

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

November 3, 2010

In the Matter of James J. Decoulos

Docket No. LSP 10AP 01

**RULING AND ORDER REGARDING
MOTION TO CORRECT, AMEND, OR MODIFY AND
REQUEST FOR A CONFERENCE**

On October 29, 2010, Mr. Decoulos filed his Motion to Correct, Amend, or Modify the Report and Order dated October 27, 2010. In that motion and the attached affidavit, Mr. Decoulos repeats a number of issues that were previously raised, considered, and addressed, and I therefore will not address those issues again. I will, however, clarify the record in this appeal. See e.g. Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 414 (2001) (hearing officer's version of the record is given deference in the absence of documentation in the record to the contrary).

On January 8, 2010, the Board of Registration of Hazardous Waste Site Professionals ("Board") issued the detailed Order to Show Cause to Mr. Decoulos pursuant to 309 CMR 7.07.¹ Mr. Decoulos responded on February 2, 2010 when he filed his Objections and Answer to the Order to Show Cause pursuant to G.L. c. 21A § 19H. Contrary to Mr. Decoulos' numerous protestations, he was aware at least by that date that the Department of Environmental Protection ("Department" or "MassDEP") was a separate legal entity that was not a party to this action—in

¹ This appeal is governed by 309 CMR 7.08 and 801 CMR 1.00.

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his Objections and Answer to the Order to Show Cause he allocated blame towards MassDEP, acknowledging MassDEP is not a party but asserting that it is a “necessary party to this proceeding.” Decoulos Objections and Answer to Show Cause Order, pp. 12-13, ¶¶ 9, 10, 11, 13. Indeed, the Board is a separate legal entity established pursuant to G.L. c. 21A §§ 19 and 19A. Section 19A of G.L. c. 21A provides that the Board shall consist of eleven members, all of whom are appointed by the Governor, with the exception of the Board Chair, who is the Commissioner of MassDEP or her designee. Section 19A also provides that “subject to appropriation, the secretary of the executive office of environmental affairs shall employ such staff and other persons as are required to assist him or the board or both in the performance of their functions or duties pursuant to sections.”

The Board’s implementing regulations are found at 309 CMR 1.00 et seq. The Board’s letterhead on correspondence sent to Mr. Decoulos contains no reference to MassDEP. The Board’s website contains no reference to MassDEP as having a legal affiliation with the Board, except as discussed above under G.L. c. 21A § 19A. See <http://www.mass.gov/lsp/>; supra. at pp. 1-2.

On March 25, 2010, I issued the Scheduling Order in this appeal, which required the parties to attend a Pre-Screening/Hearing Conference on April 13, 2010, to perform a number of preparatory tasks, and to file a report in advance of the Pre-Screening/Hearing Conference with respect to those tasks. See Scheduling Order, pp. 2-4. Among other things the parties were to provide: “A list of basic documents that will be necessary for the record in order for the Presiding Officer to reach a decision in this matter and on which the parties can stipulate to admissibility (e.g., Notice of Noncompliance, Notices of Audit Findings, Written Responses to

such enforcement documents, IRA plans and reports, Phase reports, Risk Assessment reports, etc.); . . .” Id.

On April 9, 2010, Mr. Decoulos advised me that he wished to extend the date for the adjudicatory hearing from sometime in July 2010 to sometime in November 2010 because he would be travelling out of the country, he was waiting to find out whether his insurance company would provide legal representation for him in this appeal, and he had to conduct substantial discovery. Motion to Extend Hearing Date. I later allowed that motion, rescheduling the hearing from July 2010 to October 27 and 29, 2010. That date was later changed to November 30 and December 1, 2010. See Ruling and Order Regarding Motion to Dismiss, etc. (October 19, 2010).

In accordance with my subsequent order, on April 16, 2010 Mr. Decoulos provided me with more information regarding the status of his legal representation in this appeal. Status Report on Legal Representation (April 16, 2010). Mr. Decoulos represented that he would know whether his professional liability insurance company would provide legal representation for him by April 30, 2010. Id. Mr. Decoulos later agreed that “that either he or his insurance carrier would retain counsel no later than May 5, 2010, or he would proceed pro se.” First Post Conference Report and Order, p. 2.

On April 9, 2010, the parties filed their joint Pre-Hearing Statement, designating, among other things, 116 separate documents or categories of documents that they believed should be a part of the record in this case. Pre-Hearing Statement, pp. 7-15.

I held the Pre-Hearing Conference on April 16, 2010 and issued a Pre-Hearing Conference Report and Order on April 28, 2010 (“First Post Conference Report and Order”). In

the Pre-Hearing Conference I discussed with the parties what discovery they believed needed to be conducted. I made it clear to the parties that they were required to meet deadlines and expeditiously conduct discovery, to the extent discovery was necessary. Mr. Decoulos again discussed the need to delay the hearing beyond July 2010 because he asserted that he would have to conduct discovery. I addressed discovery issues at length with the parties and summarized those issues in my First Report and Order (pp. 2-4). Regarding document discovery, the parties discussed voluntarily exchanging documents pursuant to 801 CMR 1.01(8), representing that there were no issues or problems with this. Mr. Decoulos mentioned nothing else with respect to document discovery. The Board represented that it would “voluntarily produce documents in its files related to the complaint against Mr. Decoulos, except documents subject to attorney-client privilege.” *Id.* I made clear to the parties that they were to expeditiously conduct their discovery, stating:

Therefore, the LSP Board shall make its files available to Mr. Decoulos for review and copying, subject to any applicable privileges, such as the attorney client privilege. Mr. Decoulos and/or his counsel shall have until **May 21, 2010** to review the LSP Board’s files and obtain non-privileged documents they desire. The LSP Board has not yet indicated a need to conduct any document discovery; if it desires documents from Mr. Decoulos it shall engage in cooperative discovery to obtain such documents by no later than **May 21, 2010**.

Although Mr. Decoulos represented that he believed he would have to subpoena MassDEP employees to provide testimony at the adjudicatory hearing, he mentioned no other issues with respect to document discovery. I concluded the First Report and Order by stating:

After it is decided whether Mr. Decoulos will be represented by counsel, I intend to hold another Pre-Hearing Conference to: (1) finalize the Issues for Resolution in this Appeal, (2) establish a final witness list, and (3) establish a date for the Adjudicatory

Hearing and a schedule of proceedings, including the submission of Pre-Filed Direct Testimony, final witness lists, stipulations of fact, and motions to strike, for directed decision, and/or for summary decision.

On May 5, 2010, Mr. Decoulos advised me that he intended to proceed pro se in this appeal. See May 5, 2010 Status Report. On June 4, 2010, Mr. Decoulos informed me that he “properly complied with deadlines” in the First Report and Order. He mentioned no problems with reviewing and obtaining documents with the Board. Respondent’s Answer to Order to Show Cause (June 4, 2010).

On June 8, 2010, the parties jointly advised me that the adjudicatory hearing could be scheduled on October 19, 20, or 26. The parties subsequently changed their proposed dates to October 14, 26, or 27 and requested a Pre-Hearing Conference to address evidentiary issues and issues related to witnesses. That notice did not identify any problems with respect to document discovery. See June 8 and June 21, 2010 letters from Ms. Read. On June 23, I notified the parties that the requested Pre-Hearing Conference would be held on July 14, 2010 and the adjudicatory hearing would occur on October 27, 2010. On July 13, 2010, Mr. Decoulos filed a Supplemental Pre-Hearing statement, identifying additional witnesses and documents. No mention was made of problems with discovery or the need for additional document discovery.

I held the Second Pre-Hearing Conference on July 13, 2010, and subsequently issued the Second Post Conference Report and Order. At the conference I noted that pursuant to the First Post Conference Report and Order, document discovery was to have been completed by May 21, 2010. Neither party indicated any problems or issues with respect to document discovery. See Second Post Conference Report and Order (“The parties represented that they had been engaging in voluntary discovery with respect to documents. Neither party indicated that any problems had

arisen with respect to such discovery.”). The First Post Conference Report and Order had required the parties to complete discovery between them by May 21, 2010. First Post Conference Report and Order, p. 3. The parties indicated that they needed some more time in order to finalize discovery, so they agreed and I required that discovery be completed by July 28, 2010.

Pursuant to 309 CMR 7.08 and 801 CMR 1.01 and in response to the Board’s objection to the relevancy and necessity of a number witnesses sought by Mr. Decoulos, I established the ground rules for Mr. Decoulos to request issuance of subpoenas. Id. ; see 801 CMR 1.01 (10)(d)(the presiding officer shall make “all decisions on the admission of evidence and resolving questions of procedure”); 801 CMR 1.01(10)(f)2 (“An offer of proof made in connection with a ruling of the Presiding Officer rejecting or excluding proffered testimony shall consist of a statement of the substance of the evidence which the Party contends would be adduced by the testimony.”); 309 CMR 7.08 (preference is for written direct testimony); Box Pond Ass’n v. Energy Facilities Siting Bd., 435 Mass. 408, 414 (2001) (hearing officer did not err in denying issuance of subpoena); G.L. c. 30A § 12 (subpoena may not issue if it evidence sought “does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive”).

At the Second Conference, I again reminded the parties that “are required to be diligent in meeting deadlines for the prosecution or defense of this appeal.” See Second Post Conference Report and Order. I also established the ground rules and timelines, agreed to by the parties, for submission of Pre-Filed Direct Testimony, stating:

The Pre-filed Testimony must also include the originals or true copies of all documents cited by the Testimony as supporting the

witnesses' testimony and a party's positions in the case. Specifically, the Pre-filed Testimony must include all exhibits to be offered in evidence and all evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision in the appeal. Any Pre-filed Testimony that fails to include that documentary evidence is incomplete and untimely.

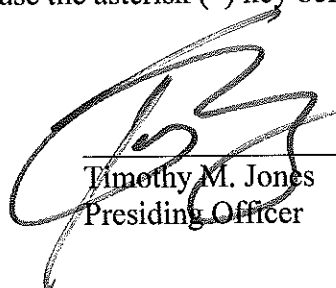
Second Post Conference Report and Order, pp. 5-6. Mr. Decoulos was originally to submit his Pre-Filed Direct Testimony by September 15, 2010, but on August 2, 2010 I changed that to September 22, 2010. Mr. Decoulos submitted his Pre-Filed Direct Testimony on September 22, 2010.

Mr. Decoulos has since complained that a nonparty to this appeal, MassDEP, has been late or incomplete in responding to public records requests. See Affidavit of Mr. Decoulos (11/3/10); Affidavit of Mr. Decoulos (10/1/10). This complaint warrants four responses for purposes of clarifying the record. First, it appears as of November 1, 2010, Mr. Decoulos received documents in response to all of his public records requests to MassDEP, although Mr. Decoulos argues the responses were incomplete. See Id. Second, Mr. Decoulos' claim of prejudice regarding the inability to secure the purported documents from MassDEP assumes their relevance to the issues in this appeal, without any evidentiary proof or proffer. Third, as I have said before, the position in which Mr. Decoulos finds himself resulted from his own delay in waiting to file public record requests in the same month in which his Pre-Filed Direct Testimony was due. See Ruling and Order Regarding Motion to Compel and Motion for Oral Testimony, p. 3 (October 12, 2010); Ruling and Order Regarding Motion to Dismiss, Offer of Proof, Motion to Strike, and Motion to Present Exhibits, p. 5 (October 19, 2010); Report and Order Regarding Evidentiary and Miscellaneous Issues, p. 3 (October 27, 2010). I do not find Mr. Decoulos'

argument that this delay resulted from his alleged prior belief that he could obtain all MassDEP documents from the Board. There is no persuasive evidence to support this argument and it is belied by the record evidence showing the legal separateness of MassDEP and the Board, and Mr. Decoulos' awareness of this. See supra. at pp. 1-2.

Fourth, notwithstanding Mr. Decoulos' claims of prejudice, even though I found that Mr. Decoulos' alleged problems in securing documents from MassDEP was a result of his own dilatory conduct, I nevertheless allowed him to file as exhibits with contemporaneous direct testimony the documents he received from MassDEP beyond my previously established timeliness; I stated that rulings regarding relevancy and weight of the such evidence will be made at a later time. Report and Order Regarding Evidentiary and Miscellaneous Issues, pp. 2-3 (October 27, 2010). As stated in my prior ruling, Mr. Decoulos must do this with documents he thus far received in response to public records requests by November 5, 2010. To be clear, this includes documents that Mr. Decoulos received from MassDEP on November 1, 2010. I will allow Mr. Decoulos to continue to do this with documents he receives from MassDEP after November 1, 2010 up until November 12, 2010, and the Board may respond by November 19, 2010.

As the parties have requested, I will hold a telephone conference status call on November 23, 2010 at 1:00 p.m. The call in number is: (866)-633-3380. When prompted, dial the room number: *7960893*. You must remember to use the asterisk (*) key before and after the number in order for it to work.

 11/3/10
Timothy M. Jones
Presiding Officer

SERVICE LIST

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OF HAZARDOUS WASTE SITE
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