**Advisory Ruling 97-01**

March 12, 1998

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**Re: Request for Advisory Ruling No. 97-01**

Dear XXXXXXXXXXXXX:

The Board of Registration of Hazardous Waste Site Cleanup Professionals has received your letter dated December 9, 1997, 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 what notification obligations, if any, you have under 309 CMR 4.03 (the Board's regulation concerning "Professional Responsibility") under the circumstances described in your letter.

**I. Facts**

Based on your letter and on telephone conversations you had with the Board's Executive Director, the Board understands the material facts to be as follows:

In the spring of 1997, your firm was engaged by a developer to perform an environmental assessment of an unimproved parcel of land in a residential area of XXXXXXXXXXXXXXX, Massachusetts. Your understanding was that this developer was a prospective purchaser of the parcel. The parcel is owned in trust, and the trustee is XXXXXXXXXXXXXXXXXXXXX.

At that time, the parcel had not been reported to DEP as the site of a release pursuant to MGL c. 21E. Occupied dwellings are located within 500 feet of the area sampled, and access to the area sampled is not controlled by a fence or other means. Historically, the parcel had been the location of a greenhouse. Your client (the developer) was requested by the Board of Health to arrange to have surface soils tested for asbestos, lead, and other hazardous materials commonly associated with greenhouse operations.

You are an LSP, and you oversaw the environmental assessment work your firm conducted at this parcel for the developer.

The area to be sampled was within 100 feet of a vernal pool; therefore, your firm obtained approval from the Conservation Commission for the work. The most notable result of your firm's sampling was that arsenic was detected in a single, surface soil sample at a level of 260 mg/kg, which is above the 2-hour release notification threshold of 40 mg/kg. See 310 CMR 40.0321(2)(b).

Your firm duly notified your client, the developer, of the 2-hour release notification requirements in the Massachusetts Contingency Plan ("MCP"); however, your client chose not to notify DEP of your firm's findings[[footnote 1](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html%22%20%5Cl%20%221)]. You have no firsthand knowledge as to whether your client notified the trustee (in prison) of the arsenic levels observed, or as to whether the trustee carried out his notification obligation.

**II. Advisory Ruling Requested**

You have requested the Board to provide you with an advisory ruling interpreting Section 4.03(2) of the Board's Rules of Professional Conduct and advising you whether, given the circumstances described above, that regulation requires you to notify DEP of an "imminent hazard" at the parcel. If so, you have further requested that the Board advise you what form that notification should take.

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 2**](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html#2)**] , 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 3**](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html#3)**] 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 definition section (40.0006) of the 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, as further described in 310 CMR 40.0950."

**III. Requestor's Views**

In Seeking this advisory ruling interpreting Section 4.03(2) in these circumstances, you have included in your letter your own views and/or argument in support of the conclusion that you are not obligated by this rule to notify DEP[[footnote 4](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html%22%20%5Cl%20%224)].

First, you note that, in accordance with 310 CMR 40.0321(2), the finding of arsenic in excess of 40 mg/kg represents only a condition that "could pose an Imminent Hazard to human health[[footnote 5](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html%22%20%5Cl%20%225)]." Noting that you did not perform a formal Imminent Hazard Evaluation, you then proceed to describe the informal evaluation you conducted to arrive at the conclusion that, in your opinion, "it is unlikely that an Imminent Hazard exists at this parcel." That conclusion rests primarily on your opinion, based on your review of all the sampling data, that "arsenic was likely to be of limited extent because of the low frequency of observation of arsenic in surface soils at levels in excess of the 40 mg/kg threshold." You state that "the average of the eight measured arsenic concentrations on this parcel was approximately 43 mg/kg, which is modestly in excess of the Method 1, S-1 Cleanup Standard of 30 mg/kg." You also note that while the parcel was not controlled by a fence or other means, "our cursory inspection did not indicate that children frequented the area."

Second, you state that "it is arguable whether the arsenic is exempt from notification pursuant to 310 CMR 40.0317(8)(c)[[footnote 6](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html#6)] because of its association with the former location of a greenhouse."

**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 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 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, which pertains to the interpretation of subsection 4.03(2), meets this requirement as well.

**B. Advisory Ruling**

The Board hereby advises you that, pursuant to 309 CMR 4.03(2) and based on the information provided in your letter of December 9, 1997, you have no obligation to notify DEP of the imminent hazard.

In making this advisory ruling, however, the Board has rejected the arguments (described above) that you included in your letter. To the contrary, the Board found (1) that the conditions you described constitute sufficient indication of an "imminent hazard" within the meaning of that term in both the MCP and the Board's regulations at 309 CMR 4.03(2), and (2) that the "pesticide application exception" to the MCP's notification requirements cannot be invoked in these circumstances. Nevertheless, the Board found that you have no obligation to report to DEP pursuant to 309 CMR 4.03(2), because you were not providing "professional services" as an LSP when your firm identified the conditions that constituted an imminent hazard. This advisory ruling is explained below.

**1. "Professional Services" were not being provided**

Even though your firm identified conditions that were sufficient to indicate the presence of an imminent hazard (See below), and even though the owner or operator would be required to notify DEP within two hours of obtaining knowledge of the conditions, you were not providing "professional services" as an LSP at the time the imminent hazard was identified.

The Board's regulations (at 309 CMR 2.02) define "professional services" as follows:

Professional Services means the rendering of waste site cleanup activity opinions, and services associated with the rendering of waste site cleanup activity opinions, by a licensed site professional who has either

(a) in the case of an opinion related to an assessment:
     1. managed, supervised or actually performed such assessment; or
     2. periodically observed 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 reviewed and evaluated the performance by others of such action.

One does not need to be an LSP to conduct or overSee the type of environmental assessment that you have described in your request. The sampling activity you describe, up to and including the identification of conditions sufficient to indicate the presence of an imminent hazard, does not fall under the rubric of "services associated with the rendering of waste site cleanup activity opinions." That sampling was not being done pursuant to any assessment or other requirements in the MCP.

**2. You had no obligation to report**

You have asked the Board to render an advisory ruling interpreting 309 CMR 4.03(2) of the Board's regulations and advising you whether, given the facts described above, that regulation requires you to notify the DEP of an imminent hazard.

By its own terms, Section 4.03(2) of the Board's Rules of Professional Conduct applies only when an LSP "identifies an imminent hazard at a particular site at which he or she is **providing professional services.**" 309 Code Mass. Regs. 4.02(2) (emphasis supplied). Because you were not providing "professional services" at the time you identified the conditions which were sufficient to indicate the presence of an imminent hazard, you had no obligation under 309 CMR 4.03(2) to notify DEP, even if your client did not do so.

In a previous Advisory Ruling concerning Section 4.03(2) (See Advisor Ruling 94-01), the Board ruled that the "trigger point" for determining whether Section 4.03(2) applies is **at the time the LSP identifies** the imminent hazard. If the LSP is providing "professional services" at that point in time, the LSP must notify DEP within 24 hours, unless the client has already provided such notice[f[ootnote 7](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html#7)]. In your case, since you were not providing "professional services" at that point in time, you have no obligation under 309 CMR 4.03(2) to report the condition to DEP[f[ootnote 8](http://www.mass.gov/eea/agencies/lsp/statutes-and-regulations/advisory-ruling-97-01.html#8)].

**V. Additional Comments**

In addition to this ruling, the Board believes that it is important to address some of the points raised in your request.

**A. Sufficient indication of an imminent hazard exists**

Under the circumstances described above, the Board is firmly convinced that you had sufficient indication of the existence of an "imminent hazard," within the meaning of that term in 309 CMR 4.03(2), to trigger the notification requirement in Section 4.03(2) had you been providing "professional services" at the time you received the results of the arsenic sampling. (See discussion of "professional services" below.)

First, the Board does not agree with the thrust of your argument that even though the conditions you identified **"could pose"** an imminent hazard to human health and triggered the MCP's 2-hour notification requirement, those conditions might not be an imminent hazard. Given this distinction, you argued, an LSP might not have to notify DEP if his/her client did not do so, so long as the LSP had some rational basis for concluding that an imminent hazard technically might not exist if a full-blown Imminent Hazard Evaluation were conducted. For purposes of applying 309 CMR 4.03(2), the Board believes that a simpler rule should prevail, and interprets the term "imminent hazard" in Section 4.03(2) of its regulations to mean conditions which, pursuant to Section 40.0321 of the MCP, are either "deemed to pose an Imminent Hazard" or "could pose an Imminent Hazard." Since the MCP makes no distinction between these two categories for purposes of requiring 2-hour notification to DEP, the Board concludes that it should not do so either when interpreting its own notification rule, 309 CMR 4.03(2). The Board believes that whenever the 2-hour notification threshold has been triggered due to a release of oil and/or hazardous material that "poses or could pose" an imminent hazard, See 310 CMR 40.0311(7), LSPs do not have the option of conducting a formal or informal Imminent Hazard Evaluation for purposes of determining whether, if their clients do not notify DEP sooner, they are obligated by 309 CMR 4.03(2) to notify DEP within 24 hours themselves.

Second, even if at least an informal imminent hazard evaluation were appropriate in these circumstances, you should have concluded that an imminent hazard existed. The fact that the high concentration of arsenic appeared in only one of the eight samples taken at the site does not rebut the fact that in one surface sample the arsenic level observed was 260 mg/kg, a level which is 6½ times greater than the level (40 mg/kg) that the MCP states "could pose" an imminent hazard. The Board understands that DEP does not allow the use of averaging in a situation such as the one you describe, where there is an apparent "hot spot." See 310 CMR 40.0321. Furthermore, the fact that your "cursory inspection did not indicate that children frequented the area" does not alter the Board's conclusion that notification of a potential imminent hazard would have been required had you been providing professional services. A "cursory" investigation cannot be used to meet the Board's standard of care in connection with investigating the likely presence of children in areas where surface soils are contaminated with arsenic. In addition, the Board understands that DEP would not consider such a "cursory" investigation to meet RAPS.

**B. "Pesticide application exception" does not apply**

The Board is firmly convinced that, in the circumstances you have described, an LSP who is meeting the Board's standard of care could not reasonably conclude that the "pesticide application exception" to the reporting requirements in the MCP applies here. The fact that the highest level of arsenic was found outside the greenhouse (260 mg/kg vs. an average concentration inside the greenhouse of 16 mg/kg) strongly suggests that the arsenic level of 260 mg/kg did not result "from the application of pesticides in a manner consistent with their labeling." The mere surmise that the pesticide application exception would apply automatically because a greenhouse was located on the property is unacceptable under the Board's standard of care. In addition, we understand, based on consultation with DEP, that such an assumption would not meet RAPS.

**VI. Availability of Advisory Rulings**

Please be advised that, pursuant to 309 CMR 5.04, all advisory rulings issued by the Board are public documents and will be available for public inspection during the Board's normal working hours. In addition, the Board may otherwise publish or circulate advisory rulings as it deems appropriate. The Board's rules provide, however, that the name of the person requesting a ruling and any other identifying information will not be included in such publication or circulation unless the person who requested the ruling consents to such inclusion in writing.

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

By:
Sarah Weinstein
Chair

**Footnotes:**

1. You note in your letter that the town of Reading "may have been notified of the results by our client." Even if you were certain that the town had been notified by your client, this would have no bearing whatsoever on the outcome of this Advisory Ruling.
2. 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."
3. All references to the "Department" in the Board's regulations are to the Massachusetts Department of Environmental Protection.
4. The Board's regulations governing advisory ruling requests clearly permit requestors to provide "supporting data, views or argument." 309 Code Mass. Regs. 5.02(4).
5. This contrasts with releases that meet the requirements of Section 40.0321(1), which are "deemed to pose an Imminent Hazard to health, safety, public welfare and/or the environment." 310 Code Mass. Regs. 40.0321 (emphasis supplied).
6. That MCP section provides as follows:
	* **40.0317 Releases and Threats of Release Which Do Not Require Notification**
	Notwithstanding the provisions of 310 CMR 40.0311 through 40.0315, the following releases and threats of release of oil and/or hazardous materials are exempt from the notification requirements set forth in 310 CMR 40.0300:
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	* (8) releases of hazardous material indicated by residues in the environment:
	\*\*\*
	* (c) resulting from the application of pesticides in a manner consistent with their labelling.
7. In Advisory Ruling 94-01, the Board ruled that an LSP who is providing "professional services" at the time an imminent hazard is identified must (if the client has not already done so) notify DEP within 24 hours even if he or she is discharged by the client (and, therefore, is no longer providing "professional services") before the 24-hour period expires.
8. Please keep in mind that the Board is not stating here that it constitutes good practice for an LSP, or any other environmental professional, not to report an imminent hazard to DEP in the situation you have described. All the Board has concluded in this Advisory Ruling is that you have no obligation under 309 CMR 4.03(2) to notify DEP. In such circumstances, however, the Board urges LSPs to use common sense and to be moved by the moral obligation one has as a citizen and a member of the community to notify DEP and/or appropriate local authorities promptly of the imminent hazard conditions so that appropriate actions can be taken to prevent harm to the public and the environment.