

## **GUIDANCE ON IMPLEMENTING ACTIVITY AND USE LIMITATIONS Policy #WSC 11-300**

*This document is intended to guide parties conducting cleanups, Licensed Site Professionals (LSPs), attorneys, MassDEP staff, and others in the appropriate implementation of Activity and Use Limitations (AULs) as part of response actions conducted at disposal sites pursuant to M.G.L chapter 21E and 310 CMR 40.0000, the Massachusetts Contingency Plan (MCP).*

*This document is intended solely as guidance. It does not create any substantive or procedural rights, and is not enforceable by any party in any administrative proceeding with the Commonwealth. The regulations related to AULs contain both specific and general requirements. This document summarizes these requirements and provides guidance on approaches the Department considers acceptable for meeting the general requirements set forth in the MCP. Parties using this guidance should be aware that there may be other acceptable alternatives for achieving compliance with general regulatory requirements.*

*Regulatory citations in this document should not be relied upon as a complete list of the regulatory requirements related to AULs. Parties implementing AULs should consult 310 CMR 40.0000.*

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## **NOTE TO REVIEWERS:**

*The AUL Guidance was developed in 1999 by MassDEP to assist parties conducting cleanups, LSPs, attorneys, MassDEP staff, and others in implementing Activity and Use Limitations. The draft revisions that follow 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.*

*The revisions contained in this draft are intended to accomplish the following:*

- Incorporate '99 and '06 MCP amendments.*
- Provide clarifications based on program experience, emphasizing AUL requirements related to the most common violations and frequently asked questions.*
- Incorporate updates, such as the 2008 Registry of Deeds formatting requirements for recorded plans and deeds/documents.*
- Move procedures for Grants to Appendices to focus the document on Notices of Activity and Use Limitations. To date, the number of Notices (more than 1,800) far exceeds the number of Grants (fewer than 30).*
- Provide additional tables for easy reference, including an expanded AUL Checklist.*

*This draft does not include updated Case Studies. MassDEP anticipates developing case studies either as an Appendix to this document and/or as training materials following input from external reviewers of this draft.*

*This draft document does not address in detail the implementation of AULs at sites where vapor intrusion is a concern. This issue is being discussed as part of the vapor intrusion guidance development. The approach that is developed as part of those discussions will be made consistent with and cross-referenced with the vapor intrusion guidance, as appropriate.*

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**NOTE TO REVIEWERS: The revisions to Section 1 include the addition of Section 1.7 that emphasizes up front post-implementation AUL requirements. This section corresponds with the requirements summarized in more detail in Section 6 – "Maintaining an AUL".**

## SECTION 1: INTRODUCTION

### 1.1 Background

The Massachusetts Contingency Plan, 310 CMR 40.0000, allows for a level of disposal site cleanup that takes into consideration the potential for exposure to oil and/or hazardous material at and in the vicinity of a specific site. This potential is defined by the uses and activities occurring at a site and the nature and accessibility of the contamination. In this regard, the MCP provides three different approaches for characterizing risks posed by a disposal site and determining the necessary level of cleanup. Method 1 provides numeric soil and groundwater cleanup standards that MassDEP has developed for approximately 100 of the most common contaminants found at disposal sites. Method 2 allows for some modification of the Method 1 standards, based on site-specific conditions; and Method 3 provides for a site-specific assessment of the cumulative risks posed by a disposal site.

All of these methods involve assumptions about exposures to oil and/or hazardous material (OHM) at the site and use the "No Significant Risk of Harm" standard for determining the level of cleanup required to address human health, safety, public welfare and environmental risk. Exposures are determined from the conditions at and surrounding the disposal site, including the current *and future* uses of the properties.

M.G.L. c.21E, section 3A(g) requires that sites be cleaned up to protect health, safety, public welfare and the environment for **any foreseeable period of time**. From experience we recognize that land uses can and do change over time, often in unpredictable ways. It is also fairly typical that some contamination will remain at a site even after completion of a cleanup that meets the MCP standards. To ensure that cleanups remain protective over time and through changes of land use, the flexibility provided by the MCP standards is accompanied by appropriate checks and balances on the assumptions used in the risk characterization to ensure that a condition of No Significant Risk will be maintained in the future.

One of the checks and balances provided by the MCP takes the form of an **Activity and Use Limitation** or **AUL**. An AUL is a legal document that identifies site conditions that are the basis for maintaining a condition of No Significant Risk<sup>1</sup> at a property where contamination remains after a cleanup.

The authority of MassDEP to acquire interests in, to restrict use of, or allow the restriction of real property as a tool to ensure that oil and hazardous material are cleaned up adequately is found at M.G.L. c.21E, § 6. The AUL requirements set forth in the MCP and this guidance are intended to carry out the purpose of M.G.L. c. 21E, §6 and to ensure that AULs are prepared and recorded or registered in the same manner and with the same professional standards as other similar real estate instruments.

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<sup>1</sup> An AUL may be used as part of either a Temporary or Permanent Solution. The standard for a Temporary Solution is "No Substantial Hazard" and the standard for a Permanent Solution is "No Significant Risk," as c.21E and the MCP define those terms. Unless otherwise specified, the term "No Significant Risk" is used for the purpose of readability throughout this guidance to refer to the disposal site cleanup standard related to the implementation on an AUL.

The MCP provide for three types of AULs:

- (1) Notice of Activity and Use Limitation ("Notice"),
- (2) Grant of Environmental Restriction ("Grant"); and
- (3) Environmental Restriction.

The Notice and the Grant are implemented and maintained by property owners, and the Environmental Restriction is imposed by MassDEP. Since the Notice is the most frequently used type of AUL, this guidance is primarily intended as a reference for parties who elect to implement a Notice. The requirements for implementing Grants are provided in Appendix J.

## **1.2 Guidance Applicability**

This guidance applies to disposal sites for which the implementation of an AUL is required pursuant to 310 CMR 40.0000.

This document is intended for Licensed Site Professionals, property owners, environmental consultants, risk assessors, attorneys, MassDEP staff and other professionals involved in developing, implementing, and maintaining AULs at disposal sites pursuant to c. 21E and the MCP. It aims to clarify the rules for AULs. This document does not create any substantive or procedural rights, and is not enforceable by any party in any administrative proceeding with the Commonwealth.

***This guidance should not be considered a substitute for specifically-tailored legal advice. Although AULs are implemented to meet the requirements of the MCP, an AUL is also a real estate document, subject to an entirely separate collection of practices, procedures, and requirements. Thus, property owners are advised to consult an experienced real estate attorney when considering or implementing an AUL.***

The guidance is organized as follows:

- *Section 1:* Purposes and application of AULs in the 21E program;
- *Section 2:* Relationship between AULs and the different MCP disposal site risk characterization methods;
- *Section 3:* Types of AULs and the elements which make up a complete AUL;
- *Section 4:* Requirements and guidance to consider when preparing an AUL;
- *Section 5:* Procedural requirements for recording/registering AULs; and
- *Section 6:* Requirements for maintaining a recorded or registered AUL, including addressing changes in site activities and uses.

## **1.3 Purposes of Activity and Use Limitations**

The primary purpose of an AUL is to minimize the chance of an unforeseen change in use of the property that could result in unacceptable exposure to chemical contaminants. An AUL helps prevent unacceptable exposures to contamination left at a disposal site by identifying activities and uses that are consistent and inconsistent with maintaining a condition of No Significant Risk.

An AUL is used to ensure that more sensitive uses than those that present No Significant Risk are not occur in the future. The major purposes of an AUL are:

- to provide property owners, holders of interests in the property, and others who review property records at the Registry of Deeds with notice of the presence and location of oil

and/or hazardous materials (OHM) remaining at a disposal site and with a description of the disposal site conditions;

- to identify site uses and activities (“consistent uses” or “permitted uses”) which would be consistent with maintaining a condition of No Significant Risk;
- to identify site uses and activities which should not occur in the future or should not occur without appropriate precautions (“inconsistent uses” or “restricted uses”), as they may result in the exposure of people at or near the disposal site to remaining contamination and would be inconsistent with maintaining a condition of No Significant Risk;
- to specify property owners’ obligations (e.g., maintenance of caps or other barriers, monitoring of the area subject to the AUL, adherence to soil management plans) which ensure that the objectives of the AUL continue to be met.

#### **1.4 AULs and the Response Action Process**

AULs are implemented as part of a Response Action Outcome (RAO) that documents the achievement of a Permanent (Class A or B RAO) or Temporary Solution (Class C RAO). A property owner may implement an AUL **only after completion of**:

- an adequate site assessment and risk characterization;
- a background feasibility evaluation in cases where remedial actions are necessary to achieve a Permanent Solution;
- the selection of the appropriate remedy for the disposal site; and
- all response actions necessary to achieve and support a condition of No Substantial Hazard or No Significant Risk for current site conditions.

At sites where remedial actions (e.g., excavation, treatment or capping of contaminated media) are necessary or have been undertaken to reach a condition of No Significant Risk, the feasibility of approaching or achieving background concentrations of oil and hazardous material at the disposal site must be evaluated before the property owner can elect to implement an AUL as part of the site remedy.

#### **1.5 Timing of the AUL and Response Action Outcome**

An RAO that relies on an AUL is not considered valid unless the AUL is in effect, i.e., the AUL is recorded or registered at the appropriate Registry of Deeds [see 310 CMR 40.1070(3)] prior to the submission of the RAO Statement to MassDEP. While an AUL must be implemented prior to the submittal of the associated RAO Statement, the AUL should not be implemented until all response actions necessary to achieve a level of No Significant Risk for current site uses have been completed. For example, if a barrier is to be placed over the area subject to the AUL (e.g., the area is to be covered with clean fill and paved) to meet the No Significant Risk standard, then those response actions must occur **before** the AUL is recorded. The reason for this is two-fold: (1) the barriers do not serve to prevent exposure until they are in place; and (2) the AUL cannot delineate the location of barriers to be maintained until such barriers have been constructed.

The scope and content of an AUL is based on the level of cleanup performed at a site and the need to protect against exposure to remaining contamination. An AUL describes permanent limitations

on site uses and activities with respect to the level of cleanup achieved and the remaining risk. If, after an RAO has been achieved, new uses and activities are considered at a site that do not fit into the AUL's "consistent uses" at a site, the MCP requires the evaluation of such new uses and activities by an LSP before they are implemented. Further, the completion of needed response actions and an amendment of the AUL may also be required before new exposures are created. These requirements are described in detail in Section 6 of this guidance.

## **1.6 Use of Deed Notices, Restrictions, or Other Measures that Are Not AULs**

Where an AUL is not otherwise required by the MCP [see 310 CMR 40.1012], a property owner may choose to impose a restriction or a notice upon his or her property related to residual contamination that is *not* an AUL (i.e., is not implemented using one of the AUL forms listed at 310 CMR 40.1099). Parties have used such notices or restrictions to provide information about contamination at sites where an RAO has not yet been achieved. For example, "non-AUL" restrictions or notices have been implemented at sites where preliminary response actions (soil and groundwater treatment) are ongoing, but the standard for either a Temporary or Permanent Solution has not yet been achieved.

A non-AUL deed restriction or notice may not be used in lieu of, nor be represented as, an AUL pursuant to the MCP. In this regard, a "non-AUL" restriction or notice:

- may not be used in place of an AUL required by the MCP to support an RAO;
- should not be entitled "Grant of Environmental Restriction" or "Notice of Activity and Use Limitation";
- should contain a statement that the restriction or notice is not an AUL implemented pursuant to 310 CMR 40.0000;
- does not need to be submitted to MassDEP;
- does not need to adhere to the requirements for implementing AULs, including public notice; and
- is not subject to MassDEP audits or enforcement.

AULs and other recorded notices or restrictions are not the only mechanism for providing information to people with potential for exposure to contamination remaining at the site. Depending upon the location of the contamination, its toxicity and potential routes of exposure, other measures for providing notice (e.g., posting signs or providing advisories to maintenance workers and others responsible for the physical management of the property) about the location and nature of the contamination should be considered. In particular, postings (in addition to measures to reduce access) may be appropriate at the perimeter of a disposal site that is in the process of assessment and remediation or at a location where people may have access to a contaminated surface water body for fishing or other recreational activities.

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.

## **1.7 Oversight and Maintenance of AULs**

Remaining in compliance with the MCP requires that the owner of a property for which an AUL has been recorded or registered continue to comply with the terms of the AUL. Violating the terms of the AUL is a violation of the underlying RAO, which is in turn a violation of the MCP, and may result

in penalty assessment or loss of the liability relief provided by M.G.L. c. 21E, §6. Section 6 of this Guidance addresses issues and procedures that apply once an AUL has been implemented, including: evaluating changes in site uses and activities with respect to an existing AUL; correcting and amending AULs; terminating AULs; referencing AULs in future deeds, lease agreements, and other instruments of transfer; MassDEP audits of disposal sites with AULs; and the consequences of violating the terms of the AUL.

**NOTE TO REVIEWERS:** *Section 2 has been reorganized and clarified to address common AUL issues related to risk characterization and exposure assumptions. The revisions include:*

- *Condensing the discussion of general risk characterization procedure to eliminate redundancies with the Guidance for Disposal Site Risk Characterization.*
- *Adding new subsections to provide guidance on the use of AULs in residential settings and in the case of sediment contamination.*
- *Adding a Table of examples of the most common exposure assumptions and how an AUL would address the assumptions.*

**Section 2.7.1 of this draft describes gardening as a current use for developed residential properties, and thus should be included as a Site Activity and Use, except where space limitations make gardening impossible. Gardening is an issue that arises frequently at sites and is of particular importance as the trend of home gardening is on the rise.**

## **SECTION 2: AULS AND RISK CHARACTERIZATION**

### **2.1 Introduction**

The MCP provides a risk characterization process, described in Subpart I [310 CMR 40.0900], to determine whether remedial action is necessary to achieve a level of No Significant Risk of harm to health, safety, public welfare or the environment. Except where site conditions are consistent with Background, it is necessary to perform a risk characterization for every site, although the level of detail and complexity of the analysis will vary depending upon the specific site conditions.

The risk characterization process determines when, in the absence of additional remediation, an AUL is needed to place limits on future activities and uses that could create exposures that would pose a significant risk. 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 and protective of human health or the environment for the property, given the level of cleanup achieved. The AUL is necessary for the continued validity of the RAO and to communicate the uses and maintenance activities that ensure that the site presents No Significant Risk of harm to healthy, safety, public welfare or the environment over time.

The appropriateness and effectiveness of an AUL are functions of proper risk characterization of the disposal site. An AUL itself does not create a condition of No Significant Risk -- it is simply a tool used to minimize the chance of an unforeseen change in use of the property that could result in unacceptable exposure to chemical contaminants.

### **2.2 Risk Characterization Steps**

The MCP identifies three methods (Method 1, Method 2, and Method 3) for characterizing risk. Regardless of the method selected, the following steps are required for all risk characterizations:

- determine the contaminants of concern and their concentrations at the site;
- determine the extent of contamination;
- determine background concentrations for the site;
- identify current and reasonably foreseeable uses;
- identify receptors;
- categorize soil and groundwater (based on location and exposure potential);

- quantify receptors' exposures; and
- characterize receptors' risks.

These steps are fundamental to conducting a risk characterization. A risk characterization concluding that the disposal site poses No Significant Risk of harm to health, safety, public welfare or the environment is inadequate if the information used in the assessment process is invalid or incomplete. Please consult the *Guidance for Disposal Site Risk Characterization (July, 1995)*, available <http://www.mass.gov/dep/service/compliance/riskasmt.htm> for a more detailed discussion regarding risk characterization.

## **2.3 Activity and Use**

To adequately evaluate potential exposures, the risk characterization must identify and describe the site activities and uses associated with the disposal site and the surrounding environment. The terms “activity” and “use” describe human actions that could result in exposure to oil and/or hazardous material. The “use” of the property is a broad term related to the property itself (e.g., commercial, industrial, residential), while “activity” is a narrower term used to describe the actions of people at the property that could result in exposure (e.g., excavation, gardening).

### **2.3.1 Current Use [310 CMR 40.0923(2)]**

The risk characterization must always evaluate the current use of the site. 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. These scenarios are used to determine who may potentially be exposed at the site and how frequently that exposure may occur. *Planned uses* are considered current uses and should be explicitly evaluated in the risk characterization. In the case where a disposal site is currently not being used (e.g., the property has never been developed or an existing facility has been closed and there are no plans to use the property), a “no use” scenario is not sufficient. 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. Parties should adopt a conservative approach when evaluating the potential for children and others to access a site.

Example: If a site currently has underground utilities, excavation and repair of the utility lines is an activity *consistent with the current use* of the property and must be evaluated in the risk characterization.

Example: 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.

Example: If an undeveloped lot is adjacent to a residential neighborhood, it is reasonably likely that it will be used by young children more frequently (e.g., as an impromptu ball field) than a similar parcel adjacent to an industrial park. The activities associated with the current use of the property should reflect this likelihood based on surrounding land use [310 CMR 40.0933(4)(a)].

Example: If an inactive industrial facility is located in or near a residential area, or an area zoned residential, then the “current use” risk characterization needs to consider the potential for young children and others walking through or using the property (i.e., trespassers).

Example: If a former mill building is purchased with plans to convert the building to condominiums, a risk characterization of the residential exposure scenario must be completed. The risk characterization must include an evaluation of the *planned* residential use of the property.

AULs cannot be used to eliminate exposure pathways that are consistent with the current uses identified in the risk characterization. Absent additional remediation, only an *actual* change in the current use (resulting in a new, different current use) can eliminate such pathways from the evaluation.

### **2.3.2 Reasonably Foreseeable Use [310 CMR 40.0923(3)]**

Land use does not remain constant over time and it is difficult to predict with certainty the future uses for specific properties. As a starting point, the regulations presume unrestricted future use of the property. The reasonably foreseeable uses and activities of a site are defined in the MCP to include "any possible activity or use that could occur in the future...", unless those activities and uses are eliminated from future consideration by application of an AUL. [See 310 CMR 40.0923(3)].

The risk characterization must evaluate all current activities and uses, and all reasonably foreseeable site activities and uses (those associated with greater exposures than the current use). In other words, if the level of site cleanup is incompatible with the unrestricted use of the property, that information must be communicated to future owners/users of the site. Reasonably foreseeable use(s) of the property that have not demonstrated No Significant Risk must be described in an AUL.

Reasonably foreseeable uses represent circumstances that are hypothetical. These conditions may not presently exist and might in fact never occur. If the cleanup is not sufficient to support the most sensitive of the reasonably foreseeable uses, then an AUL would be required to identify the limitations on future use that are assumed in the risk characterization. Section 2.1 of the *Guidance for Disposal Site Risk Characterization* provides additional guidance on identifying the current and reasonably foreseeable use(s) of a site for the purpose of risk characterization to support a condition of No Significant Risk.

Example: At an active manufacturing plant the owner has no plans to curtail operations. In order to close out an UST release, the current and reasonably foreseeable use of the site is identified as manufacturing and the AUL prohibits all activities and uses that would result in greater exposure.

Example: A former mill building, which is now vacant, abuts an industrial area and several homes. The property owner has no specific plans for redevelopment. Reasonably foreseeable uses should include the building's former manufacturing use in the risk characterization, as well as all uses consistent with the site and the character of the surrounding neighborhood. In this case, a residential redevelopment is a reasonably foreseeable use.

The risk characterization must include consideration of any activities and exposures consistent with the identified future use(s). AULs are not required if the property owner wishes to assume unrestricted use of the property, characterizes potential risks under conservative exposure

assumptions (generally consistent with unrestricted use of the property), and, using these assumptions, concludes that No Significant Risk exists or was achieved.

Example: A commercial property may currently have no potential for exposures associated with children playing on the property. However, it is reasonably foreseeable that the property use could change in the future, making these types of exposures possible. Such potential future exposures must be evaluated in the risk characterization unless specifically ruled out through the use of an AUL.

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

The MCP specifies the conditions, based on the concentrations and location of OHM remaining at a disposal site and the risk characterization method, for which an AUL is or is not required. 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 conditions under which an AUL is required are summarized below.

### **2.4.1 When AULs Are Required [310 CMR 40.1012(2)]**

An AUL is required any time No Significant Risk has not been demonstrated for the most sensitive unrestricted site use(s). An AUL is specifically required by the MCP to address contamination left at the site in the following cases when:

- Method 1 or Method 2 is used to characterize risk and the soil Exposure Point Concentrations do not meet the S-1 Soil Standards [Table 2 at 310 CMR 40.0975(6)(a)];
- an RAO relies upon Exposure Pathway elimination measures that require monitoring and maintenance to prevent exposure to levels of OHM that would otherwise pose a significant risk;
- Method 3 is used to characterize risk and assumptions are made in the risk characterization about restricting or limiting use of the property;
- an existing private well has been removed from service as a drinking water supply, but is maintained for other uses such as irrigation, in accordance with the provisions of 310 CMR 40.0932(5)(d);
- OHM in soil at a depth greater than fifteen feet from the ground surface exceeds an applicable Upper Concentration Limit (UCL) in soil listed in the table at [310 CMR 40.0996(7)].

### **2.4.2 When AULs Are Not Required [310 CMR 40.1012(3)]**

An AUL is *not* required by the MCP to address contamination left at the site when:

- OHM remains in soil at levels at or below the UCLs only at a depth greater than 15 feet below the ground surface;
- OHM remaining in soil is located in a public way or rail right-of-way, as those terms are defined in 310 CMR 40.0006;
- OHM concentrations are consistent with Background; and

- substantial hazards have been eliminated and all requirements for a Class C RAO have been met.

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.

AULs are not required beneath a public right of way or rail right of way is that the potential for future exposure to or excavation into contamination at that depth or in those locations is considered minimal. Note, while public ways and rail rights-of-way do not require AULs, owners of these lands are required to meet all other cleanup requirements, including cleanup of contamination in areas that are outside the legal bounds of the right-of-way. Further, the AUL exception for a public right of way or rail right of way is limited to the lands within the transit corridor; it does not extend to ancillary land contiguous with the public right of way or rail right of way (e.g., garages or other maintenance facilities associated with the transit corridor, but not within it).

### **2.4.3 Prohibited Uses of AULs [310 CMR 40.1012(4)]**

An AUL cannot be used in lieu of achieving an applicable Method 1 or Method 2 standard for current use. For example, when using Method 1, if the soil is categorized as S-2 and the calculated Exposure Point Concentrations exceed S-2 standards, cleanup to meet the S-2 level is needed to achieve a Permanent Solution. The implementation of an AUL does not negate the requirement to meet the applicable standards. Specifically, an AUL cannot be used to:

- justify a conclusion of No Significant Risk when using Method 1 or 2 if an applicable standard is exceeded; *or*
- change the category of groundwater categorized as GW-1 or GW-2 (except as provided in 310 CMR 40.0932(5)(d) with respect to existing private wells).

## **2.5 AULs and the Risk Characterization Methods**

The MCP's risk characterization methods are used to determine whether a level of No Significant Risk exists or has been achieved for current and reasonably foreseeable uses of the site. AULs can be used with all of the three MCP risk characterization methods (Methods 1, 2 or 3).

### **2.5.1 Method 1 [310 CMR 40.0970]**

Method 1 is the simplest approach to characterizing risk at a site. In a Method 1 risk characterization, Exposure Point Concentrations at the site are compared to promulgated standards for soil and groundwater. The Method 1 Standards were developed for three broad categories of sites. The standards represent a template for a certain type of site. For example, the Method 1 S-1 Standards are designed to be protective of unrestricted land use and activities.

The Method 1 Standards can only be used alone if the contamination is limited to soil and/or groundwater (i.e., it cannot be used to address contamination in sediments or indoor air). 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). Method 1 does not provide flexibility to modify the exposure assumptions used by MassDEP to develop the standards.

If the applicable Method 1 soil standards are exceeded, a party must either remediate the site to a point that the calculated Exposure Point Concentrations meet the Method 1 levels, or demonstrate using a Method 2 or 3 risk characterization that the contaminant levels do not pose a significant risk. A Method 2 or 3 risk characterization may also indicate that contaminant levels require remediation. A more detailed discussion of Method 1 is provided in the *Guidance for Disposal Site Risk Characterization, Section 5.0*.

### **2.5.2 Method 2 [310 CMR 40.0980]**

A Method 2 risk characterization allows for limited modifications of some of the existing Method 1 Standards, as well as the development of standards for soil and groundwater for chemicals for which a Method 1 standard does not currently exist. A Method 2 risk characterization uses site specific information to modify the fate and transport assumptions in the Method 1 standards. The Method 2 equations are provided at 310 CMR 40.0983 and 40.0984 for soil and groundwater, respectively. Once the new or modified standards are developed using Method 2, the risk characterization is conducted in accordance with the rules for a Method 1 assessment. Under Method 2, exposure assumptions, such as the type of receptor or the duration of exposure, cannot be modified; a Method 3 risk characterization is necessary to change exposure assumptions. A more detailed discussion of Method 2 Modifications is provided in the *Guidance for Disposal Site Risk Characterization, Section 6.0*.

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

A Method 3 risk characterization is a site specific approach that determines cumulative site risk and considers the risk management criteria described in 310 CMR 40.0990. As described in Section 2.3 above, all risk characterization methods must evaluate both current and reasonably foreseeable uses of the site and its surrounding area. When using a Method 3 risk characterization, an AUL is required any time No Significant Risk is not demonstrated for the most sensitive reasonably foreseeable use [310 CMR 40.1012(2)(a)(2)], unless an AUL is specifically not required. An AUL may *not* be used to eliminate current site uses or activities from consideration in the risk characterization [310 CMR 40.0923(4)(a)]. If a Method 3 risk characterization relies on a site-specific feature to prevent or mitigate exposures such as a building or pavement, those features must be identified on a survey plan (see Section 4.3). A more detailed discussion of Method 3 is provided in the *Guidance for Disposal Site Risk Characterization, Section 9.0*.

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. When Method 3 is selected, a level of No Significant Risk exists or can be achieved by meeting the risk management criteria described in 310 CMR 40.0990.

## **2.6 AULs by Medium – Soil, Groundwater, and Sediment**

Compliance with the terms of an AUL ensures the assumptions about the stated site use and corresponding exposure limitations remain valid into the future. The media in which contamination is present often determine the routes and likelihood of exposure, and thus there are several media-specific considerations for AULs. The MCP risk characterization process further requires that some media be categorized based on the likely receptors at the site, e.g., whether children might be using a site intensely and playing in soil. Examples of AULs by medium and risk characterization method are available in Section 2.8. These medium-specific exposure assumptions and method-specific considerations are described in more detail below.

### **2.6.1 Soil Contamination**

Under the MCP, soils are placed into one of three categories based on potential for exposure: S-1, S-2, and S-3. The soil categories are broad because the specific exposure factors for each category were designed to describe a range of potential exposures situations commonly found at disposal sites. Regardless of the risk characterization method used, site soils must be categorized to evaluate exposure.

The Soil Category S-1 includes land used for residential or active recreational purposes where frequent and intense direct contact exposures are likely. When conducting a Method 1 or 2 risk characterization at a site where S-1 standards are applicable, the disposal site Exposure Point Concentrations are compared to the appropriate standards. The Method 1 or Method 2 S-1 standards are based upon a residential exposure scenario in which a potential receptor comes into contact with the contaminated soil while playing or gardening, and includes active recreational areas such as playgrounds. Using Method 1 or 2, an AUL is not required if the disposal site Exposure Point Concentrations are equal to or less than the Method 1 or Method 2 S-1 standards. The exposures assumed from ingestion and dermal contact with contaminated soil represents levels acceptable for unrestricted use and thus is considered to be protective for all potential site uses. Similarly, if a Method 3 risk characterization for a residential scenario finds No Significant Risk to human health at a site, those soils are acceptable for unrestricted use under the MCP, and no AUL is required,

The Soil Category S-2 includes land used for commercial and passive recreational uses, where a person could come into contact with contaminated soil in a work environment or during passive recreational activities such as walking, birdwatching, or picnicking. The exposures accounted for in the S-2 Method 1 or Method 2 standards include incidental ingestion and dermal contact with contaminated soil during the warmer months. When conducting a Method 1 or 2 risk characterization at a site where S-2 standards are applicable, the disposal site Exposure Point Concentrations are compared to those standards. 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 is required. This is because of the limits on receptor exposure assumed with the S-2 soil category, and these limits must be documented in the AUL Opinion. Similarly, when a Method 3 risk characterization determines No Significant Risk for exposure scenarios like recreation as the most sensitive reasonably foreseeable use at the site, all more sensitive scenarios must be prohibited by the AUL.

The Soil Category S-3 is based upon a person coming into contact with contaminated soil during a short but intense exposure, such as excavation work. The exposures considered in the Method 1 or Method 2 S-3 standards are incidental ingestion and dermal contact with contaminated soil

during the warmer months as would be experienced in construction work. When conducting a Method 1 or 2 risk characterization at a site where S-3 standards are applicable, the disposal site Exposure Point Concentrations are compared to those standards. Whenever the Exposure Point Concentrations are equal to or less than the applicable S-3 standards, but exceed the S-1 standards, an AUL is required. This is because like S-2, the S-3 soil category assumes limitations on receptor exposure and these limitations must be documented in the AUL Opinion. When a Method 3 risk characterization determines No Significant Risk for an exposure like construction work as the most sensitive reasonably foreseeable use, all more sensitive scenarios must be prohibited by the AUL.

Further detail about soil categories, exposures, and AUL considerations is provided in the following sections on site specific activities. This includes a more in-depth look at common soil questions in residential and construction use scenarios.

## **2.6.2 Groundwater**

The MCP limits the use of AULs for groundwater contamination. The limited application of AULs to groundwater rests on several considerations. First, because contamination in groundwater migrates over time, providing an accurate description of the affected area of groundwater as part of an AUL is problematic as the boundaries can be expected to change. Second, because groundwater migration does not respect property boundaries, AULs for groundwater in many cases would entail the need for an AUL for each of the affected properties to restrict access/exposure to contamination in groundwater. Implementing multiple AULs in such cases would be complex, difficult, and often impractical.

However, AULs are specifically required for groundwater in one instance as described in 310 CMR 40.0932(5): to provide notice that an *existing* private water supply well is not suitable for future use as a potential drinking water supply. The Notice of AUL required in this case may only be used after the property supplied by the well is tied into a public drinking water supply. The groundwater, as a result, can be eliminated from consideration as a current drinking water source area as detailed in 310 CMR 40.0932(5) (d). The well, provided these requirements are met, may be maintained for non-potable uses as long as those uses meet a level of no significant risk.

AULs may also be necessary to ensure the maintenance of Pathway Elimination Measure technologies that are installed and maintained to prevent exposure to OHM in groundwater [see 310 CMR 40.1012(2)(b)], such as a passive subslab venting system and vapor barrier, to prevent the migration of volatile contaminants from the groundwater into an existing building. In such instances, the AUL ensures that the system will remain in place and intact so that it will continue to function effectively in preventing exposure. Note: 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.

AULs are not required to prevent installation of future private drinking water wells in areas where groundwater exceeds the GW-1 standards. In the case of *new* private water supply wells, local Boards of Health have the authority to ensure that such supplies are potable and are not installed in or drawing upon contaminated groundwater. The MCP does not provide a separate regulatory check on potential exposure to groundwater contamination via new private water supply wells.

All Method 1, 2, and 3 risk characterizations require that the exposure scenarios developed for the risk characterization be consistent with the groundwater categories. An AUL may only be

used to eliminate groundwater exposures if private wells are removed from service as drinking water supplies pursuant to 310 CMR 40.0932(5)(d).

***NOTE TO REVIEWERS: The use of AULs to address the vapor intrusion pathway for both existing buildings and future construction is under discussion as part of the development of MassDEP's Vapor Intrusion guidance. The use of AULs (as described above) to ensure that barrier systems necessary to prevent vapor intrusion in existing buildings remain intact over time is consistent with past MassDEP guidance as well as the Vapor Intrusion guidance under development. More recent policy discussions in the Vapor Intrusion guidance work group have focused on providing a standardized approach for addressing the construction of future buildings (i.e., buildings constructed after a Response Action Outcome) in areas with volatile organic compounds above the GW-2 standards. For more discussion of the proposed standardized approach for future buildings and related AUL requirements, see the draft Vapor Intrusion Guidance, December 2010.***

### **2.6.3 Sediment**

AULs are used infrequently at sites where sediments have been contaminated. This is because sediment is an essential medium for ecological receptors, and an AUL cannot be used effectively to limit ecological exposure. Additionally, where access rights exist, exposures associated with that access must be evaluated under the current use scenario. For example, a river must be cleaned up to protect activities that are authorized by federal and commonwealth statutes, such as navigation, swimming and fishing. An owner of land adjacent to a surface water body cannot use an AUL to restrict access to contaminated sediment if people could be exposed to it while exercising riparian rights such as navigation, swimming and fishing. As with any AUL, access can only be restricted by the property owner, subject to any easement rights.

In limited cases, an AUL may be appropriate for sites with sediment contamination. Where a sediment cap is part of an implemented remedy, the AUL documents the presence of the sediment cap, requires that the cap remain in place, and specifies obligations for the monitoring and maintenance of the cap. The AUL cannot, in such cases, restrict access. The appropriateness of a sediment cap would be dependent upon site-specific conditions, including factors such as ownership of the sediments, access rights, and the responsible party's continued ability to monitor and maintain the cap.

## **2.7 AULs and Specific Site Activities**

### **2.7.1 Residential Use**

Residential use is often the scenario that presents the most risk in a risk characterization, because of the presence of sensitive receptors and the intensity of use at the site. AULs may be used in certain circumstances with respect to residential use. AULs to address residential use include: an AUL that prohibits residential use altogether, or an AUL that limits direct contact exposure to soil at residential sites.

**AUL to Prohibit Residential Use** - Residential use must be considered a current or reasonably foreseeable 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. If residential use is

not a current use, as defined at 310 CMR 40.0923(2), then an AUL may be implemented to prohibit such use in order to limit associated exposure pathways.

**AULs to Limit Direct Contact Exposure to Soil at Residential Sites** - An AUL may be used in some cases to limit certain activities associated with soil exposures in residential settings. Generally, AULs limiting soil exposures in residential settings are used to ensure either (1) that a barrier to direct contact remains intact and effective into the future or (2) that homegrown produce consumption does not become an exposure pathway.

An AUL may be used to ensure that the direct contact exposure pathway for residential use is limited through the placement and maintenance of adequate barriers, such as buildings, pavement, and/or other structures designed as a pathway elimination measure. For example, if an existing building foundation limits dermal exposure to underlying contamination, an AUL would specify that the basement floor and foundation remain in place and be maintained as a barrier to dermal contact.

AULs may be used to limit direct contact to soil in conjunction with Method 1, Method 2 and Method 3 risk characterizations. Conditions under which AULs are appropriate are more limited when Method 1 or 2 are applied.

Method 1 can be used to demonstrate a condition of No Significant Risk from soil contamination on a residential site if (a) OHM concentrations in soil beneath permanent structures do not exceed S-3 standards, (b) OHM concentrations in soil beneath pavement do not exceed S-2 standards, and (c) OHM concentrations in accessible soil (to a depth of 15 feet) do not exceed S-1 standards. An AUL would be necessary to ensure the long-term effectiveness of any direct contact barrier beneath which OHM concentrations exceed S-1 Standards.

Method 2 may be used in residential settings to incorporate site-specific conditions in the leaching model. Under Method 2, the allowable soil concentrations for a given soil category may be higher than the Method 1 Standards, but may not exceed the applicable MCP Direct Contact Soil Concentrations listed at 310 CMR 40.0985(6). As is the case for Method 1, soil under pavement may be categorized as S-2, and soil under buildings may be categorized as S-3, but an AUL is required to ensure that the building or pavement remains intact and effective as a barrier to direct contact.

Method 3 can be used to demonstrate a condition of No Significant Risk from soil contamination on a residential site if (a) OHM concentrations beneath a barrier do not exceed UCLs, and (b) OHM concentrations in accessible soil (to a depth of 15 feet) do not exceed levels associated with MCP risk limits. When Method 3 risk characterization is used to demonstrate a condition of No Significant Risk, an AUL can be used with a wider range of contaminant concentrations than would be allowed under Method 1 or Method 2.

**AULs and Gardening** – Gardening is considered a current use at residential properties. Since an AUL may not be used to eliminate a current use, gardening should be included as a Site Activity and Use at a residential property. The only limited exception is where available space makes gardening impossible (e.g., the entire property is occupied by the residential building(s)).

In a Method 3 risk characterization, the on-site garden/vegetable ingestion pathway should be conducted for all OHM with MassDEP published uptake factors. The uptake factors published with the risk assessment shortforms (in the spreadsheet called the v-lookup table) are generally the

most updated chemical-specific information. See “Shortforms: Method 3 Human Health Risk Assessment” available at <http://mass.gov/dep/service/compliance/riskasmt.htm>.

### **2.7.2 Utility Work Exposures**

If a parcel has a utility line or easement, then at a minimum that area of the site must be cleaned up to a level that poses No Significant Risk for emergency repair workers. Utility repair work should be evaluated as a *current* use in a risk characterization of the property. An AUL cannot be used to limit activities and exposures consistent with current use.

Where underground utilities exist, exposures associated with emergency repair work must be evaluated under the current use scenario. Utility worker risk assessment should focus on exposures associated with acute, non-cancer effects. Due to the short-term nature of the exposure, it is not necessary to evaluate potential cancer risk for utility repair work. The exposure routes in this scenario include direct contact and incidental ingestion of contaminated soil, inhalation of particulates, and inhalation of vapors associated with either contaminated soil or groundwater. The risk characterization for utility work should also consider the potential for explosive vapors as a risk of harm to public safety.

Where a Method 1 or a Method 2 risk characterization is performed, MassDEP does not require a separate Method 3 risk characterization to evaluate possible exposures to utility workers. S-3 standards are assumed to be protective of such exposures. Where a Method 3 risk characterization is performed, utility worker exposures should be considered, as appropriate. Regardless of the Method used, cleanup is required unless the risk characterization results indicate that a level of No Significant Risk exists for an emergency utility worker.

Where future utility construction is possible, an AUL may be used to preclude construction of utilities until measures to protect both utility construction workers and utility repair workers are in place. The AUL should indicate that prior to construction, a Health and Safety Plan be developed and implemented. The Health and Safety Plan should specify protections for construction workers from exposure to OHM that could pose a risk, consistent with Section 2.7.3. Conditions under such Plan must be such that exposure during future utility repair would pose No Significant Risk.

### **2.7.3 Construction, Excavation, and Health and Safety Plans**

An AUL can be used to limit potential exposures related to excavation and construction, and will often include a requirement that a Health and Safety Plan be prepared to manage risk from potential exposure to OHM. The AUL should describe what activities warrant the implementation of a Health and Safety Plan (e.g., excavation) and identify whom the plan is intended to protect (e.g., workers and people residing on and near the site).

If a completed assessment of construction worker risk does not demonstrate No Significant Risk for workers, the AUL should document the requirement of a Health and Safety Plan to address that risk. A complete Health and Safety Plan does not need to be prepared at the time that the AUL is recorded, but the “Obligations and Conditions” section of the AUL should include a requirement to develop and use such a plan. The scope and objectives of the plan should be described in the AUL.

The AUL should specify that the Health and Safety Plan be prepared by a Certified Industrial Hygienist or other individual appropriately trained and/or experienced in the development of Health

and Safety Plans. The Health and Safety Plan should specifically provide information on all of the following:

- the chemicals at the site;
- the types of contaminated media present;
- the extent of contamination;
- the potential routes of exposure;
- the appropriate level of personal protective equipment;
- the type of monitoring required;
- that worker safety will be monitored by a Certified Industrial Hygienist or other individual appropriately trained and/or experienced in the development of Health and Safety Plans; and
- hazard communication to workers, including appropriate health and safety training, dissemination of Material Safety Data Sheets (MSDS), and clear, concise information to workers about the contaminants, their concentrations at the site, and the concentrations that would pose a significant risk.

A general statement such as, "OSHA procedures will be used during excavation," provides too little information as to what health and safety requirements are necessary at the site. OSHA guidelines for construction workers do not address OHM exposures and do not necessarily equate to a level of No Significant Risk at the site or incorporate risk management criteria consistent with the MCP. Stating that OSHA guidelines will be followed does not identify whether monitoring for off-site exposures is necessary (e.g., monitoring for particulates at the site boundary to guard against exposures to people other than those performing the excavation who are in the vicinity of the site). Unless it is documented that construction activities will not pose a risk to neighboring residents or others who might be exposed outside the site boundaries, the Health and Safety Plan should specify the monitoring of remedial activities necessary during any construction. All Health and Safety Plans should, at a minimum, be consistent with the health and safety procedural requirements of the MCP [310 CMR 40.0018].

#### **2.7.4 Soil Management Plans**

In certain situations it may be necessary to develop a specific Soil Management Plan to address the handling and disposition of soil excavated from the AUL area. As with the Health and Safety Plan, Soil Management Plans may be developed either at the time the AUL is filed, or at the time the excavation is being planned. Again, the AUL Opinion and form should specify that the development of a Soil Management Plan is necessary and provide information regarding the scope and objectives of such a plan.

### **2.8 Common Exposure Assumptions and Related AUL Conditions**

As presented in previous sections, an AUL is based on the risk characterization method used and the medium from which exposure is being restricted. Table 2-1 provides general examples of common exposure assumptions, the media in which contamination remains, and an AUL condition that addresses that situation.

**Table 2-1: EXAMPLES OF COMMON EXPOSURE ASSUMPTIONS AND AUL CONDITIONS**

<b>Media</b>	<b>Risk Characterization Method</b>	<b>Conditions</b>	<b>Exposure Assumptions</b>	<b>AUL Limitation/Obligation</b>
Soil	Method 1 or 2	Soil meets S-2 and S-3 standards, but does not meet S-1.	No routine exposure to children.	AUL prohibits residential, school, playground, or day care use of the site.
Soil	Method 1 or 2	Soil at depth does not meet S-3, but does meet S-2 standard.	Excavation could expose construction workers to contamination.	AUL prohibits excavation or prohibits excavation without the development and implementation of an appropriate Health and Safety and Soil Management Plans.
Soil	Method 1 or 2	Soil does not meet the S-1 standard, but such soil is below a solid pavement barrier.	Exposure to soil is prevented by the barrier	AUL requires that the barrier be inspected and maintained.
Soil	Method 3	Soil does not show No Significant Risk for the S-2 soil category.	No direct contact with soils by workers or recreational use.	AUL requires placement and maintenance of a barrier to direct contact, such as 3 feet of clean fill and a demarcation layer. Includes requirement to implement appropriate Health and Safety and Soil Management Plans.
Groundwater	Method 3	VOCs in GW are migrating into indoor air of an on-site building.	Installation of a subslab venting system and vapor barrier to prevent vapor intrusion from subsurface to indoor air.	AUL requires maintenance of the subslab venting system and vapor barrier (see <b>NOTE TO REVIEWERS</b> below table).
Sediment	Method 3	Sediments capped as part of remedy.	Cap prevents exposure to contamination.	AUL requires inspection and maintenance of the cap.

**NOTE TO REVIEWER:** *Specific guidance on the use and content of an AUL to address the potential for vapor intrusion into indoor air is provided in MassDEP’s interim Vapor Intrusion Guidance draft (December 2010), Section 4 and Appendix VIII.*

**2.9 Risk of Harm to Safety, Public Welfare and the Environment**

Although AULs are primarily intended to address risks to human health, they may also be used to protect against activities or maintain remedies to address risks to safety, public welfare or the environment.

### Risk of Harm to Safety

An AUL could be used to condition or prohibit activities that could pose a risk of harm to safety. The risk of harm to safety is always a separate evaluation from the risks to health, public welfare, and the environment in accordance with 310 CMR 40.0960.

Example: An AUL could provide for the maintenance of a cap to prevent direct contact with physical hazards located in the area of OHM contamination (e.g., glass and metal fragments) present at a site, or maintenance of a fence to help control access to certain areas of a site where safety hazards exist as part of a Temporary Solution. (Note: a fence should not be used as part of a Permanent Solution where the maintenance of a condition of No Significant Risk relies upon the maintenance of the fence.)

### Risk of Harm to the Environment

The use of an AUL to address risk of harm to environmental receptors may be effective in limited cases. Clearly, an AUL specifying limits on animal use of the property is not realistic and should not be considered. However, when a remedial action, such as capping to prevent soil run-off to a wetland, is conducted to prevent risk of harm to the environment, it may be appropriate to include an AUL that establishes continuing obligations for maintenance of the cap and obligations to not interfere with its function.

### Risk of Harm to Public Welfare

An AUL to prevent risk of harm to public welfare may also be employed.

Example: A risk characterization may conclude that potential soil exposures do not pose an unacceptable risk of harm to human health, but the soil may have a strong odor or oily residue that could cause a nuisance if the contaminated soil were placed in an area of unrestricted use that would be considered a risk to public welfare. An AUL could be applied in this case to guard against the excavation or relocation of soils without a Health and Safety Plan and a Soil Management Plan to an area where odors or residue could cause a nuisance.

## **2.10 Evaluation of Risks Associated with Changes in Uses and Activities**

An AUL is not necessarily a permanent limitation on future development of contaminated property. Where an AUL has been used to eliminate certain exposure scenarios at a site and the property owner later intends to change the site uses or conditions to uses or conditions which were not evaluated in the risk characterization or addressed by the existing AUL, an LSP must determine before the changes are implemented whether a level of No Significant Risk would continue to exist under the contemplated new uses or conditions, as described in 310 CMR 40.1080. In cases where proposed activities would not be consistent with a level of No Significant Risk, additional cleanup and the amendment or termination of the initial AUL and implementation of a revised AUL would be necessary before the proposed activities could occur. (See *Section 6* for the requirements related to a change in property use after an AUL has been implemented).

**NOTE TO REVIEWERS: The revisions to Section 3 are intended to clarify already existing Guidance – for example, the elements of a Notice are more specifically described to address common problems, such as missing attachments to the AUL. In addition, because Grants represent a small number of the total AULs, procedures for Grants were moved to Appendix J.**

### **SECTION 3: AUL TYPES AND ELEMENTS**

AULs are a form of land use control created under the MCP. As described in Section 2, an AUL is required to alert current and future property owners and other interested parties of the activities and uses which are appropriate for the property and consistent with maintaining a condition of No Significant Risk. The information in this section distinguishes between the types of AULs, and describes in detail the components of the Notice of Activity and Use Limitation, the most commonly used type of AUL.

#### **3.1 Authority for Establishing AULs**

MassDEP is authorized by M.G.L. c.21E, § 6 to acquire interests in or to restrict use of real property as a tool to ensure that oil and hazardous material are cleaned up adequately. Specifically, Section 6 provides that if necessary to carry out the purposes of Chapter 21E, MassDEP may:

- acquire real property or any interest therein, by purchase, gift or lease, or by eminent domain under M.G.L. c. 79;
- restrict the use of property that is or was a site or vessel; and
- record, or may cause, allow, or require the owner of property to record, notice of the restrictions of the use of such property. No restriction held by MassDEP shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body, provided such restrictions or assignments are approved by the commissioner of MassDEP.

The AUL requirements set forth in the MCP are intended to ensure that AULs appropriately describe limitations on use of the property which are protective of health, safety, public welfare, and the environment; and are prepared and recorded or registered in the same manner and with the same professional standards as other similar real estate instruments.

#### **3.2 Types of AULs**

The authorization in M.G.L. c. 21E, §6 led MassDEP to develop the following types of AULs or forms of land use control in the MCP:

1. Grant of Environmental Restriction or “Grant”;
2. Notice of Activity and Use Limitation or “Notice”;and
3. Environmental Restriction (imposed by MassDEP)

The Grant and Notice are designed for use by and at the discretion of property owners. The Environmental Restriction may be imposed by MassDEP where the Department conducts response actions and the property owner fails to implement an AUL at the property where control of land use is considered necessary. Since the intent of this Guidance is to provide the requirements for AULs

implemented and maintained by property owners, no additional discussion of the Environmental Restriction is provided.

### **3.3 Differences between the Grant and Notice**

The Grant of Environmental Restriction and Notice of Activity and Use Limitation have important similarities, but also distinct differences. Both the Grant and Notice document that a release of OHM has occurred at a property, that response actions have been conducted at the site, and that the protectiveness of the cleanup relies upon limiting certain activities and uses at the property. The legal effects of a Grant and Notice, however, differ significantly.

#### **3.3.1 Grants**

A Grant of Environmental Restriction is a **legally enforceable contract** that conveys property interests to MassDEP. Such interests take the form of restrictions, easements and covenants. Present and future property owners, present interest holders who have subordinated their interests to the Grant, and future interest holders are legally required to abide by the terms of the Grant and its restrictions, easements and covenants. The Department, as the grantee or recipient of such interests, has the right to enforce the terms of the Grant if these terms are violated.

MassDEP may enforce the Grant under the MCP or seek legal and/or equitable remedies through the courts. In general, MassDEP will pursue enforcement actions for Grant violations against the party who caused the violation (or allowed the violation to occur), and not against former property owners who implemented the Grant correctly and complied with its terms while they owned the property (see 310 CMR 40.0019).

Use of a Grant requires review and approval by MassDEP, and payment of associated permit fees. Subordination agreements must be obtained from current interest holders. By these subordination agreements, the interest holders acknowledge the primacy of the Grant over their rights and agree to comply with the Grant's terms when exercising their right in the affected property. Without such agreement(s), parties whose property interests were created prior to the Grant would not be legally obligated to comply with the terms of the Grant.

Procedures for implementing Grants are provided in *Appendix J*.

#### **3.3.2 Notices of Activity and Use Limitation**

A Notice of Activity and Use Limitation is not a legally enforceable contract, and does not require advance Department review or approval, or payment of permit fees. Rather, it operates as a notice of record at the Registry of Deeds. The Notice identifies activities and uses that are allowable, as well as those that are inconsistent with maintaining a condition of No Significant Risk. Unlike a Grant, a Notice does not convey a property interest to MassDEP. There is no enforceable contract created between MassDEP and property owners and interest-holders. Although Notices do not legally restrict the use of property as a matter of real estate law (as is the case with a Grant), they do provide information about property uses and activities related to maintaining conditions of "No Significant Risk." A Notice is not "implemented" until it is recorded and/or registered by the property owner(s) in the appropriate Registry of Deeds.

A Notice does not require subordination agreements from interest holders. 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)). Current holders of record interest are those individuals or entities with an interest in the subject property on record at the Registry of Deeds or registered in the Land Court (e.g., owners, mortgage holders, lessees or tenants, and easement or license holders). See *Section 5.3* for a more detailed discussion of the requirement to notify current interest holders.

While not a legally enforceable contract, MassDEP can enforce the terms of a Notice of Activity and Use Limitation through enforcement of M.G.L. c. 21E and the MCP requirements. MassDEP can pursue enforcement actions against a party for violating an RAO when the terms of the AUL have not been met. However, enforcement may not be taken against the former property owners who implemented the Notice properly and complied with its terms while they owned the property (see 310 CMR 40.0020).

The requirements for a Notice are set forth at 310 CMR 40.1074.

### **3.4 Rationale for the AUL Requirements**

In establishing the requirements of an AUL, MassDEP's objective was to create a standardized document whose content and format accurately and clearly describe what can and cannot happen at a site to maintain a condition of No Significant Risk. Since AULs are legal real estate instruments, it was necessary for MassDEP to take into account applicable real estate law and practice standards. Thus, the legal terms and format of the AUL forms published in the MCP are similar to other real estate instruments, and the requirements for AULs are consistent with current real estate practice.

The MCP reflects the legal requirements and practice standards by requiring that:

- the property owner sign the AUL;
- surveys be prepared by a Massachusetts Registered Land Surveyor and recorded as plans with the Registry of Deeds;
- legal descriptions be provided defining the parcel and the area subject to the AUL; and
- what can and cannot happen at the site and the obligations and conditions for maintaining a condition of No Significant Risk at the site be clearly identified.

### **3.5 Elements of a Notice of Activity and Use Limitation ("Notice")**

A Notice identifies the subject property and describes the activities and uses that are consistent with and inconsistent with maintaining a condition of No Significant Risk at a property. Notices must be prepared using Form 1075 provided in the MCP at 310 CMR 40.1099 (See *Appendix H* for a complete list of AUL forms). This section describes the elements contained in a Notice (Form 1075). A similar discussion about Grants (Form 1072B) is provided in *Appendix J*.

The information required to be included in a Notice is found at 310 CMR 40.1074(2) and is described below in the order in which it appears in Form 1075 (see *Appendix C, "Step by Step Through Form 1075"* for additional guidance on completing Form 1075):

- The MassDEP Site Name (if there is one) and MassDEP Release Tracking Number(s);
- The date on which the Notice is signed by the property owner and the name and address of the property owner;

- First “Whereas” Clause – the name of the property owner and the municipality and county in which the property containing the area subject to the AUL is located (if the property owner is a corporation, the state of incorporation and the principal place of business should be included). The reference to the owner’s source of title: for recorded land, the deed book and page number; for registered land, the Certificate of Title number. If the owner inherited the property, the probate docket number should also be included;
- Second “Whereas” Clause” – refers to the legal description of the property containing the area subject to the AUL (which is attached as Exhibit A). If the land is recorded, the Registry of Deeds recording reference for the survey plan showing the property is required in this clause. If the land is registered, the Land Court Plan reference is required;
- Third “Whereas” Clause (only included if the AUL applies to a portion of the property rather than the entire property) – refers to the legal description of the portion of the property subject to the AUL which must be attached as Exhibit A-1 and references the survey plan or Land Court Plan for the portion. For recorded land, the Plan Book and Plan Number must be inserted; for registered land, the survey plan of the portion is “a sketch plan attached hereto and filed herewith for registration”;
- Fourth “Whereas” Clause – establishes whether the area subject to the AUL is the disposal site or is a portion of the disposal site. This clause also refers to a sketch plan showing the boundaries of the area subject to the AUL in relation to the disposal site boundaries. The sketch plan is attached to the AUL as Exhibit B;
- Fifth “Whereas” Clause – establishes that response actions taken at the site are based on restrictions on human access to OHM remaining at the property, and the restriction of certain activities occurring “in, on, through, over or under” the area subject to the AUL. This clause also establishes that the basis for the restrictions is the AUL Opinion (attached to the Notice as Exhibit C) and requires the date of the AUL Opinion;
- The next paragraph (that begins “NOW, THEREFORE...”) establishes that notice is being given of certain activity and use limitations as set forth in the AUL Opinion.
- Numbered sections:
  - “1. Activities and Uses Consistent with the AUL Opinion” – lists uses and activities that are allowed in the area subject to the AUL, based on the AUL Opinion attached to the Notice as Exhibit C;
  - “2. Activities and Uses Inconsistent with the AUL Opinion” - lists uses and activities that would be inconsistent with the objectives of the Notice. Implementing such uses or activities may result in significant risk or a substantial hazard;
  - “3. Obligations and Conditions Set Forth in the AUL Opinion” – lists any obligations or conditions that must be followed or undertaken to maintain a condition of No Significant Risk or eliminate a substantial hazard;
  - “4. Proposed Changes in Activities and Uses” - specifies that any proposed changes in activities and uses at the area subject to the AUL that may result in

higher levels of exposure to OHM require an evaluation by an LSP in accordance with 310 CMR 40.1080 *et seq.* (see Section 6.2, *Changes in Site Activities and/or Uses or Other Site Conditions after a Response Action Outcome with an Activity and Use Limitation has been Submitted*).

“5. Violation of a Response Action Outcome” - specifies that activities and uses upon which the Notice is based may not “change at any time to cause a significant risk” without prior evaluation by an LSP and any necessary response action. This paragraph references the requirement in 310 CMR 40.0020 that the owner or operator of a property notify MassDEP in the event of any such change of activity or use that occurs without prior LSP evaluation and necessary response actions.

“6. Incorporation Into Deeds, Mortgages, Leases and Instruments of Transfer” - requires that the Notice be referenced or incorporated into any subsequent “deeds, easements, mortgages, leases, licenses, occupancy agreements” or other instruments that transfer an interest in or a right to use the area subject to the AUL.

- The notarized signature of the property owner and the notarized signature and seal of the LSP. Note that the date entered by the owner in this section should be the same date that is entered on the first page of the Notice as the date on which the Notice is made. The signature of the LSP must not predate the signature of the owner.

- Exhibits:

Exhibit A: a written legal description of the parcel of land that contains the area subject to the AUL.

Exhibit A-1 (only needed if the AUL applies to a portion of the property/parcel): a written legal description of that portion to which the AUL applies.

Exhibit A-2 (only needed when the AUL applies to a portion of registered land): a plan of the portion prepared by a Massachusetts Registered Land Surveyor.

Exhibit B: a sketch plan showing the boundaries of the area subject to the Notice in relation to the boundaries of the disposal site. (This plan does not need to be prepared by a Registered Land Surveyor.)

Exhibit C: an AUL Opinion, in narrative form, written, dated, signed, and sealed by an LSP.

Exhibit D: documentation of signatory authority, if necessary.

A Registry-certified copy of the Notice must be submitted to MassDEP using transmittal form BWSC-113. MassDEP must also be provided with a Registry copy of all survey plans referenced in the Notice (plans for the property/parcel and for the portion of the property/parcel).

**NOTE TO REVIEWERS: The MCP currently requires that the Registry-certified copy of the Notice, bearing the book and page/instrument number and/or document number and a Registry copy of the survey plan(s) referenced in the Notice be submitted to MassDEP within 30 days of recording/registering the Notice. With the transition to electronic MCP**

***submittals, it is acceptable to submit an electronic scanned copy of the Registry - certified documents to satisfy this requirement. A separate hardcopy submittal to MassDEP is not required. Future revisions to the MCP will clarify this requirement at 310 CMR 40.1074(4)(a).***

***In addition, MassDEP no longer requires that Form 113A be recorded at the Registry of Deeds as Exhibit D of the AUL.***

**NOTE TO REVIEWERS: Section 4 revisions include: clarifications to existing guidance on the distinction between recorded and registered land, procedures for recording/registering documents, and procedures for preparing survey and sketch plans. New subsections were added to address AULs that apply to multiple continuous parcels and AULs that rely on one or more barriers to maintain a condition of No Significant Risk. Additional guidance emphasizing the consequences of restricting the entire property rather than a portion is provided in Section 4.2.**

**Requirements for documenting signatory authority have been expanded, but moved to Appendix D.**

**As noted previously, procedures for Grants have been moved to Appendix J.**

## **SECTION 4: PREPARING AN AUL**

This section discusses important legal considerations and identifies the necessary steps in preparing an AUL for recording or registration. *See also Appendix C, “Step By Step through Form 1075” and Appendix I, “Activity and Use Limitation Checklist.”*

It is important that both the property owner who is considering using an AUL and his or her LSP understand that **an AUL is a legal document** that functions as a component of a cleanup remedy in accordance with MCP requirements. Since an AUL documents limitations on activities and uses occurring at a site, the property owner needs to be clear about what those limitations are, the area(s) of the property subject to such limitations, and ongoing maintenance obligations for adhering to the AUL conditions. In this regard, MassDEP strongly advises the preparer of an AUL to discuss specifically with the property owner the AUL requirements, the consequences of the site use limits under consideration, and the consequences of violating the terms set forth in the AUL. Consideration of these factors up front will reduce the likelihood of needing to amend the AUL, or to terminate the AUL and redraft a new one.

### **4.1 The Difference between Recorded and Registered Land**

Documents pertaining to real property in the Commonwealth are filed at the Registry of Deeds. Massachusetts is divided into twenty-one (21) registry districts, each under the direction of a different Registrar of Deeds. Since procedures may vary, it is important to consult with the appropriate Office of the Registry of Deeds to ensure that all filing requirements are met. The “City/Town to Registry Guide” on the Registry of Deeds webpage at <http://www.sec.state.ma.us/rod/rodidx.htm> can be used to determine the Registry District that includes the subject property.

Real property in the Commonwealth of Massachusetts is either Registered Land or Recorded Land. In drafting an AUL, it is important to recognize which type of land is involved, because plan requirements and property descriptions differ between these two separate land indexing systems.

#### **4.1.1 Recorded Land**

Most real property in Massachusetts is Recorded Land. A transfer of ownership in Recorded Land is typically completed by recording a new deed at the Registry of Deeds. Dealings with Recorded Land are based on the concept of caveat emptor (“let the buyer beware”). There is no

judicial determination of title and boundaries with Recorded Land, so the recording of a deed does not guarantee that the parcel is free from all liens, encumbrances, and other legal problems that would cloud the title. Thus, performing a title search is generally necessary to determine the status of a property in Recorded Land.

Documents pertaining to Recorded Land are located at the Recorded Land section of the Registry of Deeds and are indexed by book and page numbers. Upon filing, a document is assigned an “instrument” number, but may not be assigned a book and page number until a later date. Assignment of a book and page number will vary depending upon the specific Registry. As such, a Registry-certified copy of the AUL with the instrument number and the date of recording is sufficient for submitting an implemented AUL to MassDEP.

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.

#### **4.1.2 Registered Land**

Land for which the title and boundaries have been created by a decree of the Massachusetts Land Court pursuant to MGL c. 185 (“The Land Court and Registration to Title to Land”) is termed Registered Land. Typically Registered Land has at some point been the subject of an ownership or boundary dispute. Once the Land Court renders a decision as to ownership and boundaries of a parcel of land, those issues cannot be challenged (unless it can be proven that fraud was involved in filing the registration petition). An owner is issued a Certificate of Title in which the Land Court declares that he or she is the owner of the property. The Certificate of Title, along with the registration plan issued by the Land Court, identify the boundaries of the subject parcel.

Although the Land Court has exclusive jurisdiction over Registered Land and functions separately from the Registry of Deeds, all registry districts operate a separate “Registered Land section” as an adjunct of the Land Court. Documents pertaining to Registered Land are indexed by Document Numbers assigned upon filing, and should reference the Certificate of Title associated with the property. The Certificate identifies most outstanding encumbrances, such as mortgages, easements, and liens. When a document is registered, it should be annotated on the back of the Certificate of Title for the associated property. When the property is transferred to a new owner, a new Certificate of Title is issued to the new owner upon the filing of the deed.

The Registered Land section of the Registry of Deeds retains all original documents; the property owner will only receive a copy of the original.

The “Commonwealth of Massachusetts Land Court Guidelines on Registered Land” provides detailed procedures for Registered Land. This document can be found on the Land Court webpage at: <http://www.mass.gov/courts/courtsandjudges/courts/landcourt/index.html>

#### **4.1.3 Land that is both Recorded and Registered**

If the document to be filed pertains to both Recorded and Registered Land, the requirements of both the Registry of Deeds and Land Court need to be met. Generally, both sets of requirements can be satisfied by following either of the following procedures:

1. obtain two sets of original documents and file one as Recorded Land and one as Registered Land; or
2. obtain one set of original documents, and file the originals as Registered Land, and then record the registered documents as Recorded Land. Depending on the procedures of the specific registry district, the document recorded will either be the original or a certified copy of the registered document. In either case, the original document is returned to the Registered Land section.

## **4.2 Description of the Area Covered by the AUL**

An AUL must describe the parcel of land that contains the area subject to the AUL. A written metes and bounds description (legal description) of this parcel of land must be attached to the AUL as Exhibit A. This requirement can best be satisfied by obtaining the description from an accurate and current survey plan that has already been recorded with the Registry of Deeds. Please note that attaching a copy of the legal description found in the property owner's deed to the AUL as Exhibit A is acceptable, as long as the deed references an accurate survey plan that was recorded at the Registry of Deeds prior to recording the AUL. If the parcel is registered land, a copy of the Owner's Certificate of Title may be attached as Exhibit A.

An AUL must also include a metes and bounds description of the specific area that is subject to the AUL. The parcel of land and the specific area subject to the AUL may be one and the same if the property owner chooses to limit site use across the entire property. When the remaining contamination is limited to only a portion of the parcel and the property owner elects to apply the AUL just to that portion of the property, then it is necessary to provide a written metes and bounds description of that portion as Exhibit A-1 of the AUL. If the entire parcel is subject to the AUL, then the description provided by Exhibit A satisfies both metes and bounds description requirements.

Consequently, in crafting an AUL, the property owner needs to decide whether to restrict the entire parcel of land or only a portion of it. A property owner may decide to restrict the entire parcel. If a parcel is small in size and has a singular use, for example a service station, it may be less costly and less complicated for AUL compliance to restrict the entire parcel. When only a portion is to be restricted, an additional survey is necessary for the portion. Depending upon the size of the lot and its versatility, the potential for decreased property functionality or value when restricting the entire parcel may exceed the cost of a survey. It may make more sense to carve out restricted and unrestricted areas if the property owner wishes to preserve flexibility in use of the parcel, especially if the restricted area does not comprise a major portion of the parcel.

If restricting the entire parcel, keep in mind that the entire parcel will be subject to restrictions in the AUL. For example, an AUL on the entire parcel cannot restrict excavation "in paved areas of the site" unless the paved area of the site has been surveyed. Without surveying the boundaries of the paved area, excavation would need to be restricted throughout the AUL area, which is the entire parcel.

### **4.2.1 Recorded Land**

A "running" description is the type of metes and bounds description used to describe both the perimeter of the parcel of land and the area subject to the AUL if the land is recorded. Accordingly, Exhibit A and Exhibit A-1 should contain running descriptions. A running

description uses compass directions and distances. An example of such a description is: "Beginning at a point on the northerly side of Main Street; thence turning and running N 20' 10' 30" W, one hundred (100) feet to ...". Such a description may be obtained from the property owner's deed as long as it is based on a survey plan that was recorded at the Registry of Deeds before the AUL was recorded.

#### **4.2.2 Registered Land**

If the land is registered land, the metes and bounds description for the parcel (attached as Exhibit A) will be a "bounding description" of the parcel's perimeter, rather than a running description. For example, a bounding description read as follows: "NORTHERLY by Old Boston Road, one hundred (100) feet...". Such a description may be obtained from the Owner's Certificate of Title. If the area subject to the AUL is a portion of a parcel of registered land, then the metes and bounds description describing the portion of the parcel (Exhibit A-1) needs to be a running description.

#### **4.3 Plans Describing the Land Covered by an AUL**

Survey Plan. It is critical that an AUL accurately describe the land to which it applies and that any terms used to identify the AUL on the plan are consistent with the terms used in the AUL. The MCP requires that a survey plan of the parcel containing the area subject to the AUL and the specific area subject to the AUL be prepared by a Massachusetts Registered Land Surveyor. Both the parcel of land containing the AUL area and the AUL area itself must be clearly and accurately defined for purposes of delineating property lines, avoiding conflicts with abutters about the boundaries of the property and the AUL area, and complying with the terms of the AUL.

Sketch Plan. A sketch plan must also be prepared to show the location of the area subject to the AUL relative to the boundaries of the disposal site. Although the sketch plan should be accurate, it is not intended to establish legally enforceable boundaries. Thus, the sketch plan need not be prepared by a Massachusetts Registered Land Surveyor.

The sketch plan should describe any facts that would provide pertinent information describing that area that is subject to the AUL, but are not otherwise included in the survey plan. Pavement, buildings, or other barriers within the boundaries of the AUL area that must be maintained to ensure a level of No Significant Risk must be depicted on a survey plan if the restrictions for the area within the barrier are different than the restrictions within the entire AUL area. However, a sketch plan depicting the boundaries of a barrier is appropriate when the restrictions are the same throughout the entire AUL area.

##### **4.3.1 Survey Plan of Parcel Containing Area Subject to the AUL (Exhibit A)**

Recorded Land. The AUL must reference a survey plan showing the boundaries of the parcel of land containing the area subject to the AUL. Check with the appropriate Registry of Deeds to determine whether a survey plan has been recorded. A survey plan that has already been recorded at the Registry of Deeds (i.e., it is "of record" at the Registry) may be referenced to describe the parcel of land within which the area subject to the AUL is located, if the plan is still current. However, if the plan no longer accurately reflects the boundaries of the property (e.g., the property has been subdivided and/or portions of the property have been sold since the

survey plan was prepared), then a new survey plan is required to show the property boundary as it exists on the date of the recording of the AUL.

The recording information of the survey plan (i.e., the Plan Book and Plan Number) must be referenced in the second “Whereas” clause of the AUL. (Note that if a new plan is required, then a new legal description should also be prepared rather than relying on a copy of the property owner’s deed for Exhibit A.)

If a new survey plan is needed, then a perimeter survey of the parcel within which the area subject to the AUL is located must be prepared by a Massachusetts Registered Land Surveyor in accordance with the Registry of Deeds plan recording requirements. Plan recording requirements are established pursuant to M.G.L. Chapter 36, Section 13A(“Plans, Rules for Filing in Registries”). (See *Appendix F, “Requirements for Survey Plans,”* for plan recording requirements). To satisfy the AUL survey plan requirement for the parcel of land, this survey plan must be recorded with the Registry of Deeds in the plan department independent of the AUL (i.e., not attached as an exhibit). The new survey plan must be recorded before recording the AUL, so that the new plan can be referenced in the AUL.

Whether referring to an existing survey plan or to a newly recorded plan, the plan recording information should be inserted into the second “Whereas” clause of the AUL before recording the AUL.

Registered Land. If the land is registered, then a plan of record already exists, namely the Land Court Plan. The Land Court Plan is referenced in the owner’s Certificate of Title and may be found at the Registered Land section of the Registry of Deeds and/or the engineering department of the Land Court. Only a Land Court Plan can establish the boundaries of registered land. If the land is registered, then it is sufficient to include a reference in the AUL to the Land Court Plan.

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

If the AUL applies to only a portion of a parcel of land, then a survey plan delineating that portion of the parcel must be prepared by a Massachusetts Registered Land Surveyor.

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.

If a new perimeter survey of a parcel is required (See Section 4.3.1, above) and a survey of the portion of the parcel subject to the AUL is required, both surveys may be consolidated on a single plan, as a cost-saving measure.

Registered Land. If the parcel is registered land, then an 8 1/2” x 11” plan must be attached to the AUL as Exhibit A-2. It will not be accepted for filing by the Registry of Deeds independently of the AUL. Preparation of a survey plan by a Registered Land Surveyor is a requirement of the MCP, not the Land Court and thus the Land Court sometimes refers to this type of plan as a “sketch plan”(not to be confused with the sketch plan required by 310 CMR 40.1074(2)(a)5. and described in Section 4.3.3, below).

If a portion of a parcel subject to the AUL contains both recorded land and registered land, a survey plan would need to be prepared showing the recorded portion and recorded as a plan, and showing the registered portion and attached as an exhibit to the AUL, respectively, in accordance with the above requirements.

#### **4.3.3 Sketch Plan of Area Subject to AUL in Relation to Boundaries of Disposal Site (Exhibit B)**

An AUL also requires an 8 ½" x 11" sketch plan (not to be confused with a Land Court sketch plan) showing the boundaries of the area subject to the AUL in relation to the boundaries of the disposal site. This sketch plan is attached to the AUL as Exhibit B. Although the MCP does not require this sketch plan to be prepared by a Massachusetts Registered Land Surveyor, it must contain accurate distances and be to scale.

The sketch plan may take the form of an 8 ½" by 11" copy of the required survey plan of the parcel subject to the AUL (that has been or will be recorded), with the boundaries of the disposal site and other pertinent information added. The sketch plan must be clearly readable, so reduction of a larger survey plan to 8 ½" x 11" must be done with consideration of the legibility of such a plan. Alternatively, Exhibit B can be a separate sketch plan showing the boundaries of the parcel subject to the AUL and the disposal site.

#### **4.3.4 Summary of Legal Descriptions and Plan Requirements**

Table 4-1 summarizes the requirements for describing the land to which an AUL applies.

#### **4.3.5 AULs and Multiple Parcels**

When there are multiple contiguous parcels that form the area to which an AUL is being applied, one AUL may be implemented that references the multiple parcels, or portions of such parcels, if all parcels are held in common ownership and all parcels are located in the same registry district.

The legal description for each parcel must be included in Exhibit A of the AUL. Multiple deed and plan references should also be provided in Exhibit A (and cross-referenced on Form 1075).

If the area to which the AUL applies includes both recorded and registered parcels of land, the original AUL must first be registered in the Registered Land section of the Registry of Deeds, and then either the original or a certified copy of the registered AUL is recorded in the Recording Section of the Registry of Deeds. The original AUL is returned and on file in the Registered Land section. See Section 4.1.3 of this document, and the "Massachusetts Land Court Guidelines on Registered Land" for additional details on procedures pertaining to AULs that involve both Recorded and Registered Land.

#### **4.3.6 Describing Area Subject to an AUL that Relies on One or More Barriers**

When an AUL relies on the use of one or more barriers to maintain a condition of No Significant Risk, the AUL must delineate that location of the barrier(s) so that a property owner (particularly a future property owner) knows the exact location of the barriers that must be maintained. Barrier delineation may be done on either a sketch plan or a survey plan, depending upon site-specific issues. If the restrictions are exactly the same for all barrier locations (e.g., no

excavation below 5 feet), a sketch plan will suffice to delineate the boundaries of the two separate areas. However, if the restrictions are NOT the same for all areas, then a survey plan would be required to delineate the respective boundaries. For example, an AUL requiring paved areas “to be maintained in good condition” and restricting landscaped areas to “no excavation below the geotextile fabric” would require separate survey plans for each of the areas, since identical excavation restrictions do not apply to the entire AUL area.

As previously discussed in Section 1.4, it is not appropriate to reference a barrier not yet in place if the presence and maintenance of that barrier is necessary to achieve and maintain a condition of No Significant Risk as part of a Permanent Solution.

#### **4.4 Description of Consistent Activities and Uses**

The “Now, therefore” paragraph of Form 1075 is where activities and uses that are “Consistent” with the AUL are listed. In identifying consistent activities and uses, thinking through such activities and uses with the property owner helps avoid inadvertent omission of an activity or use and drafting an AUL too narrowly. Conversely, broad descriptions of uses and activities should also be avoided, as they may create ambiguity. Either situation could result in the need to amend the AUL in the future. Consistent activities and uses must be in agreement with the risk characterization, i.e., these activities and uses can occur while still maintaining a condition of No Significant Risk.

Following the list of “Activities and Uses Consistent with the AUL Opinion” in Form 1075 is the following clause: “Such other activities or uses which, in the Opinion of an LSP, shall present no greater risk of harm to health, safety, public welfare or the environment than the activities and uses set forth in this Paragraph.” This language is in the AUL form to indicate that activities outside of those listed as “consistent” may be conducted (as long as they are not expressly inconsistent with the AUL), provided that an LSP evaluates the activity or use before the new activity or use occurs in accordance with the procedures specified in 310 CMR 40.1080 and described in Section 6 of this document.

#### **4.5 Description of Inconsistent Activities and Uses**

The “Now, therefore” paragraph of Form 1075 also describes the activities and uses that are inconsistent with maintaining a level of No Significant Risk. Vague and broad descriptions can result in an overly restrictive document that unnecessarily limits the uses of the property. For example, if excavation is prohibited below a depth of three feet in order to ensure a condition of No Significant Risk, then the language in the AUL should clearly state this. A general statement prohibiting any excavation would unnecessarily include digging at shallower depths that do not pose a significant risk.

Over-restricting activities may create additional and unnecessary work. If there is interest in implementing an activity or use that is prohibited by an AUL, then it is necessary to obtain an LSP Opinion stating that such activity is permissible (or that it can be implemented after additional response actions are performed). An amended AUL may be needed if the new activity or use will be a permanent feature of the site. Additional work and expense can be avoided by thinking through what specific activities and uses are not appropriate in achieving and maintaining a condition of No Significant Risk. *(See Section 6 on procedures to address changes in use once an AUL has been implemented).*

**Table 4-1: HOW TO DESCRIBE THE LAND COVERED BY AN AUL**

LAND AREA	REGISTERED LAND	RECORDED LAND
<p>A. Parcel containing AUL area (See <i>Guidance Section 4.2</i>)</p> <ul style="list-style-type: none"> <li>• Survey Plan (See <i>Guidance Appendix F</i> for Plan Requirements)</li> </ul>	<ul style="list-style-type: none"> <li>• Reference Land Court Plan Number in AUL's 2<sup>nd</sup> "Whereas" clause</li> </ul>	<ul style="list-style-type: none"> <li>• If a survey plan has already been recorded, reference the Registry of Deeds' Plan Book / Plan Number in AUL's 2<sup>nd</sup> "Whereas" clause;</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>• If a survey plan has not been recorded, have one prepared by an MA Registered Land Surveyor and record it before the AUL is recorded. Reference Registry of Deeds' Plan Book / Plan Number in AUL's 2<sup>nd</sup> "Whereas" clause</li> </ul>
<ul style="list-style-type: none"> <li>• Written Description</li> </ul>	<ul style="list-style-type: none"> <li>• Use bounding language from property owner's Certificate of Title issued by Land Court [attach to AUL as Exhibit A]</li> </ul>	<ul style="list-style-type: none"> <li>• Copy metes and bounds from recorded survey plan [attach to AUL as Exhibit A];</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>• Copy metes and bounds from deed referencing a survey plan recorded with Registry of Deeds [attach to AUL as Exhibit A]</li> </ul>
<p>B. Area to which AUL applies (only needed if this area is a portion of the parcel) (See <i>Guidance Section 4.3.1</i>)</p> <ul style="list-style-type: none"> <li>• Survey Plan (See <i>Guidance Appendix F</i> for Plan Requirements)</li> </ul>	<ul style="list-style-type: none"> <li>• Have a survey plan of AUL area prepared by a MA Registered Land Surveyor [attach to AUL as Exhibit A-2]</li> </ul>	<ul style="list-style-type: none"> <li>• If a survey plan of the AUL area has already been recorded, reference the Registry of Deeds' Plan Book / Plan Number in the AUL's 3<sup>rd</sup> "Whereas" clause</li> <li>• If a survey plan of the AUL area has not been prepared, have one prepared by an MA Registered Land Surveyor. Record plan before the AUL is recorded and reference the Registry of Deeds' Plan Book / Plan Number in the AUL's 3<sup>rd</sup> "Whereas" clause (Plan does not get attached to AUL as an exhibit). If a survey plan of the parcel containing the AUL area is also being prepared, both the parcel and the AUL area can be shown on the same plan.</li> </ul>
<ul style="list-style-type: none"> <li>• Written Description</li> </ul>	<ul style="list-style-type: none"> <li>• Copy metes and bounds from survey plan [attach to AUL as Exhibit A-1]</li> </ul>	<ul style="list-style-type: none"> <li>• Copy metes and bounds from recorded survey plan [attach to AUL as Exhibit A-1]</li> </ul>
<p>C. Relationships between AUL area and disposal site (contaminated area) (See <i>Guidance Section 4.3.3</i>)</p> <ul style="list-style-type: none"> <li>• Sketch Plan</li> </ul>	<ul style="list-style-type: none"> <li>• Prepare a sketch plan showing both the boundaries of the AUL area (from survey plan) and the boundaries of the oil or hazardous material release within the parcel (from site assessment) [attach to AUL as Exhibit B]</li> </ul>	<ul style="list-style-type: none"> <li>• Prepare a sketch plan showing both the boundaries of the AUL area (from survey plan) and the boundaries of the oil or hazardous material release within the parcel (from site assessment) [attach to AUL as Exhibit B]</li> </ul>
<ul style="list-style-type: none"> <li>• Written Description</li> </ul>	<ul style="list-style-type: none"> <li>• None Needed</li> </ul>	<ul style="list-style-type: none"> <li>• None Needed</li> </ul>

#### **4.6 Description of Obligations and Conditions**

Also found within the “Now, Therefore” paragraph of Form 1075 is a section describing obligations and conditions. This section is intended to provide the property owner, interest holders (and anyone else who looks at the document) with a clear list of measures to be undertaken and/or continued at the property in order to maintain a condition of No Significant Risk.

Similar to the language describing activities and uses that are consistent or inconsistent with the AUL, detail is important when describing obligations and conditions necessary to maintain a condition of No Significant Risk. The activity that must be undertaken or maintained should be described precisely so that anyone reading the document has a clear understanding of the responsibilities for ensuring that No Significant Risk is maintained. For example, if a cap is not to be disturbed, and is to be maintained in good repair, then such an obligation should be clearly stated. This section may also be used to specify a frequency of inspections, and measures to be taken in response to inspection findings.

In drafting an AUL, it is permissible and appropriate to require that any future excavation occur in accordance with a health and safety and/or soil management plan. The obligation to develop and adhere to such plans would be specified in the AUL in the list of “Obligations and Conditions”. In addition, the purpose and elements of these plans should be described in the narrative AUL Opinion. Please note that a health and safety plan and/or soil management plan cannot be used in lieu of an AUL. *For more discussion on referencing health and safety procedures in an AUL, see Section 2.7.3.*

#### **4.7 AUL Opinion (Exhibit C)**

A narrative AUL Opinion must be prepared by an LSP and attached to the AUL form as Exhibit C. This Opinion should provide sufficient detail so that a reader who is unfamiliar with the MCP requirements and terminology can understand what has occurred at the property requiring the implementation of an AUL and the terms of the AUL.

MassDEP recommends that the Opinion include the following elements:

- a brief summary of the incident that resulted in the release. For example, if the release is the result of a leaking underground storage tank, then the Opinion should describe details such as: the size and contents of the tank;
- the date on which the release was discovered and manner of discovery;
- the general extent of the release (impact soil and/or groundwater/indoor air/surface water, etc.);
- the response actions taken to address the release;
- the nature of the contamination remaining at the site that is the subject of the AUL (type of contamination, media affected, vertical and horizontal extent, concentrations, exposures of concern); and
- why an AUL is necessary to maintain a condition of No Significant Risk.

In addition, the Opinion should fully describe consistent and inconsistent activities and uses, and obligations and conditions necessary to maintain a condition of No Significant Risk. The lists of consistent and inconsistent activities and uses, and conditions and obligations in the

AUL Opinion should mirror the contents of the AUL form. Otherwise any discrepancy between the two raises a question as to which is correct.

As described in Section 4.12, BWSC-113A is a transmittal form for the narrative Opinion (and not a substitute for this Opinion) and must be used for submitting the AUL Opinion to MassDEP. (Attaching Form 113A to the AUL for recording purposes is no longer required.)

#### **4.8 Documentation of Signatory Authority (Exhibit D)**

If the owner of the parcel to be subject to the AUL is an entity, rather than an individual, then documentation of the signatory authority of the individual signing the AUL must be attached as Exhibit D to the AUL. Entities include, but are not limited to, corporations, limited liability corporations, limited liability companies, limited partnerships, towns and states. Signatory authority documentation must also be attached as an exhibit to the AUL if the individual signing the AUL is signing as a trustee, executor, or attorney in fact.

As a general rule, the signatory documentation attached to an AUL should be equivalent to what would be required for a sale of the parcel. If there are questions as to the appropriate documentation for signatory authority, a real estate attorney should be consulted about the documents required.

Please note that some Registry of Deeds require that documentation of signatory authority be recorded separately from the AUL.

See *Appendix D* for specific information relevant to determining which person(s) has signatory authority for an AUL and what documents are required as an exhibit to the AUL submittal.

#### **4.9 Deleting or Changing Language of AUL Forms**

The AUL forms are codified in the MCP and must not be edited. Changing or deleting language of an AUL form, except to eliminate inapplicable bracketed language or to add a clarifying notation as described in Section 4.10 below may invalidate the AUL and the RAO that relies upon it.

#### **4.10 Adding Language to AUL Forms**

Language may be added to AUL forms for the purpose of providing greater detail and clarity. For instance, if the property is placed in trust, it would be helpful to include the book and page of the Declaration of Trust. Any language that is added to the standard form should be concise and limited to only what is necessary to provide critical information – one to two sentences if possible. Language may not be added which contradicts or qualifies the standard form language. The owner agrees to assume the language of the AUL in full when electing to implement the AUL.

#### **4.11 Requirements for a Registry-Certified Copy of the AUL**

A registry-certified copy of an AUL, as required under 310 CMR 40.1074, is a copy of an AUL which is issued by the Registry of Deeds and is signed and/or stamped by the registrar stating it is a true copy of the AUL as recorded and/or registered. Any other type of copy is insufficient (i.e., the RAO submittal will not be considered complete). To comply with the requirement for

electronic MCP submittals, it is acceptable to submit an electronic scanned copy of the Registry-certified AUL to satisfy this requirement.

#### **4.12 Transmittal Forms**

Two transmittal forms are necessary when submitting a Registry-certified copy of the AUL to MassDEP:

1. BWSC-113 – Activity and Use Limitation (AUL) Transmittal Form; and
2. BWSC-113A – Activity and Use Limitation (AUL) Opinion Form.

***NOTE TO REVIEWERS: MassDEP is currently reviewing the possibility of combining transmittal forms 113 and 113A as part of its ongoing process to update forms submitted through eDEP.***

**NOTE TO REVIEWERS: Revisions to Section 5 are intended to address common procedural violations by providing more specific guidance on the following: AUL recording procedures, differences in procedures for recorded vs. registered land, notification to record interest holders, and AUL incorporation into future instruments of transfer. As with previous sections of this document, procedures describing Grants have been relocated to Appendix J.**

## **SECTION 5: AUL RECORDING AND PROCESSING REQUIREMENTS**

This section addresses the procedural requirements for implementing an AUL after it has been properly prepared and signed by the property owner and the LSP. Once the Notice form has been filled out (with all the relevant exhibits) and signed, the next step is recording or registering the Notice with the appropriate Registry of Deeds.

### **5.1 Recording and/or Registration Requirements for All AULs**

A property owner must record and/or register an AUL at the appropriate Registry of Deeds in order for the Notice to be deemed implemented and in effect (see 310 CMR 40.1070(3)). Recording and registration requirements for the acceptance of real estate documents are very specific and need to be complied with strictly. In addition, requirements may vary from county to county and change periodically. Consequently, this guidance should not be considered a substitute for case specific legal advice; property owners are advised to consult with experienced real estate counsel in connection with the recording and/or registration process to ensure acceptance of the AUL Notice for recording/registration by the applicable Registry of Deeds.

#### **5.1.1 Recording Requirements**

Requirements for recording real estate documents include, but are not limited to, name and address identification, document identification, document dimensions, font size, page margins, document highlighting, written signature execution and signature identification, and notarization requirements. The “Massachusetts Deed Indexing Standards” provides statewide procedures intended to be effective at all Registry of Deeds. These standards address issues such as document formatting requirements (e.g., paper type, font size, page margins) for all documents recorded at any Registry and are provided in Appendix G. Similarly, some rules for plan recording (e.g., formatting, signatures, and graphics) are consistent within the different Registries (see Appendix F).

Remember, however, that the recording requirements referenced in this guidance are not inclusive - *it is important to check with the specific Registry where the AUL and supporting documents will be recorded to determine if there are any additional Registry-specific requirements that apply.* In addition to document preparation rules, individual Registries implement their own procedures for payment, the number of documents that may be recorded in a single day, and the time of day documents will be accepted for recording.

Much of the information pertaining to general and Registry-specific requirements is available online – links to the individual Registries can be found at <http://www.sec.state.ma.us/rod/rodidx.htm>.

### **5.1.2 Registration Requirements**

The registration of documents at the Registry of Deeds has its own set of requirements, and is governed by the Massachusetts Land Court and the provisions of M.G.L., c. 185. As described in Section 4.1 of this Guidance, a decree by the Land Court creates registered land – thus, acceptance of subsequent encumbrances and restrictions on property after title has been established through the original registration process are also subject to the Land Court’s strict procedures (see M.G.L. c. 185, §§57-63).

In general, the registration of an AUL is accomplished through notation on the Certificate of Title. However, in order for an AUL to be accepted for registration, the property owner must comply with the Commonwealth of Massachusetts Land Court Guidelines on Registered Land (Guidelines, February 27, 2009). In particular, Section 19 of the Guidelines addresses “easements, restrictions, covenants and other rights granted or reserved in a deed,” and contains procedures that apply to registering a Notice of AUL.

The Land Court also provides specific requirements for the acceptance of surveys and plans in the Land Court Instruction Manual. As stated in the Manual’s introduction, “[c]ompliance with these instructions is mandatory, and no survey or plan will be accepted for filing unless these requirements have been fulfilled to the satisfaction of the Land Court’s Survey Division.” Accordingly, a property owner registering an AUL must ensure that both the survey plan (if required) and the sketch plan comply with the technical requirements of the Land Court Instruction Manual and the MCP.

The Massachusetts Land Court Guidelines on Registered Land and the Land Court Instruction Manual can be found on the Land Court’s webpage at <http://www.mass.gov/courts/courtsandjudges/courts/landcourt/policies-procedures.html>

### **5.2 Documents to be Submitted to MassDEP**

Within thirty days of recording and/or registering an AUL with the appropriate Registry of Deeds, the property owner must submit to MassDEP the following documents, in accordance with 310 CMR 40.1074(4):

- A registry-certified copy of the AUL. The Registry-certified copy is necessary to verify that the document submitted to MassDEP is an exact copy of the AUL as recorded/registered. It is insufficient to submit an uncertified photocopy of the AUL. It must be a Registry-certified copy, which is stamped by the Registrar of the Registry of Deeds. If the land is registered land, the Registry-certified copy will include a document number. If the land is recorded land, the certified copy will include an instrument number and/or book and page number. It is sufficient to submit a scanned copy of the Registry-certified document as an electronic submittal.
- A registry copy of all survey plans referenced in the AUL. Specifically, the survey plan of the parcel and the survey plan of the portion of the parcel, if applicable (See the second and third whereas clauses in the AUL forms). The registry copy will bear the recording information for the plan. If the parcel is registered land, a copy of the Land Court Plan should be provided. It is sufficient to submit a scanned copy of the Registry-certified document as an electronic submittal.

An RAO Statement that relies upon the implementation of an AUL is not considered complete or effective until MassDEP has received a Registry-certified copy of the AUL, consistent with 310 CMR 40.1056(2)(g) and 40.1070(3).

Transmittal forms BWSC 113 and BWSC 113A, bearing original signatures should be included with the above-referenced submittals. A statement certifying that the property owner identified on the Notice owned the property at the time the Notice was recorded and/or registered, and that record interest holders were notified of the proposed Notice is required pursuant to 310 CMR 40.1074(1)(f). This statement is provided by checking the appropriate box in Section F of the BWSC 113 transmittal form.

### **5.3 Notice to Current Record Interest Holders**

The property owner must provide written notice of the AUL to any current record interest holder by certified mail, return receipt requested, 30 days prior to the implementation of an AUL, as set forth at 310 CMR 40.1074(1)(e). The purpose of the notification is to identify to such interest holders the terms of the proposed AUL and the existence and location of the oil and/or hazardous material at the property.

“Holders of any record interest” are those individuals or entities having an interest in the subject property on record at the Registry of Deeds, whichever is applicable. Examples of record interest holders include, but are not limited to, owners, mortgage holders, lessees or tenants (if lease is recorded or registered), and easements or licenses holders, if such easement or license passes through the AUL area. Please note that a property abutter is not a record interest holder – the abutter must otherwise hold a record interest in the property, as described above.

A record interest is “current” if the interest exists at the time the AUL is recorded. For example, if a mortgage is discharged before the Notice of AUL is recorded, the mortgage holder is not a “current holder of record interest.”

A thorough search at the appropriate Registry of Deeds is necessary to accurately identify all current record interest holders. Identifying record interest holders should include, but are not limited to, searching grantor and grantee indices for the proceeding fifty (50) years for all property within the disposal site. Examining the deed or Certificate of Title (with any memoranda of encumbrances), and any plans for the property are a starting point in identifying record interest holders, but will not provide a complete review. Once a holder of a record interest is identified in the Registry of Deeds, additional work may be required to identify that person’s current address and/or successors, to the extent that such information is not clear from the recorded interest itself. MassDEP recommends consulting an experienced real estate attorney or title examiner to conduct these searches.

If there are no record interest holders to notify, then there is no required 30-day waiting period. If there are record interest 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)).

There is no requirement to enter into subordination agreements with or to obtain agreement of current record interest holders when a Notice of AUL is implemented. However, there are situations where executing such an agreement may be appropriate. A condition of No

Significant Risk must be achieved at a disposal site for all current uses, including current uses of current record interest holders. For example, excavation is a current use for a property with an underground utility easement. When the terms of the Notice of AUL potentially affect the use of a record interest holder (e.g., by conditions placed on access or excavation), it may be prudent to execute agreements with such interest holders stating that they agree to the terms of the AUL.

#### **5.4 Public Notice Requirements**

AULs are subject to public involvement requirements set forth at 310 CMR 40.1403(7). These requirements establish that within thirty days of recording and/or registering an AUL, a copy of the recorded and/or registered AUL must be provided to the following local officials in the community(ies) in which the property subject to the AUL is located:

- the Chief Municipal Officer;
- the Board of Health;
- the Zoning Official; and
- the Building Code Enforcement Official

In addition, a public notice must also be published in a newspaper that circulates in the community in which the property subject to the AUL is located, indicating that the AUL has been recorded and/or registered. A copy of the public notice must be submitted to MassDEP within seven days of its publication. It is recommended that a scanned copy of the actual newspaper clipping, showing the date of publication, be submitted to MassDEP to confirm its publication. (See *Appendix E, Public Notice of an Activity and Use Limitation*, for the notice format.)

Note that Confirmatory AULs are not subject to the public notice requirements of 310 CMR 40.1403(7).

#### **5.5 Incorporation of AUL into Future Instruments of Transfer**

The Notice of AUL and 310 CMR 40.1074(5) require that any “deeds, easements, mortgages, leases, licenses, occupancy agreements, or other instruments of transfer” of an interest in the property or right to use the property incorporate the AUL in full or by reference. Accordingly, any lease, easement, etc. that is created after an AUL has been recorded or registered must either include a copy of the AUL or specifically reference the AUL (by date, Registry, and instrument/Plan Book and Page Number or document number). This requirement is intended to ensure that people with legal rights to use the property, other than the owner, are aware of the existence of the AUL, the specific limitations placed on the use of the property, and conditions and obligations necessary to maintain No Significant Risk. Failure to provide a reference to the AUL in a future document may require filing an affidavit or refiling of the future document.

By way of example, the following statement would be acceptable language to meet this requirement:

“This property is subject to a Notice of Activity and Use Limitation recorded on [date] with the [County] Registry of Deeds in Book [number], Page [number].”

**NOTE TO REVIEWERS: Section 6 was primarily revised to incorporate the Post-RAO requirements for sites with AULs included in the 2006 MCP revisions. In addition, revisions were made to the discussion of Amendments and Terminations to clarify the use of forms, procedures, etc. A table was also added summarizing these requirements. Finally, emphasis has been added on the necessity of maintaining the AUL after implementation, and the potential consequences of noncompliance. Section 6.5 describes the various forms available for terminating an AUL.**

## **SECTION 6: MAINTAINING AN AUL**

To remain in compliance with the MCP, the owner of a property for which an AUL has been recorded or registered has an ongoing obligation to comply with the terms of the AUL. Violating the terms of the AUL is a violation of the MCP, and may result in penalty assessment or loss of the liability relief provided by M.G.L. c. 21E, §6. This section addresses issues and procedures that apply once an AUL has been implemented, including: conducting response actions after an RAO has been submitted, evaluating changes in site uses and activities with respect to an existing AUL; correcting and amending AULs; terminating AULs; referencing AULs in future deeds, lease agreements, and other instruments of transfer; MassDEP audits of disposal sites with AULs; and the consequences of violating the terms of the AUL.

All remedial actions that are conducted after an RAO has been submitted are subject to, at a minimum, the procedures set forth at 310 CMR 40.1067. When such remedial actions are conducted within the area subject to an AUL, the requirements at 310 CMR 40.1067(4) must be followed. These requirements are addressed in Section 6.1.

If a change in Site Activities and/or Uses within the area subject to the AUL is being considered, and the change is not within the uses or activities specifically permitted by the AUL, then the requirements set forth at 310 CMR 40.1080 must also be complied with. These procedures are summarized in Section 6.2.

### **6.1 Conducting Response Actions after a Response Action Outcome Statement has been Submitted**

As described at 310 CMR 40.1067(4), remedial actions within the area subject to an AUL must follow specific procedures based on scope and complexity of the remedial actions. These provisions are described below:

- *Limited soil excavation* is described at 310 CMR 40.1067(4) as excavation producing Remediation Waste that does not exceed 100 cubic yards if contaminated solely by oil or waste oil, or 20 cubic yards if contaminated by hazardous materials (or a combination thereof) - may proceed with no notification to MassDEP and no public involvement activities, provided that such excavation is not be prohibited by the AUL and the excavated Remediation Waste must be managed in accordance with 310 CMR 40.0030.
- If remedial actions beyond limited soil excavation are planned that fall within the limits set forth at 310 CMR 40.0440 and 40.0442 for RAMs, then remedial actions may be conducted as a RAM. The provisions for RAMs described at 310 CMR 40.0440 must be complied with, including document submission requirements, and the provisions for notification to local officials provided at 310 CMR 40.1403(3).

- All other remedial actions planned within the AUL area must be conducted as a Phase IV Comprehensive Remedial Response Action, pursuant to 310 CMR 40.0870. Such actions must be performed under a valid Tier I Permit, Tier II Classification, or Tier II Extension, and all public involvement activities applicable to Phase IV Comprehensive Remedial Response Actions must be conducted.

## **6.2 Changes in Site Activities and/or Uses or Other Site Conditions after a Response Action Outcome with an Activity and Use Limitation has been Submitted**

If a change in Site Activities or Use of the area subject to the AUL is being considered and the new activity or change is not within the uses or activities specifically permitted by the AUL, then an LSP must evaluate the new activities or uses using the MCP risk characterization process. (See 310 CMR 40.1080.) This evaluation must determine whether a condition of No Significant Risk would be maintained with the new use or activity or whether additional response actions would be needed to achieve a level of No Significant Risk. An LSP Opinion based on this evaluation must be submitted to MassDEP **before** the change in activity or use takes place and should include documentation of the supporting risk characterization and a response action plan, in accordance with 310 CMR 40.1067, that describes the actions necessary to maintain or achieve a condition of No Significant Risk for the new activity or use. Additional site characterization may be necessary to provide information necessary for the revised risk characterization.

The regulations take a conservative approach by requiring an evaluation of any activity or use that is not specifically permitted in the AUL. In cases where the AUL does not clearly include the contemplated activity or use, an evaluation by an LSP is necessary. This requirement underscores the importance of developing an AUL that addresses the likely range of future activities and uses at a site. "Specifically permitted" does not mean, however, that the exact type of business needs to be listed in the AUL in order for a contemplated use to be considered consistent under the AUL. For example, if the AUL permits "any commercial and industrial uses of the site that do not involve excavation," then a change of use from a shoe store to a drug store would be considered consistent or "specifically permitted." However, where an AUL allows for "commercial and industrial use" and the addition of on-site day care at an industrial facility is being considered, the day care is not clearly included within the broad "commercial and industrial use" description. Consequently, an LSP must evaluate such use using the MCP risk characterization process to determine whether allowing day care on the site would be consistent with maintaining a condition of No Significant Risk.

If, after an evaluation of a change of use and/or activity, a property owner abandons his or her plan to proceed with the change, it is not necessary to submit an LSP Opinion. That is, the submission of the LSP Opinion to MassDEP is only required if the change is to occur.

Keep in mind that both activities and uses that are not within those listed in the AUL must be evaluated by an LSP. Take for example, a property owner who is not proposing to change the use of the property as a marina, but is proposing to build a warehouse for boat storage. If the AUL for the property does not identify the excavation and construction necessary to build the new structure as an activity consistent with maintaining a condition of No Significant Risk, then an LSP must evaluate these activities. Other situations will require an evaluation of both a change in use and the activities that are needed to prepare the area for the new use. For example, where the only permitted use of the area subject to the AUL is as a paved parking lot, the property owner wishing to landscape a corner of the area for use as an employee picnic area, must have an LSP evaluate

both the use of the area for picnicking and the activities (asphalt removal and soil excavation related to landscaping) needed to prepare for the change in use.

For activities that involve response actions (e.g., excavation of contaminated soil, treatment or containment measures, or additional testing to better define contaminant levels), Section 6.2.1 below outlines procedures for performing and documenting those actions.

### **6.2.1 If the Contemplated Change in Activities or Uses Involves Response Actions**

If the LSP concludes that the new activity and/or use is inconsistent with maintaining a condition of No Significant Risk based on current site conditions and additional response actions are needed before the level of cleanup at the site is sufficient to allow the new use, then, in accordance with 310 CMR 40.1080(2) and 40.1067(4), the procedure below must be followed before undertaking the new use or activity. In this situation, the new use or activity could create a new exposure to contamination remaining at the site; without additional response actions, the site would no longer have a level of No Significant Risk. This procedure would also apply where remedial actions are being conducted to achieve a level of cleanup that allows for unrestricted use of the site, and as a result, the termination of the AUL. Plans for any response actions required to maintain a condition of No Significant Risk need to be submitted to MassDEP as follows:

1. The LSP Opinion submitted in accordance with 310 CMR 40.1080(2) should specify what additional response actions are necessary to allow for a change in site use or activity or the termination of the AUL. As described at 310 CMR 40.1067(4) and below, response actions that are being conducted to allow a change in Site Activities and Uses may be conducted as either a Release Abatement Measure (RAM) in accordance with 310 CMR 40.0440 or a Phase IV Comprehensive Response Action (Phase IV) in accordance with 310 CMR 40.0870.

Response actions may be conducted as a RAM, if the provisions at 310 CMR 40.0440 limiting the scope of RAMs are not exceeded, and such actions are not within and will not affect an Engineered Barrier. A Tier I Permit or Tier II Classification is not required, but all response actions must be conducted in accordance with 310 CMR 40.0440, including the provisions for submittal of Plans, Status Reports and Completion Statements. In addition, public notice to local officials must be made in accordance with 310 CMR 40.1403(3).

All other response actions – that is, those that are beyond the scope of a RAM or involve an Engineered Barrier – must be conducted as a Phase IV. A valid Tier I Permit or a Tier II Classification is required, and all response actions must comply with 310 CMR 40.0870. Public Involvement applicable to Phase IVs must also be completed, as required by 310 CMR 40.1400.

2. The AUL must be amended, terminated, or partially terminated in accordance with 310 CMR 40.1080 and 40.1081 to include the proposed Site Activities or Uses; and
3. A revised RAO Statement must be submitted to MassDEP along with supporting documentation to reflect any changes from the previous RAO.

## **6.2.2 If the Contemplated Change in Activities or Uses Does Not Involve Response Actions**

If an LSP evaluates a contemplated change in use and concludes that no further response actions are needed to provide for the new use, it is recommended that the AUL be amended to add the contemplated use to the list of uses consistent with the AUL Opinion, if the duration of the activity is longer than a few months or is likely to reoccur (i.e., not a one-time event). By doing so, both MassDEP's records and the AUL itself will be current, and future confusion as to whether the terms of the AUL are being met can be avoided.

## **6.3 Correcting Errors in an Implemented AUL**

If a recorded and/or registered AUL contains errors, steps must be taken to correct the errors. Depending on the nature of the error, the correction is made by recording a "Confirmatory AUL," an "AUL Amendment," an "AUL Termination" or by terminating/releasing the original AUL and recording a new corrected AUL. These filings are described in greater detail in the sections below and summarized in Table 6-1. Confirmatory AULs, Amendments, and Terminations must follow the requirements described in Section 5.2 regarding submittals to the MassDEP.

### **6.3.1 Non-Substantive Errors**

A **Confirmatory Notice** may be used to correct non-substantive errors and omissions in a recorded Notice of AUL, AUL Amendment or Termination. Examples of non-substantive errors include misspelled names, missing lines in the legal description of the parcel and inadvertent omission of the AUL Opinion attached to the AUL. A Confirmatory Notice of AUL is also appropriate in the instance where a consistent or inconsistent use, or an obligation or condition described in the AUL Opinion is inadvertently omitted in the AUL form in the respective sections where such activities and uses, or obligations and conditions are specified.

If the AUL applies to registered land, a Confirmatory AUL may NOT be used to correct a non-substantive error, because the Land Court does not accept confirmatory documents. In such cases, errors must be corrected by terminating the original AUL using Form 1084C and filing a new AUL.

A Confirmatory AUL cannot be used to add or delete activities or uses that are not supported by the existing AUL Opinion. In such cases an amendment must be used instead to provide a new AUL Opinion and to change the activities and uses (see Section 6.4).

To complete a Confirmatory Notice of AUL, the Confirmatory language located in brackets throughout the form must be selected. This includes the bracketed paragraph at the end of the form which states that the document is a confirmatory document executed to correct an inadvertent error made in the original instrument. The error should be specifically identified in this paragraph as well. A Confirmatory AUL must repeat word-for word the language of the original AUL, but should not repeat the error. The error should be deleted and the correct information substituted.

The Confirmatory AUL is read in conjunction with the original AUL, so MassDEP does not require duplication of the exhibits attached to the original AUL – only if an exhibit changes must it be attached to the Confirmatory AUL. However, the rules of the Registry of Deeds or Land

Court may require otherwise. For example, while not required by MassDEP, it may be helpful to include Exhibit A (the metes and bounds description of the property) as an exhibit to the Confirmatory AUL as well as Exhibit B, the sketch plan depicting the location of the restricted area, since both are helpful identify the property and area restricted by the AUL.

A Registry-certified copy of the Confirmatory AUL as recorded must be forwarded to MassDEP within thirty days of recording. The requirements for filing a confirmatory AUL can be found at 310 CMR 40.1085.

### **6.3.2 Substantive Errors**

Examples of substantive errors in a recorded AUL include, but are not limited to: the wrong party named as the property owner, the AUL was not signed by all property owners; the property description is for the wrong parcel; the survey and sketch plan requirements were not met; and other errors of this nature.

If substantive errors are discovered in an implemented AUL, the defective AUL must be terminated using Form 1084C, **Termination of Notice of Activity and Use Limitation**, and a new AUL must be recorded. An LSP Opinion is not necessary when terminating an AUL using Form 1084C. Following recording of the AUL Termination and the new AUL, registry-certified copies of both documents should be forwarded to MassDEP. Additional MCP requirements for filing a termination of AUL can be found at 310 CMR 40.1083(1)(e).

### **6.4 Amendments**

An amendment of an AUL is required where an LSP determines that the terms of the original AUL (i.e., consistent activities and uses, inconsistent activities and uses, or obligations and conditions) need additions or modifications to ensure maintenance of a condition of No Significant Risk. An AUL may only be amended on the basis of an AUL Opinion.

In situations where additional remedial actions are necessary to achieve a level of No Significant Risk (as described in Section 6.2.1), remedial actions must be completed prior to recording the amendment reflecting the new activity or use.

Amendments to AULs may also be used to increase the area restricted under the AUL when the additional area is located within the same parcel as the area identified in the original AUL. However, an amendment to an AUL may not be used to decrease the size of the area subject to the AUL. In order to decrease the size of the restricted area, it will be necessary to terminate the AUL, as described below in Section 6.5.

Unlike the Confirmatory AUL (Form 1075) the AUL Amendment form (Form 1082B) only lists those activities and uses that are being “amended” as supported by the new AUL Opinion. However, to ensure that all consistent and inconsistent uses of the AUL are clear, MassDEP recommends that all inconsistent uses as well as obligations and conditions be listed on the Form 1082B, even if they are not being changed.

The requirements for amending AULs can be found at 310 CMR 40.1081.

### **6.5 Terminating AULs**

There are numerous scenarios by which a property owner can terminate an AUL. Depending on the reason for termination, terminating a Notice of AUL requires the use of one of four termination forms, as described below:

**Form 1084B:** Based upon an AUL Opinion prepared by an LSP, a property owner can terminate an AUL that is no longer necessary to maintain a condition of No Significant Risk. This scenario is most likely to occur where additional cleanup or other response actions eliminate the need for the AUL. See Section 6.2.1 above on conducting response actions/remedial work prior to recording a release or termination of the AUL. A revised RAO Statement must also be submitted to MassDEP along with supporting documentation to reflect any changes from the previous RAO.

**Form 1083B:** In order to decrease the size of the restricted area, it will be necessary to partially release or terminate the portion of the AUL area. A revised RAO Statement must also be submitted to MassDEP along with supporting documentation to reflect any changes from the previous RAO.

**Form 1084C & Form 1075:** If substantive errors are discovered in an implemented AUL, it is necessary to terminate the defective AUL using Form 1084C, **Termination of Notice of Activity and Use Limitation**, and record a new AUL using Form 1075. See Section 6.3.2.

**Form 1084D:** If additional response actions are necessary to support a conclusion that a condition of No Significant Risk has been achieved or that all Substantial Hazards have been eliminated, then the AUL must be terminated using Form 1084D. In this instance, an RAO Retraction Statement must also be submitted to MassDEP.

The requirements for filing a termination of AUL can be found at 310 CMR 40.1083(1)(e).

**Table 6-1: CORRECTING ERRORS IN AN IMPLEMENTED AUL**

<b>Reason for Correcting AUL</b>	<b>Required Form(s)</b>	<b>LSP Stamp &amp; Signature Required?</b>	<b>RAO Revision Required?</b>
Non-Substantive Errors Identified in AUL	Form 1075 (Confirmatory)	Yes	No
Substantive Errors Identified in AUL	Form 1082B (Amendment)	Yes	No
Substantive Errors Identified in AUL recorded on Registered Land	Form 1084C (Termination) & Form 1075	Form 1084C - No Form 1075 - Yes	No
Substantive & Non-Substantive Errors Identified in AUL	Form 1084C (Termination) & Form 1075	Form 1084C - No Form 1075 - Yes	No
AUL no longer needed to maintain condition of No Significant Risk or No Substantial Hazard	Form 1084B (Termination)	Yes	Yes
Reduce area covered by AUL (partial termination)	Form 1083B (Termination)	Yes	Yes
Additional response actions are necessary at site	Form 1084D (Termination)	No	Retract RAO

**6.6 Incorporation of AUL into Future Instruments of Transfer**

As discussed previously in Section 5.5, the Notice of AUL and 310 CMR 40.1074(5) require that the AUL "be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements, or other instruments of transfer." Accordingly, whenever a property owner grants an interest in the property through a deed, easement, mortgage, lease, license, occupancy agreement, or any other instrument of transfer after an AUL has been recorded or registered, the property owner must either include a copy of the AUL or reference the AUL (by date, Registry, and instrument/Plan Book and Page Number or document number) in the instrument of transfer. By way of example, incorporating the following language suffices to fulfill the requirement of referencing the AUL:

"This property is subject to a Notice of Activity and Use Limitation recorded on [date] at the [county] Registry of Deeds in Book [book #], Page [page #]."

## **6.7 Maintenance Contracts and Property Managers**

While not required by the MCP, where the area subject to the AUL is maintained by a contractor (e.g., landscaper), the maintenance contract/agreement should reference the AUL, and its terms should be discussed with the contractor to ensure that he/she understands the limitations. By providing this information to the contractor, the property owner helps to ensure that the maintenance workers are aware of and protected from exposure to the remaining contamination. Likewise, any employee of a company located on a site with an AUL who is responsible for managing or maintaining the property should also be familiar with the terms of the AUL.

## **6.8 MassDEP Audits of Disposal Sites with AULs**

The 1998 Brownfield's amendments to Chapter 21E require MassDEP to conduct targeted audits at all sites at which an AUL has been implemented. During an audit of a disposal site with an AUL, MassDEP may evaluate whether the AUL has been properly implemented and whether the activities and uses occurring in the area subject to the AUL are consistent with the terms of the AUL as recorded. Further, MassDEP has the authority to initiate an audit of a site with an AUL at any time to determine whether the AUL was properly implemented (see 310 CMR 40.1110(5)). A disposal site with an AUL may be subject to subsequent audits as long as the AUL remains in effect.

## **6.9 Noncompliance with the Terms of the AUL**

Failure to properly implement or maintain an AUL is a violation of the RAO, and MassDEP may initiate enforcement proceedings under the MCP and M.G.L. c. 21E. Chapter 21A, §16 ("Civil Administrative Penalties") makes failure to maintain the conditions of an AUL subject to a maximum penalty of \$25,000 per violation per day. Chapter 21E, §6 extends liability relief to certain former property owners for violations of an AUL that occur after a property is transferred, provided that the AUL was properly implemented and maintained under the terms of their ownership.

## **APPENDICES**

<b>APPENDIX A:</b>	<b>TABLE OF REQUIREMENTS FOR AUL SUBMITTALS</b>
<b>APPENDIX B:</b>	<b>AUL IMPLEMENTATION FLOW CHART</b>
<b>APPENDIX C:</b>	<b>STEP BY STEP THROUGH FORM 1075</b>
<b>APPENDIX D:</b>	<b>REQUIRED SIGNATORIES AND DOCUMENTATION</b>
<b>APPENDIX E:</b>	<b>PUBLIC NOTICE OF AN AUL</b>
<b>APPENDIX F:</b>	<b>REQUIREMENTS FOR SURVEY PLANS</b>
<b>APPENDIX G:</b>	<b>MASSACHUSETTS DEED INDEXING STANDARDS</b>
<b>APPENDIX H:</b>	<b>LIST OF AUL RELATED FORMS</b>
<b>APPENDIX I:</b>	<b>ACTIVITY AND LIMITATION CHECKLIST</b>
<b>APPENDIX J:</b>	<b>GRANTS OF ENVIRONMENTAL RESTRICTION</b>
<b>APPENDIX K:</b>	<b>SAMPLE TITLE CERTIFICATION FOR GRANT</b>

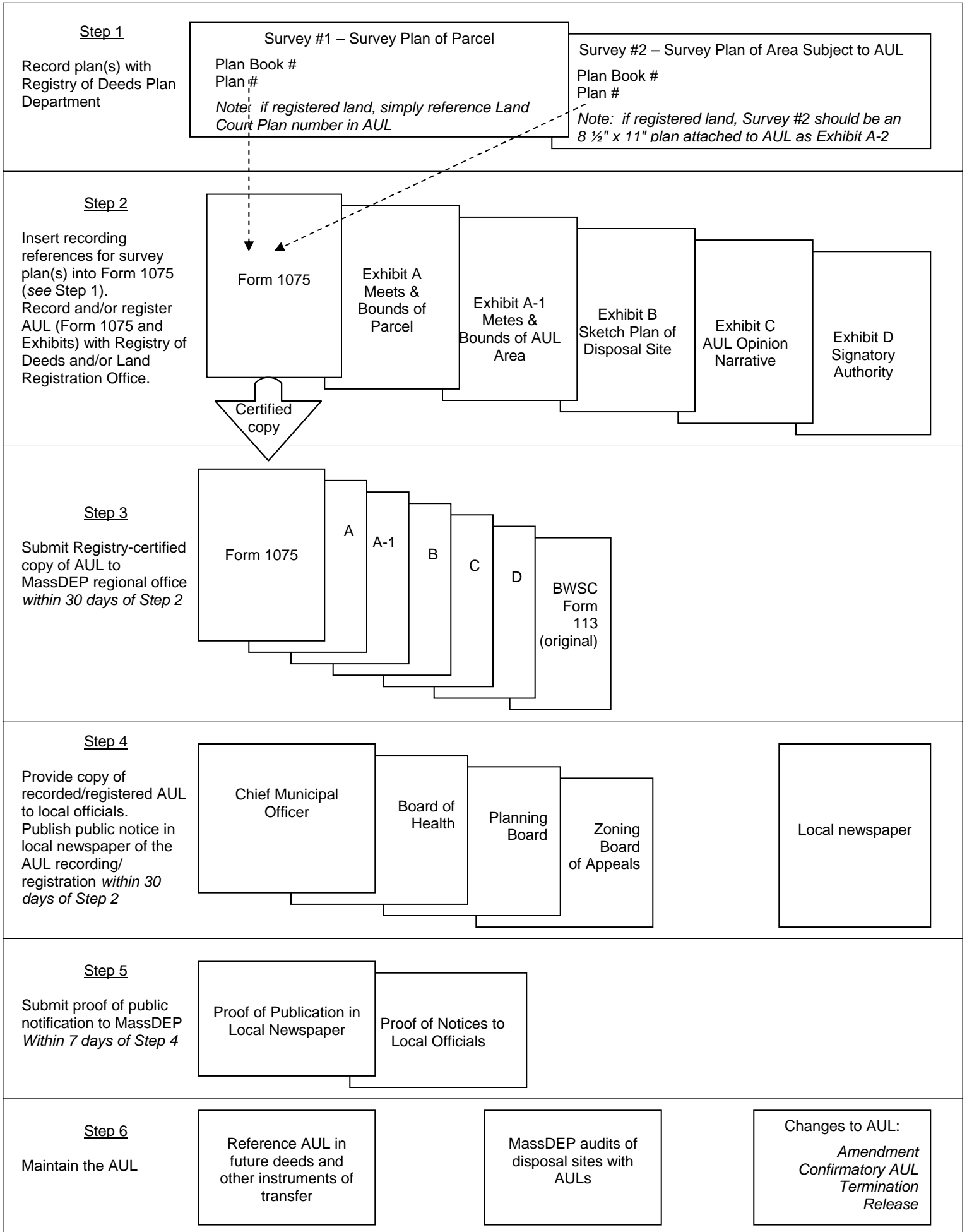
**APPENDIX A: TABLE OF REQUIREMENTS FOR AUL SUBMITTALS**

**Table of Requirements for AUL Submittals**

<b>Requirement</b>	<b>Notice of Activity and Use Limitation</b>	<b>Grant of Environmental Restriction</b>	<b>Confirmatory Notice</b>	<b>Amendments</b>
AUL Form	1075	1072A	1075	1082B
Notification of Record Interest Holders 30 days prior to implementation	✓			
BWSC Transmittal Form 113	✓	✓	✓	✓
Exhibit A: Legal description of parcel of land containing area subject to AUL	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit A-1: Legal description of area subject to AUL	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit B: Sketch plan showing boundaries of area subject to AUL in relation to boundaries of disposal site	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit C: AUL Opinion in narrative form	✓	✓	Depending upon correction*	Depending upon correction*
BWSC AUL Transmittal Form 113A	✓	✓	Depending upon correction*	Depending upon correction*
Documentation of Signatory Authority	✓	✓	Depending upon correction*	Depending upon correction*
Title Certification (See Appendix K)		✓		
Subordination Agreement(s) (Form 1072B)		✓		
Transmittal Form for Application and Payment (Permit Code – BWSC 40)		✓		

\* Only the Exhibits requiring correction must be included. Please note that MassDEP's preference is for all Exhibits to be attached to the Confirmatory.

**APPENDIX B: AUL IMPLEMENTATION FLOW CHART**



**APPENDIX C: STEP BY STEP THROUGH FORM 1075**

Form 1075

Provide date property owner is signing the Notice.

[CONFIRMATORY] NOTICE OF ACTIVITY AND USE LIMITATION

M.G.L. c. 21E, § 6 and 310 CMR 40.0000

Provide name of property owner(s). Name should match signature at end of form (including middle initial, if any).

Disposal Site Name: \_\_\_\_\_  
DEP Release Tracking No.(s): \_\_\_\_\_

This [Confirmatory] Notice of Activity and Use Limitation ("Notice") is made as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by [Name and address of property owner(s)], together with his/her/its/their successors and assigns (collectively "Owner").

Provide owner's source of title

WITNESSETH:

Attach, as Exhibit A, the legal description of the parcel of land containing area subject to

WHEREAS, \_\_\_\_\_ (Name of Owner), [is][are] the owner(s) in fee simple of [that][those] certain parcel(s) of [vacant] land located in \_\_\_\_\_ (Town/City), \_\_\_\_\_ County, Massachusetts, with the buildings and improvements thereon, pursuant to [a deed recorded with the \_\_\_\_\_ Registry of Deeds in Book \_\_\_\_, Page \_\_\_\_];[source of title other than by deed]; and/or [Certificate of Title No. \_\_\_\_ issued by the Land Registration Office of the \_\_\_\_\_ Registry District];

Reference survey plan of parcel of land described in Exhibit A in AUL: For registered land, provide Land Court Plan #; for unregistered land, provide plan book and plan #s. If plan for unregistered land is to be recorded at time of recording of AUL, so indicate

Tip: If a survey plan for the entire parcel of land is also being prepared, the two plans can be combined into one.

WHEREAS, said parcel(s) of land, which is more particularly bounded and described in Exhibit A, attached hereto and made a part hereof ("Property") is subject to this Notice of Activity and Use Limitation. The Property is shown on [a plan recorded in \_\_\_\_\_ Registry of Deeds in Plan Book \_\_\_\_, Plan \_\_\_\_], and/or on Land Court Plan No. \_\_\_\_];

Guidance: A Registry-certified copy of all survey plans referenced in the Notice must be submitted to MassDEP.

Guidance: Any terms used to identify the AUL on the survey plan should be consistent with the terms used in the AUL.

[WHEREAS, a portion of the Property ("Portion of the Property") is subject to this [Notice of Activity and Use Limitation]. The Portion of the Property is more particularly bounded and described in Exhibit A-1, attached hereto and made a part hereof. The Portion of the Property is shown on [a plan recorded with the \_\_\_\_\_ Registry of Deeds in Plan Book \_\_\_\_, Plan \_\_\_\_], and/or on [a sketch plan attached hereto and filed herewith for registration];

Attach, as Exhibit A-1, legal description of portion of property subject to AUL. Reference survey plan of portion of property subject to AUL. If registered land, attach as Exhibit A-2, a 8 1/2" by 11" plan of portion of property

WHEREAS, the Property [Portion of the Property] comprises [all][part of] a disposal site as the result of a release of oil and/or hazardous material. Exhibit B is a sketch plan showing the relationship of the [Property][Portion of the Property] subject to this Notice of Activity and Use Limitation to the boundaries of said disposal site existing within the limits of the Property and to the extent such boundaries have been established. Exhibit B is attached hereto and made a part hereof.; and

Attach, as Exhibit B, a sketch plan showing the relationship of the area subject to the AUL to the boundaries of the disposal site.

WHEREAS, one or more response actions have been selected for [the Disposal Site][Portion of the Disposal Site] in accordance with M.G.L. c.21E ("Chapter 21E") and the Massachusetts Contingency Plan, 310 CMR 40.0000 ("MCP"). Said response actions are based

upon (a) the restriction of human access to and contact with oil and/or hazardous material in soil [and/or groundwater] and/or (b) the restriction of certain activities occurring in, on, through, over or under the [Property] [Portion of the Property]. The basis for such restrictions is set forth in an Activity and Use Limitation Opinion ("AUL Opinion"), dated \_\_\_\_\_, (which is attached hereto as Exhibit C and made a part hereof);

**Guidance: The AUL Opinion should mirror what is identified in Permitted, Prohibited, and Obligations and Conditions sections below.**

*The AUL Opinion should be in narrative form and attached as Exhibit C. Note: Form 113A cannot be substituted for the AUL Opinion.*

NOW, THEREFORE, notice is hereby given that the activity and use limitations set forth in said AUL Opinion are as follows:

1. Activities and Uses Consistent with the AUL Opinion. The AUL Opinion provides that (select one) [a condition of No Significant Risk to health, safety, public welfare or the environment exists for any foreseeable period of time] [no substantial hazards remain] (pursuant to 310 CMR 40.0000) so long as any of the following activities and uses occur on the [Property][Portion of the Property]:

(i) \_\_\_\_\_ ;

**Guidance: Be careful not to inadvertently omit a permitted activity. Omissions may result in the need to amend the AUL.**

(ii) \_\_\_\_\_ ; and

(iii) Such other activities or uses which, in the Opinion of an LSP, shall present no greater risk of harm to health, safety, public welfare or the environment than the activities and uses set forth in this Paragraph;

(iv) Such other activities and uses not identified in Paragraph 2 as being Activities and Uses Inconsistent with the AUL.

2. Activities and Uses Inconsistent with the AUL Opinion. Activities and uses which are inconsistent with the objectives of this Notice of Activity and Use Limitation, and which, if implemented at the [Property] [Portion of the Property], may result in a significant risk of harm to health, safety, public welfare or the environment or in a substantial hazard, are as follows:

(i) \_\_\_\_\_ ;

**Guidance: Be as specific as possible when identifying Activities and Uses Inconsistent with the AUL Opinion. Vague descriptions may unintentionally result in over restricting the property.**

(ii) \_\_\_\_\_ ; and

(iii) \_\_\_\_\_ .

3. Obligations and Conditions Set Forth in the AUL Opinion. If applicable, obligations and/or conditions to be undertaken and/or maintained at the [Property] [Portion of the Property] to (select one) [maintain a condition of No Significant Risk] [eliminate a substantial hazard] as set forth in the AUL Opinion shall include the following:

- (i) ;
- (ii) ; and
- (iii) .

**Guidance: Obligations and Conditions should be clearly spelled out so that current and future interest holders clearly understand what needs to be done to maintain a condition of No Significant Risk.**

4. Proposed Changes in Activities and Uses. Any proposed changes in activities and uses at the [Property] [Portion of the Property] which may result in higher levels of exposure to oil and/or hazardous material than currently exist shall be evaluated by an LSP who shall render an Opinion, in accordance with 310 CMR 40.1080 *et seq.*, as to whether the proposed changes will (select one) [present a significant risk of harm to health, safety, public welfare or the environment] [will invalidate the conclusion that no substantial hazards remain]. Any and all requirements set forth in the Opinion to meet the objective of this Notice shall be satisfied before any such activity or use is commenced.

5. Violation of a Response Action Outcome. The activities, uses and/or exposures upon which this Notice is based shall not change at any time to cause a significant risk of harm to health, safety, public welfare, or the environment or to create substantial hazards due to exposure to oil and/or hazardous material without the prior evaluation by an LSP in accordance with 310 CMR 40.1080 *et seq.*, and without additional response actions, if necessary, to achieve or maintain a condition of No Significant Risk or to eliminate substantial hazards.

If the activities, uses, and/or exposures upon which this Notice is based change without the prior evaluation and additional response actions determined to be necessary by an LSP in accordance with 310 CMR 40.1080 *et seq.*, the owner or operator of the [Property] [Portion of the Property] subject to this Notice at the time that the activities, uses and/or exposures change, shall comply with the requirements set forth in 310 CMR 40.0020.

- 6. Incorporation Into Deeds, Mortgages, Leases, and Instruments of Transfer. This Notice 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, whereby an interest in and/or a right to use the Property or a portion thereof is conveyed.

**Remember that the Notice must be incorporated either in full or by reference into all future instruments of transfer.**

Owner hereby authorizes and consents to the filing and recordation and/or registration of this [Confirmatory]Notice, said [Confirmatory} Notice to become effective when executed under seal by the undersigned LSP, and recorded and/or registered with the appropriate Registry(ies) of Deeds and/or Land Registration Office(s).

[This Confirmatory Notice of Activity and Use Limitation is given to correct the inadvertent error(s) made in the Notice of Activity and Use Limitation dated \_\_\_\_\_, and recorded with the \_\_\_\_\_ Registry of Deeds in Book \_\_\_\_, Page \_\_\_\_, and error(s) being as follows:

- (i) \_\_\_\_\_ ;
- (ii) \_\_\_\_\_ ; and
- (iii) \_\_\_\_\_ .

In all other respects the terms of the Notice of Activity and Use Limitation remain unchanged.]

WITNESS the execution hereof under seal this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

*Owner signs first, then the LSP.*

\_\_\_\_\_

[Name of Owner]

**Guidance: AUL must be signed by all property owners. An LSP may not sign on the property owner's behalf unless he or she has power of attorney from the owner. See Section 4.16 for instructions on signatures from corporations, partnerships, etc.**

COMMONWEALTH OF MASSACHUSETTS  
OR [STATE OF \_\_\_\_\_ ]

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_ (name of document signer), proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for \_\_\_\_\_, a partnership)  
(as \_\_\_\_\_ for \_\_\_\_\_, a corporation)  
(as attorney in fact for \_\_\_\_\_, the principal)  
(as \_\_\_\_\_ for \_\_\_\_\_, (a) (the) \_\_\_\_\_)  
\_\_\_\_\_ (official signature and seal of notary)

The undersigned LSP hereby certifies that [he][she] executed the aforesaid Activity and Use Limitation Opinion attached hereto as Exhibit C and made a part hereof and that in [his][her] Opinion this [Confirmatory] Notice of Activity and Use Limitation is consistent with the terms set forth in said Activity and Use Limitation Opinion.

Date:

\_\_\_\_\_

\_\_\_\_\_

LSP  
[ LSP SEAL ]

COMMONWEALTH OF MASSACHUSETTS  
OR [STATE OF ]

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_ (name of document signer), proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

- (as partner for \_\_\_\_\_, a partnership)
- (as \_\_\_\_\_ for \_\_\_\_\_, a corporation)
- (as attorney in fact for \_\_\_\_\_, the principal)
- (as \_\_\_\_\_ for \_\_\_\_\_, (a) (the) \_\_\_\_\_)
- \_\_\_\_\_ (official signature and seal of notary)

Upon recording, return to:

(Name and Address of Owner)

## **APPENDIX D: REQUIRED SIGNATORIES AND DOCUMENTATION**

## **REQUIRED SIGNATORIES AND DOCUMENTATION FOR PROPERTY OWNERS**

The current owner of the property on which the AUL is being placed must sign an the AUL. The property owner is the individual or entity who holds the fee simple interest in the property.

Individual. The property must be signed by the individual who owns the property. If the property is owned by more than one individual (e.g., spouses, siblings, etc.), then all of the owners must sign the AUL.

A ground lessee, not being the owner of the property (i.e., the land itself), may not sign an AUL.

When the property owner is not an individual, but is one of the entities listed below, it is necessary to ensure that the person(s) signing the AUL has the legal capacity, and the power, authority and due authorization to sign on behalf of the entity. The following signatures and documentation are required:

Corporation. The AUL must be signed by a person duly authorized to do so on behalf of the corporation. A corporate vote authorizing the signature on behalf of the corporation must be obtained prior to the date of the signature. A clerk's certificate of the vote, in recordable form, is also required.

For Massachusetts corporations, an exception to the corporate vote requirement exists if the AUL is signed by both an executive officer (e.g., the president or vice-president) and a fiscal officer (e.g., the treasurer or assistant treasurer). One person may hold both types of offices (see MGL c. 155, section 8).

A corporate clerk's Certificate of Incumbency is required to confirm that the person(s) signing the AUL held holds his or her respective offices as identified on the date the AUL was signed. If the AUL is being signed by both the president or vice president and the treasurer or assistant treasurer, then the Certificate of Incumbency is all that is required for the exhibit. If an individual holds both the office of president and treasurer, then the one signature is sufficient. If only one officer is signing the AUL, or if the officers have delegated authority to sign to another individual (such as a director), then the exhibit must also include a Clerk's Certificate. The Certificate must be signed by the clerk or the secretary of the corporation, and must document a corporate vote, resolution, or by-law granting the individual authority to bind the corporation in real estate transactions (or, more specifically, authority to sign the AUL).

Limited Partnership. The General Partner of a Limited Partnership must sign the AUL, unless the limited partnership agreement authorizes another party to sign. Documentation indicating who is the general partner must be attached as an exhibit to the AUL. If the partnership agreement authorizes another party to sign, then the agreement (or relevant portion thereof) must also be attached as an exhibit to the AUL.

Limited Liability Company ("LLC"). The person(s) named in the Certificate of Organization of a Massachusetts LLC (or on the application for registration of a foreign limited liability company) as a manager/member or a person authorized to execute, acknowledge, deliver, and record instruments affecting interests in real estate documents in real property, such as

an AUL, must sign the AUL. The portion of the Certificate of Organization identifying the authorized signatories must be attached as an exhibit to the AUL.

Limited Liability Partnership ("LLP"). The person(s) authorized in the partnership agreement registration to execute real estate documents must sign the AUL on behalf of the LLP. The partnership agreement (or relevant portion thereof) must be attached as an exhibit to the AUL.

Condominium. For an AUL affecting Common Area property, authorized trustees and directors may sign the AUL if documents are of record at the Registry of Deeds authorizing the trustees or directors of a condominium to execute documents which affect a Common Area on behalf of the unit owners. The documents authorizing the trustees or directors to execute the AUL must be attached as an exhibit to the AUL. If no such document exists on record, then all the unit owners must sign the AUL. If the area subject to the AUL is on one or more condominium units, but does not affect any portion of any Common Area, then only the affected unit owner(s) must sign the AUL.

Trusts. If title to the property subject to the AUL is held by the trustee(s) of a trust, then the AUL must be signed by the trustee(s) authorized under the Declaration of Trust to execute real estate documents. The relevant portion(s) of the Declaration of Trust must be attached as an exhibit to the AUL, unless it is already on record. If the Declaration of Trust is already recorded at the Registry of Deeds, the exhibit evidencing the signatory authority of the trustee can make reference to the Book and Page of where the Declaration of Trust is recorded. In this case, a copy of the recorded Declaration of Trust should be submitted to the MassDEP with the AUL submittal.

The Declaration of Trust will establish the type of trust (e.g., nominee, inter vivos, business). If a business trust, information may be available at the Secretary of State's Office. (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>)

The first step in obtaining a copy of the Declaration of Trust is to determine if it has been recorded at the appropriate Office of the Registry of Deeds (<http://www.masslandrecords.com/malr/index.htm>). Note, however, that not all Declaration of Trusts are recorded. For example, a nominee trust does not require that the Declaration of Trust be recorded (see M.G.L. c. 203, §2). The deed conveying title to the trustee of a nominee trust may refer to a Declaration of Trust, but may not include any additional information. In such cases, a notarized Trustee's Certificate should be obtained from the trustee. The Trustee's Certificate verifies the existence of the Declaration of Trust, whether it has been amended, the identity of the current trustees or beneficiaries, and the trustee's authority to act with respect to the subject property.

Note also that subsequent trust documents, such as amendments, and appointments, resignations, and removal of trustees may not be recorded at the Registry of Deeds.

Municipality. The chief municipal officer(s) of a city or town must sign an AUL that affects municipally owned property. Specifically, the Board of Selectmen (or a majority of members of the board) should sign in the case of town-owned property. Depending upon the type of charter held, the Mayor or City Manager should sign in the case of city-owned property. Heads of municipal departments cannot sign the AUL (e.g., the Chief of the Department of Public Works (DPW) is not an authorized signatory on the AUL affecting the DPW garage

site). Documentation stating that the individual signing the AUL is the appropriate office holder must be attached as an exhibit to the AUL.

LSP Signing on Behalf of Property Owner. An LSP may not sign an AUL on behalf of the property owner without first obtaining a power of attorney authorizing him or her to do so. The power of attorney must be recorded with the AUL.

**APPENDIX E: PUBLIC NOTICE OF AN ACTIVITY AND USE LIMITATIONS**

**[NOTICE OF AN ACTIVITY AND USE LIMITATION OR GRANT OF ENVIRONMENTAL RESTRICTION]**

**[SITE NAME]  
[SITE ADDRESS]  
[RELEASE TRACKING NUMBER]**

A release of oil and/or hazardous materials has occurred at this location, which is a disposal site as defined by M.G.L. c. 21E, § 2 and the Massachusetts Contingency Plan, 310 CMR 40.0000. On **[DATE]**, **[NAME OF PERSON RECORDING AND/OR REGISTERING THE NOTICE OR GRANT]** **[recorded with the \_\_\_\_\_ County Registry of Deeds and/or registered with the Land Registration Office of the \_\_\_\_\_ Registry District]**, a **[NOTICE OF ACTIVITY AND USE LIMITATION or GRANT OF ENVIRONMENTAL RESTRICTION]** on the disposal site, pursuant to 310 CMR 40.1070 through 40.1080.

The **[NOTICE OF ACTIVITY AND USE LIMITATION or GRANT OF ENVIRONMENTAL RESTRICTION]** will limit the following site activities and uses on the above property:

- 
- 
- 

Any person interested in obtaining additional information about the **[NOTICE OF ACTIVITY AND USE LIMITATION or GRANT OF ENVIRONMENTAL RESTRICTION]** may contact **[NAME OF PERSON RECORDING AND/OR REGISTERING THE NOTICE OR GRANT OR SUCH PERSON'S REPRESENTATIVE, NAME OF ORGANIZATION, ADDRESS, TELEPHONE NUMBER]**.

The **[NOTICE OF ACTIVITY AND USE LIMITATION OR GRANT OF ENVIRONMENTAL RESTRICTION]** and the disposal site file can be reviewed at **[MassDEP, REGIONAL OFFICE ADDRESS, TELEPHONE NUMBER]**.

## **APPENDIX F: REQUIREMENTS FOR SURVEY PLANS**

## Requirements for Survey Plans

Amendments under the General Laws, Chapter 36, Section 13A, approved by the Attorney General are as follows:

1. Plan sizes shall be a minimum of 8 1/2" by 11" and a maximum of 24" by 36".
2. Plans being presented for recording shall be on linen or polyester film ("mylar"), single matte with a thickness of 0.003 or 3 mils, and must have an opacity so as to allow consistent computer scanning and Diazo and microfilm reproduction.
3. All plans shall be prepared using a compatible ink with excellent cohesiveness which will produce a permanent bond and result in a plan with long term durability. All signatures must be in black India ink or its equal.
4. Linen or polyester reproductions shall be accepted for recording provided they contain original signatures and comply with the other requirements for the recording of plans.
5. Each plan shall have 3/4" borders.
6. The minimum letter size on plans presented for recording shall be 1/8" if free-hand lettering is used and 1/10" if lettering guides are used.
7. Each plan presented for recording shall include a graphic scale.
8. Each plan shall have an area reserved to receive planning board recitation or contain a surveyor's certification as per Chapter 380, Acts of 1966 (G.L. c. 41, s. 81x).
9. Each sheet of plan shall have a 3 1/2" square reserved for Registry use.
10. Each plan must contain a certification clause signed by the preparer stating that he/she has conformed with the rules and regulations of the Registers of Deeds in preparing the plan.
11. No tape adhesion or the like shall be placed on any plan presented for recording or registration. Plans presented for recording shall not contain any raised print.

**APPENDIX G: MASSACHUSETTS DEED INDEXING STANDARDS DOCUMENT**  
**FORMATTING STANDARDS**

## **Massachusetts Deed Indexing Standards Document Formatting Standards**

Documents recorded after January 1, 2008 must meet the following requirements, as described in "Massachusetts Deed Indexing Standards, Version 4.0, January 1, 2008":

1. Be on white paper of sufficient weight to reproduce in registry scanners.
2. All document pages and attachments must be on paper that is no larger than 8.5 inches by 14 inches.
3. Printing shall be on one side only; double-sided pages will not be accepted.
4. Documents that contain printing, writing or other markings must be sufficiently dark in appearance to be legibly reproduced on standard registry scanners.
5. All printing and writing on a document must be of sufficient size to be legibly reproduced on standard registry scanners.
6. Margins on all sides of all document pages must be of sufficient size to be legibly reproduced on standard registry scanners.
7. The first page of all documents must contain a "recording information area" in the upper right hand corner measuring three inches from the top edge of the document and three inches from the right edge of the document that is free from all writing or printing.
8. Documents that do not comply with Formatting Standard 7 above may still be recorded when attached to an official registry Document Cover Sheet or through the use of some other method adopted by the registry.

**APPENDIX H: LIST OF AUL RELATED FORMS**

## List of AUL-Related Forms

### BWSC Transmittal Forms:

- BWSC-113: Activity and Use Limitation (AUL) Transmittal Form
- BWSC-113A: Activity and Use Limitation (AUL) Opinion Form  
Transmittal Form for Application and Payment (For Grants only)

### MCP Forms for Activity and Use Limitations:

- 1072A: Grant of Environmental Restriction
- 1072B: Subordination Agreement
- 1075: Notice of Activity and Use Limitations
- 1082A: Amendment to Grant of Environmental Restriction
- 1082B: Amendment to Notice of Activity and Use Limitations
- 1083A: Partial Release of Grant of Environmental Restriction
- 1083B: Partial Termination of Notice of Activity and Use Limitation
- 1084A: Release of Grant of Environmental Restriction (pursuant to 310 CMR  
40.1083(1)(a))
- 1084B: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR  
40.1083(1)(a); termination because the AUL is no longer necessary)
- 1084C: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR  
40.1083(1)(b); termination to substitute with a new AUL)
- 1084D: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR  
40.1083(1)(c); termination to conduct response actions to meet NSR, or NSH)
- 1084E: Release of Grant of Environmental Restriction (pursuant to 310 CMR  
40.1083(1)(c); release to conduct response actions to meet NSR, or NSH)

**NOTE: The AUL forms that appear in the MCP are revised periodically. Please make sure that you use the most current version of these forms when preparing an AUL.**

**APPENDIX I: ACTIVITY AND LIMITATION CHECKLIST**

## AUL COMPLIANCE ASSISTANCE FORM

*Checklist for Notice of Activity and Use Limitation -- MCP as amended through December 2007 -- Form 1075*

NOTE: This checklist is intended to assist parties in preparing and implementing Notices of Activity and Use Limitation (AULs) using Form 1075. This checklist is intended solely as guidance, and is not a substitute for the regulations. Parties implementing AULs should carefully consult 310 CMR 40.0000 (the MCP) for general and AUL-specific regulatory requirements.

REQUIREMENTS FOR COMPLETING FORM 1075		Circle one		Reference(s) to MCP, Form	Notes
Is the 3/24/06 (Effective 4/3/06) version of the Form 1075 being used?		Y	N	40.1074(1)(a)	
Is the Form's boilerplate unaltered, except where alterations are allowed through bracketed language?		Y	N	40.1074(1)(a)	
Is the AUL a Confirmatory Notice of Activity and Use Limitation?		Y	N	40.1085	
1.	Is the word "Confirmatory" appropriately included or omitted in the following locations, to indicate whether the AUL is a Confirmatory Notice of Activity and Use Limitation? <input type="checkbox"/> Header <input type="checkbox"/> Paragraph 1 <input type="checkbox"/> Paragraph 15 <input type="checkbox"/> Paragraph 19	Y	N	Form 1075	
2.	Is optional Paragraph 16 appropriately included or omitted, to indicate whether the AUL is a Confirmatory Notice of Activity and Use Limitation?	Y	N	Form 1075	
3.	If the AUL is a Confirmatory Notice of Activity and Use Limitation, does Paragraph 16 identify the date, Registry, book and page number of the original AUL?	Y	N	Not applicable	Form 1075

4.	If the AUL is a Confirmatory Notice of Activity and Use Limitation, are the errors in the original AUL listed in Paragraph 16?	Y	N	Not applicable	Form 1075	
5.	Are the Confirmatory Exhibits accurately attached to the Confirmatory AUL? (For example, is documentation of signatory authority attached as Exhibit E)	Y	N	Not applicable	Form 1075	
	Is the Disposal Site name (if applicable) identified in the Header of Form 1075?	Y	N		40.1074(2)(d)	
	Is the Release Tracking Number(s) identified in the Header of Form 1075?	Y	N		40.1074(2)(d)	
	Does the Form identify, in Paragraph 1, the date on which the property owner(s) signed the AUL?	Y	N		Form 1075	
	Is (are) the name(s) of the property owner(s) identified, in the following locations? <input type="checkbox"/> Paragraph 1 <input type="checkbox"/> Paragraph 2 <input type="checkbox"/> Paragraph 21 (this paragraph may reference the property owner or an authorized representative)	Y	N		40.1074(2)(b)	
	Is (are) the name(s) of property owner(s) consistent in all locations?	Y	N			
	If property owner(s) is (are) a corporation(s), is (are) the state(s) of incorporation identified in Paragraph 1?	Y	N	Not applicable  (property owner(s) not a corporation)		
	Is (are) the address(es) of the property owner(s) identified in Paragraph 1?	Y	N		Form 1075	
	Does the Form indicate, through use of bracketed language in Paragraph 2, whether land is vacant or improved?	Y	N		Form 1075	

Is the address of the Property subject to the AUL identified (City/Town & County) in Paragraph 2?	Y	N		40.1074(2)(a)1 <sup>2</sup>	
In Paragraph 2, does the Form identify the owner's source of title (i.e. deed, Certificate of Title, probate docket number)?	Y	N		Form 1075	
In Paragraph 3, is reference made to a survey plan of the Property? (Indicate the form of reference below) ___ Registry of Deeds, Plan Book & Plan Number (if Property is unregistered land) ___ Land Court Plan Number (if Property is registered land)	Y	N		40.1074(2)(a)3	
Is it clear that the AUL applies to the entire Property, or only to a Portion of the Property? ___ Entire Property ___ Portion of the Property	Y	N		40.1074(2)(a)4	
Is optional Paragraph 4 properly included or omitted, to indicate whether the AUL applies to the entire Property or only to a Portion of the Property?	Y	N		Form 1075	
Is bracketed language selected in the following locations, indicating whether the AUL applies to the entire Property or only to a Portion of the Property (check all that apply)? ___ Paragraph 5 (twice) ___ Paragraph 6 ___ Paragraph 8 ___ Paragraph 9 ___ Paragraph 10 ___ Paragraph 11 ___ Paragraph 13	Y	N		Form 1075	

<sup>2</sup> Form and regulation are inconsistent: regulation requires street address, not just city/town and county.

Is bracketed language indicating Property or Portion of Property consistent in all locations?	Y	N			
If only a Portion of the Property is subject to the AUL: Is reference made in Paragraph 4 to a survey plan of the Portion of the Property subject to the AUL? (If yes, indicate the form of reference below)  <input type="checkbox"/> Registry of Deeds, Plan Book & Plan Number (if Property is unregistered land) <input type="checkbox"/> Survey or Land Court "Sketch Plan"(if Property is registered land) (see AUL Guidance Section 4.3.2)	Y	N	Not applicable  (entire Property is subject to AUL)	40.1074(2)(a)4.	
Is it clear that the area subject to the AUL comprises the entire Disposal Site, or only a Portion of the Disposal Site?  <input type="checkbox"/> Entire Disposal Site <input type="checkbox"/> Portion of Disposal Site	Y	N		Form 1075	
Is bracketed language selected in the following locations, indicating whether the area subject to the AUL comprises the entire Disposal Site or only a portion of the Disposal Site?  <input type="checkbox"/> Paragraph 5 <input type="checkbox"/> Paragraph 6	Y	N		Form 1075	
Is bracketed language indicating entire Disposal Site/Portion of Disposal Site consistent in all locations?	Y	N			
In Paragraph 5, is reference made to a sketch plan, attached as Exhibit B, showing the relationship of the Disposal Site to the Property or Portion of Property subject to the AUL?	Y	N		40.1074(2)(a)5.	
Does the Form include, in Paragraph 6, the date of the Activity and Use Limitation Opinion (AUL Opinion)?	Y	N		Form 1075	
Is the purpose of the AUL to maintain a condition of No Significant Risk (NSR)?	Y	N		Form 1075	
Is the purpose of the AUL to maintain a condition of No Substantial Hazard (NSH)?	Y	N			

Is bracketed language selected in the following locations, indicating whether the purpose of the AUL is to maintain a condition of NSR, or to maintain a condition of NSH? ___ Paragraph 8 ___ Paragraph 10 ___ Paragraph 11	Y	N		Form 1075	
Is language indicating NSR or NSH consistent in all locations?	Y	N		Form 1075	
In Paragraph 8, does the Form include a description of permitted activities and uses (i.e., consistent with AUL Opinion)?	Y	N		40.1074(2)(e)	
Is the description of permitted activities and uses written in a clear and understandable manner?	Y	N		40.1074(2)(e)	
In Paragraph 9, does the Form include a description of inconsistent activities and uses?	Y	N		40.1074(2)(g)	
If yes, is the description of inconsistent activities and uses written in a clear and understandable manner?	Y	N	Not applicable	40.1074(2)(g)	
Does AUL limit access to and/or use of groundwater in order to achieve a condition of No Significant Risk?	Y	N		40.1074(1)(d)	
Does AUL identify use of a private well as a drinking water source as an inconsistent use pursuant to 310 CMR 40.0932(5)(d)1.c?	Y	N	Not applicable	40.1074(1)(d) 40.0932(5)(d)1.c	
In Paragraph 10, does the Form include a description of obligations and conditions?	Y	N		40.1074(2)(f)	
If yes, is the description of obligations and conditions written in a clear and understandable manner?	Y	N	Not applicable	40.1074(2)(f)	
Are the descriptions of consistent (permitted) activities and uses, inconsistent activities and uses, and obligations and conditions consistent with each other?	Y	N			

Is the Form signed by the property owner(s) in Paragraph 17?	Y	N		40.1074(2)(j)	
<p>Is (are) the property owner(s)'s signature authorized and binding? (Check one of the options below)</p> <p><input type="checkbox"/> Sole ownership: signed by sole owner</p> <p><input type="checkbox"/> Joint ownership: signed by all owners</p> <p><input type="checkbox"/> Trust: Signed in accordance with requirements established by the trust document</p> <p><input type="checkbox"/> Corporation: Certificate of incumbency AND (Check one)</p> <p><input type="checkbox"/> Signed by President and Treasurer</p> <p><input type="checkbox"/> Signed by President and Assistant Treasurer</p> <p><input type="checkbox"/> Signed by Vice President and Treasurer</p> <p><input type="checkbox"/> Signed by Vice President and Assistant Treasurer</p> <p><input type="checkbox"/> Signed by other officer(s) authorized by vote of the Board of Directors, with vote authorizing said officer(s) attached to Form</p> <p><input type="checkbox"/> Limited Partnership: signed by General Partner or person authorized by LP agreement</p> <p><input type="checkbox"/> Limited Liability Company: signed by manager or member authorized in Certificate of Organization to sign real estate documents</p> <p><input type="checkbox"/> Limited Liability Partnership: signed by person authorized in partnership agreement registration to sign real estate documents</p> <p><input type="checkbox"/> Other (explain): _____</p> <p>_____</p>	Y	N		40.1074(2)(j)	
Is (are) the property owner(s)'s signature dated in Paragraph 17?	Y	N		Form 1075	

<p>Is (are) the property owner(s)'s signature(s) properly notarized (i.e., are each of the following requirements met) in Paragraph 18?</p> <p><input type="checkbox"/> All signatures are notarized</p> <p><input type="checkbox"/> State and county of notary are identified</p> <p><input type="checkbox"/> Property owner(s) is/are named in notary block</p> <p><input type="checkbox"/> Notary signature is present</p> <p><input type="checkbox"/> Notary signature is dated</p> <p><input type="checkbox"/> Notary seal or stamp is included (required for out-of-state notary; not required for Massachusetts notary)</p>	Y	N		40.1074(2)(j)	
Is the Form signed by an LSP in Paragraph 19?	Y	N		40.1074(2)(j)	
Is the LSP's signature dated in Paragraph 19?	Y	N		40.0015(1)	
<p>Is the LSP's signature dated on or after (not before) the date of owner's signature?</p> <p><input type="checkbox"/> Date of LSP's signature ___ (e.g. <u>10-17-09</u>) ___</p> <p><input type="checkbox"/> Date of Owner's signature _ (e.g. <u>10-27-09</u>) ___</p>	Y	N			
Is LSP's signature sealed with LSP stamp?	Y	N		40.1074(2)(j)	
<p>Is the LSP's signature properly notarized (i.e., are each of the following requirements met) in Paragraph 20?</p> <p><input type="checkbox"/> State and county of notary are identified</p> <p><input type="checkbox"/> LSP is named in notary block</p> <p><input type="checkbox"/> Notary signature is present</p> <p><input type="checkbox"/> Notary signature is dated</p> <p><input type="checkbox"/> Notary seal or stamp is included (required for out-of-state notary; not required for Massachusetts notary)</p>	Y	N		40.1074(2)(j)	

REQUIRED ATTACHMENTS TO FORM 1075					
EXHIBITS A, A-1, A-2				Reference(s)	Notes
Is a legal description of the Property subject to the AUL (either a running description or a bounding description) attached as Exhibit A? (Check one): <input type="checkbox"/> Running (metes & bounds) description (if Property is unregistered land) <input type="checkbox"/> Bounding description (if Property is registered land)	Y	N		40.1074(2)(a)2.	
If only a Portion of the Property is subject to the AUL, is a legal description of that Portion (running description) attached as Exhibit A-1?	Y	N	Not applicable  (entire Property subject to AUL)	40.1074(2)(a)4.	
If Property is registered and only a Portion of the Property is subject to the AUL, is an 8.5" x 11" survey plan of the restricted Portion attached as Exhibit A-2?	Y	N	Not applicable  (entire Property is subject to AUL, or is unregistered)	40.1074(2)(a)4.a	
If the Property is registered, and only a Portion of the Property is subject to the AUL, does the description of the Portion subject to the AUL (Exhibit A-1) conform to the survey plan (Exhibit A-2)?	Y	N	Not applicable  (entire Property is subject to AUL, or is unregistered)		

<b>EXHIBIT B</b>				<b>Reference(s)</b>	<b>Notes</b>
Is a sketch plan attached as Exhibit B?	Y	N		40.1074(2)(a)5.	
Does the sketch plan clearly illustrate the relationship of the area subject to the AUL to the boundaries of the Disposal Site?	Y	N		40.1074(2)(a)5.	
Is the sketch plan consistent with the Form (e.g. if the Form indicates that only a Portion of the Property is restricted, does the sketch plan conform)?	Y	N			
<b>EXHIBIT C</b>				<b>Reference(s)</b>	<b>Notes</b>
Is the Activity and Use Limitation Opinion (AUL Opinion), in narrative form, attached as Exhibit C?	Y	N		40.1074(1)(b)	
Does AUL Opinion specify why AUL is appropriate to achieve and/or maintain a condition of No Significant Risk or No Substantial Hazard?	Y	N		40.1074(1)(b)(1)	
Is the AUL Opinion signed by the LSP?	Y	N		40.0015(1)	
Is the LSP's signature dated?	Y	N		40.0015(1)	
Is the LSP's seal included?	Y	N		40.0015(1)	

<b>EXHIBIT D - SIGNATORY AUTHORITY</b>				<b>Reference(s)</b>	<b>Notes</b>
If the person signing the AUL is not an individual signing on his/her own behalf, is there documentation of the person's signatory authority attached as an exhibit to the AUL? (See AUL Guidance Section 4.8 and 4.13)	Y	N	Not applicable (individual(s) signing on his/her/their own behalf)	40.1074(2)(c)	
<b>CONSISTENCY OF FORMS &amp; ATTACHMENTS</b>				<b>Reference(s)</b>	<b>Notes</b>
Do the consistent activities and uses in the Form (Paragraph 8) match those permitted in the AUL Opinion (Exhibit C)?	Y	N			

Do the inconsistent activities and uses in the Form (Paragraph 9) match those in the AUL Opinion (Exhibit C)?	Y	N			
Do the conditions and obligations in the Form (Paragraph 10) match those in the AUL Opinion (Exhibit C)?	Y	N			
If the land is unregistered, does the legal description of the Property containing the area subject to the AUL (Exhibit A) conform to the survey plan of the Property?	Y	N	Not applicable  (Property is registered land)		
If the land is registered, does the legal description of the Property containing the area subject to the AUL (Exhibit A) conform to the Land Court Plan of the Property?	Y	N	Not applicable  (Property is unregistered land)		
If land is unregistered and only a portion of the Property is subject to the AUL, does the legal description of the Portion of the Property (Exhibit A-1) conform to the survey plan of the Portion?	Y	N	Not applicable  (entire Property is subject to AUL, or Property is registered land)		

PUBLIC NOTICE REQUIREMENTS				Reference(s)	Notes
<p>Was a copy of the Form forwarded to each of the local officials listed below within 30 days of being recorded or registered?</p> <p><input type="checkbox"/> Chief Municipal Officer</p> <p><input type="checkbox"/> Board of Health</p> <p><input type="checkbox"/> Zoning Official</p> <p><input type="checkbox"/> Building Code Enforcement Official</p>	Y	N		40.1403(7)(a) BWSC Form 113	
<p>Was a notice of the AUL published in a local newspaper within 30 days of the AUL being recorded or registered, identifying the following?</p> <p><input type="checkbox"/> The name, complete address, and RTN of the Disposal Site</p> <p><input type="checkbox"/> The type of Activity and Use Limitation (i.e., Notice of Activity and Use Limitation)</p> <p><input type="checkbox"/> Information about where the AUL and site file can be reviewed</p> <p><input type="checkbox"/> The name, address and phone number of the person(s) recording the AUL</p>	Y	N		40.1403(7)(b) BWSC Form 113	
BWSC TRANSMITTAL FORM 113				Reference(s)	Notes
<p>Is the following information about the Disposal Site included?</p> <p><input type="checkbox"/> Release Tracking Number</p> <p><input type="checkbox"/> Disposal Site name (if applicable)</p> <p><input type="checkbox"/> Disposal Site address</p>	Y	N		BWSC Form 113	
<p>Is the address of the Property subject to AUL identified, if different from the address of the Disposal Site?</p>	Y	N	<p>Not applicable</p> <p>(addresses of Property and Disposal Site are the same)</p>	BWSC Form 113	

Is a box checked to indicate what Form is being submitted?	Y	N		BWSC Form 113	
Is the following information about the recording of the AUL included? <input type="checkbox"/> Date AUL was recorded or registered <input type="checkbox"/> Registry of Deeds where AUL was recorded or registered <input type="checkbox"/> One of the following: <input type="checkbox"/> Instrument Number (unregistered land only) <input type="checkbox"/> Book and Page Number (unregistered land only) <input type="checkbox"/> Land Court Document Number (registered land only)	Y	N		BWSC Form 113	
Is the following information about the person/organization submitting the Transmittal Form included? <input type="checkbox"/> Name of person/organization <input type="checkbox"/> Contact person (if Transmittal Form 113 is submitted by an organization) <input type="checkbox"/> Address <input type="checkbox"/> Telephone number <input type="checkbox"/> Fax number (if applicable)	Y	N		BWSC Form 113	
Is the following information about the property owner(s) included, if property owner is different from person/organization submitting Transmittal Form? <input type="checkbox"/> Name(s) <input type="checkbox"/> Addresses(s) <input type="checkbox"/> Telephone number(s) <input type="checkbox"/> Fax number(s) (if applicable)	Y	N	Not applicable  (Transmittal Form 113 submitted by property owner(s))	BWSC Form 113	
Is a box checked indicating the relationship of the person submitting Transmittal Form 113 to the Disposal Site?	Y	N		BWSC Form 113	
Is the Transmittal Form signed, dated and certified by person submitting Transmittal Form?	Y	N		BWSC Form 113	

Is the signature dated on or after (not before) the date the AUL was recorded or registered?	Y	N		BWSC Form 113	
Is the following information about the person providing certification included, if not already provided earlier in the Transmittal Form? ___ Name ___ Addresses ___ Telephone number ___ Fax number (if applicable)	Y	N	Not applicable  (information already provided)	BWSC Form 113	
Has a certification been made that the person(s) or entity(ies) identified as the owner(s) on the AUL owned the Property at the time the AUL was recorded and/or registered?	Y	N		40.1074(1)(f)1  BWSC Form 113	
Has the person(s) signing the AUL certified that record interest holders were notified pursuant to 40.1074(1)(e), or that there are no such holders?	Y	N		40.1074(1)(f)2.  BWSC Form 113	
At least 30 days prior to recording and/or registration of the AUL, were all current record interest holders, if any, notified, by certified mail, return receipt requested, of the existence and location of oil and/or hazardous material within the AUL area, and the terms of the proposed AUL (or did such holders waive the prior notification)?	Y	N	No record interest holders	40.1074(1)(e)	
<b>SUBMITTAL OF AUL DOCUMENTATION TO MassDEP</b>				<b>Reference(s)</b>	<b>Notes</b>
Was the AUL recorded and/or registered at the Registry of Deeds?	Y	N		40.1074(3)	
If land is unregistered: was a survey plan of the Property containing the area subject to the AUL recorded as a Plan with the Registry of Deeds prior to or with the recording of the AUL?	Y	N	<input type="checkbox"/> Registered  <input type="checkbox"/> Unclear	40.1074(2)(a) 3.	

<p>If land is unregistered and only a Portion of the Property is subject to the AUL: was a survey plan of the Portion of the Property recorded as a Plan with the Registry of Deeds prior to or with the recording of the AUL?</p>	Y	N	<input type="checkbox"/> Not a portion  <input type="checkbox"/> Registered  <input type="checkbox"/> Unclear	40.1074(2)(a) 4.b	
<p>Within 30 days of recording and/or registering the AUL, was a <u>certified</u> copy of the AUL with proof of recording/registration sent to MassDEP? (i.e., Is Registrar's stamp on the document, indicating it is certified?) If yes, check one of the options below:</p> <p>___ AUL marked with a Registry stamp indicating an Instrument Number (if Property is unregistered land and Book and Page Number have not yet been assigned)</p> <p>___ AUL marked with a Registry stamp indicating a Book and Page Number (if Property is unregistered land and Book and Page Number have been assigned)</p> <p>___ AUL marked with a Land Registration stamp indicating a Land Registration Document Number (if Property is registered land)</p>	Y	N		40.1074(4)(a)	
<p>Within 30 days of recording and/or registering the AUL, was a registry copy of the required survey plan(s) referenced in the AUL, bearing the plan book and plan numbers sent to MassDEP?</p>	Y	N		40.1074(4)(b)	

## **APPENDIX J: GRANTS OF ENVIRONMENTAL RESTRICTION**

## Grants of Environmental Restriction

The Grant of Environmental Restriction has important similarities to the Notice of Activity and Use Limitation. Both the Grant and Notice document that a release of OHM has occurred at a property, that a response action has been undertaken at the site, and that the protectiveness of the cleanup relies upon restricting or eliminating certain types of activities and uses occurring at the site. Further, both the Grant and Notice are voluntary and designed for use by and at the discretion of private parties. However, the legal effects of a Grant and Notice differ significantly.

As described in Section 3.3 of this Guidance, a Grant of Environmental Restriction is a legally enforceable contract that conveys property interests to MassDEP. As such, present and future property owners, present interest holders who have subordinated their interests to the Grant, and future interest holders are legally required to abide by the terms of the Grant and its restrictions, easements and covenants. MassDEP, as the grantee or recipient of such interests, has the right to enforce the terms of the Grant if these terms are violated.

Use of a Grant requires MassDEP review and approval, and payment of associated permit fees. To obtain MassDEP's approval, the property owner must submit a Grant application to MassDEP in accordance with 310 CMR 40.1071. The review involves a determination by MassDEP that the application is administratively and technically complete, but does not include a review of the adequacy of the response actions.

The procedures described in this Appendix are limited to the requirements specific to implementing Grants, but are not a complete description of the process. Many of the requirements outlined in the main sections of this Guidance apply to both Notices and Grants, and should be read in conjunction with this Appendix and the regulations.

### **AJ.1 Elements of a Grant of Environmental Restriction**

The Grant of Environmental Restriction (Form 1072A) identifies the subject parcel and specifies restrictions and requirements with which the property owner agrees to comply. The information required by a Grant is listed below in the order in which it appears in Form 1072A:

- The MassDEP Site Name (if there is one) and MassDEP Release Tracking Number(s);
- The date on which the Grant is signed by the property owner and the name and address of the property owner ("Grantor");
- First "Whereas" Clause - the name and address of the property owner and the municipality and county in which the parcel containing the area subject to the AUL is located (if the property owner is a corporation, the state of incorporation and the principal place of business should be included). The reference to the owner's source of title: for unregistered land, the deed book and page number; for registered land, the Certificate of Title number. If the owner inherited the property, the probate docket number should also be included;
- Second "Whereas" Clause – refers to the legal description, in metes and bounds, of the parcel containing the area subject to the AUL (which is attached as Exhibit A). If the land is unregistered, the Registry of Deeds recording reference for the survey plan showing the parcel is required in this clause. If the land is registered, the Land Court Plan reference is required;

- Third “Whereas” Clause (only included if the AUL applies to a portion of the parcel) refers to the legal description, in metes and bounds, of the portion of the parcel subject to the AUL attached as Exhibit A-1 and references the survey plan or Land Court Plan for the portion. For unregistered land, the Plan Book and Plan Number must be inserted; for registered land the survey plan of the portion is “a sketch plan attached hereto and filed herewith for registration”;
- Fourth “Whereas” Clause - establishes whether the area subject to the AUL is the disposal site or is a portion of the disposal site. This clause also refers to a sketch plan showing the boundaries of the area subject to the AUL in relation to the disposal site boundaries, which is attached to the AUL as Exhibit B;
- Fifth “Whereas” Clause - establishes that response actions taken at the site are based on restrictions on human access to OHM remaining at the property, and the restriction of certain activities occurring “in, on, through, over or under” the area subject to the AUL. This clause also establishes that the basis for the restrictions is the AUL Opinion (attached to the Grant as Exhibit C) and requires the date of the AUL Opinion;
- The next paragraph (that begins “NOW, THEREFORE...” ) establishes that the grant is a gift to MassDEP pursuant to section 6 of Chapter 21E. The term “QUITCLAIM COVENANTS” means that the grantor is passing whatever title and interest he or she has in the parcel within the limits of the grant and warrants that he or she has not encumbered the parcel during his or her term of ownership, yet makes no representation as to the state of title that preceded his or her term of ownership;
- Numbered sections:
  - “1. Restricted Uses and Activities” establishes the list(s) of Restricted Uses and Activities that may not occur “in, on, upon, through, over or under” the area subject to the AUL. These restrictions are based upon the AUL Opinion, which is attached to the Grant as Exhibit C. The restrictions place limits on uses (e.g., no residential use) and activities, including a prohibition against excavation [paragraph (iii)] and any action that is reasonably likely to result in significant risk or the disturbance of any cap or other cover over the Restricted Area;
  - “2. Permitted Uses and Activities” lists uses and activities that are allowed in the Restricted Area. The AUL Opinion supports these uses and activities. Clause (iii) of this section provides for an LSP evaluation of activities other than those listed (*see Section 6.1* of this guidance document on “Changes in Land Uses or Activities After an AUL Has Been Implemented”);
  - “3. Obligations and Conditions” lists specific conditions and obligations established in the AUL Opinion that have to be met to maintain a condition of No Significant Risk in the Restricted Area;
  - “4. Emergency Excavation” allows for emergency excavation in the Restricted Area (e.g., in order to repair utility lines or respond to a fire or flood) as long as specific conditions are met. The conditions are notifying MassDEP, limiting the degree of disturbance, undertaking listed measures to reduce risk, and engaging an LSP to oversee the activities and prepare a plan to restore the area following excavation;
  - “5. Easements” provides MassDEP, its agents, contractors and employees with a right of access across the parcel subject to the Grant to inspect the Restricted Area for the purposes of ensuring compliance with the AUL and conducting assessment activities;

“6. Severability” provides that if any provision of the AUL is later found to be invalid by a court or tribunal, the remaining provisions of the AUL will remain in effect. It also provides that the invalid provision shall be deemed automatically modified, or if it cannot be modified, it will be deemed deleted from the AUL;

“7. Enforcement” establishes that a violation of the terms of Grant could result in MassDEP enforcement actions, including the assessment of administrative penalties, or the issuance of civil or criminal penalties and/or “equitable remedies” by a court of law, including an order to remove or modify improvements that violate the terms of the Grant;

“8. Provision to Run with the Land” states that the terms of the Grant attach to the parcel, meaning that these terms remain in effect for the term of Grant regardless of whether the property ownership changes;

“9. Concurrence Presumed” is a formal acknowledgment by the Grantor that he/she agrees to the terms of the Grant and that he/she and any of his/her agents, contractors, subcontractors and employees will comply with its terms;

“10. Incorporation into Deeds, Mortgages, Leases and Instruments of Transfer” establishes that the property owner must either reference or incorporate the Grant in full into any subsequent deeds, easements, mortgages, leases, licenses, occupancy agreements or other instruments that transfer an interest in or right to use the property or restricted area. By signing the Grant, this agreement becomes legally binding. [Any lease, easement, etc. that is created after an AUL has been recorded or registered must either include a copy of the AUL or reference the AUL (by date, Registry, and instrument/Plan Book and Page Number or document number). This requirement is intended to ensure that people with legal rights to use the property, other than the owner, are aware of the existence of the AUL, the specific limitations placed on the use of the property, and conditions and obligations necessary to maintain No Significant Risk];

“11. Amendment and Release” specifies that the Grant may be amended or released and references 310 CMR 40.1080 *et seq.*, the MCP provisions that address changes in site use and activities after an AUL has been implemented and the procedures for amending or releasing an AUL;

“12. No Dedication Intended” establishes that the Grant is not intended to constitute a transfer of property ownership of the subject parcel or Restricted Area to MassDEP;

“13. Term” the Grantor indicates, by selecting the appropriate term, whether the Grant is “in perpetuity,” meaning continuing forever, or “for a period of \_\_ years.” In the latter case, the Grantor would indicate the appropriate number of years. In the majority of Grants, the Grant runs “in perpetuity,” unless it is released. Even when the term of a Grant has expired, it is still necessary to obtain from MassDEP a Release of Grant of Environmental Restriction;

“14. Rights Reserved” specifies that in accepting the Grant, MassDEP is not expressing approval as to the adequacy of the Grant or any response actions taken at the disposal site. That is, MassDEP reserves its rights to pursue enforcement actions related to the area subject to the Grant;

- The notarized signature of the Grantor, the notarized signature and seal of the LSP, and finally, the signature of the Commissioner of MassDEP.
- Exhibits (*see Section 4 for detailed instructions for preparing these Exhibits*):

Exhibit A: a written legal description, in metes and bounds, of the parcel of land that contains the area subject to the AUL,

Exhibit A-1 (*only needed when the AUL applies to a portion of the parcel*): a written legal description, in metes and bounds, of that portion to which the AUL applies;

Exhibit A-2 (*only needed when the AUL applies to a portion of registered land*): a plan of the portion prepared by a Massachusetts Registered Land Surveyor;

Exhibit B: a sketch plan showing the boundaries of the area subject to the Notice in relation to the boundaries of the disposal site. (This plan does not need to be prepared by a Registered Land Surveyor);

Exhibit C: an AUL Opinion, in narrative form, written, dated, signed, and sealed by an LSP; and

Exhibit documenting signatory authority, if the individual signing the Grant is signing on behalf of an entity, rather than signing for oneself.

A Registry-certified copy of the Grant must be submitted to MassDEP using transmittal form BWSC-113. MassDEP must also be provided with a Registry copy of all survey plans referenced in the Grant.

## **AJ.2 Subordination Agreements**

The property owner must obtain subordination agreements from any holders of a prior interest in the Restricted Area or Property, as set forth in 310 CMR 40.1071(4). In a subordination agreement, the holder of a prior interest acknowledges and agrees that his or her interest is subject to the Grant of Environmental Restriction; therefore, he or she must comply with the terms of the Grant of Environmental Restriction when exercising such prior interest. Without a subordination agreement, a holder whose interest was created prior to the Grant of Environmental Restriction would not be legally obligated to comply with its terms.

Subordination agreements must be submitted to MassDEP as part of the Grant application package using Form 1072B, found at 310 CMR 40.1099. If the Restricted Area is a portion of a parcel, then subordination agreements must also be obtained from any holders of interests in the parcel whose activities could be affected by the Grant (e.g., a utility easement on the larger parcel but not in the AUL area may allow utility workers to move equipment over the AUL area to reach the easement).

A subordination agreement should be recorded and/or registered immediately after the recording or registering of the Grant. If the land is unregistered, then the signed original Subordination agreement should be returned to MassDEP after it has been recorded. If the land is registered, the signed original Subordination Agreement will be retained by the Registered Land section of the Registry of Deeds, and a certified copy should be forwarded to MassDEP.

### **AJ.3 Filing A Grant Application**

As part of the Grant application, the applicant must file three transmittal forms:

1. a Transmittal Form for Application and Payment (Form 50);
2. an Activity and Use Limitation (AUL) Transmittal Form BWSC-113; and
3. an Activity and Use Limitation (AUL) Opinion Form BWSC-113A. (See *Appendix H* for a list of AUL-related forms.)

It is important to obtain and submit as part of your Grant package the Application and Payment Transmittal Form in order to ensure proper crediting of your permit application fee.

#### **AJ.3.1 Grant Application Requirements**

A complete Grant Application must be submitted to MassDEP using transmittal form BWSC-113. The Grant application requirements are set forth in 310 CMR 40.1072, and include:

1. A completed Form 1072A set forth at 310 CMR 40.1099, including the exhibits described above.
2. Any necessary subordination agreements using Form 1072B set forth at 310 CMR 40.1099;
3. A title certification issued to the Department by an insured title examiner certifying title in the Grantor, and copies of any outstanding record encumbrances (e.g., mortgages, easements, liens) and any plans of record. (See *Appendix K*, “*Sample Title Certification*”) and;
4. A check in payment of the permit application fee submitted with a “Transmittal Form for Application and Payment,” (available from MassDEP offices). The permit code for this transmittal form is BWSC 40. See Section AJ.5, below.

#### **AJ.4 MassDEP Review of a Grant**

Once a Grant has been prepared, it must be submitted to MassDEP for review, accompanied by a title certification, copies of outstanding encumbrances, plans of record, and the applicable permit application fee (see *Section 5.2*). The review performed by MassDEP has two steps (see MassDEP’s Fee Regulations, 310 CMR 4.04(10)):

***NOTE TO REVIEWERS: The permit review timeframes have been changed to reflect the amended permit review timeframes in the revised fee regulations, 310 CMR 4.00, which resulted in a 20 % reduction in permit review timeframes across all MassDEP programs. The MCP will be revised to be consistent with the fee regulations.***

##### **Step 1: Administrative Completeness**

The initial review determines whether the application is complete; that is, whether all necessary documents have been submitted to MassDEP. Such documents include the signed original of the Grant and any associated documents, such as subordination agreements, survey plans, title certification, title documents and any corporate votes and Certificates of Incumbency. The timeframes for the permit application review are provided in 310 CMR 4.10(g), Timely Action and Fee Provisions. MassDEP must conduct this review within 24 days after it receives the submittal. If the submittal is incomplete, MassDEP provides the party filing the Grant application with a written notice of deficiencies and 30 days within which to provide the missing information. Failure to provide this missing information within this time frame is considered a withdrawal of the application.

(Note: These time frames may be changed by mutual written consent of MassDEP and the applicant.)

A second administrative completeness review is conducted for the supplementary material in which MassDEP determines that all necessary material has been submitted. MassDEP will not review or process an incomplete application.

## **Step 2: Technical Review**

This stage involves a review of the Grant documents, survey plans and title certification to determine whether they are correct as to substance and form. MassDEP has 48 days in which to conduct this review. If the submittals are found to be satisfactory, then MassDEP will approve the Grant application. If there are technical deficiencies, MassDEP will send a written notice of the deficiencies to the party filing the Grant application. A second technical review takes place upon submission of the supplementary material. MassDEP has 36 days from the day after receipt of the supplementary material to complete the review. This review is limited to the sufficiency of documents and not the sufficiency of the response action. A decision to approve or not approve the Grant is made upon completion of the second technical review (or the first if no supplemental information was needed). MassDEP then sends a written statement indicating whether the Grant has or has not been approved to the applicant. (Note: These time frames may be changed by mutual, written consent of MassDEP and the applicant.)

Once MassDEP staff decides that the Grant can be approved, the Grant is forwarded to MassDEP Commissioner for approval and signature. Once the Commissioner has signed the Grant, MassDEP will return it and any other associated documents, plans and subordination agreements to the applicant so that they may be recorded and/or registered. The Grant does not become effective until it has been recorded or registered.

## **AJ.5 Grant Fee Requirements**

The permit application fee for MassDEP's review of the Grant is set forth in MassDEP's fee regulations at 310 CMR 4.04(10)(4)(g). The permit application fee is **\$1050** [see 310 CMR 4.10(10)(g)]. A permit applicant may apply for consolidated review of multiple Grant or Private Well Grant applications and a special fee if the application meets the following criteria [see 310 CMR 4.10(10)(g)(4)(b)]:

1. the application covers Grants for 6 or more separate parcels which comprise, in whole or part, a single disposal site;
2. each of the proposed Grants references a single AUL Opinion in accordance with 310 CMR 40.1071(2)(f); and
3. the inconsistent and consistent activities and uses, and the obligations and conditions stated in the respective Grants are identical for each of the parcels.

With respect to consolidated Grant applications, MassDEP must refund any portion of a permit application fee that exceeds the agency's actual costs for review and approval. Mass's costs are calculated by applying the method used to calculate Response Action Costs in 310 CMR 40.1220(1) and the Indirect Rate set forth in 310 CMR 40.1221(2). Regardless of MassDEP's actual review costs, the fee for reviewing a consolidated application for multiple Grants cannot be less than \$1050, and cannot exceed \$6,000.

## **AJ.6 Recording and/or Registering the Grant**

After the Grant has been reviewed by MassDEP and signed by the Commissioner, the Grant is recorded and/or registered within 30 days of the property owner's receipt of a Department approved Grant. The property owner must then submit a certified registry copy of the recorded Grant bearing the book/page, instrument number, and or document number and survey plans bearing the plan book /plan number within 30 days of recording or registering the Grant. Additionally, the property owner must comply with the public involvement requirements at 310 CMR 40.1403(7).

### **AJ.7 Amending and Releasing a Grant**

Amendments and Releases of Grants must be reviewed and approved by MassDEP, generally this process follows the steps described above for review of the original Grant in accordance with the timeframes in 310 CMR 4.10(h) and (i), respectively. The permit application fee for MassDEP's review of an Amendment of Environmental Restriction is **\$850**; and the permit application fee for a Release of Environmental Restriction is **\$650**.

Once approved, Amendments and Releases must be recorded and/or registered with the appropriate Registry of Deeds, and a Registry-certified copy of the amendment, including instrument and/or book and page number, and/or document number must be submitted to MassDEP within thirty days of its recordation and/or registration. As with the original Grant, the Amendment must comply with the public involvement requirements set forth at 310 CMR 40.1403(7). (See Section 5.4)

#### **AJ.7.1 How to Amend a Grant**

Amending a Grant requires the use of the Amendment to Grant of Environmental Restriction Form 1082A set forth at 310 CMR 40.1099. The following documents must be attach to Form 1082A: a written legal description of the parcel (Exhibit A); an AUL Opinion (Exhibit B) explaining the proposed changes in Site Activities and Uses and how those changes are consistent with the requirement to maintain No Significant Risk; and BWSC-113A. The AUL Opinion must be prepared, signed and sealed by an LSP in accordance with 310 CMR 40.1082. The amendment application must also include a title certification, copies of pertinent instruments and plans, and payment of an application fee. If applicable, subordination agreements must be obtained using Form 1072B set forth at 310 CMR 40.1099. It is also necessary to include in the application a Transmittal Form for Application and Payment and BWSC Forms 113.

#### **AJ.7.2 How to Release a Grant**

Releasing a Grant requires the use of Form 1083A, Form 1084A, or Form 1084E, set forth at 310 CMR 40.1099. depending on the nature of the Release: Form 1083A is used for Partial Release of the Grant, pursuant to 310 CMR 40.1083(2); Form 1084A is used when the Release is based upon an LSP Opinion stating that the Grant is no longer necessary to maintain a condition of No Significant Risk [310 CMR 40.1083(a)]; and Form 1084E is used when additional response actions are necessary to support a conclusion that a condition of No Significant Risk has been achieved or that all Substantial Hazards have been eliminated [310 CMR 40.1083(c)].

A written legal description of the parcel (Exhibit A), an AUL Opinion prepared by an LSP (Exhibit B), and BWSC-113A must be attached to the Release and the applicable fee must be submitted in accordance with 310 CMR 40.1083 and 310 CMR 4.10(i). The Transmittal Form for Application and Payment and BWSC-113 must be used to submit the application to MassDEP.

**APPENDIX K:**

**SAMPLE TITLE CERTIFICATION  
FOR GRANT OF ENVIRONMENTAL RESTRICTION**

[FIRM LETTERHEAD]

\_\_\_\_\_,20\_\_

Commonwealth of Massachusetts, Acting by  
and through its Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

RE: [BRIEF DESCRIPTION OF PROPERTY TOGETHER WITH DEED REFERENCE]

Ladies/Gentlemen:

We have examined the records of the \_\_\_\_\_ Registry of Deeds with respect to the above-described premises for a period of at least fifty (50) years through [DATE], at [TIME], [INSTRUMENT NO.]. We certify, that at such time, [NAME OF PARTY HOLDING TITLE], held good, clear, record and marketable title to the above premises, free from all encumbrances which would materially affect the title, except the following matters which are not covered by our title examination and which may materially affect the title:

*NOTE:* We do not certify as to violations of subdivision controls or planning board regulations; conservation commission and environmental control questions, if any; zoning; bankruptcy and creditors' rights; accuracy of descriptions of surveys; rights of parties in possession; any matters which would be disclosed by an accurate survey and inspection; whether or not restrictions have been violated; disposition agreements of any Redevelopment Authority; pending federal liens not of record; usurious provisions, variable rates repayment or rewrite provisions of mortgages; Indian tribal land claims; validity of corporate or other type entity existence; errors or omissions in indexing at the Registries of Deeds and probate (including computer errors or omissions); unpaid taxes, municipal assessments or any other matters not of record at the Registry of Deeds or Registry of Probate or to subsequent owners. Liability is limited to matters appearing of record during the period of the examination, and only to the parties to whom the certificate is issued. This certificate does not cover Chapter 963 Acts of 1973 (re: abandoned railroad beds) or provisions of M.G.L. Chapter 21E (Superfund Statute). No liability is assumed for obtaining releases, discharges or any other instruments noted below.

*ENCUMBRANCES:*

[LIST ALL MATTERS AFFECTING TITLE - THE DESCRIPTION OF THE ENCUMBRANCE SHOULD INCLUDE THE DATE OF THE DOCUMENT OR PLAN AS WELL AS A BOOK AND PAGE REFERENCE. ADDITIONALLY, COPIES OF ALL DOCUMENTS SHOULD BE INCLUDED WITH CERTIFICATION]

This certification relies upon [DESCRIPTION OF PLAN, INCLUDING RECORDING INFORMATION] for the accuracy of the description.

The certifications set forth above are solely for your benefit in connection with an application for a Grant of Environmental Restriction and are issued pursuant to the provisions of 310 CMR 40.1072(2)(c). These certifications may not be furnished to any other person or entity or relied upon by you for any other matter, nor by any other person or entity in any manner.

Very truly yours,  
[NAME OF LAW FIRM OR TITLE COMPANY CERTIFYING TITLE]