

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

In the Matter of:)
)
)

James J. Decoulos,
Respondent)
)
_____)

Docket No.: LSP 10 AP 01

**RESPONSE TO OBJECTIONS OF JAMES J. DECOULOS, P.E., LSP, TO
RECOMMENDED DECISION**

Prosecuting counsel hereby responds to the "Objections of James J. Decoulos, P.E., LSP, to the Presiding Officer's 'Recommended Decision' Dated September 7, 2012" (the "Objections").

I. BACKGROUND

A. Procedural Posture of the Case

A private party filed the Complaint in this matter on December 15, 2005. In accordance with its regulations and policies, the Board of Registration of Hazardous Waste Site Cleanup Professionals ("Board") reviewed redacted copies of the Complaint and Mr. Decoulos's Answer, with all identifying information removed, and accepted the Complaint for investigation by a Complaint Review Team ("CRT"). In conducting its investigation, the CRT reviewed the Complaint and Mr. Decoulos's written response, and interviewed Mr. Decoulos on December 12, 2007, and May 12, 2008. The CRT reviewed the documents in the file of the Massachusetts Department of Environmental Protection ("MassDEP") for the site at issue in the Complaint. The CRT investigated work done by the LSP at a second site, and questioned the LSP about

his/her work at this second site for which MassDEP had invalidated a Response Action Outcome Statement ("RAO").

On July 23, 2009, having reviewed report by the CRT that did not contain any identifying information, the non-recused members of the Board who were not on the CRT voted that sufficient facts exist to warrant discipline against Mr. Decoulos. An Order to Show Cause and Proposed Order were mailed on January 11, 2010, and Mr. Decoulos's Answer was received by the Board on February 2, 2010. On February 12, 2010, the Board designated Presiding Officer Tim Jones, a hearing officer in the Office of Appeals and Dispute Resolution ("OADR") of MassDEP, to conduct the adjudicatory hearing in the matter. After pre-hearing conferences, the hearing was held on January 26-27, 2011 and February 10, 2011. On September 7, 2012, a Recommended Decision ("RD") was issued. On October 1, 2012, and December 6, 2012, the Board extended the deadlines for Objections to the Recommended Decision until January 4, 2013, and Responses to Objections until February 1, 2013.

**B. MR. DECOULOS HAS NOT DEMONSTRATED THAT THE
ADJUDICATORY HEARING WAS UNFAIR.**

Mr. Decoulos objects to the adjudicatory proceeding, stating it was biased and unfair because one of the Board members who "interviewed and selected" the Presiding Officer testified as a witness in the hearing. He also claims that Presiding Officer Tim Jones was biased in favor of the Massachusetts Department of Environmental Protection ("MassDEP") because he was a "DEP attorney," and MassDEP had overseen Mr. Decoulos's response actions at the site and its personnel were witnesses in the hearing. Objections, pages 16-19.

Mr. Decoulos inaccurately characterizes the process by which the Board delegated this hearing to Presiding Officer Jones. Mr. Luhrs did not "select" the Presiding Officer. The Professional Conduct Committee, a "committee of the whole" Board, made that selection, as

evidenced by the vote of the Committee in Mr. Decoulos's Exhibit C to his Objections. That vote did not violate Mr. Decoulos's right to a fair hearing. The Board is authorized by statute to delegate adjudicatory hearings to administrative law judges, G.L. c. 21A, §19A, and agencies may take reasonably necessary steps to engage the professionals needed to conduct adjudicatory hearings. For instance, due process rights were not violated when a licensing board's presiding officer solicited an expert who later testified before that presiding officer in a disciplinary hearing, where there was no conversation between the presiding officer and the expert about respondent's case or any specific case. Goldstein vs. Board of Registration of Chiropractors, 426 Mass. 606, 615-616 (1998). There is no suggestion here that Mr. Luhrs discussed Mr. Decoulos's case or any specific case with Mr. Jones. As co-chair of the Board's Professional Conduct Committee, Mr. Luhrs participated in a group meeting with the other co-chair Debra Stake, the chair of the Board Janine Commerford, and Mr. Jones as one Presiding Officer within OADR, to determine whether Mr. Jones had some experience with the extensive regulatory process of the Massachusetts Contingency Plan ("MCP"). The LSP Board's desire to ensure that its cases were heard before a Presiding Officer with some experience in the regulatory program at issue was entirely reasonable. See Goldstein, 426 Mass. at 616 (that the board should want its presiding officer to develop a panel of experts is entirely reasonable and does not suggest bias or partiality).

Mr. Decoulos's objection that Mr. Jones was biased in favor of the witnesses who were employees of MassDEP should be rejected. His argument would mean that no agency could delegate its adjudicatory hearings to designated administrative law judges ("ALJs"), and that OADR Hearing Officers could not hear any case involving MassDEP. MassDEP is authorized to appoint Presiding Officers from among employees who have expertise and have the single

function of conducting adjudicatory proceedings. 310 CMR 1.02(1)(a). The internal separation between OADR hearing officers and the other employees of MassDEP allows the hearing officers to develop independence in their work. Cella, A.J., *Administrative Law and Practice*, 38 Mass. Pract. §345 (1986). MassDEP creates such separation by requiring that presiding officers'

salaries, promotions, benefits, working conditions, case assignments, and opportunities for employment or promotion shall not be based upon whether an ALJ's rulings, decisions or other actions favor or disfavor the agency or the Commonwealth. The work of an ALJ shall be evaluated on the basis of competence, objectivity, fairness, productivity, diligence, and judicial temperament. DEP shall not establish quotas or similar expectations for any ALJ that relate in any way to whether the ALJ's ruling, decisions, or other actions favor or disfavor the agency or the Commonwealth.¹

The Board issued a formal "Appointment of Presiding Officer and Instructions for Conducting Adjudicatory Proceeding" which specified, "The Presiding Officer shall conduct the adjudicatory proceeding, and prepare recommended findings of fact and rulings of law, by exercising his independent judgment impartially and without bias or prejudice." See attached Exhibit 1. Presiding Officer Jones addressed this issue by including the following note in each of his orders:

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,² 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.

For all these reasons, there is no presumed bias toward the Board. The Board will make the final decision after examining the record of the hearing. G.L. c. 21A, §19A.

¹ OADR website, <http://www.mass.gov/dep/service/adr/direc001.htm>.

² MassDEP did not initiate this complaint.

II. ARGUMENT

A. STANDARD OF REVIEW

The prosecuting attorney in this matter has the burden to prove the case against the Respondent by a preponderance of the evidence. Craven vs. State Ethics Commission, 390 Mass. 191, 200 (1983). If the Board finds the prosecuting attorney's evidence even slightly more convincing than that of the Respondent, then the Board must find against the Respondent. The Board must consider the entire record, and in considering the weight of evidence, must take into account whatever in the record fairly detracts from that weight. Duggan v. Board of Registration in Nursing, 456 Mass. 666, 674-75 (2010) (citations omitted). The Board resolves factual disputes involving contradictory testimony, and may apply its experience, technical competence, and specialized knowledge in evaluating the evidence presented. G. L. c. 30A, §11(5). The Board's interpretation of its regulations is conclusive at the agency level and will be given deference by the courts. Peabody v. Department of Environmental Protection, Mass. App. Ct. Docket No. 08-P-674 (November 8, 2012),³ citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 228 (2010).

The Objections attack individual subsidiary findings in the Recommended Decision in a piecemeal, disjointed fashion, without presenting a reasoned argument addressing the main issues in the case. The present response will nevertheless address the Objections as they relate to the Presiding Officer's conclusions on the main issues in the case.

³ Available via <http://www.massreports.com/UnpublishedDecisions/default.aspx>

B. EAGLE GAS SITE

1. Introduction

The Presiding Officer found that Mr. Decoulos violated the Board's standard of professional care by not collecting sufficient data to support his assertion that a diesel fuel release at his client's gas station, that was detected immediately adjacent to the storm drain pipe under the street, was not a source of the diesel-range petroleum contamination that flowed from the storm pipe's outfall emptying into a brook. Recommended Decision ("RD") pp. 17-26, 29-30. Mr. Decoulos relied on visual inspection of the storm pipe, vapor readings in the pipe, and soil borings and groundwater samples at three downgradient locations along the pipe, but the Presiding Officer found that evidence was not sufficient to outweigh the several lines of evidence that indicated the diesel release was a source of the contamination at the outfall, including: the recurrence for 12 months of separate-phase diesel (known as light non-aqueous phase liquid, "LNAPL" or "NAPL") in well BP-5RR, the appearance of NAPL in well DCW-1 adjacent to the storm pipe (after Mr. Decoulos had failed to sample the wells for 12 months); vapor readings that were undetectable in the catch basin and manhole upgradient of the gas station, but that increased substantially at the catch basin and manhole downgradient of the station; extremely high concentrations (2,150,000 parts per billion) of diesel-range extractable petroleum hydrocarbons ("EPH") in surface water at the outfall; gross thicknesses of oil emulsion were photographed at the outfall on multiple dates; and the absence of any other identified source of NAPL in the vicinity. RD pp. 19-26, 29-30. The Presiding Officer found that Mr. Decoulos failed to collect evidence that MassDEP required to rule out the indications that the diesel release may have infiltrated the pipe, because he relied on sampling in June 2003 at downgradient locations to which NAPL had not migrated, but he did not measure the depth of the storm drain inverts or compare them to groundwater elevations, which could have indicated if contaminated

groundwater was in contact with the storm pipe and possibly infiltrating it, until December 2004, 23 months after the release was reported. The Presiding Officer found that Mr. Decoulos failed to implement active NAPL recovery that he initially proposed and MassDEP required as an IRA Plan. RD pp. 15-16, 21.

Mr. Jones also found Mr. Decoulos did not collect sufficient data to support his assertion that the source of the contamination at the outfall was surface runoff into a catch basin connected to the storm drain pipe, because he provided no evidence of diesel surface releases and rainfall at times that corresponded with the high concentrations of diesel-range petroleum in surface water at the outfall; he did not perform timely sampling or analysis of contamination at the outfall and in the storm drain system; and did not perform an Imminent Hazard Evaluation or assess conditions of Substantial Release Migration until December 2004, and the Imminent Hazard Evaluation he submitted was non-quantitative and failed to provide information required by the MCP. RD pp. 24-30. In addition to violating the requirement to act with reasonable care and diligence, the Presiding Officer found he violated applicable provisions of the MCP requiring Immediate Response Actions ("IRA") and site assessment commensurate with the complexity of the site and remediation in compliance with the MCP. 309 CMR 4.02(1), 4.03(3)(b).

2. The Presiding Officer Correctly Found That Mr. Decoulos Failed to Implement The Requirement for Active NAPL Recovery.

Mr. Decoulos initially objects to the Presiding Officer's finding that he did not follow through on his first written IRA Plan in March, 2003 (Exhibit B-16) to initiate active NAPL recovery if NAPL returned to well BP-5RR after the initial bailing of the well. He claims the Presiding Officer did not give any consideration to his position that active recovery did not apply to the low-permeability soils at the site and that he conducted "appropriate" assessment and response actions from January-May, 2003. Objections #7-11, 18, 20.

However, a preponderance of the evidence supports the Presiding Officer's findings that Mr. Decoulos proposed active recovery of the NAPL release, and MassDEP required active NAPL recovery, but Mr. Decoulos did not comply with the approved IRA plan. When Mr. Decoulos notified MassDEP in January 2003 of ten inches of NAPL in monitoring well BP-5RR, which was less than ten feet from the storm drain pipe that ran under the street parallel to the site frontage, he proposed a verbal IRA Plan that included installing a "large" well, inspecting the storm drain system, and testing USTs for tightness. Exhibit B-14 (Release Log Form Attachment). MassDEP's Notice of Responsibility, Exhibit B-15, required installation of an active remediation system, and Mr. Decoulos filed an IRA plan, Exhibit B-16, that proposed to evacuate well BP-5RR, and if after the four-hour evacuation of NAPL, additional NAPL continued to infiltrate the well, to install a 12-inch recovery well. Mr. Decoulos's first IRA Status report showed that over six feet of NAPL was found in well BP-5RR, near the storm pipe, on April 24, 2003, was vacuumed that day, and by May 14, 2003, over 6.5 feet of NAPL returned to that well. Exhibit B-21 (IRA Status Report 7/3/03) p. 13. Mr. Decoulos claims the tank-tightness tests indicated no leakage and NAPL did not return to the well until "weeks" after the vacuuming, indicating a limited release and the "slow permeability" of the soil. Objections #9, 18. However, he has no information about how quickly the NAPL returned to well BP-5RR, because no observations of the well were conducted between his vacuuming on April 24, 2003 and his return May 14, 2003. Exhibit B-21, p. 13. Thus a preponderance of the evidence supports the finding that Mr. Decoulos prematurely abandoned his initial, MassDEP-approved IRA plan for active recovery of the diesel NAPL release.

3. A Preponderance Of The Evidence Shows That Mr. Decoulos Failed To Adequately Assess The Indications That LNAPL Was Infiltrating The Storm Drain Pipe.

Mr. Decoulos objects to the Presiding Officer's finding that several strands of evidence supported MassDEP's determination that diesel fuel at the site was infiltrating the public stormwater collection pipe and flowing to the outfall and brook. Objections 13, 14. He suggests the Board must proffer evidence to "prove[] infiltration" of NAPL into the storm pipe (Objections ##12, 14b), but it is not the prosecuting attorney's burden to prove site conditions or to proffer site data other than the data on which Mr. Decoulos relied. Prosecuting counsel's burden is to show by a preponderance of the evidence that Mr. Decoulos's opinions were not adequately supported with site data, in violation of the Board's Rules of Professional Conduct and the MCP, 309 CMR 4.02(1), 4.03(3)(b).

A preponderance of the evidence introduced at the hearing demonstrated that MassDEP had a basis for concluding that the diesel NAPL release at Eagle Gas was a likely source of the contamination at the outfall, and it is undisputed that MassDEP required Mr. Decoulos to assess the site on that basis. As discussed above, multiple feet of NAPL returned to well BP-5RR in May 2003, after it had been vacuumed in April 2003; extremely high concentrations of diesel-range EPH was measured at the outfall, and gross petroleum emulsion was photographed at the outfall on multiple dates. Exhibit B-21; Exhibits B-25 and RR-2, photographs nos. 34-39, 44-53, 58-62, 70-72, 139, 141, and 150 (photos taken May-June 2003, March-May 2004, and March-June 2005). Although Mr. Decoulos claimed the release was a small amount of leakage from the remote-fill line during filling events, his report offered no objective evidence of the time, amount, or frequency of such leaks. Exhibit B-21, p. 15. His argument that the duration of the releases was "clearly limited" because the leaky fill line was installed in 1999 (Objection 14b)

does not make sense, because the 3-4 years from 1999 to 2003, when the release was reported, is a long time for an intermittent release to persist.

Mr. Decoulos objects, as he did at the hearing, that the pattern of vapor readings in the storm drain system does not support MassDEP's position, but rather supports his theory that the petroleum contamination originated at CB-4, downstream from the gas station. Objection 14d, 14e. He states that the vapor reading of 0.5 ppm in manhole DMH-2 in front of the gas station was so low as to prove there was no infiltration from the NAPL release upgradient around BP-5RR, and he claims that Mr. Jablonski did not observe a sheen in manhole DMH-2. In his view, infiltration could only have occurred in the immediate vicinity of well BP-5RR. Objections pp. 4-5, Objection #14a. He states that the higher vapor readings starting at catch basin #CB-4, downstream from the gas station and DMH-2, show that contamination from runoff or dumping began at CB-4. He also claims the Board's witnesses do not understand the operation of the storm drain system or that the catch basins are open structures adjacent and connected to the storm pipe, subject to runoff and illicit dumping of oil or hazardous materials. Objections p. 33 fn. 33; Objections ## 3, 14e, 15, 23, 28, 44.

The vapor readings are undisputed and show the same pattern as the visual observations that Mr. Decoulos disputes - petroleum contamination originating at the gas station.⁴ As the Board's expert witness Ian Phillips testified, the low vapor readings in storm system upgradient and in front of the gas station, and higher readings downgradient to the south, indicated that the

⁴ Prosecuting counsel does not concur with Mr. Decoulos's claim that Mr. Jablonski's testimony at the hearing was inconsistent with his field report that he observed a sheen in the storm drain system in front of the gas station. Mr. Decoulos is taking advantage of the admitted use of the term "catch basin" in the field report, which Mr. Jablonski corrected to "manholes" in the Notice of Responsibility that he issued when he returned from the site visit. Compare Exhibit B-19 ("CB [catch basin] next to the Gas Station had diesel fuel odor & an oil sheen") to Exhibit B-20 ("Observations within the manholes determined that an oil sheen was noted on the stormwater flowing within the culvert"); Transcript p.93 (Jablonski).

diesel NAPL was a likely source of the contamination at the outfall. Pre-Filed Direct Testimony of Ian Phillips ("Phillips PFT") p. 9; Luhrs PFT p. 9; Luhrs Rebuttal p. 4-5. In conjunction with the return of multiple feet of NAPL in well BP-5RR near the storm pipe, the very high concentrations of diesel-range petroleum compounds at the outfall, and the absence of any other potential source of such compounds, the vapor readings support MassDEP's belief that that the diesel NAPL was the likely primary source of the contamination at the outfall.

The Presiding Officer's conclusion that Mr. Decoulos failed to adequately assess site conditions was also supported by a preponderance of evidence that he failed to investigate whether the diesel-contaminated groundwater was in contact with the storm drain pipe. Mr. Decoulos placed three monitoring wells at downgradient locations along the storm drain pipe, and he relied on the first groundwater sampling results in June, 2003, showing low concentrations of diesel-range EPH compounds. Exhibit B-21, Table 3. But in that same sample, diesel PAH analytes were detected above Method 1 standards. *Id.* His wells solely along the pipe were not adequate to delineate the extent of contamination, as Board witness Cynthia Baran, Chief of the Risk Reduction section of MassDEP's Southeast Region Bureau of Waste Site Cleanup, testified. Exhibit B-21 p. 13; Baran PFT p. 19. He did not sample those wells again for 12 months, in June 2004, at which time 6.67 feet of NAPL was detected in the most upgradient of these wells, DCW-1. Exhibit B-33 (IRA Status Report & Modification).

All of the Board's witnesses testified that an LSP acting with reasonable care and diligence would have measured and compared the elevations of the groundwater and the pipe at multiple points, and on dates when contamination was observed at the outfall, because the contamination could have migrated with the groundwater via permeable seams in the soil and could have entered the pipe through joints or cracks in the concrete. Phillips PFT pp. 13-14;

Baran PFT pp. 19-20; Luhrs PFT pp. 9-10. Also, seasonal groundwater fluctuations would affect where groundwater was in contact with the storm pipe, and contact could occur downgradient of manhole DMH-2, thus it would not be visible there, contrary to Mr. Decoulos's claim. Mr. Decoulos did not measure the invert elevations until December 2004, 24 months after the release was reported, and he did not compare the invert elevations to groundwater elevations until April 2005, and even then he did not utilize site-specific groundwater measurements, but used groundwater elevation data from a USGS monitoring station two towns away. Exhibit B-49, (5/05 IRA Status Report) p. 18. Mr. Decoulos's objection that the USGS data were "easily available" and permissible under the Title V program for septic systems (Objection #40) evidences his lack of diligent site assessment and failure to apply the standards of the MCP. All the Board's witnesses testified there was no justification for his failure for two years from January 2003 to December 2004 to measure the elevations of the pipe and compare them to groundwater elevations to adequately assess the site for the Immediate Response Action. Phillips PFT p. 13-14, 22; Luhrs PFT p. 9-10, 14; Luhrs Rebuttal p 7; Baran PFT p. 19-20; Transcript pp. 278-279, 380, 394-398; Baran Rebuttal p. 3.

4. A Preponderance Of Evidence Shows That Mr. Decoulos Failed To Support His Opinion That Surface Runoff And Catchbasin Dumping Were Sources Of Contamination At The Outfall.

Mr. Decoulos objects to the Presiding Officer's finding that he lacked sufficient technical, factual, and scientific support to conclude that the release at the outfall resulted from stormwater surface flows from Eagle Gas or dumping of waste oil into catchbasin CB-4. He states that the contamination in the storm drain system began only at CB-4, and claims there was evidence of recent diesel releases on the surface at the gas station, that would have run into CB-4. Objection #23. Yet the evidence he cites of surface spills in December, 2004 and November, 2005 post-dates the diesel release by 24 and 36 months respectively. The Presiding Officer

correctly found that Mr. Decoulos's evidence of historic activities as a junkyard, and his January, 2004 plan to address the outfall contamination by placing a canopy over the pumps and capturing runoff, Exhibit B-24, were not sufficient to comply with the obligation of reasonable care and diligence and compliance with the MCP. A preponderance of evidence, including testimony by his own expert, Richard E. Doherty, showed that historical petroleum storage and handling practices in 1997 or earlier did not cause the contaminated runoff in 2003-2004 when Mr. Decoulos performed his work, and such history was not a substitute for sampling the site itself for evidence that runoff was a primary source of the outfall contamination. Transcript p. 443, 447-449 (Doherty); Phillips Rebuttal p. 5.

Mr. Decoulos also offered no evidence to support his argument that dumping occurred at catch basin CB-4, where he claimed the contamination began in the storm drain system. He sampled sediment/groundwater from catch basin CB-4, but did not include these results in anything other than an email (Exhibit RR-30), and did not compare the results to samples from the storm pipe to rule out infiltration in that pipe. He sampled sediment at the outfall only once, in June, 2004 (Exhibit RR-30), 18 months after the release occurred, but the sediment samples contained diesel-range EPH compounds, and he did not submit them for forensic analysis to determine what type of petroleum product was the source of the contamination. See Objection #32, and Exhibit RR-40 Ex. C, D. The only other support he musters is that environmental agencies and professionals "have long been aware that dumping waste oil and other pollutants directly into catch basins has been commonplace at uncontrolled pollutant-generating businesses like those at this site," and he points to the existence of regulatory policies against such dumping. Objections p. 5 fn 7, p. 12, and Objection #23. This is not the site-specific support for LSP Opinions that the Board's regulations and the MCP require.

Contrary to Mr. Decoulos's Objection 14.f, the Board and the Presiding Officer credited his testimony that catch basin CB-4 received surface runoff from the gas station and that samples from CB-4 and the outfall would reflect some contamination from that runoff, including some "pyrogenic PAHs." Transcript p. 31, 35 (Phillips), 300-301 (Luhrs); RD p. 33. However, his evidence of surface runoff in CB-4 is outweighed by the several strands of evidence discussed above that indicated the NAPL release at the gas station was a likely source of the contamination at the outfall. This evidence includes the pattern of vapor readings increasing downgradient from the gas station; the recurrence of diesel NAPL at BP-5RR near the storm drain pipe; the migration of NAPL to well DCW-1; the high concentrations at the outfall of EPH compounds associated with diesel fuel; and the absence of any other source of such NAPL.

5. The Presiding Officer Decided Correctly That Mr. Decoulos Failed To Support His Late Proposals For NAPL Recovery.

Mr. Decoulos objects to the Presiding Officer's finding that MassDEP justifiably denied his June 2004 and November 2004 proposals for a recovery trench, and claims the denials mean he cannot be held accountable for not implementing active NAPL recovery at those times. Objections #18, 27-29. However, a preponderance of evidence shows that his June 2004 proposal was for passive recovery, not the active recovery that was approved in the IRA Plan. The Presiding Officer also found correctly that Mr. Decoulos failed to adequately support either the June 2004 proposal or the November 2004 proposal. Exhibits and testimony show that Mr. Decoulos's June 2004 proposal for a passive skimmer with a capacity of ½ gallon failed to include specifications for frequency and method of bailing, information on hydraulic conductivity of soils, and did not show the proposed trench was in the area of greatest contamination. Exhibits B-34, B-35; Phillips PFT pp. 13, 17-18, Baran PFT pp. 17, 25-26. His proposal did not include an impervious barrier on the downgradient side or active pump

mechanism to gain hydraulic control, thus the proposed system could exacerbate the contamination, and it failed to comply with MassDEP's longstanding requirements for active NAPL recovery. *Id.* Although an LSP who disagrees with MassDEP's requirements for an IRA may provide technical justification for an alternative plan, Mr. Decoulos did not present adequate technical justification for the June 2004 IRA Plan or the November 2004 IRA Plan.

The evidence also shows that Mr. Decoulos installed four recovery wells in August 2004 without approval, and his November 2004 IRA Plan to utilize certain wells for active and passive recovery again failed to show the system was located in the area of greatest contamination or that the active components would provide control of contaminant migration; it also proposed to inject additives on a residential property served by a well and a protection area for public water supply, which is prohibited by the MCP. Exhibit B-39; Phillips PFT pp. 18-19; Baran PFT p. 27; 310 CMR 40.0046(3).

**6. A Preponderance of Evidence Shows that Mr. Decoulos's Opinions
Were Not Supported by the LSP Opinions Filed by His Successor LSPs
On the Eagle Gas Site.**

Mr. Decoulos claims that several findings and actions by the successor LSPs on the Eagle Gas site corroborated his opinions and undercut the Presiding Officer's findings. However, the issue in this case is whether Mr. Decoulos had adequate scientific support for his opinions, thus evidence that post-dated his opinions does not show they were adequately supported at the time they were rendered. Moreover, he describes the evidence of his successors inaccurately. He objects to the Presiding Officer's findings that he should have conducted a video survey of the storm drain pipe, and claims the video survey that his successor, ECS, Inc., ultimately conducted showed a lack of infiltration of NAPL to the pipe. Objection #17. In fact, however, ECS's Phase II describes infiltration observed in that video:

[I]ndications of water intrusion into the pipe through joints and cracks was observed as indicated by wetness around these areas, drops of water seeping from the seams, upward movement of water from the base of the pipe and/or visual staining along joints...The staining of the concrete pipe was especially prevalent at the location where the LNAPL had apparently been in contact with the outer portion of the pipe.

Exhibit B-53 at pp. 18-19.

Mr. Decoulos also claims that, to the extent his successor found evidence that diesel was migrating into the storm drain pipe, he had already documented the same migration. Objection #19. He refers to his discovery in April, 2005, that gasoline and diesel compounds were infiltrating the storm pipe, and his comparison at that time of the invert elevations to groundwater elevations (measured by a USGS monitoring station two towns away). But his comparison was 28 months after the release was reported. He claims that the absence of a visible sheen in the manhole before April 2005 showed that NAPL did not infiltrate the storm pipe before April 2005. Objection #39. However, as discussed above, visual observation and vapor readings in one drain manhole, did not adequately support the opinion that NAPL did not infiltrate the storm pipe before April 2005, when multiple feet of NAPL continued to appear in multiple wells near the storm pipe, and gross petroleum emulsion continued to appear at the outfall.

Mr. Decoulos argues that he collected more NAPL passively than his successors collected actively, and he disparages the amount of NAPL recovered by his successors, Objections #32, 41. He ignores that his collection stretched over two years while an undetermined amount of contamination, likely originating from the NAPL release, flowed from the outfall, reducing the source. His own expert testified that if he had implemented his own original proposal for active recovery, a greater volume of NAPL would have been recovered and

the environmental benefit would have been greater than what resulted from the trench that was eventually implemented. Doherty PFT p. 9.

7. The Presiding Officer Correctly Decided That Mr. Decoulos Violated The Board's Rules Of Professional Conduct And The MCP.

In evaluating the evidence presented at the hearing with regard to the Eagle Gas site, the Presiding Officer concluded correctly that Mr. Decoulos violated the Board's Rules of Professional Conduct 309 CMR 4.02(1) and 4.03(3)(b) by, among other things, not collecting sufficient data to assess the evidence that the diesel release at the gas station was a primary cause of the contamination at the outfall of the storm drain pipe in close proximity to the release; not collecting data to support his opinion that surface runoff was the source of the contamination at the outfall; and not implementing active recovery of the NAPL release.

C. SPEEDY LUBE SITE, RANDOLPH

1. The Presiding Officer Found Correctly That Mr. Decoulos Failed To Demonstrate That The Source Of Contamination Was Eliminated Or Controlled.

Mr. Decoulos filed a Response Action Outcome (RAO) Statement for a gasoline release at the Speedy Lube gas station in Randolph. Prosecuting counsel offered evidence, including the testimony of John Fitzgerald of MassDEP, to show that Mr. Decoulos failed to act with reasonable care and diligence, and failed to follow the requirements of the MCP, by, among other things, filing an RAO without demonstrating the source of the contamination was eliminated or controlled when two rounds of groundwater test results showed increasing concentrations of petroleum contaminants in groundwater; failing to estimate exposure concentrations conservatively when he averaged widely divergent analytical results; failing to follow scientifically acceptable risk assessment practices in his a Method 2 risk characterization; and thus failing to show a condition of No Significant Risk was achieved.

The Presiding Officer found that Mr. Decoulos's RAO Statement failed to show that the source of the contamination was eliminated or controlled because the two rounds of groundwater sampling were less than four weeks apart, and showed increasing concentrations of petroleum contaminants that were substantially higher than the Method 1 standards, and thus would preclude a finding of no significant risk unless Method 2 or 3 standards could be developed to show that site-specific conditions will reduce exposure concentrations. RD p. 38-39. Mr. Decoulos objects on the grounds that: a prior environmental consultant had removed the three former USTs that were the source; contaminated soil was removed and the area was capped; the replacement USTs had a continuous monitoring system with no evidence of any leaks; and an Activity and Use Limitation protected against exposure. Objection B.1. He claims the Board failed to support with substantial evidence its assertion that residual soil contamination was a source. The Board does not have any burden to prove what site conditions were, but rather has the burden to show that Mr. Decoulos's RAO opinion was not adequately supported with site data. It is undisputed that Mr. Decoulos opined that a condition of no significant risk had been achieved when concentrations of several contaminants of concern increased in the second of two rounds of sampling, some increases were two to three times higher, and seven of the ten contaminants exceeded applicable Method 1 cleanup standards. Exhibit B-55 Table 3; Phillips PFT p. 26, Fitzgerald PFT p. 17-18; Luhrs PFT p. 19. This evidence outweighs Mr. Decoulos's assertion that the broken well cover was a secondary source into which surface runoff during rain events would carry petroleum from around the gas pumps (Objection B.2), given that contaminants increased upgradient of that well and the well cover was repaired during the first sampling, leaving the increased concentrations with no explanation. Transcript p. 609 (Decoulos); Exhibit B-55 pp. 10-11. Thus a preponderance of the evidence supported the finding

in the Recommended Decision that the RAO statement failed to show the source of contamination had been controlled or eliminated.

Mr. Decoulos states incorrectly that at the time he filed his RAO Statement in June, 2002, MassDEP's VPH/EPH Policy permitted the two rounds of sampling he used to support the RAO. Objection B.7. In fact, Table 4-14 of the version of the VPH/EPH Policy that was in effect at the time he filed his RAO Statement⁵ identified 2-3 rounds as the "Minimum Recommended Quarterly Rounds of Groundwater Monitoring" (emphasis added), and the accompanying text above Table 4-14 discusses obtaining "at least 4 measurements over a 1 year period, coinciding with seasonal variations." Exhibit B-10, pp. 36-37. The VPH/EPH "FINAL POLICY" implemented in October 2002, which Mr. Decoulos cites in Objection B.7, did not change this policy.

2. A Preponderance Of Evidence Shows That Mr. Decoulos Failed To Comply With MassDEP Guidance And MCP Requirements For Risk Characterization.

Mr. Decoulos objects to the Presiding Officer's finding that he failed to perform the Method 2 Risk Characterization using scientifically acceptable risk assessment practices and did not follow available MassDEP guidance, claiming he complied with MassDEP's "VPH/EPH Policy"⁶ and the MCP in establishing Method 2 standards, and the MCP provides no instructions on how to establish Method 2 standards. Objection B.3. He claims it was appropriate to place soil gas testing points away from the site building (Objection B.9), and properly filtered groundwater samples (Objection B.10). However, a large preponderance of evidence shows that Mr. Decoulos deviated from MassDEP guidance by using MassDEP's VPH/EPH Policy to

⁵ "Characterizing Risks Posed by Petroleum Contaminated Sites, Implementation of MADEP VPH/EPH Policy FINAL DRAFT" (June 2001).

⁶ "Characterizing Risks Posed by Petroleum Contaminated Sites, Implementation of MADEP VPH/EPH Policy FINAL DRAFT" (June 2001).

develop Method 2 standards, a function that the VPH/EPH Policy does not address. Fitzgerald PFT pp. 9-10. The Presiding Officer correctly found that he also violated that policy when he placed soil gas test points away from the site building, did not evaluate MTBE as a separate contaminant, filtered groundwater samples, and calculated a site-wide EPC value for benzene, rather than a value at each monitoring well, which improperly lowered the exposure estimate for this carcinogen. Fitzgerald PFT pp. 8-16. Mr. Decoulos denies he calculated site-wide exposure concentrations, Objections B.4-B.5, but Table 4 in the RAO, which is expressly titled "Development of Method 2 Standards – GW2," sets out only one average result for each contaminant of concern, indicating he averaged results from multiple wellheads across the site, in violation of the MCP's requirements to use each wellhead as an exposure point and identify the most conservative estimates of exposure concentrations at each exposure point. 310 CMR 40.0924(2)(a)(1), 40.0926(3).

3. The Presiding Officer Correctly Decided That Mr. Decoulos Violated The Board's Rules Of Professional Conduct And The MCP.

In evaluating the evidence presented at the hearing with regard to the Speedy Lube site, the Presiding Officer concluded correctly that Mr. Decoulos violated the Board's Rules of Professional Conduct 309 CMR 4.02(1) and 4.03(3)(b) by filing the RAO Statement without delineating the extent of contamination, having taken only two rounds of groundwater samples less than four weeks apart, in the second of which concentrations of contaminants were substantially increasing and above Method 1 cleanup standards, and by using methods of site assessment and risk characterization that violated the MassDEP policy and guidance he purported to apply.

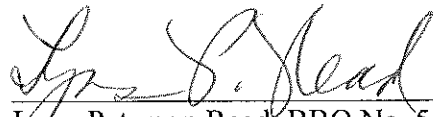
RESERVATION OF RIGHT TO OBJECT TO LATE-FILED EXHIBITS

Prosecuting counsel reserves and does not waive her right to object to Respondent's attempt to introduce evidence with his Objections, after the record of the adjudicatory hearing was closed and the Presiding Officer issued his Recommended Decision. Such right shall be exercised within five (5) business days of the filing of this Response to Objections of James J. Decoulos, P.E., LSP, to Recommended Decision.

CONCLUSION

Prosecuting counsel respectfully requests that the Board affirm and adopt the findings and conclusions of the Recommended Decision.

Respectfully submitted,
Prosecuting counsel,

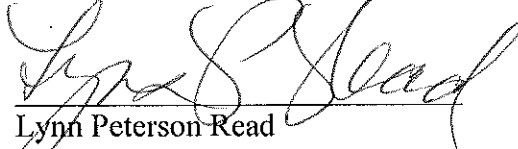

Lynn Peterson Read, BBO No. 551671
Board of Registration of Hazardous
Waste Site Cleanup Professionals
One Winter Street
Boston, MA 02108
(617) 348-4032
lynn.read@state.ma.us

Dated: February 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date a true copy of the above Response to Objections of James J. Decoulos, P.E., LSP, to Recommended Decision was served by electronic mail upon the attorney of record for each party herein.

2/1/13
Date


Lynn Peterson Read