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

MOTION TO DISMISS

Now comes the Respondent, James J. Decoulos, who hereby moves to dismiss the current action under the provisions of 801 CMR 1.01(7)(g) on the grounds that the Petitioner, the Board of Registration of Hazardous Waste Site Cleanup Professionals (the "Board") 1) failed to timely prosecute the matter; 2) failed to add a necessary and indispensable party, the Massachusetts Department of Environmental Protection ("MassDEP" or the "Department"); and 3) violated Respondent's right to due process under article 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

In support of this motion, Respondent has prepared an affidavit this date to support the motion (the "Decoulos Aff. #3"). Two affidavits were previously filed in this proceeding. The first, accompanied a Motion to Seek Oral Testimony dated September 29, 2010 (the "Decoulos Aff. #1"), and the second, accompanied a Motion to Compel Discovery dated October 1, 2010 (the "Decoulos Aff. #2").

Exhibits cited in this motion have been previously filed by the Board on August 25, 2010 (to support its direct testimony) and by the Respondent on September 22, 2010 (to support his rebuttal testimony and direct testimony). All of the exhibits have been posted at:

http://decoulos.com/LSPBoard10AP01.htm

FACTS

1. The Board is an agency of the Commonwealth established under the provisions of G.L. c. 21A, §§ 19 – 19J.

2. The Board has adopted regulations at 309 CMR 1.00 *et seq.* pursuant to its statutory authority (the "Board's Regulations").

3. The procedures governing disciplinary proceedings and other dispositions of the Board are set forth at 309 CMR 7.00.

4. James J. Decoulos (the "Respondent") is an individual licensed by the Board as a Hazardous Waste Site Cleanup Professional, otherwise known as a Licensed Site Professional (or "LSP").

5. On November 20, 2002, attorney David Y. Li of the law firm Posternak Blankstein & Lund LLP submitted a letter to the Board on behalf of his firm recommending proposed amendments to the Board's regulations at 309 CMR 7.00 (the "Posternak Letter"). *See* ¶ 5 and Exhibit A of Decoulos Aff. #3.

6. On November 14, 2005, Respondent's attorney F. Henry Ellis III notified attorney James W. Marsh of the intent to file a civil complaint based on the failure of Eagle Gas, Inc. ("Eagle") to pay Decoulos & Company, LLC ("D&C") and Wright Industries, Inc. ("Wright") $79,110.38 in outstanding balances, plus interest. *See* Exhibit RR-12.

7. On December 13, 2005, Eagle Gas, Inc. filed a complaint against Respondent with the Board. *See* Exhibit RR-14.

8. The Complaint was received by the Board on December 15, 2005 (the "Complaint Date"). *See* ¶ 2 and Exhibit A of Decoulos Aff. #1.

9. On December 15, 2005, D&C and Wright filed a complaint in Plymouth Superior Court against Eagle seeking relief for Breach of Contract and Unjust Enrichment/Quantum Meruit. *See* Exhibit RR-15.

10. Plymouth Superior Court Justice Suzanne DelVecchio issued a Finding and *Ex Parte* Order for Approval of Attachment of Eagle's real estate on December 15, 2005. *See* Exhibit RR-17.

11. On December 20, 2005, the Board notified Respondent that the complaint from Eagle had been received and that actions were being taken by the Board's Professional Conduct Committee to review the complaint and recommend further investigation. If the Committee recommended to pursue additional investigation, a Complaint Review Team (CRT) would be formed to conduct additional investigation. *See* Exhibit R-10.

12. Respondent's professional liability insurance carrier, Hudson Insurance, defended Respondent in the counterclaims filed by Eagle. *See* ¶ 1 of Decoulos Aff. #3.

13. Eagle, D&C and Wright entered into a Settlement Agreement on July 23, 2007 to resolve the outstanding balance owed D&C and Wright; release the attachment on Eagle's real estate; and, withdraw the complaint against Respondent filed with the Board. *See* Exhibit R-11.

14. Attorneys from Hudson Insurance advised Respondent on the resolution and settlement of all claims between Eagle, D&C and Wright. *See* ¶ 2 of Decoulos Aff. #3.

15. On August 6, 2007, attorney Shephard S. Johnson, Jr. requested that the complaint filed by Eagle with the Board on December 13, 2005 be withdrawn. *See* Exhibits R-12 and RR-14.

16. Mr. Johnson was notified by the Board's attorney Lynn Peterson Read, in a letter dated August 15, 2007, that it must decline his request to withdraw the complaint. The letter stated that "Once the Board accepts a complaint for investigation, the complaint can never be retracted for any reason." *See* Exhibit R-13a.

17. The Board did not send a copy of the letter dated August 15, 2007 to Respondent or any of his attorneys. *See* ¶ 45 of Decoulos Aff. #1.

18. On January 12, 2010, Respondent received an Order to Show Cause and a Proposed Order Finding Sufficient Grounds for Discipline (the "Proposed Order"). The Proposed Order does not describe any specific discipline or rationale for why disciplinary actions are being sought in this matter. Furthermore, the Proposed Order does not describe any proposed penalty. *See* ¶ 1 of Decoulos Aff. #1.

19. The time between the Complaint Date and the receipt of the Proposed Order is four years and 27 days.

20. Hudson Insurance has refused to defend Respondent in this proceeding. *See* ¶¶ 3 and 4 of Decoulos Aff. #3.

21. On October 7, 2010, Respondent received an email from Board attorney Lynn Peterson Read which provided new evidence that Respondent has been seeking *See* ¶ 7 and Exhibit C of Decoulos Aff. #3.

ARGUMENT

A. THE ORDER TO SHOW CAUSE WAS UNTIMELY

There is no statute of limitations established by the Legislature at G.L. c. 21A, §§ 19 – 19J or in the Board's Regulations which describes a reasonable limitations period for the Board to pursue disciplinary actions against LSPs. Absent any reasonable period in either the legislation or the regulations, it is left to the courts to determine when a cause of action should accrue. Doe v. Harbor Schools, Inc., 446 Mass. 245, 254 (2006) [where "basic fairness dictates a more flexible approach"]; and Riley v. Presnell, 409 Mass. 239, 243 (1991).

Page 2 of the Posternak Letter states that:

> Like other causes of action, such as tort and contract claims, there should be a reasonable limitations period imposed upon the CRT to complete its investigation and to timely file a recommendation for disciplinary action with the Board. Otherwise, LSPs could be subjected to long, drawn out investigations, during which the LSP could be prejudiced by witnesses' loss of memory or by the inadvertent destruction of documentary evidence.

In a comparable tort claim heard by the Supreme Judicial Court (SJC) in 2001, the court determined that both G. L. c. 260, § 2A and G. L. c. 21E, § 11A provided statutory limitations periods of three years. Taygeta Corp. v. Varian Associates, Inc., 436 Mass. 217, 220 (2002)[1].

The Legislature has established limitations on personal actions for consumer protection actions. *See* G.L. c. 260, § 5A. Similar to the broad duty to protect the public interest which the Board argued in its letter to Mr. Johnson (Exhibit R-12), c. 260, § 5A provides a limitations period not to exceed four years. Ditommaso v. Laliberte, 9 Mass. App. Ct. 890 (1980). *See also* Donovan v. Philip Morris USA, Inc., 455 Mass. 215 (2009).

The Board's interpretation of its statutory authority to never retract a complaint "for any reason" has severely prejudiced Respondent. *See* Exhibit R-13a. If Respondent knew that the Board was prepared to act in the autocratic fashion of acting without any limitations periods, he would have never executed a Settlement Agreement with Eagle. *See* Exhibit R-11. There are no guidelines or inferences in either G.L. c. 21A, §§ 19 – 19J or the Board's Regulations which support the Board's broad interpretation of its self-appointed never ending powers.

[1] In Taygeta, the SJC also revisited the "discovery rule", with its application to contamination under c. 21E and the consideration of appropriate statutes of limitations for tort litigation. Id at 224-229.

Adopting the basic fairness doctrine that the SJC described in Doe, the more flexible consideration of limiting disciplinary actions should be that Board actions commence no more than four years after a complaint is filed. Waiting four years and 27 days between the Complaint Date and the receipt of the Proposed Order is simply too long for justice to be served.

B. THE DEPARTMENT IS A NECESSARY AND INDISPENSABLE PARTY

Respondent has been frustrated by the unwillingness of the Department to cooperate in the discovery phase of this matter. *See* Respondent's Motion to Seek Oral Discovery dated September 29, 2010 and Respondent's Motion for Order Compelling Discovery dated October 1, 2010.

The documents and correspondence sought by Respondent are important pieces of evidence that Respondent was unable to introduce prior to the deadline established for the Respondent to file Direct Testimony and Rebuttal Testimony (September 22, 2010). The deliberate actions of the Board and the Department to delay this information has caused significant prejudice on the Respondent.

It is patently unfair for the Respondent to continue to receive evidence from the Board at the last hour. *See* ¶¶ 7 - 18 of Decoulos Aff. #3. The newly discovered evidence provides significant support for the actions of the Respondent and demonstrate that the Department failed to fulfill its most basic duties in overseeing response actions at a Tier 1A site defined in the Massachusetts Contingency Plan at 310 CMR 40.0700 *et seq. See* Exhibit RR-7.

The Board has stated that they are "a separate agency from MassDEP". *See* ¶¶ 46 – 50 of Decoulos Aff. #1 and ¶¶ 1 – 3 of Decoulos Aff. #2. The two agencies are both charged by the Legislature to oversee compliance for G.L. c. 21E. They operate under the same roof, share

similar office spaces, use common office equipment and operate under the same budget. *See* Ciardi v. F. Hoffman-LaRoche, Ltd., 436 Mass. 53, 62 (2002) ("Statutes addressing the same subject matter clearly are to be construed harmoniously so as to give full effect to all of their provisions and give rise to a consistent body of law.") It is clear that the Board operates under a budgetary line item of the Department and is subject to their control. *See* ¶ 6 and Exhibit B of Decoulos Aff. #3.

The Department clearly recognizes the importance of preventing surface contamination that threatens public health, safety, welfare and the environment. *See* Exhibits RR-24 and RR-27. Respondent has argued vehemently that the significant contamination he identified at the stormwater outfall in Carver was caused from these well recognized types of surface releases.

MassDEP directs many government entities and institutions to recognize the importance of stormwater best management practices to prevent oil or hazardous material spills from entering catch basins, stormwater collection systems and waterways. Numerous governmental entities have also implemented storm drain stenciling or the placement of fixed templates, markers and decals at catch basins to inform the public of the dangers of oil spills and pollutants into catch basins. *See e.g.* EPA public involvement/participation web site at: http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=15 ; Boston Water and Sewer Commission educational outreach at http://www.bwsc.org/COMMUNITY/education/stenciling.asp and http://www.bwsc.org/COMMUNITY/Prevention/prevention.asp ; and Harvard University environmental outreach at http://www.uos.harvard.edu/ehs/environmental/stormwater_oil.shtml and http://www.uos.harvard.edu/ehs/environmental/stormwater_paved.shtml

The Department is a necessary and indispensable party to this action and this matter must be dismissed if the Department is unwilling or unable to join. Department of Revenue v. Lafratta, 408 Mass. 688 (1990).

The Massachusetts Rules of Civil Procedure clearly recognize the importance of equitable principles of harm and good conscience. Mass. R. Civ. P. 19(a) provides:

> A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.

Mass. R. Civ. P. 19(b) addresses the possibility that an indispensable party cannot be joined:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Because the Board has relied on unsubstantiated allegations made by Department employees, the Department is a party necessary for a just adjudication of the present action. The record strongly suggests that Respondent took careful actions that went beyond his duty to protect public health, safety, welfare and the environment and that he was frustrated by decisions of the Department. Any determination of the Board's claims without the Department as a party

presents a substantial likelihood of prejudice to the Respondent, who faces the likely threat of being unable to defend himself with documents or testimony from Department personnel.

The present action cannot be determined in the absence of the Department without substantial and unavoidable risk of prejudice to Respondent. This matter must be dismissed under the principles of Mass. R. Civ. P. 19(b).

C. RESPONDENT HAS BEEN DENIED DUE PROCESS

The evidence that the Board has garnered to date has relied on unsubstantiated and outdated practices from the Department. Furthermore, the Board has taken various positions without having qualified experts knowledgeable in non-point source pollution, surface contamination and the design and maintenance of stormwater collection systems. Without an opportunity to properly rebut the contrary opinions and decisions of both the Board and the Department, Respondent is being denied the "fundamental fairness" that constitutional due process protections provide. Duro v. Duro, 392 Mass. 574, 580 (1984); Commonwealth v. Soares, 377 Mass. 461, 486 (1978), cert. denied, 444 U.S. 881 (1979).

The issues raised in the Posternak Letter at page 4 describe how the Board's procedures not only undercut "the spirit and purpose of Massachusetts administrative procedure" but also lead to fundamental due process violations under both the Massachusetts and United States Constitutions.

The defects in the issuance of a Proposed Order without any specific proposed discipline for the Respondent to rebut have denied him "the opportunity to be heard `at a meaningful time and in a meaningful manner,' " as due process requires. Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The Board has established a

pattern of disregarding administrative rulings and pursuing discipline after an administrative ruling that violate LSPs' due process rights. *See e.g.* Matter of Loitherstein, Docket No. HW-04-206 (DALA, 2008) and the Board's subsequent action at:

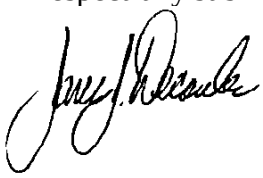
http://db.state.ma.us/dep/lsp/Details.asp?LSPNumber=6815

CONCLUSION

For the foregoing reasons, Respondent moves that this matter be dismissed for 1) failure to timely prosecute the matter; 2) failure to add the Massachusetts Department of Environmental Protection as a necessary and indispensable party to this proceeding; and 3) violation of Respondent's right to due process under article 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

Dated: October 8, 2010

Respectfully submitted,



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STATEMENT OF SERVICE

I, James J. Decoulos, do hereby certify that I caused a copy of the MOTION TO DISMISS with the supporting AFFIDAVIT OF JAMES J. DECOULOS AND EXHIBITS A – J dated October 8, 2010 to be served on the following parties by electronic mail:

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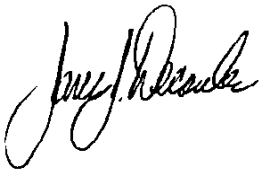
Signed under the penalties of perjury this 8th day of October, 2010.



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