**Closing Thoughts on the 2016 Audit & Enforcement Training**

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During November and December 2016, nearly 400 Licensed Site Professionals and other practitioners were able to attend MassDEP, Bureau of Waste Site Cleanup’s (BWSC) Audit and Enforcement Case Study Training in Boxborough, MA.

As usual, we start out with all attendees in one room, introduce MassDEP staff, go over the “homework” and answer a few questions before breaking into small groups for the case discussions. All facilitators have the same notes, but each group has slightly different discussions. We thought it might be good to cover a few key points some LSPs may have missed.

**Three Types of Audits**

As many of you know, the BWSC conducts three different types of Audits:

* Level One (L1) – an L1 File Review audit is completed by filling out a standardized checklist, often after a site has filed a Response Action Outcome statement (RAO) or a Permanent or Temporary Solution (PTS); L1 audits may also be performed on Preliminary or Comprehensive Site activities (e.g., Immediate Response Action or IRA, Release Abatement Measure or RAM, or a Phase II Comprehensive Site Assessment);
* Level Two (L2) – an L2 Site Inspection Audit takes place at the site and may be an audit of an Activity and Use Limitation (AUL), a Remedy Operation Status (ROS) site , or a site visit to observe general site conditions to ascertain compliance with the MCP; and
* Level Three (L3) – an L3 Comprehensive Audit includes review of the entire site file, a site inspection, possibly sample collection and sometimes a meeting with the potentially responsible party (PRP) and/or LSP at the site. An L3 audit often takes place after an RAO or PTS is filed, but it can be performed at any time in the MCP process.

In previous trainings, we focused on Level One Audits using MassDEP’s standardized checklists and had LSPs put on their “Auditor” hats to do a “file review” audit, going through key aspects of site assessment and risk characterization while filling out the checklist , paying special attention to sections with “flags” that could indicate risks. LSPs would review an actual redacted submittal while filling out the L1 checklist. During past trainings, we usually used an RAO report, but we also went through Phase reports and AULs. If any “flags” were checked, we would discuss whether the LSP/auditor should recommend further review (L2 or L3 Audit) and what should be in the Notice of Audit Findings.

As a reminder, examples of “flags” on the screening forms include:

* Exceeding GW-2 standards near a residence or school with no indoor air sampling;
* Site contaminants impacting indoor air;
* More than ½ inch of Non-Aqueous Phase Liquid in a monitoring well; or
* A public or private water supply well contaminated as a result of the site.

During the L1 trainings, LSPs used the standardized checklist to audit an actual redacted submittal. The idea was to help LSPs understand what Auditors look for and to ensure complete submittals. Historically, BWSC has tried to conduct at least a brief screen to a full L1 audit on every site that files an RAO or PTS. The results of the screen may mean a site gets recommended for L2 or L3 audit.

About 12% of sites closing in a given year have an L2 Site Inspection Audit because they are in ROS, have an AUL or warrant further investigation based on the L1. An additional (approximate) 10% have an L3 Audit (with site inspection). This means that up to 22% of all sites closing in a given year have an Inspection as part of an L2 or an L3 Audit. This varies year-to-year based on sites notifying and closing.

**Enforcement**

A portion of sites receiving L2 or L3 audits end up with either “lower level enforcement” (i.e., a Notice of Noncompliance) or “higher level enforcement” (i.e., Administrative Consent Orders with or without Penalties). Most sites do *not* end up in higher level enforcement. The majority of the enforcement comes in the form of a Notice of Noncompliance (NON). Less than half of sites selected for an L2 or L3 audit based on an L1 screen end up in higher level enforcement.

**Enforcement Training - Change of Pace**

This year we decided to focus the training on situations where enforcement *has* happened. We also wanted to share the different types of L2 Audits and associated checklists and go over the most common L2 Audits: Remedy Operation Status (ROS) sites, Remedial System Inspections, sites in Monitored Natural Attenuation (MNA) and inspections at sites with Activity and Use Limitations (AULs).

Ahead of any L2 audit, the auditor reviews key site information (ROS Status Reports, AUL requirements, etc.). The auditor’s job is to determine whether the site is maintaining specific requirements, achieving stated goals, or otherwise maintaining a condition of No Significant Risk. The auditor usually contacts the PRP to ensure they can gain access to the property and lets the PRP decide if they want to be present and/or to invite their consultant or LSP to the site visit.

During the inspection, the auditor may take samples, photos, meet with the LSP and/or PRP, walk the site and generally document findings. Back at the office, the auditor may compare current conditions to what was in place at the time reports were filed, including review of aerial photos and site plans. When changes are observed, as in the cases reviewed this year, the auditor may send Requests for Information to the PRPs before completing the Audit. Most L2 Audits result in a written Notice of Audit Findings (with or without a Notice of Noncompliance) issued to the PRP, often with a brief summary of findings and the inclusion of the inspection forms.

**Discussions in the Training**

For the 2016 training, the homework included review of the Penalty Statute (M.G.L. Chapter 21 A, Section 16, “the Civil Administrative Penalty Act”) and the Administrative Penalty regulations (310 CMR 5.00). Together, these documents guide BWSC how to determine when a case moves from “lower level enforcement” (a NON) to “higher level enforcement” (Penalty Assessment Notice, or ACO/ACOP).

During the break-out sessions, we presented two ROS sites that ended up with NONs, and two AUL sites that ended up with ACOPs. Some LSPs thought one of the ROS sites should also have gone to an ACOP so we discussed that. Factors in the decision to issue a NON included a cooperative PRP and contaminant concentrations below GW-1. Following the two AUL inspections, Requests for Information were issued. Both AUL sites ended up with ACOPs. We discussed the differences in the ACOPs: one violation versus many, impacts on receptors and dollar values for different types of violations.

In order to make sure everyone heard the same key messages, we’ll reiterate them here.

An individual auditor never decides on his or her own, “This should go to a $5,000 penalty.” The auditor conducts the audit and the findings are discussed with the supervisor and the Section Chief. Depending on the specifics of the case, if the violations meet the Penalty Statute requirements for higher level enforcement (e.g., violation of an AUL condition, willful or repeat violations, failure to maintain ROS, etc.) then consideration is given to the facts of the case. Was there one violation or many? Was anyone put at risk? What contaminants are left at the site, how much, who was or would be affected? Is the PRP cooperative? The case is then brought to the Regional Enforcement Review Committee (RERC). The RERC is comprised of the Regional Director, Deputy Regional Directors for all the bureaus in a given region, enforcement coordinators, bureau attorneys, and other staff as appropriate. Depending on the penalty assessed, the Boston headquarters may get involved, and, in rare cases, the Massachusetts Attorney General’s Office, federal Environmental Protection Agency and/or the MassDEP Strike Force. The penalty is calculated based on the Penalty Statute, an ACOP is drafted and an enforcement conference is scheduled. During negotiations, and depending on the facts of the case, some portion of the penalty may end up being suspended pending compliance.

In the four cases *(2 page summary doc)* presented in the training: Case #1 went to a NON because the violations did not meet the criteria for an *automatic* higher level enforcement in the Penalty Statute. Case #2 *could* have gone to a penalty, but the low level of contaminants and the cooperation by the PRP and LSP worked in the PRP’s favor. In Case #3, the AUL violation was clear, but the contaminated soil never left the site, and was subsequently re-covered and/or remained at depth so it did not seem that anyone had been exposed to the site contaminants for an extended time during construction. Finally, in Case #4, the AUL conditions were known by one party who did not inform a worker at the site of the contamination. That person was then exposed to the site contaminants. Additionally, since contaminated soils were disturbed in multiple locations within the AUL area during site work, MassDEP cited the same violation multiple times.

At both AUL sites, it was work conducted *by the PRPs* that caused the violations. And it was the PRPs that were issued the penalties. Could the penalty have been avoided with some additional work before site *closure*? Would it have helped to maintain communication with the PRP after the AUL was filed? Hard to know, but we hope that this training gave LSPs additional tools for communicating with their clients. In the end, the goal is always protection of human health and the environment.

For additional information, see: ENFORCEMENT RESPONSE GUIDANCE POLICY ENF-97.001 Revised 12/10/2004, 6/18/2008