**Advisory Ruling 94-01**

April 18, 1994

Jeffrey M. Hardin, President
LSP Association
P.O. Box 382
Dover, MA 02030-0382

**Re: Request for Advisory Ruling No. 94-01**

Dear Mr. Hardin:

The Board of Registration of Hazardous Waste Site Cleanup Professionals has received your letter dated June 3, 1994, requesting that the Board render an advisory ruling pursuant to Part 5 of the Board's regulations. See 309 Code Mass. Regs. ("CMR") 5.00 et seq. The question on which you request an advisory ruling is as follows:

"What responsibility(ies) does the LSP have for making notification to the DEP of an Imminent Hazard in the case where the LSP informs the client of the Imminent Hazard condition and is immediately relieved of his duties either by his employer or by the client, thereby no longer satisfying the "is providing" condition that is specified in the Professional Responsibility section of the LSP Regulations, 309 CMR 4.03(2)."

According to your letter, "[t]he question arose at the joint LSPA-DEP continuing education course on the notification requirements of the MCP and entails a clarification of when an LSP must report an imminent hazard condition the DEP."

**A. Threshold Issues**

Before issuing an advisory ruling on any question, the Board first must determine that the request meets the threshold requirements set forth in the regulations. For example, the Board's regulations require that a request for an advisory ruling be submitted in writing by a Licensed Site Professional ("LSP") or an attorney acting on his or her behalf. See 309 CMR 5.01(1) and 5.02(1). Because you are an LSP (No. 2367) and submitted your request in writing, these threshold requirements have been met. Additionally, a request must pertain to an interpretation of only the Board's Rules of Professional Conduct. See 309 CMR 5.01(1). Your request, which pertains to the interpretation of subsection 4.03(2), meets this requirement as well.

A further threshold issue arises, however, in that it appears that the circumstances on which your request is based are hypothetical. This raises the question for the Board as to whether the Board's Advisory Ruling regulations contemplate the issuance of advisory rulings only in response to questions arising out of actual circumstances confronting an LSP. The regulations themselves offer some support for the conclusion that advisory ruling requests must be based on real events, not hypothetical ones. Subsection 5.02(3) states that a signature on an LSP's request for an advisory ruling constitutes a certification that, among other things, "the statements contained therein are **true and correct** to the best of his or her knowledge" (emphasis added). In addition, subsection 5.02(4) requires that each request "state clearly and concisely the substance or nature of the request, including **all material facts** pertinent to the request" (emphasis added). Finally, subsection 5.02(5) provides that the Board "may request written information as necessary to complete a **factual background** for its ruling" (emphasis added).

The Board is also aware that in a March 1992 report to the Massachusetts Department of Environmental Protection ("DEP") accompanying its draft regulations for the Board, the Licensed Site Professional Advisory Committee took the position the Board should provide advisory rulings only with respect to "prospective factual situations." See Advisory Committee Report at p. 36. The Committee stated:

"The Board should not permit LSPs to seek advisory rulings after-the-fact; granting retrospective rulings may place the Board in the position of adjudicating between parties. Requests for rulings must reflect factual situations, since responses to hypothetical queries could easily be misconstrued when applied to real situations and could prove so numerous as to overwhelm the Board." Id.

While the Board is not compelled to follow the views expressed by the Advisory Committee, it is not insignificant that the Board adopted, with minor changes not pertinent here, the Committee's draft regulation regarding Advisory Rulings. Compare Advisory Committee Report at 91-92 (draft regulation regarding Advisory Rulings) with 309 CMR 5.00 et seq.

Notwithstanding this background, the Board has concluded that it may from time to time find it to be in the interests of all concerned to render advisory rulings on certain hypothetical questions. For example, if, as in this case, the factual circumstances in the hypothetical are clearly described and the regulatory interpretation requested is an important one that would be of widespread interest, the Board does not view its own regulations as prohibiting the Board from responding to the request for an interpretation of its Rules of Professional Conduct. Issuing rulings in such cases does not raise the concern that exists regarding retrospective rulings, i.e., that the Board may be interjecting itself into existing contractual or other monetary disputes between LSPs and third parties that concern issues other than the protection of the public health, safety, welfare and the environment. Nor is the Board concerned, as the Advisory Committee was, that it will be overwhelmed by such hypothetical requests. As long as the Board has the power, as it does, to "decline to issue an advisory ruling for any reason the Board deems proper," 309 CMR 5.01(3), the Board has the power to ensure that it will not become overburdened answering requests for advisory rulings concerning hypothetical situations.

**B. Advisory Ruling**

Section 4.03 of the Board's Rules of Professional Conduct is entitled "Professional Responsibility." Subsection (2) of that rule states as follows:

"If a licensed site professional, acting in accordance with 309 CMR 4.02(1)[[footnote 1](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-94-01.html%22%20%5Cl%20%221)] , identifies an imminent hazard 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)[[footnote 2](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-94-01.html#2)] 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."

In The Massachusetts Contingency Plan ("MCP"), DEP has defined "Imminent Hazard" to mean

"a hazard which would pose a significant risk of harm to health, safety, public welfare or the environment if it were present for even a short period of time."

310 CMR 40.0006. The MCP requires that such hazards be reported to DEP "as soon as possible but not more than two hours after obtaining knowledge that a release or threat of release meets [the criteria for an imminent hazard]." 310 CMR 40.0332(1). While it is typically the LSP's client and not the LSP that is obligated to notify DEP of an imminent hazard within the 2-hour period, subsection 4.03(2) of the Board's Rules of Professional Conduct is designed to ensure that the public and the environment will still receive some reasonably prompt measure of protection within 24 hours in situations where the client refuses, for whatever reason, to notify DEP of the imminent hazard.

After a careful review of subsection (2) of section 4.03, it is the Board's view that so long as the LSP was providing professional services regarding a site **at the time the LSP identifies** the imminent hazard, the LSP must notify DEP within 24 hours, unless the client has already provided such notice, even if the LSP is discharged by his or her employer or the client before that 24-hour period has expired)[[footnote 3](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-94-01.html#3)]. As noted above, the words "is providing" are found in a clause that addresses the timing of the imminent hazard **identification** by the LSP, not the timing of the subsequent required notification to DEP. Thus, so long as the identification of the imminent hazard occurs while the LSP "is providing professional services" in connection with the site, the notification obligation set forth in the rule applies. In the Board's opinion, any other interpretation of subsection 4.03(2) would strain the language used in the regulation and undermine its obvious intent to protect the public health, safety, welfare and the environment from the serious harm that could be caused by an imminent hazard if it were present for even a short period of time.

Sincerely,
The Board of Registration of
Hazardous Waste Site
Cleanup Professionals

By:
James C. Colman
Designate Chairman

**Footnotes:**

1. 309 CMR 4.02(1) states as follows:

"In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily required of licensed site professionals in good standing practicing in the Commonwealth at the time the services are performed."

We assume for the purposes of this advisory ruling that the LSP in the hypothetical met this standard of professional competence in initially identifying the imminent hazard at the site.

2. All references to the "Department" in the Board's regulations are to the Massachusetts Department of Environmental Protection.

3. While subsection 4.03(2) requires the LSP to make this notification "not less than 24 hours" after identifying the imminent hazard, the Board encourages LSPs to notify DEP as soon as possible in circumstances where the LSP has reported the imminent hazard condition to the client but, based on the client's response in words or conduct, the LSP has reasonable cause to believe that the client will very likely not observe the 2-hour notification obligation imposed by the MCP. The Board is of the opinion that such reasonable cause is likely to exist in circumstances where an LSP is discharged by a client for simply having reported to the client that an imminent hazard exists.