

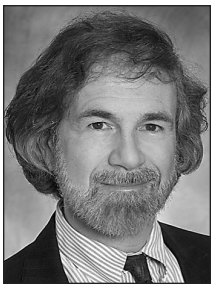
# BANKER & TRADESMAN

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## AULs Address Potential Dangers; Set Future Limitations, Standards

By Bruce Nickelsen & Jim Okun



**H**ave you prevented unacceptable exposures to contamination left at a site or are you considering a site that currently is contaminated? Are you aware of the potential hazards of exposure to oil, and that hazardous materials remaining in the soil can contaminate groundwater or indoor air? There are valuable tools in the risk-based corrective-action arsenal you need to be

aware of, including the activity and use limitation. An AUL is a restriction that allows certain uses of a property but not others. They also are a mechanism to insert notices in property deeds informing potential purchasers of the effect an AUL has on a property's value. To understand their weight, one must evaluate lifecycle costs, short-term and long-term effectiveness and the importance of human health. AULs also may be used to address potential risks to public safety, welfare and the envi-

ronment.

An AUL accomplishes this objective by identifying activities, based on an evaluation of human health risk, that are consistent or inconsistent with maintaining a condition of "no significant risk." The main purpose of an AUL is to provide property owners, those interested in the property and others who review property records at the Registry of Deeds with notice of the presence and location of oil or hazardous materials (OHM), if one or both is present in the soil at the property.

After an OHM release to the environment, the responding party has an obligation to undertake response actions as needed to reach regulatory closure. Achieving closure typically includes a combination of assessment and cleanup actions. This work is overseen by a licensed site professional, an environmental consultant licensed by the state, who, when applicable requirements are satisfied, concludes that a condition of "no significant risk" has been achieved and the closure certification may be issued.

In cases where the cleanup is less than 100 percent, and this is the vast majority of cases, a risk assessment must demonstrate that the residual contaminant concentrations do not pose a health or environmental risk. Unfortunately, often cleaning up a release to the point where it no longer poses a risk can be extremely costly or it may require the demolition of existing valuable structures to remove the underlying contaminated soil. What to do?

Enter the AUL. If a property owner is willing to agree to a future limitation regarding access to the contaminated soil area, and if the owner also is willing to document this willingness in the legal format of an AUL, then it may be possible for the licensed site professional to conclude that a condition of

"no significant risk" has been achieved and the release condition may be closed out.

### How AULs Work

You may ask why a commercial or industrial property that is not going to include a residence, school or daycare center should have to meet the same cleanup standards as these more sensitive land uses. The answer is they usually don't. There are cleanup standards for the more sensitive land uses and less-strict standards for the less-sensitive uses.

But to make sure the commercial or industrial property doesn't change to a residence, school or daycare, a legal notice is attached to the property deed, which identifies the conditions that are the basis for maintaining a designation of "no significant risk." The legal document through which this is accomplished is the AUL.

An AUL typically is attached to a property deed at the end of the assessment and remediation process, just before filing a completion statement or Response Action Outcome - the endpoint in the Massachusetts Contingency Plan process (the state regulation that governs cleanups). The Response Action Outcome documentation report will rely on the AUL to demonstrate that a condition of "no significant risk" is present currently and for the foreseeable future. The AUL is prepared by a licensed site professional and provides a brief summary of property conditions and appropriate and inappropriate activities. A survey by a licensed surveyor needs to be prepared (or amended, if one already exists) to show the portion of the property to which the AUL applies.

Construction activities still can be performed at properties with AULs. The language of the AUL will rely on soil-manage-

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ment plans to specify the circumstances under which soil can be handled. If the language of the AUL did not foresee the activities under contemplation, a licensed site professional can provide an opinion before the work is performed. It must be documented that the "no significant risk" condition will be maintained. AULs also can be amended or removed, if the conditions that initially required them are no longer present.

Property owners who have hired a licensed site professional to oversee an environmental cleanup often are disconcerted when they learn that there typically

is no governmental review and approval of the completed work. The Massachusetts Department of Environmental Protection simply does not have the staff or time to review the work being conducted at the hundreds of sites of environmental spills that occur each year. However, a property cleanup that includes an AUL is assured governmental review.

**AULs and Brownfields**

The 1998 Massachusetts Brownfields Act included new language regarding AULs. Significant penalties can be levied for violating the conditions of an AUL. However, the Brownfields Act provides liability pro-

tection for former property owners who may have incorporated an AUL into their redevelopment of a Brownfield property, provided that the AUL was properly applied and maintained. The act also requires that the DEP audit all properties with AULs. When the DEP audits an AUL, the audit usually will include review of the Response Action Outcome completion statement, which is supported by the AUL. The advantage of this is that the property owner will receive governmental review of the assessment and remediation that they performed, giving them added confidence to move forward with development or property transfer plans. ■