COMMONWEALTH OF MASSACHUSETTS

Board of Registration of Hazardous Waste Site Cleanup Professionals

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PROFESSIONAL CONDUCT COMMITTEE

Minutes of Meeting on April 18, 2007

[Approved on May 23, 2007]

Prepared by: Terry Wood

Meeting Location: Massachusetts Department of Environmental Protection, Central Regional Office, Worcester, MA.

1. **Call to Order:** Debra Stake called the meeting to order at 12:38 p.m. Also present were Gail Batchelder, Janine Commerford, Kirk Franklin, Christophe Henry, Gretchen Latowsky, Paul Mullen, Debra Phillips, Kelley Race and Robert Luhrs. Committee members absent: Deborah Farnsworth. Staff members present were Allan Fierce, Brian Quinlan, Lynn Read, Jan Reitsma, Terry Wood and Al Wyman. Also present were Wesley Stimpson, the LSP Association's Interim Executive Director, and Larry Feldman. Mary Gardner of DEP joined the meeting at 1:07 p.m.

2. **Announcements:** None.

Ms. Stake stated that the agenda for the meeting would be changed to add a new item under New Business: Discussion of draft memo regarding performance goals.

3. **Previous Minutes:** The draft minutes of the meeting held on March 7, 2007 were approved.

4. **Old Business**

   A. Status of CRTS

   At Ms. Stake's request, the chair of each CRT reported on progress made during the last month.

5. **New Business**

A. Discussion of draft memo regarding performance goals.

Ms. Commerford made a presentation regarding the memo. She stated that the memo discussed placing reasonable performance goals on the completion of complaint investigations and appeals. The performance goals recommended in the memo were as follows:

From receipt of Complaint to notification of LSP requesting response	10 days
From LSP response to decision to either dismiss or investigate (i.e., form CRT)	30 days or next Board mtg
From decision to investigate to CRT report	180 days
From CRT report to dismiss or serve OTSC	60 days
From filing of Answer to commencement of hearing	180 days
From commencement of hearing to conclusion of hearing (i.e., closing of the record after final briefs submitted)	90 days
From conclusion of hearing to recommended decision	60 days
From recommended decision to Board's final decision	180 days

Ms. Commerford added that the performance goals discussed in the memo would allow the Committee to track cases and, in the event the goals were not met, the Committee might be able to more readily discern the reasons why. Ms. Phillips stated that she believed the Committee had discussed the use of similar timelines a couple of years ago but that effort had fallen by the wayside.

Mr. Fierce stated that the Committee had previously discussed coming up with timelines for different phases of the complaint investigation but this memorandum goes further to include time lines for the appeal phase as well. Mr. Luhrs stated that he does not consider it helpful to have goals that have no teeth if unmet. He added that, if this proposal is pushed on the Board by MassDEP management, he is not sure it will work.

Mr. Franklin stated that he believes investigations are being completed more quickly than ever before and that it is not necessary to institute these performance goals.

Ms. Commerford stated that she should have prefaced her comments by saying that the Board has improved the process but added that she believes there is room for additional improvement.

Ms. Phillips stated that she believes the proposed performance goals should only be adopted if the Committee believes they would speed up the process. She said that the Committee should not adopt them if they do not believe they will result in constructive change. She stated that she believes the problem with tackling the backlog is due to the need for additional Board staff and, if adoption of the performance goals might result in the LSP Board being allowed to hire additional staff, she would support adopting them.

Mr. Reitsma stated that MassDEP's Acting Commissioner recognizes the need to hire someone to replace Anne Hartley. He added that he believes the backlog is due to both the Board's limited staff and the Board members' busy schedules.

Ms. Latowsky stated that she believes the Committee needs to track the reasons why cases are not moving forward more quickly.

Ms. Batchelder stated that the Committee cannot lose sight of the need to protect the public and, regardless of any performance goals, the Committee needs to be sure to investigate complaints thoroughly.

Ms. Wood stated that, while she appreciates that Board staff members have had to spend time recently doing the tasks Anne Hartley used to do, she does not believe that hiring a new administrative person will significantly impact the Board's ability to process complaints. She stated that she believes the bigger staff issues are that there are only two investigators and two full-time lawyers to work on both the backlog and new complaints.

Mr. Fierce stated that he believes it is a good idea to have performance goals. He stated that he does not believe the performance goals will help the Committee address the backlog but states they are an aspirational goal for future cases.

Ms. Race asked whether MassDEP staff could assist by copying files so complaint review teams (CRTs) could begin case investigations more quickly. She stated that she has wanted to begin investigation on some cases but the Board investigators have not had time to get the documents from MassDEP. Ms. Gardner stated that MassDEP does not have staff to copy files.

Ms. Latowsky stated that the Board investigators are very helpful because they cull out the important information from the DEP files for CRTs to review. She added that she believes the performance goals might be hard to meet when investigating a complicated multi-site case. She added that tracking the Board's progress might help to explain the reasons why the goals aren't met, but she is concerned that failing to meet them might look bad to the public. She inquired as to the status of the vacancy left by Anne Hartley's departure.

Mr. Luhrs stated that, even without a backlog, the Board's ability to complete investigations within 180 days might still be difficult if a number of new complaints were accepted around the same time.

Mr. Reitsma stated that, if the Committee were to adopt performance goals, the Committee should also indicate that they are the maximum times for completion of the various phases of the process. He stated that, based on the statistics he has compiled, the Board's timelines have been on average a total of 315 days from acceptance of complaint to completion of the investigation, and over 900 days to final adjudication in the event of an appeal.

Ms. Latowsky stated that the Committee should begin tracking the time when a CRT is ready to work on a new complaint as opposed to when the complaint is initially accepted by the Board for investigation. She stated that to begin imposing timelines now when a backlog still exists, is counter-productive because the Board won't be able to meet them.

Ms. Batchelder stated that she believes it might make sense to use the performance goals as aspirational goals and to identify the reasons why the Board isn't able to meet them.

Ms. Commerford stated that she supports making the performance goals policy as opposed to aspirational goals.

Mr. Wyman stated he believes that the Committee should attempt to document the reasons why investigations can take longer.

Mr. Mullen suggested that all Board staff and Board members document the time they spend on various cases.

Mr. Stimpson stated that he believes the Board lacks a management system and that someone should be put in charge of supervising to make sure things are getting done. He suggested that maybe Mr. Reitsma be placed in this role.

Ms. Wood stated that she believes the Board has made significant progress recently in reducing the backlog of old cases. Mr. Stimpson disagreed stating that he believed the Board had simply been pleading cases out.

Mr. Luhrs stated that he supports the idea of performance goals but he is not certain they should be made policy. He also suggested that someone, perhaps Mr. Reitsma, could compare the timelines the Committee discussed previously with the performance goals being proposed.

Mr. Reitsma stated that he would counsel the Committee to make the performance goals policy.

Mr. Stimpson stated that he does not understand why it takes so long for the staff investigators to get documents from MassDEP. Mr. Wyman and several others explained the time involved in reviewing DEP files and also that the investigators are working on a number of investigations at one time as well as completing numerous administrative tasks (such as new LSP applications, continuing education, and filling in for the vacant administrative position).

Ms. Commerford stated that Committee members do not see all the work the Board staff does. She stated that it might make sense to institute a weekly Board staff meeting.

Mr. Fierce stated that, because the Board staff is so small, the staff members already have a pretty good idea what everyone is working on.

Mr. Luhrs stated that the issue is whether the Board members are in a position to go forward with setting up a definitive policy and create a process to track and record the reasons why any performance goals are not met.

Ms. Race stated that she believes the Committee should have goals and try to meet them. She stated that, if the staff investigators need to spend a good deal of time on administrative tasks, then maybe the Board should try to minimize that time by dealing with continuing education and new LSP applications every two months as opposed to every month.

Ms. Batchelder stated that she would not commit to taking on any additional cases if she believed she could not meet the performance standards.

Mr. Henry stated that he liked the idea of dealing with new LSP applications and continuing education every two months instead of every month. He added that he believes there should be a limit to how long a case is allowed to be on hold.

Mr. Wyman posed the question whether a MassDEP staff person might be temporarily assigned to work for the Board retrieving documents.

Ms. Latowsky asked why Anne Hartley's position has not yet been filled.

Ms. Commerford stated that up until recently MassDEP did not have permission to do any hiring, but within the last week hiring had been unfrozen. She added that the Acting Commissioner's decision to fill Anne's position is not clearly tied to the Board adopting performance goals but she stated that the Acting Commissioner may be more willing to fill the position if they were adopted.

Ms. Batchelder stated that she believes she can commit to completing the investigation of a case within 180 days once the investigation has begun as opposed to when the case is accepted for investigation.

Ms. Phillips suggested that the Committee look at the new complaints on the agenda and, if any are accepted for investigation, the Board could try to appoint CRTs today and try to meet the performance goals for these new cases.

Ms. Latowsky stated that the Committee may be more reticent to accept new cases for investigation if the members were concerned that the performance goals could not be met.

Mr. Franklin stated that, if the filling of Anne Hartley's position is dependent on the Committee's acceptance of the performance goals, the Committee should agree to them.

Mr. Reitsma suggested that the Committee double the timelines for some number of months to try to progress through the backlog and then follow the timelines proposed in the memo.

Ms. Latowsky asked why an independent board could not make decisions about staff hiring.

Ms. Commerford stated that, while the Board is independent, the Board staff are appointed by MassDEP.

The Committee took a break beginning at 2:25 p.m.

Ms. Commerford called the meeting back to order at 2:35 p.m. She asked if Committee members had any final comments regarding the proposed performance goals.

Ms. Latowsky stated that she thinks the Committee's decision whether to accept the performance goals should be separate from filling Anne Hartley's position.

Ms. Commerford stated that the Committee could incorporate language in a final version of the memo stating that meeting the performance goals is dependent upon having a complete staff at the Board.

Mr. Phillips stated that she does not recommend incorporating this language because she does not believe filling Anne's position will allow the performance goals to be met.

Mr. Reitsma stated the memo could explain that the performance goals are aspirational and the Committee could use a failure to meet them as an argument for additional staff.

Ms. Latowsky is concerned that the Acting Commissioner of MassDEP is deciding whether a Board staff position can be filled.

Ms. Commerford stated that the filling of Board staff positions is dependent upon staffing caps at MassDEP.

Ms. Race stated that the Board apparently can not do anything about the staffing issue.

Mr. Reitsma stated that he wants to be clear that he does not believe the Acting Commissioner wants to control the Board. He does not believe she views the filling of Anne Hartley's position as a *quid pro quo* for the Board voting to accept the performance goals.

Ms. Commerford stated that the Acting Commissioner realizes the importance of filling Anne Hartley's position.

Mr. Mullen suggested that a rider be added to the policy stating that the Board will revisit the performance goals in one year.

Mr. Luhrs recommends that, instead of making the memo policy, the Board staff should prepare a draft policy document for the Board's review. He suggested that Mr. Reitsma draft the policy.

Ms. Latowsky stated that it might make sense to appoint a subcommittee to determine when to institute such a policy by considering when the backlog might be under better control.

Ms. Phillips stated that she liked Mr. Reitsma's suggestion that the Board implement the performance goals for new cases and not apply them to the backlog per se with the understanding that there may be problems meeting them due to staffing and also that the purpose of implementation is to discern reasons why performance goals are not met.

Mr. Fierce asked how the Committee should handle old pending cases in relation to new ones. He stated that he sees 2 or 3 possible options: 1) for now, due to the backlog, the Board could determine to start counting the 180-day investigation period for new cases once the CRT begins to start work on the case; 2) for new cases, start counting the 180 days from when the complaint is accepted; or 3) start the 180 days for some new cases when the cases are accepted but not for others.

Ms. Latowsky asked how the old cases would be prioritized in comparison to new ones.

Ms. Batchelder asked why the Committee could not apply the 180-day investigation period to all cases.

Ms. Phillips stated that it will not work to apply it to all cases. Ms. Phillips asked whether it made sense to look at the new complaints on the agenda for today and, if any were accepted, decide whether implementation of the performance goals would be feasible for them.

Mr. Reitsma suggested that someone make a motion to agree to the policy in principle and to work out the details later.

Mr. Luhrs made a motion that the Board staff draft a policy for the Committee's review at next month's meeting. The motion was seconded and passed unanimously.

The Committee than went back to the remaining agenda items under Old Business.

Old Business (continued)

B. Update re: Web Site Subcommittee, including issue when new complaint should be listed on the Web

Ms. Commerford stated that the subcommittee has not met. Mr. Wyman stated that he recently updated some aspects of the Web site and that this project took a fair amount of time.

C. Reconsideration request regarding dismissal of complaint 06C-05

Ms. Phillips and Mr. Fierce left the room because they are recused. Ms. Read stated that the Committee previously voted to dismiss this complaint and the complainant sent a letter asking the Committee to reconsider. The Committee asked the screening panel that had reviewed the initial complaint to consider the information provided by the complainant. She stated that the panel had not yet met. She stated that she anticipated the panel would meet prior to next month's meeting. Mr. Feldman asked whether the LSP submitted any additional information in response to the request for reconsideration. Ms. Read stated that the LSP had done so and that the LSP's information had also been forwarded to the panel.

The Committee next began to review the remaining agenda items under New Business.

6. New Business (continued)

B. Complaint 07C-02

This complaint was filed by a private party and alleged, among other things, that an LSP working on a contaminated site adjacent to his private residence had collected samples from his property without his knowledge or consent in June 2005, and also that, after giving approval to the removal of some contaminated soil from his property in December 2006, the LSP's firm had left his property in an unsafe condition with holes in the ground and pieces of fence on the ground. The complaint also alleged that a non-LSP who was involved with the project held himself out to be an LSP. After discussion of the complaint and the responses from both the LSP and the non-LSP, a motion was made and seconded to dismiss the complaint against the LSP for lack of jurisdiction, and to send the LSP a dismissal with warning letter stating that, while the version of the Massachusetts Contingency Plan regulations in effect in June 2005 did not require that an abutter be notified before samples were taken from his property, the MCP regulations were recently changed to require notification. The motion passed unanimously. Ms. Wood will prepare a draft letter for the Committee's review at next month's meeting. Another motion was made and seconded to dismiss the complaint against the non-LSP because the Committee believed investigation of the complaint would not likely lead to sufficient evidence to warrant discipline. The motion passed unanimously.

C. Complaint 07C-01

This complaint was filed by a private party who was a former client of the LSP and alleged, among other things, that the LSP had violated the Board's Professional Conduct regulations in connection with a Release Notification Form (RNF) that he filed for the complainant's site and also violated the Professional Conduct regulations by making statements to DEP about

the complainant's site after the client had discharged the LSP. After discussion of the complaint and response, a motion was made and seconded to dismiss the allegations in the complaint for lack of jurisdiction on the grounds that the LSP was not performing professional services in filing an RNF or after being discharged, but to appoint a CRT to investigate whether, as information in the complaint and response suggested, the LSP had conducted a Limited Removal Action when contamination was known to be present in the groundwater. The motion passed unanimously. Kelley Race, Kirk Franklin and Terry Wood were appointed to serve on the Complaint Review Team.

D. Complaint 07C-03

This complaint was filed by a private party alleging that an LSP performed work that was not in compliance with the MCP when acting as a consultant to an abutter. The complainant alleges that the LSP's work resulted in costly litigation between the complainant and abutter. After discussion of the complaint and response, a motion was made and seconded to dismiss the complaint for lack of jurisdiction because the LSP was not the LSP-of-Record and never performed 'professional services' at the site. The motion passed unanimously.

6. Future Meetings

The Committee will next meet on May 23, 2007 at the MassDEP Northeast Regional Office. The Committee will also meet on June 20, 2007 at a location to be determined.

7. **Adjournment:** The meeting was adjourned at approximately 4: 05 p.m.