

**LSPA Suggestions on  
309 CMR Regulations of the Board of Registration of  
Hazardous Waste Site Cleanup Professionals**

The LSP Board solicited the assistance of the LSP community and general public in suggesting areas of possible amendments to its regulations at 309 CMR 1.00-9.00.

Provided below are the LSP Association’s suggestions in response to this request.

“Page No.” refers to the pages in the document available on the LSP Board website.

“Regulatory Reference” refers to the citations in the above-referenced document.

“Comment” refers to the LSPA’s comment on each particular regulatory reference noted.

<b>309 CMR 2.00 INTRODUCTORY PROVISIONS</b>		
<b>Page No.</b>	<b>Regulatory Reference</b>	<b>Comment</b>
4	2.00 Introductory Provisions	General comment – The LSPA recommends revising this entire section to incorporate electronic submissions.
5	2.02 Definitions	Insert actual definition of “Hazardous Waste Cleanup Professional” rather than incorporate by reference. Make consistent reference to this term and “Licensed Site Professional or LSP”. Throughout the document the terms are inconsistent.

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		Add a definition for "Regulatory Credit."
9	2.04 (1) Scheduling and Conduct of Meetings	We suggest that the reserved section on Meetings be inserted so that meeting scheduling and conduct can be explicit and clarified. The LSPA notes that in the past few years there have been fewer than 10 meetings per year and the meetings have not been scheduled in advance.  For example, this section could be completed to include requirements for posting of meeting schedule and minutes, and reference to open meeting requirements.
9	2.04 (2) Scheduling and Conduct of Meetings	Decisions by the Board: There are many types of decisions made by the Board that are not captured in this section, such as approving a course for continuing education credit, or approving a request to take the exam. Silence provides flexibility to the Board but limits transparency as to how decisions are made. We are not certain if a change should be made here, but suggest considering a new "catch-all" subsection (d) in a way that encourages flexibility in making decisions but improves transparency, such as: "All other decisions by the Board, including decisions regarding the acceptability of an application, shall be made by affirmative vote of at least a majority of the Board members present at a meeting, unless the Board has identified in a written document available to the public an alternate approval process." This would allow the Board to appoint a subcommittee, a staff member, or a single Board member to make certain decisions, but the Board would have to commit to that in a document the public can review.
9	2.04 (2) Scheduling and Conduct of Meetings	Decisions by the Board: We suggest revising this section to reflect that two concepts be established: (1) a simple majority of the appointed members must be present to have a quorum for conducting business, and (2) for disciplinary action taken against the LSP, the action must carry two thirds of the voting body and no fewer than three members. For all other actions and decision, a simple majority of the voting body will be needed. (Also modify subsequent sections of the regulations to reflect this.)
9	2.04 (4) Scheduling and Conduct of Meetings	Recommend replacing with the revised open meeting law, M.G.L. c. 30A, §§ 18 to 25.

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10	2.09 Annual Fee	Suggest this section be modified to allow payment electronically in addition to check or money order.
11	2.12 Petitions for Waivers	Suggest allowing this provision to be applicable to applicants, not just to licensees. Revise language to say “any licensee or applicant may petition the Board for good cause shown to waive any requirement, limitation or provision, or waive or extend any deadline, or to reconsider a decision regarding an applicant’s eligibility, and the Board shall, in its sole discretion, approve or deny any such petition. The Board shall require said licensee or applicant...”
<b>309 CMR 3.00 LICENSING OF LICENSED SITE PROFESSIONALS</b>		
Page No.	Regulatory Reference	Comment
13	3.02(2)(a) Qualifications for Eligibility to Take the Licensing Examination	Suggest additional language that further clarifies the Minimum Experience Requirements.
14	3.02(2)(a) Qualifications for Eligibility to Take the Licensing Examination	Minimum Experience Requirements: We do not see the need for the requirement that “At least 3 years of the relevant professional experience must have occurred within five years prior to submission...” Given the other mechanisms the Board has available for approving someone to take the exam, this seems unnecessarily restrictive. By the time a professional has the required eight years of experience it is entirely possible that an applicant may have taken a break to raise or care for a family member, participate in military service, and other possibilities.
15	3.03 (3) Application for Licensure	Review of Applications: There should be a reference to the Application Review Panel (ARP) that is assigned to review applications, and language about the ARP process. To preserve the integrity of institutional knowledge and the ARP process, the Board should generate a record of the rationale for each ARP’s recommendations to the full Board, as well as to clarify the criteria for making the decision. This is important for transparency, and so the ARP process can be conducted fairly and consistently.

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		The Board should commit to reviewing and providing a response to an applicant on his/her application within no more than 180 days from the Board's receipt of the application.
15	3.03 (6)	Reapplication: Suggest consideration of the possibility that an applicant may appeal the decision of an ARP. Revise language to say "any applicant may petition the Board for good cause shown to reconsider a decision regarding an applicant's eligibility, and the Board shall, in its sole discretion, approve or deny any such petition. "
16	3.04 (1) Examination	Frequency and Schedule: This section allows for at least one exam per year. At a minimum this should be revised to be at least twice per year. In addition, the LSPA strongly recommends that the Board consider multiple exams at multiple locations, perhaps through regional and regularly open licensing centers. The Commonwealth has regional licensing centers (for example for asbestos monitor licenses) already established, so there is a model in place that could be used.
16	3.04 (5)	Examination Procedures and Rules: This section should be updated to reference that computers are typically used for exam taking. It should also describe what the contingency plans are if computers fail.  Having different percentage scores for passing different exams contributes to the perception of inconsistency and lack of transparency; in addition, there is no explicit justification for this situation. This situation should be addressed during the roll out of the new exams. Every exam should have the same percentage score to qualify for passing.
17	3.04 (8) Examination	Exam Review and Challenges: This section needs further clarification to explain the process for reaching a final decision about a challenge; for example, does the full Board need to vote to accept the recommendation of the technical advisor? Can the Board reject the recommendation of the technical advisor? What is the time frame in which challenges must be approved or disapproved?
17	3.04 (8) Examination	Exam Review and Challenges: The terms "exam contractor" and "technical advisors" should be defined. Can these be the same person?
18	3.06 License Renewal	The license renewal process could be completed in a manner that would reduce costs and time for the Board. Renewals should be done electronically. Consider following the procedures used by the NH Board of Registration.

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21	3.09 Continuing Education Requirements	Definitions: Courses, classes, workshops, and meetings need to be included in the definition of Continuing Education. This section also needs to be updated to include definitions for on-line and distance learning forums. Also suggest including that CEU forms might be issued electronically.
22	3.09 Continuing Education Requirements	Definitions, DEP Course: Need to clarify whether a course taught by LSP Board members is considered eligible for MassDEP credit.
23	3.09 (2)(a) Continuing Education Requirements	Basic Requirements: This needs to be clarified to indicate where appropriate that "attending" doesn't necessarily mean in person because one can participate in/take on – line courses.
23	3.09(2)(a) Continuing Education Requirements	Basic Requirements: Suggest allowing a certain maximum number (we suggest 12) and type of continuing education credits obtained in the last renewal period to be carried over into the subsequent renewal period.
23	3.09 (3) Continuing Education Requirements	<p>Credit Minimums: Suggest simplifying this section in its entirety to require a total of 36 credits over three years, of which 8 should be Regulatory /DEP credits. Reference: CT LEP, NJ LSRP, NH PG, and NY PE requirements.</p> <p>Suggest removing the DEP credit label and changing these credits to Regulatory credit. Define Regulatory credit upfront. The LSPA also suggests allowing the Board at the time of course approval to decide whether Regulatory credits are DEP credits, or general regulatory credits. Either all regulatory courses should be taught by MassDEP, or the Board may at its discretion on a case-by-case basis approve a limited number of regulatory courses by non-MassDEP instructors.</p> <p>This section also needs to be updated to limit the percentage of total courses in a renewal period that can be non-interactive electronic and interactive electronic (e.g., remote locations with streaming).</p>

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		<p>Consider other ways to meet continuing education requirements, for example:</p> <ol style="list-style-type: none"> <li>1. Gain credit for writing technical articles and delivering presentations.</li> <li>2. Gain credit for teaching a relevant college or university course for the first time.</li> <li>3. Gain credit for holding leadership position (co-chair, board) in LSPA/other relevant association.</li> <li>4. Gain credit for submitting LSP Examination questions which are approved for the exam.</li> <li>5. Gain DEP credit hours for each year of service on the Board of Registration of Hazardous Waste Site Cleanup Professionals.</li> <li>6. Gain credit for each 4 hours of attendance, up to a maximum of 4 credits per year or a maximum of 8 credits per renewal period, at MassDEP Bureau of Waste Site Cleanup Meetings and/or Workgroup Sessions whose content and credit hours are pre-approved by the LSP Board.</li> </ol>
25	3.09 (6) Continuing Education Requirements	<p>Requests for Approval of Continuing Education Courses: Suggest changing “Courses” to “Credits.”</p> <p>(c) Suggest clarifying what changes to a course that has previously been approved require re-submittal of the request for course credit.</p>
25	3.09 (7) Continuing Education Requirements	<p>Attendance Requirements: The LSPA recommends streamlining and simplifying this section.</p>
27	3.09 (10) Continuing Education Requirements	<p>Internet Courses: Need to expand and clarify this section to accommodate all forms of electronic learning.</p>
29	Appendix B Minimum Length & Minimum Attendance...	<p>Simplify and streamline to be consistent with the preceding language of the regulations.</p>

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<b>309 CMR 4.00      RULES OF PROFESSIONAL CONDUCT</b>		
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31	4.02 Professional Competency	Recommend consistent use “licensed site professional” instead of “hazardous waste site cleanup professional” throughout regulations, except in the definitions section.
31	4.02 Professional Competency	Be consistent with the use of “LSPs” vs. “licensed site professionals.” Also – define “in good standing.”
32	4.03 (02) Professional Responsibility	Suggest language change to: “Except in those circumstances in which a licensed site professional is acting as a successor LSP as described in 309 CMR 4.02(4), a licensed site professional shall render a waste site cleanup activity opinion only when he or she has either:..”
34	4.03 (12) Professional Responsibility	Suggest modifying the rules to allow voluntary peer review to be exempt from responsibility under these rules. See suggested language below:  (12) (a) An LSP who is involved in a management or review capacity at a disposal site will be considered responsible, along with a second LSP, for the second LSP’s violation of the Board’s Rules of Professional Conduct set forth in 309 CMR 4.00 if he or she: <ol style="list-style-type: none"> <li>1. orders, directs, or formally ratifies Professional Services or an Opinion being conducted or prepared by the second LSP;</li> <li>2. recognizes that the Professional Services and/or Opinion violate an obligation or prohibition contained in the Rules of Professional Conduct; and</li> <li>3. fails to take reasonable steps to attempt to avoid or mitigate this violation.</li> </ol> (b) Notwithstanding the above Section 12(a), if an LSP reviews one or more draft Opinions and provides comments, suggestions and/or advice to another LSP and the reviewing LSP receives no compensation for providing this review and is not employed by the same company as the other LSP, the reviewing LSP will not be considered to be providing Professional Services and will not be responsible for the other LSP’s violation, if any, of the Board’s Rules of Professional Conduct set

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		forth in 309 CMR 4.00.
<b>309 CMR 5.00    ADVISORY RULINGS</b>		
<b>309 CMR 6.00                    DESIGN AND USE OF LICENSED SITE PROFESSIONAL'S SEAL</b>		
<b>309 CMR 7.00    PROCEDURE GOVERNING DISCIPLINARY PROCEEDINGS AND OTHER DISPOSITIONS</b>		
<b>Page No.</b>	<b>Regulatory Reference</b>	<b>Comment</b>
42	7.02 Types of Discipline and Other Dispositions	Suggest the addition of: “(6) A complaint must be dismissed with prejudice if three years elapse from the initial filing of the complaint without resolution by issuance of an order to show cause or entry into an administrative order of consent.”
42	7.04 Preliminary Investigation	The LSPA is concerned with four things: 1) Giving the LSP notice and opportunity to be involved; 2) the possible involvement of a former member of the Board; 3) simplifying the CRT process; and 4) providing a time limit.  Suggest revisions as follow: “(1) Prior to accepting a complaint, the Board may, in its discretion, appoint a Preliminary Screening Review Team to determine whether the complaint should be accepted. This team must consist of at least three people, including two current Board members. This team will recommend to the Board whether the complaint should be accepted based on the allegations in the complaint and readily available information such as waste site cleanup activity opinions available on the Department’s website.

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		<p>(2) Upon accepting a complaint, the Board shall notify the licensed site professional that it has received a complaint regarding that LSP, and shall include in the notice a description of the complaint, the process, the LSP’s right to representation, and how the LSP may participate to resolve the complaint, including when the LSP may respond to the complaint. The LSP has the right to provide a written response regarding the allegations in the complaint, and shall be given at least thirty days to do so, which time may be extended at the discretion of the Complaint Review Team.</p> <p>(3) The Board may appoint a Complaint Review Team to conduct or arrange for the conduct of a preliminary investigation to determine the truth and validity of all or a portion of the allegations set forth in a complaint. The Board may also request that a Complaint Review Team investigate matters directly related to the complaint that are not alleged in a complaint but which, if established, may constitute grounds for discipline or other disposition as described in 309 CMR 7.02.</p> <p>(4) A Complaint Review Team shall be comprised of at least three people, including two Board members. No member of the CRT may have favorable or unfavorable bias or prejudice, or any conflict of interest with the LSP, the site, or the complainant at issue. Each member of the CRT has an affirmative obligation to recuse himself or herself should such bias, prejudice or conflict of interest be identified at any time during prior to disposition of the complaint. The Complaint Review Team shall investigate the issues.....”</p> <p>The LSPA refers the LSP Board to the June 22, 2006 letter from the (then) LSPA Board to (then) LSP Board Chair Janine Commerford. This letter describes serious concerns with the ways in which complaints are handled by the LSP Board; most of which are still of concern today. The LSPA continues to support the five suggested solutions proposed in this letter.</p> <p>The Board should identify and adhere to time limits on the interval between when a complaint is received by the Board and when the Board’s preliminary investigation is concluded; the LSPA suggests that time be no longer than one year.</p>
43	7.05 Informal	The LSPA understands that this provision has been used to ask the LSP to provide evidence which is

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	Conferences	<p>then used against him or her. We suggest that this be clarified with the following language.</p> <p>“To facilitate disposition of a complaint, the Board may request the person filing the complaint and/or the licensed site professional who is the subject of the complaint, and/or any other person, to attend an informal conference at any time prior to or after the commencement of an adjudicatory proceeding. The complainant and/or the LSP shall have the right to be represented by counsel. When invited to the conference and at the beginning of the conference the LSP must be advised by the Board that (1) attendance at the conference is voluntary; (2) the Board will not infer any fact from the decision of the LSP not to participate; and (3) the information the LSP provides may be used against him or her by the Board.”</p>
43	7.06 Disposition by the Board	Suggest inserting as last line in (1) and (2): “A decision by the Board under this section is governed by 309 CMR 2.04(2)(b).”
43	7.07 Initiation of Formal Adjudicatory Proceedings	<p>The LSPA is concerned that the LSP Board is not required to identify the chosen disciplinary action in an order to show cause, so the LSP does not know what the penalty is – making a decision whether to appeal difficult. The LSP can never plead his/her case in front of the Board before a vote of the action.</p> <p>Suggest revising this sentence as follows: “The order shall state the grounds for taking disciplinary action or other disposition, including the specific facts relied upon and the statute(s) and/or regulations authorizing the Board to take disciplinary action or other disposition, and the proposed disciplinary action.”</p>
44	7.08 (1) Conduct of Formal Adjudicatory Proceedings	Please clarify what is meant by “the parties” in the sentence, “At the conclusion of the proceeding, in accordance with the provisions of 801 CMR 1.00, the presiding officer shall file a recommended decision with the Board and promptly provide the parties with a copy.”
46	7.10 (2) Final Decision of the Board	Board’s Final Finding of Fact and Rulings of Law: Suggest previous wording changes related to quorum/minimum numbers of members (See section 2.04(2)).

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<b>309 CMR 8.00 ADMINISTRATIVE PENALTY REGULATIONS</b>		
<b>Page No.</b>	<b>Regulatory Reference</b>	<b>Comment</b>
49	8.03 Notice of Noncompliance	This Part appears to have no relevance to the remainder of 309 CMR. We suggest it be eliminated, or its role identified.
50	8.04 Pattern of Noncompliance	This section should specify that in deciding whether or not there has been a “pattern of non-compliance,” the Board must consider whether the site owner/responsible party has in any way impeded the LSP in the performance of his/her duties as s/he was undertaking response actions including, but not limited to, meeting deadlines or otherwise impeding work progress though budgetary or other means. This is particularly true in periods of bad economic times where the LSP’s client is short of funds or simply chooses to ignore regulatory deadlines. The LSP should not be penalized for this.
<b>309 CMR 9.00 INACTIVE STATUS</b>		
<b>Page No.</b>	<b>Regulatory Reference</b>	<b>Comment</b>
57	9.00 Inactive Status	Consider adding a retired status – reduced fees, no continuing education courses, but not practicing/stamping anything.