

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

April 28, 2010

In the Matter of James J. Decoulos

Docket No. LSP 10AP 01

POST CONFERENCE REPORT & ORDER

This is an appeal of an Order to Show Cause issued by the Board of Registration of Hazardous Waste Site Professionals (the "LSP Board") to Mr. James J. Decoulos, a Licensed Site Professional who holds a license from the LSP Board and who is the Respondent in this matter. The Order to Show Cause was issued under the authority of 309 CMR 4.00 et seq., and this proceeding is governed by that set of regulations and the adjudicatory hearing rules at 801 CMR 1.00 and M.G.L. c. 30A.

Pursuant to 309 CMR 7.08 and 801 CMR 1.00 et seq., the parties participated in a Pre-Hearing Conference on Friday, April 16, 2010 under the auspices of Office of Appeals and Dispute Resolution ("OADR"). I had anticipated issuing this Report & Order by no later than April 23, 2010, but unfortunately unexpected pressing issues in other matters precluded that. The parties should review this Report and Order carefully regarding whether it contains any perceived errors. If either party wants to object to anything in this document, they must do so no later than May 5, 2010.

One of the first issues discussed was whether Mr. Decoulos would be represented by counsel in this matter. Based upon filings and representations by Mr. Decoulos, he indicated that either he or his insurance carrier would retain counsel no later than May 5, 2010, or he would proceed pro se. By May 5, 2010, Mr. Decoulos must therefore notify OADR whether he will proceed pro se or with representation by counsel. Given the state of flux regarding this issue of representation, we discussed that the Pre-Hearing Conference would have to be somewhat preliminary in nature. In addition, I also stated that the adjudicatory hearing would likely not occur until sometime in the end of September. This was acceptable to the LSP Board. Mr. Decoulos believed such time frame may not allow him a sufficient amount of time to conduct discovery. This issue of when the hearing will occur will be discussed more definitively after it is decided whether Mr. Decoulos will be represented by counsel.

Mr. Decoulos stated he intended to conduct discovery regarding qualifications of LSP Board members, as it was his position that LSP Board members lacked the qualifications to render fair and sound decisions in this appeal. I questioned the extent to which such an attack would be permissible in this appeal, given the narrow nature of the issues. I required Mr. Decoulos to provide briefing on the extent to which it was permissible by no later than May 12, 2010. The LSP Board shall respond no later than May 21, 2010.

Mr. Decoulos also anticipated that he would either have to present live testimony or deposition testimony, instead of pre-filed direct testimony, because he perceived several of his intended witnesses to be hostile. We discussed that this issue would be revisited after it was decided whether Mr. Decoulos would be represented by counsel.

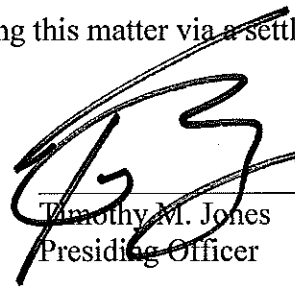
After discussing the parties' positions, it appeared that settlement of this case was unlikely. Mr. Decoulos represented that he believes the LSP Board has a fundamental misunderstanding as to his liability, and he believes that he has no liability. The LSP Board on the other hand represented that it believed liability was relatively clear and sanctions were appropriate. I encourage the parties to recognize that there may be problems with their cases and to continue discussing whether some compromise can be reached, perhaps using the services of a mediator.

In terms of document discovery from the LSP Board, the LSP Board has represented that it will "voluntarily produce documents in its files related to the complaint against Mr. Decoulos, except documents subject to attorney-client privilege." 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, 2010.¹

¹ All parties should note that although the Presiding Officer in this matter is an employee of the Department of Environmental Protection, which agency initiated a case referral in this matter, the Presiding Officer sits in the Office of Appeals and Dispute Resolution which is an entirely separate operational group providing hearing officer and dispute resolution services to MassDEP. OADR also provides such services to other agencies upon request. Presiding Officers are appointed who have had no prior knowledge of cases at issue. Presiding Officers have duties under M.G.L. c. 30A, 801 CMR 1.00 et seq., and the LSP Board regulations at 309 CMR 7.08 to conduct fair proceedings that protect the rights of all parties involved in the proceeding. Presiding Officers must also comply with the ex parte communication rules required by 801 CMR 1.00 et seq. OADR is separate and independent of MassDEP's program offices, Regional Offices, and Office of General Counsel. OADR is staffed by a Case Administrator, an Administrator of Alternative Dispute Resolution ("ADR"), and Presiding Officers. A Chief Presiding Officer, who reports to MassDEP's Commissioner, supervises Presiding Officers and other OADR staff. Presiding Officers in OADR are experienced attorneys at MassDEP appointed by MassDEP's Commissioner to serve as neutral hearing officers, and are responsible for facilitating settlement

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.

Prior to the Hearing, the parties to this appeal shall continue efforts to discuss the informal resolution of this matter. I strongly encourage the parties to keep open lines of communication and discussion relative to resolving this matter via a settlement agreement.

 4/28/10

Timothy M. Jones
Presiding Officer

discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. Ex Parte communications between OADR's Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited. These provisions ensure that the appeal process will be fair and will result in unbiased decision-making.

SERVICE LIST

BOARD OF REGISTRATION
OF HAZARDOUS WASTE SITE
CLEANUP PROFESSIONALS

Lynn Peterson Read, Esq.
Prosecuting Attorney
Board of Registration of Hazardous
Waste Site Cleanup Professionals
One Winter Street, 3d Flr.
Boston, MA 02108
Lynn.read@state.ma.us

JAMES J. DECOULOS, LSP

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

