

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO	)	
	)	
Plaintiff,	)	Civil No. 1:12-cv-00130-JD
v.	)	
	)	
WRIGHT-PIERCE,	)	
	)	
Defendant.	)	

**WOLFEBORO’S OBJECTION TO WP’S MOTION TO STRIKE UNTIMELY  
DISCLOSED FACT AND/OR EXPERT OPINIONS AND REPORTS**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby submits this Objection to WP’s Motion to Strike Untimely Disclosed Fact and/or Expert Opinions and Reports (“WP’s Motion”). WP’s Omnibus Motion repeats many of the exact arguments made in its accompanying motions in limine, to include its oft-repeated and incorrect statement that Wolfeboro produced “7000 documents” after the discovery deadline, and its allegations that Wolfeboro’s experts do not provide an admissible opinion that the RIB Site is a total loss. Wolfeboro hereby relies on and incorporates its prior objections on these points.<sup>1</sup>

**FACTUAL BACKGROUND**

Wolfeboro has disclosed Mr. Bowden, Mr. Cullen, and Mr. Forzley from Fuss & O’Neill (“F&O”) as its testifying experts in this case. F&O produced two expert reports dated October 19, 2012 (Exhibit 4 to WP’s Motion) and February 8, 2013 (Exhibit 5 to WP’s Motion). Mr. Bowden, Mr. Cullen, and Mr. Forzley were all deposed in this case between November 2013 and January 2014.

<sup>1</sup> See Objections to Motion to Exclude Evidence of Speculative Damages Supporting a Total Loss Theory (Document No. 96), Motion to Exclude Evidence of Damages (Document No. 97), and Motion to Preclude Untimely Disclosed Documents (Document No. 101).

## **LEGAL ANALYSIS**

The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. See Stephen v. Hanley, 2009 U.S. Dist. LEXIS 43334 (E.D.N.Y. 2009) (citations omitted). Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. Id. (citing Baxter Diagnostics, Inc. v. Novatek Med., Inc., 1998 U.S. Dist. LEXIS 15093 (S.D.N.Y. 1998)). Motions in limine that exclude broad categories of evidence are disfavored, and such issues are better dealt with during trial as the admissibility of evidence arises. See Saenz v. Reeves, 2013 U.S. Dist. LEXIS 8262, \*3 (E.D.N.Y. 2013) (citing Sperberg v. Goodyear Tire & Rubber, Co., 519 F.2d 708, 712 (6<sup>th</sup> Cir. 1975)).

### **A. Supplemental Document Productions**

WP's Motion alleges that supplemental documents were produced by Wolfeboro after the close of discovery. WP's argument in the instant motion is virtually identical to its argument in its Motion to Exclude Untimely Disclosed Documents ("Motion to Exclude"). There is, however, additional hyperbole in the instant motion, including the following erroneous statements that require Wolfeboro to respond:

- the productions included "7000 documents,"
- the productions were not a "paltry sum of documents,"
- "there is no conceivable way to WP to view all of these untimely disclosed documents"
- "The Town has essentially ambushed WP on the eve of trial with copious amounts of documents"

The supplemental documents total less than 500 documents, not 7000, and comprise roughly two small banker's boxes. WP's position that there is no conceivable way to review two

banker's boxes of documents over a three month period is not credible.<sup>2</sup> As fully described in Wolfeboro's Objection to WP's Motion to Preclude Untimely Disclosed Documents, Wolfeboro's supplemental productions were not "untimely" because they were either: (1) previously-produced documents; or (2) documents created in the ordinary course of business which were not in existence at the time of the Initial Productions.

With respect to WP's request to preclude the use of these documents at trial, Wolfeboro objects and has fully briefed that issue in its Objection to WP's Motion to Preclude, which is expressly incorporated herein. For the reasons articulated in that Objection, WP's request to exclude these documents from trial should be denied.

**B. Alleged Late Opinions of F&O at Deposition**

WP identifies three "new opinions" in F&O's deposition testimony which it seeks to strike:

- "The F&O reports do not discuss slope permit issues or provide any indication that permits cannot be obtained," therefore, F&O's deposition testimony on this issue is an untimely "supplement" to their report and should be excluded. Motion at P. 6.
- Mr. Forzley has changed his opinion regarding damages. Motion at P. 7.
- A "myriad of new opinions [by Mr. Ford, who is a fact witness at the Director of Public Works] that are not found anywhere in the F&O expert reports." Motion at P. 7.

Wolfeboro addresses each of these alleged "new" opinions in turn.

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<sup>2</sup> WP represents in its Motion to Preclude Untimely Disclosed Documents that it has not reviewed these documents, despite the fact that it received them on January 30, 2014 and February 26, 2014.

**1. Slope Stability Permit Issues.**

WP alleges that the F&O expert reports “do not discuss slope permit issues or provide any indication that permits cannot be obtained.” Motion at 6. In fact, this issue is squarely addressed in the F&O Reports:

If a geotechnical study had been performed prior to construction and operation, the NHDES would not have granted a permit to allow 600,000 gpd. Supplemental Report, WP Exhibit 5, P. 7

Conceptual remedial options were discussed during the monitoring period, all of which involved some form of seepage water collection or blockage of subsurface water flow. All remedial options offered since the failure of the site have involved these measures in addition to grading and filling of the wetlands at the site. These options all involve activities that are not permissible under the laws of New Hampshire. Supplemental Report, WP Exhibit 5, P. 20

Measures such as those proposed by Wright-Pierce, SW Cole and Haley & Aldrich would involve eliminating wetlands, collection and concentrated discharge of flow, activities not permissible by NHDES. Supplemental Report, WP Exhibit 5, P. 21

At this time, the condition of the site is worsening even at much reduced flow rates, well below current permit rates. There is no guarantee that the NHDES will continue to allow this site to be used, as it becomes evident that the site cannot sustain reduced loading rates. Supplemental Report, WP Exhibit 5, P. 22

There is no guarantee that suggested remedial efforts would succeed or even be allowed by permitting agencies, or that the site will not be shut down by outside forces, such as the revocation of permits by NHDES or EPA, or that the Town won't be sued by abutters suffering property damage. Supplemental Report, WP Exhibit 5, P. 27

Another consideration of the RIB site's operational life span relates to limits imposed by regulatory agencies. It is possible that continued soil piping, sinkhole formation, wetland damage, and slope failure will not be

tolerated by the NHDES when the permit expires and needs to be renewed. Initial Report, WP Exhibit 4, P. 25.

Remedies for interception of water emanating from the slope may be considered discrete discharges, which are a violation of the existing permit. Initial Report, WP Exhibit 4, P. 25.

Thus, F&O's opinions regarding the slope stability, including the fact that point source discharges would be considered a violation of the regulations precluding issuance of a permit, were disclosed in its timely filed reports, and testified to further at the depositions of Mr. Cullen and Mr. Bowden. For this reason, WP's Motion should be denied.

## **2. Mr. Forzley**

As already noted in Wolfeboro's Objection to WP's Motion to Exclude Evidence of Damages (WP's Daubert Motion as to Mr. Forzley), Wolfeboro is withdrawing Mr. Forzley as a testifying expert in this case. This issue is therefore moot, and requires no further analysis.

## **3. Testimony of Mr. Ford**

Mr. Ford is the Director of Public Works in Wolfeboro. He is a fact witness, not an expert witness. Any admissible opinion that Mr. Ford would offer at trial would be the opinion of a lay witness based on Fed. R. Evid. 701, which states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Wolfeboro is under no obligation to disclose the "opinions" of a lay witness, such as Mr. Ford and Rule 701 makes clear that he is absolutely entitled to testify as to his understanding or perception on site issues. Whether Mr. Ford's opinions or inferences offered at his deposition are purportedly "consistent" with Wolfeboro's testifying experts' opinions is irrelevant, and not

the appropriate subject matter for a motion to strike. Rather, that is ground for cross-examination.

Furthermore, Mr. Ford is fully permitted to testify as to the full extent of his knowledge on factual issues. For example, if a government entity such as DES recently advised Mr. Ford regarding the scope or potential violations of Wolfeboro's NHDES permit, Mr. Ford can testify as to that statement. The mere fact that DES issued a letter, or communicated a position to Mr. Ford, after the case discovery deadline does not make the statement a "late disclosure", prejudicial to WP or inadmissible at trial.

#### **4. Generalized "New Opinions"**

WP's generally alleges that there are "new" opinions offered by F&O at their deposition that are not disclosed in their report.

WP undertakes no effort to specifically identify any specific new opinions to strike, therefore, it fails to meet its burden on a motion to strike. See First Sav. Bank v. U.S. Bancorp, 117 F. Supp.2d 1078, 1082 (D. Kan. 2000) (A party who brings a motion in limine to exclude evidence has the burden of demonstrating that the evidence is inadmissible).

#### **5. Engineering Reports Provided to NHDES**

WP broadly states that Wolfeboro "provided WP with untimely expert reports submitted well after the expert disclosure deadline." WP fails to identify the specific late expert reports in its Motion. To the extent WP is referring to engineering reports prepared for Wolfeboro for submission to NHDES, these communications with NHDES regarding the Site are not expert litigation reports, they are factual communications and are admissible as evidence at trial, along with NHDES's corresponding communications to Wolfeboro (all of which have been timely produced to WP).

“Although federal district courts have the power to proscribe time limits for conducting discovery, a discovery cutoff date does not affect the admissibility of evidence obtained or created outside of the discovery process.” See Bradley v. Denver Health & Hosp. Auth., 2010 U.S. Dist. LEXIS 85870, at \*24-25 (D. Colo. Mar. 22, 2010) (denying motion to strike document produced three months after discovery deadline because document was a recently revised version of a document previously disclosed and was only finalized and published after discovery closed, and finding defendant, in disclosing the document, complied with its obligations under Rule 26(e)(1) by supplementing its disclosures upon learning of the updated document); Whittaker Corp. v. Execuair Corp., 736 F.2d 1341, 1347 (9th Cir. 1984) (reversing district court’s exclusion of documents discovered in a separate antitrust action between the parties after the discovery cutoff date in the case at bar, and stating “A discovery cutoff does not, however, affect admissibility of evidence obtained outside of the discovery process of the case in which the cutoff date is ordered.”)

These reports, as well as correspondence from NHDES, are admissible as exhibits at trial and F&O may not be precluded from testifying as to the content of these reports and ongoing discussions with the NHDES. Furthermore, to the extent that FRCP 37(c)(1) applies to these reports, Wolfeboro is justified in a disclosure beyond the discovery deadlines where such information arose for the first time after the deadline. See Id.

#### **CERTIFICATION PURSUANT TO LR 7.1(a)(2)**

Pursuant to LR 7.1(a)(2), no memorandum of law is necessary, as all supporting authorities are cited herein.

**REQUEST FOR RELIEF**

Wherefore, Wolfeboro respectfully requests that this Honorable Court deny WP's Motion to Strike Untimely Disclosed Fact and/or Expert Opinions and Reports and grant such further relief as is necessary and just.

Respectfully submitted,

**The Town of Wolfeboro,**

By its attorneys,

Date: March 27, 2014

/s/ Seth M. Pasakarnis

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**CERTIFICATE OF SERVICE**

I, Seth M. Pasakarnis, Esq., hereby certify that on this date a true and accurate copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Seth M. Pasakarnis

Seth M. Pasakarnis