

Attachment to LSPA September 22, 2014 Cover Letter

LSPA Comments on 2014 MassDEP Draft AUL Guidance

The following are comments from the LSP Association on MassDEP’s June 2014 Public Review Draft, Guidance on Implementing Activity and Use Limitations, Policy #WSC 14-300

Page numbers refer to the Public Comment Draft made available electronically in pdf. Every effort has been made to state the issue of concern, provide a specific example wherever possible and propose suggested language changes where appropriate.

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NA	NA	As discussed at the July 31, 2014 Pre-Comment Meeting, the draft AUL guidance must be reviewed in conjunction with the draft LNAPL guidance and draft VI guidance. At that time, the regulated community was assured that the VI guidance would be forthcoming, and that sufficient time would be available to review all three documents in conjunction, as there is significant overlap. As of September 18, 2014, the draft VI guidance has not been published. The LSPA is providing these comments with the understanding that additional comments on the AUL guidance may be warranted after review of the VI guidance document.
4	1.6	The concept of “non-AUL” notices as presented in the guidance is confusing. The concept of non-AULs is not provided for in the MCP and has been blurred with the concept of AULs that may be imposed but are not required, as described in 310 CMR 40.1013. The LSPA suggests creating separate subsections to describe these two different concepts.
4	1.6	MassDEP is silent on the structure and content of a non-AUL. Does MassDEP have suggestions on when and how LSPs should use this vehicle? Even a short list of what MassDEP thinks are good uses of this vehicle would go a long way to helping the community craft appropriate “non-AULs,” recognizing that they are voluntary, and never required under the MCP.
5	1.7	First sentence, 2 nd paragraph, revise “a few exceptions” to “the following exceptions.”
5	1.7	Bullet #2, revise “The requirement to maintain a condition of No Significant Risk.” The initial read suggests the risk management component is not required for CERCLA site AULs, when in fact it will be managed under a different set of regulations. Can this be qualified by adding the underlined language at the end: “The requirement to maintain a condition of No Significant Risk <u>in accordance with 310 CMR 40.0000?</u> ”

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6	2.1	Second paragraph, last sentence: change “healthy” to “health.”
8	2.3.2	The second paragraph states: “If the cleanup is not sufficient to support unrestricted use, then an AUL is required to identify the limitations on future use that are assumed in the risk characterization.” This statement doesn’t account for the possibility of a Permanent Solution with Conditions (but no AUL) for potential VI sites with no buildings, or other sites where an AUL is not required. Additionally, it assumes remediation must be conducted at a site prior to filing an AUL (consider the old B-2 RAO). Suggest rewording to: “With certain exceptions (see 2.4.2), if site conditions are not sufficient to support unrestricted use, then an AUL is required to identify the limitations of future use that are assumed in the risk characterization.”
8	2.3.2	Second <u>Example</u> , last sentence: remove second “.”
9	2.4	In the <u>Exposure Pathway Mitigation Measures</u> section, first paragraph, replace “Exposure Pathway Elimination Measure” with “Exposure Pathway Mitigation Measure” throughout to be consistent with revised MCP.
10	2.4	<u>NAPL with Micro-Scale Mobility</u> , first paragraph. This discussion does not include the entire metric for micro-scale mobility. As currently written, it states: “such that it is visibly present in the subsurface (i.e., observable in an excavation, boring or monitoring well), then an AUL is required as part of the Permanent Solution.” This implies if you see any NAPL then it has micro-scale mobility and an AUL is required. It is missing the following language: “present at sufficient quantities to migrate or potentially migrate over a short distance and visibly impact excavation boring or well.” The LSPA requests that this be revised to be fully consistent with the metric.
12	2.4.2.2	In the subtitle, <u>Public Ways or Rail Right-of-Ways</u> , please change “Rail Right-of-Ways” to “Rail Rights-of-Way.”
12	2.4.2.2	Under <u>Public Ways or Rail Right-of-Ways</u> , the statement is made that “Note, while public ways and rail rights-of-way do not require AULs, owners of these lands are required to meet all other cleanup requirements, including cleanup of contamination in areas that are outside the legal bounds of the public way or rail right-of-way.” This statement does not consider the possibility that the owner of the way is not a responsible party. This should be changed to (suggested new language is underlined): “Note, while public ways and rail rights-of-way do not require AULs, owners of these lands are required to meet all other cleanup requirements, including cleanup of contamination in areas that are outside the legal bounds of the public way or rail right-of-way, <u>if the owner is also a Responsible Party.</u> ”
12	2.4.2.2	Under <u>Public Ways or Rail Right-of-Ways</u> , the guidance states that “the AUL exception for a public way or rail right-of-way is limited to the lands within the transit corridor; it does not extend to ancillary land contiguous with the public way or right-of-way (e.g., garages or other maintenance facilities associated with the transit corridor, but not within it).” It is not clear what “transit corridor” means. If it is intended to limit the AUL exception area to areas where motor vehicles or rail cars travel this appears to be too narrow as it would exclude sidewalks, central medians, associated utility corridors, shoulders, embankments, and other areas within the right-of-way that are intended to serve as buffers between the paths of vehicular travel and the surrounding land, which have traditionally been included in the areas exempt from AULs. Please clarify.

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12	2.4.2.2	<u>Residential Gardening</u> , last sentence. Please consider the following clarifying language (suggested new language is underlined). “ <u>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). Best Management Practice recommendations are not required if No Significant Risk is demonstrated via a Method 1 risk characterization.</u> ”
14	2.6	Indoor air should be added as a medium and a sub-heading added to address AULs for indoor air issues and EPMM. With the recent MCP changes, this will be a significant section and should be included. The LSPA notes that the MCP refers to indoor air as an environmental medium in 310 CMR 40.0942, but not in the definition of “Contaminated Media” in 310 CMR 40.0006. Therefore, there may be some lack of clarity or confusion as to whether indoor air should be considered its own medium. We believe that LSPs looking for guidance on indoor air issues will look specifically for discussions of indoor air issues, and for that reason this comment and several others suggest referring specifically to indoor air as a medium.
15	2.6.1	2 nd to last paragraph. Revise the following sentence by adding the suggested new language, which is underlined: “Whenever the EPCs are equal to or less than the applicable S-3 standards, but exceed the S-1 standards, <u>either remediation or an AUL is required</u> . This is because, like S-2, the S-3 soil category assumes limitations on receptor exposure.”
15	2.6.2	2 nd paragraph. In this paragraph, a sub-slab venting system and vapor barrier are provided as examples of an EPMM to prevent exposure to groundwater. The LSPA suggests discussing measures associated with indoor air in a separate category, in light of the complexity of those issues, with a cross reference here. The LSPA suggests adding an active EPMM that treats drinking water as a more direct groundwater example.
17	2.7	Under <u>AULs to Limit Direct Contact Exposure to Soil at Residential Sites</u> , barriers that may be used to limit soil exposure are listed. Please add “a layer of clean fill material” to the list of potential barriers.
18	2.7.2	First sentence. This sentence states that if utility lines exist or an easement exists, the site must achieve NSR for workers conducting emergency repairs of the utilities. Please clarify. Is the reference to “an easement” intended to refer to those easements that allow construction and maintenance of utilities, as opposed to easements for passage? What if the easement allows utilities, but none exists today?
19	2.7.3	Suggest that language similar to the following be added as the last paragraph to Section 2.7.3: “Where underground utilities currently exist, exposures associated with emergency repair of utilities must be evaluated under the current use scenario in the risk characterization. As stated previously, 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.”

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23	Table 2-1	<p>2nd row. Please clarify. As written, this indicates that an AUL would prohibit excavation or prohibit excavation without a HASP and SMP where S-3 soil standards are met but S-2 soil standards are not met. However, the S-3 soil standards are protective of excavation exposure. Therefore, if the S-3 standards are met, then a condition of NSR exists for construction workers. If the excavation scenario is at NSR, the MCP <u>does not require</u> that a HASP be included in an AUL.</p> <p>Alternatively, as described in Section 2.7.3 of the draft AUL guidance, "If a completed assessment of construction worker risk does not demonstrate No Significant Risk for workers, the AUL should document the requirement of a Health and Safety Plan to address that risk."</p> <p>The previous draft AUL guidance "strongly recommended" that a HASP and SMP be included any time an AUL is prepared so that excavation workers are informed of subsurface conditions. If that continues to be MassDEP's recommendation, the LSPA suggests revising the language in Table 2-1 to make it clear that it is MassDEP's preference (but not required) that an HASP be included in this example.</p>
23	Table 2-1	<p>3rd row. Please clarify. As written, this suggests that single family residential use does not need to be restricted at a site where soil does not meet the S-1 standard and that soil is located under a barrier. Based on previous MassDEP guidance, this scenario would preclude single-family residential use.</p>
23	Table 2-1	<p>5th row. This row identifies the relevant media as soil or groundwater and indicates that VOCs are migrating into indoor air. The LSPA suggests that the referenced media include indoor air. In addition, obligations may also include monitoring/reporting requirements associated with an EPMM.</p>
23	Table 2-1	<p>7th row (Subslab Soil Gas example). The example indicates VOCs are "high" in subslab soil but no pathway exists, and the AUL would provide notice, require maintenance of the slab, and address future renovation or construction. Please clarify what is intended by "high." In addition, the LSPA suggests giving this example more discussion, and perhaps placing it in text. It is not clear that LSPs would expect that the building slab would be identified as a barrier in an AUL, along with associated obligations. This may be addressed in the forthcoming VI guidance; however, the question demonstrates the interconnectivity of these documents.</p>
26	3.4	<p>The second bullet indicates that surveys must be prepared by registered surveyors and recorded with the Registry of Deeds. Please clarify that creating a new survey is not always required, perhaps by adding at the end of the bullet the following: "(Note: a current, properly prepared and recorded preexisting survey may meet this requirement for those AULs which are placed on a parcel in its entirety, as described in Section 4.3.)"</p>
26	3.4	<p>Fourth bullet. We suggest replacing the language, "what can and cannot happen" with "uses consistent and inconsistent with maintaining a condition of No Significant Risk," for consistency.</p>

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28	3.5	<p>Second bullet. This describes the requirement that the signature of the LSP must not predate the signature of the owner. This requirement presents a logistical obstacle and the LSPA thinks it should be removed. This requirement is not found in the referenced section of the MCP. The only stated requirement is at 310 CMR 40.1074(2)(m), which requires: “the notarized signature(s) of the property owner(s), and the notarized signature and seal of the LSP of Record who certifies that in [his][her] Opinion the Notice of Activity and Use Limitation is consistent with a Permanent or a Temporary Solution.”</p> <p>On the other hand, if MassDEP determines that this is required, please explain in the guidance why it is required. This will enable LSPs to explain to their clients why this logistical hurdle is important.</p>
28	3.5	Last paragraph. Define “Registry-copy” or refer to Section 4.1.1 where it is defined.
28	3.5	Last paragraph. This paragraph requires that MassDEP must be provided with “a Registry copy of all survey plans referenced in the Notice.” However, 310 CMR 40.1074(4) requires “a Registry copy of the <i>required</i> survey plans referenced in the notice,” (emphasis supplied), which suggests only those plans generated as part of the AUL process must be provided (i.e. there is no need to produce copies of historic survey plans used as a reference to the property location). The LSPA requests that MassDEP clarify what survey plans must be submitted to MassDEP; we recommend that only the required survey plans referenced in the notice be provided.
31	4.2.2	At the end of the first sentence, please correct “February 27, 20090.”
34	4.3.5	This section concerning filing of an AUL on both registered and recorded land appears to contradict Section 4.1.3, which offers two options for filing an AUL on land that is both registered and recorded. Please clarify.
34	4.3.6	<p>Please replace the first “that” with “the” in the following: “...the AUL must delineate that location of the barrier(s) so that a property owner (particularly a future property owner) ...”</p> <p>The bulleted list suggests that, when a barrier is used as part of an AUL, all of these listed items must be shown on the sketch plan, even if they are not included as part of the barrier. The referenced sections of the guidance and MCP do not contain requirements to delineate buildings, structures, pavement, walkways, landscaping, etc. The LSPA recommends that this be clarified to say that the sketch plan must include accurate information concerning the location of barriers without needing to identify the other listed site features that are not barriers.</p>
36	4.6	Third paragraph, first sentence. Please add “except emergency excavation and repair of existing utilities” after the word “excavation.”
37	Table 4-1	This table should clearly define when a survey plan is needed as part of Exhibit B.
37	Table 4-1	Under “C/Registered Land” and “C/Recorded Land,” change “oil or hazardous material release within the property (from site assessment)” to “Disposal Site.”

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38	4.7	To avoid the discrepancies that have been noted in numerous MassDEP audits of AULs, the LSPA recommends that this section clearly state that consistent and inconsistent uses and obligations should not be included in the narrative describing the basis for the AUL.
39	4.11	First sentence. Please remove extra “.”
42	5.3	First sentence. Please add “at least” before “30 days.”
43	5.3	Last sentence. Please delete this sentence, or clarify that this is optional. There is no regulatory requirement to provide MassDEP with copies of the letters sent to record interest holders.
43	5.5	This section is repeated as Section 6.6, please delete one or the other.
44	5.5	Under <u>Sale of property</u> , please clearly define the procedures to be taken for the buyer and/or seller to provide a copy of the deed to MassDEP (i.e. by mail, through eDEP).
49	6.4	Fourth paragraph: This statement is incorrect and should be struck. The revised Form 1082B now contains a requirement to restate all consistent and inconsistent uses.
I-7	Row 35	Please see earlier comment on the timing of the LSP and land owner signatures.