

SUMMARY OF DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act* and in the matter of a complaint regarding the conduct of A MEMBER of the Association of Professional Engineers of Ontario.

This matter came on for hearing before a panel of the Discipline Committee on November 5, 2012, at the Association of Professional Engineers of Ontario (PEO or association) in Toronto. All parties were present. The association was represented by Leah Price. The member was represented by Donald G. Kidd. David P. Jacobs acted as independent legal counsel.

The Notice of Hearing issued on June 21, 2012, and Statement of Allegations dated March 27, 2012, were filed with the panel. There was no issue as to the panel's jurisdiction to determine this matter, which had been referred to the Discipline Committee for disposition. The parties filed an Agreed Statement of Facts signed by the member and counsel for the association.

The member, through his counsel, admitted the conduct alleged as set out in the Agreed Statement of Facts. The panel then conducted a plea inquiry and was satisfied that the member's admissions were voluntary, informed and unequivocal. The parties submitted that the agreed-upon facts as presented supported the allegations that the member had committed acts of professional misconduct as defined under section 28(2)(a) of the *Professional Engineers Act* (act), and sections 72(2) (a), (b), (c), (d), (g) and, in part, (j) of Regulation 941 and in consequence of his contravention of section 53 of the regulation and section 12 of the act.

SUMMARY OF THE MATTER

The member offered an opinion in writing over his signature as a P.Eng. on a matter of public safety that he knew was not substantiated by proper inspection or investigation, and that he ought to have anticipated would be used in a dispute between a relative and a municipal building department.

While he issued the letter without compensation as a personal favour to his relative, in so doing he placed the interest of his family ahead of his professional duty to protect the public and to uphold the integrity of the profession. For this, he was found guilty of professional misconduct by a discipline panel of his peers, and was reprimanded. In recognition of (i) the member's previously unblemished record, (ii) his retirement from the practice of professional engineering, (iii) his co-operation with PEO in presenting an agreed statement of facts and a joint submission on penalty, (iv) his genuine remorse, and (v) the embarrassment and stress he has already experienced in being brought to discipline, the panel agreed to publish its decision and reasons without the member's name and other identifying detail.

PENALTY SUBMISSIONS

The parties filed a Joint Submission on Penalty, which read as follows:

1. Pursuant to s. 28(4)(f) of the act, the member shall be orally reprimanded and the fact of the reprimand shall be recorded on the register for a period of one year;
2. The member shall provide an undertaking to the Discipline Committee, in accordance with subsection 28(4)(c) of the act, not to carry out any work in the practice of professional engineering;
3. There shall be no order with respect to costs;
4. Pursuant to s. 28(4)(i) of the act, the findings and order of the Discipline Committee shall be published in summary form in the official publication of PEO; and

5. The issue of whether such publication shall be with or without the member's name shall be determined by the panel at the hearing of this matter.

The Joint Submission on Penalty stated that the member had independent legal advice with respect to his agreement to the penalty.

The association submitted that the admitted misconduct was serious; the member should have recognized that in using his professional engineer designation he shouldered responsibility to ensure public safety, among other things. The building, which he purported to inspect, is occupied by tenants and thus the member should have either refused to write a report for this property, or should have prepared a thorough and professional engineering report. The association argued that although there was no report of harm resulting, the conditions on the site could have resulted in harm and therefore raised concerns for public safety.

On the only issue that the parties raised on whether to publish the summary with or without the member's name, the association submitted that the summary should be published with the name. The association reasoned, among other things, that protection of the public, general deterrence and transparency considerations would all be met by publication with names. Further, it was urged that there should be compelling reasons to order publication without names.

The member's counsel argued that there were a number of factors mitigating against publication of the member's name (or details that could identify him), including: his age; his history and record as a professional engineer; the nature of his practice; and the facts in this case. Counsel pointed out that the member is over 70 years of age, is not now a practising engineer and admitted his guilt right away. It was submitted that the member was not aware that the document at issue—a letter that he signed directed to the counsel dealing with property belonging to his relative's corporation—would be used as an engineering report to present to the municipality, although he did know that his relative and the municipality were engaged in a dispute.

It was further submitted on behalf of the member that he was not paid for the letter, was not retained, was not involved in a project such as design services, and that he did use the words "visual report." It was submitted that the member made an error in judgment for which he was remorseful, and which had already caused him considerable embarrassment, anxiety and stress. The member has co-operated in all matters, and acknowledged his wrongdoings.

It was submitted that in balancing the public interest and the interest in fairness to the member, the panel should weigh the considerations in all the circumstances, against the publication of his name in the summary. It was further urged that the conduct in question was at the lower end of the scale of seriousness: publication was not necessary for general deterrence or protection of the public interest. The member was not likely to reoffend and was not practising or planning to practise given his undertaking and age. He was aware of the inappropriate

nature of his conduct. No actual harm had befallen anyone as a result of the misconduct. The conduct was not motivated by personal commercial gain. A publication of the summary without names would be sufficient to protect the public interest and deter potential wrongdoers. The summary itself shows that the association is prepared to deal aggressively with complaints and notify the profession of the need to be scrupulous in adhering to professional standards even when providing "off the cuff" opinions.

Counsel for the association replied that the breaches of the act and regulation in question were not merely technical breaches and the cumulative effect of the sanctions jointly submitted were not disproportionate to the culpability of the member, even including the publication of his name. Further, it was argued by the association that transparency was necessary to fulfil the objectives of the sentencing regime, including public protection and maintaining the integrity of the profession, among other considerations. The profession has expectations in respect of the drafting of such reports, as were at issue in this case. The association sought a ruling in which the panel exercised its discretion to order publication of the summary with the member's name.

PENALTY DECISION

The panel deliberated and rendered its decision. The panel chair noted that the panel had found the member guilty of the misconduct described in the Agreed Statement of Facts. Accordingly, the panel ordered the penalty in accordance with the Joint Submission on Penalty, deciding that the member will not be named in the official publication.

The panel concluded that the proposed penalty is reasonable and in the public interest. It is neither disproportionate nor does it bring the administration of justice into disrepute. The member is over 70 years of age, is not practising professional engineering, does not hold a Certificate of Authorization, has not been the subject of a complaint prior to this one, and his name will still be on the register for 12 months. The member acknowledged his shortcomings and his responsibility for same, has been co-operative and remorseful and has demonstrated respect for the profession in reaching agreement on fact and penalty with alacrity.

The parties left the determination as to whether to publish with the member's name to the discre-

tion of the panel. The panel considered the facts, the submissions of the parties, and the case law provided by the parties, and determined to exercise its discretion to order that the summary of the decision should be published without names. In the view of the panel, having regard to the facts and submissions, publication of the member's name would cause unnecessary and disproportionate anxiety and stress to the member given all of the circumstances, his advanced age, and the fact that the member has clearly undertaken not to practise professional engineering. It would be an unwarranted and disproportionate penalty when considered cumulatively with the balance of the penalties. It is the panel's view that the publication of the summary without names, would, in the very specific fact situation herein, be sufficient to meet the requirements of the sentencing regime under the act. The member, the profession and the public may have confidence in the conduct of professional regulation by the publication of the summary. The panel finds the particular constellation of facts before it sufficiently compelling to order publication without the name of the member.

The panel rendered its decision on penalty, including as to publication without the name of the member, orally at the conclusion of the hearing. The member waived his right to appeal. The association advised that it would not appeal.

The oral reprimand was administered at the conclusion of the hearing on November 5, 2012.

The written summary of the Decision and Reasons was signed by John Vieth, P.Eng., as chair on behalf of the other members of the discipline panel: Ishwar Bhatia, P.Eng., George Comrie, P.Eng., Daniela Iliescu, P.Eng., and Sharon Reid, C.Tech.

DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, c. P.28; and in the matter of a complaint regarding the conduct of PAUL D. REW, P.ENG., a member of the Association of Professional Engineers of Ontario, and RUBICON ENVIRONMENTAL INC., a holder of a Certificate of Authorization.

This matter first came on for hearing before a panel of the Discipline Committee on August 30, 2010, at which time the panel granted an adjournment at the request of the Association of Professional Engineers of Ontario (association), with the consent of the member, Paul D. Rew, P.Eng. (Rew), and the holder, Rubicon Environmental Inc. (REI), due to the unavailability of certain witnesses and, as Aviva Harari, counsel for the association, was not ready to proceed at that time. Subsequently, the association retained Leah Price as counsel for the balance of the hearing. Prior to the adjournment being granted, the Notice of Hearing and Statement of Allegations were entered as exhibits. Rew and REI pleaded not guilty to the allegations, and the panel became seized. The hearing was scheduled to resume on November 30, 2010, but did not proceed on that date due to the unavailability of a member of the panel.

The hearing was then set to proceed on January 10, 2012. The panel received a motion from the association seeking an adjournment as one of their witnesses was unable to attend to testify on those dates because of childcare difficulties or, alternatively, that the hearing be held electronically, in part, so the witness could be heard. The panel determined to hear the motion and the responses from defence counsel in writing. The panel was not inclined to grant the association's request for an adjournment as the allegations concerned events that took place in 2007, and the matter was referred to the Discipline Committee and the allegations served on the defendants on or about October 28, 2009. The witness was able to revisit her childcare arrangements so that she could be available after 1 p.m. on the afternoon of January 10, 2012. The hearing ultimately proceeded on January 10, 11 and 12, 2012, and was scheduled to resume on May 1, 2 and 3, 2012. The defendant, Rew, was ill at that time, and so the hearing was rescheduled to July 24, 2012.

Prior to that date, a member of the panel, David Smith, became unable to complete the hearing. The remaining four panel members proceeded with the hearing, pursuant to section 4.4(1) of the *Statu-*

tory Powers Procedure Act, R.S.O. 1990, Chapter s.22 (and with the consent of all parties) on July 24, 25 and 26, 2012, and on August 16, 2012, at the offices of the association.

THE ALLEGATIONS

The allegations against Rew and REI, as stated in the four-page Statement of Allegations dated October 28, 2009, may be summarized as follows:

It is alleged that Rew and Rubicon Environmental Inc:

- (a) failed to report a potential risk to public health (from a contaminated aquifer) to the local medical officer of health and the Ministry of the Environment (MOE) office forthwith, contrary to subsections 72(2)(a) and (b), and 77(2)(i) of Regulation 941;
- (b) failed to provide accurate and timely information when directly questioned by the MOE, contrary to subsections 72(2)(c) and (d), and 77(6) of Regulation 941;
- (c) failed to act with courtesy and good faith toward Frank Colozza, P.Geol. (Colozza), when Colozza's name was used on correspondence without his consent, contrary to subsection 77(7)(i) of Regulation 941;
- (d) made a number of statements in the May 16, 2007 letter (public notice) that were not supported by the data reported, contrary to subsection 77(2)(iii) of Regulation 941;
- (e) failed to disclose appropriately a conflict of interest when REI was retained by a number of parties having an interest in the fill material at the subject site, contrary to subsections 72(2)(i) and 77(3) of Regulation 941;
- (f) failed to meet the standard expected from a professional engineer regarding the information documented in the phase II environmental site assessment (ESA) report, contrary to subsections 72(2)(d) and (g), and 77(1)(iv) of Regulation 941;
- (g) demonstrated a lack of understanding of the practices, protocols and standards involved in designing and conducting a sampling and analysis program for a phase II ESA, contrary to subsection 72(2)(a) of Regulation 941; and
- (h) breached section 53 of Regulation 941 made under the *Professional Engineers Act* by failing to date the phase II ESA report.

PLEA OF THE MEMBER AND/OR HOLDER

Rew and REI denied the allegations set out in the Notice of Hearing.

OVERVIEW

The hearing arose as a result of Rew's involvement in the assessment of soil and ground water conditions at 223017 Grey Road 17 in Springmount, ON, known as Paper Products Plus Inc. property (PPP), as a professional service to Norm Prince (Prince), the owner of this commercial property. The allegations pertain to the conduct of Rew and REI between April 18, 2007 and July 23, 2007.

Rew has held a licence under the provisions of the *Professional Engineers Act* since 1991. Rew was the responsible professional engineer for REI while this firm held a Certificate of Authorization from October 4, 1994 to January 13, 2010. Rew had been practising environmental engineering with his company, REI, in the Owen Sound area for approximately 13 years at the time he was retained by Prince to assess the conditions on the PPP property. Rew completed numerous environmental assessments, nationally and internationally, prior to being retained by Prince and has not been before a discipline panel previously. Rew has been practising environmental engineering for the past 22 years.

Prince was concerned about the content of fill materials that had been placed on his property without his consent, and that these materials might have caused the degradation he observed in the water supplied by a well located on the property. He contacted REI to investigate.

Rew supervised the excavation of test pits, collected samples and submitted them for laboratory analysis. Rew also accepted samples taken by his client for analysis. He produced a report for his client based on the laboratory analysis and his own observations at the site.

The complaint against Rew and REI was raised by a professional engineer working in the Owen Sound office of the MOE that oversees the region where the PPP property is located. The complaint raised questions about the quality of the report produced by Rew. The complaint also questioned Rew's conduct toward protection of public safety through the course of his involvement with the site assessment. The validity of the allegations arising from this complaint were evaluated by the panel based on the evidence presented.

Several of the allegations pertained to a letter circulated in the community warning of potential environmental issues around the PPP property and calling a public meeting. The fact of the letter was uncontested. For ease of reference and because

much of the evidence in this case related to the sending and content of that letter, the text of the letter dated May 16, 2007 is set out in full below:

“May 16, 2007

To Whom It May Concern -

ENVIRONMENTAL ISSUES - SPRINGMOUNT

Construction and demolition waste, solid waste and hazardous industrial waste from the former BCK property were mixed and placed on the Win-Mar and Paper Products Plus Inc. properties on Grey Road 17. Contamination from these soils has leached into the aquifer. Testing of the groundwater has confirmed that the Paper Products property water well contains elevated levels of the heavy metals parameters.

Until further notice, we are recommending that you do not drink water from your water well, and minimize the amount of water used.

In this regard, a public meeting is being held at 1:00 p.m. on Tuesday, May 22, 2007 at the Springmount RV property and we encourage your attendance.

*Frank Colozza, P.Geol
Hydrogeologist”*

Paul D. Rew, P.Eng.

The key evidentiary question is whether this letter was authored, sent or was caused to be sent by Rew or REI.

Another question is whether Rew was aware of any potential danger to public safety from his assessment of the PPP property that he failed to report to the proper authorities. In particular, did Rew or REI fail to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public?

Further, was it reasonable, under the circumstances at the time, for Rew to withhold the report prepared for his client from the MOE?

The MOE succeeded in compelling the disclosure of the report Rew delivered to his client. This report was subsequently assessed as being intended as a full and complete phase II ESA. It did not meet the standard for several reasons. The key evidentiary question for the panel is whether this report met the standard expected from a professional engineer, given the purpose for which the report was intended by Rew’s client.

THE EVIDENCE

In the seven-day span of this hearing, a large volume of evidence was presented. The panel found that much of this evidence was not pertinent to decisions on the allegations. In fact, much of the evidence presented was not disputed, and could have been agreed prior to the hearing and introduced as a statement of facts. For the benefit of reading, the panel will only present the pertinent evidence here.

Exhibit 5 was the Professional Engineers Ontario registrar’s certification that Rew held a licence and REI held a Certificate of Authorization under the provisions of the act at all material times during the events giving rise to this hearing.

The association called Heather Pollard (Pollard), an area supervisor with the MOE during the period to which her testimony pertained. Pollard

referred to her notes (Exhibit 7) while testifying that she was made aware of the public meeting in Springmount and the invitation letter (Exhibit 8). Pollard recounted the dialogue with the Grey-Bruce Health Unit regarding information on any drinking water contamination. The health unit reported to her by email (Exhibit 9) that they received a call from Prince on August 8, 2006 complaining of contaminated well water that they did not act on.

Pollard testified that she attended the meeting in Springmount. During that meeting, Rew showed her the laboratory analysis results he had received and agreed to send her his full report. She testified that, at the meeting, Rew stated that the laboratory analysis results showed “hits in every category.” However, she “became less concerned” when Rew indicated, in response to Pollard’s questions, that he had not compared the lab results with the Ontario Safe Drinking Water Standard (OSDWS). Pollard identified the phase II ESA report document authored by Rew and REI as received by the MOE (Exhibit 12). She stated that Rew requested she visit the test pits with him. She never complied with his request. In cross-examination, Pollard testified that Prince did not require a phase II ESA report for his PPP property.

The association called Colozza to testify about the letter (Exhibit 8) bearing his name. Colozza is a hydrogeologist with JFM Environmental. He testified that he was informed about the letter by Ian Mitchell (Mitchell) of the MOE. Colozza testified that he was not aware of the letter (Exhibit 8) previously. He identified his May 23 message to Mitchell (Exhibit 15), denying his involvement with the letter (Exhibit 8) and explaining his interaction with Rew and REI regarding the PPP property. In the message, Colozza states that Rew informed him in a telephone conversation that Christi Rew, Rew’s wife, distributed the letter and that Rew described and provided background on the letter. On cross-examination, Colozza could not recall from whom he received a copy of the letter (Exhibit 8). Colozza testified that he did not know whether Rew was aware of the contents of the letter (Exhibit 8) prior to the May 22 meeting.

The association called Dana Mohammed (Mohammed), MOE environmental officer, to recount his investigation of the ground water

contamination concerns reported to Pollard during the May 22 meeting, Mohammed referred to his notes (Exhibit 16) during testimony about the water samples he collected and had analyzed. He testified to his letter to Rew requesting a report detailing the data he mentioned during the May 22 meeting (Exhibit 17) and, subsequently, contacting Bruce Thom (Thom) and Prince with the same request. Mohammed identified the fax received from REI in response to his request for the report and that he was directed to contact lawyer Ian Robertson. Mohammed identified the provincial order he issued (Exhibit 11) to Thom and Prince, demanding the report pertaining to the ground water contamination reported by Rew at the May 22 meeting. Mohammed identified the letter (Exhibit 24) he received from attorney John Tamm, representing Prince, and stating conditions under which his client would agree to provide the report. Mohammed testified that he received the requested report (Exhibit 14) from Thom. Mohammed also testified that the analytical results for the water samples he collected on May 22, entered as Exhibit 27, did not justify a warning, as given in the May 16 letter. The panel asked Mohammed if he expected to receive a phase II ESA report in response to his request. He answered he was happy to see it, but it was not expected.

The association called David Flynn (Flynn) of Stantec Consulting as an expert witness regarding environmental engineering practice. Flynn identified the report he prepared (Exhibit 29) on his review of the phase II ESA report produced by Rew and REI pertaining to the PPP property (Exhibit 12). Flynn also referred to a constellation of professional standards, guidelines and regulations pertaining to environmental engineering (Exhibit 30). Throughout his testimony, Flynn identified the deficiencies of the report in Exhibit 12 and an entirely completed phase II ESA. In cross-examination, Flynn testified that the analysis results in the report (Exhibit 12) were within Ontario safe drinking water standards. Flynn felt that the ministry should have called Rew before the public meeting. He also testified that he did not believe Prince was injured by the conduct of Rew or REI.

The defence called Rew. He recounted the circumstances of his being retained by Prince to investigate the fill placed on his PPP property and the possible connection with the contamination of the water in the well. Rew testified that he was

not aware of the May 16 letter (Exhibit 8), calling a public meeting, until May 22, the day of the meeting. Rew testified that he did discuss the water analysis results he had during the meeting. He testified that he told Pollard he could not provide his report because it was prepared for Prince for litigation. He claimed his report was protected by “litigation privilege.” Rew testified to presenting the report in exhibits 12 and 14 to Prince and his attorney as a draft. He testified that his client did not require a full phase II ESA because a land use change was not contemplated. He testified that he signed and sealed the report, after review, on the request of Prince. Rew testified to having been retained by Harold Sutherland to assure compliance with the MOE order to remove the contaminated fill from the Win-Mar and adjacent PPP property. Rew identified his report on compliance (Exhibit 33) as accepted by the MOE. The report shows that the contaminated fill that was the cause of Prince’s concerns, and the reason he engaged Rew and REI, had been removed. In cross-examination, Rew was presented with his invoice to Prince and asked whether the May 16 entry for preparing correspondence was for the letter in Exhibit 8. Rew denied this. He testified to receiving a copy of the letter at the meeting on May 22 and including it as an appendix of his report. Rew was asked to explain why he did not respond to clarify the statements made by Colozza (Exhibit 15) implicating him and REI in the preparation and distribution of the May 16 letter (Exhibit 8). Rew responded by showing that the message was not copied to him by email, despite the footnote, and that he did not receive this message from Colozza in a timely way.

The defence called Bruce Tunnicliffe (Tunnicliffe) of Vertex Environmental Inc. as an expert witness regarding environmental engineering practice. Tunnicliffe testified in support of the report prepared by Vertex employee, Rick McGregor, (Exhibit 39) in response to the report prepared by expert Flynn. He testified that he would sign the report as his own work. Tunnicliffe testified that it is common practice to include a statement on a phase II ESA that the contents of the report cannot be relied upon. He testified that a report prepared for a client should not be distributed without the client’s consent. Tunnicliffe testified that it is typical practice to distribute reports in draft form to clients for review. He testified that draft reports are also

often submitted to the MOE, in draft, for technical review and comment. Tunncliffe testified that he has been involved in the preparation of many phase II ESA reports and that the reports are written differently depending on the needs of the client. He testified that, in his experience, large corporate clients often have different standards for the phase II ESA reports they order in terms of format, methods used and extent of sampling and analysis.

The defence called Colleen Newell (Newell), owner of many gas stations and a frequent client of Rew and REI. Newell testified to her satisfaction with the work of Rew and REI.

The defence called Zihnija Hurem, PhD (Hurem), of PH Quantum, an analytical services laboratory that tested water samples provided by Rew and REI. Hurem testified that the results of his testing appear on pages 132 to 150 of Exhibit 12. He testified to the special purpose of analyzing the old samples provided to Rew by Prince. He testified to the circumstances of the certification of his employees and the accreditation of his laboratory at the time he tested the samples provided by Rew from the PPP property.

DECISION

(i) Onus and standard of proof

The association bears the onus of proving the allegations in accordance with the standard of proof, which the panel is familiar with, set out in *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977) 15 O.R. (2d) 477. The standard of proof applied by the panel, in accordance with the Bernstein decision, was a balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the panel.

(ii) Decision

Having considered the evidence and the onus and standard of proof, the panel finds that the association has failed to prove any of the allegations against Rew and REI.

REASONS FOR DECISION

The first allegation is that Rew and REI failed to report a potential risk to public health (from a contaminated aquifer) to the local medical officer of health and the MOE office forthwith. Mohammed testified that laboratory analysis of the water samples he obtained from wells on the PPP property and

adjacent properties did not justify a warning. Pollard testified that she was less concerned when she compared the analysis results obtained from Rew to the OSDWS. Flynn testified that the laboratory results presented in the report prepared by Rew (Exhibit 12) did not indicate a drinking water safety hazard. Rew testified that the water he sampled from the well on the PPP property was of poor quality due to odour, appearance and taste; however, the laboratory analysis indicated it was within Ontario safe drinking water standards. Rew testified that he was concerned about the condition of the water, but he did not have facts indicating a public health risk. In evidence introduced during the testimony of Pollard (Exhibit 9, pp 2), the health unit acknowledges receiving a report from Prince almost one year prior about well water contamination, and that they were not so concerned for public safety to act on it. The association did not introduce any evidence that a potential public health risk existed of which Rew was, or ought to have been, aware. The panel finds that Rew and REI had no reasonable cause to report a risk to public health.

The second allegation is that Rew and REI failed to provide accurate and timely information when directly questioned by the MOE. Pollard of the MOE testified that, during a public meeting on May 22, 2007, Rew indicated that he had evidence of soil groundwater contamination on the PPP property and that he had prepared a report of his findings. Pollard testified that she verbally requested a copy of the report from Rew during the meeting. Rew and REI did not provide the report to the MOE. Mohammed, a senior environmental officer with the MOE, testified to the multiple requests for the report, including a letter dated May 28, 2007 to Rew and REI (Exhibit 17). Rew testified he informed the MOE that the report was the property of his client and that he did not have the authority to release it without his client's permission. This is corroborated by the fax sent on May 28, 2007, by Mohammed to Prince (Exhibit 19) requesting the report and identifying Rew and REI as consultants of Prince. Mohammed identified a letter received by fax from Rew on June 15, 2007 (Exhibit 20), in which Rew indicates that further correspondence needs to be handled through a lawyer. Mohammed complied and sent a letter dated June 19, 2007 (Exhibit 21), to the lawyer requesting the report. Rew testified to his concern about the contaminated soil his report

indicates is on the PPP property and the cost his client would incur if the MOE ordered it removed. Rew testified to his belief that it would be unprofessional for him to release the report without his client's permission. Rew testified that he was not aware of any imminent threat to public safety indicated by the findings of his report. This is corroborated by the findings of the panel on the first allegation. Without an overriding public safety concern, the panel believes that Rew made a reasonable decision not to release the report and to direct the MOE to the proper authority to obtain the report. The panel finds that Rew and REI did act professionally, contrary to the allegation.

The third allegation, that Rew failed to act with courtesy and good faith toward Colozza, when Colozza's name was used on correspondence without his consent, relates to the May 16, 2007 letter (Public Notice). The letter was introduced as Exhibit 8 by the association and identified in testimony by Pollard as under-signed by Rew and Colozza. In his testimony, Colozza denies involvement in preparing the letter and claims his name was used without his knowledge or consent. Rew testified that this letter was not authored, sent or was caused to be sent by him. Rew testified that he did receive the letter and that he included it as correspondence in his report. As it appears in evidence, there are no signatures on the letter, and it is on plain paper without a letterhead. To prove the allegation, the association must establish that the letter was authored, sent or was caused to be sent by Rew or REI. The panel did not find any clear and cogent evidence identifying Rew or REI as the source of the letter. In deciding whether Rew is likely responsible for the letter, the panel looked for motivation. From the decision on the first allegation, Rew does not have reasonable cause to declare a public health risk to warn against drinking water from wells on and around the PPP property, as is written in the letter. The panel found no evidence to suggest a motive for an experienced environmental engineer like Rew to issue such a letter. The panel does find evidence in the testimony of Rew and in correspondence (Exhibit 41) from Prince to Rew dated June 1,

2007 that other parties with a pecuniary interest in the remediation of the PPP property and adjacent properties were aware of the names and facts to have written the letter. Not being professionals, these parties would not likely have been aware of the consequences of circulating such a letter in terms of public alarm and panic. One possible motivation for calling a public meeting could have been to raise awareness of the contaminated soil to build public demand for having it removed, as testified by Rew. Because there is no clear, cogent and convincing evidence that Rew or REI was responsible for the letter, the panel found, on the balance of probabilities, that the allegation of failing to act with courtesy and good faith was not proven.

The fourth allegation is that Rew and REI made a number of statements in the May 16, 2007 letter (Public Notice) that were not supported by the data reported. Following from the decision on the third allegation that the letter was not authored, sent or caused to be sent by Rew or REI, the statements in the letter cannot be attributed to them. The panel, therefore, found this allegation was also unproven.

On the fifth allegation of failing to appropriately disclose a conflict of interest when Rubicon was retained by a number of parties having an interest in the fill material at the subject site, the evidence brought by the association referred to the former site of the Black Clawson Kennedy foundry in Owen Sound (BCK property), where it was believed the fill material originated. Rew testified to the fact that his father-in-law had owned the BCK property at one time, and that he and REI were retained to manage the environmental issues on that site. He also testified that, on the death of his father-in-law, his wife inherited the property. He testified that the BCK property was subsequently sold and the new owners did not retain him or REI. Rew testified that material was not moved from the BCK property to the PPP property, or the adjacent Win-Mar property prior to the sale. His testimony is corroborated in the earlier cross-examination of Pollard on page 77 of Exhibit 12 to show that the township permit that resulted in the contaminated fill on the PPP property had not been issued prior to July 2004. The defence presented page 47 of Exhibit 12, identified by Rew as a letter naming Azimuth Environmental as the firm retained by the new owners and dated February 2004, prior to the fill being placed and over three years prior to Rew and REI working for Prince on the PPP property. The association did not bring any contradictory evidence. From the evidence presented, the panel does not find any apparent conflict of interest that Rew could have failed to disclose.

The sixth allegation is that Rew and REI failed to meet the standard expected from a professional engineer regarding the information documented in the phase II ESA report. Mohammed testified that the MOE did receive the report of Rew and REI in reply to the order he issued to Prince. Flynn, as an expert for the association, gave his detailed opinion of the deficiencies of the report as received by the MOE (Exhibit 12) in comparison to standards of practice in phase II ESAs, while referring to his written analysis (Exhibit 29). Flynn regarded the report as a complete and final report. Rew testified that he was the author of the report, as presented

in Exhibit 12, and that this version of the report was a draft presented to his client for interim review. Although the report bears his seal and signature, unusual practice for a draft report, Rew testified that he had not presented it as a final report, but as a draft for discussion with his client, as was his usual practice. His client, Prince, asked him to sign and seal the report to show that he would stand behind it. Rew testified that the report was intended for his client to have contaminated fill removed from his property and that the report was never intended for submission to the MOE for any purpose for which such a report would normally be used, as in the change of use or the sale of a property. In Exhibit 34, the association presented the REI invoice for the preparation of the report. The invoice does not indicate that the work was complete. The association did not introduce any testimony, in chief or in cross, that Rew and REI represented the report (Exhibit 12) as a final phase II ESA. Tunnicliffe, as an expert for the defence, noted that it was his practice to mark each page of a draft report as draft. He also testified that draft phase II ESA reports, at various stages of completeness, are frequently provided to clients and the MOE for review and comment. The panel does not find that Rew or REI failed to meet the standard expected from a professional engineer by presenting a draft copy of the report to his client and his client's lawyer.

The seventh allegation is that Rew and REI demonstrated a lack of understanding of the practices, protocols and standards involved in designing and conducting a sampling and analysis program for a phase II ESA. Although Rew and REI had likely conducted similar work on many occasions, the association chose to restrict the evidence it presented to the one instance on the PPP property. In his own testimony and in the text of his report, Rew identified aspects of the sampling and analysis that were incomplete or not conducted according to standards. The evidence indicated that Rew understood that he was deliberately not following all practices, protocols and standards, while meeting the needs of his client's situation. In that context, Rew took samples from the test pits to provide his

client with a cost-effective and timely preliminary evaluation of contamination to facilitate preparation for possible future litigation. On this single instance of practice by Rew and REI presented as evidence by the association, the panel does not find a lack of understanding of the practices, protocols and standards involved in designing and conducting a sampling and analysis program for a phase II ESA.

On the eighth allegation of Rew and REI breaching section 53 of Regulation 941 made under the *Professional Engineers Act* by failing to date the phase II ESA report, the panel considered the evidence in Exhibit 12 and the possibility that the order of the pages may have been altered as the document was handled and copied. The panel heard no clear and cogent evidence that the letter was not part of the report. The panel finds the cover letter for the report bearing a date satisfied the regulatory requirement.

The panel orders that its decision be published in full in the official journal of the association. J.E. (Tim) Benson, P.Eng., signed this Decision and Reasons as chair on behalf of the members of the discipline panel: Ishwar Bhatia, P.Eng., Phil Maka, P.Eng., and John Vieth, P.Eng.

SUMMARY OF DECISION AND REASONS

Association of Professional Engineers of Ontario v. MICHAEL M. COOK, P.ENG.

On June 12, 2009, the chief building official of the City of Belleville referred documents accompanying building permit applications to the Association of Professional Engineers of Ontario (association) for the purpose of determining if the *Professional Engineers Act* (act) was contravened by the member. The registrar initiated an investigation pursuant to section 33 of the act. The results of the investigation were reported to the association's Executive Committee, who referred the matter by resolution to the Discipline Committee on August 9, 2011.

An Amended Statement of Allegations dated March 26, 2012, was tabled at the hearing. The panel was advised that both counsel for PEO and for the member had reached an Agreed Statement of Facts, which included an admission of guilt, and that there was a Joint Submission on Penalty. Both documents, dated September 10, 2012, were filed at the hearing.

The member was licensed in 1982 and was the sole practitioner under a Certificate of Authorization issued initially in 2003. The complaint from the chief building official related to errors of omission on five building permit applications, dating from May 19, 2006 to June 1, 2009. The member had made revisions, which were accepted, and permits were issued for two of the applications. The association's investigation identified shortcomings in practice standards, and that there were deficiencies in documentation on four projects during the period from September 2009 through February 2010.

The member pled guilty, and a plea inquiry conducted by the panel chair satisfied the panel that the plea was made willingly, unequivocally and without reservation.

DECISION

The panel determined that the member was guilty of professional misconduct, as defined under section 28(2)(a) of the act, as a result of contravening Regulation 941, R.R.O. 1990, as amended, section 53 and section 72(2), subsections (a) negligence; (b) safeguarding life, health or property; (d) compliance with statutes, etc.; (e) signing and sealing documents; (h) competence to do work; and (j) unprofessional conduct.

The panel accepted that the shortcomings and deficiencies were acknowledged in the Agreed Statement of Facts. The facts presented supported the allegations that the applicable sections of Regulation 941 had

been contravened. A finding of "unprofessional" under subsection 72(2)(j) was appropriate as there was no evidence to support the more serious provisions. The member's guilty plea was offered willingly and without reservation.

PENALTY

Both counsel argued in support of the Joint Submission on Penalty, which was the outcome of serious negotiations. The member had legal counsel throughout this adversarial process. The penalty addressed concerns related to specific and general deterrence, remediation and public protection. Two precedent decisions of the Discipline Committee were presented in support of the Joint Penalty Submission. The member had been co-operative throughout the process.

The penalty proposed suspensions of the member's licence and Certificate of Authorization, with such suspensions commencing October 1, 2012, thus allowing three weeks to clear up outstanding work. The four-month licence suspension was considered significant, and reinstatement of the Certificate of Authorization was conditional on the member passing two examinations.

The panel accepted the Joint Submission on Penalty, and ordered:

1. Pursuant to section 28(4)(b) of the act, Cook's licence shall be suspended for a period of four months, commencing on October 1, 2012;
2. Pursuant to section 28(4)(b) of the act, Cook's Certificate of Authorization shall be suspended from October 1, 2012, until such time as Cook shall have written and passed both of the following two examinations:

- (a) 07-STR-A2 (formerly 98-CIV-A2)–
Elementary Structural Design, and
 - (b) 07-STR-A5 (formerly 98-CIV-B2)–
Advanced Structural Design;
3. Pursuant to section 28(4)(e) of the act, it shall be a term, limitation and condition on Cook’s licence that, in the event Cook fails to pass successfully the examinations referred to in paragraph two hereof within 24 months of the discipline hearing, his licence shall be revoked;
 4. Pursuant to section 28(4)(c) of the act, Cook undertakes that his practice from September 10, 2012, until the commencement of the suspensions referred to above, shall be limited to completing projects currently underway, and that he shall not accept or carry out any new or additional work or projects in this period;
 5. It shall be a further term, limitation and condition on Cook’s licence that, in the event Cook offers engineering services to the public while his Certificate of Authorization is suspended pursuant to paragraph two hereof, or practises professional engineering while his licence is suspended pursuant to paragraph one hereof, his licence shall be revoked;
 6. Pursuant to section 28(4)(i) of the act, the findings and order of the Discipline Committee shall be published in summary form, including Cook’s name, in PEO’s official publication; and
 7. There shall be no order with respect to costs.

REASONS FOR PENALTY DECISION

The panel accepted that the joint submission was the result of a serious attempt to reach agreement, and that the member’s interest was well represented in the process.

The four-month suspension of the member’s licence is significant, but appropriate in this case. The prerequisites for reinstating the member’s Certificate of Authorization are a reasonable means to address remediation and public safety. Publication, in sum-

mary, should deter the general membership from engaging in similar conduct in the future.

The member acknowledged shortcomings and his responsibility for same. He was co-operative in the investigation and demonstrated respect for the profession in reaching agreement on fact and penalty. As such, an award of costs was not warranted.

The Joint Submission on Penalty is reasonable and would not bring the administration of justice into disrepute. Existing client needs were considered. Public confidence in the association’s ability to be a self-regulator of the profession should be satisfied. The decision and penalty serves and protects the public interest.

The Decision and Reasons was signed by the panel chair, Michael Wesa, P.Eng., on behalf of the panel, which included Ishwar Bhatia, P.Eng., Rebecca Huang, LLB, David Robinson, P.Eng., and Bill Walker, P.Eng.

NOTICE OF LICENCE SUSPENSION, HOUSTON T. ENGIO

On January 8, 2013, Houston T. Engio’s professional engineering licence was suspended pursuant to a November 8, 2011 order of the Discipline Committee. The order was issued following a finding of professional misconduct against Engio at a discipline hearing held on that date. Engio’s licence was suspended because he failed to write and pass the professional practice examination within the 14-month timeframe prescribed by the Discipline Committee.



PUBLICATIONS ORDER FORM

	\$	No.	Total
The Professional Engineers Act, R.S.O. 1990, Chapter P.28	N/C		
Ontario Regulation 941/90.....	N/C		
Ontario Regulation 260/08.....	N/C		
By-law No. 1	N/C		
Practice Guidelines			
Acting as Contract Employees (2001).....	10.00		
Acting as Independent Contractors (2001).....	10.00		
Acting Under the Drainage Act (1988).....	10.00		
Acoustical Engineering Services in Land-Use Planning (1998).....	10.00		
Building Projects Using Manufacturer-Designed Systems & Components (1999).....	10.00		
Commissioning Work in Buildings (1992).....	10.00		
Communications Services (1993).....	10.00		
Engineering Services to Municipalities (1986).....	10.00		
Environmental Site Assessment, Remediation & Management (1996).....	10.00		
General Review of Construction as Required by Ontario Building Code (2009).....	10.00		
Geotechnical Engineering Services (1993).....	10.00		
Guideline to Professional Engineering Practice (2012).....	10.00		
Human Rights in Professional Practice (2009).....	10.00		
Land Development/Redevelopment Engineering Services (1994).....	10.00		
Mechanical & Electrical Engineering Services in Buildings (1997).....	10.00		
Professional Engineer as an Expert Witness (2011).....	10.00		
Professional Engineer's Duty to Report (1991).....	N/C		
Project Management Services (1991).....	10.00		
Reports on Mineral Properties (2002).....	10.00		
Reports for Pre-Start Health and Safety Reviews (2001).....	10.00		
Reviewing Work Prepared by Another Professional Engineer (2011).....	10.00		
Roads, Bridges & Associated Facilities (1995).....	10.00		
Selection of Engineering Services (1998).....	10.00		
Solid Waste Management (1993).....	10.00		
Structural Engineering Services in Buildings (1995).....	10.00		
Temporary Works (1993).....	10.00		
Transportation & Traffic Engineering (1994).....	10.00		
Use of Agreements Between Clients & Engineers (2000) (including sample agreement).....	10.00		
Use of Computer Software Tools Affecting Public Safety & Welfare (1993).....	10.00		
Use of the Professional Engineer's Seal (2008).....	10.00		
Business Publications			
Agreement Between Prime Consultant & Sub-Consultant (1993) per package of 10.....	10.00		
Licensing Guide & Application for Licence (2007).....	N/C		
Required Experience for Licensing in Ontario (2007).....	N/C		

Fax to: 416-224-8168 or 800-268-0496
 Phone: 416-224-1100 or 800-339-3716
 Mail to: Professional Engineers Ontario
 40 Sheppard Ave. W., Suite 101
 Toronto, ON M2N 6K9
 Attn: Margaret Saldanha

Name _____

Shipping Address _____

City _____

Province _____

Postal Code _____

Tel _____

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Shipping and handling is included.
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Subtotal	
13% HST	
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I have enclosed a cheque or money order made payable to Professional Engineers Ontario.

Membership # _____