

**COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION OF
HAZARDOUS WASTE SITE PROFESSIONALS**

July 22, 2010

In the Matter of James J. Decoulos

Docket No. LSP 10AP 01

SECOND POST CONFERENCE REPORT & ORDER

This is an appeal of an Order to Show Cause issued by the Board of Registration of Hazardous Waste Site Professionals (the "Board") to Mr. James J. Decoulos, a Licensed Site Professional who holds a license from the Board and who is the Respondent in this matter. The Order to Show Cause was issued under the authority of 309 CMR 4.00 et seq., and this proceeding is governed by that set of regulations and the adjudicatory hearing rules at 801 CMR 1.00 and M.G.L. c. 30A.

Pursuant to 309 CMR 7.08 and 801 CMR 1.00 et seq., the parties participated in a Pre-Hearing Conference on Friday, April 16, 2010 under the auspices of Office of Appeals and Dispute Resolution ("OADR"). On April 28, 2010, I issued a Post Conference Report and Order summarizing the Pre-Hearing Conference. On July 14, 2010, I held a Second Pre-Hearing Conference in order to address a number of outstanding issues and to establish a schedule for this adjudicatory proceeding. This Second Post-Conference Report and Order summarizes what was discussed in that conference and establishes a schedule for this adjudicatory proceeding.

The parties represented that they had been engaging in voluntary discovery with respect to documents. Neither party indicated that any problems had arisen with respect to such discovery.

On June 23, 2010, I notified the parties that the Adjudicatory Hearing would be held on October 27, 2010, which was one of the dates the parties had indicated was available to them. I informed the parties at the Second Pre-Hearing Conference that this date would not change, absent a timely showing of good cause. Mr. Decoulos requested that I schedule two additional days for the Hearing. I informed the parties that although I believe that this appeal can be heard in one day, I have scheduled October 29, 2010 as a day on which the Hearing may continue if that becomes absolutely necessary.

Mr. Decoulos has designated several witnesses whose testimony he desires at the adjudicatory hearing. See Pre-Hearing Statement and Supplemental Pre-Hearing Statement of Respondent James J. Decoulos. Mr. Decoulos believes that several witnesses will be hostile witnesses, and thus he will not be able to obtain their Pre-Filed Direct Testimony. He requested that he be able to depose these witnesses for purposes of obtaining their testimony for the Hearing. In the Second Conference, I established a schedule of proceedings that will address Mr. Decoulos' alleged need for testimony from the specified witnesses. In general, the schedule requires Mr. Decoulos to first make every reasonable effort to obtain Pre-Filed Direct Testimony. See 309 CMR 7.08 (requiring submission of Pre-Filed Testimony absent showing of good cause). If he cannot obtain such testimony, then he must make a detailed showing: (1) that he has made every reasonable effort to obtain the Pre-Filed Direct testimony; (2) that the desired testimony could not reasonably be obtained through Pre-Filed Direct Testimony from another

designated witness, from a witness who is not designated, or through cross-examination of the Board's witnesses; (3) that the desired testimony is necessary and relevant and not duplicative of other witnesses' testimony. If Mr. Decoulos is able to make this showing, then I will allow the subject witness (or witnesses) to be subpoenaed and testify at the Hearing. See 801 CMR 1.01(10)(g). If Mr. Decoulos persists in wanting to depose the subject witness (or witnesses), then he must meet the criteria in 801 CMR 1.01(8)(c).

Mr. Decoulos also requested pursuant to 801 CMR 1.01(8)(g) that he be permitted to propound interrogatories on the Board. Interrogatories are generally not allowed in adjudicatory appeals under 801 CMR 1.01(8)(g). See 801 CMR 1.01(8)(g). Mr. Decoulos represented that he needed such interrogatories in order to better understand the Board's positions on the claims against him. The Board opposed Mr. Decoulos' use of interrogatories on the grounds that (1) it was unnecessary in light of ongoing document discovery, (2) Mr. Decoulos' ability to ascertain and respond to the Board's positions via Pre-Filed Testimony and the detailed Order to Show Cause, and (3) it would be unduly burdensome in light of the dearth of resources at the Board and the tight schedule between now and the Hearing. See 801 CMR 1.01(8)(a) (orders allowing discovery may include limitations to protect party from undue burden or expense); 801 CMR 1.01(8)(g) (interrogatories may be allowed to discover information not previously supplied through voluntary discovery, such as produced documents). Mr. Decoulos' response to the Board's position iterated his desire to know more about the Board's claims against him. Although I am not persuaded that Mr. Decoulos' has made the necessary showing for the submission of interrogatories, I allowed him until July 21, 2010 to file a motion to propound no more than ten interrogatories, which motion shall include a draft of the proposed interrogatories.

I gave the Board until July 28, 2010 to respond.

The Board objected to Mr. Decoulos' witnesses on the grounds that several appeared to be duplicative and irrelevant. I stated that the Board could file timely motions to strike, if it desired to pursue this issue further. I informed Mr. Decoulos, however, that I would not allow duplicative or irrelevant evidence to be admitted into the record.

All parties to this appeal are required to be diligent in meeting deadlines for the prosecution or defense of this appeal. Parties should be prepared to move forward expeditiously with cross-examination at hearing. The failure of any party to file testimony in a timely manner, to attend the Hearing, to maintain appropriate decorum, to participate in these proceedings in good faith, or to comply with any requirements of this Order will result in the imposition of appropriate sanctions on that party pursuant to 801 CMR 1.00 and 309 CMR 4.00.

ISSUES FOR RESOLUTION

The Adjudicatory Hearing will focus solely on the Issues for Resolution. Based upon the Order to Show Cause, Pre-Hearing Statement, and the Pre-Hearing Conferences, I have framed the Issues for Resolution as follows:

Site: 131 Main St., Carver:

1. Whether Mr. Decoulos failed to act with reasonable care and diligence in assessing the site at 131 Main St., Carver, MA, in violation of 309 CMR 4.02 (1), as alleged in the Order to Show Cause.
2. Whether Mr. Decoulos did not follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E and 310 CMR 40.000, at 131 Main St., Carver, MA, in violation of 309 CMR 4.03(3)(b), as alleged in the Order to Show Cause.

Site: 633 North Main St., Randolph:

1. Whether Mr. Decoulos failed to act with reasonable care and diligence in assessing the site at 633 North Main St., Randolph, MA, in violation of 309 CMR 4.02(1), as alleged in the Order to Show Cause.

2. Whether Mr. Decoulos did not follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E and 310 CMR 40.000, at 633 North Main St., Randolph, MA, in violation of 309 CMR 4.03(3)(b), as alleged in the Order to Show Cause.

WITNESSES

I will conduct the Hearing on October 27, 2010 from 9:00 a.m. until 4:00 p.m. in DEP's Boston Office, in the event that this appeal is not settled by agreement of the parties or resolved via dispositive motions. The hearing will be recorded via audio tape unless a party retains at its expense a stenographer, in which case the party or parties shall pay for copies of the transcript to be provided to the Board and OADR. The purpose of the Hearing will be the cross-examination of witnesses who have filed sworn written Pre-filed Testimony on behalf of a party in the case according to the schedule that I established at the Pre-Hearing Conference. The Pre-filed Testimony is the witnesses' Direct Examination Testimony, and, perhaps, their Rebuttal Testimony at the Hearing.

The witnesses' Pre-filed Testimony must contain evidence that is relevant to resolution of the issues in the case. The Pre-filed Testimony must also include the originals or true copies of all documents cited by the Testimony as supporting the witnesses' testimony and a party's positions in the case. Specifically, the Pre-filed Testimony must include all exhibits to be offered in evidence and all evidence, including any records, investigative reports, documents,

and stipulations, which is to be relied upon in a final decision in the appeal. Any Pre-filed Testimony that fails to include that documentary evidence is incomplete and untimely.

A party's failure to file pre-filed direct testimony within the established time, without good cause shown, shall result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner. Indeed, "a petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008).

The cross-examination of witnesses at the Hearing will be subject to time limits or other limits set by the Presiding Officer. If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise.

Re-direct examination of witnesses following their cross-examination is generally not permitted unless authorized by the Presiding Officer. If redirect examination is allowed by the Presiding Officer, it shall be limited to the scope of cross-examination. Hence, if a party chooses not to cross-examine a witness, the witness may not provide oral Re-direct Examination Testimony at the Hearing. There is also no requirement that a party cross-examine its opponent's witnesses at the Hearing.

The witnesses who shall be permitted to submit Pre-Hearing Testimony and testify at the Hearing have been identified in the parties' Pre-Hearing Statement and supplements to that, subject to the allowance of any motions to strike or, as otherwise ordered by me. There will be

no additions to the currently identified witnesses, without a showing of good cause as to why the witness was not timely designated.

SCHEDULE OF PROCEEDINGS

The schedule for the remainder of this Adjudicatory Proceeding is as follows:

1. By **July 28, 2010**, the parties shall file all proposed substantive changes to the Issues for Resolution.
2. By **July 28, 2010**, all discovery shall be completed, excluding possible interrogatories discussed above.
3. By **August 18, 2010**, the Board shall file its Pre-filed Direct Testimony.
4. By **September 1, 2010**, the Board shall respond to any interrogatories that Mr. Decoulos is allowed to propound.
5. By **September 15, 2010**, Mr. Decoulos shall file his Pre-filed Direct and Rebuttal Testimony.
6. By **September 22, 2010**, Mr. Decoulos shall file all motions seeking to submit testimony orally at trial or to conduct depositions, in accordance with this order.
7. By **October 1, 2010**, the Board shall file (a) its response to all motions filed by Mr. Decoulos seeking to submit testimony orally at trial or to conduct depositions and (b) its Pre-Filed Rebuttal Testimony, responding to Mr. Decoulos' Pre-Filed Testimony and Rebuttal Testimony.
8. By **October 8, 2010**, the parties shall file all motions to strike testimony and exhibits.

The Hearing will be held on **October 27, 2010 from 9:00 a.m. until 4:00 p.m. in DEP's**

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Boston Office (Second Floor Hearing Room) unless the parties file by **4 p.m., October 26, 2010**, a fully executed Settlement Agreement.

The hearing will be recorded via audio tape unless a party (or parties) retains at its expense a stenographer, in which case the party or parties shall pay for copies of the transcript to be provided to the Department and OADR.

 7/22/10
Timothy M. Jones
Presiding Officer

SERVICE LIST

BOARD OF REGISTRATION
OF HAZARDOUS WASTE SITE
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