

Public Discussion Draft

RSR Wave 2 - Notice of Activity and Use Limitation Regulations and Additions to ELUR Regulations

January 2015

The Department of Energy and Environmental Protection is developing “public discussion drafts” of ideas for potential future amendment to DEEP regulations, or new provisions for regulations, to address remediation of releases and sites where hazardous substances or oil have been released. Many of the subject matters for these drafts grew out of the Cleanup Transformation workgroup recommendations from November 2012. The purpose of the public discussion drafts is to provide more detail to the concepts set forth in the November 2012 Workgroup reports and the February 2013 Cleanup Transformation draft report. As a discussion draft, the language is not structured to read exactly as regulation language would, and does not attempt to propose section and subsection outline format. Also, this discussion draft is not a public hearing draft of a proposed regulation; DEEP will further shape and refine the discussion draft after considering public feedback, before proposing any formal proposed regulation for amendment/adoption and before initiating the formal regulation adoption process.

Background

Since the adoption of Remediation Standards Regulations (RSRs) in 1996, Environmental Land Use Restrictions (ELURs) have been the only institutional control (IC) allowed to permit this type of cleanup approach where polluted soil or groundwater is left in place with appropriate control measures. As part of the Cleanup Transformation, the use of alternative and more easily-implemented Institutional Controls were proposed for sites where there are lower levels of pollution and control measures are more easily implemented. During the 2013 Connecticut Legislative session, Section 22a-133o through Section 22a-133r of the Connecticut General Statutes (CGS) were amended by [Public Act No. 13-308](#) to allow use of Notice of Activity and Use Limitation (Notice AUL), also known as a “Deed Notice”, as an additional tool to reach a site cleanup end point. The statutory amendment also added authority to adopt regulations for post-filing requirements for both Notice AUL and ELUR. This will promote more efficient, streamlined and result-oriented cleanups. A public discussion draft pertaining to the potential types of institutional controls and changes to the RSRs has been published on the DEEP’s Website since November 14, 2013.

Please note important differences in terms. As defined in Section 33 of Public Act 13-308, an “**Environmental Use Restriction**” (EUR) is a general umbrella term, under which are the specific ICs of deed restriction (ELUR) and deed notice (Notice AUL).

Environmental Land Use Restrictions

An ELUR is a grant of an easement to the Commissioner of DEEP. Pursuant to Section 22a-133o of the CGS, interests in the Property must not affect the ELUR. An interest includes any right in or potential claim to the Property; for example, mortgages, liens, leases, easements, etc. If an interest does affect the purpose of the ELUR, it must be released or irrevocably subordinated to the ELUR through a “subordination agreement”. If the interest is so minor that it does not affect the purpose of the ELUR, a waiver (approved by the Commissioner) from the requirement to obtain a subordination agreement (“waiver”) must be requested for that interest.

Concept of Notice of Activity and Use Limitation / Deed Notice

DEEP is currently in the process of writing regulations for Notice AUL. The comments received in response to this document will help inform DEEP, and expedite the preparation of these regulations. A Notice AUL is a legal document recorded in the public land records which is intended to alert anyone searching the records to important information about pollution above criteria remaining at the property, as well as activity and use limitations due to such environmental conditions. Although both Notice AUL and ELUR need to be recorded in public land records, in certain circumstances there are some advantages to using Notice AULs over ELURs.

COMPARISON OF NOTICE AULs OVER ELURs

| Factor | Notice AUL | ELUR |
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| Ownership | State has no ownership or interest. | DEEP is the Grantee, thus owns an interest in the property. |
| Subordination of pre-existing easements or interests | Subordination is not required. However, a Notice AUL cannot be used if a preexisting interest allows for the conduct of an activity that interferes with the conditions or purposes of the Notice AUL or allows for intrusion into polluted soil. | Interests which are contrary to the purpose of the ELUR must be subordinated to the ELUR. |
| Subordination Waivers | No subordination waivers are required. | Subordination waivers are required when the interest does not affect the purpose of the ELUR |
| Implementation and approval | Self-implementing with LEP oversight | DEEP review and written approval for all ELURs except for those ELURs approved by a LEP pursuant to section 22a-133y CGS |
| Release Area Conditions | In order for the a Notice AUL to be used the following conditions must be satisfied: <ul style="list-style-type: none"> • Concentrations must be no greater than ten times the DEC, or ten times the PMC. • For environmentally isolated soil a volume limit of 10 cubic yards applies to soil that exceeds ten times the DEC and PMC. • For a residential activity restrictions, the property must be zoned industrial/commercial and not have current residential uses. | As described in the RSRs |
| Post Recording Requirements and Certificate of Title | A certificate of title is not required. Evaluation of interests and potential interests is submitted on a form prescribed by the Commissioner which demonstrates that the Notice AUL was properly recorded and that at the time of the recording of the Notice AUL there were no preexisting interests or potential | A Certificate of title is required to demonstrate that the ELUR, and all required subordination agreements and subordination agreements were properly recorded. A copy of the ELUR should be included with the Certificate of Title. |

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| | interests which allow for the conduct of an activity that interferes with the conditions or purposes of the Notice AUL or allow for intrusion into polluted soil ELUR. A copy of the AUL must be included with the form. | |
| Preparation and Recording Costs | Less costly than ELUR to create | More costly due to additional preparation of a complex legal document (similar to a real estate closing) |
| Modification & Release | Provisions would be included to allow for the modification of AUL Notices for the purpose of making corrections. Modifications of Notice AUL would be allowed by the DEEP or an appropriately qualified professional such as a LEP. | Commissioner approval required for releases. Currently the statutes do not allow for modification of ELURs. DEEP may propose regulatory updates in the future. |

Notes:

DEC = Direct Exposure Criteria, as defined in the RSRs

PMC = Pollutant Mobility Criteria, as defined in the RSRs

Description of Proposed Regulations and Changes

In response to Public Act 13-308, Section 22a-133q of the Regulation of Connecticut State Agencies is proposed to be changed to include the following four subsections:

- Section 22a-133q-1 to include all definitions for ELUR and Notice AUL
 - Environmental Use Restriction
 - Environmental Land Use Restriction
 - Notice of Activity and Use Limitation
 - Class A-2 survey (may change to include other types of surveys)
 - Licensed Environmental Professional
 - Other definitions as needed
- Section 22a-133q-2 to include the existing ELUR provisions that are currently cited as 22a-133q-1 of the RSRs
- Section 22a-133q-3 to include new regulations for Notice AUL
- Section 22a-133q-4 to include new regulations for post-filing requirements of Notice AUL and ELUR

A more detailed description of Sections 22a-133q-3 and -4 is provided below:

Notice AUL Applicability (Section 22a-133q-3)

The following is taken from the statutory language:

“A Notice AUL may be used and recorded for releases remediated in accordance with the regulations adopted pursuant to sections 22a-133k and 22a-133q of the General Statutes, as amended, for the following conditions and purposes:

(1) To achieve compliance with industrial/commercial direct exposure criteria, groundwater volatilization criteria, and soil vapor criteria, as established in regulations adopted pursuant to section 22a-133k, by preventing residential activity and use of the area to be affected through the Notice of activity and use limitation, provided such property is zoned for industrial or commercial use, is not used for any residential use, and no holder of an interest in such property, other than such owner, has a right of residential use, as defined in regulations adopted pursuant to section 22a-133k;

(2) To prevent disturbance of polluted soil that exceeds the applicable direct exposure criteria but that is inaccessible soil, in compliance with the provisions of the regulations adopted pursuant to section 22a-133k, provided pollutant concentrations in such inaccessible soil do not exceed ten times the applicable direct exposure criteria;

(3) To prevent disturbance of an engineered control to the extent such engineered control is for the sole remedial purpose of eliminating exposure to polluted soil that exceeds the direct exposure criteria, provided pollutant concentrations in such soil do not exceed ten times the applicable direct exposure criteria;

(4) To prevent demolition of a building or permanent structure that renders polluted soil environmentally isolated, provided: (i) The pollutant concentrations in the environmentally isolated soil do not exceed ten times the applicable direct exposure criteria and the applicable pollutant mobility criteria, or (ii) the total volume of soil that is environmentally isolated that exceeds ten times the applicable direct exposure criteria and the applicable pollutant mobility criteria is less than or equal to ten cubic yards; or

(5) Any other purpose the commissioner may prescribe by regulations adopted in accordance with the provisions of chapter 54.”

➤ *The Department is seeking comments on any such additional purpose/condition.*

Please note that with exception of certain activities and uses discussed later in this document, a Notice AUL shall not be used if a prior holder of interest in the property is allowed (by such interest) to conduct an activity that would interfere with the underlying remedy of the Notice AUL.

Proposing and Recording a Notice AUL (Section 22a-133q-3)

A Notice AUL shall be prepared using a form prescribed by the Commissioner of the DEEP and shall include the signature and seal of an LEP and shall be recorded in the municipal land records. The Commissioner shall have similar authority.

The DEEP is considering using a form similar to the [Massachusetts's template](#), since the Notice AUL has been implemented in Massachusetts for many years.

A Notice AUL shall include, but is not limited to:

- The LEP's opinion that the activity and use limitation is protective, satisfies the remedial requirements of the RSRs, and complies with the Notice AUL regulations;
- The metes and bounds description of the area that is subject to Notice AUL;
- A survey depicting the locations subject to the Notice AUL.
- Permitted site activities and uses
- Temporary activities (See below);
- Obligations and conditions for the permitted activities and uses; and
- Prohibited or limited site activities and uses.

- An evaluation of the interests in the land, on a form prescribed by the Commissioner, which includes a copy of the title search used to determine that there are no preexisting interests or potential interests which could allow for the conduct of an activity that interferes with the conditions or purposes of the Notice AUL or allow for intrusion into polluted soil. The Form would require a signature of an attorney.

Public Notice

Similar to an ELUR, a 30 day public notice period is envisioned prior to recording. After recording, a copy of recorded Notice AUL shall be submitted to the DEEP, the municipality, and any interest holders.

- *The Department is seeking comments on the nature of such a public notice.*

Temporary Activities

Certain short-term activities may be allowed under the Notice AUL. Such temporary activities and uses shall be included in the list of the permitted site activity and use in the original Notice AUL, and may include excavation tasks such as those associated with emergency or short term underground utility and/or construction work.

- *The Department is seeking comments on what activities and uses might be appropriate under this exemption, including the duration of those activities (e.g. 15 days, 30 days, or 90 days).*

Transfer, Modification, Amendment, and Release of a Notice AUL (Section 22a-133q-3)

The Notice AUL shall be incorporated into future instruments of transfer. The Notice AUL requires that any “deeds, easements, mortgages, leases, licenses, occupancy agreements, or other instruments of transfer” of an interest in the property or right to use the property incorporate the Notice AUL in full or by the reference.

To remain in compliance with the RSRs, the owner of a property for which a Notice AUL has been recorded has an ongoing obligation, pursuant to the statute, to comply with the terms of the Notice AUL. Any changes to an implemented Notice AUL shall be overseen by an LEP or the Commissioner, and recorded on the land record, as follows:

- If a recorded Notice AUL contains non-substantive errors, a Confirmatory Notice AUL may be used to correct such errors and omissions and recorded in public land records. A certified copy of the Confirmative Notice AUL shall be submitted to the DEEP Commissioner. Examples of non-substantive errors include misspelled names, missing lines in the legal description of the parcel, or omission of the Notice AUL Opinion.
- If substantive errors are discovered in a recorded Notice AUL, the defected Notice AUL must be released and a new Notice AUL must be recorded. Following recording of the Notice AUL release and the new Notice AUL, both certified documents shall be forwarded to DEEP.
- If a change is proposed in site activities and/or uses within the areas that are subject to an implemented Notice AUL, the owner shall have an LEP evaluate such proposed change and determine whether an additional method of compliance with the RSRs is required. If an LEP concludes that no further remedial actions are required for the proposed change, the owner shall

amend the existing Notice AUL and record it in the land records, in the same way an original Notice AUL is prepared and recorded. A copy of the amendment shall be submitted to DEEP. Any changes to subject area features must be reflected in an updated plan.

- If an LEP concludes that additional remedial actions are required for the proposed change, the existing Notice AUL shall be released, and a new Notice AUL shall be recorded unless a Notice AUL is not needed for RSR compliance. Documentation of such changes shall be submitted to DEEP.

A notice AUL can be released in whole and in part on a temporary or permanent basis. Examples of these type of releases are provided below:

- Upon completion of remediation with an LEP determination or the approval of the Commissioner that the Notice AUL is no longer necessary;
- To decrease the size of the restricted area (partial release);
- When substantive errors are discovered in an implemented Notice AUL; or
- An LEP or DEEP determines that additional remedial actions are necessary.

The release shall be recorded on the land records and notice of release and associated supporting documents shall be submitted to DEEP.

Compliance and Reporting of ELUR and Notice AUL (Section 22a-133q-4)

Owners shall perform on-going compliance inspections and reporting of ELUR and Notice AUL after filing on the land records, as follows. Owners shall self-monitor their compliance with the ELUR or Notice AUL, and shall certify and submit annually, on a form prescribed by the Commissioner, that the ELUR or Notice AUL is still in effect, remedial measures remain in place to be protective of human health at the property, and whether any prohibited activities have occurred. Reporting frequency for more comprehensive information will be determined based on the type of ELUR or Notice AUL.

Public Act 13-308 authorizes the Commissioner to require financial surety for use of an ELUR or a Notice AUL.

- *The Department is considering use of the financial surety similar to those used for engineered controls, but is open to suggestions. For example, the Department is considering establishing a threshold (based on one or more the following factors: size of subject area, type and concentration of pollutants, complexity of remedy, etc) over which financial surety would be required. It is envisioned that a small sub-set of the total number of EURs would need to include surety based on such thresholds.*

If an ELUR or Notice AUL is solely used for an engineered control purpose, no duplicated financial assurance would be required (because the engineered control already requires a financial assurance).

Liability/Enforcement of ELUR and Notice AUL

Pursuant to Section 34 of the Public Act 13-308, ELURs and Notice AULs are legal documents which are enforceable in court or by order by the State.

In the event that an ELUR or Notice AUL is determined by a court to be invalid, the owner shall remediate the contamination.

Fees (Section 22a-133q-4)

The Public Act 13-308 authorizes the Commissioner to collect a fee for an ELUR or Notice AUL.

- *The Department is considering types of fee structure for both ELUR and Notice AUL, except that no fee is being considered for a municipality or non-profit organization or anyone receiving brownfields funding for investigation or remediation from either EPA or the state.*

The Department is aware that many states, including the State of Massachusetts, New Jersey, Wisconsin, and Pennsylvania, have established fees for an Environmental Use Restriction (an ELUR or a Notice AUL). The fee structures in these states are closely associated with the completion of cleanup milestones. Additional research is needed to determine actual amount of fees in these states. Below is one of the examples for fees imposed by the State of Massachusetts:

- Effective June 20, 2014, Massachusetts Contingency Plan (MCP) Revisions establish a one-time fee of \$2,000 for non-homeowner and \$1,000 for homeowner for a Notice of Activity and Use Limitation filed prior to or concurrent with a Permanent Solution (similar to Remedial Action Plan).
- The fee structure for a Grant of Environmental Restriction (similar to an ELUR) includes the following:
 - Permit application fee of \$1,290 per Grant of Environmental Restriction;
 - Permit application fee of \$1,040 for Amendments of Environmental Restrictions; and
 - Permit application fee of \$795 for Releases of Environmental Restriction.