



May 17, 2013

**Via electronic mail:**

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**RE: Joint Comments on Proposed Amendments to the Massachusetts Contingency Plan,  
310 CMR 40.0000**

Dear Ms. Callahan:

We, the undersigned, submit the following comments on the proposed amendments to the Massachusetts Contingency Plan, 310 CMR 40.0000 (“Amendments”). Our review of the proposed amendments and the following comments are not intended to address every aspect of the MCP rule changes, but instead are narrowly focused on the rule changes as they pertain to residential gardening. Our comments encourage DEP to strengthen the Amendments related to residential gardening in order to adequately protect public health and respond to community needs. We appreciate the Department’s consideration of our concerns.

- 1. Activity and Use Limitations (AULs) should be required for sites that achieve a Permanent Solution with Conditions for the category of closure: “residential gardens for which BMPs are recommended.”***

It is in the general public’s interest to facilitate the use of land for residential gardening because gardening has direct benefits to residents’ food access and nutrition, invigorates neighborhoods, builds amenities, and improves public health and the environment.<sup>1</sup> DEP should require the complete clean-up of brownfields in urban areas to prevent the need for any activity and use limitation or other means that curtail the usefulness of the land for future gardening.

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<sup>1</sup> U.S. Environmental Protection Agency, *Brownfields and Urban Agriculture: Interim Guidelines for Safe Gardening Practices*, Summer 2011, available at: [http://www.epa.gov/swerosps/bf/urbanag/pdf/bf\\_urban\\_ag.pdf](http://www.epa.gov/swerosps/bf/urbanag/pdf/bf_urban_ag.pdf) (last visited May 15, 2013).

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Notwithstanding, when DEP will issue a permanent solution with conditions for the category of closure “residential gardens for which BMPs are recommended,” the agency should require an AUL to facilitate the ability of future property users to become aware of residual contamination prior to making a decision to garden on the property.

The Amendments currently propose to “carve[] out several categories of sites that can achieve a Permanent Solution with Conditions without the implementation of an AUL” which can include sites with one of “four types of conditions,” one of which is “residential gardens for which BMPs are recommended.” 310 CMR 40.0765 (Note to Reviewers).

Instead of requiring an AUL, the Amendments provide that the possibility of future use of the property for residential gardening “would be addressed qualitatively in the risk characterization... and the Permanent Solution with Conditions Statement would describe the potential for exposure and recommend the use of gardening Best Management Practices (BMPs) to limit to minimize future risk.” 310 CMR 40.1000, Subpart J (Note to Reviewers). This subpart does not adequately provide future owners, renters or individuals with other future property interests, with information about risks associated with sites that have achieved a Permanent Solution with Conditions designation. Instead of the approach identified in the Amendments, the MCP should require an AUL for sites that achieve a Permanent Solution with Conditions designation and could be used in the future for residential gardening. The notice and filing of an AUL at the Registry of Deeds is a critical part of communicating to future property owners and renters that there are increased levels of contaminants, such as lead and arsenic, in the soil. AULs thus enable the public to make informed decisions about acquiring property interests and what land uses are appropriate for a given site.

The maximum permitted lead level for a site with the designation of Permanent Solution with Conditions is 300ppm, which is 100 ppm higher than the permitted level for a site designated as Permanent Solution with No Conditions. The fact that a site has lead at levels 100 ppm higher than is required for closure with no conditions is important information that should be made readily accessible to people with future property interests in a site. Public health research indicates that lead levels of 300ppm are not safe for all land uses, such as where children have direct contact with soil:

- The University of Minnesota Extension Services recommends 300ppm as an acceptable lead level for growing fruits and vegetables *only* if children are not going to have frequent, direct contact with the soil.<sup>2</sup>

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<sup>2</sup> See Carl J. Rosen, *Lead in the Home Garden and Urban Soil Environment*, UNIV. OF MINN. EXTENSION (2010), available at <http://www.extension.umn.edu/distribution/horticulture/DG2543.html>.

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- The 2005 California Human Health Screening Levels for Lead identified 150mg/kg<sup>3</sup> as “the maximum soil concentration which, combined with an assumed background lead exposure from food, air, and water, would result in a total blood lead not to exceed 10 µg/dl.”<sup>4</sup> At that time, the U.S. Centers for Disease Control and Prevention (CDC) had identified 10 µg/dL as the lowest level of concern for children’s blood lead levels; in 2012 they updated their standard to 5 µg/dL to “identify children with blood lead levels that are much higher than most children’s levels.”<sup>5</sup>

It is very likely that residential properties where gardening occurs will have children coming into direct contact with the soil on a regular basis. Given the state of the science on this issue, it is critical that property owners and renters are clearly put on notice that a property has elevated levels of lead that could be harmful to children.

While most property buyers will review the line of title before purchasing property, which would include any applicable AUL, it is unrealistic to expect homeowners and renters to know that they should search DEP’s website for closure records documenting increased toxins in the soil. This important toxicity information should be clearly identified in the line of title, not buried in administrative records that most people will not know to review. The AUL should indicate that property owners must communicate the need to follow BMPs for residential gardening uses on the site to all rental tenants.

**2. *The AULs should require that property owners follow Best Management Practices (BMPs) rather than just encouraging them.***

Merely encouraging property owners and renters to follow BMPs infers that these standards are not required for protecting human health. Property owners will likely not adequately understand the health risks involved in interacting with soil with increased levels of toxins through practices other than BMPs. To make references to BMPs effective, DEP should require, rather than merely advise, adherence to BMPs and develop mechanisms for ensuring that BMPs are utilized.

Moreover, DEP should clearly indicate on its website what BMPs are and provide links to resources for implementing BMPs so that property owners and tenants can easily identify what practices are required to ensure public health and safety. DEP should provide a link of the homepage of its website that makes it easy for tenants and homeowners to obtain information

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<sup>3</sup> Ppm:mg/kg is 1:1.

<sup>4</sup> *Revised California Human Health Screening Levels for Lead*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, INTEGRATED RISK ASSESSMENT BRANCH 6-7 (Sept. 2009), *available at* <http://oehha.ca.gov/risk/pdf/LeadCHHSL091709.pdf>.

<sup>5</sup> *Update on Blood Lead Levels in Children*, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 30, 2012), [http://www.cdc.gov/nceh/lead/ACCLPP/blood\\_lead\\_levels.htm](http://www.cdc.gov/nceh/lead/ACCLPP/blood_lead_levels.htm).

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about whether there has been a reported release on the property of interest and the current status of the remediation, if any, and whether BMPs are required for gardening.

**3. *DEP should collaborate with community members, gardeners, and environmental specialists to develop BMPs.***

The potential impacts of the Amendments are impossible to understand without first knowing the contents of the as-yet unannounced BMPs. Unless DEP develops comprehensive and easily understood BMPs and engages affected communities to ensure that the BMPs are followed, the Amendments will not achieve their goal of streamlining the administrative process of site clean-up while continuing to have high standards of environmental and public health protection.

DEP should engage health and environmental experts, gardeners and community members in developing BMPs that are effective in protecting public health, easily understood by lay persons, not cost-prohibitive, and realistic for small-scale gardeners. By holding public meetings at convenient times such as nights and weekends, DEP can collaborate with these stakeholders and hear feedback on proposed BMPs. Beyond the organizations named below, others that should be engaged include the Massachusetts Environmental Justice Alliance, Boston Natural Areas Network, The Food Project, and Dudley Street Neighborhood Initiative.

We encourage DEP to consider how BMPs can be implemented by persons of limited financial means. BMPs that require use of specialized materials that are costly or difficult to obtain will render the BMPs meaningless for low and moderate income residents.

We thank you for the opportunity to comment on the Proposed Amendments and look forward to continuing this conversation.

Sincerely,



Jennifer Rushlow  
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Conservation Law Foundation



Staci Rubin  
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