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VIA EMAIL AND FIRST CLASS MAIL

Friday, May 17, 2013

Benjamin J. Ericson, Assistant Commissioner
Bureau of Waste Site Cleanup
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

RE: Proposed amendments to the Massachusetts Contingency Plan

Dear Commissioner Ericson:

Pursuant to the recently proposed amendments to the Massachusetts Contingency Plan, 310 CMR 40.0000 (the "MCP"), I submit the following comments for consideration.

ACTIVITY AND USE LIMITATION AMENDMENTS

In the initial Note to Reviewers for the AUL section of the Redline/Strikeout package at page 23, it was stated that metes and bounds descriptions in deeds "have been known to add or remove parcels of land not shown on survey plans earlier in the chain of title, and thus may not accurately reflect current lot boundaries." I disagree.

Both legal descriptions and survey plans are evidence of ownership. There are errors found on both types of instruments. Proof of ownership can only be confirmed by the Massachusetts Land Court. When the Land Court reviews instruments to register title, they look to deed descriptions and plans as evidence, but make final determinations on property ownership based upon monumentation found on the ground. It is the monuments that govern. White et al. v. Hartigan et al., 464 Mass. 400, 410-411 (2013). The additional expense of seeking certification of deed descriptions appears to be an unnecessary burden on the private sector.

Additionally, as an active member of the LSPA Loss Prevention Committee who participates in the review of Department audits of AULs, our group has noticed numerous problems with "sketch plans". 40.1074(2)(a)(5). A common problem with these "sketches" is that they lack accuracy and fail to locate barriers that limit potential risk exposures at a site. Its time to call these plans more than "sketches" and I suggest modifying the language of 40.1074(2)(a)(5) to clarify the importance of these plans being accurate and clear in showing what areas are being restricted.

ACTIVE EXPOSURE PATHWAY ELIMINATION MEASURES

The Department has made an admirable effort to establish a procedure that allows troublesome vapor intrusion sites to be permanently closed. I propose an alternative mechanism that is simpler, less burdensome and more easily understood by the real estate conveyancing and finance communities. More importantly, the public and municipal governments need to know that a mechanism is in place to address potential vapor sites and common repository where they can find it.

Attached is an alternative Subpart G that eliminates Active Exposure Pathway Elimination Measures and incorporates the same protection into AULs. See Exhibit A. Binding these active controls with AULs allows the Commonwealth's registries of deeds to be the repository of information on these controls. I have modeled the language of the revised Subpart G to mirror Release Abatement Measures at 40.0440.

NON-AQUEOUS PHASE LIQUID AND SOURCE CONTROL AMENDMENTS

The new definition "Source of OHM Contamination" at 40.0006 has numerous problems and should be revised. It is inappropriate to expand the concept of contaminated fill, soil and sediment as being a "source".

The term "source" should be defined using its plain and ordinary meaning. Webster's Third New International Dictionary defines source as "a point of origin". If the origin of the release has been eliminated (i.e. UST, piping, drum, etc.), the source has been eliminated. We would then be left with a hot spot or residual contamination that needs to be assessed and clearly evaluated for risk.

As to Non-Aqueous Phase Liquids (NAPL), the Department has taken a brave and important step in addressing the latest science on this issue. It was a pleasure to see the Department actively involved in hosting and participating in the LNAPL training by the Interstate Technology & Regulatory Council (ITRC) held in Boston in April of 2012.

The new definition of NAPL at 40.0006 is important. However, the second sentence must be struck. The science is clear that NAPL occurrence in the subsurface should be controlled by soil factors not groundwater.

Furthermore, the proposed MCP amendments on addressing NAPL do not go far enough. It is clear today that the factors that govern LNAPL assessment and recoverability are residual concentration and transmissivity.¹ Literature from ASTM, EPA and the ITRC strongly support this approach. Kendall Marra from the Department has been a strong advocate and his continued

¹ Brost, E.J. and DeVaul, G.E., 2000, Non-Aqueous Phase Liquid (NAPL) Mobility Limits in Soil, Soil & Groundwater Research Bulletin, American Petroleum Institute, June, 2000, No.9

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leadership in this effort is critical.

The proposed amendments should provide a more prescriptive approach for the conditions that lead to “Non-Stable NAPL”. Brost and DeVauil established an important parameter known as “Residual NAPL Concentration” that is well recognized as the soil concentration at which NAPL will migrate due to convection or gravity (or become non-stable).² The amended regulations should adopt this approach.

Furthermore, the regulations are silent on the critical issue of NAPL recoverability. Too many decisions are made that grossly waste unnecessary resources on recovering NAPL in restrictive geologic formations. Decision making should be based on currently available science and be protective of public funds (such as the 21J Program). I suggest that the Department amend the regulations to address this urgent matter and not leave them for another day or guidance.

Please feel free to contact me if you have any questions or concerns. Thank you.

Very truly yours,



James J. Decoulos, PE, LSP
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attachment

² Ibid

EXHIBIT A
ALTERNATIVE SUBPART G TO THE MCP

SUBPART G: REQUIREMENTS FOR ACTIVE EXPOSURE PATHWAY ELIMINATION MEASURES

40.0700: Requirements for Active Exposure Pathway Elimination Measures

310 CMR 40.0701 through 40.0765, cited collectively as 310 CMR 40.0700, contain the requirements and procedures for the operation of Active Exposure Pathway Elimination Measures as a component of a Permanent or Temporary Solution.

40.0701: Purpose and Scope

- (1) The purpose of 310 CMR 40.0701 is to specify:
 - (a) requirements to operate an Active Exposure Pathway Elimination Measure as a component of a Permanent Solution with Conditions or a Temporary Solution;
 - (b) conditions under which an Active Exposure Pathway Elimination Measure may be used to support a Permanent Solution with Conditions or a Temporary Solution, pursuant to 310 CMR 40.1000;
 - (c) requirements for installation, testing, operation and maintenance of an Active Exposure Pathway Elimination Measure;
 - (d) notification requirements for prolonged suspension or failure of an Active Exposure Pathway Elimination Measure; and
 - (e) procedures for determining when an Active Exposure Pathway Elimination Measure is no longer required to support a Permanent Solution with Conditions or a Temporary Solution.

- (2) Unless otherwise specified in 310 CMR 40.0000, the requirements for Active Exposure Pathway Elimination Measures described in 310 CMR 40.0700 apply to those measures operated to maintain:
 - (a) a level of No Significant Risk as a component of a Permanent Solution with Conditions for a disposal site; or
 - (b) a level of No Substantial Hazard as a component of a Temporary Solution for a disposal site.

- (3) Exposure Pathway Elimination Measures do not include Remedial Systems as that term is defined in 310 CMR 40.0006.

- (4) An Active Exposure Pathway Elimination Measure shall not be used to support a Permanent or Temporary Solution if suspension or failure of such measure lasting 60 consecutive days would result in a Receptor exposure to OHM that would pose an Imminent Hazard.

- (5) Nothing in 310 CMR 40.0700 shall relieve any person described in M.G.L. c.21E § 5(a)(1) through (5) from any liability which that person would otherwise have in connection with a release or threat of release of oil and/or hazardous material.

- (6) No provision of 310 CMR 40.0700 shall limit the authority of the Department to initiate, oversee or order the performance of any response action deemed necessary by the Department to protect health, safety, public welfare or the environment.

40.0710: Installation, Testing and Operation of Active Exposure Pathway Elimination Measures

40.0711: Installation and Initial Testing of Active Exposure Pathway Elimination Measures

(1) An Active Exposure Pathway Elimination Measure may be evaluated, designed and installed as part of either:

- (a) an Immediate Response Action pursuant to 310 CMR 40.0410; or
- (b) a Comprehensive Response Action pursuant to 310 CMR 40.0800.

(2) Until a Permanent or Temporary Solution has been achieved for the disposal site, monitoring of the effectiveness of the Active Exposure Pathway Elimination Measure shall be conducted either:

- (a) as part of a monitoring plan detailed in an Immediate Response Action Plan pursuant to 310 CMR 40.0424;
- (b) as part of the installation and inspection of a Comprehensive Remedial Action as specified in 310 CMR 40.0870; or
- (b) as part of an Operation, Maintenance and/or Monitoring Plan, pursuant to the requirements for the Operation, Maintenance and/or Monitoring of Comprehensive Response Actions as specified in 310 CMR 40.0890.

(3) Until a Permanent or Temporary Solution has been achieved for the disposal site, the results of monitoring the effectiveness of the Active Exposure Pathway Elimination Measure must be submitted to the Department as a part of either:

- (a) Immediate Response Action Status and Remedial Monitoring Reports pursuant to 310 CMR 40.0425;
- (b) Phase IV Status Report and Remedial Monitoring Report pursuant to 310 CMR 40.0877; or
- (c) Phase V Status and Monitoring Reports pursuant to 310 CMR 40.0892.

(4) The frequency and nature of testing required to establish the initial effectiveness of the Active Exposure Pathway Elimination Measure and to monitor its continued operation shall be determined considering:

- (a) the exposure medium of concern;
- (b) the temporal variability, including seasonal variability, of site conditions;
- (c) the Receptor(s) of concern;
- (d) the frequency and magnitude of ongoing exposure to the contaminated medium or potentially contaminated medium;
- (e) the magnitude of the risk that would result from a failure of the Active Exposure Pathway Elimination Measure; and
- (f) any institutional or technological controls put in place to identify a failure of the Active Exposure Pathway Elimination Measure in a timely manner.

(5) All Active Exposure Pathway Elimination Measures shall be equipped with remote monitoring technology that will alert the occupants of the building, the party(ies) responsible for maintaining and operating the measure, and the Department, immediately upon failure of the system.

40.0712: Operation of Active Exposure Pathway Elimination Measures

- (1) The operating regimen for the Active Exposure Pathway Elimination Measure shall be specified in the applicable Active Exposure Pathway Elimination Measure Plan pursuant to 310 CMR 40.0752.
- (2) The operating regimen for the Active Exposure Pathway Elimination Measure shall be designed to ensure a level of No Significant Risk is maintained for the Receptor(s) of concern, with a sufficient margin of safety to account for planned and unplanned shut-downs.
- (3) The operating regimen shall document the longest duration of a shutdown that would be consistent with:
 - (a) a level of exposure that does not pose an Imminent Hazard;
 - (b) a level of exposure that does not pose a Substantial Hazard; and
 - (c) a level of exposure that poses No Significant Risk.
- (4) Following submittal of a Permanent or Temporary Solution, the Active Exposure Pathway Elimination Measure shall be operated and maintained following the operating regimen documented at 310 CMR 40.0712 and any requirements pursuant to 310 CMR 40.1070 through 310 CMR 40.1099.

40.0720: Discontinuing Operation of Active Exposure Pathway Elimination Measures No Longer Required to Maintain a Permanent or Temporary Solution

Where a Permanent or Temporary Solution is based upon the operation of an Active Exposure Pathway Elimination Measure, the operation of such a measure may be terminated following documentation that the measure is no longer necessary to maintain a Permanent or Temporary Solution.

- (1) Evaluation of Conditions in the Absence of an Active Exposure Pathway Elimination Measure.
 - (a) The frequency and nature of testing required to establish that the Active Exposure Pathway Elimination Measure is no longer required to maintain a Permanent or Temporary Solution shall be determined considering:
 1. the exposure medium of concern;
 2. the temporal, including season, variability of site conditions;
 3. the Receptor(s) of concern; and
 4. the frequency and magnitude of ongoing exposure to the contaminated medium or potentially contaminated medium.
 - (b) Pursuant to 310 CMR 40.0900, a Risk Characterization shall be conducted to evaluate and document any exposure to OHM at or from the disposal site in the absence of the Active Exposure Pathway Elimination Measure; and
 - (c) Pursuant to 310 CMR 40.1020, an analysis shall be conducted to evaluate and document the feasibility of continuing to operate the Active Exposure Pathway Elimination Measure in order to achieve or approach background levels of OHM.

(2) Documentation that an Active Exposure Pathway Elimination Measure is No Longer Required to Maintain a Permanent Solution. The evaluation of site conditions in the absence of an Active Exposure Pathway Elimination Measure shall be submitted to the Department using a transmittal form provided for such purpose and shall include:

- (a) an LSP Opinion on a form prescribed by the Department as to whether, based on an evaluation of the site conditions pursuant to the risk characterization process in 310 CMR 40.0900, a condition of No Significant Risk will continue to exist in the absence of an Active Exposure Pathway Elimination Measure;
- (b) the risk characterization conducted pursuant to 310 CMR 40.0900 evaluating the site conditions in the absence of an Active Exposure Pathway Elimination Measure on which the LSP Opinion in 310 CMR 40.0720(2)(a) is based;
- (c) the feasibility analysis conducted pursuant to 310 CMR 40.1020; and
- (d) a Major Modification as specified in 310 CMR 40.0754 that eliminates the necessity of the Active Exposure Pathway Elimination Measure.

(3) Notwithstanding the provisions of 310 CMR 40.0720(1) and (2), upon documenting that an Active Exposure Pathway Elimination Measure is no longer required to maintain a Permanent Solution, such measure may continue to be operated, and such voluntary continued operation would not be considered a response action pursuant to 310 CMR 40.0000.

40.0750: General Provisions for Active Exposure Pathway Elimination Measures

The regulations published at 310 CMR 40.0750 through 40.0765, cited collectively as 310 CMR 40.0750, establish the requirements, standards and procedures for obtaining, modifying, transferring, suspending and revoking the approval of Active Exposure Pathway Elimination Measures. The regulations published at 310 CMR 4.00, which govern application fees, annual compliance assurance fees and schedules for timely action, also apply to the operation of Active Exposure Pathway Elimination Measures and shall be consulted as necessary.

40.0751: Applicability

(1) An RP, PRP or Other Person may operate an Active Exposure Pathway Elimination Measure pursuant to 310 CMR 40.0750 for any disposal site where such a measure is part of:

- (a) a Permanent Solution and is required to maintain a level of No Significant Risk;
- or
- (b) a Temporary Solution and is required to maintain a level of No Substantial Hazard.

(2) The operation of an Active Exposure Pathway Elimination Measure is not necessary if:

- (a) a Permanent or Temporary Solution has not been achieved at the disposal site and the measure is operated pursuant to 310 CMR 40.0711(2); or
- (b) the measure is installed as a voluntary measure and is not required to maintain a level of No Significant Risk as part of a Permanent Solution pursuant to 310 CMR 40.1040.

(3) An Active Exposure Pathway Elimination Measure shall not be implemented at any disposal site until a complete Active Exposure Pathway Elimination Measure Plan, as described in 310 CMR 40.0752, has been approved by the Department and described on a form prescribed by the Department into an Activity and Use Limitation that is in effect and duly recorded or registered with the appropriate registry of deeds or land registration office.

(4) The approval of an Active Exposure Pathway Elimination Measure shall be recorded or registered with an Activity and Use Limitation on a form prescribed by the Department for:

- (a) each Active Exposure Pathway Elimination Measure required at a disposal site; or
- (b) one or more required Active Exposure Pathway Elimination Measures located on a single parcel of land within the disposal site.

40.0752: Active Exposure Pathway Elimination Measure Plans

(1) Content of Plan. Except as expressly provided by 310 CMR 40.0753 through 40.0754, each Active Exposure Pathway Elimination Measure Plan filed with the Department shall include, at a minimum, the following:

- (a) a completed Transmittal Form and Payment using the form established by the Department for such purposes;
- (b) documentation of the financial assurance mechanism required by 310 CMR 40.0752(5);
- (c) the certifications required by 310 CMR 40.0009 and 40.0752(7) through (9);
- (d) the applicable application fee payable under 310 CMR 4.00 (to be sent to the Lockbox designated by the Department for such payments);
- (e) a certification by the applicant that the Exposure Pathway Elimination Measure Plan fee has been mailed, or hand-delivered to the Department, concurrent with submittal of the Plan.

(2) Filing a Permanent or Temporary Solution Statement Prior to Approval of a Active Exposure Pathway Elimination Measure Plan. An applicant may not submit a Permanent or Temporary Solution Statement that relies upon the operation of an Active Exposure Pathway Elimination Measure prior to the approval of the Plan pursuant to 310 CMR 40.0760.

(3) Filing. The applicant shall file an electronic application for the Active Exposure Pathway Elimination Measure Plan with the Department.

(4) Presentation. All data, facts and other information provided in any document submitted with an Active Exposure Pathway Elimination Measure Plan shall be current and presented clearly and concisely.

(5) The RP, PRP or Other Person who files the Plan shall establish and maintain a financial assurance mechanism pursuant to 310 CMR 40.0170(6) that provides for the continued availability of an immediate repair and replacement account to be used by

the RP, PRP or Other Person solely for the immediate repair and replacement of any failing components of the Active Exposure Pathway Elimination Measure(s).

(6) LSP Opinions. Active Exposure Pathway Elimination Measure Plans shall include an LSP Opinion that such application has been prepared pursuant to the provisions of 310 CMR 40.0000, and shall include the signature and seal of the LSP-of-Record.

(7) Demonstration of Ability and Willingness.

Each applicant shall include the following written declaration with an Active Exposure Pathway Elimination Measure Plan:

"I attest under the pains and penalties of perjury that (i) I/the person(s) or entity(ies) on whose behalf this submittal is made has/have personally examined and am/is familiar with the requirements of M.G.L. c. 21E and 310 CMR 40.0000; (ii) based upon my inquiry of the/those Licensed Site Professional(s) employed or engaged to render Professional Services for the disposal site which is the subject of this Plan and of the person(s) or entity(ies) on whose behalf this submittal is made, and my/that person's(s') or entity's(ies)' understanding as to the estimated costs of necessary operation and maintenance of the measure(s), that/those person(s) or entity(ies) has/have the technical, financial and legal ability to proceed with the operation of the Active Exposure Pathway Elimination Measure(s) in accordance with M.G.L. c. 21E, 310 CMR 40.0000 and other applicable requirements; and (iii) that I am fully authorized to make this attestation on behalf of the person(s) or entity(ies) legally responsible for this submittal. I/the person(s) or entity(ies) on whose behalf this submittal is made is aware of the requirements in 310 CMR 40.0172 for notifying the Department in the event that I/the person(s) or entity(ies) on whose behalf this submittal is made am/is(are) unable to proceed with the necessary operation of the Measure(s)."

(8) Certification of Acceptance. Each Plan shall include a letter from the owner of each property on which an Active Exposure Pathway Elimination Measure is operated. Each letter shall clearly indicate:

(a) the owner's acceptance of the Active Exposure Pathway Elimination Measure on their property(ies) as a required component of the Permanent or Temporary Solution;

(b) the owner's agreement to:

1. provide reasonable access to the property for employees, agents, and contractors of the Department to inspect the Active Exposure Pathway Elimination Measure;
2. notify any buyer of the property of the need for the continued operation of the Active Exposure Pathway Elimination Measure as part of a Permanent or Temporary Solution;
3. avoid engaging in any activity which could prevent or impede the operation of the Active Exposure Pathway Elimination Measure; and

(c) the owner's acknowledgement that an extended shut-down or failure of the Active Exposure Pathway Elimination Measure, except as provided by 310 CMR 40.0720 and 40.0754, may invalidate the Permanent or Temporary Solution.

(9) Certification of Remittance of Application Fee. Each Active Exposure Pathway Elimination Measure Plan shall include the following written declaration:

"I attest under the pains and penalties of perjury that, on or before the date of submittal of this Active Exposure Pathway Elimination Measure Plan to the Department, I remitted, or caused to be remitted, the applicable fee payable in accordance with 310 CMR 4.00."

40.0753: Additional Requirements for the Continued Operation of Active Exposure Pathway Elimination Measures

(1) General. The RP, PRP or Other Person who originally obtained approval of the Active Exposure Pathway Elimination Measure Plan shall be responsible for maintaining the effective operation of the Measure as specified in the Activity and Use Limitation that is in effect and duly recorded or registered with the appropriate registry of deeds or land registration office.

(2) Transfer of Property Interest. Upon the transfer of any interest in the right to use the portion of the property that is subject to the Active Exposure Pathway Elimination Measure, the Notice of Activity and Use Limitation that describes the Measure shall be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer.

40.0754: Additional Requirements for Major Modifications to Active Exposure Pathway Elimination Measures

(1) General. An application for a Major Modification to amend an Active Exposure Pathway Elimination Measure shall be filed with the Department to modify any previously approved terms or conditions, except as provided by 310 CMR 40.0755.

(2) No Active Exposure Pathway Elimination Measure shall be deemed modified until a complete application for a Major Modification has been approved by the Department and said approval has been amended to the Activity and Use Limitation that is duly recorded or registered with the appropriate registry of deeds or land registration office.

(3) Content of Application for Major Modification. In addition to the requirements in 310 CMR 40.0752, an application for a Major Modification of the Active Exposure Pathway Elimination Measure shall include the following:

- (a) a description of the modification sought;
- (b) if the application is made to modify the terms or conditions of the original Active Exposure Pathway Elimination Measure Plan, an LSP Opinion as to why the terms or conditions are no longer necessary or appropriate, including a report detailing any new or additional information to justify the modification(s) sought if the application is to modify the terms or conditions of the original approval of said Plan; and
- (c) if the application is made to terminate the Active Exposure Pathway Elimination Measure, the evaluation and documentation required pursuant to 310 CMR 40.0720.

40.0755: Requirements for Minor Modifications to Active Exposure Pathway Elimination Measures

(1) General. The party responsible for maintaining the Active Exposure Pathway Elimination Measure shall notify the Department of any of the following changes to the Measure which are described in the Activity and Use Limitation that is duly recorded or registered with the appropriate registry of deeds or land registration office:

- (a) change(s) in the name or address of the party responsible for maintaining the effective operation of the Measure as specified in the Activity and Use Limitation; and
- (b) any omission or modification that does not materially affect the nature or complexity of the Active Exposure Pathway Elimination Measure.

(2) Notification of a Minor Modification shall include the following:

- (a) a completed transmittal form using the form established by the Department for such purposes;
- (b) a description of the modification sought; and
- (c) the certification required by 310 CMR 40.0009.

(3) Minor modifications to Active Exposure Pathway Elimination Measure Plans shall not be subject to processing requirements under 310 CMR 40.0760 or 310 CMR 4.00.

40.0759: Incomplete Active Exposure Pathway Elimination Measure Plans

Approvals for an Active Exposure Pathway Elimination Measure Plan or Modification shall not be deemed complete if the applicant:

- (1) fails to include all required information, as listed in 310 CMR 40.0752 through 40.0755;
- (2) fails to include the applicable fee established by 310 CMR 4.00; or
- (3) fails to fill out the application correctly.

40.0760: Approval Process for Active Exposure Pathway Elimination Measure Plans or Major Modifications

(1) General. 310 CMR 40.0760 through 40.0765, cited collectively as 310 CMR 40.0760, together with 310 CMR 4.04, define the approval process for Active Exposure Pathway Elimination Measure Plans or Modifications of an Active Exposure Pathway Elimination Measure.

(2) Unless otherwise specified by the Department in writing, an Active Exposure Pathway Elimination Measure Plan or Major Modification, is presumptively approved 21 days subsequent to the receipt by the Department.

(3) Commencement of Schedule. For purposes of 310 CMR 40.0760(2) and 310 CMR 4.04(2)(a), the computation of time periods shall commence on the day a complete Active Exposure Pathway Elimination Measure Plan or Major Modification is received electronically by the Department, received at the appropriate regional office of the Department, or on the day the applicable fee is received, as described in 310 CMR 40.0008, whichever occurs later.

(4) Presumptive approval of a Active Exposure Pathway Elimination Measure Plan or Major Modification pursuant to 310 CMR 40.0760(2) means the applicant has approval to operate the Active Exposure Pathway Elimination Measure in compliance with all applicable provisions of 310 CMR 40.0000. Such presumptive approval shall not be construed as approval by the Department of the adequacy of the Permanent or Temporary Solution for which the Active Exposure Pathway Elimination Measure is required, or as forgiveness of non-compliance with any provision of 310 CMR 40.0000.

40.0761: Conditions Applicable to all Active Exposure Pathway Elimination Measures

(1) Any person that is responsible for the operation of an Active Exposure Pathway Elimination Measure shall comply at all times with M.G.L. c. 21E, 310 CMR 40.0000, the terms and conditions of the Department's approval, and any other applicable federal, state or local laws.

(2) Any person that is responsible for the operation of an Active Exposure Pathway Elimination Measure shall maintain the remote monitoring technology required at 310 CMR 40.0711(5) and notify the Department immediately of any suspension or failure of the Measure lasting 30 consecutive days immediately following the expiration of 30 days.

(3) All Active Exposure Pathway Elimination Measures or Modifications shall be conditioned on the following:

(a) compliance with the requirements of 310 CMR 40.0000;

(b) notification in writing to the Department:

1. upon gaining knowledge of any technical, financial or legal inability to operate and maintain any Active Exposure Pathway Elimination Measure required as part of a Permanent or Temporary Solution; or

2. upon a decision by the person operating and maintaining an Active Exposure Pathway Elimination Measure to terminate operation of the measure;

(c) inclusion of the Release Tracking Number(s) on documents submitted to the Department with respect to the disposal site;

(d) certification of documents submitted to the Department as required by 310 CMR 40.0009;

(e) authorization for personnel and authorized agents of the Department to enter, at reasonable times and with sufficient notice, and upon the presentation of credentials, any premises at which an Active Exposure Pathway Elimination Measure is in effect for the purpose of investigating, sampling, or inspecting any records, conditions, equipment, practice or property relating to said Measure at

the disposal site, or protecting health, safety, public welfare, or the environment;
and

(f) any other conditions necessary to ensure the appropriate level of Departmental oversight of response actions.

(5) The operation of an Active Exposure Pathway Elimination Measure does not grant any property rights or exclusive privileges, nor does it authorize any injury to private property or invasion of property rights.

40.0762: Effective Date of an Active Exposure Pathway Elimination Measure

- (1) An Active Exposure Pathway Elimination Measure shall become effective:
 - (a) 21 days from the date the complete Active Exposure Pathway Elimination Measure Plan is received by the Department, if the Plan is presumptively approved pursuant to 310 CMR 40.0760(2); or
 - (b) on the date the Department issues its written approval of the Active Exposure Pathway Elimination Measure; and
 - (c) The date on which the Measure has been described on a form prescribed by the Department that is duly recorded or registered with the Activity and Use Limitation in the appropriate registry of deeds or land registration office.

40.0763: Duration of Active Exposure Pathway Elimination Measures

- (1) An Active Exposure Pathway Elimination Measure shall remain in effect until:
 - (a) the Measure is suspended or revoked by the Department pursuant to 310 CMR 40.0764; or
 - (b) the Measure is terminated pursuant to 310 CMR 40.0720 and 40.0754.

40.0764: Active Exposure Pathway Elimination Measure Suspension and Revocation

- (1) The Department may suspend or revoke any Active Exposure Pathway Elimination Measure and the binding Activity and Use Limitation for sufficient cause including, but not limited to, the following:
 - (a) any violation of M.G.L. c. 21E, 310 CMR 40.0000 or other applicable law or regulation;
 - (b) submittal of false or misleading information in the Active Exposure Pathway Elimination Measure Plan; or
 - (c) nonpayment of annual compliance assurance fees required pursuant to 310 CMR 4.00.
- (2) Prior to the suspension or revocation of a Active Exposure Pathway Elimination Measure and the binding Activity and Use Limitation for sufficient cause, the Department shall issue a notice of intent to suspend or revoke the approval of said Measure which describes the basis for the proposed suspension or revocation and informs the person to whom it is issued of his or her right to request an adjudicatory hearing pursuant to M.G.L. c. 30A.

(3) Notwithstanding 310 CMR 40.0764(2), suspension or revocation of the Active Exposure Pathway Elimination Measure and the binding Activity and Use Limitation because of nonpayment of annual compliance assurance fees shall be processed in accordance with 310 CMR 4.03(7).

40.0765: Right to Request an Adjudicatory Hearing

(1) Any person that is aggrieved by a decision of the Department with respect to the denial, suspension or revocation of an Active Exposure Pathway Elimination Measure may request an adjudicatory hearing before the Department in accordance with 310 CMR 40.0050.

(2) A person shall be deemed to have waived his or her right to an adjudicatory hearing if he or she failed to raise the matter of his or her complaint at the appropriate point during the Department's review of the Active Exposure Pathway Elimination Measure Plan in accordance with 310 CMR 40.0760, provided that a matter may be raised upon a showing that it is material and that it was not reasonably possible with due diligence to have been raised during the review of said Plan.

(3) A request for an adjudicatory hearing pursuant to 310 CMR 40.0765 shall:

- (a) comply with 310 CMR 40.0050 and 310 CMR 1.00;
- (b) include a copy of the Department's decision; and
- (c) state the reason(s) why the Active Exposure Pathway Elimination Measure does not comply with 310 CMR 40.0000;

(4) The adjudicatory hearing shall be limited to the issue of whether the Department's decision is in accordance with the criteria set forth in 310 CMR 40.0750.

(5) When a request for an adjudicatory hearing is made following receipt of a notice of intent to suspend or revoke an Active Exposure Pathway Elimination Measure for sufficient cause, allegations made at the adjudicatory hearing shall be limited to whether the Department has cause to deny, suspend or revoke said Measure.