

LSP BOARD UPDATES/ OVERVIEW OF THE RULES OF PROFESSIONAL CONDUCT

June 18, 2024

Presenters:

Diane Baxter, LSP Board
Chair;

Matthew Lyne, LSP Board
Staff Scientist; and

Terry Wood, LSP Board
Executive Director

LSP BOARD

COMPOSITION

- Independent, appointed by Governor;
- Unpaid volunteers;
- 11 members, 5 of whom by statute are LSPs; Chair is DEP Commissioner or Commissioner's designee

RESPONSIBILITIES

- Make decisions regarding LSP licensing (review and approve LSP applications);
- Oversee LSP examination development and implementation;
- Oversee LSP continuing education (review and approve courses);
- Investigate complaints and impose discipline as warranted

CURRENT LSP BOARD MEMBERS

Diane Baxter,
Board Chair

David Austin,
LSP, Petroleum
Slot

Gail Batchelder,
Hydrogeologist
Slot

Kathleen
Campbell, LSP

Craig Ellis,
LSP

Kirk Franklin,
Environmental
Slot

Patrick Herron,
Environmental
Slot

Gregg McBride,
LSP,
Manufacturing
Slot

Paul McKinlay,
LSP

James Smith,
Labor Slot

[OPEN
ENVIRONMENTAL
SLOT; BOARD IS
ACTIVELY SEEKING
APPLICANTS]

LSP BOARD STAFF

**TERRY WOOD,
EXECUTIVE
DIRECTOR**

**NOTOSHIA DIX,
PROGRAM
COORDINATOR**

**MATTHEW LYNE,
INVESTIGATOR
and CONTINUING
EDUCATION
COORDINATOR**

CURRENT BOARD INITIATIVES

UPDATING THE LSP EXAMINATION

Ensure exam questions comport with recent MCP amendments;

Working toward having four available versions of the examination.

AMENDING THE LSP BOARD REGULATIONS

Potential amendments include:

Changes to reflect recent conversion to online portal for submittal of applications and renewals, electronic payments, and electronic notifications from the Board;

Amendments to continuing education requirements;

The public will have an opportunity to review and provide comment before any amendments become final.

Online Portal (ePlace)

- Rolled out in the fall of last year
- 27 LSP Applications processed online since the rollout
- Some initial issues with uploading reference forms, and instructions were then revised to fix that.
- 3 Renewal Cycles have been completed online since the rollout (approx. 100 LSPs).
- Learning curve for first time users
- LSPs are sent a notice/reminder to renew 60 days before license expiration date
- Board Staff and EEA IT Staff have supported LSPs that had difficulty or issues with the renewal process.

Online Portal (ePlace)

- Advantages:

- For LSP Applicants, no more mailing in 50+ page hard copy applications and attachments
- For LSPs, fast and friendly automated emails to confirm receipt, approval of applications, and next steps.
- Automated and frequent reminders for renewal applications and annual fee payment deadlines
- Online Payments: Can pay by credit card and get application submitted instantly.
- Can still pay by check, but that process still takes a week or so to receive check and post payment before application is deemed Submitted.

Online Portal (ePlace)

- Advantages:

- For Board, easier for Board staff to review and process applications
- Application approval is documented via database workflow
- Exam scheduling can be done electronically
- 2-Year Window to take the exam is automated
- Examinee details are stored in the database forever
- Pass/Fail letters are automated and get sent out via email by the database within a few days of taking the exam.

Online Portal-Helpful Tips

- **Renewal Applications:**

- Character limit for course names and file names when uploading documents (50 characters max). Instructions reflect that.
- Recommend uploading all Attendance Forms in 1 pdf file, instead of individual files for each course, to minimize uploading failure.
- Selecting the correct credit type (DEP, Regulatory, Technical, and split credit courses). Changes were made to website after the first round of Renewals to better address this confusion.
- For split credit courses, add 2nd line/course entry.
- Difference between "DEP Regulatory credit" and "Regulatory"
- Responding to information requests: Respond in a timely manner. *No response means no board action.*

Online Portal-cont'd.

- **Change of Contact Information:**

- Previously:

- LSP would contact the Board office via phone, email, or through renewal application to request change of information.
- Board staff would have to receive that correspondence, and then manually complete the updates in our database and then the LSP website would get updated.
- Now, LSPs will control all of that by being able to log into ePlace and populate the Change of Address link. Board staff will not have to do anything to have the changes reflected on the website or in eDEP. *LSPs are responsible for updating their contact info.*
- Correct & updated emails are very important, most communication is done by email.

Common LSP Questions

- **LSP Stamp/Seal**

- Board regulations require LSPs to submit a copy of their seal to the Board office (309 CMR 6.00). Question on how to order a new LSP seal?

- **Repeating a Course**

- ❓ Board regulations do NOT allow repeating a course in the same or consecutive renewal periods. 310 CMR 3.09(2)(c). An LSP may not repeat a course for credit during the same 3-year renewal period or during the following 3-year renewal period.

ePlace Portal Support

- **What to do if stuck in an application:**
 - Review the instructions that are provided in the application instructions
 - Contact the LSP Board staff (lsp.board@mass.gov)
 - Contact the ePlace Help Desk by using the link on the form
 - We have Board staff and IT Staff available every day to assist with stumbling blocks and issues. Some have quick and easy resolutions, some may take a few days to fix.

Questions at End of Presentation

What Constitutes Grounds for Discipline

Some grounds for Board discipline
against LSPs:

-Violating rules of professional conduct
while performing 'professional services'*

-Violating requirements of the MCP
(aspects that are the LSP's rather than
the PRP's responsibility)

* 'Professional Services' means rendering
opinions and conducting work associated
with MCP response actions

Professional Conduct Rules

Professional Competency

Act with reasonable care and diligence

Apply knowledge and skill ordinarily exercised by LSPs in Massachusetts at the time

Rely on other professionals whom LSP has reasonably determined are qualified

Rely on predecessor's response actions only after reviewing their documentation, **visiting the site**, and independently concluding you have sufficient information with which to render an LSP Opinion

Don't provide professional services outside area of competency unless rely on professionals the LSP reasonably determined to be qualified

Professional Conduct Rules Professional Responsibility

- Hold paramount public health, safety, welfare and the environment
- Base LSP Opinions on personal management, performance or review
- Exercise independent professional judgment
- Follow requirements and procedures of 21E and the MCP
- Obtain readily available information necessary to discharge professional obligations
- Disclose and explain known information that may contradict the Opinion

Disciplinary Process (Abbreviated)

- Board complaint/LSP response redacted by staff before being reviewed by Board
- Board decides whether a complaint merits investigation.
- If complaint merits investigation, Board appoints a Complaint Review Team (CRT)
- Each CRT composed of Board member who is an LSP, non-LSP Board member and staff attorney. Staff investigator assists the CRT.
- At end of investigation (or if CRT and LSP agree on potential settlement), CRT prepares a redacted report for the Board.

Disciplinary Process (Cont'd)

- Board votes whether any discipline is warranted and, if so, the level of discipline.
- If the Board votes discipline is warranted, the Board will attempt to reach agreement with the LSP on the terms of an Administrative Consent Order. (LSP and Board can settle earlier in the process as well)
- If the parties can not reach agreement, the Board will issue an Order to Show Cause
- An LSP will have 21 days to file an appeal
- If no appeal is filed within 21 days, the Board will issue a Final Order to the LSP.

Types of Discipline

- Private Censure
- Public Censure
- Suspension
- Revocation
- Administrative Penalty
- (Warning is not discipline)

Case Snapshots

- Review several past Board disciplinary cases
- Discuss information reviewed by the CRT
- Discuss key issues in case and what, if any, discipline imposed
- Point out key takeaway(s)

Snapshot 1 – Disgruntled Client

- Complaint submitted by client
- Client alleged LSP proposed a remedial approach to a release that had remote chance of working
- Claimed LSP failed to meet professional obligations because LSP visited the site only once in 15 months

Disgruntled Client, cont'd



Fuel oil release (~ 28 gallons) from AST located next to residence



Impacted soil and groundwater



PRP interviewed 2 LSPs: #1 one proposed dig and haul; #2 proposed recovery well, product collection, monitoring, close site via risk characterization (Method 1 or 3)



PRP chose #2 because believed would be “most economical” approach

Disgruntled Client, cont'd



Information reviewed during investigation:

Complaint; LSP written response; Documentation (proposal, invoices to client; examples of other client proposals prepared by LSP; MCP submittals); Interviewed LSP



Potential violations:

Inappropriate remedial approach; LSP visiting site only once; Not informing client of “relevant and material assumptions” (310 CMR 4.03 (14)); Creating “unjustified assumptions about results LSP can achieve” (310 CMR 4.03(16))

Disgruntled Client (cont'd)

Board voted to dismiss case with a warning;

Found LSP's remedial approach technically sound based on available data and regulations in place at time of proposal;

Visiting site only once not a violation (small release and staff went to site several times to collect samples).

No evidence client was misled

Disgruntled Client (Con't.)

Key Takeaway:

Client's and LSP's understanding might have been enhanced if proposal indicated:

- Budget based on assumption use of vacuum truck to recover product would improve conditions sufficiently to allow closure with a Permanent Solution; and
- Additional actions may be needed and costs might increase if strategy does not achieve anticipated results.

Snapshot 2: Failure to Document

- Complaint filed by client
- CRT looked at more recent work at 3 sites, each of which had NONs/NOAFs
- CRT believed the LSP had a solid technical understanding but was not aware of certain MCP regulations and failed to adequately document information in submittals

Failure to Document (Cont'd)

Issues Relevant to One of the Additional Sites:

- Site initially associated with release from a waste oil UST
- The waste oil UST and contaminated soil had been removed
- Petroleum, lead and PCBs had been detected in soil/GW
- Two additional releases had been detected on the property:
 - 1) waste oil impacted soil and GW from a former dry well; and
 - 2) gasoline in soil near a former 1,000-gallon UST and dispenser

Failure to Document (Cont'd)

- All three releases combined in Phase I/Tier Classification submittal
- Sampling results in Phase I indicated PCBs present in GW above GW-3 standards but exceedance not discussed in text of the submittal and sampling results table only compares GW samples to GW-2 and not GW-3 standards
- LSP files a RAM Plan (excavates contaminated soil and applies remedial additives; monitors near where additives applied)
- LSP subsequently files an RAO

Failure to Document (Cont'd)

Information reviewed by CRT:

- Complaint;
- LSP's Response;
- NOAF;
- MCP submittals;
- Interview w/LSP

Failure to Document (Cont'd)

Issues with LSP's Work at this Site:

- Failure to monitor upgradient of location where remedial additives applied in violation of the MCP
- Failure to document technical justification (LSP noted in CRT interview that location of building made upgradient sampling impossible but not explained in submittals);
- Site plan in RAO submittal did not depict disposal site boundary;
- Failure to note existence of a GW-3 exceedance for PCBs.
- Failure to understand that under the MCP GW-3 applies to all sites

Failure to Document (cont'd)

The Board disciplined the LSP with a public censure and additional continuing education (18 credits in addition to credits needed to renew)

Key Takeaways:

- Keep abreast of MCP requirements and any amendments to the regulations
- **DOCUMENT** your reasoning in your submittals including any technical justification for deviating from an MCP requirement (as required by 310 CMR 40.0193)

Snippet 3: Due diligence

Complaint filed by MassDEP that alleged:

- MCP violations at a number of sites
- “Pattern of practice”
- ‘Willful’ failure to evaluate key site conditions before beginning remediation and/or filing MCP Opinions.

CRT looked at following information:

- Complaint; LSP response; MCP submittals; MassDEP enforcement documents issued to both the LSP and the LSP’s clients; invoices to LSP’s clients
- Interviewed LSP and a former project manager who worked on a number of the sites the CRT was reviewing

Due Diligence (cont'd)

Issues with one site reviewed by the CRT (similar to issues present at several other sites):

- LSP's firm hired to address hydraulic oil release
- LSP assigned Project Manager
- Phase I/Tier Classification signed and stamped by LSP
- LSP determined site could be remediated via bioremediation
- RAM Plan signed and stamped by LSP (but was never submitted to MassDEP)
 - RAO and RAM Completion were submitted (these submittals did not reference RAM Plan in the text)
 - MassDEP assessed penalty against site owner for conducting RAM activities without submitting a RAM Plan

Due Diligence (Cont'd)

Among issues of concern:

- LSP appeared to abdicate responsibility for several sites to PM
- Told clients firm would take care of deadlines but many MCP deadlines were missed at LSP's sites and LSP was unaware
- LSP blamed former PM (who was fired) for many of the issues but invoices indicated LSP spent little very time on some of the sites. CRT believed LSP failed to review several MCP submittals before signing and stamping.
- Were other significant issues with the LSP's work such as missing a potential IH condition at a site and misrepresenting information included in a DPS submittal for a property downgradient of a site the LSP was working on
- **Discipline:** 18-month suspension and 24 additional CE credits.

Due Diligence (cont'd)

Key Takeaway:

LSP is responsible for content of opinions and whether those opinions were actually submitted.

Snippet Four: Successor LSP

- MassDEP Complaint
- LSP filed an RAO which MassDEP invalidated on basis description of reportable release conditions/site history did not match MassDEP staff's field observations
- LSP became LSP-of-Record shortly before RAO was filed. Prior LSP has observed release conditions at the time the release was initially reported and had written draft RAO opinion. Prior LSP worked at same firm and had license lapse due to lack of sufficient CE credits to renew.
- LSP had faith in predecessor's work but visited the site, reviewed file, questioned prior LSP and thoroughly reviewed and edited RAO report before signing off.

Successor LSP (Cont'd)

- Release of fuel oil to a river
- During heavy rainfall event
- Neighbor called due to smell of oil; police, fire and MassDEP ER respond
- MassDEP staff interpretation of release:

Source was broken fuel line to diesel pump at construction site

Pump left on all night to dewater excavation

Fuel oil entered catch basin and then river

MassDEP ER staff stated they saw impact to river

Booms placed in river.

Successor LSP (Cont'd)

LSP's RAO stated the diesel fuel release was approximately 10-15 gallons and had not impacted the river

LSP believed the oil observed in river was likely from new asphalt pavement nearby or from runoff from a nearby stockpile of contaminated soil

CRT noted MassDEP ER staff visited site at night; prior LSP visited the next morning

CRT reviewed site photos and determined booms in river did not appear as "oil soaked"

MassDEP NOR did not mention impacts to river

Successor LSP (Cont'd)

- CRT reviewed Complaint; LSP's response; MCP submittal; MassDEP file documentation including MassDEP photos regarding oil in river
- Board dismissed complaint with warning
- Board believed LSP adequately met requirements as successor LSP by reviewing site file; visiting the site; questioning the prior LSP regarding his observations; and reviewing and editing the draft RAO before signing off.
- Board understood how LSP and MassDEP's staff interpretations of events might differ
- Board warned LSP that LSP should have explained in RAO why LSP did not believe release had impacted river due to proximity of release to storm drain and facts booms had been placed in river.

Successor LSP (Cont'd)

Key Takeaways:

- Be mindful of 309 CMR 4.02(4) that requires successor LSP to review all related information and conduct a site visit
- Again DOCUMENT in opinions all relevant information supporting your opinion.

Snippet Five: Supervisory LSP

- Complaint filed by Board attorney
- During investigation of complaint against another LSP at same firm
- Complaint alleged supervisory LSP had responsibility to ensure MCP work was not performed at site until after release reported to MassDEP

Supervisory LSP (Cont'd)

Project Players:

LSP #1 (Firm Decision-maker)

LSP #2 (Another LSP at firm; recently licensed)

Project Manager (overseeing project that started as tank pull and replacement, not under the MCP)

Field staff person

Supervisory LSP (Cont'd)

Relevant Facts:

PRP contracts with LSP firm for removal of 3 USTs and associated soil (LRA)

Contract included the firm providing MCP services if needed

Firm initiates removal of soil with separate contractor engaged by PRP to remove USTs

Firm provides field oversight (field staff person assigned)

Supervisory LSP (Cont'd)

- Oil contaminated soil discovered during UST removal
- Over day 1,2,3,4 a total of 750 yd³ of contaminated soil excavated
- LSP #1 (firm decision-maker) notified daily by field staff person re: status of project
- Day 5, LSP #1 has email communication with office staff re: the project and the excavation of contaminated soil
- Day 7, UST contractor removed USTs and transferred them to disposal facility, installed dewatering well and removed 5,000 gallons of contaminated groundwater
- Day 8, LSP #1 and LSP #2 discuss reporting to MassDEP

Supervisory LSP (Cont'd)

Day 8:

- LSP #1 and LSP #2 have email communication regarding reporting to MassDEP
- LSP #2 assumes LSP #1 will notify MassDEP
- Both field staffer and PM stated only LSP #1 had authority to stop work at site
- Field staffer is directed to report to MassDEP to seek approval for prior response actions
- MassDEP denies request
- LSP #1 directs LSP #2 to sign overdue RAM Plan

Supervisory LSP (Cont'd)

Information reviewed by CRT:

- Complaint;
- LSP #1 and #2 written responses;
- MassDEP documents;
- Documents from the PRP and the Firm;
- Interviews with LSP#1 and LSP #2, PM and field staffer

Supervisory LSP (Cont'd)

Main Issue: Should LSP #2 disciplined for unauthorized RAM activities even though LSP #1 was LSP-of-Record?

Board decision:

- Case against LSP #1: Public Censure and \$1000 fine
- Case against LSP #2 dismissed with a warning

Supervisory LSP (Cont'd)

Key Takeaway:

An LSP in a management or review capacity may be disciplined, along with a second LSP, for the second LSP's violation of the Board's Rules of Professional Conduct if:

The LSP orders, directs or formally ratifies Professional Services performed by or an Opinion prepared by the second LSP;

The LSP is aware the Professional Services/Opinion violate the Rules of Professional Conduct; and

Don't act to correct or mitigate the violation.

Example Defenses Raised by LSPs in Disciplinary Cases

I had a technical justification for my conclusions in my MCP Opinion. I simply did not explain my reasoning in my submittal.

Subsequent assessment confirmed the conclusions in my submittal; therefore, I should not be disciplined.

There was never any risk to the public by my work at the disposal site; therefore, I should not be disciplined.

The Board did not look only at the site that was the subject of the complaint but looked at my work at other sites as well which is not fair.