

## Compliance Tip of the Month

**Dates Posted:** February 12, 2020 through March 18, 2020

**Compliance Tip:**

The MCP includes specific requirements for the application of Remedial Additives at Disposal Sites near *Sensitive Receptors* (310 CMR 40.0046), which are defined along with the key distances to them at 40.0046(3)(a). These include:

- 40.0046(3)(a)3. within 800 feet of any surface water supply used in a public water system or any tributary of such surface water supply
- 40.0046(3)(a)4. within 50 feet of any other surface water body or any tributary of such surface water

A potential remedial application site should be carefully evaluated for these criteria.

**Dates Posted:** December 16, 2020 through February 11, 2020

**Compliance Tip:**

If a new site owner qualifies as an "eligible person/tenant/other person" (310 CMR 40.0570), s/he can file to reset the clock on response action deadlines. This requires filing a Miscellaneous Document BWSC Form 126 which should include a completed BWSC Form 107D: *ELIGIBLE PERSON, ELIGIBLE TENANT OR OTHER-PERSON CERTIFICATION TRANSMITTAL FORM*, as well as a letter of request from the new site owner to establish the new deadlines. The Form 107D does not get filed separately and an LSP should not file the form.

**Dates Posted:** November 21, 2019 through January 15, 2020

**Compliance Tip:**

Applying for a National Pollutant Discharge Elimination System (NPDES) Remediation General Permit (RGP) for discharge to an Outstanding Resource Water (ORW) requires a 30-day public comment period (*314 CMR 4.04 (5) (c)*) and must be demonstrated "to be for the express purpose and intent of maintaining or enhancing the resource for its designated use..." (*314 CMR 4.04 (3) (b)*).

This could catch you by surprise as it is a higher bar to meet and requires more time to obtain than a "typical" NPDES RGP.

**Dates Posted:** September 18, 2019 through November 20, 2019

**Compliance Tip:**

309 CMR 3.09(3)(a) states that "...at least 12 of the 48 [continuing education] credits must be earned at a Board-approved DEP Course or Courses." The LSPA urges LSPs to secure as many DEP credits as possible in the first two years of their licensing period. Waiting until the last year to secure even half of the required DEP credits is risky - setting LSPs up, at best, to having to request a 90-day extension from the LSP Board of Registration.

**Dates Posted:** June 13, 2019 through September 17, 2019

**Compliance Tip:**

Do not ship any hazardous waste, either listed or characteristic, on a 21E Bill of Lading.

The determination that a waste is not a listed hazardous waste cannot be made on the basis of laboratory data alone, nor is it enough to assume that due diligence has been conducted. The BOL requires an LSP Opinion that the waste has been adequately and properly characterized, which may require research into site history and process operations. Documentation of research to back up the determination that a waste is not a hazardous waste must meet the requirements of 310 CMR 30.007 (Accurate and Complete Record Keeping). See Interim Policy [HW93-01](#).

**Dates Posted:** May 16, 2019 through June 12, 2019

**Compliance Tip:**

MassDEP reports receiving IRA, RAM, and OMM Plans that do not provide detailed objectives, sample locations, sampling frequencies and analyses, and/or schedules as required by the MCP (cf. 310 CMR 40.0424, 40.0444, and 40.0874(3)(d)). LSPs should confirm that their work plans meet the MCP requirements for content.

Don't submit a Non-Plan Plan!

**Dates Posted:** April 23, 2019 through May 15, 2019

**Compliance Tip:**

When assessing the extent of release as required for Risk Characterizations, if OHM concentrations (excluding VOCs) in GW are greater than GW-3 within 500 feet of a surface water body, or if OHM are detected in GW within 200 feet of a surface water body, these OHM should be analyzed for in the surface water and/or sediment. *MCP 310 CMR 40.0904(2)(c)(1 and 2)*

The need for such measurements may be obviated by technical justification consistent with 310 CMR 40.0193.

**Dates Posted:** March 19, 2019 through April 22, 2019

**Compliance Tip:**

LSPs must not delete the note at the top of the first page of Form 1075

"[Confirmatory] Notice of Activity and Use Limitation."

The note is part of the document; it is not optional.

*310 CMR 40.1099 Forms for Activity and Use Limitations*

**Dates Posted:** February 12, 2019 through March 18, 2019

**Compliance Tip:**

If a risk characterization supporting a Permanent Solution Statement relies on the exclusion of OHM associated with Anthropogenic Background (e.g. Historic Fill), to arrive at a conclusion of No Significant Risk, then the Permanent Solution must be filed as a Permanent Solution with Conditions. 310 CMR 40.1013

**Dates Posted:** January 16, 2019 through February 11, 2019

**Compliance Tip:**

If you are denied access to an abutting property to evaluate the nature and extent of a release or to further evaluate sensitive receptors, you can ask MassDEP for assistance:

- You must first make "reasonable efforts" to gain access to the property.
- If you receive no response or are denied access, you can then make a written request for assistance from MassDEP in accordance with 310 CMR 40.0173(1).
- A copy of the request to MassDEP must also be sent by certified mail to each person who owns and operates the site or location to which access is sought in accordance with 310 CMR 40.0173(2).
- While not a regulatory requirement, it is good practice to document all phone conversations, emails, and correspondence with the recalcitrant owner/operator, and mail any requests via certified mail with mail receipt.

**Dates Posted:** November 13, 2018 through January 15, 2019

**Compliance Tip:**

An Activity and Use Limitation (AUL) cannot be used to limit the activities and exposures of utility workers conducting emergency excavation and repair of existing subsurface utilities. If the property has a utility line or easement, then at a minimum that area of the site must be cleaned up to a level that poses No Significant Risk for emergency excavation and repair of existing subsurface utilities by workers without personal protective equipment.

*310 CMR 40.1074(2)(h): Contents of a Notice of an Activity and Use Limitation*

**Dates Posted:** September 26, 2018 through November 12, 2018

**Compliance Tip:**

The LSPA's review of recent Notices of Audit Findings indicates that a common violation of sites in Remedy Operation Status (ROS) is the failure to fulfill reporting obligations.

To maintain compliance with the MCP ROS requirements, Phase V Status and Remedial Monitoring Reports must be submitted on a semi-annual basis (310 CMR 40.0893(2)(g)). Failure to report could result in the termination of ROS (310 CMR 40.0893(6)). Where ROS has been terminated, the PRP has two years from the date of termination to achieve a Permanent or Temporary Solution. Response actions after the ROS termination cannot be conducted without a valid Tier Classification or Tier Classification Extension (310 CMR 40.0893(6)(e)).

**Dates Posted:** June 14, 2018 through September 25, 2018

**Compliance Tip:**

**Conducting Public Involvement at PIP Sites**

A quick check of BWSC126 Forms on eDEP identified about 48 active Public Involvement Plan (PIP) sites in the Commonwealth. This is certainly not a high percentage of total overall sites, but PIP sites require extra attention to public communication about key milestones.

In addition to the requirements outlined in 310 CMR 40.1400, MassDEP's website has a section dedicated to public involvement at PIP sites.

Check out [Tips on PIPs](#) and [MassDEP's Q & As on PIP sites](#).

When in doubt, contact the Public Involvement Coordinator at your MassDEP Regional Office with any questions regarding public involvement plans.

**Dates Posted:** May 18, 2018 through June 13, 2018

**Compliance Tip:**

MassDEP recommends that at sites relying on a sub slab depressurization system (SSDS) to prevent exposure to contaminants of concern, annual checks be conducted of fan operation status and for potential differential pressure drops. These annual checks should be conducted as part of site maintenance and monitoring activities, and are recommended even after the installation of remote monitoring (telemetry). This applies to SSDS systems at sites in Remedy Operation Status, and sites with a Temporary Solution or a Permanent Solution with Conditions.

This is a reminder that the Responsible Party is advised to continue to verify the operation of the SSDS until such time that it is demonstrated the SSDS is no longer needed.

From VAPOR INTRUSION GUIDANCE: SITE ASSESSMENT, MITIGATION AND CLOSURE Policy #WSC-16-435, Table 3-1.

**Dates Posted:** April 24, 2018 through May 17, 2018

**Compliance Tip:**

Remediation Waste (e.g., contaminated soil or debris excavated from a site or groundwater collected for disposal) should be removed from a site within 120 days of its initial excavation or collection.

If the LSP anticipates the waste remaining on site for more than 120 days, (s)he can submit a RAM or IRA Plan or Phase IV RIP to MassDEP outlining a specific plan and schedule for dealing with the waste beyond the 120-day deadline.

Don't forget that remediation waste does not include hazardous waste, which must be removed within 90 days. 310 CMR 40.0031(7)

**Dates Posted:** March 15, 2018 through April 23, 2018

**Compliance Tip:**

When making the case for Downgradient Property Status (DPS, 310 CMR 40.0180), an LSP must demonstrate that the DPS property has not contributed to the release in question (see 310 CMR 40.0183(2)(b)(c)).

MassDEP Notices of Audit Findings indicate that typical DPS issues involve inadequate assessment of potential on-site sources and failure to adequately demonstrate groundwater flow direction and contaminant concentration gradients supportive of DPS.

**Dates Posted:** February 13, 2018 through March 14, 2018

**Compliance Tip:**

A feasibility evaluation is required to close any site at which NAPL with Micro-scale Mobility is present.

310 CMR 40.1003(7)(a)2 states that a Permanent Solution shall not be achieved until "all NAPL with Micro-scale Mobility is removed if and to the extent feasible based upon consideration of CSM principles."

This feasibility evaluation must be conducted in accordance with the requirements of 310 CMR 0860.

**Dates Posted:** January 11, 2018 through February 12, 2018

**Compliance Tip:**

A feasibility evaluation is required to close any site at which NAPL with Micro-scale Mobility is present.

310 CMR 40.1003(7)(a)2 states that a Permanent Solution shall not be achieved until "all NAPL with Micro-scale Mobility is removed if and to the extent feasible based upon consideration of CSM principles."

This feasibility evaluation must be conducted in accordance with the requirements of 310 CMR 0860.

**Dates Posted:** November 14, 2017 through January 10, 2018

**Compliance Tip:**

If a "Potentially Responsible Party" is asked to undertake additional work as a result of a Notice of Audit Findings or any audit followup plan under the MCP, a BWSC111 form (also called Form 111) is required to be filed.

310 CMR 40.1170: Post-audit Completion Statements

(1) Upon completion of the activities required by the Department in a Notice of Audit Findings or any approved Audit Follow-up Plan, the RP, PRP or Other Person undertaking such activities shall submit a Post-audit Completion Statement to the Department using a form established by the Department for such purpose.

**Dates Posted:** September 26, 2017 through November 13, 2017

**Compliance Tip:**

When a property with a Notice of Activity and Use Limitation (AUL) has been sold, the Responsible Party must submit to MassDEP a Form BWSC 113 with a copy of the recorded deed conveying the record title. Remember it is essential that subsequent property owners be given notice of the AUL.

310 CMR 40.1074 (5) states “.....*Within 30 days of recording or registering a deed conveying record title for a property which is subject in whole or in part to a Notice of Activity and Use Limitation, a copy of such deed containing said reference shall be submitted to the Department. This obligation shall attach both to the grantor and the grantee on such deed, provided that submission of such copy to the Department by either the grantor or the grantee shall satisfy this obligation for both of them.*”

**Dates Posted:** August 1, 2017 through September 25, 2017

**Compliance Tip:**

Exposure Point Concentrations (EPCs)

As you develop your EPCs for a site, remember to evaluate your data to see if there are hotspots present in any of your media. A hotspot is a location which has a Contaminant of Concern concentration > 100x higher than surrounding locations. Hotspots are considered distinct EPCs and must be separately evaluated in the risk characterization. Typically, at least five sampling points are necessary to have insight into the variability of a data set.

Consistent with the Guidance for Disposal Site Characterization (MassDEP, July 1995) and 310 CMR 40.0926, an EPC should be a “conservative estimate of the average concentration” to which a receptor may be exposed over the applicable exposure period and at the exposure point. Caveats or exceptions to the use of the average concentration as the EPC include:

- Acute exposure evaluations – typically the maximum concentration is recommended;
- Screening/streamlined assessments - typically maximum or other upper bound concentrations are recommended; and
- When data are limited/insufficient to characterize the “temporal variability or the spatial distribution of Site concentrations.”

**Dates Posted:** June 8, 2017 through July 31, 2017

**Compliance Tip:**

Every three years following issuance of her/his license, an LSP must demonstrate that s/he has earned a minimum of 48 continuing education credits. Of these, at least 12 of the 48 credits must be earned at LSP Board-approved “DEP Course(s)”.

No fewer than 8 credits must be from LSP Board-approved courses classified as “Regulatory.” The balance of the 48 required credits may be earned by attending any LSP Board-approved course, conference, or conference workshop. 309 CMR 3.09(3)(a) and (b)

**Three things to remember:**

1. Some “DEP Courses” are also “Regulatory.”
2. But not all “Regulatory” courses are also “DEP Course(s).”
3. If a course is classified as a “DEP Course” and a “Regulatory” course (listed as “*DEP Course*” *Regulatory* or *DEP/Regulatory*), it can be applied toward both the 12-credit “DEP Course” requirement and the 8-credit “Regulatory” requirement.

**Dates Posted:** May 11, 2017 through June 7, 2017

**Compliance Tip:**

Remediation waste contaminated with waste oil that isn't otherwise a hazardous waste, including [remedial wastewater](#), [soil](#), debris, and sediment that contains used or unused waste oil, does not need to be managed as MA-01 hazardous waste if managed under the MCP's remediation waste requirements at 310 CMR 40.0030, and shipped to a facility permitted to receive these materials. (See [310 CMR 30.252](#))

For [petroleum contaminated soils](#), the MassDEP policy goal is to avoid disposal. Note that asphalt batching facilities operate under Class A recycling permits and are technically recycling rather than disposal facilities.

**Dates Posted:** April 6, 2017 through May 10, 2017

**Compliance Tip:**

**How does one apply Reportable Concentrations and Method 1 Standards when they are equal to the site Oil and Hazardous Materials (OHM) concentrations?**

**If the concentration of OHM is equal to the Reportable Concentration it is deemed a reportable condition.** (310 CMR 40.0360(1): "A release indicated by the measurement of oil and/or hazardous material in soil and/or groundwater requires notification to the Department....if the measured concentration of one or more listed substances in 310 CMR 40.1600 in any soil or groundwater sample is **equal to or greater than** the media and category-specific Reportable Concentration value....")

**If the concentration of OHM is equal to the Method 1 Standard it is considered to represent a condition of no significant risk.** (310 CMR 40.0973(7): A condition of no significant risk of harm to health, public welfare and the environment exists if no Exposure Point Concentration is **greater than** the applicable MCP Method 1 Soil or Groundwater Standard.")

**Dates Posted:** March 14, 2017 through April 5, 2017

**Compliance Tip:**

"Greener Cleanup evaluations" or considerations are not only called out in the MCP under Phase III (Detailed Evaluation Criteria for selecting a comprehensive remedy at 310 CMR 40.0858[4][c]), but also under Response Action Performance Standard (RAPS) at 310 CMR 40.0191(3)(e).

Therefore, Greener Cleanup practices should be considered in all MCP Phases, except during time critical responses (e.g., "2-hour" and "72-hour" reportable conditions). MassDEP provides assistance in the [Greener Cleanups Guidance, WSC #14 – 150](#) (October 2014).

**Dates Posted:** February 9, 2017 through March 13, 2017

**Compliance Tip:**

When to check the "orders, permits, and approvals" box in the "Required Attachment and Submittals Section" of a BWSC transmittal form?

LSPs should check this box only if the response actions covered by the transmittal are based on a sitespecific Administrative Consent Order, Notice of Audit Findings, Interim Deadline, MassDEP-approved Order of Conditions, or similar written order issued by MassDEP or EPA to the PRP. Refer to "Form Questions" section [here](#).



**Dates Posted:** January 12, 2017 through February 8, 2017

**Compliance Tip:**

An LSP can sign a MassDEP Materials Shipping Record (MSR), and if the LSP has another credential such as a P.E. or P.G., the LSP can stamp the form with that other credential subject to its rules. However, an LSP cannot use the LSP seal on an MSR form. According to LSP Board [Advisory Ruling 9801](#), an LSP "must not use his or her seal when signing other documents," meaning documents other than formal waste site cleanup activity opinions.

**Dates Posted:** November 16, 2016 through January 11, 2017

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**Dates Posted:** September 15, 2016 through November 15, 2016

**Compliance Tip:**

MassDEP audits often flag a particular problem at Temporary Solution sites: a failure to include an updated Substantial Hazard Evaluation in the 5-year Periodic Review. This re-evaluation is necessary because the Substantial Hazard Evaluation, by definition, has a 5-year shelf life (see 310 CMR 40.0956(1)(b)).