Enforcement for the Greater Good: Supplemental Environmental Projects

Compiled by Lisa Alexander

This month's article discusses the use of Supplemental Environmental Projects ("SEPs") as tools for environmental compliance enhancement, presenting two recent examples of SEPs – one with a link to the new Homeowner Heating Safety law and the second that resulted in a town hazardous waste collection day. The article ends with a reminder of the benefits of secure monitoring wells.

SUPPLEMENTAL ENVIRONMENTAL PROJECTS ("SEPs")

Section 16 of MGL Chapter 21A defines SEPs as "any environmentally beneficial project or action approved by the [MassDEP] commissioner that a regulated entity agrees to undertake in a settlement of an enforcement action brought by the department and is not otherwise required to perform." The SEP policy and several early examples can be found at: http://www.mass.gov/dep/service/seppo107.doc.

SEPs, while voluntary, play an important role in MassDEP settlements, furthering compliance and enforcement while providing increased environmental awareness, education and protection. They may be especially beneficial in communities disproportionately burdened by pollutant exposure. SEPs may involve pollution prevention or reduction, environmental enhancement or restoration, education, scientific research, monitoring and/or data collection, emergency preparedness and compliance or other projects, as long as they bear some relevance to the original type of non-compliance involved and the community affected.

SEPs listed in the link to the SEP Policy include: construction of a vegetative border on a river bank, publication of a paid advertisement regarding waste oil management, retrofitting diesel vehicles with diesel oxidation catalysts to reduce local emissions, proper removal of asbestos from a local historic building, an energy efficiency audit of city-owned facilities, asbestos inspector training for employees whose job involved identifying asbestos, and replacement of two electric-powered school safety signals with solar powered signals.

Administrative Consent Order with Penalty/Voluntary SEP - NERO, oil delivery company:

The site originally came to MassDEP's attention in December 1998 when the Respondent removed three underground oil storage tanks (USTs) from the *northwest* (500-gallon waste oil) and *northeast* (500-gallon fuel oil and 4,000 gallon diesel) portions of the property. Four other USTs located on the *eastern* portion of the property (approximately 50 feet from the 500-gallon fuel oil UST) were left in the ground and upgraded at that time.

Results of soil and groundwater samples collected where the USTs were removed exhibited several petroleum constituents exceeding MCP Reportable Concentrations. On February 4, 1999

the release was reported to MassDEP and Release Tracking Number (RTN) 3-17974 was assigned for the *northern* portions of the property.

From 2000 to 2005, the Respondent submitted a Tier Classification Submittal and Tier I Permit Application, Phase I through Phase III Reports and a Tier I Permit Extension. On June 5, 2006, MassDEP received a Phase IV Completion Statement and a Phase V Report establishing a Remedy Operation Status (ROS) for the site. Actions proposed under the ROS consisted of Monitored Natural Attenuation with quarterly groundwater monitoring.

Subsequent to the ROS submittal, between September 6, 2006 and September 15, 2006, the Respondent removed the four USTs that had been upgraded in 1998 from the *eastern* portion of the property, together with 250 cubic yards of petroleum-contaminated soils. The UST removals and management of contaminated soils were not proposed as a Release Abatement Measure (RAM), nor were they proposed as part of the Phase IV Plan or as an addendum to the Phase IV.

On September 13, 2006, the Respondent obtained knowledge of a reportable release condition at the location *outside* the original boundary of the known release area. Laboratory analysis of soil and groundwater samples collected from the new UST removal area revealed oil contamination at concentrations that exceeded "120-day" Reportable Concentrations pursuant to 310 CMR 40.0315(2). Nevertheless, the Respondent failed to notify MassDEP and proceeded to perform response actions that consisted of:

(i) Removing the four USTs and 250 cubic yards of petroleum impacted soils which were later disposed of at a recycling facility;
(ii) Performing in-situ bioremediation of impacted groundwater; and
(iii) pumping petroleum-impacted groundwater into a holding tank for treatment and discharge on Site.

As of January 2007, the Respondent had not submitted a Release Notification Form ("RNF") for the separate and distinct 120-day release discovered during the removal of the additional UST field, in violation of 310 CMR 40.0333(2).

According to an October 5, 2007 Phase V Remedy Operation Status Report, the Respondent's consultant stated, in part, that "the UST closure was performed as part of a routine UST closure and was not associated with site source removal and remediation… [the] UST closure and associated soil and groundwater removal was not done under a specific MCP remedial action plan".

MassDEP determined that conducting such work prior submittal of either a Release Abatement Measure ("RAM") Plan or a Phase IV addendum constituted violations of the MCP.

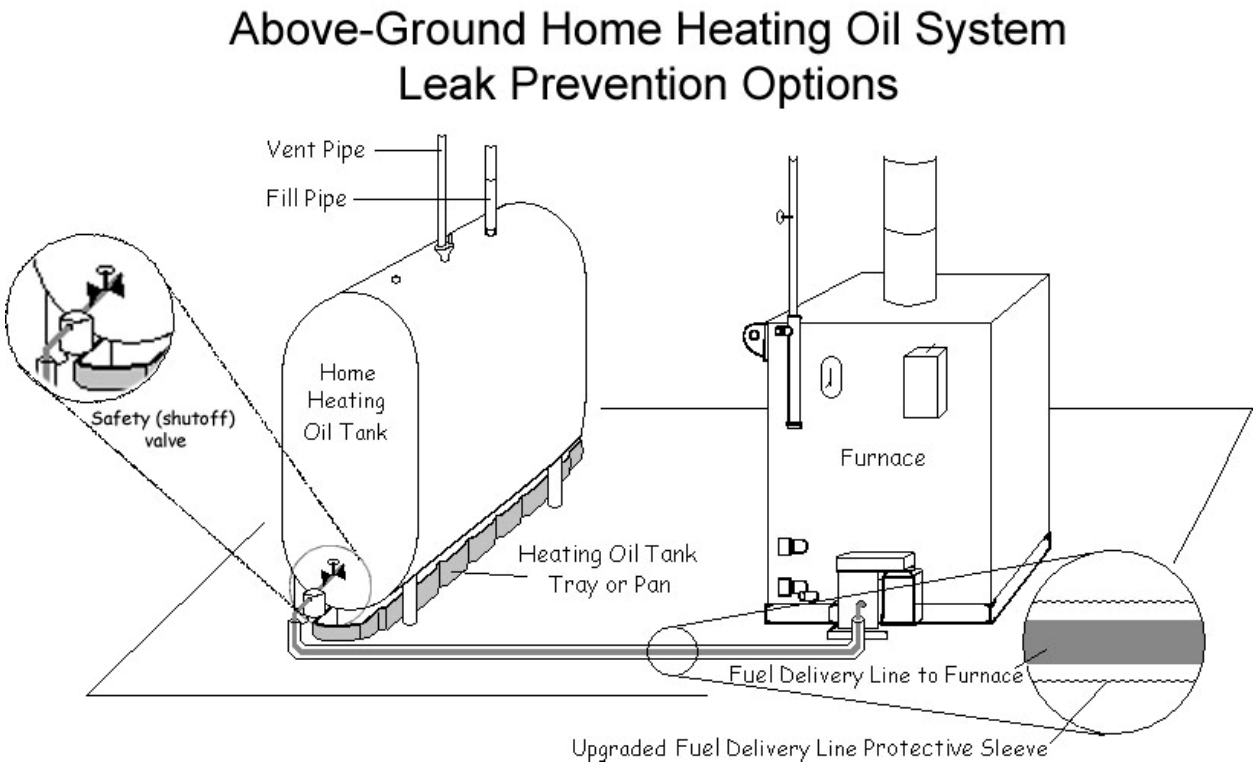
Release Abatement Measures or "RAMs", are the popular, flexible vehicles for conducting relatively rapid and simple response actions – during preliminary response actions, before or after Tier Classification, and sometimes, after a Response Action Outcome – but, they are not without notification requirements, and they are not allowed prior to submitting a RAM Plan.

The region initiated enforcement actions including a penalty, and the Respondent proposed to conduct a SEP. The approved SEP requires the Respondent, within 12 months, to spend no less than $10,000 (the amount of the calculated penalty) to replace existing copper heating oil feed lines with double walled lines in a minimum of 50 residences with preference given to elderly residents or "Environmental Justice" communities served by the Respondent and must submit quarterly reports on the progress of the SEP. NERO: RTN 3-17974, ACOP-NE-08-3R007

The Homeowner Heating Safety Law

The strategy to replace 50 fuel feed lines in lieu of a penalty directly supports the new Homeowner Heating Safety law, Chapter 453 of the Acts of 2008, which was signed into law on January 5, 2009. MassDEP is developing a fact sheet on the law. Although some sections will not take effect until July 2010, the full text may be viewed at: http://www.mass.gov/legis/laws/seslaw08/sl080453.htm.

The law allows homeowners to purchase insurance coverage for heating oil leaks, but also requires them to take steps to minimize chances that leaks might happen. Among the options to meet that requirement are enclosing the fuel supply line with a continuous non-metallic sleeve or installing a safety valve at the tank end of the fuel supply line (see diagram).



Administrative Consent Order with Penalty/Voluntary SEP - SERO, Town DPW garage:

Following an audit of a Downgradient Property Status (DPS) submittal for a Town Department of Public Works facility (DPW), MassDEP issued a Notice of Audit Findings/Notice of Noncompliance (NOAF/NON) for failing to meet the requirements of a DPS determination and established a sixty-day deadline to the correct the violations. The Town DPW failed to comply with the NOAF/NON requirements by the applicable deadline and did not provide notice that additional time was needed to meet the requirements.

On October 16, 2009, MassDEP executed an Administrative Consent Order with a Penalty with the Town for failure to comply with the requirements of the NOAF/NON. The ACOP was negotiated as follows: $25,000 penalty with $17,000 suspended and a SEP in the amount of $8,000.

The SEP includes implementing a Household Hazardous Waste Day within 180 days of the date of the ACOP. The SEP will allow the Town to collect hazardous waste generated by its residents, thereby preventing potential illegal dumping or improper disposal of household hazardous waste that could pose a risk to human health, public safety, public welfare, or the environment. The Town was also required to provide personnel time to contract with a licensed hazardous waste transportation company and a licensed hazardous waste receiving facility to properly transport and dispose of the hazardous waste generated during the event.

In addition, the Town was required to conduct an inventory of its own hazardous waste at the DPW facility and to dispose of any material not currently being used, or likely to be used in the near future in facility operations, and to provide the funding to properly transport and dispose of the facility and household hazardous waste. SERO: RTN 4-0001295, ACOP-SE-09-3P003.

<u>A REMINDER: SECURE THOSE MONITORING WELLS!</u>

According to a September 2009 EPA press release, a Connecticut oil company violated the federal Clean Water Act when it "delivered" oil from a delivery truck into a monitoring well rather than the appropriate fill port of an underground storage tank. The oil subsequently discharged to the environment including a wetland and perennial stream flowing to the Farmington River. The Connecticut DEP was notified of a visible sheen and the oil company was able to immediately hire a response team to contain most of the oil before it reached the waterways. The oil company subsequently paid a $30,000 fine, but its insurance company has already spent over $1 million intercepting the remaining oil and remediating the wetlands and is continuing to work with Connecticut DEP to resolve the issues.

It's a powerful reminder that simple pollution prevention pays! Had the monitoring well been locked – this accident might not have happened. The MCP, at 310 CMR 40.0028, states:

> Any well installed or constructed for the purposes of sampling, monitoring or remediating environmental media or environmental conditions as part of response

> actions conducted under the MCP shall be maintained and secured throughout its period of service to prevent the introduction of contaminants to the subsurface environment or the exacerbation of groundwater contamination by the vertical movement of water within the borehole or annular space.

And, of course, when the well is no longer in service, it should be properly closed in accordance with Policy #91-310, Standard References for Monitoring Wells (available for viewing on line at: http://www.mass.gov/dep/cleanup/laws/91-310.htm)