

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE
CLEANUP PROFESSIONALS

In the Matter of:)
)
James J. Decoulos,)
Respondent)
_____)

Docket No. LSP 10AP 01

OPPOSITION TO MOTION TO SEEK ORAL TESTIMONY

The LSP Board, by its attorney, hereby opposes Respondent's Motion to Seek Oral Testimony. All the witnesses sought would testify regarding the Eagle Gas site. The issue on appeal for this site is whether Mr. Decoulos acted with reasonable care and diligence in assessing the site and complied with the Massachusetts Contingency Plan (MCP),¹ that is, whether he had adequate data and information to support his conclusions in his Immediate Response Action (IRA) submittals that the diesel fuel release at Eagle Gas was not the source of the contamination present at the storm drain outfall to the South Meadow Brook. The Board has not taken a position regarding the true source of the contamination but rather found that Mr. Decoulos did not have adequate support for his submittals. The testimony proposed by Mr. Decoulos will not be helpful to the factfinder as it is not relevant to the issue for adjudication.

The Testimony Sought from Thomas Potter is Irrelevant to the Issues in this Adjudicatory Proceeding

The testimony that Mr. Decoulos seeks from Mr. Potter relates only to site conditions observed by Mr. Potter when he visited the site on one occasion in 1998. Mr. Decoulos states that Mr. Potter would testify regarding his observations during the 1998

¹ Second Post Conference Report & Order

visit; specifically, he wants to question Mr. Potter regarding (1) his observations during that visit of a pipe leading from an excavation, (2) his observations of storage and handling of oil and hazardous materials on the Eagle Gas property, and (3) MassDEP's views in 1998 of contaminant migration at the site. The diesel fuel release in this case was not discovered until January 2003, more than four years after Mr. Potter's site visit.

Mr. Potter's information about site conditions in 1998 is irrelevant to whether Mr. Decoulos had adequate data and information to support his conclusions in his IRA submittals beginning in 2003 that the diesel fuel release at Eagle Gas was not the source of the contamination present at the storm drain outfall to the South Meadow Brook. Likewise, any testimony by Mr. Potter about the storage and handling of oil and hazardous materials at Eagle Gas in 1998 is irrelevant to the issue whether Mr. Decoulos had sufficient evidence to support his assertion that the diesel release was not the source of the contamination at the outfall.

The Testimony Sought from Mark Jablonski is Irrelevant to the Issues in this Adjudicatory Proceeding

Mr. Decoulos seeks to examine Mark Jablonski about Mr. Jablonski's observations on May 16, 2003, when he responded to the release of contamination at the stormwater outfall. Mr. Jablonski prepared the Release Log Form Attachment and the Field Notice of Responsibility that the Board has offered as Exhibits B-18 and B-19. The Board respectfully suggests that Mr. Decoulos has not made the necessary showing that the testimony desired from Mark Jablonski is necessary and relevant to the issues for adjudication in this proceeding.

Mr. Decoulos states, "Mr. Jablonski's testimony may provide substantial value to this forum in understanding the events of May 16, 2003." Motion p. 3. However, the events of May 16, 2003, the date when the release to the brook was reported and Mr. Jablonski issued a Field Notice of Responsibility (Exhibit B-19), are not material or relevant to the central issue for adjudication in this hearing, which is whether Mr. Decoulos had adequate data and information to support his conclusions in his IRA submittals that the diesel fuel release at Eagle Gas was not the source of the contamination present at the storm drain outfall to the South Meadow Brook.

Mr. Jablonski's testimony would unnecessarily prolong the adjudication of this matter because the Board's decision did not turn on Mr. Jablonski's stated observations on May 16, 2003. The Board's decision turned on the fact that MassDEP issued Notices of Responsibility for Immediate Response Actions, Exhibits B-15 and B-20, that required Eagle Gas to evaluate whether the diesel release was infiltrating the storm drain pipe and a source of the contamination at the storm drain outfall. As the Board's witnesses have testified, if Mr. Decoulos disagreed with MassDEP's IRA requirements, he could present technical justification for an alternative view of the source and alternative Immediate Response Actions. Direct Testimony of Cynthia Baran, Exhibit B-1, p. 17; Direct Testimony of Ian Phillips, Exhibit B-6, p. 13. The Board found that Mr. Decoulos did not collect and document adequate data to support his opinion that the diesel fuel release at Eagle Gas was not the source of the contamination present at the outfall, and that is the issue on appeal. Thus Mr. Jablonski's observations on May 16, 2003 are not relevant to the issues for adjudication.

The Testimony Sought from Fred Civian is Irrelevant to the Issues in this Adjudicatory Proceeding

Mr. Decoulos argues that Fred Civian should testify about

how easily oil spills can be carried by stormwater into regulated wetlands and waterways...the complexities of stormwater contamination and how they may interact with an LSP's duties...the relevance of stormwater regulations to protecting the Commonwealth's waterways and why the contamination at the stormwater outfall into South Meadow Brook would not be an unusual finding given the historical patterns of use at the Eagle Gas site and the fact that the stormwater collection system is an EPA designated Urban Watershed.

Motion p. 3. The Board respectfully suggests that Mr. Decoulos has not made the showing required by 801 CMR 1.01(10)(g) and the Second Post Conference Report and Order in this proceeding, that the testimony desired from Fred Civian is necessary and relevant to the issues for adjudication.

On its face, the Motion's grounds for requesting Mr. Civian's testimony are speculative and not grounded upon site-specific information: "how easily oil spills can be carried by stormwater...[how] the complexities of stormwater contamination may interact with an LSP's duties...why the contamination at the stormwater outfall...would not be an unusual finding given the historic patterns of use at the Eagle Gas site..."

Testimony about probabilities based on historic patterns of use is speculative.

Stormwater regulation is irrelevant to the issues in the case. This case is not about whether the sheen on the brook was related to the movement of stormwater. The Board has made no finding as to whether Mr. Decoulos's LSP Opinion that the source of the outfall contamination was stormwater runoff was correct or not. The issue for determination is whether Mr. Decoulos had adequate data and information to support his conclusions in his IRA submittals that the diesel fuel release at Eagle Gas was not the

source of the contamination present at the storm drain outfall to the South Meadow Brook. The testimony requested from Mr. Civian is not relevant to this issue.

The Testimony Sought from Jonathan Hobill Would Duplicate the Testimony of Cynthia Baran

Mr. Decoulos seeks the testimony of Jonathan Hobill, on the grounds that

Mr. Hobill was the supervisor at MassDEP who approved all remedial actions at the Eagle Gas Site. Because he was the Regional Engineer responsible for issuing approvals and denials of various actions, his testimony is expected to be different, and with a higher level of understanding of engineering concepts, than his subordinate Cynthia A. Baran. See e.g. Exhibits B-35 through B-44. Ms. Baran holds a masters degree in epidemiology. See Exhibit B-2.

Motion p. 4.

Mr. Hobill's testimony will not be materially different from the testimony of Cynthia Baran. Ms. Baran was MassDEP's representative with direct oversight of Mr. Decoulos's submittals for the Eagle Gas site. She made multiple site visits and communicated directly with Mr. Decoulos about the site. Therefore, her knowledge of MassDEP's actions in regard to the Eagle Gas site is more detailed than that of Mr. Hobill, whose role was to review and approve the actions recommended by Ms. Baran. Thus Mr. Hobill's testimony would not add detail and would be duplicative of Ms. Baran's testimony.

The Testimony Sought From Attorney Lynn Read Would Duplicate the Testimony of Another Witness, Is Irrelevant to the Issues in This Adjudicatory Proceeding, and Would Work an Insuperable Hardship on the Board.

Mr. Decoulos states that the undersigned counsel should testify because she made representations in the LSP Association newsletter about Mr. Decoulos and has personally

visited the Eagle Gas site. Previously, Mr. Decoulos has stated that he seeks counsel's testimony about "her observations of surface flows from the Eagle Gas site on June 26, 2008 and the conditions of the stormwater outfall into South Meadow Brook," Pre-Hearing Statement p. 7. In the present Motion, he argues that "Despite her appearance as counsel on behalf of the Board, she has acted as a public advocate in this proceeding, which is contrary to Rule 3.7 of the SJC's Rules of Professional Conduct." He argues that he will suffer prejudice "in the nature of this proceeding if he is unable to have Ms. Read respond to questions as a witness," and that her appearance will not work a hardship on the Board because other counsel is available.

To the extent that Mr. Decoulos seeks testimony from counsel about the site visit on June 2008, such testimony is irrelevant as outside Mr. Decoulos's work, and is duplicative because Mr. Luhrs was present at the visit, is a witness at the hearing, and may be cross-examined by Mr. Decoulos.

To the extent that Mr. Decoulos seeks to question counsel about statements in the article in the LSPA newsletter, the article is irrelevant to the issues in this adjudicatory proceeding. The Board issued its findings in the Order to Show Cause, which is a public record, and it is those findings that Mr. Decoulos is appealing.

To the extent Mr. Decoulos asserts that the authorship of the article amounted to acting "as a public advocate in this proceeding, which is contrary to Rule 3.7 of the Supreme Judicial Court's Rules of Professional Conduct," he has made no valid argument. Rule 3.7 does not address "public advocacy" by trial counsel. It states,

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

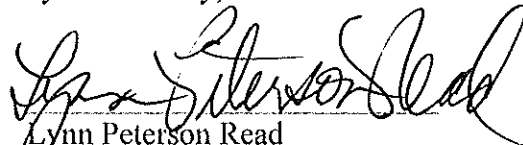
This Rule requires as a prerequisite that the lawyer is a necessary witness, a contention that Mr. Decoulos has not supported.

Mr. Decoulos appears to argue that the authorship of the article is inconsistent with counsel's role as prosecuting attorney and that counsel's statements in the article should be subject to questioning in the hearing. The drafting and publication of the article was part of the ordinary procedure the Board follows after it completes its investigation and issues the Order to Show Cause. Such articles are part of the Board's function to educate the LSP community regarding LSP work it has determined to violate the Board's Rules of Professional Conduct. The article contains no information to identify Mr. Decoulos or the sites at issue, although the Board is under no obligation not to disclose this information after it has completed its investigation and issued the Order to Show Cause. Mr. Decoulos states that the article was damaging to his professional standing. However, any complaint Mr. Decoulos has with this article has no bearing on the quality of his own work, which is the issue for adjudication.

Disqualification of counsel would work severe hardship on the Board, which has suffered a 50% loss of staff in the last 12 months, including the death of the investigator who assisted the Complaint Review Team that investigated this Complaint. The Board's one other attorney could not assume the role of prosecuting attorney in this case. Not only does she not have any time available, but she must serve as the Board's counsel in this matter, separate from the prosecuting attorney, when the Board considers the Recommended Decision and issues a Final Order in this action.

For all the foregoing reasons, the Board of Registration of Hazardous Waste Site Cleanup Professionals requests that the Respondent's Motion to Seek Oral Testimony be denied.

Respectfully submitted,
Board of Registration of Hazardous
Waste Site Cleanup Professionals,
By its Attorney,


Lynn Peterson Read
BBO No. 551671

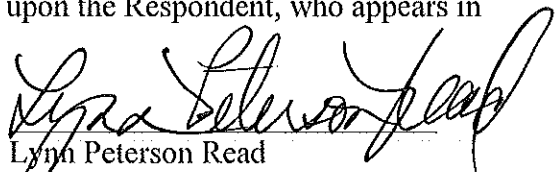
Board of Registration of Hazardous
Waste Site Cleanup Professionals
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Date: October 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this date a true copy of the above Opposition to Motion to Seek Oral Testimony was served by electronic mail upon the Respondent, who appears in this action *pro se*.

10/1/2010
Date


Lynn Peterson Read