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North Carolina Board for Licensing of Geologists

To: North Carolina Licensed Geologists
Fr: North Carolina Board for Licensing of Geologists
Date: November 6, 2017
Re: Guidance to licensed geologists on their obligation to report.

Background: The North Carolina Board for Licensing of Geologists (the “Board”) is aware that questions have been raised about when a licensee is obligated to report information learned during a site assessment. The Board decided it would be useful to have a guidance document on the website so licensees may better understand the factors to be considered in answering this question.

Discussion: Following are a few scenarios in which the question of whether something should be reported may arise.

Scenario 1: During an assessment for a private client, the licensed geologist (“LG”) detects soil contamination on a site and does not consider the contamination an imminent danger to the public. Based on a site inspection, the LG concludes that the contamination may have existed for many years undetected, is not near any drinking water sources, has not caused a vapor intrusion condition, and is not migrating. However, there may be an economic impact if the information is not disclosed to persons (not the client) interested in purchasing the site.

Scenario 2: During an assessment for a private client, the LG detects contamination on the client’s site which appears to be emanating from an adjacent site where a dry cleaner (or similar business) is located. Is the LG required to report the contamination to the North Carolina Department of Environmental Quality (“DEQ”) even if the client has not given permission by the client to report the contamination?

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Scenario 3: Should an LG report information to the DEQ regarding an imminent health hazard discovered by the LG during a site assessment regardless of whether the client agrees to the disclosure?

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In considering whether there is an obligation to report information learned during an assessment, the first thing for a LG to consider is whether there is a legal obligation to report. Under the Geologists Licensing Act, the “[p]ublic practice of geology” is defined as “the performance for others of geological service or work in the nature of work or consultation, investigation, surveys, evaluations, planning, mapping and inspection of geological work, in which the performance is related to the public welfare of safeguarding of life, health, property and the environment, except as specifically exempted by this Chapter.” Indeed, the primary obligation for any geologist licensed in North Carolina is “to protect the safety, health, and welfare of the public in the performance of his or her professional duties.” 21 NCAC 21.1101(b)(1) Furthermore, as stated in this rule, if a LG’s “geologic judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, he or she shall inform his or her employer of the possible consequences and notify other proper authority of the situation, as may be appropriate.” (Emphasis added). Therefore, if a LG is confronted with a situation which in his or her professional judgment constitutes an imminent danger to health, safety, and welfare, the LG must inform his or her employer and notify the proper authorities (e.g. DEQ or other agency responsible for dealing with the hazard) even if the employer does not agree to the notification. Based on this assessment, any LG confronted with the facts described in Scenario 3 above is required to report an imminent hazard to the client and the proper authority.

If there is no imminent danger and no law requires disclosure, the LG is not required to report the information learned during the assessment to anyone other than the client. The question of whether there is an imminent danger is a matter to be determined by the LG based on his or her professional judgment. This addresses the facts set forth in Scenarios 1 and 2 above.

Other statutes or regulations may also be factors for the LG to consider in assessing whether the LG has a duty to report to someone other than his or her client. For example, under N.C.G.S. §§ 143-215.85, “a person who owns or has control over petroleum that is discharged into the environment shall . . . report the discharge to the Department within 24 hours of the discharge.” In addition,

the owner of the real property on which a site is located that is subject to current or future use restrictions approved as provided in G.S. § 143-215.84(f) shall submit to the

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Department a survey plat as required by this section within 180 days after the owner is notified to do so.

§143-215.85A(a)(emphasis added). Similarly, a civil penalty may be assessed against

[a]ny person who intentionally or negligently discharges oil or other hazardous substances, or knowingly cause or permits the discharge of oil in violation of this Part or fails to report a discharge as required by G.S. 143-215.85

§143-215.88A(a). In each case, the LG should first determine whether he or she is the person who is directly charged with reporting under the statute. If the LG is not the landowner or the person having control over oil or other hazardous substances discharged in violation of the statute, then the rules of professional conduct require a LG to advise any client who is in that position of the responsibility to report under the Oil Pollution and Hazardous Substances Control Act. Note that as long as in the LG's opinion, the discharge does not pose an imminent danger to the safety, health, and welfare of the public and there is no other statutory or regulatory obligation to report, the LG is not required to provide a report to anyone other than the client.

The contract between the LG and a client may also address the question of who "owns" the information learned during an inspection. If there is a confidentiality clause in the contract, the LG may not share information learned during the inspection with others, including members of the public or a governmental agency. The only exception to this limitation would be if the LG's "geologic judgment is overruled under circumstances where the safety, health, and welfare of the public are endangered." 21 N.C.A.C. 21 .1101(b)(1). In such a case, the Rules of Professional Conduct require the LG to "inform his or her employer of the possible consequences and notify other proper authority of the situation." *Id.* Thus, in a situation such as was described in Scenario 3 above, the LG would be required to report the hazardous situation to DEQ after informing the client of the possible consequences requiring disclosure.

The rules of professional conduct involve multiple concepts such as "safeguarding the life, health, property and welfare of the public" and establishing and maintaining "high standard of integrity, skills, and practices in the profession of geology." Welfare is not defined in the rules. Board counsel is not aware of any case law that requires the LG to protect the economic welfare of a non-client over the duty owed to a client. Thus, the facts set forth in Scenario 1 would not allow for disclosure to a non-client unless there was an imminent danger. In the case of an imminent danger, the disclosure required is to the responsible agency.

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Simply put, while the Board cannot speculate about the proper application of the Board's Rules of Professional Conduct without knowing all the relevant facts, if in a LG's professional opinion there exists an imminent danger to the public health, safety, and welfare, information regarding that danger must be reported to the responsible agency. If there is no imminent danger, the LG is not required to report to anyone other than his or her client.