STATE OF VERMONT
CHITTENDEN COUNTY

STATE OF VERMONT on behalf of the AGENCY OF TRANSPORTATION AND AGENCY OF NATURAL RESOURCES Plaintiff v. GILBERT A. RHOADES, SR. AND BLANCHE E. RHOADES Defendants	SUPERIOR COURT Docket No. S0569-07 CnC

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The State of Vermont, on behalf of the Agency of Transportation ("AOT") and the Agency of Natural Resources ("ANR"), sues Defendants Gilbert A. Rhoades, Sr. and Blanche E. Rhoades for: (1) unlicensed operation of a junkyard in violation of 24 V.S.A. § 2242; (2) operation of an uncertified solid waste facility in violation of 10 V.S.A. § 6605(a)(1); (3) release of hazardous materials in violation of 10 V.S.A. § 6616; and (4) improper management of hazardous waste in violation of the Vermont Hazardous Waste Management Regulations ("HWMR"). Invoking this court's jurisdiction under 24 V.S.A. § 2243(6) and 10 V.S.A. §§ 6610a(a)(2) and 8221, the State seeks injunctive relief, a declaratory judgment, and civil penalties. The State has filed a motion for summary judgment on liability. Defendants oppose summary judgment, and have filed a cross-motion for partial summary judgment. Robert F. McDougall, Esq. represents the State; Thomas G. Walsh, Esq. represents Defendants.

I. Background

A. Procedural History

A brief recitation of the procedural background in this case is helpful to put the present motions in context, and necessary to understand Defendants' estoppel arguments. The State filed its Complaint in this case on May 14, 2007. On the same day, the State filed a Motion for Preliminary Injunction, seeking an order requiring Defendants to: (1) obtain a junkyard license; (2) begin removing waste tires from their property ("the Site"); (3) cease accepting additional tires at the Site; (4) submit to ANR and implement a plan to investigate the release and threatened release of hazardous materials on the Site; and (5) submit to ANR and implement a written plan to address all identified deficiencies in the handling and management of hazardous materials.

On August 3, 2007, based on a stipulation between the parties, the court entered an Order on the State's Motion for Preliminary Injunction. That Order consisted of four basic provisions. First, Defendants would file for a State Junkyard license from VTrans within 30 days of obtaining a Certificate of Approval from the Town of Milton. Second, Defendants would submit a written hazardous waste management plan within 120 days. Third, within 45 days, Defendants would submit a written work plan by an environmental consultant to address possible groundwater contamination. Finally, the parties would make best efforts toward settling the issue of tire disposal, but if they failed to resolve the issue within 60 days, they would jointly request that the court schedule a hearing on that matter.

On October 25, 2007, the parties stipulated to a further Order regarding tires. That Order required, among other things, that Rhoades have two tractor trailer loads of

existing tires removed from the Site. The State agrees that two tractor trailer loads of tires were removed from the Site under the authority of the Order, but disputes that Defendants have otherwise satisfactorily complied with the Order.

On April 28, 2009, the State filed its Motion for Summary Judgment on Defendants' Liability. On June 12, 2009, Defendants filed their reply and Cross-Motion for Partial Summary Judgment.

B. Factual Background

The following material facts are undisputed except where noted.[1] Defendants Gilbert A. Rhoades and Blanche E. Rhoades are the owners of property located at 15 Shirley Avenue in Milton, Vermont ("the Site"). The State asserts that, at the Site, Defendants operate Rhoades Salvage and ABC Metals and Recycling ("Rhoades Salvage"), a business that involves buying, receiving, storing, keeping, treating, dismantling, processing, selling and disposing of used and discarded materials. The materials at the Site include junk, junk motor vehicles and other waste products associated with vehicle salvage operations such as gasoline, diesel, antifreeze, waste oil, lead acid batteries, tires, soil that has absorbed spills of waste liquids, and sawdust that has absorbed spills of waste liquids. The State asserts that Defendants have established and currently operate and maintain a junkyard, as defined in 24 V.S.A. § 2241(7). Defendants deny that Blanche Rhoades is involved in operating and maintaining a junkyard, but do not dispute that Gilbert A. Rhoades, Sr. operates a junkyard.

[1] The court uses the unchallenged portions of both parties' statements of undisputed facts for the purposes of the pending motions.

1. Facts Relating to the Junkyard License and the Tire Pile

In 1995, in connection with a lawsuit brought by AOT against Defendants,[2] AOT entered into a stipulated order with Defendants regarding a tire pile at the Site and the licensing of the Site as a junkyard. Defendants say that, in formulating the 1995 Order, AOT consulted, worked closely with, and was in privity with ANR. The State maintains that ANR was not a party to the 1995 Order between AOT and Defendants. The 1995 Order did not require Rhoades to remove the existing tire pile. The Order did require Rhoades to create a fire lane around the existing tire pile and shred any new tires coming onto the Site. Defendants did create fire lanes at the Site, but the parties dispute whether Defendants complied with the covenant to shred all "newly acquired" tires.

Defendants do not hold a junkyard license from AOT to operate and maintain a junkyard as required under 24 V.S.A. § 2242(2). No such junkyard license for the Site has been issued since at least 2001. Rhoades' local location approval from the town of Milton also lapsed in July 2001 and has not been renewed. There is a large pile of tires in the northeast corner of the Site.[3] Defendants do not have a certification from ANR to operate a solid waste management facility at the Site.

2. Facts Relating to the Alleged Release of Hazardous Materials

During visits to the Site, ANR became concerned that mismanagement of hazardous wastes at the Site may have led to the release of hazardous materials into the groundwater, surface water and lands of the State. At visits to the Site on September 12,

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[2] Vermont Agency of Transportation v. Rhoades, No. S933-94-CnC.

[3] Neither party has elaborated on the size of the pile of tires for the purposes of the present motions, although Defendants do not dispute that the pile is "large." The court notes that the record includes estimates ranging from 200,000 tires to more than one million tires. See Rhoades Aff. ¶ 10; Schwendtner Aff. ¶ 9.

2003, November 8, 2006, September 22, 2008, October 1, 2008 and October 20, 2008, ANR observed stained soils and sheens on standing water. ANR staff also observed batteries stored on bare ground and smelled odors of petroleum during these visits, and ANR claims that all these observations are indicators of a release of hazardous materials.[4]

In October 2008, the Environmental Protection Agency ("EPA") visited the Site and conducted a Preliminary Assessment/Site Inspection ("PA/SI"). This work included the collection of soil samples from the Site and neighboring properties and the collection of sediment and surface water samples from Hobbs Pond. A revised EPA report summarizing the findings of the PA/SI was provided to ANR on April 7, 2009.

a. Alleged Release to Surface Water

A surface water sample, referred to as "SW-04" in the EPA report, was collected at the north end of Hobbs Pond.[5] Sample SW-04 detected arsenic, a hazardous material, at levels exceeding Vermont water quality standards. The State maintains that this high level of arsenic, especially when compared to the surface water samples collected at Hobbs Pond farther away from the Site, indicates that it is unreasonable to believe that the arsenic detected was naturally occurring. According to the State, this is further supported by the fact that arsenic has been detected on the Site in groundwater samples at

[4] Defendants "dispute observations indicating the release of hazardous materials" and the presence of stained soils and sheens on standing water, but have only cited a single paragraph of the affidavit of Gilbert Rhoades, in which he states that "[b]ased on information and belief, there has not been any stained soils or sheens on standing water at the site." That statement is not based on personal knowledge as required by V.R.C.P. 56(e), and the court will not consider it here. Johnson v. Fisher, 131 Vt. 382, 384 (1973).

[5] The State asserts that the north end of Hobbs Pond is "where water flowing from the Site enters the pond." Citing the affidavit of Chad Farrell, an environmental engineer, Defendants say that they "dispute that sample SW-04 is located where surface water from the site enters Hobb's Pond." Farrell's affidavit states that "[i]f the contaminants found in the sediments and surface water of Hobbs pond were originating from the Rhoades site, onsite contaminant levels would be expected to be significantly elevated." Farrell Aff. ¶ 24.

a level above the Vermont enforcement standards. The State concludes that this shows the release of arsenic by Defendants into the surface waters of the State.

Defendants dispute that arsenic has been detected onsite in groundwater samples at a level above Vermont enforcement standards, because they argue that those findings are based on improper sampling protocols and preservation techniques. Defendants also argue that there has been insufficient study of the possibility that the arsenic is naturally occurring.

EPA also collected a sediment sample, referred to as sample "SD-04" in the EPA report, just outside the northwest corner of the Site. The State contends that sample SD-04 analyzed water exiting the Site through a culvert extending from land beneath the tire pile into Hobbs Pond. Defendants dispute that sample SD-04 analyzed water exiting the Site.[6] The State says that sample SD-04 reflects the hazardous materials that are settling out of the surface water as it exits the Site and passes over the area where the sample was collected. Defendants contend that sample SD-04 provides no reliable evidence that hazardous materials settle out of surface water as water exits the Site.[7] Sample SD-04 was shown to have levels of lead, nickel, chromium, cadmium, copper and zinc at levels exceeding "threshold effects concentrations" ("TECs") and lead, nickel, copper and zinc in excess of "probable effects concentrations" ("PECs").

[6] For this proposition, Defendants cite paragraph 24 of the Farrell affidavit, which states that: "[i]f the contaminants found in the sediments and surface water of Hobbs pond were originating from the Rhoades site, onsite contaminant levels would be expected to be significantly elevated."

[7] For this proposition, Defendants again cite paragraph 24 of Farrell's affidavit.

b. Alleged Release to Soil

EPA collected soil samples at the Site. One of the soil samples taken at the Site, referred to as "SS-11" in the EPA report, detected lead at levels well in excess of the Vermont screening levels. SS-11 detected lead at 3,300 milligrams per kilogram ("mg/Kg"). The Vermont screening level for lead in residential soil is 400 mg/Kg and 800 mg/Kg for lead in industrial soil.

c. Alleged Release to Groundwater

In the fall of 2007, ANR approved a work plan for the Site prepared by Environmental Products and Services ("EPS"), environmental consultants hired by Defendants. EPS performed on-site groundwater testing through the installation of three monitoring wells at the Site. The State says that the results of the on-site groundwater sampling showed levels of metals above Vermont enforcement standards for arsenic, cadmium, chromium and lead. Defendants argue that the results of EPS's on-site groundwater sampling are invalid due to improper sampling protocols and preservation techniques.

d. Long History of Salvage Operations

ANR records show that Defendants have owned the Site for more than 30 years and that salvage operations have occurred at the Site since the 1950s. The Site handles materials including hazardous wastes normally associated with vehicle salvage operations such as gasoline, diesel, antifreeze, waste oil and lead acid batteries. The State asserts that the hazardous materials detected at the Site through the sampling are of the sort that would normally be associated with a vehicle salvage operation. Again alleging sampling

errors, Defendants dispute that the sampling has identified hazardous materials coming from vehicle salvage operations.

3. Facts Relating to Alleged Improper Management of Hazardous Waste

In 1996, Defendants filed a "Notice of Regulated Waste Activity" with ANR identifying the Site as a Conditionally Exempt Generator ("CEG"). As a CEG, the Site is required to comply with the State of Vermont's Hazardous Waste Management Rules ("HWMR") for all hazardous and conditionally exempt wastes handled at the site. ANR visited the Site on October 21, 2005 and November 8, 2006, and found four specific violations of the HWMR at the Site: (1) the storage of spent automotive batteries; (2) the storage of spent antifreeze; (3) the process used by Defendants to clean leaks and spills at the Site; and (4) the storage of waste oil.[8] During its inspection on October 21, 2005, ANR observed three truck bed bodies full of batteries at the Site, on bare ground and outside with no cover from precipitation. Three industrial sized batteries were found on bare ground at the Site. ANR also observed four 55-gallon drums and two 100 gallon tanks of spent antifreeze within the body of a bus with no labeling indicating the contents of the tanks.

Also during its inspection, ANR observed no containers of oil contaminated soil or Speedi-Dry.[9] Gilbert Rhoades admitted to ANR staff that he was continuing to place these materials in vehicles prior to the vehicles being crushed and sent to Canada. Shipping contaminated substances off site in crushed vehicles is not consistent with the

[8] Defendants dispute that Blanche Rhoades violated the HWMR. For the remainder of this factual recitation, Defendants dispute Blanche Rhoades' involvement, and assert that the Site is presently operating in compliance with the HWMR, citing Gilbert Rhoades' assertion to that effect in his affidavit.

[9] According to Thomas Benoit, Sr., Speedi-Dry is a material used to clean leaks and spills. Benoit Aff. ¶ 14.

proper disposal of hazardous waste under the HWMR, and Defendants were not making the specific determinations called for when spills occurred. Finally, ANR observed twenty-six 55-gallon drums of waste oil being stored outside in an old truck bed, on the ground, without cover and with no labeling identifying the contents.

II. Operating a Junkyard Without a License

Under the applicable Vermont law,[10] "[a] person shall not operate, establish or maintain a junkyard unless he [or she]: (1) Holds a certificate of approval for the location of the junkyard; and (2) Holds a license to operate, establish or maintain a junkyard." 24 V.S.A. § 2242. It is undisputed that Defendant Gilbert Rhoades operates a junkyard. It is also undisputed that since 2001 Defendants have not held a junkyard license from AOT to operate and maintain a junkyard. Nor has any license been issued to anyone else to operate the Site as a junkyard since 2001.

Defendants argue that the doctrine of equitable estoppel prevents the State from pursuing a claim for the unlicensed junkyard operation. Defendants argue that they have relied on this court's August 3, 2007 Order, which required Defendants to file for a State Junkyard license from VTrans within 30 days of obtaining a Certificate of Approval from the Town of Milton. Defendants say they have been pursuing the Certificate of Approval, and reasonably believed that the State would not seek to establish liability while they went through the location approval process. The State responds that, in the current motion, it seeks to establish liability for unlicensed operation of a junkyard only for the period from July 1, 2001 to the date of the August 3, 2007 court order.

[10] The Legislature has recently amended § 2242. See 2009, No. 56, § 5. Under the new law, "junkyards" are now called "salvage yards," and a "license" to operate such a salvage yard is now called a "certificate of registration." Since this case was pending well before the 2009 amendments, pursuant to 1 V.S.A. § 213, those amendments do not apply to this case.

Initially, the court notes that, because of the negative impact on public policy, estoppel is applied against the government only in rare cases. Cold Brook Fire Dist. v. Adams, 2008 VT 28, ¶ 7, 183 Vt. 614 (mem.). Regardless, for the period after July 1, 2001 but before this court's August 3, 2007 Order, Defendants could not have relied upon that Order, and the doctrine of equitable estoppel could not apply.

Defendants respond that the Order resolved all issues related to the junkyard license. The court disagrees. The Order was the result of the State's Motion for Preliminary Injunction, in which the State sought to require Defendants to obtain a junkyard license. The Order did not address or resolve the issue of whether the junkyard should be permanently shut down, a remedy the State sought if Defendants did not obtain the necessary license.[11] See Compl. p.12 (filed May 14, 2007). The State is also still seeking, pursuant to 24 V.S.A. § 2282, civil penalties for unlicensed junkyard operation. See id. p.13.

The court concludes that there is no genuine issue of material fact and that the State is entitled to judgment as a matter of law on the issue of Defendant Gilbert Rhoades' liability for unlicensed junkyard operation for the period from July 1, 2001 to August 3, 2007.[12]

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[11] During the pendency of these motions, events have transpired bearing on whether Defendants can obtain the requisite license. On January 21, 2008, the Town of Milton denied Defendants' application for a "Certificate of Approved Location." Defendants appealed that decision to this court in a separate action, and, on October 6, 2009, Judge Pearson affirmed the Town's denial of the Certificate of Approval. Rhoades Salvage/ABC Metal v. Town of Milton, No. S0121-08 CnC (Vt. Super. Ct. Oct. 6, 2009). Defendants are appealing that decision to the Supreme Court. Meanwhile, the State in this action has filed for a preliminary injunction, asserting that, without the Certificate of Approval, Defendants cannot obtain a junkyard license, and are therefore in present violation of 24 V.S.A. § 2242. The court addresses the State's motion for a preliminary injunction in a separate contemporaneous ruling.

[12] As to Defendant Blanche Rhoades, the record is inadequate to render summary judgment. The parties have, in their legal memoranda, suggested some facts that they contend are relevant to her liability. See State's Reply to Defs.' Opp'n to Pl.'s Mot. for Summ. J. at 12 (filed July 15, 2009); Resp. to Pl.'s Reply to Defs.' Opp'n to Pl.'s Mot. for Summ. J. at 5 (filed July 28, 2009). Even if those facts had been presented in

III. Operating a "Solid Waste Management Facility" Without Certification

In Vermont, "[n]o person shall construct, substantially alter, or operate any solid waste management facility without first obtaining certification from the secretary [of ANR] for such facility, site or activity . . . ." 10 V.S.A. § 6605(a)(1).[13] A "facility" is "all contiguous land, structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of waste" and "may consist of several treatment, storage, or disposal operational units." Id. § 6602(10). "Waste," in turn, means "a material that is discarded or is being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or has served its original intended use and is normally discarded or is a manufacturing or mining by-product and is normally discarded." Id. § 6602(13). Section 6602 also contains specific definitions for "solid waste," "storage," and "disposal." See id. at § 6602(2), (7), and (12).

A. Issue Preclusion

Defendants argue that the doctrine of collateral estoppel, or issue preclusion, bars the State from re-litigating management of the existing tires because, as the court understands it, Defendants say that issue was finally decided in the 1995 litigation and resulting Order. Both parties have correctly stated the requirements for collateral estoppel:

> [P]reclusion should be found only when the following criteria are met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

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an admissible form in accordance with Rule 56, the court concludes they are still too sparse to render judgment. As to the liability of Blanche Rhoades, the court will deny both parties' motions.

[13] Section 6605(a)(1) contains an exception for sludge or septage treatment and storage facilities. Defendants do not argue that that exception applies here.

Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990).

Defendants have proffered not a single case suggesting that one government agency is "in privity" with another government agency merely because they both have authority to regulate, under different statutes, the same activities of a defendant. Nor is the court convinced that the level of participation in the prior litigation by ANR, a non-party then, established privity. The court concludes that privity has not been shown. *Accord*, Rocque v. DeMilo and Co., Inc., 857 A. 2d 976, 985 (Conn. App. 2004)(finding, in environmental enforcement action involving vehicle salvage business, that state department of transportation and state department of environmental protection were not in privity).

The court also concludes that the issues here are not the same for purposes of preclusion. Defendants characterize the issue in this action and the 1995 action broadly, as "deal[ing] with concerns of the existence and management of the existing tire pile." Generally speaking, the 1995 Order did address concerns surrounding the existing tire pile. It does not appear from that Order, however, that it resolved the particular issue here: are Defendants in violation of Vermont law regarding solid waste management facility certification? Therefore, it does not appear on the face of the record, and Defendants have not shown by extrinsic evidence, that this precise question was raised and determined in 1995. See Town of Jericho v. Town of Underhill, 67 Vt. 85, 89 (1894); see also 47 Am.Jur.2d Judgments § 493 ("Parties will not be collaterally estopped unless the precise facts and issues were clearly determined in the prior judgment."). Because Defendants have not shown that the issue in the 1995 action is the same as the issue here, collateral estoppel does not bar the State from litigating that issue.

B. Claim Preclusion

In their Response to Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment, Defendants assert for the first time that the doctrine of res judicata, or claim preclusion, bars the State from pursing liability on this count. Defendants should have raised that argument in their Opposition, but even if they had, it would have been unavailing.

Under the doctrine of claim preclusion, "a final judgment in previous litigation bars subsequent litigation if the parties, subject matter, and cause(s) of action in both matters are the same or substantially identical." Carlson v. Clark, 2009 VT 17, ¶ 13 (quoting Faulkner v. Caledonia County Fair Ass'n, 2004 VT 123, ¶ 8, 178 Vt. 51). "The doctrine 'bars parties from relitigating, not only those claims and issues that were previously litigated, but also those that could have been litigated in a prior action.'" Id. (quoting Merrilees v. Treasurer, 159 Vt. 623, 624 (1992) (mem.)).

For the same reasons addressed above, the court concludes that AOT and ANR were not "substantially identical" parties with regard to the issues that were raised before. In addition, Defendants have not shown that this precise claim or issue was raised and determined in 1995. Neither have Defendants shown that AOT could have litigated a claim related to waste management in 1995, since ANR—not AOT—has authority to regulate waste management. See 10 V.S.A. § 6610a. Claim preclusion does not bar the State from litigating the waste management issue.

C. Merits

It is undisputed that there is a large pile of tires in the northeast corner of the Site. It is also undisputed that Defendants do not have a certification from ANR to operate a

solid waste management facility at the Site. The State contends that they must have such a certification because they store and dispose of "waste tires." Defendants say they do not need the certification because the tires are "junk" as defined by 24 V.S.A. § 2241, and because a junkyard is not subject to solid waste facility requirements. Defendants say that, while a tire may appear to fall within the definitions of "solid waste" or "waste," the existence of a tire or tires at a facility does not alone trigger the need for a certification.

Defendants admit in their Answer that, as to Gilbert Rhoades, their materials include tires, waste sawdust and waste soil, which constitute solid waste and waste as defined by 10 V.S.A. § 6602(2) and (13). Defs.' Answer at ¶ 45 (filed July 16, 2007). They also admit that "[a]s to Gilbert Rhoades, the storage of solid waste is admitted, however, the allegation of treatment and disposal of solid waste is denied." Id. at ¶ 46. To the extent Defendants are now arguing that the tires are "junk," and therefore not "solid waste," that argument is inconsistent with the admissions in their Answer. The State maintains that Defendants' admissions in their Answer are "binding and conclusive." The court agrees. Barber v. Chase, 101 Vt. 343, 350 (1928); see also Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003).

Even if Gilbert Rhoades had not admitted it, however, the court concludes that the tires constitute solid waste. The court agrees with Defendants that the tires fit the definition of "junk." See 24 V.S.A. § 2241 (defining "junk"). But just because the tires are "junk" does not mean they cannot also be "waste."[14] An engine block, for example,

[14] Section 2245 of Title 24 as it applies to this case does not, as Defendants contend, establish that a junkyard cannot be subject to solid waste management facility certification. That section was recently amended by 2009, No. 56, § 7, but pursuant to 1 V.S.A. § 213, the applicable text is as follows:

can fit the definition of "discarded, dismantled, wrecked, scrapped or ruined motor vehicle or parts thereof," but it can also fit the definition of solid waste. See Agency of Natural Res. v. Towns, 173 Vt. 552, 555 (2001) (mem.) (engine block, among other things, used as fill in a yard behind a house "clearly fall[s] within the definition of solid waste").

Whether this particular junk—the tire pile—is "waste" depends upon whether it is discarded, has served its original intended use and is normally discarded, or is being accumulated, stored, or treated prior to being discarded. 10 V.S.A. § 6602(13). The Legislature has not explicitly defined "discarded" in § 6602. Because the definitions in § 6602 are similar to those in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901–7000, the court looks to the decisions of the federal courts which have interpreted the term "discard." The United States Court of Appeals for the District of Columbia Circuit has held:

> [T]he term "discarded" cannot encompass materials that "are destined for beneficial reuse or recycling in a continuous process by the generating industry itself." Am. Mining Cong. v. EPA ("AMC I"), 824 F.2d 1177, 1186 (D.C. Cir. 1987); see also Ass'n of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1056 (D.C. Cir. 2000). We have also held that materials destined for future recycling by another industry may be considered "discarded"; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem. Am. Petroleum Inst. v. EPA, 906 F.2d 729, 740–41 (D.C. Cir. 1990); Am. Mining Cong. v. EPA ("AMC II"), 907 F.2d 1179, 1186–87 (D.C. Cir. 1990).

Safe Food and Fertilizer v. Envtl. Prot. Agency, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Thus whether materials are "discarded" depends on where those materials are destined.

> The provisions of this subchapter [regulating junkyards] shall not be construed to apply to incinerators, sanitary landfills, or open dumps wholly owned or leased and operated by a municipality for the benefit of its citizens, or to any private garbage dump or sanitary landfill which is in compliance with section 2202 of this title and the regulations of the secretary of human services.

Some facilities, then, are exempt from the requirements of licensing as a junkyard. See Op. Att'y Gen. 146, n.1 (1973). This does not mean that all junkyards are exempt from solid waste management facility certification.

The tires in this particular tire pile are no longer part of any process; as is clear from the history in this case, they have become part of a waste disposal problem. See State v. Botelho, 568 A.2d 1102, 1103 (Me. 1990) (affirming superior court conclusion that State was likely to succeed on the merits in an action for operating an unlicensed solid waste facility where, although tires in pile had some resale value, only a fraction of the tires added to the pile were resold). In short, they are not only "junk," but also "waste." Even if Defendants have not "disposed" of the tires, they are certainly using their land to "store" them. Defendant Gilbert Rhoades is therefore operating a "facility" without certification in violation of 10 V.S.A. § 6605(a)(1).[15]

IV. Release of Hazardous Materials to Surface Water, Land, and Groundwater

The State argues that it is entitled to summary judgment on the issue of Defendants' liability for release of hazardous materials into surface water, ground water, and lands based on the results of the sampling done at the Site, the long history of Defendants' use of the property as a salvage operation, the types of hazardous materials detected, and ANR's observations of the Site. Defendants respond that the data from the samples are flawed, and do not support the State's conclusions.

A "release" is "any intentional or unintentional action or omission resulting in the spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing of hazardous materials into the surface or groundwaters, or onto the lands in the state . . . ." 10 V.S.A. § 6602(17). The existence of a "release" is both a question of law and fact. State v. Howe Cleaners, Inc., No. 27-1-04 Wncv, slip op. at 9 (Vt. Super. Ct. Mar. 10, 2006), available at http://www.vermontjudiciary.org/TCDecisionCvl/2006-3-15-2.pdf. A

[15] As to Defendant Blanche Rhoades, as mentioned earlier, the record is inadequate to render judgment. As to her liability, the court will deny both parties' motions.

"release" may cause "contamination," but release is not defined as contamination. See id. at 8. This observation is one reason why the statutory scheme at issue here is both complicated and "strikingly circular and confusing." Id. at 9.

The State's evidence of a "release" consists primarily of circumstantial evidence: evidence of contamination. As discussed below, Defendants dispute most of that evidence. The State's remaining evidence—Defendants' long use of the Site and ANR's observations—is very general in nature. In light of those considerations, and the complexity of the legal issues here, the court concludes that there is an inadequate record upon which to adjudicate, on summary judgment, the issue of release. See 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2728 ("[D]ifficult or complicated legal issues should not be adjudicated upon an inadequate record.").

With respect to releases to soil, there is no dispute that sample SS-11 detected lead at levels well in excess of the Vermont screening levels. The parties argue over the meaning of this evidence. See Reply in Opp'n to Pl.'s Mot. for Summ. J. at 16 (filed June 12, 2009); State's Reply to Defs.' Opp'n to Pl.'s Mot. for Summ. J. at 9 (filed July 15, 2009). The court concludes that the facts are insufficient to establish summary judgment on this issue.

Regarding releases to water, the State has come forward with circumstantial evidence in the form of evidence of contamination. Defendants challenge that evidence through their engineer, Chad Farrell. As to ground water contamination, Farrell opines that, without low flow sampling and nitric acid preservation techniques, the sampling overestimates metals concentrations, and "should not be considered for evaluating environmental contamination." In its Reply, the State relies on the supplemental affidavit

of Linda Elliot for the proposition that, "[w]hile the results of non-low flow sampling may show metals at slightly higher levels, the sampling is still valid." Pl.'s Reply to Defs.' Opp'n to Pl.'s Mot. for Summ. J. at 9 (filed July 15, 2009). The court concludes there is a genuine issue of material fact as to the validity of the groundwater sampling.

As to surface water contamination, Farrell opines that "[i]f the contaminants found in the sediments and surface water of Hobbs pond were originating from the Rhoades site, onsite contaminant levels would be expected to be significantly elevated." Farrell Aff. ¶ 24. He then concludes that "[t]he analytical results of the EPA soil samples and the data presented relative to sediments and surface samples are insufficient to determine any relationship between conditions at the Rhoades site and the environmental quality of Hobbs Pond." Id. ¶ 25. Again citing the supplemental affidavit of Linda Elliott, the State replies that the reason the sediment and surface water samples show concentrations higher than those detected in the soil is because of years of accumulation from runoff and drainage. This reinforces the court's conclusion that there is a genuine issue of material fact as to the interpretation of the samples.

V. Improper Management of Hazardous Waste

Except with respect to Blanche Rhoades' liability, Defendants do not dispute the four violations of the HWMR identified by the State. Instead, without citing any authority, Defendants argue that, as a matter of fairness, they should not be "retroactively held liable for hazardous waste management activities that occurred from 2005–2008." The gist of Defendants' argument appears to be that, during that time, they were expending time, money, and effort working to come into compliance, believing that those

efforts would satisfy the State. That argument, while perhaps relevant to the issues of remedy or penalty, does not preclude judgment as a matter of law on the issue of liability.

Order

1. The State's motion for summary judgment as to Defendant Gilbert Rhoades' liability for unlicensed operation of a junkyard for the period from July 1, 2001 to August 3, 2007 is granted. The State's motion for summary judgment as to Defendant Gilbert Rhoades' liability for operation of a solid waste management facility without certification is granted. The State's motion for summary judgment as to Defendant Gilbert Rhoades' liability for improper management of hazardous waste is granted.

2. The State's motion for summary judgment as to Defendants' liability for release of hazardous materials to surface water, land, and groundwater is denied.

3. As to Defendant Blanche Rhoades, the State's motion for summary judgment is denied. Defendants' cross-motion for partial summary judgment as to her is also denied.

4. A status conference will be set to discuss scheduling as to the remaining aspects of this case.

Dated at Burlington this 20 day of November 2009.

Helen M. Toor
Superior Court Judge