

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

No. SJC-11851

Peterborough Oil Company, LLC,  
Plaintiff-Appellant

v.

Department of Environmental Protection,  
Defendant-Appellee

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On Appeal from the Order Entered in the Worcester County  
Superior Court

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**BRIEF OF LSP ASSOCIATION, INC.**

**AMICUS CURIAE**

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### INTEREST OF AMICUS CURIAE

The LSP Association, Inc. ("LSPA") is a nonprofit corporation formed in 1993 in response to the substantial professional needs of a new, first-of-its-kind environmental professional licensure, the "hazardous waste site cleanup professional," also known as a "licensed site professional" or "LSP". The LSPA has more than 800 members about half of whom are LSPs. LSPs are the scientists, engineers, and public health specialists authorized by the Commonwealth of Massachusetts to work on behalf of property owners, operators, and other parties to oversee the assessment and cleanup of oil and hazardous materials released to the environment. In July of 1992 the Massachusetts Legislature enacted a significant redesign of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E ("Chapter 21E"). St. 1992, c. 133, §§ 270 - 315. As a result, the program for identifying and addressing sites where a release of oil or hazardous material had occurred was "privatized" - that is, private parties, rather than the Massachusetts Department of Environmental Protection ("DEP"), would take primary responsibility for responding to contaminated sites. The Legislature

created a new category of environmental professional - the LSP - to oversee responses to releases of oil and hazardous materials and to render "waste site cleanup activity opinions" about site conditions and the response actions taken. St. 1992, c. 133, § 270, codified as G.L. c. 21A, §§ 19-19J. The 1992 legislation created a Board of Registration of Hazardous Waste Site Cleanup Professionals ("LSP Board") to license and regulate the conduct of LSPs. Id.

Maintaining an LSP license requires constant vigilance on the part of an LSP. The regulations that govern an LSP's work are numerous and complex. Practice standards for LSPs are continuously evolving and the continuing education requirements are substantial. Licensing requirements include 48 hours of LSP Board-approved professional education courses every three years. The LSPA is on the forefront of providing its members with technical and professional information, education programs, and a forum for timely topics and professional issues. The LSPA maintains active committees on Regulations and Technical Practice, which among other things, deal

with regulatory and technical issues that frequently arise in the LSP practice.

The Commonwealth's ability to respond to sites impacted by releases of oil or hazardous materials is now dependent on LSPs. As of 2013, LSPs have achieved regulatory (either permanent or temporary) solutions for over 32,000 sites. In all of those cases, risks to public health, safety, welfare, and the environment posed by oil or hazardous material contamination were evaluated and, where necessary, reduced or eliminated. Many contaminated sites - often referred to as "brownfields" - were put back into productive use.

The LSPA seeks to ensure that the intent of the 1992 amendments to Chapter 21E - that is, to promote prompt and efficient, necessary and appropriate responses by private parties to releases of oil or hazardous materials into the environment - is satisfied.

The reasonable and consistent interpretation and application of Chapter 21E and the regulations promulgated pursuant thereto at 310 CMR 40.0000, et seq. (the Massachusetts Contingency Plan or "MCP") is an essential component of an LSP's practice to ensure compliance with regulatory standards as protective of

human health, public safety and the environment, and to meet an LSP's obligations under his or her license.

**STATEMENT OF THE ISSUES**

The LSPA is responding to this Court's solicitation of amicus briefs on "[w]hether, for the purposes of 310 Code Mass. Regs. s. 40.0924(2)(b)(3)(a), oil includes leaded gasoline." The LSPA is responding to provide this Court with information about the experience of its members regarding this issue and not to offer any legal opinions or analysis.

**STATEMENT OF THE CASE**

The LSPA takes no position on the recitation of the course of proceedings and disposition of the case in the court below.

**STATEMENT OF FACTS RELEVANT  
TO THE LSPA'S INTEREST IN THIS APPEAL**

The LSPA is generally satisfied with the "Statutory and Regulatory Framework" presented in the brief of DEP. Brief of Defendant-Appellee at 3-16. The LSPA takes no position on the recitation of the facts regarding Plaintiff-Appellant, Peterborough Oil Company's situation.

## ARGUMENT

### I. DEP'S INTERPRETATION AND ENFORCEMENT OF 310 CMR 40.0924(2)(b)(3)(a) HAS BEEN CONSISTENT AND REASONABLE.

The subject regulation, 310 CMR 40.0924(2)(b)(3), addresses the "Identification of Exposure Points" in groundwater within an Aquifer Protection District or the Zone II of a Public Water Supply well. The regulation provides that the Exposure Point(s) for application of GW-1 standards for risk assessment purposes is limited to the existing Public Water Supply well(s) if certain criteria are met. One of the criteria, at 310 CMR 40.0924(2)(b)(3)(a) is that the "[c]ontamination is limited to Oil."<sup>1</sup> This results in an exemption to identification of GW-1 standards elsewhere in the GW-1 zone, other than at Public Water Supply well(s) (the so-called "Zone II Exemption") for

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<sup>1</sup> "Oil" is a defined term in Chapter 21E, § 2, defined as "insoluble or partially soluble oils of any kind or origin or in any form, including, without limitation, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils. The term shall not include waste oil, and shall not include those substances which are included in 42 USC Sec. 9601(14)."



releases limited to Oil, providing the other criteria are also met.<sup>2</sup>

The issue is whether the term "Oil" in 310 CMR 40.0924(2)(b)(3)(a) applies only to "petroleum hydrocarbons," or alternatively to a broader definition of "Oil" that would include the lead additive in leaded gasoline and, by extension, other additives and hazardous materials.

The LSPA has sought out the experience of its membership regarding their practice on the subject as guided and informed by DEP's interpretation and enforcement of 310 CMR 40.0924(2)(b)(3)(a). Upon promulgation, DEP personnel in training sessions for LSPs specifically informed the LSPs who attended those sessions that the Zone II Exemption applied only to the "petroleum hydrocarbon" components of oil releases, and did not include additives such as lead, ethylene dibromide (EDB), and MTBE (methyl tertiary-butyl ether).

DEP's stated rationale was that these additives are either persistent compounds, as in the case of

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<sup>2</sup> For a more fulsome explanation of the purpose and function of the Zone II Exemption, see the Statutory and Regulatory Framework of the Brief of the Defendant/Appellee at 3-16.

lead, or more soluble and mobile than oil, as in the case of EDB and MTBE. Neither of these characteristics was regarded by DEP as consistent with the intent of the Zone II Exemption at the time it was developed.

In the experience of the LSPA, DEP's application of the Zone II Exemption has been limited to the petroleum hydrocarbon component of oil and, in the context of this narrowly focused application, the Zone II Exemption is considered reasonable. To the knowledge of the LSPA, the rule has been applied in a consistent manner by DEP. Heretofore, the LSPA was unaware of confusion or misinterpretation in the LSP community over the meaning and application of 310 CMR 40.0924(2)(b)(3)(a). In the approximately seven years since its promulgation its meaning and application has not been in question as differing from the stated position of DEP in any forums of the LSPA.

**II. THERE IS A VALID SCIENTIFIC AND PUBLIC HEALTH BASIS FOR DEP'S INTERPRETATION.**

The provision at 310 CMR 40.0924(2)(b)(3)(a) was based on scientific studies showing that most petroleum hydrocarbon fuel compounds, i.e. compounds composed solely of hydrogen and carbon, and found in

common fuels such as gasoline, kerosene, diesel/No. 2 fuel oil and heavier fuel oils, rarely migrated more than 1,000 feet from the point of release. The technical reasons for this were twofold:

1. These compounds are readily biodegradable, and/or,
2. These compounds are hydrophobic and/or have low solubility.

Typically, the lower molecular weight compounds have higher solubility, but are more biodegradable, and the higher molecular weight, and particularly polycyclic compounds, are less biodegradable but have lower solubility.

These studies supported a regulation limiting the Exposure Point for assessment of the human health risk to the Public Water Supply well(s) associated with the GW-1 zone because petroleum hydrocarbons would either biodegrade or have such low solubility as not to pose a significant risk to human health or public safety, except at the well itself. The LSPA supports risk-based site cleanups under the MCP.

Thus, DEP correctly based the genesis of this provision, as it has been utilized by LSPs and

enforced by DEP, on well-established science and risk analysis, which the LSPA also supports.

**III. DEP'S INTERPRETATION OF "OIL" IN THE ZONE II EXEMPTION IS NOT CONSISTENT IN OTHER SECTIONS OF THE MCP AND ANOTHER STATUTE.**

DEP acknowledges in its brief to this Court that the term "Oil" in the Zone II Exemption was and is intended to be limited in meaning to petroleum hydrocarbons. Brief of Defendant-Appellee at 28-29. Although the LSPA agrees that DEP's interpretation and enforcement of the term "Oil" in 310 CMR 40.0924(2)(b)(3)(a) has consistently been limited to petroleum hydrocarbons, elsewhere in the MCP and in another statute, the same term "Oil" is utilized, but has been interpreted by DEP to include common additives such as lead in leaded gasoline, in addition to petroleum hydrocarbons.

This is inconsistent with DEP's interpretation of the term in 310 CMR 40.0924(2)(b)(3)(a). While this inconsistency has not been the source of problems or questions in LSPs' regulatory practice to date, its existence is acknowledged.

The understanding of "Oil" in the definitions section of the MCP (310 CMR 40.0006) includes gasoline, oils, fuels and additives. This definition

has been consistent with implementation of other sections of the MCP over several decades. Examples of other provisions in the MCP, and a related statute, which rely on that more inclusive definition of Oil and the importance of these provisions to hazardous waste site cleanup practice include:

- The exemption from notification for less than two cubic yards of oil impacted soil (310 CMR 40.0315(2)). Maintaining this exemption allows for streamlining responses to such releases in Massachusetts, allowing DEP to focus on the larger releases. Site cleanups with less than two cubic yards of oil-impacted soil still must be cleaned up, but with less paperwork and cost.
- The Limited Removal Actions of up to 100 cubic yards of soil contaminated solely by a release of oil or waste oil (310 CMR 40.0318(4)(a)). The current interpretation by most LSPs is that if there is (or was) a release of gasoline to soil, the LSP on behalf of the responsible party could remove up to 100 cubic yards of soil for off-site recycling, reuse, treatment, and/or disposal without additional paperwork and cost. It would be detrimental to rapid site cleanups if the

definition of "Oil" is modified to only allow Limited Removal Action cleanup limits of 20 cubic yards of soil for releases of gasoline.

- The funding for underground storage tank cleanup reimbursement (G.L. c. 21J). Funding under G.L. 21J could become more complex and confusing. For example, important 21J funding for "MTBE" remediation in groundwater could be stopped if additives were not included in the definition of "Oil."

**IV. HUMAN HEALTH AND PUBLIC SAFETY WARRANTS  
PRESERVING THE INTERPRETATION OF 310 CMR  
40.924(2)(b)(3)(a) AS APPLYING ONLY TO  
PETROLEUM HYDROCARBONS.**

In the opinion of the LSPA, the Zone II Exemption, as currently interpreted and enforced by DEP, serves its regulatory purpose and is properly protective of public health. On the other hand, the LSPA does not know of any scientific research which would support the inclusion of additives such as lead, EDB and MTBE in the current exemption by demonstrating that these additives are sufficiently attenuated within 1,000 feet of the point of release, such as has been demonstrated for petroleum hydrocarbons. Therefore, the LSPA is of the opinion that if the Zone II

Exemption were to be applied to contamination which includes additives like lead, such as leaded gasoline, it would not be adequately protective of the public health.

The definition of "Oil" in the MCP has worked well and is important to the effectiveness of other provisions in the MCP. The definition should not be changed. It seems clear to the LSPA that the intended meaning of 310 CMR 40.0924(2)(b)(3)(a) should be codified by a regulatory change. Therefore, the LSPA urges this Court to allow DEP to revise 310 CMR 40.0924(2)(b)(3)(a) so it explicitly applies to "petroleum hydrocarbons", rather than "Oil", as intended and currently enforced by the DEP, without allowing use of the Zone II Exemption in the present case or on other sites which may be in a similar regulatory situation. If possible, this Court should not allow what might be characterized as an unintended regulatory loophole to potentially compromise public health at the present, or any other, cleanup site to which the Zone II Exemption could be applied contrary to scientific and risk concepts.

## CONCLUSION

The LSPA supports the position that DEP has consistently limited application of 310 CMR 40.0924(2)(b)(3)(a) to the petroleum hydrocarbon component of Oil. This interpretation is reasonable for the purposes of the Zone II Exemption and is supported by scientific studies and public health concerns. However, the LSPA recognizes that the term "Oil" is interpreted more broadly to include certain additives, such as lead, in other sections of the MCP and another statute, and use of this broader definition in these other contexts is important for current hazardous waste cleanup practices and should be maintained. To effectuate the purpose of the Zone II Exemption and to ensure public health is appropriately protected, the LSPA supports preserving the current DEP interpretation and enforcement of 310 CMR 40.0924(2)(b)(3)(a) to include only petroleum hydrocarbons and encourages this Court to allow a regulatory revision to that effect without permitting use of the Zone II Exemption by the Plaintiff-Appellant in the present case or by other parties in similar situations.



Respectfully submitted,

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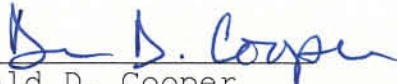
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**MASS.R.A.P. 16(k) CERTIFICATION**

I certify that the foregoing Brief of *Amicus Curiae* LSP Association, Inc. complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass.R.A.P. 16(a)(6), Mass.R.A.P. 16(f), Mass.R.A.P. 16(h), Mass.R.A.P. 18, and Mass.R.A.P. 20.

  
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