VERMONT SUPERIOR COURT
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CHITTENDEN UNIT

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CIVIL DIVISION

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

RULING ON THE MERITS

This case involves a junkyard in Milton. Some claims have already been resolved on summary judgment. The remaining claims relate to the State's allegations that the defendants have operated a junkyard without proper permits and violated various environmental statutes in their operation of the junkyard. A court trial was held on November 17, 2010, and a site visit took place on November 23, 2010. Post-trial filings were complete December 27. Plaintiff is represented by Robert F. McDougall, Esq.; Defendants are represented by Thomas G. Walsh, Esq.

Findings of Fact

The court finds the following facts to be established by a preponderance of the evidence. Defendants Gilbert and Blanche Rhoades, husband and wife, jointly own property at 15 Shirley Avenue in Milton ("the Site"). The Site is a five-acre property surrounded by residences, an adjoining junkyard, and a pond (Hobbs Pond). Since 1969

Gilbert Rhoades[1] has run a junkyard at that location under various different trade names. Mrs. Rhoades was listed on various filings as a director or officer, and shared in the profits with her husband, but in actuality her role was limited to answering the phone, clerical office duties, and sale of new and used radiators from inside the shop.

For many years from 1972 on, Rhoades had a license to operate the junkyard. During the period August 3, 2007 to November 30, 2009, Rhoades operated the junkyard without any license or certificate from the Town of Milton or the State. It was his understanding that as long as he was *trying* to obtain a license from the town he would be allowed by the State to continue operating. He did continue to seek a license during that period. In fact, he appealed the town's denial to this court (Judge Pearson presiding) and then to the Vermont Supreme Court. He therefore feels it is unfair to make him pay penalties for operating without a license during the 2007-09 period.

Barbara Schwendler is a Solid Waste Compliance Specialist with the Department of Environmental Conservations' Waste Management Division. In 2003, she did her first inspection at the Site. She observed various scrap metals – mostly cars but also piping, cabinets, and what is referred to as "white metals": refrigerators, stoves, and other large appliances. Schwendler observed stained soils and noted a gasoline odor. She also saw lead acid car batteries. Most were stored outside uncovered in a scrap truck bed. Some were just scattered around the Site on bare ground.

Schwendler also observed junked car parts in an old underground tank cut in half and used as storage. There was a hole in the bottom for rainwater to drain, and Schwendler could also see oil on the ground that had seeped from the car parts. She also observed old cars tipped up onto their sides with holes cut in their radiators and gas tanks

[1] The court will refer to Gilbert as "Rhoades" and to Blanche as "Mrs. Rhoades."

to let the liquids drain out. Photos of this were admitted in evidence. Rhoades explained that he had his employees capture the dripping liquids in buckets. However, Schwendler saw fluids on the soil and could smell gasoline. The cars were on bare ground. Schwendler did not test any of the stained soils to see what was staining them. However, her opinion from viewing and smelling it was that it was petroleum contamination. She has had professional training in identifying soil stains. The court finds that some of the oil and other fluids from the cars did drip onto the soil. Petroleum products are "hazardous wastes."[2] Although Rhoades did use sawdust to capture spills when he or his staff observed them, the court does not believe that sawdust sprinkled on top of spilled oils can possibly clean up the liquids that have already seeped down into the soil. Nor does the court believe that every such leak would have been observed, given the number of parts and locations on the Site. In addition, Rhoades told Schwendler that he disposed of such used sawdust by bulldozing it into the ground or putting it into cars before crushing them.

Schwendler also observed fluids stored in an old truck bed -- some in dented, unlabeled drums. This violated hazardous waste management rules because the drums were dented and not labeled.[3] Although Schwendler also believed they were in violation of the rules because they were not stored on an impervious surface, Rhoades explained that he had welded the truck beds so they could not leak.

Schwendler's next visit was in 2006. The batteries were then stored indoors, covered, on an impervious surface as required by waste management rules. Rhoades had built a "battery hut" in 2005 or 2006 to handle the batteries indoors. This hut met all the

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[2] See 10 V.S.A. § 6602(16).

[3] The court did not find credible the claim that the labels all happened to be where Schwendler (and the camera) could not see them.

requirements for a safe and impervious storage location. However, Rhoades agreed that prior to that time they were handled and tested outside, although he claimed that they were covered at night. The court did not find credible the claim that the storage bins containing the batteries were dragged inside every night. Batteries often burst in cold weather or if they are dropped during handling. Rhoades agreed that over thirty years there would be some leaking batteries or residue from the corrosion on batteries.

Starting in 1997, Linda Elliott of the Department of Environmental Conservation was assigned to this Site as a Project Manager, after a 1996 inspection by the Hazardous Waste Management Program. Her office gets involve when there is a release or suspected release of hazardous materials. Her role was to determine the extent of any contamination. She began by asking Rhoades to hire someone to do samples, which he did. The quick screening that was done showed "elevated levels of concern" near the car crusher. However, Elliott apparently did nothing further until 2003, when she visited the Site. At some point she asked Rhoades to do further testing, which he apparently did in 2007 or 2008. It is unclear why the delay, and whether it was attributable to Elliott or to Rhoades.

Subsequently, Elliott asked the federal Environmental Protection Agency ("EPA") to come to do some sampling, which it did. Its role was to decide whether there was any immediate threat to human health, such as oozing drums. EPA's testing looks for volatiles, heavy metals, pesticides and herbicides.

The EPA testing, done in 2008, showed elevated lead levels in the soils in two locations, identified as SS-11 and SS-12 on Exhibit 26. SS-11 is the area where the batteries were stored and cars disassembled. The testing there showed lead concentrations

above both residential and industrial screening levels. SS-12 had lead above residential screening levels. Screening levels are the levels at which you start to see impacts on human health and the environment. The residential level for lead is 400; the industrial level is 800. The levels at SS-11 and SS-12 were 3,300 and 570, respectively. Lead is considered a hazardous material. SS-11 is the area where Rhoades handled used car batteries for over thirty years.

EPA did testing of Hobbs Pond as well as residential properties nearby. They tested fish, water and sediment in the pond. The EPA testing also involved collecting soils 6 inches below ground surface to determine whether there was any threat of direct contact from inhalation or ingestion. EPA concluded that there was no evidence of petroleum contamination of groundwater, and no evidence of any threat to human health.

However, without deeper sampling it is impossible to determine whether there is any risk to groundwater. Therefore, Elliott asked Rhoades to do further testing. He did so. This involved installing test wells and sampling them. Elliott approved the work plan for this. The results of that testing showed several metals above groundwater "standards" in three wells: arsenic, barium, chromium and lead. However, due to the nature of the testing these could be false positives. Thus, Elliott hired a consultant and did another round of well testing. That testing reflected that the water from the Site flows in a south/southwest direction towards well MW-3. However, it showed no concerns about lead levels.

Elliott does not feel the testing that has been done is enough to assure that there are no problems at the Site. She would like to see quarterly testing for a year to be assured that the water is safe. In addition, she believes that more wells are needed, for

example near the SS-11 area where high lead concentrations were found in the soil. Her testimony was that "we can't determine whether there's been a release [of hazardous materials] or not at this point because we need more sampling." She believes there is, however, a "threatened release" because the contamination of the soils has never been cleaned up. She would like to see additional soil testing as well as groundwater testing. Additional testing would determine whether any cleanup is necessary.

Elliott acknowledged that there was less testing done by EPA than she would have liked because EPA had a limited budget. She acknowledged that Rhoades would have a similar issue with financial ability to afford such testing. It is unclear to the court why, if Elliott felt there should be more wells dug, she did not have that done by the consultant she hired. The cost for the additional soil testing she would like to do is roughly $41,000. No evidence was presented about the cost of water testing.

Rhoades hired Chad Farrell, an environmental engineer who has worked in the area of hazardous wastes since 1992, to review the reports that have been done and visit the Site. His opinion is that there has been a release of lead into soils at the site, but that there is no other evidence of a release. If the Site continues to be used for industrial as opposed to residential purposes, without disturbance of the soil, he sees no need for further testing, which would itself disturb the soil. If the Site is controlled by fencing it off, he believes there is no risk of further migration of lead offsite. It is strongly absorbed by soil and does not travel easily through soil. In his opinion it is unlikely that lead would ever be able to reach the groundwater, which all the witnesses agree is ten to twelve feet below ground, and it is almost impossible for it to reach the wells at bedrock level.

Farrell does agree that this Site has a threat of release. However, he sees no need for further testing as long as the Site remains an industrial use without development on the land. It has been subject to a phased investigation and in his opinion needs no further testing unless it is going to be used for residential purposes. A notice can be placed in the land records documenting the conditions so that any future developer of the area would be on notice of the need to do further testing before changing the use to residential. However, he also acknowledged that if any building foundations are installed, or utility trenches, workers could come into contact with the lead in the soil. If the soil is going to be disturbed the testing that has been done – down six inches in selected locations – is inadequate. He did suggest that the area could be paved and thus would not be at risk of release.

Farrell recommends that if any further lead testing is done it should be what EPA calls the Triad Approach. This is to start at the known impact (here SS-11) and work out in a radial direction, both in depth and distance. There are hand-held tests that can be done to delineate the impacted area of soils. It is much cheaper than the lab sampling. Then all those soils can be removed and shipped to a permitted facility. In addition, an existing shallow well near the facility entrance could be monitored.

The Site continued to be used as a junkyard until November of 2009. Rhoades is now considering using the Site for the towing and storage of vehicles. He is also considering trying again to get a license from the town to operate the junkyard.

Rhoades did do a great deal to attempt compliance with legal requirements. In addition, since the court's order that he cease accepting new materials, he has sold off a great deal of metal and has cleaned up the Site significantly. At the site visit, the court

was impressed by the neatness and organization of the facility and the creativity with which Rhoades has used unusual materials as structures and enclosures. As Schwendler said, Rhoades is creative and innovative.

Rhoades now has in place various State-approved plans which he began working on in 2007: a Hazardous Materials Cleanup Plan, a Stormwater Plan, and a Spill Prevention Plan.

Conclusions of Law

The legal claims remaining in this case relate to whether Defendants operated an unlicensed junkyard between 2007 and 2009 in violation of 24 V.S.A. § 2242; whether they have released hazardous materials in violation of 10 V.S.A. § 6616; whether they are responsible for abating a release and/or threatened release of hazardous materials pursuant to 10 V.S.A. § 6615; and whether Blanche Rhoades bears any liability. Because the latter question relates to several of the issues, the court will first address Gilbert Rhoades' liability and then will take up that of Blanche Rhoades. The court will, as above, refer to Gilbert Rhoades as Rhoades and to Blanche Rhoades as Mrs. Rhoades.

1. Operation of an Unlicensed Junkyard

The first issue is relatively easy to resolve, as the facts are essentially undisputed. The law applicable to this case[4] prohibited anyone from operating a junkyard without a "certificate of approval for the location" and "a license to operate, establish or maintain" it. 24 V.S.A. § 2242. Licenses are issued by the local authorities; certificates of approval are issued by the Agency of Transportation. Id. §§ 2251, 2261. Rhoades does not deny that he had neither a certificate nor a license during the period in question, and that he was in fact operating a junkyard.

[4] The statute has changed somewhat since that time.

What Rhoades argues is that the State should be estopped from enforcing the statute for that period. Estoppel against the government is disfavored, and "are to be invoked only in extraordinary circumstances." In re McDonald's Corp., 146 Vt. 380, 383 (1985). This is not such a circumstance. Nor has Rhoades established all of the necessary requisites of estoppel. In particular, he has not demonstrated that any State employee intended Defendants to believe that no enforcement action would ever be taken in connection with the lack of a license. The court finds that estoppel is not applicable here and concludes that the junkyard was operating without a license from August 3, 2007 to November 30, 2009.

2. Release of Hazardous Materials

The parties disagree over whether there has been any release of hazardous materials at the Site. A release is defined in the relevant statute as follows:

> [A]ny 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, or into waters outside the jurisdiction of the state when damage may result to the public health, lands, waters or natural resources within the jurisdiction of the state.

10 V.S.A. § 6602(17).

Rhoades does not dispute that lead has been found in the soils at the Site, or that lead constitutes a hazardous materials as defined by Vermont statute and rules. 10 V.S.A. § 6602(16)(A)(1); 10 V.S.A. § 6002(4); Vermont Hazardous Waste Management Rule 7-208. Rather, he argues that the last phrase of the definition, requiring damage to public health or resources, applies to any release. To the contrary, based upon the placement of the commas in the definition, the court reads the last phrase as relating only to releases

into "waters outside the jurisdiction of the state." To support Rhoades' theory, there would have to be an additional comma after the words "outside the jurisdiction of the state." The definition applies to any amount of hazardous materials. In any case, the evidence was that the lead found in one location was substantially higher than the level at which human health can be impacted.

The court finds it clear that lead has been released to the soil, and that it constitutes a hazardous material.[5] The court does not find any release to waters of the State has been established, however, as Ms. Elliott expressly stated that there was insufficient evidence to show that.

3. Abatement

The State seeks to require Defendants to pay for abating both existing contamination and the possibility of future contamination. "[T]he Hazardous Waste Act creates responsible party liability for the abatement of releases or threatened releases of hazardous materials, as well as the "costs of investigation, removal and remedial actions incurred by the state which are necessary to protect the public health or the environment." Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124,¶ 28,177 Vt. 421; 10 V.S.A. § 6615(a)(1)-(4)(A)-(B). To the extent that the court has already found there has been a "release" of lead, Vermont law creates strict liability for the owner or operator of the Site. 10 V.S.A. § 6615.

The State also argues that there is a threat of future release, and that Rhoades should be required to do cleanup work to avoid such a release. There is no definition in the Vermont statute of what constitutes a "threatened release." The State argues that the

[5] The State makes clear in its filings that it is not asking the court to find that there was any "release" of other products – such as petroleum – other than lead. *See, e.g.*, State of Vermont's Trial Memorandum at 4-5.

court should look to federal law for assistance in defining this term, since "Vermont's Hazardous Waste Act (HWA), 1985, No. 70, parallels CERCLA in many relevant respects." Hardwick, 2004 VT 124, ¶ 28. Specifically, the State points to case law interpreting the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq. The Second Circuit has held that a "threat of release" can be created by such things as "corroding and deteriorating tanks, lack of expertise in handling hazardous waste," and "failure to license a facility." State of New York v. Shore Realty Corp., 759 F. 2d 1032, 1045 (2d Cir. 1985). *See also*, United States v. Saporito, 684 F. Supp. 2d 1043, 1059 (N.D. Ill. 2010)(storing hazardous materials "unsafely in a building with a deteriorating concrete floor" established a threat or release).

Rhoades does not disagree with the State's legal argument here. Instead, he argues that the evidence did not establish any corroding and deteriorating tanks or lack of expertise in handling hazardous wastes, and that despite the lack of a license Defendant ran a "clean operation." However, there are photographs in evidence showing unlabeled, rusty and corroded tanks. Moreover, although Rhoades was very creative in his use of materials and apparently tried to maintain a neat and organized workplace, it is apparent that he did not have professional training or expertise in handling hazardous materials. A simple look at Exhibit 8 shows that despite the organized manner of the battery storage in an old truck bed, and Rhoades' claim that the truck bed was impervious because he welded it closed, there is an obvious leak of some sort running out from under the truck bed.

The State argues that "there has been a threat of release at the property during the period of time that it operated as an unlicensed junkyard." State's Trial Mem. at 7. The court agrees there was a threat of release of petroleum products in the past. This may be relevant to the State's claim for reimbursement for testing previously done by the State.

However, with regard to imposing liability for "abating" the problem, the court understands the State to be asking for future cleanup action and/or costs. In that context, the court reads the phrase "threatened release" as applying to a current threat, not a past threat. The question, then, is what may currently be at risk of leaking, spilling, or otherwise making it out of containers into the environment. At the site visit, the court was impressed with how neat the facility now is, although it is undisputed that this is a recent development. Rhoades has brought in new soil and raked the land, as well as selling off large quantities of materials. Based upon viewing the site, and the fact that it is not currently being operated as a junkyard, the court might conclude that it is no longer at risk for a threatened release. The State has not established that any of the containers remaining at the Site are at risk of spilling or leaking, and because they are not currently being used and are only being stored, there is clearly less risk than before. In addition, it was undisputed at trial that Rhoades is now operating under various State-approved plans for addressing any spills. Thus, the court does not find a current threat of release of petroleum products.[6]

However, the evidence established that the lead in the soil creates a risk of release to the environment if, for example, the soil is further disturbed. Rhoades' own expert

[6] Although there is arguably a risk that there are currently petroleum products in the soil that may leach into groundwater or run off into surface water, (a) no evidence was presented to establish that, and (b) unlike the federal statute Vermont's definition of "release" does not include "leaching." *Compare* 10 V.S.A. § 6602(17) *with* 42 U.S.C. § 9601(22).

witness agreed that there is a threat of release at the Site. The court concludes that there is such a threat with regard to the lead in the soil.

4. Blanche Rhoades' Liability

a. Operation

Mrs. Rhoades argues that she is not liable for the unlicensed operation of the junkyard, or for operation of a solid waste facility without certification,[7] because she was not an "operator" of the facility.[8] An "operator" of a facility is not defined in the Vermont statutes. However, federal law interprets the term to mean someone who "directs the workings of, manages, or conducts the affairs of a facility." United States v. Bestfoods, 524 U.S. 51, 66 (1998). In the context of environmental contamination specifically, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." Id. at 66-7.

The evidence was that Mrs. Rhoades acted essentially as clerical staffer in the office, as well as handling sales of used radiators from inside the shop. She knew little about the details of the outside operation, and had no direct involvement in the disposal or handling of waste of hazardous materials. Based upon that evidence, the court concludes that Mrs. Rhoades was not an operator of the facility for purposes of 24 V.S.A. § 2242, 10 V.S.A. § 6605(a)(1), or the Hazardous Waste Management Rules.

[7] The court previously found on summary judgment that Rhoades had operated the Site as an unlicensed junkyard from 2001 to 2007, that he had operated it as a solid waste facility without certification, and that he had improperly managed hazardous wastes.

[8] The State is not seeking to hold Blanche Rhoades liable for the release of lead under 10 V.S.A. § 6616.

b. Ownership

Mrs. Rhoades, although conceding that there is strict liability for property owners for abatement of releases or threatened releases of hazardous wastes under 10 V.S.A. § 6615, argues that she is not liable for any such release because none has been proved. The court's discussion above disposes of this argument. Mrs. Rhoades is strictly liable for abatement costs and investigation costs because of her joint ownership of the land.

Order

The court finds that (1) Rhoades operated an unlicensed junkyard between 2007 and 2009 in violation of 24 V.S.A. § 2242, (2) Rhoades is liable for the release of hazardous materials at the Site, specifically lead, in violation of 10 V.S.A. § 6616, (3) Rhoades is liable for the abatement of existing lead contamination at the Site as well as the threatened release of lead, pursuant to 10 V.S.A. § 6615, and (4) Mrs. Rhoades is liable only for the abatement of releases or threatened releases of hazardous wastes under 10 V.S.A. § 6615, not for any other claims asserted by the State.

A hearing will be scheduled to address remedies, damages, and/or penalties. The parties are directed to advise the court in writing, within two weeks, with regard to the amount of time necessary for the hearing.

Dated at Burlington this 9th day of February, 2011.

Helen M. Toor
Superior Court Judge