

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

In the Matter of: _____)
)
)

Respondent _____)
)

LSP Board Complaint No. 05C-07
OADR Docket No. LSP 10AP 01

**OPPOSITION TO MOTION TO ALLOW ADDITIONAL EXHIBITS
AND
REPLY TO OPPOSITION TO MOTION TO STRIKE LATE-FILED EXHIBITS**

Prosecuting counsel opposes Respondent's "Motion to Allow Additional Exhibits to the Record" and "Opposition to LSP Board's Motion to Strike Late-Filed Exhibits" (together, the "Motion to Reopen"), for the following reasons:

1. The record of this proceeding closed when the Presiding Officer issued the Recommended Decision on September 7, 2012. Evidence not made part of the record is prohibited by G.L. c. 30A, §11, and the Standard Rules of Practice and Procedure applicable to this proceeding state, "No evidence shall be admitted after the close of the record unless the Presiding Officer reopens the record." 801 CMR 1.01(10)(k)(2).
2. Moreover, there are no grounds to reopen the record, which is permitted only to admit newly-discovered evidence which by due diligence could not have been discovered at the time of the hearing. 801 CMR 1.01(7)(k).
3. Respondent made no showing why he could not have offered Appendix Q at the hearing, because it is a permit dated in 2008, more than two years before the hearing. It is irrelevant because it was issued for discharge of treated site

groundwater into the storm drain pipe after site remediation, three years after Respondent's work, thus it did not reflect site conditions faced by Respondent.

4. Respondent's motion to offer new documents and oral argument about proposed amendments to the Massachusetts Contingency Plan ("MCP") regarding assessment and remediation of non-aqueous phase liquid ("NAPL") should be denied because Respondent admits they are offered to show changes in policy and practice after he was involved with the site from 2002 to 2005. However, the Rules of Professional Conduct require an LSP to apply the knowledge and skill ordinarily exercised by LSPs at the time the services are performed, and follow applicable provisions of the MCP. 309 CMR 4.02(1), 4.03(3)(b).
5. The MCP's provisions for NAPL have not been amended, thus the MCP requirements for assessment and remediation of NAPL have not changed even now.
6. Indeed, the Presiding Officer already ruled that documents showing NAPL policy development by the Department of Environmental Protection ("MassDEP"), were irrelevant to this case, and he denied Respondent's motion to compel MassDEP to produce them for his potential use in the hearing, stating,

[Respondent] has failed to demonstrate how the ... documents are relevant... At issue in this appeal are the Board's allegations that with respect to remediation of a release of oil or hazardous material at [the site], [Respondent] failed to act with reasonable care and diligence...and he failed to comply with G.L. c. 21E and [the MCP]...Therefore, of relevance is the standard of care and regulatory requirements that existed at the time of the alleged violations. ...[D]ocuments that have been and are being generated in the course of general policy discussions that commenced approximately four years after the incidents that form the basis of the alleged violations ...are too far afield in terms of relevance.

Ruling and Order Regarding Motion to Compel Documents Pertaining to NAPL Work Group, pp. 3-4 (emphasis added).

7. Appendices R and S are not new evidence that can support reopening the record. They are training materials and standards published in 2011-2012 that Respondent offers to show how standards changed after his work on the site, thus they were not in existence at the time of the hearing, which is required. See, 801 CMR 1.01(7)(k); Mass. R. Civ. P. 60(b)(2), Reporter's Notes ("newly discovered evidence" as grounds for relief from judgment refers to evidence in existence at time of trial).¹
8. Respondent is attempting to re-litigate the core issues of whether he violated the Rules of Professional Conduct, 309 CMR 4.00. He has not specified how the MCP amendments would affect the findings that he failed to act with reasonable care and skill ordinarily exercised by LSPs at the time of his work, and several core findings in the Recommended Decision, which were supported by citations to substantial evidence, would remain unaffected by any MCP amendments regarding NAPL. First, the Presiding Officer found the Respondent "had not performed the most fundamental of assessment activities to rule out infiltration of the storm drain pipe and support his alternate theory that the contamination in the brook resulted from surface water runoff." Recommended Decision p. 20. For example, Respondent did not measure the storm pipe invert elevations to compare

¹ Appendix T is a copy of curb stickers prohibiting dumping into catch basins that has no probative value because Respondent offered no evidence of actual dumping in the site catch basin or that such stickers were put there, but merely asserted that conditions in the catch basin were caused by dumping. Appendix V is Respondent's comparison of petroleum concentrations in the storm drain pipe in April 2005 and at the outfall in May 2003, which was created after the hearing was closed and argues illogically that upgradient pipe conditions in 2005 did not contaminate the downgradient outfall two years earlier, in 2003.

them to seasonal high groundwater elevations before ruling out infiltration of the storm drain pipe. Id. at 20-21. Also, he stated “unequivocally, incorrectly, and without sufficient technical, factual, and scientific support, that the release at the outfall resulted from ‘stormwater surface flows,’” Id. at 23, without forensic testing of water or sediment, or explanation how routine stormwater runoff could cause the egregious contamination observed at the storm pipe’s outfall on multiple dates. Id. at 23-24, 32-35. Lack of basic data cannot be remedied retroactively by MCP amendments.

9. MCP amendments also will not change the findings that Respondent failed to submit timely Immediate Response Action Plans and failed to follow through on MassDEP’s orders approving IRA Plans and to evaluate conditions of Substantial Release Migration and potential Imminent Hazard evaluation, without adequate technical justification. Rec. Dec. pp. 24-30. Respondent’s proposals for LNAPL remediation were unsupported by adequate evidence of the extent of contamination, and did not show such remediation would be effective. Id. at 27-29, 35. Again, lack of adequate site-specific data in 2003-2005 cannot be affected by MCP amendments that have not yet occurred.
10. Respondent has not specified how possible future amendments to the MCP could affect the findings that he failed to act with reasonable care and diligence or apply the knowledge and skill ordinarily exercised by LSPs practicing at the time his services were performed. He has not attempted to correlate any proposed MCP amendments with his actions in this case. The evidence was comprehensive that Respondent failed to act with reasonable care, ordinary knowledge and skill, or in

compliance with the MCP, and Respondent cannot show the proposed MCP amendments would affect such findings.

CONCLUSION

Respondent's Appendices Q, R, S, T, and V should be stricken, and his request to argue that MCP amendments proposed in 2013 are relevant to this proceeding should be denied, because Respondent has not shown that they relate in any way to the issues for determination of the adequacy of the data supporting his opinions or proposals in 2003-2005.

Respectfully submitted,
Prosecuting attorney,



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CERTIFICATE OF SERVICE

I hereby certify that on this date a true copy of the above document was served upon the attorney of record for each party herein by electronic mail.

9/6/13
Date



Lynn Peterson Read