In re Application of Lathrop Limited Partnership I, II, III (2013-444, 2013-445, 2013-446)

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Nos. 2013-444, 2013-445 & 2013-446

In re Application of Lathrop Limited Partnership I In re Application of Lathrop Limited Partnership II In re Application of Lathrop Limited Partnership III	Supreme Court On Appeal from Superior Court, Environmental Division October Term, 2014

Thomas S. Durkin, J.

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PRESENT: Reiber, C.J., Dooley, Skoglund and Robinson, JJ., and Morse, J. (Ret.), Specially Assigned

¶ 1. **DOOLEY, J.** This appeal arises from a decision of the Superior Court, Environmental Division in three consolidated dockets, all of which carved a very long and circuitous path through the lower tribunals before reaching this Court. The subject of these dockets is the proposal of Lathrop Limited Partnership ("Lathrop") to establish a sand and gravel extraction operation on a parcel of land in the Town of Bristol, Vermont. Neighbors of the project appeal the environmental court's decision to

approve Lathrop's conditional use and Act 250 permit applications, and raise six claims of error. They argue that the court erred in: (1) holding that sand and gravel extraction is permitted as a conditional use in the Town's Rural Agricultural (RA-2) and Mixed Use (MIX) zoning districts; (2) holding that the operation will not create a pit within the meaning of § 526(2) of the Town's zoning bylaws; (3) concluding that the court could review Lathrop's 2012 permit application de novo, without regard to the 2004 permit, and that the successive-application doctrine does not apply; (4) relying on one-hour average noise levels and ignoring uncontested evidence of large increases in the number of high-decibel noise events in determining impact of traffic on neighbors; (5) admitting and relying on acoustical-modeling software for predicting noise levels emitted by the project; and (6) concluding that it had jurisdiction to review Lathrop's amended Act 250 permit application without a remand. We affirm the environmental court's holdings that sand and gravel extraction is permitted as a conditional use in the RA-2 and MIX districts and that the acoustical-modeling testimony is admissible. We reverse its holdings with respect to the creation of a pit under § 526(2), the successive-application doctrine, the impact of traffic noise on neighbors, and its jurisdiction to review Lathrop's amended Act 250 permit application.

¶ 2. We start with the factual and procedural background. The three environmental court dockets, Lathrop I, No. 122-7-04, Lathrop II, No. 210-9-08, and Lathrop III, No. 136-8-10, are addressed in turn below. Much of the detailed description of the proposals and administrative and environmental court actions is set forth in the attached Appendix.

Lathrop I

¶ 3. In 2003,[1] Lathrop applied for a permit from the Town of Bristol's Zoning Board of Adjustment (ZBA) for a proposed sand and gravel extraction operation on a sixty-five acre parcel located on South Street, Rounds Road, and Bristol Notch Road in the Town's RA-2 and MIX zoning districts. Lathrop proposed to extract up to 60,000 cubic yards of material per year, resulting in an average of seventeen truckloads each day over 250 days of operation. As proposed, the extraction would take place exclusively within the RA-2 district, with an access road to the pit from South Street at the northern edge of the parcel. The access road would pass through the MIX district, where it would cross over a preexisting, but abandoned, non-conforming gravel pit. At its July 2004 hearing, the ZBA

voted to consider the application under § 526 of the Town of Bristol Zoning Bylaws & Regulations (2003) [hereinafter Bylaws], which provides, in pertinent part, that "in any district the removal of sand and gravel for sale . . . shall be permitted only after conditional use review and approval by the Board of Adjustment." In reviewing the application, the ZBA found no fewer than nine other gravel pits in the Town, at least three of which were also located in the RA-2 district. The ZBA also considered the character of the area; the noise levels associated with the project; possible increases in truck traffic along public highways; impact on historic and natural sites; impact on the Town's water supply; and Lathrop's proposals for a reclamation plan, erosion control, and other related issues.

¶ 4. The ZBA also addressed the nine criteria listed in § 526, to which all projects must conform. Specifically, the ZBA determined that, pursuant to provision (8), the project would not constitute an extension of an existing non-conforming operation; and, pursuant to provision (2), the project would not create a pit within the meaning of § 526 because a pit must have "vertical sides" or "an almost perpendicular slope or pitch." The ZBA ultimately approved the application with twenty-three additional conditions, which included, among other things, limits on days and hours of operation, scope of extraction, decibel levels, and daily truck trips; mitigation with respect to noise, dust, traffic, and aesthetics; and requirements for access road construction, reclamation, and reporting and recordkeeping. The conditions, which are set forth in greater detail in the Appendix, have become a central focus of this appeal.

¶ 5. Neighbors appealed the ZBA's decision to the environmental court. The parties filed cross-motions for summary judgment, which the court addressed in In re Rueger, No. 122-7-04 Vtec, slip op. (Vt. Envtl. Ct. May 5, 2005), https://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx, and again in a supplemental decision and order dated June 23, 2005. The court held that the ZBA properly reviewed Lathrop's application under § 526 of the bylaws and that the access road across the discontinued gravel pit would not constitute an extension of a non-conforming operation. The court found, however, that material facts remained in dispute as to whether, and under what conditions, the proposed sand and gravel operation should be granted a conditional use permit. The parties initially prepared for trial on the remaining issues, but then requested that the court place the appeal on inactive status while Lathrop sought additional permits for the project. This appeal has been

termed Lathrop I.

Lathrop II

¶ 6. In 2007, Lathrop submitted a second application to the ZBA for the sand and gravel extraction operation, partly in response to concerns and criticisms about the original proposal. At its September 2008 hearing, the ZBA determined that the new application differed substantially from the original application approved in 2004, citing the changed access point to Rounds Road at the southern end of the parcel, altered phasing scheme for the development, and addition of plantings for screening purposes. The ZBA noted that "no provision of the [bylaws] prohibits filing an application for a zoning permit that differs substantially from a permit previously granted and that remains undeveloped." Additionally, Lathrop's second application presented extended hours of operation, an increase in the scope of extraction and average daily truck trips, higher decibel levels at property boundaries, and a narrower road bed for the access road. Although the ZBA found that the second application satisfied nearly all the conditional use requirements, it ultimately denied the permit for Lathrop's failure to submit a plan for refilling the resulting pit, as required under § 526(2).

¶ 7. Lathrop appealed the ZBA's denial of its 2007 application to the environmental court. Several neighbors filed a motion to dismiss on various grounds, including that the application was not ripe for review and that it asked for an advisory opinion. They primarily argued that the new proposal was a successive application that did not meet the requirements of the successive-application doctrine. The court denied neighbors' motion, holding in pertinent part that the successive-application doctrine does not govern because the second application was not a revised proposal submitted as a consequence of the ZBA denying the original application. Neighbors then moved for summary judgment on the issue of whether the project will create a pit within the meaning of the bylaws. The Town submitted a memorandum in support of neighbors' motion for summary judgment, concurring with their argument that Lathrop's operation will create a pit and also asserting that Lathrop failed to present its plan for a berm removal to the ZBA and therefore should be barred from doing so on appeal. In In re Lathrop Limited Partnership II, No. 210-9-08 Vtec, slip op. (Vt. Envtl. Ct. Aug. 14, 2009), https://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx, the court denied neighbors' motion for summary judgment, reasoning that the question of whether the reclaimed extraction area is a

pit under § 526(2) is highly fact-specific. Id. at 3. The court also concluded that its de novo review allows it to consider project revisions so long as the revisions do not require a new application. The parties then requested to stay this and the Lathrop I appeals pending completion of the Act 250 proceedings.

Lathrop III

¶ 8. In 2006, Lathrop filed its first Act 250 permit application with the District No. 9 Environmental Commission, while the environmental court was considering Lathrop I. In the 2006 application, Lathrop requested that the district commission consider only whether the project conforms with the Bristol Town Plan—more specifically, whether the town plan prohibits sand and gravel extraction in the MIX and RA-2 districts. The district commission concluded that the project conflicted with the town plan, specifically because the plan prohibits the creation of pits, and denied the application. Lathrop appealed to the environmental court. After a series of motions from the parties, the court granted Lathrop's motion to remand the application to the district commission for consideration under all relevant Act 250 criteria.[2]

¶ 9. In July 2010, on remand, the district commission found that Lathrop's application conformed with criteria 1 (air pollution), 1(B) (waste disposal), 1(G) (impact on wetlands), 2 (sufficiency of water supply for dust suppression), 3 (potential impact on neighboring wells), 8(A) (impact on wildlife), 9(A) (impact of growth), 9(B) (impact upon primary agricultural soils), 9(C) (impacts on forests and secondary agricultural soils), and 9(L) (rural growth areas). The district commission also found that Lathrop failed to submit evidence sufficient to carry its burden with respect to criteria 8 (aesthetics, noise, visual impacts, odors), 5 and 9(K) (transportation and pedestrian safety, public investment), 9(E) (impacts from pit operations, sufficiency of reclamation plan, blasting impacts), and 10 (town and regional plan). Lathrop appealed to the environmental court the district commission's determination on criteria 5, 8, 9(E), 9(K), and 10 and moved to consolidate the three dockets. The court granted Lathrop's motion to consolidate and moved Lathrop I and Lathrop II out of inactive status.

Consolidated Appeal

¶ 10. The three consolidated dockets proceeded to trial in the environmental court. Prior to trial, neighbors filed several motions. The court addressed three of these motions, all relevant to this

appeal, in a 2011 order. First, the court denied neighbors' motion to exclude evidence of the berm removal, concluding that the proposal was merely a minor application revision allowable under the court's de novo review. Second, the court denied neighbors' motion for partial summary judgment on the issue of Lathrop's conflicting permit applications. Neighbors argued that Lathrop should be prohibited from presenting a second application after its first application already was approved conditionally by the ZBA. The court concluded that nothing prevents applicants from submitting conflicting proposals for the same project and stated that "[t]he only restriction to submitting another application arises after a permit application has been denied: in that instance, an applicant is prohibited from submitting an application that is substantially similar to the one that was denied." Finally, the court denied neighbors' motion to reconsider its 2009 decision under Lathrop II, where it denied summary judgment on the issue of whether § 526 allows sand and gravel extraction in the RA-2 and MIX districts, because neighbors' motion was filed beyond the ten-day limit specified in Vermont Rule of Environmental Court Proceedings 5(b) and neighbors did not submit any new information or argument that would justify reconsideration.

¶ 11. Neighbors also moved for the court to rule as inadmissible testimony based on acoustical modeling from Lathrop's expert witness on noise impacts, arguing that it violated Vermont Rule of Evidence 702 and the standard for admissibility of expert testimony, as outlined in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The court decided to allow the testimony at trial and make a post-trial determination as to whether it should remain part of the record. The court ultimately denied neighbors' motion and admitted the testimony. We address this issue in the merits below.

¶ 12. The environmental court considered several issues preserved by the parties on each of the three dockets. As relevant to this appeal, it held that § 526 of the bylaws permits sand and gravel extraction operations in the RA-2 and MIX districts; Lathrop's project will not create a pit within the meaning of § 526(2); and Lathrop's application adequately addresses impacts from noise, as required under both the Town's bylaws and the Act 250 criteria. Neighbors appealed. With regard to the noise impacts, neighbors specifically appeal the court's reliance on one-hour average noise levels to determine impacts and the court's decision to admit evidence based on acoustical modeling. In addition to these three issues, neighbors also appeal the court's decision to review Lathrop's conflicting conditional use

applications and the change in access point from Rounds Road to South Street, which Lathrop presented for the first time at trial.

I.

¶ 13. The first issue, and a threshold matter, is whether the bylaws allow sand and gravel extraction in the RA-2 and MIX districts. Before proceeding to the parties' arguments, we set forth the relevant bylaws. The primary bylaw at issue is § 526, which regulates the extraction of soil, sand, and gravel. Section 526 states, in pertinent part:

> In accordance with [24 V.S.A. § 4407(8)], in any district the removal of sand or gravel for sale, except when incidental to construction of a structure on the same premises, shall be permitted only after conditional use review and approval by the Board of Adjustment.

Bylaws § 526.[3] The bylaw goes on to require conformity with nine specific conditions and to allow for the attachment of additional conditions as the ZBA deems necessary to protect the safety and general welfare of the public. Additional criteria for conditional use review are laid out in § 341, including requirements that the proposed uses shall not result in an undue adverse effect on community facilities, the character of the area, traffic, and other bylaws and ordinances in effect.

¶ 14. Sand and gravel extraction is considered "quarrying" in § 130, the definition section of the bylaws. Quarrying, in turn, is listed as a form of "heavy manufacturing or industry," which is defined as "[t]he processing, assembly, distribution, or packaging of natural or man-made products where such activity results in substantial off-site impacts or all such activity and storage of raw or finished products is not enclosed inside a building or screened from the abutting properties and public rights-of-way." Id. § 130. Conversely, "light manufacturing or industry" encompasses activities that do not result in substantial off-site impacts and are enclosed inside a building or otherwise screened from adjacent properties and rights-of-way. Id.

¶ 15. Sections 1000 through 1013 provide specific regulations for each individual district, including a statement of objectives and guidelines and an itemized list of permitted uses. No district expressly permits sand and gravel extraction or any form of quarrying as either an authorized or conditional use. Although several districts permit as a conditional use "light manufacturing," only one district, the Commercial District (C-1), § 1005, broadly permits "industrial use," which can be

interpreted to encompass both heavy and light manufacturing. Similarly, no district expressly prohibits sand and gravel extraction or quarrying in its statement of objectives and guidelines.

¶ 16. With respect to the RA-2, § 1002, and MIX, § 1012, districts, neither lists as by-right or conditional uses sand and gravel extraction, quarrying, heavy manufacturing, or industry. The RA-2 district does not permit light manufacturing and, as noted in the statement of objectives, "is intended to be primarily residential in character." Id. § 1002. The MIX district does permit light manufacturing as a conditional use, but expressly prohibits heavy manufacturing in its statement of objectives. Id. § 1012.

¶ 17. In addition to the district-by-district enumeration of permitted uses, § 546 provides a blanket restriction on several specific uses within certain zoning districts, including the MIX district. Within this list of prohibited uses is "unenclosed manufacturing or processing of goods or materials," which aligns with the definition of "heavy manufacturing." Id. § 546. The bylaw does not specifically list "quarrying" or "sand and gravel extraction."

¶ 18. With this regulatory background in mind, we turn to the parties' arguments and interpretations of the bylaws. Neighbors argue that the ZBA's and environmental court's interpretation allowing sand and gravel extraction in any zoning district creates internal inconsistencies within the bylaws—that is, § 526 would expressly allow sand and gravel extraction while other bylaws prohibit this use. They reason that because sand and gravel extraction is defined as a form of quarrying, which in turn is defined as heavy manufacturing—and heavy manufacturing is prohibited in virtually all districts—sand and gravel extraction must be prohibited in these same districts. Specifically, they argue that because neither the RA-2 nor the MIX district expressly allows heavy manufacturing, sand and gravel extraction must be prohibited in these districts. Under neighbors' theory, we should read § 526 to mean that "in any district zoned to allow it the removal of sand or gravel for sale . . . shall be permitted only after conditional use review and approval by the Board of Adjustment." This, according to neighbors, is the only reading that will not produce absurd results.

¶ 19. Lathrop, on the other hand, urges us to look at the plain language of § 526, which, it contends, expressly allows sand and gravel extraction in all districts, subject only to conditional use approval. Lathrop's theory is that because no other provision expressly prohibits sand and gravel extraction, but merely heavy industry or unenclosed manufacturing, the more specific language of § 526

should trump the more general language found in the other bylaws. Lathrop also argues that any ambiguity should be resolved in favor of the landowner and that because the ZBA twice stated that § 526 allows sand and gravel extraction we should sustain its interpretation. Both the ZBA and the environmental court agreed with Lathrop and concluded that § 526 of the bylaws allows sand and gravel operations in any district, including the RA-2 and MIX districts, subject only to conditional use review.

¶ 20. The fundamental difference between the two interpretations advanced by the parties is that neighbors' reading creates a necessary condition, while Lathrop's reading, and the reading adopted by the ZBA and environmental court, creates a sufficient condition. The ambiguous phrase at issue in § 526 is "in any district." Neighbors' theory asks that we read "in any district" to mean in any district where sand and gravel extraction is permitted. Thus, meeting the requirements of § 526 is a necessary, but not sufficient, condition of approval; the use still must be expressly permitted in the relevant district. Lathrop's theory asks that we read "in any district" without restriction. Thus, meeting the requirements of § 526 is sufficient to meet the requirements of conditional use approval because sand and gravel extraction is conditionally permitted in any district.

¶ 21. Our decision is greatly affected by the standard of review. Although we review the environmental court's legal conclusions de novo, In re Grp. Five Inv. CU Permit, 2014 VT 14, ¶ 4, ___ Vt. ___, 93 A.3d 111, we will uphold those conclusions if "they are reasonably supported by the findings." In re Champlain Oil Co. Conditional Use Application, 2014 VT 19, ¶ 2, ___ Vt. ___, 93 A.3d 139. We will defer to the court's factual findings and uphold them "unless taking them in the light most favorable to the prevailing party, they are clearly erroneous." Id. We also defer to the environmental court's construction of a zoning ordinance "unless it is clearly erroneous, arbitrary, or capricious," In re Beliveau NOV, 2013 VT 41, ¶ 8, 194 Vt. 1, 72 A.3d 918, and to a municipality's interpretation of its own ordinance if it is reasonable and has been applied consistently. In re Champlain Coll. Maple St. Dormitory, 2009 VT 55, ¶ 10, 186 Vt. 313, 980 A.2d 273.

¶ 22. This case involves competing claims of statutory interpretation, each relying on a different canon of construction. We interpret zoning ordinances according to the principles of statutory construction, In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578, 15 A.3d 590 (mem.), and adopt an interpretation that implements the legislative purpose. In re Grp. Five Inv., 2014 VT 14, ¶ 23.

As usual, we start with the plain language and will enforce it according to its terms if it is unambiguous. Evans v. Cote, 2014 VT 104, ¶ 13, ___ Vt. ___, ___ A.3d ___. We conclude that the plain language of § 526 is ambiguous and therefore cannot interpret the bylaw on the plain language alone.[4]

¶ 23. Neighbors base their interpretation of § 526 on the text of 24 V.S.A. § 4407(2) (repealed 2005),[5] from which part of the language of § 526 was derived. They cite Drumheller v. Shelburne Zoning Board of Adjustment, 155 Vt. 524, 586 A.2d 1150 (1990), for the proposition that when the language of a regulation closely tracks the language of an enabling statute, the regulation must be construed in the same way as the statute. Id. at 529, 586 A.2d at 1152. Consequently, neighbors reason, because the enabling statute here confers on the municipality only the authority to allow conditional uses in any zoning district, and does not state that such uses may be undertaken in all districts so long as the applicant satisfies the relevant criteria, then § 526 cannot be read any more broadly to allow sand and gravel extraction in any district.[6]

¶ 24. We are not persuaded by neighbors' argument. They overextend our statement in Drumheller to mean that any time regulatory language is derived from statutory language it must be read in precisely the same manner. The question in Drumheller was one of defining an ambiguous term: "developed." Because the language in the ordinance was identical to that of the enabling statute, using the term "developed" in the same manner, we inferred that the drafters of the bylaw intended the term to have the same meaning as in the statute. Id. We then looked to the related definition section in the statute to discern the term's meaning. Id. Here, however, we are not comparing identical language. While the language of § 526 indeed has been derived from the statute, the nature of the language as transposed from the statute to the bylaw has been altered from the general—municipalities may permit conditional uses—to the specific—sand and gravel extraction requires a conditional use permit. We cannot conclude here as we did in Drumheller that the bylaw regulating sand and gravel extraction must be read in precisely the same manner as the enabling statute.[7]

¶ 25. The fact that myriad other towns have adopted the same pro forma language with respect to sand and gravel extraction, all tailored somewhat differently, lends further support for our conclusion.[8] If we were to interpret every such bylaw in the same manner as the statute, we would negate the

more individualized language incorporated by the towns into these bylaws.[9]

¶ 26. Nor are we persuaded by neighbors' other related arguments. They argue that it makes no sense for the Town to single out sand and gravel extraction for special treatment. While it is not for us to judge the wisdom of the drafters in choosing to incorporate this bylaw, we do note that the Town contains several sand and gravel extraction operations, as found by the ZBA when reviewing Lathrop's first application. The proliferation of these operations may suggest that the region is well-suited for this type of operation, or that the Town itself finds a strong demand for sand and gravel. Whatever the rationale, it is reasonable for the Town to create an exception for this type of activity. And the fact that so many other towns have followed suit with similar bylaw provisions suggests a larger trend toward favoring sand and gravel operations throughout the state. Moreover, as we observed above, supra, ¶ 23 n.6, the Legislature treated soil, sand, and gravel removal separately from other extraction activities when it passed 24 V.S.A. § 4407(8).

¶ 27. In another related argument, neighbors predict that the ZBA's and environmental court's construction of § 526 will result in sand and gravel extraction in districts reserved for residential use, the historic downtown, or other areas not suitable for intensive industrial operations, thereby interfering with the use and enjoyment of those neighboring properties impacted by the operations. They cite to the seminal zoning case Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), to support their contention that construing zoning regulations narrowly in favor of the landowner cuts both ways. Neighbors liken sand and gravel operations in the Town's many non-industrial districts to the notorious "pig in a parlor" from Euclid—the right thing in the wrong place that creates a nuisance for the surrounding properties. Id. at 388.

¶ 28. We emphasize that just because the bylaws permit sand and gravel extraction in any district does not mean that such an operation will end up in the middle of a high-density residential or commercial district, a sensitive conservation district, or on any other parcel of land where it is incompatible with surrounding uses. Such is the nature of conditional use review to ensure that the uses are appropriately sited and conditioned to harmonize with their surroundings. Not only does § 4414(3)(A) provide baseline standards for review, including that the proposed use "shall not result in an undue adverse effect on . . . [t]he character of the area affected," 24 V.S.A. § 4414(3)(A)(ii), but § 341 of the

bylaws ensures, among other things, a "harmonious relationship between proposed uses and existing adjacent uses." Moreover, the high-density commercial and residential districts invariably offer restrictive lot sizes with strict setback requirements. See Bylaws §§ 1009-1013.

¶ 29. We do find that a number of statutory construction principles aid Lathrop. First, because zoning ordinances "are in derogation of common law property rights," they must be construed narrowly in favor of the property owner, In re Champlain Oil Co., 2014 VT 19, ¶ 2, and "any ambiguity is resolved in favor of the landowner." In re Tyler Self-Storage Unit Permits, 2011 VT 66, ¶ 16, 190 Vt. 132, 27 A.3d 1071 (quotation omitted). Neighbors misunderstand the rationale behind this rule. They reason that it equally should favor the rights of neighboring property owners, but their reliance on Euclid here undercuts their argument. Euclid concerned a municipality's power to regulate land use within the constraints of the United States Constitution's substantive due process protections. The United States Supreme Court upheld zoning regulations, recognizing that a municipality may have a rational reason for separating incompatible uses, and set the precedent that zoning regulations are presumptively valid. Euclid, 272 U.S. at 395. Ambiguous zoning regulations, however, risk arbitrary and capricious exercise of the police power in violation of due process. 1 A. Rathkopf et al., The Law of Zoning and Planning § 2:3 (4th ed. 2014). The strict construction rule serves to protect the landowner whose common law property rights are being restricted by the regulation. We do, however, recognize that neighboring property owners have a right to the use and enjoyment of their property; the common law nuisance doctrine protects this right. As such, any ambiguity in § 526 is construed in favor of Lathrop.

¶ 30. Second, if we adopt neighbors' interpretation, we will be reading a restrictive condition into the bylaw—the condition that "in any district" means "in any district where sand and gravel extraction is permitted." We generally do not read conditions into the language of the bylaw unless necessary to make it effective. See Brennan v. Town of Colchester, 169 Vt. 175, 177, 730 A.2d 601, 603 (1999). As we can interpret the bylaw effectively without imposing such a condition, we must not do so here.

¶ 31. Finally, a commonly recognized method for reconciling conflicting statutory provisions is to hold the specific provision as an exception to the general. Smith v. Desautels, 2008 VT 17, ¶ 17, 183 Vt. 255, 953 A.2d 620; see also Stevenson v. Capital Fire Mut. Aid Syst., Inc., 163 Vt. 623, 624-25,

661 A.2d 86, 88 (1995) (mem.) (holding that statute providing immunity for fire departments and their personnel trumps statute providing for waiver of sovereign immunity upon purchase of insurance and concluding that fire departments therefore are immune from liability regardless of insurance). This also is applicable in the context of municipal ordinances. See 6 E. McQuillin, The Law of Municipal Corporations § 20:63 (3d ed. rev. 2008) ("When general and specific provisions are employed in ordinances, where there are two provisions, one general and the other specific and relating to only one subject, the specific provision ordinarily must prevail and be treated as an exception to the general provision."). Here, by the use of general terms—heavy manufacturing, industry, unenclosed manufacturing—sand and gravel extraction would appear to be prohibited in all but the C-1 District. But we must read the specific provision, § 526, as an exception to this general rule, thereby treating sand and gravel extraction as an exception to the prohibition on heavy manufacturing. While neighbors contend that the other bylaws are equally specific, we cannot overlook the fact that nowhere in the bylaws is sand and gravel extraction ever explicitly regulated or even mentioned—except in § 526. This is the same reasoning supplied by both the ZBA and the environmental court, and we find no reason not to defer to their interpretation.

¶ 32. Lathrop's interpretation also has some support in our prior case law. In In re John A. Russell Corp., 2003 VT 93, 176 Vt. 520, 838 A.2d 906 (mem.), we looked at similar inconsistencies with respect to conditional uses in the Town of Clarendon's bylaws. There, the appellants argued that asphalt plants are prohibited in the commercial-residential district because they are not listed as a permitted use within that district. We concluded that the bylaw regulating uses within the commercial-residential district "does not limit . . . the [Town of Clarendon Zoning Board of Adjustment's] authority to approve an asphalt plant as a conditional use under the separate conditional use provision." Id. ¶ 27. We further stated, in response to the appellants' observation that another bylaw sets forth a specific list of conditional uses allowed in other zoning districts, that "[w]e discern no basis to conclude from this that the ordinance may not incorporate a different approach for the commercial-residential district by allowing a [conditional use permit] for those uses not otherwise permitted." Id.

¶ 33. We therefore conclude that our deferential standard of review and the principles of statutory construction favor Lathrop's interpretation that the bylaws allow sand and gravel extraction as

a conditional use in any district. The environmental court did not err in holding that the project location did not violate the bylaws.

II.

¶ 34. As we have concluded that Lathrop's proposed sand and gravel extraction operation is permitted as a conditional use in the RA-2 and MIX districts, we must determine if the project will create a "pit" within the meaning of § 526(2). The court found that upon completion of the excavation the reclaimed area will be left with a cavity measuring 1000-by-1100 feet across and 100 feet deep at its deepest point. The issue is whether this cavity is a pit.

¶ 35. Section 526(2), the controlling bylaw, provides:

> The removal of material shall be conducted so as to result in the improvement of the land, having due regard to the contours in the vicinity such as leveling slopes and removing hills. The digging or creating of pits or steep slopes shall not be permitted, unless provision is made to refill such pit.

The term "pit" in § 130, the definition section of the bylaws, is cross-referenced with "quarry," which is defined as "[m]arble, granite, or other stone extraction operations and any land development incidental thereto . . . includ[ing] extraction of soil, sand or gravel and the enlargement of any existing quarrying excavations." Although "steep slope" is not explicitly defined, § 526(7) requires that "slopes in excess of one to two shall be adequately fenced."[10]

¶ 36. The 2004 ZBA concluded that Lathrop's project would not create a pit. The ZBA found that no definition of pit was provided in the bylaws and referenced a dictionary definition describing pits as having "vertical sides." In a reversal of its 2004 interpretation, the 2008 ZBA concluded that § 526 (2) prohibits any substantial depression or large hole in the landscape that remains unfilled, no matter how steep the slopes. The ZBA observed that § 526 targets open-pit techniques, which result in alterations to the landscape that do not "mesh[] with the surrounding contours of the land." The ZBA emphasized that "[a]t the end of the day, the intent of § 526(2) is for the discontinued pit site to blend in with the surrounding landscape, rather than leave the landscape in a state that testifies unremediated removal of material."

¶ 37. The environmental court adopted the interpretation of the 2004 ZBA and concluded that because Lathrop's project would maintain slopes of no more than 1:2 (rising one foot for every two feet

across) during the lifetime of the project and result only in a "shallow saucer" with a 1:10[11] slope in the end, it would not have steep slopes and therefore not create a pit. The court supported its interpretation with the language of § 526(7), which requires that steep slopes be fenced. The court reasoned that Lathrop's "shallow saucer" is neither susceptible to filling with water nor capable of becoming a dangerous attractive nuisance.

¶ 38. Neighbors argue that the court's interpretation is too restrictive and that the court erroneously conflated the terms "pit" and "steep slope," thereby failing to serve the purpose of restoring the landscape to its pre-extraction condition. They argue that this interpretation ignores the common usage of the term and fails to achieve the bylaw's landscape-remediation goals. Neighbors further argue that the ZBA's 2008 decision broadly interpreting the term should receive deference. Lathrop counters that neighbors' interpretation is irreconcilable with the bylaw's definition of "steep slope," reasoning that a "pit" must have at least a "one to two" slope. Lathrop further counters that because the 2004 and 2008 ZBAs reached opposite conclusions, it is clear that the term is ambiguous and that the environmental court's interpretation is reasonable and entitled to deference. We agree with neighbors and uphold the 2008 ZBA's interpretation of § 526(2).

¶ 39. As stated above, we review questions of law de novo and factual findings for clear error, and we also review interpretations of zoning ordinances for clear error. Supra, ¶ 21. We interpret zoning ordinances under the principles of statutory construction and resolve ambiguity in favor of the landowner. Supra, ¶¶ 22, 29.

¶ 40. At the heart of the parties' dispute is not just the definition of pit but where to look for that definition. The briefs and decisions below supply a laundry list of dictionary definitions, and the language of § 526 has been picked apart to discern some meaning. What has been overlooked completely, however, is the reference to "pit" in § 130, the definition section of the bylaws. See In re Burlington Airport Permit, 2014 VT 72, ¶ 21, ___ Vt. ___, 103 A.3d 153 ("[A] word used throughout an act or statutes in pari materia bears the same meaning throughout the act, unless it is obvious that another meaning was intended." (quotation omitted)). "Pit" is cross-referenced with "quarry," which broadly encompasses stone-extraction operations and expressly includes sand and gravel removal. Bylaws § 130. Thus, "pit" can be defined as the resulting cavity created by the extraction activities

defined under "quarry." The 2008 ZBA's interpretation—that pits result from open-pit techniques employed in quarrying and similar extraction activities—aligns with this definition.

¶ 41. Having a definition provided within the bylaws, we need not resort to dictionary definitions. See Franks v. Town of Essex, 2013 VT 84, ¶ 8, 194 Vt. 595, 87 A.3d 418 ("Words that are not defined within a statute are given their plain and ordinary meaning, which may be obtained by resorting to dictionary definitions."). We nonetheless conclude that the § 130 definition fits comfortably within the ordinary understanding and common usage of the term. The 2004 ZBA supplied two very restrictive definitions of "pit," while the 2008 ZBA furnished a large number of broader definitions—e.g., hole, cavity, indentation, excavation—that capture the term in its most ordinary sense. The definitions selected by the 2004 ZBA require that pits have almost vertical or perpendicular slopes, but nothing in § 130 suggests this restrictive reading.

¶ 42. The environmental court provides an equally restrictive interpretation, not through dictionary definitions but from § 526(7), which seemingly defines "steep slopes" as having a rise of 1:2 or greater. The court's rationale derives from the public safety concerns implied in § 526(7)'s requirement that steep slopes be fenced. While these public safety concerns are valid, and an interpretation founded on such concerns may be reasonable, the court still overlooks both the § 130 definition, which makes no mention of steep slopes, and the remediation goals evinced within § 526. In addition, as neighbors point out, the environmental court improperly conflated the terms "pit" and "steep slope." Because the terms are separated by "or" they must be read disjunctively and given separate meanings. Loughrin v. United States, ___ U.S. ___,134 S. Ct. 2384, 2390 (2014).

¶ 43. Moreover, the effect of the court's interpretation is to nullify the bylaws' refill requirement. It will always be easier and less expensive to create slopes that meet the degree-of-steepness requirement than to refill a pit. For example, if Lathrop were to excavate a cavity that resembles a box with horizontal dimensions of 1000-by-1100 feet and a uniform depth of 100 feet, it would remove 110 million cubic feet of material. It would then have to refill the pit with that same amount of material. Lathrop could create, however, the "one to two" sloped walls with roughly one-third of the material, obviously a less expensive alternative. While the difference depends on the amount of extraction, the creation of sloping walls will always be easier and less expensive than refilling

the cavity. It is unreasonable to conclude that the Town created a bylaw requirement that is never applicable, except in theory. We therefore conclude that the 2004 ZBA's and environmental court's interpretation of § 526(2) is clearly erroneous, and we uphold the 2008 ZBA's interpretation of the bylaw.

¶ 44. Having resolved the legal question that the court's definition of "pit" is incorrect, and having provided the proper definition, we must consider the factual question of whether Lathrop's project will result in a pit under this definition. We review mixed questions of law and fact de novo. See Luck Bros., Inc. v. Agency of Transp., 2014 VT 59, ¶ 26, ___ Vt. ___, 99 A.3d 997 (stating that our review of mixed questions of law and fact is nondeferential and on-the-record). Under a broad reading of pit, as defined by the 2008 ZBA, even a "shallow saucer" with 1:10 slopes would constitute a pit because it would be a depression in the landscape that does not blend with the surrounding contours. The vertical-walled cavity described in the above hypothetical would produce approximately 4.08 million cubic yards of material. The environmental court found that Lathrop proposes to extract 2.67 million cubic yards of material, roughly two-thirds the amount of material that would be extracted from the hypothetical vertical-walled cavity. Except by focusing on the slope of the walls, as the environmental court did, it is difficult to see how one cavity is a pit while the other is not.

¶ 45. Again, we emphasize that the environmental court's rationale that the resulting cavity would not threaten public safety or fill with water is not part of the analysis. The site will be excavated for the removal of sand and gravel with an open-pit technique; this is precisely the type of activity targeted under the definition of "quarry," as incorporated by reference into the definition of "pit."

¶ 46. We therefore reverse the environmental court's decision and hold as a matter of law that Lathrop's project creates a "pit" within the meaning of § 526(2).

¶ 47. While we have reversed the environmental court's decision that the project would not create a pit, this holding does not end the inquiry into whether the project violates § 526(2) of the bylaws. The ZBA denied the zoning permit because it ruled that Lathrop failed to make provisions to refill the pit. Lathrop claimed in its statement of issues on appeal to the environmental court that the ZBA should not have denied the permit but instead should have imposed a permit condition requiring compliance with § 526(2). At the environmental court, Lathrop argued that its proposal to regrade the

land for future development was a sufficient provision for refilling a pit and therefore satisfied the requirement of § 526(2). The court never reached these arguments because it concluded that the project would not create a pit. Accordingly, the case is remanded to the environmental court to address Lathrop's other compliance claims. Because our holding with respect to § 526(2) does not end the controversy, we consider the other issues raised in the appeal.

III.

¶ 48. We next address the issue of whether the environmental court was precluded from hearing and adjudicating Lathrop's revised permit application or issuing a judgment inconsistent with the 2004 permit issued by the ZBA. Neighbors argue that, because the application Lathrop finally presented to the environmental court in Lathrop II is not substantially different from the application it submitted to the ZBA in 2003 in Lathrop I, it should be barred by the successive-application doctrine. Lathrop responds that the successive-application doctrine is premised on the local board denying the initial application, not approving the application, as occurred here. Moreover, Lathrop argues that its revised application indeed was substantially different, as recognized by the ZBA when it reviewed the new application in 2008. The environmental court agreed with Lathrop and concluded that it had jurisdiction to review the application. We disagree with the court's analysis and reverse and remand on this issue as explained in more detail below.[12]

¶ 49. Because resolution of this issue will require a full analysis of all the principles related to issue and claim preclusion in zoning cases, we start with an explanation of what was presented and what was either allowed or disallowed in the three adjudications—the first adjudication by the 2004 ZBA, the second adjudication by the 2008 ZBA, and the third and final adjudication by the environmental court.

¶ 50. We have attached to this opinion, as the Appendix, a chart containing for each important component of the project an entry describing the component: (1) in the 2003 application to the ZBA (as amended in 2004); (2) in the ZBA's 2004 decision approving the proposal with conditions; (3) in the second application to the ZBA in 2007; (4) in the amended proposal to the environmental court; and (5) as conditioned in the environmental court's decision.[13] As an overview, the project as approved by the ZBA in 2004 and the project as proposed by Lathrop in 2007 differ in two primary respects: (1) the extraction rate and its consequences and (2) the location of the access point.

¶ 51. The first main difference is the extraction rate and the consequences that flow from the changed rate. In its 2003 application, Lathrop proposed to extract only 60,000 cubic yards per year. In its 2007 application, Lathrop proposed 60,000 cubic yards per year only for the first fifteen years; it proposed to excavate 100,000 cubic yards per year thereafter. To accommodate the increased excavation rate, Lathrop proposed doubling the average and maximum allowable truck trips and lengthening the hours of operation. The 2004 ZBA allowed, as proposed by Lathrop, an average of 17 truckloads per day with a maximum peak of 34 truckloads per day. The 2007 proposal sought an average of 36 truckloads per day, with a peak of 72 truckloads per day. This higher number of truckloads was proposed for the entire duration of the project, not just after the fifteenth year when the extraction rate would increase.

¶ 52. The second main difference is the location of the access point. The 2003 proposal provided access off South Street on the northern edge of the property. The 2007 proposal changed the access point to Rounds Road on the southern edge of the property. Trucks leaving the property by either exit would reach Hewitt Road proceeding west from the project, but would reach that road by different routes. Due to this relocation of the access point, different adjacent property owners would be exposed to truck traffic along the route between the project site and Hewitt Road.

¶ 53. On appeal from the 2008 ZBA decision denying its permit, Lathrop presented a virtually identical proposal to the environmental court. It then modified its proposal to change the location of the access point back to the South Street route approved by the 2004 ZBA. In all other respects the proposal was identical to the proposal that Lathrop made to the ZBA in 2007.[14] Except in relatively minor respects the environmental court approved Lathrop's proposal.

¶ 54. With this overview in mind, we proceed to the applicable law. Two preclusion doctrines are implicated in this decision: the standards and restrictions on zoning permit amendments and the successive-application doctrine. Each of these doctrines is governed by and must be consistent with the controlling statute, 24 V.S.A. § 4472(d), which provides:

> Upon the failure of any interested person to appeal to an appropriate municipal panel under section 4465 of this title, or to appeal to the Environmental Division under section 4471 of this title, all interested persons affected shall be bound by that decision or act of . . . [the administrative] officer, the provisions or the decisions of the panel, as the case may be, and shall not thereafter contest, either directly or indirectly,

> the decision or act, provision, or decision of the panel in any proceeding, including any proceeding brought to enforce this chapter.

This statutory requirement underlies all preclusion rules in zoning cases. It is very broadly stated, applying to decisions of both the local administrative officer and the local hearing panel—here the ZBA. With respect to the ZBA, it insulates from collateral attack any decision or act of the ZBA and defines collateral attack to include both direct and indirect challenges.

¶ 55. Before analyzing the two preclusion doctrines, we address one application of § 4472(d) that is important to this case: that permit conditions or amendments may be challenged on appeal but cannot be attacked collaterally. In Village of Woodstock v. Bahramian, 160 Vt. 417, 631 A.2d 1139 (1993), a zoning applicant appealed to the superior court a denial by the local planning commission of amendments to its preexisting permit. Without filing a cross-appeal, the Village of Woodstock sought reversal of other amendments approved by the planning commission but not part of the applicant's appeal. The superior court concluded that because its review under § 4472(d) is de novo, it could consider the entire application, including those amendments challenged by the Village. We held that the superior court erred in reviewing the entire application because, as the Village did not appeal, "the alterations that were approved by the commission were not properly before the court." Id. at 424, 631 A.2d at 1133; see also In re Hildebrand, 2007 VT 5, ¶ 11, 181 Vt. 568, 917 A.2d 478 (mem.) (stating that unappealed permit conditions are final under 24 V.S.A. § 4472 and may not be challenged collaterally); In re Garen, 174 Vt. 151, 156, 807 A.2d 448, 451 (2002) (stating that issues on appeal to environmental court are limited to those identified in statement of questions filed in connection with notice of appeal).

¶ 56. The first preclusion doctrine implicated in this case deals with the standards and restrictions on zoning permit amendments, which we have held are allowable under 24 V.S.A. § 4472 (d). Hildebrand, 2007 VT 5, ¶ 12. There are no statutory standards that an amendment to a zoning permit or condition must meet; nor in this case do the Town's bylaws establish any standards. We first considered the availability of permit amendments to zoning and other land use permits in In re Stowe Club Highlands, 166 Vt. 33, 687 A.2d 102 (1996). In Stowe Club Highlands, upon review of an Act 250 proceeding, we determined "under what circumstances . . . permit conditions may be modified." Id.

at 37, 687 A.2d at 105. Our decision generally affirmed the reliance on factors that had been identified by the former Environmental Board: (1) whether there had been "changes in factual or regulatory circumstances beyond the control of a permittee"; (2) whether there had been "changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued"; and (3) whether there had been "changes in technology." Id. at 38, 687 A.2d at 105. These factors are intended to "assist in assessing the competing policies of flexibility and finality in the permitting process." In re Nehemiah Assocs., 168 Vt. 288, 294, 719 A.2d 34, 37 (1998). We applied the holding of Stowe Club Highlands to a municipal zoning permit in Hildebrand. In Hildebrand, we affirmed the environmental court's importation of the Stowe Club Highlands factors on the reasoning that the competing interests in Act 250 and municipal zoning cases are so similar. Hildebrand, 2007 VT 5, ¶ 13.

¶ 57. That our authorization of permit amendments is a liberalization of preclusion rules is demonstrated by In re Dunkin Donuts, 2008 VT 139, 185 Vt. 583, 969 A.2d 683 (mem.). There, the applicant had sought unsuccessfully to build a Dunkin Donuts restaurant with a drive-through window but finally obtained a permit by eliminating the window from its proposal. A neighboring business appealed the board's grant of the permit and settled the appeal pursuant to a stipulation that the project would not include drive-through service. The settlement was incorporated into a court judgment. Nonetheless, the applicant thereafter applied for and was granted an amendment to install a drive-through window. On appeal, the environmental court reversed the decision of the development review board, holding that the issue of drive-through service was controlled by the original court judgment and that the judgment could be set aside only by meeting the standards for relief from judgment contained in Vermont Rule of Civil Procedure 60(b). Id. ¶¶ 2-5. Although the environmental court's decision could be viewed as a routine application of § 4472(d), we reversed on the basis that preclusion applies flexibly to administrative proceedings. Id. ¶ 7. As explained infra, ¶ 64, we applied the successive-application doctrine to an amendment request, but we held that the development review board could amend the prior permit so long as the amendment addressed the concerns that prevented approval of the drive-through window in the original proposal. Id. ¶ 13.

¶ 58. The second preclusion doctrine implicated here is the successive-application doctrine.

This preclusion doctrine provides that a local board "may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merits of the request have intervened between the first and second application." In re Carrier, 155 Vt. 152, 158, 582 A.2d 110, 113 (1990) (quotation omitted); see also In re Woodstock Cmty. Trust & Hous. Vt. PRD, 2012 VT 87, ¶ 4, 192 Vt. 474, 60 A.3d 686. The second application can be granted "when the application has been substantially changed so as to respond to objections raised in the original application or when the applicant is willing to comply with conditions the commission or court is empowered to impose." In re Carrier, 155 Vt. at 158, 582 A.2d at 113. In an attempt to balance the competing concerns of flexibility and finality in zoning decisions, the successive-application doctrine carves an exception out of the otherwise rigid standard of preclusion of § 4472(d) to allow local boards the ability to respond to changing circumstances that often arise in zoning decisions. In re Woodstock Cmty. Trust, 2012 VT 87, ¶ 4; In re Dunkin Donuts, 2008 VT 139, ¶ 9. The policy behind preclusion is to "protect the courts and the parties from the burden of relitigation." Russell v. Atkins, 165 Vt. 176, 179, 679 A.2d 333, 335 (1996). The successive-application doctrine in particular encourages applicants "in the interest of finality and judicial economy" to be thorough in their initial applications. In re Armitage, 2006 VT 113, ¶ 10, 181 Vt. 241, 917 A.2d 437.

¶ 59. In general terms, the amendment rules are an application of issue preclusion, or collateral estoppel, in the less-rigid environment of zoning adjudication—they apply to the issues actually resolved in the adjudication process and reflected in the decision on the permit application. The successive-application doctrine is an application of claim preclusion, or res judicata, in the special environment of zoning adjudication—it applies to the overall claim that the project is entitled to a permit.[15] They should be viewed as flexible applications of the comprehensive standard of § 4472(d) that allow changes in proposals or permits without destroying the finality of decisions on which both interested parties and the public rely.

¶ 60. In essence, the environmental court held that neither of the specific preclusion doctrines applied and, as a result, no preclusion was involved. It found that the permit amendment requirements did not apply because Lathrop never had sought a permit amendment,[16] and it found that the

successive-application doctrine did not apply because Lathrop had not been denied a permit in 2004. The court did not address whether § 4472(d) imposed any restrictions on its actions, given that the successive application and permit amendment requirements did not apply.

¶ 61. The court did focus on the permit conditions imposed in Lathrop I by the 2004 ZBA, but the rationale for the court's decision on this point is not entirely clear beyond its apparent reliance on the Lathrop II 2008 ZBA decision that the second application "differs substantially" from that approved in 2004 and the fact that Lathrop's 2004 permit was not denied. The court went on to state that Lathrop raised on appeal "whether the original conditions imposed by the ZBA are appropriate" and that it concluded that Lathrop "preserved its ability to assert that its revised project conforms to the Bylaws without condition."[17] It went on to state that it would consider conditions "which may or may not coincide with the twenty-three conditions the ZBA imposed in its approval of Lathrop's original proposal."

¶ 62. The logic of the environmental court's decision takes us in the wrong direction. If the flexible preclusion doctrines do not apply, we must analyze the circumstances under 24 V.S.A. § 4472 (d), with a result directly contrary to that of the environmental court. The Lathrop II application contests, at least indirectly, the decision of the 2004 ZBA in Lathrop I, to the extent that there is an inconsistency between them. Thus, it violates § 4472(d), and the ZBA should not have entertained it.

¶ 63. The reason that the environmental court's decision goes in the wrong direction is that it elevates form over substance. As neighbors note, the Lathrop I decision could have been expressed either as a denial of a permit until certain conditions are met or as an approval of a permit so long as certain conditions are met. It is illogical to reject the use of the successive-application doctrine in one instance and not the other. Similarly, it is illogical to apply one standard when a permit holder seeks an amendment to the permit and another when a permit holder seeks a new permit, the purpose of which is to amend the conditions in the preexisting permit. The preclusion doctrines should apply when the circumstances to which they respond arise, and not based primarily on the form of the action that the applicant seeks or the form of the earlier action of an adjudicatory panel. In a complex case like this one, it is possible, even likely, that both preclusion doctrines should apply, just as it is possible that in civil litigation both issue and claim preclusion can be involved.

¶ 64. Our decision in Dunkin Donuts illustrates the flexibility both in the preclusion doctrines and in how they are employed. Although that case involved a permit amendment, we applied the successive-application doctrine, even though there never was a permit denial. Our holding there directly responded to the environmental court's holding that the successive-application doctrine does not apply when a permit has been granted. More importantly, we broadly applied the successive-application doctrine because we had not yet held that the standards for permit amendments developed for Act 250 proceedings in Stowe Club Highlands also apply to zoning cases. See In re Dunkin Donuts, 2008 VT 139, ¶ 9 n.2 (citing Stowe Club Highlands but explaining that "an independent set of rules, not the successive-application doctrine, are applied to Act 250 permit amendment requests"). After our decision in Hildebrand, applying the Stowe Club Highlands standards for permit amendments, Dunkin Donuts should be viewed as a permit amendment case. Dunkin Donuts is important, however, because of its flexible use of the successive-application doctrine in applying preclusion principles.

¶ 65. A good example of the proper application of preclusion doctrines to facts like those before us is DeTray v. City of Olympia, 90 P.3d 1116 (Wash. Ct. App. 2004). In DeTray, the developer sought a permit for a mobile home park abutting a lake and accessible via a private road. The developer received the necessary permit with two conditions: one requiring dedication of the private road as a public road and a second requiring creation and dedication of an extension of an existing pedestrian trail around the lake. The developer appealed, attempting to strike the conditions, but later abandoned the appeal. Thereafter, the developer submitted a new proposal, which he called a modification of the previous application, that reduced the number of mobile homes, added a senior citizen apartment building, and also included the public road and pedestrian trail extension. The developer received permits for this proposal but again appealed, seeking to strike the public road and pedestrian trail extension requirements. In response to the city's argument that he was precluded from again challenging the requirements for failure to continue the appeal from the earlier permit, the developer responded that the new proposal was such a substantial change from the earlier one that no preclusion applied. The court rejected the developer's argument and held that a substantial change in the overall development proposal is not sufficient to allow the striking of the original permit conditions, especially where the new proposal increased the need for those conditions. Id. at 1123. The court stressed that the

failure of the developer to pursue his original appeal made the conditions final and that claim preclusion prevented the developer from challenging them in this new successive application. Id.

¶ 66. The case before us should proceed similarly. Where there is a preexisting permit, it should not matter to applicable regulatory standards whether the applicant submits a new application or requests an amendment to an existing permit. The first step is to determine whether there is a judgment with preclusive effect. If so, the second step should be review of the proposal as a whole. If the board or court concludes that there is a substantial change from the permitted project,[18] review should proceed as if there is no prior permit. In the relaxed environment of zoning permits, it is not determinative that the applicant could have or should have made the new proposal at the time of the original permit review. The third step is that conducted for permit amendments. To the extent the applicant seeks to change or avoid permit restrictions or conditions, the applicant must meet the standards for permit amendments as set forth in Hildebrand[19] in light of the new project and any restrictions and conditions imposed from the second step.

¶ 67. Looking at the first step in this case, there is a judgment—the 2004 ZBA permit—with preclusive effect as specified in 24 V.S.A. § 4472(d). While the permit is not final because of neighbors' appeal, it is final with respect to any change from Lathrop because Lathrop failed to appeal. This result is commanded by Bahramian as described above, supra, ¶ 55.

¶ 68. The ZBA conducted the second step of the review in 2008, and the environmental court relied upon that review to reach its conclusions and order. The ZBA review was conducted, however, with respect to a proposal that was significantly different from that approved by the environmental court. As we discussed above, supra, ¶¶ 51-52, the two main differences between the 2007 proposal and the 2004 ZBA approval were the annual extraction rate and the location of the access point. Under the environmental court's order, the project essentially has returned to that approved in 2004 with respect to these two issues.[20] Before the court can consider the project as approved, a substantially different project under the successive-application doctrine, it must analyze the differences from the 2004 permit and find the necessary substantial change.

¶ 69. Even if Lathrop is allowed to go further after the second step of review, the conditions and restrictions must be reviewed as permit amendments in light of the changed project. Neither the

ZBA nor the environmental court conducted this third step of the review. Assuming it is necessary at all, we leave that review to the environmental court on remand. We do address, however, the truck-travel limits as imposed by the ZBA in 2004 because it is a central point of this appeal and can be resolved as a matter of law.

¶ 70. The 2004 ZBA decision imposed a permit condition that "[g]ravel may be removed from the site at a rate of 17 loaded trucks/day averaged over 250 days of operation, with 34 trucks per day maximum." The environmental court judgment order provided that "Lathrop shall restrict . . . the maximum one way truck trips to no more than 100 per day unless and until authorized by both the District Commission and the ZBA to increase such limits."[21] The decision notes that the trip-rate maximum proposed by Lathrop would mean that Lathrop would reach the extraction maximum of 60,000 cubic yards if truck traffic were at its maximum, given the size of the trucks Lathrop would use. It found that an average of 23 truck trips per day would allow for the excavation and transportation of 60,000 cubic yards. It noted, however, that if the extraction rate increased to 100,000 cubic yards per year it would take an average of 38 truck trips per day to transport that material. In its findings, it added that "[w]e have some concern, perhaps best explained as uncertainty, of the impact to area highways if the truck traffic from the proposed project continues at the projected maximum rate for more than sixty-two days a year."

¶ 71. Based on the above findings and drawing on the expert testimony and the historic truck traffic on Hewitt Road, the court concluded that a "maximum level of 100 one-way truck trips generated per day . . . will not cause unreasonable congestion or unsafe conditions on the town highways." See 10 V.S.A. § 6086(a)(5) (Act 250 Criterion 5 (traffic)). The conclusion goes on to state that Lathrop can apply after fifteen years for an increase in the excavation rate and truck-trip maximum. At that time, there will be better evidence of the impacts of the truck traffic.

¶ 72. While we have no doubt that Lathrop presented a much better and more thorough case to the environmental court in 2012 than it presented to the ZBA in 2004, we see nothing in the court's findings and conclusions to support a permit amendment with respect to truck traffic. As we held with respect to the successive-application doctrine, and it applies equally here, an applicant seeking a permit amendment may not merely introduce new evidence that it could have presented in the initial

proceeding. In re Armitage, 2006 VT 113, ¶ 10.

¶ 73. As in DeTray, the main question is whether the permit amendment is motivated by changes in construction or operation of the project not reasonably foreseeable at the time the permit was issued, one of the three critical factors in Hildebrand, 2007 VT 5, ¶ 7. The testimony regarding the contested application conditions indicates that no such change in circumstances occurred, but rather that Lathrop finds the conditions impractical. As we look at the changes in the project from 2007 through the environmental court's approval, we see none that suggests or supports loosening the truck-traffic limit. Under the circumstances, we hold that the grounds for a permit amendment were not established and the court erred in changing that limit from where it was set by the 2004 ZBA.

IV.

¶ 74. We next address the issue of whether the environmental court erred in relying on one-hour average noise levels and failing to consider an increase in high-decibel noise events, or instantaneous peak noise levels. The environmental court's analysis with respect to this issue goes to whether the project will have an adverse aesthetic impact under Act 250 Criterion 8, which the former Environmental Board and this Court have held covers noise impacts. See In re Chaves A250 Permit Reconsider, 2014 VT 5, ¶¶ 23-24, ___ Vt. ___, 93 A.3d 69. An analysis of a project's aesthetic impacts under Criterion 8 begins with the two-part Quechee test formulated by the Environmental Board in In re Quechee Lakes Corp., Nos. 3W0411-EB, 3W0439-EB, slip op. at 19-20 (Vt. Envtl. Bd. Nov. 4, 1985), http://www.nrb.state.vt.us/lup/decisionis.htm. Under the Quechee test, a project violates Criterion 8 if: (1) the proposed project will have an adverse aesthetic impact and (2) that impact will be undue. In re Times & Seasons, LLC, 2008 VT 7, ¶ 8, 183 Vt. 336, 950 A.2d 1189. An impact is undue if: (1) it "violate[s] a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area"; (2) it "offend[s] the sensibilities of the average person"; and (3) the applicant has "failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings." Id.

¶ 75. We reiterate that our evaluation of this claim, as others, is limited by our standard of review. We defer to the environmental court's expertise in matters of land-use permitting and its conclusions on the impacts a proposed project will have on the environment. In re Rte. 103 Quarry,

2008 VT 88, ¶ 4, 184 Vt. 283, 958 A.2d 694. It is the role of the environmental court to weigh the evidence and assess the credibility of the witnesses with respect to these impacts, In re McShinsky, 153 Vt. 586, 589-90, 572 A.2d 916, 918-19 (1990), and we will uphold the court's conclusions so long as it has not abused its discretion. In re Chaves, 2014 VT 5, ¶ 30. The court's conclusions, however, must be supported by the factual findings. Turnley v. Town of Vernon, 2013 VT 42, ¶¶ 11-12, 194 Vt. 42, 71 A.3d 1246.

¶ 76. Before we analyze the environmental court's decision, we emphasize that the issue is limited only to noise from truck traffic under Act 250. There is an apparent conflict between the 2004 ZBA permit condition with respect to noise from the project site and the permit condition imposed by the environmental court. The ZBA set a limit of 55 dB at the property line, which seemingly excludes noise from truck traffic outside the project site, while the environmental court set a limit of 70 dBA at the property line.[22] As we held in Part III, supra, ¶ 66, this conflict must be resolved by treating any higher noise limit as a zoning permit amendment that must meet the standard for such amendments. Neighbors have not raised this conflict in particular, and it is not the basis of this issue with respect to truck-traffic noise under Act 250.

¶ 77. The crux of the parties' dispute here is the use of two different noise measurements for assessing the traffic impacts under Criterion 8. The first measurement is the Lmax, which is the maximum noise level that will occur irrespective of its duration. In re McLean Enters. Corp., No. 2S1147-1-EB, slip op. at 22 (Vt. Envtl. Bd. Nov. 24, 2004), http://www.nrb.state.vt.us./lup/decisions.htm. Simply put, Lmax measures instantaneous noise. Id. The second measurement is the Leq(n), which is the maximum noise level that will occur as averaged over a period of time (n). Id. Both the Lmax and Leq are measured in decibels (dB or dBA). Neighbors essentially argue that noise impacts under Criterion 8 should be evaluated under the Lmax standard for instantaneous noise, with particular concern about noise emitted from truck traffic along Hewitt Road. The environmental court instead applied the Leq standard, which neighbors claim was averaged over a period of one hour. Although the court never explicitly stated the duration of the Leq measurements, neighbors point out that the court used predicted noise levels drawn from the testimony of Lathrop's expert witnesses.

¶ 78. The environmental court recognized that former Act 250 decisions under Criterion 8 consistently have assessed noise impacts using the Lmax measurement, but the court relied on testimony from Lathrop's expert witnesses that the average Leq noise levels emitted by passing trucks, although discernible to residents, likely would not exceed the existing background levels. Specifically, the court found that Lathrop's haul trucks will emit noise at a level of 70 dBA (Leq) at the edge of the roadway and 56 dBA (Leq) at residences and outside areas of frequent human use, and that the average noise levels recorded at monitoring stations along nearby roads reported existing levels of 55-57 dBA (Leq). On that basis, the court concluded that the noise emitted from the truck traffic would not be undue, thereby satisfying Criterion 8.[23] The court made no findings as to the Lmax and did not consider Lmax measurements in reaching its conclusion.

¶ 79. Neighbors do not contest the court's findings with respect to the existing traffic and background noise levels, the average and maximum traffic that may be generated by the project, or the potential increase in decibel levels emitted by the additional traffic. Rather, neighbors dispute the environmental court's conclusion that the traffic generated by Lathrop's project will not emit noise that will create an undue adverse impact on neighbors and the surrounding area. Specifically, neighbors argue that the undue adverse impact will be created by the higher frequency of peak noise levels, especially during times that existing traffic is low, notably during the project's operating season, and during the warm season when windows and doors are open and people spend more time outdoors.

¶ 80. As the environmental court acknowledged, the Environmental Board formulated a standard for determining at what point a noise event is adverse: where the noise exceeds 70 dBA (Lmax) at the property line and 55 dBA (Lmax) at surrounding residences and outside areas of frequent human use. In re Barre Granite Quarries, LLC, No. 7C1079 (Revised)-EB, slip op. at 80 (Vt. Envtl. Bd. Dec. 8, 2000), http://www.nrb.state.vt.us./lup/decisions.htm. This standard has guided Act 250 determinations over the past decade, and we recognized the standard in Chaves, 2014 VT 5, ¶ 31 n.4.

¶ 81. Although the environmental court recognized this standard, it emphasized that the standard should not be applied rigidly. The court cited McLean Enterprises, No. 2S1147-1-EB, in which the Environmental Board acknowledged that the context and setting of a project should aid in dictating the appropriate noise levels. Id. at 64. As the Board stated, "a 50 dBA Lmax standard may not make

sense in noisy areas . . . . It may be of questionable logic and practically impossible to enforce a 50 dBA Lmax when trucks passing by . . . already register 78 dBA at an adjacent residence." Id.

¶ 82. We endorsed this flexibility in Chaves, 2014 VT 5, where we reviewed a claim quite similar to the one at issue here. The project neighbors in Chaves, who owned a country inn located across the highway from the quarry entrance, claimed that the environmental court erred in concluding that a proposed sand and gravel quarry satisfied Criterion 8 because the noise resulting from the truck traffic would exceed the maximum 55 dBA level established under Barre Granite. We disagreed with the neighbors' claim, even though the applicant's expert witness conceded that trucks accelerating past the neighbors' inn would produce sounds up to 69 dBA, and stated that "[t]his statement does not undermine the court's overall finding that noise levels would generally remain under 55 dBA and that the noise was not adverse to the area's aesthetics." In re Chaves, 2014 VT 5, ¶ 33. We also noted that the noise expert explained that the existing truck traffic already emitted noise up to 68 dBA and that the 1 dBA difference is insignificant. Id. We concluded:

> From this evidence, the court found that in those instances where the noise exceeded the 55 dBA standard, the Project noises will be no louder than the discernible noises from the Route 100 traffic and activities on surrounding properties. Essentially, even though applicants' experts testified that in some instances the noise from trucks leaving the quarry could exceed 55 dBA, the character of the area already included significant traffic noise at or near the level of those exceedances and therefore a slight increase in the traffic noise would not amount to an adverse impact.

Id. (quotation omitted). The neighbors in Chaves also argued that the court erred in looking at the average rather than the maximum number of trips that may be generated by the proposed project. We again disagreed with the neighbors and stated that the court considered both the average and maximum "but credited applicants' expert that if this level of operation were maintained, the project would operate on only forty-eight days, given the limit on extraction . . . [and] that it was more likely that extraction and traffic would be spread across an operating season." Id. ¶ 28.

¶ 83. Lathrop argues that the Chaves decision controls and decides the issue here. We do find Chaves helpful in creating the parameters within which the environmental court can exercise its discretion, but we ultimately conclude that it is distinguishable and thus not controlling here. First, while the environmental court in both Chaves and in this case considered the preexisting overall

background averages and concluded that the noise emitted by the truck traffic would remain within those averages, the court in Chaves conducted a more thorough analysis, looking at not only the overall averages but also the Lmax, as required under the Barre Granite standard. The Chaves court made findings as to the Lmax and concluded that the 1 dBA increase over the maximum existing noise from passing traffic would not be adverse in the context of the industrial setting. Here, the environmental court made no findings as to the Lmax, considering only the Leq, despite testimony from Lathrop's noise expert that the instantaneous noise emitted by passing traffic would exceed the 70 dBA Lmax standard.

¶ 84. Second, Chaves dealt with preexisting traffic on a major road, and there is no indication in the opinion that there was seasonal variation in traffic volume or noise. The court there considered the increase in traffic generated by the quarry and the noise experts' testimony that the additional trips would increase the noise level by less than 3 dB. In this case, the trucks travel along secondary roads—South Street and Hewitt Road—and primarily during a different operational season from the preexisting truck traffic generated by Lathrop Forest Products. From this, the environmental court concluded that the truck traffic would "mesh conveniently" with the existing traffic and not increase the overall average noise levels, even though neighbors complain that the adverse impact is created by the increased frequency of peak noises on a year-round basis. Cf. John A. Russell Corp., 2003 VT 93, ¶ 33 (stating that environmental court erred in failing to consider increase in frequency of loud noises emitted by proposed asphalt plant even though plant would not emit noise in excess of preexisting decibel levels).

¶ 85. While the Barre Granite standard indeed is applied flexibly to accommodate existing background noise and the project context, the Environmental Board consistently adhered to Lmax calculations when assessing the adverse impact of noise. See, e.g., McLean Enters. Corp., No. 2S11471-EB, at 65. The environmental court explicitly relied on McLean Enterprises and its discussion of the need for flexibility, quoting the Board's statement that a permit condition of 50 dBA Lmax would be inappropriate "in a quiet rural residential area with background noises under 30 dBA L90" and that "[i]t may be of questionable logic and practically impossible to enforce a 50 dBA Lmax when trucks passing by . . . already register 78 dBA at an adjacent residence." Id. at 64. We agree that the reliance on McLean Enterprises was appropriate, see 10 V.S.A. § 8504(m) (stating that in Act 250 appeals, prior

decisions of Environmental Board "shall be given the same weight and consideration as prior decisions of the Environmental Division"), but the court failed to apply the full holding of McLean Enterprises. The Board in McLean Enterprises rejected the applicant's argument that the Board should use the Leq standard, rather than the Lmax standard, in imposing permit conditions and emphasized that although "the time period of 1 second for an Leq theoretically would result in readings similar to a Lmax . . . the Board has historically used Lmax." McLean Enters. Corp., No. 2S11471-EB, at 65.

¶ 86. As evidenced by the transcript, the environmental court wrestled with the application of the Lmax standard to highway traffic, concluding that "if we were obligated to apply the 55 dB or 75 dBA noise-level standards to traffic as it crossed the border . . . there would be no large development that would receive a permit in the State of Vermont." While our decision in Chaves had not been issued when the environmental court made its decision, several Environmental Board decisions have applied the Lmax instantaneous noise level standards to truck traffic. In In re Casella Waste Management, Inc., No. 8B0301-7-WFP, slip op. (Vt. Envtl. Bd. May 16, 2000), http://www.nrb.state.vt.us./lup/decisions.htm, the Waste Facility Panel of the Environmental Board found that "[i]nstantaneous sound levels (in relation to background noise) are the appropriate standard (as opposed to average levels over time) by which to judge noise impacts from trucks, as that is what impacts on the human ear from truck traffic" and that "[m]aximum sound (peak level) readings are a better indicator than average sound readings for determining the impacts of instantaneous noise from trucks." Id. at 22. The Panel further stated that "[w]hen evaluating the real effect on people from the noise of passing trucks, it is more appropriate to consider the instantaneous noise from the trucks as they pass because that is what people experience." Id. at 34 (quoting In re OMYA, Inc., No. 9A0107-2-EB, slip op. at 15 (Vt. Envtl. Bd. May 25, 1999), http://www.nrb.state.vt.us./lup/decisions.htm). The Board in OMYA similarly rejected average noise levels for truck traffic, emphasizing that "[w]hile the average noise levels may not increase significantly with OMYA's proposed additional truck traffic, each additional instance of a truck passing results in an additional instantaneous loud noise, or an additional annoyance that interferes with sleep and conversations." In re OMYA, Inc., No. 9A0107-2-EB, slip op. at 15. And in In re Bickford, No. 5W1186-EB, slip op. (Vt. Envtl. Bd. May 22, 1995), http://www.nrb.state.vt.us./lup/decisions.htm, the Board found the traffic noise adverse, citing the 55

dBA standard for outside areas of frequent human use, because the haul trucks from the project site when passing the adjacent motel cabins would emit peak noises of 85-95 dBA, a "high increase" over the existing 42-50 dBA "no traffic" background levels. Id. at 33.

¶ 87. In general, the Environmental Board decisions reflect a more thorough analysis of the changes in traffic patterns and the attendant noise emissions than the environmental court decision before us. This analysis is demonstrated in OMYA, No. 9A0107-2-EB, slip op., where the Board considered the large increases in high-decibel noise events in relation to the existing traffic passing through a downtown. Id. at 37-38; see also Bickford, No. 5W1186-EB, slip op. at 33 (concluding that, although tourist cabins already experience traffic from state highway, increase in instantaneous traffic noise during periods of no traffic on highway would be adverse). Our discussion of noise impacts in John A. Russell Corp., 2003 VT 93, although in the context of a municipal permit, also points to a more complete analysis. There, the environmental court concluded that the noise emitted by the asphalt plant, which was added to an existing quarry, would not adversely affect the character of the area because it would be no louder than the noise limits under the quarry's Act 250 permit. Id. ¶ 32. We held that the court failed to conduct a complete analysis because even though the court found the asphalt plant would not emit noise in excess of the decibel levels set by the preexisting permits, it "did not evaluate the neighbors' complaint that the frequency of loud noise would increase and affect the use and enjoyment of nearby residences." Id. ¶ 33.

¶ 88. We therefore conclude that the environmental court erred in not making findings on the Lmax instantaneous noise levels emitted by the project traffic and failing to consider the increase in frequency of high-decibel noise events during the project's operational season in assessing the project's compliance with Criterion 8. On remand, the court should assess the evidence with respect to high Lmax events and make findings with respect to the evidence. Based on those findings, it should determine whether the frequency and amount of these events and intensity complies with Criterion 8.

V.

¶ 89. We next address the issue of whether the environmental court erred in admitting and relying on the acoustical-modeling testimony under Vermont Rule of Evidence 702 and the Daubert standard for admissibility. Lathrop's expert witness testified to the noise impacts on surrounding

landowners from the site's operations. In doing so, the witness relied upon acoustical modeling produced by the computer software CADNA-A. Neighbors moved to exclude the testimony because the software's limitations make it inapplicable to the type of rugged terrain on Lathrop's parcel. Neighbors point to the International Organization for Standardization's method for calculating ground attenuation, which is implemented by CADNA-A, and its caveat that the method "is applicable only to ground which is approximately flat, either horizontally or with a constant slope." The environmental court rejected neighbors' assertion, finding credible the noise expert's testimony that the program took into account the topography and other acoustical mitigating factors. We need not resolve the issue of the software's limitations. We conclude that the environmental court did not err in admitting and relying on the CADNA-A acoustical-modeling testimony because, regardless of the limitations of the software, the testimony is relevant under Rule 702 and Daubert.

¶ 90. The environmental court's decision to admit or exclude evidence is "highly discretionary" and will be reversed "only where discretion has been abused or withheld and prejudice has resulted." Griffis v. Cedar Hill Health Care Corp., 2008 VT 125, ¶ 18, 185 Vt. 74, 967 A.2d 1141. Nonetheless, with respect to the admissibility of evidence under Rule 702 and the Daubert factors, we must "engage in a substantial and thorough analysis of the trial court's decision and order to ensure that the trial judge's decision was in accordance with Daubert and our applicable precedents." Lasek v. Vt. Vapor, Inc., 2014 VT 33, ¶ 9, ___ Vt. ___, 95 A.3d 447 (quotation omitted). We are also mindful that this is a bench trial and that although the Daubert standard is applicable, "a judge in a bench trial should have discretion to admit questionable technical evidence," although the judge "must not give it more weight than it deserves." USGen New Eng., Inc. v. Town of Rockingham, 2004 VT 90, ¶ 26, 177 Vt. 193, 862 A.2d 269.

¶ 91. Vermont Rule of Evidence 702 allows admission of scientific or technical knowledge if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702 further states that

> a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Our Rule 702 closely follows the federal rule, which was delineated in Daubert, 509 U.S. 579. The Daubert factors have become the preeminent standard for admissibility of expert testimony and were adopted by this Court in State v. Brooks, 162 Vt. 26, 30, 643 A.2d 226, 229 (1993). The Daubert standard requires that judges act as gatekeepers of expert testimony, admitting it only if it is both reliable and relevant. State v. Scott, 2013 VT 103, ¶ 9, ___ Vt. ___, 88 A.3d 1173.

¶ 92. Neighbors do not dispute the reliability of the CADNA-A acoustical-modeling software, nor do neighbors dispute the relevancy of acoustical modeling generally in assessing the noise impacts of the project: indeed this goes directly to one of the major issues. Rather, neighbors contest the reliability of the evidence as it applies specifically to the rugged terrain of Lathrop's parcel—in essence, they argue that the evidence does not "fit" the facts of the case. The United States Supreme Court discussed fit in Daubert as an issue of relevancy, stating that the expert testimony must be "sufficiently tied to the facts of the case that it will aid the [fact finder] in resolving a factual dispute." 509 U.S. at 591 (quoting United State v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)). The Supreme Court further noted that fit "is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." Id.

¶ 93. The relevancy of the CADNA-A testimony as applicable to the facts here is controlled by State v. Scott, 2013 VT 103, which was issued on the same day as the environmental court's decision. In Scott, the defendant was charged with grossly negligent operation of a motor vehicle, with death resulting, because of an accident in which the defendant's vehicle went through a stop sign and collided with another vehicle. The prosecution offered the testimony of an accident-reconstruction expert who testified to the impact speed of the defendant's vehicle. The expert's calculations were derived in part from on-site testing that involved pulling a drag sled over the road surface and onto the grass where the vehicles had traveled. The defendant moved to exclude the testimony as unreliable, citing expert analysis, including that of the American Prosecutor's Research Institute, that the drag sled could not be used on grass. The expert witness testified that his techniques were nationally accepted within his field and consistent with his training, and he added that, while using the sled on grass "was not ideal, . . . it was the best technique available." Id. ¶ 13.

¶ 94. We affirmed the superior court's admission of the evidence, ruling that the general

understanding that the drag sled should not be used on grass went to weight of the evidence and not admissibility. Id. ¶ 14. While we acknowledged that accuracy of the drag sled's use on grass was "lacking," we concluded that "[t]his alone . . . does not transform [its use on grass] to 'junk science' to be categorically excluded under Rule 702." Id. Rather, we found that the use "qualifies as a well-reasoned but novel application of a traditionally accepted technique" and emphasized that the defendant had ample opportunity to explore the proper weight of this evidence through cross-examination of the expert witness. Id. We think that holding is equally applicable here.

¶ 95. We are cognizant of the split in the federal courts over whether the necessary "fit" under Daubert requires more than relevancy under Federal Rule of Evidence 401. See D. Herr, Annotated Manual for Complex Litigation § 23.25 (4th ed. 2014). In essence Scott provides a holding that bare relevancy or something akin to bare relevancy is sufficient for evidence to meet the fitness requirement. While we had not addressed the issue explicitly before Scott, our prior decisions were entirely consistent with its holding. See Estate of George v. Vt. League of Cities & Towns, 2010 VT 1, ¶ 71, 187 Vt. 229, 993 A.2d 367 (applying Vermont Rule of Evidence 401 in Daubert context); State v. Brochu, 2008 VT 21, ¶ 49, 183 Vt. 269, 949 A.2d 1035 (same); see also State v. Burgess, 2010 VT 64, ¶¶ 12, 15, 188 Vt. 235, 5 A.3d 911 (stating that deficiencies in expert testimony should be attacked through cross-examination and presentation of contrary evidence); In re JAM Golf, LLC, 2008 VT 110, ¶ 9, 185 Vt. 201, 969 A.2d 47 (same).

¶ 96. Turning to the expert testimony here, the relevancy analysis is not whether the acoustical modeling will help the trier of fact determine the impact of noise on neighbors, but whether evidence of acoustical modeling with a program limited to flat terrain will help the trier of fact determine noise impacts of a project on rugged terrain. Lathrop's expert witness testified that the CADNA-A predictions would be of assistance to the court. Furthermore, one could argue that noise levels predicted for flat terrain would be too high when applied to rugged terrain because berms, hills, and other geographical features may absorb and temper the sound; this certainly would help neighbors' case. In any event, while the alleged disconnect between the computer software and the facts here may render the testimony deficient, it is the province of the court to then weigh the credibility of that evidence. Neighbors had the opportunity to cross-examine Lathrop's noise expert and present contrary evidence, and the

environmental court aptly considered both, ultimately finding Lathrop's evidence more credible.

¶ 97. Finally, we note that it was reasonable for the court to find the testimony of Lathrop's noise expert that the computer software takes into account the geography of the terrain credible, even in light of neighbors' claim that the software is limited in application, and to rely on the acoustical-modeling testimony in drawing its conclusions on the noise impacts to neighbors. Beyond that, it is not our role to second-guess the court's evidentiary rulings. Rutland Herald v. City of Rutland, 2012 VT 26, ¶ 41, 191 Vt. 387, 48 A.3d 568 (stating that it is exclusive role of trial court to weigh evidence).

¶ 98. We therefore conclude that the environmental court did not err in admitting and relying on the acoustical-modeling testimony of Lathrop's noise expert.[24]

VI.

¶ 99. Finally, we turn to the issue of whether the environmental court was required to remand the Act 250 application to the district commission to consider project changes including the changed access point from Rounds Road back to South Street. Neighbors and amicus Vermont Natural Resources Board (NRB) argue that the changed access point in particular substantially altered the project, requiring remand to the district commission to give notice to affected parties and consider the impacts. The NRB additionally argues that the court's failure to remand contradicts the Act 250 statute and rules and sets a precedent that diminishes the role of the district commission in Act 250 proceedings. In opposing a remand, Lathrop primarily relies on our decision in Chaves, 2014 VT 5, ¶¶ 13-14, where we held that the changed access point for the sand and gravel operation did not require a remand, and argues that we should apply its holding here. Our standard of review for the environmental court's decision to remand a permit application is abuse of discretion. In re Maple Tree Place, 156 Vt. 494, 501, 594 A.2d 404, 408 (1991).

¶ 100. We start with Chaves, 2014 VT 5, our most recent Act 250 decision to address this issue and a focal point of the parties' arguments. In Chaves, we held that the site plan changes—which involved changing the access point from a proposed new entrance to an existing access road; changing the loading area and a related berm for noise mitigation; adding noise mitigation berms; limiting maximum daily truck trips; and restricting the days and hours for blasting, drilling, and crushing—were not substantial enough to require a remand. Id. ¶¶ 13-14. We relied on In re Sisters and Brothers

Investment Group, LLC, 2009 VT 58, 186 Vt. 103, 978 A.2d 448, a local zoning decision in which we held that the environmental court may review revisions to a proposal so long as those revisions are not "truly substantial changes to the form or type of an application." Id. ¶ 21. In Sisters and Brothers, we cautioned against the "procedural ping-pong match" that would ensue between the environmental court and municipal board if applicants were barred from presenting minor revisions to the court. Id. We further stated in Chaves that we should encourage applicants to resolve differences with interested parties by amending proposals to respond to issues and that it would be inefficient to remand all changes to the district commission. 2014 VT 5, ¶ 16.

¶ 101. Neighbors and the NRB argue that this case is distinguishable from Chaves because the impacts of the changed access point here are more significant than in Chaves. The NRB also asks that we clarify our holding in Chaves and limit the reach of that case "in a fashion that preserves the legislatively-intended, important role of the District Commission and does not deprive neighbors and other interested parties of the opportunity to participate in the Act 250 process." The fact in Chaves that neighbors and the NRB highlight as distinguishable is that the amended access point was a preexisting historically used road, while the South Street access point here will require construction of the access road and physical improvements along South Street. We did emphasize in Chaves that the fact that "the changed entry point may now impact neighbors more particularly does not amount to a substantial change in the project itself." Id. ¶ 15. We also noted that this and other project changes were attempts to mitigate noise and traffic impacts and limit the time for operations. Id. ¶ 14. Our decision there largely was based on the fact that the neighbors had been a party to the settlement agreement in which the changed access point was proposed, that the neighbors had prior knowledge of the proposal, and that the neighbors were aware of the existing access point, which had been actively used during excavation following Hurricane Irene. Id. ¶ 20. In this sense, Lathrop's proposal is distinguishable from the facts of Chaves. But our analysis does not end there. We must still determine the reach of Chaves, and its applicability here.

¶ 102. The rule that we formulated in Chaves, as derived from our consideration in Sisters and Brothers, states that a remand is not necessary unless there are changes in the scope of the project, the location of the project, or the nature of the permit. Chaves, 2014 VT 5, ¶ 14. We likened the changes

made by the applicants in Chaves to those in Sisters and Brothers for our conclusion that they were insubstantial. Turning to Sisters and Brothers, it is unclear just what changes were made to the application. The recitation of background facts contains no such itemization of changes. Rather, the discussion of this issue merely provides: "[The neighbor's] contention that the changes were material and substantial is directly contrary to the Environmental Court's finding on this point. The court expressly found that the changes were not so material as to require remand." 2009 VT 58, ¶ 19. This rule, although a helpful starting point, does not delineate just what it means when the "scope" of the project changes. We recently returned to this issue in the context of local zoning in In re All Metals Recycling, Inc., 2014 VT 101, ___ Vt. ___, ___ A.3d ___, where we addressed a revised parking plan submitted to the environmental court that had not been presented to the local development review board. We again looked to Chaves and Sisters and Brothers to hold that the revised parking plan was not a substantial enough change to warrant a remand. Id. ¶¶ 19-20. We concluded that the revised plan differed little from the original, except to superimpose lines denoting specific parking spaces and to label the number of available spots. Id. ¶ 20. While this conclusion helps us little, we are guided somewhat by our statement that the court's review is limited to those matters that have undergone proper public notice and hearing before the local board. Id. ¶ 19.

¶ 103. These cases present the lower limit of the environmental court's discretion not to remand but provide little guidance on the upper limit. Because our prior case law is not particularly decisive in this area, we also consider the role of the district commission and the policy behind the remand requirement. It is the role of the district commission to adjudicate Act 250 permit applications under the ten criteria. 10 V.S.A. §§ 6083(a), 6086. The Act 250 process also guarantees public notice and the opportunity for interested parties to participate and present evidence on the criteria. Id. §§ 6084, 6085. Furthermore, the Act 250 Rules have codified the former Environmental Board's consistent practice of requiring new notice of project changes. Rule 10(H) provides:

> If, in the course of reviewing an application, the district commission determines that a project has changed from the project that has been noticed to the extent that such change may have a significant adverse impact under any of the criteria or may affect any person under any criteria, the commission shall stay the proceedings and provide new notice of the changed project, pursuant to this rule.

Act 250 Rule 10(H), 6 Code of Vt. Rules 12 004 060-7, http://www.lexisnexis.com/hottopics/codeofvtrules. The Board further has held that remand to the district commission is necessary when a project change may impact new criteria or affect new parties. See, e.g., In re Osgood, No. 7E0709-3-EB, slip op. at 2 (Vt. Envtl. Bd. Nov. 26, 2002), http://www.nrb.state.vt.us./lup/decisions.htm (stating that application must be returned to commission if amendment involves construction on new lands, creates impacts on new parties, or creates impacts to criteria not at issue before Board); In re Colton, No. 3W0405-5(Revised)-EB, slip op. at 3 (Vt. Envtl. Bd. Oct. 2, 2002), http://www.nrb.state.vt.us./lup/decisions.htm (requiring remand to assess impacts from trucks using new driveway and changing direction they turn from project tract onto state highway).

¶ 104. While the environmental court reviews appeals from the district commission de novo, its authority is no larger than that of the district commission and it cannot consider issues not presented to the commission, cf. Maple Tree Place, 156 Vt. at 500, 594 A.2d at 407 (emphasizing that environmental court "must resist the impulse to view itself as a super planning commission" and therefore must not address issues "never presented to the planning commission and on which interested persons have not spoken" (quotation omitted)), particularly Act 250 criteria. Cf. In re Taft Corners Assocs., 160 Vt. 583, 591, 632 A.2d 649, 653 (1993) (stating that Environmental Board's jurisdiction is limited by proceedings below and does not extend to new criteria never considered by district commission). This rationale is supported by our case law that acknowledges the particular expertise of administrative bodies in adjudicating the issues before it. See, e.g., In re Stormwater NPDES Petition, 2006 VT 91, ¶ 30, 180 Vt. 261, 901 A.2d 824 (recognizing expertise of Agency of Natural Resources in issuing stormwater permits); In re Investigation into Regulation of Voice Over Internet Protocol Servs., 2013 VT 23, ¶ 32, 193 Vt. 439, 70 A.3d 997 (recognizing expertise of Public Service Board in assessing digital voice services).

¶ 105. With this background in mind, we turn to the revisions here. The original project as presented to the district commission involved construction of a haul road off of Rounds Road and included an alternative South Street access road to be constructed in the future, but that application was considered only under Criterion 10. The application as presented to the district commission in 2010 for full consideration under the remaining criteria included only the construction of a 300-lineal-foot haul

road off of Rounds Road and made no mention of the possibility of a future South Street access point.

¶ 106. As the environmental court found, the South Street access road construction, including all work on the surrounding area and improvements to South Street, will take one year to complete. Construction will begin with clearing and slope stabilization work, which will involve the rehabilitation of the preexisting extraction area. This extraction area will then be graded and sculpted to create a level area for vehicles entering and exiting the project site. The exposed sand and gravel will be covered with top soil, seeded, and mulched, and the natural ground cover will be reestablished. The access road will be paved from South Street to just past the highest point of the access road. As excavation progresses, the access road will be realigned to accommodate excavation. Lathrop submitted an erosion prevention and sedimentation control plan for the access road construction. South Street itself will be widened to improve travel lanes and add shoulders. The court also found that while the work will occur outside the buffers of the project area, resulting in more noise impacts to neighbors, the work will be short and temporary in duration.

¶ 107. There is no indication that the access point was changed to address substantial criticism of the Rounds Road proposal, and the revisions clearly are more substantial than those discussed in Chaves and All Metals Recycling. Here, the South Street access point is not using a preexisting road, and the parties potentially impacted by the improvements were not necessarily involved in the case before the environmental court and thus had no opportunity to comment. Because construction is involved in a new location—construction that involves earthmoving and reshaping the land, equipment that may produce noise or dust, and possible future realignment—there may be impacts on Act 250 criteria that were not reviewed by the district commission. The environmental court reviewed the project only with respect to the limited criteria appealed from below: aesthetics, traffic, impacts on public investments, impacts from pit operations, and consistency with the town and regional plans. The court never considered the new criteria that may be impacted by this construction and the ensuing changes in traffic patterns.

¶ 108. Lathrop urges that remand is unnecessary because neither the district commission nor any interested parties have alleged that the Rounds Road access point is preferable. But Lathrop's

argument misses the point of the district commission's role. First, without a full review of the access road improvements, the district commission cannot make a full assessment as to its impacts and therefore cannot opine on whether the South Street access point is an improvement over the Rounds Road access point. Second, the role of the district commission is not just to select which alternative plans are the most preferable. The district commission also is responsible for assessing the impacts of the project and conditioning them as necessary.

¶ 109. While we still promote the need for efficiency in the permitting process, as discussed in Chaves, we decline to extend Chaves to project revisions that may implicate new criteria not before the environmental court or affect new parties not participating in the proceedings. Truly minor revisions of the type addressed in Chaves and All Metals Recycling, specifically the type of revisions that mitigate impacts in response to the concerns of interested parties, may still remain within the discretion of the court and do not require remand. But requiring remand for larger changes of the type here preserves the role of the district commission and ensures interested parties have the opportunity to comment and present evidence on the new impacts.

¶ 110. We therefore conclude that the environmental court erred in failing to remand the application to the district commission to assess the impacts from the revised South Street access point.

Affirmed with respect to sand and gravel extraction operations as a conditional use in the RA-2 and MIX districts and the admissibility of the acoustical-modeling testimony. Reversed and remanded with respect to compliance with § 526(2) of the Town of Bristol zoning bylaws for proceedings consistent with this decision. Reversed and remanded to determine whether the proposal approved by the environmental court represented a substantial change from the proposal approved by the ZBA in 2004 and to determine the preclusive effect of the 2004 ZBA permit conditions. Reversed and remanded to determine the impact of truck traffic noise under Act 250 Criterion 8 consistent with this decision. The environmental court shall remand the Act 250 permit application to the district commission for consideration of the project as presented to the environmental court.

FOR THE COURT:

_____

Associate Justice

Appendix

Lathrop I: Proposed to ZBA in 2003 (as amended in 2004)	Lathrop I: Conditioned by ZBA in 2004	Lathrop II: Proposed to ZBA in 2007 and to District Commission in 2010	Lathrop III: Proposed to Environmental Division in 2012 Appeal	Conditioned by the Environmental Court in 2013
60,000 cubic yds/yr	Max 60,000 cubic yds/yr	60,000 first 15 years; 100,000/year thereafter	Lathrop II	Max 60,000 cubic yards/yr unless and until authorized by both the district commission and the ZBA
17 daily truckloads	17 daily truckloads on average; max 34 trucks per day	36 daily truckloads on average; max 72 trucks per day	Lathrop II	Max 100 one-way truck trips per day unless and until authorized by the district commission and ZBA (50 truckloads)
South Street access road	Access road paved to beyond crest; 25 feet wide min, not including ditches; runaway ramp at base	Rounds Road access road	South Street access road; 22 feet wide minimum access road; no runaway ramp	
Mature trees within 200 feet of roads and property lines will be maintained around perimeter of site		SAME	SAME	
Trees more than 200 feet from roads and property lines will be maintained until removal is necessary for extraction		SAME	SAME	
Mature maple trees will be maintained to buffer properties to the north		SAME	SAME	
Staggered line of softwoods will be planted on north side of property for further screening	Rows of evergreens planted at the 570-foot elevation at the north end of the property; at least three rows; quick growing, dense, last for at least 50 years	SAME but with more detail: 4-5 feet high, staggered, 188 trees minimum, lists specific tree options	Lathrop II	
Lathrop I: Proposed to ZBA in 2003 (as amended in 2004)	**Lathrop I: Conditioned by ZBA in 2004**	**Lathrop II: Proposed to ZBA in 2007 and to District Commission in 2010**	**Lathrop III: Proposed to Environmental Division in 2012 Appeal**	**Conditioned by the Environmental Court in 2013**
1/2 vegetated slopes with flat interior pit	Must leave no slope steeper than 1/2; all	SAME	Remove part of South Street berm	Revise to include plans to remove

floor and buffer of vegetation will remain when extraction is complete	slopes in excess shall be fenced		along north side of project as part of reclamation plan	portion of berm
Reclamation will be ongoing, creating 1/2 slopes reclaimed with vegetation moving top to bottom and south to north	Excavated area shall be fertilized, mulched, and reseeded; no more than 2 acres unclaimed at any time; average rate of 1 acre per year; top down finish	Maximum 5 acres disturbed at any time	Lathrop II	
All surface drainage kept within confines of pit or excavated area	All surface drainage shall be controlled	SAME	SAME	
	No excavation, blasting, or stockpiling within 200 feet of road or other property line	SAME	SAME	
	No power-activated sorting machinery located within 300 feet of road or property line and must be equipped with dust-elimination devices	Not specified	Not specified	
	Hours of operation: • 7:30-3:00 M-F (all pit ops) • 7:30-12:00 S (loading only) • 8:00-3:00 M-F (blasting; 3 days/year) • Crushing limited to 20 days/year in May and September only	Hours of operation: • 7:00-4:30 M-F; 7:00-3:30 S (site development) • 6:30-4:30 M-F; 7:00-3:30 (general ops) • 7:00-3:30 M-F; 7:30-12:00 S (sales) • Blasting: no change • Crushing: no limit on May and September	Lathrop II	
Lathrop I: Proposed to ZBA in 2003 (as amended in 2004)	**Lathrop I: Conditioned by ZBA in 2004**	**Lathrop II: Proposed to ZBA in 2007 and to District Commission in 2010**	**Lathrop III: Proposed to Environmental Division in 2012 Appeal**	**Conditioned by the Environmental Court in 2013**
	All trucks covered	SAME	SAME	
	All trucks over 2 cubic yard capacity must receive sticker	Not specified	SAME	
	Truck size, max 14 cubic yard dual axle and 19 cubic yard tri-axle; no trailers	Not specified	No limit on truck size or tractor trailers, except general legal limits	
	Blasting mitigation: • Granular stemming	SAME	N/A—no blasting proposed	

	• Boulders buried • Avoid detonating cord • Seismographs to measure air blast overpressure • Notification posted at entrance at least 7 days in advance			
	Crushing mitigation: • Operated inside pit • Noisiest part directed away from residences	SAME	SAME	
	Noise & dust mitigation: • No drilling earlier than one hour after sunrise • European-grade mufflers and other sound-control devices on all equipment • Backup alarm noise reduced • Trucks should not back up before loading • Screening deck inside pit; loudest side facing away from neighbors • Quarry site vegetated as much as possible • On-site water truck for dust control • Overburden used to create berms around perimeter of pit close to residential areas • No off-site emissions visible • Key lot and access road oriented to minimize noise	SAME	SAME, except no specific requirement for "European-grade" mufflers	Noise mitigation shall be revised to include European-grade mufflers and prohibit engine compression or "jake" breaks
Lathrop I: Proposed to ZBA in 2003 (as amended in 2004)	**Lathrop I: Conditioned by ZBA in 2004**	**Lathrop II: Proposed to ZBA in 2007 and to District Commission in 2010**	**Lathrop III: Proposed to Environmental Division in 2012 Appeal**	**Conditioned by the Environmental Court in 2013**
	Noise shall not exceed 55 db at property line; if it does, additional mitigation necessary	Noise from operational sources (excluding on-road trucks and blasts) limited to 55 db at all homes and areas of frequent human use	Noise shall not exceed 55 at residences and areas of frequent human use and 70 at property line; no noise limit on truck traffic or construction activities	
	All materials and inventory stored in pit	SAME	Not specified	
	All excavation, except access road, will stay in wooded area for 15 years	SAME	SAME	
	No gravel imported	Not specified	Not specified	

	from other sites			
	Annual geologist's report and truck log	Not specified	Annual report—not necessarily from geologist	
	No processing in the MIX zone; gravel used to construct roads and berms within project site	SAME	See berm comment above	

[1] The initial application was submitted in July 2003 but was amended in January 2004. For the purposes of this decision, we refer to this as the 2003 application, although the relevant details of the proposal are reflected in the 2004 amended application.

[2] Lathrop's first appeal to the environmental court of its Act 250 permit application, Docket No. 64-3-06 Vtec, was closed upon remand to the district commission. That docket is not part of this consolidated appeal.

[3] The statutory section referenced in the bylaw, 24 V.S.A. § 4407(8), was repealed in 2005. It provided that a municipality may adopt regulations for sand, gravel, and soil removal requiring applicants to submit an acceptable rehabilitation plan and post bond to assure rehabilitation. Id.

[4] In many zoning cases, we find the language of the town plan helpful in interpreting the disputed bylaw, but we do not find the Bristol Town Plan helpful here. We recognize that town plans merely are advisory, but, because the bylaws must implement the plan, a plan can aid in interpreting an ambiguous zoning provision. Kalakowski v. John Russell Corp., 137 Vt. 219, 225-26, 401 A.2d 906, 910 (1979). No section of Bristol's plan either expressly allows or prohibits sand and gravel removal or any other type of extraction. It encompasses many long-range goals to encourage business development, economic growth, and compatible industrial and commercial siting. Bristol Town Plan 1-4 (2001). The plan also incorporates land use goals for each individual district, which establish the character of the district, recommended uses that should predominate, and features that should be promoted or protected. Id. at 4-8. Again, this language is stated in broad, very general terms, and we cannot conclude from it that a bylaw permitting sand and gravel extraction as a conditional use in any zoning district fails to implement these goals.

[5] Section 4407(2) was repealed in 2005 and replaced with § 4414(3)(A), which contains almost identical language. Section 4407(2) stated:

> In any district, certain uses may be permitted only by approval of the board of adjustment or the development review board, if general and specific standards to which each permitted use must conform are prescribed in the appropriate bylaws and if the board of adjustment or development review board after public notice and public hearing determines that the proposed use will conform to such standards.

[6] Neighbors also point to 24 V.S.A. § 4407(8) (repealed 2005), discussed supra, ¶ 13 n.3, but this adds nothing to their argument. In fact, this subsection of the statute may hurt their argument, infra, ¶ 26, that we cannot interpret the bylaws in such a way that singles out sand and gravel extraction for special treatment. A clause at the end of § 4407(8) stated that it "does not apply to mining or quarrying." Clearly the Legislature found reason to single out sand and gravel extraction as distinct from mining and quarrying and entitled to special treatment.

[7] Neighbors also cite In re Bailey, 2005 VT 38A, 178 Vt. 614, 883 A.2d 765, to advance essentially the same argument. Under Bailey, we stated that we owe no deference to the environmental court's interpretation of an ordinance when the ordinance does not deviate from the enabling statute. Id. ¶ 9. Because we conclude here that the language of § 526 does deviate from the statute, Bailey does not control.

[8] See, e.g., Town of Ferrisburgh Zoning Bylaws, § 5.8 (2010); Town of Lincoln Zoning Regulations, § 570 (2011); Town of Morgan Zoning Bylaw, § 312 (2012); Town of Proctor Zoning Regulations, § 436 (2008); Town of Stratton Zoning Ordinance & Permit Handbook, § 10045 (2007); Town of Thetford Zoning Bylaw, § 5.02 (2011); Town of Westfield Zoning Bylaws, § 313 (2010); Town of Woodbury Zoning Ordinance, § 3.9 (1989).

[9] We think it is worth noting that an interpretation of § 526 that permits sand and gravel extraction in all districts does not give the Town any broader authority than conferred upon it by the enabling statute. See City of Montpelier v. Barnett, 2012 VT 32, ¶ 20, 191 Vt. 441, 49 A.3d 120 ("[A] municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." (quotation omitted)). The statute authorizes the Town to provide for conditional uses and ensure that those uses meet the minimum standards set forth in the statute. 24 V.S.A. § 4414(3)(A). The Town is within its discretion to choose the districts within which conditional uses may be located.

[10] Although it is not entirely clear whether "one to two" slopes rise one foot for every two feet across or vice versa, it does not bear on the question of whether Lathrop's project creates a pit. Furthermore, as the environmental court found, the slopes at Lathrop's site never would exceed a rise of one foot for every two feet across—the shallower interpretation of "one to two."

[11] The environmental court erroneously used the designation 10:1 in describing the slopes, but the official mathematical designation is 1:10 (rise over run).

[12] Lathrop contends that neighbors failed to preserve this issue for appeal because they never appealed the 2008 ZBA's review of Lathrop's revised application but instead collaterally attack that decision in this consolidated appeal. Neighbors are correct in pointing out that what they are contesting is not the 2008 ZBA's review of the application but the environmental court's review of an application they claim is essentially the same as that already conditionally approved by the 2004 ZBA. Neighbors raised the issue in a pre-trial motion, which the court denied. They have preserved the issue for appeal.

[13] The application to the district commission was virtually identical to the 2007 proposal to the ZBA. The original proposal to the environmental court also was identical to the 2007 proposal to the ZBA, but was modified to change the access point in applicant's evidentiary presentation.

[14] Lathrop's engineering consultant testified that "in essence, [it is] the same project" as that submitted to the ZBA in 2003. This characterization underlies many of the arguments of the parties. In general, the characterization is wrong and is the cause of confusion in this case. While it is similar to Lathrop's initial proposal in 2003, it differs significantly from the amended 2004 proposal, which was the proposal considered by the 2004 ZBA.

[15] We described the successive-application doctrine as an application of issue preclusion in Woodstock Community Trust, 2012 VT 52, ¶ 4. In the earlier Dunkin Donuts decision, 2008 VT 139, ¶ 7, we characterized the doctrine as an application of claim preclusion. The description in Dunkin Donuts was correct, and we employ it in this opinion. To the extent it may be relevant in the future, we correct the mistake in Woodstock Community Trust.

[16] The court did not actually rule on the applicability of permit amendment requirements, although they were discussed in filings from the neighbors. Our discussion reflects the necessarily implied ruling of the court.

[17] It is not clear what action of Lathrop the court is referring to. In the appeal of Lathrop II, Lathrop filed a list of questions and an amended list of questions. In neither is there a question with respect to the 2004 conditions. In the appeal of Lathrop I, neighbors submitted questions, pursuant to Vermont Rule for Environmental Court Proceedings 5(f), one of which asked whether the application "adequately addressed all proper concerns for the health and safety of the residents." This question might be taken to have raised impliedly the adequacy of the ZBA conditions, but it did not help Lathrop, who was prohibited from submitting questions without a cross-appeal. See In re Garen, 174 Vt. at 156, 807 A.2d at 851.

[18] Of course, the applicant can indicate that any changes are not substantial and, if the board or court agrees, proceed to the third step.

[19] These standards are applicable if the zoning bylaws do not set forth different ones.

[20] The final judgment of the environmental court sets the extraction rate at 60,000 cubic yards, as conditioned in the 2004 permit, but allows Lathrop to seek a permit amendment after fifteen years to allow a higher extraction rate. Since Lathrop could always seek a permit amendment, we do not see that provision in the court's judgment as significant.

[21] Although Lathrop's proposal is confusing, we read it to propose a higher limit, an average daily one-way trip rate of 72 trucks per day and a peak one-way trip rate of 144 trucks per day.

[22] The dBA scale sets 0 dBA at the threshold for human hearing.

[23] We note that the environmental court's conclusion was based in part on the frequency of loaded trucks leaving Lathrop's property and the project's operational season as it relates to the operational season of Lathrop Forest Products, the wood pellet plant located across South Street. Assuming the number of truck trips per day was even further limited by the condition imposed by the 2004 ZBA order, there would be less noise.

[24] Because we conclude that the court did not err in admitting the evidence under Daubert and Rule 702, we do not reach neighbors' argument that the court erred in admitting the evidence under Vermont Rule for Environmental Court Proceedings 2(e)(1), which allows evidence not privileged and otherwise inadmissible under the Rules of Evidence to be admitted at the discretion of the court "if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 70-2-15

STATE OF VERMONT,)
)
Plaintiff,)
)
v.)
)
HERMITAGE INN REAL ESTATE)
HOLDING COMPANY, LLC;)
RUSHING CREEK, LLC,)
)
Defendants.)

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties' filing of a Stipulation for the Entry of Consent Order and Final Judgment Order. Based upon that Stipulation, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION FOR VIOLATIONS

1. Defendants Hermitage Inn Real Estate Holding Company, LLC and Rushing Creek, LLC are adjudged liable for the following violations of Vermont's land use and environmental laws and regulations at The Hermitage Club at Haystack Mountain, in Wilmington and Dover, Vermont:

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a. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in Fall 2012 for constructing a 1.25 mile snowmobile trail without an Act 250 permit (Count One of the Complaint);

b. violating 10 V.S.A. § 8002(9) in Fall 2012 for removing trees and vegetation within buffer zones in contravention of applicable Act 250 permit conditions (Count Two of the Complaint);

c. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in Fall 2012 for installing a ski patrol and bathroom building without an Act 250 permit (Count Three of the Complaint);

d. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in Fall 2011 for constructing trails and stream crossings without an Act 250 permit (Count Four of the Complaint);

e. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in Fall 2012 for performing blasting work for a wind turbine without an Act 250 permit (Count Five of the Complaint);

f. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in June 2014 for constructing a dock, raft, fence, and beach area at Mirror Lake without an Act 250 permit (Count Six of the Complaint);

g. violating 10 V.S.A. § 8002(9) in Fall 2011 for removing trees and vegetation within buffer zones in contravention of applicable Act 250 permit conditions (Count Eight of the Complaint);

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h. violating 10 V.S.A. Chapter 47 in Fall 2012 for construction without a Moderate Risk stormwater general permit (Count Nine of the Complaint);

i. violating 10 V.S.A. § 8002(9) in December 2012-January 2013 for construction activities in contravention of applicable stormwater permit conditions (Count Ten of the Complaint);

j. violating 10 V.S.A. § 1259(a) in November-December 2012 for discharging sediment and runoff into state waters without a permit from the Secretary of the Agency of Natural Resources (Count Eleven of the Complaint);

k. violating 10 V.S.A. § 1973 in Fall 2012 for connecting a ski patrol and bathroom building to sewer lines without a wastewater and potable water supply permit (Count Twelve of the Complaint);

l. violating 10 V.S.A. § 1673 in Fall 2012 for connecting a ski patrol and bathroom building to public water lines without a public water supply permit (Count Thirteen of the Complaint);

m. violating 10 V.S.A. § 1082 in June 2014 by constructing a beach area at Mirror Lake without authorization from the Secretary of the Agency of Natural Resources to alter a dam or spillway (Count Fourteen of the Complaint); and

n. violating 10 V.S.A. § 913 and Vermont Wetland Rule 9.1 in Fall 2012 for removing trees and vegetation within a wetland without a permit or

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authorization from the Secretary of the Agency of Natural Resources (Count Fifteen of the Complaint).

2. This Consent Order and Final Judgment Order resolves all claims in the State's Complaint in this matter. Any violations alleged by the State in the Complaint for which Defendants have not been adjudicated liable in this Consent Order and Final Judgment Order are dismissed with prejudice. This Consent Order and Final Judgment Order does not affect any potential violations by Defendants at The Hermitage Club not alleged in the Complaint.

PENALTIES

3. For the violations described above, Defendants shall pay a civil penalty of two hundred and five thousand U.S. dollars ($205,000.00).

4. Payment of the $205,000.00 penalty shall be made as follows: $55,000.00 shall be paid within seven (7) days after entry of this Consent Order and Final Judgment Order, and $25,000.00 shall be paid on or before the first day of every month for six months for the remaining $150,000.00, beginning with the first month after entry of this Consent Order and Final Judgment Order. All payments shall be by check payable to the "State of Vermont" and sent to: Justin E. Kolber, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. In the event that payment is received by the State before the Court has approved the Consent Order and Final Judgment Order, the State shall hold the

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check(s) in trust until approval. Should the Court reject the Consent Order and Final Judgment Order, the State will return the check(s) to Defendants.

5. In the event that Defendants fail to pay the penalty described in paragraphs 3 and 4, such failure shall constitute a breach of this Consent Order and Final Judgment Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. Defendants shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.

OTHER PROVISIONS

6. Defendants waive: (a) all rights to contest or appeal this Consent Order and Final Judgment Order; and (b) all rights to contest the obligations imposed upon Defendants under this Consent Order and Final Judgment Order in this or any other administrative or judicial proceeding involving the State of Vermont.
7. This Consent Order and Final Judgment Order is binding upon the parties and all their successors and assigns.
8. Nothing in this Consent Order and Final Judgment Order shall be construed to create or deny any rights in, grant or deny any cause of action to, or release any claim from, any person not a party to this Consent Order and Final Judgment Order, including any third party or any other government or sovereign.

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9. This Consent Order and Final Judgment Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, the Consent Order and Final Judgment Order shall be final.

10. Any violation of this Consent Order and Final Judgment 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.

11. Nothing in this Consent Order and Final Judgment 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.

12. This Consent Order and Final Judgment Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this Court. Any representations not set forth in this Consent Order and Final Judgment 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. The Superior Court of the State of Vermont, Windham Unit, shall have jurisdiction over this Consent Order and Final Judgment Order and the parties hereto for the purpose of enabling any of the parties hereto to

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apply to this Court at any time for orders and directions as may be necessary or appropriate to carry out or construe the Orders, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions. The laws of the State of Vermont shall govern the Orders.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Windham, Vermont this 1 day of May, 2015.

Hon. John Wesley
Windham Superior Court Judge

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

cc: J. Kolber, Esq.
R. J. Berlach, Esq.

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT,	)
	)
Plaintiff,	)
	)
v.	)
	)
HERMITAGE INN REAL ESTATE HOLDING COMPANY, LLC; RUSHING CREEK, LLC,	)
	)
Defendants.	)

COMPLAINT

Plaintiff, State of Vermont, by and through the Office of the Attorney General, files this complaint pursuant to 10 V.S.A. § 8221 and 3 V.S.A. § 157. The State alleges that Defendants violated: (i) 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) by performing construction activities without land use permits; (ii) 10 V.S.A. § 8002(9) by failing to comply with existing permit conditions; (iii) 10 V.S.A. Chapter 47 by performing construction activities without a stormwater permit; (iv) 10 V.S.A. § 1259 by discharging into state waters without a permit; (v) 10 V.S.A. § 1973 by constructing a building without a wastewater and potable water supply permit; (vi) 10 V.S.A. § 1673 by constructing a building without a public water supply permit; (vii) 10 V.S.A. § 1082 by altering a dam without authorization; and (viii) 10 V.S.A. § 913 and Wetland Rule 9.1 by

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109 State Street
Montpelier, VT 05609

disturbing a significant wetland without approval. The State seeks permanent injunctive relief and civil penalties.

THE PARTIES

1. Vermont Agency of Natural Resources (ANR) is a state agency with offices in Montpelier, Vermont. The Department of Environmental Conservation (DEC) is a department within ANR.
2. Vermont Natural Resources Board (NRB) is a state board with offices in Montpelier, Vermont.
3. Defendant Hermitage Inn Real Estate Holding Company, LLC (Hermitage Inn) is a foreign limited liability company incorporated in Connecticut and located at 10 Columbus Blvd 4th floor, Hartford, CT 06106.
4. Defendant Rushing Creek, LLC (Rushing Creek) is a Vermont Limited Liability Company located in Dover, Vermont.
5. Rushing Creek and Hermitage Inn are both owned by the same person.
6. Hermitage Inn is the named entity on the majority of the permits described in this complaint, and the majority landowner of the subject property. Hermitage Inn is the principal operator of the construction activities at issue in this complaint.
7. Venue is proper in Windham Superior Court.

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FACTUAL AND LEGAL BACKGROUND

The Property

8. Hermitage Inn and Rushing Creek own property in Wilmington and Dover, Vermont, including property associated with Haystack Mountain (the Property), with Hermitage Inn being the majority landowner. The Property has been developed, and continues to be developed, into an exclusive private ski resort known as "The Hermitage Club at Haystack Mountain" (the Hermitage Club), complete with alpine ski trails, ski lifts, snowmaking lines, snowmobile trails, cross-country ski trails, a clubhouse, a hotel, single-family homes, condos, and other associated buildings, trails, roads, utilities, and structures. The Hermitage Club is not open to the public; use of the ski mountain is through private club membership only.
9. The Property is approximately 1,014 acres, with approximately 881 acres affected by the development described herein.
10. Some of the major features and facilities of the Property and the Hermitage Club include the following:
    a. Haystack Mountain: an existing alpine ski mountain (elevation approx. 3,445 feet) located in Wilmington, VT, and purchased by Defendants in 2011. The Mountain is currently advertised as containing 38 ski trails with 6 ski lifts covering 194 skiable acres, and snowmaking for 90% of the trails.

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Montpelier, VT
05609

b. The Haystack Base Lodge and Club House: a new base lodge and club house (approx. 80,000 sq. ft.) recently constructed at the base of the main ski area of Haystack Mountain (ground broken in August 2012 and completed as of January 2015).

c. The Williams Scott Mobile Rescue Building and Lavatory Facility (Scott Rescue Facility): In November 2012, a double-wide trailer (24 x 60 feet) was installed at the base area of Haystack Mountain for the 2012-2013 ski season and was used for ski patrol, public bathrooms, and a warming hut. The Scott Rescue Facility was necessary for Hermitage Inn to operate the ski mountain for the winter season, by providing essential ski rescue services and bathrooms.

d. Summit Building: originally planned as a warming hut at the summit of Haystack Mountain; the building was later renovated to an administrative and sales office.

e. Mirror Lake: a pond located on the Property, approximately 3-4 acres in surface area, holding approximately 10-14 million gallons of water; it includes a dam and spillway.

f. Snowmobile Trail: a snowmobile trail of approximately 1.25 miles in length and up to fifteen (15) feet in width, crossing over a 27-acre parcel of property, constructed on the Property.

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g. Single Family Homes and Condos: around 20 homes have been built and sold between 2011-2014, with hundreds more planned (up to 450-500 combined condos and homes).

h. Club Members: 215 club memberships sold as of February 2014, at a membership fee of between $20,000-$65,000. The Hermitage Club first opened for the 2012-2013 ski season and continues to operate.

Act 250 Land Use Permits

11. 10 V.S.A. § 6081(a) states that "no person shall . . . commence construction on a . . . development, or commence development without a permit."

12. Act 250 Rule 34(A) states that "[a]n amendment shall be required for any material change to a permitted development or subdivision, or any administrative change in the terms and conditions of a land use permit."

13. Act 250 Rule 33(C)(3) states that "all permits shall run with the land." Rule 32(B)(2) also states that "[d]uring its term, a permit shall run with the land."

14. The Property is subject to several Land Use Permits (LUP) under Act 250. Specifically, LUP series 700002 has applied to the Property for over twenty years, and contains numerous Act 250 permits and permit amendments under that series number.

15. On November 23, 2010, LUP 2W0635-1 was issued to Rushing Creek, authorizing creation of seven (7) lots and construction of seven (7) single-family homes in Dover and Wilmington (off of Fannie Hill and Hermitage

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Hill roads). LUP 2W0635-1 was granted subject to compliance with 27 enumerated Conditions.

16. On September 17, 2012, LUP 700002-19 was issued to Hermitage Inn, authorizing construction of: a ski lift, a ski trail with snowmaking line, a Summit Warming Hut, a Base Area Warming Hut, a Base Lodge, stream bridges and crossings, if specifically approved by ANR, and allowing winter activities on existing trails. LUP 700002-19 was granted subject to compliance with 29 enumerated Conditions. LUP 700002-19 also stated: that "[s]pecifically not approved are . . . construction of any new trails."

ANR Discharge and Construction General Permits

17. 10 V.S.A. § 1259(a) prohibits a person from discharging any waste, substance or material into the waters of the state without first obtaining a permit for that discharge.

18. 10 V.S.A. § 1251 defines "waters" to include "all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs, and all bodies of surface waters, artificial or natural, which are contained within, flow through or border upon the state or any portion of it."

19. Chapter 47 of Title 10 (water pollution control) requires a stormwater permit from ANR for all construction activities affecting state waters:

    a. 10 V.S.A. § 1258(b) states that "[t]he Secretary shall manage discharges to the waters of the State by administering a permit program."

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b. 10 V.S.A. § 1263(a) states that "[a]ny person who intends to discharge waste into the waters of the state . . . shall make application to the secretary for a discharge permit."

c. 10 V.S.A. § 1264(e)(1) states that "the Secretary shall, for new stormwater discharges, require a permit."

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

21. On June 13, 2012, the DEC issued a Low Risk authorization to Hermitage Inn to discharge stormwater under CGP 3-9020 (NOI #6839-9020) (authorization under CGP 3-9020), only for "the following construction activities: Construction of a ten-unit guest building, construction of a single family residence, construction of an extension to a potable water service line and sewer line and the clearing for a ski lift and associated ski trails."

22. On July 31, 2012, the DEC issued a second Low Risk authorization to Hermitage Inn to discharge stormwater under CGP 3-9020 (NOI #4245-9020) (authorization under CGP 3-9020), only for "the following construction activities: Construction of the [Haystack] Upper Base Lodge and access

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road." Hereafter, the June 13th and July 31st authorizations are referred to as the "Low Risk CGP Permits." As detailed below, these were "after-the-fact" permits, i.e., some of this construction work had already been performed in Fall 2011 (see ¶¶ 39-40).

23. On August 27, 2012, Hermitage Inn submitted a Moderate Risk CGP application to replace the Low Risk CGP Permits and to allow additional construction not previously authorized by the Low Risk CGP Permits. The application was deemed complete on December 13, 2012.

24. On December 20, 2012, the DEC issued a Moderate Risk stormwater authorization to Hermitage Inn under CGP 3-9020 (NOI #4245.9020.1) (hereafter "Moderate Risk Permit"). This Moderate Risk Permit covered the majority of the construction at the Property associated with The Hermitage Club, including construction of a ski lift, a snowmaking line, construction of the Scott Rescue Facility, construction of underground sewer lines, and construction and authorization of roads, utilities, and other associated work. As detailed below, this was an "after-the-fact" permit in that much of the construction work had already been performed in Fall 2012 (see ¶¶ 48-55).

ANR Wastewater and Potable Water Supply Permits

25. 10 V.S.A. § 1973(a)(5) requires a person to obtain a wastewater and potable water supply permit "before . . . constructing a new building or structure."

26. On January 31, 2013, ANR issued a wastewater permit pursuant to 10 V.S.A. Chapter 64 (permit # WW-2-0100-7) to Hermitage Inn, allowing water

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and sewage connection for the temporary Scott Rescue Facility (which had already been installed and connected as of December 2012).

ANR Public Water Supply Permits

27. 10 V.S.A. § 1673(a)-(b) prohibits a person from "construct[ing] a new public water system or public water source," or altering, expanding, or otherwise changing "an existing water system or source . . . without a permit from the Secretary" of ANR.

28. On January 30, 2013, ANR issued a public water supply permit pursuant to 10 V.S.A. Chapter 56 (permit WSID # VT0005313) to Hermitage Inn, allowing a public water source for the temporary Scott Rescue Facility (which had already been installed and connected as of December 2012).

ANR Dam Authorization

29. 10 V.S.A. § 1082(a) requires a person to obtain authorization from ANR before constructing, remodeling, reconstructing, or otherwise altering "any dam, pond or impoundment or other structure which is or will be capable of impounding more than 500,000 cubic feet of water."

30. Mirror Lake, including its dam and spillway, impounds more than 500,000 cubic feet of water and therefore requires ANR authorization for any construction or alterations. Mirror Lake is a state water.

10 V.S.A. § 913 and the Vermont Wetland Rules

31. The Vermont Wetland Rules are part of the rules, permits, assurances, or orders related to 10 V.S.A. Chapter 37.

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32. 10 V.S.A. § 913 and Vermont Wetland Rule 9.1 prohibit a person from conducting an activity in a significant wetland or its buffer zone unless it is an allowed use or it is authorized by a permit, conditional use determination, or order issued by ANR.

33. 10 V.S.A. § 902(11) defines a "significant wetland" as "any Class I or Class II wetland."

34. Vermont Wetland Rule 2.07 defines a "Class II wetland" as a wetland other than a Class I or Class III wetland that is a wetland identified on the Vermont significant wetlands inventory maps or that ANR "determines merits protection" based on "an evaluation of the extent to which the wetland serves the functions and values set forth at . . . Section 5 of [the Vermont Wetland Rules], either taken alone or in conjunction with other wetlands."

35. In early 2012, ANR determined that a Class II wetland exists on the Property.

36. Defendants were aware of the wetland classification, as acknowledged in correspondence between Defendants' engineer and ANR in Feb.–June, 2012.

Construction Activities and Site Visits

37. Defendants engaged in extensive construction and development activities at the Property without necessary state approvals, and in violation of existing permit conditions, as described further below.

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Rushing Creek Development Project

38. Between 2011-2012, Rushing Creek created and constructed seven (7) single-family homes on separate lots off Fannie Hill road in the towns of Wilmington and Dover (hereafter "Rushing Creek Development project").

39. In Fall 2011, in the area between the entrance to Haystack Ski Resort and the entrance to the Hermitage Inn, along Fannie Hill Road, Defendants:

    a. relocated several existing snowmobile trails and created new snowmobile trails;

    b. constructed several bridges to cross over streams; and

    c. cut trees and cleared vegetation within 50 feet of state waters and within marked buffer zones.

40. Defendants were informed that the 2011 construction work required a stormwater construction permit under CGP 3-9020. Hermitage Inn obtained the Low Risk Permits (issued June-July 2012) after-the-fact for these activities.

41. In Fall 2012, Rushing Creek (and/or Hermitage Inn) removed additional trees and vegetation in the Rushing Creek development area.

42. The tree cutting that occurred at Rushing Creek Lot # 4 took place within a Class II forested wetland and buffer zone of an unnamed tributary to Cold Brook.

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43. Removal of trees and vegetation for the purpose of construction and development is not an authorized or allowed use of a wetland and therefore required authorization from ANR.

44. Defendants did not have a Vermont Wetland Permit authorizing activities or uses of the Class II wetland.

The Hermitage Club Project

45. Between 2011-2014, Hermitage Inn performed extensive construction in connection with developing its private Hermitage Club ski resort at Haystack Mountain.

46. Significant portions of the project were performed without authorization and without Act 250 land use and CGP permits, as described below.

47. In October 2012, Hermitage Inn began construction and electrical work for installation of a wind turbine on the summit of Haystack Mountain. Hermitage Inn did not obtain the required land use permit for this activity until September 24, 2013.

48. On or about October 26, 2012, DEC Environmental Analyst Ryan McCall visited the Property and observed unauthorized construction of the Hermitage Club project, including extensive amounts of disturbed and open earth. He specifically observed that work had begun on:

    a. Excavating for a beginner ski slope;

    b. Constructing the Summit Building;

    c. Constructing a snowmaking line; and

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d. Constructing a ski lift.

49. McCall advised Defendants' engineer that these activities were not authorized under the Low Risk CGP Permits, that Hermitage Inn must install erosion prevention sediment control (EPSC) practices, and that Hermitage Inn must cease construction activity until a moderate risk permit was authorized.

50. On or about November 13, 2012, McCall and DEC Stormwater Analyst Kevin Burke visited the Property, and observed that: EPSC practices were not installed, further construction had progressed at the same areas identified on October 26th, and there were unpermitted discharges to waters of the state. Specific problems observed included:

a. Unauthorized soil and earth disturbance associated with a beginner slope and ski lift;

b. Failure to mark construction limits;

c. Lack of orange plastic durable fencing around construction zones;

d. Lack of stable construction entrances;

e. Lack of required silt fences and failed silt fences;

f. Exposed soil without seeding or mulching;

g. Unauthorized use of hay bales as sediment traps or check dams;

h. Failure to implement winter construction practices such as temporary and daily stabilization; and

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i. Evidence of a turbid stormwater discharge at the construction site of the Haystack Base Lodge and Club House.

51. On or about November 26, 2012, McCall, Burke, and NRB Permit Compliance Officer John Wakefield visited the Property. Wakefield observed that unauthorized bridges were constructed over several stream crossings, and unauthorized tree cutting and vegetation clearing had occurred within a buffer zone of a marked stream/wetland area in the Rushing Creek development area. McCall and Burke observed that:

a. EPSC practices were still not followed;

b. Construction had progressed extensively -- nearly all of the work in the pending Moderate Risk Permit application was already nearly complete, including the beginner slope, snowmaking line, and Summit Building (with the exception of the ski lift at the base lodge site);

c. Clearing and grading had been done for foundations;

d. Foundations had begun to be installed for new ski lift towers; and

e. There was evidence of sediment-laden discharges below the first lift tower.

52. On or about December 6, 2012, Hermitage Inn applied for an Act 250 amendment to install the Scott Rescue Facility at the base of Haystack Mountain to be used as a rescue building for ski patrol, and a warming hut with public bathrooms for club members and guests. In the course of the

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NRB's Act 250 and ANR's wastewater and public water supply permitting processes, Defendants acknowledged that the Scott Rescue Facility had already been constructed on or around November 15, 2012, and by mid-December 2012, was connected to electric, water and sewage lines and was being used for the 2012-2013 winter ski season. The Scott Rescue Facility was a new building or structure requiring public water supply and wastewater permits. Hermitage Inn received its public water supply permit for the Scott Rescue Facility on January 30, 2013; its wastewater permit on January 31, 2013; and its Act 250 permit amendment on March 15, 2013.

53. On or about December 11, 2012, Wakefield visited the Property and observed that an unauthorized snowmobile trail of approximately 1.25 miles in length and up to fifteen (15) feet in width had been constructed, crossing over a 27-acre parcel of property that is conserved for critical wildlife habitat (American black bears) and onto National Forest Service property. In connection with the snowmobile trail, an unauthorized bridge crossing had also been constructed over a tributary of Haystack Brook.

54. On or about December 12, 2012, McCall visited the Property and observed more unauthorized work, including:

    a. An excavator located in a stream buffer at the base of a new ski lift tower (known as "The Tage" lift); and

    b. Evidence of two turbid sediment and stormwater discharges in the vicinity of the base lodge construction site.

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55. From December 10-14, 2012, Hermitage Inn (through its engineer) self-reported three (3) unpermitted discharges at the Property:

    a. On December 10, 2012, Defendants' engineer notified ANR that a turbid stormwater discharge had occurred at the Haystack Club and Base Lodge construction site and into Cold Brook, a state water, due to a leak in the pressure test of the snowmaking line.

    b. On December 11, 2012, Defendants' engineer notified ANR that another turbid stormwater discharge had occurred in the vicinity of the base lodge construction area into an unnamed tributary of Cold Brook known as Oak Brook, a state water, due to a construction vehicle running over the berm of a sediment pond.

    c. On December 14, 2012, Defendants' engineer notified ANR that a third turbid stormwater discharge had occurred in the vicinity of the townhomes to Oak Brook, a state water, due to water line construction and relocation.

56. On or about December 18, 2012, the Vermont Superior Court—Environmental Division issued an Emergency Order, addressing the unauthorized activities described above in paragraphs 48-55, and ordering Hermitage Inn to immediately cease all unauthorized construction activities and comply with all ANR permitting requirements.

57. After the Emergency Order (December 18, 2012) and the Moderate Risk Permit (December 20, 2012) were issued, ANR and NRB staff conducted

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additional site visits to ensure compliance with permitting conditions, and found that additional work had been done that was not in compliance with the Moderate Risk Permit, as described further below.

58. On or about December 26, 2012, Environmental Enforcement Officer (EEO) Tim McNamara and Burke visited the Property and observed the following activities that were not in compliance with the Moderate Risk Permit:

    a. Open areas of disturbed earth of around 3-4 acres for longer than 14 days (which is prohibited by both the low risk and moderate risk permit);

    b. Failure to stabilize the construction site;

    c. Lack of orange plastic durable fencing;

    d. Lack of vegetated buffer zones between sediment traps and tributaries;

    e. Lack of a snow management plan;

    f. Inspection records not being maintained properly;

    g. Lack of reinforced fences;

    h. Improper installation of silt fences; and

    i. Other EPSC practices not being followed.

59. On or about January 9, 2013, McCall returned to the Property and found nearly all of the same problems as the Dec. 26th visit, and that construction had occurred within 50 feet of a tributary to Cold Brook, in contravention of the Moderate Risk Permit conditions.

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60. On or about January 17, 2013, EEO McNamara returned to the Property and spoke with Defendants' engineer, who stated that in October/November 2012 underground sewer lines were constructed (approx. 5,000 feet) for the Summit Building, before the Moderate Risk Permit authorizing such construction was issued.

61. Since January 2013, most of the remediation associated with the above-described problems has been completed. Defendants have entered into remediation plans, and have replanted trees and vegetation, removed unauthorized bridges and stream crossings, relocated trails, etc. However, further inspection may reveal the need for additional remediation at the Property.

62. More recently, however, Hermitage Inn performed additional construction at the Property that was not authorized.

63. On or about June 20, 2014, Hermitage Inn converted Mirror Lake from a snowmaking pond into a recreation area by constructing the following: a 90-foot-long split-rail fence, a 176-square-foot dock along the shore, an 80-square-foot floating dock, a boat rack for kayaks and other watercraft, and a beach area of approximately 20-25 cubic yards of sand (some of which was dumped or raked directly into the pond and into the spillway). Hermitage Inn applied for the required land use permit for these activities on or around July 16, 2014, after performing the work. Hermitage Inn also failed to obtain ANR dam authorization for work done in the dam and spillway.

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64. From May-July 2014, work was performed around an area of land known as Cold Brook Fire District #1, Well No. 9, in Wilmington, which is property owned by Hermitage Inn. The work included clearing trees and vegetation, and constructing a parking lot, impervious road areas, a pump house, and adding poles for power lines. The required land use permit for these activities listed Hermitage Inn as the landowner and was submitted on or around August 25, 2014, after performing the work (no permit has issued yet).

Statutory Framework for Environmental Enforcement Actions

65. Under 10 V.S.A. § 8221, the Attorney General is authorized to bring enforcement actions for violations of any of the provisions of law specified in § 8003(a), including the following Vermont statutes under Title 10: Wetlands Protection (Chapter 37); Dams (Chapter 43); Water Pollution Control (Chapter 47); Public Water Supply (Chapter 56); Potable Water and Wastewater (Chapter 64); and Land Use – Act 250 (Chapter 151).

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

67. Under 10 V.S.A. § 8221(b)(6), each violation that occurred is subject to civil penalties of up to $85,000 for each initial violation and up to $42,500 for each day a violation continued.

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VIOLATIONS

68. Paragraphs ¶¶ 1–67 are re-alleged and incorporated by reference for each of the below Counts.

COUNT ONE (as to Defendant Hermitage Inn):
Construction of Snowmobile Trail and Bridge without Act 250 Permit

69. In Fall 2012, Hermitage Inn built an approximate 1.25 mile snowmobile trail through a conserved habitat area on the Property, including a bridge crossing over a tributary of Haystack Brook.

70. Construction of the snowmobile trail and the bridge crossing required an Act 250 permit.

71. Defendant Hermitage Inn did not have an Act 250 permit for constructing the snowmobile trail, or the bridge crossing, in violation of 10 V.S.A. § 6081(a).

72. Defendant Hermitage Inn also failed to get an amendment to its preexisting LUP 700002-19 (Sept. 17, 2012) prior to constructing the snowmobile trail and bridge crossing, in violation of Act 250 Rule 34(A).

73. Construction of the snowmobile trail and the bridge crossing is a violation of 10 V.S.A. § 6081(a) and/or Rule 34A. Each day that a violation continued is a separate continuing violation.

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COUNT TWO (as to Defendant Hermitage Inn):
Failing to Maintain 50-foot Buffer Zone in Violation of Act 250 Permit

74. Condition 21 of LUP 700002-19 (Sept. 17, 2012) required Hermitage Inn to maintain "a 50-foot undisturbed, naturally vegetated, unmowed buffer strip" from all watercourses and wetlands on the Property.

75. In Fall 2012, in connection with constructing the 1.25 mile snowmobile trail, Hermitage Inn constructed a bridge crossing within the marked 50-foot buffer zone of a tributary of Haystack Brook. Hermitage Inn also cut trees and cleared vegetation within 50 feet of marked buffer zones and waterways.

76. Each of the above activities is a violation of Condition 21 of LUP 700002-19. Each day that a violation continued is a separate continuing violation.

COUNT THREE (as to Defendant Hermitage Inn):
Construction of Scott Rescue Facility without Act 250 Permit

77. In November 2012, Hermitage Inn constructed and installed the Scott Rescue Facility at the base area of Haystack Ski Resort and used the building for the 2012-2013 winter ski season.

78. Installation of the Scott Rescue Facility required an Act 250 permit.

79. Defendant Hermitage Inn did not have an Act 250 permit for constructing the Scott Rescue Facility, in violation of 10 V.S.A. § 6081(a).

80. Defendant Hermitage Inn also failed to get an amendment to its preexisting land use permit (LUP 700002-19, Sept. 17, 2012) prior to constructing the Scott Rescue Facility, in violation of Act 250 Rule 34(A). Defendant Hermitage Inn did not obtain its amended LUP (700002-19C) until March

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15, 2013, approximately four months after erecting and using the Scott Rescue Facility.

81. Construction of the Scott Rescue Facility is a violation of 10 V.S.A. § 6081(a) and/or Rule 34A. Each day that the violation continued is a separate continuing violation.

COUNT FOUR (as to Defendant Hermitage Inn):
Construction of Trails and Stream Crossings without Act 250 Permit

82. In Fall 2011, in the area between the entrance to Haystack Ski Mountain and the entrance to the Hermitage Inn, along Fannie Hill Road, Hermitage Inn: (i) relocated several existing snowmobile trails and created new trails; and (ii) constructed several stream crossings.

83. Construction of the relocated trails, new trails and stream crossings required an Act 250 permit.

84. Defendant Hermitage Inn did not have an Act 250 permit for construction of the relocated and new trails or the stream crossings, in violation of 10 V.S.A. § 6081(a).

85. Defendant Hermitage Inn also failed to get an amendment to its preexisting LUP series 700002, prior to constructing the trails and crossings, in violation of Act 250 Rule 34(A).

86. Each of the above activities is a separate violation of 10 V.S.A. § 6081(a) and/or Rule 34A. Each day that a violation continued is a separate continuing violation.

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COUNT FIVE (as to Defendant Hermitage Inn): Construction of Wind Turbine without Act 250 Permit

87. Beginning in October 2012, Hermitage Inn began construction work on a wind turbine at the summit of Haystack Mountain, including blasting and electrical work.

88. Construction of the wind turbine required an Act 250 permit.

89. Defendant Hermitage Inn did not have an Act 250 permit for construction of the wind turbine, in violation of 10 V.S.A. § 6081(a).

90. Defendant Hermitage Inn also failed to get an amendment to its preexisting permit LUP 700002-19 (Sept. 17, 2012), in violation of Act 250 Rule 34(A). Defendant Hermitage Inn did not apply for a permit amendment until December 10, 2012 (nearly two months after starting work on the wind turbine). Hermitage Inn's application was deemed incomplete, and amended permit LUP 700002-19B (authorizing the wind turbine) was not issued until September 24, 2013.

91. Each of the above activities is a separate violation of 10 V.S.A. § 6081(a) and/or Rule 34A. Each day that a violation continued is a separate continuing violation.

COUNT SIX (as to Defendant Hermitage Inn): Construction at Mirror Lake without Act 250 Permit

92. In June 2014 at Mirror Lake (a snowmaking pond connected to Cold Brook), Hermitage Inn constructed several docks, a beach area using sand, a fence,

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and a boat rack for swimming and boating activities. This construction required an Act 250 permit.

93. Defendant Hermitage Inn did not have an Act 250 permit for construction at Mirror Lake, in violation of 10 V.S.A. § 6081(a).

94. Defendant Hermitage Inn also failed to get an amendment to its preexisting permit LUP 700002-19 (Sept. 17, 2012), in violation of Act 250 Rule 34(A). Defendant Hermitage Inn did not apply for a permit amendment until July 16, 2014.

95. Each of the above activities is a separate violation of 10 V.S.A. § 6081(a) and/or Rule 34A. Each day that a violation continued is a separate continuing violation.

COUNT SEVEN (as to Defendant Hermitage Inn):
Construction at Cold Brook Fire District without Act 250 Permit

96. In May-July 2014 at Cold Brook Fire District #1, Well No. 9, a parking lot, impervious road areas, a pump house, and poles for power lines were constructed. This construction required an Act 250 permit.

97. As the landowner, Defendant Hermitage Inn did not have an Act 250 permit for this construction, in violation of 10 V.S.A. § 6081(a). A permit application was not submitted until August 25, 2014, and no permit has yet been issued.

98. Each of the above activities is a separate violation of 10 V.S.A. § 6081(a). Each day that a violation continued is a separate continuing violation.

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COUNT EIGHT (as to Defendant Rushing Creek):
Failing to Maintain 50-foot Buffer Zone in Violation of Act 250 Permit

99. Condition 12 of LUP 2W0635-1 (Nov. 23, 2010) required Rushing Creek to maintain "a 50-foot undisturbed, naturally vegetated, unmowed buffer strip" from all watercourses and wetlands on the Property.

100. In Fall 2012, in connection with the Rushing Creek Development project, Rushing Creek cut trees within the marked 50-foot buffer zone for wetlands and a stream on the Property in violation of LUP 2W0635-1, Condition 12.

101. Each of the above activities is a violation of Condition 12 of LUP 2W0635-1. Each day that a violation continued is a separate continuing violation.

COUNT NINE (as to All Defendants):
Construction Activities without ANR Stormwater Permit

102. In Fall 2011, Defendant Rushing Creek performed construction activities in connection with the Rushing Creek Development project, including the activities described in paragraphs 38-39, without the required stormwater construction permit under CGP 3-9020, in violation of 10 V.S.A. Chapter 47.

103. In Fall 2012, Defendant Hermitage Inn engaged in extensive construction activities in connection with The Hermitage Club project, including the activities described in paragraphs 48-55 and 60, that were not authorized by then applicable Low Risk Permits, and which required a Moderate Risk stormwater permit, in violation of 10 V.S.A. Chapter 47.

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104. Each and every activity described above is a separate violation of CGP 3-9020 and the authorization under CGP 3-9020. Each day that a violation continued is a separate continuing violation.

COUNT TEN (as to Defendant Hermitage Inn):
Failure to Comply with ANR Stormwater (Moderate Risk) Permit

105. After the issuance of Hermitage Inn's Moderate Risk Permit on December 20, 2012, Hermitage Inn continued to perform construction activities that did not comply with the permit conditions, including those described in paragraphs 58-59.

106. Hermitage Inn's noncompliance with its Moderate Risk Permit violated 10 V.S.A. § 8002(9).

107. Each and every activity described above is a separate violation of 10 V.S.A. § 8002(9). Each day that a violation continued is a separate continuing violation.

COUNT ELEVEN (as to Defendant Hermitage Inn):
Unpermitted Discharges into State Waters

108. Hermitage Inn's extensive construction activities at the Property (described in ¶¶ 48-55, 58-59, and 63) resulted in several unpermitted discharges into state waters, including three discharges reported by Defendant's own engineer (see ¶ 55), in violation of 10 V.S.A. § 1259.

109. Each and every discharge described above is a separate violation of 10 V.S.A. § 1259. Each day that a violation continued is a separate continuing violation.

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COUNT TWELVE (as to Defendant Hermitage Inn):
Construction without ANR Wastewater Permit

110. Construction of the Scott Rescue Facility required a wastewater and potable water supply permit under 10 V.S.A. § 1973 because the facility was connected to a sewer line.

111. Defendant Hermitage Inn constructed and used the Scott Rescue Facility at the Property before obtaining a wastewater and potable water supply permit, in violation of 10 V.S.A. § 1973.

112. Each day that the violation continued is a separate continuing violation.

COUNT THIRTEEN (as to Defendant Hermitage Inn):
Construction without ANR Public Water Supply Permit

113. Construction of the Scott Rescue Facility required a public water supply permit under 10 V.S.A. § 1673 because the facility provided a water supply for public consumption.

114. Defendant Hermitage Inn constructed and used the Scott Rescue Facility before obtaining a public water supply permit, in violation of 10 V.S.A. § 1673.

115. Each day that the violation continued is a separate continuing violation.

COUNT FOURTEEN (as to Defendant Hermitage Inn):
Dam Alteration without ANR Authorization

116. Construction of the beach and recreation area at Mirror Lake required ANR authorization under 10 V.S.A. § 1082 because Mirror Lake impounds more than 500,000 cubic feet of water.

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117. Defendant Hermitage Inn made alterations to Mirror Lake and its dam and spillway without obtaining ANR's authorization, in violation of 10 V.S.A. § 1082.

118. Each day that the violation continued is a separate continuing violation.

COUNT FIFTEEN (as to All Defendants):
Unauthorized Wetland Disturbance

119. On information and belief, in Fall 2012, Defendants Rushing Creek and/or Hermitage Inn, removed trees and vegetation at Rushing Creek Lot #4, which was within a significant wetland and buffer zone, as defined by the Vermont Wetland Rules, without a permit or authorization from ANR.

120. Defendants' construction activities in a significant wetland and its associated buffer zone without first obtaining ANR approval violated 10 V.S.A. § 913 and Vermont Wetland Rule 9.1. Each day that a violation continued is a separate continuing violation.

WHEREFORE, the State of Vermont seeks the following relief:

1. Civil penalties pursuant to 10 V.S.A. § 8221 of not more than $85,000 for each violation, and not more than $42,500 for each day a violation continued, under the following:

   (a) 10 V.S.A. § 6081(a) and Act 250 Rule 34(A);

   (b) 10 V.S.A. § 8002(9) (failing to comply with permit conditions);

   (c) 10 V.S.A. Chapter 47 (§§ 1258(b); 1263(a); and 1264(e));

   (d) 10 V.S.A. § 1259(a);

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(e) 10 V.S.A. § 1973;

(f) 10 V.S.A. § 1673;

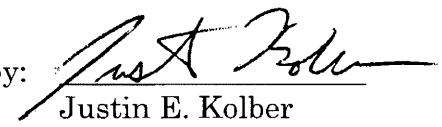
(g) 10 V.S.A. § 1082; and

(h) 10 V.S.A. § 913 and Vermont Wetland Rule 9.1.

2. Permanent injunctive relief requiring Defendants to: (i) comply with all NRB and ANR statutory and permit requirements; (ii) retain an environmental compliance officer, approved by ANR and the NRB, who will make periodic direct reports to ANR and the NRB on Defendants' compliance with all statutory and permit requirements; and (iii) provide written advance notice of future development and construction activities in the state by Defendants;
3. The award to the State of investigative costs of enforcement, court costs, and fees incurred in this litigation; and
4. Such other relief as this court deems just and appropriate.

Dated February 18, 2015 at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 

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Form No. 369A

SUPERIOR COURT
WINDHAM Unit

NOTICE OF PLEA AGREEMENT

STATE OF VERMONT CRIMINAL DIVISION

Date 5/15/15

Docket No. 1524-11-14 Wmcr

STATE OF VERMONT	v.	Defendant's Name	DOB
		Expert Drain Care, LLC	/ /

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

Charge: Waste Transportation, Ct 1	Charge: Waste Disposal, Ct 2	Charge: false claim > $500, Ct 6
Docket Number: 1524-11-14 Wmcr	Docket Number: 1524-11-14 Wmcr	Docket Number: 1524-11-14 Wmcr
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 Contendere)	Guilty (Nolo Contendere)	Guilty (Nolo Contendere)
SENTENCE: 225	SENTENCE: 225	SENTENCE: 300
FINE $1,500 & Surcharge $147	FINE $1,500 & Surcharge $147	FINE $2,000 & Surcharge $147
(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
Term of Probation: ___ months yrs	Term of Probation: ___ months yrs	Term of Probation: ___ months yrs
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

TOTAL SENTENCE: $5,000 Fine. Total FINE & Surcharges: $ 6197.00

Cases to be Dismissed by State:

Docket # 1524-11-14 Wmcr Charge: Waste Discharge, Ct 3
Docket # 1524-11-14 Wmcr Charge: Waste Trans., Ct 4
Docket # 1524-11-14 Wmcr Charge: Waste Storage, Ct 5
Docket # ___ Charge: ___
Docket # ___ Charge: ___

Special Probation Conditions:
Standard and or Special probation conditions attached
Credit as allowed by law.

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

Other:
Addendum to Plea Agreement and Waiver of Rights attached and incorporated.
$5,000 fine shall be paid in 10 consecutive $500 monthly installments.
~~Judgment for State / Operator in civil suspension. Docket No.~~ Wmcs.

This is a binding Rule 11 Agreement.

I have reviewed this agreement and understand it.

Defendant [signature] Date 5/15/15

Defense Attorney [signature] Date 5/15/15

Guardian ad Litem ___ Date ___

Prosecutor [signature] Date 5/15/15

Judge ___ Date ___

Rev. 7/10 SML Distribution: 1st Copy ~ Court; 2nd Copy ~ Computer Operator; 3rd Copy ~ State's Attorney; 4th Copy ~ Defendant; 5th Copy ~ Defense Attorney

State of Vermont v. Expert Drain Care, LLC Docket No. 1524-11-14 Wmcr

ADDENDUM TO PLEA AGREEMENT

1) Defendant understands and waives all rights under both 13 V.S.A. Sec. 7042 and V.R.Cr.P. 35(b) to move for reduction of the sentence imposed under this Agreement, except to the extent that the penalty imposed is greater than that recommended in this Agreement.

2) The Addendum to Plea Agreement, Plea Agreement, and Waiver of Rights form the complete agreement of the parties and may not be altered or amended, except in writing signed by both parties.

WAIVER OF RIGHTS

Being the Defendant in this criminal case, I understand that I have certain constitutional and statutory rights. In support of my desire to change my plea to the offense(s), I represent to the court that I understand these rights and make the appropriate waivers thereof. As evidence of my knowing, intelligent, and voluntary waiver, my signature is at the bottom of this document, as well as on the Plea Agreement.

(1) I understand the charge(s) against me as set forth in the Information(s) and the Plea Agreement. I have read and understand the Information(s) and supporting Affidavit(s). I am aware of the evidence to support the charge(s) and any defenses which might be available to me.

(2) **Check whichever of the following apply:**

(a) ☑ I have consulted and discussed my case(s), the Plea Agreement, and this Waiver of Rights with my attorney. I have carefully considered the advice and counsel that my attorney has provided with regard to these matters. Having that advice and counsel in mind, I wish to change my plea(s) in accord with the plea agreement. I have had a full opportunity to assess the advantages and disadvantages of a trial, as compared with those attending my plea(s).

(b) ☐ Although I represent myself, I fully understand the charge(s) described in the Information(s), and I have considered whether it is in my best interest to sign this Plea Agreement or to insist on my right to a trial.

(c) ☐ I have discussed my plea with my Guardian Ad Litem, whose signature below indicates his/her agreement with my decision to plead to the charge(s).

(3) I understand that the State has the burden of proving me guilty beyond a reasonable doubt. I understand that I am entitled to continue with my plea(s) of not guilty and, if so, have the following rights:

(a) to either a trial by court or by jury;
(b) to be confronted with witnesses against me and to cross examine those witnesses;
(c) to maintain my own silence;
(d) to present evidence and to have witnesses brought to the Court for me;
(e) to present any defenses available; and if convicted
(f) to appeal my conviction and/or sentence.

(4) No promises have been made to me by anyone from the State, except those contained in the written Plea Agreement.

(5) I understand that if my plea is GUILTY, I am admitting the essential elements of the offense(s). I understand that if my plea is NO CONTEST, I am not contesting that the State could prove that I committed the essential elements of the charge(s) contained in the Information(s), and that the State has sufficient evidence to convict me of the offense(s). I have read this Waiver of Rights and consulted with my attorney about it, if I am so represented, or considered it carefully on my own, or with my Guardian Ad Litem (as indicated by my checkmarks in section 2 above), and I understand it fully. I hereby knowingly and voluntarily give up each and every one of the rights written above, and ask the Court to accept my plea(s), making no claim of innocence. I ask the Court to accept my plea(s) and to proceed to sentence me as required by law.

(6) I understand that, if I am not a citizen of the United States of America, admitting to facts sufficient to warrant a finding of guilt, or entering a plea of guilty or nolo contendere (no contest) to a crime, may have consequences of deportation or denial of United States citizenship.

X _____ _____ 5/15/15
DEFENDANT GUARDIAN AD LITEM DATE

updated 7/10/10

STATE OF VERMONT

SUPERIOR COURT
WINDHAM UNIT

CRIMINAL DIVISION
DOCKET NO. _____ Wmcr

STATE OF VERMONT

v.

EXPERT DRAIN CARE, LLC d/b/a
ROTO ROOTER and MONADNOCK
SEPTIC SERVICE

INFORMATION BY ATTORNEY GENERAL

BY THE AUTHORITY OF THE STATE OF VERMONT, the Attorney General for the State of Vermont, upon his oath of office, charges:

COUNT 1 of 6
CHARGE CODE: 10V6612D2, CHARGE NAME: WASTE-TRANSPORTATION>275 POUNDS, OFFENSE CLASS: F

On or about June 14, 2013, Expert Drain Care, LLC at Brattleboro, Vermont, in this county and territorial unit, knowingly transported more than 275 pounds of solid waste in violation of 10 V.S.A. Ch. 159 and the rules promulgated thereunder: to wit, it transported approximately 8,330 pounds of solid waste from the Grafton Cheese Factory located at 400 Linden Street, Brattleboro, VT to 464 Canal Street, Brattleboro, VT without a valid permit as required by 10 V.S.A. § 6607a, in violation of 10 V.S.A. § 6612(d)(2) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than five years or a fine of not more than $250,000.00 or both.

COUNT 2 of 6
CHARGE CODE: 10V6612D2, CHARGE NAME: WASTE-TRANSPORTATION>275 POUNDS, OFFENSE CLASS: F

On or about July 11, 2013, Expert Drain Care, LLC at Brattleboro, Vermont, in this county and territorial unit, knowingly disposed of more than 275 pounds of solid

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GENERAL
109 State Street
Montpelier, VT
05609

waste in violation of 10 V.S.A. Ch. 159 and the rules promulgated thereunder: to wit, it discharged between 1,666 and 8,330 pounds of solid waste from the Grafton Cheese Factory onto the ground at 464 Canal Street, Brattleboro, VT in violation of Solid Waste Management Rule 6-302(d), in violation of 10 V.S.A. § 6612(d)(2) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than five years or a fine of not more than $250,000.00 or both.

COUNT 3 of 6
CHARGE CODE: 10V6612A, CHARGE NAME: WASTE-FACILITY- NO CERTFICATE, OFFENSE CLASS: M

On or about July 11, 2013, Expert Drain Care, LLC at Brattleboro, Vermont, in this county and territorial unit, was a person who violated a provision of 10 V.S.A. Ch. 159 and the rules promulgated thereunder: to wit, it discharged solid waste onto the ground at 74 Black Mountain Road, Brattleboro, VT in violation of Solid Waste Management Rule 6-302(d), in violation of 10 V.S.A. § 6612(a) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than six months or a fine of not more than $25,000.00 or both.

COUNT 4 of 6
CHARGE CODE: 10V6612D2, CHARGE NAME: WASTE-TRANSPORTATION>275 POUNDS, OFFENSE CLASS: F

Between January 25 and 29, 2013, Expert Drain Care, LLC at Brattleboro, Vermont, in this county and territorial unit, knowingly transported more than 275 pounds of solid waste in violation of 10 V.S.A. Ch. 159 and the rules promulgated thereunder: to wit, it transported approximately 8,330 pounds of solid waste from Fran Hutchinson's septic tank located at 36 Golden Woods Road, Newfane, VT to the Keene, NH Waste

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05609

Water Treatment Facility without a valid permit as required by 10 V.S.A. § 6607a, in violation of 10 V.S.A. § 6612(d)(2) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than five years or a fine of not more than $250,000.00 or both.

COUNT 5 of 6
CHARGE CODE: 10V6612D2, CHARGE NAME: WASTE-TRANSPORTATION>275 POUNDS, OFFENSE CLASS: F

On or about August 7, 2013, Expert Drain Care, LLC at Brattleboro, Vermont, in this county and territorial unit, knowingly stored more than 275 pounds of solid waste in violation of 10 V.S.A. Ch. 159 and the rules promulgated thereunder: to wit, it stored approximately 24,990 pounds of solid waste in two 1,500 gallon underground storage tanks located at 464 Canal Street, Brattleboro, VT, which is not a certified solid waste management facility under 10 V.S.A. § 6605, in violation of 10 V.S.A. § 6612(d)(2) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than five years or a fine of not more than $250,000.00 or both.

COUNT 6 of 6
CHARGE CODE: 13V3016A=F, CHARGE NAME: FALSE CLAIM >$500, OFFENSE CLASS: F

From December 3, 2011 to September 30, 2013, Expert Drain Care, LLC at Brattleboro, Vermont, in this county and territorial unit, did, in a matter within the jurisdiction of an agency of the State and with the intent to defraud, make a false representation as to a material fact resulting in a loss of $500 or more to a governmental entity: to wit, in furtherance of its scheme of misrepresenting the origins of septage in order to pay lower disposal fees, it falsely represented to the Vermont Agency of Natural Resources on its Residuals Management Quarterly Reports that it was not managing or

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disposing of any solid waste in Vermont and thereby avoided $840 in permit fees, in violation of 13 V.S.A. § 3016 and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than 5 years or a fine of not more than $10,000.00 or both.

Dated: 11/17/14.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Evan Meenan
Assistant Attorney General

This information was presented to me and I have found probable cause this _____ day of _____, _____.

_____
Superior Court Judge

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109 State Street
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05609

ENTRY ORDER

2015 VT 88

SUPREME COURT DOCKET NO. 2014-162

NOVEMBER TERM, 2014

In re Zaremba Group Act 250 Permit (Shawn Cunningham, Michele Bargfrede, Cindy Farnsworth, Richard Farnsworth, Gail Gibbons, Robert Gibbons, Diane Holme, John Holme, Janice Housten, Leonard Lisai, Scott Morgan, Donald Payne, Stephanie Payne, Kathy Pellett, William Reed, Kathy Schoendorf, Claudio Veliz, Bonnie Watters and Lew Watters, Appellants)	}	APPEALED FROM: Superior Court, Environmental Division DOCKET NO. 36-3-13 Vtec

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

Affirmed.

FOR THE COURT:

Marilyn S. Skoglund, Associate Justice

Concurring:

John A. Dooley, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Walter M. Morris, Jr., Superior Judge (Ret.),
Specially Assigned

2015 VT 88

No. 2014-162

In re Zaremba Group Act 250 Permit
(Shawn Cunningham, Michele Bargfrede, Cindy Farnsworth, Richard Farnsworth, Gail Gibbons, Robert Gibbons, Diane Holme, John Holme, Janice Housten, Leonard Lisai, Scott Morgan, Donald Payne, Stephanie Payne, Kathy Pellett, William Reed, Kathy Schoendorf, Claudio Veliz, Bonnie Watters and Lew Watters, Appellants)

Supreme Court

On Appeal from
Superior Court,
Environmental Division

November Term, 2014

Thomas G. Walsh, J.

James A. Dumont of Law Office of James A. Dumont, P.C., Bristol, and Charlotte B. Ancel of Sheehey Furlong & Behm PC, Burlington, for Appellants.

William H. Sorrell, Attorney General, and Justin Kolber, Assistant Attorney General, Montpelier, for Appellees Agency of Natural Resources and Natural Resources Board.

David R. Cooper of Kenlan, Schwiebert, Facey & Goss, P.C., and Alan Biederman of Biederman Law Office, Rutland, for Appellee Zaremba Group, LLC.

PRESENT: Dooley, Skoglund, Robinson and Eaton, JJ., and Morris, Supr. J. (Ret.), Specially Assigned

¶ 1. **SKOGLUND, J.** Neighbors of a plot of land in Chester appeal the environmental division's decision to grant an Act 250 permit amendment to appellee Zaremba Group to build a Dollar General store ("the Project") on that plot. We affirm.

¶ 2. The trial court found the following facts relevant to this appeal. Zaremba is the owner of the 10.08-acre plot of land in question. The proposed building site lies within the floodway of Lovers Lane Brook ("the Brook"). The Project would result in a loss of flood-water

storage of 1,305 cubic yards, but is designed to include a flood-mitigation cut area, which would provide additional flood-water storage of 2,544 cubic yards. The Project would narrow the Brook floodway at two points, but both of these areas are at least as wide as the Brook's narrowest section, which is just south of the Project site. The Project includes a minimum fifty-foot buffer along the Brook.

¶ 3. The Project is located in Chester's Residential Commercial District. The area 0.6 miles to the northwest of the Project site is a historical, dense, and walkable village center, while a contemporary, less dense mixed-use area lies to the south of the site. Buildings directly around the Project site are mostly set back from roadways with individual driveways and parking lots. Several properties in the immediate area of the site have large parking lots in front of their respective buildings. Views looking out from the Project site include some dense vegetation, a diner, and a building containing a gas station, mini market, and liquor outlet. The Project's highest point is thirty-five feet, and its footprint dimensions are seventy-feet wide by 130-feet deep. Its overall size is bigger than neighboring buildings, but the surrounding area includes buildings larger than the Project, such as the American Legion, St. Joseph's Church, and a self-storage facility. These buildings vary in architectural styles, sizes, and ages, with different roof pitches, building materials, numbers of stories, colors, and numbers and sizes of windows.

¶ 4. Despite this diversity among nearby buildings, the Project is distinct in several respects. The Project is intended to appear similar to a backyard barn, but its warehouse-like features shine through. It has large faux windows on each side of the front entrance, while no other buildings in the area have faux windows. The front entrance is comprised of full-length glass doors, while the sides of the building have no windows. It has a cupola, as some other buildings in the area have, but its cupola is located off-center, toward the front of the building and closer to Route 103, unlike those of nearby buildings. Finally, the Project's building has a

large, undifferentiated mass. The Project, and especially these features, will be visible to travelers on Route 103.

¶ 5. To subdivide the lot for the Project, Zaremba applied to the District #2 Environmental Commission for an amendment to the existing Act 250 permit on that property. The Commission gave neighbors—the appellants here—as well as the Agency of Natural Resources (ANR) and Natural Resources Board, interested-person status. The Commission ultimately granted the permit amendment. Neighbors appealed that decision to the environmental division, claiming the proposed construction failed to meet the following Act 250 Criteria: 1(D), "Floodways"; 5, "Traffic Safety and Congestion"; 8, "Aesthetics"; and 10, "Conformance with Local and Regional Plans." Following trial, the environmental division affirmed the Commission's grant of the permit. Neighbors now appeal that decision to this Court, claiming that the environmental division's findings as to Criteria 1(D), "Floodways" and 8, "Aesthetics" were clearly erroneous. We affirm.

¶ 6. Neighbors must overcome a deferential standard of review to prevail on appeal in this case. "We will defer to the [environmental division's] factual findings and uphold them unless taking them in the light most favorable to the prevailing party, they are clearly erroneous." In re Application of Lathrop Ltd. P'ship I, II, III, 2015 VT 49, ¶ 21, ___ Vt. ___, ___ A.3d ___ (quotation omitted). Its factual findings are clearly erroneous only if they are supported by no credible evidence that a reasonable person would rely upon to support the conclusions. In re Eastview at Middlebury, Inc., 2009 VT 98, ¶ 10, 187 Vt. 208, 992 A.2d 1014; In re Bennington School, Inc., 2004 VT 6, ¶ 11, 176 Vt. 584, 845 A.2d 332. "Although we review the environmental [division]'s legal conclusions de novo, we will uphold those conclusions if they are reasonably supported by the findings." Lathrop, 2015 VT 49, ¶ 21 (quotation and citation omitted).

¶ 7. Criterion 1(D) requires the applicant to show, and the environmental division to find, the project's impacts on floodways will not endanger the public. That provision addresses two distinct flooding hazards: (i) inundation flooding, resulting from diversion or restriction of floodwaters; and (ii) erosion hazards, caused by "significantly increas[ing] the peak discharge" of the waterway. See 10 V.S.A. § 6086(a)(1)(D). ANR also plays an important role in cases involving Criterion 1(D). ANR has authority, pursuant to Act 250, to determine whether a particular project will fall within a floodway. In re Woodford Packers, Inc., 2003 VT 60, ¶ 13, 175 Vt. 579, 830 A.2d 100 (mem.) (interpreting 10 V.S.A. §§ 6001(6) and (7)). Moreover, at an environmental-division trial, ANR may, as intervenor, present evidence relevant to its expertise, which the environmental division may rely upon in deciding the case. See id. ¶ 17 (noting that while burden of proof remains on applicant, environmental division may rely on evidence presented by ANR); see also 10 V.S.A. § 8504(n) (allowing persons granted interested-party status by District Commission to intervene in appeals to environmental division).

¶ 8. At trial, two experts testified as to the Project's potential floodway impacts: one from ANR and one on behalf of Zaremba. Neighbors presented no evidence with respect to Criterion 1(D), so their arguments on appeal are limited to showing the inadequacy of ANR's and Zaremba's expert testimony. Neighbors do not challenge the environmental division's findings as to inundation flooding,* but contest its determination as to erosion in two ways.

¶ 9. They first argue that the environmental division's finding that the two floodway constrictions caused by the Project would be wider than the narrowest existing constrictions is contradictory to the evidence and amounts to reversible error. Zaremba's expert—who presented

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* In the Statement of Issues of their brief, neighbors purport to challenge the environmental court's findings with respect to Criterion 1(D)(i), but offer no arguments or authority to show that the environmental division's decision as to that specific provision should be overturned. We therefore will not consider the issue. See Flex-A-Seal v. Safford, 2015 VT 40, ¶ 20, ___ Vt. ___, ___ A.3d ___ (Supreme Court will not consider issues not adequately briefed).

the only evidence directly related to this finding—testified that the Project's narrowest constriction of the Brook floodway would be "no more narrow [than the current narrowest area]; it would be equal to or greater." The environmental division's finding that the constriction would be "wider" rather than "wider or as wide" is indeed erroneous, but harmless. Although Zaremba's expert testified that the velocity of flowing water generally increases at points of constriction, other things being equal, he also explained that it decreases proportionately wherever the waterway widens, as the Brook floodway does at various points upstream and downstream of the new constrictions. Thus, any increase in velocity would be limited in time and space to the two newly constricted areas. Even so, he explained that the additional flood storage created by excavation for the Project would generally cause lower maximum water velocity, as compared with current floodway conditions. The environmental division found the same.

¶ 10. Velocity, moreover, is not the only factor that determines erosion. Both ANR's Technical Guidance document for Criterion 1(D), admitted into evidence in this case, and the expert testimony make clear that volume or height of floodwaters, tailwater, channel slope, sediment load, and channel-boundary resistance collectively determine erosion. Zaremba's expert testified, and the environmental division found, given the existing constrictions, the Project will not increase the volume of floodwaters. ANR's expert's testimony corroborated that of Zaremba's expert, as ANR's expert determined the Project's minimum fifty-foot buffer adequately addressed erosion hazards. The environmental division agreed. The testimony of both of the floodway experts and related evidence thus support the conclusion that the Project would not significantly increase peak discharge, and would not endanger the public. The environmental division's misstatement concerning the width of constriction does not significantly factor into this conclusion.

¶ 11. Neighbors also claim the environmental division had insufficient evidence on which to base its finding that the Project would not harm the public because certain computer modeling, which was not performed, was necessary to assess whether the changed topography would cause increased velocity and an erosion hazard. This argument fails because an applicant's burden under Criterion 1(D) does not require computer-modeling evidence. Neighbors cite to no authority for this proposition, and it has no basis in the statutory language. The environmental division need only determine by credible evidence that the project would not significantly increase peak discharge in such a way as to endanger the public. See 10 V.S.A. § 6086(a)(1)(D)(ii). As explained above, the environmental division did just that, so we affirm its findings and conclusions as to Criterion 1(D).

¶ 12. We next turn to neighbors' argument regarding Criterion 8, Aesthetics. The framework for the environmental division's analysis under Criterion 8 is known as the Quechee test. See Lathrop, 2015 VT 49, ¶ 74 (citing In re Quechee Lakes Corp., Nos. 3W0411-EB, 3W0439-EB, slip op. at 19-20 (Vt. Envtl. Bd. Nov. 4, 1985), http://www.nrb.state.vt.us/lup/decisions/1985/3w0439-eb-fco.pdf). The Quechee test provides:

> [A] project violates Criterion 8 if: (1) the proposed project will have an adverse aesthetic impact and (2) that impact will be undue. An impact is undue if: (1) it violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; (2) it offends the sensibilities of the average person; or (3) the applicant has failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.

Id. (citations, quotations, and alterations omitted).

¶ 13. The environmental division concluded that the project would have an adverse aesthetic impact on the surrounding area, but that the impact would not be undue. Neighbors challenge this latter conclusion, but based on only one of the three prongs of the undue-impact test—violation of "a clear, written community standard intended to preserve the aesthetics" of

the area. Neighbors offer, as such a standard, a specific provision of the Chester Zoning Regulations. Our inquiry regarding aesthetic impacts is thus limited to whether the court clearly erred in analyzing that zoning provision. If that provision constitutes "a clear, written community standard intended to preserve the aesthetics" of the area, and if the Project would violate it, the project's impact would be undue and it could not go forward. In re Times & Seasons, LLC, 2008 VT 7, ¶ 8, 183 Vt. 336, 950 A.2d 1189.

¶ 14. The statement at issue is a criterion that the town's development review board "should . . . consider[]" in reviewing applications for conditional-use permits: that "all construction of new buildings . . . adhere harmoniously to the over-all New England architectural appearance which gives the center of Chester its distinct regional character and appeal." Town of Chester Zoning Regulations, § 9.4(c)(4). The trial court did not determine whether this language provides a clear standard intended to preserve aesthetics because the court concluded that, even if it does, the Project would not violate it. We hold that the provision does not qualify as such a standard, so our inquiry stops there.

¶ 15. Assuming without deciding that such a discretionary factor could be a clear standard intended to preserve aesthetics, it must contemplate the actual aesthetics of the area, rather than some idealistic portrait. See In re Times & Seasons, LLC, 2008 VT 7, ¶ 8 (explaining that community standard must be intended to preserve aesthetics of area). The criterion refers to the "center of Chester"—a vague description that we will assume means the historic village center—but the Project is not located in the pedestrian-oriented village center; it is more than a half-mile away in a vehicle-oriented part of the town. We need not decide whether the reference to "over-all New England architectural appearance" in this provision would provide clear guidance if this project were in the historic village center. The Project's immediate surroundings—including a flat-roofed structure containing a gas station, mini market, and liquor store—and the entirety of diverse architecture in the area cannot be said to conform to a

discernible "New England architectural appearance." These conflicting architectural styles are evidence that the zoning criterion is not a clear community standard intended to preserve aesthetics, at least as applied to the area surrounding the Project. See In re Woodstock Cmty. Trust & Hous. Vt. PRD, 2012 VT 87, ¶ 33 n.8, 192 Vt. 474, 60 A.3d 686.

¶ 16. Because we reject neighbors' challenges based on Criteria 1(D) and 8, we affirm the environmental division's grant of an Act 250 permit amendment to Zaremba.

Affirmed.

FOR THE COURT:

Associate Justice

STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket No. 214-5-15 Frcv

In re: PABOCO MFO Permit NOV)

FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of a Stipulation of Settlement. Based upon that Stipulation it hereby ORDERED as follows:

1. The Vermont Agency of Agriculture, Food and Markets shall modify paragraph 1 of its December 5, 2014 Secretary's Order by reducing the administrative penalty imposed from $5,000.00 to $3,000.00. A copy of this Final Judgment Order shall be sufficient proof of modification of the December 5, 2014 Secretary's Order;
2. All terms, provisions and obligations of the December 5, 2014 Secretary's Order, except as modified by paragraph 1 above, are hereby AFFIRMED;
3. Appellant Paul Bourbeau/PABOCO Farm, Inc. waives any right to challenge the December 5, 2014 Secretary's Order in any future proceeding; and
4. The Parties shall bear their own costs and attorney's fees.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at St. Albans, Vermont this 2nd day of October, 2015.

Hon. Robert A. Mello
Franklin Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket No. 214-5-15 Frcv

In re: PABOCO MFO Permit NOV)

SETTLEMENT STIPULATION OF THE PARTIES

In order to resolve the above-captioned matter, the parties, Appellant, Paul Bourbeau/PABOCO Farms, Inc. and, Respondent, the State of Vermont Agency of Agriculture, Food and Markets ("the Agency") by and through Vermont Attorney General William H. Sorrell, hereby stipulate and agree as follows:

1. The Agency agrees to modify paragraph 1 of its December 5, 2014 Secretary's Order in *Agency Docket No. AAFM 2014-06-03-MF* (copy attached) by reducing the administrative penalty imposed from **$5,000.00** to **$3,000.00**. All other terms of the December 5, 2014 Secretary's Order shall remain unchanged.
2. Appellant agrees to be bound by the December 5, 2014 Secretary's Order subject to the modification described in paragraph 1 above, and shall waive any right to challenge the findings and requirements of the December 5, 2014 Secretary's Order in a future proceeding.
3. The Parties request that the Court may affirm the December 5, 2014 Secretary's Order subject to the modification described in paragraph 1 above.
4. The Parties shall bear their own costs and attorney's fees.
5. The Parties request that the Court may enter the attached Order as the final resolution of this matter.

DATED at Montpelier, Vermont this 10th day of September, 2015.

WILLIAM H. SORRELL

ATTORNEY GENERAL

By: _____

Robert F. McDougall
Diane Zamos
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Burlington, Vermont this 22nd day of September, 2015.

PAUL BOURBEAU
PABOCO Farm, Inc.

By: _____

Sean M. Toohey, Esq.
Lynn, Lynn, Blackman & Manitsky, P.C.
76 St. Paul St., Suite 400
Burlington, VT 05401
(802) 860-1500

116 STATE STREET
MONTPELIER, VERMONT
05620

OFFICE OF THE SECRETARY
TEL: (802) 828-1619
FAX: (802) 828-2361

Chuck Ross, SECRETARY

STATE OF VERMONT
AGENCY OF AGRICULTURE

December 5, 2014

Paul Bourbeau
PABOCO Farm, Inc.
1247 Dunsmore Road
Swanton, VT 05488

Docket # AAFM 2014-06-03-MF

Secretary's Order

This matter is before Deputy Secretary Diane Bothfeld, under delegated authority of Secretary Ross pursuant to 6 V.S.A. §1(a)(1) and 3 V.S.A.§253(c), to consider the merits of the Agricultural Resource Management Division's *Notice of Violation*. The *Notice* is incorporated by reference. It alleges a violation of Subchapter IV.D.7.m (i) of the Medium Farm Operation (MFO) General Permit which requires a 25' wide buffer of perennial vegetation between crop lands and the top of the bank of adjoining surface waters.

The *Notice* was served on June 21, 2014, by certified mail. The farm failed to request a hearing within 15 days, as required by the Notice, but instead of requesting a default, the Division contacted the farm numerous times beyond the 15 day timeframe to inquire if the farm wanted a hearing. The farm eventually asked for a hearing and a prehearing conference between the Division and Mr. Bourbeau was held on September 4, 2014.

On October 9, 2014, the Division informed the Secretary's Office that no settlement had been reached and a hearing on the merits of the *Notice* was needed. On or about November 3, 2014, the Secretary's Office issued a Notice of Administrative Hearing scheduling the case for hearing on November 25, 2014 at 2:00 PM in Montpelier.

PABOCO Farm's Request to Reschedule the Hearing

On the day of the hearing, Mr. Bourbeau e-mailed and asked that the hearing be rescheduled. I denied the request on the record, November 25, 2014, but am memorializing my decision here, too.

On November 25, 2014 at 6:38 am Mr. Bourbeau informed the Division via e-mail that "something has come up," and he would be unable to attend the 2:00 PM hearing. His e-mail, without being specific, said that he was working with a third party on many water quality

practices. The Division responded to Mr. Bourbeau's e-mail, with a copy to the Secretary's Office, saying the Division opposed postponing, would argue the reasons for its opposition to the Hearing Officer at 2:00 PM, but that ultimately it would be up to the Hearing Officer to decide whether or not to postpone the hearing.

Mr. Bourbeau responded to the Division's e-mail saying that another important meeting had been re-scheduled last minute due to weather issues from the week before and again said he would not be attending the hearing. The Division did not receive any other communication from Mr. Bourbeau.

At 2:00 PM, the Division presented the credible testimony of its Enforcement Coordinator Wendy-Houston Anderson who described the entire procedural timeline of the case, starting with the June *Notice*. The Division then made several arguments through its counsel as to why the case should not be postponed. These included: the amount of time the case has been pending (since June), the curious timing of Mr. Bourbeau's last minute e-mail (6:38 am the day of the hearing), the lack of specificity in his request, and no telephone call from Mr. Bourbeau with more information.

Ultimately, I was not persuaded that there was sufficient reason to postpone the hearing. The Division clearly communicated its position on the request to Mr. Bourbeau and he was aware the matter might go forward without him. The *Notice* was issued in June, the Division has tried to work with Mr. Bourbeau, but alleged water quality violations must receive prompt attention by all parties.

Merits of the *Notice*

After denying the request to postpone the hearing, I considered the merits of the *Notice* on November 25, 2014, at the Agency of Agriculture in Montpelier, even though Mr. Bourbeau was not present and did not have any other representative of PABOCO Farm, Inc. attend. Medium Farm Permit Coordinator Trevor Lewis, Assistant Division Director Laura DiPietro and Division Director Jim Leland testified for the Division, which was represented by legal counsel Assistant Attorney General Diane Zamos. In addition to testimony, the Division submitted documentary evidence, Exhibits 1 through 9.

My findings and conclusions are based on the credible testimony and evidence produced at the hearing.

Findings of Fact

The PABOCO Farm, Inc. is also known as Paul Bourbeau's farm and it currently operates under the Medium Farm Operations General Permit. Due to animal numbers, the farm is transitioning to a Large Farm Operation Permit with the Agency. In May of 2011 Division staff, including MFO Coordinator Trevor Lewis, visited the farm to determine if the ditch between fields 4 and 20 was a ditched stream. Based on their collective observations and experience, Division staff determined that the ditch was indeed a surface waterway of the state that required a 25 foot perennial vegetated buffer from the top of bank to cropland, under the MFO Permit.

Mr. Lewis called Mr. Bourbeau in June 2011 to follow up about the buffers but learned that corn had already been planted in fields 4 and 20, which have the ditched stream at the fields' edge. Mr. Lewis specifically told Mr. Bourbeau that the MFO Permit required the buffers and that the farm needed to plant them to achieve compliance with the MFO permit. Mr. Lewis communicated the Division's expectation that the buffers be seeded in the fall after the corn came off so that the buffers would be in place for the 2012 crop season.

In the fall of 2011, Mr. Lewis and Ben Gabos, CREP Coordinator, met with Mr. Bourbeau at the farm about the buffer requirement and available resources. Lewis and Gabos staked and flagged the required 25' foot buffer for Mr. Bourbeau the whole length of the ditched stream between fields 4 and 20, and the ditched stream along the backside of field 4. No one from the Division inspected the fields for buffers in either 2012 or 2013 to determine if the buffers had been established.

In connection with the farm's application for a Large Farm Operation Permit, Mr. Lewis inspected the farm's production area with Marli Rupe, CAFO permit Coordinator from Vermont's Department of Environmental Conservation in May 2014. Although field and buffer checks were not planned, as he was leaving the farm Mr. Lewis observed from the road that the vegetation along the ditched stream between fields 4 and 20 appeared inadequate. Mr. Lewis then walked the field on both sides of the ditch, from the road to the fields' end and back. He did not walk the entire length of the ditched area staked by both he and Ben Gabos in 2011. On the areas he did inspect, he periodically measured the vegetation from the top of bank of the ditched stream to the first corn row. Mr. Lewis also documented his inspection with photographs. Exhibits 1- 9.

The vegetation in the buffers was less than 25 feet. The width varied from 17 feet, closest to the road, to as little 9 feet, at the back of the field, furthest from the road. The vegetation within the 9-17 foot buffer was sparse, natural growth. It had not been purposefully seeded as perennial buffers. There were areas of channelization caused by run off erosion from the cultivated area of the corn field to the ditch in varying locations in fields 4 and 20. The pictures Mr. Lewis took show the limits of the previous year's corn harvest which means that the buffers measured in May 2014 were the same width as during the entire 2013 corn crop season.

The ditch adjacent to fields 4 and 20 is a channelized or ditched stream. It is a natural waterway that was straightened at some point after the 1940s by human land shaping activities. Based on its characteristic and the surrounding topography, the ditch has the potential to deliver sediment and other nutrients from field run off to Jewett Brook. The ditch adjacent to fields 4 and 20 is a tributary to Jewett Brook which then flows into the Lake. Jewett Brook, into which sediment and nutrient from fields 4 and 20 can flow via the ditches, is an impaired waterway.

Mr. Bourbeau has been aware since 2011 of the requirement that the ditches on these fields need 25' vegetated buffers. He is aware of the programs to assist farmers with cost-share of installing vegetated buffers.

On November 24, 2014, Mr. Lewis went to the farm to see if the 25' buffers had been planted after the 2014 corn crop was harvested. As of November 24, 2014, 25' buffers had not been established and there was no indication that any work, such as plowing, seeding, or the installation of a winter cover crop to serve as a "nurse crop" had been attempted on field 4 or field 20. The buffers were the same as they had been in May of 2014.

Fields 4 and 20 are maintained in permanent corn, according to the farm's recent Nutrient Management Plan (NMP). The area within the required 25' zone that was not properly buffered supported a corn crop during 2013 and during 2014. The cost to establish the required 25' vegetated buffers ranges, depending on the type of buffer installed. It can be as little as $0 per acre for naturally occurring vegetation or might cost $400.00 or $500.00 per acre for harvestable hay buffers.

Conclusion, Rationale and Order

Based on the credible evidence and my findings of fact, I conclude Paul Bourbeau's farm, PABOCO Farm, Inc., violated its Medium Farm Operation Permit by failing to install and maintain the required 25' foot perennial vegetated buffers, as measured from the top of bank to cropland and as alleged in the *Notice*.

A. Penalty Amount

A penalty is warranted for the violation of lack of adequate buffers on these fields at this farm, especially in light of the history. The Division recommended a penalty of $1,500.00 in its June 2014 *Notice*. At the hearing, the Division suggested that the passage of time since June 2014, the lack of corrective action after 2014 corn harvest, and the lateness of the season for any 2014 corrective planting, were facts and circumstances that might support a higher penalty. The Division did not, however, recommend a specific higher penalty amount.

The statute allows a $5000.00 maximum administrative penalty per water quality violation. 6 V.S.A. § 4860 (a). In determining the appropriate amount of penalty, the Secretary is guided by statutory criteria and is not bound by the Division's recommendation in the *Notice*. These statutory criteria include the degree of actual and potential impact on public health, safety and welfare resulting from the violation, the presence of mitigating or aggravating circumstances, the economic benefit gained by the violation, the deterrent effect of the penalty, and the financial condition of the violator. 6 V.S.A. § 15.

I conclude there has been actual harm to the environment. Sediment and nutrients have run off the field into the ditch, as shown by the channelization Mr. Lewis described, and the ditch flows to Jewett Brook and eventually into the Lake. Without adequate buffers, there is continuing potential for actual harm with every rain event and the spring snow melt. The farm has been aware of the requirement for 25' buffers since at least 2011 and yet these fields have not had adequate buffers during the last two cropping seasons. These are aggravating factors. The farm has gained an economic benefit by harvesting corn, for at least the last two cropping seasons, from acreage that should have had perennial buffer. There is cost share available for installing buffers. Milk prices have been strong during 2014 and this farm is transitioning to a

Large Farm Operation Permit. The penalty amount must serve as a deterrent to this farm and to other farms. Based on the facts and circumstances of this case as applied to the statutory criteria, I conclude that a $5000.00 penalty for the violation is appropriate.

B. Enforcement Remedy

The *Notice* required PABOCO Farm, Inc. to immediately establish a 25 foot wide buffer of perennial vegetation, measured from the top of the bank of the Jewett Brook tributary. The *Notice* was served June 21, 2014. As of November 24, 2014, the required buffers have not been established.

It is now too late in the growing season to for the farm to install a 25' vegetative buffer. It is interesting that Mr. Bourbeau's November 25, 2014 e-mail claims that the farm is working to implement as many water quality practices as possible yet buffers have not been installed. The *Notice* required immediate remedy, there is cost share available for buffers, and yet, despite the passage of another growing and harvest season, the farm continues to ignore the lawful requirement to have 25' buffers on these fields.

To ensure that the potential for additional harm to the environment is mitigated, and until the required 25' vegetated buffers are installed in the spring and are established well enough to function, I have decided that the farm must install a physical barrier/buffer, 25' from the top of the bank, as an erosion control measure along the full length of the ditched stream between field 4 and 20. This physical barrier/buffer can be a silt fence or other physical barrier that meets the Vermont DEC's standards for erosion control. The physical barrier/buffer shall be installed within 30 days of the date of this Order.

Order

1. A $5000.00 penalty is hereby imposed for PABOCO Farm Inc.'s violation of the Medium Farm Operation General Permit as alleged in the *Notice*.

2. Within 30 days, PABOCO Farm Inc. shall install a physical barrier/buffer that meets the Vermont's DEC standards for erosion control. It shall be installed 25' from the top of the bank along both sides of the ditched stream between field 4 and 20. The farm shall maintain the physical barrier/buffer until the required 25' vegetated buffers have been established to the satisfaction of the Division.

3. The Division shall inspect the ditched stream between fields 4 and 20 in 30 days and file a report in this docket with its findings.

4. The Division shall inspect all of the farm's fields for required buffers as soon as practicable in the spring of 2015.

So Ordered

Diane Bothfeld, Deputy Secretary
Agency of Agriculture, Food and Markets

Date 12/5/14

Appeal Rights

Any party aggrieved by a final decision of the secretary may appeal *de novo* to the superior court within 30 days of the final decision of the secretary. 6 V.S.A. § 4812 (c); 6 V.S.A. § 4860; 6 V.S.A. § 15(e).

(Please note: Failure to pay an administrative penalty or to cure an on-going violation may result in additional enforcement. See 6 V.S.A. §17; 6 V.S.A. § 4812(c).)

2016 VT 39

No. 2015-259

In re Waterfront Park Act 250 Amendment
(Alison Lockwood, Appellant)

Supreme Court

On Appeal from
Superior Court,
Environmental Division

December Term, 2015

Thomas G. Walsh, J.

Hans G. Huessy of Murphy Sullivan Kronk, Burlington, for Appellant.

Brian S. Dunkiel, Geoffrey H. Hand and Karen L. Tyler of Dunkiel Saunders Elliott Raubvogel & Hand, PLLC, Burlington, for Appellee City of Burlington.

William H. Sorrell, Attorney General, and Robert F. McDougall, Assistant Attorney General, Montpelier, for Appellee Vermont Natural Resources Board.

PRESENT: Skoglund, Robinson and Eaton, JJ., and Tomasi, Supr. J., and Morse, J. (Ret.), Specially Assigned

¶ 1. **ROBINSON, J.** This case requires us to apply Act 250 Rule 34(E), which establishes a framework for determining whether a party may seek to amend an Act 250 permit. Neighbor Alison Lockwood appeals from the Environmental Division's award of summary judgment to the City of Burlington. The Environmental Division ruled that the City is entitled to seek an amendment to its Act 250 permit covering the Waterfront Park located on the shores of Lake Champlain. We affirm.

¶ 2. The material facts are not substantially in dispute. In 1990, the City obtained a land-use permit for the Waterfront Park (the Park). The City hosted a number of events at the Park in the summer of 1993 and may have hosted others prior to that time. In December 1993, the City applied for an amendment to its permit to allow for hosting of festivals and public events at the Park. During the amendment process, the City argued against any express permit condition regarding the timing, duration, and frequency of events and sound levels, taking the position that the City Parks and Recreation Commission should regulate these matters. In February 1994, after considering the impact on neighboring residents caused by noise and traffic from events, the district commission granted the amendment and imposed twenty-six conditions, some of which related to the maximum sound levels associated with events at the Park, when and where to measure those sound levels, and the timing and number of events that could be held at the Park.

¶ 3. In August 2008, neighbor purchased her property located at 200 Lake Street, which is adjacent to the Park. Prior to purchasing the property, neighbor researched and read the 1994 Permit. In buying the property, she specifically relied on the permit conditions governing the timing and frequency of events at the Park and the maximum allowed sound levels. At the time of her purchase, neighbor was aware that festivals and events would take place at the Park, but she understood these events would be limited by the conditions in the permit. Neighbor is significantly impacted by the events and festivals. She experiences loud noise for extended periods of time, significant vehicular and pedestrian traffic congestion, and limits on her ability to sleep, spend time outdoors, open her windows, and enjoy her property.

¶ 4. Since the Park's inception, there has been significant residential and commercial development in and around the Park, including the Wing Building, Cornerstone Building, 40 College Street (seventy-eight condominiums), the Gateway building, Union Station, 200 Lake Street (sixteen condominiums), ECHO Center, Waterfront Housing, 300 Lake Street (rental

units), 60 Lake Street, Westlake Condominiums, Harbor Courtyard Marriott, Hilton Hotel renovations, and 180-188 Battery Street. In addition, festivals and events at the Park have become a central element of the City's and region's cultural life, as well as a central component of the City's downtown economic development strategy.[1] Collectively, the events attract over 185,000 visitors to the Park and the City's downtown, resulting in a substantial economic benefit to businesses in the area and the City as a whole.[2]

¶ 5. In 2013, the City Council adopted PlanBTV, which outlines the City's development goals for downtown Burlington and the waterfront. With respect to the Park, Plan BTV provides:

> Waterfront Park has been wildly successful as a place to host important cultural, civic, and athletic events that bring thousands of people to Burlington's waterfront each year. These events celebrate our community and lakefront, expose new people to the city, and generate millions of dollars for the local economy. The continued evolution of Burlington's waterfront into a mixed-use area that is active year-round will require a careful balance of competing demands. Waterfront businesses and residents need to embrace the important community role played by the park and its many events, while waterfront event planners and organizers need to be sensitive to the impacts that event noise, lighting, and traffic congestion has on their neighbors.

¶ 6. PlanBTV references and incorporates the Burlington Waterfront Revitalization Plan, approved in 1998, which calls for maximizing the use of the Park for festivals and special events and cautions that "the right of the public to use and enjoy the waterfront, including festivals, music and other noise producing activities must not be limited by development." Finally, the City's 2014 Municipal Development Plan emphasizes the importance of arts and

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[1] Signature events at the Park include: the Burlington Independence Day Celebration; Burlington First Night; Burlington Discover Jazz Festival; Key Bank Vermont City Marathon; Vermont Brewer's Festival; Dragon Boat Festival; Vermont Maritime Festival; USA Triathlon Championship; Penguin Plunge for the Special Olympics; and Lake Champlain Regional Chamber of Commerce Pumpkin Regatta.

[2] For example, the Key Bank Vermont City Marathon and the USA Triathlon generated approximately $8.14 million in local economic activity.

entertainment, as well as recreation and tourism, in expanding economic activity and enhancing the City's quality of life.

¶ 7. This case began in November of 2012 when the City filed an application with the district environmental commission to amend a number of conditions in the 1994 permit. Among the permit conditions the City sought to amend was Condition #19, which reads as follows:

> The following rules shall apply to events held in the park, unless the [City] secures written permission from the District Commission to change these rules.
>
> a) The park can be used for events for up to 27 days between May 27 to September 15.
>
> b) A maximum of 22 days may involve amplified music. Amplified music does not include music from acoustic instruments which is subsequently amplified.
>
> c) No more than 18 of the 27 days may be Saturdays and Sundays.
>
> d) Events may occur on no more than three consecutive weekends.
>
> e) Sound will not exceed 85 decibels, measured at the perimeter of the park nearest the source of the sound. Sound may not exceed 75 decibels measured at the eastern edge of Lake Street adjacent to any residential or commercial property.
>
> f) The cutoff time for amplified music will be 9:45 PM Sunday through Thursday and 10:45 PM on Friday and Saturday.

¶ 8. In its November 2012 application, the City proposed to eliminate the restrictions on dates, total days, and weekend days of events in the Park reflected in Condition #19(a)-(c). The City did not seek to amend Condition #19(d), limiting events to no more than three consecutive weekends. The City requested a detailed substitution for Condition #19(e), regulating maximum sound levels, requiring monitoring of sound levels during events, and

limiting sound levels during post-event strike times. And the City sought to extend the cutoff time for amplified sound, or loud motorized sounds authorized by an event permit, to 11:00 p.m.

¶ 9. The district commission granted the City's request and amended Condition #19 to delete 19(a)-(c), and to change the cutoff time in 19(f) to 11:00 PM. With respect to Condition #19(e), the district commission substituted the following provision regulating noise levels in the Park:

> Average equivalent sound levels ($Leq_{(event)}$) as measured on the sidewalk at a single point in front of the residences on Lake Street nearest to Waterfront Park shall not exceed the following limits over the course of a public event:
>
> - 74 dBA for events 0 to 2 hours in length
> - 71 dBA for events 2 to 4 hours in length
> - 69 dBA for events 4 to 6 hours in length
> - 68 dBA for events 6 to 8 hours in length
> - 55 dBA Leq and 70 dBA LAFmax for set up and strike down activities from 11:00 PM to 7 AM
> - 65 dBA Leq for set up and strike down activities from 7 AM to 11 PM
> - Independence Day and First Night firework events are exempt from the sound level thresholds. However, any other firework event must receive a permit amendment.
>
> Event length is calculated from opening of gates to closing of gates except for musical concerts when it is calculated from start of amplified music to end of amplified music. Night time is defined as 11 PM to 7 AM for event or festival times.[3]

The district commission also established noise monitoring requirements.

¶ 10. Neighbor appealed the amended land-use permit to the Environmental Division pursuant to 10 V.S.A. § 8504. On appeal before the Environmental Division, the City and neighbor filed cross motions for summary judgment on the threshold question of whether the

[3] The district commission's original order set slightly different parameters on sound levels. In response to subsequent motions, the commission revised its original order and permit to provide more clarification.

City was entitled to request the amendments to the 1994 Permit under Act 250 Rule 34(E).[4] See Code of Vt. Rules 12-004-060. The Environmental Division granted the City's motion, and denied neighbor's, concluding on the basis of the undisputed evidence that the City had satisfied the threshold requirements for seeking a permit amendment reflected in Rule 34(E). The parties subsequently stipulated to several revisions to the amended permit that are not directly at issue here, and withdrew all of their respective statements of questions not previously decided by the Environmental Division—essentially stipulating that if the City was entitled to seek to amend the permit conditions, the amended permit satisfies the requirements of Act 250. Neighbor now appeals the Environmental Division's ruling on the threshold question of whether the City was entitled to request the permit amendment under Rule 34(E).

¶ 11. The sole issue on appeal is whether the 2013 Amendment violated Act 250 Rule 34(E). Rule 34(E) was codified after we issued our decision in In re Stowe Club Highlands, 166 Vt. 33, 687 A.2d 102 (1996). In that case, this Court considered the circumstances under which permit conditions may be modified. Id. at 37, 687 A.2d at 105. We validated the Environmental Board's framing of the discussion as "weighing the competing values of flexibility and finality in the permitting process." Id. at 38, 687 A.2d at 105. On the "flexibility" side of the ledger, we noted, "If existing permit conditions are no longer the most useful or cost-effective way to lessen the impact of development, the permitting process should be flexible enough to respond to the changed conditions." Id. We acknowledged that "changes in factual or regulatory circumstances beyond the control of the permittee," unforeseeable changes in the "construction or operation of the permittee's project," and "changes in technology" were among the kinds of changes to be considered. Id. On the "finality" side, we acknowledged that "parties and other interested

[4] The Natural Resources Board (NRB) intervened in September 2014 pursuant to 10 V.S.A. § 8504(n)(3). After intervening, the NRB moved for summary judgment essentially supporting the City's position. On appeal, the NRB advocates that we affirm the Environmental Division's award on largely the same grounds as the City. Accordingly, we consider the NRB's motion in conjunction with the City's motion.

persons rely on permit conditions designed to mitigate the impact of proposed developments." Id. at 39, 687 A.2d at 106. This Court deferred to the Board to develop more specific standards to guide applications for permit amendments. Id. at 38, 687 A.2d at 105.

¶ 12. The Board did adopt more specific standards in Act 250 Rule 34(E). That Rule, which lays out what it identifies as the "Stowe Highlands Analysis," provides:

> (1) In reviewing any amendment application, the district commission shall first determine whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.
>
> . . .
>
> (2) In reviewing an application seeking to amend a condition that was included to resolve an issue critical to the issuance of the applicable permit, the district commission shall consider whether the permittee is merely seeking to relitigate the permit condition or to undermine its purpose and intent.
>
> (3) If the application proposes to amend a permit condition that was included to resolve an issue critical to the issuance of a permit and is not merely seeking to relitigate the permit condition, the district commission shall apply the balancing test set forth in subsection (4) below. If the . . . need for finality outweighs the need for flexibility, the district commission shall deny the permit amendment application. In the alternative, the district commission may rule in favor of flexibility.
>
> (4) In balancing flexibility against finality, the district commission shall consider the following, among other relevant factors:
>
> (a) changes in facts, law or regulations beyond the permittee's control;
>
> (b) changes in technology, construction, or operations which necessitate the need for an amendment;
>
> (c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition;
>
> (d) other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans;

(e) manifest error on the part of the district commission, the environmental board, or the environmental court in the issuance of the permit condition; and

(f) The degree of reliance on prior permit conditions or material representations of the applicant in prior proceeding(s) by the district commission, the environmental board, the environmental court, parties, or any other person who has a particularized interest protected by 10 V.S.A. Ch. 151 that may be affected by the proposed amendment.[5]

¶ 13. Neighbor makes two arguments with respect to Rule 34(E).[6] First, neighbor challenges the trial court's conclusion that the City was not merely trying to relitigate Condition #19. Second, neighbor contends the trial court did not properly balance finality with flexibility.

¶ 14. We review the trial court's summary judgment ruling anew and without deference, applying the same standard as the Environmental Division. In re Times & Seasons, LLC, 2011 VT 76, ¶ 8, 190 Vt. 163, 27 A.3d 323.[7]

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[5] In December 2015, the Act 250 Rules were amended, and subsection (2) of Rule 34(E) was deleted. The NRB indicated in its explanation of the amendments that the "mere relitigation" test in subsection (2) requires consideration of the factors in the balancing test contained in what was formerly subsection (4). In deciding this dispute, we rely on the prior version of Rule 34(E), because this was the version of the rule in effect at the time of the dispute. As a consequence, our two-step analysis under the prior version of the rule relies on largely overlapping considerations.

[6] Neither party challenges the trial court's finding that Condition #19 was critical to the issuance of the 1994 Permit. Therefore, we assume that criterion has been satisfied.

[7] We note that the proper standard of review is not entirely clear. Although the trial court resolved this matter on summary judgment, its decision refers to various undisputed facts as "findings of fact," and on appeal the parties reference the trial court's factual findings. The City argues that we should review the trial court's determination deferentially, and at oral argument, neighbor acknowledged that this case is more akin to a ruling on the merits based on stipulated facts. Whether applying the Act 250 Rule 34(E)(4) balancing test to the undisputed facts is an application of the law that is subject to non-deferential review or an exercise of factfinding subject to deference is an open question. Compare Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1170, 1173-83 (9th Cir. 2012) (applying de novo review to trial court's summary judgment based on balancing of factors under fair use defense to copyright infringement) and Gregory v. Beazer East, 892 N.E.2d 563, 578 (Ill. App. Ct. 2008) (explaining that trial court's choice-of-law determination is reviewed de novo because "the task of evaluating and balancing the choice-of-law factors . . . is a matter of law rather than [] of fact"), with Crum & Forster

I. Relitigation of Prior Permit

¶ 15. Neighbor argues the trial court erred in concluding the City was not merely trying to relitigate Condition #19 because in connection with the 2012 application to amend the permit the City relied on circumstances it knew or could have foreseen back in 1994.

¶ 16. We have recognized that requests to amend permits on the basis of small or moderate changes in circumstances are ordinarily disfavored, while amendment applications based on more extreme changes may not be. In Stowe Club Highlands, we stated: "Permit applicants should consider foreseeable changes in the project during the permitting process, and not suggest conditions that they would consider unacceptable should the project change slightly. Otherwise, the initial permitting process would be merely a prologue to continued applications for permit amendments." 166 Vt. at 39, 687 A.2d at 106. We further explained that, "while small or moderate changes are expected and even common, extreme changes will likely come as a surprise to all involved." Id. at 39, 687 A.2d at 106.

¶ 17. We conclude that the changes in and around the Park since 1994 have been so extensive that it would be improper to characterize the City's application as a mere effort to relitigate the 1994 permit, or to undermine the purposes of the conditions in that permit. In 1994, the City did have plans for development in and around the Park. At the time of the 1994 Permit proceedings, the City noted: "[T]he Waterfront is an extremely dynamic area at this point in time. There is no question that there will be an expansion of both commercial and residential development in the area." However, the evolution and realization of the City's goals has led to a

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Specialty Ins. Co. v. Creekstone Builders, Inc., __ S.W.3d. __, __, 2015 WL 6488276, at *4 (Tex. App. 2015) (holding that when trial court has considered all relevant factors in its forum non conveniens analysis, "the court's ruling deserves substantial deference," and appellate court should not conduct de novo review "by reweighing each of the factors" (quotation marks omitted)). Because we reach the same conclusion as the trial court even affording its ruling no deference, the resolution of this case does not turn on the applicable standard of review.

transformation that cannot be characterized as "small or moderate." Stowe Club Highlands, 166 Vt. at 39, 687 A.2d at 106.

¶ 18. Since the Park's inception, it has undergone dramatic changes, with such notable additions as the ECHO Lake Aquarium and Science Center, Union Station, and Main Street Landing. At the time of the 1994 permit proceedings, the City had only just begun to use the Park as a venue for public events. Since that time, the Park has grown from hosting thirteen events in the summer of 1993, to hosting multiple events throughout the year, generating millions of dollars in local revenue and drawing over 185,000 visitors to the Park and downtown Burlington. Festivals and other events at the Park have become a central element of City and regional cultural life, and most City residents have identified increasing the number of events in the Park as a top priority. The City's plans to grow and support the downtown economy depend in part on increasing public use of the Park, including hosting events all four seasons of the year. In short, the changes to the Park have been anything but "expected and common." Id.

¶ 19. As the trial court correctly observed, "[f]oresight alone does not overcome the conclusion" that circumstances might change to such a degree that an amendment is warranted. The fact that the City had ambitious aspirations for the Park in 1994 does not render the realization of its goals a "moderate change[]" and foreseeable outcome. Stowe Club Highlands, 166 Vt. at 39, 687 A.2d at 106. The City hoped for a robust waterfront that would serve as a focal point for the community and the region. The extent of its success in achieving these hopes was not so foreseeable at the time of the 1994 Permit that the City was forever precluded from seeking amendments to the permit if its hopes were realized. We agree with the Environmental Division's conclusion that in seeking to amend the permit, the City is not merely seeking to relitigate matters resolved in 1994.[8]

[8] We note several factors that support the Environmental Division's conclusion on this point with respect to the regulation of sound levels in particular. As noted more fully below,

II. Balancing Finality and Flexibility

¶ 20. Neighbor also argues that Environmental Division incorrectly balanced the need for flexibility over finality in concluding that an amendment to Condition #19 was warranted and that each of the pertinent factors weighs in favor of affirming the finality of the 1994 permit.

¶ 21. Although we conclude that one factor—others' reliance on the prior permit conditions—weighs in favor of finality, we agree with the trial court that the weight of the relevant factors tips in favor of flexibility in this case.

¶ 22. The first three factors—relating to intervening changes, including changes in facts, laws, technology, and innovative design between when Condition #19 was imposed and when the permit amendment was requested—favor flexibility. See Act 250 Rule 34(E)(4)(a)-(c). Two main categories of changes support the City's request to revisit the condition.

¶ 23. One set of changes, already described more extensively above, involves changes in the City's use of the Park and in the number and location of surrounding residential and commercial structures. Given the extent of these changes, and the more central role that the Park has come to play in the social, cultural, and economic life of the City, we agree with the Environmental Division that it is appropriate to revisit whether Condition #19, including its limitations on the number and times and dates of events, is the most effective way to mitigate any adverse impacts events at the Park may cause.

¶ 24. We reject neighbor's argument that these changes carry no weight because they were not beyond the City's control. As noted above, although the City planned for a robust Park, successful realization of that plan required a confluence of different factors, including intense community engagement, investment by private developers, and the efforts of myriad event

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Condition #19(e) was inherently ambiguous insofar as it did not indicate the method by which the sound levels were to be measured. Moreover, significant developments in the measurement and regulation of sound levels, and in scientific understanding of the health effects of varying sound levels, support the conclusion that the City's 2012 amendment application did not merely seek a second bite at the apple on this issue. See infra, ¶ 26.

planners and guests who helped transform the Park into a social, cultural and recreational focal point for the City.

¶ 25. Another set of changes supporting consideration of the City's application to amend Condition #19 involves the regulation and measurement of sound levels. The limitations in the 1994 permit are ambiguous; although they restrict sound to eighty-five decibels at the perimeter of the Park nearest the source of the sound and seventy-five decibels at the eastern edge of Lake Street adjacent to any residential or commercial property, they do not specify whether the restrictions limit the instantaneous decibel readings, or the average. See In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 77, __ Vt. __, 121 A.3d 630 (recognizing distinction between Lmax measurement, which measures instantaneous noise, and Leq(n), which measures maximum noise level averaged over a period of time (n)). At a minimum, the ambiguity in the prior permit condition called for clarification. Moreover, adoption of the proposed Leq_{event} metric (equivalent continuous sound pressure level over the course of the event) and the LAfmax metric (maximum fast-response sound pressure) would allow comparison with community noise guidelines published by the World Health Organization (WHO). These WHO guidelines, published in 2000, provide a scientific basis for ascertaining noise levels that cause "serious annoyance" and "sleep disturbance." These guidelines were not available in 1994, and they form the basis for the City's proposed amendments to Condition #19(e).[9]

¶ 26. The fourth factor, focusing on policy considerations, "including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans," most

[9] In her reply brief, neighbor argues against the merits of the City's proposed amendments to the sound restrictions in the 1994 permit on the basis that the proposed amendments do not further mitigate the sound impacts of events in the Park but instead allow for higher levels of noise. We do not address the question of whether the City's proposed sound limits are sufficient to mitigate any otherwise undue adverse noise impact from events in the Park pursuant to Act 250 standards. The question before us, and the only question we resolve in this decision, is whether, under Rule 34(E), the City is entitled to seek an amendment of the condition.

strongly supports flexibility in this case. Act 250 Rule 34(E)(4)(d). As noted above, the City's plans call for maximizing the use of the Park for festivals and special events. The fact that the property in question is publicly owned, and is dedicated to public use, further enhances the weight assigned to this factor.

¶ 27. The fifth factor—manifest error in the original permitting process—is a wash. Act 250 Rule 34(E)(4)(e). There is no evidence of any "manifest error" on the part of the district commission in issuing the 1994 permit. Act 250 Rule 34(E)(4)(e). On the other hand, as noted above, Condition #19(e) contained ambiguities that merited clarification.

¶ 28. The final factor—reliance by others on the terms of the permit—points in favor of finality. See Act 250 Rule 34(E)(4)(f) (citation omitted). Neighbor, and no doubt others who live by the Park, have relied on the prior permit conditions, including the limits on the frequency and dates of events and on sound levels. The City's proposed changes will unquestionably affect neighbor's interests. On appeal, the City argues that the following language in Condition #19 renders any reliance by neighbor unreasonable: "The following rules shall apply to events held in the Park, unless the permittee secures written permission from the District Commission to change these rules." The fact that permit conditions may be amended does not mean neighbors cannot ever reasonably rely on the conditions in a permit. As we noted in Stowe Club Highlands, "parties and other interested persons rely on permit conditions designed to mitigate the impact of proposed developments." 166 Vt. at 39, 687 A.2d at 106. While this reliance does not defeat any proposed amendment, it is factor in the balance. As in Stowe Club Highlands, neighbor benefitted from Condition #19, and it was reasonable for her to rely on Condition #19 in purchasing her home. Id. at 40, 687 A.2d at 106-07.

¶ 29. On balance, and for the reasons set forth above, we agree with the Environmental Division's conclusion that the factors supporting flexibility in this case outweigh those calling for finality. The Park has been a dynamic resource to the City, and its increased use has been

and will continue to be important to the City's cultural, recreational and social life, and its prosperity. While neighbor's reliance on the prior permit limitations carries some weight, in this case it is outweighed by other factors so that it is not unreasonable to consider proposed amendments to the permit.[10]

Affirmed.

FOR THE COURT:

Associate Justice

[10] Having found that Rule 34(E) does not preclude the City from seeking an amendment, we do not address the City's argument that neighbor is precluded from challenging the City's ability to seek a permit amendment on account of a settlement and stipulation reached between the parties in a related matter.

2016

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1279 **September Term, 2015**

NRC-80FR35992

Filed On: February 8, 2016

State of Vermont, et al.,

Petitioners

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

Entergy Nuclear Vermont Yankee, LLC and
Entergy Nuclear Operations, Inc.,
Intervenors

BEFORE: Henderson, Rogers, and Srinivasan, Circuit Judges

ORDER

Upon consideration of the motion to dismiss for lack of jurisdiction, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The petition for review is "incurably premature" and must be dismissed for lack of jurisdiction. See Bellsouth v. FCC, 17 F.3d 1487 (D.C. Cir. 1994); Tennessee Gas Pipeline v. FERC, 9 F.3d 980 (D.C. Cir. 1993). Once the Nuclear Regulatory Commission has resolved petitioners' pending request for Commission review, see NRC Dkt. No. 50-271, they may file a petition for judicial review of the resulting order, as well as the NRC Staff's prior order, see Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) ("[T]he party that . . . sought administrative reconsideration may, if reconsideration is denied, challenge that denial as well as the agency's original order by filing a timely petition for review of both orders.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

FEB 12 2016

2016 VT 20

SUPREME COURT DOCKET NO. 2015-168

SEPTEMBER TERM, 2015

In re Treetop Development Company Act 250 Development (Treetop at Stratton Condominium Association, Inc., Appellant)	}	APPEALED FROM: Superior Court, Environmental Division DOCKET NO. 77-6-14 Vtec

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

Affirmed.

FOR THE COURT:

Harold E. Eaton, Jr., Associate Justice

Concurring:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Timothy B. Tomasi, Superior Judge,
Specially Assigned

Alden T. Bryan, Superior Judge (Ret.),
Specially Assigned

2016 VT 20

No. 2015-168

In re Treetop Development Company Act 250 Development
(Treetop at Stratton Condominium Association, Inc., Appellant)

Supreme Court

On Appeal from
Superior Court,
Environmental Division

September Term, 2015

Thomas G. Walsh, J.

A. Jay Kenlan of Kenlan, Schwiebert, Facey & Goss, P.C., Rutland, for Appellant.

Lisa B. Shelkrot of Langrock Sperry & Wool, LLP, Burlington, for Appellees.

William H. Sorrell, Attorney General, and Gavin J. Boyles and Scot L. Kline, Assistant Attorneys General, Montpelier, for Natural Resources Board.

PRESENT: Dooley, Skoglund and Eaton, JJ., and Tomasi and Bryan (Ret.), Supr. JJ., Specially Assigned

¶ 1. **EATON, J.** This appeal is the latest chapter in an ongoing dispute between the Treetop at Stratton Condominium Association, Inc. (Association) and the Stratton Corporation, Treetop Development Company, LLC, Treetop Three Development Company, LLC, and Intrawest Stratton Development Corporation (collectively, Stratton) over an improperly constructed stormwater management system. The pending matter follows the Association's appeal of the District 2 Environmental Commission's (Commission) refusal to impose additional

conditions on Stratton's Act 250 permit, which the Environmental Division of the Superior Court determined to be invalid and unenforceable. For the reasons stated herein, we affirm.

¶ 2. On November 18, 2002, the District 2 Environmental Commission issued Act 250 Permit #2W1142 to Stratton for the construction of twenty-five three-unit townhouses (the Treetop Project) in the Town of Stratton, Vermont. Included in the Act 250 permit was approval for the development and construction of the infrastructure required for the occupancy, use, and management of the Treetop Project and associated infrastructure, including a stormwater management system.

¶ 3. A Stratton Corporation affiliate, the Treetop Development Company, LLC, completed construction of the Treetop Project in 2006, at which point all seventy-five townhouses were sold and conveyed to third-party owners. Each individual owner acquired an undivided percentage interest in the Treetop Project's common areas and facilities, including the stormwater management systems, which were managed and administered by the Association.

¶ 4. In response to problems with the stormwater management system, the Association filed suit against Stratton in 2009 seeking damages and remediation for various construction defects in the Treetop Project, including those involving the stormwater management system. The parties ultimately reached a settlement agreement, which, relevant to this appeal, required Stratton to apply for and obtain corrective permit amendments and pay for any work necessary to bring the stormwater management aspects of the Treetop Project into compliance with its Act 250 permit. On August 13, 2012, Stratton filed an application with the Commission to amend its Act 250 permit to reflect deviations from the original permit, specifically "to authorize changes in the original as-built plans to the permit plans submitted." These changes included repairs and

modifications to the stormwater management system necessary to fix leaks and seepage and to bring the system into compliance with the terms of General Permit 3-9010.[1]

¶ 5. In its Findings of Fact and Conclusions of Law, the Commission expressed its concern over Stratton's "failure to build its stormwater system in compliance with its prior permits." The Commission conceded that "[w]hile Stratton's plan is not the only way to [correct significant stormwater problems], it is the plan on the table[,] . . . [and it] has been approved by the Agency of Natural Resources and is implementable immediately." Emphasizing the importance that "the water quality and safety issues be resolved satisfactorily as soon as possible," the Commission concluded that "issuing a permit with conditions is the most effective way to achieve this outcome." The Commission provided that it would add "protections in the permit to ensure that solutions proposed by Stratton are effective in addressing the problems," and that it would "retain jurisdiction over these matters." In its conclusion, the Commission found that the Treetop Project would be in compliance with Act 250 criteria if it was "completed and maintained as represented in the application and other representations of the Applicants, and in accordance with the findings and conclusions of this decision and the conditions [herein]."

¶ 6. Following a decision by the Commission on October 21, 2013 to approve Act 250 Permit #2W1142-D (amended permit) with conditions, both Stratton and the Association moved to alter and amend the amended permit. After making minor changes, the Commission issued a Memorandum of Decision on November 15, 2013, granting the amended permit. The amended permit included several conditions, including conditions that required Stratton to repair the stormwater retention pond pursuant to approved plans on or before September 1, 2014, and to

[1] The Treetop Project's stormwater management system was originally approved under Stormwater Discharge Permit #1-1537. That permit expired on August 28, 2007 and was replaced by General Permit 3-9010, authorizing previously permitted stormwater discharges to waters that are not principally impaired by stormwater runoff. General Permit 3-9010, issued under the State Stormwater Permit Program, requires Stratton to correct any deficiencies in the stormwater management system resulting from substantial deterioration.

provide weekly reports on the progress of the repairs until completion. By that time of year, however, the weather made further site work impossible. Relevant to this appeal, permit Condition 14 provided:

> The Commission reserves the right to review erosion, the ability of the land to hold water, stormwater management and revegetation issues outlined in these proceedings and to evaluate and impose additional conditions as needed.

(Emphasis added.). Importantly, neither party appealed the amended permit, which became final and binding on December 15, 2013.

¶ 7. In January 2014, the Association provided the Commission with information about the status of the stormwater management system, including a letter from Stratton's engineer, plans for remediation dated December 13, 2013, and the Association's response to those filings. Shortly thereafter, on February 7, 2014, the Commission issued a Notice of Reconvened Hearing on the amended permit. The notice was issued pursuant to the authority the Commission reserved unto itself under Condition 14 and indicated the Commission's intent to discuss whether additional conditions were necessary to address problems with the stormwater management system. Following hearings, the Commission issued a Memorandum of Decision on May 16, 2014 "declin[ing] to impose additional permit conditions with respect to [the amended permit]," and affirming the "adequacy of the conditions of the permit, which was not appealed." The Commission also noted that, "given there is an active enforcement action [underway] by both [the Agency of Natural Resources] and the [Natural Resources Board], we are assured that there will be oversight regarding compliance with the relevant state requirements, including conditions of [the amended permit], which were not appealed."[2]

[2] The enforcement action, Docket No. 106-7-14 Vtec, was initiated on April 21, 2014, when the Natural Resources Board (NRB) and Stratton filed a proposed Assurance of Discontinuance. The Association was subsequently granted limited rights to intervene in the

¶ 8. The Association timely appealed the Commission's May 16, 2014 Memorandum of Decision declining to impose further conditions on Stratton to the Environmental Division of the Superior Court. Stratton then moved to dismiss the appeal, alleging that the questions raised on appeal were either collateral attacks on the unappealed amended permit or outside the scope of the Environmental Division's de novo review. On November 14, 2014 the Environmental Division dismissed the appeal, finding, relevant to the matter now before this Court, that:

> [t]he sole purpose of Condition 14 is to ensure compliance with the initial Permit and Permit Amendment. This authority does not belong to the Commission. Rather, it rests with the Natural Resources Board's authority to ensure compliance with an Act 250 Permit and its conditions through its enforcement powers . . . the Association cannot use Condition 14 to privately enforce the Permit or Permit Amendment.

Treetop Dev. Co. Act 250 Application, No. 77-6-14 Vtec, slip op., at 3 (Envtl. Div. Vt. Sup. Ct. Nov. 14, 2014), https://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx (citations omitted). The Environmental Division also later denied the Association's motion for relief from judgment, in which the Association claimed that the Environmental Division acted outside its authority in concluding that Condition 14 was unenforceable because the amended permit was not appealed. Treetop Dev. Co. Act 250 Application, No. 77-6-14 Vtec, slip op., at 3 (Envtl. Div. Vt. Sup. Ct. Mar. 25, 2015), https://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx. In response, the Environmental Division noted that "[i]t would be irrational to read the Commission's decision on the [amended permit] as granting an Act 250 permit despite insufficient findings of compliance with Act 250," and that "a district commission simply cannot use a permit condition to reserve the authority to reopen a final and binding Act 250 permit sua sponte in order to enforce the permit or impose conditions." Id. The

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matter, as allowed by 10 V.S.A. § 8020. That matter is currently ongoing before the Environmental Division.

Environmental Division further provided that "[t]he injustice alleged by the Association stems from its free, calculated, and deliberate choice not to take an appeal" from the amended permit. Id.

¶ 9. This appeal from the Environmental Division's decision followed. Our review of "issues of law or statutory interpretation is de novo." In re Vill. Assocs. Act 250 Land Use Permit, 2010 VT 42A, ¶ 7, 188 Vt. 113, 998 A.2d 712. De novo review allows this Court to proceed with a nondeferential, on-the-record review. See In re Gulli, 174 Vt. 580, 582, 816 A.2d 485, 488 (2002) (mem.) ("Questions of law are reviewed de novo, allowing us to proceed with a nondeferential, on-the-record review.").

¶ 10. The Association alleges that the Environmental Division erred in granting Stratton's motion to dismiss the appeal because Condition 14 is a valid and enforceable permit condition reserving jurisdiction over the stormwater system at the Treetop Project and allowing the Commission to amend or add conditions as necessary to bring the system into compliance with Act 250. The Association also asserts that it based its decision not to appeal the amended permit on the Commission's reservation of authority to impose further conditions in order to ensure the stormwater management system's compliance with Act 250, and that Stratton's motion to dismiss is a collateral attack on Condition 14. Stratton, on the other hand, contends that under the Association's view, Condition 14 amounts to a key that can be used to re-open the door to amend the permit at any time and impose additional conditions, preventing finality. Both Stratton and the NRB argue that Condition 14 is an unenforceable condition subsequent and that the Association's appeal is a collateral attack on the amended permit.[3] We find that condition 14

[3] Although this Court recently addressed an Act 250 permit subject to conditions reserving jurisdiction over traffic congestion and safety impacts in In re Champlain Parkway Act 250 Permit, 2015 VT 105, ¶ 1, ___ Vt. ___, ___ A.3d ___, we have yet to specifically address the Commission's discretion to impose conditions that reserve jurisdiction over a project, either in part or in its entirety, after making affirmative findings under the relevant criteria. In

is invalid and affirm the Environmental Division's decision, rendering Condition 14 unenforceable.

¶ 11. Act 250, codified at 10 V.S.A. §§ 6001 through 6093, was enacted "to protect Vermont's lands and environment by requiring statewide review of 'large-scale changes in land utilization.' " In re Audet, 2004 VT 30, ¶ 13, 176 Vt. 617, 850 A.2d 1000 (mem.) (quoting Comm. to Save Bishop's House, Inc. v. Med. Ctr. Hosp. of Vt., Inc., 137 Vt. 142, 151, 400 A.2d 1015, 1020 (1979)). To that end, it falls to the nine District Environmental Commissions to consider Act 250 permit applications and amendments in the context of the ten statutory criteria listed in 10 V.S.A. § 6086(a). The Commissions may approve or deny any such applications, although approval requires that the Commissions make affirmative findings under all ten statutory criteria before issuing a permit. See In re SP Land Co., LLC, 2011 VT 104, ¶ 25, 190 Vt. 418, 35 A.3d 1007 (Act 250 "[r]ule 21 mandates that a permit may issue only when positive findings of fact and conclusions of law have been made under all criteria and subcriteria. It follows, therefore, that findings of fact and conclusions of law on only some criteria—but not all—are not equivalent to a permit."). Any changes to the permit or the conditions therein must be made pursuant to the formal permit amendment procedure outlined in the Act 250 Rules. Appeals of the Commission's decision, including decisions approving or denying a permit or the conditions therein, must be filed within thirty days of the date of the decision. 10 V.S.A. § 8504(a).

¶ 12. In order to ensure continued compliance with the statutory criteria, the Commission is entitled to grant conditional approval by imposing reasonable conditions on a

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Champlain Parkway, the Environmental Division found that the project might, rather than would, cause unreasonable traffic congestion and imposed conditions requiring future monitoring and reporting as well as conditions reserving the Commission's jurisdiction over the matter. Id. ¶ 12. Neither party challenged the condition, and this Court did not consider the court's authority to impose conditions in the absence of an actual affirmative finding. Id. ¶ 12 n.3.

project. See id. § 6086(c); Act 250 Rule 32(A), 6 Vt. Code of Rules 16-5-200, available at https://perma.cc/VJ7H-YRPU). Permissible conditions include those with prospective application that are intended to alleviate adverse impacts that either are or would otherwise be caused or created by a project, or those necessary to ensure that the development is completed as approved, such as those requiring permittees to take specific action when triggered by certain events, incorporating a schedule of actions necessary for continued compliance with Act 250 criteria, and requiring future compliance related filings, including affidavits of compliance with respect to certain permit conditions. See, e.g., In re North East Materials Grp. LLC Act 250 JO #5-21, 2015 VT 79, ¶ 27, ___ Vt. ___, 127 A.3d 926 ("[P]ermits are frequently issued with conditions and requirements mitigating the impact of particular development"); In re R.E. Tucker, Inc., 149 Vt. 551, 557-58, 547 A.2d 1314, 1318-19 (1988) (approving condition in land use permit placing limitations on where gravel crusher could be located within tract because severity of noise pollution depended on placement). For example, this includes conditions limiting development to areas of land subject to Act 250 jurisdiction, establishing hours of operation, directing the placement of specific machinery, and requiring reclamation following completion of a project.

¶ 13. The power to enforce compliance with Act 250 permits and the underlying conditions is vested exclusively in the NRB and the Agency of Natural Resources (ANR), and not with the Commission. See 10 V.S.A. § 6027(g) (authorizing NRB to "initiate enforcement" of Act 250 permits and to "petition the Environmental Division for revocation" of Act 250 permits for, among other things, "noncompliance with any permit or permit condition."); id. § 8003 (stating that NRB has discretion to institute enforcement actions); id. § 8004 (providing that NRB and ANR act cooperatively to enforce Act 250). It therefore falls to the NRB, and not

the Commission, to determine whether violations of Act 250, or permits issued thereunder, exist and to exercise the discretion granted under 10 V.S.A. § 6027(g) to initiate enforcement actions.[4]

¶ 14. By its terms, Condition 14 reserves continuing jurisdiction over the stormwater system at the Treetop Project, creating for the Commission a mechanism to continuously amend the permit as necessary to redress future Act 250 violations or failures under the terms of the approved project by adding additional conditions. Not only does this exceed the Commission's authority, which is limited to considering permit applications in the context of the ten statutory criteria and either approving or denying the application, and amending permits under the procedure outlined in In re Stowe Club Highlands, 166 Vt. 33, 37, 687 A.2d 102, 105 (1996), but it prevents finality, an integral part of the land use permitting process. Furthermore, unlike a condition with prospective application intended to alleviate adverse impacts, Condition 14 allows the Commission to circumvent the requirement that projects which have been permitted satisfy the statutory criteria and prospectively expropriate the NRB's enforcement authority, effectively creating a de facto mechanism of internal enforcement for the Commission. This reservation of extra-statutory authority renders the Commission's permit approval illusory, simultaneously approving stormwater system remediation under a set of parameters and reserving the authority to alter these parameters at any time, including when necessary to correct violations of Act 250. Such an open-ended condition, effectively endowing the Commission with the prospective extra-statutory authority to re-open the amended permit and perpetually act, is an invalid condition subsequent. [5]

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[4] As indicated above, enforcement proceedings against Stratton were initiated by the NRB on April 21, 2014, and the Association was subsequently granted limited rights to intervene in the matter as an interested party. While interested parties may participate in enforcement proceedings, they are without the right to initiate such proceedings or raise additional violations.

[5] Although not binding precedent in this Court, we note that the former Environmental Board likewise found conditions subsequent to be impermissible substitutions for affirmative

¶ 15. Although the permit itself was unappealed, and is therefore final and binding on the parties, this does not make Condition 14 enforceable. In our discussions of the failure to appeal zoning permits, this Court has consistently held that the parties are bound by the terms of the permit, even where the municipal body's actions in granting the permit exceeded their authority. See City of S. Burlington v. Dep't. of Corrections, 171 Vt. 587, 588-89, 782 A.2d 1229, 1230 (2000) (mem.) (binding permitee following untimely challenge to validity of zoning permit condition where municipal body lacked jurisdiction over permitee due to sovereign immunity); Levy v. Town of St. Albans, 152 Vt. 139, 142, 564 A.2d 1361, 1363 (1989) (binding permitee following untimely challenge to validity of zoning permit where administrator who issued permit lacked authority to do so). Condition 14, however, does not merely bind the parties to the terms of the amended permit; rather, it seeks to prospectively expand the Commission's authority to include enforcement, allowing it to circumvent the procedure for permit amendments and to continuously reconsider the Treetop Project's compliance with the Act 250 criteria. It is the very infirmity of Condition 14—the creation of prospective, extra-statutory authority—that renders the condition unenforceable. To hold otherwise would do more than bind the parties, it would indissolubly expand the Commission's jurisdiction, creating perpetual uncertainty as to the terms of the amended permit. For this reason, the Court is not bound to uphold the Commission's self-granted enforcement authority simply because neither party chose to appeal under 10 V.S.A. § 8504(a). We conclude, therefore, that Condition 14 is unenforceable.

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findings under the Act 250 criteria. See Town of Stowe, #100035-9-EB (May 22, 1998), http://nrb.state.vt.us/lup/decisions.htm; OMYA, Inc., #1R0271-9-EB (Feb. 7, 1991), http://nrb.state.vt.us/lup/decisions.htm; Norman R. Smith, Inc. & Killington Ltd., #1R0584-EB-1 (Sept. 21, 1990), http://nrb.state.vt.us/lup/decisions.htm, aff'd, In re Killington, Ltd., 159 Vt. 206, 616 A.2d 241 (1992); Paul E. Blair Family, #4C0388-EB (June 16, 1980), http://nrb.state.vt.us/lup/decisions.htm.

¶ 16. We note that this decision does not affect the Association's right, as a matter of law, to appeal the Commission's decisions generally or to seek permit amendments. The Association claims that although it believed the amended permit to be significantly deficient, it relied on the Commission's right to impose further conditions if necessary to ensure compliance with Act 250 rather than file an appeal, and that the Environmental Division's decision deprives them of their right to challenge this decision. An interested party's right to appeal a decision by the District Commission is clearly defined by statute. Under 10 V.S.A. § 8504(a), any person aggrieved by an act or decision of the District Commission may file an appeal in the Environmental Division within thirty days. This includes the Commission's decision granting the amended permit. Had the Association appealed the amended permit to the Environmental Division, it would have been entitled to challenge the sufficiency of the amended permit and its conditions, including those regarding the stormwater management system. Furthermore, there is a formal procedure regarding the amendment of permit conditions, which depends on factors outlined in In re Stowe Club Highlands, 166 Vt. at 37, 687 A.2d at 105. These factors are intended to "assist in assessing the competing policies of flexibility and finality in the permitting process." In re Nehemiah Assocs., 168 Vt. 288, 294, 719 A.2d 34, 37 (1998). They include: whether were (1) "changes in factual or regulatory circumstances beyond the control of a permittee"; (2) "changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued"; and (3) "changes in technology." In re Stowe Club Highlands, 166 Vt. at 37, 687 A.2d at 105. The Association chose not to exercise these rights, however, and the unappealed amended permit is final and binding. For this reason, despite our decision affirming the Environmental Division's decision, the Association has not been denied a mechanism to challenge the Commission's decisions generally. That right existed at the time the permit was issued and was not exercised. It will also exist regarding any amended

permits Stratton may seek and which may properly issue following a new application, should those circumstances be presented.

¶ 17. This result does not leave the Association without possible recourse relative to Stratton's alleged violations of the amended permit and Act 250, generally. As indicated above, both NRB and ANR have undertaken enforcement actions against Stratton pursuant to their authority in 10 V.S.A. §§ 6027(g) and 8004. The agencies have indicated that "there will be oversight regarding compliance with the relevant state requirements, including conditions of [the amended permit], which were not appealed." The NRB and ANR are empowered to enforce Act 250 and the amended permit and the Association, as an interested party, may participate, and in fact is participating, in those proceedings by the rights vested under 10 V.S.A. § 8020. The Association remains free to raise any concerns it might have about Stratton's compliance with the permit conditions and may request that the NRB or ANR enforce or investigate possible violations under 10 V.S.A. § 8005(a)(2).

Affirmed.

FOR THE COURT:

Associate Justice

WILLIAM H. SORRELL
ATTORNEY GENERAL

SUSANNE R. YOUNG
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
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http://www.ago.vermont.gov

March 3, 2016

Tina de la Bruere, Clerk
Vermont Superior Court
Washington Civil Division
65 State Street
Montpelier, VT 05602

Re: *State of Vermont v. Vermont Department of Forests, Parks and Recreation*

Dear Ms. de la Bruere,

Enclosed for filing in the above matter, please find the parties' Pleadings by Agreement and Stipulation for the Entry of Consent Order and Final Judgment Order. Additionally, for the Court's consideration please find the parties' proposed Consent Order and Final Judgment order.

To facilitate public participation in proposed settlements of civil environmental enforcement cases, it is the policy of the Vermont Attorney General's Office to post all such proposed settlements on its website at the time of their submission to the Court for a period of 21 days. This posting provides notice to the public who may seek to intervene under Rule 24 of the Vermont Rules of Civil Procedure for the purpose of presenting information or argument to the Court relevant to the proposed settlement.

Consistent with this policy, the State requests that the Court please refrain from taking action on the proposed settlement for the duration of the 21-day posting period. I am authorized to state that Vermont Department of Forests, Parks and Recreation will not oppose this request.

Sincerely,

Justin Kolber
Assistant Attorney General

Enc
cc: Meghan Purvee, Esq., Counsel for Defendant

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. _____

State of Vermont,)
)
Plaintiff,)
)
v.)
)
Vermont Department of Forests,)
Parks and Recreation,)
)
Defendant.)

PLEADINGS BY AGREEMENT

The State of Vermont, by and through Vermont Attorney General William H. Sorrell, and Defendant Vermont Agency of Natural Resources, Department of Forests, Parks and Recreation hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The Vermont Attorney General's Office is an office of the State of Vermont located in Montpelier, Vermont.
2. Defendant Vermont Agency of Natural Resources, Department of Forests, Parks, and Recreation ("Defendant" or "FPR") is a Vermont state agency with offices in Montpelier, Vermont. As part of its operations, FPR manages and oversees several state parks in Vermont, including Button

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

Bay State Park in Ferrisburgh and Lake Carmi State Park in Enosburg Falls.

Statutory and Regulatory Structure

3. The protection of Vermont's waters (including groundwater), maintenance of water quality, and control of water pollution is regulated through 10 V.S.A., Chapters 47 and 48.
4. Pursuant to Title 10, section 8221, the State may bring an action in superior court to enforce Vermont's environmental laws, including permit violations. The action shall be brought by the Attorney General in the name of the State of Vermont.

Facts relating to Defendant and Factual Allegations

5. FPR operates Button Bay State Park pursuant to a Campground Permit (Permit ID TT-9-0001). Among other conditions, the permit requires FPR to have a certified operator to operate the sewage treatment and disposal system serving Button Bay State Park. The permit also requires FPR to sample, analyze and report on the performance of the sewage treatment and disposal system.
6. FPR failed to submit a monthly operating and monitoring report for the month of May 2014. From May 23-31, 2014, FPR also did not have a certified operator analyze the pond levels and flow volume of the sewage treatment and disposal system.

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7. On August 29, 2014, sampling at Button Bay State Park showed an exceedance of the fecal coliform spray effluent limitation, indicating a potential failure of the disinfection system.
8. FPR operates Lake Carmi State Park pursuant to a Campground Permit (Permit ID 9-0061). Among other conditions, the permit requires FPR to have an engineer inspect all spray lines of the sewage treatment and disposal system's sprayfield.
9. In September 2014, FPR did not ensure that all spray lines at Lake Carmi State Park were inspected and did not submit a complete inspection report confirming that all spray lines were inspected.

Violations

10. FPR violated its permit at Button Bay State Park by failing to conduct required operational activities for the sewage treatment and disposal system from May 23-31, 2014, including by not having a certified operator conduct analysis of the pond levels and flow volume of the sewage treatment and disposal system and not submitting a timely monthly report.
11. FPR violated its permit at Button Bay State Park by exceeding the fecal coliform spray effluent limitations for the sewage treatment and disposal system on August 29, 2014.

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12. FPR violated its permit at Lake Carmi State Park by not inspecting all spray lines for the sewage treatment and disposal system in September 2014.

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

13. Defendant admits the allegations set forth in paragraphs 1-12.

14. 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.

DATED at Montpelier, Vermont this 3rd day of March, 2016.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Montpelier, Vermont this _____ day of _____, 2016.

VERMONT AGENCY OF NATURAL RESOURCES, DEPARTMENT OF FORESTS, PARKS AND RECREATION

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

By: _____

Michael C. Snyder, Commissioner
Department of Forests,
Parks and Recreation
1 National Life Drive, Davis 2
Montpelier, VT 056201-3801

APPROVED AS TO FORM:

_____

Justin E. Kolber
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609

_____

Meghan A. Purvee
General Counsel
Department of Forests, Parks and Recreation
1 National Life Drive, Davis 2
Montpelier, VT 056201-3801

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,)
)
Plaintiff,)
)
v.)
)
Vermont Department of Forests,)
Parks and Recreation,)
)
Defendant.)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

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

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated two of its state park permits;

WHEREAS, Defendant has admitted in the Pleadings by Agreement that it committed those violations of its permits;

WHEREAS, pursuant to 3 V.S.A., Chapter 5, the Attorney General 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;

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WHEREAS, under 10 V.S.A. § 8221, Defendant is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500.00 per violation for each day the violation continued;

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

WHEREAS, the Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred; and

WHEREAS, the Stipulation and Consent Order have 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 as a final judgment in this matter 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

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3. 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 incorporated in an order issued by the Court.

DATED at Montpelier, Vermont this 3rd day of March, 2016.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Montpelier, Vermont this _____ day of _____, 2016.

VERMONT AGENCY OF NATURAL RESOURCES, DEPARTMENT OF FORESTS, PARKS AND RECREATION

By: _____
Michael C. Snyder, Commissioner
Department of Forests,
Parks and Recreation
1 National Life Drive, Davis 2
Montpelier, VT 056201-3801

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

APPROVED AS TO FORM:

Justin E. Kolber
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609

Meghan A. Purvee
General Counsel
Department of Forests, Parks and Recreation
1 National Life Drive, Davis 2
Montpelier, VT 056201-3801

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VT SUPERIOR COURT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 193-3-16 Wnav

2016 MAR 25 A 8:28

State of Vermont,

Plaintiff,

v.

Vermont Department of Forests, Parks and Recreation,

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) and a Stipulation for the Entry of Consent Order and Final Judgment Order. Based upon the Pleadings by Agreement and the Stipulation, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION FOR VIOLATIONS

1. Defendant Vermont Department of Forests, Parks and Recreation is adjudged liable for the following violations of Vermont's environmental laws and permits:

   a. FPR's Campground Permit ID TT-9-00001 at Button Bay State Park for failure to conduct operational activities for the sewage treatment and disposal system from May 23-31, 2014, including by not having a certified operator analyze the pond levels and flow volume of the

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sewage treatment and disposal system, and not submitting a timely monthly report;

b. FPR's Campground Permit ID TT-9-00001 at Button Bay State Park for exceeding the fecal coliform spray effluent limitation of the sewage treatment and disposal system on August 29, 2014; and

c. FPR's Campground Permit ID 9-0061 at Lake Carmi State Park for failing to inspect all spray lines of the sewage treatment and disposal system's sprayfield in September 2014.

PENALTIES

2. For the violations described above, Defendant shall pay a civil penalty of five thousand dollars ($5,000.00).

3. Payment of the $5,000.00 penalty shall be paid within fifteen (15) days after entry of this Consent Order, by check payable to the "State of Vermont" and sent to: Office of the Attorney General, Attention: Justin E. Kolber, Assistant Attorney General, 109 State Street, Montpelier, VT 05609.

4. Failure to pay the penalty described in paragraphs 2 and 3 shall constitute a breach of this Consent Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum, provided however that Defendant shall have a 10-day grace period to cure any late payment. Defendant shall also be liable for costs incurred by the State,

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including reasonable attorney's fees, to collect any unpaid penalty amount.

INJUNCTIVE RELIEF

5. On or before April 30th of each year for the next two state park operating seasons (calendar year 2016 and 2017), Defendant shall provide to the Agency of Natural Resources, Drinking Water and Groundwater Protection Division the following: (a) written notice identifying the certified operator at Button Bay, Lake Carmi, and Woodford state parks; and (b) a copy of Defendant's compliance checklist, completed by FPR, for the sewage treatment and disposal systems at Button Bay, Lake Carmi, and Woodford state parks.

OTHER PROVISIONS

6. Defendant waives: (a) all rights to contest or appeal this Consent Order and Final Judgment Order; and (b) all rights to contest the obligations imposed upon Defendant under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.
7. This Consent Order is binding upon the parties and all their successors and assigns.
8. Nothing in this Consent Order shall be construed to create or deny any rights in, grant or deny any cause of action to, or release any claim from, any person not a party to this Consent Order.

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9. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, the Consent Order shall be final.

10. Any violation of this Consent Order and Final Judgment 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.

11. Nothing in this Consent Order and Final Judgment 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.

12. This Consent Order and Final Judgment Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this Court. Any 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. The Vermont Superior Court, Civil Division, Washington Unit, shall have jurisdiction over this Consent Order and Final Judgment Order and the parties hereto for the purpose of enabling any of the parties hereto to apply to this Court at any time for orders and directions as

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may be necessary or appropriate to carry out or construe the Orders, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions. The laws of the State of Vermont shall govern the Orders.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this 25th day of March, 2016.

Hon. Timothy Tomasi
Washington Superior Court Judge

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STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION

RUTLAND UNIT — Docket No. 597-10-15 Rdcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

JUDGMENT ORDER

Plaintiff State of Vermont, Agency of Agriculture, Food and Markets and Agency of Natural Resources has moved this Court to enter a default judgment against Defendants William and Robin Hanfield. Based on the pleadings on file in this case and the affidavits and exhibits supporting Plaintiff's motion, the Court finds as follows:

1. Plaintiff filed a complaint in this action on October 8, 2015.
2. On October 27, 2015, Plaintiff filed a Return of Service with the Court showing that service of the summons and complaint was made upon Defendants, pursuant to V.R.C.P. 4, by the Rutland County Sheriff on Feb. 16, 2015.
3. Defendants have not answered the Complaint or otherwise defended this action.
4. Plaintiff filed a Motion for Default Judgment on March 21, 2016, with supporting affidavits and exhibits establishing the liability of Defendants. The affidavits and exhibits accompanying the Motion for Default Judgment also establish that Defendants are not infants, the State has no reason to believe that

either is an incompetent person, and Defendants are not persons in military service.

5. 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, Agency of Agriculture, Food and Markets and Agency of Natural Resources shall have judgment against Defendants William and Robin Hanfield as follows:

A. Defendants are liable for a violation of 10 V.S.A. § 1259(a) for discharging waste (manure-laden water) from their overtopped manure pit to waters of the state, i.e. the unnamed tributary of the Neshobe River, on December 26, 2014 without a permit from the Secretary of the Agency of Natural Resources;

B. Defendants are liable for a violation of 10 V.S.A. § 1259(a) for discharging waste (manure-laden water) from their overtopped manure pit to waters of the state, i.e. the unnamed tributary of the Neshobe River, on December 30, 2014 without a permit from the Secretary of the Agency of Natural Resources;

C. Defendants are liable for a violation of 10 V.S.A. § 1259(a) for discharging waste (manure-laden water) from their overtopped manure pit to waters of the state, i.e. the unnamed tributary of the Neshobe River, on January 9, 2015 without a permit from the Secretary of the Agency of Natural Resources;

D. Defendants are liable for violating section 4.01(a) of the Vermont Accepted Agricultural Practices (AAPs) for creating a direct discharge of waste into the surface waters of the state, i.e. the unnamed tributary of the Neshobe River, from a discrete conveyance, i.e. a ditch or conduit, without a permit from the Secretary of the Agency of Natural Resources, on December 26 and 30, 2014 and January 9, 2015;

E. Defendants are liable for violating section 4.01(b) of the Vermont AAPs for failing to manage and control the farm's manure pit to prevent the runoff of waste to adjoining waters and across property boundaries, including December 26 and 30, 2014 and January 9, 2015 when discharges to waters of the state were observed; and

F. Defendants are liable for violating section 4.01(d) of the Vermont AAPs for failing to manage and maintain the farm's waste management system so as to prevent discharges or structural failures by allowing the farm's manure pit to overtop on December 26 and 30, 2014, and January 9, 2015, and by failing to properly connect the milk house pipe to the manure pit as observed on or about September 18, 2014.

The State may request a hearing on civil penalties and any necessary corrective action that is needed at the farm location.

SO ORDERED.

Hon. Michael J. Harris
Superior Court, Civil Division, Rutland Unit

4/27/16
Date

STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION

RUTLAND UNIT — Docket No. 597-10-15 Rdcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

ORDER ON INJUNCTIVE AND MONETARY REMEDIES

The Complaint in this action was filed on October 8, 2015. The State moved for Default Judgment on Liability on March 21, 2016 with supporting affidavits and exhibits establishing the liability of Defendants. On April 27, 2016, the Court granted the State's Motion for Default Judgment and found Defendants liable for violations of Vermont's environmental and agricultural law and regulations. On June 28, 2016, a hearing on injunctive and monetary remedies was held.

Based on the liability found by the Court in its April 27th Order and the evidence presented at the hearing on injunctive and monetary remedies, and pursuant to 6 V.S.A. § 4812(c) and 10 V.S.A. § 8221, the Court now ORDERS as follows:

1. Defendants shall follow all applicable Vermont statutes and regulations at their farm, including that they will manage the manure pit properly and so as to not overflow;
2. Defendants shall certify in writing to the Vermont Agency of Agriculture, Food and Markets (AAFM) by November 1st each year for 3 years following the date

of the order that there is at least 180 days of storage at the manure pit or that Defendants have made arrangements for alternative storage capabilities (i.e. transport of waste);

3. Defendants shall: (i) hire an outside consulting engineer, approved in advance by AAFM, to review the construction, use and capacity of the manure pit and milk house waste system, including whether the manure pit meets National Resources Conservation Service (NRCS) standards; (ii) provide the consultant's findings and recommendation to AAFM; and (iii) make any alterations or construction to the manure pit and milk house waste system deemed necessary by AAFM in order for the manure pit and milk house waste system to comply with Vermont statutes and regulations;
4. Defendants shall limit the use of the manure pit to on-site generated waste only, i.e. manure, milk house waste and water, until AAFM has reviewed the consulting engineer's report and necessary changes, if any, have been made to the manure pit to the satisfaction of AAFM; and
5. Defendants shall pay the State of Vermont the sum of $24,750.00 in civil penalties for the three violations of Title 10, section 1259.

SO ORDERED

Hon. Michael J. Harris
Superior Court, Civil Division, Rutland Unit

6/28/16
Date

STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION

RUTLAND UNIT — Docket No. Rdcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

COMPLAINT

NOW COMES the State of Vermont, by and through Vermont Attorney General William H. Sorrell, and pursuant to 6 V.S.A. § 4812(c), 10 V.S.A. § 8221 and the general equitable jurisdiction of the Court, hereby makes the following complaint against William and Robin Hanfield:

ALLEGATIONS

The Parties

1. The Agency of Agriculture, Food and Markets (AAFM) and the Agency of Natural Resources (ANR) are agencies of the State of Vermont created through 3 V.S.A. § 212(2) and 3 V.S.A. § 2802, respectively. The principal situs of the State of Vermont is Montpelier in Washington County.
2. William and Robin Hanfield ("Defendants") are the owners of the real property at 1022 Wheeler Road in Brandon, Vermont.

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3. Defendants are engaged in agricultural operations, i.e. the operation of a dairy farm, at the property.

Statutory and Regulatory Structure[1]

4. The protection of Vermont's waters, the permitting and management of discharges, maintenance of water quality, and control of water pollution is regulated through 10 V.S.A., Chapter 47.
5. The regulation of agricultural wastes as related to waters of the State occurs through 6 V.S.A., Chapter 215.
6. The AAFM and ANR cooperate and coordinate their respective efforts relating to agricultural water quality pursuant to 6 V.S.A. § 4810(b).
7. Section 1259(a) in Chapter 47 of Title 10 provides, in part, that "[n]o person shall discharge any waste, substance or material into waters of the state … without first obtaining a permit for that discharge from the secretary [of ANR]."
8. Pursuant to 10 V.S.A. § 8221, the State may bring an action in superior court to enforce Vermont's environmental laws, including violations of Chapter 47.
9. Pursuant to 6 V.S.A. § 4810(a)(1), the Secretary of AAFM has adopted Accepted Agricultural Practices (AAPs) to "address activities which have a potential for causing pollutants to enter the groundwater and waters of the state."
10. Under Vermont's AAPs, section 4.01(a), "[a]gricultural operations shall not create any direct discharge of wastes into the surface waters of the State from a discrete

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[1] The Vermont Legislature passed comprehensive water quality legislation in Act 64, signed into law by Governor Shumlin on June 16, 2015. The relevant law and all statutes referenced in this Complaint are to the law applicable during the period of the alleged violations and prior to the enactment of Act 64.

conveyance such as, but not limited to, a pipe, ditch, or conduit without a permit from the Secretary of ANR."

11. Under Vermont's AAPs, section 4.01(b), "[b]arnyards, manure storage areas, animal holding areas and production areas shall be managed or controlled to prevent runoff of wastes to adjoining waters, groundwater or across property boundaries."
12. Under Vermont's AAPs, section 4.02(d), "[w]aste management systems shall be managed and maintained so as to prevent discharges or structural failures."
13. Vermont's AAPs, section 2.20, define "wastes" as including but not limited to "sediments, minerals (including heavy metals), plant nutrients, pesticides, organic wastes (including livestock waste, mortalities, compost, feed and crop debris), waste oils, pathogenic bacteria and viruses, thermal pollution, silage runoff, untreated milkhouse waste and any other waste compound or material which is determined by the Secretary of ANR to be harmful to the waters of the State, or other wastes as defined in 10 V.S.A. § 1251(12)."
14. Vermont's AAPs, section 4.03(c), prohibits the spreading of manure between December 15 and April 1 (Winter Spreading Ban) unless the Secretary of AAFM grants an exemption due to an "emergency situation."
15. Section 4812(c) of Title 6 provides that whenever the Secretary of AAFM believes that any person engaged in farming is in violation of the agricultural water quality laws of Title 6, Chapter 215, or the rules adopted thereunder, an action may be brought in the name of the agency in a court of competent jurisdiction to restrain by temporary or permanent injunction the continuation or repetition of the violation.

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The court may issue temporary or permanent injunctions, and other relief as may be necessary to curtail any violations.

Facts relating to Defendants

16. On or about December 17, 2014, two days after the Winter Spreading Ban began, Defendants requested an exemption from AAFM to permit them to continue spreading manure even though the Winter Spreading Ban had already gone into effect.

17. An inspector from AAFM visited Defendants' farm on December 18, 2014 to review the exemption request. During this visit, the inspector observed the manure pit at the farm overflowing and made a referral to ANR's Department of Environmental Conservation (DEC) for possible discharges to waters of the state.

18. On or about December 19, 2014, AAFM denied Defendants' request to continue spreading and Defendants were advised to transfer waste from the pit to allow for additional capacity.

19. An Environmental Enforcement Officer (EEO) visited the farm on December 26, 2014 and observed that the manure pit had overtopped, but did not observe a discharge to waters of the state at that time.

20. Later that same day, December 26, 2014, an inspector from AAFM visited the farm and observed the overtopped manure pit and an active discharge to waters of the state. Specifically, the AAFM inspector observed the flow of manure-laden water from the pit, along a driveway, to a ditch running south along Wheeler Road, into a culvert and into a pasture where it eventually flowed into an unnamed tributary of

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the Neshobe River, a water of the State of Vermont. *See* Attachment 1 (ANR Atlas Map) (red line is estimated flow path from manure pit to waters of the state); Attachment 2 (photos 12/26/14); *see also* Attachment 3 (Application for Emergency Order) at Affidavit of Lowkes ¶ 5.

21. Also during his visit to the farm on December 26, 2014, the AAFM inspector observed evidence of the manure pit overtopping on the south side of the pit, evidenced by dried manure observed on the nearby grass. *See* Attachment 4 (photo 12/26/14).

22. On December 30, 2014, an EEO visited the farm and observed conditions to be the same as reported by the AAFM inspector on December 26, 2014, including a discharge of manure-laden water along the same pathway from the farm to the waters of the state. The EEO took photographs at the farm on December 30, 2014. *See* Attachment 5 (photos 12/30/14).

23. DEC filed an *Application for an Emergency Order* (Application) in Vermont Superior Court, Environmental Division. *See* Attachment 3 (Application for an Emergency Order). The Application argued that Defendants violated 10 V.S.A. § 1259 and its prohibition on discharges to waters of the state without a permit. *Id.*

24. The Vermont Superior Court, Environmental Division granted DEC's Application on January 2, 2015 and issued an Emergency Order. *See* Attachment 6 (Emergency Order).

25. The Emergency Order required that Defendants "cease the discharge of manure from the manure pit on the property and in so doing drop the level of manure in the pit a

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minimum of one foot below the top of the pit (one foot of freeboard). [Defendants] shall accomplish this by pumping manure from the pit and moving it to alternative storage." Attachment 6 at 2. This provision of the Emergency Order was to occur "[w]ithin 72 hours of receipt of" the Order. *Id.*

26. The Emergency Order also required Defendants to maintain "at least one foot of freeboard in the pit (manure level one foot below the top of the pit)" and "no later than fifteen... calendar days following receipt of this Order, empty the manure pit by pumping and trucking the manure from the pit to create sufficient capacity to store manure for the remainder of the winter spreading ban." *Id.* at 2-3.

27. The Order also permitted ANR personnel to inspect the facility for compliance with the Order or related laws, rules or permits. *Id.* at 3.

28. DEC and AAFM jointly inspected Defendants' manure pit on January 9, 2015 and observed that no manure had been removed from the pit and a discharge of manure-laden water from the pit to waters of the state was observed. *See* Attachment 7 (photos 1/9/15)

29. DEC inspected Defendants' manure pit on January 13, 2015 and determined that some of the manure had been removed, but the pit was still not in compliance with the Emergency Order.

30. On January 15, 2015, an AAFM inspection of Defendants' manure pit confirmed that the Emergency Order had been complied with, the pit had been lowered to create one foot of freeboard space, and no discharge to waters of the state was occurring.

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31. Subsequent inspections by DEC through early June found no discharge from Defendants' manure pit, though not all manure had been removed from the pit.

32. During visits to the site by AAFM, a pipe running from Defendants' milk house was observed as not being properly connected to the farm's manure pit.

33. Defendants do not have a permit from the Secretary of ANR to discharge any waste into waters of the state.

COUNT ONE – Unpermitted discharge to waters of the state (10 V.S.A. §1259(a) -- December 26, 2014)

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

35. By discharging manure-laden water from their overtopped manure pit to waters of the State of Vermont, i.e. an unnamed tributary of the Neshobe River, on December 26, 2014 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT TWO – Unpermitted discharge to waters of the state (10 V.S.A. §1259(a) -- December 30, 2014)

36. Paragraphs 1-35 are incorporated by reference and realleged.

37. By discharging manure-laden water from their overtopped manure pit to waters of the State of Vermont, i.e. an unnamed tributary of the Neshobe River, on December 30, 2014 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT THREE – Unpermitted discharge to waters of the state (10 V.S.A. § 1259(a) – January 9, 2015)

38. Paragraphs 1-37 are incorporated by reference and realleged.

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39. By discharging manure-laden water from their overtopped manure pit to waters of the State of Vermont, i.e. the unnamed tributary of the Neshobe River, on January 9, 2015, without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

40. This discharge occurred after the entry of the Emergency Order by the Vermont Superior Court, Environmental Division on January 2, 2015.

COUNT FOUR – Violation of Vermont's Accepted Agricultural Practices (Section 4.01 (a))

41. Paragraphs 1-40 are incorporated by reference and realleged.

42. By creating a direct discharge of waste into the surface waters of the state, i.e. the unnamed tributary of the Neshobe River, from a discrete conveyance, i.e. a ditch or conduit, without a permit from the secretary of ANR, on December 26 and 30, 2014 and January 9, 2015, Defendants violated section 4.01(a) of the Vermont AAPs.

COUNT FIVE – Violation of Vermont's Accepted Agricultural Practices (Section 4.01 (b))

43. Paragraphs 1-42 are incorporated by reference and realleged.

44. By failing to manage and control the farm's manure pit to prevent the runoff of waste to adjoining waters and across property boundaries, including December 26 and 30, 2014 and January 9, 2015 when discharges to waters of the state were observed, Defendants violated section 4.01(b) of the Vermont AAPs.

COUNT SIX – Violation of Vermont's Accepted Agricultural Practices (Section 4.01 (d))

45. Paragraphs 1-44 are incorporated by reference and realleged.

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

46. By allowing the farm's manure pit to overtop on December 26 and 30, 2014, and January 9, 2015, and by failing to properly connect the milk house pipe to the manure pit, Defendants failed to manage and maintain the farm's waste management system so as to prevent discharges or structural failures in violation of section 4.01(d) of the Vermont AAPs.

RELIEF SOUGHT

WHEREFORE, based on the allegations set forth above, the State of Vermont respectfully requests that the Court award the following relief:

1. An Order adjudicating Defendants liable for the violations of Vermont statutes and regulations set forth above in counts one through six;
2. An Order requiring that Defendants will follow all applicable Vermont statutes and regulations at their farm, including that they will manage the manure pit properly and so as to not overflow;
3. An Order requiring that Defendants: (i) hire an outside consulting engineer to review the construction, use and capacity of the manure pit and milk house waste system, including whether the manure pit meets Natural Resource Conservation Standards (NRCS) standards; (ii) provide the consultant's findings and recommendation to AAFM; and (iii) make any alterations or construction to the manure pit and milk house waste system deemed necessary by AAFM in order for the manure pit and milk house waste system to comply with Vermont statutes and regulations;
4. An Order that Defendants limit the use of the manure pit to on-site generated waste only, i.e. manure, milk house waste and water, until AAFM has reviewed the

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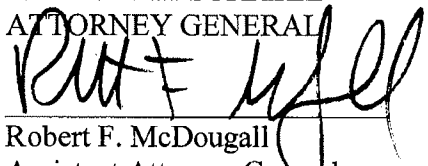
consulting engineer's report and necessary changes, if any, have been made to the manure pit to the satisfaction of AAFM;

5. An Order levying civil penalties against Defendants on the title 10 violations in accordance with 10 V.S.A. § 8221(b)(6); and
6. An Order requiring Defendants to reimburse the State for its costs and expenses in investigating and prosecuting this action; and
7. Such other relief as the Court may deem just and appropriate.

DATED at Montpelier, Vermont this 8th day of October, 2015.

Respectfully submitted,

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made by and between Harleysville Worcester Insurance Company ("Harleysville"), the State of Vermont Agency of Natural Resources ("Agency"), and R. L. Vallee, Inc. ("Vallee") (collectively, the "Parties").

RECITALS

WHEREAS, Vallee owns underground storage tanks at the property known as Nan's Mobil, located at 1301 Main Street, Fairfax, Vermont (the property and the tanks are collectively referred to as the "Site"); and

WHEREAS, Harleysville issued Vallee a Deluxe Garage Owners Property and Liability insurance policy, number GO 0J 41 61, and renewals covering the period of October 1, 2003–October 1, 2009 (the "Policies"), which are listed in Exhibit A; and

WHEREAS, on or around February 10, 2009, Vallee submitted a claim to Harleysville for petroleum contamination at the Site, which Harleysville denied based, *inter alia*, on the Policy's pollution exclusion (the "Claim"); and

WHEREAS, Vallee submitted the Claim to the State of Vermont Petroleum Cleanup Fund (the "PCF") seeking reimbursement for amounts spent to address contamination at the Site; and

WHEREAS, the Agency has challenged Harleysville's denial of the Claim and disputes the enforceability of the Policies' pollution exclusion; and

WHEREAS, in 2013, Harleysville filed an action against the Agency and Vallee entitled *Harleysville Worcester Insurance Company v. R.L. Vallee, Inc., et al.*, in the State of Vermont, Superior Court, Washington County, Civil Division, Docket No. 624-10-13 Wncv (the "Action"); and

WHEREAS, the Agency and Vallee each filed a counterclaim against Harleysville in the Action seeking, among other relief, a declaration that the Policies' pollution exclusion is void and/or unenforceable and requiring Harleysville to, inter alia, reimburse the Agency for past PCF expenditures for the Site (the "Counterclaim");

WHERAS, the Parties have determined that it is in their mutual best interests to resolve the disputes among them and dismiss the Action and have negotiated a settlement and compromise with respect to the Claim and contamination at the Site, the terms and conditions of which are set forth herein; and

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

TERMS

1. Neither this Agreement nor any consideration paid hereunder shall in any way constitute or be deemed an admission of any act, omission, wrongdoing, or of any liability whatsoever by any of the Parties. Nothing contained in this Agreement is or shall be deemed to be an admission by Harleysville that Vallee was or is entitled to insurance coverage with respect to the Claim, or any other claims, or as to the validity of any of the coverage positions that have been or could have been asserted by the Parties.

2. In consideration of the settlement and release of all claims set forth herein, and dismissal with prejudice of the Action, Harleysville will pay the Agency the sum of $200,000. Payment shall be made to State of Vermont, Department of Environmental Conservation, and delivered to State of Vermont, Department of Environmental Conservation, Waste Management and Prevention Division, One National Life Drive, Davis 1, Montpelier, VT 05602-3704 within thirty (30) days from the date this Agreement is fully executed by all the Parties.

3. Within thirty (30) days from the date the Agreement is fully executed by all the Parties, Harleysville will dismiss the Action, with prejudice, and the Agency and Vallee will dismiss their Counterclaims.

4. Vallee and the Agency, on behalf of themselves, and their past, present, and future heirs, representatives, lien holders, creditors, insurers, reinsurers, executors, administrators, predecessors, successors, assigns, attorneys, agents, parents, guardians and employees, and all persons acting by, through, under, or in concert with them, and each of them ("Releasors"), hereby release and discharge Harleysville, together with all of its respective past, present, and future owners, members, managers, officers, directors, shareholders, attorneys, employees, agents, brokers, heirs, lien holders, creditors, executors, parents, guardians, administrators, personal or legal representatives, parent companies, subsidiaries, affiliated entities, insurers and re-insurers, affiliates, predecessors, successors, and assigns, and all persons acting by, through, under or in concert with them ("Releasees"), from and against any and all actions, claims, liabilities, causes of action, suits, damages of any kind including punitive damages, judgments, executions and demands whatsoever, including without limitation claims for bad faith, which Releasors ever had, now have or which they, hereafter can, shall, or may have on account of any and all claims made, or which could have been made, whether known or unknown, whether in law or in equity, contract or tort, arising out of, in any way relating to, or in any way flowing from any petroleum that has been released at the Site as of the date of this Settlement Agreement and Release (the "Contamination"), including any and all migration of any portion of the Contamination to any other property or to soil,

groundwater, surface water, or any other receptor that has occurred or is occurring as of the date of this Settlement Agreement and Release, or that may occur subsequent to the date of this Settlement Agreement and Release, the Claim, or as set forth in the Action or the Counterclaim. The Parties agree that the Agency does not release and hereby expressly retains its claims against Vallee relating to Vallee's responsibility for the Contamination at the Site.

5. Harleysville's settlement payment set forth in Paragraph 2, which represents insurance proceeds from Vallee's policies, shall be used by the Agency as follows: (1) $66,724.66 shall be applied to reimburse the PCF for its payments of claims for PCF reimbursement of costs incurred by Vallee and its contractors in addressing contamination at the Site subsequent to the petroleum release discovered in February 2009; (2) $98,448.86 shall be paid to Vallee in full satisfaction of all claims for PCF reimbursement in connection with the Site submitted by Vallee to the State prior to the date of this Agreement which have not been paid by the PCF to date; and (3) $34,826.48 shall be deposited by ANR into a dedicated PCF account and, for a period of ten years from the date of this Agreement, may be used only for future PCF-eligible investigation and remediation costs related to the Site. (the "Dedicated Fund").

6. The Agency agrees to process claims for PCF reimbursement of costs incurred by Vallee in connection with the Contamination submitted by Vallee after the date of this Agreement pursuant to 10 V.S.A. § 1941(b) and the Agency's Procedures for Reimbursement from the Petroleum Cleanup Fund ("PCF Procedures"). Payment of such claims is subject to all of the requirements and restrictions of 10 V.S.A. § 1941(b) and the PCF Procedures, including limits on total payments, and to the availability of funds. Any payments shall be made first from the Dedicated Fund, and, after the Dedicated Fund is exhausted, from other funds of the PCF. If funds remain in the Dedicated Fund at the expiration of ten (10) years from the date of this Agreement, the Agency may close out the Dedicated Fund and transfer its remaining balance to the general PCF balance available for use in connection with other contaminated sites.

7. The Agency warrants that it has not at any time transferred or assigned to any third party any claim, right, or cause of action pursuant to, or in connection with the Claim or the Site, and that the foregoing is a full and final release of all of their claims against the Releasees with respect to the matters described herein.

8. By entering into this Agreement, the Parties have not waived nor shall be deemed to have waived any right, obligation, privilege, defense, or position they may have asserted or might assert in connection with any claim, matter, person, or insurance policy outside the scope of this Agreement. No person or entity other than the Parties shall have any legally enforceable rights or benefits under this Agreement.

9. Settlement negotiations leading up to this Agreement and all related discussions and negotiations shall be deemed to fall within the protection afforded to compromises and to offers to compromise by Rule 408 of the Federal Rules of Evidence or any similar federal or state court rule or law that protects the admissibility of compromises or offers of compromise.

10. This Agreement shall be governed by the laws of the State of Vermont.

11. This Agreement supersedes all prior and contemporaneous agreements and is the full and entire agreement between the Parties.

12. No part or provision of this Agreement may be changed, modified, waived, discharged, or terminated, except in writing signed by the parties such modification intends to bind.

13. Failure of any party to seek redress for violation of or to insist upon strict performance of, any provision of this Agreement shall not be a waiver of that provision by that party or estop that party from asserting fully any and all of its rights under this Agreement.

14. If any part of this Agreement should be held void or invalid, the remaining provisions shall remain in full force and effect. Moreover, this Agreement shall not be construed more strictly against one party than another.

15. The Parties incorporate all recitals as set forth above as if set forth fully herein.

16. This Agreement may be executed in counterparts, each of which shall constitute an original and which, when taken together, shall constitute one and the same instrument. A fax, copy or electronic signature page shall constitute an original.

17. Each party executing this Agreement warrants that he/she is fully authorized to execute it on behalf of the respective Parties he/she purports to represent.

18. The Parties will execute such other and further documents, and take such other actions, as may be required for the purposes of effectuating this Agreement.

IN WITNESS WHEREOF, the Parties, by their duly authorized representative, have caused this Agreement to be duly executed as of the date set forth with the respective signatures below:

HARLEYSVILLE WORCESTER INSURANCE COMPANY

By: Laura L Archie

Name: Laura L. Archie

Title: Claims Consultant - Indemnity Specialty

Date: June 7, 2016

STATE OF VERMONT AGENCY OF NATURAL RESOURCES

By: Nicholas F. Persampieri

Name: Nicholas F. Persampieri

Title: Assistant Attorney General

Date: May 25, 2016

R.L. VALLEE, INC.

By: _____

Name: _____

Title: _____

Date: _____

IN WITNESS WHEREOF, the Parties, by their duly authorized representative, have caused this Agreement to be duly executed as of the date set forth with the respective signatures below:

HARLEYSVILLE WORCESTER INSURANCE COMPANY

By: _____

Name: _____

Title: _____

Date: _____

STATE OF VERMONT AGENCY OF NATURAL RESOURCES

By: _____

Name: _____

Title: _____

Date: _____

R.L. VALLEE, INC.

By: Rodolphe M Vallee

Name: Rodolphe M. Vallee

Title: CEO

Date: 6/2/16

EXHIBIT A

Policy Number	Policy Period
GO 0J 41 61	10/01/03–10/01/04
GO 0J 41 61	10/01/04–10/01/05
GO 0J 41 61	10/01/05–10/01/06
GO 0J 41 61	10/01/06–10/01/07
GO 0J 41 61	10/01/07–10/01/08
GO 0J 41 61	10/01/08–10/01/09

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STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION

RUTLAND UNIT — Docket No. 597-10-15 Rdcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

FILED
JUN 28 2016
VERMONT SUPERIOR COURT
RUTLAND

ORDER ON INJUNCTIVE AND MONETARY REMEDIES

The Complaint in this action was filed on October 8, 2015. The State moved for Default Judgment on Liability on March 21, 2016 with supporting affidavits and exhibits establishing the liability of Defendants. On April 27, 2016, the Court granted the State's Motion for Default Judgment and found Defendants liable for violations of Vermont's environmental and agricultural law and regulations. On June 28, 2016, a hearing on injunctive and monetary remedies was held.

Based on the liability found by the Court in its April 27th Order and the evidence presented at the hearing on injunctive and monetary remedies, and pursuant to 6 V.S.A. § 4812(c) and 10 V.S.A. § 8221, the Court now ORDERS as follows:

1. Defendants shall follow all applicable Vermont statutes and regulations at their farm, including that they will manage the manure pit properly and so as to not overflow;
2. Defendants shall certify in writing to the Vermont Agency of Agriculture, Food and Markets (AAFM) by November 1st each year for 3 years following the date

of the order that there is at least 180 days of storage at the manure pit or that Defendants have made arrangements for alternative storage capabilities (i.e. transport of waste);

3. Defendants shall: (i) hire an outside consulting engineer, approved in advance by AAFM, to review the construction, use and capacity of the manure pit and milk house waste system, including whether the manure pit meets National Resources Conservation Service (NRCS) standards; (ii) provide the consultant's findings and recommendation to AAFM; and (iii) make any alterations or construction to the manure pit and milk house waste system deemed necessary by AAFM in order for the manure pit and milk house waste system to comply with Vermont statutes and regulations;
4. Defendants shall limit the use of the manure pit to on-site generated waste only, i.e. manure, milk house waste and water, until AAFM has reviewed the consulting engineer's report and necessary changes, if any, have been made to the manure pit to the satisfaction of AAFM; and
5. Defendants shall pay the State of Vermont the sum of $24,750.00 in civil penalties for the three violations of Title 10, section 1259.

SO ORDERED

Hon. Michael J. Harris
Superior Court, Civil Division, Rutland Unit

6/28/16
Date

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 624-10-13 wncv

2013 OCT -8 A 11:01

FILED

HARLEYSVILLE WORCESTER INSURANCE COMPANY

Plaintiff,

v.

R.L. VALLEE, INC. and STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Harleysville Worcester Insurance Company ("Harleysville") by and through counsel, and for its complaint pursuant to the Declaratory Judgment Act, 12 V.S.A. § 4711, alleges against R.L. Vallee ("Vallee") and the State of Vermont, Agency of Natural Resources ("ANR") as follows:

I. Nature of Action

1. This is an action pursuant to 12 V.S.A. § 4711 for a declaratory judgment in which Harleysville seeks an order declaring it has no obligation under insurance policies Harleysville issued to Vallee to pay to test for, monitor, clean up or otherwise respond to petroleum contamination at Vallee's "Nan's Mobil" location, 1301 Main Street, Fairfax, Vermont. Harleysville owes no coverage because the applicable liability insurance policy excludes coverage for all costs arising out of the discharge, dispersal or release of "pollutants," which includes all the petroleum contamination at issue. While the Policy affords some pollution cleanup coverage, it does not apply here. In addition, Harleysville owes no coverage for the incurred and future costs sought by Vallee because they do not result from an "accident" during the applicable policy period,

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ATTORNEYS AT LAW
BURLINGTON, VERMONT
PLATTSBURGH, NEW YORK

relate to pollution known by Vallee before the policy period, or are excluded by policy exclusions applying to expected and intended injuries or damage to owned property.

II. The Parties and Venue

2. Harleysville incorporates by reference the allegations of all preceding paragraphs as though plead here.

3. Harleysville is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with a principal place of business in Harleysville, Pennsylvania. It is an insurer admitted to issue insurance in the State of Vermont.

4. Vallee is a business entity organized and existing under the laws of the State of Vermont, with a principal place of business in Vermont.

5. ANR is an agency of the State of Vermont statutorily empowered to administer the Vermont Petroleum Cleanup Fund ("PCF") pursuant to 10 VSA § 1941(f) and is further statutorily authorized to assert direct causes of action against insurers for amounts expended from the PCF that ANR contends should be covered by insurance.

6. Venue is proper pursuant to 12 V.S.A. § 402.

IIII. The Policies

7. Harleysville incorporates by reference the allegations of all preceding paragraphs as though plead here.

8. Harleysville issued Vallee a Deluxe Garage Owners Property and Liability insurance policy, number GO 0J 41 61, for the period October 1, 2003 to October 1, 2004 ("03-04 Policy") and which afforded coverage to several Vallee gas station locations, including Vallee's "Nan's Mobil" location in Fairfax, Vermont.

9. Harleysville issued successive renewal policies to Vallee for the following years:

a. October 1, 2004 to October 1, 2005 ("04-05 Policy").

b. October 1, 2005 to October 1, 2006 ("05-06 Policy").

c. October 1, 2006 to October 1, 2007 ("06-07 Policy").

d. October 1, 2007 to October 1, 2008 ("07-08 Policy").

e. October 1, 2008 to October 1, 2009 ("08-09 Policy").

For convenience, all policy years referenced in paragraphs 8 and 9 will be referred to as "Policies".

10. Under Form BO-7305 (3/95), Garage Business Owners Property Form, the Policies provide as follows:

Section I

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered property, as used in this policy, means the following types of property for which a Limit of Insurance is shown in the Declarations:

a. **Buildings,** meaning the buildings and structures at the premises described in the Declarations, including:

(2) Above and below ground gasoline, diesel or kerosene fuel storage tanks including piping and connections pertaining thereto; ...

2. Property Not Covered

Covered Property does not include:

d. Land (including land on which the property is located), water ...

3. Covered Causes of Loss

Risks of Direct Physical Loss unless the loss is:

a. Excluded in Section B, Exclusions; or ...

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PLATTSBURGH, NEW YORK

* * *

Policy GO-0J4161 also contains endorsement GO-7029 (6/97), Amendment of Policy Provisions Garage Business Owners Program, which states the following:

Section 1.A.5. (Additional Coverages) m. is amended to read as follows:

m. Pollutant Clean Up and Removal

We will pay your expenses to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days or the earlier of:

(1) The date of direct physical loss or damage; or

(2) The end of the policy period.

The most we will pay for each location under this additional Coverage is $25,000 for the sum of all such expenses arising out of Covered Causes of Loss occurring during each separate 12 month period of this policy.

This limit is in addition to the Limits of Insurance.

* * *

B. Exclusions

2. We will not pay for loss or damage caused by or resulting from any of the following:

j. Pollution. We will not pay for loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if loss or damage by the "specified causes of loss" results, we will pay for the resulting damage caused by the "specified causes of loss."

k. Other Types of Loss:

(1) Wear and tear;

(2) Rust, corrosion, fungus, decay deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

H. Property Definitions

4. "Operations" means your business activities occurring at the described premises.

7. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

9. "Specified Causes of Loss" means the following:

Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicle; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage ...

11. Pursuant to the Garage Coverage Form, the Policies provides liability insurance as follows:

Section II – Liability Coverage

A. Coverage

1. "Garage Operations" – Other Than Covered "Autos"

a. We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which the insurance applies caused by an "accident" and resulting from "garage operations" other than the ownership, maintenance or use of covered "autos".

We have the right and duty to defend any "insured" against a "suit" asking for these damages. However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the applicable Liability Coverage Limit of Insurance – "Garage Operations" – Other Than Covered "Autos" has been exhausted by payment of judgments or settlements.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "accident" occurs in the coverage territory;

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no "insured" listed under **Who Is An Insured** and no "employee" authorized by you to give or receive notice of an "accident" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed "insured" or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any "insured" listed under **Who Is An Insured** or any "employee" authorized by you to give or receive notice of an "accident" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily Injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when an "insured" listed under **Who is An Insured** or any "employee" authorized by you to give or received notice of an "accident" or claim:

(1) Reports all, or any part, of "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

* * *

The policy also contains the following exclusions:

B. Exclusions

This insurance does not apply to any of the following:

1. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured". But for "garage operations" other than covered "autos"

this exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

6. Care, Custody or Control

"Property damage" to or "covered pollution cost or expense" involving:

a. Property owned, rented or occupied by the "insured";

b. Property loaned to the "insured";

c. Property held for sale or being transported by the "insured"; or

d. Property in the "insured's" care, custody or control.

But this exclusion does not apply to liability assume under a sidetrack agreement.

8. Pollution Exclusion Applicable to "Garage Operations" – Other Than Covered "Autos"

a. "Bodily injury", "property damage" or loss, cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(1) At or from any premises, site or location that is or was at any time owned or occupied by, rented or loaned to, any "insured";

(2) At or from any premises, site or location that is or was at any time used by or for any "insured" or others for the handling, storage, disposal, processing or treatment of waste;

(3) At or from any premises, site or location on which any "insured" or any contractors or subcontractors working directly or indirectly on any "insured's" behalf are performing operations;

(a) To test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of the "pollutants"; or

(b) If the "pollutants" are brought on or to the premises, site or location in connection with such operations by such "insured," contractor or subcontractor; or

(4) That are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any "insured" or any person or organization for whom you may be legally responsible...

(b) Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of "pollutants."

However, this paragraph does not apply to liability for damages because of "property damage" that the "insured" would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim of "suit" by or on behalf of a governmental authority.

* * *

Section VI – Definitions

A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".

H. "Garage operations" means the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. "Garage operations" includes the ownership, maintenance or used of the "autos" indicated in Section 1 of this Coverage Form as covered "autos". "Garage operations" also include all operations necessary or incidental to a garage business.

M. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

O. "Property damage" means damage to or loss of tangible property.

12. The Policies in effect between 10/1/03 and 10/1/08 also include notice conditions requiring "prompt" notice of any loss or accident, immediate notice of any demands concerning any claim or "suit". The Policies also prohibit Vallee from assuming any obligations except at its own cost.

13. Harleysville obtained regulatory approval to issue the Policies to Vallee.

IV. Factual Background

14. Harleysville incorporates by reference the allegations of all preceding paragraphs as though plead here.

15. Vallee owns and operates "Nan's Mobil" located at 1301 Main Street, Fairfax, Vermont ("Property").

16. On information and belief, the Property is operated as a gas station and a convenience store.

17. In and around September 1993 an environmental consultant reported petroleum contamination in the soil and groundwater at the Property during the removal and replacement of underground storage tanks ("1993 Petroleum Contamination").

18. The 1993 Petroleum Contamination was in excess of federal and state minimum standards.

19. On information and belief, the 1993 Petroleum Contamination was not removed from the soil at the Property and the groundwater was not remediated.

20. As a result of the 1993 Petroleum Contamination the State of Vermont required periodic and continuous testing and monitoring of the soil and groundwater pursuant to a State-approved work plan, which has continued through at least February 2009.

21. On information and belief, testing and monitoring associated with the 1993 Petroleum Contamination has shown persistent and continuous soil and groundwater petroleum contamination at the Property above federal and state recommended minimum guidelines that has not been remediated.

22. Before February 2009 Vallee never informed Harleysville of the 1993 Petroleum Contamination, any testing and monitoring that followed, or any State directives associated with the 1993 Petroleum Contamination.

23. On or about February 2, 2009 Vallee informed an environmental consultant of gasoline vapors in the store and basement of the Property.

24. On February 3, 2009 an environmental consultant determined that gas was leaking from a rusted fitting under the pump island which had broken off.

25. On information and belief, Vallee's environmental consultant concluded that a release from the gasoline pump impacted surrounding soils, the basement sump and the airspace of the basement, store and residence ("2009 Petroleum Contamination").

26. On information and belief, following the February 2, 2009 report, Vallee's environmental consultant, under the direction of the State of Vermont, undertook site assessment, testing, monitoring and cleanup activity to address the 2009 Petroleum Contamination from the Property.

27. On information and belief, site assessment, testing, monitoring and clean up activity relating to the 2009 Petroleum Contamination has been within some of the same areas impacted by the 1993 Petroleum Contamination.

28. Monitoring, testing and other site management activity relating to all the petroleum contamination is ongoing at the Property and is subject to State review and approval.

29. Additional expenses will be incurred to comply with State ordered site management activity to address all petroleum contamination at the Property, including expenses associated with a Corrective Action Feasibility Plan now required by the State.

30. On February 10, 2009 Vallee reported the 2009 Petroleum Contamination to Harleysville.

31. On February 19, 2009 Harleysville denied coverage for the claim based, *inter alia*, on the 2009 Policy's pollution exclusion.

32. Vallee presented Harleysville's denial to the State of Vermont to recoup prior and future expenses from the PCF relating to petroleum contamination from the Property.

33. The State of Vermont has challenged Harleysville's denial, preventing Vallee from recovering reimbursement from the PCF for all of its expenses.

34. Harleysville disputes the State's challenges to its coverage denials.

V. Counts For Declaratory Judgment

Count I – No Property Coverage – 08-09 Policy

35. Harleysville incorporates by reference the allegations of all preceding paragraphs as though pled here.

36. Subject to all of the terms and conditions of the 08-09 Policy, the 08-09 Policy affords coverage for damage to Covered Property caused by or resulting from any Covered Cause of Loss.

37. Pollution Clean Up and Removal coverage is also afforded if pollution is caused by a Covered Cause of Loss occurring during the policy period and the expenses are reported to Harleysville within 180 days of the earlier of: (1) the date of direct physical loss or damage; or (2) the end of the policy period.

38. On or about February 10, 2009 Vallee reported the 2009 Petroleum Contamination was due to a rusted fitting under a pump island.

39. Vallee seeks to recover expenses to assess, monitor and treat the 2009 Petroleum Contamination.

40. Vallee also seeks to recover past and future expenses to assess, monitor, treat, or remove other petroleum contamination on and off the Property.

41. Pursuant to the terms and conditions of the Policy, all current and future costs incurred to assess, monitor, treat or remediate petroleum contamination on the Property are not covered under the 08-09 Policy as they were not incurred to address a Covered Cause of Loss and were not reported to Harleysville according to the terms of the Policy.

Count II – No Liability Coverage – 08-09 Policy

42. Harleysville incorporates by reference the allegations of all preceding paragraphs as though plead here.

43. Subject to all of the terms and conditions of the 08-09 Policy, the 08-09 Policy affords coverage for damages because of "bodily injury" or "property damage" to which the insurance applies and which is caused by an "accident" resulting from "garage operations".

44. The 08-09 Policy applies only if, *inter alia*, "property damage" occurs during the policy period and was not known prior to the policy period.

45. In relevant part, the 08-09 Policy also limits coverage pursuant to the "Expected and Intended Injury", "Care Custody and Control", and "Pollution Exclusion" exclusions.

46. Pursuant to the terms and conditions of the 08-09 Policy, any "property damage" from the 2009 Petroleum Contamination is not covered.

47. Pursuant to the terms and conditions of the 08-09 Policy, any "property damage" from any other petroleum contamination prior to the 2009 Petroleum Contamination is not covered.

48. Pursuant to the terms and conditions of the 08-09 Policy, current and future costs incurred to assess, monitor, treat or remediate petroleum contamination from the Property are not covered.

Count III – No Coverage Under Policies In Effect Between 10-1-03 and 10-1-08

49. Harleysville incorporates by reference the allegations of all preceding paragraphs as though plead here.

50. The 10-1-03 to 10-1-08 Policies are not triggered for the 2009 Petroleum Contamination.

51. In the alternative, to the extent one or more of the 10-1-03 to 10-1-08 Policies are triggered for any petroleum contamination on or off the Property, they do not apply because all such petroleum contamination was known by Vallee to have occurred in whole or in part before the Policies incepted.

52. In the alternative, to the extent one or more of the 10-1-03 to 10-1-08 Policies are triggered, there is no coverage under those Policies for any petroleum contamination on or off the Property for the same reasons as the 08-09 Policy.

53. In the alternative, to the extent one or more of the 10-1-03 to 10-1-08 Policies are triggered, Vallee never notified Harleysville of such petroleum contamination in accordance with the terms of the Policies and Harleysville has been prejudiced as a result.

54. Finally, to the extent Vallee incurred any cost in relation to any petroleum contamination, it did so at its own risk and such costs are not covered.

WHEREFORE, Harleysville respectfully requests this Court enter an Order and Judgment declaring the Policy affords no insurance coverage for the pollution on or off the Property,

including all costs associated with the assessment, monitoring, treatment or remediation of pollutants on or off the Property.

Dated: October 7, 2013

Respectfully submitted,

HARLEYSVILLE WORCESTER INSURANCE COMPANY

By: _____

Nolan C. Burkhouse Esq.
Paul Frank + Collins P.C.
P.O. Box 1307, One Church Street
Burlington, VT 05402-1307
(802) 658-2311
nburkhouse@pfclaw.com
Attorney for Plaintiff

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STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 348-6-15

STATE OF VERMONT,	)
	)
PLAINTIFF,	)
	)
v.	)
	)
PICO VILLAGE WATER CORPORATION,	)
	)
DEFENDANT.	)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

In order to resolve the allegations of the Complaint filed in the above-captioned matter, Plaintiff, the State of Vermont ("the State") by and through Vermont Attorney General William H. Sorrell, and Defendant Pico Village Water Corporation, hereby stipulate and agree as follows:

Background

1. Defendant Pico Village Water Corporation ("Pico Village") is a Vermont not-for-profit corporation located in Killington, Vermont.
2. Pico Village owns and operates a public community water system located in Killington ("the Water System"). The Water System is a groundwater system that includes two well systems and a single pump station.
3. The Water System provides drinking water year-round to approximately 90 individuals via approximately 34 or so service connections.

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4. The Water System first began operating pursuant to a temporary operating permit issued on December 30, 2004.
5. In May 2007, the Agency of Natural Resources ("ANR") determined that Pico Village was operating the Water System in violation of several provisions of the Vermont Water Supply Rule ("VWSR").
6. On September 1, 2009, Pico Village and ANR entered into an Assurance of Discontinuance ("AOD"), filed with the Vermont Environmental Court (Docket # 174-8-09 Vtec). The AOD listed 16 violations of the Vermont Water Supply Rule and the temporary operating permit; required a penalty payment of $12,000; and required Pico Village to take numerous and prompt actions to comply with the Vermont Water Supply Rule and all applicable permit conditions.
7. From 2012-2013, the Water System experienced: (i) an exceeded lead level; (ii) a fecal indicator positive result at one of its wells; and (iii) a chlorine leak in the distribution system.
8. On October 7, 2013, ANR issued a public water supply permit to Pico Village to operate the Water System ("Permit," WSID # 5238).
9. The Permit identified that the Water System was in violation of the Vermont Water Supply Rule and included a compliance schedule requiring eight (8) specific actions that, if taken, would bring the Water System into compliance and thus allow continued operation. The compliance provisions required prompt submission of documents, reports, and plans to be

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submitted on or before certain dates. The Permit also included other conditions and reporting requirements, including having a certified operator of the Water System.

10. From 2013-2015, the Water System did not comply with certain permit conditions, which led to the filing of this action.

11. Since the filing of this action, Defendant has substantially complied with its Permit and has submitted all items required by the Permit with the exception of the final lead and copper sampling plan, which will be submitted within thirty (30) days of the date of execution of this Stipulation.

Resolution of Claims

12. Defendant admits to liability for the following violations involving its Water System:

    a. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 7.1 for failure to submit an approved operation and maintenance manual by March 2014 (Count One of the Complaint);

    b. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 9.1.2 for failure to submit monthly operating reports between February 2013 and June 2015 (Count Two of the Complaint);

    c. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 6.5 for failure to submit a lead and copper sampling plan by November 2013 (Count Three of the Complaint);

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109 State Street
Montpelier, VT
05609

d. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 6.5 for failure to distribute lead education materials after an exceeded lead level by November 2013 (Count Four of the Complaint);

e. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 16.3 for failure to submit an updated Source Protection Plan by February 2014 (Count Five of the Complaint);

f. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 12.1 for failure to contract with an operator who is certified to operate the Water System as of November 2013 (Count Six of the Complaint);

g. violating its Permit under 10 V.S.A. § 8002(9) for failure to submit a target pH range by December 2013 (Count Seven of the Complaint);

h. violating its Permit under 10 V.S.A. § 8002(9) for failure to identify system improvements and upgrades, and submit a comprehensive water system improvement plan and schedule by March 2014 (Count Eight of the Complaint);

i. violating its Permit under 10 V.S.A. § 8002(9) for failure to submit "as-built" Record Drawings (including maps) for the water treatment and distribution system by April 2014 (Count Nine of the Complaint);

j. violating VWSR § 1.1 for failure to provide documentation of corrective actions taken in response to a fecal indicator positive result at one of the Water System's wells in 2012 (Count Ten of the Complaint); and

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k. violating VWSR § 10.2.1 for failure to provide boil water notices and show corrective actions taken in response to a chlorine leak in 2013 (Count Eleven of the Complaint).

13. This Stipulation and the Consent Order and Final Judgment Order resolve all claims in the State's Complaint in this matter against Defendant, including its officers and directors, and the State hereby releases the Defendant and its officers and directors from any further liability associated with the violations described herein. This Stipulation and the Consent Order and Final Judgment Order do not affect any potential violations by Defendant at the Water System not alleged in the Complaint.

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

15. Pursuant to 3 V.S.A., Chapter 5, the Attorney General 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. The Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred.

16. The State has considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment

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Montpelier, VT 05609

resulting from the violations, the length of time the violations existed and that Defendant knew or had reason to know the violations existed. For the violations described above, Defendant shall pay a civil penalty of thirty-seven thousand U.S. dollars ($37,000.00) in the manner set forth in the Final Judgment Order attached hereto.

17. This Stipulation for the Entry of Consent Order and Final Judgment Order has been negotiated by and among the State and Defendant in good faith.

18. The attached Consent Order and Final Judgment Order may be entered as a final judgment in this matter by the Court.

DATED at Montpelier, Vermont this 2nd day of August, 2016.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Killington, Vermont this 2nd day of August, 2016.

PICO VILLAGE WATER CORP.

By: _____
Ralph Thompson, President of Pico Village Water Corporation and authorized agent for Defendant

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

Approved as to form:

David G. Carpenter, Esq.
Attorney for Defendant
Facey Goss & McPhee, P.C.
71 Allen Street
P.O. Box 578
Rutland, Vermont 05702
(802) 665-2724

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STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 348-6-15
Rdcv

STATE OF VERMONT,

PLAINTIFF,

v.

PICO VILLAGE WATER CORPORATION,

DEFENDANT.

FILED
AUG 04 2016
VERMONT SUPERIOR COURT
RUTLAND

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties' filing of a Stipulation for the Entry of Consent Order and Final Judgment Order. Based upon that Stipulation, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION FOR VIOLATIONS

1. Defendant Pico Village Water Corporation is adjudged liable for the following violations of Vermont's environmental laws and regulations in its operation of its public water system in Killington, Vermont:

   a. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 7.1 for failure to submit an approved operation and maintenance manual by March 2014 (Count One of the Complaint);

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b. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 9.1.2 for failure to submit monthly operating reports between February 2013 and June 2015 (Count Two of the Complaint);

c. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 6.5 for failure to submit a lead and copper sampling plan by November 2013 (Count Three of the Complaint);

d. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 6.5 for failure to distribute lead education materials after an exceeded lead level by November 2013 (Count Four of the Complaint);

e. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 16.3 for failure to submit an updated Source Protection Plan by February 2014 (Count Five of the Complaint);

f. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 12.1 for failure to contract with an operator who is certified to operate the Water System as of November 2013 (Count Six of the Complaint);

g. violating its Permit under 10 V.S.A. § 8002(9) for failure to submit a target pH range by December 2013 (Count Seven of the Complaint);

h. violating its Permit under 10 V.S.A. § 8002(9) for failure to identify system improvements and upgrades, and submit a comprehensive water system improvement plan and schedule by March 2014 (Count Eight of the Complaint);

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i. violating its Permit under 10 V.S.A. § 8002(9) for failure to submit "as-built" Record Drawings (including maps) for the water treatment and distribution system by April 2014 (Count Nine of the Complaint);

j. violating VWSR § 1.1 for failure to provide documentation of corrective actions taken in response to a fecal indicator positive result at one of the Water System's wells in 2012 (Count Ten of the Complaint); and

k. violating VWSR § 10.2.1 for failure to provide boil water notices and show corrective actions taken in response to a chlorine leak in 2013 (Count Eleven of the Complaint).

2. This Consent Order and Final Judgment Order resolves all claims in the State's Complaint in this matter against Defendant, including its officers and directors, and the State hereby releases the Defendant and its officers and directors from any further liability associated with the violations described herein. This Consent Order and Final Judgment Order does not affect any potential violations by Defendant not alleged in the Complaint.

PENALTIES

3. For the violations described above, Defendant shall pay a civil penalty of thirty-seven thousand U.S. dollars ($37,000.00).

4. Payment of the $37,000.00 penalty shall be made as follows: $15,000.00 shall be paid within fifteen (15) days after entry of this Consent Order and Final Judgment Order, and the remaining $22,000.00 shall be paid within ninety (90) days after entry of this Consent Order and Final Judgment

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Order. All payments shall be by check payable to the "State of Vermont" and sent to: Office of the Attorney General, Attention: Justin E. Kolber, Assistant Attorney General, 109 State Street, Montpelier, VT 05609. In the event that payment is received by the State before the Court has approved the Consent Order and Final Judgment Order, the State shall hold the check(s) in trust until approval. Should the Court reject the Consent Order and Final Judgment Order, the State will return the check(s) to Defendant.

5. In the event that Defendant fails to pay timely the penalty described in paragraphs 3 and 4, such failure shall constitute a breach of this Consent Order and Final Judgment Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. In such circumstances, the State may accelerate to be due immediately any unpaid amounts under this Consent Order and Final Judgment Order. Defendant shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.

INJUNCTIVE RELIEF

6. Defendant shall provide to the Agency of Natural Resources, Drinking Water and Groundwater Protection Division the final lead and copper sampling plan within thirty (30) days of the date of execution of the Stipulation.

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OTHER PROVISIONS

7. Defendant waives: (a) all rights to contest or appeal this Consent Order and Final Judgment Order; and (b) all rights to contest the obligations imposed upon Defendant under this Consent Order and Final Judgment Order in this or any other administrative or judicial proceeding involving the State of Vermont.
8. This Consent Order and Final Judgment Order is binding upon the parties and all their successors and assigns.
9. Nothing in this Consent Order and Final Judgment Order shall be construed to create or deny any rights in, grant or deny any cause of action to, or release any claim from, any person not a party to this Consent Order and Final Judgment Order.
10. This Consent Order and Final Judgment Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, the Consent Order and Final Judgment Order shall be final.
11. Any violation of this Consent Order and Final Judgment 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.
12. Nothing in this Consent Order and Final Judgment Order shall be construed as having relieved, modified, or in any manner affected

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Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant.

13. This Consent Order and Final Judgment Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this Court. Any representations not set forth in this Consent Order and Final Judgment 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.

14. The Vermont Superior Court, Civil Division, Rutland Unit, shall have jurisdiction over this Consent Order and Final Judgment Order and the parties hereto for the purpose of enabling any of the parties hereto to apply to this Court at any time for orders and directions as may be necessary or appropriate to carry out or construe the Orders, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions. The laws of the State of Vermont shall govern the Orders.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Rutland, Vermont this 4th day of August, 2016.

Mike J. Harris

Hon. Michael J. Harris
Rutland Superior Court Judge

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

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 348-6-15

STATE OF VERMONT,	)
	)
PLAINTIFF,	)
	)
v.	)
	)
PICO VILLAGE WATER CORPORATION,	)
	)
DEFENDANT.	)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

In order to resolve the allegations of the Complaint filed in the above-captioned matter, Plaintiff, the State of Vermont ("the State") by and through Vermont Attorney General William H. Sorrell, and Defendant Pico Village Water Corporation, hereby stipulate and agree as follows:

Background

1. Defendant Pico Village Water Corporation ("Pico Village") is a Vermont not-for-profit corporation located in Killington, Vermont.
2. Pico Village owns and operates a public community water system located in Killington ("the Water System"). The Water System is a groundwater system that includes two well systems and a single pump station.
3. The Water System provides drinking water year-round to approximately 90 individuals via approximately 34 or so service connections.

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4. The Water System first began operating pursuant to a temporary operating permit issued on December 30, 2004.
5. In May 2007, the Agency of Natural Resources ("ANR") determined that Pico Village was operating the Water System in violation of several provisions of the Vermont Water Supply Rule ("VWSR").
6. On September 1, 2009, Pico Village and ANR entered into an Assurance of Discontinuance ("AOD"), filed with the Vermont Environmental Court (Docket # 174-8-09 Vtec). The AOD listed 16 violations of the Vermont Water Supply Rule and the temporary operating permit; required a penalty payment of $12,000; and required Pico Village to take numerous and prompt actions to comply with the Vermont Water Supply Rule and all applicable permit conditions.
7. From 2012-2013, the Water System experienced: (i) an exceeded lead level; (ii) a fecal indicator positive result at one of its wells; and (iii) a chlorine leak in the distribution system.
8. On October 7, 2013, ANR issued a public water supply permit to Pico Village to operate the Water System ("Permit," WSID # 5238).
9. The Permit identified that the Water System was in violation of the Vermont Water Supply Rule and included a compliance schedule requiring eight (8) specific actions that, if taken, would bring the Water System into compliance and thus allow continued operation. The compliance provisions required prompt submission of documents, reports, and plans to be

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submitted on or before certain dates. The Permit also included other conditions and reporting requirements, including having a certified operator of the Water System.

10. From 2013-2015, the Water System did not comply with certain permit conditions, which led to the filing of this action.

11. Since the filing of this action, Defendant has substantially complied with its Permit and has submitted all items required by the Permit with the exception of the final lead and copper sampling plan, which will be submitted within thirty (30) days of the date of execution of this Stipulation.

Resolution of Claims

12. Defendant admits to liability for the following violations involving its Water System:

    a. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 7.1 for failure to submit an approved operation and maintenance manual by March 2014 (Count One of the Complaint);

    b. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 9.1.2 for failure to submit monthly operating reports between February 2013 and June 2015 (Count Two of the Complaint);

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d. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 6.5 for failure to distribute lead education materials after an exceeded lead level by November 2013 (Count Four of the Complaint);

e. violating its Permit under 10 V.S.A. § 8002(9) and VWSR § 16.3 for failure to submit an updated Source Protection Plan by February 2014 (Count Five of the Complaint);

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j. violating VWSR § 1.1 for failure to provide documentation of corrective actions taken in response to a fecal indicator positive result at one of the Water System's wells in 2012 (Count Ten of the Complaint); and

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k. violating VWSR § 10.2.1 for failure to provide boil water notices and show corrective actions taken in response to a chlorine leak in 2013 (Count Eleven of the Complaint).

13. This Stipulation and the Consent Order and Final Judgment Order resolve all claims in the State's Complaint in this matter against Defendant, including its officers and directors, and the State hereby releases the Defendant and its officers and directors from any further liability associated with the violations described herein. This Stipulation and the Consent Order and Final Judgment Order do not affect any potential violations by Defendant at the Water System not alleged in the Complaint.

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

15. Pursuant to 3 V.S.A., Chapter 5, the Attorney General 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. The Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred.

16. The State has considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment

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Montpelier, VT 05609

resulting from the violations, the length of time the violations existed and that Defendant knew or had reason to know the violations existed. For the violations described above, Defendant shall pay a civil penalty of thirty-seven thousand U.S. dollars ($37,000.00) in the manner set forth in the Final Judgment Order attached hereto.

17. This Stipulation for the Entry of Consent Order and Final Judgment Order has been negotiated by and among the State and Defendant in good faith.

18. The attached Consent Order and Final Judgment Order may be entered as a final judgment in this matter by the Court.

DATED at Montpelier, Vermont this 2nd day of August, 2016.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

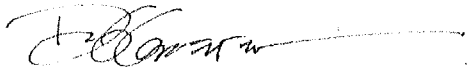
DATED at Killington, Vermont this 2nd day of August, 2016.

PICO VILLAGE WATER CORP.

By: _____
Ralph Thompson, President of Pico Village Water Corporation and authorized agent for Defendant

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

Approved as to form:



David G. Carpenter, Esq.
Attorney for Defendant
Facey Goss & McPhee, P.C.
71 Allen Street
P.O. Box 578
Rutland, Vermont 05702
(802) 665-2724

Office of the
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GENERAL
109 State Street
Montpelier, VT
05609

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT,	)
	)
Plaintiff,	)
	)
v.	)
	)
PICO VILLAGE WATER CORPORATION,	)
	)
Defendant.	)

COMPLAINT

Plaintiff, State of Vermont, by and through the Office of the Attorney General, files this complaint pursuant to 10 V.S.A. § 8221 and 3 V.S.A. § 157. The State alleges that Defendant repeatedly violated 10 V.S.A. § 8003(a)(3) by failing to comply with its Water Supply Permit and the Vermont Water Supply Rule, including by not submitting mandatory documents and plans, and failing to take corrective actions regarding a chlorine leak and a potential positive indication of *E. coli*. The State seeks permanent injunctive relief and civil penalties.

THE PARTIES

1. Vermont Agency of Natural Resources (ANR) is a state agency with offices in Montpelier, Vermont.
2. Defendant Pico Village Water Corporation (Pico Village) is a Vermont not-for-profit corporation located in Killington, Vermont.

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Montpelier, VT
05609

3. Venue is proper in Rutland Superior Court.

FACTUAL AND LEGAL BACKGROUND

The Water System

4. Pico Village owns and operates a public community water system located in Killington (the Water System). The Water System is a groundwater system that includes two well systems and a single pump station.
5. The Water System provides drinking water year-round to approximately 90 individuals via approximately 34 or so service connections.

ANR Public Water Supply Permit and Water Supply Rule

6. Chapter 56 of Title 10 (public water supply) requires a permit from ANR for all public water supply systems.
7. A water system is defined as "public" if it has at least 15 service connections or serves an average of at least 25 people for at least 60 days per year. 10 V.S.A. § 1671 (5)(A).
8. Pursuant to the authority granted in 10 V.S.A. § 1672, ANR issued its Vermont Water Supply Rule (revised as of December 2010). The Rule provides standards and requirements applicable to all water supply systems in order to protect public health.
9. The Vermont Water Supply Rule also expressly adopts the federal Safe Drinking Water Act (42 U.S.C. § 300 *et. seq.*) standards and implementing regulations, including, among others, 40 C.F.R. § 141 (July 1, 2009), the National Primary Drinking Water Regulations.

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The Water System's Operating History

10. The Water System is a "public water system" under Title 10, Chapter 56 because it has more than 15 service connections or serves more than 25 people for more than 60 days per year.
11. The Water System first began operating pursuant to a temporary operating permit issued on December 30, 2004.
12. The temporary operating permit expired on December 31, 2006 and Pico Village did not apply for a new operating permit.
13. In May 2007, ANR determined that Pico Village was continuing to operate the Water System in violation of several provisions of the Vermont Water Supply Rule.
14. On September 1, 2009, Pico Village and ANR entered into an Assurance of Discontinuance (AOD), filed with the Vermont Environmental Court (Docket # 174-8-09 Vtec). The AOD listed 16 violations of the Vermont Water Supply Rule and the temporary operating permit; required a penalty payment of $12,000.00; and required Pico Village to take numerous and prompt actions to comply with the Vermont Water Supply Rule and all applicable permit conditions.
15. After the 2009 AOD, Pico Village applied for a new operating permit but did not take all actions ordered by the AOD, and the Water System continued to experience problems. For example:

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a. After the AOD in 2009, and in 2012, tap water samples showed that the Water System exceeded the lead levels allowed by federal law, 40 C.F.R. § 141.85-86. A 2012 sample showed lead levels at 0.024 mg/L, which exceeds the 0.015 mg/L federal standard, as implemented by the Vermont Water Supply Rule. To date, Pico Village has not provided documentation of its corrective actions to address the exceeded lead levels.

b. On October 16, 2012, the Water System experienced a fecal indicator positive result at one of its wells, which indicates a potential source of *E. coli* contamination. On October 18, 2012, ANR notified Pico Village of the test result and corrective actions to take. To date, Pico Village has not provided documentation of its corrective actions to address the potential contamination.

c. On February 8, 2013, ANR required Pico Village to issue a boil water notice due to a chlorine leak in the distribution system. The notice was to be issued every three months until Pico Village provided weekly testing results and documentation showing that the chlorine leak had been addressed. To date, Pico Village has not been issuing boil water notices and has not provided the documentation of its corrective actions to address the chlorine leak.

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The Water System's Permit

16. On October 7, 2013, ANR issued a public water supply permit to Pico Village to operate the Water System (Permit, WSID # 5238).

17. The Permit identified that the Water System was in violation of the Vermont Water Supply Rule and included a compliance schedule requiring eight (8) specific actions that, if taken, would bring the Water System into compliance and thus allow continued operation. The compliance provisions required prompt submission of documents, reports, and plans to be submitted on or before certain dates. The Permit also included other conditions and reporting requirements.

18. To date, Pico Village has not complied with the Permit conditions and the Vermont Water Supply Rule (VWSR) as explained further in the Counts below.

Statutory Framework for Environmental Enforcement Actions

19. Under 10 V.S.A. § 8221, the Attorney General is authorized to bring enforcement actions for violations of any of the provisions of law specified in § 8003(a), including Title 10 of the Vermont statutes, Public Water Supply (Chapter 56).

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

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21. Under 10 V.S.A. § 8221(b)(6), each violation that occurred is subject to civil penalties of up to $85,000 for each initial violation and up to $42,500 for each day a violation continued.

VIOLATIONS

22. Paragraphs ¶¶ 1–21 are re-alleged and incorporated by reference for each of the below Counts.

COUNT ONE: Failure to Submit Operation and Maintenance Manual

23. VWSR § 7.1 requires all water systems to have an Operation and Maintenance (O&M) Manual approved by ANR. The Permit required Pico Village to submit a copy of its O&M Manual for ANR's review and approval by March 1, 2014.

24. To date, Pico Village has not submitted its O&M Manual to ANR.

25. Failure to submit the O&M Manual is a violation of the Permit, 10 V.S.A. § 8002(9), and VWSR § 7.1. Each day that a violation continues is a separate continuing violation.

COUNT TWO: Failure to Submit Monthly Operating Reports

26. VWSR § 9.1.2 requires submission of monthly operating reports. The Permit requires Pico Village to submit a monthly operating report that summarizes the Water System's operation and includes certain water testing data and analyses as required by VWSR § 9.1.2.

27. Since 2009, Pico Village submitted only six (6) monthly reports, and has submitted no report since February 2013.

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28. Failure to submit a monthly operating report is a violation of the Permit, 10 V.S.A. § 8002(9), and VWSR § 9.1.2. Each day that a violation continues is a separate continuing violation.

COUNT THREE: Failure to Submit Lead and Copper Sampling Plan

29. VWSR § 6.5 requires compliance with the federal lead and copper standards contained in 40 C.F.R. § 141.80. 40 C.F.R. § 141.80 requires monitoring and sampling of lead and copper, and reporting such information to a state. The Permit required Pico Village to submit an updated lead and copper sampling plan for ANR's review and approval by November 1, 2013.

30. To date, Pico Village has not submitted its updated lead and copper sampling plan to ANR and, on information and belief, has not been monitoring and sampling for lead and copper.

31. Failure to submit a lead and copper sampling plan and failure to monitor and sample for lead and copper is a violation of the Permit, 10 V.S.A. § 8002(9), and VWSR § 6.5. Each day that a violation continues is a separate continuing violation.

COUNT FOUR: Failure to Certify Lead Education Materials

32. VWSR § 6.5 requires compliance with the federal lead and copper standards contained in 40 C.F.R. § 141.85, including delivery of public education materials following detection of an exceeded lead level.

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33. Because sampling results exceeded allowed lead levels in 2012, the Permit required Pico Village to distribute lead education materials to its water users by November 1, 2013, and to send ANR a copy and written certification that the lead education materials were submitted.

34. To date, Pico Village has not submitted a copy and certification of the lead education materials.

35. Failure to submit a copy and certification of the lead education materials is a violation of the Permit, 10 V.S.A. § 8002(9), and VWSR § 6.5. Each day that a violation continues is a separate continuing violation.

COUNT FIVE: Failure to Submit Updated Source Protection Plan

36. VWSR § 16.3 requires a public water system to identify sources of contamination in a Source Protection Plan that is updated every three years. The Permit required Pico Village to submit an updated Source Protection Plan for ANR's review and approval by February 1, 2014.

37. Pico Village's Source Protection Plan was last updated in September 2009. To date, Pico Village has not submitted an updated Source Protection Plan.

38. Failure to submit an updated Source Protection Plan is a violation of the Permit, 10 V.S.A. § 8002(9), and VWSR § 16.3. Each day that a violation continues is a separate continuing violation.

COUNT SIX: Failure to Identify a Class 3 Operator

39. VWSR § 12.1 requires a public water system to be operated by a certified operator of the appropriate class. VWSR § 12.8 defines the classes of public

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water systems (Class 1, 2, or 3). Under VWSR § 12.8.3, the Water System is a Class 3.

40. Since March 2009, Pico Village's operator of record is a Class 2 operator.

41. The Permit required Pico Village to contract with an operator of the appropriate class and submit an updated Water System Officials Contact Form by November 1, 2013.

42. To date, Pico Village has not shown that its operator of record is certified to operate a Class 3 water system.

43. Failure to have an operator of the appropriate class is a violation of the Permit, 10 V.S.A. § 8002(9), and VWSR § 12.1. Each day that a violation continues is a separate continuing violation.

COUNT SEVEN: Failure to Submit Target pH Range

44. The Permit required Pico Village to set a target pH range and obtain ANR's approval of the target pH range by December 31, 2013.

45. To date, Pico Village has not submitted any target pH range to ANR.

46. Failure to submit a target pH range is a violation of the Permit, 10 V.S.A. § 8002(9). Each day that a violation continues is a separate continuing violation.

COUNT EIGHT: Failure to Submit a Comprehensive Water System Improvement Plan

47. The Permit required Pico Village to identify system improvements and upgrades, and have a professional engineer prepare and submit a

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comprehensive water system improvement plan and schedule by March 1, 2014.

48. To date, Pico Village has not submitted its comprehensive water system improvement plan and schedule to ANR.

49. Failure to submit the comprehensive water system improvement plan and schedule is a violation of the Permit, 10 V.S.A. § 8002(9). Each day that a violation continues is a separate continuing violation.

COUNT NINE: Failure to Submit "as-built" Record Drawings

50. The Permit required Pico Village to submit "as-built" Record Drawings (including maps) for the water treatment and distribution system by April 1, 2014.

51. To date, Pico Village has not submitted its "as-built" Record Drawings for the treatment and distribution system to ANR.

52. Failure to submit the "as-built" Record Drawings for the treatment and distribution system is a violation of the Permit, 10 V.S.A. § 8002(9). Each day that a violation continues is a separate continuing violation.

COUNT TEN: Failure to Complete Corrective Actions for Fecal Indicator Results

53. VWSR § 1.1 expressly adopts the federal standards contained in 40 C.F.R. § 141.404(b)(1), which require a groundwater system to follow the corrective actions advised by a state within 120 days of a fecal indicator positive sample.

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54. On October 16, 2012, the Water System experienced a fecal indicator positive result at one of its wells, which indicates a potential source of *E. coli* contamination.

55. On October 18, 2012, ANR notified Pico Village of the result and the corrective actions to take.

56. To date, Pico Village has not provided documentation of its corrective actions to address the potential *E. coli* contamination.

57. Failure to show completion of the fecal indicator corrective actions is a violation of the Vermont Water Supply Rule and 40 C.F.R. § 141.404(b)(1) as adopted in the Rule. Each day that a violation continues is a separate continuing violation.

COUNT ELEVEN: Failure to Issue Boil Water Notices

58. VWSR § 10.2.1 requires compliance with any public notification that ANR determines is necessary to protect public health.

59. On February 8, 2013, ANR required Pico Village to issue a boil water notice due to a chlorine leak in the distribution system. The notice was to be issued every three months until Pico Village provided weekly chlorine testing results and documentation showing the corrective actions taken to address the chlorine leak. The boil water notice has not been rescinded.

60. To date, Pico Village has not issued boil water notices every three months and has not provided the documentation of its corrective actions to address the chlorine leak.

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61. Failure to issue boil water notices or show completion of the chlorine leak corrective actions is a violation of VWSR § 10.2.1. Each day that a violation continues is a separate continuing violation.

WHEREFORE, the State of Vermont seeks the following relief:

1. Civil penalties pursuant to 10 V.S.A. § 8221 of not more than $85,000 for each violation, and not more than $42,500 for each day a violation continued, under 10 V.S.A. § 8003(a)(3) for failing to comply with the Water Supply Permit (Counts One through Nine), and failing to comply with the Vermont Water Supply Rule (Counts One through Six, Ten and Eleven);
2. Permanent injunctive relief requiring Defendant to: (i) comply with all ANR regulatory and permit requirements, including timely submission of all monitoring reports, plans, manuals, and other required documents; and (ii) hire a certified operator of the water system, to be approved in advance by ANR, who will be responsible for providing all required reports and responding on a timely basis to all ANR inquiries regarding Defendant's regulatory and permit compliance;
3. The award to the State of investigative costs of enforcement, court costs, and fees incurred in this litigation; and
4. Such other relief as this court deems just and appropriate.

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Dated June 17, 2015 at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____

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ENTRY ORDER

2016 VT 90

SUPREME COURT DOCKET NO. 2015-412

APRIL TERM, 2016

Agency of Natural Resources	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court,
	}	Environmental Division
	}	
Hugh McGee & Eileen McGee	}	DOCKET NO. 94-8-15 Vtec

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

Affirmed.

FOR THE COURT:

Harold E. Eaton, Jr., Associate Justice

Concurring:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

2016 VT 90

No. 2015-412

Agency of Natural Resources

v.

Hugh McGee & Eileen McGee

Supreme Court

On Appeal from
Superior Court,
Environmental Division

April Term, 2016

Thomas G. Walsh, J.

Hugh McGee & Eileen McGee, Pro Ses, Brandon, Appellants.

William H. Sorrell, Attorney General, and Robert F. McDougall, Assistant Attorney General, Montpelier, for Appellee.

PRESENT: Reiber, C.J., Dooley, Skoglund, Robinson and Eaton, JJ.

¶ 1. **EATON, J.** In this environmental enforcement action, the Agency of Natural Resources (ANR) issued a violation and imposed a penalty of $10,000 against defendants Hugh McGee and Eileen McGee for placing unpermitted fill in a Class II wetland. Defendants appealed and, following a site visit and evidentiary hearing, the Environmental Division concluded that the land was not exempt, upheld the violation, and reduced the penalty to $3647. On appeal, defendants argue that the land is used for grazing horses and it therefore meets the requirements of the farming exemption in the wetlands regulations. We conclude that the evidence supports the Environmental Division's finding that the area had not been used consistently to grow food or crops since 1990 and therefore any exemption had expired, and affirm.

¶ 2. A little background regarding the underlying statutes and regulations is useful to understanding the arguments involved in this appeal. Pursuant to statute, a permit is generally required before conducting an activity "in a significant wetland or buffer zone." 10 V.S.A. § 913(a). This broad requirement is tempered in two ways. First, the definition of wetland exempts certain lands. Wetlands are defined as areas "inundated by surface or groundwater with a frequency sufficient to support significant vegetation or aquatic life that depend on saturated or seasonally saturated soil conditions for growth and reproduction," but excluding "such areas as grow food or crops in connection with farming activities." 10 V.S.A. § 902(5) (emphasis added). ANR's wetlands regulations contain a parallel "Farming Exemption," which defines farming activities as "the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; and the growing of food and crops in connection with the raising, feeding, or management of livestock, poultry, equines, fish farms, or bees for profit." Vermont Wetlands Rules § 3.1(a)(2), Code of Vt. Rules 12 030 026 [hereinafter Wetlands Rules]. The Wetlands Rules specify that the farming exemption has a "Limitation on Exemption," which confines its application to those areas used for farming activities as of the rules' effective date and expires "whenever the area is no longer used to grow food or crops or in ordinary rotation." Id. § 3.1(a)(3). Thus, under the statute and applicable regulations, only those areas that have been used for farming activities continuously since 1990 are exempt from regulation as a wetland.

¶ 3. The second way that the general prohibition on activity in a wetland is narrowed is that the statute authorizes nonpermitted "allowed uses," which are set by rule. 10 V.S.A. § 913(a). The Wetlands Rules list certain activities that are allowed in Class I or Class II wetlands without a permit, but emphasize that these may be conducted only "provided that the configuration of the wetland's outlet or the flow of water into or out of the wetland is not altered and that no draining, dredging, filling, or grading occurs." Wetlands Rules § 6. This list includes "[t]he growing of

food or crops in connection with farming activities," under certain conditions. Id. § 6.06. Thus, unless an activity takes place in an area exempt from regulation or is an allowed use, it requires a permit. Id. § 9.1.

¶ 4. Here, ANR alleged that defendants violated the Wetlands Rules by placing fill in a Class II wetland without a permit. The Environmental Division made the following factual findings. Defendant Eileen McGee is the sole owner of the 28.36-acre property in Brandon, Vermont. Her former husband, Hugh McGee, is responsible for the daily upkeep of the property. For thirty years, defendants have conducted various farming activities on areas of the property including raising and training horses, raising cattle, haying, and grazing horses. The property spans Smalley Road. On the south side of the road, there are several paddocks and fields close to the road where defendants pasture the horses. South of the paddocks is a pond that provides water for the horses. South and east of the pond is a large Class II wetland. The land south of the pond has been used for grazing horses, but, as the trial court found, only in that the horses were permitted to eat what was attractive to them for forage and was there growing naturally. The ANR enforcement officer testified that the area in question was not being used to grow crops in connection with the management of horses or livestock. The findings and conclusions of the trial court leave no doubt that except for occasional cutting, there was an absence of any soil management practice for pasture land intended to cultivate fertile soils consistent with animal health and water quality.

¶ 5. In August 2013, ANR received a citizen complaint about a possible wetland violation. An ANR enforcement officer visited defendant's land on August 26 and observed Hugh McGee using an excavator to dredge the pond south of the horse paddocks and placing the dredged material on the southern bank of the pond. The enforcement officer spoke to Hugh McGee and explained that it did not appear that his current actions were a violation, but that it would be a

violation to place any dredged material in the wetland. He advised Hugh McGee to stop dredging until he could return with a wetlands ecologist. On August 29, the enforcement officer returned with a wetlands ecologist. They observed that material had been pushed into the wetland. That area of the wetland had wild vegetation growing. The brush was chest-high and thick and did not show signs of being cultivated.

¶ 6. In September 2013, ANR issued a notice of alleged violation. In response, Eileen McGee sent a letter stating that the property was an agricultural operation and therefore exempt. In June 2015, ANR issued an administrative order for the violation, ordering removal of the fill and requiring payment of a $10,000 fine. Defendants requested a hearing, claiming they were exempt from the Wetlands Rules because the land was used for farming activities. The matter was heard before the Environmental Division. The court conducted a site visit and heard testimony from the enforcement officer, the wetlands ecologist, and defendant Hugh McGee.

¶ 7. The court concluded that defendants' activities of intermittently cutting the brush and allowing horses to graze in the area did not meet the definition of farming in the statute or the Wetlands Rules. 10 V.S.A. § 902(5) (exempting from definition of wetland "such areas as grow food or crops in connection with farming activities"); Wetlands Rules § 3.1(a)(2) (defining farming activities as "cultivation or other use of land for growing food"). The court explained that the definition of farming entailed some type of cultivation—physical measures applied directly to the soil—and did not include land where vegetation was merely allowed to grow in a random fashion and animals were permitted to graze.

¶ 8. The court further concluded that even if periodic cutting of vegetation and grazing of livestock fit within the meaning of "farming activities" and "cultivation," the evidence failed to show that the activity had been continuous since 1990 when the Wetlands Rules went into effect. See Wetlands Rules § 3.1(a)(3) (limiting farming exemption to those areas used to grow food or

crops as of the rules' effective date and explaining that exemption expires "whenever the area is no longer used to grow food or crops or in ordinary rotation"). The court explained that the credible evidence showed that to the extent the area had been managed—by cutting with a brush hog—this was on an intermittent and inconsistent basis. The court cited defendant Hugh McGee's testimony that he intermittently brush-hogged and hayed the land south of the pond, and that at times the area was reclaimed by brush. In addition, the court credited the testimony of the wetlands ecologist that when she inspected the area in August 2013 the brush was chest high and thick and showed no signs of cultivation. Therefore, the court concluded that whatever exemption the land may have had, it was abandoned by the inconsistent nature of the use.

¶ 9. The court additionally held that the activity of putting fill in the wetland was not an allowed use under the Wetlands Rules, which specifically disallowed any use which entailed "draining, dredging, filling or grading." Wetlands Rules § 6. Finally, the court considered various factors and decreased the penalty to $3647.

¶ 10. On appeal, defendants argue that their land has been used continuously since 1976 as a farming operation and it is therefore exempt from regulation under the Wetlands Rules. Defendants list various types of activities they allege amount to farming, including raising and training horses, growing Christmas trees, caring for stray animals, and haying, and assert that at the evidentiary hearing the court agreed that the land was used as a farm. It is important to distinguish, however, between the defendants' property generally and the area of the wetland where the alleged violation took place. While defendants may engage in other activities on the property, the sole use on the area in question was, as defendants testified, that the land was used as pastureland to graze horses. According to defendants, the land was cultivated because it was brush-hogged to keep it open for pasturing horses.

¶ 11. There are essentially two main questions presented by this appeal. The first one is legal—whether defendants' activities of brush-hogging and grazing horses on open land not managed for pasture other than mere intermittent and occasional cutting, satisfied the farming exemption as an area that was used to "grow food or crops in connection with farming activities," 10 V.S.A. § 902(5), or used for the "cultivation or other use of land for growing food," Wetlands Rules § 3.1(a)(2). The second question is factual—whether defendants' "no longer used [the area] to grow food or corps or in ordinary rotation" at a time after 1990 and therefore any exemption expired. Wetlands Rules § 3.1(a)(3).

¶ 12. This Court applies a deferential standard of review to the findings made by the Environmental Division. In re Carrigan Conditional Use & Certificate of Compliance, 2014 VT 125, ¶ 9, 198 Vt. 438, 117 A.3d 788. Factual findings will not be reversed "unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous." In re Goddard Coll. Conditional Use, 2014 VT 124, ¶ 4, 198 Vt. 85, 111 A.3d 1285 (quotation omitted).

¶ 13. Defendants bear the burden of proving that their land is exempt from the wetlands regulations. See In re Ochs, 2006 VT 122, ¶ 12, 181 Vt. 541, 915 A.2d 780 (mem.) (stating that landowners bore burden of demonstrating that their operation fit within farming exemption and was exempt from Act 250 regulation). "The farming exemption, like all exemptions, is to be read narrowly and only applied when the facts support the exemption's application." Id. (discussing farming exemption in Act 250).

¶ 14. We do not reach the former legal question of whether defendants' activities amounted to farming as defined in the statute and the rule because we conclude that the evidence supports the court's finding that defendants did not consistently use the area "to grow food or crops in ordinary rotation" since 1990.

¶ 15. The evidence concerning the extent to which the area south of the pond had been used was as follows. The wetlands ecologist testified that the area of the wetland where fill was placed was thickly forested. She testified that she did not observe any cultivation of the area for growing food or crops. She stated that there was no indication that the area had been used in a continuous or ordinary rotation for cultivating or maintaining crops because the area was shrubby, very wet, mucky, and thickly forested. Upon being shown a recent photograph of the property, the ecologist explained that the area looked very different in the photograph because the vegetation had been cut back and was no longer the shrub swamp that she had observed.

¶ 16. Defendant Hugh McGee testified that the area to the south and east of the pond had been hayed without much specification as to when that had occurred. He testified that areas of the farm are brush-hogged every year. He also stated that the horses will eat items growing in the wetland including cattails, crabgrass, and trees. He acknowledged that he did not regularly brush hog the entire farm and that the horses would nonetheless graze in the wooded areas. He testified that the area where fill was placed was a location that needed to be taken care of. He admitted there were trees growing in that area and that all he had done in that area was clean some brush. He stated that in that particular area he did not brush hog it every year and that "when it gets too big for using, then when you get around to it, you clean it up." He stated that the horses will still wander in the area and "pick and eat some of it." He acknowledged that the growth of brush does prevent the horses from using the area as pastureland and that is why he needs to go in and clean it out.

¶ 17. Therefore, there was sufficient evidence to support the court's finding that defendants' management of the property in the area of the alleged violation—brush-hogging only —was intermittent and not consistent since 1990. It was up to the trial judge to determine the weight to assign to particular evidence. See In re Eastview at Middlebury, Inc., 2009 VT 98, ¶ 10,

187 Vt. 208, 992 A.2d 1014 (explaining that environmental court as factfinder determines credibility of witnesses and weighs persuasiveness of evidence). Here, it was within the court's discretion as factfinder to credit the testimony of the wetlands ecologist that the brush was overgrown and did not display signs of cultivation.

¶ 18. Defendants assert that the ecologist did not have knowledge of how long the land had been used for farming and that ANR did not do any background checks to determine whether the farm had operated consistently. The ecologist's testimony regarding her observations of the area combined with the testimony of Hugh McGee was sufficient for the court to find that activities in that area were not consistent. The ecologist testified that she was not aware of how long the property had been used for farming and agriculture. She also testified that this portion of the land displayed signs that it had not recently been managed in any way. In addition, defendant Hugh McGee's testified that he had not done any cutting or brush-hogging of that area for several years and sometimes let the area get overgrown. His testimony was consistent with photographs of the area which depicted significant overgrowth. This evidence supported the court's finding the area had not been consistently "used to grow food or crops or in ordinary rotation" since 1990. Wetlands Rules, § 3.1(a)(3). This finding in turn supports the court's conclusion that whatever exemption may have applied had expired and therefore that defendants' property did not qualify for the farming exemption.

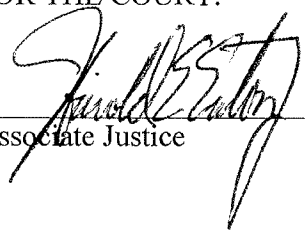
¶ 19. Even for land that does not qualify for the farming exemption, some uses are allowed. Wetlands Rules § 6.06 provides an allowed use for "[t]he growing of food or crops in connection with farming activities," with certain restrictions. See Sec'y, Vt. Agency of Nat. Res. v. Irish, 169 Vt. 407, 412, 738 A.2d 571, 578 (1999) (explaining that allowed uses are separate from farming exemption, which requires current and ongoing use of land for growing crops). Defendants assert that their activity of grazing was an allowed use. Here, however, the grazing is

not the activity for which the defendants were penalized. It was the act of placing fill in the wetland. This activity of placing fill in the wetland is prohibited under § 6, which explicitly states that allowed uses must not include "draining, dredging, filling, or grading." Wetlands Rules, § 6. Therefore, defendants' activity, for which the penalty was assessed, was not an allowed use.

¶ 20. Because defendants do not qualify for the farming exemption and their activity was not an allowed use, the violation was proper. On appeal, defendants do not challenge the amount of the penalty imposed and therefore we do not address the issue.

Affirmed.

FOR THE COURT:



Associate Justice

ENTRY ORDER

2016 VT 114

SUPREME COURT DOCKET NO. 2015-454

JUNE TERM, 2016

In re B&M Realty, LLC	}	APPEALED FROM:
	}	
	}	Superior Court,
	}	Environmental Division
	}	
	}	DOCKET NO. 103-8-13 Vtec

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

Reversed.

FOR THE COURT:

Beth Robinson, Associate Justice

Concurring:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Mary Miles Teachout, Superior Judge,
Specially Assigned

2016 VT 114

No. 2015-454

In re B&M Realty, LLC

Supreme Court

On Appeal from
Superior Court,
Environmental Division

June Term, 2016

Thomas G. Walsh, J.

Robert E. Woolmington of Witten, Woolmington, Campbell & Bernal, P.C., Manchester Center, for Appellant Two Rivers-Ottauquechee Regional Commission.

Bridget C. Asay, Solicitor General, and Elizabeth M. Tisher, Assistant Attorney General, Montpelier, for Appellant Natural Resources Board.

David K. Mears, Environmental and Natural Resources Law Clinic, South Royalton, for Amici Curiae Vermont Natural Resources Council and Preservation Trust of Vermont.

Nathan H. Stearns of Hershenson, Carter, Scott & McGee, P.C., Norwich, for Amici Curiae Bennington County Regional Commission, Central Vermont Regional Planning Commission, Northwest Regional Planning Commission, Southern Windsor County Regional Planning Commission, and Windham Regional Commission.

Paul S. Gillies of Tarrant, Gillies & Richardson, Montpelier, for Cross-Appellant B&M Realty, LLC.

PRESENT: Reiber, C.J., Skoglund, Robinson and Eaton, JJ., and Teachout, Supr. J., Specially Assigned

¶ 1. **ROBINSON, J.** Appellants Natural Resources Board and Applicant Two Rivers-Ottauquechee (TRO) Regional Commission appeal the Environmental Division's award of an Act 250 permit to Applicant B&M Realty, LLC, to construct a large mixed-use business park near the

Interstate 89 Exit 1 interchange in the Town of Hartford. The trial court concluded that the project satisfied Act 250, including the requirement that it conform with the 2007 TRO Regional Plan. The Natural Resources Board and the TRO Regional Commission appeal, arguing that the project is inconsistent with mandatory and unambiguous provisions in the regional plan. Applicant cross-appeals, asserting that the 2007 Regional Plan does not apply, and that the Court need not consider the plan because the proposed development will not have substantial regional impact. We conclude that the 2007 Regional Plan applies and that the trial court's conclusion that the project will have substantial regional impact is supported by the evidence, but hold that the project is inconsistent with several provisions in the regional plan. We accordingly reverse.

I. Overview of Land Use Planning in Vermont

¶ 2. The Vermont Planning and Development Act, 24 V.S.A. ch. 17, governs municipal and regional planning in Vermont. The Act is intended to "encourage the appropriate development" of state lands by providing for a "coordinated, comprehensive planning process and policy framework" to guide decisions by municipalities, regional planning commissions, and State agencies. 24 V.S.A. § 4302(a), (b)(1). To that end, the Act provides for municipal planning commissions, id. § 4321 et seq., and creation of regional planning commissions by the act of voters or municipal legislative bodies, subject to State approval. Id. § 4341. The regional commissions are composed of at least one representative appointed from each member municipality. Id. § 4342. Those commissions are charged with, among other things, preparing regional plans consistent with the general goals of the Planning and Development Act articulated in § 4302. Id. § 4345a(5).

¶ 3. These broad land-use goals established by the Legislature include "maintain[ing] the historic settlement pattern of compact village and urban centers separated by rural countryside," discouraging "strip development along highways," and encouraging economic growth "in locally designated growth areas," or in "existing village and urban centers, or both." Id. § 4302(c)(1)(A)-(B). In addition to serving these goals, regional plans must identify land uses

within each region that will further the region-specific goals set forth in § 4347. Plans should also be "compatible with approved municipal and adjoining regional plans." Id. § 4345a(5).

¶ 4. Regional plans provide a comprehensive framework for regional development. They must include, among other elements, "[a] statement of basic policies of the region to guide the future growth and development of land and of public services and facilities, and to protect the environment" as well as a "map and statement of present and prospective land uses." Id. § 4348a(1)-(2). Plans must also discuss regional energy needs, transportation issues, utility issues, and numerous other regional issues. Id. § 4348a(3)-(9). In this way, the plans serve to "guid[e] and accomplish[] a coordinated, efficient and economic development of the region" that will "best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants as well as efficiency and economy in the process of development." Id. § 4347.

¶ 5. The Act calls for "widespread citizen involvement" in the regional planning process. Id. § 4345a(5)(A). At the outset of the planning process and throughout the process, regional planning commissions are required to "solicit the participation of local citizens and organizations by holding informal working sessions that suit the needs of local people." Id. § 4348(a). The commissions must solicit comments from a range of identified stakeholders, and hold two or more public hearings within the regions on any proposed plans or amendments. Id. § 4348(b), (c). At least 60% of a region's commissioners representing municipalities must vote to adopt a regional plan before it can take effect. Id. § 4348(f).

¶ 6. In furtherance of the Legislature's goal of a coordinated state planning process, both municipal plans and regional plans are made enforceable through Act 250. Thus, applicants who seek Act 250 permits must show that their projects are "in conformance with any duly adopted local or regional plan." 10 V.S.A. § 6086(a)(10). Regional planning commissions must assist district environmental commissions in assessing whether a project complies with a regional plan. 24 V.S.A. § 4345a(13). A regional plan's provisions will apply in Act 250 proceedings "to the

extent that they are not in conflict with the provisions of a duly adopted municipal plan." Id. § 4348(h)(1). If a conflict exists, the regional plan will be given effect if the project "would have a substantial regional impact." Id. § 4348(h)(2).

II. Facts and Proceedings Below

¶ 7. Applicant owns three separately deeded lots covering 167.7 acres in Hartford. The property is located between U.S. Route 4 and Old Quechee Road near the north and southbound I-89 exit ramps. It is two miles away from Quechee Village and Quechee Gorge and five miles from White River Junction. The property is mostly undeveloped, although it presently contains a single-family dwelling and a 2433-square-foot commercial building. There are miscellaneous scattered businesses south of the property on U.S. Route 4, including a former real estate office and a country store with an upstairs apartment. There is a convenience store/gas station adjacent to U.S. Route 4 opposite the I-89 southbound ramp and U.S. Route 4 intersection.

¶ 8. Applicant proposes a development project designed as a mixed-use business park with office, retail, restaurant and residential uses to proceed in three phases. Phase 1 of the project contemplates a clustered mixed-use development encompassing more than 115,000 square feet of new construction on approximately 15.5 acres. The first construction cycle consists of 18,142 square feet of office space, 18,142 square feet of retail space, and a 5,667 square foot restaurant. The second cycle consists of 15,110 additional square feet of office space and 15,110 additional square feet of retail space, and nine residential units. The final construction cycle of phase 1 consists of 33,000 square feet of office space. Phase 2 consists of fifty residential units. The Phase 1 buildout includes approximately 2700 linear feet of internal roadway designed more or less as a loop, and the proposal contemplates a "center" that would mimic a small version of Church Street Marketplace in Burlington, Vermont.

¶ 9. In July 2005, applicant and then-landowners David and Ernest Punt sought to rezone portions of the Punt property and create a new zoning district, the Quechee Interstate

Interchange (QII). The municipal planning commission approved the zoning amendment in September 2005. In 2006, applicant presented a sketch plan to the municipal planning commission for the "Quechee Highlands Project."

¶ 10. The regional plan in effect at that time, the 2003 TRO Regional Plan, did not address the Town of Hartford because the Town joined the TRO Regional Commission in 2004, after the 2003 Regional Plan went into effect. In 2007, the TRO Regional Commission replaced the 2003 Regional Plan with the 2007 TRO Regional Plan, which did specifically address Hartford.

¶ 11. In May 2012, applicant sought zoning permits for its project from the Hartford Planning Commission. Applicant indicated its intent to develop approximately 120,000 square feet of commercial space and 10,000 square feet of residential space on its property. The planning commission approved the project in October 2012. Then, in December 2012, applicant sought an Act 250 permit. The district environmental commission unanimously denied its request, concluding, among other things, that the project failed to conform with the 2007 Regional Plan.

¶ 12. Applicant appealed to the Environmental Division of the Superior Court. Applicant first moved for partial summary judgment, asking the court to rule that the 2003 Regional Plan governed its Act 250 application. Applicant offered two grounds. First, it argued that its right to Act 250 review of its project pursuant to the then-existing regional plan vested in 2005 when it sought to amend local zoning bylaws. Alternatively, applicant asserted that its rights vested in 2006 when it shared a sketch plan with the municipal planning commission. The court rejected these arguments and concluded that applicant's rights vested in 2012 when applicant sought local zoning permits for its project. The court therefore conducted its Act 250 review under the 2007 Regional Plan.

¶ 13. Following a merits hearing, the court determined that the project complied with Act 250. The court's consideration of Criterion 10 of Act 250—whether the project is "in conformance

with any duly adopted local or regional plan," 10 V.S.A. § 6086(a)(10)—is at the heart of this appeal.

¶ 14. The threshold question before the trial court was whether a conflict existed between the municipal and regional plans, since, in the event of a conflict, the regional plan may only be given effect if the project would have a substantial regional impact. See 24 V.S.A. § 4348(h). Finding a lack of evidence in the record on the point, and noting that the applicant bears the burden of showing that the provisions of the plan do not conflict, the court assumed that a conflict existed between the municipal plan and the 2007 Regional Plan.

¶ 15. The court then considered whether the project would have a substantial regional impact. It first addressed applicant's assertions that by empowering regional commissions to define "substantial regional impact" without providing any specific standards, the Legislature had unconstitutionally delegated unconstrained discretion to the regional commissions. See id. § 4345a(17) (requiring regional commissions, as part of regional plan, to "define a substantial regional impact, as the terms may be used with respect to its region"). The court concluded that the applicable statutes collectively provide guidance to the regional planning commissions and noted that "substantial regional impact" is necessarily a region-specific concept best determined on a regional level. Ultimately, it decided that it was unnecessary to decide the delegation issue given its conclusion that applicant satisfied Criterion 10 in any event.

¶ 16. The court also considered and rejected applicant's argument that the TRO Regional Commission's definition of "substantial regional impact" did not provide a clear and applicable standard. It explained that the 2007 Regional Plan defined "substantial regional impact" as any development that met one or more of eight criteria, and the court found these criteria sufficiently clear to prevent discriminatory application and to provide adequate information to landowners. It was uncontested that the project as proposed would exceed 20,000 square feet and would require

substantial capital improvements of a local or State highway, and the court found that either of these facts would meet one or more of the criteria in the 2007 Regional Plan.

¶ 17. Having concluded that the project must accordingly comply with the 2007 Regional Plan, the court turned to the terms of the regional plan, focusing on the following provisions:

> Principal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers to minimize the blighting effects of sprawl and strip-development along major highways and maintain rural character.
>
> [The] existing settlement pattern . . . provid[es] a system of centers both efficient and economical for the conduct of business enterprise and for the provision of social and community facilities and services. This pattern must be protected and enhanced and is supported by state planning law.
>
> Any development planned for interchange development must be constructed to . . . discourage creation or establishment of uses deemed more appropriate to regional growth areas.
>
> Major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available.
>
> [The Exit 1] interchange is not an appropriate location for a growth center.

¶ 18. The court considered each provision separately. It acknowledged that the first provision—dealing with principal retail establishments—contains mandatory language, but concluded that it did not apply. The court construed the term "principal retail establishment" to mean a project where retail was the chief, leading, or most important use. It reasoned that the project did not fall within this definition because less than 40,000 of 115,000 square feet of development would be devoted to retail space. The court considered the next three provisions to be unenforceable either as aspirational policy statements or because they failed to provide adequate guidance or clear definitions of terms such as "major growth or investments," and "planned settlement area." The court concluded that these standards gave unfettered discretion to the regional commission, and thus, could not be grounds for denying a proposed development.

¶ 19. The court concluded that the final provision prohibiting a "growth center" at Exit 1 was mandatory but inapplicable. It explained that the plan designated two types of growth centers: regional growth centers, "the traditional developed areas in the region," and designated growth centers, areas that a municipality seeks to designate as growth centers based on a number of criteria. The court noted that the project here was not located in an area where traditional development had occurred and that no party was seeking to have the project receive a growth center designation. The court thus concluded that the project conformed with the 2007 Regional Plan and that as long as applicant complied with conditions to mitigate traffic concerns, the project satisfied Act 250. This appeal and cross-appeal followed.

III. Applicability of the TRO 2007 Regional Plan

A. Vested Rights

¶ 20. We reject applicant's assertion on cross-appeal that the 2007 Regional Plan does not apply to its project. Applicant argues that it "started the process of obtaining a zoning permit" in 2005 by seeking to amend the town's zoning regulations, and it thereby acquired a vested right to use the 2003 Regional Plan for any Act 250 permit it might seek in the future. According to applicant, it diligently pursued its plans to develop its project after securing the zoning change.

¶ 21. Applicant provides no legal support for its position, and we find none. We agree with the trial court that this argument fails as a matter of law. See Richart v. Jackson, 171 Vt. 94, 97, 758 A.2d 319, 321 (2000) (explaining that Supreme Court reviews summary judgment ruling using same standard as trial court; summary judgment appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law).

¶ 22. As the trial court explained, Vermont follows the "minority rule" that a party obtains a vested right in existing regulations "as of the time when [a] proper [permit] application is filed." Smith v. Winhall Planning Comm'n, 140 Vt. 178, 181, 436 A.2d 760, 761 (1981). The majority rule holds, by contrast, that "rights vest only if an applicant has both received a permit

and substantially relied on it in commencing work, or can show that an amendment was enacted to target its development." In re Keystone Dev. Corp., 2009 VT 13, ¶ 6, 186 Vt. 523, 973 A.2d 1179 (mem.) (citing Smith, 140 Vt. at 181, 436 A.2d at 761). Pursuant to the minority rule this Court adopted, a party's ability to rely on a particular zoning regime vests sooner than it would under the majority rule. We adopted this minority rule because we found it more practical to administer, it provided greater certainty, and it avoided extended litigation. Smith, 140 Vt. at 181-82, 436 A.2d at 761. We made clear that parties do not have an "open-ended right to 'freeze' the applicable regulatory requirements by proposing a development with inadequate specificity." In re Ross, 151 Vt. 54, 56, 557 A.2d 490, 491 (1989). Instead, a party must file a complete permit application before any rights will vest. Id. (concluding that applicant had no vested right in town plan in existence at time it filed incomplete application for Act 250 permit).

¶ 23. A request to amend a town's zoning regulations is not tantamount to filing a complete permit application for a particular project. We rejected a similar argument in In re Taft Corners Associates, 171 Vt. 135, 758 A.2d 804 (2000). In that case, a developer sought and received a municipal permit to subdivide land in 1987. Id. at 135, 758 A.2d at 805. In that application, the developer represented that its anticipated development would include mixed uses, retail and light industrial. Id. Following the subdivision permit, the developer made considerable investment in pursuing its development plans. Id. at 135, 758 A.2d at 806. In 1997, the town adopted an interim zoning amendment that changed the available uses in the area of the subdivided property. Id. at 136, 758 A.2d at 806. The developer subsequently sought a permit for a specific development, and argued that by virtue of the subdivision permit, it had a vested right to rely on the zoning regulations in effect at the time of that permit. Id. This Court rejected that argument, explaining:

> We have no doubt that a subdivision application creates a vested right that the subdivision permit be evaluated under the regulatory law in effect at the time of the application. That is the holding of

> [Smith v. Winhall], and it is not under debate in this case. What [the developer] seeks, however, is a vested right that a separate zoning permit will be evaluated under the regulatory law in effect at the time of the application for the subdivision permit, and not that in effect at the time of the zoning permit application. We can understand this position if the legality of the act of dividing the parcel of land necessarily depends upon a specific provision of the zoning ordinance, and that zoning ordinance provision was amended before the zoning permit was sought. Thus, if the developer in Smith had been awarded a subdivision permit despite the fact that his lots were undersized, but had been denied a zoning permit because of the size of the lots, he should have had a vested right to the zoning permit provided he met all other zoning requirements. . . . Beyond this narrow circumstance, however, we believe [the developer's] position represents an unwarranted and unprecedented expansion of our vested rights jurisprudence. See L.M. Everhart Constr., Inc. v. Jefferson Cty. Planning Comm'n, 2 F.3d 48, 52 (4th Cir. 1993) ("no court . . . has adopted such a broad conception of vested rights").

In re Taft Corners Assocs., 171 Vt. at 139-40, 758 A.2d at 808-09 (footnote omitted). This is an easier case because here, although the developer describes steps that it took to pursue its development project (requesting a change in the municipal zoning requirements), it did not prior to 2012 file a permit application of any sort.

¶ 24. Nor do the facts that prior to 2007 applicant was taking steps to advance the development project, and that municipal leaders were aware of these efforts, give rise to a vested right in application of the 2003 Regional Plan. A mere "suggestion" to a municipality "that a property owner would like to undertake ill-defined work at an unspecified time" is insufficient to vest in a developer a right to rely on the then-existing regional plan for purposes of an application for a future Act 250 permit. In re Keystone Dev. Corp., 2009 VT 13, ¶¶ 5-6 (holding that developer acquired no vested rights in zoning ordinance where it did not submit a "full and complete" application for a zoning permit but merely alerted city officials that it intended to perform certain work on its property). As in Keystone, applicant's position here would create great uncertainty in the law and move us even further away from the majority rule. See id. ¶ 6 (explaining that without a proper application, one cannot know "what rights, exactly, had vested as to a particular party, or

when"). It is clear that applicant acquired no vested right in use of the 2003 Regional Plan for Act 250 purposes prior to the TRO Regional Commission's adoption of the 2007 Regional Plan.

¶ 25. We need not decide exactly when a party's interest in using a specific regional plan vests, whether it is when the applicant files a complete application for an Act 250 permit, or when a party files a complete application for a zoning permit associated with that project.[1] In either case, the zoning and Act 250 permit requests here were both made in 2012, well after the 2007 Regional Plan took effect.

B. Substantial Regional Impact

¶ 26. We likewise conclude that because the project will have a substantial regional impact, the 2007 Regional Plan applies. Applicant argues the 2007 Regional Plan does not apply because the project will not have a "substantial regional impact." See 24 V.S.A. § 4348(h) (directing that to the extent a conflict exists between the regional plan and municipal plan, the regional plan shall be given effect "if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact"). Applicant acknowledges that its project falls squarely within the definition of "substantial regional impact" contained in the 2007 Regional Plan insofar as the project, among other things, contemplates commercial or industrial construction involving 20,000 square feet or more of gross floor area. It argues, however, that the Legislature

[1] We held in In re Molgano that where "a developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance [with local and regional plans under criterion 10 of Act 250] is to be measured with regard to zoning laws in effect at the time of a proper zoning permit application." 163 Vt. 25, 33, 653 A.2d 772, 776-77 (1994). Given the rationale for this decision, it is not necessarily dispositive of the question of whether a proper zoning permit application vests the applicant's expectation in application of the then-existing regional plan for purposes of an Act 250 permit. Moreover, within the municipal zoning context we have held that an application for a subdivision permit does not create vested rights in application of those zoning laws to a distinct application for a development permit with respect to that same property. In re Taft Corners Assocs., 171 Vt. at 139-40, 758 A.2d at 808-09. These decisions leave unanswered the question whether it is the Act 250 application that vests in the applicant a right to rely on the existing regional plan for purposes of Act 250 review, or whether an application for a zoning permit for that project can have that effect.

improperly gave "complete and utter discretion" to regional commissions to define "substantial regional impact," and that the arbitrariness of the definition in the 2007 Regional Plan highlights the improper breadth of the Legislature's delegation. See id. § 4345a(17) (requiring regional commissions, as part of regional plan, to "define a substantial regional impact, as the terms may be used with respect to its region" and stating that commission's definition shall be given "due consideration" in state regulatory proceedings).

¶ 27. In support of its claim that the 2007 Regional Plan definition of "substantial regional impact" is arbitrary and unconnected to actual regional impacts of development, applicant describes a hypothetical scenario in which a development may exceed 20,000 square feet of commercial space without having any regional impact. In particular, it describes an antiques dealer who sells only through the internet and has a direct route to the post office with no neighbors who would be impacted by the limited truck traffic. Applicant further argues that the court was only required to give "due consideration" to the regional commission's definition of "substantial regional impact," was required to make an independent determination of such impact, and engaged in "rank speculation" by finding a substantial regional impact here.

¶ 28. We find these arguments without merit. First, there can be no claim of "unconstitutional delegation of legislative power" where a statute "establish[es] reasonable standards to govern the achievement of its purpose and the execution of the power which it confers." Vermont Home Mortg. Credit Agency v. Montpelier Nat'l Bank, 128 Vt. 272, 278, 262 A.2d 445, 449-50 (1970) (recognizing that "[w]ithin these limits," legislature "may confide a broad grant of authority to a subordinate agency in intricate matters affecting the general welfare in natural resources, health, education and economics"); see also Rogers v. Watson, 156 Vt. 483, 493, 594 A.2d 409, 415 (1991) (recognizing that delegation of discretionary authority is valid as long as Legislature provides "sufficient standard or policy to guide" agency's action). We conclude that the Vermont Planning and Development Act provides ample guidance to regional

commissions regarding the development of regional plans. See 24 V.S.A. ch. 17. The law identifies a legislative purpose for planning generally, id. § 4302, it lists specific goals with which regional plans must be consistent, id. § 4347, it identifies the duties of regional planning commissions and required elements for regional plans, id. § 4348a, and it provides procedural requirements for adopting plans, including the opportunity for public hearing and comment. Id. §§ 4392(a)-(e), 4345a, 4347, 4348a, 4348. Given this extensive statutory scheme, we reject applicant's unsupported suggestion that requiring regional commissions to define "a substantial regional impact" as part of developing its regional plan constitutes an unlawful delegation.

¶ 29. Moreover, applicant's second argument swallows up its first. As applicant contends, a regional commission's definition of "substantial regional impact" is not binding on the court; rather, it is entitled to "due consideration" in state regulatory proceedings. Id. § 4345a(17). Because the court retains ultimate discretion to determine a substantial regional impact with reference to the statutory framework and goals, subject to due consideration of a regional commission's own definition, the Legislature has not made the kind of wholesale delegation of legislative authority to the regional commissions that applicant suggests.

¶ 30. Finally, the regional plan contains various nonarbitrary provisions that the trial court concluded were sufficiently clear to prevent discriminatory application and that support the court's conclusion that the proposed project would have a substantial regional impact. As indicated above, the 2007 Plan states that a substantial regional impact exists for "commercial or industrial construction involving 20,000 square feet or more of gross floor area" and for projects that "necessitat[e] substantive capital improvements, such as widening or signalization of regionally significant local or State highways." These requirements are clearly defined and reasonable. It is not "rank speculation" to conclude that a project involving 115,000 square feet of commercial development at a highway interchange, and that requires a new traffic signal on a regionally significant roadway, as well as construction of additional turning lanes, will have a

substantial regional impact. Indeed, as the regional commission emphasized in the Plan, developments near highway exchanges are particularly suited for evaluation on a regional basis "given the considerable public investment in the interstate highway system and regional growth areas, and the significant public exposure to such areas." These areas are "powerful magnets for nonresidential uses" that "often compete[] with and erode[] regional growth areas."

IV. Conformance with the 2007 Regional Plan

A. Standard of Review

¶ 31. With respect to our standard of review, the interpretation of a regional plan is analogous to the interpretation of a zoning ordinance; it presents a legal issue that we review without deference to the trial court. In re Grp. Five Invs. CU Permit, 2014 VT 14, ¶ 4, 195 Vt. 625, 93 A.3d 111 ("The Supreme Court reviews the environmental court's rulings on questions of law or statutory interpretation de novo." (citing In re Vill. Assocs. Act 250 Land Use Permit, 2010 VT 42A, ¶ 7, 188 Vt. 113, 998 A.2d 712)); see also In re Lathrop Ltd. P'ship I, 2015 VT 49, ¶¶ 21, 44, 121 A.3d 630 (explaining that proper interpretation of terms of zoning ordinance presents legal question, and question of whether project meets definition in ordinance is also subject to de novo review).[2]

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[2] We stated in In re Chaves Act 250 Permit that "[w]e accord deference to the trial court's finding of conformity." 2014 VT 5, ¶ 38, 195 Vt. 467, 93 A.3d 69. That statement is inconsistent with our standard. See, e.g., In re JAM Golf, LLC, 2008 VT 110, ¶ 17, 185 Vt. 201, 969 A.2d 47 (rejecting environmental court's interpretation of municipal plan, and concluding, based on our own review, that particular provisions in plans could not be enforced). Moreover, it is inconsistent with our actual analysis in Chaves. See 2014 VT 5, ¶¶ 41-42.

Although we gave great deference to decisions by the former Environmental Board as "an agency charged with promulgating and interpreting its own rules," In re Vill. Assocs., 2010 VT 42A, ¶ 7 n.2, the Environmental Division "is part of the judicial branch," and "there is no separation-of-powers imperative for deferential review." In re Albert, 2008 VT 30, ¶ 6, 183 Vt. 637, 954 A.2d 1281 (mem.). Thus, we have stated "that where the outcome of the matter turns not on findings of fact, but on interpretation of a statutory term, and where we are not reviewing a decision by an agency charged with promulgating and interpreting its own rules, we employ the familiar de novo standard of review for matters of law." In re Vill. Assocs., 2010 VT 42A, ¶ 7 n.2. We clarify here that we review without deference the environmental court's interpretation of

B. Merits

¶ 32. In determining whether a proposed project complies with Criterion 10 of Act 250—that is, whether it "[i]s in conformance with any duly adopted local or regional plan," 10 V.S.A. § 6086(a)(1)—a court must read the requirements of that plan in light of several considerations.

¶ 33. First, courts must strike a balance between the need for a plan to provide broad and flexible guidance with the need for clear requirements. We require plan provisions to be clear and definite to prevent arbitrary application and to provide adequate notice to landowners. In re JAM Golf, LLC, 2008 VT 110, ¶¶ 13, 17-19 ("We will not uphold a statute that fail[s] to provide adequate guidance, thus leading to unbridled discrimination by the court and the planning board charged with its interpretation." (quotation omitted)). Nonetheless, we do not require "mathematical certainty of language." State v. Danaher, 174 Vt. 591, 594, 819 A.2d 691, 695 (2002) (mem.); see also Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (concluding that ordinance was not unconstitutionally vague because although language was "marked by flexibility and reasonable breadth, rather than meticulous specificity," it was clear what ordinance as a whole prohibited (quotation omitted)). Even in the context of municipal noise ordinances, we have recognized that "we are dealing with an area where some imprecision and generality is necessary and inevitable and our void-for-vagueness test is less strict where the regulation is economic and the landowner can seek clarification of its meaning or resort to administrative processes." In re Ferrera & Fenn Gravel Pit, 2013 VT 97, ¶ 16, 195 Vt. 138, 87 A.3d 483 (quotations omitted).

¶ 34. Additionally, a regional plan is not a municipal zoning ordinance and is likely to contain even less detail than a zoning bylaw. Zoning bylaws are designed to specifically "permit, prohibit, restrict, regulate, and determine land development," including specific uses of land;

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the terms of a regional plan as well as its legal conclusion that a project does or does not conform to a regional plan.

dimensions, location, changes to and use of structures; and areas and dimensions of land to be used by structures or for other purposes. 24 V.S.A. § 4411(a). By contrast, regional plans are designed "to guide the future growth and development of land and of public services and facilities, and to protect the environment." Id. § 4348a(a)(1). They cover a much broader geographic area than municipal ordinances. And they serve a host of purposes—from informing consideration of Act 250 permit applications in cases like this to shaping highway projects to informing economic development plans.[3] The breadth of regional plans' application is not an excuse for imprecision, but it does shape reasonable expectations as to the level of detail in those plans. In short, we will enforce a provision in a regional plan where it is "sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed." Brody v. Barasch, 155 Vt. 103, 110, 582 A.2d 132, 137 (1990).

¶ 35. Second, "broad policy statements phrased as nonregulatory abstractions are not equivalent to enforceable restrictions." Chaves, 2014 VT 5, ¶ 38 (quotation omitted). Thus, provisions that "recommend" or "encourage" certain uses are generally insufficient to create an enforceable obligation. See id. ¶¶ 40-41 (concluding that plan provision stating that mineral extraction "should minimize adverse effects on aesthetics and special community resources (such as historic sites) and should not interfere with or have negative impacts on historic sites" was "broad and nonregulatory, espousing general policies" without any "specific requirements that are legally enforceable"); see also In re John A. Russell Corp., 2003 VT 93, ¶ 19, 176 Vt. 520, 838 A.2d 906 (mem.) (concluding that plan that "discouraged" certain uses in particular area did not evince sufficiently "specific policy" against particular kind of development to support finding of nonconformity with town plan); In re MBL Assocs., 166 Vt. 606, 607-08, 693 A.2d 698, 700-01

[3] See 19 V.S.A. § 10c(a) (providing that Agency of Transportation may pursue exceptions to national standards for geometric design when appropriate to comply with local or regional plans as interpreted by the adopting entities); 32 V.S.A. § 5930a(c)(4) (directing Vermont Economic Progress Council to consider conformity with regional plans in awarding tax incentives).

(1997) (mem.) (concluding that use of word "should" in regional plan did not create mandatory enforceable requirement). Mandatory language includes terms like "must" and "shall" and it sets forth a requirement rather than a recommendation.

¶ 36. Third, in considering a provision's enforceability, we must view the provision in the context of the regional plan as a whole, bearing in mind the legislative goals that regional plans must serve. See In re Tyler Self-Storage Unit Permits, 2011 VT 66, ¶ 13, 190 Vt. 132, 27 A.3d 1071 (explaining that in interpreting zoning ordinances, Court must "examine not only the plain language . . . but also the whole of the ordinance in order to try to give effect to every part, and will adopt an interpretation that implements the legislative purpose" (quotations omitted)); Williston Citizens for Responsible Growth v. Maple Tree Place Assocs., 156 Vt. 560, 563, 593 A.2d 469, 470 (1991) (holding that construction of ordinance "not limited to consideration of an isolated sentence . . . rather, we must look to the whole of the ordinance"). This does not mean that the aspirational goals of a plan as a whole can salvage a vague or aspirational provision, but it does mean that a court must view provisions with reference to the broader purposes articulated in the plan, especially where they are not internally inconsistent. See In re Tyler Self-Storage, 2011 VT 66, ¶ 13 (explaining that provisions should be construed "to determine and give effect to the intent of the drafters," and this intent "is most truly derived from a consideration of not only the particular statutory language, but from the entire enactments, its reason, purpose and consequences" (quotation omitted)); see also In re Green Peak Estates, 154 Vt. 363, 368-69, 577 A.2d 676, 679 (1990) (concluding that regional plan providing that residential development on slopes greater than 20% "should not be permitted" was sufficiently specific to be enforceable, and, while it did not explicitly state that all development was precluded, "Board's commonsense interpretation of the plan's policy" was "consistent with the overall approach to use of the region's intermediate uplands").

¶ 37. With these principles in mind, we consider several salient provisions of the regional plan that individually, but, more importantly, in concert, establish that the project does not conform to the plan as required by 10 V.S.A. § 6086(a)(10).

1. "Principal Retail Establishments"

¶ 38. The 2007 Regional Plan states: "Principal retail establishments must be located in town centers, designated downtowns, or designated growth centers to minimize the blighting effects of sprawl and strip-development along major highways and maintain rural character."

¶ 39. This language is mandatory and the proscription is clear: retail development must be limited to specified areas within the region to promote clearly identified land-use goals. There is no dispute that the proposed project is not located in a town center, designated downtown, or designated growth area. Nevertheless, the trial court concluded that the proposed project conformed with this provision of the 2007 Regional Plan. It viewed the mixed-use development project in its entirety as a single "establishment" and concluded that it was not a "principal retail establishment" because the project's total proposed retail square footage was not greater than the total square footage of any other use.

¶ 40. We reject the trial court's construction of the regional plan on the basis of the plain language of the plan itself and because the court's construction of the "principal retail establishment" provision would lead to results squarely at odds with the purpose of the plan and the underlying enabling legislation. The proposal in this case is for a mixed-use development—one that encompasses multiple primary or principal uses in multiple establishments. As appellants' expert testified below, a principal retail establishment is an establishment where retail is the primary occupant of space in a building, as distinguished from an ancillary use. See also 4 P. Salkin, American Law of Zoning § 41:16 (5th ed. 2015) (explaining that accessory use, unlike principal use, is "use of a building or structure which . . . is subordinate to or customarily incidental to the main use of the building and the permitted use of the zoning district in which it is located").

The trial court's approach of considering the proposed mixed-use project as a whole as a single establishment for purposes of this requirement is not supported by the plain meaning of "principal retail establishment."

¶ 41. Moreover, the interpretation would yield a result at odds with the stated purposes of the regional plan itself. A general goal outlined in the plan is preserving the existing settlement pattern consisting of "clusters of residences and other activities in the form of villages and hamlets surrounded by less dense settlement, rural in character, or large spaces in natural vegetation." The plan explains that such a pattern of development has proven to be "of a sociological, psychological, and aesthetic benefit to the region, while at the same time providing a system of centers both efficient and economical for the conduct of business enterprise and for the provision of social and community facilities and services." The plan promotes this goal by requiring "[m]ajor growth or investments [to] be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available" and specifically defines seven types of growth center in the region. It further articulates a series of goals as promoting the public interest, including encouraging "full use" of regional growth areas, protecting the character of rural areas by avoiding sprawling development, and reserving land at interchange areas for the development of services for the traveling public and transport of goods, not for high traffic-generating commercial activities that are unrelated to services for the traveling public or trucking interests. And the requirement that "principal retail establishments" be located in Town Centers, Designated Downtowns, or Designated Growth Centers was, by its own terms, designed to "minimize the blighting effects of sprawl and strip-development along major highways and maintain rural character."

¶ 42. Under the trial court's interpretation, unlimited retail development could occur outside of growth areas consistent with the regional plan as long as such development was folded into even larger square footage development of other sorts. This interpretation cannot be squared

with the clearly stated goals of the regional plan as a whole and the particular limitation on retail development. The trial court's interpretation would allow sprawl and strip-development, rather than minimize it, and thus cannot be squared with the regional plan as a whole. In re Grp. Five Invs. CU Permit, 2014 VT 14, ¶ 23 ("We adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense." (quotation omitted)). This project, which proposes to create a restaurant and almost 35,000 square feet of new retail space, clearly includes "principal retail establishments" as contemplated by the Plan, and thus squarely runs afoul of the requirement that "principal retail establishments" must be located in designated areas that do not include the site of this project.

2. "Regional Growth Areas"

¶ 43. As noted above, the regional plan seeks to limit "major growth or investments" into existing or planned settlement centers:

> Due to severe physical site limitations and the relatively high costs incidental to land development in certain areas as compared to others, much of the region is neither readily available nor suited for intense development. Major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available. Regional Growth Areas are the traditional developed areas in the region. They are differentiated into the following seven types: Regional Center, Town Centers, Village Settlements, Hamlet Areas, Designated Growth Centers, Designated Downtowns, and Designated Village Centers as well as expansion areas that are designated to accommodate future growth based on the capacity to provide infrastructure and suitable land without threatening critical resources or creating sprawl.

Like the provision governing "principal retail establishments," this provision contains mandatory language. It requires major growth or investments to be located in specified areas.

¶ 44. The trial court recognized the mandatory nature of this provision but concluded that the "critical words are undefined and subject to interpretation," and thus, it could not "discern a specific policy" that prohibited this project. In particular, the trial court stated that terms "major

growth or investment" and "planned settlement area" were undefined, and their meaning was unclear so that this provision did not establish a clear, unqualified and unambiguous standard that could be enforced.

¶ 45. We disagree. Considering this language in the broader context of the regional plan, a reasonable person can discern what is prohibited. In the context of this case, the term "major development" is "sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed." Brody, 155 Vt. at 110, 582 A.2d at 137. A reasonable person would recognize that "major development" is large-scale development, including development with the potential to have a "substantial regional impact." A proposal that contemplates 115,000 square feet of new construction in a largely undeveloped area near an interstate exchange falls within a common-sense understanding of this term. As the NRB notes, moreover, this project represents a significant change to the existing landscape and contemplates a level of development much greater than the yearly average for the entire Town of Hartford between 1998 and 2005. The project at issue here is clearly "major development" as that term is commonly understood.

¶ 46. Nor is the requirement that major development be channeled into or adjacent to "existing or planned settlement centers and . . . areas where adequate public facilities and services are available" obscure in the overall context. Directly following this requirement, the regional plan identifies "regional growth areas" as the "traditional developed areas in the region," and categorizes these areas into seven types, recognizing as well "expansion areas that are designated to accommodate future growth." It is evident that the commission is referring to these areas as the "existing or planned settlement centers" appropriate for "major growth and development." A review of the more specific definition of each of these areas, stated elsewhere in the plan, underscores this conclusion. The plan recognizes, for example, that a regional center has existing public sewer and water utilities, as well as transportation infrastructure capable of handling

significant volumes of commuting and commercial traffic, and that "[m]ajor developments like large governmental, medical, commercial, industrial building must be located in Regional Centers where utilities, facilities, and human capital are concentrated." The Exit 1 interchange is not an "existing or planned settlement center" under the regional plan, and therefore, it is not an appropriate location for major development.

3. Development at Highway Interchange

¶ 47. Given that there are thirteen highway interchanges in this region, the plan also includes a general discussion of development at highway interchange areas. The plan states that it is in the public interest to "reserve land at Interchange Areas for the development of services for the traveling public and transport of goods, not for the development of high traffic-generating commercial activities that are unrelated to services for the traveling public or trucking industry, or institutional uses such as governmental offices or post offices." It cautions that "Interchange Area development should not be promoted to the detriment of regional growth areas or the public investments made therein." It reiterates that "[r]etail establishments providing goods and services to a regional clientele should be located in Regional Centers to minimize the blighting effects of sprawl and strip-development along major highways and to maintain rural character."

¶ 48. The plan identifies general highway interchange policies, indicating again that land uses planned for interchanges areas should "complement rather than compete with uses that exist in Designated Downtowns, Designated Village Centers, Designated Growth Centers, and other regional growth areas." It identifies specific uses appropriate for interchange development, which "include highway-oriented lodging and service facilities, trucking terminals, truck-dependent manufacturing, and park-and-ride commuter lots."

¶ 49. The plan then specifically states what is not appropriate: "Any development planned for interchange development must be constructed to . . . discourage creation or establishment of uses deemed more appropriate to regional growth areas." Specific to Exit 1, the

plan provides that "[t]his interchange is not an appropriate location for a growth center." The plan identifies the types of development appropriate for Exit 1 as "residential, appropriately-scaled traveler-oriented uses, and other similar uses that are not intended to draw on regional populations."

¶ 50. The trial court turned this language on its head, concluding that because the project is not located in an area where traditional development has occurred and no party is seeking to have the project receive a formal growth center designation, the prohibition on growth centers at Exit 1 does not apply to the project. This ignores the obvious intent of the provisions above. The plan clearly and repeatedly states that the type of development that belongs in a regional growth center—which includes "[r]etail establishments providing goods and services to a regional clientele" and "major developments"—does not belong at the Exit 1 interchange. Applicant's proposed project is not transit-oriented, nor is it scaled to fit among the small, low-density residential and commercial structures that currently exist in this area. It is a "major development" that includes a significant retail component, which, as stated throughout this plan, must be channeled into or adjacent to planned settlement areas to "minimize the blighting effects of sprawl and strip-development along major highways and to maintain rural character."

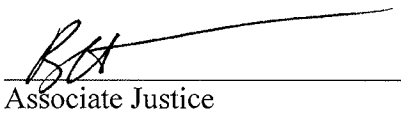
¶ 51. These provisions, all of which are clear and enforceable, reinforce each other in establishing a clear and mandatory framework for development. That framework does not authorize major development—including principal retail establishments—at this non-growth-center highway interchange major development, given that the development as proposed is not oriented to the traveling public or trucking industry. For these reasons, we conclude that the project does not satisfy the requirements of Criterion 10 because it does not conform with clear and enforceable provisions of the applicable regional plan. 10 V.S.A. § 6086(a)(10).

¶ 52. The Legislature has made clear that regional plans are key to the "appropriate development" of state lands, 24 V.S.A. § 4302(a), with Act 250 serving as a critical enforcement

mechanism. Consistent with its statutory obligations, the TRO Regional Commission developed a comprehensive plan to guide development in its region. It repeatedly manifested its intent to prohibit large-scale development of this sort at the Exit 1 interchange, thereby serving key land-use goals identified by the Legislature: maintaining historic settlement patterns, discouraging strip development along highways, and encouraging economic growth in specific areas. Id. § 4302(c)(1). The TRO Regional Commission used language that is "clear and unqualified, and creates no ambiguity," Chaves, 2014 VT 5, ¶ 38 (quotation omitted), and thus, those standards must be enforced. Any other conclusion would undermine the continued viability of regional planning in this state. Applicant's proposal does not conform to the regional plan, and the trial court erred in concluding otherwise.

Reversed.

FOR THE COURT:



Associate Justice

STATE OF VERMONT

SUPERIOR COURT
Windsor **Unit**

CRIMINAL DIVISION
Docket No. 509-6-16 wrcr

STATE OF VERMONT	**v.**	**DOB**
	Matthew Wyman	01/24/1985

RESTITUTION JUDGMENT ORDER

DEFENDANT	*Defendant's Name* MATT WYMAN	*Phone Number* 603-812-3739	*Social Security Number* 008-66-7442	
	Mailing Address 2330 Cavendish Gulf Rd	*Town* Cavendish	*State* VT	*Zip* 05142
EMPLOYER	*Employer's Name* Accurate Tree Service		*Phone Number*	
	Address 150 Londonderry Tnpike	*Town*	*State* NH	*Zip*
VICTIM	*Victim's Name* State of Vermont			

Findings of Fact

1. The victim incurred an uninsured material loss in the amount of $ 669.
2. Defendant's ability to pay:
   - ☑ Defendant has the current or reasonably foreseeable ability to make restitution payments.
   - ☐ Defendant has no ability to make payments at this time.

Therefore, it is hereby **ORDERED:**

1. Defendant shall pay restitution in the amount of $ 669. Judgment is against Defendant individually for the entire amount and jointly with the following persons:

   Name: _____ Docket No.: _____

   Name: _____ Docket No.: _____

   Name: _____ Docket No.: _____

2. Defendant shall make payment by cash, certified check, credit/debit card or money order payable to the State of Vermont Restitution Unit as follows:

   ☐ Defendant shall immediately pay $_____ to the court clerk's office.

   ☑ Defendant shall pay $ 10 per ☑ week ☐ 2 weeks ☐ ½ month ☐ month, beginning 11/18/16 to: **State of Vermont Restitution Unit, P.O. Box 10, Waterbury VT 05676-0010** (Phone: 1-800-584-3485; Outside Vermont 802-241-4688)

   ☐ Defendant shall return the following property to the victim within _____ days:

   _____

   ☐ Defendant shall make the following payments in kind to the victim within _____ days:

   _____

3. Defendant remains liable for the judgment until paid in full. Until the judgment due is paid in full, Defendant shall notify the Vermont Restitution Unit in writing of any change of home address or employment within 30 days of such change including the name, address and phone number of any new employer.

4. The Restitution Unit shall have the authority to Collect from an offender subject to a restitution judgment order all fees and direct costs, including reasonable attorney's fees, incurred by the Restitution Unit as a result of enforcing the order and investigating and locating the offender.

Dated 11/8/16

Superior Court Judge

IMPORTANT NOTICES TO DEFENDANT

FAILURE TO PAY: If you fail to pay as ordered, **the Vermont Restitution Unit may file a motion to enforce which may result in suspension of recreational licenses, trustee process against your earnings and other enforcement remedies as provided by law.**

TAX REFUND AND LOTTERY WINNINGS: Any monies owed to the State by the defendant who is under a restitution order, including lottery winnings and tax refunds, shall be used to discharge the restitution order to the full extent of the unpaid total financial losses, and regardless of the payment schedule established by the court.

Acceptance of Service by Defendant

I accept service of a copy of this Restitution Judgment Order.

Dated

Signature of Defendant

NOTICE OF PLEA AGREEMENT

Date 11/8/16

SUPERIOR COURT — Windsor Unit

STATE OF VERMONT — CRIMINAL DIVISION

Docket No. 509-6-16 Wncr

STATE OF VERMONT	v.	Defendant's Name	DOB
		Matthew Wyman	01/24/1985

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

Charge: Unlawful mischief misd.	Charge: Unlawful mischief misd.	Charge:
Docket Number: 509-6-16wncr	Docket Number: 509-6-16wncr	Docket Number:
Amended: (Yes) No	Amended: Yes (No)	Amended: Yes No
Amended Charge Code: 13V3701B	Amended Charge Code:	Amended Charge Code:
Amended Section No: 13 VSA 3701(b)	Amended Section No:	Amended Section No:
(Guilty) Nolo Contendere	(Guilty) Nolo Contendere	Guilty Nolo Contendere
SENTENCE:	SENTENCE:	SENTENCE:
FINE $ 500 & Surcharge $	FINE $ 0 & Surcharge $	FINE $ & Surcharge $
(Min.) Yr. Mo. 29 Days	(Min.) Yr. Mo. 29 Days	(Min.) Yr. Mo. Days
(Max.) Yr. Mo. 30 Days	(Max.) Yr. Mo. 30 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
Term of Probation: months yrs	Term of Probation: months yrs	Term of Probation: months yrs
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
(*) PAF work crew	(*) PAF work crew	

☐ 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:

TOTAL SENTENCE: 30 days ~~WW~~ PAF work crew Total FINE & Surcharges: $

Cases to be Dismissed by State:

Docket # Charge:
Docket # Charge:
Docket # Charge:
Docket # Charge:
Docket # Charge:

Special Probation Conditions:

(See Reverse for General Conditions)

Report Date: Forthwith:
PSI Ordered? Yes No
☐ Sex offender registration required
Defendant already on probation? Yes No

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 — Date 11-8-16

Defense Attorney — Date 11-8-16

Guardian ad Litem — Date

Prosecutor — Date

Judge — Date 11/8/16

Rev. 3/15 SML Distribution: 1st Copy ~ Court; 2nd Copy ~ Computer Operator; 3rd Copy ~ State's Attorney; 4th Copy ~ Defendant; 5th Copy ~ Defense Attorney

NOTICE OF THE POTENTIAL COLLATERAL CONSEQUENCES OF A CONVICTION

(1) When you plead guilty or are convicted of an offense, you may suffer additional legal consequences beyond jail. or prison, home confinement, probation, an fines. These consequences may include:

(A) being unable to get or keep some licenses, permits, orjobs;

(B) being unable to get or keep benefits such as public housing or education;

(C) receiving a harsher sentence if you are convicted of another offense in the future;

(D) having the government take your property;

(E) being unable to serve in the military or on ajury;

(F) being unable to possess a firearm; and

(G) being unable to exercise your right to vote if you move to another state.

(2) If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.

(3) The law may provide ways to obtain some relief from these consequences. Contact information for organizations that may be able to offer assistance to persons seeking relief from collateral consequences may be found on the Internet at:
http://forms.vermontlaw.edu/criminaljustice/index.cfin

(4) Further information about the consequences of conviction is available on the Internet at: http://www.ago.vermont.gov/divisions/criminal-division/collateral-consequences-of-conviction.php

(5) Conviction of a crime in Vermont does *not* prohibit an individual from voting in Vermont.

I acknowledge receipt of this notice, I have read it, and if represented by an attorney, have reviewed with my attorney.

Signature: [signature] Date: 11-8-16

STATE OF VERMONT

SUPERIOR COURT
WINDSOR UNIT

CRIMINAL DIVISION
DOCKET NO. _____

STATE OF VERMONT

v.

MATTHEW WYMAN

INFORMATION BY ATTORNEY GENERAL

BY THE AUTHORITY OF THE STATE OF VERMONT, the Attorney General for the State of Vermont, upon his oath of office, charges:

COUNT 1 of 2

UNLAWFUL MISCHIEF
CHARGE CODE: 13V3701A
OFFENSE CLASS: F

On April 19, 2016, Matthew Wyman of Cavendish, Vermont, at Cavendish, Vermont, in this county and territorial unit, was a person who, with intent to damage property, and having no right to do so or any reasonable ground to believe that he had such right, damaged property valued in an amount exceeding $1,000.00, to wit: intentionally cut down a maple tree from State land without permission, valued at more than $1,100.00, in violation of Title 13 V.S.A. Section 3701(a) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than five years, or a fine of not more than $5,000.00, or both.

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

COUNT 2 of 2

UNLAWFUL MISCHIEF
CHARGE CODE: 13V3701C

OFFENSE CLASS: M

On April 20, 2016, Matthew Wyman of Cavendish, Vermont, at Cavendish, Vermont, in this county and territorial unit, was a person who, with intent to damage property, and having no right to do so or any reasonable ground to believe that he had such right, damaged property valued in an amount not exceeding $250.00, to wit: intentionally cut down a birch tree from State land without permission, valued at $168.00, in violation of Title 13 V.S.A. Section 3701(c) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than six months, or a fine of not more than $500.00, or both.

Dated: June 1, 2016

Respectfully submitted,

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Sarah Katz
Assistant Attorney General

This information was presented to me and I have found probable cause this _____ day of _____, 2015.

_____
Superior Court Judge

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

2017

STATE OF VERMONT

SUPERIOR COURT
WINDSOR UNIT

CRIMINAL DIVISION
DOCKET NO. _____

STATE OF VERMONT

v.

JOEY WYMAN

INFORMATION BY ATTORNEY GENERAL

BY THE AUTHORITY OF THE STATE OF VERMONT, the Attorney General for the State of Vermont, upon his oath of office, charges:

COUNT 1 of 2

POSSESSION OR SALE OF STOLEN PROPERTY
CHARGE CODE: 13V2561B=F
OFFENSE CLASS: F

On April 19, 2016 Joey Wyman of Cavendish, Vermont, at Cavendish, Vermont, in this county and territorial unit, was a person who knowingly possessed or sold stolen property greater than $900.00 in value without the intent to return the property to its owner, to wit: possessed or sold a maple tree stolen from Proctor Piper State Forest estimated to be greater than $1,100.00 in value without the intent to return it to the State in violation of Title 13 V.S.A. Section 2561(b) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than 10 years, or a fine of not more than $5,000.00, or both.

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

COUNT 2 of 2

POSSESSION OR SALE OF STOLEN PROPERTY
CHARGE CODE: 13V2561B=M

OFFENSE CLASS: M

On April 20, 2016, Joey Wyman of Cavendish, Vermont, at Cavendish, Vermont, in this county and territorial unit, was a person who knowingly possessed or sold stolen property less than $900.00 in value without the intent to return the property to its owner, to wit: possessed or sold a yellow birch tree stolen from Proctor Piper State Forest estimated to be $168.00 in value without the intent to return it to the State in violation of Title 13 V.S.A. Section 2561(b) and against the peace and dignity of the State.

PENALTY: Imprisonment for not more than one year, or a fine of not more than $1,000.00, or both.

Dated: June 1, 2016

Respectfully submitted,

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Sarah Katz
Assistant Attorney General

This information was presented to me and I have found probable cause this _____ day of _____, 2015.

_____
Superior Court Judge

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

STATE OF VERMONT

SUPERIOR COURT
ESSEX UNIT

CIVIL DIVISION

Plum Creek Maine Timberlands, LLC,

Plaintiff,

v.

Vermont Department of Forests, Parks, and Recreation, and the Vermont Department of Taxes,

Defendants.

Docket Nos. 72-12-10 Excv, 30-6-11 Excv, 19-4-11 Excv, 31-6-11 Excv, 294-12-10 Oscv and 76-4-11 Oscv

STIPULATION OF VOLUNTARY DISMISSAL PURSUANT TO V.R.C.P. 41(a)(1)(ii)

The parties stipulate that the above-captioned actions have been settled to the satisfaction of the parties and, pursuant to Rule 41(a)(1)(ii), these actions shall be dismissed with prejudice, each party to bear its own costs and attorneys' fees.

Dated: July 14, 2017

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

by: _____

Kyle H. Landis-Marinello
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-1361
kyle.landis-marinello@vermont.gov

Counsel for Defendants Vermont Department of Forests, Parks, and Recreation, and the Vermont Department of Taxes

Dated: July 14, 2017

David L. Grayck

David L. Grayck, Esq.
Law Office of David L. Grayck, Esq.
57 College Street
Montpelier, VT 05602
(802) 223-0659
david@graycklaw.com

Counsel for Plaintiff Plum Creek Maine Timberlands, LLC and Weyerhaeuser Company

STATE OF VERMONT

SUPERIOR COURT
ESSEX UNIT

CIVIL DIVISION

Plum Creek Maine Timberlands, LLC, Plaintiff, v. Vermont Department of Forests, Parks, and Recreation, and the Vermont Department of Taxes, Defendants.	)	Docket Nos. 72-12-10 Excv, 30-6-11 Excv, 19-4-11 Excv, 31-6-11 Excv, 294-12-10 Oscv and 76-4-11 Oscv

SETTLEMENT AGREEMENT

Weyerhaeuser Company (Weyerhaeuser), successor by merger to Plaintiff Plum Creek Maine Timberlands, LLC (Plum Creek), by and through its attorney David L. Grayck, and Defendants Vermont Department of Forests, Parks, and Recreation (FPR), and the Vermont Department of Taxes, by and through Vermont Attorney General Thomas J. Donovan, Jr., stipulate and agree as follows.

WHEREAS:

This matter concerns 56,604 acres that were removed from the Use Value Appraisal Program (Current Use) based on logging activities that occurred in January 2010 on logging stands 34, 43, and 44 in Essex County;

On April 26, 2010, in response to the January 2010 logging activities, the County Forester for Caledonia and Essex counties issued an Adverse Inspection Report documenting water-quality violations and violations of Plum Creek's forest management plan on around 140 acres of the 56,604 acres at issue in this matter;

Plum Creek brought timely appeals of the Adverse Inspection Report and of the decision of the Department of Taxes to remove 56,604 acres from Current Use;

On November 30, 2010, in response to an appeal, the Commissioner of the Department of Forests, Parks & Recreation upheld the Adverse Inspection Report;

On March 31, 2011, in response to an appeal, the Department of Taxes upheld the decision to remove 56,604 acres from Current Use;

Plum Creek filed a timely appeal of both on those decisions to the Civil Division of the Superior Court;

After trial, the Superior Court concluded that Plum Creek had not violated its forest management plan and reversed the decisions of both Departments;

The State filed a timely appeal to the Vermont Supreme Court;

The Vermont Supreme Court reversed the trial court and "reinstate[d] the adverse-inspection report as upheld by the FPR Commissioner";

The matter has now been remanded to the Superior Court to determine the tax consequences of Plum Creek's forestry violations;

During the pendency of these proceedings, Plum Creek remained in Current Use, allowing it to pay lower tax rates to eight affected towns;

At the same time, the State made "hold harmless" payments to those eight towns so they received the same amount in property taxes as they would have if Plum Creek had not been in Current Use, which precludes the towns from bringing a claim for unpaid taxes based on the Vermont Supreme Court decision;

On June 14, 2017, foresters from Weyerhaeuser and FPR visited the site in furtherance of Weyerhaeuser's efforts to prepare a compliance report to submit to FPR pursuant to 32 V.S.A. § 3755(d);

On July 12, 2017, after consultation and review by FPR, Weyerhaeuser submitted a compliance report, which FPR approved that same day; and

Both Parties have an interest in resolving this matter and have thus made compromises, but emphasize that nothing in this settlement shall be considered precedential, and both Parties reserve all rights in all future proceedings.

NOW, THEREFORE, Plaintiff and Defendants stipulate and agree as follows:

1. Plaintiff shall dismiss with prejudice the above-captioned actions pursuant to Rule 41(a)(1)(ii);

2. Plaintiff shall, upon signing of this Settlement Agreement, pay $375,000 to the State of Vermont;

3. Defendants shall consider the transfer of ownership application filed on November 4, 2016 as a timely application for reenrollment in Current Use for 2016 and 2017, and thus shall not issue revised tax bills for 2016, and shall enroll the property in the Current Use program for 2017;

4. Except for the requirements of this Settlement Agreement and the July 12, 2017 compliance report, the Defendants and the Agency of Natural Resources, inclusive of its Departments, shall not seek additional remediation, mitigation, taxes, fines, or penalties related to the January 2010 forestry violations that gave rise to these proceedings, including, but not limited to, remediation,

mitigation, taxes, fines, or penalties which could be sought or imposed pursuant to an action commenced under 10 V.S.A. Chapter 201; 10 V.S.A. Chapter 211; 10 V.S.A. § 2625; 10 V.S.A. § 1263(a); and 10 V.S.A. § 1275(a);

5. This Settlement Agreement shall be binding upon the parties and all their successors and assigns, including successors and assigns that predate the signing of this Settlement Agreement;

6. Nothing in this Settlement Agreement 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 Settlement Agreement;

7. Nothing in this settlement shall be considered precedential, and both Parties reserve all rights in all future proceedings; and

8. Each party shall bear its own costs and attorneys' fees.

Dated: July 14, 2017

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

by: _____

Kyle H. Landis-Marinello
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-1361
kyle.landis-marinello@vermont.gov

Counsel for Defendants Vermont Department of Forests, Parks, and Recreation, and the Vermont Department of Taxes

Dated: July 14, 2017

_____

David L. Grayck, Esq.
Law Office of David L. Grayck, Esq.
57 College Street
Montpelier, VT 05602
(802) 223-0659
david@graycklaw.com

Counsel for Plaintiff Plum Creek Maine Timberlands, LLC and Weyerhaeuser Company

STATE OF VERMONT

SUPERIOR COURT
Essex Unit

CIVIL DIVISION
Docket No. - 72-12-10 Excv; 30-6-11 Excv;
19-4-11 Excv, 31-6-11 Excv

Plum Creek Maine Timberlands, LL vs. Vermont Depar

ENTRY REGARDING MOTION

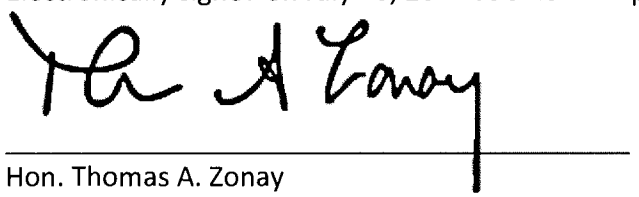
Count 1, Appeal - Other (72-12-10 Excv)
Count 1, Appeal - Other (30-6-11 Excv)
Count 1, Appeal - Tax (19-4-11 Excv)
Count 1, Appeal - Tax (31-6-11 Excv)

Title:	Motion to Dismiss (Stipulated) (Motion 4)
Filer:	Plum Creek Maine Timberlands, LL
Attorney:	David L. Grayck
Filed Date:	July 17, 2017

Stipulated to by all Parties

The motion is GRANTED.

Electronically signed on July 20, 2017 at 01:07 PM pursuant to V.R.E.F. 7(d).



Hon. Thomas A. Zonay
Superior Court Judge

Notifications:
David L. Grayck (ERN 4510), Attorney for Plaintiff Plum Creek Maine Timberlands, LL
Kyle H. Landis-Marinello (ERN 2305), Attorney for Defendant Vermont Department of Taxes
Thea J. Schwartz (ERN 3342), Attorney for party 2 Co-counsel
Kimberly B. Cheney (ERN 3670), Attorney for party 1 Co-counsel

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
Docket No. 597-10-15 Rdcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

ORDER ON MOTION FOR CONTEMPT

The Complaint in this action was filed on October 8, 2015. The State moved for Default Judgment on Liability on March 21, 2016 with supporting affidavits and exhibits establishing the liability of Defendants. On April 27, 2016, the Court granted the State's Motion for Default Judgment and found Defendants liable for violations of Vermont's environmental and agricultural laws and regulations. On June 28, 2016, a hearing on injunctive and monetary remedies was held and an Order on Injunctive and Monetary Remedies (the "Order") issued by this Court.

On June 19, 2018, the State filed a Motion for Contempt alleging that Defendants failed to comply with the Order. On June 20, 2018, the Court issued an Order to Show Cause. The Court held ~~an evidentiary~~ hearing on the Order to Show Cause on July 23, 2018.

Based on the ~~evidence presented~~ at the hearing on the Order to Show Cause, the Court hereby FINDS as follows:

1. On November 14, 2016, Defendants were served with a copy of the Order.

2. In violation of ¶ 5 of the Order, Defendants did not pay the $24,750.00 civil penalty assessed. The State was able to obtain $752.39 through a tax set-off, leaving a current outstanding balance due to the State of $23,997.61.
3. In violation of ¶¶ 3(i) and (ii) of the Order, Defendants failed to have an outside consulting engineer review the construction, use, and capacity of the manure pit and milk house waste system, and failed to provide the consultant's findings and recommendations to the Agency of Agriculture Food and Markets (AAFM) as required.
4. In violation of ¶ 3(iii) of the Order, Defendants failed to make any alterations or construction to the manure pit and milk house waste system necessary to comply with Vermont statutes and regulations.
5. In violation of ¶ 2 of the Order, Defendants failed to certify in writing to AAFM by November 1st each year for 3 years following the date of the order that there is at least 180 days of storage at the manure pit or that they made arrangements for alternative storage capabilities. Although Defendants were served with the Order mid-November of the first year, Defendants have since failed to submit any writing to AAFM for purposes of complying with the directive of ¶ 2.
6. In February 2018, AAFM representatives responded to complaints regarding the manure pit at Defendants' Farm and observed that manure was leaking and/or overflowing from Defendants' manure pit.
7. Defendants have failed to manage the manure pit in order to prevent overflow of manure, risking discharge of manure to State waters.

8. In violation of ¶ 1 of the Order, Defendants have failed to follow all applicable Vermont statutes and regulations, including that they manage the manure pit properly and so as to not overflow.
9. As set forth above, Defendants have knowingly and willfully failed to comply with the June 28, 2016 Order on Injunctive and Monetary Remedies.

Based on the foregoing findings supported by clear and convincing evidence, and pursuant to 6 V.S.A. § 4995, 10 V.S.A. § 8221, and 12 V.S.A. § 122, the Court hereby ORDERS as follows:

1. Defendants, William and Robin Hanfield, are each in civil contempt for violating this Court's June 28, 2016 Order on Injunctive and Monetary Remedies, a copy of which is attached and incorporated in this Order.
2. Defendants shall comply with the June 26, 2016 Order as set forth below, while all terms not specifically addressed shall remain in full force and effect:
    a. Defendants shall comply with ¶ 3 of the June 28, 2016 Order, as follows:
        i. ¶ 3(i) (Defendants shall "hire an outside consulting engineer, approved in advance by AAFM, to review the construction, use and capacity of the manure pit and milk house waste system") on or before September 1, 2018;
        ii. Defendants shall empty the manure pit on or before November 15, 2018, in order to facilitate the consulting engineer to review the construction, use and capacity of the manure pit.
        iii. ¶ 3(ii) (Defendants shall "provide the consultant's findings and recommendations to AAFM") on or before April 15, 2019;

iv. ¶ 3(iii) (Defendants shall "make any alterations or construction to the manure pit and milk house waste system deemed necessary by AAFM") as directed by AAFM, if deemed necessary by AAFM.

b. Defendants shall comply with ¶ 5 of the June 28, 2016 Order, as follows:

i. On or before the 15th day* of each month, beginning on August 15, 2018, Defendants shall pay $800.00 toward ~~the total amount~~ Defendants' remaining civil penalty of $23,997.61 ~~plus interest at the statutory rate of 12% per annum~~.

3. Should Defendants fail to comply with the requirements set forth in paragraph 2a. above ~~any of the above-listed requirements, which shall include the remaining terms of the June 28, 2016 Order not otherwise addressed above~~, Defendants shall be liable for an additional $100.00 per day in coercive penalties.

4. The Court hereby reserves the right to require Defendants to reimburse the State of Vermont for the costs of bringing the motion for contempt, including reasonable attorney's fees.

5. The Court hereby reserves the right to impose further coercive monetary sanctions and all other coercive measures allowable by law should Defendants fail to comply with this Order.

6. Defendants shall comply with all terms of the June 28, 2016 order not otherwise addressed above.

SO ORDERED.

7/23/18

Hon. Samuel Hoar, Jr.
Superior Court, Civil Division, Rutland Unit

Date

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 597-10-15 Rdcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD AND MARKETS and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

STATE OF VERMONT'S MOTION FOR CONTEMPT

NOW COMES the State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and hereby moves this Court, pursuant to 12 V.S.A. § 122 and the general equitable jurisdiction of the Court, to find Defendants, William and Robin Hanfield ("Defendants"), in contempt of the Court's June 28, 2016 Order on Injunctive and Monetary Remedies. In support of the motion, the State provides the following Memorandum of Law.

MEMORANDUM OF LAW

Procedural History

On October 8, 2015 the State of Vermont filed its Complaint in this matter. The Complaint alleged that Defendants violated 10 V.S.A. § 1259 and Vermont's

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Accepted Agricultural Practices[1] ("AAPs") by, on multiple occasions, allowing the manure pit on Defendants' farm to overtop. Defendants did not answer the Complaint.

On March 21, 2016, the State moved for Default Judgment on liability. In support of the motion, the State filed affidavits and exhibits sufficient to establish the violations alleged in the Complaint. The State represented that if liability was found against Defendants, it would request a hearing on injunctive and monetary remedies. By Judgment Order dated April 27, 2016, this Court granted the State's motion and entered judgment on liability against Defendants.

The April 27, 2016 Judgment Order

In its April 27, 2016 Judgment Order, this Court ordered that Defendants are liable for six violations of Vermont's agricultural and environmental laws and regulations. *See* Judgment Order ("the Default Order"). The Court concluded that Defendants violated 10 V.S.A. § 1259(a) on three separate occasions by discharging waste from their overtopped manure pit to waters of the State without a permit from the Secretary of the Agency of Natural Resources. *Id.* ¶¶ A–C. Additionally, the Court determined that Defendants violated three separate provisions of the Vermont AAPs. *Id.* at ¶ D.

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[1] The AAPs in effect at the time of the underlying violations alleged in the Complaint were adopted in 2006, but were renamed "Required Agricultural Practices" ("RAPs") by Act 64 of 2015. Act 64 also directed the Secretary of the Agency of Agriculture, Food, and Markets ("AAFM") to revise the RAPs. The new RAPs went into effect on December 5, 2016. For purposes of clarity, this Motion refers to the applicable AAFM regulations as AAPs where the underlying violations occurred before December 5, 2016, and as RAPs where the alleged noncompliance has occurred on or since December 5, 2016.

Defendants violated section 4.01(a) of the AAPs by creating the direct discharges described above. Defendants violated section 4.01(b) of the AAPs by failing to manage and control the manure pit to prevent runoff to adjoining waters and across boundaries. *Id.* at ¶ E. Defendants violated section 4.01(d) of the AAPs by failing to manage and maintain the farm's waste management system so as to prevent the discharges or structural failures by allowing the manure pit to overtop on three occasions, and by failing to properly connect the milk house pipe to the manure pit. *Id.* ¶ F.

Having found Defendants liable as set forth above, the Court set a hearing on injunctive and monetary penalties.

The June 28, 2016 Order on Injunctive and Monetary Remedies

The Court held a hearing on June 28, 2016 to determine the appropriate injunctive and monetary remedies for the violations established by the Default Order. The Court required the State to serve notice of the hearing on Defendants in advance of the hearing. Despite being served with a copy of the hearing notice, Defendants did not appear or participate at the hearing. The State presented multiple witnesses to support the appropriate injunctive remedies and monetary penalties. This Court issued the Order on Injunctive and Monetary Remedies that same day, June 28, 2016. *See* Order on Injunctive and Monetary Remedies ("the Remedies Order") at 1.

Specifically, the Court ordered that Defendants comply with five provisions: (1) that Defendant properly manage the manure pit to prevent

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overflow; (2) that Defendants certify in writing to AAFM by November 1 of each of the three years following the Order that Defendants maintained at least 180 days of storage at the manure pit or had alternative storage capabilities; (3) that Defendants hire a consulting engineer, approved by AAFM, to review the manure pit, that Defendants provide the consulting engineer's findings and recommendations to AAFM, and that Defendants make any alterations to the manure pit and milk house waste system deemed necessary by AAFM; (4) that Defendants limit the use of the manure pit to only on-site generated waste until AAFM reviewed the consulting engineer's report and any required alterations were complete; and (5) that Defendants pay a $24,750.00 penalty to the State of Vermont.

The Remedies Order represents a final adjudication of the violations alleged in the Complaint and the appropriate remedies for those violations. No party appealed the Remedies Order to the Vermont Supreme Court.

Facts

In support of the motion for contempt the State offers the following summary of the relevant facts which are supported by the attached Affidavit of David Huber.

After several unsuccessful attempts by the State to have this Court's Remedies Order served on Defendants by the Rutland County Sheriff, an AAFM field agent served Defendants with a copy of the Remedies Order on November 14, 2016. Despite having been served with the Remedies Order, Defendants have

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not complied with this Court's Order.

To date, the outstanding penalty has not been paid to the State of Vermont, save for $752.39 obtained via tax-set off. The current outstanding balance of the amount due to the State is therefore $23,997.61 plus interest at the statutory amount.

More importantly, Defendants have not satisfied the injunctive remedies intended to ensure that State waters are protected. Defendants have neither submitted an engineer's report regarding the construction of the manure pit nor made any alterations to the pit to ensure that the manure pit will not overflow. Defendants have not operated and maintained the manure pit to ensure that it does not overflow.

In response to complaints that the manure pit was overflowing, AAFM investigated the Hanfield Farm in February 2018. The investigator observed that the pit was overflowing and/or leaking, and that more than 100 feet of the roadside ditch along Wheeler Road abutting the Hanfield Farm was full of manure. AAFM staff did not observe the manure reaching waters of the State, but observed clear violations of the RAPs[2], which demonstrate noncompliance with this Court's Remedies Order.

Despite a clear and unequivocal order of this Court, Defendants have continued to allow the manure pit to overtop in violation of Vermont's environmental laws and regulations and the Remedies Order.

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[2] *See supra* at footnote 1.

Argument

This Court has both statutory and inherent authority to enforce its orders. First, section 122 of Title 12 provides, in relevant part:

> [w]hen a party violates an order made against him [or her] in a cause brought to or pending before a superior judge or superior court or the district court after service of the order upon that party, contempt proceedings may be instituted against him [or her] before the court or any superior judge.

12 V.S.A. § 122. While authorized by statute, this court also has the inherent authority to enforce its orders and hold those who violate them in contempt. *See State v. Stell*, 2007 VT 106, ¶ 14, 182 Vt. 368 ("[T]he inherent authority to punish disobedience to judicial orders is a creature of necessity, to ensure that the Judiciary has a means to vindicate its own authority." (internal quotation and citation omitted)).

Civil contempt is a coercive measure and the court has discretion in fashioning an appropriate remedy. *See Sheehan v. Ryea*, 171 Vt. 511, 512 (2000). The remedy can include compensatory or coercive monetary sanctions, provided that the coercive sanctions are "purgeable, i.e., they must be capable of being avoided by defendants through adherence to the court's order." *Id.* (quoting *Russell v. Armitage*, 166 Vt. 392, 407–08 (1997)). In addition, "[i]mprisonment of indefinite duration may be the means to compel a party to do some act ordered by the court, and the party must be released on compliance with the order." *Id.* (citing *In re Sage*, 115 Vt. 516, 517 (1949)).

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Defendants have not performed the actions required of them by the Remedies Order, nor have they paid the penalty. Defendants continue to violate the Remedies Order by allowing the manure pit at their farm to overflow. Defendants have failed to submit to the Agency the report from an outside consulting engineer regarding the construction, use and capacity of the manure pit and milk house waste system. This Court should therefore find Defendants in contempt of the Court's June 28, 2016 Order.

RELIEF SOUGHT

WHEREFORE, based on the foregoing, the State of Vermont respectfully requests that the Court award the following relief:

(1) Find Defendant in contempt of the June 28, 2016 Order on Injunctive and Monetary Remedies;

(2) Order that Defendant comply with all terms of the June 28, 2016 Order on Injunctive and Monetary Remedies;

(3) Order that Defendant immediately pay the remaining penalty of twenty-three thousand nine hundred ninety-seven dollars and sixty-one cents ($23,997.61) with interest at the rate of 12% per annum to the State of Vermont;

(4) Order that Defendant reimburse the State for costs incurred as a result of the need to collect the unpaid penalty, including the cost of service and attorney's fees;

(5) Impose purgeable coercive sanctions or other coercive means to ensure

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Defendants comply with the June 28, 2016 Order; and

(6) Such other relief as the Court may deem just and appropriate.

DATED at Montpelier, Vermont this 19th day of June, 2018.

Respectfully submitted,

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

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