COMMONWEALTH OF MASSACHUSETTS
Board of Registration
of
Hazardous Waste Site Cleanup Professionals
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September 13, 2000

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Re: **Request for Advisory Ruling**
No. 2000-01

Dear XXXXXXXXXXX:

The Board of Registration of Hazardous Waste Site Cleanup Professionals has received your letter dated May 23, 2000, 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 concerns an LSP's obligations under the Rules of Professional Conduct when he or she is involved in overseeing a Limited Removal Action ("LRA") but does not know when the 120-day period for conducting the LRA will expire or whether it has already expired.

I. FACTS

Based on your letter, the Board understands the facts that give rise to your request to be as follows:

A machining business was located on a parcel of property (the "site"). You believe that this company was seeking additional financing and that the potential lender had requested a limited environmental site investigation (ESI) of the property. Another environmental consulting firm conducted the ESI in 1993. You assert that at the time your firm, XXXXXXXXXXXXXX, did the work described below, you were unaware of this ESI.

The ESI included, among other tasks, the execution of soil borings from which selected soil samples were submitted to a laboratory for quantitative analysis for TPH. According to the report prepared for the lender by the consulting firm, the laboratory found that one of the samples was contaminated with TPH at a concentration of 28,300 mg/kg. Another sample contained 12,100 mg/kg of TPH. Based on this data, the consulting firm concluded that a reportable release of contamination to the environment had occurred on the property.

You assert that you now know that at some point in 1993 or early 1994 a copy of this report was made available to the PRP company or its president, but you did not know this when your company worked on the site in 1994. Assuming that the PRP did not have prior knowledge of the release, the receipt of this report by the PRP would have triggered a 120-day reporting requirement pursuant to 310 CMR 40.0315. Pursuant to this requirement, upon obtaining knowledge of the reportable release the PRP company had 120 days to report the release to the Department of Environmental Protection ("DEP") unless, by conducting a Limited Removal Action ("LRA"), the TPH concentration in the soil could be reduced to a concentration less than the Reportable Concentration prior to the expiration of that 120-day period.

On or about late January or early February 1994, your firm entered into discussions with the PRP company president regarding 21E-related activities on the property that might be needed due to the presence of TPH-contaminated soil at the property. The PRP company president did not say, and no one at your firm asked, when he or his company had first obtained notice of the release of contaminants on the site. You assert that you and your firm were not provided with the ESI report, did not know of its contents, and did not know when the PRP had received it.

On February 3, 1994, your firm prepared and forwarded to the PRP company president a written proposal to conduct 21E-related site assessment activities at the property. On February 18, 1994, your firm submitted a revised Scope of Work indicating that two options were possible relative to the remediation of contaminated soil: Option One, a Limited Removal Action ("LRA"), could be conducted *"if allowable by regulation criteria . . . in an effort to provide a condition [under] which no reporting or further action is legally required by Massachusetts environmental regulations."* Option Two, a Release Abatement Measure ("RAM"), was proposed by your firm in the event that an LRA was not permissible due to excessive contaminated soil and notification to DEP was required. In the proposal, you were identified as the firm's LSP who would be working on this project, although another member of the firm was to serve as the Project Manager.

On or about March 17, 1994, your firm was retained to perform 21E-related activities at the site. On April 6, 1994, without obtaining approval from DEP, your firm began LRA-type activities, excavating and removing contaminated soil. Before initiating this work, neither you nor others at your firm took any additional steps to ascertain when the PRP company or its president first obtained knowledge of the release. At that time, you assert, you believed that your firm had no legal obligation to find out or even inquire whether the 120-day LRA period had expired.

On April 8, 1994, finding that the anticipated cumulative volume of contaminated soil to be removed exceeded 100 cubic yards, your firm orally notified the DEP of a release of oil and of the LRA activities. In addition, your firm obtained DEP's verbal approval to continue soil excavation as a RAM.

DEP later conducted an audit, which included a review of the ESI report, and found that the presence of TPH in the soil at a concentration of 28,300 mg/kg constituted a 120-day reporting requirement and that, based on when the owner first obtained knowledge of the release, this 120-day reporting period had expired by the time your firm began excavating and removing contaminated

soil on April 6, 1994, as an LRA. DEP found that this work should have been conducted as a Release Abatement Measure ("RAM"), which requires DEP approval. No DEP approval had been obtained for this work on April 6.

You assert that you did not know until you received a copy of the Notice of Audit Findings that the work your firm did on this site between April 6 and April 8, 1994, had been done more than 120 days after the PRP first obtained notice of this reportable release and was viewed by DEP as an unauthorized RAM.

II. ADVISORY RULING REQUESTED

You have requested that the Board provide you with a formal advisory ruling interpreting the Board's Rules of Professional Conduct and advising you whether, in future situations similar to the one described above, you have an obligation before starting work to inquire of your firm's client, a PRP, what date it first obtained knowledge of the release so that you and your firm will know how many days, if any, are left in the 120-day notification period to conduct an LRA.

III. REQUESTOR'S VIEWS

In seeking this advisory ruling interpreting the Board's Rules of Professional Conduct in these circumstances, you have included in your request your own views and/or arguments in support of the conclusion that you should have no obligation in such situations to ask the PRP company when it first obtained knowledge of the release.

The first point you make is that LRAs conducted in compliance with 310 CMR 40.0318 do not require oversight by LSPs. Therefore, you contend, the fact that you were listed on your firm's proposal as the LSP should not obligate you to perform any LSP professional services or even to ask the PRP any questions during the LRA-phase of the work, let alone prior to starting that phase of the work.

You contend additionally that requiring an LSP to take certain steps prior to initiating an LRA would not be consistent with the goal of making LRAs a fast-track, non-regulatory oversight task that does not require LSP management, direction, or oversight.

Additionally, you argue that as a matter of policy LSPs should not be in the business of tracking or "hunting" for information regarding whether or when their own clients should notify DEP. While you apparently agree that LSPs should be cognizant of any DEP notification that has been made previously, since this can be easily researched or confirmed via a phone call and/or file review, you do not believe that LSPs should be in the business of interrogating their clients or otherwise searching for information regarding when their clients must report to DEP. This is especially so, you believe, where there has been a change of consultants or LSPs.

You also believe that the involvement of LSPs is not needed for environmental consulting firms to minimize the risk of conducting unauthorized RAMs, as your firm did in April 1994. In your view, environmental consulting firms can add a clause to their contracts requiring each PRP to disclose to the firm whether and when he or she obtained knowledge of a

release or condition that triggered a notification requirement to any governmental authority. But, in your view, once the PRP has asserted in a signed contract that no reportable condition exists, or that a 120-day condition exists but the PRP has, say, 100 days to report, then the environmental consulting firm (and even an LSP, if an LSP is involved) should take this at face value and proceed with its LRA activities based on those assertions. It would not be appropriate, in your view, for the firm or the LSP to search for additional information that might call the PRP's assertions into question.

You conclude your comments by emphasizing that it is the obligation of PRPs, not LSPs, to notify DEP of reportable conditions. You note that many PRPs seek legal advice from attorneys regarding their notification obligations. LSPs are not attorneys, and notifications of reportable conditions do not need to be accompanied by LSP opinions. While many LSPs do informally educate their clients about the reporting requirements, the "professional services" described in the Board's Rules of Professional Conduct pertain only to the rendering of opinions and "services associated with the rendering of such opinions." Therefore, you contend, the Board's Rules should not impose any obligation on LSPs with respect to notification or conducting LRAs, since neither of these events requires an LSP opinion.

IV. ANALYSIS

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. The Board's regulations require that a request for an advisory ruling be submitted in writing and signed and dated by a LSP. *See* 309 CMR 5.02(3). Because you are an LSP and you submitted your request in a signed and dated letter, these threshold requirements have been met. Additionally, a request must pertain only to an interpretation of the Board's Rules of Professional Conduct. *See* 309 CMR 5.01(1). Your request meets this requirement as well. Finally, the Board must elect to issue the requested advisory ruling. The Board is not required to do so. In deciding whether to issue a formal advisory ruling, the Board examines the importance of the question asked and whether the circumstances that gave rise to the question are either: (a) presently posing uncertainty for the LSP about a proposed course of action or (b) likely to reoccur and pose that uncertainty repeatedly. After making that examination here, the Board has decided to issue a formal advisory ruling in response to your request. While you are not presently confronted with the circumstances described in your request, the question you raise is an important one and situations of the type you describe are not uncommon.

B. Advisory Ruling

The narrow question you have asked is whether the Board's Rules of Professional Conduct require an LSP to inquire of his or her firm's PRP clients what date the client first obtained knowledge of a reportable release. This information would allow the LSP and his/her firm to know how many days, if any, are left in the 120-day notification period to conduct an LRA. The facts you presented, however, beg an additional question: Are the Rules of

Professional Conduct violated when an LSP is involved in conducting what he or she thinks are LRA excavation activities but which DEP later finds constituted an unauthorized RAM? Both of these questions are analyzed below.

1. Overseeing and assisting with timely LRA excavation activities does not constitute "Professional Services"

With a few exceptions that are not relevant here, LSPs must be performing "professional services," as that term is defined in the regulations, to be subject to the Board's disciplinary rules in 309 CMR 4.00. Thus, the first issue raised by your request is whether overseeing and assisting with LRAs that are performed in a timely manner constitutes "professional services."

"Professional services" are defined in the Board's regulations at 309 CMR 2.02 to mean "the rendering of waste site cleanup activity opinions, and services associated with the rendering of such opinions." You are correct in your assertion that the performance of legitimate and timely LRA-related excavation activities does not require oversight by an LSP. Specifically, on this point the applicable MCP provision states as follows:

> *Limited Removal Activities conducted in compliance with the provisions of 310 CMR 40.0318 shall not require oversight by a Licensed Site Professional, except for Limited Removal Actions that involve the use of the Bill of Lading soil management process described in 310 CMR 40.0030.*[1] 310 CMR 40.0318(8).

We understand that DEP interprets the exception in this provision to mean that LSPs are required only with respect to the completion of a Bill of Lading, not that an LSP must oversee all LRA activities, including excavation activities, whenever the removal of the LRA remediation waste involves the use of a Bill of Lading. Therefore, to the extent that you happen to oversee the excavation activities your firm conducts during timely LRAs, you are performing services that do not need to be performed by an LSP and do not require an LSP opinion in connection with their completion. As a result, we conclude that your professional oversight of timely LRA excavation activities does not constitute "professional services" that are subject to the Board's Rules of Professional Conduct.

Since the Rules of Professional Conduct do not apply at all when you are simply overseeing timely LRA excavation activities, they cannot impose any obligation on you, before or during those timely excavation activities, to inquire of your firm's client, a PRP, what date it first obtained knowledge of the release so that you and your firm will know how many days, if any, are left in the 120-day LRA period.

2. Overseeing and assisting with excavation activities that require DEP approval does constitute "Professional Services"

[1] Pursuant to Section 40.0035(h), a Bill of Lading must contain either an LSP opinion or a signature from an authorized representative of DEP regarding the adequacy of testing and assessment actions undertaken to characterize the remediation waste and whether the remediation waste, as characterized, conforms with permitting and regulatory requirements for acceptance at the receiving facility or location.

The above-described legal analysis does not apply, however, if you are overseeing or assisting with excavation activities that occur more than 120 days after your client, a PRP, first obtained notice of the reportable release. Such activities may not be conducted as an LRA, but must be conducted as a DEP-approved Release Abatement Measure.

Section 40.0318(5) of the MCP states as follows:

> *All excavation activities conducted by an RP, PRP or Other Person as a Limited Removal Action shall occur within 120 days of obtaining knowledge of a release described in 310 CMR 40.0315.*[2]

The PRP, not the LSP, is the obvious referent of the timing clause in the second half of this regulation. In other words, all excavation activities must occur within 120 days of the day on which the PRP, not the LSP, obtains knowledge of the release.

Once the 120 days have elapsed, any RP, PRP, or Other Person who seeks to continue LRA excavation activities in compliance with state regulations must notify DEP of the release and either obtain DEP's oral approval to continue excavation activities or submit a Plan for conducting a Release Abatement Measure ("RAM") containing a signed LSP opinion. *See generally* 310 CMR 40.0440. If oral approval to proceed is obtained, the person receiving that oral approval has 60 days to submit either a complete RAM Plan, a RAM Completion Report, or a Response Action Outcome Statement. 310 CMR 40.0443(5)(b). All of these submittals require an LSP opinion. There can be no doubt, therefore, that the services an LSP provides in connection with overseeing or performing a RAM constitute "professional services" within the meaning of that term in the Board's regulations, since those services would constitute "services associated with the rendering of [LSP] opinions."

This analysis is not altered by the fact that you may not know that your excavation activities are being conducted more than 120 days after your client first obtained knowledge of the release. For purposes of applying the MCP and deciding what is an LRA and what is (or should be) a RAM, the relevant date for DEP is the date on which a PRP first obtained knowledge of the release, not the date on which the LSP working for that PRP first obtained knowledge of that release. Your subjective ignorance of the relevant date does not alter the objective fact that you would be overseeing what DEP classifies as an unauthorized RAM.

3. LSPs who participate in unauthorized RAMs can be disciplined by the LSP Board for violating the Board's Rules of Professional Conduct

Having found that the type of LSP conduct you described in your advisory ruling request constitutes participation in an unauthorized RAM, and that such conduct also constitutes "professional services" that are subject to the Board's Rules of Professional Conduct, the next issue is whether such conduct would actually violate any of those Rules. In fact, were such conduct to be made the subject of a future Complaint presented to the Board, the Board could find that the LSP had violated a number of those Rules.

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[2] Section 40.0315 describes "Releases Which Require Notification Within 120 Days."

First, it is very likely that an LSP who participates in an unauthorized RAM would be found to have violated 309 CMR 4.03(3)(a), which requires an LSP to "follow the requirements and procedures set forth in applicable provisions of M.G.L. c. 21E and [the MCP]."

Second, depending on the circumstances, the Board could find that the LSP had violated Section 4.02(1), which provides as follows:

> *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.*

It is likely that an LSP who did not make a reasonable effort to ascertain the relevant dates would be found not to have exercised "reasonable care and diligence." If, however, an LSP had made a reasonable inquiry of his PRP client, had reviewed documents which came to his or her attention during the course of developing a proposed scope of work, and had consulted the DEP database concerning the date the PRP first obtained knowledge of the release, and, as a result, had reasonably concluded that the 120-day period for conducting an LRA had not expired, then the Board might be expected to find that this Rule of Professional Conduct had not been violated.

Third, an LSP who willfully ignored the relevant dates and ended up involved in an unauthorized RAM could be found to have violated Section 4.03(3)(c), which provides that in providing professional services an LSP shall:

> *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***.
> (Emphasis supplied.)

Moreover, it is likely that the situation you have asked to Board to issue an Advisory Ruling on will not arise if LSPs, before embarking on LRAs, think about all the restrictions that apply,[3] exercise appropriate prudence and professional judgment,[4] and comply with the Rule of Professional Conduct at Section 4.03(14), which states as follows:

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[3] Of course, many restrictions apply on the use of an LRA besides the 120-day rule. See generally 310 CMR 40.0318. LSPs are obligated to observe all these restrictions. For example, LRAs may be undertaken only prior to notification of "120 Day Notification Releases," and may not be conducted to address conditions which trigger "2-hour" or "72-hour" notification.

[4] In exercising professional judgment, LSPs would be well advised to follow the advice offered by DEP in an MCP "Q&A":

> *Keep in mind that LRAs are intended for minor discrete releases, and are not appropriate for larger sites which warrant a holistic approach to assessment and cleanup.*

A60 in Master Q&A (DEP, March 1999) [available on DEP's Web site].

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.

4. A good faith misperception of the relevant dates would be viewed by the Board as a mitigating circumstance in a disciplinary proceeding

While it is very likely that the Board would find that an LSP's participation in an unauthorized RAM violates one or more provisions of the Board's Rules of Professional Conduct, the discipline that the Board imposes could vary depending on various aggravating and mitigating circumstances.

The range of possible disciplinary options available to the Board in any given disciplinary case where "grounds" for discipline are found includes dismissal with a warning, private censure, public censure, suspension of license, and termination of license. *See* 309 CMR 7.02. The Board may also assess a civil administrative penalty, subject to the requirements of 309 CMR 8.00.

In any given case of an LSP participating in an unauthorized RAM, the type of discipline imposed could vary depending on the circumstances. As it does in other disciplinary cases, the Board would consider all aggravating and mitigating circumstances.

In circumstances of the type you described in your advisory ruling request, the Board could find that an LSP's willful ignorance of the relevant dates constituted an aggravating factor that could warrant the imposition of a higher level of discipline than would otherwise be warranted. Conversely, to the extent that the LSP had made a good faith and reasonable effort to ascertain the relevant dates, and had drawn from this inquiry a reasonable if mistaken conclusion that the 120-day LRA period had not expired, the Board would view this as a mitigating factor that could justify a milder form of discipline or possibly an outright dismissal.

To be considered a good faith and reasonable effort, the LSP's inquiry must include asking the PRP client directly, whether orally or through a contractual requirement as you suggest, what date he or she first obtained knowledge that the release met a reporting threshold. A reasonable and good faith inquiry does not stop, however, when the client's statements indicate that the 120-day LRA period has not expired. While reviewing documents that come to his or her attention both during the course of developing the proposed scope of work or during the course of working on the project, the LSP must not disregard information concerning the date the PRP first obtained knowledge of the release. In addition, an LSP should consult the DEP database to see whether the subject release has already been reported. If the LSP has done all these things and, as a result, has reasonably concluded that the 120-day period for conducting

an LRA has not expired, then, in the absence of other aggravating factors, the Board would consider the LSP to have made a reasonable and good faith effort to avoid conducting an unauthorized RAM and would view this as a mitigating factor.

V. Conclusion -- Advisory Ruling

The Board hereby advises you that if you are involved in any capacity in the activities your firm undertakes prior to and during the conduct of timely LRAs, your services do not constitute "professional services" and, therefore, are not subject to the Board's Rules of Professional Conduct. However, if you are identified as the LSP on a given project, and your firm is found by DEP to have conducted an LRA more than 120 days after the PRP obtained knowledge of a "120-day" release, you will likely be deemed by DEP to be conducting an unauthorized RAM and could be disciplined by the LSP Board for violating the Board's Rules of Professional Conduct. The discipline that would be imposed would depend upon the circumstances of the case, but the Board would consider it to be a mitigating (and, in the absence of other aggravating factors, probably exonerating) circumstance if you had made a good faith and reasonable inquiry as described above in Section B.4 and concluded reasonably, based on that inquiry, that your firm's excavation activities were conducted within the 120-day LRA period.

Thus, LSPs proceed at their own peril and may face disciplinary action when they and their firms conduct LRAs without confirming that they are still within the 120-day LRA period. LRA activities conducted outside of this period are in fact unauthorized RAMs, and can subject the LSP and/or his firm to disciplinary action by both DEP and the Board. [5]

Sincerely,

The Board of Registration of Hazardous Waste Site Cleanup Professionals

By: _____
Janine Commerford
Chair

[5] An LSP's firm and colleagues may be placed in peril as well, not of disciplinary action by the LSP Board, but of an enforcement action by DEP. Section 40.0441(5) of the MCP states: *"Any person who conducts a Release Abatement Measure shall do so in accordance with all applicable requirements and specifications prescribed in 310 CMR 40.0000."* The MCP at 40.0006 broadly defines the word "person" to include, among others, any corporation, firm, or partnership, as well as their officers, employees, and agents.