



May 10, 2016

Representative Brian S. Dempsey, Chair
House Committee on Ways and Means
State House, Room 243
Boston, MA 02133

Re: **Opposition to H. 695**
An Act Establishing a Department of Environmental Protection appeals board

Dear Chairman Dempsey and Members of the Committee:

The LSP Association (LSPA) is writing to ask you and the House Committee on Ways and Means to **oppose H. 695**, which has been referred to your Committee. Please **do not advance** this bill for further action by the House.

The LSPA is the non-profit association for Licensed Site Professionals (LSPs) and related practitioners. LSPs are the 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 materials released to the environment.

The LSPA has more than 800 members, over half of whom are LSPs. Our members are consultants who work with government, non-profit, institutional, and private clients to remediate contaminated sites, so that these properties can be placed back into active and productive use. Along with the Massachusetts Department of Environmental Protection and the Board of Registration of Hazardous Waste Site Cleanup Professionals, commonly referred to as the LSP Board of Registration or the LSP Board, LSPs are the third “arm” of an innovative, privatized program, created in 1993. LSPs have since helped bring over 35,000 sites to a condition where they meet regulatory standards for a variety of uses, including business, commercial/retail, industrial, institutional, open space, and housing.

H. 695 proposes the creation of an appeals board to sit within the Executive Office of Energy and Environmental Affairs (EOEEA) and hear appeals of those who have been aggrieved by decisions of the current LSP Board of Registration. This new board would be able to reverse, affirm, or



modify in whole or in part the determination of the current LSP Board. If someone was displeased with the determination of the new appeals board, that person could then pursue judicial action.

In September 2015, the LSPA submitted written testimony and appeared before the Joint Committee on the Environment, Natural Resources, and Agriculture in opposition to H. 695, *An Act Establishing a Department of Environmental Protection appeals board*. Following that, at his request, we met with Representative Kafka and his Legislative Director to further explain our serious concerns about the bill and its significant flaws.

Based on our understanding, this bill was drafted on behalf of a constituent who had failed to convince the current LSP Board to accept and investigate a complaint made against a practicing LSP. While the intent of this bill may have been to provide recourse for “any person” wishing to pursue disciplinary action against an LSP, it would also provide recourse for an aggrieved LSP who was dissatisfied with the results of any LSP Board “determination,” including not only disciplinary matters but also other “determinations” such as decisions regarding licensing applications or the correct answers to the examination which applicants must take and pass in order to be licensed. Either way, from the perspective of a private citizen with no ownership in the site, or an abutter, or an LSP of Record for the site, this bill poses myriad issues and unintended consequences.

The LSPA is convinced that such an appeals board would wreak havoc on the licensing and disciplinary processes by which the LSP Board currently abides. We have four specific areas of concern: 1) the proposed appeal board would deliver problematic decisions due to its composition and lack of technical expertise, 2) the proposed appeal board’s actions would be repetitive and duplicative of the processes and actions of the current LSP Board, and out of line with the processes and actions of other state licensing boards, 3) the language in the bill as to the proposed appeal board’s purview is so imprecise as to cause great confusion over the bill’s actual intent and boundaries, and 4) the significant financial and human resource costs required to create, manage and maintain the proposed appeals board would significantly outweigh any benefits to the Commonwealth and its stakeholders.

The proposed appeals board would deliver problematic decisions due to its composition and lack of technical expertise.

The stakeholder composition of the proposed board would essentially be a subset of the composition of the LSP Board of Registration as specified in its enabling legislation, MGL c.21A, Sections 19A – 19J:

- It would sit within EOEEA, as does the LSP Board;



- The Governor would appoint its members, as is the case for the LSP Board;
- One member would be an LSP, while the LSP Board requires 5 LSPs;
- One member would be from a labor organization, as is the case for the LSP Board;
- One member would be a hydrologist, as is required for the LSP Board; and
- One member would be from a statewide organization that promotes the protection of the environment, while the LSP Board requires 3 members in this category.

There appears to be no logic in establishing an appeals board which possesses less breadth and depth of technical knowledge than the LSP Board whose decisions it would be reviewing. For example, the proposed board would only have one LSP out of the five board members (20%), whereas the LSP Board of Registration has five LSPs out of its eleven members (45%). LSPs on the LSP Board rely on their technical expertise and experience to interpret what is considered an appropriate standard of care for conducting the highly technical and extremely complex work conducted by this profession, which requires a thorough understanding of the Massachusetts Contingency Plan. (The MCP is the detailed set of regulations at 310 CMR 40.0000 to which all LSPs must adhere as they assess and remediate sites).

The prospect of an inexperienced appeals board is alarming. The fact that the proposed board of appeals would be less qualified than the LSP board to understand and analyze the work of an LSP creates a particular conundrum for an LSP, or any other aggrieved party, seeking a fair appeals process.

This inexperienced board of appeals might also be asked to review applications from environmental consultants wishing to take the LSP exam, whose applications and experiences had been deemed insufficient by the LSP Board. The application review process is a serious undertaking in which a professional's experience is carefully analyzed. Board members with little direct experience in the field could potentially be allowing underqualified professionals to take the LSP exam; this would create a burden for the LSP Board staff who administer the rigorous, day-long exam. Not to mention the (very unlikely) event that someone unqualified to become an LSP might actually pass the exam and practice as an LSP.

Another area of concern regarding the composition of the board involves the designation of a labor seat on the appeals board. The enabling legislation for the LSP Board of Registration has a similar provision, but finding candidates who have both the interest and the expertise to fill such a seat has been a significant challenge; in fact, the labor seat on the LSP Board has been empty for over five years due to an apparent lack of candidates.

The LSPA believes the potential effects to the current LSP disciplinary and licensing processes would be one of many unintended consequences. No LSP should be subject to lose his or her professional livelihood based on decisions by such a board. Too much is at stake here.



This board’s actions would be repetitive and duplicative of the processes and actions of the LSP Board, and out of line with the processes and actions of other state licensing boards.

Currently, an LSP who wishes to pursue further options in a disciplinary case once the LSP Board has issued an Order to Show Cause can request an adjudicatory hearing before a hearing officer. This adjudicatory hearing is a full evidentiary hearing and follows the state’s *Standard Adjudicatory Rules of Practice and Procedure*, (801 CMR 1.00). It is a formal, lengthy process, and indeed the exact same process used by all other state licensing boards.

Again, as with all other state adjudicatory proceedings, a person still aggrieved after the adjudicatory hearing process may seek judicial review in Superior Court.

It is difficult to imagine how the additional proposed layer of appeals, using the same standard rules and procedures as are currently in place, would be beneficial to any of the parties involved. Attempting to deal with a perceived problem by adding another layer of bureaucracy to an already redundant process can serve no productive end. There is just no logic or benefit to this process.

The language in the bill is so imprecise as to cause great confusion over its actual intent and boundaries.

The bill proposes to change MGL c.21A, Section 19H to read that “Whoever is aggrieved by a determination” of the LSP Board may appeal to the proposed appeals board. The proposed language eliminates the current language of c.21A, Section 19H which reads: “Any person aggrieved by a determination by the board *and who has legal standing to do so.....*” [italics added].

It should be noted that a large percentage of the complaints that come before the LSP Board simply do not fall within its jurisdiction, and the Board “determines” that it has no role in the matter at hand. The proposed legislation opens wide the possibility of an appeals board overburdened with complaints that are related to matters outside the jurisdiction of the LSP Board, brought by people with no legal standing.

Again, no LSP – in fact, no person - should have to spend the time and money necessary to defend himself or herself under these conditions.

The significant financial and human resource costs required to create, manage, and maintain the proposed appeals board would significantly outweigh any benefits to the Commonwealth and its stakeholders.

The FY 16 GAA budget for the 11-member LSP Board of Registration was \$394,761. We estimate that establishing, managing, and maintaining a 5-member appeals board would cost at least half of that, but more likely a considerably higher percentage. In addition, a new board would require



significant up-front expenditures to assemble and screen candidates, hire an investigative and administrative staff, establish and administer a public record, and set up and house secure and functional facilities, hardware and software that would be required to function appropriately. The infrastructure and personnel necessary to properly administer complaints and disciplinary actions related to the LSP practice already exists with the LSP Board. For the redundancy that such an appeals board would create, it is our opinion that the cost is far too great.

Enacting this legislation would create serious confusion and upheaval in the regulation of LSPs. The LSPA is deeply concerned about the potential for significant negative impact to the public credibility and, frankly, the effectiveness of the current LSP-based site clean-up program if H. 695 were to become law.

The LSPA strongly urges the Ways and Means Committee to give H. 695 an adverse report. Please do not advance this bill for further action by the House.

Please do not hesitate to contact us for further information.

Respectfully,
The LSP Association

A handwritten signature in purple ink that reads "Kevin Beaulieu".

Kevin Beaulieu, LSP
President

A handwritten signature in black ink that reads "Wendy Rundle".

Wendy Rundle
Executive Director

Cc:
Martin Suuberg, MassDEP Commissioner
Maria Pinaud, Chair, LSP Board of Registration
Beverly Coles-Roby, Executive Director, LSP Board of Registration