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June 28, 2024

Rachel M. Davison, Commissioner
Commonwealth of Massachusetts
Division of Insurance
1000 Washington St, Suite 810
Boston, MA 02118-6200

Subject: Professional Liability Exclusions for Work with Perfluoroalkyl or Polyfluoroalkyl Substances (PFAS)

Dear Commissioner Davison:

The LSP Association, Inc. (LSPA) is writing to bring attention to an extremely concerning and unviable trend we are seeing in the liability insurance policies of our members. Recent professional and umbrella insurance renewal policies have been updated to exclude coverage for any and all work involving Perfluoroalkyl or Polyfluoroalkyl Substances (PFAS). Provided below is more context and details.

The LSPs and the Commonwealth's Privatized Waste Site Cleanup Program

The LSPA is the non-profit association for Licensed Site Professionals (LSPs) and related practitioners. LSPs are scientists, engineers, and public health specialists licensed by the Commonwealth to work on behalf of property owners, operators, and other involved parties to oversee the assessment and cleanup of oil and hazardous material released to the environment. Our members work with their institutional, non-profit, government, and private clients to remediate contaminated sites, including brownfield sites, so these properties can be placed back into active and productive use. Through education, information, and advocacy, the LSPA supports our 800 members in achieving and maintaining high standards of practice in overseeing the assessment and remediation of hazardous waste disposal sites.

Together with the Massachusetts Department of Environmental Protection ("MassDEP") and the Board of Registration of Hazardous Waste Site Cleanup Professionals, LSPs are the third "arm" of an innovative, privatized program, created by the legislature in 1993. In adherence with Mass. Gen. Laws c. 21E and its implementation of hazardous waste site cleanup

regulations at 310 CMR 40.0000, also known as the Massachusetts Contingency Plan (MCP), LSPs have helped bring over 40,000 sites to a condition where they safely meet regulatory standards for business, commercial/retail, industrial, institutional, open space or housing. The Massachusetts waste site cleanup program relies on the skills and work of LSPs and their support teams of field staff, risk assessors, and others. [Read more specific details here](#) about the MassDEP Waste Site Cleanup Program.

Local, State, and Federal Government Efforts to Address PFAS Contamination

The MCP [Massachusetts Oil and Hazardous Material List](#) (MOHML) at 310 CMR 40.1600 provides quantities and concentrations of the threshold values for each of the (several thousands) oils and hazardous materials that must be reported to MassDEP. Six PFAS compounds are included on the MOHML list, each considered to be hazardous material, and subject to the MCP notification, assessment and cleanup requirements under MGL 21E.

Currently, MassDEP, other state agencies, and many local municipalities have efforts underway to address [PFAS in drinking water, groundwater, and soil](#). Moreover, as of April 19, 2024, the U.S. Environmental Protection Agency (USEPA) has enacted regulations requiring investigation and cleanup of PFAS compounds in the drinking water, groundwater, and soil. The new Maximum Contaminant Levels (MCLs) USEPA has established are more strict than those of the Commonwealth, requiring MassDEP to lower the reporting thresholds in the MOHML as all states must soon enact regulations that are at least as strict as those of the federal government. The new USEPA PFAS standards also include additional PFAS compounds which MassDEP will need to add to the MOHML list to comply with new MCLs for PFAS. It is estimated that the group of PFAS chemicals includes nearly 15,000 compounds. The MCP currently regulates only six.

Environmental Consultants Are Needed to Conduct Work at PFAS Sites

Public health and environmental laws and regulations require that LSPs and, by extension, their support teams (at environmental consulting firms) be involved in the work of identifying, assessing, and remediating PFAS contamination. [This long list of activities](#) demonstrates the work that LSPs, other environmental consultants, and their consulting firms may conduct at any given site. These professionals are in the business of responding to client requests to assess and maintain compliance with federal, state, and local health, safety, or environmental regulations.

Understandably, environmental professionals rely on professional liability insurance for myriad loss prevention purposes. Excluding liability coverage for work involving PFAS compounds would bring such work to a standstill. For example, regardless of whether an LSP pursues PFAS

work, they are in the business of environmental consulting and cleaning up hazardous waste sites. It is not uncommon for an LSP working on a site cleanup with certain known contaminants to detect PFAS in the course of response actions. That would then require the responsible party and the LSP to assess further and, if necessary, remediate PFAS, in addition to the other contaminants at the site. If an LSP can't test for PFAS because of insurance exclusions, they risk loss of work as they would be unable to provide the level of due diligence investigation clients require to determine if a property has environmental liability. Additionally, if PFAS compounds are subsequently discovered on a property on which an LSP consulted, they could be sued by their client for failing to identify the risk. Additionally, many prospective purchasers of potentially environmentally impaired properties seek the assistance of LSPs to understand the risks associated with ownership of a contaminated property in their pre-acquisition due diligence. If LSPs were to fail to identify a risk during a property transaction assessment, they could also be subject to legal exposure.

The situations above provide examples of risk to property owners and purchasers, but these risks can also extend to concerns for human health where the risk of ingestion of contaminated drinking water may not be identified. It is impossible and unreasonable to avoid *all* of this PFAS work as an environmental consultant because it is not possible to screen out all possible properties where PFAS could be present.

The assessment and remediation of PFAS, like any other contaminant, is the job of LSPs and other environmental consultants. The types of insurance exclusions our members are seeing would not only limit the work they do, but they would also limit the options of property owners impacted by PFAS who are required by law to retain an LSP to assist them. Given the ubiquity of PFAS, these exclusions would apply to many sites, whether or not PFAS is a primary contaminant of concern.

Current Situation

Upon learning of these exclusions, some of our members' firms have been able to negotiate exceptions with their carriers for certain types of PFAS activities. Others have been successful in obtaining full waivers of the PFAS exclusions. Some consulting firms have had to switch carriers to obtain coverage from insurers who do not (yet) have PFAS exclusions in their policies, while others are still actively working with their brokers to find insurers that provide appropriate coverage.

Fundamentally, the laws of the Commonwealth require that PFAS in the environment be addressed due to public health concerns, and that its assessment and cleanup be conducted by LSPs and other environmental consultants. If professional liability coverage for work involving PFAS sites is excluded from insurance policies, it will essentially shut down the work provided by these professionals. Such a situation would make it impossible for the Commonwealth to meet its public health and environmental responsibilities under the law. It should be noted that it will also impede the redevelopment of contaminated sites for desperately needed housing, as well as commercial, retail, industrial, laboratory and other uses.

We urge the Division of Insurance to address this situation promptly. The LSPA is available to provide additional information and discuss at your convenience.

Respectfully,
The LSP Association, Inc.



Charles Young, LSP
LSPA President



Wendy Rundle
Executive Director

cc:

Bonnie Heiple, Commissioner, MassDEP

Millie Garcia-Serrano, Assistant Commissioner, BWSC, MassDEP

Rebecca Tepper, Secretary, Executive Office of Energy and Environmental Affairs

Yvonne Hao, Secretary, Executive Office of Economic Development

Edward Augustus, Secretary, Executive Office of Housing and Livable Communities

Dr. Robert Goldstein, Commissioner, MassDPH

Adam Chapdelaine, Executive Director, Massachusetts Municipal Association