



May 17, 2013

Massachusetts Department of Environmental Protection  
Bureau of Waste Site Cleanup, 6<sup>th</sup> Floor  
One Winter Street  
Boston, Massachusetts 02108  
Attn: Elizabeth Callahan  
Sent via e-mail ([Elizabeth.j.callahan@state.ma.us](mailto:Elizabeth.j.callahan@state.ma.us)) and U.S. Mail

**RE: Comments to Proposed MCP Changes**

Dear Ms. Callahan:

We have reviewed the Proposed Amendments to the Massachusetts Contingency Plan (MCP) and offer the following comments for your consideration.

**PERMIT/TIER CLASSIFICATION AND NUMERICAL RANKING SYSTEM**

The proposed changes to the Tier Classification process will achieve the stated objective of greatly simplifying the ranking of disposal sites as either Tier I or Tier II. Specifically, replacing the Numerical Ranking System and Subpart O with Tier I Criteria to determine whether a disposal sites classification is Tier I or Tier II.

At 40.0510(3)(a) it would be helpful to add “or upon submittal of” after “Prior to”. The proposed timeframe is unnecessarily tight and may be difficult to meet.

Section 40.0570 of the proposed amendments includes minor changes to the Requirements for Eligible Persons, Eligible Tenants or Other Persons (collectively “Eligible Persons”) Seeking to Re-establish Response Action Deadlines. Is it accurate that under the MCP and at M.G.L. c. 21E, §2, that Eligible Persons status only has meaning in the context of M.G.L. c. 21E, §5C which exempts Eligible Persons from liability only at sites for which a permanent solution (Class A RAO) or Remedy Operation Status (ROS) has been achieved? {The Brownfields Act of 1998, amended M.G.L. c. 21E to add Section 5C to provide an exemption from liability for Eligible Persons. Section 5C may be viewed at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter21E/Section5C>.}

It is our understanding that the Eligible Persons status was created to help facilitate response actions at disposal sites and to afford Eligible Persons liability protection regardless of the Phase or regulatory status of the disposal site. We recommend that M.G.L. c. 21E Section 5C be amended or revised to allow the Eligible Persons status to apply to all disposal sites, not only

disposal sites for which a Permanent Solution or Remedy Operation Status have been achieved. This comment may go beyond the scope of the proposed amendments, however, it warrants consideration.

### **ACTIVITY AND USE LIMITATIONS**

Deletion of 310 CMR 40.1085(4)(e) is helpful in that it clarifies ambiguity regarding the public notice requirements for Confirmatory Notices of Activity and Use Limitation.

### **VAPOR INTRUSION AND CLOSURE-RELATED AMENDMENTS**

Section 40.0313(5)(f)4. as proposed would require MassDEP notification within 72 hours for all disposal sites where “one or more volatile organic compounds (VOCs) exist in the groundwater beneath or near the structure (a school, daycare or child care center, or occupied residential dwelling) with an earthen floor, fieldstone or concrete foundation, significant cracks and/or a groundwater sump”. This requirement is overly broad, does not take into consideration the concentrations of VOCs in groundwater, and has the potential to trigger numerous reporting obligations, associated Immediate Response Action activities and associated regulatory filings.

The proposed “Anthropogenic Background” definition helps clarify and define terms related to “Background” and allows for a more nuanced approach that incorporates historic fill. We caution that the definition for “historic fill” as currently written has the potential to be interpreted to include pre-1971 landfills.

Section 40.1030 establishes two categories of Permanent Solutions and one category for Temporary Solutions, as follows:

- Permanent Solution,
- Permanent Solution with Conditions, and
- Temporary Solution.

We suggest that a Temporary Solution with Conditions category be added. This category would apply to a disposal site where a Temporary Solution exists that relies upon an Activity and Use Limitation to maintain a condition of No Substantial Hazards.

Section 40.0752(8) Certification of Acceptance would establish a requirement to include an “owner acceptance and agreement letter” from the owner of each property on which an Active Exposure Pathway Elimination Measure is operated. In cases such as a multi-story building where portions of the building are under separate ownership (i.e. a condominium complex) this requirement may be cumbersome. In addition, the upper floors may be outside the boundaries of the disposal site. We suggest that language be added to Section 40.0752(8) that would require owner acceptance and agreement letters only from owners of property within the boundaries of the disposal site.

**RISK ASSESSMENT AND MCP STANDARDS**

No comments.

**NON-AQUEOUS PHASE LIQUID (NAPL) AND SOURCE CONTROL AMENDMENTS**

We support the elimination of the ½ inch NAPL Upper Concentration Limit criterion.

In Section 40.0313 MassDEP proposes to reduce the existing 72 hour NAPL thickness reporting threshold from ½ inch (0.5 inch or 0.04 foot) to ⅛ inch (0.125 inch or 0.01 foot). Since most electronic interface probes have a minimum measurement interval of 0.01 foot any detectable level of NAPL could be interpreted to be equal to or greater than ⅛ inch. We recommend that the proposed 72 hour NAPL thickness reporting threshold be changed from ⅛ inch (0.125 inch or 0.01 foot) to ¼ inch (0.25 inch or 0.02 foot) and/or that the proposed timeframe for reporting be changed to 120 days, as currently exists for NAPL at a thickness of ⅛ inch {310 CMR 40.0315(4)}.

Section 310 CMR 40.0924(2)(b)3. includes GW-1 areas that are designated GW-1 solely on the basis of being located within a Zone II or an Aquifer Protection District that overlays or is contiguous with a Zone II. However, it does not include GW-1 areas that are designated GW-1 solely on the basis of being within a medium or high yield Potentially Productive Aquifer that overlays or is contiguous with a Zone II. We request that MassDEP give consideration to including Potentially Productive Aquifers in Section 310 CMR 40.0924(2)(b)3.

**MISCELLANEOUS AND CROSS-REFERENCING AMENDMENTS**

In the definition for “Threat of Release” we suggest that the word “reportable” also be inserted where noted below.

Threat of release means a substantial likelihood of a release of oil and/or hazardous material which requires action to prevent or mitigate damage to health, safety, public welfare or the environment which may result from the release. Circumstances which represent a threat of release include, but are not limited to, sites containing or conducting an amount of oil and/or hazardous material in excess of the Reportable Quantity for that oil and/or hazardous material, or of an unknown quantity, where no **reportable** release has occurred but where a person required by 310 CMR 40.0331 to report the threat of release has knowledge of any corrosion, damage, malfunction or other condition that is likely to result in a **reportable** release.

Please contact either of the undersigned if further discussion would be helpful.

Sincerely,



Adam J. Last, P.E., LSP  
Principal Engineer



Scott VanderSea, LSP  
Principal Hydrogeologist