

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

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

**MOTION TO PRECLUDE DEFENDANT’S EXPERT, RICHARD MOORE, FROM  
TESTIFYING THAT THE SITE CAN BE REPAIRED**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby moves to preclude Defendant Wright-Pierce’s (“WP”) expert, Richard Moore from testifying that the RIB Site can be repaired.

**FACTUAL BACKGROUND**

**A. Project History**<sup>1</sup>

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.

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<sup>1</sup> Wolfeboro’s Motions in Limine include an identical “Project History” section for the Court’s ease of reference.

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 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 Concerning Mr. Moore’s Report**

On December 19, 2012, WP served its expert witness disclosure, identifying Richard A. Moore as one of its testifying experts and attaching a copy of his report (the “Moore Report,” attached hereto as Exhibit A). Mr. Moore’s expert report opines generally on the professional standard of care applicable to the work performed by WP on the Project; however, Mr. Moore also offers the unsupported and unsubstantiated conclusion that the RIB Site can be repaired:

It is also not appropriate to claim, as F&O does, that the site should be considered completely failed. The site is operating at a reduced flow and has been operating for almost 4 years without any remediation of the failed slopes beyond cutting down trees and the construction of settling basins prior to discharges entering Nineteen Mile Brook. With the implementation of remedial actions to stabilize the failed slopes, the site could return to its original estimated capacity of 0.6 mgd.

Exhibit A, Moore Report at 12.

The site is still viable at flows less than 0.6 mgd, and if appropriate slope mitigation is implemented, the site could satisfy the original permit requirements of 0.6 mgd.

Id. at 13.

Noticeably absent for Mr. Moore's report is any description of (1) the factual basis for this conclusion, (2) the methodology for how he arrived at this conclusion, (3) what the "remedial action to stabilize the failed slopes" entails; or (4) how "appropriate slope mitigation" could be implemented. Quite simply, Mr. Moore's conclusion that the RIB Site can be repaired is unsubstantiated speculation, lacking any foundation or factual support.

Mr. Moore's deposition testimony confirms that his opinion is entirely speculative, has no factual basis, is entirely theoretical, and based on speculation:

Q. Let's skip to that. What do you believe the remedial measures should be? You say with remedial measures it could go back up to 600.

A. Well, there seems to be some consensus that clearly there would have to be more work. But there seems to be some census that the problem here is that flow was concentrated and piping occurred.

So the **theoretical** conclusion would be to spread the flow out so it enters the wetland in a more distributed fashion and that those areas that have been, that have slumped and are in precarious positions are reinforced. **So I would suspect** that a **good concept plan** would be a layer of sand, potentially geo fabric, and an overburden on top of the sand to keep it in place. So that when the water exited the natural slope now, it disburses through an engineered sand and seeps for a distance and then seeps into the wetland.

Q. Do you describe that fix anywhere in your report?

A. No.

Exhibit B, Moore Deposition, 175:1-14 (emphasis added).

Mr. Moore continue:

Q. So what's the basis of your opinion, your expert opinion, that this site can be remediated to dispose of an annual average of 0.6 mgd?

A. The dispersal of the flow can be engineered. And if the flow is dispersed as opposed to concentrated, there should not be a problem.

Q. So on --

A. That's based on -- that's not obviously a design, it's a theory that would have to be put into practice.

Id. 243:8-17.

### **LEGAL ANALYSIS**

The admission of expert testimony is governed by Federal Rule of Evidence 702, which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Rule 702, the Court must act as a “gatekeeper” and admit expert testimony only if it is both reliable and relevant. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Id. at 592-93. The proponent of an expert witness bears the burden of laying a foundation establishing that the witness is qualified to give an expert opinion on the subject in question, Bourne v. Town of Madison, U.S. Dist. LEXIS 34537 (D.N.H., May 9, 2007), and the overall admissibility of the testimony. United States v. Mooney, 315 F.3d 54, 63 (1st Cir. 2002).

The Court must ensure that speculative, unreliable expert testimony does not reach the jury under the mantra of reliability that accompanies the appellation “expert testimony.” Daubert, 509 U.S. at 590; see also Zibolis- Sekella v. Ruerhwein, 2013 U.S. Dist. LEXIS 111915, at \*7 (D.N.H. 2013) (excluding expert opinion based on “mere possibilities and

speculation”); Damon v. Sun Co., Inc., 87 F.3d 1467, 1474 (1st Cir. 1996) (holding an expert should not be permitted to give an opinion that is based on “conjecture or speculation from an insufficient evidentiary foundation.”)

“Conjecture, chance, or doubtful and unsatisfactory speculation” that the Supreme Court noted in Townsend should be “withdrawn[n]...from the consideration of the jury.” Townsend v. Legere, 141 N.H. 593, 595 (1997); see also Damon v. Sun Co., Inc., 87 F.3d 1467, 1474 (1st Cir. 1996) (holding an expert should not be permitted to give an opinion that is based on “conjecture or speculation from an insufficient evidentiary foundation”); see also Damon v. Sun Co., Inc., 87 F.3d 1467, 1474 (1st Cir. 1996) (holding an expert should not be permitted to give an opinion that is based on “conjecture or speculation from an insufficient evidentiary foundation”).

As discussed above, Mr. Moore makes the conclusory statement that the RIB Site can be repaired and restored to its design capacity. His report offers no description of any testable methodology used to come to this conclusion. He does not identify the “remedial measures” that could be implemented, only the conclusion that if “if appropriate slope mitigation is implemented, the site could satisfy the original permit requirements of 0.6 mgd.” Exhibit A, Moore Report, at 13.

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

### **REQUEST FOR RELIEF**

Wolfeboro respectfully requests that this Court preclude Mr. Moore from offering expert opinion that the RIB Site can be repaired and grant such further relief as is necessary and just.

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