

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 MOTION TO COMPEL PUBLIC RECORDS**

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

1. I filed public record requests to Cynthia Baran and John Fitzgerald, employees of the Massachusetts Department of Environmental Protection (“MassDEP”), pursuant to the Massachusetts Public Records Law, G. L. c. 66, § 10, and the Public Records Access Regulations, 950 CMR 32.00, *et seq.* on September 1, 2010.

2. After several weeks of attempting to coordinate my review of Ms. Baran’s records with the keeper-of-the-records for her office, I refined my request on September 27th as follows:

I request all email communications, telephone notes or meeting notes by or between DEP representatives Cynthia Baran and Jonathan Hobill regarding the Eagle Gas Site at 131 Main Street in Carver.

3. I conducted a public records review at Ms. Baran’s office on October 19, 2010 and I scanned every document in the file that Irene Lavoie, the keeper-of-the-records, made available to me.

4. There are additional documents I requested from Ms. Baran which were not made available for my review.

5. The records I reviewed on October 19th did not include emails that Ms. Baran sent to me on the following dates regarding the Eagle Gas Site at 131 Main Street in Carver: March 12, 2004; March 30, 2004; April 7, 2004; April 23, 2004; May 20, 2004; July 9, 2004; July 15, 2004; November 26, 2004 and February 3, 2005.

6. The records I reviewed on October 19th did not include any emails I would have expected that Ms. Baran or Mr. Hobill would have sent to Hazardous Waste Site Cleanup Professionals or Licensed Site Professionals (“LSPs”) Theodore J. Kaegael or David C. Bennett, who represented Richard Nantais, a responsible party who caused a release of gasoline at the Eagle Gas Site in 1997.

7. The records I reviewed on October 19th did not include any emails I would have expected that Ms. Baran or Mr. Hobill would have sent to LSP Daniel W. Felten, who represented Eagle Gas, Inc. after my work at the Eagle Gas Site was completed in July of 2005.

8. The records I reviewed on October 19th did not include any emails I would have expected that Ms. Baran and Mr. Hobill would have sent between themselves prior to March 30, 2004.

9. The records I reviewed on October 19th did not include any emails I would have expected that Ms. Baran and Mr. Hobill would have sent between themselves after November 17, 2005.

10. The records I reviewed on October 19th did not include any telephone notes or meeting notes that I would have expected that Ms. Baran and Mr. Hobill would have generated for the Eagle Gas Site.

11. The records that Ms. Baran has not produced, which I have described in Paragraphs 6 through 10, are likely to support my position that MassDEP failed to inspect or require the inspection of the stormwater collection system which passes in front of the Eagle Gas Site and discharges into South Meadow Brook prior to 2003; and, that there were no Substantial Release Migration¹ conditions that existed from the subsurface diesel release identified as Release Tracking Number 4-17582 through the end of 2004.

12. The failure of MassDEP to inspect or require the inspection of the stormwater collection system placed an unwarranted burden on my duties as LSP for Eagle Gas, Inc., which were unsupported by the evidence I collected and the inspections I made.

13. As I stated in my testimonies of September 22, 2010, the evidence I relied on to make the determinations at the Eagle Gas Site included visual observations of the stormwater collection system in the Main Street right-of-way on May 16, 2003, September 4, 2003, June 24, 2004 and December 10, 2004; a knowledge as to how the stormwater collection system functioned; Photo Ionization Detector (PID) readings of various stormwater control structures; analytical results from soil borings and groundwater monitoring wells along the pervious backfill of the stormwater piping; and observations of storage and handling practices at the Eagle Gas Site.

14. My records request to Mr. Fitzgerald on September 1, 2010 sought “All notes and internal MassDEP communication John Fitzgerald has generated or received related in any way to the work of the LNAPL Workgroup.”

¹ See definition of Substantial Release Migration at 310 CMR 40.0006.

15. On November 1, 2010, in response to my records request to Mr. Fitzgerald, I received electronic files in an email from Kathleen Delaplain, an attorney with the Office of General Counsel of MassDEP.

16. I replied to Ms. Delaplain's email on November 2nd and informed her that the information she provided did "not include any notes or communications generated from Mr. Fitzgerald. Please let me know as soon as possible if you can provide this information."

17. On November 4th, Ms. Delaplain provided seven additional records from Mr. Fitzgerald, the content of which were significantly redacted. Additionally, Ms. Delaplain claimed that 18 records from Mr. Fitzgerald were exempt from public records disclosure under the provisions of the deliberative process exemptions set forth in G.L. c. 4, § 7(26)(d). *See* attached Exhibit A.

18. I expect that the records I am seeking from Mr. Fitzgerald will support the proposed excavation of Light Non-Aqueous Phase Liquid (LNAPL) contaminated soil I presented in the Immediate Response Action Status Report and Plan Modification I presented to DEP on June 15, 2004.

19. Recent advances in understanding the fate and remediation of LNAPL contamination have radically altered how the contamination should be addressed – and are consistent with the proposals I submitted to MassDEP for the Eagle Gas Site in 2004.

Signed under the pains and penalties of perjury this 10th day of November, 2010.

A handwritten signature in black ink, appearing to read "James J. Decoulos", written in a cursive style.

James J. Decoulos



James Decoulos <decoulos@gmail.com>

FW: LNAPL Workgroup / John Fitzgerald Public Records Request

4 messages

Delaplain, Kathleen (DEP) <Kathleen.Delaplain@state.ma.us>
To: "James J. Decoulos" <jamesj@decoulos.com>

Thu, Nov 4, 2010 at 3:36 PM

Enclosed please find records responsive to your public records request, referenced above, as well as a log of records which MassDEP considers exempt under the law. This letter completes MassDEP's response to your request. If you have any questions please contact me at (617) 654-6546.

Pursuant to M.G.L. c. 4, § 7(26)(d), the following documents fall under the deliberative process exemption and are therefore exempt from disclosure:

1. 1/11/10 Kendall Marra Email to John Fitzgerald
2. 6/16/10 John Fitzgerald Email to Nancy Bettinger
3. 6/17/10 John Fitzgerald Email to John Miano
4. 3/12/10 Kendall Marra Email to Elizabeth Callahan
5. 6/10/10 Kendall Marra Notes
6. 2/1/10 Kendall Marra Email to John Fitzgerald
7. 10/29/08 Kendall Marra Email to Elizabeth Callahan
8. 9/23/09 John Miano Email to John Fitzgerald
9. 3/11/10 Jack Miano Memorandum to Elizabeth Callahan
10. 4/28/09 John Miano Email to Kendall Marra
11. 11/24/09 John Fitzgerald Memorandum
12. 6/08/09 Kendall Marra Email to John Fitzgerald
13. 3/18/10 John Fitzgerald Email to Kendall Marra
14. 6/17/10 John Miano Email to John Fitzgerald
15. 3/15/10 Elizabeth Callahan Email to Kendall Marra
16. 2/2/10 Elizabeth Callahan Email to Kendall Marra

17. 2/2/10 Kendall Marra Email to Elizabeth Callahan

18. John Fitzgerald 10/28 Notes and 10/28/08 Kendall Marra Email to John Fitzgerald

Pursuant to M.G.L. c. 4, § 7(26)(d), the following documents fall under the deliberative process exemption and are therefore exempt from disclosure. However, the deliberative process material in these documents has been redacted, and the redacted electronic versions are attached to this email.

1. January 2010 John Fitzgerald Draft Memo (LNAPL.redacted.doc)
2. January 2010 John Fitzgerald Draft Memo (LNAPL_2.redacted.doc)
3. 1/21/10 John Fitzgerald Draft Memo (LNAPL_3.redacted.doc)
4. 1/29/10 John Fitzgerald Draft Memo (LNAPL_4.redacted.doc)
5. 1/29/10 John Fitzgerald Draft Memo (LNAPL_Fitz_1_29_10.redacted)
6. 12/02/09 John Fitzgerald Draft Memo (NAPL Thoughts_12_01.redacted.doc)
7. 6/10/10 Kendall Marra Notes (marra comments 6_10_1)
8. 3/18/10 Kendall Marra Email to John Fitzgerald (new british columbia lnapl.docx)

Sincerely,

Kathleen Delaplain
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