residential Use) specifically providing that “[r]esidential use must be considered a current or reasonably foreseeable [use] at almost all sites.” The only exception appears to be sites situated in regulated wetlands.

These proposed revisions to the current Guidance would render that Guidance *ultra vires*. The Department’s jurisdiction and authority under Mass. G. L. c. 21E are limited to actions necessary to achieve a “permanent solution” at the site of a release of oil and/or hazardous material. Section 3A of c. 21E defines “permanent solution” as a measure(s) that attain “no significant risk” with respect to “current or reasonably foreseeable future uses of the site and the surrounding environment.” Thus, it is these current and “reasonably foreseeable” future uses (not all possible future uses) that must be evaluated to determine whether site contamination poses any significant risk(s) requiring remediation and/or by AULs prohibiting or restricting site uses incompatible with the level of cleanup conducted.

Consistent with the plain meaning of the words, the term “reasonably foreseeable” is well known in the law as a probabilistic standard, not a standard of mere possibility. In the context of proximate causation, for example, it is clear that what is reasonably foreseeable is equated with “what usually happens and what is likely to happen ....” *Falk v. Finkelman*, 268 Mass. 524, 527 (1929). *See also Zompanti v. Ferguson*, 336 Mass. 167, 169 (1957). Had the Massachusetts General Court, in enacting Chapter 21E, meant to give the Department authority extending to all possible future uses of disposal sites, it would have said so; instead, the legislature undeniably limited that authority to something less than all possible future uses – namely, to those that are reasonably foreseeable, *i.e.*, that are likely, not merely speculatively possible.

The Massachusetts Contingency Plan, 310 CMR 40.0000, (“MCP”) properly interpreted, is consistent with Chapter 21E in this regard. The Department, in citing to the MCP in Section 2.3.2 of its proposed revised AUL Guidance, includes an incomplete quote to 310 CMR 40.0923(3), eliminating the defined terms that incorporate the concept of probability and significantly change the meaning of the partial quote.

The MCP approach to risk characterization actually begins, as set forth in 310 CMR 40.0920, with the identification of Human Receptors and Environmental Receptors, both defined terms. Human Receptor is defined in 310 CMR 40.0006 to mean “a person who is *likely* to be affected by a site, as further described in 310 CMR 40.0900.” (Emphasis supplied) Section 40.0921 further describes Human Receptors as those “who are *likely* to be present at the disposal site or in the surrounding environment, and who, as a result, would *likely* be exposed to oil and/or hazardous material.” (Emphasis supplied) Similarly, Section 40.0922 limits the Environmental Receptors to be considered to those “which are *likely* to be present at the disposal site or in the surrounding environment and which, as a result, would *likely* be exposed to oil and/or hazardous material.” (Emphasis supplied)

The only way to determine what human and environmental receptors will *likely* be present at a disposal site and will *likely* be exposed to oil and/or hazardous material is to determine the current and *likely* (i.e., reasonably foreseeable) future uses of the disposal site. Hence, Section 40.0921(1) indicates that “identification of the Human Receptors shall consider the current and reasonably foreseeable uses of the disposal site and the surrounding environment.” This statutory standard also is repeated in Section 40.0923(1), which indicates that the site activities and uses to be considered in the risk characterization process “shall include all current and reasonably foreseeable uses and activities occurring at the disposal site or in the

surrounding environment which could result in exposure to oil and/or hazardous material by Human or Environmental Receptors” (i.e., by people and other receptors likely to be at the disposal site and likely to be exposed).

If the Department could reasonably equate the statutory standard of “reasonably foreseeable uses” with “all possible uses” – which it may not – then the MCP would have to require identification of *all possible* human and environmental receptors, not just those that are likely to be present and exposed. The statute contains only the one standard, which must be applied to all relevant aspects of the risk characterization process.

The Department misreads 310 CMR 40.0923(3) to the extent that it has determined (inconsistently with its own current official interpretation of the MCP as set forth in the existing AUL Guidance) that this provision allows or requires consideration of all possible future uses, as opposed to simply those that are likely. Given the use of the defined terms “Human or Environmental Receptors” in Section 40.0923(3), that provision is simply indicating that in the process of identifying receptors that are likely to be present and likely to be exposed one must (with noted exceptions) consider any possible use or activity that could lead to greater exposures than those associated with current uses. Thus, the consideration of all possible future uses is merely a backdrop to identifying the likely future site uses and, hence, the likely receptors and exposure pathways. Or, as the current AUL Guidance phrases it, consideration of all possible future site uses is simply a “starting point” for the analysis, not the endpoint.

The bottom line, of course, is that the Department cannot deviate from the governing statutory standard, whether in its regulations or in a guidance document. The General Court already decided this issue and limited the obligations of property owners and operators to

eliminating (whether by response actions or implementation of AULs) significant risk posed by current and reasonably foreseeable future site uses, not all possible site uses.

The proposed revised Guidance on reasonably foreseeable future use has other infirmities as well. On the one hand, it attempts to eliminate the reference to current site zoning as a factor in determining foreseeable future site use, presumably based on the fact that zoning laws can change. At the same time, it excludes from consideration as a future site use the development of regulated wetlands, apparently on the assumption that development in such locations would never be permitted. Of course, just as zoning laws can change, so can wetlands laws. And resource areas can cease, through natural phenomena or sanctioned man-made intervention, to be resource areas. Implementation of the MCP risk assessment and AUL provisions is complicated enough without introducing the uncertainty that necessarily flows from unsupportable distinctions such as the new AUL guidance would introduce.

**II. THE PROPOSED GUIDANCE REGARDING CURRENT SITE USE IS UNCLEAR, INCONSISTENT WITH THE MCP, AND LIKELY TO CAUSE NONCOMPLIANCE.**

Under Section 2.3.1 of the Department's current AUL Guidance, "current use" includes activities that are "actually occurring" or "probable and consistent with surrounding land uses." And under the MCP, the Department's Guidance for Disposal Site Risk Characterization, and the current AUL Guidance, once an AUL is effective, it helps to define the current site uses. In other words, under the current regime one may implement an AUL eliminating or restricting an activity that is not actually ongoing but would otherwise be considered probable and consistent with disposal site and surrounding land uses. One may then submit a risk characterization that relies on that AUL in supporting a determination of no significant risk. In addition, under the current AUL Guidance, a planned use is considered a reasonably foreseeable future use, not a current use, and therefore AULs are available to restrict planned uses.

There is no discussion of gardening in the current AUL Guidance, but the risk assessment guidance treats gardening as a current activity for any residential use unless an AUL indicates otherwise. Under the MCP, however, an activity such as gardening is to be considered a current use only if it is actually ongoing or “may reasonably be expected to occur” at the disposal site. 310 CMR 40.0923(2).

Thus, the Department appears to be suggesting with its proposed revisions to the AUL Guidance that property owners should no longer eliminate or restrict with an AUL a use that, while not ongoing, is deemed probable and consistent with disposal site and surrounding uses (such as gardening on residential property) but which the property owner does not reasonably expect to occur, to use MCP language. However, that right will continue to exist under the MCP and the risk assessment guidance, whatever the AUL guidance indicates. Moreover, the MCP will continue to restrict the concept of current use to activities that are either ongoing or reasonably to be expected at a given site, leaving property owners free to conclude that gardening is not, in fact, likely at a particular residential site even where space limitations do not preclude it. In short, these proposed changes to the AUL Guidance are inconsistent with the MCP and should not be implemented.

These proposed changes also would have the effect of precluding AULs restricting planned uses. However, property owners would remain able to effectuate restrictions of planned uses through the details of their plans, which would then define the parameters of the “planned use” that must be considered a current use for risk characterization purposes. It is unclear how this change would serve the Department’s purposes, since future property owners will likely be far less focused on the details of a prior owner’s plans than on the terms of an AUL and may as a result lack knowledge of important restrictions contained only in plans. Moreover, a planned site

use is, in common understanding, *not* a current use, but rather a reasonably foreseeable future use, and rendering it a current use for regulatory purposes invites noncompliance.

Section 2.3.1 of the draft revised AUL Guidance also contains unclear language regarding the treatment of undeveloped property and inactive industrial property. The draft revisions indicate that these properties should be evaluated as if “occupied and in use.” The normal meaning of those words would suggest that undeveloped property should be viewed as developed and inactive industrial property should be viewed as active industrial property. However, that result does not appear to be intended, since examples indicate that undeveloped property abutting residential properties should be evaluated as an impromptu ball field and that an inactive industrial facility should be evaluated for trespassing. What is presumably intended is for these properties to be assessed in light of activities that can reasonably be expected to occur, given the current state of the properties, and which would result in human or environmental receptor exposure(s). The language should be so clarified.

### **CONCLUSION**

REBA urges the Department not to implement its proposed changes to Section 2.3.2 of the AUL Guidance regarding reasonably foreseeable future site uses. Those proposed changes would exceed the Department’s statutory authority and will be of no legal effect even if adopted.

With respect to the proposed changes to Section 2.3.1 regarding current site use, the revised Guidance blurs the meaning of “current use” and the distinction between it and “reasonably foreseeable future use” in ways that are unclear, counterproductive and, in certain respects, inconsistent with controlling regulatory language. REBA urges the Department to form a workgroup with representatives of external stakeholders to review the intentions behind these proposed changes and develop clearer, more user-friendly language describing the general

REBA COMMENTS

concepts governing current use determinations. REBA further recommends that the workgroup develop concrete case studies demonstrating the application of the AUL Guidance in common scenarios.

May 1, 2011

VIA EMAIL

May 1, 2011

Margaret Shaw  
Massachusetts Department of Environmental Protection  
Bureau of Waste Site Cleanup  
Division of Policy and Program Development  
One Winter Street, 8<sup>th</sup> Floor  
Boston, MA 02108

RE: Comments on Policy #WSC 11-300

Dear Ms. Shaw:

This letter includes National Grid's comments to the Massachusetts Department of Environmental Protection (MassDEP) Bureau of Waste Site Cleanup (BWSC) draft Policy #WSC 11-300 titled "Guidance on Implementing Activity and Use Limitations". As stated in the document, MassDEP is revising this document to "provide updates to the Guidance to make it consistent with the current MCP and to provide clarification on AUL implementation issues with the goal of promoting greater understanding, consistency, and compliance". National Grid is of the opinion that further clarification for some of the revisions is needed and that other revisions are too prescriptive. In addition, as requested by MassDEP, we are providing some additional items that we feel should be addressed in this guidance document.

First, as stated in Section 2.3.2 of the Guidance and in the Massachusetts Contingency Plan, reasonably foreseeable uses and activities should include "any possible activity or use that could occur in the future". The question is what is "reasonably" foreseeable. Section 2.7.1 of the draft guidance states that "Residential use must be considered a current or reasonably foreseeable use at almost all sites. Even an industrial property in an area zoned industrial may be rezoned and redeveloped as condominiums or other types of residences, so residential use must be considered reasonably foreseeable. An exception to this requirement is sites situated in wetlands, as regulatory requirements would prohibit residential development." Therefore, it appears that MassDEP's position is that prohibition of use by local ordinances would not be acceptable for exclusion of a use as reasonably foreseeable but that state or potentially federal regulations would be deemed suitably restrictive for excluding a use as "reasonably foreseeable". If that supposition is true, then could reasonably foreseeable uses on properties or areas whose uses are restricted by other state or federal regulations be assumed by the requirements of those regulations? For instance, if a property is located within a Designated Port Area, which can only be used for water-dependent industrial use pursuant to M.G.L. c. 91 and 310 CMR 9.32(1)(b), then can the reasonably foreseeable uses exclude residential and recreational use since those uses are already restricted by

regulation? A second example would be properties formally dedicated to conservation or recreational use and would not be able to be converted to other uses without a super-majority vote of the General Court pursuant to Article 97 of the Massachusetts Constitution. If MassDEP's position is that residential use should still be evaluated as a reasonably foreseeable use in such circumstances as described above, then it is National Grid's opinion that such a scenario is too prescriptive and that reasonably foreseeable uses should be based on what uses other current regulations allow because an Activity and Use Limitation (AUL) would likely be necessary to restrict such residential use when it would be unlikely such a property would ever be developed for that use. While National Grid appreciates that MassDEP has included the wetland example in this guidance, we believe that further clarification on this issue is necessary for other similar regulations.

Second, Section 2.3.1 of the draft guidance indicates that "*Planned uses* are considered current uses and should be explicitly evaluated in the risk characterization." As stated in this same section of the document, AULs cannot be used to eliminate pathways that are consistent with current uses. Therefore, if a planned use was considered a current use, then an AUL would not be able to be used to restrict some activities associated with such a planned use to eliminate an exposure pathway. It is National Grid's opinion that this revision is too prescriptive. Planned uses should not be considered current uses but reasonably foreseeable uses since plans do change. If planned uses were considered reasonably foreseeable uses, then the responsible party would have greater flexibility to use an AUL to eliminate an exposure pathway rather than perform a more costly remediation that may not be required to reduce any potential risk to a potential planned receptor.

Third, National Grid wants to acknowledge our appreciation for the revision associated with the implementation of AULs on sites where sediments have been contaminated (Section 2.6.3). Due to the lack of policy on this issue, we have not been able to achieve a Permanent Solution on sites where a sediment cap has been implemented because an AUL could not be placed to require the maintenance of said cap. However, National Grid believes further clarification is necessary on the actual implementation of an AUL in some circumstances. Currently, an AUL cannot be recorded for waterways that are not privately owned as there is generally no means to record the AUL for areas that have no property boundaries or other recording information. For instance, for waters of the Commonwealth (i.e., those waterways owned by the state), if a sediment cap is the selected remedy and approved by the appropriate local, state, and federal agencies through the issuance of the applicable licenses, orders, and permits as required by various statutes and regulations, would the AUL be placed on the property that owns the rights to the sediment area that abuts their property? Or, could the obligations of an AUL be placed in the appropriate permits and a Permanent Solution still be achieved without the recording of the AUL? There may be other ways of addressing this particular issue but further clarification in this document is welcomed by National Grid.

Fourth, included in Section 2.7.1 of this document is a revision that states that gardening should be considered a current use at residential properties. We realize that MassDEP has been receiving comments on the assessment of this pathway and that this section may be revised. If that is not the case, then we believe that this section should be addressed at a later date similar to the vapor

intrusion portion of this document. As it currently stands, if gardening is to be considered a current use and the assessment of the pathway should be conducted with MassDEP published uptake factors, then most residential properties that have concentrations of some metals, in particular lead, above background would require remediation even if gardening was not being conducted on said property because an AUL could not restrict a current use. In addition, it is National Grid's opinion that a distinction between single-family residential and restricted residential properties (i.e., condominiums) should be made while addressing this issue since it is more likely gardening would occur on the former type of property than the latter.

Fifth, Section 2.7.2 and 2.7.3 of this guidance addresses utility work and construction as they relate to AULs. The guidance clearly states that emergency utility work should be considered a current use and therefore, an AUL cannot be used to eliminate this potential pathway meaning a site should be safe for utility workers to perform their repairs as necessary. In addition, the guidance states that an AUL should reference whether a Health and Safety Plan (HASP) would be required and what information should be included in a required HASP. However, the guidance also states that the HASP does not have to be part of the AUL. Therefore, it is possible that, although it may be safe for our workers to perform necessary repairs based on a risk assessment, they may not have the information necessary to ensure that is the case. National Grid believes that these sections should be more descriptive and that the information that should be included in a HASP per Section 2.7.3 should be provided to the utility company whether or not a HASP has been attached to the AUL or not. The burden of information gathering to identify the contaminants, contaminant levels, and other information necessary to evaluate risk for our workers should be on the responsible party and not on the utility company. This information could be provided with the notice as described in Section 5.3. In addition, although AULs are not required for public right-of-ways per Section 2.4.3, the utility companies should be informed if contamination is present in and around the utilities to be protective of our workers. Furthermore, based on recent AUL audits, if MassDEP is requiring wording within an AUL that a utility worker is specifically allowed to perform emergency work on a site even though that is a requirement of the regulations and should already be implied, then that requirement should specifically be included in this guidance document.

Sixth, according to the revisions of this guidance document, a fence can no longer be used as part of a Permanent Solution where maintenance of the fence is required to maintain a condition of No Significant Risk. National Grid's opinion is that this should not be changed.

As a summary, AULs are costly and usually require extensive negotiations with property owners. The major revisions to this document dealing with residential use as a current or reasonably foreseeable use at almost all sites and the inclusion of gardening as a current use on all residential properties taken together will drastically increase the number of properties requiring AULs with no realistic decrease in potential risk since many of these properties would be unlikely to change to residential use in the future due to other regulations. The increase in properties requiring AULs would directly lead to more Temporary Solutions due to protracted and irresolvable negotiations with some property owners unwilling to accept AULs, which would then not allow the achievement of a Permanent Solution for these sites.

NATIONALGRID COMMENTS

If you have any questions regarding these comments, please do not hesitate to contact me via telephone at (617) 791-2627 or e-mail: [kenneth.lento@us.ngrid.com](mailto:kenneth.lento@us.ngrid.com). Thank you for your continued cooperation.

Sincerely,

National Grid

A handwritten signature in black ink, appearing to read "Kenneth E. Lento". The signature is fluid and cursive, with a large initial "K" and "L".

Kenneth E. Lento  
Project Manager

c: File

To be delivered via Electronic Mail to: Margaret.Shaw@state.ma.us

May 2, 2011

Ms. Margaret Shaw  
Bureau of Waste Site Cleanup  
Massachusetts Department of Environmental Protection  
One Winter Street  
Boston, MA 02108



One Edgewater Drive  
Norwood  
Massachusetts  
02062  
781-278-3700  
FAX 781-278-5701  
<http://www.gza.com>

RE: GZA Comments  
Guidance on Implementing Activity and Use Limitations (Policy #WSC 11-300)  
December 2010 Revised Draft

Dear Ms. Shaw:

GZA GeoEnvironmental, Inc. (GZA) has prepared the following comments with respect to the December 2010 Revised Draft of the Guidance on Implementing Activity and Use Limitations (Policy #WSC 11-300). GZA supports the Massachusetts Department of Environmental Protection's (MassDEP's) effort to provide guidance with respect to the management of Activity and Use Limitations (AULs) and we acknowledge the progress that the Department has made. However, we suggest the formation of a stakeholder work group including representatives of MassDEP, LSPs, members of the regulated community, environmental attorneys, and other stakeholders as may be deemed appropriate, to assist in finalizing the document. In addition, we offer the following specific comments:

#### Section 1.5 Timing of AUL and RAO

This section indicates that an AUL must be implemented prior to the submittal of the Response Action Outcome (RAO) Statement and that an AUL should not be implemented until all response actions necessary to achieve a level of No Significant Risk (NSR) for current site uses have been completed. This section should be revised to acknowledge that AULs can be (and have been) implemented as part of Temporary Solutions, while response actions are in progress. In certain cases, MassDEP has directed that AULs be implemented as an interim step while response actions were proceeding under a Temporary Solution. The current wording in this section implies that this scenario would not be appropriate. Additionally, this section indicates that barriers associated with AULs must be in place before the AUL is recorded. This contradicts the concept of requiring vapor barriers for possible future construction (which is an element of the vapor intrusion guidance) and would also preclude the use of similar exposure barriers for certain future use scenarios. The language in this section should be modified to accommodate the future installation of exposure barriers.

#### Note to Reviewers Prior to Section 2:

The gardening issue identified in this note is presently a source of substantial confusion and uncertainty. The Department's position on the approach for evaluating gardening under the MCP has not yet been clearly stated. We recommend that some clear guidance be provided.



Section 2.3.1. Current Use

The guidance equates planned uses with current site uses, and indicates that AULs cannot be used to eliminate exposure pathways consistent with current uses. This language should be reconsidered. As currently written, this could be viewed as precluding the use of AULs as part of planned redevelopment, which could restrict such beneficial reuse and place unreasonable burdens on property owners and responsible parties. A common redevelopment scenario for industrial properties entails multi-tenant residential usage, with appropriate use restrictions (e.g., prohibiting gardening) and exposure barriers. That scenario could be precluded by the new guidance, resulting in lost opportunities for the beneficial reuse of brownfield sites.

Section 2.6.3 Sediment

We recommend that the discussion of AULs for sediments be expanded and that a case study be provided that focuses specifically on the sediment issue.

Section 2.7.1 Residential Use

The guidance notes that sites situated in wetlands may be exempted from the requirement to evaluate future residential use (and therefore would not require an AUL). We believe that other regulatory/zoning restrictions could fall under this same scenario and should be incorporated into this section of the guidance. For example, certain areas that are designated as park land or for other specific uses (e.g., marine uses) via specific legislation could be considered analogous to wetland areas with respect to future use.

We appreciate the opportunity to provide our comments on this matter. Please feel free to contact the undersigned at (781) 278-3700 if you would like to discuss these matters further.

Very truly yours,

GZA GEOENVIRONMENTAL, INC.

A handwritten signature in blue ink, appearing to read 'AJR'.

Albert J. Ricciardelli, P.E., LSP  
Senior Principal

A handwritten signature in blue ink, appearing to read 'Lawrence Feldman'.

Lawrence Feldman, LSP  
Senior Principal

A handwritten signature in blue ink, appearing to read 'Charles A. Lindberg'.

Charles A. Lindberg, LSP  
Senior Principal

A handwritten signature in blue ink, appearing to read 'Sara R. Hanna'.

Sara R. Hanna  
Senior Technical Specialist



May 1, 2011

Ms. Margaret Shaw  
Massachusetts Department of Environmental Protection  
Bureau of Waste Site Cleanup  
Division of Policy & Program Development  
One Winter Street, 8th Floor  
Boston, MA 02108

RE: COMMENTS ON DRAFT AUL GUIDANCE DOCUMENT

Dear Ms. Shaw:

Attached to this letter are our detailed comments on the Department's Draft AUL Guidance Document (Policy #WSC 11-300), which was issued for public comment in December, 2010. Normally, MassDEP involves the regulated community in the process of developing the draft documents for significant issues, such as this one. However, in this case, the Department chose not to convene such a work group, which is unfortunate since many of the issues could probably have been resolved at an earlier stage. We hope that the Department will convene such a work group to address the major issues raised by NAIOP and the other commenters.

While the attached comments range in scope from very detailed to fairly broad, there are five main issues that we feel should be highlighted. First is the issue of foreseeable use, which has become a source of some friction between the Department and some members of the regulated community. The practices of the Department and those regulated over the past 18 years notwithstanding, the Department's position that "reasonably foreseeable use" equates to "the most sensitive possible use" is not supported by the provisions of Chapter 21E. In fact, the currently effective AUL Guidance document, which was issued in 1999, explicitly recognizes that "reasonably foreseeable" means just that, stating that, "[t]he MCP affords property owners wide latitude in identifying the foreseeable use of their property, considered within the context of the surrounding community." The Draft Guidance seeks to eliminate this language. While we will not repeat their arguments in detail in this letter, NAIOP agrees with other commenters that it is time to reexamine MassDEP's practice regarding foreseeable use, and to bring the Department's policy in line with the legislative intent.

Second, as we have previously expressed and as further discussed in our comment on the Note to Reviewers below, we are concerned that with the interplay of the Vapor Intrusion Guidance and the AUL Guidance still in flux, it is difficult to assess the combined effect of these two documents, in general, and on Brownfields redevelopment activities, in particular.

COMMENTS ON DRAFT AUL GUIDANCE DOCUMENT

May 1, 2011

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Third, as expressed in more detail in our comments on Section 4.3 of the Guidance, we feel that the Department's requirement for overly specific survey plans as part of an AUL represent an unnecessary effort and expense. We have previously approached the Department about resolving what seems to be a common sense issue, but to no avail. We hope that the Department will reconsider this issue as part of the AUL Guidance discussion.

Finally, as spelled out in our comments on Section 2.7.1, we have some concerns regarding the Department's approach to the gardening pathway, at least as set forth in the draft Guidance. We applaud the Department for reconsidering the need for a quantitative evaluation of the gardening pathway on every site using the Department's very conservative plant uptake factors, and we hope that the forthcoming technical guidance on this matter will be consistent with the early indications of the Department's position. We have previously voiced our concern that the Department might bring all gardening exposure issues under the MCP, even though, in many cases, the relevant contamination is exempt from reporting under the MCP (e.g., lead in soil related to flaking paint from the house on the lot). We understand that DEP is now not planning on moving in that direction. We feel strongly that non-MCP issues should be dealt with outside of the MCP, and should not become *de facto* MCP issues through guidance or otherwise.

Finally, when the "new" MCP was developed in 1992-1993, AULs were rightly touted as an effective tool that would be useful in encouraging the regulatory closure and redevelopment of Brownfield sites, which would otherwise lie fallow and unremediated. In particular, the efficiencies that AULs would bring to the MCP response action process were highlighted and very much encouraged. This concept is essentially missing from the 2010 draft, the focus instead being almost entirely on whether a particular AUL is sufficiently protective. The AUL Guidance should highlight how these two concepts should work together harmoniously. The AUL Guidance should maintain these objectives, and should not make AULs so onerous as to discourage their use and, consequently, the redevelopment of contaminated properties.

We appreciate your considering our comments, and we would be pleased to participate in any work group that might be established to complete the AUL Guidance.

Sincerely,

NAIOP MASSACHUSETTS



David Begelfer  
Chief Executive Officer

Cc: Assistant Commissioner Janine Commerford  
Commissioner Kenneth Kimmell  
Elizabeth J. Callahan, Acting Director, Division of Policy and Program Development  
Paul W. Locke, Director, Division of Response and Remediation

## NAIOP'S DETAILED COMMENTS

### Page i – Note to Reviewers

Among the notes to reviewers included on this introductory page of the draft Guidance is a paragraph concerning sites where vapor intrusion is a concern. We agree that it does not make sense to lay out in detail the provisions of the AUL Guidance that pertain to VI issues until the Vapor Intrusion Guidance itself is in (at least near) final form. That being said, we did want to note that we had a number of significant concerns with the December 2010 revised draft of the Vapor Intrusion Guidance, which were set forth in our March 1, 2011 letter to the Department. Although we do not repeat all of those concerns here, we want to reiterate our concern regarding the broad scope of those sites where AULs apparently were required by the draft Vapor Intrusion Guidance document. In addition, particularly with regard to VI issues, we believe case studies will be useful in terms of providing sample language and addressing commonly encountered situations.

### Page 3, Section 1.5 – Timing of the AUL and Response Action Outcome

The second sentence of the second paragraph begins, “*An AUL describes permanent limitations...*” This language is incorrect, since of course an AUL may be amended or removed at some future date. The sentence should instead read, “*An AUL describes restrictions...*”

### Page 4, Section 1.6 – Use of deed notices, restrictions or other measures that are not AULs

The Guidance adds the clause “*Where an AUL is not otherwise required by the MCP [see 310 CMR 40.1012]*” to the paragraph which previously began: “A property owner may choose to impose a restriction or notice upon his or her property related to residual contamination that is *not* an AUL (i.e., it is not implemented using one of the AUL forms listed at 310 CMR 40.1012).” The addition of this clause is confusing and unnecessary. 310 CMR 40.1012(3) addresses circumstances where AULs are not required, but may be used to provide notice of evidence of residual contamination. That option is addressed at Section 2.4.2. of the Guidance. Section 1.6 provides general background on real estate related notices or restrictions, and the two should be kept separate.

The last sentence of the first paragraph (“*For example, ‘non-AUL’ restrictions..., but the standard for either a Temporary or Permanent Solution has not yet been achieved.*”) is also somewhat confusing, since often the achievement of such a result is dependent upon the filing of an AUL. Moreover, a non-AUL deed notice may also be used to advise future owners of residual contamination even when this contamination does not present a Significant Risk. Accordingly, this last sentence should be revised to read, “*For example, a ‘non-AUL’ restriction or notice may be implemented as an interim measure when the more formal AUL is not yet appropriate, or as a voluntary notification regarding the presence of residual contamination at a site which has nevertheless attained a condition of No Significant Risk without the filing of an AUL.*”

Section 1.6 includes a list of six bulleted items. The third bullet (“*should contain a statement that the restriction or notice is not an AUL implemented pursuant to 310 CMR 40.0000*”) should be deleted. In our experience with non-MCP restrictions concerning the use of real property, this

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language is unnecessary and would add confusion to what are, otherwise, established real estate forms.

The last sentence of Section 1.6 notes that, *“Parties have also elected to post signs to alert site users that an AUL has been implemented at the property. The posting directs site users to consult the AUL for more information about the contamination and the permitted and restricted site activities and uses and related obligations.”* In order to clarify that such posting is not a requirement of the MCP and not included in the standard language of Form 1075, the sentence should be revised to read, *“While not a requirement of the MCP, some parties have also elected to post...”*

### **Pages 4-5, Section 1.7 – Oversight and Maintenance of AULs**

In deleting the reference to the Brownfields Act, the Guidance also excludes information from the former Section 1.6 regarding who has liability for a violation of the AUL. To cure this omission, the following sentence should be added to the end of the paragraph: *“Provided that the AUL was properly implemented and maintained under their term of ownership, former property owners have no liability for violations of an AUL occurring after the property is transferred.”*

### **Page 6, Section 2, Note to Reviewers, last paragraph.**

The validity of considering gardening as a current use at any residential property is addressed in detail in our comments on Section 2.7.1 below.

### **Page 6, Section 2.1 – Introduction**

The Guidance states, in the second paragraph, *“Unless the most sensitive activities and uses have been demonstrated to pose no significant risk, an AUL is required to alert future owners or interested parties that certain uses may not be appropriate to protect human health or the environment for the property, given the level of cleanup achieved.”* The highlighted language does not have a regulatory definition; the Guidance should track the statutory language, which refers to a “reasonably foreseeable use,” i.e., *“Unless a site has been shown to pose No Significant Risk for both current and reasonably foreseeable uses...”*

For clarity, the last sentence in Section 2.1 should be revised to read, *“An AUL itself does not create a condition of No Significant Risk – it is simply a tool that can be used to minimize the chance of an unforeseen change in the use of the property that could result in unacceptable exposure to chemical contaminants, and, in some cases, to lock in certain assumptions in a risk characterization for the site.”*

### **Page 7, Section 2.3.1 – Current Use**

The draft Guidance notes that, *“Activities identified for the current site use must include those that are actually occurring, and those use scenarios that are probable and consistent with surrounding land uses....The risk characterization must incorporate probable uses and those that are consistent with surrounding land uses for the property were it occupied and in use....AULs cannot be used to*

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*eliminate exposure pathways that are consistent with the current uses identified in the risk characterization.*” In short, under the Guidance “current uses” include “probable uses,” and – unlike “planned uses” – those rely, to some extent, on the surrounding land use. Following this logic, one could infer that for an industrial property adjacent to a single-family residential neighborhood (not an uncommon occurrence in Massachusetts), single-family residential use is a “probable use” (i.e., a “current use”), and therefore cannot be addressed through an AUL. Assuming that MassDEP does not want to impose such a constraint, either the language in the Guidance should be revised, or the Guidance should include an example that makes it clear that such a constraint is not the intent. One way to do this would be to revise the fourth example to read, “*If an inactive industrial facility is located in or near a residential area, or an area zoned residential, the facility itself does not have to be considered a residential property, but the “current use” risk characterization needs to consider...*”

The second example of this section states, “*If a residential property is currently occupied by adults only, children playing on-site must be evaluated in the risk characterization as such activities are consistent with the current (residential) use of the property.*” However, not all residential properties are the same, and they should not all be treated in the same way single-family homes would be. For example, if the residential property is an assisted living facility or an adult-only complex that restricts children living on site through deed or other institutional controls, then children playing on-site is unlikely to occur, except perhaps at a frequency consistent with visitors or trespassers.

Similarly, the third example should make it clear that while the frequency of trespassing may be greater in the “impromptu ball field” scenario, it does not necessarily rise to the frequency of a more formal park or playground, or of a single-family residential scenario.

### **Pages 8-9, Section 2.3.2 – Reasonably Foreseeable Use**

As noted in the cover letter accompanying these comments, NAIOP is in agreement with other commenters on this issue, who have convincingly argued that a plain reading of the language within MGL c. 21E would limit the universe of site uses and activities which must be considered to those which are truly “reasonably foreseeable.”

### **Page 9, Section 2.4.1 – When AULs are required**

As noted above in the comment on the Introduction to Section 2.1, the Guidance should track the statutory language, which refers to current and “reasonably foreseeable” uses, rather than introducing the undefined term, “*the most sensitive unrestricted site use[s].*”

In the fourth bullet of Section 2.4.1, the Guidance references 310 CMR 40.0932(5)(d). It should also cross-reference 310 CMR 40.1012(2)(c).

**Pages 9-10, Section 2.4.2 – When AULs are not required**

This section should also note, consistent with the wording of 310 CMR 40.1012(3), that an AUL is *not* required by the MCP to address contamination at the site “but may be used to provide notice of the existence of residual contamination to future holders of interest[s] and property that is located in a disposal site or a portion of a disposal site.”

**Page 13, Section 2.6.2 - Groundwater**

The Guidance states, “*An AUL must only be used to document an otherwise appropriate permanent solution; an active subslab venting system where its operation is necessary to maintain a condition of No Significant Risk cannot be part of a permanent solution.*” This statement is incorrect, since an AUL may also be used for notification purposes at a site where, to date, only a Temporary Solution has been achieved.

**Page 14, Section 2.71 – Residential use (AUL to Prohibit Residential Use)**

DEP should also recognize in the Guidance that there are other state-enforceable conditions or regulatory requirements, beyond the presence of wetlands, that effectively preempt residential use. These would include properties that have been formally dedicated to conservation or recreation use (and therefore cannot be converted in use without a super-majority vote of the General Court pursuant to Art. 97 of the Massachusetts Constitution); properties within Designated Port Areas (which can be used only for water-dependent-industrial use pursuant to G.L. c. 91 and 310 CMR 9.32(1)(b)); and properties whose frontage is along a state highway layout that prohibits access for residential use.

**Page 15, Section 2.7.1 - Residential use (AULs to Limit Direct Contact)**

For completeness, the last paragraph of this section should also note that a Method 3 risk assessment can be used to demonstrate No Significant Risk from soil contamination on a residential site when OHM concentrations beneath an engineered barrier exceed UCLs.

**Page 15, Section 2.7.1 – Residential use (AULs and Gardening)**

The very narrowly drawn exclusion for having to consider the gardening pathway at a residential site (“not enough room”) is unreasonable. Residential properties range from single-family residential homes to large condominium/apartment complexes. It is common for apartments and condominiums to have by-laws that prohibit gardening in common areas, and require that gardening/planting by residents be limited to raised beds or containers not in contact with soils or landscaped areas. AULs coincident with these types of restrictions on gardening are commonplace for these types of multi-tenant residential scenarios. Not allowing an option for an AUL to eliminate residential exposure pathways associated with gardening at condominium or apartment complexes means that significant monies will need to be spent to either remove contaminated soils or to place protective barriers over an entire site, in order to eliminate a “current” pathway that is unlikely to exist or that can be easily controlled by management.

The second paragraph of this section specifically requires the use of MADEP published plant uptake factors. Since the Department's approach to the gardening pathway is currently in a state of flux, with new technical guidance soon to be issued, this language should be removed from the AUL Guidance. Moreover, based on recent presentations by MassDEP personnel, it appears that the Department is leaning toward a more qualitative approach to addressing gardening risks, with Best Management Practices ("BMPs") used to address potential gardening concerns at both MCP and non-MCP locations. We recommend that these BMPs not be required as part of an AUL for an MCP site. AULs are a risk management tool to be used as part of MCP response actions at regulated sites, and reflect the specific activities and uses considered and either evaluated or eliminated from consideration in the MCP risk characterization. Since it is no longer required to quantify this pathway in the risk assessment, the BMPs should not be addressed as part of an AUL, which (as the Guidance notes elsewhere) should mirror the risk assessment. A more appropriate mechanism, with potentially further reach, would be to implement an educational campaign through the Mass. Department of Public Health or a similar type of government agency. (The Guidance could note, however, that the option would remain to include appropriate BMPs in an AUL if doing so made sense in light of the risk characterization that was performed for that specific site.)

Finally, with respect to the statement at the end of this section that the risk assessment Shortform should be used, it should be noted that many of the uptake factors presented in the Shortform are not "updated," and in fact are in conflict with numerous other published values and studies. This portion of the Guidance should also note that there is always the option in a Method 3 risk assessment of using alternative values, so long as they are scientifically supported.

#### **Page 17, 2.7.3 – Construction, Excavation, and Health and Safety Plans**

The bullet list of detailed requirements for a Health and Safety Plan does not belong in an AUL Guidance document, and should be removed

While it is true that permissible exposures under OSHA regulations are typically higher than those which equate to a level of No Significant Risk under the MCP, the statement that "*OSHA guidelines for construction workers do not address OHM exposures...*" is not accurate. 29 CFR 1926, the section of the OSHA regulations which deals with standards for construction workers, includes several sections dealing with exposure to hazardous materials.

#### **Page 17, 2.7.4 – Soil Management Plans**

The last clause in this paragraph ("*...and provide information regarding the scope and objectives of such a plan.*") should be deleted. Since the Soil Management Plan will very much depend on the specifics of future development plans, disposal options, regulatory standards, and other conditions not foreseeable at present, asking for meaningful details at the time of the AUL filing is unreasonable. Moreover, this is not a requirement of the MCP.

#### **Page 19, 2.9 – Risk of Harm to Safety**

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The example given in this section, which suggests that the presence of “glass and metal fragments” at a site would require the implementation of an AUL, is much too broad. In the first place, this threshold is well below the level suggested by the specific examples provided at Section 40.0960(3) of the MCP. In the second place, a strict interpretation of the “glass and metal fragments” language would require the implementation of an AUL on virtually every vacant urban lot that was part of a disposal site, even if a condition of No Significant Risk with respect to OHM had been achieved without the need for an AUL.

While the example cited above previously appeared in the 1999 AUL Guidance, the parenthetical note to the example – which states that a fence cannot be part of a permanent solution - is an addition. We strongly object to this language, which seems to have no basis in legislation or regulation. A properly maintained fence, like a properly maintained cap or a properly implemented AUL, can be an effective means of eliminating an exposure pathway. This parenthetical should be eliminated.

### **Page 20, Section 3: AUL Types and Elements**

The first two sentences to the introduction to this Section are unnecessary and so should be deleted.

### **Page 20, Section 3.1 – Authority for Establishing AULs**

The statutory reference noted in the first sentence of this section authorizes the Department to do certain things “if necessary to carry out the purposes of this chapter.” Accordingly, the phrase “..., and to encourage Brownfields redevelopment.” should be added at the end of the first sentence in this section in light of the 1998 Brownfields Bill amendments to Chapter 21E. Similarly, the first sentence of the second paragraph should be amended to read “*The AUL requirements set forth in the MCP are intended to ensure that AULs appropriately describe permitted uses and, conversely,...*”

### **Pages 21-22, Section 3.3.2 – Notices of Activity and Use Limitation**

The Guidance at the second paragraph of Section 3.3.2 states “*However, written notification to current record interest holders is required within 30 days prior to the implementation of the Notice (see 310 CMR 40.1074(1)(e)).*” For clarity, the text “(i.e., its recording/registering)” should be added after the words “*the implementation of the Notice.*”

The third paragraph of Section 3.3.2 states, “*However, enforcement may not be taken against the former property owner who implemented the Notice properly and complied with its terms while they owned the property (see 310 CMR 40.0020).*” This section should include a reference to G.L. c. 21E, §6. which provides this liability exemption.

### **Pages 23-24, Section 3.5 – Elements of a Notice of Activity and Use Limitation (“Notice”)**

The third bullet of the second paragraph (the first “Whereas” clause) provides: “*the name of the property owner and the municipality and county which the property containing the areas subject to*

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*the AUL is located . . .*” Consistent with Form 1075, following the word “*name,*” the words “*and address*” should be inserted.

The Guidance should include in Section 3.5, under the bullet labeled “numbered sections,” the examples provided in the prior Guidance. Specifically, under paragraph 2 – Activities and Uses Inconsistent with the AUL Opinion, insert, “*the restrictions place limits on uses (e.g., no residential use) and activities (e.g., uncontrolled excavation activities) that may result in a significant risk of harm to health, safety, public welfare or the environment or a substantial hazard.*”

The Guidance refers to a new *Exhibit D: documentation of signatory authority, if necessary.* Documentation of signatory authority should not be a separate lettered exhibit, but rather appended immediately following the signature page on Form 1075 and not separated by other exhibits. This change should also be made at Section 4.8 of the Guidance.

### **Page 26, Section 4: Preparing an AUL**

In the first sentence of the second paragraph of this Section, the word “*cleanup*” should be replaced with the words “*response action*” to take into account the possibility of implementing Class B-2 and Class B-3 RAOs.

### **Page 29, Section 4.3 – Plans describing the land covered by an AUL Pages 31-32, Section 4.3.6 – Describing Areas Subject to an AUL, etc.**

While it is reasonable to expect areas requiring a barrier to be delineated on a scaled site plan, it should not be necessary to require separately surveyed areas for different, but similarly effective, barriers (e.g., buildings, pavement, imported clean soil, etc.). For example, a change in the type of barrier (i.e., the transposition of a proposed building with a proposed parking lot) should not require an amendment to the AUL, and incurring the associated time and expense, provided that both the building and the parking lot provide the necessary barrier. The point here is that the performance standard – breaking the relevant exposure pathway – is met, not which type of barrier is used to achieve that result. Including some examples in this portion of the Guidance may be helpful. For example, if an entire parcel is to be covered by a barrier consisting of a building, pavement, and/or three feet of clean fill, those barriers could be described in the alternative and the aggregate area that needs to be covered should be delineated. In that case, it should not matter which of the three barriers is in place at any particular point in time so long as one or more of them is present and the relevant exposure pathway is being broken. Alternatively, if only a portion of a property is covered by a barrier and, due to further response actions or some other reason, the portion of the property that needs to be covered by the barrier changes, then a new/separate survey plan would make sense. Question 23 of the November 2007 MCP Q&A also needs to be corrected on this point.

### **Page 34, Section 4.7 – AUL Opinion (Exhibit C)**

Of the six bulleted items “recommended” by the Guidance, only the last (why an AUL is necessary) is actually required by 40.1074(1)(b). This section should refer to the MCP for the AUL Opinion content requirements, rather than create new requirements.

**Page 38, Section 5.1.2 – Registration Requirements**

The first sentence, which begins, “*The registration of documents at the Registry of Deeds...*” should instead read, “*The registration of an AUL at the Land Registration District of the local Registry of Deeds...*”

**Page 39, Section 5.2 – Documents submitted to MassDEP**

The Guidance at the second paragraph of Section 5.2 states, “*An RAO Statement that relies on the implementation of an AUL is not considered complete or effective until MassDEP has received a registry-certified copy of an AUL, consistent with 310 CMR 40.1056(2)(g) and 40.1070(3).*” The underscored language is inconsistent with the provisions of the MCP, and should be revised. While 310 CMR 40.1056(2)(g) does require that AUL documentation be submitted to MassDEP, 310 CMR 40.1070(3) clearly provides that an AUL “*shall be deemed implemented and shall be in effect upon being recorded and/or registered . . .*,” not when MassDEP has received a copy. It should also be noted that the underscored language is inconsistent with the first sentence of Section 1.5 of the Guidance. Further, the underscored language would lead to quite a bit of confusion regarding when MCP deadlines concerning the submission of an RAO would have been met, both in light of the MCP language referenced above and current practice.

**Page 39, Section 5.3 – Notice to current record interest holders**

The fourth paragraph of Section 5.3 of the Guidance, describing the research necessary to identify current record interest holders, should explain that a search should focus on those holders of record interest in the area that is subject to the AUL. Consistent with 310 CMR 40.1074(1)(e), only those holders of any record interest “in the area subject to the proposed notice” need to be identified and provided with the proposed Notice. (We also note that “proceeding” in the third line of this paragraph should actually be “preceding.”)

The fifth paragraph provides “*If there are record holders to notify and time is short, the record interest holder may waive the waiting period, if the waiver is put in writing and submitted to MassDEP (see 310 CMR 40.1074(1)(e)).*” The underscored language goes beyond the requirements of the MCP, and should be deleted from the Guidance. 310 CMR 40.1074(1)(e) sets forth no requirement to submit the waiver letter to MassDEP. In addition, nothing under 310 CMR 40.1056(2) (setting forth documentation, plans and/or reports necessary to support an RAO) supports this new requirement of the “Guidance.” 310 CMR 40.1074(1)(f) requires the submission of a statement, on MassDEP’s form, certifying that “record interest holders were notified of the proposed notice pursuant to 310 CMR 40.1074(1)(e).” This certification serves as proof of notice; there is no need for a copy of that waiver letter.

In addition, Section 5.3 should note that 310 CMR 40.074(1)(e) refers to a “proposed” notice. The Guidance should clarify that a proposed notice, substantially in the form finally recorded, gives adequate notice of “the existence and location of [OHM] within the area” and the proposed “terms of an AUL.”

**Page 41, Section 6 – Maintaining an AUL**

The first paragraph of this section provides, “*Violating the terms of the AUL is a violation of the MCP and may result in penalty assessment or loss of liability relief provided by M.G.L. c. 21E, §6.*” Liability relief under Section 6 is only provided to the former property owner or operator. Reference should be made to G.L. c. 21E, §5C(j), which warns that Eligible Person status may be lost for “any action or failure to act that violates or is inconsistent with an AUL.”

**Pages 44-45, Section 6.3.1 – Non-Substantive errors**

The Guidance should also note that certain non-substantive errors may be corrected pursuant to M.G.L. c.183, §5B which provides: “*Subject to section 15 of chapter 184, an affidavit made by a person claiming to have personal knowledge of the facts therein stated and containing a certificate by an attorney at law that the facts stated in the affidavit are relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of the title may be filed for record and shall be recorded in the registry of deeds where the land or any part thereof lies.*”

**Page 48, Section 6.7—Maintenance Contracts and Property Managers**

While the substance of the suggestion here is very good, we are concerned that, on audit, the proposed language will result in the concept being a requirement rather than a suggestion. We suggest that the first sentence here be revised to read, “*While not required by the MCP, where the area subject to the AUL is maintained by a contractor (e.g., a landscaper), it may be helpful if the maintenance/agreement references the AUL and it may be helpful to discuss its terms with the contractor so that he/she understands the limitations.*”

## MEMORANDUM

**TO:** Paul Locke  
**FROM:** Ned Abelson  
**DATE:** March 21, 2008  
**SUBJECT:** November 2007 MCP Q&A, Question 23

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Attached please find a copy of the above-referenced question, as well as the section in the MCP referred to in the answer to that question. I do not agree with the answer provided in the attached Q&A material, and wanted to get your response to my thinking.

As I understand it (and as explained to me by an experienced and respected LSP with whom I am working on a project), if we intend to implement an AUL at a site pursuant to which one of the ongoing obligations in order to maintain a Condition of No Significant Risk is that the site be covered by either a building or competent pavement, then, according to the answer to Question 23, "the AUL must delineate the location of each barrier." Again, as I understand it, this means that the plans that are exhibits to the AUL are supposed to show separately the areas that will be covered by a building or competent pavement (or a landscape barrier, if that is relevant at the particular site).

Why is that? The performance objective of the pavement and/or building is simply to break an exposure pathway between residual contamination in soil and possible receptors at the site. Why does it matter whether that exposure pathway is broken by a building or by pavement, so long as one of the two is in place and is effectively breaking the exposure pathway?

I think the quoted answer in this MCP guidance document is unnecessarily inflexible without any associated environmental benefit. What if in the future the site is to be redeveloped and the location of the building will change? Why would one need to amend the AUL to show the new location of the building if throughout the exposure pathway remains interrupted by either pavement or building? This "guidance" seems to result in unnecessary time and expense being expended to revise an AUL when the AUL as written initially would be perfectly functional.

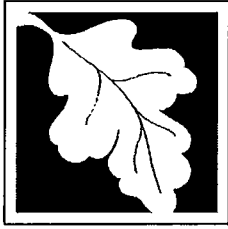
In addition, I think the cited provision in the MCP does not support this restrictive result. The relevant MCP section refers to specific types of land uses (that makes sense), but does not specify that the locations of those of land uses have to be locked in, as apparently suggested by the answer to Question 23.

Are we misunderstanding what the Q&A answer here is saying? Is there some other reason that would support delineating the specific areas of the pavement and the building at the site as described above that we are not considering?

Solutions to this possible problem we have considered include showing the delineation of the areas in the AUL Area at which there must be "pavement and/or a building" and using that same "pavement and/or a building" wording in the provisions of the AUL itself. Wouldn't these approaches satisfy the relevant objectives here?

Thanks for your time. I look forward to your thoughts.

HEA:jc



Massachusetts  
Department  
of  
ENVIRONMENTAL  
PROTECTION

## M C P Q & A

November 2007

eDEP

HCA notes  
3/21/08

### **Q. 1 How does a "Person Making a Submittal" via eDEP sign the submittal?**

Both the LSP and the "Person Making the Submittal" (typically the PRP) must register in eDEP. To register, go to the MassDEP homepage and click on eDEP online filing <https://edep.dep.mass.gov/DEPHome.aspx>. The registration process is similar to creating any online account with a user name and password. Registration by the LSP also requires submitting a stamped (with his/her LSP stamp) Proof of Identity form to MassDEP. The PRP does not need to submit a Proof of Identity form. The eDEP sharing function allows BWSC documents to be shared, edited and electronically signed by both parties. Signatures on paper copies are not required if a submittal is made through eDEP. The electronic signature is the legal signature for the document.

### **Q. 2 Is an electronic signature the legal equivalent of a written signature?**

Yes. Case law has established the legality of electronic signatures and found that electronic signatures carry the same legal authority as a handwritten signature. The use of the electronic signature is appropriate and legally equivalent to a handwritten signature for eDEP submittals.

### **Q. 3 To whom can I address questions about eDEP?**

As a first step, consult the BWSC "Frequently Asked Questions" on eDEP at: <http://www.mass.gov/dep/cleanup/approvals/edepfaq.htm>. If your question is not addressed by the FAQs, you may email your question to [BWSC.eDEP@state.ma.us](mailto:BWSC.eDEP@state.ma.us).

### **Q. 4 Why can't I, as the LSP, upload my supporting documentation after my client (the PRP) signs the eDEP transmittal?**

The PRP certifies both the form and the work, including supporting documentation. To ensure that the electronic process does not circumvent the ability of a PRP to review the supporting documentation, the upload of the final supporting documentation must take place before the PRP certification step.

### **Risk Characterization**

### **Q. 5 Why does the MassDEP Method 3 Human Health Risk Assessment Short Form show unacceptable risk for some chemicals when the Exposure Point Concentration is below the chemical's Method 1 standard?**

## AULs

### **Q. 22 Can an AUL be used to prohibit gardening at a current residential unit without a garden? Does the type of residence (single family home versus condominium) make a difference?**

An AUL cannot be used to eliminate current or reasonably foreseeable use. However, an AUL can be used to prohibit gardening at condominium residences where by-laws exist that prohibit gardening or at condominiums or other multi-family residences where the limitations on space make gardening impossible, so that this activity can be credibly eliminated as a current or reasonably foreseeable use (e.g., entire lot, with the exception of small, landscaped areas, is occupied by the residential building(s) and parking lot/structure).

Gardening should not be eliminated as a current or reasonably foreseeable use at single-family homes or any condominium or other multi-family residence where gardening is not prevented by by-law or current space limitations.

Massachusetts Department of  
Environmental Protection  
One Winter Street  
Boston, MA 02108-4746

Commonwealth of Massachusetts  
Deval Patrick, Governor  
Tim Murray, Lt. Governor

Executive Office of  
Energy & Environmental Affairs  
Ian A. Bowles, Secretary

Department of  
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alternate format by calling our ADA  
Coordinator at  
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### **Q. 23 When an AUL requires the maintenance of multiple barriers, is it necessary to delineate each barrier separately?**

Yes. When an AUL requires the maintenance of multiple barriers (e.g. pavement and a building), the AUL must delineate the location of each barrier. The AUL serves to identify the location of the barriers so that a property owner (particularly a future property owner) knows the location of the barriers that must be maintained (see 310 CMR 40.1074(2)(e)). Separate delineation of each barrier is required.

### **Q. 24 How do I delineate barriers within the area subject to the AUL?**

The boundaries of the area subject to the AUL must be depicted on a survey plan. If there is a barrier (e.g., some form of cap, pavement or building) *within* the boundaries of the AUL area that must be maintained to ensure a level of No Significant Risk, that barrier must also be depicted on either a sketch or survey plan. Which type of plan is required for the barrier depends on whether the restrictions that apply in the barrier area are the same or different from the restrictions that apply in the larger AUL area. If, for example, the AUL area includes both landscaping and pavement and the restrictions of the AUL are the same for both paved and landscaped areas (e.g. no excavation below 5 feet), the boundaries of the pavement and landscaped areas do not need to be surveyed. In such a case, a sketch plan will suffice to delineate the boundaries of the pavement and landscaped areas within the larger AUL area boundaries. If, on the other hand, an AUL restricts any or all "excavation under paved areas" and the paved areas represent only a

40.1074: continued

1. why the Notice of Activity and Use Limitation is appropriate to:
    - a. achieve and/or maintain a level of No Significant Risk for a Class A or B Response Action Outcome; or
    - b. eliminate a substantial hazard for a Class C Response Action Outcome.
  2. Site Activities and Uses which are inconsistent with maintaining a condition of No Significant Risk or eliminating a Substantial Hazard;
  3. Site Activities and Uses to be permitted; and
  4. obligations and conditions necessary to meet the objectives of the Notice of Activity and Use Limitation;
- (c) a Notice of Activity and Use Limitation shall be recorded and/or registered as specified in 310 CMR 40.1074(3);
- (d) except as provided in 310 CMR 40.0932(5)(d)c., a Notice of Activity and Use Limitation shall not be used to limit access to and/or use of groundwater for a Class A or B RAO pursuant to 310 CMR 40.1035 and 310 CMR 40.1045; and
- (e) Prior to the recording and/or registration of a Notice of Activity and Use Limitation pursuant to 310 CMR 40.1074(3), current holders of any record interest(s) in the area subject to the proposed Notice (including without limitation, owners, lessees, tenants, mortgagees, and holders of easements or licenses) shall be notified by certified mail, return receipt requested, of the existence and location of oil and/or hazardous material within such area and the terms of such proposed Notice. Such proposed Notice of Activity and Use Limitation shall not be recorded and/or registered until at least 30 days after such notification of current record interest holders has occurred, unless all parties receiving such notification provide a written waiver of the 30-day waiting period to the property owner;
- (f) the person(s) signing the Notice of Activity and Use Limitation shall submit a statement, on a form prescribed by the Department, certifying that:
1. the person(s) or entity identified as the property owner(s) on the Notice owned the property at the time the Notice was recorded and/or registered pursuant to 310 CMR 40.1074(3); and
  2. record interest-holders were notified of the proposed Notice pursuant to 310 CMR 40.1074(1)(e).

(2) Contents of a Notice of Activity and Use Limitation. A Notice of Activity and Use Limitation shall contain the following information:

- (a) the location of the property, including:
1. the property's street address;
  2. a metes and bounds description of the parcel(s) of land which contain(s) the area that is subject to the Notice of Activity and Use Limitation;
  3. a reference to a survey plan of such parcel(s) of land, prepared by a Massachusetts Registered Land Surveyor, that has been recorded as a plan with the appropriate registry of deeds and/or a Land Court Plan;
  4. if the area subject to the Notice of Activity and Use Limitation comprises only a portion of the property described in 310 CMR 40.1074(2)(a)2., a metes and bounds description of the portion subject to the Notice of Activity and Use Limitation; and
    - a. (for registered land only) an 8½" x 11" survey plan, prepared by a Massachusetts Registered Land Surveyor, which shows the metes and bounds of the portion subject to the Notice of Activity and Use Limitation, attached as an exhibit to the Notice of Activity and Use Limitation; or
    - b. (for unregistered land only) a reference to a survey plan of the portion subject to the Notice of Activity and Use Limitation, prepared by a Massachusetts Registered Land Surveyor, that has been recorded as a plan with the appropriate registry of deeds; and
  5. an 8½" x 11" sketch plan, attached as an exhibit to the Notice of Activity and use Limitation, showing the location of the portion subject to the Notice of Activity and Use Limitation in relation to the boundaries of the disposal site to the extent that the boundaries of the disposal site have been established;
- (b) name(s) of the property owner(s);
- (c) if a person(s) signing the Notice of Activity and Use Limitation is not an individual signing on his/her own behalf, but rather on behalf of an entity (LLC, LLP, limited partnership, etc.), or as trustee, executor, or attorney in fact, documentation of the person(s)' signatory authority as described in 310 CMR 40.1071(2)(c), attached as an exhibit to the Notice of Activity and Use Limitation;

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- (d) the disposal site name and DEP Release Tracking Number(s);
- (e) a description of the Site Activities and Uses permitted on the subject property, including but not limited to specific provisions for purposes of maintenance or repair of utilities, and specific types of land uses;
- (f) a description of any obligations and/or conditions for conducting the permitted Site Activities to meet the objectives of the Notice of Activity and Use Limitation;
- (g) a description of any Site Activities and Uses that are inconsistent with the Response Action Outcome;
- (h) an agreement to reference this Notice in all future deeds, easements, mortgages, leases, licenses, occupancy agreements, or any other instruments which convey an interest in and/or a right to use the property subject to the Activity and Use Limitation pursuant to the Response Action Outcome;
- (i) reference to procedures to be followed to ensure that changes in the permitted activities and/or uses meet the objectives of the Notice of Activity and Use Limitation; and
- (j) the notarized signature(s) of the property owner(s), and the notarized signature and seal of the LSP who signed the Activity and Use Limitation Opinion.

(3) Recording/Registering Notices The property owner shall record and/or register any Notice of Activity and Use Limitation in the appropriate Registry of Deeds and/or Land Registration Office.

- (4) Filing with the Department: Within 30 days of recording and/or registering any Notice of Activity and Use Limitation, the property owner shall submit the following to the Department:
- (a) a certified Registry copy of the Notice bearing the book and page/instrument number and/or document number; and
  - (b) a Registry copy of the required survey plan(s) referenced in the Notice, bearing the plan book/plan number(s);

(5) Upon transfer of any interest in and/or a right to use the property or a portion thereof that is subject to a Notice of Activity and Use Limitation, the Notice of Activity and Use Limitation shall be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer.

40.1075: Form of Notice of Activity and Use Limitation

Any person who intends to limit the Site Activities and Uses of property through a Notice of Activity and Use Limitation shall complete Form 1075 set forth in 310 CMR 40.1099 in accordance with 310 CMR 40.1074.

40.1080: Changes in Site Activities and/or Uses or Other Site Conditions After a Response Action Outcome with an Activity and Use Limitation Has Been Filed

(1) Evaluation of Contemplated Site Activity and/or Use Changes. Where a Response Action Outcome is based upon certain restrictions, limitations and/or conditions on Site Activities and/or Uses, any contemplated Site Activity and/or Use that is not specifically permitted by an Activity and Use Limitation and that may invalidate the condition of No Significant Risk or No Substantial Hazards, whichever is applicable to the Response Action Outcome, were it to occur, shall be evaluated by an LSP before such Site Activity and/or Use is implemented. Such evaluation shall be submitted to the Department using a transmittal form provided for such purpose and shall include:

- (a) an LSP Opinion on a form prescribed by the Department as to whether, based on an evaluation of the contemplated Site Activity and/or Use pursuant to the risk characterization process in 310 CMR 40.0900, a condition of No Significant Risk or a condition of No Substantial Hazard, whichever is applicable, will continue to exist if the contemplated changes in Site Activity and/or Use were to occur;
- (b) the risk characterization conducted pursuant to 310 CMR 40.0900 evaluating the contemplated Site Activity and/or Use on which the LSP Opinion in 310 CMR 40.1080(1)(a) is based; and