

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

**PLAINTIFF’S MOTION IN LIMINE TO PRECLUDE WP’S EXPERTS FROM
OFFERING OPINIONS NOT CONTAINED IN THEIR
TIMELY-DISCLOSED REPORTS**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby submits this Motion in Limine to Preclude Defendant Wright-Pierce’s (“WP”) experts from offering any opinions not contained in timely-disclosed reports.

INTRODUCTION

The Court-ordered deadline for expert supplemental reports was February 8, 2013. Prior to that deadline, WP submitted the following expert reports: (1) a Haley & Aldrich, Inc. report dated December 19, 2012 (“HA Report”); and (2) a Richard A. Moore report dated December 19, 2012 (“Moore Report”). Long after the supplementation deadline passed, and without Court permission, Haley & Aldrich issued two (2) “supplemental reports.” In addition, on December 31, 2013, WP’s counsel submitted a purported expert report prepared by John Field of Field Geology Services (the “Field Report”). Wolfeboro requests that WP’s Experts be precluded from testifying as to any of the facts and/or opinions contained in any these late supplemental expert reports, and reaffirm its earlier order precluding Mr. Field from testifying at trial.

Wolfeboro assures the Court that this is not a “speculative” motion simply seeking compliance with existing Court Rules. Rather, Wolfeboro submits this Motion based on its

understanding that WP intends to have its witnesses testify as to certain of the opinions or facts contained in the referenced, untimely reports. As recently as February 24, 2014, WP's counsel indicated that "we will be taking affirmative steps to introduce Haley & Aldrich's August 2013 report at trial." Despite the undersigned counsel's request that WP's counsel withdraw this email or otherwise confirm that it will not seek to have its witnesses testify as to the contents of this late report, WP's counsel has not done so.

FACTUAL BACKGROUND

A. Project History¹

On April 19, 2005, NHDES issued an Administrative Order (No. WD 05-014) (the "Administrative Order") identifying several existing violations in Wolfeboro's system of treating wastewater and storing and disposing of treated effluent. Amended Complaint at ¶12. The Administrative Order directed Wolfeboro to complete a number of remedial actions, all by May 1, 2007. Id.

On or about November, 11, 2005, Wolfeboro selected WP as the Engineer of Record to assist Wolfeboro in responding to and complying with the Administrative Order. Id. at ¶14. WP and Wolfeboro subsequently entered into a series of contracts which required WP to perform all investigation, engineering and design related services related a new wastewater disposal facility. See generally Amended Complaint.

The Project required the expertise and cooperation of multiple engineering disciplines. Indeed, the contract executed by Wolfeboro and WP required WP to perform all of the engineering and design related services required of the Project. Thus, WP was required to investigate and understand the RIB Site (hydrogeology and geotechnical engineering), correctly estimate the capacity of the RIB Site (hydrogeology, groundwater modeling and geotechnical

¹ Wolfeboro's Motions in Limine include an identical "Project History" section for the Court's ease of reference.

engineering), interpret the applicable federal and local regulations (environmental engineering and wastewater engineering), site and design the rapid infiltration beds (hydrology, groundwater modeling, geotechnical engineering and civil engineering), design the piping and pumps necessary to transport the treated effluent to the rapid infiltration beds (geotechnical engineering and civil engineering), and provide guidance on the operation of the RIB System (a combination of all engineering disciplines). WP represented to Wolfeboro that it had the ability to provide all of the engineering services necessary for the Project. In fact, WP did not. The standard of care applicable to WP's work on the Project requires that WP not only satisfy the standard of care applicable to each of these individual disciplines but also satisfy the standard of care applicable to the wastewater project engineer who is responsible for identifying the need for each area of expertise, bringing together and managing each of these individual disciplines and ultimately interpreting the findings and work product of each of the individual components of the Project.

In March of 2007, WP issued a Preliminary Design Report recommending that Wolfeboro purchase a parcel of land (described as "Wolf 1A") for the construction of a rapid infiltration disposal system (also known as a Rapid Infiltration Basin System or a "RIB" or "RIB System") (the investigation, capacity analysis, selection, evaluation, design, and operation of the RIB system is hereinafter referred to as the "Project"). Id. at ¶58. As a result of WP's recommendation and representations, Wolfeboro paid \$1,050,000 to purchase the "Wolf 1A" Site for the specific purpose of siting the Project. Id. at ¶60. In total Wolfeboro paid WP over \$1,500,000 for engineering services pursuant to five (5) separate contracts with WP, culminating in the selection of the Wolf 1A Site ("RIB Site") and the construction of the RIB System on the RIB Site. Id. at ¶71.

It is undisputed that, soon after initial startup and operation of the RIB System in March

2009, numerous issues arose regarding the performance of the RIB System and the impact of its operation on the RIB Site. Wolfeboro now seeks damages arising out of the services and work performed by WP on the Project, alleging, *inter alia*, that WP was negligent in its evaluation of disposal alternatives available to Wolfeboro, its investigation of the RIB Site, capacity analysis of the RIB Site, its evaluation of the RIB Site, its selection of the RIB Site its overall design of the Project, and its instructions to Wolfeboro regarding the initial operation of the Project.

B. Facts Specific to Late Disclosure of Expert Reports

On August 17, 2012, the Court approved the Joint Discovery Plan, which established the following deadlines for expert disclosures:

Plaintiff's Expert Disclosure: October 19, 2012

Defendants Expert Disclosure: December 19, 2012

Supplementation Under Rule 26(e) Due: February 1, 2013

On December 19, 2012, WP served its expert witness disclosure, identifying various professionals from Haley and Aldrich (“HA”) as well as Richard A. Moore, as its testifying experts and attaching a copy of their respective expert reports (the “HA Report” and the “Moore Report”).

WP did not file a supplemental expert report prior to the deadline, which was extended to February 8, 2013 pursuant to a Court Order. Nor did WP seek to extend that February 8, 2012 deadline prior to its expiration.

C. The “Supplemental” HA Reports.

On August 16, 2013 and March 13, 2014 (respectively six (6) and thirteen (13) months after the expert supplementation deadline expired) WP’s counsel provided Wolfeboro’s counsel with additional reports from Haley and Aldrich (the “HA Supplemental Reports”).

The August 16th HA Report was prepared in anticipation of mediation and includes the following disclaimer on each page:

“THIS MEMORANDUM IS CONFIDENTIAL AND PREPARED FOR PURPOSES OF SETTLEMENT AND/OR MEDIATION ONLY.”

On August 28, 2013, WP’s counsel confirmed that the contents of the August 16th HA Report was confidential in an email to Wolfeboro’s counsel concerning a potential meeting with NHDES. See Exhibit A, 8/28/13 Email from K. Malone to R. Cull.

Because WP’s counsel took the position that the August 16th Report was confidential and made in furtherance of settlement communications, on October 3, 2013, WP’s counsel stated that she would “object and instruct our experts (or any deponent for that matter) not to answer any questions” about the H&A Remedial Plan. See Exhibit B, 10/3/13 Email from K. Malone to R. Cull. Wolfeboro’s counsel complied with this directive and did not question witnesses regarding the content of the August 16th Report.

As the Court is well aware, despite the fact that the August 16th Report was disclosed long after the deadline for supplementation of experts’ written reports, WP sought to extend the expert disclosure deadline. The Court denied WP’s request, as well as WP’s Motion for Reconsideration, making it clear that late disclosed expert reports would not be admissible at trial. See Nov. 19, 2013 Order (Documents No. 51) and January 23, 2014 Order (Document No. 72).

The March 13, 2014 Report was submitted to Wolfeboro’s counsel long after expert depositions had concluded.

D. The Field Report

On December 26, 2013, WP’s counsel filed a reply memorandum with the Court

attaching a report prepared by John Field (the “Field Report”). The Field Report offered expert opinions regarding wetlands located on the RIB Site.

The Court has already held that “Wright-Pierce cannot use Field as an expert witness at trial and cannot supplement its disclosed expert reports with information Field might uncover during an inspection of the site.” See Court Order Denying Motion to Compel Site Visit (Document No. 73).

LEGAL ANALYSIS

“For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party’s duty to supplement extends both to information included in the report and to information given during the expert’s deposition.” Fed. R. Civ. P. 26(e)(2). “Unless the court orders otherwise,” supplementation under Rule 26(e)(2) must be made “at least 30 days before trial.” Fed. R. Civ. P. 26(a)(3)(B). Under Rule 26(a)(3)(B), the deadline ordered by the court supersedes that provided in the rule. In this case, the deadline for supplementation of expert’s opinions was February 8, 2013.

“A party may not use a supplemental report to disclose information that should have been disclosed in the initial expert report, thereby circumventing the requirement for a timely and complete expert report.” 6 Moore’s Federal Practice § 26.131[2]. Therefore, a supplemental report cannot include new opinions not expressed in the original report. Marine Polymer Tech., Inc. v. HemCon, Inc., 2010 DNH 57 (2010). The expert cannot testify about matters that were not disclosed under Rule 26(a)(2)(B) unless the party offering the expert can meet the requirements of Fed. R. Civ. P. 37(c)(1) - that the delay was substantially justified or harmless. Fed. R. Civ. P. 37(c)(1).

A. The H&A Experts Should Be Limited to Opinions Offered in the December 19, 2012

Report.²

In this case, WP cannot show that supplementing the H&A Report six (6) and thirteen (13) months after the February 8, 2013 deadline was substantially justified or harmless. In fact, Wolfeboro was precluded from questioning any witness about the content of the August 16th report per WP's counsel's directive. Further, Wolfeboro could not question any witnesses regarding the March 14, 2014 Report because it was disclosed long after expert depositions had concluded, on the virtual eve of trial.

B. WP's Experts Should Be Precluded From Offering Testimony Based on Any Information Obtained From Mr. Field.

WP did not disclose John Field as a testifying expert at any point during this litigation. To that end, this Court has already held that "Wright-Pierce cannot use Field as an expert witness at trial and cannot supplement its disclosed expert reports with information Field might uncover during an inspection of the site." See Court Order Denying Motion to Compel Site Visit (Document No. 73). Upon information and belief, it is highly likely that WP's testifying experts have spoken with Mr. Field regarding the RIB Site. Because none of WP's testifying experts timely disclosed that they formed their opinions based on any information obtained from Mr. Field, Wolfeboro requests that WP's testifying experts be precluded from testifying as to any facts or information gathered from Mr. Field. See Fed. R. Civ. P. 26(a)(2)(B)(ii) (requiring disclosure of the facts or data considered by the witness). Wolfeboro's request to limit WP's testifying experts in this regard is in an abundance of caution in order to avoid any potential "back-door" attempt by WP to offer information obtained by Mr. Field during his undisclosed

² Wolfeboro has also filed a Motion in Limine to Exclude the HA Experts from testifying at trial or to limit their testimony. If the HA Experts are allowed to testify at trial in any capacity, Wolfeboro requests that their testimony be limited to the content of the December 19, 2012 HA Report.

RIB Site inspection.³

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 requests that this Honorable Court issue an order

- A. That WP's designated testifying experts, Mr. Kastrinos and Mr. DeGenova, are precluded from offering any expert opinions not contained in their timely disclosed expert report dated December 19, 2012; and
- B. That WP's designated testifying expert, Mr. Moore, is precluded from offering any expert opinion not contained in his timely disclosed expert report dated December 19, 2012; and
- C. That no WP expert may testify as to any information provided by, or contained in the Field Report; and
- D. Granting such further relief as is necessary and just.

³ WP previously represented to the Court that Mr. Field inspected the RIB Site from the Tuftonboro site, and did not trespass onto the Wolfeboro side.

Respectfully submitted,

The Town of Wolfeboro,

By its attorneys,

Date: March 18, 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