

Activity and Use Limitation (AUL)

And

Private Cost Recovery

LSPA Seminar: “MCP for Everyone”

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Activity and Use Limitation (AUL)

- Deed restrictions to reduce exposures and reduce response actions.
- Why and how they are used?

Private Cost Recovery

- How private parties recover response costs.
- Section 4A of Chapter 21E: mandatory pre-suit demand letter and dispute resolution.

Regulatory Purpose:

“The purpose of an Activity and Use Limitation is to narrow the scope of exposure assumptions used to characterize risks to human health from a release pursuant to 310 CMR 40.0900, by specifying activities and uses that are prohibited and allowed at the disposal site in the future.”

310 CMR 40.1012(1)

“An AUL is a legal document that identifies site conditions that are the basis for maintaining a condition of No Significant Risk at a property where contamination remains after a cleanup.”

(AUL Guidance, DEP, 1999)

“To help prevent unacceptable exposures to contamination left at a site.”

(AUL Guidance, DEP, 1999)

Elements of an AUL:

- written restriction, providing notice
- imposed by the land owner (DEP approval not required, but DEP can enforce)
- recorded at the Registry of Deeds (or Land Court)
- restricts future uses and allows permitted uses
- to prevent exposure to remaining oil or hazardous materials (OHM)
- largely used for soil contamination

(for groundwater: to eliminate an existing private well, O + M of venting system or vapor barrier)

- Goal/Benefit: to reduce response actions (and costs) while maintaining protection (e.g., Brownfields redevelopment)

Definitions Under Chapter 21E and the MCP:

“Activity and use limitation, a restriction, covenant or notice concerning the use of real property which is imposed upon real property by a property owner or the department pursuant to and in accordance with this chapter and regulations promulgated hereunder.” (G.L. c.21E, §2)

“Activity and Use Limitation means a Grant of Environmental Restriction or Notice of Activity and Use Limitation recorded, registered or filed in accordance with 310 CMR 40.1070 through 310 CMR 40.1099.” (310 CMR 40.0006)

“Notice of Activity and Use Limitation means a written notice of the activities, uses and/or exposures that provide the basis for a Response Action Outcome Statement, as further described in 310 CMR 40.1099. (310 CMR 40.0006)

Examples of AUL Restrictions and Obligations:

- Prohibition of residential, school, agricultural and sensitive uses
- Allowance of commercial and industrial activities
- Install and maintain an impervious surface (e.g., pavement)
- Limitation on excavation activities, including Health and Safety Plan and Soil Management Plan
- Inspection and maintenance of venting system or vapor barrier, to prevent indoor air contamination

Contents of an AUL Filing:

- “Notice of Activity and Use Limitation” (DEP Form 1075; see next page)
- Exhibit A – Parcel Description
- Exhibit B – Sketch Plan
- Exhibit C – AUL Opinion (by LSP, including history, reason for AUL, permitted and restricted uses, and obligations)
- Exhibit D – AUL Opinion Form – BWSC Form 113A
- Exhibit E – Signatory Authority (by Owner)

45-day prior notice to record interest holders (e.g., tenants, mortgagees, easement holders).

All documents recorded at Registry of Deeds (or Land Court if registered land)

Contents of DEP Form 1075 – “Notice of AUL”

- Activities and uses consistent with AUL Opinion (permitted uses)
- Activities and uses inconsistent with AUL Opinion (prohibited uses)
- Obligations and conditions in the AUL Opinion
- Proposed changes in activities and uses (new LSP Opinion required)
- Incorporation in deeds, mortgages and leases

Sources and References:

- **Chapter 21E:**
 - Section 2 (Definitions)
 - Section 6 (Restrictions on Property)
- **MCP, 310 CMR 40.0000:**
 - §40.0006 (Definitions)
 - §40.1012 (Application of AULs)
 - §40.1074 (Notice of AULs)
- **DEP Policy:**
 - “Guidance on Implementing Activity and Use Limitations”
 - (Interim Final Policy #WSC 99-300; May 1999)

Scenarios of Private Cost Recovery

- Current owner incurred response costs due to former owner's contamination
- Current owner incurred costs due to off-site, neighboring source
- Landlord and tenant

Section 4A Process (of Chapter 21E)

- To obtain reimbursement, contribution, or equitable share, or to request performance of response actions.
- To recover “necessary and appropriate” response actions, including:
 - Assessment, containment, remediation
 - Identification of responsible party
 - LSP and consultant fees
 - Attorneys’ fees if tied to response action (e.g., response action and regulatory strategy, management of the clean-up)

Section 4A Process (of Chapter 21E)

- Mandatory, pre-suit process
 - Demand letter outlining claims
 - Written response within 45 days
 - Parties confer in good faith within 60 days.
 - Response can request documents or information
 - Either party can request alternative dispute resolution (e.g., mediation, arbitration) within 75 days.

Sanctions Under Section 4A

- Litigation costs and attorneys' fees may be awarded if:
 - Failure to respond to demand letter within 45 days
 - Failure to negotiate in good faith
 - Unreasonable refusal to enter into agreement (where liability is reasonably clear).
- The notifying party can be liable for attorneys' fees if:
 - No reasonable basis for claim
 - Failure to negotiate in good faith

Recent Supreme Judicial Court case:

Bank v. Thermo Elemental, Inc., 451 Mass. 638 (2008)

(*Email me for a summary of the Bank case: pfeuerbach@rubinrudman.com)