



COMMONWEALTH OF MASSACHUSETTS  
**Board of Registration  
of  
Hazardous Waste Site Cleanup Professionals**

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BOSTON, MA 02108  
PHONE: (617) 556-1091 FAX: (617) 292-5872

November 21, 2011

Samuel Butcher, LSP  
Goldman Environmental Consultants, Inc.  
60 Brooks Drive  
Braintree, MA 02184

Re: Request for Advisory Ruling No. 2011-01

Dear Mr. Butcher:

The Board of Registration of Hazardous Waste Site Cleanup Professionals (Board) has received your letter dated September 6, 2011, requesting that the Board render an advisory ruling pursuant to 309 Code Mass. Regs. 5.00 et seq. The Board declines to provide the Advisory Ruling you request, for the reasons stated below.

**I. Facts**

Based on your letter, the Board understands the material facts to be as follows:

You have been the LSP of Record for the owner of a property (Owner #1) that was the source of a plume of dissolved contaminants. The plume extends off the source property and beneath several residential properties. Several years ago, as part of an Immediate Response Action (IRA), a Point of Entry Treatment System (POETS) was installed at the one residential property served by a private drinking water supply well. A new owner (Owner #2) purchased the source property, retained you as LSP, and instructed you to discontinue sampling and operation of the POETS effective immediately but to continue response actions associated with the rest of the disposal site. You state that the POETS continues to remove low levels of contamination and, if it were to fail or when breakthrough occurs, then the resident will ingest water at concentrations above drinking water standards. You sent emails to Owner #2 stating your interpretation that the new owner is responsible for the continued operation of the POETS. You sent email and submitted IRA Status Reports informing MassDEP of the new owner's position regarding the ongoing operation and maintenance of the POETS.

**II. Advisory Ruling Requested**

You request an advisory ruling that answers the following questions:

1. Did your e-mails to Owner #2 and MassDEP satisfy the notice requirements of 309 CMR 4.03(4)?

309 CMR 4.03(4) states:

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.

2. Did your emails to Owner #2 satisfy the notice requirements of 309 CMR 4.03(6)?

309 CMR 4.03(6) states:

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.

and

3. By noticing Owner #2 tythe resident served by the POETS, and MassDEP, did you meet the requirement of 309 CMR 4.03(1) to hold paramount public health

309 CMR 4.03(1) states as follows:

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

### **III. Analysis**

#### **A. Threshold Requirements Not Met**

- A. The Board may decline to issue an advisory ruling for any reason it deems proper. 309 CMR 5.01(3). 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. 9185) 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 subsections 4.03(1), (4) and (6), 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 not prospective in nature. 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.*

The Board has determined that the questions you raise concern actions and statements made in the past by you and your client about site conditions and the requirements of c. 21E and the MCP. Your questions do not concern a proposed course of action or prospective factual situation. The ruling you request may place the Board in a position of adjudicating between you and your client. For this reason, the Board declines to provide an advisory ruling in response to your request.

## **B. Additional Comments**

Although the Board declines to provide an advisory ruling, we offer the following general guidance.

In providing professional services, all LSPs must follow the requirements and procedures set forth in applicable provisions of the MCP, including, of course, requirements applicable to Immediate Response Actions. 309 CMR 4.03(3)(b) An LSP cannot acquiesce to the wishes of his or her client when doing so would compromise the LSP's independent professional judgment. 309 CMR 4.03(3)(a) If a client's instructions would require the LSP to perform professional services in a manner that would not comply with the MCP or the Board's regulations, the LSP always has the choice to withdraw from the engagement if necessary to avoid such noncompliance.

## **C. Availability of Advisory Rulings**

Advisory Rulings issued by the Board are public documents and are made available for public inspection on the Board's website and at the Board's offices. Although this letter does not constitute a formal Advisory Ruling, the Board does intend to publish or circulate this informal interpretation of its rules, and pursuant to the Board's rules you are eligible to request that your name and any other identifying information not be included in any publication of this letter or the informal interpretation it contains. If you wish to

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November 21, 2011

Page 4 of 4

request that your name or other identifying information not be published, please advise the Board's staff in writing within 7 days.

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

By: \_\_\_\_\_  
Elizabeth Callahan, Chair