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Via Electronic Mail

Ms. Elizabeth Callahan
Director of Policy & Program Planning
Bureau of Waste Site Cleanup, 6th Floor
One Winter Street
Boston, MA 02108

RE: Vertex Environmental Inc.'s Comments on 2013 Proposed Amendments to the
Massachusetts Contingency Plan (MCP), 310 CMR 40.0000

Dear Ms. Callahan:

Vertex Environmental (VERTEX) appreciates the opportunity to provide comments to the Massachusetts Department of Environmental Protection (MassDEP) related to the proposed 2013 Massachusetts Contingency Plan (MCP) regulation amendments.

VERTEX supports the MassDEP's goals to streamline the MCP process and finds that many of the proposed revisions should help streamline portions of the MCP. In particular, we support the following amendments:

- Eliminating the Numerical Ranking System for ranking MCP sites;
- Eliminating Tier I permits;
- Extending the deadline for submittal of Phase II Reports from two years to three years, which will allow additional assessment work or multiple seasonal rounds of sampling;
- Changing the terminology from Class A-B-C Response Action Outcomes (RAOs) to Permanent and Temporary Solutions. This will allow individuals not familiar with the MCP terminology to understand the type of closure at their site;
- Streamlining of Activity & Use Limitations (AULs) by removing the requirement for a separate LSP Opinion (Exhibit C);
- Increasing the lead Upper Concentration Limit (UCL) because this is more representative of urban fill conditions throughout the Commonwealth; and
- Removing the Light Non-Aqueous Phase Liquid (LNAPL) UCL of ½ inch.

However, we additionally have found some of the proposed amendments to be overly prescriptive and believe that they would have the effect of removing an LSP's discretion to select a site-



specific approach to the closure of many sites. The strength of the MCP program has been to allow site specific, risk based closures that are appropriate to the site conditions. Some of the proposed amendments appear to have a “one-size fits all” approach that we believe could be modified to be more appropriate for the variety of types and sizes of MCP sites.

In many instances, the proposed MCP amendments appear to restrict and even eliminate the ability of the LSP to be innovative and to develop models and endpoints that reflect emerging science and lead to overall greater benefits, as is currently allowed within Response Action Performance Standards (RAPS). We believe that some of the proposed reforms will create more stress on limited financial resources and serve as a disincentive to returning Brownfields/underutilized properties to more viable and beneficial uses.

VERTEX’s specific comments, questions, and suggestions regarding these issues are outlined below according to the topics presented in the MCP amendments.

Permit/Tier Classifications & Numerical Ranking System

- **Transition** - Clarification is needed on how the current Tier classifications will transition into the new classification system.
- **Inclusionary Criteria** - The Tier I inclusionary criteria (of IRAs with remedial actions) will likely cause many more sites moving into the Tier I category than previously. Additional clarification in guidance documents will be beneficial to assist LSPs and PRPs with understanding which IRAs will automatically trigger Tier I classifications.
- **Tearsheets** - VERTEX suggests that MassDEP consider allowing an electronic version of the newspaper “tearsheet” for documenting Public Notice requirements. With the use of internet newspapers, a paper copy of public notices is becoming difficult to obtain and does not further the streamlining intent of these new amendments.

AULs

- **Invalidation Due to Violations** - The proposed revision to 40.0019(1) requires MassDEP to deem a Permanent/Temporary Solution to be invalid if a violation of the AUL causes a response action to fail to achieve or maintain a level of No Significant Risk/No Substantial Hazard. This is a strong bright line, which provides no schedule to allow the violation to come into compliance or discretion to the type of violation causing the invalidation. Would this mean that, if a snow plow damages the asphalt cover of a parking lot required by an AUL and the site is visited by MassDEP the following day that the Permanent Solution can be considered invalid before the site owner has the ability to schedule the repairs? This wording of this section should be removed or revised to ensure that there is some discretion allowed by enforcement and a clear pathway for correcting the violation prior to the invalidation of a Permanent or Temporary Solution.

The new section 40.0020(2) provides additional requirements for MassDEP to invalidate a Permanent/Temporary Solution if there is a violation of an AUL. The proposed



language in this section currently states that the “owner and operator” “and/or any other person liable under MGL c 21E for the disposal site who has knowledge of” a change in the AUL activities/uses/exposures, etc., and if these changes are considered a failure to achieve/maintain a level of NSR/No Substantial Hazard, then MassDEP “shall deem” the Permanent/Temporary Solution to be invalid. Does this include the prior owners, former/current LSPs, business partners of the operators, and/or lenders who may not have control over the site conditions, but who may be negatively impacted by the invalidation of the Permanent/Temporary Solution? Is MassDEP planning on fining these groups if the site is out of compliance? This wording should be removed or significantly modified to clarify responsibilities and reduce the chances that many RAOs might be invalidated and parties who have achieved MCP closure in good faith be punished for the actions of others.

- **LSP Opinion** - VERTEX supports the removal of the LSP Opinion as a separate part of the AUL, and supports including it in the AUL form. However, the LSP summary of site conditions and contamination should be re-ordered from that proposed by MassDEP: the summary of site conditions should be placed after the description of AUL permitted and prohibited uses and not be placed first in the form. We believe that new owners might not read the permitted/prohibited uses, if they are required to read site condition information first.
- **Metes and Bounds** - VERTEX supports keeping the metes and bounds requirement in the AULs. There are several examples that we have encountered when the owner did not know the full extent of their property and, without a survey and a metes and bounds requirement, the AUL would have been placed on either the wrong portion of the property, or the property boundaries would have been inaccurate.
- **MassDEP Notification** - The requirement of submittal of deeds to MassDEP when a property with an AUL is sold is not clear as to who is responsible to submit this documentation. Is the current owner or future owner responsible for this submittal? VERTEX believes that this responsibility should be clearly the future property owner’s (purchaser’s) responsibility.

Vapor Intrusion and Closure

- **Class C-2 RAOs** - We do not support the elimination of Class C-2 RAOs from the Temporary Solution category. This will not streamline the MCP process and it will add additional costly steps to sites that had a pathway to Permanent Closure. The proposed changes would increase reporting requirements (Phase IV report, Phase V report, status reports) and not provide MassDEP with any information that wasn’t already being provided under Class C-2 RAO by post-Class C RAM reports and/or Tier II extensions. In particular, sites that have unchanging site conditions (i.e. very large master-plan type Brownfields sites with urban fill impacts that cannot be exempted from MCP compliance) that are being remediated over a period of 10 to 15 years due to immense redevelopment costs/logistics seem particularly unsuited for Phase IV/V/ROS compliance requirements. In addition, a site that has successfully demonstrated No Substantial



Hazard to achieve a Class C-2 RAO would now be indistinguishable from a site that has not proven such.

It is also unclear how this transition would occur, what deadlines would apply, and whether redevelopment of the site would best occur under current Release Abatement Measures or under the comprehensive response actions (Phase IV/V). How would the compliance timelines be re-established for longstanding Class C-2 RAO sites? This seems an unnecessary confusion to owners with C-2 RAOs. This will also cause unnecessary confusion and financial burdens for recent property transactions, where the lender approved of the property transfer because the site was not considered an active MCP site.

Finally, MassDEP's own training (Spring 2011), urged LSPs/PRP's to file C-2 RAO's at perhaps unnecessary cost to the PRPs, in order to bring older sites out of active Phase V, and presumably into compliance. This confusing reversal does not further the streamlining intent of these new amendments.

We strongly recommend keeping the C-2 RAOs within the Temporary Solution category.

- **Permanent Solutions for Sites with Active Mitigation Systems** - VERTEX supports the mechanisms that allow achieving Permanent Solutions while using active vapor mitigation systems, but the amended language is too prescriptive regarding the installation and operation of active, and to some extent passive, vapor mitigation systems. The need for a permit and an AUL is excessive for some systems, at least with the proposed level of permit requirements. The use of a "one-size-fits-all" permit should be re-evaluated. The permits, as written, appear to be more restrictive than permits required for air permits from industrial facilities. The requirements for immediate alerts for all residents in the building whenever the system shuts down (no matter the timeline or whether there is a potential risk to any of the residents) are inappropriate.

The financial assurance requirements have not been described, but may be prohibitive, and prevent owners/operators from implementing the needed remedial system. We urge MassDEP to revise the permit requirements and allow for flexibility in this process, as is appropriate for the type of MCP release site. Telemetry is appropriate notification for owners and other responsible individuals. The need for notification of impacted residents could be based upon the length of time and/or the potential risks to the residents. The permit could require certifications of such response times, reasons for responses, etc. to be attested to annually.

VERTEX supports the changes in the MCP amendments that allow permanent closure of sites with active vapor mitigation systems. However, the permit requirements are too prescriptive and will pose significant issues for multifamily developments

- **Substantial Release Migration (SRM)** - The revisions to SRM language will require additional resources to be spent to address the new interpretation without a commensurate benefit in protection of public health. These revisions will likely result in more IRAs and



more Tier 1 sites, regardless of plume direction or depth to groundwater. During due diligence investigations, the fear of a potential purchaser identifying an IRA condition that would need to be addressed before the property transaction, may result in sellers preventing subsurface investigations during due diligence. This could result in a “chilling effect” on property transfers, even though the detectable contamination may be low-level historic contamination that is not expected to migrate towards a building.

VERTEX recommends that the 72-hour reporting requirement be limited to conditions where there is a discharge of vapors that likely exceed indoor air screening levels, permitting LSPs to evaluate site-specific conditions to determine if there is an SRM at the site.

- **Modeling** - VERTEX disagrees with the elimination of modeling as a technically justified approach to assessment tool, as part of the multiple lines of evidence at some sites. There is some confusion about the prohibition on modeling, and whether it cannot be used for determining if groundwater concentrations might impact a local surface water body.
- **Historic Fill** - VERTEX supports the recognition that many MCP sites are located within soil and fill containing elevated levels of various contaminants. We welcome the Anthropogenic and Historic Fill definitions, but we believe that these definitions and the criteria for their applicability need revising. Parts (c) and (e) of the historic fill definition should be deleted, or modified to clarify the meaning. In many cases, historic fill might be related to the demolition of the buildings at the property (and therefore, part c would eliminate that fill from being considered “historic fill”). In addition, it may be impossible to determine if the fill was placed legally or illegally. Lack of this knowledge should not prevent identifying the material as historic fill. Perhaps the wording could be modified to soften this language to allow for lines of evidence to be considered by the LSP that support the historic nature of the fill.

Also the issue of unacceptable risk/imminent hazard noted in 40.0370 should be specifically addressed within this exemption so that practitioners/PRPs understand the importance of balancing the need to protect human health, with inaction potentially allowed by legal exemptions.

Pesticides, herbicides, asbestos containing materials, petroleum hydrocarbons, and other compounds can also be present in historic fill. In the absence of generic background concentrations for comparison, is MassDEP expecting site-specific fill concentrations from the site and surrounding properties? There are numerous implementation questions that will benefit from a DEP Workgroup on this issue.

Risk Assessment and Standards

- **Hierarchy** - VERTEX believes that the toxicity value hierarchy presented in the amendments should be provided in a guidance document and not in the regulations. The hierarchy needs clarification as written. The list of appropriate risk assessment documents



will change over time and should not be included in regulations. In addition, this list minimizes appropriate judgment by LSPs and risk assessors based on site specific conditions and updated toxicity references by USEPA and other groups.

- **Lead Standards** - The bifurcated S-1 standard should be revised to include only one standard. As written, the 200 and 300 mg/kg levels are confusing. By lowering the lead reportable concentration to 200, it is likely that more sites will get into the MCP system.

As mentioned previously, VERTEX supports the change of lead UCLs from 3,000 to 6,000 mg/kg.

- **Vanadium Standards** - MassDEP is lowering the vanadium standards to levels below typical background levels in soil and in the Boston Blue Clay. Questions of the applicability of some of the risk assumptions have been raised by several clients. In addition, the primary analytical laboratories in the region cannot analyze for vanadium pentoxide.

VERTEX supports retaining the current vanadium reportable concentrations, cleanup standards, and UCLs until such time as the proposed standards have been more fully discussed in a public forum/workgroup setting. The inadvertent impact of this lower concentration will be to impact the already dire soil management issue by requiring large quantities of naturally occurring vanadium soils (such as the Boston Blue Clay) to be disposed of at the already dwindling number of regulated disposal facilities.

- **TCE Standards** - The lower TCE groundwater standards will be problematic for many owners/operators of sites in Massachusetts. These lower standards will create more Tier I sites, and with indoor air action levels being lower than background levels, more sites will have a difficult time achieving permanent closures. There is additionally the concern that closed MCP sites will be reopened.
- **1,4 Dioxane Standards** - The revised GW-1 standard for 1,4 dioxane should be reconsidered. The analysis will require SIMS analysis to reach the low levels of detection required and 1,4 dioxane can have multiple sources in the environment, unrelated to discrete MCP releases. Guidance should be prepared to address this new standard, if it remains at the proposed level.

NAPL and Source Control Amendments

- **LNAPL 72-Hour Reporting** - VERTEX recommends that the new 72-hour reporting requirement for 1/8 inch LNAPL in a well or depression/excavation be increased to 1/4 inch. Otherwise, there will be many more Tier I sites in the system for releases that might only be a sheen in an excavation.
- **LNAPL CSM** - We support the use of Conceptual Site Models for MCP reports, but believe the requirement for an LNAPL CSM redundant and should be removed from the MCP amendments.



- **Feasibility-Closure** - The requirement that NAPL must be removed to the extent feasible as a condition of source control and a requirement for closure implies that active remediation of NAPL is required in all cases, which is not necessarily appropriate.
- **DNAPL** - We disagree with the language that makes it impossible to obtain any type of outcome, Permanent or Temporary Solution, for sites with DNAPL constituent concentration above 1% of its corresponding solubility limit. We understand and support the 1% solubility (assuming a corresponding guidance that defines those solubility assumptions) for use as a criterion for inclusion of the potential for DNAPL in the CSM and the corresponding assessment of it as a potential source. However, it should not be part of criteria for closure.

Miscellaneous

- **RAPS** - VERTEX does not support the inclusion of sustainability criteria in the definition of RAPS. These goals are not tied to achieving a condition of No Significant Risk in response to a release. Responsible parties and LSPs should not need to demonstrate the extent to which such measures are practicable in the context of addressing site related protection of health, safety, welfare, and the environment.

We believe our suggestions for changes to the MCP amendments provide consistency with the overall goals of eliminating unnecessary steps, reducing the burden on MassDEP, streamlining the site cleanup process, returning more sites to functional and productive use following risk-based closure, and supporting urban redevelopment.

Thank you for the opportunity to comment on the 2013 Proposed MCP Amendments.

Sincerely,

Vertex Environmental Services, Inc.



James B. O'Brien, LSP
President

