

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 (2008) INC., a holder of a certificate of authorization.

The panel of the Discipline Committee met to hear this matter on March 2, 2022, by means of an online video conference platform that was open to observers from the public. All participants in the proceedings attended via videoconference, including counsel for the Association of Professional Engineers of Ontario (the association or PEO); Mr. Paul D. Rew, P.Eng. (the member or Rew); and legal counsel for the member and Rubicon Environmental (2008) Inc. (Rubicon or REI).

PROCEDURAL HISTORY AND ALLEGATIONS

This matter came before the panel following a lengthy procedural history.

Specified allegations of professional misconduct against the member were originally referred to the Discipline Committee by the Complaints Committee in its decision of February 10, 2014.

The matter was heard by a panel of the Discipline Committee over multiple dates in 2017 and 2018. The panel delivered two sets of concurring decisions and reasons on November 16, 2018, and December 18, 2018, respectively, each signed by two members of the panel. Both decisions and reasons found that PEO had failed to prove the allegations of misconduct against the member and Rubicon.

Both of these decisions and reasons were appealed by PEO. In its ruling of October 22, 2020, the Divisional Court allowed the appeal, set aside the decisions of the initial panel and remitted the matter to the Discipline Committee. Leave to appeal to the Ontario Court of Appeal was denied in June 2021.

The members of the panel presided at a pre-hearing conference for this matter immediately prior to the hearing. The parties consented for the members to continue to serve on the panel for the hearing pursuant to section 5.3(4) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

The allegations against the member and Rubicon as set out in the Statement of Allegations dated January 24, 2014, were as follows:

1. Conducting environmental assessment, sampling and remediation of a residential property that failed to meet the standard of a reasonable and prudent practitioner, amounting to professional misconduct as defined by section 72(2)(a), (d) and (j) of Regulation 941;
2. Producing a signed and sealed report that failed to meet the standard of a reasonable and prudent practitioner, amounting to professional misconduct as defined by section 72(2)(a) and (j) of Regulation 941;
3. Failing to take adequate measures to protect the welfare of the public, including the current and subsequent owners of a residential property, from soil and groundwater contamination, amounting to professional misconduct as defined by section 72(2)(b) and (c) of Regulation 941;
4. Providing engineering services to the public while not being the holder of a certificate of authorization contrary to s. 12(2) of the *Professional Engineers Act*, amounting to professional misconduct as defined by section 72(2)(g) of Regulation 941.

PLEA BY MEMBER AND HOLDER

The member and Rubicon denied the allegations of professional misconduct as set out in the Statement of Allegations.

AGREED STATEMENT OF FACTS

Counsel for the association advised that, notwithstanding the member's plea, the parties were entering an Agreed Statement of Facts (ASF).

Additionally, counsel for the association advised that the association was seeking to withdraw all allegations, except for the one allegation contained in the ASF set out below.

The ASF, signed by counsel for both parties on March 2, 2022, provided as follows:

1. Mr. Paul D. Rew, P.Eng. (Rew), is, and was at all material times, a professional engineer licensed in good standing pursuant to the *Professional Engineers Act* (the act). He has been an experienced soil remediator for 22 years and has successfully filed close to 80 Records of Site Condition with the Ontario Ministry of Environment (MOE).

2. Rubicon Environmental (2008) Inc. (REI) is an Ontario corporation and certificate of authorization (C of A) holder. At all material times while that C of A has been in force, Rew was listed as the individual accepting professional responsibility for engineering services provided under the C of A.
3. The complainant, Kevin J.D. Ridley, P.Eng., was, at the material times, a principal of Red Lea Environmental Corporation (Red Lea) located in Brampton, Ontario. Red Lea has a history of being a contractor for DLS Services Inc. (DLS), a competitor of REI, in this and in other matters.
4. On November 12, 2008, the owner of a residential property at 55 Doyle Avenue, Spanish, Ontario (the Property or House) reported a furnace oil leak in her above ground storage tank, which was located outside and adjacent to the House, to her insurance company. The insurance company estimated amount of leaked fuel oil to be between 15 and 20 litres.
5. On November 14, 2008, the insurance company retained DLS to conduct an investigation and propose remediation. Early on in its investigation, DLS estimated that the volume of the leaked oil was, in fact, approximately 100 to 150 litres; however, DLS later admitted that this estimate was meaningless and that the true volume of the leak was unknown. In any event, DLS concluded that the soil and groundwater at the Property had been contaminated and recommended that the House be demolished and the soil under and adjacent to the House be excavated.
6. The homeowner had previously reported a spill of furnace oil to the Technical Standards and Safety Authority (TSSA) on April 29, 1997 (the Historical Spill). The Historical Spill was estimated to be 700 litres of fuel oil. There is no report of any remediation of the Historical Spill. In Rew's opinion, DLS's borehole records did not show evidence of the Historical Spill.
7. On April 14, 2009, the insurance company retained Rew and REI to review the work of DLS, conduct its own assessment, and propose a remediation of the Property. According to Rew, the insurance company and Property owner advised him at the time of both the recently reported spill as well as the Historical Spill.
8. On April 29, 2009, Rew and REI signed and sealed a written report that stated that "the proposed demolition of the house and shed is not required." A second signed and sealed report of June 8, 2009, concluded that the Property met "MOE Regulations for residential land use." In neither report did Rew or REI refer to the Historical Spill. Rew was of the opinion that the Historical Spill had biodegraded.
9. On July 10, 2009, Rew and REI signed and sealed a final report certifying that following their assessment, sampling and remediation work, the Property "posed no significant risk in owning, financing or developing" and warranted "no further environmental investigation" at the time. Again, this report did not mention the Historical Spill.
10. Rew admits that his and REI's reports were lacking for failing to have referred to the Historical Spill in its conclusions.
11. Upon receiving the report by Rew and REI, the Property owner again retained DLS to conduct further assessment. DLS retained Red Lea to conduct supervision and peer review of its further assessment of the Property.
12. After the Property Owner had barred Rew from the Property in August 2009, DLS and Red Lea confirmed DLS's earlier conclusion that the soil and groundwater beneath the Property was contaminated with petrochemicals and was unsafe for residential use. Rew and REI had come to the contrary conclusion. The House was demolished in fall 2010, and an excavation of the affected soil was carried out.
13. The assessment, sampling and remediation work carried out by Rew and REI did not meet the minimum standards of a reasonable and prudent professional engineer for the following reasons:
 - a. Although retained specifically to investigate the petrochemical spill on the Property, Rew and REI determined it was not necessary to conduct further testing of soil and groundwater, as he had concluded there would be no detectable F2 (a type of petroleum hydro-

- carbon, or PHC) contamination by the spill or the larger 700 litre Historical Spill on the Property;
- b. The remedial interventions undertaken by Rew and REI did not explicitly address the Historical Spill;
 - c. As they understood that they had removed the source of F3 (another type of PHC) detection prior to rendering the report of July 10, 2009, and they had not detected F2 contamination, Rew and REI concluded it was unnecessary to account for potential rebounding of groundwater contaminants following certain remedial interventions during their environmental remediation of the Property;
 - d. Rew and REI acknowledge that, before certifying property as requiring no further environmental investigation and suitable for residential use, the minimum standards of responsible and prudent professional engineering generally require that an engineer perform additional testing following the remedial interventions undertaken by Rew and REI to account for the possibility of the rebounding of groundwater contamination; and
 - e. Rew and REI certified the property as requiring no further environmental testing and suitable for residential use on July 10, 2009, before any such testing had been performed and without Rew and Rubicon explaining (in their written reports, requested to be in a summary format by the insurance company, of April 29, June 8 or July 10, 2009) their view that such testing was not needed in this specific case. Rew and REI later became unable to perform any such testing for the reasons set out in paragraph 12.
14. Based on the preceding facts, the association submits that Rew and REI are guilty of professional misconduct as follows:
- a. By committing acts or omissions in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances, contrary to section 72(2)(a) of Regulation 941.

Counsel for the association indicated that the association would be calling no further evidence and closed its case.

Counsel for the member and Rubicon indicated that their position was set out in the plea and made no further submissions.

DECISION

The panel considered the ASF and finds that the facts agreed to therein support a finding of professional misconduct against the member and Rubicon. In particular, the panel finds that the member and Rubicon committed an act of professional misconduct as alleged in paragraph 14(a) of the ASF, namely by committing acts or omissions in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances, contrary to section 72(2)(a) of Regulation 941.

The panel also accepts the withdrawal of the remaining allegations.

REASONS FOR DECISION

The panel carefully considered the ASF submitted by and agreed to by both parties. It accepts that it can rely on the facts set out therein as evidence for the purpose of determining whether the member engaged in acts of professional misconduct as alleged.

Section 72(1) of Regulation 941 made under the *Professional Engineers Act*, R.S.O. 1990, c. P.28, defines negligence as follows: “an act or an omission in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances” (emphasis added). Section 72(2)(a) of Regulation 941 goes on to establish negligence, as defined above, as an act of professional misconduct.

Paragraph 13 of the ASF states that the “assessment, sampling and remediation work carried out by Rew and REI did not meet the minimum standards of a reasonable and prudent professional engineer...” (emphasis added). This fact, which was agreed to by the member and Rubicon, falls squarely within the definition of negligence in section 72(1) of Regulation 941 and is therefore an act of professional misconduct contrary to section 72(2)(a) of Regulation 941.

This conclusion is supported by other accepted facts in the ASF, including the following:

- The member admitted that “his and REI’s reports were lacking for failing to have referred to the Historical Spill in its conclusions,” and the “remedial interventions undertaken by Rew and REI did not explicitly address the Historical Spill.”
- The member and REI acknowledged that “before certifying property as requiring no further environmental investigation and suitable for residential use, the minimum standards of responsible and prudent professional engineering generally require that an engineer perform additional testing following the remedial interventions undertaken by Rew and REI to account for the possibility of the rebounding of groundwater contamination.” However, the member and REI certified the property as requiring no further

environmental testing and suitable for residential use prior to any such testing being performed and without explaining their view that such testing was not needed in this specific case.

Accordingly, the panel had no difficulty in finding that the member and Rubicon were negligent in their assessment, sampling and remediation work and had thereby engaged in professional misconduct as defined in section 72(2)(a) of Regulation 941.

Further, the panel accepted the withdrawal of the remaining allegations against the member and Rubicon as requested by the association. The panel noted that there was no evidence contained in the ASF or called by the association to prove the remaining allegations. The panel also acknowledged that this matter had a lengthy and complex procedural history and that the ASF was the result of negotiations between experienced legal counsel. In light of its finding of professional misconduct with respect to one allegation, the panel was of the view that accepting the withdrawal of the remaining allegations and bringing this matter to a conclusion was in the public interest.

The panel delivered its finding of professional misconduct orally with written reasons to follow.

PENALTY

Following the panel's finding of professional misconduct, counsel for the association advised that the parties had reached a Joint Submission on Penalty (JSP). The JSP, signed by counsel for both parties on March 2, 2022, provided as follows:

1. Within eighteen (18) months of the decision of the panel, Rew shall take and successfully complete at his own expense the following remedial courses in environmental engineering pursuant to s. 28(4) (d) of the *Professional Engineers Act* (the act):
 - a. The Educational Program Innovations Centre (EPIC) course on Environmental Site Assessment and Remediation (Course Code: 12-0412-ONL22)
2. In addition to paragraph 1 above, Rew successfully completed the "Florida Mold Remediator, Licensing Exam" offered by the National Association of Environmentally Responsible Mold Contractors in December 2018. The parties agree that this accomplishment should be considered positively by the panel in assessing this joint submission on penalty.
3. Pursuant to s. 28(4)(e)(iii) of the act, for a period not exceeding two (2) years, Rew and REI shall be subject to periodic practice inspection by the association (on two weeks' notice, during normal business hours), including on-site inspections, and shall promptly and fully respond to all reasonable requests for information or client files by the association.
4. For a period of three years, Rew shall be subject to practice supervision pursuant to s.28(4)(e)(i) of the act at his own expense and by a professional engineer acceptable to the association, but such penalty shall be suspended pursuant to s. 28(4)(k), subject to

the successful completion of remedial courses within the time period contemplated in paragraph 1 above;

5. Publication of the decision of the Discipline Panel, including the Agreed Statement of Facts, with full identification of the member; and
6. No order as to costs.

Neither counsel for the association nor counsel for the member and Rubicon made any substantive submissions regarding the JSP; however, the parties advised the panel that the member had already enrolled in the course outlined in paragraph 1 of the JSP.

PENALTY DECISION

The panel carefully considered the JSP. It is a well-established principle of law that a disciplinary panel should not interfere with a Joint Submission on Penalty except where the panel is of the view that to accept the joint submission would bring the administration of the disciplinary process into disrepute or otherwise be contrary to the public interest (see, e.g., *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303).

In the circumstances of this case, the panel is of the view that the JSP proposed by the parties is reasonable and appropriately reflects the principles of penalty.

The requirement for the member to complete a course in environmental site assessment and remediation specifically addresses the concerns identified with respect to his practice and serves to both remediate the member and to protect the public. This is reinforced by the requirement that the member practice under supervision should he not successfully complete the course within a reasonable timeframe.

The panel also notes that the member has already completed a licensing exam in a related field and has already enrolled in the required course, which points to his willingness to improve and remediate his practice.

The requirement that the member be subject to periodic practice inspection by the association for up to two years also serves to protect the public by helping to ensure that the member has incorporated the lessons from this matter and the remedial courses into his practice.

The publication of the decision of the panel with the member's name serves both specific and general deterrence, in that it illustrates to both the member and the profession at large that instances of negligent practice will result in an appropriate response by the association and the Discipline Committee. Publication also helps to maintain the public's confidence in the discipline process.

Overall, the panel is of the view that the JSP provides appropriate safeguards for remediating and monitoring the member's practice, ensuring that the public interest is protected and that confidence in the disciplinary process is maintained. In coming to this conclusion, the panel took note of the lengthy and complex history of the case and the desirability of achieving a fair and reasonable outcome without additional delay, expense or uncertainty.

Accordingly, the panel orders as follows:

1. Within eighteen (18) months of the decision of the panel, Rew shall take and successfully complete at his own expense the following remedial courses in environmental engineering pursuant to s. 28(4)(d) of the *Professional Engineers Act* (the act):
 - a. The Educational Program Innovations Centre (EPIC) course on Environmental Site Assessment and Remediation (Course Code: 12-0412-ONL22)
2. Pursuant to s. 28(4)(e)(iii) of the act, for a period not exceeding two (2) years, Rew and REI shall be subject to periodic practice inspection by the association (on two weeks' notice, during normal business hours), including on-site inspections, and shall promptly and fully respond to all reasonable requests for information or client files by the association.
3. For a period of three years, Rew shall be subject to practice supervision pursuant to s.28(4)(e)(i) of the act at his own expense and by a professional engineer acceptable to the association, but such penalty shall be suspended pursuant to s. 28(4)(k), subject to the successful completion of remedial courses within the time period contemplated in paragraph 1 above.
4. This Decision and Reasons shall be published including the Agreed Statement of Facts, with full identification of the member.
5. There shall be no order as to costs.

Robert Willson, P.Eng., signed this Decision and Reasons for the decision as chair of this Discipline Panel and on behalf of the members of the Discipline Panel: Warren Turnbull, P.Eng., and Eric Bruce, J.D.