

LSPs, Be Wary of Unscrupulous Contractors

by Susan J. Crane

In an all too familiar scenario, a property owner contracts with a tank removal company to remove an underground storage. In the course of the tank removal, sub-surface contamination is encountered. The tank removal company subcontracts with an LSP and then continues to run the show, limiting the LSP's site access and barring contact between the LSP and the site owner. The tank removal company puts together and implements an assessment plan, and then proceeds with a response action. Along the way, the company provides the LSP with site data and requests the LSP to file reports with MassDEP.

The Rules of Professional Conduct do not specify how often or even whether an LSP must visit a site. However, LSPs who issue opinions without sufficient personal knowledge of site conditions or who have relied on unqualified third parties to provide the information are at risk of being sanctioned by the LSP Board.

309 CMR 4.02 provides:

- (1) In providing Professional Services, a licensed site professional shall act with reasonable care and diligence

- (3) In providing Professional Services, an LSP may rely in part upon the advice of one or more professionals whom the LSP reasonably determines are qualified by education, training and experience.

309 CMR 4.03 also provides:

- (2) A licensed site professional shall render a waste site cleanup activity opinion only when he or she has either:
 - (a) in the case of an opinion related to an assessment:
 - 1. managed, supervised or actually performed such assessment, or
 - 2. periodically reviewed and evaluated the performance by others of such assessment; or
 - (b) in the case of an opinion related to a containment or removal action:
 - 1. managed, supervised, or actually performed such action, or
 - 2. periodically observed the performance by others of such action.

The interpretation of these provisions is subjective. In rendering opinions, LSPs routinely rely on the work of other professionals to some extent. However, unless the LSP is reasonably convinced of a third party professional's adequate qualifications and competence, any misplaced reliance is fraught with risk and may result in sanctions for violating the Rules of Professional Conduct.

Let's embellish the scenario set forth above. Suppose the tank removal company were to inform the unsuspecting site owner that the groundwater classification is GW-1, when the actual classification is less stringent. Then with the excavation open, the contractor presents the site owner with intentionally misleading screening data when laboratory analyses were available to indicate that the applicable standards had been met. The contractor recommends groundwater treatment and the excavation of much larger volumes of soil and informs its client that the additional work is required by regulation. Additional expensive and disruptive response actions are undertaken, leaving the site owner with a major re-landscaping project and an onerous bill that far exceeds all earlier "worst case" estimates by the contractor. The contractor then provides the absentee LSP with a pile of data and requests that an RAO be filed. The confirmatory sampling data appear to be reliable and well within all Method 1 standards.

Exactly what is the LSP's obligation? What if the LSP recognizes that much of the work undertaken by the contractor was entirely unnecessary? Would the situation be different if the LSP questioned the adequacy of the data, the scope of the assessment or the sufficiency of response actions? What if the LSP knew of other instances of questionable business practices by this contractor?

In accordance with 309 CMR 4.03(10):

A licensed site professional shall not allow the use of his or her name by, or associate in a business venture with, any person or firm which he or she knows or should know is engaging in fraudulent or dishonest business or professional practices relating to the professional responsibilities of a licensed site professional.

There is no golden rule about what constitutes adequate site oversight by an LSP, and the circumstances of each site are unique. Unfortunately, Massachusetts is not immune to unscrupulous but clever contractors looking to make a profit by undertaking unnecessary work at their clients' expense. There are also plenty of unsuccessful cleanups caused by overreaching and unqualified contractors who, for all intents and purposes, take on the role of LSP.

LSPs should consider their personal and their firm's liability exposures each time they sign and stamp a MassDEP Opinion attesting to compliance with the MCP and satisfaction of the Professional Conduct standard of care. When an LSP does not exercise independent judgment, but defers to strategic decisions made by contractors without appropriate credentials and experience, any number of problems can arise, ranging from excessive billings, to off-site migration of contaminants, to the presence of imminent hazards.

LSPs need to be wary of any contractor who insists on taking an aggressive role in preparing and implementing a scope of work at a site without sufficient input from an LSP. A contractor who seeks to limit an LSP's site access or contact with the site owner should serve as a bright red

flag. LSPs who are willing to work under these terms may be seriously jeopardizing their licenses.

In fulfilling the role entrusted to LSPs under the MCP, it is essential that LSPs be selective about contractors to assure public confidence in our privatized cleanup system. As long as LSPs are meeting their state-mandated responsibilities and contractual obligations to their clients, however, they should not be at risk of liability for their contractors' mistakes. An entirely different situation arises when an LSP has actual knowledge of a contractor's unethical conduct but passively acquiesces by taking no action. Legal and factual gray areas may arise when it appears an LSP should have known of a contractor's poor performance or unethical conduct.

LSPs are in a unique position to maintain the integrity of the cleanup process and to protect the public interest. Unscrupulous contractors could not remain in business without willingly participating LSPs. By agreeing to work under the direction of these contractors, LSPs are tacitly condoning unethical practices and substandard work.

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