ENTRY ORDER

2011 VT 108

SUPREME COURT DOCKET NO. 2010-361

MARCH TERM, 2011

Bradford Oil Company, Inc.	}	APPEALED FROM:
v.	}	
Stonington Insurance Company	}	Superior Court, Washington Unit, Civil Division
and	}	
State of Vermont Agency of Natural Resources	}	DOCKET NO. 636-10-06 Wncv

In the above-entitled cause, the Clerk will enter:

Affirmed.

FOR THE COURT:

John A. Dooley, Associate Justice

Concurring:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

2011 VT 108

No. 2010-361

Bradford Oil Company, Inc.

v.

Stonington Insurance Company

and

State of Vermont Agency of Natural Resources

Supreme Court

On Appeal from
Superior Court, Washington Unit,
Civil Division

March Term, 2011

Geoffrey W. Crawford, J.

William H. Sorrell, Attorney General, and Nicholas F. Persampieri and Scot L. Kline, Assistant Attorneys General, Montpelier, for Defendant-Appellant.

Bret P. Powell of Powell Orr & Bredice PLC, Williston, for Defendant-Appellee Stonington Insurance Company.

PRESENT: Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.

¶ 1. **DOOLEY, J.** This case considers who should bear responsibility for the cost of cleaning up petroleum contamination caused by releases from a gas station's underground storage tanks. The controversy in this appeal is between the State of Vermont, which runs the Vermont Petroleum Cleanup Fund (VPCF) and Stonington Insurance Co. (Stonington), which insured Bradford Oil, the owner of the underground storage tanks, for approximately a three-and-a-half-year period. The State appeals from the trial court's judgment limiting Stonington's liability to a 4/27 share of past and future cleanup costs and awarding the State $45,172.05. On

appeal, the State argues: (1) this Court's application of time-on-the-risk allocation in Towns v. Northern Security Insurance Co., 2008 VT 98, 184 Vt. 322, 964 A.2d 1150, does not preclude joint and several liability under all standard occurrence-based policy language; (2) the circumstances here, including the reasonable expectations of the insured and the equity and policy considerations, support imposing joint and several liability on Stonington for all of the State's VPCF expenditures; and (3) even if time-on-the-risk allocation would otherwise be appropriate, Stonington is not entitled to such allocation because it has failed to show sufficient facts to apply this allocation method in the present case. We conclude that Towns does control here, and we are unconvinced by the State's reasonable expectations, equity, and policy arguments to distinguish this recent decision. Accordingly, we affirm.

¶ 2. Plaintiff Bradford Oil Company, Inc. (Bradford) owns a Mobil station in St. Johnsbury that is the site of the petroleum contamination at issue. According to the parties' experts, the contamination may have begun as early as the 1960s or as late as the end of the 1970s. The Agency of Natural Resources (ANR) placed the site on the Vermont Hazardous Waste Sites List when, in April 1997, petroleum contamination was discovered following the removal of three underground storage tanks. In recent years, at the State's direction, Bradford has been paying to investigate and clean up the contamination, and the VPCF has reimbursed most of Bradford's expenses. Bradford initiated this case in 2006 to establish coverage for its cleanup liability under four commercial general liability policies from Stonington. The State cross-claimed seeking reimbursement to the VPCF from Stonington under the same policies. The coverage periods for the policies at issue began on July 18, 1994, and continued through December 1, 1997.

¶ 3. Initially, Stonington denied that its policies provided any coverage for the contamination damage on Bradford's property, but it eventually stipulated to the existence of coverage, leaving only the allocation of costs and damages before the trial court. The allocation

question arises because the coverage periods of Bradford's Stonington policies cover only a portion of the total time that contamination was allegedly occurring and that other policies might have been triggered, if any others existed.[1]

¶ 4. Stonington filed a motion for partial summary judgment in October 2009, asserting that a simple time-on-the-risk allocation method should apply in this case and that the company should be held liable for damages only in proportion to the time it assumed the risk of loss. Under a time-on-the-risk allocation or "pro-ration by years" method, each triggered policy bears responsibility for damages in proportion to the time it was "on the risk," relative to the total time of triggered coverage. Towns, 2008 VT 98, ¶ 33 (quotation omitted). Stonington argued that the trial court should follow this Court's decision in Towns, where we held that a simple time-on-the-risk allocation method was appropriate based on standard occurrence-based insurance policy language in the context of slowly occurring environmental contamination. The Washington Superior Court, Civil Division, agreed that Towns controls this case. The court granted Stonington's motion for summary judgment as to the method of risk allocation, but found that it could not determine Stonington's actual total liability on summary judgment because the proportion of time for which Stonington was responsible was still in dispute. Following summary judgment, in response to the remaining issues of fact identified by the trial court, the parties submitted a joint statement of facts not in dispute. Based on these undisputed facts and the earlier summary judgment decision, the trial court issued a judgment in August 2010 decreeing that Stonington's liability under its four insurance policies is limited to a 4/27 share of past and future cleanup costs and awarding the State $45,172.05 from Stonington for reimbursement of the VPCF expenditures and interest on the expenditures. This appeal followed.

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[1] The record indicates that two other policies, covering the period between July 18, 1992 and July 18, 1994, have been discovered, but these policies contain pollution exclusion clauses.

¶ 5. This Court reviews a grant of summary judgment de novo, applying the same standard as the trial court. Towns, 2008 VT 98, ¶ 8. We will uphold summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id.; V.R.C.P. 56(c)(3). Likewise, our review of a trial court's interpretation of an insurance contract is "plenary, and non-deferential," because such an interpretation is a question of law. Towns, 2008 VT 98, ¶ 8 (quotation omitted).

¶ 6. The central question here is which of the two principal methods of allocating costs and damages is appropriate given the facts of this case. The first allocation method, advocated for by the State, is joint and several liability,[2] in which "any policy on the risk for any portion of the period in which the insured sustained property damage . . . is jointly and severally obligated to respond in full, up to its policy limits, for the loss." Towns, 2008 VT 98, ¶ 33 (quotation omitted). Under joint and several liability as argued by the State, Stonington would be liable for all cleanup costs up to its policy limits, irrespective of when the contaminant exposure occurred, but would have the right to obtain contribution from other insurers or the owner for the period in which there is no insurance based on a time-on-the risk analysis. The second method, advocated for by Stonington, and adopted by the trial court, is the time-on-the-risk or "pro-ration by years" method in which "each triggered policy bears a share of the total damages proportionate to the number of years it was on the risk, relative to the total number of years of triggered coverage." Id. (quotation omitted). Under this method, Stonington is liable for only 4/27, or 15%, of the cleanup costs.

¶ 7. Specific policy language limiting coverage affects whether liability allocation should be joint and several or related to time on the risk. "Claims-made" policies generally

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[2] As discussed infra, ¶ 12, the description "joint and several liability" is a misnomer when applied to insurance coverage. See Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 301 n.24 (Mass. 2009); J. Stempel, Domtar Baby: Misplaced Notions of Equitable Apportionment Create a Thicket of Potential Unfairness for Insurance Policyholders, 25 Wm. Mitchell L. Rev. 769, 791 n.98 (1999).

restrict coverage to claims made during the policy period "without regard to the timing of the damage or injury." Id. ¶ 29 (quotation omitted). "Occurrence-based" policies, on the other hand, provide coverage only for injury or property damage "which occurs during the policy period." Id. ¶ 28 (quotation omitted); see also Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 892 (Cal. 1995) (holding that standard occurrence-based policy "was intended to provide coverage when damage or injury . . . occurs during the policy period"). In cases of contamination from continuing leakage of hazardous materials, courts have used the "continuous trigger" theory to find that damage from continuous exposure to contaminants during a policy period is an "occurrence" sufficient to trigger coverage under an occurrence-based policy. See Towns, 2008 VT 98, ¶ 6; see also Montrose, 913 P.2d at 894 (stating that under continuous-trigger test, "injuries and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods").

¶ 8. The State makes two categories of arguments: (1) Towns should be narrowed so it doesn't apply to commercial general liability insurance or to litigation brought by the State on behalf of the VPCF; and (2) Towns should not apply on the facts of this case. Before we get to the specifics of these arguments, we summarize our decision in Towns. Towns involved a property owner who, from 1972 to 1987, diverted waste and debris from his waste-hauling business to his own private property to use as fill. This fill resulted in chemical contamination, which was described in the case as generally including "an initial 'burst' of constituents lasting several months, followed by a relatively 'steady state' of contamination lasting for as long as the material remains in place." Towns, 2008 VT 98, ¶ 32. The litigation involved an action filed by the property owner against an insurance company that had provided him a homeowner's liability policy covering the property from November 1983 to June 1987. The property owner was self-insured from November 1972 until November 1983. Id. ¶ 6 n. 2. As in the current case, the insurance policy at issue in Towns was an occurrence-based policy. Id. ¶ 28. We concluded that

chemical contamination undoubtedly occurred during the period when the insurance policy was in effect and that the trial court properly applied a continuous-trigger test to determine whether an injury-producing occurrence took place during the policy period. Id. ¶¶ 31-32. Under the continuous-trigger test, any insurance carrier who insured the risk during the period from the point the property was first exposed to the migration of hazardous chemicals into the soil and groundwater to the point where the migration ceased is liable in some amount. Id. Thus, the "injury is deemed to have 'occurred' at each and every point of time at which there was a contributing contamination." R. Bratspies, Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies, 1999 BYU L. Rev. 1215, 1230 (cited in Towns).

¶ 9. After determining that there was an occurrence during the period of coverage by the insurance policy, we turned to how the damages caused by the contamination would be allocated. We carefully reviewed numerous commentators and jurisdictions addressing the proper method of allocating insurance coverage in such situations. Id. ¶¶ 34-35. After taking into account various policy considerations, we ultimately held that defense and indemnity costs in Towns were properly allocated between the property owner and the insurance company based on the percentage of each party's time on the risk. Id. ¶ 38. Thus, based on the total period of the exposure of approximately fourteen and a half years, and the policy period of approximately three and a half years, the decision allocated approximately 25% of the damages to the insurance carrier.[3] Id. ¶¶ 6, 38. We concluded that this method of allocation was the "most consistent with the continuous-trigger rule and the standard occurrence-based policy provision," id. ¶ 34, and that the "time-on-the-risk method offers several policy advantages, including spreading the risk to the maximum number of carriers, easily identifying each insurer's liability through a relatively simple calculation, and reducing the necessity for subsequent actions between and among the

[3] The actual allocation was done based on a count of the number of days of the exposure and the aggregate policy periods. See Towns, 2008 VT 98, ¶ 6 n.2.

insurers," id. ¶ 35. We also held that "where the policyholder is self-insured for any period of time on the risk . . . it is equally fair and reasonable to hold the policyholder responsible for that portion of the total defense and indemnity costs over which he or she chose to assume the risk." Id. ¶ 37.

¶ 10. In its first category of arguments, focusing on the idea that Towns should be narrowed, the State argues that Towns should not apply, and joint and several liability should apply, because the policy involved here was a commercial general liability policy for a gasoline station. Because the station owner is subject to joint and several liability under 10 V.S.A. § 6615(c), and faced the risk of a hazardous waste migration, the State argues that the owner expects that the policy would impose the same joint and several liability on the insurer. There are multiple difficulties with the State's argument. First, Towns is fundamentally based on the occurence-based language of the policy, and the language is not significantly different in the policy in this case. The State correctly notes that, because an insurer generally prepares insurance policies with little meaningful input from the insured, this Court construes insurance policy language in favor of the insured, in accordance with the insured's reasonable expectations for coverage. See Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124, ¶ 23, 177 Vt. 421, 869 A.2d 82. At the same time, however, we "will not deprive the insurer of unambiguous terms placed in the contract for its benefit." Fireman's Fund Ins. Co. v. CNA Ins. Co., 2004 VT 93, ¶ 9, 177 Vt. 215, 862 A.2d 251; see also Vt. Mut. Ins. Co. v. Parsons Hill P'ship, 2010 VT 44, ¶ 28, 188 Vt. 80, 1 A.3d 1016 (reasonable expectations of insured cannot control over unambiguous policy language). We give insurance contracts a "practical, reasonable, and fair interpretation, consonant with the apparent object and intent of the parties, and strained or forced constructions are to be avoided." McAlister v. Vt. Prop. & Cas. Ins. Guar. Ass'n, 2006 VT 85, ¶ 17, 180 Vt. 203, 908 A.2d 455 (quoting Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 297, 187 A.2d 331, 333 (1963)) (internal quotation marks omitted). Bradford's

Stonington policies unambiguously state that the insurance provided "applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and (2) The 'bodily injury' or 'property damage' occurs during the policy period." The only reasonable interpretation of this policy language is that Stonington was limiting its liability to damages for occurrences that took place during the policy period.

¶ 11. Further, the State has adopted a selective view of the reasonable expectations of the insured. As many courts have held, it is unreasonable to expect that an insurance policy with a specific durational limit will provide coverage for occurrences outside of that limit. The Massachusetts Supreme Judicial Court recently explained:

> Further, we doubt that an objectively reasonable insured reading the relevant policy language would expect coverage for liability from property damage occurring outside the policy period. Read as a whole, neither Century policy expressly makes or implies a promise to pay one hundred per cent of Boston Gas's liability for multi-year pollution damage occurring decades before or after the policy period. No reasonable policyholder could have expected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of several decades. Any reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year.

Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 309 (Mass. 2009). We do not see how this reasonable expectation is any different for an insured under a homeowner's policy than for an insured under a commercial general liability policy. In fact, virtually all the significant cases in this area have involved commercial general liability policies covering businesses with hazardous waste exposure risk. See Pub. Serv. Co. v. Wallis & Cos., 986 P.2d 924, 927-28, 939-40 (Colo. 1999); Boston Gas Co., 910 N.E.2d at 294; EnergyNorth Nat'l Gas, Inc. v. Certain Underwriters at Lloyd's, 934 A.2d 517, 519, 526 (N.H. 2007); Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 695 (N.Y. 2002).

¶ 12. Finally on this point, the State's argument is based on a supposed equivalence of the insured's joint and several liability and that of the insurer. We used the term "joint and several liability" to describe the alternative allocation rule in Towns, but this description only confuses the issue here. Other courts have used different descriptions, and one commentator has urged that "[c]ourts . . . refrain from describing the results they reach as having any relationship to 'joint and several' liability when, in fact, no such relationship exists." W. Hickman & M. DeYoung, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N. Ky. L. Rev. 291, 315 (1990). In fact, the indemnity obligation of insurance carriers will be determined by contract language and policy limits, which may have no relationship to the duration of insurance or the amount of damages. Thus the contribution of insurers is different from the tort concept of contribution between joint tortfeasors. This difference can be further seen in the fact that even the supposed "joint and several" liability that the State seeks would allow any insurer that pays the State's cost to seek contribution from other insurers, whereas our common law does not recognize a right of contribution between tortfeasors who are jointly and severally liable, see Swett v. Haig's, Inc., 164 Vt. 1, 5, 663 A.2d 930, 931 (1995). The equivalence on which the State relies is, at best, a rough similarity that may or may not apply in the individual case.

¶ 13. To summarize, the reasonable expectation of the insured, if it controls at all, is too uncertain for us to rely upon in fashioning an allocation rule for insurers. The State's reasonable expectation arguments do not persuade us to abandon Towns or to distinguish that decision in this case.

¶ 14. The State's second argument in this category is that the Towns allocation rule should not apply when the plaintiff is the VPCF and not the insured. By statute, the State may recover cleanup costs "to the extent covered, when there is insurance coverage." 10 V.S.A. § 1941(f). The statute authorizes the State to "seek reimbursement in instances where the land is

covered by insurance, to the extent of the coverage." Agency of Nat. Res. v. U.S. Fire Ins. Co., 173 Vt. 302, 307, 796 A.2d 476, 480 (2001). Consistent with the use of the term "to the extent covered," the statute does not govern how coverage will be determined. As the trial court held, the State stands in the shoes of the insured when it sues the insurer. Despite that relationship, the State is arguing that it should be able to recover more from the insurer than the insured can recover. Towns specifically governs the relationship between the insured and the insurer. We see no reason why it should not govern the insurance coverage available to VPCF.

¶ 15. The State makes a number of policy arguments why VPCF should be able to recover the full policy limits from any insurer irrespective of the duration of its coverage. For example, the State argues that early VPCF intervention limits the total cost of cleanup and reduces the cost for all responsible parties. It points out that VPCF is not an insurance company that can limit its liability. These arguments presuppose a different statutory scheme in which insurance coverage and the allocation of responsibility between insurers and between insurers and the insured(s) is determined specifically by statute based on the policy concerns the State asserts. In this case, the responsibility of a specific insurer is based on its insurance policy with the insured, and Towns governs that relationship.

¶ 16. The State's third argument falls mainly in its second category of claims—that Towns should not apply on the facts of this case. Specifically, the State argues that a share of the liability can be allocated to the owner, Bradford, only if it elected to self-insure during that period and Stonington failed to prove that Bradford did choose to self-insure. The State's argument is premised on its claim that Stonington had the burden of proof on allocation and that burden included showing the presence and availability of other insurance and Bradford's reasons for its actions. We cannot accept the State's argument either as to the burden of proof or as to the importance of the reasons for Bradford's actions.

¶ 17. We acknowledge that we did not comprehensively analyze these issues in Towns because they were not raised in that case, and the absence of this analysis enables the State's argument. In Towns, we said "where the policyholder is self-insured for any period of time on the risk, . . . it is equally fair and reasonable to hold the policyholder responsible for that portion of the total defense and indemnity costs over which he or she chose to assume the risk." 2008 VT 98, ¶ 37. In fact, there are multiple reasons why the evidence may show gaps in insurance coverage: (1) the landowner chose not to purchase insurance; (2) there is insurance, but the carrier is insolvent; (3) there is insurance, but the landowner cannot locate the policy or identify the insurer; (4) there is insurance, but the risk is covered by an exclusion; (5) insurance for the risk involved is unavailable. See T. Jones & J. Hurwitz, An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases, 10 Vill. Envtl. L.J. 25, 51 n.115 (1999). In the aggregate, the period of time when there is no effective insurance is known as "orphan shares." Id. at 51. In general, courts that have adopted time-on-the-risk allocation have not deemed relevant why there is no effective insurance and have allocated orphan shares to the landowner. See S. Plitt & J. Rogers, A Proportional Methodology for Determining Covered Damages Where Continuing and Progressive Injury Is Involved, 31 Ins. Litig. Rep. 361, 370 n.31 (2009). The reason is stated in Spartan Petroleum Co. v. Federated Mutual Insurance Co., 162 F.3d 805, 812 (4th Cir. 1998), a decision relied upon in Towns: "To hold otherwise would be to make an insurer liable for damages that occurred when it was not on the risk."

¶ 18. The State has relied upon a line of cases beginning with Owens-Illinois, Inc. v. United Insurance Co., 650 A.2d 974 (N.J. 1994). In Owens-Illinois, the Court adopted an allocation that melded time on the risk with policy limits and decided that no period would be allocated to the landowner where insurance was unavailable. Id. at 995-96. Courts following Owens-Illinois have held that an insurer seeking to allocate a period to the landowner bears the burden of proving that insurance was available at that time. See Chem. Leaman Tank Lines, Inc.

v. Aetna Cas. & Sur. Co., 177 F.3d 210, 231 (3d Cir. 1999). The State, by its argument, has attempted to limit Towns to any reason for an orphan share other than the first—intentional self-insurance where insurance extending coverage is available—and has attempted to place the burden on the insurer to prove that no other reason for lack of coverage applied.

¶ 19. We conclude that the reason for the absence of effective insurance is not determinative. The rationale for the allocation of orphan shares in Owens-Illinois may be consistent with its overall allocation methodology, but it is not consistent with a pure time-on-the-risk methodology. Moreover, we do not want to adopt a methodology that rewards inaction, failure to obtain appropriate coverage, or failure to keep track of insurance policies. Also, we note that in this case the State challenged a pollution exclusion in the Stonington policy and prevailed. We cannot assume that pollution exclusion provisions in other policies would be effective to prevent liability for other carriers.

¶ 20. Apart from the substance of the State's argument, we cannot accept much of its procedural argument. The State argues that allocation is an affirmative defense that Stonington must plead under V.R.C.P. 8(c), and prove under Pharmacists Mutual Insurance Co. v. Myer, 2010 VT 10, ¶ 14, 187 Vt. 323, 993 A.2d 413. We do not believe that allocation was an affirmative defense in this case. The State brought a cross-claim against Stonington alleging that it was liable for all cleanup costs. It was required to prove this claim.

¶ 21. Assignment of the burden of proof, particularly in insurance coverage cases, must often be based on practical considerations. In State v. CNA Insurance Cos., 172 Vt. 318, 329-331, 779 A.2d 662, 671-72 (2001), we assigned to the insurer the burden of proof to show the absence of an occurrence that would trigger insurance coverage. The issue was whether the pollution was intended or expected from the actions of the insured taken some fifty years earlier. We held that the insurer was in the better position to show an intent to harm the environment rather than imposing the obligation to prove the negative on the insured. Id. at 331, 779 A.2d at

672. As we explained in Northern Security Insurance Co. v. Stanhope, 2010 VT 92, ¶ 10, ___ Vt. ___, 14 A.3d 257, the holding in CNA is intended to avoid leaving the insured the obligation to prove a negative and to place the burden on the party with the most incentive and ability to develop the issue. The State's theory of burden allocation in this case would leave Stonington proving a negative—that Bradford did not intend to self-insure—during periods without effective insurance, including the absence of policies and the failure to obtain complete coverage. While it might have been appropriate to hold that Stonington must prove that insurance with pollution coverage was available from some source, as cases in the Owens-Illinois line held, we do not believe it would be appropriate to make the insurer disprove other reasons why effective insurance was not present.

¶ 22. Finally, we consider one other argument that the State failed to preserve. The State contends that, due to the equities involved here, the policies at issue should not be construed as occurrence-based policies but, rather, as essentially claims-made policies. It argues that, based on prior Vermont cases, the policies should have included a pollution coverage endorsement providing coverage on a claims-made basis[4] and that, since Stonington stipulated to coverage here, the company "effectively acknowledg[ed] that its insurance policy was not enforceable under Vermont law." We decline to reach the merits of this argument because the State failed to preserve it in the trial court. We have consistently held that matters not raised at the trial court may not be raised for the first time on appeal. Progressive Ins. Co. v. Brown ex

[4] Despite the State's characterization of the pollution coverage endorsement as providing coverage on a claims-made basis, we note that the endorsement to which the State refers is actually titled "Commercial General Liability Coverage Form (Occurrence Version)," and it includes specific occurrence-based coverage language: "The insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; (2) The 'bodily injury' or 'property damage' occurs during the policy period." Thus, not only does the endorsement limit coverage to claims "first made against any insured . . . during the policy period," but it also appears to limit coverage by requiring that the claim relate to damage that occurred during the policy period.

rel. Brown, 2008 VT 103, ¶ 8, 184 Vt. 388, 966 A.2d 666. Preservation requires a party to "present the issue with specificity and clarity" at the trial court in order to "ensure that the original forum is given an opportunity to rule on an issue" prior to review by this Court. Id. (quotations omitted). In its statement of undisputed facts, the State did mention multiple times that the general insurance policy Stonington issued to Bradford did not contain a pollution endorsement. However, the State never made any argument in the trial court about the effect that this absence might have on the characterization of Stonington's policy as either occurrence-based or claims-made. We conclude that the State's references to the pollution endorsement at the trial court were insufficient to properly preserve the pollution endorsement argument now brought on appeal—the argument was not brought before the trial court with enough clarity to allow the court to rule on it. Because the issue was not properly preserved, we decline to reach it on appeal.

¶ 23. In conclusion, although the State has argued that our decision in Towns can be distinguished, we conclude that this case fits squarely within the Towns holding. In order for the State to prevail, we would have to overrule much of the Towns holding. We decline to do so.

Affirmed.

FOR THE COURT:

John A. Dooley, Associate Justice

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 113-11-11 Wncv

STATE OF VERMONT,
Plaintiff,

v.

VERMONT AGENCY OF NATURAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Defendant.

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties, Plaintiff, the State of Vermont, by and through Vermont Attorney General William H. Sorrell, and Defendant, Vermont Agency of Natural Resources ("ANR" or "the Agency"), Department of Environmental Conservation ("DEC"), filing of Pleadings by Agreement under Vermont Rule of Civil Procedure 8(g). Based upon those Pleadings by Agreement and the Stipulation for the Entry of Consent Order and Final Judgment Order, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED and ORDERED as follows:

ADJUDICATION OF HAZARDOUS WASTE MANAGEMENT VIOLATIONS

1. On January 7, 10, and 14, 2011, certain ANR staff, assigned to report directly to the Attorney General's Office ("AGO-directed staff"), conducted inspections ("the inspections") of the Agency's R.A. LaRosa Environmental Laboratory ("the lab") at the state office complex in Waterbury, Vermont. During the inspections, the

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

Attorney General's Office ("Attorney General") found violations of the following Vermont Hazardous Waste Management Rules and Vermont law:

- Sections 7-303 and 7-308(b) – Hazardous waste determination;
- Sections 7-308(b)(2)(A) and (B) – Storage of hazardous waste;
- Sections 7-308(b)(3) and 7-304(b) – Hazardous Waste Handler Site ID Form;
- Section 7-708 – Biennial report;
- Section 7-308(b)(9) – Written contingency plan;
- Section 7-309(a)(4) – Arrangements with local authorities;
- Section 7-308(b)(10) – Employee training;
- Section 7-309(a) – Preparedness and Prevention;
- Sections 7-310(a)(5), (6), (7), and (8) – Satellite accumulation of hazardous waste;
- Section 7-311(b)(2) – Labeling;
- Section 7-311(b)(3) – Operating standards;
- Section 7-311(d)(1) – Inventory;
- Section 7-311(d)(2) – Inspection;
- Section 7-311(e)(2) – Security (no smoking signage);
- Section 7-311(f)(1) – Marking;
- Section 7-311(f)(4)(B) – Container storage;
- Section 7-311(f)(4)(C)(iii) – Incompatibles/storage;
- Section 7-504(a) – Facility certification;
- Section 7-912(d)(6) – Universal waste – mercury containing devices;

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- Section 7-912 (e)(7) – Universal waste – labeling and marking;
- Section 7-912(f)(1) – Accumulation time limits; and
- 10 V.S.A. § 6616 – Release of Hazardous Materials.

2. Defendant is adjudged liable for these violations.

PENALTIES

3. For the violations described above, Defendant shall pay a civil penalty of eighty-five thousand dollars ($85,000.00) and shall also pay thirty thousand dollars ($30,000.00) to fund a Supplemental Environmental Project ("SEP").
4. No later than sixty (60) days after the entry of this Consent Order as a Final Judgment Order by the signature of the Court ("effective date of this Order"), payment of the eighty-five thousand dollar ($85,000.00) civil penalty shall be made to the "State of Vermont" and shall be sent to the Office of the Attorney General at the following address: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609.
5. Unless otherwise agreed in writing by the parties, the SEP shall be for the purpose of creating a contingency fund managed by the Vermont Solid Waste District Managers Association to be utilized to provide services to stabilize or handle highly hazardous wastes when such waste is collected at a household hazardous waste collection event organized by a local solid waste planning entity. The final plans for the SEP shall be subject to the approval of the Attorney General, and shall be fully funded by Defendant no later than one hundred eighty (180) days following the effective date of this Order.

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6. If, at the close of the one hundred eighty (180) consecutive calendar days, any of the thirty thousand dollars ($30,000.00) allocated for the SEP has not been funded by Defendants, that unfunded amount shall be converted to a civil penalty and shall be immediately due and payable to the State of Vermont.
7. Defendant agrees that in the event Defendant publishes by any means, directly or indirectly, the identity or result of the SEP Defendant has funded, Defendant shall also include in that publication a statement that the SEP is a product of the settlement of an environmental enforcement action brought by the Attorney General.
8. Failure to make any penalty payment as required by paragraphs 3 and 4, including any portions of the SEP funds which are converted to civil penalties as described in paragraph 6, shall constitute a breach of this Consent Order, and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum, provided however, that Defendant shall have a 10 day grace period to cure any late payment.

INJUNCTIVE RELIEF

9. Due to the flooding of the lab following Tropical Storm Irene in August of 2011, the lab has been displaced and at the time of filing has not been relocated to a permanent location.
10. During its displacement, the lab expects to operate at the University of Vermont ("UVM"). If the lab operates at UVM during this interim period, the lab shall comply with all approved laboratory management practices and procedures being implemented by UVM and incorporated by reference in HWMR 7-109(c). Defendant shall provide a copy of the approved laboratory management practices and procedures being implemented at UVM to the Attorney General. In the event

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the lab operates at a location other than UVM, Defendant shall notify the Attorney General and provide written management practices and procedures of that location for review prior to operation at that location. Defendant shall implement the written management practices and procedures as modified and approved by the Attorney General and AGO-directed staff.

11. Defendant shall notify the Attorney General in writing when a date certain is determined for moving the lab to a permanent location and shall provide the address for the permanent location.

12. No later than thirty (30) days prior to the commencement of lab operations at the permanent location, Defendant shall submit a Compliance Plan for the lab to the Attorney General for approval. The Compliance Plan shall be sent to the Attorney General at the address listed in paragraph 4. Defendant will implement the Compliance Plan as modified and approved by the Attorney General and AGO-directed staff prior to the commencement of lab operations at the permanent location.

13. The Compliance Plan shall, *inter alia*, include the following:

- Identification of all waste-generating processes;
- Identification of possible Pollution Prevention opportunities;
- Revision of "Hazardous Waste Handler Site ID Form" as necessary;
- Identification of employees responsible for hazardous waste management (DEC lab, other DEC Program labs);
- Identification of all satellite accumulation areas, personnel responsible for management;
- Creation of a plan for managing unused (and no longer needed) lab chemicals (in labs and chemical stockroom);
- Clarification of responsibilities for managing labs/rooms operated by other DEC programs (e.g., APCD, WQ, WW);
- Establishment of a regular waste shipment schedule with transporter (to ensure that storage time limits are not exceeded);
- Development of a protocol for moving waste to short-term storage room (by DEC lab, other DEC Program labs);

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- Development of a short-term storage room inventory and inspection forms and identify person(s) responsible for completing;
- Development of a drain disposal policy (working w/ municipality);
- Establishment of a sufficient training plan/schedule for employees; and
- Creation/establishment of necessary contingency plan(s).

14. Upon relocation of the lab to a permanent location, Defendant shall hire an independent contractor to review the hazardous waste practices of the lab. The identity of the independent contractor shall be subject to the approval of the Attorney General. The independent contractor shall review the hazardous waste practices of the lab to ensure that such practices are consistent with the Vermont Hazardous Waste Management Rules. The results of the independent contractor's review shall be simultaneously reported to Defendant and the Attorney General. Defendant shall submit a proposed independent contractor to the Attorney General for approval no later than thirty (30) days from the identification of the permanent location as provided in paragraph 11 above.

15. The independent contractor hired by Defendant pursuant to paragraph 14 shall perform additional bi-annual reviews of the hazardous waste practices of the lab for two (2) years after the date that the lab moves to a permanent location. The results of these reviews shall also be simultaneously reported to Defendant, the Attorney General, and AGO-directed staff. In the event that Defendant wishes to hire a different independent contractor than the one approved pursuant to paragraph 14, it shall be responsible for submitting the name of a new proposed independent contractor to the Attorney General for approval no later than thirty (30) days prior to the bi-annual review.

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16. In addition, Defendant also agrees to prepare and submit quarterly reports for the two (2) years after the date that the lab moves to a permanent location, to the Attorney General and AGO-directed staff that summarize information about wastes generated (identifying waste-generating activity, waste types, description, applicable hazardous waste codes, quantity generated per month, etc.).

OTHER PROVISIONS

17. Defendant hereby waives: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendants under Paragraphs 3 through 16 of this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont or the Attorney General.
18. This Consent Order is binding upon Defendant and its successors and assigns.
19. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.
20. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.
21. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.
22. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant.

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23. This Consent Order may be altered, amended, or otherwise modified only by written agreements signed by the parties hereto or their legal representatives and incorporated into an order issued by the Vermont Superior Court, Civil Division, Washington Unit. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

24. Defendants shall not be liable for additional civil penalties with respect to the specific facts described herein or in the Complaint or Stipulation for the Entry of Consent Order and Final Judgment Order occurring before the effective date of the Order provided that Defendant fully comply with the terms of the Consent Order set forth above.

SO ORDERED, and **ENTERED** as **FINAL JUDGMENT**.

DATED at Montpelier, Vermont this 21 day of Nov, 2011.

Hon. Michael S. Kupersmith
Vermont Superior Court Judge
Civil Division, Washington Unit

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STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

VERMONT AGENCY OF NATURAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Defendant.

PLEADINGS BY AGREEMENT

The State of Vermont, by and through Vermont Attorney General William H. Sorrell, and Defendant Vermont Agency of Natural Resources, Department of Environmental Conservation, hereby submit these Pleadings by Agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

1. The Vermont Attorney General's Office ("AGO") is an office of the State of Vermont located in Montpelier, Vermont.

2. The Vermont Agency of Natural Resources ("ANR" or "the Agency") is a state agency with offices in Waterbury, Vermont. The Department of Environmental Conservation ("DEC") is a department within ANR. The DEC is responsible for the operation of the R.A. LaRosa Environmental Laboratory ("the lab") at the state office complex in Waterbury, Vermont. The lab handles and stores hazardous waste as a part of its day-to-day operations.

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Statutory Scheme

3. The storage and disposal of hazardous waste is regulated through 10 V.S.A., Chapter 159 and the Vermont Hazardous Waste Management Regulations ("HWMR").

4. Pursuant to Title 10, section 8221, the State may bring an action in superior court to enforce Vermont's environmental laws. The action shall be brought by the Attorney General in the name of the State.

Facts relating to Defendant and Allegations

5. In early January, 2011, the DEC contacted the AGO and reported possible violations by the lab.

6. Certain Agency staff were assigned to report directly to the AGO ("AGO-directed staff"). AGO-directed staff conducted inspections of the lab on January 7, 10 and 14, 2011.

7. During one or more of these inspections, AGO-directed staff found the following:

a. At the time of the inspections, the lab was a large quantity generator.

b. Defendant did not make hazardous waste determinations for various containers located at the lab. Furthermore, various solvent-contaminated wastes derived from water and soil sample extractions were routinely disposed down the drain and in the regular trash. The lab failed to determine if these wastes were hazardous.

c. Numerous containers of hazardous waste were stored at the lab for longer than 90 days. Further, an inventory indicated that some of the hazardous waste had been in storage for at least several years.

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d. The lab's Vermont Hazardous Waste Handler Site ID Form did not accurately describe all waste types and quantities generated by the lab. At the time of the inspections, a lab representative stated that the form was not up-to-date.

e. At the time of the inspections, the lab had never submitted a biennial report.

f. No written contingency plan was maintained by the lab.

g. The lab did not make the necessary arrangements with local authorities for emergency preparedness.

h. The lab did not provide its employees with the required hazardous waste training.

i. The lab was not managed to minimize the possibility of fire, explosions or unplanned sudden or non-sudden releases of hazardous waste.

j. Satellite accumulation areas of hazardous waste were inadequately marked and managed.

k. Numerous containers of hazardous waste were stored in a short-term storage area without proper labeling or in a manner such that labels were not visible.

l. Required aisle space was not maintained between the hazardous waste containers stored in the hazardous waste storage room.

m. An inventory list at the hazardous waste storage area was not accurate because it identified waste that had been shipped in June of 2006.

n. Daily inspections of the hazardous waste storage room were not being conducted.

o. A "no smoking" sign was not posted at the hazardous waste storage room.

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p. Numerous containers of hazardous waste at the lab were not properly marked.

q. A number of hazardous waste containers in a short-term storage room were being stored in a manner that could cause them to rupture or leak.

r. Containers of incompatible hazardous wastes were stored together in the same cabinet in the hazardous waste storage room.

s. Despite not having a hazardous waste facility certification from the Secretary of the ANR, the lab stored hazardous waste on-site for longer than 90 days and disposed of various solvent-contaminated down the drain and via the regular trash.

t. Mercury-containing probes and thermometers were being managed in a fashion that could result in a release to the environment. Further, the mercury-containing probes and thermometers were not being packaged in containers as required.

u. Mercury-containing probes and thermometers were inadequately labeled or marked.

v. At the time of inspections, a box of mercury-containing probes was observed in the hazardous waste storage room. An inventory list indicated that a box of probes had been stored in the hazardous waste storage room since December 2007.

w. Various solvent-contaminated wastes resulting from water and soil sample extractions were routinely disposed of down the drain and via the regular trash.

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8. Under sections 7-303 and 7-308(b) of the Vermont Hazardous Waste Management Rules ("HWMR"), any person, including large quantity generators of hazardous waste, who generates a waste shall determine if that waste is a hazardous waste.

9. By failing to determine if wastes located at the lab were hazardous wastes, the Defendant violated HWMR 7-303 and 7-308(b).

10. Pursuant to HWMR 7-308(b)(2)(A) and (B), a large quantity generator must store hazardous waste no longer than 90 days from the date when the waste first started to accumulate or 90 days from the date when the maximum amount allowed under HWMR 7-310 was reached.

11. By storing numerous containers holding hazardous waste longer than 90 days, from the day the waste started to accumulate and/or from the date when the maximum amount allowed was reached, Defendant violated HWMR 7-308(b)(2)(A) and (B).

12. Under HWMR 7-308(b)(3) and 7-304(b), large quantity generators of hazardous waste must maintain an up-to-date Vermont Hazardous Waste Handler Site ID Form and obtain an identification number.

13. Because the Vermont Hazardous Waste Handler Site ID Form on file with the Secretary (of ANR) at the time of the inspections was not up to date, i.e. it did not accurately describe all waste types and quantities generated by the lab, the Defendant violated HWMR 7-308(b)(3) and 7-304(b).

14. HWMR 7-708 requires that large quantity generators submit a biennial report accurately describing the composition, quantity, and destination of each hazardous waste stream generated.

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15. By not submitting a biennial report for the lab, the Defendant violated HWMR 7-708.

16. Pursuant to HWMR 7-308(b)(9), large quantity generators must maintain a written contingency plan.

17. Because no contingency plan is maintained by the lab, Defendant violated HWMR 7-308(b)(9).

18. Under HWMR 7-309(a)(4), small and large quantity generators of hazardous materials must make arrangements with local officials for the potential need of the services of such local officials. Refusal of any authorities to enter into such arrangements must be documented.

19. Because the required arrangements for the lab had not been made with local authorities, and because no records were available to document refusal of such arrangements, the Defendant violated HWMR 7-309(a)(4).

20. HWMR 7-308(b)(10) requires that a large quantity generator must maintain a training program for facility personnel.

21. By not providing the required hazardous waste training program to lab personnel, the Defendant violated HWMR 7-308(b)(10).

22. Pursuant to HWMR 7-309(a), small and large quantity generator facilities must be maintained and operated to minimize the possibility of fire, explosion or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents.

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23. Because the lab needed to hire an environmental contractor to treat potentially reactive sodium azide waste solution on-site, under an emergency permit, before

that waste could be transported off-site for proper disposal; because potentially incompatible hazardous wastes were observed stored together in multiple locations; and because glass bottles of ignitable waste solvent were stored on the floor of the hazardous waste storage room within inches of the swing path of the room's metal door, the facility was not maintained and operated to minimize the possibility of fire, explosion or an unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents. Therefore, the Defendant violated HWMR 7-309(a).

24. Under HWMR 7-310(a)(5), (6), (7), and (8), containers located at hazardous waste satellite accumulation areas must be: marked with the words "Hazardous Waste" and other words that identify the contents of the waste; marked with a fill date; managed in accordance with the container management requirements of HWMR 7-311(b)(3) and 7-311(f)(4); and moved to the required short-term storage areas within three (3) days of becoming full.

25. By inadequately marking containers of hazardous waste, storing incompatible hazardous wastes within the same laboratory cabinet and not moving full containers of hazardous waste to the hazardous waste storage room within three (3) days of becoming full at the lab, the Defendant violated HWMR 7-310(a)(5), (6), (7), and (8).

26. Under HWMR 7-311(b)(2), small and large quantity generators must store containers of hazardous materials such that the hazardous waste labeling is visible.

27. Because numerous containers of hazardous waste were stored in a short-term storage area without proper labeling or in a manner such that labels were not visible at the lab, the Defendant violated HWMR 7-311(b)(2).

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28. HWMR 7-311(b)(3) requires that aisle space between rows of containers in short-term storage areas must be sufficient to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of facility operation.

29. By not maintaining the required aisle space between the hazardous waste containers stored in the hazardous waste storage room at the lab, Defendant violated HWMR 7-311(b)(3).

30. Pursuant to HWMR 7-311(d)(1), small and large quantity generators shall maintain a list of all hazardous waste currently in storage at a location apart from the short-term storage area.

31. By including waste that had been shipped in June 2006 on the inventory list current at the time of the inspections and failing to maintain an accurate list, Defendant violated HWMR 7-311(d)(1).

32. HWMR 7-311(d)(2) requires, in part, that small and large quantity generators conduct daily inspections during regular business days of each short-term storage area.

33. By failing to conduct daily inspections of the hazardous waste storage room at the lab, Defendant violated HWMR 7-311(d)(2).

34. Pursuant to HWMR 7-311(e)(2), small and large quantity generators storing ignitable waste must post a "No Smoking" sign at each short-term hazardous waste storage area.

35. By not posting a "No Smoking" sign at the hazardous waste storage room at the lab, Defendant violated HWMR 7-311(e)(2).

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36. HWMR 7-311(f)(1) requires that containers and packages used for the storage of hazardous wastes shall be clearly marked from the time they are first used to accumulate or store waste.

37. Because the Defendant did not mark numerous containers of hazardous waste at the lab, Defendant violated HWMR 7-311(f)(1).

38. Under HWMR 7-311(f)(4)(B), a container holding hazardous waste must not be opened, handled or stored in a manner that may rupture the container or cause it to leak.

39. By storing containers holding hazardous waste in a manner that could cause them to rupture or leak (e.g. multiple four liter glass bottles of waste acetone were stored on the floor in close proximity to swing path of metal door) at the lab, Defendant violated HWMR 7-311(f)(4)(B).

40. HWMR 7-311(f)(4(C)(iii) requires that a storage container holding a hazardous waste that is incompatible with any waste or other materials stored nearby must be separated from the other such materials.

41. By storing containers of incompatible hazardous waste in the same cabinet at the lab, Defendant violated HWMR 7-311(f)(4(C)(iii).

42. Under HWMR 7-504(a), facilities that treat, store, dispose or accept any hazardous waste require certification from the Secretary of the ANR.

43. By storing hazardous waste on-site for longer than 90 days and by disposing of solvent-contaminated wastes down the drain and via the regular trash and without proper certification, Defendant violated HWMR 7-504(a).

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44. Pursuant to HWMR 7-912(d)(6), small and large quantity generators must manage universal waste mercury-containing devices in a way that prevents releases of any universal waste or component of a universal waste to the environment.

45. By storing mercury-containing probes at the lab in a fashion that could result in a release to the environment, the Defendant violated HWMR 7-912(d)(6).

46. HWMR 7-912(e)(7) requires that containers holding universal waste mercury-containing devices must be labeled or clearly marked with one of the following phrases: "Universal Waste-Mercury Device(s)," or "Waste Mercury Device(s)," or "Used Mercury Device(s)."

47. Because mercury-containing probes and thermometers were observed to not be labeled or marked at the lab as per HWMR 7-912(e)(7), Defendant violated HWMR 7-912(e)(7).

48. Under HWMR 7-912(f)(1), a small or large quantity generator may not accumulate universal waste for longer than one (1) year from the date the universal waste is generated.

49. Because an inventory list and observations during the site investigation indicated that mercury-containing probes had been stored in the hazardous storage room since December 2007 at the lab, Defendant violated HWMR 7-912(f)(1).

50. Pursuant to 10 V.S.A. § 6616, the release of hazardous materials into the surface or groundwater, or onto the land of the state is prohibited.

51. Defendant violated 10 V.S.A. § 6616 by disposing of various solvent-contaminated wastes down the drain and via the regular trash at the lab.

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52. In March of 2011, the hazardous waste accumulated at the lab and observed during the inspections was transported by a Vermont-permitted hazardous waste transporter to a permitted hazardous waste treatment, storage, disposal facility.

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

53. Defendant admits the allegations set forth in paragraphs 1-52.

54. The AGO and Defendant have agreed to resolve the violations set forth herein through a Stipulation for Entry of Consent Order, which has been executed by the parties and is being filed in this action together with these Pleadings by Agreement.

DATED at Montpelier, Vermont this 9th day of November, 2011.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802.828.5506

DATED at Montpelier, Vermont this 9th day of November, 2011.

VERMONT AGENCY OF NATURAL RESOURCES,
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION

By: _____
David Mears, Commissioner

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

Agency of Natural Resources,
Department of Environmental Conservation
103 South Main Street
Waterbury, Vermont 05676

APPROVED AS TO FORM:

Robert F. McDougall
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609

Catherine Gjessing
Associate General Counsel
Agency of Natural Resources
Department of Environmental Conservation
103 South Main Street
Waterbury Vermont 05676

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

VERMONT AGENCY OF NATURAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

Plaintiff, the State of Vermont ("State"), by and through Vermont Attorney General William H. Sorrell, and Defendant Vermont Agency of Natural Resources, Department of Environmental Conservation ("Defendant"), stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont's Hazardous Waste Management Rules and 10 V.S.A. § 6616;

WHEREAS, Defendant has admitted in the Pleadings by Agreement that it committed those violations of Vermont's Hazardous Waste Management Rules and 10 V.S.A. § 6616;

WHEREAS, the Attorney General, pursuant to 3 V.S.A. Chapter 5, has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

WHEREAS, under 10 V.S.A. § 8221, the Defendant is potentially liable for civil penalties of up to $85,000 for each violation and $42,500 per violation for each day the violation continued;

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WHEREAS, the Attorney General considered the criteria in 10 V.S.A. §§ 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment; the length of time the violations existed; and whether Defendant knew or had reason to know the violations existed;

WHEREAS, the Attorney General believes that this settlement is in the State's interest as it upholds the statutory regime of 10 V.S.A. Chapter 159 in which the violations occurred; and

WHEREAS, the Consent Order has been negotiated by and among the State and Defendant in good faith;

NOW, THEREFORE, the State and Defendant hereby stipulate and agree as follows:

1. The attached Consent Order may be entered by the Court;
2. The State and Defendant hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and
3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and incorporated in an order issued by the Court.

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT 05609

DATED at Montpelier, Vermont this 9th day of November, 2011.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

DATED at Montpelier, Vermont this 9th day of November, 2011.

VERMONT AGENCY OF NATURAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL CONSERVATION

By: _____
David Mears, Commissioner
Agency of Natural Resources
Department of Environmental Conservation
103 South Main Street
Waterbury, Vermont 05676

APPROVED AS TO FORM:

_____
Robert F. McDougall
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609

_____
Catherine Gjessing
Associate General Counsel
Agency of Natural Resources
Department of Environmental Conservation
103 South Main Street
Waterbury Vermont 05676

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Vermont Superior Court
Washington Civil Division

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E N T R Y R E G A R D I N G M O T I O N

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State of Vermont vs. Vermont Agency of Natural **44-1-14 Wncv**
[Kline/Mears/Gjessing/Landis-Marinello]

Title: **Motion Stipulated Mo. for Entry of Judgment**, No. 1
Filed on: January 21, 2014
Filed By: Kline, Scot L., Attorney for:
Plaintiff State of Vermont
Defendant Vermont Agency of Natural Resouces, Department of Environmental

Response filed on 02/04/14 by Attorney Kline
Letter w/attachment.

✓ Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____; Time Allotted _____

___ Other

. . . . . .

. . . . . .

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. . . . . .

Helen M. Toor
Judge

2/20/14
Date

==========

Date copies sent to: 2/21/14 Clerk's Initials CMR
Copies sent to:
Attorney Scot L. Kline for Plaintiff State of Vermont
Attorney David K. Mears for Defendant Vermont Agency of Natural Resouces, Department of Environmental
Attorney Kyle H. Landis-Marinello for party 1 Co-counsel
Attorney Catherine J. Gjessing for party 2 Co-counsel

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2012

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 2012 Decided June 8, 2012

No. 11-1045

STATE OF NEW YORK, ET AL.,
PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

STATE OF NEW JERSEY, ET AL.,
INTERVENORS

Consolidated with 11-1051, 11-1056, 11-1057

On Petitions for Review of Orders
of the Nuclear Regulatory Commission

Monica Wagner, Deputy Bureau Chief, Office of the Attorney General for the State of New York, argued the cause for petitioners States and Prairie Island Indian Community Petitioners. With her on the briefs were *Eric T. Schneiderman*, Attorney General, Office of the Attorney General for the State of New York, *John J. Sipos* and *Janice A. Dean*, Assistant Attorneys General, *Barbara D. Underwood*, Solicitor General, *Brian A. Sutherland*, Assistant Solicitor General of Counsel,

Jeffrey S. Chiesa, Attorney General, Office of the Attorney General for the State of New Jersey, *Kevin P. Auerbacher*, Assistant Attorney General, *Ruth E. Musetto*, Deputy Attorney General, *William H. Sorrell*, Attorney General, Office of the Attorney General for the State of Vermont, *Thea Schwartz*, Assistant Attorney General, *George Jepsen*, Attorney General, Office of the Attorney General for the State of Connecticut, *Robert Snook*, Assistant Attorney General, and *Joseph F. Halloran*.

Geoffrey H. Fettus argued the cause for petitioners the Environmental Groups. With him on the briefs were *Andres J. Restrepo* and *Diane Curran*.

Robert M. Rader, Senior Attorney, U.S. Nuclear Regulatory Commission, argued the cause for respondents. With him on the brief were *John E. Arbab*, Attorney, U.S. Department of Justice, *Stephen G. Burns*, General Counsel, U.S. Nuclear Regulatory Commission, and *John F. Cordes Jr.*, Solicitor.

David A. Repka argued the cause for intervenors Nuclear Energy Institute, et al., in support of respondents. With him on the brief were *Brad Fagg* and *Jerry Bonanno*. *Anne W. Cottingham* entered an appearance.

Before: SENTELLE, *Chief Judge*, TATEL and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: Four states, an Indian community, and a number of environmental groups petition this Court for review of a Nuclear Regulatory Commission ("NRC" or "Commission") rulemaking regarding temporary storage and permanent disposal of nuclear waste. We hold that the

rulemaking at issue here constitutes a major federal action necessitating either an environmental impact statement or a finding of no significant environmental impact. We further hold that the Commission's evaluation of the risks of spent nuclear fuel is deficient in two ways: First, in concluding that permanent storage will be available "when necessary," the Commission did not calculate the environmental effects of failing to secure permanent storage—a possibility that cannot be ignored. Second, in determining that spent fuel can safely be stored on site at nuclear plants for sixty years after the expiration of a plant's license, the Commission failed to properly examine future dangers and key consequences. For these reasons, we grant the petitions for review, vacate the Commission's orders, and remand for further proceedings.

I. Background

This is another in the growing line of cases involving the federal government's failure to establish a permanent repository for civilian nuclear waste. *See, e.g.*, *In re Aiken County*, 645 F.3d 428, 430–31 (D.C. Cir. 2011) (recounting prior cases). We address the Commission's recent rulemaking regarding the prospects for permanent disposal of nuclear waste and the environmental effects of temporarily storing such material on site at nuclear plants until a permanent disposal facility is available.

After four to six years of use in a reactor, nuclear fuel rods can no longer efficiently produce energy and are considered "spent nuclear fuel" ("SNF"). Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* 10–11 (2012). Fuel rods are thermally hot when removed from reactors and emit great amounts of radiation—enough to be fatal in minutes to someone in the immediate vicinity. *Id.* Therefore, the rods are transferred to racks within deep, water-filled pools

for cooling and to protect workers from radiation. After the fuel has cooled, it may be transferred to dry storage, which consists of large concrete and steel "casks." Most SNF, however, will remain in spent-fuel pools until a permanent disposal solution is available. *Id.* at 11.

Even though it is no longer useful for nuclear power, SNF poses a dangerous, long-term health and environmental risk. It will remain dangerous "for time spans seemingly beyond human comprehension." *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1258 (D.C. Cir. 2004) (per curiam). Determining how to dispose of the growing volume of SNF, which may reach 150,000 metric tons by the year 2050, is a serious problem. *See* Blue Ribbon Commission, *supra*, at 14. Yet despite years of "blue ribbon" commissions, congressional hearings, agency reports, and site investigations, the United States has not yet developed a permanent solution. That failure, declared the most recent "blue ribbon" panel, is the "central flaw of the U.S. nuclear waste management program to date." *Id.* at 27. Experts agree that the ultimate solution will be a "geologic repository," in which SNF is stored deep within the earth, protected by a combination of natural and engineered barriers. *Id.* at ix, 29. Twenty years of work on establishing such a repository at Yucca Mountain was recently abandoned when the Department of Energy decided to withdraw its license application for the facility. *Id.* at 3. At this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one.

Due to the government's failure to establish a final resting place for spent fuel, SNF is currently stored on site at nuclear plants. This type of storage, optimistically labeled "temporary storage," has been used for decades longer than originally anticipated. The delay has required plants to expand storage pools and to pack SNF more densely within them. The lack of

progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary SNF storage and the reasonableness of continuing to license and relicense nuclear reactors.

In this case, petitioners challenge a 2010 update to the NRC's Waste Confidence Decision ("WCD"). The original WCD came as the result of a 1979 decision by this court remanding the Commission's decision to allow the expansion of spent-fuel pools at two nuclear plants. *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). In *Minnesota*, we directed the Commission to consider "whether there is reasonable assurance that an off-site storage solution [for spent fuel] will be available by . . . the expiration of the plants' operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates." *Id.* at 418. The WCD is the Commission's determination of those risks and assurances.

The original WCD was published in 1984 and included five "Waste Confidence Findings." Briefly, those findings declared that: 1) safe disposal in a mined geologic repository is technically feasible, 2) such a repository will be available by 2007–2009, 3) waste will be managed safely until the repository is available, 4) SNF can be stored safely at nuclear plants for at least thirty years beyond the licensed life of each plant, and 5) safe, independent storage will be made available if needed. Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,659–60 (Aug. 31, 1984). The Commission updated the WCD in 1990 to reflect new understandings about waste disposal and to predict the availability of a repository by 2025. *See* Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,505 (Sept. 18, 1990). The Commission reviewed the WCD again in 1999 without altering it. *See* Waste Confidence Decision Review: Status, 64 Fed. Reg. 68,005, 68,006–07 (Dec. 6, 1999).

In 2008, the Commission proposed revisions to the Waste Confidence Findings, and, after considering public comments, made revisions in 2010. Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010). That decision, under review in this case, reaffirmed three of the Waste Confidence Findings and updated two. First, the Commission revised Finding 2, which, as of 1990, expected that a permanent geologic repository would be available in the first quarter of the twenty-first century. As amended, Finding 2 now states that a suitable repository will be available "when necessary," rather than by a date certain. *Id.* at 81,038. In reaching that conclusion, the Commission examined the political and technical obstacles to permanent storage and determined that a permanent repository will be ready by the time the safety of temporary on-site storage can no longer be assured. *Id.*

Finding 4 originally held that SNF could be safely stored at nuclear reactor sites without significant environmental effects for at least thirty years beyond each plant's licensed life, including the license-renewal period. *Id.* at 81,039. In revising that finding, the Commission examined the potential environmental effects from temporary storage, such as leakages from the spent-fuel pools and fires caused by the SNF becoming exposed to the air. Concluding that previous leaks had only a negligible near-term health effect and that recent regulatory enhancements will further reduce the risk of leaks, the Commission determined that leaks do not pose the threat of a significant environmental impact. *Id.* at 81,069–71. The Commission also found that pool fires are sufficiently unlikely as to pose no significant environmental threat. *Id.* at 81,070–71. As amended, Finding 4 now holds that SNF can be safely stored at plants for at least sixty years beyond the licensed life of a plant, instead of thirty. *Id.* at 81,074. In addition, the Commission noted in its final rule that it will be developing a plan for longer-term storage and will conduct a full assessment

of the environmental impact of storage beyond the sixty-year post-license period. *Id.* at 81,040. Based on the revised WCD, the Commission released a new Temporary Storage Rule ("TSR") enacting its conclusions and updating its regulations accordingly. *See* Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010); 10 C.F.R. § 51.23(a). Petitioners challenge the amended 10 C.F.R. § 51.23(a) based on both Finding 2 and Finding 4.

II. The Commission's Obligations Under NEPA

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, requires federal agencies such as the Commission to examine and report on the environmental consequences of their actions. NEPA is an "essentially procedural" statute intended to ensure "fully informed and well-considered" decisionmaking, but not necessarily the best decision. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Under NEPA, each federal agency must prepare an Environmental Impact Statement ("EIS") before taking a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An agency can avoid preparing an EIS, however, if it conducts an Environmental Assessment ("EA") and makes a Finding of No Significant Impact ("FONSI"). *See Sierra Club v. Dep't of Transp.*, 753 F.2d 120, 127 (D.C. Cir. 1985); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503–04 (D.C. Cir. 2010) (explaining NEPA procedures in detail). The issuance or reissuance of a reactor license is a major federal action affecting the quality of the human environment. *See New York v. Nuclear Regulatory Comm'n*, 589 F.3d 551, 553 (2d Cir. 2009).

The parties here dispute whether the WCD itself constitutes a major federal action. To petitioners, the WCD is a major federal action because it is a predicate to every decision to license or relicense a nuclear plant, and the findings made in the WCD are not challengeable at the time a plant seeks licensure. The Commission contends that because the WCD does not authorize the licensing of any nuclear reactor or storage facility, and because a site-specific EIS will be conducted for each facility at the time it seeks licensure, the WCD is not a major federal action. To the Commission, the WCD is simply an answer to this court's mandate in *Minnesota* to ensure that plants are only licensed while the NRC has reasonable assurance that permanent disposal of the resulting waste will be available. The Commission also contends that the WCD constitutes an EA supporting the revision of 10 C.F.R. § 51.23(a), and because the EA found no significant environmental impact, an EIS is not required.

We agree with petitioners that the WCD rulemaking is a major federal action requiring either a FONSI or an EIS. The Commission's contrary argument treating the WCD as separate from the individual licensing decisions it enables fails under controlling precedent.

We have long held that NEPA requires that "environmental issues be considered at every important stage in the decision making process concerning a particular action." *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). The WCD makes generic findings that have a preclusive effect in all future licensing decisions—it is a pre-determined "stage" of each licensing decision. NEPA established the Council on Environmental Quality ("CEQ") "with authority to issue regulations interpreting it." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004). The CEQ has defined major federal actions to include actions with

"[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §§ 1508.8, 1508.18; *Public Citizen*, 541 U.S. at 763; *see also Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (holding that the CEQ's NEPA interpretations are entitled to substantial deference); *accord CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 115 (D.C. Cir. 2006). It is not only reasonably forseeable but eminently clear that the WCD will be used to enable licensing decisions based on its findings. The Commission and the intervenors contend that the site-specific factors that differ from plant to plant can be challenged at the time of a specific plant's licensing, but the WCD nonetheless renders uncontestable general conclusions about the environmental effects of plant licensure that will apply in every licensing decision. *See* 10 C.F.R. § 51.23(b).

Petitioners' argument continues by suggesting that the WCD lacks an EIS and must be reversed on that basis. Not necessarily. No EIS is required if the agency conducts an EA and issues a FONSI sufficiently explaining why the proposed action will not have a significant environmental impact. *Public Citizen*, 541 U.S. at 757–58. Though we give considerable deference to an agency's decision regarding whether to prepare an EIS, the agency must 1) "accurately identif[y] the relevant environmental concern," 2) take a "hard look at the problem in preparing its EA," 3) make a "convincing case for its finding of no significant impact," and 4) show that even if a significant impact will occur, "changes or safeguards in the project sufficiently reduce the impact to a minimum." *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (internal quotation omitted). An agency's decision not to prepare an EIS must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Public Citizen*, 541 U.S. at 763 (quoting 5 U.S.C. § 706(2)(A)).

III. Availability of a Permanent Repository

With these NEPA obligations in mind, we turn to the Commission's conclusion that a permanent repository for SNF will be available "when necessary." In so concluding, the Commission examined the historical difficulty—now measured in decades rather than years—in establishing a permanent facility. *See, e.g.*, Waste Confidence Decision Update, 75 Fed. Reg. at 81,049. Though a number of commenters suggested that the social and political barriers to building a geologic repository are too great to conclude that a facility could be built in any reasonable timeframe, the Commission believes that the lessons learned from the Yucca Mountain program and the Blue Ribbon Commission on America's Nuclear Future will ensure that, through "open and transparent" decisionmaking, a consensus would be reached. *Id.* Further, the Commission noted that the Nuclear Waste Policy Act mandates a repository program, demonstrating the continued commitment and obligation of the federal government to pursue one. The scientific and experiential knowledge of the past decades, the Commission explained, would enable the government to create a suitable repository by the time one is needed. *Id.*

A.

Petitioners argue that the Commission's conclusion regarding permanent storage violates NEPA in two ways: First, it fails to fully account for the significant societal and political barriers that may delay or prevent the opening of a repository. Second, the Commission's conclusion that a permanent repository will be available "when necessary" fails to define the term "necessary" in any meaningful way and does not address the effects of a failure to establish a repository in time. Petitioners further contest the Commission's claim that the WCD constitutes an EA for permanent disposal, let alone the

EIS they contend is required here.

The Commission responds by contending that it "candidly acknowledged" the societal and political challenges, and crafted the WCD to account for those risks. Overcoming political obstacles is not the responsibility of the Commission, it contends, and the NRC's conclusion that institutional obstacles will not prevent a repository from being built is entitled to substantial deference. The Commission contends that the selection of a precise date for Finding 2 is not required by NEPA or any other laws governing the NRC, and the Commission used the "when necessary" formulation as far back as 1977. *See NRDC v. Nuclear Regulatory Comm'n*, 582 F.2d 166, 170, 175 (2d Cir. 1978).

As for examining the environmental effects of failing to establish a repository, the Commission contends that the WCD is an EA supporting the revision of 10 C.F.R. § 51.23(a). No EIS is necessary regarding permanent disposal because, the Commission argues, the WCD is not a major federal action, and conducting an EIS for this issue would be the sort of "abstract exercise" the Supreme Court declined to require in *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 100 (1983). Further, the Commission's existing "Table S-3" already considers the environmental effects of the nuclear fuel cycle generally and found no significant impacts. Therefore, the Commission believes, no EIS is required.

B.

The Commission's "when necessary" finding is already imperiled by our conclusion that the WCD is a major federal action. We hold that the WCD must be vacated as to its revision to Finding 2 because the WCD fails to properly analyze the environmental effects of its permanent disposal conclusion.

While we share petitioners' considerable skepticism as to whether a permanent facility can be built given the societal and political barriers to selecting a site, we need not resolve whether the Commission adequately considered those barriers. Likewise, we need not decide whether, as the Commission contends, an agency's interpretation of the political landscape surrounding its field of expertise merits deference. Instead, we hold the WCD is defective on far simpler grounds: As we have determined, the WCD is a major federal action because it is used to allow the licensing of nuclear plants. *See supra* Part II. Therefore, the WCD requires an EIS or, alternatively, an EA that concludes with a finding of no significant impact. The Commission did not supply a suitable FONSI here because it did not examine the environmental effects of failing to establish a repository.

Even taking the Commission's word that the WCD constitutes an EA for the permanent storage conclusion, *see* Waste Confidence Decision Update, 75 Fed. Reg. at 81,042, the EA is insufficient because a finding that "reasonable assurance exists that sufficient mined geologic repository capacity will be available when necessary," *id.* at 81,041, does not describe a probability of failure so low as to dismiss the potential consequences of such a failure. Under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass. *See, e.g.*, *Carolina Envtl. Study Grp. v. U.S.*, 510 F.2d 796, 799 (D.C. Cir. 1975). An agency may find no significant impact if the probability is so low as to be "remote and speculative," or if the combination of probability and harm is sufficiently minimal. *See, e.g.*, *City of New York v. Dep't of Transp.*, 715 F.2d 732, 738 (2d Cir. 1983) ("The concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence."). Here, a "reasonable assurance" that permanent storage will be available is a far cry

from finding the likelihood of nonavailability to be "remote and speculative." The Commission failed to examine the environmental consequences of failing to establish a repository when one is needed.

The Commission argues that its "Table S-3" already accounts for the environmental effects of the nuclear fuel cycle and finds no significant impact. Not so. Table S-3, like the Commission itself, presumes the existence of a geologic repository. Therefore, it cannot explain the environmental effects of a failure to secure a permanent facility. The Commission also complains that conducting a full analysis regarding permanent storage would be an "abstract exercise." Perhaps the Commission thinks so because it perceives the required analysis to be of the effects of the permanent repository itself. But we are focused on the effects of a *failure* to secure permanent storage. The Commission apparently has no long-term plan other than hoping for a geologic repository. If the government continues to fail in its quest to establish one, then SNF will seemingly be stored on site at nuclear plants on a permanent basis. The Commission can and must assess the potential environmental effects of such a failure.

IV. Temporary On-Site Storage of SNF

In concluding that SNF can safely be stored in on-site storage pools for a period of sixty years after the end of a plant's life, instead of thirty, the Commission conducted what it purports to be an EA, which found that extending the time for storage would have no significant environmental impact. *See* Waste Confidence Decision Update, 75 Fed. Reg. at 81,074. This analysis was conducted in generic fashion by looking to environmental risks across the board at nuclear plants, rather than by conducting a site-by-site analysis of each specific nuclear plant. Two key risks the Commission examined in its

EA were the risk of environmental harm due to pool leakage and the risk of a fire resulting from the fuel rods becoming exposed to air. *See id.* at 81,069–71. We conclude that the Commission's EA and resulting FONSI are not supported by substantial evidence on the record because the Commission failed to properly examine the risk of leaks in a forward-looking fashion and failed to examine the potential consequences of pool fires.

A.

Petitioners challenge the finding of no significant impact on two bases: First, petitioners argue that a generic analysis is simply inappropriate and that the Commission was required to look at each plant individually. A site-by-site analysis is necessary, petitioners argue, because the risks of leaks and fires are affected by site-specific factors such as pool configuration, leak detection systems, the nature of SNF stored in the pool, and the location of the pool within the plant. Overall, petitioners argue that NEPA requires the Commission to fully analyze the environmental effects of on-site storage, and a generic analysis cannot fulfill that statutory mandate.

Second, petitioners argue that even if generic analysis is appropriate, the Commission's generic EA in this case was insufficient. They maintain that the Commission did not adequately account for leaks from on-site pools because the Commission only looked at past leaks to see if they caused environmental damage, rather than examining the risks of future leaks. Also, as petitioners point out, the Commission's own studies have shown that previous leaks "did, or potentially could, impact ground-water resources relative to established EPA drinking water standards." NRC, *Liquid Radioactive Release Lessons Learned Task Force Final Report* 13 (2006). Petitioners also argue that the Commission's analysis of the

effects of pool fires was deficient because the Commission declined to examine the consequences of pool fires due to the low probability of such an occurrence. In petitioners' view, the Commission could only avoid examining the consequences of pool fires in a full EIS if it found the risk so low as to be "remote and speculative"—a finding the Commission did not make. Finally, Petitioners contend that the Commission completely failed to look at non-health environmental factors such as effects on the Prairie Island Indian Community's homeland, which is located near one of the plants governed by the rule.

The Commission responds by stating that its examination of past leaks properly demonstrated that the potential for environmental harm from leakage is negligible. The Commission argues that the effects of past leaks have been shown to be quite minimal, and the Commission's leakage task force has recommended twenty-six specific measures to minimize the risk even further. Also, the NRC exercises oversight over the pools and will ensure that they do not become unsafe over the sixty-year period. With regard to fires, the Commission contends that it engaged in an "exhaustive consideration" of the risk and found that such an event is extremely unlikely. In the Commission's view, a site-by-site analysis of pool-fire risk is unnecessary because the Commission relied on studies which accounted for all of the variations cited by petitioners and essentially looked at the most dangerous combinations of site-specific factors. Even looking to a worst-case scenario, the Commission says, the risk of fires was still extremely low.

Responding to petitioners' argument that the Commission failed to determine that the risk of fires was "remote and speculative," the Commission suggests that it did not dismiss the risk out of hand as "remote and speculative" but rather examined

it thoroughly and found it to be so low that the consequences could not possibly overcome the low probability. Therefore, the Commission did not need to conduct a full EIS for pool fires. Finally, the Commission argues that petitioners did not raise the issue of non-health impacts during the rulemaking, and thus they cannot raise that issue on petition now.

B.

Both the Supreme Court and this court have endorsed the Commission's longstanding practice of considering environmental issues through general rulemaking in appropriate circumstances. *See, e.g.*, *Baltimore Gas*, 462 U.S. at 100 ("The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA."); *see also Minnesota*, 602 F.2d at 416–17. Though *Baltimore Gas* dealt with the nuclear fuel cycle itself, which is generally focused on things that occur outside of individual plants, we see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants. This is particularly true given the Commission's use of conservative bounding assumptions and the opportunity for concerned parties to raise site-specific differences at the time of a specific site's licensing. Nonetheless, whether the analysis is generic or site-by-site, it must be thorough and comprehensive. Even though the Commission's application of its technical expertise demands the "most deferential" treatment by the courts, *Baltimore Gas*, 462 U.S. at 103, we conclude that the Commission has failed to conduct a thorough enough analysis here to merit our deference.

1.

The Commission admits in the WCD Update that there have been "several incidents of groundwater contamination

originating from leaking reactor spent fuel pools and associated structures." 75 Fed. Reg. at 81,070. The Commission brushes away that concern by stating that the past leaks had only a negligible near-term health impact. *Id.* at 81,071. Even setting aside the fact that near-term health effects are not the only type of environmental impacts, the harm from past leaks—without more—tells us very little about the potential for future leaks or the harm such leaks might portend. The WCD Update seeks to extend the period of time for which pools are considered safe for storage; therefore, a proper analysis of the risks would necessarily look *forward* to examine the effects of the additional time in storage, as well as examining past leaks in a manner that would allow the Commission to rule out the possibility that those leaks were only harmless because of site-specific factors or even sheer luck. The WCD Update has no analysis of those possibilities other than to say that past leaks had "negligible" near-term health effects. *Id.* A study of the impact of thirty additional years of SNF storage must actually concern itself with the extra years of storage.

The Commission also notes that a taskforce has made recommendations for improvements to spent-fuel pools, which the NRC "has addressed, or is in the process of addressing." *Id.* But those improvements are thus far untested, and we have no way of deferring to the Commission's conclusion that they will ensure the absence of environmental harm. Finally, the Commission refers to its monitoring and regulatory compliance program as a buffer against pool degradation. *Id.* That argument is even less availing because it amounts to a conclusion that leaks will not occur because the NRC is "on duty." With full credit to the Commission's considerable enforcement and inspection efforts, merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent-fuel pools will not cause a significant environment impact during the extended storage

period. This is particularly true when the period of time covered by the Commission's predictions may extend to nearly a century for some facilities.

Despite giving our "most deferential" treatment to the Commission's application of its technical and scientific expertise, we cannot reconcile a finding that past leaks have been harmless with a conclusion that future leaks at all sites will be harmless as well. The Commission's task here was to determine whether the pools could be considered safe for an additional thirty years in the future. That past leaks have not been harmful with respect to groundwater does not speak to whether and how future leaks might occur, and what the effects of those leaks might be. The Commission's analysis of leaks, therefore, was insufficient.

2.

Even though the Commission engaged in a more substantial analysis of fires than it did of leaks, that analysis is plagued by a failure to examine the consequences of pool fires in addition to the probabilities. Petitioners, citing *Limerick Ecology Action, Inc. v. Nuclear Regulatory Commission*, 869 F.2d 719, 739 (3d Cir. 1989), argue that the Commission could only avoid conducting an EIS if it found the risk of fires to be "remote and speculative." The Commission, citing *Carolina Environmental Study Group v. United States*, 510 F.2d at 799, argues that it did not need to examine the consequences of fires because it found the risk of fires to be very low.

We disagree with both parties. As should be clear by this point in our opinion, an agency conducting an EA generally must examine both the probability of a given harm occurring *and* the consequences of that harm if it does occur. Only if the harm in question is so "remote and speculative" as to reduce the

effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis. *See Limerick Ecology Action, Inc.*, 869 F.2d at 739. But, contra petitioners, the finding that the probability of a given harm is nonzero does not, by itself, mandate an EIS: after the agency examines the consequences of the harm in proportion to the likelihood of its occurrence, the overall expected harm could still be insignificant and thus could support a FONSI. *See Carolina Envtl. Study Grp.*, 510 F.2d at 799 ("Recognition of the minimal probability of such an event is not equatable with nonrecognition of its consequences."). Here, however, the Commission did not undertake to examine the consequences of pool fires at all. Depending on the weighing of the probability and the consequences, an EIS may or may not be required, and such a determination would merit considerable deference. *C.f.*, *City of New York*, 715 F.2d at 751–52 (deferring to an agency's weighing of a "catastrophic" harm against an "infinitesimal probability"). But unless the risk is "remote and speculative," the Commission must put the weights on both sides of the scale before it can make a determination.

3.

As for petitioners' remaining argument that the Commission did not consider non-health environmental effects, we agree with the Commission that petitioners did not properly raise those issues in the rulemaking. Petitioners essentially present two non-health impacts: decrease in property values and risk of harm to the Prairie Island Indian Community's homeland. The Tribe did mention its small size and close proximity to the Prairie Island Nuclear Generating Plant, but it did not assert specifically how it might be harmed by either the rulemaking itself or the licensing the rulemaking enables. With regard to property values, petitioners point to a study considering the economic impact of the Indian Point plant. But that study actually

assumes a diminution in values caused by current plant operation and simply extends it mathematically—it in no way asserts whether or how any harm to property values might occur nor how that harm is related to a change in the physical environment. Petitioners' failure to raise these objections to the agency waives them. *See Public Citizen*, 541 U.S. at 764. We note, as did the Supreme Court in *Public Citizen*, that primary responsibility for compliance with NEPA lies with the Commission, not petitioners; nonetheless, the non-health effects alluded to here are not "so obvious that there is no need for a commentator to point them out." *Id.* Given, however, that we are invalidating the Commission's conclusions as a whole, petitioners will have the opportunity to properly raise and clarify these concerns on remand.

* * *

Overall, we cannot defer to the Commission's conclusions regarding temporary storage because the Commission did not conduct a sufficient analysis of the environmental risks. In so holding, we do not require, as petitioners would prefer, that the Commission examine each site individually. However, a generic analysis must be forward looking and have enough breadth to support the Commission's conclusions. Furthermore, as NEPA requires, the Commission must conduct a true EA regarding the extension of temporary storage. Such an analysis must, unless it finds the probability of a given risk to be effectively zero, account for the consequences of each risk. On remand, the Commission will have the opportunity to conduct exactly such an analysis.

V. Conclusion

We recognize that the Commission is in a difficult position given the political problems concerning the storage of spent

nuclear fuel. Nonetheless, the Commission's obligations under NEPA require a more thorough analysis than provided for in the WCD Update. We note that the Commission is currently conducting an EIS regarding the environmental impacts of SNF storage beyond the sixty-year post-license period at issue in this case, and some or all of the problems here may be addressed in such a rulemaking. In any event, we grant the petitions for review, vacate the WCD Update and TSR, and remand for further proceedings consistent with this opinion.

So ordered.

STATE OF VERMONT

SUPERIOR COURT
Bennington Unit

CIVIL DIVISION
Docket No.380-9-10 Bncv

State of Vermont,
Plaintiff,

v.

Nelson J. Dunn, Jr., Joni L. Dunn, and
John D. Dunn,
Defendants

ORDER ON PENALTIES

The State brought this action against Nelson Dunn, Joni Dunn, and John Dunn, landowners, alleging that they cleared portions of 157 acres of land in Stamford, Vermont, extracted substantial amounts of soil and earth, built a road through the property, and improved it significantly, without obtaining necessary Act 250 land use permits, and that all of this activity resulted in significant storm water discharges, for which the defendants also did not seek permits. The State seeks civil penalties, injunctive relief to bar further legal violations, and costs. On January 23, 2012, the court issued a decision granting summary judgment in favor of the State as to the claims that the defendants failed to obtain necessary Act 250 permits and that they operated an excavation project without obtaining necessary storm water discharge permits. Because the court concluded that there were disputed material facts, the court declined to issue summary judgment as to Count III of the State's complaint, which alleged that the defendants' activities were industrial activities subject to additional or different

standards regarding storm water discharge, and that the defendants' failed to comply with those standards. The State then voluntarily dismissed Count III of its complaint and the court proceeded with the penalty phase of the proceedings under Counts I and II.

A contested evidentiary hearing as to the appropriate sanctions to be imposed on the defendants was held on May 22, 2012. The State was represented by Assistant Attorney General Nicholas Persampieri. Nelson Dunn and John Dunn appeared and represented themselves. Joni Dunn did not appear.

Defendants Nelson and Joni Dunn are a husband and wife who now reside in North Adams, Massachusetts, but have owned a residence and land located at 4957 Main Road in Stamford since 1984. In 2005, Nelson Dunn applied to the town zoning board for a permit to "restore pastures and fields of farm land by clearing, cutting, stumping and selling excess soil products." Nelson Dunn took the lead throughout this process, and Joni Dunn merely signed the documents as a joint landowner. The permit was initially denied by the town zoning administrator, but was later granted on appeal to the zoning board of adjustment. In his application for this permit, Nelson Dunn "[t]he applicant acknowledges responsibility for obtaining . . . [additional] permits." He did not acquire any additional permits beyond the zoning permit.

Following the approval of the zoning permit, in 2006, Nelson Dunn cleared about 50 acres of his land of trees and stumps, and began excavating topsoil and fill. He excavated and removed topsoil from two areas of this cleared land – one about five acres in size and the other about two acres in size. Nelson Dunn oversaw the excavation

project, and received assistance from his son John Dunn. John Dunn owned many of the pieces of construction equipment used to excavate the property, and operated some of the equipment during the excavation process. He also owns an adjacent parcel of land, across which the road used for the excavators and trucks passed during the project, with his permission. Joni Dunn kept the books for the excavation business and is the joint owner of the subject property with Nelson. The excavated material was sold to businesses, including Yankee Atomic Electric Company and J.H. Maxymillian, Inc. Nelson and Joni Dunn received in excess of $500,000 from the sale of topsoil and fill to Yankee Atomic and J.H. Maxymillian. Their net profit from this enterprise, as shown on their joint federal income tax return in 2006, was $33,116.

After receiving a citizen complaint about the Dunns' activity in 2009, John Wakefield, then a permit compliance officer with the Natural Resources Board, investigated this matter. He learned that John and Joni Dunn were the owners of the land in question. He obtained invoices from Yankee Atomic Electric Company, Inc. and J.H. Maxymilian, Inc. showing payments to Mr. Dunn's business, Nelwood Farm, for excavated materials. He contacted Mr. Dunn, and spoke to him in May 2009. Mr. Dunn falsely told Mr. Wakefield that he was not removing materials from the site, but was clearing the land for grazing by cattle.

The costs of Mr. Wakefield's investigation were $2786.57.

In 2010, Dan Mason, then a storm water compliance specialist for the Agency of Natural Resources, inspected the Dunns' property. He observed storm water containing a great deal of sediment flowing from the excavation site. Based on his

observations, Mr. Mason concluded that storm water was likely discharged from the excavation sites after every significant rainfall and during spring runoff, from the time of the excavation in 2006 to that date. Photographs Mr. Mason took show very significant runoff from the site. The runoff likely continues today, because the site has not been repaired. The turbid waters from the Dunns' land run into a stream that flows directly into the Hoosac River, about 0.4 miles from the Dunns' home. This kind of turbid water can fill up streams with silt, destroying or damaging them. Turbidity of this kind also reduces the oxygenation of the streams, and damages the habitat for fish and other aquatic life. Mr. Mason testified credibly that Nelson Dunn's project created a substantial threat to water quality from the destabilized earth that the excavation caused to erode and flow into the streams. This damage is continuing to date.

The costs of Mr. Mason and other staff from his department's investigation were $2,263.37.

In order to repair the damage to the property, a reclamation plan is required, which will also require an Act 250 permit, and probably also storm water permits. Reclamation would likely require the creation of storm water sedimentation ponds, the use of armored channels, and stabilization of some of the excavated areas with vegetation. Approval of the necessary permits would likely take about 90 to 120 days, before work could begin.

At the hearing, Nelson and John Dunn both accepted responsibility for their actions. Nelson Dunn was the person who decided to engage in this unlawful activity, and he persuaded his son to provide some assistance with the excavation, and to lend

him the use of some equipment. Nelson Dunn suffered a significant injury in a work-related accident in about 2005, before this excavation took place, and apparently had a significant stroke and some brain damage as a result. Both Nelson and John Dunn testified that Nelson Dunn's judgment was affected by the stroke and resulting brain damage. Nelson Dunn's statements and conduct at this hearing suggest that his impulse control and judgment are in fact impaired. Both Nelson and John also testified that Joni Dunn played no active role in the unpermitted activity, and that they did not believe any penalties should be imposed on her. Also, she is apparently in poor health.

Nelson Dunn testified that his only income source at present is social security disability, and he has insufficient funds to pay any penalties or to retain an engineer or other experts to assist with reclamation.

John Dunn works full-time, but is responsible for the support of his two sons as well. His total net annual income, after taxes, is about $26,000. He and his father had a bitter falling out after this enforcement action began. John Dunn understandably blamed Nelson Dunn for the potential liability imposed on him in this action. The father and son only recently began to communicate with one another again.

Based on Nelson Dunn's testimony, it appears that the Dunn family home, located on the subject property, is subject to a foreclosure action by the bank, and that the Town of Stamford may also have begun or concluded a tax sale of the property.

Nelson Dunn is considering filing for bankruptcy. He and Joni Dunn have also separated, and it appears they may be in the middle of a divorce action.

In March, the parties agreed to limited injunctive relief. In particular, they stipulated that Nelson Dunn would not engage in excavation or remove topsoil or fill from the property without obtaining Act 250 and storm water permits authorizing any such activity from the State. The court issued an order to that effect on March 7, 2012. Mr. Dunn had complied with that order as of the date of the penalty hearing, and stated his intention to continue to do so.

Under 10 V.S.A. § 8221(b), the court may grant temporary and permanent injunctive relief and impose civil penalties for violations of the requirements of Chapter 151 of Title 10. The court may:

> (1) enjoin future activities;
> (2) order remedial actions to be taken to mitigate hazard to human health or the environment;
> (3) order the design, construction, installation, operation, or maintenance of facilities designed to mitigate or prevent a hazard to human health or the environment or designed to assure compliance;
> (4) fix and order compensation for any public or private property destroyed or damaged;
> (5) order reimbursement from any person who caused governmental expenditures for the investigation, abatement, mitigation, or removal of a hazard to human health or the environment;
> (6) levy a civil penalty as provided in this subdivision. A civil penalty of not more than $85,000.00 may be imposed for each violation.

In setting an appropriate penalty, Section 8221(a)(6) also directs the court to consider the criteria set forth in Section 8010(b) for administrative penalties. These criteria are:

> (1) the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violation;
> (2) the presence of mitigating circumstances, including unreasonable delay by the secretary in seeking enforcement;
> (3) whether the respondent knew or had reason to know the violation existed;
> (4) the respondent's record of compliance;
> (5) [Repealed.]
> (6) the deterrent effect of the penalty;

(7) the state's actual costs of enforcement; and
(8) the length of time the violation has existed.

Under 10 V.S.A. § 1274(a), the court may also issue injunctive relief, assess damages, and levy civil penalties for unlawful discharge of waste, including unlawful storm water discharges. The court may:

(1) Enjoin future discharges.
(2) Order the design, construction, installation or operation of pollution abatement facilities or alternate waste disposal systems.
(3) Order the removal of all wastes discharged and the restoration of water quality.
(4) Fix and order compensation for any public property destroyed, damaged or injured. Compensation for fish taken or destroyed shall be deposited into the fish and wildlife fund.
(5) Assess and award punitive damages.
(6) Levy civil penalties not to exceed $10,000.00 a day for each day of violation.

Based on the findings of fact summarized above, the court reaches the following conclusions regarding the relevant legal factors to be considered in assessing penalties here.

Impact on public health, safety, welfare and the environment. The evidence, particularly the photographs of the sites, shows that this property was essentially stripped of all vegetation and several feet of soil was removed. The method of removal and the failure to repair the damage have in fact resulted in continuing impacts on the environment due to soil and silt eroding and leaching into the nearby stream. It is also a shocking destruction of what could have been farmland, open pasture, or forest.

Mitigating circumstances. As to Joni and John Dunn, their reliance on the expertise of Nelson Dunn and on his taking reasonable and necessary steps to comply with legal requirements is a mitigating circumstance. Joni Dunn played no active role in the actual

work done, and only processed related paperwork. John Dunn played a limited role, in assisting in obtaining equipment to use for the excavation, and allowing the use of his adjacent land for a road. There are really no mitigating circumstances as to Nelson Dunn, except for his alleged lack of capacity to make good decisions due to his stroke and brain damage. He admitted that he was motivated by greed for the short term profits from the sale of the soil and fill removed from his land. He does now recognize that this was a very poor decision.

Whether the respondents knew or had reason to know the violation existed. The court concludes that Nelson Dunn, as an experienced logger should have known that permits would be required for the work that he undertook here. The court concludes that John and Joni Dunn did not know of the violations, but that John Dunn had reason to be very concerned, and a duty to make more of an inquiry than he did.

The respondents' record of compliance. None of the respondents have any history of violations in the past, and therefore they have no history of compliance or lack thereof. Since this action began, they have generally been cooperative, and Nelson Dunn agreed to the issuance of an injunction barring him from engaging in further excavation.

The deterrent effect of the penalty. The court concludes that there is little or no risk that any of the respondents will engage in similar violations in the future. However, there is likely to be a general deterrent effect from penalties imposed here on other landowners in similar positions. This should play a role in the court's decision.

The state's actual costs of enforcement. As noted above, the costs of enforcement as to the general Act 250 permit violation were $2,786.57, and as to the storm-water discharge permit violation, they were $2,263.37.

The length of time the violation has existed. This violation began in 2006, and continues to this day. However, the bulk of the violative conduct occurred in 2006, and the only reason that the violation continues is because of continuing erosion from the excavated sites.

The State has presented carefully prepared calculations of what it argues are the appropriate penalties, using forms and formulas that the Natural Resources Board relies on in administrative proceedings. The court has reviewed these proposals, which are also based on consideration of the criteria discussed above.

The court concludes that Nelson Dunn is in fact the primary offender here, and should bear the bulk of the financial responsibility for the violations of applicable law. However, the court recognizes that Joni Dunn is the joint owner of the real estate in question, and that is the primary asset against which collection of penalties may possibly be recovered. Moreover, she did benefit financially from Nelson Dunn's extraordinarily poor decisions, and therefore it is not inequitable to impose a significant portion of the costs on the husband and wife jointly.

John Dunn, the court concludes, was essentially duped into participating in this ill advised project by his father. He was a very young man at the time, and trusted his parent to make good decisions. The court concludes that no substantive penalty above

costs should be imposed on John Dunn as a result of his very limited involvement in these legal violations.

Finally, the court concludes that the limited assets and income available to Nelson Dunn should play a role in the amount of the penalty assessed. For this reason, and the other reasons stated above, the court declines to impose penalties as large as the State has requested.

Based on consideration of all the statutory factors and the conclusions stated above, it is hereby ORDERED:

1. Nelson Dunn and Joni Dunn shall apply for a storm-water discharge permit within 60 days of this order, and an Act 250 permit within 90 days of this order, to allow them to stabilize and reclaim the property in question, and shall comply with those permits and complete the necessary and permitted work as soon as practicable after the permits are obtained.
2. John Dunn shall cooperate with all efforts to stabilize and reclaim the property in question, in accordance with permits, and shall provide access to the site on the road that crosses his property as necessary to facilitate the stabilization and reclamation of the property in question.
3. Nelson and Joni Dunn shall pay a civil penalty of $10,000, for which they shall be jointly and severally liable, for violation of 10 V.S.A. § 6081(a) (Act 250 permit violation). They shall also be jointly and severally liable for the costs incurred by the State in investigating that violation, in the sum of $2,786.57, so the total of their joint civil penalties is $12,786.57. Nelson Dunn shall pay an additional civil

penalty for this violation, for which he shall be solely and individually liable, in the sum of $15,000.

4. Nelson Dunn shall pay a civil penalty to the State of $10,000, for violation of 10 V.S.A § 1259(a) (storm-water permit violation). Nelson Dunn and John Dunn shall jointly and severally be responsible for the State's costs of $2,263.37, for that violation.

Dated at Bennington, this 2nd day of August, 2012.

Katherine A. Hayes
Superior Judge

STATE OF VERMONT

SUPERIOR COURT
BENNINGTON UNIT

CIVIL DIVISION
Docket No. _____

State of Vermont,

Plaintiff,

v.

Nelson J. Dunn, Jr.; Joni L. Dunn; and John D. Dunn,

Defendants.

COMPLAINT

The State of Vermont, by and through Attorney General William H. Sorrell, on behalf of the Agency of Natural Resources, and the Natural Resources Board, Land Use Panel (collectively "the State"), file this complaint pursuant to 10 V.S.A. §§ 6027(g) and 8221, and the Court's general equitable jurisdiction. The State seeks injunctive relief and civil penalties for Defendants' construction of improvements without an Act 250 land use permit, and discharges of stormwater without stormwater discharge permits, in connection with Defendants' extraction of earth resources from property in Stamford, Vermont.

State Agencies and Defendants

1. The State of Vermont, Agency of Natural Resources ("ANR"), is a state agency with offices in Waterbury, Vermont.

2. The State of Vermont, Natural Resources Board, Land Use Panel, is a panel of five members of the Vermont Natural Resources Board appointed by the Governor of the State of Vermont, created by 10 V.S.A. § 6021(a).

3. Defendant Nelson J. Dunn, Jr. ("Nelson Dunn"), is an individual residing in

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Stamford, Vermont.

4. Defendant Joni L. Dunn ("Joni Dunn"), spouse of Nelson Dunn, is an individual residing in Stamford, Vermont.

5. Defendant John D. Dunn ("John Dunn") is an individual residing in Stamford, Vermont.

The Dunns' Earth Resources Extraction Business

6. Defendants Nelson and Joni Dunn own real property located at 4957 Main Road, Stamford, Vermont ("Site").

7. The Site totals approximately 157.8 acres.

8. The Site is located within the municipality of Stamford, a municipality which has not adopted permanent zoning and subdivision bylaws.

9. Defendants Nelson and John Dunn, doing business as Nelwood Farm and/or J.J. Topsoil, have operated an earth resources extraction and processing business on the Site.

10. In furtherance of their business, Defendants Nelson and John Dunn have, inter alia, cleared portions of the Site of vegetation; removed overburden; extracted earth resources, including materials they have described as topsoil, fill, and clay gravel; stockpiled removed materials on Site; processed extracted material using screeners; transported or arranged for transport of extracted earth resources offsite to purchasers of the material; and stored and maintained vehicles and equipment.

11. On information and belief, the primary area of the Site from which Defendants Nelson and John Dunn have extracted earth resources ("Main Pit") totals approximately 25 acres.

12. In furtherance of their business, Defendants Nelson and John Dunn made

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improvements to a preexisting road or trail running from Vermont Route 8 (Route 100) to the Main Pit area.

13. Such improvements have included widening, grading, addition of base-fill material and gravel, and installation of culverts. The improvements converted a rough, relatively narrow road or trail into a relatively wide road with a base of fill material suitable for travel by trucks hauling heavy loads.

14. The improved road has been used by trucks to access and haul extracted materials from the Main Pit.

The Dunns' Failure to Obtain Required Permits and the Resulting Competitive Advantage

15. Defendants Nelson, Joni and John Dunn (collectively "the Dunns") have never applied for or obtained an Act 250 land use permit for the Site.

16. By failing to obtain an Act 250 permit, the Dunns have avoided costs borne by others operating similar businesses, including a permit fee; costs of preparing an Act 250 permit application and accompanying documentation, including a location map, plan of the proposed development, demonstration of compliance with Act 250 criteria set forth at 10 V.S.A. § 6086, and site rehabilitation plan; and costs of complying with permit requirements, including conditions relating to erosion prevention, sediment control, and site rehabilitation.

17. The Dunns have never applied for or obtained coverage under a stormwater discharge permit for the Site.

18. By failing to apply for and obtain stormwater discharge permits, the Dunns have avoided costs borne by others operating similar businesses, including the costs of developing and implementing a site specific erosion prevention and sediment control plan

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("EPSC") and stormwater pollution prevention plan ("SWPPP"), training, sampling and maintenance costs.

19. On information and belief, Nelson and John Dunn have realized profits from their earth resources extraction business.

20. By failing to obtain Act 250 land use and stormwater discharge permits, Nelson and John Dunn gained a competitive advantage over other earth resources extraction businesses.

Impacts to the North Branch of the Hoosic River

21. The North Branch of the Hoosic River is located approximately 2100 feet to the Southeast of the Main Pit.

22. Precipitation that falls on the Site, including the Main Pit and Access Road, drains into the North Branch of the Hoosic River.

23. Taking into account the potential for erosion of soils at the Site and the moderate to high slope of the Site, the Dunns' unpermitted activities at the Site present a high risk of erosion and a significant risk of harm to the North Branch of the Hoosic River from erosion and sediment deposition.

COUNT I- FAILURE TO OBTAIN ACT 250 LAND USE PERMIT
(All Defendants)

24. The allegations of Paragraphs 1- 23 are restated and incorporated by reference herein.

25. Defendants Nelson, Joni, and John Dunn commenced development, as defined in 10 V.S.A. § 6001(3)(A)(ii), through the construction of improvements for commercial or industrial purposes on more than one acre of land within the municipality of

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Stamford, without obtaining an Act 250 Land Use Permit, in violation of 10 V.S.A. § 6081(a).

26. This violation is a continuing violation for each day that the violation continued at the Site.

27. The State is entitled to injunctive relief requiring the Dunns to cease land clearing, overburden removal, earth resources extraction, road construction and improvement at the Site, and cease removal of earth resources and overburden from the Site, until the Dunns submit a complete Act 250 land use permit application and such application is approved.

28. The State is entitled to injunctive relief requiring Defendants to take action to mitigate or prevent hazards to human health and the environment and to come into compliance with the requirements of an appropriate Act 250 permit, including action to mitigate or prevent erosion and sediment releases and rehabilitate the Site.

29. Pursuant to 10 V.S.A. § 8221, the State is entitled to recover from the Dunns civil penalties, economic benefit realized by the Dunns, including avoided costs and/or wrongful profits, and the State's costs of enforcement.

COUNT II- UNPERMITTED STORMWATER DISCHARGES FROM CONSTRUCTION ACTIVITY
(Defendants Nelson J. and John D. Dunn)

30. The allegations of Paragraphs 1 - 29 are restated and incorporated by reference herein.

31. Effective April 17, 2003, ANR issued General Permit 3-9001 (2003) For Stormwater Runoff From Large Construction Sites ("GP 3-9001"), pursuant to the Vermont

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Water Pollution Control statute, 10 V.S.A. Chapter 47, and other applicable law, for a five year term expiring April 17, 2008.

32. Owners of property on which construction activity would disturb five (5) or more acres of land were required to apply to ANR for coverage under GP 3-9001 or an individual construction permit prior to commencement of construction activity.

33. Following receipt of an application for coverage under GP 3-9001, ANR would determine whether the discharge was eligible for coverage under GP 3-9001. If ANR determined that the discharge was not eligible for coverage under GP 3-9001, ANR would require the applicant to apply for an individual permit.

34. Effective September 13, 2006, ANR issued General Permit 3-9020 (2006) For Stormwater Runoff From Construction Sites ("GP 3-9020"), pursuant to the Vermont Water Pollution Control statute, 10 V.S.A. Chapter 47, and other applicable law.

35. GP 3-9020 was amended effective February 2008.

36. GP 3-9020 provides coverage for discharges of stormwater runoff from construction activities at sites where construction activities will result in the disturbance of one (1) or more acres of land.

37. Owners of property on which construction activities would disturb five (5) or more acres of land and operators of such construction activities, for which coverage under GP 3-9001 or an individual permit was not obtained or applied for before the effective date of GP 3-9020, were required to obtain coverage under GP 3-9020 before commencement of construction activities.

38. Effective August 18, 2006, ANR issued Vermont Multi-Sector General Permits For Stormwater Discharges Associated With Industrial Activity, MSGP 3-9003

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("MSGP 3-9003"), pursuant to the Vermont Water Pollution Control Statute, 10 V.S.A. §§ 1250-1283, and other applicable law.

39. MSGP 3-9003 authorizes discharges of stormwater to waters of the State of Vermont from industrial activities at facilities within specified sectors, including facilities within Standard Industrial Classification ("SIC") Major Group 14 (Mining And Quarrying Of Nonmetallic Minerals, Except Fuels).

40. Operators of industrial facilities within the specified sectors were required to apply for coverage under MSGP 3-9003 by submitting a Notice of Intent and a SWPPP.

41. Upon receipt of an application for coverage under MSGP 3-9003, ANR may require the applicant to apply for an individual permit or an alternative general permit instead of MSGP 3-9003.

42. For mining activities, including activities at facilities within SIC Major Group 14, MSGP 3-9003 can provide coverage for stormwater discharges from construction activities, thereby obviating the need to obtain coverage for construction discharges under construction general permit GP 3-9001 or GP 3-9020, as otherwise applicable, if the terms and conditions and applicable technical standards of the otherwise applicable construction general permit are met and incorporated into the applicant's SWPPP.

43. Defendants Nelson and John Dunn have conducted industrial activities at the Site that are within SIC Major Group 14.

44. Defendants Nelson and John Dunn have engaged in construction activities at the Site, including land clearing, topsoil and overburden removal, and road improvement.

45. On information and belief, Defendants Nelson and John Dunn commenced construction activity at the Site no later than June 5, 2006.

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46. Discharges of stormwater from construction activities at the Site, including activities in the Main Pit area, flow into the North Branch of the Hoosic River, a water of the State of Vermont.

47. Defendants Nelson and John Dunn have discharged stormwater from construction activities at the Site to waters of the State of Vermont without applying for or obtaining coverage under GP 3-9001, or, in the alternative, an individual permit, in violation of 10 V.S.A. § 1259(a).

48. This violation is a continuing violation for each day that the violation continued at the Site.

49. Subsequent to failing to apply for and obtain coverage under GP 3-9001, Nelson and John Dunn have violated 10 V.S.A. § 1259(a) by discharging stormwater from construction activities at the Site to waters of the State of Vermont without applying for and obtaining coverage for such construction discharges under MSGP 3-9003 or an alternative general permit or individual permit.

50. This violation is a continuing violation for each day that the violation continued at the Site.

51. The State is entitled to injunctive relief requiring Nelson and John Dunn to cease construction activities at the Site until such time as they submit to ANR a complete application for a permit for stormwater discharges from construction activities and the application is approved.

52. The State is entitled to injunctive relief requiring Nelson and John Dunn to take action to mitigate or prevent hazards to human health and the environment and to come into compliance with stormwater discharge permitting requirements for construction

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activities.

53. Pursuant to 10 V.S.A. § 8221, the State is entitled to recover from Nelson and John Dunn civil penalties, economic benefit realized by Nelson and John Dunn, including avoided costs and/or wrongful profits, and the State's costs of enforcement.

COUNT III- UNPERMITTED STORMWATER DISCHARGES FROM INDUSTRIAL ACTIVITY
(Defendants Nelson J. Dunn and John D. Dunn)

54. The allegations of Paragraphs 1 - 53 are restated and incorporated by reference herein.

55. Defendants Nelson and John Dunn have engaged in industrial activities at the Site, including extraction or removal of minerals, stockpiling of overburden and topsoil, use of access roads, vehicle and equipment maintenance and parking.

56. On information and belief, Nelson and John Dunn commenced industrial activities at the Site no later than June 5, 2006.

57. Discharges of stormwater from industrial activities at the Site, including activities in the Main Pit Area and on the Access Road, flow into the North Branch of the Hoosic River, a water of the State of Vermont.

58. Nelson and John Dunn have discharged stormwater from industrial activities, separate from construction activities, at the Site into waters of the State of Vermont without applying for and obtaining coverage under MSGP 3-9003 or an individual permit, in violation of 10 V.S.A. § 1259(a).

59. This violation is a continuing violation for each day that the violation continued at the Site.

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60. The State is entitled to injunctive relief requiring Nelson and John Dunn to cease industrial activities, until such time as Nelson and John Dunn submit to ANR a complete application for a permit for stormwater discharges from industrial activities and the application is approved.

61. The State is entitled to injunctive relief requiring Nelson and John Dunn to take action to mitigate or prevent hazards to human health and the environment and to come into compliance with stormwater discharge permitting requirements for industrial activities.

62. Pursuant to 10 V.S.A. § 8221, the State is entitled to recover from Nelson and John Dunn civil penalties, economic benefit realized by Nelson and John Dunn, including avoided costs and/or wrongful profits, and the State's costs of enforcement.

PRAYER FOR RELIEF

WHEREFORE, the State requests that the Court enter judgment in its favor and award the following relief:

(1) Pursuant to 10 V.S.A. § 8221, civil penalties against the Dunns for violation of 10 V.S.A. § 6081(a), plus additional penalties for each day that the violation continues, and an amount that permits the State to capture the economic benefit realized by the Dunns from the violation;

(2) Pursuant to 10 V.S.A. § 8221, civil penalties against Nelson and John Dunn for each violation of 10 V.S.A. § 1259(a), plus additional penalties for each day that the violation continues, and an amount that permits the State to capture the economic benefit realized by Nelson and John Dunn from each violation;

(3) Injunctive relief requiring the Dunns to cease construction and industrial

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activities at the Site until the Dunns submit complete Act 250 land use and stormwater discharge permit applications and such applications are approved;

(4) Injunctive relief requiring the Dunns to take action to mitigate or prevent hazards to human health and the environment and to come into compliance with Act 250 and stormwater laws, regulations, and permits;

(5) The State's costs of enforcement; and

(6) Such other and further relief as the Court deems just and proper.

Dated: September 28, 2010

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: Nicholas F. Persampieri

Nicholas F. Persampieri
Scot L. Kline
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6902

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ORDER

2012 NOV -5 P 3:39

STATE OF VERMONT
WASHINGTON COUNTY, SS.

2012 NOV -5 A 9:51

Stipulation

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 593-8-09 Wncv

State of Vermont)
Plaintiff,)
)
v.)
)
Adrien Inkel and Son, Inc.)
Stephane Inkel, Inc.)
Defendants.)

STIPULATION OF SETTLEMENT
AND
ORDER

In order to resolve the allegations made in the complaint filed in the above-captioned matter, the plaintiff ("the State of Vermont") and the defendants Adrien Inkel and Son, Inc. and Stephane Inkel, Inc. ("the defendants") stipulate and agree as follows:

1. The defendants jointly own approximately 2,113 acres of forest land in Bloomfield, Vermont that they purchased in August 2003.
2. In December 2003, the defendants submitted to the Department of Forests, Parks and Recreation ("the Department") a 32 V.S.A. § 3755 Use Value Appraisal (UVA) forest management plan for state approval and a 10 V.S.A. § 2625 notice of intent to cut for their Bloomfield property. In their notice, the defendants certified that the cutting that they proposed would be consistent with the state-approved UVA forest management plan.
3. The Department approved the UVA forest management plan, and issued a notice of determination stating that the defendants' proposed cut was consistent with their

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state-approved UVA forest management plan.

4. The defendants then cut on their land.

5. In 2006, during a UVA inspection, the Department determined and alleged that the defendants had cut in noncompliance with their state-approved UVA forest management plan in eleven (11) forest stands, and that the defendants had not implemented Acceptable Management Practices, causing discharges to the waters of the state in three (3) locations.

6. The Department issued a UVA adverse inspection report, and the Department of Taxes removed the land from the UVA program.

7. The State of Vermont filed a complaint in this matter pursuant to the environmental civil enforcement provisions of 10 V.S.A. § 8221. The State of Vermont alleged in its complaint that the defendants committed eleven (11) violations of 10 V.S.A. § 2625(j) by cutting trees in noncompliance with their state-approved UVA forest management plan in each of eleven (11) individual forest stands on their land, and committed a violation for each day that each of these violations continued. The State also alleged that the defendants discharged materials into the waters of the state without a permit in violation of 10 V.S.A. § 1259 in three (3) locations, and committed a violation for each day that each of these violations continued.

8. To resolve the State of Vermont's allegations in its complaint, the defendants admit that they committed four (4) violations of 10 V.S.A. § 2625(j) by cutting not in compliance with their state-approved UVA forest management plan in four (4) individual forest stands on their land, and agree that they will pay civil penalties to the State of Vermont in the amount of $150,000.00 for the four (4) § 2625(j)

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violations.

9. The entry of this judgment as to the four (4) forest stands shall not be construed as an admission to any other allegations made by the State in its complaint. The defendants deny the State's allegations as to the seven (7) remaining forest stands as well as the State's allegations regarding the violations of Acceptable Management Practices at three (3) locations. The defendants claim that their cutting in those seven (7) stands was appropriate based on their contention that the stands were damaged by ice.

10. The State contends that the civil penalties of $150,000 take into consideration the burden of proof at trial with regard to the eleven alleged violations in the eleven (11) forest stands; the economic advantage that the State believes was gained by the defendants from the sale of the timber that they cut in violation of their state-approved UVA forest management plan; and the additional economic effect on the defendants from the loss of eligibility for use value appraisal of the subject real property; and also serve as a deterrent to future similar conduct. The State also contends that the penalties reflect the impact on the environment by the destruction of the productive value of the forest land and the loss of its preservation for its future productive use caused from the defendants' cutting.

11. The payment of the civil penalties in Paragraph 8 above by the defendants fully resolves any and all legal and equitable claims that the State of Vermont has or may have had against the defendants and their agents, officers and employees related to the violations of the state-approved UVA forest management plan on the defendants' jointly owned land in the town of Bloomfield that was the subject of

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this action.

12. In consideration of the defendants' payment of civil penalties in the amount of $150,000.00 to the State of Vermont, the State, as the plaintiff, agrees to dismiss with prejudice its remaining claims in this action.

13. Nothing in this Stipulation of Settlement and Order modifies the defendants' obligations to comply with Vermont state laws and rules regarding the requirements for eligibility and qualification for the UVA program, regarding the regulation of the heavy cutting of timber resources, and regarding Vermont's water pollution control laws including, but not limited, to acceptable management practices for maintaining water quality on logging jobs in Vermont.

14. The terms of this stipulation may be entered as an order of the court.

15. Each party shall be responsible for its own costs.

Dated at Montpelier, Vermont this 31 day of October, 2012.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Thea J. Schwartz
Assistant Attorney General

and _____
Michael O. Duane
Assistant Attorney General

Dated at Newport, Vermont this 2nd day of ~~October~~ November, 2012.

Adrien Inkel and Son, Inc.
Stephane Inkel, Inc.
Defendants

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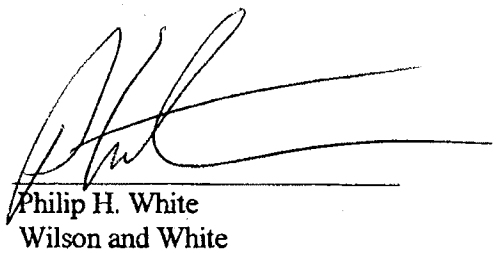
By: 

Philip H. White
Wilson and White
Their Attorney

ORDER

Upon the Stipulation of Settlement and the consent of the parties, Judgment is entered against the Defendants and in favor of the Plaintiff as to four counts of 10 V.S.A. § 2625(j) in stands numbered 5002, 5007, 5012, and 5005 and Defendants are ordered to pay a penalty of $150,000 to the State of Vermont. All other counts are hereby dismissed with prejudice. Each party shall be responsible for their own costs.

SO ORDERED:

Honorable Robert R. Bent
Superior Court Judge

DATE: 11 5 12

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109 State Street
Montpelier, VT 05609

STATE OF VERMONT
COUNTY OF WASHINGTON, SS.

State of Vermont Plaintiff, v. Adrien Inkel and Son, Inc. Stephane Inkel, Inc. Defendants.	))))))))	Superior Court Civil Action Docket No. _____

COMPLAINT

Now comes the Plaintiff, State of Vermont, by and through its attorney, William H. Sorrell, Attorney General, and pursuant to 10 V.S.A. § 8221 and 3 V.S.A. § 157 complains as follows:

The State alleges that the Defendants failed to comply with a forest management plan by cutting approximately 456 acres in violation of 10 V.S.A. § 2625. The State also alleges that the Defendants discharged materials into the waters of the state without first obtaining a permit for such discharge in violation of 10 V.S.A. § 1259. The State seeks civil penalties. Venue is proper in Washington Superior Court.

FACTS

1. Adrien Inkel and Son, Inc. is a New Hampshire corporation.

2. Stephane Inkel, Inc. is a Vermont corporation.

3. Adrien Inkel and Son, Inc. and Stephane Inkel, Inc. (collectively referred to herein as "the Inkels") own approximately 2113 acres of land (the Property) in the town of Bloomfield, Vermont. The Property is located along the

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Bloomfield Ridge adjacent to the Mill Brook Road and the Crank Road. The Property is located in a very rural area of northeastern Vermont.

4. The Inkels purchased the Property in August 2003. At the time of purchase the Property had been enrolled in the Use Value Appraisal Program pursuant to 32 V.S.A. Chapter 124 and had an approved forest management plan.

5. The Inkels continued the Property's enrollment in the Use Value Appraisal Program after their purchase. They submitted an updated forest management plan for the Property on or about December 10, 2003. The forest management plan was approved. The forest management plan specifies and defines the treatment and the harvest amount allowed, if any, for each individual stand of trees on the Property. The forest management plan sets the standards for compliance by stand of trees.

6. On or about December 11, 2003 the Inkels filed a notification of intent to cut with the Vermont Department of Forests, Parks and Recreation (FP&R) for a proposed heavy cut of "+/- 1600 " acres. Stephane Inkel and Adrien Inkel signed the notification as the landowners of record.

7. On the notification of intent to cut, the Inkels checked off that they "certify that the proposed heavy cut is consistent with . . . [a] forest management plan currently in effect and approved by the department under the current use assessment program."

8. On or about December 18, 2003 FP&R District Forestry Manager, Jim Horton, signed a Notice of Determination which stated that the proposed cut on the

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Property was "consistent with . . . a forest management plan currently in effect and approved by the Department under the Current Use Assessment program."

9. On or about June 13, 2006 the Caledonia and Essex County forester, Matthew Langlais, accompanied by Stephane Inkel, visited the Property as part of a routine five year use value appraisal inspection of the Property. Langlais observed that cutting had occurred on the Property which was not in compliance with the forest management plan.

10. Langlais' inspection was the state's first discovery of Defendants' violation of 10 V.S.A. § 2625 for noncompliance with the forest management plan. The violation was not such that it reasonably should have been discovered prior to that date. Further, on information and belief, Defendants did not commence their improper cutting of trees until after their forest management plan was approved in December, 2003.

11. On or about June 27, 2006 forester Langlais, and State Lands Forester Richard Greenwood made a follow-up visit to the Property with Stephane Inkel's permission. Langlais and Greenwood observed that cutting had occurred on the Property which was not in compliance with the forest management plan. They also observed that the Inkels had failed to implement Acceptable Management Practices (AMPs) and that the discharge of sediment to state waters resulted at three different locations. They observed inadequate skidder crossings and debris in state waters at those locations. Defendants did not have a permit for such discharges to state waters.

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12. On November 8, 2006 pursuant to 32 V.S.A. Chapter 124 the Vermont Department of Taxes removed the Property from the Use Value Appraisal Program for cutting contrary to the forest management plan.

13. During the summer of 2007, FP&R personnel with verbal permission visited the Property and conducted a heavy cut inspection. FP&R personnel found that the Inkels had cut more heavily than called for by the forest management plan, had cut ahead of the forest management plan's time schedule, and had cut in stands that were not to be cut under the forest management plan. FP&R personnel identified approximately 456 acres in eleven stands which the Inkels heavily cut in noncompliance with the forest management plan.

VIOLATIONS

14. Paragraphs 1-13 are re-alleged and incorporated by reference.

15. The cutting of trees in noncompliance with the forest management plan in each of the eleven stands is a violation of 10 V.S.A. § 2625(j) and a continuing violation of 10 V.S.A. § 2625(j) for each day that the violation continued.

16. The discharge of materials into the waters of the state without first obtaining a permit for such discharge is a violation of 10 V.S.A. § 1259 and a continuing violation of 10 V.S.A. § 1259 for each day that the violation continued.

WHEREFORE, the State of Vermont seeks the following relief:

1. Civil penalties pursuant to 10 V.S.A. § 8221 of not more than $50,000 for each of the eleven (11) violations of 10 V.S.A. § 2625, and of not more than $25,000 for each day each of these violations continued;

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2. Civil penalties pursuant to 10 VSA § 8221 of not more than $50,000 for each of the three (3) violations of 10 V.S.A. § 1259, and of not more than $25,000 for each day each of these violations continued;

3. The award to the State of costs, fees, and attorneys fees incurred in this litigation; and,

4. Such other relief as this court deems just and appropriate.

Dated August 7, 2009 at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Thea Schwartz, Esq.
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

_____
Scot L. Kline, Esq.
Chief of Environmental Protection
Division, Assistant Attorney General

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2013

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO.: S0226-11 CnC

STATE OF VERMONT

v.

N.L. CHAGNON INC., NELSON CHAGNON, and PATRICIA CHAGNON

FINDINGS OF FACT and CONCLUSIONS OF LAW

This is a civil enforcement proceeding filed by the State of Vermont pursuant to 10 V.S.A. § 8221. The court held an evidentiary hearing on October 26 and December 18, 2012. In addition, the court visited the site with the parties and counsel on October 25, 2012.

FINDINGS OF FACT

Nelson Chagnon owns and operates N. L. Chagnon Inc. which is a small excavating company. He and his wife are nearing retirement age. In December 2006, the Chagnons purchased two adjoining lots within the Gauthier Industrial Park in Essex Junction, Vermont. The industrial park lies behind Susie Wilson Road. It includes various manufacturing and storage businesses. To the northeast, the property slopes down towards wetlands which border Indian Brook. There are about 10 acres of heavily forested wetland in the valley bottom along the brook.

The two lots which Mr. Chagnon purchased are hilly and uneven. Previous owners used the property as a "boneyard" for construction debris such as cement pipes, rubble, and equipment. Mr. Chagnon insisted that the previous owner clean up the site before he took title.

In 2007 Mr. Chagnon embarked on a plan to construct a commercial building on the high ground of the property which is located close to the road. He obtained the following construction permits:

a. Wastewater permit issued 8/31/07;

b. General discharge permit issued 9/27/07;

c. Construction general permit issued 8/21/07;

d. Land use permit issued 11/21/07.

These permits all include requirements that the builder take measures to reduce erosion and runoff of muddy water.

Mr. Chagnon cleared the entire property of trees and other vegetation. At the southern height of the property, closest to the road, he leveled a space for the proposed building. From south to north, the land sloped steeply to a dirt access road and then steeply again down to the wetland area. The Chagnon property included less than an acre of the total wetland.

In 2008, Mr. Chagnon's financing dried up. He was unable to build anything on his property. He used it to store building supplies and excavating equipment. He did not address the bald, scraped surface of the lot which began to erode with the flow of rainwater to the north towards the wetland.

The soil on the Chagnon property and the surrounding area is fine silt and sand. This is true both of the upper area which Mr. Chagnon cleared to build his warehouse and the lower level which is wetland. The wetland area is not a marsh or swamp. There are no pools or moving water. Instead, it is an expanse of extremely damp mud and sand which is overgrown with trees, grasses, shrubs, and invasive reeds (phragmites). The expansive creek bottom protects the water in Indian Brook by providing an absorbent buffer for water and sediment flowing downhill from the higher ground.

In 2009 the Enforcement Division of the Department of Environmental Conservation received a complaint about conditions at the site. A DEC inspection report dated April 15, 2009, noted that earthwork had commenced over a year ago and that the site was not stabilized with an acre of "steep slopes, silty/sand." A silt fence designed to control runoff was "collapsed, unmaintained." Work on the site "appears to be intermittent."

A year later conditions were not greatly improved. A second DEC report noted "large amount of fill put over bank near or in wetland buffer; material being screened on site. No one on site working at time of inspection. All areas, w/exception of one slope unstabilized with active erosion and sediment transport likely occurring during precip. events."

On June 3, 2010, the Compliance and Enforcement Division of DEC issued a notice of alleged violations to the Chagnons. A report by a DEC investigator dated July 9, 2010, focused attention on the problem of erosion and instability of the bank immediately above the protected wetland.

> This embankment was eroding away steadily by large 18" deep rivulets and gullies that lead from the "roadway" atop the embankment to the wetland below about 45 feet downslope. In some places these rivulets were 2' wide near the top of the slope. The slope was very unstable. There were four separate rows of silt fence from different time frames that were failing to keep large deposits of sand and silt from entering the wetland. The wetland is in the upper half of the photograph and Indian Brook is through the woods about 100 feet away from the toe of the slope.

The investigator's photos show an eroding moonscape of bare earth with deep runnels carved into the soil. Work on Mr. Chagnon's proposed building had been stopped for more than two years at this time.

With a violation pending, Mr. Chagnon took steps to address the problem. He retained an engineer (Douglas Henson) who submitted a new construction permit application. The renewed permit covered the work necessary to address the DEC's concerns about erosion into the wetland. The renewed permit issued in October 2011. It called for stabilization of the bank by regrading and replanting the bank and placing an area of riprap stones at the steepest area at the base of the slope.

Between October 2011 and October 2012, Mr. Chagnon completed the stabilization of the bank. He installed heavy stonework at the base of the slope. He replanted the hillside. He has returned to address "rills" – small gullies – which have developed during heavy rains. The hillside is now covered with wild grasses and young trees. The vegetation is extremely dense. The DEC representatives are now satisfied that the slope is sufficiently stabilized.

The remaining area of dispute is what to do about the silt which washed down in an apron-like area at the base of the hill. The affected area is approximately 50' x 100'. Fresh sandy soil has been deposited on the existing sandy soil to a depth of one foot or more.

It has been very difficult for the parties to provide hard information about the exact depth of the new material. By taking some core samples and looking for levels of organic material from the previous groundcover, members of the DEC staff have estimated that about 18 inches of silt covers the affected area. This would compute to 7,500 square feet of material or 277 cubic yards – 40 dump truck loads at 7 yards per load. Since there is no evidence that the contours of the upper level of the site – above the bank – altered greatly, it is unlikely that such an immense amount of sand was deposited at the base of the slope. It is undisputed, however, that water running off the site carried a significant quantity of fine sand and silt onto the area immediately below the hillside.

Following the initial hearing, the court continued the hearing for about six weeks and informed Mr. Chagnon that he should remove as much material from the base of the slope as possible. It is a difficult area to work. There is no access except from above. The sandy slopes are too steep to bear the weight of earth-moving equipment. Mr. Chagnon brought workers and friends to the site and over the course of about a week they cut down the phragmites reeds which have grown over the site and removed approximately six yards of silt and mud by hand in plastic buckets. The work was hampered by the dense growth of roots below the surface. Mr. Chagnon left the ground at the very base of the hill alone because he had "keyed in" large boulders when he built the riprap slope. He did not wish to undermine these boulders which support and stabilize the stonework above them.

Unfortunately, when Mr. Chagnon and his crew carried the sand off the site, they deposited it in a low mound which is still located within the 50-foot buffer zone for the wetlands area. At the final hearing, Mr. Chagnon agreed that he would follow the State's direction in moving the mound further uphill outside of the buffer zone.

CONCLUSIONS OF LAW

There is no dispute that Mr. Chagnon violated the conditions of his original permits by leaving the disturbed ground uncovered and unprotected for two years. His failure to immediately grade and replant the area permitted sand and silt to flow onto the wetlands in violation of law. He does not deny this violation.

In bringing this case to a conclusion for both sides, the court addresses two issues: what further remediation should be ordered and what penalty should be imposed.

Further Remediation

Mr. Chagnon has agreed on the record to remove the sand which he dug out of the wetland and deposited within the 50-foot buffer. The court will confirm this agreement in its final order.

The court will not require additional removal of sand from the base of the slope. The work is almost impossible to complete. The sand is indistinguishable (except by layers of roots and branches) from the sand already on the site. Although the new material is drier in the sense that any increase in elevation increases the distance from the water table, there was no evidence of specific environmental harm or failure of the wetland. In the future, water will continue to drain downhill through and over the sandy creek bottom towards Indian Brook. The area affected (approximately the size of a tennis court) is a very small portion of the total ten acres of wetland.

At this point, the sincere efforts by the State and by Mr. Chagnon to return the site to its original condition have reached the point of diminishing returns. The crucial remediation – the stabilization of the steep bank – has been accomplished. A substantial portion of the sand has been removed. The boulders at the foot of the riprap appear to be stable and fully embedded in the hillside. There is no evidence of specific environmental benefit from the removal of more sand and there is no evidence of specific harm if it remains in place. Work at the foot of the hillside is immensely difficult and labor-intensive. The use of power equipment on the steep, unstable slope would be dangerous. The area is remote and already compromised by previous owners who discarded construction debris in the area. The removal of all traces of the sand which washed downhill during the years 2008 – 2010 is no longer possible since it is difficult to tell with certainty which layer of sand was deposited in which year. The court concludes that the record shows substantial compliance with the renewed construction permit and the requirements imposed by DEC.

For these reasons, the court will order no further work on the site except for the removal of the sand pile which was created in November 2012 to a location outside of the 50-foot buffer.

Civil Penalty

In considering the issue a civil penalty, the court relies upon the seven statutory factors which appear at 10 V.S.A. § 8010(b).

1. Degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violation.

This case has had no impact on public health, safety or welfare. The impact on the environment is low. The bank above the wetland has now been restored to a state of dense, erosion-preventing vegetation. There is no long-term damage to any part of the site except for the area at the base of the slope. In that area, additional sand has been deposited on the underlying sand. The area affected forms a small part of a 10-acre sandy bottom area. There is no evidence of any discharge of muddy water into Indian Brook or other impact on the surrounding wetland.

The state's witnesses testified credibly that a wetland which has become less wet through the addition of the local sand is less desirable than the original, damper, lower wetland. The change in this case is not great. The area remains extremely damp and muddy. Both at the time of the site visit and through photos it was clear that the additional sand had not changed the character of the wetland markedly. It remained wet and difficult to walk through. This is a factor which supports a civil penalty to only a moderate degree.

2. Presence of mitigating circumstances.

There are no mitigating circumstances arising from the actions of the State. From the time the DEC received a complaint about the site, its representatives have worked responsibly with Mr. Chagnon to achieve the highest possible degree of remediation. The court has no complaint about their work or any reason to find any delay by DEC. This factor has no bearing on the civil penalty decision.

There are mitigating circumstances when one considers the experience of Mr. Chagnon. At the commencement of his project in 2007, he was engaged in lawful development with all the necessary permitting in place. This is not a case of a violation by a person involved in illegal or unsanctioned activity. He intended to build a commercial warehouse in a business park specifically designed for that purpose. He was thwarted in his efforts by economic conditions which have affected small businesses throughout the state and elsewhere. This was his first and likely only attempt to develop property for himself. Since the project failed, he has earned nothing from it. Instead, he has lost money.

Mr. Chagnon's circumstances in no way excuse the environmental violation. But they do place it in context. He should not be treated in the same fashion as a large, financially successful

company which cuts corners in order to save money. This is a factor which supports a smaller rather than a larger civil penalty.

3. Whether Mr. Chagnon knew of the violation

Certainly by 2009 Mr. Chagnon knew about the need to take action to remedy the problems at the site. He delayed taking significant steps for about two years. If he had not delayed, it is unlikely that the case would have been filed. His delay in taking action is one of the principal factors that supports a civil penalty.

4. Mr. Chagnon's record of compliance

By October 2011, Mr. Chagnon came to appreciate the seriousness of the State's concerns about the erosion problem. At that point his record of compliance changed from "poor" to "good." He undertook the work himself. He spent money on an engineering study, on employees' wages, and on materials. Over the course of a year, prodded and encouraged by representatives of DEC, he transformed the moonscape into a normal, steep, brushy Vermont hillside. Pushed by the court, he removed a substantial amount of sand from the wetland. It took Mr. Chagnon more time than many would have required to understand that the scrubby forest below the bank has real environmental value. Once he recognized that the State's concerns were not merely the actions of bureaucrats but had purpose, he joined with them in a reasonable cooperative effort to remediate the site.

Since this was Mr. Chagnon's only effort at becoming a property developer, he has no history of prior non-compliance or other violations which would support a heavier penalty.

Mr. Chagnon's initial delay is offset by the commitment to make things right which he has demonstrated in the last year. This is a factor which is neutral in its application to the civil penalty decision.

5. Deterrent effect of the penalty

The concept of deterrence includes both specific and general deterrence. Specific deterrence concerns the impact of a penalty on the defendant himself. Specific deterrence is particularly important when the defendant is continuing in business and will face similar temptations to take a short-cut on environmental measures. Mr. Chagnon is not continuing with his short career as a property developer. He continues to operate an excavating business which brings him into contact with various permit and construction requirements. Specific deterrence is a factor which supports a moderate penalty.

The State argues more forcefully in favor of a penalty which will deter other members of the development community. Representatives of the State testified that building contractors watch the environmental enforcement cases closely and make decisions about whether to comply with environmental regulations depending upon the experience of others. The court accepts this

perception as true. Chittenden County is a small community and it is likely that many people in the building trades are aware of Mr. Chagnon's case. Few, however, would fail to be deterred by his experience – even before the imposition of a civil penalty. After losing heavily on his investment, he has been sued and has incurred substantial costs of his own in repairing and replanting the affected area. At a minimum, the week he and his crew spent digging with spade and bucket in the soggy bottomlands and carrying six yards of wet sand off site would deter all but the most hardened environmental violator. The court believes that it could impose -0- penalty (which is not going to happen) and that other contractors who learned of the facts would do anything they could to avoid having the same experience. Nevertheless, imposing no penalty at all could be understood by the development community to be tacit approval of a violation of law. This is a factor which supports a moderate civil penalty.

6. State's Actual Costs of Enforcement

The State estimates its costs of enforcement at $8,040, exclusive of legal expenses and the cost of investigating the enforcement case. The court finds that these costs are reasonable. It is clear from the testimony and the exhibits that the DEC staff, especially Ms. Foley and Mr. Burke, exhibited determination and professionalism in persuading Mr. Chagnon over time that it was necessary to address the problems on the site.

7. Length of time the violation has existed

The site was in violation of its permits for more than two years. This is neither a short time such as a violation for a month or part of a building season nor is it a very long time. This is a factor which supports a moderate civil penalty.

Considering these factors, the court will impose a moderate civil penalty of $10,000. This exceeds the cost to the State of investigation. It is high enough that no other property developer will be encouraged to postpone regrading, mulching, and replanting the exposed earth on a development because the fine is so low. It recognizes the expense that Mr. Chagnon has borne in the last 12 months to address the environmental problems on the site.

CONCLUSION

The court will issue a final judgment imposing a civil penalty of $10,000 and providing injunctive relief requiring Mr. Chagnon to remove the six-yard pile of material to a location outside the 50-foot buffer zone not later than June 1, 2013. The penalty is levied against both Mr. and Ms. Chagnon since the permits were issued to both individuals as joint owners of the subject property.

Dated: January 3, 2013

Geoffrey Crawford,
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO.: S0226-11 CnC

STATE OF VERMONT

v.

N.L. CHAGNON INC., NELSON CHAGNON, and PATRICIA CHAGNON

FINAL JUDGMENT ORDER

Following an evidentiary hearing and based upon the Findings of Fact and Conclusions of Law issued in this case, the court enters final judgment as follows:

1. Nelson and Patricia Chagnon are ordered to remove the 6 yard pile of sandy soil which they placed within the "buffer zone" of the subject wetland to a location beyond the buffer zone. This pile shall be removed not later than June 1, 2013. In all other respects, the Chagnons have substantially completed the remediation of the subject site.

2. Nelson and Patricia Chagnon are subject to a civil penalty in the amount of $10,000. Of this amount, $8,040 shall be payable directly to the Agency of Natural Resources as repayment of the cost of enforcement pursuant to 10 V.S.A. § 8010(e)(2). The balance ($1,960) shall be paid to the General Fund.

Dated: January 3, 2013

Geoffrey Crawford,
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT Chittenden Unit	)	CIVIL DIVISION Docket No._____
State of Vermont Plaintiff	)	
v.	)	
N.L. Chagnon, Inc., Nelson Chagnon, and Patricia Chagnon Defendants	)	

COMPLAINT

The State of Vermont, by and through Attorney General William H. Sorrell, on behalf of the Agency of Natural Resources and the Natural Resources Board Land Use Panel, files this complaint pursuant to 10 V.S.A. § 8221 and 3 V.S.A. § 157. The State alleges that Defendants have: (1) failed to comply with their stormwater construction permit; (2) failed to comply with conditions in their Amended Act 250 Permit; and (3) violated the Vermont Wetlands Rules. The State seeks injunctive relief and civil penalties.

Defendants

1. Nelson and Patricia Chagnon are joint owners of the land upon which the violations alleged in this Complaint took place, and both are the named parties on the permits that are the subject of the permit violations alleged in this Complaint.

2. N.L. Chagnon, Inc. is a Vermont corporation.

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3. Nelson Chagnon is the current President, Treasurer, and Director of N.L. Chagnon, Inc., and Patricia Chagnon is the current Secretary of N.L. Chagnon, Inc. On information and belief, each has held these respective positions during the time period relevant to the violations alleged in this Complaint.

4. N.L. Chagnon, Inc., under the direction of Nelson Chagnon, is the principal operator of the construction activities at issue in this Complaint.

5. On information and belief, Nelson Chagnon has personally overseen the construction activities at issue in this Complaint and has personally directed or actively participated or cooperated in the actions underlying the violations alleged in this Complaint.

The Property

6. Nelson and Patricia Chagnon own two lots of commercial property located at 22 Gauthier Drive in Essex Junction, Vermont (the Property).

7. Nelson and Patricia Chagnon purchased the Property in December 2006.

8. The Property is part of Gauthier Industrial Park, a large development project that disturbs one or more acres of land.

9. In 2007, Nelson and Patricia Chagnon proposed to construct a 9,000 square foot building on the Property, with professional office space and an office/shop/contractor's yard.

10. On information and belief, construction began on the Property on or about the spring of 2008, and the site remains not fully stabilized to date.

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11. The Property contains part of a significant wetland, as defined by the Vermont Wetlands Rules.

12. The wetland on the Property drains into Indian Brook.

Authorization Under Construction General Permit 3-9020

13. Vermont Construction General Permit (CGP) 3-9020 is a stormwater general permit issued by the Agency of Natural Resources pursuant to the Vermont Water Pollution Control statute, 10 V.S.A. Chapter 47, and other applicable law. CGP 3-9020 is for Low Risk or Moderate Risk construction sites. To determine whether a project qualifies as Low Risk or Moderate Risk and can therefore take advantage of CGP 3-9020, an applicant must complete a risk evaluation, including filling out a form located at Appendix A of the permit.

14. On or about August 6, 2007, Nelson and Patricia Chagnon, with their engineer, filed with the Vermont Agency of Natural Resources Department of Environmental Conservation (DEC) a document titled "Notice of Intent for Stormwater Discharges Associated with Construction Activity on Low Risk Sites under the Vermont Construction General Permit 3-9020" (NOI) and an attached Appendix A. The NOI lists Nelson and Patricia Chagnon as the landowners of the Property, and N.L. Chagnon, Inc. as the principal operator of the Property. Nelson Chagnon signed the NOI on behalf of himself and Patricia Chagnon as the landowners of record.

15. On or about August 21, 2007, the DEC issued an authorization to discharge stormwater under CGP 3-9020 (NOI #5370-9020) (authorization

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under CGP 3-9020), approving the stormwater discharges described in the NOI and Appendix A.

16. The authorization under CGP 3-9020 stated that it required implementation of the practices required by the Low Risk Site Handbook for Erosion Prevention and Sediment Control (Low Risk Handbook).

17. Rule 2.4(B) of CGP 3-9020 states that "[a]n authorization to discharge for a low risk project shall be valid for a period of two (2) years." Rule 7.3(C) of CGP 3-9020 states that "[i]f a low risk construction site has not achieved final stabilization two years after receiving an authorization to discharge then a new NOI shall be filed." Similarly, the letter accompanying the authorization under CGP 3-9020 stated that the authorization was "valid for two years from the date of the authorization" (August 21, 2007), and that if the project "will proceed past the automatic termination date" (August 21, 2009), the Chagnons "must reapply for coverage under this or another construction stormwater permit before that time."

18. To date, the Chagnons have not reapplied for coverage under CGP 3-9020 or another construction stormwater permit.

Act 250 Permit Amendment

19. The Property is subject to Act 250 Permit #4C0842, issued on or about August 6, 1990, authorizing subdivision of the original 179-acre tract of land on which the Property is located.

20. Nelson and Patricia Chagnon's proposed construction of a 9,000 square foot building required an Act 250 Permit amendment.

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21. On or about October 2, 2007, Nelson and Patricia Chagnon applied for an amendment to Act 250 Permit #4C0842. Both Nelson and Patricia Chagnon signed the application.

22. On or about November 21, 2007, the Act 250 District #4 Environmental Commission issued Land Use Permit Amendment #4C0842-13 (Amended Act 250 Permit) to Nelson and Patricia Chagnon.

23. The Amended Act 250 Permit was not appealed and is therefore final.

24. The Amended Act 250 Permit contains mandatory conditions that are applicable to the Property.

Site Visits

25. On or about May 13, 2008, August 13, 2008, April 15, 2009, April 16, 2009, June 10, 2009, April 9, 2010, April 16, 2010, June 17, 2010, July 15, 2010, September 29, 2010, and November 4, 2010, DEC staff and at times Act 250 staff visited the Property. On these visits, DEC and Act 250 staff observed various violations at the Property, including that materials, such as fill and construction debris, had been deposited in the wetland and its accompanying fifty-foot buffer zone, and that the site was not stabilized and was continuing to deposit materials into the wetland and buffer zone.

Statutory Framework for Environmental Enforcement Actions

26. Under 10 V.S.A. § 8221, the Attorney General is authorized to bring enforcement actions for violations of any of the provisions of law specified in § 8003(a), including the Vermont Water Pollution Control statute in 10 V.S.A.

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Chapter 47, Act 250 in 10 V.S.A. Chapter 151, and the Wetlands Protection statute in 10 V.S.A. Chapter 37.

27. Under 10 V.S.A. § 8002(9), a "violation" is defined as "noncompliance with one or more of the statutes specified in section 8003 of this title, or any related rules, permit, assurances, or orders."

28. Under 10 V.S.A. § 8221(b)(6), each violation that occurred before July 1, 2008, is subject to civil penalties of up to $50,000 for each initial violation and up to $25,000 for each day a violation continued, and each violation that occurred on or after July 1, 2008, is subject to civil penalties of up to $85,000 for each initial violation and up to $42,500 for each day a violation continued.

VIOLATIONS

COUNT I — Violations of Stormwater Construction Permit (Defendants Nelson Chagnon and Patricia Chagnon)

29. Paragraphs 1-28 are realleged and incorporated by reference.

30. CGP 3-9020 and the authorization under CGP 3-9020 are rules, permits, assurances, or orders related to 10 V.S.A. Chapter 47.

31. CGP 3-9020 and the authorization under CGP 3-9020 require Defendants, as the permit holders and as owners or operators of the Property, to take certain steps to comply with state law.

32. Defendants' activities and associated discharges of stormwater at the Property between the commencement of construction activities on or about the spring of 2008 and the expiration of the authorization under CGP 3-9020 on or about August 21, 2009, were in violation of CGP 3-9020 and the authorization under CGP 3-9020, including the following requirements:

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a. The authorization under CGP 3-9020 required that Defendants have all stormwater discharges first pass through a fifty-foot vegetated buffer area before entering receiving waters. Defendants violated this provision by allowing discharges of stormwater at the Property to receiving waters without such discharges first passing through a fifty-foot vegetated buffer, including at times at least one erosion channel that brought stormwater directly from the Property to a wetland.

b. The authorization under CGP 3-9020 required that Defendants stabilize all areas of disturbance within fourteen days of the initial disturbance. Defendants violated this provision by engaging in construction activities that disturbed earth that was not stabilized within fourteen days.

c. The authorization under CGP 3-9020 required implementation before and throughout construction of the practices listed in the Low Risk Handbook. As revealed during various site visits by DEC and Act 250 staff, Defendants violated the following requirements of the Low Risk Handbook:

    i. Physically marking the boundaries of the construction area, which Defendants violated by not physically marking the boundaries before undertaking construction;

    ii. Installing a stabilized construction entrance, which Defendants violated by not installing such an entrance;

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iii. Properly installing and maintaining silt fences, which Defendants violated by installing silt fences on or about the spring of 2008 in an improper way that allowed sediment to pass through and under the fences during discharge events;

iv. Installing stone check dams where needed to slow channelized runoff, which Defendants violated by not installing such dams, even when it was clear that stormwater was running through at least one erosion channel from the Property directly to the wetland; and

v. Stabilizing exposed soil, which Defendants violated by failing to take proper measures to stabilize exposed soil.

Defendants did not properly implement these measures and therefore violated each of these requirements of the Low Risk Handbook and the authorization under CGP 3-9020.

d. CGP 3-9020 Rule 7.3(C) requires that "[i]f a low risk construction site has not achieved final stabilization two years after receiving an authorization to discharge then a new NOI shall be filed." Defendants violated this provision when they failed to file an NOI or take other action to renew their stormwater permit when the site had not achieved final stabilization on or about August 21, 2009, when Defendants' authorization under CGP 3-9020 expired.

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33. Each of these activities or failures to act is a separate violation of CGP 3-9020 or the authorization under CGP 3-9020, and Defendants have also committed continuing violations for each day that a violation continued.

COUNT II — Violations of Amended Act 250 Permit
(Defendants Nelson Chagnon and Patricia Chagnon)

34. Paragraphs 1-33 are realleged and incorporated by reference.

35. Defendants' Amended Act 250 Permit is a rule, permit, assurance, or order related to 10 V.S.A. Chapter 151.

36. The Amended Act 250 Permit requires Defendants, as the permit holders and as owners or operators of the Property, to comply with the permit and all of its listed conditions.

37. As revealed during site visits by DEC and Act 250 staff, Defendants violated the following applicable conditions of their Amended Act 250 Permit:

a. Condition 11, incorporating all of the conditions listed in the authorization under CGP 3-9020, which Defendants violated each time that a violation listed in Count I of this Complaint occurred;
b. Condition 13, requiring a stabilized construction entrance, which Defendants violated by failing to install such an entrance;
c. Condition 16, requiring erosion-control measures that prevent the transport of any sediment beyond the area necessary for construction, which Defendants violated by allowing the transport of sediment to the wetland and its fifty-foot buffer zone during discharge events in 2008, 2009, and 2010;

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d. Condition 17, requiring maintenance of siltation dams and other erosion-control measures, which Defendants violated by failing to install proper siltation dams and by failing to take other measures to ensure proper erosion control;

e. Condition 18, requiring that all exposed earth be mulched and that water bars be in place at the end of each construction day, which Defendants violated beginning on or about the spring of 2008 by leaving exposed earth without mulching and failing to install proper water bars;

f. Condition 19, requiring that all disturbed areas not involved in winter construction be mulched and seeded before October 1 of each year, which Defendants violated by not mulching or seeding all disturbed areas before October 1, 2008, or October 1, 2009; and

g. Condition 20(a), requiring clear delineation of construction limits before construction begins, which Defendants violated by not installing flagging or fencing around the construction area before the start of construction.

38. Each of these activities or failures to act is a separate violation of the Amended Act 250 Permit, and Defendants have also committed continuing violations for each day that a violation continued.

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COUNT III — Disturbing Wetlands Without Conditional Use Determination (Defendants N.L. Chagnon, Inc. and Nelson Chagnon)

39. Paragraphs 1-38 are realleged and incorporated by reference.

40. The Vermont Wetlands Rules are rules, permits, assurances, or orders related to 10 V.S.A. Chapter 37.

41. Former Vermont Wetlands Rule 6.3 was applicable at the time of the activities underlying the violations alleged in this Complaint.

42. Former Vermont Wetlands Rule 6.3 required any person who intended to initiate a conditional use within a significant wetland or its fifty-foot buffer zone to apply for and receive Conditional Use Determination (CUD) approval for such conditional uses.

43. As observed during the site visits, Defendants N.L. Chagnon, Inc. and Nelson Chagnon's construction activities, including the direct or indirect placement of materials or fill in the wetland or its associated fifty-foot buffer zone, were a conditional use of a significant wetland or its fifty-foot buffer zone and therefore required CUD approval.

44. Defendants N.L. Chagnon, Inc. and Nelson Chagnon never obtained CUD approval for any of their construction activities at the Property.

45. Defendants N.L. Chagnon, Inc. and Nelson Chagnon's construction activities disturbing a significant wetland or its associated buffer zone without first obtaining CUD approval violated Former Vermont Wetlands Rule 6.3 for each disturbance and created a continuing violation of Rule 6.3 for each day that a violation continued.

WHEREFORE, the State of Vermont seeks the following relief:

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A. Injunctive relief requiring Defendants to develop and implement a comprehensive compliance plan approved by the Agency of Natural Resources for the clean-up and further maintenance and operation of the Property;

B. For each violation that occurred before July 1, 2008, civil penalties pursuant to 10 V.S.A. § 8221(b)(6) of up to $50,000 for each initial violation and up to $25,000 for each day that a violation continued;

C. For each violation that occurred on or after July 1, 2008, civil penalties pursuant to 10 V.S.A. § 8221(b)(6) of up to $85,000 for each initial violation and up to $42,500 for each day that a violation continued;

D. The award to the State of costs, fees, and attorney's fees incurred in this litigation; and

E. Such other relief as this Court deems just and appropriate.

Dated February 24, 2011, at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____

Kyle H. Landis-Marinello
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 738-10-10 Wncv

STATE OF VERMONT,)
)
Plaintiff,)
)
v.)
)
CUMBERLAND FARMS, INC.,)
)
Defendant.)

CONSENT ORDER AND FINAL JUDGMENT ORDER

Based upon the Stipulation for the Entry of Consent Order and Final Judgment Order filed by the parties, Plaintiff, the State of Vermont, by and through the Office of the Attorney General William H. Sorrell, on behalf of the Agency of Natural Resources, and Defendant Cumberland Farms, Inc., and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

ADJUDICATION OF UNDERGROUND STORAGE TANK VIOLATIONS

1. Cumberland Farms, Inc. ("CFI") is adjudged liable for violating § 8-605(2)(a)(i) of the Vermont Agency of Natural Resources ("ANR") Underground Storage Tank Regulations, effective February 1, 1991 (the "1991 UST Regulations"), at its Barre North Main Street Facility by failing to provide ANR notice of a UST closure (Count I).

2. CFI is adjudged liable for the following violations of the 1991 UST Regulations at its Northfield Facility: § 8-504(1)(c) (failure to maintain release detection documentation, Count II); § 8-504(1)(c) (failure to produce release detection documentation

to ANR, Count III); § 8-504(1)(c) and (2)(a) (failure to conduct release detection monitoring of USTs, Count IV); § 8-602(3) (failure to report suspected releases to ANR, Count VI); and § 8-603 (failure to investigate and confirm suspected releases, Count VII).

3. CFI is adjudged liable for the following violations of the 1991 UST Regulations at its Lyndon Facility: § 8-504(1)(c) (failure to maintain release detection documentation, Count VIII); § 8-504(1)(c) (failure to produce release detection documentation to ANR, Count IX); § 8-504(1)(c) and (2)(a) (failure to conduct release detection monitoring of USTs, Count X); § 8-602(3) (failure to report suspected releases to ANR, Count XII); and § 8-603 (failure to investigate and confirm suspected releases, Count XIII).

4. CFI is adjudged liable for the following violations of the 1991 UST Regulations at its Fairlee Facility: § 8-504(1)(c) (failure to maintain release detection documentation, Count XIV); § 8-504(1)(c) (failure to produce release detection documentation to ANR, Count XV); § 8-504(1)(c) and (2)(a) (failure to conduct release detection monitoring of USTs, Count XVI); § 8-602(3) (failure to report suspected releases to ANR, Count XVIII); and § 8-603 (failure to investigate and confirm suspected releases, Count XIX).

5. CFI is adjudged liable for the following violations of the 1991 UST Regulations at its St. Johnsbury Facility: § 8-504(1)(c) (failure to maintain release detection documentation, Count XX); § 8-504(1)(c) (failure to produce release detection documentation to ANR, Count XXI); and § 8-504(1)(c) and (2)(a) (failure to conduct release detection monitoring of USTs, Count XXII).

6. CFI is adjudged liable for violating § 8-504(1)(b) of the 1991 UST

Regulations at its Morrisville Facility by failing to install electronic liquid sensors in accordance with manufacturer instructions (Count XXVI).

7. CFI is adjudged liable for the following violations of ANR's Underground Storage Tank Rules, effective August 1, 2007 (the "2007 UST Rules"), at its Fairlee Facility: § 8-502(c)(3) and (e)(1) (failure to maintain release detection documentation, Count XXX); § 8-502(c)(3) and (e)(2) (failure to produce release detection documentation to ANR, Count XXXI); and § 8-506(a)(3) and (c)(2) (failure to conduct release detection monitoring of USTs, Count XXXII).

8. CFI is adjudged liable for the following violations of the 2007 UST Rules at its Barre North Main Street Facility: § 8-502(c)(3) and (e)(1) (failure to maintain release detection documentation, Count XXXIII); § 8-502(c)(3) and (e)(2) (failure to produce release detection documentation to ANR, Count XXXIV); § 8-503(c) (failure to keep spill containment devices free of liquids and debris, Count XXXV); and §§ 8-506(c)(1) and 8-507(a) and (b) (failure to conduct release detection monitoring of piping, Count XXXVI).

9. CFI is adjudged liable for the following violations of the 2007 UST Rules at its Barre South Main Street Facility: § 8-502(c)(3) and (e)(1) (failure to maintain release detection documentation, Count XXXVII); § 8-502(c)(3) and (e)(2) (failure to produce release detection documentation to ANR, Count XXXVIII); § 8-503(c) (failure to keep spill containment devices free of liquids and debris, Count XXXIX); 8-405(c) (failure to maintain vapor-proof fittings on USTs, Count XL); and §§ 8-103(a)(2)(B) and 8-506(c)(1)(G) (failure to report suspected releases to ANR, Count XLI).

10. CFI is adjudged liable for the following violations of the 2007 UST Rules at its Montpelier Facility: § 8-502(c)(3) and (e)(1) (failure to maintain release detection

documentation, Count XLII); and § 8-502(c)(3) and (e)(2) (failure to produce release detection documentation to ANR, Count XLIII).

11. CFI is adjudged liable for the following violations of the 2007 UST Rules at its Newport Facility: § 8-502(c)(3) and (e)(1) (failure to maintain weekly release detection documentation, Count XLIV); § 8-503(c) (failure to keep spill containment devices free of liquids and debris, Count XLV); and §§ 8-506(c) and 8-507(a) and (b) (failure to conduct release detection monitoring of piping, Count XLVI).

12. CFI is adjudged liable for the following violations of ANR's Underground Storage Tank Rules, effective August 1, 2009 (the "2009 UST Rules"), at its Woodstock Facility: § 8-506(a)(3) and (c)(1) (failure to conduct release detection monitoring of USTs, Count XLVII); and § 8-103(b) (failure to investigate suspected release, Count XLVIII).

PENALTIES

13. For the violations described above, Defendant shall pay a civil penalty of $150,000 to the State of Vermont ("State").

14. Penalties owing to the State as of the date of this Consent Order shall be paid as follows:

Payment of $150,000 shall be by certified check made payable to "Treasurer, State of Vermont" and forwarded to:

Vermont Office of the Attorney General
Environmental Protection Division
109 State Street
Montpelier, VT 05609-1001

Payment shall be received no later than thirty (30) consecutive calendar days following the date this Consent Order is entered as an Order by signature of the Court (effective date).

15. Failure to make payment by the date specified shall constitute a breach

of this Consent Order, and interest shall accrue on the entire unpaid balance at Twelve Per Cent (12%) per annum.

COMPLIANCE REQUIREMENTS

16. CFI shall comply with the Compliance Plan that is attached hereto as Attachment 1.

DISMISSAL OF CERTAIN CLAIMS

17. Counts V, XI, XVII, XXIII, XXIV, XXV, XXVII, XXVIII, and XXIX of the Complaint filed October 15, 2010 are hereby dismissed with prejudice.

MISCELLANEOUS PROVISIONS

18. CFI hereby waives: 1) all rights to contest or appeal this Consent Order; and 2) all rights to contest the obligations imposed upon CFI under Paragraphs 13 - 18 of this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

19. This Consent Order is binding upon CFI and its successors and assigns.

20. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

21. This Consent Order shall become effective only after it is signed by all parties and entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.

22. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 & 211, and 12

V.S.A. § 122.

23. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.

24. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected CFI's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to CFI. The State reserves all rights, claims and interests not expressly waived herein.

25. This Consent Order and the Stipulation for Entry of Consent Order and Final Judgment Order set forth the complete agreement of the parties, and they may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and, as to the Consent Order and Final Judgment Order, incorporated into an order issued by the Superior Court, Washington Unit, Civil Division. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect. If the Court does not execute the Consent Order as submitted, minor deviations in the form of the document excepted, it shall be voidable at the election of either party in accordance with ¶ 124 of the Stipulation for the Entry of Consent Order and Final Judgment Order.

26. CFI shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein or in the Stipulations occurring before the effective date of the Order, provided that CFI fully complies with the terms of the Consent Order set forth above. This Consent Order includes all alleged claims and violations at the CFI Facilities referenced in Paragraph 1- 12 of this Consent Order that the ANR is aware of and could bring against CFI regarding the 1991 UST Regulations, the 2007 UST Rules and the 2009 UST Rules as of the effective date of this Consent Order.

27. The Court hereby finds that the State and CFI have negotiated this

Consent Order in good faith, that implementation of this Consent Order will avoid prolonged and complicated litigation between the parties, and that this Consent Order is fair, reasonable and in the State's interest. The Court hereby enters this Consent Order as an Order of the Court and final judgment.

SO ORDERED, and **ENTERED** as **FINAL JUDGMENT**

Dated: _____

_____
The Honorable Robert W. Bent
Superior Court Judge

ATTACHMENT 1- COMPLIANCE PLAN

1. The obligations of this Compliance Plan shall be effective from the date the Consent Order is entered by the Court in this matter through the latter of March 1, 2015 or the date that Cumberland Farms, Inc. ("CFI") comes into compliance with the State of Vermont Underground Storage Tank Rules, effective October 1, 2011, as may be amended ("the UST Rules"), with respect to any and all incidents of noncompliance with the UST Rules identified by any inspection conducted pursuant to this Compliance Plan. Thereafter, CFI shall follow and comply with the UST Rules.

Bi-annual Inspections

2. CFI shall inspect each and every underground storage tank system that it owns or operates in the State of Vermont for compliance with the UST Rules on or before June 30 and December 31 of 2013 and 2014. ("Bi-annual Inspections").

3. Bi-annual inspections shall be in accord with §8-509(b) of the UST Rules and shall include compliance with requirements of the UST Rules regarding release detection, spill containment and overfill prevention, and corrosion protection.

4. Consistent with § 8-509(c) of the UST Rules, CFI shall repair or replace components that the inspection reveals do not meet the requirements of the UST Rules in accordance with § 8-508 of the UST Rules as applicable.

5. CFI shall report the results of each Bi-annual Inspection conducted pursuant to Paragraph 2 to the UST Program, Waste Management Division, Department of Environmental Conservation, Vermont Agency of Natural Resources ("ANR"), on or before sixty days from the date the inspection was conducted ("Inspection Report").

6. CFI shall, consistent with § 8-509(e) of the UST Rules, submit to ANR with each Inspection Report a description of steps proposed to correct any and all incidences of noncompliance with the UST Rules identified through the Bi-annual Inspection which CFI has not corrected prior to submission of the Inspection Report, including a proposed schedule for completing the proposed steps ("Return to Compliance Plan").

7. Consistent with § 8-509(f) of the UST Rules, ANR shall either accept or reject a proposed Return to Compliance Plan. If ANR rejects a plan, it will advise CFI in writing of the reasons why it rejected the plan, and CFI

shall submit a revised Return to Compliance Plan within a time frame specified by ANR. ANR may not require CFI to include in the return to compliance plan any requirements more stringent than the UST Rules.

8. Following ANR's approval of a Return to Compliance Plan, CFI shall implement the plan in accordance with the schedule set forth in the approved plan.

9. Consistent with § 8-509(g) of the UST Rules, CFI shall within five (5) business days after coming into compliance notify ANR in writing that compliance has been achieved.

10. Neither this Compliance Plan nor CFI's compliance with this Compliance Plan shall obviate or in any way affect CFI's obligations under the UST Rules to comply with all requirements of the UST Rules at all of CFI's facilities located in the State of Vermont.

Agency of Natural Resources v. Timothy Persons, and Trust A of Timothy Persons (2012-274)

2013 VT 46

[Filed 28-Jun-2013]

2013 VT 46

No. 2012-274

Agency of Natural Resources	Supreme Court
v.	On Appeal from Superior Court,
	Environmental Division
Timothy Persons, and Trust A of Timothy Persons	February Term, 2013

Thomas S. Durkin, J.

Paul S. Gillies of Tarrant, Gillies, Merriman & Richardson, Montpelier, for Appellants.

William H. Sorrell, Attorney General, and Kyle H. Landis-Marinello, Assistant Attorney General, Montpelier, for Appellee.

PRESENT: Reiber, C.J., Skoglund, Burgess and Robinson, JJ., and Bent, Supr. J., Specially Assigned

¶ 1. **SKOGLUND, J.** Defendants Timothy Persons and Trust A of Timothy Persons appeal from a Superior Court, Environmental Division decision that held certain construction and excavation work performed on defendants' property violated the Vermont Wetlands Protection and Water Resources Management laws and the Vermont Wetlands Rules (VWR). For a host of reasons, defendants contend they were not given adequate notice that portions of their lands contain a protected wetland, and therefore, they should not be subjected to the resulting fines. We affirm.

¶ 2. Defendant Timothy Persons or his relatives owned a 152-acre plot of farmland in Lunenburg, Vermont, with frontage along U.S. Route 2 and Hastings Road. In August 1998, the property was subdivided into seven individual parcels. Defendant Trust A of Timothy Persons (Trust A) purchased the property in April 1999 and began selling the subdivided lots. Defendant Trust A sold Lots 5 and 5A to Carl Jaborek, an individual not a party to this proceeding. Defendant Trust A retained ownership of Lot 4, with Allen Bacon acting as sole trustee.

¶ 3. Lots 4, 5, and 5A are the subject of this appeal. Lots 4 and 5A each contain 10.1 acres; Lot 5 contains 59 acres, including the property's original farmhouse. There is a Class II wetland located on Lot 4. As found by the environmental court, areas with wet soils extend from the Lot 4 wetland across Lots 5 and 5A, such that the wet soils abut the Class II wetland.

¶ 4. In September 1999, the Agency of Natural Resources (ANR) issued an Administrative Order against defendant Persons for unpermitted excavation work within a Class II wetland and its fifty-foot buffer on Lot 4. Defendant Persons initially contested the Order but later admitted to the 1999 wetland violation. He subsequently entered into an Assurance of Discontinuance (AOD)[1] with ANR in 2001, wherein he admitted to the existence of the Class II wetlands on Lot 4, and that excavation work and the dumping of fill and gravel within the wetland and its

buffer were violations of the applicable wetland-protection laws and regulations. Defendant Persons thereafter enrolled in classes pertaining to wetlands delineation and septic design.

¶ 5. Years later, Mr. Jaborek, owner of Lots 5 and 5A, learned of the Administrative Order against defendant Persons and contacted ANR's Waterbury office to inquire what excavation could lawfully be performed on his property in order to prepare his lots for sale. He also asked whether there were any outstanding requirements from the 2001 AOD that required attention. As a consequence, ANR officials visited Lots 4, 5, and 5A in May 2007 and confirmed that the wet soils located on the lots represented an additional wetland as evidenced by the surrounding vegetation, soil, and hydrology.

¶ 6. During the initial visit, ANR officials noted that defendant Persons recently cleared a swath of trees and excavated soils from a strip of land that cut across Lots 4, 5, and 5A, to replace a damaged water line that supplied water to Lot 4. The area cleared was wholly contiguous to the Class II wetland on Lot 4. In June 2007, after receiving a report that defendant Persons was conducting further excavation work in the identified wetland, ANR conducted another site visit, which revealed that defendant Persons dug three additional spring-fed wells, approximately five feet deep in the secondary wetland. The wells were encapsulated in concrete tiles and extended three feet above ground level.

¶ 7. In July 2007, ANR issued a notice of violation, requiring that defendants remove the new tiles and gravel and make repairs to the cleared land by August 15, 2007. In September 2007, an ANR official and the State Wetlands Coordinator conducted another site visit, where they observed no change in conditions or attempt to ameliorate the cited violations; rather, they found that defendant Persons had installed electrical fixtures on the three new tile structures. In May 2010, ANR issued an Administrative Order against defendants for dredging and filling in a Class II wetland and its fifty-foot buffer zone without obtaining a conditional use determination pursuant to VWR §§ 6.3(b), 8.

¶ 8. Defendants appealed the Order to the environmental court. After a full hearing on the merits, the court concluded that defendants "knew or should have known that their activities were conducted within wetlands that are protected by 10 V.S.A., Chapter 37 and the VWR." Even though defendant Persons testified that the soils were not wet when he conducted the excavation work, the court did not find his testimony credible. Based on the credible evidence, including evidence of the existing plant, soil, and hydrology in the area in question, the court determined that a Class II wetland existed at the time defendants conducted their work and, continues to exist today. As such, the court concluded that defendant Persons knowingly and defiantly excavated the land and installed wells without seeking the guidance of ANR or petitioning for a new wetlands determination. The court also found Allen Bacon, the sole trustee of Trust A, to be equally responsible, based on his knowledge of the area and the Trust's ownership interest. Accordingly, the court assessed a penalty of $14,222 against defendants pursuant to 10 V.S.A. § 8010(b)(1)-(8). This appeal followed.

¶ 9. We begin by setting forth the appropriate standard of review. The trial court's factual findings must be upheld unless clearly erroneous. Town of Bethel v. Wellford, 2009 VT 100, ¶ 5, 186 Vt. 612, 987 A.2d 956. "Where the trial court has applied the proper legal standard, we

will uphold its conclusions of law if reasonably supported by its findings." Id. (quotation omitted).

¶ 10. Defendants articulate thirteen objections to the trial court's findings. The thrust of their arguments focuses on whether they knew or should have known they were working within protected wetlands and whether the associated penalty is reasonable. Because of the significant overlap among defendants' claims, we address them thematically.

¶ 11. Defendants first contend they were not given adequate notice that they were working in protected wetlands, and any violation would be in contravention of basic due process. Specifically, they allege that ANR should have informed them of wetland boundaries during the initial site visits. Defendants also maintain that neither the 2001 AOD nor the National Wetlands Inventory (NWI) maps sufficiently alerted them to other wetland areas located on the property. We disagree.

¶ 12. VWR[2] provides protection for significant wetlands, which include any Class I or Class II wetland and their associated buffer zones. Vermont Wetlands Rules §§ 2.24, 6.1, 6 Code of Vt. Rules 12 004 056. The rules require landowners to seek authorization from the Secretary of ANR before commencing any nonexempt activities, including clearing and excavating the land. See VWR §§ 6.3, 8.1, 6 Code of Vt. Rules 12 004 056; see also 10 V.S.A. § 913(a) ("[N]o person shall conduct or allow to be conducted an activity in a significant wetland or buffer zone of a significant wetland except in compliance with a permit, conditional use permit determination, or order issued by the secretary."). The rules provide further that all wetlands shown on the state's NWI maps and all wetlands contiguous to such mapped wetlands are presumed to be Class II wetlands. See VWR §§ 4.1, 4.2, 6 Code of Vt. Rules 12 004 056. Similarly, Chapter 37 of Title 10, entitled Wetlands Protection and Water Resources Management, outlines the state's commitment to protect and regulate the water resources of the state through statute and sets forth similar guidelines in determining wetlands; Chapter 201 of Title 10 outlines the enforcement action for wetland violations.

¶ 13. Pursuant to 10 V.S.A. § 8006, the Secretary of ANR may issue either a written warning or a written notice for an alleged violation, with a brief description of the violation and the intended course of action, as well as, specific time lines and directives to achieve compliance, if appropriate. The rules do not require the Secretary to first issue a warning and then a notice as defendants contend. While it may have been good practice for ANR officials to orally notify defendants of the alleged violation during their first site visit in May 2007, such action was not required.[3]

¶ 14. Next, defendants argue that the 2001 AOD did not provide adequate notice that they were operating on protected wetlands, as the AOD addressed only a discrete portion of Lot 4, and failed to indicate the existence of nearby wetlands. The record makes clear that the work in question, namely—excavation, dredging, gravel and other fill work, and the installation of the spring wells—took place outside the precise boundaries of what the AOD delineated as Class II wetlands. The trial court, however, did not presume that the AOD had provided defendants in 2001 with actual notice of all wetlands on their property. The court merely reasoned that, in light of defendants' prior exchanges with ANR officials, defendants knew agency officials could

provide wetland boundary determinations on their land. Also, the court found that, because of the prior compliance matter, defendants knew or should have known that if they "intended to conduct excavation work or other activities and uses in an area protected by state wetland protection laws and regulations, [they] could only receive lawful authority to do so by requesting a conditional use determination." So, while the court used the 2001 AOD as contextual background, it did not find that the AOD provided defendants with a definitive ruling of the boundaries of all the existing wetlands.

¶ 15. Similarly, defendants allege that the NWI maps failed to accurately denote the secondary wetlands on their property. They argue the maps were difficult to read and required professional assistance or input to determine the boundary, as they were not "intended to show the exact location of wetland boundaries." We find this argument unavailing.

¶ 16. Even though the record indicates that NWI maps may not illustrate the precise boundary of each and every wetland in the state, they highlight protected areas, generally.[4] The onus is placed on the landowner to seek further clarification or petition for remapping. VWR § 7.1, 6 Code of Vt. Rules 12 004 056. In fact, the rules expressly state that "the maps denote the approximate location and configuration of significant wetlands. The actual boundaries . . . shall be determined in the field." VWR § 3.2(b), 6 Code of Vt. Rules 12 004 056. Furthermore, the trial court never declared that NWI maps would apprise defendants of wetlands. Instead, the court used the map as a counterpoint to illustrate that Class II wetlands extend beyond those marked on the map.

> Class II wetlands are not limited to just those wetlands identified on the VSWI map. Rather, due to the metamorphic nature of surface and ground water, the classification of Class II wetlands also includes "all wetlands contiguous to such mapped wetlands, . . . unless determined otherwise by the [Water Resources] Board," pursuant to a successful petition for an alternative wetlands determination by ANR or a property owner. VWR § 4.2(b), 6 Code of Vt. Rules 12 004 056.

¶ 17. In sum, defendants argue they were not afforded basic due process because they were never notified or able to learn the location of the wetlands before being charged by ANR for violating the law and regulations. Due process necessitates that there is "notice sufficient to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them. Agency of Natural Res. v. Irish, 169 Vt. 407, 411, 738 A.2d 571, 575-76 (1999) (quotations omitted). The U.S. Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

¶ 18. In particular, this Court in Agency of Natural Resources v. Irish, found that NWI maps in conjunction with ANR's recommendations could provide a defendant with reasonable notice that it was necessary to procure a conditional use determination before commencing work. 169

Vt. at 413, 738 A.2d at 577. There, the Court reasoned that in light of the less demanding strictures in civil suits and the fact that the defendant knew there were significant wetlands on his property as marked by the NWI maps and that ANR recommended that he obtain an expert opinion and a conditional use determination prior to the excavation work, the defendant had ample notice he was working on protected land. Id. at 412-13, 738 A.2d at 576-77.

¶ 19. Similarly, defendants here were well aware that significant wetlands were located on the property. While neither the AOD nor the NWI map detailed the precise locations of all secondary wetlands, the underlying facts suggest defendants knew or had reason to know they were performing work on protected wetlands, as evidenced by the fact that Lot 4 contains a Class II wetland, the work was performed on Lot 4 and the abutting lands, and as the environmental court noted, credible evidence indicated that the surrounding soils were wet. Based on the totality of facts, defendants had sufficient reason to know that the excavation work was prohibited without a permit or a conditional use determination. At the very least, defendants should have sought the advice of ANR before commencing work. What is more telling is that defendants received the notice of the violation in July 2007, and they did not protest the violation or make reparations to the land until ANR sought a penalty for noncompliance in May 2010. Accordingly, we are satisfied there was no violation of defendants' due process rights.

¶ 20. Defendants next assert that the trial court erred in calculating the penalty. We disagree. "The imposition of civil penalties represents a discretionary ruling that will not be reversed if there is any reasonable basis for the ruling." Id. at 418, 738 A.2d at 580. Here, the court outlined its penalty assessment in accordance with 10 V.S.A. § 8010, the remedial statute designed to "to enhance the protection of environmental and human health," "prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws," "foster greater compliance with environmental laws, and deter repeated violation[s]." 10 V.S.A. § 8001; see also Agency of Natural Res. v. Deso, 2003 VT 36, ¶ 18, 175 Vt. 513, 824 A.2d 558.

¶ 21. The court imposed a total penalty of $14,222. To encourage remediation, the court imposed a penalty of $3000. Because defendant Persons had knowledge of the significance of the wetlands and nonetheless pursued his own interests, it imposed a $3000 penalty. Defendant Persons' previous violations generated a $4000 fine. To deter future violations, the court assessed a penalty of $2000. The court incorporated ANR's expenditures of $1722 into the assessment. Lastly, the court fined defendants $500 for the amount of time they allowed the wetland encroachments to go unaddressed.

¶ 22. Defendants claim the trial court failed to account for mitigating factors when assessing the penalty. They suggest that their attempt to locate wetland maps and defendant Persons' enrollment in wetland classes was sufficient to eliminate any penalty assessment. They also maintain that ANR's failure to notify them that they were operating in wetlands should serve as a mitigating factor. We find defendants' arguments unavailing.

¶ 23. The fact that defendant Persons took a class on wetland delineation and made an effort to locate wetlands on environmental maps is not a mitigating factor here. As a landowner of protected wetlands, the onus is on him, individually, to ensure that he is conducting permissible activities in permitted areas. Also, ANR had no obligation to discuss the situation with

defendants before issuing the violation. See 10 V.S.A. § 8006(b). Moreover, defendants had almost three years from receipt of the notice of violation before any penalties were assessed. In those three years, they could have challenged the ANR's findings pursuant to VWR § 7.1, 6 Code of Vt. Rules 12 004 056, or they could have complied with the Agency's order and performed the necessary repairs. The mitigating factors argued were insignificant. We find no error in the court's decision.

¶ 24. Additionally, defendants claim that the court improperly assessed the fines because there was no evidence of direct impacts on the wetlands. Section 8010(b)(1) of the remedial statute specifically informs the court to consider both actual and potential impacts of the environmental violation when calculating a penalty. While there were no demonstrable impacts to the wetlands evidenced at trial, the court factored that into its assessment. In fact, it declined to impose a more significant penalty because "actual impacts were not demonstrated by the evidence presented at trial." Because the court factored the actual impacts into its equation, we find its calculation reasonable.

¶ 25. Finally, defendants assert that the environmental court increased the penalty six fold based on a violation of the 2001 AOD. We find no facts to support this assertion. There was no dispute that the activities in question were beyond the scope of the AOD. The environmental court merely found that the AOD should have informed defendants that they were operating in areas contiguous to the previously identified wetlands on Lot 4. Further, the court provided calculated and well-founded reasoning for each and every penalty assessment under 10 V.S.A. § 8010. The record does not indicate that the environmental court increased any one penalty six fold on the basis of the AOD violation.

¶ 26. Finally, defendants allege that they were entitled to a jury trial. They concede they do not have a constitutional right to a jury trial and fail to provide any rationale as to why this Court should expand its interpretation of the right to a jury trial in this instance. See State v. Irving Oil Corp., 2008 VT 42, ¶¶ 11, 15, 183 Vt. 386, 955 A.2d 1098 (looking beyond traditional analysis of whether claim had eighteenth century common law analogue and reasoning that civil penalty served remedial purpose and, as such, found that penalty was equitable in nature and defendant was not entitled to jury trial.). Accordingly, we do not address this issue.

Affirmed.

FOR THE COURT:

_____

Associate Justice

[1] Pursuant to 10 V.S.A. § 8007(a), the Secretary may accept from a respondent an assurance of discontinuance of a violation as an alternative to administrative or judicial proceedings.

[2] Since the activities in question were conducted in 2007, the Rules that were in effect from January 1, 2002 through July 31, 2010 control.

[3] Reginald Smith, an ANR environmental enforcement officer, testified that he attempted to call defendant Persons and Allen Bacon, trustee, to inform them of the alleged violation but was unable to reach them.

[4] As an extension, defendants argue that because the maps lack exactitude, a landowner cannot discern lands "contiguous" to an identified wetland, or a "buffer zone"—fifty feet from the designated wetland. For the same reasons we find defendants' argument regarding the maps unavailing, we also find this argument unpersuasive.

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 389-6-10 Wncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

R.L. VALLEE, INC., and CHARTIS SPECIALTY INSURANCE COMPANY, f/k/a AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,
Defendants.

STIPULATION OF DISMISSAL

NOW COME the plaintiff, the State of Vermont, Agency of Natural Resources and the defendant, Chartis Specialty Insurance Company, f/k/a American International Specialty Lines Insurance Company, by and through their undersigned counsel, and hereby stipulate and agree pursuant to V.R.C.P. 41(a) that this action is hereby dismissed with prejudice and that the parties shall bear their respective costs and expenses incurred in the action.

Dated: 4/5/13

By: Mark J. DiStefano

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

Mark J. DiStefano
Nicholas F. Persampieri
Assistant Attorneys General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

CHARTIS SPECIALTY INSURANCE COMPANY

Dated: 5/7/13 By: _____

F. Brian [Ted] Joslin, Esq.
Theriault & Joslin, P.C.
141 Main Street
P.O. Box 249
Montpelier, VT 05602
(802) 223-2381

Julie S. Selesnick, Esq.
Timothy P. Kilgore, Esq.
JACKSON & CAMPBELL, P.C.
1120 20th Street, N.W., South Tower
Washington, D.C. 20036
(202) 457-1600

SO ORDERED:

Dated: 5/9/13 _____

Presiding Judge
Superior Court
Washington Unit

STATE OF VERMONT
SUPERIOR COURT – ENVIRONMENTAL DIVISION

In re HCRS NOV	{	**Docket No. 16-2-13 Vtec**
(Municipal DRB Notice of Violation)	{	
	{	

Decision on Cross-Motions for Summary Judgment

Healthcare and Rehabilitation Services of Southeastern Vermont, Inc. (HCRS) appeals a January 15, 2013 decision of the Town of Westminster (Town) Development Review Board (DRB). In the decision, the DRB affirmed a Notice of Violation (NOV) issued to HCRS by the Town Zoning Administrator (ZA) for HCRS's failure to obtain a zoning permit, allegedly in violation of the Town of Westminster Zoning Ordinance (Ordinance). Through its Statement of Questions, HCRS questions whether, under state and federal law, the Town may require it to obtain a zoning permit for the use and occupancy of a state-licensed residential care home serving eight or fewer residents. HCRS also seeks costs, attorneys' fees, and civil damages from the Town. On March 12, 2013, the State of Vermont (State) filed a stipulated motion to intervene in the appeal with respect to HCRS's Questions 1 and 2, regarding state law. HCRS and the Town subsequently moved for summary judgment,[1] and the State specifically moved for summary judgment on Questions 1 and 2. We address all motions for summary judgment in this decision.

George W. Nostrand, Esq. and Richard H. Coutant, Esq. represent HCRS in this matter. The Town is represented by Robert M. Fisher, Esq., and Michael S. McGillion, Esq., and Gavin J. Boyles, Esq. represent the State.

Factual Background

To put the pending motion into context, the Court recites the following facts, which it understands to be undisputed unless otherwise noted:

1. HCRS operates Hilltop Recovery Residence (Hilltop), a state-licensed residential care home serving not more than eight residents, at 94 Westminster Terrace in the Town of Westminster, Vermont.

[1] Neither HCRS nor the Town identify the specific questions for which they seek summary judgment, and it is unclear to the Court whether they move for summary judgment on all questions or only Questions 1 and 2. This lack of clarity does not affect our final conclusion, however.

2. Hilltop serves residents who have a "handicap" or "disability" as defined in 9 V.S.A. § 4501.
3. Hilltop is located more than 1,000 feet from any other licensed residential care home or group home.
4. The property at 94 Westminster Terrace was used as a single family residence at the time of its sale to HCRS on December 6, 2011.

Discussion

HCRS appeals a January 15, 2013 DRB decision affirming an NOV issued by the ZA to HCRS for failure to apply for a zoning permit to use HCRS's property at 94 Westminster Terrace as a residential care home serving eight or fewer residents. In this decision, we address motions for summary judgment filed by HCRS and the Town, in addition to the State's motion for summary judgment on HCRS's Questions 1 and 2.[2]

A trial court may only grant summary judgment to a moving party upon a showing that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); V.R.E.C.P. 5(a)(2). In this case, the parties do not raise any disputes of material fact. Instead, this matter hinges upon disputes of law, and it is therefore appropriate for summary judgment.

I. HCRS's Questions 1 and 2

Questions 1 and 2 posed by HCRS essentially ask the same question: whether the Town has the authority, specifically in light of 24 V.S.A. § 4412, to require HCRS to apply for and receive a zoning permit to operate a state-licensed residential care home serving eight or fewer residents and located more than 1,000 feet from any other residential care or group home.[3] "Under Vermont law, municipalities 'may define and regulate land development' in any

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[2] We also note that, because the state has intervened in this matter pursuant to 24 V.S.A. § 4453, the Town bears the burden of proving by a preponderance of the evidence that its challenged ordinance does not violate 24 V.S.A. § 4412(1)(G). See 24 V.S.A. § 4453.

[3] Question 1 asks, "Does the Town of Westminster have authority to require Hilltop Recovery Residence, a state licensed residential care home located more than 1,000 feet away from any other residential care home or group home, to obtain a zoning permit before it may lawfully operate?" (Appellant's Statement of Questions at 1, filed Feb. 6, 2013.) Question 2 asks, "If the Town of Westminster does not require a zoning permit for the sale and occupancy of a single family residence but requires a state licensed residential care home to obtain a zoning permit before it may lawfully operate, is the zoning permit requirement discriminatory and violative of the Vermont Equal Treatment of Housing Act to which all municipalities are subject pursuant to 24 V.S.A. § 4412, et seq.[?]" Id.

manner they establish in their bylaws; *however*, they may *not* enact bylaws that directly conflict with the several specified state laws relating to municipal and regional planning." In re Regan Subdivision Permit, No. 188-9-09 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Dec. 18, 2012) (Durkin, J.) (emphasis in original) (quoting 24 V.S.A. § 4410). In particular, "no bylaws shall directly conflict with sections 4412 and 4413 of [Title 24]." 24 V.S.A. § 4410.

24 V.S.A. § 4412(1)(G) states:

> A residential care home or group home to be operated under state licensing or registration, serving not more than eight persons who have a handicap or disability as defined in 9 V.S.A. § 4501, shall be considered by right to constitute a permitted single-family residential use of property, except that no such home shall be so considered if it is located within 1,000 feet of another existing or permitted such home.

(emphasis added). The parties in this case do not dispute that Hilltop is a state licensed residential care home serving not more than eight persons who have a "handicap" or "disability" as defined in 9 V.S.A. § 4501 and is not within 1,000 feet of another residential care or group home. Accordingly, the parties agree that Hilltop should be considered by right a permitted single-family residential use. HCRS's Questions 1 and 2 therefore revolve around the import of the phrase: "considered by right to constitute a permitted single-family residential use of property." 24 V.S.A. § 4412(1)(G).

Under Ordinance § 122(A), a zoning permit is required "prior to the commencement of any development" in the Town. The Ordinance definition of "development," however, excludes the continuing use or occupancy of a single-family residential structure. See State Ex. O. Hilltop was used as a single-family residence before HCRS acquired it, and its future use by HCRS is considered to be single-family residential. Thus, the acquisition of Hilltop by HCRS would not ordinarily require a zoning permit under the Ordinance.

Ordinance § 416.1(A), however, states that for residential care or group homes serving no more than eight disabled persons and not located within 1,000 feet of another such home, "[a] zoning permit shall be required." Despite this requirement, § 416.1(A) recognizes that such residential care or group homes constitute permitted single family residential uses. The Ordinance goes on to state: "The zoning permit shall not be issued until the applicant submits proof that the facility is property registered by the Vermont Department of Social and Rehabilitative Services or Department of Rehabilitation and Aging, as applicable. Site plan review is not required." Id.

The Town contends that Ordinance § 416.1(A) does not conflict with 24 V.S.A. § 4412(1)(G). The Town acknowledges that residential care homes like Hilltop are considered permitted single-family residential uses under state law and the Ordinance and that, generally, the continuation of such uses does not require a zoning permit. However, the Town argues that before it can recognize a residential care home as a permitted single-family residential use, it must receive proof from the home's owner that the home is licensed or registered by the state. To do so, the Town has opted to require the owner of such a home to apply for and receive an administrative or nondiscretionary zoning permit. The Town claims that this requirement is consistent with 24 V.S.A. § 4412(1)(G), that it is nondiscriminatory, and that it is necessary to determine whether a proposed residential care or group home is within 1,000 feet of another such home.

HCRS and the State disagree. Both HCRS and the State note that even if the ZA has no discretion over whether to grant a permit for the operation of a state-licensed residential care home like Hilltop, the requirement to submit and receive such a permit is discriminatory and treats residential care homes differently than other permitted single-family residential uses. For example, the grant of a zoning permit, even one that is nondiscretionary, can be appealed to the DRB and potentially to this Court and the Vermont Supreme Court. Thus, when the Town requires a permit for the sale or occupancy of a residential care home like Hilltop, it not only differentiates between permitted single-family residential uses, it also imposes an appreciable legal burden on the operator of such a home that is not borne by the owners of other single-family residential properties.

We agree with HCRS and the State. Ordinance § 416.1(A), while stating that state-licensed residential care homes serving eight or fewer disabled persons and not located within 1,000 of another such home are permitted single-family residential uses, treats such homes as separate and distinct uses requiring zoning permits. Ordinance § 416.1(A) violates 24 V.S.A. § 4412(1)(G). We recognize that the Town has legitimate policy reasons for requiring the owners of residential care homes to submit proof of licensure, but the Town cannot place a burden on the owners of residential care homes like Hilltop that it does not place on the owners of other single-family residential uses. Thus, we conclude that HCRS does not require a zoning permit for the use and occupancy of Hilltop, and we **VACATE** the October 31, 2012 Notice of Violation.

II. HCRS's Questions 3, 4, and 5

HCRS's Question 3 asks, "Does the State of Vermont have exclusive jurisdiction over the licensure, approval and operation of residential care homes?" (Appellant's Statement of Questions at 1, filed Feb. 6, 2013.) Because we conclude above that the Town cannot require HCRS to apply for and receive a zoning permit for the use and occupancy of Hilltop under 24 V.S.A. § 4412(1)(G), we do not reach the significantly wider question presented in HCRS's Question 3, which in any case so far exceeds the scope of this case as to constitute a request for an impermissible advisory opinion. See, e.g., Chase v. State, 2008 VT 107, ¶ 13, 184 Vt. 430 (court lacks constitutional authority to render an advisory opinion). Accordingly, we **DISMISS** Question 3.

HCRS's Questions 4 and 5 concern violations of the Federal Fair Housing Act and damages, penalties, and attorneys' fees under that Act.[4] We note that neither HCRS nor the Town mentions the Federal Fair Housing Act in their motions for summary judgment or their responsive filings. In any case, we need not reach Questions 4 and 5. The Town's alleged violations of the Federal Fair Housing Act are not within this Court's jurisdiction to consider, nor do we have the authority to assess civil damages or penalties under that Act. See 4 V.S.A. § 34 (outlining the Environmental Division's limited jurisdiction over claims arising under certain enumerated statutes). We therefore **DISMISS** HCRS's Questions 4 and 5.[5]

Conclusion

For the reasons stated above, we **GRANT** HCRS and the State summary judgment on HCRS's Questions 1 and 2. We conclude that Ordinance § 416.1(A) violates 24 V.S.A. § 4412(1)(G) and that HCRS does not need a zoning permit to operate Hilltop. Accordingly, we

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[4] Question 4 asks, "If a state licensed residential care home is required by the Town of Westminster to obtain a zoning permit before it may lawfully operate does the requirement of a zoning permit constitute a discriminatory housing practice in violation of the Federal Fair Housing Act, 42 U.S.C. § 3601, et seq.?" (Appellant's Statement of Questions at 1, filed Feb. 6, 2013.) Question 5 asks, "Is the Town of Westminster liable for damages, penalties and reasonable attorneys fees by engaging in discriminatory housing practices directed toward Hilltop Recovery Residence in violation of the Federal Fair Housing Act, 42 U.S.C. § 3601, et seq.?" Id.

[5] We also note that on page 9 of HCRS's motion for summary judgment, HCRS states that it seeks costs and attorneys fees under 9 V.S.A. § 4506 for the Town's alleged violation of 9 V.S.A. § 4503(a)(12). As with HCRS's federal law claims, we questions whether we have the jurisdiction to review such a claim. In any case, HCRS failed to raise any questions relating to 9 V.S.A. § 4506 in their Notice of Appeal or Statement of Questions. In an appeal before this Court, "[t]he appellant may not raise any question on the appeal not presented in the statement [of questions] as filed." V.R.E.C.P. 5(f). For these reasons, we do not address HCRS's claims under 9 V.S.A. § 4506.

VACATE the October 31, 2012 Notice of Violation. In addition, pursuant to 24 V.S.A. § 4453, we order the Town to amend its Ordinance to conform to 24 V.S.A. § 4412(1)(G) within a reasonable amount of time.[6] Because we **DISMISS** HCRS's Questions 3, 4, and 5, this decision concludes the pending appeal. A Judgment Order accompanies this decision.

Done at Berlin, Vermont this 19th day of August, 2013.

Thomas G. Walsh, Environmental Judge

[6] In its motion for summary judgment, the State asks this Court to strike Ordinance § 416.1(A). We note, however, that 24 V.S.A. § 4453 requires this Court to grant a municipality a reasonable period of time to correct any violation of 24 V.S.A. § 4412(1).

STATE OF VERMONT
SUPERIOR COURT - ENVIRONMENTAL DIVISION

In re HCRS NOV	{	**Docket No. 16-2-13 Vtec**
(Municipal DRB Notice of Violation)	{	
	{	

Judgment Order

In this case, Healthcare and Rehabilitation Services of Southeastern Vermont, Inc. (HCRS) appeals a January 15, 2013 decision of the Town of Westminster (Town) Development Review Board (DRB). In the decision, the DRB affirmed a Notice of Violation (NOV) issued to HCRS by the Town Zoning Administrator (ZA) for HCRS's failure to obtain a zoning permit, allegedly in violation of the Town of Westminster Zoning Ordinance (Ordinance) § 416.1(A). Through its Statement of Questions, HCRS questions whether, under state and federal law, the Town may require it to obtain a zoning permit for the use and occupancy of a state-licensed residential care home serving eight or fewer residents and located more than 1,000 feet from another state licensed residential care home. On March 12, 2013, the State of Vermont (State) filed a stipulated motion to intervene in the appeal with respect to HCRS's Questions 1 and 2, regarding state law. HCRS and the Town subsequently moved for summary judgment, and the State specifically moved for summary judgment on Questions 1 and 2.

For the reasons explained in our decision dated August 19, 2013, we conclude that Ordinance § 416.1(A) violates 24 V.S.A. § 4412(1)(G) and that HCRS does not require a zoning permit for the use and occupancy of its Hilltop Recovery Residence. We therefore **VACATE** the October 31, 2012 NOV, and we grant the Town a reasonable period of time to bring its Ordinance into compliance with state law. Because we **DISMISS** HCRS's remaining questions in this appeal, this completes the current proceedings before this Court.

Done at Berlin, Vermont, this 19th day of August, 2013.

Thomas G. Walsh, Environmental Judge

IN THE UNITED STATES DISTRICT COUT
FOR THE DISTRICT OF VERMONT

State of Vermont)
Plaintiff,)
)
v.)
) CIVIL ACTION NO.
Vermont Asbestos Group, Inc.) 2:13-cv-239

COMPLAINT

The State of Vermont, Agency of Natural Resources, by and through the Attorney General, William H. Sorrell, states:

NATURE OF ACTION

1. This is a civil action brought by the State of Vermont under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607 and Chapter 159, Waste Management, and Section 8221 of Title 10 of the Vermont Statutes Annotated. The State seeks to recover response costs incurred and to be incurred in response to the release and/or threatened release of hazardous substances and hazardous materials from the Vermont Asbestos Group Mine Site located in the Towns of Lowell and Eden, Vermont (the Site). The State also seeks injunctive relief requiring Vermont Asbestos Group, Inc. to perform response actions at the Site and a declaration that it is legally responsible in any subsequent action for response costs that may be incurred by the State in connection with the Site.

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05609

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 107 of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b) and 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1367 this Court has supplemental jurisdiction over claims arising under Vermont law.

3. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b) and (c), because the releases or threatened releases of hazardous substances that gave rise to the claim occurred in this district.

DEFENDANT

4. Vermont Asbestos Group, Inc. (the Defendant) is a corporation established under the laws of the State of Vermont with a mailing address of 120 Northgate Plaza, Morrisville, Vermont 05661.

GENERAL ALLEGATIONS

5. The Site is a former asbestos mine that operated from at least the 1930s to 1993. The Defendant is the current owner and has owned the Site since 1975. The Defendant operated the mine from 1975 to 1993.

6. From 1975 to 1993, the Defendant mined and milled asbestos at the Site.

7. The Defendant's mining and milling operation left behind acres of asbestos-containing waste rock and mine tailings, some of which are concentrated in piles on the Site. Asbestos is a hazardous substance within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) and hazardous material under 10 V.S.A. § 6602(16)(A)(i).

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8. Some of the piles have eroded significantly since 1993, carrying asbestos-containing material into areas and waterways at and around the Site.

9. In 2005, the Vermont Agency of Natural Resources Department of Environmental Conservation (DEC) conducted studies to determine the impact of the asbestos-containing mine tailings on area watersheds. The studies found hazardous substances at the Site, as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) and hazardous materials as defined in 10 V.S.A. § 6602(16)(A)(i) and Section 7-103 of the Vermont Hazardous Waste Management Regulations, including asbestos fibers in streams and tributaries; magnesium and nickel in surface water samples; and chromium, nickel, and iron in sediment samples.

10. The United States Environmental Protection Agency (EPA) determined that certain response actions were necessary to respond to the release or threatened release of hazardous substances from the Site and the resulting harm or threat of harm to the public health or welfare of the environment and undertook removal action pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. The removal action included construction of erosion mitigation structures including deposition basins, water-bars, diversion trenches, and berms to prevent contaminated runoff from reaching off-site water bodies. EPA incurred costs associated with the undertaking of the response actions.

11. The State also incurred costs of response to respond to the releases or threatened releases of hazardous substances and hazardous materials at the Site. The erosion mitigation structures have required and will continue to require operation and maintenance, which has been performed by the Defendant and overseen by the State. The State has incurred and will continue to incur costs in overseeing the operation and maintenance of these erosion mitigation structures.

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FIRST CLAIM FOR RELIEF

12. The allegations set forth in Paragraphs 1 through 11 are incorporated herein by reference.

13. The Site is a "facility" within the meaning of Section 101(9) and 107(a) of CERCLA, 42 U.S.C. § 9601(9) and § 9607(a).

14. Actual or threatened "releases" of "hazardous substances" within the meaning of Section 101(14) and (22), and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14) and (22) and § 9607(a), have occurred and continue to occur into the environment and at and from the Site.

15. At times relevant to this action, hazardous substances were disposed of at the Site, as the term "disposal" is defined in Section 101(29) of CERCLA, 42 U.S.C. § 9601(29).

16. The Defendant is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

17. The Defendant is the owner and operator of the Site pursuant to Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), and was the owner and/or operator pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2) at the time of disposal of hazardous substances at the facility from which there was a release and/or threatened release of hazardous substances.

18. The State has incurred and will continue to incur "response costs" within the meaning of Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), for actions taken in response to the release or threatened release of hazardous substances at the Site. The State has incurred at least $174,620 in unreimbursed response costs at the Site.

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19. The State's response actions in connection with the Site were not inconsistent with the National Oil and Hazardous Substance Pollution Contingency Plan, 40 C.F.R. Part 300.

20. The Defendant is jointly and severally liable to the State for all unrecovered response costs incurred and to be incurred by the State in connection with the Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

21. The releases and threatened releases of hazardous substances at or from the Site have caused and will cause the State to incur response costs in connection with the Site in addition to those incurred to date. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), in any action for recovery of response costs, the State is entitled to declaratory judgment on liability for response costs that will be binding on any subsequent action or actions to recover further response costs.

22. Continued response actions to maintain the integrity of the erosion mitigation structures are necessary to abate the dangers or threat at the Site.

23. Pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a)(1), the Defendant is liable to perform the operation and maintenance of the erosion mitigation structures at the Site, which is necessary to abate the endangerment to the public health or welfare or the environment caused by the Site.

SECOND CLAIM FOR RELIEF

24. The allegations set forth in Paragraphs 1 through 23 are incorporated herein by reference.

25. The unauthorized release of hazardous materials into the surface or groundwater, or onto the land of the state is prohibited under 10 V.S.A. § 6616.

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26. The Defendant is an owner and operator of a facility where, during its ownership or operation, there existed an unauthorized release or a threatened release of hazardous materials into the surface or groundwater or lands of the state. The Defendant is strictly liable under 10 V.S.A. § 6615 for abatement of the release or threatened release.

27. Abatement of all releases and all threatened releases is necessary to protect the public health and the environment.

28. The State has determined that in order to abate the releases or threatened releases at the Site the integrity of the erosion mitigation structures constructed by EPA must be maintained.

29. Pursuant to 10 V.S.A. §§ 6615 and 8221, the Defendant is liable to perform the operation and maintenance of the erosion mitigation structures, which is necessary to abate the endangerment to the public health or welfare or the environment caused by the Site.

30. The release and threatened release of hazardous materials at the Site during the Defendant's ownership or operation has caused and will cause further governmental expenditures for the investigation, abatement, mitigation, and removal of hazards to human health and the environment, and enforcement of this action.

31. Pursuant to 10 V.S.A. §§ 6615 and 8221, the Defendant should be ordered to reimburse the State for all expenditures it has incurred or may incur for the investigation, abatement, mitigation, or removal of hazardous material contamination at the Site, and enforcement of this action.

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THIRD CLAIM FOR RELIEF

32. The allegations set forth in Paragraphs 1 through 31 are incorporated by reference.

33. The unauthorized release of hazardous materials at the Site during the Defendant's ownership or operation has destroyed, damaged or injured public property. The Defendant's unauthorized discharge of waste into waters of the State during the Defendant's ownership or operation has destroyed, damaged or injured public property.

34. Pursuant to 10 V.S.A. §§ 6610a, 1274 and 8221, the Defendant should be ordered to compensate the State for public property destroyed, damaged or injured by the unauthorized release of hazardous materials and/or the unauthorized discharge of waste into waters of the State during the Defendant's ownership or operation of the Site.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, the State of Vermont, respectfully requests that the Court:

A. Order the Defendant to perform the operation and maintenance of the erosion mitigation structures constructed by EPA during the 2007 and 2008 removal action at the Site and any necessary future response actions.

B. Enter judgment in favor of the State of Vermont, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) and 10 V.S.A. § 6615, holding the Defendant liable for all unreimbursed costs incurred and to be incurred by the State at the Site, plus interest accrued;

C. Enter a declaratory judgment regarding the Defendant's liability for response costs that will be binding in any subsequent action or actions to recover further response costs regarding the Site;

D. Enter judgment in favor of the State of Vermont, pursuant to 10 V.S.A. §§ 6610a, 1274 and 8221, for compensation for destruction, damage or injury to public property destroyed or damaged during Defendant's ownership or operation of the Site;

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E. Award the State of Vermont the costs of this action; and

F. Order such other and further relief as the Court deems appropriate.

DATED at Montpelier, Vermont this 30th day of August 2013.

Respectfully submitted,

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

Thea Schwartz, Esq.
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
802-828-3186
tschwartz@atg.state.vt.us

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA, and THE STATE OF VERMONT Plaintiffs, v. VERMONT ASBESTOS GROUP, Inc. Defendant.	Civil Action No. _____ CONSENT DECREE

TABLE OF CONTENTS

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), concurrent with the lodging of this Consent Decree, filed a complaint against the Vermont Asbestos Group, Inc. ("Vermont Asbestos Group" or "VAG") in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9606 and 9607, as amended ("CERCLA"), seeking action to address the release or threatened release of hazardous substances related to the Vermont Asbestos Group Mine Site in the Towns of Eden and Lowell, Vermont ("the Site") and reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the Site.

B. On August 12, 2008, the State of Vermont Agency of Natural Resources, by and through the Attorney General, William H. Sorrell, brought a civil action against the Vermont Asbestos Group in Vermont Superior Court for abatement, cleanup of hazardous waste and water pollution, cost recovery, civil environmental penalties and for injury to public property pursuant to Title 10 of the Vermont Statutes Annotated, including Chapter 159, Waste Management and Chapter 47, Water Pollution Control, and the common law and the general equitable jurisdiction of the court. *State of Vermont, Agency of Natural Resources v. Vermont Asbestos Group, Inc.*, Docket No. 532-8-08 Wncv. The State has also filed a complaint against Vermont Asbestos Group in this Court pursuant to Section 107 of CERCLA seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the Site, and certain appended claims that it brought against Vermont Asbestos Group in *State of Vermont, Agency of Natural Resources v. Vermont Asbestos Group, Inc.*, Docket No. 532-8-08 Wncv.

C. In performing response actions related to the Site, both the United States and the State (collectively "Plaintiffs") have incurred and will continue to incur response costs.

D. The United States alleges that Vermont Asbestos Group ("Settling Defendant"), is a liable person pursuant to Sections 101(21) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(21) and 9607(a), and jointly and severally liable for response costs incurred and to be incurred at the Site.

E. The State alleges that Vermont Asbestos Group is a liable party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) and 10 V.S.A. § 6615.

F. The United States and the State have reviewed the Financial Information submitted by Settling Defendant to determine whether it is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, the United States has determined that Settling Defendant has a limited financial ability to pay for response costs incurred and to be incurred, and the State concurs in this determination.

G. EPA incurred approximately $4.1 million in response costs at the Site as of September 18, 2012. As of February 1, 2013, EPA has received $674,200, as reimbursement for Site costs

pursuant to a settlement agreement with G-I Holdings, Inc., the successor to a prior owner of the Site. EPA expects an additional future payment in the amount of $57,800 from G-I Holdings, Inc. pursuant to the settlement agreement as reimbursement for Site costs. After this payment, EPA's unreimbursed costs are anticipated to be $3,360,082.60.

H. The State incurred approximately $461,420 in response costs at the Site as of September 30, 2012. As of February 1, 2013, the State has received $286,800 in reimbursement pursuant to a settlement agreement with G-I Holdings, Inc. The State's total unreimbursed costs at the Site are approximately $174,620. Based upon current information, the State estimates that it will incur at least $28,000,000 in future response costs at the Site.

I. Settling Defendant does not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaints.

J. The Plaintiffs and Settling Defendant ("the Parties") agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of these actions pursuant to 28 U.S.C. §§ 1331, 1367 and 1345, and 42 U.S.C. §§ 9607 and 9613(b), and also has personal jurisdiction over Settling Defendant.

2. Settling Defendant consents to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

3. This Consent Decree is binding upon Plaintiffs and Settling Defendant and their successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "ANR" shall mean the State of Vermont Agency of Natural Resources, including the Vermont Department of Environmental Conservation and any successor departments, agencies or instrumentalities of the State.

b. "ANR Activities" shall mean all actions performed by ANR necessary to oversee Settling Defendant's operation and maintenance of the EPA Removal Structures (defined below) as provided for in Section VIII (Operation and Maintenance) of this Consent Decree and all actions performed by ANR necessary for operation and maintenance of the EPA Removal Structures.

c. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

d. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

e. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

f. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies, or instrumentalities of the United States.

g. "Effective Date" shall mean the date upon which this Consent Decree is entered, or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

h. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

i. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

j. "EPA Removal Structures" shall mean the sedimentation basins, storage area, berms, or other structures installed as part of the Mine Site Removal Action.

k. "EPA Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through September 18, 2012, plus any applicable Interest on all such costs through such date.

l. "Financial Information" shall mean the financial information submitted by Settling Defendant to EPA, an index of which is included in Appendix B to this Consent Decree.

m. "G-I" shall mean G-I Holdings, Inc. and any authorized representatives of G-I Holdings, Inc.

n. "G-I Trustee" shall mean the trustee, appointed by G-I Holdings, Inc. pursuant to the consent decree entered in the case captioned United States et al. v. G-I Holdings, Inc., et al., Adversary Proceeding No. 08-2531 (RG) (D.N.J. Bankr.).

o. "G-I Work" shall mean the injunctive relief activities required under the consent decree entered in the case captioned United States et al. v. G-I Holdings, Inc., et al., Adversary Proceeding No. 08-2531 (RG) (D.N.J. Bankr.) and all attachments to that consent decree.

p. "Institutional Controls" or "ICs" shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (a) limit land, water, and/or resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site; (b) limit land, water, and/or resource use to implement, ensure non-interference with, or ensure the protectiveness of the response actions; and/or (c) provide information intended to modify or guide human behavior at or in connection with the Site.

q. "Insurance Policies" shall mean any liability or indemnity insurance policies issued to or for the benefit of Settling Defendant, its employees, its officers and directors, or any predecessor or successor in interest, or affiliate to Settling Defendant, including all policies for which Settling Defendant or its predecessor, successor, or affiliate is an "insured," "named insured," or "additional insured," and including all policies for primary, excess, pollution legal liability, and environmental impairment liability. This includes, but is not limited to, the list of insurance policy numbers included in Appendix C to this Consent Decree.

r. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

s. "Mine Site Removal Action" shall mean all activities undertaken by the United States and the State as part of the 2007 through 2008 EPA removal action at the Site.

t. "Operation and Maintenance" shall mean all activities that Settling Defendant is required to perform under this Consent Decree as set forth in Section VIII (Operation and Maintenance) and Appendix D (Operation and Maintenance Plan).

u. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

v. "Parties" shall mean the United States, the State of Vermont, and the Vermont Asbestos Group.

w. "Plaintiffs" shall mean the United States and the State of Vermont.

x. "Property" shall mean the portion of the Site owned by Settling Defendant including any contiguous land acquired by VAG after lodging this Consent Decree.

y. "Proprietary Controls" shall mean easements or covenants running with the land that (a) limit land, water, or resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded by the owner in the appropriate land records office.

z. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

aa. "Settling Defendant" shall mean the Vermont Asbestos Group, Inc.

bb. "Site" shall mean the Vermont Asbestos Group Mine Site, which is located in the Towns of Eden and Lowell, Vermont and encompasses approximately 1,673 acres including all areas where mining and milling activities took place, and surrounding property where any hazardous substances originating at the mine have been deposited, stored, disposed of, placed, or otherwise become located, as generally depicted on the VAG Site Map, included in Appendix A. The Site shall also include any adjacent land owned by Leonard P. Prive in Eden, Vermont that has been or will be acquired by Settling Defendant that contains hazardous substances originating from the mine.

cc. "State" shall mean the State of Vermont, including its departments, agencies and instrumentalities.

dd. "State Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the State of Vermont incurs at or in connection with the Site after September 30, 2012.

ee. "State Past Response Costs" shall mean all costs, including, but not limited to direct and indirect costs, that the State of Vermont has incurred at or in connection with the Site through September 30, 2012 plus Interest on all such costs through such date.

ff. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

gg. "VAG" and "Vermont Asbestos Group" shall mean the Vermont Asbestos Group, Inc.

hh. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C.§ 6903(27) and 10 V.S.A. § 6602(2); and (4) any "hazardous material" under 10 V.S.A. § 6602(16).

V. STATEMENT OF PURPOSE

5. By entering into this Consent Decree, the mutual objective of the Parties is to avoid litigation by requiring Settling Defendant (i) to use "best efforts" to obtain any available monetary indemnification or recovery from all applicable Insurance Policies and pay the United States and the State from such recoveries; (ii) to make cash payments to the State; (iii) perform Operation and Maintenance at the Site for a period of 10 years and maintain funding to ensure Operation and Maintenance can be performed; and (iv) to resolve its alleged civil liability as provided in the Covenants Not to Sue by United States and the State in Section XIII, and subject to the Reservations of Rights by United States and the State in Section XIV.

VI. CONFESSION AND SATISFACTION OF JUDGMENT

6. Settling Defendant agrees and confesses to entry of a judgment in favor of the United States in the amount of $3,360,082.60 for EPA Past Response Costs and in favor of the State in the amount of $174,620 for State Past Response Costs. Settling Defendant agrees and confesses to entry of a judgment against itself and in favor of the State for State Future Response Costs estimated to be at least $28,458,399. This judgment shall remain in effect until Settling Defendant complies with all requirements in this Consent Decree. Such judgment shall be satisfied through (i) recovery of insurance proceeds from any Insurance Policies as specified in Paragraph 7 and (ii) cash payments by Settling Defendant as specified in Paragraph 13.

7. Settling Defendant agrees to use "best efforts" to satisfy the foregoing judgment by obtaining any available indemnification or recovery from all applicable Insurance Policies held by VAG, its predecessors in interest, or affiliates. For the purposes of this subparagraph, "best efforts" includes cooperating with and assisting the United States and State in (i) asserting and pursuing claims for coverage under those policies and (ii) negotiating or litigating to obtain the most favorable resolution of claims under those policies as is reasonable.

8. Settling Defendant shall submit any proposed settlement of insurance claims to the United States and the State for approval.

9. Settling Defendant may retain from any insurance proceeds reasonable attorneys' fees they incur and pay after the Effective Date in pursuing claims against the applicable insurers, provided, however, that such attorneys' fees (i) shall not exceed five percent of the total monetary recovery from such party or parties, (ii) are substantiated in writing by Settling Defendant's

counsel to the United States and the State; and (iii) are confirmed in writing by the United States to be the correct amount prior to such disbursements.

10. The amount remaining after such reasonable attorneys' fees have been deducted from the insurance recovery shall be paid consistent with the instructions in Paragraph 14 (Payment Instructions) and as follows:

a. For the Lexington Insurance Company and London Market policies, 55 percent to the United States and 45 percent to the State; and

b. For all other insurance policies, 50 percent to the United States and 50 percent to the State.

11. Settling Defendant shall make all reasonable attempts to have the United States' and the State's portion of the insurance proceeds paid by the insurers directly to the United States and the State respectively. If it is not practicable for the insurers to pay the United States or the State directly, then Settling Defendant shall arrange for insurance proceeds to be paid to Settling Defendant's counsel who will forward to the United States and the State their respective portions identified in the preceding paragraph within three days of receiving such proceeds.

12. Settling Defendant consents to the filing by the United States and the State in the Recorder's Office in the Towns of Eden and Lowell, Vermont, as applicable, of notices of judgment liens regarding the mine Property and the buildings owned by Settling Defendant located at 230 Wilkins Street, Morrisville, Vermont based on the respective judgments in favor of the United States and the State. The amount of the United States' Judgment Lien shall be $3,360,082.60. The amount of the State's Judgment Lien shall be $28,458,399.

VII. REIMBURSEMENT OF RESPONSE COSTS

13. Cash Payments.

a. Within 30 days of entry of this Consent Decree, Settling Defendant shall pay to the State $5,000. Additional payments of $5,000 shall be made annually for nine years thereafter on the anniversary of the date the first payment is made.

b. Additional cash payments shall be made to the United States and the State from any insurance proceeds recovered pursuant to Paragraphs 6-11 and shall be paid in accordance with Paragraph 14.

14. Payment Instructions.

a. All payments to the United States shall be made at https://www.pay.gov to the Department of Justice account in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the District of Vermont following lodging of the Consent Decree. The payment instructions provided by the Financial Litigation

Unit shall include a Consolidated Debt Collection System ("CDCS") number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. All payments shall reference the CDCS Number, Site/Spill ID Number 01ED, and DOJ Case Number 90-11-3-07425/3.

b. At the time of each payment to the United States, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XVIII (Notices and Submissions). Settling Defendant shall also send such notice to the Regional Financial Management Officer and to EPA's Cincinnati Finance Center at the addresses specified below. Such notice shall reference the CDCS Number, Site/Spill ID# 01ED and the DOJ Case # 90-11-3-07425/3.

As to the Regional Financial Management Officer:

Shannon Schofield, Regional Financial Management Officer
U.S. EPA Region 1
Five Post Office Square, Suite 100
Mailcode: OARM16-1
Boston, MA 02109-3912

As to EPA's Cincinnati Finance Center:

U.S. Environmental Protection Agency
Cincinnati Finance Center
26 Martin Luther King Dr.
Cincinnati, Ohio 45268
Email: acctsreceivable.cinwd@epa.gov

c. The total amount of each payment paid to the United States pursuant to Section VI (Confession and Satisfaction of Judgment) and Paragraph 15 (Conveyance of the Property) shall either be deposited in the Vermont Asbestos Group Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or deposited in the EPA Hazardous Substance Superfund.

d. Payments to the State shall be made by official bank check made payable to "State of Vermont – Environmental Cleanup Fund," referencing the name and address of the party making the payment, and the Site No. 1995-1825. The check shall be sent to:

John Schmeltzer, Environmental Analyst
Vermont Agency of Natural Resources Department of Environmental Conservation
Waste Management and Prevention Division
1 National Life Dr - Davis 1
Montpelier, VT 05620-3704

e. The total amount of each payment paid to the State pursuant shall be deposited in the Department of Environmental Conservation Miscellaneous Settlements Fund Vermont Asbestos Group Mine Site Account, which shall be used solely for costs associated with the Vermont Asbestos Group Mine Site and for no other purpose.

15. Conveyance of the Property.

a. Any sale, lease, or other transfer (collectively, "Conveyance") of the Property, including any portion thereof or interest therein, (including any timber, educational, mineral, or recreational interest) must be approved by EPA in writing after a reasonable opportunity for review and comment by the State.

b. Settling Defendant shall submit to EPA, at least 30 days prior to the date of the Conveyance of the Property, a notice of the Conveyance, Settling Defendant's calculation of the net Conveyance proceeds, and all documentation regarding the values used in the calculation, including: (i) copies of all documents to be executed regarding the Conveyance; (ii) documentation of the amounts of closing costs to be paid by each party to the Conveyance; (iii) documentation of any broker's fees regarding the Conveyance; and (iv) documentation of the amounts of state and/or municipal transfer taxes to be paid regarding the Conveyance. Settling Defendant may request that EPA approve the calculation of net Conveyance proceeds prior to the Conveyance.

c. Settling Defendant shall retain $75,000 of Net Conveyance Proceeds from the first Conveyance of Property after entry of this Consent Decree by the Court. After the first Conveyance of Property, the following distribution of Net Conveyance Proceeds shall apply. At the time of the receipt of the Net Conveyance Proceeds, Settling Defendant shall pay to the United States 45% and the State 45% of the Net Conveyance Proceeds of the Conveyance of the Property. "Net Conveyance Proceeds" shall mean, for purposes of this Paragraph, all monetary consideration received by Settling Defendant from the Conveyance of the Property, not including: (i) any reasonable closing costs paid by Settling Defendant regarding the Conveyance; (ii) any reasonable broker's fees paid by Settling Defendant regarding the sale; and (iii) any state and/or municipal transfer taxes regarding the Conveyance. Payment to EPA and the State shall be made in accordance with Paragraph 14 of this Consent Decree.

d. Settling Defendant shall not convey any Property prior to executing and recording Propriety Controls as set forth in Paragraph 22(c) of this Consent Decree or prior to entry of this Consent Decree by the Court.

VIII. OPERATION AND MAINTENANCE

16. Pursuant to 10 V.S.A. Chapter 159, Settling Defendant shall perform for a period of ten years commencing on the Effective Date of this Consent Decree all actions necessary to implement the Operation and Maintenance Plan set forth in the April 10, 2009 letter from Gary Nolan to the State of Vermont Department of Environmental Conservation and the accompanying

chart that collectively constitute Appendix D of this Consent Decree and as may be modified at the direction of the Department of Environmental Conservation.

17. Selection of Contractor for Operation and Maintenance. Settling Defendant shall submit to the State the name(s), contact information, and qualifications of its selected Contractor(s) for Operation and Maintenance, and any subcontractor(s), within 30 days of the Effective Date. Settling Defendant shall not retain such Contractor(s) for Operation and Maintenance without first receiving written approval from the State.

18. The State retains the right to disapprove of the contractors and/or subcontractors to be retained by Settling Defendant. If the State disapproves of a selected contractor, Settling Defendant shall submit to the State a different contractor for State approval, and shall notify the State of that contractor's name, contact information, and qualifications within 30 days of the disapproval.

19. Selection of Project Coordinator for Operation and Maintenance. Within 14 days after the Effective Date, Settling Defendant shall submit a Project Coordinator for Operation and Maintenance who shall be responsible for administration of the Operation and Maintenance. Settling Defendant shall submit to the State the designated Project Coordinator for Operation and Maintenance's name, contact information, and qualifications.

a. The State retains the right to disapprove of the designated Project Coordinator for Operation and Maintenance. If the State disapproves of the designated Project Coordinator for Operation and Maintenance, Settling Defendant shall within 14 days following the disapproval submit a different Project Coordinator for Operation and Maintenance for State approval and shall notify the State of that person's name, contact information, and qualifications.

b. Within ten days of the State's approval of the Project Coordinator for Operation and Maintenance, Settling Defendant shall be responsible for performance of the Operation and Maintenance as set forth in Appendix D, and the Project Coordinator for Operation and Maintenance shall be present on Site or readily available during such performance.

c. Receipt by the Project Coordinator for Operation and Maintenance of any notice or communication from the State relating to this Consent Decree or the Operation and Maintenance shall constitute receipt by Settling Defendant.

20. Settling Defendant shall have the right, subject to Paragraph 19, to change its designated Project Coordinator. Settling Defendant shall notify the State 14 days before such a change is made, including the name and qualifications of the proposed new Project Coordinator. The initial notification may be made orally, but shall be promptly followed by a written notice.

IX. DESIGNATION AND AUTHORITY OF STATE PROJECT MANAGER

21. Designation of and Authority of State Project Manager. The State has designated John Schmeltzer of the Vermont Department of Environmental Conservation, Site Management

Section as the State Project Manager. The State Project Manager shall be responsible for overseeing Settling Defendant's performance of Operation and Maintenance as set forth in Section VIII. Absence of the State Project Manager from the Site shall not be cause for stoppage of performance of Operation and Maintenance unless specifically directed by the State Project Manager. The State shall have the sole right to change its designated State Project Manager without consultation with the Settling Defendant. If the State Project Manager is changed Settling Defendant shall be notified in writing.

X. ACCESS AND INSTITUTIONAL CONTROLS

22. If the Site, or any other real property where access or land/water use restrictions are needed, is owned or controlled by Settling Defendant:

a. Settling Defendant shall, commencing on the date of lodging of the Consent Decree, provide the United States, the State, the G-I Trustee, and their representatives, contractors, and subcontractors, with access at all reasonable times to the Site, or such other real property, to conduct any activity regarding the Consent Decree including, but not limited to, the following activities:

(1) Monitoring the Operation and Maintenance;

(2) Verifying any data or information submitted to the United States or the State;

(3) Conducting investigations regarding contamination at or near the Site;

(4) Obtaining samples;

(5) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or their agents;

(6) Assessing the need for, planning, or implementing additional response actions at or near the Site;

(7) Assessing Settling Defendant's compliance with the Consent Decree;

(8) Determining whether the Site or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Consent Decree; and

(9) Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls.

b. commencing on the date of lodging of the Consent Decree, Settling Defendant shall not use the Site, or such other real property, in any manner that EPA or the State determines will pose an unacceptable risk to human health or to the environment due to exposure

to Waste Material or interfere with or adversely affect the implementation, integrity, or protectiveness of the past and/or future response actions or increase the response action costs. The restrictions, and related obligations, shall include, but not be limited to:

(1) taking reasonable steps to prohibit public access to the Site or such other property, including restricting the public from entering for purposes of mineral collecting, hunting, hiking, ATV riding, snowmobiling, snowboarding, skiing or any other recreational activity or for any other reason, except that Settling Defendant may allow access to the Site for (i) public or private research and education that is conducted in accordance with a health and safety plan that complies with 29 C.F.R. 1910.120 and for which prior written approval has been obtained from the State Project Manager, and (ii) Lenard P. Prive to use any property that he conveys to VAG after entry of this Consent Decree for purposes consistent with his existing use, which include recreational activities;

(2) posting the Site with "No Trespassing" signs and taking all necessary legal steps to ensure that access to the Site has been limited until otherwise directed by the State;

(3) prohibiting the occupation of any buildings or structures within the fenced area of the Site and prohibiting the demolition, recycling, or scrap of any building or structure within the fenced area of the Site without a work plan approved by the State;

(4) prohibiting the off-site transport, sale, or use of the Waste Material, including mine tailing and crushed and blasted stone/rock from the Site;

(5) not undertaking and restricting any activities that would interfere with or compromise the integrity of the land that is subject to response actions. Prohibited activities include construction of buildings or facilities, drilling drinking water well(s), and any use or disturbance of the groundwater. Construction and/or disturbance is prohibited on the Site without prior written approval of the State;

(6) undertaking of any activities at the Site must comply with applicable federal, state, and local laws and regulations. This includes applicable health and safety requirements for all workers; and

(7) with respect to tree harvesting, including timber, non-timber, and sugar harvesting, the following additional restrictions apply:

(i) The party performing the tree harvesting shall hire an environmental consultant qualified with monitoring and mitigating asbestos hazards. The environmental consultant shall work with the consulting forester and party performing the tree harvesting to develop a plan that addresses worker

safety and steps taken to prevent the spread of contamination through airborne or erosion transport and the transport of the harvest to offsite locations.

(ii) The tree harvesting plan must be submitted to the State Project Manager. The tree harvesting plan must be reviewed and approved by the State Project Manager, after consultation with the Vermont Department of Forests, Parks and Recreation. All timber harvesting must comply with the Acceptable Management Practices (AMPs) and the acceptable standards for forest management as set forth by the Department of Forests, Parks and Recreation;

(iii) No timber harvesting activities may occur unless the ground is frozen and adequate snow cover is on the ground so the soil is not exposed and is not disturbed by harvesting activities; and

(iv) Buyers of wood products originating from the Site must be notified about the exposure potential. Buyers include receiving yards, saw mills, biomass facilities, and individuals. A copy of these notifications must be sent to the State Project Manager.

c. Settling Defendant shall:

(1) execute and record in the Recorder's Office in the Towns of Eden and Lowell, Vermont Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the Consent Decree including, but not limited to, those activities listed in Paragraph 22.a; and (ii) grant the right to enforce the land/water use restrictions set forth in Paragraph 22.b, including, but not limited to, the specific restrictions listed therein, as further specified in this Paragraph 22.c. The Proprietary Controls shall be granted to one or more of the following persons, as determined by the State: (i) the State and its representatives; (ii) the G-I Trustee; and/or (iii) other appropriate grantees. The Proprietary Controls shall include a designation that EPA (and/or the State as appropriate) is a third-party beneficiary, allowing EPA to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property.

(2) within 30 days after the Effective Date, submit to the State for review and approval regarding such real property: (i) draft Proprietary Controls that are enforceable under state law; and (ii) a current title insurance commitment or other evidence of title acceptable to the State, that shows title to the land affected by the Proprietary Controls to be free and clear of all prior liens and encumbrances (except when the State waives the release or subordination of such prior liens or encumbrances or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances).

(3) within 15 days after the State's approval and acceptance of the Proprietary Controls and the title evidence, update the title search and, if it is determined that nothing has occurred since the effective date of the commitment, or other title evidence, to affect the title adversely, record the Proprietary Controls with the appropriate land records office. Within 30 days after recording the Proprietary Controls, Settling Defendant shall provide the State with a final title insurance policy, or other final evidence of title acceptable to the State, and a certified copy of the original recorded Proprietary Controls showing the clerk's recording stamps.

23. Until Settling Defendant has met the requirements of Section VIII (Operation and Maintenance) and Section VII (Reimbursement of Response Costs), Settling Defendant agrees to: (i) comply with all requirements necessary to maintain its corporate existence in good standing, including but not limited to filing any reports and paying any fees with the State or other authorities to maintain Settling Defendant's corporate status in good standing, and (ii) pay all federal, state and/or local taxes assessed on the Property.

24. The State and the United States shall not be responsible for any harm to Settling Defendant or other person arising out of or resulting from any act or omission by Settling Defendant or other person in the course of a visit to the Site.

XI. FAILURE TO COMPLY WITH CONSENT DECREE

25. Stipulated Penalties.

a. If any amounts due under Section VII are not paid by the required due date, Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest, $500 per violation per day that such payment is late.

b. If Settling Defendant does not comply with the obligations set forth in Section VIII (Operation and Maintenance), Settling Defendant shall be in violation of the Consent Decree and shall pay, as a stipulated penalty $500 per violation per day of such noncompliance.

c. If Settling Defendant does not comply with any other non-payment obligation set forth in the Consent Decree, including but not limited to obligations set forth in Sections VI (Confession and Satisfaction of Judgment) and XI (Access and Institutional Controls), Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, $250 per violation per day of such noncompliance.

d. In the event Settling Defendant believes that it will be unable to comply with any obligations under this Decree due to insufficient financial resources and/or unforeseen or unusual Operation and Maintenance requirements necessitated by a severe weather event, Settling Defendant may submit a written notification of such circumstances to EPA and the State along with a request for a reduction or waiver of penalties. The United States and the State shall provide

a written response to Settling Defendant. If Settling Defendant is not satisfied with the United States' and/or State's position set forth in the written response(s) and requests a meeting, an EPA management official at a Branch Chief level or higher and/or State management official at the Section Chief level or higher, shall meet with Settling Defendant, review the concerns raised, and make a determination for the respective agency.

e. EPA or the State, in exercising their discretion as to whether to assess penalties or seek relief for breach of this Consent Decree, shall consider (1) Settling Defendant's financial situation at the time of Settling Defendant's failure to comply with this Consent Decree, and (2) any unforeseen and unusual Operation and Maintenance activities necessitated by a severe weather event. The governments' consideration of these factors shall not be subject to judicial review.

26. Payments of stipulated penalties under Paragraph 25(a)-(c) shall be divided between EPA and the State with 50% to EPA and 50% to the State.

27. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA or the State.

28. All payments to EPA under this Section shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" or by wire transfer. The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID # 01ED, and DOJ Case #90-11-3-07425/3, and shall be sent to:

Regular Mail:
U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

Overnight Mail:
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101
314-418-4087

Wire transfers should be sent to:
Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

29. All payments to the State under this Section shall be identified as "stipulated penalties" and shall be made by official bank check made payable to "State of Vermont – Environmental Cleanup Fund," referencing the name and address of the party making the payment, and the Site No. 1995-1825. The check shall be sent to:

John Schmeltzer, Environmental Analyst
Vermont Agency of Natural Resources Department of Environmental Conservation
Waste Management and Prevention Division
1 National Life Dr - Davis 1
Montpelier, VT 05620-3704

30. At the time of each payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XVIII (Notices and Submissions). The Settling Defendant shall also send such notice to the Regional Financial Management Officer and to EPA's Cincinnati Finance Center at the addresses specified below. Such notice shall reference the Site/Spill ID# 01ED and the DOJ Case # 90-11-3-07425/3.

As to the Regional Financial Management Officer:

Shannon Schofield, Regional Financial Management Officer
U.S. EPA Region 1
Five Post Office Square, Suite 100
Mailcode: OARM16-1
Boston, MA 02109-3912

As to EPA's Cincinnati Finance Center:

U. S. Environmental Protection Agency
Cincinnati Finance Center
26 Martin Luther King Dr.
Cincinnati, Ohio 45268
Email: acctsreceivable.cinwd@epa.gov

31. Penalties shall accrue as provided in this Section regardless of whether EPA or the State has notified Settling Defendant of the violation or made a demand for payment.

32. All penalties shall begin to accrue on the day after payment or performance is due or the day a violation occurs, and shall continue to accrue through the date of payment or the final day of correction of the noncompliance or completion of the activity.

33. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

34. If the United States or the State brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States and/or the State for all costs of such action, including but not limited to costs of attorney time.

35. Payments made under this Section shall be in addition to any other remedies or sanctions available to the United States or the State by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

36. Notwithstanding any other provision of this Section, the United States or the State may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. The United States and the State may only waive that portion of the stipulated penalties that would be paid to it and do not have the discretion to waive the portion of the stipulated penalties that is payable to the other. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section VI (Confession and Satisfaction of Judgment), Section VII (Reimbursement of Response Costs), or from performance of any other requirements of this Consent Decree.

XII. CERTIFICATION

37. Settling Defendant certifies that, to the best of its knowledge and belief, after thorough inquiry:

a. it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by EPA or the State,

b. it has fully complied with any and all EPA or State requests for documents or information regarding the Site and its financial circumstances;

c. it has submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Defendant executed this Consent Decree; and

d. it has fully disclosed the existence of any Insurance Policies, or evidence of such policies, that may be applicable to claims relating to cleanup of the Site, that it continues to hold all rights under the Insurance Policies, and that it has not and will not settle, compromise, or assign any insurance rights or the assigned proceeds from any of its rights provided in the Insurance Policies prior to the Effective Date of this Consent Decree.

XIII. COVENANTS NOT TO SUE BY UNITED STATES AND THE STATE

38. Covenants Not to Sue by United States. Except as specifically provided in Section XIV (Reservation of Rights by United States and the State), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), with regard to the Site. With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Confession and Satisfaction of Judgment), Section VII (Reimbursement of Response Costs), and any amount due under Section XI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Defendant. If the Financial Information is subsequently determined by EPA to be false or inaccurate in any material respect, Settling Defendant shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 49 shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from Settling Defendant's false or materially inaccurate information. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

39. Covenants Not to Sue by the State. Except as specifically provided in Section XIV (Reservation of Rights by United States and the State), the State covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), and 10 V.S.A. § 6615 with regard to the Site. With respect to present and future liability, this covenant shall take effect upon receipt by the State of all amounts required by Section VI (Confession and Satisfaction of Judgment), Section VII (Reimbursement of Response Costs), and any amount due under Section XI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Defendant. If the Financial Information is subsequently determined by EPA or the State to be false or inaccurate in any material respect, Settling Defendant shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 49 shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the State's right to pursue any other causes of action arising from Settling Defendant's false or materially inaccurate information. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

XIV. RESERVATION OF RIGHTS BY UNITED STATES AND THE STATE

40. Reservation of Rights by United States against Settling Defendant. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by

United States in Paragraph 38. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

d. liability based on the operation of the Site by Settling Defendant when such operation commences after signature of this Consent Decree by Settling Defendant and does not arise solely from Settling Defendant's actions performed in accordance with Section VIII (Operation and Maintenance);

e. liability based on Settling Defendant's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of hazardous substances at or in connection with the Site, other than as specifically provided for in Section VIII (Operation and Maintenance), or otherwise ordered by EPA or the State, after signature of this Consent Decree by Settling Defendant;

f. liability for violations of federal or state law that occur during or after Settling Defendant's performance of Operation and Maintenance in accordance with Section VIII; and

g. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

41. Reservation of Rights by the State against Settling Defendant. The State reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by the State in Paragraph 39. Notwithstanding any other provision of this Consent Decree the State reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to:

a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree, including but not limited to, the issuance of orders pursuant to 10 V.S.A. §§ 1272, 1283, 6610a, 6615, 6615b, 8003, and 8221, to prohibit or enjoin Settling Defendant from undertaking activities which might interfere with or adversely affect the protectiveness of the response actions;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

d. liability based on the operation of the Site by Settling Defendant when such operation commences after signature of this Consent Decree by Settling Defendant and does not arise solely from Settling Defendant's actions performed in accordance with Section VIII (Operation and Maintenance);

e. liability based on Settling Defendant's transportation, treatment, storage, or disposal, or arraignment for transportation, treatment, storage, or disposal of hazardous substances at or in connection with the Site, other than as specifically provided for in Section VIII (Operation and Maintenance) or otherwise ordered by EPA or the State, after signature of this Consent Decree by Settling Defendant; and

f. liability for violations of federal or state law that occur during or after Settling Defendant's performance of Operation and Maintenance in accordance with Section VIII; and

g. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

42. Notwithstanding any other provision of this Consent Decree, the United States and State reserve, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Settling Defendant, or the financial certification made by Settling Defendant in Paragraph 37.c, is false or, in any material respect, inaccurate.

43. Nothing in this Consent Decree is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States and/or the State may have against any person, firm, corporation or other entity not a signatory to this Consent Decree. Nothing in this Consent Decree is intended to be a waiver of the sovereign immunity of the United States or the State.

XV. COVENANT NOT TO SUE BY SETTLING DEFENDANT

44. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State, or their contractors or employees, with respect to the Site or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Vermont Constitution, the Tucker

Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, State law, or at common law; or

c. any claim against the United States or the State pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, or pursuant to state law relating to the Site.

45. Except as provided in Paragraph 51, Settling Defendant's covenants not to sue shall not apply in the event the United States or the State brings a cause of action or issues an order pursuant to the reservations set forth in Section XIV (Reservation of Rights by the United States and the State), but only to the extent that Settling Defendant's claim arises from the same response action or response costs that the United States or the State is seeking pursuant to the applicable reservation.

46. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

47. Settling Defendant agrees not to assert any CERCLA claims (including but not limited to claims or causes of action under Sections 107(a) or 113 of CERCLA) or claims under state law that they may have for all matters relating to the Site against any other person. This waiver shall not apply with respect to (i) any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendants, and (ii) any claim filed against insurance carriers to recover insurance proceeds consistent with this Consent Decree.

XVI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

48. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. The United States and the State expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States and the State, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

49. EPA, the State, and Settling Defendant agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or as may be otherwise provided by law, for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are

all response actions taken or to be taken, all response costs, incurred or to be incurred, at or in connection with the Site, by the United States, the State, or any other person, including the G-1 Trustee; provided, however, that if the United States or the State exercises rights under the reservations in Section XIV, other than in Paragraphs 40.a, 40.b, 41.a, and 41.b the "matters addressed" in this Consent Decree will no longer include those response costs or response actions that are within the scope of the exercised reservation.

50. Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify EPA, DOJ, and the State in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify EPA, DOJ, and the State in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA, DOJ, and the State within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

51. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants Not to Sue by Plaintiffs set forth in Section XIII.

XVII. RETENTION OF RECORDS

52. Until 10 years after the Effective Date, Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site, to Insurance Policies, or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

53. After the conclusion of the 10 year document retention period, Settling Defendant shall notify the United States and the State at least 90 days prior to the destruction of any such records, and, upon request by the United States or the State, Settling Defendant shall deliver any such records to the requesting party. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, Settling Defendant shall provide EPA and the State with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States or the State shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a

portion of a record, the record shall be provided to the United States and the State in redacted form to mask the privileged portion only. Settling Defendant shall retain all records that they claim to be privileged until the United States and the State have had an opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Defendant's favor. Settling Defendant and the United States and the State shall confer in good faith before filing with the Court pursuant to Section XIX (Retention of Jurisdiction) for an order resolving the privilege dispute.

XVIII. NOTICES AND SUBMISSIONS

54. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, the State, and Settling Defendant, respectively.

As to the United States:

As to DOJ:
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-3-07425/3)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:
Office Director
Office of Site Remediation and Restoration
US EPA Region 1
Five Post Office Square, Suite 100 (OSRR07-5)
Boston, MA 02109-3912

As to the State of Vermont:

John Schmeltzer, Environmental Analyst
Vermont Agency of Natural Resources Department of Environmental Conservation
Waste Management and Prevention Division
1 National Life Dr - Davis 1
Montpelier, VT 05620-3704

As to Settling Defendant:

Edward French, Esq.
Stackpole & French

255 Maple Street
Stowe, VT 05672

Howard Manosh
Vermont Asbestos Group, Inc.
120 Northgate Plaza
Morrisville, VT 05661

XIX. RETENTION OF JURISDICTION

55. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XX. INTEGRATION/APPENDICES

56. This Consent Decree and its appendices constitute the final, complete, and exclusive Consent Decree and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

a. "Appendix A" is a map of the Site.

b. "Appendix B" is an index of Financial Information.

c. "Appendix C" is a non-exhaustive list of Insurance Policies within the meaning of Paragraph 4.q. of this Consent Decree.

d. "Appendix D" is the Statement of Operation and Maintenance.

XXI. MODIFICATION

57. Except as provided in Appendix D (Statement of Operation and Maintenance), material modifications to this Consent Decree shall be in writing, signed by the United States, the State, and Settling Defendant, and shall be effective upon approval by the Court. Except as provided in Appendix D, non-material modifications to this Consent Decree shall be in writing and shall be effective when signed by duly authorized representatives of the United States, the State, and Settling Defendant.

58. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

XXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

59. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. The State may withdraw or withhold its consent to the entry of this Consent Decree if comments received disclose facts or considerations which show that the Consent Decree is inconsistent with State law or CERCLA. The United States reserves the right to challenge in court the State withdrawal from the Consent Decree, including the right to argue that the requirements of State law have been waived, pre-empted or otherwise rendered inapplicable by federal law. The State reserves the right to oppose the United States' position taken in opposition to the proposed withdrawal. In addition, in the event of the United States' withdrawal from this Consent Decree, the State reserves its right to withdraw from this Consent Decree. Settling Defendant consents to the entry of this Consent Decree without further notice.

60. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

XXIII. SIGNATORIES/SERVICE

61. The undersigned representative of the Parties each certify that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally the Party to this document.

62. Settling Defendant agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States or the State has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

63. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including service of a summons.

XXIV. FINAL JUDGMENT

64. Upon approval and entry of this Consent Decree by the Court, this Consent Decree constitutes the final judgment between the Parties. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ___ DAY OF _____, 2013.

_____
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Vermont Asbestos Group, Inc.*, relating to the Vermont Asbestos Group Mine Site.

FOR THE UNITED STATES OF AMERICA

Date: 8/29/13

ELLEN M. MAHAN
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20044-7611

DAVID L. GORDON
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
(202) 514-3659

TRISTRAM J. COFFIN
United States Attorney

JAMES J. GELBER
Assistant United States Attorney
District of Vermont
P.O. Box 570
Burlington, Vermont 05402-0570

Of Counsel:
SARAH MEEKS
Enforcement Counsel, Region 1
U.S. Environmental Protection Agency
5 Post Office Square – Suite 100
Boston, MA 02109-3912

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Vermont Asbestos Group, Inc.*, relating to the Vermont Asbestos Group Mine Site.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Date: 6/21/13

for

H. CURTIS SPALDING
Regional Administrator, Region 1
U.S. Environmental Protection Agency
5 Post Office Square – Suite 100
Boston, MA 02109-3912

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Vermont Asbestos Group, Inc.*, relating to the Vermont Asbestos Group Mine Site.

FOR THE STATE OF VERMONT ON BEHALF OF THE VERMONT AGENCY OF NATURAL RESOURCES

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

Date: 8/30/2013

THEA SCHWARTZ
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
802-828-3186

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Vermont Asbestos Group, Inc.*, relating to the Vermont Asbestos Group Mine Site.

FOR DEFENDANT
VERMONT ASBESTOS GROUP

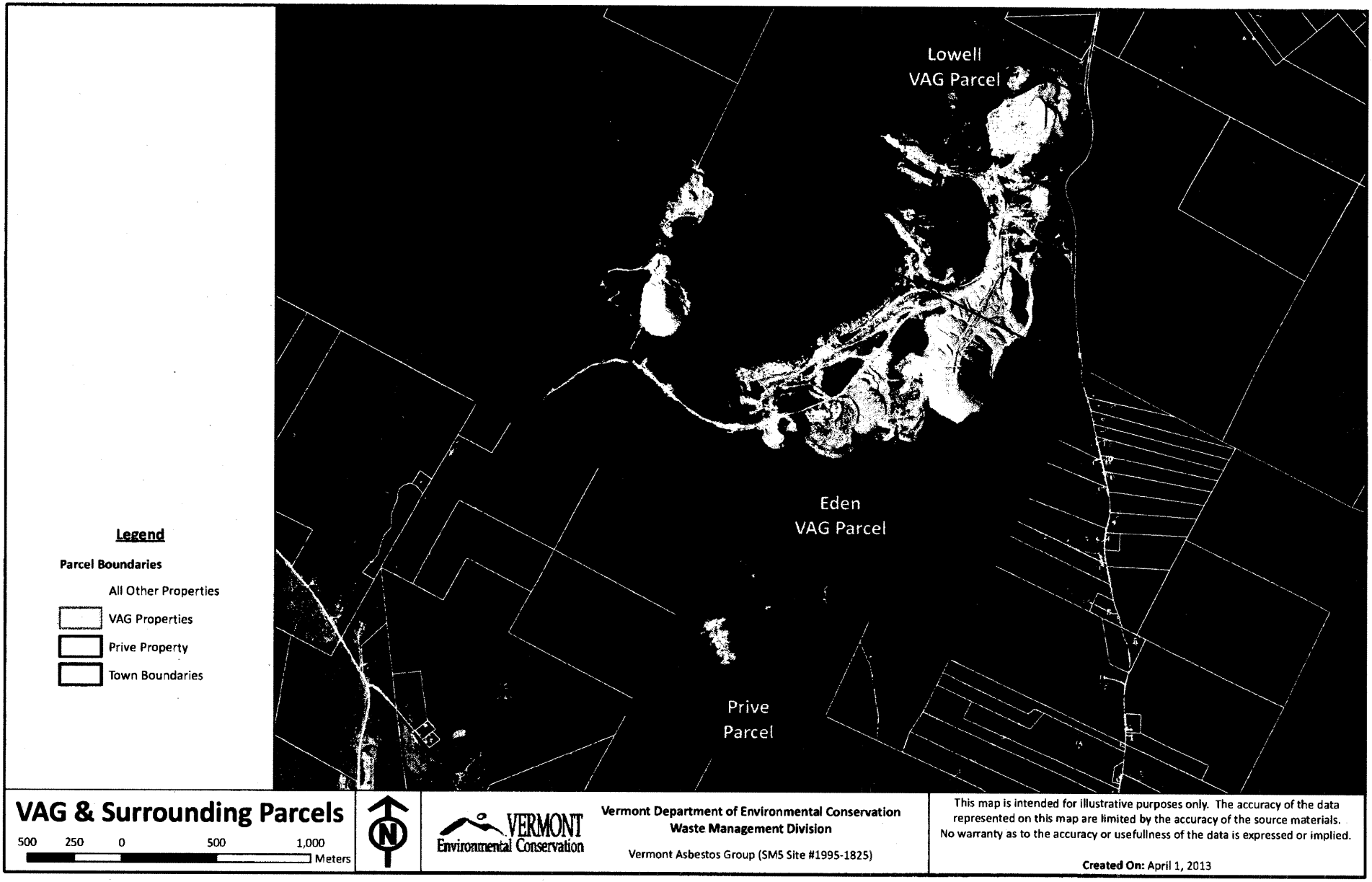
Date: August 8, 2013 Howard A Manosh

Authorized to Accept Service on behalf of Above-signed Party:

Name (print): Howard A. Manosh
Title: President
Address: 120 Northgate Plaza
Morrisville, Vermont
05661
Phone: 802-888-5722
Email: None

APPENDIX A

MAP OF VERMONT ASBESTOS GROUP MINE SITE


Lowell
VAG Parcel
Eden
VAG Parcel
Prive
Parcel
Legend
Parcel Boundaries
All Other Properties
VAG Properties
Prive Property
Town Boundaries
VAG & Surrounding Parcels
500 250 0 500 1,000
Meters
N
VERMONT
Environmental Conservation
Vermont Department of Environmental Conservation
Waste Management Division
Vermont Asbestos Group (SMS Site #1995-1825)
This map is intended for illustrative purposes only. The accuracy of the data represented on this map are limited by the accuracy of the source materials. No warranty as to the accuracy or usefullness of the data is expressed or implied.
Created On: April 1, 2013

APPENDIX B

INDEX OF VERMONT ASBESTOS GROUP, INC. FINANCIAL INFORMATION

Vermont Asbestos Group, Inc., U.S. Income Tax Returns (Form 1120S), for tax years 2006-2009 and 2011.

Vermont Asbestos Group Financial Statement for Business, dated February 23, 2011.

Vermont Asbestos Group, Inc.'s Response to Information Request for Vermont Asbestos Group Mine Superfund Site, dated February 23, 2011.

Letter from Michael F. Keller to Gail E. Westgate, Esq., dated August 3, 2011.

Vermont Asbestos Group Mine Superfund Site TDD, sent to IEc by EPA on August 25, 2011.

EPA (Sarah Meeks) email dated October 6, 2011 conveying Vermont Asbestos Group attorney's responses to IEc questions.

VAG Fiscal 2013 Projections, dated November 27, 2012.

Letter to David Gordon from Judy Beliveau, dated November 27, 2012.

VAG Mine Site – Environmental Protection Agency. Waste Cleanup & Reuse in New England. http://yosemite.epa.gov/r1/npl_pad.nsf/31c4fec03a0762d285256bb80076489c/cdc20741d29da4b18525762b0072e07c!OpenDocument.

Vermont Department of State, Division of Corporations, Entity Information for Vermont Asbestos Group, Inc.

Eisenstein Malanchuk, LLP Vermont Asbestos Group, Inc. Allocation Scenarios. Undated.

APPENDIX C

LIST OF VERMONT ASBESTOS GROUP, INC. INSURANCE POLICIES

List of Vermont Asbestos Group, Inc. Insurance Policies

Admiral Insurance Company; Policy Number 6CG0903; Policy Period: March 12, 1976 –March 12, 1977.

Admiral Insurance Company; Policy Number 7CG2248; Policy Period: March 12, 1977 –March 12, 1978.

Admiral Insurance Company; Policy Number 8CG3297; Policy Period: March 12, 1978 –March 12, 1979.

Charter Oak Fire Insurance Company; Policy Number 650-373B5492-COF-75: Policy Period: March 12, 1975 – March 12, 1976.

Chicago Insurance Company; Policy Number 55-U 029653; Policy Period: October 31, 1975 – October 31, 1976.

London Market; Policy Number AC26288A760000; Policy Period: January 9, 1976 —October 31, 1976.

Lexington Insurance Company; Policy Number GC5503514; Policy Period: January 9, 1976 – October 31, 1976.

APPENDIX D

OPERATION AND MAINTENANCE PLAN

APPENDIX D

OPERATION AND MAINTENANCE PLAN

Upon entry of the Consent Decree between the United States, the State, and VAG, the Operation and Maintenance ("O&M") requirements will continue as specified in this Operation and Maintenance Plan ("O&M Plan") that consists of the attached April 10, 2009 letter from Gary Nolan to John Schmeltzer and Linda Elliott.

The objective of the O&M Plan is to set forth the activities VAG must continue to take to ensure that erosion control structures built by EPA during the 2007 and 2008 removal action, including deposition basins, water-bars, diversion trenches, and berms, are maintained and properly function to abate the danger or threat caused by contaminated runoff reaching off-site water bodies.

Revisions to this O&M Plan may be necessary to achieve this objective. Any revision of this plan proposed by VAG must be approved by the State. If the State revises the plan, then the State will notify VAG when it revises the O&M Plan, and VAG will be responsible to comply with the revised O&M Plan.

In addition, the State Project Manager must be notified by VAG, verbally or in writing, prior to any O&M activities taking place at the site. This notification, which provides an opportunity for the State to comment prior to the work being completed, must include a description of the proposed activities. Within 30 days after O&M activities are completed, VAG must provide the State Project Manager with written documentation, including photo-documentation as needed, of the O &M activities that were completed.

120 Northgate Plaza
Morrisville, VT 05661

(800) 544-7666
(802) 888-5722
(802) 888-4681 Fax
manosh@pwshift.com Email

The Manosh Corporation

April 10, 2009

State of Vermont
Department of Environmental Conservation
Waste Management Division
103 South Main Street - West Building
Waterbury, VT 05671 -0404

Attn: John Smeltzer / Linda Elliot

Re: O & M Plan in response to letter dated March 6, 2009

Dear John and Linda,

I wish to report that VAG was proactive in insuring that erosion was not presenting a problem upon the completion of the mitigation measures instituted by E.P.A.

A chart was designed, which I believe, incorporated the first four of the five bullets in your letter.

Inspection will occur on a weekly basis, with immediate inspection taking place during and/or after a significant storm event. Special emphasis will be added during snowmelt and spring run off.

There are 14 sites that correlate with the pictures and identification in the E.P.A. reports.

As stated on the bottom of the chart-copy attached- any excavated sediment will be disposed of at site 13, the same site used by E.P.A.

VT ANR will be notified at the completion of any remedial work that might need to take place. This will be done before any equipment is removed from site, in the event ANR would like more effort expended.

The employees that will be on site have the 40 hour Hazwopper certification with the up to date refresesher course as well.

VAG will use the same H&S plan as prepared by it's own consultant in 2008. It appears that the air monitoring by E.P.A. reinforces the fact that there is little danger associated with airborne particles at the site. A reasonable person, would also assume that the removal of sediment from a retention basin would be material that was somewhat saturated, or it would not have reached the containment area. Therefore, one might also conclude that airborne particles would be very minimal. Even more minimal than E.P.A. construction of the measures, as they were transporting drier materials from a huge stockpile.

Sincerely,

Gary Nolan

[illegible] Lowell Vermont
[illegible] Mendell [illegible]

Inspection Date	Site # (1-13)	Precipitation (0-5 inches)	Sediment Buildup (0%-100%) Full	Needs to be cleand out (Y/N)
Week 1	1	1" Snow	No Recordable Buildup	No
11-19-08	2	" "	" " "	No
Cloudy and cold	3	" "	" " "	No
20° F	3a	" "	" " "	No
	4	" "	" " "	No
	5	" "	" " "	No
	6	" "	" " "	No
	7	" "	" " "	No
	8	" "	" " "	No
	9	" "	" " "	No
	10	" "	" " "	No
	11	" "	" " "	No
	12	" "	" " "	No
	13	" "	" " "	No

Any Sediment Excavated Will Be Disposed Of At Work Area 13

Notes / Comments

- An Inch of snow covers the site.
- There has been no snow melting.
- Some Baffles are out of place on the Eden mine and should be repaired at some point.

STATE OF VERMONT

SUPERIOR COURT WASHINGTON UNIT	CIVIL DIVISION Docket No. 663-11-14 Wncv

State of Vermont,)
)
Plaintiff,)
)
v.)
)
Moretown Landfill, Inc.,)
)
Defendant.)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

In order to resolve the allegations of the Complaint filed in the above-captioned matter, the parties, Plaintiff, the State of Vermont, by and through Attorney General Thomas J. Donovan, Jr., on behalf of the Agency of Natural Resources and the Natural Resources Board ("State"), and Defendant, Moretown Landfill, Inc. ("MLI"), hereby stipulate and agree as set forth below.

STATE'S ALLEGATIONS

The State alleges:

Background

The parties

1. The State of Vermont Agency of Natural Resources (ANR) is a state agency created through 3 V.S.A. § 2802. Its responsibilities include enforcement of laws, regulations and permits pertaining to solid waste, air and water quality.

2. The Vermont Natural Resources Board (NRB) is a state board created through 10 V.S.A., Chapter 151. It is responsible for enforcement of land use permits issued under Act 250, Vermont's comprehensive land use law.

3. MLI is a Delaware corporation registered to do business in Vermont. MLI owns and operates a solid waste management facility located at 187 Palisades Park in Moretown known as the Moretown Landfill (the Site).

4. The Site includes four areas into which solid waste has been disposed: an unlined landfill; two lined landfill cells known as Cells 1 and 2, which have been closed; and a third lined cell, Cell 3.

5. MLI ceased disposing of waste in Cell 3 on or before July 15, 2013, and is now closing the Site pursuant to a Consent Order and Judgment Order entered September 16, 2013 in State of Vermont, Superior Court, Environmental Division, Docket No. 37-3-13 Vtec, as amended by a First Amendment to Consent Order and Judgment Order entered December 3, 2015.

Permits issued to MLI

6. MLI was the permittee under Solid Waste Facility Management Certification #WA-470 (the "Certification"), originally issued by ANR on April 28, 2005, and subsequently amended a number of times, including on or about July 25, 2005 ("Certification Amendment 1"), August 22, 2005 ("Certification Amendment 2"), and November 8, 2007 ("Certification Amendment 5"). The Certification incorporates by reference a number of documents submitted by MLI to ANR,

including a Facility Operation Manual dated February 2005 ("FOM"), and a Surface Emission Monitoring Plan ("SEM Plan").

7. MLI was the permittee under Discharge Permit #4015-INDC, issued by ANR on or about July 22, 2011 (the "Stormwater Construction Permit"). The Stormwater Construction Permit incorporates by reference an Erosion Prevention and Sediment Control Plan ("EPSC Plan").

8. MLI is the permittee under Land Use Permit #5W0164 and amendments thereto, including amendments #5W0164-30, #5W0164-32, and #5W0164-34, issued by the District 5 Environmental Commission on or about September 21, 2005, March 13, 2008, and December 19, 2011, respectively (collectively the "Land Use Permit"). The Land Use Permit incorporates certain documents filed with the District 5 Environmental Commission, including Certification Amendments 1, 2, and 5, the FOM, and the Stormwater Construction Permit.

Statutory framework

9. Under 10 V.S.A. § 8221, the Attorney General is authorized to enforce the provisions of law specified in 10 V.S.A. § 8003(a), including the Vermont Solid Waste Act, the Vermont Water Pollution Control statute, the Vermont Air Pollution Control statute, and Act 250.

10. A "violation" that may be enforced under 10 V.S.A. § 8221 is "noncompliance with one or more of the statutes specified in [§ 8003] or any related rules, permits, assurances, or orders." 10 V.S.A. § 8002(9).

11. Each violation is subject to civil penalties of up to $85,000 for each initial violation and up to $42,500 for each day a violation continued. 10 V.S.A. § 8221(b)(6).

Violations

Count One – Failure to Operate and Maintain a Landfill Gas Collection and Control System that Effectively Captures Landfill Gas

12. Landfill gas is created as solid waste decomposes in a landfill.

13. Landfill gas includes methane, carbon dioxide, water vapor, and non-methane organic compounds.

14. Some of the compounds in landfill gas can have strong odors. Such odorous compounds include sulfides (hydrogen sulfide, dimethyl sulfide, and mercaptans) and ammonia.

15. MLI operates a landfill gas collection and control system which collects gas generated by the decomposition of waste disposed of at the Site, specifically in the unlined landfill and Cells 1, 2, and 3 (the "LFG Collection System").

16. The LFG Collection System includes gas collection wells with perforated sections of pipe, piping that carries the gas from the collection wells toward control devices where collected gas is burned, and a blower system that creates a vacuum (negative pressure) to draw the gas toward the control devices.

17. Commencing in January 2009, collected gas has been piped to a "gas to energy" plant ("energy plant") owned and operated by PPL Renewable Energy, where it is burned in two internal combustion engines generating electricity, and a

flare has been used as a back up to the energy plant and to burn excess landfill gas not used by the engines.

18. The Certification and Land Use Permit required MLI to:

> [I]nstall, operate and maintain a landfill gas collection and control system that effectively captures the gas generated within landfill and routes the gas to a control device that effectively destroys the NMOCs within the gas. (Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶56); and
>
> [E]nsure the active gas collection system maintains a negative pressure at each gas collection wellhead . . . . (Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 59).

19. A landfill gas collection and control system requires regular and continued monitoring, maintenance, and upgrading in order to operate properly and effectively capture landfill gas and route it to a control device.

20. Water and/or leachate can collect in landfill gas collection wells and piping and interfere with the collection of gas and its transmission to the control device, resulting in fugitive emissions of landfill gas to the atmosphere that would otherwise be collected and burned at the control device.

21. Data collected at the Site by MLI indicated numerous instances in which water had collected in gas collection wells.

22. An ANR inspection of the Site on September 20, 2012 determined that gas wells were watered out.

23. A Notice of Alleged Violation issued by ANR to MLI on or about November 20, 2012 stated that "Gas wells and horizontals have routinely been "watered out," preventing the effective collection of landfill gas and control of

landfill gas odors," and directed MLI to submit a plan to address all watered out gas wells.

24. In a December 7, 2012 letter, ANR requested that MLI conduct a "comprehensive site-wide evaluation of the entire gas well system . . . to determine the actual effectiveness of current wells . . . ."

25. An MLI contractor conducted an evaluation of the gas well system at the Site in response to ANR's request. The contractor's report on the evaluation found "significant liquid in gas wells," and concluded that "liquid in gas wells is likely negatively impacting the ability of the gas collection system to operate effectively." The report noted that liquid levels found in wells ranged up to 63% of total well depth.

26. Negative pressure must be maintained in landfill gas collection wells to effectively collect gas and route it to a control device.

27. MLI documentation of pressure readings at gas collection wells indicate that MLI repeatedly failed to maintain negative pressure at gas collection wells from August 2009 through August 2014.

28. By allowing water to accumulate in gas collection wells and failing to maintain negative pressure at gas collection wells, MLI failed to operate and maintain a gas collection system that effectively captures the gas generated at the Site and routes it to a control device in violation of Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶56, and the Land Use Permit.

29. By failing to maintain negative pressure at gas collection wells, MLI also violated Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 59, and the Land Use Permit.

Count Two – Failure to Maintain Intermediate Cover

30. Covering waste serves a number of purposes, including controlling odor and disease vectors, discouraging scavenging by animals, preventing blowing litter, reducing the potential for infiltration of rainwater and snowmelt and the generation of leachate, reducing fugitive emissions of landfill gas, and reducing the potential for waste materials to be transported from the Site by stormwater flow.

31. The Vermont Solid Waste Management Rules ("SWMR"), Certification, and Land Use Permit require: "In all areas other than the working face which have not received waste material in any given operating day, the owner or operator shall take all steps necessary to ensure that the cover material remains functional and stable until such time as the final cover system is installed." SWMR § 6-702(d)(5) (effective 3/15/12 & 6/12/06); FOM § 3.5.

32. Additionally, the Certification and Land Use Permit require that "Intermediate Cover shall consist of a 12-inch cover layer. In order to minimize leachate production, the Intermediate Cover shall be placed over all areas that have obtained final grades as soon as possible. Intermediate Cover shall be placed over all areas that are to remain unused for six months or more. . . . The 12-inch soil layer shall be seeded and mulched to prevent erosion." FOM § 3.5.5

33. ANR personnel observed intermediate cover inadequacies on July 8, 2011 (areas lacking required 12 inches of cover, areas lacking seeding and mulch, erosion); November 22, 2011 (areas lacking seeding and mulch); November 30, 2011 (areas lacking required 12 inches of cover, areas lacking seeding and mulch); May 10, 2012 (areas lacking required 12 inches of cover and mulch); September 20, 2012 (erosion); October 19, 2012 (erosion); October 26, 2012 (erosion); and November 7, 2012 (areas lacking seeding and mulch, erosion).

34. MLI's actions or failures to take action which resulted in each of the conditions described in Paragraph 33, violated SWMR § 6-702(d)(5), the Certification and the Land Use Permit.

Count Three – Failure to Prevent Nuisance Odors

35. Section 6-701(6) of the SWMR (effective March 15, 2012) requires, and, prior to March 15, 2012, § 6-701(f) of the SWMR (effective June 12, 2006) (collectively "SWMR § 6-701(6)") required the owner and operator of a solid waste management facility to take all steps necessary to prevent and/or control nuisance odors.

36. Vermont's environmental laws, 10 V.S.A. § 552, and the Vermont Air Pollution Control Regulations ("VAPCR") define "air contaminant" as "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substances, or any combination thereof."

37. Section 5-241(1) of the VAPCR provides that a person shall not discharge, cause, suffer, allow or permit air contaminants which will cause injury,

detriment, nuisance or annoyance to any considerable number of people or which endangers the comfort, repose, health or safety of any such persons.

38. Biosolids are nutrient-rich organic materials produced from wastewater treatment facilities.

39. Biosolids can exacerbate the odors generated by a landfill in a number of ways, including, directly, by being particularly odiferous, and, indirectly, by accelerating the creation of landfill gas and by increasing leachate generation due to their relatively high water content, which can lead to problems with collection and control of landfill gas.

40. On or about May 18, 2011, MLI submitted to ANR a Biosolids Management Plan setting forth a preferred method for disposal of biosolids which involved directing arriving trucks carrying biosolids directly to the Site's working face, unloading the biosolids directly on to the working face and promptly covering the biosolids with municipal solid waste. The plan also set forth two alternative methods for disposal of biosolids when weather and/or available municipal solid waste did not permit use of the preferred method.

41. On March 22, 2012, ANR personnel observed that sludge in rolloff bins had been unloaded from one or more trucks and placed adjacent to the Site's access road, rather than being delivered directly to the working face, covered with municipal solid waste, or otherwise handled in accordance with any of the three preferred disposal methods specified in the Biosolids Management Plan.

42. On April 12, 2012, ANR personnel observed a pile of sludge that had been dumped and left unattended on pavement near the top of the old Cell 2 access road.

43. Documents incorporated into both MLI's Solid Waste Certification and Land Use Permit provided that the management methods that MLI would use to control odors included prohibiting or restricting the disposal of odiferous waste. FOM §§ 2.6, 6.5 & Addendum #1; Exhibit 1 to applications for Land Use Permit Amendments #5W0164-30 and #5W0164-32 (discussion related to Criterion 1, Air Pollution).

44. An MLI contractor confirmed moderate to strong off-site odors attributable to biosolids on 15 separate occasions in response to complaints from members of the public called in to an odor hotline, and ANR personnel confirmed off-site odors attributable to biosolids on 9 separate occasions.

45. Following confirmation of off-site odors from biosolids, ANR repeatedly advised MLI that it may need to cease accepting biosolids at the Site in order to control odors.

46. During a meeting on July 26, 2012, an MLI representative advised ANR personnel that the Holyoke and Northampton Massachusetts wastewater treatment plants did not anaerobically digest biosolids before trucking them to MLI, and that the biosolids were odorous.

47. Despite its admission that the biosolids from these sources were odorous, MLI continued to accept such biosolids for disposal for several months during which time additional off-site odors attributable to biosolids were confirmed.

48. In a December 7, 2012 letter to ANR, MLI's parent corporation, Advanced Disposal, "acknowledge[d] a large number of off-site odors this summer and fall were caused by a particularly odorous sludge account and we recently removed it from [the Site]."

49. An MLI contractor confirmed moderate to strong off-site odors attributable to landfill gas on 86 separate occasions in response to complaints by members of the public called into an odor hotline between August 5, 2011 and March 24, 2014.

50. Independent of the complaints confirmed by MLI's contractor, ANR personnel confirmed off-site odors attributable to landfill gas on 31 separate occasions from November 5, 2008 through February 13, 2013.

51. By allowing water to accumulate and failing to maintain negative pressure in gas collection wells, by failing to take adequate measures to prevent odors from biosolids, and by failing to maintain adequate intermediate cover, MLI failed to take all steps necessary to control nuisance odors in violation of Section 6-701(6) of the SWMR (effective March 15, 2012).

52. MLI discharged, caused, allowed or permitted air contaminants from the Site in the form of odorous landfill gas and odors from biosolids, which caused

injury, detriment, nuisance or annoyance to a considerable number of people and endangered their comfort and repose in violation of VAPCR 5-241(1).

Count Four – Excessive Landfill Gas Temperature and Oxygen Levels

53. Controlling the temperature and oxygen level of landfill gas serves to prevent explosions and fires.

54. Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 60 states:

> The Permittee shall ensure the gas collection system maintains at each gas collection wellhead, a landfill gas collection temperature below 131°F (55°C) with either a nitrogen level of less than twenty (20) percent by volume or an oxygen level less than five (5) percent by volume. The Permittee shall monitor and record the temperature and either the nitrogen or oxygen level at each wellhead monthly.

55. MLI undertook to monitor and record temperature and oxygen levels at the Site in order to comply with this requirement.

56. MLI records provided to ANR show that gas temperatures at the Site reached or exceeded 131°F at two wellheads in June 2009, at two wellheads in July 2009, at two wellheads in June 2012, at three wellheads in July 2012, at three wellheads in August 2012, at one wellhead in September 2012, at two wellheads in October 2013, and at two wellheads in November 2013.

57. MLI records provided to ANR show that gas oxygen levels at the Site exceeded five per cent by volume at multiple wellheads each month beginning in June 2011 and continuing through April 2014, except for August 2011 and August 2012 when there were exceedances at one wellhead.

58. MLI violated Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 60 and the Land Use Permit by failing to ensure that the gas collection system maintains at each gas collection wellhead, a landfill gas collection temperature below 131°F with an oxygen level of less than 5% by volume.

Count Five – Failure to Monitor Leachate

59. Leachate is water that has percolated through waste in a landfill cell, picking up contaminants and odors as it does so.

60. Leachate may increase the production of landfill gas, and may be a source of odors. Leachate released to the environment may contaminate soil, groundwater and surface water.

61. Double liner systems installed at Cells 1, 2, and 3 of the Site are designed to collect leachate.

62. At all relevant times, the Site has operated leachate collection systems for Cells 1, 2, and 3. In each landfill cell, leachate is collected in perforated pipes located above the primary and secondary liners and flows by gravity to sumps at the low point of the primary and secondary liner systems. From the sumps, the leachate is pumped to storage tanks, from which it is removed from time to time and disposed of off-site.

63. Certification Amendment 1, Condition 39 states, in pertinent part:

> The Permittee shall record leachate flow from the primary and secondary leachate collection systems to the leachate storage tanks during each working day.

64. An MLI contractor's inspection reports indicate that the Cell 1 flow meters were either being repaired or were not installed from May 20, 2009 through August 23, 2012.

65. In a November 20, 2012 Notice of Alleged Violation, ANR requested MLI to install flow meters from the Cell 1 primary and secondary liners to the leachate collection tank within 30 days.

66. An MLI consultant advised ANR that installation of flow meters for Cell 1 was completed on December 19, 2012.

67. An MLI contractor's inspection reports indicate that the Cell 2 flow meters were being repaired or were not operable from May 20, 2009 through May 21, 2012.

68. A September 27, 2012 email from MLI to ANR states that new Cell 2 flow meters were installed on June 27, 2012, and that at least one meter began working on September 20, 2012.

69. An MLI contractor's inspection reports indicate that the Cell 3 flow meters were being repaired from August 14, 2008 through November 23, 2010.

70. MLI violated Condition 39 of Certification Amendment 1 and the Land Use Permit by failing to measure and record leachate flow from the primary and secondary leachate collection systems for Cells One, Two and Three to the leachate storage tanks.

Count Six – Excessive Leachate Depth on Liner

71. As the depth of leachate (leachate head) on a landfill cell liner increases, the potential impacts to soil and groundwater increase.

72. Certification Amendment 1, Condition 26, states: "The depth of leachate shall not exceed twelve (12) inches at any location on the primary liner, except following a 25 year/24 hour or greater storm event."

73. According to records obtained from MLI, the depth of leachate on the Cell 2 primary liner exceeded twelve (12) inches on August 15, 16, and 17, 2012, and the depth of leachate on the Cell 3 primary liner exceeded twelve (12) inches on July 16, 2013. These depths were not recorded following a 25 year/24 hour or greater storm event.

74. MLI violated Certification Amendment 1, Condition 26, and the Land Use Permit by allowing the depth of leachate on the Cell 2 and Cell 3 primary liners to exceed 12 inches.

Count Seven – Failure to Collect and Treat Water Contacting Waste or Leachate as Leachate

75. Stormwater that comes into contact with waste or leachate and runs off a landfill cell can contaminate soil, groundwater, and surface water.

76. Certification Amendment 1, Condition 28 read in conjunction with ANR's Procedure Addressing Requirements for Run-On/Run-Off Control Systems for Municipal Solid Waste Landfills (May 27, 1994), requires that "[d]uring the active life of a facility, stormwater (including rain water or snow melt) that comes in contact with solid waste or leachate in the active portion of the [municipal solid

waste landfill] is considered contaminated and must be collected and treated as leachate."

77. On July 8, 2011, ANR personnel observed water that had been in contact with waste running freely over the top of plastic temporary cover toward a stormwater ditch at the toe of the slope on the north side of the Site.

78. On November 22, 2011, ANR personnel observed areas of Cell 3's side slope located immediately above a stormwater conveyance that were unstable and exhibited gully erosion, allowing stormwater runoff to come in contact with the underlying waste.

79. On November 30, 2011, ANR personnel observed water that had been in contact with waste running freely over the top of plastic temporary cover toward a stormwater conveyance at the base of Cell 3; and a stone lined trench leading from a portion of Cell 3 to a stormwater channel, which allowed runoff to come in contact with waste.

80. On September 20, 2012 ANR personnel observed areas of gully erosion of intermediate cover on Cell 3 side slopes leading to a stormwater conveyance, and sediment that had accumulated beyond the limits of the Cell 3 liner, including in stormwater structures.

81. On October 26, 2012, ANR personnel observed gully erosion of intermediate cover on Cell 3 side slopes leading to a stormwater conveyance, and areas of erosion at the base of a Cell 3 sideslope in contact with a stormwater conveyance along the side of the access road, which was also observed to be eroded.

82. With respect to each of the conditions described in Paragraphs 77- 81, above, MLI did not collect and treat water that came into contact with waste or leachate as leachate.

83. MLI violated Certification Amendment 1, Condition 28 and the Land Use Permit by permitting water that had come into contact with waste and leachate to run off Cell 3 rather than collecting and treating it as leachate.

Count Eight – Failure to Prevent and Control Windblown Debris

84. Section 6-701(6) of the SWMR (effective March 15, 2012) requires, and, prior to March 15, 2012, § 6-701(f) of the SWMR (effective June 12, 2006) (collectively SWMR 6-701(6)) required the owner and operator to take all steps necessary to prevent windblown debris.

85. ANR personnel observed excessive litter or debris at the Site in areas outside of the working face at which waste was actively being disposed on April 26, 2011, November 30, 2011, January 20, 2012, February 9, 2012, April 9, 2012, April 12, 2012, May 10, 2012, May 23, 2012, July 13, 2012, September 20, 2012, December 5, 2012, and February 19, 2012.

86. MLI violated SWMR 7-701(6) by failing to take all steps necessary to prevent and control windblown debris at the Site.

Count Nine – Failure to Maintain Limit of Waste Containment Markers

87. Certification Amendment 2, Condition 3 states:

> Prior to the operation of Cell 3, the Permittee shall install non-liner-penetrating markers indicating the limit of waste containment in Cell 3 as shown on Page 5 of the Engineering Plans. The limit of waste markers shall remain until the landfill slopes have reached final slope elevation.

88. The markers indicate the extent of the underlying liner system at the surface. This enables equipment that may puncture the liner to be kept away from the liner, which is shallow near its edges. It also prevents disposal of waste beyond the limits of the underlying liner. Waste disposed of beyond the limits of the liner generates leachate that is not captured by the liner and may contaminate soil, groundwater, and surface water. Further, such improperly disposed-of waste must be excavated and moved, which may result in odors.

89. On September 20, 2012, ANR personnel observed that the required markers were not in place at the Site.

90. The markers remained absent until November 27, 2012.

91. MLI violated Certification Amendment 2, Condition 3, and the Land Use Permit by failing to maintain limit-of-waste-containment markers at the Site until the landfill slopes reached final slope elevation.

Count Eleven – Failure to Report

92. Section 6-703(b) of the SWMR (effective 3/15/12 and 6/12/2006) states:

> The operator shall submit a report to the Secretary within five working days of the receipt of any information indicating non-compliance with any term or condition of certification or other operating authority.

93. Certification Amendment 1, Condition 46, states:

> In accordance with Section 6-703 of the VTSWMR, the operator shall submit a report to the Solid Waste Program within five working days of the receipt of any information indicating non-compliance with any term or condition of certification.

94. MLI did not submit to ANR the required reports for the violations at the Site described in Counts Five (Failure to Monitor Leachate Flow), and Six (Excessive Leachate Depth on Liner).

95. MLI's failure to submit to ANR the required reports for the violations at the Site described in Counts Five (Failure to Monitor Leachate Flow), and Six (Excessive Leachate Depth on Liner) violated SWMR 6-703(b), Certification Amendment 1, Condition 46, and the Land Use Permit.

Count Twelve – Failure to Sequence Work as Required by Stormwater Construction Permit

96. The purposes of the EPSC Plan incorporated into the Stormwater Construction Permit include limiting the potential for erosion through soil stabilization techniques, thereby reducing the quantity of sediment in stormwater runoff, and controlling sediment if erosion cannot be prevented.

97. The EPSC Plan incorporated into the Stormwater Construction Permit required MLI to install silt fence along downgradient limits of work and to delineate limits of disturbance with wood stakes and flagging tape prior to commencing earthwork activities. EPSC Plan §§ 4.0, 5.1, 5.3 & Plan Drawings Sheet No. 1.

98. Construction at the Site during the 2012 construction season began on or about July 2, 2012.

99. During a July 16, 2012 site visit, ANR personnel observed that earthwork had begun and heavy equipment was being used to remove topsoil/overburden in the Proposed Phase II Borrow Area depicted in EPSC Plan

Drawing 4. Further, the removed material was being stockpiled in Northern Soil Stockpile Area depicted in that drawing.

100. During the July 16, 2012 site visit, ANR personnel observed that no silt fence had been installed downgradient of the then ongoing earthwork in the Proposed Phase II Borrow Area and downgradient of the Proposed Northern Soil Stockpile Area, and that limits of disturbance at the Site had not been delineated.

101. The EPSC Plan and Land Use Permit Amendment #5W0164-34 required MLI to construct and stabilize a clean water diversion channel referred to in the ESPC Plan as the Southeastern Clean Water Diversion Channel (SW-4) before beginning excavation from the Phase II Borrow Area.

102. The purpose of SW-4 was to divert stormwater runoff from areas upgradient of the construction site to prevent it from commingling with potentially sediment-laden stormwater from the construction site.

103. Observations of ANR personnel and reports filed by MLI with ANR indicate that blasting and excavation in the Phase II Borrow Area began in July 2012. Reports filed by MLI with ANR also indicated that work on SW-4 did not begin until Between August 13 and August 26, 2012.

104. ANR personnel observed on September 26, 2012, October 10, 2012 and October 24, 2012 that SW-4 had not been stabilized through the establishment of grass.

105. MLI's failure to timely install silt fence and delineate limits of disturbance, and failure to timely construct and stabilize SW-4 violated the Stormwater Construction Permit and the Land Use Permit.

Count Thirteen – Failure to Construct and Maintain Erosion Prevention and Sediment Control Measures in Accordance With Specifications of Stormwater Construction Permit

106. The Stormwater Construction Permit and EPSC Plan required MLI to construct erosion prevention and sediment control measures in accordance with drawings and specification set forth in the EPSC Plan and the Vermont Standards & Specifications for Erosion Prevention & Sediment Control (2006) Handbook (Amended February 2008), and to maintain them in effective operating condition.

107. During an October 26, 2012 site visit, ANR personnel observed the following:

a. Unstabilized slopes in the Phase II Borrow Area of greater than 3:1 on which erosion control matting had not been installed as required by the EPSC plan;

b. A roadside swale in which check dams were not functioning properly in that sediment laden water was flowing down the swale without any appreciable slowing from check dams;

c. A construction entrance that was not properly sized and lacked required stone and geotextile;

d. Inlet protection had not been installed in accordance with EPSC plan specifications; and

e. A culvert had not been maintained in that rocks were allowed to collect immediately upstream of the culvert, preventing water from flowing freely through it.

108. MLI's actions or failures to take action at the Site that resulted in the conditions observed in Paragraph 107, subparagraphs a - e, violated the Stormwater Construction Permit, EPSC Plan and the Land Use Permit

Count Fourteen – Failure to Conduct Dewatering in Accordance With the EPSC Plan and a Dewatering Plan

109. The Stormwater Construction Permit required that a site-specific dewatering plan be employed for any dewatering activities.

110. The EPSC Plan required that all effluent from dewatering be filtered or passed through an approved sediment-trapping device.

111. During an October 26, 2012 site visit ANR personnel observed that water was being pumped out of the excavated Phase II Borrow area into a swale and was not directed through a filter or approved sediment-trapping device.

112. MLI did not have a site-specific dewatering plan for the dewatering activity described in Paragraph 111.

113. Because the water was not directed through a filter of approved sediment-trapping device and was not conducted pursuant to a site-specific dewatering plan, the dewatering observed at the Site by ANR personnel on October 26, 2012 violated the Stormwater Construction Permit and the Land Use Permit.

Count Fifteen – Unpermitted Discharges to Waters of the State

114. Section 1259(a) of Title 10 prohibits the unpermitted discharge of any waste, substance, or material into waters of the state.

115. A stream is located in close proximity to and to the west of the area in which construction was undertaken pursuant to the Stormwater Construction Permit.

116. On October 19-20, October 29, and November 5, 2012 sediment was discharged to the stream through a 60-inch diameter culvert located to the west of an above-ground storage tank at the Site.

117. The discharges at the Site on October 19-20, October 29, and November 5, 2012 were not permitted by any permit issued to MLI.

118. The discharges at the Site on October 19-20, October 29, and November 5, 2012 violated 10 V.S.A. § 1259(a).

Count Sixteen – Failure to Timely File Biweekly Reports Required by Stormwater Construction Permit

119. The Stormwater Construction Permit required MLI to file with ANR's Department of Environmental Conservation a report biweekly during earth disturbance activities. The report was to outline, *inter alia,* construction status, erosion prevention and sediment control practices installed and removed since the last report, erosion problems encountered and how they were resolved, location and amount of land disturbed, description of areas stabilized, and turbidity monitoring reports collected since the last report. Permit, Part IV, § A.3. The Stormwater

Construction Permit required MLI to file the reports by the Wednesday following the end of the biweekly period. *Id.*, § A.4.

120. Although MLI commenced construction on July 2, 2012, MLI did not begin submitting the required biweekly reports until August 29, 2012, more than two weeks after ANR had inquired about the status and the lack of reporting on August 13, 2012.

121. MLI did not submit the biweekly reports for July 2-15, 2012, July 16-29, 2012, and July 30-August 12, 2012 until August 29, 2012. violated the Stormwater Construction Permit and the Land Use Permit by not submitting the reports for.

122. Subsequently, MLI failed to timely submit the biweekly reports for August 27 - September 9, 2012, September 10 - 23, 2012, and September 24 - October 7, 2012.

123. MLI's failure to timely submit the biweekly reports referenced in Paragraphs 121-122 violated the Stormwater Construction Permit and the Land Use Permit.

MLI's ADMISSIONS AND AGREEMENTS

124. MLI admits the background allegations of Paragraphs 1-11, above.

125. MLI admits the factual allegations of Paragraphs 12-27, 30-33. 35-50, 53-57, 59-69, 71-73, 75-82, 84-85, 87-90, 92-94, 96-104, 106-107, 109-112, 114-117, and 119-122 solely for purposes of resolving this case.

126. Without formally admitting or denying liability, MLI agrees to this settlement of the violations alleged in Paragraphs 12-123, above, in order to resolve this case.

127. MLI agrees that each of the violations alleged in Paragraphs 12-123, above, is deemed proved and established as a prior violation in any future State proceeding that permits or requires consideration of MLI's past record of compliance, such as administrative or judicial enforcement actions for civil penalties calculated pursuant to 10 V.S.A. § 8010 and permit proceedings.

ADDITIONAL STIPULATIONS BY THE STATE AND MLI

The State and MLI further stipulate and agree:

128. Count Ten (failure to conduct random load inspections) should be dismissed with prejudice.

129. Pursuant to 3 V.S.A. Chapter 7 and 10 V.S.A. § 8221, the Attorney General is authorized to represent the State in this action and may settle actions as the interests of the State require.

130. Under 10 V.S.A. § 8221, MLI is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500 per violation for each day a violation continued.

131. The State has considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the

violations, the length of time the violations existed and that Defendants knew or had reason to know the violations existed.

132. The Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred.

133. This Stipulation for Entry of Consent Order and Final Judgment Order ("Stipulation") has been negotiated by and between the State and MLI in good faith.

134. The State and MLI hereby waive all rights to contest or appeal the accompanying Consent Order and Final Judgment Order ("Consent Order") and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or this Court's jurisdiction to enter the Consent Order.

135. This Stipulation and the accompanying Consent Order set forth the complete agreement of the parties, and they may be altered, amended or otherwise modified only by subsequent written agreements signed by the parties' legal representatives, and as to the Consent Order, when incorporated into an order issued by the Court.

136. The Court should hold this Stipulation and the Consent Order for twenty-one (21) calendar days following their submission to the Court for the State to post them on its website to facilitate possible public participation in consideration of this settlement.

137. Following expiration of the twenty-one (21) day period, the attached Consent Order may be entered as a final judgment in this matter by the Court.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

Dated: 5/11/18 By: Nicholas F. Persampieri

Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

MORETOWN LANDFILL, INC.

Dated: 5/8/18 By:

Tristram J. Coffin
Downs Rachlin Martin PLLC
199 Main Street
Burlington, VT 05402-0190
(802) 863-2375

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 37-3-13 Vtec

Moretown Landfill Cell 3 Recertification)
)
)

CONSENT ORDER AND JUDGMENT ORDER

This matter involves Moretown Landfill, Inc.'s appeal of the Agency of Natural Resources' March 14, 2013 decision denying the application for recertification of Cell 3 and all of the solid-waste related operations located at the Moretown Landfill. Based on ANR and MLI's Joint Motion for Entry of Consent Order and Judgment Order in this matter, and pursuant to V.R.E.C.P. 5(j), and this Court's inherent equitable powers, the Court hereby ORDERS, ADJUDGES AND DECREES:

The Parties

1. The Vermont Agency of Natural Resources (ANR) is a state agency with various offices in Vermont.

2. The Attorney General pursuant to 3 V.S.A. Chapter 7 is authorized to represent the State in this action and may settle the action as the interests of the State.

3. Moretown Landfill, Inc. (MLI) is a foreign corporation organized under the laws of Delaware, which is registered to do business in Vermont.

Background

4. MLI operates a solid waste disposal facility known as the Moretown Landfill located in Moretown, Vermont, under certification issued by ANR pursuant to 10 V.S.A. § 6605 (Facility).

5. The Facility contains an unlined landfill and two lined landfill cells, Cells 1 and 2, into which waste was disposed in the past, and Cell 3, in which MLI is currently disposing of waste.

6. MLI contemplates applying in the future for certification from ANR for a new landfill cell, Cell 4, which, if approved, would partially overlie Cell 3. No such Cell 4 application is currently pending with ANR.

7. MLI applied for recertification of the Facility in June 2009.

8. On March 14, 2013 ANR issued a decision which denied the application for recertification, ordered MLI to cease accepting waste at the Facility on April 15, 2013, ordered MLI to revise its closure plan and closure and post-closure cost estimate, and ordered MLI to submit odor and groundwater corrective action plans.

9. On March 29, 2013 MLI filed with this Court its Notice of Appeal of ANR's March 14, 2013 decision.

10. This Court's April 12, 2013 Order extended to July 15, 2013 the date on which MLI must cease accepting waste at the Facility.

11. ANR and MLI now desire to resolve the appeal through a consent order by the Court.

12. The Attorney General believes that this settlement is in the State's interest.

Cessation of Waste Acceptance

13. MLI shall not accept any solid waste as defined in 10 V.S.A. § 6602(2) at the Facility after July 15, 2013, unless and until MLI receives all appropriate certifications, permits and licenses required for management of waste at the Facility.

Cell 3 Closure

14. MLI shall implement a phased closure of Cell 3 pursuant to §§ 6-1002(b)(4) and 6-1002(h) of ANR's Solid Waste Management Rules ("SWMR"), in accordance with Paragraphs 15-17 of this Consent Order. MLI shall diligently file for and use best efforts to obtain all regulatory approvals required to implement this section. Subject to obtaining the required regulatory approvals, MLI shall implement this section in accordance with the plans approved by ANR.

15. MLI shall complete the closure of the north slope of Cell 3 (approximately 6.5 acres) as depicted in the Map attached hereto as **Exhibit A** through the installation of final cover in accordance with the design described in the Amended Closure Plan that MLI submitted to ANR on or about March 29, 2013, as may be modified in a manner that renders it equally or more protective by a revised plan submitted by MLI no later than August 1, 2013 and approved by ANR. Subject to the receipt of the necessary approvals from governmental agencies (e.g., the Development Review Board ("DRB"), stormwater management program, Act 250

District Commission), and subject to favorable weather conditions, MLI shall complete the installation of the final cover for the north slope of Cell 3 by October 15, 2013. Subject to favorable weather conditions, MLI shall establish grass or ground cover within four months of completion of installation of the final cover.

16. In addition, within 30 days of the Effective Date of this Consent Order, MLI shall submit for ANR's review and approval a revised closure plan that provides for the following:

a. Installation of a first phase of cover of the south slope of Cell 3 as generally depicted in the Map attached hereto as **Exhibit B**, which shall be a temporary cover that utilizes a Dura Skrim (or equivalent) temporary cap. Subject to the receipt of the necessary approvals from governmental agencies, and subject to favorable weather conditions, MLI shall complete the installation of the first phase of cover of the south slope of Cell 3 by October 15, 2013.

b. Replacement of the first phase of cover of the portions of the south slope of Cell 3 that are not within the Cell 4 Overlay Area described in Paragraph 16c as generally depicted in the Map attached hereto as **Exhibit C** with a second and final phase of cover which shall at a minimum meet the requirements of SWMR §§ 6-606(b)(2)(M) and 6-606(b)(2)(O). Subject to obtaining all necessary approvals from governmental agencies, MLI shall complete the installation of final cover in these areas no later than August 1, 2014. Subject to favorable weather conditions, MLI shall establish grass or ground cover within four months of completion of installation of the final cover.

c. If MLI submits to ANR an administratively complete application for certification of Cell 4 by December 31, 2013 and ANR approves the application, MLI shall replace the first phase of cover of the area of Cell 3 that underlies the area for which MLI anticipates seeking approval for construction of Cell 4, as is generally depicted in the map attached hereto as **Exhibit D** ("the Cell 4 Overlay Area"), in accordance with the plans for Cell 4 which have been approved by ANR.

d. If MLI submits to ANR an administratively complete application for certification of Cell 4 by December 31, 2013 and ANR denies the application, MLI shall replace the first phase of cover of the Cell 4 Overlay Area with a second and final phase of cover which shall at a minimum meet the requirements of SWMR §§ 6-606(b)(2)(M) and 6-606(b)(2)(O). Subject to obtaining all necessary approvals from governmental agencies and subject to favorable weather conditions, MLI shall complete installation of the second and final phase of cover no later than 90 days following the date of ANR's denial of the certification application, and subject to favorable weather conditions, MLI shall establish grass or ground cover within four months of completion of installation of the final cover. Notwithstanding the foregoing, MLI's obligation to comply with this subparagraph will be stayed if MLI files an appeal of the denial and obtains a court order staying its obligation to comply with this subparagraph.

e. If MLI fails to submit an administratively complete application to ANR for Cell 4 by December 31, 2013, MLI shall replace the first phase of cover of the Cell 4 Overlay Area with a second and final phase of cover which shall at a

minimum meet the requirements of SWMR §§ 6-606(b)(2)(M) and 6-606(b)(2)(O). Subject to obtaining all necessary approvals from governmental agencies and subject to favorable weather conditions, MLI shall complete installation of the second and final phase of cover no later than August 1, 2014. Subject to favorable weather conditions, MLI shall establish grass or ground cover within four months of completion of installation of the final cover.

f. Provisions for addressing the pre-construction work that took place preparing for Cell 4 and the settlement that took place on Cell 2.

17. Within sixty (60) days of the Effective Date of this Consent Order, MLI shall provide updated cost estimates and financial assurance mechanisms for closure of Cell 3 at the Facility.

Groundwater Corrective Action

18. MLI hereby acknowledges that three contaminants of concern ("COCs") have been identified in the groundwater at the Facility: Arsenic (As), Iron (Fe), and Manganese (Mn). ANR has established a primary enforcement standard of 10 µg/l for As and 300 µg/l for Mn and a secondary enforcement standard of 300 µg/l for Fe. MLI hereby acknowledges that there are levels of As, Fe, and Mn that exceed the State's primary or secondary enforcement standards in groundwater at the Facility, and that historical operations at the landfill have contributed to those exceedances for one or more of the COCs.

19. ANR hereby acknowledges that As, Fe, and Mn are naturally occurring and that there are background levels of the COCs present in the groundwater at the

Facility and that further characterization is necessary to establish background levels.

20. Within ninety (90) days of the Effective Date of this Consent Order, MLI shall submit a Feasibility Study to ANR that will identify the range of potential alternatives designed to reduce the level of COCs in the groundwater at the property boundary of the Facility (point of compliance) to regulatory levels, or background levels, whichever is higher, which shall include active remediation technologies and may include a monitored natural attenuation remedy option. The Feasibility Study shall also outline a plan and schedule for completing any additional monitoring necessary for developing and submitting a Groundwater Corrective Action Plan, including but not limited to: i) establishing the background levels of the COCs in the groundwater at the Facility; ii) confirming the direction and flow of groundwater at the Facility; iii) determining the current groundwater conditions (baseline); iv) updating the trend analysis using historical and supplemental (ongoing) groundwater data; and v) a schedule for achieving compliance with groundwater standards or achievement of background levels, as applicable. The feasibility study is subject to ANR review and approval.

21. In accordance with the schedule set forth in the approved Feasibility Study by ANR, MLI will prepare and submit to ANR a Groundwater Corrective Action Plan (Corrective Action Plan), which selects the remedial action that best meets the following criteria: i) overall protection of human health and the environment; ii) compliance with Applicable or Relevant and Appropriate

Requirements (ARARs); iii) long-term effectiveness and permanence; iv) reduction of toxicity, mobility, and volume; v) short-term effectiveness and implementability; and vi) cost. This Corrective Action Plan will, at a minimum, present a schedule with milestones. The Corrective Action Plan shall also provide for a monitoring plan that requires at least semi-annual monitoring. The Corrective Action Plan is subject to ANR review and approval.

22. MLI shall implement the Corrective Action Plan, as approved by ANR, in accordance with the schedule set forth in the approved Plan.

Odor Plan

23. Within sixty (60) days of the Effective Date of this Consent Order, MLI shall submit to ANR for review and approval an Odor Maintenance and Preventative Action Plan (Odor Plan). The Odor Plan shall be organized as a comprehensive and easily referenced manual for prevention and control of odors from the facility and shall include:

- operations and maintenance manual for the landfill gas and condensate management systems;
- gas well monitoring and balancing procedures and responsibilities;
- update to the post-closure plan for Cell 3 to include annual odor and gas maintenance costs;
- preventative maintenance provisions;
- ongoing monthly gas system monitoring, including but not limited to the existing monitoring and reporting;

- record keeping and reporting requirements;
- standard operational procedures for odor control;
- an annual budget allotment for odor control;
- gas well pump and well replacement/addition plan;
- gas well liquid level monitoring schedule;
- odor control Standard Operating Procedure (SOP) for any activities that breach the cap, excavate into waste, or require removal of cleanouts or wellheads;
- leachate odors control procedures;
- odor patrol/inspections plan;
- procedures in case of complaints or confirmed off-site odors;
- gas system extraction and combustion plant maintenance;
- ongoing monitoring plan for methane and hydrogen sulfide at compliance points;
- H_2S and methane action levels and minimum response actions at various action levels and averaging times; and
- hazardous air sampling.

24. MLI shall implement the Odor Plan, as approved by ANR, in accordance with the schedule set forth in the approved Plan.

General Provisions

25. This Consent Order affirms and, as set forth herein, modifies the March 14, 2013 ANR decision denying MLI's application for recertification of the Facility. ANR's findings and conclusions in the March 14, 2013 Denial shall be unaffected by entry of this Consent Order, and shall remain in effect following entry of this Consent Order.

26. MLI hereby waives: 1) all rights to contest or appeal this Consent Order; and 2) all rights to contest the obligations imposed upon MLI under Paragraphs 13 - 24 of this Consent Order in this or any other administrative or judicial proceeding. Notwithstanding the foregoing, if the Court does not execute this Consent Order as submitted, minor deviations in the form of the document excepted, it shall be voidable at the option of either the State or MLI.

27. This Consent Order is binding upon MLI and its successors and assigns.

28. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

29. This Consent Order shall become effective only after it is entered as an order of the Court, and the date of entry will be the Effective Date of the order. When so entered by the Court, this Consent Order shall become a final Judgment Order.

30. Any violation of this Consent Order shall be deemed to be a violation

of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 & 211, and 12 V.S.A. § 122.

31. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.

32. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected MLI's obligations to comply with all federal, state, or local statutes, regulations, permits and directives applicable to MLI.

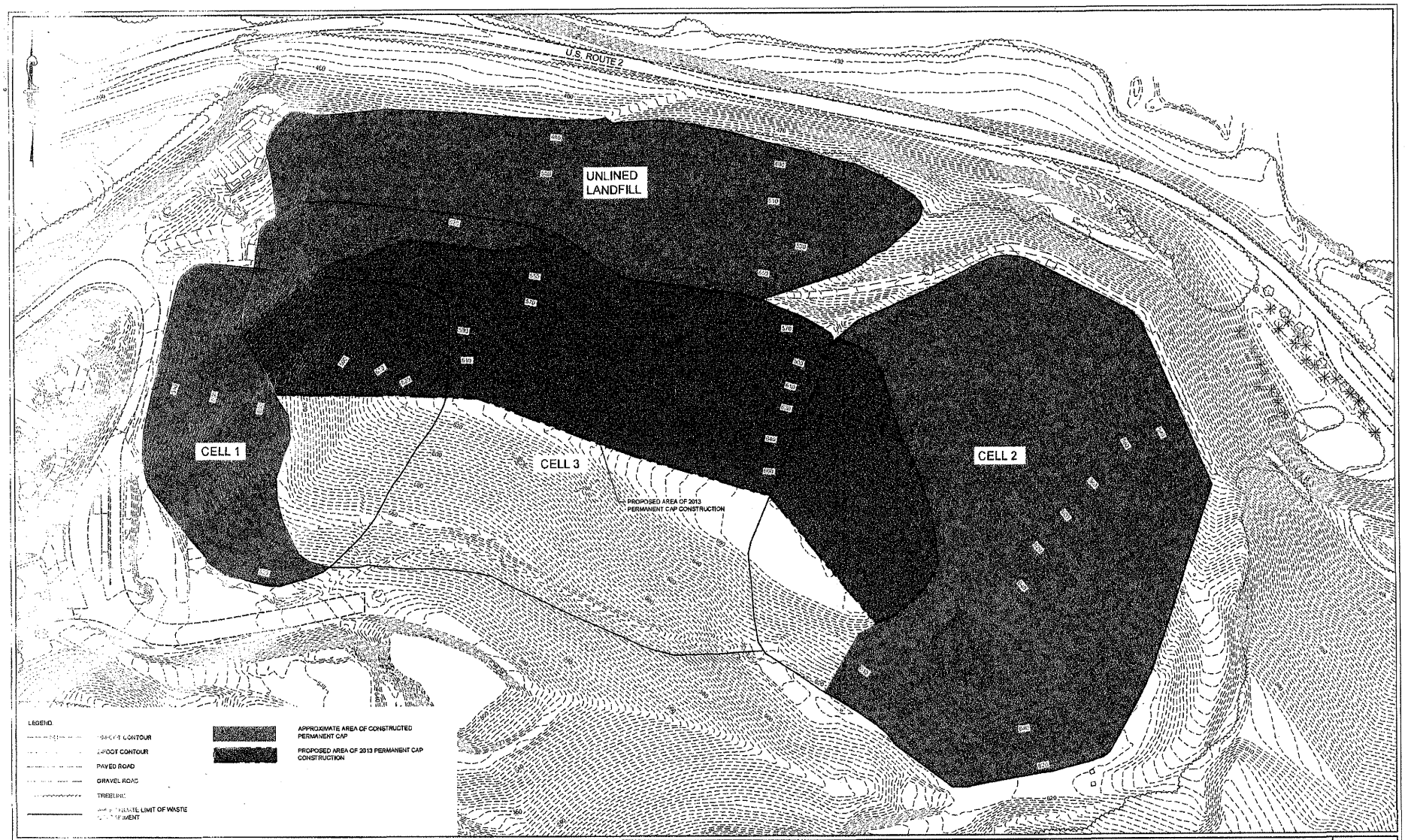
33. This Consent Order resolves only the appeal by MLI of ANR's March 14, 2013 denial decision for recertification of the Facility. Nothing in this Consent Order shall be construed to preclude or prevent an enforcement action by ANR or the State against MLI relating to the Facility. Similarly, nothing in this Consent Order shall be construed to preclude or prevent any defense that may be raised by MLI in such action. Additionally, nothing in this Consent Order shall be construed to have any effect on ANR's regulatory review of and decision on any future solid waste facility certification application, including any application for certification of Cell 4, submitted by MLI to ANR. Further, the plans and activities authorized under this Consent Order apply only to the closure of Cell 3 and ANR may modify such plans or require new plans as a part of its review of any future solid waste facility certification application.

34. This Consent Order sets forth the complete agreement of the parties, and may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated into an order issued by the Superior Court, Environmental Division. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and shall be of no legal force or effect.

35. The Court hereby finds that the State and MLI have negotiated this Consent Order in good faith, that implementation of this Consent Order will avoid prolonged and complicated litigation between the parties, and that this Consent Order is fair, reasonable and in the State's interest. The Court hereby enters this Consent Order as a final Judgment Order of the Court.

Dated: Sept. 16, 2013

The Honorable Thomas G. Walsh
Superior Court Judge



SANBORN | HEAD

GRAPHICAL SCALE
80' 40' 0 80' 160'

NO.	DATE	DESCRIPTION	BY

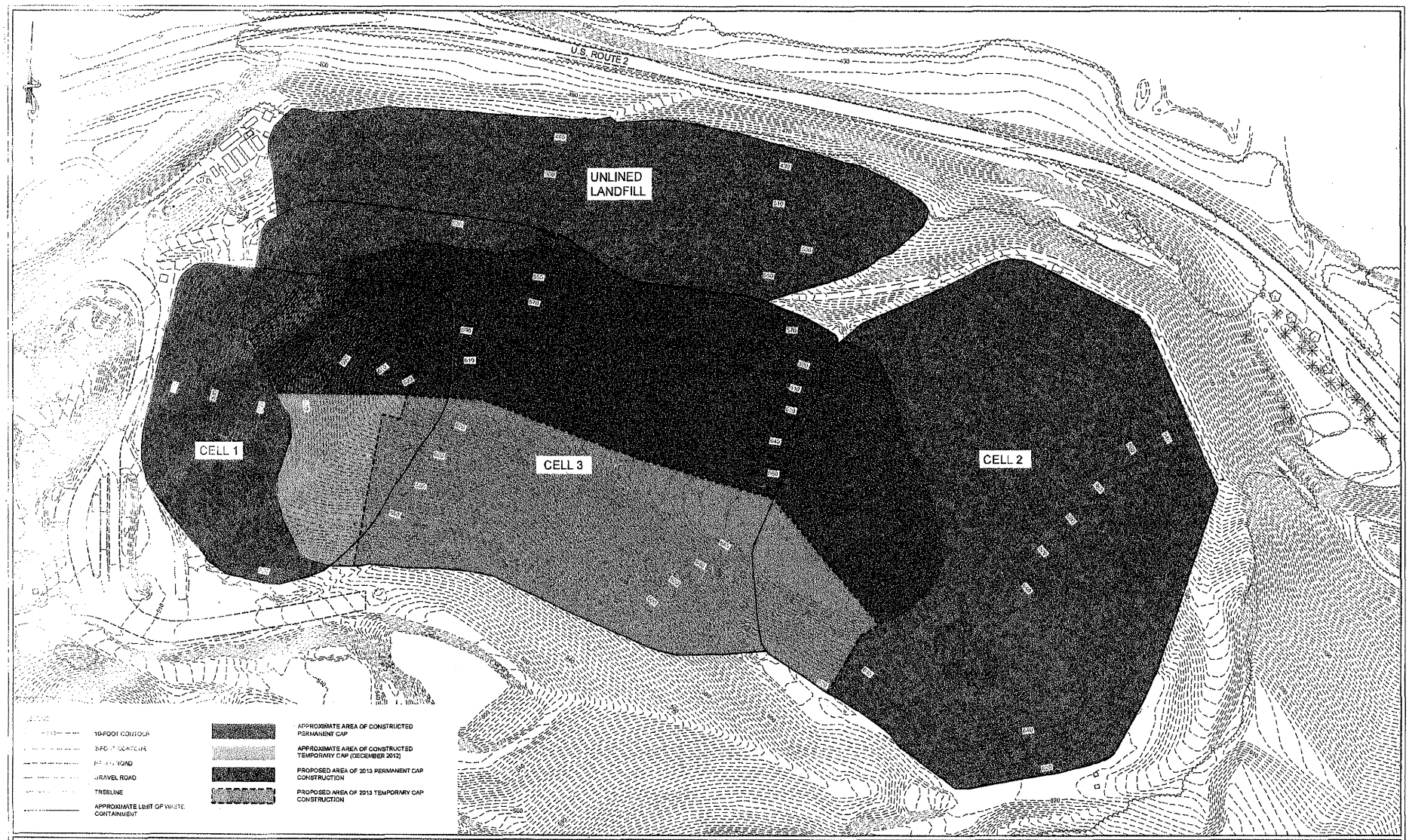
DRAWN BY: C. WEAVER
DESIGNED BY: C. WEAVER
REVIEWED BY: M. POIRIER
PROJECT MGR: C. WEAVER
PIC: M. POIRIER
DATE: JULY 2013

ADVANCED DISPOSAL SYSTEMS
MORETOWN LANDFILL, INC.
MORETOWN, VERMONT

LANDFILL CAP SYSTEM FIGURE

PROJECT NUMBER: 3040.06

EXHIBIT A



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80' 40' 0 80' 160'

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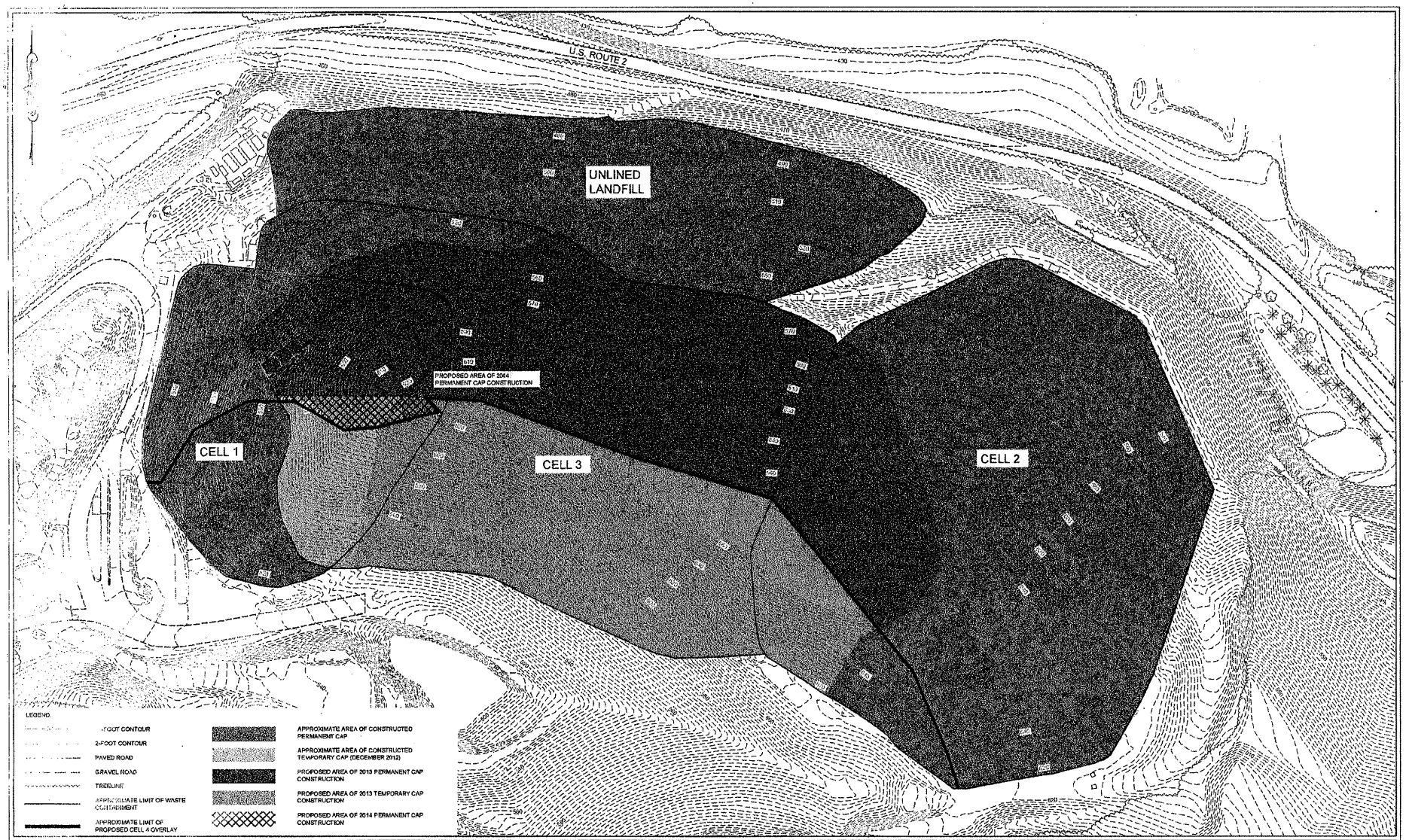
REVIEWED BY: M. POIRIER
PROJECT MGR: C. WEAVER
PIC: M. POIRIER
DATE: JULY 2013

ADVANCED DISPOSAL SYSTEMS
MORETOWN LANDFILL, INC.
MORETOWN, VERMONT

PROJECT NUMBER 3040.06

LANDFILL CAP SYSTEM FIGURE

EXHIBIT B



SANBORN HEAD

GRAPHICAL SCALE
80' 40' 0 80' 160'

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DRAWN BY: C. WEAVER
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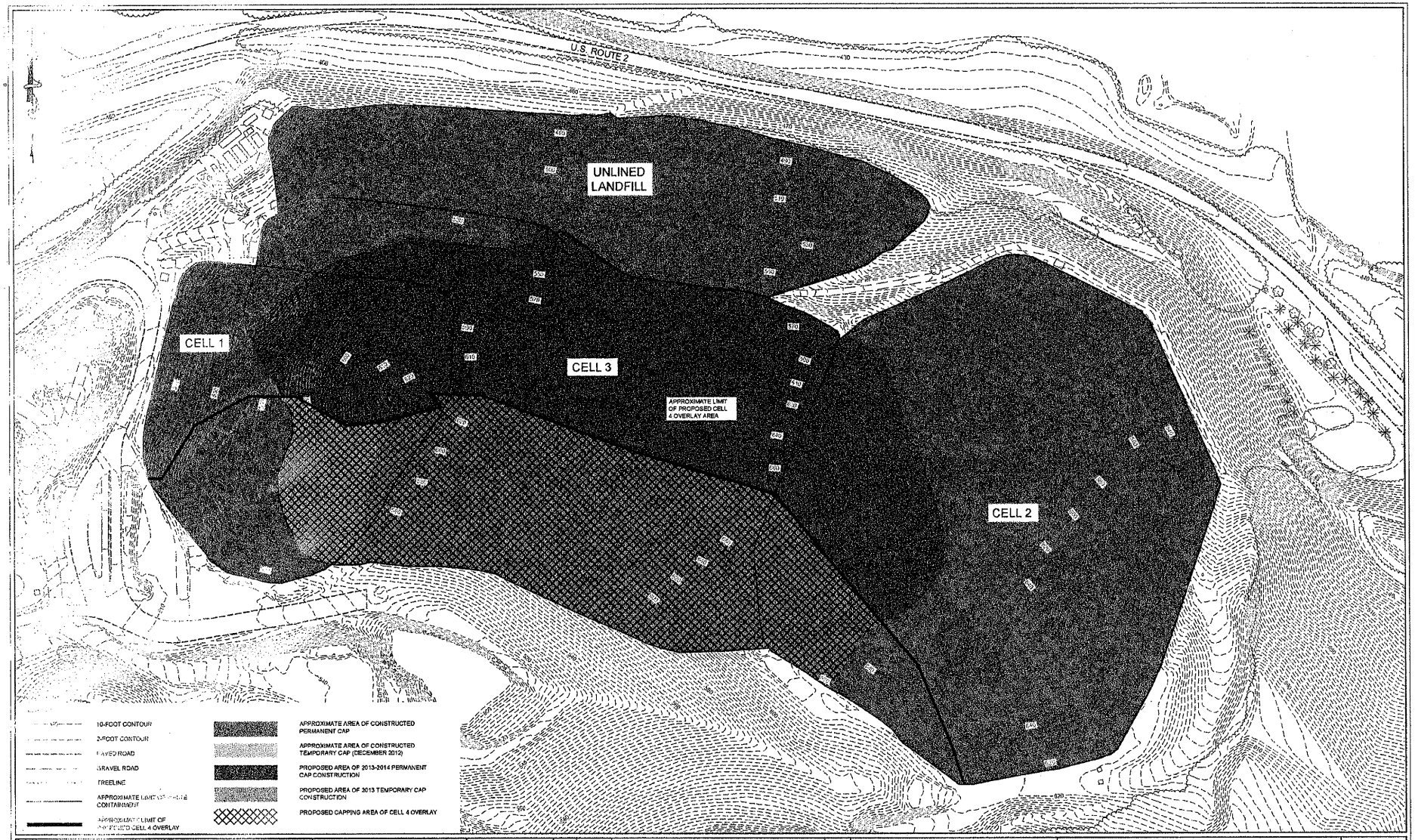
PROJECT MGR: C. WEAVER
PIC: M. POIRIER
DATE: JULY 2013

ADVANCED DISPOSAL SYSTEMS
MORETOWN LANDFILL, INC.
MORETOWN, VERMONT

PROJECT NUMBER
3040.06

LANDFILL CAP SYSTEM FIGURE

EXHIBIT C



SANBORN HEAD

GRAPHICAL SCALE
80' 40' 0 80' 160'

NO.	DATE	DESCRIPTION	BY

DRAWN BY: C. WEAVER
DESIGNED BY: C. WEAVER
REVIEWED BY: M. POIRIER
PROJECT MGR: C. WEAVER
PIC: M. POIRIER
DATE: JULY 2013

ADVANCED DISPOSAL SYSTEMS
MORETOWN LANDFILL, INC.
MORETOWN, VERMONT

PROJECT NUMBER: 3040.06

LANDFILL CAP SYSTEM FIGURE

EXHIBIT D

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO. 430-7-06 Wncv

STATE OF VERMONT,)
)
)
PLAINTIFF)
v.)
)
THE GOODYEAR TIRE &)
RUBBER COMPANY and)
CONNECTICUT RIVER)
DEVELOPMENT CORPORATION)
)
DEFENDANTS)

STIPULATION FOR ENTRY OF CONSENT ORDER AND CONSENT ORDER

Plaintiff the State of Vermont, (the "State"), through the Attorney General William H. Sorrell, and defendants The Goodyear Tire & Rubber Company ("Goodyear") and Connecticut River Development Corporation ("CRDC" and collectively with Goodyear, "Defendants"), individually, and through the undersigned counsel, hereby stipulate and agree as follows:

WHEREAS, the State filed a civil action in the Vermont Superior Court, Washington Unit, Civil Division, on July 26, 2006 against Defendants seeking enforcement of environmental claims under state statutes and common law concerning the presence of hazardous materials on real estate now owned by Defendant CRDC and formerly owned by Goodyear, located along River Street in Windsor, Vermont (the "Site"); and

WHEREAS, Goodyear and CRDC answered the complaint and also filed cross

claims against each other; and

WHEREAS, the State and Defendants entered into a Stipulation and Partial Settlement Agreement dated December 21, 2007 ("Partial Settlement"), which provided, *inter alia*, for an investigation of the Property and submission of a Site Investigation Report by Defendants. The parties have fulfilled the obligations of the Partial Settlement; and

WHEREAS, the parties have continued to act cooperatively in connection with the environmental work at the Site, and in connection with that environmental work, Goodyear has submitted to the Vermont Agency of Natural Resources ("ANR") a proposed Corrective Action Feasibility Investigation and Corrective Action Plan ("CAP") for the Site, and ANR has approved the CAP and issued an implementation letter dated September 19, 2013.

WHEREAS, the parties now wish to resolve all claims in the pending case and enter into a final consent order to govern the implementation of the CAP at the Site, along with appropriate re-opening provisions for additional remedial work if ANR reasonably determines that such implementation of the CAP is insufficient to achieve Site remediation in accordance with applicable requirements; and

WHEREAS, CRDC will provide to the Defendants and the State access to the Site for implementation of the CAP in accordance with the Consent Order; and

WHEREAS, the parties agree that the Partial Settlement will be superseded by the new consent order entered into by the parties via this Stipulation for Entry of Consent Order; and

WHEREAS, nothing in this Stipulation for Entry of the Consent Order or the Consent Order shall be construed as an admission by any of the Defendants of any liability for the environmental clean-up of the Site to the State, or among the Defendants; and

WHEREAS, the Attorney General pursuant to 3 V.S.A. Chapter 7 has general supervision of matters and actions in favor of the state and may settle such matters as the interests of the state require; and

WHEREAS, the Attorney General believes this settlement is in the state's interest as it serves the statutory purposes of 10 V.S.A. Chapter 159 under which this litigation has been brought;

NOW THEREFORE, the State and the Defendants, individually and collectively, hereby stipulate and agree as follows:

1. The consent order which follows immediately below ("the Consent Order") may be entered by the Court;

2. The Consent Order has been negotiated by and among the State and Defendants in good faith and is in the State's interest;

3. The State and Defendants hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and

4. The Consent Order sets forth the complete agreement of the parties, and may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and incorporated in an order by the Court.

IT IS SO STIPULATED.

Dated: 10/3, 2013 at Windsor, Vermont.

Thomas M. Rounds, Esq.
Attorney for Defendant Goodyear
Tire & Rubber Company

Dated: ___, 2013 at Ludlow, Vermont.

Matthew T. Birmingham, III
Attorney for Defendant
Connecticut River Development
Corporation

Dated: 10/7, 2013 at Montpelier, Vermont.

STATE OF VERMONT
ATTORNEY GENERAL
WILLIAM H. SORRELL

By:

Scot L. Kline
Assistant Attorney General

Dated: ___, 2013 at Windsor, Vermont.

Thomas M. Rounds, Esq.
Attorney for Defendant Goodyear
Tire & Rubber Company

Dated: 10/24, 2013 at Ludlow, Vermont.

Matthew T. Birmingham III by Karen Reynolds, ESQ.

Matthew T. Birmingham, III
Attorney for Defendant
Connecticut River Development
Corporation by Karen Reynolds, Esq.

Dated: , 2013 at Montpelier, Vermont.

STATE OF VERMONT
ATTORNEY GENERAL
WILLIAM H. SORRELL

By: _____
Scot L. Kline
Assistant Attorney General

CONSENT ORDER

Based upon the Stipulation for Entry of Consent Order in this action, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ORDERED, ADJUDGED AND DECREED, as follows:

1. The Goodyear Tire & Rubber Company ("Goodyear") and Connecticut River Development Corporation ("CRDC," and collectively with Goodyear, "Defendants") shall implement, at their own expense, the continuing environmental work, reporting and evaluation of site conditions recommended in the Corrective Action Plan ("CAP") (attached hereto as Appendix 1), as modified by ANR's letter/response dated September 19, 2013 (attached hereto as Appendix 2), subject to the provisions in paragraph 3 below regarding possible future additional remedial work, at the real estate now owned by Defendant CRDC and formerly owned by Goodyear, located along River Street in Windsor, Vermont (more fully described in Appendix 1) (the "Site").

2. The Defendants shall submit any required report or workplan pursuant to this Consent Order to the project manager of the Vermont Agency of Natural Resources ("ANR") Sites Management Section ("SMS") designated in Appendix 2. The parties agree that the project manager may be changed by the State without a modification to this Consent Order.

3. If the State reasonably determines, based on future monitoring or sampling results at the Site and other information, that implementation of the CAP pursuant to this Consent Order will be insufficient to achieve Site remediation in accordance with applicable Vermont legal requirements, including the Vermont Investigation and

Remediation of Contaminated Properties Procedure, then the parties shall consult in good faith on what additional remedial work ("Additional Remedial Work"), if any, is necessary at the Site. Upon request by the State, the Defendants shall submit a workplan for such Additional Remedial Work within forty-five (45) days of such request, and shall implement the workplan as approved, modified or conditioned by the State unless, within thirty (30) calendar days of receipt of the written communication from the State, one or more of the Defendants invokes the dispute resolution procedures set forth in paragraph 13 of this Consent Order.

4. Commencing on the date of approval of the Consent Order by this Court, CRDC shall provide the State, Goodyear and their representatives, contractors, and subcontractors, access at all reasonable times to the Site, or such other real property owned or controlled by CRDC, to conduct any activity implementing the CAP or relating to the Consent Order, including, but not limited to, the following activities:

a. Verifying any data or information submitted to the State;

b. Conducting investigations regarding contamination at or near the Site;

c. Obtaining samples;

d. Assessing the need for, planning, or implementing additional response actions at or near the Site;

e. Assessing Defendants' compliance with the Consent Order;

f. Determining whether the Site or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Consent Order; and

g. Implementing, monitoring, maintaining, reporting on, or enforcing any restrictions on use of the Site in this Consent Order.

5. Commencing on the date of approval of the Consent Order by this Court, Defendants shall not use or allow use of the Site in any manner that the State determines

will pose an unacceptable risk to human health or to the environment due to exposure to a hazardous material or will interfere with or adversely affect the implementation, integrity, or protectiveness of the past and/or future response actions or increase the response action costs. The restrictions, and related obligations, shall include, but not be limited to:

a. Taking reasonable steps to prohibit unauthorized public access to the Site;

b. Posting the Site with "No Trespassing" signs and taking all necessary legal steps to ensure that access to the Site has been limited until otherwise directed by the State;

c. Obtaining approval from the State prior to allowing the public to enter any areas of the Site where the Defendants or the State is conducting work, including both active work or passive work, such as monitoring activities; and

d. Not undertaking and restricting any activities that would interfere with or compromise the integrity of the land that is subject to response actions.

6. Prior to completion of the obligations in paragraph 7, CRDC is prohibited from taking or authorizing any of the following activities or actions on the Site without the written consent of the State:

a. any construction activity on the surface of the Site;

b. any activity at the Site that has the potential to damage any part of the response action at the Site (e.g., soil borings, posts, stakes, excavations);

c. installation of wells at any location or use of the groundwater underlying the Site;

d. construction, substantial improvement, or stabilization of buildings, camping accommodations or mobile homes, fences, signs, billboards or other advertising material, or any other structures;

e. plowing, tilling, ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, or building of roads or changing the topography of the land;

f. removal, destruction or cutting of trees or plants, planting of trees or plants, use of fertilizers, spraying with biocides, introduction of non-native

animals, grazing of domestic animals, or disturbance or change in the natural habitat in any manner;

g. storage, treatment or disposal of solid waste or hazardous materials or wastes, including, but not limited to, fuel, solvents, lubricants, ashes, trash, garbage, construction or demolition debris, or other unsightly or offensive material; land application of disposal of biosolids, sludges, or septage; or activities which could cause erosion or siltation on the Site;

h. construction activities which will materially change the hydrogeologic conditions or will likely cause migration of contaminated groundwater;

i. manipulation of alteration of natural water courses, marshes or other water bodies, or any other activity which would be detrimental to water quality, or which could alter natural water level and/or flow; and

j. any other use that may impact or adversely affect the implementation, construction, operation, or maintenance of the response action at the Site.

The State, and its contractors and assigns, shall have the right to undertake any activity determined to ensure the integrity and protectiveness of any remedial structure or response activity on the Site.

7. CRDC shall:

a. Execute and record in the Recorder's Office in the Town of Windsor, a grant of environmental restrictions, rights of access and easement ("Grant") in a form acceptable to the State. At a minimum, the Grant shall identify areas on the property identified in the CAP, and any addendum to the CAP, as requiring land use controls to protect human health or the environment. CRDC shall provide the State with a narrative description of the restrictions, and a map, in recordable form, clearly identifying those restricted areas. Any restricted area shall be surveyed and monumented by a licensed Vermont land surveyor.

b. Within 30 days after the State's approval of a "Completion Report" of the active remedial measures (for purposes of this Order "active remedial measures" excludes any environmental monitoring) of the CAP and any addendum thereto:

(i) Submit to the State for review and approval regarding such real property: (1) a draft Grant that is enforceable under state law; and (2) a current title insurance commitment or other evidence of title acceptable to the State, that shows title to the land affected by the Grant to be free and clear of

all prior liens and encumbrances (except when the State waives the release or subordination of such prior liens or encumbrances or when, despite best efforts, CRDC is unable to obtain release or subordination of such prior liens or encumbrances).

(ii) Submit to Goodyear for review and approval regarding such real property a draft grant of environmental restrictions, rights of access and easement consistent with the Grant to the State, that is enforceable under state law. CRDC also shall submit this draft grant to the State, whose approval shall be required.

c. Within 15 days after the State's approval and acceptance of the grants referenced in Sections 7(b)(i) and (ii) above, and the title evidence, update the title search and, if it is determined that nothing has occurred since the effective date of the commitment, or other title evidence, to affect the title adversely, record the grants referenced in Sections 7(b)(i) and (ii) above with the appropriate land records office. Within 30 days after recording the grants, CRDC shall provide the State and Goodyear with a final title insurance policy, or other final evidence of title acceptable to the State, and a certified copy of the original recorded grants showing the clerk's recording stamps.

8. CRDC agrees to incorporate, in full or by reference, all of its land use obligations under paragraphs 4-7 of this Consent Order, including the obligations under the grants, into all leases, sales agreements, licenses, occupancy agreements or any other instrument of transfer by which a right to use the Site, or any portion thereof, is conveyed.

9. Nothing in this Consent Order precludes or limits the State's statutory or regulatory authority to respond to conditions at the Site in the future which the State reasonably determines constitute an emergency risk to public health or to the environment that requires immediate action.

10. This Consent Order resolves the State's claims in its Complaint dated July 25, 2006 and is binding on the State and its agencies and on Defendants and their successors and assigns. Specifically, except as provided in this Consent Order, the Consent Order

resolves all environmental claims of the State as to the Site known to the State at this time against the Defendants, and all claims of the State for civil penalties against Defendants, individually or collectively, in connection with the Site. This Consent Order also resolves the cross claims of Goodyear and CRDC against each other and all obligations under the Consent Order are binding on Defendants and their successors and assigns.

11. The Stipulation and Partial Settlement Agreement, dated December 21, 2007, in this matter shall be superseded by this Consent Order.

12. The State and Defendants hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order.

13. In the event of a dispute between or among any of the parties to this Consent Order, or their successors and assigns, regarding the obligations and covenants set forth in this Consent Order, the parties shall resolve any such dispute in accordance with the following dispute resolution procedures; provided, however, that in the event the Commissioner of the Vermont Department of Environmental Conservation (hereinafter, "Commissioner") determines, in the Commissioner's reasonable discretion, that a dispute involves a condition or conditions having a reasonable potential to create a threat to public health or the environment, the Commissioner may waive the dispute resolution procedures set forth in Section 13 (a) through (d):

> a. Either Defendant or the State may initiate these dispute resolution procedures by providing written notice to the other party or parties identifying the matter(s) in dispute and requesting that this process be initiated. In the event of such notice, the parties shall attempt to resolve the matters in dispute through informal discussions by telephone or in person within thirty (30) calendar days after receipt of such notice.

b. Upon expiration of this initial thirty (30) day period, if the parties have been unable to resolve the dispute, the parties involved in the dispute shall each submit to the other(s), within ten (10) calendar days, a written summary of the matter(s) in dispute and a statement of its positions on each matter (hereinafter, "Statement of Position"), including any data, analysis, or opinion supporting those positions and all supporting documentation.

c. Within thirty (30) calendar days of exchanging Statements of Position, the parties involved in the dispute shall meet by telephone or in person to attempt to resolve the dispute.

d. If the parties are unable to resolve a dispute through the procedures set forth in Section 13 (c), any party involved in the dispute may petition the Court for equitable relief with respect to the matter(s) involved in that dispute.

e. In any court proceeding with respect to the matter(s) involved in the dispute, the Defendants shall bear the burden of showing that the State's request is unreasonable.

f. Time periods for the resolution of disputes may be extended or shortened by mutual agreement of the parties involved in the dispute, provided that the parties involved in a dispute agree to use reasonable efforts to resolve the dispute at the earliest possible time taking into consideration the primary objective of protecting the public health, welfare, safety and the environment.

14. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

15. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

16. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.

17. Nothing in this Consent Order shall be construed as having relieved, modified,

or in any manner affected Defendants' obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendants. The State reserves all rights, claims and interests not expressly waived herein. Except as provided in this Consent Order, the obligations of each Defendant herein under this Consent Order are joint and several. Nothing in this Consent Order shall affect the rights of the Defendants to allocate among themselves responsibility for any actions required under this Consent Order.

18. This Consent Order sets forth the complete agreement of the parties with the State, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated into an order issued by the Superior Court, Civil Division, Washington Unit. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

19. The Court hereby finds that this Consent Order has been negotiated by the State and Defendants in good faith, that implementation of this Consent Order will avoid potentially prolonged and complicated litigation among the parties, and that this Consent Order is fair, reasonable and in the state's interest. The Court hereby enters this Consent Order as an Order of the Court and final judgment.

20. Defendants shall cause all work hereunder to be performed in accordance with applicable schedules and time frames set forth in this Consent Order or the CAP unless any such performance is prevented or delayed by an event that constitutes an unavoidable delay. For purposes of this Consent Order, an "unavoidable delay" shall mean an event

beyond the control of Defendants that prevents or delays performance of any obligation required by this Consent Order and that could not be overcome by due diligence on the part of Defendants.

21. Defendants' obligations under this Consent Order shall terminate upon ANR's approval in writing of Defendants' written notification to ANR that all work required to be performed under this Consent Order has been completed, provided that any such termination of Defendants' obligations under this Consent Order shall not terminate any continuing obligations set forth in Sections 4 through 8 of this Consent Order.

THE GOODYEAR TIRE & RUBBER COMPANY

Witness/Attest:

By: _____

Its: Assistant Secretary

Date: September 30, 2013

By: Donald E. Stanley

Its: Vice President

Date: September 30, 2013

SEAL

CONNECTICUT RIVER DEVELOPMENT CORPORATION

Witness/Attest:

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

STATE OF VERMONT
ATTORNEY GENERAL
WILLIAM H. SORRELL

Witness/Attest:

By: _____

Its: Paralegal Tech II

Date: 10/7/13

By: _____

Its: Environmental Protection Division Chief

Date: 10/7/13

THE GOODYEAR TIRE & RUBBER COMPANY

Witness/Attest:

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

CONNECTICUT RIVER DEVELOPMENT CORPORATION

Witness/Attest:

By: _____

Its: _____

Date: _____

By: [signature]

Its: PRESIDENT

Date: 10 OCTOBER 2013

Approved by Matthew Birmingham, III _____

STATE OF VERMONT
ATTORNEY GENERAL
WILLIAM H. SORRELL

Witness/Attest:

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

THE GOODYEAR TIRE & RUBBER COMPANY

Witness/Attest:

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

CONNECTICUT RIVER DEVELOPMENT CORPORATION

Witness/Attest:

By: [signature]

Its: ATTORNEY

Date: 10/18/13

By: [signature]

Its: PRESIDENT

Date: 10 OCTOBER 2013

STATE OF VERMONT ATTORNEY GENERAL WILLIAM H. SORRELL

Witness/Attest:

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

IT IS SO ORDERED at Montpelier, Vermont this _____ day of _____, 2013.

_____
Superior Court Judge

VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

2013 OCT 10 P 4:30

NORTHEAST RESOURCE RECOVERY ASSOCIATION, and AMERICAN RETROWORKS, INC., d/b/a GOOD POINT RECYCLING, Plaintiffs v. STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Defendant	FILED Docket No. 595-9-13 Wncv

RULING ON DEFENDANT'S MOTION TO DISMISS

This case is brought by a non-profit entity, Northeast Resource Recovery Association, which until this month had the contract for a statutorily mandated consumer electronic waste recycling program in the State of Vermont.[1] The other plaintiff, Good Point Recycling, is the subcontractor that actually carried out the recycling work. As of October 1, the State awarded the contract in question to a different entity, Casella Waste Systems. This case seeks to unravel that contract, alleging that the State failed to comply with legal requirements in awarding it.

Plaintiffs filed a motion for preliminary injunction on September 30, the day before the new contract was to take effect. A hearing was held on that motion on October 3. The State requested an opportunity to file a memorandum of law. Until briefing could be completed, then, the court issued a temporary order maintaining the status quo that existed at the time the motion was filed.

[1] "Electronic waste" as used here refers to used computers, computer monitors, televisions and the like.

The State filed a motion to dismiss this case in its entirety, arguing that only the Environmental Division has jurisdiction. Plaintiffs have responded to that motion, and the State has filed a reply. In addition, Casella Waste Systems filed a motion to intervene on October 9. Plaintiffs were given until October 11 to respond to that motion.

Because the court concludes that the motion to dismiss disposes of the entire case, making the other motions moot, it is ruling without waiting for tomorrow's deadline for additional filings on the other motions.

Background

Chapter 166 of Title 10 is the source of the legal requirement for the electronic waste recycling program at issue in this case. 10 V.S.A. § 7552 (mandating a plan for electronic waste recycling by January 1, 2011). The Agency of Natural Resources ("ANR" or "the State") is required to establish and review a state-wide program providing for free recycling for households, charities, schools, and businesses with less than eleven employees. Id. § 7552, 7559 and 7551(9). A plan went into effect in 2010. The plan is paid for by imposing fees on manufacturers of electronic devices. Id. § 7553. The statute allows ANR to contract out the administration of the recycling program, which is what it has done. Id. § 7560.

Findings of Fact

The court finds the following facts established by a preponderance of the evidence. For the first two years of the program, ANR awarded the administration of the recycling contract to Northeast Resource Recovery Association ("NRRA" or "Northeast"). Northeast is a non-profit entity that serves numerous municipalities around New England. Its mission is to increase and improve recycling, and to assist municipalities in obtaining the best contracts for doing so. Northeast subcontracted with Good Point for the actual collection, transportation and recycling

work in Vermont. Good Point is based in Middlebury, Vermont. It is run by the former head of the Massachusetts Department of Environmental Protection, Robin Ingenthron, who has also been a leader in the recycling field. He appears deeply committed to the principle of recycling, not merely as a business proposition but as an environmental ethic.

The second year of the Northeast contract was set to expire on September 30, 2013. In June, after a formal bidding process, ANR told Northeast its bid had been "conditionally selected . . . pending contract negotiations." Ex. E. Negotiations began with regard to the exact terms of the contract. On July 3, ANR emailed Northeast what it termed its "***final offer*** with regard to the payment of the collection/transportation/recycling of covered electronic devices." Ex. F (emphasis in original). The "final offer," however, was not a draft contract. Rather, it was a brief list of six items relating to compensation to Northeast and to local collection centers. The email demanded a response by July 8.

On July 8, Northeast responded as follows, also by email: "Given the stated position of the Agency, demanding an unequivocal acceptance of this brand new proposed compensation approach for the payment of collection services to which NRRA/GPR is not allowed the opportunity to discuss interpretation nor ramifications such as unintended consequences, we have no choice but to accept the offer." Ex. G. The email requested a copy of the draft contract to review. However, despite repeated requests from Northeast, ANR did not send Northeast any drafts of a contract until over two weeks later, on July 23.

After receipt of the draft contract, the parties had ongoing discussions. Northeast hired a New Hampshire attorney to assist with negotiations. On August 2, the attorney sent a letter to ANR in which he stated that Northeast had "a number of serous concerns that are obstacles to concluding a satisfactory agreement." Ex. I. The letter listed a number of concerns and requested

a meeting to discuss them. A meeting or meetings were held and emails were exchanged. On August 13, one of ANR's staff told Northeast to send over some specific language reflecting its proposal. Northeast did so the next day. Ex. J. It received no substantive response to the proposal. Instead, on August 20 ANR sent an email stating that it had reviewed the proposed language and that "[i]n consideration of the status of negotiations at this point in time, and in light of the current time limitations, the Division has decided to suspend the current negotiations with NRRA and pursue an agreement with a second contractor/bidder." Ex. K.

The Solid Waste Program Manager, Cathy Jamieson, testified that ANR was concerned that the negotiations were taking too long, and that Northeast was not agreeing to one of ANR's key requirements, a 7 cents per pound payment to collection centers. However, ANR never told Northeast that was a non-negotiable, required component of the contract. Rather than sending back a counterproposal, stating that Northeast's proposal was rejected unless certain terms were agreed to, or even clarifying that certain terms were non-negotiable, ANR unilaterally suspended negotiations and started negotiating with another bidder, Casella Waste Systems. On September 24, the Commissioner of the Department of Environmental Conservation signed a contract with Casella.

ANR never actually notified Northeast that it was being denied the contract. Nor did ANR ever send Northeast anything in writing after the email suspending negotiations. Northeast learned of the Casella contract on September 26 when it was at a meeting in connection with completion of the 2012-13 contract terms.

Plaintiffs assert a Rule 75 claim in this case, arguing that ANR failed to comply with (1) mandated contracting procedures for state agencies, and (2) the Request for Proposal itself.

According to Plaintiffs, these acts were an abuse of discretion. The complaint seeks an order requiring ANR to rebid the project and properly apply the mandated procedures.

Northeast planned to subcontract to Good Point again if it was awarded the 2013-14 contract. Good Point ramped up its staff in reaction to winning the state contract in 2010, and will have to downsize if it is not awarded the contract this year. Although it has a number of other clients in other states, with contracts worth several hundred thousand dollars, it allegedly cannot meet its mortgage payments on its plant in Middlebury without this contract. The owner testified that the business will likely close if it loses the Vermont contract, and will be unable to reopen in the future because it will no longer be credit-worthy. Thus, Good Point argues that it will suffer irreparable harm in the absence of a preliminary injunction maintaining Northeast's contract while this case proceeds.

Motion to Dismiss

The State argues that this court lacks jurisdiction because all claims against the State relating to recycling of electronic waste must by law be heard in the Environmental Division of the Superior Court (formerly the "Environmental Court"), rather than the Civil Division. Specifically, 10 V.S.A. § 8503 states that Chapter 220 of Title 10 "shall govern *all appeals of an act or decision of the secretary*, excluding enforcement actions . . . and rulemaking, *under the following authorities*..." (emphasis added).[2] The list that follows includes Chapter 166, entitled "Collection and Recycling of Electronic Devices."[3] Title 10 further states that "any person aggrieved by an act or decision of the secretary . . . may appeal to the environmental division," with an exception not applicable here. 10 V.S.A. § 8504(a).

[2] The statute makes clear that "the secretary" means the Secretary of the Agency of Natural Resources or his or her delegate. Id. § 8502(8). The definition expressly includes the Commissioner of the Department of Environmental Conservation. Id.

[3] The court will refer to this as the "Ewaste statute."

On its face, Title 10 appears to require that all challenges to any act of the Secretary of ANR or the Commissioner of the Department of Environmental Conservation be brought in the Environmental Division. The contract awarded to Casella was signed by the Commissioner. Thus, this challenge to that award appears to be within that statutory requirement, depriving this court of jurisdiction.

Northeast and Good Point argue, however, that Title 10 does not apply for various reasons. First, they assert that it merely consolidates existing appeal rights rather than creating any. The court is not persuaded. Section 8504 states that a person aggrieved "may appeal to the environmental division." The court has trouble construing that as not expressly creating a right to appeal.[4]

Plaintiffs also argue that this is not an "appeal" because there is no formal written decision here denying them the contract, and no express statutory provision in the Ewaste statute defining a process for such decision-making. They are correct that the action taken by the Secretary here differs from the more formal denial sent to Good Point rejecting their proposal for an "Opt-Out" recycling program under the very same statute. Ex. A to Plaintiffs' Opposition. ANR's failure to send any written denial of the bid here certainly complicates the court's analysis and is somewhat puzzling. However, the court finds nothing in the statute requiring that something must be written and formal to be an "act or decision."

Nor have the parties pointed to any law suggesting that the terms "act" and "decision" have anything other than their obvious meanings. *See, e.g.*, Town of Bennington v. Hanson-

[4] Northeast and Good Point also argue correctly that Rule 5 of the Environmental Rules does not seem to neatly fit this sort of case. For example, it requires an appellant to state the address or location of "the property or development with which the appeal is concerned." V.R.E.C.P. 5(b)(3). That obviously makes no sense here. However, the fact that the rules may not have been amended to match changes in the statute is not a ground on which to reject the clear language of the statute. The court notes, for example, that the title of the Environmental Rules also has not yet been amended to delete the outdated reference to the Environmental Court, but the law changing that court's name is still effective.

Walbridge Funeral Home, Inc., 139 Vt. 288, 292-93 (1981)("A 'decision' has been defined as 'a determination or result arrived at after consideration'")(citation omitted); Brown v. Standard Casket Mfg. Co., 175 So. 358, 364 (Ala. 1937)("Webster's New International Dictionary defines act, primarily as 'that which is done or doing; the exercise of power, or the effect of which power exerted is the cause; a performance; a deed.'")(citations omitted). While the court has found one case in which the Water Resources Board apparently argued that "act or decision" meant a "contested case" as statutorily defined, the Court did not analyze or address that question. In re Stormwater NPDES Petition, 2006 VT 91, ¶ 16, 180 Vt. 261. Even if the requirement for "final" agency action is imported from federal administrative law, it would appear to have been met once the Casella contract was signed. *See, e.g.*, Federal Procedure, Lawyer's Edition, 2 Fed Proc. L. Ed. § 2:318 (West, Westlaw though Sept. 2013)("To be judicially reviewable under the Administrative Procedure Act (APA), agency action must be 'final.'. . . The core questions, for purposes of determining finality, are whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect other parties.").

The court concludes that this case does involve an "act or decision" made "under" Chapter 166 in that ANR's powers to issue contracts such as the one at issue here flow directly from Chapter 166. That Chapter expressly gives ANR the power to "contract for implementation and administration of" the mandated recycling program. 10 V.S.A. § 7560. That is precisely what this case is about. For this reason, the court concludes that it lacks jurisdiction to hear this case. [5]

[5] If truly any "act" of the Secretary related to the Ewaste statute can be appealed, it could lead to absurd results. Can someone appeal to the Environmental Division the personnel actions of the Secretary related to staff working on the Ewaste program, or the paint color for an office for such staff? Surely that was not intended, but "any act" would arguably include such matters. Here, however, the contract in dispute is something expressly referenced in the statute. Thus, the court does not find the outer reach of the statute to be an issue that must be resolved today.

Order

The court grants the State's motion to dismiss this case for lack of jurisdiction. The temporary preliminary injunction is hereby vacated.

Dated at Montpelier this 10th day of October, 2013.

Helen M. Toor
Superior Court Judge