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GUIDANCE ON IMPLEMENTING ACTIVITY AND USE LIMITATIONS Policy #WSC 25-300

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 MassDEP 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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SECTION 1: INTRODUCTION

1.1 Background

Massachusetts General Laws Chapter 21E (M.G.L. c. 21E) and the Massachusetts Contingency Plan (MCP), 310 CMR 40.0000, allow for a level of disposal site cleanup that takes into consideration the potential for exposure to oil and/or hazardous material (OHM) 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 the Massachusetts Department of Environmental Protection (MassDEP) has developed for over 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 OHM at the site and use the “No Significant Risk” 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, considering both the current *and future* uses of the properties.

M.G.L. c. 21E, §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, MassDEP recognizes 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 the completion of a cleanup that meets the MCP requirements. The flexibility provided by the MCP risk characterization methods 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 over time and in the event of land use changes.

One of the checks and balances provided by the MCP takes the form of a land use control known as an **Activity and Use Limitation** or **AUL**. An AUL is a legal document recorded or registered with the Registry of Deeds that identifies activities and uses that are consistent and inconsistent with, and ongoing obligations and conditions that are necessary to maintain, a level of No Significant Risk¹ at a disposal site where contamination remains after completing assessment and/or cleanup activities.

M.G.L. c. 21E, §6 gives MassDEP the authority to (a) acquire real property or any interests therein, (b) restrict use of real property and (c) record or cause to be recorded notice of restrictions or land use limitations affecting real property, in each case as a tool to ensure that risks posed by OHM are managed appropriately. Real property includes real estate (land and anything permanently affixed

¹ An AUL may be used as part of either a Temporary Solution, Remedy Operation Status or Permanent Solution. The standard for a Temporary Solution or Remedy Operation Status is “No Substantial Hazard” and the standard for a Permanent Solution is “No Significant Risk,” as M.G.L. 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.

to it), and the interests, benefits and rights inherent in real estate ownership. The AUL requirements set forth in the MCP and described in this guidance are intended to carry out the purpose of M.G.L. c. 21E, including 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.

The MCP provides for three types of AULs:

1. Notice of Activity and Use Limitation ("Notice" or "Notice of AUL") [see 310 CMR 40.1074];
2. Grant of Environmental Restriction ("Grant") [see 310 CMR 40.1071]; and
3. Environmental Restriction [see 310 CMR 40.1073].

The Notice and the Grant are implemented and maintained by property owners, and the Environmental Restriction is imposed by MassDEP.

Since 1993, when the MCP provisions allowing for the use of AULs first took effect, the vast majority of AULs implemented by property owners have been Notices. This guidance therefore is focused primarily on such Notice of AULs. Guidance pertaining to the requirements for implementing Grants is provided in Appendices K and L. Except as otherwise noted, or where the context otherwise requires, the use of the term "AUL" in this guidance refers to a Notice of AUL.

1.2 Guidance Applicability

This guidance applies to disposal sites for which an AUL is implemented pursuant to 310 CMR 40.0000.

It is intended as guidance 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 M.G.L., c. 21E and the MCP. This document does not create any substantive or procedural rights and is not enforceable by any party in any administrative proceeding with the Commonwealth and is subject to change at any time with or without notice. If any language in this document conflicts with applicable law, then the provisions of M.G.L. c.21E and 310 CMR 40.0000 shall control.

This guidance should not be considered a substitute for 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: Introduction and purposes of AULs;

Section 2: Relationship between AULs and the MCP disposal site risk characterization assumptions;

Section 3: Types of AULs and the elements that 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 provide property owners, interest holders in the property, and others who review property records at the Registry of Deeds with notice of:

- the site uses and activities that are consistent with maintaining a condition of No Significant Risk;
- the site uses and activities that should not occur in the future or should not occur without appropriate precautions 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; and
- the property owner's obligations that ensure that the objectives of the AUL continue to be met (e.g., maintenance of caps or other barriers, monitoring of the area subject to the AUL, adherence to soil management plans, ongoing operation of Active Exposure Pathway Mitigation Measures); and
- the location of contamination remaining at the disposal site.

1.4 AULs and the Response Action Process

AULs that are implemented as part of a Permanent Solution or Temporary Solution may be implemented **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, including within the area to which the AUL applies.

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 OHM 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

A Permanent or Temporary Solution that relies on an AUL is not considered valid unless the AUL is in effect, i.e., the AUL is recorded at the appropriate Registry of Deeds or filed with the appropriate registry district of the land court [see 310 CMR 40.1070(3)], prior to the submission of the Permanent Solution, Temporary Solution Statement to MassDEP. While an AUL must be implemented prior to the submittal of the associated Permanent Solution Statement or Temporary Solution Statement, the AUL should not be implemented until all response actions necessary to achieve a level of No Significant Risk for current site uses and activities 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 that barrier must be in place before the AUL is recorded. The reason for this is three-fold: (1) the barriers do not serve to prevent exposure until they are in place; (2) the AUL cannot document the location of barriers to be maintained until such barriers have been constructed; and (3) the AUL cannot accurately describe uses and activities that are consistent and inconsistent with maintaining a condition of No Significant Risk until that condition has in fact been achieved, but for the implementation of the AUL, through the implementation of necessary response actions

The scope and content of an AUL are based on the level of cleanup performed at a site and the need to protect against exposure to remaining contamination. An AUL describes limitations to on-site uses and activities with respect to the remaining risk. If, after a Permanent Solution or Temporary Solution has been achieved, new uses and activities are considered at a site that do not fit into the AUL's "consistent uses" at the 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 activities and uses commence. These requirements are further described in Section 6.

1.6 Use of AULs or Other Measures (Non-AUL Recorded Instruments and Notices, Signage and Advisories) when an AUL is Not Required

Where an AUL is not otherwise required by the MCP [see 310 CMR 40.1012], a property owner may choose to provide notice to future interest holders or others of the existence of residual contamination on the property by optionally using an AUL pursuant to 310 CMR 40.1012(3) or using non-AUL measures. See Section 2.4.2 for further discussion of implementing an AUL when an AUL is not required.

Any AUL implemented pursuant to the MCP when such AUL is not required is still subject to MCP audit and enforcement activities.

1.6.1 Use of Other Types of Recorded Notices

A notice or instrument that is *not* an AUL (e.g., a restriction written into a deed, or contained in a self-standing document, or some other kind of notice in a deed) may also be used as a protective measure to provide notice of the existence of residual contamination when an AUL is not otherwise required by the MCP. For example, non-AUL notices or restrictions may be used to provide information about contamination at sites where a Permanent Solution or Temporary Solution has not yet been achieved. A non-AUL restriction or notice may also be implemented as an interim protective measure during the course of conducting assessment and cleanup activities or as a voluntary notification of residual contamination at a site at which a condition of No Significant Risk has been attained without the use of an AUL (where an AUL is otherwise not required).

However, where an AUL is required by the MCP, the property owner may not use a non-AUL type of restriction or notice in lieu of an AUL, nor represent a non-AUL restriction or notice as an AUL pursuant to the MCP. In this regard, a non-AUL restriction or notice:

- shall not be entitled “Grant of Environmental Restriction” or “Notice of Activity and Use Limitation;”
- may, but is not required to be submitted to MassDEP;
- may, but is not required to adhere to the MCP requirements for implementing AULs, including public notice; and
- is not subject to MassDEP audits or enforcement.

1.6.2 Other Forms of Notice

AULs and non-AUL recorded restrictions or notices are not the only mechanisms for providing information to individuals with potential for exposure to contamination remaining at a 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 may be considered. In particular, postings (in addition to measures to reduce access) may be an appropriate option 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.

While not a requirement of the MCP, some property owners 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 consistent and inconsistent site activities and uses and related obligations.

1.7 Use of AULs at Disposal Sites Subject to Federal Superfund Program

As provided at 310 CMR 40.0111(8), parties implementing remedies at disposal sites that MassDEP deems adequately regulated under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.* (CERCLA) may implement a Notice of Activity and Use Limitation when the CERCLA remedy relies on the imposition of land use controls to minimize the potential for exposure to contamination or to protect the integrity of the remedy. Such Notices of Activity and Use Limitation are referred to in this Section 1.7 as “NAULs,” consistent with federal practice in Massachusetts, and the disposal sites at which such NAULs are implemented will be generally referred to as “CERCLA sites.” Implementation of such NAULs and any subsequent Amendments or Terminations of the NAUL require written approval from U.S. Environmental Protection Agency (EPA) and MassDEP. The NAUL must incorporate the land use control requirements set forth in an institutional control design statement approved by EPA. Such NAUL shall be implemented on a form developed by MassDEP for such purpose, and shall include any additional terms, approved by EPA and MassDEP in writing, to achieve the objectives of the selected remedy.

NAULs at CERCLA sites are authorized by the MCP, but they must also reflect the requirements of the CERCLA remedy. To achieve this, 310 CMR 40.0111(8)(a) provides for which specific provisions of the MCP apply to NAULs at CERCLA sites and which do not. Most notably, NAULs at CERCLA sites do not require the involvement of an LSP. This is because LSPs typically do not have the same role at CERCLA sites as they do at disposal sites being managed in accordance with the MCP and in general are subject to greater EPA and MassDEP direct oversight. NAULs implemented at MCP disposal sites and NAULs implemented at CERCLA sites are subject to enforcement through the MCP, M.G.L. c. 21E, M.G.L. c. 21A, §16, and 310 CMR 5.00 (see 310 CMR 40.0111(9)).

1.8 AULs and Brownfields Redevelopment

The Brownfields Act, St. 1998, c. 206, established incentives to encourage individuals to cleanup and redevelop, preserve and/or conserve contaminated properties in Massachusetts. EPA characterizes “Brownfields” as properties where redevelopment is hindered by perceived or documented contamination. Brownfields are often unused or underutilized properties, including those abandoned or for sale or lease, that were once used for commercial or industrial purposes. AULs can play an important role when assessment and cleanup of contamination is necessary to return Brownfields properties to productive use and the law recognizes the significance of proper implementation and maintenance of AULs. In addition to financial incentives available to parties opting to clean up and redevelop these properties, M.G.L. c. 21E, sec. 6, as amended by the Brownfields Act, provides liability relief to certain former property owners for AUL violations that occur after a property is transferred, provided that the AUL was properly implemented and maintained under their terms of ownership and the relevant conditions described in M.G.L. c. 21E, sec. 6 are otherwise complied with.

1.9 Oversight and Maintenance of AULs

In order to be in compliance with the MCP, the current owner of a property for which an AUL has been recorded or registered must continue to comply with the terms of the AUL. MassDEP has the authority to perform audits of sites where an AUL has been implemented. Violating the terms of the AUL may result in a maximum penalty of up to \$25,000 per violation per day pursuant to M.G.L. c. 21A, §16.

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.

SECTION 2: AULS AND RISK CHARACTERIZATION

2.1 Introduction

The MCP establishes a risk characterization process 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 conditions are consistent with Background, it is necessary to perform a risk characterization for every disposal site. The level of effort required for a risk characterization will vary depending upon the complexity of site conditions and potential routes for exposure to site contaminants.

The risk characterization process provides the information needed to determine when, in the absence of additional remediation, an AUL would be required to communicate the presence of contaminants at the property and limit or place conditions on future activities and uses that could pose potential for exposure and a significant risk of harm to health, safety, public welfare or the environment. The appropriateness and protectiveness of an AUL are functions of proper disposal site assessment and risk characterization. Implementation of an AUL does not achieve a condition of No Significant Risk — it does however serve to provide notice of the presence of contaminants at the property and to describe the uses, activities and obligations necessary to maintain a condition of No Significant Risk.

This section discusses aspects and the relationship of the disposal site risk characterization with the activities, uses, obligations and conditions described in an AUL. More detailed risk characterization guidance may be found in MassDEP's *Guidance for Disposal Site Risk Characterization*, #WSC/ORS-2024.

2.2 Risk Characterization Steps

The MCP provides three methods—Method 1, Method 2, and Method 3—for characterizing risk. Regardless of the method selected, all risk characterizations require determining:

- contaminants of concern;
- environmental media affected by the contaminants of concern;
- extent of contamination;
- contaminant concentrations at the site;
- background concentrations for the site where appropriate;
- current and reasonably foreseeable uses of the property(ies) that comprises the site;
- pathways of exposure and receptors;
- applicable soil and groundwater categories (based on location and exposure potential);
- exposure point concentrations; and
- receptors risks.

2.3 Site Activity and Use

To adequately evaluate potential exposures, the disposal site risk characterization must identify and describe all current and reasonably foreseeable uses and activities associated with the disposal site and the surrounding environment as described at 310 CMR 40.0923. The term “activity” refers to actions by human and environmental receptors that could result in exposure to OHM. The “use” of the property refers to a broader description of the property use (e.g., commercial, industrial, residential). Zoning designations may be helpful in the process of identifying the current use of the property, but do not necessarily reflect and should not be relied upon to determine either current or foreseeable uses or activities that may occur within the site boundaries.

2.3.1 Current Site Activities and Uses [310 CMR 40.0923(2)]

The risk characterization must always evaluate the current site use and activities. Activities identified for the current site use must include those that are actually occurring, and those that are not occurring at the time of the evaluation, but may reasonably be expected to occur because they are consistent with the current use of the site and surrounding land use. Current site activity and use scenarios help to identify who may potentially be exposed at the site and how frequently that exposure may occur.

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. 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, emergency 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, child residents must still be evaluated in the risk assessment. Children residing and playing at a property in a residential setting are site activities that 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 property adjacent to an industrial park. Although the frequency of the activities associated with the current use of the property may not necessarily equal that of an official park or ball field, the current use risk characterization should still 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, the current use of the facility itself may not be residential, but 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 residential 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.

Relevance of Current Site Activities and Uses to AULs

AULs cannot be used to eliminate from consideration 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.

Example: If a commercial building is currently vacant, the future occupancy of the building for commercial use must be considered in the risk characterization. An AUL may not be used to avoid performance of a risk characterization of current uses consistent with the typical use of the building. In other words, an AUL may not render the use of a building as “no use” or direct that a risk characterization be performed only upon the reoccupation of the building.

2.3.2 Reasonably Foreseeable Site Activities and Uses [310 CMR 40.0923(3)]

Land use does not remain constant over time and it is difficult to predict the future uses for a specific property. As a starting point, the regulations presume unrestricted future use of the property that comprises the site. As specified at 310 CMR 40.0923(3), 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 to the extent that such activity or use could result in exposures to Human or Environmental Receptors that are greater than the exposures associated with current Site Activities and Uses..." unless those activities and uses are eliminated from future consideration by application of an AUL, or are identified in 310 CMR 40.1013 as not requiring an AUL because they are consistent with certain limitations, assumptions or conditions documented in support of a Permanent Solution.

Reasonably foreseeable uses include circumstances that are hypothetical and might never occur. Except where noted at 310 CMR 40.1013 (and further described in Section 2.4.2.2), when the disposal site conditions do not support unrestricted use, either remediation must occur or an AUL is required to identify the limitations on reasonably foreseeable future activities and uses that are assumed in the risk characterization.

The primary requirement of the MCP is that all reasonably foreseeable activities and uses of the property be evaluated in the risk characterization or restricted in an AUL unless the property will be clean enough for unrestricted use.

Example: At an active manufacturing plant the owner has no plans to curtail certain 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 (e.g., residential, school, daycare).

Example: A vacant former mill building abuts an industrial area and several homes, and the property owner has no specific plans for redevelopment. For the risk characterization, the property owner identifies reasonably foreseeable uses as including the building's former manufacturing use but not residential use even though both uses would be consistent with the site and the adjacent land uses. The AUL must therefore include a prohibition against residential use.

The risk characterization must include consideration of any activities and exposures consistent with the identified current and reasonably foreseeable future activities and uses. 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. AULs are also not required for the conditions provided in 310 CMR 40.1013 and described in Section 2.4.2.2.

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 and Are Not Required [310 CMR 40.1012 and 310 CMR 40.1013]

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 (EPCs) 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 may be 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 unrestricted site use. 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 EPCs do not meet the applicable S-1 Soil Standards;
- Method 3 is used to characterize risk and assumptions are made in the risk characterization about restricting or limiting the use of the property;
- OHM in soil at a depth greater than fifteen feet from the ground surface exceeds an applicable Method 3 Ceiling Limits (M3CLs) in soil listed in the table at [310 CMR 40.0996(7)], or for a contaminant not listed in the table, a default or chemical-specific M3CL, as required by 310 CMR 40.0996(8);
- a Permanent Solution relies on an AUL where visible coal tar deposits are located at a depth greater than fifteen feet from the ground surface [310 CMR 40.0997(3)];
- a Permanent Solution relies upon an Exposure Pathway Mitigation Measure to prevent exposure to OHM that would otherwise pose a significant risk;
- 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);
- NAPL (Nonaqueous Phase Liquid) at any depth is or is anticipated to be present at a thickness greater than ½ inch in an excavation, boring or monitoring well at the disposal site; and
- Radioactive Material emitting Radiation above background levels is present at a site not otherwise licensed and overseen by the Massachusetts Department of Public Health [310 CMR 40.0115(2)].

Exposure Pathway Mitigation Measures

An Exposure Pathway Mitigation Measure can be either a “passive” or “active” remedial action that is directed at eliminating or reducing exposure to OHM by human or ecological receptors at the point of exposure. Passive Exposure Pathway Mitigation Measures include barrier systems such as Engineered Barriers, geotextiles or geomembranes, crushed stone, and/or pavement that prevent direct contact with OHM. With respect to the indoor air pathway, Passive Exposure Pathway Mitigation Measures include vapor barriers or passive venting systems that do not rely on mechanical or electromechanical components (e.g., a subslab venting that does not rely on fans or blowers).

An Active Exposure Pathway Mitigation Measure or AEPMM is a type of Exposure Pathway Mitigation Measure that relies on the continual use of a mechanical or electro-mechanical device to actively prevent exposure to OHM that would otherwise pose a significant risk. By definition, AEPMMs may either: (1) prevent or mitigate the migration of subsurface OHM vapors into a building

by creating and maintaining a negative pressure field beneath and/or surrounding a building or by creating or maintaining a positive pressure field within the living and working space of the building; or (2) treat OHM present in a private water system associated with a private water supply well [310 CMR 40.0006 and 310 CMR 40.1012(2)(b)].

When achievement of a Permanent Solution is dependent upon the maintenance of an Exposure Pathway Mitigation Measure, whether active or passive, an AUL is required to document that the function and integrity of the measure or system must be maintained. In the case of a Passive Exposure Pathway Mitigation Measure, such as a vapor barrier, the AUL would provide notice that:

- the barrier serves to prevent the infiltration of VOCs into the building;
- any activity that would harm the integrity of the barrier should be avoided; and
- in the event that the barrier is breached (either intentionally as the result of planned construction or unintentionally as the result of damage or building settling, etc.), it must be repaired to ensure that a level of No Significant Risk is maintained/restored.

When the achievement of a Permanent Solution relies on the ongoing operation of an AEPMM to prevent the migration of subsurface OHM into a building, specific requirements apply to both the operation and maintenance of the AEPMM and the contents of the Notice of Activity and Use Limitation [see 310 CMR 40.1025]. In such cases, Form 1075 must incorporate standardized Obligations and Conditions specific to the AEPMM. These Obligations and Conditions require that:

- a description of the AEPMM system type and location be provided;
- the AEPMM be operated according to the regimen specified in the Permanent Solution Statement;
- remote monitoring technology be employed to alert MassDEP and the property owner and operator immediately when the system is operating outside of its range of effectiveness;
- immediate steps be taken to repair and return the AEPMM to operation if a shutdown occurs; and
- building occupants and MassDEP be notified in writing if the shutdown lasts 30 consecutive days.

When achievement of a Permanent Solution relies on the ongoing operation of an AEPMM to remove OHM from drinking water supplied by a private water supply well, specific requirements apply to both the operation and maintenance of the AEPMM and the contents of the Notice of Activity and Use Limitation [see 310 CMR 40.1025]. In such cases, Form 1075 must incorporate standardized Obligations and Conditions specific to the AEPMM. These Obligations and Conditions require that:

- a description of the AEPMM system type and location be provided;
- the AEPMM be operated according to the regimen specified in the Permanent Solution Statement;
- records documenting all activities to maintain the system be maintained and made available to the Department upon request:

- immediate steps be taken to repair and return the AEPMM to operation if a shutdown occurs; and
- building occupants and the Department be notified in writing if the shutdown lasts 30 consecutive days.

An AEPMM may be installed and operated at any point in the MCP response action process. MassDEP encourages, for example, installation of subslab depressurization (SSD) systems to eliminate or reduce vapor intrusion to buildings as part of Immediate Response Actions, particularly when the affected building is a school, daycare or residence (i.e., where there is a Critical Exposure Pathway). AEPMMs may also be part of the remedy at disposal sites where a Temporary Solution or Remedy Operation Status has been achieved [see 310 CMR 40.1026]. An AUL is only required for AEPMMs, however, that are implemented as part of a Permanent Solution.

More information about the Exposure Pathway Mitigation Measures to address the vapor intrusion pathway and the operation of SSD systems as part of a Permanent Solution (i.e., as an AEPMM) can be found in MassDEP's *Vapor Intrusion Guidance*, #WSC-16-435.

NAPL with Micro-Scale Mobility

A Permanent Solution may be achieved at a disposal site where some NAPL remains in the environment, provided a level of No Significant Risk has been achieved, NAPL with Micro-scale mobility has been removed if and to the extent feasible, and the NAPL that is remaining is not considered "Non-stable NAPL." Non-stable NAPL, as that term is defined at 310 CMR 40.0006(12), is NAPL with a footprint that is still expanding laterally or vertically. Where the remaining NAPL is demonstrated to have a stable footprint but its thickness **at any depth** is or is anticipated to be greater than ½ inch for any foreseeable period of time in an excavation, boring or monitoring well, an AUL is required as part of the Permanent Solution pursuant to 310 CMR 40.1005(2) and 310 CMR 40.1012(2)(d).

The purpose of the AUL where NAPL thickness exceeds ½ inch is to provide notice to the property owner about the presence of NAPL and to establish - through the "Consistent" and "Inconsistent" Activities and Uses and "Obligations and Conditions" of the AUL - appropriate measures to manage potential future exposure to the NAPL. Such measures must include appropriate protections for construction workers and other potentially impacted human receptors, including the obligation to develop management/contingency plans for any NAPL that may be present or flow into future excavations in the event of construction activities ("NAPL Management Plans").

The obligation to develop and adhere to a NAPL Management Plans, as well as an outline of the objectives, scope and general provisions of the NAPL Management Plan, must be included in the Obligations and Conditions of the AUL in the same manner as Health and Safety and Soil Management Plans [see Section 2.7.3]. If appropriate, these plans may be combined. The outline of the objectives, scope and general provisions of the NAPL Management Plan must address such issues as NAPL containment, collection, recovery, storage and removal, worker protection measures related to the NAPL consistent with the Health and Safety Plan, monitoring, and

excavation safety. It is not necessary to attach a detailed NAPL Management Plan to the AUL; detailed Plans that better reflect actual construction plans can be developed by LSPs prior to any work occurring in the AUL area.

Please keep in mind that in order to achieve a Permanent Solution without an AUL, not only must NAPL remaining in the environment pose No Significant Risk, but any residual contamination in soil must be at levels that support unrestricted use.

More information about NAPL behavior and characteristics may be found in MassDEP's *Light Nonaqueous Phase Liquid (LNAPL): Guidance for Site Assessment and Closure under the Massachusetts Contingency Plan*, #WSC-16-450.

2.4.2 When AULs Are Not Required [310 CMR 40.1012(3) and 310 CMR 40.1013]

The MCP describes several situations where an AUL is not required by the MCP but a property owner may choose to provide notice to future interest holders of residual contamination left at the site. As described in Section 1.6, this *optional notice* may be provided by implementing an AUL or using alternative methods, such as non-AUL deed restriction, sign postings, or advisories to building occupants. It is important to note that if the property owner chooses to implement an AUL pursuant to the MCP, even if not specifically required by the MCP, that AUL must still comply with requirements set forth at 310 CMR 40.1070 through 310 CMR 40.1099.

2.4.2.1 Sites with a Permanent Solution with No Conditions, Temporary Solution or Remedy Operation Status [310 CMR 40.1012(3)(a) through (j)]

Situations where an AUL is not required but may be used to provide notice of residual contamination include:

- Contamination in soil at levels at or below the M3CLs is located at a depth greater than 15 feet below the ground surface [see 310 CMR 40.1012(3)(b)];
- OHM concentrations are consistent with Background, as that term is defined at 310 CMR 40.40.0006(12) [see 310 CMR 40.1012(3)(a)];
- Levels of OHM in soil have been reduced below applicable S-1 standards where risks are characterized using Method 1 or Method 2 [see 310 CMR 40.1012(3)(d and e)];
- No Significant Risk has been achieved and no limitations on the site were assumed in the Method 3 Risk Characterization [see 310 CMR 40.1012(3)(f)]; and
- All substantial hazards have been eliminated and all applicable requirements for Remedy Operation Status have been met [see 310 CMR 40.1012(3)(h)].

Also pursuant to 310 CMR 40.1012(3), an AUL is not required to support a Temporary Solution, but may be used when all substantial hazards have been eliminated and the requirements for a Temporary Solution have been met in accordance with 310 CMR 40.1050, except where an AUL is required pursuant to 310 CMR 40.1012(2)(e). [see 310 CMR 40.1012(3)(g)].

2.4.2.2 Sites with a Permanent Solution with Conditions that do not require AULs [310 CMR 40.1013]

Except where otherwise required pursuant to 310 CMR 40.1012(2), an AUL is not required but may be used where a Permanent Solution with Conditions is based on one or more of the limitations, assumptions, or conditions at the site that are specified at 310 CMR 40.1013 and described below.

GW-2 standards exceeded at the site with no occupied building

When OHM levels in groundwater exceed GW-2 standards at a disposal site that is not currently categorized as GW-2 (i.e., there are no existing or planned buildings on the property), the MCP does not require an AUL be implemented to address the potential for vapor intrusion if a building were constructed at the property in the future [see 310 CMR 40.1013(1)(d)].

However, an AUL may be used to provide future owners or developers with notice of the potential risks associated with site development and to establish limitations on site activities and uses related to the potential for vapor intrusion or conditions for the construction of future buildings to ensure that the plans incorporate measures that prevent vapor intrusion.

An AUL in such cases may be used to specify measures to be taken at the time of building construction to prevent vapor intrusion impacts. Such measures may include the installation of a vapor barrier, SSD system, passive venting system, open-air parking facility or limiting construction to locations outside of areas with groundwater VOC contamination.

More information related to AULs implemented to address vapor intrusion at future buildings can be found in the *Vapor Intrusion Guidance*, #WSC-16-435.

Public Ways or Rail Rights-of-Way [310 CMR 40.1013(1)(c)]

AULs are not required but may be used for areas within a public way or rail right-of-way, as those terms are defined at 310 CMR 40.0006(12). The reasons for not requiring AULs in these areas include the limited potential for future exposure to or excavation into contamination in these locations and the public oversight in place to maintain them. Note, while public ways and rail rights-of-way do not require AULs, all other cleanup requirements in these areas must be met. Further, the AUL exception is limited to land used for transportation purposes, and does not extend to ancillary land contiguous with the public way or rail right-of-way, such as garages or other maintenance facilities that are associated with the public way or rail right-of-way, but not located within it.

Residential Gardening [310 CMR 40.1013(1)(a)]

An AUL is not required but may be used to address residential gardening exposures in situations where the Risk Characterization demonstrates No Significant Risk for residential direct contact exposures to site soils. If No Significant Risk is demonstrated via Method 3 Risk Characterization, Best Management Practices are recommended for non-commercial gardening in a residential setting to minimize and control potential risk, pursuant to 310 CMR 40.0923(3)(c) and 310 CMR 40.0942(1)(e). Best Management Practices recommendations are not required if No Significant Risk is demonstrated using a Method 1 Risk Characterization. Method 1 risk characterizations are presumed to be protective of gardening exposures through the evaluation of direct contact exposures. More information on the use of Best Management Practices at disposal sites is available in *Best Management Practices (“BMPs”) for Non-Commercial Gardening at Disposal Sites, #WSC-14-910*.

Anthropogenic Background Levels are achieved [310 CMR 40.40.1013(1)(b)]

AULs are not required but may be used to address residual contamination that meets the definition of Anthropogenic Background, in accordance with 310 CMR 40.0006. The MCP defines Anthropogenic Background as the level of OHM resulting from any of the following sources that would exist in the absence of the disposal site:

- atmospheric depositions of industrial process or engine emissions;
- Historic Fill, as defined at 310 CMR 40.0006;
- coal, coal ash, or wood ash, excluding ash landfills or wood ash resulting from combustion of lumber or wood products that have been treated with chemical preservatives;
- sources specifically exempt from the definition of disposal site or release;
- groundwater releases from a public water supply system; or
- petroleum residues incidental to normal operation of motor vehicles.

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 (EPCs) exceed S-2 standards, cleanup to meet the S-2 level is necessary to achieve a Permanent Solution [see 310 CMR 40.0970]. 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 identified EPC exceeds an applicable Method 1 or Method 2 standard; *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, EPCs at the site are compared to promulgated standards for soil and groundwater. 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. 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 EPCs meet the Method 1 standards, 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 MassDEP's *Guidance for Disposal Site Risk Characterization*.

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*.

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 relies on reduced exposure potential due to the restriction or limitation of Site Activities and Uses [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 in the AUL (*see* Section 4.3). A more detailed discussion of Method 3 is provided in the *Guidance for Disposal Site Risk Characterization*.

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 Permanent Solution.

2.6 AULs by Medium – Soil, Groundwater, Indoor Air, 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 Table 2-1. 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 exposure 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 is associated with the highest potential for exposure, such as land used for residential or active recreational purposes. When conducting a Method 1 or 2 risk characterization at a site where S-1 standards are applicable, the disposal site EPCs 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 EPCs 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

represent levels acceptable for unrestricted use and thus are 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 without restrictions to on-site activities and uses, then 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, bird watching, 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 EPCs are compared to those standards. Whenever the EPCs are equal to or less than the applicable S-2 (Method 1 or 2) standards, but exceed the S-1 standards, either remediation or 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 an AUL. 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 EPCs are compared to those standards. Whenever the EPCs are equal to or less than the applicable S-3 standards, but exceed the S-1 standards, either remediation or an AUL is required. This is because like S-2, the S-3 soil category assumes limitations on receptor exposure.

Further details about soil categories, exposures, and AUL considerations are provided in the following sections on site-specific activities. This includes a more comprehensive 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. AULs are specifically required for groundwater as described in 310 CMR 40.0932(5)(d): 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). Provided these requirements are met, the well may be maintained for non-potable uses as long as those uses meet a level of No Significant Risk.

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 applicable groundwater categories. The MCP states that AULs may not be used to change the category of groundwater categorized as GW-1 or GW-2, and may not be used to justify a conclusion that a condition of No Significant Risk exists at sites characterized using Method 1 or 2 if an identified EPC exceeds applicable standards [see 310 CMR 40.1012(4)(a)].

The limited application of AULs to groundwater rests on several considerations. Because contamination in groundwater migrates over time, providing an accurate description of the affected area of groundwater as part of an AUL is potentially problematic because the boundaries can be expected to change. Further, 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 likely be complex, and often impractical. Further, the installation of new public and private drinking water supply wells is otherwise regulated on the state and local level to ensure that such wells provide safe drinking water.

AEPMM implemented as part of a Permanent Solution to remove OHM from drinking water supplying a Private Water Supply Well

As discussed previously in Section 2.4.1, an AUL with standardized Obligations and Conditions is required, pursuant to 310 CMR 40.1025, when an AEPMM is implemented to remove contamination from drinking water supplied by a private water supply well as part of a Permanent Solution with Conditions. In such cases, the AEPMM must be successful in reducing and maintaining OHM levels in drinking water at a level of No Significant Risk.

Former Private Water Supply Well Maintained for Other Use

There is a narrow application of AULs specified at 310 CMR 40.1012(2)(c) to a private drinking water supply well that has been taken out of service as a potable water source, but is being maintained for non-drinking water purposes. In such case, the well must be properly disconnected from service as a potable water source following the procedures at 310 CMR 40.0932(5)(d)1. and the risk characterization must support that its continued use for other purposes (e.g., irrigation) is consistent with a condition of No Significant Risk. The AUL in this case documents the use of the well as a drinking water source as an inconsistent use.

2.6.3 Indoor Air

AULs may be necessary to ensure the maintenance of Exposure Pathway Mitigation Measures that are installed and maintained to prevent exposure to the volatilization of OHM in the subsurface environment into the indoor air of a building [see 310 CMR 40.1012(2)(b)]. These measures include Passive Exposure Pathway Mitigation Measures, such as subslab venting systems and vapor barriers, and Active Exposure Pathway Mitigation Measures, such as subslab depressurization systems. In such instances, the AUL helps ensure that the system will remain in place, in good repair and operating in a manner so that it continues to function effectively in preventing exposure.

An AUL that is implemented at a disposal site where vapor intrusion occurs in “mixed-use” buildings (e.g., commercial use on the first floor and residential use on the upper floors) and distinguishes uses between floors or “zones” must include provisions to ensure that a condition of No Significant Risk is met for each distinct use and receptor of every zone of the building. While basements and ground floors are generally the most impacted by vapor intrusion, air mixing can occur throughout a building, and OHM in vapors can migrate to other zones through preferential pathways. As such, it is essential and must be demonstrated that the building design includes elements that will maintain the existing diffusion and transport mechanisms between distinct zones, and that the AUL includes a requirement to maintain these mechanisms. A well-documented assessment of vapor migration pathways and conditions is crucial, especially for older or renovated buildings where construction details may be unknown. Furthermore, as buildings age or undergo renovations (e.g., HVAC adjustments, annular spaces in newly installed utilities, elevator shafts and stairwells) new preferential pathways may be created, complicating the prediction and control of vapor movement between zones. The AUL should therefore include provisions to address these future concerns, including a requirement that an LSP evaluate any future building modifications to ensure that no new preferential pathways are created. Additionally, the different zones should be clearly documented to support ongoing maintenance and compliance.

See the Vapor Intrusion Guidance, #WSC-16-435 for guidance on implementing AULs when Exposure Pathway Mitigation Measures are relied upon to mitigate vapor intrusion in indoor air, including to maintain a Permanent Solution and 310 CMR 40.1025 for the requirements applicable to Active Exposure Pathway Mitigation Measures implemented to support of a Permanent Solution. See also related discussion in Section 2.4.1.

2.6.4 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 public access rights to the shores of a water body 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 permitted by federal and Commonwealth statutes, such as navigation, swimming and fishing, including statutes such as M.G.L. c. 91. 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, including public easements and rights of access.

In limited cases, an AUL may be appropriate for sites where a sediment cap is part of an implemented remedy. An AUL may be used to document the presence of the sediment cap, require that the cap remain in place, and specify obligations for the monitoring and maintenance of the cap. The AUL cannot, in such cases, restrict access. The appropriateness of an AUL for a sediment cap would be dependent upon site-specific conditions, including factors such as ownership of the sediments, other state permit requirements, 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 greatest risk in a risk characterization because of the presence of sensitive receptors and the intensity of use. AULs may be used in certain circumstances where a reasonably foreseeable use is residential. 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 – In the absence of an AUL, residential use must be considered reasonably foreseeable use at almost all sites. This is because 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)].

Even an industrial property in an area zoned industrial may be rezoned and redeveloped as condominiums or other types of residences. If residential use is not a current use, as defined at 310 CMR 40.0923(2), then an AUL may be implemented to prohibit residential use in order to limit associated exposure pathways, and the exposure pathways associated with residential use would not need to be evaluated in the risk characterization.

Condominium properties that are subject to an AUL are a unique ownership scenario. Additional information and procedures for condominium properties can be found in Appendix E.

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 that a barrier to direct contact remains intact and effective into the future. Such barriers include buildings, pavement, a layer of clean fill material at an adequate depth to prevent exposure (minimum of 3 feet), and/or other structures designed as a pathway mitigation measure. For example, if an existing building foundation prevents dermal exposure to contaminated soil, an AUL would specify that the

basement floor and foundation remain in place and be maintained as a barrier to dermal contact with underlying soil contamination.

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

Method 1 may be used to demonstrate a condition of No Significant Risk from soil contamination on a residential site if: (a) OHM concentrations in soil to a depth of 15 feet (paved or unpaved) do not exceed S-1 standards, or (b) OHM concentrations in soil beneath a building or permanent structure do not exceed S3- standards [see 310 CMR 40.0933]. Method 2 may be used in residential settings to document 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). For both Method 1 and Method 2, an AUL would be required to ensure that any building or other direct contact barrier beneath which OHM concentrations exceed S-1 Standards remains intact and effective.

Method 3 may 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 M3CLs, and (b) OHM concentrations in accessible soil (to a depth of 15 feet) do not exceed levels associated with MCP risk limits. When a 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.

For example, a Method 3 risk characterization for a Senior Living Facility might show No Significant Risk at higher soil concentrations than would a risk characterization for an unrestricted residence with possible child residents. While children may visit formally restricted Senior Living residences, the exposure would be less frequent than a child resident and likely more similar to that of a park visitor. The AUL would document the prohibition against child residents that was already formally restricted in the deed or other previous legal obligation and enforced by facility authorities. Any contemplated removal of the residency age restriction in the future would require a risk characterization that supported unrestricted use that includes child residents.

2.7.2 Utility Work Exposures

If the property has an existing utility line or an easement that allows for construction and maintenance of utilities, 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 for the duration of the anticipated exposure. 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 of existing subsurface utilities by workers without personal protective equipment must be evaluated under

the current use scenario, pursuant to 310 CMR 40.0923(2). Utility worker risk assessment should focus on exposures associated with acute (i.e., short term), 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 Method 2 risk characterization is performed, MassDEP does not require a separate Method 3 risk characterization to evaluate possible exposures to utility workers. 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 foreseeable, an AUL may be used to preclude the 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 within a utility corridor constructed under these circumstances must be such that exposure during future emergency utility repair would pose No Significant Risk.

2.7.3 Construction, Excavation, and Health and Safety Procedures

An AUL can be used to limit potential exposures related to excavation and construction, and will often include a requirement to implement health and safety procedures to manage risk from potential exposure to OHM [see 310 CMR 40.0018]. The AUL should describe the activities that warrant the need for health and safety procedures and identify whom the plan is intended to protect.

If an assessment of construction worker risk does not demonstrate No Significant Risk, the AUL should include the requirement to implement a Health and Safety Plan to address that risk. A complete Health and Safety Plan is not required at the time that the AUL is recorded, but the “Obligations and Conditions” section of the AUL should stipulate that such a plan be developed and implemented prior to the start of construction. The scope and objectives of the Health and Safety Plan should be described in the AUL. The AUL should also specify that a site-specific Health and Safety Plan be prepared by a qualified individual with experience developing Health and Safety Plans.

It is important to note that OSHA guidelines for construction workers do not necessarily equate to a level of No Significant Risk at the site or incorporate risk management criteria consistent with the MCP. 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. And does not address the need to identify whether monitoring for off-site exposures is necessary (e.g.,

monitoring for particulates at the site boundary). Unless it is demonstrated that construction activities will not pose a risk to neighboring residents or others outside the site boundaries, health and safety procedures should include provisions for monitoring remedial activities necessary during any construction, and at a minimum, be consistent with the health and safety procedural requirements of the MCP [see 310 CMR 40.0018].

If underground utilities currently exist, exposure associated with emergency repair of utilities must be evaluated under the current use scenario in the risk characterization. As stated in Section 2.7.2, AULs cannot be used to eliminate exposure pathways that are consistent with current uses. Accordingly, a Health and Safety Plan cannot be used to mitigate unacceptable risks for an emergency utility repair scenario.

2.7.4 Fences

Fences are commonly used as part of an Immediate Response Action or Release Abatement Measure (as part of a risk reduction measure) or as a Temporary Solution to restrict access to contaminated soils. The risk characterization provision at 310 CMR 40.0923(5) cite the use of fences as an example of a temporary risk reduction measure, stating that, “If the Site Activities and Uses considered in the Risk Characterization have been limited in any way by temporary risk reduction measure (e.g. fences which restrict access) ... the documentation of the Risk Characterization shall describe clearly and concisely the nature of all such limitations.”

While the use of a fence is not explicitly precluded as part of a Permanent Solution, the extent to which the Permanent Solution relies on the fence would be a consideration in evaluating the appropriateness of the remedy. Fences do not prevent transport of soils via wind or water, and are susceptible to damage from natural forces and trespassers. Therefore, fencing alone, with or without an AUL, is not sufficient or appropriate to prevent direct exposure. However, in combination with other measures that do prevent exposure to OHM, fencing may be an effective and appropriate component of a Permanent Solution. For example, a fence may be used to delineate the area of the AUL. In cases where a fence is relied upon as part of the Permanent Solution, the AUL must identify the maintenance of the fence among the conditions that ensure the maintenance of a level of No Significant Risk.

Example: Fencing with an AUL is used as part of a Permanent Solution at an industrial property. The AUL also includes maintenance of pavement as a barrier to prevent exposure to soil in the fenced area and routine checks on the fence by the facility’s security detail.

2.8 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.

2.8.1 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 that provides for the maintenance of a cap to limit access to OHM may also be used, to prevent direct contact with physical hazards located in the area of OHM contamination (e.g., glass and large metal fragments) present at a site. The AUL could also be used as part of a Temporary Solution to specify requirements for the maintenance of a fence to help control access to certain areas of a site where safety hazards exist. (Note: as identified in Section 2.7.4, a fence alone 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.)

2.8.2 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.

2.8.3 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.

2.9 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).

2.10 Common Exposure Assumptions and Related AUL Conditions

As discussed in previous sections, an AUL is based on the risk characterization method used and the environmental medium from which exposure is being restricted. Table 2-1 outlines examples of common exposure assumptions, the affected media, and a typical AUL condition that may apply. *The examples provided in this table illustrate the most general scenarios; however, site-specific details may lead to different conclusions.*

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

Media	Risk Characterization Method	Conditions	Exposure Assumptions	AUL Limitation/Obligation
Soil	Method 1 or 2	Soil meets S-2 and S-3, but does not meet S-1 standard.	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-2, but does meet S-3 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 and does not meet S-2 standards.	Exposure to soil is prevented by this barrier	AUL requires that the barrier be inspected and maintained.
Soil	Method 3	Soil does not meet level of 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 eliminate direct contact, such as 3 feet of clean fill and a demarcation layer and includes requirement to implement appropriate Health and Safety and Soil Management Plans.
Groundwater or Soil, and Indoor Air	Method 3	VOCs in GW and/or soil are migrating into indoor air of an on-site building.	Installation of a vapor barrier, subslab depressurization system, or subslab venting to prevent vapor intrusion from subsurface to indoor air.	AUL requires maintenance of the vapor barrier, subslab depressurization system, or subslab venting system. May also include monitoring and reporting requirements.
Indoor Air	Method 3	VOCs in indoor air attributable to the disposal site are at a level of No Significant Risk for Commercial/Industrial Use, but represent significant risk for residential use.	OHM in indoor air attributable to the disposal site are maintained at a level of No Significant Risk for current use.	AUL limits future building use to commercial/industrial or requires the installation of Exposure Pathway Mitigation Measure(s) and post-installation sampling before building may be used as a residence.
Subslab Soil Gas	Method 3	VOCs present in the subslab soil gas pose No Significant Risk for current conditions and uses, but estimated Exposure Point Concentrations demonstrate that current levels do not meet a condition of No Significant Risk in the future.	Building conditions, including building slab, are maintained to prevent migration of VOCs into indoor air.	AUL provides notice of the presence of VOC levels in the subslab soil gas, specifies the maintenance of the building slab, and in the event of future renovation or construction, the repair/restoration of the barrier/slab to prevent the migration of VOCs into indoor air.
Groundwater	Method 1, 2 or 3	NAPL with Micro-Scale Mobility of a thickness greater than ½”.	Exposure to NAPL could occur with future construction, NAPL management may be necessary.	AUL provides notice of NAPL’s presence and location, alerts property owners to the need for contingencies to manage NAPL in the event of excavation into the area where it is present, includes a requirement to implement a NAPL Management Plan.
Sediment	Method 3	Sediments capped as part of remedy.	Cap prevents exposure to contamination.	AUL requires periodic inspection and maintenance of the cap.

SECTION 3: AUL TYPES AND ELEMENTS

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, to restrict, or require the restriction of the use of, real property affected by a release of OHM to ensure that use of such property is protective of public health, safety, welfare and the environment. Specifically, M.G.L. c. 21E, §6 provides, in pertinent part, that MassDEP may:

- acquire real property or any interest therein, by purchase, gift or lease, or by eminent domain under the provisions of 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 or of the modification or release of such restrictions.

M.G.L. c. 21E, §6 also provides that “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 permitted uses and limitations on uses 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

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

1. Grant of Environmental Restriction or “Grant” [see 310 CMR 40.1071];
2. Notice of Activity and Use Limitation or “Notice” [see 310 CMR 40.1074]; and
3. Environmental Restriction (imposed by MassDEP) [see 310 CMR 40.1073].

The Grant and Notice are designed for use by and at the discretion of property owners. The Environmental Restriction may be imposed by MassDEP when MassDEP conducts response actions and the property owner fails to implement an AUL to control use of the property where such control is considered necessary. This Guidance focuses on AULs implemented and maintained by property owners; it does not provide further discussion of the MassDEP-imposed Environmental Restriction.

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 site conditions following those response actions relies upon limiting certain activities and uses at the property. The legal nature of a Grant and Notice, however, differ.

3.3.1 Grants [310 CMR 40.1071]

A Grant of Environmental Restriction 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. MassDEP, 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 may pursue enforcement actions for Grant violations against the party who caused the violation (or allowed the violation to occur) [see 310 CMR 40.0019].

Implementation 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 rights in the affected property.

Procedures for implementing Grants are provided in Appendix K.

3.3.2 Notices of Activity and Use Limitation [310 CMR 40.1074]

In contrast to the Grant, a Notice of Activity and Use Limitation does not convey a property interest to MassDEP, nor does it require review or approval by MassDEP before it is implemented. Rather, it operates as a Notice of record at the appropriate Registry of Deeds and/or Land Registration Office, identifying activities and uses that are consistent and inconsistent with maintaining a condition of No Significant Risk. A Notice is "implemented" when it is recorded and/or registered by the property owner(s) in the appropriate Registry of Deeds or Land Registration Office.

A Notice does not require subordination agreements from interest holders (which are required for a Grant). However, written notification to current record interest holders is required within 30 days prior to recording and/or registering the Notice [see 310 CMR 40.1074(1)(d)]. Current record interest holders 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, easement holders, and any of-record tenants or license holders). See Section 5.3 for a more detailed discussion of the requirement to notify current interest holders.

MassDEP can enforce the terms of a Notice through enforcement of M.G.L. c. 21E and the MCP. The MCP establishes adverse consequences for performing activities or uses that are inconsistent with maintaining a condition of No Significant Risk or No Substantial Hazard, and thus violating a Permanent Solution or Temporary Solution [see 310 CMR 40.0020]. Thus, a Notice, together with the relevant MCP provisions, is intended to be the functional equivalent of a land use restriction that could otherwise be established by a Grant. In general, MassDEP can pursue enforcement actions if activities or uses inconsistent with the AUL have occurred.

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 uses and activities can and cannot occur at a property and what obligations must be met in order to maintain a condition of No Significant Risk. Since AULs are 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 conveyancing law.

The MCP reflects such standards by requiring that:

- the property owner(s) 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
- the consistent and inconsistent activities and uses, and the obligations and conditions for maintaining a condition of No Significant Risk at the site be clearly identified in the AUL.

3.5 Elements of a Notice of Activity and Use Limitation [310 CMR 40.1074(2)]

A Notice identifies the subject property and describes the activities and uses that are consistent and inconsistent with maintaining a condition of No Significant Risk at a property (or portion thereof). Notices must be prepared using Form 1075 provided in the MCP at 310 CMR 40.1099 (see Appendix I 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 K.

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):

- A “Note” describing the requirements set forth in 310 CMR 40.1074(5) to incorporate the AUL in full or by reference in all future instruments of transfer, and upon transfer of the property, to submit any such instrument of transfer that is a “deed” to MassDEP is presented in a box at the top of Form 1075. The instructions included in the note are relevant to future recorded transactions affecting the property, so the box must not be deleted.
- The Disposal Site Name—this corresponds to the Site Name used for response action submittals for the disposal site and on MassDEP’s disposal site database available at <https://www.mass.gov/find-out-about-a-contaminated-property> [see 310 CMR 40.1074(2)(d)]. If there is no disposal site name, the property address can be added, e.g., “Property (123 Main Street)” or “123 Main Street, Jonesville;”
- DEP Release Tracking Number(s) [see 310 CMR 40.1074(2)(d)]. If the AUL covers multiple Release Tracking Numbers (RTNs), list all relevant RTNs;
- The date on which the Notice is signed by the property owner, and the name and address of the property owner [see 310 CMR 40.1074(2)(b)];
- First “WHEREAS” Clause—provides general information about the parcel or parcels of property containing the area subject to the AUL, including the name of the property owner, the address of the property that is subject to the AUL, the municipality and county in which the property is located (if the property owner is a corporation, the state of incorporation and the principal place of business should be included) [see 310 CMR 40.1074(2)(a)1. and 40.1074(2)(b)]. With regard to the reference to the owner’s source of title: for recorded land, the deed book and page number must be included; for registered land, the Certificate of Title number must be included. If the owner inherited the property, the probate docket number should also be included;
- Second “WHEREAS” Clause—refers to the legal description of the parcel(s) of land containing the area subject to the AUL (which must be attached as Exhibit A). If the land is recorded, the Registry of Deeds recording reference for the survey plan showing the parcel must be inserted in this clause. If the land is registered, the Land Court Plan reference must be inserted [see 310 CMR 40.1074(2)(a)2. and 40.1074(2)(a)3.];
- Third “WHEREAS” Clause (only included if the AUL applies to a portion of the property referenced in the Second “WHEREAS” Clause 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, an 8½” x 11” survey plan prepared by a Massachusetts Registered Land Surveyor delineating the portion of the property subject to the AUL must also be attached as Exhibit A-2. Please note that the Land Court sometimes refers to such plans as “sketch plans” [see 310 CMR 40.1074(2)(a)4.];

- Fourth “WHEREAS” Clause—establishes whether the area subject to the AUL contains the entire disposal site or 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, to the extent that the boundaries of the disposal site have been established, the property boundaries, and the location of any Engineered Barriers as defined in 310 CMR 40.0998, permanent caps, Active Exposure Pathway Mitigation Measures (AEPMMs) and other barriers or systems that are subject to the terms of the AUL. The sketch plan is attached to the AUL as Exhibit B [see 310 CMR 40.1074(2)(a)5.];
- 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 a discussion of the basis for the restrictions is to be provided as an attachment to the Notice (Exhibit C) [see 310 CMR 40.1074(2)(e-g) and Section 4.8];
- Sixth “WHEREAS” Clause (only included where documentation of signatory authority is required pursuant to 310 CMR 40.1071(2)(c))—refers to the requirement to provide documentation that is consistent with conveyancing standards and practices evidencing that the individual signing the AUL has such authority. This documentation, described in Appendix D of this Guidance, is to be provided as an attachment to the Notice (Exhibit D).
- The next paragraph that begins “NOW, THEREFORE” establishes that the AUL gives notice of certain activity and use limitations, and obligations and conditions, as listed in the numbered sections that follow:

“1. Activities and Uses Consistent with Maintaining No Significant Risk or No Substantial Hazard Conditions”—lists uses and activities that *may occur* at the property or portion of the property subject to the AUL, i.e., such uses and activities would be consistent with maintaining a condition of No Significant Risk or No Substantial Hazard, as applicable, in the area subject to the AUL [see 310 CMR 40.1074(2)(h)];

“2. Activities and Uses Inconsistent with Maintaining No Significant Risk or No Substantial Hazard Conditions”— lists uses and activities that *may not occur* at the property or portion of the property subject to the AUL, i.e., such uses and activities would be inconsistent with maintaining a condition of No Significant Risk or No Substantial Hazard, as applicable [see 310 CMR 40.1074(2)(i)];

“3. Obligations and Conditions”— lists any obligations or conditions that must be followed or undertaken to maintain a condition of No Significant Risk or No Substantial Hazard. For a Permanent Solution with Conditions that relies on the operation and maintenance of an AEPMM, the standard language, which reflects the criteria set forth in 310 CMR 40.1025(3), must be included in this paragraph;

“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 prior evaluation by an LSP in accordance with 310 CMR 40.1080 [see also 310 CMR 40.1074(2)(l) and Section 6.2, *Changes in Site Activities and/or Uses or Other Site Conditions after a Permanent Solution or Temporary Solution Statement with an Activity and Use Limitation has been Submitted*].

“5. Violation of a Permanent or Temporary Solution”— 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 of transfer [see 310 CMR 40.1074(2)(k) and 310 CMR 40.1074(5)].

- The notarized signature of the property owner and the notarized signature and professional seal of the LSP. The date entered by the owner in this section should be the same date that is entered in the first paragraph of Form 1075 (i.e., the date on which the Notice is made) [see 310 CMR 40.1074(2)(m)].

- Exhibits (attached to and recorded with Form 1075) include:

Exhibit A—a written legal description of the parcel of land that contains the area subject to the AUL. This exhibit is referenced in the second “WHEREAS” clause.

Exhibit A-1 (*only needed if the AUL applies to a portion of the property*)—a written legal description of that portion of the property to which the AUL applies. This exhibit is referenced in the third “WHEREAS” clause.

Exhibit A-2 (*only needed if the AUL applies to a portion of registered land*)—a “sketch plan” of the portion prepared by a Massachusetts Registered Land Surveyor. This exhibit is referenced in the third “WHEREAS” clause.

Exhibit B—a sketch plan showing the boundaries of the area subject to the Notice in relation to the boundaries of the disposal site as they exist within the limits of the property, the property boundaries, and the location of any Engineered Barriers, permanent caps, AEPMMS and other barriers or systems that are subject to the terms

of the AUL. This plan does not need to be prepared by a Registered Land Surveyor. This exhibit is referenced in the fourth “WHEREAS” clause.

Exhibit C—a narrative description of the basis for the AUL restrictions. This exhibit is referenced, and its required content is described in, the fifth “WHEREAS” clause.

Exhibit D—documentation of signatory authority, if such documentation is required by 310 CMR 40.1074(2)(c). Where such documentation has been previously recorded or the Registry of Deeds requires that it be recorded separately of the AUL, a recording reference (i.e., sentence including book and page number for separately recorded documentation) should be provided in Exhibit D.

A Registry copy of the AUL (i.e., a copy of the AUL that was recorded at the Registry of Deeds bearing the book and page number and date of recording) must be submitted to MassDEP using transmittal form BWSC113 within 30 days of recording. MassDEP must also be provided with a Registry copy of required survey plans referenced in the Notice (survey plans for the parcel and for the portion of the property) within 30 days of recording the AUL. The survey plans may be submitted using BWSC126. *See also* Section 5.2.

SECTION 4: PREPARING AN AUL

This section discusses important legal considerations and information, documentation and procedural requirements related to preparing an AUL for recording or registration. *See also* Appendix C, “Step By Step through Form 1075,” and Appendix J, “Activity and Use Limitation Checklist.”

It is important that a property owner who is considering using an AUL, as well as their LSP, recognize that **an AUL is a legal real estate document** that functions as a component of response actions conducted in accordance with MCP requirements. An AUL documents what activities and uses may or may not occur at a property, and what obligations and conditions must occur, to maintain a condition of No Significant Risk at a property. The property owner must therefore understand what those land use limitations, obligations and conditions are, as well as the area(s) of the property subject to them. Those limitations, obligations and conditions may pertain to physical barriers, or other features of the property, whose location and function must also be understood and adequately described in the AUL.

MassDEP strongly advises that the AUL preparer review and discuss specifically with the property owner the AUL requirements, the implications of the site use and activity limits under consideration relative to contemplated property use and development, and the consequences of violating the terms set forth in the AUL. Full consideration of these factors will reduce the likelihood of needing to amend the AUL, terminate and replace it with a new AUL, or be subject to potential enforcement actions.

4.1 The Difference between Recorded and Registered Land

Documents pertaining to real property in Massachusetts are filed at the Registry of Deeds. There are twenty-one (21) registry districts, each under the direction of a different Registrar of Deeds. Since procedures can vary between registries, it is important to consult with the registry that covers the city or town where the AUL is to be implemented to ensure that all filing requirements are met. The Secretary of the Commonwealth of Massachusetts’ website provides a “Locate my Registry of Deeds Office” guide at <https://www.sec.state.ma.us/divisions/registry-of-deeds/registry-of-deeds.htm> to help find the appropriate registry district.

Real property in Massachusetts is either recorded land or registered land. In drafting an AUL, it is necessary to know which type of land is involved because plan requirements, recording or filing procedures, property descriptions, and other legal requirements 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 of recorded land is typically completed by recording a new deed at the Registry of Deeds. There is generally no judicial determination of title and boundaries with recorded land, and the recording of a deed does not guarantee that the property 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 typically assigned a “document” number, but may not be assigned a book and page number until a later date. The timeframe for assigning a book and page number will vary depending upon the specific Registry. Therefore, a Registry copy of the AUL with the document number and the date of recording is sufficient for submitting an implemented AUL to MassDEP (i.e., satisfying the requirement at 310 CMR 40.1074(4)(a)):-

The Registry of Deeds will return the original of the recorded AUL with the assigned book and page numbers to the property owner. The property owner should retain the original AUL for their 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 M.G.L. c. 185 (“The Land Court and Registration of Title to Land”) is termed registered land. Registered land may have at some point been the subject of an ownership or boundary dispute, which was resolved through the registration process. Once the Land Court renders a decision as to ownership and boundaries of a parcel of land, those issues generally 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 of Title 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.

Please refer to ***Commonwealth of Massachusetts Land Court Guidelines on Registered Land, February 27, 2009*** for detailed procedures related to registered land. This document can be found on the Land Court webpage at <http://www.mass.gov/courts/docs/courts-and-judges/courts/land-court/guidelines-registered-land.pdf>.

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 set with the registered land section of the Registry of Deeds and one set with the recorded section of the Registry of Deeds; or
2. obtain one set of original documents, and file the originals with the registered land section of the Registry of Deeds, and then record the registered documents with the recorded land section of the Registry of Deeds. 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.

Some Registries of Deeds have the same staff performing both registration of registered land and recording of recorded land, in which case, just one set of documents is required. It is important to check with the appropriate Registry of Deeds to clarify their procedures.

4.2 Legal 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 legal description of the parcel of land must be attached to the AUL as Exhibit A. This requirement can best be satisfied by obtaining the legal description from an accurate and current survey plan that has already been recorded with the Registry of Deeds.

An AUL must also include a written legal description of the specific area *within the parcel* 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 activities or uses across the entire property. When the remaining contamination is limited to only a portion of the property and the property owner elects to apply the AUL just to that portion, then it is necessary to provide a written legal description of that portion as Exhibit A-1 of the AUL. If the entire property is subject to the AUL, then Exhibit A-1 is not required (the description provided by Exhibit A satisfies both requirements)-Figure 1 below depicts examples of an AUL that applies to an entire property and an AUL that applies to a portion of a property.

Consequently, in crafting an AUL, the property owner needs to decide whether to limit activities and uses on the entire property or only a portion of it. If the property 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 purposes to limit activities and uses on the entire property. When only a portion of the property is to be limited, an additional survey is necessary to delineate the boundaries of the portion being limited. Depending upon the size of the lot and its versatility, the potential for decreased property functionality or value resulting from limiting activities and uses on the entire property may exceed the cost of a survey. It may make more sense to carve out areas subject to activity and use limitations if the property owner wishes to preserve flexibility in use of the property, especially if the area subject to the activity and use limitations does not comprise a major portion of the property.

By limiting activities and uses on the entire property, all of the area within the boundaries of the parcel will be subject to the activity and use limitations in the AUL. For example, an AUL on the entire property cannot limit excavation “in paved areas of the site.” Limiting activities and uses on just the paved area of the site would require surveying the boundaries of the paved area; otherwise, excavation would be limited throughout the AUL area (i.e., the entire property).

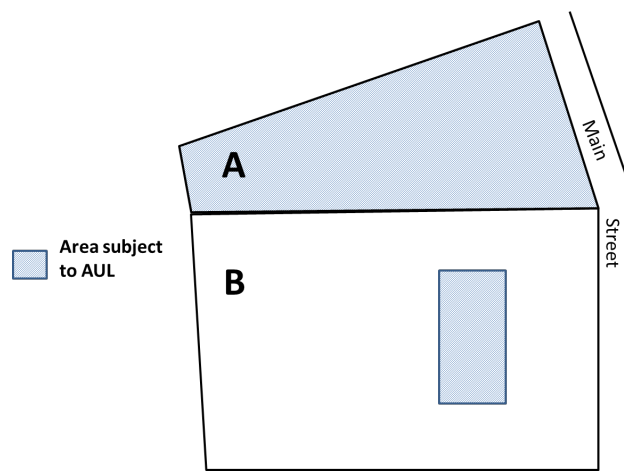


Figure 1: Legal Description of the Area Subject to the AUL – Parcels A and B each have an AUL. At parcel A, the area subject to an AUL is the entire property; at parcel B, the area subject to an AUL is a portion of the property. For parcel A, one written legal description of the parcel boundaries is required (Exhibit A). For parcel B, two written legal descriptions are required – a description of the parcel boundaries (Exhibit A), and a description of the boundaries of the area subject to the AUL (Exhibit A-1).

4.2.1 Recorded Land Legal Description

For recorded land, a “running” description should be used in Exhibit A and Exhibit A-1 to describe both the perimeter of the parcel of land that contains the area subject to the AUL and the area subject to the AUL, respectively. 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 for the parcel may usually be obtained from the property owner’s deed or a recorded survey plan and should be included in Exhibit A in its entirety (i.e., providing only a reference to a recorded deed

from which the legal description is obtained does not fulfill the requirements of 310 CMR 40.1074(2)(a)2.). If a new survey plan has been prepared, an updated legal description that corresponds with the new survey plan should also be prepared. The new legal description should include language that references any prior plan or legal description.

4.2.2 Registered Land Legal Description

If the land is registered land, the legal description for the parcel (attached as Exhibit A) will either be a “bounding description” of the parcel’s perimeter (e.g., “NORTHERLY by Old Boston Post Road, one hundred (100) feet...”), or a reference to a lot number on a Land Court Plan and a reference to the certificate with which the plan is filed (*see Commonwealth of Massachusetts Land Court Guidelines on Registered Land*). Such a description may be obtained from the Owner’s Certificate of Title, and thus the requirement to provide a legal description of the parcel for registered land may be satisfied by attaching a copy of the Owner’s Certificate of Title as Exhibit A.

If the area subject to the AUL is a portion of a property which is registered land, then the legal description describing the AUL portion of the property (Exhibit A-1) also needs to be a running description (described previously in Section 4.2.1).

4.3 Plans Describing the Land Covered by an AUL

An AUL requires both a survey plan and a sketch plan. This section describes the requirements for those plans and the differences between these requirements for recorded and registered land.

Survey Plan

It is critical that an AUL accurately describes the land to which it applies and that any terms used to identify the AUL on required plans 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 of the specific area subject to the AUL be prepared by a Massachusetts Registered Land Surveyor. Both the parcel of land containing the AUL and the AUL area itself (if the AUL area is less than the entire parcel) must be clearly and accurately defined for purposes of delineating property lines, avoiding conflicts with abutters regarding these boundaries, 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 for the purpose of conveyancing. Thus, the sketch plan need not be prepared by a Massachusetts Registered Land Surveyor.

The sketch plan must also provide pertinent information regarding the area that is subject to the AUL, and which is not otherwise included in the survey plan. For example, pavement, buildings, or other barriers or physical features within the boundaries of the AUL area that must be maintained to ensure a level of No Significant Risk must be accurately depicted on a sketch plan, as described in Section 4.3.3 below. If these features are not accurately described, the AUL may be deemed to not provide adequate notice of activities, uses, obligations and conditions that may or may not occur to maintain a condition of No Significant Risk.

4.3.1 Survey Plan of Parcel Containing Area Subject to the AUL [310 CMR 40.1074(2)(a)3.]

Recorded Land

The AUL must reference a recorded survey plan prepared by a Massachusetts Registered Land Surveyor showing the boundaries of the parcel of land containing the area subject to the AUL.

As a first step in meeting this requirement, check with the appropriate Registry of Deeds to determine whether a survey plan has already been recorded. A survey plan that has 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. Procedures for properties that are subdivided *after* an AUL has been implemented can be found in Section 6.5.

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 by registries of deeds pursuant to M.G.L. Chapter 36, Section 13A, “Plans, Rules for Filing in Registries” (*see also* Appendix G, “Requirements for Survey Plans,” for plan recording requirements). To satisfy the AUL survey plan requirement for the parcel of land, this new survey plan must be recorded with the Registry of Deeds in the plan department separately from (i.e., the plan may not be attached as an AUL exhibit) and prior to recording the AUL.

Once there is a current survey plan of record, the survey plan recording information (i.e., the Plan Book and Plan Number) must be inserted into the second “WHEREAS” clause of the AUL before recording the AUL.

Registered Land

If the land is registered, then a survey plan, or a Land Court Plan, already exists. 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.

4.3.2 Survey Plan of Area Subject to the AUL [310 CMR 40.1074(2)(a)4.]

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

Recorded Land

If the land is recorded land, then the survey plan of the portion of the property subject to the AUL must be recorded with the plan department of the Registry of Deeds separately from and before the AUL is recorded. The recording information for this plan (i.e., the Plan Book and Plan Number) must be referenced in the third “WHEREAS” clause of the AUL before the AUL is recorded.

In such case where a new perimeter survey of a parcel is required (see Section 4.3.1, above)-then both surveys (survey of the entire parcel and survey of the portion of the parcel subject to the AUL) may be consolidated on a single plan as a cost-saving measure. It must be clear from the survey where the portion of the parcel subject to the AUL is relative to the parcel itself.

Registered Land

If the parcel is registered land, an 8 ½” x 11” survey plan of the portion of the property subject to the AUL must be attached to the AUL as Exhibit A-2. This survey plan will not be accepted for filing by the Registry of Deeds independently of the AUL. Preparation of this 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 the property subject to the AUL contains both recorded land and registered land, a single survey plan must be prepared showing the portions of the AUL area on recorded land and on registered land. This plan must be recorded with the plan department of the Registry of Deeds, and attached to the AUL as Exhibit A-2 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 requires an 8 ½” x 11” sketch plan (not to be confused with a Land Court sketch plan) that shows the boundaries of the area subject to the AUL in relation to the boundaries of the disposal site (i.e., where the contamination has come to be located) as they exist within the property boundaries, the property boundaries, and the location of any Engineered Barriers, permanent caps, AEPMMs or any other barriers or systems that are subject to the terms to the AUL (see also Section 3.6). For both recorded and registered land, this sketch plan, required pursuant to 310 CMR 40.1074(2)(a)5., is attached to the AUL Exhibit B. Although the MCP does not require this sketch plan to be prepared by a Massachusetts Registered Land Surveyor, it should contain accurate distances, indicate direction (i.e., include North arrow), and be to scale. In addition to the elements required by 310 CMR 40.1074(2)(a)5., the sketch plan may also

depict features helpful in identifying the area subject to the AUL such as the following (if not already required):

- buildings, structures, other improvements;
- pavement and walkways;
- landscaping;
- fences;
- easements; and
- utility corridors.

The sketch plan can be a new plan (i.e., not based on the survey plan) or it may take the form of an 8 ½" by 11" copy of the required survey plan or applicable Land Court Plan of the parcel subject to the AUL (that has been or will be recorded). In either case, the sketch plan must be clearly readable, so a reduction of a larger survey plan to 8 ½" x 11" must be done with consideration of the legibility of such a plan.

Because the Registry of Deeds scans documents in black and white, sketch plans should not include color-coding as a key to describing information on the plan.

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 if all parcels are located in the same registry district.

A legal description for each parcel must be included in Exhibit A of the AUL and deed and plan references for each parcel must be included in Form 1075. When there are multiple parcels, it is acceptable to include the deed and plan references along with the legal descriptions in Exhibit A and a cross reference included in Form 1075. If the area to which the AUL applies includes both recorded and registered parcels of land, the procedures pertaining to AULs that involve both Recorded and Registered Land described in Section 4.1.3 of this document, and the *Commonwealth of Massachusetts Land Court Guidelines on Registered Land* must be followed.

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 or physical features on the property to maintain a condition of No Significant Risk, the AUL must delineate the location of the barrier(s) or features so that a property owner (particularly a future property owner) knows the location

of the barriers and other features that must be maintained. Barrier delineation within the area subject to the AUL must be done on the sketch plan (attached as Exhibit B), which at a minimum must meet the requirements of 310 CMR 40.1074(2)(a)5. and must include the information listed in Section 4.3.3.

For multiple contiguous barriers with the same restrictions in all areas, it is sufficient to delineate the entire area as one. For example, if the AUL requires both a paved area and a building to “be maintained in good condition,” the AUL could describe these areas together as one barrier. A sketch plan attached as Exhibit B should delineate the boundaries of each barrier as well as the outer boundary of the contiguous area.

Accurate delineation is particularly important when there are multiple barriers and activity and use limitations are not the same for all areas covered by the barriers. 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 need a sketch plan that very clearly delineates the separate restricted areas, since identical excavation restrictions do not apply to the entire AUL area. The information on the plan must be clear enough to provide adequate notice as to what activities and uses are consistent with maintaining a condition of No Significant Risk.

Future modifications of barriers would require an Amendment to the AUL if there is a change to either the activity and use limitations or obligations and conditions set forth in the AUL related to one or more of the barriers, or if there is a change in the outermost boundary of the combined area of the barriers.

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

LAND AREA	REGISTERED LAND	RECORDED LAND
<p>A. Parcel containing AUL area</p> <ul style="list-style-type: none"> • Survey Plan (See Section 4.3.1, and Appendix G) 	<ul style="list-style-type: none"> • Reference Land Court Plan Number in AUL's 2nd "WHEREAS" clause 	<ul style="list-style-type: none"> • If a survey plan has already been recorded, reference the Registry of Deeds Plan Book / Plan Number in AUL's 2nd "WHEREAS" clause OR • If a survey plan has not been recorded, have one prepared by a MA Registered Land Surveyor and record it before the AUL is recorded. Reference Registry of Deeds Plan Book / Plan Number in AUL's 2nd "WHEREAS" clause
<ul style="list-style-type: none"> • Written Description (See Section 4.2) 	<ul style="list-style-type: none"> • Use legal description from property owner's Certificate of Title issued by Land Court [attach to AUL as Exhibit A] 	<ul style="list-style-type: none"> • Copy metes and bounds from the most current recorded survey plan [attach to AUL as Exhibit A] OR • Copy metes and bounds from deed referencing the most recent survey plan recorded with Registry of Deeds [attach to AUL as Exhibit A]
<p>B. Area to which AUL applies (only needed if this area is a portion of the property)</p> <ul style="list-style-type: none"> • Survey Plan (See Section 4.3.2, and Appendix G) 	<ul style="list-style-type: none"> • Have a survey plan of AUL area prepared by a MA Registered Land Surveyor [attach to AUL as Exhibit A-2] 	<ul style="list-style-type: none"> • 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 3rd "WHEREAS" clause • If a survey plan of the AUL area has not been prepared, have one prepared by a MA Registered Land Surveyor <ul style="list-style-type: none"> - Record plan before the AUL is recorded and reference the Registry of Deeds Plan Book / Plan Number in the AUL's 3rd "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.
<ul style="list-style-type: none"> • Written Description (See Section 4.2) 	<ul style="list-style-type: none"> • Copy legal description from survey plan [attach to AUL as Exhibit A-1] 	<ul style="list-style-type: none"> • Copy metes and bounds from recorded survey plan [attach to AUL as Exhibit A-1]
<p>C. Relationships between AUL area and disposal site (contaminated area)</p> <ul style="list-style-type: none"> • Sketch Plan (See Section 4.3.3) 	<ul style="list-style-type: none"> • Prepare a sketch plan showing both the boundaries of the AUL area (from survey plan) in relation to the boundaries of the Disposal Site within the property (from site assessment), and the location of any Engineered Barriers, permanent caps, AEPMMs and other barriers or systems subject to AUL [attach to AUL as Exhibit B] 	<ul style="list-style-type: none"> • Prepare a sketch plan showing both the boundaries of the AUL area (from survey plan) in relation to the boundaries of the Disposal Site within the property (from site assessment), and the location of any Engineered Barriers, permanent caps, AEPMMs and other barriers or systems subject to AUL [attach to AUL as Exhibit B]

4.3.7 Describing a Future Barrier Within an Existing AUL Area

As previously discussed in Section 1.5, it is not appropriate to record an AUL depicting 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 for current site uses and activities as part of a Permanent Solution. However, if a contemplated barrier is not required to maintain a condition of No Significant Risk for current uses and activities (i.e., at the time that the AUL is recorded), but would be necessary for a different use, then the location of such a barrier may be identified in the AUL sketch plan. Otherwise, an Amendment would be required that includes a sketch plan showing the location of the relevant barrier(s). An Amendment would likewise be required if the location of the future barrier upon actual construction/installation is inconsistent with the location on the sketch plan.

4.4 Description of Consistent Activities and Uses

The first numbered section of the “NOW, THEREFORE” paragraph of Form 1075 is where activities and uses that are “Consistent” with maintaining a condition of No Significant Risk are listed. Consistent activities and uses should be carefully identified and described in order to 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 disposal site risk characterization, i.e., the risk characterization must support that the consistent activities and uses as listed and described in the AUL can occur while still maintaining a condition of No Significant Risk.

Following the list of “Activities and Uses Consistent with Maintaining No Significant Risk or No Substantial Hazard” in Form 1075 are the clauses: “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” and “Such other activities and uses not identified in Paragraph 2 as being Activities and Uses Inconsistent with maintaining No Significant Risk.” The intent of this language is to indicate that new activities outside of those listed as “consistent” may be conducted if they are not expressly inconsistent with the AUL (i.e., listed as inconsistent activities and uses) or 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. In some circumstances, such an LSP evaluation must be followed by an AUL amendment. *See* Section 6.

4.4.1 Emergency Repair of Underground Utilities

As stated in Section 2.3 of this Guidance, AULs cannot be used to eliminate from consideration exposure pathways that are consistent with the current uses, and one current use that is often overlooked is the maintenance and repair of underground utilities. If underground utilities transect the area subject to the AUL, exposures associated with emergency excavation and repair

of those utilities by workers without personal protective equipment must be evaluated under the current use scenario, pursuant to 310 CMR 40.0923(2). In other words, if contaminant levels present in a utility corridor pose a significant risk for emergency excavation and repair of utilities without personal protective equipment then such areas must be remediated sufficiently to support such activity. See Section 2.7.2 for further discussion. As a result, if underground utilities are present, the maintenance and repair of such underground utilities must be included as a “consistent use.” Emergency utility repair should be listed as a separate and distinct consistent use.

4.5 Description of Inconsistent Activities and Uses

The second numbered section of the “NOW, THEREFORE” paragraph of Form 1075 describes the activities and uses that are inconsistent with maintaining a level of No Significant Risk. Inconsistent activities and uses should be carefully identified and described. Vague or broad descriptions can result in an overly restrictive AUL that unnecessarily limits the uses of the property. For example, if excavation must be 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 limiting any excavation would unnecessarily restrict digging at shallower depths.

Over-restricting activities relative to what is warranted based on the contamination remaining at the site 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 based on the LSP’s review, such activity can be implemented. An amended AUL may be needed if the new activity or use requires that the terms of the original AUL be modified to ensure maintenance of a condition of No Significant Risk. (See Section 6 on procedures to address changes in use once an AUL has been implemented).

4.6 Description of Obligations and Conditions

The third numbered section of the “Now, Therefore” paragraph of Form 1075 describes 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 AUL has a clear understanding of the responsibilities for ensuring that a condition of 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. It is recommended that property owners maintain records of routine inspections, even where not required by the AUL.

In drafting an AUL, it is permissible and appropriate to require that any future planned construction or excavation activities in the AUL area, except emergency excavation and emergency repair of utilities, 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.”² For more discussion on referencing health and safety procedures in an AUL, see Section 2.7.3.

4.6.1 Description of Obligations and Conditions for Active Exposure Pathway Mitigation Measures

An AUL is required in all cases where a Permanent Solution relies upon an Active Exposure Pathway Mitigation Measure (AEPMM) pursuant to 310 CMR 40.1025. In such cases, the Obligations and Conditions portion of Form 1075 must incorporate the standard conditions as they appear in Form 1075 (i.e., the standard conditions listed in the text that begins “For a Permanent Solution with Conditions that relies upon the operation and maintenance of an Active Exposure Pathway Mitigation Measure...” must be included verbatim). Additional obligations or conditions related to the AEPMM may be added, provided the additional conditions are consistent with the required obligations and conditions.

4.7 Ensuring Consistency between AUL Descriptions of Activities and Uses and Obligations and Conditions

In drafting AUL descriptions of the consistent and inconsistent activities and uses, and obligations and conditions necessary for maintaining a condition of No Significant Risk applicable, attention must be paid toward ensuring that these descriptions, taken together, are practically and logically compatible. For example, if the inconsistent activities and use description includes a prohibition on access to soil beneath pavement, the description of obligations and conditions must support this by requiring the maintenance and repair of the pavement. Similarly, the descriptions of consistent activity and uses or obligations and conditions (i.e., what can, and what must, be done, in order to maintain a condition of No Significant Risk) cannot conflict with the description of inconsistent activities and uses (i.e., what must not occur in order to maintain such conditions). For example, if the inconsistent use description limits residential use, the consistent use description cannot allow for a specific type of residential use, such as elderly housing.

4.8 Narrative Describing the Basis for AUL (Exhibit C)

A narrative describing the basis for the AUL must be attached to the AUL form as Exhibit C. This narrative must include, at a minimum, the information at 310 CMR 40.1074(2)(e)-(g), keeping in

² As discussed in Section 4.4, in contrast to planned construction or excavation it is assumed that emergency excavation and repair activities may take place without the implementation of a health and safety and/or soil management plan because there may be insufficient time and opportunity in such instances to recognize the existence of the AUL and its obligations and conditions.

mind that sufficient detail and explanation should be provided but written as simply as possible so that a reader who is unfamiliar with the MCP requirements and terminology can understand what has occurred at the property that requires the implementation of an AUL and how the terms of the AUL appropriately limit the potential for exposure to contamination remaining at the property.

The narrative should not repeat the lists of consistent and inconsistent activities and uses and obligations and conditions that are already required by and listed in Form 1075 of the AUL. The narrative does not require a separate signature and seal of an LSP. The LSP signature and seal on the completed Form 1075 certifies to the appropriateness of Exhibit C.

At a minimum, the following elements must be included in the narrative description (see 310 CMR 40.1074(2)(e)-(g)):

- a statement specifying why the AUL is appropriate to maintain a Permanent Solution and condition of No Significant Risk or maintain a Temporary Solution and a condition of No Substantial Hazard (this should include the purpose of any barrier, management plan, or system and operating regimen in place as part of the AUL);
- a concise summary of the OHM release events or site history that resulted in the contamination that is subject to the AUL (i.e., date of release(s), to the extent known, release volume(s), historic OHM use and disposal, response actions taken to address the release(s)); and
- a description of the contaminated media (i.e., media type(s), contaminant types(s), approximate vertical and horizontal extent) subject to the AUL.

4.9 Signing the AUL and Documentation of Signatory Authority (Exhibit D)

Once the information in the AUL has been completed, and prior to recording or registering it at the Registry of Deeds/Land Registration Office, the AUL must be signed by the property owner and the LSP who is certifying that the AUL in their Opinion is consistent with maintaining No Significant Risk. Each of these signatures must be notarized. The LSP must also affix their Licensed Site Professional seal next to the signature. The date entered by the property owner in the signature section should be the same date that is entered in the first paragraph of Form 1075 (i.e., the date on which the Notice is made). See 310 CMR 40.1074(2)(m).

If the owner of the property to be subject to the AUL is an entity or is an individual signing as trustee or in some other capacity, rather than an individual acting on their own behalf, then documentation of the signatory authority of the person signing the AUL must be attached as Exhibit D. Entities include, but are not limited to, corporations, limited liability corporations, limited liability companies, municipalities, states, and the federal government. Signature authority is also required from trustees, personal representatives, attorneys in fact, and agents. Signatory authority documentation must also be attached as Exhibit D to the AUL if the individual signing the AUL is signing as a trustee, executor, or attorney-in-fact.

Condominium properties that are subject to an AUL are a unique ownership scenario. While a buyer of a condominium becomes the sole owner of a condominium unit, they also acquire an undivided share along with other unit owners in the underlying parcel of land and designated portions of the buildings (“common elements”). Each individual owner records a deed for their condominium unit, but the entire property is subject to a Master Deed that is recorded along with the condominium bylaws. If the AUL is limited to an area that is part of the undivided common elements, then a designated representative of the governing body authorized in the condominium bylaws to manage and regulate the property (e.g., condominium association, trust, corporation) would sign the AUL. However, in situations where the AUL includes limitations imposed on both common elements and on individual condominium units, then the owners of those units affected by the AUL would need to sign separate AULs for their respective units. Information about condominium ownership can be found in Appendix E.

As a general rule, the signatory documentation attached to an AUL should be consistent with current conveyancing standards and practices, and equivalent to what would be required for a sale of the property. If documentation of signatory authority was previously recorded or if the Registry of Deeds requires that documentation of signatory authority be recorded separately from the AUL, the book and page number or document number generated by this separate recording should also be submitted to MassDEP in Exhibit D. It is recommended that appropriate Registry of Deeds be consulted to ensure their specific requirements are met.

It is recommended that a real estate attorney be consulted with specific questions about the appropriate documentation required to evidence signatory authority.

See Appendix D, “Required Signatories and Documentation,” 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.

4.10 Deleting or Changing Language of AUL Forms

The AUL forms are codified in the MCP at 310 CMR 40.1099 as required forms and as such these forms³ must be used and their text and format 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 4.11 below, may invalidate the AUL and the Permanent Solution or Temporary Solution that relies upon it.

4.11 Adding Language to AUL Forms

Beyond the information that is required to be inserted into an AUL form, language may be added to AUL forms for the purpose of providing helpful detail and greater clarity. For instance, if the property is held in trust, the book and page of the Declaration of Trust should be included. Any

³ There is an exception to using the forms at 310 CMR 40.1099 in the case of CERCLA sites specified at 310 CMR 40.1075; the Notice of AUL in such case uses a form that is developed and approved by MassDEP, but is not published in the MCP.

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 that contradicts or qualifies the standard form language.

4.12 Requirements for a Registry Copy of the AUL

A “Registry copy” of an AUL (the Notice and required survey plan(s)), as required under 310 CMR 40.1074(4), is a copy that bears the book and page/instrument number and/or document number. Any other type of copy is insufficient (i.e., the Permanent Solution or Temporary Solution submittal will not be considered complete).

To comply with the requirement for the electronic submittal of the AUL to MassDEP, a scanned copy of the Registry copy of the AUL must be submitted using MassDEP’s online filing system and transmittal form, as described in Section 4.13.

4.13 Activity and Use Limitation Transmittal Form (BWSC113)

The Registry copy of the AUL must be submitted to MassDEP via its online filing system with the BWSC113 Activity and Use Limitation Transmittal Form. Submitting the Registry copy of the AUL with the Permanent Solution or Temporary Solution Statement alone does meet the requirements of 310 CMR 40.1074(1)(e) and 40.1074(3). Form BWSC113 is available at <http://www.mass.gov/eea/agencies/massdep/cleanup/approvals/#2>.

In addition to its use for submitting the Registry copy of an original AUL, BWSC113 is used to submit an AUL Amendment, Termination, Confirmatory AUL document, an Evaluation of Changes in Land Uses/Activities and/or Site Conditions pursuant to 310 CMR 40.1080, and a Registry copy of a Deed referencing the AUL after a property transfer pursuant to 310 CMR 40.1074(5).

SECTION 5: AUL RECORDING AND PROCESSING REQUIREMENTS

This section addresses the procedural requirements for implementing an AUL after it has been properly prepared. Once the Notice form has been completed 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

An AUL must be recorded at the appropriate Registry of Deeds and/or registered with the Land Court in order for the AUL to be deemed implemented and in effect [see 310 CMR 40.1070(3)]. Recording and registration requirements for the acceptance of real estate documents by the Registry of Deeds are very specific and need to be complied with strictly for the AUL to be legally effective. 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; MassDEP recommends that an experienced real estate attorney be consulted to ensure acceptance of the AUL by the applicable Registry of Deeds and/or Land Court.

5.1.1 Recording Requirements

Requirements for recording real estate documents for recorded land (described in Section 4.1.1) concern such details as name and address identification, document identification, document dimensions, font size, page margins, document highlighting, written signature execution and signature identification, and notarization requirements. The most recent version of the *Massachusetts Deed Indexing Standards* by the Massachusetts Registers & Assistant Registers of Deeds Association reflects the practice of the majority of Massachusetts Registries of Deeds. These standards include document formatting requirements (e.g., paper type, font size, page margins) for documents recorded at any Registry that are provided in Appendix H. Similarly, some rules for plan recording (e.g., formatting, signatures, and graphics) are consistent across the different Registries; these “Requirements for Survey Plans” are provided in Appendix G.

Because the recording requirements referenced in this guidance are not all-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 have 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, including links to the individual Registries, can be found at <http://www.sec.state.ma.us/rod/rodidx.htm>.

5.1.2 Registration Requirements

Registering documents with the Land Court has its own set of requirements, pursuant to M.G.L. c. 185. As described in Section 4.1.2, a decree by the Land Court creates registered land. Once a judgment has been obtained registering a parcel of land, the Land Court enters a Certificate of Title and the land is forever registered until the property is withdrawn. The 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]. When an AUL is accepted for registration, a notation will be added to the Memorandum of Encumbrances accompanying the Certificate of Title for the registered parcel of land.

In order for an AUL to be accepted for registration, the property owner must comply with the most recent edition of the *Commonwealth of Massachusetts Land Court Guidelines on Registered Land*. 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 an AUL.

The Land Court also provides specific requirements for the acceptance of surveys and plans in the most recent edition of the *Manual of Instructions for the Survey of Lands and Preparation of Plans to be filed in the Land Court*. 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 *Manual* and the MCP.

The Land Court *Guidelines* and *Manual* can be found on the Land Court's webpage at <https://www.mass.gov/orgs/land-court>.

5.2 Documents to be Submitted to MassDEP

Within thirty days of an AUL being recorded with the appropriate Registry of Deeds and/or registered with the Land Court, the property owner must submit to MassDEP the following documents and fees, in accordance with 310 CMR 40.1074 and 310 CMR 4.03:

- BWSC113 Transmittal Form bearing original signatures. 310 CMR 40.1074(1)(e) requires a statement certifying that the property owner identified on the Notice of AUL owned the property at the time the Notice was recorded and/or registered, and that record interest holders were notified of the proposed Notice. This statement is provided by checking the appropriate box in Section F of the BWSC 113 Transmittal Form.
- A Registry copy of the AUL. The Registry copy is necessary to verify that the document submitted to MassDEP is an exact copy of the AUL (including all required exhibits) that

was recorded/registered. This copy must be stamped by the Registrar of the Registry of Deeds or the Land Court. If the land is registered land, the initial Registry copy will include a document number and may include the book and page number. If the land is recorded land, the Registry copy will include an instrument number and/or book and page number. It is sufficient to submit a scanned copy of the Registry 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 document as an electronic submittal.

If a Permanent or Temporary Solution Statement relies upon the implementation of an AUL, such Permanent Solution, Temporary Solution or Remedy Operation Status is not considered complete or effective until MassDEP has received a Registry copy of the AUL, consistent with 310 CMR 40.1056(2)(h) and 40.1070(3).

Additionally, a copy of the published public notice (newspaper notice) of the AUL recording/registration must be submitted to MassDEP within seven days of its publication (see 310 CMR 40.1403(7)(b)2. and Section 5.4 of this Guidance).

5.2.1 AUL Compliance Assurance Fees

A one-time fee of \$2,000 (\$1,000 for Homeowners⁴)⁵ in accordance with 310 CMR 4.03, Timely Action Schedule and Fee Provisions, applies to each AUL filed prior to or concurrent with a Permanent Solution, including AULs that are not required but may be implemented in accordance with 310 CMR 40.1012(3). This fee does not apply to subsequent Amendments, Confirmatory AULs, or Terminations, and does not apply to a new AUL implemented after a Termination is filed as long as the original Permanent Solution remains in effect. The fee is applicable to each AUL and not to each disposal site or parcel. So one AUL that is implemented for an area that includes multiple parcels would generate one fee. Likewise, multiple AULs implemented on one parcel or disposal site would generate a separate fee for each AUL. This Fee must be paid concurrent with submitting the BWSC113 Transmittal Form and AUL documents as BWSC113 requires a certification that the AUL Compliance Fee has been submitted to MassDEP.

⁴ Lower fee rates apply to qualifying homeowners who are conducting response actions to address a release of oil at the homeowner's principal residence and have submitted a Homeowner Certification Form (BWSC120). See the definition of "Homeowner" at 310 CMR 4.02.

⁵ AUL Fee Rates in effect beginning June 20, 2014.

5.3 Notice to Current Record Interest Holders

The property owner must provide written notice of the proposed AUL to any current holder of a record interest in the area of the property subject to the proposed AUL. Such notice must be made by certified mail, return receipt requested, at least 30 days prior to the implementation of an AUL, as set forth at 310 CMR 40.1074(1)(d). The purpose of the notification is to make known and available to such interest holders the terms of the proposed AUL, and the existence and location of the OHM at the property. Although not the only means of providing notice, providing each current record interest holder with a copy of the proposed AUL, substantially in its final form (as it is to be recorded) gives adequate notice and fulfills this requirement.

“Record interest holders” are those individuals or entities having an interest in the area of the property that is subject to the proposed AUL on record at the Registry of Deeds, Land Registration Office, or Registry of Probate. Examples of record interest holders typically include, but are not limited to, owners, mortgage holders, and holders of easements. Tenants, lessees, and license holders may also be record interest holders, if the instrument creating their interest, or notice thereof, is of record. Please note that a property abutter is not a record interest holder unless the abutter otherwise holds a record interest in the property, as described above. In the case of a condominium development, written notice must be provided to the person(s) who owns a unit that is within the area of the AUL and/or who holds an undivided interest in a common area within the area of the AUL at the time the AUL is recorded. If the AUL area is limited to an area which is part of the common elements, then in general this means that the governing body must notify all unit owners. More information about condominiums can be found in Appendix E.

A record interest is generally “current” if the interest exists at the time the AUL is recorded, i.e., it has not been discharged or otherwise eliminated by a subsequently recorded or registered instrument. For example, if a mortgage is discharged before the Notice of AUL is recorded, and that discharge has been recorded, the mortgage holder is not a “current record interest holder.”

Searches for record interest holders should generally conform with prevailing conveyancing practices and applicable title standards, including the Massachusetts Real Estate Bar Association (“REBA”) Title Standard 1, “Period of Search.” The process for identifying current record interest holders for recorded land therefore should include, but not be limited to, conducting a search in the Registry of Deeds covering a period of at least 50 years, where the starting point is a warranty, quitclaim, or duly authorized or empowered fiduciary deed which on its face does not suggest any defect and Records at the Probate and Family Court.

In the case of registered land, per REBA Title Standard 1, the examination may begin on the date of the most recently issued certificate of title signed by the Land Court District’s Assistant Recorder, and such examination must include a review of the memorandum of encumbrances.

Once a record interest holder is identified, 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 the identity of current record interest holders cannot be ascertained upon careful review of all available and relevant records, as described above, publication in a newspaper of general circulation serving the community where the property is located is recommended.

If there are no record interest holders to notify, then there is no required 30-day waiting period before recording the AUL. Further, if there are record interest holders to notify and the time for completing the recording of the AUL is under time constraints (e.g., the AUL filing is tied to a scheduled property transaction), the record interest holder may provide a written waiver of the 30-day the waiting period to the property owner [see 310 CMR 40.1074(1)(d)].

There is no requirement to enter into subordination agreements with, or to obtain the 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. When the terms of the Notice potentially affect reasonably foreseeable activities or uses of a current record interest holder, it may be prudent to execute agreements with such interest holder through which it agrees to the terms of the Notice.

Although not required, it is recommended that copies of the notice letters sent to record interest holders be submitted to MassDEP as well.

5.4 Public Notice Requirements

AULs (Notices and Grants) and any subsequent Amendments and Terminations/Releases are subject to public notice requirements set forth at 310 CMR 40.1403(7). These requirements establish that within 30 days of recording and/or registering any original, amended, released or terminated 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.

Also within 30 days of recording and/or registering an original, amended, released, or terminated AUL, a public notice must be published in a newspaper that circulates in the community in which the property subject to the AUL is located, indicating that the original, amended, released or terminated 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. Submittal of the public notice to MassDEP may be accomplished by: (1) including it with the AUL submittal using BWSC Transmittal Form 113; (2) submitting it

separately using BWSC Transmittal Form 126; or (3) including it with a Permanent Solution Statement using BWSC Transmittal Form 104.

Pursuant to 310 CMR 40.1403(7)(b), this public (newspaper) notice must be in a “form established by the Department for such purpose” and include:

- the name, address, and Release Tracking Number(s) of the disposal site associated with the Activity and Use Limitation;
- the type of Activity and Use Limitation;
- information about where the Activity and Use Limitation instrument and disposal site file can be reviewed; and
- the name, address and telephone number of the person recording and/or registering the Activity and Use Limitation from whom the public can obtain additional information.

The forms established by MassDEP for public notices for both original AULs and Amendments/Releases/Terminations are provided in Appendix F, “Public Notice of an Activity and Use Limitation.”

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 terms of the AUL (numbered section 6 of Form 1075) 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 deed, confirmatory deed, easement, mortgage, lease, 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 includes all instruments of transfer, including instruments that are not recorded at the Registry of Deeds or registered in Land Court, such as residential leases. This requirement is intended to ensure that people who obtain legal rights to use the property after the recordation of the original AUL are aware of the existence of the AUL, the specific limitations placed on the activities and uses of the property, and the conditions and obligations necessary to maintain a level of No Significant Risk. It is also designed to ensure that title examiners continue to find AULs that are recorded prior to the fifty-year period of search adopted by title examiners.

For example, including the following statement within such instruments of transfer would 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].”

For condominiums where the AUL applies to common areas, the AUL must be incorporated by reference into all unit deeds even if the area affected by a notice does not include the individual

condominium unit that is being sold. This is because the unit owner's undivided interest in the common elements—which *is* subject to the notice—is also being transferred. If the AUL only applies to a specific condominium unit(s) and not to common areas, the AUL need only be referenced in the deeds of the affected units. More information about condominiums can be found in Appendix E.

Failure to reference an AUL. Correcting a violation of failing to reference an AUL in a future instrument of transfer will depend upon the type of instrument involved and whether the property is recorded or registered land. For recorded land, failure to provide such reference in a deed may be remedied by recording with the appropriate Registry of Deeds either a Confirmatory or Corrective Deed or an Affidavit of Title as described below. Such document must incorporate the AUL in full or by reference to fulfill the requirement in 310 CMR 40.1074(5), and a copy of the recorded document must be submitted to MassDEP.

- Confirmatory or Corrective Deed— may only be executed by the grantor of the original deed, who is generally the individual who owned the property at the time the AUL was implemented; or
- Affidavit of Title, in accordance with M.G.L. c. 183, §5B—may be made by persons having personal knowledge of the AUL and relevant instrument of title, which includes the current and prior owners of the property, and must otherwise be consistent with the requirements of M.G.L. c. 183, §5B.

The Land Court does not accept Confirmatory Deeds or Affidavits of Title for this purpose. For land that is registered, the AUL must be terminated and refiled, and the refiled AUL must be incorporated into any future deeds or Certificate or Memorandum of Encumbrances.

Amendments to the newly recorded instrument of transfer, in particular, mortgages and leases, are also an acceptable remedy to correct this violation if all parties to such recorded instrument of transfer agree to the amendment.

Sale of property. When the instrument of transfer is a deed, 310 CMR 40.1074(5) requires that a copy of such deed containing the reference to the AUL be submitted to MassDEP within 30 days of such deed being recorded or registered.

This requirement attaches to both the buyer and seller of the property; however, submission of the deed copy by either party fulfills the requirement for both parties. Submittal of the copy of the deed is accomplished either by submitting the AUL Transmittal Form BWSC113 via MassDEP's online filing system, eDEP (an LSP signature is not required when submitting BWSC113 for this purpose), or by mailing it to the appropriate regional office of MassDEP. When mailing the deed copy, referencing the applicable Release Tracking Number(s) in the correspondence will ensure that the submittal will be uploaded to the appropriate disposal site file.

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. This section addresses issues and procedures that apply once an AUL has been implemented including: conducting response actions after a Permanent or Temporary Solution has been submitted; evaluating contemplated changes in site uses and activities; correcting, amending, and terminating an AUL; referencing an AUL in future instruments of transfer; MassDEP audits of disposal sites with AULs; and the consequences of violating the terms of an AUL.

All remedial actions that are conducted after a Permanent Solution 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(5) 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 original AUL is being considered after a Permanent Solution, Temporary Solution or Remedy Operation Status has been submitted, and the contemplated change is not within the uses or activities specifically permitted by the original AUL, then the requirements set forth at 310 CMR 40.1080 must be followed. These requirements are summarized in Section 6.2.

6.1 Conducting Remedial Actions after a Permanent Statement has been Submitted if such Remedial Actions are within an Area or have the potential to affect an Area Subject to an AUL

The MCP anticipates that construction, maintenance and/or redevelopment activities may occur within areas of residual contamination at properties that have been assessed and remediated to achieve a Permanent Solution. Remedial actions that are conducted at a disposal site after a Permanent Solution has been achieved and are within or have the potential to affect an area subject to an AUL are addressed in 310 CMR 40.1067(5). These remedial actions are conducted as “limited soil excavations,” Release Abatement Measures (or Utility Release Abatement Measures) or Phase IV Comprehensive Response Actions depending on their scope and complexity and the limitations in place under the AUL, and must be conducted under the supervision of an LSP:

Limited Soil Excavation. Limited soil excavation is described at 310 CMR 40.1067(5)(a) as excavation producing Remediation Waste that does not exceed 100 cubic yards if the soil is contaminated solely by oil or waste oil, or 20 cubic yards if the soil is contaminated by hazardous materials (or a combination thereof). Limited soil excavation may proceed with no notification to MassDEP and no public notice activities, provided that such excavation is not prohibited by the AUL and Remediation Waste is managed in accordance with 310 CMR 40.0030.

Release Abatement Measures. Remedial actions that go beyond the scope of limited soil excavation but fall within the limits for a Release Abatement Measure (RAM), as set forth at 310 CMR 40.0440 (including 310 CMR 40.0442) may be conducted as a RAM [see 310 CMR 40.1067(5)(b)]. The requirements of the RAM provisions at 310 CMR 40.0440 must be followed, including requirements related to document submission (i.e., RAM Plan, Status Reports and Completion Statements) and notifications to local officials provided at 310 CMR 40.1403(3)(d). A Tier Classification or Tier Classification Extension is not required.

Utility Release Abatement Measures. Remedial actions initiated as a Utility Release Abatement Measure (URAM) may proceed as a URAM, provided that such remedial actions are conducted in accordance with the provisions of 310 CMR 40.1067(5) or (6) [see 310 CMR 40.1067(9)] and the URAM provisions at 310 CMR 40.0460. A Tier Classification or Tier Classification Extension is not required.

Phase IV Comprehensive Response Actions. All other remedial actions that go beyond the scope of a RAM, including remedial actions within an area or that affect an area where an Engineered Barrier is located [see 310 CMR 40.1067(7)] 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 or Tier II Classification or Tier Classification Extension, and all public notice requirements applicable to Phase IV Comprehensive Remedial Response Actions must be conducted [see 310 CMR 40.1067(5)(c)].

If remedial actions are being conducted to allow for a change in Site Activity or Use at site with an AUL, then those actions must also be conducted according to the procedures at 310 CMR 40.1080 discussed in Section 6.2 below. Remedial actions may also be taken to achieve a level of cleanup at the site that eliminates the need for an AUL to maintain a condition of No Significant Risk. In such cases, the AUL may be terminated. See Section 6.5 for guidance on terminating AULs.

6.2 Changes in Site Activities and/or Uses or Other Site Conditions after a Permanent or Temporary Solution Statement with an Activity and Use Limitation has been Submitted

If a change in Site Activities or Use in the area subject to the AUL is contemplated and the new or altered activity or use is not within the uses or activities specifically permitted by the AUL, then an LSP must evaluate the new or altered activity or use using the MCP risk characterization process **before** the change in use or activity takes place [see 310 CMR 40.1080]. This evaluation must determine whether a condition of No Significant Risk or No Substantial Hazard would be maintained with the contemplated change in activity or use and whether additional response actions would be needed to achieve a level of No Significant Risk or No Substantial Hazard.

The requirement for an LSP evaluation in situations where the contemplated new or altered activity or use is not clearly included in the AUL and may be inconsistent with the condition of No Significant Risk or No Substantial Hazard underscores the importance of developing an AUL that initially addresses the likely range of future activities and uses at a site. However, this does not mean 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 lists as consistent with the maintenance of No Significant Risk or No Substantial Hazard “any commercial and industrial uses of the site,” then a change of use from a shoe store to a drug store would be considered consistent. 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 a daycare on the site would be consistent with maintaining a condition of No Significant Risk.

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.

If, after an evaluation of a change of use or activity, a property owner abandons their 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.

Where response actions are necessary to make the property within the AUL area ready for the new use or activity (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 planned new activity and/or use would be inconsistent with maintaining a condition of No Significant Risk or No Substantial Hazard based on current site conditions and that additional response actions are needed before the level of cleanup at the site is sufficient to allow the new use, then the procedure below must be followed before undertaking the new use or activity (*see* 310 CMR 40.1080(2)). 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 or No Substantial Hazard at sites where a Permanent or Temporary Solution that relies upon an AUL has been achieved need to be submitted to MassDEP as described below. These procedures apply to all sites where an AUL has been implemented, including AULs implemented in accordance with 310 CMR 40.1012(3).

1. An LSP Opinion must be submitted in accordance with 310 CMR 40.1080(1)(a) using the BWSC113 Transmittal Form for the evaluation of the contemplated change in activity and use. The LSP Opinion must support the change in activity or use following additional response actions, along with a risk characterization that evaluates the contemplated activity and use and is the basis of the LSP Opinion (310 CMR 40.1080(1)(b)). Additional site

characterization may be necessary to provide information required for the revised risk characterization.

2. A response action plan must be submitted for any additional response actions that are necessary to allow for a change in site use or activity or the termination of the AUL. As previously described in Section 6.1, such response actions must be conducted either as a RAM (if they fall within the scope of a RAM) (310 CMR 40.1067(5)(b) or 310 CMR 40.1050(6)), a Phase IV Comprehensive Remedial Response Action (see 310 CMR 40.1067(4)(c) or 310 CMR 40.1050(5)(b)), or a URAM (see 310 CMR 40.1067(9)).
3. The AUL must be amended, terminated, or partially terminated as appropriate in accordance with 310 CMR 40.1080 and 40.1081 or 40.1083 to include the proposed Site Activities or Uses prior to commencing the new or altered Site Activities or Uses; and
4. A revised Permanent or Temporary Solution Statement must be submitted to MassDEP within 60 days of completion of response actions along with supporting documentation to reflect any changes from the previous Permanent or Temporary Solution Statement. As specified at 310 CMR 40.1067(5)(d), a revised Permanent Solution Statement may be limited to the area in which the response actions were conducted.

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 strongly recommended that the AUL be amended to add the contemplated use to the list of uses consistent with maintaining a condition of No Significant Risk or No Substantial Hazard, *if the duration of the activity is longer than a few months or it 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 reflect accurately the range of activity occurring in the area subject to the AUL, thus avoiding possible future confusion as to whether the terms of the AUL are being followed that could lead to potential enforcement actions.

6.3 Correcting Errors in an Implemented AUL

If a recorded and/or registered AUL contains errors, steps must be taken to correct them. The means of correcting AUL errors depends on the nature of the error. Corrections are made by recording a "Confirmatory AUL" or an "AUL Amendment," 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 be submitted to MassDEP in the same manner as an original AUL using the BWSC113 transmittal form and following the document submittal requirements described in Section 5.2.

6.3.1 AUL 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. 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 on the same property as the area subject to the original AUL. Likewise, an amendment to an AUL may be used to decrease the size of the area on the same property subject to the AUL if such decrease is consistent with the risk characterization and maintenance of No Significant Risk; otherwise, decreasing the size of the AUL area requires partially terminating the AUL as described below in Section 6.5.

An Amendment may also be used to revise AUL Exhibits, for example, update a sketch plan (Exhibit B) to describe the disposal site boundaries or to delineate the areas of multiple barriers associated with distinct restrictions (*see* related discussion in Section 4.3.7).

The AUL Amendment Form, Form 1082B, first lists those activities and uses and/or obligations and conditions that are being “amended” under Paragraphs 1, 2, and 3 of the third “WHEREAS” clause. In addition, Form 1082B requires a fully updated list of the consistent activities and uses, inconsistent activities and uses, and obligations and conditions (i.e., any unamended items of the original AUL combined with the newly amended items) be listed in Paragraphs 4, 5, and 6 of the “NOW THEREFORE” clause. Including the fully updated lists in the Amendment ensures that the Amendment document is a clear and complete reference of those terms (i.e., it is not necessary to refer to both the original AUL and the Amendment to determine what terms are in effect).

Form 1082B also contains a bracket in the title of the form that indicates whether the amendment is the “FIRST” or a subsequent amendment to the original AUL.

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

6.3.2 Confirmatory AULs

A Confirmatory AUL may be used to correct non-substantive errors and omissions in a recorded Notice of AUL, AUL Amendment or AUL Termination. Examples of non-substantive errors include misspelled names, missing lines in the legal description of the parcel and inadvertent omission of one of the required exhibits that must be 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 is inadvertently omitted in the AUL form in the respective sections where such activities and uses, or obligations and conditions are specified.

A Confirmatory AUL cannot be used to add or delete activities or uses that are not supported by the existing Permanent Solution. In such cases an Amendment must be implemented to change the activities and uses (see Section 6.3).

To complete a Confirmatory AUL, the Confirmatory language located in brackets throughout must be selected. This includes the bracketed:

- “CONFIRMATORY” in the title of the form;
- reference to the document that is being corrected by the Confirmatory AUL (e.g., *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 ____, said errors being as follows...*); the error should be specifically identified in this paragraph; and
- paragraph at the end of the form which states that the property owner authorizes the recording of the confirmatory document.

Beyond the bracketed language, a Confirmatory AUL must match word-for-word the language of the original AUL except for the text that was in previously in error; the correct information should appear in place of the erroneous text.

The Confirmatory AUL is read in conjunction with the original AUL, so MassDEP does not require that the exhibits that were attached to the original AUL be included with the Confirmatory AUL, unless the Confirmatory AUL is being used to record exhibits that were inadvertently omitted. However, be aware that the Registry of Deeds may require otherwise.

The requirements for filing a confirmatory AUL can be found at 310 CMR 40.1085. As specified at 310 CMR 40.1085(4)(e), a Registry copy of the Confirmatory AUL as recorded must be forwarded to MassDEP within thirty days of recording. The requirements to provide notice to local officials and public at 310 CMR 40.1403(7) do not apply to Confirmatory AULs as they are not considered “original” or “amended” AULs.

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. As with the Confirmatory AUL, notice to local officials and the public (pursuant to 310 CMR 40.1403(7)) is not required when implementing this corrective AUL.

6.3.3 AUL Terminations

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

Form 1084B: A property owner can terminate an AUL that is no longer necessary to maintain a condition of No Significant Risk, as determined and documented by an LSP. This scenario is most likely to occur where additional cleanup eliminates the need for the AUL or additional assessment demonstrates that the AUL is not necessary. Along with the documentation for an AUL termination, a revised Permanent or Temporary Solution Statement must also be submitted to MassDEP with supporting documentation to reflect any changes from the previous Permanent or Temporary Solution (including a change in the Permanent or Temporary Solution category). See Section 6.1 above on conducting remedial action in an AUL area.

Form 1083B: If as a result of additional response actions an AUL is no longer necessary to maintain a Permanent Solution at a portion of the property subject to the AUL, an AUL may be partially terminated as to such portion of the Property. If the partial termination results in a change in the category of the Permanent Solution, a revised Permanent or Temporary Solution Statement must also be submitted to MassDEP along with supporting documentation.

Form 1084C & Form 1075: If substantive errors are discovered in an AUL, the defective AUL must be terminated using Form 1084C and a new AUL using Form 1075 must be recorded. 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, and the survey requirements were not met. An LSP signature is not necessary when terminating an AUL using Form 1084C (as the terminated AUL is to be replaced with a new AUL signed by both the LSP and property owner).

Form 1084D: If a Permanent or Temporary Solution that has been filed with the Department is found to be invalid (e.g., after an audit by MassDEP or upon review by a new property owner or LSP) such that additional response actions are necessary to achieve or support a conclusion that a condition of No Significant Risk or No Substantial Hazard has been achieved, then the AUL must be terminated using Form 1084D. In addition, the Permanent Solution or Temporary Statement must be retracted and submitted to MassDEP.

A description of the applicability of each of the termination forms is provided under the title at the top of each form. The requirements for filing a termination of AUL can be found at 310 CMR 40.1083(1)(e).

Table 6-1: CORRECTING OR REVISING IN AN IMPLEMENTED AUL

Reason for Correcting or Revising the AUL	Required Form(s)	LSP Stamp & Signature Required?	Permanent or Temporary Solution Statement Revision Required?
Non-substantive errors in AUL for recorded land	<ul style="list-style-type: none"> Form 1075 (Confirmatory) 	Yes	No
AUL is being substituted with a new AUL Substantive & Non-Substantive Errors in AUL	<ul style="list-style-type: none"> Form 1084C (Termination) & Form 1075 	Form 1084C— No Form 1075 — Yes	No
Additional response actions are necessary to achieve a Permanent or Temporary Solution for current conditions (i.e., Permanent or Temporary Solution is not valid)	<ul style="list-style-type: none"> Form 1084D (Termination) 	No	Retract Permanent or Temporary Solution
AUL no longer needed to maintain No Significant Risk or No Substantial Hazard	<ul style="list-style-type: none"> Form 1084B (Termination) 	Yes	Yes
Add or change activities and uses, or obligations and conditions to ensure maintenance of No Significant Risk, revise Exhibits	<ul style="list-style-type: none"> Form 1082B (Amendment) 	Yes	Depends
Increase area covered by the AUL	<ul style="list-style-type: none"> Form 1082B (Amendment) 	Yes	Depends
Reduce area covered by AUL (partial termination)	<ul style="list-style-type: none"> Form 1083B (Termination) or Form 1082B (Amendment) 	Yes	Form 1083B – Yes, if category of Permanent Solution is changed Form 1082B - Depends
All errors in AUL for registered land (Land Court)	<ul style="list-style-type: none"> Form 1084C (Termination) & Form 1075 	Form 1084C — No Form 1075 — Yes	No

6.4 Subdivision of Property with an AUL

An owner of a property for which an AUL has been recorded or registered may look to subdivide the property at some point in the future. Procedures for handling the AUL to ensure that it is appropriately carried forward in the chain of title of the new parcels will vary depending on how the land is to be subdivided relative to the AUL area and the terms of the original AUL.

When the original AUL applies to an entire parcel of land, and that parcel is subsequently subdivided, every new parcel that is created by the subdivision will be subject to the AUL. Likewise, when the original AUL area affects only a portion of the parcel of land to be subdivided, the subdivision development may still result in the AUL area straddling multiple parcels. In both of these scenarios, while not required, terminating the original AUL using Form 1084C and

substituting it with new and separate AULs for each individual parcel affected by the AUL may provide future property owners with greater clarity about their responsibilities and greater control over subsequent modifications of an AUL.

However, maintaining the original AUL may make sense in some scenarios, such as when the AUL area is contained within only one newly created subdivided parcel. In such a case, terminating the original AUL may be beneficial only if the terms of the AUL are no longer relevant (e.g., there will be a change in activities and uses on the property) and such change cannot be cured with an Amendment.

Subdividing a parcel provides an opportunity to re-evaluate the contamination, which could potentially result in a reduced AUL area and/or a determination that the terms of the original AUL are no longer relevant for a portion of the property. Redefining the AUL area in relation to the boundaries of the new parcels may actually result in limiting the AUL to fewer parcels. Work performed during subdivision construction, and all activities and uses thereafter, must comply with the terms of whichever AUL is of record at the time of such work, and all relevant provisions of the MCP (see Sections 6.1 and 6.2).

6.5 Incorporation of AUL into Future Instruments of Transfer

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, 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 includes all instruments of transfer, including instruments that are not recorded at the Registry of Deeds or registered in Land Court, such as residential leases. 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.

In addition, when the property that is subject to the AUL is sold or otherwise conveyed by deed, 310 CMR 40.1074(5) requires that a copy of such deed containing the reference to the AUL be submitted to MassDEP within 30 days of such deed being recorded or registered. This requirement applies to both the buyer and seller of the property and submission of the deed copy by either fulfills the requirement.

See Section 5.5 for specific procedures related to these requirements.

6.6 Maintenance Contracts and Property Managers

Where the area subject to the AUL is maintained by a contractor who may be affected by the terms of the AUL (e.g., maintenance contractor, landscaper where the AUL includes limitations on soil disturbance), MassDEP recommends that the maintenance contract/agreement reference the AUL,

and its terms and relevant plans (survey and sketch plans) be discussed with and made available to such contractors to ensure that they understand the applicable limitations, obligations and conditions, and the location of any barriers within to AUL area. By providing this information to the contractor, the property owner helps to (i) ensure that such contractors and their workers are aware of and protected from exposure to the remaining contamination, and (ii) avoid any inadvertent damage to barriers or activities and uses inconsistent with the terms of the AUL. For the same reasons, any employee of a company located on a site with an AUL who is responsible for managing or maintaining the property should be familiar with the terms of the AUL and be aware of activities and uses occurring at the property that may require oversight to ensure that all such activities and uses are consistent with the AUL.

6.7 MassDEP Audits of Disposal Sites with AULs

MassDEP has the authority to initiate an audit of a disposal site with an AUL at any time to determine whether the AUL is 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.

During an audit of a disposal site with an AUL, MassDEP may evaluate whether the AUL has been properly prepared and recorded (which entails a review of the documentation and supporting risk characterization), whether the activities and uses occurring in the area subject to the AUL are consistent with the terms of the AUL as recorded, whether any obligations and conditions that must be undertaken to maintain a Permanent Solution are being followed, and whether all administrative requirements (e.g., AUL has been referenced in all instruments of transfer) have been complied with.

6.8 Noncompliance with the Terms of the AUL

In the case of any failure to properly implement or comply with the terms of an AUL, MassDEP may initiate enforcement proceedings under M.G.L. c. 21E and the MCP. Chapter 21A, §16 ("Civil Administrative Penalties") makes failure to comply with the terms 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

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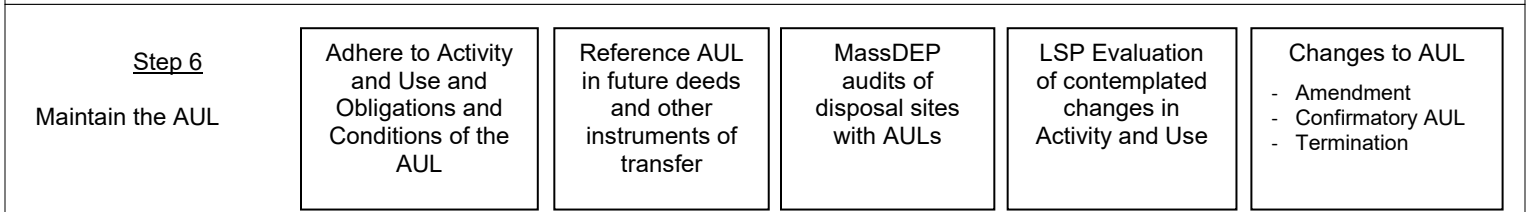
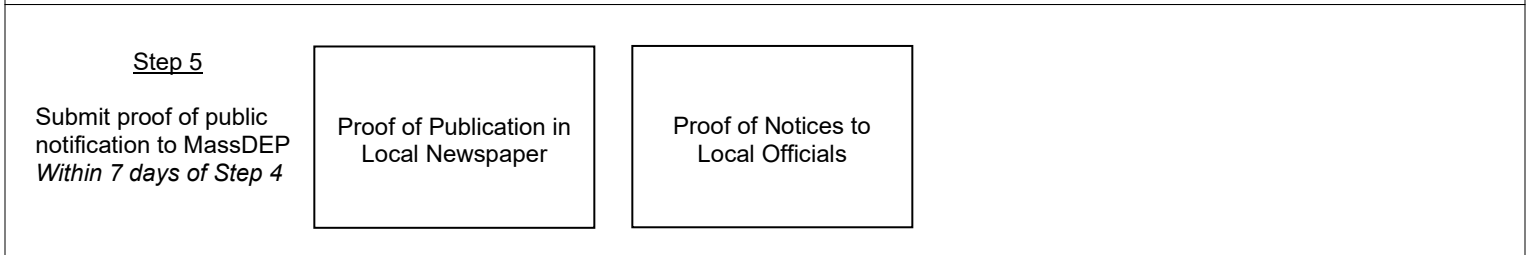
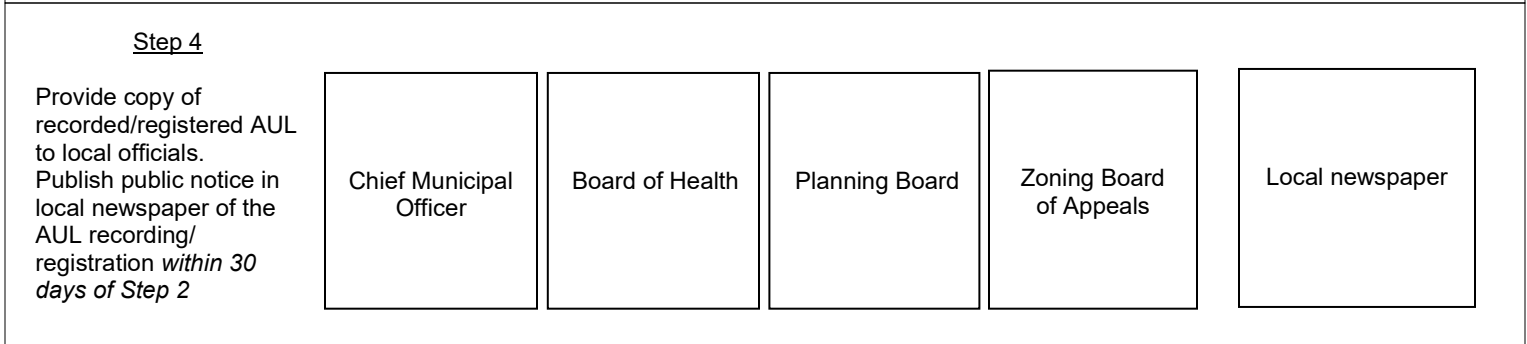
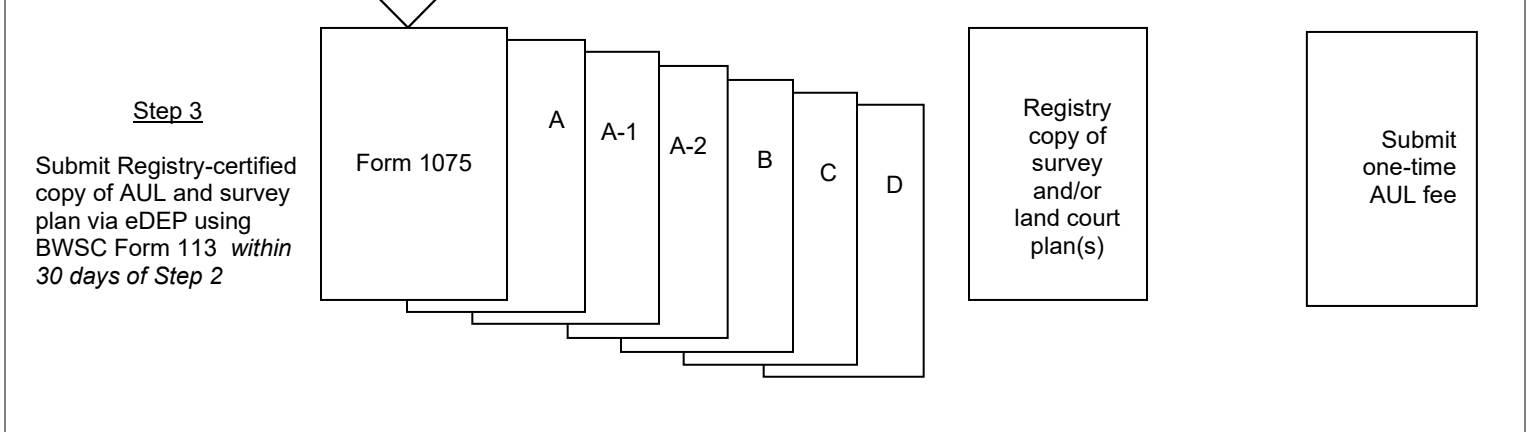
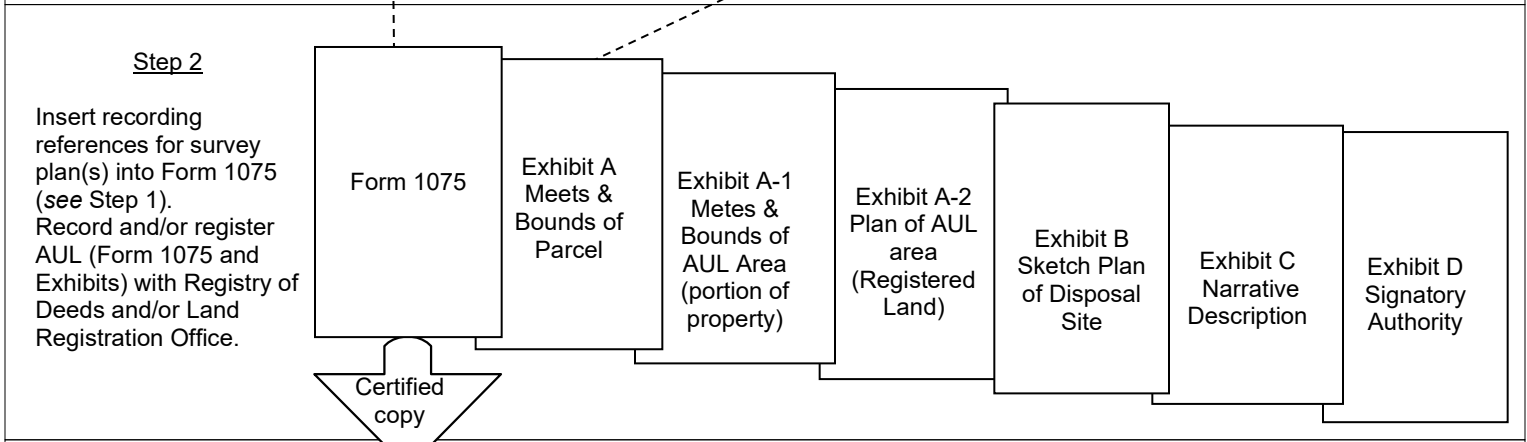
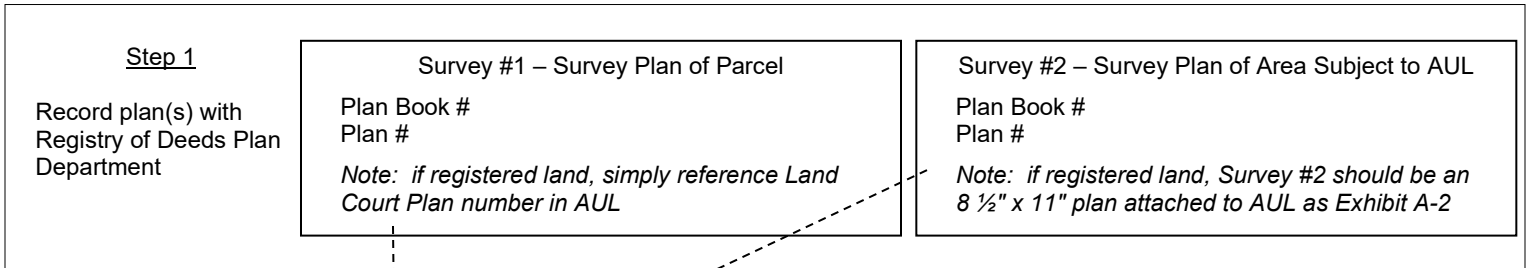
APPENDIX A: TABLE OF REQUIREMENTS FOR AUL SUBMITTALS

TABLE OF REQUIREMENTS FOR AUL SUBMITTALS

Requirement	Notice of Activity and Use Limitation	Confirmatory Notice	Amendments	Terminations
AUL Form	1075	1075	1082B)	1083B,1084B, 1084C, 1084D
Notification of Record Interest Holders 30 days prior to implementation	✓		✓	
BWSC Transmittal Form 113	✓	✓	✓	✓
Legal description of parcel of land containing area subject to AUL	Exhibit A	Exhibit A	Exhibit A	Exhibit A, in the case of Partial Terminations
Legal description of area subject to AUL (portion of property)	Exhibit A-1	Exhibit A-1*	Exhibit A-1*	Exhibit A-1*, in the case of Partial Terminations
Plan of area subject to AUL (Registered Land only)	Exhibit A-2	Exhibit A-2*	Exhibit A-2*	
Sketch plan showing boundaries of area subject to AUL in relation to boundaries of disposal site	Exhibit B	Exhibit B*	Exhibit B*	
Narrative description of basis for AUL	Exhibit C	Exhibit C*	Exhibit C Exhibit C*	Exhibit B (1084A)
Documentation of Signatory Authority (for entity)	Exhibit D	Exhibit D	Exhibit B	Exhibit C (1083A) Exhibit B (1083B, 1084A, 1084B, 1084C, 1084E) Exhibit A (1084D)
Notice to local officials and the public within 30 days of recording/registering AUL	✓		✓	✓

* 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

Note: Pursuant to 310 CMR 40.1074(5), upon transfer of any interest in or a right to use the property or a portion thereof that is subject to this Notice of Activity and Use Limitation, the Notice of Activity and Use Limitation shall be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer. Within 30 days of so incorporating the Notice of Activity and Use Limitation in a deed that is recorded or registered, a copy of such deed shall be submitted to the Department of Environmental Protection.

Guidance: Note intended to emphasize requirement to reference the AUL in future deeds and other instruments of transfer and a copy of a new deed must be submitted to MassDEP to confirm compliance. This note is intended as an instruction for future transactions: it must not be deleted.

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

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

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

Guidance: Exhibit C should be understandable by a reader who is unfamiliar with the MCP. The narrative should be concise and yet provide sufficient detail. Terminology that is not commonly understood should be explained.

[CONFIRMATORY] NOTICE OF ACTIVITY AND USE LIMITATION
M.G.L. c. 21E, § 6 and 310 CMR 40.0000

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

Provide date property owner is signing the Notice.

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

P.1 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:

P.2 WHEREAS, _____ (Name of Owner(s)), [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];

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

P.3 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 the _____ Registry of Deeds in Plan Book _____, Plan _____], and/or on Land Court Plan No. _____];

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.

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

P.4 (where applicable) [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, a 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, an 8 1/2" by 11" "sketch plan" of the portion of property subject to AUL.

Tip: This "sketch plan" refers to the Land Court (Registered) Sketch Plan, not Exhibit B.

P.5 WHEREAS, the [Property][Portion of the Property] comprises [all][part of] a disposal site as the result of [a] release[(s)] 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;

P.6 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

Attach as Exhibit C the description of the basis for AUL in narrative form that includes the required information listed in (a) through (c).

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]. A description of the basis for such restrictions, and the oil and/or hazardous material release event(s) or site history that resulted in the contaminated media subject to the Notice of Activity and Use Limitation is attached hereto as Exhibit C and made a part hereof (Exhibit C shall include: (a) a statement that specifies why the Notice of Activity and Use Limitation is appropriate to maintain a Permanent Solution and condition of No Significant Risk or maintain a Temporary Solution and condition of No Substantial Hazard, or maintain Remedy Operation Status and a condition of No Substantial Hazard; (b) a description of the oil and/or hazardous material release event(s) or site history that resulted in the contaminated media subject to the Notice of Activity and Use Limitation (i.e., date of the release(s), to the extent known, release volumes(s), and response actions taken to address the release(s); and (c) a description of the contaminated media (i.e., media type(s), approximate vertical and horizontal extent) subject to the Notice of Activity and Use Limitation); and

[WHEREAS, attached hereto as Exhibit D pursuant to 310 CMR 40.1074(2)(c) is documentation consistent with conveyancing standards and practices verifying that the individual[s] signing this Notice of Activity and Use Limitation has [have] the authority to sign such document;]

P.7 NOW, THEREFORE, notice is hereby given that the activity and use limitations set forth in this Notice of Activity and Use Limitation are as follows:

P.8 1. Activities and Uses Consistent with Maintaining (select one) [No Significant Risk][No Substantial Hazard] Conditions. The following Activities and Uses are consistent with maintaining (select one) [a Permanent Solution and a condition of No Significant Risk][a Temporary Solution and a condition of No Substantial Hazard] [Remedy Operation Status and a condition of No Substantial Hazard] and, as such, may occur on the [Property][Portion of the Property] pursuant to 310 CMR 40.0000:

Guidance: The list of consistent activities and uses should include all activities and uses that are reasonably expected to occur on the property. If there is ambiguity as to what is consistent, the AUL may need to be amended.

(i) ;

(ii) ;

(iii) Such other activities or uses which, in the Opinion of a Licensed Site Professional, 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; and

(iv) Such other activities and uses not identified in Paragraph 2 as being Activities and Uses Inconsistent with maintaining (select one) [No Significant Risk][No Substantial Hazard] Conditions.

P.9 2. Activities and Uses Inconsistent with (select one) Maintaining [No Significant Risk][No Substantial Hazard] Conditions. The following Activities and Uses are inconsistent with maintaining a (select one) [a Permanent Solution and a condition of No Significant Risk][a Temporary Solution and a condition of No Substantial Hazard] [Remedy Operation Status and a condition of No Substantial Hazard] pursuant to 310 CMR 40.0000, and, as such, may not occur on the [Property][Portion of the Property]:

(i) ;

(ii) ; and

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.

(iii)

P.10

3. Obligations and Conditions. The following obligations and/or conditions are necessary and shall be undertaken and/or maintained at the [Property] [Portion of the Property] to (select one) [maintain a Permanent Solution and a condition of No Significant Risk] [maintain a Temporary Solution and a condition of No Substantial Hazard] [Remedy Operation Status and a condition of No Substantial Hazard]:

(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 or No Substantial Hazard. Where a Permanent Solution relies on an Active Exposure Pathway Mitigation Measure, the Obligations and Conditions must include verbatim the four conditions below (the numbering can be changed if there are other/additional

(For a Permanent Solution with Conditions that relies upon the operation and maintenance of an Active Exposure Pathway Mitigation Measure, installed to prevent the migration of subsurface vapors into a building pursuant to 310 CMR 40.1025, include the following in the listed Obligations and Conditions:

- [(i) The Active Exposure Pathway Mitigation Measure comprised of (insert description of the system type) located (specify where on the property the system is located) shall be operated according to the operating regimen specified in the Permanent Solution Statement submitted to the Department of Environmental Protection to ensure a level of No Significant Risk is maintained for the Receptor(s) of concern under normal operating conditions;
- (ii) The Active Pathway Mitigation Measure shall employ remote monitoring technology that immediately sends an alert to the property owner and operator and the Department of Environmental Protection upon loss of power, mechanical failure or when the system is operating outside of the system’s range of effectiveness;
- (iii) In the event of any suspension or failure of the Active Exposure Pathway Mitigation Measure immediate steps shall be taken to return the Active Exposure Pathway Mitigation Measure to full operating condition;
- (iv) If such suspension or failure of the system lasts 30 or more consecutive days, written notice shall be provided to both Department of Environmental Protection and any non-transient building occupant who may have experienced exposure to oil or hazardous material as the result of the system failure or suspension on the 30th day from the start of the suspension or failure period; this notice shall document the reason for the suspension or failure of the system, any efforts taken to resume operation of such Measures, and the expected timeframe for resuming operation of such Measure; and
- (v) .])

(For a Permanent Solution with Conditions that relies upon the operation and maintenance of an Active Exposure Pathway Mitigation Measure installed for the removal of oil or hazardous material from drinking water supplied by a private water supply well pursuant to 310 CMR 40.1025, include the following in the listed Obligations and Conditions:

- [(i) The Active Exposure Pathway Mitigation Measure comprised of (insert description of the system type) located (specify where on the property the system is located) shall be operated according to the operating regimen specified in the Permanent Solution Statement submitted to the Department of Environmental Protection to ensure a level of No Significant Risk is maintained for the Receptor(s) of concern under normal operating conditions;
- (ii) Records documenting all activities to maintain the system, including replacing, recharging, removing or disposing of spent media, and the results of any confirmatory testing of drinking water samples shall be maintained and made available to the

Department upon request;

(iii) In the event of any suspension or failure of the Active Exposure Pathway Mitigation Measure, immediate steps shall be taken to return the Active Exposure Pathway Mitigation Measure to full operating condition;

(iv) If such suspension or failure of the system lasts 30 or more consecutive days, written notice shall be provided to both Department of Environmental Protection and any non-transient building occupant who may have experienced exposure to oil and/or hazardous material as the result of the system failure or suspension on the 30th day from the start of the suspension or failure period; this notice shall document the reason for the suspension or failure of the system, any efforts taken to resume operation of such Measures, and the expected timeframe for resuming operation of such Measure; and

(vi) .])

P.11

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 a Licensed Site Professional who shall render an Opinion, in accordance with 310 CMR 40.1080 *et seq.*, as to whether the proposed changes (select one) [are inconsistent with maintaining a Permanent Solution and a condition of No Significant Risk] [are inconsistent with maintaining a Temporary Solution and a condition of No Substantial Hazard][are inconsistent with maintaining Remedy Operation Status and a condition of No Substantial Hazard]. 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.

P.12

5. Violation of a Permanent or Temporary Solution. 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 a Licensed Site Professional in accordance with 310 CMR 40.1080 *et seq.*, and without additional response actions, if necessary, to maintain a condition of (select one) [No Significant Risk] [No Substantial Hazard].

P.13

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 a Licensed Site Professional 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.

P.14

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 in accordance with 310 CMR 40.1074(5).

Guidance: It is a requirement of the AUL that it be incorporated either in full or by reference into all future instruments of transfer.

P.15

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 Licensed Site Professional, and recorded and/or registered with the appropriate Registry(ies) of Deeds and/or Land Registration Office(s).

P.16
(where
applicable)

[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 ____, said error(s) being as follows:

Guidance: Include paragraph 16 if the AUL is a confirmatory document that corrects errors in a prior AUL. Otherwise, delete this paragraph, including the last line, "In all other respects... unchanged."

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

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

P.17

WITNESS the execution hereof under seal this _____ day of _____, 20____.

[Name of Owner]

Guidance: The 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 4.9 and Appendix D for guidance on signatures from individuals, corporations, partnerships, etc.

COMMONWEALTH OF MASSACHUSETTS
[STATE OF]

_____, ss _____, 20__

P.18

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)

P.19

The undersigned Licensed Site Professional hereby certifies that in [his][her] Opinion this [Confirmatory] Notice of Activity and Use Limitation is consistent with (select one) [a Permanent Solution and maintaining a condition of No Significant Risk][a Temporary Solution and maintaining a condition of No Substantial Hazard].

Date: _____

[Name of Licensed Site Professional]
[Licensed Site Professional SEAL]

COMMONWEALTH OF MASSACHUSETTS
[STATE OF]

_____, ss _____, 20__

P.20

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)

P.22

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. Any individual, on their own behalf or in some other capacity, or entity who holds the fee simple interest in the property is the owner. When signing on behalf of an entity, documentation verifying signatory authority should be consistent with current conveyancing standards and practices, as described below. If there is uncertainty about the proper documentation, or who has the authority to sign AULs affecting a parcel of property, it is recommended that an attorney be consulted.

Individual. The AUL must be signed by any individual or individuals who owns the property in their own capacity. 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 in their own capacity, but is one of the entities, or persons acting in a representative or fiduciary capacity, listed below, it is necessary to ensure that the person(s) signing the AUL has the authority to sign it. See 310 CMR 40.1074(2)(c). 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 vote by the board 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 M.G.L. c. 155, §8].

A corporate clerk's Certificate of Incumbency is required to confirm that the person(s) signing the AUL held their 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 one individual holds both the office of president and treasurer (and therefore, only one person is signing the AUL) or if the officers have delegated authority to sign the AUL to another individual (such as a director), then a Clerk's Certificate must also be provided in Exhibit D, in addition to the Certificate of Incumbency. The Clerk's 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 the general partner is 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 only common areas of the property, the governing body of the unit owners' association may sign the AUL on behalf of all individual unit holders who hold an undivided interest in the common areas subject to the AUL. Under the Condominium Act, the governing body has the authority to lease, and manage the common areas described in the master deed, in accordance with MGL c. 183A, § 10(b)(1). The type of governing body (e.g., corporation, limited liability corporation, trust or unincorporated body) will dictate which individuals are authorized to sign the AUL. The master deed and by-laws (on record at the relevant Registry of Deeds or on file at the Land Court), should be reviewed to determine the type of governing body and also to identify any limitations on the governing body's statutory authority to act independently on behalf of the unit owners (e.g., the master deed and by-laws may require a vote of the unit owners).

There are two scenarios where individual unit holders are required to sign the AUL. If no document exists on record establishing a governing body, then all the unit owners must sign the AUL. In addition, if the area subject to the AUL affects both the common areas and one or more condominium units, then each individual affected unit owner(s) must sign a separate AUL for their unit.

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 should make reference to the Book and Page where the Declaration of Trust is recorded.

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/corpweb/corpsearch/CorpSearch.aspx>).

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>).

If the Declaration of Trust, or a certificate conforming to the requirements of M.G.L. c. 203, §2 is not recorded, 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.

State Agencies. The department head, typically the Commissioner or their designee, is authorized to sign on behalf of the agency.

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 them to do so. The power of attorney must be recorded with the AUL.

APPENDIX E: CONDOMINIUMS

AULS AND CONDOMINIUMS

To establish an AUL, the owner of the subject property must sign the AUL before recording it at the appropriate registry of deeds or filing it at the appropriate land records office. When ownership is legally complex, such as when the property owner is a legal entity other than an individual, or when multiple persons own different portions of the property, it may not be readily apparent who must sign the AUL. This note examines how ownership of land subject to the Condominium Act, Chapter 183A of Massachusetts General Laws, impacts the establishment and management of an AUL.

1. What is different about condominium ownership? There are important differences between the rights a buyer typically acquires in a purchase of property not subject to the Condominium Act and of property subject to the Act. A buyer of a detached, single family dwelling typically acquires sole ownership of the building and the underlying parcel of land, subject only to a mortgage if financing was obtained, and to other prior interests in the land. Someone who buys a condominium, however, acquires different ownership interests.

a. The nature of condominium ownership. In a condominium unit purchase, the buyer usually acquires sole ownership of the condominium unit, but does *not* typically acquire sole ownership of other elements of the building containing the condominium unit nor of the underlying parcel of land. Instead, the buyer usually acquires an undivided share along with other unit owners in portions of the condominium building that are not part of individual condominium units and in the underlying parcel of land and other portions of the property. It is important to understand the nature of these ownership interests in order to properly establish an AUL. A condominium is created by declaring in a recordable document— typically referred to as the master deed— that a parcel of land is subject to the Condominium Act. The master deed establishes the ownership interests in the property, consistent with the Condominium Act, and includes other required provisions. For example, a master deed typically establishes the number of condominium units, defines what constitutes an individual unit (*e.g.*, from the unit walls inward), establishes that each unit owner fully owns a unit (*e.g.*, owns the unit in “fee simple”), and establishes that each unit owner also owns an undivided share in other areas of the condominium facilities (*e.g.*, parking lots, roadways, hallways, stairways, elevators, HVAC systems, roofs, etc.) and in land, in common with all of the other unit owners (*i.e.*, “the common areas and facilities;” also referred to below as “the common elements”). The percentage interest of each condominium unit owner’s undivided share is also established in the master deed, often in proportion to the fair market value of the owner’s condominium unit relative to that of the other owners’ condominium units, as such percentages are set forth in the master deed. *See* MGL c. 183A, § 5(a). Expenses for operating and maintaining the common elements and contributions to a reserve fund for future capital expenditures are shared among the unit owners in proportion to their percentage interests, as well.

b. Condominium governance. A condominium also requires a recorded instrument, usually including by-laws, establishing the form of management and governance of the condominium— a corporation, limited liability corporation, trust or unincorporated association (*i.e.*, the

governing body). For example, the instrument may take the form of a Declaration of Trust and may establish governance of a unit owners' association by an elected board of trustees. A condominium consisting of many units may not only be governed by a unit owners' association run by a board of trustees, for example, but the unit owners' association may also employ a property manager to assist the board in implementing its duties. Some condominiums may also employ a building superintendent to take care of day-to-day operations. A condominium consisting of only a few units may be unincorporated and self-run (*i.e.*, run by the unit owners). Under the Condominium Act, the governing body has the authority to lease, manage, and otherwise deal with the common areas and facilities described in the master deed. *See* MGL c. 183A, § 10(b)(1). The master deed and by-laws (on record at the relevant Registry of Deeds or on file at the Land Court), however, should always be consulted to ascertain whether they impose any limitations on the statutory authority of the governing body that could impair its independent ability to establish an AUL. (*E.g.*, this could be an issue if, for example, a master deed and by-laws were to require a vote of the unit owners, notwithstanding the statutory authority of the governing body to otherwise act independently.) In such cases, applicable requirements of the master deed and by-laws should also be considered and addressed, as appropriate.

2. How do AUL requirements apply to condominiums? Both the unique ownership structure under the Condominium Act and the powers of a condominium's governing body must be considered in establishing an AUL on land subject to the Condominium Act.

a. Who should sign the notice of activity and use limitation?

i. When the area subject to an AUL is all or part of the common elements. In cases where the property subject to the notice consists *only* of common elements (*i.e.*, does not include any individual units), the governing body of the unit owners' association should sign the notice. This is because the act of establishing an AUL is inherent in the governing body's rights and obligations under the Condominium Act. (Individual unit owners do not need to sign an AUL that only affects common elements because the governing body would be acting on their behalf.) Depending on whether the governing body is a corporation, limited liability corporation, a trust or an unincorporated body, either the appropriate officers, the manager, the trustees or the unit owners individually would need to sign the notice. (The type of governing body will be specified in the condominium documents.)

Because common elements, as discussed above, are typically comprised of the land or building areas that are not individual condominium units, typical vapor intrusion mitigation systems are installed in or on these common elements. Similarly, contaminated soil remedies may incorporate a layer of clean fill (*e.g.*, over lawns, gardens and other vegetative cover), asphalt cover (*e.g.*, for parking areas and roadways), and building foundations as a protective barrier. In this example, as well, the land or building areas where the barriers are situated are often part of the common elements.

ii. When the area subject to an AUL includes one or more condominium units. Occasionally, however, all or part of one or more individual units will be subject to an AUL (*i.e.*, the notice will

contain a requirement or restriction affecting all or part of a unit in addition to a common element). In those situations, in addition to the governing body signing an AUL for the land or building area which is part of the common elements, the owner of each such affected unit would need to sign a separate notice for that unit.

Practice Tips:

#1. The design of remedial actions to address releases of OHM at condominiums will determine whether an AUL is needed just for the common areas, for one or more individual condominium units, or for both. Where possible, PRPs may wish to consider implementing sufficient OHM removal and other remedial design elements that limit the need for notices to just the common areas, in order to avoid having individual condominium unit owners also record notices directly affecting their units.

#2. It is recommended that the governing body's notice also identify and include a reference to each such unit owner's related notice.

b. Who should be notified of the notice of activity and use limitation, in advance of recording? The MCP requires certain advance written notification to record interest holders in the area subject to a proposed notice of activity and use limitation. This includes, without limitation, notice to owners, lessees, tenants, mortgagees, and holders of easements or licenses. If the area subject to an AUL is limited to an area which is part of the common elements, then in general this means that the governing body must notify all unit owners (in addition to any other interest holders). This is because each unit owner holds an undivided interest in the common elements and thus would be considered a record interest holder. See 310 CMR 40.1074(1)(d).

Practice Tip:

#3. Some condominiums may be managed by an unincorporated association of unit owners, as opposed a formally established trust, limited liability corporation or other legal entity. In such cases, each individual unit owner would need to sign the notice in order to establish it. Therefore, no additional notice would be required to such owners (as holders of an undivided interest in the common areas) pursuant to 310 CMR 40.1070.

c. Which instruments of transfer need to include a reference to the notice of activity and use limitation? For any property subject to an AUL of activity and use limitation, the MCP requires that the notice be incorporated in full or by reference in any instrument transferring an interest in or a right to use that property or a portion of that property—including all deeds, easements, mortgages, leases, licenses and occupancy agreements. See 310 CMR 40.1074(5). For condominiums, this means that even if an individual condominium unit situated outside of the

area subject to the notice, for example, is being sold, the new deed must nonetheless reference the notice or include it as an attachment. This is because the unit owner's undivided interest in the common elements—which *is* subject to the notice—is also being transferred. Likewise, if an individual condominium unit being sold includes an area within that unit subject to an AUL, then the unit owner would also be required to incorporate the notice either by reference in or as an attachment to the unit deed. See 310 CMR 40.1074(5).

APPENDIX F: PUBLIC NOTICE OF AN ACTIVITY AND USE LIMITATIONS⁶

⁶ See *Instructions for MCP-related Public Notices (Newspaper Notices)* on MassDEP's webpage to obtain current templates of public notice forms at <https://www.mass.gov/doc/instructions-for-newspaper-public-notices-of-response-action-status/download>.

**[NOTICE OF 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]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** on the disposal site, pursuant to 310 CMR 40.1070 through 40.1080.

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

[List inconsistent/restricted activities and uses]

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

The **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** and the disposal site file can be viewed at MassDEP website using Release Tracking Number (RTN) **[RTN]** at <https://eeaonline.eea.state.ma.us/portal#!/search/wastesiteor> at **[MassDEP, REGIONAL OFFICE ADDRESS, TELEPHONE NUMBER]**.

NOTICE OF [AMENDMENT, RELEASE OR TERMINATION] OF ACTIVITY AND USE LIMITATION

**[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 AMENDMENT, RELEASE OR TERMINATION]** [recorded with the _____ County Registry of Deeds *and/or* registered with the Land Registration Office of the _____ Registry District] an **[AMENDMENT, RELEASE OR TERMINATION]** of a **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** on the disposal site, pursuant to 310 CMR 40.1080 through 40.1084. The **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** was originally recorded and/or registered on **[DATE]**.

The **AMENDMENT** **[this paragraph is only applicable if an amendment is involved]** to the **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** is as follows:

[Listed the amended information]

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

The **[AMENDED, RELEASED OR TERMINATED]** **[GRANT OF ENVIRONMENTAL RESTRICTION OR NOTICE OF ACTIVITY AND USE LIMITATION]** and the disposal site file can be viewed at MassDEP website using Release Tracking Number (RTN) **[RTN]** at <https://eeonline.eea.state.ma.us/portal#!/search/wastesiteor> at **[MassDEP, REGIONAL OFFICE ADDRESS, TELEPHONE NUMBER]**.

**APPENDIX G: MASSACHUSETTS DEED INDEXING STANDARDS -REQUIREMENTS
FOR SURVEY PLANS**

REQUIREMENTS FOR SURVEY PLANS

No plan shall be recorded unless it complies with the following regulations:

1. **Size of Plan.** Plan sizes shall be a minimum of eight and one-half inches by eleven inches (8 1/2" x 11") and a maximum of twenty-four inches by thirty-six inches (24" x 36").
2. **Plan Material.** Plans being presented for recording shall be on linen or polyester film ("mylar"), single matte with a thickness of 3 mils (i.e., .003 inches), and must have an opacity so as to allow consistent computer scanning and Diazo and microfilm reproduction.
3. **Type of Ink.** 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. **Plan Reproductions.** 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. **Borders.** Each plan shall have three quarter inch (3/4") borders.
6. **Size of Letters.** The minimum letter size on plans presented for recording shall be one-eighth (1/8") if free-hand lettering is used and one-tenth inch (1/10") if lettering guides are used.
7. **Graphic Scale.** Each plan presented for recording shall include a graphic scale.
8. **Recitations or Certifications.** Each plan shall have an area reserved to receive planning board recitation or contain a surveyors certification as per Chapter 380, Acts of 1966 (MGL c.41, s.81x).
9. **"Registry Square."** Each sheet of each plan shall have a three and one-half (3 1/2") square
10. **Certification Clause.** Each plan must contain a certification clause signed by the person preparing the plan stating that he has conformed with the rules and regulations of the Registers of Deeds in preparing the plan.
11. **No Tape or Raised Print.** No tape adhesion or the like shall be placed on any plan presented for recording or registration. Plans presented for recording.

Massachusetts Registers and Assistant Registers of Deeds Association, Deed Indexing Standards 2018 (January 1, 2018), Section 20-5.

APPENDIX H: MASSACHUSETTS DEED INDEXING STANDARDS -DOCUMENT FORMATTING STANDARDS

DOCUMENT FORMATTING STANDARDS

All documents presented for recording must meet the following formatting standards, promulgated pursuant to MGL c.36, s.12A (“A register of deeds may refuse to accept an instrument for recording if it cannot be properly duplicated or a proper record cannot be made thereof.”). :

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 sufficient blank space to permit the registry of deeds to affix standard recording information to the document without obscuring any information contained in the document.
8. Each register of deeds retains the discretion to record documents that do not fully comply with these formatting standards provided that the record created by the registry is legible and retrievable on standard registry computer systems.

Massachusetts Registers and Assistant Registers of Deeds Association, Deed Indexing Standards 2018 (January 1, 2018), Section 16-1 .

APPENDIX I: LIST OF AUL-RELATED FORMS

LIST OF AUL-RELATED FORMS

BWSC Transmittal Forms:

- BWSC113: Activity and Use Limitation (AUL) Transmittal Form
- BWSC126: Miscellaneous (may be used to submit survey plans or copies of public notices)
Transmittal Form for Permit Application and Payment (For Grants only)

MCP Forms for Activity and Use Limitations (310 CMR 40.1099)

- 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 J: AUL COMPLIANCE ASSISTANCE CHECKLIST

AUL COMPLIANCE ASSISTANCE CHECKLIST

Notice of Activity and Use Limitation — Form 1075

This checklist is intended to assist parties in preparing and implementing a Notice of Activity and Use Limitation (AUL) using Form 1075. It is intended solely as guidance and is not a substitute for the regulations; parties should carefully consult 310 CMR 40.0000 (the MCP) for AUL-specific requirements.

Refer to Appendix C for paragraph numbers.

REQUIREMENT	Circle one			MCP Reference(s)	Notes
1. Is the current version of the Form 1075 being used (effective 3/1/2024)?	Y	N		40.1074(1)(a)	
2. Is the Form's boilerplate unaltered, except where alterations are allowed through bracketed language?	Y	N		40.1074(1)(a)	
3. Is the Disposal Site name (if applicable) identified in the Header of Form 1075?	Y	N	Not Applicable	40.1074(2)(d)	
4. Is the Release Tracking Number(s) identified in the Header of Form 1075?	Y	N		40.1074(2)(d)	
5. Does the Form identify, in Paragraph 1, the date on which the property owner(s) signed the AUL?	Y	N		Form 1075	
6. Is (are) the name(s) of the property owner(s) identified, in the following locations? ___ Paragraph 1 ___ Paragraph 2 ___ Paragraph 18 (this paragraph may reference the property owner or an authorized representative)	Y	N		40.1074(2)(b) Form 1075	
7. Is (are) the name(s) of property owner(s) consistent in all locations?	Y	N		Form 1075	
8. Is (are) the address(es) of the property owner(s) identified in Paragraph 1?	Y	N		Form 1075	
9. Does the Form indicate, through use of bracketed language in Paragraph 2, whether land is vacant or improved?	Y	N		Form 1075	
10. Is the address of the Property subject to the AUL identified (Street Address, City/Town & County) in Paragraph 2?	Y	N		40.1074(2)(a)1	
11. 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	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
12. In Paragraph 3, is reference made to a survey plan of the Property? (Indicate the form of reference below) <input type="checkbox"/> Registry of Deeds, Plan Book & Plan Number (if Property is recorded land) <input type="checkbox"/> Land Court Plan Number (if Property is registered land)	Y	N		40.1074(2)(a)3	
13. Is it clear that the AUL applies to the entire Property, or only to a Portion of the Property? <input type="checkbox"/> Entire Property <input type="checkbox"/> Portion of the Property	Y	N		40.1074(2)(a)4	
14. If AUL applies to only a Portion of the Property, is optional Paragraph 4 properly included?	Y	N		Form 1075	
14A. If yes, is a reference to the Book and Page (recorded land) included?	Y	N	Not Applicable (registered land)	40.1074(2)(a)4.b	
15. 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)? <input type="checkbox"/> Paragraph 5 (twice) <input type="checkbox"/> Paragraph 6 <input type="checkbox"/> Paragraph 8 <input type="checkbox"/> Paragraph 9 <input type="checkbox"/> Paragraph 10 <input type="checkbox"/> Paragraph 11 <input type="checkbox"/> Paragraph 13	Y	N		Form 1075	
16. Is bracketed language indicating Property or Portion of Property consistent in all locations?	Y	N		Form 1075	
17. 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	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
18. 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? ___ Paragraph 5 ___ Paragraph 6	Y	N		Form 1075	
19. Is bracketed language indicating entire Disposal Site/Portion of Disposal Site consistent in all locations?	Y	N		Form 1075	
20. 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.	
21. 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 9 ___ Paragraph 10 ___ Paragraph 11 ___ Paragraph 12 ___ Paragraph 19	Y	N		40.1074(2)(e) Form 1075	
22. Is language indicating NSR or NSH consistent in all locations?	Y	N		Form 1075	
23. In Paragraph 8, does the Form include a description of consistent activities and uses?	Y	N		40.1074(2)(h)	
23A. If yes, is the description of consistent activities and uses written in a clear and understandable manner?	Y	N		40.1074(2)(h)	
24. In Paragraph 9, does the Form include a description of inconsistent activities and uses?	Y	N		40.1074(2)(i)	
25A. If yes, is the description of inconsistent activities and uses written in a clear and understandable manner?	Y	N		40.1074(2)(i)	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
25. 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	40.0932(5)(d)1.c	
26. In Paragraph 10, does the Form include a description of obligations and conditions?	Y	N		40.1074(2)(j)	
27A. If yes, is the description of obligations and conditions written in a clear and understandable manner?	Y	N	Not Applicable	40.1074(2)(j)	
27. Are the descriptions of consistent (permitted) activities and uses, inconsistent activities and uses, and obligations and conditions consistent with each other?	Y	N		40.1074(2)(h, l, j)	
28. Is the Form signed by the property owner(s) in Paragraph 17?	Y	N		40.1074(2)(m)	
29. Is (are) the property owner(s)'s signature authorized and binding? (Check one of the options below) <input type="checkbox"/> Sole ownership: signed by sole owner <input type="checkbox"/> Joint ownership: signed by all owners <input type="checkbox"/> Trust: Signed in accordance with requirements established by the trust document <input type="checkbox"/> Corporation: Certificate of incumbency AND (Check one) <input type="checkbox"/> Signed by President and Treasurer <input type="checkbox"/> Signed by President and Assistant Treasurer <input type="checkbox"/> Signed by Vice President and Treasurer <input type="checkbox"/> Signed by Vice President and Assistant Treasurer <input type="checkbox"/> Signed by other person(s) authorized by vote of the Board of Directors, with vote authorizing said officer(s) attached to Form <input type="checkbox"/> Limited Partnership: signed by General Partner or person authorized by LP agreement <input type="checkbox"/> Limited Liability Company: signed by manager or member authorized in Certificate of Organization to sign real estate documents <input type="checkbox"/> Limited Liability Partnership: signed by person authorized in partnership agreement registration to sign real estate documents <input type="checkbox"/> Other (explain): _____ _____	Y	N		40.1074(2)(m) Form 1075	
30. Is (are) the property owner(s)'s signature dated in Paragraph 17?	Y	N		Form 1075	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
31. Is (are) the property owner(s)'s signature(s) properly notarized (i.e., are each of the following requirements met) in Paragraph 18? <input type="checkbox"/> All signatures are notarized <input type="checkbox"/> State and county of notary are identified <input type="checkbox"/> Property owner(s) is/are named in notary block <input type="checkbox"/> Notary signature is present <input type="checkbox"/> Notary signature is dated <input type="checkbox"/> Notary seal or stamp is included (required for out-of-state notary; not required for Massachusetts notary)	Y	N		40.1074(2)(m)	
32. Is the Form signed by an LSP in Paragraph 19?	Y	N		40.1074(2)(m)	
33. Is the LSP's signature dated in Paragraph 19?	Y	N		40.0015(1)	
34. Is LSP's signature sealed with LSP stamp?	Y	N		40.1074(2)(m)	
35. Is the LSP's signature properly notarized (i.e., are each of the following requirements met) in Paragraph 20? <input type="checkbox"/> State and county of notary are identified <input type="checkbox"/> LSP is named in notary block <input type="checkbox"/> Notary signature is present <input type="checkbox"/> Notary signature is dated <input type="checkbox"/> Notary seal or stamp is included (required for out-of-state notary; not required for Massachusetts notary)	Y	N		40.1074(2)(m) Form 1075	
CONFIRMATORY AUL LANGUAGE					
36. Is the AUL a Confirmatory Notice of Activity and Use Limitation?	Y	N	Not Applicable	40.1085(1)	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
37. 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? ___ Header ___ Paragraph 1 ___ Paragraph 15 ___ Paragraph 19	Y	N	Not Applicable	Form 1075	
38. Is optional Paragraph 16 appropriately included to indicate the AUL is a Confirmatory Notice of Activity and Use Limitation?	Y	N	Not Applicable	40.1085(4)(a) Form 1075	
39. Does Paragraph 16 identify the date, Registry, book and page number of the original AUL?	Y	N	Not Applicable	Form 1075	
40. Are the errors in the original AUL listed in Paragraph 16?	Y	N	Not Applicable	Form 1075	
41. Are the Confirmatory Exhibits accurately attached to the Confirmatory AUL? (For example, documentation of signatory authority attached as Exhibit D)	Y	N	Not Applicable	Form 1075	
REQUIRED ATTACHMENTS TO FORM 1075					
EXHIBITS A, A-1, A-2 – Legal Descriptions of Property, Survey Plans					
42. 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): ___ Running (metes & bounds) description (if Property is recorded land) ___ Bounding description (if Property is registered land)	Y	N		40.1074(2)(a)2.	
43. If only a Portion of the Property is subject to the AUL, is a legal description of that Portion (running for recorded land and bounding for registered land) attached as Exhibit A-1? (Applies to either/both recorded and registered land)	Y	N	Not Applicable (entire Property subject to AUL)	40.1074(2)(a)4.	

REQUIREMENT	Circle one		MCP Reference(s)	Notes	
44. 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 recorded)	40.1074(2)(a)4.a	
45. 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 recorded)	Form 1075	
EXHIBIT B – Sketch Plan					
46. Is a sketch plan attached as Exhibit B?	Y	N		40.1074(2)(a)5.	
47. 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.	
48. Is the sketch plan consistent with the Form (e.g. if the Form indicates that only a Portion of the Property is subject to the AUL, does the sketch plan conform)?	Y	N		Form 1075	
EXHIBIT C – Narrative Description					
49. Is a Narrative Description of the basis for the AUL attached as Exhibit C?	Y	N		40.1074(2)(e-g)	
50. Does Narrative Description specify why AUL is appropriate to achieve and/or maintain a condition of No Significant Risk or No Substantial Hazard?	Y	N		40.1074(2)(e)	
51. Does Narrative Description contain a concise summary of the release events?	Y	N		40.1075(2)(f)	
52. Does Narrative Description identify the: (Check all that apply) _____ contaminated media (soil/groundwater/indoor air/surface water/sediment) _____ OHM (chlorinated solvents, VOCs, petroleum hydrocarbon, metals, etc.) _____ vertical and horizontal extent of contamination?	Y	N		40.1075(2)(g)	

REQUIREMENT	Circle one		MCP Reference(s)	Notes	
EXHIBIT D – SIGNATORY AUTHORITY					
53. If the person signing the AUL is not an individual signing on their own behalf, is there documentation of the person’s signatory authority attached as an exhibit to the AUL? (See AUL Guidance Section 4.9 and Appendix D)	Y	N	Not Applicable (individual(s) signing on their own behalf)	40.1074(2)(c)	
CONSISTENCY OF FORMS & ATTACHMENTS					
54. If the land is recorded, 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)	Form 1075	
55. 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 recorded land)	Form 1075	
56. If land is recorded 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)	Form 1075	
PUBLIC NOTICE REQUIREMENTS					
57. Was a copy of the Form forwarded to each of the local officials listed below within 30 days of being recorded or registered? <input type="checkbox"/> Chief Municipal Officer <input type="checkbox"/> Board of Health <input type="checkbox"/> Zoning Official <input type="checkbox"/> Building Code Enforcement Official	Y	N		40.1403(7)(a) BWSC113	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
58. Was a notice of the AUL published in a local newspaper within 30 days of the AUL being recorded or registered, identifying the following? <input type="checkbox"/> The name, complete address, and RTN of the Disposal Site <input type="checkbox"/> The type of Activity and Use Limitation (i.e., Notice of AUL) <input type="checkbox"/> Information about where the AUL and site file can be reviewed <input type="checkbox"/> The name, address and phone number of the person(s) recording the AUL	Y	N		40.1403(7)(b) BWSC113 Form	
BWSC113 TRANSMITTAL FORM					
59. Is the following information about the Disposal Site included? <input type="checkbox"/> Release Tracking Number <input type="checkbox"/> Disposal Site name (if applicable) <input type="checkbox"/> Disposal Site address	Y	N		BWSC113 Form	
60. Is the address of the Property subject to AUL identified, if different from the address of the Disposal Site?	Y	N	Not Applicable (addresses of Property and Disposal Site are the same)	BWSC113 Form	
61. Is a box checked to indicate what type of AUL document is being submitted?	Y	N		BWSC113 Form	
63. 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 (recorded land only, when Book and Page Number not yet assigned) <input type="checkbox"/> Book and Page Number (recorded land only) <input type="checkbox"/> Land Court Document Number (registered land only)	Y	N		BWSC113 Form	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
64. Is the following information about the person/entity submitting the BWSC113 Form included? ___ Name of person/ entity ___ Contact person (if BWSC113 is submitted by an entity) ___ Address ___ Telephone number ___ Fax number (if applicable)	Y	N		BWSC113 Form	
65. Is the following information about the property owner(s) included, if property owner is different from person/entity submitting BWSC113 Form? ___ Name(s) ___ Addresses(s) ___ Telephone number(s) ___ Fax number(s) (if applicable)	Y	N	Not Applicable (BWSC113 Form submitted by property owner(s))	BWSC113 Form	
66. Is a box checked indicating the relationship of the person submitting BWSC113 Form to the Disposal Site?	Y	N		BWSC113 Form	
67. Is the BWSC113 Form signed, dated and certified by person submitting the Form?	Y	N		BWSC113 Form	
68. Is the signature dated on or after (not before) the date the AUL was recorded or registered?	Y	N		BWSC113 Form	
69. Is the following information about the person providing certification included, if not already provided earlier in the BWSC113 Form? ___ Name ___ Addresses ___ Telephone number ___ Fax number (if applicable)	Y	N	Not Applicable (information already provided)	BWSC113 Form	
70. 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)(e)1 BWSC113 Form	

REQUIREMENT	Circle one			MCP Reference(s)	Notes
	Y	N			
71. 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)(e)2. BWSC113 Form	
72. 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 OHM 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)(d)	
SUBMITTAL OF AUL DOCUMENTATION TO MassDEP					
73. Was the AUL recorded and/or registered at the Registry of Deeds?	Y	N		40.1074(3)	
74. Within 30 days of recording and/or registering the AUL, was a Registry copy of the AUL with proof of recording/registration sent to MassDEP? Check the applicable option below that represents proof or recording/registration: <input type="checkbox"/> AUL marked with a Registry stamp indicating an Instrument Number (if Property is recorded land and Book and Page Number have not yet been assigned) <input type="checkbox"/> AUL marked with a Registry stamp indicating a Book and Page Number (if Property is recorded land and Book and Page Number have been assigned) <input type="checkbox"/> AUL marked with a Land Registration stamp indicating a Land Registration Document Number (if Property is registered land)	Y	N		40.1074(4)(a)	
75. 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?	Y	N		40.1074(4)(b)	

APPENDIX K: 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 and 40.1072. 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.

J.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 Grant 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 Grant (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 Grant 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 Grant 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 Grant 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 Grant in relation to the disposal site boundaries, which is attached to the Grant 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 Grant. 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;
- Sixth “WHEREAS” Clause – refers to documentation that is required, pursuant to 310 CMR 40.1071(2)(c) verifying that the individual signing the Grant has authority to do so. Such documentation, when applicable should be attached as Exhibit D;
- 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 their term of ownership, yet makes no representation as to the state of title that preceded their 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 Grant. 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 6.2, “Changes in Site Activities and/or Uses or Other Site Conditions after a Permanent or Temporary Solution Statement with an Activity and Use Limitation has been Submitted”);

“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 Grant and conducting assessment activities;

“6. Severability” provides that if any provision of the Grant is later found to be invalid by a court or tribunal, the remaining provisions of the Grant 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 Grant;

“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 their 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 Grant has been recorded or registered must either include a copy of the Grant or reference the Grant (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 Grant, 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 Grant has been implemented and the procedures for amending or releasing an Grant;

“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 guidance 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 Grant;

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

Exhibit A-2 (*only needed when the Grant 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 D —documentation of signatory authority is required if the individual signing the Grant is signing on behalf of an entity, or in some other capacity, rather than signing in their own capacity.

A Registry-certified copy of the Grant must be submitted to MassDEP using BWSC113 transmittal form. MassDEP must also be provided with a Registry copy of all survey plans referenced in the Grant.

J.2 Subordination Agreements

The property owner must obtain subordination agreements from: (a) any holders of a prior interest in the Restricted Area, and (b) any holders of a prior interest in the Property insofar as such interests in the Property affects those interests created under the Grant, as set forth in 310 CMR 40.1071(4). In a subordination agreement, the holder of a prior interest acknowledges and agrees that their 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.

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 interest holders in the parcel whose activities could be affected by the Grant (e.g., a utility easement on the larger parcel but not in the area subject to the Grant may allow utility workers to move equipment over the area subject to the Grant 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.

J.3 Filing a Grant Application

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

1. a Transmittal Form for Permit Application and Payment (permit code WSC40); and
2. an Activity and Use Limitation (AUL) Transmittal Form BWSC113.

It is important to obtain and submit as part of your Grant package the Transmittal Form for Permit Application and Payment in order to ensure proper crediting of your permit application fee. The Transmittal Form and instructions for completing may be found at: <https://www.mass.gov/service-details/transmittal-form-number-for-massdep-permit-application-payment>

J.3.1 Grant Application Requirements

A complete Grant Application must be submitted to MassDEP using transmittal form BWSC113. 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 MassDEP 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 Permit Application and Payment," (available from MassDEP offices). The permit code for this transmittal form is WSC40. See Section J.5, below.

J.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. The review performed by MassDEP has two steps (see MassDEP's Timely Action Schedule and Fee Provisions, 310 CMR 4.04(10)),

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. (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. (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.

J.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 \$1,290 [see 310 CMR 4.10(10)(g) to confirm the current fee]. A permit applicant may apply for consolidated review of multiple 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)(g); 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. MassDEP'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 \$1,290, and cannot exceed \$6,000 [see 310 CMR 4.10(10)(g)].

J.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 MassDEP 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).

J.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. As of the publication date of this Guidance, the permit application fee for MassDEP's review of an Amendment of Environmental Restriction is **\$1,040**; and the permit application fee for a Release of Environmental Restriction is **\$795** [see 310 CMR 4.10(10)(h) and 310 CMR 4.10(1)(i) to confirm the current fee].

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)

J.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 attached to Form 1082A: a written legal description of the parcel (Exhibit A); and 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. 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 Permit Application and Payment and BWSC113.

J.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), and an AUL Opinion prepared by an LSP (Exhibit B) 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 Permit Application and Payment and BWSC113 must be used to submit the application to MassDEP.

**APPENDIX L: 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]