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Guidance for Persons Performing Response Actions at Massachusetts Contingency Plan Disposal Sites Who May be Generators of Hazardous Waste

Policy #WSC 26-_____

I. Introduction

This document ("Guidance") is intended to assist persons performing response actions at disposal sites (respectively, "Response Actions" and "Disposal Sites") regulated under Chapter 21E of the General Laws of Massachusetts ("Chapter 21E") and the Massachusetts Contingency Plan at 310 CMR 40.0000 ("MCP") in determining whether they are a generator of one or more hazardous wastes (respectively, "Generator" and "Hazardous Wastes") as defined in the Massachusetts hazardous waste regulations at 310 CMR 30.000 ("Massachusetts Hazardous Waste Regulations"). This Guidance also intends to introduce basic Hazardous Waste concepts to an "MCP audience."

MCP Response Actions frequently involve the excavation of contaminated soil and other media as well as the use and disposal of filters, canisters and other products used in Disposal Site cleanup. These materials are sometimes, but not always, Hazardous Waste under the Massachusetts Hazardous Waste Regulations that require special handling. To address areas of potential confusion, this Guidance focuses on how to recognize the difference between waste that is a Hazardous Waste and waste that is not Hazardous Waste, and in particular how appropriately to deploy "due diligence" in recognizing "listed" Hazardous Waste.

II. Intersection of Two Related but Distinct Regulatory Schemes and the Use of Defined Terms

Knowing when Hazardous Wastes are generated while performing MCP Response Actions at Disposal Sites requires an understanding of both the MCP and the Massachusetts Hazardous Waste Regulations. These two regulatory schemes address, in part, similar matters, cross-reference each other, and use similar, and sometimes identical, regulatory terms. To facilitate clarity, this Guidance will, as much as possible, state explicitly whether a defined term is drawn from the MCP or the Massachusetts Hazardous Waste Regulations. If a capitalized term is used without definition, it has, for the purposes of this Guidance, the definition given to it in Chapter 21E and the MCP.

III. Basic Hazardous Waste Concepts Relevant to Persons Performing Response Actions at Disposal Sites

a) Wastes at MCP Disposal Sites

The term "Waste" is broadly defined in the Massachusetts Hazardous Waste Regulations as any discarded material. 310 CMR 30.010 (definition of "Waste"). Waste includes any material that is accumulated, stored or treated before, or in lieu of, being disposed of, burned or incinerated. *Id*. At a Disposal Site, Waste may include excavated, contaminated soil and other contaminated media, as well as spent canisters and filters used in connection with Response Actions. It is normal and expected that Wastes will result from the performance of MCP Response Actions.

b) Some Wastes at Disposal Sites are Hazardous Wastes; Introduction to Different Kinds of Hazardous Waste

Some but not all Waste is Hazardous Waste. Waste is Hazardous Waste either because it exhibits the **characteristics** of Hazardous Waste or because it is a **listed** Hazardous Waste. *See* 310 CMR 30.100: *Identification and Listing of Hazardous Waste*.

Characteristic Hazardous Wastes are discussed further below. Whether a Waste is a listed Hazardous Waste may depend on the **source** of the Waste and whether the Waste has been **used**.

> Example. A container of unused methyl ethyl ketone is likely not a listed Hazardous Waste.
>
> Example. Oil contaminated with a spent, non-halogenated solvent containing methyl ethyl ketone is likely a listed Hazardous Waste.

Under the "mixture rule," soil mixed with a listed Hazardous Waste is also a Hazardous Waste. 310 CMR 30.102(2)(c).

This Guidance discusses different kinds of Hazardous Waste further below.

c) Persons Engaging in Certain "Acts or Processes" Involving Hazardous Waste at Disposal Sites may be "Generators" of Hazardous Waste

A person performing MCP Response Actions at a Disposal Site may be a **Generator** of Hazardous Waste if that person's "act or process produces" the Hazardous Waste or if that person's act "first causes" a Hazardous Waste to become subject to the Massachusetts Hazardous Waste Regulations. *See* 310 CMR 30.010 (definition of "Generator"). Being a "Generator" of a Hazardous Waste is generally the initial, principal trigger to becoming subject to the Massachusetts Hazardous Waste Regulations for a person performing Response Actions at a Disposal Site.

Probably the most common "act" or "process" at a Disposal Site that constitutes generation is the excavation of contaminated soils or sediments that are Hazardous Waste *that are not properly consolidated at the Disposal Site*. These acts or processes may also include Response Actions that result in the production of used or spent carbon canisters and filters and other contaminated media. The person performing Response Actions who performs these acts or conducts these processes may be a Generator of Hazardous Waste.

> Example. A person performing Response Actions who places excavated soil constituting Hazardous Waste in a container is likely a Generator of Hazardous Waste.
>
> Example. A person performing Response Actions who places pumped or treated groundwater constituting Hazardous Waste in a tank is likely a Generator of Hazardous Waste.
>
> Example. A person performing Response Actions who properly consolidates soil constituting Hazardous Waste within a Disposal Site, consistent with the requirements of the MCP and the Hazardous Waste Regulations, is not a Generator of Hazardous Waste as a result of such consolidation. Such consolidation may include, as a temporary step, the placement of excavated soil constituting Hazardous Waste on a tarp directly next to an area of contamination.

See 310 CMR 40.0031(3)-(5) and 310 CMR 30.801(11) for additional information regarding the movement of materials within a Disposal Site.

d) To Ensure Compliance with the Massachusetts Hazardous Waste Regulations, a Person Performing Response Actions at a Disposal Site Must Determine Whether that Person is a Generator of Hazardous Waste.

Any person who generates a Waste must determine whether that person is a Generator of Hazardous Waste. 310 CMR 30.302. This applies to persons performing Response Actions at Disposal Sites: if such person generates Waste, that person must determine if they are a Generator of Hazardous Waste.

e) Once a Person Performing Response Actions at a Disposal Site Determines he or she is a Generator of Hazardous Waste, That Person Must Determine What Other Requirements Apply.

If a person performing Response Actions is a Generator of Hazardous Waste, that person must determine what the Massachusetts Hazardous Waste Regulations require with respect to such Hazardous Waste. If such person is not a Generator of Hazardous Waste, that person may proceed with managing any Waste (including Remediation Waste and Containerized Waste[1] that are not also Hazardous Waste) in accordance with the relevant provisions of the MCP, the Massachusetts solid waste regulations at 310 CMR 16.00 and 310 CMR 19.00, and other applicable law.

A full discussion of the requirements of the Massachusetts Hazardous Waste Regulations as they apply to Generators of Hazardous Waste is beyond the scope of this Guidance. However, as a general matter, a Generator of a Hazardous Waste who offers Hazardous Waste for transportation for the purpose of off-site treatment or storage must usually prepare a **manifest**, as that term is used in the Massachusetts Hazardous Waste Regulations ("Hazardous Waste Manifest"). 310 CMR 30.311(1). A Hazardous Waste Manifest is the shipping document EPA FORM 8700-22 and, if necessary, 8700-22A, originated and signed in accordance with federal hazardous waste regulations at 40 CFR Part 262. Further information regarding the use of Hazardous Waste Manifests in Massachusetts is contained in 310 CMR 30.300 and 310 CMR 30.400.

An exception to the requirement to use a Hazardous Waste Manifest when transporting Hazardous Waste applies to Remediation Waste, Remedial Wastewater, Soil and Sediment that is a Hazardous Waste solely because it contains waste oil (as that term is used in the Massachusetts Hazardous Waste Regulations, "Waste Oil"). 310 CMR 30.252(2). Such soil may be transported from the Disposal Site using a Bill of Lading, as described below. 310 CMR 40.0032(2).

[1] "Remediation Waste" and "Containerized Waste" are MCP terms. Some Remediation Waste and Containerized Waste are Hazardous Waste, some are not.

Waste, including Remediation Waste and Containerized Waste, that is produced at a MCP Disposal Site that is *not* Hazardous Waste does not require a Hazardous Waste Manifest. Such materials may instead be transported from the Disposal Site using a MCP form BWSC112: *Bill of Lading* ("Bill of Lading") instead of a Hazardous Waste Manifest. 310 CMR 40.0032(2). *See also* 310 CMR 40.0034 and 310 CMR 40.0035. The Bill of Lading must contain assurances from both the person performing Response Actions and the Licensed Site Professional ("LSP")-of-Record for the relevant Disposal Site that the materials being transported under the Bill of Lading are appropriately transported.

f) Relationship between "Hazardous Waste," "Remediation Waste," and "Containerized Waste."

As noted above, "Waste" and "Hazardous Waste" are terms that are defined in the Massachusetts Hazardous Waste Regulations. Both Waste and Hazardous Waste may be generated by a person performing Response Actions at a Disposal Site, but not all Waste is Hazardous Waste. Also as noted above, Waste that is not Hazardous Waste does not require a Hazardous Waste Manifest but must be managed in accordance with applicable provisions of the MCP and other law. *See* 310 CMR 40.0030: *Management Procedures for Remediation Waste*. Although an analysis of these provisions of the MCP is beyond the scope of this Guidance, to avoid confusion it may be helpful to recall that the MCP contains numerous additional terms for various kinds of "waste." These include:

- **Remediation Waste.** This is an MCP concept encompassing Uncontainerized Waste, Contaminated Media and Contaminated Debris, in each case as those capitalized terms are defined in the MCP. Contaminated Media and Contaminated Debris can usually be recognized by containing oil or hazardous waste at levels or concentrations for which notification would be required at the Disposal Site at which the waste is produced. Uncontainerized Waste means discarded oil or hazardous materials (as opposed to oil or hazardous materials mixed with soil or debris) at a Disposal Site that is not contained in a drum, tank or other "fabricated container." *See* relevant definitions at 310 CMR 40.0006.

- **Containerized Waste.** Containerized Waste, like Uncontainerized Waste, is an MCP concept that refers to discarded oil or hazardous materials at a Disposal Site but, unlike Uncontainerized Waste, *is* contained in a fabricated container as provided for in the definition. *See* 310 CMR 40.0006 (definition of "Containerized Waste").

For the purposes of this Guidance, what is important to note is that just as some Waste is a Hazardous Waste and some is not, so too (a) some Remediation Waste is a Hazardous Waste and some is not and (b) some Containerized Waste is a Hazardous Waste and some is not. The consequences are the same: if Remediation Waste or Containerized Waste is a Hazardous Waste and is generated at a Disposal Site, it must be handled in accordance with the Massachusetts Hazardous Waste Regulations, unless the exceptions described above apply. If it is not, the person performing Response Actions must adhere to applicable provisions of the MCP and other law in transporting such waste, in particular, as to Remediation Waste, the above-referenced remediation waste provisions of the MCP at 310 CMR 30.0000.

IV. Identifying Hazardous Wastes at Disposal Sites

As noted above, a Waste is a Hazardous Waste if it exhibits any of the characteristics of hazardous waste in 310 CMR 30.120 through 30.125 ("Characteristic Hazardous Waste") or if it is listed in 310 CMR 30.131 through 310 CMR 30.136 ("Listed Hazardous Waste"). 310 CMR 30.102(2)(a) and (b).

a) How to Determine Whether a Waste is a Characteristic Hazardous Waste

Waste is a Characteristic Hazardous Waste if it exhibits the characteristics of ignitability, corrosivity, reactivity or toxicity. 310 CMR 30.120 through 310 CMR 30.125. In determining whether a Waste exhibits any of these characteristics, a person performing Response Actions must ensure that representative sampling and testing of the Waste occurs, as provided in 310 CMR 30.151 through 310 CMR 30.157. Some or all of this analysis may be conducted as part of MCP-required Immediate Response Actions, Phase II Comprehensive Response Actions or Release Abatement Measures. However, additional sampling and assessment of Waste produced at a Disposal Site may also be warranted to ensure that representative sampling has occurred and to determine whether the Waste is a Characteristic Hazardous Waste.

b) How to Determine Whether a Waste is a Listed Hazardous Waste – General Principles.

A Waste is a Listed Hazardous waste if it is listed in 310 CMR 30.131 through 30.136, unless it has been excluded pursuant to the petition process described in 310 CMR 30.142 or the "contained-in" determination process described in MassDEP's *2010 Technical Update:*

Considerations for Managing Contaminated Soil: RCRA Land Disposal Restrictions and Contained-In Determinations ("Contained-In Guidance"). (The contained-in process is not described further in this Answer.) 310 CMR 30.131 through 30.136 contains four "lists" of Hazardous Wastes. 310 CMR 30.130. The first list is a list of wastes typically associated with common manufacturing and industrial processes that occur in different sectors of industry ("F-Listed Wastes" or "Hazardous Wastes from Non-Specific Sources"). The second is a list of Hazardous Wastes produced by specific sectors of industry and manufacturing ("K-Listed Wastes" or "Hazardous Wastes from Specific Sources"). The third list ("U Listed Wastes") are generally discarded commercial chemical products, off-specification commercial chemical products, and spill residues of either. The fourth list ("P-Listed Wastes") are acutely hazardous wastes. 310 CMR 30.130 – 310 CMR 30.136. A substantial portion of Hazardous Wastes at Disposal Sites are U-Listed Wastes or P-Listed Wastes.

c) *How to Determine Whether a Waste is an F-Listed Hazardous Waste.*

The identification of an F-Listed Waste will typically depend on the general manufacturing and industrial process from which it originated and the specific constituents in the waste.

> Example. Specified "spent halogenated solvents used in degreasing," including tetrachloroethylene and trichloroethylene, are Hazardous Wastes with the EPA Hazardous Waste Number F001, and "spent cyanide plating bath solutions from electroplating operations" are F006 Wastes.

Understanding the history of the site in question is important in informing what sampling and analysis is appropriate to determine whether F-Listed Wastes are present.

d) *How to Determine Whether a Waste is a K-Listed, P-Listed or U-Listed Hazardous Waste.*

The identification of K-Listed, P-Listed and U-Listed Hazardous Wastes presents a special problem to persons performing Response Actions, as determining whether a Waste is on these lists depends on several factors related to industrial activity or process that produced that Waste, or purposes for which such Waste was used or intended. Many of these uses, activities or processes may have occurred in the past given the long history of industrial activities in Massachusetts. It therefore may not be immediately obvious to the person performing Response Actions whether a Waste such as excavated soil, whose constituents are otherwise known, is a K-Listed, P-Listed or U-Listed Hazardous Waste.

K-Listed Wastes are most clearly tied to specific named sectors of industry or manufacturing.

Example. "Process residues from aniline extraction from the production of aniline" is a Hazardous Waste with the EPA Hazardous Waste Number K103 only if the Waste in question results from "aniline extraction from the production of aniline." Not all "process residues" are Hazardous Waste, nor is all aniline.

Example. "Ammonia still lime sludge from coking operations" is the Hazardous Waste with Hazardous Waste Number K060 only if the ammonia still lime sludge is from coking operations. Not all ammonia is a Hazardous Waste, nor is all lime sludge.

As to U-Listed Wastes and P-Listed Wastes, the person performing Response Actions may need to determine whether a listed product is a "commercial chemical product," a "manufacturing chemical intermediate," an "off-specification" product, or the spill residue of any of those products. 310 CMR 30.133(1)(a) - (d); 310 CMR 30.136(1)(a) through (f). U-Listed and P-Listed Wastes are among the most commonly found at Disposal Sites.

e) The Concept of "Due Diligence" in HW 93-01

In recognition of the challenge posed by the importance of knowing the historic use or industrial process associated with various Wastes, in 1993 MassDEP issued a policy entitled *Interim Policy Regarding the Regulatory Status of Soils Contaminated with Waste Oil of Unknown Origin and/or Hazardous Constituents ("*HW 93-01*")*. When issued, HW 93-01 was "limited to excavated soils that result from actions taken pursuant to M.G.L. c. 21E." Referencing analogous guidance issued by the United States Environmental Protection Agency ("EPA") addressing sites regulated under the Comprehensive Environmental Response, Compensation and Liability Act at 42 U.S.C. sec. 9601 ("CERCLA"), HW 93-01 states that "**due diligence** shall be employed" to determine if soil is a listed hazardous waste. HW 93-01, sec. 4.0 (emphasis added). HW 93-01 also states that where the source can be "**reasonably determined**" to be one associated with a Hazardous Waste, the soil in question should be managed as a Hazardous Waste. *Id*. (emphasis added).

f) Application of "Due Diligence" Concept to Cleanups Today

HW 93-01 was published before amendments to the Massachusetts Hazardous Waste Regulations allowing soil and other media contaminated with Waste Oil that is not otherwise a Hazardous Waste to be handled under a Bill of Lading, without a Hazardous Waste Manifest, became effective. 310 CMR 30.0252(2); 310 CMR 40.0030. HW 93-01 has accordingly been "superseded" by those regulations *as to Waste Oil in soil*. HW 93-01 (see first page of current version of HW 93-01 posted online). HW 93-01 is also *limited* to soil. By its own terms, therefore, HW 93-01 now only addresses Hazardous Wastes in soil other

than Waste Oil in soil that is not otherwise a Hazardous Waste.

As discussed above, Hazardous Waste generated at an MCP site is not limited to soil, but may include such Wastes as groundwater, wastewater, filters and canisters. Therefore, HW 93-01, considered alone, does not provide a comprehensive account of how persons performing Response Actions at an MCP site may determine whether they have generated a Hazardous Waste. Notwithstanding these limitations, the concept of "due diligence" contained in HW 93-01 remains relevant.

Accordingly, MassDEP hereby affirms and clarifies that persons performing Response Actions at MCP sites who produce Waste that, based on its constituents, *may* constitute a F-Listed, K-Listed, P-Listed or U-Listed Hazardous Waste, must use available information regarding historical processes and industrial sectors that operated at the MCP site in question in an effort to ascertain whether the Waste is a Hazardous Waste. *See* HW 93-01, Sec. 4.0, fn. 1, citing 53 FR 51444. Consistent with HW 93-01, MassDEP refers to this effort as "appropriate due diligence."

g) What Constitutes "Appropriate Due Diligence"?

HW 93-01 states that the required due diligence consists of a "search of all available site information, manifests, storage records and vouchers." HW 93-01, Secs. 3.0 and 4.0, citing Federal Register 53 FR 51444. These requirements apply both to soil contaminated with hazardous constituents and to other forms of Waste, such as other contaminated media. Therefore, relevant information includes:

- Generator registrations, if a Hazardous Waste generator previously operated on the Disposal Site (search the Handler section of RCRAInfo Sign In;
- Information regarding prior industrial processes at the Disposal Site;
- Information regarding historical operations using Listed Hazardous Wastes;
- Historical maps;
- Toxics Use Reduction Act data extracts;
- Information regarding historical use of the parcel at which Response Actions are occurring as well as on contiguous parcels previously under common ownership;
- Information regarding historic site operations, whether or not such operations are related to the specific release tracking number under which Response Actions are occurring; and
- Information regarding both the use of raw materials and process activities generating waste.

Methods described in ASTM E-1527, describing Phase I ESA all appropriate inquiry, may also be helpful in locating relevant information.

h) Documenting Due Diligence

If, as a result of the above-referenced due diligence, a person performing Response Actions determines that that person is a Generator of Hazardous Waste that must be transported under a Hazardous Waste Manifest, such person must produce a Hazardous Waste Manifest prior to transporting the Hazardous Waste. The Hazardous Waste Manifest must be retained in accordance with 310 CMR 30.331, known generally as an "e-Manifest. If, however, as a result of the above-referenced due diligence, the person performing Response Actions at a Disposal Site determines that that person is *not* a Generator of Hazardous Waste that must be transported under a Hazardous Waste Manifest, it remains crucially important to retain documentation of that due diligence. Such documentation (a) helps support the certifications that the person performing Response Actions must make in any Bill of Lading used in connection with transporting Waste that is not Hazardous Waste requiring a Hazardous Waste Manifest, (b) helps support the certification that the LSP-of-Record for the Disposal Site in question must make in any Bill of Lading, (c) helps assure future owners and operators of properties on and adjacent to the MCP site in question as well as the owners and operators of receiving facilities that the appropriate processes were followed with respect to Waste transported from the Disposal Site, (d) assists MassDEP and other enforcement agencies in determining that the appropriate processes were followed with respect to Waste transported from the Disposal Site. As to the latter, the *absence* of appropriate documentation may raise questions for MassDEP auditors and enforcement staff, and may trigger additional inquiry (e.g., a Request for Information) and, where appropriate, enforcement.

V. Additional Resources

Both the MCP and the Massachusetts Hazardous Waste Regulations are complex, and understanding how they intersect with each other at MCP Disposal Sites requires the assistance of an LSP and, potentially, other subject-matter experts. This Guidance has focused on introducing basic Hazardous Waste concepts to an MCP audience and the initial threshold question as to whether a person performing Response Actions at an MCP Disposal Site is a Generator of Hazardous Waste, with a particular focus on appropriate due diligence. If the answer to that question is "yes," then additional research may be required as to how to transport and dispose of that Hazardous Waste and how to keep

appropriate documentation. Additional resources may be found here: https://www.mass.gov/hazardous-waste-management.