

## Attachment to LSP Association Cover Letter

### **Attachment I: Detailed Comments by Section** **Guidance on Implementing Activity and Use Limitation (Policy #WSC 11-300)** **December 2010 Public Review Draft**

The LSP Association has organized its detailed comments 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.

Comments in both categories are provided below.

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

##### **General Comments**

1. The Revised Draft should address overlapping AULs and AULs placed on a single property to address two different releases. These situations occur and are frequently the result of releases separated by time with different owners, different LSPs, different constituents of concern and different PRPs. We recommend a Case Study to illustrate a second release/AUL on top of a site with an existing AUL.
2. The Revised Draft interchangeably uses the terms “parcel” and “property;” we recommend either defining the terms to further clarify the differences or choosing to use just one.
3. In Sections 1 and 2, the meanings of the terms “unforeseen” and “unpredictable” are vague as they are used in discussing “reasonably foreseeable uses.”
4. The case studies in the existing guidance should not be eliminated. A review of the existing case studies can be undertaken to see if specific examples need to be revised.

## Section 1: Introduction

- 1.4 AUL, §§ 1.4 & 1.5. These sections indicate that an AUL should not be implemented until all response actions necessary to achieve “No Significant Risk” have been completed. Please clarify that in some circumstances, such as when discrete soil areas or different media are affected by contaminants of concern, only those response actions relating to the area/medium to which the AUL will apply need to be completed prior to implementing the AUL. In such cases, a partial RAO may be appropriate.
- 1.6 AUL, § 1.6. The last two paragraphs of this section relate to available mechanisms for notifying people of an AUL. These do not relate to the topic of Section 1.6, which is entitled “Use of Deed Notices, Restrictions, or Other Measures that are Not AULs.” We recommend re-locating these and also clarifying that these public notice measures are not required by the MCP but should be considered by the PRP and may be appropriate in certain circumstances.

## Section 2: AULs and Risk Characterization

- 2.5. AUL, §§ 2.5.3 & 2.6.1. In these sections, MassDEP is setting forth the principle that an AUL can, in many circumstances, be used to achieve closure when the risk assessment shows significant risk. We suggest clarifying that further remediation is also an option, as follows:
- § 2.5.3. Please consider revising the third sentence to read: “When using a Method 3 risk characterization, an AUL (or remediation) is required any time No Significant Risk is not demonstrated ...”
- § 2.6.1. Please consider revising the 4th sentence of the third paragraph to read: “Whenever the Exposure Point Concentrations are equal to or less than the applicable S-2 (Method 1 or 2) standards, but exceed the S-1 standards, an AUL (or remediation) is required.”
- 2.7 AUL, § 2.7.2. This section should clearly note that for existing utilities in which a Significant Risk to a utility worker has been identified, a “clean utility corridor” shall be established. For foreseeable future use that includes a utility corridor, it should be noted that emergency utility repairs (including electric & gas service connections and equipment) cannot be restricted under the AUL. AUL requirements should include a statement that it is the “owner’s” responsibility to post an AUL warning sign (language as prescribed by MassDEP) along utility easements. Because utility corridors are often coincident with rail and highway rights of way, the guidance should suggest a mechanism for notice to utility easement interest holders for property that would have been subject to an AUL were it not for being an ROW.

While it is acknowledged that current practice typically conforms with the concept that an existing utility corridor that might be subject to emergency repair must present No Significant Risk to a utility worker (i.e., risk to a utility worker cannot be eliminated with an AUL as a 'future' use), the requirement to notify record holders such as utility-easement holders suggests that this was not the original intent of guidance or regulation. If current practice is to remain consistent with the concept that AULs cannot be used to eliminate utility worker risk, then it would seem logical to eliminate the requirement to notify utility easement holders of the AUL.

AUL, § 2.7.3. In the situation where a human health risk assessment indicates that the construction worker scenario demonstrates No Significant Risk, thus eliminating the need for an AUL to reference the requirement of a Health and Safety Plan (HASP) to address risk, it would be worthwhile to include the assumed period of time that MassDEP guidance provides for the construction worker scenario (e.g., six months). This may assist practitioners in completing human health risk assessments and provide clearer information about the need (or lack thereof) for HASPs in AULs.

### **Section 3: AUL Types and Elements**

- 3.5. AUL, § 3.5. It would be helpful if there were more details concerning Exhibit A-2 in this section. We understand the difference between registered and unregistered land; however, we suggest a clearer description of Exhibit A-1, and especially Exhibit A-2, in this section.

Exhibit A-2 is not included in Appendix A: Table of Requirements for AUL Submittals and the Flow Chart in Exhibit B.

### **Section 4: Preparing an AUL**

- 4.3. AUL, § 4.3.2. The inclusion of "(Exhibit A)" and "(Exhibits A-1 and A-2)" in the titles of these sections are confusing because the sections deal with survey plans, and Exhibits A and A-1 are written legal descriptions. As noted in the guidance, the survey plans are independently filed with the local Registry of Deeds and referenced in the appropriate "Whereas" clause (and not attached as Exhibits A or A-1). We recommend removing the parenthetical references to exhibits in the titles of these sections.

### **Section 5: AUL Recording and Processing Requirements**

- 5.2. AUL, § 5.2, paragraph 2. This paragraph indicates that an RAO that relies on an AUL is not effective until the MassDEP receives a Registry-certified copy of the AUL. This is not consistent with 310 CMR 40.1070(3), which states clearly that an AUL is effective upon filing at the Registry of Deeds. As such this should be struck from the Guidance.

5.3. AUL, § 5.3. This section discusses notice to record interest holders. Please consider providing guidance here on how to handle a number of circumstances that we believe to be fairly common, including:

a. Please clarify that a newspaper notice is appropriate when it is not possible or is nearly impossible to identify the current beneficiaries of a right granted in a deed. This may occur when an ancient deed grants rights to a named individual and his or her heirs, and these heirs cannot now be identified.

b. Please clarify the content of the written "AUL Notice" to easement holders, particularly in the case where the subject easement carries subsurface utilities. We recommend that the notice include:

1. RTN
2. Identification and concentration of contaminants of concern (COC)
3. Description of impacted media and depth

5.4. AUL, § 5.4. In addition to Confirmatory AULs already noted in this section, it may be worthwhile to also point out public notice requirements for AUL Amendments and Terminations, if different.

#### **Appendix D**

Appendix D states that a portion of an LLC's Certificate of Organization should be included as an exhibit to document the signatory's authority to execute the AUL. A Certificate of Good Standing obtained from the Secretary of State's Office should also be an acceptable exhibit for this purpose.

Perhaps it is worth explaining that when an AUL requires the signatures of a multi-party ownership group such as a Board of Selectman, not all signatures are required as long as a quorum is met.

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

#### **Section 2: AULs and Risk Characterization**

2.3 AUL, § 2.3.1. The guidance states that "*Planned uses* are considered current uses ...." The 1999 AUL guidance stated on page 7: "Planned uses are certainly "foreseeable" and should be explicitly evaluated in the risk characterization."

While we agree that planned uses are important, we do not understand why a future planned use - which may only be a concept in the landowner's mind without financial backing or necessary permitting - needs to be considered as a current use. Perhaps some planned uses are sufficiently ripe to be considered current uses, such as when a building permit has been issued.

Current use should remain as described in the existing guidance as “actually occurring” or “probable and consistent with surrounding land uses.” The current use of a site should be limited to the existing conditions at the site at the time the risk characterization is completed, and future use, including any planned future use, should be potentially subject to AULs. Planned uses should be considered foreseeable future uses.

- 2.6 AUL, § 2.6.2. The Revised Draft leaves some of these most significant AUL-related issues unaddressed. The LSPA recommends that specific AUL language and case studies in the final Vapor Intrusion Guidance document should also be included in the Revised Draft AUL Guidance document.

AUL, § 2.6.3. The Revised Draft does not fully address new AUL issues and procedures such as those needed at sediment sites.

AUL, § 2.6.3. There should be a case study on application of an AUL to subtidal and intertidal sediment.

AUL, § 2.6.3. MassDEP appears to advocate for flexibility in site-specific determinations as to whether AULs are appropriate at sites where residual sediment contamination exists beneath subaqueous caps. MassDEP correctly notes that federal and state riparian rights preempt and effectively negate a primary purpose of AULs - to control changes in activities and uses that could present unacceptable exposures to residual contamination - since fishing, swimming, navigation, and other recreational activities and uses are protected. The institution of AULs within wetlands and waterways poses many legal complications and offers no benefit regarding ecological exposures, facts that MassDEP acknowledges.

Local, state, and federal waterway/wetland statutes and regulations already effectively and permanently control any changes in current or future activities and uses within the Commonwealth’s wetlands and waterways. The rigorous scrutiny afforded by the public process for all such applications by local, state, and federal agencies has clearly established the fact that a protective, enforceable, and transparent regulatory alternative to AULs is in full force and effect under the existing waterway/wetland regulations. The implementation of AULs for this purpose poses legal and administrative complications without improving the protection, enforceability, transparency, and/or certainty of subaqueous cap remedies already provided under the wetland and waterway statutes and regulations.

2.7 AUL, § 2.7.1. 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.

AUL, § 2.7.1 The Revised Draft does not present a clear new approach to addressing the gardening pathway. In addition, a revised definition of gardening is needed. We await MassDEP's draft Technical Update. Similar reconciliation will be required of the new Vapor Intrusion Guidance, and (further in the future) the LNAPL Policy.