From: Clark, Charity <Charity.Clark@vermont.gov>
Sent: Monday, August 5, 2019 12:23 PM
To: Meyn, Colin <cmeyn@vtdigger.org>
Subject: Re: Environmental and Consumer docs

Hi Colin,

Here's the final cost of the Environmental documents is below:

111 single sided copies at $.05 each = $5.55

943 double sided copies at $.09 each = $84.87

150 minutes time spent copying (minus the first 30 min.) = 120 min. at $.33/minute = $39.60

Environmental Division Total: $133.02

Charity

2010

Form No. 369A
Notice of Plea Agreement

State of Vermont
District Court of Vermont
[redacted] PLEA AGREEMENT

State of Vermont vs. | Defendant: DAVID B. MCLELLAN | Date: JANUARY 20 2010

The State of Vermont and the Defendant named above enter into the following agreement:

COUNT ONE	COUNT FOUR	COUNT THREE
Charge: RECKLESS STORAGE OF HAZARDOUS WASTE	Charge: RECKLESS STORAGE OF HAZARDOUS WASTE	Charge: RECKLESS DISPOSAL OF SOLID WASTE
Docket Number: 1614-10-08	Docket Number: 1614-10-08	Docket Number: 1614-10-08
Amended: Yes (No)	Amended: Yes (No)	Amended: Yes (No)
Amended Charge Code:	Amended Charge Code:	Amended Charge Code:
Amended Section No:	Amended Section No:	Amended Section No:
Guilty Nolo Contendre	Guilty Nolo Contendre	Guilty Nolo Contendre
SENTENCE: *	SENTENCE: *	SENTENCE: *
FINE $ & Surcharge $	FINE $ & Surcharge $	FINE $ & Surcharge $
(Min.) Yr. Mo. Days	(Min.) Yr. Mo. Days	(Min.) Yr. Mo. Days
(Max.) Yr. Mo. Days	(Max.) Yr. Mo. Days	(Max.) Yr. Mo. Days
Concurrent Consecutive	Concurrent Consecutive	Concurrent Consecutive
Suspended with Probation: Yes No	Suspended with Probation: Yes No	Suspended with Probation: Yes No
Treatment Credit: Days	Treatment Credit: Days	Treatment Credit: Days
Out-of-State Credit: Days	Out-of-State Credit: Days	Out-of-State Credit: Days
Local Lock-up Credit: Days	Local Lock-up Credit: Days	Local Lock-up Credit: Days
All Suspended except days months yrs	All Suspended except days months yrs	All Suspended except days months yrs

☐ The parties hereby stipulate that this conviction is a violation of the Defendant's probation and, as part of this Plea Agreement, waive further notice, separate hearing, and agree that the Court impose the following: FINE AND RESTITUTION TO BE ARGUED

TOTAL SENTENCE: COURT TO SET (SUSPENDED) Total FINE & Surcharges: $

Cases to be Dismissed by State:

Docket # 1614-10-08 Charge: COUNT TWO (STORAGE)
Docket # Charge:
Docket # Charge:
Docket # 1614-10-08 Charge: COUNT FIVE (RELEASE)
Docket # Charge:

Report Date: Forthwith:
PSI Ordered? Yes No
Defendant already on probation? Yes No

~~Special Probation Conditions:~~

* STATE IS "CAPPED" WITH ITS REQUEST AS OUTLINED IN THE ATTACHMENT. DEFENDANT MAY REQUEST LESS. FINAL TERMS TO BE SET BY COURT

(See Reverse for General Conditions)

Other:

In addition to any credit to which defendant is entitled by law, the parties agree defendant shall receive credit for treatment, out-of-state, and local lockup as shown above.

This is a binding Rule 11 Agreement.

I have reviewed this agreement and understand it.

Defendant [signature] Date 1/19/10

Prosecutor [signature] Date 1-2010

Defense Attorney [signature] Date 01/19/10

Judge Date

Guardian ad Litem Date

Dear Barry:

Our office has staffed and reviewed this case and consulted with the Agency of Natural Resources (ANR). In an effort to resolve the pending charges against your client the State proposes the following:

- Plead guilty to Counts 1, 3 & 4, State will dismiss Counts 2 and 5
- Sentence of 3-6 years all suspended with the following Special Conditions of Probation:
  - Defendant shall, upon request, allow his PO and/or ANR officials access to his property for inspection
  - Defendant shall obtain all necessary permits for waste disposal
  - Defendant shall hire a consultant to develop a hazardous waste management plan to be approved by his PO, in consultation with ANR, and shall implement such plan
  - Defendant shall take a hazardous waste management training program approved by his PO, in consultation with ANR
- Restitution to State of Vermont for excavation/cleanup: $29,077.24
- $65,000 Fine

The evidence against Mr. McLellan is strong and includes photographs, video, audio recorded statements, and witnesses who saw him disposing of the hazardous materials. Were these five violations pursued as civil enforcement by ANR, the State could seek penalties in excess of $100,000.

Count 1 Storing on 4/17
Count 4 Releasing on 4/17
Count 3 Solid waste 5/5

Count 2 Storing on 4/18
Count 5 Releasing on 4/18

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
2010 MAR -8 A 9:48

STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Plaintiff,	)	
v.	)	Washington Superior Court Docket No. 154-3-10 Wncv
MOUNT SNOW, LTD., Defendant.	)	

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties 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 ORDERD as follows:

ADJUDICATION OF HAZARDOUS WASTE MANAGEMENT VIOLATIONS

1. The Agency of Natural Resources ("ANR") conducted inspections of Defendant Mount Snow, Ltd.'s ("Defendant") facilities on February 27, 2008 and April 29, 2008 ("the inspections"). During the inspections, ANR found violations of the following Vermont Hazardous Waste Management Rules:

- Section 7-302(a); Section 7-504(a) – Disposal of hazardous waste by evaporation/disposal of hazardous waste without certification;
- Section 7-406(a) – Transportation of hazardous waste without a permit;
- Section 7-303 – Failure to make a hazardous waste determination;
- Sections 7-311(a)(2), (4) and (5) – Storage area design standards;
- Section 7-806(b)(7) – Used oil storage;

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

- Section 7-311(e)(1) - Security;
- 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 7-307(c)(9)(B) – Employee training;
- Section 7-307(c)(9)(C) – Emergency preparedness;
- Section 7-309(a)(4)(D) – Hospital arrangements;
- Section 7-310(a)(5) – Container markings;
- Section 7-310(a)(8) – Short-term storage;
- Section 7-812(c)(1)(A) – Used oil; and
- Section 7-912(d)(5)(A)(i) – Universal waste lamps.

2. Defendant is adjudged liable to the State for these violations.

PENALTIES

3. For the violations described above, Defendant shall pay a penalty of ninety-five thousand dollars ($95,000.00).

4. Payment of the ninety-five thousand dollars ($95,000.00) penalty shall be made to the "State of Vermont" and shall be due at the time when Defendant executes and signs the Pleadings by Agreement and Stipulation for the Entry of Consent Order and Final Judgment Order.

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

OTHER PROVISIONS

5. Defendant hereby waives: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendant under

Paragraphs 3 and 4 of this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

6. This Consent Order is binding upon Defendant and its successors and assigns.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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. The State reserves all rights, claims and interests not expressly waived herein.

12. This Consent Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal

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

representatives and incorporated into an order issued by the Washington Superior Court. 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.

13. Defendant shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein or in the Pleadings by Agreement occurring before the effective date of the Order, provided that the Defendant fully complies with the terms of the Consent Order set forth above.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this 5 day of March 2010.

Hon. Geoffrey W. Crawford
Washington Superior Court Judge

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

STATE OF VERMONT
WASHINGTON COUNTY, SS.

STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Plaintiff,	)	
	)	Washington Superior Court
v.	)	Docket No. Wncv
MOUNT SNOW, LTD., Defendant.	)	

PLEADINGS BY AGREEMENT

NOW COMES the State of Vermont Agency of Natural Resources, by and through Vermont Attorney General William H. Sorrell, and Defendant Mount Snow, Ltd., by its respective undersigned counsel, and hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

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

2. Mount Snow, Ltd. ("Mt. Snow" or "Defendant") is a Vermont corporation organized under the laws of the State of Vermont with its principal place of business in West Dover, Vermont. Mt. Snow engages in the ownership of Mount Snow Resort which includes operation of a ski area, real estate development, retail shops, a golf course, mountain biking trails, and other resort related activities in West Dover and the surrounding area. Since April 2007, Mt. Snow has been a subsidiary of Peak Resorts, Inc., a Missouri-based company who owns and operates a number of ski area/resorts in the United States.

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

Statutory Scheme

3. The Agency has the authority to regulate the storage and disposal of hazardous waste through 10 V.S.A., Chapter 159 and the Vermont Hazardous Waste Management Regulations ("HWMR").

4. Pursuant to 10 V.S.A. § 8221, the Secretary of the Agency 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. The Agency conducted inspections of Defendant's facilities at the Mount Snow Resort on February 27, 2008 and April 29, 2008 (hereinafter the "inspections").

6. During one or both of these inspections, the Agency found the following:

a. Defendant was disposing of hazardous waste at its Howe Farm facility by evaporation and without certification;

b. hazardous waste was transported by Defendant without a permit from the State;

c. Defendant was making no hazardous waste determinations for ski-tuner emulsions, various products contained in aerosol cans, and sand blast dust from the lift maintenance shop. Defendant also failed to made hazardous waste determinations for waste disposed at its Howe Farm facility;

d. Defendant's short-term hazardous waste storage containers were placed out of doors on a containment pad but without a structure that was able to shed rain and snow;

e. Defendant's short-term hazardous waste storage area was not equipped to prevent the freezing of waste;

f. Defendant's spill control equipment was not located in the vicinity of the short-term hazardous waste storage area;

g. Defendant had placed a container holding used oil and water outside without a means to prevent freezing;

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

h. there was no warning sign posted in Defendant's short-term hazardous waste storage area;

i. the aisle space in Defendant's short-term hazardous waste storage area was inadequate to permit unobstructed movement of personnel, fire safety equipment, or spill control equipment.;

j. Defendant did not maintain a list of hazardous wastes stored in its short-term hazardous waste storage area;

k. daily inspections of the short-term hazardous waste storage area were not occurring;

l. required annual training concerning hazardous waste handling and emergency procedures had not been provided to Defendant's employees with hazardous waste management responsibilities;

m. required emergency preparedness information was posted on its company computer system but not posted next to each phone at Defendant's waste handling areas;

n. Defendant failed to make arrangements with local hospitals to familiarize hospital personnel with the types of waste it generates;

o. Defendant failed to mark satellite accumulation containers, including plastic bags used to store spent hazardous waste contaminated disposable absorbent wipes with the words "hazardous waste" and other words to describe their contents;

p. full containers of disposable absorbent wipes generated at the lift maintenance shop were stored at an offsite location, the Howe Farm, prior to being shipped for disposal;

q. drums in Defendant's short-term hazardous waste storage area were covered in snow, and snow around the base of the drums obscured the labels of some of the drums;

r. used oil to be burned had not been recently evaluated by Defendant for halogens and other suspected constituents or properties; and

s. used fluorescent lamps were not stored in boxes or containers.

7. Under section 7-302(a) of the Vermont Hazardous Waste Management Rules ("HWMR"), disposal of hazardous waste by evaporation is prohibited. Under HWMR 7-

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

504(a), unless excluded by the HWMR, certification from the Agency is required to treat, store, dispose, or accept any hazardous waste.

8. Defendant's disposal of hazardous waste at its Howe Farm facility by evaporation and without certification violated HWMR 7-302(a) and 7-504(a).

9. Pursuant to HWMR 7-406(a), no person shall transport or accept for transport any hazardous waste without first obtaining a permit to do so from the Agency.

10. By transporting hazardous waste without a permit from the State, Defendant violated HWMR 7-406(a).

11. HWMR 7-303, requires any person who generates a waste to determine if that waste is a hazardous waste in accordance with the HWMR.

12. By failing to make its own waste determinations for ski-tuner emulsions, various products contained in aerosol cans, sand blast dust from the lift maintenance shop, and waste materials at the Howe Farm facility, Defendant violated HWMR 7-303.

13. HWMR 7-311(a)(2) states that hazardous waste containers may be placed out-of-doors only if they are within a structure that sheds rain and snow.

14. By storing short-term hazardous waste storage containers outdoors without a structure that sheds rain and snow, Defendant violated HWMR 7-311(a)(2).

15. Pursuant to HWMR 7-311(a)(4), hazardous wastes subject to freezing and expansion may not be stored in containers or above ground tanks unless mechanical or physical means are employed to prevent freezing.

16. By having a short-term hazardous waste storage area that was not equipped to prevent the freezing of waste, Defendant violated HWMR 7-311(a)(4).

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

17. HWMR 7-311(a)(5) requires that spill control equipment must be available in the immediate vicinity of the short-term storage area.

18. By not having spill control equipment located in the vicinity of its short-term hazardous waste storage area, Defendant violated HWMR 7-311(a)(5).

19. Under HWMR 7-806(b)(7), a container holding used oil may only be stored outside if the container is placed within a structure that sheds rain and snow.

20. By storing drums of used oil outside, not within a structure that sheds rain and snow, Defendant violated HWMR 7-806(b)(7).

21. Pursuant to HWMR 7-311(e)(1), small quantity generators must post a sign that must be visible from at least 25 feet, with the legend "Danger-Hazardous Waste Storage Area-Authorized Personnel Only" at each short-term hazardous waste storage area.

22. By having no warning signs posted at the short-term hazardous waste storage area, Defendant violated HWMR 7-311(e)(1).

23. Under HWMR 7-311(b)(3), there must be sufficient aisle space between containers to allow for the unobstructed movement of personnel, fire protection equipment, and spill control equipment.

24. By not having adequate aisle space in its short-term hazardous waste storage area to permit unobstructed movement of personnel, fire safety equipment, and spill control equipment, Defendant violated HWMR 7-311(b)(3).

25. HWMR 7-311(d)(1) requires, in part, small quantity generators to maintain, at a location apart from the short-term hazardous waste storage area, a list of all hazardous wastes currently in storage.

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

26. By failing to maintain a list of hazardous wastes stored in its short-term storage area, Defendant violated HWMR 7-311(d)(1).

27. HWMR 7-311(d)(2) requires small quantity generators to conduct daily inspections during regular business days of each short-term hazardous waste storage area.

28. By failing to conduct daily inspections of its short-term hazardous waste storage area, Defendant violated HWMR 7-311(d)(2).

29. HWMR 7-307(c)(9)(C) requires small quantity generators to ensure that each employee is familiar with proper waste handling and emergency procedures relevant to their responsibilities during regular facility operations and emergencies.

30. By failing to ensure that employees with hazardous waste management responsibilities were familiar with proper hazardous waste handling and emergency procedures , Defendant violated HWMR 7-307(c)(9)(C).

31. HWMR 7-307(c)(9)(B) requires small quantity generators to post emergency preparedness information next to each telephone located in the vicinity of where hazardous wastes are managed. This information includes, *inter alia*, the name and telephone number of a site's emergency coordinator, locations of fire extinguishers, spill control material and fire alarms, and the telephone of the fire department unless the site has a direct alarm.

32. By failing to post required emergency preparedness information next to each phone in waste handling areas, Defendant violated HWMR 7-307(c)(9)(B).

33. Under HWMR 7-309(a)(4)(D), small quantity generators must make arrangements to familiarize local hospitals with the properties of hazardous wastes handled at the facilities and the types of injuries or illnesses that could result from fires, explosions or releases.

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

34. By failing to complete arrangements with local hospitals to familiarize hospital personnel with the types of wastes it generates, Defendant violated HWMR 7-309(a)(4)(D).

35. Pursuant to HWMR 7-310(a)(5), small quantity generators are permitted to accumulate as much as one cubic yard of non-liquid, Vermont regulated, hazardous waste; one quart of acutely hazardous waste; or 55 gallons of any other hazardous waste in containers at or near the point of generation, without a permit if certain conditions are met, including the containers being marked with the words "hazardous waste" and other words that identify their contents.

36. By failing to mark satellite accumulation containers with the words "hazardous waste" and with other words to identify the container's contents, Defendant violated HWMR 7-310(a)(5).

37. Pursuant to HWMR 7-310(a)(8), small quantity generators are permitted to accumulate as much as one cubic yard of non-liquid, Vermont regulated, hazardous waste; one quart of acutely hazardous waste; or 55 gallons of any other hazardous waste in containers at or near the point of generation, without a permit if certain conditions are met, including all containers being dated when filled and moved to a short-term hazardous waste storage area within three days of becoming full.

38. By moving full containers of disposable absorbent wipes generated at the lift maintenance shop to an offsite location, the Howe Farm, which is not a short-term hazardous waste storage area, for storage prior to being shipped for disposal, Defendant violated HWMR 7-310(a)(8).

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

39. Under HWMR 7-311(b)(2), containers of hazardous waste must be stored such that the hazardous waste labeling is visible.

40. By storing hazardous waste in snow covered drums and in such a manner so as to have the labels on some of the drums be obscured by snow around the base of the drums, Defendant violated HWMR 7-311(b)(2).

41. Pursuant to HWMR 7-812(c)(1)(A), used oil that is burned for energy recovery must be tested from each source for total halogens.

42. By failing to test used oil that was to be burned for halogens and other suspected constituents or properties, Defendant violated 7-812(c)(1)(A).

43. Under HWMR 7-912(d)(5)(A)(i), universal waste lamps must be managed in a way that prevents releases of universal waste or a component of a universal waste into the environment. Universal waste lamps must be packaged in containers that are structurally sound and adequate to prevent breakage.

44. By storing used florescent lamps without protection of boxes or other containers to prevent breakage, Defendant violated HWMR 7-912(d)(5(A)(i).

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

45. Defendant admits the allegations set forth in paragraphs 1-44.

46. The State 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.

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

DATED at Montpelier, Vermont this 4th day of March, 2010.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Robt F McDougall

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

DATED at W. Dover, Vermont this 26th day of Febreary, 2010.

MOUNT SNOW, LTD.

By: Thomas J. Montemagni

Thomas J. Montemagni
Mount Snow, Ltd.
12 Mountain Snow Rd.
West Dover, Vermont 05356

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

STATE OF VERMONT
WASHINGTON COUNTY, SS.

STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Plaintiff, v. MOUNT SNOW, LTD., Defendant.	)	Washington Superior Court Docket No. Wncv

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

NOW COMES the parties, Plaintiff, the State of Vermont Agency of Natural Resources ("the State"), by and through Vermont Attorney General William H. Sorrell, and Defendant Mount Snow, Ltd. ("Defendant"), and 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 regulations;

WHEREAS, Defendant has admitted in the Pleadings by Agreement that it committed those violations of Vermont's hazardous waste management regulations;

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 $50,000 for each violation and $25,000 per violation for each day the violation continued;

WHEREAS, the State considered the criteria in 10 V.S.A. §§ 8010(b) and (c) in arriving at the proposed penalty amount, including the length of time the violations existed and that Defendant knew or had reason to know the violations existed;

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

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.

DATED at Montpelier, Vermont this 4th day of March, 2010.

WILLIAM H. SORRELL
ATTORNEY GENERAL

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

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

DATED at W. Dover, Vermont this 26th day of February, 2010.

MOUNT SNOW, LTD.

By: Thomas J. Montemagni

Thomas J. Montemagni
Mount Snow, Ltd.
12 Mountain Snow Rd.
West Dover, Vermont 05356

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

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
2010 MAY 11 A 10:30
Stipulation

STATE OF VERMONT AGENCY OF NATURAL RESOURCES Plaintiff,	)	Washington Superior Court Docket No. 378-5-09 Wncv
SLIMAIN HANDY'S CONVENIENCE STORES, INC. Defendant	)	

FILED
2010 MAY 18 P 2:03
Order

STIPULATION OF SETTLEMENT
AND
CONSENT DECREE

In order to resolve the allegations made in the complaint filed in the above-captioned matter the plaintiff State of Vermont and the defendant Slimain Handy's Convenience Stores, Inc. stipulate and agree as follows:

1. The defendant owns and operates a gasoline station and convenience store known as "Gracey's Store" at 1333 Williston Road in South Burlington, Vermont;
2. Gasoline is a petroleum product and a hazardous material as defined at 10 V.S.A. §6602(16)(A).
3. On October 22 and 23, 2006 there was a release of gasoline into the environment from the underground storage tank and piping system at the Gracey's Store gasoline station. The release from the Gracey's Store gasoline station underground storage tank and piping system was prohibited pursuant to 10 V.S.A. §6616.

4. To resolve the State of Vermont's allegations in its complaint the defendant agrees to pay a civil penalty to the State of Vermont in the amount of $35,000.00. The defendant shall pay $10,000.00 of the penalty to the State of Vermont within seven days of the entry of this Order. The remaining $25,000.00 of the penalty shall be paid to the State of Vermont in nine monthly installments to be paid on the tenth day of each month commencing on June 10, 2010. If the remaining $25,000.00 of the penalty has not been paid in full on February 10, 2011, any unpaid balance of the remaining $25,000.00 of the penalty not paid to the State of Vermont on February 10, 2011 shall accrue at an interest rate of 12% per annum simple interest until the unpaid balance is paid in full.
5. The payment of the civil penalty in paragraph 4 above by the defendant fully resolves any and all legal and equitable claims that State of Vermont has or may have against the defendant its agents, officers and employees related to any release of hazardous materials from the underground storage tank and piping system at the Gracey's Store gasoline station on October 22 and 23, 2006, and includes the resolution of any and all legal and equitable claims that State of Vermont has or may have related to the allegations that the defendant its agents, officers and employees failed to report a suspected release of hazardous materials at the Gracey's Store gasoline station on September 5 and 6, 2006 as set forth in the plaintiff's complaint.

6. Nothing in this Stipulation of Settlement and Consent Decree modifies the defendant's obligations to comply with Vermont state laws and rules regarding the installation, operation, maintenance, monitoring and closure of underground storage tanks.
7. The terms of this stipulation may be entered by consent of the parties as an order of the court, to which each party hereby waives its right to appeal.
8. Each party shall be responsible for its own costs.

Dated at Montpelier, Vermont this 10 day of May, 2010.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Michael O. Duane
Assistant Attorney General

Dated at Burlington, Vermont this 6th day of May, 2010.

SLIMAIN HANDY'S
CONVENIENCE STORES, INC.

By: _____
Joseph Handy, President
Slimain Handy's
Convenience Stores, Inc.

Approved: _____
David H. Greenberg, Esq.
Its Attorney

CONSENT DECREE

Upon the stipulation and consent of the parties, through counsel, the terms of the Stipulation of Settlement is hereby entered as an Order and Decree of the court in the above-captioned matter.

SO ORDERED:

Hon. Geoffrey W. Crawford
Superior Court Judge

DATE 5/17/10

STATE OF VERMONT
WINDSOR COUNTY, SS.

WINDSOR SUPERIOR COURT
DOCKET NO. 693-10-08 Wrcv

STATE OF VERMONT)
AGENCY OF TRANSPORTATION)
AND)
AGENCY OF NATURAL RESOURCES,)
)
Plaintiffs)
v.)
)
JOHN F. HENNESSEY, JR.)
)
Defendant.)

CONFORMED COPY

JUDGMENT ORDER

Based on the Motion for Summary Judgment filed by the State of Vermont, Agency of Transportation and Agency of Natural Resources ("State"), the Court's March 9, 2010 Decision on Motion for Summary Judgment in favor of the State against Defendant John F. Hennessey, Jr. ("Defendant"), the Court's April 9, 2010 Partial Judgment Order in favor of the State against Defendant, the evidence introduced into the record at a hearing on civil penalties before this Court on May 20, 2010, including the Environmental Administrative Penalty Forms prepared by the State, and the Court's application of the criteria set forth in 10 V.S.A. § 8010(b) and (c), it is ORDERED and ADJUDGED that:

1. Defendant is liable for civil penalties totaling $ 10,000.00 for violations of the State of Vermont's environmental statutes and regulations at his property at 138 Cummings Road in Chester, Vermont (hereinafter "the site") as follows:

   a. Defendant operated a junkyard at the site without a license in violation of 24 V.S.A. §§ 2242 and 2251 for 841 days from July 21, 2006 through November 7, 2008, and Defendant is liable to the State for a penalty of $5.00 per day for a civil penalty of $4,205.00 pursuant to 24 V.S.A. § 2282;

   b. Defendant stored and/or disposed of solid waste at the site outside of a certified solid waste management facility in violation of Vermont Solid Waste Management Rules § 6-302(d) for 841 days from July 21, 20

FILED

MAY 20 2010

WINDSOR COUNTY CLERK

through November 7, 2009 and Defendant is liable to the State for a civil penalty of $1,795.00 pursuant to 10 V.S.A. § 8221;

c. Defendant illegally stored hazardous waste at the site in violation of Vermont's Hazardous Waste Management Regulations §§ 7-103 and 7-306(c), for 42 days from July 21, 2006 through August 31, 2006, and Defendant is liable to the State for a civil penalty of $2,000.00 pursuant to 10 V.S.A. § 8221; and

d. Defendant released hazardous materials, such as waste oil, diesel fuel, hydraulic oil and gear oil, at the site in violation of 10 V.S.A. § 6616 for 1,150 days from July 21, 2006 through September 12, 2009, and Defendant is liable to the State for a civil penalty of $2,000.00 pursuant to 10 V.S.A. § 8221.

2. The cost of collection of the penalties assessed in this Judgment Order shall be assessed against and added to such penalties pursuant to 10 V.S.A. § 8221(6).

3. The Court directs entry of this order as a judgment in favor of the State and against Defendant.

Date: 5/20/10

By: _____
Harold E. Eaton, Jr.
Superior Court Judge

ENTRY ORDER

2010 VT 70

SUPREME COURT DOCKET NO. 2009-110

NOVEMBER TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	
	}	Washington Superior Court
Howe Cleaners, Inc., David Benvenuti,	}	
Jason's Dry Cleaning, Inc., Granite Savings	}	
Bank & Trust Company, The Howard Bank,	}	
N.A., T.D. Banknorth, N.A., and John Fiore,	}	DOCKET NO. 27-1-04 Wncv
Trustee, 9 Depot Square Realty Trust	}	

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

Affirmed.

FOR THE COURT:

Brian L. Burgess, Associate Justice

Dissenting:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Concurring:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

2010 VT 70

No. 2009-110

State of Vermont

v.

Howe Cleaners, Inc., David Benvenuti, Jason's Dry Cleaning, Inc., Granite Savings Bank & Trust Company, The Howard Bank, N.A., T.D. Banknorth, N.A., and John Fiore, Trustee, 9 Depot Square Realty Trust

Supreme Court

On Appeal from
Washington Superior Court

November Term, 2009

Mary Miles Teachout, J.

William H. Sorrell, Attorney General, and Mark J. Di Stefano and John D. Beling, Assistant Attorneys General, Montpelier, for Plaintiff-Appellant.

R. Bradford Fawley, Matthew S. Borick, and Elizabeth R. Wohl of Downs Rachlin Martin PLLC Brattleboro, for Defendant-Appellee T.D. Banknorth, N.A.

Robert Reis and Matthew D. Anderson of Reis, Urso, Ewald & Anderson, PLLC, Rutland, for Defendant-Appellee Fiore.

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

¶ 1. **BURGESS, J.** In this civil enforcement action concerning the State's attempt to hold prior and past owners liable for its costs of responding to and cleaning up a hazardous waste contamination site, the State appeals from the dismissal of its claims against appellees T.D. Banknorth, N.A. (Banknorth), and John Fiore. We affirm.

¶ 2. In 2000, the Agency of Natural Resources (ANR) determined that the property located at 9 Depot Square in the City of Barre was the source of extensive perchloroethylene contamination of the soil and groundwater in the area. A dry-cleaning business, Howe Cleaners, Inc., had operated on the site for over two decades before a bakery business started up in 1997. When the bakery failed a year or so later, Banknorth (through a predecessor-in-interest) foreclosed on and took title to the property. Several months

later, in March 1999, Fiore purchased the property and operated a pizzeria on the premises until a fire destroyed the building in 2008. Since 2000, the State has incurred, and is continuing to incur, substantial response costs for studying and monitoring the site.

¶ 3. In January 2004, the State brought an action in the superior court pursuant to 10 V.S.A. § 6615 of Vermont's Waste Management Act (VWMA) and the common law of public nuisance against the current owner, Fiore, and various past owners and operators of the site, including Banknorth and Howe Cleaners. The State sought to hold defendants liable for its past, present, and future response costs and also sought civil penalties against Howe Cleaners and Banknorth based on the release of hazardous material into the environment during the time that they owned the premises. Defendants generally denied liability and filed cross-claims or third-party claims or sought indemnity from other defendants.

¶ 4. In June 2005, Banknorth and Fiore moved for summary judgment. The State opposed the motions and cross-moved for summary judgment. In March 2006, the trial court issued a ruling on the motions. In denying Fiore's motion, the court ruled that Fiore, as owner of the property, could be held liable even absent proof of any release or threat of release while he owned the property. The court further held that it had no clear factual record on which to decide whether Fiore was entitled to judgment as a matter of law on his defense that, as a "diligent owner" who investigated the site before buying it, he was not liable under the statute. Regarding Banknorth's motion, the court ruled that the State had presented sufficient evidence "in the posture of the motion under consideration to establish a triable issue" as to whether there was a release or threat of release during Banknorth's ownership, but that the State had failed to come forward with any facts demonstrating a triable issue on whether Banknorth had created a public nuisance. Accordingly, the court denied summary judgment to Banknorth as to the State's statutory claim, but granted its motion as to the public nuisance claim. The court also denied the State's cross-motion with respect to Howe Cleaners and Banknorth. Finally, although the court ruled that Fiore could be liable as owner of the contaminated site, it reiterated that he was entitled to present his diligent-owner defense at trial.

¶ 5. Two months later, in June 2006, the trial court ruled on Banknorth's pending motion to compel the attendance of the State's designee(s) at a deposition noticed pursuant to V.R.C.P. 30(b)(6). Rule 30(b)(6) allows a party to name an organization, including a governmental agency, as the deponent and requires the named organization to designate one or more persons to testify on its behalf. Banknorth's notice included a request for the State to produce nine categories of documents and evidence underlying or relating to the claims of contaminants released at the property during and prior to Banknorth's ownership. In response, the State moved for a protective order, arguing that the Rule 30(b)(6) deposition improperly sought attorney work-product and was premature, overbroad, and not sufficiently particular. For the most part, the court rejected each of these arguments in granting Banknorth's motion to compel the discovery and denying the State's request for protection except for one category of information relating to the federal government's role at the site. Banknorth decided not to proceed with the deposition at that time, however, while the parties engaged in court-ordered mediation over the summer of 2006.

¶ 6. On October 10, 2006, following an unsuccessful mediation, Banknorth and Fiore filed motions to compel further discovery and issued a joint Rule 30(b)(6) "re-notice" of deposition scheduled for November 1, 2006. This re-notice listed the same evidence to be produced as in the first deposition notice, including the one category previously quashed by the court, plus two new requests to disclose evidence of Fiore's knowledge of contaminant release and lack of care. The State opposed the discovery and, five days before the scheduled deposition, again filed a motion for a protective order on many of the same grounds as before. The State notified Banknorth and Fiore that it would not appear for the deposition pending a ruling on its renewed motions. With no ruling from the court, the State did not appear at the deposition. Nevertheless, Banknorth and Fiore did attend the deposition as scheduled, and then filed motions for sanctions based on the State's failure to appear.

¶ 7. In April 2007, the trial court, with a new judge presiding on rotation, granted Fiore's renewed motion for summary judgment, concluding that Fiore's reasonable reliance on his physical inspection of the subject property and on a professional environmental assessment produced for his

review by Banknorth before its sale of the contaminated property to him was, as a matter of law, a diligent and appropriate investigation that satisfied the statutory diligent-owner defense to liability under the VWMA. The court also concluded that the State failed to make an adequate showing of a public nuisance that was actionable outside the scope of the Act.

¶ 8. Soon afterwards, in May 2007, and in response to Banknorth's motion for sanctions, the trial court precluded the State "from using at trial evidence that should have been provided in accordance with" the court's first order, in June 2006, compelling the State's compliance with discovery and its attendance at deposition. Following that ruling, Banknorth filed a second motion for summary judgment, arguing that the State could not prevail in light of the evidence limitations imposed by the sanctions order. The State opposed Banknorth's motion and cross-moved for summary judgment.

¶ 9. In February 2008, the trial court granted summary judgment to Banknorth. Declining the State's invitation to set aside the sanction in light of more recent discovery production, the court reviewed the history of the discovery dispute and reiterated that the serious sanction imposed on the State was justified. Most significantly, the court concluded that without the evidence of contaminant release precluded by the sanctions order, the State could not meet its burden of proof on its claims against Banknorth.

¶ 10. In July 2008, the State entered into a consent decree with Howe Cleaners. Further negotiations proceeded between the remaining parties. The trial court dismissed the State's claims against Banknorth and Fiore in February 2009 after those and other defendants settled cross-claims and third-party claims among themselves.

¶ 11. The State appeals, arguing that the trial court erred in granting summary judgment to Banknorth based on a litigation-ending discovery sanction against the State by not considering a lesser penalty, by disregarding its earlier acknowledgement of evidence produced by the State, and by failing to specify the perimeters of its preclusion order. Regarding summary judgment in favor of Fiore, the State asserts that the court erred in accepting as adequate Fiore's reliance upon a site-assessment report that the State contends was insufficient as a matter of law to satisfy the statutory defense of diligent investigation.

The court erred further, the State maintains, by not allowing the State to seek additional discovery as to whether Fiore knew or should have known about the contamination regardless of the assessment report, and by ruling that its public nuisance claim was effectively preempted by the VWMA.

I.

¶ 12. We first address the State's claims of error with respect to the trial court's grant of summary judgment in favor of Banknorth. The State's primary argument is that, given the facts and circumstances of this case, the court lacked a sufficient basis to impose what amounted to a litigation-ending sanction under Rule 37(b)(2) of the Vermont Rules of Civil Procedure. For the reasons discussed below, we disagree.

¶ 13. Before examining Rule 37 and the State's specific arguments, we recount in detail the parties' positions on Banknorth's liability and the trial court's reasoning for initially denying, and then later granting, summary judgment to Banknorth. In the March 2006 order, Judge Toor denied both Banknorth's and the State's motions for summary judgment. The critical dispute that the court resolved in that order concerned the scope of Banknorth's liability under 10 V.S.A. § 6615(a)(2), a provision of the VWMA that extends liability to "any person who at the time of release or threatened release of any hazardous material owned or operated any facility at which such hazardous materials were disposed of." The court rejected what it described as the State's expansive view that the mere fact of continuing contamination from an event preceding a particular person's ownership of the subject property is a "release" and thus makes that person liable under § 6615(a)(2). Instead, the court accepted Banknorth's position that, for the State to prove liability under § 6615(a)(2), it would have to demonstrate that a release or threat of release—such as a spill or threat of a spill—actually occurred or existed during the brief period when Banknorth owned the property.

¶ 14. Having determined the scope of Banknorth's liability, the trial court then moved on to the question of whether either Banknorth or the State was entitled to summary judgment. In describing the state of the evidence and ruling on the parties' competing motions for summary judgment, the court made what appear to be conflicting statements. Specifically referring to Banknorth's motion for summary

judgment, the court noted that because the State had taken the position that the timing of the release was irrelevant, it had made only "an evidentiary showing that there is a triable issue about whether a release or threat of release occurred or was ongoing during Banknorth's ownership." (Emphasis added.) Yet, the court also found that "the State has cited to substantial evidence in support of a release or threat of release during the period of Banknorth's ownership," including evidence supporting the State's contention that (1) underground storage tanks "may have" been abandoned or not maintained during that time; (2) vapors from hazardous wastes were being emitted into the air; and (3) a sump pump that was prone to collecting hazardous wastes may have been cleaned out. At the same time, however, the court stated that "[i]n analyzing whether the State has demonstrated that there is a triable issue with regard to 'release,' the court . . . bears in mind that this matter has been raised only in the most general sense." In the end, the court denied Banknorth's motion for summary judgment because Banknorth had indicated "an absence of evidence only in a very general way," and the State had established a triable issue given "the posture of the motion under consideration."

¶ 15. Moreover, the court stated, in denying the State's motion for summary judgment as to its claims against Banknorth, that in light of its decision on the scope of Banknorth's liability under § 6615(a)(2), "[t]he remaining controversy between the parties is the timing of any releases or threats of releases." The court reiterated that, thus far, the State had merely alleged that releases or threats of release—which it viewed as including the mere continuation of contamination—took place during the time each defendant owned or operated the facility. According to the court, with respect to the brief period of Banknorth's ownership, the State "fail[ed] to articulate any specific evidence of 'spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing' necessary to a release or threat of release, or any evidence as to the timing thereof."[1] Rather, the court found that the State had "merely

[1] Indeed, at the time of the March 2006 ruling, the court seemed to view these first cross-motions for summary judgment as amounting to little more than a preliminary factual skirmish lacking particularized proof, noting that "[i]n its statement of material facts, the State makes little more than the conclusory allegation that there have been ongoing releases and threats of releases of hazardous wastes throughout all defendants' ownership of the property, failing to explain what they may be, or when they may have occurred." The court added that while it was undisputed that the property was contaminated

cite[d] to a long list of exhibits without separately listing or explaining what facts they arguably prove." The court further stated that many of the cited exhibits contained "highly technical scientific information likely requiring expert interpretation."

¶ 16. In the February 2008 order granting summary judgment to Banknorth, Judge Teachout discussed the March 2006 order in which Judge Toor had denied summary judgment, noting that the State's evidence "was of a general nature and not sufficiently specific to support judgment as a matter of law in its favor." The court stated that although Judge Toor had denied summary judgment to both parties, her ruling on the scope of liability under § 6615(a)(2) not only rejected the theory under which the State had made its proffer of evidence but also focused the controversy on the timing of any alleged releases with regard to Banknorth's ownership. With this ruling in play, it became incumbent upon the State to focus its evidence on the timing of any claimed release or threat of release. As Judge Teachout stated, "following [Judge Toor's] ruling, the strength of the State's case against TD Banknorth depended on the specific evidence the State had to support its claim that there had been a 'release or threat of release' during the period of TD Banknorth's ownership under the interpretation set forth by Judge Toor." Banknorth subsequently pursued discovery precisely on this issue, which, the court observed, was unduly resisted by the State, thereby opening the door for Banknorth's renewed motion for summary judgment.

¶ 17. With this background in mind, we now examine Rule 37 and the State's claims of error with respect to the trial court's grant of summary judgment in favor of Banknorth. In relevant part, Rule 37(b)(2) states that if a party fails to obey a court order to provide or permit discovery, "the court in which the action is pending may make such orders in regard to the failure as are just." These may include presuming that certain facts have been established, "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence," or even dismissing an action. V.R.C.P. 37(b)(2)(B)-(C). Imposition of sanctions under this rule "is necessarily a matter of judicial discretion" that is "not subject to appellate review unless it is

---

with hazardous waste at the present time, neither party had "organized the record sufficiently for purposes of Rule 56 [summary judgment] to allow the court to reliably determine what other material facts are genuinely disputed."

clearly shown that such discretion has been abused or withheld." John v. Med. Ctr. Hosp. of Vt., 136 Vt. 517, 519, 394 A.2d 1134, 1135 (1978); accord State v. Lee, 2007 VT 7, ¶ 15, 181 Vt. 605, 924 A.2d 81 (mem.) ("As with other discovery rulings, the decision to impose sanctions for failure to comply with an order compelling discovery lies well within the trial court's discretion." (quotation omitted)).

¶ 18. Notwithstanding this broad discretion, however, we have held "that where the ultimate sanction of dismissal is invoked, it is necessary that the trial court indicate by findings of fact that there has been bad faith or deliberate and willful disregard for the court's orders, and further, that the party seeking the sanction has been prejudiced thereby." John, 136 Vt. at 519, 394 A.2d at 1135; accord Rathe Salvage, Inc. v. R. Brown & Sons, Inc., 2008 VT 99, ¶ 12, 184 Vt. 355, 965 A.2d 460 ("Despite trial courts' otherwise broad discretion to impose discovery sanctions . . ., litigation-ending sanctions are reserved for only the most flagrant cases and are inappropriate where failure to produce discovery is due to an inability fostered by circumstances outside of the party's control."). Accordingly, we have reversed trial court orders dismissing cases or entering default judgments as discovery sanctions when the orders did not set forth findings indicating the existence of bad faith on the part of the recalcitrant party and prejudice to the other side. See John, 136 Vt. at 519, 394 A.2d at 1135 (reversing dismissal order as discovery sanction where trial court's lack of findings regarding bad faith and prejudice left this Court unable to perform its function of reviewing trial court's exercise of discretion); see also In re Houston, 2006 VT 59, ¶¶ 13-16, 180 Vt. 535, 904 A.2d 1174 (mem.) (reversing dismissal order as discovery sanction because order was not supported by findings demonstrating bad faith and prejudice); Manosh v. First Mountain Vt., L.P., 2004 VT 122, ¶¶ 1, 10, 177 Vt. 616, 869 A.2d 79 (mem.) (reversing default judgment as discovery sanction because order was not supported by findings indicating willfulness or prejudice, and it was impossible for this Court to ascertain basis for sanction). We have stated that "[t]he purpose of the findings required by John is to protect against arbitrary dismissals that may violate principles of due process." Houston, 2006 VT 59, ¶ 17.

¶ 19. The State relies on these cases generally disapproving the "ultimate sanction" of summary default or dismissal in response to a party's failure to abide by its discovery obligations, arguing that the

trial court abused its discretion by imposing a litigation-ending sanction without making the requisite findings of bad faith and prejudice. We find the State's reliance on these cases unavailing. However similar in its effect, no ultimate sanction was actually imposed here. Although the sanction order led to the adverse judgment against the State, there was no outright dismissal or default. That the State could not proceed was due at least in part to its earlier tactical decision to present only the most general proffer of evidence sufficient to defeat Banknorth's original motion for summary judgment designed to flush out the State's evidence. As discussed above and explained by the trial court, the State then argued for the broadest application of release liability supported by only general evidence barely sufficient to establish an outstanding factual dispute, but failed to proffer specific evidence to confront and prevail against Banknorth's narrower theory of its potential liability based on the timing of the release. Had the State adopted a different strategy, more specific evidence produced in the earlier proceeding may have been exempt from the later sanction and possibly sufficient to survive the post-sanction motion for summary judgment.

¶ 20. Hence, the State's premise—that the court's sanction order was an unfounded ultimate sanction not favored in our case law—is faulty, and the cases cited in support of the State's proposition are inapposite. Rather than sanction the State by dismissing or defaulting its case, the court tailored the sanction to fit the violation by precluding the State "from using at trial evidence that should have been provided in accordance with" the June 2006 order requiring the State's representative(s) to be available for Banknorth's noticed deposition. By its terms, the court's order was the neutralizing evidentiary remedy contemplated by Rule 37(b)(2)(B) (authorizing trial court to prohibit disobedient party "from introducing designated matters in evidence")—not a dismissal under Rule 37(b)(2)(C) (authorizing trial court to dismiss action).

¶ 21. This case is similar to Lee, where the trial court sanctioned the offending party for discovery violations by accepting facts and allegations in the complaint as established and precluding the offending party from presenting a defense. 2007 VT 7, ¶ 6. As here, the trial court later granted summary judgment to the other side, and the sanctioned party argued to this Court that "the superior court was

required to make findings [of bad faith and prejudice] on the record prior to imposing such sanctions." Id. ¶ 17. We acknowledged that such findings are necessary when the "trial court imposes the ultimate sanction of dismissal," but concluded that "dismissal was not ordered" and that the offending party had been "allowed additional opportunities to argue against the relief sought by the [opposing party] in response to its motion for summary judgment." Id.; accord Von Brimer v. Whirlpool Corp., 536 F.2d 838, 843-44 (9th Cir. 1976) (rejecting appellants' argument that trial court's order excluding exhibits was dispositive of case and thus amounted to extreme sanction of dismissal under 37(b)(2)(C) requiring showing of bad faith, and instead concluding that evidence was excluded under 37(b)(2)(B)). But cf. United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 602-03 (9th Cir. 1988) (concluding that sanction declaring all allegations in complaint as established and precluding any defense to claim was equivalent to dismissal or default judgment).

¶ 22. Here, as noted, but for the State's earlier decision to pursue a broadly general—rather than more specific time-of-release-based—theory of liability, there may still have been, as in Lee, an opportunity to present evidence not improperly withheld and to argue its sufficiency to overcome Banknorth's motion for summary judgment. The State correctly notes that the sanction in Lee, in contrast to the instant case, was not particularly prejudicial because the essential facts established against the violator were incontrovertible in any event. Lee, 2007 VT 7, ¶ 17. The strength of the non-offending party's case in Lee, however, was entirely coincident to, and not the point of, the holding relied upon here. Although the sanction ordered in Lee fixed facts against the discovery violator that practically sealed a litigation victory for the other side, that result neither influenced nor diminished our holding that the order was not a litigation-ending "ultimate sanction" of dismissal requiring special findings of bad faith and prejudice. See id. In short, no special findings of bad faith or prejudice, or exhaustion of lesser sanctions, are required for anything less than the ultimate sanctions of dismissal or default, id., and thus the State's claim of error in this case based on the trial court's omission of such findings is unavailing.

¶ 23. The State makes several other related arguments. For example, the State contends that the trial court could not describe the State's conduct as constituting bad faith or willful disregard of a

previous court order because (1) the State's renewed motion for a protective order was appropriate in light of Banknorth's expanded Rule 30(b)(6) notice of deposition; (2) the State made a good-faith request that the deposition notice be held in abeyance in light of Banknorth's pending motions to compel further discovery and to grant summary judgment; and (3) the court inappropriately considered previous discovery delays allegedly caused by the State but not subject to a prior order. Moreover, the State contends that the court's prejudice analysis was flawed because the court considered earlier discovery delays not subject to a prior order, failed to consider that discovery was not yet closed in the case, and failed to consider a lesser sanction. In the State's view, the court should have imposed a less drastic sanction because, following the court's preclusion order, the State complied with the court's order by submitting supplemental discovery responses and allowing a deposition of its expert.

¶ 24. As explained above, the sanction order required no special findings of bad faith, prejudice, or lack of enforcement alternatives. Nevertheless, the trial court hardly imposed or enforced its sanction in a vacuum. In its order granting summary judgment, the court categorized the State's election not to appear for the compelled deposition as egregious because it ignored a specific court order and deprived Banknorth of discovery that the court ruled the bank had been entitled to for a considerable period of time, thereby causing significant delay in the progress of the case and unnecessary expense to the other litigants. The court's refusal to overlook the State's egregious noncompliance simply because the State cooperated after the sanction was invoked is an entirely supportable act of discretion.

¶ 25. In its summary judgment order, the trial court recounted a history in which the State resisted Banknorth's efforts to unveil the precise factual basis for the State's lawsuit against it. Since the court's earlier March 2006 order denying summary judgment narrowed the focus of the case to liability turning on the timing of contaminant releases, Banknorth sought to discover the State's evidence on that point, but to no avail. As the court stated, its previous June 2006 order denying the State a protective order made it "clear that the State would not be permitted to obviate TD Banknorth's discovery rights and simply refuse to disclose the factual basis for its claims." As for the State's renewed motion for a protective order—which preceded the scheduled deposition by only a few days—the court found the

motion allowed insufficient time for Banknorth or the court to respond, and that the motion's new objections could have been raised and addressed individually at the noticed deposition without the need to thwart the scheduled and otherwise court-approved proceeding.[2]

¶ 26. The State further argues that even if the sanction was not error, the superior court nevertheless abused its discretion when it disregarded its prior summary judgment decision both by failing to give effect to the limitation in its sanctions order precluding only that evidence that "should have been provided," and by excluding the affidavit of the State's expert witness. Noting that the court's earlier order denying summary judgment explicitly stated that the State presented evidence supporting its assertion of releases during Banknorth's ownership of the property, the State argues that Banknorth should have been required to delineate what evidence presented in the State's later opposition and cross-motion to Banknorth's second summary judgment motion was "new" evidence that "should have been provided" at the Rule 30(b)(6) noticed deposition. In short, the State argues that the court never gave effect to the "should have been provided" language in its sanctions order.

¶ 27. We disagree. As noted, while it is true that the court's denial of Banknorth's earlier motion for summary judgment recited that the State had satisfied its burden of establishing a triable issue, that same order more particularly described the state of the record as only generally including evidence supporting the State's contentions that releases or threats of releases may have occurred during Banknorth's ownership of the subject property. In an apparently generous characterization, keeping in mind that its ruling on the scope of liability under § 6615(a)(2) had focused the controversy on the timing of any releases or threats of releases, the court described the State's evidence in the earlier motion as "sufficient in the posture of the motion under consideration to establish a triable issue."

---

[2] The State makes too much of the fact that Banknorth's "re-notice" of the deposition requested some additional information, sought one category of information disallowed by the court's previous order, and was joined by Fiore. The State posits that the second notice was sufficiently distinct so as to justify its renewed motion for a protective order and its decision not to appear for the deposition unless compelled anew by the court. As a practical, rather than tactical, matter, however, most of the re-notice did not differ in any material way from the first notice previously ruled on and endorsed by the court.

¶ 28. The trial court's initial reliance on exhibits generally referencing potential bases for releases during Banknorth's ownership does not demonstrate, as the State suggests, that the court later erred either by failing to parse the State's evidence or by granting Banknorth summary judgment based on its conclusion that the State could no longer prove its case in light of the sanctions order. At minimum, more discovery was needed to explore potential sources of releases generally referenced in the State's exhibits, and most particularly the timing of any releases with respect to Banknorth's ownership of the property. The fact that the State may have had some evidence as to what releases may have occurred during Banknorth's brief ownership of the property did not preclude the court from later granting Banknorth summary judgment based on its preclusion order imposed after the State resisted Banknorth's efforts to learn the bases for these alleged releases.

¶ 29. More to the point, it was for the State, not the court or Banknorth, to give effect to and take advantage of the limits of the sanction. The State correctly recognizes the import of the court's order precluding only such evidence that was ordered to be disclosed and thus that "should have been provided" at the time of the deposition. But, as the party solely responsible for its evidence, only the State knew for certain what evidence it had in hand that was not covered by the June 2006 compulsion order and subject to the May 2007 sanction. To avoid summary judgment, therefore, it was properly the State's burden to identify, with supporting affidavits, the specific evidence upon which it continued to base its case that was not precluded by the sanctions order. The State, however, failed to disclose or distinguish the full extent of the evidence in its possession at the time of the deposition. In short, the State failed to meet its burden of demonstrating precisely what evidence was not covered by the sanctions order and how that evidence was sufficient to defeat Banknorth's motion for summary judgment.

¶ 30. The State's final argument on this point is that the trial court erred by relying on its sanctions ruling to preclude the State from offering the opinion of its expert. According to the State, the court ruled it was obligated to disclose the expert at the Rule 30(b)(6) deposition because the expert had submitted an affidavit in support of the State's earlier motion for summary judgment and thus was its designated representative. The State contends, however, that the expert was not its designee for purposes

of testifying at the deposition, but rather an independent environmental consultant whom the State hired to undertake response actions at the site and whom the State later timely disclosed as an expert witness following the close of discovery. In the State's view, it was error to exclude the expert's affidavit because he was not the designated State representative for purposes of the Rule 30(b)(6) deposition, and further because the State submitted the expert's affidavit in compliance with the court-ordered schedule for disclosure of experts. The State asserts that Banknorth cannot use a Rule 30(b)(6) deposition notice to force the State to disclose all expert testimony that it might offer against the bank.

¶ 31. Again, the State's argument is unavailing. The critical inquiry is whether the evidence presented in the expert's affidavit could have been identified and disclosed by the State's representative, whoever that would have been, at the deposition noticed for November 1, 2006. The deadline for disclosure of experts did not obviate compliance with a parallel court order arrived at by separate motion practice compelling the State to disclose certain described evidence at an earlier date. The State fails to demonstrate that its expert's affidavit contained new information outside the purview of the sanctions order and, if so, that its content was sufficient to avoid summary judgment. Accordingly, we find no error in the trial court granting summary judgment to Banknorth.

II.

¶ 32. We now turn our attention to the State's claims of error with respect to the trial court granting summary judgment in favor of Fiore. The State first argues that the court erred in granting summary judgment to Fiore based on what the court referred to as the "diligent owner" defense. The statute provides that a person who owns or operates a facility at the time of a release or threatened release "shall be liable unless he or she can establish by a preponderance of the evidence that after making diligent and appropriate investigation of the facility, he or she had no knowledge or reason to know that said release or threatened release was located on the facility." 10 V.S.A. § 6615(e) (emphasis added). In the State's view, Fiore's alleged good-faith lack of knowledge of any contamination on the subject property is based primarily on his reliance upon an environmental assessment that did not meet professional standards and thus cannot support his statutory diligent-owner defense.

¶ 33. The trial court took a different view. Interpreting this defense as having both objective and subjective components, the court applied an objective reasonable person standard as to whether the investigation was "diligent and appropriate," and both objective and subjective standards as to whether the owner had knowledge or reason to know of the release or threatened release. The court found that Fiore never had any knowledge of any contamination on the property before buying it. According to the court, then, the questions were whether Fiore's investigation was diligent and appropriate under the circumstances, and whether, following the investigation, a reasonable person should have known of the contamination.

¶ 34. The court found that Fiore's investigation consisted of his visual inspection of the property and his review of a recent Phase I environmental site assessment of the subject property commissioned by Banknorth after it foreclosed on the property. This assessment was conducted by an engineering company, Griffin International, Inc. The detailed fourteen-page Griffin report included various attachments and described, among other things, (1) the property's site features, geologic/hydrogeologic conditions, and historical use; (2) the company's site reconnaissance of the property; (3) its search of an environmental database to determine what other nearby uses might indicate contamination of the property; and (4) its interviews with state agency personnel and persons with knowledge of the subject property. The report indicated that it had been completed in accordance with standard practices for a Phase I environmental site assessment, and concluded that, other than the need to remove construction debris, "[n]o other significant environmentally hazardous conditions were identified on the subject property," and that "no further investigative work is recommended at this time, based on currently available data."

¶ 35. The court determined that it was objectively reasonable for Fiore "to rely on a recently produced, professional Phase I environmental report, such as the Griffin report in this case, and that such reliance is sufficient to constitute diligent and appropriate investigation as a matter of law." According to the court, it was objectively reasonable for Fiore to rely upon the Griffin report because neither party suggested the existence of any facts that should have put Fiore on notice of either existing contamination

or a faulty environmental assessment. The court noted that the State failed to identify "any circumstances that would have given an ordinary person such as Fiore any reason whatsoever to doubt the findings and conclusions in the Griffin report, or any reason to question whether it conformed to professional standards or was negligently undertaken." Given these circumstances, the court concluded that Fiore was not required to "look behind" the Griffin assessment.

¶ 36. The State's principal argument in challenging the trial court's decision is that merely being shown a report does not constitute an investigation. According to the State, the Griffin investigation failed to comply with performance standards and thus could not be "diligent and appropriate" under the plain meaning of § 6615(e). The State asserts that Fiore's recourse for the faulty investigation is to pursue claims against Griffin, but that Fiore cannot escape liability under the VWMA by relying on a negligently conducted environmental assessment. In making this argument, the State relies upon an analogous federal law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which requires landowners seeking the defense to demonstrate that they carried out all appropriate inquiries "into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices," 42 U.S.C. § 9601(35)(B)(i)(I), as well as federal regulatory criteria for determining whether an innocent-landowner defense has been met under that statute. Finally, the State argues that public policy militates against allowing landowners to rely on negligently conducted Phase I environmental site assessments. According to the State, Fiore should be liable under the circumstances because the public has a strong interest in promoting (1) a system of strict liability for hazardous waste sites; (2) accountability of environmental professionals called upon to perform Phase I investigations; and (3) responsibility on the part of purchasers of properties with a history of commercial use.

¶ 37. We uphold the trial court's grant of summary judgment in favor of Fiore, but we emphasize that our decision is based on all of the circumstances of this case and not just Fiore's reliance upon the Griffin assessment. While the trial court focused primarily on the Griffin assessment, it also noted Fiore's visual inspection of the property and other facts, as well as the absence of any evidence

indicating that the assessment was faulty. To the extent that the trial court's decision suggests that reliance upon a seemingly valid Phase I environmental site assessment always satisfies the diligent-owner defense, we need not reach that question. Rather, as detailed below, we examine all of the circumstances of this case in affirming the trial court's grant of summary judgment in favor of Fiore.

¶ 38. In any event, we reject the State's argument that reliance on a negligently performed environmental assessment cannot ever be, as a matter of law, a factor in determining whether the diligent-owner defense is satisfied. That a professionally prepared and apparently legitimate assessment turns out to be flawed casts no shadow on its objective dependability, or on the actual and objective lack of suspicion of the user, at the time the assessment was relied upon. As the trial court found, nothing in the record suggests that a thorough visual inspection by Fiore should have turned up evidence of contamination. Nor is there anything in the record to suggest that someone reviewing the detailed and recent Phase I environmental site assessment conducted by an acknowledged professional firm would be aware that it may have been inadequately or negligently performed. The Griffin report, on its face, stated an awareness of the past commercial use of the property, the completion of a thorough Phase I environmental site assessment of potential contamination based on that history, and a determination following that assessment that no significant problems existed. These facts demonstrate, as the trial court found, that Fiore made a diligent and appropriate investigation and had no reason to know that a release or threatened release existed at the facility.[3]

---

[3] Justice Johnson's dissent echoes many of the State's arguments. Asserting that the VWMA is a strict-liability statute intended to protect the public, her dissent advocates precluding, as a matter of law, a landowner's good-faith reliance on any environmental assessment that turned out, in retrospect, to be negligently performed. See post, ¶ 54. The logic of this reasoning does not withstand scrutiny. Although the VWMA undeniably has strict-liability aspects to it, it also contains an explicit statutory defense that allows a landowner to avoid liability if he or she can demonstrate that, after making a "diligent and appropriate investigation" of the property, "he or she had no knowledge or reason to know" of a release or threatened release on the property. 10 V.S.A. § 6615(e). This diligent-owner defense is an exception to the strict liability standard normally imposed on landowners. Yet, were we to accept the position taken in Justice Johnson's dissent, it would effectively nullify that defense and impose strict liability even in cases such as this where the landowner had no knowledge of any contamination and relied upon a seemingly thorough professional assessment by a consultant upon which both the bank and the State had relied to make a diligent and appropriate investigation of the site.

¶ 39. Nonetheless, the State asserts that Fiore should have hired his own consultant to check the work done by Griffin, even though the State cannot point to anything on the face of the report suggesting the assessment was incomplete or negligently performed. There is no statutory basis for grafting such an absolute condition on the diligent-owner defense, particularly in the absence of any objective or subjective suspicions. Imposing such a condition would have its own public policy repercussions, such as potentially increasing the expense involved in each and every commercial real estate transaction. In effect, the State takes the position that no purchaser of commercial real estate can rely on even multiple environmental assessments if those assessments prove to be inadequate. There is always a risk that existing contamination may not be detected by an assessment. Notwithstanding the State's insistence that Phase I assessments may be relied upon as long as they meet performance standards regardless of whether they detect contamination, its position would tend to mandate for every commercial real estate transaction a more thorough Phase II assessment. Such a requirement would involve extensive and costly soil sampling to assure the accuracy of a prior Phase I assessment, even in situations where there is no reason to doubt the first assessment. This, in turn, would tend to discourage the productive use of land by driving up transaction costs and would effectively nullify the statutory diligent-owner defense since no degree of diligence can guarantee accuracy.

¶ 40. The State further insists that Fiore cannot have made a diligent and appropriate investigation, given his claim in a lawsuit against Griffin that the company conducted a negligent and inadequate assessment.[4] We disagree. By its terms, the diligent-owner defense focuses on the investigation conducted, or reasonably relied upon, by the buyer at the time of purchase. There is no culpable nexus between the unknown poor quality of a consultant's investigation and the objective

---

Justice Johnson cites the Restatement (Second) of Agency § 215 (1958) to support her point that a negligent professional assessment should be attributable to whoever relies upon it, post, ¶ 64, but, apart from the fact that Griffin was not Fiore's agent, that section concerns an agent's conduct that "constitutes a tort to a third person." The section generally applies to trespasses, conversions, and interferences with pecuniary interests. See Restatement (Second) of Agency § 215 cmt. c. In this situation, the assessment itself did not constitute a tort and thus does not, under the Restatement, result in liability to a landowner who made the statutorily required diligent and appropriate investigation. The Restatement is inapposite.

[4] Fiore sued Griffin after the State sued Fiore.

reasonableness of the buyer's efforts and reliance, the buyer's actual reliance, or the buyer's subjective knowledge or suspicion.

¶ 41. The State's reliance upon LaSalle Nat'l Trust, N.A. v. Schaffner, No. 91 C 8247, 1993 WL 499742 (N.D. Ill. Dec. 2, 1993) is unavailing. That court, in determining whether all appropriate inquiry had been made to escape liability under CERCLA, mentioned that although it was "alleged" that the purchaser of the contaminated property at issue had "hired a consultant for an environmental audit prior to the purchase," there was no evidence that the audit was consistent with good commercial practices and in fact the purchaser was alleging in another suit that the audit had not satisfied that standard. Id. at *7. But the court also stated that, "[m]ore importantly," the Phase I environmental site assessment arguably raised concerns that should have alerted the purchaser to potential contamination. Id. Accordingly, the court concluded that there were genuine issues of material fact precluding summary judgment in favor of the purchaser. Id. Here, in contrast, as the trial court found, there was no notice of contamination reasonably available to Fiore in the assessment or otherwise. Cf. Goe Eng'g Co. v. Physician's Formula Cosmetics, Inc., No. CV 94-3576-WDK, 1997 WL 889278, at *13 (C.D. Cal. June 4, 1997) (granting summary judgment to defendant based upon conclusion that it had made all appropriate inquiries and had no reason to know of contamination, given that defendant purchased property at full fair market value, physically inspected property twice, and presented testimony that no contamination was discoverable by viewing property); 1325 "G" Street Assocs. v. Rockwood Pigments, Inc., No. Civ.A.DKC 2002-1622, 2004 WL 2191709, at *11-13 (D. Md. Sept. 7, 2004) (granting summary judgment to defendant based upon conclusion that company had made all appropriate inquiry under circumstances into whether contamination existed, even though no environmental assessment was conducted).

¶ 42. To the extent that the CERCLA innocent-landowner defense is relevant, we also find unavailing the State's reliance on that defense here to support its assertion that Fiore failed to make a sufficient investigation in this case.[5] The "innocent landowner" defense provides that there shall be no

[5] Justice Johnson's dissent cites Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 165, 624 A.2d 1122, 1130 (1992), for the proposition that we generally look to similar federal law for guidance, and should

liability for a person who can establish that a release or threatened release was caused solely by an act or omission of a third party other than one whose act or omission occurred in connection with a contractual relationship with the person. 42 U.S.C. § 9607(b)(3). Although the term "contractual relationship" includes land contracts, a purchaser may still escape liability if he did not know and had no reason to know of the contamination. Id. § (35)(A)(i). To satisfy those conditions, the purchaser must have undertaken "all appropriate inquiries . . . into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." Id. § 9601(35)(B)(i)(I). The statute specifies various criteria for determining whether this condition has been met, including (1) "[t]he results of an inquiry by an environmental professional"; (2) interviews of past and present owners, operators, and occupants of the facility; (3) review of historical sources; (4) review of any government records regarding the handling of hazardous waste; (5) visual inspections of the property; (6) "[s]pecialized knowledge or experience on the part of the defendant"; (7) the relationship between the purchase price and the value of the property as if it were uncontaminated; (8) "[c]ommonly known or reasonably ascertainable information about the property"; and (9) the obviousness of the presence of contamination on the property. Id. § 9601(35)(B)(iii).

---

look in particular to the innocent-landowner provision of CERCLA to resolve issues under the VWMA's diligent-owner defense. Post, ¶ 61. In Hodgdon, a disability discrimination case, we imported federal case law interpretation of the terms "handicapped individual" when the Vermont statutory definition was identical to the federal statute upon which our law was patterned. Id. The principle of Hodgdon is inapposite here, where the Vermont statute does not track its federal counterpart, and there is no federal case law interpreting the innocent-landowner defense to render a landowner, who has committed no further acts of disposal or obstructed remediation, strictly liable despite good faith reliance upon what purports and appears to be a valid Phase I environmental site assessment. Nor does the logic of Hodgdon extend to borrowing detailed statutory criteria enacted by Congress, but omitted at length from Vermont's legislation, to inform our interpretation of the state statute. The particular CERCLA factors in determining whether a purchasing landowner "did not know and had no reason to know" of contamination, 42 U.S.C. § 9601(35)(A)(i), are addressed in four interrelated subsections composed of some six hundred words and incorporating additional federal regulations. See id. § 9601 (35)(A)(i), (B)(ii)-(B)(iv). If the Legislature intended to parrot the entirety of CERCLA on the topic of exculpatory diligence it could have done so, but did not. Cf. 9 V.S.A. § 2453(b) (stating legislative intent that courts, in construing state law on unfair or deceptive practices in commerce, be guided by comparable federal law); 9 V.S.A. § 4500(a)-(b) (stating legislative intent that certain provisions of Vermont's Fair Housing and Public Accommodations Act be construed consistent with federal Americans with Disabilities Act); Hodgdon, 160 Vt. at 165, 624 A.2d at 1130 (applying federal court interpretation of congressional definitions copied into state act). Nevertheless, a number of the CERCLA factors germane to diligence are considered in affirming the ruling of the trial court here. See ¶¶ 40-43.

¶ 43. Notwithstanding the State's citation to federal regulations—regulations that were promulgated after the events that are the subject of this lawsuit—requiring that Phase I assessments meet certain objectives and performance standards, see 40 C.F.R. §§ 312.20(d), 312.20(e)(1), 312.20(f), & 312.23(c), virtually all of the relevant federal statutory criteria militate in favor of Fiore in this case. Fiore himself had no specialized knowledge of the dry-cleaning business or potential contamination posed by such a business. No contamination was obvious from observation of the site. As noted by the trial court, Fiore purchased the property for $125,000, which Fiore averred in an affidavit and his statement of undisputed facts was only two thousand dollars less than its appraised value.[6] Fiore had available to him the recent Griffin Phase I environmental site assessment indicating the absence of significant contamination, and in fact no significant contamination was discovered until soil testing was done, which is not part of a Phase I assessment. The company that conducted the assessment had also removed an underground tank on the subject property in 1992, at which time the company did not detect any pollution, and the State later relied on the company's report regarding the tank removal to inform the then-current owner that it was unaware of any threat to human health or the environment on the site. In January 2000, a hazardous material specialist for ANR, in seeking funding for cleanup of the property, stated in a letter to her supervisor that Fiore had done everything he reasonably could have done to ensure that he was not purchasing contaminated property, noting that all of the information he had at his disposal from consultants and the agency itself indicated the absence of contamination.

¶ 44. Before buying the subject commercial property for nearly its fully appraised value, Fiore looked into the possibility that the property was contaminated but concluded that it was not, relying in large part on a recent Phase I environmental site assessment that purported to have been completed in compliance with applicable and accepted performance standards. The assessment was recent, was conducted by professionals whom the State itself had relied upon in connection with the same property,

[6] The State responded by asserting that Fiore's statement was unsupported by specific citations to the record and thus hearsay, and in any case was not material to the diligent-owner defense. There does not appear to be any real dispute, however, as to whether Fiore paid close to fair market value for the property.

and no other information available to Fiore indicated any significant contamination on the property. The State has not pointed to anything in the record, years after it filed suit, suggesting that Fiore acted in an improper or collusive manner with respect to his purchase of the foreclosed property. Given this record, there is no basis to overturn the trial court's award of summary judgment to Fiore.

¶ 45. The State argues, however, that the trial court erred by not allowing it to take further depositions to gather information in opposition to Fiore's motion for summary judgment based on the diligent-owner defense. According to the State, because discovery had not yet been closed in the case, it should have been given a further opportunity to depose Fiore, Banknorth, Griffin, and an environmental consultant who filed an affidavit indicating that Fiore could not have known that the Griffin report was inadequate and had no reason to know of any contamination on the property.

¶ 46. Once more, we find no error. In denying the State's request for additional discovery as to whether Fiore had made a diligent and appropriate investigation of the property and had any reason to know of the contamination later discovered there, the court noted that the State had filed the case three years earlier and that Fiore's motion for summary judgment had been pending for over a year. According to the court, the State failed to cite any particular need for additional discovery as required by Rule 56(f) of the Vermont Rules of Civil Procedure.[7] On appeal, the State fails to demonstrate how the court abused its discretion in so ruling.

---

[7] Justice Johnson would have this Court remand the matter for the trial court to reconsider whether Fiore had made a diligent and reasonable investigation of any potential contamination, this time without taking into account Fiore's reliance upon the Griffin assessment. See post, ¶¶ 65-66, 70. Such a remand would be futile for no other reason than we have concluded that the trial court correctly considered Fiore's reliance on the assessment, among other things, in determining whether Fiore had satisfied the statutory diligent-owner defense. Supra, ¶¶ 37-38. We point out further, however, that with respect to Fiore's motion for summary judgment, the court concluded "that there are no disputes of material fact, nor does it appear that additional time for discovery is warranted." (Emphasis added.) The court noted that the State had filed the case more than three years earlier, that Fiore's summary judgment motion had been pending for nearly one year, and that the State had "not cited any particular need for more discovery that it ha[d] not already had a reasonable opportunity to undertake." Moreover, on appeal, the State neither seeks a remand nor suggests that there are any material facts in dispute regarding any issue other than Fiore's reliance on the Griffin assessment. Indeed, the State argues only that (1) it is entitled to judgment as a matter of law; and (2) in the alternative, if the Griffin assessment can be considered with respect to Fiore's diligent-owner defense, the trial court erred by not allowing it to depose

¶ 47. Rule 56(f) provides that if it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition," then "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." In its filings in opposition to Fiore's motion for summary judgment, the State briefly requested, as an alternative to its primary legal theory that Fiore's knowledge was immaterial to his diligence defense, to depose Fiore and others pursuant to Rule 56(f).[8] The request was not supported by affidavit or explanation, as called for by Rule 56, as to why the discovery sought had been previously unavailable. Nothing was proffered to compel the court to grant the State the requested depositions at this point in the proceedings. As the court indicated, the State had plenty of time to develop its case and failed to articulate precisely what material facts essential to the State's opposition remained undiscovered. See State v. Heritage Realty, 137 Vt. 425, 429, 407 A.2d 509, 511 (1979) (stating that discovery should be ended when record indicates that it is not likely to produce genuine issue of material fact).

Fiore and others concerning his reliance upon the Griffin assessment. In short, no-one is arguing that there is any dispute as to any material facts apart from those concerning the Griffin assessment.

In his dissent, Chief Justice Reiber does not show that there are material facts in dispute but rather suggests that, given the current undisputed facts, Fiore is not entitled to judgment as a matter of law. See post, ¶ 79. Even the State does not advocate this position on appeal. The State's principal arguments are that (1) in light of Fiore's concession that the Phase I environmental site assessment was negligent, the trial court should be disallowed, as a matter of law, from considering Fiore's reliance upon the assessment as a basis for the diligent-owner defense; and (2) under the circumstances of this case, Fiore cannot prevail on that defense when we exclude his reliance on the assessment. The State also argues that, even if the trial court properly considered Fiore's reliance on the assessment, the court erred by not allowing the State to take further depositions concerning his reliance on the assessment. In this opinion, we have rejected each of these arguments, upholding the trial court's view that Fiore's reliance on the assessment should be considered and that the State had already had ample opportunity to investigate that reliance. See supra, ¶¶ 37-38, 46. The State does not argue, however, that—assuming the trial court properly considered Fiore's reliance on the assessment and refused to give the State further opportunity to investigate his reliance on the assessment—that summary judgment was inappropriate or premature.

[8] This request to depose, without heading, elaboration, or separate motion, consisted of a single sentence included, respectively, within a twenty-two-page memorandum opposing summary judgment and a thirty-two-page response to Fiore's statement of facts.

III.

¶ 48. Finally, the State argues that the trial court erred in dismissing its common law nuisance claim. Again, we disagree. In dismissing the claim, the court ruled that the mere fact of pollution migrating offsite is not, in and of itself, sufficient to show a public nuisance, and, in any case, the State had not identified any specific public rights with which Fiore had interfered that suggested potential liability outside the scope of 10 V.S.A. § 6615. According to the court, the liability that the State sought to impose under its public nuisance claim is identical to the liability imposed by § 6615. The court noted that the VWMA does not preclude other civil or injunctive remedies "[e]xcept insofar as expressly provided in this section," id. § 6615(f), and that the diligent-owner defense is expressly provided in that section. Id. § 6615(e). The court concluded that the State cannot nullify this statutory defense by resorting to an alternative common law public nuisance theory.

¶ 49. We conclude that the State has failed to demonstrate that the trial court erred in dismissing its common law public nuisance claim. In determining that the State had failed to make a showing that the pollution on the subject property had reached the level of a public nuisance, the trial court noted that a public nuisance must impact a right common to the general public. See Restatement (Second) of Torts § 821B(1) (1979) ("A public nuisance is an unreasonable interference with a right common to the general public."); see also Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 357, 376 A.2d 342, 346 (1977) ("[T]o be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interest."). The court cited a Restatement comment indicating that, for example, pollution of a stream that deprived lower riparian owners of the use of water for purposes of their land would not, in and of itself, be a public nuisance, but that a public nuisance would exist if, for example, the pollution prevented use of a public beach or killed the fish in a navigable stream. See Restatement (Second) of Torts § 821B cmt. g. The court stated that the mere fact that the pollution in this case had migrated offsite was not, in and of itself, an adequate showing of a public nuisance.

¶ 50. The State submits a one-page response to this aspect of the court's ruling, asserting only that the State of Vermont has expressed through statute and regulations a desire to protect its

groundwater, and that having unpolluted groundwater is a general interest of the public. The State briefly asserts that the contaminated plume in this case exists hundreds of feet beyond the subject property. Despite the trial court's ruling, the State does not indicate, other than noting the general public interest in protecting groundwater, how the contamination at the subject property affects or has the potential to affect the general public. Cf. Allen v. Uni-First Corp., 151 Vt. 229, 231, 558 A.2d 961, 962-63 (1988) (where evidence demonstrated that hazardous chemicals from dry-cleaning business had been discharged into municipal sewage system and had contaminated numerous private wells, as well as town well, town landfill, and air around public schools, trial court charged jury on theories of both public and private nuisance).

¶ 51. Nor does the State cite any case in which a state or federal court has ruled that a defendant entitled to a statutory innocent-landowner defense is liable for the same conduct under a common law public nuisance theory. Rather, the State cites a federal appeals court case for the proposition that groundwater contamination provides a sufficient basis for imposing common law public nuisance liability. See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). In that case, however, the court emphasized that a public nuisance, under New York law, involves conduct that interferes with public rights common to all in a manner that endangers the property, health, or safety of a considerable number of persons. Id. at 1050. This is precisely what the trial court ruled that the State had failed to show in this case.

¶ 52. The State also cites Shore Realty for the proposition that it is appropriate to impose public nuisance liability on current owners of contaminated properties even if they did not cause the contamination. In making this point, however, the court in Shore Realty noted that the current owner had purchased the property with knowledge of its contaminated condition and further stated that the trend toward limiting the liability of successor landowners "clearly does not extend to successor owners who knew about the condition of the land before purchasing it." Id. at 1051 n.25. In the instant case, of course, the State is seeking to extend liability to Fiore based on a common law public nuisance theory even if he is not liable under the VWMA because he had no reason to know of the contamination

following an appropriate and diligent investigation. We need not decide in this case whether the VWMA always precludes public nuisance claims under such circumstances because, in this case, the State has not demonstrated that the trial court erred in concluding that the State failed to make a prima facie showing of a public nuisance.

Affirmed.

FOR THE COURT:

Associate Justice

¶ 53. **JOHNSON, J., dissenting in part, and concurring in part.** I concur with Part I of the majority's opinion, but considering the remedial purpose of the Vermont Waste Management Act (VWMA) combined with its strict liability statutory framework, I cannot agree that a landowner is able to escape liability simply by pointing to a negligently conducted environmental assessment given to him by the party selling him the subject property. If that is all it takes to meet the VWMA's exception from liability, then the tail is wagging the dog. Contrary to the arguments implicit in defendant Fiore's diligent-owner defense, the VWMA was not intended to be an economic redevelopment statute. Instead, it is a strict liability statute enacted to protect the public from the health and environmental consequences of hazardous waste contamination, and thus its exceptions to liability for current owners of contaminated property are necessarily narrow. Accordingly, I dissent from Part II of the majority's decision.

¶ 54. The majority errs by focusing solely on whether it was reasonable for Fiore to rely on an admittedly "flawed" environmental assessment of the land. Ante, ¶¶ 34, 38. Such an interpretation of the VWMA undercuts the law's strict liability scheme and expands a narrow exception to liability by ignoring the fact that the assessment upon which Fiore relied—regardless if that reliance was reasonable—was worthless. Once Fiore is precluded from using the negligently performed environmental assessment to make out an affirmative diligent-owner defense, there remain factual questions as to whether his inquiry

amounted to a diligent investigation; thus, I would conclude that summary judgment on this issue was premature, and I respectfully dissent.[9]

¶ 55. The facts and complicated procedural history of this case are set forth in detail by the majority. Ante, ¶¶ 2-10. Fiore purchased the subject property in March 1999 and opened a pizzeria shortly thereafter. At the time of purchase, the property was owned by Banknorth, which had foreclosed on the property in 1997. The previous owner had used the property from 1996 until 1997 to operate a bakery. Before its use as a bakery, the property was owned from 1970 to 1996 by David Benvenuti and Howe Cleaners, who used the property to operate a dry-cleaning business. It was during the property's use for dry cleaning that hazardous waste, such as perchloroethylene (PCE), was released onto the property. The release of this hazardous waste has resulted in contamination of the air within the building located on the property as well as migration of contaminants to underlying and adjoining properties through contaminated soils and groundwater. Vermont's Agency of Natural Resources (ANR) has incurred over $300,000 in response costs to clean up the contamination, and the site remains contaminated.

¶ 56. At the time he purchased the property, Fiore was aware of the property's past use as a dry-cleaning site, but maintained that there was no physical indication of present contamination. Just prior to purchase, Banknorth furnished Fiore with a Phase I environmental site assessment report prepared in 1998 by Griffin International, Inc., an environmental consulting and engineering company. The assessment, which all sides now concede was negligently conducted, concluded that "the property presented no significant environmentally hazardous conditions" and recommended "no further investigation." Fiore also claims he justifiably relied on assurances from ANR that the site presented no health hazards. Fiore subsequently purchased the property and opened his pizzeria.

---

[9] I concur, however, with the majority that the discovery sanction issued by the trial court against the State was warranted and that summary judgment in favor of Banknorth was appropriate. I also agree with the majority that the State's late discovery requests were properly denied and that the State was precluded from bringing its common law nuisance claim.

¶ 57. Following its discovery of contamination, the State brought a cost recovery action against Fiore and the previous owners of the property. In response to that action, Fiore moved for summary judgment, arguing that he was shielded from liability under the VWMA on a diligent-owner defense. See 10 V.S.A. § 6115(e).[10] The trial court ruled in favor of Fiore, concluding that "it is reasonable for a person to rely on a recently produced, professional Phase 1 environmental report . . . and that such reliance is sufficient to constitute diligent and appropriate investigation as a matter of law." The court further noted that even though the Griffin report was negligently conducted, the State had not produced evidence that would have "put Fiore on notice of either existing contamination or a faulty investigation or report by Griffin." On appeal, the State argues—and I agree—that a negligently performed assessment cannot form the basis of a diligent-owner defense.

¶ 58. The purpose and statutory scheme of the VWMA, and its federal counterpart the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), indicate that the remedial goals of these statutes were intended to be quite broad and that the exceptions to liability quite narrow. By enacting the VWMA, the Vermont Legislature sought to address "the increasingly complex social, economic and legal problems of managing solid and hazardous wastes." State v. Ben-Mont Corp., 163 Vt. 53, 57, 652 A.2d 1004, 1007 (1994); accord State v. Carroll, 171 Vt. 395, 400, 765 A.2d 500, 503 (2000) ("The statutory scheme is intended to hold all parties responsible for hazardous materials contamination accountable for the costs associated with its proper clean-up and disposal."). The same impetus to impose strict liability on those responsible for the problems caused by the treatment and disposal of hazardous waste motivated enactment of CERCLA. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989) ("The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."); Walls v. Waste Res. Corp., 823 F.2d 977, 980 (6th Cir. 1987) (noting that CERCLA was

[10] Fiore also claims he is entitled to the defense set forth in 10 V.S.A. § 6615(d). Though the applicability of this defense was not addressed in the trial court's order, it would appear that this defense is not available to Fiore because, as a purchaser of contaminated land, he is in an indirect contractual relationship with the third party he claims is responsible for the contamination.

enacted to require responsible parties to "bear the costs and responsibility for remedying the harmful conditions they created" (quotation omitted)).

¶ 59. Thus, the VWMA provides that a person who currently owns or operates a facility on which contamination has occurred, regardless of whether the current owner or operator is directly responsible for the contamination, shall be liable for "abating such release or threatened release" and for the "costs of investigation, removal and remedial actions incurred by the state which are necessary to protect the public health or the environment." 10 V.S.A. § 6615(a)(4)(A)-(B). The statute explicitly holds responsible parties strictly liable "for all cleanup, removal and remedial costs." Id. § 6615(c).

¶ 60. One of the limited exceptions to liability under the VWMA is what the trial court referred to as the "diligent owner" affirmative defense:

> Any person who is the owner or operator of a facility where a release or threatened release existed at the time that person became owner or operator shall be liable unless he or she can establish by a preponderance of the evidence that after making diligent and appropriate investigation of the facility, he or she had no knowledge or reason to know that said release or threatened release was located on the facility.

Id. § 6615(e). Presumably, the Legislature added this limited exception to liability to incentivize inquiry into whether purchased property is contaminated and to prevent unfairness that would result from holding a purchaser of contaminated land liable when he made every reasonable effort to determine if the land was contaminated before purchase. The passive landowner, however, who turns a blind eye to potential contamination on his newly acquired land, cannot escape liability.[11]

---

[11] Given the strict liability framework and remedial purpose of CERCLA, federal courts have adopted a narrow interpretation of the comparable innocent-landowner defense. For instance, the First Circuit has noted:

> As an acquiring party and an owner of the facility during a period of "passive" disposal, [defendant] would be held to an especially stringent level of preacquisition inquiry—on the theory that an acquiring party's failure to make adequate inquiry may itself contribute to a prolongation of the contamination.

In re Hemingway Transp., Inc., 993 F.2d 915, 932-33 (1st Cir. 1993) (footnote omitted); accord Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845-46 (4th Cir. 1992) ("A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot

¶ 61. The VWMA largely tracks its federal precursor, CERCLA.[12] Thus, we look to interpretation and application of the comparable federal innocent-landowner defense for guidance in interpreting our own provision. See Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 165, 624 A.2d 1122, 1130 (1992) (noting that "[b]ecause the Vermont Legislature patterned our handicap-discrimination statute on federal legislation, we look to federal case law for guidance in construing the definitions at issue").[13] The innocent-landowner defense in CERCLA focuses on whether a purchaser of contaminated property had "reason to know" of the contamination at the time of purchase. 42 U.S.C. § 9601(35)(A)(i). Unlike the VWMA, CERCLA (as set forth during the relevant time period of this action) provides explicit guidance on how a defendant may establish that it had "no reason to know" of a prior disposal:

> To establish that the defendant had no reason to know . . . the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any

---

be what Congress had in mind."). The same policy reasons that dictate narrow interpretation of the exceptions to liability under CERCLA necessitate a similar interpretation of exceptions to liability under the VWMA, especially given the similarity between the two schemes.

[12] The VWMA's diligent-owner defense, for instance, is substantially similar to the innocent-landowner defense contained in CERCLA. Under 42 U.S.C. § 9601(35)(A)(i), a person may qualify for the innocent-landowner defense if:

> At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

[13] The majority criticizes the use of CERCLA's innocent-landowner defense as helpful guidance for interpretation of our own diligent-owner defense, seemingly arguing that the Legislature in Vermont intended to adopt a much broader exception to liability under the VWMA. Ante, ¶ 42 n.5. The majority cites no authority that directly supports this proposition, and it is difficult to believe that, where much of the statutory provisions of the VWMA are taken word-for-word from CERCLA, the Legislature intended the VWMA to depart from CERCLA in this way. Such an interpretation would be woefully out of line with other areas of environmental protection law in Vermont, where the regulatory scheme is often more stringent than federal counterparts. Cf. Jipac, N.V. v. Silas, 174 Vt. 57, 62-63, 800 A.2d 1092, 1097 (2002) (noting strong environmental protection policy behind Vermont's Act 250); In re Town of Sherburne, 154 Vt. 596, 601 n.6, 581 A.2d 274, 277 n.6 (1990) (noting that in context of interaction between Vermont's Water Quality Standards and federal Clean Water Act, "[b]ecause state regulations may impose more rigorous standards than the federal counterparts, state agencies should first look to the state regulations for guidance").

> specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id. § 9601(35)(B) (1999).[14]

¶ 62. The performance of a Phase I environmental site assessment, which courts considered the customary commercial practice even before the 2002 amendments to CERCLA codified it as the baseline, acts as a safe harbor to CERCLA liability. See R.E. Goodson Constr. Co. v. Int'l Paper Co., Civil Action No. 4:02-4184-RBH, 2006 WL 4916336, at *38 (D.S.C. Dec. 15, 2006) (considering whether landowner had met his burden under pre-2002 CERCLA innocent-landowner defense and concluding that "customary practice" included performance of Phase I assessment and that performance of such assessment provided "safe harbor" to escape CERCLA liability); see also United States v. Domenic Lombardi Realty, Inc., 290 F. Supp. 2d 198, 211 (D.R.I. 2003) (citing expert testimony that environmental assessment of property was required to satisfy "good commercial or customary practices" for purchasing property).

¶ 63. The fact that a defendant is merely shown an environmental assessment, however, may not be enough to escape liability. Rather, the adequacy of the assessment is a crucial fact in determining

[14] It may very well be that the analysis employed to determine whether Fiore made out his diligent-owner defense is hopelessly stuck in time. Subsequent to Fiore's purchase of the relevant property, Congress and the Environmental Protection Agency recognized that evolving technology and savvier land purchasers necessitated a narrower definition of "all appropriate inquiry" under CERCLA, one that takes into account more modern commercial practices. Thus, in 2002, CERCLA's innocent-landowner affirmative defense provision was amended to provide clarity to courts and purchasers of land alike. The 2002 "Brownfields Amendments" clarified the "all appropriate inquiry" standard, stating that purchasers of property before May 31, 1997, shall take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria. 42 U.S.C. § 9601(35)(B)(iv)(I). For property purchased on or after May 31, 1997, the procedures of the American Society for Testing and Materials, including the document known as Standard E1527-97, entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process," were to be used until EPA promulgated regulations. 42 U.S.C. § 9601(35)(b)(iv)(II). The EPA promulgated regulations further clarifying what amounted to "all appropriate inquiry" in 2005. See 40 C.F.R. § 312.20(e) (noting that all appropriate inquiries may include results of environmental reports, provided those reports meet certain objectives and performance standards). I agree with Fiore, however, that the appropriate standard that guides analysis in this case was that in existence in 1999 when Fiore purchased the property.

whether it is even relevant to a diligent-owner defense. See LaSalle Nat'l Trust, N.A. v. Schaffner, No. 91 C 8247, 1993 WL 499742 (N.D. Ill. Dec. 2, 1993). In LaSalle National Trust, the court considered whether evidence presented by the defendant that he had hired a professional consultant to conduct an environmental audit before purchasing the land in question and that the audit had yielded no evidence of contamination could meet the "all appropriate inquiry" requirement under CERCLA. Id. at *7. The court looked at evidence beyond the mere fact that an environmental investigation was conducted and inquired into whether the audit was "consistent with good commercial and customary practices." Id. As part of this analysis, the court considered the fact that the defendant itself had brought an independent action against the consultant alleging that the consultant had been negligent in its investigation. Id. The court refused to grant summary judgment on the basis of the facts presented, finding instead that genuine issues of fact existed as to whether the inquiry made by the defendant was sufficient to escape liability. Id.[15] See also S.S. & G, LLC v. California, No. 02:02-CV-2514-GEBJFM, 2005 WL 2016843, at *2 (E.D. Cal. 2005) (noting that questions of fact were raised as to whether environmental consultants performing Phase I assessment "exercised a level of care in accordance with generally accepted and local standards of professional practice in effect at the time" and thus summary judgment was inappropriate for this issue).

¶ 64. The reasoning behind imputing a professional environmental consultant's negligence to the landowner who relies upon it is straightforward: when a defendant relies upon a professional company's performance of an environmental assessment to meet his burden to conduct a diligent investigation, he adopts whatever investigation is performed by the professional company as his own. This is hardly a new concept of law and one that makes sense in this context given the remedial purpose and strict liability framework of the VWMA. See Restatement (Second) of Agency § 215 (1958) ("A master or other principal who unintentionally authorizes conduct of a servant or other agent which constitutes a tort to a third person is subject to liability to such person."); see also In re Desautels Real Estate, Inc., 142 Vt. 326,

[15] The majority attempts to distinguish LaSalle by focusing on the fact that in that case the Phase I assessment raised concerns that should have alerted the purchaser to contamination. Ante, ¶ 41. This fact may have indicated that there were other factors present suggesting that the landowner should have been aware of the contamination, but it does not answer the question of whether any weight should be given to a negligently performed assessment.

337, 457 A.2d 1361, 1366 (1982) ("The law of vicarious liability has long been recognized in Vermont as but an outgrowth of the maxim respondeat superior. Vicarious responsibility has been defined as an indirect legal responsibility, as for example, the liability of an employer for the acts of an employee, or a principal for the torts and contracts of his agent." (citation omitted)). Thus, though I agree with the majority that performance of a valid Phase I assessment may indicate a purchaser's due diligence under § 6115(e), I cannot agree that a negligently performed assessment should be given any weight.

¶ 65. Here, all sides agree that the Phase I environmental site assessment performed by Griffin International was negligently conducted. It may well be that the Griffin report was objectively dependable or that Fiore had no reason to be suspicious of the report's legitimacy, ante, ¶ 38, but this guise of authority does not change the fact that the report was essentially worthless. Indeed, the end result is as if no environmental assessment had been performed at all. Thus, I cannot agree that the mere fact that Fiore happened to be given an assessment—especially by the entity attempting to convince him to buy the property—is enough, as a matter of law, to shield him from liability under the VWMA. This fact alone does not necessarily mean that Fiore automatically fails in making out his diligent-owner affirmative defense. Instead, Fiore merely loses the "safe harbor" from liability that performance of a valid Phase I assessment normally provides. Indeed, the performance of a Phase I assessment is only one factor that courts consider in determining whether a landowner can prevail on an affirmative defense to liability; Fiore, therefore, is left to point to other evidence indicating that he met his burden. See 42 U.S.C. § 9601(35)(B)(iii) (1999) (listing factors); Maturo v. Comm'r of Dep't of Envtl. Prot., No. CV910313753S, 2008 WL 1734580, at *10 (Conn. Super. Ct. Mar. 19, 2008) (concluding that though defendant had made some inquiry, there were multiple warning signs that should have alerted him to contamination, such as the land's past use as gas station); BCW Assocs., Ltd. v. Occidental Chem. Corp., Civ. A. No. 86-5947, 1988 WL 102641, at *21 (E.D. Pa. Sept. 29, 1988) (rejecting innocent-landowner defense in situation where defendant had conducted several environmental studies, none of which were found to be deficient, but where "[i]n light of [the defendant's] knowledge concerning the dust in the

warehouse and the nature of [the defendant's] activities, it cannot be said that it exercised due care or took adequate precautions").

¶ 66. After the assessment falls out of the equation, there are simply not enough facts on which the trial court could rule on Fiore's diligent-owner defense as a matter of law. Fiore asserted the following in support of his diligent-owner claim: (1) he did nothing to contaminate the property; (2) he had no actual knowledge of the contamination; (3) physical inspection did not indicate any contamination; (4) he paid $125,000 for the property, which had been assessed at $127,000; (5) he had no specialized knowledge of the dry-cleaning business; (6) following a tank pull report and investigation (conducted by Griffin) of the underground tanks on the property, Fiore was told by ANR that the agency was not aware of any health threat from the site; and (7) in 2000, he was told by a hazardous materials specialist at ANR that he had done "everything he could reasonably do to insure he was not purchasing an impacted piece of property." See 42 U.S.C. § 9601(35)(B) (1999) (listing statutory factors indicating all appropriate inquiry, including "obviousness of the presence" of the contamination, "ability to detect" the contamination, the "specialized knowledge or experience" of the defendant, and the "relationship of the purchase price to the value of the property").

¶ 67. On the other side, the State presented the following evidence demonstrating that Fiore should have discovered the contamination: (1) Fiore was aware that the property was formerly used as a dry-cleaning business; (2) Fiore has brought suit against Griffin International for negligence, in which Fiore has alleged that Griffin should have inquired further into the significance of the storage of dry-cleaning chemicals on the property and should have been aware that the previous owner improperly disposed of dry-cleaning chemicals; (3) the tank pull report submitted to ANR in 1997 and indicating that the site was free of health hazards involved a different inquiry and is irrelevant to the diligent-owner defense here; (4) there were two abandoned storage tanks, one of which contained some liquid and emanated PCE odors, on the property of which Fiore should have been aware; and (5) multiple environmental assessments indicated that the land was contaminated.

¶ 68. Because inquiry into whether a defendant has made out a diligent-owner defense is fact intensive, summary judgment on this issue is rarely appropriate. See United States v. 150 Acres of Land, 204 F.3d 698, 707 (6th Cir. 2000) (concluding that because particular inquiry necessary for defendant to establish innocent-landowner defense to CERCLA liability "is clearly dependent on the totality of the circumstances" and is thus "a very fact-specific question," summary judgment was inappropriate to establish that, as matter of law, defendant's actions did not amount to "appropriate inquiry"); Advanced Tech. Corp. v. Eliskim, Inc., 87 F. Supp. 2d 780, 785 (N.D. Ohio 2000) (noting that "[w]hat constitutes appropriate inquiry is a mixed question of law and fact and will depend on the totality of the circumstances"). Here, there is at least a factual question as to whether the inspection conducted by Fiore could meet the diligence requirement under § 6115(e).

¶ 69. The majority suggests that it would be unfair to preclude a landowner from showing he made at least some effort in obtaining an environmental investigation, even though the investigation turned out to be negligently performed. Ante, ¶ 38. Though in some instances the result may be unfair to an individual defendant, the statutory scheme of the VWMA, like that of CERCLA, is strict liability. See United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983) ("Though strict liability may impose harsh results on certain defendants, it is the most equitable solution in view of the alternative—forcing those who bear no responsibility for causing the damage, the taxpayers, to shoulder the full cost of the clean up."); see also United States v. Alcan Aluminum Corp., 990 F.2d 711, 716-17 (2d Cir. 1993) ("There may be unfairness in the legislative plan, but . . . we still must take [CERCLA] as it is.").[16]

[16] Moreover, and as Fiore is well aware, a defendant who has been wronged by an environmental consulting company is not without recourse. In WATCO v. Pickering Environmental Consultants, Inc., for instance, the state appeals court addressed whether an environmental consulting agency had engaged in negligent misrepresentation when it prepared what ended up being an inaccurate Phase I assessment. No. W2006-00978-COA-R3-CV, 2007 WL 1610093 (Tenn. Ct. App. June 5, 2007); see also Iron Partners, LLC v. Dames & Moore, No. C07-5643RBL, 2009 WL 1587898 (W.D. Wash. June 8, 2009). The court found that the standard of care is "that level of care and diligence ordinarily employed by the average firm practicing in the same geographic area and at the same time." WATCO, 2007 WL 1610093, at *21.

¶ 70. For these reasons, I would conclude that summary judgment in favor of Fiore was inappropriate, and I would remand for resolution by the trier-of-fact whether Fiore has made out his diligent-owner defense. I respectfully dissent from Part II of the majority's opinion.

Associate Justice

¶ 71. **REIBER, C.J., dissenting in part, and concurring in part.** I concur with Part I of the majority's opinion, but I agree with Justice Johnson that Fiore was not entitled to summary judgment in his favor and that a remand is appropriate. I write separately because I believe that whether Fiore reasonably relied exclusively on the Phase I environmental site assessment is a question of fact to be decided by the trier of fact if Fiore is to benefit from the diligent-landowner affirmative defense. In my view, a fact-finder must decide whether Fiore reasonably relied on this assessment, and whether on all of the facts Fiore has satisfied the requirements of 10 V.S.A. § 6615(e). I therefore dissent.

¶ 72. To be entitled to the diligent-landowner defense, Fiore needed to establish "by a preponderance of the evidence that after making diligent and appropriate investigation of the facility, he . . . had no knowledge or reason to know that said release or threatened release was located on the facility." 10 V.S.A. § 6615(e). Fiore argued below that these requirements were satisfied as a matter of law because, prior to purchasing the property, he was shown a Phase I report prepared by Griffin International, Inc. The report, which was prepared at the behest of the seller, concluded that the property presented no significantly environmentally hazardous conditions and recommended no further investigative work. Fiore argued that he reasonably relied on the report's conclusions. "If professional engineers could not detect the presence of the dry cleaning chemicals," Fiore argued, "then obviously [he] should not be expected to have detected those chemicals."

¶ 73. Fiore also claimed that he had no specialized knowledge of dry cleaning or the chemicals involved in that business; he had not observed anything on the property suggestive of contamination; there were no obvious indicators of recent dry cleaning on the property; and he had purchased the

property for slightly less than its appraised value. Fiore provided an opinion from an expert that the Phase I report "purported" to have been completed in accordance with standard practice guidelines, and that a layperson reviewing the Phase I assessment would have reasonably concluded that he had conducted an appropriate inquiry "necessary to qualify for the innocent landowner defense."

¶ 74. The State opposed Fiore's motion, relying heavily on Fiore's lawsuit against Griffin, and Fiore's allegations in that litigation that the Phase I assessment had been negligently prepared. According to the State, Fiore presented no evidence or legal support for the proposition that a buyer's subjective reliance on a Phase I report prepared by a seller constituted a diligent and appropriate investigation of a former dry-cleaning facility, without regard to whether the assessment itself was a diligent and appropriate investigation. The State maintained that Fiore was not entitled to rely blindly on any Phase I investigation report and thereby avoid liability, particularly given Fiore's allegations in related litigation that the report did not comply with standard practice guidelines. The State argued that, at a minimum, these allegations demonstrated a material question of fact as to whether there had been a diligent and appropriate investigation in this case.

¶ 75. The State also asserted that a reasonable investigation would have revealed the presence of contaminants. It presented evidence that its environmental consultant had been able to enter a crawl space beneath the building. The consultant located a variety of pipes, determined that several were connected to tanks beneath the building, and observed two abandoned storage tanks that were later found to be contaminated with hazardous material commonly used in dry-cleaning operations. The State added that while Fiore asserted that the purchase price was close to the appraised value of the property, he provided no admissible evidence to support this contention. Additional filings by both parties followed.

¶ 76. I believe the State presented sufficient evidence to show the existence of a genuine factual dispute as to whether Fiore reasonably relied on the Phase I report, and whether his investigation was diligent and appropriate under the circumstances. As recounted above, Fiore claimed only that he was "shown" a report prepared at the request of the seller. The report identified the property as a "closed site on the Vermont Hazardous Waste Site list," and indicated that it had been used as a dry-cleaning business

for almost thirty years. The report referred to the disposal of dry-cleaning waste, stating that the "[d]ocumentation of the proper disposal of dry cleaning wastes was reviewed previously and documented in the previous Phase I report." Fiore did not assert that he had sought, been shown, or reviewed this related Phase I report, although he alleges in related litigation against Griffin that this statement—that the previous assessment had documented proper disposal of dry-cleaning waste—was false. As discussed above, the parties concede that the Phase I report was negligently conducted. Ante, ¶ 65.

¶ 77. Because this was a summary judgment proceeding, we must give the State "the benefit of all reasonable doubts and inferences." Doe v. Forrest, 2004 VT 37, ¶ 9, 176 Vt. 476, 853 A.2d 48. Thus, one could argue that information about the property's past use and its placement on a hazardous waste-site list might have prompted Fiore to undertake a more thorough evaluation of the property. Similarly, one might argue that a diligent and reasonable investigation would have uncovered the two underground storage tanks on the property, which were accessible via a crawl space under the building. Ultimately, these are questions that a fact-finder must resolve. As noted above, I am not persuaded that a landowner's reliance on a Phase I report, which is later determined to be negligently prepared, must be excluded from this analysis. Cf. ante, ¶ 57. The apparent reliability of the Griffin report, and Fiore's alleged reliance on it, are relevant factors that must be evaluated by a fact-finder, and the weight to be given such evidence is exclusively for the trier to determine.

¶ 78. The problem is that the majority inappropriately acts as the fact-finder here, weighing the evidence and concluding that the statutory requirements are satisfied. Ante, ¶ 37. In reaching its conclusion, it relies in part on a finding that there was nothing in the record to suggest that a thorough visual inspection by Fiore should have turned up evidence of contamination. Ante, ¶ 38. But, as noted above, the State presented evidence that its inspection of the property revealed two abandoned storage tanks that contained hazardous material. The majority also finds that Fiore purchased the property at close to its appraised value. Ante, ¶ 43. It states that the property had been recently appraised, as uncontaminated, at $127,000. Id. There is no admissible evidence to this effect in the record, however, as the State pointed out below.

¶ 79. As we have often repeated, "[s]ummary judgment is not a substitute for a determination on the merits, so long as evidence has been presented which creates an issue of material fact, no matter what view the court may take of the relative weight of that evidence." Vt. Envtl. Bd. v. Chickering, 155 Vt. 308, 319, 583 A.2d 607, 613-14 (1990). As Justice Johnson observes, a landowner's entitlement to the benefit of the diligent-owner defense is an inherently fact-specific query, and one that is generally inappropriate for resolution on summary judgment. Ante, ¶ 68 (citing cases to this effect). Reasonable minds could disagree over whether Fiore made a diligent and appropriate investigation under the totality of the circumstances here. I would thus reverse the trial court's summary judgment decision, and remand this case for resolution of outstanding factual questions.

Chief Justice

FILED

STATE OF VERMONT
WASHINGTON COUNTY, SS.

SUPERIOR COURT
Docket No. 147-3-10 Wncv
2010 MAR -3 P 1:27

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,

Plaintiff

v.

HOWE CLEANERS, INC.; DAVID BENVENUTI; NEW HAMPSHIRE INSURANCE COMPANY, and AMERICAN INTERNATIONAL PACIFIC INSURANCE COMPANY,

Defendants

COMPLAINT

NOW COMES the State of Vermont, Agency of Natural Resources, by and through William H. Sorrell, Attorney General, and brings the following complaint pursuant to 10 V.S.A. § 6615, the Declaratory Judgments Act, 12 V.S.A. § 4711 et seq., and the court's general equitable jurisdiction:

THE PARTIES

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

2. Defendant Howe Cleaners, Inc. ("Howe Cleaners"), is a Vermont corporation that was incorporated in 1965 and dissolved in 1999.

3. Defendant David Benvenuti held a controlling stock interest in Howe Cleaners and held the title of President of Howe Cleaners from approximately 1975 until Howe Cleaners was dissolved in 1999.

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

4. Defendant New Hampshire Insurance Company ("New Hampshire Insurance") is an insurance company licensed to do business in the State of Vermont.

5. Defendant American International Pacific Insurance Company ("American International Insurance") is an insurance company licensed to do business in the State of Vermont and is the corporate successor of American Fidelity Company.

GENERAL ALLEGATIONS

6. Defendant Howe Cleaners owned the real property located at 9 Depot Square in Barre, Vermont ("the 9 Depot Square property") between approximately 1970 and 1996.

7. Defendants Howe Cleaners and David Benvenuti operated a dry cleaning business on the 9 Depot Square property between approximately 1970 and 1989.

8. In January 2004, the State filed a complaint against Howe Cleaners and David Benvenuti in the Superior Court of Washington County, State of Vermont, entitled *State of Vermont v. Howe Cleaners, Inc. et al.*, Superior Court Docket No. 27-1-04 Wncv., in which it alleged that Howe Cleaners and David Benvenuti had released hazardous materials to soil, groundwater, and surface waters on the 9 Depot Square property.

9. On September 8, 2008, the Washington Superior Court issued a Consent Decree and Judgment Regarding Plaintiff's Claims Against Defendants

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

Howe Cleaners, Inc. and David Benvenuti ("the 2008 Consent Decree"), which embodied a settlement agreement between the State of Vermont, Howe Cleaners and David Benvenuti. A true and accurate copy of the 2008 Consent Decree is attached hereto as Appendix 1.

10. Under the terms of the 2008 Consent Decree, Howe Cleaners and David Benvenuti agreed, *inter alia*, to pay a sum of money to the State ("the payment obligation") and further agreed to the issuance by the court of the following declaration of liability set forth in paragraph 2 of the 2008 Consent Decree: "Each of the Settling Defendants [Howe Cleaners and David Benvenuti] is hereby declared a responsible person under 10 VSA § 6615(a) and liable to the State in connection with the hazardous waste contamination associated with the Site (DEC Site # 99-2631). This declaration shall be binding on Settling Defendants in any future action or actions brought by the State against either or both of the Settling Defendants pursuant to 10 V.S.A. § 6615(a) to seek further relief relating to the Site beyond the relief provided to the State through this Consent Decree."

11. Under the terms of the 2008 Consent Decree, the State agreed to provide a release of the State's claims relating to ANR response costs incurred through June 2, 2008, to prejudgment interest on ANR's past response costs incurred through June 2, 2008, and to any and all costs to undertake and complete a so-called Corrective Action Feasibility Investigation ("CAFI"), and the State reserved the right to pursue all other claims. In addition, the State

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

agreed that it would not attempt to satisfy any future liability of David Benvenuti by execution against his personal assets, while reserving its right to take legal action to secure the benefits of any and all policies of liability insurance that may be available to satisfy Benvenuti's liability to the State.

12. Defendant New Hampshire Insurance and defendant American International Insurance's corporate predecessor, American Fidelity Company, issued liability insurance policies that named defendant Howe Cleaners as an insured and that were in effect during the time that Howe Cleaners operated a dry cleaning business on the 9 Depot Square property.

13. Defendant New Hampshire Insurance agreed to fund and did fund the payment obligation of Howe Cleaners and David Benvenuti under the 2008 Consent Decree, without waiving any claims or defenses and without making any admissions.

14. Prior to the submission of the 2008 Consent Decree to the Superior Court for approval and prior to funding the payment obligation of Howe Cleaners and David Benvenuti under the 2008 Consent Decree, defendant New Hampshire Insurance consented to the settlement between the State of Vermont and Howe Cleaners and David Benvenuti and reviewed and approved the substance and form of the 2008 Consent Decree, while reserving its rights as to the claims of the State which were not released by the State through the 2008 Consent Decree.

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

15. Subsequent to June 2, 2008, ANR has incurred and will continue to incur costs, in addition to the costs of undertaking and completing a CAFI, to investigate, remediate, and otherwise respond to hazardous waste contamination associated with the 9 Depot Square property.

CLAIMS FOR RELIEF

16. Defendants Howe Cleaners and David Benvenuti are strictly liable under 10 V.S.A. § 6615 and the terms of the 2008 Consent Decree for response costs that have been incurred by ANR subsequent to June 2, 2008 and continue to be incurred by ANR and the State is entitled to reimbursement for said costs, plus prejudgment interest.

17. Defendants Howe Cleaners and David Benvenuti are liable under 10 V.S.A. § 6615 and the terms of the 2008 Consent Decree for abatement of the hazardous waste contamination associated with the 9 Depot Square site.

18. On information and belief, the State is entitled to a declaration that insurance policies issued by defendant New Hampshire Insurance and by defendant American International Insurance's corporate predecessor, American Fidelity Company, provide coverage with respect to the liability of defendant Howe Cleaners and David Benvenuti for response costs that have been incurred by ANR subsequent to June 2, 2008 and continue to be incurred by ANR and for abatement of hazardous waste contamination associated with the 9 Depot Square property.

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

19. The State is entitled, under the doctrine of equitable subrogation, to a declaration that defendant New Hampshire Insurance and defendant American International Insurance are liable for response costs that have been incurred by ANR subsequent to June 2, 2008 and continue to be incurred by ANR, plus prejudgment interest.

WHEREFORE, plaintiff respectfully requests that the court:

1. order defendants Howe Cleaners and David Benvenuti to reimburse the State for response costs that have been incurred by ANR subsequent to June 2, 2008 and continue to be incurred by ANR and to abate the hazardous waste contamination associated with the 9 Depot Square property;

2. issue a declaration that insurance policies issued by defendant New Hampshire Insurance and by defendant American International Insurance's corporate predecessor, American Fidelity Company, provide coverage with respect to the liability of defendant Howe Cleaners and David Benvenuti for response costs that have been incurred by ANR subsequent to June 2, 2008 and continue to be incurred by ANR and for abatement of hazardous waste contamination associated with the 9 Depot Square property and that defendant New Hampshire Insurance and defendant American International Insurance are obligated to pay for such response costs and abatement costs until the hazardous waste contamination has been fully addressed or the policy limits have been exhausted;

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

3. issue a declaration as to the amount of the policy limits available under any and all liability insurance policies issued by defendants New Hampshire Insurance and American International Insurance;

4. issue a declaration that ANR is entitled to reimbursement for response costs incurred by ANR subsequent to June 2, 2008, and that defendants New Hampshire Insurance and American International Insurance are liable for abatement, until the hazardous waste contamination has been fully addressed or the policy limits have been exhausted;

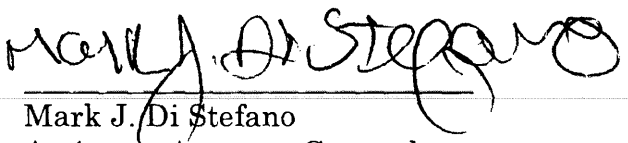
5. order defendants to pay prejudgment interest; and

6. grant such other relief as the court deems just.

Dated: March 3, 2010

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 

Mark J. Di Stefano
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-5500

by: 

John Beling
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

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

FILED
2004 SEP -8 A 10:37
SUPERIOR COURT
WASHINGTON COUNTY

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
WASHINGTON SUPERIOR COURT
Docket No. 27-1-04 Wncv

STATE OF VERMONT, Plaintiff, v. HOWE CLEANERS, INC.; DAVID BENVENUTI; JASON'S DRY CLEANING INC.; GRANITE SAVINGS BANK & TRUST COMPANY; THE HOWARD BANK, N.A.; T.D. BANKNORTH, N.A.; and JOHN FIORE, TRUSTEE, 9 DEPOT SQUARE REALTY TRUST, Defendants.	)
BANKNORTH, N.A., Third-Party Plaintiff, v. GRIFFIN INTERNATIONAL, INC., Third-Party Defendant	)

CONSENT DECREE AND JUDGMENT REGARDING PLAINTIFF'S CLAIMS AGAINST DEFENDANTS HOWE CLEANERS, INC. AND DAVID BENVENUTI

The plaintiff, the State of Vermont ("the State"), and defendants Howe Cleaners, Inc. ("Howe Cleaners") and David Benvenuti ("Benvenuti") hereby stipulate and agree to the entry of the following Consent Decree and Judgment.

)ffice of the
:TTORNEY
:ENERAL
) State Street
)ntpelier, VT
05609

BACKGROUND

A. The State asserts in this action that defendants Howe Cleaners and Benvenuti are liable to the State in connection with the hazardous waste contamination of real property located at 9 Depot Square in Barre, Vermont ("the 9 Depot Square property") and adjoining properties.

B. Howe Cleaners is a Vermont corporation that owned the 9 Depot Square property between 1970 and 1996. Howe Cleaners operated a dry cleaning business on the property between 1970 and 1989. Defendant Benvenuti acquired a controlling stock interest in the company in approximately 1975 and was the President of Howe Cleaners thereafter until the 9 Depot Square property was sold in 1996. Howe Cleaners was formally dissolved as a corporation in 1999 and is no longer engaged in any business activities.

C. The State asserts that dry cleaning waste materials containing a commonly used dry cleaning chemical, perchloroethylene ("PCE"), were released on the 9 Depot Square property and resulted in both soil and groundwater contamination on the property. The State further alleges that the contaminants have resulted in contamination of the indoor air within the building located at 9 Depot Square and that contaminants have migrated beyond the property boundaries through groundwater and have contaminated soils and groundwater underlying adjoining properties.

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

D. The State asserts that Howe Cleaners is liable to the State pursuant to 10 V.S.A. § 6615(a)(2) as an "owner" of a facility at which hazardous materials were disposed of. The State asserts that defendant Benvenuti is liable to the State pursuant to § 6615(a)(2) as an "operator" of a facility at which hazardous materials were disposed of.

E. The Vermont Agency of Natural Resources ("ANR") has incurred costs responding to the PCE contamination that is associated with the 9 Depot Square property and affected adjoining properties ("DEC Site # 99-2631" or "the Site"). An itemized summary of ANR's past response costs through June 2, 2008 ("ANR's past response costs" or "past response costs"), together with an accounting of prejudgment interest on these response costs from the date of payment by ANR, at the statutory rate of 12%, is attached hereto as Appendix 1. ANR has determined that a total of $363,331.17 in past response costs have been incurred. The total amount of prejudgment interest on ANR's past response costs through July 15, 2008, the first day of the court-scheduled trial on the State's claims against defendants Howe Cleaners and Benvenuti, is $187,693.48. *See* Appendix 1.

F. ANR has determined that high levels of PCE contamination remain at the Site and require the consideration by ANR of remedial alternatives. To that end, a Corrective Action Feasibility Investigation ("CAFI") must be undertaken for the Site by a qualified environmental consultant and submitted to ANR for review in accordance with the guidelines set forth in

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

ANR's Corrective Action Guidance. The Corrective Action Guidance document is available at http://www.anr.state.vt.us/dec/wastediv/sms/smsgdint.htm. To date a CAFI has not been undertaken either by the State or by any potentially responsible person. Following the completion of a CAFI, ANR may require the preparation and implementation of a Corrective Action Plan ("CAP") to effect remediation of the contamination associated with the Site. If a CAP is required for the Site by ANR, a CAP will have to be prepared by a qualified consultant and approved by ANR in accordance with the guidelines set forth in ANR's Corrective Action Guidance. If ANR requires remediation to be undertaken, remediation will have to be implemented in accordance with the CAP approved by ANR.

G. ANR estimates that it will cost approximately $100,000 to $200,000 to complete a CAFI for the Site.

H. The State and defendants Howe Cleaners and Benvenuti reached a settlement agreement in principle on July 15, 2008, which is embodied in the terms and conditions of this Consent Decree and Judgment. The parties' settlement agreement is contingent upon the Court approving this Consent Decree pursuant to 10 V.S.A. § 6615(i) and issuing it as a judgment of the Court.

I. By entering into this Consent Decree and agreeing to the entry of judgment as set forth herein, Defendants Howe Cleaners and Benvenuti (collectively "Settling Defendants") do not admit any of the State's factual

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

allegations in this action, with the sole exception of those set forth in paragraph B, above. In addition, Settling Defendants do not admit, and affirmatively deny, any wrongdoing or any violation or breach of common law, statute, rule, regulation, or of any other source of law whatsoever. In addition, Settling Defendants hereby state that they have entered into this Consent Decree to avoid complicated, prolonged, and otherwise burdensome litigation.

J. The State and Settling Defendants agree that this Consent Decree has been negotiated by the parties hereto in good faith and that this Consent Decree is in the public interest.

K. The Settling Defendants further agree that they hereby waive all rights to contest or appeal this Consent Decree and that they shall not challenge, in this or any other proceeding, the validity of any of the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

PAYMENT BY SETTLING DEFENDANTS TO THE STATE

1. Settling Defendants shall pay the State the sum of $ 580,000.00 (Five Hundred Eighty Thousand Dollars). Payment in full shall be made no later than 45 consecutive calendar days following the date on which this Consent Decree is issued as an order by the Court. The obligations of the

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

individual Settling Defendants to make this payment are joint and several. Failure to make payment as provided herein shall constitute a default and breach of this Consent Decree and the State shall be entitled to interest on the unpaid balance at the rate of 12% per annum as long as any balance remains outstanding.

DECLARATION OF SETTLING DEFENDANTS' LIABILITY TO THE STATE AND POTENTIAL FUTURE ACTIONS AGAINST SETTLING DEFENDANTS

2. Each of the Settling Defendants is hereby declared a responsible person under 10 VSA § 6615(a) and liable to the State in connection with the hazardous waste contamination associated with the Site (DEC Site # 99-2631). This declaration shall be binding on Settling Defendants in any future action or actions brought by the State against either or both of the Settling Defendants pursuant to 10 VSA § 6615(a) to seek further relief relating to the Site beyond the relief provided to the State through this Consent Decree.

3. In any future action or actions brought by the State against either or both of the Settling Defendants pursuant to 10 VSA § 6615(a) relating to the Site, Settling Defendants shall be entitled to challenge the reasonableness or necessity of any response cost and any response action that is the subject of the State's claim or claims. Settling Defendants may not otherwise challenge a response cost or response action in any such future action.

4. The State agrees that it will not attempt to satisfy any future liability of Benvenuti to the State relating to the hazardous waste contamination associated with the Site (DEC Site # 99-2631) by levy of

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

execution against Benvenuti's personal assets; provided, however, that the State, as a judgment creditor or as might otherwise be provided by law, may seek to obtain satisfaction of any such future liability of Benvenuti to the State by taking legal action to secure the benefits of any and all policies of liability insurance that may be available to satisfy Benvenuti's liability to the State.

RELEASE GIVEN BY THE STATE FOR PAST COSTS AND FOR COSTS OF CORRECTIVE ACTION FEASIBILITY INVESTIGATION AND STATE'S RESERVATION OF RIGHTS

5. The State remises, releases, and forever discharges each of the Settling Defendants, all of their predecessors, successors, assigns, parents, affiliates, subsidiaries, divisions, general and limited partners, sister companies and holding companies, and all directors, shareholders, officers, employees, agents and representatives of the foregoing of and from any and all claims and demands whatsoever, in law or in equity, which the State ever had, now has, or may have in the future, that arise out of or on account of the Howe Cleaners site located in Barre, Vermont (DEC Site # 99-2631) and that relate to the following matters, including any attorney's fees, fines, penalties and costs, and any claim for interest thereon, that relate to the following matters:

(a) any and all claims for ANR's past response costs;

(b) any and all claims for prejudgment interest on ANR's past response costs; and

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

(c) any and all claims for costs that may be expended by or on behalf of the State to undertake and complete a CAFI ("the State's Release").

This Release is expressly limited to the three claims set forth in subsections (a), (b), and (c) above and shall not be construed to extend to any other claim or potential claim by the State against Settling Defendants, whether the claim is an existing claim or potential claim. In addition, this Release by the State shall not become effective unless and until the full payment that Settling Defendants are required to make under this Consent Decree has been received by the State. In the event that either full payment is not made or payment is not made within the time set forth for payment under the terms of this Consent Decree, this Release shall not become effective until Settling Defendants have cured the breach and paid all accrued interest that is or becomes due under the terms of this Consent Decree.

6. The State reserves, and this Consent Decree is without prejudice to, all rights, claims, and interests not expressly released in this Consent Decree.

EFFECT OF SETTLEMENT

7. Nothing contained in this Consent Decree constitutes or may be taken or construed as:

(a) an admission or concession by Settling Defendants or evidence

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

of any wrongdoing or any violation or breach of any law, rule, regulation, or any other source of law whatsoever by Settling Defendants; or

(b) the creation, authorization, or substantiation, to any degree whatsoever, of any claim or cause of action against Settling Defendants by any co-defendant or third-party defendant in this action or any future action, or any claim or cause of action that may exist or that may be asserted against Settling Defendants by any other entity not a party in this proceeding, including but not limited to the United States or the federal Environmental Protection Agency; or

(c) a waiver or limitation or any impairment whatsoever of any defense (including, but not limited to, any defense to any claimed liability or claim for any damages or other relief) otherwise available to Settling Defendants in connection with any claim or cause of action against Settling Defendants by any co-defendant or third-party defendant in this action or any future action, or any claim or cause of action that may exist or that may be asserted against Settling Defendants by any other entity not a party in this proceeding, including but not limited to the United States or the federal Environmental Protection Agency.

8. Nothing in this Consent Decree shall be construed as enlarging any right or cause of action or to grant any cause of action to any person not a party to this Consent Decree. Each of the parties expressly reserves any and all

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

rights, defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

9. Upon entry of this Consent Decree by the Court, the Consent Decree shall become a judicial order and subject to enforcement.

10. Upon entry of this Consent Decree and payment in full to the State as forth herein, Settling Defendants shall be entitled pursuant to 10 V.S.A. § 6615(i) to protection from contribution and indemnification actions or claims for matter addressed in this Consent Decree, including but not limited to protection from any and all such claims asserted by any party in this proceeding. The "matters addressed" in this Consent Decree are those matters that are set forth in the State's Release in this Consent Decree. The "matters addressed" do not include any matter as to which the State has reserved its rights under this Consent Decree.

11. In any subsequent proceeding initiated by the State seeking any relief relating to the Site, Settling Defendants 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 State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this paragraph shall affect the enforceability of the State's Release set forth in this Consent Decree.

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

12. This Consent Decree constitutes the entire agreement of the parties. This Consent Decree may only be altered, amended, or otherwise modified by subsequent written agreement signed by the parties hereto or their legal representative and incorporated into an order issued by the Washington Superior Court.

APPROVAL BY THE COURT AND ENTRY OF JUDGMENT

13. By entering this Consent Decree, the Court finds that this Consent Decree has been negotiated by the parties in good faith and that this Consent Decree is in the public interest.

14. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the State and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment pursuant to V.R.C.P. 54 and 58.

SO ORDERED this 5th day of ~~August~~ September, 2008.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge

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

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Dated: 7.30.08 By: Mark J. DiStefano

Mark J. Di Stefano
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
(802) 828-5500

Dated: 7.30.08 By: Mark J. DiStefano for

John D. Beling
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
(802) 828-5500

HOWE CLEANERS, INC.

Dated: 7/30/08 By: David A Benvenuti

Name (Print): David A Benvenuti

Address: 167 Cassie St
Barre, VT 05641

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

Dated: 7/30/08

DAVID BENVENUTI

Approved as to Substance
And Form:

Dated: 7/30/08

F. Brian Joslin, Esq.
Attorney for Howe Cleaners, Inc.
And David Benvenuti

Dated: 7/30/08

L. Brooke Dingledine, Esq.
Attorney for David Benvenuti

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

Appendix 1

Department of Environmental Conservation

9 Depot Square, Barre City, Vermont Environmental Site Expenditures

Calculation date	**7/15/2008**							
Daily Interest rate	**0.03288%**	**(12% interest per year)**						
Vendor	**Invoice #**	**Invoice Date**	**Voucher#**	**Amount Paid**	**Date of Payment**	**Interest**	**Principal Plus Interest**	**Daily Interest Accrued**
Heindel & Noyes	11683	03/13/00	145536	$1,049.04	4/4/2000	1,042.95	2,091.99	$0.34
Heindel & Noyes	11783	04/07/00	162107	$12,694.61	5/5/2000	12,491.50	25,186.11	$4.17
Heindel & Noyes	12060	05/10/00	172648	$4,694.41	5/26/2000	4,586.89	9,281.30	$1.54
Severn Trent	55362	04/30/00	190572	$2,880.00	6/29/2000	2,781.84	5,661.84	$0.95
Heindel & Noyes	12478	07/12/00	27232	$929.75	8/24/2000	880.94	1,810.69	$0.31
Heindel & Noyes	12677	08/11/00	39518	$477.50	9/19/2000	448.35	925.85	$0.16
Heindel & Noyes	13328	11/20/00	87648	$22,175.63	12/13/2000	20,202.30	42,377.93	$7.29
Heindel & Noyes	13500	12/11/00	107257	$5,795.61	1/19/2000	5,906.76	11,702.37	$1.91
DEC Lab	2000-OCT-22-2631	01/02/01		$11,240.00	6/30/2001	9,504.42	20,744.42	$3.70
Heindel & Noyes	13730	01/09/01	117738	$2,171.30	2/7/2001	1,938.11	4,109.41	$0.71
Heindel & Noyes	13961	02/08/01	138217	$10,861.54	3/19/2001	9,552.20	20,413.74	$3.57
Heindel & Noyes	14289	04/10/01	176820	$24,079.42	5/31/2001	20,598.79	44,678.21	$7.92
DEC Lab	2001-APR-22-2631	07/02/01		$4,480.00	12/5/2001	3,555.52	8,035.52	$1.47
Heindel & Noyes	14529	05/09/01	842	$3,744.10	8/9/2001	3,116.73	6,860.83	$1.23
Heindel & Noyes	14719	06/11/01	841	$1,433.17	8/9/2001	1,193.03	2,626.20	$0.47
Heindel & Noyes	14968	07/13/01	946	$2,538.11	8/15/2001	2,107.81	4,645.92	$0.83
Heindel & Noyes	15419	09/25/01	3519	$4,398.78	12/10/2001	3,483.83	7,882.61	$1.45
Heindel & Noyes	15613	10/11/01	3521	$565.18	12/10/2001	447.62	1,012.80	$0.19
Heindel & Noyes	15864	11/09/01	3520	$623.25	12/10/2001	493.61	1,116.86	$0.20
Heindel & Noyes	16120	12/11/01	4732	$2,061.09	2/4/2002	1,594.44	3,655.53	$0.68
Heindel & Noyes	16293	01/14/02	5321	$704.93	3/4/2002	538.84	1,243.77	$0.23
Heindel & Noyes	16490	02/08/02	5870	$548.23	3/28/2002	414.73	962.96	$0.18
Heindel & Noyes	16685	03/12/02	6231	$545.00	4/9/2002	410.14	955.14	$0.18
Heindel & Noyes	16859	04/08/02	6595	$632.38	5/2/2002	471.11	1,103.49	$0.21
Heindel & Noyes	17032	05/10/02	8274	$546.90	7/24/2002	392.51	939.41	$0.18
Heindel & Noyes	17418	07/12/02	8738	$1,092.75	8/12/2002	777.44	1,870.19	$0.36
Heindel & Noyes	17711	08/19/02	9378	$546.70	9/12/2002	383.38	930.08	$0.18
Heindel & Noyes	17844	09/13/02	10906	$547.86	11/7/2002	374.11	921.97	$0.18
Heindel & Noyes	18088	10/17/02	10907	$1,089.66	11/12/2002	742.28	1,831.94	$0.36
Heindel & Noyes	18774	02/01/03	14958	$1,237.44	5/14/2003	768.50	2,005.94	$0.41

Vendor	Invoice #	Invoice Date	Voucher#	Amount Paid	Date of Payment	Interest	Principal Plus Interest	Daily Interest Accrued
Heindel & Noyes	19215	05/14/03	15395	$1,215.50	6/9/2003	744.49	1,959.99	$0.40
Heindel & Noyes	19306	06/03/03	16619	$1,168.60	7/28/2003	696.93	1,865.53	$0.38
Heindel & Noyes	19534	07/01/03	17777	$1,156.15	9/18/2003	669.74	1,825.89	$0.38
Heindel & Noyes	18305	12/13/02	20511	$2,722.18	2/3/2004	1,453.42	4,175.60	$0.89
Heindel & Noyes	18576	01/08/03	20512	$724.18	2/3/2004	386.65	1,110.83	$0.24
Lincoln Applied Geology	24123	01/02/04	20515	$5,177.32	2/3/2004	2,764.26	7,941.58	$1.70
Heindel & Noyes	18937	09/09/03	20975	$5,987.78	2/23/2004	3,157.61	9,145.39	$1.97
Heindel & Noyes	19718	12/29/03	20976	$3,505.57	2/23/2004	1,848.64	5,354.21	$1.15
Lincoln Applied Geology	24293	03/11/04	22313	$3,088.46	4/14/2004	1,576.89	4,665.35	$1.02
DEC Lab		04/02/04		$3,500.00	5/27/2004	1,737.53	5,237.53	$1.15
Lincoln Applied Geology	24499	05/10/04	23379	$1,673.89	6/3/2004	827.13	2,501.02	$0.55
Heindel & Noyes	20911	02/20/04	23532	$206.46	6/4/2004	101.95	308.41	$0.07
Lincoln Applied Geology	24381	04/06/04	23530	$1,726.95	6/4/2004	852.78	2,579.73	$0.57
Lincoln Applied Geology	24643	06/07/04	24267	$760.80	7/7/2004	367.44	1,128.24	$0.25
Lincoln Applied Geology	24748	07/08/04	25039	$4,947.27	8/9/2004	2,335.65	7,282.92	$1.63
Lincoln Applied Geology	24874	08/10/04	26268	$16,501.43	10/21/2004	7,394.45	23,895.88	$5.43
Lincoln Applied Geology	24961	09/03/04	26264	$1,545.95	10/21/2004	692.76	2,238.71	$0.51
Dec Lab	2004-JUL-22-2631	10/04/04		$3,360.00	12/30/2004	1,428.32	4,788.32	$1.10
Lincoln Applied Geology	25069	10/06/04	27241	$4,681.25	12/2/2004	2,033.07	6,714.32	$1.54
Lincoln Applied Geology	25171	11/05/04	27905	$965.51	12/23/2004	412.66	1,378.17	$0.32
Lincoln Applied Geology	25247	12/03/04	27906	$947.38	12/28/2004	403.35	1,350.73	$0.31
Lincoln Applied Geology	25370	01/10/05	28889	$3,133.55	2/7/2005	1,291.88	4,425.43	$1.03
DEC Lab		01/06/05		$4,060.00	3/22/2005	1,616.44	5,676.44	$1.33
Lincoln Applied Geology	25466	02/02/05	29902	$1,132.88	3/23/2005	450.67	1,583.55	$0.37
Lincoln Applied Geology	25583	03/04/05	30042	$3,187.58	3/31/2005	1,259.66	4,447.24	$1.05
DEC Lab	0504-05	05/12/05		$3,360.00	6/21/2005	1,237.22	4,597.22	$1.10
DEC Lab	0504-22	05/12/05		$840.00	9/16/2005	285.28	1,125.28	$0.28
Lincoln Applied Geology	25695	04/20/05	32193	$5,547.56	7/6/2005	2,015.36	7,562.92	$1.82
Lincoln Applied Geology	30011	05/11/05	32194	$6,236.00	7/6/2005	2,265.46	8,501.46	$2.05
Lincoln Applied Geology	30134	06/03/05	32195	$2,221.08	7/6/2005	806.89	3,027.97	$0.73
Lincoln Applied Geology	30292	07/06/05	33037	$3,524.35	8/4/2005	1,246.75	4,771.10	$1.16
Lincoln Applied Geology	25693	07/29/05	33477	$13,245.77	8/26/2005	4,589.93	17,835.70	$4.35
Lincoln Applied Geology	30505	08/31/05	34610	$1,099.46	10/18/2005	361.83	1,461.29	$0.36
DEC Lab		07/01/05		$840.00	3/31/2006	231.15	1,071.15	$0.28
Lincoln Applied Geology	30649	10/03/05	35500	$622.72	11/23/2005	197.56	820.28	$0.20
Lincoln Applied Geology	30756	11/03/05	35501	$15,936.99	11/29/2005	5,024.74	20,961.73	$5.24
LaJeunesse Construction		10/31/05	35591	$6,632.00	12/2/2005	2,084.45	8,716.45	$2.18
Lincoln Applied Geology	30906	12/01/05	36317	$9,308.82	12/27/2005	2,849.26	12,158.08	$3.06
DEC Lab		12/05/05		$980.00	12/28/2005	299.64	1,279.64	$0.32
LaJeunesse Construction		11/22/05	36947	$480.00	2/2/2006	141.08	621.08	$0.16
Lincoln Applied Geology	31047	01/05/06	37398	$7,572.75	2/15/2006	2,193.40	9,766.15	$2.49
Lincoln Applied Geology	31163	02/02/06	37416	$844.17	2/28/2006	240.90	1,085.07	$0.28

Vendor	Invoice #	Invoice Date	Voucher#	Amount Paid	Date of Payment	Interest	Principal Plus Interest	Daily Interest Accrued
Lincoln Applied Geology	31240	03/02/06	38840	$3,140.26	4/19/2006	844.51	3,984.77	$1.03
DEC Lab		04/01/06		$840.00	12/21/2006	157.97	997.97	$0.28
Lincoln Applied Geology	31316	04/03/06	38839	$6,449.50	4/27/2006	1,717.51	8,167.01	$2.12
Lincoln Applied Geology	31398	05/02/06	39699	$1,913.42	5/26/2006	491.30	2,404.72	$0.63
Lincoln Applied Geology	31483	06/01/06	40895	$3,321.91	7/27/2006	785.24	4,107.15	$1.09
Lincoln Applied Geology	31583	07/05/06	41374	$3,611.01	8/14/2006	832.21	4,443.22	$1.19
Lincoln Applied Geology	31681	08/01/06	43050	$8,324.26	11/6/2006	1,688.57	10,012.83	$2.74
Lincoln Applied Geology	31772	09/01/06	43051	$2,602.01	11/6/2006	527.82	3,129.83	$0.86
Lincoln Applied Geology	31852	10/02/06	43052	$9,743.90	11/6/2006	1,976.54	11,720.44	$3.20
DEC Lab		10/01/06		$840.00	6/30/2007	105.22	945.22	$0.28
Lincoln Applied Geology	32040	12/01/06	45074	$1,378.63	2/2/2007	239.77	1,618.40	$0.45
Lincoln Applied Geology	31935	11/01/06	45075	$7,746.52	2/2/2007	1,347.26	9,093.78	$2.55
Lincoln Applied Geology	32123	01/03/07	45425	$10,489.35	2/20/2007	1,762.21	12,251.56	$3.45
Lincoln Applied Geology	32289	02/26/07	46772	$1,094.98	4/26/2007	160.56	1,255.54	$0.36
Lincoln Applied Geology	32214	02/07/07	46773	$1,122.42	4/26/2007	164.58	1,287.00	$0.37
Lincoln Applied Geology	32396	04/04/07	48243	$375.35	7/11/2007	45.66	421.01	$0.12
Lincoln Applied Geology	32607	07/02/07	49205	$1,039.28	8/9/2007	116.51	1,155.79	$0.34
Lincoln Applied Geology	32687	07/18/07	49321	$2,988.65	8/17/2007	327.20	3,315.85	$0.98
Lincoln Applied Geology	32703	08/02/07	50215	$1,455.46	9/21/2007	142.60	1,598.06	$0.48
Lincoln Applied Geology	32790	09/05/07	51410	$301.98	11/5/2007	25.12	327.10	$0.10
Lincoln Applied Geology	32929	10/15/07	51683	$779.81	11/19/2007	61.27	841.08	$0.26
Lincoln Applied Geology	32861	10/02/07	51682	$849.63	11/19/2007	66.76	916.39	$0.28
Lincoln Applied Geology	32946	11/01/07	52240	$240.00	12/10/2007	17.20	257.20	$0.08
Lincoln Applied Geology	33016	12/06/07	53461	$934.70	1/30/2008	51.32	986.02	$0.31
Lincoln Applied Geology	33096	01/03/07	53462	$1,369.45	1/30/2008	75.19	1,444.64	$0.45
Lincoln Applied Geology	33230	03/03/08	54924	$1,460.17	3/28/2008	52.33	1,512.50	$0.48
Lincoln Applied Geology	33177	02/04/08	54740	$2,712.93	3/26/2008	99.00	2,811.93	$0.89
Lincoln Applied Geology	33258	04/07/08	56026	$2,070.57	5/23/2008	36.08	2,106.65	$0.68
Lincoln Applied Geology	33313	04/29/08		$1,131.56				
Lincoln Applied Geology	33391	06/02/08		$250.81				
			Totals	**$363,331.17**		**187,693.48**	**$551,024.65**	**$119.00**

STATE OF VERMONT

SUPERIOR COURT 2010 NOV -4 P 1:05
Washington Unit

CIVIL DIVISION
Docket No. 774-10-10

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,	)
Plaintiff,	)
v.	)
VERMONT RAILWAY, INC.,	)
Defendant.	)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND CONSENT ORDER

Plaintiff, the State of Vermont, Agency of Natural Resources ("ANR" or "State"), through the Office of the Attorney General, and Defendant, Vermont Railway, Inc. ("Vermont Railway" or "Defendant"), through the undersigned counsel, stipulate and agree as follows:

WHEREAS, the Attorney General pursuant to 3 V.S.A. Chapter 7 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; and

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action ("Pleadings by Agreement") that Vermont Railway violated hazardous waste management regulations; and

WHEREAS, Vermont Railway has admitted in the Pleadings by Agreement that it committed hazardous waste management violations; and

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

WHEREAS, under 10 V.S.A. § 8221, Vermont Railway is potentially liable for civil penalties as follows:

a) not more than $50,000 for the initial violations of Vermont's Environmental Protection Rules and not more than $25,000 for each day that the violation continues for violations prior to July 1, 2008; and

b) not more than $85,000 for the initial violations of Vermont's Environmental Protection Rules and not more than $42,500 for each day that the violation continues for violations on or after July 1, 2008; and

WHEREAS, the State considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the length of time the violations existed and whether Vermont Railway had reason to know the violations existed; and

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

WHEREAS, the State and Vermont Railway agree that this settlement will avoid prolonged and complicated litigation between them;

NOW, THEREFORE, the State and Vermont Railway 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 the State and Vermont Railway in good faith;

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

3. The State and Vermont Railway 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 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.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Dated: 10/29/10 By: _____

Paul R. Brierre
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

VERMONT RAILWAY, INC.

Dated: 10/28/10 By: _____

Eric R. Benson, Esq.
Vermont Railway, Inc.
One Railway Lane
Burlington, VT 05401

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

CONSENT ORDER

Based upon the parties' Pleadings by Agreement in this action and the Stipulation for the Entry of Consent Order, 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 HAZARDOUS WASTE VIOLATIONS

1. The Agency of Natural Resources ("ANR") conducted inspections of facilities owned by Vermont Railway, Inc. ("Vermont Railway" or "Defendant") in Burlington, Vermont ("Burlington facility") on July 15 and 30, 2008, and in Rutland, Vermont ("Rutland facility") on June 25 and July 2, 2008.

2. During the inspections of the Burlington facility referenced in paragraph 1 of this Consent Order, ANR found violations of the following Vermont Environmental Protection Rules: Section 7-308(b)(9) (maintain a written contingency plan); Section 7-308(b)(10) (maintain a training program); Section 7-310(b)(1)(A)(iv) (label hazardous waste containers); Section 7-311(a)(5) (maintain spill/fire control equipment); Section 7-311(d)(1) (maintain list of hazardous waste in short-term storage areas); Section 7-311(d)(2) (maintain log of daily inspections of short-term storage areas); Section 7-311(f)(1) (properly mark containers when hazardous waste is first stored); Section 7-806(d)(2) (label above-ground used oil storage tanks); Section 7- 912(d)(5)(A)(i-ii) (manage universal waste lamps to prevent releases); and Section 7-912(f)(3) (date universal waste lamps).

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

3. During the inspections of the Rutland facility referenced in paragraph 1 of this Consent Order, ANR found violations of the following Vermont Environmental Protection Rules: Sections 7-303 and 7-308(b)(1) (determine if waste is hazardous waste); Section 7-308(b)(2) (store hazardous waste no more than 90 days); Section 7-308(b)(9) (maintain a written contingency plan); Section 7-308(b)(10) (maintain a training program); Section 7-309(a)(1) (minimize possibility of unplanned release); Section 7-309(a)(4) (make preparedness arrangements with local authorities); Section 7-311(a)(1) (store hazardous waste on impervious surface); Section 7-311(a)(2) (store hazardous waste within a structure); Section 7-311(a)(5) (maintain spill/fire control equipment); Section 7-311(b)(3) (maintain sufficient space between hazardous waste containers); Section 7-311(d)(1) (maintain list of hazardous waste in short-term storage areas); Section 7-311(d)(2) (maintain log of daily inspections of short-term storage areas); Section 7-311(e)(1) (post "hazardous waste" warning signs at short-term storage areas); Section 7-311(e)(2) (post "no smoking" warning signs at short-term storage areas); Section 7-311(f)(1) (properly mark containers when hazardous waste is first stored); Section 7-311(f)(4)(B) (properly store hazardous waste containers); Section 7-504(a) (obtain certification to store hazardous waste over 90 days); Section 7-702(b)(5) and (9) (retain copies of manifests for at least three years); and Section 7-806(b)(1), (2) & (5 – 8) (comply with used oil storage requirements).

4. Vermont Railway is adjudged liable for the violations listed in paragraphs 2 and 3 of this Consent Order pursuant to 10 V.S.A. § 8221.

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

PENALTIES

5. For the violations described above, Vermont Railway shall pay a civil penalty of $70,000 as follows:

a) one (1) payment of $5,833.37 due within five (5) business days of entry of this Consent Order as an Order by signature of the Court ("effective date of this Order") or the first day of the month following the effective date of this Order, whichever is later; ten (10) payments of $5,833.33 each due on the first day of the following ten (10) months; and one (1) payment of $5,833.33 due on the first day of the following month or the last business day falling on or before the three hundred sixty-fifth (365th) calendar day from the effective date of this Order, whichever is earlier; and

b) the payments shall be by check 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

6. Failure to make any payment as required by paragraph 5 shall constitute a breach of this Consent Order, and interest shall accrue on the entire unpaid balance at Twelve Per Cent (12%) per annum. In the event that any payment has not been made by the date due, the State may accelerate the remaining payments and declare the whole amount then owing under this Consent Order due and payable; provided however, that Vermont Railway shall

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

have a 10-calendar-day grace period to cure any late payment, except the payment due on or before the three hundred sixty-fifth (365th) calendar day from the effective date of this Order, by remitting the payment and the interest due.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

7. For the violations described above, Defendant shall also pay $50,000 to fund a Supplemental Environmental Project ("SEP"). The SEP shall be subject to the approval of ANR, and shall be fully funded by Defendant no later than 180 days following the effective date of this Order. The payments shall be as follows:

a) one (1) payment of $8,333.35 due within five (5) business days of the effective date of this Order or the first day of the month following the effective date of this Order, whichever is later; four (4) payments of $8,333.33 each due on the first day of the following four (4) months; and one payment of $8,333.33 due on the first day of the following month or the last business day falling on or before the one hundred eightieth (180th) calendar day from the effective date of this Order, whichever is earlier; and

b) the payments shall be by check payable to "State of Vermont, DEC SEP Fund" and forwarded to:

Department of Environmental Conservation
Business Office
103 South Main Street
Waterbury, VT 05671

8. If, at the close of 180 days after the effective date of this Order, any

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

of the $50,000 due to be paid to the State of Vermont, DEC SEP Fund has not been paid, that unpaid amount shall be converted automatically to a civil penalty and shall be immediately due and payable to the State of Vermont. Defendant shall make such payment by check, payable to the "Treasurer, State of Vermont" and forwarded to:

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

9. Failure to make any payment as required by paragraphs 7 and 8 shall constitute a breach of this Consent Order, and interest shall accrue on the entire unpaid balance at Twelve Per Cent (12%) per annum. In the event that any payment required by paragraph 7 above is not made by the date due, the State may accelerate the remaining payments and declare the whole amount then owing under this Consent Order due and payable to the State of Vermont, DEC SEP Fund; provided however, that Vermont Railway shall have a 10-calendar-day grace period to cure any late payment, except the payment due on or before the one hundred eightieth (180th) calendar day from the effective date of this Order, by remitting the payment and the interest due.

COMPLIANCE REQUIREMENTS

10. No later than sixty (60) calendar days following the effective date of this Order, Vermont Railway shall submit a work plan to complete the following for the Rutland facility:

a) Perform groundwater sampling from monitoring wells MW-1, MW-2 and MW-4 through MW-7 every three months for one year for

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

analysis for volatile organic compounds using EPA Method 8021B and for metals using RCRA 8 Metals; groundwater sampling for metals shall use standard EPA approved Low Flow sampling procedures;

b) Perform groundwater sampling from monitoring wells MW-1, MW-2 and MW-4 through MW-7 every three months for one year for analysis for polynuclear aromatic hydrocarbons ("PAHs") using EPA Method 8270 with a detection limit lower than the Vermont Groundwater Enforcement Standards of 0.2 parts per billion ("ppb") for benzo(a)pyrene; and

c) Submit all groundwater data from the sampling required in paragraph 10(a) – (b) to ANR within 10 calendar days after Vermont Railway receives the laboratory reports with such data.

11. Within 60 days of ANR's written response to Vermont Railway's quarterly submissions of groundwater data required in paragraph 10 above, Vermont Railway shall, if directed by ANR, complete the following tasks for the Rutland facility:

a) Submit a work plan to implement further measures required by ANR to address any groundwater contamination; or

b) Develop and submit a corrective action plan ("CAP") pursuant to 10 V.S.A. § 6615b to remediate or monitor any groundwater contamination as required by ANR.

12. Upon receiving ANR's approval of the work plan or CAP required under paragraph 11 above, Vermont Railway shall implement the work plan or

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

the CAP, including any modifications to the work plan or the CAP directed by ANR.

13. No later than (60) calendar days following the effective date of this Order, Vermont Railway shall submit a report documenting any remediation performed on any visible contamination of soils and free product, including such contaminated soils and free product observed during ANR's inspections on June 25 and July 2, 2008. The report required by this subparagraph shall:

a) document the areal extent of remediation of contaminated soils and free product;

b) document the quantity of contaminated soils excavated and free product removed for off-site disposal, including copies of manifests for the shipment and off-site disposal of contaminated soils and free product and any associated materials utilized to remove the free product;

c) describe the contaminated soils and free product and any other materials included in the shipments for off-site disposal; and

d) include current photographs of the area from which contaminated soils and free product were removed for off-site disposal.

14. No later than sixty (60) calendar days following the effective date of this Order, Vermont Railway shall develop and submit to ANR for review and approval a plan to prevent releases of hazardous materials from operation and maintenance activities at each facility located in Vermont at which Vermont Railway is a "generator," as that term is defined in section 7-103 of the Vermont Environmental Protection Rules. The plan required by this paragraph shall

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

include:

a) Management and operational procedures and measures designed to minimize hazardous material spills, including but not limited to:

i) Installing appropriate liquid collection devices for tracks in all areas where maintenance, fueling and other hazardous material liquid transfer operations occur;

ii) Identifying appropriate types and uses of absorbent materials;

iii) Developing standard operating procedures for maintenance, fueling and other hazardous material liquid transfer operations for the purposes of preventing spills; and

iv) Conducting maintenance, fueling and other hazardous material liquid transfer operations only in locations where liquid collection devices are in place;

b) Emergency response procedures for containment and cleanup of hazardous materials in the event of a spill;

c) A training program for Vermont Railway employees on implementation of the plan; and

d) A schedule for implementation of the plan.

15. Upon receiving ANR's approval of the plan required under paragraph 14 above, Vermont Railway shall implement the plan, including any modifications to the plan directed by ANR.

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

STIPULATED PENALTIES

16. The following stipulated penalties shall be payable by Vermont Railway to the State of Vermont per violation per day for any noncompliance with the requirements set forth in paragraphs 10 through 15 of this Consent Order:

Penalties Per Violation Per Day	Period of Noncompliance
$ 250.00	1st through 14th day
$ 500.00	15th through 30th day
$ 750.00	31st day and beyond

17. Vermont Railway agrees to reimburse the State for costs and reasonable attorney's fees incurred by the State to enforce the terms of this Consent Order and to collect the stipulated penalties.

MISCELLANEOUS PROVISIONS

18. Vermont Railway hereby waives: 1) all rights to contest or appeal this Consent Order and the Pleadings by Agreement filed concurrently with this Consent Order; and 2) all rights to contest the obligations imposed upon Defendant under this Consent Order in this or any other administrative or judicial proceeding.

19. 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 violations set forth herein.

20. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Vermont Railway's obligation to comply with all other federal, State, or local statutes, regulations, permits or

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

directives applicable to Vermont Railway in the operation of its business. The State reserves all rights, claims and interests not expressly waived herein.

21. Vermont Railway shall not be liable for additional civil or criminal penalties with respect to the specific violations described herein or in the Pleadings by Agreement filed concurrently with this Consent Order provided that Vermont Railway fully complies with the requirements and provisions set forth in this Consent Order.

22. This Consent Order is binding upon Defendant and its successors and assigns.

23. Nothing in this Consent Order may 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.

24. This 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 hereto or their legal representatives and incorporated in 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.

25. This Consent Order shall become effective only after it is signed by the State and Vermont Railway and entered as an order of the Superior Court, Washington Unit, Civil Division. When it is signed by the Court, this Consent Order shall become a final judgment and a judicial order.

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

26. 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. Chapter 211 and 12 V.S.A. § 122.

27. With respect to paragraphs 10 through 15 of this Consent Order, all correspondence from Vermont Railway to ANR shall be addressed to:

Vermont Department of Environmental Conservation
Hazardous Waste Management Program
Waste Management Division
103 South Main Street, West Building
Waterbury, VT 05671-0404

28. Except as provided in paragraph 27 of this Consent Order, all correspondence from Vermont Railway to the State regarding this Consent Order shall be addressed to:

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

29. All correspondence from the State to Vermont Railway regarding this Consent Order shall be addressed to:

Eric R. Benson, Esq.
Vermont Railway, Inc.
One Railway Lane
Burlington, VT 05401

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

30. The Court hereby finds that this Consent Order has been negotiated by the State and Vermont Railway 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.

Dated: 11/3/10

Honorable Geoffrey Crawford
Superior Court Judge

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

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,

Plaintiff,

v.

VERMONT RAILWAY, INC.,

Defendant.

PLEADINGS BY AGREEMENT

NOW COMES the State of Vermont, Agency of Natural Resources, by and through the Office of the Attorney General William H. Sorrell, and Defendant, Vermont Railway, Inc., by their respective undersigned counsel, and hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

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

2. Vermont Railway, Inc. ("Vermont Railway" or "Defendant"), is a corporation organized under the laws of Vermont with its principal place of business in Burlington. Vermont Railway owns and operates a rail system

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

which includes yards located in the City of Burlington, Chittenden County, Vermont ("the Burlington facility") and the City of Rutland, Rutland County, Vermont ("the Rutland facility").

3. ANR conducted inspections of the Burlington facility on July 15 and 30, 2008.

4. During the July 15 and 30, 2008 inspections conducted at the Burlington facility, ANR found the following:

a. The contingency plan that was being maintained by Vermont Railway did not meet the requirements of the Vermont Hazardous Waste Management Regulations;

b. Vermont Railway did not maintain a hazardous waste training program for facility personnel;

c. Not all drums containing hazardous wastes were labeled with the words "Hazardous Waste";

d. During the July 15, 2008 inspection, the outdoor short-term storage area used to store hazardous waste was not equipped with required spill and fire control equipment;

e. Inventories of hazardous waste stored in the short-term storage areas were not accurate;

f. Documentation of daily inspections of hazardous waste stored in the short-term storage areas was not up-to-date;

g, Not all drums containing hazardous wastes were dated correctly;

h. During the July 15, 2008 inspection, aboveground storage tanks holding used oil were not marked with the words "Used Oil";

i. Six boxes of waste lamps were not closed or stored in a manner to prevent breakage; and

j. Vermont Railway was not able to demonstrate the length of time that the six boxes of waste lamps had been accumulating on-site;

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

5. ANR conducted inspections of the Rutland facility on June 25 and July 2, 2008.

6. During the June 25 and July 2, 2008 inspections conducted at the Rutland facility, ANR found the following:

a. Numerous containers at various locations were described by Vermont Railway representatives as holding unknown waste material, showing that Vermont Railway failed to determine if the waste material in those containers was hazardous waste;

b. Numerous containers of hazardous waste were stored in boxcars for longer than 90 days, and subsequent communication with Vermont Railway representatives indicates that these containers of waste material may have been stored in the boxcars since the 1960s;

c. No contingency plan was being maintained by Vermont Railway for the Rutland facility;

d. Vermont Railway did not maintain a hazardous waste training program for facility personnel;

e. Boxcars used to store hazardous waste were not equipped with required preparedness and prevention equipment;

f. The required preparedness and prevention arrangements had not been made with local authorities and no records were shown documenting that such arrangements had been refused by local authorities;

g. Hazardous wastes were observed being stored on the ground and on surfaces that were not impervious;

h. Hazardous waste containers were observed being stored out-of-doors and not within a structure that sheds rain and snow;

i. Spill and fire control equipment were not available at either of the two boxcars being used to store hazardous wastes;

j. Required aisle space was not maintained between the hazardous waste containers stored in the two boxcars;

k. No inventory of hazardous waste stored in the two boxcars was maintained;

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

l. Daily inspections of the boxcars used to store hazardous waste were not being conducted;

m. "Danger - Hazardous Waste Storage Area - Authorized Personnel Only" signs were not posted at the boxcars being used to store hazardous waste;

n. "No Smoking" signs were not posted at the boxcars being used to store hazardous waste;

o. Numerous hazardous waste containers were not properly marked;

p. A number of hazardous waste containers were stored in a manner that could cause them to rupture or leak;

q. Although Vermont Railway had stored hazardous waste on-site for longer than 90 days, Vermont Railway had not obtained a hazardous waste storage facility certification from ANR;

r. Vermont Railway did not maintain copies of signed manifests for at least three years from the date of initial shipment or until receipt of a completed copy at the Rutland facility;

s. Vermont Railway did not have a system in place to determine if completed manifests were received within 35 days of the original shipment from the Rutland facility; and

t. Numerous containers of used oil were not closed, managed in a manner to prevent a release, marked, stored on an impervious surface, stored within a structure that sheds rain or snow, or protected from freezing.

Burlington Facility

7. Vermont Railway's Burlington facility is a large quantity generator within the meaning of Vermont's Environmental Protection Rules.

8. Under section 7-308(b)(9) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a written contingency plan.

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

9. By failing to maintain a written contingency plan as required by the Vermont Hazardous Waste Management Regulations at the Burlington facility, Vermont Railway violated section 7-308(b)(9) of Vermont's Environmental Protection Rules.

10. Under section 7-308(b)(10) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a training program for facility personnel.

11. By failing to maintain a training program for Burlington facility personnel, Vermont Railway violated section 7-308(b)(10) of Vermont's Environmental Protection Rules.

12. Under section 7-310(b)(1)(A)(iv) of Vermont's Environmental Protection Rules, small and large quantity generators may accumulate as much as one cubic yard of non-liquid hazardous waste that is not defined as hazardous in 40 CFR Part 261 (i.e., waste regulated as hazardous by Vermont), one quart of acutely hazardous waste, or 55 gallons of any other hazardous waste in containers in a short-term storage area without obtaining certification as a storage facility, provided that the waste is brought directly from the point of generation to the short-term storage area by the end of each work shift (not to exceed 12 hours), and the waste has been collected in a shift accumulation container that is marked or labeled with the words "hazardous waste" and other words that identify the contents of the container.

13. By failing to label all drums containing hazardous wastes with the

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

words "hazardous waste" at the Burlington facility, Vermont Railway violated section 7-310(b)(1)(A)(iv) of Vermont's Environmental Protection Rules.

14. Under section 7-311(a)(5) of Vermont's Environmental Protection Rules, the spill and fire control equipment required under section 7-309(a)(1)(A) and (C) shall be available in the immediate vicinity of each short-term storage area.

15. By failing to place spill and fire control equipment in the immediate vicinity of each short-term storage area at the Burlington facility, Vermont Railway violated section 7-311(a)(5) of Vermont's Environmental Protection Rules.

16. Under section 7-311(d)(1) of Vermont's Environmental Protection Rules, small and large quantity generators shall maintain, at a location apart from the short-term storage area, a list of all hazardous waste currently in storage. For generators storing hazardous waste in containers, the list shall identify each container being stored and the type of hazardous waste held by each container. Any waste being accumulated within a short-term storage area must be included on the list of hazardous waste in storage.

17. By failing to maintain, at a location apart from the short-term storage area, a list of all hazardous waste currently in storage at the Burlington facility, Vermont Railway violated section 7-311(d)(1) of Vermont's Environmental Protection Rules.

18. Under section 7-311(d)(2) of Vermont's Environmental Protection

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

Rules, small and large quantity generators shall conduct daily inspections during regular business days of each short-term storage area. The inspections shall be recorded in a log that is kept at the facility for at least three years.

19. By failing to keep an up-to-date log of daily inspections of each short-term storage area at the Burlington facility, Vermont Railway violated section 7-311(d)(2) of Vermont's Environmental Protection Rules.

20. Under section 7-311(f)(1) of Vermont's Environmental Protection Rules, with the exception of satellite accumulation containers managed in accordance with section 7-310(a), 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. Such marking shall include: the generator's name, address, and EPA identification number; the name and hazardous waste identification code(s) of the hazardous waste stored therein; the date when the container was first used to accumulate or store hazardous waste and the following language, "Hazardous Waste - Federal Law Prohibits Improper Disposal. If found contact the nearest police or public safety authority or the U.S. Environmental Protection Agency."

21. By failing to properly mark containers and packages used for the storage of hazardous waste at the Burlington facility, Vermont Railway violated section 7-311(f)(1) of Vermont's Environmental Protection Rules.

22. Under section 7-806(d)(2) of Vermont's Environmental Protection Rules, above-ground storage tanks holding used oil shall be clearly marked with

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

the words "Used Oil."

23. By failing to mark above-ground storage tanks holding used oil at the Burlington facility, Vermont Railway violated section 7-806(d)(2) of Vermont's Environmental Protection Rules.

24. Under section 7-912(d)(5)(A)(i-ii) of Vermont's Environmental Protection Rules, both small and large quantity handlers must manage universal waste lamps in a way that prevents releases of any universal waste or component of a universal waste to the environment.

25. By failing to manage universal waste lamps at the Burlington facility in a way that prevents releases of any universal waste or component of a universal waste to the environment, Vermont Railway violated section 7-912(d)(5)(A)(i-ii) of Vermont's Environmental Protection Rules.

26. Under section 7-912(f)(3) of Vermont's Environmental Protection Rules, a small or large quantity handler who accumulates universal waste must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received.

27. By failing to date the universal waste lamps in storage at the Burlington facility, Vermont Railway violated section 7-912(f)(3) of Vermont's Environmental Protection Rules.

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

Rutland Facility

28. Vermont Railway's Rutland facility is a large quantity generator within the meaning of Vermont's Environmental Protection Rules.

29. Under sections 7-303 and 7-308(b)(1) of Vermont's Environmental Protection Rules, a large quantity generator must determine if any waste generated is a hazardous waste.

30. The failure of Vermont Railway to determine if numerous containers at the Rutland facility held hazardous waste violated sections 7-303 and 7-308(b)(1) of Vermont's Environmental Protection Rules.

31. Under section 7-308(b)(2) of Vermont's Environmental Protection Rules, a large quantity generator can store hazardous waste no longer than 90 days from the date when the waste first started to accumulate.

32. By storing hazardous waste longer than 90 days at the Rutland facility, Vermont Railway violated section 7-308(b)(2) of Vermont's Environmental Protection Rules.

33. Under section 7-308(b)(9) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a written contingency plan.

34. By failing to maintain a written contingency plan at its Rutland facility, Vermont Railway violated section 7-308(b)(9) of Vermont's Environmental Protection Rules.

35. Under section 7-308(b)(10) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a training program for facility personnel.

36. By failing to maintain a training program for Rutland facility personnel, Vermont Railway violated section 7-308(b)(10) of Vermont's

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

Environmental Protection Rules.

37. Under section 7-309(a)(1) of Vermont's Environmental Protection Rules, 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 to air, soil, groundwater, or surface water which could threaten human health or the environment.

38. By failing to maintain and operate the Rutland facility to minimize the possibility of fire, explosion or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, groundwater, or surface water which could threaten human health or the environment, including the failure to maintain required preparedness and prevention equipment, Vermont Railway violated section 7-309(a)(1) of Vermont's Environmental Protection Rules.

39. Under section 7-309(a)(4) of Vermont's Environmental Protection Rules, small and large quantity generator facilities must make preparedness and prevention arrangements with local authorities. Refusal of any authorities to enter into such arrangements must be documented.

40. By failing to make preparedness and prevention arrangements with local authorities at the Rutland facility or document the refusal of local authorities to do so, Vermont Railway violated section 7-309(a)(4) of Vermont's Environmental Protection Rules.

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

41. Under section 7-311(a)(1) of Vermont's Environmental Protection Rules, generators must accumulate and store hazardous waste upon an impervious surface except for spill cleanup debris that is generated in response to an emergency action.

42. By storing hazardous wastes on the ground and on surfaces that were not impervious, Vermont Railway violated section 7-311(a)(1) of Vermont's Environmental Protection Rules.

43. Under section 7-311(a)(2) of Vermont's Environmental Protection Rules, hazardous waste containers may be placed out-of-doors only if they are within a structure that sheds rain and snow.

44. By storing hazardous wastes outside of structures at the Rutland facility, Vermont Railway violated section 7-311(a)(2) of Vermont's Environmental Protection Rules.

45. Under section 7-311(a)(5) of Vermont's Environmental Protection Rules, spill and fire control equipment shall be available in the immediate vicinity of each short-term storage area.

46. By storing hazardous wastes in two boxcars without spill and fire control equipment in the immediate vicinity of each of those short-term storage areas at the Rutland facility, Vermont Railway violated section 7-311(a)(5) of Vermont's Environmental Protection Rules.

47. Under section 7-311(b)(3) of Vermont's Environmental Protection Rules, aisle space between rows of containers must be sufficient to allow the

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

unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of facility operation. In no circumstance shall the aisle space be less than twenty-four inches wide.

48. By failing to maintain required aisle space between hazardous waste containers in the two boxcars at the Rutland facility, Vermont Railway violated section 7-311(b)(3) of Vermont's Environmental Protection Rules.

49. Under section 7-311(d)(1) of Vermont's Environmental Protection Rules, small and large quantity generators shall maintain, at a location apart from the short-term storage area, a list of all hazardous waste currently in storage. For generators storing hazardous waste in containers, the list shall identify each container being stored and the type of hazardous waste held by each container. Any waste being accumulated within a short-term storage area must be included on the list of hazardous waste in storage.

50. By failing to maintain inventory of hazardous waste in storage in the two boxcars serving as short-term storage areas at the Rutland facility, Vermont Railway violated section 7-311(d)(1) of Vermont's Environmental Protection Rules.

51. Under section 7-311(d)(2) of Vermont's Environmental Protection Rules, small and large quantity generators shall conduct daily inspections during regular business days of each short-term storage area.

52. By failing to conduct daily inspections of the two boxcars serving as short-term storage areas at the Rutland facility during regular business days,

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

Vermont Railway violated section 7-311(d)(2) of Vermont's Environmental Protection Rules.

53. Under section 7-311(e)(1) of Vermont's Environmental Protection Rules, small and large quantity generators must post a sign at each short-term hazardous waste storage area, which must be visible from at least 25 feet with the legend, "Danger-Hazardous Waste Storage Area-Authorized Personnel Only."

54. By failing to post a sign with the legend "Danger-Hazardous Waste Storage Area-Authorized Personnel Only" at each of the two boxcars serving as short-term hazardous waste storage areas at the Rutland facility, Vermont Railway violated section 7-311(e)(1) of Vermont's Environmental Protection Rules.

55. Under section 7-311(e)(2) of Vermont's Environmental Protection Rules, small and large quantity generators storing ignitable waste must also post a sign at each short-term hazardous waste storage area, which must be visible from 25 feet with the legend, "No Smoking."

56. By failing to post a sign with the legend, "No Smoking" at each of the two boxcars serving as short-term hazardous waste storage areas with ignitable waste at the Rutland facility, Vermont Railway violated section 7-311(e)(2) of Vermont's Environmental Protection Rules.

57. Under section 7-311(f)(1) of Vermont's Environmental Protection Rules, with the exception of satellite accumulation containers managed in

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

accordance with section 7-310(a), 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. Such marking shall include: the generator's name, address, and EPA identification number; the name and hazardous waste identification code(s) of the hazardous waste stored therein; the date when the container was first used to accumulate or store hazardous waste and the following language, "Hazardous Waste - Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency."

58. By failing to properly mark containers and packages used for the storage of hazardous wastes at the Rutland facility, Vermont Railway violated section 7-311(f)(1) of Vermont's Environmental Protection Rules.

59. Under section 7-311(f)(4)(B) of Vermont's Environmental Protection Rules, 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.

60. By using containers that were stored in a manner that may rupture the container or cause it to leak at the Rutland facility, Vermont Railway violated section 7-311(f)(4)(B) of Vermont's Environmental Protection Rules.

61. Under section 7-504(a) of Vermont's Environmental Protection Rules, certification from ANR is required to treat, store, dispose, or accept any

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

hazardous waste for over 90 days.

62. By failing to obtain certification from ANR to treat, store, dispose, or accept any hazardous waste for over 90 days at the Rutland facility, Vermont Railway violated section 7-504(a) of Vermont's Environmental Protection Rules.

63. Under section 7-702(b)(5) and (9) of Vermont's Environmental Protection Rules, any generator who transports or offers for transport hazardous waste to a designated facility using a manifest shall (1) retain a signed copy of the manifest for at least three years from the date of initial shipment or until receipt of a completed copy, and (2) determine whether completed manifests are returned within 35 days of shipment from the Rutland facility, and investigate those that are not pursuant to section 7-707 of Vermont's Environmental Protection Rules.

64. By failing to retain signed copies of manifests for at least three years from the date of initial shipment or until receipt of a completed copy at the Rutland facility, and by failing to have a system in place to determine if completed manifests were received within 35 days of the original shipment from the Rutland facility, Vermont Railway violated section 7-702(b)(5) and (9) of Vermont's Environmental Protection Rules.

65. Under section 7-806(b)(1), (2) & (5 – 8) of Vermont's Environmental Protection Rules, containers holding used oil shall be kept closed at all times, except when adding or removing used oil; a container holding used oil must not be opened, handled or stored in a manner which may rupture the container or

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

cause a release; if a container begins to leak, the used oil must immediately be transferred from the leaking container to a container that is in good condition, or the used oil shall be managed in some other way that complies with the requirements of this section; containers holding used oil must be labeled or marked with the words "Used Oil" such that the label or marking is visible; containers holding used oil must be stored on an impervious surface; a container holding used oil may be stored out-of-doors only if the container is placed within a structure that sheds rain and snow; and a container holding a mixture of used oil and water shall be placed within a structure that protects the container from freezing.

66. By storing used oil in containers that were not: closed, managed in a manner to prevent a release, marked, stored on an impervious surface, within a structure that sheds rain or snow, or protected from freezing at the Rutland facility, Vermont Railway violated section 7-806(b)(1), (2) & (5 – 8) of Vermont's Environmental Protection Rules.

67. Pursuant to 10 V.S.A. § 8221(b)(6), Vermont Railway is potentially liable for civil penalties as follows:

a) not more than $50,000 for the initial violations of Vermont's Environmental Protection Rules and not more than $25,000 for each day that the violation continues for violations prior to July 1, 2008; and

b) not more than $85,000 for the initial violations of Vermont's Environmental Protection Rules and not more than $42,500 for each day

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

that the violation continues for violations on or after July 1, 2008.

DEFENDANT'S RESPONSES TO THE ALLEGED VIOLATIONS

The Defendant answers the preceding allegations as follows:

68. Vermont Railway admits the allegations set forth in paragraphs 1 through 67 of this Pleadings by Agreement.

RESOLUTION OF VIOLATIONS BY PLAINTIFF AND DEFENDANT

69. ANR and Vermont Railway 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 this Pleadings by Agreement.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Dated: 10/29/10 By: _____

Paul R. Brierre
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

VERMONT RAILWAY, INC.

Dated: 10/28/10 By: _____

Eric R. Benson, Esq.
Vermont Railway, Inc.
One Railway Lane
Burlington, VT 05401

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

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,

Plaintiff,

v.

VERMONT RAILWAY, INC.,

Defendant.

PLEADINGS BY AGREEMENT

NOW COMES the State of Vermont, Agency of Natural Resources, by and through the Office of the Attorney General William H. Sorrell, and Defendant, Vermont Railway, Inc., by their respective undersigned counsel, and hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

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

2. Vermont Railway, Inc. ("Vermont Railway" or "Defendant"), is a corporation organized under the laws of Vermont with its principal place of business in Burlington. Vermont Railway owns and operates a rail system

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

which includes yards located in the City of Burlington, Chittenden County, Vermont ("the Burlington facility") and the City of Rutland, Rutland County, Vermont ("the Rutland facility").

3. ANR conducted inspections of the Burlington facility on July 15 and 30, 2008.

4. During the July 15 and 30, 2008 inspections conducted at the Burlington facility, ANR found the following:

a. The contingency plan that was being maintained by Vermont Railway did not meet the requirements of the Vermont Hazardous Waste Management Regulations;

b. Vermont Railway did not maintain a hazardous waste training program for facility personnel;

c. Not all drums containing hazardous wastes were labeled with the words "Hazardous Waste";

d. During the July 15, 2008 inspection, the outdoor short-term storage area used to store hazardous waste was not equipped with required spill and fire control equipment;

e. Inventories of hazardous waste stored in the short-term storage areas were not accurate;

f. Documentation of daily inspections of hazardous waste stored in the short-term storage areas was not up-to-date;

g, Not all drums containing hazardous wastes were dated correctly;

h. During the July 15, 2008 inspection, aboveground storage tanks holding used oil were not marked with the words "Used Oil";

i. Six boxes of waste lamps were not closed or stored in a manner to prevent breakage; and

j. Vermont Railway was not able to demonstrate the length of time that the six boxes of waste lamps had been accumulating on-site;

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

5. ANR conducted inspections of the Rutland facility on June 25 and July 2, 2008.

6. During the June 25 and July 2, 2008 inspections conducted at the Rutland facility, ANR found the following:

a. Numerous containers at various locations were described by Vermont Railway representatives as holding unknown waste material, showing that Vermont Railway failed to determine if the waste material in those containers was hazardous waste;

b. Numerous containers of hazardous waste were stored in boxcars for longer than 90 days, and subsequent communication with Vermont Railway representatives indicates that these containers of waste material may have been stored in the boxcars since the 1960s;

c. No contingency plan was being maintained by Vermont Railway for the Rutland facility;

d. Vermont Railway did not maintain a hazardous waste training program for facility personnel;

e. Boxcars used to store hazardous waste were not equipped with required preparedness and prevention equipment;

f. The required preparedness and prevention arrangements had not been made with local authorities and no records were shown documenting that such arrangements had been refused by local authorities;

g. Hazardous wastes were observed being stored on the ground and on surfaces that were not impervious;

h. Hazardous waste containers were observed being stored out-of-doors and not within a structure that sheds rain and snow;

i. Spill and fire control equipment were not available at either of the two boxcars being used to store hazardous wastes;

j. Required aisle space was not maintained between the hazardous waste containers stored in the two boxcars;

k. No inventory of hazardous waste stored in the two boxcars was maintained;

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

l. Daily inspections of the boxcars used to store hazardous waste were not being conducted;

m. "Danger - Hazardous Waste Storage Area - Authorized Personnel Only" signs were not posted at the boxcars being used to store hazardous waste;

n. "No Smoking" signs were not posted at the boxcars being used to store hazardous waste;

o. Numerous hazardous waste containers were not properly marked;

p. A number of hazardous waste containers were stored in a manner that could cause them to rupture or leak;

q. Although Vermont Railway had stored hazardous waste on-site for longer than 90 days, Vermont Railway had not obtained a hazardous waste storage facility certification from ANR;

r. Vermont Railway did not maintain copies of signed manifests for at least three years from the date of initial shipment or until receipt of a completed copy at the Rutland facility;

s. Vermont Railway did not have a system in place to determine if completed manifests were received within 35 days of the original shipment from the Rutland facility; and

t. Numerous containers of used oil were not closed, managed in a manner to prevent a release, marked, stored on an impervious surface, stored within a structure that sheds rain or snow, or protected from freezing.

Burlington Facility

7. Vermont Railway's Burlington facility is a large quantity generator within the meaning of Vermont's Environmental Protection Rules.

8. Under section 7-308(b)(9) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a written contingency plan.

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

9. By failing to maintain a written contingency plan as required by the Vermont Hazardous Waste Management Regulations at the Burlington facility, Vermont Railway violated section 7-308(b)(9) of Vermont's Environmental Protection Rules.

10. Under section 7-308(b)(10) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a training program for facility personnel.

11. By failing to maintain a training program for Burlington facility personnel, Vermont Railway violated section 7-308(b)(10) of Vermont's Environmental Protection Rules.

12. Under section 7-310(b)(1)(A)(iv) of Vermont's Environmental Protection Rules, small and large quantity generators may accumulate as much as one cubic yard of non-liquid hazardous waste that is not defined as hazardous in 40 CFR Part 261 (i.e., waste regulated as hazardous by Vermont), one quart of acutely hazardous waste, or 55 gallons of any other hazardous waste in containers in a short-term storage area without obtaining certification as a storage facility, provided that the waste is brought directly from the point of generation to the short-term storage area by the end of each work shift (not to exceed 12 hours), and the waste has been collected in a shift accumulation container that is marked or labeled with the words "hazardous waste" and other words that identify the contents of the container.

13. By failing to label all drums containing hazardous wastes with the

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

words "hazardous waste" at the Burlington facility, Vermont Railway violated section 7-310(b)(1)(A)(iv) of Vermont's Environmental Protection Rules.

14. Under section 7-311(a)(5) of Vermont's Environmental Protection Rules, the spill and fire control equipment required under section 7-309(a)(1)(A) and (C) shall be available in the immediate vicinity of each short-term storage area.

15. By failing to place spill and fire control equipment in the immediate vicinity of each short-term storage area at the Burlington facility, Vermont Railway violated section 7-311(a)(5) of Vermont's Environmental Protection Rules.

16. Under section 7-311(d)(1) of Vermont's Environmental Protection Rules, small and large quantity generators shall maintain, at a location apart from the short-term storage area, a list of all hazardous waste currently in storage. For generators storing hazardous waste in containers, the list shall identify each container being stored and the type of hazardous waste held by each container. Any waste being accumulated within a short-term storage area must be included on the list of hazardous waste in storage.

17. By failing to maintain, at a location apart from the short-term storage area, a list of all hazardous waste currently in storage at the Burlington facility, Vermont Railway violated section 7-311(d)(1) of Vermont's Environmental Protection Rules.

18. Under section 7-311(d)(2) of Vermont's Environmental Protection

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

Rules, small and large quantity generators shall conduct daily inspections during regular business days of each short-term storage area. The inspections shall be recorded in a log that is kept at the facility for at least three years.

19. By failing to keep an up-to-date log of daily inspections of each short-term storage area at the Burlington facility, Vermont Railway violated section 7-311(d)(2) of Vermont's Environmental Protection Rules.

20. Under section 7-311(f)(1) of Vermont's Environmental Protection Rules, with the exception of satellite accumulation containers managed in accordance with section 7-310(a), 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. Such marking shall include: the generator's name, address, and EPA identification number; the name and hazardous waste identification code(s) of the hazardous waste stored therein; the date when the container was first used to accumulate or store hazardous waste and the following language, "Hazardous Waste - Federal Law Prohibits Improper Disposal. If found contact the nearest police or public safety authority or the U.S. Environmental Protection Agency."

21. By failing to properly mark containers and packages used for the storage of hazardous waste at the Burlington facility, Vermont Railway violated section 7-311(f)(1) of Vermont's Environmental Protection Rules.

22. Under section 7-806(d)(2) of Vermont's Environmental Protection Rules, above-ground storage tanks holding used oil shall be clearly marked with

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

the words "Used Oil."

23. By failing to mark above-ground storage tanks holding used oil at the Burlington facility, Vermont Railway violated section 7-806(d)(2) of Vermont's Environmental Protection Rules.

24. Under section 7-912(d)(5)(A)(i-ii) of Vermont's Environmental Protection Rules, both small and large quantity handlers must manage universal waste lamps in a way that prevents releases of any universal waste or component of a universal waste to the environment.

25. By failing to manage universal waste lamps at the Burlington facility in a way that prevents releases of any universal waste or component of a universal waste to the environment, Vermont Railway violated section 7-912(d)(5)(A)(i-ii) of Vermont's Environmental Protection Rules.

26. Under section 7-912(f)(3) of Vermont's Environmental Protection Rules, a small or large quantity handler who accumulates universal waste must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received.

27. By failing to date the universal waste lamps in storage at the Burlington facility, Vermont Railway violated section 7-912(f)(3) of Vermont's Environmental Protection Rules.

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

Rutland Facility

28. Vermont Railway's Rutland facility is a large quantity generator within the meaning of Vermont's Environmental Protection Rules.

29. Under sections 7-303 and 7-308(b)(1) of Vermont's Environmental Protection Rules, a large quantity generator must determine if any waste generated is a hazardous waste.

30. The failure of Vermont Railway to determine if numerous containers at the Rutland facility held hazardous waste violated sections 7-303 and 7-308(b)(1) of Vermont's Environmental Protection Rules.

31. Under section 7-308(b)(2) of Vermont's Environmental Protection Rules, a large quantity generator can store hazardous waste no longer than 90 days from the date when the waste first started to accumulate.

32. By storing hazardous waste longer than 90 days at the Rutland facility, Vermont Railway violated section 7-308(b)(2) of Vermont's Environmental Protection Rules.

33. Under section 7-308(b)(9) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a written contingency plan.

34. By failing to maintain a written contingency plan at its Rutland facility, Vermont Railway violated section 7-308(b)(9) of Vermont's Environmental Protection Rules.

35. Under section 7-308(b)(10) of Vermont's Environmental Protection Rules, a large quantity generator must maintain a training program for facility personnel.

36. By failing to maintain a training program for Rutland facility personnel, Vermont Railway violated section 7-308(b)(10) of Vermont's

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

Environmental Protection Rules.

37. Under section 7-309(a)(1) of Vermont's Environmental Protection Rules, 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 to air, soil, groundwater, or surface water which could threaten human health or the environment.

38. By failing to maintain and operate the Rutland facility to minimize the possibility of fire, explosion or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, groundwater, or surface water which could threaten human health or the environment, including the failure to maintain required preparedness and prevention equipment, Vermont Railway violated section 7-309(a)(1) of Vermont's Environmental Protection Rules.

39. Under section 7-309(a)(4) of Vermont's Environmental Protection Rules, small and large quantity generator facilities must make preparedness and prevention arrangements with local authorities. Refusal of any authorities to enter into such arrangements must be documented.

40. By failing to make preparedness and prevention arrangements with local authorities at the Rutland facility or document the refusal of local authorities to do so, Vermont Railway violated section 7-309(a)(4) of Vermont's Environmental Protection Rules.

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

41. Under section 7-311(a)(1) of Vermont's Environmental Protection Rules, generators must accumulate and store hazardous waste upon an impervious surface except for spill cleanup debris that is generated in response to an emergency action.

42. By storing hazardous wastes on the ground and on surfaces that were not impervious, Vermont Railway violated section 7-311(a)(1) of Vermont's Environmental Protection Rules.

43. Under section 7-311(a)(2) of Vermont's Environmental Protection Rules, hazardous waste containers may be placed out-of-doors only if they are within a structure that sheds rain and snow.

44. By storing hazardous wastes outside of structures at the Rutland facility, Vermont Railway violated section 7-311(a)(2) of Vermont's Environmental Protection Rules.

45. Under section 7-311(a)(5) of Vermont's Environmental Protection Rules, spill and fire control equipment shall be available in the immediate vicinity of each short-term storage area.

46. By storing hazardous wastes in two boxcars without spill and fire control equipment in the immediate vicinity of each of those short-term storage areas at the Rutland facility, Vermont Railway violated section 7-311(a)(5) of Vermont's Environmental Protection Rules.

47. Under section 7-311(b)(3) of Vermont's Environmental Protection Rules, aisle space between rows of containers must be sufficient to allow the

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

unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of facility operation. In no circumstance shall the aisle space be less than twenty-four inches wide.

48. By failing to maintain required aisle space between hazardous waste containers in the two boxcars at the Rutland facility, Vermont Railway violated section 7-311(b)(3) of Vermont's Environmental Protection Rules.

49. Under section 7-311(d)(1) of Vermont's Environmental Protection Rules, small and large quantity generators shall maintain, at a location apart from the short-term storage area, a list of all hazardous waste currently in storage. For generators storing hazardous waste in containers, the list shall identify each container being stored and the type of hazardous waste held by each container. Any waste being accumulated within a short-term storage area must be included on the list of hazardous waste in storage.

50. By failing to maintain inventory of hazardous waste in storage in the two boxcars serving as short-term storage areas at the Rutland facility, Vermont Railway violated section 7-311(d)(1) of Vermont's Environmental Protection Rules.

51. Under section 7-311(d)(2) of Vermont's Environmental Protection Rules, small and large quantity generators shall conduct daily inspections during regular business days of each short-term storage area.

52. By failing to conduct daily inspections of the two boxcars serving as short-term storage areas at the Rutland facility during regular business days,

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

Vermont Railway violated section 7-311(d)(2) of Vermont's Environmental Protection Rules.

53. Under section 7-311(e)(1) of Vermont's Environmental Protection Rules, small and large quantity generators must post a sign at each short-term hazardous waste storage area, which must be visible from at least 25 feet with the legend, "Danger-Hazardous Waste Storage Area-Authorized Personnel Only."

54. By failing to post a sign with the legend "Danger-Hazardous Waste Storage Area-Authorized Personnel Only" at each of the two boxcars serving as short-term hazardous waste storage areas at the Rutland facility, Vermont Railway violated section 7-311(e)(1) of Vermont's Environmental Protection Rules.

55. Under section 7-311(e)(2) of Vermont's Environmental Protection Rules, small and large quantity generators storing ignitable waste must also post a sign at each short-term hazardous waste storage area, which must be visible from 25 feet with the legend, "No Smoking."

56. By failing to post a sign with the legend, "No Smoking" at each of the two boxcars serving as short-term hazardous waste storage areas with ignitable waste at the Rutland facility, Vermont Railway violated section 7-311(e)(2) of Vermont's Environmental Protection Rules.

57. Under section 7-311(f)(1) of Vermont's Environmental Protection Rules, with the exception of satellite accumulation containers managed in

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

accordance with section 7-310(a), 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. Such marking shall include: the generator's name, address, and EPA identification number; the name and hazardous waste identification code(s) of the hazardous waste stored therein; the date when the container was first used to accumulate or store hazardous waste and the following language, "Hazardous Waste - Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency."

58. By failing to properly mark containers and packages used for the storage of hazardous wastes at the Rutland facility, Vermont Railway violated section 7-311(f)(1) of Vermont's Environmental Protection Rules.

59. Under section 7-311(f)(4)(B) of Vermont's Environmental Protection Rules, 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.

60. By using containers that were stored in a manner that may rupture the container or cause it to leak at the Rutland facility, Vermont Railway violated section 7-311(f)(4)(B) of Vermont's Environmental Protection Rules.

61. Under section 7-504(a) of Vermont's Environmental Protection Rules, certification from ANR is required to treat, store, dispose, or accept any

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

hazardous waste for over 90 days.

62. By failing to obtain certification from ANR to treat, store, dispose, or accept any hazardous waste for over 90 days at the Rutland facility, Vermont Railway violated section 7-504(a) of Vermont's Environmental Protection Rules.

63. Under section 7-702(b)(5) and (9) of Vermont's Environmental Protection Rules, any generator who transports or offers for transport hazardous waste to a designated facility using a manifest shall (1) retain a signed copy of the manifest for at least three years from the date of initial shipment or until receipt of a completed copy, and (2) determine whether completed manifests are returned within 35 days of shipment from the Rutland facility, and investigate those that are not pursuant to section 7-707 of Vermont's Environmental Protection Rules.

64. By failing to retain signed copies of manifests for at least three years from the date of initial shipment or until receipt of a completed copy at the Rutland facility, and by failing to have a system in place to determine if completed manifests were received within 35 days of the original shipment from the Rutland facility, Vermont Railway violated section 7-702(b)(5) and (9) of Vermont's Environmental Protection Rules.

65. Under section 7-806(b)(1), (2) & (5 – 8) of Vermont's Environmental Protection Rules, containers holding used oil shall be kept closed at all times, except when adding or removing used oil; a container holding used oil must not be opened, handled or stored in a manner which may rupture the container or

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

cause a release; if a container begins to leak, the used oil must immediately be transferred from the leaking container to a container that is in good condition, or the used oil shall be managed in some other way that complies with the requirements of this section; containers holding used oil must be labeled or marked with the words "Used Oil" such that the label or marking is visible; containers holding used oil must be stored on an impervious surface; a container holding used oil may be stored out-of-doors only if the container is placed within a structure that sheds rain and snow; and a container holding a mixture of used oil and water shall be placed within a structure that protects the container from freezing.

66. By storing used oil in containers that were not: closed, managed in a manner to prevent a release, marked, stored on an impervious surface, within a structure that sheds rain or snow, or protected from freezing at the Rutland facility, Vermont Railway violated section 7-806(b)(1), (2) & (5 – 8) of Vermont's Environmental Protection Rules.

67. Pursuant to 10 V.S.A. § 8221(b)(6), Vermont Railway is potentially liable for civil penalties as follows:

a) not more than $50,000 for the initial violations of Vermont's Environmental Protection Rules and not more than $25,000 for each day that the violation continues for violations prior to July 1, 2008; and

b) not more than $85,000 for the initial violations of Vermont's Environmental Protection Rules and not more than $42,500 for each day

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

that the violation continues for violations on or after July 1, 2008.

DEFENDANT'S RESPONSES TO THE ALLEGED VIOLATIONS

The Defendant answers the preceding allegations as follows:

68. Vermont Railway admits the allegations set forth in paragraphs 1 through 67 of this Pleadings by Agreement.

RESOLUTION OF VIOLATIONS BY PLAINTIFF AND DEFENDANT

69. ANR and Vermont Railway 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 this Pleadings by Agreement.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Dated: 10/29/10 By: _____

Paul R. Brierre
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

VERMONT RAILWAY, INC.

Dated: 10/28/10 By: _____

Eric R. Benson, Esq.
Vermont Railway, Inc.
One Railway Lane
Burlington, VT 05401

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

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is by and between R.L. Vallee, Inc. ("Vallee") and the State of Vermont, Agency of Natural Resources (the "State"). Vallee and the State are referred to in this Agreement as "the Parties" or individually as a "Party."

RECITALS

A. In 1995, Vallee purchased a gas station/convenience store located in New Haven, Vermont ("the gas station" or "the Site" or "the property" or "New Haven Mobil") from MacIntyre Fuels, Inc. ("MFI"), and Roch and Joy MacIntyre ("the MacIntyres"), the owners and officers of MFI. Vallee has owned and operated the gas station continuously since 1995;

B. When Vallee acquired the property, soil and groundwater on the property were contaminated as a result of releases of gasoline that occurred while MFI owned the property. In 1992, prior to Vallee's acquisition of the property, MFI removed four underground storage tanks and associated piping at the station ("the UST System") and installed aboveground storage tanks and associated underground piping running from the ASTs to pump islands at the station ("the AST System"). During removal of the UST System, gasoline contamination was discovered ("the UST Release"). The UST Release resulted in contamination of soil and groundwater;

C. In 1998, Vallee discovered a release of petroleum from the AST System at the gas station ("the AST Release"). The AST Release resulted in contamination of soil and groundwater;

D. Subsequent to the discovery of the UST release in 1992, MFI hired an environmental consultant, Griffin International, Inc. ("Griffin"), to undertake investigation and remediation activities at the Site and submitted requests to ANR for reimbursement of certain costs of investigation and remediation from the Petroleum Cleanup Fund that is authorized by 10 V.S.A. § 1941 ("PCF"). Vallee has also hired environmental consultants to undertake investigation and remediation activities at the Site and submitted requests to ANR for reimbursement from the PCF for certain costs of investigation and remediation;

E. The Site remains extensively contaminated and requires substantial remediation and, potentially, additional investigation;

F. ANR administers the Petroleum Cleanup Fund ("PCF") pursuant to 10 V.S.A. § 1941(b) and ANR's Procedures for Reimbursement from the Petroleum Cleanup Fund. The Secretary may disburse funds from the PCF for the investigation and remediation of contaminated soil and groundwater caused by releases of petroleum from underground storage tanks and aboveground storage tanks, as well as for certain "third-party" costs associated with such contamination;

G. ANR has from time to time approved various requests by MFI and Vallee, respectively, to reimburse through the PCF various costs of investigation and remediation at the Site that would otherwise have been incurred by MFI or

Vallee. In addition, ANR has paid for various "third party" costs associated with the contamination, including point-of-entry treatment systems and bottled water supplies;

H. In 2002, Vallee sued MFI, the MacIntyres, and Griffin in Vermont Superior Court, Docket No. 248-11-02 Ancv (the "MFI/Griffin Lawsuit"), alleging *inter alia* that MFI and Griffin's acts and omissions resulted in contamination and otherwise increased the costs of investigation and remediation at the Site;

I. In 2004, MFI and Vallee settled the MFI/Griffin Lawsuit through a stipulated judgment that included MFI's assignment to Vallee of MFI's rights to insurance;

J. In 2005, Vallee sued MFI's insurance carrier, American International Specialty Lines Insurance Company ("AISLIC"), now Chartis Specialty Insurance Company ("Chartis"), in the United States District Court for the District of Vermont, Civil Action No.1:05-cv-131 (the "AISLIC Action");

K. In April 2007, Vallee entered into a settlement agreement in the AISLIC Action, under which AISLIC agreed to make payments to Vallee ("the AISLIC Settlement Agreement"). Vallee has received all the payments referenced in the AISLIC Settlement Agreement and further represents to ANR that, pursuant to the agreement, $350,000 has been deposited into an escrow account in Community National Bank account No. 908362616 ("the AISLIC Settlement Escrow Fund" or "Escrow Fund");

L. In February 2008, Vallee entered into a settlement agreement in the MFI/Griffin Lawsuit with Griffin and its insurer, Gulf Underwriters Insurance Company ("Gulf"), under which Gulf agreed to make a payment to Vallee ("the Griffin/Gulf Settlement Agreement"). Vallee has received the payment under the terms of the agreement;

M. On June 2, 2010, ANR filed a lawsuit in Vermont Superior Court, Civil Division, Washington Unit, *State of Vermont, Agency of Natural Resources v. R.L. Vallee, Inc., et al.*, Docket No. 389-6-10 Wncv, asserting claims against Vallee and AISLIC's successor, Chartis, for recovery of the settlement proceeds from the AISLIC Settlement Agreement and Griffin/Gulf Settlement Agreement (collectively "the Settlement Proceeds") and for other relief ("the State's Lawsuit"). The State's Lawsuit is presently pending. Vallee disputes the allegations and claims set forth in the State's Lawsuit;

N. In addition, based in part on the AISLIC Settlement Agreement and Griffin/Gulf Settlement Agreement, ANR has denied requests that were recently submitted by Vallee for PCF reimbursement in connection with the Site. A true copy of the ANR's denial dated June 3, 2010 and the decision dated July 30, 2010 denying Vallee's administrative appeal are attached hereto as Appendix 1 (collectively "the ANR PCF Denial"). Vallee disputes the ANR PCF Denial and has appealed the ANR PCF Denial to the Vermont Superior Court, Environmental Division, Docket No. 141-8-10. Vallee's appeal is presently pending;

O. ANR could deny additional requests by Vallee for PCF reimbursement in connection with the Site based on the reasons set forth in the ANR PCF Denial, subject to Vallee's right to appeal such denials; and

P. The parties seek to resolve their differences regarding the State's Lawsuit and the ANR PCF Denial, without any admission of liability by Vallee or concession by either party as to the strengths or weakness of their claims or their potential defenses and consistent with both parties' interest in remediation of the Site.

NOW THEREFORE, in consideration of the mutual promises and covenants set forth in this Agreement, the receipt and sufficiency of which each Party acknowledges, the Parties jointly agree as follows:

1. Vallee shall pay the sum of $550,000.00 to ANR. The schedule for payment shall be: $250,000.00 by January 10, 2011, and $300,000 by April 1, 2011. These payments by Vallee shall not include, or be counted towards, any portion of the funding obligation that is set forth in paragraph 2 of this Agreement. The payments by Vallee totaling $550,000.00 will be deposited by ANR in a dedicated PCF account (the "Dedicated Fund") and may be utilized only for future PCF-eligible investigation and remediation costs related to the New Haven Mobil Site that are approved by ANR and only after Vallee fully satisfies the funding obligation set forth in paragraph 2. Expenditures from the Dedicated Fund shall require prior approval by ANR and ANR shall account for the resulting expenditures as provided in paragraphs 3 and 4. The Dedicated Fund shall be

reserved for a period of ten (10) years, until January 10, 2021, and the funds shall be used only for payment of future PCF-eligible investigation and remediation costs for the Site during that period; after expiration of the ten-year period, the State may use any remaining funds for any PCF-related use at any PCF site or sites; and, upon expiration of the ten-year period or exhaustion of the funds, whichever occurs first, the State may close out the Dedicated Fund.

2. Vallee shall not request any reimbursement from the Dedicated Fund or from the PCF until it has fully exhausted the sum of money in the AISLIC Settlement Escrow Fund (the sum of $350,000 plus all interest that has accrued to date in said Fund and that may accrue in the future in said Fund) for costs of future investigation and remediation activities at the Site that would otherwise be reimbursable from the PCF, as determined by ANR, and for the pending but unreimbursed requests by Vallee for reimbursement that are outstanding at this time which the parties have agreed would otherwise be PCF-eligible, as set forth in the separate agreement attached hereto as Appendix 2, or it has paid an equal sum of money from any combination of the Escrow Fund and funding made available by Vallee from any other source (other than the Dedicated Fund) for said purposes ("the Initial Funding Obligation"). Vallee shall provide an accounting of the Escrow Fund to ANR within 5 days after execution of this Agreement and on a quarterly basis thereafter and shall provide quarterly accounting of any other funding it utilizes to meet the Initial Funding Obligation and a final accounting that demonstrates full satisfaction of the Initial Funding Obligation. Vallee will fully

assert its rights to secure, retain, and make payments from the Escrow Fund pursuant to its agreements with Chartis. In addition, Vallee will take no action to relinquish or alter its rights under the AISLIC Settlement Agreement or Escrow Agreement with respect to the Escrow Fund. In connection with Vallee's Initial Funding Obligation, ANR will review invoices and advise Vallee whether invoices would otherwise be PCF-eligible.

3. Upon fulfillment of its Initial Funding Obligation, as provided in paragraph 2, Vallee may resume submitting reimbursement requests to the PCF and ANR will process the requests in the normal course and shall not deny any requests or reduce reimbursement on the basis of Vallee's receipt of payments pursuant to the AISLIC Settlement Agreement or Griffin/Gulf Settlement Agreement; provided, however, that upon Vallee's fulfillment of its Initial Funding Obligation, any requests for PCF reimbursement approved by ANR, except for third-party cost requests, shall be paid, first, from the Dedicated Fund until the Dedicated Fund has been fully exhausted and only thereafter from the PCF.

4. With respect to any future expenditures from the PCF for investigation and remediation related to the Site that are made subsequent to Vallee's fulfillment of the Initial Funding Obligation and exhaustion of the Dedicated Fund, the PCF coverages applicable to the UST and AST releases at the Site shall be combined and administered without any allocation between UST and AST releases, resulting in total PCF coverage of $1,980,000 for "investigation and remediation," from which past ANR-approved expenditures and future ANR-approved expenditures (that is,

approved subsequent to fulfillment of the Initial Funding Obligation and exhaustion of the Dedicated Fund) shall be deducted. Attached to this Agreement as part of Appendix 3 is an accounting, agreed upon by the Parties, that utilizes this method of accounting and deducts past PCF expenditures, resulting in an agreed-upon current PCF balance for future investigation and remediation ("the current PCF balance for investigation and remediation"). Upon ANR approval of any future request for reimbursement from the PCF by Vallee for future investigation and remediation for the Site, the approved amount shall be deducted from the current PCF balance for investigation and remediation set forth in Appendix 3;

5. The Parties agree that total PCF coverage for approved third-party claims relating to the Site shall be $1,000,000. The Parties further agree that ANR will not request any reimbursement or adjustment from Vallee with respect to past PCF expenditures for third-party claims or deny any request or any portion of any request for third-party claim reimbursement from the PCF on the grounds that all or any portion of the costs associated with the reimbursement request may be attributable to the AST release and thus ineligible for third-party coverage under the PCF. Attached to this Agreement as part of Appendix 3 is an accounting, agreed upon by the Parties, that deducts all past PCF expenditures for third-party claims, resulting in an agreed-upon current PCF balance for third-party claims ("the current PCF balance for third-party claims"). Upon ANR approval of any future request for reimbursement for a PCF-eligible third-party claim related to the

Site, the approved amount shall be deducted from the current PCF balance for third-party claims set forth in Appendix 3;

6. If the State obtains any recovery from Chartis related to its claims in the State's Lawsuit by settlement or judgment, its net recovery will be applied as follows: first, to reimburse the PCF for past expenditures in connection with the Site, in which case a commensurate credit shall be made to the balance of available PCF coverage for the Site; second, to reimburse accruing PCF-eligible investigation and remediation costs and/or third-party costs approved by ANR for the Site; third, any remaining proceeds will be reserved for a period of ten (10) years from the date they were received for payment of future PCF-eligible investigation and remediation costs and/or third-party costs approved by ANR for the Site; and, fourth, after expiration of the ten-year period the State may use any remaining proceeds for any PCF-related use at any PCF site or sites.

7. Except as expressly provided in paragraphs 3 and 5, above, nothing in this Agreement is intended to limit or shall be construed as limiting ANR's discretion to deny any future request for PCF reimbursement related to the Site.

8. Vallee has represented that it has a contract to purchase a parcel that adjoins Vallee's New Haven Mobil property to the east ("the eastern field") and believes that such purchase and use of the eastern field will provide at least $49,500.00 in net savings in remediation costs. If the final Corrective Action Plan approved by ANR utilizes the eastern field and, at the point in time after the permitting and construction/placement of the soil piles on the eastern field, a

comparison of the actual expenditures associated with utilization of the eastern field to the expenditures estimated byVerterre on the November 11, 2010 Verterre spreadsheet for use of the "front field" (i.e. the field currently owned by Vallee) as set forth in Appendix 4 ("Table 5: Corrective Action Plan Costs – Soil Pile Construction – Front Field"), excluding consideration of CAP Tasks 16 and 17, demonstrates $49,500 or more in net savings of remediation costs, the State will pay Vallee the sum of $25,000.00; if such net savings are less than $49,500 but greater than $25,000, the amount to be paid to Vallee by the State shall be reduced by an amount equal to the difference between $49,500 and the lesser amount of net savings; if such net savings are $25,000 or less, the State shall not be obligated to make any payment to Vallee. Any obligation of the State under this paragraph shall not operate as an offset against any obligation on the part of Vallee under any provision of this Agreement.

9. In consideration of and effective automatically upon ANR's receipt of all payments provided for in paragraph 1, and for other good and valuable consideration recited in this Agreement, the Parties hereby mutually release and forever discharge one another, including their respective past, present and future directors, officers, shareholders, employees, representatives, agents, attorneys, parents, subsidiaries, divisions, affiliates, elected or appointed officials, successors and assigns from any claims, causes of action, cross-claims, liabilities, rights, demands, lawsuits, costs, actions, proceedings or orders, of whatever nature, character, type, or description, whether at law or equity, and whether sounding in

tort or contract or any statutory or common law claim or remedy of any type, and which has been asserted by or could have been asserted by the Parties, or either of them, that arises out of, is related to, or is on account of (a) the proceeds of the AISLIC Settlement Agreement or of the Griffin/Gulf Settlement Agreement; (b) the State's Lawsuit; or (c) the ANR PCF Denial. ANR shall dismiss with prejudice its claims against Vallee in the State's Lawsuit and Vallee shall dismiss with prejudice its appeal of the ANR PCF Denial, no costs or attorneys fees to either Party. In addition, Vallee covenants and agrees that it will not assert any claim against the State in connection with any claim that the McIntyres, Chartis, Griffin, or Gulf may assert against Vallee relating in any way to ANR's pending claims against Chartis in the State's Lawsuit. However, nothing in this paragraph or this Agreement shall prevent either Party from enforcing this Agreement or from asserting claims against any non-Party.

10. Nothing in this Agreement is intended or shall be construed to give any person or entity that is not a Party any legal or equitable right, remedy, or claim under or in respect to this Agreement or any provisions in this Agreement, which is intended for the sole and exclusive benefit of each Party and no other persons or entities.

11. This Agreement is a final, complete and exclusive expression of the contract and understanding of each Party with respect to its subject matter and supersedes any and all prior promises, representations, warranties, agreements, understandings and undertakings between the Parties, and there are no other

promises, representations, warranties, agreements, understandings, or undertakings with respect to such subject matter except those set forth in this Agreement. Neither this Agreement nor any term set forth herein may be changed, waived or terminated except by a writing signed by each Party.

12. This Agreement is made under and shall be governed by and construed under the laws of Vermont, without regard to principles of conflicts of laws. Any litigation relating to the subject matter of this Agreement shall be initiated and maintained exclusively in the state courts of Vermont, which courts shall have exclusive jurisdiction over the Parties and this Agreement.

13. This Agreement is a negotiated compromise and accord concerning disputed claims and defenses between the Parties that remain in dispute. It shall not constitute nor be construed as an admission that any liability or other obligation to a person or entity that is not a Party does or does not exist.

14. Each Party will execute such additional documents as may be reasonably required in order to carry out the purpose and intent of this Agreement. Each Party also represents and warrants that it (a) carefully read this Agreement and understands it and its legal meaning; (b) executes this Agreement under its own free will; (c) has obtained all approvals needed to enter into this Agreement; and (d) the undersigned has obtained full authority to execute this Agreement without the necessity of obtaining the consent of any other Person.

15. Each Party acknowledges it has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement is deemed to

have been negotiated and prepared at the joint request and direction of the Parties acting at arm's length, with the advice and participation of counsel and will be interpreted in accordance with its terms without favor to either Party by virtue of drafting any particular terms of the Agreement.

16. This Agreement may be signed in counterparts and the separate signature pages executed by each Party may be combined to create one document binding on each Party and together shall constitute the same instrument. The Parties agree to accept facsimile or imaged copies of signature pages as binding upon the Parties.

WITNESS

The Parties have executed this Agreement on the date of the respective signatures below.

R.L. Vallee, Inc.

By: _____ Dated: December 21, 2010

Title: _____

State of Vermont, Agency of Natural Resources

By: _____ Dated: December ____, 2010

Title: _____

have been negotiated and prepared at the joint request and direction of the Parties acting at arm's length, with the advice and participation of counsel and will be interpreted in accordance with its terms without favor to either Party by virtue of drafting any particular terms of the Agreement.

16. This Agreement may be signed in counterparts and the separate signature pages executed by each Party may be combined to create one document binding on each Party and together shall constitute the same instrument. The Parties agree to accept facsimile or imaged copies of signature pages as binding upon the Parties.

WITNESS

The Parties have executed this Agreement on the date of the respective signatures below.

R.L. Vallee, Inc.

By: _____ Dated: December ____, 2010

Title: _____

State of Vermont, Agency of Natural Resources

By: Merrill D. Stafano Dated: December 22, 2010

Title: Assistant Attorney General
State of Vermont

VERMONT

State of Vermont
Department of Environmental Conservation
Waste Management Division
103 South Main Street/West Building
Waterbury, VT 05671-0404
(802) 241-4528
FAX (802) 241-3296
tami.wuestenberg@state.vt.us

AGENCY OF NATURAL RESOURCES

June 3, 2010

Mr. Skip Vallee
R.L. Vallee, Inc.
PO Box 192
280 South Main Street
St. Albans, Vermont 05478

Re: Petroleum Cleanup Fund Reimbursement Determination
New Haven Mobil, New Haven, Vermont
SMS Site #92-1251

Dear Mr. Vallee:

The Vermont Agency of Natural Resources, Department of Environmental Conservation, Sites Management Section ("SMS") hereby denies the following requests of R.L. Vallee, Inc. ("Vallee") for Vermont Petroleum Cleanup Fund ("PCF") reimbursement in connection with cleanup of the New Haven Mobil site (the "Site"):

1. May 2010 POET Sampling - $983.65;
2. April 2010- POET Sampling- $908.30;
3. February/March 2010- POET Sampling and Reporting- $2,356.30;
4. December 2009/January 2010- POET Sampling and Reporting- $1,573.40;
5. July-November 2009- Groundwater Monitoring and Reporting/Site Repairs- $8,102.11;
6. October/November 2009- POET Sampling and Reporting- $2,215.65; and
7. July-September 2009- POET Sampling and Reporting- $3,019.25.

The Agency of Natural Resources' authority to make PCF disbursements is limited to uninsured costs, 10 V.S.A. § 1941(b). The Procedures for Reimbursement from the Petroleum Cleanup Fund provide that "the responsible party must be able to demonstrate that there is no insurance which would cover the costs of cleanup." Procedures, p. 4.

Vallee has failed to demonstrate that no insurance coverage is available. Documents recently obtained from Vallee by the SMS indicate that Vallee filed a lawsuit against American International Specialty Lines Insurance Company ("AISLIC"), U.S.D.C. D. Vt. Civil No. 2:05-cv-131, in which it asserted that an AISLIC insurance policy provides coverage for cleanup of contamination at the Site. The documents also indicate that pursuant to a settlement of the lawsuit, Vallee has received payments from AISLIC, and it appears that an additional payment may be made by AISLIC to Vallee in the future. In addition, the documents indicate that Vallee has received a payment from another insurance company, Gulf Underwriters Insurance Company, in connection with an insurance policy that Gulf

Underwriters issued to Griffin International and that Vallee received the payment in settlement of its claims against Griffin regarding contamination at the Site.

In addition, apart from Vallee's settlement with AISLIC, the SMS has determined that the costs of cleanup at the Site should be covered under the AISLIC insurance policy and therefore denies the requests for that reason as well.

And, finally, based on the circumstances involving Vallee's recoveries from AISLIC and Gulf Underwriters, the SMS declines to make the requested payments in order to preserve the funds in the PCF for more pressing cases in which the owner or operator of a facility does not have recoveries relating to a site which could be applied to investigation and remediation of the site.

For all these reasons, the requests are denied.

If you would like to appeal the decision in this letter, you must do so in writing within 60 days by submitting a written appeal to George Desch, Division Director, Waste Management Division. If you have any questions concerning the contents of this letter, please feel free to contact me at the information listed above, or my supervisor, Chuck Schwer at 241-3888.

Sincerely,

Tami Wuestenberg

Tami Wuestenberg
Environmental Analyst
Sites Management Section

VERMONT

State of Vermont
Department of Environmental Conservation
Waste Management Division
103 South Main Street/West Building
Waterbury, VT 05671-0404
(802) 241-4528
FAX (802) 241-3296
tami.wuestenberg@state.vt.us

AGENCY OF NATURAL RESOURCES

July 30, 2010

Bruce C. Palmer
Downs Rachlin Martin PLLC
PO Box 99
St. Johnsbury, VT 05819-0099

Re: Petroleum Cleanup Fund Reimbursement Determination
New Haven Mobil, New Haven, VT
SMS Site #92-1251

Dear Attorney Palmer:

On June 3, 2010, the Sites Management Section of the Waste Management Division of the Department of Environmental Conservation ("Department") denied seven itemized requests by R.L. Vallee, Inc. ("Vallee") for Vermont Petroleum Cleanup Fund ("PCF") reimbursement relating to the New Haven Mobil site (the "Site"). That decision is attached as Appendix 1. On July 2, 2010, the Waste Management Division received an appeal that you filed on behalf of Vallee from the June 3, 2010 Department's decision ("Vallee's appeal"). Vallee's appeal consists of your letter to me dated July 1, 2010, a copy of which is attached as Appendix 2.

Vallee's appeal is hereby denied for the reasons set forth below. I will address Vallee's arguments in the order that they are presented in your letter.

Vallee Argument #1 -- Vallee argues that its requests for PCF reimbursement may not be denied unless and until the State of Vermont obtains a judicial determination that insurance coverage is available. Vallee provides no legal support for this assertion. As noted in the Department's June 3, 2010 decision, the Procedures for Reimbursement from the Petroleum Cleanup Fund provide that it is Vallee's burden as an applicant for PCF reimbursement "to demonstrate that there is no insurance coverage which would cover the costs of cleanup." Procedures, p. 4. Moreover, as noted in the Department's decision, Vallee took the position in a lawsuit it filed against American International Specialty Lines Insurance Company ("AISLIC") that an AISLIC policy provides coverage for cleanup of contamination at the Site and Vallee has received payments from AISLIC and from another insurance company, Gulf Underwriters. Vallee does not dispute these facts. Under the circumstances presented, the conclusion that Vallee has failed to meet its burden to show that no insurance coverage is available is more than reasonable. Finally, Vallee does not address an additional basis stated in the Department decision for denying the requests – the appropriateness of preserving funds in the PCF for more pressing cases in which

the owner or operator of a facility does not have recoveries relating to a site which could be applied to investigation and remediation of the site. The PCF statute, 10 V.S.A. §1941(b), allows for the exercise of discretion when considering requests for disbursements and these circumstances are appropriate considerations.

Vallee's Argument #2 – Vallee argues that the Department "should not deny all reimbursement." In support of this argument, Vallee asserts that the AISLIC policy is a "claims made" policy in effect for one year, 1998, that any coverage under the policy is limited to allocable costs attributable to an aboveground storage tank release discovered at the Site in 1998 and does not extend to costs attributable to a leak discovered at the Site in 1992 or any other release and, therefore, that allocation of PCF expenditures is necessary. This argument is rejected for several reasons. First, even assuming that Vallee could show that some portion of the requested costs were addressing a pre-1998 release, Vallee has not demonstrated that AISLIC would be entitled to allocation or that the AISLIC policy would not be required to cover the full amount of the costs anyway in order to address the aboveground storage tank release. Second, all costs for which Valle seeks reimbursement in its seven requests post-date by many years the aboveground tank release discovered in 1998, and Vallee has made no attempt to demonstrate that any of these costs are attributable in whole or in part to a pre-1998 release. Third, even assuming that the AISLIC policy would only be required to cover some portion (attributable to the aboveground storage tank release) of the costs for which Vallee seeks reimbursement, Vallee has not demonstrated why it should receive any reimbursement in light of the fact that Vallee has received payments from both AISLIC and Gulf Underwriters and the additional fact that the Department has already made extensive payments in response to the 1998 release, and yet has received no payments from the AISLIC insurance policy for any of those expenditures. The amount of payments made by the Department since the 1998 release far exceed the cumulative amount of the payments requested by Vallee which the Department has denied -- $19,158.66. These circumstances justify the decision to deny the requests for reimbursement. Finally, as stated above, Vallee does not address the Department's other justification of preserving funds in the PCF for more pressing cases in which the owner or operator of a facility does not have recoveries relating to a site which could be applied to investigation and remediation of the site. For each of these reasons, Vallee's argument that the Department should not have denied all reimbursement is rejected.

Vallee's Argument #3 – Vallee seems to argue that because the Department did not file its own claims against McIntyre Fuels, Inc. or Griffin International, Inc. it cannot base its decision to any extent on Vallee's receipt of payments from McIntyre's and Griffin's insurance companies. The issue presented here is whether the Department can consider the circumstances involving Vallee's pursuit of claims and recoveries from insurance companies in deciding whether to grant or deny requests by Vallee for PCF disbursements. Responsible parties are jointly and severally liable for cleanup costs under the law, and the State of Vermont has discretion to seek recovery from any one or more responsible parties. In addition, Vallee has not demonstrated that the Department is without discretion to consider the fact that Vallee has received payments from insurance companies or to consider any other circumstances set forth in the SMS's decision or that it abused its discretion in any way.

Vallee's Argument #4 -- Vallee asserts that Griffin is not a responsible party and that therefore any reliance by the Department on the fact that Vallee received payments from Griffin's insurer is inconsistent with 10 V.S.A. § 1941 and the common law of subrogation. Vallee also argues that the

Department cannot rely on Vallee's recovery from Griffin's insurer because it was aware as a result of other litigation that Griffin was insured and that it never pursued a claim against Griffin's insurer or declared Griffin to be a responsible party. Vallee's first argument is inconsistent with Vallee's state court lawsuit against Griffin in which it alleged that Griffin is a responsible party under 10 V.S.A. § 6615. Vallee cannot use that argument to obtain an insurance recovery and then take the opposite position when requesting PCF reimbursement. With respect to Vallee's second argument, whether or not the State was aware that Griffin held any insurance policies that might apply to the Site, I have previously explained that the State was under no requirement to declare Griffin to be a responsible party or to pursue a claim against Griffin or against its insurer. The Department was entitled to consider the fact that Vallee pursued claims against Griffin and obtained a recovery from Griffin's insurer.

Vallee's final argument is that it has been "singled out" and is being selectively treated based on impermissible considerations "as compared with others similarly situated." However, Vallee has not presented any factual support for these allegations, and the Department is not aware of any.

For all the reasons set forth in the SMS's decision and in this letter, Vallee's appeal is denied.

* * * *

Pursuant to 10 V.S.A. Chapter 220, any appeal of this decision must be filed with the clerk of the Vermont Superior Court, Environmental Division, within 30 days of the date of the decision. The appellant must attach to the Notice of Appeal the entry fee of $225.00 payable to the State of Vermont.

The Notice of Appeal must specify the parties taking the appeal and the statutory provision under which each party claims party status; must designate the act or decision appealed from; must name the Vermont Superior Court, Environmental Division; and must be signed by the appellant or their attorney. In addition, the notice of appeal must give the address or location and description of the property, project or facility with which the appeal is concerned and the name of the applicant for any permit involved in the appeal.

The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on-line at www.vermontjudiciary.org. The address for the Vermont Superior Court, Environmental Division is 2418 Airport Road, Suite 1, Barre, VT 05641 (Tel. #802-828-1660).

Sincerely,

George Desch, Director
Waste Management Division

Appendix 1

VERMONT

State of Vermont
Department of Environmental Conservation
Waste Management Division
103 South Main Street/West Building
Waterbury, VT 05671-0404
(802) 241-4528
FAX (802) 241-3296
tami.wuestenberg@state.vt.us

AGENCY OF NATURAL RESOURCES

June 3, 2010

Mr. Skip Vallee
R.L. Vallee, Inc.
PO Box 192
280 South Main Street
St. Albans, Vermont 05478

Re: Petroleum Cleanup Fund Reimbursement Determination
New Haven Mobil, New Haven, Vermont
SMS Site #92-1251

Dear Mr. Vallee:

The Vermont Agency of Natural Resources, Department of Environmental Conservation, Sites Management Section ("SMS") hereby denies the following requests of R.L. Vallee, Inc. ("Vallee") for Vermont Petroleum Cleanup Fund ("PCF") reimbursement in connection with cleanup of the New Haven Mobil site (the "Site"):

1. May 2010 – POET Sampling - $983.65;
2. April 2010- POET Sampling- $908.30;
3. February/March 2010- POET Sampling and Reporting- $2,356.30;
4. December 2009/January 2010- POET Sampling and Reporting- $1,573.40;
5. July-November 2009- Groundwater Monitoring and Reporting/Site Repairs- $8,102.11;
6. October/November 2009- POET Sampling and Reporting- $2,215.65; and
7. July-September 2009- POET Sampling and Reporting- $3,019.25.

The Agency of Natural Resources' authority to make PCF disbursements is limited to uninsured costs, 10 V.S.A. § 1941(b). The Procedures for Reimbursement from the Petroleum Cleanup Fund provide that "the responsible party must be able to demonstrate that there is no insurance which would cover the costs of cleanup." Procedures, p. 4.

Vallee has failed to demonstrate that no insurance coverage is available. Documents recently obtained from Vallee by the SMS indicate that Vallee filed a lawsuit against American International Specialty Lines Insurance Company ("AISLIC"), U.S.D.C. D. Vt. Civil No. 2:05-cv-131, in which it asserted that an AISLIC insurance policy provides coverage for cleanup of contamination at the Site. The documents also indicate that pursuant to a settlement of the lawsuit, Vallee has received payments from AISLIC, and it appears that an additional payment may be made by AISLIC to Vallee in the future. In addition, the documents indicate that Vallee has received a payment from another insurance company, Gulf Underwriters Insurance Company, in connection with an insurance policy that Gulf

Underwriters issued to Griffin International and that Vallee received the payment in settlement of its claims against Griffin regarding contamination at the Site.

In addition, apart from Vallee's settlement with AISLIC, the SMS has determined that the costs of cleanup at the Site should be covered under the AISLIC insurance policy and therefore denies the requests for that reason as well.

And, finally, based on the circumstances involving Vallee's recoveries from AISLIC and Gulf Underwriters, the SMS declines to make the requested payments in order to preserve the funds in the PCF for more pressing cases in which the owner or operator of a facility does not have recoveries relating to a site which could be applied to investigation and remediation of the site.

For all these reasons, the requests are denied.

If you would like to appeal the decision in this letter, you must do so in writing within 60 days by submitting a written appeal to George Desch, Division Director, Waste Management Division. If you have any questions concerning the contents of this letter, please feel free to contact me at the information listed above, or my supervisor, Chuck Schwer at 241-3888.

Sincerely,

Tami Wuestenberg

Tami Wuestenberg
Environmental Analyst
Sites Management Section

Appendix 2

DRM
DOWNS RACHLIN MARTIN PLLC

BRUCE C. PALMER
bpalmer@drm.com

July 1, 2010

Mr. George Desch, Director
Department of Environmental Conservation
Waste Management Divisions
103 South Main Street/ West Building
Waterbury, VT 05671-0404

VIA FEDERAL EXPRESS AND FIRST CLASS MAIL

Re: Petroleum Cleanup Fund (PCF) Eligibility Determination
New Haven Mobil, New Haven, VT
Site No. 92-1251

Dear Mr. Desch:

R. L. Vallee, Inc. (Vallee) appeals the attached decision of the Department of Environmental Conservation (DEC) dated June 3, 2010. As grounds, Vallee states as follows:

1. The Department has not established that insurance covers the PCF reimbursement Vallee seeks. The Vermont Attorney General, on behalf of the Agency of Natural Resources (ANR), has filed a lawsuit in which it seeks to recover insurance proceeds, but no one has established coverage. If the State cannot establish coverage, there are no grounds for denying Vallee's claims for reimbursement. Conversely, if the State establishes coverage, the proceeds will reimburse the PCF. It is premature to use insurance coverage as a basis to deny reimbursement, and an abuse of discretion.

2. The Chartis Policy at issue in the pending lawsuit is a "claims made" policy in force only in 1998. If it did apply, it could only cover an allocable portion of the expenditures at the New Haven Mobil site. It could only apply to the allocable costs attributable to the release of contaminants from the supply line attached to the former above ground storage tanks discovered by Vallee in 1998 and reported in that year to Chartis. The Chartis Policy cannot cover expense related to the original leak discovered in 1992, or to any

other releases. As not all expense at the Site is attributable to the leak discovered in 1998, DEC should not deny all reimbursement.

3. ANR/DEC has always had the right to pursue responsible parties or insurance companies under 10 V.S.A. 1941(f), but it declined to pursue McIntyre Fuels, Inc. or its contractor, Griffin International, Inc. ANR/DEC declined despite Vallee's strong encouragement that it sue those parties. Given such decision not to participate, DEC should not now punish Vallee for moving forward to obtain recoveries that protect its own interests in reimbursement for potential liabilities and costs not covered by the PCF. ANR's pursuit of recovery is certainly not mandatory, is not exclusive and does not afford ANR with priority in recoveries unrelated to PCF expenditures. Punishing Vallee for pursuing its legal rights is also an abuse of discretion.

4. The Legislature in providing that the PCF would cover only "uninsured costs" meant costs not covered by liability or property insurance of the PCF fund applicant, or other responsible parties. Vallee's settlement with Griffin International, Inc. would not be a recovery of monies to which the State is entitled under 10 V.S.A. §1941(f), or any common law right of subrogation, as that entity is not a responsible party. Denying reimbursement because Vallee recovered from Griffin and its insurer is likewise an abuse of discretion, particularly because ANR has always known Griffin was insured as the result of other litigation in which it is involved, but has never sought coverage for the New Haven site, nor could it have sought such coverage without declaring Griffin a responsible party.

Over the past several years, Vallee has repeatedly asked to sit down with DEC to discuss the New Haven cleanup plan and funding for the cleanup. Given the above, and DEC's listing of the New Haven site as a "high" priority site, Vallee feels strongly that DEC has unconstitutionally singled it out for enforcement. As compared with others similarly situated, Vallee is being selectively treated based on impermissible considerations, for the apparent purpose inhibiting or punishing its exercise of legal rights DEC chose not to exercise.

For those reasons, we request that you reverse the decision of the Department and authorize reimbursement for the listed expenses.

Sincerely,

Bruce C. Palmer

c: Skip Vallee

APPENDIX 2

Agreement of Parties Regarding PCF Eligibility of Pending Unreimbursed Costs
Subject to Vallee's Initial Funding Obligation

New Haven Mobil
SMS Site #92-1251

Date	Consultant	Amount	Notes	PCF Eligibility
10/26/06	Verterre	$5,869.16	2006 spill submittal	No
10/29/09	Verterre	$1,509.63	*Monthly POET Sampling	Yes
1/25/10	Verterre	$1,107.83	*Monthly POET Sampling	Yes
1/25/10	Verterre	$4,051.06	Groundwater Monitoring & Reporting; road box repairs	Yes
2/12/10	Verterre	$786.70	*Monthly POET Sampling	Yes
4/1/10	Verterre	$1,178.15	*Monthly POET Sampling	Yes
5/5/10	Verterre	$454.15	*Monthly POET Sampling	Yes
5/24/10	Verterre	$491.83	*Monthly POET Sampling	Yes
6/1/10	Verterre	$473.75	*Monthly POET Sampling	Yes
8/5/10	Verterre	$543.53	*Monthly POET Sampling	Yes
9/14/10	Verterre	$489.08	*Monthly POET Sampling	Yes
10/6/10	Verterre	$695.55	*Monthly POET Sampling	Yes
10/6/10	Verterre	$420.00	Corrective Action Plan	Yes
11/15/10	Verterre	$521.20	*Monthly POET Sampling	Yes
11/15/10	Verterre	$3,176.50	Corrective Action Plan	Yes
11/1/10	Verterre	$5,227.94	Bedrock Well Installation & Pump Test	Yes
11/17/10	Verterre	$5,610.00	Bedrock Well Installation & Pump Test	Yes

*Representing the portion of invoice not covered by 3rd Party (50%); the 3rd party portion (50% of invoice) will be paid by the PCF

APPENDIX 3

Accounting for RL Vallee Inc. Settlement Agreement

SMS Site #92-1251
New Haven Mobil Expenditures

Date	Consultant	Amount	Notes	3rd Party Claims	Yearly Totals (including 3rd party costs)
			Some costs denied, only paid for 80 cubic yards vs. 110;		
4/29/94	Griffin	$1,905.00	plus $10k deductible		1994
11/18/94	Griffin	$4,178.86			$6,083.86
2/17/95	Griffin	$2,198.25			
4/27/95	Griffin	$1,448.33			1995
11/16/95	Griffin	$2,897.46			$6,544.04
10/14/96	Griffin	$20,031.71	Packer test, Down Hole Video, VT Land Surveyors		
10/22/96	Griffin	$3,819.46			
2/29/96	Griffin	$2,924.74			
4/24/96	Griffin	$2,181.23			
5/13/96	Griffin	$4,085.84			
6/19/96	Griffin	$2,503.44			
8/14/96	Griffin	$6,021.48			1996
12/20/96	Griffin	$5,961.54			$47,529.44
5/1/97	Griffin	$4,017.84			
5/12/97	Griffin	$7,728.76			
5/12/97	Griffin	$5,593.49			
5/12/97		$224.02	Check to VT Water Treatment Company	$224.02	
5/15/97		$224.02	Check to VT Water Treatment Company	$224.02	
6/12/97	Griffin	$2,135.64			
6/13/97	Griffin	$683.75			
6/13/97	Griffin	$6,298.54			
6/13/97	Griffin	$20,844.27	System Installation		
6/13/97	Griffin	$8,251.55			
6/13/97	Griffin	$1,852.56			
6/24/97		$399.02	Check to VT Water Treatment Company	$399.02	
6/26/97	Griffin	$53,109.62	System Installation		
8/1/97	Griffin	$7,246.82			
8/1/97	Griffin	$7,242.60			
8/1/97	Griffin	$1,183.99			
8/8/97		$224.02	Check to VT Water Treatment Company	$224.02	
8/8/97		$224.02	Check to VT Water Treatment Company	$224.02	
8/8/97		$224.02	Check to VT Water Treatment Company	$224.02	
9/3/97	Griffin	$4,515.40			
10/17/97	Griffin	$6,422.10			
11/20/97		$224.02	Check to VT Water Treatment Company	$224.02	
11/20/97	Griffin	$9,484.29			
11/20/97	Griffin	$10,631.89			
12/4/97		$410.02	Check to VT Water Treatment Company	$410.02	
12/16/97	Griffin	$9,342.15			1997
12/23/97	Griffin	$1,634.28			$170,372.70
1/12/98	Griffin	$5,541.48			
2/19/98	Griffin	$6,758.31			
2/18/98		$136.52	Check to VT Water Treatment Company	$136.52	
2/19/98	Griffin	$20,621.00	System Operation - Carbon Drums, removal, replacement		
2/19/98	Griffin	$9,680.21			
3/23/98	Griffin	$16,039.87	System Operation - Carbon Drums, removal, replacement		
3/23/98		$224.02	Check to VT Water Treatment Company	$224.02	
4/6/98	Griffin	$5,398.22			
4/6/98	Griffin	$7,834.30			
4/24/98	Griffin	$12,937.40			
4/24/98	Griffin	$11,325.72			
4/10/98	Griffin	$7,582.78			
4/10/98	Griffin	$2,146.39			
5/19/98	Griffin	$14,619.07	system operation - Carbon Drums, removal, replacement; Plus new mechanical/electrical engineering design		
6/9/98		$224.02	Check to VT Water Treatment Company	$224.02	
6/17/98	Griffin	$31,923.00	Catox		

Accounting for RL Vallee Inc. Settlement Agreement

SMS Site #92-1251
New Haven Mobil Expenditures

Date	Consultant	Amount	Notes	3rd Party Claims	Yearly Totals (including 3rd party costs)
6/17/98	Griffin	$19,182.04	System Operation - Carbon Drums, removal, replacement		
6/17/98	Griffin	$21,434.52	system operation - Carbon Drums, removal, replacement; Plus new mechanical/electrical engineering design		
7/1/98	Griffin	$2,074.80			
7/6/98	Griffin	$875.80			
7/6/98	Griffin	$3,364.30			
7/6/98	Griffin	$24,541.95	stripper		
8/18/98		$426.52	Check to VT Water Treatment Company	$426.52	
9/30/98	Griffin	$17,360.93	Blower ($6k)		
10/5/98	Griffin	$12,404.11			
10/22/98		$426.52	Check to VT Water Treatment Company	$426.52	
11/12/98	Griffin	$18,379.47	Electrical and Control Systems		
11/13/98	Griffin	$1,067.48			
11/13/98	Griffin	$6,205.00			
11/24/98	Griffin	$262.50			
11/23/98		$224.02	Check to VT Water Treatment Company	$224.02	
12/7/98	Griffin	$262.50			
12/11/98		$224.02	Check to VT Water Treatment Company	$224.02	1998
1/8/99	Griffin	$15,849.76	System Startup		$281,708.79
1/21/99		$224.02	Check to VT Water Treatment Company	$224.02	
1/21/99	Griffin	$3,128.92			
2/4/99	Griffin	$525.00			
3/10/99		$224.02	Check to VT Water Treatment Company	$224.02	
3/10/99	Griffin	$2,299.12			
4/16/99	Griffin	$4,382.24			
4/16/99	Griffin	$1,366.46			
4/16/99		$224.02	Check to VT Water Treatment Company	$224.02	
4/23/99	Griffin	$12,443.60			
4/27/99	Griffin	$4,055.55			
6/1/99		$224.02	Check to VT Water Treatment Company	$224.02	
6/21/99	Griffin	$787.50			
7/19/99		$448.04	Check to VT Water Treatment Company	$448.04	
7/23/99	Griffin	$1,273.49			
7/23/99	Griffin	$10,830.66			
10/4/99		$224.02	Check to VT Water Treatment Company	$224.02	
10/21/99		$224.02	Check to VT Water Treatment Company	$224.02	
10/13/99	Griffin	$11,310.69			
11/19/99		$448.04	Check to VT Water Treatment Company	$448.04	
12/1/99	Griffin	$2,739.26			1999
12/28/99	Griffin	$8,707.24			$81,939.69
2/4/00	Griffin	$12,880.97			
2/17/00		$224.02	Check to VT Water Treatment Company	$224.02	
2/24/00	Griffin	$4,717.26			
2/24/00	Griffin	$11,035.14			
3/16/00	Griffin	$8,205.60		$548.28	
4/7/00		$426.52	Check to VT Water Treatment Company	$426.52	
5/11/00		$251.52	Check to VT Water Treatment Company	$251.52	
5/12/00	Griffin	$6,757.46		$534.43	
5/31/00	Griffin	$4,792.96		$409.68	
5/31/00	MacIntyre	$6,858.19	electrical bills		
7/10/00		$224.02	Check to VT Water Treatment Company	$224.02	
7/10/00		$426.52	Check to VT Water Treatment Company	$426.52	
8/15/00	Griffin	$9,496.72		$411.18	
8/15/00	Griffin	$1,958.99			
9/21/00		$426.52	Check to VT Water Treatment Company	$426.52	
10/24/00	Griffin	$13,401.73		$350.80	
10/24/00	MacIntyre	$3,593.05	electrical bills		
11/6/00		$5,915.64	Check to VT Water Treatment Company	$5,915.64	
12/11/00		$432.02	Check to VT Water Treatment Company	$432.02	
12/13/00		$77.60	Check to VT Water Treatment Company	$77.60	

Accounting for RL Vallee Inc. Settlement Agreement

SMS Site #92-1251
New Haven Mobil Expenditures

Date	Consultant	Amount	Notes	3rd Party Claims	Yearly Totals (including 3rd party costs)
12/22/00	Griffin	$7,855.36		$1,142.26	2000
12/22/00	Griffin	$5,496.91		$390.50	$105,454.72
1/12/01		$128.15	Check to VT Water Treatment Company	$128.15	
1/17/01	Griffin	$6,347.51		$1,497.50	
2/8/01		$224.02	Check to VT Water Treatment Company	$224.02	
2/26/01	MacIntyre	$2,264.88	electrical bills		
3/2/01	TSEC	$859.00	$1,000 deductible paid by Vallee		
3/2/01	TSEC	$13,104.90			
3/9/01		$64.55	VT Pure Springs - Church	$64.55	
3/16/01		$410.02	Check to VT Water Treatment Company	$410.02	
3/23/01		$224.02	Check to VT Water Treatment Company	$224.02	
3/22/01	MacIntyre	$2,623.76	electrical bills		
4/10/01		$36.95	VT Pure Springs - Church	$36.95	
4/12/01	Griffin	$2,925.07			
5/16/01		$234.86	Check to VT Water Treatment Company	$234.86	
5/17/01		$24.70	VT Pure Springs - Church	$24.70	
5/22/01		$234.86	Check to VT Water Treatment Company	$234.86	
6/4/01		$234.86	Check to VT Water Treatment Company	$234.86	
6/8/01		-$12.25	Check to VT Water Treatment Company	-$12.25	
6/18/01	Griffin	$33,665.06	4 invoices	$7,726.89	
7/12/01		$234.86	Check to VT Water Treatment Company	$234.86	
7/12/01		$240.36	Check to VT Water Treatment Company	$240.36	
7/19/01	Griffin	$5,500.80		$987.70	
7/19/01	TSEC	$2,589.85			
7/30/01		$45.75	VT Pure Springs - Church	$45.75	
7/30/01		$66.50	VT Pure Springs - Church	$66.50	
8/13/01		$239.26	Check to VT Water Treatment Company	$239.26	
8/17/01	MacIntyre	$3,610.70	electrical bills		
8/17/01	Griffin	$4,941.90		$1,707.81	
8/28/01		$62.35	VT Pure Springs - Church	$62.35	
9/21/01		$116.30	VT Pure Springs - Church	$116.30	
10/10/01		$234.86	Check to VT Water Treatment Company	$234.86	
10/24/01		$53.20	VT Pure Springs - Church	$53.20	
10/19/01		$1,486.36	Check to VT Water Treatment Company	$1,486.36	
11/6/01		$894.72	Check to VT Water Treatment Company	$894.72	
11/6/01	Griffin	$4,104.35		$510.00	
11/14/01	Griffin	$4,805.54		$1,825.25	
11/14/01	Griffin	$3,958.13		$88.50	
12/18/01		$234.86	Check to VT Water Treatment Company	$234.86	2001
12/27/01		-$38.60	VT Pure Springs - Church	-$38.60	$96,976.97
1/7/02	MacIntyre	$4,758.26	electrical bills		
1/22/02		$65.35	VT Pure Springs - Church	$65.35	
2/20/02		$447.36	Check to VT Water Treatment Company	$447.36	
2/22/02		$31.50	VT Pure Springs - Church	$31.50	
3/1/02		$234.86	Check to VT Water Treatment Company	$234.86	
3/8/02	MacIntyre	$1,842.28	electrical bills		
3/8/02	Griffin	$11,559.11	HEAT Pilot test	$1,614.63	
4/15/02		$234.86	Check to VT Water Treatment Company	$234.86	
4/15/02		$212.50	Check to VT Water Treatment Company	$212.50	
4/18/02	Griffin	$1,780.03		$582.00	
4/26/02		$46.50	VT Pure Springs - Church	$46.50	
4/29/02	Griffin	$3,384.85		$1,307.50	
5/10/02	Griffin	$1,524.28			
5/16/02		$234.86	Check to VT Water Treatment Company	$234.86	
5/23/02		$33.60	VT Pure Springs - Church	$33.60	
6/18/02		$234.86	Check to VT Water Treatment Company	$234.86	
6/18/02		$234.86	Check to VT Water Treatment Company	$234.86	
6/21/02		$12.45	VT Pure Springs - Church	$12.45	
7/30/02	Griffin	$1,667.25			
7/25/02		$47.05	VT Pure Springs - Church	$47.05	
8/12/02		$423.86	Check to VT Water Treatment Company	$423.86	
8/28/02		$46.60	VT Pure Springs - Church	$46.60	

Accounting for RL Vallee Inc. Settlement Agreement

SMS Site #92-1251
New Haven Mobil Expenditures

Date	Consultant	Amount	Notes	3rd Party Claims	Yearly Totals (including 3rd party costs)
9/30/02		$49.80	VT Pure Springs Church	$49.80	
10/16/02		$447.36	Check to VT Water Treatment Company	$447.36	
10/23/02		$41.50	VT Pure Springs Church	$41.50	
11/26/02		$33.20	VT Pure Springs Church	$33.20	
12/19/02	Griffin	$22,329.41	Pump test on new supply well	$7,826.88	2002
12/31/02		$53.20	VT Pure Springs - Church	$53.20	$52,011.60
1/31/03		$17.35	VT Pure Springs - Church	$17.35	
1/29/03		$452.86	Check to VT Water Treatment Company	$452.86	
2/24/03		$56.50	VT Pure Springs - Church	$56.50	
3/14/03		$643.36	Check to VT Water Treatment Company	$643.36	
3/25/03		$33.20	VT Pure Springs Church	$33.20	
4/25/03		$29.05	VT Pure Springs - Church	$29.05	
4/29/03		$234.86	Check to VT Water Treatment Company	$234.86	
5/23/03		$61.50	VT Pure Springs Church	$61.50	
6/4/03		$469.72	Check to VT Water Treatment Company	$469.72	
7/16/03		$39.80	VT Pure Springs Church	$39.80	
7/25/03		$447.36	Check to VT Water Treatment Company	$447.36	
7/21/03		$12.45	VT Pure Springs Church	$12.45	
8/27/03		$58.10	VT Pure Springs Church	$58.10	
9/26/03		$447.36	Check to VT Water Treatment Company	$447.36	
9/29/03		$73.95	VT Pure Springs - Church	$73.95	
10/1/03		$1,645.36	Check to VT Water Treatment Company	$1,645.36	
11/3/03		$70.65	VT Pure Springs - Church	$70.65	
11/18/03		$643.36	Check to VT Water Treatment Company	$643.36	
11/20/03		$36.60	VT Pure Springs - Church	$36.60	2003
12/22/03		$36.60	VT Pure Springs - Church	$36.60	$5,509.99
1/30/04		$91.50	VT Pure Springs - Church	$91.50	
3/9/04		$54.90	VT Pure Springs - Church	$54.90	
3/15/04		$257.96	Check to VT Water Treatment Company	$257.96	
3/22/04		$263.46	Check to VT Water Treatment Company	$263.46	
3/24/04		$25.30	Check to VT Water Treatment Company	-$25.30	
3/31/04		$630.28	Check to VT Water Treatment Company	$630.28	
4/28/04		$32.90	VT Pure Springs Church	$32.90	
5/11/04		$262.36	Check to VT Water Treatment Company	$262.36	
5/20/04		$38.60	VT Pure Springs Church	$38.60	
6/22/04		$47.35	VT Pure Springs - Church	$47.35	
7/26/04		$51.50	VT Pure Springs Church	$51.50	
8/4/04		$240.36	Check to VT Water Treatment Company	$240.36	
9/7/04		$40.75	VT Pure Springs - Church	$40.75	
9/29/04		$5,989.42	Check to VT Water Treatment Company	$5,989.42	
9/29/04		$162.05	VT Pure Springs - Church	$162.05	
10/28/04		$109.80	VT Pure Springs Church	$109.80	
11/5/04	Verterre	$9,770.69	Feb-June 2004		
11/5/04	Verterre	$45,682.15	Aug-Dec 2003		
11/16/04		$850.36	Check to VT Water Treatment Company	$850.36	
11/30/04		$2,764.44	Check to VT Water Treatment Company	$2,764.44	
12/7/04		$104.86	Check to VT Water Treatment Company	$104.86	2004
12/28/04		$3,900.00	Cost Recovery - Equipment Sale		$63,520.39
3/3/05	Verterre	$60,949.75	pkg #9		
5/20/05		$18.65	VT Pure Springs - Church	$18.65	
6/29/05		$22.80	VT Pure Springs - Church	$22.80	
7/28/05		$145.45	VT Pure Springs - Church	$145.45	
9/7/05	Verterre	$38,150.37	Aug-Dec 2004		
9/9/05		$219.60	VT Pure Springs - Church	$219.60	
9/27/05		$2,031.92	Check to VT Water Treatment Company	$2,031.92	2005
12/16/05		$10.60	VT Pure Springs - Church	$10.60	$101,549.14
1/24/06		$878.46	Check to VT Water Treatment Company	$878.46	
1/30/06	Verterre	$21,029.38	Jan-July 2005		
2/21/06		$28.05	VT Pure Springs - Church	$28.05	
3/20/06		$45.75	VT Pure Springs Church	$45.75	
4/26/06		$49.80	VT Pure Springs - Church	$49.80	

Accounting for RL Vallee Inc. Settlement Agreement

SMS Site #92-1251
New Haven Mobil Expenditures

Date	Consultant	Amount	Notes	3rd Party Claims	Yearly Totals (including 3rd party costs)
5/26/06		$91.50	VT Pure Springs - Church	$91.50	
6/16/06		$43.10	VT Pure Springs - Church	$43.10	
9/2/06		$2.25	VT Pure Springs - Church	$2.25	
10/19/06		$73.20	VT Pure Springs - Church	$73.20	
11/2/06		$1,585.08	Check to VT Water Treatment Company	$1,585.08	
11/27/06		$73.20	VT Pure Springs - Church	$73.20	
12/6/06		$1,133.29	Check to VT Water Treatment Company	$1,133.29	2006
12/21/06		$91.50	VT Pure Springs - Church	$91.50	$25,124.56
1/25/07		$36.60	VT Pure Springs - Church	$36.60	
2/27/07		$40.11	VT Pure Springs - Church	$40.11	
3/30/07		$90.79	Check to VT Water Treatment Company	$90.79	
5/31/07		$61.91	VT Pure Springs - Church	$61.91	
6/16/07		$23.20	VT Pure Springs - Church	$23.20	
6/22/07		$636.79	Check to VT Water Treatment Company	$636.79	
7/24/07		$109.80	VT Pure Springs - Church	$109.80	
8/17/07		$36.60	VT Pure Springs - Church	$36.60	
9/25/07	Verterre	$12,057.39	August 2005 January 2006 Invoice total was $21,057.39 minus $9,000 for remaining deductible.		
9/25/07	Verterre	$8,272.51	Feb-May 2006		
9/25/07	Verterre	$21,674.00	June-September 2006		
9/25/07	Verterre	$9,292.95	October 2006 January 2007		
9/28/07		$82.35	VT Pure Springs - Church	$82.35	
10/24/07		$36.60	VT Pure Springs - Church	$36.60	
11/15/07		$2,147.58	Check to VT Water Treatment Company (1230.79 church)	$1,230.79	2007
12/13/07		$3,125.78	Check to VT Water Treatment Company (2338.99 church)	$2,338.99	$57,724.96
1/4/08	Verterre	$7,119.01	March 2007-November 2007; POET sampling only (pkg 17)	$3,559.51	
1/23/08		$24.90	VT Pure Springs - Church	$24.90	
2/26/08		$631.09	Check to VT Water Treatment Company (0.00-church)	$0.00	
2/29/08		$67.43	VT Pure Springs - Church (2 invoices - one for $.65)	$67.43	
3/3/08	Verterre	$2,874.22	December 2007-January 2008; POET sampling only (pkg 19)	$1,437.11	
3/20/08		$24.90	VT Pure Springs - Church	$24.90	
4/17/08		$13.20	VT Pure Springs - Church	$13.20	
4/30/08		$255.08	Check to VT Water Treatment Company (0.00-church)	$0.00	
5/20/08		$21.50	VT Pure Springs - Church	$21.50	
5/28/08	Verterre	$3,016.42	February 2008 April 2008; POET sampling only (pkg 20)	$1,508.21	
6/12/08		$34.05	VT Pure Springs - Church	$34.05	
6/19/08	Verterre	$17,786.46	February 2007-November 2007; Pkg 18 - Site operations. Denied $1,233.49; $8,118.01 - 3rd party supply well sampling	$8,118.01	
6/19/08	Verterre	$7,646.14	December 2007-March 2008; Pkg 21 - Site operations; Denied $273.00;		
8/8/08		$664.89	Check to VT Water Treatment Company (0.00-church)	$0.00	
7/18/08		$34.05	VT Pure Springs - Church	$34.05	
9/17/08		$8.85	VT Pure Springs - Church	$8.85	
9/17/08		$630.69	Check to VT Water Treatment Company (0.00-church)	$0.00	
11/12/08		$11.40	VT Pure Springs - Church	$11.40	
11/12/08		$319.69	Check to VT Water Treatment Company (0.00-church)	$0.00	
11/12/08	Verterre	$3,654.25	May 2008-July 2008 - POET sampling only (pkg 22)	$1,827.13	
12/11/08		$109.80	VT Pure Springs - Church	$109.80	

Accounting for RL Vallee Inc. Settlement Agreement

SMS Site #92-1251
New Haven Mobil Expenditures

Date	Consultant	Amount	Notes	3rd Party Claims	Yearly Totals (including 3rd party costs)
12/11/08		$1,859.58	Check to VT Water Treatment Company (1236.39 church)	$1,236.39	2008
12/11/08	Verterre	$12,560.79	May 2008-August 2008 - CAP		$59,368.39
3/20/09	Verterre	$3,883.55	August 2008-November 2008 POET Sampling (pkg23)	$1,941.78	
5/15/09	Verterre	$2,965.30	December 2008-February 2009 POET Sampling (pkg25)	$1,482.65	
5/28/09		$69.95	VT Pure Springs - Church	$69.95	
5/28/09		$630.69	Check to VT Water Treatment Company (0.00-church)	$0.00	
6/24/09		$54.90	VT Pure Springs - Church	$54.90	
7/24/09		$54.90	VT Pure Springs - Church	$54.90	
8/26/09		$14.00	VT Pure Springs - Church	$14.00	
9/10/09	Verterre	$3,016.75	March 2009-May 2009 - POET Sampling (pkg 26)	$1,508.38	
9/10/09	Verterre	$588.25	September 2008-May 2009 Admin. site maint.		
9/25/09		$32.30	VT Pure Springs Church	$32.30	
10/8/09		$630.69	Check to VT Water Treatment Company (0.00-church)	$0.00	
10/23/09		$35.20	VT Pure Springs - Church	$35.20	
11/4/09		$348.19	Check to VT Water Treatment Company (0.00-church)	$0.00	
11/7/09		$1,172.19	Check to VT Water Treatment Company (0.00-church)	$0.00	
11/19/09		$55.70	VT Pure Springs Church	$55.70	2009
12/17/09		$61.60	VT Pure Springs - Church	$61.60	$13,614.16
2/1/10		$73.20	VT Pure Springs - Church	$73.20	
2/1/10		$2,476.88	Check to VT Water Treatment Company (0.00-church)	$0.00	
2/16/10		$3.00	Town of New Haven - Copy fees		
2/26/10		$73.20	VT Pure Springs - Church	$73.20	
5/14/10		$73.20	VT Pure Springs Church	$73.20	
5/26/10		$73.20	VT Pure Springs Church	$73.20	
7/15/10		$18.50	VT Pure Springs Church	$18.50	
8/4/10		$41.50	VT Pure Springs - Church	$41.50	
8/25/10		$623.19	Check to VT Water Treatment Company (0.00-church)		
8/25/10		$49.80	VT Pure Springs - Church	$49.80	
9/30/10		$91.50	VT Pure Springs - Church	$91.50	2010
10/25/10		$5.95	VT Pure Springs - Church	$5.95	$3,554.22

PCF Monies Spent (not including 3rd party)	**$1,073,055.60**	**3rd Party Costs**	**$105,532.03**
Remaining PCF Balance for Remediation	**$906,944.40**	**Remaining PCF Balance for 3rd Party Costs**	**$894,467.97**

NEW HAVEN MOBIL
TABLE 6: CORRECTIVE ACTION PLAN COSTS - SOIL PILE CONSTRUCTION - FRONT FIELD

Date: November 11, 2010
SITE Name: New Haven Mobil
Verterre Project Manager: Martha Roy
Verterre Project #: 95051
Site Location: New Haven, VT

The Verterre Group
414 Roosevelt Highway
Colchesester, VT 05446

	TASK	CONTRACTOR	DESCRIPTION	UNITS	TYPE	RATE	ENG/HYDRO	SUB EXP	LAB	OTHER	TOTALS
CAP1	***Obtain necessary Permits***	Verterre	Principal	2	hr	$125.00	$250.00				
	Digsafe Property	Verterre	Project Manager	40	hr	$90.00	$3,600.00				
	VTRANS Permit - meet Travis on Site	Verterre	Field Technician	8	hr	$65.00	$520.00				
	Update HASP	Verterre	mileage	140	mi	$0.50				$70.00	
	Stormwater & Construction Permit	Verterre	Drafting	4	hr	$70.00	$280.00				
		Phelps	Stormwater permit	1	ea	$9,900.00		$9,900.00			
		Verterre	Clerical	1	hr	$50.00	$50.00				
		Verterre	Fees (estimate)	1	est	$330.00				$330.00	
						Subtotal	$4,700.00	$9,900.00	$0.00	$400.00	$15,000.00
CAP2	***Attend Meetings***	Verterre	Principal	6	hr	$125.00	$750.00				
	Attend kick off meeting State Verterre Phelps Vallee Excavator	Verterre	Project Manager	20	hr	$90.00	$1,800.00				
	Meet with Town of New Haven										
	Discuss Project Funding	Verterre	Staff Scientist	8	hr	$75.00	$600.00				
		Verterre	mileage	200	mi	$0.50				$100.00	
						Subtotal	$3,150.00	$0.00	$0.00	$100.00	$3,250.00
CAP4	***Baseline Groundwater & Parameter Sampling***	Verterre	Project Manager	2	hr	$90.00	$180.00				
	Sample all Overburden and Bedrock wells for VOCs	Verterre	Staff Scientist (baseline table prep for data)	4	hr	$75.00	$300.00				
	Sample all Overburden and Bedrock wells for DO, pH, Temp, ORP	Verterre	Field Tech	33	hr	$65.00	$2,145.00				
		Verterre	Mileage	70	mi	$0.50				$35.00	
	Include data in excavation report	Verterre	Interface Probe	1	day	$50.00				$50.00	
		Verterre	Well Sample Fee	19	ea	$15.00				$285.00	
		Geotech	Grundfos pump and Controller	1	day	$205.00		$225.50			
		Verterre	Tubing	500	ft	$0.14				$70.00	
	Digsafe for Excavation	Verterre	Generator	1	day	$50.00				$50.00	
		Verterre	Multimeter - DO, pH, Temp, ORP	1	day	$100.00				$100.00	
		Laboratory	EPA 8021B analysis (wells, trip, 2 dups)	22	ea	$54.00			$1,306.80		
						Subtotal	$2,625.00	$225.50	$1,306.80	$590.00	$4,747.30

P:\95051_new haven\2010 CAP revisions\2010_CAP estimate_drmsoil pile constr-FrontField

APPENDIX 4

NEW HAVEN MOBIL
TABLE 5: CORRECTIVE ACTION PLAN COSTS - SOIL PILE CONSTRUCTION - FRONT FIELD

Date: November 11, 2010
SITE Name: New Haven Mobil
Verterre Project Manager: Martha Roy
Verterre Project #: 95051
Site Location: New Haven, VT

The Verterre Group
414 Roosevelt Highway
Colchester, VT 05446

	TASK	CONTRACTOR	DESCRIPTION	UNITS	TYPE	RATE	ENG/HYDRO	SUB EXP	LAB	OTHER	TOTALS
CAP5	*Construct staging area for on site biopiles*	Verterre	Principal	2	hr	$125.00	$250.00				
	1 Construct access road to staging area (if necessary)	Verterre	Project Manager	40	hr	$90.00	$3,600.00				
	2 Install impermeable liner, piping, stone and fabric	Verterre	Field Technician	252	hr	$65.00	$16,380.00				
	Cover tops of piles to prevent moisture from getting in	Verterre	mileage	770	mi	$0.50				$385.00	
	Install temp. safety fence around biopile staging area	Ferguson	Ventilation piping	1	est	$15,000.00		$16,500.00			
			Hardwood Chips to add to pile	1	est	$27,000.00		$29,700.00			
			Irrigation Piping for Top of Piles	1	est	$8,000.00		$8,800.00			
		Marteli	Construction of Access Roads to Pile	2400	ft	$22.00		$58,080.00			
		Marteli	Excavation of top soil and lay crushed stone	740	cyr	$5.00		$4,070.00			
		Reef Industries	Impermeable soil pile liner Permeflex X-210	84	roll	$588.00		$54,331.20			
		Grainger	Safety Fencing & Signs	2	est	$1,500.00		$3,300.00			
	2 Install Jersey Barricades	Marteli	Filter Fabric	1	est	$4,000.00		$4,400.00			
	3 Install Safety Fenced Signs	Pike	1.5" Stone (1500 yards for vent piping)	1875	tons	$12.85		$26,503.13			
		Pike	3.5" Stone (600 yards for water piping on top)	750	tons	$12.85		$10,601.25			
	4 Install silt fencing on downhill side (well side) for erosion control	Grainger	Ventilation Fans	5	ea	$58.00		$319.00			
		Geotech	Carbon Drums for soil pile venting	5	ea	$575.00		$3,162.50			
		Marteli	Install silt fencing	6	ea	$350.00		$2,310.00			
	Carbon Drum install during excavation	EPS	Carbon Drum disposal	5	ea	$300.00		$1,650.00			
	Carbon Drum Disposal pick-up when 4 drums stockpiled	EPS	Stop Fee & Fuel Surcharge	1	ea	$85.00		$93.50			
		SD Ireland	Jersey Barricades	1	est	$4,140.00		$4,554.00			
		Marteli	Signage	1	est	$4,000.00		$4,400.00			
						Subtotal	$20,230.00	$232,774.58	$0.00	$385.00	$253,389.58
CAP6	*Dewatering System Set up*	Verterre	Project Manager	6	hr	$90.00	$540.00				
		Selkoup Electric	Electrical Installation	1	est	$1,500.00		$1,650.00			
		Verterre	Electric cords	1	ls	$200.00				$200.00	
	2 Coordinate delivery of Frac Tank and install treatment system	Verterre	Field Tech II	120	hr	$65.00	$7,800.00				
	3 Install first set of overburden dewatering sumps before excavation	Verterre	mileage	350	mi	$0.50				$175.00	
	4 Install second set of dewatering sumps during excavation	Marteli	Sump Installation	2	est	$1,200.00		$2,640.00			
		Verterre	Misc PVC Piping	1	est	$200.00				$200.00	
		Verterre	PID	1	est	$90.00				$90.00	
		Verterre	6 Mil Poly 20x100	0.5	roll	$125.00				$62.50	
		Baker Tanks	mob/demob of treatment system	1	ea	$3,200.00		$3,520.00			
		Baker Tanks	mob/demob of frac tank	1	ea	$3,200.00		$3,520.00			
		Baker Tanks	Fuel Surcharge	1	ea	$350.00		$385.00			
						Subtotal	$8,340.00	$11,715.00	$0.00	$727.50	$20,782.50
CAP7	***Dewatering Prior to and During Soil Removal Activities***	Verterre	Project Manager (Reporting discharge permit)	20	hr	$90.00	$1,800.00				
	Assumes 12 hour days for Field Tech II	Verterre	Field Tech II	72	hr	$65.00	$4,680.00				
	Treatment system includes pump, bag filter housing, valves and 2 flow meters	Essex Rental	3" Trash Pump Rental	2	months	$450.00		$990.00			
		Essex Rental	3" x 50' Hose Rental (16 hoses)	2	months	$1,680.00		$3,696.00			
		Essex Rental	2" x 50' Hose Rental (20 hoses)	2	months	$2,100.00		$4,620.00			
	Dewater week ahead of time	Verterre	3" Grundfos pump system for Bedrock Well	2	months	$1,425.00				$2,850.00	
		Verterre	Dewatering pumps (6 pumps)	2	months	$2,100.00				$4,200.00	
		Verterre	Filters	100	ea	$8.00				$800.00	
		Verterre	Misc PVC	1	est	$400.00				$400.00	
		Baker Tanks	Carbon - 4000 lbs	4000	lb	$0.92		$4,048.00			
		Baker Tanks	Treatment System Rental - 2 - 2k vessels	2	months	$4,100.00		$9,020.00			
		Baker Tanks	*frac tank rental (20K)*	2	months	$1,500.00		$3,300.00			
	Clean treatment system	EPS	Waste Disposal (Cubic Yard Boxes)	6	ea	$450.00		$2,970.00			
		EPS	Treatment System Cleaning	1	ls	$2,500.00		$2,750.00			
		EPS	Stop Fee & Fuel Surcharge	1	ea	$325.00		$357.50			
		CVPS	Electricity	2	months	$500.00		$1,100.00			
	(1 Inf. 2 Mid. 2 Eff. 2 times pr month)	Laboratory	VOCs 8021 (inf. mid. eff- 2 times per month)	20	ea	$54.00			$1,188.00		

NEW HAVEN MOBIL

TABLE 5: CORRECTIVE ACTION PLAN COSTS - SOIL PILE CONSTRUCTION - FRONT FIELD

Date: November 15, 2010
SITE Name: New Haven Mobil
Verterre Project Manager: Martha Roy
Verterre Project #: 95051
Site Location: New Haven, VT

The Verterre Group
414 Roosevelt Highway
Colchester, VT 05446

TASK	CONTRACTOR	DESCRIPTION	UNITS	TYPE	RATE	ENG/HYDRO	SUB EXP	LAB	OTHER	TOTALS
	Laboratory	TPH-DRO (inf, mid, eff- 2 times per month)	20	ea	$83.00			$1,826.00		
	Verterre	Mileage	350	ea	$0.50		$192.50			
					Subtotal	$6,480.00	$33,044.00	$3,014.00	$8,250.00	$50,788.00
CAP8 ***Excavation of Contaminated Soil***	Verterre	Project Manager	84	hr	$90.00	$7,560.00				
Assumes 12 hour days for Staff Scientist for 31 days	Verterre	Staff Scientist	380	hr	$75.00	$28,500.00				
Assumes 12 hour days for Field Tech II for 31 days	Verterre	Field Tech II	380	hr	$65.00	$24,700.00				
Collect samples for waste characterization (<1000 ppm)	Verterre	PID (weekly rate)	8	ea	$350.00				$2,800.00	
	Verterre	LEL	8	ea	$350.00				$2,800.00	
	Verterre	PPE	1	ea	$2,000.00				$2,000.00	
	Verterre	Mileage	3,700	ea	$0.50				$1,850.00	
	Martell	Remove Pump Island & Storage area Concrete	1	est	$5,000.00		$5,500.00			
							$0.00			
	Verterre	6 Mil Poly Temporary Stockpile	4	ea	$125.00				$500.00	
	Martell	Remove c/l fencing	1	ea	$1,000.00		$1,100.00			
	Martell	Excavate, backfill, compacting of excavation area	7,125	yd³	$32.00		$250,800.00			
Protect Bedrock Wells	Martell	Construct Soil Piles	7,125	yd³	$5.00		$39,187.50			
	Bourdeau Brothers	Bulk Fertilizer	1	est	$5,343.75		$5,878.13			
	Ferguson	6" Steel pipe	1	est	$500.00		$550.00			
	P&P Septic	Port-o-let	2	months	$135.00		$297.00			
	JR's rubish	Roll-off Dumpster	1	est	$1,200.00		$1,320.00			
	Mod Space	Job Trailer Rental	1	est	$1,800.00		$1,980.00			
							$0.00			
	Phelps	Design of Infiltration Trench	1	est	$2,500.00		$2,750.00			
	Pike	3/4" Stone for Infiltration Trench	28	tons	$12.85		$395.78			
	Ferguson	Piping for Infiltration Trench	1	est	$500.00		$550.00			
	Martell	Clay	1	est	$600.00		$660.00			
	Ferguson	Filter Fabric	2	rolls	$105.00		$231.00			
	Martell	Bedrock Sump Install	1	est	$5,000.00		$5,500.00			
Replace roadboxes for bedrock wells	Verterre	Roadbox (8")	5	ea	$100.00				$500.00	
Collect confirmatory sidewall and bottom samples where possible	Laboratory	VOCs 8021	20	ea	$54.00			$1,188.00		
	Laboratory	TPH-DRO	20	ea	$83.00			$1,826.00		
					Subtotal	$60,760.00	$316,699.41	$3,014.00	$10,450.00	$390,923.41
CAP09										
CAP10 ***Base Preparation and Paving***	Verterre	Project Manager	2	hr	$90.00	$180.00				
	Desautels	Paving	1	est	$73,500.00		$80,850.00			
					Subtotal	$180.00	$80,850.00	$0.00	$0.00	$81,030.00
CAP11 ***Fencing Installation***	Verterre	Project Manager	4	hr	$90.00	$360.00				
1. Install protective fencing around the soil piles	Verterre	Field Tech	8	hr	$65.00	$520.00				
2. Re-install the concrete and fencing for the dumpster area	Verterre	Mileage	70	est	$0.50				$35.00	
	Middlebury Fence	Materials and Installation - Dumpster area	1	est	$6,000.00		$6,600.00			
	Middlebury Fence	Materials and Installation - Soil Piles	1	est	$41,000.00		$45,100.00			

NEW HAVEN MOBIL
TABLE 5: CORRECTIVE ACTION PLAN COSTS - SOIL PILE CONSTRUCTION - FRONT FIELD

Date: November 11, 2010
SITE Name: New Haven Mobil
Verterre Project Manager: **Martha Roy**
Verterre Project #: 95051
Site Location: New Haven, VT

The Verterre Group
414 Roosevelt Highway
Colchester, VT 05446

	TASK	CONTRACTOR	DESCRIPTION	UNITS	TYPE	RATE	ENG/HYDRO	SUB EXP	LAB	OTHER	TOTALS
						Subtotal	$880.00	$51,700.00	$0.00	$35.00	$52,615.00
CAP12	*Monitoring Well Replacement (8 new Overburden)*	Verterre	Project Manager	2	hr	$90.00	$180.00				
	Reshgeotic site	Verterre	Staff Scientist	20	hr	$75.00	$1,500.00				
		Verterre	PID	2	days	$90.00				$180.00	
		Verterre	Geoprobe	2	days	$1,350.00	$2,700.00				
		Verterre	mobilization/demobilization	2	ls	$150.00	$300.00				
		Verterre	Jack Hammer	2	days	$75.00				$150.00	
		Verterre	well materials	8	wells	$250.00				$2,000.00	
		Verterre	Generator	2	days	$50.00				$100.00	
		Verterre	Concrete	4	Bags	$10.00				$40.00	
		Verterre	MacroCore Liners	24	pc	$8.00				$192.00	
						Subtotal	$2,680.00	$0.00	$0.00	$2,662.00	$7,342.00
CAP13	*Dewatering, Biopile Monitoring & Carbon Drum - 3 Months*	Verterre	Project Manager	2	hr	$90.00	$180.00				
		Verterre	Field Tech II	32	hr	$65.00	$2,080.00				
	Install carbon treatment system - 2 people for 10 hours	Verterre	Mileage	140	mi	$0.50				$70.00	
	2 Train system, with option to switch to 3 train if necessary	Verterre	Treatment System Rental	3	months	$500.00				$1,500.00	
	Change out carbon drums	Verterre	Misc PVC	1	est	$400.00				$400.00	
		Verterre	Bag Filters	25	ea	$8.00				$200.00	
		Geotech	Carbon Drums - Liquid	12	ea	$665.00		$8,778.00			
		Geotech	Clay Anthracite Drums - Liquid	6	ea	$750.00		$4,950.00			
		CVPS	Electricity	3	months	$250.00		$825.00			
		GeoTech	Bedrock Dewatering Pump	3	months	$1,425.00		$4,702.50			
		Baker Tanks	frac tank rental	3	months	$1,500.00		$4,950.00			
		EPS	Carbon Drum Removal	18	ea	$400.00		$7,920.00			
		EPS	Stop Fee & Fuel Surcharge	1	ea	$85.00		$93.50			
		Empire	Poly Tank Rental	3	months	$450.00		$1,485.00			
		HomeDepot	Metal Shed	1	est	$1,500.00		$1,650.00			
	Weekly Site visits to monitor dewatering system and	Verterre	Project Manager (reporting)	4	hr	$90.00	$360.00				
	Collect discharge samples	Verterre	Field Tech II	64	hr	$65.00	$4,160.00				
	of Inf - 2 Mid, 2 Eff 2 times pr month for 3 months)	Laboratory	VOCs 8021 (inf, mid, eff- 2 times per month)	30	ea	$54.00			$1,782.00		
	(Assumes silt levels are at a minimum and bag filters will last for more	Laboratory	TPH-DRO (inf, mid, eff- 2 times per month)	30	ea	$83.00			$2,739.00		
	than one week)	Verterre	Mileage (13 trips at 70 miles each)	910	mi	$0.50				$455.00	
	[redacted]	Verterre	PID Full Day	3	day	$90.00				$270.00	
		Verterre	Air Flow instruments and Gauges	3	day	$100.00				$300.00	
	10 - 4 hr visits & 3 - 8 hr visits										
	Biofilm Watering - At the beginning of three months	Verterre	Project Manager	2	hr	$90.00	$180.00				
	Need to blow out lines when done	Verterre	Field Tech II	24	hr	$65.00	$1,560.00				
		Essex Rental	Compressor	1	day	$185.00				$203.50	
		Verterre	Mileage (2 trips at 70 miles each)	140	mi	$0.50				$70.00	
		Verterre	Poly Tank Rental	1	day	$100.00				$100.00	
		Verterre	Generator	1	day	$80.00				$80.00	
		Verterre	Pump	1	day	$35.00				$35.00	

NEW HAVEN MOBIL
TABLE 5: CORRECTIVE ACTION PLAN COSTS - SOIL PILE CONSTRUCTION - FRONT FIELD

Date: November 11 2010
SITE Name: New Haven Mobil
Verterre Project Manager: Martha Roy
Verterre Project #: 95051
Site Location: New Haven, VT

The Verterre Group
414 Roosevelt Highway
Colchester, VT 05446

	TASK	CONTRACTOR	DESCRIPTION	UNITS	TYPE	RATE	ENG/HYDRO	SUB EXP	LAB	OTHER	TOTALS
	Soil Pile Carbon Drum Change out	Verterre	Project Manager	1	hr	$90.00	$90.00				
		Verterre	Field Tech II	10	hr	$65.00	$650.00				
		Verterre	Mileage	70	mi	$0.50				$35.00	
		Geotech	Carbon Drums for soil pile venting	5	ea	$550.00		$3,025.00			
		EPS	Carbon Drum disposal	5	ea	$300.00		$1,650.00			
		EPS	Stop Fee & Fuel Surcharge (10 visits)	1	ea	$85.00		$93.50			
	Clean Frac Tank	EPS	Cleaning Frac Tank	1	ea	$2,000.00		$2,200.00			
		Verterre	Field Tech II	10	hr	$65.00	$650.00				
		EPS	Stop Fee & Fuel Surcharge	1	ea	$85.00		$93.50			
		EPS	Waste Disposal (Liquids)	2	ea	$150.00		$330.00			
		EPS	Waste Disposal (Solids)	2	ea	$400.00		$880.00			
						Subtotal	$9,910.00	$43,626.00	$4,521.00	$3,718.50	$61,775.50
CAP14	*Update Site Survey*	Verterre	Project Manager	2	hr	$90.00	$180.00				
		Verterre	Field Tech II	12	hr	$65.00	$780.00				
		Verterre	survey equipment	1	days	$50.00				$50.00	
		Verterre	Staff Scientist (boring logs)	4	hr	$75.00	$300.00				
		Verterre	Auto CAD	4	hr	$70.00	$280.00				
		Verterre	mileage	70	mi	$0.50				$35.00	
						Subtotal	$1,540.00	$0.00	$0.00	$85.00	$1,625.00
CAP15	*Excavation & Groundwater Monitoring Report*	Verterre	Principal	1	hr	$125.00	$125.00				
		Phelps	Senior Engineer II	4	hr	$115.00		$506.00			
		Verterre	Project Manager	8	hr	$90.00	$720.00				
		Verterre	Staff Scientist	24	hr	$75.00	$1,800.00				
		Verterre	Drafting	6	hr	$60.00	$360.00				
		Verterre	Clerical	2	hr	$50.00	$100.00				
		Verterre	Miscellaneous copying and mailing expenses	1	est	$35.00				$35.00	
						Subtotal	$3,105.00	$506.00	$0.00	$35.00	$3,646.00
CAP16	*Groundwater Monitoring & Biopile Sampling*	Verterre	Project Manager	2	hr	$90.00	$180.00				
	1 Time and Materials to sample 21 wells for 1 year semi annually	Verterre	Field Tech II (33 hrs * 2 trips)	66	hr	$65.00	$4,290.00				
	2 Sample analysis (21 samples 2 DUPs 1 TB x 4 times per year)	Verterre	mileage	140	mi	$0.50				$70.00	
	3 Collect DO temp ORP and pH from each well	Verterre	interface probe	2	ea	$50.00				$100.00	
		Verterre	ORP pH temp and DO Meter	2	ea	$100.00				$200.00	
		Verterre	well sampling fee (21 wells *4 trips)	42	ea	$15.00				$630.00	
		Resource	groundwater sample analysis (8021B)	48	ea	$54.00			$2,851.20		
		Geotech	2" Grundfos & Controller (300 ft)	2	days	$205.00		$451.00			
	Discard tubing after each trip	Verterre	3/8 Tubing	1200	ft	$0.30				$360.00	
	Soil Pile Monitoring - Every six months	Verterre	Project Manager	2	hr	$90.00	$180.00				
		Verterre	Field Tech (24 hrs * 2 trips)	48	hr	$65.00	$3,120.00				
		Verterre	PID Full Day	2	day	$90.00				$180.00	
		Verterre	Mileage (2 trips at 70 miles each)	140	mi	$0.50				$70.00	
		Verterre	Air Flow instruments and Gauges	2	day	$100.00				$200.00	
						Subtotal	$7,770.00	$451.00	$2,851.20	$1,810.00	$12,882.20
CAP17	*Reporting, 1 Year*	Verterre	Principal (1 hour per GW)	2	hr	$125.00	$250.00				
	Semi Annual GW & Soil Pile Monitoring Report -2 reports	Phelps	Senior Engineer II	4	hr	$115.00		$506.00			
		Verterre	Project Manager (4 hrs per GW)	8	hr	$90.00	$720.00				
		Verterre	Staff Scientist (8 hours per GW)	16	hr	$75.00	$1,200.00				
		Verterre	Drafting (4 hours per GW)	8	hr	$70.00	$560.00				
		Verterre	Clerical (1.5 hr per report)	3	hr	$50.00	$150.00				
		Verterre	Miscellaneous copying and mailing expenses	2	ea	$35.00				$70.00	
						Subtotal	$2,880.00	$506.00	$0.00	$70.00	$3,456.00
						Totals	$137,230.00	$781,997.48	$14,707.00	$29,318.00	$963,252.48

Notes:
Project will likely occur in the spring/summer of 2011 - all costs are subject to increase with 2011 rates

Total:	$963,252.48
Total costs from Table 5A	$107,090.00
Total 2 Years	$1,070,342.48

2011

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 414-8-08 Wmcv

STATE OF VERMONT,
Plaintiff,

v.

THE STRATTON CORPORATION
a/k/a STRATTON MOUNTAIN
CORPORATION and WINHALL-
STRATTON FIRE DISTRICT,
Defendants.

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 ("the State"), by and through Vermont Attorney General William H. Sorrell, and Defendants the Stratton Corporation a/k/a Stratton Mountain Corporation ("Stratton") and the Winhall-Stratton Fire District ("the District"), and pursuant to 10 V.S.A. §§ 1274 and 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED AND ORDERED as follows:

ADJUDICATION OF VIOLATIONS

1. The Vermont Agency of Natural Resources ("ANR") issued Indirect Discharge Permit ID-9-0019-1/ID-9-0044 to Stratton and the District on May 15, 1997. The Permit was administratively amended on August 24, 1998 (Permit 1D-9-0019-2/1D-9-0044-2), and November 2, 1998 (Permit ID-9-0019-2A/ID-9-0044-2A). On May 26, 2005, ANR amended Indirect Discharge Permit ID-9-0019-1/ID-9-0044. The discharge permits, referenced below as the "Discharge Permits" were issued jointly to Stratton and the District.

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

2. On December 11 and 12, 2004, a discharge associated with approximately 821,000 gallons of secondarily treated effluent was released through an open valve at the facility. Some of this effluent overflowed from a holding tank on to a spray disposal field, and an amount of effluent then discharged into a tributary of the Winhall River, a water of the State. Test results disclosed no release of Escherichia coli at levels that would constitute a violation of the Vermont Water Quality Standard for E. coli. The discharge is a violation of the Discharge Permits issued to Defendants, specifically, permit Condition C5(A), which requires that the wastewater disposal system shall be operated at all times in a manner that will not result in the direct discharge of sewage into waters of the State. Defendants are adjudged liable to the State for this violation.

3. On January 7, 2008, a sewer manhole overflowed at the Stratton Mountain Resort. The overflow caused the release of raw sewage into an unnamed tributary which eventually flows into Stratton Lake, a water of the State. Test results confirmed the release of fecal coliform into the tributary. The discharge is a violation of the of the Discharge Permits issued to Defendants, specifically, permit Condition C5(A), which requires that the wastewater disposal system shall be operated at all times in a manner that will not result in the direct discharge of sewage into waters of the State. Defendants are adjudged liable to the State for this violation.

PENALTIES

4. For the above violations Defendants shall pay a civil penalty of fifty-five thousand dollars ($55,000.00) and shall also pay twenty-five thousand dollars ($25,000.00) to

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

fund a Supplemental Environmental Project ("SEP"). Defendants shall be jointly and severally liable for the payments described.

5. Payment of the fifty-five thousand dollar ($55,000.00) 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. Payment shall be due no later than thirty (30) days after entry of this Consent Order as a Final Judgment Order by the signature of the Court ("effective date of this Order").
6. Unless otherwise agreed in writing by the parties, the SEP shall be for the purpose of undertaking trail work to mitigate and prevent erosion into the watershed of Middle Brook in the Towns of Winhall and Stratton. The final plans for the SEP shall be subject to the approval of ANR, and shall be fully funded by Defendants no later than one hundred eighty (180) days following the effective date of this Order.
7. If, at the close of the one hundred eighty (180) consecutive calendar days, any of the twenty-five thousand dollars ($25,000.00) allocated for SEP has not been expended by Defendants, that unexpended amount shall be converted to a civil penalty and shall be immediately due and payable to the State of Vermont.
8. Defendants agree that funds directed to a SEP are not tax deductible and consequently shall not deduct, nor attempt to deduct any SEP expenditures from Defendants' tax obligations. Further, in the event Defendants publish by any means, directly or indirectly, the identity or result of the SEP Defendants have funded, Defendants shall also include in that publication a statement that the SEP is a product

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

of the settlement of an environmental enforcement action brought by the State of Vermont.

9. Failure to make any penalty payment as required by paragraph 4, including any portions of the SEP funds which are converted to civil penalties as described in paragraph 7, shall constitute a breach of this Consent Order, and interest shall accrue on the entire unpaid balance at Twelve Per Cent (12%) per annum; provided however, that Defendants shall have a 10 day grace period to cure any late payment.

OTHER PROVISIONS

10. Defendants hereby waive: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendants under Paragraphs 4 through 8 of this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.
11. This Consent Order is binding upon Defendants and their successors and assigns.
12. 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.
13. 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.
14. 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.

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

15. 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.

16. This Consent Order may only 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 Windham Superior Court. 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.

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

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

DATED at Newfane, Vermont this 3rd day of January, ~~2010~~ 2011.

Hon. John P. Wesley
Windham Superior Court Judge

FILED
JAN 03 2011
Vermont Superior Court
Windham Unit

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

CC: R. McDougall, Esq.
L. Crispe, Esq.
R. Woolmington, Esq.

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 414-8-08 Wmcv

STATE OF VERMONT,
Plaintiff,

v.

THE STRATTON CORPORATION
a/k/a STRATTON MOUNTAIN
CORPORATION and WINHALL-
STRATTON FIRE DISTRICT,
Defendants.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

In order to resolve the allegations of the Amended Complaint filed in the above-captioned matter, the parties, Plaintiff, the State of Vermont ("the State"), by and through Vermont Attorney General William H. Sorrell, and Defendants the Stratton Corporation a/k/a Stratton Mountain Corporation ("Stratton") and the Winhall-Stratton Fire District ("the District"), stipulate and agree as follows:

WHEREAS, the Attorney General pursuant to 3 V.S.A., Chapter 7 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, Defendant Stratton is a corporation organized under the laws of the State of Vermont with its principal place of business in the Town of Stratton, Windham County;

WHEREAS, Defendant the District is a municipal fire district located in the towns of Winhall and Stratton established in 1995 pursuant to 20 V.S.A. § 170. The District owns the

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

wastewater treatment facility ("the facility") located on Stratton Mountain in the towns of Winhall and Stratton and through an operating agreement, Stratton operates the facility;

WHEREAS, the Vermont Agency of Natural Resources ("ANR") issued Indirect Discharge Permit ID-9-0019-/ID-9-0044 to Stratton and the District on May 15, 1997. The Permit was administratively amended on August 24, 1998 (Permit 1D-9-0019-2/1D-9-0044-2), and November 2, 1998 (Permit ID-9-0019-2A/ID-9-0044-2A). On May 26, 2005, ANR amended Indirect Discharge Permit ID-9-0019-1/ID-9-0044. The discharge permits, referenced below as the "Discharge Permits" were issued jointly to Stratton and the District;

WHEREAS, the State filed a complaint in the above-captioned matter on August 13, 2008 asserting statutory and permit violations by Defendants, including alleged violations relating to unauthorized releases in December, 2004 and January, 2008;

WHEREAS, the State was permitted to amend the complaint by the Court on September 2, 2008;

WHEREAS, Defendants denied the alleged violations in the Amended Complaint;

WHEREAS, the parties now desire to resolve the enforcement action through a consent order by the Court;

WHEREAS, the State considered the criteria in 10 V.S.A. §§ 8010(b) and (c) in arriving at the proposed penalty amount, including the length of time the violation existed and that Defendants 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 47 in which the violations occurred; and

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

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

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

1. The attached Consent Order may be entered by the Court.
2. As part of the settlement pursuant to the Consent Order, Defendants admit to liability for the December 11 and 12, 2004 discharge associated with approximately 821,000 gallons of secondarily treated effluent through an open valve at the facility. Some of this effluent overflowed from a holding tank on to a spray disposal field, and an amount of effluent then discharged into a tributary of the Winhall River, a water of the State. Test results disclosed no release of Escherichia coli at levels that would constitute a violation of the Vermont Water Quality Standard for E. coli. This discharge constituted a violation of the Discharge Permits issued to Defendants, specifically, permit Condition C5(A), which requires that the wastewater disposal system shall be operated at all times in a manner that will not result in the direct discharge of sewage into waters of the State (a violation pled in Count II of the Amended Complaint).
3. As part of the settlement pursuant to the Consent Order, Defendants admit to liability for a sewer manhole overflow at the Stratton Mountain Resort on January 7, 2008 which caused the release of raw sewage into an unnamed tributary which eventually flows into Stratton Lake, a water of the State. Test results confirmed the release of fecal coliform into the tributary. The discharge is a violation of the Discharge Permits issued to Defendants, specifically, permit Condition C5(A), which requires that the wastewater disposal system shall be operated at all times in a manner that

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

will not result in the direct discharge of sewage into waters of the State (a violation pled in Count II of the Amended Complaint)..

4. The parties agree that funds required the Supplemental Environmental Project ("SEP") provided for in the Consent Order shall be granted to the Stratton Mountain School and Ski Foundation, Inc. for the purpose of undertaking trail work to mitigate and prevent erosion into the watershed of Middle Brook in the Towns of Winhall and Stratton. The final plans for the SEP shall be subject to the approval of ANR.
5. The Consent Order has been negotiated by the State and Defendants in good faith.
6. 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.
7. This Stipulation and the Consent Order sets 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.

DATED at Montpelier, Vermont this 17th day of December, 2010.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Robert F McDougall

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

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

DATED at Brattleboro, Vermont this 14th day of December, 2010.

THE STRATTON CORPORATION

By: _____

Lawrin P. Crispe, Esq.
Crispe & Crispe
114 Main Street, P.O. Box 556
Brattleboro, VT 05302-0556
802.254.4441

DATED at Manchester Ctr, Vermont this 15 day of December, 2010.

WINHALL-STRATTON
FIRE DISTRICT

By: _____

Robert E. Woolmington, Esq.
Witten, Woolmington & Campbell, P.C.
4900 Main Street, P.O. Box 2748
Manchester Center, VT 05255-2748
802.362.2560

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

STATE OF VERMONT
WINDHAM COUNTY, SS.

SUPERIOR COURT
DOCKET NO. 414-8-08 Wncv

STATE OF VERMONT,

Plaintiff

v.

THE STRATTON CORPORATION; a/k/a STRATTON MOUNTAIN CORPORATION; and WINHALL-STRATTON FIRE DISTRICT

Defendants.

COMPLAINT

NOW COMES the State of Vermont, Agency of Natural Resources, by and through the Office of the Attorney General William H. Sorrell, and hereby makes the following complaint pursuant to 10 V.S.A. §§ 1259, 1274 and 8221, the common law, and the general equitable jurisdiction of the court:

1. Plaintiff, the State of Vermont, Agency of Natural Resources, is a state agency with offices in Waterbury, Vermont.

2. Defendant, The Stratton Corporation, is a corporation organized under the laws of the State of Vermont with its principal place of business in the Town of Stratton, County of Windham, Vermont ("Stratton"). Stratton owns and operates the Stratton Mountain Resort (Stratton Mountain), a ski and vacation resort located in the Town of Stratton, Windham County, Vermont.

3. The Winhall-Stratton Fire District ("the District") is a municipal fire district located in the towns of Winhall and Stratton established in 1995 pursuant to 20 V.S.A. § 170. The District operates the wastewater treatm

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

facility located on Stratton Mountain in the Towns of Winhall and Stratton, Vermont (Facility). The Facility serves the Stratton Mountain Resort and surrounding communities.

4. The Facility is authorized to have two indirect discharges of treated domestic sewage. One discharge is associated with an existing spray disposal system serving the Stratton Mountain Ski Area which discharges to the groundwater and indirectly into the North Branch of Ball Mountain Brook in Winhall, Vermont. The second discharge is associated with the Winhall sprayfield that serves existing and proposed facilities located in Stratton and Winhall, Vermont which discharges to the groundwater and indirectly to the Winhall River in the Town of Winhall, Vermont.

5. The Agency of Natural Resources ("ANR") issued Indirect Discharge Permit ID-9-0019-1/ID-9-0044 to Stratton and the District on May 15, 1997. The Permit was administratively amended on August 24, 1998 (Permit 1D-9-0019-2/1D-9-0044-2), and November 2, 1998 (Permit ID-9-0019-2A/ID-9-0044-2A). On May 26, 2005, ANR amended Indirect Discharge Permit ID-9-0019-1/ID-9-0044. The discharge permits described above, referenced below as the "Discharge Permit" were issued jointly to Stratton and the District.

6. On or about December 11 and 12, 2004, Stratton and the District discharged approximately 821,000 gallons of effluent into a tributary of the Winhall River, a water of the State ("December 2004 Discharge").

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

7. On or about January 7, 2008, a sewer manhole overflowed at the Stratton Mountain Resort. The overflow caused the release of raw sewage into an unnamed tributary which eventually flows into Stratton Lake, a water of the State ("January 2008 Discharge"). Test results confirmed the release of fecal coliform into the tributary.

8. On or about May 1, 2008, Stratton and the District directly discharged effluent into waters of the state ("May 2008 Discharge"). The discharge was caused by three malfunctioning sprayfield nozzles. A significant amount of effluent was discharged before the District shut down operation of the sprayfield.

COUNT I – Violations of 10 V.S.A. § 1259.

9. Paragraphs 1 through 8 are incorporated by reference and realleged.

10. 10 V.S.A. § 1259(a) prohibits the discharge of waste to a water of the state without a permit.

11. At all times relevant hereto, neither Stratton nor the Winhall-Stratton Fire District had a permit to discharge any waste directly to state waters.

12. The December 2004 and May 2008 Discharges of effluent directly into waters of the State without a permit violated 10 V.S.A. §1259(a).

13. The January 2008 discharge of raw sewage into waters of the State without a permit violated 10 V.S.A. §1259(a).

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

14. Pursuant to 10 V.S.A. §§ 1274(a) and 8221(b)(6), the defendants are liable for civil penalties of not more than $50,000 for the initial violations of 10 V.S.A. § 1259(a) and $25,000.00 for each day that the conditions giving rise to the discharge has continued unabated thereafter.

COUNT II – Violations of Discharge Permit Condition C5(A)

15. Paragraphs 1-14 are incorporated by reference and realleged.

16. Discharge Permit Condition C5(A)(3) requires that the wastewater disposal system shall be operated at all times in a manner that will not result in the direct discharge of sewage into waters of the State.

17. The December 2004 and May 2008 Discharges of effluent directly into waters of the State violated Condition C5(A)(3) of the Discharge Permit.

18. The January 2008 discharge of raw sewage into waters of the State violated Condition C5(A)(3) of the Discharge Permit.

19. Pursuant to 10 V.S.A. §§ 1274(a) 8221(b)(6), the defendants are liable for civil penalties of not more than $50,000 for the initial violations of Discharge Permit Condition C5(A)(3) and $25,000.00 for each day that the conditions giving rise to the discharge has continued unabated thereafter.

COUNT III – Violations of Discharge Permit Condition D13

20. Paragraphs 1-19 are incorporated by reference and realleged.

21. Discharge Permit Condition D13 requires that only the Chief or Assistant Chief Operator is permitted to operate the spray system.

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

22. Stratton and the District's use of uncertified operator trainees to operate the effluent discharge system without supervision violated Discharge Permit Condition D13.

23. Pursuant to 10 V.S.A. §§ 1274(a) and 8221(b)(6), the defendants are liable for civil penalties of not more than $50,000 for the initial violations of Discharge Permit Condition D13, and $25,000.00 for each day that the conditions giving rise to the violation continued unabated thereafter.

WHEREFORE, the State respectfully requests that the Court:

A. Adjudge defendants Stratton and the Winhall-Fire District liable on Counts I-III;

B. Order defendants to pay civil penalties to the State pursuant to 10 V.S.A. §§ 1274(a) and 8221(b)(6) of up to $50,000 for defendant's initial violation of 10 V.S.A. § 1259(a) and Discharge Permit Conditions C5(A)(3) and D13, and $25,000 for each day that defendants failed to take action and comply with the terms of the Discharge Permit.

C. Order defendants to reimburse plaintiffs for all expenditures plaintiff has incurred or may incur in connection with the December 2004, January 2008 and May 2008 discharge events, including costs of investigation and enforcement and attorneys' fees.

D. Issue injunctive relief requiring defendants to undertake specific measures as required by the Agency of Natural Resources Wastewater Management Division for the operation of the facility.

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

E. Grant such further relief as the court deems just.

Dated: August 11, 2008.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

John Beling
Assistant Attorney General
Office of the Attorney General
Environmental Division
109 State Street
Montpelier, VT 05609
(802) 828-5518

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

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

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	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

---

[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

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

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	Docket No. S0569-07 CnC

RULING ON DAMAGES

This case involves a junkyard in Milton. Some claims were resolved on summary judgment, some after a court trial. A hearing on damages was held on May 11. Post-trial memos were complete June 1. Plaintiff is represented by Robert F. McDougall, Esq.; Defendants, although previously represented by Thomas G. Walsh, Esq., were represented at the damages hearing by Michael Gadue, Esq.

Findings of Fact

The court will not repeat here its earlier findings of fact; familiarity with the court's earlier rulings is presumed. Additional facts established at the damages hearing by a preponderance of the evidence are set forth below. References to "Rhoades" refer to Gilbert A. Rhoades, Sr.; references to "the Site" refer to the five-acre property at 15 Shirley Avenue in Milton.

It is undisputed that Rhoades lacks a permit for a junkyard, a solid waste facility, or a hazardous waste facility. The Site is currently neatly kept and well-organized, but it still contains a large tire pile. The parties disagree over the likely number of tires there,

and thus how long removal may take and what it would cost is disputed. However, the court finds that the exact amount and cost are not the key factors here. The evidence established that the tires create a danger of fire, which could be significant and dangerous to the community. It is undisputed that the tires constitute solid waste. They must be removed to protect the safety of the community. The question of cost, and whether Rhoades or the State will ultimately bear it, is not a reason for the court to decline to order the cleanup. While the court is sympathetic to Rhoades' concerns about the cost involved and his current lack of income due to the closure of the bulk of his business, questions about his ability to pay do not outweigh the need for injunctive relief for the safety of the community.

Although there was testimony that a limited amount of other "solid waste" at the Site needs to be removed, the evidence was unclear as to what materials that included.

As noted in the court's prior opinion, there have been a number of tests done of soil and water at the Site in connection with the presence of lead. The EPA testing, done in 2008, showed elevated lead levels in the soils in two locations, identified as SS-11 and SS-12. EPA also did testing of Hobbs Pond as well as residential properties nearby. The tests analyzed fish, water and sediment in the pond. No lead was found, and no other health risks were established as a result of those water tests. Rhoades hired a consultant to do further water tests, which also showed no lead or other contaminants in the water.

The State has spent $36,007.32 in investigative costs in connection with the Site, including soil and water testing. The State asserts that these costs were expended because of a release of lead and the threat of future release of lead or other potentially hazardous materials. Although Rhoades argues that certain testing did not show any negative results,

or results that were tied to the Site, that does not mean the State was unreasonable in doing the tests to find out what the results might be. The court finds that the investigative actions were reasonable and were done in connection with a release or threatened release of hazardous materials.

The court does find, however, that certain of the expenses are not adequately documented. Specifically, Exhibit R-3 in the amount of $480 shows no connection to the Site; Exhibits R-5 and R-6 in the amounts of $665.98 and $543.76 involve a well that the State's witness acknowledged was tested merely because the neighbor asked, not because of any scientific basis for doing so; and R-9 shows nothing on the $9,460 invoice from Alpha Analytical to confirm that the testing was related to this case at all. Thus, the court finds these amounts (totaling $11,149.74) inadequately documented.

Conclusions of Law

The State seeks injunctive relief, recovery of investigation costs, and financial penalties. The court will address each in turn.

1. Injunctive Relief

With regard to injunctive relief, the State first seeks a permanent injunction barring the use of the Site as a junkyard or solid waste facility unless Rhoades obtains appropriate permits and licenses. The court will grant that request.

Next the State seeks an order requiring Rhoades to remove to a certified solid waste facility all the tires and other solid waste that are currently located on the Site, and barring him from accepting or storing any other solid waste at the Site in the future. The court grants the request as to the tires, but as to the "other solid waste" the court finds the term too undefined to be the subject of injunctive relief.

The State also seeks an order that Rhoades comply with all applicable laws and regulations regarding the handling of hazardous waste at the Site in the future. Rhoades can hardly object to an order to comply with the law; the court will grant this request.

Finally, the State seeks an order requiring Rhoades to hire an environmental consultant to develop a plan to do additional sampling of soil and water, as well as removal of contaminated soil. The court concludes that the State has failed to show the need for further testing of the water. Multiple tests have already been done, by the State, by EPA and by Rhoades' consultant. All tests done so far have shown no lead contamination of water. While one could go on testing forever to be absolutely certain there is no problem anywhere, the court concludes that there is no evidence of any danger to water outside the Site, and the State has not shown by a preponderance of the evidence that such testing is necessary to assure public health or safety.

However, even Rhoades' expert testified at the prior hearing that the lead in the soil poses a potential threat if disturbed in the future, and the court therefore concludes that it must be cleaned up. Rhoades is liable for doing so. Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124,¶ 28,177 Vt. 421 (liability for abatement of threatened release). The court will mandate the approach offered by Rhoades' expert at the prior hearing – the Triad approach[1] – to clean up the area of soil contaminated by lead.

Rhoades asks the court to permit him to continue his business of selling new and used car radiators and batteries at the site. Based upon the record before the court, the

[1] This is to start at the known area of 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. Then all those soils can be removed and shipped to a permitted facility.

court is not able to address whether such activities would require any permits or licenses. The court is not, however, ordering removal of such materials from the Site as part of this case.

2. Investigative Costs

A landowner who is found legally responsible for "releases or threatened releases" of hazardous materials is liable for the costs of investigation by the State if the investigation was "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). The court has already found there has been a "release" of lead, and that there is an ongoing threat of release of lead because it remains in the soil.

The State seeks recovery of investigative costs in the amount of $36,007. Because most of those costs were reasonably incurred in investigating releases and/or threatened releases of hazardous materials at the Site, the State is entitled to recover those costs. 10 V.S.A. § 6616(a)(2)(B).With the exception of $11,149.74 that the court has found inadequately documented or tied to the Site, the court will award the investigative costs, in the total amount of $24,857.58. As noted in the court's prior ruling, Blanche Rhoades is also liable for these costs.

3. Penalties

With regard to the penalties, the State seeks a total of $78,000, broken down as follows: $15,250 for unlicensed operation of a junkyard; $25,000 for operation of an uncertified waste facility; $5,250 for violations of hazardous waste management regulations concerning antifreeze and oil; $17,500 for hazardous waste violations concerning leaks and spills; and $15,000 for the release of lead. The State explained how

staff came up with these proposed amounts, all of which demonstrated a measured and fair approach. However, although it is clear that Rhoades violated various laws and regulations over the years, he has also made significant attempts to clean up the Site and get into compliance, and some of his inability to gain compliance was the result of actions by the Town of Milton beyond his control. Moreover, the court concludes that given Rhoades' limited sources of income as a result of the closure of most of his business pursuant to court order, his funds should primarily be directed to cleanup of the Site rather than penalty payments to the State. The court will therefore impose lower penalties, in the following amounts: $5,000 for unlicensed operation of a junkyard; $5,000 for operation of an uncertified waste facility; $2,500 for violations of hazardous waste management regulations concerning antifreeze and oil; $2,500 for hazardous waste violations concerning leaks and spills; and $5,000 for the release of lead.

Order

1. Rhoades is permanently enjoined from operating a junkyard or salvage yard at the Site unless he obtains all necessary permits and licenses.
2. Rhoades is ordered to remove all the tires at the Site within 90 days, in a manner approved in advance by the State.
3. Rhoades is ordered to comply with all statutes and regulations governing the handling of hazardous wastes.
4. Rhoades is ordered to do additional soil sampling and removal of lead-contaminated soil using the Triad Approach.
5. Rhoades and his wife are ordered to reimburse the State $24,857.58 in past investigative costs.

6. Rhoades is ordered to pay the State $20,000 in penalties.

Dated at Burlington this 11th day of October, 2011.

Helen M. Toor
Superior Court Judge

Vermont Superior Court
Washington Civil Division

ENTRY REGARDING MOTION

State of Vermont vs. Roberts et al **14-1-11 Wncv**
[Landis-Marinello]

Title: **Motion for Default Judgement**, No. 1
Filed on: March 8, 2011
Filed By: Landis-Marinello, Kyle H., Attorney for:
Plaintiff State of Vermont

FILED
2011 MAR 14 A 9:31
VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL

Response: ~~NONE~~

___ Granted Compliance by_____

___ Denied

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

___ Other Judgment renewed

Judge

3/10/11
Date

Date copies sent to: 3/14 Clerk's Initials BH

Copies sent to:
Attorney Kyle H. Landis-Marinello for Plaintiff State of Vermont
~~Defendant Marcel Roberts~~
~~Defendant David Currier~~

RECEIVED
MAR 15 2011
ATTORNEY GENERAL'S OFFICE
ENVIRONMENTAL

STATE OF VERMONT

SUPERIOR COURT Washington Unit	)	CIVIL DIVISION Docket No. ~~1-4-11~~ Wncv 14-1-11
State of Vermont, Plaintiff	)	
v.	)	
Marcel Roberts and David Currier, Defendants	)	

FILED
2011 MAR 14 A 9:31
BY

VT SUPERIOR COURT
WASHINGTON UNIT

JUDGMENT ORDER

Plaintiff State of Vermont has moved this Court to enter a default judgment against Defendants Marcel Roberts and David Currier. Based on the pleadings on file in this case and the affidavit supporting Plaintiff's motion, the Court finds as follows:

1. Plaintiff filed a complaint in this action on January 4, 2011, which was within eight years of the last judgment order filed in the matter underlying this case.

2. On January 13, 2011, Plaintiff filed executed Summonses and Returns of Service showing that service of the summonses and complaint was made upon each of the Defendants, Marcel Roberts and David Currier, on January 10, 2011.

3. Defendant Marcel Roberts has failed to plead, appear, or otherwise defend himself, either personally or through counsel, within 20 days of service of the summons and complaint upon him, as required by Vermont Rule of Civil Procedure 12(a).

4. Defendant David Currier has failed to plead, appear, or otherwise defend himself, either personally or through counsel, within 20 days of service of the summons and complaint upon him, as required by Vermont Rule of Civil Procedure 12(a).

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

5. Plaintiff filed and served a Motion for Default Judgment in this matter on or about March 8, 2011.

6. Plaintiff's Motion for Default Judgment is hereby granted by the issuance of this Judgment Order.

It is therefore ORDERED, adjudged and decreed that Plaintiff State of Vermont shall have judgment against Defendants Marcel Roberts and David Currier as follows:

A. Plaintiff State of Vermont's Amended and Supplemental Judgment Order dated March 20, 2003, and the earlier judgment on which it was based, in Docket Numbers S-119-90 WnC and S-357-93 WnC (both orders of which are attached to this Judgment Order), are hereby renewed as of the date of this Judgment Order.

B. As of the date of this Judgment Order, Defendant Marcel Roberts owes Plaintiff State of Vermont under the previous judgment orders a principal balance of $88,721.18 for which he is solely liable, as well as a principal balance of $27,603.69 for which he is jointly and severally liable with David Currier, totaling an aggregate amount of $116,324.87 in principal for which Defendant Marcel Roberts is liable, plus interest that has been accruing and continues to accrue at 12% per annum on the unpaid balance of the judgment.

C. As of the date of this Judgment Order, Defendant David Currier owes Plaintiff State of Vermont under the previous judgment orders a principal balance of $27,603.69 for which he is jointly and severally liable with Marcel Roberts, plus interest that has been accruing and continues to accrue at 12% per annum on the unpaid balance of the judgment.

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

D. Plaintiff State of Vermont is entitled to continuing post-judgment interest from the date of entry of judgment to the date of satisfaction.

E. Pursuant to 32 V.S.A. § 1433, Defendants must also pay $262.50 to the clerk of the court for costs in this action.

3/10/11
Date

The Honorable Geoffrey Crawford
Superior Court, Civil Division

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

EXHIBIT 1

STATE OF VERMONT
WASHINGTON COUNTY, SS.

SUPERIOR COURT

STATE OF VERMONT,
PLAINTIFF

v.

MARCEL ROBERTS AND DAVID CURRIER,
DEFENDANTS

DOCKET NO. S-119-90 WnC

STATE OF VERMONT,
PLAINTIFF

v.

MARCEL ROBERTS, STELLA ROBERTS, ROBERTS REAL ESTATE, INC., ROGER LUSSIER, EVELYN LUSSIER, and A.R.D.I. INC.,
DEFENDANTS

DOCKET NO. S-357-93 WnC

JUDGMENT ORDER

Pursuant to the stipulation signed by the State of Vermont, by and through its attorney, Jeffrey L. Amestoy, Attorney General, and the defendants Marcel Roberts and David Currier (hereinafter "the defendants"), and Gravel & Shea, attorney for defendants Marcel Roberts and David Currier, it is hereby adjudged, decreed and ordered:

A. The following lands are subject to Act 250 (10 V.S.A. Chapter 151) jurisdiction, as they are "subdivisions," as that term is defined in 10 V.S.A. §6001(19), because of actions of the defendants in controlling the partitioning of these lands:

1. the lands sold to Marcel Roberts and David Currier by Quitclaim Deeds of the President and Fellows of Harvard College dated April 5, 1989 and recorded in the Land Records of the Town of Brownington, Vermont in Book 30 at pages 5 - 24;

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

2. the lands sold to Marcel Roberts and David Currier and others by Warranty Deeds of Harrington Investments, Ltd. dated May 2, 1989 and recorded in the Land Records of the Town of Brownington, Vermont in Book 30 at pages 52 - 73 and 90 - 97;

3. the lands sold to Marcel Roberts by Warranty Deeds of Edward Salesky dated October 18, 1988 and recorded in the Land Records of the Town of Holland, Vermont in Book 25 at pages 526 - 537;

4. the lands sold to Marcel Roberts by Warranty Deeds of Gilles Blais dated September 30, 1988 and recorded in the Land Records of the Town of Holland, Vermont in Book 25 at pages 463 - 470;

5. the lands sold to Marcel Roberts and David Currier by Warranty Deeds of James and Debra Cobb dated September 1, 1989 and recorded in the Land Records of the Town of Coventry, Vermont in Book 29 at pages 133 - 143;

6. the lands sold to Marcel Roberts by Warranty Deeds of Ronald and Rochelle Moss dated April 7, 1987 and recorded in the Land Records of the Town of Derby, Vermont in Book 105 at pages 298 - 317;

7. the lands sold to Marcel Roberts and others by Warranty Deeds of Ranson and Doris Mead dated September 18, 1987 and recorded in the Land Records of the Town of Coventry, Vermont in Book 28 at pages 213 - 223;

8. the lands sold to Marcel Roberts by Warranty Deeds of Francis and Elizabeth Lackie dated November 4, 1988 and recorded in the Land Records of the Town of Troy, Vermont in Book 47 at pages 499 - 510;

9. the lands sold to Marcel Roberts by Warranty Deeds of Earl and Brenda Simons dated June 23, 1988 and recorded in the Land Records of the Town of Morgan, Vermont in Book 34 at pages 170 - 183;

10. the lands sold to Marcel Roberts by Warranty Deeds of Herbert and Juanita Hodgeman dated September 26, 1989 and recorded in the Land Records of the Town of Lowell, Vermont in Book 32 at pages 452 - 469;

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

11. the lands sold to Marcel Roberts and Noel Lussier by Warranty Deeds of William and Doris Ryan dated August 10, 1989 and recorded in the Land Records of the Town of Irasburg, Vermont in Book 34 at pages 59 - 73;

12. the lands sold to Marcel Roberts by Warranty Deeds of Peter and Ellen DiVietro dated January 6, 1989 and

recorded in the Land Records of the Town of Irasburg, Vermont in Book 33 at pages 331 - 336;

13. the lands sold to Marcel Roberts by Warranty Deeds of Joseph and Ruth Dubois dated December 19, 1988 and recorded in the Land Records of the Town of Derby, Vermont in Book 113 at pages 457 - 462;

14. the lands sold to Marcel Roberts by Warranty Deeds of Elia Favreau dated November 29, 1985 and recorded in the Land Records of the Town of Holland, Vermont in Book 24 at pages 159 - 174;

15. the lands sold to Marcel and Stella Roberts by Warranty Deeds of the Federal Land Bank of Springfield dated January 2, 1986 and recorded in the Land Records of the Town of Derby, Vermont in Book 101 at pages 484 - 493;

16. the lands sold to Marcel Roberts by Warranty Deeds of Philip Humes dated August 15, 1988 and recorded in the Land Records of the Town of Brownington, Vermont in Book 29 at pages 192 - 207;

17. the lands sold to Marcel Roberts by Warranty Deeds of Mark Lalime dated June 18, 1988 and recorded in the Land Records of the Town of Derby, Vermont in Book 111 at pages 199 -204;

18. the lands sold to Marcel Roberts by Warranty Deeds of the Northern Land Development Co. dated September 20, 1988 and recorded in the Land Records of the Town of Irasburg, Vermont in Book 33 at pages 214 -217;

19. the lands sold to Marcel Roberts by Warranty Deeds of Glen and Sharon Patten dated October 19, 1988 and recorded in the Land Records of the Town of Holland, Vermont in Book 25 at pages 506 - 509;

20. the lands sold to Marcel Roberts by Warranty Deeds of John and Donna Quinn dated February 3, 1988 and recorded in the Land Records of the Town of Newport, Vermont in Book 14WD at pages 260 -267;

21. the lands sold to Marcel Roberts and Jean Paul Bonneau by Warranty Deeds of Norman and Annette Tetreault dated September 26, 1985 and recorded in the Land Records of the Town of Newport, Vermont in Book 12 at pages 333 - 340;

22. the lands sold to Marcel Roberts by Warranty Deeds of Herbert Wicks dated November 14, 1987 and recorded in the Land Records of the Town of Brownington, Vermont in Book 28 at pages 465 - 468; and

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

23. the lands sold to Marcel Roberts by Warranty Deeds of Ulric and Annette Wright dated August 1, 1986 and recorded in the Land Records of the Town of Derby, Vermont in Book 102 at pages 351 - 360.

B. By the sale or offer of sale of the lots created at the lands described in ¶A above without first obtaining Act 250 Land Use Permits pursuant to 10 V.S.A. Chapter 151, the defendants, with each sale or offer of each lot, violated 10 V.S.A. §6081(a).

C. Within 180 days of the entry of this Judgment Order, the defendants shall apply for and diligently pursue Act 250 subdivision permits for all lands which they own which are listed in ¶A which are not already covered by Act 250 subdivision permits. The defendants shall arrange for, carry out and pay all costs of mitigation, remediation and the fulfillment of all other terms or conditions that may be required by such Act 250 subdivision.

D. For any lot listed in ¶A which has been sold by the defendants to a third party:

1. if the third party owner qualifies as a person eligible for an Act 250 permit pursuant to 10 V.S.A. §6025(c) and Environmental Board Rule 60, within 60 days of the entry of this Judgment Order, the defendants shall notify such owners of the provisions of this Paragraph and shall offer to assist and pay for the filing of an application filed under §6025(c). The defendants shall assist and pay for the filing of any application filed under §6025(c) and shall cooperate with the third party owner by providing information and attending hearings as required by the District Environmental Commission.

2. if the third party owner does not qualify as a person eligible for an Act 250 permit pursuant to 10 V.S.A. §6025(c) and Environmental Board Rule 60, within 60 days of the entry of this Judgment Order, the defendants shall notify such owners of the provisions of this Paragraph and shall offer to assist and pay for the filing of an application filed under 10 V.S.A. Chapter 151, subchapter 4. The defendants shall assist and pay for the filing of any application filed under 10 V.S.A. Chapter 151, subchapter 4, and shall cooperate with the third party owner by providing information and attending hearings as required by the District Environmental Commission or the Environmental Board.

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

3. If mitigation is required or if any condition or term is imposed by the District Environmental Commission or the Environmental Board as a condition of issuing a permit under either §6025(c) or Chapter 201, subchapter 4, the defendants

shall either pay the costs of the mitigation or repurchase the property from the third party owner. If the lot is repurchased by the defendants, the lot shall be treated as if it were a lot presently owned by the defendants, and the defendants shall comply with the provisions of ¶C of this stipulation within 180 days of the date of repurchase.

E. The defendants shall engage in activity on the lands which they own only in accordance with the terms of their Act 250 Land Use Permits. The defendants shall arrange for, carry out and pay all costs of mitigation, remediation and the fulfillment of all other terms or conditions of such Act 250 Land Use Permits.

F. If a subdivision is "uncreated" by the defendants, Act 250 jurisdiction over such subdivision can be dissolved.

If the defendants propose to "uncreate" a particular subdivision, the defendants shall comply with the following procedure:

1. if "construction of improvements" (as that term is defined in Environmental Board Rule 2(D)) has occurred on the parcel, the defendants shall seek an advisory opinion from the district coordinator on question of whether such construction constituted "commencement of construction on a subdivision." Should the coordinator issue an opinion that "commencement of construction on a subdivision" has occurred, the defendants agree that this opinion will not be appealed, and they further agree that they will either

   (a) apply for an Act 250 permit for the land as it is, or

   (b) apply for a permit to remediate any impact from the construction;

in the latter case, the land will be subject to Act 250 jurisdiction until the impacts are fully remediated and a certification of compliance has been issued pursuant to Environmental Board Rule 37;

or

2. if no "construction of improvements" has occurred on the parcel, or if construction has previously been remediated under a permit, then, in order to "uncreate" the subdivision, the defendants shall

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

(a) repurchase all lots of the subdivision that have been sold;

(b) re-combine all lots into the original configuration;

(c) revoke all existing plot plans for the subdivision on file with any state agency or municipality; and

(d) in any transfer, place a restrictive covenant on the entire parcel to the benefit of the State that no future subdivision of the property will be based upon, or be substantially similar to, the plot plans that exist for the parcel.

When all of the above conditions have been met, the original parcel can be sold or transferred without Act 250 involvement, unless another basis for Act 250 jurisdiction exists.

G. For a period of five years from the entry of this Judgment Order, the defendants, together or individually, and any "person" related to them, as that term is defined in 10 V.S.A. §6001(14), shall not divide or partition any property within the jurisdictional area of the District 7 Environmental Commission. For a period of five years from the entry of this Judgment Order, the defendants, together or individually, shall not purchase any property which has been divided or partitioned by anyone within the jurisdictional area of the District 7 Environmental Commission after the date of this Judgment Order, without either i) an Act 250 Land Use Permit, or ii) a decision from the District Environmental Commission Coordinator (which may be appealed pursuant to 10 V.S.A. §6007(c) and Environmental Board Rule 3) that such a permit is not required. The Coordinator shall issue a decision within 30 days of a request by the defendants.

H. The defendants shall pay a civil penalty in the total amount of One Hundred Twenty-Five Thousand ($125,000.00 (US)) Dollars (with interest as set forth below in this Paragraph) to the State of Vermont not later than five years from the entry of this Judgment Order. Defendants Marcel Roberts and David Currier are jointly and severally liable for the payment of $31,250.00 of this penalty; defendant Marcel Roberts is solely liable for the payment of $93,750.00 of this penalty.

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

Payment of this penalty shall be as follows:

1. In July 1994, defendant Marcel Roberts deposited the sum of One Thousand ($1000.00 (US)) Thousand in an escrow

account held by the State of Vermont. Pursuant to the terms of the Escrow Agreement (attached as Attachment A to this Judgment Order), the State shall take these funds, and the remaining penalty due and owing to the State shall be reduced by this amount.

2. Within 45 days after entry of this Judgment Order the defendants shall pay to the State of Vermont the sum of Ten Thousand ($10,000.00 (US)) Dollars.

3. The defendants shall execute two promissory notes to the benefit of the State of Vermont in the amounts of Twenty-Eight Thousand Five Hundred ($28,500.00 (US)) Dollars and Eighty-Five Thousand Five Hundred ($85,500.00 (US)) Dollars, representing the remaining civil penalty due ($114,000.00) after payment is made pursuant to subparagraphs H(1) and H(2), above. The notes shall provide that full payment of the civil penalty shall be due not later than five years from the entry of this Judgment Order. The notes are attached to this Judgment Order as Attachments B and C and are incorporated into this Judgment Order. The defendants shall be permitted to decide to which of the notes any one-time payments (for instance, from the sale of property or the receipt of an award in litigation) will be applied.

4. The defendants shall pay the remaining civil penalty of $114,000.00 in annual payments, commencing not later than one year from the entry of this Judgment Order. Such payments shall be based on a ten year amortization schedule with a five year balloon, at an interest rate of 12%, as set out in the schedules attached to this Judgment Order as Attachments D and E. The defendants shall make payments in compliance with the terms and schedules of Attachments D and E.

5. The defendants are presently engaged in litigation in the matter of Marcel Roberts, David Currier and Roberts Real Estate v. Chimileski, Dkt. No. S167-9-93 OnC. Any proceeds (less attorneys fees) paid to the defendants from a settlement or judgment in that matter shall, within fifteen days of receipt by the defendants, be applied to pay the civil penalty owed to the State under this Paragraph (¶H), up to the outstanding amount of principal and interest which remains to be paid under this Paragraph as of the date of the said proceeds.

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

I. 1. To secure part of the penalty ordered by this Judgment Order, the attachment by the State of Vermont of the real estate of defendant Marcel Roberts in the amount of $66,000.00, as ordered by this Court in its Order of Approval entered in this matter on August 31, 1993, remains in effect.

2. To secure the remainder of the penalty ordered by this Judgment Order, attachment by the State of Vermont of

the real estate of the defendant Marcel Roberts, to wit the lands described as follows:

(a) being 16 acres, more or less, in the Town of Westford, Vermont as described in the Quitclaim Deed from Noel Lussier to Marcel Roberts, dated July 18, 1991 and recorded in Book 64 at page 4 of the Westford Land Records;

(b) being 60.38 acres, more or less, in the Town of Troy, Vermont as described in the Quitclaim Deed from Marcel Roberts to Marcel and Stella Roberts, recorded in the Book 50 at pages 314 - 315 of the Troy Land Records;

(c) being 10.52 acres, more or less, in the Town of Troy, Vermont as described in the Quitclaim Deed from Marcel Roberts to Marcel and Stella Roberts, dated August 23, 1990 and recorded in the Book 50 at pages 316 - 317 of the Troy Land Records; and

(d) being 10.04 acres, more or less, in the Town of Troy, Vermont as described in the Quitclaim Deed from Marcel Roberts to Marcel and Stella Roberts, dated August 23, 1990 and recorded in the Book 50 at pages 313 - 314 of the Troy Land Records;

in the amount of $48,000.00 is hereby approved.

3. The attachment by the State of Vermont of the real estate of defendant David Currier in the amount of $34,000.00, as ordered by this Court in its Order of Approval entered on August 31, 1993, is hereby released.

4. As payments on the principal of the civil penalty are received by the State under this Judgment Order, the State shall release its attachments by like amounts, so that the amount of the remaining attachments equals the amount of the remaining penalty to be paid. Upon the full payment of the penalty amount by the defendants to the State of Vermont, the State shall release all remaining attachments on lands attached pursuant to this Order.

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

J. This Judgment Order constitutes full resolution of all outstanding claims of the parties in these matters, Docket Nos. S-119-90 WnC and S-357-93 WnC. No further enforcement by the State of the allegations contained in the Complaints in these matters shall be permitted.

K. Within 30 days of the entry of this Judgment Order, the defendants shall record a copy of this Judgment Order, excluding the information contained in Paragraphs H and I of this Judgement Order under the defendants' names in the Land Records of any Town where any lot listed in Paragraph A is located.

Dated at Montpelier, Vermont this 17 day of October, 1995.

John P. Meaker
Presiding Judge
Superior Court

jhasen/roberts/consorder

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

EXHIBIT 2

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
2003 MAR 24 A 11:41
SUPERIOR COURT
WASHINGTON COUNTY

STATE OF VERMONT, PLAINTIFF v. MARCEL ROBERTS and DAVID CURRIER, DEFENDANTS	)	Docket No. S-119-90 WnC
STATE OF VERMONT, PLAINTIFF v. MARCEL ROBERTS, STELLA ROBERTS, ROBERTS REAL ESTATE, INC., ROGER LUSSIER, EVELYN LUSSIER, and A.R.D.I. INC., DEFENDANTS	)	Docket No. S-357-93 WnC

AMENDED AND SUPPLEMENTAL JUDGMENT ORDER

Pursuant to the Stipulation signed by the State of Vermont, Plaintiff, by and through its attorney, William H. Sorrell, Attorney General, and the Defendant, Marcel Roberts, *pro se*, it is hereby ADJUDGED, DECREED AND ORDERED:

1. The Judgment Order signed by John P. Meaker, Presiding Judge, under date of October 17, 1995, and filed with the Court on October 18, 1995, which appears of record in various municipal land records, including at Book 144, Pages 229-236 of the Town of Derby, Vermont Land Records, is hereby amended by striking Paragraph A.17 from said Judgment Order as the parcels of land referenced in said paragraph were included in the Judgment Order in error.

2. Except as set forth in Paragraph 1 above, said Judgment Order shall remain in full force and effect in accord with its terms.

Dated at Montpelier, Vermont this 20th day of March, 2003.

Mary Miles Teachout
Presiding Judge

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
2003 FEB 28 P 4:18
SUPERIOR COURT
WASHINGTON COUNTY

STATE OF VERMONT, PLAINTIFF v. MARCEL ROBERTS and DAVID CURRIER, DEFENDANTS	Docket No. S-119-90 WnC
STATE OF VERMONT, PLAINTIFF v. MARCEL ROBERTS, STELLA ROBERTS, ROBERTS REAL ESTATE, INC., ROGER LUSSIER, EVELYN LUSSIER, and A.R.D.I. INC., DEFENDANTS	Docket No. S-357-93 WnC

STIPULATION

NOW COME the State of Vermont, Plaintiff, by and through its attorney, William H. Sorrell, Attorney General, and the Defendants, Marcel Roberts and David Currier, *pro se*, and stipulate and agree as follows:

1. The Judgment Order signed by John P. Meaker, Presiding Judge, under date of October 17, 1995, and filed with the Court on October 18, 1995, which appears of record in various municipal land records, including at book 144, Pages 229-236 of the Town of Derby, Vermont Land Records, shall be amended by striking Paragraph A.17 from said Judgment Order as the parcels of land referenced in said paragraph were included in the Judgment Order in error.

2. Said Paragraph A.17 reads as follows:

17. the lands sold to Marcel Roberts by Warranty Deeds of Mark Lalime dated June 18, 1988 and recorded in the Land Records of the Town of Derby, Vermont in Book 111 at pages 199-204; ...

3. Except as set forth in Paragraph 1 above, said Judgment Order shall remain in full force and effect in accord with its terms.

Dated at Montpelier, Vermont this 28 day of February, 2003.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
S. Mark Sciarrotta
Assistant Attorney General

Dated at Derby, Vermont this 24th day of February, 2003.

_____
Marcel Roberts, pro se

Dated at Derby, Vermont this 24th day of February, 2003.

_____
David Currier, pro se

STATE OF VERMONT CHITTENDEN COUNTY, SS.	CHITTENDEN SUPERIOR COURT DOCKET NO.

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.	))))))))))))))

COMPLAINT

NOW COMES the State of Vermont, on behalf of the Agency of Transportation and the Agency of Natural Resources, by and through the undersigned attorney, and hereby bring this action for unlicensed operation of a junkyard, operation of an uncertified solid waste facility, a release or threatened release of hazardous materials, and the improper management of hazardous waste. This action is brought pursuant to Vermont Statutes relating to Junkyards and Waste Management, and the Vermont Solid Waste Management Rules and the Vermont Hazardous Waste Management Regulations.

This action is brought against Gilbert A. Rhoades, Sr. and Blanche E. Rhoades, the owners of real property located in Milton, Chittenden County, Vermont, who operate a junkyard business, that is also known as Rhoades Salvage and ABC Metals and Recycling, on their Milton property.

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

JURISDICTION AND VENUE

1. Jurisdiction over this action is vested in Superior Court and venue is proper in Chittenden County pursuant to 24 V.S.A. § 2243(6), for claims relating to junkyards, and 10 V.S.A. §§ 6610a (a)(2) and 8221, as well as 12 V.S.A. § 402, for claims relating to solid and hazardous waste.

PARTIES

2. Plaintiff Agency of Transportation (VTrans) is an agency of the State of Vermont charged with the duty to enforce the state laws pertaining to junkyards.

3. Plaintiff Agency of Natural Resources (ANR) is an agency of the State of Vermont charged with the duty to enforce the state laws pertaining to solid and hazardous waste.

4. Defendants Gilbert A. Rhoades, Sr. and Blanche E. Rhoades (defendants) are the owners of a ± 5-acre parcel of real property located at 15 Shirley Avenue in Milton, Vermont ("the Site").

5. Defendants are engaged in a business at the Site which involves the buying, selling and storing of large quantities of used and discarded items, including motor vehicles.

STATUTORY AND REGULATORY FRAMEWORK

6. VTrans has authority to regulate the existence and operation of junkyards in Vermont through Chapter 61, Subchapter 10, Junkyards, Title 24 of Vermont Statutes Annotated, 24 V.S.A. §§ 2241-2283. This subchapter requires that all junkyards obtain an annual license from the State of Vermont and comply with certain operational requirements, including the screening of the junkyard from view from public highways.

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

7. ANR has authority to regulate the storage or disposal of any solid waste through Chapter 159, Waste Management, Title 10 of the Vermont Statutes Annotated, 10 V.S.A §§ 6602, 6605, 6610a and the Vermont Solid Waste Management Rules, ("VSWMR") *available at* http://www.anr.state.vt.us/dec/wastediv/solid/SWRules.htm.

8. The § 6602(13) definition of waste is extremely broad and includes "a material that is discarded or is being accumulated, stored... prior to being discarded or has served its intended use and is normally discarded...." Solid waste is also broadly defined in § 6602(2) as "discarded garbage, refuse... and other discarded material" and encompasses waste tires.

9. ANR has authority to regulate the storage or disposal of hazardous waste through Chapter 159, Waste Management, Title 10 of the Vermont Statutes Annotated, 10 V.S.A §§ 6602, 6606, 6610a and the Vermont Hazardous Waste Management Regulations ("VHWMR") *available at* http://www.anr.state.vt.us/dec/wastediv/rcra/regs.htm.

10. Hazardous waste is broadly defined in § 6602(4) and includes among other things, wastes that are "toxic, corrosive, ignitable, reactive" which encompasses gasoline, diesel, antifreeze, engine oils, lead acid batteries and any soil or absorbent material that contain these wastes. Entities that generate, transport, store or dispose of hazardous waste are required to notify ANR as to the nature and quantity of hazardous wastes handled. Entities that generate hazardous waste in an amount less than 220 lbs. per month and accumulate less than 2200 lbs. of hazardous waste on site at any point in time are deemed to be "Conditionally Exempt Generators" and

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

must comply with specific handling, storage and labeling requirements. Among the handling requirements is a duty, when there is a spill of suspected hazardous waste, to make a determination as to whether any contaminated media or spill clean up material is hazardous waste.

11. ANR has the authority to regulate the release or threatened release of any hazardous material into the surface or groundwater, or onto the land of the State, pursuant to Chapter 159, Waste Management, Title 10 of the Vermont Statutes Annotated, 10 V.S.A §§ 6602, 6606, 6610a, 6612, 6615, 6615b, and 6616. Hazardous materials are specifically defined in § 6602(16)(A) and include petroleum products. Petroleum products are part of a class of hazardous materials known as Volatile Organic Compounds (VOCs), and include gasoline and engine oil. The Vermont soil guideline threshold for requiring treatment for gasoline impacted soils is 20 parts per million as set forth in the "Agency Guidelines for Petroleum Contaminated Soil and Debris" *available at* http://www.anr.state.vt.us/dec/wastediv/sms/pubs/Petro_soils96.pdf.

12. If there is a release or a threatened release, as defined in § 6602(17), of a hazardous material, ANR is authorized to require a responsible party to investigate and abate the release or threatened release of the hazardous material, and if necessary to remediate or clean up the release.

FACTS

Facts relating to Operation of a Junkyard and Solid Waste Facility

13. Defendants are the owners of the Site.

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

14. Defendants operate and maintain a business that involves buying, receiving, storing, keeping, treating, dismantling, processing, selling and disposing of used and discarded items (collectively 'materials') outdoors, on the Site.

15. The defendants' materials 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 ("waste soil"), and sawdust that has absorbed spills of waste liquids ("waste sawdust").

16. VTrans staff inspected the Site on 3/9/01, 3/30/01 and 4/26/01.

17. Prior to the 3/9/01 inspection, VTrans staff determined that the Site did not have a State junkyard license for 2001.

18. No State Junkyard license for the Site was issued for any year between 2001 and 2007.

19. During the inspections VTrans staff observed junk and junk motor vehicles that were being dismantled and processed at the Site.

20. VTrans staff also observed that along the northern boundary of the Site, directly adjacent to several residential dwellings on a cul-de-sac, Duck Court, in Milton, the defendants had replaced a portion of a corrugated metal fence with large metal tanks formerly used for underground storage of petroleum products.

21. The metal tanks are plainly visible from Duck Court and the residential dwellings located at the end of Duck Court.

22. ANR staff inspected the Site on 5/3/96, 7/11/96, 9/12/03, 10/21/05, and 11/8/06.

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

23. During every inspection of the Site over the past eleven years ANR staff observed a junkyard operation and also noted a large pile of waste tires.

24. This tire pile is now estimated to be 100 x 150 feet in size, 20 feet in height, and to contain at least 50,000 tires.

25. Waste soil and waste sawdust were also observed during the ANR inspections.

26. Prior to the inspections ANR staff determined that defendants do not have and never have had a certification from ANR for the storage, treatment or disposal of solid waste at the Site.

27. ANR has incurred costs and expenses in its investigation of the solid waste violations at the Site.

Facts relating to Release or Threatened Release of Hazardous Materials

28. During the 5/3/96 inspection by ANR, the defendants filed a 'Notification of Regulated Waste Activity' form with the inspector, acknowledging that they routinely handled certain hazardous wastes normally associated with vehicle salvage operations, including gasoline, diesel, antifreeze, waste oil and lead acid batteries.

29. In the course of that same inspection, the ANR inspector detected a strong gasoline odor and also observed stained soils in the areas used to drain gasoline tanks, near the car crushing facility, and in other areas throughout the Site.

30. The presence of stained soils at a facility that uses or processes liquid hazardous waste gave the inspector cause to believe that there existed a release or threatened release of such hazardous wastes into the environment at the Site.

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

31. Following the inspection, defendants were directed by ANR staff to conduct an environmental site assessment to determine the nature and extent of any hazardous waste contamination at the Site.

32. In a report dated 9/20/96, environmental assessment work conducted by Kent Koptiuch, Inc. Geo-Environmental Services confirmed the presence of Volatile Organic Compounds (VOCs) in soils at the Site at 200 parts per million (ppm) which is ten times higher than the Vermont soil guideline threshold for requiring treatment for gasoline impacted soils.

33. The presence of contaminated soil on Site provided reason to suspect that the groundwater beneath the Site might also be contaminated and as a consequence ANR requested that a groundwater investigation be conducted at the Site.

34. An environmental assessment Work Plan for the Site to determine the nature and extent of groundwater contamination was approved by ANR in July of 1997, but was never completed by the defendants.

35. As of the date of this complaint there exists a release or threatened release of hazardous materials from the Site into the groundwater of the State.

Facts relating to Improper Management of Hazardous Waste

36. ANR staff inspected the Site on 5/3/96, 7/11/96, 9/12/03, 10/21/05, and 11/8/06.

37. During each inspection listed above, ANR staff determined that numerous hazardous wastes were being improperly managed on the Site as follows:

- Spent lead acid batteries were being stored on bare ground, not under cover and not within a structure that sheds rain and snow (thereby increasing the potential for contamination to the environment).

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

- Spent ethylene glycol fluid (antifreeze) was stored in containers with no or illegible labels on them, and the containers were not kept closed and sealed at all times.
- Hazardous waste determinations were not being made on spills of suspected hazardous materials.
- Contaminated sawdust, placed on the ground to absorb spills of potentially hazardous waste, was being placed in crushed automobiles and shipped off site or being plowed just beneath the surface of the bare ground at the Site.
- Used oil was being stored out of doors, in a disabled truck bed or on bare ground, without cover and without identifying labels.

Count 1 - Operation of an Illegal Junkyard

38. The allegations in paragraphs 1-37 are incorporated by reference.

39. Defendants' materials include junk and junk motor vehicles as defined by 24 V.S.A. § 2241(5) and (6).

40. Defendants have established, and currently operate and maintain a junkyard, as defined by 24 V.S.A. § 2241(7), at the Site.

41. Defendants do not hold a license from the Vermont Agency of Transportation to operate and maintain a junkyard, in violation of 24 V.S.A. § 2242(2).

42. The large steel storage tanks that defendants have placed on a portion of the northern boundary of the Site do not adequately screen the Site from Duck Court and the residential dwellings located there, in violation of 24 V.S.A. § 2257(a) and (b).

43. Plaintiff Vermont Agency of Transportation is entitled to injunctive relief and penalties, pursuant to 24 V.S.A. §§ 2243(6), 2281 and 2282.

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

Count 2 – Uncertified Operation of a Solid Waste Facility

44. The allegations in paragraphs 1-43 are incorporated by reference.

45. Defendants' 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).

46. Defendants currently operate and maintain a facility where solid waste is disposed of and stored, as defined by 10 V.S.A. § 6602(2), (7) and (12) and VSWMR 6-201. The unregulated storage, treatment or disposal of solid waste at the Site poses a potential health and safety threat to humans and the environment.

47. Defendants do not have a certification from the Vermont Agency of Natural Resources to operate a solid waste management facility at the Site, in violation of 10 V.S.A. § 6605(a)(1) and VSWMR 6-301(a) and 6-302(d).

48. Plaintiff Vermont Agency of Natural Resources has expended money to investigate this matter.

49. Plaintiff Vermont Agency of Natural Resources is entitled to injunctive relief, civil penalties, and recovery of governmental expenditures for the investigation of the operation of an uncertified solid waste facility pursuant to 10 V.S.A. §§ 8221 and 6612(b).

Count 3 – Abatement of Release or Threatened Release of Hazardous Materials

50. The allegations set forth in Paragraphs 1 through 49 are incorporated herein by reference.

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

51. Defendants are the owners and operators of a facility where hazardous materials have been and are being released and where a threat of release of hazardous materials exists at this time.

52. Defendants are strictly liable under 10 V.S.A. § 6615 for abatement of the release and the threatened release of hazardous materials.

53. Abatement of the release and any threatened release is necessary to protect the public health and the environment.

54. Plaintiff Vermont Agency of Natural Resources has expended money to investigate the release and threatened release of hazardous materials at the Site.

55. Plaintiff Vermont Agency of Natural Resources is entitled to injunctive relief, civil penalties, and recovery of governmental expenditures for the investigation of the release or threatened release of hazardous materials pursuant to 10 V.S.A. §§ 8221 and 6612(b).

56. Pursuant to 10 V.S.A. § 8221(b)(6), the defendants are liable for civil penalties of not more than $50,000.00 for the initial violation of 10 V.S.A. § 6616, and $25,000.00 for each day that the release has continued unabated thereafter.

Count 4 – Improper Management of Hazardous Waste

57. The allegations set forth in Paragraphs 1 through 56 are incorporated herein by reference.

58. Defendants' 5/3/96 filing of a 'Notice of Regulated Waste Activity' with ANR identified their generator status as a Conditionally Exempt Generator ("CEG") pursuant to VHWMR 7- 104. As a CEG, the defendants are required to comply with the VHWMR for all hazardous and conditionally exempt wastes handled on Site.

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

59. Defendants failed to comply with the requirements of VHWMR 7-204(f)(1) pertaining to the storage of lead acid batteries in that they stored lead acid batteries on bare ground, not under cover and not within a structure that sheds rain and snow.

60. Defendants failed to comply with the requirements of VHWMR 7-204(i)(2)(A) and (B) pertaining to the storage of ethylene glycol (antifreeze) in that they stored antifreeze in containers with no or illegible labels and such containers were not kept closed at all times.

61. Defendants failed to comply with the requirements of VHWMR 7-303 by failing to make hazardous waste determinations on spills of suspected hazardous waste.

62. Defendants failed to comply with the requirements of VHWMR 7-306(c)(2) by failing to deliver any waste determined to be hazardous to an appropriate disposal facility.

63. Defendants failed to comply with the requirements of VHWMR 7-806(b) (5), (6) and (7) by failing to store used oil in marked containers, on impervious surfaces and within structures that were capable of shedding rain and snow.

Prayer for Relief

WHEREFORE, the plaintiffs respectfully request that the Court enter an order containing the following terms:

1. Order the defendants, within 90 days from the date of this Court's order, to obtain all necessary permits, licenses, and certifications from the Town of Milton and the State of Vermont to conduct junkyard operations on the Site, including but not limited to making arrangements to address, by a time certain, the fencing/screening issues on the northern boundary of the Site.

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

2. If within 90 days of this Court's Order, the defendants have not obtained all necessary permits, licenses, and certifications from the Town of Milton and the State of Vermont to conduct junkyard operations on the Site, then the defendants shall permanently shut down the facility, accept no new materials, and remove all materials including scrap from the site within fifteen months of this Court's order.

3. Order the defendants, within 90 days from the date of this Court's order, to begin removing waste tires from the Site at the rate of one tractor-trailer load per month, until all tires are removed from the Site. The defendants shall provide written documentation that all tires removed from the Site have been delivered to a certified processing or disposal facility by submitting evidence of proper disposal of the tires, in the form of a tipping slip from the certified facility, indicating the date, the name of the disposal facility, the source of the tires, and the tonnage. Defendants shall provide such documentation, to Barb Schwendtner of the Agency of Natural Resources at 103 South Main Street Waterbury, Vermont 05671-0404, via US Mail on the first day of each month, for every month until the existing tire pile has been completely removed.

4. Order the defendants not to accept any tires at the Site except those associated with junk motor vehicles it acquires for salvage, to document additional tires received as to the date of their arrival on Site and their association with a particular vehicle and to remove any such tires within 1 year from their receipt at the Site.

5. Order the defendants, within 30 days from the date of this Court's order, to submit a work plan to the Agency of Natural Resources to investigate the release and threatened release of hazardous materials on the Site, and to implement that work

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

plan to the satisfaction of ANR pursuant to the requirements of 10 V.S.A. § 6615b (Corrective Action Procedures).

6. Order the defendants, within 45 days from the date of this Court's order, to submit a written plan to address all identified deficiencies in the handling and management of used oil, antifreeze, lead acid batteries, waste gas, diesel, and other automotive fluids, as well as spills of suspected hazardous materials on Site, and to implement that plan within 45 days of the date that ANR gives written approval of that plan, incorporating all amendments and modifications required by ANR.

7. If the defendants fail to meet any deadline set forth in this Court's order, appoint a special master authorized to carry out the dictates of this Court's order at the defendants' expense.

8. Issue a declaratory judgment and order the defendants to reimburse the Vermont Agency of Natural Resources for expenditures it has incurred or may incur in connection with the investigation, removal, and cleanup of the solid and hazardous wastes at the Site, plus prejudgment interest and including the costs of enforcement and attorneys fees.

9. Order the defendants to pay civil penalties to the Vermont Agency of Transportation pursuant to 24 V.S.A. § 2282 of up to $50 per day for defendants' junkyard violations.

10. Order the defendants to pay civil penalties to the Vermont Agency of Natural Resources pursuant to 10 V.S.A. § 8221(b)(6) of up to $50,000 for defendants' initial violations of 10 V.S.A. § 6605 and 6615, and up to $25,000 for each day thereafter

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

that the defendants failed to take action and allowed the solid and/or hazardous waste violations to continue unabated.

11. Order such other and further relief as the Court may deem just and proper.

Dated at Montpelier, this 11th day of May, 2007

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Jeanne Elias

Jeanne Elias
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609

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

ENTRY ORDER

2011 VT 68

SUPREME COURT DOCKET NO. 2009-388

NOVEMBER TERM, 2010

In re Shenandoah LLC, et al. (Appeal of Act 250 JO #9-066)	}	APPEALED FROM:
	}	Environmental Court
	}	DOCKET NO. 245-10-08 Vtec

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

Affirmed.

FOR THE COURT:

Brian L. Burgess, Associate Justice

Dissenting:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Concurring:

Denise R. Johnson, Associate Justice

Harold E. Eaton, Jr., Superior Judge,
Specially Assigned

2011 VT 68

No. 2009-388

In re Shenandoah LLC, et al.
(Appeal of Act 250 JO #9-066)

Supreme Court

On Appeal from
Environmental Court

November Term, 2010

Thomas S. Durkin, J.

David J. Shlansky of Shlansky & Co., LLP, Vergennes, for Plaintiffs-Appellants.

William H. Sorrell, Attorney General, and Scot L. Kline and Nicholas F. Persampieri, Assistant Attorneys General, Montpelier, for Amicus Curiae State of Vermont.

PRESENT: Reiber, C.J.[1], Dooley, Johnson, Skoglund and Burgess, JJ., and Eaton, Supr. J., Specially Assigned

¶ 1. **BURGESS, J.** Shenandoah, LLC, David Shlansky, Ting Chang, and other entities and individuals, appeal from the Environmental Court's summary judgment decision upholding an Act 250 jurisdictional opinion. They challenge the court's attribution of certain development and subdivision activities to Shlansky and Chang. Appellants also argue that "person-based jurisdiction" under Act 250 violates the Vermont Constitution. Appellants failed to preserve their constitutional argument, and we do not address it. We affirm the court's jurisdictional opinion.

¶ 2. Appellants have a variety of overlapping interests. Shlansky averred below that in 2000, he created an irrevocable trust (Trust) to benefit his and his wife Chang's children.

[1] Chief Justice Reiber was present for oral argument, but did not participate in this decision. Judge Eaton was not present for oral argument, but reviewed the briefs, listened to oral argument, and participated in the decision.

Chang is the trustee of the Trust. Shlansky, as settlor of the Trust, contributed the property that is the subject of the underlying jurisdictional opinion. Appellants did not disclose the purpose for which the Trust was established, and the Environmental Court presumed that Shlansky conveyed real estate to the Trust to benefit the minor children and for general estate planning purposes. As of June 2009, the Trust had two beneficiaries: Asa Shlansky, age nine, and Beatrice Shlansky, age seven.

¶ 3. The Trust has an ownership stake in various companies that have engaged in land-development activities in the relevant jurisdictional area. The Trust and Pedro Zevallos own Shenandoah, LLC, Ferrisburgh Realty Investors (FRI), and Bluefield, LLC. The Trust also owns Witherbee, LLC. Shlansky owns Mahaiwe, LLC.[2] The court found that FRI had created a twenty-one-lot planned residential development in September 2008. Bluefield created a two-lot subdivision in 2007. Witherbee constructed five housing units in March 2007, and Mahaiwe constructed four housing units in November 2005.

¶ 4. Shenandoah now seeks to build a ten-unit residential housing project known as the Shade Roller Planned Unit Development (Shade Roller PUD) in Vergennes. In August 2008, Zevallos, as Vice President of Shenandoah, requested a jurisdictional opinion to determine if the project required an Act 250 permit. See 10 V.S.A. § 6007(c). He also asked for clarification of "[t]he current total subdivision and housing unit counts for the owners and manager of Shenandoah, LLC, for Act 250 jurisdictional purposes" and "[w]hat the total housing unit counts for the owners and manager of Shenandoah, LLC, will be as a result of the Shade Roller [PUD]." This information is relevant to determining when the various parties will need to obtain Act 250 permits for purposes of future subdivisions and development. See id. § 6001(3)(A)(iv), (19).

[2] Appellants did not submit any actual trust documents to support these representations or any other materials identifying corporate structure and responsibilities of the business entities involved in this case. Instead, they relied on affidavits from Shlansky and Chang, and thus, the recited information is based solely on the affiants' representations.

¶ 5. In a September 2008 decision, the district coordinator found that the project required an Act 250 permit because it involved the construction of a housing project with ten or more units. See id. § 6001(3)(A)(iv) (defining "development" under Act 250 to include the "construction of housing projects . . . with 10 or more units"). The district coordinator also attributed a certain amount of subdivision lots and housing units for purposes of Act 250 jurisdiction to FRI, Bluefield, Shenandoah, Shlansky, Chang, the Shlansky children, and Zavallos, based on their relationships with one another. Additional housing units were attributed to Shlansky and Chang based on Shlansky's control of Mahaiwe.

¶ 6. Appellants appealed portions of this decision to the Environmental Court. They submitted a statement of questions, and later filed a memorandum of law. The court construed this latter document as a motion for summary judgment, and in a September 2009 order, it upheld the district coordinator's jurisdictional opinion. As explained in greater detail below, it concluded that Shlansky and Chang benefit from the Trust's land-development activities, and thus, the Trust's development activities were attributable to them personally. Appellants challenge this conclusion on appeal. As support for their position, they point to the affidavits filed by Shlansky and Chang, and "the legal existence of the Trust, which is irrevocable."

¶ 7. We begin with the statutory and regulatory requirements at issue. Generally speaking, an Act 250 permit is required before a "person" can sell any interest in a subdivision, commence construction on a subdivision or development, or commence development. 10 V.S.A. § 6081(a); see id. § 6001(14) (defining "person"). As relevant here, the term "subdivision" means "a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years." Id. § 6001(19). For purposes of a "subdivision," the term "person":

> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;
>
> . . . .
>
> (iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land; [and]
>
> (iv) includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by the parent, child or spouse.

Id. § 6001(14)(A).

¶ 8. We held in In re Spencer, that this statutory language was "intended to broaden the definition of a 'person' owning or controlling land to include those who may not be mentioned specifically in the conveyance, but who may nevertheless derive some benefit from partition or division of the land." 152 Vt. 330, 339, 566 A.2d 959, 964 (1989). We found this interpretation consistent with the Legislature's express finding that " 'to ensure appropriate Act 250 review, it is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction.' " Id. (quoting 1987, No. 64, § 1).

¶ 9. Relying on Spencer, and the plain language of the statute, the Environmental Court found that all prior subdivisions attributable to Zevallos and the Trust were also attributable to Shenandoah because they were "individuals and entities affiliated with each other for profit." 10 V.S.A. § 6001(14)(A)(iii). Zevallos and the Trust also owned Bluefield and FRI, making these four parties "individuals and entities affiliated with each other for profit." Id. Therefore, the court attributed twenty-one lots that FRI had created in 2008 and lots created by Bluefield in 2007 to Zavallos, the Trust, and Shenandoah, for purposes of Act 250.

¶ 10. The court also considered how many subdivided lots should be attributed to the individual appellants for purposes of Act 250. It explained that FRI was owned in part by the Trust. The Trust would accrue profits from FRI's activities, which would in turn benefit the Shlansky children. Because the definition of "person" specifically included "an individual's parents" and because the Shlansky children would receive or had received a beneficial interest from the Bluefield and FRI subdivisions, the court found that Shlansky and Chang also met the definition of "person" in 10 V.S.A. § 6001(14)(A)(iv). Thus, it found that the FRI and Bluefield subdivisions were attributable to Shlansky and Chang as well.

¶ 11. The court found that appellants proffered no specific evidence to refute the presumption that the term "person" included Shlansky and Chang as parents of the Trust's beneficiaries. To the contrary, it found that the evidence supported the statutory presumption. Shlansky had contributed to the Trust the property that was the subject of the subdivision and development at issue. As the parents of the sole beneficiaries, both of whom were minors, the Trust's land development activities would provide financial support and benefit to children whom Shlansky and Chang had a parental obligation to support. Thus, to the extent that the Trust provided funds for the education and care of the minor children, the court concluded that Shlansky and Chang received the collateral benefit of having their minor children provided for by the Trust.

¶ 12. The court reached a similar conclusion with the respect to the number of housing units attributable to Shansky and Chang for purposes of future "development." The term "development" is defined in 10 V.S.A. § 6001(3)(A)(iv) as:

> [t]he construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on involved land, and within any continuous period of five years.

For purposes of "development," Act 250 Rule 2(C)(1)(a) defines "person" as:

> an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; a municipality or state agency; and, individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the "development" of land.

6 Code of Vt. Rules 12 004 060-2, available at http://www.michie.com/vermont [hereinafter Act 250 Rule]. Unlike the definition of "person" for purposes of "subdivisions," this definition does not presumptively include "an individual's parents and children, natural and adoptive, and spouse." 10 V.S.A. § 6001(14)(A)(iv).

¶ 13. The Environmental Court concluded that Shenandoah's housing units, once built, would be attributable to Shenandoah, Zavallos, the Trust, and the Shlansky children. It also found these units attributable to Shlansky and Chang based on its finding that to the extent that the minor children benefitted from the Trust's development activities, Shlansky and Chang benefitted as well. It reiterated that the profits accumulated by the Trust would provide for the Shlansky children, which would thereby diminish the parents' burden to provide for their minor children. The court noted the absence of any evidence to indicate that Shlansky and Chang would not benefit from the Trust's providing for their minor children. The court also attributed Witherbee's housing units to the Trust, Shlansky, Chang, and the Shlansky children. Additional housing units were attributed to Shlansky based on his ownership, management, and control of Mahaiwe.

¶ 14. The court's conclusions are compelled by the record. Appellants proffered that the Trust was established by Shlansky for the benefit of his and his wife's children and that the child beneficiaries were minors at the time of permit application and remain so now. The Trust's subdivision and development activities are, therefore, for the benefit of the children. The parents are financially responsible for their minor children so that, absent any evidence or argument to the contrary, any financial benefit to the children inures to the benefit of the parents.

¶ 15. As the Environmental Court concluded, that benefit to the parents renders them "persons" affiliated with subdivisions and development previously undertaken by entities owned or affiliated with the Trust as defined by Act 250. 10 V.S.A. § 6001(14)(A)(iii) (pertaining to subdivisions); Act 250 Rule 2(C)(1)(a) (pertaining to development). In turn, such prior real estate involvement triggers Act 250 review jurisdiction, as the Environmental Court also determined. Under the first definition of "person," it is explicitly up to the parents to prove otherwise. See 10 V.S.A. § 6001(14)(A)(iv) (presuming to include the parents as "persons," "unless the individual establishes that he or she will derive no profit or . . . acquire any other beneficial interest from the partition or division of land by the . . . child"). While Act 250 Rule 2(C)(1)(A) does not contain the same explicit presumption, the effect is identical. The Environmental Court correctly concluded that, since Rule 2(C)(1)(a) includes as a person "any other beneficial interest derived from the development of land," the rule's definition encompasses a trust for one's minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support.

¶ 16. As they did below, appellants seek to counter such a presumed benefit not with evidence to rebut the presumption, but by positing only that the Trust is irrevocable. There was neither evidence nor suggestion that the Trust's acknowledged benefit for the children was beyond the practical enjoyment of the parents or was somehow delayed, withheld, or unavailable to the children at the time of the land use proposed by the Trust and its subsidiaries. As explained by the trial court, the mere fact that the Trust for the minor children is irrevocable does not alter its beneficial impact on the parent.

¶ 17. Appellants' reliance on their affidavits is equally misplaced. Obviously, the Environmental Court was not bound by the bald assertions contained in these documents. Appellants provided no information to the court, and no actual documentation to support their

conclusory statements that they had no "control" over the Trust's activities and derived no "benefit" from the Trust's land development activities. It is well-established that "ultimate or conclusory facts and conclusions of law . . . cannot be utilized on a summary-judgment motion." 10B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2738, at 346-56 (3d ed. 1998); see also Lussier v. Truax, 161 Vt. 611, 612, 643 A.2d 843, 844 (1993) (mem.) (reaching similar conclusion). The evidence provided by appellants supports the Environmental Court's findings, and the court's findings necessitate its conclusions. We therefore affirm its decision.

¶ 18. Finally, we do not address appellants' constitutional challenge, which they raise for the first time on appeal. See V.R.E.C.P. 5(k)(4) ("An objection that was not raised before the Environmental Court may not be considered by the Supreme Court, unless the failure or neglect to raise that objection is excused by the Supreme Court because of extraordinary circumstances."); Bull v. Pinkham Eng'g Assocs., Inc., 170 Vt. 450, 459, 752 A.2d 26, 33 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). There are no extraordinary circumstances that excuse appellants' failure to raise this argument below. By rule, appellants are limited to those issues identified in their statement of questions filed with the Environmental Court. V.R.E.C.P. 5(f). They did not raise a constitutional challenge in this document, and they are precluded from doing so now.

Affirmed.

FOR THE COURT:

Associate Justice

¶ 19. **SKOGLUND, J., dissenting.** I believe the Environmental Court erred in resolving the issue on summary judgment. I would reverse and remand this case for additional

proceedings given the case's posture before the Environmental Court and the statutory structure at issue. Respectfully, I dissent.[3]

¶ 20. To prevail on a motion for summary judgment, the moving party must satisfy a stringent two-part test: first, there must be no genuine issues of material fact, and second, the moving party must be entitled to judgment as a matter of law. Wesco, Inc. v. Hay-Now, Inc., 159 Vt. 23, 26, 613 A.2d 207, 209 (1992). Summary judgment is appropriate only when the materials before the court show that there is no genuine issue as to any material fact. See Carr v. Peerless Ins. Co., 168 Vt. 465, 466, 724 A.2d 454, 455 (1998). The Environmental Court, having found the evidence offered by appellants insufficient for a determination on the material fact in issue, should have simply denied summary judgment, thereby putting appellants to their proof in the de novo hearing to which they were entitled. 10 V.S.A. § 8503(b)(2); id. § 8504(h); V.R.E.C.P. 5(g) (stating that appeals to Environment Court, including appeals of jurisdictional opinions, shall be by "trial de novo."); see Bennett Estate v. Travelers Ins. Co., 138 Vt. 189, 191, 413 A.2d 1208, 1209 (1980) (remanding case where trial court converted motion to dismiss into motion for summary judgment without notifying parties and giving opportunity to supply additional materials).

¶ 21. Courts are not empowered to try issues of fact on a motion for summary judgment; they examine affidavits or other evidence to determine whether a triable issue exists rather than for the purpose of resolving the issue. Braun v. Humiston, 140 Vt. 302, 306, 437 A.2d 1388, 1389 (1981) overruled on other grounds by Soucy v. Soucy Motors, Inc., 143 Vt. 615, 471 A.2d 224 (1983). To complicate the matter before the Environmental Court, there was no adversarial party to oppose summary judgment, or to argue that the case was not properly resolved on summary judgment, or to argue that there were contested material facts at issue.

---

[3] I do concur with the majority's determination of appellants' third claim of error. Ante, ¶ 18. Appellants failed to adequately raise their constitutional argument below and may not do so now.

And, a material fact is at issue: do David Shlansky and Ting Chang, as parents, have a beneficial interest in the Trust's development activities. Instead of requesting further evidence, the court summarily decided the case against the movant, essentially holding that the proffered facts were so lacking as to prove their own negative.

¶ 22. In making its ruling, the Environmental Court held that Shlansky and Chang "have not fulfilled their evidentiary burden of exempting themselves from being included within the statutory definition of 'persons' contained in § 6001(14)(A)(iv)" because they failed to prove they would derive no "beneficial interest" from the Trust's development activities. On appeal, as below, appellants relied on affidavits. The affidavits stated that the affiants do not "derive any profit or consideration . . . or acquire any other beneficial interest" from the partition of the land or development activities. Rather than finding that further evidence was needed to decide the factual matter of the existence of a beneficial interest, the trial court wrote, "we conclude as a matter of law from the undisputed facts, even when viewed in a light most favorable to Appellants, that all Appellants . . . are 'persons' for purposes of Act 250 jurisdiction." (Emphasis added.) The court then held: "Appellants have not provided any factual foundation" to meet their burden of proof that they will not derive any profit, consideration, or any other beneficial interest from the land development activities. The court wrote "[t]heir general assertion that they derive no benefit from the Trust or other related entities cannot be viewed as fulfilling their burden of proof." It then cited to Gore v. Green Mountain Lakes, Inc. in support, with a parenthetical that explained "to survive summary judgment, a party may not merely rely upon assertions or allegations." 140 Vt. 262, 266, 438 A.2d 373, 375 (1981). Reliance on Gore would have been appropriate had there been an adversarial party arguing for summary judgment, but there was not. If the court had reached the same conclusion after a full opportunity for appellants to develop a factual record after a de novo hearing, I would agree. While the majority may be correct in holding that the affidavits contained only "ultimate or conclusory facts and

conclusions of law," ante, ¶ 17 (quotation omitted), a contested issue of material fact existed and appellants should have been allowed to go forward with their proof. I would therefore remand.

¶ 23. And, I suggest, on such a remand the court would be obligated to consider all relevant statutory language. The central question before the court was what constitutes a "person" for purposes of Act 250 jurisdiction. "Person" is defined broadly within the Act, see 10 V.S.A. § 6001(14), and we have recognized that the Act's aim is to "include those who may not be mentioned specifically in the conveyance, but who may nevertheless derive some benefit from partition or division of the land." In re Spencer, 152 Vt. 330, 339, 566 A.2d 959, 964 (1989). For purposes of a "subdivision," the term "person" :

> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;
>
> . . . .
>
> (iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land; [and]
>
> (iv) includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by the parent, child or spouse.

Id. § 6001(14)(A); see 6 Code of Vt. Rules 12 004 060-2, available at http://www.michie.com/vermont.

¶ 24. The Environmental Court concluded that Shlansky and Chang, as parents, benefit from the division/partition of land merely because their children would benefit from the Trust's development activities: "Profits accumulated by the Trust will provide for the children of David Shlansky and Ting Chang, which will thereby diminish the parents' burden to provide for their minor children." Before examining the strength of that analysis, it is important to recognized that § 6001(14)(B) identifies individuals and entities not presumed to be persons for purposes of

the Act: "The following individuals and entities shall be presumed not to be affiliated for the purpose of profit, consideration, or other beneficial interest within the meaning of [Act 250], unless there is substantial evidence of an intent to evade the purposes of this chapter." 10 V.S.A. § 6001(14)(B) (emphases added). This presumption extends to those who take actions solely "as an agent of another within the normal scope of duties of a court appointed guardian, a licensed attorney, real estate broker or salesperson, engineer or land surveyor, unless the compensation received or beneficial interest obtained as a result of these duties indicates more than an agency relationship." Id. § 6001(14)(B)(ii). Shlansky operates as the Trust's attorney. In his affidavit he asserted that his role is that of an agent within the normal scope of duties of a licensed attorney. Chang is a trustee of the Trust and, by law, is strictly governed by requirements that she "administer the trust solely in the interests of the beneficiaries." 14A V.S.A. § 802(a). In her affidavit she avowed that she "is prohibited from obtaining profit or other beneficial interest from her position as fiduciary trustee." The court did not discuss § 6001(14)(B) in its decision, even though it was raised below by appellants. The majority ignores the section. I do not believe we can. And, as the case stands, I can see no evidence of an intent to evade the purposes of the chapter.

¶ 25. The statute presumes, for the purpose of counting subdivisions, that the term "person" includes an individual's parents "unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by . . . [the] child." 10 V.S.A. § 6001(14)(A)(iv). The key term for the Environmental Court was "beneficial interest." That term, does not, as the court's opinion suggests, mean any conceivable benefit whatsoever. Black's Law Dictionary defines "beneficial interest" as "[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing." Black's Law Dictionary 149 (7th ed. 1999). Redefining this term so broadly to include "collateral benefit"—the court's term—or any relief from parental obligations

of support would make the parental presumption of personhood contained in § 6001(14)(A)(iv) virtually insurmountable. The majority affirms this broad expansion of the statutory term, holding that "any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support." Ante, ¶ 15. I do not equate a financial advantage with a beneficial interest for purposes of the statute.

¶ 26. In order to apply the standard contained in § 6001(14)(A)(iv), however, it is critical to know how the Trust operates. Appellants argue that, because the Trust is "irrevocable," they receive no benefit from its land-development activities. I agree this assertion is likely insufficient for the trial court to evaluate, notwithstanding that it arrives before the court uncontested. But, without information about when and how income and/or assets from the Trust would be distributed to the beneficiaries, the opposite conclusion cannot be established. It may be that the children will not receive any value from the Trust until they are each eighteen years old, in which case there would no longer be any responsibility placed on the parents to support their offspring and the flaw in the court's analysis would be apparent. This information bears on any finding by the court of a beneficial interest received by Shlansky and Chang. Assuming the parents would benefit simply because their children received or will receive some unknown value at some unspecified time is to make an unfounded assumption of fact contrary to the evidence submitted by the moving party, and then use it as a basis for not merely denying the party's motion, but actually holding against it. It is one thing for the court to find affidavits insufficient to support a party's position, but it is quite another for the court to determine that no issue of material fact exists based on the court's own unsupported assumptions.

¶ 27. As with the subdivision analysis, there needed to be additional factual development before the issue of Shlansky and Chang's affiliation with the Trust's land-development activities could be properly addressed. This includes additional factual evidence regarding the precise terms of the Trust and the corporate structure of the various entities at

issue, an explanation of Shlansky's role as agent and manager and Chang's responsibilities as trustee, and presumably an evaluation of the weight of the evidence and the credibility of the witnesses. In addition to considering whether Shlansky and Chang receive a beneficial interest from the Trust's land-development activities, the court should have also evaluated whether, alternatively, these parties exercised "control" over the developments (or subdivisions) in question such that they should be considered "persons" for purposes of Act 250. See, e.g., State Envtl. Bd. v. Chickering, 155 Vt. 308, 315-16, 583 A.2d 607, 611-12 (1990) (explaining that "control" of a corporation for Act 250 purposes not limited to cases where a person holds majority of a company's stock, and court will disregard fiction of corporation's separate identity whenever concept asserted in endeavor to circumvent statute and defeat legislative policy).

¶ 28. Through this affirmance, the majority approves a procedure in which a party puts forth an unopposed motion for summary judgment—albeit lacking in evidence sufficient to allow the court to make a finding, one way or the other, of a contested material fact—and, instead of concluding that the matter cannot be resolved on summary judgment, the court determines there are no material facts at issue and grants judgment against the movant. The result in this case is an expansion of the statutory definition of "person"—a central jurisdictional prerequisite for Act 250—so that any parent is swept into the Act 250 process if their child—dependent or not—benefits from a proposed land development. This is far beyond the broad definition of that term that we have recognized under the Act. See Spencer, 152 Vt. at 339, 566 A.2d at 964. Regardless of the merits of appellants' application, I would reverse and remand this case for further factual development and analysis.

¶ 29. I am authorized to state that Justice Dooley joins this dissent.

Associate Justice

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 498-8-11

STATE OF VERMONT,

Plaintiff,

v.

REEBOK-CCM HOCKEY U.S., INC., f/k/a MASKA U.S., INC. and REEBOK-CCM HOCKEY, INC.,

Defendants.

Stip.

FILED
2011 AUG 17 P 12:11
VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND 2011 CONSENT ORDER

Plaintiff, the State of Vermont, through the Office of the Attorney General on behalf of the Agency of Natural Resources ("ANR" or "State"), and Defendants, Reebok-CCM Hockey U.S., Inc. (formerly known as Maska U.S., Inc.) and Reebok-CCM Hockey, Inc. ("Defendants"), through the undersigned counsel, stipulate and agree as follows:

WHEREAS, the Attorney General pursuant to 3 V.S.A. Chapter 7 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; and

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action ("Pleadings by Agreement") that Defendants committed a violation of a Consent Decree signed by this Court as a judicial order of the Court on June 20, 1996 ("1996 Consent Decree"); and

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

WHEREAS, Defendants have admitted in the Pleadings by Agreement that they are subject to the terms of the 1996 Consent Decree and violated those terms; and

WHEREAS, pursuant to paragraph 68 of the 1996 Consent Decree, Defendants shall pay, at a minimum, a stipulated penalty of $1,000.00 per day for each day Defendants fail to meet a deadline set by the 1996 Consent Decree; and

WHEREAS, the State considered the nature and circumstances of the violation of the 1996 Consent Decree, including the length of time the violation existed, in arriving at a proposed stipulated penalty; and

WHEREAS, the Attorney General believes that this settlement is in the State's interest as it upholds the 1996 Consent Decree and the statutory program of 10 V.S.A. Chapter 159 under which the violations occurred; and

WHEREAS, the State and Defendants agree that this settlement will avoid prolonged and complicated litigation between them, and that avoiding such litigation constitutes good and valuable consideration for both parties;

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

1. The consent order that follows immediately below ("the 2011 Consent Order") may be entered by the Court;

2. The 2011 Consent Order has been negotiated by the State and Defendants in good faith;

3. The State and Defendants hereby waive all rights to contest or

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

appeal the 2011 Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the 2011 Consent Order or this Court's jurisdiction to enter or enforce the 2011 Consent Order; and

4. The 2011 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.

5. Nothing in the 2011 Consent Order shall be construed as having (i) modified or changed the 1996 Consent Decree in any respect other than clarifying that Defendants are bound by its terms or (ii) relieved, modified, or in any manner affected Defendants' obligation to comply with the 1996 Consent Decree, which obligation Defendants hereby expressly acknowledge.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Dated: 7/27/11 By: _____

Gavin J. Boyles
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

REEBOK-CCM HOCKEY U.S., INC.
and REEBOK-CCM HOCKEY, INC.,

Dated: 8/2/11 By: _____

Samuel Hoar, Jr., Esq.
Dinse, Knapp, & McAndrew
209 Battery St
Burlington, VT 05401

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

2011 CONSENT ORDER

Based upon the parties' Pleadings by Agreement in this action, the above Stipulation for the Entry of Consent Order, and the Consent Decree signed by this Court as a judicial order of the Court on June 20, 1996, 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 VIOLATION OF 1996 CONSENT DECREE

1. A work plan approved by ANR pursuant to the 1996 Consent Decree ("Work Plan") required Maska and/or its successors and assigns to conduct quarterly sampling for groundwater parameters, and included a schedule with deadlines for such sampling imposed by the State's Project Coordinator. The Work Plan required quarterly sampling by the deadlines imposed by the State's Project Coordinator unless Maska and/or its successors and assigns requested and received an extension or waiver of the deadlines from the State's Project Coordinator.

2. The Work Plan required Defendants to conduct quarterly sampling for groundwater parameters on September 1, 2008.

3. Defendants failed to conduct quarterly sampling for groundwater parameters on September 1, 2008 (or thereafter for that quarter) and failed to request an extension or waiver of the September 1, 2008 deadline from the State's Project Coordinator.

4. Defendants are adjudged liable for the violation of the 1996 Consent Decree listed in paragraph 3 of this Consent Order.

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

STIPULATED PENALTIES

5. For the violation described above, Defendants shall pay stipulated penalties of $40,000 no later than thirty (30) days after this Consent Order is entered as an Order by signature of the Court ("effective date of this Order"). Defendants shall make this payment by check payable to "Treasurer, State of Vermont" and forwarded to:

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

6. Failure to make the payment required by paragraph 5 shall constitute a breach of this Consent Order, and interest shall accrue on the entire unpaid balance at Twelve Per Cent (12%) per annum.

7. Defendants agree to reimburse the State for costs and reasonable attorney's fees incurred by the State to enforce the terms of this Consent Order and to collect the stipulated penalties.

MISCELLANEOUS PROVISIONS

8. Defendants hereby waive: (i) all rights to contest or appeal this Consent Order and the Pleadings by Agreement filed concurrently with this Consent Order; and (ii) all rights to contest the obligations imposed upon Defendants under this Consent Order in this or any other administrative or judicial proceeding.

9. The State of Vermont and the Court reserve continuing jurisdiction

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

to ensure future compliance with all statutes, rules, and regulations applicable to the facts and violation set forth herein.

10. Nothing in this Consent Order shall be construed as having (i) modified or changed the 1996 Consent Decree in any respect other than clarifying that Defendants are bound by its terms or (ii) relieved, modified, or in any manner affected Defendants' obligation to comply with the 1996 Consent Decree.

11. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendants' obligation 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.

12. Defendants shall not be liable for additional civil or criminal penalties with respect to the specific violation described herein or in the Pleadings by Agreement filed concurrently with this Consent Order, provided that Defendants fully comply with the requirements and provisions set forth in this Consent Order.

13. This Consent Order is binding upon Defendants and their successors and assigns.

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

14. Nothing in this Consent Order may 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. This 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 hereto or their legal representatives and incorporated in 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.

16. This Consent Order shall become effective only after it is signed by the State and Defendants and entered as an order of the Superior Court, Washington Unit, Civil Division. When it is signed by the Court, this Consent Order shall become a final judgment and a judicial order.

17. 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. Chapter 211 and 12 V.S.A. § 122.

18. All correspondence from Defendants to the State regarding this Consent Order shall be addressed to:

Gavin J. Boyles
Environmental Protection Division
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001

19. All correspondence from the State to Defendants regarding this Consent Order shall be addressed to:

Samuel Hoar, Jr., Esq.
Dinse, Knapp, & McAndrew
209 Battery St
Burlington, VT 05401-5261

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

20. 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 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:

Dated: 4/15/11

Presiding Judge
Civil Division, Washington Unit

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

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
Order
JUN 20 3 11 PM '96
SUPERIOR COURT,
WASHINGTON COUNTY

STATE OF VERMONT,)
Plaintiff,)
)
v.)
)
MASKA U.S., INC.)
Defendant.)
)

WASHINGTON SUPERIOR COURT
DOCKET NO. 262-5-96

FILED
MAY 21 1996
SUPERIOR COURT
WASHINGTON COUNTY

CONSENT DECREE

A. Findings of Fact and Conclusions of Law

1. Perc' is a "hazardous material" under 10 V.S.A. § 6602(16)(A), § 7-103 of the HWMR effective August 15, 1991 ("1991 HWMR"), § 7-103(17) of the HWMR effective October 1, 1988 ("1988 HWMR"), and see also § 6-602 of the HWMR effective September 1984 ("1984 HWMR"), § 6-602 of the HWMR effective November 3, 1981 ("1981 HWMR")

2. Spent perc is a "hazardous waste" under 10 V.S.A. § 6602(4), §§ 7-103, 7-202, 7-204, 7-207, & 7-210 of the 1991 HWMR, §§ 1-103(18) & 7-210 of the 1988 HWMR, §§ 6-602(1) & 6-602(2)(a)(6) of the 1987 HWMR, §§ 6-602(1) & 6-602(2)(a)(6) of the 1984 HWMR and §§ 6-602(1) & 6-602(2)(a)(8) of the 1981 HWMR.

3. The release of hazardous materials into the surface or groundwater or onto the land of the State is prohibited, 10 V.S.A. §6616, and the disposal of hazardous waste without a permit is prohibited. 10 V.S.A. §6605.

---

[1]Terms used herein, such as "Perc," and defined terms identified by the use of initial capital letters, are given the meaning ascribed to them in the Parties Joint Pleading and Stipulation filed in this Court on May 14, 1996.

4. The Manufacturing Facility is a facility as that term is defined in 10 V.S.A. §6602(10).

5. Subject to and in accordance with ¶ 12 of the parties' Joint Pleading and Stipulation, Maska does not oppose the following findings by this Court: (a) the Releases at the Manufacturing Facility constitute "releases" as release is defined in 10 V.S.A. §6602 (10) & (17); (b) Maska is liable under 10 V.S.A. §6615(a)(A) & (B) to Remediate the Releases; and (c) the State has met the burden imposed upon it pursuant to 10 V.S.A. § 6615(c) in establishing Maska's liability.

6. The Court finds that this Consent Decree has been negotiated by the State and Maska in good faith.

7. Based upon these findings, and as set forth more fully below, the Court concludes as follows:

   a. Maska shall Remediate the Releases in accordance with all approved, conditioned or modified Workplans submitted pursuant to the terms of this Consent Decree;

   b. Maska shall reimburse the State for its costs and expenses to oversee the Remediation of the Releases as provided by this Consent Decree; and

   c. Maska shall pay a civil penalty as provided in this Consent Decree. See e.g., 10 V.S.A.§§ 6610a, 6612 & 8221.

B. Parties Bound

8. This Consent Decree applies to and is binding upon the parties.

9. Subject to the provisions of ¶ 46 hereof, this Consent Decree will continue to be binding upon Maska and its successors and assigns unless and until the State is provided with

financial and other assurances reasonably satisfactory to the State sufficient to assure the performance of all of Maska's obligations under this Consent Decree, including, without limitation, the Remediation and Work at the Site and to assure that the State obtains all of the benefits of all of the provisions of this Consent Decree, provided however, that Maska may only so modify its obligations under this Consent Decree in relation to:

a. the sale, transfer or other disposition of the Facility;

b. the sale, transfer or other disposition of all or substantially all of Maska's assets in a single transaction or series of related transactions (whether including the Facility); or,

c. pursuant to the terms of a plan of reorganization proposed to be confirmed pursuant to 11 U.S.C.§§ 1121, 1129 in the Bankruptcy.

During the Bankruptcy, the Bankruptcy Court shall resolve any dispute over the State's determination that such financial and other assurances are not reasonably satisfactory to the State sufficient to assure the performance of all of Maska's obligations under this Consent Decree, including, without limitation, the Remediation and Work at the Site and to assure that the State obtains all of the benefits of all of the provisions of this Consent Decree, as provided in Section F of this Consent Decree. This Court shall otherwise have exclusive jurisdiction

C. Obligations of Maska

1. Structure of the Remediation Process

10. An analysis of the data regarding the conditions at portions of the Site at and around the Upper Site was conducted by Nelson, Heindel & Noyes between August and December

1995. The results of this analysis are set forth in the December 28, 1995 Conceptual Model.

11. All other information provided by Maska about the Site is contained in the documents listed in Appendix B. Maska represents that it used due diligence in its review of materials in its, its agents', contractors', and/or employees' possession or control relevant to this matter and has, in listing the documents in Appendix B, identified the documents in a meaningful way and made them available to the State.

12. Based upon this information and analysis of the data regarding the Site, it is appropriate to Remediate the Site in stages. These stages are set forth in Appendix A, the entire content of which is incorporated herein.

13. Maska shall perform and complete the steps set forth in Appendix A as each Submission in the process is approved, modified or conditioned by the State and as soon as necessary and reasonably practicable but in any event in accordance with the timetables established in Appendix A or as otherwise set by the State's Project Coordinator in accordance with ¶ 41. If any activity required to be performed does not have a specific schedule for performance, it shall be performed at the earliest practicable time.

14. Maska shall do all Work required by this Consent Decree in accordance with all approved, conditioned or modified Workplans and with applicable local, state or federal law.

15. As part of any proposed Workplan, Maska shall identify all permits, consents, and regulatory approvals (collectively the "Required Permits") that Maska determines may be required. As part of its review of Maska's Submission of a Workplan, the Agency shall review and, where required, modify the list of Required Permits by adding to it those other

Required Permits that, in the Agency's opinion, are required.

16. Maska shall use best efforts to obtain all Required Permits. Maska shall obtain any permit required for any portion of the Work prior to commencing that portion of the Work. The Agency shall assist Maska in Maska's obtaining permits when the Agency deems such assistance appropriate.

17. Maska shall ensure that the Work is performed by qualified and properly licensed personnel. All Remediation performed by Maska pursuant to this Consent Decree shall be under the direction and supervision of a qualified consultant, contractor or engineer, and, if required by the related Workplan, one who has been approved by the Agency.

2. Access To The Site

18. For as long as Maska owns or controls any portion of the Site, Maska shall provide to Agency personnel unrestricted access to such portions of the Site in order that the Agency may exercise any rights under, and monitor compliance with, this Consent Decree. If Maska assigns, sells or otherwise transfers any interest in any of its portion of the Site, Maska shall expressly reserve in the documents transferring such interest reasonable access to that portion of the Site sufficient to permit Maska, its successors, assigns, purchaser. contractor, or any transferee to complete fully the Remediation and to provide Agency personnel with such unrestricted access.

19. With respect to any portion of the Site not owned or controlled by Maska, Maska will use its best efforts to obtain necessary access for itself, its contractors, agents or employees to implement the work and for the Agency to oversee the Work, provided that Maska shall have no obligation to satisfy commercially unreasonable demands.

20. If Maska's best efforts fail, the Agency may secure necessary access to any portion of the Site not owned or controlled by Maska. Evidence that necessary access is being denied because of unreasonable demands or acts by property owners shall be considered in the Agency's determination whether to obtain such access.

21. Difficulty in obtaining or inability to obtain such access shall be cause to modify any Workplan and/or timetable if necessary

3. Project Coordinators

22. Within seven (7) days from the entry of this Consent Decree, Maska and the State shall notify each other, in writing, of the names, addresses and telephone numbers of their respective designated Project Coordinators. If a Project Coordinator initially designated is changed, the identity of the successor shall be given to the other Party at least five (5) working days before the change occurs, unless absolutely impracticable, but in no event later than the actual day the change is made.

23. Maska's Project Coordinator shall: (a) be subject to approval by the State; (b) have the technical expertise and broad authority sufficient to oversee all aspects of the Work; and (c) not be an attorney for any party in this matter.

24. All notifications required under the terms of this Consent Decree and Appendix A shall be provided to the parties through the Project Coordinators

25. All deadlines and timetables outlined in Appendix A to this Consent Decree shall be subject to review by the State's Project Coordinator, who may modify deadlines and timetables in extraordinary circumstances, or for good cause shown, upon written request by Maska. The State's Project Coordinator is not under any obligation to modify

deadlines and timetables except when a Force Majeure occurs or as provided in ¶ 37.

4. General Obligations of Maska

26. Except as must occur because of the specific required actions taken by Maska, its agents, contractors, or employees, pursuant to an approved, conditioned or modified Workplan, Maska shall ensure that no activity or use undertaken at the Site by it, its agents, contractors, employees or those in privity or concert with it, will increase any risk to public health and the environment from the Releases identified in this Consent Decree, or cause, worsen or contribute to the Releases

27. For as long as is required by any approved, conditioned or modified Workplan, Maska shall perform on-going monitoring and shall maintain the accessibility and integrity of any required monitoring wells or equipment at or near the Site. If a proposed use or activity on the Site would unduly hinder the integrity of, or access to, any such well or equipment, Maska shall propose a Workplan for the installation and maintenance of alternative wells or equipment as necessary. That Workplan shall be implemented by Maska as approved, conditioned or modified by the State.

28. Maska shall provide a copy of this Consent Decree to any contractor performing any Work and shall condition any such contract upon compliance with this Consent Decree and with all related approved, conditioned or modified Workplans.

29. Within thirty (30) days of the entry of this Consent Decree, Maska shall record the entry of the Parties' Joint Pleading and Stipulation and this Consent Decree in the Bradford, Vermont land records and shall disclose the existence of the Parties' Joint Pleading and Stipulation and this Consent Decree to any prospective purchaser of the Facility prior to

any purchase

30 Subject to the provisions of Paragraph *25* hereof. no change in ownership of the Facility or corporate status of Maska including, but not limited to, any dissolution, restructuring, or reorganization of Maska, shall occur absent sufficient prior written notice to the State and the provision of financial and other assurances reasonably satisfactory to the State sufficient to assure the continued Remediation and Work at the Site and that the State will obtain all benefits of this Consent Decree. During the Bankruptcy, the Bankruptcy Court shall resolve any dispute over the adequacy of such financial and other assurances arising under this Paragraph as provided in Section F of this Consent Decree

31 Maska shall retain and, at any time during performance of the Work and up to five (5) years after completion of the Work, shall provide to the State, upon written request, all relevant and material documents and information within Maska's, its contractors', employees', or agents' possession or control relating to performance of the Work or any other Remediation, releases or threatened releases at the Site. The State shall also retain such documents and information and shall provide such documents and information to Maska in accordance with applicable law on access to public documents.

32. If the State receives an access to public documents request for a document Submitted to the State pursuant to this Consent Decree and clearly identified in advance by Maska as one for which it wants notice by the State of such a request, the State shall, if practicable, provide Maska with notice and time to oppose the release of the document. In order to be "clearly identified in advance" for purposes of this paragraph, Maska shall have stamped or printed on the front page of the document, in 16 point type and in red ink, "Maska U.S.,

Inc., attention Richard Levy, Esq , at (514) 331-5150, requests notice of access to public document requests as to this document."

33. At any time prior to completion of the Work, whether or not sampling is part of the Work, when samples are taken at the Site by, or on behalf of, Maska, Maska shall notify the State not less than ten (10) days, or immediately if the samples must be taken on less than ten days' notice given extraordinary circumstances, before the intended sampling and shall allow the State, upon request, to take split or duplicate samples.

34. If during the performance of the Work, any action or condition at the Site results in a reiease or threatened release of hazardous materials, Maska shall immediately notify the Chief of the Sites Management Section ("SMS") of the Hazardous Materials Management Division ("HMMD") of the State of Vermont's Department of Environmental Conservation ("DEC") or, if the Chief is unavailable, the State's Project Coordinator

35. If such a release or threatened release is on land owned or controlled by Maska and amounts to an imminent and substantial danger, Maska shall undertake an appropriate emergency response and shall coordinate such response with the State's Project Coordinator and the Chief of the HMMD

36 If during the performance of the Work, any action or condition at the Site results in a release or threatened release of hazardous materials and the release or threatened release results from any act by or omission of Maska, its agents, contractors, or employees, Maska shall undertake appropriate emergency response and appropriate response action to abate the release or threatened release and shall immediately notify the Chief of the SMS at HMMD or, if the Chief is unavailable, the State's Project Coordinator. If the State's

Project Coordinator requests a Workplan for the response action or for necessary further Remediation, Maska shall submit such a Workplan within the requested time and shall implement the Workplan as approved, conditioned or modified by the State.

37. Within four (4) years of the completion of all activities required under all outstanding approved, conditioned or modified Workplans, the State may determine that additional work is required because the Work was not performed in substantial conformance with any approved, modified or conditioned Workplan; if the State determines that such additional Work is required, Maska shall submit a Workplan for the specified additional Work and shall implement the Workplan as approved, conditioned or modified by the State

5. Approval By The State

38. After receipt of any submission by Maska to the State as required by this Consent Decree and Appendix A to this Consent Decree. the State shall, within sixty (60) days, either: (1) approve the submission; (2) approve the submission with modifications; (3) approve the submission with conditions; or (4) disapprove the submission. If the State cannot respond to a submission within sixty (60) days, the State shall notify Maska, set a date by which it expects to respond, and shall be barred from obtaining a stipulated penalty for a failure by Maska to meet a requirement of this Consent Decree proximately caused by the State's failure to respond.

39. After having once disapproved a submission or having approved the submission with conditions requiring changes and re-submission, and Maska having failed to submit a timely or satisfactory re-submission, the State may issue a modified submission which

cures the deficiencies in the submission; in the event of disapproval or modification, the State shall inform Maska in writing of the reason for disapproval or modification.

40. When a submission by Maska is approved or modified by the State, Maska shall implement the submission as approved or modified. When a submission by Maska to the State is approved with conditions. Maska shall begin implementation as approved and conditioned, and shall resubmit the submission for approval within 14 days (or a longer period if allowed in the approval with conditions) with the changes necessary to cure all deficiencies. If a submission is disapproved, Maska shall resubmit it within 14 days (or a different period if set forth in the disapproval) with the changes necessary to cure all deficiencies.

41. Any approval by the State as described above may be conditioned on a public participation process and receipt by the State of public comments.

6. Reporting & Coordination of Work

42. Unless instructed by the State that the frequency of reports may be less, Maska shall submit quarterly reports to the State regarding progress under any and all Workplans and Work, and shall keep in routine contact with the State's Project Coordinator and shall cooperate fully with the State's Project Coordinator by sharing all reports, memoranda, notes and the contents of all computer files or data, as set forth above.

43. Every six years, for thirty years from the date hereof, unless reduced or extended for good cause shown, Maska shall: (a) conduct studies and investigations designed to aid the State in reviewing whether the Remediation is protective of human health and the environment; and (b) if requested by the State's Project Coordinator, submit a Workplan for such

studies and investigations within the time designated by the State's Project Coordinator. In addition, if reasonable and for good cause shown, the State's Project Coordinator may request such a study or investigation more frequently than every six years.

7. Cost Reimbursement

44. Maska shall reimburse the State for the State's reasonable and documented costs and expenses to oversee the Remediation of the Releases, provided that, except for extraordinary circumstances, such reimbursement shall not exceed $US 60,000.00 in any one year. This cap on costs and expenses to oversee the Remediation o'f the Releases shall be adjusted annually to reflect increases in the United States Consumer Price Index. The State shall submit invoices no more frequently than quarterly. Payment shall be made by check or electronic transfer to the "State of Vermont, Secretary of the Agency of Natural Resources" and shall be paid within thirty (30) days in the sum stated in the State's invoice for deposit into the environmental contingency fund, and with reference made to this Consent Decree, 10 V.S.A.§1283(f), at the following address:

Office of the Attorney General
109 State Street
Montpeiier, Vermont 05609-1001

The transmittal letter shall include the caption, civil action number, invoice number, and provision of this Consent Decree pursuant to which payment is being made. Prior to sending a payment by wire and upon request by Maska, the State shall provide Maska with the necessary wire transfer routing information.

45. Reimbursable costs and expenses shall include., but not be limited to, all personnel and

material costs and expenses for the following: (a) review or development of deliverables, plans, reports and other items developed pursuant to this Consent Decree; and (b) oversight efforts necessary to enforce and monitor compliance with this Consent Decree

46. Past costs owing as of the date of this Consent Decree are $US 20,000.00, and shall be paid within thirty (30) days according to the process set forth above

47. For so long as Maska remains in bankruptcy under any chapter of the Bankruptcy Code, the cost reimbursement(s) set forth in this Section C.7, shall constitute a first priority administrative expense claim allowed pursuant to 11 U.S.C.§§ 503(b) & 507(a)(1).

D. Covenants

48. The State of Vermont covenants not to institute or pursue other civil litigation or administrative action against Maska, the Related Entities, or their respective officers, directors, agents or employees for the Releases and based upon the causes of action stated herein. Nothing herein shall preclude the State from obtaining and protecting its rights in a manner consistent with this Consent Decree

49. The above covenant by the State is conditioned on: (a) there being a good faith basis for Maska's representations in the Joint Pleading and Stipulation and this Consent Decree; (b) Maska's due diligence in the provision of information to the State in accordance with this Consent Decree; and (c) Maska's substantial compliance with all terms of this Consent Decree.

50. Maska covenants not to sue the State of Vermont, its officials, agents, employees, contractors, or representatives for any claim or cause of action related to, or arising from, or on account of acts or omissions of Maska or its officers, employees, agents,

contractors, subcontractors, and any persons acting on their behalf or under their control, in performing the Work.

51 Maska covenants not to sue the State of Vermont, its officials, agents, employees, contractors, or representatives, for any claim or cause of action related to, or arising from, or on account of acts or omissions of the Agency, its contractors, subcontractors, and any persons acting on their behalf or under their control, relating to the Work and including but not limited to actions taken by the Agency pursuant to the Approval Process set forth in this Consent Decree.

52. Maska shall defend, indemnify, and save and hold harmless the State of Vermont, its officials, agents, employees, contractors, or representatives, for any claim or cause of action related to, or arising from, or on account of acts or omissions of Maska, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, related to the Work or which cause, worsen or contribute to a release or threatened release of hazardous materials at the Site, except when Maska is acting in compliance with an approved, modified, or conditioned Workplan.

53. The above covenant by the State shall be void to the extent that Maska, at any time, worsens or contributes to the Releases, except when Maska is acting in compliance with an approved, modified, or conditioned Workplan, or when Maska's actions do not rise to the level of gross negligence and Maska submits a Workplan to Remediate such worsening or contribution to the Releases, and implements the Workplan as approved, modified or conditioned and in accordance with a time line acceptable to the State.

54. The above covenant by the State shall be void if. (i)(a) Maska withheld or concealed. or in

the future withholds or conceals, material information about the Site and/or the Releases from the Agency; or (b) Maska failed, or in the future fails, to use due diligence in obtaining and/or providing material information to the Agency; and (ii) the State determines that the Work is not protective of human health and the environment or exposes the public or environment to an imminent hazard. Information about the Site and/or the Releases is deemed to have been withheld or concealed to the extent the information was presented in a manner which obfiiscates the information.

55. The above covenant by the State shall be void if new information becomes known to the State about a risk, hazard or threat posed by the Releases and the State determines, based on the new information (together with any other relevant information), that the Work leaves the public or environment exposed to an unacceptable risk, hazard or threat.

56. Before the above covenant by the State is voided pursuant to ¶¶ 69, 70, 71, or 74 hereof, the State shall give Maska reasonable notice and an opportunity to cure, correct or remedy the basis on which the covenant would otherwise be voided.

57. The Agency or State is not deemed to know material information provided to it by Maska, its agents, employees, or representatives. or by other potentially responsible parties, if the information was presented in a manner which obfiiscates the information.

58. The above'covenant by the State shall be void if Maska transfers all, or a portion of, the Site without restrictions, covenants, and sufficient financial and other assurances as provided in ¶¶ 25 & 46 of this Consent Decree.

E. Reservation of Rights

59. If Maska fails or refuses to comply with this Consent Decree in any respect, the State may

seek and obtain any remedy, sanctions, or penalties available at law or in equity to enforce this Consent Decree.

60. Except as otherwise provided in this Consent Decree, nothing contained in this Decree shall be construed to limit or restrict any remedy or legal right Maska may have against any third parties, exemplified by the right Maska has to recover, from other potentially responsible parties, Remediation costs incurred in connection with the Site and/or Releases, including but not limited to the costs of compliance with this Consent Decree. See e.g., 10 V.S.A. §6615(i).

F. Disputes

61. Maska and the State shall make good faith efforts to resolve any dispute which arises under or with respect to this Consent Decree.

62. If there is a dispute which relates to financial or other assurances, or to the selection, extent, or adequacy of any aspect of Remediation, Maska shall make its position known to the State's Project Coordinator within ten (10) business days of the realization by Maska that there is a dispute. Maska shall provide the State's Project Coordinator with any written material pertaining to the dispute within thirty (30) days of Maska's realization that there is a dispute.

63. Maska and the State shall meet and attempt to resolve any dispute once Maska has complied with the preceding paragraph.

64. If the parties do not resolve the dispute, upon motion, the dispute shall be reviewed on the basis of the administrative record maintained by the State, which shall include all submissions relating to the dispute made to or by the State before, or within 30 days

following, the date on which the State was notified of the dispute, by this Court, except in the limited and express circumstances where there is a dispute over financial and other assurances referred to in ¶¶ 25 & 46, when the dispute will be heard before the Bankruptcy Court for as long as Maska remains in the Bankruptcy. Nothing in this paragraph shall prevent the use of live testimony to help present the administrative record maintained by the State.

65. In any court proceeding to resolve any dispute, the State's disputed decision shall be upheld unless Maska demonstrates, based upon clear and convincing evidence. that the State's position is erroneous.

66. A request for dispute resolution discussions or a request to this Court, or, in the limited circumstances set forth in ¶¶ 25 & 46 herein the Bankruptcy Court, for relief shall not, by itself, extend, postpone or suspend any obligation or deadline of this Consent Decree or of any approved, conditioned or modified Workplan. Any party may, however, while seeking resolution of a dispute under the terms of this Agreement, seek a stay from this Court.

G. Civil Penalty

Upon entry of this Consent Decree, Maska shall pay to the State a civil penalty of two hundred fifty thousand dollars ($US 250,000.00), as a first priority administrative expense claim, by delivering, within fourteen (14) days, a cashier's or certified check in the sum stated above made payable to the "State of Vermont" by delivery to the Office of the Attorney General at the following address:

Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001

The transmittal letter shall include the caption, civil action number, invoice number, and provision of this Consent Decree pursuant to which payment is being made

H. Stipulated Penalties

67. The State shall give notice to Maska. through Maska's Project Coordinator and Maska's Vermont and Bankruptcy Counsel of Record, in writing, ten (10) business days prior to seeking a penalty from this Court, of any event, occurrence, act or omission by Maska that the State believes constitutes a material default of this Joint Pleading and Stipulation.

68. Upon a failure by Maska to meet a deadline set by this Consent Decree, including deadlines imposed by the State's Project Coordinator, Maska shall pay, at a minimum, a stipulated penalty to the State of one thousand dollars ($US 1,000.00) per day for each day Maska fails to meet the deadline at issue.

69. Upon a failure by Maska (other than the failure to meet a deadline, as provided above) Maska shall pay, at a minimum, a stipulated penalty to the State of five thousand dollars ($US 5,000.00).

70. For so long as Maska remains in bankruptcy under any chapter of the Bankruptcy Code, the stipulated penalties described above shall constitute first priority administrative expense claims allowed pursuant to 11 U.S.C.§§ 503(b) & 507(a)(1)

71. The State is not hereby limited to seeking and obtaining any remedy, sanctions, or penalties available at law or in equity to enforce this Consent Decree.

I. Retention of Jurisdiction

72. This Court shall retain continuing jurisdiction over both the subject matter of this action and the parties: (a) to provide further relief as may be necessary beyond what is addressed in this Consent Decree; (b) to enforce the terms and conditions of this Consent Decree; and (c) to resolve disputes arising through the implementation of this Consent Decree.

J. Force Majeure

73. When circumstances occur which may delay or prevent the completion of any portion of the Work or impede necessary access to any property on which part of the Work is to be performed, whether or not caused by a Force Majeure, Maska shall notify the State's Project Coordinator orally of the circumstances within seventy-two (72) hours of first becoming aware of the circumstances. Within fourteen (14) days of becoming aware of the circumstances, Maska shall provide the State's Project Coordinator with a written explanation of the cause(s) of any actual or expected delay, the anticipated duration of any delay, the measures taken and to be taken by Maska to prevent or minimize the delay, and the timetable for implementation of such measures.

74. Failure to give timely oral and written notice to the State's Project Coordinator in accordance with the preceding paragraph shall constitute a waiver of any claim that the circumstances in question were a Force Majeure or that Maska needs additional time to perform the Work in question.

75. If the delay is or was caused by a Force Majeure, the parties shall agree to a modified timetable to allow the completion of the specific portion of the work and/or any succeeding portion of the Work affected by such delay proximately caused by the Force

Majeure event and stipulated penalties shall not apply.

76. In any proceeding on any dispute regarding a delay in performance, Maska shall have the burden of proving (a) that the delay is or was caused by a Force Majeure, and (b) that the amount of additional time requested is necessary to compensate for the event

K. Miscellaneous

77. Neither the execution of this Consent Decree, nor the approval, conditioning or modification of any Workplan, nor the taking of any other action by the State pursuant to this Consent Decree or any Workplan, constitutes a finding or representation by the State: (a) as to the risks to human health and the environment which may be posed by contamination at the Site, either before or after the Work has been completed; (b) that the Site is fit for any proposed use or particular use; or (c) that performance in accordance with any Workplan will achieve the Remediation necessary

78. No Remediation shall proceed on the Site without prior written approval from the State.

79. This Consent Decree represents the entire agreement of the Parties. No modification of this Consent Decree shall occur without written approval of the Parties and the Court

80. This Consent Decree shall continue in full force and effect notwithstanding the dismissal, closing or conversion of Maska's pending case under the Bankruptcy Code. This Consent Decree shall be binding automatically upon any Chapter 11 trustee appointed in the pending Bankruptcy or any Chapter 7 trustee appointed upon conversion of Maska's pending case under the Bankruptcy Code.

81. Except as provided in ¶ 25 of this Consent Decree, compliance with this Consent Decree shall be provided for in any Chapter 11 Plan in the Bankruptcy and shall constitute treatment acceptable to the State of the State's administrative claims arising hereunder.

SO ORDERED,

John P. Mahan
Superior Court Judge
Dated: June 20, 1996

FILED
JUN 20 3 11 PM '96
SUPERIOR COURT
KITSAP COUNTY