

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

309 CMR 7.00: PROCEDURE GOVERNING DISCIPLINARY PROCEEDINGS AND OTHER
DISPOSITIONS

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7.01: General Provisions

(1) Any licensed site professional or other person who acts as, advertises as, or holds themselves out to be a licensed site professional shall be subject to the disciplinary authority of the Board.

(2) A licensed site professional who, individually or in concert with another person, violates any provision of M.G.L. c. 21A, §§ 19 through 19J, or any provision of 309 CMR, including but not limited to the Rules of Professional Conduct in 309 CMR 4.00: *Rules of Professional Conduct*, shall be subject to the disciplinary authority of the Board.

(3) It shall constitute misconduct, and may be grounds for appropriate discipline, for a licensed site professional to engage in conduct that results in the LSP's conviction for:

- (a) any felony;
- (b) a misdemeanor committed in the course of providing Professional Services;
- (c) a misdemeanor which contains as a necessary element fraud, misrepresentation, deceit, bribery, extortion, misappropriation, theft, false swearing, or willful failure to file income tax returns;
- (d) a misdemeanor involving acts that reveal a sufficient lack of good moral character such that the Board no longer is persuaded that the LSP will be in compliance routinely and on a continuing basis with all standards and requirements applicable to LSPs.

The following shall be deemed to be a conviction within the meaning of this section, whether or not sentence has been imposed: a guilty verdict or finding of guilt, any admission to or finding of sufficient facts, and any plea of guilty or *nolo contendere* which has been accepted by the court.

(4) It shall also constitute misconduct, and be grounds for appropriate discipline, for an applicant to engage in fraud, misrepresentation, deception, or concealment of a material fact:

- (a) in applying to the Board for a license or a renewal license; or
- (b) in taking any examination administered by the Board or its exam contractor.

(5) It shall also constitute misconduct, and be grounds for appropriate discipline, for a licensed site professional to engage in acts that:

- (a) involve dishonesty, fraud, deceit, lack of good moral character, assault, threats, intimidation, or coercion; and
- (b) have a substantial connection to the professional responsibilities of a licensed site professional.

(6) It shall be grounds for the Board to take any action allowed by law for any non-licensee to act as, advertise as, hold the non-licensee out to be, or represent the non-licensee as being a licensed site professional.

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7.01: continued

(7) Regardless of whether misconduct has occurred, the Board may take any action allowed by law, including but not limited to suspending or revoking a license, if the Board finds that a licensed site professional is unable to perform the essential functions of a licensed site professional in accordance with the requirements of 309 CMR.

7.02: Types of Discipline and Other Dispositions

(1) Discipline of licensed site professionals may be by revocation of license, suspension of license for a period of up to five years, public censure, or private censure.

(2) The Board may also assess a civil administrative penalty on any person who is in noncompliance with any provision of any regulation, order, or license issued or adopted by the Board, or with any provision of M.G.L. 21A, §§ 19 through 19J, subject to the requirements of 309 CMR 8.00: *Administrative Penalty Regulations*.

(3) The Board may also take any other action as allowed by law, including but not limited to issuing orders imposing such restraints on or requiring action by licensed site professionals as the Board deems necessary to abate a hazard or the violation of any provision of M.G.L. c. 21A, §§ 19 through 19J, or any provision of 309 CMR.

(4) If the Board determines that a licensed site professional is unable to perform the essential functions of a licensed site professional in accordance with the requirements of 309 CMR, the Board may place the licensed site professional on inactive status or take other appropriate action, including but not limited to suspending or revoking the licensed site professional's license. If the Board places a licensed site professional on inactive status, the Board shall promptly remove the LSP's name from the Board's official list of active LSPs and take all other actions specified in 309 CMR 9.01: *General*.

(5) Any person who is disciplined by the Board shall also be subject to such other penalties as may be provided by law, including but not limited to actions for civil injunctive relief and civil or criminal penalties.

7.03: Initiation

(1) Any person or any member of the Board may file a complaint with the Board charging:

- (a) a licensed site professional with misconduct;
- (b) a licensed site professional with being unable to perform the essential functions of a licensed site professional in the manner described in 309 CMR 7.01(7); or
- (c) a non-licensee with acting as, advertising as, holding themselves out to be, or representing themselves as being a licensed site professional.

(2) The Board, in its discretion, may investigate anonymous complaints.

7.04: Preliminary Investigation

(1) The Board may appoint a Complaint Review Team to conduct or arrange for the conduct of a preliminary investigation to determine the truth and validity of all or a portion of the allegations set forth in a complaint. The Board may also request that a Complaint Review Team investigate matters that are not alleged in a complaint but which, if established, may constitute grounds for discipline or other disposition as described in 309 CMR 7.02.

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7.04: continued

(2) A Complaint Review Team shall be comprised of one member or former member of the Board who is an LSP and was appointed to fill one of the five positions specified by M.G.L. c. 21A, § 19A, for hazardous waste site cleanup professionals, one member or former member who is or was one of the other members of the Board, and one of the attorneys on the Board's staff. The Complaint Review Team shall investigate the issues designated by the Board and prepare a report to the Board summarizing the findings of the investigation and providing a recommendation to the Board with respect to the presence of sufficient grounds for disciplinary action or other disposition as described in 309 CMR 7.02. If the Complaint Review Team recommends that the Board find sufficient grounds for disciplinary action or other disposition, it must also prepare a supplemental memorandum that recommends what type of discipline or other disposition, as described in 309 CMR 7.02, the Board should impose and explains the basis for this recommendation. In making these recommendations, each member of the Complaint Review Team, including the attorney, shall have one vote.

(3) If, upon investigation of the complaint, the Complaint Review Team has reason to believe that:

- (a) the licensed site professional who is the subject of the investigation is unable to perform the essential functions of 309 CMR;
- (b) such failings are a result of an addiction to or excessive use of controlled substances, any dangerous drug or combination of drugs, or alcohol, or are due to a disability; and
- (c) a medical or other appropriate examination or examinations would aid the Board in its decision, the Complaint Review Team may recommend to the Board that it direct the licensed site professional, as a condition of retaining the LSP's license, to be examined by a qualified medical or other applicable expert or experts designated by the Board at the LSP's expense. The Board shall thereupon determine whether to direct such examination.

7.05: Informal Conferences

To facilitate disposition of a complaint, the Board may request the person filing the complaint and/or the licensed site professional who is the subject of the complaint, and/or any other person, to attend an informal conference at any time prior to or after the commencement of an adjudicatory proceeding.

7.06: Initial Disposition by the Board

(1) The members of each Complaint Review Team shall present their report summarizing the findings of their preliminary investigation to the other Board members at a quasi-judicial session of the Board. The members of the Board who did not serve on the Complaint Review Team shall then either recommit the matter to the Complaint Review Team for further investigation or determine whether there are sufficient grounds to initiate disciplinary action or other disposition as described in 309 CMR 7.02.

(2) If the Board determines that based on the preliminary investigation it has sufficient grounds to initiate disciplinary action or other disposition as described in 309 CMR 7.02, the Board shall review the Complaint Review Team's supplemental memorandum and take such action as it deems appropriate, including, but not limited to, issuing an order, commencing an adjudicatory proceeding, imposing discipline or other disposition by agreement, or disposing of the matter at an informal conference.

(3) If the Board determines that it does not have sufficient grounds to initiate disciplinary action or other disposition as described in 309 CMR 7.02, it shall dismiss the complaint. In dismissing a complaint, the Board may issue the respondent a warning or admonition, that is not considered a disciplinary action, not to engage in certain conduct. Both the complainant and the respondent shall promptly be notified of the dismissal of a complaint and the basis for the dismissal. A complainant shall have 30 days to petition the Board to reconsider the dismissal of the complaint for good cause shown.

7.07: Initiation of Formal Adjudicatory Proceedings

If the Board determines that, based on the preliminary investigation, sufficient grounds exist to initiate disciplinary action or other disposition as described in 309 CMR 7.02, the Board may commence a formal adjudicatory proceeding by providing the respondent with an order to show cause why disciplinary action or other disposition as described in 309 CMR 7.02 should not be taken. The order shall state the grounds for taking disciplinary action or other disposition, including the specific facts relied upon and the statute(s) and/or regulations authorizing the Board to take disciplinary action or other disposition. It shall also explain the respondent's right to request an adjudicatory hearing to contest the grounds for discipline or other disposition set forth in the order. The order shall direct the respondent to file an answer within 21 days of receipt or notice of the order. The order shall also advise the respondent that failure to file a timely answer to the order shall be deemed an admission of the charges contained therein. Such admission shall permit the Board to proceed to impose discipline or other disposition pursuant to 309 CMR 7.10.

7.08: Conduct of Formal Adjudicatory Proceedings

(1) Procedure Generally. The conduct of formal adjudicatory proceedings shall be governed by 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure*. Upon receipt of the respondent's answer requesting a formal adjudicatory proceeding, the proceeding shall be conducted by a presiding officer appointed by the Board. The staff attorney member of the Complaint Review Team shall serve as the prosecuting attorney. The adjudicatory proceeding shall serve to finalize the Board's investigation of the facts and grounds for discipline or other disposition as described in 309 CMR 7.02. At the conclusion of the proceeding, in accordance with the provisions of 801 CMR 1.00, the presiding officer shall file a recommended decision with the Board and promptly provide the parties with a copy. This recommended decision shall contain the presiding officer's recommended findings of fact and rulings of law concerning the charges set forth in the order to show cause. It shall not be the role of the presiding officer to recommend the form of discipline or other disposition to be taken by the Board.

(2) Written Direct Testimony. Notwithstanding anything to the contrary in 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure*, all parties shall file within a reasonable time in advance of the hearing the full written text of the testimony of their witnesses on direct examination, including all exhibits to be offered in evidence. The presiding officer shall establish a schedule for the filing of this direct testimony and exhibits. A party may by motion seek permission for good cause shown to present the direct testimony of a witness by oral examination. Good cause in this context includes, but shall not be limited to, persuasive evidence that the witness is an adverse witness, hostile, or otherwise unwilling to prepare the witness's direct testimony in writing. The presiding officer may exclude direct testimony offered at the hearing that was not included in the previously filed, written direct testimony but was reasonably obtainable at the time it was filed. The presiding officer may also require the filing of written rebuttal testimony within a reasonable time after the filing of the direct testimony. All witnesses whose testimony is filed in writing shall appear at the hearing, attest under the penalties of perjury to the accuracy of their written testimony, and be available for cross-examination. If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise. Notwithstanding the foregoing, the requirement to file written direct testimony can be waived by stipulation of the parties.

7.09: Suspension Prior to Hearing

In the event that the Board finds that an imminent threat to public health or safety or to the environment could result during the pendency of an adjudicatory proceeding, the Board may issue an order suspending or revoking a licensed site professional's license. This order shall be effective and enforceable immediately upon issuance, and may remain so notwithstanding and until the conclusion of the adjudicatory proceeding, unless the Board orders otherwise during the course of the adjudicatory proceeding. The Board shall provide an opportunity for a hearing on the necessity for the summary action within seven days of the date on which the Board issues such an order.

7.10: Final Decision of the Board

- (1) Objections to Recommended Decision. If either the respondent or the prosecuting attorney files objections within 30 days to the presiding officer's recommended decision, the Board shall allow the other party 20 days to submit a response. The Board may allow the parties to argue orally.
- (2) Board's Final Findings of Fact and Rulings of Law. The Board members who served on the Complaint Review Team shall not participate in making the final decision. The Board may affirm and adopt the presiding officer's recommended decision in whole or in part, and it may recommit the recommended decision to the presiding officer for further findings as it may direct. If the Board does not accept the whole of the recommended decision, it shall provide an adequate reason for rejecting those portions of the recommended decision it does not affirm and adopt. The Board shall endeavor to issue final findings of fact and rulings of law within 90 days of the filing or re-filing with the Board of the recommended decision. Notwithstanding anything to the contrary in 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure*, the findings of fact and rulings of law shall not become final until the Board votes and issues its final findings of fact and rulings of law.
- (3) Board's Decision on Form of Discipline or Other Disposition. If the Board's final findings of fact and rulings of law conclude with a finding that sufficient grounds exist for disciplinary action or other disposition as described in 309 CMR 7.02, or if the respondent has failed to file a timely answer to the order to show cause, the prosecuting attorney shall file with the Board a memorandum containing a final recommendation, with supporting reasons, concerning the form of discipline or other disposition, as described in 309 CMR 7.02, the Board should impose in light of the Board's final findings of fact and rulings of law. The prosecuting attorney shall also serve a copy of this memorandum upon the respondent. Thereupon, the respondent shall have 21 days to submit a memorandum in opposition to the prosecuting attorney's final recommendation and to present an alternative recommendation. If the respondent submits a memorandum in opposition, the prosecuting attorney shall have 14 days to submit a response. The Board may allow the parties to argue orally.
- (4) Final Decision. The final decision of the Board shall contain both the Board's final findings of fact and rulings of law and its final order of discipline or other disposition as described in 309 CMR 7.02.

7.11: Board Action without Hearing

Notwithstanding any provision of 309 CMR to the contrary, the Board may revoke, suspend or refuse to renew a license without affording an opportunity for an adjudicatory hearing if the revocation, suspension, or refusal to renew is based solely upon failure of the licensee to file timely applications or to pay lawfully prescribed fees, provided the Board gives notice of its intent to take such action to the licensee seven days prior to taking such action. If the licensee files the necessary application, or pays the prescribed fee within the time period, the Board shall terminate the revocation, suspension or refusal proceedings.

7.12: Voluntary Surrender of License by Those under Disciplinary Investigation

A licensed site professional may not voluntarily surrender a license during the course of a disciplinary investigation or adjudicatory proceeding without the consent of the Board.

7.13: Discipline or Other Disposition by Agreement

At any point during the course of a disciplinary investigation or adjudicatory proceeding, the parties may present a proposed agreement for discipline or other disposition to the Board for its review and approval. The Board may approve or reject the proposed agreement. If the proposed agreement is accepted, the respondent shall waive the right to further administrative proceedings or judicial review pertaining to the matters that are subject to the agreement.

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7.14: Reinstatement

- (1) Any person whose license is revoked may be barred by the Board from applying for reissuance of a license for a period of not more than five years. The term during which re-issuance is barred will be established by the Board as part of its decision in the revocation proceeding.
- (2) Any person whose license is suspended may be barred by the Board from applying for reinstatement of the license until the suspension period established by the Board as part of its decision in the suspension proceeding has run.
- (3) A licensed site professional placed on inactive status pursuant to 309 CMR 7.02(4) shall be entitled to request transfer from inactive status to active status in accordance with 309 CMR 9.04: *Reinstatement after Being Placed on Inactive Status Pursuant to 309 CMR 7.02(4)*.

7.15: Client Notification Requirements after Revocation or Suspension

- (1) In every case where an LSP's license has been revoked or suspended for a period of 90 days or more as a result of a disciplinary action, the LSP shall document to the Board, in the manner described below, that the LSP has notified the LSP's current clients in writing that the LSP's license has been revoked or suspended. The term "current clients" means all clients for whom the LSP is serving as an LSP-of-record or is otherwise engaged to provide Professional Services on the date of the revocation or suspension order. This documentation requirement also applies when an LSP's license is suspended during the pendency of an adjudicatory proceeding pursuant to 309 CMR 7.09; however, if the LSP requests a hearing on the necessity of such action, this documentation requirement shall apply only after that hearing if the suspension order is reaffirmed. For LSPs whose license is suspended during the pendency of an adjudicatory proceeding, the term "current clients" means all clients for whom the LSP was serving as an LSP-of-record or was otherwise engaged to provide Professional Services on the date of the original immediate suspension order.
- (2) The Board shall provide written notification of this documentation requirement to each LSP to whom this documentation requirement applies. This notification shall accompany each final order of revocation, suspension of 90 days or more, or reaffirmation of a suspension order issued pursuant to 309 CMR 7.09. Upon receipt of this notification, the LSP shall take the following steps:
 - (a) Within 14 days from the date of notification, the LSP shall notify all of the LSP's current clients by certified mail, return receipt requested, that the LSP's license has been revoked or suspended, whichever is the case, and that the LSP can no longer serve as the LSP for the client's site or sites.
 - (b) Within 21 days from the date of notification, the LSP shall submit a signed affidavit to the Board attesting that all the LSP's current clients have been notified of the revocation or suspension. The LSP shall attach to the affidavit a copy of each notification sent to the LSP's current clients and all return receipts or returned mail received up to the date of the affidavit. The LSP shall file supplemental affidavits covering subsequently received return receipts and returned mail.
- (3) Any LSP subject to the terms of 309 CMR 7.15 who fails to notify one or more of the LSP's current clients shall be subject to any action allowed by law, including but not limited to a separate disciplinary proceeding and/or the assessment of an administrative penalty pursuant to 309 CMR 8.00: *Administrative Penalty Regulations*. It shall be considered to be a separate violation each time the LSP fails to notify one current client.

REGULATORY AUTHORITY

309 CMR 7.00: M.G.L. c. 21A, §§ 16 and 19 through 19J.