NAIOP
COMMERCIAL REAL ESTATE
DEVELOPMENT ASSOCIATION
MASSACHUSETTS

May 15, 2013

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

Re: Comments Concerning March 2013 Public Hearing Draft MCP Revisions

Dear Commissioner Ericson:

Thank you for the opportunity to provide our comments concerning the March 2013 public hearing draft amendments to the Massachusetts Contingency Plan (the "MCP"). These proposed amendments have been a long time coming, and NAIOP recognizes that they reflect a remarkable amount of effort on the part of the Department to address most, if not all, of the currently outstanding implementation issues under the MCP. In addition to a considerable amount of public outreach on the part of the Bureau of Waste Site Cleanup, we recognize that BWSC also made a significant effort to reach out to other branches of state government.

These draft regulations provide a real opportunity to address a number of important issues currently involved at sites subject to the MCP. The good news is that on a conceptual level the Department has put forward many helpful and productive ideas. Some of these ideas are particularly creative in terms of addressing problems that have long vexed the Department, the regulated community, and the LSPs and attorneys who work with these parties, particularly regarding vapor intrusion sites. These good ideas include the following:

1. Permit/Tier Classification and the Numerical Ranking System: The proposed regulations would do away with the need for MCP Tier I Permits, and the need for completing a Numerical Ranking System Scoresheet when Tier Classifying a site.

2. AULs: Here, the ideas include eliminating the need for an AUL Opinion and allowing AULs to be used at federal Superfund sites. Again, good ideas. Getting rid of the AUL Opinion requirement is intended to eliminate duplicative effort which really only results in additional busy work and proof reading, and not in additional environmental protection.

3. Vapor Intrusion: The proposed regulations incorporate some of the ideas that were developed as part of the December 2011 Interim Final VI Guidance, and establish a way for VI sites to achieve an RAO (i.e., MCP closure, and not just ROS) even if it is necessary to

maintain an active post–RAO mitigation measure, such as a sub-slab depressurization system. Here, at the conceptual level, DEP's proposed Permanent Solution with Conditions nicely resolves what previously had been a conundrum.

4. NAPL: Here too, the draft attempts to resolve long-acknowledged issues regarding how the MCP should address NAPL, including the designation of NAPL in environmental media as a UCL.

5. Definitions were added to the regulations concerning Natural Background, Anthropogenic Background, and Historic Fill in an effort to address the so-called "urban fill" issue, which has been a topic of discussion for the past quarter-century.

Unfortunately, while many of the regulatory concepts outlined above were thoughtful and helpful, the detailed provisions implementing these policy efforts were less so, in some cases remarkably less so. Some of the proposed revisions will increase burdens and decrease certainty at many sites, including those with no VI issues. On a conceptual level, in many instances, it appears that the proposed revisions were designed to address the "lowest common denominator" of a particular problem. Further, a number of provisions would result in less LSP discretion in situations where that discretion is most necessary and/or critical in terms of how to appropriately manage a site. The increased "command and control" flavor of a number of the proposed provisions would result in a significant step backwards for the MCP program. Some specific examples are listed below:

1. Changes in the SRM and NAPL definitions will result in more sites requiring front-end management as IRAs, which in turn will increase the likelihood of more sites being Tier Classified as Tier I. In addition, the broadness of some of the new Tier I inclusionary criteria will probably bring in many other sites which under the current MCP would be classified as Tier II. These sites would then have to do additional work not currently required under the MCP, would have additional negative stigma associated with them, and would be subject to the new Tier I Tier Classification public comment period, none of which helps advance the goal of brownfields redevelopment.

2. Changes in the Source Elimination or Control requirements would prevent most sites at which DNAPL is present from reaching either a Temporary or a Permanent Solution. In particular, the requirement that, to achieve "control," every instance of a DNAPL constituent concentration greater than 1 percent of its solubility limit in groundwater must be eliminated is untenable. The dissolved concentration of a contaminant is merely one line of evidence indicating that DNAPL may be present, and cannot be used as an indicator of whether DNAPL is stable or migrating. Making this one indicator a remedial objective would require removal of the DNAPL source in every instance. That is not consistent with the remainder of the source control provision, nor is it achievable.

3. A strict reading of the new definition of a "source" could result in almost any contaminated medium being considered a source, so that it is more difficult – if not impossible - to achieve MCP closure. This is one of the most significant issues raised by the proposed amendments.

4. Overall, the draft regulations result in less certainty regarding site closure due to the creation of more possible (and in some instances required) reopeners, which in turn results in a greater liability risk for parties (and potential brownfield developers) performing MCP response actions. The two most significant examples of this are the conditions to and fragility of the proposed Active Exposure Pathway Elimination Measure Permit, and the proposed revision of the MCP to invalidate an RAO if any Environmental Restriction is violated by any person even if the violator has no relationship to the person who achieved the RAO and could be responsible for further response actions if it is invalidated. This significant step backward would apply to all sites, not just VI sites.

5. The new draft regulations revise the current MCP so that EPA standards are no longer given the highest priority in evaluating certain toxicity and risk characterization issues. No technical justification has been provided for this change in either the draft regulation materials which were made available in March, or in numerous communications with the Department since then.

6. Many of the details of the draft regulations hinder the redevelopment of sites with otherwise manageable CVOC/VI issues.

(a) The draft regulations further limit the use of modeling (beyond the limitations already set forth in the December 2011 Interim Final VI Guidance) so that the value of being able to conduct a Site-specific Method 3 Risk Characterization is greatly diminished. From a big picture perspective, what this means is that the flexibility that was the hallmark of the MCP in addressing site conditions is being more and more limited.

(b) The new Active Existing Pathway Elimination Measure Permit provisions, which were supposed to help sites achieve regulatory closure and encourage the use of sub-slab depressurization systems, are so cumbersome that it is not clear that a PRP or redeveloper would want to seek such a Permit, particularly with its remarkable notice provision. For example, as proposed, these Permits would require that notice be given immediately to all occupants of a building at which such a system is in operation "upon the failure of the system." So, to consider a hypothetical very large vertical or horizontal structure, if such a system were to cease operating, then all of the occupants of that building would require immediate notification, like an alarm, regardless of whether or not they might be subject to any negative effect whatsoever, and regardless of the duration that the relevant system was not operating.

7. Historical Fill – On the one hand, the proposed revisions include a new definition of Anthropogenic Background that would seem to allow urban fill sites to move through the MCP more easily. However, the proposed definition of Historic Fill (which is an element of the definition of Anthropogenic Background) contains new conditions that would be very difficult, if not impossible, to prove in most cases (i.e., the subject material was not connected with the

operations at the location of emplacement, not a result of illegal disposal of waste materials at the time of placement [for example, even if that time were more than 100 years ago], and not residues, slag or tailings).

Notwithstanding these and other significant potential problems, this regulatory package presents a real opportunity to address some of the issues which have come to bedevil the implementation of the "new" MCP since that groundbreaking regulatory leap was taken two decades ago. The proposed regulations could represent a significant improvement over the current MCP, but also have the potential for representing a significant step backward. We very much hope that the more detailed comments provided in the following pages will be useful to the Department in continuing to move the MCP program forward in a positive manner that carefully balances all of the relevant interests at MCP sites. Thank you again for the opportunity to provide comments.

Sincerely,

David I. Begelfer
Chief Executive Office
NAIOP Massachusetts

Comments on Permit/Tier Classification and Numerical Ranking System Amendments

Page 8, 40.0510(2)(g)(1) – The requirement for a tearsheet from the newspaper being submitted as part of the Tier Classification process should be removed. This requirement would shorten the available time for the completion of Tier Classification by a week or more.

Page 9, 40.0510(3)(c)(e) – These requirements should be deleted, since it is not clear how MassDEP would be able to implement these comments in a substantive way.

Page 11, 40.0520(2)(b)(2) – While NAIOP applauds MassDEP's intention of simplifying the Tier Classification process, this Tier I criterion is overly broad, and will result in a significantly higher percentage of sites having Tier 1 status, many of which should not be considered "priority" sites. Tier I Sites often have a much more negative public perception than Tier II Sites, which impacts community responses to proposed work at the sites, as well as the ability to finance, lease, or otherwise engage in transactions concerning these sites. For all of these reasons, this section should be deleted.

Page 11, 40.0520(4) - The new Transition Provisions section clarifies how previously classified sites are to be classified once the amendments are adopted. However, according to 40.0530(1), reclassification is required if new information is obtained that would cause reclassification of a site from Tier II to Tier I. Therefore, any site that has an "Open IRA" according to 40.0414(2) or (3), or at which groundwater concentrations exceed RCGW-1 standards within 500 feet of a private well, will have to be reclassified to Tier I. This will likely, and unnecessarily, result in many more Tier I Sites with the same negative impacts noted above.

Page 12, 40.0530(3) – MassDEP should confirm that the "revised Tier Classification Submittal" specified in this section refers only to a transmittal form, and not to a new Tier Classification report as well. This can be accomplished simply by adding the word "form" at the end of the language as it is proposed to be revised.

Page 16, 40.0560(7)(d) – The 45 day time periods should be shortened to 21 day periods. There is no need for a 45 day lead time for this process.

Page 17, 40.0560(8)(c) – Similarly, these time periods should be shortened to 21 days from the 45 days specified in the draft.

Page 18, 40.0570(4) – As above, MassDEP should clarify the term "Tier Classification Submittal" with respect to whether it implies only the transmittal form, or also an accompanying report.

Page 19, 40.0583(3) – NAIOP recommends changing the language in this section to, "The Department *may reclassify a disposal site upon making an appropriate finding based on:* ….

(b) the nature and extent of *risk* to health, safety…

Comments on Proposed MCP Revisions relating to AULs and other Conditions or Restrictions

General Comments

1. The proposed revisions include language that would lead to the invalidation of Permanent Solutions based on facts arising after those Permanent Solutions were achieved and documented. This is contrary to the "liability endpoint" concept enshrined in the 21E statute since 1998, and would do grave harm to the transferability and financeability of any property that has ever been part of an MCP site. Massachusetts Permanent Solutions would no longer be treated as credible by the market. Brownfields redevelopers will conduct cleanup at their peril with the potential of a subsequent violation of an AUL provision, or a Condition, or a Restriction by others causing the retroactive invalidation of the Permanent Solution. The invalidation of Permanent Solutions also necessarily reaches back in time to threaten clawbacks of Brownfields Tax Credits received by a redeveloper and either used by that redeveloper or sold into the tax credit marketplace.

The proposed revisions that would permit the invalidation of Permanent Solutions for violations of AUL provisions, Conditions or Restrictions, or Permit provisions should be dropped from the final regulations. In particular, this comment concerns the language in 40.0020(1) and (2); in 40.0019(1); in 40.0752(8)(d); and the silence on the point in 40.1012(3)(c). The troublesome language frequently appears as a clause phrased as, "and the Department shall deem the Permanent or Temporary Solution to be invalid," or as "and any person liable under M.G.L. c. 21E for the disposal site who has knowledge of such…" The troublesome language is also contradictory to the long-standing policy of the Department to focus on enforcement for violations and to target the violators, memorialized in the current 310 CMR 40.0020(2) regulation.

In addition, in order to remove any cloud on market and financing certainty, language should be added specifically providing that a violation of any Condition in a Permanent Solution With Conditions (PSWC), a violation of a provision in an AUL, a violation of a provision in the newly-proposed Permit for Active Exposure Pathway Elimination Measure (PAEPEM), or a violation of a Restriction in a Grant of Environmental Restrictions (GERs), will not invalidate the original Permanent Solution (PS) or PSWC filing. The Department should continue its current enforcement practices relative to violations of AULs and apply them to PAEPEMs, GERs or Conditions in a PWSC.

2. In a Note to Reviewers immediately before the proposed changes to Subpart J, the Department asks for comment on whether metes and bounds descriptions of parcels subject to AUL documents should be eliminated and perhaps a certification (perhaps by an owner?) substituted. We strongly object to this proposal. It is true that property boundaries are subject to change over time. That is a reason to require metes and bounds descriptions of the subject parcels or lots, not the opposite. It is important for purposes of title searches, title insurance and financeability, as well as for clarity of environmental conditions and obligations attached to land, to help all parties involved in property transactions and development to understand "where is here." Certainly mistakes may occur from time to time; that is inevitable with any system. Requiring a metes and bounds description is really a means of requiring competent

professionals to do their jobs; on the contrary, substituting a certification by an owner or an LSP who may not be familiar with property descriptions and property description law is an invitation to widespread confusion and related errors in recorded documents. By its nature, the preparation of a property description is a multi-disciplinary activity and should be left as such. We recommend that the requirement for a metes and bounds description (Exhibit A) remain a component of an AUL.

3. We applaud the Department's proposal to eliminate the separate LSP Opinion as a part of an AUL, as that approach involved unnecessary duplication of the statement of activities, uses and obligations (and thus invited inadvertent discrepancy between the text in the body of the AUL and the language in the LSP Opinion). We believe it is not appropriate, however, to require the "reasons" portion of the former LSP Opinion to be stated in a Whereas clause in the AUL Form. Such statements of reasons are by their nature discursive and often lengthy. Setting forth those statements of reasons in the preliminary portion of the AUL will tend to make the document organization complicated, will make it more difficult for readers to find the critical provisions of an AUL -- the statements of the actual limitations on activities and uses-- and will likely confuse readers. We suggest, instead, that the statement required by the new 40.1074(2)(e), the summary required by the new 40.1074(2)(f), and the description of contaminated media required by the new 1074(2)(g) all be included in a reformatted Exhibit C, limited to just that statement, summary and description. The fourth Whereas clause in the AUL Form can then simply refer the reader to "Exhibit C" as it currently does, and Exhibit C will be a streamlined, simplified attachment not duplicative of other language in the AUL. Again, as an AUL is a document in which multiple disciplines must collaborate, allowing those sections uniquely prepared by LSPs to take the form of an Exhibit, which can be separately prepared as it is now, but covering just the facts addressed by 40.1074(2)(e), (f) and (g), will be a better method of streamlining AUL preparation than requiring lengthy text to be inserted in a Whereas clause.

4. We appreciate that by the proposed changes to 40.1074(2)(c) the Department is attempting to codify the required corporate authority documentation for AULs and Grants of Environmental Restrictions (GERs) by copying the language from 40.1071(2)(c) into 40.1074(2)(c), and is looking to streamline paperwork by dropping the requirement for certified copies of Clerk's Certificates of Incumbency and corporate resolutions or votes in both. We would note that in both cases corporations may authorize any person, not simply officers, to sign on their behalf. References to "officer(s)" in both 1071(2)(c)1 and 2 and 1074(2)(c)1 and 2 would be better stated as "person(s)" and the reference to the name of the office be stated as a title.

We appreciate the continued generality regarding the authority-proving documentation acceptable to the Department in the language of the bodies of 1071(2)(c) and 1074(2)(c). At the same time, such generality risks the Department departing from generally accepted conveyancing standards in Massachusetts with respect to evidence of authority for entities to take action. For internal purposes, and perhaps in external guidance documents as well, the Department may wish to take official notice of the numerous Title Standards of the Real Estate Bar Association for Massachusetts (REBA) which already address the nature of authority documentation for recorded transactions with respect to LLCs (Title Standard 59), LLPs (Title Standard 60),

Limited Partnerships (Title Standard 26), Devisees (Title Standard 40), and Trustees (Title Standards 33 and 68).

5. The proposed revision in 40.1075(5), and the related language in the cover Note added to Form 1075, are confusing. They appear to require that a copy of the recorded or filed AUL be provided to the Department only when an AUL has been recorded or registered (the Land Court system often uses the verb "filed") within a deed. We believe the Department meant to require that all copies of all deeds for a property subject in whole or in part to an AUL be supplied to the Department within 30 days of recording or filing. If so, we suggest that the new sentence at the end of 40.1074(5), and the same language in the Note on the first page of Form 1075, be rewritten as follows:

> *"Within 30 days of recording or registering a deed for a property which is subject in whole or in part to a Notice of Activity and Use Limitation, a copy of such deed 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."*

6. We applaud the Department for reducing the notice period to interest holders for AUL Amendments to 30 days from the current 45 days, consistent with other AUL placement notification requirements.

7. Given the focus on emergency utility repairs at 40.0923(2), we believe it is important for the Department to provide a clearer definition of subsurface utilities for which emergency worker exposure must be addressed. Some utilities, especially some storm drains or culvertized ancient streams, are located at significant depths. We propose excluding from the required Risk Characterization exposures to emergency workers on all utilities, including without limitation drainage facilities, located more than 15 feet below grade.

Specific Comments

Page 25, 40.1074(2)(b)1. – The last word in this section should be "or," not "and."

Page 55, 40.0111 – This section should consider response actions under TSCA to also be "otherwise adequately regulated."

Page 55, 40.0111(1)(a) – NAIOP does not agree that, for a CERCLA site where work is being done with EPA approvals and oversight, MassDEP should have the option of imposing additional response action requirements. Accordingly, we recommend deleting the last two lines ("…unless…environment"), or at least limiting the trigger for MassDEP involvement to an exceedance of ARARs.

Page 57, 40.0019(1) – The second sentence of this section ("If such violation…to be invalid.") is extremely onerous, and could unjustly – and, from a financial and liability perspective, catastrophically – impact a PRP who was not involved in the subject violation of the Environmental Restriction or covenant. In many cases, if not in most cases, such a failure to comply with a covenant will be related to the actions of parties subsequent to the PRP who agreed to the covenant in the first place. While MassDEP should have the power to enforce a covenant and compel the violator of the covenant to come into compliance, the "innocent PRP" should not be penalized.

Page 58, 40.0020(2) – Similarly, the party who filed the Permanent or Temporary Solution Statement should not be penalized for the acts of subsequent parties. Once again, the response should be enforcement actions against the offending party, not against the innocent party. This section should be deleted.

Comments on Vapor Intrusion and Closure-Related Amendments

General Comments

MassDEP has offered some new, positive concepts and features in the proposed regulatory reform package with respect to Vapor Intrusion sites. For example, the proposed revisions include an option for permanent closure at VI sites with active "pathway elimination" systems (i.e., active SSDS), which can be a very effective mitigation option for these types of sites. However, as with several of the proposed changes in other aspects of the MCP, the specifics of these draft regulations, their proposed implementation process, and their repercussions are of concern. Furthermore, many of the specific features proposed for the new VI closure mechanisms will not result in greater efficiency for the Department, which is an overarching principle for regulatory reform in the Commonwealth, but rather will move the MCP process back to a more "command and control" model.

The concerns we have as practitioners, regulated parties, and other stakeholders about this portion of the draft regulation amendments can be grouped into three main categories:

- ***Movement away from a Performance and Risk-Based system/"RAPS" towards a Prescriptive System.*** This is a "step backwards" for the privatized program and appears to be reactive to problems with specific sites and/or LSPs rather than an endemic failure of the LSP system. Examples include:
    - Expansion of SRM conditions (and hence 72-hour notification and associated IRAs) to include sites that simply have groundwater concentrations >GW-2 by some factor;
    - Prohibition of the use of site-specific fate and transport information/modeling to estimate current or future exposure point concentrations, such as for the VI pathway;
    - Prescribing the 1% of solubility criterion as part of the "Source Control" demonstration, rather than relying on the current approach which requires a demonstration that a plume is at steady state or decreasing, that the origin of the release has been controlled/mitigated or eliminated, and that a condition of NSR to human health, safety, public welfare, and the environment has been achieved.
- ***The Treatment of Vapor Intrusion Sites as categorically different.*** Some of the changes proposed will cast a huge net for inclusion as a potential VI Site, with the associated concerns, and will leave many sites without a pathway to closure – the precise opposite of the 21E program goal over the past 20 years. This is evident in such proposed provisions as setting the trigger for "Critical Exposure Pathways" at levels consistent with or, in some cases, as for TCE, below typical/background concentrations, and for setting the bar very high for demonstrating the infeasibility of installation of active systems at these sites, regardless of actual human health risk. Furthermore, with the expansion of the "Source" definition, it is doubtful that closure can be attained at sites with residual stable NAPL or soil gas concentrations, regardless of whether or not there is an indoor air issue or ongoing groundwater contamination issue. This and other examples, along with potential "re-openers" (discussed in more detail elsewhere in these comments), will either block the path to

Site closure or, at a minimum, lead to significant uncertainty about what constitutes "being done," and thus negatively impact the real estate market, the financeability of VI sites in regulatorily-expanded numbers, the business community, the market perception of the Brownfield Tax Credits tool, and the Commonwealth's redevelopment goals for Gateway Cities and other brownfields.

- ***Onerous requirements for, and numerous limitations on the installation of, active exposure pathway elimination measures (AEPEMs) as part of Permanent/Temporary Solutions.*** Earlier Workgroup discussions surfaced the concept of using ***either*** an AUL ***or*** a Permit for sites where AEPEMS were contemplated as part of Site closure, ***not mandating both*** an AUL and a Permit as appears to be required by the draft regulations. NAIOP's recommendation on this issue is set forth in the "General Comments" introductory section of our Subpart G comments, below. In addition, there are numerous limitations on the use of AEPEMS that greatly reduce their utility and/or their regulatory availability under the proposed regulations, such as the prohibition against using them at sites where an IH may be present if the system were not operational for 60 days, the prohibition on using AEPEMS with carbon filters on exhaust (arising from the proposed prohibition on waste generation by AEPEMs), the requirement for "immediate" notification of large numbers of persons in the event of even short-term AEPEM shutdown, the requirement for Financial Assurance Mechanisms (FAMs) for AEPEMS (the administrative cost of FAMs in this context will almost certainly overwhelm the funds escrowed to replace simple fans or reporting equipment), and result in the re-imposition of liability on Eligible Persons, the invalidation of Permanent Solutions, and the re-imposition of liability on Eligible Persons arising from the failure of post-Solution third parties to maintain an AEPEM – the polar opposite of the liability framework currently provided under AULs.

In summary, NAIOP applauds MassDEP for some of the very thoughtful and positive steps taken in this draft regulatory reform package with respect to the closure of Vapor Intrusion Sites, but believes that several of the specifics related to definitions, and the applicability and repercussions of the proposed changes, will result in the unwarranted and overly prescriptive regulation of a huge number of properties. Below we provide specific comments related to the Vapor Intrusion proposed changes.

Specific Comments

Page 61, 40.0006(12) – In the 6th line of the CSM definition, replace "determining" (a freighted term with respect to liability) with "evaluating."

Page 62, 40.0006(12) – The revised subsection (f) of the SRM definition eliminates the time factor from the evaluation of whether such a condition exists. The original language should be retained, since the removal of the time variable, in conjunction with the absence of any de minimis provision with respect to "the discharge of vapors," makes this definition, and the universe of sites caught up in it, much too broad. The changes in the SRM definition, in conjunction with the NAPL notification requirement, will unnecessarily expand the number of IRAs and, as a result, substantially increase the paperwork, time and expense for many sites. Regardless of whether these sites in fact involve completed indoor air exposure pathways, they will now require IRA Plans, Status Reports and Completion Reports. Many more sites will likely be classified as Tier I. While the Department has pointed out that currently most IRAs are closed within one year, it has adopted monitoring requirements that, going forward, will in many cases extend the site closure time to well beyond that time period. Potential VI sites often require multi-season indoor air testing, and NAPL sites will now require ongoing gauging and increased removal actions. In addition, these sites would be considered Tier I sites under the new inclusionary criteria, resulting in additional work not necessarily required under the current MCP; would have additional negative stigma associated with them; and would be subject to the new Tier I Tier Classification public comment period. None of this will encourage the redevelopment of brownfields.

Page 62, 40.0006(12) – In the definition of Daycare or Child Care Center, we recommend the insertion of the following after "attending religious services" in order to address daycare operations within an office, a health club, a retail store or facility, etc.: *a facility within or attached to a commercial facility where children are cared for during periods of time when the persons responsible for the children are engaged in work or other activities within such facility;*. In addition, the rationale for the age specificity for special needs youth is unclear.

Page 63, 40.0006(12) – In the first line of the definition of Residential Dwelling, add "…, or that portion of a structure," after the word "structure." This change is necessary to account for mixed-use structures.

Page 63, 40.0046(3)(e) – This new section of the definition should be eliminated. This situation is already adequately addressed by the requirements for IRAs and phase reports.

Page 64, 40.0313(5)(a) – The inclusion of "subsurface structures, or underground utilities or conduits" in this definition is overly broad, since it would seem to encompass even releases that were contained within such structure, etc., and did not actually reach the environment.

Page 65, 40.0313(5)(f) – Again, the first sentence should be revised to read, "…have resulted in, or are likely within one year to result in, the discharge of vapors…" In addition, the six listed items in this clause should be considered <u>potential</u> SRM conditions to be evaluated by the Site LSP, and not "likely" conditions.

Page 65, 40.0425(1) – The current (and retained) language specifies that the first IRA status report should be submitted to MassDEP on the 120th day – not "within 120 days" - following the approval of the IRA. MassDEP has rejected at least one status report submitted "too early," although the Department does accept reports "somewhat" before the 120th day. This provision should either be modified to allow submittal of the report any time within 120 days, or should specify what interval prior to the 120-day mark is acceptable.

Pages 66-67, 40.0425(5) and (7)(c) - The fact that MassDEP differentiates between IRAs for CEPs vs. those for Imminent Hazards is a positive change, as is the reduction in RMR frequency for non-IH CEPs.

Page 67, 40.0427(1)(c) – This section should be revised to read:

(c) the performance of time-critical measures addressing the elimination, prevention or mitigation of Critical Exposure Pathway(s) as documented with an LSP Opinion concluding that:

3. mitigation is…Pathway(s); or
4. a risk assessment completed pursuant to 310 CMR 40.0900 has demonstrated that a condition of No Significant Risk has been achieved.

Page 71, 40.0483.1(e)(5) – This section should be eliminated in its entirety. While NAIOP appreciates the significant effort MassDEP has put into developing a rational approach for dealing with NAPL, in the end NAPL is simply another form of a contaminant at a disposal site, and does not require special regulatory treatment here, particularly since the same requirement in the proposed new language is set forth in the immediately preceding provision (subparagraph 4).

Page 72, 40.0483(1)(h) - Similarly, NAPL should be dealt with in the context of the overall site contamination and site CSM, rather than in a separate LNAPL CSM. The reference to such an additional CSM should be eliminated here and throughout the rest of the document.

Page 73, 40.0835(3) – Since the CSM may continue to change even after the completion of Phase II, the word "final" in the second line of this section should be replaced by "current."

Page 74, 40.0853(4)(i) – Consistent with our comments above, "final" should be changed to "current" CSM, and the reference to a separate LNAPL CSM should be eliminated.

Page 75, 40.0904(2)(c) – For clarity, the added sentence to this section should be revised to read, "…utility lines or corridors, should be evaluated if there is an increased potential for exposure."

Page 77, 40.0926(6) – Not surprisingly, NAIOP continues to believe that competent modeling, based on adequate data, can be an effective tool for evaluating site risks. Accordingly, we recommend retaining the language proposed to be deleted from this section. This point is particularly important from a brownfields redevelopment and future building perspective.

Page 78, 40.0942(1)(d) – In the third line, the change from "and" to "or" should be reversed. Applying either standard individually can lead to nonsensical conclusions regarding the potential for vapor intrusion.

Pages 78 and 79, 40.0942(1)(d)(1) and 40.0986(2)(a) - Consistent with our previous comments, the deleted references to modeling should be restored.

Page 80, 40.0006(12) – While we appreciate the Department's attempt to reduce the burdens placed on Site owners by "historic fill," and are generally encouraged by the approach that the Department has used to introduce the various subcategories of Background, we believe that the proposed definition for Historic Fill is far too limiting, and sets too high a burden of proof. In particular:

i. The phase "deposited to raise the topographic elevation of the site" should be replaced by the simpler, "placed on the site." It may or not be possible to ascertain the purpose for which fill was placed (or emplaced) on a site decades previously.

ii. In (a), there is no reason to specify the chemical constituents contained within the fill materials. The universe of anthropogenic chemicals in fill materials is quite broad, and there are many hydrocarbons that are outside of the "semi-volatile" class in historic fill materials. As an alternative, NAIOP suggests beginning this section, "may contain certain chemical constituents including, but not limited to, metals and/or hydrocarbons…"

iii. In addition, there is no reason to specify in (a) that the materials have to be "weathered." This will simply create confusion, for any material that has been out in the environment for any period of time will have undergone some degree of weathering. In addition, the phrase "reworked soils" should be inserted before "construction and demolition debris."

iv. The requirements of sections (b) through (e) will be difficult, if not impossible, to meet at many historic fill sites. In the case of (e), for example, current owners will have little to no certain knowledge regarding the far distant past practices of prior owners. While NAIOP agrees that contamination that is identified as having been released on-site should not qualify as historic fill, the broadness of sections (b) through (e), and the burden-of-proof obligations that they impose on site owners, will obviate the intent of the historic fill concept in the proposed regulations.

Page 81, 40.1020(3) – Consistent with the language in subparts (1) and (2) of this section, the word "applicable" should be inserted before "background levels."

Page 84, 40.0006(12) – The differentiation of AEPEM from "remedial systems" is a very positive step taken by MADEP. However, this definition should not exclude "waste" generation due to the common use of carbon filters/granulated activated carbon for off-gassing for SSDS, including the voluntary use of such material by parties who have a low risk tolerance and want a "belt and suspenders" approach.

General Comments on Subpart G Provisions

The "permit for active SSD systems" concept was suggested in a Workgroup meeting as a possible mechanism to allow VI sites to achieve permanent closure (not just ROS) where conditions warrant continued use (existing buildings) or inclusion and operation (future buildings) of an active ventilation system to achieve NSR. MassDEP's current MCP proposals provide for an Active Exposure Pathway Elimination Measure (referred to in these comments as "AEPEM") Permit, as part of a Permanent Solution With Conditions, that would ostensibly meet

this objective. However, the Permit requirements and features as currently drafted raise a number of serious concerns about the workability and fairness of the proposed Permit program. Further, the proposed requirements and obligations that pertain to these Permits are so extensive that we doubt parties involved with sites where such Permits may be relevant would find it worthwhile to obtain such a Permit, thus defeating the objective of the new Permit approach.

- The original suggestion intended that such an operating permit would substitute for an AUL, but in the proposed regulatory amendments Active Measures require both Permits and AULs.

- The original suggestion was for a simple permit by rule that would outline standard specifications for system operation, and require only periodic certification (by an LSP or other appropriate licensed specialist) that the system was operating in accordance with those specifications. The currently proposed Permits require express MassDEP approval (sometimes, but not always, presumptive), site-specific operating regimens, extensive notice and monitoring procedures, financial assurance, annual compliance fees, and cumbersome modification and transfer approvals.

- Further, the objective was to provide a reasonable Permanent Solution option for VI sites that complete MCP-compliant response actions, affording access to the same liability protection, brownfields incentives, and transactional certainty that have promoted the cleanup of 21E sites generally. However, the proposed regulatory amendments would invalidate Permanent or Temporary Solutions achieved by entities that have completed successful cleanups based on, among other reasons, even minor or ministerial Permit "violations" by unrelated subsequent owners or operators.

NAIOP believes that a better approach would be to allow property owners a *choice* of whether to use a Permit mechanism as a framework for operating an AEPEM. The regulations could provide the same operating standards for all AEPEMs; an AUL implemented as part of a Permanent Solution would require that the AEPEM that is necessary to maintain NSR must be operated and maintained in accordance with the operating standards. The AUL mechanism, which runs with the land, provides notice to all future owners through the Registry of Deeds, requires that AULs be effectively "re-noticed" in every deed and lease, and is enforceable by MassDEP against the current owner, should generally be sufficient to assure continuing responsibility for the AEPEM and to place the burden of compliance where it belongs – on the person or entity currently making use of and receiving the benefit of the AEPEM on his, her or its property.

However, if a property owner or group of owners *chooses* to have the AEPEM placed under the auspices of someone other than the owner(s), that entity should be required to secure and hold a Permit to operate the system. This might be the preferred mode, for example, when a PRP provides an AEPEM for a group of downgradient properties. The Operator would be responsible for compliance with the operating standards, and MassDEP would enforce this compliance through the Permit provisions. The MCP should provide for the use of either an AUL or a Permit to regulate and control the use of AEPEMs.

None of these models should include recourse against the original person who conducted response actions at the Site and achieved the Permanent Solution if the current property owner or Permit operator, whichever is responsible, fails to properly maintain the system. In addition, as discussed in further detail below, the proposed installation and operating requirements for AEPEMs and the proposed Permit procedures (which under the approach recommended above would continue to be applicable where the owner(s) have selected a separate system operator) should be refined to provide a more workable and realistic framework for these types of Permanent Solutions.

Specific Comments on Subpart G Provisions

Page 86, 40.0701(4) – Given the other requirements for the Exposure Pathway Elimination System, this provision is unnecessary and should be eliminated. The current proposal specifies that any concentrations that could cause an Imminent Hazard in 60 days or less cannot be addressed by the pathway elimination approach. What is the basis for this prohibition and what is the technical basis for the 60 day criterion? The provisions requiring source control and exposure pathway elimination, and implementation of remote telemetry with requirements for prompt repair of a system within a reasonable time in the case of a failure, would be sufficient to prevent future risks.

Pages 86 and 87, 40.0711(1), (2), and (3) – These systems should also be allowed as part of a RAM, which would facilitate their implementation.

Page 87, 40.0711(4) - The term "testing" is not defined, but should include pressure differential or vacuum testing in addition to analytical testing. If installing the AEPEM only to mitigate a CEP, there are many situations where no Imminent Hazard or even No Significant Risk may have existed even without installation of the AEPEM. Thus, several of the criteria to be considered (e.g., (e) and (f)) are not relevant.

Page 87, 40.0711(5) – This section requires the remote monitoring technology to provide an alert to all occupants of a building, to the person responsible for operating the AEPEM, and to MassDEP, "immediately" upon "failure of the system." This remarkable notice provision would require that all occupants, even of a very large vertical or horizontal structure only portions of which are potentially affected by the operating AEPEM, receive an immediate notification, such as an alarm, of system downtime of any duration or for any reason, which could result in alarms even for regular planned maintenance or a two-minute power outage. We agree that remote telemetry can be useful for monitoring AEPEM operations and for informing responsible operating parties of equipment failures or an unanticipated need for repairs. However, there is no reason to think that all of the occupants of the building will be put at immediate risk in such circumstances, or that constant alarms to more people than are potentially affected would provide meaningful communication regarding potential risks.

The requirement for the "immediate" notification of all occupants of a building is not needed, particularly in light of the requirement at 40.0712(2) to design the system with a sufficient margin of safety to account for relatively short-term shut-downs. Moreover, in other proposed Permit conditions concerning remote monitoring (40.0761(2)), notice of such circumstances is

required only to DEP and only upon the "suspension or failure of the measure lasting 30 consecutive days." The "immediate notification" requirement will create unnecessary concern and chaos for the Department, the PRP, and the community in which the system is located. We recommend that the "immediate" notification requirement to occupants and MassDEP be deleted.

Page 87, 40.0712(2) and (3) – Both of these provisions require a rigorous assessment of potential risk, substantial and/or imminent hazards. This is a significant undertaking and, in the case of CEPs, is not directly relevant. We also note that the requirements of 40.0712(3) will, in effect, require the performance of some level of predictive modeling.

Page 88, 40.0712(4) - The mandate for a Permit in order to achieve and maintain a Temporary Solution (see 40.0712(4) and 40.0751(1)(b)) will impose the paperwork and reporting burdens of both a Temporary Solution and a Permit for an AEPEM.

Page 88, 40.0720 – This section should include transition provisions for systems already in place at the time the revised regulations go into effect. NAIOP recommends adding language such as, "For the purposes of this section 40.0720, a vapor intrusion mitigation system already in operation as part of an IRA, a Comprehensive Response Action, or ROS as of [DATE] will be considered in the same way as an AEPEM."

Page 88, 40.0720(1)(c) and (2)(c) – These sections should be deleted. The feasibility analysis is not appropriate for a pathway elimination system, which is not designed or intended to function as a remedial system.

Page 89, 40.0751(1) and 40.0752(2) - "Approval" of the AEPEM Permit is required prior to operating an AEPEM as part of a Permanent or Temporary Solution, and prior to filing a Permanent or Temporary Solution Statement. The Permit is presumptively approved, under 40.0760, 21 days subsequent to receipt of a "complete" Permit application. Under 40.0759, applications are deemed incomplete if they fail to "include all required information" or the applicable fee, or if the applicant fails to "fill out the application correctly." In order for an applicant to be able to definitively rely on presumptive approval based on the passage of 21 days, there needs to be a regulatory requirement for (and MassDEP will need to absolutely commit to) raising concerns about applications and notifying applicants within the allotted time. The same is true regarding the transfer of Permits, and the associated 21 day presumptive approval there.

It should also be noted that the proposed regulation does not specify any mechanisms for addressing asserted deficiencies or completing the approval of the Permit if an application is not presumptively approved within the first 21 days. There is a right for the applicant to appeal Permit denial (40.0765), but only if he or she raises the complaint "at the appropriate point during the processing of the application in accordance with 310 CMR 40.0760." It is not clear how during that processing any information would be provided to the applicant.

Once the system is operating under an approved Permit, what happens if DEP proposes to suspend or revoke a Permit (see 40.0764)? While there is a notice and appeal process provided in 40.0765, the operating system would by almost by definition need to continue operating to

control risk, so there needs to be a process for the Permittee (or if necessary a designated substitute operator) to continue to legally operate the AEPEM while problems or deficiencies are being addressed.

Page 89, 40.0751(2) - AEPEMs without the need for a Permit should be clearly allowed to support ROS. This appears to be the intent of draft 40.0751(2)(a), but it would be better if ROS were mentioned to avoid any possible uncertainty on the part of either LSPs or line staff at the Department. We would suggest adding at the end of (a), *", including a measure operated to achieve and maintain Remedy Operation Status under 310 40.0893; or".*

Page 89, 40.0751(3) – This provision requires a Permit application for each AEPEM, but allows a single Permit application to cover more than one Active Measure "located on a single parcel of land within the disposal site." Many properties/sites consist of more than one real estate "parcel." If the intent is to allow the property owner to determine an appropriate aggregation of functioning AEPEMs associated with the Site, as it is described in the Permanent Solution Statement (and the AUL), the regulation should provide more flexibility. While separate Permits may be appropriate at some Sites, they should not be the default requirement.

Page 90, 40.0752(1)(c) and (5) – These sections require the establishment of a financial assurance mechanism, per 40.0170(6), to cover the immediate repair or replacement of any failing components of an AEPEM. However, they do not provide any standards for setting a sufficient (but not excessive) amount to fund the financial assurance mechanism for the Permit. The costs of maintenance, repair and replacement of moving parts of AEPEMS are likely to be very modest (note, for example, the Department's analogy to inexpensive radon systems). The replacement of a fan and telemetry equipment is not likely to run more than a few hundred dollars every few years. The cost of establishing the escrow paperwork, identifying and replacing escrow agents, and releasing funds out of escrow is likely to overwhelm the funds actually drawn from escrow. A FAM is not needed or appropriate in this context.

Page 90, 40.0752(7) – This provision goes beyond the current requirements of Section 40.0009(1), Section 40.0442(5), and the reasonable expectations of any party seeking a Permit. In particular, the attestation under the pains and penalties of perjury in subparagraph (i) that the person is familiar with the requirements of the MCP is remarkable. LSPs and attorneys have spent years getting to that point; it is unreasonable to expect a party, in particular a party who is relying on his or her LSP and/or attorney for just that expertise, to provide such a declaration. Why is the standard MCP language insufficient here?

Page 91, 40.0752(8) – Permit applications require a certification of acceptance from the owner of each property where the AEPEM will operate. Each such owner is required to agree in writing: to accept the AEPEM; not to do anything to prevent or impede its operation; to provide reasonable access to the property to the Permittee and the Department; to notify future buyers of the need for operation of the AEPEM; to notify the Permittee in the event of sale of the property; and to acknowledge that an extended shut-down or failure of the AEPEM may invalidate the associated Permanent or Temporary Solution. In addition, the Permit is "conditioned" on, among other provisions, a requirement for notification in writing (by whom is not clear) to the Department on gaining knowledge of any technical, financial, or legal inability which would

prevent the Site owner or Permit holder to operate and maintain an AEPEM required as part of a Permanent Solution. See proposed 40.0761(4).

As a procedural matter, it may be impracticable to obtain affirmative approval letters from all "owners" if there are multiple parties, such as individual condominium owners or downgradient property owners. As a substantive matter, this proposed provision also creates extensive ongoing obligations on the part of multiple property owners who are not within the control of the Permittee (such as individual condominium unit owners or downgradient property owners) and/or who, as is the case in many brownfields redevelopment scenarios, are likely to be unrelated to the person who originally achieved the Permanent or Temporary Solution. It is not clear whether such owners will be willing to sign on to these terms, or whether such conditions will in fact deter the use of AEPEMs at Sites. At a minimum, and as noted above, under the Permit program as proposed, the future activities of these various layers of owners can negate the Permittee's compliance with the Permit and/or invalidate the Permanent or Temporary Solution through no fault of the person who originally completed the response action and achieved that Solution.

Taken together with the extremely detailed operating and administrative conditions applicable to AEPEMs, these regulatory provisions suggest that any asserted failures to comply exactly with Permit conditions, even if committed by owners, operators, or occupants who have no relationship to the person who achieved a Permanent or Temporary Solution, will invalidate the Permanent or Temporary Solution and expose the original person to potential responsibility for further response actions.

Page 93, 40.0761(2) – This section should be clarified or eliminated; the language is somewhat convoluted. Additionally, this section conflicts with, or is redundant to, the requirement of 40.0712(2) for designing the system with a safety margin.

Page 93, 40.0761(4)(e) – This section requires "authorization" (by whom is unclear) for MassDEP and its agents to enter "any premises owned or controlled by the Permittee" to investigate, sample, or inspect aspects of the AEPEM. The investigating personnel are to enter at "reasonable times" and to provide "credentials," but the provision is open-ended as to reasons and frequency, and does not require any notice to anyone of intent to enter.

To clarify that MassDEP's right of entry only applies to the property subject to the Permit, "permitted" should be inserted between "any" and "premises" in the second line. Beyond that, however, this proposed provision could be read to require that the Permittee assure DEP essentially unlimited access to private property to which the Permittee itself (whether or not it is the property owner) may have only limited access rights. For example, residential landlords do not themselves have unconstrained rights to enter tenant units and could not authorize that type of access for MassDEP. Permittees who are not themselves the property owners have only specified agreed-upon access rights to downgradient properties. The regulatory language should be clarified to ensure that Permittees are required to deliver only those access rights that they can actually authorize. In addition, the Department should provide advance notice before exercising any access rights, as is customary.

Page 94, 40.764(1)(a) - A Permit may be revoked for undefined causes including "any violation" of any Permit condition, any provision of c. 21E or the MCP, or indeed any "applicable law or regulation." This "for cause" language is not limited to alleged "violations" committed by the Permittee, to activities relating to the Permit or the operation of the AEPEM, or indeed even to the disposal site at issue. This provision, taken together with the provisions of 40.00020 and 40.0751(8)(d), with the extremely detailed operating and administrative conditions applicable to Active Measure Permits, and with the provisions of draft section 40.1005(1)(b)(3), suggest that any asserted failures to comply precisely with Permit conditions, even if committed by a party who has no relationship to the person who achieved the Permanent or Temporary Solution, will invalidate the Permanent or Temporary Solution and expose that original person, frequently an Eligible Person, to potential retroactive responsibility for further response actions. Brownfields Tax Credits issued for the original response action, which in the case of transferable credits will have been sold and used by other taxpayers in the marketplace, may also be subject to clawback.

In short, the proposed AEPEM Permit, which as currently proposed would be mandatory in all cases to achieve and maintain a Permanent Solution or a Temporary Solution, has been structured in ways that make the Permit difficult to obtain and, once obtained, very fragile. Combined with other proposed draft language likely to significantly increase the number of VI sites, the Permit requirement for AEPEMs and the Permit conditions in the draft regulations threaten to return the MCP program to the gridlock the program escaped when it was privatized in 1993. The implementation of (1) a Permanent Solution with Conditions, (2) reasonable time periods for the repair and maintenance of AEPEMs stated in operating standards, (3) telemetric reporting to a few, key persons of AEPEM failures of more than temporary duration, and (4) enforcement by the Department of substantive violations by those subject to the AUL or Permit requiring the AEPEM, should be sufficient to achieve the desired goal of protecting public health, safety and the environment, without disrupting the marketplace or impeding brownfields redevelopment. Implementing the proposed Permit program in a less burdensome manner and as an alternative program (i.e., a party performing response actions could choose between using a Permit *or* an AUL) would continue the productive tradition of the "new" MCP that provides a variety of alternatives that allow a party to perform response actions in a manner that achieves a condition of No Significant Risk as efficiently as possible.

Comments on Subpart J Provisions

Page 95, Note to Reviewers, second paragraph – Class C-2 RAOs should retain their status as Temporary Solutions. NAIOP feels this would be less confusing than having these sites revert to a Phase status, in many cases immediately becoming non-compliant by virtue of not having achieved a Permanent Solution within the requisite time period.

Page 96, Note to Reviewers – NAIOP fully supports MassDEP's preferred approach of recommending BMPs, as opposed to requiring them via an AUL, for all the reasons previously articulated by MassDEP.

Page 96, Section 40.1003 – While not included in the proposed amendments, this section also needs to be updated to reflect the removal of RAO terminology and, most importantly, to bring

forward under the proposed regulations the concept of a Partial RAO (i.e., a Permanent Solution for a portion of a disposal site).

Page 98, 40.1012(2)(b) – This section specifies that both an AUL and a Permit are required for an AEPEM. Per our previous comments, we recommend that either a Permit or an AUL be required, but not both, for a particular property.

Page 98, 40.1012(3)(c) – So as to not unnecessarily burden a property, NAIOP recommends the addition of a new subparagraph 5. to read: *the use of the building on the disposal site is currently commercial or industrial, but the results of soil gas and/or indoor air testing indicate a condition of No Significant Risk for a potential residential use of the structure.*

Page 99, 40.1012(5)(b) – So as not to recreate an existing standard of care, revise the inserted language to read, *"to notify the Department pursuant to the requirements of 40.1080(1)."*

Pages 100, 40.1020(1) and (2) – Delete the word "applicable" before "background" in both sections. This modifier is confusing in this context, and the reason for the change is not clear.

Page 105, 40.1050(1)(c) - What happens if achieving a Permanent Solution is feasible, but simply takes too long at the relevant site notwithstanding the "best efforts" of the party performing response actions? Such a site would not be in compliance with the deadline to achieve a Permanent Solution and would not qualify for a Temporary Solution. Then what? (This scenario applies to some sites that currently fit the Class C-2 RAO definition.)
Page 101, 40.1040(1)(d) – The current MCP language regarding the criteria for a Permanent Solution should be retained in this section. Again, the reason for the proposed change is not clear.

Page 114, 40.1067(4)(d) – Revise to read, *"A RAM Completion Report, a Phase IV Completion Statement, or a revised Permanent Solution Statement…"*

Page 114, 40.1067(7) – The RAM should be retained as the vehicle for conducting post-Solution Statement remedial actions. What is broken here that needs fixing?

Comments on Risk Assessment and Method 1 Standards

Page 112, 40.0926(6) – The proposed changes state that exposure point concentrations "shall be developed using analytical data gathered during the site investigation at the Exposure Point…" The option for the use of fate and transport modeling has been removed, despite the fact that there are many situations where the use of accepted modeling approaches is either necessary or technically justified and sound. For example, the standard hydrogeological models can be used to estimate concentrations in a nearby surface water body when sampling is either infeasible or inappropriate (e.g., when there are multiple sources with similar contaminants entering a surface water body at approximately the same point). Further, there can be situations, such as with potential future buildings or significantly renovated buildings, in which indoor air sampling is not possible and a Lines of Evidence Approach that incorporates the use of modeling can be applied in a productive manner. Finally, it is unclear how the currently proposed language jibes with the concept and procedures for Method 2 Risk Assessments that permit adjusting these same types of models via the use of site-specific information. We continue to object strenuously to the Department's refusal to allow modeling in appropriate circumstances with appropriate inputs.

Page 124, 40.0993(5) – NAIOP does not support the changes proposed to the hierarchy for sources of toxicity values. As with other assumptions that may be made in a Method 3 Risk Characterization, if technical justification can be provided for the use of a toxicity value from a peer-reviewed, accepted source, such as the USEPA IRIS or similar, then the preferential use of a MADEP-derived value should not be required. In addition, we are not aware of a technical justification that supports the proposed amendment here. Specifically, what has changed such that the previous MCP language is no longer appropriate?

Page 132, 40.0974(2), Table 1 – The TCE GW-2 standard is proposed to be changed to 5 ug/L based on changes to USEPA toxicity values. This will impact a significant number of Sites, especially in urban areas, which will need to undergo a vapor intrusion assessment and, if the proposed changes to the SRM condition move forward, will also require 72-hour reporting and an IRA submittal. NAIOP does not support the use of this very stringent, and potentially irrelevant, criterion for SRM conditions.

In direct contrast to the proposed revisions for the TCE standard based on USEPA's toxicity value re-assessment, no changes are currently proposed for PCE. NAIOP recommends adopting the USEPA IRIS values, and revising the PCE standards accordingly, with this revision of the MCP.

Page 135, 40.0975(6)(a), Table 2 - The proposed S-1 standard change for vanadium (decreasing from 600 to 30 mg/kg) is based on the toxicity of vanadium pentoxide, and may result in capturing background levels for more common forms of vanadium detected at sites. Unlike chromium and cyanide, however, there is no commonly available analytical approach for speciating the form of vanadium present. Accordingly, NAIOP does not support this change.

Comments on NAPL Amendments

General Comments

NAIOP applauds MassDEP's efforts to move beyond the current arbitrary standards in the MCP to a more technically-based approach to NAPL. Nevertheless, as described in our comments on this section, we feel that some of the proposed regulatory language will be counter-productive in resolving NAPL issues in practice.

In particular, and as noted above, the current proposal places too much emphasis on NAPL conditions, and unnecessarily complicates the performance standard, particularly given that NAPL conditions are already addressed in other portions of the MCP. The requirement to achieve "control" in every instance of a DNAPL constituent concentration greater than 1 percent of its solubility limit (presumably in groundwater) must be eliminated. Solubility is merely one line of evidence indicating that DNAPL may be present, and cannot be used as an indicator of whether the DNAPL, if it is present, is stable or migrating. Making this one indicator a remedial objective would require removal of the DNAPL source in every instance; that is not consistent with the remainder of the source control provision. More importantly, it is not achievable. (That is the whole point of EPA's Technical Impracticability Guidance – DNAPL elimination is rarely achievable.) Changes in the Source Elimination or Control requirement would prevent most sites at which DNAPL is present from reaching either a Temporary or a Permanent Solution.

Specific Comments

Page 155, 40.0006(12) – As noted above, we do not feel that there should be a separate CSM for NAPL; rather, NAPL should be addressed in the CSM as one of possibly several contaminants. This comment carries throughout the remaining provisions of the MCP, although we will not highlight all occurrences of the NAPL CSM in our comments.

Page 155, 40.0006(12) – The definition of NAPL is far too broad, arguably including any situation involving, for instance, only a few droplets of oil in the water in a test pit or in a soil sample.

Page 155, 40.0006(12) - The Department's newly defined term – "Non-stable NAPL" – may have been motivated by an attempt to more closely approximate the original purpose of the performance standard, which is to control "sources" that continue to increase potential risks at a site. This is apparent from the Department's use of "active" verbs – "migrating, spreading or expanding" – in defining the term "non-stable." However, it has long been acknowledged that DNAPL comes to rest very quickly after being released into the environment. If the Department believes that Non-stable LNAPL in fact is a condition sufficiently common to warrant its own MCP provision, then the concepts of "Stable DNAPL" and "Non-stable DNAPL" could also be added.

Page 156, 40.0006(12) – The definition of "Source of OHM Contamination" is also far too broad, and could be interpreted to include almost any contaminated soil, groundwater, or soil vapor. The Department should not abandon the essential purpose of the original performance standard for source elimination or control: "oil and/or hazardous material which is resulting or is

likely to result in an increase in concentrations of oil and/or hazardous material in an environmental medium, either as a consequence of a direct discharge or through intermedia transfer of oil and/or hazardous material." Consistent with the risk-based MCP, the existing performance standard focuses specifically on whether or not there is a discrete source that continues to release OHM into the environment, resulting in increased or expanded potential risks at a site. By contrast, a steady state plume that is not expanding is not a discrete "uncontrolled source," regardless of whether it inevitably will result, to some degree, in ongoing "intermedia transfer." For that reason, the existing performance standard states that "the downgradient leading edge of a plume of oil and/or hazardous material dissolved in and migrating with groundwater shall not, in and of itself, be considered a source of oil and/or hazardous material." There is no good reason to eliminate this existing provision, as the Department apparently now proposes to do. Otherwise, the proposed new definition of a "Source" will result in both many more "sources" subject to the MCP, and a remarkably higher degree of difficulty in reaching closure for sites subject to the MCP, even though the facts at those sites have not changed at all. That result does not appear to be an improvement of any kind.

Instead, the Department should follow U.S. EPA's example and clarify the definition of source by adding a new subsection to 310 CMR 40.1003 (310 CMR 40.1003(5)(e)), as follows:

> *(e) For the purposes of 310 CMR 40.1003(5), oil and/or hazardous material dissolved in groundwater or present in soil gas that results in intermedia transfer shall not, in and of itself, be considered a source of oil and/or hazardous material.*

Page 157, 40.0313(1) – The proposed 1/8" trigger for 72-hour reporting purposes is much too sensitive. This is the equivalent of approximately 0.01 feet, little more than a sheen. This minimal standard is often met in test pits or newly installed wells, where the sheen is the result of soil agitation related to excavation or drilling, and where subsequent measurements in monitoring wells do not indicate the presence of NAPL. Accordingly, with respect to the threshold for 72-hour reporting, NAIOP recommends maintaining the current ½" standard.

Page 169, 40.1003(5)(c)(4) – As noted above, the 1% rule is an arbitrary standard, and should not be included in this body of regulations. "Stable DNAPL," whatever the concentration in the adjacent groundwater, should be considered in the same light as Stable LNAPL. The use of the 1% criterion is obviously extremely problematic at, for example, chlorinated and MGP sites, where the solubilities of key contaminants are relatively low, often significantly below current UCL levels. If these levels are steady or decreasing, and a condition of NSR can be demonstrated, then the source should be considered to be "controlled."

Page 169, 40.1003(5) - The Department should clarify those circumstances in which a "source" has been controlled by adding a new subsection to 310 CMR 40.1003 (310 CMR 40.1003(5)(f) (assuming that 310 CMR 40.1003(5)(e) suggested above also is adopted)), as follows:

> *(f) For the purposes of 310 CMR 40.1003(5), if it can be demonstrated that a groundwater plume is at a steady state condition and is not expanding, the source shall be considered controlled.*

Finally, to meet the Department's concern that "unstable" NAPL sources not be permitted to be left in the environment where they will continue to migrate and increase site risks, we also recommend that paragraph (g) be added to explicitly state that LNAPL must be stable to be a controlled source:

(g) the absence of any Non-Stable LNAPL.

Page 168, 40.0006(12) – The definition of Source of OHM Contamination should also be revised to explicitly exclude Historic Fill, as that term may ultimately be defined.

Page 171, 40.1012(2)(d) – An AUL is neither necessary nor appropriate where LNAPL has been demonstrated to be "stable" and there are no UCL exceedances remaining at the site. In this regard, it is important to note that the mere observation of LNAPL at some point in the history of a site should not be construed to mean that, even if it is no longer observable, it should be assumed to exist, albeit in a "stable" form, and therefore require an AUL. Moreover, currently, if one can demonstrate that there is less than ½ inch of NAPL in the formation and the soil concentrations pose no significant risk for unrestricted use, an AUL is not required. With the proposed expansion of NAPL notification to 1/8" in wells, excavations and depressions, the universe of NAPL sites will expand greatly. If this new AUL requirement were adopted, the number of sites at which AULs will be required will expand proportionately. We must provide for some minimal amount of LNAPL, historically or persistently observed, to exist at a site without the need for imposing AULs. By contrast, if it is the Department's intent to create a new form of Permanent Solution in which LNAPL may persist at a Site in excess of the UCL, but in a "stable" form, then NAIOP agrees that providing for an AUL to address that situation may be sensible. The Department should make clear its intentions for sites that may have greater than 1/8 inch of LNAPL where a permanent or temporary solution, or other regulatory closure status, may be achieved.

Page 174, 40.0005(7) – NAIOP recommends an effective date 90 days after promulgation, to allow PRPs and their LSPs an opportunity to anticipate the forthcoming changes.

Page 176, 40.0045(3)(a)(2) and 40.0046(1)(c) – These added provisions should be deleted as effectively unworkable. For many of these compounds there is no "background" level, and the language regarding the exacerbation of existing conditions is too broad to be of use in resolving this situation.

Page 178, 40.0046(6) – Replace "utilize" with "require" in the first line. Similarly, in the fourth line, replace "include" with "require." These provisions should not apply in cases where off-gas controls are implemented voluntarily.