STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

SAFETY-KLEEN SYSTEMS, INC.
Defendant.

PLEADINGS BY AGREEMENT

The State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant Safety-Kleen Systems, Inc. hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The Vermont Agency of Natural Resources (ANR or the Agency) is an agency of the State of Vermont created through 3 V.S.A. § 2802. The principal situs of the State of Vermont is Montpelier in Washington County.
2. Safety-Kleen Systems, Inc. (Defendant) is a Wisconsin for-profit corporation, authorized to do business in Vermont.
3. Defendant operates a commercial hazardous waste storage and transfer facility at 23 West Second Street, Barre, Vermont (the Facility).

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4. Defendant provides services to customers primarily engaged in the business of automotive repair, automotive salvage, industrial maintenance, manufacturing, photo processing and dry cleaning.
5. Venue is proper in Vermont Superior Court, Civil Division, Washington Unit.

Statutory and Regulatory Scheme

6. The Agency has the authority to regulate the generation, storage, collection, transport, treatment, disposal, use, reuse, and recycling of hazardous waste in Vermont through 10 V.S.A. Chapter 159 and the Vermont Hazardous Waste Management Regulations (VHWMR).
7. Defendant's Facility is a "certified hazardous waste facility" as defined in VHWMR § 7-103. "Certified hazardous waste facility" is a treatment, storage or disposal facility which is authorized to operate" under a federally approved state hazardous waste program. Defendant is also a "generator" as defined in the VHWMR.
8. Defendant is required to comply with the VHWMR and Vermont's waste management laws, 10 V.S.A. Chapter 159.
9. Petroleum is both a hazardous waste and hazardous material under VHWMR § 7-103. The definition of "hazardous material" in VHWMR § 7-103 specifically includes "petroleum" and "hazardous waste." Waste petroleum is a listed hazardous waste. VHWMR § 7-211, VHWMR § 7-205.

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10. VHWMR § 7-103 defines "Hazardous Waste Management Unit" as "a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is a significant likelihood of mixing hazardous waste constituents in the same area." Examples of Hazardous Waste Management Units (HWMU) include "a tank and its associated piping and underlying containment system and a container storage area."
11. "Storage" is defined in VHWMR § 7-103 as "the actual or intended containment of wastes, either on a temporary basis or for a period of years; in such a manner, as not to constitute disposal of such wastes."
12. Pursuant to 10 V.S.A. § 8221, the Secretary of the Agency may bring an action in superior court to enforce Vermont's environmental laws. The action shall be brought by the Attorney General in the name of the State.
13. Pursuant to 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." Chapter 159 (Waste Management) is one of the statutes listed in 10 V.S.A. § 8003.
14. Pursuant to 10 V.S.A. § 8221(b)(6), each violation that occurs 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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Applicable Vermont Hazardous Waste Management Regulations

15. Under VHWMR § 7-311(b)(1), containers or tanks holding incompatible hazardous wastes must not be stored in the same enclosure, building or structure unless they are segregated in a manner that prevents the wastes from coming into contact with one another under any circumstances (such as spillage or simultaneous leakage).

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

17. VHWMR § 7-311(d)(2) requires that small and large quantity generators shall conduct daily inspections during regular business days of each short-term storage area, and that the inspections be recorded in a log that is kept at the facility for at least 3 years.

18. Any generator who transports or offers for transport hazardous waste to a designated facility using a manifest shall sign the manifest and otherwise complete each manifest as required under VHWMR §§ 7-702(a) and 7-702(b)(4).

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19. Under VHWMR § 7-806(d)(3), above-ground storage tanks (including unregistered tank trailers) holding used oil shall be managed in such a manner as to prevent rupture of the tank and to ensure that no release occurs. If a tank begins to leak, the owner or operator must immediately either transfer the used oil from that tank to another tank or to containers that are in good condition, or manage the used oil in some other way that complies with the requirements of VHWMR § 7-806(d)(3).

20. A transporter of hazardous waste shall comply with the manifest, reporting and recordkeeping requirements of VHWMR § 7-702.

21. Pursuant to VHWMR § 7-404(a)(3), a transporter who owns and operates a transfer facility in Vermont must "[h]old hazardous waste at the transfer facility for a period of ten days or less."

22. Pursuant to VHWMR § 7-504(e)(1), every hazardous waste treatment, storage, or disposal facility issued a permit under the provisions of subchapter 5 of the VHWMR, shall, at a minimum, be designed, constructed, operated and maintained in accordance with all applicable requirements of 40 CFR Part 264.

23. Requirements of 40 CFR Part 264 which are applicable to Defendant include:

    a. Secondary containment systems must be at a minimum constructed of or lined with materials that are compatible with the wastes(s) to

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be placed in the tank system and must have sufficient strength and thickness to prevent failure owing to pressure gradients (including static head and external hydrological forces), physical contact with the waste to which it is exposed, climatic conditions, and the stress of daily operation (including stresses from nearby vehicular traffic). 40 CFR § 264.193(c)(1).

b. Each piece of equipment to which 40 CFR § 264.1050, subpart BB applies shall be marked in a such a manner that it can be distinguished readily from other pieces of equipment. 40 CFR § 264.1050, subpart BB generally applies to "owners and operators of facilities that treat, store, or dispose of hazardous wastes."

c. Additionally, and except as otherwise provided in 40 § CFR 264.1, owners and operators of facilities that have equipment to which subpart BB of part 264 applies must provide for each piece of equipment to which that subpart BB applies, equipment identification number and hazardous waste management unit identification. 40 CFR § 270.25(a)(1).

Defendant's Hazardous Waste Facility Permit

24. On September 26, 2007, Defendant was issued a Hazardous Waste Facility Permit (Permit) pursuant to 10 V.S.A. Chapter 159 and VHWMR § 7-504 to operate a Hazardous Waste Facility in Barre, Vermont.

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25. Permit Condition 4.11 requires the maintenance of a written operating record at the facility or alternative location, approved by the Secretary, which meets the requirements of 40 CFR § 264.73 and any additional requirements listed [in the permit].

26. Permit Conditions 5.6 and 5.7 requires Defendant to inspect the facility for malfunctions and deterioration, operation errors and discharges which may be causing, or may lead to, release of hazardous waste constituents to the environment and shall remedy any deterioration or malfunction of equipment or structures which the inspector reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard.

27. Permit Condition 5.10 allows Defendant to receive, store, treat and/or transfer for disposal, hazardous wastes from the sources listed in the Waste Analysis Plan of the permit. Receipt of hazardous waste from any other sources or the conduct if hazardous waste treatment, storage, or disposal activities other that those specified in this permit is prohibited.

28. Under Permit Condition 5.11, Defendant may receive from off-site, store, treat and/or transfer for disposal, only those hazardous wastes specified in Waste Types and Characteristics (Appendix A) of the Permit.

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Facts relating to Defendant and Factual Allegations

29. On June 8-10, 2016, representatives from the Agency's Waste Management and Prevention Division conducted a hazardous waste compliance evaluation inspection at the Facility.

30. During the Agency's inspection, incompatible wastes (oxidizing liquids and lead-acid batteries) were observed being stored on the same pallet in an area identified as HWMU #5.

31. During the Agency's inspection, the inventory of hazardous waste stored in the area identified as HWMU #3 was not accurate.

32. During the Agency's inspection, a record review revealed that on November 21, 2014, Defendant had not completed the required daily hazardous waste inspection at the Facility.

33. During the Agency's inspection, the floor cover in the area identified as the HWMU #1 secondary containment system was observed to be cracked and separating from the floor surface. Therefore, the secondary containment surface could not be adequately inspected for malfunctions (i.e. cracks, leaks, gap), as the surface of the secondary containment could not be directly observed. Daily inspection of the HWMU #1 by Defendant failed to identify the floor condition as an issue for remediation.

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34. During the Agency's inspection, a used oil tank (used oil tank #1), located in the area identified as HWMU #1 was observed leaking from the manway.

35. During the Agency's inspection, one identification tag affixed to the return and fill ancillary piping at the Facility was observed having two separate ID numbers (one on each side of the tag).

36. During the Agency's inspection, an identification tag affixed to the return and fill gate valve was observed; this ID number was not included on Defendant's schematic diagram for the return and fill equipment.

Defendant's Non-Permitted Storage of Waste Petroleum

37. As a certified hazardous waste facility, Defendant is permitted to accept a limited amount of identified hazardous wastes at the Facility for up to one year. Waste petroleum is not an identified hazardous waste that Defendant can store for up to one year.

38. On November 13, 2015, Defendant, per manifest 004840846 SKS, transported ten containers of waste petroleum, listed as weighing 3,000 lbs., from Townline Scrap in Derby, Vermont to the Facility, for further transport to another Safety-Kleen facility in Kentucky.

39. Defendant's manifests listed its Facility in Barre as the Alternate Facility (or Generator) of the waste received from Townline Scrap.

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40. On January 28, 2016, per manifest 005261550SKS, Defendant offered for transport 3,300 lbs. of waste petroleum from the Facility.

41. During the Agency's inspection on June 8-10, 2016, a document review revealed that Defendant's manifest 005261550SKS was without a generator signature and date.

42. On January 29, 2016, and February 1, 2016, Clean Harbors Environmental Service, Inc., acknowledged receipt of the waste petroleum from the Facility for shipment to the Safety-Kleen facility in Kentucky.

43. Defendant stored the approximately 3,000 lbs. of waste petroleum that it collected from Townline Scrap at the Facility from November 13, 2015, to February 1, 2016.

VIOLATIONS

44. By storing the approximately 3,000 lbs. of waste petroleum that it transported from Townline Scrap at the Facility for a period of more than 10-days, Defendant violated VHWMR § 7-404(a)(3) and conditions 5.10 and 5.11 of its Hazardous Waste Facility Permit.

45. By storing incompatible wastes in a manner that failed to prevent wastes from coming into contact with one another, as observed during the Agency's inspection on June 8-10, 2016, Defendant violated VHWMR § 7-311(b)(1).

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46. By failing to maintain an accurate inventory for the hazardous wastes stored in its HWMU#3 area, as observed during the Agency's inspection on June 8-10, 2016, Defendant violated VHWMR § 7-311(d)(1) and condition 4.11(b) of its Hazardous Waste Facility Permit.

47. By failing to perform or record that a hazardous waste inspection was performed at the Facility on November 21, 2014, Defendant violated VHWMR § 7-311(d)(2) and condition 4.11 of its Hazardous Waste Facility Permit.

48. By failing to inspect and maintain a secondary floor covering in the Barre facilities' HWMU#1 secondary containment system area, as observed during the Agency's inspection on June 8-10, 2016; by allowing the floor covering in the Barre facilities' HWMU#1 secondary containment system area to become cracked and separating from the floor surface; and by failing to identify the floor condition as an issue for remediation during daily inspection of the Barre facility's HWMU#1 area, Defendant violated VHWMR § 7-504(e)(1), 40 CFR § 264.193(c), and conditions 5.6 and 5.7 of its Hazardous Waste Facility Permit.

49. By failing to properly execute Manifest 005261550SKS, i.e. by failing to have a generator signature and date, as observed during the Agency's inspection on June 8-10, 2016, Defendant violated VHWMR § 7-702(b)(4).

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50. By failing to detect and cure a deficiency on an oil tank in the Facility's HWMU#1 area, i.e. the oil tank was observed to be leaking a hazardous material from the manway during the Agency's inspection on June 8-10, 2016, Defendants violated VHWMR § 7-806(d)(3).

51. By improperly placing an identification tag on the return and fill ancillary piping, e.g. piping had one number on one side and a different number on the other, in the Facility as observed during the Agency's inspection on June 8-10, 2016, Defendant violated VHWMR § 7-504(e)(1) and 40 § CFR 264.1050.

52. By affixing an identification tag to the return and fill gate valve that was not included on the schematic diagram for the return and fill equipment at the Facility, as observed during the Agency's inspection on June 8-9, 2017, Defendant violated 40 CFR § 270.25(a)(1).

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

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

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

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55. Prior to the filing of this action, Defendant implemented appropriate hazardous waste management transport, disposal, document recording processes and storage procedures at this location such that the State does not believe it necessary to have a formal compliance plan as part of the consent order resolving this action.

SIGNATURES

DATED at Montpelier, Vermont this 15th day of June, 2017.

STATE OF VERMONT,
AGENCY OF NATURAL RESOURCES

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____
Keith W. Flynn
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-6906

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

DATED at Norwell, Massachusetts this 12th day of June, 2017.

SAFETY KLEEN, INC

By: Will F Connors
William F. Connors
Title: Sr. Vice President, Compliance

Approved as to form:

Signature

Name (printed)

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

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

SAFETY-KLEEN SYSTEMS, INC.
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

The parties, Plaintiff, the State of Vermont (the State), by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant Safety-Kleen Systems, Inc. (Defendant), hereby stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont's hazardous waste management regulations;

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

WHEREAS, the Attorney General pursuant to 3 V.S.A. Chapter 7 has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

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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 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 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 interest as it upholds the statutory regime of 10 V.S.A. Chapter 159 in which the violations occurred; and

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

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

1. The attached Consent Order may be entered by the Court;
2. The State and Defendant hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and

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3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

DATED at Montpelier, Vermont this 19th day of June, 2017.

STATE OF VERMONT,
AGENCY OF NATURAL RESOURCES

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____
Keith W. Flynn
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-6906

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

DATED at Norwell, Massachusetts this 12th day of June, 2017.

SAFETY-KLEEN SYSTEMS, INC

By: William F. Connors
William F. Connors
Title: Sr. Vice President, Compliance

Approved as to form:

Signature

Name (printed)

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

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv
380-6-17 Wncv

STATE OF VERMONT,
AGENCY OF NATURAL
RESOURCES,
Plaintiff,

v.

SAFETY-KLEEN SYSTEMS, INC.
Defendant.

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of Pleadings by Agreement under Vermont Rule of Civil Procedure 8(g). Based upon those Pleadings by Agreement and the Stipulation for the Entry of Consent Order and Final Judgment Order, and pursuant to 10 V.S.A. § 8221, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION OF HAZARDOUS WASTE MANAGEMENT VIOLATIONS

1. Defendant Safety-Kleen Systems, Inc., (Defendant) is adjudged liable for violating the following regulations and conditions of the Hazardous Waste Facility Permit (Permit) issued to it on September 26, 2007:

   - Vermont Hazardous Waste Management Regulation (VHWMR) 7-404(a)(3) and Permit conditions 5.10 and 5.11 (storage of hazardous

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waste (approximately 3,000 lbs. of waste petroleum) for more than 10 days at its Barre Facility (Facility));

- VHWMR 7-311(b)(1) (storing incompatible wastes in a manner that failed to prevent wastes from coming into contact with one another);
- VHWMR 7-311(d)(1) and Permit condition 4.11(b) (failure to maintain an accurate inventory of hazardous waste);
- VHWMR 7-311(d)(2) and Permit condition 4.11 (failure to perform or record a complete a daily hazardous waste inspection on November 21, 2014);
- VHWMR 7-504(e)(1), 40 CFR 264.193(c) and Permit conditions 5.6 and 5.7 (failure to inspect and maintain the facility for malfunction and deterioration);
- VHWMR 7-702(b)(4) (failing to properly execute a manifest (no generator signature or date on manifest 00561550SKS);
- VHWMR 7-504(e)(1) and 40 CFR 264.1059(d) (failure to properly affix a correct identification tag to a required piece of equipment); and
- 40 CFR 270.25(a)(1) (failure to place the location of an equipment identification tag on the facility's schematic diagram).

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PENALTIES

2. For the violations described above, Defendant shall pay a civil penalty of twenty-five thousand dollars ($25,000.00).
3. Payment of the twenty-five thousand dollars ($25,000.00) civil penalty shall be made to the "State of Vermont" and shall be sent to: Keith W. Flynn, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609.
4. Payment of the twenty-five thousand dollars ($25,000.00) penalty shall be received by the State within 10 days of the issuance of this ORDER.

OTHER PROVISIONS

5. Defendant waives: (a) all rights to contest or appeal this Consent 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.
6. This Consent Order is binding upon Defendant and its successors and assigns.
7. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

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8. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.
9. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.
10. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.
11. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant. The State reserves all rights, claims and interests not expressly waived herein.
12. This Consent Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

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

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this 3rd day of August, 2017.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge

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

STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 129-10-16 Vtec

Four Hills Farm Partnership Amendment	

Decision on Cross Motions for Summary Judgment

Four Hills Farm Partnership appealed certain conditions included in its Large Farm Operations Permit Amendment that was issued by the Vermont Agency of Agriculture, Food & Markets ("Agency" or "AAFM") on September 16, 2016 for a dairy farm in Bristol, Vermont. Cross motions for summary judgment are now before the Court.

Four Hills Farm ("Four Hills" or "Appellant") is represented by Kevin T. Brennan and Joan Donahue, Esqs. AAFM is represented by Melanie Kehne and Thea J. Schwartz, Esqs. The parties' filings and replies were completed on May 16, 2017.

For the reasons set out below, we **GRANT** Four Hills' motion for summary judgment and **DENY** AAFM's motion for summary judgment. The consequences of our determinations are noted in the Conclusions section of this Decision.

Standard of Review

We begin our analysis with the established standard that summary judgment may only be granted when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a) (applicable here through V.R.E.C.P. 5(a)(2)). The moving party shows that no material fact is in dispute principally by filing a statement of undisputed facts supported by materials in the record. V.R.C.P. 56(c)(1)(A).

In reviewing a motion for summary judgment, the Court: 1) accepts as true any factual allegations made in opposition to the motion by the non-moving party that are supported by affidavits or other evidentiary material; and 2) gives the non-moving party the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (internal citation omitted). If an assertion of fact is unchallenged, the Court may consider the

fact undisputed. V.R.C.P. 56(e). Nevertheless, the moving party still "must demonstrate the absence of a genuine issue of material fact and entitlement to a judgment as a matter of law." In re Pixley, No. 2004-477, slip op. at *2 (Vt. June 2005) (unpub. mem.) (citing Miller v. Merchants Bank, 138 Vt. 235, 237–38 (1980)).

When, as here, "there are cross-motions for summary judgment, both parties are entitled to the benefit of all reasonable doubts and inferences" when being considered as the non-moving party. Vermont Coll. of Fine Arts v. City of Montpelier, 2017 VT 12, ¶ 7 (Vt. Feb. 10, 2017) (citing Montgomery v. Devoid, 2006 VT 127, ¶ 9, 181 Vt. 154). The applicable law governing the case helps determine what facts are material and necessary to resolving the legal issues presented. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) (citing *C. Wright, A, Miller & M. Kane, Federal Practice and Procedure* § 2725 pp. 93–95 (1983)). Factual disputes that do not affect the outcome of the necessary legal determinations will not "preclude the entry of summary judgment." Id. We review the facts and legal precedent asserted by each party with these standards in mind.

Factual Background

The parties disagree on the interpretation of some facts, as well as presenting some alternate facts, but do not dispute any material facts. The following list of material facts has been culled from the parties' motions, exhibits, and affidavits, and are recited here solely to decide the pending motions for summary judgment.

1. Four Hills is a Large Farm Operation ("LFO") in Bristol, Vermont that is subject to 6 V.S.A. Subchapter 4 (regulating LFOs), 6 V.S.A. Subchapter 2 (Required Agricultural Practices and Best Management Practices), and the Large Farm Operations Rules ("LFO Rules") promulgated by the Agency pursuant to 6 V.S.A. § 4852.

2. Four Hills is subject to LFO Permit #2000-04-A1 issued by the Agency on October 2, 2007.[1]

3. Four Hills submitted application materials to amend its LFO Permit to the Agency in February and July of 2014.

[1] The LFO Permit issued in October 2007 to Four Hills (#2000-04-A1) was actually an amendment to an earlier LFO Permit (#2004-04). The parties appear to agree that the earlier Permit is not material to the legal issues presented in this appeal.

4. A public informational meeting regarding Four Hills's proposed expansion was held by the Agency on October 15, 2014. Appellant's Ex. 3.

5. In December 2014, Four Hills submitted additional application materials, which included an expansion in animal numbers over the previous materials.

6. Four Hills submitted a revised LFO permit amendment application to the Agency in March 2015, which further expanded the animal numbers.

7. Jonathan Chamberlain, on behalf of Four Hills, sent an email to the Agency's LFO program manager, Katie Gehr, on August 20, 2015 requesting feedback on the revised application. Appellant's Ex. 4.

8. On September 4, 2015, Ms. Gehr sent an email to representatives of Four Hills, including Mr. Chamberlain, requesting additional information. She stated that "[s]ubmitting this information will complete your application, enabling the Agency to complete the review of the application to amend the LFO Permit." Appellant's Ex. 5.

9. On September 8, 2015, Appellant responded to Ms. Gehr's request for additional information. Appellant's Ex. 5.

10. Ms. Gehr acknowledges that she received the additional information that Four Hills submitted, but asserts that one item delivered didn't contain all the information requested. Ms. Gehr did not inform Four Hills representatives of their filing deficiency.

11. On October 30, 2015, Nathaniel Sands, an AAFM agriculture water quality supervisor, sent an email to Chanin Hill, a representative of Four Hills, that stated "We are currently reviewing a draft permit amendment . . . ." Appellant's Ex. 6.

12. On January 14, 2016, Mr. Sands sent Mr. Chamberlin a "final draft" of the permit amendment "that is prepared for the Directors to review." Appellant's Ex. 7.

13. On or around April 6, 2016, the Agency sent Four Hills a letter stating that the Agency was unable to approve requests for permit amendments at that time. This statement appeared to be general in nature and not directed to Four Hills's specific permit amendment application.

14. Agency staff met with Four Hills representatives on June 16, 2016 to discuss its March 2015 revised permit amendment request.

15. The Agency issued to Four Hills LFO Permit #2000-04-A2 dated September 16, 2016 (hereinafter referred to as the "Paper Permit"). The Paper Permit includes conditions that were

not part of Four Hills' application, and were not part of the January 2016 final draft permit amendment prepared and forwarded to Four Hills by Mr. Sands. Those conditions require Four Hills to hold another public informational meeting in coordination with the Agency prior to the construction of any additional animal housing; to develop and implement a plan for odor, noise, traffic, and pests; and to develop and implement a stormwater management plan to minimize the adverse impacts of stormwater runoff to surface waters.

16. At no time did the Agency provide prior notice to or an opportunity for Four Hills representatives to offer comment or criticism to the conditions that the Agency included in the Paper Permit.

17. Both the "draft" amendment sent to Four Hills in January 2016 and the "final" permit issued eight months later allow Four Hills to more than double its herd from 1,850 mature cows to 2,850, and from 600 youngstock or heifers to 2,450. To accommodate the additional animals, Four Hills plans to add three new barns and other facilities.

Discussion

Four Hills first argues that its permit amendment application submitted in September 2015 was deemed approved due to Agency inaction prior to the issuance of the Paper Permit by AAFM in September 2016. As a result, Four Hills contends the latter permit amendment is invalid. Appellant's second argument is that if in fact the latter permit is valid, then the condition requiring a public informational meeting should be struck since a meeting was already held. Their third and final argument is that if the latter permit is valid, then the condition requiring Appellant to develop and implement a stormwater management plan should be struck because 1) the rules in effect when the Appellant submitted its application did not require stormwater management plans; and 2) AAFM did not at that time have the statutory and rulemaking authority to regulate stormwater management. Four Hills specifically argues that any new rule requiring large farms to develop and implement stormwater management plans must first be promulgated in accordance with the Vermont Administrative Procedure Act ("VAPA") before such a condition is included in its LFO permit amendment.

Four Hills sets out these issues in its Statement of Questions, pursuant to V.R.E.C.P. Rule 5(f). The questions, as paraphrased, are:

1. Whether AAFM's failure to issue a permit determination within 45 business days resulted in the amendment application being deemed approved.
2. Whether, because the amendment application is deemed approved, the Paper Permit issued by the Agency in September 2016 is invalid.
3. Whether, if the September 2016 permit is valid, the condition requiring a public informational meeting should be stricken.
4. Whether the conditions requiring Four Hills to develop and implement a plan for odor, noise, traffic, and pests, and another for stormwater management, should be stricken if they would not have been added to the permit had it been timely reviewed and issued.

The Agency initially appears to contest that Four Hills Farm is entitled to deemed approval of the revised permit amendment application it submitted in March 2015 and supplemented with additional materials on September 8, 2015. We address this legal dispute in the first subsection, below.

Secondly, the Agency appears to argue that, under its regulations, it may treat deemed approved permits—or permits awarded by default—differently from permits issued through the proper procedures. According to the Agency, it can condition deemed approved permits without giving the permittee notice and an opportunity to be heard. In addition, the Agency argues that the conditions placed on the permit without notice or hearing are valid. The Agency further offers that the public information meeting requirement is valid because Four Hills' application changed substantially after the first meeting, and the requirement to develop and implement a stormwater plan is valid because the Agency interpreted the state's agricultural water quality laws as requiring the condition, and the interpretation warrants the Court's deference.

I. Whether the Permit Amendment Application was Deemed Approved

The deemed approval remedy for an application submitted for an LFO permit is established by 6 V.S.A. § 4851(c), which states:

> The Secretary shall approve, condition, or disapprove the application within 45 business days of the date of receipt of a complete application for a permit under this section. Failure to act within the 45 business days shall be deemed approval.

The deemed approval remedy is also codified in the Agency's regulations. Under the LFO Rules, the Secretary is required to notify the applicant in writing as to whether the AAFM and the

Agency of Natural Resources have determined the application is administratively complete or administratively incomplete. 2-3 Vt. Code R. § 403:5(B)(4)(a). The rules further state:

> b. An incomplete application shall not be deemed complete until the identified items or components are submitted.
>
> c. . . .
>
> d. Title 6 Chapter 215 4851(c) states that the Agency has 45 business days to review an application once it is fully complete.
>
> e. The formal 45 business day application review period will not start until the Agency determines that the application has been considered administratively complete, the application review advisory group has met and provided feedback (where required by statute),[2] and the public informational meeting has been held. The day after the application is deemed complete is day 1 of the statutory 45 business day review period.

2-3 Vt. Code R. § 403:5(B)(4)(b), (d), and (e).

Neither the Vermont Supreme Court nor this Court has considered the deemed approval remedy in relation to LFO permits.[3] We instead use the case law in the municipal land use context by analogy. In that context, the Supreme Court has taken a conservative approach in applying the deemed approval remedy. Because a deemed approved permit may be at odds with the law, the Court has cautioned against extending the remedy beyond its statutory intent, which is to "eliminate deliberate or negligent inaction by public officials." In re Morrill House, 2011 VT 117, ¶ 8, 190 Vt. 652 (citing In re Ashline, 2003 VT 30, ¶ 13, 175 Vt. 203). The Supreme Court has refused to apply the deemed approval remedy in cases where the decisions were timely made, but technically deficient or insufficiently noticed. See id. at ¶¶ 10–11; see also In re Appeal of Newton Enterprises, 167 Vt. 459, 463, 465 (1998). It has applied the remedy where an untimely decision resulted from protracted deliberations. In re McEwing Servs., LLC, 2004 VT 53, ¶ 21, 177 Vt. 38. In those instances, "deemed approval occurs by operation of law, and requires no action on the part of the applicant." Id. at ¶ 18 (expressly rejecting the trial court's holding that an

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[2] Neither party mentions the application review advisory group in its filings. Under 6 V.S.A. § 4853(a), the AAFM Secretary is required to establish an advisory group to assist in reviewing the application for a new barn under an LFO permit. "The advisory group shall consist of, in addition to the secretary, the secretary of natural resources or his or her duly authorized representative, a farmer appointed by the governor, and a representative of the legislative body of the municipality in which the proposed facility would be located." Id.

[3] This Court has heard only three prior LFO permit appeals.

applicant was not entitled to the deemed approval remedy because it had not actively requested a timely decision or objected to delays).

In this case, the undisputed facts cause us to conclude that AAFM did not make a timely decision on Four Hills' complete application for an amended LFO permit. We have concluded that Four Hill's application was or should have been deemed complete because of several undisputed facts. In an email to Four Hills, Ms. Gehr on behalf of AAFM advised that the application would be deemed complete once Four Hills provided the information she requested; Four Hills did so on September 8, 2015. While Ms. Gehr now represents that one of Four Hills's responses was incomplete, she did not advise Four Hills at that time of this supposed deficiency and never requested the information she now represents was lacking. In fact, without requesting and receiving further information, AAFM later acted on Four Hills application. We must conclude that at that time, AAFM regarded Four Hills's application as complete. AAFM's inaction therefore caused the permit amendment application to be deemed approved without any conditions.

The overall timeline of events is also uncontested. Four Hills submitted its revised application for an LFO permit amendment on March 17, 2015. The Agency did not notify Four Hills as to the status of its application until nearly six months later, after Four Hills inquired about it in an email on August 20, 2015. Appellant's Ex. 4. Ms. Gehr's reply, emailed on September 4, 2015, requested additional information, adding that "submitting this information will complete your application enabling the Agency to complete the review of the application to amend the LFO Permit." Appellant's Ex. 5. Four Hills submitted the requested information on September 8, 2015. On October 30, 2015, Mr. Sands on behalf of AAFM sent an email to Four Hills advising that the draft permit amendment was under review. Mr. Sands then sent a draft permit to Four Hills without conditions on January 14, 2016. Mr. Sands said in an affidavit that the draft permit amendment was for the first phase of Four Hills' permit amendment request, but provides no explanation for this limitation or its relevance to the deemed approval analysis. Nearly eight months later, on September 16, 2016, the Agency issued to Four Hills LFO Permit Amendment #2000-04-A2, with the contested conditions.

Ms. Gehr's email on September 4, 2015 is the only notice in writing that Four Hills received regarding the administrative completeness of its application. While the Agency did not follow up to expressly state that the application was considered complete, the Agency implied as much.

The Agency neither objected to the information provided by Four Hills in response to that email, nor requested more information. Based on the Agency's assurance that submitting the information would complete the application, and in the absence of contrary evidence, the Court concludes that the application became administratively complete when Four Hills provided the requested information on September 8, 2015. The fact that the Agency followed up on October 30, 2015 to state that the draft permit was under review is a further undisputed confirmatory fact.

The Agency's claim that it "never deemed the application complete," is unconvincing, particularly since it had to determine the application was complete at some point in order to issue a permit. State's Opposition to Appellant's Mot. Summary Judgment (May 5, 2017). Because the Agency did not ask for further information from Four Hills after September 8, 2015, we conclude that the application was complete on that date, pursuant to 6 V.S.A. § 4851(c). Four Hills' permit amendment application was therefore deemed approved on or about November 10, 2015, without any conditions. Activities that occurred after that date are not relevant to this determination. For example, when the Agency informed Four Hills in April 2016 that it could not approve requests for permit amendments, the permit amendment had already been deemed approved.[4]

With no material facts in dispute, we answer Question 1 in the affirmative: AAFM's failure to issue a permit determination within 45 business days after Four Hills application became complete resulted in the permit amendment application being deemed approved.

II. Whether AAFM has Authority to Condition a Deemed Approved Permit Without Justification, Notice, or a Hearing

a. *No "Permit Lite"*

The Agency appears to argue that it is has the authority to condition LFO permits that are deemed approved without justification, notice, or a hearing. The Agency bases this authority on its own regulations, the LFO Rules, which state: "A permit awarded by default can be amended,

[4] Also irrelevant to the matter before the Court is the Agency's enforcement action in 2015 against Four Hills that predated the deemed approval of the permit amendment. See Aff. of Nate Sands, ¶ 28. That enforcement action, which was related to Four Hills' failure to notify the Agency of plans to construct two new waste storage facilities, and subsequent deficiencies found in Four Hills' annual report and nutrient management plan, are enforcement matters outside the scope of the Court's review in this case.

conditioned, or revoked by the Secretary."[5] 2-3 Vt. Code R. § 403:5(B)(4)(f)(ii). The LFO Rules also allow the Agency to require permittees who are awarded permits by default to demonstrate compliance with various regulations and that "there will be no discharge to waters of the state and groundwater impacts will meet state groundwater quality standards." Id. at § 403:5(B)(4)(f)(i).

This distinction between permits awarded by default and other permits is unsupported by applicable law. A permit awarded based on Agency inaction is not a "permit lite," undeserving of the same vested rights and privileges that attend any other permit. Such an interpretation undermines the remedy for government inaction. The Agency seeks support for its distinction in Vermont Supreme Court decisions in which that Court, as noted above, has taken a conservative approach to deemed approval. But the decisions cited make no after-the-fact distinction between permits granted in the normal course, and those granted by deemed approval. The cited decisions simply caution that because permits granted by default may otherwise be illegal, the deemed approval remedy should only be applied in cases where doing so "clearly implements the statutory purpose." McEwing Servs., 2004 VT 53, ¶ 21, 177 Vt. 38 (citing In re Newton Enters., 167 Vt. 459, 465 (1998)). The Supreme Court advises caution when applying the remedy, not in how the permit is to be treated once it is deemed approved.

Because we disagree with the AAFM's reading of Supreme Court precedent in this matter, and because its interpretation would undermine the Legislature's remedy for agency inaction, we find AAFM does not have the authority to treat Four Hills' deemed approved permit amendment differently than other permits that it timely issues.

b. *Due Process for Existing Permits*

The Agency next argues that if Four Hills's application was deemed approved sometime before the Paper Permit was issued, it also has the authority to condition existing LFO permits without notice or a hearing based on state law and its LFO Rules. The Agency cites 6 V.S.A. § 4851(e), which gives the Secretary the authority to "condition or deny a permit on the basis of odor, noise, traffic, insects, flies, or other pests."

[5] According to the Agency, a permit awarded by default is synonymous with a permit awarded via deemed approval.

The Agency also cites Subchapter 8 of the LFO Rules, which gives the Secretary discretion "to amend an existing LFO permit on his or her own initiative." 2-3 Vt. Code R. § 403:8(A)(4). The provision lists six circumstances which may prompt such initiative, all of which require the Secretary to justify the action. Id. For example, if the farm does not adequately protect waters of the state, or is not properly managed, the Secretary may amend an existing LFO permit. Id. But the rule is open ended, in that the Secretary is "not limited to" acting under one of the six circumstances. Id.

Generally, courts defer to an administrative agency's interpretation "of statutory provisions that are within its particular area of expertise." In re Porter, 2012 VT 97, ¶ 8, 192 Vt. 601 (quoting In re Prof'l Nurses Serv., Inc., 164 Vt. 529, 532 (1996)). Absent a compelling indication of error, we are directed not to disturb a state agency's statutory interpretation. Prof'l Nurses Serv., 164 Vt. at 532.

Here, the state agency has clearly erred in its statutory interpretation. This Court fails to see how AAFM derived its seemingly limitless power to condition a permit based on 6 V.S.A. § 4851(e). "It is a fundamental rule of law that agencies cannot act beyond the authority conferred on them by statute." In re Petition of the Intervale Ctr., No. 89-5-08 Vtec, slip op. at 14 (Vt. Envtl. Ct. Feb. 24, 2009) (Durkin, J.) (citing Martin v. State of Vt. Agency of Transp. Dep't of Motor Vehicles, 2003 VT 14, ¶¶ 15-16, 175 Vt. 80). We are thus required to supply our own interpretation, with the primary goal of giving effect to the legislative intent. In re Village Associates Act 250 Land Use Permit, 2010 VT 42A, ¶ 9, 188 Vt. 113. In seeking out legislative intent, we first look to the statute's plain meaning. Id.

6 V.S.A. § 4851(e) gives the Agency the authority to "condition or deny" an LFO permit when it is evaluating a farm's permit request. In re Petition of the Intervale Ctr., No. 89-5-08 Vtec, slip op. at 15 (Vt. Envtl. Ct. Feb. 24, 2009) (Durkin, J.). This is not a retroactive power that can be used after a permit has been awarded. See id. Our interpretation is supported for two reasons. First, 6 V.S.A. § 4851(e), like § 4851(a)–(d) and (f), speaks to the Agency's authority in the context of a permit request, not authority after-the-fact when a permit has been issued. Second, the power to condition in this case is given in the same phrase as the power to deny; they are the two choices afforded the Agency at the same point in the permitting application process. The Agency can only deny a permit request; it cannot deny a permit that has already

been issued. That would require revocation. It is therefore reasonable to infer that the Legislature intended to limit the Agency's power to "condition" a permit to the context of reviewing and approving an application. The Legislature further limited the Agency's power by noting the exact bases on which to place conditions, or deny the permit, namely to control "odor, noise, traffic, insects, flies, or other pests." Intervale Ctr., No. 89-5-08 Vtec at 15–16 (Feb. 24, 2009); 6 V.S.A. § 4851(e).

A different part of the statute speaks to the Agency's authority to "revoke or condition coverage" under an LFO permit once it has been issued. 6 V.S.A. § 4994. As the Agency points out, this statute provides enforcement powers. Once a permit has been issued, the "Secretary may, after due notice and hearing, revoke or condition coverage under . . . an individual permit . . . when the person subject to the permit . . . fails to comply with a requirement of this chapter or any term, provision, or requirements of a permit . . . required by this chapter." This provision gives the Agency the power to condition or modify a permit when the law changes and the permit is no longer sufficient, or the permittee is violating the law or the terms of the permit.[6] But the Agency's determination to revoke or add conditions to an existing permit may only occur after notice and an opportunity to be heard is afforded the permittee. Id.

The Agency's interpretation of this enforcement statute, as it relates to § 4851(e), appears to be that the Secretary concedes that it must provide notice and a hearing to violators before conditioning their permits, but not to law-abiding permit holders. We find no statutory support for this interpretation. A wrongdoer should not be afforded more rights than a permittee following the law. Instead, the more rational interpretation is that the Legislature intended to give the Secretary the power to condition an existing permit only with cause, and only after giving the permittee due notice and the opportunity to be heard.

In this case, the Agency in September 2016 added conditions after-the-fact to Four Hills' valid permit amendment, without cause, notice, or a hearing. This administrative action had no

[6] Allowing the Agency to add conditions for cause makes sense given that LFO permits do not have expiration dates. It may be relevant to note here that the Legislature updated the regulations for Vermont farms in 2015 to improve water quality. See V.S.A. §§ 4810–10A, 4813–16. We do not consider these statutory amendments because they were enacted after Four Hills filed its most-recent permit amendment application.

legal foundation. We therefore conclude that the September 2016 AAFM permit determination is invalid. With no material facts in dispute, we can answer Question 2 in the affirmative.

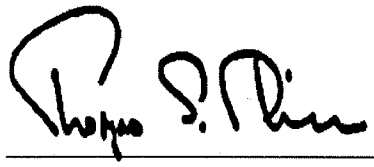
Because we find that the September 2016 AAFM permit determination is invalid, we conclude that Questions 3 and 4, which relate to the conditions added, are moot.

Conclusion

Four Hills' permit amendment application was deemed approved on or about November 10, 2015, which we calculate to be 45 business days after Four Hills submitted the information requested by the Agency to complete its application. The permit amendment that was issued by the Agency in September 2016 (#2000-04-A2) is invalid because it was issued after Four Hills's application was deemed complete, and because the September 2016 Amended Permit added conditions without cause, and without providing Four Hills with notice and an opportunity to be heard, as required under 6 V.S.A. § 4994. The Court therefore **GRANTS** Four Hills' motion for summary judgment and answers Questions 1 and 2 in the affirmative. Because of these outcomes, we conclude that Questions 3 and 4 are now moot. For all these same reasons, we **DENY** the Agency's motion for summary judgment and **VOID** LFO Permit Amendment #2000-04-02 that was issued by the Agency.

A Judgment Order accompanies this Decision. This concludes the current proceedings before this Court.

Electronically signed on August 22, 2017 at Burlington, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge

STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 154-12-15 Vtec

Old Lantern Non-Conforming Use	JUDGMENT ORDER

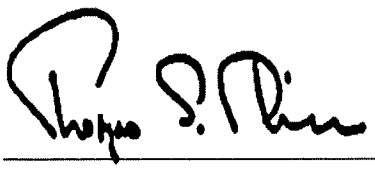
Four Hills Farm Partnership appealed certain conditions included in its Large Farm Operations Permit Amendment that was issued by the Vermont Agency of Agriculture, Food & Markets ("the Agency") on September 16, 2016 for a dairy farm in Bristol, Vermont. Cross motions for summary judgment are now before the Court.

The Court finds that this matter can be determined by summary judgment pursuant to the Vermont Rules of Civil Procedure Rule 56(a) and applicable here through the Vermont Rules for Environmental Court Proceedings Rule 5(a)(2).

First, the Court concludes that Four Hills Farm Partnership's permit amendment application was deemed approved on or about November 10, 2015 as per 6 V.S.A. § 4851(c). That date is 45 business days after Four Hills submitted information requested by the Agency in order to complete its application, triggering the deemed approval remedy. Second, because Four Hills's permit amendment application was deemed complete in November 2015, the permit amendment issued by the Agency in September 2016 (#2000-04-A2) is invalid. The Agency added conditions to the invalid permit without cause, and without providing Four Hills with notice and an opportunity to be heard, as required under 6 V.S.A. § 4994.

For these reasons, which are explained in detail in the Decision on Cross Motions for Summary Judgment that accompanies this Judgment Order, the Court hereby **GRANTS** Four Hills' motion for summary judgment and **DENIES** the Agency's motion for summary judgment.

Electronically signed on August 22, 2017 at Burlington, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
DOCKET NO.

IN RE: FOUR HILLS FARM PARTNERSHIP
(Appeal of Vermont Agency of Agriculture, Food,
and Markets Large Farm Operation Permit Amendment
Permit Number LFO #2000-04-A2 dated
September 16, 2016)

NOTICE OF APPEAL

Now comes Appellant Four Hills Farm Partnership by and through its attorneys Brennan Punderson & Donahue, PLLC, and hereby appeals to the Superior Court-Environmental Division a Vermont Agency of Agriculture, Food, and Markets Large Farm Operation Permit Amendment, Permit Number LFO #2000-04 A2, dated September 16, 2016 wherein Charles R. Ross, Secretary, Agency of Agriculture, Foods, and Markets approved the Appellant's Amendment Application with conditions. A copy of the Permit is attached.

Appellant claims party status and status to appeal pursuant to 6 V.S.A. § 4855.

TO ALL INTERESTED PERSONS: In order to participate in this appeal, interested persons must enter an appearance in writing with the Vermont Superior Court, Environmental Division within 20 days of receiving this notice, or in such other time as may be provided in subsection (c) of Rule 5 of the Vermont Rules for Environmental Court Proceedings. Notices of appearance should be mailed to Court Manager, Vermont Superior Court-Environmental Division, 32 Cherry Street, Second Floor, Suite 303, Burlington, Vermont 05401.

Dated at Monkton, Vermont, this 13th day of October, 2016.

BRENNAN PUNDERSON & DONAHUE, PLLC

By: _____

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Attorney for the Appellant

Large Farm Operation Permit Amendment

The Vermont Agency of Agriculture, Food, and Markets is authorized to regulate Large Farm Operations under 6 V.S.A. Chapter 215 Subchapter 3 § 4851.

Permittee:

Four Hills Farm Partnership
845 Burpee Rd.
Bristol, VT 05443

Brian, Joanne, Kevin, and Ron Hill
722 Burpee Rd.
Bristol, VT 05443

Watersheds

020100020203 New Haven River – Baldwin Creek to Mouth
020100080402 Little Otter Creek – Mud Creek to Mouth
020100080401 Little Otter Creek – Headwaters to Mud Creek
020100080502 Lewis Creek – Pond Brook to Mouth
020100020502 Otter Creek - Main Stem - Lemon Fair River- Mouth
020100080501 Lewis Creek – Headwaters to Pond Brook
020100080801 La Platte River
020100020202 Baldwin Creek

Permit Number: LFO #2000-04 A2

Animal Type: Dairy Cows

Permit Type: Operation of a Large Farm, construction of animal housing, inclusion of facilities used for animal housing, increase in herd size, and construction of waste storage facilities, importation of non-farm generated wastes.

Farm Operation:

The Four Hills Farm Partnership (FHFP) owns a modern dairy facility (defined as those farms where animals are raised and where waste is stored) with freestall housing barns for milking cows, dry cows, young stock, and hutches for calves. FHFP was previously authorized to maintain a herd of 1,850 mature cows and 600 young stock or heifers. Most livestock are confined to areas inside barns and on improved paved barnyards with curbing to keep manure water separate from clean water from roof and dooryard rainfall runoff. The Four Hills (Home) Farm is located approximately 4000' north of the intersection of Route 17 W and Burpee Rd. in Bristol and the farm manages approximately 5,628 acres of cropland.

Manure from livestock is stored in multiple waste storage facilities and stockpile locations. At the Home Farm, manure is transferred from the manure pit as liquid slurry into the anaerobic digester. After digesting, the manure and substrates are separated, with the liquid fraction being sent back to the Home Farm manure pit via underground pipe. Some of this manure is loaded into manure

spreading tanks for direct field application to cropland, and some of the manure is transported to remote storage pits for future land application. The separated solids portion of the manure is used as bedding for the cows. Calf manure and yearling manure are managed as semi-solid and may be stockpiled on sites prior to land application.

FHFP is proposing to expand operations which includes construction of animal housing, inclusion of facilities that house livestock, an expansion in herd size, construction of waste storage facilities and importation of non-farm generated wastes. The proposed expansion is as follows:

- FHFP proposes the construction of an additional milking freestall barn at the Home Farm. The additional milking freestall barn is designed to be identical (dimensions and capacity) to the southernmost milking freestall barn on site at this time.
- FHFP proposes the construction of the following youngstock and heifer barns:
    - A new heifer barn at Ron's Farm that will be identical to, and south of the existing barn below the bunkers on the west side of Sawyer Road.
    - A new calf barn to be located at the northwest corner of the intersection of Burpee Road and Plank Road adjacent to the Home Farm.
- FHFP proposes the inclusion of the following additional facilities to house livestock:
    - Ron's Farm (includes both east and west sides of Sawyer Rd. which has been summarized as Hibert and Ron's Farm)
    - Mierop Farm (only animal housing on east side of Monkton Rd)
    - Kevin's House
    - Brian's House
    - Heffernan Farm
- FHFP proposes an expansion in herd size above previously permitted animal numbers as follows:
    - A maximum increase of an additional 1,000 mature cows
    - A maximum increase of an additional 1,850 youngstock and heifers
- FHFP proposes construction of the following waste storage facilities:
    - Ron's Heifer Barn Pit (upgrade to existing pit)
    - Home Farm: Old Barn Pit
- FHFP proposes the importation of non-farm generated wastes in an annual amount not to exceed 1,566,380 gallons. This includes substrates delivered to the Home Farm for use in the digester as well as dairy and turkey manure to supplement crop nutrient requirements.

I. FINDINGS OF FACTS: LFO BASIC INFORMATION

1. Animal Numbers and Annual Manure/Waste Generation at all facilities:

PREVIOUSLY PERMITTED ANIMAL NUMBERS

Type	Total Number
Mature Dairy Cows (milkers/dry cows/bulls)	1,850
Youngstock or Heifers	600

INCREASE IN ANIMAL NUMBERS

- **Expand by up to 1,000 mature cows and by up to 1,850 youngstock or heifers**
  - **Build New Barn at Home Farm, Build New Heifer Barn at Ron's Farm, Build Calf Barn across from Home Farm**
  - **Inclusion of additional facilities that house livestock**

Type	Total Number
Mature Dairy Cows (milkers/dry cows/bulls)	2,850
Youngstock or Heifers	2,450
Liquid Volume Generated in 365 Days	29,093,996 gallons
Semi-solid Volume Generated in 365 Days	17,025 tons/yr

Non-Farm Generated Waste Importation

Vendor/Producer Waste is Being Imported From – Description of Waste	Maximum Amount Imported Annually	Nutrient Analysis		
		N (total)	P	K
Misty Knoll Farm – Chicken Manure	1,566,380 gallons from all sources listed	9*	5.7*	8.3*
Cobble Hill Dairy – Liquid Dairy Manure		25	8	20
Agri Mark – Waste Whey		1,147.5**	810**	n/a***

*** lbs/ton**
**** mg/l and listed values average 4 samples (conversion to lbs/1,000gallons: N=9.6; P=6.75)**
***** K was not analized**

Total Waste Generated and Imported On LFO

Liquid Volume Generated in 365 Days	29,093,996 gallons
+ Imported wastes	1,566,380 gallons
- Liquid Manure Exported	0 gallons
TOTAL Annual Liquid Manure Remaining	30,660,376 gallons
Liquid Storage Required for 180 Days	15,585,345 gallons
TOTAL Semi-Solid Volume Generated for 365 Days	17,025 tons
- Semi Solid Manure Exported	0 tons
Semi-Solid Storage Required for 180 Days	8,396 tons

2. Current and Proposed Liquid Storage Capacity

a. **CURRENT** Liquid Manure Pits, Locations, and Available Capacity

Name of Structure	Location, Town	Available Storage
Home Farm Manure Pit	**Burpee Rd., Bristol**	**4,221,288 gallons**
Home Farm Old Barn Runoff Pit	**Burpee Rd., Bristol**	**164,384 gallons**
Hunt Rd. Pit	**Hunt Rd., New Haven**	**2,357,740 gallons**
River Rd. Pit	**River Rd., New Haven**	**3,428,271 gallons**
Lime Kiln Rd. Pit	**Lime Kiln Rd., New Haven**	**1,168,278 gallons**
Mierop Tank	**Monkton Rd, Bristol**	**953,867 gallons**
Parazo Pit	**Mountain Rd., Monkton**	**315,152 gallons**
Kevin's Farm Tank (former Norris Farm)	**Bristol Rd., Monkton**	**470,798 gallons**
Ron's Hibert Heifer Barn Pit	**Sawyer Rd., New Haven**	**362,513 gallons**
Ron's Hibert Old Cow Barn Pit	**Sawyer Rd., New Haven**	**362,513 gallons**
Plank Rd. Pit	**Plank Rd., New Haven**	**1,920,389 gallons**
Heffernan Pit	**Choiniere Rd., Bristol**	**362,513 gallons**
Ron's Heifer Barn Pit (upgrade to existing pit)	**Sawyer Rd., New Haven**	**651,056 gallons***
TOTAL CURRENT LIQUID STORAGE		**16,738,762 gallons**

* volume will be verified post construction/after upgrading the waste storage structure.

b. **PROPOSED** Liquid Manure Pits, Locations, and Capacity

Name of Structure	Location, Town	Available Storage
Home Farm: Old Barn Pit	**Burpee Rd., Bristol**	**1,381,933 gallons***
TOTAL PROPOSED LIQUID MANURE STORAGE		**1,381,933 gallons**

* volume will be verified post construction of the waste storage structure.

c. Current Remote Stockpiles (semi-solid storage)

Semi-Solid Stockpiles/Storages	Town	Maximum Volume of Manure in Stockpile
NorBe-03	Monkton	1,238 tons
Nor-01a	Monkton	13,230 tons
Cou-01b	Monkton	11,808 tons
Meh-01	Starksboro	5,184 tons
Meh-02	Starksboro	2,700 tons
WW-04aa	New Haven	18,900 tons
Mierop-04/Mierop-06	Bristol	30.600 tons
NH-04	New Haven	18,000 tons
NH-Barn	New Haven	17,424 tons
Bes-11	New Haven	24,300 tons
H-03b	New Haven	22,275 tons
Wal-05a	Waltham	11,340 tons
Hu-01	New Haven	10,800 tons
JC-03	New Haven	10,800 tons
TOTAL VOLUME OF MANURE THAT CAN BE STOCKPILED		168,030 tons

Total Storage Available On LFO

TOTAL Liquid Storage Available 16,738,762 gallons

TOTAL Semi-Solid Storage Available 168,030 tons

3. Nutrient Generation from Animals and Wastes
   - Includes any proposed animal increase included in permit as well as imported non-farm generated wastes
   - Information used for nutrients is from the farm's 2016 nutrient management plan and 2015 LFO annual report
   - Nitrogen listed is total nitrogen and is not fertilizer equivalent

Liquid and Semi-Solid Nutrients Generated

Nutrient	Total Nutrients Generated
Nitrogen	971,832 lbs
Phosphorus	356,103 lbs

Imported Nutrients

Nutrient	Total Nutrients Imported
Nitrogen	13,612 lbs
Phosphorus	5,991 lbs

TOTAL NUTRIENTS

Nitrogen	985,444 lbs
Phosphorus	362,094 lbs

4. Land Base and Crop Nutrient Removal

- Information used for nutrients is from the farm's 2016 nutrient management plan and 2015 LFO annual report

Crop	Acres	Nitrogen Removal	Phosphorus (P_2O_5) Removal
Perennial Crops	3,688	957,667 lbs	332,287 lbs
Annual Crops	1,940	319,150 lbs	177,306 lbs
TOTALS	5,628	1,276,817 lbs	509,593 lbs

5. Waste Storage and Nutrient Balance Summary

Waste Storage Overview

Liquid Storage Currently Available	16,738,762 gallons
- Liquid Storage Required for 180 Days (includes all expansion)	15,585,345 gallons
Balance (surplus)	1,153,417 gallons
- Semi-Solid Storage Available	168,030 tons
- Semi-Solid Storage Required for 180 Days (includes all expansion)	8,396 tons
Balance (surplus)	159,634 tons

Nutrient Balance Overview

- Information used for nutrients is from the farm's 2016 nutrient management plan and 2015 LFO annual report

	Nitrogen	Phosphorus
Crop Nutrient Recommendations/Removal	1,276,817 lbs	509,593 lbs
Nutrients (fertilizer equivalent) applied from wastes (-)	368,331 lbs	318,039 lbs
Nutrients applied form fertilizer (-)	54,891 lbs	37,060 lbs
Excess Nutrient Balance (=)	-853,595 lbs	-154,494 lbs

6. Agency Conclusions

Waste Generation and Storage Conclusion: The Agency concludes that Four Hills Farm Partnership has demonstrated that their waste management system meets the 180-day minimum storage requirement.

Nutrient Management and Land Base Conclusion: The Agency concludes that Four Hills Farm Partnership has adequate land base to address the nutrients generated and managed, which includes all planned expansion.

II. SPECIFIC PERMIT CONDITIONS, REQUIREMENTS

Pursuant to 6 V.S.A. Chapter 215, this permit authorizes Four Hills Farm Partnership to manage its facility according to the representations contained in the Large Farm Operation Permit Amendment Application (except where modified herein), which is hereby incorporated by reference, and under the following conditions:

A. Herd Size and Information

The authorized herd size is based in part on each of the following:

- The total volume of waste generated, exported and imported;
- The total volume of waste storage available that meets the standards;
- The total land base, and crop nutrient recommendations (for manure spreading); and
- The availability of other means of managing manure.

The permittee may not increase animal numbers above those listed in Section II (A.I.) of this permit unless a compliance schedule has been authorized and is outlined in Section II (A.II).

I. Current Authorized Herd Size

Type	Maximum Number Immediately Authorized
Mature Dairy Cows (milkers/dry cows/bulls)	1,900
Youngstock or Heifers	1,800

II. Expansion of Herd Size

Type	Total Number of Animal Increase
Mature Dairy Cows (milkers/dry cows)	950
Youngstock or Heifers	650

The expansion/increase in herd size authorized in this permit is related to construction of animal housing. Conditions associated with the construction of animal housing are outlined in Section II (C.I) and must be met prior to increasing the herd size above the Current Authorized Herd Size outlined above in Section II (A.I). Exceeding the Current Authorized Herd Size prior to meeting the conditions outlined in Section II (C.I) may lead to enforcement action.

III. Maximum Authorized Herd Size

The table below combines the current authorized herd size and the expansion of herd size, and may not be exceeded at any time under this permit as outlined below. Increasing the current authorized herd size to include the expansion of herd size animal numbers is only authorized once all conditions associated with the proposed animal increase are met. If the proposed animal increase involves constructing a barn, or an addition to a barn, or purchasing a new facility, the conditions in Section II (C) must be met prior to increasing animal numbers to the maximum amounts. Increase in animal numbers above those listed below would be a violation of this permit which may lead to enforcement action.

Type	Total Number
Mature Dairy Cows (milkers/dry cows/bulls)	2850
Youngstock or Heifers	2450

B. Water Quality Discharge

There shall be no discharge from the storage or management of manure, compost, haylage, silage, or other wastes at any time.

C. Construction/Purchase/Use of Structures

The permittee may not construct any new barns, expand existing barns, or add any new facilities for the purposes of animal housing to the existing LFO permit unless a compliance schedule has been authorized and is included in a written amendment signed by the Secretary of Agriculture, Food and Markets.

The permittee may not add, construct or expand any waste management system or use a new waste management system unless a compliance schedule has been authorized and is included in a written amendment signed by the Secretary of Agriculture, Food and Markets.

Siting and setback criteria in the LFO Rules apply, and a public informational meeting may be required for the construction, expansion and/or use of structures as part of the application and/or amendment request process.

It is the responsibility of the permittee to notify the town zoning administrator or the town clerk in writing of the proposed construction activity PRIOR to the construction of any farm structure. The notification must contain a sketch of the proposed structure including the setbacks from adjoining property lines and road rights-of-way. It is also the responsibility of the permittee to work with the Vermont Department of Environmental Conservation: Watershed Management Division on proper construction storm water permitting if the construction project triggers permit thresholds, currently one acre.

I. Proposed Construction, Purchase or Use of a New Facility or Barn Authorized with Conditions:

This permit authorizes the permittee to construct animal housing as outlined below. This authorization is granted with the following conditions:

- Prior to increasing the herd size beyond the Current Authorized Herd Size outlined in Section II (A.I.) the following actions must be completed. The permittee shall:
  - Hold, at minimum, at least one additional public information meeting prior to the construction of any additional animal housing. The permittee shall coordinate the public information meeting process with the Agency. The Agency will determine if additional public information meetings are required;
  - Develop and implement a plan for odor, noise, traffic and pests that will identify and mitigate the farm's impact on the surrounding community as a result of expansion;
  - Develop and implement a storm water management plan for impervious surface runoff to ensure proper design and construction of storm water treatment and control practices as well as erosion prevention and sediment control practices necessary to minimize the adverse impacts of storm water runoff to surface waters from production areas; and
  - Annually submit the LFO annual report and a nutrient management plan that meet appropriate standards and requirements and illustrates that as the farm continues to expand that all conditions of the LFO Rules are met.
- The construction authorization is only valid for the proposed construction as presented by the permittee. Failure to notify the Agency of changes that would result in an increase in animal housing capacity as compared to the proposed construction of animal housing, change in location, dimension,

orientation of structures, or any other variable that is significantly different than what is proposed may result in enforcement action.

- Construction authorization is valid for two years from the date the permit is signed by the Secretary of Agriculture. If construction is not completed by the end of the two-year period, the permittee must reapply for construction authorization. Failure to reapply may result in enforcement action.
- Notification to the town prior to construction is required and construction storm water permitting may also be required. The permittee shall submit copies of notification(s) to the Town as well as any construction stormwater permits to the Agency within two weeks of notifying the Town or receiving construction stormwater permit(s). Failure to notify the Town prior to construction, failure to receive proper construction storm water permitting or failure to submit copies to the Agency of notification(s) to the Town or stormwater permits may result in enforcement action.

The proposed construction of animal housing is as follows:

- Construction of an additional milking freestall barn for mature dairy cows at the Home Farm. It is designed to be identical (dimensions, capacity) to the most southern barn on site at this time.
- Construction of a new heifer barn at Ron's Farm that will be identical to, and south of the existing barn below the bunkers on the west side of Sawyer Road; and,
    - Construction of a new calf barn to be located at the northwest corner of the intersection of Burpee Road and Plank Road adjacent to the Home Farm.

Dimensions outlined below of proposed buildings and additions are estimates and are based on scaled maps as submitted by the farm. The Agency must be notified prior to construction if changes are made to any of the proposed structures.

Facility/Barn Name	Location and Approximate Dimensions	Animals/Type
Home Farm: New Freestall Barn	**new freestall barn (~115' x ~500') south of current freestall barns**	**Mature dairy cows**
Ron's Farm: Ron's New Heifer Barn	**new heifer barn (~115' x ~260') south of existing heifer barn at Ron's Farm on west side of Sawyer Rd**	**Heifers and youngstock**
Home Farm: Calve Barn	**new calf barn (~115' x ~500') north side of Plank Road at corner of Plank and Burpee Rds.**	

No construction of any new barns, expanding existing barns, or adding any new facilities for the purposes of animal housing, other than what is outlined above, is authorized in this permit. The process for authorization for construction of any new barns, expanding existing barns, or adding any new facilities for the purposes of animal housing is outlined in Section III (E & F). The permittee may be subject to enforcement action if new barns are constructed, existing barns are expanded, or if a new facility is used for the purposes of animal housing prior to authorization.

II. Proposed Use, Purchase or Construction of a New Waste Storage Facility:

Construction of a waste storage facility is authorized in this permit and is outlined in the table below. All conditions listed below must be met as well as conditions outlined in Section II (E.2.).

- The construction authorization is only valid for the proposed construction as presented by the permittee. Failure to notify the Agency of changes such as, but not limited to, change in location, dimension, orientation of structures, or any other variable that is significantly different than what is proposed may result in enforcement action.
- Construction authorization is valid for two years from the date the permit is signed by the Secretary of Agriculture. If construction is not completed by the end of the two-year period, the permittee must reapply for construction authorization. Failure to reapply may result in enforcement action.
- Notification to the town prior to construction is required and construction storm water permitting may also be required. The permittee shall submit copies of notification(s) to the Town as well as any construction stormwater permits to the Agency within two weeks of notifying the Town or receiving construction stormwater permit(s). Failure to notify the Town prior to construction, failure to receive proper construction storm water permitting or failure to submit copies to the Agency of notification(s) to the Town or stormwater permits may result in enforcement action.

Waste Storage Facility Location and Type	Estimated Volume
Ron's Heifer Barn Pit (upgrade to existing pit); Sawyer Rd., New Haven	**651,056 gallons**
Home Farm: Old Barn Pit; Burpee Road, Bristol	**1,381,933 gallons**

No new construction of a waste management system, expansion of an existing waste management system or use of a new waste storage system, other than what is outlined above, is authorized in this permit. The process for authorization for construction, expansion, use, or purchase of a waste management system not authorized in this permit is outlined in Section III (G & H). The permittee may be subject to enforcement action if waste storage systems are constructed, expanded or used prior to authorization.

D. Facilities Approved for Animal Housing

The following facilities are the only authorized locations for animal housing under the conditions of this permit:

Facility Name	Facility Location
Home Farm	**845 Burpee Road, Bristol, VT**
Ron's Farm (includes both east and west sides of Sawyer Rd. which has been summarized as Hibert and Ron's Farm)	**802 Sawyer Road, New Haven, VT**
Microp Farm (only animal housing on east side of Monkton Rd)	**1641 Monkton Road, Bristol, VT**
Kevin's House	**3091 Bristol Road, Monkton, VT**
Brian's House	**1176 Monkton Road, Bristol, VT**
Heffernan Farm	**227 Choiniere Road, Bristol, VT**

Facilities listed above are the only authorized locations for the purposes of animal housing in this permit. The process for authorization for adding any new facilities for the purposes of animal housing is outlined in Section III (F). The permittee may be subject to enforcement action if a facility not listed above is used for the purposes of animal housing prior to authorization.

E. Manure, Compost, and Other Waste Storage

Manure and other wastes shall be properly stored, handled and disposed of, so as to *minimize adverse* water quality impacts.

I. Waste Storage Facilities Approved for Use

The following waste storage facilities are authorized for use under the conditions of this permit:

A. Existing Liquid Storage Facilities and Capacities

Name of Structure	Location, Town	Available Storage
Home Farm Manure Pit	**Burpee Rd., Bristol**	**4,221,288 gallons**
Home Farm Old Barn Runoff Pit	**Burpee Rd., Bristol**	**164,384 gallons**
Hunt Rd. Pit	**Hunt Rd., New Haven**	**2,357,740 gallons**
River Rd. Pit	**River Rd., New Haven**	**3,428,271 gallons**
Lime Kiln Rd. Pit	**Lime Kiln Rd., New Haven**	**1,168,278 gallons**
Mierop Tank	**Monkton Rd, Bristol**	**953,867 gallons**
Parazo Pit	**Mountain Rd., Monkton**	**315,152 gallons**
Kevin's Farm Tank (former Norris Farm)	**Bristol Rd., Monkton**	**470,798 gallons**
Ron's Hibert Heifer Barn Pit	**Sawyer Rd., New Haven**	**362,513 gallons**
Ron's Hibert Old Cow Barn Pit	**Sawyer Rd., New Haven**	**362,513 gallons**
Plank Rd. Pit	**Plank Rd., New Haven**	**1,920,389 gallons**
Heffernan Pit	**Choiniere Rd., Bristol**	**362,513 gallons**
* Ron's Heifer Barn Pit (upgrade to existing pit)	**Sawyer Rd., New Haven**	**651,056 gallons**
* Home Farm Old Barn Pit	**Burpee Rd., Bristol**	**1,381,933 gallons**
	TOTAL LIQUID STORAGE	**16,738,762 gallons**

* must meet the requirements outlined in Section II (E.II.) PRIOR to use.

II. Waste Storage Facility Certification and Available Waste Storage Capacity

All waste storage facilities must be certified to meet the current NRCS 313 Waste Storage Facility conservation practice standard, as amended. Each waste storage facility at Four Hills Farm Partnership will need to be re-certified by NRCS, or certified by a professional engineer.

As built drawings, or surveys, will need to be provided for each structure along with *LFO Appendix A-2: Waste Storage Facility (WSF) Form* to verify the available waste storage capacity for each structure. A signed letter, by a professional engineer, needs to accompany the above information for each waste storage facility that states that each structure meets the current NRCS 313 Waste Storage Facility conservation practice standard, or an equivalent standard, at the time of submission.

Actions Required	**Date Due**
Provide the Agency with the following documentation for each structure listed below each section of required information: <u>Certification Documentation:</u> - A letter from NRCS or a professional engineer licensed in Vermont, stating that each structure meets the NRCS 313 conservation practice, or equivalent, standard; or - Certification from a professional engineer that each structure meets the NRCS 313 conservation practice, or equivalent, standard. i. Home Farm Manure Pit ii. Home Farm Old Barn Runoff Pit iii. Hunt Rd. Pit iv. River Rd. Pit v. Lime Kiln Rd. Pit vi. Mierop Tank vii. Parazo Pit viii. Kevin's Farm Tank (former Norris Farm) ix. Ron's Hibert Heifer Barn Pit x. Ron's Hibert Old Cow Barn Pit xi. Plank Rd. xii. Heffernan Pit xiii. Ron's Heifer Barn Pit (upgrade to existing pit) * xiv. Home Farm Old Barn Pit * <u>As-built drawings and/or a survey of the structure:</u> i. Mierop Tank ii. Parazo Pit iii. Kevin's Farm Tank (former Norris Farm) iv. Ron's Hibert Old Cow Barn Pit v. Plank Rd. vi. Heffernan Pit vii. Ron's Heifer Barn Pit (upgrade to existing pit) * viii. Home Farm Old Barn Pit * <u>A completed LFO Appendix A-2: Waste Storage Facility (WSF) Form:</u> i. Heffernan Pit ii. Ron's Heifer Barn Pit (upgrade to existing pit) * iii. Home Farm Old Barn Pit *	December 31, 2017, or * within 30 days post construction and PRIOR to use (includes upgrades and new construction of waste storage facilities).

III. Manure and Waste Stacking Sites

Fourteen (14) manure field stacking sites are authorized in this permit and are listed in Section I. All manure field stacking sites must meet the NRCS 313 standard, as amended, including operations and management requirements and conditions. The permittee must notify the Agency and provide certification that manure field stacking sites meet the NRCS 313 standard prior to using a site for manure stacking. Failure to notify the Agency and use of an uncertified site may result in enforcement action.

IV. Manure and Waste Stacking Site Certification

All authorized manure and waste stacking sites have been identified as being certified to meet the NRCS 313 conservation practice standard. Certification information for fourteen (14) manure field stacking sites was submitted as part of the LFO Permit Amendment Application.

F. Land Base and Nutrient Management

It is the responsibility of the permittee to maintain an adequate land base as part of a nutrient management plan (NMP) to adequately manage nutrients from generated and imported wastes. It is the permittees responsibility to notify the Secretary in writing (within 15 days) if the NMP becomes deficient. The permittee shall include a revised NMP that will address how the nutrients will be managed to meet permit requirements and include any written export agreements if applicable. Animal numbers and/or imported wastes shall be adjusted if an adequate land base is not available, storage is insufficient, and/or waste exports cannot adequately address nutrients of all wastes.

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G. Non-Farm Waste Importation

This permit authorizes the permittee to receive waste whey from Agri-Mark, dairy manure from Cobble Hill Dairy Farm, and turkey manure from Misty Knoll Farm as outlined in the table below. Section III (J) outlines the required process for authorization of additional imported non-farm generated waste. Importation of non-farm generated wastes without authorization may result in enforcement action.

Vendor/Producer Waste is Imported From	**Maximum Volume
Agri-Mark (waste whey)	Up to 702,000 gallons/year and volume must align with ANR Indirect Discharge Permit
Cobble Hill Dairy Manure	Variable, dependent on the total amount of Misty Knoll Farm Turkey Manure and Agri-Mark (waste whey) imported.
Misty Knoll Farm Chicken Manure	Variable, dependent on the total amount of Cobble Hill Dairy Manure and Agri-Mark (waste whey) imported.

**** The Maximum Volume of authorized imported wastes is <u>1,566,380 gallons</u> and is based on the conditions outlined below:**

The permittee is responsible for managing the volumes and aggregate nutrients contained in these substrates and manure. Specifically:

- the total volume of imported wastes shall not exceed 1,566,380 gallons per calendar year. This includes Agri-Mark (waste whey), Cobble Hill Dairy Manure and Misty Knoll Farm Turkey Manure;
- the total volume of imported wastes shall not exceed the farm's ability to maintain 180 days of waste storage;
- the total volume of imported wastes shall not exceed the capacities of liquid and semi-solid manure storages;
- the nutrients imported shall not exceed the capacity of the land base when integrated into the nutrient management plan with all other wastes and nutrients; and
- in addition to the LFO Annual Reporting requirements, the farm's LFO Annual Report shall clearly document the total volume and nutrients of each imported waste by vendor/producer.

III. GENERAL REQUIREMENTS

The permittee shall comply with the following requirements:

A. The permittee shall use the appropriate Appendices (forms) as outlined below:

i. When requesting permit amendments and modifications, a letter of intent must be submitted to the Secretary for review. *Appendix A: Application for Large Farm Operation Permit* shall be filled out in its entirety, signed and submitted to the Secretary, along with the following forms, as appropriate:

   a. *Appendix A-1: Facilities Information Form*: must be filled out for all facilities associated with the LFO
   b. *Appendix A-2: Waste Storage Facility Form*: must be filled out for each waste storage facility associated with the LFO
   c. *Appendix A-3: Proposed Construction Form*: must be filled out prior to any proposed construction (including waste management systems and barns as well as additions and/or expansion of existing structures)
   d. *Appendix A-4: Animal Increase Form*: must be filled out when proposing to increase animal numbers above permitted number
   e. *Appendix A-5: Substrate/Waste Import Form*: must be filled out for all wastes imported or proposed to be imported to LFO
   f. *Appendix A-6: Transfer of Ownership Form*: must be filled out when transferring an existing LFO Permit to a new owner

ii. Nutrient Management: Appendix B: GUIDANCE DOCUMENT: COMPONENTS OF A MODEL NUTRIENT MANAGEMENT PLAN must be followed when preparing or modifying your NMP

iii. Annual Water Withdrawal and Use
   a. *Appendix C: LFO Water Withdrawal and Use Report*

iv. Annual Reporting:
   a. *Appendix D: LFO Annual Compliance Report*

Note: Forms and NMP guidance shall be requested by the permittee from the Agency and can be in hard copy form or in digital fillable format, as applicable.

B. Large Farm Operations Rule and Accepted Agricultural Practices

All permitted Large Farm Operations shall comply with all LFO rule provisions and with all Accepted Agricultural Practices regulations adopted under 6 V.S.A. Chapter 215, unless a compliance schedule is provided to bring the farm into compliance with the LFO Rules and Accepted Agricultural Practices.

C. Waste Storage Structure Storage Volume, Operation and Management

It is the responsibility of the permittee to maintain a minimum of 180 days of total waste storage at all times. It is also the permittees responsibility to notify the Secretary in writing (within 15 days after) that the 180 day storage requirement cannot be met. The permittee shall also include a revised waste storage plan that will address how the volume of wastes managed on the farm will be addressed and include written export agreements as applicable. Animal numbers and/or imported wastes shall be revised if there is insufficient storage for wastes.

All Waste storage structures shall be operated and maintained in such a manner as to prevent overflow and to prevent discharges to waters. All waste storage structures shall be managed and their contents shall be removed on a regular basis in compliance with this permit in order to avoid an overflow or a discharge.

D. Manure, Waste and Other By-Product Management and Utilization

Manure and other wastes shall be managed in accordance with the AAP's, the LFO Rules, and the NRCS operations and management standards and to prevent discharges to waters of the State. The permittee is authorized to land apply manure and other wastes based upon rates and recommendations in a nutrient management plan (NMP) that meets NRCS Technical Practice Code 590, as amended.

E. Building a Barn or Expanding an Existing Barn for Animal Housing

Required Action	Date Due
- Submit a letter of intent to the Secretary describing the proposed new facility, new barn or extension of an existing barn, including blueprints and/or a design for the proposed construction, including location and maximum number of animals the building is intended to house. Submit appropriate forms listed in Section III (A). The Agency will respond in writing outlining next steps. - The permittee shall complete and submit information as required by the Secretary and shall await the Secretary's written determination as to whether a full permit application or modification is required to accommodate the proposed change. - Follow the process that is laid out in the Secretary's written determination regarding application review and permit decision.	Prior to construction
Construction of a new barn/facility or expansion of an existing facility may begin ONLY once conditions above are met and written approval is given by the Agency.	

F. Purchasing a Barn/Facility for Animal Housing

Required Action	Date Due
- Submit a letter of intent to the Secretary describing the proposed change to the existing operation including location of new barn/facility, type of operation and available storage associated with it. Submit appropriate forms listed in Section III (A). The Agency will respond in writing outlining next steps. - The permittee shall complete and submit information as required by the Secretary and shall await the Secretary's written determination as to whether a full permit application or modification is required to accommodate the proposed change. - Follow the process that is laid out in the Secretary's written determination regarding application review and permit decision.	Prior to using an acquired barn or barns
A new barn/facility may be added to the LFO ONLY once conditions above are met and written approval is given by the Agency	

G. Constructing a New or Expanding an Existing Waste Storage Structure

Required Action	Date Due
- Submit a letter of intent to the Secretary describing a proposed change to the existing operation including the design and location of the structure. Submit appropriate forms listed in Section III (A). The Agency will respond in writing outlining next steps. - The permittee shall complete and submit information as required by the Secretary and shall await the Secretary's written determination as to whether a full permit application or modification is required to accommodate the proposed change. - Follow the process that is laid out in the Secretary's written determination regarding application review and permit decision.	Prior to building or expanding a Waste Management System
Construction of a new or expansion of an existing Waste Storage Structure may begin ONLY once conditions above are met and written approval is given by the Agency	

H. Purchasing or Using a New Waste Storage Structure

Required Action	Date Due
- Submit a letter of intent to the Secretary describing a proposed change to the existing operation including the design and location of the structure. - Complete and submit *Appendix A-2; Waste Storage Facility Form.* - The Agency will respond in writing outlining next steps. Complete and submit necessary information as required by the Secretary. Await the Secretary's written determination as to whether a full permit application or modification is required to accommodate the proposed change. - Follow the process that is laid out in the Secretary's written determination regarding application review and permit decision.	Prior to utilizing a new Waste Management System
Utilization of a new Waste Storage Structure may begin ONLY once conditions above are met and written approval is given by the Agency	

I. Adding Additional Animals Above Permitted Level

Required Action	Date Due
Prior to increasing animal numbers above the permitted level, complete and submit *Appendix A-4; Animal Increase Form* to the Secretary. Submit additional documentation to the Agency showing the following; - Storage requirements for additional proposed animals and an overall balance showing total manure and waste generation and storage for 180 days; - Estimated nutrient (N, P and K) generation of the proposed animal increase; - Land base capacity to accept all waste generated. - Await the Secretary's written determination as to whether a full permit application or modification is required to accommodate the proposed change. - Follow the process that is laid out in the Secretary's written determination regarding application review and permit decision.	Prior to increasing animal numbers
Increasing animal numbers above those listed in Section II may occur ONLY once conditions above are met and written approval is given by the Agency.	

J. Non-Farm Generated Waste Importation

Required Action	Date Due
Prior to receiving Non-Farm Generated Wastes the permittee must notify VAAFM. - Complete and submit *Appendix A-5; Substrate/Waste Import Form* - Nutrient samples must be obtained for the waste. - The nutrient values must be used to determine if the farm has the land base to accommodate the additional nutrients in accordance with the farm's NMP. - Additionally, the volume of proposed wastes must be stated and it must be proven that the farm has sufficient storage. - Documentation must be provided to VAAFM showing the storage structures have been certified to meet applicable standards as amended. - If proposed wastes are a Food Processing Waste (Substrate), the generator is also required to obtain an indirect discharge permit from ANR to transfer wastes to an offsite facility. - Other non-ag generated wastes may require the generator to obtain a permit from ANR to transfer wastes to an offsite facility.	Prior to receiving non-farm generated wastes
Non-farm generated wastes may be imported ONLY once conditions above are met and written approval is given by the Agency.	

K. Annual Reporting Requirements

Required Action	Date Due
Annual reports shall be submitted by all LFO operators to the Agency no later than February 15 of each year. The annual report submission shall include a filled out and signed copy of *Appendix D: LFO Annual Compliance Report* and the form shall be requested annually from the Agency.	Feb 15 of each year

L. Land, Waste and Nutrient Management

Required Action	Date Due
1. Nutrient management plan (NMP) - Your NMP must be submitted to the Agency annually (required elements are outlined in Appendix B which can be requested from the Agency). - All land application of waste shall be completed in accordance with an approved nutrient management plan that meets standards of the LFO Rules and NRCS Technical Practice Code 590. The NMP shall be implemented in full compliance. - Future application rates shall show how accurately the plan was implemented in the previous growing season, and this shall be reflected in the following year's proposed NMP, by reconciling the actual application rates, with the following years' plan.	Feb. 15 of each year for the next season Ongoing Ongoing
2. Soil Cultivation Yearly soil loss for all fields receiving manure, wastes or nutrients shall not exceed T (of the dominant soil type) as determined by RUSLE 2 (Revised Universal Soil Loss Equation 2). If a rotation is needed to meet T, that rotation shall not exceed 10 years in length. Crop rotations shall be maintained in full compliance with the Large Farm Operations Rule and NRCS 590 Standard as amended.	Ongoing
3. Vegetative Buffer Zones A buffer zone of perennial vegetation shall be maintained between annual and perennial croplands and the top of the bank of adjoining surface waters, including intermittent waterways that are determined to potentially transport significant waste or nutrients. Vegetative buffers shall be maintained in full compliance with the Large Farm Operations Rule and NRCS 590 Standard, as amended, and as follows: a. Surface waters, including intermittent waterways that are determined to potentially transport significant waste or nutrients, shall be buffered from croplands by at least 25 feet of perennial vegetation, measured from the top of the bank. b. No manure, compost, or other wastes shall be applied within vegetative buffers. c. Use of fertilizer for the establishment and maintenance of the vegetative buffer is allowed. d. Tillage shall not occur in a vegetative buffer except for the establishment or maintenance of the buffer. e. Harvesting the buffer as a perennial crop is allowed.	Ongoing
4. Daily Spreading Records All manure and other wastes that are land applied shall be documented on log sheets including: - field name or number - dates of spreading - whether each field is owned or leased - weather conditions at time of application and for 24 hours prior to and following application; - method used to apply the wastes; - gallons per acre or tons per acre of manure or waste spread each date; - name of waste structure from which manure or other waste came; - last manure analysis for each waste structure; - nutrient analysis, pounds of nutrients applied and pounds per acre of commercial fertilizer applied	Maintain Daily; make available to the Agency upon request.
5. Records for Wastes Transferred/Exported - Wastes generated by the LFO facility, which are transferred to another manager or person,	Ongoing

shall require a contract or other written agreement including sufficient detail to require no direct discharges to waters of the state or to prevent groundwater from exceeding state standards, and to require compliance with AAP's. - Small volumes of wastes transferred via individual buckets or truckloads do not require a contract, but shall be tracked as part of the annual report requirements. - Waste transferred must be analyzed a minimum of once annually for nutrient content and organic matter. The results of the analyses are to be used in determining application rates for waste.	
6. Manure, Other Waste Analysis A representative sample from each waste management structure shall be sampled annually and the results submitted with the Annual Report. The laboratory analysis report shall include the moisture content of the waste and the available nitrogen, phosphorus and potassium content, calculated per wet ton or 1,000 gallons as appropriate.	Feb 15 of each year for the next season
7. Soil Test Requirements All fields, which are identified in the nutrient management plan, shall be soil tested every three years and shall be collected and prepared according to UVM guidance, the NRCS 590 standard and/or standard industry practice.	Feb 15 of each year for the next season

M. Farm Water Supply Requirements

Required Action	Date Due
- Every five (5) years, sample and analyze the farm water supply for each barn within 500 feet of row cropland or on a production area that has a waste management system for: nitrates, chlorides, total-and fecal-coliform, and soil-applied pesticides that have been used during the most recent growing season on that field. - If nitrate levels are above 5 ppm nitrate-N, if chloride levels are above 250 ppm, or if soil-applied pesticides are detected, reanalyze annually (or as otherwise directed by the Agency) until nitrate levels are below 5 ppm, chloride levels are below 250 ppm, or soil-applied pesticides are not detected.	Feb 15 of each year submit most recent sample result in Annual Report
Submission of *Appendix C: LFO Water Withdrawal and Use Report* (form is to be requested from the Agency annually)	February 15 of each year for the preceding calendar year

N. Liquid Waste Storage Structures (Pits, Lagoons)

Required Action	Date Due
Operate and manage all structures in accordance with NRCS standards, the engineer's standards, or absent specific operational requirements from the engineer, the structure shall be managed in accordance with NRCS standards. This includes, but is not limited to, maintaining at all times at least one foot (12" twelve inches) of freeboard (unused space) between the highest level of liquid in the structure and the top of the structure berm.	Ongoing
Weekly inspections of the manure, litter, and process wastewater impoundments; the inspection will note the level in liquid impoundments.	Weekly
Manage structures so that there is no discharge to surface waters.	Ongoing

O. Mortality Storage and Management

Required Action	Date Due
Mortalities shall not be disposed of in a liquid waste storage structure, and shall be handled in such a way as to prevent the discharge of pollutants to surface water or groundwater.	Ongoing
Mortality handling area(s) shall be inspected weekly to affirm that no discharge of pollutants to surface water has or can occur.	Weekly
Divert surface waters away from storage/stacking area.	Ongoing
Do not stack waste material within 100 feet of a property line.	Ongoing

P. Observational Requirements for the Production Area and Associated Conservation Practices

Required Action	Date Due
Visual inspections: There shall be routine visual inspections of the LFO production area. At a minimum, the following must be visually inspected:	
- Weekly inspections of all storm water diversion devices, runoff diversion structures, and devices channeling dirty storm water to the wastewater and manure storage and containment structure;	Weekly
- Daily inspection of water lines; including drinking water or cooling water lines;	Daily
- Weekly inspections of the manure, litter, and process wastewater impoundments; the inspection will note the level in liquid impoundments.	Weekly
- Corrective actions: Any deficiencies found as a result of these inspections shall be corrected as soon as possible	As soon as possible

Q. Waste Storage Structure(s) (Annual Inspection)

Required Action	Date Due
All waste storage structures shall be inspected annually for cracks and corrosion. In addition, any earthen manure storage structures shall be inspected for damage, including that from frost, equipment and rodents. The inspection reports shall be kept for a minimum of five years and be available for inspection by the Agency.	Feb 15 of each year

R. Runoff Control Structure(s): Installation, Operation and Maintenance

Required Action	Date Due
All runoff control structures shall be operated and maintained in accordance with requirements in the USDA NRCS Technical Guide, Section IV, or as designed by a professional engineer.	Daily, Ongoing
All runoff control structures shall be inspected to confirm the system's integrity, and its adequacy to control dirty water runoff. The inspection reports shall be kept for a minimum of five years and be available for inspection by the Agency.	Daily, Ongoing

S. Traffic

The facility shall not generate traffic flows and frequencies at a greater level than a well-managed similar sized farm of the same animal type.

T. Odors

The facility shall not generate odors of a type different than or in excess of a well-managed similar sized farm of the same animal type using a similar waste management system.

U. Noise

The facility shall not create noise disturbances at a greater level than a well-managed similar sized farm of the same animal type.

V. Insects, Flies and Other Pests

The facility shall not propagate flies, insects, or other pests at populations greater than a well-managed similar sized farm of the same animal type.

IV. ADDITIONAL REQUIREMENTS

A. Duty to Comply

The permittee shall comply with all conditions of the permit. Non-compliance may result in enforcement action, permit modification or permit revocation.

B. Permit Actions

After notice and opportunity for a hearing the permit may be modified or revoked and reissued for cause. If the permittee files a request for a permit modification, revocation or reissuance, or a notification of planned changes or anticipated noncompliance, this action by itself does not relieve the permittee of any permit condition.

C. Property Rights

The permit does not convey any property rights of any sort, or any exclusive privilege. The permit does not authorize any injury or damage to private property or any invasion of personal rights, or any infringement of federal, state or local laws or regulations.

D. Compliance Schedules

Reports of compliance or noncompliance with interim and final requirements contained in any compliance schedule of the permit shall be submitted in writing within 14 days after the scheduled date, except that progress reports shall be submitted in writing on or before each schedule date for each report. Any report of non-compliance shall include the cause of non-compliance, a description of remedial actions taken and an estimate of the effect of the non-compliance on the permittee's ability to meet the remaining scheduled completion dates.

E. Access to Site & Records

i. The permittee shall allow the Secretary access to the site and records, and shall allow the Secretary to copy, at reasonable times, any records that are required under the conditions of the permit or the LFO Rules.
ii. The permittee shall allow the Secretary to inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under the permit.
iii. The permittee shall allow the Secretary to sample or monitor at reasonable times, for the purposes of assuring permit compliance, any substances at any location.

F. Transfer of Permit Ownership

i. A permittee may transfer permit ownership with the sale or lease of a LFO. *Appendix A-6: Transfer of Ownership Form* shall be submitted by the original permittee to the Agency within 10 days of that transaction. The written notification shall include a statement signed by the new owner or lessee which indicates that the new owner or lessee understands and agrees to comply with the conditions of the transferred LFO permit.
ii. The Secretary may determine that a new application, or an application amendment is required to accomplish the permit transfer.

G. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any adverse impact on the waters of the state resulting from noncompliance with the permit.

H. Duty To Provide Information

The permittee shall furnish the Agency, within a reasonable time put in writing by the Agency, any information that the Agency may request to determine whether cause exists for modifying, revoking or reissuing the permit or to determine compliance with the permit. The permittee shall also furnish the Agency, upon request, copies of records required to be kept by the permittee.

I. Records Retention

The permittee shall retain records of all monitoring information, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least five years from the date of the sample, measurement, report or application. The Agency may request that this period be extended by issuing a public notice to modify the permit to extend this period.

J. Spill Reporting

The permittee shall notify the Agency within 24 hours, or on the next working day, in the event that a spill or accidental release of any material or substance results in the discharge of pollutants to the waters.

K. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems which are installed or used by the permittee to achieve compliance with the conditions of the permit, so that no discharge from the LFO occurs, and in compliance with the NRCS Standards for that type of structure.

L. All Reports and Forms Required by this Permit Shall Be Signed, as appropriate

i. For a corporation by a principal executive officer of at least the level of Vice President or his or her duly authorized representative having overall responsibility for the operation of the facility for which this permit is issued;
ii. For a partnership, by a general partner; or
iii. For a sole proprietorship, by the proprietor.

M. Permit Modifications

i. Prior to making a substantial change in the LFO facility or in its operation, a Permittee shall submit a letter of intent along with the appropriate appendices referenced in this permit describing the proposed change. The Agency will determine whether a full application is required to accommodate that change, or whether a modification to an existing LFO permit is required, or neither. The Secretary's written determination will be sent to the Permittee and may approve, modify with consent or deny the requested changes. The permit shall stay in effect until the Agency has acted on the permit modification request(s) in writing.
ii. Where Agency initiated modifications to the LFO permit require actions by the permittee, such actions shall be completed by the Permittee within the time frame established by the Agency.

N. Secretary's Compliance/Enforcement Determinations

i. The Secretary may seek enforcement remedies, including administrative penalties, under Sections 1, 12, 13, 15, 16, and 17 of Title 6 with regard to any person who violates the provisions of the LFO law, the LFO Rules, Vermont's AAP Regulations, or the conditions of a LFO permit.
ii. The Secretary's authority to take a compliance or enforcement action does not preclude another regulatory entity from being able to execute any authority granted to it.

O. Appeals of Secretary's LFO Permit Determinations

i. Only the applicant seeking a permit who is aggrieved by the Secretary's final decision on the application, and the Secretary are parties to an LFO permit appeal in accordance with 6 V.S.A. §4855.
ii. An applicant may appeal the Secretary's final permit decision to the environmental court within 30 days of the Secretary's final permit decision.
iii. The notice of appeal shall be filed with the Secretary under Rule 5 of the Vermont Rules for Environmental Court Proceedings.
iv. Nothing in these rules shall be construed to affect the legal rights of any person aggrieved by a permit decision of the Secretary.

P. Revocation of Permits

i. The Secretary may, after due notice and an opportunity for a hearing with the Permittee, revoke a permit issued under this Subchapter if, after investigation, the Secretary deems the permittee to be in violation of the provisions of the LFO law, the LFO Rules, Vermont's AAPs, or the conditions of a LFO permit.
ii. A permittee aggrieved by the Secretary's final decision on an enforcement decision or on a permit revocation decision may appeal the decision to the Superior Court within 30 days of the final decision.

Charles R. Ross
Secretary
Agency of Agriculture, Food, and Markets

9-16-16
Effective Date

Delivered to farm for first presentation on 10/13/16.
Laura DiPietro

SETTLEMENT AGREEMENT

This Settlement and Release Agreement (the "Agreement") is made and entered into by and between **the Vermont Association of Snow Travelers ("VAST")**, the State of Vermont (the "State"), the Vermont Agency of Transportation ("VTrans"), and the Natural Resources Board ("NRB") (collectively the "Parties").

Background

WHEREAS, on September 30, 2009, a Jurisdictional Opinion was issued that concluded that the Lamoille Valley Rail Trail (the "Trail") required an Act 250 permit, Jurisdictional Opinion #5-06, #6-005 (2009) #7-267 (Reconsideration); and

WHEREAS, VAST applied for and obtained Act 250 permit for the Trail, LUP 7C1321; and

WHEREAS, VAST has filed a Petition for a Declaratory Order with the Surface Transportation Board arguing that Act 250 is preempted by federal law and that no Act 250 permit is needed for the Trail;

WHEREAS, the Parties desire to resolve and settle all disputes relating to the Trail with regard to Act 250 jurisdiction over the Trail;

WHEREAS, the Parties acknowledge the important role that the Trail plays for recreation, exercise, tourism and education in Vermont;

WHEREAS, the Parties are willing to work together to reach a settlement balance that will preserve the use of the Trail and the protections contained in LUP #7C1321; and

NOW COME the Parties, and in consideration of the mutual promises set forth herein, agree as follows:

1. Within two weeks of this Agreement being final, VAST and VTrans shall execute an amendment to the Trail Lease, *Amendment No. 6 to the October 2, 2006 Lease Agreement Between State of Vermont Agency of Transportation and Vermont Association of Snow Travelers, Inc. ("Amendment No. 6")*, that contains certain conditions set forth in LUP #7C1321, a copy of which is attached hereto as Exhibit A.

2. The certain conditions of LUP #7C1321, which have been incorporated to the Trail Lease as set forth in the preceding paragraph, shall be enforceable by VTrans as a term of the Lease.

3. In the event that VAST seeks an amendment of the Trail Lease from VTrans that affects or seeks to alter Amendment No. 6, notice shall be given by VTrans to the NRB of the request. The NRB shall have the opportunity to provide comments to VTrans on the amendment(s) sought.

4. LUP #7C1321 shall not be enforced by the NRB absent a material breach of Amendment No. 6. This means that VAST shall not need to apply for an Act 250 Permit or Act 250 Permit amendment with respect to Phase II and III of the Trail and may proceed with the construction of the Trail without any further Act 250 approval. In addition VAST shall not need to apply for Act 250 Permit amendments for work done in the Trail right-of-way in completed sections of the Trail. VAST shall have the discretion to deviate from the sequencing of the Trail work contemplated by LUP #7C1321 and the NRB agrees that any change from the plans submitted with LUP #7C1321 mandated by a permit issued by another State entity shall not constitute a breach of Amendment No. 6.

5. In the event of a suspected material breach of Amendment No. 6, and before any enforcement of LUP #7C1321, VTrans shall provide written notice of the suspected material breach to VAST and afford VAST the opportunity to cure in a reasonable time. A copy of the written notice shall also be provided to the NRB. The NRB shall only seek to enforce LUP #7C1321 as described in paragraph 4 above if VAST fails to cure the material breach in a reasonable time. Enforcement by the NRB shall include the conduct that was determined to be a suspected material breach of Amendment No. 6 and any subsequent violations of LUP #7C1321, but shall not include purported violations of LUP #7C1321 that occurred before the suspected material breach of Amendment No. 6.

6. As provided in paragraph 2 of *Amendment No. 6*, and as amended by that document and herein, to the extent reasonably possible, the Trail shall be completed, operated and maintained in accordance with: (a) *Vermont Natural Resources Board, District Environmental Commission #7, Findings of Fact and Conclusions of Law #7C1321*, including but not limited to findings concerning noise, mitigation and potential trail reroutes (*See*, e.g. Exhibit B at 54-55): (b) the plans and exhibits on file with the Commission: and (c) the conditions of this Amendment. Any material deviation therefrom shall be disclosed to VTrans.

7. The parties understand that by agreeing to this Settlement, VAST is committing to construct any future portion of the Trail in substantial compliance with the requirements of paragraph 6 above. VAST will make all good faith efforts to identify any deviation from the plans on file in advance with notice to VTrans as provided above.

8. This Settlement shall not be admissible as evidence in any future legal proceeding, including any proceeding brought under Act 250, other than an attempt to enforce LUP #7C1321 by a third party.

9. A notice to the parties to the previous Act 250 proceeding will be sent by e-mail or U.S. Mail by the NRB counsel detailing the terms of the settlement at the STB.

10. The State will notice the settlement for public comment on the NRB's website within two weeks of the execution of this Agreement. The public comment period shall be limited to 30 days. Following the close of the public comment period, the State shall have 20 days to withdraw from this Settlement for any reason.

11. If the State so withdraws, its responsive filing to the STB shall be due 20 days after said withdrawal. VAST will cooperate in obtaining further extensions of the deadline for the State's responsive filing as necessary.

12. If the State does not withdraw from this Settlement, VAST will move to dismiss its petition in STB Docket No. AB-444 (Sub-NO. IX) without prejudice and the State shall support said Motion.

13. The State may enforce LUP #7C1321 and/or Act 250 jurisdiction, in the event of a material breach of the Trail Lease as provided for in paragraphs 4 and 5above.

14. If the State seeks to enforce LUP #7C1321 and/or Act 250 jurisdiction, the Parties shall be free to advance all arguments available to them relating to the imposition of Act 250 jurisdiction and no arguments shall be precluded on the grounds of *res judicata*, collateral estoppel, or similar doctrine of claim preclusion arising from the issuance of Jurisdictional Opinion #5-06, #6-005 (2009) #7-267 (Reconsideration) or VAST's filing of its Petition with the STB.

15. This Agreement supersedes all prior agreements, whether written or oral, between the parties with respect to its subject matter, and there are no covenants, promises, agreements, conditions or understandings, written or oral, except as herein set forth. This Agreement may not be amended except by an instrument in writing executed by the party against whom such amendment is to be enforced.

16. The provisions of this Agreement shall extend and inure to the benefit of and be binding upon, in addition to the parties hereto, just as if they had executed this Agreement, the respective successors and assigns of each of the parties hereto and that party's administrators, directors, officers, partners, agents, servants, employees, representatives, affiliates, parents, subsidiaries, shareholders, predecessors, successors, and assigns, and each of the foregoing.

17. This Agreement may be executed in counterparts, each of which shall be original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of this____day of_____, 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

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STATE OF VERMONT

SUPERIOR COURT
BENNINGTON UNIT

CIVIL DIVISION
Docket No. Bncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER

Plaintiff, the State of Vermont, Agency of Natural Resources ("ANR" or "the State"), through the Office of the Attorney General, and Saint-Gobain Performance Plastics Corporation ("Settling Defendant"), individually, and through the undersigned counsel, stipulate and agree as follows:

WHEREAS, the Chemical Fabrics Corporation (Chemfab) previously operated a fabric coating facility at 108 Northside Drive in the Town of Bennington from approximately 1968 to 1978.

WHEREAS, Chemfab moved from the Northside Drive facility to a facility at 1030 Water Street in the Village of North Bennington in 1978.

WHEREAS, Settling Defendant acquired Chemfab in 2000 and continued to perform fabric coating operations at the Water Street facility until the facility closed in February 2002.

WHEREAS, perfluorooctanoic acid (PFOA) was contained in certain polytetrafluoroethylene (PTFE) coatings purchased by Chemfab and Saint-Gobain from third parties and used by Saint-Gobain at the Water Street facility to coat fabrics, and used by Chemfab at the Northside Drive and Water Street facilities to coat fabrics.

WHEREAS, in February 2016, the State received a complaint that Settling Defendant's fabric coating operation may have resulted in the release of PFOA into the environment.

STATE OF VERMONT

SUPERIOR COURT
BENNINGTON UNIT

CIVIL DIVISION
Docket No. Bncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Defendant.

PLEADINGS BY AGREEMENT

The State of Vermont, Agency of Natural Resources, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant Saint-Gobain Performance Plastics Corporation, by their undersigned counsel, hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The State of Vermont Agency of Natural Resources (ANR) is a state agency created through 3 V.S.A. § 2802.

2. Saint-Gobain Performance Plastics Corporation (Defendant) is a California corporation with offices and operations in the United States. From approximately 2000-2002, Defendant owned and operated a fabric coating facility at 1030 Water Street in the Village of North Bennington, Vermont.

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Statutory Scheme

3. ANR has authority to regulate hazardous materials and solid and hazardous waste through 10 V.S.A. Chapter 159 and administrative rules and procedures adopted under that authority.

4. Pursuant to 10 V.S.A. § 6615(a) and (b) and 10 V.S.A. § 1283(c), ANR may recover its costs of investigation, removal, mitigation, and remediation for releases of hazardous materials, and may require a responsible person to take necessary removal and remedial actions.

5. Pursuant to 3 V.S.A. Chapter 7, the Attorney General has the general supervision of matters and actions on behalf of the State, and may settle such matters as the interests of the State require.

Facts

Perfluorooctanoic Acid (PFOA) Release and Agency Response

6. From approximately 1968 to 1978, Chemical Fabrics Corporation (Chemfab) operated a fabric coating facility at 108 Northside Drive in the Town of Bennington, Vermont.

7. In 1978, Chemfab moved from the Northside Drive facility to a facility at 1030 Water Street in the Village of North Bennington, Vermont.

8. In 2000, Defendant acquired Chemfab.

9. From approximately 2000-2002, Defendant continued fabric coating operations at the Water Street facility.

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10. PFOA was contained in certain polytetrafluoroethylene (PTFE) coatings purchased by Chemfab and Saint-Gobain from third parties and used at the Northside Drive and Water Street facilities (Facilities) to coat fabrics.

11. PFOA is a synthetic, fully fluorinated, organic acid used in a variety of consumer products and industrial applications.

12. In February 2016, ANR received a complaint that Defendant's fabric coating operation may have resulted in the release of PFOA into the environment.

13. In response to the complaint, ANR sampled several drinking water wells in the area of the Water Street facility and found PFOA to be present in the wells.

14. As a result of the presence of PFOA in drinking water wells, ANR initiated a response action that has included sampling additional wells, providing bottled water, and overseeing State contractor and Defendant's response activities.

a. ANR has sampled approximately 592 drinking water wells in the Village of North Bennington, Town of Bennington, and Town of Shaftsbury.

b. Of those 592 wells sampled, 298 contained PFOA concentrations at or above 20 parts per trillion (ppt). 20 ppt is Vermont's primary groundwater quality standard for PFOA.

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Defendant's Response Activities

15. By letter dated March 1, 2016, ANR notified Defendant that ANR had determined Defendant may be responsible for cleanup actions.

16. Defendant has voluntarily cooperated with ANR with respect to response activities, including paying for the sampling of soils, surface water, groundwater, and drinking water supply wells in the Bennington and North Bennington area; providing bottled water to residents in Bennington and North Bennington; paying for the installation of point-of-entry treatment (POET) systems on private drinking water wells in which PFOA has been detected at concentrations at or above 20 ppt; and paying for municipal water lines to be extended to certain residences along Northside Drive.

17. Defendant has developed a Conceptual Site Model identifying potential sources and pathways of PFOA in portions of the Village of North Bennington, Town of Bennington, and Town of Shaftsbury.

18. Defendant has developed a comparative analysis of corrective action alternatives with respect to drinking water and groundwater remediation in Corrective Action Area I as defined in Appendix B to the Consent Order.

19. The response activities performed to date by Defendant and the State have ensured that residents have drinking water that meets state and federal standards and advisory levels while the State and Defendant cooperate to implement the additional response activities provided for in the Consent Order.

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ANR's Determinations

20. The Facilities released PFOA and caused and/or contributed to PFOA contamination in areas including, but not necessarily limited to, Corrective Action Area I.

21. Pathways for the PFOA contamination include, but are not necessarily limited to, airborne emissions through stacks at the Facilities.

22. Saint-Gobain is liable pursuant to 10 V.S.A. § 6615 and 10 V.S.A. § 1283 for the release of the hazardous material PFOA, response costs, and resulting contamination in the area including, but not necessarily limited to, Corrective Action Area I.

DEFENDANT'S RESPONSE TO THE ALLEGATIONS

Defendant answers the preceding allegations as follows:

23. Defendant admits the allegations set forth in paragraphs 1 through 2, 6 through 11, and 15 through 19.

24. The allegations in paragraphs 3 through 5 set forth the purported statutory scheme in Vermont, to which no response is necessary.

25. Defendant denies the allegations and conclusions set forth in paragraphs 12 through 14 and 20 through 22.

STIPULATION

26. Notwithstanding paragraph 25, the State and Defendant have agreed to a Stipulation for Entry of Consent Order and Consent Order, which has been executed by the parties and is being filed in this action together with these

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Pleadings by Agreement and stipulation. This agreement is made in compromise of disputed claims and is not an admission of liability by Defendant, and Defendant expressly denies the allegations as set forth in paragraph 25.

27. The Consent Order is in the parties' interests because it will memorialize areas of agreement between the State and Defendant and facilitate remediation and long-term management of groundwater and drinking water in Corrective Action Area I.

28. The parties agree and request that the Court withhold entry of the Consent Order for 30 days to allow for public notice and comment with ANR.

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

DATED at Montpelier, Vermont this 25th day of July, 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Robert F. McDougall
ERN 2973
Laura B. Murphy
ERN 5042
Assistant Attorneys General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

JULIA S. MOORE
SECRETARY

By: _____

Jennifer Duggan, General Counsel
ERN 7163
Matthew Chapman, General Counsel DEC
ERN 7943
1 National Life Drive
Davis 2
Montpelier, VT 05620-3901

Dated at Brattleboro, Vermont, this 24th day of July, 2017.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

By: _____

Brad Fawley, Esq.
Downs Rachlin Martin PLLC
28 Vernon Street, Suite 501
P.O. Box 9
Brattleboro, VT 05302
ERN 3514

STATE OF VERMONT

SUPERIOR COURT Bennington Unit	CIVIL DIVISION Docket No. 205-7-17 Bncv
State of Vermont, Plaintiff v. Saint-Gobain Performance, Defendant	ENTRY ORDER RE: MOTION FOR ENTRY OF CONSENT ORDER

This is an environmental contamination and remediation case under 10 V.S.A. §§ 1283 and 6615 regarding the alleged improper release into the environment of perfluorooctanoic acid (PFOA) by Defendant Saint-Gobain Performance Plastics Corporation. The parties have requested the Court approve their settlement, including a consent order and judgment. The proposed agreement contains nearly 70 pages of provisions, contemplating payment for past expenses incurred by the State, methods for continued payments by the Defendant for the State's costs, and commitments by Defendant to perform remedial work. Provisions included a fund secured by the Defendant to ensure resources would always be available to State. See Consent Order § VIII.

The parties filed pleadings by agreement on July 26, 2017, pursuant to V.R.C.P. 8(g), along with a stipulation of for entry of consent order and the proposed consent order itself. The proposed 68-page consent order also contains numerous and detailed attachments. The Attorney General requested a hold on the case for 30 days to allow public comment. The Court was informed by letter the public comment period was over and none of the comments affected the settlement. No specific motion had been filed by either party at this time.

On September 28, 2017, the Court held a status conference to determine precisely what action was being requested of the Court. Attorneys for the Agency of Natural Resources from the State of Vermont Attorney General's Office as well as the ANR's Office of General Counsel were present, as well as private attorneys for the Defendant. At this hearing, the Court was informed that the proposed consent order should be approved if the order is in the public interest, fair, reasonable, and adequate. Since the case has been filed, there have been no requests to intervene, nor any indication of any public dissatisfaction to the resolution. It was also stated at numerous times that this action would in no way interfere, preclude or affect any of the individual claims by any person or entity.

The instant motion was filed on September 29, 2017 by the State of Vermont and by the Agency of Natural Resources. The court grants the motions and will approve the consent order based upon the information contained in the pleading by agreement and the representations by the Attorney General for the State of Vermont providing a sufficient basis to defer to the Attorney General in determining public good, reasonableness, and fairness.

10 V.S.A. § 6615 is a provision of Vermont's Waste Management Act, a state analogue to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See *State v. Howe Cleaners, Inc.*, 2010 VT 70, ¶ 61, 188 Vt. 303. The parties agree

that judicial review of consent orders proposed under 10 V.S.A. § 6615 should proceed under similar standards as judicial review of consent orders proposed under CERCLA. See Pl. Motion for Entry of Consent Order at 1–2, 5. "In order to approve a CERCLA consent decree, a district court must conclude that the agreement is procedurally and substantively fair, reasonable, and consistent with CERCLA's objectives." *Arizona v. City of Tucson*, 761 F.3d 1005, 1011–12 (9th Cir. 2014) (internal quotations omitted) (citing *U.S. v. Montrose Chemical Corp. of California*, 50 F.3d 741, 748 (9th. Cir. 1995). Generally speaking, federal policy encourages "early settlement between [potentially responsible parties] and environmental regulators." *Anderson Bros, Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 929–30 (9th Cir. 2013). The Court believes that the merits of federal CERCLA early settlement are equally persuasive at the state level under the Vermont Waste Management Act.

A CERCLA consent decree is reasonable when it provides for an efficacious cleanup, and at the same time adequately compensates the public for the cost of that cleanup. *U.S. v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994). Assuming an analogous standard applies here, the proposed consent decree provides for the continuation of currently-underway remediation efforts, memorializes Defendant's commitment to expand water lines, and flexibly allows the State to bring other actions as necessary if new contamination or other facts come to light. The State is compensated for its remediation efforts to date as well as future remediation efforts, and Defendant's performance is secured by a financial assurance provision (Consent Order § VIII) as well as a work takeover provision in the event Defendant can no longer perform remediation itself (Consent Order ¶ 60). In light of these specific provisions, as well as the detail and forethought obviously put into the consent order provisions in general, the Court finds that the proposed consent order is reasonable.

Fidelity with the intentions of CERCLA requires consistency with its goals of "accountability, the desirability of an unsullied environment, and promptness of response activities." *U.S. v. Cannons Engineering Corp*, 899 F.2d 79, 91 (1st Cir. 1990). The Vermont Waste Management Act, CERCLA's Vermont analogue, summarizes its policy and purpose at 10 V.S.A. § 6601, which reads as follows:

> (a) The developed world continues to pollute the environment and add to the depletion of the world's resources by burning and burying resources as waste. Furthermore, inefficient and improper methods of managing solid and hazardous waste result in scenic blights, hazards to the public health, cause pollution of air and water resources, increase the numbers of rodents and vectors of disease, have an adverse effect on land values, create public nuisances, and otherwise interfere with proper community life and development.
> (b) The overall problems of solid waste management have become a matter statewide in scope and in concern and necessitate State action through planning, financial, and technical assistance and regulation to reduce the amount of waste generated and to promote environmentally acceptable and economical means of waste management.
> (c) The generators of waste should pay disposal costs that reflect the real costs to society of waste management and disposal...
> (e) It is the purpose of this chapter that the State provide technical and financial leadership to municipalities for the siting of solid waste, management facilities and the implementation of a program for the management and reduction of wastes that over the long term is sustainable, environmentally sound, and economically beneficial, and that encourages innovation and individual responsibility. The Program should give priority to reducing the

wastestream through recycling and through the reduction of nonbiodegradable and hazardous ingredients.

Generally speaking, the statutory scheme for waste management is intended to hold all parties responsible for hazardous materials contamination accountable for the costs associated with its proper clean-up and disposal. *State v. Carroll*, 171 Vt. 395, 399 (2000). Here, Defendant contests liability, and the Court respects that Defendant has not been found to be responsible for the alleged improper release of PFOA at issue. The consent order is consistent with the legislature's stated principle that generators of waste should pay disposal costs that reflect waste management and disposal's real costs in three ways: first, Defendant has agreed to make significant payments and efforts to remediate PFOA contamination here, second, the agreement permits the State to bring further actions for other contaminated areas or for new contamination in the current areas, and third, the consent order does not implicate or in any way diminish the rights and responsibilities of third parties. Accordingly, the Court finds that the proposed consent order is in keeping with the intentions of the Vermont Waste Management Act.

Fairness in the CERCLA settlement context has both procedural and substantive components. *Cannons*, 899 F.2d at 86. To measure procedural fairness, a court ordinarily should look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. Here, both parties represent to the Court that the negotiation process was fair. The cooperation between the parties and the extent to which they agree on the outcome of their year-long negotiation process is indicated at least in part by their mode of filing this action: the parties came together and collaborated prior to filing, resulting in a relatively rare pleadings by agreement under V.R.C.P. 8(g) rather than a more adversarial vehicle. The parties are both highly sophisticated, and there is no reason to believe there was a disparity in bargaining balance. See *Charles George Trucking,* 34 F.3d at 1088 ("Sophisticated actors know how to protect their own interests, and they are well equipped to evaluate risks and rewards."). There is no reason to believe any party acted not in accordance with good faith. Accordingly, the Court finds that the consent order is procedurally fair.

Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible. *Cannons*, 899 F.2d at 87 (citing *Developments in the Law — Toxic Waste Litigation*, 99 Harv.L.Rev. 1458, 1477 (1986). Here, the agreement has significant provisions for linking Defendant's obligation to pay to the State's incurred remedial costs, as well as dispute resolution provisions in the event there is a disagreement between the parties The agreement does not profess itself to be a complete reckoning of all possible PFOA acid contamination in the Site, leaving open the possibilities both of other parties being held accountable for harms they cause, and parties and injuries not contemplated the agreement being made whole or remedied in separate actions. The agreement requires that Defendant obtain financial assurances, and that Defendant forfeit those assurances in the event the State is required to take over the work, ensuring it bear the cost of the PCAO contamination contemplated by the order. Because the consent order allows the State and other parties to bring separate actions to recover in the event further contamination is discovered it does nothing to sever the potential connection between Defendant and hypothetical future harm for which it is adjudicated responsible. Accordingly, the Court finds that the consent order is also substantively fair.

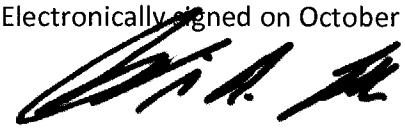
Finally, the underlying purpose of each of the above inquiries is to determine whether the consent decree The Attorney General acting on behalf of the people of the State of Vermont submitted the consent order including a multitude of contingencies that would allow the remediation of PFOA contamination in Corrective Action Area I to continue until it is completed, as well as in other areas in the event further PFOA contamination is discovered. See,

e.g. Consent Order § XIV. The fact that there was an opportunity for public comment is of special relevance. During the public comment period, which followed the filing the parties' pleadings by agreement, any member of the public potentially aggrieved by the consent order had an opportunity to voice a concern. Likewise, the documents filed with the Court were publicly available, allowing anyone the chance to review the pleadings, including the settlement. 3. V.S.A. § 159 specifically contemplates the Attorney General making settlement decisions on the basis of the best interests of the State, which must include in some way the public interest. With this specific legislative authorization, it can be presumed that the Attorney General acts on behalf of the public and, in general, in accordance with the public interest. There has been no indication here that this presumption has been rebutted.

In light of the above, the Court finds that the consent order satisfies the requirements of being reasonable, procedurally and substantively fair, consistent with the Vermont Waste Management Act's objectives, and in the public interest.

So Ordered.

Electronically signed on October 02, 2017 at 04:22 PM pursuant to V.R.E.F. 7(d).



William D. Cohen
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
BENNINGTON UNIT

CIVIL DIVISION
Docket No. Bncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER

Plaintiff, the State of Vermont, Agency of Natural Resources ("ANR" or "the State"), through the Office of the Attorney General, and Saint-Gobain Performance Plastics Corporation ("Settling Defendant"), individually, and through the undersigned counsel, stipulate and agree as follows:

WHEREAS, the Chemical Fabrics Corporation (Chemfab) previously operated a fabric coating facility at 108 Northside Drive in the Town of Bennington from approximately 1968 to 1978.

WHEREAS, Chemfab moved from the Northside Drive facility to a facility at 1030 Water Street in the Village of North Bennington in 1978.

WHEREAS, Settling Defendant acquired Chemfab in 2000 and continued to perform fabric coating operations at the Water Street facility until the facility closed in February 2002.

WHEREAS, perfluorooctanoic acid (PFOA) was contained in certain polytetrafluoroethylene (PTFE) coatings purchased by Chemfab and Saint-Gobain from third parties and used by Saint-Gobain at the Water Street facility to coat fabrics, and used by Chemfab at the Northside Drive and Water Street facilities to coat fabrics.

WHEREAS, in February 2016, the State received a complaint that Settling Defendant's fabric coating operation may have resulted in the release of PFOA into the environment.

WHEREAS, as a result of this complaint, the State sampled several wells in the area of the Water Street Facility and found PFOA to be present in the wells.

WHEREAS, as a result of the presence of PFOA, the State initiated a response action pursuant to 10 V.S.A. §§ 1283 and 6615 that has included the sampling of approximately 592 water supply wells, 298 of which have been found to contain PFOA at concentrations at or above 20 parts per trillion (ppt).

WHEREAS, as a part of its response, the State has incurred costs, including costs associated with sampling drinking water supplies for PFOA, providing bottled water, and oversight of both State contractor and Settling Defendant's response activities.

WHEREAS, Settling Defendant was formally notified of the release by the State in a letter dated March 1, 2016.

WHEREAS, Settling Defendant has voluntarily cooperated with the State with respect to the response activities to date, including paying for the sampling of soils, surface water, groundwater, and drinking water supply wells throughout Corrective Action Area I and II; providing bottled water to residents in Bennington and North Bennington; paying for the installation of point-of-entry treatment (POET) systems on private supply wells in which PFOA has been detected at concentrations at or above 20 ppt; paying for municipal water lines to be extended to certain residences along Northside Drive; and agreeing to pay for engineering designs for potential expansions of municipal water lines in Corrective Action Area I.

WHEREAS, Settling Defendant has also voluntarily performed additional response activities at the Site, including the submission of a Conceptual Site Model modeling potential PFOA impacts from the Northside Drive and Water Street facilities and a comparative analysis of corrective action alternatives.

WHEREAS, the response activities performed to date by Settling Defendant and the State have ensured that residents have drinking water that meets state and federal standards and advisory levels while the State and Settling Defendant cooperate to implement the additional response activities provided for in this Consent Order.

WHEREAS, the State and Settling Defendant now seek to memorialize their agreement concerning additional response activities to be performed at the Site.

WHEREAS, the Attorney General pursuant to 3 V.S.A. Chapter 7 has the general supervision of matters and actions on behalf of the State and may settle such matters as the interests of the State require; and

WHEREAS, the Attorney General believes this settlement is in the State's interest as it will facilitate the prompt remediation and long-term management of groundwater and drinking water in Corrective Action Area I, expedite investigation and remediation for the remainder of the Site, and further the goals of the statutory program in 10 V.S.A. Chapter 159.

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

1. The Consent Order which follows immediately below ("Consent Order") may be entered by the Court;

2. The State and Settling Defendant agree to voluntarily dismiss without prejudice the case titled "Saint-Gobain v. State of Vermont," Docket No. 30-1-17 Wncv;

3. The Consent Order has been negotiated by and between the State and Settling Defendant in good faith and is in the State's interest;

4. The State and Settling 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 the Consent Order or this Court's jurisdiction to enter or enforce the Consent Order;

5. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only as provided in Section XXIII (Modification) of the Consent Order; and

6. This Consent Order may be executed in identical counterparts, each of which shall be deemed an original, and all such counterparts shall constitute one and the same instrument.

DATED at Montpelier, Vermont this 25th day of July, 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____
Robert F. McDougall
ERN 2973
Laura B. Murphy
ERN 5042
Assistant Attorneys General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

JULIA S. MOORE
SECRETARY

By: _____
Jennifer Duggan, General Counsel
ERN 7163
Matthew Chapman, General Counsel DEC
ERN 4943
1 National Life Drive, Davis 2
Montpelier, VT 05620

Dated at Brattleboro, Vermont, this 24th day of July, 2017.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

By: _____

Brad Fawley, Esq.
Downs Rachlin Martin PLLC
28 Vernon Street, Suite 501
P.O. Box 9
Brattleboro, VT 05302
ERN 3514

CONSENT ORDER AND FINAL JUDGEMENT

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 10 V.S.A. Chapter 159. This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Order and the underlying Pleadings by Agreement, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court. Settling Defendant shall not challenge the Consent Order or this Court's jurisdiction to enter and enforce this Consent Order.

II. PARTIES BOUND

2. This Consent Order is binding upon the State of Vermont and upon Settling Defendant and its successors and assigns. Any change in Settling Defendant's ownership or corporate or other legal status including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Order.

3. Settling Defendant shall provide a copy of this Consent Order to each contractor hired to perform the Site Work and to each person representing Settling Defendant with respect to the Site Work, and shall condition all contracts entered into hereunder upon performance of the Site Work in conformity with this Consent Order. Settling Defendant or its contractors shall provide written notice of the Consent Order to all subcontractors hired to perform any portion of the Site Work.

Settling Defendant shall nonetheless be responsible for ensuring that all contractors and subcontractors perform the Site Work in accordance with this Consent Order. Each contractor and subcontractor undertaking any activity involving or relating to the performance of the Site Work shall be deemed to be in a contractual relationship with Settling Defendant within the meaning of 10 V.S.A. § 6615(d)(1)(C).

III. DEFINITIONS

4. Unless otherwise defined in this Consent Order, terms used in this Consent Order that are defined in 10 V.S.A. Chapter 159 (the Vermont Waste Management Act) or in the procedure entitled "Investigation and Remediation of Contaminated Properties Rule" (IROCPR), dated July, 2017, shall have the meaning assigned to them by statute or procedure.

5. Whenever terms listed below are used in this Consent Order or its appendices, the following definitions shall apply solely for purposes of this Consent Order:

"Affected Property" shall mean all real property at the Site and any other real property where the State determines, at any time, that access, land, water, or other resource-use restrictions, and/or Institutional Controls are needed to implement the Corrective Action.

"Consent Order" shall mean this Consent Order and all appendices attached hereto (listed in Section XXII). In the event of a conflict between this Consent Order and any appendix, this Consent Order shall control.

"Corrective Action" means those actions taken under this Consent Order to implement the Work, and other actions consistent with the Work taken in response to a release or threatened release of PFOA into the environment to prevent a threat or potential threat to present or future public health or welfare or the environment.

"Corrective Action Area I" means the area identified in Appendix B as Corrective Action Area I that the parties agree is subject to the corrective action required by the terms of this Consent Order.

"Corrective Action Area II" means the area identified as Corrective Action Area II in Appendix B.

"Corrective Action Plan" or "CAP" shall mean the technical analysis and procedures which follow the selection of a remedy for Corrective Action Area I and result in a detailed set of plans and specifications for implementation of the corrective action. The CAP shall incorporate the Site Work and the Water Extensions Work and be in conformance with the requirements of Appendix A and the IROCPR.

"Day" or "day" shall mean a calendar day. In computing any period of time under this Consent Order, where the last day would fall on a Saturday, Sunday, or

federal or Vermont State holiday, the period shall run until the close of business of the next day that is not a Saturday, Sunday, or federal or Vermont State holiday.

"Effective Date" shall mean the date upon which this Court enters this Consent Order as a Court order.

"Future Oversight Costs" shall mean that portion of Future Response Costs that the State incurs in monitoring and supervising Settling Defendant's performance of the Site Work to determine whether such performance is consistent with this Consent Order, including costs incurred in reviewing deliverables submitted pursuant to this Consent Order, as well as costs incurred in overseeing implementation of the Site Work or Water Extensions Works; however, Future Oversight Costs do not include, *inter alia*: the costs incurred by the State of Vermont pursuant to Section VI (Remedy Review), and ¶ 22 (Access to Financial Assurance), or the costs incurred by the State of Vermont in enforcing this Consent Order, including all costs incurred pursuant to Section XII (Dispute Resolution), and all litigation costs.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the State of Vermont incurs in reviewing or developing deliverables submitted pursuant to this Consent Order, in overseeing implementation of the Site Work or Water Extensions Work, or otherwise implementing, overseeing, or enforcing this Consent Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, and the costs

incurred pursuant to, ¶ 22 (Access to Financial Assurance), Section VI (Remedy Review), and Section XII (Dispute Resolution). Future Response Costs shall also include all Interim Response Costs. "Future Response Costs" shall not include any direct or indirect costs incurred by the State in connection with Corrective Action Area II, including the provision of alternative water, the operation and maintenance of POET systems, the extension of municipal water lines, or any other response activities undertaken by the State.

"Include" or "including" shall mean including but not limited to.

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

"Interim Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the State of Vermont in connection with Corrective Action Area I between June 30, 2017 and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date but excluding Past Response Costs. Interim Response Costs shall not include any direct or indirect

costs incurred by the State in connection with Corrective Action Area II, including the provision of alternative water, the operation and maintenance of POET systems, the extension of municipal water lines, or any other response activities undertaken by the State.

"Interest" shall mean the interest rate established at 12 V.S.A. § 2903(c) (interest on judgment liens) and 9 V.S.A. § 41a (pre-judgment interest).

"Municipalities" shall mean the Town of Bennington and the Village of North Bennington.

"Operation and Maintenance" or "O&M" shall mean all activities required to operate, maintain, and monitor the effectiveness of the Corrective Action as specified in the Corrective Action Plan.

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

"Parties" shall mean the State of Vermont and Settling Defendant.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the State of Vermont paid at or in connection with Corrective Action Area I through June 30, 2017.

"Performance Standards" shall mean the applicable and relevant cleanup levels or other measures of achievement of the Corrective Action objectives as set forth for each operable unit in Appendix A.

"PFOA" shall mean perfluorooctanoic acid.

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

"Response Costs" shall mean Past Response Costs, Interim Response Costs, and Future Response Costs.

"Secretary" shall mean the Secretary of the Agency of Natural Resources.

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

"Settling Defendant" shall mean Saint-Gobain Performance Plastics Corporation.

"Site" shall mean any location in the Town of Bennington, Town of Shaftsbury, or the Village of North Bennington where the release of PFOA associated with former operations at the Northside Drive or Water Street facilities has come to be located.

"Site Work" shall mean that portion of the work set forth in Appendix A, and detailed in the Corrective Action Plan, that is to be directly performed by Settling Defendant or its contractors in connection with the investigation and remediation of the former Northside Drive and Water Street facilities; the installation, operation, and maintenance of POETs; the provision of alternative water supplies; and long-term monitoring and well-testing. Site Work shall also include site investigation work performed by Settling Defendant in Corrective Action Area II. Site Work shall not include the Water Extensions Work.

"Supervising Contractor" shall mean the principal contractor retained by Settling Defendant to supervise and direct the implementation of the Site Work under this Consent Order.

"Transfer" shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or, where used as a noun, a sale, assignment, conveyance, lease, mortgage, grant of security interest, or other disposition of any interest by operation of law or otherwise.

"Validated Sample" shall mean a sample that is collected and analyzed in accordance with a workplan approved by the Secretary that addresses quality assurance and quality control, which may be included in a sampling and analysis plan or a quality assurance program plan.

"Water Extension Work" shall mean that portion of the work set forth in Appendix A, and detailed in the Corrective Action Plan, that Settling Defendant is obligated to fund under this Consent Order but that Settling Defendant will not be directly performing, specifically including the work associated with the extension of municipal water lines to homes in Corrective Action Area I—Operable Unit A, as described in Appendix B. Water Extension Work shall not include costs associated with operation and maintenance of municipal water line extensions once construction is complete.

"Work" shall mean all activities and obligations Settling Defendant is required to perform or pay for under this Consent Order, including all activities set forth in Appendix A and, upon approval, the Corrective Action Plan, except the activities required under Section XVIII (Retention of Records).

IV. GENERAL PROVISIONS

6. **Objectives of the Parties.** The objectives of the Parties in entering into this Consent Order are to provide for the investigation, design, and implementation of corrective actions in Corrective Action Area I, and for site investigation in Corrective Action Area II; to pay the State's Response Costs; and to resolve the State's claims against Settling Defendant under 10 V.S.A. §§ 1283 and 6615 with respect to releases of PFOA in Corrective Action Area I.

7. **Commitments by Settling Defendant.** Settling Defendant shall pay for or perform the Work in accordance with this Consent Order, Appendix A,

Appendix E, and all deliverables approved by the State pursuant to this Consent Order. Settling Defendant shall pay the State for its Response Costs as provided in this Consent Order.

8. **Compliance with Applicable Law.** Nothing in this Consent Order limits Settling Defendant's obligations to comply with all applicable state and federal laws and regulations, including all applicable or relevant and appropriate requirements of all state and federal environmental laws. The activities conducted pursuant to this Consent Order, if approved by the Secretary, shall be deemed to be consistent with the IROCPR.

9. **Permits.**

a. Settling Defendant must submit timely and complete applications for all permits or approvals required by law or regulation in order to perform the Site Work, and take all other actions (including payment of fees) necessary to obtain such permits or approvals.

b. Settling Defendant shall timely notify the State's Project Coordinator, and provide the Coordinator with electronic copies, of all applications submitted under ¶ 9(a).

c. Settling Defendant may seek relief under the provisions of Section XI (Force Majeure) for any delay in the performance of the Site Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval

required for the Site Work, provided that it has submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

d. This Consent Order is not, and shall not be construed to be, a permit issued pursuant to any state statute or rule.

V. PERFORMANCE OF THE WORK

10. **Coordination and Supervision.**

a. **Project Coordinator.**

(1) Settling Defendant's Project Coordinator must have sufficient technical expertise to coordinate the Site Work. Settling Defendant's Project Coordinator may not be an attorney representing any Settling Defendant in this matter. Settling Defendant's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Site Work.

(2) The State shall designate and notify Settling Defendant of the State's Project Coordinator and Alternate Project Coordinator. The State may designate other representatives, which may include its employees, contractors or consultants, to oversee the Site Work. Subject to the dispute resolution procedures set forth in Section XII, this oversight includes the authority to halt the Site Work or to conduct or direct any necessary response

action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of PFOA.

(3) Settling Defendant's Project Coordinator shall meet with the State's Project Coordinator at a frequency determined by the State Project Coordinator.

b. **Supervising Contractor**. Settling Defendant's proposed Supervising Contractor must have sufficient technical expertise to supervise the Site Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

c. **Procedures for Disapproval/Notice to Proceed.**

(1) Settling Defendant shall designate, and notify the State, within 10 days after the Effective Date, of the name, contact information, and qualifications of the Settling Defendant's proposed Project Coordinator and Supervising Contractor.

(2) The State shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If the State issues a notice of disapproval, Settling Defendant shall, within 30 days, submit to the State a

list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. The State shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. Settling Defendant may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify the State of Settling Defendant's selection.

(3) Settling Defendant may change its Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of ¶¶ 10(c)(1) and 10(c)(2).

(4) Notwithstanding the procedures of ¶¶ 10(c)(1) and 10(c)(2), Settling Defendant has proposed, and the State has authorized Settling Defendant to proceed, with the following Project Coordinator and Supervising Contractor:

Kirk Moline
C.T. Male Associates
50 Century Hill Drive
Latham, New York 12110

Ray Wuolo
Barr Engineering
4300 MarketPointe Drive, Suite 200
Minneapolis, Minnesota 55435

11. **Performance of Work in Accordance with Appendix A.**

a. Settling Defendant shall perform the Work as set forth in Appendix A and the approved CAP until:

(1) all applicable Performance Standards identified in Appendix A have been achieved; and

(2) the Secretary has issued a Certification of Corrective Action Completion, provided, however, that the Parties agree that Settling Defendant may cease the portion of the Work associated with a particular operable unit upon the Secretary's issuance of a Certification of Corrective Action Completion for that particular operable unit. Likewise, the parties agree that Settling Defendant may not be required to perform further actions with respect to individual wells if Performance Standards have been achieved for such wells.

b. Following the completion of the extensions of municipal water lines associated with the Water Extension Work, the State shall reclassify the groundwater in these potions of the Site as Class IV non-potable groundwater in accordance with the IROCPR and state groundwater protection rules to prohibit future use of this groundwater for human consumptive or other residential purposes in areas served by the municipal water line. To the extent allowed by law, the State may use its reclassification authority to develop well construction standards to the extent that such standards may avoid the consumption or use of water containing

PFOA. The particular areas where groundwater will be reclassified are identified in Appendix B.

c. All deliverables required to be submitted for approval under the Consent Order, Appendix A, or the IROCPR shall be subject to approval by the State in accordance with Appendix A and the IROCPR.

d. If Settling Defendant is responsible for PFOA at the Site, outside Corrective Action Area I, the Consent Order specific cleanup value shall be 20 ppt for PFOA. The parties agree that if Settling Defendant is required to undertake corrective action in an area or areas of the Site outside Corrective Action Area I, an amendment of this Consent Order or another settlement document is required. The Parties agree that, if consensus can be reached with respect to the selected remedy, the State will provide releases that are substantially in the same form as this agreement. If the State determines that Saint-Gobain is not liable for releases of PFOA in an area or areas of the Site outside Corrective Action Area I, it will issue such a determination in writing. The terms of this Consent Order shall not require Settling Defendant to take corrective action in Corrective Action Area II or other areas of the Site not included in Corrective Action Area I, and shall not restrict the State from initiating an action in the future to require a corrective action in other areas of the Site not in Corrective Action Area I.

VI. REMEDY REVIEW

12. **Periodic Review**. Settling Defendant shall conduct, in accordance with the approved Corrective Action Plan, studies and investigations to support the State's review to ensure that the Corrective Action and Corrective Action Plan are protective of human health and the environment. The Consent Order specific cleanup value shall be 20 ppt for a periodic review required by this section.

13. **State Selection of Further Response Actions**. If the State determines, at any time, that the Corrective Action or Corrective Action Plan is not protective of human health and the environment, the State may determine that further response actions or modifications to the Corrective Action Plan may be necessary in accordance with the requirements of the Vermont Waste Management Act and the IROCPR. The corrective action Consent Order specific cleanup value for PFOA shall be 20 ppt for a selection of further response actions under this section.

14. **Opportunity to Comment**. Settling Defendant will be provided with an opportunity to comment on any further response actions or modifications to the Corrective Action Plan proposed by the State as a result of the review to determine that the Corrective Action is protective of human health and the environment, and to submit written comments for the record.

15. **Settling Defendant's Obligation to Perform Further Corrective Actions**. If the State determines that further response actions relating to

Corrective Action Area I may be necessary, the State may direct Settling Defendant to fund or perform such further corrective actions, but only if the reopener conditions in ¶¶ 56, 57, or 59 (State's Pre-Certification, Post-Certification, and General Reservations) are satisfied. Settling Defendant may invoke the procedures set forth in Section XII (Dispute Resolution) to dispute (a) the State's determination that the reopener conditions of ¶¶ 56 or 57 are satisfied, (b) the State's determination that the Corrective Action is not protective of human health and the environment, or (c) the State's selection of the further response actions. Disputes regarding the State's determination that the Corrective Action is not protective or the State's selection of further corrective actions shall be resolved pursuant to ¶ 41 (Record Review). Settling Defendant reserves all rights and defenses it may have to an action brought by the State to compel additional response actions under one of the reservations provided in ¶ 59.

16. **Submission of Plans.** If Settling Defendant is required to perform further corrective actions pursuant to ¶ 15, it shall submit a Corrective Action Plan to the State for approval in accordance with the IROCPR. The Corrective Action Plan shall be submitted within 30 days of the State's request for such plan, unless otherwise agreed by the State. Settling Defendant shall implement the approved Corrective Action Plan in accordance with this Consent Order.

VII. ACCESS REQUIREMENTS

17. **Agreements Regarding Access and Non-Interference.** Settling Defendant shall, with respect to any Affected Property, use best efforts to secure from the owner of such property an agreement, enforceable by Settling Defendant and by the State, that such owner: (i) will provide the State and Settling Defendant — and their representatives, contractors, and subcontractors — with access at all reasonable times to such Affected Property to conduct any activity regarding the Consent Order, including those listed in ¶ 17(a) (Access Requirements); and (ii) will refrain from using such Affected Property in any manner that the State determines will pose an unacceptable risk to human health or to the environment due to exposure to PFOA, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Corrective Action.

a. **Access Requirements.** The following is a list of activities for which access may be required regarding the Affected Property:

(1) Monitoring the Work;

(2) Verifying any data or information submitted to the State of Vermont;

(3) Conducting investigations regarding contamination at or near the Site;

(4) Obtaining samples of water, air, or any other resource meant to be protected by the Corrective Action;

(5) Assessing the need for, planning, or implementing additional corrective actions at or near the Site;

(6) Assessing implementation of quality assurance and quality control practices as defined in the approved quality assurance quality control plan as provided in Appendix A;

(7) Implementing the Work pursuant to the conditions set forth in ¶ 60 (Work Takeover);

(8) Assessing Settling Defendant's compliance with the Consent Order;

(9) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Consent Order; and

(10) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions.

18. **Best Efforts**. As used in this Section, "best efforts" means the efforts that a reasonable person in the position of Settling Defendant would use to achieve the goal in a timely manner, including the cost of employing professional assistance

to secure access. However, nothing herein shall obligate Settling Defendant to file litigation to obtain access to the Affected Property. If Settling Defendant is unable to accomplish what is required through "best efforts" in a timely manner, it shall notify the State, and include a description of the steps taken to comply with the requirements. If the State deems it appropriate, it may assist Settling Defendant, or take independent action, in obtaining such access. All costs incurred by the State in providing such assistance or taking such action constitute Future Response Costs to be reimbursed under Section IX (Payments for Response Costs).

VIII. FINANCIAL ASSURANCE

19. In order to ensure completion of the Site Work, within 30 days of the Effective Date, Settling Defendant shall secure financial assurance, initially in the amount of $ 2,500,000.00 ("Estimated Cost of the Work"), for the benefit of the State. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from the "Financial Assurance" category on the Cleanup Enforcement Model Language and Sample Documents Database at http://cfpub.epa.gov/compliance/models/, and satisfactory to the State. Settling Defendant may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Site Work that is issued by a surety company among those listed as acceptable

sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of the State, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of the State that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides the State with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in Vermont and whose insurance operations are regulated and examined by a federal or state agency;

e. A demonstration by Settling Defendant that Settling Defendant meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or

f. A guarantee to fund or perform the Site Work executed in favor of the State by one of the following: (1) a direct or indirect parent company of

Settling Defendant; or (2) a company that has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the State's satisfaction that it meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee.

20. If Settling Defendant provides financial assurance by means of a demonstration or guarantee under ¶ 19(e) or 19(f), Settling Defendant shall also comply with, and shall ensure that its guarantors comply with, the other relevant criteria and requirements of 40 C.F.R. § 264.143(f) and this Section, including, but not limited to: (a) the initial submission to the State of required documents from the affected entity's chief financial officer and independent certified public accountant no later than 30 days after the Effective Date; (b) the annual resubmission of such documents within 90 days after the close of each such entity's fiscal year; and (c) notification to the State no later than 30 days, in accordance with ¶ 21 after any such entity determines that it no longer satisfies the relevant financial test criteria and requirements set forth at 40 C.F.R. § 264.143(f)(1). Settling Defendant agrees that the State may also, based on a belief that an affected entity may no longer meet the financial test requirements of ¶ 19(e) or 19(f), require reports of financial condition at any time from such entity in addition to those specified in this

Paragraph. For purposes of this Section, references in 40 C.F.R. Part 264, Subpart H, to: (1) the terms "current closure cost estimate," "current post-closure cost estimate," and "current plugging and abandonment cost estimate" include the Estimated Cost of the Work; (2) the phrase "the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates" includes the sum of all environmental obligations guaranteed by such company or for which such company is otherwise financially obligated in addition to the Estimated Cost of the Work under this Consent Order; (3) the terms "owner" and "operator" include Settling Defendant making a demonstration or obtaining a guarantee under ¶ 19(e) or 19(f); and (4) the terms "facility" and "hazardous waste management facility" include the Site.

21. Settling Defendant shall diligently monitor the adequacy of the financial assurance. If Settling Defendant becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, Settling Defendant shall notify the State of such information within 7 days. If the State determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, the State will notify Settling Defendant of such determination. Settling Defendant shall, within 30 days after notifying the State or receiving notice from the State under this Paragraph, secure and submit to the State for approval a proposal for a revised or alternative financial

assurance mechanism that satisfies the requirements of this Section. The State may extend this deadline for such time as is reasonably necessary for Settling Defendant, in the exercise of due diligence, to secure and submit to the State a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. Settling Defendant shall follow the procedures of ¶ 23 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Settling Defendant's inability to secure and submit to the State financial assurance in accordance with this Section shall in no way excuse performance of any other requirements of this Consent Order, including, without limitation, the obligation of Settling Defendant to complete or fund the Site Work in accordance with the terms of this Consent Order.

22. **Access to Financial Assurance.**

a. If the State issues a notice of implementation of a Work Takeover under ¶ 60 then, in accordance with any applicable financial assurance mechanism, the State is entitled to require that any funds guaranteed be paid in accordance with ¶ 22(d).

b. If the State is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and Settling Defendant fails to provide an alternative financial assurance mechanism in accordance with this

Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 22(d).

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 60, either: (1) the State is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, to continue and complete the Site Work; or (2) the financial assurance is provided under ¶19(e) or 19(f), then the State may demand an amount, as determined by the State, sufficient to cover the cost of the remaining Site Work to be performed. Subject to any defenses it may have, Settling Defendant shall, within 10 days of such demand, pay the amount demanded as directed by the State.

d. Any amounts required to be paid under this ¶ 22 shall be, as directed by the State: (i) paid to the State in order to facilitate the completion of the Site Work by the State or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the Federal Deposit Insurance Corporation (FDIC), in order to facilitate the completion of the Site Work by another person. If payment is made to the State, the State may deposit the payment into the Contingency Fund to be retained and used to conduct or finance response actions at or in connection with the Site.

e. All State Work Takeover costs not paid under this ¶ 22, and for which no valid defense is available to Settling Defendant, must be reimbursed as Future Response Costs under Section IX (Payments for Response Costs).

23. **Modification of Amount, Form, or Terms of Financial Assurance.** Settling Defendant may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to the State, and must include an estimate of the cost of the remaining Site Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. The State will notify Settling Defendant of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Settling Defendant may reduce the amount of the financial assurance mechanism only in accordance with: (a) the State's approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XII (Dispute Resolution). Any decision made by the State on a request submitted under this Paragraph to change the form or terms (other than the amount) of a financial assurance mechanism shall be made in the State's sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendant pursuant to the dispute resolution provisions of this Consent Order or in any other forum. Within 30 days after receipt of the State's approval of,

or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, Settling Defendant shall submit to the State documentation of the reduced, revised, or alternative financial assurance mechanism.

24. **Release, Cancellation, or Discontinuation of Financial Assurance.** Settling Defendant may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if the State issues a Certification of Work Completion under Appendix A; (b) in accordance with the State's approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation, or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XII (Dispute Resolution).

IX. PAYMENTS FOR RESPONSE COSTS

25. **Payment by Settling Defendant for State's Past Response Costs.** Within 30 days after the Effective Date, Settling Defendant shall pay to the State $1,857,853.87 in payment for Past Response Costs. Payment shall be made in accordance with ¶ 27 (Payment Instructions for Settling Defendant).

26. **Payments by Settling Defendant for Interim and Future Response Costs.** Settling Defendant shall pay to the State all Interim and Future Response Costs, which are not inconsistent with the Vermont Waste Management Act.

a. **Periodic Bills.** The State will send Settling Defendant a monthly bill requiring payment that includes a cost summary, which includes Response Costs incurred by the Agency of Natural Resources and the Department of Health, and their contractors, subcontractors, and agents; the Attorney General's Office; and any other State agencies or departments that have incurred Response Costs. Settling Defendant shall make all payments within 30 days after Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in ¶ 28, in accordance with ¶ 27 (Payment Instructions for Settling Defendant).

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by Settling Defendant pursuant to ¶ 26(a) (Periodic Bills) shall be deposited in the Contingency Fund.

27. **Payment Instructions for Settling Defendant.** All payments shall be made to the attention of:

Tracy LaFrance, Financial Operations Director
Administration and Innovation Division
Department of Environmental Conservation
1 National Life Drive, Davis 1
Montpelier, Vermont 05620-3802

28. **Contesting Interim or Future Response Costs.** Settling Defendant may submit a notice of dispute, initiating the procedures of Section XII (Dispute Resolution), regarding any Interim or Future Response Costs billed under ¶ 26 (Payments by Settling Defendant for Interim and Future Response Costs) if it

believes that the State has made a mathematical error, included a cost item that is not within the definition of Interim or Future Response Costs, or if it believes the State incurred excess costs as a direct result of State action that was inconsistent with a specific provision or provisions of the Vermont Waste Management Act. Such notice of dispute shall be submitted in writing within 30 days after receipt of the bill and must be sent to the State pursuant to Section XIX (Notices and Submissions). Such notice of dispute shall specifically identify the contested Interim or Future Response Costs and the basis for objection. If Settling Defendant submits a notice of dispute, Settling Defendant shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Interim or Future Response Costs to the State, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the FDIC in the full amount of the contested Interim or Future Response Costs. Settling Defendant shall send to the State, as provided in Section XIX (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Interim or Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, the identity of the bank and bank account number as well as a bank statement showing the initial balance of the escrow account. If the State prevails in the dispute, Settling Defendant shall pay the sums due (with accrued Interest) to the State within 7 days after the resolution of the dispute. If Settling Defendant prevails concerning any

aspect of the contested costs, Settling Defendant shall pay that portion of the costs (plus associated accrued Interest) for which they did not prevail to the State within 7 days after the resolution of the dispute. After such payment, Settling Defendant shall be disbursed any balance of the escrow account. All payments to the State under this Paragraph shall be made in accordance with ¶ 27 (Payment Instructions for Settling Defendant). The dispute-resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to reimburse the State for its Interim or Future Response Costs.

X. DEFENSE, INDEMNIFICATION, AND INSURANCE

29. Settling Defendant's Defense and Indemnification of the State.

a. The State of Vermont does not assume any liability by entering into this Consent Order. The Settling Defendant shall defend, indemnify, save, and hold harmless the State and its officers and employees against all third-party claims or suits arising in whole or in part from any act or omission of the Settling Defendant in connection with the performance of the Site Work or by a failure of Settling Defendant to fund the Account, as defined in Appendix E, for the Water Extension Work provided that all prerequisites to payment set forth in Appendix E have been met and Settling Defendant has still failed to fund the Account for the Water Extension Work. The State shall notify Settling Defendant in the event of

any such claim or suit, and the Settling Defendant shall immediately retain counsel and provide a complete defense against the entire claim or suit. The State retains the right to participate at its own expense in the defense of any such claim or suit. The State shall have the right to approve all proposed settlements of such claims or suits. If the State withholds consent to settle any such claim, then the Settling Defendant shall proceed with the defense of the claim but Settling Defendant's indemnification obligation shall be limited to the amount of the proposed settlement rejected by the State. The State shall not be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out the Site Work. Neither Settling Defendant nor any such contractor shall be considered an agent of the State.

b. The State shall give Settling Defendant notice of any claim for which the State plans to seek defense or indemnification pursuant to this ¶ 29, and shall consult with Settling Defendant prior to settling such claim.

30. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the State for damages or reimbursement or for set-off of any payments made or to be made to the State, arising from or on account of any contract, agreement, and any person for performance of the Site Work, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall defend, indemnify, save and hold harmless the State with respect to any and all claims for damages or reimbursement arising from or on

account of any contract, agreement, or person for performance of the Site Work, including, but not limited to, claims on account of construction delays.

31. **Insurance**. No later than 15 days before commencing any Site Work, Settling Defendant or its contractors or subcontractors shall secure and shall maintain until the first anniversary after issuance of the State's Certification of Corrective Action Completion pursuant to Appendix A, commercial general liability insurance with limits of $1,000,000.00, for any one occurrence, and automobile liability insurance with limits of $2,000,000.00, combined single limit, naming the State as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Settling Defendant pursuant to this Consent Order. In addition, for the duration of this Consent Order, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Site Work. Prior to commencement of the Site Work, Settling Defendant shall provide to the State certificates of such insurance and a copy of each insurance policy, including for all contractors and subcontractors. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date.

XI. FORCE MAJEURE

32. "Force Majeure," for purposes of this Consent Order, is defined as any event arising from causes beyond the control of Settling Defendant, of any entity

controlled by Settling Defendant, or of Settling Defendant's contractors, subcontractors, or agents, that delays or prevents the performance of any obligation under this Consent Order despite Settling Defendant's best efforts to fulfill the obligation. The requirement that Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure and best efforts to address the effects of any Force Majeure (a) as it is occurring and (b) following the Force Majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

33. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Order for which Settling Defendant intends or may intend to assert a claim of Force Majeure, Settling Defendant shall notify the State's Project Coordinator orally or, in his or her absence, the State's Alternate Project Coordinator or, in the event both of the State's Coordinators are unavailable, the Director of the Waste Management and Prevention Division of the Agency of Natural Resources. Such notice must be given within 7 days of when Settling Defendant first believed that the event might cause a delay. Within 10 days after the initial notice, Settling Defendant shall provide the State a written explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a

schedule for implementation of any measures to be taken to prevent or mitigate the delay or its effects; Settling Defendant's rationale for attributing such delay to a Force Majeure; and a statement as to whether Defendant believes such event may cause or contribute to an endangerment to public health, welfare, or the environment. Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a Force Majeure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors, subcontractors, or agents knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Settling Defendant from asserting Force Majeure regarding that event, provided, however, that the State may, in its unreviewable discretion, excuse Settling Defendant's failure to submit timely or complete notices under this Paragraph. Where Force Majeure is asserted, Settling Defendant must also prove that it made all reasonable efforts to remove, eliminate, or minimize such cause of delay or damages, diligently attempted to perform the obligations from which it seeks to be excused, and timely fulfilled all non-excused obligations.

34. If the State agrees that the delay or anticipated delay is attributable to a Force Majeure, the time to perform the obligations affected by the Force Majeure will be extended by the State as necessary in the State's judgment to complete those obligations. An extension of the time based on the Force Majeure shall not, of itself,

extend the time to perform any other obligation. If the State agrees that the delay is attributable to a Force Majeure, the State will notify Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure.

35. If the State does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure, the State will notify Settling Defendant in writing of its decision.

36. If Settling Defendant elects to invoke the procedures set forth in Section XII (Dispute Resolution), it shall do so no later than 15 days after receiving the State's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure, that the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the delay, and that Settling Defendant complied with the requirements of ¶ 32. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation of this Consent Order. However, Settling Defendant must complete the work affected by the delay within a timeline to be established by the State.

37. The State's failure to timely complete any obligation under the Consent Order or the Corrective Action Plan is not a violation of the Consent Order, provided, however, that if such failure prevents Settling Defendant from meeting

one or more deadlines in the Consent Order or the CAP, Settling Defendant may seek relief under this Section.

XII. DISPUTE RESOLUTION

38. Unless otherwise expressly provided for in this Consent Order, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this Consent Order. However, the procedures set forth in this Section shall not apply to actions by the State of Vermont to enforce obligations of Settling Defendant that have not been disputed in accordance with this Section.

39. A dispute shall be considered to have arisen when one party sends the other a written notice of dispute. Any dispute regarding this Consent Order shall in the first instance be the subject of informal negotiations between the parties. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties.

40. **Statements of Position.**

a. If the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the State shall be binding unless, within 10 business days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by providing the State a written Statement of Position on

the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation.

b. Within 10 days after receipt of Settling Defendant's Statement of Position, the State shall provide Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation. Within 5 business days after receipt of the State's Statement of Position, Settling Defendant may provide a Reply.

41. **Record Review**. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by the State under this Consent Order, and the adequacy of the performance of response actions taken pursuant to this Consent Order. Nothing in this Consent Order shall be construed to allow any dispute by Settling Defendant regarding the validity of Appendix A.

a. The State shall maintain an administrative record of the dispute. That record shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the State may allow submission of supplemental statements of position by the parties.

b. The Director of the Agency of Natural Resources' Waste Management and Prevention Division will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 41(a). This decision shall be binding upon Settling Defendant, subject only to the right to seek judicial review pursuant to ¶ 41(c).

c. The Director's decision shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court under this docket and served on all Parties within 10 business days after receipt of the State's decision. The review shall be conducted pursuant to Rule 75 of the Vermont Rules of Civil Procedure. The State may file an opposition to Settling Defendant's motion, and Settling Defendant may file a Reply, as allowed by the Vermont Rules of Civil Procedure.

42. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way Settling Defendant's obligations under this Consent Order, except as provided in ¶ 28 (Contesting Interim or Future Response Costs), as agreed by the State, or as determined by the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute, as provided in ¶ 28. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Order. In the event that Settling Defendant does not prevail on the disputed issue,

stipulated penalties shall be assessed and paid as provided in Section XIII (Stipulated Penalties).

XIII. STIPULATED PENALTIES

43. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in ¶¶ 44 and 45 to the State for failure to comply with the requirements of this Consent Order specified below, unless excused under Section XI (Force Majeure). "Compliance" by Settling Defendant shall include completion of all activities and obligations, including payments, required under this Consent Order or any deliverable approved under this Consent Order, in accordance with all applicable requirements of law, this Consent Order, Appendix A, and any deliverables approved under this Consent Order or Appendix A and within the specified time schedules established by and approved under this Consent Order and Appendix A.

44. **Stipulated Penalty Amounts – Consent Order (Including Payments).** The following stipulated penalties shall accrue per violation per day

for the failure to submit a timely deliverable or comply with any term of this Consent Order:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	$500
15th through 30th day	$ 750
31st day and beyond	$ 1,000

45. **Stipulated Penalty Amounts - Corrective Action Plan.** The following stipulated penalties shall accrue per violation per day for failure to comply with, or submit timely deliverables pursuant to, the approved Corrective Action Plan:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	$100
15th through 30th day	$ 250
31st day and beyond	$ 500

46. The provisions of Section XII (Dispute Resolution) and Section XIII (Stipulated Penalties) shall govern the accrual and payment of any stipulated

penalties regarding Settling Defendant's submissions under this Consent Order or an approved Corrective Action Plan.

47. In the event the State assumes performance of a portion or all of the Work pursuant to ¶ 60 (Work Takeover), Settling Defendant shall be liable for a stipulated penalty in the amount of $2,200,000.00. Defendant hereby expressly waives any claim that this stipulated penalty is excessive or otherwise contrary to law in any way. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 22 (Access to Financial Assurance) and 60 (Work Takeover).

48. Following the State's determination that Settling Defendant has failed to comply with a requirement of this Consent Order or the Corrective Action Plan, the State shall give Settling Defendant written notification of the same and describe the noncompliance. Settling Defendant shall have 10 days from the date of such notification to cure the deficiency identified by the State before penalties may begin to accrue. All penalties shall begin to accrue on the 10th day after the State provides Settling Defendant with notice of noncompliance, and shall continue to accrue until the noncompliance is corrected or the activity completed. However, stipulated penalties shall not accrue: (a) with respect to a decision by the Director of the Waste Management and Prevention Division, under ¶ 41(b), during the period, if any, beginning on the 1st day after the State's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (b)

with respect to judicial review by this Court of any dispute under Section XII (Dispute Resolution), during the period, if any, beginning on the 1st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this Consent Order shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Order or the Corrective Action Plan.

49. All penalties accruing under this Section shall be due and payable to the State within 30 days after Settling Defendant's receipt from the State of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XII (Dispute Resolution) within the 30-day period. All payments to the State under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 27 (Payment Instructions for Settling Defendant).

50. Except as provided in ¶ 48, penalties shall continue to accrue during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the parties or by a decision of the State that is not appealed to this Court, accrued penalties determined to be owed shall be paid to the State within 15 days after the agreement or the receipt of the State's decision or order;

b. If the dispute is appealed to this Court and the State prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to the State within 60 days after receipt of the Court's decision or order, except as provided in ¶ 48;

c. If this Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by this Court to be owed to the State into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the State or to Settling Defendant to the extent that each prevails.

51. If Settling Defendant fails to pay stipulated penalties when due, Settling Defendant shall pay Interest on the unpaid stipulated penalties as follows: (a) if Settling Defendant has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to ¶ 43 until the date of payment; and (b) if Settling Defendant fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 43 until the date of payment. If Settling Defendant fails to pay stipulated

penalties and Interest when due, the State may institute proceedings to collect the penalties and Interest.

52. The payment of penalties and Interest, if any, shall not alter in any way Settling Defendant's obligation to complete or fund the Work.

53. Nothing in this Consent Order shall be construed as prohibiting, altering, or in any way limiting the State's ability to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to 10 V.S.A. § 8221, provided, however, that the State shall not seek civil penalties pursuant to 10 V.S.A. § 8221 for any violation for which a stipulated penalty is provided in this Consent Order, except in the case of a willful violation of this Consent Order.

54. Notwithstanding any other provision of this Section, the State may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Order.

XIV. COVENANTS BY THE STATE

55. Except as provided in this paragraph and in ¶¶ 56, 57 (State's Pre- and Post-Certification Reservations), and 59 (General Reservations of Rights), the State covenants not to sue or take administrative action relating to releases of PFOA in Corrective Action Area I against Settling Defendant pursuant to 10 V.S.A. §§ 1283,

1410, 6610a, 6615, 6615d, 6615e, 6616, 8003, 8221 and 42 U.S.C. §§ 6972, 9607, 9659 or the common law, including claims for natural resource damages. In addition, the State covenants not to sue or take administrative action against Settling Defendant under any future law or regulation to compel Settling Defendant to pay for water line extensions for PFOA contamination in Corrective Action Area I except as provided for in this Consent Order. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of Corrective Action Completion for Corrective Action Area I by the State pursuant to Appendix A. These covenants extend to Settling Defendant and any of its corporate successors; and corporate parents, subsidiaries, predecessors, or other corporate affiliates identified in Appendix F, but do not extend to any other person. These covenants are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Order.

56. **State's Pre-Certification Reservations.** Notwithstanding any other provision of this Consent Order, the State reserves, and this Consent Order is without prejudice to, the State's right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel Settling Defendant to perform further corrective actions relating to the Site and/or to pay the State for additional costs of response or penalties if:

(a) prior to Certification of Corrective Action Completion for Corrective Action Area I:

(1) conditions at the Site, previously unknown to the State, are discovered, or

(2) information, previously unknown to the State, becomes known, in whole or in part, and

(b) the State determines that these previously unknown conditions or information together with any other relevant information indicate that the Corrective Action is not protective of human health or the environment.

57. **State's Post-Certification Reservations**. Notwithstanding any other provision of this Consent Order, the State reserves, and this Consent Order is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel Settling Defendant to perform further corrective actions relating to the Site and/or to pay the State for additional costs of response or penalties if:

a. subsequent to Certification of Corrective Action Completion for Corrective Action Area I:

(1) conditions at the Site, previously unknown to the State, are discovered, or

(2) information, previously unknown to the State, becomes known, in whole or in part, and

b. the State determines that these previously unknown conditions or this information together with any other relevant information indicate that the Corrective Action is not protective of human health or the environment.

58. For purposes of ¶ 56 (State's Pre-Certification Reservations), the information and the conditions known to the State will be limited to all factual information or quantitative data collected by the State and all factual information and quantitative data submitted to the State by Settling Defendant as of the effective date of this Consent Order. For purposes of ¶ 57 (State's Post-Certification Reservations), the information and the conditions known to the State shall include all information and those conditions known to the State as of the date of Certification of Corrective Action Completion for Corrective Action Area I, the administrative record supporting the Corrective Action Plan, and any information received by the State pursuant to the requirements of this Consent Order prior to said Certification of Corrective Action Completion.

59. **General Reservations of Rights**. The State reserves at all times the right to seek an order compelling Settling Defendant to perform its obligations under the Corrective Action Plan and this Consent Order. The State reserves, and this Consent Order is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the State's covenants.

Notwithstanding any other provision of this Consent Order, the State reserves all rights it may have against Settling Defendant with respect to:

a. liability for failure by Settling Defendant to meet a requirement of this Consent Order;

b. liability arising from any past, present, or future disposal, release, or threat of release of PFOA in an area or areas of the Site outside Corrective Action Area I;

c. liability arising from the past, present, or future disposal, release, or threat of release of PFOA outside of the Site;

d. liability arising from releases after the Effective Date of this Consent Order;

e. criminal liability;

f. civil penalty liability;

g. liability for violations of federal or state law not expressly released as a part of this Consent Order; and

h. subject to the provisions of ¶¶ 13, 14, and 15, liability, prior to achievement of Performance Standards, for additional response actions that the State determines are necessary to achieve and maintain Performance Standards or

to carry out and maintain the effectiveness of the remedy set forth in the approved Corrective Action Plan.

60. **Work Takeover.**

a. In the event the State determines that Settling Defendant: (1) has ceased implementation of any portion of the Site Work; (2) is seriously or repeatedly deficient or late in its performance of the Site Work; or (3) is implementing the Site Work in a manner that may endanger human health or the environment, the State may issue a written notice ("Work Takeover Notice") to Settling Defendant. Any Work Takeover Notice will specify the grounds upon which it was issued and will provide Settling Defendant a period of 10 days within which to remedy the circumstances set forth in the notice.

b. If, after expiration of the 10-day notice period specified in ¶ 60(a), Settling Defendant has not remedied to the State's satisfaction the circumstances giving rise to the State's issuance of the relevant Work Takeover Notice, the State may at any time thereafter assume the performance of all or any portion(s) of the Site Work the State deems necessary ("Work Takeover"). The State will notify Settling Defendant in writing (which writing may be electronic) if the State determines that a Work Takeover is warranted. Funding of Work Takeover costs is addressed under ¶ 22 (Access to Financial Assurance). The Stipulated Penalty for a Work Takeover is addressed in ¶ 47.

c. Settling Defendant may invoke the procedures set forth in ¶ 41 (Record Review), to dispute the Work Takeover. However, notwithstanding Settling Defendant's invocation of such dispute resolution procedures, and during the pendency of any such dispute, the State may in its sole discretion commence and continue a Work Takeover until the earlier of (1) the date that Settling Defendant remedies, to the State's satisfaction, the circumstances giving rise to the State's issuance of the Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with ¶ 41 (Record Review) requiring the State to terminate such Work Takeover.

61. Notwithstanding any other provision of this Consent Order, the State retains all authority and reserves all rights to take any and all response actions authorized by law.

XV. COVENANTS BY SETTLING DEFENDANT

62. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the State with respect to the Work, past response actions regarding the Site, Past Response Costs, Interim Response Costs, or Future Response Costs. This includes, but is not limited to:

a. any claims arising under state law regarding the Work, past response actions regarding the Site, Past Response Costs, Interim Response Costs, Future Response Costs, Settling Defendant's Past Response Costs, Settling

Defendant's Interim Response Costs, Settling Defendant's Future Response Costs, and this Consent Order; and

b. any claims arising out of response actions at or in connection with the Site, including claims under the United States Constitution, the Vermont Constitution, or at common law.

63. Except as provided in ¶ 69 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the State brings a cause of action or issues an order to compel corrective action pursuant to any of the reservations in Section XIV (Covenants by the State), other than in ¶¶ 59(a) (claims for failure to meet a requirement of the Consent Order), 59(e)(criminal liability), and 59(g) (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the State is seeking pursuant to the applicable reservation.

XVI. EFFECT OF SETTLEMENT; CONTRIBUTION

64. Except as provided in ¶¶ 65 and 66 (protection from contribution), nothing in this Consent Order shall be construed to create any rights in, or grant or deny any cause of action to, any person not a Party to this Consent Order. This Consent Order shall not create any third-party beneficiary status to any person who is not a party to this Consent Order. Each of the Parties expressly reserves any and all rights, defenses, claims, demands, and causes of action that each Party may

have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto, and nothing herein shall be construed as any admission of or any evidence of any fault, wrongdoing, or liability by Settling Defendant in this action or any other action or proceeding. Nothing in this Consent Order diminishes the right of the State to pursue any Person not a party hereto to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection.

65. The Parties agree, and by entering this Consent Order this Court finds, that this Consent Order constitutes a judicially-approved settlement pursuant to which the Settling Defendant has, as of the Effective Date and subject to satisfactory completion of the Work, resolved liability to the State for PFOA contamination in Corrective Action Area I within the meaning of 10 V.S.A. §§ 1283 and 6615 for the matters addressed in this Consent Order.

66. The Parties further agree, and by entering this Consent Order this Court finds, that this Consent Order constitutes a judicially-approved settlement pursuant to which Settling Defendant has, as of the Effective Date and subject to satisfactory completion of the Work, resolved liability to the State for PFOA contamination in Corrective Action Area I within the meaning of 10 V.S.A. § 6615, and Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or contribution claims as provided by any and all applicable laws, for the "matters addressed" in this Consent Order. The "matters addressed"

in this Consent Order are the Work, Past Response Costs, and Interim and Future Response Costs.

67. Settling Defendant shall, with respect to any suit or claim brought by it for matters addressed in this Consent Order as described above (namely, the Work, Past Response Costs, and Interim and Future Response Costs), notify the State in writing no later than 15 days prior to the initiation of such suit or claim.

68. Settling Defendant shall, with respect to any suit or claim brought against it for matters addressed in this Consent Order as described above (namely, the Work, Past Response Costs, and Interim and Future Response Costs), notify in writing the State within 10 days after service of the complaint on Settling Defendant. In any such action, Settling Defendant shall notify the State within 10 days after service or receipt of any Motion for Summary Judgment on such claim and within 10 days after receipt of any order from a court setting such a case for trial.

69. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim against the State based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the State in the subsequent proceeding were or should have been

brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XIV (Covenants by the State).

XVII. ACCESS TO INFORMATION

70. Settling Defendant shall provide to the State, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as "Records") within Settling Defendant's possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Consent Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. Settling Defendant shall also make available to the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

71. **Privileged or Protected Claims.**

a. Settling Defendant may assert that all or part of a Record requested by the State is privileged or protected as provided under applicable law, in lieu of providing the Record, provided Settling Defendant complies with ¶ 71(b).

b. If Settling Defendant asserts a claim of privilege or protection, it shall provide the State with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Settling Defendant shall provide the Record to the State in redacted form to mask the privileged or protected portion only. Settling Defendant shall retain all Records that it claims to be privileged or protected until the State has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the Settling Defendant's favor.

c. Settling Defendant hereby expressly agrees to produce to the State upon request, and agrees not to assert claims of privilege or protection against the State (but reserves any such claim as against all other persons or parties, and reserves all trade-secret and business-confidential claims as described below), information regarding: (1) any quantitative data regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that Settling Defendant is required to create or generate pursuant to this Consent Order.

72. **Trade-Secret and Business-Confidential Claims.** Settling Defendant may assert that all or part of a Record provided to the State under this Section or Section XVIII (Retention of Records) is either a trade secret or business confidential to the extent permitted by and in accordance with 10 V.S.A. § 6615c(f). Settling Defendant shall segregate and clearly identify all Records or parts thereof submitted under this Consent Order for which Settling Defendant asserts such claims. Records determined to be confidential will be afforded the protection specified in 10 V.S.A. § 6615c(f) and 1 V.S.A. § 317(c)(9). If no claim of confidentiality accompanies Records when they are submitted to the State or if the State has notified Settling Defendant that the Records are not confidential, the public may be given access to such Records without further notice to Settling Defendant.

73. If relevant to the proceeding, the Parties agree that validated sampling or monitoring data generated during the performance of the Work and reviewed and approved by the State shall be admissible as evidence, without objection, in any proceeding under this Consent Order.

74. Notwithstanding any provision of this Consent Order, the State retains all of its information-gathering and inspection authorities and rights, including enforcement actions related thereto, under the Vermont Waste Management Act, and any other applicable statutes or rules.

XVIII. RETENTION OF RECORDS

75. Until 10 years after the State's Certification of Work Completion for Corrective Action Area I under Appendix A, Settling Defendant shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability or potential liability under the Vermont Waste Management Act with respect to the Site. Settling Defendant must also retain all Records that relate to the liability or potential liability of any other person under the Vermont Waste Management Act with respect to the Site. Settling Defendant must also retain, and instruct its contractors, sub-contractors, and agents to preserve, for the same period of time specified above, all non-identical copies of the final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work, and copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record-retention requirements shall apply regardless of any corporate retention policy to the contrary.

76. At the conclusion of this record-retention period, Settling Defendant shall notify the State at least 30 days prior to the destruction of any such Records, and, upon request by the State, and except as provided in ¶ 71 (Privileged or Protected Claims), Settling Defendant shall deliver any such Records to the State.

77. Settling Defendant certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its liability or potential liability regarding the Site since notification of potential liability by the State and that it has fully complied or is working in good faith towards compliance with any and all State requests for information regarding the Site.

XIX. NOTICES AND SUBMISSIONS

78. All approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, and requests specified in this Consent Order must be in writing unless otherwise specified. Whenever, under this Consent Order, notice is required to be given, or a report or other document is required to be sent, by one Party to another, it must be directed to the person(s) specified in Appendix G. Any Party may change the person and/or address applicable to it by providing notice of such change to the other Party. All notices under this Section are effective upon receipt, unless otherwise specified. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the Consent Order regarding such Party.

XX. RETENTION OF JURISDICTION

79. This Court retains jurisdiction over both the subject matter of this Consent Order and Settling Defendant for the duration of the performance of the terms and provisions of this Consent Order for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Order, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XII (Dispute Resolution).

XXI. WAIVER

80. The failure of any Party at any time to require performance by the other Party of the provisions of this Consent Order will not be deemed a waiver of that provision or a waiver of any other provision of this Consent Order and will in no way affect the right to require such performance from such other Party at any time thereafter.

XXII. APPENDICES

81. The following appendices are attached to and incorporated as terms of this Consent Order:

"Appendix A" is Corrective Action Work Items and Schedule.

"Appendix B" is the map of the area designated as Corrective Action Area I, including Operable Units A and B, and Corrective Action Area II.

"Appendix C" is the Comparitive Analysis of Corrective Action Options: North Bennington, Vermont.

"Appendix D" is the Agency of Natural Resources Record of Decision and Selection of Remedy for Corrective Action Area I.

"Appendix E" is the Agreement for Payment for Expansion of Municipal Water Lines.

"Appendix F" is a list of Settling Defendant's related entities for purposes of the covenant not to sue in Paragraph 55.

"Appendix G" is a list of contacts for purposes of providing notice under this Consent Order.

XXIII. MODIFICATION

82. Settling Defendant may request that the Secretary modify any deadline established in the Consent Order or any work plan required by the Consent Order. The Parties understand and agree that circumstances may make it difficult for Settling Defendant to comply with deadlines at times, including but not limited to the timeline of deliverables set forth in Appendix A, and the Secretary agrees to grant requests for extensions made by Settling Defendant provided that such requests are not unreasonable. When making a request for an extension, Settling Defendant shall propose an alternative deadline and provide a brief justification for why the change is necessary.

83. All material modifications to this Consent Order shall be in writing, signed by the State and Settling Defendant, and shall be effective only upon approval by this Court. A modification shall be considered material if it fundamentally alters the Parties' obligations.

84. Non-material modifications to this Consent Order shall be in writing and shall be effective when signed by duly authorized representatives of the State and Settling Defendant. Any modification agreed to by the Parties that does not fundamentally alter the parties' obligations is a non-material modification.

XXIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

85. This Consent Order shall be lodged with the Court for at least 30 days for public notice and comment. The State will provide notice of the proposed Consent Order on its website, and in other media as the State in its sole discretion deems appropriate. The State reserves the right to withdraw or withhold its consent if comments sent to the Agency of Natural Resources regarding the Consent Order contain facts or considerations that indicate that the Consent Order is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Order without further notice after it is lodged with the Court.

86. If for any reason the Court should decline to approve this Consent Order in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXV. SIGNATORIES/SERVICE

87. The undersigned representatives of Settling Defendant and the State hereby certify that they are fully authorized to enter into this Consent Order and to execute and legally bind such Party to it.

88. Settling Defendant agrees not to oppose entry of this Consent Order by this Court or to challenge any provision of this Consent Order unless the State has notified Settling Defendant in writing that it no longer supports entry of the Consent Order.

89. Settling Defendant shall identify, on the attached signature page, the name, address, email, and telephone number of an agent who is authorized to accept service by mail or email on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Order. Settling Defendant agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Vermont Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXVI. FINAL JUDGMENT

90. This Consent Order constitutes the final, complete, and exclusive agreement and understanding between the Parties regarding the settlement embodied in the Consent Order. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Order.

91. Upon entry of this Consent Order by the Court, this Consent Order shall constitute a final judgment between the State and Settling Defendant.

SO ORDERED THIS __ DAY OF _____, 20__.

_____
Superior Court Judge

DATED at Montpelier, Vermont this 25th day of July, 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____
Robert F. McDougall
ERN 2973
Laura B. Murphy
ERN 5042
Assistant Attorneys General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

JULIA S. MOORE
SECRETARY

By: _____
Jennifer Duggan, General Counsel
ERN 7163
Matthew Chapman, General Counsel DEC
ERN 4943
1 National Life Drive, Davis 2
Montpelier, VT 05620

DATED at Malvern, Pennsylvania this 24 day of July, 2017.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

By: _____

Thomas Kinisky, President
Saint-Gobain Corporation
20 Moores Road
Malvern, PA 19355

DATED at Brattleboro, Vermont this 24th day of July, 2017.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

By: _____

Brad Fawley, Esq.
Downs Rachlin Martin PLLC
28 Vernon Street, Suite 501
P.O. Box 9
Brattleboro, VT 05302
ERN 3514

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
DOCKET NUMBER 470-8-14 Rcdv

State of Vermont, Plaintiff

V.

John M. Ruggiero
Second City LLC, Second City Properties LLC,
6 Hopkins LLC, 10 Cleveland LLC,
16 Meadow LLC, 32 Merchants LLC
35 Elm LLC, 38 Elm LLC, 48 Strongs LLC
49 Forest LLC, 54 Cherry LLC, 61 School LLC
65 School LLC, 70 Grove LLC, 75 Harrison LLC
76 Grove LLC, 79 School LLC, 84 Woodstock LLC
114 Strongs LLC, 212 Columbian LLC
222 Stratton LLC

JUDGMENT ORDER

This matter came before the Court for a hearing on damages on September 25, 2017 based on the claims made in the Complaint by the State of Vermont (Plaintiff) in this matter. Plaintiff was present represented by Assistant Attorney General Justin Kolber, Esq. Defendant Ruggiero was present pro se, for himself individually, and on behalf of each of the Corporate Defendants as Member-Manager of each Corporate Defendant. Liability in this matter has been determined pursuant to the Summary Judgment Order of the Court dated April 22, 2016. The findings, conclusions and order of the Summary Judgment Order are included herein and made a part of this Judgment Order as if fully rewritten herein and made a part hereof.

Based upon the evidence presented at the final hearing on damages and the findings, conclusions and order of the Summary Judgment Order the Court finds damages as follows:

1. **Remedial Damages.** Remedial damages pursuant to 10 VSA 6615(a) in favor of the Plaintiff in the amount of $535,679.00. The remedial damages are reasonable and necessary pursuant to 10 VSA 6615(a). Defendant 84 Woodstock LLC and Defendant Ruggiero, individually, are jointly and severally liable for the remedial damages of $535,679.00. The remedial damages awarded herein are inclusive of the treble damages awarded in Paragraph 3 below, and are not in any way to be construed or interpreted to be or mean in addition to the treble damages awarded herein.

2. **Future Monitoring Costs.** Future monitoring costs in favor of the Plaintiff not to exceed $15,000.00 per year commencing 2017 and payable in Paragraph 2(a)-(b) below. Defendant 84 Woodstock LLC and Defendant Ruggiero shall be jointly and severally liable for the future monitoring costs found to be due in this Paragraph 2. The future Monitoring costs shall be due and payable as follows.

a. **Years 2017 through 2022 inclusive:** $75,000 in future monitoring costs paid within 30 days of execution of this Order for the years 2017 through and including 2022. Said amount shall be paid to the Agency of Natural Resources ("ANR"). ANR shall establish a settlement account into which said $75,000 monitoring costs shall be deposited and from which ANR shall pay the invoices for such annual monitoring as such invoices become due. The amount of future monitoring costs is capped at no more than $15,000 per year plus the Consumer

Price Index (CPI). CPI shall be calculated by taking the difference between the CPI for the previous year and the CPI in the year in which the invoice is presented. CPI shall be the CPI for all indexes. Any amounts remaining after payment of the annual invoices shall be carried over to the following years and after payment of the invoices for the year 2022. Any excess amount remaining after 2022 shall either be credited towards the amounts due in Paragraph 1 or carried forward to 2023 and thereafter if continued monitoring is required as provided in Paragraph 2(b).

(b) **Future monitoring costs after 2022.** In 2022, ANR shall review its determination of future monitoring and give notice of its decision to Defendant Ruggiero in writing. Such notice shall be sufficient notice to Defendant 84 Woodstock LLC. If ANR determines that future monitoring is needed, then any monies left over from the settlement account shall be credited to future monitoring. After 2022, if ANR determines to continue future monitoring of the Site, Defendant 84 Woodstock LLC and Defendant Ruggiero shall remain jointly and severally liable for future monitoring costs not to exceed $15,000 plus CPI as provided herein annually for future monitoring costs. Any annual monitoring costs after 2022, shall be payable by Defendant 84 Woodstock LLC and/or Defendant Ruggiero to ANR within 60 days of presentation of the invoices for such cost.

(c) Future monitoring costs shall terminate on the earlier of 2045 or the year in which ANR determines to cease future monitoring of the site.

3. **Treble Damages.** Treble damages in favor of Plaintiff in the amount of $1,607,037.00 pursuant to 10 VSA 6615(b). Defendant Ruggiero, individually, and each Corporate Defendant shall be jointly and severally liable for the treble damages

awarded herein. Defendant 84 Woodstock LLC is not liable for treble damages awarded in this paragraph 3. The treble damages herein are inclusive of the remedial damages awarded in Paragraph 1 above and are not to be construed or interpreted in any way to be in addition to the remedial damages provided in Paragraph 1.

4. **Prejudgment Interest.** Prejudgment interest in favor of Plaintiff in the amount of $180,443.00. Defendant 84 Woodstock LLC and Defendant Ruggiero are jointly and severally liable for prejudgment interest awarded herein.

5. **Costs.** Costs in favor of Plaintiff in the amount of $555.00. All Defendants are jointly and severally liable for the costs awarded hereunder.

Dated at Rutland, Vermont on this 5th day of October, 2017.

Superior Court Judge

APPROVED AS TO FORM:

10/4/17

Justin Kolber, Assistant Attorney General, for Plaintiff State of Vermont

John M. Ruggiero, individually and as agent for each Corporate Defendant

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
DOCKET NO. _____

State of Vermont	)
v.	)
	)
John M. Ruggiero; Second City LLC;	)
Second City Properties LLC;	)
6 Hopkins LLC; 10 Cleveland LLC;	)
16 Meadow LLC; 32 Merchants LLC;	)
35 Elm LLC;38 Elm LLC; 48 Strongs LLC;	)
49 Forest LLC; 54 Cherry LLC; 61 School LLC;	)
65 School LLC; 70 Grove LLC;	)
75 Harrison LLC; 76 Grove LLC;	)
79 School LLC; 84 Woodstock LLC;	)
114 Strongs LLC; 212 Columbian LLC;	)
222 Stratton LLC	)

COMPLAINT

The State of Vermont, by and through Attorney General William H. Sorrell, files this complaint pursuant to 10 V.S.A. §§ 1283, 8221, 6612, and 6615 and the common law and equitable jurisdiction of the court, to declare Defendants liable for and to recover Environmental Contingency Fund expenditures for investigation, remediation, and removal activities at a site at 84 Woodstock Avenue (US Route 4) in Rutland ("Site") and to hold Defendants liable as owners and/or operators for violations of the Vermont Waste Management Act ("VWMA"). The State's expenditures arise from releases of hazardous materials relating to past dry-cleaning, auto-repair, and fuel-station activities and other more recent activities at the Site.

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

Defendants are past and present owners and operators of the Site, including John M. Ruggiero and 21 of his single-member shell companies. Defendant Ruggiero created these companies and made fraudulent transfers of assets in 2011 to attempt to shield assets from the State immediately following an Environmental Division ruling finding two of his existing companies liable for future cleanup costs. The State has since undertaken to start the cleanup itself. The State brings this action for declaratory, monetary, and injunctive relief, including a preliminary injunction preventing Defendant Ruggiero from further attempting to shield his assets from cost recovery.

Defendants

1. Defendant Ruggiero, personally and via single-member alter ego LLCs, some of them fictional, has owned and/or operated the Site since approximately September 13, 2001.

2. Defendant Ruggiero has been in sole control of all operations and activities at the Site since approximately September 13, 2001.

3. Defendant Ruggiero has been in sole control of decisions relating to environmental compliance, remediation, investigation, and cleanup at the site since approximately September 13, 2001.

4. Rutland Property Recovery LLC, Rutland Resource Recovery LLC, and VT Property Recovery LLC are listed in public documents signed

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by Defendant Ruggiero as owning the Site from approximately September 13, 2001 until approximately April 30, 2004.

5. None of the three companies named in ¶ 4 ever existed as an LLC.

6. Defendant Ruggiero held himself out as the agent of the three companies named in ¶ 4, including in a Vermont property transfer tax return.

7. Defendant Ruggiero was at all relevant times in sole control of the operations and activities of the three companies named in ¶ 4 as relates to the Site.

8. Second City LLC and/or Second City Properties LLC owned or operated the Site from approximately April 30, 2004 until approximately August 5, 2011.

9. 84 Woodstock LLC has owned and operated the Site since approximately August 5, 2011.

10. On or about August 2, 2012 Defendant Ruggiero represented to the Environmental Division that two Ruggiero-controlled companies — "5 Harrington LLC" and "6 Harrington LLC" — would allow liens to attach to their property to repay State funds expended to remediate the Site.

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11. "5 Harrington LLC" and "6 Harrington LLC" did not exist on August 2, 2012, and have never existed as Vermont companies.

12. Defendant Ruggiero is the sole owner, member, and manager of 84 Woodstock LLC; Second City LLC; Second City Properties LLC; 35 Elm LLC; 38 Elm LLC; 75 Harrison LLC; 32 Merchants LLC; 48 Strongs LLC; 114 Strongs LLC; 54 Cherry LLC; 10 Cleveland LLC; 49 Forest LLC; 70 Grove LLC; 76 Grove LLC; 6 Hopkins LLC; 16 Meadow LLC; 61 School LLC; 65 School LLC; 79 School LLC; 212 Columbian LLC; and 222 Stratton LLC (together with the non-existent LLCs described in ¶¶ 4 and 11, the "Ruggiero LLCs").

13. In 2011, Defendant Ruggiero caused Second City LLC and Second City Properties LLC to fraudulently convey assets to other Ruggiero LLCs to shield assets that were held by Defendant Ruggiero, Second City LLC, and/or Second City Properties LLC as of July 19, 2011 ("the 2011 transfers").

14. The Ruggiero LLCs are mere alter egos of Defendant Ruggiero, or in some cases do not exist at all.

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Statutory Framework

Environmental Enforcement

15. Under 10 V.S.A. § 8221, the Attorney General may enforce any of the provisions of law specified in § 8003(a), including the VWMA.

16. Under the VWMA, 10 V.S.A. § 6615 *et seq.*, an owner or operator of a facility is liable for the State's costs of investigation, removal, and remedial actions which are necessary to protect the public health or the environment.

17. Under § 8221(a)(5), this Court may "order reimbursement from any person who caused governmental expenditures for the investigation, abatement, mitigation, or removal of a hazard to human health or the environment."

18. A "violation" that may be enforced under § 8221 is "noncompliance with one or more of the statutes specified in [§ 8003] or any related rules, permits, assurances, or orders." 10 V.S.A. § 8002(9).

19. The Secretary "may bring an action under [10 V.S.A. § 1283] or other available state and federal laws to enforce the obligation to repay the [environmental contingency fund]." 10 V.S.A. § 1283.

20. The Secretary may enforce the requirement that a responsible party implement a corrective action plan. 10 V.S.A. § 6615b.

21. A party that does not comply with a court order to implement a corrective action plan is liable for three times the cost of corrective action undertaken by the State. 10 V.S.A. § 6615(b).

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22. When the Attorney General's Office brings an enforcement action relating to 10 V.S.A. Chapter 159, the Court may, among other things, award civil penalties of up to $85,000 for each violation and, in the case of continuing violations, up to $42,500 for each day the violation continues.

Fraudulent Transfers

23. A transfer is fraudulent as to a present creditor if the debtor made the transfer without receiving a reasonably equivalent value in exchange, and the debtor is already insolvent or becomes so because of the transfer. 9 V.S.A. § 2289(a).

24. A transfer is fraudulent as to present and future creditors if it is made with actual intent to hinder, delay, or defraud any creditor. 9 V.S.A. § 2288(a)(1).

25. A transfer is fraudulent as to present and future creditors if it is made without receiving reasonably equivalent value in exchange, and the debtor "intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." 9 V.S.A. § 2288(a)(2).

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Factual and Procedural History

The Site

26. The Site is located at 84 Woodstock Avenue (U.S. Route 4) in Rutland where dry-cleaning operations were held for a number of years. The Site is a facility under the VWMA.

27. Environmental investigations and subsurface investigations of the Site in 1997, 2006, 2008, and late 2012 revealed contamination by chlorinated volatile organic compounds (CVOCs) stemming from historical dry-cleaning operations at the Site.

28. These CVOCs include the dry-cleaning solvent tetrachloroethene (PCE) and its byproducts, including trichloroethene (TCE); 1,2-dichloroethene (DCE), and vinyl chloride.

29. The 1997, 2006, 2008, and 2012 investigations also showed contamination by petroleum volatile organic compounds (VOCs).

30. CVOCs and VOCs are hazardous materials and hazardous wastes as those terms are defined at 10 V.S.A. §§ 6602(16)(A) and 6602(4).

31. Site contamination has historically been centered below the basement-floor concrete foundation slab of a building at 84 Woodstock Avenue, which was in existence on September 13, 2001.

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32. Defendant Ruggiero, then purporting to act on behalf of a non-existent company or companies he referred to as "Rutland Property Recovery LLC," "Rutland Resource Recovery LLC," and "VT Property Recovery LLC," acquired the Site on or about September 13, 2001 for no consideration.

33. Defendant Ruggiero, then acting through Second City Properties LLC, purchased the 84 Woodstock Avenue property at a tax sale on or about April 30, 2004 for ten dollars.

34. Defendant Ruggiero knew or should have known at the time of the 2001 and 2004 purchases that the Site was contaminated.

35. After purchasing the Site, and without notice to or approval by the Agency, Defendant Ruggiero caused the demolition of the last remaining structure at 84 Woodstock Avenue, exposing the source area to rainwater infiltration resulting in the increased leaching of subsurface adsorbed soil contaminants, namely tetrachloroethylene (PCE) into groundwater.

36. Groundwater monitoring results in 2009 and 2012 indicated that a plume of CVOC contamination had spread southward across two neighboring properties located at 5 and 6 Harrington Avenue(the JAMAC parcels) via groundwater flow and threatened to affect indoor air quality at residences on Harrington Avenue.

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37. In August 2010, Second City Properties LLC and Second City LLC, via Defendant Ruggiero, submitted to the Agency a Corrective Action Plan ("2010 CAP").

38. The Agency approved the 2010 CAP on or about September 1, 2010.

39. The 2010 CAP included remedial activities to address the above-described contamination which, among others, included physical removal of contaminated soils and installation of a granular iron permeable reactive barrier ("PRB") at the southern boundary of the JAMAC parcel.

40. By law, the owner or operator of the 84 Woodstock Avenue site — i.e. Defendant Ruggiero or one of the Ruggiero LLCs — was to fully implement the 2010 CAP by November 2010. *See* 10 V.S.A. § 6615b(4).

41. The 2010 CAP was not implemented by November 2010 and has never been implemented.

2011 Environmental Division Emergency Order and Defendant Ruggiero's Fraudulent Transfers

42. On July 18, 2011, Defendant Ruggiero on behalf of Second City LLC and Second City Properties LLC stipulated in a Stipulated Emergency Order that:

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a. Second City LLC and Second City Properties LLC own and operate the Site;

b. the Site is contaminated with hazardous materials, which are spreading southward toward a residential neighborhood;

c. Second City LLC and Second City Properties LLC had violated 10 V.S.A. § 6615b by not implementing an Agency approved corrective action plan;

d. the failure to implement the corrective action plan presented an immediate threat to public health and to the environment;

e. Second City LLC and Second City Properties LLC would implement the corrective action plan by October 1, 2011.

43. On July 19, 2011, the Agency submitted the Stipulated Emergency Order and the Environmental Division approved it. (the "2011 Order").

44. On or about July 21, 2011 and August 11, 2011, Defendant Ruggiero registered at least the following 19 new companies ("the 2011 LLCs") with the Secretary of State:

35 Elm LLC	114 Strongs LLC
38 Elm LLC	84 Woodstock LLC
75 Harrison LLC	54 Cherry LLC
32 Merchants LLC	10 Cleveland LLC
48 Strongs LLC	49 Forest LLC

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70 Grove LLC
76 Grove LLC
6 Hopkins LLC
16 Meadow LLC
61 School LLC
65 School LLC
79 School LLC
212 Columbian LLC
222 Stratton LLC

45. At all relevant times, Defendant Ruggiero was the sole member, owner, and manager of all of the Ruggiero LLCs, and controlled all of their activities.

46. All of the Ruggiero LLCs are mere alter egos of Defendant Ruggiero and all of the Ruggiero LLCs formed in 2011 are mere continuations of Second City LLC and Second City Properties LLC.

47. In the months of July and August 2011, without informing the Agency or the Environmental Division, Defendant Ruggiero caused Second City LLC, Second City Properties LLC, and "Rutland Resource Recovery LLC" to transfer roughly $2 million in real-property assets to the newly formed Ruggiero LLCs ("the 2011 transfers").[1]

48. "Rutland Resource Recovery LLC" has never existed.

49. The 2011 transfers were fraudulent.

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[1] The lister card and PTTR for 202 Columbian Ave. erroneously refer to "202 Columbian LLC" as the current owner of the property. The deed transferring the same property from Second City LLC refers to the grantee at different times as "212 Columbian LLC" and "202 Columbian LLC."

a. Neither Defendant Ruggiero nor the 2011 LLCs paid any consideration in any of the 2011 transfers.

b. In one of the 2011 transfers, Defendant Ruggiero purported to *personally* transfer to the Ruggiero LLCs real-property assets that were in fact held by Second City LLC.

c. Defendant Ruggiero made the 2011 transfers with an actual intent to hinder, delay, or defraud the State from recovering moneys expended to clean up the site.

d. Defendant Ruggiero made the 2011 transfers without adequate consideration and thereby left 84 Woodstock LLC, Second City LLC and Second City Properties LLC insolvent and unable to pay debts and meet obligations that Defendant Ruggiero believed or reasonably should have believed would become due.

The 2012 Environmental Division Proceeding

50. At a reconvened Environmental Division hearing on August 2, 2012 Defendant Ruggiero testified that respondents 84 Woodstock LLC, Second City LLC, and Second City Properties LLC lacked funds to implement the 2010 CAP, but did have funds to purchase the neighboring JAMAC parcels. Defendant Ruggiero did not disclose the 2011 transfers to the Court or to the State.

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51. The Court ordered that respondents would acquire the JAMAC parcels and provide the deeds to the Court and Agency by August 10, 2012.

52. Respondents did not acquire the JAMAC parcels.

53. The Court issued an August 9, 2012 Order that contemplated that ANR would implement the 2010 CAP and ordered respondents to reimburse ANR for its costs to do so.

54. At the August 2, 2012 Environmental Division hearing, Ruggiero represented that two additional Ruggiero-controlled companies — "5 Harrington LLC" and "6 Harrington LLC" — would allow liens to attach to their property to repay the funds expended from the environmental contingency fund to remediate the site.

55. However, "5 Harrington LLC" and "6 Harrington LLC" did not exist on August 2, 2012, and have never existed.

56. Neither Defendant Ruggiero nor any Ruggiero LLC has ever owned the JAMAC parcels.

57. Neither Defendant Ruggiero nor any of the Ruggiero LLCs have provided the Agency with liens to secure reimbursement of the Agency's costs.

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58. Since the August 2, 2012 hearing, the Agency has incurred further expenses investigating the contamination at 84 Woodstock Avenue and the JAMAC parcels, and commissioned from the Johnson Company a necessary Corrective Action Feasibility Study Update and Corrective Action Plan Addendum, which the Agency received on December 31, 2012 (the "2012 CAP").

59. The 2012 CAP was necessary because conditions on the site and the JAMAC parcels have worsened because Defendant Ruggiero and the Ruggiero LLCs have not remediated the contamination.

60. The 2010 CAP is no longer adequate to remediate the site or to protect human health and the environment, given changed site conditions.

61. The 2012 CAP will be substantially more expensive to implement than the 2010 CAP.

62. In the fall of 2013, the Agency received the necessary legislative approval to implement the 2012 CAP. *See* 10 V.S.A. § 1283(b) (requiring legislative approval for Environmental Contingency Fund expenditures exceeding $100,000).

63. The Agency has approved a contract and contractor to perform the first phase of the 2012 CAP, and anticipates that the work will begin

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in earnest in August 2014. The contract amount for the first phase — a permeable reactive barrier — is over $400,000.

64. As a condition of the § 1283(b) approval, the Legislature required the Agency to pursue recovery of costs incurred to implement the 2012 CAP.

65. The contaminant plume poses an imminent risk of impacting indoor air quality at homes on Harrington Avenue, and is adversely affecting groundwater in the area.

Claims

I. First Cause of Action

Declaratory Judgment pursuant to 12 V.S.A. § 4711

66. The State realleges and reaffirms each and every allegation in all the preceding paragraphs as if fully restated in this section.

67. The Ruggiero LLCs are alter egos of Defendant Ruggiero and their independent corporate status is void. Defendant Ruggiero is personally liable for all the Ruggiero LLCs' actions.

68. The 2011 LLCs are mere continuations of Second City Properties LLC and/or Second City LLC, and are liable on the same terms as those two predecessor companies.

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69. Defendant Ruggiero is personally liable for acts and failures to act on behalf of companies that did not exist.

70. Defendant Ruggiero is personally liable as a past owner and operator of the Site because he purported to buy, own, and sell it on behalf of a company that he knew did not exist. 11A V.S.A. § 2.04.

71. Defendant Ruggiero's assets may be attached in order to secure reimbursement for the State's costs of investigation, removal, and remediation at the Site, because he purported to make the assets of non-existent companies available for that purpose. 11A V.S.A. § 2.04.

II. Second Cause of Action

10 V.S.A. § 6615 – Costs

72. The State realleges and reaffirms each and every allegation in all the preceding paragraphs as if fully restated in this section.

73. Defendants are current owners and operators of the Site, which is a facility, from which there was a release and/or threatened release of hazardous materials.

74. Defendants are liable under 10 V.S.A. § 6615 (a)(1) for abating the release and/or threatened release of hazardous materials at the

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Site and for the State's costs of investigation, removal and remediation at the Site.

75. Defendants are persons who at the time of release or threatened release of a hazardous material owned and/or operated the Site, which is a facility, at which such hazardous materials were disposed of.

76. Defendants are liable under 10 V.S.A. §6615(a)(2) for abating the release and/or threatened release of hazardous materials at the Site and for the State's costs of investigation, removal and remediation at the Site.

III. Third Cause of Action

10 V.S.A. § 6615(b) – Treble Costs

77. Defendants are persons who failed to comply with court orders in 2011 and 2012 requiring them to take the ordered actions relating to removal and remediation of the Site.

78. Defendants are liable under 10 V.S.A. §6615(b) for three times the State's costs of removal and remediation for failing to comply with court orders in 2011 and 2012 requiring them to take such actions.

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IV. Fourth Cause of Action

10 V.S.A. § 6615(c)

79. The release or threatened release of hazardous materials at the Site occurred at or involved the real property, structure, equipment, or conveyance under Defendant Ruggiero's control.

80. Defendant Ruggiero is liable under 10 V.S.A. §6615(c) for all cleanup, removal and remedial costs related to the Site.

V. Fifth Cause of Action

10 V.S.A. § 6616

81. Defendants Ruggiero, Second City LLC, and Second City Properties LLC caused or contributed to the release of hazardous materials into the groundwater or onto the land of the state in violation of 10 V.S.A. § 6616 by demolishing structures at the Site, exposing the source area to rainwater infiltration, and thereby increasing leaching of subsurface contaminants, namely tetrachloroethylene (PCE) into groundwater.

WHEREFORE, the State respectfully requests that the Court:

A. Declare that:

1. The 2011 transfers were fraudulent transfers and are void;

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2. Defendants are jointly and severally liable for investigation, abatement, removal, and remediation of the contamination at the Site;

3. Defendants are jointly and severally liable for the costs of investigation, removal and remediation actions the State has incurred or may incur in connection with the contamination at the Site, plus pre-judgment interest, including the costs of enforcement and attorneys' fees;

4. Defendants are jointly and severally liable for three times the State's costs of investigation, removal and remediation of the contamination at the Site under 10 V.S.A. §6615(b);

5. Defendants are jointly and severally liable under 10 V.S.A. § 6615(a)(2) for abating the release and/or threatened release of hazardous materials at the Site.

B. Order Defendants to reimburse the State for all expenditures the State has incurred or reasonably may incur in connection with the contamination at the Site, plus pre-judgment interest, including the costs of enforcement and attorneys' fees;

C. Order Defendants, in the alternative, to abate the release and/or threatened release of hazardous materials at the Site;

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D. Order Defendants to reimburse the State in an amount three times the State's costs of investigation, removal and remediation of the contamination at the Site;

D. Order Defendants to pay a civil penalty pursuant to 10 V.S.A. §8221 in the amount the Court deems just after consideration of the statutory criteria.

* * *

DATED at Montpelier, Vermont, this 1st day of August, 2014.

Respectfully submitted,

WILLIAM H. SORRELL
ATTORNEY GENERAL

Gavin J. Boyles
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SETTLEMENT AGREEMENT AND RELEASE

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN:

GREETINGS: KNOW YE, that the State of Vermont, Agency of Natural Resources ("the State") and Great American Insurance Company of New York and Great American Assurance Company (collectively, "Great American") (the State and Great American collectively referred to hereinafter as "the Parties") do hereby enter into the following Agreement, dated this 2nd day of August, 2007 ("the date of this Agreement"):

WHEREAS, the State has filed suit against Great American in an action entitled *State of Vermont, Agency of Natural Resources v. Great American Ins. Co. of New York et al.*, filed in Vermont Superior Court, Washington County, and bearing the docket designation No. 546-9-06 Wncv (the "Action");

WHEREAS, the State alleges in the Action that it is entitled to a declaration that liability insurance policies issued by Great American's predecessors, American National Fire Insurance Company and Agricultural Insurance Company, to Bruce Jolley, Bob Jolley, Jolley Associates and/or S. B. Collins, Inc., (collectively, "Jolley") between January 1, 1996, and January 1, 1999, numbered PAC 1241632 and PRO 1241635, (the "Policies"), provide coverage for past and future response costs associated with environmental contamination at certain Jolley sites and that it is entitled to reimbursement from Great American for past and future response costs at certain Jolley sites, as alleged in the Action;

WHEREAS, Great American disputes the State's allegations and requests for relief in the Action; and

WHEREAS, the Parties wish to settle their dispute, without making any admission concerning the strength or weakness of any claim or defense, in order to avoid further litigation;

NOW, THEREFORE, in consideration for the mutual covenants and agreements contained herein, the Parties hereby agree as follows:

1. Before the close business on Wednesday, August 8, 2007, Great American shall pay to the State the sum of Two Million Seven Hundred Thousand

Dollars ($2,700,000.00) by wire transfer to the State of Vermont Depository Account ("Great American's payment"). In the event that any portion of Great American's payment is not timely received under the terms of this paragraph 1, interest thereon shall accrue at the rate of 12% per annum until the payment is received and such interest shall be promptly paid to the State by Great American.

2. In the event that the State determines at any time within the 10-year period following the date of this Agreement that the Hinesburg municipal water system has been contaminated as a result of contamination associated with the Lantman's IGA Site (Site #961988) that was present in the subsurface soil, groundwater, and/or bedrock as of the date of this Agreement, Great American shall pay any and all amounts up to but not exceeding a total of Six Hundred Sixty Thousand Dollars ($660,000.00) for any and all costs of investigation, removal action, or remedial action relating to such contamination, including but not limited to water treatment, that the State determines to be necessary to protect public health or the environment, subject to the following additional terms and conditions:

(a) The State shall promptly provide to Great American notice of its determination and claim for costs. Any claim must be made by the State and received in writing by Great American within the period of ten (10) years following the date of this Agreement and Great American shall have no obligation with respect to any such claim received by Great American thereafter; provided, however, that Great American shall be obligated to pay any and all costs up to but not exceeding a total of Six Hundred Sixty Thousand Dollars ($660,000.00) that are incurred or billed thereafter if a timely claim for the Hinesburg municipal water system was made by the State before the expiration of the 10-year period;

(b) At the time the State provides Great American with notice of its determination and claim for costs (as set forth in subparagraph (a) of this section), the State shall also provide Great American with paper copies or electronic copies of all relevant consultant reports, site studies, work plans, and correspondence between the State, contractors or consultants, and third-party claimants which the State has received or generated up to that point in time ("claim-related documents"). Subsequent to this initial production, the State will promptly provide Great American with paper copies or electronic copies of additional claim-related documents as the State receives or generates such documents;

(c) The State shall promptly provide to Great American all invoices for costs of investigation, removal action, or remedial action relating to such contamination; and

(d) Within thirty (30) days after the State has provided an invoice to Great American pursuant to subsection (c), Great American shall pay the invoice in full. Payment of the invoice shall be made by Great American to the State or, in the

event that the State retains and designates any consultant(s) to perform work related to such contamination, directly to the consultant(s).

3. (a) Subject to the exceptions, reservations and contingencies set forth in this paragraph 3, the State agrees to remise, release, and forever discharge Great American and its respective predecessors, successors, assigns, parents, subsidiaries, directors, shareholders, officers, employees, agents, and representatives of and from any and all manner of action and actions, administrative claims, grievances, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, cost, attorney's fees, penalties, and demands whatsoever, in law or in equity, which the State ever had, now has, or may have in the future, including all claims that were asserted or could have been asserted in the Action, arising out of or on account of any and all petroleum contamination that was initially released or was continuing to be released or was migrating on or from the following Department of Environmental Conservation ("DEC") sites at any time between January 1, 1996 and January 1, 1999:

Site #961948 – Pauline's (formerly Marge's) Quick Stop (Sheldon, VT)

Site #961972 – Taft Corners Short Stop (Williston, VT)

Site #961988 – Lantman's IGA (Hinesburg, VT)

Site #961994 – O'Brien's Town & Country Store (Williston, VT)

Site #962025 – Bradley's General Store (Johnson, VT)

Site #962026 – Hayes Ford (Newport, VT)

Site #962027 – Office Quarters (St. Albans, VT)

Site #962028 – Middlebury Beef and Grocery Supply (Middlebury, VT)

Site #962037 – Chuck's Convenience Store (Rutland, VT)

Site #962039 – Brownington General Store (Brownington, VT)

Site #972147 – Peter's Country Store (Fair Haven, VT)

Site #972230 – Jimmo's Market (Ferrisburgh, VT)

Site #982365 – Corner Gas Store (Essex, VT)

Site #982463 – Milton Beverage Warehouse (Milton, VT)

This release shall extend to any and all such contamination relating to said sites that existed on or before January 1, 1999 and was continuing for any period of time thereafter or is continuing to the present. This release is not intended to and shall not extend to any contamination resulting from any initial release of any hazardous material that occurred or occurs subsequent to January 1, 1999, and the Parties further acknowledge and agree, for purposes of this Agreement only, that the Policies do not apply to any initial release of any hazardous material that occurred or occurs subsequent to January 1, 1999. In addition, and nothwithstanding any provision in this Agreement to the contrary, this release does not extend to the matters set forth in paragraph 2 or alter in any way Great American's obligations or the State's rights under paragraph 2;

(b) The State represents that it has, with due diligence, conducted a review of its files based upon the two lists provided to the State by Great American that are attached hereto as Appendix 1 to determine whether it is aware of any other claims or potential claims arising out of or on account of petroleum contamination, other than the claims and potential claims for the sites listed in subsection (a) above, for which it could assert coverage pursuant to the Policies and that based on ANR's due diligence file review the State is not aware of any other such claims or potential claims, including any third-party claim or potential claim against ANR for payment or reimbursement by ANR, for which ANR could assert insurance coverage pursuant to the Policies. With respect to those locations listed on Appendix 1 that are not listed in subsection (a) of this paragraph 3, the State shall not assert or maintain any claim or action against Great American for coverage pursuant to the Policies arising out of or on account of petroleum contamination at any of those locations if ANR was aware or reasonably should have been aware of the claim or of the potential for such a claim based on the documents contained in ANR's files as of June 24, 2007, the date ANR completed its due diligence file review. Great American's exclusive remedy with respect to this subsection (b) of this paragraph 3 shall be to request (1) a ruling that the State is precluded from asserting a claim on grounds that the State was aware or reasonably should have been aware of the claim or of the potential for such a claim based on the documents contained in ANR's files as of June 24, 2007; and (2) reasonable attorney's fees and costs associated with seeking such preclusion; and

(c) The foregoing subsections (a) and (b) of this paragraph 3 are both contingent on Great American's full compliance with paragraph 1 of this Agreement and shall have no force or effect unless and until Great American has complied fully with paragraph 1.

4. Within ten (10) days after receipt of Great American's payment, the State shall execute and deliver to Great American's counsel the form of stipulation of

dismissal with prejudice that is attached hereto as Appendix 2 and Great American shall promptly cause the stipulation to be executed and filed with the Washington Superior Court. The Parties agree that the stipulation of dismissal with prejudice will bar the refiling of all claims that were asserted or that could have been asserted in this Action by the State.

5. Notwithstanding any provision of this Agreement, the State and Great American fully reserve all of their respective rights to enforce the terms and conditions of this Agreement.

6. This Agreement represents a compromise to avoid further litigation. By making this Agreement, no party makes any admission concerning the strength or weakness of any claim or defense. Nothing contained herein shall be construed as an admission of liability by Great American, any and all such liability being expressly denied.

7. No party to this Agreement relies upon any statement, representation or promise of any other party not contained herein in executing this Agreement or in making the settlement provided for herein. There are no other agreements or understandings between the Parties hereto relating to the matters referred to in this Agreement.

8. Each party has made such investigation of the facts pertaining to the underlying dispute and this Agreement, and all matters pertaining thereto, as they deem necessary.

9. The terms of this Agreement are contractual, and are the result of negotiation between the Parties.

10. This Agreement has been carefully read by each of the Parties and the contents hereof are known to and understood by each of the Parties. It is signed freely by each party executing this Agreement.

11. This settlement agreement has been drafted jointly by counsel for all parties to this Agreement. The parties agree that the terms of this Agreement shall not be construed against any party as the drafter of this Agreement.

12. The parties agree that this Agreement constitutes a single, integrated contract expressing the entire agreement of the Parties with respect to the subject matter hereof, and all prior understandings and discussions are merged and integrated into, and are superseded by, this Agreement.

13. No change or modification of this Agreement shall be valid unless it is made in writing and signed by the Parties.

14. This Agreement shall inure to the benefit of and shall bind the predecessors, successors, assigns, representatives, and attorneys of the Parties, and each of them. This Agreement is intended to and does inure to the benefit of each party and each party's affiliated corporations and other related entities (including, without limitation, parent corporations), subsidiaries, divisions, officers, directors, agents, agencies, employees, representatives, shareholders, accountants and attorneys, individually as well as in the capacity indicated.

15. (a) The State, as required by law, may release this Agreement and its terms in response to a request that is made pursuant to the Vermont Public Records Act, 1 V.S.A. § 316. The State may also discuss the terms of this Agreement with other persons and agencies in State government, and may respond to requests about this Agreement from the Vermont legislature. Otherwise, the Parties shall initiate no public comment or disclosure concerning this Agreement or the terms thereof. The parties may also respond to lawful subpoenas and discovery requests, and discuss the terms of this Agreement with their attorneys, tax advisers, reinsurers and regulatory authorities;

(b) In the event that the State receives a request for disclosure of the Agreement or any of its terms, or receives notice of a subpoena or order directing the disclosure of this Agreement or any portion thereof, the State shall promptly provide notice to Great American to permit it to take any steps it may deem necessary to prevent disclosure. If the State is required to disclose this Agreement by a government agency or by court order, it shall promptly notify Great American; provided, however, that nothing herein shall preclude any party from using confidential information for its own internal purposes and the Parties further agree that they may disclose to the court and mediator the fact that a final settlement has been reached; and

(c) The State's original copy of this Agreement shall be maintained in the Office of the Vermont Attorney General and one copy may be maintained by the Agency of Natural Resources. The Agency of Natural Resources shall not make or distribute any additional copy of this Agreement, in whole or in part, without the authorization of the Attorney General's Office. All subsequent copies made of this Agreement shall retain the notice regarding copying and dissemination set forth on the first page of this Agreement.

16. In the event that any provision of this Agreement should be held to be void, voidable or unenforceable, the remaining portions hereof shall remain in full force and effect..

17. This Agreement shall be interpreted under the laws of the State of Vermont. Any action brought to enforce this Agreement shall be brought in the

Washington Superior Court and the prevailing party shall be entitled to recover its costs and reasonable attorney's fees, in addition to any other appropriate relief.

18. The parties agree that two identical originals of this document have been executed and provided to the State and Great American, respectively, and shall be deemed in the aggregate to constitute one and the same document.

19. All notices, requests, and other communications that any party desires to give or is required to give to the other shall be given in writing by facsimile and first-class mail. All such communications shall be sent to the individuals noted below, or to such other individual as such party may designate in writing from time to time. Notice shall be effective at such time as it is transmitted by facsimile.

If to the State:

Commissioner's Office
Vermont Department of Environmental Conservation
103 South Main St., 1 South
Waterbury, VT 05671-0401
Facsimile: (802) 244-5141

with a copy to:

Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
Facsimile: (802) 828-2154

If to Great American:

General Counsel
Great American Insurance Group
580 Walnut Street
Cincinnati, OH 45202
Facsimile: (513) 369-3655

with a copy to:

Robert P. Firriolo, Esq.
Duane Morris LLP
1540 Broadway

New York, NY 10036-4068
Facsimile: (212) 692-1020

STATE OF VERMONT
AGENCY OF NATURAL RSOURCES

Dated: 8.2.07 By: Mark J. Di Stefano

Mark J. Di Stefano
Assistant Attorney General

GREAT AMERICAN INSURANCE
COMPANY OF NEW YORK

Dated: 8/2/07 By: Catherine M Zacharias

(Print Name) CATHERINE M. Zacharias

(Print Title) Sr. Litigation Specialist

GREAT AMERICAN ASSURANCE
COMPANY

Dated: 8/2/07 By: Catherine M Zacharias

(Print Name) Catherine M Zacharias

(Title Print) Sr. Litigation Specialist

PROPERTY VALUES

1.	54 Lower Weldon St St Albans VT Office / Warehouse	Building Contents	$ 303,310 $ 50,580
2.	54 Lower Weldon St St Albans VT Bulk Tanks	Tanks Contents	$ 9,090 $ 52,380
3.	Midtown Plaza Milton VT C-Store	Building	$ 169,380
4.	1555 North Ave Burlington VT C-Store	Building Contents	$ 241,470 $ 18,360
5.	1830 Shelburne Rd. S Burlington VT C-Store	Building Contents	$ 211,680 $ 28,800
6.	966 North Ave Burlington VT Gas Station Lessors Risk	Building	$ 90,450
7.	Rotary Mobil Burlington VT Gas Station Lessors Risk	Building	$ 77,490
8.	1 Bay Rd Colchester VT One Family Dwelling Lessors Risk	Building	$ 19,260
9.	222 Lake St St Albans VT Gas Station Lessors Risk	Building	$ 41,220
10.	Maquam Shore St Albans VT C-Store Lessors Risk	Building	$ 133,020
11.	South Main St St Albans VT C-Store Lessors Risk	Building	$ 151,290
12.	First St Swanton VT Gas Station Lessors Risk	Building	$ 97,740
13.	Route 105 Enosburg Falls VT C-Store Lessors Risk	Building	$ 144,900
14.	Midtown Mobil Milton VT C-Store	Building Contents	$ 300,000 $ 20,000
15.	54 North Winooski Ave Burlington VT Gas Station Lessors Risk	Building	$ 52,470
16.	Saint Service Station East Berkshire VT C-Store Lessors Risk	Building	$ 108,810

17. Short Stop Derby Line VT C-Store	Building Contents	$ 295,920 $ 28,170
18. Route 7 & 4 Rutland VT C-Store	Building Contents	$ 186,600 $ 28,800
19. Main & Depot Bennington VT C-Store Lessors Risk	Building	$ 114,840
20. Route 7 Manchester VT Gas Station Lessors Risk	Building	$ 96,930
21. 266 North Main St St Albans VT Gas Station Lessors Risk	Building	$ 54,180
22. Milton Short Stop Milton VT Retail / C-Store	Building Contents	$ 529,830 $ 16,470
23. 314 Williston Rd S Burlington VT C-Store	Building Contents	$ 254,430 $ 16,830
24. 450 Williston Rd Williston VT C-Store	Building Contents	$ 186,750 $ 28,440
25. Shelburne Rd Short Stop S Burlington VT C-Store	Building Contents	$ 171,800 $ 25,740
26. 58 Lower Weldon St St Albans VT Warehouse	Building Contents	$ 702,450 $ 183,600
27. 1316 North Ave Burlington VT Gas Station Lessors Risk	Building Contents	$ 107,300 $ 28,170
28. Route 7 Getty Middlebury VT C-Store	Building Contents	$ 350,000 $ 31,000
29. 422 Upper Cornelia Plattsburg NY C-Store	Building Contents	$ 220,140 $ 30,000
30. Upper Cornelia Getty Plattsburg NY C-Store	Building Contents	$ 282,400 $ 16,000
31. Route 2 Alburg VT C-Store Lessors Risk	Building	$ 282,420
32. Route 2 Alburg VT C-Store	Building Contents	$ 300,000 $ 19,200
33. Barre/Montpelier Rd Barre VT C-Store	Building Contents	$ 491,640 $ 19,000

34. 136 Grove St Rutland VT Gas Station Lessors Risk	Building	$ 150,000
35. Route 7 Colchester VT C-Store Lessors Risk	Building	$ 180,000
36. Route 108 Bakersfield VT C-Store Lessors Risk	Building	$ 150,000
37. Route 116 Hinesburg VT C-Store	Building Contents	$ 325,000 $ 20,000
38. 54 Lower Weldon St St Albans VT 79' Fruehauf CHV308802	Trailer Contents	$ 5,000 $ 5,000
39. 54 Lower Weldon St St Albans VT 75' Great Dane 70090	Trailer Contents	$ 5,000 $ 5,000
40. Route 100B Moretown VT C-Store	Building	$ 150,000
41. Route 7 Sheldon VT Apartment/ C-Store	Building	$ 150,000
42. Route 4E Woodstock Ave Rutland VT C-Store	Building Contents	$ 250,000 $ 35,000
43. Route 2 Alburg VT One Family Dwelling	Building	$ 150,000
TOTAL BLANKET COVERAGE	**BUILDINGS** **CONTENTS**	**$8,294,210** **$ 706,540**

SOV PS4 (93)

TO BE COMPLETED BY COMPANY, AGENT OR BROKER

Item No.	Description, Location and Occupancy of Property Covered	Coverage*	Values	Rate Pub. No.
90	54 LOWER WELDON RD. ST ALBANS VT 05478 CONST FRAME, PROT 6, YR CONST 1965, 4000 SQFT, OFFICE / WAREHOUSE	BLDG	302,310	✓773
		CONT	50,580	
090	54 LOWER WELDON ST, ST ALBANS,VT 05478 CONST NC, PROT 6, YR CONST 1985 1500 SQFT, OFFICE / TANKS	BLDG	9,090	✓134
		CONT	52,380	
106	MIDTOWN PLAZA,ROUTE 7 MILTON,VT 05468 CONST FRAME, PROT 8, YR CONST 1975 2800 SQ FT, RETAIL STORES	BLDG	169,380	✓376
		CONT		
126	1555 NORTH AVE BURLINGTON,VT 05401 RETAIL CONST FRAME, PROT 4, YR CONST 1975 1500 SQ FT, C-STORES / PUMPS	BLDG	241,470	✓577
		CONT	18,360	
104	1830 SHELBURNE RD. SOUTH BURLINGTON, VT CONST FRAME, PROT 5, YR CONST 1980 4000 SQ FT, C-STORES / PUMPS	BLDG	211,600	✓535
		CONT	28,800	
101	966 NORTH AVE BURLINGTON, VT 05401 GAS CONST JM, PROT 4, YR CONST 1950 950 SQ FT, GAS STATION - LRO	BLDG	90,450	✓ 197
115	ROTARY MOBIL, BURLINGTON, VT 05401 CONST JM, PROT 4, YR CONST 1980 1100 SQ FT, GAS RETAIL - LRO	BLDG	77,490	✓ 169
129	1 BAY RD COLCHESTER,VT 05446 1 FAMILY CONST FR, PROT 5, YR CONST 1980 1000 SQ FT, 1 FAMILY DWELLING - LRO	BLDG	19,260	✓ 42
		CONT		
109	222 LAKE ST, ST ALBANS,VT 05478 GAS CONST FR, PROT 5, YR CONST 1980 1200 SQ FT, GAS STATION LRO	BLDG	41,220	✓ 90
110	CORNER LAKE RD & MAQUAM SHORE ST ALBANS CONST FR, PROT 9, YR CONST 1975 2500 SQ FT, C-STORE/GAS LRO	BLDG	133,020	✓ 305
108	SO MAIN STREET, ST ALBANS, VT 05478 CONST FR, PROT 6, YRS CONT 1975 3200 SQ FT, C-STORE/GAS LRO	BLDG	151,290	✓ 345
		TOTALS		

* B = Building S = "Stock" YBPP = Your Business Personal Property
PPO = Personal Property of Others Other--specify above

SOV PS4 (93)

TO BE COMPLETED BY COMPANY, AGENT OR BROKER

Item No.	Description, Location and Occupancy of Property Covered	Coverage*	Values	Rate Pub. No.
111	FIRST STREET, SWANTON, VT 05488 CONST JM, PROT 6, YR CONST 1960 1600 SQ FT, GAS STATION - LRO	BLDG	97,740	✓ 213
127	ROUTE 105, ENOSBURG FALLS VT 05450 CONST FR, PROT 8, YR CONST 1978 1200 SQ FT, C-STORE/GAS - LRO	BLDG	144,900	✓ 316
128	ROUTE 7, MILTON, VT 05468 / MIDTOWN MOBIL CONST JM, PROT 8, YR CONST 1965 700 SQ FT, C-STORE/GAS	BLDG CONT	300,000 20,000	✓ 719
102	54 NORTH WINOOKSI AVE, BURLINGTON, VT CONST JM, PROT 4, YR CONST 1980 950 SQ FT, GAS STATION - LRO	BLDG	52,470	✓ 114
12	SAINT SERV STATION, E. BERKSHIRE VT CONST FR, PROT 9, YR CONST 1960 1850 SQ FT / C-STORE/GAS - LRO	BLDG	108,810	✓ 237
113	SHORT STOP DERBY LINE, VT 05830 CONST FR, PROT 8, YR CONST 1985 1200 SQ FT, C-STORE/GAS	BLDG CONT	295,920 28,170	✓ 725
114	ROUTE 7&4 RUTLAND VT 05701 CONST JM, PROT 4, YR CONST 1960 2400 SQ FT, C-STORE/GAS	BLDG CONT	186,600 28,800	✓ 470
117	MAIN & DEPOT BENNINGTON, VT 05201 CONST JM, PROT 5, YR CONST 1960 1800 SQ FT, C-STORE/GAS LRO	BLDG	114,840	✓ 251
118	ROUTE 7, MANCHESTER VT 05254 CONST FR, PROT 7, YR CONST 1975 1500 SQ FT, GAS STATION - LRO	BLDG	96,930	✓ 212
120	266 NO MAIN STREET, ST ALBANS, VT 05478 COSNT FR, PROT 6, YR CONST 1980 950 SQ FT, GAS STATION -LRO	BLDG	54,180	✓ 118
122	ROUTE 7, MILTON, VT 05468/MILTON SHORT CONST FR, PROT 8, YR CONST 1985 6500 SQ FT, RETAIL/ C-STORE/GAS	BLDG CONT	529,830 16,470	1,192
		TOTALS		

* B = Building S = "Stock" YBPP = Your Business Personal Property
PPO = Personal Property of Others Other--specify above

SOV PS4 (93)

TO BE COMPLETED BY COMPANY, AGENT OR BROKER

Item No.	Description, Location and Occupancy of Property Covered	Coverage*	Values	Rate Pub. No.
105	1314 WILLISTON ROAD, SO. BURLINGTON, VT CONST FR, PROT 5, YR CONST 1975 500 SQ FT, C-STORE/GAS STATION	BLDG	254,430	✓ 592
		CONT	16,830	
124	450 WILLISTON ROAD, WILLISTON, VT 05496 CONST NC, PROT 6, YR CONST 1986 2400 SQ FT, C-STORES/GAS	BLDG	186,750	✓ 469
		CONT	28,440	
107	SHELBURNE ROAD SHORT STOP, SO. BURLINGTON' CONST NC, PROT 5, YR CONST 1990 2900 SQ FT, C-STORES/GAS	BLDG	171,800	✓ 431
		CONT	25,740	
121	58 LOWER WELDON STREET, ST. ALBANS, VT CONST FR, PROT 6, YR CONST 1955 28000 SQ FT, WAREHOUSE	BLDG	702,450	1,934
		CONST	183,600	
130	1316 NORTH AVENUE, BURLINGTON, VT CONST JM, PROT 4, YR CONST 1965 800 SQ FT, GAS STATION LRO	BLDG	107,300	✓ 295
		CONT	28,170	
134	ROUTE 7, GETTY, MIDDLEBURY, VT 05753 CONST FR, PROT 6, YR CONST 1975 120 SQ FT, C-STORE/GAS	BLDG	350,000	✓ 832
		CONT	31,000	
611	422 UPPER CORNELIA, PLATTSBURG, NY CONST JM, PROT 3, YR CONST 1975 2200 SQ FT, C-STORE / GAS	BLDG	220,140	✓ 545
		CONT	30,000	
613	GETTY, UPPER CORNELIA, PLATTSBURG, NY CONST NC, PROT 3, YR CONST 1975 16000 SQ FT, C-STORE / GAS	BLDG	282,400	✓ 651
		CONT	16,000	
135	ROUTE 2, ALBURG, VT 05478 CONST FR, PROT 9,. YR CONST 1990 2500 SQ FT, C-STORES/GAS LRO	BLDG	282,420	✓ 616
136	ROUTE 2, ALBURG, VT 05478 CONST FR, PROT 9, YR CONST 1993 2500 SQ FT, C-STORE/GAS	BLDG	300,000	✓ 697
		CONT	19,200	
137	BARRE/MONTPELIER RD, BARRE, VT 05602 CONST FR, PROT 7, YR CONST 1995 1000 SQ FT, C-STORE/GAS LRO	BLDG	491,640	1,115
		CONT	19,000	
138	136 GROVE STREET, RUTLAND, VT 05701 CONST FR, PROT 4, YR CONST 1995 1500 SQ FT, GAS STATION LRO	BLDG	150,000	327
	TOTALS			

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PPO = Personal Property of Others Other--specify above

SUV PS4 (93)

TO BE COMPLETED BY COMPANY, AGENT OR BROKER

Item No.	Description, Location and Occupancy of Property Covered	Coverage*	Values	Rate Pub. No.
139	ROUTE 7, COLCHESTER VT 05446 CONST NC, PROT 8, YR CONST 1975 1800 SQ FT, C-STORE/GAS LRO	BLDG	180,000	✓ 393
141	ROUTE 108, BAKERSFIELD, VT CONST NC, PROT 8, YR CONST 1982 1800 SQ FT, C-STORE/GAS LRO	BLDG	150,000	✓ 327
143	ROUTE 116, HINESBURG, VT 05461 CONST JM, PROT 8, YR CONST 1995 2200 SQ FT, C-STORE/GAS	BLDG CONT	325,000 20,000	✓ 709
090	54 LOWER WELDON STREET, ST. ALBANS, VT 1979 FRUEHAUF BOX TRAILER CHV308802 STORAGE USE	BLDG CONT	5,000 5,000	✓ 22
090	LOWER WELDON STREET, ST. ALBANS, VT 05478 1975 GREAT DANE BOX TRAILER 70090 STORAGE USE	BLDG CONT	5,000 5,000	✓ 22
321	ROUTE 100B MORETOWN VT 05660 CONST FR, PROT 9, YR CONST 1967 3100 SQ FT, C-STORES/GAS	BLDG CONT	150,000	✓ 327
307	ROUTE 7, SHELDON, VT CONST FR, 1700 SQ FT, APART/C-STORE	BLDG	150,000	✓ 327
140	ROUTE 4E, WOODSTOCK AVENUE, RUTLAND, VT . C-STORE	BLDG CNTS	250,000 35,000	✓ 622
	TOTALS		8,901,410.00	

* B = Building S = "Stock" YBPP = Your Business Personal Property
PPO = Personal Property of Others Other--specify above

STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. 546-9-04 Wncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,

Plaintiff

v.

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK f/k/a AMERICAN NATIONAL FIRE INSURANCE COMPANY and GREAT AMERICAN ASSURANCE COMPANY f/k/a AGRICULTURAL INSURANCE COMPANY,

Defendants

STIPULATION OF DISMISSAL

NOW COME the parties in the above-captioned action, by and through their undersigned counsel, and hereby stipulate and agree pursuant to V.R.C.P. 41(a) that this action is hereby dismissed with prejudice and that the parties shall bear their respective costs and expenses incurred in the action.

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

Dated: _____

By: _____

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

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK

Dated: _____

By: _____

W. Scott Fewell, Esq.
Burak Anderson & Melloni, PLC
P.O. Box 787
Burlington, VT 05402-0787
(802) 862-0500

Dated: _____

By: _____

Robert P. Firriolo, Esq.
Duane Morris LLP
1540 Broadway
New York, NY 10036-4086
(212) 692-1091

GREAT AMERICAN ASSURANCE COMPANY

Dated: _____

By: _____

W. Scott Fewell, Esq.
Burak Anderson & Melloni, PLC
P.O. Box 787
Burlington, VT 05402-0787
(802) 862-0500

Dated: _____

By: _____

Robert P. Firriolo, Esq.
Duane Morris LLP
1540 Broadway
New York, NY 10036-4086
(212) 692-1091

ACKNOWLEDGEMENT

The State of Vermont, Agency of Natural Resources ("the State") and Great American Insurance Company of New York and Great American Assurance Company (collectively "Great American"), parties to a Settlement Agreement and Release dated August 2, 2007 ("Settlement Agreement"), hereby acknowledge and agree with respect to the Settlement Agreement:

1. The State has presented to Great American a claim for payment of costs pursuant to Paragraph 2 of the Settlement Agreement in the amount of $523,250.78, and the State certifies that it incurred such costs for investigation, removal action or remedial action within the scope of Paragraph 2 of the Settlement Agreement.

2. Great American has paid the $523,250.78 claimed by the State and the State acknowledges receipt of such amount.

3. The remaining amount that Great American may be required to pay under Paragraph 2 of the Settlement Agreement is $136,749.22.

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

Dated: 10/25/17 By: Nicholas F. Persampieri
Nicholas F. Persampieri
Assistant Attorney General

GREAT AMERICAN INSURANCE
COMPANY OF NEW YORK

Dated: 10/23/17 By: CBS

(Print name) Alfred B Shikany

(Print title) Claim Technical Director

GREAT AMERICAN ASSURANCE
COMPANY

Dated: 10/23/17 By: CBS

(Print name) Alfred B Shikany

(Print title) Claim Technical Director

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT.

2017 NOV -3 P 4:1

CIVIL DIVISION
Docket No. 536-9-16 Wncv

STATE OF VERMONT

Plaintiff,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT a/k/a VOLKSWAGEN AG; VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS LLC; AUDI AKTIENGESELLSCHAFT a/k/a AUDI AG; AUDI OF AMERICA, L.L.C.; DR. ING. H.C.F. PORSCHE AKTIENGESELLSCHAFT a/k/a PORSCHE AG; and PORSCHE CARS NORTH AMERICA, INC.;

Defendants.

PARTIAL CONSENT JUDGMENT

WHEREAS, Plaintiff, the State of Vermont ("State"), acting by and through the Attorney General and on behalf of Vermont consumers and the Vermont Agency of Natural Resources ("Agency"), filed a Complaint in this action alleging that Volkswagen Aktiengesellschaft a/k/a Volkswagen AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations LLC, Audi Aktiengesellschaft a/k/a Audi AG, and Audi of America, L.L.C. (collectively, "Volkswagen"), Dr. Ing. h.c. F. Porsche Aktiengesellschaft AG, a/k/a Porsche AG, and Porsche Cars North America, Inc. (collectively, "Porsche") (Volkswagen and Porsche together, "Defendants"), designed, produced, marketed, advertised, distributed, sold, and leased certain 2.0- and 3.0-liter diesel passenger vehicles (the

"Subject Vehicles")[1] containing undisclosed software allegedly intended to circumvent federal or state emissions standards in violation of (a) the Vermont Air Pollution Control statutes, 10 Vt. Stat. Ann. §§ 551 et seq., and the Vermont Air Pollution Control Regulations ("VAPCR") §§ 5-1101 – 1109 (Counts 1-8), and (b) the Vermont Consumer Protection Act, 9 V.S.A. § 2453 *et seq.* (Counts 9-10) and;

WHEREAS, on or about March 30, 2017, the State (together with a coalition of nine other States) and Defendants entered into a Second Partial Settlement Agreement ("Partial Settlement Agreement"), a true and correct copy of which is attached hereto as Exhibit A, which resolves the State's Environmental Claims[2] against Defendants concerning the Subject Vehicles, including the claims alleged in Counts 1-8 of the State's Complaint, while reserving to the State all rights with respect to claims by the State arising under its state consumer and unfair trade and deceptive acts and practices laws, rules and/or regulations, including the claims against Defendants concerning the Subject Vehicles alleged in Counts 9 and 10 of the State's Complaint;

WHEREAS, the State and Defendants (collectively, the "Parties") consent to entry of this Partial Consent Judgment ("Judgment" or "Consent Judgment") in order to effectuate the Partial Settlement Agreement's resolution of the State's Environmental Claims, avoid prolonged and costly litigation of such claims, and further the public interest, while reserving to the State all rights with respect to claims by the State arising under its state consumer and unfair trade and deceptive acts and practices laws, rules and/or regulations.

---

[1] The term "**Subject Vehicles**" is defined at paragraph 3, below.
[2] The term "**Environmental Claims**" is defined at paragraph 3, below.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED:

I. JURISDICTION AND VENUE

1. Defendants consent to this Court's continuing subject matter and personal jurisdiction solely for the purposes of entry, enforcement, and modification of this Judgment and without waiving their right to contest this Court's jurisdiction in other matters. This Court retains jurisdiction of this action for the purposes of enforcing or modifying the terms of this Judgment, or granting such further relief as the Court deems just and proper.

2. Defendants consent to venue in this Court solely for the purposes of entry, enforcement, and modification of this Judgment and do not waive their right to contest this Court's venue in other matters.

II. DEFINITIONS

3. Capitalized terms used herein shall have the following meanings (in alphabetical order):

a. "Agency" means the Vermont Agency of Natural Resources.

b. "Attorney General" means the Vermont Attorney General's Office.

c. "BEV" means Battery Electric Vehicle.

d. "California Second Partial Consent Decree" means the Second Partial Consent Decree executed by Defendants and California, by and through by the California Air Resources Board ("CARB") and the California Attorney General ("CA AG"), and entered by the MDL Court on May 17, 2017, a true and correct copy of which is attached hereto as Exhibit B.

e. "Covered Conduct" means any and all acts or omissions, including all communications, occurring up to and including the effective date of this

Consent Judgment, relating to: (a) the design, installation, presence, or failure to disclose any Defeat Device in any Subject Vehicle; (b) the marketing or advertisement of any Subject Vehicle as green, clean, or environmentally friendly (or similar such terms), and/or compliant with state or federal emissions standards, including the marketing or advertisement of any Subject Vehicles without disclosing the design, installation or presence of a Defeat Device; (c) the offering for sale, sale, delivery for sale, or lease of the Subject Vehicles in the Section 177 States; (d) statements or omissions concerning the Subject Vehicles' emissions and/or the Subject Vehicles' compliance with applicable emission standards, including, but not limited to, certifications of compliance or other similar documents or submissions; and (e) conduct alleged, or any related conduct that could have been alleged, in any Complaint, Notice of Violation, or Notice of Penalty filed or issued by a Section 177 State, and/or a State Environmental Agency[3], including, but not limited to, that the Subject Vehicles contain prohibited Defeat Devices that cause the Subject Vehicles to emit nitrogen oxides ("NO_x") in excess of applicable legal standards and that Volkswagen and Porsche falsely reported vehicle emissions, that Volkswagen and/or Porsche tampered

[3] These pleadings include, but are not limited to, *State of Maine* v. *Volkswagen AG, et al.*, No. 3:17-cv-00784 (CRB); *Commonwealth of Massachusetts* v. *Volkswagen Aktiengesellschaft et al.*, No. 3:16-cv-05088 (CRB); *State of New York et al.* v. *Volkswagen Aktiengesellschaft et al.*, No. 3:16-cv-05089 (CRB); *Commonwealth of Pennsylvania, Department of Environmental Protection et al.* v. *Volkswagen Aktiengesellschaft et al.*, No. 3:16-cv-05159 (CRB); *State of Vermont et al.* v. *Volkswagen Aktiengesellschaft et al.*, No. 3:16-cv-06299; and *Volkswagen, et al.* v. *Ecology*, PCHB No.16-104c.

with any emissions control device or element of design installed in the Subject Vehicles, that Volkswagen and/or Porsche affixed labels to the Subject Vehicles that were false, invalid or misleading and/or that Volkswagen and/or Porsche breached its warranties relating to the Subject Vehicles.

f. "Defeat Device" means "an auxiliary emission control device (AECD) that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless: (1) Such conditions are substantially included in the Federal emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident; (3) The AECD does not go beyond the requirements of engine starting; or (4) The AECD applies only for emergency vehicles[.]" 40 C.F.R. § 86.1803-01, or "any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [the Emission Standards for Moving Sources section of the Clean Air Act], and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use." 42 U.S.C. § 7522(a)(3)(B).

g. "Defendants" means Volkswagen and Porsche, collectively.

h. "Environmental Claims" mean claims or potential claims that could be brought by the State, including in its sovereign enforcement capacity or as *parens patriae* on behalf of its citizens, or by the Agency under all potentially applicable federal, state, and/or local environmental laws, rules, and/or regulations, including, but not limited to, laws, rules, and/or regulations regarding mobile source emissions, certification, reporting of information, inspection and maintenance of vehicles and/or anti-tampering provisions, together with related common law and equitable claims.

i. "Environmental Laws" means any potentially applicable laws, rules, regulations, and/or common law or equitable principles or doctrines under which the Environmental Claims may arise including, without limitation, 10 Vt. Stat. Ann. §§ 551 *et seq.*, and VAPCR §§ 5-1101 - 1109.

j. "Escrow Account" means the bank account established for purposes of making the escrow payment set forth in paragraph 8(A) of the Partial Settlement Agreement.

k. "Escrow Agent" means Citibank, N.A., as the mutually agreed escrow agent under paragraph 8(A) of the Partial Settlement Agreement.

l. "Escrow Agreement" means the agreement between the Volkswagen Group of America, Inc. and the Escrow Agent concerning the creation of the Escrow Account.

m. "FTC's Second Partial Stipulated Order" means the Amended Second Partial Stipulated Order for Permanent Injunction and Monetary Judgment

entered by the MDL Court on May 17, 2017, a true and correct copy of which is attached hereto as Exhibit C.

n. "MDL" means the multidistrict litigation styled as *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB (N.D. Cal.) (MDL 2672).

o. "MDL Court" means the U.S. District Court for the Northern District of California, the court in which the MDL is pending.

p. "Section 177 States" means, collectively, the States of Connecticut, Delaware, Maine, New York, Oregon, Rhode Island, Vermont, and Washington, and the Commonwealths of Massachusetts and Pennsylvania.

q. "State" or "Vermont" means the State of Vermont.

r. "Subject Vehicles" means each and every light duty diesel vehicle equipped with a 2.0-liter or 3.0-liter TDI engine that Volkswagen and Porsche or their respective affiliates sold or offered for sale in, leased or offered for lease in, or introduced or delivered for introduction into commerce in the United States or its states or territories, or imported into the United States or its states or territories, and that is or was purported to have been covered by the following EPA Test Groups:

2.0-Liter Diesel Models

Model Year (MY)	**EPA Test Group**	**Vehicle Make and Model(s)**
2009	9VWXV02.035N 9VWXV02.0U5N	VW Jetta, VW Jetta Sportwagen
2010	AVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2011	BVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3

2012	CVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2013	DVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2014	EVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen
2012 2013 2014	CVWXV02.0U4S DVWXV02.0U4S EVWXV02.0U4S	VW Passat
2015	FVGAV02.0VAL	VW Beetle, VW Beetle Convertible, VW Golf, VW Golf Sportwagen, VW Jetta, VW Passat, Audi A3

3.0-Liter Diesel Models

Model Year (MY)	**EPA Test Groups**	**Vehicle Make and Model(s)**
2009	9ADXT03.03LD	VW Touareg, Audi Q7
2010	AADXT03.03LD	VW Touareg, Audi Q7
2011	BADXT03.02UG BADXT03.03UG	VW Touareg Audi Q7
2012	CADXT03.02UG CADXT03.03UG	VW Touareg Audi Q7
2013	DADXT03.02UG DADXT03.03UG DPRXT03.0CDD	VW Touareg Audi Q7 Porsche Cayenne Diesel
2014	EADXT03.02UG EADXT03.03UG EPRXT03.0CDD EADXJ03.04UG	VW Touareg Audi Q7 Porsche Cayenne Diesel Audi A6 Quattro, A7 Quattro, A8L, Q5
2015	FVGAT03.0NU2 FVGAT03.0NU3 FPRXT03.0CDD FVGAJ03.0NU4	VW Touareg Audi Q7 Porsche Cayenne Diesel Audi A6 Quattro, A7 Quattro, A8L, Q5
2016	GVGAT03.0NU2 GPRXT03.0CDD GVGAJ03.0NU4	VW Touareg Porsche Cayenne Diesel Audi A6 Quattro, A7 Quattro, A8L, Q5

s. "U.S. First Partial Consent Decree" means the consent decree executed by Defendants, the United States, on behalf of the United States Environmental Protection Agency ("DOJ/EPA"), and California, by and

through CARB and CA AG, concerning the 2.0-liter Subject Vehicles and entered by the MDL Court on October 25, 2016, a true and correct copy of which is attached hereto as Exhibit D.

t. "U.S. Second Partial Consent Decree" means the consent decree executed by Defendants, the United States on behalf of DOJ/EPA, and California, by and through CARB and CA AG, concerning the 3.0-liter Subject Vehicles and entered by the MDL Court on May 17, 2017, a true and correct copy of which is attached hereto as Exhibit E.

u. "U.S. Third Partial Consent Decree" means the consent decree executed by Defendants and the United States on behalf of DOJ/EPA, and entered by the MDL Court on April 13, 2017, a true and correct copy of which is attached hereto as Exhibit F[4].

v. "3.0 Liter Class Action Settlement" means the Plaintiffs Steering Committee's 3.0-Liter Class Action Settlement Agreement, entered by the MDL Court on May 17, 2017, a true and correct copy of which is attached hereto as Exhibit G.

w. "ZEV" means Zero Emission Vehicle.

III. EFFECT OF JUDGMENT

4. Entry of this Consent Judgment fully and finally resolves and disposes the Environmental Claims arising from or related to the Covered Conduct that were alleged in the

[4] The U.S. Third Partial Consent Decree covers both 2.0-liter and 3.0-liter Subject Vehicles.

State's Complaint in this matter or that could be brought by the State in its sovereign enforcement capacity or as *parens patriae* on behalf of Vermont citizens.

5. This Consent Judgment will, upon its Entry Date, constitute a fully binding and enforceable agreement between the Parties, and the Parties consent to its entry as a partial final judgment by the Court.

IV. ADMISSIONS

6. Volkswagen admits that:

   a. software in the Volkswagen- and Audi-branded 2.0 and 3.0 Liter Subject Vehicles enables the vehicles' engine control modules to detect when the vehicles are being driven on the road, rather than undergoing Federal Test Procedures, and that this software renders certain emission control systems in the vehicles inoperative when the engine control module detects the vehicles are not undergoing Federal Test Procedures, resulting in NO_x emissions that exceed EPA-compliant and CARB-compliant levels (which CARB standards are applicable in the Commonwealth) when the vehicles are driven on the road; and

   b. this software was not disclosed in the Certificate of Conformity and Executive Order applications for the 2.0 and 3.0 Liter Subject Vehicles, and, as a result, the design specifications of the 2.0 and 3.0 Liter Subject Vehicles, as manufactured, differ materially from the design specifications described in the Certificate of Conformity and Executive Order applications.

7. Porsche admits that:

a. software in the Porsche-branded 3.0 Liter Subject Vehicles enables the vehicles' engine control modules to detect when the vehicles are being driven on the road, rather than undergoing Federal Test Procedures, and that this software renders certain emission control systems in the vehicles inoperative when the engine control module detects the vehicles are not undergoing Federal Test Procedures, resulting in NO_x emissions that exceed EPA-compliant and CARB-compliant levels (which CARB standards are applicable in the Commonwealth) when the vehicles are driven on the road; and

b. this software was not disclosed in the Certificate of Conformity and Executive Order applications for the 3.0 Liter Subject Vehicles, and, as a result, the design specifications of the 3.0 Liter Subject Vehicles, as manufactured, differ materially from the design specifications described in the Certificate of Conformity and Executive Order applications.

8. Volkswagen AG admits, agrees, and stipulates that the factual allegations set forth in the Statement of Facts attached as Exhibit 2 to its January 11, 2017 Rule 11 Plea Agreement in *U.S. v. Volkswagen AG*, No. 16-CR-20394 are true and correct. Volkswagen AG agrees it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 to the Rule 11 Plea Agreement in any proceeding. A true and correct copy of the Statement of Facts described in this paragraph is attached hereto as Exhibit H.

9. Except as provided in paragraphs 6 through 8 herein, Volkswagen and/or Porsche neither admits nor denies any factual allegations regarding the Covered Conduct.

V. RELIEF

A. PAYMENT

10. Within five business days of receipt from the State of (1) a signed, written certification, in a mutually agreeable form,[5] that the Partial Settlement Agreement has been duly approved by all necessary legal action by execution or filing of this Judgment and is now final under the law of the State, (2) a true and accurate copy of this Judgment, as entered, and any other documents implementing this Judgment, and (3) instructions, in mutually agreeable form, for wiring funds to the State, Volkswagen will pay to the State $4,242,401.80 ("Judgment Amount") by authorizing the Escrow Agent to disburse that amount to the State according to the wiring instructions provided by the State.

B. ZERO EMISSION VEHICLE (ZEV) COMMITMENT

11. Defendants shall increase the availability of ZEVs in the State by introducing in the State the three additional BEV models to be introduced in California under Paragraphs 11.a. and 11.b. of the California Second Partial Consent Decree. Defendants shall introduce and continue to market these BEV models in the State within the same time periods that are set forth for California in Paragraphs 11.a. and 11.b. of the California Second Partial Consent Decree.

12. In the State until at least 2019, Volkswagen shall offer its existing BEV model (the VW e-Golf BEV) or its successor or replacement models.

13. In the State until at least 2025, in the event that Volkswagen agrees to offer a new BEV model in the United States between 2020 and 2025 (in addition to the three BEV models identified in paragraph 11 above), it will offer that BEV model (or its successor).

---

[5] The certification shall include the name and title of the signatory and shall certify that such signatory is a duly authorized representative of the State and is duly authorized to make such certification.

14. Defendants shall make each BEV model launched in the Section 177 States available to their dealers of new vehicles in the State and encourage such dealers to make the BEV models available for potential consumers for demonstration and test drive. Defendants shall deliver at least one vehicle of each BEV model within eight weeks of the port release date to all of their dealers in the State that (i) agree to sell BEV models; and (ii) sell the brand of that particular BEV model (*e.g.*, Volkswagen BEV models need only be delivered to Volkswagen dealers and need not be delivered to Audi or Porsche dealers).

15. Defendants shall undertake commercially reasonable efforts to make each such BEV model available to their dealers through the course of each model's production for purposes of consumer demonstration, test drive, sale and lease.

16. In the State, Defendants' launch and marketing of each BEV model shall include advertising, promotional support, and support to dealers to incentivize dealer participation in the offering for sale or lease of the BEV models. This dealer support shall include support for dealers in (i) making the BEV models available for consumer demonstration and test driving; and (ii) the servicing of the BEV models.

17. Defendants' obligations under paragraphs 11-16, including to introduce, offer for sale, deliver, advertise, market or promote the BEV models, shall be limited to (i) the State, provided Defendants have dealers of new vehicles in the State; and (ii) dealers that agree to sell the BEV models. Defendants shall have no obligations under paragraphs 11-16 (i) if they have no dealer of new vehicles in the State; and (ii) with respect to any dealer that does not agree to sell the BEV models.

18. Regardless of the foregoing, Volkswagen will ensure that at least one vehicle of each of the Audi- or Volkswagen-branded BEV models introduced in the Section 177 States is

available for consumer demonstration and driving in the State until at least 2025 to the extent that there is at least one Audi or Volkswagen dealer in the State and for so long as such BEV model is being offered nationally for new vehicle sale.

VI. ZEV INVESTMENT COMMITMENT, MITIGATION TRUST, AND FURTHER INJUNCTIVE RELIEF

19. To the extent that such requirements apply to the State or Subject Vehicles therein, Volkswagen shall, consistent with the terms and definitions set forth in the U.S. First Partial Consent Decree, comply with:

a. The Buyback, Lease Termination, and Vehicle Modification Recall Program requirements of Section IV.A and Appendix A;

b. The Vehicle Recall and Emissions Modification Program requirements of Section IV.B and Appendices A & B;

c. The ZEV Investment Commitment requirements of Section IV.C and Appendix C; and

d. The Mitigation of Excess Emissions and Mitigation Trust requirements of Section IV.D and Appendix D, as may be modified by the Trustee to the Mitigation Trust and approved by the MDL Court.[6]

20. Volkswagen and Porsche, as applicable, shall, consistent with the terms and definitions set forth in U.S. Second and Third Partial Consent Decrees, and as approved by the MDL Court:

[6] As set forth in the U.S. First Partial Consent Decree, Section IV.D and Appendix D required Volkswagen to make $2,700,000,000 in Mitigation Trust Payments.

a. Implement the Buyback, Lease Termination, and Vehicle Modification, and Emissions Compliant Recall Program and Vehicle Recall and Emissions Modification Program for 3.0 Liter Vehicles set forth in Section IV and Appendices A and B of the U.S. Second Partial Consent Decree;

b. Comply with the obligation to deposit $225,000,000[7] in Mitigation Trust Payments into the Trust Account to be used to fund Eligible Mitigation Actions, as set forth in paragraph 17(a) of Section IV of the U.S. Second Partial Consent Decree; and

Comply with the injunctive relief provisions set forth in Section V (Volkswagen) and Section VI (Porsche) of the U.S. Third Partial Consent Decree.

VII. REPORTING AND NOTICES

21. Volkswagen shall produce to the State:

a. any status reports provided to the EPA, CARB and the CA AG under Paragraph 7.4 of Appendix A to the U.S. First Partial Consent Decree;

b. any status reports to be provided by Volkswagen to the EPA, CARB and the CA AG under Paragraph 11.3 of Appendix A to the U.S. Second Partial Consent Decree;

c. any consumer name and address information to be provided by Volkswagen to the Notice Administrator under the 3.0 Liter Class Action Settlement. To the extent that it has not already done so, Volkswagen will provide this information to the State promptly upon entry of this Consent

[7] Such payment under the U.S. Second Partial Consent Decree is in addition to the $2,700,000,000 payment required under the U.S. First Partial Consent Decree.

Judgment. The State will take all reasonable efforts to protect data consumers provide for any purpose related to this Consent Judgment or the settlement agreements referenced herein.

22. Unless otherwise specified in this Consent Judgment, notices and submissions required by this Consent Judgment shall be sent by United States mail, certified mail return receipt requested or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

For the State:

Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609

Megan O'Toole
Associate General Counsel
Department of Environmental Conservation
Office of General Counsel
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

For Volkswagen:

As to Volkswagen AG and Audi AG:

Berliner Ring 2
38440 Wolfsburg, Germany
Attention: Group General Counsel

As to Volkswagen Group of America, Inc. and Volkswagen Group of America Chattanooga Operations LLC

2200 Ferdinand Porsche Dr.
Herndon, VA 20171
Attention: U.S. General Counsel

For Porsche:

As to Dr. Ing. h.c. F. Porsche AG:

Dr. Ing. h.c. F. Porsche Aktiengesellschaft
Porscheplatz 1, D-70435 Stuttgart
Attention: GR/Rechtsabteilung/General Counsel

As to Porsche Cars North America, Inc.:

1 Porsche Dr.
Atlanta, GA 30354
Attention: Secretary
With copy by email to offsecy@porsche.us

As to one or more of the Volkswagen parties:

David M.J. Rein
William B. Monahan
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As to one or more of the Porsche parties:

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VIII. RELEASE

23. Subject to paragraph 24, below, in consideration of the admissions in Section IV, the monetary and non-monetary relief described in Section V, certain of the undertakings to which Volkswagen and/or Porsche have agreed in the U.S. First, Second, and Third Partial Consent Decrees, the 3.0 Liter Class Action Settlement, and the FTC's Second Partial Stipulated Order, to the extent approved by the MDL Court, as set forth in Section VI and upon Volkswagen's payment of the amount contemplated in paragraph 10, the State:

a. releases Volkswagen, Porsche, their affiliates and any of Volkswagen's, Porsche's or their affiliates' former, present or future owners, shareholders, directors, officers, employees, attorneys, parent companies, subsidiaries, predecessors, successors, dealers, agents, assigns and representatives (collectively, the "Released Parties"[8]), from all Environmental Claims arising from or related to the Covered Conduct, including, without limitation, penalties, fines, or other monetary payments and/or injunctive relief; and

[8] For avoidance of doubt, for purposes of this Judgment, Robert Bosch GmbH and Robert Bosch LLC are not Released Parties and IAV GmbH and IAV Automotive Engineering, Inc. are Released Parties.

b. The claims released under subsection (a) above include claims that the State and the Agency brought or could have brought under Environmental Laws: (i) in the State's sovereign enforcement capacity; and (ii) as *parens patriae* on behalf of its citizens.

24. The State reserves, and this Judgment is without prejudice to, all claims, rights, and remedies against Volkswagen, Porsche, and their affiliates, and Volkswagen, Porsche, and their affiliates reserve, and this Judgment is without prejudice to, all defenses (except to the extent waived in Paragraph 6 of the Partial Settlement Agreement) with respect to all matters not expressly released in paragraph 23 above, including, without limitation:

a. any claims arising under state tax laws;

b. any claims for the violation of securities laws;

c. any claims unrelated to the Covered Conduct;

d. any claims by the State arising under its state consumer protection and unfair and deceptive acts and practices laws, rules and/or regulations; and

e. any action to enforce this Judgment and subsequent, related orders or judgments.

25. All claims raised in Counts 1-8 of the State's Complaint in this matter are released pursuant to paragraph 23, above.

IX. MISCELLANEOUS

26. The provisions of this Judgment shall be construed in accordance with the laws of the State.

27. This Judgment is made without trial or adjudication of any issue of fact or law.

28. The Parties agree that this Judgment does not enforce the laws of other countries, including the emissions laws or regulations of any jurisdiction outside the United States.

Nothing in this Judgment is intended to apply to, or affect, Defendants' obligations under the laws or regulations of any jurisdiction outside the United States. At the same time, the laws and regulations of other countries shall not affect Defendants' obligations under this Judgment.

29. Nothing in this Judgment shall limit or expand the Attorney General's right to obtain information, documents, or testimony from Volkswagen and Porsche pursuant to any state or federal law, regulation, or rule concerning the claims reserved in paragraph 24, or to evaluate Volkswagen and Porsche's compliance with the obligations set forth in this Judgment.

30. Nothing in this Judgment constitutes an agreement by the Attorney General concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws. The Judgment takes no position with regard to the tax consequences of the Judgment with regard to federal, state, local and foreign taxes.

31. Nothing in this Judgment releases any private rights of action asserted by entities or persons not releasing claims under this Judgment, nor does this Judgment limit any defense available to Volkswagen or Porsche in any such action.

32. Nothing in this Judgment shall be construed to waive any claims of sovereign immunity any party may have in any action or proceeding.

33. Any failure by any party to this Judgment to insist upon the strict performance by any other party of any of the provisions of this Judgment shall not be deemed a waiver of any of the provisions of this Judgment.

34. This Judgment, which constitutes a continuing obligation, is binding upon the State, the Agency, Defendants, and any of Defendants' respective successors, assigns, or other entities or persons otherwise bound by law.

35. Aside from any action stemming from compliance with this Judgment and except in the event of a Court's material modification of this Judgment, the Parties waive all rights of appeal or to re-argue or re-hear any judicial proceedings upon this Judgment, any right they may possess to a jury trial, and any and all challenges in law or equity to the entry of this Judgment. The Parties will not challenge or appeal (i) the entry of the Judgment, unless the Court materially modifies the terms of the Judgment, or (ii) the Court's jurisdiction to enter and enforce the Judgment.

36. The terms of this Consent Judgment may be modified only by a subsequent written agreement signed by the Parties. Where the modification constitutes a material change to any term of this Consent Judgment, it will be effective only by written approval of the Parties and the approval of the Court.

37. Consent to this Judgment does not constitute an approval by the Attorney General of the Defendants' business acts and practices, and Defendants shall not represent this Judgment as such an approval.

38. Defendants shall not take any action or make any statement denying, directly or indirectly, the propriety of the Judgment by expressing the view that the Judgment or its substance is without factual basis. Nothing in this paragraph affects Volkswagen or Porsche's right to take legal or factual positions in defense of litigation or other legal, administrative, or regulatory proceedings, including with respect to any legal or factual matter that is not admitted herein.

39. Nothing in this Judgment shall preclude any party from commencing an action to pursue any remedy or sanction that may be available to that party upon its determination that another party has failed to comply with any of the requirements of this Judgment.

40. Nothing in this Judgment shall create or give rise to a private right of action of any kind or create any right in a non-party to enforce any aspect of this Judgment or claim any legal or equitable injury for a violation of this Judgment. The exclusive right to enforce any violation or breach of this Judgment shall be with the parties to this Judgment and the Court.

41. Nothing in this Judgment shall relieve the Defendants of their obligation to comply with all federal, state or local law or regulation.

42. This Judgment effectuates and is consistent with the Partial Settlement Agreement. The Parties acknowledge that there are no documents, representations, inducements, agreements, understandings or promises that constitute any part of this Judgment other than those contained in the Partial Settlement Agreement or this Judgment. This Judgment is not intended to nullify or modify the Parties' obligations as set forth in the Partial Settlement Agreement.

43. If any portion of this Judgment is held invalid by operation of law, the remaining terms of this Judgment shall not be affected and shall remain in full force and effect.

44. This Judgment becomes effective upon entry by the Court. The court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under V.R.C.P. 54 and 58.

45. No court costs shall be taxed to any party.

46. Each of the persons who signs his/her name below affirms that he/she has the authority to execute this Judgment on behalf of the Party whose name appears next to his/her signature and that this Judgment is a binding obligation enforceable against said Party under the law of the State. The signatory from the State's Attorney General Office represents that he/she has the authority to execute this Judgment on behalf of the State and that this Judgment is a binding obligation enforceable against the State under the law of the State.

IT IS SO ORDERED. JUDGMENT is hereby entered in accordance with the foregoing.

By the Court:

Mary Miles Teachout

Hon. Mary Miles Teachout
Vermont Superior Court Judge

November 3, 2017

Dated: September 14, 2017

The Undersigned Parties enter into this Consent Judgment in the matter of *State of Vermont v. Volkswagen AG, et al.* (Washington Superior Court).

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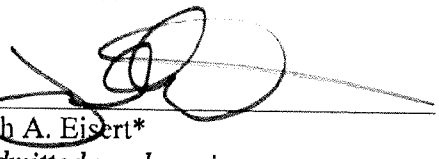

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EXHIBIT LIST

Exhibit	Title
A	Partial Settlement Agreement
B	California Second Partial Consent Decree
C	FTC's Second Partial Stipulated Order
D	U.S. First Partial Consent Decree
E	U.S. Second Partial Consent Decree
F	U.S. Third Partial Consent Decree
G	3.0 Liter Class Action Settlement
H	Statement of Facts from Plea Agreement

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. _____

536-9-16 Wncv.

STATE OF VERMONT,

Plaintiff,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT, a/k/a VOLKSWAGEN AG; VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN GROUP OF AMERICA; CHATTANOOGA OPERATIONS, LLC; AUDI AKTIENGESELLSCHAFT a/k/a AUDI AG; AUDI OF AMERICA, LLC; DR. ING. H.C.F. PORSCHE AKTIENGESELLSCHAFT a/k/a PORSCHE AG; and PORSCHE CARS NORTH AMERICA, INC.,

Defendants.

COMPLAINT

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COMPLAINT

The State of Vermont brings this action against the above-named defendants (collectively referred to herein as "Defendants") for multiple violations of the Vermont Consumer Protection Act, Chapter 63, Title 9, Vermont Statutes Annotated; and Vermont Air Pollution Control statutes and regulations, Chapter 23, Title 10, Vermont Statutes Annotated and Subchapter XI, Vermont Air Pollution Control Regulations.

Over the course of eight years, Defendants deceived consumers and regulators by producing diesel passenger vehicles that they falsely marketed as environmentally friendly, when in reality the vehicles contain software to trick emissions tests. The State of Vermont seeks civil penalties, injunctive relief, restitution, disgorgement, fees, costs, and other appropriate relief.

I. SUMMARY

1. Between 2008 and 2015, Defendants designed, produced, advertised, sold and leased 16 models of passenger diesel vehicles equipped with illegal software which allowed the vehicles to circumvent air pollution control laws ("Unlawful Vehicles"). See Table 1 below for a complete list of Unlawful Vehicles. For reference, an index of defined terms as used herein is attached as Appendix 1.

2. This software is commonly known as a defeat device or a cycle beater ("Defeat Device"). A Defeat Device detects when a vehicle is undergoing emissions testing as opposed to when it is being driven normally. During emissions testing, the Defeat Device activates the vehicle's emissions controls so that the vehicle complies with emissions standards. When the vehicle is being driven normally during non-test conditions, however, the Defeat Device deactivates the legally required emissions controls, causing the vehicle to emit unlawful levels of nitrogen oxides (NOx), a family of harmful pollutants. According to the United States Environmental Protection Agency ("EPA"), these Defeat Device-equipped vehicles emit levels of NOx up to 40 times the legal limit. The vehicles' test results, however, always falsely show that their emissions control systems are lawful and functioning properly.

3. Defendants publicly admitted that they installed illegal Defeat Devices in nearly 600,000 vehicles sold in the United States. Approximately 3,400 of these vehicles are currently registered in Vermont and continue to emit unlawful levels of NOx. From June 2009 to June 2015, Vermont drivers registered the second highest per capita number of Unlawful Vehicles in the United States.[1]

4. Defendants' internal communications show that they knew their use of the Defeat Device was unlawful, that they took measures to continue to deny its existence, and that they actively misled regulators even after independent on-road emissions testing showed that their vehicles emitted unlawful levels of NOx when

[1] Gates, Guilbert et al., *Explaining Volkswagen's Emissions Scandal,* N.Y. Times, Updated July 19, 2016, http://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html

driven on the road. In 2014, Defendants submitted to regulators a proposed software recall, assuring regulators it "would optimize" the vehicles' emissions. They knew, however, that the sham recall would not bring the Unlawful Vehicles into compliance.

5. In order to sell or lease vehicles in Vermont, Defendants falsely certified to consumers as well as state and federal regulators that their vehicles conformed to California Air Resources Board ("CARB") NOx emissions requirements, which are incorporated into Vermont law under the Vermont Air Pollution Control Regulations.

6. Defendants' deceptions permitted them to obtain federal and state certifications required to sell vehicles in Vermont, and undeserved premium prices from consumers for the Unlawful Vehicles.

7. As part of carrying out this eight-year fraud upon regulators and consumers, Defendants launched widespread, targeted marketing campaigns aimed at convincing consumers that their vehicles were the number one choice for environmentally conscious drivers and superior to gas/electric hybrids and other transportation choices. Defendants falsely promised consumers a "clean" diesel car that was higher performing and more fuel efficient than non-diesel competitor vehicles.

8. Through online and print media, Defendants falsely associated their brands with clean diesel technology innovation through statements such as "Clean Diesel. Like really clean diesel," and "Di*sel: it's no longer a dirty word." One ad

states, "Diesel has really cleaned up its act. Find out how clean diesel technology impacts fuel efficiency and performance, while also being a more eco-conscious choice." A popular video ad campaign posted in 2015 called "Old Wives' Tales" featured a character who places her scarf against the tailpipe of an Unlawful Vehicle and exclaims "see how clean it is!" Data shows that the Old Wives' Tales videos were viewed more than 20 million times.

9. Defendants also used false test data to promote their vehicles. For example, in an August 25, 2013, press release advertising the 2014 Volkswagen Toureg, Defendants falsely stated that "[t]o achieve its 50 state emissions qualification, a deNOx catalytic converter, augmented by a special injection system ... helps reduce NOx emissions by up to 90 percent."

10. The marketing for the Unlawful Vehicles was some of the most widely-viewed advertising ever aired. An Audi of America media communication dated January 8, 2010, described its upcoming Superbowl ad by stating "This year, Audi will demonstrate its leadership position within the luxury segment with a brand spot that delivers the message that being environmentally conscious might not be easy, but the Audi A3 TDI clean diesel is now a proven environmental solution." The communication also noted that the Audi A3 received *Green Car Journal*'s 2010 "Green Car of the Year" award and that this award was "a true validation of the quality and environmentally sound elements of [the car's] technology." Viewer data from the Superbowl ad shows that, at the time, it was the second most-viewed commercial in U.S. history with 115.6 million viewers.

11. Only in September 2015, when regulators denied certification of model year 2016 vehicles making them illegal for sale in the U.S., did Defendants finally admit to the existence and installation of the Defeat Devices.

12. By the conduct described in this Complaint, Defendants have violated the unfair and deceptive practices provisions of the Vermont Consumer Protection Act and Vermont Air Pollution Control statutes and regulations. Through this action, the State seeks to protect the interests of consumers, public health, and the environment and requests injunctive relief, civil penalties, restitution, disgorgement of profits, fees, costs and other appropriate relief.

II. PARTIES

13. Plaintiff State of Vermont, appears by and through the Vermont Attorney General who is the chief law enforcement officer of the State and authorized to bring this action pursuant to 3 V.S.A. §§ 152, 157, and 10 V.S.A. § 8221. This action is brought on behalf of the State, Vermont consumers and the Vermont Agency of Natural Resources ("ANR").

14. ANR is an agency of the State with the powers and duties set forth in the Vermont air pollution control statutes, 10 V.S.A. §§ 551-585, (Air Pollution Control Statutes") and maintains its principal offices in Montpelier, Vermont.

15. Defendant Volkswagen Aktiengesellschaft a/k/a Volkswagen AG ("VW AG") is a corporation organized under the laws of Germany and has its principal place of business in Wolfsburg, Germany. At all relevant times, VW AG was the

ultimate parent company of Audi Aktiengesellschaft, Porsche Aktiengesellschaft, Volkswagen Group of America, VW Chattanooga Operations, LLC, Audi of America, LLC, and Porsche Cars of North America. For reference, an illustrative flowchart of Defendants' entities and key employees is attached as Appendix 2. VW AG designs, manufactures, markets and sells automobiles under the Volkswagen, Audi and Porsche brands, including the Unlawful Vehicles that were sold or leased in the U.S.

16. VW AG acting individually, jointly, and by and through its subsidiaries, committed all of the acts alleged in this Complaint.

17. Defendant Volkswagen Group of America, Inc. ("VWGoA") is a New Jersey corporation registered to conduct business in Vermont.[2] VWGoA maintains its principal place of business at 2200 Ferdinand Porsche Drive, Herndon, Virginia. VWGoA is a wholly-owned subsidiary of VWAG. Acting in concert with the other Defendants, VWGoA manufactured Unlawful Vehicles—which included installing Defeat Devices—and marketed and delivered Unlawful Vehicles for sale or lease in Vermont. At the direction of VW AG, VWGoA's Engineering and Environmental Office ("EEO") submitted false documentation to federal and state regulators to obtain certification of compliance with emission requirements for the Unlawful Vehicles.

[2] Vermont Secretary of State Foreign Profit Corporation, ID No. 0082456. VWGoA engages in business activities in all fifty states and the District of Columbia.

18. Defendant Volkswagen Group of America Chattanooga Operations, LLC, ("VW Chattanooga") operates a manufacturing plant in Chattanooga, Tennessee.[3] VW Chattanooga is a wholly owned subsidiary of VWGoA. VW Chattanooga manufactured some of the Unlawful Vehicles, specifically, the Volkswagen Passat turbocharged direct injection ("TDI") diesel vehicles. VW Chattanooga installed Defeat Devices into these diesel Passats.[4] Further, VW Chattanooga delivered or arranged for delivery of these cars for sale or lease within the U.S., including Vermont.

19. Defendant Audi Aktiengesellschaft a/k/a Audi AG ("Audi AG") is a corporation organized under the laws of Germany, and has its principal place of business in Ingolstadt, Germany. Audi AG, a VW AG subsidiary,[5] designs, manufacturers, markets and sells automobiles under the Audi brand name, including Unlawful Vehicles delivered for sale or lease in Vermont. Audi AG also sold and supplied its 3.0-liter engines to Porsche Aktiengesellschaft which were marketed, titled, and/or registered in Vermont. At all relevant times, Audi AG has transacted and continues to transact business throughout Vermont.

20. Defendant Audi of America, LLC, also known as Audi of America, Inc., or Audi of America ("AoA"), is a Delaware limited liability company with its principal place of business located at 2200 Ferdinand Porsche Drive, Herndon,

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[3] *see* http://www.volkswagengroupamerica.com/facts.html
[4] *Id.*
[5] VW AG owns 99.55% of Audi AG's stock.

Virginia. AoA is a wholly owned subsidiary of VWGoA.[6] AoA marketed and delivered for sale or lease Unlawful Vehicles throughout the U.S., including Vermont. VWGoA is responsible for the acts of AoA in the State and the U.S. AoA is controlled and directed by VWGoA.

21. Dr. Ing. h.c. F. Porsche d/b/a Porsche Aktiengesellschaft a/k/a Porsche AG ("Porsche AG") is a corporation organized under the laws of Germany and has its principal place of business in Stuttgart, Germany. Porsche AG is a wholly-owned subsidiary of VW AG. Porsche AG bought and installed unlawful 3.0 liter TDI engines in Unlawful Vehicles it delivered for sale or lease throughout the U.S.

22. Porsche Cars North America, Inc. ("PCNA") is a Delaware corporation that is registered to do business in Vermont and has its principal place of business at One Porsche Drive, Atlanta, Georgia. PCNA is a wholly-owned subsidiary of Porsche AG (Defendants PCNA and Porsche AG are collectively referred to as "Porsche"). PCNA marketed and delivered for sale or lease Unlawful Vehicles throughout the U.S. and submitted documentation to federal and state regulators to obtain certifications of compliance with emission requirements for such vehicles. PCNA provided documentation for registration and/or titling of Unlawful Vehicles in Vermont.

III. JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action, personal jurisdiction over the Defendants and authority to grant the relief requested pursuant to 12 V.S.A. § 913(b).

24. At all relevant times, VW AG, its subsidiaries Audi AG, Porsche AG, VWGoA, and, in turn their subsidiaries, VW Chattanooga, and PCNA, have purposefully availed themselves of this forum through, among other things, the conduct described herein. Further, VW AG, Audi AG, and Porsche AG:

a. designed the Unlawful Vehicles with their Defeat Device software for sale within the U.S., including Vermont;

b. directed VWGoA[7] to submit to U.S. and state regulators applications for certification required to sell or lease the Unlawful Vehicles in the U.S., including within Vermont;

c. directed VWGoA and PCNA to submit to U.S. and state regulators documentation and emissions labeling that is required to title and/or register the Unlawful Vehicles in Vermont;

[7] VWGoA's Engineering and Environmental Office ("EEO") submits to U.S. and state regulators applications for certification to sell, title and/or register the Unlawful Vehicles. This documentation provides that VW's Unlawful Vehicles meet the Vermont emission standards allowing for their sale, title and registration in Vermont.

d. directed VWGoA and PCNA to make periodic submissions documenting the vehicles delivered for sale or lease and the applicable emissions standards with which they allegedly complied to U.S. and state regulators, including ANR, as required by Section 5-1107 of the Vermont Air Pollution Control Regulations;

e. placed, or directed VWGoA and PCNA to place, false Smog Index Label and Environmental Performance Labels on Unlawful Vehicles;

f. oversaw and/or directed VWGoA's, AoA's and PCNA's dissemination of false and misleading advertising and marketing of the Unlawful Vehicles as clean, green and environmentally friendly, to U.S. consumers, including Vermont Consumers;

g. directed VWGoA to issue false and/or misleading recall notices in or around January and March 2015 to Vermont buyers and lessees; and

h. controlled and directed VWGoA's, AoA's and PCNA's communications to U.S. regulators and the public in the aftermath of the 2014 independent study[8] that exposed Defendants' fraud to the public.

25. In addition, VWAG transacted business in Vermont through at least six Vermont car dealerships.

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[8] West Virginia University's Center for Alternative Fuels, Engines & Emissions was commissioned by the International Council on Clean Transportation to test the Unlawful Vehicles. As discussed herein, the report found that under real world driving conditions emissions from two of the three diesel vehicles it tested contained levels of NO_x between five and thirty-five times higher than the legal emissions limits.

26. Venue lies in the Washington Unit of the Superior Court of the State of Vermont pursuant to 12 V.S.A § 402.

IV. LAW

A. Clean Air Regulatory Background

1. Vermont Has Adopted California Motor Vehicle Emission Control Requirements, Including Exhaust Emission Standards for Nitrogen Oxides.

27. Vermont's Air Pollution Control statutes provide for a coordinated statewide program of air pollution prevention, abatement and control for the purposes of protecting human health and safety, preventing injury to plant and animal life and property, fostering the comfort and convenience of the people, promoting the state's economic and social development, and facilitating enjoyment of the state's natural attractions. 10 V.S.A. § 551.

28. Section 567(a), 10 V.S.A. authorizes the Secretary of the Agency of Natural Resources ("Secretary") to provide rules for the control of emissions of air contaminants, including NOx, from motor vehicles, including requirements for the installation, use and maintenance of equipment designed to reduce or eliminate emissions.

29. The Secretary has adopted Air Pollution Control Regulations ("VAPCR"), including Subchapter XI, VAPCR §§ 5-1101 - 1109, which prescribes emission control requirements for new passenger cars and light-duty trucks.

30. Pursuant to VAPCR § 5-1102 & Appendix F, Subchapter XI of the VAPCR incorporates by reference motor vehicle emission control requirements adopted by the California Air Resources Board ("CARB") and codified in Title 13 of the California Code of Federal Regulations, including 13 C.C.R. §§ 1961, 1961.2, 1965, and 1968.2. Violations of the incorporated CARB regulations are violations of the VAPCR.

31. The California requirements incorporated into Subchapter XI of the VAPCR prohibit defeat devices and prescribe, *inter alia*: exhaust emission standards, including standards for NOx; and requirements for smog index and environmental performance labels, on-board diagnostic systems, durability data vehicles, emission data vehicles, and emission control system warranties.

2. NOx Emissions Are Harmful to Public Health and the Environment.

32. NOx are a family of poisonous, highly reactive gases. Direct health impacts of NOx include respiratory problems and decreased lung function. NOx can also cause eutrophication and excess nutrient loading in bodies of water, and can negatively affect vegetation by, inter alia, causing leaf damage and reduced growth.

33. NOx reacts with volatile organic compounds in the presence of sunlight to produce ground-level ozone.

34. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma, and can lead to premature death. Children are at greatest risk of negative health impacts from ozone exposure.

35. NOx contributes to the formation of fine particulate matter, which causes respiratory ailments, cardiovascular disease and even premature death.

36. NOx also interacts with moisture in the atmosphere creating acid rain, which negatively impacts plants and aquatic ecosystems.

3. Vermont Requires Certification of New Motor Vehicles by California to Ensure Compliance with Emission Control Requirements

37. CARB administers a certification program to ensure that motor vehicles introduced into commerce in the State of California satisfy that state's emission control requirements. California Health & Safety Code §§ 43100 *et seq.*

38. To ensure that new motor vehicles sold or leased in Vermont comply with the CARB requirements that Vermont has adopted, VAPCR § 5-1103(a) requires pre-sale or lease certification by CARB.

39. CARB certifies compliance with emission control requirements, including its exhaust emission standards for NOx, by processing applications for certification submitted by new vehicle manufacturers.

40. Vehicles for which certification is sought are assigned to test groups. A test group consists of vehicles with common features anticipated to result in similar emissions profiles for regulated pollutants. VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) & 1961.2(d)).

41. Prototype vehicles for a test group are tested to determine if they meet, *inter alia,* exhaust emission standards. If the prototype passes the tests and other

applicable requirements are met, CARB certifies the vehicles by issuing an Executive Order for all vehicles in the test group for the particular model year.

4. The Attorney General is Authorized to Seek Injunctive Relief and Civil Penalties for Violations of Emission Control Requirements.

42. Under 10 V.S.A. § 8221, the Attorney General is authorized to enforce Vermont's Air Pollution Control Statutes and the VAPCR by filing an action in the Civil Division of the Superior Court.

43. In such an action, the Superior Court is authorized to grant temporary and permanent injunctive relief, and may, *inter alia,* enjoin future activities, order remedial actions to be taken to mitigate hazard to human health or the environment, and award a civil penalty of not more than $85,000 for each violation and up to an additional $42,500 for each day that a violation continues. The Court may also award additional civil penalties to recapture economic benefits resulting from a violation. 10 V.S.A. §§ 8221(b), 8010(c).

B. The Vermont Consumer Protection Act.

44. The Vermont Consumer Protection Act ("CPA"), 9 V.S.A. § 2453(a), prohibits unfair or deceptive acts or practices in commerce.

45. The Vermont Attorney General may bring an action under the CPA, 9 V.S.A. § 2458(b), against any person using or about to use any method, act, or practice declared to be unlawful under 9 V.S.A. § 2453 when such proceedings would be in the public interest.

V. FACTS

46. Unless otherwise stated, the allegations set forth in this Complaint are based upon information obtained from the documents produced by Defendants, the testimony of Defendants' current and former employees, information available in the public domain, and information and documents obtained from other third-party sources through Plaintiff's investigatory efforts.

A. The Volkswagen Group: Volkswagen AG and Its Subsidiaries

47. At all relevant times, Defendants acted together and directly aided one another in achieving their common objective of obtaining regulatory approval to sell and lease the Unlawful Vehicles in the United States, including Vermont. Therefore, all acts and knowledge of each Defendant are imputed to the other Defendants. Among other things:

a. VW AG controls the overall research and development and marketing budgets for the brands in the "Volkswagen Group";[9]

b. for the Unlawful Vehicles that Defendants sold in the United States, VWGoA's EEO acted as their representative before U.S. and state regulators for compliance and certification-related issues;

c. AoA is a subsidiary of VWGoA;

d. the three brands, Volkswagen, Audi, and Porsche, share engineering research and development and engine concepts and designs, including in

[9] The "Volkswagen Group" comprises twelve brands: Volkswagen Passenger Cars, Audi, SEAT, ŠKODA, Bentley, Bugatti, Lamborghini, Porsche, Ducati, Volkswagen Commercial Vehicles, Scania and MAN.

this case VW AG's incorporation of Audi-designed software and hardware elements into the Unlawful Vehicles. As detailed below, VW AG incorporated this Defeat Device software in the 2.0 liter Unlawful Vehicles, including the Generation 1 / EA 189 ("Gen 1") diesel engines and Generation 2 EA / 189 ("Gen 2") diesel engines. Porsche AG incorporated the Audi 3.0-liter diesel engine for its Cayenne SUV Unlawful Vehicles; and

e. officers and employees of Defendants, including several of those involved in the unlawful conduct described in this Complaint, are shared among the Defendants, and have moved from the employ of one Defendant to another, including during the time relevant to the State's claims.[10,11] A

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[10] Individuals names will be provided in full the first time they appear and thereafter by surname only.

[11] Among other examples:

- Martin Winterkorn served as CEO of Audi AG from 2002 to 2007, when the defeat devices were first developed, before be becoming VW AG's CEO in 2007, a position he held until shortly after Defendants' unlawful conduct was publicly exposed in September 2015;

- Wolfgang Hatz led Audi's Powertrain Department (engines and transmissions) from 2001 to 2007, when Audi developed its first defeat device for its 3.0 liter V6 diesel for the European market. In 2007, Hatz assumed the same role at VW AG, just as VW AG was finalizing its own defeat devices for its U.S.-market 2.0 liter diesels. In 2011, Hatz moved to the top engineering job at Porsche, where he oversaw its rollout of a defeat-device equipped 3.0 liter Audi V6 to the U.S. market the following year;

- Ulrich Hackenberg held senior engineering positions, including emissions responsibilities, at Audi from 2002 to 2007. He then moved to VW AG from 2007 to 2013, when both companies were developing and

reference index of Defendants' referenced officers and employees referred to herein is attached as ***Appendix 3***; and

f. senior management at VW AG, VWGoA, and Audi AG discussed, planned and coordinated the response to the diesel scandal as it unfolded for Defendants in the United States.

B. Defendants Used Defeat Device Software to Sell Unlawful Vehicles in the United States, including Vermont.

1. The Unlawful Vehicles

48. In response to Toyota's commercial growth in the U.S. in environmentally advanced hybrid technology, Defendants began to design and develop and ultimately marketed, sold and leased, the light duty diesel throughout the U.S., including in Vermont.

49. The Unlawful Vehicles are a line of diesel turbocharged direct injection ("TDI") 2.0-liter ("2.0L") and 3.0-liter ("3.0L") vehicles which include several makes

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implementing their defeat device strategies, before moving back to Audi from 2013 to 2015;

- Oliver Schmidt headed the EEO office within VWGoA in 2014 and early 2015 before returning to VW AG in Germany. He played an important role (from both positions) in Defendants' efforts to conceal from U.S. regulators the true reason for the Unlawful Vehicles' unlawfully high real-world NO_x emissions which were first detected in Spring 2014; and

- James Liang was one of the engineers at VW AG in Wolfsburg, Germany who was directly involved in the development of the defeat device for the Gen 1 Volkswagen Jetta in 2006; by 2014-15, he was conducting tests for VWGoA at its Oxnard, California facility as part of Defendants' efforts to conceal from regulators that the defeat devices were responsible for the Unlawful Vehicles' illegal emissions.

and models sold or leased in the United States from 2008 through 2015 (or model years ("MY") 2009-2016). There were versions of TDI 2.0L vehicles manufactured by Defendants that differed from each other in engine design and/or emissions control system. The makes and models for each of the 2.0L and 3.0L Unlawful Vehicles are summarized in the table below:

Table 1: Unlawful Vehicles

2.0L Diesel Models

Model Year ("MY")	**Generation (Gen)/Engine**	**Environmental Protection Agency ("EPA") Test Group**	**Vehicle Make and Model(s)**
2009	Gen 1 /EA189	9VWXV02.035N 9VWXV02.0U5N	VW Jetta, VW Jetta Sportwagen
2010	Gen 1 /EA189	AVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2011	Gen 1 /EA189	BVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	Gen 1 /EA189	CVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, VW Beetle, VW Beetle Convertible, Audi A3,
2013	Gen 1 /EA189	DVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2014	Gen 1 /EA189	EVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012 2013 2014	Gen 2 /EA189	CVWXV02.0U4S DVWXV02.0U4S EVWXV02.0U4S	VW Passat
2015	Gen 3 /EA288	FVGAV02.0VAL	VW Beetle, VW Beetle Convertible, VW Golf, VW Golf Sportwagen, VW Jetta, VW Passat, Audi A3

3.0L Diesel Models

Model Year (MY)	EPA Test Group(s)	Vehicle Make and Model(s)
2009	9ADXT03.03LD	VW Touareg, Audi Q7
2010	AADXT03.03LD	VW Touareg, Audi Q7
2011	BADXT03.02UG BADXT03.03UG	VW Touareg Audi Q7
2012	CADXT03.02UG CADXT03.03UG	VW Touareg Audi Q7
2013	DADXT03.02UG DADXT03.03UG DPRXT03.0CDD	VW Touareg Audi Q7 Porsche Cayenne Diesel
2014	EADXT03.02UG EADXT03.03UG EPRXT03.0CDD EADXJ03.04UG	VW Touareg Audi Q7 Porsche Cayenne Diesel Audi A6 Quattro, Audi A7 Quattro, Audi A8L, Audi Q5
2015	FVGAT03.0NU2 FVGAT03.0NU3 FPRXT03.0CDD FVGAJ03.0NU4	VW Touareg Audi Q7 Porsche Cayenne Diesel Audi A6 Quattro, Audi A7 Quattro, Audi A8L, Audi Q5
2016	GVGAT03.0NU2 GPRXT03.0CDD GVGAJ03.0NU4	VW Touareg Porsche Cayenne Diesel Audi A6 Quattro, A7 Quattro, Audi A8, Audi A8L, Audi Q5

50. For clarity, throughout this Complaint, the 2.0-liter Generation 1/EA-189 engines, the Generation 2/EA-189 engines, and Generation 3/EA-288 engines identified above will be referred to respectively, as "Gen 1s", "Gen 2s", and "Gen 3s", and collectively as the "2.0Ls"; the 3.0-liter models will be referred to collectively as the "3.0Ls"; and the 2.0Ls and the 3.0Ls will be referred to collectively as the "Unlawful Vehicles."

51. Defendants sold, leased, and warranted nearly 500,000 2.0Ls and more than 88,000 3.0Ls in the U.S.

52. From 2009 to 2015, at least 2,900 Unlawful Vehicles were delivered for sale or lease to Vermont consumers. Additional Unlawful Vehicles were purchased or leased outside Vermont and then brought to Vermont to be titled and/or registered. As of October 1, 2015, at least 3,400 Unlawful Vehicles were titled and/or registered through the Vermont Department of Motor Vehicles ("DMV").

2. Defendants' Defeat Devices

53. Defendants wanted to use their existing diesel engine technology in the U.S. market, but faced an engineering challenge: diesel engines are high NOx emitters, making compliance with U.S. NOx emissions regulations especially difficult. Instead of meeting this challenge through engineering, improvements, and innovation, Defendants installed Defeat Devices in the Unlawful Vehicles to mask their failure to meet federal and state emissions standards.

54. Defendants installed illegal Defeat Devices in the Unlawful Vehicles' engine control units ("ECU(s)"). The Defeat Device software recognized when the Unlawful Vehicles were undergoing laboratory testing, such as test cycles on a rolling dynamometer,[12] using time and temperature parameters, among others. When the Defeat Device software detected a test cycle, it optimized the emissions controls to bring emissions into compliance with applicable standards. Outside of

[12] Also known as a "treadmill" or "roller" or "dyno" during controlled lab emissions testing.

the test cycle, the Defeat Device software lowered the emissions controls, resulting in NOx emissions up to 40 times the permissible limit.

55. For example, the Defeat Devices installed in the 2.0Ls work by directing the engine to run in one of two modes: a "testing" mode during which the car's emissions systems are fully operational, and a "driving" mode during which the car's emissions systems are substantially deactivated.

56. Every time one of these vehicles is started, it automatically enters into "testing" mode. During the first several minutes of operation, the software checks the car's acceleration and speed profile against the tightly-defined acceleration and speed profiles of the government-specified emissions test cycles used to test a car's emissions.

57. If the Defeat Device software determines that the car is running in a test cycle, it keeps the engine in "testing" mode so that the car's emissions controls remain fully operational. If, on the other hand, the Defeat Device determines the car is being driven in normal, random conditions as occur in real-world driving, the Defeat Device switches the engine into "driving" mode, during which emissions controls are substantially deactivated, with the effect that NOx emissions increase by a factor of up to 40 times the legal limit.

3. Defendants' Manipulation of On-Board Diagnostics to Conceal the Defeat Devices

58. Vermont has adopted Inspection and Maintenance ("I & M") programs that require all registered motor vehicles to pass periodic inspection tests that evaluate, among other things, the vehicles' emissions systems. In Vermont, as

elsewhere, the inspection tests do not directly measure the cars' emissions, but rely instead on the vehicles' on-board malfunction and diagnostic system ("OBD") to indicate whether the cars' emissions system is functioning properly. State and federal laws require auto manufacturers to equip their cars with OBD systems that electronically report failures of emissions systems to mechanics or inspectors during service or inspection.

59. For example, a properly-functioning OBD system would have reported the failure of the Unlawful Vehicles to run their exhaust gas recirculation ("EGR") systems properly and would have alerted inspectors, mechanics, and car owners that the cars' emissions systems were not functioning correctly and required repair.

60. To allow the Unlawful Vehicles to pass Vermont's inspection and maintenance tests, Defendants implemented a further deception: they programmed the OBD systems on the Unlawful Vehicles to falsely report, at inspection time, that the Unlawful Vehicles' emissions systems, including EGR, were working properly.

61. For a period of more than eight years, despite subjecting the Unlawful Vehicles to thousands of periodic inspections, Vermont's inspectors, mechanics, and car owners were misled into believing that Unlawful Vehicles complied with applicable environmental laws when they did not.

C. Defendants Falsified Certification Applications, Manufacturer's Certificates of Origin and Emission Control Information Labels to Allow Sale and Registration of Unlawful Vehicles in Vermont.

62. In order to deliver for sale or lease, offer for sale or lease, sell or lease vehicles in Vermont, a company must obtain from CARB an Executive Order which

certifies that the vehicles are in compliance with applicable emission control requirements.

63. Defendants obtained CARB Executive Orders for the Unlawful Vehicles through submitting to CARB test data from the vehicles equipped with Defeat Devices and failing to disclose the Defeat Devices in their applications for Executive Orders. To the extent that it disclosed the Defeat Devices on the list of Auxiliary Emissions Control Devices ("AECDs") required in the applications for Executive Orders, it falsely represented that they were active in all conditions (i.e., in test and real driving conditions).

64. In order to register and title a new vehicle in Vermont, DMV requires submission of a Manufacturer's Certificate of Origin ("MCO") which indicates compliance with applicable Vermont emissions requirements.

65. Defendants provided to their dealers MCOs for the Unlawful Vehicles, which indicated that the vehicles complied with applicable emissions requirements when in fact they did not. The MCOs were provided by the dealer or purchaser to DMV, and, in reliance on the MCOs, DMV permitted the Unlawful Vehicles to be titled and/or registered in Vermont when they should not have been titled and/or registered.

66. Manufacturers also are required to affix an Emission Control Information Label in the engine compartment of a vehicle which certifies compliance with applicable emissions standards and OBD requirements. In order to register and title a vehicle with less than 7,500 miles in Vermont that has been

registered and titled in another state, DMV checks the Emission Control Information Label to determine whether the vehicle complies with applicable requirements.

67. Defendants affixed to the Unlawful Vehicles Emission Control Information Labels which certified compliance with applicable requirements, when in fact the vehicles were not compliant. In reliance on the Emission Control Information Labels, DMV permitted Unlawful Vehicles to be registered in Vermont when they should not have been registered.

D. Defendants Implemented the Defeat Devices Knowing They Were Illegal.

68. In very limited circumstances, a vehicle manufacturer may install an Emission Increasing-Auxiliary Emission Control Device(s) ("EI-AECD(s)") to run only in extreme driving circumstances to protect the engine, and only if (a) the automaker discloses it to the regulators; and (b) the regulators determine the software is not actually designed primarily to cheat the emissions testing. Defendants attempted to shoehorn their Defeat Devices into this limited exception.

69. From the inception of its 2006 plan to launch the Unlawful Vehicles in the United States, Defendants intensively researched whether they could pass off the various Defeat Devices as legally-permitted exception to the Defeat Device ban for certain EI-AECD(s).

70. On October 3, 2006, multiple executives and managers from VW AG,[13] Audi AG,[14] and VWGoA[15] met with CARB officials to provide a "technical description of future light-duty diesel emission control strategies [Lean Trap and selective catalytic reduction ("SCR")] and to discuss emission certification implications (e.g., timing)." According to VW AG's October 3, 2006 Meeting Report, during the meeting, CARB officials repeatedly requested "additional detail regarding AECDs." The report states that, as a follow-up, "EEO, Volkswagen AG, and Audi AG [agreed] to review regulations to help identify AECDs, particularly EI-AECDs." VW AG, Audi AG, and VWGoA further promised to provide CARB a more complete description of the AECDs by Spring 2007, in particular noting: "[p]er [C]ARB request, identify, describe function (e.g., activate, deactivate, or modulate the operation of emission control devices), describe effect on emission levels[.]" In other words, CARB required Defendants to submit documentation to show that its EI-AECDs (now known to be Defeat Devices) were permissible under limited circumstances, and were not illegal.

71. Following the October 3, 2006, meeting with CARB, the topic of AECDs and defeat devices became the subject of intensive internal discussion at VW AG, Audi AG, and VWGoA, both in Germany and the United States. In a November 2006 email to several of his VWGoA colleagues and multiple engineers at

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[13] Volkswagen AG executives: Richard Dorenkamp, Dr. Achim Freitag, James Liang, Juergen Peter, Detlef Stendel, and Burkhard Veldten.
[14] Audi AG: Klaus Appel, Dr. Armin Burkardt, Carsten Nagel, and Giovanni Pamio
[15] VWGoA's Engineering and Environmental Office: Leonard Kata and Norbert Krause

Audi AG and VW AG, Stuart Johnson, a VWGoA EEO official, explained, *"almost all AECDs are really calibration issues and strategies, such as having a timing shift for engine starts, shutting off EGR certain modes such as extended idle to prevent plugging, timing changes for altitude, etc. . . .The agencies are really focused on how often an AECD is used."* He referenced an earlier lawsuit in which heavy-duty engine manufacturers were caught using *"cycle beating strategies [with] timers on them that enacted the injection timing change once the engine was in a mode for a specific length of time"* as a *"clear violation of the spirit of the emission regulations and the certification test procedure."* It is easy to infer from this communication that Defendants understood that the use of the Defeat Devices to circumvent applicable emissions standards was unlawful.

72. A few days later, Leonard Kata, Manager of Emission Regulations and Certification at EEO, emailed multiple VW AG, Audi AG, and VWGoA managers and noted:

> [I]n connection with the introduction of future diesel products, there has been considerable discussion recently regarding the identification of Auxiliary Emission Control Devices (AECDs)...The agencies' interest in the identification of AECDs is to determine whether any of these devices can be considered a defeat device.

73. In the email, Kata went on to explain how an EGR system that runs differently under test conditions than in real driving conditions—a central function of the Defeat Devices in all the Unlawful Vehicles —would constitute a defeat device under EPA and CARB regulations:

> EPA also discusses the concept of the existence of a defeat device strategy if a manufacturer's choice of basic design strategy cannot provide the same degree of emission control during both [emissions-test cycle] and [non-emissions-test cycle] operation when compared with other systems available in the industry. A simple example is an EGR system that provides adequate performance under [emissions-test cycle] conditions, but insufficient performance under non- [emissions-test cycle] conditions (e.g., higher speed, load or temperature). This lack of control under [non-emissions-test cycle] conditions will be considered a defeat device.

74. In the AECD analysis attached to his email, Kata also explained:

> Both EPA and [C]ARB define a defeat device as an AECD "...that reduces the effectiveness of the emission control system under conditions that may reasonably be expected to be encountered in normal vehicle operation and use unless: (1) Such conditions are substantially included in the Federal emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident; or (3) The AECD does not go beyond the requirement of engine starting."

75. On March 21, 2007, multiple managers and engineers at VW AG,[16] Audi AG,[17] and VWGoA[18] EEO had a follow-up meeting with CARB "to discuss Auxiliary Emission Control Devices (AECDs) associated with the diesel concepts presented." A March 21, 2007, Volkswagen Meeting Report summarizing the discussions states, in relevant part:

> VW [sic] position regarding "normal vehicle operation" is that the light-duty vehicle emission test procedures cover normal vehicle operation in customer's hands. [CARB official] Duc Nguyen expects emission control systems to

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[16] VW AG: Richard Dorenkamp, James Liang, and Juergen Peter
[17] Audi AG: Klaus Appel, Dr. Armin Burkardt, Giovanni Pamio, and Lothar Rech
[18] VWGoA EEO: Leonard Kata and Norbert Krause

work during conditions outside of the emissions tests. Volkswagen agrees.

76. Despite being fully aware of the prohibitions against defeat devices, Defendants proceeded to sell hundreds of thousands of Unlawful Vehicles, all of which featured undisclosed and illegal Defeat Devices.

E. Internally, Defendants' Executives and Engineers Openly Discussed Defeat Device Development and Implementation.

77. While Defendants were assuring CARB that their emissions control systems would work during real world driving, executives and engineers within their Powertrain Development departments were developing and implementing emissions-controlling defeat devices, such as those installed in the Unlawful Vehicles.

78. Discussions concerning Defeat Device development and implementation took place over nearly a decade between and among dozens of executives, senior managers and engineers.[19] The written discussions detail the use

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[19] Those involved in the discussions included, for example:

a. Frank Tuch (2010-2015 head of Volkswagen AG Quality Management and a direct report to Volkswagen AG CEO and Management Board Member, Winterkorn);
b. Bernd Gottweis (2007-2014 head of Product Safety within Volkswagen AG Quality Management);
c. Rudolf Krebs, Jens Hadler, Heinz-Jakob Neusser and Friedrich Eichler (heads of Volkswagen AG's Powertrain Development from 2005-2007, 2007-2011, 2011-2013 and 2013-2015, respectively)
d. multiple Volkswagen AG division heads, including Hanno Jelden (head of Drive Electronics from Nov. 2005 – Sept. 2015), Falko Rudolph (Diesel Engine Development from Nov. 2006 -Sept. 2010), Stefanie Jauns-Seyfried (head of Functions and Software Development within Powertrain Electronics from Nov. 2005 – Sept. 2015), Richard Dorenkamp (2003-2013) and Thorsten Duesterdiek (2013-present) heads

of the Defeat Devices to reduce emissions during test cycles, and otherwise described the expansion, modification and optimization of the cycle-beating Defeat Devices, well into 2014.

79. A February 29, 2016, Statement of Defense filed by VW AG in a pending European shareholder lawsuit offers possible insight into why, in light of its knowledge of the illegality of its conduct and the potential fines the company thought it would face, VW AG nevertheless opted to proceed with its fraudulent scheme:

> Under the Clean Air Act, violations of the statutory emission standards may be sanctioned by fines called civil penalties. While these fines may be as much as U.S.-$ 37,500 per vehicle and are thus in theory quite high, the statutory maximum amounts have to date played no role in practice. Nonetheless, they define the available range of penalties for the relevant U.S. authorities and are thus routinely cited in the corresponding notices – as was also the case with the EPA's Notice of Violation of 18 September 2015.

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of Ultra-low Emissions Engines and Exhaust Post-Treatment within Diesel Engine Development), Hermann-Josef Engler (head of Passenger Car Engines within Diesel Engine Development), and Mathias Klaproth (head of Diesel System Applications within Powertrain Electronics);

e. numerous managers and engineers, including Veldten, Volker Gehrke and Dieter Mannigel (in Diesel Engine Functions within Powertrain Electronics' Functions and Software Development department) and Andreas Specht, Hartmut Stehr, Michael Greiner and James Liang (in Procedures and Exhaust Post-Treatment within the Diesel Engine Development department);
f. top Audi engineers, including Giovanni Pamio (General Manager of V6 Diesel Engines), Henning Loerch (Director of Exhaust Gas After treatment) and Martin Gruber (Director of Audi Diesel Engine Thermodynamics Department); and
g. Carsten Schauer, Chief of Porsche Electronics Development.

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> Regardless of the statutory maximum amounts and the abstract presentation of the fine assessment criteria in the law, fines in practice do not even approach the upper end of the range, especially in cases involving passenger cars in large numbers (instead of heavy trucks).

F. THE COVERUP: Defendants Continued to Deny the Existence of the Defeat Devices, Mislead Regulators, and Deceptively Marketed the Unlawful Vehicles Even After Initial Evidence of the Defeat Devices Caught the Attention of U.S. Regulators.

80. While speaking about the Defeat Devices relatively openly in internal discussions, Defendants actively sought to conceal the Defeat Devices from regulators, researchers, and the public. For example, Defendants:

a. directed the removal of reference to the Defeat Device (or the "acoustic function" as it was called internally) from ECU documentation;

b. buried the results of 2012-2013 internal testing that reflected real world NO_x emissions exceeding U.S. limits by many multiples;

c. obfuscated, in response to questions presented by Dutch researchers in March 2012, information concerning lowered EGR in real driving conditions and corresponding increases in NO_x emissions;

d. denied independent researchers access to data that would confirm NO_x discrepancies between testing and real driving conditions in Defendants' U.S. fleet; and

e. failed to disclose the illegal, emissions-increasing Defeat Devices in their certifications to state and federal regulators which falsely represented full compliance with applicable emissions and durability standards.

1. Defendants' Initial Reaction to the Spring 2014 Publication of the West Virginia University Testing Results and International Council on Clean Transportation Report

81. On March 31, 2014, an Audi AG engineer alerted colleagues at VW AG and VWGoA's EEO to the upcoming publication of a report by the West Virginia University's Center for Alternative Fuels, Engines & Emissions ("WVU") commissioned by the International Council on Clean Transportation (the "ICCT Report"). The ICCT Report found that real world emissions from two of the three light duty diesel vehicles it tested contained levels of NO_x between five and thirty-five times higher than the legal emissions limit. WVU researchers conducted those tests using a portable emissions measurement system ("PEMS") – essentially a lightweight mobile laboratory used to test and/or assess mobile source emissions in real driving conditions – rather than in a laboratory on a dynamometer.

82. Anxiety amongst Defendants about the possibility that the vehicles that failed were Defendants' vehicles was demonstrated by a flurry of internal VW AG, Audi AG, and VWGoA communications. Within days, those fears were confirmed when WVU researchers told VWGoA EEO that a 2012 Jetta (Gen 1s) and a 2013 Passat (Gen 2s) failed their tests.

83. Thereafter, VWGoA's EEO began receiving calls and requests for reports and analyses of the ICCT Report from multiple high-ranking VW AG and

VWGoA executives, including Michael Horn (then-CEO and President of VWGoA), Carsten Krebs (a Director at VWGoA), Frank Tuch (then-head of Group Quality Management for VW AG), Bernd Gottweis (then-head of Product Safety within VW AG Group Quality Management) and Christian Klingler (then-VW AG Management Board member responsible for Sales and Marketing).

84. Documents and information provided by managing engineers at VW AG, Audi AG, VWGoA, and AoA (including several engineers who participated in the design and implementation of the Defeat Devices in the early-2000s) to multiple senior management officials (including Winterkorn, then-CEO of VW AG and Chairman of VW AG's Board of Management, and Klingler) in the immediate aftermath of the ICCT study clearly demonstrates their understanding that:

a. the high NO_x emissions under real driving conditions could be readily explained by the existence of the Defeat Devices;

b. Defendants would be subject to significant penalties if they admitted to regulators that the discrepancies were caused by Defeat Devices;

c. Defendants could be required to buy back the vehicles if it could not bring the emissions down with a software update; and

d. if Defendants opted to stay silent, EPA or CARB could obtain vehicles and conduct emissions testing that would reveal the existence of the Defeat Devices.

85. Indeed, in a May 23, 2014, letter to Winterkorn, CEO and Chairman of Volkswagen AG's Board of Managers, Volkswagen AG Quality Assurance head Frank Tuch warned:

> *A thorough explanation for the dramatic increase in NO_x emissions cannot be given to the authorities.* It can be assumed that the authorities will then investigate the VW systems to determine whether Volkswagen implemented a test detection system in the engine control unit software (so-called defeat device) and, in the event a "treadmill test" is detected, a regeneration or dosing strategy is implemented that differs from real driving conditions. In Drivetrain Development, modified software versions are currently being developed which can reduce the RDE, but this will not bring about compliance with the limits, either.
>
> We will inform you about the further development and discussion with the authorities.
>
> (Emphasis added)

86. With the risks of detection in mind, Defendants embarked on a strategy to deflect scrutiny. Defendants publicly denied that the Unlawful Vehicles failed emissions requirements. They neutrally acknowledged the existence of the problem without explaining its known cause to authorities or involving Volkswagen AG Group Product Safety, to maintain the illusion that the problem was insignificant, and it proposed software updates to "optimize" the emissions on the Gen 1 and Gen 2 vehicles.

87. Yet, as the executives at VW AG, Audi AG, VWGoA, and AoA who worked on this damage-control effort well knew, the proposed software modifications would:

a. only bring the Gen 1s' emissions down to ten times the legal limits, while at the same time increasing fuel consumption;

b. only bring the Gen 2s' emissions down to five times the legal limits;

c. only bring the Gen 3 Defeat Devices' (i.e., all the MY 2015 Unlawful Vehicles with 2.0L engines, which were about to roll off the production line) emissions down to up to double the legal limits; and

d. in the case of SCR-equipped Unlawful Vehicles – the Gen 2s, the Gen 3s and the 3.0Ls – nearly double urea dosing[20] requirements, thereby necessitating additional urea tank refills for a significant percentage of drivers.

88. Urea dosing is used in connection with SCR to reduce NOx in diesel exhaust. Urea dosing requires a storage tank that needs to be refilled at intervals. VW AG, Audi AG, VWGoA, and AoA looked into potentially increasing urea dosing as a way to bring the 3.0Ls into compliance with applicable emissions standards.

89. Defendants began a seventeen month-plus campaign, from May 2014 until September 3, 2015 (and beyond for the 3.0Ls), to mislead and confuse regulators and the public about the fact that their installation of the Defeat Devices was the true cause of the high real-driving NO_x emissions identified in the ICCT Report.

2. Defendants' Desperate Efforts to Deflect Scrutiny of the Model Year 2015 Generation 3s About to Hit the U.S. Market

90. One of the most pressing dilemmas Defendants faced in the immediate aftermath of the ICCT Report related to the SCR-equipped MY 2015 Gen 3s. The

[20] Urea dosing refers to a system which reduces NOx emissions by injecting a urea solution into the diesel exhaust stream.

vehicles were set to roll off the production line a few months later for delivery in the United States with the Defeat Devices installed.

91. On or around March 2014, just before the ICCT Report was released, Defendants had applied to CARB and EPA to certify the MY 2015 Gen 3s to the Low Emission Vehicle III ("LEV III") standard rather than the Low Emission Vehicle II ("LEV II") standard to which they had certified the earlier, MY 2009-2014 2.0Ls.

92. With the publication of the ICCT Report and the resulting intense scrutiny from regulators, Defendants were under immediate pressure to bring the Gen 3s into actual compliance with LEV III standards as quietly and quickly as possible.

93. Defendants estimated that in order to bring NOx emission down to within *two times* the legal limits, urea dosing would need to nearly double (from 0.8l/1,000 miles up to 1.5l/1,000 miles). And even then, according to VW AG's own estimates, 20% of Gen 3 owners would have to refill their urea tanks well before 10,000 miles.

94. Unwilling to come clean with the regulators, Defendants decided to use an impending change to EPA rules (effective September 8, 2014) (which permitted automakers to decouple urea tank refills from service intervals) as a pretext to update the software in the Gen 3s waiting in U.S. ports. During this update, and before the Unlawful Vehicles reached regulators or customers, Defendants changed

the software such that the amount of urea dosing was increased under real world driving conditions.

95. Thus, in early June 2014, VW AG, Audi AG, VWGoA, and AoA submitted revisions to its applications for certification to CARB and EPA which changed the anticipated urea refill interval from 10,000 miles to "approximately 10,000 miles."

96. Sensitive that the potentially increased number of urea refills and the impact on drivability (vehicles with empty urea tanks cannot be started) brought "significant rejection reason to potential buyers," Defendants also began discussing how to announce and message this change to dealers and consumers.

97. Given the time constraints and the significant threat to future sales, Defendants treated this matter with urgency and involved a multitude of executives and engineers at VW AG, Audi AG, VWGoA's EEO, and AoA.

98. Defendants' communications to dealers and the public regarding the changes in urea consumption for the Gen 3s falsely and/or misleadingly:

a. suggested that the vehicles would meet EPA and CARB emissions standards;

b. omitted any mention of the fact that NO_x emissions in real driving conditions would still be as much as double legal limits;

c. claimed that only customers with aggressive driving styles would see the intervals between refills reduced when, in fact, internal estimates reflected that 20% of drivers would have to refill their urea tanks before

10,000 miles (according to Audi AG and Volkswagen AG estimates, between 6,000 and 8,000 miles); and

d. suggested that the older SCR-equipped Gen 2s (namely, MY 2012-2014 Passats) would not require increased urea dosing to comply with LEV II emissions standards, when in fact urea dosing would likely increase.

99. Defendants further mislead regulators and consumers by claiming the decision to increase urea dosing was a proactive decision by Defendants to meet more stringent Tier 2/Low Emission Vehicle III ("LEV III") emissions standards—when in fact it was a ruse to conceal from authorities Defendants' illegal urea dosing strategy.

3. Defendants' Deception Continued by Attempting to Placate Regulators by Offering Deceptive, Sham Software Recalls on the Generation 1s and Generation 2s

100. At the same time, it was covertly managing the Gen 3 Defeat Device issue, Defendants were also attempting to downplay the scope and severity of the problems with the Gen 1 and Gen 2 Unlawful Vehicles. Defendants were particularly focused on preventing CARB from conducting its own tests on the Gen 1s, over 400,000 of which were already on U.S. roads and emitting NO_x at up to 40 times the legal limits.

101. At an October 1, 2014, a teleconference with CARB attended by VWGoA and VWAG, including EEO's former and current heads (Oliver Schmidt and Stuart Johnson) and Emission Regulations and Certification Manager (Len Kata), and Volkswagen AG engineer (Juergen Peter), VW AG and VWGoA cited

bogus technical explanations for the high emissions, omitted any mention of the true cause of the high NO_x emissions, and assured regulators it could "optimize" the vehicles' emissions performance by conducting software recalls.

102. Defendants made those representations notwithstanding their knowledge that the proposed software recalls – the true purpose of which was to adjust the Defeat Devices in the Gen 1s (by increasing EGR and Lean Trap regeneration) and Gen 2s (by increasing EGR and urea dosing) – would not bring the Unlawful Vehicles into compliance with applicable emissions standards and would increase fuel and urea consumption, respectively.

103. In its November 26, 2014, and December 12, 2014, recall-related submissions to CARB and EPA, Defendants touted the Gen 2 software recall as a "pro-active" "upgrade." In the description of the corrective action to CARB and EPA in those submissions, Defendants did not state why the software action was needed. Rather, they diverted attention from the Defeat Devices by describing the software recall as follows:

- Improvements have been made with regard to the [particulate matter] PM filter loading / regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the KI-factor determination or influence the on road performance of the vehicle.

- Improvements have been made ensuring a higher Ammonia filling level of the SCR catalyst. This ensures that the SCR catalyst is more robust against NO_x-peaks caused by dynamic and transient speed / load changes. The new software incorporates the latest engineering experiences to enhance the efficiency of the SCR system.

104. Notices to dealers and consumers issued, in or around January 2015, were similarly misleading and deceptive, stating: "the vehicle's engine management software has been improved to assure the vehicle's tailpipe emissions are optimized and operating efficiently. Under certain operating conditions, the earlier strategy may have increased the chance of the vehicle's [malfunction indicator lamp] light illuminating." The letter sent to consumers detailing the recall notice misleadingly stated that the recall was being undertaken "[a]s part of Volkswagen's ongoing commitment to our environment, and in cooperation with the United States Environmental Protection Agency."

105. Those recall notices were deceptive. No dealer or customer recipient would have understood why the recall was being conducted or the fact that the Unlawful Vehicles' urea consumption would likely substantially increase, in many cases requiring consumers, for the first time, to refill their urea tanks between 10,000-mile service intervals and the Unlawful Vehicles would still not be in compliance with applicable emission standards.

106. Later, Defendants' March 2015 recall-related submissions concerning the software update for the Gen 1s were similarly misleading and deceptive, again describing the action as a "pro-active" "upgrade" of Electronic Control Module ("ECM") Software levels. Again, Defendants diverted attention from potential Defeat Devices in their description of the "specific modification" to EPA when it stated:

> These changes will assist in reducing [malfunction indicator lamp] illumination for DTC P0401 & P2463, thus reducing the frequency of

> unnecessary replacement of after treatment system components. In addition, the vehicle's engine management software strategy has been modified to optimize the PM filter loading and regeneration model under extreme driving conditions.

107. Defendants further falsely reported that the update would "pose no impact on fuel economy."

108. As with the earlier Gen 2 recall-related notices, Defendants deceptively told dealers and customers: "the vehicle's engine management software has been improved to assure the vehicle's tailpipe emissions are optimized and operating efficiently. Under certain operating conditions, the earlier strategy may have increased the chance of the vehicle's [malfunction indicator lamp] light illuminating." Defendants omitted any mention of the reason for the software update, the fact that post-update real-driving NOx emissions would still be up to ten times legal limits, and the anticipated decrease in fuel economy.

4. Audi AG's Efforts to Deflect Regulators' Suspicions About the 3.0Ls

109. Around the same time Defendants were meeting with regulators to describe the proposed 2.0L recalls and offering a host of improbable reasons for the NOx discrepancies that the recalls were meant to fix, regulators' suspicions about the 3.0Ls started to build.

110. Those suspicions were well-founded. Internal PEMS tests on multiple 3.0Ls conducted by Audi AG itself (starting in Fall 2014) had reflected real driving NO_x emissions many times higher than permissible limits.

111. In February 2015, in response to increasing pressure from regulators for transparency on the 3.0Ls (and, in particular, questions about whether the upcoming MY 2016s for which Audi AG was then seeking emissions compliance certification were beset by the same issues as the 2.0Ls), EEO conveyed results of Audi AG's late 2014 – early 2015 PEMS testing of an Audi A8 V6 TDI MY 2016 to CARB: "emissions at a level of three times the NO_x ULEV II [full useful life] standard."

112. In a one-page written submission to CARB, Audi AG attributed the discrepancy between NO_x emissions on the dyno and on the PEMS to "increased driving dynamics in combination with a lot more unsteady driving characteristics" and, to the fact that "the driving kinematics in the [Los Angeles] area are significantly different from standard [test cycle] characteristics" such "that a sustainable high SCR effectiveness in comparison to the regulatory [test cycle] can be reached and therefore leads to an increase in NO_x emissions." Audi AG further claimed:

> the temporary reduction of the SCR effectiveness is caused by the underfloor position of the SCR system and therefore represents a physical boundary of the technical capability of the system and no intervention in the control strategy. Therefore[,] Volkswagen concludes that the current SCR-application fulfils the requirement of the AECD regulation. As a consequence[,] Audi requests an unconditional [Executive Order].

113. Although it had conducted additional PEMS tests of earlier and current 3.0L model years, and obtained considerably worse results (NOx emissions during real drive of ten times legal levels), Audi AG did not disclose those results to regulators or consumers. Instead, Audi disclosed only that it planned to alter the

applicable software to improve real-world emissions for future 3.0L models. At the same time, Defendants continued to market and sell the 3.0Ls to consumers.

114. Over the course of Spring 2015, CARB made multiple requests for information concerning: (a) whether the software updates Defendants offered for the Gen 1s and Gen 2s had brought those vehicles into compliance with relevant standards; and (b) whether the MY 2016 Gen 3s and the 3.0Ls, for which neither EPA nor CARB had yet issued emissions compliance certification, were beset by the same issues.

115. CARB officials followed up multiple times, requesting from Defendants more specific information regarding how the software controlled urea dosing on the MY 2016 2.0Ls and 3.0Ls for which Defendants was then seeking certification. Engineers and officials at VW AG, Audi AG, and VWGoA were in frequent contact with CARB, but did not provide CARB clear answers. Defendants failed to provide CARB with requested information for months.

116. Upon learning that CARB planned to conduct confirmatory testing of an updated Gen 2 Defeat Device using "Special Cycles," i.e., consecutive test cycles on the dynamometer, internal emails between EEO and engineers at VW AG began to reflect desperation and panic. In a May 18, 2015, email to several managers and engineers within VW AG's Powertrain Development Department and to EEO Head Johnson, VW AG engineer Peter conveyed serious concern regarding what CARB's Special Cycles would expose, asking his colleagues: "Do we need to discuss next

steps?" In response to CARB's questions relating to the soot loading of the DPF [Diesel Particulate Filter], Peter begged: "Come up with the story please!"

117. The same concern about the growing frequency and intensity of CARB's requests for information was reflected in a May 21, 2015, email from Mike Hennard, Senior Manager of Emissions Compliance at EEO, to multiple VW AG managers and engineers. It stated: "[p]lease be aware that this type of action from California ARB staff / management is not a normal process and that we are concerned that there may be possible future problems/ risks involved. It should also be noted that this TDI software issue is being reviewed and monitored by upper management at ARB [CARB]." After receiving Hennard's email, one of the senior managers wrote an email to Hennard's manager (VWGoA EEO-head Stuart Johnson) admonishing him for allowing his direct report to send such an open email to those recipients.

118. In June 2015, CARB conducted confirmatory testing on a 2012 SCR-equipped Passat (a Gen 2). Based on that testing, CARB notified Defendants that it had concluded that "VW's 'fix' Calibration" did not: (a) "directly address the lack of [urea] dosing filling strategy on some drive cycles" or (b) "directly address high NOx emissions on drive cycles extending beyond 1,400 seconds. VW's [urea] filling strategy is still only invoked once per drive cycle; therefore, NOx emissions will continue to increase as the drive cycle progresses [;]" and (c) "address why or when the filling strategy is invoked. Some drive cycle [sic] may never activate the [urea] filling strategy."

119. Thus, CARB indicated it could not certify the MY 2016 Gen 3s until it received confirmation they did not have the same parameters for urea dosing as the updated Gen 2s, which had already failed CARB's confirmatory testing.

G. Defendants Only Admitted Their Misconduct on the 2.0Ls When They Thought Doing So Would Prompt Regulators to Certify Them to Sell Model Year 2016 Generation 3s.

120. Defendants' repeated attempts to assure CARB that the "Gen 3 2016 MY did not share the [Gen 2] strategy or concern" were unsuccessful.

121. By mid-July 2015, Defendants had not obtained certification to sell the MY 2016 Gen 3 vehicles, the Unlawful Vehicles were piling up in the ports, and every interaction with regulators raised more questions and concerns than it answered.

122. On or about July 20, 2015, upon learning that CARB planned to test a MY 2015 Gen 3s to resolve questions about whether these vehicles (and the MY 2016 Gen 3s) needed a software update, EEO Head Johnson internally floated the possibility of "discussing a 'working mistake' with [C]ARB" and further suggested "how we handle this could be a positive step if we tie it to the refill interval and dosing strategy."

123. In an email dated July 21, 2015, VWGoA President and CEO Horn, conveyed the urgency of the situation to multiple board members and executives in Germany (including Klingler, VW AG Management Board member responsible for Sales and Marketing, and Neusser, the VW AG Passenger Car Board member responsible for Technical Development). Horn made clear that certification of the

MY 2016 Gen 3s was at risk if Defendants failed to provide CARB with all the outstanding information it was awaiting.

124. Thereafter, on or about August 5, 2015, Head of VW AG Engine Development head (and former VWGoA EEO head) Schmidt and VWGoA EEO head Johnson met with CARB management and admitted that, even after the software recalls, the Gen 1s and Gen 2s did not meet legal emissions compliance requirements. With respect to the SCR-equipped Gen 2s, they attributed the low urea dosing to efforts to conserve urea due to the 10,000-mile refill interval.

125. The Gen 2 recall VW AG, VWGoA, and Audi AG had just conducted should have addressed that issue, given the September 2014 change to EPA rules allowing refills to occur between the 10,000-mile service intervals.

126. A week later, on August 12, 2015, while still withholding the MY 2016 Gen 3 certifications because of concerns the MY 2015 and 2016 Gen 3s suffered from the same dosing issues as the Gen 2s, CARB technical staff again requested "the exact parameters that control [Generation 3 urea] dosing and show the before & after calibration difference that corrected the lack of dosing issues found during our [Generation 2] testing."

127. After extensive internal discussion between and among the Head of EEO Johnson and multiple high level executives at VW AG (including Schmidt, Head of Engine Development and Gottweis, then-Head of Quality Management/ Product Safety) in which Johnson expressed doubt concerning whether it would even be possible to give CARB what it requested "given the complication of today's

code," Defendants again decided to obfuscate. Rather than provide CARB with the information it sought regarding the MY 2016 Gen 3 urea dosing parameters, VW AG dispatched Johnson to reiterate to CARB the "same message Oliver [Schmidt] brought last week when we both met with [CARB officials], which is a partial admission that concern of the 10K refill interval is another parameter that influences the dosing and that is why he is not always seeing the dosing at the enabling temperature."

128. Johnson's effort to allay CARB's concerns was unsuccessful. As Johnson reported in an August 12, 2015, email report to multiple high level executives, managers and engineers at VW AG,[21] CARB "still asked for information. This is not a new request. [CARB] has asked for the parameters in the calibration of Gen 2 that are limiting the dosing to ensure that it is not in Gen 3."

129. On August 18, 2015, Eichler, Head of Volkswagen AG Drivetrain Development, sought authority from Neausser, then-VW AG Passenger Car Board member and Head of VW AG Engine Development, to send multiple VW AG diesel department heads (together with current and former EEO heads Johnson and Schmidt) to meet with CARB the following day. The express goal of the meeting was to secure the release of the MY 2016 Gen 3 vehicles and to convince CARB that Defendants would be able to implement measures to reduce the Gen 2s real driving NO_x emissions values to an acceptable level within an agreed timeframe. To do

[21] Volkswagen AG (Oliver Schmidt, Friedrich Eichler, Bernd Gottweis, Daniel Schukraft, Juergen Peter, Detlef Stendel, Richard Preuss, and Duesterdiek),

that, they agreed to (again): acknowledge problems in the Gen 1 and Gen 2 engines; promise another software update to the Gen 2 engines in mid-2016; and continue to assure CARB that the lessons learned from the Gen 2 engine issues had informed and improved the emissions controls in the Gen 3 engines.

130. Consistent with the agreed-upon approach, the technical presentation Defendants made to CARB on August 19, 2015, (entitled "Technical Information to enable ARB to issue the MY16 – Gen 3 certificate") generally described the modifications to the Gen 3 dosing strategy as compared to the Gen 2s, and generally described the inputs, but did not provide the actual values that enabled or disabled urea dosing or admit any time- or distance-related inputs.

131. This presentation did not satisfy CARB, which demanded more information and continued to withhold MY 2016 Gen 3 certification.

132. By late August 2015, Defendants' concerns went beyond the MY 2016 Unlawful Vehicles piling up at the ports. On August 26, 2015, CARB obtained a MY 2016 Gen 3 engine for testing, making the discovery of the Defeat Devices inevitable. VW AG, Audi AG, and VWGoA management knew they needed to provide CARB with the information it sought and expressly recognized that potential financial liability necessitated the creation of a reserve. Yet, Defendants continued to question whether and to what extent it should disclose other functions controlled by the Defeat Devices, e.g., Lean Trap Regeneration and EGR.

133. On September 3, 2015, at a meeting attended by multiple CARB officials, VW AG executives and managers (Eichler, Preuss, Schmidt, Duesterdiek,

Veldten) and Head of EEO Johnson, Defendants finally admitted the existence of the Defeat Devices in the Gen 2s and disclosed the existence of "test recognition software and engine map/dosing changes between road and chassis dyno."

134. At that September 3, 2015, meeting, VW AG, Audi AG, and VWGoA admitted for the first time that the Gen 2 ECUs had two calibrations: one for real world driving (Calibration 1) and one for testing (Calibration 2). In Calibration 1, Defendants disclosed that the urea dosing, the EGR, and the common direct feel injection system, also known as common rail direct fuel injection (the "Rail Pressure"), were lower than would be required to cause more complete combustion resulting in lower emissions. In Calibration 2, VW AG, Audi AG, and VWGoA disclosed that the urea dosing, the EGR and the Rail Pressure were higher, thereby meeting applicable emissions standards. In addition, VW AG, Audi AG, and VWGoA provided greater detail regarding the enable/disable values for these calibrations.

135. Far from convincing the regulators that certification of the MY 2016 Gen 3s should move forward, VW AG, Audi AG, and VWGoA's admissions raised additional questions and concerns to which CARB sought a response, including concerns regarding compliance with applicable durability standards (given the anticipated increase in the number of diesel particulate filter regenerations post-software update).

136. On September 18, 2015, EPA issued to VW AG, Audi AG, and VWGoA a Notice of Violation ("NOV 9-18-2015") reflecting the agency's determination that

> VW manufactured and installed defeat devices in certain model year 2009 through 2015 diesel light-duty vehicles

> equipped with 2.0 liter engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emissions control system that exists to comply with [Clean Air Act] emission standards... Additionally, the EPA has determined that, due to the existence of the defeat devices in these vehicles, these vehicles do not conform in all material respects to the vehicle specifications described in the applications for the certificates of conformity that purportedly cover them.

137. The same day, CARB sent an In-Use Compliance letter to VW AG, Audi AG, and VWGoA describing its investigation of the "reasons behind these high NO_x emissions observed on their 2.0L diesel vehicles over real world driving conditions" and its related discussions with VW AG, Audi AG, and VWGoA. According to CARB, those discussions "culminated in VW's [September 3, 2015] admission to CARB and EPA staff that it has, since model year 2009, employed a defeat device to circumvent CARB and the EPA emission test procedures."

H. Even in the Face of Formal Actions Concerning the 2.0Ls, Defendants Continued to Deny the Existence of Defeat Devices in the 3.0Ls.

138. Even in the face of regulatory action concerning the 2.0Ls and the intense public scrutiny they were facing, Defendants continued to publicly deny the existence of the Defeat Devices in the 3.0Ls.

139. At the same time, affected managers and engineers at Audi AG and EEO were discussing how to disclose to CARB the existence of time- and temperature-based urea dosing and EGR software strategies in the 3.0Ls, without expressly acknowledging the presence of the Defeat Devices VW AG, Audi AG, and VWGoA had admitted existed in the Gen 2s.

140. On or around October 2015, CARB conducted its own special cycle testing on a MY 2016 Audi A6 and a MY 2014 Volkswagen Touareg.

141. On November 2, 2015, EPA issued a Notice of Violation ("NOV 11-2-2016") to VW AG, Audi AG, Porsche AG, VWGoA and PCNA, in which EPA notified Defendants that it had conducted defeat device screening and certification testing on an MY 2016 Audi A6 and a MY2014 Volkswagen Touareg and "observed the same type of emissions behaviors as those in which VW has admitted defeat devices exist. These activities corroborate testing conducted by U.S. EPA and Environment Canada on a 2014 VW Touareg (Test Group EADXT03.02UG) and a 2015 Porsche Cayenne (Test Group FPRXT03.0CDD), respectively. This testing has also yielded evidence of a defeat device."

142. On November 20, 2015, CARB issued a press release reporting that in a November 19, 2015, meeting with EPA and CARB, "VW and AUDI told EPA and CARB that the issues raised in the In-Use Compliance letter extend to all 3.0L diesel engines from model years 2009 through 2016. Thereafter, in an In-Use Compliance Letter dated November 25, 2015, CARB confirmed its determination "that all 3.0-liter model years 2009-2016 test groups of the [Audi AG, Porsche AG, Porsche Cars North America, Volkswagen AG, and Volkswagen Group of America, Inc.] are in noncompliance with CARB standards."

I. Defendants' Deception Perpetrated On Vermont Consumers

1. Defendants Deceived Consumers Because the Unlawful Vehicles Were Not the "Green", "Clean Diesel" Cars Promised.

143. At all relevant times, in an effort to spur sales in the United States, Defendants proudly touted the performance and reliability of the Unlawful Vehicles and their purported environmental leadership, intentionally targeting its marketing to environmentally-conscious consumers.

144. Defendants employed an advertising and marketing campaign designed to transform the reputation of diesel engines among American consumers from one of noisy and smoky workhorses best left to trucks and buses into one of smooth-running, high-technology automotive engines that would deliver fuel efficiency, high performance and low NOx emissions.

145. From as early as 2007, internal documents relating to "Volkswagen's Opportunities with Clean Diesel" reflect VW AG's determination to "OWN the segment before the competition come to market" and "own 'Clean Diesel' the way Toyota owns 'Hybrid'." VW AG's marketing strategy focused on positioning "Clean Diesel as [an] environmental halo over [the] VW brand" and making "environmental conscience" the "centerpiece" of Volkswagen's "innovation/technology story."

146. Defendants' deceptive advertising was effective. By 2015, the Volkswagen Group became the world's largest automaker by sales, and by July of 2015 ranked eighth on the Fortune Global 500 list of the world's largest companies. Between 2009 and 2015, Defendants sold or leased over 3,400 Unlawful Vehicles in Vermont.

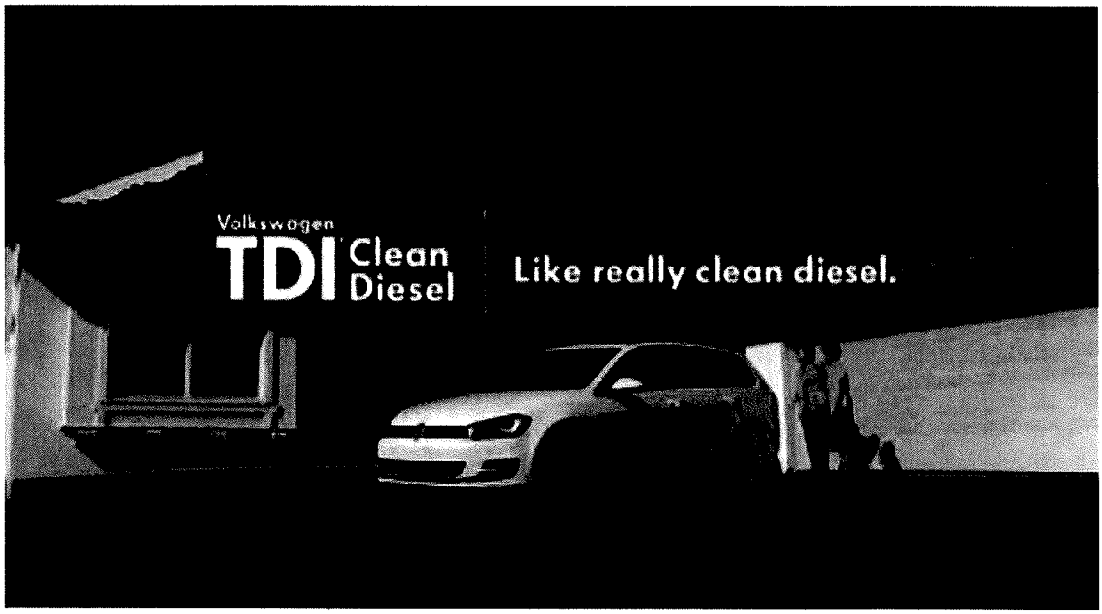
2. *Volkswagen and Audi's Clean Diesel Promotion Permeated the Media in Several Forms and Prominently Featured Its Purported Environmental Benefits.*

147. At all relevant times, Defendants were responsible for marketing and selling the Unlawful Vehicles.

148. Even in the wake of the ICCT study in Spring 2014, their own internal PEMS testing that confirmed the high real driving emissions in the 2.0Ls and 3.0Ls, and even as the regulators grew increasingly skeptical about the Unlawful Vehicles' emission compliance, Defendants did nothing to modify or scale back its message of environmental leadership and the benefits of "Clean Diesel" in the United States.

149. From 2009 through 2015, Defendants spent hundreds of millions of dollars to develop and place internet, television and print advertisements that highlighted the fuel efficiency, performance and environmental hygiene of the Unlawful Vehicles, to rebrand diesel as a clean-running, fuel-efficient alternative to their gas and hybrid competitors, and to associate the Volkswagen and Audi brands with progressive ideals, environmental consciousness, and innovation. These advertisements appeared nationally, including in Vermont.

150. Commercial videos lampooned as "Old Wives' Tales" the notion that diesel was dirty and noxious. "[Diesel] used to be dirty," says one character, "but this is 2015." A character places her scarf against the exhaust of a diesel and states, "see how clean it is!" The ad is followed by a statement, "Like really clean diesel." Exemplars are provided below.



151. As of March 30, 2015, Volkswagen's "Old Wives' Tales" ad campaign alone – a media campaign aimed at debunking the myths that diesel was, among other things, sluggish, stinky and dirty – had gotten over 9.9 million views on Visible Measures True Reach, 13.5 million Tumblr impressions, and over 5 million Twitter impressions. Within just six hours of posting, the "Dirty" video alone got over 80,000 views.

152. In separate commercials, including during multiple Super Bowls, Defendants touted the Volkswagen Jetta TDI and Audi A3 TDI as the "Green Car of the Year."

153. A 2010 AoA press release announcing the decision to advertise during the Super Bowl stated: "[T]he spot will highlight the Audi A3 TDI, recently named by Green Car Journal as the 2010 "Green Car of the Year" and will have a fun, tongue-in-cheek environmental theme....This year, Audi will demonstrate its leadership position within the luxury segment with a brand spot that delivers the message that being environmentally conscious might not be easy, but the Audi A3 TDI clean diesel is now a proven environmental solution." Metrics from that Super Bowl ad reflect the commercial had 115.6 million viewers and was, at the time, the second most watched commercial in U.S. history.

154. A commercial for the Audi A3 TDI urged consumers to "Do Your Part," and went on to depict the TDI engine as efficient, high performing, and therefore a "more fun" alternative to forms of green transportation such as cycling, bio-diesel, and public transit.

155. Press releases issued by VWGoA concerning the Unlawful Vehicles were misleading as well, falsely touting the effectiveness of the emissions control systems. For example, an August 25, 2013 press release for the MY 2014 Touareg falsely claimed its Selective Catalytic Reduction system "helps reduce NOx emissions by up to 90 percent. This lets the engine meet the Tier 2, BIN 5/ ULEVII standards imposed across all 50 U.S. states." These were the very standards that the Unlawful Vehicles violated.

156. Marketing brochures likewise contained misstatements about the effectiveness of the emissions control systems. A brochure for the MY 2015 A3, for

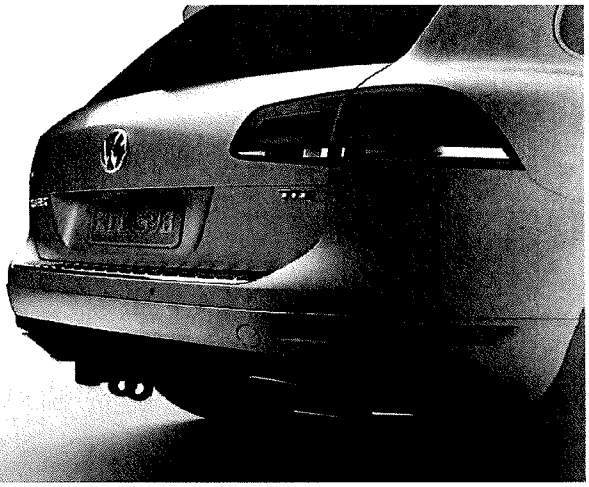
example, featuring Audi's slogan "Truth in Engineering" contained the following misleading claim about the Audi A3's NOx reduction technology: "[w]ith innovative diesel particulate filters and the nontoxic AdBlue reducing agent, we eliminate up to 95% of diesel NO_x emissions."

157. Print ads featuring tag-lines like "This ain't your daddy's diesel," "Diesel has really cleaned up its act" and "Di*sel - it's no longer a dirty word" (exemplars directly below) were geared toward rebranding diesel as a clean alternative to gasoline and hybrid competitors of Volkswagen and Audi. Exemplars of such ads are below:

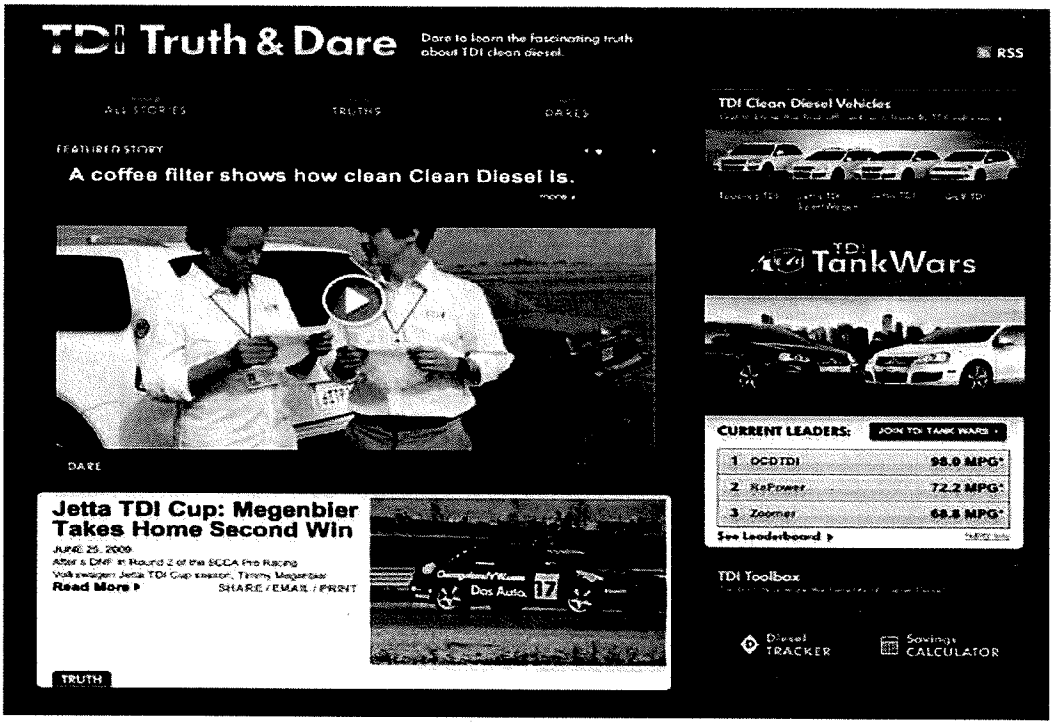
Diesel has really cleaned up its act.

Find out how clean diesel technology impacts fuel efficiency and performance, while also being a more eco-conscious choice.

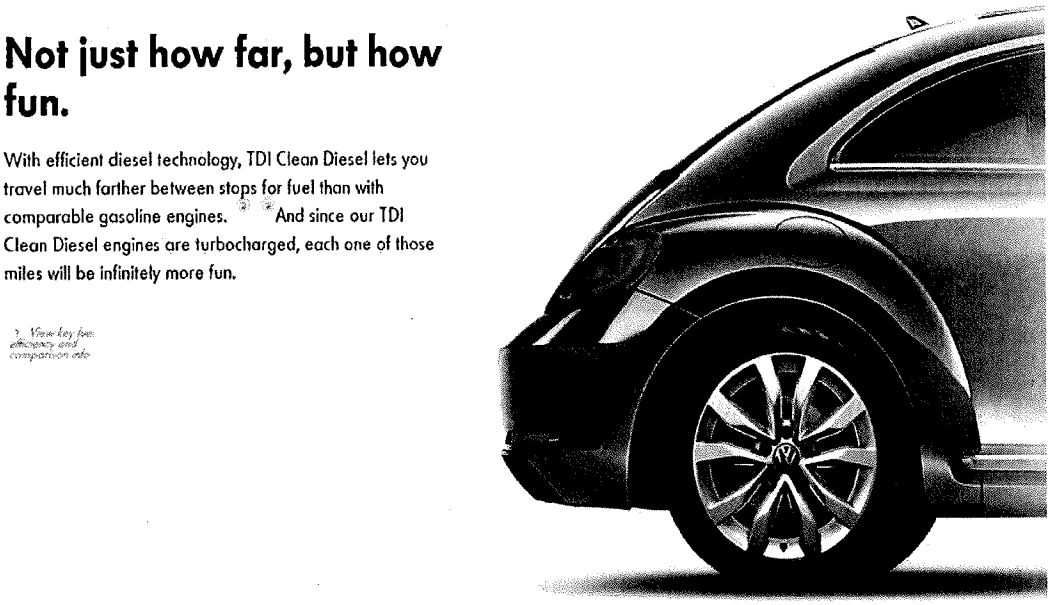
Go to clearlybetterdiesel.org



158. These advertisements directed consumers to promotional websites such as TDItruthanddare.com, launched by VW AG and VWGoA in March 2009, which included promotional advertisements, videos and interactive tools (exemplar below) which dramatized claims of TDI engines' being clean, or clearlybetterdiesel.org, which was presented as an informational factsheet and listed claims about the environmental, efficiency, and performance benefits of "Clean Diesel" engines.



159. Like the advertisement below, Volkswagen and Audi advertisements uniformly promised consumers not only a "clean" car, but one that was higher performing, and more fuel efficient than non-diesel options.



160. Defendants' advertisements also claimed that their Clean Diesel models typically retain a higher resale value than similar gasoline vehicles.

161. Defendants disseminated these advertisements and marketing materials throughout the United States, including in Vermont.

3. Porsche Deceived Consumers by Promising "Clean Diesel" Cars That Were "Green" but Which In Fact Unlawfully Polluted the Air.

162. At all relevant times, Defendants Porsche AG and PCNA (collectively referred to as "Porsche") were responsible for marketing and selling the MY 2013--2016 diesel Cayennes ("Cayennes").

163. Porsche's literature for its first diesel-powered Porsche, the Cayenne, heavily touted its new, "clean" diesel technology that allowed for clean emissions while retaining the feel of a sports car.

164. A Porsche brochure issued in 2012 for the Cayenne described the vehicle as a "technological marvel, able to take its unique fuel source and transform

it into clean, efficient, and incredibly torque-rich power," further noting: "what is new" in the Cayenne "is the degree of refinement that Porsche has brought to it, making a new 3.0-liter turbo diesel V6 that is far advanced from what many people perceive – especially in terms of its acceleration, clean emissions, and quiet-running operation.",

165. In its literature, Porsche described the Cayenne's emission control system as "innovative" and "intelligent" and claimed, among other things, the Cayenne's Exhaust Gas Recirculation, Diesel Particulate Filter, and Selective Reduction Catalytic Converter "help to ensure the reduction of harmful pollutants into the environment and make the Cayenne Diesel compliant with U.S. emissions standards."

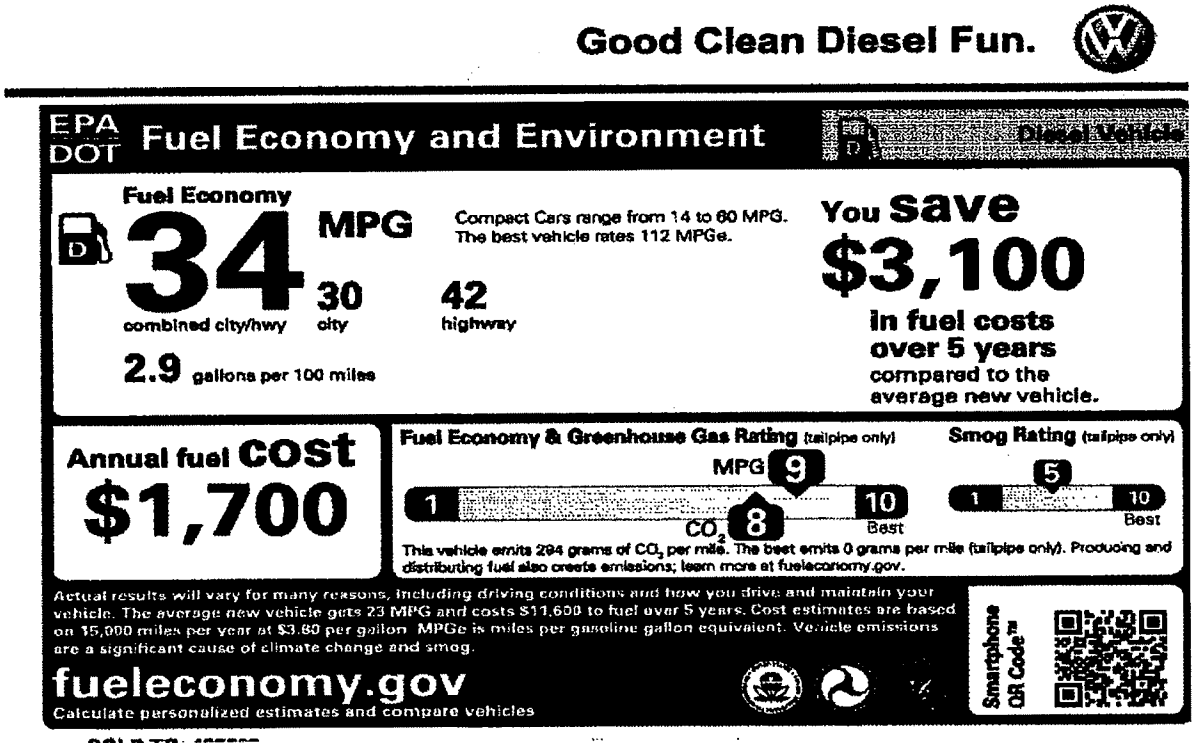
166. Porsche made these false and misleading advertisements across the country, including in Vermont. For example, Porsche targeted direct mailers to Vermont residents.

167. These claims were false and misleading because the Cayennes did not comply with U.S. or Vermont emissions standards. The Cayennes only appeared to be compliant during laboratory emissions testing due to the installation of the Defeat Devices.

4. *Defendants Subjected Buyers and Lessees to a Barrage of False and Misleading Representations and Warranties at the Point of Sale.*

168. In addition to promoting sales through its deceptive advertising campaigns, Defendants subjected actual and potential buyers and lessees to additional material misrepresentations at the point of sale and after.

169. Window stickers affixed to each of the Unlawful Vehicles for sale or lease reflected average "smog ratings" when, in fact, the Unlawful Vehicles' NO_x emissions—a major factor in smog ratings—actually exceeded applicable standards by up to 40 times. For example, the representations below were affixed to the window of a 2013 Golf TDI:



170. As required by federal and state law (including Vermont Air Pollution Control Regulation 5-1104 applicable to vehicles delivered for sale or lease in

Vermont), Defendants expressly represented to each purchaser and any subsequent purchaser that every Unlawful Vehicle was "designed, built and equipped" to conform with applicable CARB requirements incorporated into Vermont law, including NOx exhaust emissions standards.

171. Those express representations were false.

5. Defendants' Environmental Message Resonated with Buyers and Lessees of the Unlawful Vehicles Who Sought to Help the Environment, Not Unlawfully Pollute It.

172. Consumers purchased and leased Unlawful Vehicles based on Defendants' materially misleading representations that the vehicles would be environmentally friendly and clean, fuel-efficient, and compliant with all applicable emissions standards, and would provide superior performance. Purchasers were willing to pay price premiums of thousands of dollars per car, depending on the model and trim packages.

173. Consumers later expressed their anger and frustration about the fact that the Unlawful Vehicles they purchased and leased violate environmental emissions standards and were not equipped with the high performance "clean" diesel engines that Defendants advertised.

174. As a result of their deceptive statements and their failure to disclose that under normal operating conditions the Unlawful Vehicles emit up to 40 times the allowed levels of NO_x pollution, Defendants sold the Unlawful Vehicles that have illegally emitted over 45,000 additional tons of NOx in the United States, including in Vermont.

175. In a June 28, 2016, court document filed in multidistrict litigation pending in the United States District Court for the Northern District of California, Defendants admitted to their multi-year deception regarding the Unlawful Vehicles, including that it (i) installed software in 2.0L Unlawful Vehicles that "result[ed] in emissions that exceed EPA-compliant and CARB-compliant levels when the vehicles are driven on the road," and (ii) failed to disclose the existence of these Defeat Devices in Defendants' applications to regulators, so that "the design specifications of the 2.0L Unlawful Vehicles, as manufactured, differ materially from the design specifications described" in those applications. See *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672, (N.D. Cal.).

176. If Defendants had not concealed the true effect of the Defeat Devices on the operation of the "clean diesel" engine systems and the true levels of pollutants the engines emitted, they would not have been allowed to sell or lease the Unlawful Vehicles, and the State and its residents would have avoided significant expense and NO_x-related air pollution.

VI. CAUSES OF ACTION

COUNT 1

Failure to Disclose Auxiliary Emission Control Devices in Certification Applications

177. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

178. Section 5-1103(a) of the VAPCR prohibits manufacturers from delivering for sale or lease, offering for sale or lease, selling, or leasing, a new 2000 or subsequent model-year passenger car or light-duty truck, unless the vehicle is certified by CARB through issuance of an Executive Order.

179. A CARB Executive Order requires that the applicant provide a list of all AECDs installed on the vehicles. VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) &, 1961.2(d)).

180. An AECD is "any element of design which senses temperature, vehicle speed, engine [revolutions per minute], transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.082-2(b).

181. An element of design is "any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. § 86.1803-01.

182. Each application for a CARB Executive Order must also include "a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device." 40 C.F.R. § 86.1844-01(d)(11).

183. The Defeat Devices described above are prohibited AECDs.

184. Defendants failed to disclose the Defeat Devices in their applications for CARB Executive Orders for its test groups for the Unlawful Vehicles delivered for sale or lease, offered for sale or lease, or sold or leased in Vermont, in violation of VAPCR Subchapter XI.

COUNT 2

Introducing Uncertified Vehicles For Sale or Lease in Vermont

185. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

186. A manufacturer shall not deliver for sale or lease, offer for sale or lease, or sell, or lease a new passenger car or light-duty truck model year 2000 or newer unless the vehicle is certified by CARB through issuance of an Executive Order. VAPCR § 5-1103(a).

187. Vehicles are authorized by a CARB Executive Order only if the vehicles are as described in the manufacturer's application for the CARB Executive

Order "in all material respects." 40 C.F.R. § 86.1848-10(c)(6)); VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) & 1961.2(d)).

188. A motor vehicle containing an AECD that can reasonably be expected to affect the emission controls and is not disclosed or justified in the application for CARB Executive Order does not conform in all material respects with the application, and is therefore not authorized by the CARB Executive Order.

189. A Defeat Device means an AECD that

> reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use...

40 C.F.R. § 86.1803-01

190. Defeat Devices are prohibited and motor vehicles equipped with them cannot be certified. 40 C.F.R. §§ 86.1809-01, 86.1809-10.

191. The Defeat Devices installed in the Unlawful Vehicles described are defeat devices as defined in VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) & 1961.2(d)).

192. Because the Unlawful Vehicles contained undisclosed AECDs, including Defeat Devices, contained on-board diagnostics systems that did not work as represented, and did not comply with emission standards, the Unlawful Vehicles differed in material respects from the vehicles described in the applications for CARB Executive Orders for the vehicles, and, therefore the Unlawful Vehicles are not authorized by CARB Executive Orders.

193. With respect to the 2,908 Unlawful Vehicles delivered for sale or lease in Vermont, Defendants violated VAPCR 5-1103(a) by delivering for sale or lease, offering for sale or lease, selling or leasing a vehicle that was not California certified.

COUNT 3

Unlawful Installation of Defeat Devices

194. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

195. Defeat Devices are prohibited by VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) & § 1961.2(d)).

196. Section 567(b), 10 V.S.A., provides that "no person shall fail to maintain in good working order or remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control system or mechanism of a motor vehicle and required by rules pursuant to this chapter to be maintained in or on the vehicle."

197. VAPCR § 5-701, prohibits any person from rendering inoperative an emission control system which has been installed as a requirement of federal or state laws or regulations.

198. Defendants repeatedly violated 10 V.S.A. § 567(b) and VAPCR Subchapter XI, VAPCR § 5-701, by installing the Defeat Devices in each of the 2,908

Unlawful Vehicles delivered for sale or lease, offered for sale or lease, sold or leased in Vermont.

COUNT 4

Offering For Sale or Lease in Vermont Vehicles that Violate NOx Exhaust Emission Standards

199. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

200. VAPCR § 5-1103(a) prohibits a motor vehicle manufacturer from delivering for sale or lease, offering for sale or lease, selling, or leasing a new vehicle, unless the vehicle complies with California exhaust emission standards, as applicable, set forth at 13 C.C.R. §§ 1961 & 1961.2.

201. Each of the 2,908 2.0L and 3.0L 2009-2014 model-year and 3.0L 2015-2016 model-year Unlawful Vehicles described above, is required to comply with an intermediate NOx exhaust emissions standard of 0.05 grams/mile at 50,000 miles, and a full useful life NOx exhaust emission standard of 0.07 grams/mile at 120,000 miles. VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. § 1961(a)(1)).

202. Each of the 314 2.0L 2015 model-year Unlawful Vehicles is required to comply with a combined emission standard for Non-Methane Organic Gases ("NMOG") and NOx of 0.125 grams/mile at the vehicle's full useful life of 150,000 miles. VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. § 1961.2(a)(1)).

203. With respect to each of the 2.0L and 3.0L 2009-2014 model-year and 3.0L 2015-2016 model-year Unlawful Vehicles, Defendants violated VAPCR § 5-

1103(a) by delivering for sale or lease, offering for sale or lease, selling or leasing, vehicles which emitted NOx at rates higher than the applicable exhaust emission standards.

204. With respect to each of the 2.0L 2015 model-year Unlawful Vehicles, Defendants violated VAPCR § 5-1103(a) by delivering for sale or lease, offering for sale or lease, selling or leasing, vehicles which emitted NMOGs and NOx combined at a rate higher than the combined exhaust emission standard of 0.125 grams.

COUNT 5

Violation of Labeling Requirements

205. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

206. The VAPCR incorporate by reference California requirements that all new cars sold in Vermont bear a label which indicates the relative level of smog forming pollutants emitted by the vehicle.

207. The smog labeling requirements are intended to allow consumers to compare the smog forming emissions of different vehicles and to make informed decisions to purchase less polluting vehicles.

208. For vehicles manufactured before January 1, 2009, California required a Smog Index Label, which listed a Smog Index for the vehicle and a Smog Index for the average new vehicle. 13 C.C.R. § 1965 (incorporating by reference *California*

Smog Index Label Specifications for 2004 Through 2009 Model Year Passenger Cars and Light-Duty Trucks).

209. For vehicles manufactured on or after January 1, 2009, California required an Environmental Performance Label in lieu of the Smog Index Label. The Environmental Performance Label was required to list a smog rating on a scale of 1 to 10. 13 C.C.R. § 1965 (incorporating by reference *California Environmental Performance Label Specifications for 2009 and Subsequent Model Year Passenger Cars, Light-Duty Trucks, and Medium Duty Passenger Vehicles* (adopted May 2, 2008)).

210. Section 579, 10 V.S.A., which became effective May 29, 2007, required the Secretary to establish by rule a vehicle emission labeling program for new motor vehicles sold or leased in the state of Vermont with a model year of 2010 or later. 10 V.S.A. § 579(a). The labels shall include the vehicle's emissions score, and the label and the score included in the label must be consistent with California motor vehicle greenhouse gas and smog index label requirements. 10 V.S.A. § 579(b). A label that complies with the California labeling requirements meets the requirements of § 579 and the rules adopted thereunder for the content of labels. *Id.*

211. The smog scores on both of the required types of labels reflect, in part, emissions of NOx.

212. Due to the use of Defeat Devices, the smog scores stated on the required labels for each of Unlawful Vehicles described above understate the actual relative contribution of the vehicles to smog.

213. With respect to each of the Unlawful Vehicles manufactured on or after January 3, 2009, Defendants violated Subtitle XI of the VAPCR (which incorporates 13 C.C.R. § 1965) by affixing a label that did not state the vehicle's actual smog score, and violated VAPCR § 5-1103(a)(2) by delivering for sale or lease, offering for sale or lease, selling or leasing a vehicle that did not have affixed to it a label reflecting the vehicle's actual smog score.

COUNT 6

Violation of On-Board Diagnostic System Requirements

214. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

215. VAPCR Subchapter XI incorporates by reference California on-board malfunction and diagnostic system requirements, known as OBD II, set forth in 13 C.C.R. § 1968.2.

216. Section 5-1103 (a)(5), VAPCR, prohibits a motor vehicle manufacturer from delivering for sale or lease, offering for sale or lease, selling or leasing a new vehicle in Vermont, unless the vehicle complies with the malfunction and diagnostic system requirements of 13 C.C.R. § 1968.2.

217. The OBD II requirements are designed to reduce emissions through improving emission system durability and performance. 13 C.C.R. § 1968.2(a).

218. Pursuant to the OBD II requirements, on-board diagnostic capabilities are incorporated into a vehicle to monitor vehicle components that can affect emissions performance. If a problem or malfunction is detected, a warning light is illuminated on the vehicle's instrument panel, and information is generated that helps technicians identify and fix the issue that has arisen. This permits the vehicle's owner to have the malfunctioning component repaired, thereby remedying issues responsible for increased emissions.

219. Defendants included in each Unlawful Vehicle software that prevented the installed OBD system from detecting the fact that the emission control system was not operating as certified during normal vehicle use.

220. In annual inspections of vehicles in Vermont pursuant to 23 V.S.A. § 1222, VAPCR § 5-703 and the Vermont Periodic Inspection Manual, OBD systems are tested to ensure that they are operating properly and would detect the fact that the emission control system was not operating as certified during normal vehicle use. The OBD systems in the Unlawful Vehicles were intentionally designed to fail to detect when emission control equipment was not operating properly. This caused the Unlawful Vehicles to pass inspection, when in fact if the OBD systems had been designed in accordance with legal requirements they would have detected malfunctioning or ineffective emission control equipment and the Unlawful Vehicles would have failed inspection. Pursuant to 10 V.S.A § 567(b), vehicles failing

inspection are not eligible for registration until the deficiency causing the vehicle to fail inspection is remedied.

221. With respect to each of the Unlawful Vehicles, Defendants violated VAPCR Subchapter XI (incorporating 13 C.C.R. § 1968.2) by installing an OBD system that did not function as required by 13 C.C.R. § 1968.2, and violated VAPCR § 5-1103(a)(5) by delivering for sale or lease, offering for sale or lease, selling or leasing a vehicle for which the OBD system did not function as required by 13 C.C.R. § 1968.2.

COUNT 7

Violation of Durability Data Vehicle and Emissions Data Vehicle Requirements

222. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

223. California requirements incorporated into Subchapter XI of the VAPCR require a demonstration of durability. This includes a demonstration of how much emissions will increase during a vehicle's useful life (emission deterioration), and a demonstration concerning whether emissions-related components will operate properly for the vehicle's useful life (emission component durability). *See* 13 C.C.R. § 1961(d) (applicable to the 2009-2014 model-year vehicles), and 13 C.C.R. § 1961.2(d) (applicable to 2015-2016 model-year vehicles).

224. The manufacturer must assign vehicles for which it seeks certification to durability groups, which, based on good engineering judgement, are expected to

have similar emission deterioration and emission component durability characteristics. 40 C.F.R. § 86.1822-01; VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) & 1961.2(d)).

225. For each test group, the manufacturer must select a group of vehicles for testing which is expected to generate the highest level of exhaust emission deterioration. *Id.*

226. By installing the Defeat Devices, Defendants changed the configuration of the vehicles used for the durability determination for each durability group so that they were not of the configuration which is expected to generate the highest level of exhaust emission deterioration, in violation of Subchapter XI of the VAPCR.

227. Similarly, the manufacturer must select for exhaust emission testing a vehicle with a configuration which is expected to be the worst case for exhaust emissions compliance. 40 C.F.R. § 86.1430; VAPCR § 5-1102 & Appendix F (incorporating 13 C.C.R. §§ 1961(d) & 1961.2(d)).

228. By installing the Defeat Devices, Defendants changed the configuration of the test group vehicles selected for exhaust emissions testing so that they were not of a configuration which is expected to be the worst case for exhaust emissions compliance, in violation of Subchapter XI of the VAPCR.

COUNT 8

Violation of Plan Submission Requirements

229. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

230. VAPCR Subchapter XI incorporates by reference California plan submission requirements set forth in 13 C.C.R. § 1903.

231. Section 1903, 13 C.C.R. provides that any person seeking CARB certification or approval of any device to control emissions from motor vehicles shall submit plans accompanied by reliable test data indicating compliance with the appropriate emission standards and test procedures adopted by CARB.

232. Defendants submitted test data that were not reliable because the tests, among other things, were conducted on vehicles: (i) with undisclosed AECDs, including the Defeat Devices, (ii) that were not the appropriate durability data vehicle; and (iii) that were not the appropriate emissions data vehicle. The plans Defendants submitted did not accurately reflect the level of emissions or compliance with applicable emissions standards.

233. Defendants submittal of test data that were not reliable violated VAPCR Subchapter XI (incorporating 13 C.C.R. § 1903).

COUNT 9

Violations of the Vermont Consumer Protection Act for Deceptive Acts

234. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

235. The Vermont Consumer Protection Act prohibits unfair methods of commerce and unfair and deceptive acts and practices in commerce. 9 V.S.A. § 2453(a).

236. Defendants engaged in deceptive acts or practices in commerce by:

a. selling, leasing and offering for sale or lease vehicles that failed to comply with applicable state emissions, certification and/or other regulatory standards;

b. misrepresenting that the Unlawful Vehicles complied with applicable state emissions, certification and/or other regulatory standards when they did not;

c. misrepresenting the Unlawful Vehicles as "clean" and "green" despite the fact that they violated applicable state emissions, certification and/or other regulatory standards;

d. misrepresenting that the Unlawful Vehicles met certain performance measures, but failing to disclose that such measures could only be met when the Defeat Devices were operating;

e. failing to disclose and/or concealing from consumers the existence of the Defeat Devices, their harmful environmental impact, and the

fact that they were illegal to sell, lease or otherwise place into commerce in Vermont;

f. falsely and expressly representing to each buyer and lessee of an Unlawful Vehicle that the vehicle was designed, built and equipped to conform at the time of sale to applicable federal and state emissions standards and other applicable federal and state environmental standards; and/or

g. issuing misleading recalls and/or service actions that failed to provide owners and lessees of the Unlawful Vehicles with a clear description of the defect being serviced.

237. Defendants' misrepresentations and omissions about the Unlawful Vehicles were likely to mislead consumers, and the meaning ascribed by consumers to Defendants' claims about the Unlawful Vehicles was reasonable given the nature of those claims. The misleading effects of Defendants' misrepresentations and omissions were material in that they were likely to affect consumers' decisions to purchase or lease the Unlawful Vehicles.

COUNT 10

Violations of the Vermont Consumer Protection Act for Unfair Practices

238. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

239. Defendants' successful efforts to sell, lease or register the Unlawful Vehicles were accomplished via the submission of unreliable and inaccurate data to regulatory authorities which prevented the authorities from discovering:

a. the existence of the Defeat Devices;

b. that the Unlawful Vehicles failed to satisfy Vermont's emission control requirements

c. falsified Manufacturers Certificate of Origins;

d. falsified under the hood Vehicle Emission Control Information Labels;

e. that the vehicles emitted NOx at illegal rates;

f. that the vehicles' actual relative contribution to smog was understated;

g. that Defendants had installed an OBD system that did not function as required; and

h. that they were unable to make accurate durability determinations.

240. As a result of the foregoing Defendants engaged in unfair acts or practices in commerce, in violation of the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a), which were unlawful and unscrupulous and caused substantial injury to consumers with no off-setting benefit.

VII. RELIEF SOUGHT

WHEREFORE, Plaintiff State of Vermont respectfully requests judgment in its favor:

1. Adjudging Defendants liable for each of the violations of law alleged in Counts 1-10, above;

2. Ordering Defendants to pay civil penalties to the State for each of the violations of law alleged in Counts 1-10, above;

3. Requiring Defendants to abate and mitigate the Unlawful Vehicles' emissions of NOx and other pollutants in excess of applicable emission standards;

4. Permanently enjoining Defendants, and, as appropriate, their agents, servants, employees, and all persons in active concert or participation with them, from future violations of the VAPCR and the Vermont Consumer Protection Act, including:

a. failing to disclose AECDs in certification applications;

b. installing defeat devices in vehicles;

c. failing to comply with labeling, on-board diagnostic system, durability data vehicle, emission data vehicle, and plan submission requirements;

d. delivering for sale or lease, offering for sale or lease, selling or leasing in Vermont vehicles which are not covered by a CARB Executive Order, do not comply with applicable NOx and/or NOx/NMOG

emission standards, do not comply with labeling requirements, and/or do not comply with on-board diagnostic system requirements; and

e. engaging in unfair and deceptive acts and practices business practices.

5. Requiring Defendants to provide restitution or other appropriate relief to Vermont consumers who purchased or leased Unlawful Vehicles, including:

a. promptly repairing Unlawful Vehicles in the Vermont in a manner that removes or permanently disables any Defeat Device and ensuring compliance with all applicable emissions standards;

b. paying the consumer restitution and damages for the economic harm suffered as a result of Defendants' unfair or deceptive conduct; and

c. providing a warranty that the Unlawful Vehicle will conform to all applicable emissions standards.

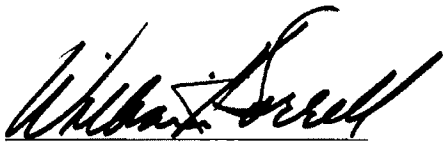
6. Requiring Defendants to disgorge to the State of Vermont all profits obtained as a result of their violations of the Vermont Consumer Protection Act;

7. Awarding investigative and litigation costs and fees to the State of Vermont; and

8. Awarding such other and further relief as the Court may deem appropriate.

Dated: September 8, 2016.

STATE OF VERMONT

By: 

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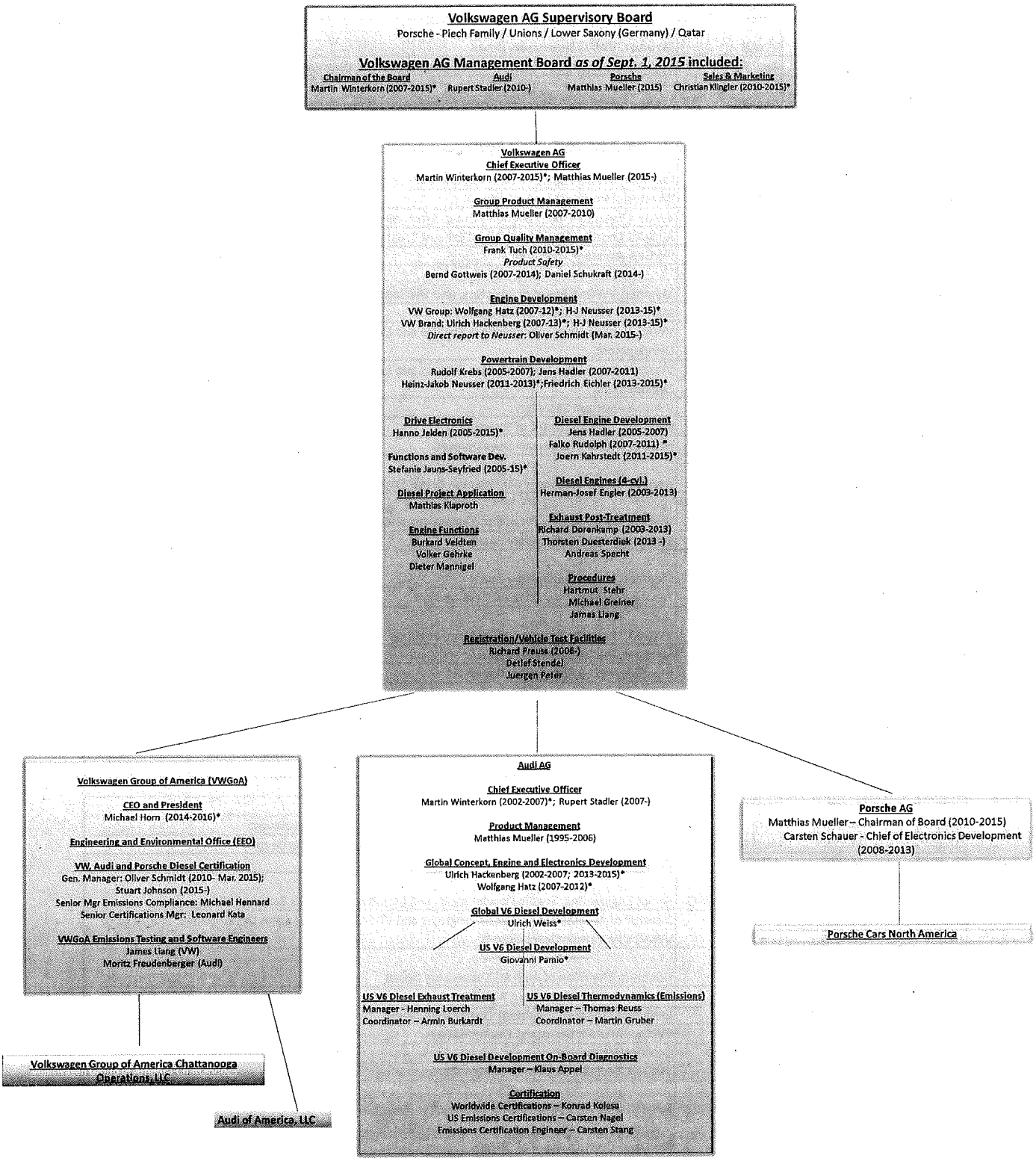
Appendix 1
Index of Defined Terms

Aconym	Term
2.0L	2.0-liter model engines
3.0L	3.0-liter model engines
ANR	Vermont Agency of Natural Resources
AoA	Audi of America, LLC, also known as Audi of America, Inc, or Audi of America
Audi AG	Audi Aktiengesellschaft
AECD	Auxiliary Emissions Control Device
CARB	California Air Resources Board
Cayennes	Porsche's diesel engine Cayenne
DEF	Diesel Exhaust Fluid
Defeat Device(s)	illegal software which allows vehicles to circumvent applicaple emissions standards
DMV	Vermont Department of Motor Vehicles
DPF	Diesel Particulate Filter
Dyno	Dynamometer/ Treadmill used in lab emissions testing
ECM	Electronic Control Module
EEO	Engineering and Environmental Office, Volkswagen Group of America, Inc.
EI-AECD	Emission Increasing-Auxiliary Emission Control Device
ECU(s)	Engine Control Units
EPA	United States Environmental Protection Agency
EGR	Exhaust Gas Recirculation
Gen 1	Generation 1/EA 189
Gen 2	Generation 2/EA 189
Gen 3	Generation 3/EA 288
ICCT	International Council on Clean Transportation
ICCT Report	International Council on Clean Transportation Report
I & M	Inspection & Maintenance
LEV	Low Emission Vehicle standards (1994-2003)
LEV II	Low Emission Vehicle standards (2004-2005)
LEV III	Low Emission Vehicle sandards (2012-)
LNT	Lean Trap
MCO	Manufacturer's Certificate of Origin
MY	Model Year
NOx	Nitrogen Oxides
OBD	On-Board Malfunction and Diagnostics System
PCNA	Porsche Cars of North America, Inc.
PEMS	Portable Emissions Measurement Systems
Porsche	PCNA and Porsche AG collectively
Porsche AG	Dr. Ing. h.c. F. Porsche d/b/a Porsche Aktiengesellschaft
SCR	Selective Catalytic Reduction
NMOG	Non-Methane Organic Gases
NOV 9-18-2015	EPA's Notice of Violation issued to VW AG, Audi AG, and VWGoA
NOV 11-2-2016	EPA's Notice of Violation issued to VW AG, Audi AG, Porsche AG, VWGoA and PCNA
Secretary	Vermont Secretary of the Agency of Natural Resources
Statutory Warranty	Vermont Emissions Warranty also known as California Emissions Warranty
TDI	Turbocharged Direct Injection
Treadmill	Treadmill test/dynometer
Unlawful Vehicles	The Diesel Vehicles with Unlawful Defeat Devices (see Table 1)
Volkswagen Group	"Volkswagen Group" comprises twelve brands: Volkswagen Passenger Cars, Audi, SEAT, ŠKODA, Bentley, Bugatti, Lamborghini, Porsche, Ducati, Volkswagen Commercial Vehicles, Scania and MAN.
VAPCR	Vermont Air Pollution Control Regulations
VW AG	Volkswagen Aktiengesellschaft
VW Chattanooga	Volkswagen Group of America Chattanooga Operations, LLC
VWGoA	Volkswagen Group of America, Inc.
WVU	West Virginia University Center for Alternative Fuels, Engines & Emissions

Appendix 2

Corporate Entities and Key Executives and Employees



* Indicates that an employee has either resigned, been suspended, or been terminated from the Volkswagen Group since the September 2015 revelations that Volkswagen employed defeat devices on its US-market diesel engines.

Appendix 3
Index of Referenced Defendants' Officers and Employees

Last Name	First Name	Defendant Entity	Department, Unit or Board
Al-Abdulla	Hussain Ali, Dr.	VWAG	Member, VWAG Supervisory Board
Appel	Klaus	Audi AG	Audi AG Manager, US V6 Diesel Development on-Board Diagnostics
Aurenz	Helmut, Senator	Audi AG	Member, Audi AG Supervisory Board (stockholder representative)
Baetge	Bjoern	VWGoA	VWGoA Treasurer
Bakar	Akbar Al	VWAG	Member, VWAG Supervisory Board
Beamish	Michael	VWGoA	Member, VWGoA Board of Directors and VWGoA Executive Vice President, Human Resources
Brabec	Filip	AoA	Director of Product Management
Bures	Jan	VWGoA	VWGoA Executive Vice President, Group After Sales and Services
Burkardt	Armin, Dr.	Audi AG	Audi AG Coordinator, U.S. V6 Diesel Exhaust Treatment (Emissions)
Creef	Larry	VWGoA	VWGoA Assistant Treasurer
Dahlheim	Christian, Dr.	VWGoA	Member, VWGoA Board of Directors; also VWGoA Executive Vice President
Diess	Herbert, Dr.	VWAG	Member, VWAG Board of Management
Dorenkamp	Richard	VWAG	VWAG Head of Ultra-Low Emissions Engines and Exhaust Post-Treatment within Diesel Engine Development.
Duesterdiek	Thorsten	VWAG	VWAG Head of Ultra-Low Emissions Engines and Exhaust Post-Treatment within Diesel Engine Development
Duke	Kevin	VWGoA	VWGoA Assistant Secretary
Dürheimer	Wolfgang	VWGoA	Member, VWGoA Board of Directors
Eichler	Friedrich	VWAG	Head of VWAG's Powertain Development
Engler	Herman-Josef	VWAG	Head of VWAG Passenger Car Engines - Diesel Engine Development
Erb	Matthias, Dr.	VWGoA	VWGoA Executive Vice President, Engineering and Planning
Falkengren	Annika	VWAG	Member, VWAG Supervisory Board
Fischer	Hans-Peter, Dr.	VWAG	Member, VWAG Supervisory Board
Freitag	Achim, Dr.	VWAG	Testing Engineer, VWAG Diesel Development
Freudenberger	Moritz	VWGoA/Audi	VWGoA Emissions Testing and Software engineer
Fritsch	Uwe	VWAG	Member, VWAG Supervisory Board
Fröhlich	Babette	VWAG	Member, VWAG Supervisory Board
Geanacopoulos	David	VWGoA	Member, VWAGoA Board of Directors and VWGoA Executive Vice President, General Counsel
Gehrke	Volker	VWAG	Dept.: VWAG Diesel Engine Functions within Powertain Electronics' Functions and Software Development
Gillies	Mark	VWAG	VW Public Relations
Goeller	Stephanie	VWGoA	VWGoA Assistant Secretary, Intellectual Property
Gottweis	Bernd	VWAG	Head of Product Safety within VWAG Quality Management.
Greiner	Michael	VWAG	VWAG Diesel Development Dept.: Procedures & Exhaust Post-Treatment
Gruber	Martin	Audi AG	Audi AG Coordinator of Audi Diesel Engine Thermodynamics Department
Guerreiro	Mario	VWGoA	VWGoA Executive Vice President, Group Communication
Hackenberg	Ulrich, Prof.	Audi AG/VWAG	Senior Engineering, Engine Development, and Member, Audi AG's Board of Management
Hadler	Jens, Dr.	VWAG	Director of Automotive Emissions Programs and VWAG in Diesel Engine Development, and Head of VWAG's Powertain Development
Hahn	Carl H., Prof.	Audi AG	Honorary Chairman of Audi AG Supervisory Board
Hahn	Christopher	VWGoA	VWGoA Assistant Secretary, Real Estate
Handschel	Uwe	Audi AG	Executive Manager, Ingolstadt Certification Group
Harrison	Scott	VWGoA	VWGoA Assitant Secretary, Dealer Matters
Hart	Robert	VWGoA EEO	Certification Analyst
Hathaway	Jed	VWGoA	VWGoA Assistant Secretary, Vehicle Administration
Hatz	Wolfgang	Audi AG/VWAG/ Porsche AG	Head of Audi AG Powertrain Department (engines and transmissions); previously held same role at Volkswagen and the top engineering job at Porsche AG.
Heimann	Ulrich	VWGoA	Member, VWGoA Board of Directors
Heizmann	Jochem, Prof.	VWAG	Member, VWAG Board of Management

Appendix 3
Index of Referenced Defendants' Officers and Employees

Heming	Mattias	VWAG	Assistance and Special Tasks Line Units Development
Hennard	Michael	VWGoA EEO	VWGoA EEO Senior Manager Emissions Compliance
Hofmann	Jörg	VWAG	Member, VWAG Supervisory Board
Horn	Johann	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Horn	Michael	VWGoA	Former CEO and President of VWGoA; Member, VWGoA Board of Directors
Huber	Berthold	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Hück	Uwe	VWAG	Member, VWAG Supervisory Board
Jauns-Seyfried	Stefanie	VWAG	VWAG Head of Functions and Software Development within Powertrain Electronics
Jelden	Hanno	VWAG	VWAG Head of Drive Electronics
Johnson	Stuart	VWGoA EEO	General Manager for VWGoA Engineering and Enviromental Office, Diesel Certification Dept.
Kata	Leonard	VWGoA EEO	Senior Certifications Manager, Emission Regulations and Certification for Diesel Certification
Keogh	Scott	VWGoA/AoA	Member, VWGoA Board of Directors and President of AoA
Kiesling	Louise, Dr.	VWAG	Member, VWAG Supervisory Board
Kilian	Gunnar	VWGoA	Member, VWGoA Board of Directors
Kissling	Karlheinz	Audi AG	Certification Engineer
Klaproth	Mathias	VWAG	VWAG Head of Diesel System Applications within Powertrain Electronics
Klingler	Christian	VWAG	VWAG Management Board, Sales & Marketing
Klotz	Rolf	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Koch	Christian	VWGoA	Member, VWGoA Board of Directors
Kolesa	Konrad, Dr.	Audi AG	Audi AG Worldwide Certifications, US V6 Diesel Development; Executive Manager, Emission Service and Certification
Kössler	Peter	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Kramer	Andy	Audi AG	Certification Engineer
Krause	Norbert	VWGoA EEO	Director, Engineering and Environmental Office (EEO)
Krebs	Carsten	VWGoA	Director at VWGoA.
Krebs	Rudolf	VWAG	Head of VWAG's Powertain Development
Kuehlwein	Joerg	Porsche AG	Former Audi AG employee
Liang	James	VWAG/VWGoA	Engineer, VWAG, Diesel Engine Development Department.; also conducted tests for VWGoA
Lies	Olaf	VWAG	Member, VWAG Supervisory Board
Loerch	Henning	Audi AG	Audi AG Director of Exhaust Gas Aftertreatment; Manager of US V6 Diesel Exhaust Treatment (Emissions)
Mannigel	Dieter	VWAG	Dept.: VWAG In Diesel Engine Functions within Powertrain Electronics' Functions and Software Development
Martens	Bernd, Dr.	Audi AG	Member, Audi AG Board of Management
McNabb	Mark	VWGoA/VoA	VWGoA Executive Vice President & Chief Operating Officer of Volkswagen of America, Inc.
Meine	Hartmut	VWAG	Member, VWAG Supervisory Board
Mosch	Peter	VWAG/Audi AG	Member, VWAG Supervisory Board; on Audi AG Supervisory Board (employee representative)
Mueller (Müller)	Matthias	VWAG/Audi AG/Porsche AG	Audi Product Managment; Chairman of VWAG Management Board, Chairman of Audi AG Supervisory Board; Chairman of Management Board for Porsche; replaced Martin Winterkorn as VWAG CEO.
Nagel	Carsten	Audi AG	Engineer; alerted colleagues at VWAG and VWGoA's EEO of the WVU ICCT Report; Executive Manager, Neckarsulm Certification Group
Neumann	Horst, Prof.	VWAG/Audi AG/VWGoA	Member, VWAG Board of Management; stockholder representative, Audi AG Supervisory Board member, VWGoA Board of Directors
Neusser	Heinz-Jakob	VWAG	VWAG In Engine Development; Head of VWAG's Powertain Development
Osterloh	Bernd	VWAG	Member, VWAG Supervisory Board
Pamio	Giovanni	Audi AG	General Manager, Audi AG
Patta	Sebastian	VWGoA	Member, VWGoA Board of Directors
Peter	Juergen	VWAG	Manager, Emission Certification & Testing; VWAG Engineer, Registration/Vehicle Test Facilities
Piëch	Hans Michel, Dr.	VWAG/Audi AG	Member, VWAG Supervisory Board; Member, Audi AG Supervisory Board (stockholder representative)
Porsche	Ferdinand Oliver, Dr. Jur.	VWAG/Audi AG	Member, VWAG Supervisory Board; Member, Audi AG Supervisory Board (stockholder representative)
Porsche	Wolfgang, Dr.	VWAG/Audi AG	Member, VWAG Supervisory Board; stockholder representative, Audi AG Supervisory Board

Appendix 3
Index of Referenced Defendants' Officers and Employees

Pötsch	Hans Dieter, Dipl.	VWAG/Audi AG	Chairman, VWAG Supervisory Board; Member, Audi AG Supervisory Board (stockholder representative)
Preuss	Richard	VWAG	Executive Manager, Emission Certification & Testing; VWAG Registration/Vehicle Test Facilities
Rank	Norbert	Audi AG	Audi AG Supervisory Board (employee representative)
Rech	Lothar	Audi AG	Certification Engineer
Reineke	Dennis	VWAG	Certification Analyst
Renschler	Andreas	VWAG	Member, VWAG Board of Management
Reuss	Thomas	Audi AG	Audi AG Manager, US V6 Diesel Thermodynamics
Rosso	Mark Del	VWGoA/AoA	VWGoA Chief Operating Office, and CEO of Audi of America, Inc.
Rudolph	Falko	VWAG	VWAG Head of Diesel Engine Development
Sanz	Francisco Javier Garcia, Dr.	VWAG/Audi AG	Member, VWAG Board of Management; Member, Audi AG Supervisory Board (stockholder representative); Member, VWGoA Board of Directors
Schauer	Carsten	Porsche AG	Chief of Porsche Electronics Development
Schlagbauer	Jörg	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Schmidt	Enrico	Audi AG	Head of Technical Services Diagnostics
Schmidt	Oliver	VWGoA EEO/ VWAG	General Manager of the EEO office and VWAG Engine Development
Schueller	Stefanie	VWGoA	VWGoA Executive Vice President, Group Quality
Schukraft	Daniel	VWAG	VWAG Product Safety in Group Quality Management.
Schwanke	Peter	VWAG	Manager, Emission Certification & Testing
Shantl	Abdallah	VWGoA	VWGoA Executive Vice President and Group Chief Information Officer--Region Americas
Sigi	Thomas, Prof.	Audi AG	Member, Audi AG Board of Management
Späth	Helmut	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Specht	Andreas	VWAG	Employee, VWAG, Diesel Engine Development Department.
Stadler	Rupert, Prof.	VWAG/Audi AG	Member, VWAG Board of Management, Chairman, Audi AG Board of Management and CEO (since 2007)
Stang	Carsten	Audi AG	Audi AG Emissions Certification Engineer
Stehr	Hartmut	VWAG	Employee, VWAG, Diesel Engine Development Department.
Stendel	Detlef	VWAG	Executive Manager, Emission Certification & Testing; Works for VWAG in Registration/Vehicle Test Facilities
Strotbek	Axel	Audi AG	Member, Audi AG Board of Management
Thomas	Suanne	VWGoA EEO	OBD Regulatory Expert
Tierney	Shannon	VWGoA	VWGoA Assistant Secretary, Licensing
Tolep	Lawrence	VWGoA	VWGoA Assistant Treasurer
Tuch	Frank	VWAG	Head of VWAG Quality Management and a direct reporter to VWAG CEO and Management Board Chairman, Martin Winterkorn.
Ulbrich	Thomas	VWGoA	Member, VWGoA Board of Directors
Veldten	Burkard	VWAG	Employee, Dept.: Diesel Engine Functions within Powertain Electronics' Functions and Software Development.
Vieser	Steffen	Audi AG	Head OBD Development
Voggenreiter	Dietmar, Dr.	Audi AG	Member, Audi AG Board of Management
Vycital	Jan	VWGoA	Member, VWGoA Board of Directors; also VWGoA Executive Vice President and Chief Financial Officer
Wäcker	Max	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Waltl	Hubert, Prof.	Audi AG	Member, Audi AG Board of Management
Wankel	Sibylle	Audi AG	Member, Audi AG Supervisory Board (employee representative)
Weil	Stephan	VWAG	Member, VWAG Supervisory Board
Weiss	Ulrich	Audi AG	Head of Global V6 Diesel Development.
Winterkorn	Martin	VWAG	CEO of Audi AG, 2002 to 2007; CEO of VWAG in 2007-2015; Chairman of VWAG's Board of Managment.
Witter	Frank	VWAG	Member, VWAG Board of Management
Wolf	Stephan	VWAG	Member, VWAG Supervisory Board
Zwiebler	Thomas	VWAG	Member, VWAG Supervisory Board

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 195-6-17 Wmcv

STATE OF VERMONT,)
)
Plaintiff,)
)
v.)
)
WESTMINSTER MEATS, LLC,)
DANIEL MANDICH,)
)
Defendants.)

STIPULATED JUDGMENT

Plaintiff, State of Vermont, and Defendants Westminster Meats, LLC and Daniel Mandich, in his personal capacity, stipulate and agree as follows:

1) Defendants Westminster Meats, LLC and Daniel Mandich, in his personal capacity, are jointly and severally liable for civil penalties amounting to $86,250.00.

2) The penalties in ¶ 1 are assessed for violations found by the Court in its August 24, 2017, default judgment order related to several environmental violations that occurred at Defendants' slaughterhouse and meat processing facility (the Facility), including: (1) discharging animal waste into state waters without a permit; (2) operating a failed wastewater system; and (3) exceeding several of the Facility's wastewater permit limits and several permit reporting violations.

3) The $86,250 penalty is due within 60 days from this Order.

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4) If Defendants do not pay the full amount within 60 days, Defendants may submit, and the State may consider, prior to initiating any contempt or collection action, Defendants' financial information demonstrating Defendants' inability to pay. The financial information shall include: (a) the past three years of federal tax returns (both individual and corporate tax returns); (b) the past six months of bank statements (both individual and corporate bank statements); and (c) a sworn statement of assets and liabilities using the "Financial Disclosure Affidavit" from the Vermont Superior Court forms.

5) The State has sole discretion to review the financial information submitted in ¶ 4, and in no way is obligated to suspend any portion of the penalty. Any reduction in the penalty will be based on the State's discretionary review and any agreement between the parties. Unless and until this Stipulated Judgment is modified by the parties, Defendants are obligated to pay the $86,250 penalty in full to the State.

6) Until such time as the penalty is paid in full, this Stipulated Judgment shall be recorded as a judgment lien in accordance with 12 V.S.A. § 2901 on Defendants' properties.

7) This Court shall retain continuing jurisdiction over the subject matter of this action and the parties: (a) to enforce the terms

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and conditions of this Order; (b) to resolve disputes between the parties concerning this Order; and (c) to conduct further proceedings and provide further relief as may be appropriate.

DATED at Windham, Vermont this 6th day of November, 2017.

STATE OF VERMONT
THOMAS J. DONOVAN, JR.
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 Windham, Vermont this 6 day of November, 2017.

DANIEL MANDICH
WESTMINSTER MEATS, LLC

By: _____
Dan Mandich, personally, and as authorized agent for Westminster Meats, LLC

SO ORDERED.

DATED at ~~Windham~~ New Haven, Vermont Nov. 6th, 2017.

_____
Hon. William D. Cohen
Windham Superior Court Judge

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I accept service of this Order and waive all other forms of service.

_____
Name & Date

cc: J Kolber, Esq.

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT,	)
	)
Plaintiff,	)
	)
v.	)
	)
WESTMINSTER MEATS, LLC, DANIEL MANDICH,	)
	)
Defendants.	)

COMPLAINT

Plaintiff, State of Vermont Agency of Natural Resources, by and through Vermont Attorney General Thomas J. Donovan, Jr., files this complaint pursuant to 10 V.S.A. §§ 8003(a), 8221 and 3 V.S.A. § 157 alleging that Defendants repeatedly violated Vermont's environmental laws. Specifically, the State alleges that Defendants violated: (1) 10 V.S.A. § 1259(a) by discharging animal waste into state waters without a permit; (2) 10 V.S.A. § 1973(a)(4) and Vermont's Wastewater System and Potable Water Supply Rule by operating a failed wastewater system; and (3) 10 V.S.A. § 8003(a)(3) by failing to comply with Defendants' wastewater permit, including exceeding water usage and effluent limits and not submitting complete and timely reports. The State seeks permanent injunctive relief and civil penalties.

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THE PARTIES

1. Vermont Agency of Natural Resources (ANR) is a state agency with offices in Montpelier, Vermont.
2. Defendant Westminster Meats, LLC (Westminster Meats) is a Vermont corporation located at 52 Seafood Lane, Westminster, Vermont.
3. Defendant Daniel Mandich is the landowner of the property at 52 Seafood Lane, Westminster, Vermont, and the manager of Westminster Meats.
4. Venue is proper in Windham Superior Court.

STATUTORY AND REGULATORY STRUCTURE

5. 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.
6. 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]."
7. "[W]aters" is defined in 10 V.S.A. § 1251(13) as including "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."
8. Title 10, Chapter 64 establishes a Potable Water Supply and Wastewater System Permit program to "regulate the construction, replacement,

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modification, and operation of potable water supplies and wastewater systems in the state in order to protect the human health and the environment . . ." 10 V.S.A. § 1971(1).

9. Pursuant to 10 V.S.A. § 1978, the Secretary of ANR "shall adopt rules" necessary for the administration of Chapter 64.

10. Section 1973(a)(4) of Title 10 requires a person to obtain a wastewater and potable water supply permit before "using or operating a failed supply or failed system."

11. Vermont's Wastewater System and Potable Water Supply Rule (Wastewater Rule), section 1-303-(a)(10), also prohibits use of a failed wastewater system without a permit.

12. Section 1-201(a)(25) of the Wastewater Rule defines a failed system, in part, as one that "allows wastewater . . . to be exposed to the open air, to pool on the surface of the ground . . . or to back up into a building or structure."

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

14. 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, Water Pollution Control (Chapter 47) and Potable Water and Wastewater (Chapter 64).

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15. 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." Chapters 47 and 64 are listed statutes identified in 10 V.S.A. § 8003. Pursuant to 10 V.S.A. § 8003(a), the State may enforce all permits issued under these statutes.

16. 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.

FACTS RELATING TO DEFENDANTS

The Westminster Meats Facility

17. Westminster Meats operates a slaughterhouse and meat packaging facility (the Facility) located at 52 Seafood Lane in Westminster, Vermont. The Facility generates animal waste and sewage as a result of its business operations. The Facility is required to have a wastewater and septic system for processing the animal waste and sewage. As set forth below, Defendants have failed to properly process the Facility's waste in multiple significant ways in violation of Vermont's environmental laws and regulations.

The Facility's Discharge of Animal Waste

18. On August 15, 2014, an inspector from the Vermont Agency of Agriculture Food and Markets (AAFM) visited the Facility and observed a garden hose running approximately 50 feet from inside the Facility to a small hole in the ground. The hole in the ground connects to a grass-covered culvert, which

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feeds into a small stream alongside the Facility's driveway. The originating end of the hose was inside the Facility and placed in an open-topped tank (approximately 800 gallons in size) containing wastewater and animal blood. At the point of discharge, the small stream was running red; above the wastewater discharge the stream was clear. The AAFM inspector documented the discharge via photographs and video, and provided the photos and video to ANR on August 16, 2014.

19. On August 22, 2014, an ANR inspector visited the facility. He dye-tested the culvert and confirmed that it discharged to Newcomb Brook via the small, unnamed stream next to the Facility's driveway.

20. The small stream and Newcomb Brook are both waters of the State as defined in 10 V.S.A. § 1251(13).

21. During the August 22nd inspection, Defendant Mandich stated to the ANR inspector that five times in the past two years he had personally instructed employees to empty the blood tank into the culvert using the garden hose. A Westminster employee signed a sworn statement (dated August 20, 2014) describing five instances in which he personally emptied the blood tank via the garden hose into the culvert hole in the past two years. The Westminster employee also described two instances where he observed Defendant Mandich personally emptying the blood tank into the culvert hole via a garden hose sometime in 2011–2012.

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22. A sampling of the stream by ANR in September 2014 confirmed there was water pollution from sewage, as shown by elevated levels of biochemical oxygen demand (BOD) as well as elevated phosphorous and certain metals.

23. On September 9, 2014, the Vermont Superior Court's Environmental Division issued an Emergency Order to Defendants to cease all unpermitted discharges and properly dispose of the animal waste and the blood tank.

The Facility's Failed Wastewater System

24. On July 15, 2014, an ANR inspector observed that the disposal chambers of the Facility's wastewater system were clogged with wastewater and wastewater was backed up into the inspection ports of the chambers, indicating that the system was failing.

25. On August 22, 2014, another ANR inspector observed that the access ports of the two in-line septic tanks were full. He then inspected the Facility's leach field and saw that sewage and wastewater had surfaced and pooled in small holes that were dug in the field.

26. Defendants did not apply for a new wastewater system permit until August 26, 2014. Therefore, prior to that date, Westminster had been operating a failed wastewater system.

27. These same violations have occurred previously. In January and February 2013 ANR inspectors observed and documented repeated instances of animal blood and waste pooling on the Facility's grounds and draining into the stream that connects to Newcomb Brook. For example, at that time, ANR

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inspectors observed open-topped and overflowing blood tanks in the Facility. The blood and waste were overflowing and mixing with snow near the Facility's driveway; employees were using a snowplow to spread the waste slurry along the Facility's dirt road. These conditions led to an Emergency Order by the Environmental Division on February 15, 2013.

28. A new wastewater system was put in place by Defendants in October 2013 but the same problems continued.

29. Defendants entered into an Assurance of Discontinuance in January 2014 with ANR, agreeing to fix the wastewater system and paying a $10,749 penalty.

30. Defendants' wastewater system continued to fail in the spring of 2014. An employee of Westminster Meats described a practice of emptying the Facility's full septic tanks into an old fuel truck and dumping that waste over an embankment adjacent to the Facility's property. The employee stated that due to the failed wastewater system, this was done a total of around 15 times by himself, Defendant Mandich and other Facility employees at Mandich's instruction.

The Facility's Wastewater Permit

31. On May 22, 2015, ANR issued a new wastewater permit pursuant to 10 V.S.A. Chapter 64, permit # WW-2-0271-4R (Permit) to Defendant Mandich, landowner of the Facility's property, to operate the Facility's new wastewater and septic system.

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32. Defendants have failed to comply with four specific Permit conditions.

33. First, the Permit allows up to 1050 gallons per day of process wastewater to be disposed of using the system.

34. Defendants exceeded this limit on two occasions in 2015, and at least eight times over a six-month period in 2016. On September 21, 2015, Defendants reported a usage of 2051 gallons per day, and on September 22, 2015, Defendants reported a usage of 1311 gallons per day. There were at least eight exceedances of the 1050 gallon per day limit over a six-month period in 2016: July 2016 (one exceedance), August 2016 (two exceedances), September 2016 (one exceedance), October 2016 (three exceedances), and December 2016 (one exceedance).

35. Second, the Permit limits total suspended solids (TSS) to 150 mg/l. Defendants exceeded this limit. On August 13, 2015, Defendants reported a TSS level of 485 mg/l.

36. Third, the Permit limits BOD effluent to less than 230 mg/l. On August 13, 2015, Defendants reported a BOD level at the limit of 230 mg/l.

37. Fourth and last, the Permit requires several reports to be submitted.

38. Condition 3.7 of the Permit required four inspection reports from a licensed service provider of the inspection and maintenance of the "HighStrengthFAST 3.0" system to be submitted in June 2015, August 2015, September 2015, and September 2016. Defendants failed to submit any of these inspection reports.

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39. Conditions 3.6 and 3.10 of the Permit required inspection reports by the Licensed Designer to be submitted within 15 days of each inspection, including bi-annual reports every October and April. The reports must also contain service reports by the service provider. Defendants failed to submit four service provider reports for May 2015, August 2015, September 2015 and September 2016. Defendants also failed to submit the April 2016 and April 2017 bi-annual reports.

40. Condition 3.9 of the Permit required the landowner or the landowner's authorized representative to submit completed daily process water meter readings and animal count reports. The initials of the individual documenting the reading and animal count, the date of the reading and count, and any pertinent notes pertaining to the flows were to be recorded. A copy of the documentation for the daily meter readings and animal count was required to be submitted within 15 days of the Licensed Designer inspections as part of the bi-annual April and October reports. Defendants failed to submit completed daily process water meter readings and animal count reports.

41. On December 23, 2016, ANR issued a Notice of Alleged Violation (NOAV) for the above reporting violations and exceedances of wastewater usage. The NOAV required immediate actions to comply with the Permit. To date, Defendants have not corrected the Permit violations.

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VIOLATIONS

42. Paragraphs 1–41 are re-alleged and incorporated by reference for each of the below Counts.

COUNT ONE: Unpermitted Discharges into State Waters

43. On August 15, 2014, Defendants used a garden hose to empty an animal blood tank into a culvert that connects to a stream and Newcomb Brook (both state waters under 10 V.S.A. § 1251(13)). This deliberate act was documented via video and photographs. Defendants further admitted to doing this at least five times in the two years prior.

44. By discharging animal waste (blood) into waters of the State, i.e. Newcomb Brook and the small stream, as observed on August 15, 2014, and admitted by Defendants on five other separate occasions, without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a). Each day that a violation continues is a separate continuing violation.

COUNT TWO: Operation of Failed Wastewater System

45. ANR inspectors observed two specific instances of Defendants' wastewater system failing: July 15, 2014 and August 22, 2014. ANR inspectors observed wastewater backed up and pooling on Facility grounds.

46. Defendants did not have a permit to operate a failed wastewater system on either occasion. Defendants' new permit application was submitted on August 26, 2014.

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47. By operating a failed wastewater system from at least July 15, 2014 through August 26, 2014, without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1973(a)(4) and Wastewater Rule § 1-303-(a)(10). Each day that a violation continues is a separate continuing violation.

COUNT THREE: Exceeded Wastewater Daily Usage Limit

48. The Facility's Permit limits Defendants to 1050 gallons per day of process wastewater.

49. Defendants exceeded this limit twice in 2015, by reporting a daily usage of 2051 gallons on September 21, 2015 and a daily usage of 1311 gallons on September 22, 2015.

50. Defendants further exceeded the 1050 gallon per day limit at least eight times over a six-month period in 2016: July 2016 (one exceedance), August 2016 (two exceedances), September 2016 (one exceedance), October 2016 (three exceedances), and December 2016 (one exceedance).

51. By exceeding the daily gallon usage limit on September 21, 2015, September 22, 2015, and throughout 2016, Defendants violated the terms of the Permit and 10 V.S.A. § 8003(a)(9). Each day that a violation continues is a separate continuing violation.

COUNT FOUR: Exceeded Total Suspended Solids Limit

52. The Facility's Permit limits TSS effluent to 150mg/l.

53. Defendants exceeded this limit, by reporting a TSS level of 485 mg/l on August 13, 2015.

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54. By exceeding the TSS effluent limit on August 13, 2015, Defendants violated the terms of the Permit and 10 V.S.A. § 8003(a)(9). Each day that a violation continues is a separate continuing violation.

COUNT FIVE: Exceeded Biochemical Oxygen Demand Limit

55. The Facility's Permit limits BOD effluent to less than 230 mg/l.

56. Defendants exceeded this limit by reporting a BOD level of 230 mg/l on August 13, 2015.

57. By exceeding the BOD effluent limit on August 13, 2015, Defendants violated the terms of the Permit and 10 V.S.A. § 8003(a)(9). Each day that a violation continues is a separate continuing violation.

COUNT SIX: Failure to Submit Inspection and Maintenance Reports

58. Condition 3.7 of the Facility's Permit required four separate reports from a licensed service provider of the inspection and maintenance of Defendants' "HighStrengthFAST 3.0" wastewater system to be submitted. The reports were to be submitted in June, August and September 2015, respectively, and one was to be submitted in September 2016.

59. Defendants did not submit any service provider inspection reports since issuance of the permit.

60. By failing to submit the inspection and maintenance reports as required by Condition 3.7 of the Permit in June 2015, August 2015, September 2015 and September 2016, Defendants violated the terms of the Permit and 10 V.S.A.

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§ 8003(a)(9). Each day that a violation continues is a separate continuing violation.

COUNT SEVEN: Failure to Submit Bi-Annual Design Reports and Service Provider Reports

61. Conditions 3.6 and 3.10 of the Facility's Permit required inspection reports by the Licensed Designer to be submitted within 15 days of each inspection, including bi-annual reports in October and April. The reports must also contain service reports by the service provider.

62. Defendants failed to submit the April 2016 and April 2017 bi-annual reports and four service provider reports for May 2015, August 2015, September 2015, and September 2016.

63. By failing to submit the April 2016 and April 2017 bi-annual reports and the four service provider reports for May 2015, August 2015, September 2015 and September 2016 as required by Conditions 3.6 and 3.10 of the Permit, Defendants violated the terms of the Permit and 10 V.S.A. § 8003(a)(9). Each day that a violation continues is a separate continuing violation.

COUNT EIGHT: Failure to Submit Completed Daily Process Water Meter Readings and Animal Count Reports

64. Condition 3.9 of the Facility's Permit required the landowner or the landowner's authorized representative to obtain and document daily readings of the wastewater meter for all of the process wastewater from the slaughterhouse and the number of animals processed that day. The initials of the individual documenting the reading and the animal count, the date of

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the reading and the count, and any pertinent notes pertaining to the flows must also be recorded.

65. A copy of the documentation for the daily wastewater meter readings and animal count was required to be submitted within 15 days of the Licensed Designer inspections as part of the bi-annual April and October reports.

66. Defendants failed to submit completed daily meter readings and animal count reports.

67. By failing to submit completed daily process water meter readings and animal count reports as required by Condition 3.9 of the Permit, Defendants violated the terms of the Permit and 10 V.S.A. § 8003(a)(9). Each day that a violation continues is a separate continuing violation.

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 Eight;
2. 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 each of the above violations (Counts One through Eight);
3. Permanent injunctive relief requiring Defendants to: (i) comply with all ANR regulatory and permit requirements, including timely submission of

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all reports and other required documents and (ii) hire a certified operator and service provider for the wastewater 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 Defendants' regulatory and permit compliance;

4. An Order requiring Defendants to reimburse the State for its costs and expenses in investigating and prosecuting this action; and
5. Such other relief as this Court deems just and appropriate.

Dated June 1, 2017 at Montpelier, Vermont.

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

by: 

Justin Kolber
Assistant Attorney General
Office of the Attorney General
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ENTRY ORDER

2017 VT 106

SUPREME COURT DOCKET NOS. 2016-273 & 2016-274

MARCH TERM, 2017

In re Hinesburg Hannaford Act 250 Permit In re Hinesburg Hannaford Site Plan Approval (Mary Beth Bowman, et al., Appellants)	}	APPEALED FROM: Superior Court, Environmental Division DOCKET NOS. 113-8-14 Vtec & 163-11-12 Vtec

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

The Environmental Division's site-plan decisions and judgment entered on April 12, 2016 and July 7, 2016 are reversed. The Environmental Division's Act 250 decisions and judgment entered on July 7, 2016 are affirmed in part and reversed in part, and the matter is remanded for further consideration consistent with this opinion.

FOR THE COURT:

Beth Robinson, Associate Justice

Concurring:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

John P. Wesley, Superior Judge (Ret.),
Specially Assigned

2017 VT 106

Nos. 2016-273 & 2016-274

In re Hinesburg Hannaford Act 250 Permit
In re Hinesburg Hannaford Site Plan Approval
(Mary Beth Bowman, et al., Appellants)

Supreme Court

On Appeal from
Superior Court,
Environmental Division

March Term, 2017

Thomas G. Walsh, J.

Allan R. Keyes of Ryan Smith & Carbine, LTD., Rutland, and James A. Dumont of Law Office of James A. Dumont, Esq., P.C., Bristol, for Appellants.

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

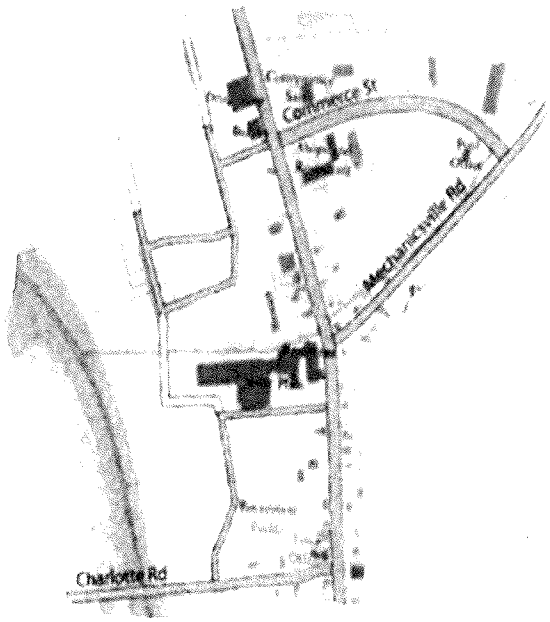
David W. Rugh of Stitzel, Page & Fletcher, P.C., Burlington, for Appellee/Cross-Appellant Town of Hinesburg.

Christopher D. Roy of Downs Rachlin Martin PLLC, Burlington, for Appellee/Cross-Appellant Martin's Foods of South Burlington, LLC.

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

¶ 1. **ROBINSON, J.** These two consolidated appeals challenge the Environmental Division's decisions concerning applications for site-plan approval and an Act 250 permit for the proposed construction of a Hannaford's supermarket in the Town of Hinesburg. We affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

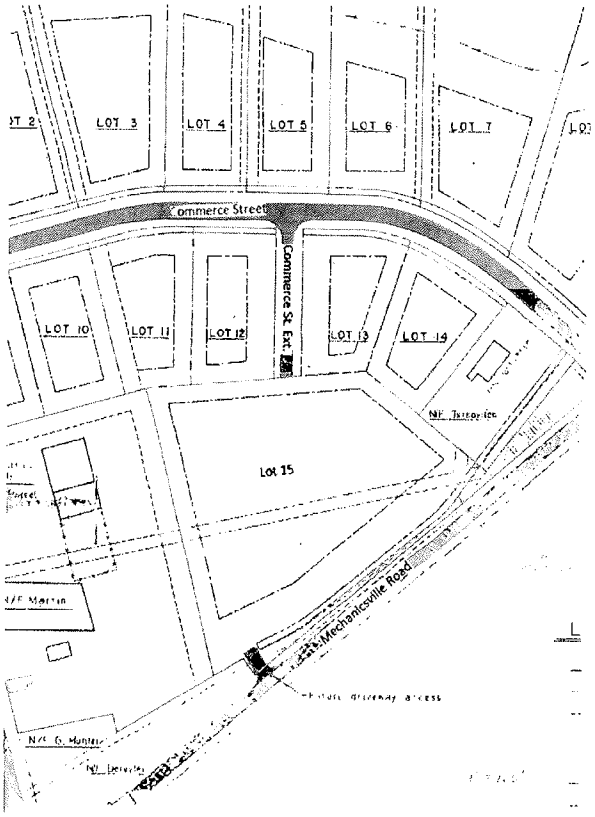
¶ 2. Appellee/cross-appellant Martin's Foods of South Burlington, LLC (Hannaford) proposes to construct a 36,000-square-foot grocery store and pharmacy with an adjacent 128-space parking lot on Lot 15 of the Commerce Park subdivision in Hinesburg. Lot 15, over four acres in size, is the largest of the fifteen lots in the subdivision, for which municipal and Act 250 permits were originally granted in 1987. The subdivision is located just north of the Hinesburg Village center within a triangular space formed by Route 116, Patrick Brook, and Mechanicsville Road. Route 116 runs north-south and is the main thoroughfare through Hinesburg. Mechanicsville Road runs northeast from Route 116, from just south of the subdivision, to the east end of Commerce Street. Commerce Street runs east-west parallel to Patrick Brook but within the subdivision north of Lot 15, connecting Route 116 and Mechanicsville Road to form the hypotenuse of the triangle in which most of the subdivision lies. Commerce Street Extension runs a short distance off Commerce street south into the subdivision toward Lot 15.



Section of June 2014 Route 116 Corridor Study Map

¶ 3. Lot 15, the last lot in the subdivision to be developed, is a four-sided irregularly-shaped lot bounded by existing development within the subdivision on two sides and by a canal and adjoining sidewalk running parallel to Mechanicsville Road. The canal was constructed over a

century ago to provide water to a cheese factory. The relatively recently built sidewalk runs along the canal on the side opposite Mechanicsville Road. Vehicular access to the proposed project on Lot 15 would be by way of Commerce Street and then the Commerce Street Extension, which runs between existing developments located on the southern side of Commerce Street.



General Plan Sheet from 1986 Subdivision Plat Plan

¶ 4. The proposed project is a permitted use in the Town's Commercial Zoning District within the Hinesburg Village Growth Area and is subject to site plan review and conditional use approval under the Town's 2009 zoning regulations. Hannaford initially applied for site-plan and conditional use approval for the proposed project in November 2010. The Hinesburg Development Review Board (DRB) reviewed the application several times before the public hearing on the project was closed for the final time in October 2012. Following evidentiary hearings and site visits, the DRB approved the application with conditions in a written decision in November 2012.

Appellants/cross-appellees, a group of Hinesburg residents that oppose the project (Neighbors), appealed the DRB decision to the Environmental Division, and Hannaford cross-appealed.

¶ 5. In March 2013, Hannaford filed its Act 250 application with the District #4 Environmental Commission. Hannaford sought approval under all Act 250 criteria except Criterion 2, relating to the water supply, because the Town was in the process of upgrading its municipal well system and did not have available capacity to support the project at the time of the application. In June 2014, after conducting site visits and evidentiary hearings, the District Commission issued its initial merits decision concluding that the project, with specified conditions, satisfied each Act 250 criterion except Criterion 2. The District Commission issued an amended set of findings and conclusions on July 23, 2014. Neighbors appealed this decision to the Environmental Division.

¶ 6. The Environmental Division coordinated the site-plan and Act 250 appeals with other appeals relating to the project. After deciding a series of pretrial motions regarding a wide variety of issues, the trial court conducted a site visit and merits hearing from November 30 through December 2, 2015. The parties stipulated to submit direct testimony and related exhibits to the court in advance of the merits hearing through prefiled testimony. Cross-examination, re-direct examination, and rebuttal testimony were then presented live at the trial. Among the numerous matters contested at trial were issues relating to stormwater management, traffic, aesthetics, and public investment in the canal sidewalk.

¶ 7. In April 2016, the trial court issued separate 23-page and 60-page decisions with accompanying judgment orders, approving, respectively, Hannaford's site-plan and Act 250 applications with conditions. In response to multiple post-trial motions regarding both decisions, the court issued an amended Act 250 decision and indicated that it was making no changes to its

site-plan decision.[1] Neighbors appealed both decisions, and Hannaford and the Town of Hinesburg cross-appealed both. This Court consolidated the appeals for purposes of argument and decision.

¶ 8. In challenging the trial court's site-plan approval, Neighbors argue that: (1) the trial court erred in declining to enforce a setback limit reflected in the final plat plan for the subdivision as approved in 1987; (2) Hannaford's site-plan application violated "front yard" parking restrictions set forth in the Town's 2009 zoning regulations; (3) the east-west swale proposed in the site-plan application will not control and treat stormwater as predicted by Hannaford's expert; and (4) Hannaford did not satisfy its burden regarding stormwater control because part of the discharge system is proposed to be located on land outside of its control. In their cross-appeals, Hannaford and the Town challenge the trial court's condition requiring Hannaford to install a traffic signal at the intersection of Route 116 and Mechanicsville Road before the project may be completed, and the Town challenges the court's elimination in its amended decision of a condition requiring Hannaford to perform a post-development traffic study.

¶ 9. In challenging the trial court's Act 250 decision, Neighbors argue that: (1) the trial court erred in declining to enforce a provision in the original approved Act 250 master subdivision permit that development in the subdivision would be "small scale"; (2) the trial court improperly focused on the foreseeability of a commercial development on Lot 15 in determining whether the proposed project would materially interfere with the public's use and enjoyment of the canal path; and (3) Hannaford failed to dispute the uncontradicted testimony of Neighbors' expert that the east-west swale would not function as claimed because of the area's saturated soils. As in their site-plan cross-appeals, Hannaford and the Town reiterate their opposition to a condition requiring a traffic

[1] The Town argues that although the trial court indicated it was not amending its initial site-plan decision, it simultaneously suggested that it was eliminating the condition in that initial order that Hannaford perform a post-development traffic study. Because we reverse the site-plan determination on other grounds, we do not resolve the confusion concerning the effect of the trial court's site-plan decision on the post-development traffic-study condition.

signal at the Route 116/Mechanicsville Road intersection. The Town also challenges the trial court's decision on reconsideration to eliminate the post-development traffic study requirement. The Natural Resources Board (NRB) has filed a brief in the Act 250 appeal asking this Court to uphold the condition that a traffic signal be placed at the Route 116/Mechanicsville Road intersection prior to operation of the proposed project.

¶ 10. For the reasons stated below, we conclude, with respect to the site-plan appeal, that Hannaford's proposed site plan violates the setback limit in the final plat plan approved in 1987. We conclude that Hannaford's parking scheme does not violate the site-plan approval standards in the applicable zoning regulations. We need not reach the issues raised in that appeal concerning the east-west swale and traffic control. Accordingly, we reverse the Environmental Division's approval of the site plan.

¶ 11. Regarding the Act 250 appeal, we conclude that the project does not violate a requirement in the original approved subdivision permit that development be primarily "small scale," and that the proposed project would not materially interfere with the public's use and enjoyment of the canal path. We remand for further development of evidence concerning the east-west swale and traffic issues. Accordingly, we reverse the Environmental Division's approval of the Act 250 permit and remand the matter for further consideration.

I. Standard of Review

¶ 12. Our general standard of review is not in doubt.[2] "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." In re Wagner & Guay Permit, 2016 VT 96, ¶ 9, ___ Vt. ___, 153 A.3d 539 (quotation omitted). This is so because "the environmental court determines the credibility of

[2] We discuss more fully below, in the context of our analysis of the trial court's site-plan approval, our standard of review with respect to the trial court's construction of municipal zoning regulations.

witnesses and weighs the persuasive effect of evidence." In re Champlain Parkway Act 250 Permit, 2015 VT 105, ¶ 10, 200 Vt. 158, 129 A.3d 670. We review the court's legal conclusions without deference, but "we will uphold those conclusions if they are reasonably supported by the findings." Wagner & Guay Permit, 2016 VT 96, ¶ 9.

II. Site-Plan Appeal

A. Review of Zoning Regulations and Permit Conditions

¶ 13. The parties disagree about whether this Court owes any deference to the Environmental Division's interpretation of the Town's zoning ordinance. Neighbors contend that the interpretation of a zoning ordinance presents a legal issue that we review without deference to the Environmental Division, while Hannaford asserts that the deference we give to the Environmental Division with respect to findings of fact extends to its interpretation of zoning ordinances. We need not resolve this dispute in this appeal because our resolution of the issues raised by the parties would be the same under either proposed standard of review.

B. Setback Limits

¶ 14. On appeal from the DRB to the Environmental Division, Neighbors argued that Hannaford's site plan violated a setback condition of the 1987 subdivision approval and that Hannaford had not sought a permit amendment from the Town. Specifically, Neighbors asserted that the proposed project violates a setback, reflected in the 1986 final approved plat plan for the subdivision, that is seventy-five feet from the canal running parallel to the southern side of the subdivision. In response, Hannaford asserted that: (1) the court was without jurisdiction to consider whether a subdivision permit amendment was required because it had not sought a permit amendment from the Town; and (2) in any event, the building setbacks depicted on the plat plan accompanying the 1987 subdivision approval did not establish enforceable conditions because they are unclear and had not been enforced by the Town with respect to other permitted projects within the subdivision.

¶ 15. The trial court acknowledged that it had no jurisdiction to consider whether the 1987 subdivision approval should be amended, given that Hannaford had not sought a permit amendment from the Town. The court determined, however, that although in 1987 the Town planning commission approved the subdivision as depicted on the final plat plan accompanying the subdivision application, the plat plan did not establish enforceable setbacks because: (1) the narrative in the planning commission's written decision approving the subdivision did not discuss or establish any required setbacks for lots within the subdivision; (2) although the plat plan includes a legend indicating various types of lines depicting setbacks, boundaries, waterways, and roads, it has no inscriptions or notes—other than a notation indicating a one-inch-per-100-foot scale—identifying any measured distances between the lines; and (3) the plat plan does not have an accompanying document indicating an intent to impose a setback restriction. Relying on a recent decision by this Court, the trial court concluded that the distances between the various lines on the 1986 plat plan were not "sufficiently clear to constitute land-use restrictions." In re Willowell Found. Conditional Use Certificate of Occupancy, 2016 VT 12, ¶ 15, 201 Vt. 242, 140 A.3d 179.

¶ 16. On appeal to this Court, Neighbors argue that the trial court erred by concluding that the seventy-five-foot building setback limit in the final approved plat plan for the original subdivision application was unenforceable.[3] According to Neighbors, the recorded plat unambiguously provided reasonable notice of the setback requirement and, even assuming the plat plan was ambiguous as to the setback requirement, the fact that the Town may have approved buildings within the subdivision that violated the setback requirement, whether intentional or not, was not persuasive evidence of the planning commission's intent when it approved the subdivision. For its part, Hannaford argues that the scant reference to setback lines on the general plan sheet of

[3] Neighbors' argument that the trial court erred in allowing Hannaford to collaterally attack the unappealed 1987 plat approval, in violation of 24 V.S.A. § 4472(d), misses the central issue. Hannaford is not seeking to set aside a condition of the plat approval; the issue in this case is whether that 1987 approval created an enforceable setback condition in the first place.

the plat was insufficient to establish an enforceable permit condition, as evidenced by the fact that no such setback limit has been enforced in the three decades since the subdivision was approved.

¶ 17. The applicable legal standard is well established: if the approved plat plan clearly includes the claimed seventy-five-foot setback, that setback is an enforceable condition. We have recently reiterated that, because the function of a subdivision permit is to approve plats of land, "recorded plats necessarily become subdivision permit conditions." Wagner & Guay Permit, 2016 VT 96, ¶ 13 (quotation omitted); see also In re Stowe Club Highlands, 164 Vt. 272, 276, 668 A.2d 1271, 1275 (1995) ("[A]lthough we will not recognize implied permit conditions as subdivision permits, recorded plats necessarily become subdivision permit conditions."). To be enforceable, subdivision permit conditions "must be specific enough to provide a landowner with notice that his or her property rights are fettered." Willowell, 2016 VT 12, ¶¶ 15, 18 (stating that "restrictions should be explicit to provide notice of all conditions imposed because [otherwise] 'subsequent purchasers would lack notice of all restrictions running with the property' " (quoting In re Kostenblatt, 161 Vt. 292, 298, 640 A.2d 39, 43 (1994))). "A violation of a condition of a subdivision permit would be a violation of the zoning ordinance itself." In re Robinson, 156 Vt. 199, 202, 591 A.2d 61, 62 (1991).

¶ 18. In this case, the building setback on the approved and recorded subdivision plat is clear and unambiguous. The Hinesburg Planning Commission's final plat approval for the subdivision specifically incorporates by reference the plan prepared by Phelps Engineering, dated September 9, 1986. The legend prominently displayed on the title sheet of that approved plat plan indicates several types of lines, one of which represents "BUILDING SETBACK LIMITS." In the general approved plan, there is nothing unclear about the corresponding building setback line on lot 15. A scale of one inch for every 100 feet is indicated on the general plan sheet of the plat. Measured

to scale, the setback limit from the canal indicated on the general plan sheet is seventy-five feet.[4] The plat plan and subdivision approval were recorded in the town clerk's office.

¶ 19. The above undisputed facts demonstrate the existence of subdivision setback limits explicit enough to provide clear notice of an enforceable condition, notwithstanding the various claimed bases for finding ambiguity. The fact that the general plat plan relies on the clear setback lines and the notated scale of the plat plan, rather than explicitly noting that the distance between the canal and the setback line is seventy-five feet, does not negate that clarity. There is no dispute that the approved plat plan, measured to scale, depicts a seventy-five-foot setback from the canal. Nor is there ambiguity because the building setback limits are not reproduced in the more detailed pages of the plat plan depicting septic and stormwater plans; in contrast to the general plan depicted in the approved plat, those pages are focused narrowly on the septic and stormwater issues.

¶ 20. Likewise, the fact that buildings in the subdivision have been built within the setback limits depicted in the recorded plat plan does not change the fact that the plat plan as approved explicitly establishes the setbacks. For one thing, we have no occasion to consider this extrinsic evidence where the requirements of the approved plat plan are clear and unambiguous. Cf. Wagner & Guay Permit, 2016 VT 96, ¶¶ 11, 13 (noting that permit condition in approved plat plan is reviewed "according to normal rules of statutory construction" and considering extrinsic evidence in construing ambiguous notation on plat plan). Moreover, the parties stipulated that the permits for those other buildings were unchallenged, and there was no evidence, other than the fact that some

[4] Notably, this seventy-five-foot setback matches a condition in the approved Act 250 permit issued to the applicant in March 1987. If we concluded that the seventy-five-foot setback was ambiguous, this fact might be relevant to our examination of the extrinsic evidence, reinforcing our interpretation of the setback requirement in the municipal subdivision approval. Because we find the setback clear and unambiguous on its face, we need not resort to extrinsic evidence. See City of Newport v. Vill. of Derby Ctr., 2014 VT 108, ¶ 14, 197 Vt. 560, 109 A.3d 412 (stating that where parties' intent as expressed in writing is unambiguous, there is no need to consider "the parties' arguments regarding extrinsic evidence of the parties' intent").

buildings were built within the setback limits, that the Town considered the setback limits to be unenforceable.

¶ 21. Hannaford's reliance on Willowell is unavailing. That case concerned two undefined phrases used on the subdivision plat plan—"Agricultural Reserve" and "Building Envelope." The neighbors opposing the proposed project argued that the phrases were sufficiently explicit to impose conditions setting aside land for agricultural use and restricting new buildings to certain areas. We upheld the Environmental Division's conclusion that the two two-word phrases, in the absence of any definitions conveying the meaning the parties sought to ascribe to those phrases, were too ambiguous to impose enforceable permit conditions. Willowell, 2016 VT 12, ¶¶ 19-20. In contrast, the significance of the line demarcating a "building setback" in this case requires no further elucidation; the meaning of "building setback" is well understood. See, e.g., Setback, Black's Law Dictionary (10th ed. 2014) (defining "setback" as "[t]he minimum amount of space required between a lot line and a building line"). Accordingly, we reverse the Environmental Division's conclusion that the setback limit was not an enforceable condition.

¶ 22. Given that the setback requirement in the master subdivision permit is enforceable, no party disputes that the proposed site plan violates the condition. The trial court found that at their closest points, the edge of the building will be about sixty-five feet from the canal and that the overhang of the roof will measure about forty-two feet from the edge of the canal. No party challenges this finding. Thus, we reverse the court's issuance of the site plan permit.

C. Front Yard Parking

¶ 23. Notwithstanding our reversal of the site-plan approval on the setback issue, we address the front-yard-parking issue because, unlike the other issues in the site-plan appeal,[5] it is

[5] We do not assume that the evidence presented at a new site-plan hearing would present the same issues concerning the east-west swale, stormwater control, and traffic issues, and accordingly do not address those issues here.

likely to reoccur in the context of a new application for site-plan approval, regardless of whether Hannaford amends its site plan or obtains a setback amendment. See In re Taft Corners Assocs., Inc., 160 Vt. 583, 593, 632 A.2d 649, 654-55 (1993) (in interest of judicial economy, court may reach issues likely to occur on remand). Although we are not actually remanding the site plan matter, it would not make sense to force Hannaford to redesign its project in connection with a new application for site plan approval, if it chooses to do so, with continued uncertainty as to the effect of the front-yard restriction on parking.

¶ 24. Neighbors argued below that the parking proposed in Hannaford's site-plan application violates the Town's zoning regulations limiting "front yard" parking. The trial court determined that the applicable regulations do not prohibit the parking proposed in the site plan based on its conclusion that, pursuant to the definitions in those regulations, the front yard of the proposed project is the side of the building facing roughly south parallel to Mechanicsville Road. We uphold the trial court's determination for the reasons stated below.

¶ 25. The zoning regulations require the DRB "to take into consideration" standards specified therein, including conformance with § 5.6 of the regulations, "where [it] applies." Town of Hinesburg Zoning Regulations, § 4.34(9). Section 5.6.3 of the zoning regulations, in relevant part, provides as follows:

> **Parking and loading areas:** Parking and loading areas for any new structures shall be located in the side or rear yards of the structure. Where sufficient screening is provided, and with Development Review Board approval, up to 20% of the total number of parking spaces may be located in the front yard of the structure.

The regulations define front, side, and rear yards as follows:

> Yard, Front: A yard on the same lot with a principal building, extending the full width of the lot and situated between the centerline of the street or right-of-way and the front line of the building extending to the side lines of the lot.
>
> Yard, Side: A yard situated between the principal building and a side line and extending from the front yard to the rear yard. The distance

> between the principal building and the side line shall be measured from the building to the nearest point on the side line along a line parallel to the front lot line.
>
> Yard, Rear: A yard on the same lot with a principal building between the rear line of the building and the rear line of the lot extending the full length of the lot. No lot shall have more than 1 rear yard with regard to setback requirements. For lots with multiple front yards, the rear yard shall be opposite the front yard that provides the primary access to the lot.

¶ 26. The regulations do not define the phrase "front line of the building" contained in the definition of "front yard." Hannaford's site plan proposes 128 parking spaces, most of which are located on the sides of the proposed building facing roughly north and east and parallel to Commerce Street as it arcs from Route 116 to Mechanicsville Road. Neighbors argue that the front yard must be in front of the east-facing side of the building, where more than half of the proposed parking spaces are located, because: (1) consistent with common English usage, the front line of a grocery store is the side that contains the public entrance and the store's name, which in this case is the east wall of the building; and (2) the rear yard must be the area in front of the south-facing wall of the building located parallel to Mechanicsville Road because there are multiple front yards in front of the north and east walls running parallel to the arcing Commerce Street, which provides the only vehicle access to parking via the Commerce Street extension.

¶ 27. We note at the outset that the front yard parking restrictions and the corresponding definitions of "front," "side," and "rear" yards in the municipal ordinance cannot be neatly applied to this lot and this project for several reasons. First, a narrow right-of-way provides access from Commerce Street to Lot 15; the lot has no frontage on Commerce Street itself. Second, the lot abuts Mechanicsville Road, but is not accessible from that road. Third, the shape of this lot, the orientation of the building on the lot, and the fact that Commerce Street and Mechanicsville Road are not parallel but in fact converge beyond the northeasterly boundary of Lot 15, make it difficult to apply the definitions in the ordinance. The irregular shape of the lot does not exempt it from the requirements

of an otherwise clear zoning ordinance, Bennett v. Zelinsky, 878 A.2d 670, 678 (Md. Ct. Spec. App. 2005), but the shape does make it more difficult to construe and apply unclear requirements. To the extent that the touchstone in the definition of "front yard" is the "centerline of the street or right of way," there are two streets potentially in play: Commerce Street, which provides access to Lot 15 but is separated from that lot by other lots and buildings, and Mechanicsville Road, which is significantly closer to the building and parking lot, but does not provide road access to Lot 15. And because of its arcing course, the centerline of Commerce Street itself is roughly parallel to two different sides of the proposed building at two different points on Commerce Street. We recognize that the definition of "rear yard" contemplates the possibility of more than one front yard, but we do not believe the parking restriction, which provides for parking in the side or rear yards, and limited parking in the front yard, purports to limit parking on three sides of this building.

¶ 28. Instead, we conclude that the regulation restricting front yard parking evinces the Town's preference for placing commercial buildings closer to streets, with parking in back, rather than having large parking areas located between streets and buildings. In this case, the proposed building adjoins Mechanicsville Road and is accessed from Commerce Street. The only yard that is situated immediately between the centerline of a road and a wall of the proposed building is the one facing Mechanicsville Road. In contrast, Lot 15 and Commerce Street are separated by several developed properties. Nothing in the text of the parking ordinance requires that the front yard be defined with reference to the road from which the building is accessed. In this case the purpose of the parking regulation would not be furthered by labeling the north and east walls of the proposed building as front yards.

¶ 29. We likewise reject Neighbors' suggestion that the location of the front yard turns on the orientation of the building entrance. To the extent the ordinance defines "front yard" at all, it does so with reference to adjoining streets rather than the main entrance of the building. Although the ordinance may reflect an assumption that in most cases the main entrance to a business will face

a road, nothing in the ordinance requires that. Accordingly, we reject Neighbors' argument that the proposed site plan violates the Town's parking regulations.

III. Act 250 Appeal

A. "Small Scale" Development

¶ 30. We affirm the Environmental Division's conclusion that the project does not run afoul of a requirement of the Act 250 master subdivision permit that development in the subdivision be "small scale."

¶ 31. The original Act 250 permit application included a project narrative with a three-paragraph general description and a preliminary outline addressing the Act 250 criteria. The third paragraph of the general description states as follows:

> The subdivision is designed as a "Commercial Industrial Park" intended for primarily local small scale and start-up businesses which are appropriate to the local scale of development. Certain lots will be designated for uses appropriate to their location on the site. Lot sizes range from 1 to 3 acres though it is expected that in some cases more than one lot may be combined. Businesses expected to locate in the project might range from "High-Tech" research and development firms supporting other Chittenden County industries to retail outlets for local agricultural or manufactured products.

The 1987 Act 250 permit requires the permittees and their successors to complete, maintain, and operate the project in accordance with the plans and exhibits stamped "Approved" and on file with the District Environmental Commission. The application containing the project narrative noted above is among the plans and exhibits thereby incorporated by reference into the 1987 Act 250 permit.

¶ 32. The Environmental Division rejected Neighbors' argument that the reference to "small scale" in the project narrative of the original permit application should be considered a permit condition. The court ruled that reference to small-scale businesses offered "a generalized aspirational goal that by its terms is not a prerequisite for development." In the court's view,

although "the goal that the subdivision should primarily be comprised of small-scale local businesses may be commendable, it does not provide an express permit condition."

¶ 33. On appeal, Neighbors argue that the statement in the approved project narrative indicating that the subdivision would be comprised primarily of small-scale businesses is an enforceable permit condition that was expressly incorporated by reference into the 1987 Act 250 permit.

¶ 34. We conclude that, even assuming the general project description in the approved project narrative may be an enforceable part of the permit condition, the project does not run afoul of a specific and enforceable requirement that all projects in the subdivision be "small scale." We reach this conclusion for several reasons. The project narrative does not require that development within the subdivision be exclusively small-scale development. It contemplates that the subdivision will consist "primarily" of local small-scale and start-up businesses. This qualifier suggests an expectation that the project may well include some development that does not fit that description. Notably, the proposed project is situated in the lot that is by far the biggest of the subdivision, and thus the most likely site for a larger business. Similarly, the general description of the kinds of businesses expected to locate in the project indicates that they "might range" from certain kinds of high-tech research and development firms to retail outlets for local agriculture or manufactured products. The description does not purport to limit development to those particular types of businesses.

¶ 35. Finally, the approved permit nowhere defines "small scale" development. It does, however, include objective metrics regulating the number of parking spaces, gallons per day of water and wastewater, daily and peak-hour vehicle trips, and electricity usage. We infer that the District Commission relied on these more specific limitations to regulate the scale of development in the subdivision and did not intend the statement that the "Commercial Industrial Park" was "primarily" for "local small scale and start-up businesses" to be an independent qualitative restriction on

development in the subdivision. See Sec'y, Vt. Agency of Nat. Res. v. Handy., 163 Vt. 476, 482, 660 A.2d 309, 312-13 (1995) (stating that Act 250 permit conditions "must be expressed with sufficient clarity to give notice of the limitations on the use of the land" (quotation omitted)).

¶ 36. Neighbors' reliance on In re Duncan, 155 Vt. 402, 584 A.2d 1140 (1990), and In re Denio, 158 Vt. 230, 608 A.2d 1166 (1992), is misplaced. In Duncan, the neighbors appealing a zoning permit for a homeless shelter argued, in relevant part, that the trial court's order was not sufficiently specific to establish operating rules for the shelter. The trial court's order generally described the proposal and approved the application pursuant to the plans and specifications admitted into evidence. This Court understood the trial court's order to mean that it was approving the project as proposed by the applicant and concluded that the order was "sufficiently specific to ascertain what has been approved." Duncan, 155 Vt. at 410, 584 A.2d at 1145. In Denio, the applicants challenged a permit condition requiring them "to complete the project consistent with the Board's findings and conclusions and the approved plans and exhibits," arguing that the condition "create[d] an unreasonable restriction on their title because of the inability to easily follow the findings, conclusions and plans and because they are vague." 158 Vt. at 241, 608 A.2d at 1172. We rejected that argument, noting that permits, including their conditions, must be recorded in land records, and that "[p]ersons coming upon this permit will know that they have to also look at the findings, conclusions and plans." Id. These cases do not undermine our conclusion that the term "small scale," in the broader context of this subdivision project narrative, did not constitute an independent limitation on development in the subdivision.

B. Public's Use and Enjoyment of Canal Path

¶ 37. We affirm the Environmental Division's conclusion that the proposed project did not materially jeopardize or interfere with the public's use or enjoyment of the path that runs along the canal near the Mechanicsville Road side of Lot 15, in violation of Act 250 Criterion 9(K).

¶ 38. In relevant part, Criterion 9(K) provides that:

> A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, . . . when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

10 V.S.A. § 6086(a)(9)(K).

¶ 39. In the 1990s, the Town of Hinesburg received over $100,000 in federal and state funds for the Hinesburg Streetscape Project to improve sidewalk infrastructure, to construct a paved walkway along the canal, and to install a footbridge near the southwestern corner of Lot 15. The canal path was built on an easement within the subdivision. Neighbors argued before the Environmental Division that the proposed project would unnecessarily or unreasonably endanger the public investment in the canal path and would materially jeopardize or interfere with the function, safety, and the public's use and enjoyment of the path and associated facilities.

¶ 40. The trial court concluded that the project would not increase the cost of maintaining the path or interfere with public access to the path. It also rejected Neighbors' assertion that the project would materially interfere with the public's use and enjoyment of the path because users of the path would see the side of a store building and a parking lot instead of an undeveloped field. The court recognized that the view from the canal path might be less scenic after the development of Lot 15, but noted that Lot 15 is one lot within a commercial development established before the canal path was built and that, although pedestrians on the path currently view an open field on Lot 15, there are multiple commercial buildings immediately beyond the open field. The court rejected Neighbors' argument on the grounds that the canal path is located in a commercial setting and was constructed "with the full understanding that commercial development would likely occur in the immediate vicinity" of the path and that the proposed project calls for substantial landscaping and

screening along the path as well as a nonstandard building designed by a local architecture firm to be compatible with its surroundings.

¶ 41. In a motion to alter or amend the judgment, Neighbors argued, among other things, that the court had erroneously considered the foreseeability of a commercial development on Lot 15 in determining whether the proposed project materially interfered with the public's use and enjoyment of the canal path. In response, the court agreed that Criterion 9(K) could be violated in instances where future development was possible, but concluded that, in considering whether a development materially interfered with the use and enjoyment of a public facility, it could not ignore that development on Lot 15 was predictable at the time of the public investment in the path.

¶ 42. On appeal, Neighbors argue that the trial court misapplied Criterion 9(K) by considering the foreseeability of commercial development on Lot 15 and that, in any event, the court erred in concluding that a commercial development of the scale and intrusiveness of the proposed project was foreseeable to public officials who developed the canal path. Regarding the first part of this argument, Neighbors acknowledge that the foreseeability of the development on Lot 15 was only part of the court's rationale in rejecting their Criterion 9(K) argument, but they contend that, as a matter of law, foreseeability is not part of the analysis under Criterion 9(K) and that we cannot determine how the court would have ruled had it not relied upon this impermissible factor. According to Neighbors, the court read Criterion 9(K) as if it included the words "unforeseeably or unduly" before the word "interfere" and, as a result, did not consider whether the actual impact of the proposed project on the canal path was material and entitled to protection.

¶ 43. While we agree that foreseeability per se is not a component of the analysis under Criterion 9(K), we do not agree that the court failed to address the materiality of the alleged interference with the public's use and enjoyment of the path. The distinction in this case is subtle. The gist of the court's decision, when read in its entirety, is that the proposed project would not materially interfere with the public's use and enjoyment of the canal path because of the commercial

setting of the path and the "substantial landscaping and screening along the path." Cf. In re McShinsky, 153 Vt. 586, 593, 572 A.2d 916, 921 (1990) (upholding Environmental Board's conclusion that applicants' proposed RV campground would interfere with public's use and enjoyment of river extensively used for various recreational pursuits). In short, in concluding that the proposed project would not materially interfere with the public's use and enjoyment of the canal path, the court considered the context of the public investment—a paved walkway on an easement along a commercial development and a former industrial canal. The court did not err in doing so.

¶ 44. Nor do we find persuasive Neighbors' contention that, even assuming the Environmental Division could properly consider the foreseeability of the development, the scale and intrusiveness of the proposed project was not foreseeable. As noted above, the foreseeability of the scope of the particular proposed project is not the legally determinative factor. Nonetheless, the location of the canal path near the fringes of a "Commercial Industrial Park" with existing and planned commercial development is a significant fact for consideration in the analysis. In determining whether the proposed project would materially interfere with the use and enjoyment of the canal path, the court assessed the current and proposed views from the canal path, noting in particular that Hannaford had proposed to spend substantial sums for landscaping and screening, including significant amounts directed specifically at the canal path, and had hired a local architecture firm to design a nonstandard building that would be compatible with its surroundings. These findings and conclusions support the court's decision regarding Criterion 9(K).

C. Grass Stormwater Swale

¶ 45. We agree with Neighbors that the Environmental Division failed to address the evidence and make findings on whether the proposed stormwater grass swale would function properly, and instead relied upon assumptions and subsequent enforcement to satisfy Act 250 water quality criteria.

¶ 46. The proposed project includes a stormwater management system designed to accommodate stormwater runoff from the 2.88 acres of impervious surface that would result from the project. The system is designed to collect stormwater through a series of catch basins and convey the water for on-site treatment and detention, with eventual discharge into a nearby brook through a detention pond and outlet structure located between Lots 2 and 3 of the subdivision. During the proceedings before the Environmental Division, Hannaford modified its stormwater design by relocating its proposed grass stormwater swale entirely within Lot 15, running in an east-west direction. Because the relocated swale had not been approved by the Agency of Natural Resources (ANR), there was no presumption of compliance with Act 250.

¶ 47. The purpose of the swale is to treat stormwater and provide for groundwater recharge, in part, by detaining water for an expected period of time. At a December 1, 2015 hearing, Hannaford's expert, a civil engineer, testified that "we've designed a system that we think meets the rules" and, more specifically, that the east-west grass stormwater swale was designed "to meet the water quality and the recharge requirements of the rules." The expert explained that the 210-foot-long grass swale would have an eight-foot-wide dipped bottom to handle storm events as required by the ANR rules. The expert acknowledged that Hannaford would have to demonstrate that the swale would be able to handle the water flow coming from its property and other properties as indicated in its design.

¶ 48. On the same hearing date, Neighbors' expert, also a civil engineer, summarized his prefiled testimony by opining that the relocated grass stormwater swale was "unlikely to function as planned" because it was located in an area that was regularly inundated with water. The expert stated that each time he had visited the site he noticed tall grass and cattails growing in saturated ground and that just the previous day the area was ponded up to six inches deep. He "fully expect[ed] the channel to be saturated after construction, and instead of being a groundwater discharge feature, in addition to a water quality treatment feature, it will likely take in groundwater" such that

"groundwater will infiltrate into the channel, rather than exfiltrate out of the channel." Consequently, the expert explained, the channel would be a perennially wet breeding ground for mosquitoes and occupied by wetland plants that would not permit it to meet the functional requirements of a grass channel for purposes of water quality treatment. Hannaford's expert did not respond to this testimony.

¶ 49. In considering whether the proposed project met Act 250 water quality standards as set forth in Criterion 1 of 10 V.S.A. § 6086(a), the trial court stated that the east-west stormwater swale was "designed according to ANR's specifications and functional requirements" and that Neighbors' arguments were insufficient to establish that the swale would not function as proposed. Addressing Neighbors' claim that stagnant water would always be present in the grass swale, the court stated that Hannaford "propose[d] to construct a grass treatment swale according to ANR's standards," and "[a]s proposed, the swale will not have standing water and will pose no risk to human health." The court stated further that "[i]f, post-development, the grass swale does not function properly, [Hannaford] will be obligated to remedy the issue." In response to Neighbors' argument in their motion to amend that they presented uncontradicted evidence that the east-west grass stormwater swale would not function properly, the court stated that it had made a "credibility determination between two or more opposing expert opinions" and that its approval was based on Hannaford's "evidence and representations, and, therefore, to comply with its permit, [Hannaford] must install and operate a grass swale that conforms to the evidence presented."

¶ 50. On appeal, Neighbors argue that the trial court failed to evaluate their expert's uncontradicted testimony that the proposed grass stormwater swale would not function as claimed. According to Neighbors, the court's approval of the system was not based on findings and conclusions as to whether the system will actually function as claimed; rather, the court relied upon unsupported assumptions that were undermined by uncontradicted expert testimony and inappropriately deferred to future enforcement procedures for compliance.

¶ 51. We agree. The Environmental Division may rely upon modeling in determining the likelihood of a system meeting Act 250 criteria. Moreover, it has "broad discretion to assess the credibility of the witnesses and the persuasive value of the evidence." In re Costco Stormwater Discharge Permit, 2016 VT 86, ¶ 14, ___ Vt. ___, 151 A.3d 320. But these principles are not controlling in this case. Hannaford had the burden of proving compliance with Criterion 1. 10 V.S.A. § 6088(a). To that end, Hannaford's expert testified simply that the relocated stormwater swale was designed to meet the applicable ANR standards—a conclusory assertion that acknowledged the governing standards. The expert did not testify that the system would likely work as designed. Nor did he address the uncontradicted testimony of Neighbors' expert that the swale would not function as designed and thus would not meet those standards for very specific reasons—the area was perennially wet, saturated with water, and populated by wetlands plants that would not hold water as designed. The trial court made no findings or conclusions regarding the uncontradicted testimony of Neighbor's expert, but instead summarily stated that, "[a]s proposed," the swale would not have standing water and thus would comply with the applicable standards, and, if it did not, Hannaford would be obligated to remedy the situation in enforcement proceedings. The finding that the swale would not have any standing water was not supported by any testimony.

¶ 52. In short, in the face of specific unchallenged evidence that the system would not work as intended, the court relied upon Hannaford's conclusory representations that the system was designed according to governing standards, without making any findings or conclusions regarding the contrary evidence, and without any testimony addressing the likely effectiveness of the system. That was error. The court was required to "make affirmative findings under all ten statutory criteria before issuing a permit." In re Treetop Dev. Co., 2016 VT 20, ¶ 11, 201 Vt. 532, 143 A.3d 1086; see In re SP Land Co., 2011 VT 104, ¶ 25, 190 Vt. 418, 35 A.3d 1007 (stating that Act 250 rules "mandate[] that a permit may issue only when positive findings of fact and conclusions of law have been made under all criteria" before issuing permit). And the court's findings must be supported by

competent evidence. See Trombly Plumbing & Heating v. Quinn, 2011 VT 70, ¶ 10, 190 Vt. 552, 25 A.3d 565 (mem.) ("The trial court's findings will stand if there is reasonable and credible evidence to support them."). In light of the uncontradicted evidence presented by Neighbor's expert, the court was obligated to make findings and conclusions on the functionality of the proposed relocated swale and not rely solely on Hannaford's expectation that the swale would meet the applicable standards and on an inference that it would actually work.

¶ 53. In the absence of evidence that the proposed swale would likely work as intended, the court's reliance on enforcement proceedings to assure the functionality of the swale would shift to those proceedings questions that should be addressed at the permitting stage. That would significantly impact Neighbors' rights. Although interested parties may participate in enforcement proceedings, they have no right "to initiate such proceedings or raise additional violations." Treetop, 2016 VT 20, ¶ 13 n.4; see 10 V.S.A. § 6027(g) (assigning to NRB discretion to initiate enforcement on matters related to land use permits). Thus, the trial court's reliance on enforcement proceedings, in the absence of evidence supporting the trial court's finding that the swale would likely work, deprives Neighbors of their only certain opportunity to present evidence demonstrating that the system would not function as designed because of the particularities of its location.

¶ 54. Accordingly, the matter must be remanded for the trial court to make findings and conclusions on the functionality of the swale in its proposed location, assuming that Hannaford does not submit a revised stormwater design. The court may take additional evidence on this question.

D. Cross-Appeals—Traffic Issues

¶ 55. The traffic issues on appeal relate to two proposed conditions—one ordered by the trial court and one declined by the trial court—designed to mitigate traffic congestion and safety issues arising from the project. Criterion 5 of Act 250 requires that a development "not cause unreasonable congestion or unsafe conditions with respect to use of the highways." 10 V.S.A. § 6086(a)(5). An Act 250 permit may not be denied solely for reasons set forth in § 6086(a)(5), but

"reasonable conditions" may be imposed "to alleviate the burdens created." Id. § 6087(b). The party opposing the applicant has the ultimate burden of persuasion with respect to Criterion 5, id. § 6088(b), but the applicant has the initial burden of production regarding that criterion, see Champlain Parkway, 2015 VT 105, ¶ 15.

¶ 56. When a proposed development will exacerbate already unreasonable congestion or unsafe conditions, courts must decide on a case-by-case basis whether to impose mitigating conditions and which conditions to impose. Compare In re Pilgrim P'ship, 153 Vt. 594, 595-98, 572 A.2d 909, 910-11 (1990) (noting that Criterion 5 "does not require that proposed development be the principal cause or original source of traffic problems" and upholding Environmental Board's determination that development did not meet Criterion 5 based on evidence that project would result in five-percent increase in traffic in area that was already "unreasonably congested and unsafe") with Costco Stormwater Discharge Permit, 2016 VT 86, ¶¶ 16-17 (affirming trial court's determination that near-term mitigation measures were sufficient to mitigate project's contribution to existing congestion where project would increase traffic at already congested intersection).

¶ 57. In this case, there was no dispute that the project would exacerbate existing congestion. Based on testimony from Hannaford's own expert, the trial court found that the project would generate 386 end trips per hour during the weekday evening commute hour, which is the peak hour. The trial court found that even without these added trips from the project, several areas near and along Route 116 currently see significant traffic congestion and delays and several high crash locations (HCLs) have been identified within the project impact area, including three between the area just north of the Commerce Street intersection and the Charlotte Road intersection.[6] The Vermont Agency of Transportation (VTrans) measures traffic congestion and traffic delays at high-traffic times through a level-of-service (LOS) rating system that assigns grades from A to F, with F

[6] An HCL indicates five or more accidents over a five-year period within a 0.3-mile stretch of road.

being the worst. The trial court found that even without the project, the Route 116/Mechanicsville Road intersection and the Route 116/Charlotte Road intersection, south of Mechanicsville Road, are LOS F. The court concluded that with many of these intersections already experiencing congestion and safety concerns without the project, the addition of 386 peak-hour trips in the early evening would "certainly exacerbate existing conditions." On appeal, nobody challenges this conclusion.

¶ 58. At issue in this appeal are the necessity and reasonableness of two proposed conditions: one requiring the installation of a traffic light at the intersection of Route 116 and Mechanicsville Road, and one calling for a post-approval traffic study of the southbound left-turn lane on Route 116 at the Commerce Street intersection.

1. Traffic Signal at Route 116/Mechanicsville Road Intersection

¶ 59. We conclude that the record does not support the Environmental Division's requirement conditioning Hannaford's permit on the installation of a traffic signal at the intersection of Mechanicsville Road and Route 116.

¶ 60. At trial, Hannaford proposed several mitigation measures, with a focus on the Route 116/Commerce Street intersection because Commerce Street would provide primary access to the proposed project. Hannaford's proposed mitigation measures included increasing from 75 feet to 185 feet the length of the Route 116 southbound left-turn lane at Commerce Street; extending by 190 feet the westbound right-turn lane on Commerce Street; increasing the Route 116 north/south green signal time at the Route 116/Charlotte Road intersection; installing sidewalks along Commerce Street to the intersection with Route 116 and within the project area to allow pedestrian access from Mechanicsville Road and Commerce Street; and restricting the time of and entry route for truck deliveries.

¶ 61. Hannaford also offered to pay $25,000 as its contribution to the traffic-signal mitigation at the Route 116/Mechanicsville intersection. That sum represented the percentage of the estimated cost of a signal attributable to the project's expected nine-percent increase in peak-hour

traffic at the intersection. The court asked Hannaford's expert what that meant in the absence of any specific proposal to address further adverse impacts at the intersection, and the expert explained that the funds would be available should the Town or the State decide to install a signal at that intersection. When asked whether the traffic signal at that intersection was necessary, the expert observed that "the warrants for the signal at that location have been met for many, many years," but the Town and the State have not pursued installing one.

¶ 62. Neighbors' expert testified that Hannaford's proposed mitigation did not adequately address the Route 116/Mechanicsville Road intersection and that the post-build status of the intersection as an LOS F was unacceptable. The expert testified that it was incumbent upon Hannaford, as well as required in the VTrans Traffic Impact Study Guidelines, to study and propose the mitigation needed to remedy an LOS of F that would result from the project, including studying the costs to implement the mitigation measures. The expert testified that Hannaford had not done this. He opined, "A potential mitigation will consist of signalizing the Mechanicsville Road intersection and coordinating it with the Commerce St. and Charlotte Road intersections," and indicated that the signal would need to be operational when Hannaford opens. Asked whether there was any downside to including a traffic light at that intersection, the expert said he could not think of any.

¶ 63. In its decision, the court found all of the mitigation measures proposed by Hannaford to be necessary but not sufficient for Act 250 approval. With respect to the Route 116/Mechanicsville Road intersection, the trial court concluded that although the proposed project was not the sole cause of traffic issues at the intersection, "a traffic signal is necessary before the Project is operational to prevent further degradation of unacceptable traffic conditions." In addition to addressing the added traffic congestion associated with the project, the court concluded that the mitigation measures, including installation of a traffic light at the Route 116/Mechanicsville Road intersection, would satisfy the safety concerns in Criterion 5. Specifically, the court stated that

installing a signal at the intersection "and coordinating it with the signals to the north and south will achieve a smoother and more consistent flow of traffic" and "coordinating the traffic lights will improve congestion and reduce the need and opportunity for risky behavior often accompanying long delays and frustrated drivers."

¶ 64. With respect to the payment for the required traffic signal, the court noted recent legislation empowering an Act 250 District Commission or VTrans (and therefore the Environmental Division when considering an appeal) to assess a transportation impact fee to fund capital improvements necessary to mitigate transportation impacts of proposed developments. See 10 V.S.A. §§ 6101-6111.[7] The court noted that neither VTrans nor the NRB had enacted rules implementing this statute and that the parties did not address the legislation at trial. Accordingly, the court ordered generally that Hannaford pay its proportional share of this mitigating measure, but left it to the parties to work through the financing details.

¶ 65. Various parties filed motions to alter or amend the judgment concerning the traffic issues. The Town asked the court to recognize that VTrans controls whether changes to Route 116 are made and to require Hannaford to pay the full cost of any mitigation measures at the Route 116/Mechanicsville Road intersection. Neighbors also requested that Hannaford be required to bear the full cost of the required traffic signal. For its part, Hannaford asked the court to confirm that it need only escrow its proportional share of the cost of any required signal at the intersection and to

[7] This legislation, enacted pursuant to 2013, No. 145 (Adj. Sess.), § 2, authorizes the assessment of a proportional transportation impact fee on proposed developments subject to Act 250. The purpose of the legislation "is to provide a mechanism to allocate the costs to mitigate the impacts of land use projects to the transportation system in a manner that is equitable and that supports the planning goals of 24 V.S.A. § 4302." 10 V.S.A. § 6101. Among other things, § 4302 encourages economic growth in locally designated growth areas, 24 V.S.A. § 4302(c)(1)(B). In its findings accompanying the statute, the Legislature indicated that the mechanism provided is intended to be an alternative to the "last-one-in" approach that tended to require applicants to bear the entire burden of installing mitigation measures benefiting not only the proposed project but also existing and future projects. 2013, No. 145 (Adj. Sess.), § 1(b)(1). Whether this 2013 legislation, with an effective date of July 1, 2014, applies to the March 2013 permit application at issue in this case was and is disputed.

allow the project to go forward if the Town and VTrans decided not to install a signal at the intersection. In the course of the briefing on these issues, the Town noted that its "enthusiasm for a traffic signal at the Mechanicville Road intersection is questionable" and that the Town "suspects that other parties are similarly unenthused." The NRB was more explicit, asserting that VTrans had informed the NRB that it had no projects in its capital program for the intersection in question and would not participate financially in any upgrades required by the Court.

¶ 66. In response to those motions, the trial court noted "uncontradicted evidence that the Mechanicsville Road and Route 116 intersection experiences significant delays and congestion and that the additional traffic from the Project will exacerbate those unacceptable conditions." The court concluded that because a traffic signal was the only proposed mitigation for addressing the conditions at that intersection, the "signal must be installed and coordinated before the Project may be completed." The court expressed frustration that the only proposed mitigation for the Route 116/Mechanicsville Road intersection offered at trial was a traffic light, yet no party could point to evidence in the record that the Town and VTrans would not support a traffic signal. The court declined to alter its decision.

¶ 67. Hannaford argues in its cross-appeal to this Court that the trial court exceeded its authority by purporting to require the Town and VTrans to install and fund a traffic signal at the Route 116/Mechanicsville Road intersection even though neither governmental entity had agreed to such a signal. In Hannaford's view, considering that neither the Town nor VTrans has any plans for a signal at the intersection despite the intersection's LOS F rating, the condition requiring the installation of a signal before the proposed project becomes operational amounts to a "functional veto" of the project, in violation of 10 V.S.A. § 6087(b). Hannaford requests that this Court modify the trial court's traffic-signal condition to require Hannaford to escrow $25,000 before commencing construction, with the escrowed funds being available for five years after the project begins operation

to contribute to the cost of any required traffic congestion improvements at the Route 116/Mechanicsville intersection.

¶ 68. The Town joins Hannaford in opposing the trial court's condition that a traffic signal be installed at the Route 116/Mechanicsville intersection before the proposed project becomes operational, stating that it "lacks enthusiasm" for a signal at the intersection. Like Hannaford, the Town argues that the condition effectively denies the project based on Criterion 5, in violation of 10 V.S.A. § 6087(b), because neither Hannaford nor the Town can install a traffic signal without the participation of VTrans, which is statutorily authorized to "[e]rect and maintain appropriate traffic control devices on state highways," 19 V.S.A. § 10(7), but was not a party in the Environmental Division proceeding. The Town notes that, under VTrans' Traffic Impact Study Guidelines, if "installation of signals is proposed, a signal warrant analysis should be performed," and "[i]f a signal is warranted, an assessment of the need for and design of pedestrian phases should be included." Vermont Agency of Transportation, Traffic Impact Study Guidelines at 23 (Oct. 2008), available at http://vtrans.vermont.gov/sites/aot/files/planning/documents/trafficresearch/VTransTISguidelines Oct2008.pdf (Dec. 8, 2016) [https://perma.cc/S57A-E6EA]. The guidelines further state that "if a traffic signal is found to be warranted at any intersection analyzed, . . . and the developer proposes to install a traffic signal, then [VTrans] strongly recommends that a roundabout also be analyzed for installation at the same locations." Id. at 24; see 2002, No. 141 (Adj. Sess.), § 37 (finding that roundabouts have proven to be cost-efficient way of dealing with dangerous intersections and directing VTrans "to carefully examine and pursue the opportunities for construction of roundabouts at intersections determined to pose safety hazards for motorists"). Accordingly, the Town maintains that the traffic-signal condition should be struck and that Hannaford should be required to perform a signal warrant analysis and to consider alternative measures to mitigate the project's impact on traffic at the intersection. In the alternative, the Town proposes that the matter could be remanded

to the District Commission, where VTrans was a party, with instructions that a signal warrant analysis for the intersection be performed.

¶ 69. Both Neighbors and the NRB urge this Court to uphold the trial court's condition requiring installation of the traffic signal before the project becomes operational. Neighbors argue that Hannaford failed to preserve in the proceedings below its objection to a condition requiring installation of a traffic signal at the Route 116/Mechanicsville intersection, that the condition is supported by the record, and that any difficulty in implementing the condition is not a basis for striking it. The NRB argues that Hannaford failed to preserve its "functional veto" argument and that, even if the argument was preserved, the court acted well within its authority in imposing the condition because it is reasonable and supported by the evidence. The NRB agrees with Hannaford and the Town that the trial court cannot order the Town or VTrans to pay for any portion of the traffic signal, regardless of whether they are a party, and thus argues that there is no basis to remand the matter to make VTrans a party before the Environmental Division. According to the NRB, as long as Hannaford offers to pay the entire costs of the traffic signal up front, there is no reason to believe that either the Town or VTrans would prevent Hannaford from satisfying the traffic-signal condition.

¶ 70. We conclude that the court's condition requiring the installation of a traffic signal at the Route 116/Mechanicsville Road intersection is not supported by the evidence. We reach this conclusion for two main reasons, operating in concert: the testimony of Neighbors' expert does not support the traffic light requirement, and Neighbors did not offer sufficient evidence that the condition was reasonable in the sense that it was likely to be attainable. If it is not, then the condition would operate as an insurmountable obstacle to the project, in violation of the Legislature's direction that Act 250 permits not be denied on the basis of Criterion 5. 10 V.S.A. § 6087(b).[8]

[8] We are not persuaded by Neighbors' argument that Hannaford failed to preserve this point below. We do not rest our decision on the claim that the condition at issue constituted a functional

¶ 71. First, Neighbors' expert did not purport to have conducted the necessary analysis to support the requirement of a signal at the Route 116/Mechanicsville Road intersection. In his prefiled direct testimony, Neighbors' expert opined that Hannaford had to do something to address the unacceptable delays the project would exacerbate at the Route 116/Mechanicsville Road intersection. He emphasized that the congestion at the intersection would be unacceptable, and stated:

> [I]n my opinion it is incumbent upon [Hannaford], as well as required in the VTrans Traffic Study Guidelines, to propose and study the mitigation needed to remedy a LOS of F that would result from the applicant's project, including study of the costs to implement the mitigation measures. [Hannaford] has not done this.

The expert identified signalizing the intersection as "a potential mitigation" and opined that the signal would need to be operational when Hannaford opens in order to mitigate the unacceptable congestion the project would cause. His live testimony at the hearing focused largely on his critique of Hannaford's traffic expert's estimate of the increased traffic the project would generate. He did opine at one point that a signal at the Mechanicsville Road intersection was "an appropriate solution." But when asked directly whether, under current conditions, a traffic light was warranted, Neighbors' expert said, "I did not do a traffic light analysis at that location." He proceeded to explain why he thought a traffic light would improve traffic flow, and that he believed the additional traffic from the project would warrant a signal, coordinated with the other signals on Route 116. He did not, however, offer any specific design or specifications, testify that he had analyzed the feasibility of coordinating the proposed light with the other lights in the corridor to achieve the predicted results, point to a signal warrant analysis supporting the installation of a light, identify any analysis of

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veto of the project; for the reasons set forth below, we conclude that there is insufficient evidence in the record to support or disprove Hannaford's suggestion that it will not be able to comply with the traffic light requirement due to VTrans's and the Town's opposition.

alternatives such as a roundabout, or provide a quantitative assessment of the impact of a light in mitigating the congestion at the intersection and associated safety issues.

¶ 72. We do not understand Neighbors' expert to have offered a specific traffic signal proposal based on appropriate traffic light analysis and a consideration of the effectiveness and desirability of other alternatives. The trial court understandably took up the traffic light suggestion because, general as it was, it was the only mitigation specifically directed at the Route 116/Mechanicsville Road intersection that was offered by any party, and the court rightly concluded that the project would exacerbate already unacceptable congestion at that intersection. But we understand the expert testimony to support only the more modest assertions that: (1) in the face of the unacceptable congestion exacerbated by the project, Hannaford was required to propose and study the mitigation needed to remedy the congestion—in essence, to conduct a signal warrant analysis as described in the VTrans guidelines; and (2) a traffic signal is a potential mitigation measure at the intersection.

¶ 73. Second, Neighbors did not meet their burden of demonstrating that the traffic light condition was reasonable, in the sense that it was attainable. A traffic light at the intersection might be a great idea, but if VTrans (a non-party to the proceedings before the Environmental Division) and the Town oppose it, and the project therefore has little chance of ever being built, it cannot be deemed a reasonable mitigating measure that is a precondition to implementation of the permit. See 10 V.S.A. § 6087(b) (providing that permit may not be denied solely on basis of Criterion 5, but authorizing "reasonable conditions and requirements" to alleviate burdens on traffic congestion and safety). In fact, as Hannaford and the Town now argue, if VTrans and the Town oppose installation of a traffic light, and it accordingly does not happen, then the permit condition requiring a traffic light would be tantamount to a denial of the permit, in violation of the provision that a permit may not be denied solely on the basis of Criterion 5. See id. Neighbors bore the burden of establishing the reasonableness of their proposed condition. See Champlain Parkway Act 250 Permit, 2015 VT

105, ¶ 16 (explaining that opposing party's burden under § 6088(b) "includes the duty to demonstrate the availability of reasonable mitigating steps, including reasonable alternatives") (quotation omitted). In this case, the absence of record evidence as to the practical feasibility of the traffic light proposal in light of VTrans's and the Town's own positions on the subject operates to Neighbors' detriment.

¶ 74. We do not mean to suggest that parties proposing mitigating measures must proactively establish in every case that the relevant state agencies will support or cooperate in the implementation of their proposed conditions. But in this case, the proposed mitigating measure called for significant action by VTrans, which was not even a party or witness in the proceeding before the Environmental Division. There was no evidence that VTrans or the Town had initiated any steps toward installing a traffic signal at the intersection. Hannaford introduced into evidence a June 2014 corridor planning study prepared by an engineering consulting firm for the Chittenden County Regional Planning Commission. See 19 V.S.A. § 10i(b) (requiring VTrans to "develop transportation corridor studies as needed," identifying problems and ranking them "according to their criticality and severity"). In relevant part, the study identified priority short-, medium-, and long-term projects for the Route 116 corridor near the Hinesburg town center. The study did not include a traffic signal at the Route 116/Mechanicsville Road intersection, notwithstanding the evidence of existing unacceptable levels of congestion during peak hours. When asked by the court what would happen if the court made a signal a condition of approval but the Town continued not to want a signal at the intersection, Neighbors' expert responded, "I can't answer that question." In this case, the parties and court were on notice of the substantial possibility that VTrans would not support a traffic signal at that intersection. Insofar as Neighbors proffered the traffic light as a mitigating measure, the burden fell to Neighbors to demonstrate the feasibility of the project. They did not meet that burden in this case.

¶ 75. For the above reasons, we remand the matter for further proceedings concerning mitigation.[9] On remand, any party advocating a traffic signal at the Route 116/Mechanicsville Road intersection, or construction of a roundabout in the state highway, as reasonable mitigation should have the opportunity to join VTrans as a necessary party. Insofar as the proposed traffic signal impacts VTrans's statutory and regulatory duties regarding state highways, the agency's participation is a necessary precursor to any ruling requiring such a condition. See 19 V.S.A. § 10(7) (providing that VTrans shall "[e]rect and maintain appropriate traffic control devices on state highways"). On remand, the trial court may on the basis of the existing record require Hannaford to conduct a traffic signal study pursuant to VTrans guidelines, including consideration of alternatives such as a roundabout, or may reopen the evidence on mitigation as it sees fit.

2. Traffic Study

¶ 76. We remand the issues surrounding the trial court's elimination of a post-approval traffic study requirement focusing on the Route 116/Commerce Street intersection so that the trial court can consider the Town's arguments in the first instance.

¶ 77. At trial, Neighbors' traffic expert testified that the southbound left-turn lane on Route 116 at Commerce Street should be extended to 200 feet in length rather than 185 as proposed by Hannaford. The fifteen-foot differential was significant because the added length pursuant to the Neighbors' proposal would have required replacement of the culvert over Patrick Brook—a substantially more involved process. The trial court found that the 185-foot left-turn lane was adequate, and no widening of Route 116 beyond that proposed by Hannaford was necessary. The court noted, however, that because much of the evidence before the court was based upon predictive traffic models, there was no certainty that the 185-foot left turn lane would be sufficient to mitigate increased traffic from the project. The court therefore imposed a condition that, post-construction,

[9] Because we conclude that the record does not support the traffic light condition, we need not address the issues concerning Hannaford's responsibility for paying for the improvement.

Hannaford and the Town should conduct a post-development traffic study of the left-turn lane from Route 116 southbound onto Commerce Street "to confirm that the 185-foot lane length is adequate." The court explained that if the lane length proved inadequate, Hannaford should obtain a further amendment to the Act 250 permit for any necessary mitigation.

¶ 78. Neighbors moved to amend this aspect of the court's order, arguing that, as framed, the condition deprived them of their statutory right to participate in the determination of whether the turn lane is adequate because they were not afforded a role in the post-development study and subsequent proceedings. Neither Neighbors, nor any other party, sought wholesale elimination of the post-development traffic study requirement.

¶ 79. In response, the court explained that there was compelling evidence that Hannaford's traffic mitigation measures for the Route 116/Commerce Street intersection adequately dealt with the projected traffic conditions, but it had initially included the post-development traffic study to accommodate Neighbors' concerns that the 185-foot left-turn lane was not long enough. Upon further review, and in light of the participation concerns raised by Neighbors, the court struck the post-development traffic-study condition altogether. The court reiterated its conclusion that the credible evidence establishes that the project satisfies Criterion 5 with the improvements proposed by Hannaford, and that no further traffic studies are necessary.

¶ 80. On appeal, the Town argues that, without the traffic-study condition, it will be impossible to determine whether Hannaford's predictive traffic impact analysis accurately forecasts the level of traffic that will be generated by the proposed project and whether the project will cause unreasonable traffic congestion. According to the Town, the court's factual findings do not support elimination of the condition. The Town emphasizes that no party on appeal opposes the condition and that, throughout these proceedings, Hannaford itself agreed that a post-development traffic study is needed to ensure that no unreasonable congestion results from the project at the Route 116/Commerce Street intersection. The Town proposes a condition similar to the one VTrans

suggested to the District Commission. The Town's proposed condition would require Hannaford to perform traffic monitoring studies of all intersections studied by Hannaford within six months to a year after the project is open to the public. The proposed condition would also allow the District Commission to reopen the docket and make further findings and conclusions regarding appropriate mitigation measures in the event that the results of the monitoring demonstrated more congestion or unsafe conditions than predicted in Hannaford's traffic-impact analysis. Further, the Town's proposed condition would require necessary mitigation measures if the post-development monitoring demonstrated that Hannaford's proposed 185-foot left-turn lane on Route 116 at Commerce Street was inadequate to handle the traffic impacts from the project.

¶ 81. We conclude that the trial court exceeded its discretion in striking the traffic-study condition concerning the southbound left-turn lane of the Route 116/Commerce Street intersection for two reasons. In striking the condition, the court relied on the same predictive-model evidence that led it to impose the condition in the first place, but failed to explain why the post-project monitoring was no longer necessary. Moreover, because all parties to the proceedings before the trial court had agreed to some form of the post-development study condition, and the trial court removed the condition on its own initiative in response to a motion to reconsider that did not suggest elimination of the condition, the Town's opportunity to present to the trial court its arguments in favor of keeping the study has been circumscribed. A second post-judgment motion would not have been practicable. See Fagnant v. Foss, 2013 VT 16A, ¶ 10, 194 Vt. 405, 82 A.3d 570 (holding that untimely successive post-judgment motion does not toll the running of the appeal period). At a minimum, on remand the Town must have an opportunity to present its arguments in favor of retaining the post-development traffic-study condition in some form.

¶ 82. We note, however, that the all-encompassing study proposed by the Town, which would allow the District Commission to reopen the docket depending on the results of the post-permit traffic study, would directly violate our recent decision in Treetop. In Treetop, the District

Commission imposed a permit condition that reserved its right to continue to review stormwater mitigation measures "and to evaluate and impose additional conditions as needed." 2016 VT 20, ¶ 6. The Commission indicated that it was retaining jurisdiction to ensure that the mitigation measures proposed by the applicant would be effective and in compliance with Act 250. We upheld the Environmental Division's rejection of the condition, stating that, by reserving continuing jurisdiction over the stormwater system, the Commission was effectively creating a mechanism for it "to continuously amend the permit as necessary to redress future Act 250 violations," which not only expropriated the NRB's enforcement authority but also prevented finality in the land-use permitting process. Treetop, 2016 VT 20, ¶ 14. We concluded that such an open-ended condition was "an invalid condition subsequent." Id.

¶ 83. We emphasized, however, that:

> 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.

Id. ¶ 12.

¶ 84. Thus, our decision in Treetop does not preclude a condition requiring a permit applicant to perform a post-development study of traffic conditions to assure that specific, evidence-based performance standards are met. The Environmental Division must, in the first instance, determine based on sufficient evidence that particular permit conditions will likely satisfy the statutory requirements. Having so concluded, the court may require the permittee to take pre-determined specific actions as a result of the failure to meet the performance standards. Whether or not a permit includes such pre-determined follow-up actions, in the absence of a permit amendment, see Act 250 Rules, Rule 34, Code of Vermont Rules, 12 004 060, available at

https://www.lexisnexis.com/hottopics/codeofvermontrules, the permittee's failure to meet the performance standards outlined in the permit conditions becomes a matter for enforcement proceedings.

¶ 85. On remand, we direct that the trial court in the first instance to consider the Town's objection to its elimination of the post-development traffic study relating to the Route 116/Commerce Street intersection. The court shall take additional evidence and make further findings regarding the propriety of a post-development traffic study given the evidence before it. We caution, however, that any condition the court imposes on remand must be consistent with our holding in Treetop, as discussed above.

The Environmental Division's site-plan decisions and judgment entered on April 12, 2016 and July 7, 2016 are reversed. The Environmental Division's Act 250 decisions and judgment entered on July 7, 2016 are affirmed in part and reversed in part, and the matter is remanded for further consideration consistent with this opinion.

FOR THE COURT:

Associate Justice

STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
Docket No. 452-11-17 Frcv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

PLEASANT VALLEY FARMS OF BERKSHIRE, LLC,
Defendant.

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing Pleadings by Agreement under Vermont Rule of Civil Procedure 8(g). Based upon those Pleadings by Agreement and the parties' Stipulation for the Entry of Consent Order and Final Judgment Order, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION OF VIOLATION

1. Defendant Pleasant Valley Farms of Berkshire, LLC is adjudged liable for violating 10 V.S.A. § 1259(a) by discharging waste, i.e. silage leachate, from the Main Farm into waters of the State, i.e. Godin Brook, on July 25 and/or 26, 2016, without a permit from the Secretary of the Agency of Natural Resources (ANR).

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109 State Street
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RELIEF

2. For the violation described above, Defendant shall pay a civil penalty of fourteen thousand dollars ($14,000). Payments shall be made in four parts, with the first payment of $3,500 due within five (5) business days of the Court's issuance of this Consent Order and Final Judgment Order. Remaining payments of $3,500 each shall be made on December 20, 2017, March 20, 2018, and June 20, 2018.
3. Payment of the fourteen-thousand-dollar ($14,000) penalty shall be made to the "State of Vermont" and shall be sent to Laura B. Murphy, Assistant Attorney General, Environmental Protection Division, Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609.
4. In the event that Defendant fails to pay the amounts described in paragraphs 2 and 3 on the dates identified, such failure shall constitute a breach of this Consent Order and Final Judgment Order and interest shall accrue on the applicable overdue balance at twelve percent (12%) per annum, beginning on the first day after each such payment is due. Defendant shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.
5. No later than the effective date of this Consent Order, in order to ensure there are no future discharges into waters of the State from the leachate pond through the valve system, Defendant shall not use the outlet valve

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and/or pipe in managing the silage leachate pond unless and until such use is approved by ANR.

OTHER PROVISIONS

6. Defendant waives: (a) all rights to contest or appeal this Consent 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 Defendant and any and all of its successors and assigns. Any change in Defendant's ownership or corporate or other legal status, including but limited to any transfer of assets or real or personal property, shall in no way alter Defendant's, or any and all of Defendant's successor's and assign's, responsibilities under this Consent Order.
8. In the event Defendant becomes insolvent or any change in Defendant's ownership or corporate or other legal status makes it impracticable for Defendant to comply with this Consent Order, or for the State to collect the amounts described in paragraphs 2 and 3 or enforce the relief described in paragraph 5: (1) the real property at 1954 Richford Road, Berkshire, Vermont shall serve as the property upon which the State may pursue a lien; and (2) Mark and Amanda St. Pierre, as the owners of the real property at 1954 Richford Road, Berkshire, Vermont and the sole

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corporate Member (Mark St. Pierre) and Registered Agent (Amanda St. Pierre) of the Pleasant Valley Farms of Berkshire, LLC corporation, agree not to challenge any lien placed on the property as described in (1), and shall be responsible for complying with the injunctive relief in paragraph 5 of this Consent Order.

9. Except as described in paragraph 8, nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

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

11. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt.

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

13. Compliance by Defendant with its obligations under this Consent Order shall constitute full compromise, settlement, satisfaction, and release of Defendant, its owners, members, employees, predecessors, successors, parents, subsidiaries, affiliated companies, officers, directors, agents, and

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assigns from all civil and/or criminal liability with respect to the specific facts described herein or in the Pleadings by Agreement. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits, or directives applicable to Defendant. The State reserves all rights, claims, and interests not expressly waived herein.

14. This Consent Order may be altered, amended, or otherwise modified only by subsequent written agreement signed by the parties and approved by this Court. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at St. Albans, Vermont this 17 day of December 2017.

Hon. Rainville
Vermont Superior Court Judge,
Franklin Unit

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

STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
Docket No. Frcv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

PLEASANT VALLEY FARMS OF BERKSHIRE, LLC,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

The parties, State of Vermont, Agency of Natural Resources, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant Pleasant Valley Farms of Berkshire, LLC, hereby stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont's water pollution law by discharging waste, i.e. silage leachate, into waters of the State, i.e. Godin Brook, without a permit from the Secretary of the Agency of Natural Resources;

WHEREAS, Defendant admits in the Pleadings by Agreement that it is liable for this violation of Vermont's water pollution law;

WHEREAS, the Attorney General pursuant to 3 V.S.A. Chapter 7 has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

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

WHEREAS, the State considered the factors in 10 V.S.A. § 8010(b) in arriving at the proposed penalty amount, including the degree of the violation's actual or potential impact on public health, safety, welfare, and the environment;

WHEREAS, the Attorney General believes that this settlement is in the State's interest as it upholds the statutory regime of 10 V.S.A. Chapter 47, under which the violation occurred; and

WHEREAS the Consent Order has been negotiated by and between the State and Defendant in good faith and the State and Defendant agree to execute the Consent Order in settlement of Defendant's liability for the violation described and identified in the Pleadings by Agreement;

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

1. The attached Consent Order may be entered by the Court, though the parties request that the Court withhold entry of the Consent Order for 21 days to allow for public notice with the Attorney General's Office;
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

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proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and

3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreement signed by the parties and approved by the Court.

DATED at Montpelier, Vermont this 13th day of Nov., 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Laura B. Murphy
Robert F. McDougall
Assistant Attorneys General
109 State Street
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DATED at Berkshire, Vermont this 8 day of November 2017.

PLEASANT VALLEY FARMS OF BERKSHIRE, LLC

By: _____
Amanda St. Pierre, on behalf of Pleasant Valley Farms of Berkshire, LLC, as its Registered Agent
1546 Richford Road
Richford, VT 05476

_____
Mark St. Pierre, on behalf of Pleasant Valley Farms of Berkshire, LLC, as Principal
1546 Richford Road
Richford, VT 05476

As to paragraph 8 of the Consent Order:

_____
Mark St. Pierre, individually as owner of real property at 1954 Richford Road, Berkshire, Vermont

_____
Amanda St. Pierre, individually as owner of real property at 1954 Richford Road, Berkshire, Vermont

STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
Docket No. Frcv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

PLEASANT VALLEY FARMS OF BERKSHIRE, LLC,
Defendant.

PLEADINGS BY AGREEMENT

The State of Vermont, Agency of Natural Resources, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant Pleasant Valley Farms of Berkshire, LLC, hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The Agency of Natural Resources (ANR) is an agency of the State of Vermont created through 3 V.S.A. § 2802.
2. Pleasant Valley Farms of Berkshire, LLC ("Defendant"), is the owner and an operator of Pleasant Valley Farms, which is a dairy farming operation comprised of multiple facilities in Vermont including the Pleasant Valley's Main Farm at 1954 Richford Road, Berkshire, Vermont.
3. Mark and Amanda St. Pierre are the owners of the real property at 1954 Richford Road, Berkshire, Vermont. Additionally, in filings with the

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Vermont Secretary of State, Mark St. Pierre is listed as the sole Member of Defendant corporation and Amanda St. Pierre is listed as its Registered Agent.

Statutory and Regulatory Structure

4. ANR regulates the protection of Vermont's waters, the permitting and management of discharges, maintenance of water quality, and control of water pollution under 10 V.S.A. Chapter 47.
5. Section 1259(a) 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]."
6. Pursuant to 10 V.S.A. § 1251(3), a "discharge" is "the placing, depositing or emission of any wastes, directly or indirectly, into an injection well or into waters of the State."
7. In 10 V.S.A. § 1251(12), "waste" is defined as "effluent, sewage or any substance or material, liquid, gaseous, solid or radioactive, including heated liquids, whether or not harmful or deleterious to waters."
8. Section 1251(13) of Title 10 provides that "waters" 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."

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9. 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. Among other things, the court may grant injunctive relief, order compliance activities, and assess civil penalties up to $85,000 per violation or, for continuing violations, up to $42,500 for each day the violation continues.

Facts Relating to Defendants

10. Pleasant Valley Farms is regulated as a Large Farm Operation and the Main Farm houses mature cows, youngstock, and heifers.

11. Godin Brook, waters of the State as defined in 10 V.S.A. § 1251(13), flows between Main Farm fields to the east of the production area.

July 26, 2016 Incident

12. On July 26, 2016, an environmental enforcement officer (EEO) from ANR visited the Main Farm in response to a call reporting that Godin Brook was red in color. The weather that day was sunny and clear, and it was not raining.

13. At the time of the EEO's visit, silage was stored in bunks on the southern half of the production area at the Main Farm. The silage leachate collection and diversion system was designed to collect leachate, divert high flow to a leachate and stormwater retention pond, and divert low flow to the primary manure pit.

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14. The leachate pond had a pink/red hue to it. The pond was originally designed by the Agency of Agriculture, Food, and Markets. It had an outlet valve by which leachate could be discharged from the pit through a pipe that empties into a field between the pit and Godin Brook, with the pipe outlet approximately 2000 feet from Godin Brook.

15. Sometime between the evening hours of July 25, 2016 and the early afternoon of July 26, 2016, a discharge of pink/red liquid from the leachate pond entered Godin Brook because a valve controlling the pipe in question was open too far and leachate was flowing onto the field from the pipe.

16. The EEO observed pink/red liquid puddling in the field next to Godin Brook and discharging into the Brook.

17. The EEO observed the Brook flowing pink/red at least 7,200 feet downstream from the point of discharge. The Brook was solid pink/red at the intersection of Marvin Road and Godin Road, looking east and flowing further downstream toward the Missisquoi River.

18. A sample of the pink/red water in Godin Brook, taken by the EEO downstream of the discharge, revealed the presence of the algae Porphyridium. Porphyridium is pink/red in tint and may have caused or contributed to the pink/red color of the silage pond and discharge. Porphyridium feeds on nutrients, but is not itself considered a biological

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toxin or cyanobacteria (blue green algae), and does not have high biological oxygen demand.

19. This sample from the Brook also revealed elevated levels of total nitrogen (17 mg/L), digested phosphorus (1810 ug/L), and turbidity (99 NTU).

20. The EEO asked Mark St. Pierre to close the valve on the silage leachate pond to stop the discharge, which he did at approximately 3:00p.m. on July 26, 2016.

21. It is Defendant's position that the source of Porphyridium in the leachate pond is unknown and that a third party tampered with the valve causing the discharge to occur. The State of Vermont does not have sufficient information to verify that a third party tampered with the valve causing the discharge to occur.

22. Shortly after the incident, Defendant installed an anti-tampering device on the valve and reduced the size of the outfall pipe from four inches to two inches. Defendant later developed a leachate management plan and is in discussions with ANR regarding an acceptable plan going forward.

Godin Brook and Lake Champlain

23. Godin Brook is in the Missisquoi River basin, which is part of the Lake Champlain watershed. The Brook flows into the Missisquoi River, which flows into the Missisquoi Bay of Lake Champlain.

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24. Godin Brook is impaired because nutrient concentrations in the Brook have exceeded the water quality criteria for aquatic life support and aesthetic uses under Vermont's Water Quality Standards.

25. Missisquoi Bay is impaired by phosphorus and has one of the highest concentrations of phosphorus of any segment of Lake Champlain.

Violation

26. By discharging waste, i.e. silage leachate, from the Main Farm to waters of the State, i.e. Godin Brook, on July 25 and/or July 26, 2016, without a permit from the Secretary of ANR, Defendant violated 10 V.S.A. § 1259(a).

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATION

Defendant answers the preceding allegations as follows:

27. Defendant admits the allegations set forth in paragraphs 1-26.

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

DATED at Montpelier, Vermont this 13th day of Nov., 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Laura B. Murphy
Robert F. McDougall
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Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

DATED at Berkshire, Vermont this 8 day of November, 2017.

PLEASANT VALLEY FARMS OF BERKSHIRE, LLC

By: _____
Amanda St. Pierre, on behalf of
Pleasant Valley Farms of
Berkshire, LLC, as its Registered
Agent
1546 Richford Road
Richford, VT 05476

_____
Mark St. Pierre, on behalf of
Pleasant Valley Farms of
Berkshire, LLC, as Principal
1546 Richford Road
Richford, VT 05476