

309 CMR: BOARD OF REGISTRATION OF
HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS

309 CMR 4.00: RULES OF PROFESSIONAL CONDUCT

Section

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4.01: Preamble

In order to safeguard the public health, safety, welfare and the environment and to establish and maintain a standard of professional integrity, the Board has established 309 CMR 4.00 (Rules of Professional Conduct). 309 CMR 4.00 shall be binding on every person licensed by the Board to render waste site cleanup activity opinions within the meaning of M.G.L. c. 21A, § 19.

Any person who may become aware of the failure of a licensed site professional to comply with an obligation or prohibition imposed by 309 CMR 4.00 may file a complaint with the Board pursuant to 309 CMR 7.00. However, the availability of this right is not intended to subject an LSP to any liability in addition to any actions that may be taken by the Board, nor is it intended that a violation of 309 CMR 4.00 shall by itself give rise to a private cause of action or create any presumption that a legal duty to a party other than the Board or the Department has been breached.

All LSPs are charged with having knowledge of 309 CMR 4.00 and shall be deemed to be familiar with the provisions and to understand them.

4.02: Professional Competency

- (1) In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily exercised by licensed site professionals in good standing practicing in the Commonwealth at the time the services are performed.
- (2) An LSP shall not provide Professional Services outside his or her areas of professional competency, where this competency is based on his or her education, training, and experience, unless that LSP has relied upon the technical assistance of one or more professionals whom the LSP has reasonably determined are qualified in such area or areas by education, training and experience.
- (3) In providing Professional Services, an LSP may rely in part upon the advice of one or more professionals whom the LSP reasonably determines are qualified by education, training and experience.
- (4) A successor hazardous waste site cleanup professional may render a waste site cleanup activity opinion regarding response actions performed under a previous hazardous waste site cleanup professional, and that opinion may be relied upon as sufficient to protect public health, safety, welfare, or the environment, only when the successor hazardous waste site cleanup professional has:
 - (a) reviewed all reasonably available documentation known to the successor hazardous waste site cleanup professional that describes previous releases, site assessment activities and results, and work performed in connection with the assessment, containment or removal action that is the subject of the opinion;
 - (b) conducted a site visit to observe current conditions and to verify the completion of as much of the work as is reasonably observable; and
 - (c) concluded, in the exercise of his or her independent professional judgment, that he or she has sufficient information upon which to render the waste site cleanup activity opinion.

4.03: Professional Responsibility

- (1) A licensed site professional shall hold paramount public health, safety, welfare, and the environment in the performance of professional services.

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- (2) A licensed site professional shall render a waste site cleanup activity opinion only when he or she has either:
- (a) in the case of an opinion related to an assessment:
 - 1. managed, supervised or actually performed such assessment, or
 - 2. periodically reviewed and evaluated the performance by others of such assessment; or
 - (b) in the case of an opinion related to a containment or removal action:
 - 1. managed, supervised, or actually performed such action, or
 - 2. periodically observed the performance by others of such action.
- (3) In providing professional services, a licensed site professional shall:
- (a) exercise independent professional judgment;
 - (b) follow the requirements and procedures set forth in applicable provisions of M.G.L. c. 21E, and 310 CMR 40.0000;
 - (c) make a good faith and reasonable effort to identify and obtain the relevant and material facts, data, reports and other information evidencing conditions at a site that his or her client possesses or that is otherwise readily available, and identify and obtain such additional data and other information as he or she deems necessary to discharge his or her professional obligations under M.G.L. c. 21A, §§ 19 through 19J, and 309 CMR; and
 - (d) with regard to the rendering of waste site cleanup activity opinions, disclose and explain in the waste site cleanup activity opinion the material facts, data, other information, and qualifications and limitations known by him or her which may tend to support or lead to a waste site cleanup activity opinion contrary to, or significantly different from, the one expressed.
- (4) If a licensed site professional identifies a release or threat of release that in the LSP's professional judgment poses or could pose an Imminent Hazard as described in 310 CMR 40.0321 at a particular site at which he or she is providing Professional Services, he or she shall:
- (a) immediately advise his or her client of the need to notify the Department of the Imminent Hazard; and
 - (b) notify the Department of the imminent hazard no later than 24 hours after identifying such, unless the client has provided such notice.
- (5) If, in the course of providing Professional Services, a licensed site professional obtains knowledge of a condition:
- (a) on a property, known by the LSP to be owned or operated by the client, that either
 - 1. contains all or a portion of the disposal site for which the LSP has been retained or
 - 2. is contiguous to a property, known by the LSP to be owned or operated by the client, that contains all or a portion of the disposal site for which the LSP has been retained, and
 - (b) that the LSP, in the exercise of his or her professional judgment, considers to require notification to the Department within either two or 72 hours,
- then the LSP shall promptly notify the client in writing of the existence of the condition.
- (6) In the event a licensed site professional knows or has reason to know of an action taken or a decision made by his or her client with respect to a particular aspect of the licensed site professional's professional services that significantly deviates from any scope of work, plan, or report developed to meet the requirements of M.G.L. c. 21E, 310 CMR 40.0000, or an order of the Department, then the licensed site professional shall promptly notify his or her client in writing of such.
- (7) An LSP shall not reveal facts, data or information obtained in his or her professional capacity without the prior consent of the client, except as authorized or required by law, if such facts, data, or information are claimed in writing to the licensed site professional to be confidential by the client and are not already in the public domain.

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(8) If subsequent to the date a licensed site professional renders a waste site cleanup activity opinion he or she learns that material facts, data or other information existed at the time the waste site cleanup activity opinion was rendered which may tend to support or lead to a waste site cleanup activity opinion contrary to, or significantly different from, the one expressed, then the licensed site professional shall promptly notify his or her client in writing of such.

(9) If, subsequent to the date of his or her engagement, a successor licensed site professional learns of material facts, data or other information that existed at the date of a predecessor licensed site professional's waste site cleanup activity opinion and was not disclosed in that waste site cleanup activity opinion, then the successor licensed site professional shall promptly notify his or her client in writing of such.

(10) A licensed site professional shall not allow the use of his or her name by, or associate in a business venture with, any person or firm which he or she knows or should know is engaging in fraudulent or dishonest business or professional practices relating to the professional responsibilities of a licensed site professional.

(11) Applicants and licensed site professionals shall cooperate fully in the conduct of investigations by the Board by promptly furnishing, in response to formal requests, orders or subpoenas, such information as the Board, or persons duly authorized by the Board, deems necessary to perform its duties under M.G.L. c. 21A, §§ 19 through 19J. In connection with the investigation by the Board of applications or disciplinary complaints, an LSP shall not:

- (a) knowingly make a false statement of material fact;
- (b) fail to disclose a fact necessary to correct a material misunderstanding known by the LSP to have arisen in the matter;
- (c) knowingly and materially falsify, tamper with, alter, conceal, or destroy any document, data record, remedial system, or monitoring device that is relevant to the investigation, without obtaining the Board's permission; or
- (d) knowingly allow or suffer any of his or her employees, agents, or contractors to do any of the foregoing.

(12) An LSP who is involved in a management or review capacity at a disposal site will be considered responsible, along with a second LSP, for the second LSP's violation of the Board's Rules of Professional Conduct set forth in 309 CMR 4.00 if he or she:

- (a) orders, directs, or formally ratifies Professional Services or an Opinion being conducted or prepared by the second LSP;
- (b) recognizes that the Professional Services and/or Opinion violate an obligation or prohibition contained in the Rules of Professional Conduct; and
- (c) fails to take reasonable steps to attempt to avoid or mitigate this violation.

(13) An LSP shall comply with all conditions that are imposed on his or her license as a result of a disciplinary proceeding.

(14) In communicating with a client or prospective client, including but not limited to communications with respect to a proposed scope of services or proposed contract, it is the LSP's responsibility to inform his or her client or prospective client of the relevant and material assumptions, limitations, and/or qualifications that underlie the LSP's communication. Evidence that an LSP has provided his or her client or prospective client with timely written documentation of these assumptions, limitations, and/or qualifications shall be deemed by the Board to have satisfied the requirements of this section.

(15) In communicating with a client or prospective client, an LSP shall not state or imply, either as an inducement or a threat, an ability to improperly influence a government agency or official.

(16) In describing his or her qualifications, experience, or ability to provide Professional Services, an LSP shall not knowingly:

- (a) make a material misrepresentation of fact or law;
- (b) omit a fact necessary to make the description, when considered as a whole, not materially misleading; or

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(c) make a statement that in the Board's opinion is likely to create an unjustified expectation about results the LSP can achieve, or state or imply that the LSP can achieve results by means that violate the Massachusetts Contingency Plan, the Rules of Professional Conduct contained in 309 CMR 4.00, or other law.

(17) A licensed site professional who becomes obligated to make any of the notifications required by 309 CMR 4.03 shall make the required notification even if he or she is discharged by the client before doing so.

4.04: Conflict of Interest

(1) A licensed site professional shall not accept compensation, financial or otherwise, for his or her professional services pertaining to a site from more than one person having significant conflicting or adverse interests unless the circumstances are fully disclosed to, and agreed to by, all clients engaging him or her with regard to that site.

(2) In the event a licensed site professional has, develops or acquires any business association, direct or indirect financial interest, or other circumstance which is substantial enough to create an impression of influencing his or her judgment in connection with his or her performance of professional services pertaining to any site, the licensed site professional shall fully disclose in writing to his or her client the nature of the business association, financial interest or circumstance. For the purposes of 309 CMR 4.04(2) receipt of salary or employee benefits by an LSP employed by his or her client on a full time basis is deemed not to be substantial.

(a) If the client or employer objects to such business association, financial interest or circumstance, the licensed site professional shall offer to terminate, at his or her discretion, either the business association, financial interest or circumstance, or his or her engagement with regard to the site or sites.

(b) If a licensed site professional believes that his or her business association, financial interest or circumstance renders him or her incapable of discharging his or her professional obligations under 309 CMR 4.00 in connection with his or her performance of professional services pertaining to a site, the licensed site professional shall terminate his or her engagement with regard to that site.

(3) A licensed site professional shall not solicit or accept financial or other valuable consideration from material or equipment suppliers in return for specifying or endorsing their products.

4.05: Accepting Compensation

An LSP shall not let his or her ownership interest, compensation, or continued employment affect his or her Professional Services to the extent that said Professional Services do not meet the standards set forth in 309 CMR 4.00 and 310 CMR 40.0000.

REGULATORY AUTHORITY

309 CMR 4.00: M.G.L. c. 21A, §§ 16 and 19 through 19J.