

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

In the Matter of:)
)
)

James J. Decoulos,
Respondent)
)
_____)

Docket No.: LSP-10AP-01

**AFFIDAVIT OF JAMES J. DECOULOS IN SUPPORT
OF RESPONDENT'S MOTION TO SEEK ORAL TESTIMONY**

My name is James J. Decoulos and the following facts are true to the best of my knowledge, information and belief.

1. Complaint 05C-07 is the disciplinary action that the Board of Registration of Hazardous Waste Site Cleanup Professionals (the "Board") is currently pursuing against me as set forth in the Order to Show Cause and the Proposed Order Finding Sufficient Grounds for Discipline dated January 8, 2010, which I received on January 12, 2010.

2. Information on my license as a Hazardous Waste Site Cleanup Professional, otherwise known as a Licensed Site Professional (LSP), is available at the Board's web site. The listing shows that Complaint 05C-07 is pending against me. A copy of the listing, which is available to the public, is attached hereto as Exhibit A.

3. On February 24, 2010, I received an email from April Turcotte which informed me that the February 2010 LSP Association Newsletter, Volume 17, Issue 1, was available online for viewing.

4. The Newsletter contained an article from Lynn Peterson Read regarding Complaint 05C-07 (the “Article”). The Newsletter is attached hereto as Exhibit B.

5. Ms. Read stated in her Article that the LSP performed an evacuation of LNAPL from an impacted monitoring well and that “LNAPL returned within a few days”.

6. After two evacuations of well BP-5RR on April 24, 2003 there was no LNAPL that returned to the well. *See* Board Exhibit B-21 and Respondent Rebuttal Exhibit RR-37.

7. On May 14, 2003, twenty (20) days after the evacuation of LNAPL from well BP-5RR, I observed LNAPL in well BP-5RR. *See* Board Exhibit B-21 and Respondent Rebuttal Exhibit RR-37.

8. Ms. Read stated in her Article that the “Town DPW and MassDEP inspected the site with the LSP and traced the sheen upstream to the outfall of the storm water drainpipe that passes in front of the Site.”

9. Ms. Read’s allegations were unsubstantiated and I disagree with her statement as to where the stormwater collection was impacted.

10. On May 16, 2003, I notified the Carver Fire Department (the “CFD”) and the Massachusetts Department of Environmental Protection (“MassDEP” or the “Department”) of a sheen on the surface of South Meadow Brook near the Eagle Gas Site and requested their assistance to identify the source.

11. Mark Jablonski of MassDEP responded to the notification of a sheen on May 16, 2003.

12. The Carver Department of Public Works (the “Town DPW”), the CFD, Mr. Jablonski and myself conducted visual observations and headspace screenings of stormwater structures within the Main Street (Route 58) right-of-way upstream of the stormwater outfall.

13. The stormwater collection system which discharges into South Meadow Brook begins near Town Hall and flows in a southeasterly direction past the Eagle Gas Site.

14. There are two drainage manholes (or “DMHs”) and three catch basins (or “CBs”) for the stormwater collection system that passes in front of the Eagle Gas Site.

15. I have identified the stormwater structures in blue on an amended version of Exhibit RR-8, which is attached hereto as Exhibit C.

16. The headspace inside the DMH in front of the Eagle Gas Site located 48 feet north of utility pole #147 (“DMH 1”) had no positive response from the Department’s MiniRAE 2000 portable photo-ionization detector (PID) on May 16, 2003.

17. None of the headspace screening of the three CBs in front of the Eagle Gas Site exhibited any positive response from the PID on May 16, 2003.

18. The DMH located due east of the three underground storage tanks (USTs), approximately 29 feet north of the Eagle Gas sign, and approximately 28 feet north of utility pole #148 (hereafter referred to as “DMH 2”) exhibited a negligible response of 0.5 parts per million (ppm) from the PID. There did not appear to be any visual impact to the interior piping of DMH 2.

19. The next downgradient stormwater collection system structure was a DMH in front of the residence now or formerly owned by Paul Malley at 133 Main Street. The DMH is located approximately 16 feet southeast of utility pole #149 and 51 feet southeast of the easterly most corner of the Eagle Gas Site (hereafter referred to as “DMH 3”).

20. On May 16, 2003, a headspace screening of DMH 3 exhibited a positive response of 27 ppm and it was visually evident that the interior of the structure was contaminated.

21. On May 16, 2003, the headspace reading of DMH 3 was 54 times higher than the headspace reading of DMH 2.

22. Approximately nine (9) feet northwest of DMH 3 is a CB which discharges directly into DMH 3. The CB is located approximately seven (7) feet southeast of utility pole #149 and nine (9) feet east of a concrete bound (hereafter referred to as “CB 4”).

23. On May 16, 2003, a headspace screening of CB 4 exhibited a positive response of 24 ppm and it was visually evident that the interior of the structure was contaminated.

24. After inspecting and screening the interior of the stormwater collection system on May 16, 2003, I conducted a boring investigation on June 2, 2003 to determine if diesel fuel was migrating underground outside the stormwater collection system in a preferential pathway and bypassing DMH 2.

25. My findings of June 2, 2003, together with groundwater sampling conducted on June 12, 2003, were summarized in an Immediate Response Action Status Report that has been presented by the Board as Exhibit B-21.

26. Based upon my investigations in May and June of 2003, it is my opinion that the contamination at the stormwater outfall which caused the sheen on the surface of South Meadow Brook originated at CB 4.

27. Ms. Read goes on to state in her Article that I “did not document any sampling or analysis of sediment from the catch basins of the storm drain system, nor did he/she obtain fingerprint analyses of the contamination in the brook to compare to the diesel fuel release.”

28. Ms. Read’s allegations were unsubstantiated and I disagree with the statements in Paragraph 27.

29. On July 21, 2004, I documented my sampling and analysis of sediment from CB 4 in an email to Cynthia Baran of MassDEP. *See* Exhibit RR-30.

30. At a meeting with the Complaint Review Team (CRT) for the Board on December 12, 2007, I described my efforts to obtain fingerprint analysis of contamination at the brook to compare with the fresh diesel release using new techniques presented at the Board approved course entitled “Environmental Chemistry and the Emergence of Forensic Geochemistry”. I documented that meeting with a letter report that has been presented as Exhibit RR-40. Neither of the two laboratories I used were able to provide the fingerprint analysis which I was instructed was easily available.

31. Ms. Read states in her article that “at no time did the LSP compare the invert elevations to groundwater elevations measured at the site.”

32. Ms. Read’s allegations were unsubstantiated and I disagree with the allegations described in Paragraph 31. *See* Exhibits B-42 and RR-11.

33. Ms. Read states in her article that “the LSP failed to implement MassDEP’s repeated requests for IRA Modifications to delineate the extent of the LNAPL”.

34. Ms. Read’s allegations were unsubstantiated and I disagree with the allegations described in Paragraph 33. *See* Exhibits B-42 and RR-11.

35. Ms. Read states in her article that “The LSP also failed repeatedly to comply with DEP’s requirements to provide an active system for the recovery of LNAPL to control and mitigate a condition of Substantial Release Migration at the site”.

36. Ms. Read’s allegations were unsubstantiated and I disagree with with the allegations described in Paragraph 35.

37. Active systems for the recovery of LNAPL were proposed as an alternative in an IRA Plan Modification dated June 15, 2004 (Exhibit B-33); in an IRA Plan Modification on November 5, 2004 (Exhibit B-37); and as the primary recovery solution in the mandated recovery trench constructed in December of 2004 and documented in the IRA Status Report dated May 6, 2005 (Exhibit B-49).

38. There was no potential for Substantial Release Migration until after MassDEP denied my two remedial designs in 2004 (Exhibit B-33 and B-37).

39. Ms. Read states in her article that “The LSP never actually conducted active recovery of the LNAPL”.

40. Ms. Read’s allegations were unsubstantiated and I disagree with the allegations described in Paragraph 39.

41. As described in Paragraph 50 of my Rebuttal Testimony dated September 22, 2010, within four months of installing the MassDEP mandated recovery trench in December of 2004, over 8,000 gallons of diesel fuel LNAPL and groundwater were actively pumped from the Eagle Gas site under the supervision of Paul B. Wright. *See also* Pre-Filed Direct Testimony of Paul B. Wright and photographs 132 - 140 of Exhibit RR-2.

42. The CRT which investigated the complaint filed against me by Eagle Gas, Inc. (Complaint 05C-07) consisted of Deborah Farnsworth, Robert Luhrs and Lynn Peterson Read.

43. Mr. Luhrs and Ms. Read conducted an inspection of the Eagle Gas Site on June 26, 2008 and personally witnessed how spills of gasoline, diesel fuel or motor oil can be transported by surface flows to CB 4. *See* photographs 155 - 162 of Exhibit RR-2.

44. On May 18, 2010, I reviewed the files of the Board regarding Complaint 05C-07 at their office located on the third floor of One Winter Street in Boston, MA.

45. At the file review on May 18, 2010, I read for the first time a letter from Ms. Read to Shephard S. Johnson, Jr. dated August 15, 2007. *See* Exhibit R-12 of my Direct Testimony dated September 22, 2010.

46. The Board's office is located in the same building as MassDEP's headquarters; shares similar spaces; and uses common office equipment.

47. In order to conduct the file review at the Board's office it was necessary for me to check in at the front desk of MassDEP and gain permission to access the Board's space.

48. MassDEP and the Board operate under the same administrative and budget umbrella of the Massachusetts Executive Office of Energy and Environmental Affairs.

49. In a meeting of the Board on July 23, 2009, Chairperson Janine Commerford was recorded as stating that "the LSP Board staff would be considered along with MassDEP staff in this overall budget review." *See* approved Board minutes as Exhibit D.

50. On August 4, 2010, I received a Response to James J. Decoulos's Request for Production of Documents from Ms. Read. *See* Exhibit E.

51. In her August 4th response, Ms. Read provided General Objection A, which she relied on for an additional eight times in her responses. The substance of the objection was that the "LSP Board is a separate agency from MassDEP and has no control over any document in the possession, custody or control of MassDEP or any MassDEP employee."

52. I made written requests to Thomas Potter, Mark Jablonski and Fred Civian on September 8, 2010 to respond to questions for Pre-Filed Direct Testimony on this matter.

53. On September 9, 2010, I received an email from Michael Dingle of the MassDEP Office of General Counsel who stated that MassDEP employees Thomas Potter, Mark Jablonski and Fred Civian would not be available to testify as witnesses in this proceeding. I responded to

the email the same day. Mr. Dingle also confirmed on September 20, 2010 that MassDEP employee Jonathan Hobill would not be available to testify as a witness in this proceeding. *See* email correspondence as Exhibit F.

54. Since 2005, I have been an active member and past chairman of the Loss Prevention Committee of the LSP Association and have reviewed hundreds of MassDEP audits.

55. Key components of MassDEP audits are an evaluation of the nature and extent of contamination; identification of the sources of contamination; and the identification of preferential pathways for the migration of contaminants through unsaturated soil, air and underground utilities.

56. Frederick Civian is the lead stormwater coordinator at MassDEP and “is responsible for reducing pollution carried by stormwater.” *See* Exhibit G.

57. Mr. Civian assists municipalities in complying with stormwater regulations issued from the U.S. Environmental Protection Agency. *See* Exhibit H.

58. The impacted stormwater collection system that passes by the Eagle Gas Site lies within the existing and historic right-of-way known as Main Street or Route 58 and is controlled by the town of Carver and the Massachusetts Department of Transportation.

59. Mr. Civian “helped develop the LSP Board’s licensing program, procure and oversee various MassDEP’s hazardous waste site assessment and remediation contracts, write the first set of rules for Small Quantity Generators of Hazardous Waste, and expand the Waste Site Cleanup program.” *See* Exhibit I.

60. On September 15, 2010, Ms. Read informed me in an email “that as the prosecuting attorney, I may not be called as a witness.”

Signed under the pains and penalties of perjury this 29th day of September, 2010.

A handwritten signature in black ink, appearing to read "James J. Decoulos". The signature is written in a cursive, flowing style with a large initial "J" and "D".

James J. Decoulos

EXHIBIT A



Board of Registration of
**Hazardous Waste Site
Cleanup Professionals**

Contact Info

Name	LSP Number	Phone Number	E-Mail	Company
Decoulos, James J	9360	(617) 489-7795	jamesj@decoulos.com	Decoulos & Company

License Info

License Status	Date Licensed	Expiration Date*
ACTIVE	10/17/1995	7/30/2011

Disciplinary History

Complaint Date	Complaint Number	Action	Action Date	Comments	Final Action
12/15/2005	05C-07	OTSC	1/11/2010		NO
		Case on appeal	2/2/2010		NO

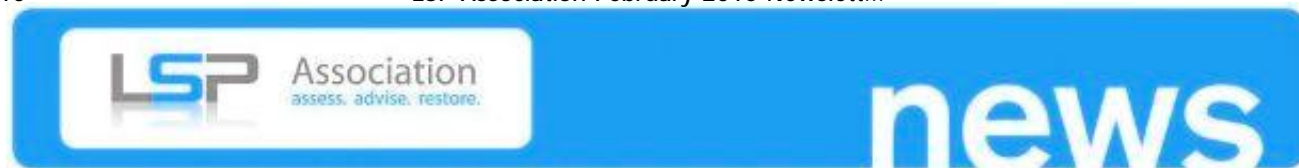
DEFINITIONS

If you have questions or seek additional information about the Contact, License, or Disciplinary information listed above, please contact the LSP Board at (617) 556-1091 or LSP.Board@state.ma.us.

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* Please note that under certain circumstances LSPs can obtain 90-day extensions to their licenses to allow them to continue to practice past their license expiration date. To determine whether an LSP has obtained such an extension, please contact the LSP Board at (617) 556-1091 or LSP.Board@state.ma.us.

EXHIBIT B



Volume 17/Issue 1

February 2010

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President's Message

by Andy Irwin
February 2010

BECAUSE WE'RE THE PROFESSIONALS, THAT'S WHY!

"Optimism is the madness of insisting that all is well when we are miserable."

VOLTAIRE, Candide

"If everything seems to be going well, you have obviously overlooked something."

ANONYMOUS

Change was the norm for 2009, with interspersed highs and lows as some transitions made for opportunities and dreams and others for sadness and setbacks. We note the recent passing of Kevin Kiernan, an attorney at MassDEP's Southeast Regional Office, and our condolences go out to his family. The MassDEP and many companies represented by our membership have had to reduce staff to respond to conditions in the economy, and my hopes are with those affected that they will find positive opportunities. Change is not always bad, but it is going to happen, and how we prepare ourselves for that inevitability is often the difference between good and bad outcomes. So looking to the future....

Maintaining the Professional Practice

The demographics in 1993 included a group of 450 or so individuals with at least 8 years of experience who were eligible to become LSPs. Though some will not admit it, they are now blessed with a quarter century, or more, of experience and are not getting younger. And I know a few who would rather be playing golf than filing RAOs. So what does this ominous trend augur for the population of the LSP community over the next 10 years? or 20 years?

Though the backlog of disposal sites is diminishing, there is a steady stream of new sites discovered each year. As Professionals, are we preparing and mentoring the next generation of potential LSPs to take over the responsibility of this very important privatized public service? Are we giving them the opportunities to learn and expand their horizons with new developments in science and technology, and to develop their judgment and sensibilities regarding the implementation and interpretation of policy and regulations?

As an organization, the LSPA has initiated a long-term initiative with the Education Committee to develop training courses that may serve as a "Core Curriculum" for new learning by Associate Members and as reinforcement of knowledge for those veteran

LSPs who took those courses long enough ago that there might now be a few cobwebs in the corners. An example of this refocused education effort is the Remediation Waste Management Course which had not been offered in over 12 years. This is a subject area fundamental to the MCP practice, and yet there may have been "aha moments" - or even "holy @\$%!" moments - for not just a few of those attending as MassDEP and the EPA explained their interpretations of the applicable regulations and policies.

This "next generation" theme for our professional practice is one that has been raised before, but I would not be doing my job as President if I were to let it fall by the wayside. The LSPA Board and its Education Committee call upon all of you Professionals to contribute to this curriculum effort with your participation in the identification of those core areas and in the actual preparation and teaching of courses. Equally as important is the need for the companies which employ younger professionals to encourage them, financially and otherwise, to get the training they need to apply in their work as they build their careers in the Profession. Along these lines, the Education Committee will soon be offering another "MCP for Everyone" training session, and a new training program specifically targeted at individuals applying to become LSPs which discusses the application process and considerations about being licensed.

Maintaining Expectations

I want to acknowledge the amount of effort put in by members of the CAM Workgroup. Many of us struggle to appreciate the scientific and procedural clarifications the Revised CAM entails, and to understand how this will affect our practice. And as the compliance checklist has become even more detailed we need to pause for a moment to consider the issue of certifications offered by laboratories, and whether the laboratories are sufficiently accountable for those certifications.

As LSPs, we rely upon our laboratory service providers to provide accurate, suitable quality data. However, I have been advised that some knowledgeable individuals have conducted random sampling of laboratory data packages and have found instances where these CAM certifications may have been inaccurate. Thus, it falls upon the LSP to be educated on how to check these packages for at least the basic requirements and to clearly set expectations regarding performance with the laboratory. Unfortunately, there is no regulatory responsibility for accountability of the laboratories to MassDEP even though they are State-Certified. That certification applies only to samples of water supplies being analyzed for potability, and not to environmental media samples from MCP Sites; thus, there is no connection between certification and the CAM requirements. MassDEP has for years indicated that it does not have the resources to establish regulations and enforce conformance by laboratories for environmental media samples from MCP sites; once again, the LSPs - as the MCP Professionals - are left holding the bag.

The Association has considered what it can do in this situation. We expect that the laboratories which provide analytical services to LSPs will act with responsibility and professionalism, and we encourage laboratory trade organizations like ITLA to encourage ethics and education within the laboratory community. We value the historically strong support and involvement of our laboratory Associate Members, and I do not mean to disparage any particular laboratory. However, the LSPA will be running a series of technical articles in our newsletter aimed at educating LSPs,

many of whom do not have strong chemistry backgrounds, about how to evaluate data packages for CAM compliance, because we as LSPs are directly accountable to our clients, the MassDEP and the LSP Board for compliance with MCP data usability requirements. Data users may also want to think about whether contractual agreements with their service providers can be used address this situation.

Maintaining the Public Trust

In November 2008, the LSPA Newsletter included an article advising LSPs to be wary of unscrupulous contractors ([Click Here to Read](#)). A year later, in November 2009, the Massachusetts Attorney General issued a [press release](#) announcing that, following an investigation by the Environmental Crimes Strike Force, an Environmental Contractor had been indicted for Larceny and False and Misleading Advertisements. This case reemphasizes the need for both caution and integrity in our dealings with both our clients and other service providers.

Maintaining a Transparent Organization

The Association has convened the Nominating Committee for developing the slate of candidates for the 2010 election of Directors. Based on input from the Past Presidents Council, the Board of Directors recently acted to expand the composition of the Nominating Committee to include both an Associate Member and a Full Member who are not current members of the LSPA Board as well as the President Elect, one other Director, and a Past President.

I call upon all of you to consider the opportunity of getting involved in the leadership of the organization by contacting Jim Young (JYoung@environcorp.com) if you are interested in serving on the LSPA Board of Directors. If that is a larger commitment than you can make at present, there is always the opportunity to get involved with one or more of our LSPA Committees.

"Individual commitment to a group effort - that is what makes a team work, a company work, a society work, a civilization work."

VINCE LOMBARDI

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Are You (and Your Clients) Getting All of Your Brownfields Tax Credits?

By: Ned Abelson

It would be an understatement to say that business and transactional work is not as "robust" now as it has been in the relatively recent past. Businesses all across the board are trying to cut costs, operate more efficiently, and find additional income wherever they can. And, tax season is almost upon us.

If you and/or your clients have worked on significant MCP projects and have reached a Permanent Solution or Remedy Operation Status, then you may be able to help your clients obtain valuable Massachusetts Brownfields tax credits. Our clients who were not aware of the available opportunities have been delighted when we have identified qualifying projects for them.

Massachusetts first created a Brownfields tax credit in 1998 to encourage the redevelopment of Brownfields sites. This credit is available to certain taxpayers who clean up qualifying sites in Massachusetts. The tax credit can be up to 50% of the net cost of the work. Based on the most recent statutory amendments, the work must be started on or before August 5, 2011. This article provides a brief summary of the Massachusetts Brownfields tax credits, as well as several of the requirements that must be met to obtain them.

The Massachusetts Brownfields Tax Credits

The 1998 Massachusetts Brownfields bill provided certain taxpayers with the ability to obtain tax credits against their Massachusetts income tax liability; these credits were meant to serve as an incentive to clean up Massachusetts Brownfields sites. In 2000, 2003 and 2006, the statute concerning these tax credits was amended. In addition, the Massachusetts Department of Revenue (the "DOR") has issued certain Technical Information Releases concerning the statute and its amendments. The information presented below is based on these materials.

- **The Brownfields Tax Credit is now transferable.** The 2006 amendments revised the original statutory language so that all or any portion of the Massachusetts tax credits may be "transferred, sold or assigned...." This change is viewed by the DOR as being effective as of June 24, 2006, and has been very helpful in increasing the usefulness of these tax credits. In particular, since the credits became transferable, they are now useful to non-profit organizations. The revised statute also sets forth the mechanism for implementing a transfer, a procedure which involves the DOR.
- **The taxpayer must "commence and diligently pursue" the relevant environmental response action(s) on or before August 5, 2011.** This language is fairly self-explanatory, particularly in comparison to much of the techno-speak often encountered in environmental and tax regulations.

In light of the complicated ownership structures associated with some real estate projects, it is also important to try to structure a transaction so that the party performing the relevant response actions (i.e., the party entitled to the credits) will also be the party with income tax liability against which the credits may be offset.

- **A Permanent Solution or Remedy Operation Status for the site must be achieved and maintained in compliance with the MCP.** In other words, the cleanup must for the most part be completed before the tax credits are available. As all LSPs know, a Permanent Solution means that there has been remediation at the disposal site which has achieved a condition of at least No Significant Risk, while Remedy Operation Status applies to sites where a remedial system that relies on active operation and maintenance (the definition for which is broader than you might expect) is being implemented for the purpose of achieving site closure.

Unaddressed and Open Issues

Neither the Brownfields bill as amended (the "Statute") nor the guidance issued by the DOR directly addresses the possibility that more than one MCP "site" may be present at a particular property. Thus, neither the Statute nor the DOR's guidance specifically addresses whether the credits may be claimed for individual MCP sites for which MCP closure has been achieved at a particular property, even though MCP closure may not have been achieved for (a) the property as a whole or (b) all of the MCP sites at that property.

Conversely, because neither the Statute nor the DOR guidance addresses the possibility of more than one MCP site at a particular property, those materials do not provide specific guidance regarding whether costs associated with more than one MCP site can be added together or "stacked," so that the cumulative total of those costs can be taken into account when calculating the amount of the tax credit for a particular property. There has, however, recently been some favorable precedent concerning this question.

- **If an Activity and Use Limitation is used to close out a site under the MCP, then a credit of 25% of the net response and removal costs is permitted.** If no Activity and Use Limitation is used, then the credit increases to 50% of the net response and removal costs.

One interesting question is what happens if an AUL is used for only part of the relevant property. The Statute and the associated DOR guidance materials do not seem to anticipate this possibility. Here, DOR's position appears to be that if any portion of an MCP site is subject to an AUL, then the costs

- **The net response and removal costs must be incurred between August 1, 1998 and January 1, 2012.** These dates are clear, but in some cases the question of what are "net response and removal costs" that have been "incurred" can be challenging.
- **The relevant property must be owned or leased by the taxpayer for business purposes, and the property must be located within an "economically distressed area."** The term "economically distressed area" is defined in the Statute. A list of these areas is available at <http://www.mass.gov/dep/cleanup/eda.htm>.
- **The net response and removal costs must be no less than (i.e., must be equal to or greater than) 15% of the assessed value of the property prior to "response action on or before remediation."** This one sounds easy, but often is not. First, you have to know the assessed value of the property prior to the response action/remediation, and you have to identify the date when the response action/remediation began. A second critical factor is the definition of the term "property." Often, the relevant tax parcel (i.e., the property for which an assessed valuation is known) is not the same as the relevant MCP site (i.e., the property in connection with which the relevant "net response and removal costs" have been incurred). As a result, interesting valuation and allocation questions often arise.

The taxpayer must be an Eligible Person, as defined by Chapter 21E. An Eligible Person is defined by Chapter 21E, in part, as an owner or operator of a site who (a) would be liable under Chapter 21E solely because that party currently owns or operates the site, (b) did not cause or contribute to the contamination at the site, and (c) did not own or operate the site at the time of the contamination. In other words, only innocent owners or tenants of the site can qualify for the Brownfields tax credit, and those parties must not have owned or operated the site at the time the relevant contamination was released.

This approach is consistent with two of the original goals of the Statute, namely that new parties be encouraged by the tax credits to take on Brownfields sites, and parties who initially caused the contamination not be allowed the benefit of these credits.

- The maximum amount of the credit allowed in any taxable year cannot exceed 50% of the tax owed by the taxpayer.
- A taxpayer may carry over any unused portion of the credits from one tax year for up to five taxable years. With some other types of tax credits, unused tax credits may be carried forward for use in any subsequent taxable year. However, the Statute specifically limits the carry-forward period for the Brownfields tax credits to five years.

The amount of any state funds received from the Massachusetts Redevelopment Access to Capital Program and/or the Massachusetts Brownfields Redevelopment Fund is deducted from the expense base for which the credit is available. This is so even Eligible Persons do not get a double benefit in connection with cleaning up a particular site.

There are additional requirements in the Statute concerning what happens if the taxpayer is subject to enforcement action under the MCP, and if MCP closure is not maintained at the relevant site. There are also a number of other details in the Statute that need to be considered when evaluating whether the Massachusetts Brownfields tax credits are available for a particular site.

Conclusion

Although the requirements to qualify for the Massachusetts Brownfields tax credit are many in number and sometimes complicated, if you or your clients have spent the money and they qualify, then they should be sure to get the credits they deserve. Based on our experience and recent communications we have had with public officials, we believe many real estate developers and other eligible parties are not taking full advantage of the available opportunities. Steering your clients toward the Brownfields tax

credits could provide them with a valuable service.

Ned Abelson is a Director with the Environmental Law Group at Goulston & Storrs in Boston.

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Dealing With Asbestos In Soil Before the MCP AIS Amendments

by James Young, LSPA President Elect

A recent soil remediation effort implemented under Phase IV of the MCP, designed to address metals-impacted soil, unexpectedly encountered buried debris containing suspected asbestos containing material (ACM). Thanks to considerable assistance from MassDEP Bureau of Waste Prevention (BWP) and Bureau of Waste Site Cleanup (BWSC) regional staff, the remedial effort experienced only short delays, and was brought to a successful conclusion. The LSPA's subsequent consultation with BWSC policy representatives in Boston has led us to conclude that the events and procedures at this site could provide LSPs with a good example of how to deal with asbestos in the environment during this period while the proposed Asbestos in Soil (AIS) regulations are still in limbo, and so are recounted here to provide insights on some of the issues involved and possible solutions.

Excavation of metals-contaminated soil at the site stopped when fragments and sections of what appeared to be transite pipe debris and roofing tar in apparent demolition debris were encountered at a depth of approximately nine feet. The potential for asbestos was recognized by the remedial contractor, who was also licensed for asbestos abatement, and a number of questions immediately arose. While asbestos is regulated under the MCP (i.e., it is on the Massachusetts Oil and Hazardous Materials List [MOHML]), should work proceed under the provisions of the MCP, or under the policies and procedures of the BWP asbestos program? Is the condition reportable under the MCP? Asbestos has no Reportable Concentration, but there is a Reportable Quantity (RQ), which is one pound. How does one determine if the RQ has been exceeded? Asbestos analytical results for pieces of solid material such as transite pipe are reported in percent asbestos content, a volume-based result - but how is this compared to a mass-based reporting threshold? On the other hand, asbestos analytical results for soil and debris are typically reported as asbestos "present" or "absent," so how does one evaluate whether the one-pound RQ has been exceeded on the basis of non-quantitative analytical results?

Presuming that the asbestos should be regulated under the MCP, there were also questions concerning the actual process. Does the presence of asbestos represent a separate release? If so, and it can be determined somehow that the volume of ACM is less than 20 cubic yards, is it possible to deal with the ACM under an LRA, and eliminate the need to notify MassDEP? Logistically, how should the excavation spoils be handled? Since there is no numerical Method 1 standard for asbestos, how is it determined when excavation is complete (i.e., is post-excavation sampling appropriate, and if so, how are the samples tested)? Should the excavation be expanded beyond the limits identified for the metals impacts in order to "chase" visible suspected ACM, or should the remedial effort remain focused on the metals impacts, and the suspected ACM be dealt with using different criteria?

An asbestos assessment consultant was contacted for advice; who in turn recommended contacting DEP's regional BWP office. BWP noted that in situations where the presence of asbestos is known in advance, there is a requirement to provide ten days notice to BWP before implementing an asbestos abatement. However, in situations such as this one, where there was no foreknowledge of asbestos, and delays in field work would result in incurring significant additional cost, it was possible for BWP to issue an Emergency Waiver that would allow work to continue quickly. However, in order to issue the Waiver, BWP required the submittal of an asbestos abatement work plan (which in turn required that the asbestos assessment consultant first visit the site to assess conditions and abatement strategies) and an Asbestos Notification Form (ANF, similar to the BWSC Release Notification Form, RNF, and also available as an eDEP submittal). In turn, the filing an ANF requires that a receiving facility for the ACM be identified (although this can be amended later, if plans change).

The initial lessons learned at this site were that when asbestos is first identified (or suspected), preliminary efforts should focus on getting an asbestos assessment consultant on site as quickly as

possible to sample material and confirm the presence of ACM, and to allow the asbestos consultant to gather sufficient information about site conditions to quickly develop an asbestos abatement plan. Concurrently, an effort should be made to identify a disposal facility which can accept both the ACM and the contaminant(s) of original concern, and to file the ANF. BWP should also be notified of the conditions discovered, and of the intention to submit a work plan requiring rapid review in the near future. Upon review and approval of the work plan (which for this site was graciously provided within hours of its receipt at BWP), an Emergency Waiver will be issued.

In the course of conversations with BWP, the question was raised as to whether the remedial excavation could stop upon reaching the limits of the metals impact that was the original target of the remedial effort, or whether the excavation had to 'chase' asbestos, which had the potential for much wider distribution. BWP said that for its purposes, the excavation need not be expanded, but that all visible suspected ACM should be removed from the walls and floor of the excavation as it existed for the metals remediation. However, BWP suggested that BWSC also be consulted on this issue, as well as on the issue of how to comply with other aspects of the MCP.

The regional BWSC contact indicated that management of asbestos sites under the MCP was typically on a case-by-case basis, but that for this site an MCP notification was not going to be required. This decision was based on the fact that the site was already well down the BWP compliance path, as well as on the fact that asbestos at the site was neither exposed at the surface nor obviously friable (i.e., unweathered transite pipe and tar-based roofing materials). For sites with friable asbestos at the surface, BWSC said that a 2-hour MCP notification was typically required.

BWSC also agreed that the excavation did not need to address the presence or distribution of asbestos beyond the requirements of the BWP, but went on to note that the additional human health risks associated with asbestos had to be taken into account as field work continued, and that asbestos should be included as a contaminant of concern in future MCP submittals. Because the asbestos was in the same depth interval as the metals contamination (i.e., was part of the same "site"), BWSC said that the asbestos could not be treated as a separate release that might be addressed through an LRA. Obviously, at sites with friable asbestos at the surface, constituting a two-hour notification condition, an LRA would also not be appropriate.

Based on this advice, the requisite requirements and paperwork were rapidly completed, which allowed the excavation of metals-impacted soils to resume after only a two-day delay. However, the LSP (who lacked asbestos awareness training) had to oversee and supervise the remedial effort from outside the exclusion zone established by the asbestos assessment consultant, and four air monitoring stations were established around the excavation area to screen for asbestos in the air. Had the remedial excavation contractor not been licensed for asbestos abatement, a different excavation contractor would also have been required.

In addition, excavation spoils were no longer stockpiled on plastic for subsequent loading into tractor dumper trucks, but were instead cast directly into double-plastic-lined roll-off boxes intended specifically for transport of ACM. When recovery of metals-impacted soil was completed, all visible potential ACM in the walls and floor of the excavation was removed, and the excavation was backfilled, loamed, and seeded.

Once the metals/asbestos-containing material was shipped off site, a Phase IV Completion report was submitted that not only summarized the work that was done in conformance with the Phase IV Remedy Implementation Plan (RIP) for the metals contamination, but also described how site work accommodated and dealt with the unanticipated ACM. Further groundwater monitoring is now required to monitor the effectiveness of the removal of the metals-impacted soil. If monitoring demonstrates that the removal of metals in soil has been effective in decreasing metals concentrations in groundwater, submittal of an RAO-A will include a risk characterization that addresses not only the metals in soil and groundwater, but the presence of asbestos in soil.

No additional data will be collected on the asbestos debris. Because the asbestos is below grade, and

represents a risk only when exposed (as an inhalation risk), it can be shown to represent No Significant Risk under current (buried) conditions. However, because it is shallower than 15 feet below grade (in "potentially-accessible" soil), site closure will also require an AUL to serve as warning to future owners/operators and future utility/maintenance workers (through notice to holders of recorded interest in the site property) of the presence of the hazard. BWSC also noted that should the soil removal prove not to have been effective in reducing groundwater concentrations sufficiently to represent a Permanent Solution, and the site qualifies only for an RAO-C, it may be appropriate to implement a "voluntary" AUL prior to site closure.

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Considering RAOs...

by Lisa Alexander, MassDEP

This article provides some reflections on the recent Audit Case Study training, discusses RAO invalidation and highlights two Natural Resource Damage Assessment cases, one in Connecticut and one in Massachusetts.

SLOGGING THROUGH THE SNOW...

On December 9th, we wrapped up the Audit Case Study training for this year at the Northeast Regional Office in the middle of a surprisingly messy snowstorm. Although the snow was pretty through the conference room windows, it made for terrible driving. In the future, if a storm event should coincide with our training, assume it will be canceled if MassDEP offices are officially closed on that morning for all but emergency personnel. In cases where adverse weather is predicted in advance of the training, contact April Turcotte at the LSPA offices at [781/876-6233](tel:7818766233) to determine whether the training has been postponed.

The Audit Case Study training prompted two questions that are nearly always asked about the subject cases --

- What is its current status? and
- Was the Response Action Outcome (RAO) Invalidated?

What is the current status of the case?

The Audit of this plating site prompted additional investigation that revealed hexavalent chromium had reached the river; an Immediate Response Action was initiated in that area. Following adjustments to the groundwater recovery system, the rest of the site is back in compliance and the site remains in Phase V, as the contaminant plume appears to have stabilized.

Was the RAO Invalidated?

There has been no RAO for this case yet. The original Audit was of the Comprehensive Response Action with two Status reports on file.

MassDEP has not used an Invalid RAO in the Audits Case Study training in many years, yet there always seems to be great interest in the answer to this question during the training.

WHEN IS AN RAO "INVALID"?

A quick data base query shows that of more than 11,000 RAOs audited and/or screened since the start of the program, fewer than 200 have been deemed "Invalid". Most of those sites were brought back into compliance - either by performing additional assessment that supported the original Opinion, or by conducting additional assessment and/or remediation work and/or risk reduction measures. The majority of the LSPs who have had an RAO invalidated have only had one such case.

In the past when the Audit Case Study training has featured sites with invalidated RAOs, the sites were chosen because:

- They were relatively interesting cases;
- MassDEP staff working on the training were familiar with the cases and had involvement with the cases after the RAOs were submitted; and
- Additional assessment after the RAO on yielded a substantially different "conceptual site model" than originally presented, illustrating how relatively few additional data points made a great difference in understanding the site and supporting the response action submittal.

Feedback from participants and the LSPA noted that these cases were often so egregious that they made poor case studies, and that more ambiguous, mainstream, or even "good" cases would be more informative as most LSP work was not as problematic as the cases selected. MassDEP agreed and has not used Invalid RAO cases in many years.

An RAO invalidation usually involves more than one violation and a high probability of current exposure risks at a site. Without getting into the specifics of particular cases, below are ten examples of combinations of violations found for individual cases that led to invalidation of the RAOs:

The RAO did not contain clear indication of site boundaries; the extent of release was not fully delineated; the furthest downgradient well had the highest contaminant concentration; there were multiple problems with execution of two Grants of Environmental Restriction, including that the use of a private well for drinking water was not properly eliminated.

- The nature and extent of contamination was not fully delineated; separate phase product was still present on site up to thicknesses of 0.63 feet following shutdown of the recovery system.
- Class C RAO (filed in 1996) did not have any periodic evaluations of the remedy (a Temporary Solution which relied on an active treatment system that had been shut down in 2001); indoor air samples collected in 2006 detected volatile organic compounds attributable to the disposal site at Imminent Hazard levels in the on-site building.
- Site was located in a GW-1 area with contaminant concentrations at the site exceeding Method 1, GW-1 standards; Exposure Point Concentrations (EPCs) for soil exceeded S-2 and S-3 cleanup standards; there was no AUL but the RAO and risk characterization findings were based on restricted site uses and activities.
- Gasoline-contaminated site where a Class A RAO was submitted without elimination or control of sources; nature and extent of the oil and hazardous material in all evaluated media was not defined; a condition of No Significant Risk was not supported; conservative Exposure Point Concentrations were not identified.
- RAO was not supported by existing assessments; Risk Characterization did not include the vertical and horizontal extent of the oil and hazardous materials in all evaluated media; Exposure Point Concentrations were not clearly documented; Method 1 Risk Characterization did not compare Method 1 cleanup standards to EPCs; Risk Characterization did not evaluate the portion of the site within an area designated as part of a National Heritage Endangered Species Program as Rare Habitat; RAO boundaries were not delineated; several violations of Activity and Use Limitation documentation.
- Not all source areas for the release(s) were identified/discussed but sampling results suggest more than one source area (site now developed for residential use); extent of release unknown; contradictory groundwater flow information; groundwater contaminant concentrations below residential buildings not sampled; pre- and post-"treatment" sampling of groundwater showed increasing concentrations (from 34,000 to 62,000 µg/L PCE); vapor barrier and subslab ventilation system installed to mitigate vapor intrusion at one residence (with only one round of indoor air sampling) and other nearby residences within the area of the groundwater contamination were not evaluated.
- Failure to document that a Critical Exposure Pathway was mitigated or eliminated to the extent possible with air filtration units at one adjacent residence (elevated petroleum vapors remained in

indoor air at the residence despite operation of filters); failure to define the extent of the contaminant plume in groundwater and soil vapor; indoor air at a second additional residence was not evaluated despite GW-2 exceedences and elevated soil vapor contamination between the site and that residence.

- AUL audit determined that the terms of an AUL were not being maintained; several problems with the AUL instrument.
- Previous Notice of Audit Findings/Notice of Noncompliance had been issued with several requirements outlined to demonstrate that a condition of No Significant Risk had been achieved and errors in the AUL had been corrected - the PRP failed to respond; the RAO was based on sampling with analytical detection limits exceeding applicable Method 1 cleanup standards; failure to delineate the boundaries of the site; insufficient information to demonstrate that groundwater EPCs were below the relevant clean up standards.

As previously stated, it is not just one violation that causes MassDEP to invalidate an RAO. Sometimes, MassDEP outlines specific requirements to support an RAO at the end of an Audit, but when the requirements are not met, the RAO may be invalidated later. Invalidated RAOs often have several serious violations and often there are indications of significant risk either to human health, or particularly sensitive environmental receptors.

At the December training, Duff Collins reminded participants about the LSPA's Peer Review Program which is available to all LSPs as a "second pair of eyes" to review a submittal (see the November 2009 LSPA newsletter for more information and one LSP's experience with the program).

RECENT NATURAL RESOURCE DAMAGE ASSESSMENTS (NRD)

Old Southington Landfill, CT - Superfund Site

Background:

This former twelve-acre municipal landfill was operational circa 1920 to 1967, with different sections used for disposal of municipal, commercial and industrial waste, and wood and construction debris. From 1973 to 1980, after the landfill was closed by the Town and covered with soil to a depth of two feet, the landfill property was subdivided and developed into residential, commercial, and industrial properties. EPA placed the site on the National Priorities List (aka Superfund list) in September 1984.

In 1994, EPA issued the first Record of Decision (ROD) requiring relocation of residences and businesses that had been built on the landfill, plus construction of a landfill cap incorporating a soil gas collection system. The ROD also required further assessment of groundwater impacts.

Damage Settlement:

Two settlement consent decrees, formalized on November 23, 2009, call for cleanup work to proceed, and establish funding responsibilities among several PRPs to help finance the cleanup remedy.

Five PRPs identified as contributing the largest volume of waste will pay:

- \$500,000 to cover EPA's future oversight costs;
- \$537,000 to the U.S. Department of the Interior for federal NRD; and
- \$2,750,000 to the State of Connecticut for state NRD.

One decree requires the five primary parties to complete the cleanup remedy, including:

- Establishing environmental land use restrictions on properties or portions of properties where groundwater contamination concentrations exceed State of Connecticut Remediation Standard Regulations;
- Building ventilation systems, sub-slab depressurization systems, or similar technology, in buildings located over properties or portions of properties where groundwater contamination

exceeds the State criteria;

- Conducting groundwater monitoring in areas where the potential for vapor intrusion is a concern;
- Performing operation and maintenance and monitoring of engineering and institutional controls to ensure remedial measures are performing as intended and continue to protect human health and the environment in the long-term; and
- Conducting five-year reviews to ensure that health protection measures continue to be effective.

The second decree provides for 86 other PRPs to collectively pay \$4,248,450, to be deposited into a trust account, managed by the five primary PRPs. A portion of the money will be used to finance the State and Federal NRD, with the rest providing financial assurance for the remedy.

The full article can be viewed at:

www.epa.gov/region1/superfund/sites/oldsouthington.

Sutton Brook Landfill Tewksbury, MA - Superfund Site

Background:

The Sutton Brook Superfund Site (formerly "Rocco's Landfill") is a 40-acre landfill comprised of two large lobes and areas of contaminated soil. Sutton Brook flows between the two lobes. Municipal, commercial, and industrial wastes were disposed there from at least 1957 through approximately 1988.

Investigations conducted by MassDEP and EPA, beginning in the 1980s, revealed various contaminants, primarily volatile organic compounds and semi-volatile organic compounds in groundwater, surface water, soil and sediments. EPA placed the site on the National Priorities List ("Superfund") in 2001.

Recent Settlement with 49 Parties:

On December 22, 2009, the Massachusetts Attorney General's Office, the Executive Office of Energy and Environmental Affairs (EEA), the EPA, MassDEP, the US Fish & Wildlife Service (USFWS) and the U.S. Department of Justice (DOJ) reached a settlement with 49 parties to both cleanup the Site and compensate for NRD for injury to groundwater and wetlands at the site.

The monetary portion of the settlement includes:

- \$512,000 to reimburse MassDEP's past response costs and an obligation to pay for MassDEP's and EPA's future oversight costs; and
- \$1,650,000 in Natural Resource Damages (NRD) to the EEA and USFWS, as the state and federal Trustees, to restore injured resources to their baseline condition, compensate for the interim loss of resources, and reimburse the cost of conducting the damage assessments.

The settlement also requires:

- 20 of 49 responsible parties to primarily finance and perform the remedy selected in the 2007 ROD (expected cost approximately \$30 million);
- Excavation and consolidation of contaminated soil and sediment;
- Installation of caps at the two landfill lobes and a vertical barrier for groundwater diversion;
- Implementation of natural attenuation and active treatment of contaminated groundwater, plus institutional controls and monitoring; and
- Contribution by the other 29 responsible parties as cash payments toward the cost of financing the remedy and for other purposes.

One novel aspect of the settlement includes reduction of greenhouse gas emissions associated with the construction and operation of the remedy, based on an evaluation of potential cost savings (to be determined).

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Recap of 21J Fund Board Meeting: 21J Fund Depleted and Board Votes for Direct Pay

by Ray Leather, Regulations Committee

At the November 19th 21J Board meeting, it was announced that following the approval of the November reimbursements, the 21J Program would have a negative balance of approximately \$2.6 million for Fiscal Year (FY) 2010, which began July 1, 2009 and ends June 30, 2010. The 21J Program claims reimbursement account began with an appropriation of approximately \$16 million, which is approximately \$2 million less than last fiscal year. In October, under the 9C budget reductions, the claims reimbursement account was further reduced by over \$3 million. Other 9C reductions included cuts to the program's administration account and funding for the cities and towns grants program.

While the 21J Program collects between \$70 - \$77 million per year in annual underground storage tank fees and a 2.5 cent per gallon load fee, the Legislature only allocates a fraction of the revenue collected to the 21J Program. Due to the economic uncertainty for funding of the 21J Program, Nat LUST has suspended interim Claims funding for Claimants until further notice. This is not good news for the economy for a program that has provided approximately \$350 million for petroleum clean-ups since 1994.

2009 was a busy year for the 21J Board. In addition to increasing its meeting frequency to once per month to expedite the reimbursement process, the Board focused its efforts on fine tuning the program. Below is a summary of the more relevant revisions to the 21J Program regulations.

The 21J Board voted to approve a Direct Pay Policy to allow UST owner/operators to authorize direct payment to consultants and contractors. Under the Direct Pay Policy, which took effect on April 1, 2009, consultants and contractors can generally submit their invoices directly to the UST Program for reimbursement consideration. In addition, the Board also adopted a policy to enable Claimants to continue making Claims submittals to the 21J Program when they are unable to obtain an Owner Authorization (O/A) Form from the current owner of the USTs. The Board also adopted a policy to streamline the assignment of claim payments from an eligible claimant to another party.

The filing time for an Application for Eligibility was increased by the 21J Board from 180 days to 365 days from the date of reporting a release to the Massachusetts Department of Environmental Protection (MassDEP) and receiving a Release Tracking Number (RTN). However, although the Board approved the change in filing time for the Application for Eligibility, the actual regulatory change has not yet been finalized.

The Appendix 3 Reimbursement Fee Schedule was revised to clarify the guidance section regarding labor categories and allowable reimbursements for environmental response actions conducted in accordance with a request from the MassDEP.

The 21J Board voted to proceed indefinitely with the preference to Dispensing Facility Owner/Operators of one or two Dispensing Facilities. The preference provision provides for the priority processing of Claims submitted by claimants that own (or owned at the time of filing) at least one, but no more than two, Dispensing Facilities.

Effective October 30, 2009, the regulations were revised to increase the minimum Claim submittal threshold from \$5,000 to \$7,500. Accordingly, reimbursement Claims for less than \$7,500 will only be accepted once every ninety (90) days. Claims greater than \$7,500 may still be submitted once per month; however, no more than one Claim per month may be submitted.

In an effort to protect sensitive and confidential information submitted with Claims, the following forms

were revised to eliminate the need to provide the Applicant's full Federal Employer Identification Number (FEIN) or Social Security Number (SSN):

- Appendix 2 - Application for Eligibility
- Appendix 4 - Application for Reimbursement
- Appendix 6 - Third Party Claims Arising from Court Action
- Application for Economic Hardship Status
- Form 500 - Monthly Delivery Fee Report
- Form 502 - Monthly Delivery Fee Report, Schedules 1 - 3
- Form 502 - Application for Delivery Fee Abatement

Finally, when providing cancelled checks as Proof of Payment, all but the last four (4) digits of the account information provided on the front and rear of cancelled checks are to be redacted to protect bank account information.

The new policy for Direct Pay and other regulation and policy revisions can be found under the UST Regulations and the UST Policies and Guidelines sections of the 21J Fund website located at www.mass.gov/ust.

The 21J Board is scheduled to meet next on Thursday, January 28th at 10:00 A.M. in the second floor conference room of the Saltonstall Building at 100 Cambridge Street, Boston, MA. For more information on these issues or upcoming meetings, please visit the website or contact the 21 Program Staff directly at (617) 626-2600.

Please watch future issues of LSPANews for additional information concerning 21J Board meetings. It is also suggested that the 21J Program website be checked prior to attending meetings of the 21J Board in order to verify any last minute changes to the meeting date, time, etc.

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TECHNICAL PRACTICES CORNER

When are VOCs not VOCs?

by Carol Bois, Technical Practices Committee

The MCP requires a 72-hour notification to MassDEP if groundwater concentrations are greater than 5 milligrams per liter (mg/l) total volatile organic compounds (VOCs) within 30 feet of a school or occupied structure, and groundwater is less than 15 feet below the ground surface. The MCP defines a VOC as an organic compound which has a boiling point less than 200°C, and which is a targeted analyte in EPA Method 8260B and/or other purgeable organic analytical methods specified in the Department's Compendium of Analytical Methods. The reference to the Compendium of Analytical Methods was added in 2006. This modification, made to reflect the publication of the CAM in 2003, has created some confusion as to whether VPH fractions should be included in determining total VOC concentrations, as the reported VPH concentration includes organic compounds with a boiling point less than 200°C.

A recent Q&A (February 2009) from the MassDEP confirms that when Volatile Petroleum Hydrocarbons (VPH) are analyzed, the concentrations of the VPH fractions should NOT be included in the "total VOCs" summary. According to the Q&A, the Department intends to amend the VOC definition and/or the requirement at 310 CMR 40.0313(4) to clarify this issue.

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LSP Board Update

by Lynn Read, Assistant General Counsel, LSP Board (Phone: 617-348-4032)

The LSP Board recently served an LSP with an Order to Show Cause ("OTSC") describing the findings of the Board's investigation and concluding that these initial findings constituted sufficient grounds for discipline of the LSP. The LSP will now have an opportunity to contest this determination in an adjudicatory proceeding. This action resulted from a complaint filed by a private party, the LSP's former client.

The Board reviewed work conducted by the LSP at two hazardous waste disposal sites, and found that work at neither site met acceptable standards. Relevant facts for one of the sites are described below.

The site property was a gas station and auto repair business located on a .85-acre lot on a secondary highway ("Main Street") that runs north-south in a rural residential area. The surrounding area includes residences with private drinking water wells and wetlands. A brook flows beneath Main Street approximately 800 feet south of the site.

The LSP was engaged to respond to a release of free-phase diesel fuel discovered in a monitoring well located between the gasoline pumps and Main Street. The source of the release was later found to be a leaking remote fill line located beneath the pump island. The LSP notified MassDEP in January 2003, and DEP orally approved an Immediate Response Action to, among other things, evacuate LNAPL from the monitoring well, and, if LNAPL returned, install a 12-inch recovery well and an active LNAPL recovery system.

The LSP performed the LNAPL evacuation. Although the LNAPL returned within a few days, the LSP did not install the 12-inch recovery well as proposed, but instead continued to hand bail LNAPL from the affected 1-inch micro well.

Five months after the discovery of the diesel release, the LSP discovered a sheen on the brook where it passes beneath Main Street. The Town DPW and MassDEP inspected the site with the LSP and traced the sheen upstream to the outfall of the storm water drainpipe that passes in front of the Site. DEP issued a separate release tracking number and required that the IRA Plan for the release to the brook include active collection of LNAPL and a remedial system to stop the diesel fuel discharge to the storm drain system.

Testing of soil, groundwater, and surface water in June 2003 detected diesel-range petroleum hydrocarbons over 3,000,000 parts per billion ("ppb") in surface water at the outfall and concentrations above Method 1 cleanup standards in soil and groundwater.

The LSP's first IRA Status Report for the LNAPL release asserted that the testing results showed that the release of diesel LNAPL did not cause the impact to the storm water system. The text of this report did not discuss the 3,000,000 ppb of hydrocarbons in surface water or their significance, although the data appeared in a table of test results.

The LSP's IRA Plan for the brook release asserted that stormwater surface flows into a catchbasin caused the impact to the outfall area and proposed to remodel the gas station surface and clean the storm drain system.

MassDEP representatives again visited the Site with the LSP, took photographs, and noted "gross contamination of wetlands, banks of brook, and surface water at outfall" and "separate-phase oil, including oil/water emulsions" on the brook. DEP requested an IRA Plan Modification, stating there was insufficient support for the assertion that the impact to the brook was caused solely by surface water runoff from the gasoline station and was not contributed to by an ongoing subsurface release at the site.

In successive IRA Plans and Modifications and a Phase I report submitted to DEP through late 2004, the LSP continued to assert that the impact to the brook was caused solely by surface water runoff and not by a subsurface release at the site. The LSP relied on groundwater samples collected in June 2003

in which no LNAPL was detected in wells other than the one in which it was first detected.

The LSP did not document any sampling or analysis of sediment from the catch basins of the storm drain system, nor did he/she obtain fingerprint analyses of the contamination in the brook to compare to the diesel fuel release. The elevations of the manhole pipe inverts were not measured until 18 months after the release to the brook was discovered, and at no time did the LSP compare the invert elevations to groundwater elevations measured at the site.

The LSP did not re-sample groundwater until June 2004, when LNAPL was detected in a second monitoring well located immediately adjacent to the storm drain pipe. The LSP continued to assert that the diesel release was not migrating in the trench of the storm drain pipe.

The Board concluded that the LSP did not act with reasonable care and diligence in assessing Site A, in violation of 309 CMR 4.02(1). The Board concluded that the LSP did not perform sufficient assessment activities to support his/her assertions that surface runoff, and not the diesel release, caused the contamination at the outfall, which MassDEP deemed a condition of Substantial Release Migration.

The Board also concluded that the LSP did not follow applicable requirements of c. 21E and the MCP, in violation of 309 CMR 4.03(3)(b). MassDEP repeatedly required IRA Modifications on the ground that the IRA Plans did not provide sufficient support for the assertions that the impact to the brook was caused solely by surface water runoff and not by the subsurface diesel fuel release. The Board found that the LSP failed to implement MassDEP's repeated requests for IRA Modifications to delineate the extent of the LNAPL, conduct an Imminent Hazard Evaluation, and conduct a video survey of the storm drain system to address the condition of Substantial Release Migration. The LSP's submittals did not include an Imminent Hazard Evaluation until December 2004, and the LSP did not videotape the interior of the storm drain pipe.

The LSP also failed repeatedly to comply with DEP's requirements to provide an active system for the recovery of LNAPL to control and mitigate a condition of Substantial Release Migration at the site. Although the initial IRA plan approved by MassDEP included plans to conduct active LNAPL recovery, the LSP never actually conducted active recovery of the LNAPL. Instead, without first seeking or receiving MassDEP's approval for the change, the LSP placed passive skimmers in monitoring wells.

The facts regarding the other site at issue in this case can be found on the Board's Web site at <http://Mass.Gov/lsp>. Click on "Summaries of Initial Board Actions" and locate the summary for Complaint 05C-07.

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The Seductive Substitute for Precision

by James Decoulos, Loss Prevention Committee

The use of the term "and/or" continues to arise in regulations, guidance and policy issued by the Department of Environmental Protection. As the body of rules and the use of this term continue to grow, practicing LSPs may be left with uncertainty in understanding the intent of the regulations, policy and guidance. The term "and/or" is not used in the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, General Laws Chapter 21E. Thus, it is a creation of the Department in drafting documents to implement the statute.

The term "and/or" has been the subject of numerous disparaging remarks from linguists and grammarians. The term has been defined as "[a] device, or shortcut, that damages a sentence and often leads to confusion or ambiguity." Strunk and White, *The Elements of Style*, 3rd Edition, p. 40.

The Massachusetts Supreme Judicial Court has criticized the use of "and/or" as "seductive substitutes for precision." *Vasilakis v. Haverhill*, 339 Mass. 97, 100 (1959).

In a 1935 opinion, the Wisconsin Supreme Court harshly condemned the use of the term. "It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interests of their clients." *Employers Mut. Liability Ins. Co. v. Tollefsen*, 219 Wis. 434, 437-438 (1935).

Two examples of potentially confusing uses of the term in the Massachusetts Contingency Plan relate to Immediate Response Actions and Imminent Hazard Evaluations.

Immediate Response Actions shall assess release, threat of release and/or site conditions and, where appropriate, contain, isolate, remove or secure a release or threat of release of oil and/or hazardous material in order to: (a) abate, prevent or eliminate an Imminent Hazard to health, safety, public welfare or the environment; and/or (b) respond to other time-critical release, threat of release and/or site conditions. 310 CMR 40.0411(1).

Active remedial systems and/or continuing response actions required and/or approved by the Department to address an Imminent Hazard condition at a site shall not be terminated by the RP, PRP, or Other Person conducting Immediate Response Actions until such time as response objectives and/or approval conditions have been met, and until approval to do so has been obtained from the Department. 310 CMR 40.0426(6).

The use of the term "and/or" in the above examples begs for an explanation. Does an LSP have a choice of (a) or (b) in section 40.0411(1)? Or is one required to do both? Under section 40.0426(6) may an LSP terminate response actions addressing an Imminent Hazard once response objectives have been met or must one wait for "approval conditions" to be met?

In case you were wondering, the term "and/or" appears an additional 1031 times in the MCP.

Ordinarily the term "and/or" should be replaced with "or" and the meaning of the phrase should not change. For example, "oil and/or hazardous material" could be changed to "oil or hazardous material" and it would be generally understood that the phrase refers to whichever substance (oil or hazardous material) is applicable. If, however, the term is intended to cover one thing or another or both, the more precise wording would say so.

Precision is an important concept to evaluate analytical data, why can't it be applied to regulations and policies?

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EXHIBIT C

EXHIBIT D



COMMONWEALTH OF MASSACHUSETTS
**Board of Registration
of
Hazardous Waste Site Cleanup Professionals**

MINUTES
of
BOARD MEETING
Held on
July 23, 2009

Meeting Location: New Bedford Whaling Museum
18 Johnny Cake Hill
New Bedford, Mass.

Prepared by: A. Fierce

[Approved: Aug. 19, 2009]

1. **Call to Order:** Chairperson Janine Commerford called the meeting to order at 2:28 p.m. The other Board members present were Gail Batchelder, Deborah Farnsworth, Kirk Franklin, Christophe Henry, Gretchen Latowsky, Robert Luhrs, Kelley Race, and Debra Stake. Jack Guswa was absent. The LSP Board staff members present were Allan Fierce, Lynn Read, Brian Quinlan, Terry Wood, Al Wyman, and Ron Viola. Also present was Wes Stimpson of the LSP Association.
2. **Announcements:** There were no announcements.
3. **Agenda:** The Board members agreed to follow the draft agenda.
4. **Minutes:** The Board reviewed the draft minutes of the meeting of the Board held on June 25, 2009. **A motion was made and seconded to approve the minutes as drafted. The motion was approved unanimously.**
5. **Decisions Regarding License Applicants:** The staff presented the following Application Dockets:

Docket No. 1: The applicant's name, company name, application number, and Application Review Panel recommendation were read into the record:

		<u>App. No.</u>	<u>ARP</u>	<u>Rec.</u>
Dawn M. Oliveira	EFI Global, Inc.	#3432	221	A

No members were recused.

A motion was made and seconded that the Board accept the recommendation from Application Review Panel #221, i.e., that the application submitted by Ms. Oliveira be approved and that she be found eligible to take the exam. The motion was approved unanimously.

Docket No. 2: The applicant's name, company name, application number, and Application Review Panel recommendation were read into the record:

		<u>App. No.</u>	<u>ARP</u>	<u>Rec.</u>
Christopher E. Gill	Corporate Env'tl Advisors	#4354	225	A

Ms. Commerford was recused and left the room.

A motion was made and seconded that the Board accept the recommendation from Application Review Panel #225, i.e., that the application submitted by Mr. Gill be approved and that he be found eligible to take the exam. The motion was approved unanimously.

Ms. Commerford returned and rejoined the meeting.

Docket No. 3: The applicant's name, company name, application number, and Application Review Panel recommendation were read into the record:

		<u>App. No.</u>	<u>ARP</u>	<u>Rec.</u>
Courtney D. Moore	Envirologic, LLC	#6870	226	A

No members were recused.

A motion was made and seconded that the Board accept the recommendation from Application Review Panel #226, i.e., that the application submitted by Mr. Moore be approved and that he be found eligible to take the exam. The motion was approved unanimously.

6. License Renewal Applications:

A. Renewal Dockets. The staff presented the following License Renewal Dockets:

Renewal Docket #1

License Renewal

Renewal Date: July 30, 2009

Have met all requirements for renewal.

New Renewal Date: July 30, 2012

- | | |
|-----------------------|-------|
| 1. Eric M. Axelrod | #6297 |
| 2. George E. Campbell | #6176 |
| 3. Thomas J. Fennick | #7155 |
| 4. John Genewicz | #4416 |

- | | |
|------------------------|-------|
| 5. Christopher D. Glod | #4900 |
| 6. Jeffrey S. Holden | #8137 |
| 7. Stewart A. Wiley | #8641 |

Renewal Docket #2
Request for a 90-day Extension
Renewal Date: July 30, 2009
New Renewal Date: October 28, 2009

- | | |
|-----------------------|-------|
| 1. Thomas P. Clark | #4654 |
| 2. William B. Kerfoot | #4276 |

A motion was made and seconded to renew the licenses of the LSPs on Renewal Docket #1 for a three-year period ending on the date indicated and to grant a 90-day extension to the LSPs on Renewal Docket #2. The motion was approved unanimously.

B. Other Renewal-related Matters. Mr. Fierce reported that no waiver requests had been received since the previous meeting, and there were no other renewal-related matters.

7. Other Licensing-Related Matters:

A. New Panel Assignments and Scheduling. The following Board members were assigned to Application Review Panel # 227: Mr. Franklin, Mr. Luhrs, and Ms. Stake.

B. Appeals Status Report. Ms. Wood reported that there are no pending appeals regarding the Board's denial of a license application.

C. Inactive Status Report. Mr. Fierce reported that since the previous meeting there have been no changes to the list of Inactive LSPs. Four LSPs remain on Inactive Status.

D. Total Number of Active and Inactive LSPs. Mr. Fierce reported that the total number of Active LSPs as of the date of this meeting was 549.

E. Revisions to Application Forms (Application Committee). Mr. Fierce reported that although the Committee had not met to discuss revisions to the key questions on the Application forms, it was planning to meet in the next few weeks.

8. Examinations:

A. New Licensees. The staff reported that the following approved applicants passed the licensing exam administered on July 9, 2009, and are now LSPs:

Minutes of LSP Board Meeting, July 23, 2009

1. Sean Healey #6389
2. Patrick King #6230
3. Joseph Lombardo, Jr. #3188

B. Next LSP Exam. The staff reported that the next exam administration date is August 26, 2009.

9. Continuing Education Committee Report:

A. Course and Conference Approval Requests. Mr. Wyman reported that the Committee had met earlier in the day and had the following course recommendation to present to the full Board:

Sponsor: Northeast Regional Environmental Public Health Center

Conference Title: 25th Annual International Conference on Soils, Sediments, Water and Energy

Credits Requested: Conference credit (50% of hours attended; non-DEP Technical credits). Also requesting 1:1 credit for each of the following conference workshops:

Workshop Number	Workshop Name	Total Technical (non-DEP) credits	Total DEP Course credits
1	Incremental and Stratified Sampling Designs for Surface Soil Analyses	8	
2	Assessing Vapor Intrusion at Petroleum Release Sites	4	
3	BioVapor, a 1-D Vapor Intrusion Model with Aerobic Biodegradation	4	
4	The MCP Audit 2009 – A Case Study Approach		(previously approved) 4
5	Environmental Fate of Hydrocarbons in Soils and Groundwater	3	
6	Building a Better Background Data Set	3	
7	The Revised CAM: What You Need to Know		3
8	Perchlorate Remediation Technologies: an ITRC Short Course	3	
9	In Situ Thermal Remediation	3	
10	Identifying Background	3	
11	In-Situ Chemical Oxidation Workshop	3	

Committee Recommendation: **Approve this conference for Conference Credit (50%) and also approve these workshops for the credits requested.**

A motion was made and seconded to accept the Committee's recommendations. The motion was approved unanimously.

B. Other Business. The Committee had no other business to report.

10. **Professional Conduct Committee:** Since all the Board members present at this meeting were not present at the meeting of the Professional Conduct Committee, the Chair reported the action taken at that meeting, namely, (i) a review of the status of the active disciplinary cases and (ii) the acceptance of a Screening Team's recommendation to dismiss Complaint 09C-01.
11. **Personnel, Budget, and Fees:** Mr. Fierce informed the Board that the final state budget for FY-10 has been enacted, and it contains \$343,117 for the LSP Board, an amount he said would be insufficient to fund the Board's operations at the current level. The Board's budget for the FY-09 was \$414,879. Ms. Commerford reported that MassDEP also received reduced funding for FY-10. She said MassDEP's senior staff is currently analyzing all its projected revenue and expenses for the coming year, and it had not yet been determined how many staff the overall budget would support. She said the LSP Board staff would be considered along with MassDEP staff in this overall budget review.
12. **Status of Board Member Replacements by Governor:** Ms. Commerford again stated that the Governor has not acted on the pending replacement request.
13. **Other Business:** It was the consensus of the Board that it would place on the agenda of the next meeting a generic discussion of procedural issues regarding the review of license applications from individuals whose licenses had been revoked for disciplinary reasons or who have voluntarily surrendered their licenses to resolve a disciplinary matter.

The Board also discussed possible topics for the next LSPA newsletter. Mr. Stimpson confirmed that the next deadline for the submission of articles was at the end of August.

14. **Scheduling of Next Meeting:** The Board agreed to hold its next meeting on August 19, 2009, at MassDEP's Central Regional Office in Worcester, starting at 10:00. The following meeting was tentatively scheduled for September 30, 2009, at a location to be determined.
15. **Enter Executive Session:** A motion was made and seconded that the Board enter Executive Session for the purpose of discussing litigation strategy, and that the Board not return to Open Session thereafter. Ms. Commerford conducted a roll-call vote. Each member present voted as follows:

Ms. Batchelder	Aye	Ms. Latowsky	Aye
Ms. Commerford	Aye	Mr. Luhrs	Aye
Ms. Farnsworth	Aye	Ms. Race	Aye
Mr. Franklin	Aye	Ms. Stake	Aye
Mr. Henry	Aye		

At 3:02 p.m. the Board entered into Executive Session.

EXHIBIT E

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

Response to James J. Decoulos's Request for Production of Documents

The Prosecuting Attorney for the Board of Registration of Hazardous Waste Site Cleanup Professionals ("Board") responds as follows to the Respondent James J. Decoulos's Request for Production of Documents.

General Objection A: The Board objects to any Document Request that requests that the LSP Board produce documents in MassDEP's possession, custody or control or in the possession, custody or control of any designated MassDEP employee. The LSP Board is a separate agency from MassDEP and has no control over any documents in the possession, custody or control of MassDEP or any MassDEP employee.

REQUEST NO. 1

All photographs taken by MassDEP representatives at the Eagle Gas site during MassDEP's March 11, 2004 site visit.

Response to Request No. 1

See General Objection A. Subject to the foregoing objection, the Board will produce all responsive documents in its possession, custody or control. In order to limit copying expenses, the Board will produce these documents in electronic PDF format, on a DVD.

REQUEST NO. 2

All communication between Cynthia Baran or Jonathan Hobill and James J. Decoulos between January, 2003 and July, 2005 regarding the Eagle Gas site.

Response to Request No. 2

See General Objection A. Subject to the foregoing objection, the Board states that it already produced all responsive documents in its possession, custody, or control to Mr. Decoulos on or around May 18, 2010, and the Board will now produce only additional non-protected responsive documents that the Board acquired after that date. In order to limit copying expenses, the Board will produce these documents in electronic PDF format, on a DVD.

REQUEST NO. 3

All communications between Cynthia Baran and Jonathan Hobill regarding the Eagle Gas site.

Response to Request No. 3

See General Objection A. Subject to the foregoing objection, the Board states that it already produced responsive documents in the LSP Board's possession, custody, or control to Mr. Decoulos on or around May 18, 2010, and the Board will now produce only additional non-protected responsive documents that the Board acquired after that date. In order to limit copying expenses, the Board will produce these documents in electronic PDF format, on a DVD.

REQUEST NO. 4

All communications between Cynthia Baran and David C. Bennett regarding the Eagle Gas site.

Response to Request No. 4

See General Objection A. Subject to the foregoing objection, the Board states that it already produced all responsive documents in the Board's possession, custody, or control to Mr. Decoulos on or around May 18, 2010, and the Board has no additional responsive documents within its possession, custody or control.

REQUEST NO. 5

All Notices of Noncompliance issued to LSPs by MassDEP in the Southeast Region between 2002 and 2010.

Response to Request No. 5

See General Objection A. The Board also objects to Request No. 5 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. Subject to the foregoing objections, the Board states that to the extent it may have such documents, they are not categorized in a manner that would allow the Board to locate them within a reasonable time, and therefore it would be unduly burdensome to produce them, and they are public records in the possession of MassDEP.

REQUEST NO. 6

All LSP Board communications and actions against Theodore Kaegael, as it relates to the license issued by the Board to Mr. Kaegael and the actions he took or failed to take in regards to the Eagle Gas site.

Response to Request No. 6

The Board objects to Request No. 6 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. The Board also objects to Request No. 6 to the extent it seeks documents protected from discovery by the attorney-client privilege or work product doctrine. Subject to the foregoing objections, the Board states that Mr. Kaegael's work at the Eagle Gas site was not one of the grounds for disciplinary

action by the Board, and thus the Board has no responsive documents within its possession, custody or control.

REQUEST NO. 7

LSP Board minutes and all communication between LSP Board members relating to the approval of the LSP continuing education course entitled "Assessment of LNAPL Mobility and Recoverability", LSP Association Continuing Education Course, which was presented on April 23, 2007.

Response to Request No. 7

The Board objects to Request No. 7 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. Subject to the foregoing objection, the Board will produce all non-protected responsive documents. In order to limit copying expenses, the Board will produce these documents in electronic PDF format, on a DVD.

REQUEST NO. 8

LSP Board minutes and all communication between LSP Board members relating to the approval of the LSP continuing education course entitled "Environmental Chemistry and the Emergence of Forensic Geochemistry", LSP Association Continuing Education Course, which was presented on July 17 and 18, 2002.

Response to Request No. 8

The Board objects to Request No. 8 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. Subject to the foregoing objection, the Board will produce all non-protected responsive documents. In order to limit copying expenses, the Board will produce these documents in electronic PDF format, on a DVD.

REQUEST NO. 9

LSP Board minutes and all communication between LSP Board members relating to the approval of the LSP continuing education course entitled "MCP Method 2 Risk Characterizations", MassDEP and LSP Association Continuing Education Course, which was presented on October 26, 2005.

Response to Request No. 9

The Board objects to Request No. 9 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. Subject to the foregoing objection, the Board will produce all non-protected responsive documents. In order to limit copying expenses, the Board will produce these documents in electronic PDF format, on a DVD.

REQUEST NO. 10

All notes and internal MassDEP communication generated by John Fitzgerald related in any way to the work of the MassDEP LNAPL Workgroup. See <http://www.mass.gov/dep/cleanup/lnaplwg.htm>.

Response to Request No. 10

See General Objection A. The Board further objects to Request No. 10 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. Subject to the foregoing objections, the Board states that it has no responsive documents within its possession, custody or control.

REQUEST NO. 11

All MassDEP communication related to post-RAO work conducted at the Speedy Lube Site between June 14, 2002 and June 18, 2004.

Response to Request No. 11

See General Objection A. Subject to the foregoing objection, the Board states that it already produced all responsive documents in its possession, custody, or control to Mr. Decoulos on or around May 18, 2010, and the Board has no additional responsive documents within its possession, custody or control.

REQUEST NO. 12

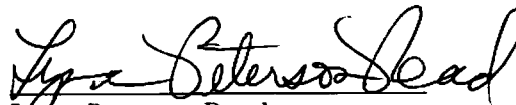
All Notices of Noncompliance issued to LSPs by MassDEP in the Northeast Region between 2002 and 2010.

Response to Request No. 12

See General Objection A. The Board also objects to Request No. 12 on the ground that the requested documents are not relevant to the issues in this adjudicatory hearing. Subject to the foregoing objections, the Board states that to the extent it may have such documents, they are not categorized or filed in a manner that would allow the Board to locate them within a reasonable time, and therefore it would be unduly burdensome to produce them, and they are public records in the possession of MassDEP.

August 4, 2010

Respectfully submitted,



Lynn Peterson Read

BBO No. 551671

Prosecuting Attorney

Board of Registration of Hazardous

Waste Site Cleanup Professionals

One Winter Street, 3rd Floor

Boston, MA 02108

Phone: 617-348-4032

E-mail: lynn.read@state.ma.us

CERTIFICATE OF SERVICE

I hereby certify that on this date a true copy of the above Response to James J. Decoulos's Request for Production of Documents was served upon the attorney of record for each party herein by electronic mail.

August 4, 2010
Date

Lynn Peterson Read
Lynn Peterson Read

EXHIBIT F

From: "Dingle, Mike (DEP)" <Mike.Dingle@state.ma.us>
Subject: **RE: Matter of James J. Decoulos; Docket No. LSP-10AP-01**
Date: September 20, 2010 10:02:13 AM EDT
To: "James J. Decoulos" <jamesj@decoulos.com>
Cc: "Mickelson, Jeffrey (DEP)" <Jeffrey.Mickelson@state.ma.us>

Dear Mr. Decoulos - Please be advised that, for the reasons stated in my prior email to you, the Department is not in a position to provide voluntary testimony from Mr. Hobill to you.

From: decoulos@gmail.com [<mailto:decoulos@gmail.com>] **On Behalf Of** James J. Decoulos
Sent: Friday, September 10, 2010 5:09 PM
To: Dingle, Mike (DEP)
Cc: Commissioner Laurie Burt
Subject: Matter of James J. Decoulos; Docket No. LSP-10AP-01

Mr. Dingle,

I am disappointed to learn that the Department is unwilling to provide additional staff to testify in an action that the LSP Board has needlessly continued to pursue. Despite the fact that the original complainant has asked the Board to drop the complaint, the Board has forged ahead on this action - with DEP testimony. As you may know, DEP employee Cynthia A. Baran has submitted 39 pages of testimony which included 42 exhibits and DEP employee John J. Fitzgerald has submitted 19 pages of testimony which included 4 exhibits.

DEP employees Tom Potter and Mark Jablonski have personally conducted site visits to the property in Carver which is the focus of the Board's action. Their observations and written reports on their findings are critical components of my defense in demonstrating that over 50 years of surface water runoff from an automotive repair and gas distribution facility caused the significant contamination at the outfall into South Meadow Brook. Photographs of the site are available at <http://picasaweb.google.com/decoulos/PetroleumSpillResponsesAtEagleGasStationCarver?feat=directlink>

DEP employee Fred Civian is the most knowledgeable individual at the Department on stormwater management who understands non-point source pollution, illicit stormwater discharges and the interplay with an LSP's duties. He provided significant staff support to the Board during its formative years.

Please confirm for me whether DEP employee Jonathan Hobill will respond to my direct testimony. Mr. Hobill was the supervisor of Ms. Baran during the relevant time period.

The Department's discretionary allocation of resources has imposed an undue hardship on my defense which is arbitrary and capricious.

Please feel free to contact me at any time. Thank you.

James J. Decoulos, PE, LSP
Decoulos & Company, LLC
185 Alewife Brook Parkway
Cambridge, MA 02138

email: jamesj@decoulos.com
web: www.decoulos.com
tel: 617.489.7795
fax: 877.842.9629

This e-mail message and any attachments are confidential and may be attorney-client privileged or protected under a work product doctrine. If you are not the intended recipient please notify Decoulos & Company LLC immediately by telephone at (617) 489-7795 or by e-mail to jamesj@decoulos.com and destroy all copies of this message and any attachments.

On Thu, Sep 9, 2010 at 4:06 PM, Dingle, Mike (DEP) <Mike.Dingle@state.ma.us> wrote:

Dear Mr. Decoulos:

I have been advised that you recently requested several Department staff (Tom Potter, Mark Jablonski and Fred Civian) to provide information and to serve as witnesses on your behalf in a pending proceeding involving the LSP Board. As you may be aware, the Department has recently experienced significant staff cutbacks, which has resulted in increase work demands for the remaining staff. The Department must focus its staff resources on carrying out its mission and is not in a position to voluntarily provide staff to serve as witnesses for you in your proceeding with the LSP Board.

Very truly yours,

Michael W. Dingle
MassDEP
Office of General Counsel
One Winter Street
Boston, MA 02108

EXHIBIT G



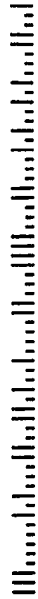
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5 reasons you won't want to miss this seminar!

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2. You'll analyze design considerations for wet and dry detention facilities.
3. You'll explore green stormwater practices.
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5. You'll discuss the Technology Acceptance Reciprocity Partnership (TARP) protocols for testing stormwater best management practice (BMP) performance.

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Standards and regulations
stormwater

Wet and dry detention
facilities

Maintenance of
stormwater management
facilities

Green stormwater
practices

Technology Acceptance
Reciprocity Partnership
(TARP)

6.0 HSW CEUs for
Massachusetts Architects

5.0 HSW Contact Hours for
NY Architects & Landscape Architects

5.0 PDHs for NY Engineers

6.0 AIA SD/HSW Learning Units

6.0 LA CES HSW PDHs

0.6 CSI HSW CEUs

HalfMoon LLC presents: Massachusetts Stormwater Management

Natick, MA • Thursday, May 13, 2010

Agenda

Stormwater Programs in Massachusetts: Standards and Regulations

F. Civian

Federal, state and local stormwater programs: which apply?

EPA construction general permit

EPA municipal separate storm sewers (MS4s)

EPA multi-sector general permit

Massachusetts Wetlands Program stormwater standards, local bylaws

Stormwater Management Using Wet and Dry Detention Facilities

J. Bensley

Detention/retention pond overview

Design considerations: hydrology, siting, permitting

Pond sizing, routing, interconnections

Water quality, outlet structures, safety considerations

Steps for detention design

Green Stormwater Practices

R. Cantoreggi

Bioretention basics and cells

Cisterns, runnels

Permeable pavers/pervious concrete

Disconnecting impervious area/vegetated swales

Soil amendments, green roofs

Sustainable landscaping, rainwater harvesting

Maintenance of Stormwater Management Facilities

M. Marcus

Evaluating erosion, preventing and repairing

Evaluating water quality

Managing sedimentation, turbidity, and algae bloom

Identifying and managing pollutants

Maintaining outlets and trash racks

Maintenance of porous pavement, bio swales, and rain gardens

Technology Acceptance Reciprocity Partnership (TARP)

J. Schoen

Stormwater Best Management Practice (BMP) Demonstrations

Overview of proprietary and non-proprietary stormwater BMPs

How TARP criteria are applied and interpreted

How this fits into the Massachusetts stormwater regulatory process

Register online at: www.halfmoonseminars.com

About the Seminar

Thursday, May 13, 2010

Courtyard by Marriott Natick (508) 655-6100
342 Speen Street • Natick, MA 01760

\$259 for one or \$239 each for three or more
from the same company, registering at the same
time. Each registration includes one copy of Massachusetts
Stormwater Management

It's easy to register. Enroll today!

Pre-registration is recommended. Walk-ins will be accepted if space is available. You
will be contacted if any scheduling changes occur. We do not send confirmations.

- Register online at www.halfmoonseminars.com
- Return the attached form with check payable to HalfMoon LLC to:
HalfMoon Seminars, PO Box 268, Eau Claire, WI 54702-0268
- Fax the attached form to (715) 835-6066.
- Call (715) 835-5900 to register over the phone.

Cancellations: Cancel at least 48 hours before the start of the seminar (CDT), and receive a full
tuition refund, minus a \$10 service charge for each registrant. If you cancel after that time, you may
choose to apply a credit toward another seminar or the CD/manual package. You may also send
another person to take your place.

Earn continuing education credit!

This program offers:

- 6.0 HSW CEUs for Massachusetts Architects.
- 5.0 HSW Contact Hours for New York Architects and Landscape Architects
(HalfMoon LLC is deemed approved provider via AIA)
- 5.0 PDHs for New York Engineers
(HalfMoon LLC is approved provider)
- 6.0 Sustainable Design HSW Learning Units
American Institute of Architects
- 6.0 HSW PDHs
Landscape Architect Continuing Education System
- 6 HSW Continuing Education Units
Construction Specifications Institute

This program will be accepted for architect, landscape architect, and engineer continuing education
by most states of licensure. Please refer to specific state rules to determine eligibility, or contact
HalfMoon LLC for assistance.

Attendance will be monitored and reported to AIA/CES, LA CES, and CSI/CEN as requested. Atten-
dance certificates will be mailed to all participants after the event.

CD/Manual Package: An audio recording of this seminar is available for \$269 (includes shipping).
Allow five weeks from the seminar date for delivery. Please refer to specific state licensing rules or
certification requirements to determine if this learning method is eligible for continuing education
credit.

Registration

8:00 - 8:30 a.m.

Morning Session

8:30 - 11:30 a.m.

Lunch (On your own)

11:30 a.m. - 12:45 p.m.

Afternoon Session

12:45 - 4:15 p.m.

Faculty

Frederick Civian *Stormwater coordinator at MassDEP*

Mr. Civian is responsible for reducing pollution carried by stormwater. He has developed
and implemented a number of MassDEP programs. Mr. Civian has also worked as a land
use planner in California, applying state and local standards to proposed residential and
commercial developments. In 1984 he played a key role writing legislation to establish
the Pajaro Valley Water Management Agency to manage critical groundwater overdraft
conditions. Mr. Civian currently serves as chair of the Dedham Massachusetts Conserva-
tion Commission.

John E. Bensley *Professional engineer and principal at Beaks and Thomas Inc.*

Mr. Bensley is responsible for all phases of planning, design, regulatory interface,
construction administration, and supervision for private and public sector projects. He
is actively participating on the Massachusetts Department of Environmental Protection
Stormwater Advisory Committee. Mr. Bensley is a member of the National Association for
Industrial & Office Properties (NAIOP), participating in the Public Affairs Committee and
the Environmental Regulations Subcommittee.

Robert A. Cantoreggi *Director of Public Works for the town of Franklin*

Mr. Cantoreggi has implemented sustainable technologies for the town's water, sewer
and stormwater management programs. These including a multi-faceted drinking water
conservation program, wastewater programs, and various stormwater treatment and
re-charge programs. He has actively worked with the Massachusetts Department of En-
vironmental Protection (DEP), regional watershed advocacy groups, and the community
about the environmental benefits of protecting all sources and uses of water. He has
implemented the use of rain gardens, rain barrels, and other water conservation prac-
tices. Mr. Cantoreggi has coordinated stormwater events and pond and lake cleanups,
and he created the Green Team with local youth organizations and schools.

Michael J. Marcus *Founder and principal of New England Environmental Inc. (NEE)*

Mr. Marcus has nearly three decades of experience as an environmental scientist and
project manager. His expertise includes: environmental permitting; wetland and river
restoration; salt marsh and coastal bank/dune restoration; bank stabilization and bio-
engineering; pond management; ecological restoration; recreational planning; wildlife
habitat assessment; sediment and erosion control plans; lake and pond management;
and control of invasive species. He has a B.S. degree in Biology from Marlboro College
and an M.S. degree in Zoology from the University of Maine-Orono.

Jerry Schoen *Director of the Massachusetts Stormwater Technology Evaluation Project*

Mr. Schoen is developing a clearing house of information on proprietary stormwater
technologies. The program focuses on validating performance of stormwater best man-
agement practices. Mr. Schoen is also director of the Massachusetts Water Watch Partner-
ship, a program of the UMass Water Resources Research Center that provides technical
assistance to nonprofit organizations, schools, municipalities, and government agencies.

Register online at: www.halfmoonseminars.com

Massachusetts Stormwater Management

Thursday, May 13, 2010

☐ Yes, I will attend Natick, MA.

\$259 for a single registrant or \$239 each for three or more from the
same company registering at the same time. (Manual Included.)

☐ No, I am not attending. Please send me the CD/Manual Package:
\$269 (Shipping and handling included.) Product will ship UPS. Allow
five weeks from the seminar date for delivery. Will not ship to PO Boxes.

☐ Check payable to HalfMoon LLC

☐ Yes, I was pre-registered by phone or fax.)

☐ Credit Card MasterCard, Visa, American Express, or Discover.

Card Number:

Expiration Date:

Cardholder Name:

Signature:

Email:

Email is used for credit card receipt and program changes only.

☐ I need special accommodations. Please contact me.

Complete the following for each registrant.

Attach duplicate forms if necessary.

Company/Firm:

Address:

City:

State:

Zip:

Phone Number:

Name:

Position:

Name:

Position:

Name:

Position:

Detach entire panel. Send via fax to 715-835-6066 or
by mail to HMS, PO Box 268, Eau Claire, WI 54702-0268.

Program # 10153

AKM #

EXHIBIT H

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MassDEP Quick Links:

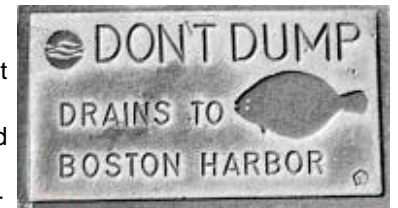
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Municipal Compliance Fact Sheet

Stormwater

What You Should Know About this Issue:

As a senior municipal official, you should be aware that municipal storm drain systems are a major source of pollutants to waters of the Commonwealth. Federal and state laws and regulations require municipalities with storm drain systems to manage and control stormwater discharges. Pollutants enter the storm drain system from illicit connections, construction sites, and commercial and municipal facilities (such as parking lots, road salt storage areas, fleet and DPW yards).



Examples of Municipal Facilities & Activities Involved:

Over 200 Massachusetts towns discharge stormwater under U.S. EPA's NPDES Municipal Separate Storm Sewer Systems permit (the MS4 Permit). This 5-year permit, jointly issued by EPA and MassDEP, requires towns to meet six minimum control measures (EPA has extensive guidance on how towns can comply with this permit). Visit: <http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm>. Towns report their progress by sending in Annual Reports each May 1 to EPA and MassDEP. The six minimum control measures are:

1. Pollution Prevention/Good Housekeeping for Municipal Operations - This measure addresses runoff from municipal operations such as DPW yards, salt storage areas, vehicle maintenance yards, road construction, and includes what practices towns should undertake to operate the stormwater system effectively. Towns must:
 - Develop an operations and maintenance plan for their stormwater system.
 - Train employees on how to incorporate pollution prevention and good housekeeping practices into their activities (e.g., vehicle and building maintenance, salt piles, and catch basin cleaning).
2. Must have an Illicit Discharge Detection and Elimination (IDDE) Program - Illicit discharges are non-stormwater discharges to the storm drain system. Because illicit discharges typically contain bacteria and other pollutants, the MS4 Permit requires towns to develop and implement an IDDE program that includes these elements:
 - A legally enforceable mechanism prohibiting illicit discharges.
 - A storm sewer map identifying the location of all storm drain outfalls.
 - A plan to detect and eliminate illicit discharges.

3. Construction Site Runoff Control - The federal Construction General Permit already requires owners/operators to file a Notice Of Intent for construction activity disturbing more than one acre of land. Towns may wish to adopt stricter local rules. Minimum requirements include adoption of:
 - Legally enforceable mechanism to control erosion during construction
 - Procedures for municipal site plan review of construction projects
4. Post Construction Runoff Control - This measure requires ongoing stormwater management after construction is completed. Requirements include:
 - Adopt a legally enforceable mechanism to control stormwater after construction
 - Establish procedures for long-term operation and maintenance of BMPs
5. Public Education and Outreach - Towns are encouraged to form partnerships to distribute educational materials to diverse local audiences within the community as part of a formal public education program.
6. Public Participation and Involvement - EPA suggests that communities give the public the opportunity to play an active role in developing and implementing the MS4 program. Towns must comply with applicable public notice requirements and determine the program's implementation goals and strategies.

Common Compliance Issues:

Although EPA and MassDEP adopted the MS4 Permit in 2003, some towns still have not yet adopted legally enforceable mechanisms to control construction site runoff, prohibit illicit discharges, or control post-construction stormwater. Before the Permit is renewed in 2008, all municipalities should examine their existing ordinances, bylaws and regulations, determine whether additional actions are needed to comply with the MS4 Permit, and if so, implement them.

Other stormwater permits and requirements include the federal Multi-Sector General Permit and the Massachusetts Stormwater Standards, which apply in [wetlands jurisdictional areas](#).

Environmental Stewardship Tips:

Cities and towns are responsible for the quality of the discharges that enter our inland and coastal waters from their municipal storm drain system. To ensure that discharges from storm drain systems do not cause or contribute to violations of the state water quality standards, cities and towns must fulfill all MS4 obligations, including full implementation of an IDDE Program and Good Housekeeping Practices at municipal facilities.

To optimize the limited capacities of storm drain systems, municipalities should encourage environmentally sensitive site design that reduces impervious surfaces, minimizes stormwater runoff, and manages stormwater in a manner that mimics natural conditions. When planning for future growth, municipalities should analyze stormwater, wastewater, and water supply issues conjunctively.

Technical Assistance, Outreach, Grants & Loans:

The Clean Water State Revolving Fund (CWSRF) program provides state-subsidized 2% interest loans to municipalities for terms up to 30 years. These loans are available for planning and the construction of stormwater infrastructure. Each year, MassDEP selects projects for funding through a competitive procurement process. MassDEP expects to finance more than \$300 million in CWSRF projects in 2008. For information on the State Revolving Fund, visit:

www.mass.gov/dep/water/wastewater/wastewat.htm

Contacts at MassDEP for More Information:**For Stormwater**

Fred Civian, MassDEP Boston, 617-292-5821

For CWSRF

Steve McCurdy, MassDEP Boston, 617-292-5779.

For more information on stormwater or other topics, visit the MassDEP website at www.mass.gov/dep, or contact your nearest regional office listed on the website.

Print-friendly version: [PDF](#) 75 KB

Find related Municipal Compliance Fact Sheets on:

- [Drinking Water](#)
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EXHIBIT I

Tuesday, November 14, 2006

Low Impact Development

An Overview of Low Impact Development Issues and Design Requirements

Richard A Claytor, Jr., PE, Principal

Horsley Witten Group

Frederick Civian, Stormwater Coordinator

MassDEP

Radisson Hotel, 200 Stuart Street, Boston, MA

5:30 PM Social/Registration; 6:00 PM Dinner; 6:30 PM Presentation

\$50 Members, \$60 Non-Members

\$45 Public Sector Members, \$55 Public Sector Non-Members

\$25 Student Members and Senior Members (65+)

There is a push at both the state and local level to encourage site development projects to implement low impact design (LID) techniques. Regulations regarding site development are being changed throughout the state to require developments to minimize development impacts and maintain natural systems. Richard A. Claytor, Jr. will discuss current trends and requirements for LID projects. Mr. Claytor has been involved in development of LID regulations and designs. He formerly served as principal engineer for the Center for Watershed Protection in Maryland and is currently a principal at Horsley Witten Group. He has presented to planners, planning board members, engineers and other civic groups on LID issues at numerous seminars.

Frederick Civian is MassDEP's Stormwater Coordinator, responsible for reducing stormwater-borne pollution in Massachusetts. A land use planner by profession, Fred has served MassDEP and the citizens of the Commonwealth in a number of different ways. He helped develop the LSP Board's licensing program, procure and oversee various MassDEP's hazardous waste site assessment and remediation contracts, write the first set of rules for Small Quantity Generators of Hazardous Waste, and expand the Waste Site Cleanup program. He also managed MassDEP transportation programs, including the state's vehicle emissions program and the transportation-related requirements of the Big Dig.

Registration Deadline: November 10, 2006

For Information/Registration Contact: Register to attend this meeting and pay by credit card online at www.engineers.org. Search for this program under Events. You can also reserve a space by contacting Brian Postlewaite at 617/520-9278 or b_postlewaite@smma.com. Cancellations received after November 7, 2006 and no-shows will be billed.