

May 1, 2011

Margaret Shaw, Esq.  
Bureau of Waste Site Cleanup  
Massachusetts Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

RE: Massachusetts LSP Association Comments  
Guidance on Implementing Activity and Use Limitation (Policy #WSC 11-300)  
December 2010 Public Review Draft

Dear Ms. Shaw:

The LSP Association, a professional non-profit association of over 900 LSPs and other environmental professionals, respectfully submits the following comments and suggestions related to the Public Review Draft Guidance on Implementing Activity and Use Limitations (AULs) published electronically by the Massachusetts Department of Environmental Protection (MassDEP) and dated December 2010. This draft will hereinafter be referenced as the Revised Draft.

The LSP Association (LSPA) recognizes the significant effort that MassDEP has put into a streamlined and current Revised Draft. We find the following revisions particularly helpful:

- Relegation of the little-used Grant of Environmental Restriction to Appendix J, allowing for greater focus in the main body of the document on Notice of Activity and Use Limitations;
- Incorporation of Appendix D, which provides much needed clarification of the signatory authority;
- Clarification of the steps to follow and requirements for AULs on registered vs. unregistered land; and
- The combination of forms 113 and 113A and revision of the AUL checklist.

The LSPA's key concerns and detailed comments are organized in two distinct categories:

A) Those that represent updates of the 1999 guidance to ensure that it is consistent with the current MCP and to clarify the current practice of preparing, processing, recording, and maintaining AULs, and

B) Those addressing draft revisions that raise more complex questions and broader issues that go beyond the current MCP, and which require further consideration by all stakeholders.

Our key concerns are described below and more detailed comments are provided in Attachment I.

#### **A) Updating Guidance to Clarify and Ensure Currency**

- Overlapping AULs: The revised draft should include discussion and provide guidance on cases where a new release requires implementation of an AUL overlapping or coincident with an AUL from a previous release.
- Case Studies: Case studies such as those that appear in the current Guidance should be retained in the revised draft. Examples dealing with issues arising from the current regulations would be helpful as part of this revised draft.
- Greater clarity is needed concerning certain issues, such as:
  - What response actions must be completed (and where) before an AUL can be completed.
  - The need for clean utility corridors despite implementation of an AUL.
  - The standard assumptions supporting the construction worker exposure period.
  - Certain administrative procedures.

#### **B) Identifying Issues for Future Discussion and Thorough Vetting**

It is our understanding from recent comments by MassDEP officials that the agency will defer developing and/or revising guidance on situational and/or still-evolving issues until additional stakeholder input can be solicited and thoroughly vetted. The LSPA strongly supports convening a workgroup drawn from stakeholders, including MassDEP, practicing LSPs, environmental attorneys and the regulated community.

We consider the following issues to go beyond what is provided for by the existing regulations. Nonetheless, we have commented on these issues in anticipation of future consideration and debate.

- Planned Use: The Revised Draft redefines current use under the MCP and risk assessment process to include planned use. This blurs the bright line between current and future use, and does not account for the possible stages and variations of what constitutes planned use.
- Foreseeable Future Use: The Revised Draft allows residential use to be eliminated as a foreseeable future use where the property is wetlands. This same strategy should be applied to properties where other existing regulatory institutional controls would prohibit future residential development, such as port areas, coastal zones, deeded open space, permanent zoning restrictions, and others.
- The Gardening Pathway: The Revised Draft does not present a clear new approach to addressing the gardening pathway.
- Vapor Intrusion Issues: The Revised Draft leaves some of these most significant AUL-related issues unaddressed.

- AULs at Sediment Sites: The Revised Draft does not fully address new AUL applications, such as those needed at sediment sites.

### **Conclusion**

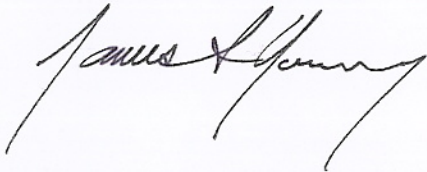
MassDEP's Public Review Draft Guidance on Implementing AULs provides much needed clarity in several areas and serves to refresh the 1999 document to bring it into better alignment with the MCP. The LSPA supports finalizing this document and making it available as soon as possible to the regulated community.

The Revised Draft document, however, also leaves unaddressed several major AUL-related areas that will require a more thorough review prior to developing comprehensive guidance. We have presented an initial list of the issues the LSPA feels are most critical. We look forward to working with MassDEP on these important areas in the near future.

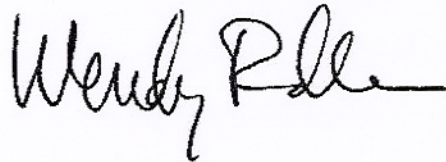
Thank you for the opportunity to comment on the Public Review Draft AUL Guidance.

Sincerely,

### **LSP Association**



James S. Young  
President



Wendy L. Rundle  
Executive Director

Cc: Janine Commerford, Assistant Commissioner, BWSC

Attachment I: Detailed Comments by Section