

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 EXCLUDE THE HALEY AND ALDRICH EXPERTS
OR IN THE ALTERNATIVE LIMIT THEIR TESTIMONY**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby moves to exclude or limit the trial testimony of Defendant Wright-Pierce’s (“WP”) experts John R. Kastrinos and John G. DiGenova from the firm of Haley and Aldrich (the “HA Experts”).

INTRODUCTION

WP has designated the HA Experts as witnesses that will testify on all opinions expressed in Haley and Aldrich’s December 19, 2012 expert report (the “HA Report”). The opinions included in the HA Report include one of the fundamental issues in this case: whether WP complied with the applicable professional standard of care in the investigation, capacity analysis, selection, evaluation, design, and operation of Wolfeboro’s Rapid Infiltration Basin wastewater disposal system (the “RIB System”).¹

The HA Experts are not qualified, by their own admission, by background, education, training or experience to offer expert opinion on the applicable professional standard of care in this case. The professional standard of care applicable to WP in this case is that of a reasonably prudent wastewater project engineering firm. The HA expert (Mr. Kastrinos) designated to testify as to the standard of care applicable to WP in this case is not a registered professional

¹ The HA Report also includes opinions on the operation of the Site and extent of damages claimed by Wolfeboro.

engineer and testified at deposition that he did not know the standard of care that applied to WP during its work in the investigation, capacity analysis, selection, evaluation, design, and operation of the RIB System.²

WP designated Mr. DiGenova to testify on the section of the HA Report that addresses Wolfeboro's damage claims, specifically, whether the Site on which the RIB System is located (the "RIB Site") is a total loss or can be repaired.³ In his deposition, Mr. DiGenova conceded that the HA Report contains nothing more than a "conceptual" analysis of how the RIB Site could "potentially" or theoretically be fixed. His opinion has no testable foundation, is not based on any expressed methodology, is almost entirely conjecture, is admittedly speculative, and thus should be barred from trial.

Since the HA Experts' testimony does not meet the threshold requirements of Rule 702 of the Federal Rules of Evidence, Wolfeboro respectfully requests that Court exclude or otherwise limit the HA witnesses from testifying at trial.

FACTUAL BACKGROUND

A. Project History

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.

² Nor does Mr. Kastinos have the experience and expertise to opine on the capacity of the RIB Site or whether Wolfeboro's initial operation of the RIB Site caused or contributed to the damages at the RIB Site. In fact, his deposition revealed that any such opinions were based on broad speculation, were not supported by a reliable foundation or accepted methodology, and as such fail to meet the standard required for an admissible expert opinion.

³ Mr. DeGenova was not designated to testify as to the professional standard of care applicable to WP and disclaimed any knowledge of the applicable professional standard of care.

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 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.

LEGAL STANDARD

A. Expert Testimony.

There is no dispute that expert testimony will be required in this lawsuit, as the underlying factual issues concern wastewater engineering, groundwater modeling, hydrology, geotechnical engineering, and other matters “distinctly related to some science...as to be beyond the ken of average layman.” Lemay v. Burnett, 139 N.H. 633, 635 (1995). One of the threshold

matters in this case is whether WP met the applicable professional standard of care of a wastewater project engineering firm, a topic which indisputably requires expert testimony as to the standard of care, breach, and causation.

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.”)

LEGAL ANALYSIS

A. Wolfeboro’s Expert Opinion: Fuss & O’Neill

On or about October 19, 2012, Wolfeboro’s experts, Fuss & O’Neill,⁴ submitted a report opining that WP was negligent and had failed to meet the standard of care for a professional wastewater engineer in the investigation, capacity analysis, selection, evaluation, design, and operation of the RIB System. Among other deficiencies, Fuss & O’Neill noted that a professional wastewater project engineer such a WP should have recognized numerous “red flag” conditions which made the RIB Site unsuitable for locating a RIB System, including the presence of non-favorable (e.g. non-porous) materials and the steeply-sloped nature of the RIB Site. Fuss & O’Neill also opined that WP was negligent in failing to identify the need for and failing to perform a standard geotechnical study when investigating the RIB Site, including the failure to perform a geotechnical slope stability analysis. See generally Exhibit A, 10/19/12 Report. Fuss & O’Neil also opined that WP was negligent in selecting the RIB Site as a suitable location for the construction of the RIB System and had grossly erred in its assessment of the capacity of the RIB Site.⁵ Id. Finally, Fuss & O’Neil opined that WP’s negligence and failure to meet the standard of care has led the RIB Site being a total loss, causing Wolfeboro approximately 10 million dollars in damages.⁶ Id. at 33.

B. WP’s Expert: Haley & Aldrich

⁴ Fuss & O’Neil is a full service environmental engineering consulting firm with locations throughout New England.

⁵ Ultimately, WP recommended to Wolfeboro that it should purchase the RIB Site, which it did for the sole purpose of constructing the RIB System.

⁶ Wolfeboro has since revised its damages, which currently total \$8,876,055.13. See Wolfeboro’s Supplemental Answers to Interrogatories.

WP, in turn, retained two set of experts, Haley & Aldrich (“HA”) and Richard Moore of City Point Partners, LLC (“Moore”).

In December 2012, HA submitted a report that addressed the opinions and conclusions in Fuss & O’Neill’s Report in a point-by-point manner. See Exhibit B, 12/19/12 HA Report. The HA Report’s ultimate conclusion was that WP’s work was “*consistent with the standard of care for engineers, geologists and hydrogeologists who typically participate in the evaluation of sites for subsurface disposal of treated wastewater in New England.*” Id. at 26. (emphasis added). The HA Report also purported to offer opinions on whether Wolfeboro caused or contributed to the damages to the RIB Site, and the extent of the damages to the RIB Site, including whether damages sustained to the RIB Site could be mitigated or “fixed.”

The HA Report was signed by four individuals, John R. Kastrinos, John G. DiGenova, Bradford A. Miller and Steven Kraemer. Prior to depositions being conducted, WP’s counsel designated Mr. Kastrinos and Mr. DiGenova as the sole testifying witnesses as to all opinions expressed in the HA Report.

Specifically, WP’s counsel designated that Mr. DiGenova would testify as Sections 4.3 (whether WP was negligent in not performing a slope stability analysis), a selected portion of Section 4.6 (whether the RIB Site is “usable”) and Section 5 (cause of slope failure, damages, and “mitigation” measures). Mr. Kastrinos was designated to testify as the remaining portions of the HA Report, including whether WP met the applicable professional standard of care, as well as the capacity of the RIB Site. See Exhibit C, Kastrinos Deposition at 5.

A. Kastrinos Testimony.

1. Standard of Care: (Section 4.5 of HA Report)

Despite being designated to opine on the standard of care applicable to WP (that of a reasonably prudent wastewater project engineering firm), Mr. Kastrinos is not a registered professional engineer. See Kastrinos Deposition at 8. Mr. Kastrinos is a hydrogeologist. Id. Mr. Kastrinos testified repeatedly that his expertise is limited to that subspecialty and that he is not qualified to comment on the standard of care for an engineering firm, such as WP. See generally, Exhibit C, Kastrinos Depo at 41, 43, 50, 214. Wolfeboro agrees. To wit, Mr. Kastrinos:

- Limited his opinion to the “work they [WP] did in siting and characterization from the standpoint of *hydrogeology*.” 43:1-5 (emphasis added).
- Stated that he “can’t answer” whether WP met the standard of care in identifying the capacity of the Site, stating “I can only speak to what I know of practicing hydrogeologists and their work in siting and hydrogeologic characterization of wastewater disposal sites.” 41:22-23.
- When asked whether WP was negligent in the characterization of the Site and in identifying the capacity of the Site, stated that he couldn’t answer that question “from an engineer’s perspective.” 50:18-24, 51:1-7.
- Could not comment on the standard of care that applied to a wastewater engineer designing a (RIB) system on a very steep slope. 214:3-9;
- Stated that he could not opine on whether WP met the standard of care in applying for a Groundwater Discharge Permit with an annual average of 600,000 gpd. 82:23-24, 83:1-4

- Commented that HA was “*really not qualified or in a position to comment on how wastewater engineers, how it met the standard of care specific to a wastewater engineer.*” 213:19-24, 214:1-2 (emphasis added).

The only engineering “standard of care” opinion testified to by Mr. Kastrinos relates to what certain, unnamed geotechnical engineers “told him” regarding how wastewater engineers would have approached the Project.

Q. You’re speaking for all of this executive summary. I would put on the Haley & Aldrich cap here. What is Haley & Aldrich saying?

A. Haley & Aldrich is saying that geologists and hydrogeologists who do this work in New England would have exercised similar judgments in evaluating sites for disposal of wastewater, selecting the specific site and then characterizing the site hydrogeology with respect to groundwater flow and contaminant fate and transport.

Q. What about engineers?

A. Again, I’m not an engineer, but based on my discussions with our own geotechnical engineers, which is spelled out in this report, is that yes, geotechnical engineers would have recognized that the site conditions warranted a geotechnical analysis. However, it was their opinion that engineers who do wastewater work, civil engineering work related to wastewater, would not have recognized the need for geotechnical analysis.

Id. at 65:12-24, 66:1-6.

This testimony is inadmissible on its face. First, the opinion is irrelevant. WP was the project engineer and was responsible for all engineering, testing and investigation. Further, Mr. Kastrinos is in no way qualified to offer an opinion on the standard of care, much less an opinion supported only by un-sourced, unsupported and untestable hearsay (a hydrogeologist testifying as to what a unnamed geotechnical engineer told him regarding the practices of a wastewater engineer).

2. Wolfeboro’s Operation of Site/Site Capacity: (HA Report 4.2, Executive Summary)

Mr. Kastrinos was also designated to testify on the sections of the HA Report regarding Wolfeboro's operation of the Project and the overall capacity of the RIB Site.

The HA Report concludes that Wolfeboro's initial operation was "aggressive and imprudent" (p. 2.) and "likely caused or contributed to the piping and slope instability issues" (p. 15) on Site.⁷ This opinion is inadmissible in several respects. First, there is no evidence that Mr. Kastrinos, a hydrogeologist, is qualified to provide expert testimony on the operation of wastewater facilities, or the damages that might result from their operation. Mr. Kastrinos' lack of qualification is underscored in the following exchange:

Q: Knowing as it did in March of 2009 that the town was discharging flows over 600,000, do you believe that Wright-Pierce was in breach of a standard of care by not warning the town of the potential damage to the site?

MR. CORKUM: Objection.

A. *I'm not a wastewater engineer. I do not get involved in start-up and operation for the most part. Basically the work of a hydrogeologist is largely complete at the design phase.* I guess just what I've stated is that in projects such as this where you're handling a lot of water or wastewater, you should start off slow and then ramp up to the higher flow rates.

Id. at 152 (emphasis added); see also at 130 (same).

In addition to not being qualified, Mr. Kastrinos' opinion is not based on sufficient facts or data and is not a product of a reliable methodology. His deposition made clear that he does not possess knowledge of what actually transpired onsite, including the directions WP gave to Wolfeboro prior to and during start-up of the Project:

Q: If you say it's a standard practice where you have a trial period to ramp it up, have you seen anywhere that Wright-Pierce told the town that that's how the system should operate?

⁷ This opinion presumably was offered in support of WP's defenses related to comparative fault. Wolfeboro has filed a separate Motion in Limine to strike WP's Comparative Fault Affirmative Defenses, as they are not supported by expert testimony.

A. I haven't seen it in their reports.

Id. at 130.

A. Again, not being able to comment on the specific communications, it's my opinion that it would have been prudent to communicate with a client, the owner, that a better approach is to ramp up slowly, as I stated previously.

Id. at 153.

Moreover, his opinion is not based on any methodology or testable principle. His entire analysis – in the HA Report and at deposition – essentially consists of a single, repeated statement that wastewater facilities “should” ramp up at “slower flows.” This conclusory statement plainly fails to meet the requirements of Rule 702.

In sum, while Mr. Kastrinos may be an expert hydrogeologist, he is clearly not qualified to testify on the facility “operational” matters he was designated by WP. The First Circuit has held “[t]hat a witness qualifies as an expert with respect to certain matters or areas of knowledge, does not mean that he or she is qualified to express expert opinions as to other fields.” Levin v. Dalva Brothers, Inc., 459 F.3d 68, 78 (1st Cir. 2006). This is because a testifying expert “should have achieved a meaningful threshold of expertise in the given area.” Id. (affirming exclusion of witness who was qualified as an expert in one field, but had attempted to testify in a different area in which he had “insufficient expertise”) (emphasis added); Bourne v. Town of Madison, U.S. Dist. LEXIS 34537 (D.N.H., May 9, 2007) (excluding expert opinion of qualified handwriting expert on other document authenticity issues); Beaudette v. Louisville Ladder Group, LLC, 2005 WL 2573384 (D.N.H. Oct.7, 2005)(excluding expert where opinions concerned areas outside his areas of expertise and experience).

Mr. Kastrinos should be precluded from testifying on the following topics since he does not have the requisite qualifications and specialized knowledge, and has not presented a reliable foundation and methodology for his opinions: (1) whether Wolfeboro's initial operation of the

Site was negligent; (2) whether such negligent acts caused or contributed to damages at the RIB Site; (3) what amount of damage was “caused” by Wolfeboro’s initial operation of the RIB Site; or (4) wastewater project engineering generally; and (5) the applicable standard of care.

Wolfeboro moves to limit Mr. Kastrinos’ testimony only to the specific areas of hydrogeology expressed in the HA Report.

B. John DiGenova:

WP’s counsel designated that Mr. DiGenova to testify as to Sections 4.3, part of 4.6 and 5 of the HA Report.

1. Slope Stability: (Section 4.3)

Section 4.3 of the HA Report relates to slope stability issues and whether WP should have retained a geotechnical engineer to perform a geotechnical analysis of the Site as part of WP’s investigation and capacity analysis of the RIB Site. Mr. DiGenova testified that WP “failed to perform a thorough geotechnical analysis of the selected site.” Exhibit D, DiGenova Depo. at 44. He further testified that if WP had hired a geotechnical engineering firm, they most likely would have concluded that there was going to be slope instability at well below the design flow rates specified by WP. Id. at 40:13-16. Finally, Mr. DiGenova testified that had WP hired a competent geotechnical engineer, that there was “a high probability that damage to the RIB Site could have been avoided.” Id. at 24:22-24.

For the purposes of the Motion, Wolfeboro concedes that Mr. DiGenova has experience and expertise in geotechnical engineering and expressly reserves the right to call him at trial to testify regarding WP’s failure to retain a geotechnical engineer to perform a geotechnical and/or slope stability analysis of the Site.

However, Mr. DiGenova has not demonstrated that he possesses the qualifications, or the foundation, to testify to any other matter in the HA Report.

2. Standard of Care: (Section 4.6)

Mr. DiGenova testified that he was not offering an expert opinion that WP met the applicable standard of care. See Exhibit D, DiGenova Depo. at 44, 57-58. He further testified that he could not state what a prudent wastewater project engineer would have done in this case. Id. at 57:13-20. Based on these statements, Wolfeboro hereby moves to exclude any testimony by Mr. DiGenova as to the professional standard of care applicable to WP, or any testimony that WP complied with that standard of care.

3. Damages/Mitigation: (Section 5.0)

Section 5 of the HA report is entitled “*Likely Cause of Slope Failure and Conceptual Approach to Remedy Conditions Downslope of The RIBS.*” In this section, HA offers several “preliminary” opinions on the causes of the damage to the RIB Site, speculates on what additional studies “could” be performed relative to remediation, and states, on a “conceptual” basis, what slope mitigation measures “could” be used. Report at 24-25. None of the opinions offered satisfy the requirements for admissible expert testimony set forth in Rule 702.

At deposition, Mr. DiGenova conceded that his opinions regarding a possible repair of the RIB Site were “preliminary” and that additional studies “would need to be undertaken.” Exhibit D, DiGenova Depo. at p. 32:12-24. He also testified that he did not account for, or even consider, NHDES permit requirements when drafting the HA Report, 35:17-19, nor is he an expert at permits or point source discharges, 38:20-24 – all of which are agreed-upon critical elements of any theoretical “fix” of the RIB Site.⁸

⁸ Wolfeboro’s experts opine that the RIB Site is a total loss and cannot be fixed.

Mr. DiGenova's opinions are entirely speculative, unreliable, and do not approach the standard for admissible expert testimony. Daubert, 509 U.S. at 590; see also Damon v. Sun Co., Inc., 87 F.3d 1467, 1474 (1st Cir. 1996) ([a]n expert should not be permitted to give an opinion that is based on conjecture or speculation from an insufficient evidentiary foundation."); Zibolis-Sekella v. Ruerhwein, 2013 U.S. Dist. LEXIS 111915, at *7 (D.N.H. 2013) (an expert opinion cannot be based entirely on "mere possibilities and speculation").

As the Court is already aware, WP recognized the insufficiency of the opinions in the HA Reports and directed HA to prepare a second (and third), more detailed report.⁹ The second and third HA reports, however, were both submitted well after the deadline for expert supplementation and the opinions expressed thereto are not properly admissible at trial.¹⁰

Accordingly, Wolfeboro seeks to strike all testimony related to this Section 5 of the HA Report related to the "likely" cause of slope failure and any "conceptual approach" to "fix" the Site and any theoretical costs associated with such "fix."

Wolfeboro made a good faith effort to resolve the issues presented in this Motion prior to seeking relief from the Court, but has been unable to do so.

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

WHEREFORE Wolfeboro respectfully requests that the Court exclude the HA experts from testifying in this matter and grant such other relief as justice may require.

⁹ The second HA report is the August 16, 2013 "H&A Remedial Plan," which has been the subject of numerous motions in this case, including WP's motions to extend the deadline to supplement experts' written reports (which were denied by the Court).

¹⁰ Wolfeboro has also filed a Motion in Limine to preclude expert testimony as to the content of expert reports disclosed by WP after the deadlines.

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