2018

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket # 480-7-10 Wncv

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

FILED

v.

PARKWAY CLEANERS, et al.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Vermont Agency of Natural Resources (ANR or the State) seeks remedies for environmental contamination related to a former dry cleaning business in the Town of Hartford.

There were initially several Defendants in the case. The claims against the others have been resolved. Judgment issued by default on June 11, 2015 against the following former operators of the dry cleaning business: Paul D. Gendron, Parkway Cleaners, and Paul D. Gendron dba Parkway Cleaners. The Fournier Defendants, who also operated the dry cleaning business for a time after Gendron, settled with the State for $100,000 in March of 2014. Third party Defendant Town of Hartford has been dismissed from the case.

The remaining Defendants are Richard S. Daniels and Hazen Street Holdings, Inc., a corporation organized and controlled by Mr. Daniels that is currently the title owner of the subject property. On August 5, 2014, summary judgment was granted to the State imposing liability on Mr. Daniels as owner of the property.[1] A motion to reopen the issue of liability was denied on September 2, 2016. The 2014 ruling provided for a period of discovery on the issue of damages, and ordered a hearing on "the amount of past damages, prejudgment interest, the amount to be credited from the Fournier settlement, and the terms of injunctive relief."

That hearing took place on April 20 and 21 and June 29 and 30, 2017. The State was represented by Attorneys Kyle Landis-Marinello and Nicholas F. Persampieri. Richard S. Daniels and Hazen Street Holdings, Inc. were represented by Attorney R. Bradford Fawley and Merrit S. Schnipper.

Post-trial memos and proposed findings have been filed by attorneys for both parties.

[1] "Daniels, not HSH, is the current owner regardless of which time frame applies to that determination. 10 V.S.A. § 6615 (a)(1)." 2014 Decision, page 10. "Daniels has current owner liability in this case under 10 V.S.A. § 6615 (a)(1)." *Id.* at page 11.

Motions

At the close of the State's case, Defendants made oral motions, which are ruled upon as follows.

Defendants renewed the Motion for Judgment on the Pleadings that was denied at the beginning of the hearing on April 20, 2017. The motion is again denied for the same reasons as stated on the record.

Defendants moved for dismissal on several grounds:

Failure to prove grounds for injunctive relief. Defendants argue that the State had a remedy at law, and therefore did not show a legal basis for injunctive relief. Since injunctive relief was authorized in the 2014 Decision, this is a request to reopen and revisit that Decision. Grounds to reopen have not been shown. Moreover, the specific statute providing for liability also provides that when liability is established and the defendant does not undertake performance of the necessary work, the State is entitled to an order requiring the Defendant to take specific actions. See 10 V.S.A. § 8221(b)(2) and the Conclusion of Law regarding injunctive relief set forth below. Therefore, the motion is denied on this ground.

Statute of Limitations. This is also a request to revisit a prior legal ruling of the court, and is denied. The prior decision was supported by the evidence at the hearing, which showed that it was not until 2006, which is within the statute of limitations period, that testing provided reliable evidence that the property of the Defendants was the source of the contamination that is the subject of this case.

Liability. Defendants again request review of prior rulings. Specifically, Defendants argue that as owner they should not have full liability both because they claim they were not responsible for a "release" and because they argue that their liability under the statute should be proportional. They raise no arguments that have not already been considered by the court, and the request to revisit the issue of liability is again denied.

Damages. Defendants argue that the damages the State seeks are special damages that were not specifically identified in pleadings. The court denied Defendants' pretrial motion on this argument at the outset of the trial on April 20, 2017 and affirms that ruling now.

Sufficiency of evidence. In addition, Defendants challenge the sufficiency of the evidence, but as set forth below, some of the State's evidence supported judgment, so that motion is also denied.

Findings of Fact

History

The subject parcel of property on which the dry cleaning business was operated, referred to in this decision as the "Parkway Lot," is a small lot adjacent to a property on which is or was located a trucking business owned by Mr. Daniels, informally called RSD Trucking in this decision. There are a few other business properties nearby, but the Parkway Lot is on a corner largely surrounded by a residential neighborhood with small lots and modest homes. The block in which the Parkway Lot is located is on Maple Street (Route 14) in the Town of Hartford. On

the other side of Maple Street is the White River. See copies of Defendants' Exhibits F and D, attached, for a layout and identification of the properties and local features.[2]

The State first became aware of contamination problems in this neighborhood in 1987. A spill occurred at Parkway Cleaners and the owner was asked to clean it up. In 1989, the State found the contaminant PERC on the adjacent St. Johnsbury Trucking (later RSD Trucking) property under a tank. PERC, or tetrachloroethene, is a chemical also known as PCE that is used in dry cleaning and for degreasing metal parts. It is a carcinogen. Although it attenuates over time, it takes a very long time to do so. At the request of the State, the owner installed a monitoring well. At that time, in 1989, there was no information that the PERC that was discovered was having an effect on human health. In 1989 or 1990, the dry cleaning business stopped operating on the neighboring Parkway Lot.

By 1994, RSD Trucking owned the St. Johnsbury Trucking property, and the State asked it to conduct testing in the monitoring wells on its property, which it subsequently did.

In 1995, the Parkway Lot went to a tax sale. Richard S. Daniels, principal owner of RSD Trucking, was the high bidder at the tax sale and purchased it for $2,278.38 in his individual capacity.

In 1996, the State received information showing the presence of PERC on the Mowers News Service property located on the opposite side of the trucking property from the Parkway Lot. The Mowers News Service property is downgradient from the Parkway Lot, suggesting the possibility that the contaminant had migrated from the Parkway Lot, although Mowers operated its own fleet of vehicles and there was also the possibility that the PERC came from its own activities. In 1999, a Report from the RSD testing in 1995 and 1999 showed PERC in the trucking property monitoring well. This PERC could have come from the Parkway Lot.

By 2002, RSD had done a Phase I Report on the RSD Trucking property that identified the Parkway Lot as a potential source of the PERC. (Phase I entails a historical assessment of the site and review of past uses.) In 2004, the State sent notice to RSD Trucking asking it to investigate contamination in the area (Phase II).

Patricia Coppolino began work at ANR in 2004 and first became familiar with the Parkway Site in September of 2004. By 2005, she was the site manager for the Parkway Site. ANR defines a site as a place where there has been a release of hazardous material above a certain standard. A site encompasses the extent of a release irrespective of property boundaries.

Ms. Coppolino met with Mr. Daniels several times, including on the property in the fall of 2005, and asked him to conduct Phase II, which involves sampling and developing the feasibility of a Corrective Action Plan for cleanup.[3] Mr. Daniels wanted to develop the

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[2] Exhibit F shows the relationship between the Parkway Lot and houses in the neighborhood. Exhibit D identifies the owners of pertinent properties described in this Decision. Both purport to show features relating to groundwater flow, but the court is not addressing that issue and does not adopt those depictions as fact. The purpose of attaching these exhibits is simply to show the layout and relationships of the properties described.

[3] ANR has apparently designated St. Johnsbury Trucking and Parkway as separate ANR sites, although they overlap. The exact history of site designations by ANR is unclear.

Parkway Lot and enrolled in a program through the Two Rivers–Ottoquechee Regional Commission, which administered federal grant funds given to the State. Two Rivers–Ottoquechee hired an environmental consultant to conduct Phase II, which led to the discovery of PERC in groundwater, soil, and soil gas underground, above the water table, on the Parkway Lot. Until then, the focus had been on contamination in groundwater. While PERC was detected in groundwater, it was at a depth not considered to cause concern for human health.

The June 2006 results showed high concentrations of PERC in soil vapor at a level in the soil (between 6 to 10 feet underground) that showed it had the potential to enter basements of nearby residences and affect indoor air quality. This suggested a possible risk to human health and linked the PERC to the Parkway Lot for the first time. It signaled the need for further investigation regarding possible effects on human health. The State hired a consultant to do indoor air sampling to determine whether soil gas was getting into homes in the neighborhood.

The State sent a "first letter" to a representative of RSD trucking, which the State assumed was the owner of the Parkway Lot, calling upon it to undertake investigative and corrective action.[4] The State also conducted a public informational meeting for neighbors. A report received by the State showed levels of contamination in five homes in the neighborhood that exceeded Department of Health safety standards, and showed the need for emergency action in those homes and testing in other homes.

Mr. Daniels cooperated with the State in the summer of 2006. In July he submitted an application to the State to participate in a "Redevelopment of Contaminated Properties Program." In August he arranged for and paid for installing fans to temporarily divert the bad air away from the occupants. However, by the fall of 2006, Mr. Daniels was no longer cooperating and did not work with ANR on further investigation. He created Hazen Street Holdings, Inc. and transferred the Parkway Lot to it. Since then, he has resisted liability.

An environmental consultant, KAS, was hired by the State to design and install "SSDs" (sub-slab depressurization systems) in eight houses in the neighborhood. They do not eliminate the source of the contamination, but divert soil gas vapors to the outside. They have been in place since then, and indoor air quality in the homes has improved. Redesign and maintenance have been required. Other than installation and maintenance of the SSDs and a little further sampling, no other activities have been pursued at the Parkway Site. The extent of PERC contamination has not yet been determined. The evidence shows that PERC from the Parkway Lot has migrated into soil, groundwater, soil gas, and indoor air on neighboring properties. The source of the vaporization has not been removed. Further investigation is needed to determine the full extent of the PERC contamination and its effect and to gather data on groundwater migration and the possible effect on the White River.

In this trial, the State seeks a judgment for approximately $283,000, plus interest from the dates of expenditures, based on three phases of action:

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[4] Apparently up to this point, both Ms. Coppolino and Mr. Daniels believed that the Parkway Lot was owned by the trucking business entity, but it was not. It was Mr. Daniels personally who had bought it at the tax sale 11 years earlier. This discovery of Mr. Daniels as owner apparently came as a surprise to both.

—from June to July of 2006, the State spent approximately $23,000 to conduct sampling;

—from September of 2006 to April of 2008, the State used approximately $20,000 of State funds and $200,000 in federal grant funds to install SSDs in eight houses and to redesign and improve the systems; and

—from July of 2008 to June of 2013, the State spent additional State funds to do additional indoor air and groundwater sampling and testing and to maintain the SSDs.

In the 2014 summary judgment decision, liability was imposed on Mr. Daniels but at that time the court did not issue judgment on the amount requested by the State, which was the same $283,000 as sought in this case, plus interest, for a total amount that was over $400,000 in 2014. The court determined that summary judgment procedure had not been properly followed with respect to amount of damages, and "given the high dollar amount at stake, the court will permit discovery on the issue of the amount of damages and then a hearing to permit Daniels to challenge the figures." 2014 Decision, page 11. Thus, the purpose of the hearing was for the State to prove the amount of money damages to be included in a judgment for "past damages, prejudgment interest, [and] the amount to be credited from the Fournier settlement." 2014 Decision, page 11.[5]

The State presented three witnesses at trial. Two of them verified that the expenditures had been made out of identified funds based on invoices that were approved by Patricia Coppolino with respect to State funds, and by a person authorized to do so on behalf of State Agency of Commerce and Community Development for the $200,000 in federal grant funds. There is no dispute that the money was spent on the basis of the invoices submitted into evidence. The key witness on the necessity and reasonableness of the expenditures was Patricia Coppolino, the ANR site manager. Defendant Daniels called no witnesses, but his attorney cross-examined extensively.

The necessity and reasonableness of expenditures by the State were highly contested.[6] Since the evidence of necessity and reasonableness came only from Patricia Coppolino, it is important to evaluate her background and experience and ability to provide expert testimony on evidence calling for an expert opinion.

She graduated from college in 1997 with a Bachelor of Science Degree in Environmental Chemistry. After college, she worked for 2 years for a company that provided technical assistance to EPA on-scene coordinators. Then for a little over 1½ years she worked for a private environmental consultant in Vermont working on "site characterizations" and preparing site plans for the Department of Environmental Conservation (DEC). She began to work for DEC in 2004 in the Waste Management Division, working primarily in the Brownfields

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[5] The specific terms of "an injunction requiring Daniels to undertake such further 'investigation, removal and remedial action' as is reasonable and necessary" will also need to be determined. 2014 Decision, page 11. This will be addressed at the time of submission of the form of judgment resulting from the damages hearing.

[6] Mr. Daniels is responsible for "costs of investigation, removal, and remedial actions incurred by the State which are *necessary to protect the public health or the environment.*" 10 V.S.A. § 6615(a) (emphasis added).

Response Program. She became a site manager in August. She provided oversight to Regional Planning Commissions related to Brownfield projects funded with EPA funds and reviewed "Phase I and II ESAs, CAFIs, and CAPs on Brownfield projects and . . . comments related to the report or redevelopment associated with the site." In 2012 she became an Environmental Program Manager.

As site manager beginning in 2004, she hired and directed consultants, reviewed and approved work plans, approved cost estimates and invoices, and ensured applicable standards were met. She has taken unspecified courses in vapor intrusion mitigation with content related to how a contaminant travels during intrusion and the best ways to sample vapor intrusion.

The evidence supports that she has knowledge and experience primarily in identifying and assessing conditions at a site and exercising responsibility for sampling. These processes are apparently known as "site characterization." She also has significant experience in administrative management of site projects. The technical work performed at the sites she has managed has been designed and done by hired contractors. The evidence does not support a finding that she is qualified to select and design and do cost analyses of mitigation or remediation systems on her own. Her approval of technical work to be done requires approval of a superior in the Waste Management Division whose identity and qualifications are unknown.

2006 Expenditures

The expenditures from June through November in 2006 were made to independent consultants largely for the purpose of indoor air sampling to determine whether soil gas was getting into homes such that the carcinogen PERC could be affecting human health. This is exactly the type of testing and sampling activity for which Ms. Coppolino had training and experience. Given the facts that PERC had been discovered in soil gas, that it was a known carcinogen, that a source of PERC in air can be vaporization of contaminated soil gas, and that homes in the neighborhood had air quality that was unsafe according to Department of Health standards, the court accepts her expert determination that there was a basis for conducting sampling in other homes in the area to investigate whether there was a risk to human health in other homes in the neighborhood.

Defendant argues that she is not qualified as a toxicologist and did not have the expertise to make such a judgment, but the court has determined that she is an expert in site evaluation. Experts often rely on the work and standards of other experts in evaluating situations within their own expertise, and she testified that ANR relies on the air quality standards developed by the Department of Health rather than duplicating or challenging that work within its own agency. The court finds this credible and reasonable for the purpose for which she used the information, which was within her realm of expertise.

The expenditures for sampling in this phase consist of the following:

6/06	Indoor air sampling (Exhibit 6)	9,319
7/06	Indoor air sampling and report (Exhibits 7, 8)	13,737
		$23,046

Based on Ms. Coppolino's expertise in site characterization and sampling of soil gas vapors and their effect on indoor air quality, the court finds that, based on her opinion, these costs were

necessarily incurred in order to investigate identified risks to human health, and that the amounts are reasonable.

2006–2008

During this period, the State spent $19,088 of State funds (Exhibit 40) and $200,000 in federal funds made available to the State and administered through the Agency of Commerce and Community Development (Exhibits 39, 41–49) to install sub-slab depressurization systems (SSDs) in eight homes with contaminated indoor air.

Ms. Coppolino's testimony was that she directed an environmental consultant to design and install SSDs in these homes, but the evidence is not entirely clear about who had authority to decide upon and order this action and there is no evidence about the professional qualifications of anyone else involved. Exhibits 10 et seq. state that the work plan for SSDs was approved by a George Desch of the State of Vermont-DEC, but there was no evidence about who he was or what his role was, although Ms. Coppolino acknowledges that her decision was approved by the Director (unnamed) in the Department of Waste Management. In any event, the decision was made to install SSDs rather than to pursue some other remedy, and Ms. Coppolino takes responsibility for that decision and for reviewing and approving work plans and cost estimates.

The evidence supports the fact that the results of site investigation showed that some type of action was needed to reduce the risk that occupants of affected homes would be breathing indoor air with excessive levels of PERC concentration. As to how and why this solution was selected, Ms. Coppolino's direct testimony was simply that the "sub-slab depressurization systems are installed in order to mitigate [] risk to indoor air." On cross-examination, she acknowledged that SSDs do not remove the source of contamination, and that there are other possible responses to the discovery of soil gas vaporization, such as capping to prevent contamination of groundwater, removal of contaminated soil, and vapor extraction. She also testified that no feasibility investigation was done to determine how best to spend money to get the best cleanup outcome overall. Apparently, she perceived that the need was to take steps right away to improve the indoor air quality in the homes in the neighborhood. While the evidence supports that there was such a need, it does not establish the necessity for the selection of SSDs as the immediate action.

The decision to install SSD systems in eight homes was a major decision that called for technical expertise and the evaluation of this and perhaps other options in relation to short and long-term benefits and costs. There is no evidence that the State engaged in a process involving expert knowledge and judgment to determine the best method for solving the problem presented by PERC concentrations in contaminated air from the soil gas vaporization. Ms. Coppolino's testimony was that installation of SSDs was common. It was an immediate measure to improve air quality for the home occupants in the short run but it was not a long-term abatement solution to the source of the problem, which still needs resolution.

One would expect that alternative plans and proposals would be solicited from environmental engineers, and then cost estimates obtained for each alternative, with an identification of its specific goal, such as whether it was a short or long-term solution, or that an environmental engineer within the Department would have the expertise to make such a decision about necessity and cost effectiveness. There is no evidence that the State engaged in a deliberative process to determine what action would be most effective to address the immediate

need to mitigate the risk to human health at the most reasonable cost. It may well be that a professional engineer with expertise in responding to a situation of indoor air contaminated by vaporized soil gas would be able to give an opinion that this was necessary action, but the evidence did not include such an opinion by a qualified expert.

Ms. Coppolino acknowledged that the source of the contaminated air has not been removed. Her testimony about why SSDs were installed was the conclusory statement that the method is "the most common and cost effective." She stated the conclusion that the costs of the SSDs were "necessary" (presumably to remove the contaminant PERC from the air breathed by occupants of the homes in which they were installed), but she did not provide facts in support of this statement. For example, she did not explain what alternatives existed for the purpose, or the comparative benefits or costs of SSDs as opposed to alternatives. The fact that no feasibility study was done makes it even more important that the immediate action taken of designing and installing SSDs be supported by expert testimony.

If a patient with a broken leg presents to an orthopedic doctor, one would expect the doctor to engage in a process of analysis to determine what course of treatment was necessary to repair the leg to the maximum extent possible (cast, traction, surgery, etc.). The doctor may need to consult with others with specialized knowledge, such as an orthopedic surgeon, and to be able to explain the basis for both short and long-term actions undertaken. If most broken legs heal with casts, which is also the least expensive, that alone is not a reason to choose a cast, although it may well be that a cast represents a reasonable short-term immediate response under particular circumstances even if other treatment is going to be pursued. If a commercial building is seriously damaged by fire, a decision has to be made as to whether it makes sense to repair it or demolish and rebuild a new building, and there may be short-term measures that are necessary to protect the public from the damaged building no matter which course is pursued, but such a decision calls for professional judgment as to alternative plans and the necessary costs associated.

There is no evidence to show that Ms. Coppolino's background and experience, either in 2006–2008 or now, were or are that of an environmental engineer with the professional capacity to make an analysis on her own of the type described above. Her testimony that the costs of the SSD system were "necessary" was conclusory and did not include a backup explanation of how and why this system, at this cost, was necessary to achieve what outcome, and necessary and reasonable as compared to alternatives. While she apparently received approval from her supervisor for the decision, as acknowledged in the State's proposed findings of fact, there is no evidence about the identity or qualifications of that person and thus the court is unable to evaluate the reliability of the decision. The normal method for proving the necessity and reasonableness of the work of professionals is to call as a witness a disinterested qualified professional in the field to testify as to the independent choices available and the necessity and reasonableness of the work done. There was no such testimony in this case, nor was there evidence from the engineering contractor hired to do the work that it was an appropriate and necessary response to the situation.

The State's evidence on the cost of the SSD system is no more sufficient on this point than it was at the time of the summary judgment motion. It is essentially the same: Ms. Coppolino's own conclusory statement that the work and its cost was necessary. In her testimony she affirmed, without elaboration, the decision that she herself made several years ago.

One reason that the court in 2014 determined that a damages hearing should be held was the fact that there was a "high dollar amount at stake." This expenditure for the SSD system represents most of that amount, yet the evidence on necessity and reasonableness is virtually the same and has not been supported by reliable expert testimony.

Under 10 V.S.A. § 6615, the obligation of an owner is primarily performance of the necessary work himself or herself, and if the owner does not do it, then the government can do the work and recover in a civil action a judgment for damages for the expenses that the owner would have incurred if he had done it himself. Such expenses must be necessary to remediate the risk to human health or the environment and reasonable in amount. An owner is not likely to simply hire a company to install a particular system without exploring alternative solutions to the problem and analyzing which one is likely to be most effective in relation to short and long-term goals.

The court cannot find that the State has met its burden of proof as to the necessity of the SSD installation or the reasonableness of its cost to the State.[7] Therefore, the State is not entitled to recovery of the $220,000 (approximately) spent to install the SSD systems. As a result of this finding, it is not necessary to address Mr. Daniels' argument that $200,000 of the money spent was not actually State money and therefore not subject to reimbursement.

2008–2013

From September of 2008 to 2013, the State made further expenditures for maintenance of the SSDs and for additional indoor air sampling and for a survey of monitoring wells to determine the direction of groundwater flow. For the reasons stated above, the expenditures related to SSDs have not been proved. Based on Ms. Coppolino's expertise in site characterization and sampling, the court finds that, based on her opinion, the following costs were necessarily incurred in order to investigate identified risks to human health, and the amounts are reasonable.

8/08–5/09	Site assessment	Exhibits 12–18	990
			2,467
			417
			1,573
			19,064
			652
			508
8/09–11/09	Indoor air sampling	Exhibit19–23	1,264
			1,368

[7] The evidence showed that even after installation of the SSDs, there were "exceedences" of air quality standards that called for redesign, and that in some houses the SSDs were not fully effective and additional work had to be done, such as pouring concrete. The cost of such work is included in the overall $200,000. The fact that redesign and remedial work in the houses had to be done underscores the necessity of expert evidence to support the necessity and reasonableness of both the original choice for SSDs and all the work done on the SSDs. To be clear, the court makes no finding that the SSD work was *not* necessary and is only finding that necessity is not proven by a preponderance of the evidence.

			833
			5,263
			644
12/09	Groundwater survey	Exhibit 24	2680
3/10	Groundwater survey	Exhibit 27	81
	Total		$37,804

Conclusions of Law

Past Damages

As previously determined, Mr. Daniels, as owner of the Parkway Lot, was responsible, starting in June of 2006, for the "costs of investigation, removal, and remedial actions incurred by the State which are necessary to protect the public health or the environment." 10 V.S.A. § 6615(a). His primary obligation as a matter of law was to assume responsibility for the work. Although he initially paid for some temporary emergency measures, he stopped paying and the State then incurred expenses to investigate and mitigate the threat to human health caused by the vaporization of soil gas containing PERC and its intrusion into neighboring homes.

The State is entitled to a civil judgment representing "reimbursement from any person who caused governmental expenditures for the investigation, abatement, mitigation, or removal of a hazard to human health or the environment." 10 V.S.A. § 8221(b)(5). Thus, the State is entitled to reimbursement for past expenditures for investigation and remedial action necessary to protect the air quality in the Parkway Lot neighborhood and to protect local residents from carcinogens in the air in their homes, to the extent that those expenditures were necessary and the amounts were reasonable.

Since the statute provides for a civil judgment, the normal jurisprudence related to civil liability applies, and the State bears the burden of proof by a preponderance of the evidence.[8] The court has found Ms. Coppolino to be an expert in site evaluation, sampling, and project administration and finds her evidence credible with respect to opinions on those topics, but not an expert in selection or design of technical remediation solutions. The burden of proof is not met with respect to the SSD systems. The court is mindful of the fact that there was an improvement in the quality of indoor air in the homes after the installation of the SSDs, and the success of that action is fortunate for the residents. That does not, however, equate to a conclusion that designing and installing SSDs for those eight homes was necessary or that the overall expense of doing so was the necessary and reasonable course of action under the circumstances.

Moreover, even if Ms. Coppolino were to have been qualified as an expert on selection of remedial methodology, the court is not bound to accept expert testimony, even if unrefuted by another expert, without its own determination that the opinion has been sufficiently supported

[8] The State argues that "cost recovery" under 10 V.S.A. § 6615 is "not traditional damages." (Transcript, Day 4, p. 73, lines 4–5) Nothing in the statute justifies such a distinction. The statute simply refers to "an action in the Civil Division," in which the burden of proof is by a preponderance of the evidence unless otherwise specified.

and is reliable. See *State v. Nugent*, 2014 VT 4, ¶¶ 8–10, 195 Vt. 411. In this case, there is insufficient evidentiary support for the necessity and reasonableness of the SSDs.

The State argues that the court should defer to the Agency and cites cases calling for substantial deference to an agency's interpretations of its own regulations and rules. The choice to install SSDs, as opposed to taking some other action, did not involve interpretation of its own rules. The evidence also did not show that the agency exercised its expertise to choose one reasonable and necessary option among competing but different reasonable and necessary options. If the agency has engineers with the expertise to make decisions about immediate actions to take, it should be a simple matter for the State to provide that testimony to support the necessity and reasonableness of the use of State funds (and thereby instill public trust and confidence).

Given that it is possible that the decision and design related to SSDs might have been able to be supported with reliable expert opinion testimony, this result may appear to be somewhat harsh on the State. The evidence is clear, however, that this is only the beginning of a significant liability to be borne by Mr. Daniels (with possible contributions from Paul Gendron[9]). The attorney for the State indicated in his Opening Statement that the overall cost of cleanup could wind up being as much as $2 million—in any event, a significant sum extending into the future. Mr. Daniels will be responsible for either doing and paying for the work himself, or reimbursing the State for its expenses, including interest. See *State v. Irving Oil Corp.*, 2008 VT 42, ¶ 15, 183 Vt. 386 (describing the "prayer for reimbursement of response costs" as incidental to the declaratory and injunctive relief certifying liability and compelling the defendant to "assume responsibility").

If Mr. Daniels believes that he can do the work at less cost than the State, he has the opportunity to do so and in fact, performance is his primary obligation. If he does not do it and the State undertakes the work, it is important that the State is able to show, by meeting its burden of proof, that the decisions it makes to spend money are for work that is necessary and that the amounts are reasonable. Moreover, as to the $220,000, it is noted that the Fourniers have already contributed $100,000. In addition, Mr. Gendron did not challenge the $283,000 figure and the State intends to pursue him for collection, in which case it may recover more of that cost.

Based on the evidence, the State has met the burden of proof on the expenditures made on the dates identified above in the total amount of $60,850 ($23,046 + $37,804 = $60,850).

Mr. Daniels argues that the State has not proved that *any* damages for which it seeks compensation were necessary. His reasoning is that because the State had knowledge of possible contamination at the site long before Mr. Daniels purchased the Parkway Lot and the State did nothing, it permitted migration of the contamination and subsequent vaporization into neighboring properties, and therefore the harm for which the State seeks to hold him responsible was determined by the State not to be necessary and should not be chargeable to him. However, under 10 V.S.A. § 6615(a), an owner of a property has full liability during the period of ownership. *State v. Howe Cleaners, Inc.*, No 27-1-04 Wncv, 2006 WL 6047594 (Vt. Super. Ct. Mar. 10, 2006), *aff'd on other grounds*, 2010 VT 70, 188 Vt. 303. Mr. Daniels became the

[9] The State indicated in Opening Statement that it intended to pursue collection action against Mr. Gendron on its default judgment for $283,000 plus interest, as well as for future work.

owner in 1995. The State first had information that contamination from the Parkway Lot represented a risk to human health in 2006. He had full responsibility for investigation and remediation of whatever existed at that time, and he has had full responsibility since then throughout his period of ownership.

Prejudgment Interest

Because Mr. Daniels was responsible for paying the proven costs in the first instance and knew of his obligation, and because the amount of each expenditure was known at the time of each payment by the State, he is responsible for prejudgment interest on each of the proven expenditures. See *Remes v. Nordic Grp., Inc.*, 169 Vt. 37, 39 (1999) (prejudgment interest "is awarded as of right where it is 'liquidated or capable of ready ascertainment'") (citation omitted)).

Credit for Fournier settlement funds

An issue identified in the 2014 Decision as an item for determination at this trial is the amount to be credited from the Fournier settlement toward the obligation of Mr. Daniels. The State's evidence was that the $100,000 received from the Fourniers from the settlement in March of 2014 has been set aside in a special fund and was used in 2016 for maintenance of the SSD systems. The State seeks a judgment that includes full prejudgment interest to date on each expenditure to which it is entitled, without credit for the funds from the Fournier settlement. That is tantamount to treating Mr. Daniels as if no compensation had been received to compensate the State for its expenses at the site.[10]

While it is reasonable for the State to segregate the Fournier funds and use them for a specific purpose from an accounting or resource management point of view, that is a matter of how recovered funds are *used*, and does not affect liability. It does not mean that the State is entitled to collect interest from Mr. Daniels as if that money had not been received by the State. The obligations of Mr. Daniels, the Fourniers, and the Gendron Defendants are joint and several to the extent they overlap. Mr. Daniels has full liability, but he is entitled to a credit against his obligation for amounts paid toward that obligation by others based on their own share of liability. Thus, Mr. Daniels is entitled to have the $100,000 paid by the Fourniers in March of 2014 credited against the total amount he owed at that time. The total amount he owed included prejudgment interest that had accrued as of that date.

The State argues that it is not seeking reimbursement for expenditures that were made in 2016 from this special fund, resulting in a reduction of his liability from what it would otherwise be, and thus Mr. Daniels cannot complain about being responsible for prejudgment interest. However, there is no evidence allowing the court to find that the benefit to Mr. Daniels of not being charged for the 2016 expenditures is equal to or greater than the benefit of a $100,000 credit in March of 2014 against his then-existing obligation as calculated on the basis of these

[10] In a post-trial memo, the State acknowledged it would recalculate prejudgment interest if the court determined that Mr. Daniels should be credited with receipt of the Fournier funds as of March of 2014.

findings. It was the State's choice not to seek compensation from Mr. Daniels for the 2016 expenditures, and the State's choice to not offer evidence of the value of those expenditures compared to prejudgment interest. The State is not entitled to make a unilateral decision to decline to credit Mr. Daniels with the Fournier settlement funds at the time it received them.

The State shall submit its calculation for prejudgment interest on the amounts included in this decision, showing interest from each date of expenditure as identified above to March 2014. Once the total due as of March 2014 has been determined, Defendants are entitled to a credit of $100,000 against that amount. They are also responsible for remaining prejudgment interest to the present. Defendants shall have 14 days to file any objection to the State's calculation of interest and credit.

Injunctive Relief

The evidence is clear that the contamination problems at the Parkway site, including their effect on the environment and human health, have not been fully remediated. Only temporary measures remain in place. In addition, more investigation is needed. Mr. Daniels has not assumed his legal responsibility under 10 V.S.A. § 6615, and shows no signs of doing so. The State is entitled, pursuant to 10 V.S.A. § 8221(b)(2), to an order requiring Mr. Daniels to undertake "remedial actions . . . to mitigate hazard to human health or the environment." Mr. Daniels raises objections to an injunction in reliance on common law jurisprudence relating to the use of injunctions for relief. Such arguments are superseded by the statute itself, which clearly provides for the court to issue an order requiring performance. Whether that order is called an injunction or otherwise is immaterial; it is authorized by statute.

The State has previously submitted a proposed order, prior to the appearance of Mr. Daniels's present attorney in the case. The State shall submit a new proposed order, and Mr. Daniel's attorney shall have 14 days to file any objection.

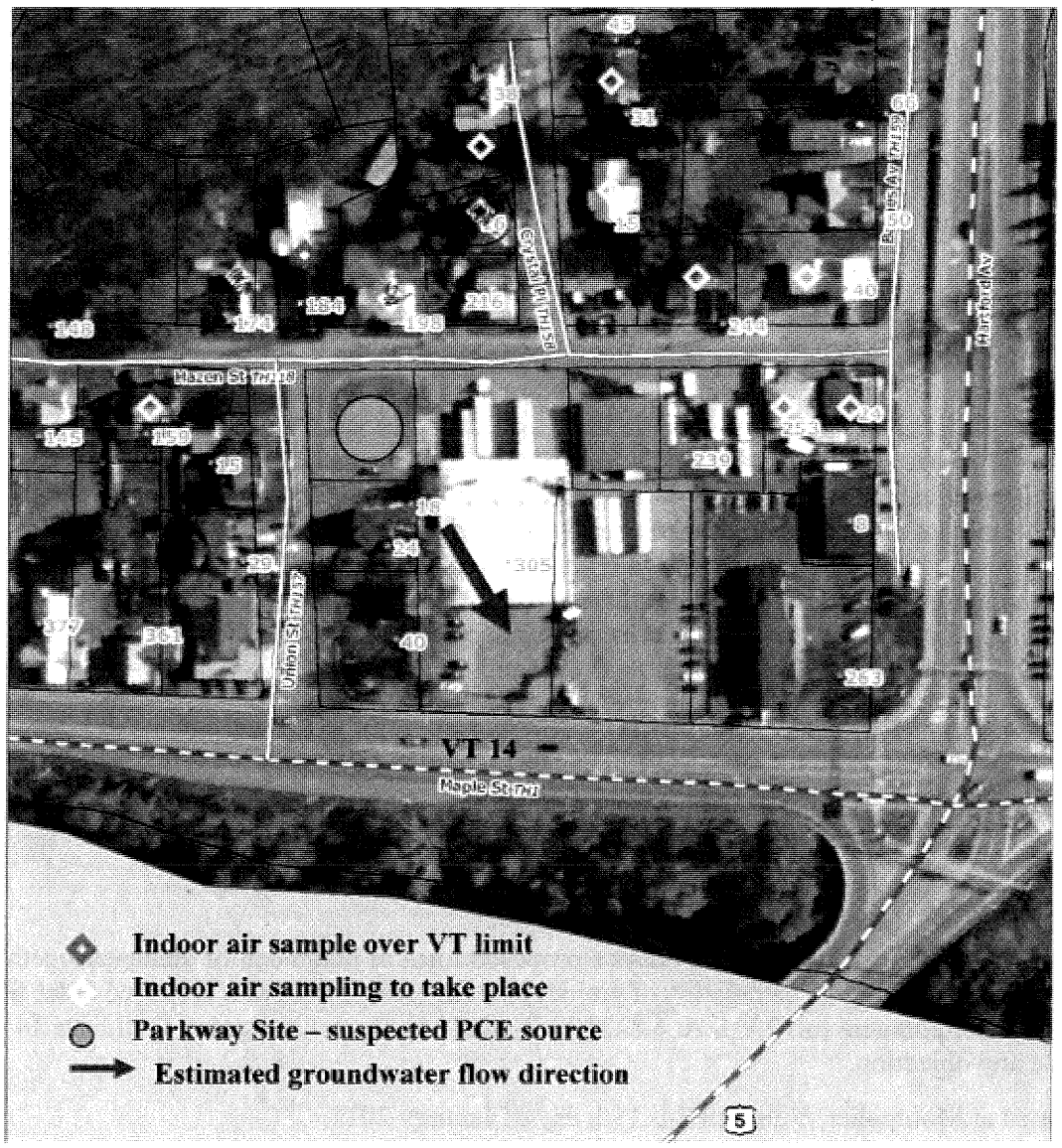
Order

The State shall submit within 14 days a proposed form of judgment for damages together with a worksheet showing its calculation of prejudgment interest as well as a proposed order for prospective relief pursuant to 10 V.S.A. § 8221(b)(2), and Mr. Daniel's attorney shall have 14 days to file any objection.

Dated at Montpelier, Vermont this 19th day of January 2018.

Mary Miles Teachout
Mary Miles Teachout
Superior Court Judge

Former Parkway Cleaners Site



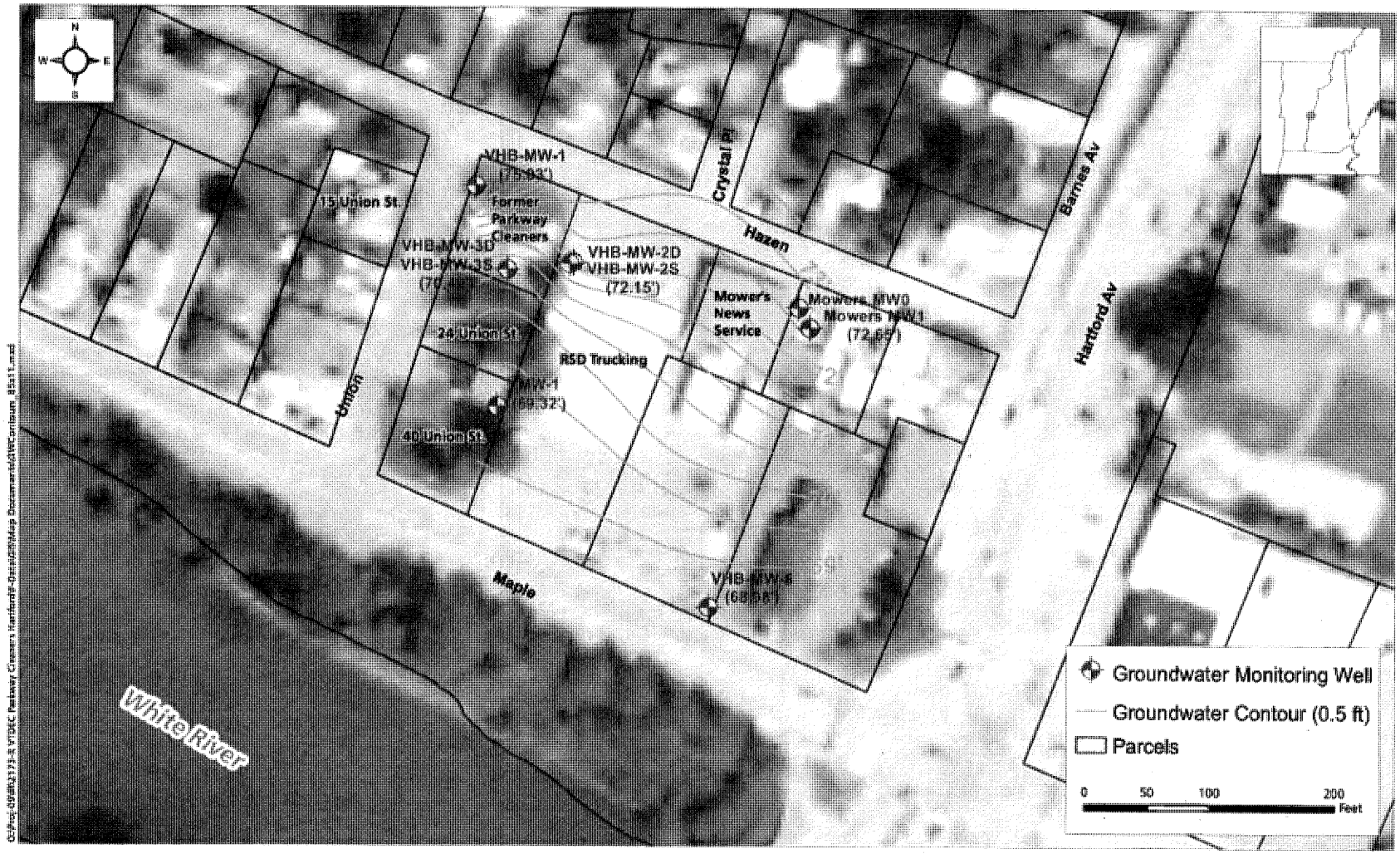


Figure 1. Hydraulic Head Distribution, Former Parkway Cleaners Site
Hartford, Vermont

Sources: Stone Field Notes

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket # 480-7-10 Wncv

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

v.

PARKWAY CLEANERS, et al.

ENTRY

The court ruled on remedies in this case on January 22, 2018 and ordered the State to submit a form of judgment, subject to objections by Defendants Richard S. Daniels and Hazen Street Holdings, Inc. The State submitted a proposed final judgment and Defendants' objections are fully briefed.

Defendants argue that the State is not entitled to a mandatory injunction and the proposed injunction is flawed because it refers to documents (rules) outside its four corners and is too nonspecific. It also argues that neither 10 V.S.A. § 6615 nor § 8221 authorize injunctive relief, and § 8221 is unconstitutionally vague.

The court declines to rule on these issues in any detail. The court already has ruled that the State is entitled to a mandatory injunction. Sections 6615, 6615b, and 8221 amply warrant it. At issue is not whether there should be an injunction, but its terms. To the extent that the injunction must lack the specificity that otherwise would be required of a typical injunction, that is due to the nature of Mr. Daniels' statutory obligations and his failure to satisfy them. The purpose of the mandatory injunction is to require him to comply with his statutory obligations.

The court is not persuaded by Defendants' objections that there is any need to modify the proposed judgment filed by the State.

So ordered.

Dated at Montpelier, Vermont this 10th day of April 2018.

Mary Miles Teachout
Mary Miles Teachout
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 480-7-10 Wncv

STATE OF VERMONT)
AGENCY OF NATURAL RESOURCES,)
Plaintiff,)
)
v.)
)
PARKWAY CLEANERS; PAUL D.)
GENDRON; SANDRA L. GENDRON;)
PAUL D. GENDRON and SANDRA L.)
GENDRON doing business as)
PARKWAY CLEANERS; FOURNIER)
CLEANERS; HAROLD N. FOURNIER;)
PEGGY J. FOURNIER; HAROLD N.)
FOURNIER and PEGGY J. FOURNIER)
doing business as FOURNIER)
CLEANERS; and RICHARD S.)
DANIELS; and HAZEN STREET)
HOLDINGS, INC.,)
Defendants.)

STATE OF VERMONT'S FINAL JUDGMENT ORDER

Final judgment is hereby entered in the above-captioned action. It is ORDERED, ADJUDGED, and DECREED as follows:

1. In accordance with the Court's August 5, 2014 summary judgment ruling, Defendants Richard S. Daniels and Hazen Street Holdings, Inc. (Defendants) are adjudged liable to the State of Vermont as current owners of a contaminated property pursuant to 10 V.S.A. § 6615(a)(1) with respect to releases of hazardous materials at and from the former Parkway Cleaners property, 7 Union Street, Hartford, Vermont (the Site).

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2. In accordance with this Court's January 19, 2018 Findings of Fact, Conclusions of Law, and Order, and the attached Exhibit A, the State is awarded judgment against Defendants in the total amount of $4,497.81, consisting of:

- the principal amount of $60,859.73 for reimbursement of past State costs
- plus $42,212.08 in prejudgment interest through March 10, 2014
- minus $100,000 for the March 10, 2014 payment from the Fournier defendants
- plus $1,426 in prejudgment interest from that date through January 19, 2018.

Within 30 days of issuance of this Order, Defendants shall reimburse the State of Vermont a total of $4,497.81.

3. Defendants shall perform site investigation and corrective action, compliant with 10 V.S.A. § 6615b and all requirements of the July 2017 Investigation and Remediation of Contaminated Properties Rule (IROCP Rule), to address contamination from releases of hazardous materials at and from the Site, including all locations potentially affected by contamination from the Site, as follows:

a. within 60 days of this Order, Defendants "shall provide the Secretary" of the Agency of Natural Resources (Secretary) "with a site investigation work plan" compliant with Subchapter 3 of the IROCP Rule for the Secretary's review (IROCP Rule §§ 35-301(b), 35-303(c)(1));

b. "no later than 60 days from the date of the Secretary's approval [of the site investigation work plan], unless an alternate implementation timeline is approved by the Secretary," Defendants "shall implement an approved site investigation work plan" compliant with Subchapter 3 of the IROCP Rule (IROCP Rule § 35-304(b));

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c. "within 90 days of receipt of final laboratory data, or within an alternate schedule approved by the Secretary," Defendants shall submit the "site investigation report" compliant with Subchapter 3 of the IROCP Rule to the Secretary (IROCP Rule § 35-305(a)), and then, if necessary, provide any follow-up information required for the Secretary to "determin[e] that the site investigation report contains all the information required in § 35-305(b)" (IROCP Rule § 35-306(b));

d. within 60 days of completing all site investigation requirements, Defendants "shall evaluate corrective action alternatives" by submitting an Evaluation of Corrective Action Alternatives compliant with Subchapter 5 of the IROCP Rule to the Secretary for review (IROCP Rule § 35-503(a));

e. "within 30 days of the Secretary's response" to the Evaluation of Corrective Action Alternatives, Defendants shall "provide the Secretary with a response to any comment provided by the Secretary including a revised corrective action alternative or a corrective action plan for the selected alternative" (IROCP Rule § 35-504(c));

f. "within 90 days of the [Secretary's] approval" of the corrective action plan selected and approved by the Secretary, "or in accordance with a schedule approved by the Secretary," Defendants "shall . . . implement[]" the approved "corrective action plan" compliant with Subchapter 5 of the IROCP Rule (IROCP Rule § 35-506(e)); and

g. "within 90 days of completing the construction of any remedy, as applicable, or in accordance with the schedule approved in the corrective

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action plan," Defendants "shall . . . submit[]" a "corrective action completion report" compliant with Subchapter 5 of the IROCP Rule to the Secretary for review (IROCP Rule § 35-507(a)).

4. The Agency shall retain the right to require further investigation by Defendants in the event of the discovery of any previously unknown condition at the Site or the receipt of any new information concerning the extent of risk or hazard or environmental impact presented at the Site and to determine based on such a condition or such information that the CAP is not sufficiently protective of human health or the environment. In addition, in the event of such a determination, the Agency shall retain the right to require implementation by Defendants of different or additional corrective action measures in connection with the Site. Nothing in this Order shall be deemed to limit the authority of the State to take any appropriate action it may deem necessary to protect human health or the environment or to prevent, abate, or respond to an actual or threatened release of hazardous materials.

5. Nothing in this Order shall relieve Defendants of any obligation they may have under federal, state, or local law to obtain a permit or other approval for any activity undertaken as part of implementing this Order or the CAP.

6. Nothing in this Order shall relieve defendants Parkway Cleaners, Paul D. Gendron, and Paul D. Gendron doing business as Parkway Cleaners, from the Default Judgment Order that has already been issued against them in this case.

7. This Court shall retain continuing jurisdiction over the subject matter of this action and the parties: (a) to enforce the terms and conditions of this Order; (b) to

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resolve any disputes between the parties concerning the application of this Order; and (c) to provide further relief as may be appropriate.

8. Any violation of this Order is a failure to comply with a court order and may result in the imposition of injunctive relief and penalties, including for contempt, as set forth in 10 V.S.A. Chapters 159, 201, and 211.

SO ORDERED, and **ENTERED** as **FINAL JUDGMENT**.

Dated: April 10, 2018

Mary Miles Teachout

Hon. Mary Miles Teachout, Presiding Judge

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STATE OF VERMONT

FILED

SUPERIOR COURT
WASHINGTON Unit

2010 JUL -1 P 2:42

CIVIL DIVISION
Docket No. 480-7-10 Wncv

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES
Plaintiff

v.

PARKWAY CLEANERS; PAUL D. GENDRON; SANDRA L. GENDRON; PAUL D. GENDRON and SANDRA L. GENDRON doing business as PARKWAY CLEANERS; FOURNIER CLEANERS; HAROLD N. FOURNIER; PEGGY J. FOURNIER; HAROLD N. FOURNIER and PEGGY J. FOURNIER doing business as FOURNIER CLEANERS; and RICHARD S. DANIELS; and HAZEN STREET HOLDINGS, INC.
Defendants

COMPLAINT

NOW COMES the plaintiff, the State of Vermont, by and through its attorney, Attorney General William H. Sorrell, and pursuant to 10 V.S.A. §8221, 10 V.S.A. §6615 and §6616, 12 V.S.A. §4711, the common law and the general equitable jurisdiction of the court brings this action against the past and present owners and operators of land and structures of a facility which had been formerly used for a dry cleaning business at 7 Union Street in the Town of Hartford, Vermont, (the Property) as set forth below, and complains as follows:

1. The Plaintiff State of Vermont, Agency of Natural Resources is a state agency with offices in Waterbury, Vermont.

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2. The defendant Parkway Cleaners was a dry cleaning business that owned or operated or controlled a facility at the Property from approximately 1977 until approximately 1988.
3. The defendant Paul D. Gendron was an owner of the Property, and an owner or operator or a person who controlled Parkway Cleaners, a dry cleaning business at the Property from approximately 1977 until approximately 1988.
4. The defendant Sandra L. Gendron was an owner of the Property, and an owner or operator or a person who controlled Parkway Cleaners, a dry cleaning business at the Property, from approximately 1977 until approximately 1988.
5. The defendant Fournier Cleaners was a dry cleaning business that owned or operated or controlled a facility at the Property from approximately 1988 until approximately 1995.
6. The defendant Harold N. Fournier was an owner of the Property, and an owner or operator or a person who controlled Fournier Cleaners, a dry cleaning business at the Property from approximately 1988 until approximately 1995.
7. The defendant Peggy J. Fournier was an owner of the Property, and an owner or operator or person who controlled Fournier Cleaners, a dry cleaning business at the Property, from approximately 1988 until approximately 1995.
8. The defendant Richard S. Daniel is an owner of or a person who controlled the Property from approximately 1995 until present, which was known to him to have been a facility formerly operated as a dry cleaning business, and for which he knew or had reason to know that a release or threatened release of hazardous materials had occurred or was occurring on the Property.
9. Defendant Richard S. Daniel attempted to transfer ownership of the Property to Hazen Street Holdings, Inc. in approximately 2006. On information and belief, the transfer of

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the Property from Defendants Richard S. Daniels to Hazen Street Holdings, Inc. was without reasonably equivalent value and is invalid.

10. The defendant Hazen Street Holdings, Inc. is listed in the Town of Hartford land records as an owner of the Property from approximately 2006 to the present time, which was known to it to have been a facility formerly operated as a dry cleaning business, and for which it knew or had reason to know that that a release or threatened had occurred or was occurring on the Property.
11. Defendants Richard S. Daniels and Hazen Street Holdings, Inc. are identical for the purposes of fairness, equity and the public need.
12. The Property is contaminated with tetrachloroethene, also known as both tetrachloroethylene and perchchloroethylene, and commonly known as PCE or PERC, which was caused by releases from the operation of the dry cleaning business on the Property. PERC is a dry cleaning chemical and is a hazardous material and a hazardous waste as those terms are defined under Vermont law at 10 V.S.A. § 6602(16) (A) and §6602(4).
13. The Property and structures and improvements abutting and surrounding the Property, including the indoor air of residences, are contaminated with hazardous materials and hazardous wastes as a result of the release and disposal of hazardous materials and hazardous wastes during the period of time that the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier owned, operated or controlled a facility at the Property at which hazardous materials and hazardous wastes were disposed of, and which release continues to the present.

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14. The soil at the Property, and the soils abutting and surrounding the Property, are contaminated with hazardous materials and hazardous wastes as a result of the release and disposal of hazardous materials and hazardous wastes during the period of time that the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier owned, operated or controlled a facility at the Property at which hazardous materials and hazardous wastes were disposed of, and which release continues to the present.

15. The groundwater beneath the Property, and the groundwater beneath the real property and improvements abutting and surrounding the Property, are contaminated with hazardous materials and hazardous wastes as a result of the release and disposal of hazardous materials and hazardous wastes during the period of time that the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier owned, operated or controlled a facility at the Property at which hazardous materials and hazardous wastes were disposed of, and which release continues to the present.

16. The Defendants Richard S. Daniels and Hazen Street Holdings, Inc. own and control the Property at which a release and threatened release of hazardous materials and hazardous wastes exist.

FIRST CLAIM FOR RELIEF

-ABATEMENT PURSUANT TO 10 V.S.A. § 8221 AND 10 V.S.A. §6615-

17. The allegations set forth in paragraphs 1 through 16 are incorporated herein by reference.

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18. Each defendant, as set forth in paragraphs 2 through 11 above, is a person who is responsible and is strictly liable for abating the release or threatened release of hazardous materials from a facility at the Property, at which hazardous materials were disposed of, which occurred or is occurring during the time that each defendant was or is a person who did or now does own, or operate, or control a facility at the Property.

SECOND CLAIM FOR RELIEF

-COSTS INCURRED BY THE STATE PURSUANT TO 10 V.S.A. § 8221 AND 10 V.S.A. §6615-

19. The allegations set forth in paragraphs 1 through 18 are incorporated herein by reference.

20. Each defendant, as set forth in paragraphs 2 through 11 above, is a person who is responsible and is liable for the costs of investigation, removal and remedial actions incurred by the State of Vermont for abating the release of hazardous materials from a facility at the Property, at which hazardous materials were disposed of, which occurred or is occurring during the time that each defendant was or is a person who did or now does own, or operate, or control a facility at the Property.

THIRD CLAIM FOR RELIEF

-COMMON LAW PUBLIC NUISANCE-

21. The allegations set forth in paragraphs 1 through 20 are incorporated herein by reference.

22. The defendants have created a public nuisance by releasing and continuing to release hazardous materials from the Property to the soil and groundwater interfering with the common and general public interest.

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FOURTH CLAIM FOR RELIEF

-RELEASE PROHIBITION PURSUANT TO 10 V.S.A. § 8221 AND 10 V.S.A. §6616-

23. The allegations set forth in paragraphs 1 through 22 are incorporated herein by reference.

24. The release of dry cleaning chemicals, which are hazardous materials, from the facility during the time the facility was used as a dry cleaning business was a violation of 10 V.S.A. §6616 by the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier which prohibits the release of hazardous materials into the land of the state, and is a continuing violation by those defendants named in this paragraph for each day that the violation continues.

FIFTH CLAIM FOR RELIEF

-RELEASE PROHIBITION 10 V.S.A. §6616-

25. The allegations set forth in paragraphs 1 through 24 are incorporated herein by reference.

26. The release of dry cleaning chemicals, which are hazardous materials, from the facility during the time the facility was used as a dry cleaning business was a violation of 10 V.S.A. §6616 by the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier which prohibits the release of hazardous materials into the land of the state, and is a continuing violation by those defendants named in this paragraph for each day that the violation continues.

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SIXTH CLAIM FOR RELIEF

-CIVIL PENALTIES PURSUANT TO 10 V.S.A. §8221(b)(6)

FOR VIOLATIONS OF 10 V.S.A. §6616-

27. The allegations set forth in paragraphs 1 through 26 are incorporated herein by reference.

28. Pursuant to 10 V.S.A. §8221(b) (6), the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier are liable for civil penalties of not more than $50,000.00 for the violations of 10 V.S.A. §6616 concerning the release of hazardous materials, and $25,000.00 for each day that the violations continued.

Request for Relief

In accordance with 10 V.S.A. §8221(b), the Plaintiff requests that the court:

1. Declare that each of the defendants are jointly and severally liable for the abatement of the release and threatened release of hazardous materials from the soil and groundwater at and surrounding the Property at 7 Union Street in the Town of Hartford, Vermont;
2. Declare that each of the defendants are jointly and severally liable for the costs incurred by the State of Vermont for investigating, removing and remediating the contamination caused by the release and threatened release of hazardous materials at and surrounding the property at 7 Union Street in the Town of Hartford, Vermont which are necessary to protect and public health and the environment;
3. Declare that each of the defendants have created a public nuisance by the release and continuing release of hazardous materials at and from the Property.

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4. Order each of the defendants to abate the release and threatened release of hazardous materials from the soil and groundwater at and surrounding the property at 7 Union Street in the Town of Hartford, Vermont;
5. Order each of the defendants to pay the costs incurred and future costs that may be incurred by the State of Vermont for investigating, removing and remediating the contamination caused by the release and threatened release of hazardous materials at and surrounding 7 Union Street in the Town of Hartford, Vermont which are necessary to protect and public health and the environment, plus pre-judgment interest;
6. Order the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier to pay civil penalties to the State pursuant to 10 V.S.A. §8221(b) (6) of not more than $50,000.00 for the defendants' violation of 10 V.S.A. §6616 and not more than $25,000.00 for each day that the defendants' have failed to take action and allowed the contamination of the Property to continue.

Dated July 1, 2010 at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL
Attorney for the Plaintiff
State of Vermont

By: _____

Michael O. Duane
Assistant Attorney General
109 State Street
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ENTRY ORDER

2018 VT 30

SUPREME COURT DOCKET NO. 2017-187

JANUARY TERM, 2018

Agency of Natural Resources	}	APPEALED FROM:
	}	
v.	}	Superior Court,
	}	Environmental Division
Francis Supeno, Barbara Supeno, and	}	
Barbara Ernst	}	DOCKET NO. 98-8-15 Vtec

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

Affirmed.

FOR THE COURT:

Marilyn S. Skoglund, Associate Justice

Concurring:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

2018 VT 30

No. 2017-187

Agency of Natural Resources

v.

Francis Supeno, Barbara Supeno, and Barbara Ernst

Supreme Court

On Appeal from
Superior Court,
Environmental Division

January Term, 2018

Thomas G. Walsh, J.

Thomas J. Donovan, Jr., Attorney General, and Robert F. McDougall, Assistant Attorney General, Montpelier, for Petitioner-Appellee.

David Bond of Strouse & Bond, PLLC, Burlington, for Respondents-Appellants.

PRESENT: Reiber, C.J., Skoglund, Eaton and Carroll, JJ.

¶ 1. **SKOGLUND, J.** Respondents, Francis Supeno, Barbara Supeno, and Barbara Ernst, appeal an order of the Environmental Division imposing a penalty of $27,213 for water and wastewater permit violations. On appeal, respondents argue that their due process rights were violated, the penalty assessment was precluded by res judicata, and the amount of the penalty was excessive. We affirm.

¶ 2. The following facts are either not disputed or were found by the court. Respondents Francis Supeno and Barbara Supeno are siblings and jointly own property in Addison at 306 Fisher Point Road. Barbara Supeno and Barbara Ernst live adjacent to the property at 330 Fisher Point Road. In October 2009, the Supeno siblings obtained a wastewater system and potable water

supply permit, which authorized the replacement of a seasonal cottage at 306 Fisher Point Road with a year-round residence with one bedroom. The permit included the construction of an on-site well and wastewater disposal system. The water supply for 330 Fisher Point Road is provided through a public water system.

¶ 3. In June 2014 the Agency of Natural Resources (ANR) received a complaint of an alleged violation of the wastewater permit. ANR also became aware that the property was advertised as a two-bedroom, two-bathroom rental. ANR sent an inquiry to respondents seeking to conduct an inspection of the property, but respondents did not reply. An ANR enforcement officer went to the property and Barbara Supeno denied ANR access to the house. The Environmental Division granted ANR's petition for an access order and ANR received access on September 9, 2014. During the visit, the ANR enforcement officer observed two water lines entering the basement of 306 Fisher Point Road. Respondent Ernst explained that one line was from the on-site well and the other was a spliced connection of the town water line from 330 Fisher Point Road, and that the house could switch between the two water sources. The enforcement officer also observed the permitted bedroom on the second floor and an additional nonpermitted bedroom in the basement.

¶ 4. On September 18, 2014, ANR filed an emergency administrative order (EAO) and the court granted the petition the same day. The EAO listed three violations: (1) respondents failed to obtain a permit before modifying the rental home at 306 Fisher Point Road to add a second bedroom; (2) respondents spliced into the public water supply line serving 330 Fisher Point Road and connected it to the rental property on 306 Fisher Point Road without obtaining a permit; and (3) respondents created an unapproved cross-connection at the rental property, which allowed it to switch between the well water and the public water system and created a risk that potentially polluted water could contaminate the public water supply. The EAO stated that the Secretary of

ANR "reserve[d] the right to subsequently issue Administrative Orders, including penalties." The EAO also notified respondents of their right to request a prompt hearing on the merits of the order.

¶ 5. Respondents requested a hearing, which the Environmental Division held in September 2014. Respondents were represented at the hearing by counsel. In October 2014, the court modified the EAO to allow respondents to seek a permit from ANR to connect the building at 306 Fisher Point Road to the public water supply, but the violations remained unchanged. Respondents did not appeal the EAO.

¶ 6. In June 2015, ANR issued an Administrative Order (AO) for the same violations contained in the EAO and assessed a $29,325 penalty against respondents. Respondents requested a hearing on the penalty assessment in the AO before the Environmental Division.

¶ 7. The parties filed cross motions for summary judgment. Respondents alleged that penalties could not be assessed in the AO for three reasons: (1) the AO violated their due process rights because they were not informed of the possibility of such a high penalty being assessed; (2) the AO was barred by res judicata because it involved the same parties and issues as the EAO; and (3) the penalty violated the Eighth Amendment to the U.S. Constitution. ANR moved for summary judgment on the penalty assessment. The court concluded that respondents had received full process and res judicata did not apply and therefore denied respondents' motion for summary judgment. The court further concluded that review of the penalty assessment involved disputed facts and denied summary judgment to both parties on this issue. Following an evidentiary hearing, the court made findings relevant to the penalty assessment, which are discussed more fully below, and set the total penalty for the violations at $27,213. Respondents filed this appeal.

¶ 8. On appeal, respondents argue that assessing a penalty in the AO after the violations were established in the EAO was a denial of due process and barred by res judicata. They also contend that the penalty assessed by the court was excessive and in error.

I. Due Process

¶ 9. Respondents first contend that assessment of a penalty in the context of the AO violates their right to procedural due process. Due process requires that a party be provided with notice " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " Town of Randolph v. Estate of White, 166 Vt. 280, 283, 693 A.2d 694, 696 (1997) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

¶ 10. Respondents allege that they were not properly noticed that a penalty might be assessed after conclusion of the EAO. To satisfy due process, an agency, prior to assessing a penalty, must inform the parties of "(1) the factual basis for the deprivation, (2) the action to be taken against them, and (3) the procedures available to challenge the action." Id. at 284, 693 A.2d at 696.

¶ 11. Here, respondents received full and proper notice of the proceedings that led to the penalty on appeal. The initial EAO provided all of the required elements of notice. It set forth the facts supporting the violations and cited the statutory basis for the violations. The EAO explained what action would be taken in response to the violations. The EAO specifically notified respondents that the Secretary of ANR "reserve[d] the right to subsequently issue Administrative Orders, including penalties." Finally, the EAO set forth respondents' right to a hearing on the merits of the order and instructions on how to pursue that avenue. Indeed, respondents availed themselves of the process accorded and requested a hearing before the Environmental Division. After the hearing, respondents were provided with a modified EAO that again specifically advised that penalties could be sought at a later time in a proceeding for an AO. The AO similarly provided the required notice to respondents.

¶ 12. Respondents argue that ANR's action of seeking a penalty in the AO amounted to the imposition of an undisclosed remedy, which violates due process. Prue v. Royer, 2013 VT 12, ¶ 53, 193 Vt. 267, 67 A.3d 895 (explaining that "relief cannot be granted if the party against which it is granted was prevented from raising appropriate defenses or submitting evidence because it did not know that that remedy was being considered"). Given that respondents were fully noticed in the EAO proceeding that penalties could be assessed later, there is no merit to respondents' argument that deferring consideration of penalties to the AO deprived respondents of an opportunity to challenge the factual findings underlying the penalty. Respondents chose not to appeal the EAO having been fully noticed that these violations could form the basis for penalties in a subsequent AO proceeding. Because respondents were provided with appropriate notice, they were not denied due process.

II. Claim Preclusion

¶ 13. Respondents next argue that the AO is barred by res judicata, also known as claim preclusion. "Under the doctrine of claim preclusion, a final judgment in previous litigation bars subsequent litigation if the parties, subject matter, and cause(s) of action in both matters are the same or substantially identical." Faulkner v. Caledonia Cty. Fair Ass'n, 2004 VT 123, ¶ 8, 178 Vt. 51, 869 A.2d 103. Respondents contend that having obtained a final judgment in the EAO proceeding, ANR could not then seek penalties in an AO because the AO involved the same parties, subject matter, and claims as those that were raised or might have been raised in the EAO.

¶ 14. The Environmental Division concluded that claim preclusion did not apply because the EAO was not a final judgment as to the penalty. The court relied on the following language in the EAO that expressly reserved ANR's right to seek penalties in a subsequent AO proceeding: "The Secretary retains the right to subsequently issue Administrative Orders, including penalties, pursuant to 10 V.S.A. § 8008 with respect to violations described therein." The court further

concluded that not applying res judicata was consistent with the language of the applicable statutes, ANR's interpretation of those statutes, and the policy behind the statutes.

¶ 15. On appeal, we review de novo the question of whether claim preclusion applies to a given set of facts. Faulkner, 2004 VT 123, ¶ 5. Here, there is no dispute that the EAO and AO involved the same parties, subject matter, and causes of action insofar as both proceedings concerned ANR and respondents and involved the same factual violations. Further, although penalties were not sought in the context of the EO, they could have been. 10 V.S.A. § 8010(a) (allowing assessment of administrative penalty in context of administrative order or emergency administrative order); see Lamb v. Geovjian, 165 Vt. 375, 380, 683 A.2d 731, 734 (1996) (explaining that issue preclusion bars both claims that were actually litigated and claims "that were or should have been raised in previous litigation" (quotation omitted)).

¶ 16. Claim preclusion may be enforced, however, only when "there exists a final judgment in former litigation." In re Tariff Filing of Cent. Vt. Pub. Serv. Corp., 172 Vt. 14, 20, 769 A.2d 668, 673 (2001) (quotation omitted). Once there is a final judgment, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction." Restatement (Second) of Judgments § 24(1) (1982). The Restatement of Judgments states that a claim is not extinguished and a second action can be maintained if "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." Id. § 26(1)(b). This exception to claim preclusion has been adopted by courts in other jurisdictions. See D & K Props. Crystal Lake v. Mut. Life Ins. Co. of N.Y., 112 F.3d 257, 260 (7th Cir. 1997) ("Under a generally accepted exception to the res judicata doctrine, a litigant's claims are not precluded if the court in an earlier action expressly reserves the litigant's right to bring those claims in a later action." (quotation omitted)); Toro Co. v. White Consol. Indus., Inc., 920 F. Supp. 1008, 1013 (D. Minn. 1996) ("In a consent judgment, a party may expressly reserve

the right to re-litigate some or all of the issues that would have otherwise been barred between the same parties."); see also 18 C. Wright et al., Federal Practice and Procedure § 4413 (3d ed.) ("A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.").

¶ 17. This Court has not previously explicitly adopted this exception to claim preclusion although some prior decisions have alluded to it. In Carmichael v. Adirondack Bottled Gas Corp. of Vermont, 161 Vt. 200, 207, 635 A.2d 1211, 1216 (1993), this Court recognized and applied a similar exception to claim preclusion set forth in the Restatement § 26—that claim preclusion does not apply if the defendant acquiesced in splitting the claims. See Restatement (Second) of Judgments § 26(1)(a) (providing that claim is not extinguished if "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein"). In Faulkner, 2004 VT 123, ¶ 16 n.5, this Court approvingly cited the Restatement for the proposition that reserved claims are not barred by claim preclusion although the Court concluded there had been no such reservation in that case.

¶ 18. In determining whether to adopt this exception, we consider the purposes of claim preclusion: "(1) to conserve the resources of courts and litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudication." Tariff Filing, 172 Vt. at 20, 769 A.2d at 673. Providing an exception to claim preclusion for issues that have been reserved by the court is consistent with these purposes. Judicial resources are conserved by allowing the court to decide important, potentially more time-sensitive, issues while reserving other claims for later adjudication. Finality and reliance are preserved insofar as all parties are on notice as to which claims have been extinguished and which

remain open for subsequent litigation. Moreover, the exception does not open the door to vexatious litigation or inconsistent outcomes. Therefore, we adopt an exception to claim preclusion for circumstances in which the court reserves the plaintiff's right to maintain a second action on a particular issue.[1]

¶ 19. The EAO in this case sufficiently reserved the issue of penalties to preclude application of claim preclusion. The EAO explicitly reserved ANR's right to seek penalties in a subsequent AO proceeding. Therefore, claim preclusion did not bar ANR from seeking penalties as part of an AO proceeding.

¶ 20. In support of their argument, respondents cite Harmon Industries, Inc. v. Browner, 19 F. Supp. 2d 988 (W.D. Mo. 1998), in which the court held that the Environmental Protection Agency (EPA) was barred from imposing a monetary penalty in a separate proceeding after the property owner had entered a consent decree with the state environmental agency for the same violation. Id. at 998. In that case, the consent decree specifically provided that it resolved all claims and constituted full satisfaction and there was no reservation to later adjudication of penalties by the EPA. Id. at 992. The fact that the EAO expressly reserved ANR's right to seek penalties in a subsequent AO proceeding distinguishes this case from Harmon.

¶ 21. Respondents also contend that the reservation was ineffective because the authorizing statute does not allow ANR to seek penalties in an AO proceeding after not including a penalty in the EAO. The statute states that a "penalty may be included in an administrative order . . . or in an emergency administrative order." 10 V.S.A. § 8010(a) (emphasis added). In construing this statute, "our primary objective is to effectuate the intent of the Legislature" and we

[1] We need not decide how explicit the reservation must be because the reservation in this case was specific and clear.

do so first by examining the plain language. C&S Wholesale Grocers, Inc. v. Dep't of Taxes, 2016 VT 77A, ¶ 13, 203 Vt. 183, 155 A.3d 169.

¶ 22. The statute's use of "or" indicates a legislative intent to allow inclusion of the penalty in either proceeding. The statute does not specifically require ANR to choose one proceeding over the other and is silent on the question of whether ANR can initiate penalties in an AO after choosing not to assess penalties in an EAO.

¶ 23. "[W]here a statute is silent or ambiguous regarding a particular matter this Court will defer to agency interpretation of a statute within its area of expertise as long as it represents a permissible construction of the statute." In re Hinsdale Farm, 2004 VT 72, ¶ 19, 177 Vt. 115, 858 A.2d 249 (quotation omitted). ANR's interpretation that an EAO can reserve the issue of penalties to an AO is reasonable. The EAO process in general is on an abbreviated timeline because the process is meant to address activities that might present an immediate concern for public health or the environment. Under the statute, an EAO may be sought when there is a threat to public health or the environment or there is ongoing action that will likely lead to such a threat, or when activity is occurring without a permit. 10 V.S.A. § 8009(a)(1)-(3). ANR's construction of the statute is permissible and it acted within the bounds of the statute by choosing to assess penalties in the AO rather than in the initial EAO.

III. Penalty

¶ 24. Finally, respondents argue that the penalty assessed by the court was excessive and an abuse of discretion. ANR initially imposed a penalty of $29,325, and after respondents requested a hearing before the Environmental Division, the court "review[ed] and determine[d] anew the amount of [the] penalty." 10 V.S.A. § 8012(b)(4). The amount of an administrative penalty is determined by considering several statutory factors. 10 V.S.A. § 8010(b) (listing factors). These include the degree of actual or potential impact, the presence of mitigating

circumstances, respondent's knowledge of the violation, respondent's record of compliance, the deterrent effect, the costs of enforcement, and the duration of the violation. Id. "The imposition of civil penalties represents a discretionary ruling that will not be reversed if there is any reasonable basis for the ruling." Agency of Nat. Res. v. Persons, 2013 VT 46, ¶ 20, 194 Vt. 87, 75 A.3d 582 (quotation omitted).

¶ 25. The Environmental Division conducted an evidentiary hearing and made specific findings related to the penalty assessment. The court adopted ANR's practice of treating multiple violations of the same permit or related violations as one violation and calculated one overall penalty for respondents' three violations. The court used the system configured by ANR to determine an appropriate penalty. Under that scheme, a violation is first identified as Class I to IV, with Class I being the most severe, depending on several factors, including the harm caused, the severity of the violation, and whether the action was initiated without a permit. Each class has a monetary penalty range. The statutory factors are then given a number between "0" and "3" and those combined numbers are multiplied by the maximum penalty for that class to arrive at a base penalty. The penalty can be decreased for mitigating factors and increased to provide a deterrent. In addition, ANR may recoup economic benefit gained by the violator and the cost of enforcement.

¶ 26. Here, the court determined that these violations were Class II because they involved construction initiated before issuance of a permit. The court then considered the various statutory factors. The court found there was a moderate potential[2] for an adverse impact on health or the

[2] As to the violations for adding a second bedroom and using the home as a rental property, the court found that there was a risk that the increased load on the wastewater treatment system would cause it to fail and could result in human exposure to contaminates or contamination of soil and groundwater. As to the violation for splicing the water supply, the court acknowledged that there was conflicting evidence. The court credited the testimony of ANR that although the cross connection was temporarily disconnected, it could have been reconnected. The court noted, however, that if there was just a cross connection violation it would assign a value of "0" to the degree of impact. On appeal, respondents assert that the court committed error in finding that the water supply could be switched back and forth from the well to the public supply. Respondents

environment and assigned that factor a "1." The court determined that respondents knew or should have known that their actions required a permit and assigned this factor a "2." Because the evidence showed that respondents had no record of noncompliance, the court gave this factor a "0." As to the length of the violation, the court found that the cross connection was in place from at least October 2009 to November 2011 and the increased load on the wastewater was in existence from July 2010 to September 2014 without a permit and assigned this factor a "3." The court looked at mitigating factors, which the statute identifies as "including unreasonable delay" by ANR and determined that no mitigation was warranted insofar as ANR acted promptly and any delay was caused by respondents' decision to require ANR to obtain a court order prior to gaining access to the property. The court increased the penalty by $9000 as a deterrent, finding that respondents were not cooperative with ANR and that the violations had existed for a long time. The court calculated the cost of enforcement as $6213. The court found that respondents' economic benefit could not be accurately calculated and did not increase the penalty on this basis. The court set the overall penalty at $27,213.

¶ 27. Respondents argue that the court clearly erred by including an increase for a deterrent because respondents did not cooperate with ANR initially and denied ANR access to the property at the time of the original site visit. Respondents contend that they should not be punished for asserting their constitutional rights to require a warrant before entry onto their property. We conclude that there was no error. The Environmental Division has discretion to determine how to apply each of the factors and "how any mitigating circumstances found should affect the amount of the penalty imposed as long as its assessment is not unreasonable." Agency of Nat. Res. v.

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assert that the facts demonstrate that the evidence does not support this finding and that there was no threat to the public water supply. Even if the finding is not supported, there was no prejudice to respondents because the court explicitly stated that its assessment of the degree of impact was derived from the violation related to the increased load on the wastewater treatment system.

Godnick, 162 Vt. 588, 597, 652 A.2d 988, 994 (1994). The court here did not penalize respondents for exercising their constitutional rights. The court determined that a larger penalty was necessary to deter future violations because respondents had not cooperated with ANR and had allowed the violations to exist for an extended duration even though they knew or should have known of the violations. Moreover, even excluding respondent's refusal to allow ANR entry to the property, the remaining facts provide a reasonable basis for the court's decision. Persons, 2013 VT 46, ¶ 20 ("The imposition of civil penalties represents a discretionary ruling that will not be reversed if there is any reasonable basis for the ruling." (quotation omitted)). The court's decision to assess a deterrent penalty is reasonable in light of the facts that respondents did not answer ANR's initial inquiry, did not cooperate with ANR's investigation, and allowed the violations to exist for a long time without a permit.

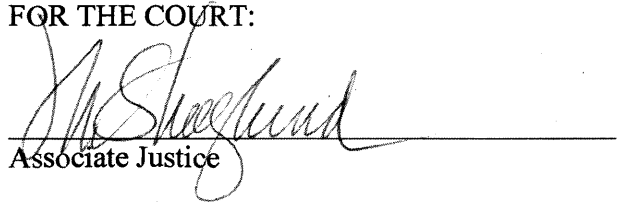
¶ 28. Respondents argue that the court erred in assessing the penalty against Barbara Ernst because she is not an owner. We do not reach this issue because respondents have failed to demonstrate how it was preserved for appeal. See Agency of Nat. Res. v. Deso, 2003 VT 36, ¶ 12, 175 Vt. 513, 824 A.2d 558 (mem.) ("Since this claim was not raised before the environmental court, it is not preserved for our review."). The violations were filed against all three respondents and at no time did they object to the inclusion of Barbara Ernst in the case or ask that she be removed as a respondent. Having failed to raise this below, the issue is not preserved for appeal.

¶ 29. Respondents make several other claims regarding the court's findings supporting the penalty assessment. They argue that the court failed to consider certain evidence demonstrating that the violations had no potential to cause harm, that the court erred in finding that respondents knew or should have known of the violations, and that the court erred in determining the length of the cross-connection violation. "The trial court determines the credibility of witnesses and weighs the persuasive effect of evidence, and we will not disturb its findings unless, taking them in the

light most favorable to the prevailing party, they are clearly erroneous." In re JLD Properties of St. Albans, LLC, 2011 VT 87, ¶ 17, 190 Vt. 259, 30 A.3d 641 (quotation omitted). Although respondents view the evidence differently, the court based its findings on evidence in the record and provided a reasonable basis for its penalty assessment.

Affirmed.

FOR THE COURT:



Associate Justice

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

COUNTY WASTE AND RECYCLING SERVICE, INC., doing business as ACE CARTING,
Defendant.

PLEADINGS BY AGREEMENT

Plaintiff, State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant County Waste and Recycling Service, Inc., d/b/a Ace Carting ("Defendant"), 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 (Agency) is an agency of the State of Vermont with enforcement authority over environmental permitting requirements including the requirement in 10 V.S.A. § 6607a(a) that commercial waste haulers obtain a permit before transporting waste. 10 V.S.A. § 8221(a) requires Agency civil enforcement actions to be "brought by the Attorney General in the name of the State."

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2. The Vermont Attorney General represents the State of Vermont in civil causes "in which the State is a party or is interested when, in his or her judgment, the interests of the State so require," including for violations of 32 V.S.A. § 5954(b), which requires commercial waste haulers to file copies of their quarterly franchise tax returns with the Agency. 3 V.S.A. § 157.

3. County Waste and Recycling Service, Inc., doing business as Ace Carting, is a State of New York foreign profit corporation transacting its waste hauling business in this State of Vermont. County Waste is registered as a solid waste removal business in the State of Vermont.

Statutory and Regulatory Structure

Title 10

4. Title 10, Chapter 159 of the Vermont Statutes grants the Agency of Natural Resources authority to regulate solid waste, hazardous waste, and hazardous materials.

5. Title 10 section 6607a(a) states as follows:

> A commercial hauler desiring to transport waste within the State shall apply to the Secretary for a permit to do so, by submitting an application on a form prepared for this purpose by the Secretary and by submitting the disclosure statement described in section 6605f of this title. These permits shall have a duration of five years and shall be renewed annually. The application shall indicate the nature of the waste to be hauled. The Secretary may specify conditions that the Secretary deems necessary to assure compliance with State law.

6. Title 10 section 6607a(b)(1)(B) defines "[c]ommercial hauler" to include "any person that transports solid waste for compensation in a vehicle."

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7. Title 10 section 6607a(d) declares it "unlawful for any person to operate a motor vehicle subject to the provisions of this section upon any public highway in the State without first obtaining the permit from the Secretary, or to so operate without having in the vehicle a permit issued under this section."

8. Pursuant to Title 10 section 8221, the Agency, through the Attorney General, may bring an action in superior court to enforce Vermont's environmental laws, including violations of Chapter 159.

Title 32

9. Title 32, Subchapter 13 of the Vermont Statutes sets forth the franchise tax requirements on waste facilities and commercial haulers of solid waste.

10. Title 32 section 5952(3) regarding the quarterly "$6.00 per ton of waste delivered"[1] franchise tax imposed by the State of Vermont provides:

> (3) The tax shall be similarly imposed on waste shipped to an incinerator or other treatment facility or disposal facility that is located outside the State, without having been delivered to a transfer station located in this State. In this situation, the tax is imposed for each calendar quarter or part thereof upon the franchise or privilege of doing business of every person regulated under 10 V.S.A. § 6607a as a commercial hauler of solid waste. This tax shall not be imposed on waste exempt under subdivision (2) of this subsection.

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[1] 32 V.S.A. § 5952(a)(1) states, "[a] tax is imposed for each calendar quarter or part thereof upon the franchise or privilege of doing business of every person required by 10 V.S.A. chapter 159 to obtain certification for a facility. The tax shall be imposed in the amount of $6.00 per ton of waste delivered for disposal or incineration at the facility, regardless of the amount charged by the operator to recoup its expenses of operation, including the expense of this tax."

11. Title 32 section 5954(b) regarding the quarterly filing of the return requires that "[c]opies of this return shall be filed with the Secretary of Natural Resources at the same time, or as otherwise required by the Secretary."

12. Pursuant to Title 3 section 157, the Attorney General may appear for the State in civil causes "in which the State is a party or is interested when, in his or her judgment, the interests of the State so require," including for violations of Title 32.

Factual Allegations

13. Defendant hauls solid waste and recyclables through and from Vermont.

14. In 2016 and the years prior, Defendant transported solid waste and recyclables throughout the State of Vermont without a commercial waste hauling permit from the State.

15. On March 3, 2016, the Vermont Agency of Natural Resource's Solid Waste Compliance Chief, Barb Schwendtner, mailed a postcard titled, "Are you hauling waste in VT without a permit?" to Defendant with instructions for filing an application for a permit. The State did not receive a response to its postcard or an application from Defendant.

16. On July 20, 2016, Ms. Schwendtner conducted unrelated fieldwork from Fair Haven to Rupert, Vermont, and observed numerous of Defendant's garbage toters and dumpsters throughout the area.

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17. On July 22, 2016, the Agency issued a Notice of Alleged Violation to Defendant for transporting waste in Vermont without a permit.

18. On July 27, 2016, Defendant submitted to the State its commercial hauler application for a permit to transport waste throughout the State of Vermont. The State issued this permit on November 7, 2016, covering Defendant's vehicles hauling solid waste and recyclables throughout Vermont.

19. By letter dated August 30, 2016, in response to the Notice of Alleged Violation, Defendant indicated it had filed quarterly franchise tax forms and paid the related fees to the State of Vermont Department of Taxes since 2012. Defendant failed to file copies of these quarterly returns with the Vermont Agency of Natural Resources as required.

20. In September 2016, Defendant provided the State with access to its 2012-2016 franchise tax returns showing total waste tonnages for that timeframe.

21. By filing quarterly franchise tax forms and paying related fees, Defendant demonstrated it had been transporting solid waste in Vermont since 2012 without the required permit from the Agency.

22. No permit authorizing Defendant's transportation of solid waste was issued by the State to Defendant prior to November 7, 2016.

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Violations

23. Defendant in January 2012 and continuing through December 2012 violated 10 V.S.A. § 6607a by transporting, without a permit from the State, solid waste in motor vehicles throughout the State of Vermont.

24. Defendant in January 2013 and continuing through December 2013 violated 10 V.S.A. § 6607a by transporting, without a permit from the State, solid waste in motor vehicles throughout the State of Vermont.

25. Defendant in January 2014 and continuing through December 2014 violated 10 V.S.A. § 6607a by transporting, without a permit from the State, solid waste in motor vehicles throughout the State of Vermont.

26. Defendant in January 2015 and continuing through December 2015 violated 10 V.S.A. § 6607a by transporting, without a permit from the State, solid waste in motor vehicles throughout the State of Vermont.

27. Defendant in January 2016 and continuing through November 2016 violated 10 V.S.A. § 6607a by transporting, without a permit from the State, solid waste in motor vehicles throughout the State of Vermont.

28. Defendant from the first quarter of 2012 continuing until the last quarter of 2016 violated 32 V.S.A. § 5954(b) by failing to file copies of its quarterly franchise tax returns with the Vermont Agency of Natural Resources.

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DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

29. Defendant admits the factual allegations set forth in paragraphs 1-3 and 13-22 solely for purposes of resolving this case.

30. Without formally admitting or denying liability, Defendant agrees to this settlement of the above violations alleged in paragraphs 23-28 in order to resolve this case.

31. Defendant agrees that each of the violations alleged in paragraphs 23-28 above is deemed proven and established as a "prior violation" in any future State proceeding considering Defendant's compliance record, as well as the compliance record in Vermont of any and all of Defendant's successors, assigns, and affiliated companies, including but not limited to administrative or judicial enforcement actions for civil penalties calculated pursuant to 10 V.S.A. § 8010, and permit proceedings.

DATED at Montpelier, Vermont, this 6th day of February, 2018.

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Megan R.H. Hereth
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

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

DATED at Rochester, New York, this 2nd day of February, 2018.

COUNTY WASTE AND RECYCLING SERVICE, INC. d/b/a ACE CARTING

By: _____

James J. Pergolizzi, Esq.
Counsel for Defendant
Bond Schoeneck & King, PLLC
350 Linden Oaks
Third Floor
Rochester, NY 14625-2825

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

DATED at Rochester, New York, this 2nd day of February, 2018.

COUNTY WASTE AND RECYCLING SERVICE, INC. d/b/a ACE CARTING

By: _____

James J. Pergolizzi, Esq.
Counsel for Defendant
Bond Schoeneck & King, PLLC
350 Linden Oaks
Third Floor
Rochester, NY 14625-2825

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

COUNTY WASTE AND RECYCLING SERVICE, INC., doing business as ACE CARTING,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

The parties, including Plaintiff, the State of Vermont (the State), by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendant, County Waste and Recycling Service, Inc., d/b/a Ace Carting ("Defendant"), hereby stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont law by transporting without a permit from the Secretary of the Agency of Natural Resources solid waste in motor vehicles throughout the State of Vermont during the calendar years 2012 through 2016;

WHEREAS, the State further alleges in the Pleadings by Agreement filed in this action that Defendant also violated Vermont law by failing to file copies of

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its quarterly franchise tax returns with the Agency of Natural Resources from the first quarter of 2012 though the end of 2016;

WHEREAS, Defendant solely for purposes of resolving this case has admitted the factual allegations of the Pleadings by Agreement and, without formally admitting or denying liability, has agreed to the settlement of these violations of Vermont law, such violations which shall qualify as "prior violations" for purposes of any future State action considering Defendant's compliance record, as well as the compliance record in Vermont of any and all of Defendant's successors, assigns, and affiliated companies;

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

WHEREAS, 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;

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WHEREAS, the Attorney General believes that this settlement is fair, reasonable, and in the State's interest as it upholds the statutory regimes of 10 V.S.A., Chapter 159, and 32 V.S.A., Subchapter 13, in which the violations occurred; and

WHEREAS, the Consent Order has been negotiated by the State and Defendant in good faith and that the implementation of this Consent Order will avoid prolonged and complicated litigation between the parties;

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

1. The attached Consent Order may be entered by the Court;
2. The State and Defendant hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and
3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

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

DATED at Montpelier, Vermont, this 6th day of February, 2018.

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Megan R.H. Hereth
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

DATED at Rochester, New York, this 2nd day of February, 2018.

COUNTY WASTE AND RECYCLING SERVICE, INC. d/b/a ACE CARTING

By: _____

James J. Pergolizzi, Esq.
Counsel for Defendant
Bond Schoeneck & King, PLLC
350 Linden Oaks
Third Floor
Rochester, NY 14625-2825

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

DATED at Montpelier, Vermont, this ____ day of February, 2018.

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Megan R.H. Hereth
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

DATED at Rochester, New York, this 2nd day of February, 2018.

COUNTY WASTE AND RECYCLING SERVICE, INC. d/b/a ACE CARTING

By: _____

James J. Pergolizzi, Esq.
Counsel for Defendant
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Third Floor
Rochester, NY 14625-2825

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 77-2-18 Wncv

STATE OF VERMONT,
Plaintiff,

v.

COUNTY WASTE AND RECYCLING SERVICE, INC., doing business as ACE CARTING,
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, 3 V.S.A. § 157, and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

VIOLATIONS

1. Plaintiff, State of Vermont's, alleged violations of 10 V.S.A. § 6607a by Defendant, County Waste and Recycling Service, Inc., d/b/a Ace Carting ("Defendant"), for the years 2012 through 2016 as set forth in paragraphs 23-27 of the parties' Pleadings by Agreement, are hereby deemed proven and established as "prior violations" in any future State proceeding considering Defendant's compliance record, as well as the compliance record in Vermont

of any and all of Defendant's successors, assigns, and affiliated companies, including but not limited to administrative or judicial enforcement actions for civil penalties calculated pursuant to 10 V.S.A. § 8010, and permit proceedings.

2. Plaintiff's alleged violations of 32 V.S.A. § 5954(b) by Defendant, for the years 2012 through 2016 as set forth in paragraph 28 of the parties' Pleadings by Agreement, are hereby deemed proven and established as a "prior violation" in any future State proceeding considering Defendant's compliance record, as well as the compliance record in Vermont of any and all of Defendant's successors, assigns, and affiliated companies, including but not limited to administrative or judicial enforcement actions for civil penalties calculated pursuant to 10 V.S.A. § 8010, and permit proceedings.

PENALTIES

3. For the violations described above, Defendant shall pay a civil penalty of forty-nine thousand five hundred dollars ($49,500.00).
4. Payment of the forty-nine thousand five hundred dollar ($49,500.00) civil penalty shall be made to the "State of Vermont" and shall be sent to Megan R.H. Hereth, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609.
5. Payment of the forty-nine thousand five hundred dollar ($49,500.00) civil penalty shall be received by the State within 10 days of the issuance of this Order.

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 its successors, assigns, and affiliated companies.
8. Except as set forth herein at paragraphs 1, 2, and 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.
9. 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.
10. 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.
11. 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.

12. 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.

13. 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 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.

14. 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 this Consent Order.

15. The Court hereby finds, based on the representations of the parties, that the parties have negotiated this Consent Order in good faith, that implementation of this Consent Order will avoid prolonged and complicated litigation between the parties, and that this Consent Order is fair, reasonable, and in the State of Vermont's interest.

16. The Court hereby enters this Consent Order as an Order of the Court and Final Judgment in this case.

77-2-48 Wnev

SO ORDERED, and ENTERED as FINAL JUDGMENT. DATED at Montpelier, Vermont, this 10th day of April, 2018.

Mary Miles Teachout
Honorable Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 663-11-14 Wncv

State of Vermont,)
)
Plaintiff,)
)
v.)
)
Moretown Landfill, Inc.,)
)
Defendant.)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

In order to resolve the allegations of the Complaint filed in the above-captioned matter, the parties, Plaintiff, the State of Vermont, by and through Attorney General Thomas J. Donovan, Jr., on behalf of the Agency of Natural Resources and the Natural Resources Board ("State"), and Defendant, Moretown Landfill, Inc. ("MLI"), hereby stipulate and agree as set forth below.

STATE'S ALLEGATIONS

The State alleges:

Background

The parties

1. The State of Vermont Agency of Natural Resources (ANR) is a state agency created through 3 V.S.A. § 2802. Its responsibilities include of laws, regulations and permits pertaining to solid waste, air and water quality.

2. The Vermont Natural Resources Board (NRB) is a state board created through 10 V.S.A., Chapter 151. It is responsible for enforcement of land use permits issued under Act 250, Vermont's comprehensive land use law.

3. MLI is a Delaware corporation registered to do business in Vermont. MLI owns and operates a solid waste management facility located at 187 Palisades Park in Moretown known as the Moretown Landfill (the Site).

4. The Site includes four areas into which solid waste has been disposed: an unlined landfill; two lined landfill cells known as Cells 1 and 2, which have been closed; and a third lined cell, Cell 3.

5. MLI ceased disposing of waste in Cell 3 on or before July 15, 2013, and is now closing the Site pursuant to a Consent Order and Judgment Order entered September 16, 2013 in State of Vermont, Superior Court, Environmental Division, Docket No. 37-3-13 Vtec, as amended by a First Amendment to Consent Order and Judgment Order entered December 3, 2015.

Permits issued to MLI

6. MLI was the permittee under Solid Waste Facility Management Certification #WA-470 (the "Certification"), originally issued by ANR on April 28, 2005, and subsequently amended a number of times, including on or about July 25, 2005 ("Certification Amendment 1"), August 22, 2005 ("Certification Amendment 2"), and November 8, 2007 ("Certification Amendment 5"). The Certification incorporates by reference a number of documents submitted by MLI to ANR,

including a Facility Operation Manual dated February 2005 ("FOM"), and a Surface Emission Monitoring Plan ("SEM Plan").

7. MLI was the permittee under Discharge Permit #4015-INDC, issued by ANR on or about July 22, 2011 (the "Stormwater Construction Permit"). The Stormwater Construction Permit incorporates by reference an Erosion Prevention and Sediment Control Plan ("EPSC Plan").

8. MLI is the permittee under Land Use Permit #5W0164 and amendments thereto, including amendments #5W0164-30, #5W0164-32, and #5W0164-34, issued by the District 5 Environmental Commission on or about September 21, 2005, March 13, 2008, and December 19, 2011, respectively (collectively the "Land Use Permit"). The Land Use Permit incorporates certain documents filed with the District 5 Environmental Commission, including Certification Amendments 1, 2, and 5, the FOM, and the Stormwater Construction Permit.

Statutory framework

9. Under 10 V.S.A. § 8221, the Attorney General is authorized to enforce the provisions of law specified in 10 V.S.A. § 8003(a), including the Vermont Solid Waste Act, the Vermont Water Pollution Control statute, the Vermont Air Pollution Control statute, and Act 250.

10. A "violation" that may be enforced under 10 V.S.A. § 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).

11. Each violation 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. 10 V.S.A. § 8221(b)(6).

Violations

Count One – Failure to Operate and Maintain a Landfill Gas Collection and Control System that Effectively Captures Landfill Gas

12. Landfill gas is created as solid waste decomposes in a landfill.

13. Landfill gas includes methane, carbon dioxide, water vapor, and non-methane organic compounds.

14. Some of the compounds in landfill gas can have strong odors. Such odorous compounds include sulfides (hydrogen sulfide, dimethyl sulfide, and mercaptans) and ammonia.

15. MLI operates a landfill gas collection and control system which collects gas generated by the decomposition of waste disposed of at the Site, specifically in the unlined landfill and Cells 1, 2, and 3 (the "LFG Collection System").

16. The LFG Collection System includes gas collection wells with perforated sections of pipe, piping that carries the gas from the collection wells toward control devices where collected gas is burned, and a blower system that creates a vacuum (negative pressure) to draw the gas toward the control devices.

17. Commencing in January 2009, collected gas has been piped to a "gas to energy" plant ("energy plant") owned and operated by PPL Renewable Energy, where it is burned in two internal combustion engines generating electricity, and a

flare has been used as a back up to the energy plant and to burn excess landfill gas not used by the engines.

18. The Certification and Land Use Permit required MLI to:

> [I]nstall, operate and maintain a landfill gas collection and control system that effectively captures the gas generated within landfill and routes the gas to a control device that effectively destroys the NMOCs within the gas. (Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶56); and
>
> [E]nsure the active gas collection system maintains a negative pressure at each gas collection wellhead . . . . (Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 59).

19. A landfill gas collection and control system requires regular and continued monitoring, maintenance, and upgrading in order to operate properly and effectively capture landfill gas and route it to a control device.

20. Water and/or leachate can collect in landfill gas collection wells and piping and interfere with the collection of gas and its transmission to the control device, resulting in fugitive emissions of landfill gas to the atmosphere that would otherwise be collected and burned at the control device.

21. Data collected at the Site by MLI indicated numerous instances in which water had collected in gas collection wells.

22. An ANR inspection of the Site on September 20, 2012 determined that gas wells were watered out.

23. A Notice of Alleged Violation issued by ANR to MLI on or about November 20, 2012 stated that "Gas wells and horizontals have routinely been "watered out," preventing the effective collection of landfill gas and control of

landfill gas odors," and directed MLI to submit a plan to address all watered out gas wells.

24. In a December 7, 2012 letter, ANR requested that MLI conduct a "comprehensive site-wide evaluation of the entire gas well system . . . to determine the actual effectiveness of current wells . . . ."

25. An MLI contractor conducted an evaluation of the gas well system at the Site in response to ANR's request. The contractor's report on the evaluation found "significant liquid in gas wells," and concluded that "liquid in gas wells is likely negatively impacting the ability of the gas collection system to operate effectively." The report noted that liquid levels found in wells ranged up to 63% of total well depth.

26. Negative pressure must be maintained in landfill gas collection wells to effectively collect gas and route it to a control device.

27. MLI documentation of pressure readings at gas collection wells indicate that MLI repeatedly failed to maintain negative pressure at gas collection wells from August 2009 through August 2014.

28. By allowing water to accumulate in gas collection wells and failing to maintain negative pressure at gas collection wells, MLI failed to operate and maintain a gas collection system that effectively captures the gas generated at the Site and routes it to a control device in violation of Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶56, and the Land Use Permit.

29. By failing to maintain negative pressure at gas collection wells, MLI also violated Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 59, and the Land Use Permit.

Count Two – Failure to Maintain Intermediate Cover

30. Covering waste serves a number of purposes, including controlling odor and disease vectors, discouraging scavenging by animals, preventing blowing litter, reducing the potential for infiltration of rainwater and snowmelt and the generation of leachate, reducing fugitive emissions of landfill gas, and reducing the potential for waste materials to be transported from the Site by stormwater flow.

31. The Vermont Solid Waste Management Rules ("SWMR"), Certification, and Land Use Permit require: "In all areas other than the working face which have not received waste material in any given operating day, the owner or operator shall take all steps necessary to ensure that the cover material remains functional and stable until such time as the final cover system is installed." SWMR § 6-702(d)(5) (effective 3/15/12 & 6/12/06); FOM § 3.5.

32. Additionally, the Certification and Land Use Permit require that "Intermediate Cover shall consist of a 12-inch cover layer. In order to minimize leachate production, the Intermediate Cover shall be placed over all areas that have obtained final grades as soon as possible. Intermediate Cover shall be placed over all areas that are to remain unused for six months or more. . . . The 12-inch soil layer shall be seeded and mulched to prevent erosion." FOM § 3.5.5

33. ANR personnel observed intermediate cover inadequacies on July 8, 2011 (areas lacking required 12 inches of cover, areas lacking seeding and mulch, erosion); November 22, 2011 (areas lacking seeding and mulch); November 30, 2011 (areas lacking required 12 inches of cover, areas lacking seeding and mulch); May 10, 2012 (areas lacking required 12 inches of cover and mulch); September 20, 2012 (erosion); October 19, 2012 (erosion); October 26, 2012 (erosion); and November 7, 2012 (areas lacking seeding and mulch, erosion).

34. MLI's actions or failures to take action which resulted in each of the conditions described in Paragraph 33, violated SWMR § 6-702(d)(5), the Certification and the Land Use Permit.

Count Three – Failure to Prevent Nuisance Odors

35. Section 6-701(6) of the SWMR (effective March 15, 2012) requires, and, prior to March 15, 2012, § 6-701(f) of the SWMR (effective June 12, 2006) (collectively "SWMR § 6-701(6)") required the owner and operator of a solid waste management facility to take all steps necessary to prevent and/or control nuisance odors.

36. Vermont's environmental laws, 10 V.S.A. § 552, and the Vermont Air Pollution Control Regulations ("VAPCR") define "air contaminant" as "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substances, or any combination thereof."

37. Section 5-241(1) of the VAPCR provides that a person shall not discharge, cause, suffer, allow or permit air contaminants which will cause injury,

detriment, nuisance or annoyance to any considerable number of people or which endangers the comfort, repose, health or safety of any such persons.

38. Biosolids are nutrient-rich organic materials produced from wastewater treatment facilities.

39. Biosolids can exacerbate the odors generated by a landfill in a number of ways, including, directly, by being particularly odiferous, and, indirectly, by accelerating the creation of landfill gas and by increasing leachate generation due to their relatively high water content, which can lead to problems with collection and control of landfill gas.

40. On or about May 18, 2011, MLI submitted to ANR a Biosolids Management Plan setting forth a preferred method for disposal of biosolids which involved directing arriving trucks carrying biosolids directly to the Site's working face, unloading the biosolids directly on to the working face and promptly covering the biosolids with municipal solid waste. The plan also set forth two alternative methods for disposal of biosolids when weather and/or available municipal solid waste did not permit use of the preferred method.

41. On March 22, 2012, ANR personnel observed that sludge in rolloff bins had been unloaded from one or more trucks and placed adjacent to the Site's access road, rather than being delivered directly to the working face, covered with municipal solid waste, or otherwise handled in accordance with any of the three preferred disposal methods specified in the Biosolids Management Plan.

42. On April 12, 2012, ANR personnel observed a pile of sludge that had been dumped and left unattended on pavement near the top of the old Cell 2 access road.

43. Documents incorporated into both MLI's Solid Waste Certification and Land Use Permit provided that the management methods that MLI would use to control odors included prohibiting or restricting the disposal of odiferous waste. FOM §§ 2.6, 6.5 & Addendum #1; Exhibit 1 to applications for Land Use Permit Amendments #5W0164-30 and #5W0164-32 (discussion related to Criterion 1, Air Pollution).

44. An MLI contractor confirmed moderate to strong off-site odors attributable to biosolids on 15 separate occasions in response to complaints from members of the public called in to an odor hotline, and ANR personnel confirmed off-site odors attributable to biosolids on 9 separate occasions.

45. Following confirmation of off-site odors from biosolids, ANR repeatedly advised MLI that it may need to cease accepting biosolids at the Site in order to control odors.

46. During a meeting on July 26, 2012, an MLI representative advised ANR personnel that the Holyoke and Northampton Massachusetts wastewater treatment plants did not anaerobically digest biosolids before trucking them to MLI, and that the biosolids were odorous.

47. Despite its admission that the biosolids from these sources were odorous, MLI continued to accept such biosolids for disposal for several months during which time additional off-site odors attributable to biosolids were confirmed.

48. In a December 7, 2012 letter to ANR, MLI's parent corporation, Advanced Disposal, "acknowledge[d] a large number of off-site odors this summer and fall were caused by a particularly odorous sludge account and we recently removed it from [the Site]."

49. An MLI contractor confirmed moderate to strong off-site odors attributable to landfill gas on 86 separate occasions in response to complaints by members of the public called into an odor hotline between August 5, 2011 and March 24, 2014.

50. Independent of the complaints confirmed by MLI's contractor, ANR personnel confirmed off-site odors attributable to landfill gas on 31 separate occasions from November 5, 2008 through February 13, 2013.

51. By allowing water to accumulate and failing to maintain negative pressure in gas collection wells, by failing to take adequate measures to prevent odors from biosolids, and by failing to maintain adequate intermediate cover, MLI failed to take all steps necessary to control nuisance odors in violation of Section 6-701(6) of the SWMR (effective March 15, 2012).

52. MLI discharged, caused, allowed or permitted air contaminants from the Site in the form of odorous landfill gas and odors from biosolids, which caused

injury, detriment, nuisance or annoyance to a considerable number of people and endangered their comfort and repose in violation of VAPCR 5-241(1).

Count Four – Excessive Landfill Gas Temperature and Oxygen Levels

53. Controlling the temperature and oxygen level of landfill gas serves to prevent explosions and fires.

54. Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 60 states:

> The Permittee shall ensure the gas collection system maintains at each gas collection wellhead, a landfill gas collection temperature below 131°F (55°C) with either a nitrogen level of less than twenty (20) percent by volume or an oxygen level less than five (5) percent by volume. The Permittee shall monitor and record the temperature and either the nitrogen or oxygen level at each wellhead monthly.

55. MLI undertook to monitor and record temperature and oxygen levels at the Site in order to comply with this requirement.

56. MLI records provided to ANR show that gas temperatures at the Site reached or exceeded 131°F at two wellheads in June 2009, at two wellheads in July 2009, at two wellheads in June 2012, at three wellheads in July 2012, at three wellheads in August 2012, at one wellhead in September 2012, at two wellheads in October 2013, and at two wellheads in November 2013.

57. MLI records provided to ANR show that gas oxygen levels at the Site exceeded five per cent by volume at multiple wellheads each month beginning in June 2011 and continuing through April 2014, except for August 2011 and August 2012 when there were exceedances at one wellhead.

58. MLI violated Certification Amendment 2, Conditions and Requirements for Construction and Operation ¶ 10 (Gas Control Conditions), ¶ 60 and the Land Use Permit by failing to ensure that the gas collection system maintains at each gas collection wellhead, a landfill gas collection temperature below 131°F with an oxygen level of less than 5% by volume.

Count Five – Failure to Monitor Leachate

59. Leachate is water that has percolated through waste in a landfill cell, picking up contaminants and odors as it does so.

60. Leachate may increase the production of landfill gas, and may be a source of odors. Leachate released to the environment may contaminate soil, groundwater and surface water.

61. Double liner systems installed at Cells 1, 2, and 3 of the Site are designed to collect leachate.

62. At all relevant times, the Site has operated leachate collection systems for Cells 1, 2, and 3. In each landfill cell, leachate is collected in perforated pipes located above the primary and secondary liners and flows by gravity to sumps at the low point of the primary and secondary liner systems. From the sumps, the leachate is pumped to storage tanks, from which it is removed from time to time and disposed of off-site.

63. Certification Amendment 1, Condition 39 states, in pertinent part:

> The Permittee shall record leachate flow from the primary and secondary leachate collection systems to the leachate storage tanks during each working day.

64. An MLI contractor's inspection reports indicate that the Cell 1 flow meters were either being repaired or were not installed from May 20, 2009 through August 23, 2012.

65. In a November 20, 2012 Notice of Alleged Violation, ANR requested MLI to install flow meters from the Cell 1 primary and secondary liners to the leachate collection tank within 30 days.

66. An MLI consultant advised ANR that installation of flow meters for Cell 1 was completed on December 19, 2012.

67. An MLI contractor's inspection reports indicate that the Cell 2 flow meters were being repaired or were not operable from May 20, 2009 through May 21, 2012.

68. A September 27, 2012 email from MLI to ANR states that new Cell 2 flow meters were installed on June 27, 2012, and that at least one meter began working on September 20, 2012.

69. An MLI contractor's inspection reports indicate that the Cell 3 flow meters were being repaired from August 14, 2008 through November 23, 2010.

70. MLI violated Condition 39 of Certification Amendment 1 and the Land Use Permit by failing to measure and record leachate flow from the primary and secondary leachate collection systems for Cells One, Two and Three to the leachate storage tanks.

Count Six – Excessive Leachate Depth on Liner

71. As the depth of leachate (leachate head) on a landfill cell liner increases, the potential impacts to soil and groundwater increase.

72. Certification Amendment 1, Condition 26, states: "The depth of leachate shall not exceed twelve (12) inches at any location on the primary liner, except following a 25 year/24 hour or greater storm event."

73. According to records obtained from MLI, the depth of leachate on the Cell 2 primary liner exceeded twelve (12) inches on August 15, 16, and 17, 2012, and the depth of leachate on the Cell 3 primary liner exceeded twelve (12) inches on July 16, 2013. These depths were not recorded following a 25 year/24 hour or greater storm event.

74. MLI violated Certification Amendment 1, Condition 26, and the Land Use Permit by allowing the depth of leachate on the Cell 2 and Cell 3 primary liners to exceed 12 inches.

Count Seven – Failure to Collect and Treat Water Contacting Waste or Leachate as Leachate

75. Stormwater that comes into contact with waste or leachate and runs off a landfill cell can contaminate soil, groundwater, and surface water.

76. Certification Amendment 1, Condition 28 read in conjunction with ANR's Procedure Addressing Requirements for Run-On/Run-Off Control Systems for Municipal Solid Waste Landfills (May 27, 1994), requires that "[d]uring the active life of a facility, stormwater (including rain water or snow melt) that comes in contact with solid waste or leachate in the active portion of the [municipal solid

waste landfill] is considered contaminated and must be collected and treated as leachate."

77. On July 8, 2011, ANR personnel observed water that had been in contact with waste running freely over the top of plastic temporary cover toward a stormwater ditch at the toe of the slope on the north side of the Site.

78. On November 22, 2011, ANR personnel observed areas of Cell 3's side slope located immediately above a stormwater conveyance that were unstable and exhibited gully erosion, allowing stormwater runoff to come in contact with the underlying waste.

79. On November 30, 2011, ANR personnel observed water that had been in contact with waste running freely over the top of plastic temporary cover toward a stormwater conveyance at the base of Cell 3; and a stone lined trench leading from a portion of Cell 3 to a stormwater channel, which allowed runoff to come in contact with waste.

80. On September 20, 2012 ANR personnel observed areas of gully erosion of intermediate cover on Cell 3 side slopes leading to a stormwater conveyance, and sediment that had accumulated beyond the limits of the Cell 3 liner, including in stormwater structures.

81. On October 26, 2012, ANR personnel observed gully erosion of intermediate cover on Cell 3 side slopes leading to a stormwater conveyance, and areas of erosion at the base of a Cell 3 sideslope in contact with a stormwater conveyance along the side of the access road, which was also observed to be eroded.

82. With respect to each of the conditions described in Paragraphs 77- 81, above, MLI did not collect and treat water that came into contact with waste or leachate as leachate.

83. MLI violated Certification Amendment 1, Condition 28 and the Land Use Permit by permitting water that had come into contact with waste and leachate to run off Cell 3 rather than collecting and treating it as leachate.

Count Eight – Failure to Prevent and Control Windblown Debris

84. Section 6-701(6) of the SWMR (effective March 15, 2012) requires, and, prior to March 15, 2012, § 6-701(f) of the SWMR (effective June 12, 2006) (collectively SWMR 6-701(6)) required the owner and operator to take all steps necessary to prevent windblown debris.

85. ANR personnel observed excessive litter or debris at the Site in areas outside of the working face at which waste was actively being disposed on April 26, 2011, November 30, 2011, January 20, 2012, February 9, 2012, April 9, 2012, April 12, 2012, May 10, 2012, May 23, 2012, July 13, 2012, September 20, 2012, December 5, 2012, and February 19, 2012.

86. MLI violated SWMR 7-701(6) by failing to take all steps necessary to prevent and control windblown debris at the Site.

Count Nine – Failure to Maintain Limit of Waste Containment Markers

87. Certification Amendment 2, Condition 3 states:

> Prior to the operation of Cell 3, the Permittee shall install non-liner-penetrating markers indicating the limit of waste containment in Cell 3 as shown on Page 5 of the Engineering Plans. The limit of waste markers shall remain until the landfill slopes have reached final slope elevation.

88. The markers indicate the extent of the underlying liner system at the surface. This enables equipment that may puncture the liner to be kept away from the liner, which is shallow near its edges. It also prevents disposal of waste beyond the limits of the underlying liner. Waste disposed of beyond the limits of the liner generates leachate that is not captured by the liner and may contaminate soil, groundwater, and surface water. Further, such improperly disposed-of waste must be excavated and moved, which may result in odors.

89. On September 20, 2012, ANR personnel observed that the required markers were not in place at the Site.

90. The markers remained absent until November 27, 2012.

91. MLI violated Certification Amendment 2, Condition 3, and the Land Use Permit by failing to maintain limit-of-waste-containment markers at the Site until the landfill slopes reached final slope elevation.

Count Eleven – Failure to Report

92. Section 6-703(b) of the SWMR (effective 3/15/12 and 6/12/2006) states:

> The operator shall submit a report to the Secretary within five working days of the receipt of any information indicating non-compliance with any term or condition of certification or other operating authority.

93. Certification Amendment 1, Condition 46, states:

> In accordance with Section 6-703 of the VTSWMR, the operator shall submit a report to the Solid Waste Program within five working days of the receipt of any information indicating non-compliance with any term or condition of certification.

94. MLI did not submit to ANR the required reports for the violations at the Site described in Counts Five (Failure to Monitor Leachate Flow), and Six (Excessive Leachate Depth on Liner).

95. MLI's failure to submit to ANR the required reports for the violations at the Site described in Counts Five (Failure to Monitor Leachate Flow), and Six (Excessive Leachate Depth on Liner) violated SWMR 6-703(b), Certification Amendment 1, Condition 46, and the Land Use Permit.

Count Twelve – Failure to Sequence Work as Required by Stormwater Construction Permit

96. The purposes of the EPSC Plan incorporated into the Stormwater Construction Permit include limiting the potential for erosion through soil stabilization techniques, thereby reducing the quantity of sediment in stormwater runoff, and controlling sediment if erosion cannot be prevented.

97. The EPSC Plan incorporated into the Stormwater Construction Permit required MLI to install silt fence along downgradient limits of work and to delineate limits of disturbance with wood stakes and flagging tape prior to commencing earthwork activities. EPSC Plan §§ 4.0, 5.1, 5.3 & Plan Drawings Sheet No. 1.

98. Construction at the Site during the 2012 construction season began on or about July 2, 2012.

99. During a July 16, 2012 site visit, ANR personnel observed that earthwork had begun and heavy equipment was being used to remove topsoil/overburden in the Proposed Phase II Borrow Area depicted in EPSC Plan

Drawing 4. Further, the removed material was being stockpiled in Northern Soil Stockpile Area depicted in that drawing.

100. During the July 16, 2012 site visit, ANR personnel observed that no silt fence had been installed downgradient of the then ongoing earthwork in the Proposed Phase II Borrow Area and downgradient of the Proposed Northern Soil Stockpile Area, and that limits of disturbance at the Site had not been delineated.

101. The EPSC Plan and Land Use Permit Amendment #5W0164-34 required MLI to construct and stabilize a clean water diversion channel referred to in the ESPC Plan as the Southeastern Clean Water Diversion Channel (SW-4) before beginning excavation from the Phase II Borrow Area.

102. The purpose of SW-4 was to divert stormwater runoff from areas upgradient of the construction site to prevent it from commingling with potentially sediment-laden stormwater from the construction site.

103. Observations of ANR personnel and reports filed by MLI with ANR indicate that blasting and excavation in the Phase II Borrow Area began in July 2012. Reports filed by MLI with ANR also indicated that work on SW-4 did not begin until Between August 13 and August 26, 2012.

104. ANR personnel observed on September 26, 2012, October 10, 2012 and October 24, 2012 that SW-4 had not been stabilized through the establishment of grass.

105. MLI's failure to timely install silt fence and delineate limits of disturbance, and failure to timely construct and stabilize SW-4 violated the Stormwater Construction Permit and the Land Use Permit.

Count Thirteen – Failure to Construct and Maintain Erosion Prevention and Sediment Control Measures in Accordance With Specifications of Stormwater Construction Permit

106. The Stormwater Construction Permit and EPSC Plan required MLI to construct erosion prevention and sediment control measures in accordance with drawings and specification set forth in the EPSC Plan and the Vermont Standards & Specifications for Erosion Prevention & Sediment Control (2006) Handbook (Amended February 2008), and to maintain them in effective operating condition.

107. During an October 26, 2012 site visit, ANR personnel observed the following:

a. Unstabilized slopes in the Phase II Borrow Area of greater than 3:1 on which erosion control matting had not been installed as required by the EPSC plan;

b. A roadside swale in which check dams were not functioning properly in that sediment laden water was flowing down the swale without any appreciable slowing from check dams;

c. A construction entrance that was not properly sized and lacked required stone and geotextile;

d. Inlet protection had not been installed in accordance with EPSC plan specifications; and

e. A culvert had not been maintained in that rocks were allowed to collect immediately upstream of the culvert, preventing water from flowing freely through it.

108. MLI's actions or failures to take action at the Site that resulted in the conditions observed in Paragraph 107, subparagraphs a - e, violated the Stormwater Construction Permit, EPSC Plan and the Land Use Permit

Count Fourteen – Failure to Conduct Dewatering in Accordance With the EPSC Plan and a Dewatering Plan

109. The Stormwater Construction Permit required that a site-specific dewatering plan be employed for any dewatering activities.

110. The EPSC Plan required that all effluent from dewatering be filtered or passed through an approved sediment-trapping device.

111. During an October 26, 2012 site visit ANR personnel observed that water was being pumped out of the excavated Phase II Borrow area into a swale and was not directed through a filter or approved sediment-trapping device.

112. MLI did not have a site-specific dewatering plan for the dewatering activity described in Paragraph 111.

113. Because the water was not directed through a filter of approved sediment-trapping device and was not conducted pursuant to a site-specific dewatering plan, the dewatering observed at the Site by ANR personnel on October 26, 2012 violated the Stormwater Construction Permit and the Land Use Permit.

Construction Permit required MLI to file the reports by the Wednesday following the end of the biweekly period. *Id.*, § A.4.

120. Although MLI commenced construction on July 2, 2012, MLI did not begin submitting the required biweekly reports until August 29, 2012, more than two weeks after ANR had inquired about the status and the lack of reporting on August 13, 2012.

121. MLI did not submit the biweekly reports for July 2-15, 2012, July 16-29, 2012, and July 30-August 12, 2012 until August 29, 2012. violated the Stormwater Construction Permit and the Land Use Permit by not submitting the reports for.

122. Subsequently, MLI failed to timely submit the biweekly reports for August 27 - September 9, 2012, September 10 - 23, 2012, and September 24 - October 7, 2012.

123. MLI's failure to timely submit the biweekly reports referenced in Paragraphs 121-122 violated the Stormwater Construction Permit and the Land Use Permit.

MLI's ADMISSIONS AND AGREEMENTS

124. MLI admits the background allegations of Paragraphs 1-11, above.

125. MLI admits the factual allegations of Paragraphs 12-27, 30-33. 35-50, 53-57, 59-69, 71-73, 75-82, 84-85, 87-90, 92-94, 96-104, 106-107, 109-112, 114-117, and 119-122 solely for purposes of resolving this case.

126. Without formally admitting or denying liability, MLI agrees to this settlement of the violations alleged in Paragraphs 12-123, above, in order to resolve this case.

127. MLI agrees that each of the violations alleged in Paragraphs 12-123, above, is deemed proved and established as a prior violation in any future State proceeding that permits or requires consideration of MLI's past record of compliance, such as administrative or judicial enforcement actions for civil penalties calculated pursuant to 10 V.S.A. § 8010 and permit proceedings.

ADDITIONAL STIPULATIONS BY THE STATE AND MLI

The State and MLI further stipulate and agree:

128. Count Ten (failure to conduct random load inspections) should be dismissed with prejudice.

129. Pursuant to 3 V.S.A. Chapter 7 and 10 V.S.A. § 8221, the Attorney General is authorized to represent the State in this action and may settle actions as the interests of the State require.

130. Under 10 V.S.A. § 8221, MLI is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500 per violation for each day a violation continued.

131. The State has considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the

violations, the length of time the violations existed and that Defendants knew or had reason to know the violations existed.

132. The Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred.

133. This Stipulation for Entry of Consent Order and Final Judgment Order ("Stipulation") has been negotiated by and between the State and MLI in good faith.

134. The State and MLI hereby waive all rights to contest or appeal the accompanying Consent Order and Final Judgment Order ("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 this Court's jurisdiction to enter the Consent Order.

135. This Stipulation and the accompanying Consent Order set forth the complete agreement of the parties, and they may be altered, amended or otherwise modified only by subsequent written agreements signed by the parties' legal representatives, and as to the Consent Order, when incorporated into an order issued by the Court.

136. The Court should hold this Stipulation and the Consent Order for twenty-one (21) calendar days following their submission to the Court for the State to post them on its website to facilitate possible public participation in consideration of this settlement.

137. Following expiration of the twenty-one (21) day period, the attached Consent Order may be entered as a final judgment in this matter by the Court.

DATED: January 8, 2018.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

MORETOWN LANDFILL, INC.

By: _____

Tristram J. Coffin
Downs Rachlin Martin PLLC
199 Main Street
Burlington, VT 05402-0190
(802) 863-2375

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 663-11-14 Wncv

State of Vermont,)
)
Plaintiff,)
)
v.)
)
Moretown Landfill, Inc.,)
)
Defendant.)

CONSENT ORDER AND FINAL JUDGMENT ORDER

Based upon the Stipulation for the Entry of Consent Order and Final Judgment Order filed by the parties, Plaintiff, the State of Vermont, by and through Attorney General Thomas J. Donovan, Jr., on behalf of the Agency of Natural Resources and Natural Resources Board ("State"), and Defendant, Moretown Landfill, Inc ("MLI"), and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, in order to resolve the allegations of the State's Complaint, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

PENALTIES

1. MLI shall pay a civil penalty of one hundred eighty thousand dollars ($180,000.00) and shall also pay twenty thousand dollars ($20,000.00) to fund a Supplemental Environmental Project ("SEP").

2. Payment of the $180,000 civil penalty shall be by certified check payable to "Treasurer, State of Vermont," and shall be received at the following

address no later than thirty (30) calendar days after the date that this Consent Order is entered by signature of the Court:

Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05602

3. Payment of the $20,000 to fund a SEP shall be by certified check payable to the "Vermont Solid Waste District Managers Association," and shall be received at the following address no later than thirty (30) calendar days after the date that this Consent Order is entered by signature of the Court:

Vermont Solid Waste District Manager's Association
Paul Tomasi,
NEKWMD
P.O. Box 1075
Lyndonville, VT 05851

4. The Vermont Solid Waste District Managers Association has agreed to administer the SEP, and has certified that the SEP funds shall be used to purchase residential compost bins, food scrap collection buckets, and kitchen counter-top compost containers, which will be sold to Vermonters at a discount as set forth in the Supplemental Environmental Project Certification attached hereto as Attachment A.

5. MLI agrees that in the event it publishes by any means, directly or indirectly, the identity or result of the SEP it has funded, it shall also include in that publication a statement that the SEP is a product of the settlement of an environmental enforcement action brought by the Attorney General.

6. MLI agrees that the funds directed to a SEP are not tax deductible and consequently shall not deduct, nor attempt to deduct any SEP expenditures from its tax obligations.

7. Failure to make any payment required by Paragraphs 1 - 3, above shall constitute a breach of this Consent Order, and interest shall accrue on the unpaid balance at 12% per year.

DISMISSAL OF COUNT TEN

8. Count Ten of the Complaint filed November 6, 2014 is hereby dismissed with prejudice.

MISCELLANEOUS

9. While pursuant to Paragraph 126 of the Stipulation for Entry of Consent Order and Final Judgment Order, the parties stipulate that MLI does not admit or deny liability for each of the violations alleged in Paragraphs 12-123 of the Stipulation for Entry of Consent Order and Final Judgment Order, the parties stipulate that the violations alleged therein are each deemed proved and established as prior violations for purposes of use in any future State proceeding that permits or requires consideration of MLI's past record of compliance, such as administrative or judicial enforcement actions for civil penalties calculated pursuant to 10 V.S.A. § 8010 and permit proceedings.

10. MLI hereby waives: 1) all rights to contest or appeal this Consent Order and Final Judgment Order ("Consent Order"); and 2) all rights to contest the

obligations imposed upon MLI under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

11. This Consent Order is binding upon MLI and its successors and assigns.

12. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

13. This Consent Order shall become effective only after it is signed by all parties and entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.

14. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 & 211, and 12 V.S.A. § 122.

15. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected MLI's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to MLI.

16. This Consent Order and the Stipulation for Entry of Consent Order and Final Judgment Order set forth the complete agreement of the parties, and they may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and, as to the Consent Order and Final Judgment Order, incorporated into an order issued by the

Superior Court, Washington Unit, Civil Division. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

17. The Court hereby finds that the State and MLI have negotiated this Consent Order in good faith, that implementation of this Consent Order will avoid prolonged and complicated litigation between the parties, and that this Consent Order is fair, reasonable and in the State's interest. The Court hereby enters this Consent Order as an order of the Court and final judgment.

SO ORDERED, and **ENTERED** as **FINAL JUDGMENT**

Dated: May 21, 2018

Mary Miles Teachout

The Honorable Mary Miles Teachout
Superior Court Judge

ATTACHMENT A

SUPPLEMENTAL ENVIRONMENTAL PROJECT CERTIFICATION

The Vermont Solid Waste District Managers Association ("VSWDMA"), submits this certification regarding its anticipated receipt of $20,000 from Moretown Landfill, Inc. ("MLI") for a Supplemental Environmental Project ("SEP Funds") pursuant to a Consent Order and Final Judgment Order in *State of Vermont v. Moretown Landfill, Inc.*, Superior Court, Washington Unit, Docket No. 663-11-14-Wncv. The SEP is described in the writeup entitled 2017 Composting Supplies SEP attached hereto as Exhibit 1.

The VSWDMA is an unincorporated association. Its members are Solid Waste Management Districts created under 24 V.S.A. App. Part IV, and Waste Alliances created by inter-local agreement among member towns pursuant to 24 V.S.A. Chapter 121, each of which has authority to provide for management of solid waste generated in their respective member municipalities. The VSWDMA's members are the Addison County Solid Waste Management District, Central Vermont Solid Waste Management District, Chittenden Solid Waste District, Great Upper Valley Solid Waste Management District, Lamoille Regional Solid Waste Management District, Northeast Kingdom Waste Management District, Northwest Vermont Solid Waste Management District, Windham Solid Waste Management District, Bennington County Solid Waste Alliance, Mad River Resource Management Alliance, Londonderry Group, and the Solid Waste Alliance Communities.

The VSWDMA agrees to administer the SEP, and certifies that the SEP Funds shall be used by its member Solid Waste Management Districts and Waste Alliances solely for purchase of residential compost bins, food scrap collection buckets, and kitchen counter-top compost containers (collectively "Compost Containers"), which shall be sold to Vermonters at a discount from retail price. Funds received from sale of Compost Containers shall be used to purchase additional Compost Containers until the funds are exhausted, Alternatively, anticipated revenue from sale of the Compost containers shall be applied to offset amounts from other sources spent on Compost Containers.

The VSWDMA shall provide ANR a written report no later than one year following its receipt of the SEP Funds, which shall include details as to: (1) the distribution of SEP Funds to its member Solid Waste Management Districts and Waste Alliances; (2) each expenditure of SEP Funds by the Solid Waste Management Districts and Waste Alliances, including the number of residential compost bins, food scrap collection buckets, and kitchen counter-top compost containers purchased in each transaction; (3) the number of residential compost bins, food scrap collection buckets and kitchen-counter-top compost containers sold to Vermonters; and (4) the prices charged for the Compost Containers; (5) if anticipated revenue is applied to offset amounts from other sources spent on Compost Containers, documentation of the amounts spent from other sources.

If the SEP has not been completed at the end of the one year period, the VSWDMA association shall provide ANR a follow-up written report annually, until such time as the SEP has been completed.

John Leddy, President Vermont Solid Waste District Managers Association

EXHIBIT 1

2018 Composting Supplies SEP

(1) Project Implementer

The Vermont Solid Waste District Manager's Association (VSWDMA) will be the implementer of the Supplemental Environmental Project (SEP).

(2) Geographic Area to Benefit from the Project

The VSWDMA represents over 85% of Vermont municipalities. Members include Addison County Solid Waste Management District (ACSWMD), Bennington County Solid Waste Alliance (BCSWA), Central Vermont Solid Waste Management District (CVSWMD), Chittenden Solid Waste District (CSWD), Greater Upper Valley Solid Waste Management District (GUVSWMD), Lamoille Regional Solid Waste Management District (LRSWMD), Londonderry Group, Mad River Resource Management Alliance (MRRMA), Northeast Kingdom Waste Management District (NEKWMD), Northwest Vermont Solid Waste Management District (NWSWD), Rutland County Solid Waste District (RCSWD), Solid Waste Alliance Communities (SWAC), Southern Windsor/Windham Counties Solid Waste Management District (SWWCSWMD), and Windham Solid Waste Management District (WSWMD).

(3) Project Description and Budget

Food scraps and other organic materials can comprise as much as third of residential waste. Wasted food in the landfill creates methane, a greenhouse gas, which is 25 times more damaging than carbon dioxide. Food scraps do not need to be wasted in landfills, and can provide other benefits—like compost for gardens. To mitigate climate change, support statewide composting, farming, and anaerobic digestion jobs, the Universal Recycling law bans disposal of food waste in landfills and trash in July 2020.

To help Vermont residents comply with the landfill ban and divert food waste, the VSWDMA proposes to utilize SEP funds associated with the Moretown Landfill for the purchase of residential compost bins, food scrap collection buckets, and kitchen counter-top compost containers.

The funded items will be distributed to Vermonters at a discount by solid waste districts, alliances, and towns.

Timeline: May 2018 – May 31, 2019

Budget:

Item:	Per Unit Cost:	Number:	Subtotal:
Soil Saver Home Compost Bin	$50	200	$10,000
Sure-Close Kitchen Composter	$6	400	$2,400
5-gallon Plastic Bucket with Lid	$15	506	$7,590
TOTAL:			$19,990

(4) Expected Project Benefits

- Reducing food waste in landfills can reduce odors and methane releases
- Reducing food waste also can lengthen the life of landfills and reduce the need for new ones.
- This project benefits residents by helping them comply with Vermont's Universal Recycling law and giving them an easy way to compost at home which potentially can save them money on their trash costs.

(5) Advertising

- In advertising (online, print, etc.) the availability of the food scrap equipment funded by the SEP, or the results of the project, the VSWDMA will state in a prominent manner that the project has been undertaken as part of the settlement of an ANR enforcement action with Moretown Landfill Inc.

(6) SEP Verification

- The VSWDMA verify the receipt of SEP funds by providing the Agency a confirming letter and a copy of the SEP check from the respondent.
- The VSWDMA will submit a final report upon completion of the SEP. VSWDMA will provide details describing tasks accomplished and deliverables met, adherence to project timeline, and any problems encountered in achieving deliverables. VSWDMA will provide a signed certification with the final project report indicating that SEP funds were used as intended

STATE OF VERMONT

SUPERIOR COURT ENVIRONMENTAL DIVISION

Diverging Diamond Interchange SW Permit	Docket No. 50-6-16 Vtec
Diverging Diamond Interchange A250	Docket No. 169-12-16 Vtec

JUDGMENT ORDER

In Docket No. 50-6-16 Vtec, RL Vallee, Inc. appeals Individual Stormwater Discharge Permit No. 6946-INDS, issued on May 11, 2016 by the Vermont Agency of Natural Resources to the Vermont Agency of Transportation for the Diverging Diamond Interchange proposed at Interstate 89, Exit 16 (the SW Permit).

In Docket No. 169-12-16 Vtec, RL Vallee, Inc. and Timberlake Associates, LLC appeal Act 250 permit #4C1271 and permit amendments #4C0676R-16, #4C0288-21, #4C0757-24, and #4C0471-7, issued jointly on November 28, 2016 by the District #4 Environmental Commission to the Vermont Agency of Transportation for the construction of the Diverging Diamond Interchange and related improvements (the Act 250 permit). Land Use Permit # 4C1271 Findings of Fact, Conclusions of Law, and Order (Dist. #4 Envtl. Comm. Nov. 28, 2016).

For the reasons detailed in the accompanying Merits Decision we **GRANT** VTrans' applications for an Act 250 land use permit, with the conditions imposed by the District Commission set out at VTrans Ex. 3, Bates 022019–24, and **GRANT** VTrans' application for an individual stormwater discharge permit.

This completes the current proceedings before this Court.

Electronically signed on June 01, 2018 at 10:05 AM pursuant to V.R.E.F. 7(d).

Tom Walsh

Thomas G. Walsh, Judge
Superior Court, Environmental Division

STATE OF VERMONT

SUPERIOR COURT ENVIRONMENTAL DIVISION

Diverging Diamond Interchange SW Permit	Docket No. 50-6-16 Vtec
Diverging Diamond Interchange A250	Docket No. 169-12-16 Vtec

MERITS DECISION

In Docket No. 50-6-16 Vtec, RL Vallee, Inc. appeals Individual Stormwater Discharge Permit No. 6946-INDS, issued on May 11, 2016 by the Vermont Agency of Natural Resources to the Vermont Agency of Transportation for the Diverging Diamond Interchange proposed at Interstate 89, Exit 16 (the SW Permit).

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Parties

RL Vallee, Inc. (Vallee) is one of two appellants in the Act 250 appeal and is the sole appellant in the stormwater appeal. Vallee is represented by Jon T. Anderson, Esq. and Alexander J. LaRosa, Esq.

Timberlake Associates, LLP (Timberlake) is an appellant in the Act 250 appeal. We held in a pretrial entry order dated March 17, 2017 that Timberlake has party status as an appellant in the Act 250 appeal as a landowner pursuant to 10 V.S.A. § 6085(c)(1)(B). In a February 8, 2018 decision we dismissed Timberlake's questions, with the understanding that Timberlake would pursue the Act 250 permit appeal under Vallee's Statement of Questions. Diverging Diamond Interchange Act 250 and SW Permits, Nos. 169-12-16 Vtec, 50-6-16 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Feb. 8, 2018) (Walsh, J.). Timberlake also entered an appearance and claimed party

status in the stormwater appeal pursuant to 10 V.S.A. §§ 8504(a) and 8504(n)(2), (4), and (6). Timberlake is represented by David L. Grayck, Esq.

The Vermont Agency of Transportation (VTrans) is the permittee in both matters. VTrans is represented by Justin E. Kolber, Esq., Jenny E. Ronis, Esq., and John K. Dunleavy, Esq.

The Agency of Natural Resources (ANR), represented by Hannah W. Smith, Esq., and Kane Smart, Esq., participated in both matters.

The Conservation Law Foundation (CLF) is represented by Elena M. Mihaly, Esq. The Court granted CLF's motion for party status in both matters pursuant to 10 V.S.A. § 8504(n)(4), (6) and V.R.C.P. 24 on the record at a status conference on January 23, 2017.

The Natural Resources Board (NRB) participated in the Act 250 appeal pursuant to 10 V.S.A. § 8504(n)(3) and is represented by Peter J. Gill, Esq.

Costco Wholesale Corporation (Costco), represented by Mark G. Hall, Esq., participated in both matters. In an April 28, 2017 entry order, we granted Costco's motion to intervene in both appeals pursuant to 10 V.S.A. § 8504(n)(6) and V.R.C.P. 24(a)(2).

Merits Trial

The Court held a five-day trial on the two appeals on March 26–30, 2018.

At the outset of trial, a site visit was discussed but then deferred unless and until the parties deemed it necessary or helpful to contextualize the evidence. No party ultimately requested a site visit during or after trial, and no visit was conducted.

Based upon the credible evidence presented at trial the Court issues the following Findings of Fact, Conclusions of Law, and Judgment Order that accompanies this Merits Decision.

Findings of Fact[1]

I. Project Overview

1. I-89 at Exit 16 is in the Town of Colchester, Chittenden County. The interstate crosses in an east-west direction via an overpass bridge over US Route 2/7 (aka Roosevelt Highway), which

[1] The parties' disputes in these coordinated matters are illustrated through considerable competing expert opinions. Our credibility determinations are central to the outcome of our decision on each dispute. We therefore express our credibility determinations in greater detail than normal within our findings of fact. See In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 52 (Nov. 9, 2017).

is oriented north-south. On- and off-ramps connect I-89 and Route 2/7. Route 2/7 leads from the City of Winooski to the south into the Town of Colchester to the north.

2. Route 2/7 from South Park Drive (south of I-89) to the Mountain View Drive intersection (north of I-89) is designated as a high-crash location. Safety problems in this area are caused by traffic congestion. VTrans Ex. 76. The purpose of the Project, which was determined by a 2011 scoping study conducted by the Chittenden County Metropolitan Planning Organization (the Exit 16 Scoping Study), is to improve safety for all users and to increase mobility and decrease traffic congestion, specifically around the Exit 16 interchange and the Route 2/7 intersections with Mountain View Drive and Lower Mountain View Drive, Hercules Drive, and Rathe Road.

3. The Project covers a total area of 18.4 acres. It begins at the Winooski / Colchester town line and extends north on for 1.05 miles to the Sunderland Woods Road intersection. VTrans Ex. 99; 2 at Bates 021565.

4. The Project proposes additional turn lanes, new crosswalks, upgraded signal infrastructure, harmonized shoulder widths, a separated shared-use path through the interchange connected to sidewalks to the north and south, and the reconfiguration of the I-89 interchange into a Diverging Diamond Interchange (DDI). North of the Mountain View Drive intersection the Project is largely a repaving operation, with some corrections to banking and curves and some widening of the roadway.

5. The Project also involves installing a stormwater collection and treatment system. There is currently no designed and permitted stormwater system in the Project area.

Experts

6. Michael LaCroix, the lead designer and manager of the Project, testified as both a fact and expert witness. A Project Manager at VTrans, Mr. LaCroix has been involved with designing traffic projects for 12 years, and has designed 40–50 traffic projects, about 12 of which included a stormwater component. Mr. LaCroix testified at trial on behalf of VTrans regarding all aspects of the Project. VTrans Ex. 76.

7. VTrans introduced testimony on the stormwater system from Jeffrey Nelson, director of energy and environmental services for the Vermont office of Vanasse Hangen Bruslin, Inc. (VHB).

Mr. Nelson and his team conducted wetlands mapping, prepared a downstream analysis for the Project, and reviewed the stormwater elements of the Project. VTrans Ex. 78.

8. Vallee offered competing testimony on the stormwater system from Andres Torizzo, President and Principal Hydrologist of Watershed Consulting Associates, LLC. Vallee Ex. Q, R, S. In addition to critiquing the system proposed by Vallee, Mr. Torizzo offered testimony on an entirely different alternative stormwater system that he designed. Vallee Ex. U, V.

9. David Marshall, a Project Engineer with Civil Engineering Associates, testified on behalf of Vallee on compliance with Act 250 Criterion 5, and on the constructability of Mr. Torizzo's alternative stormwater system. Vallee Ex. KK, LL.

Route 2/7 Overview

10.

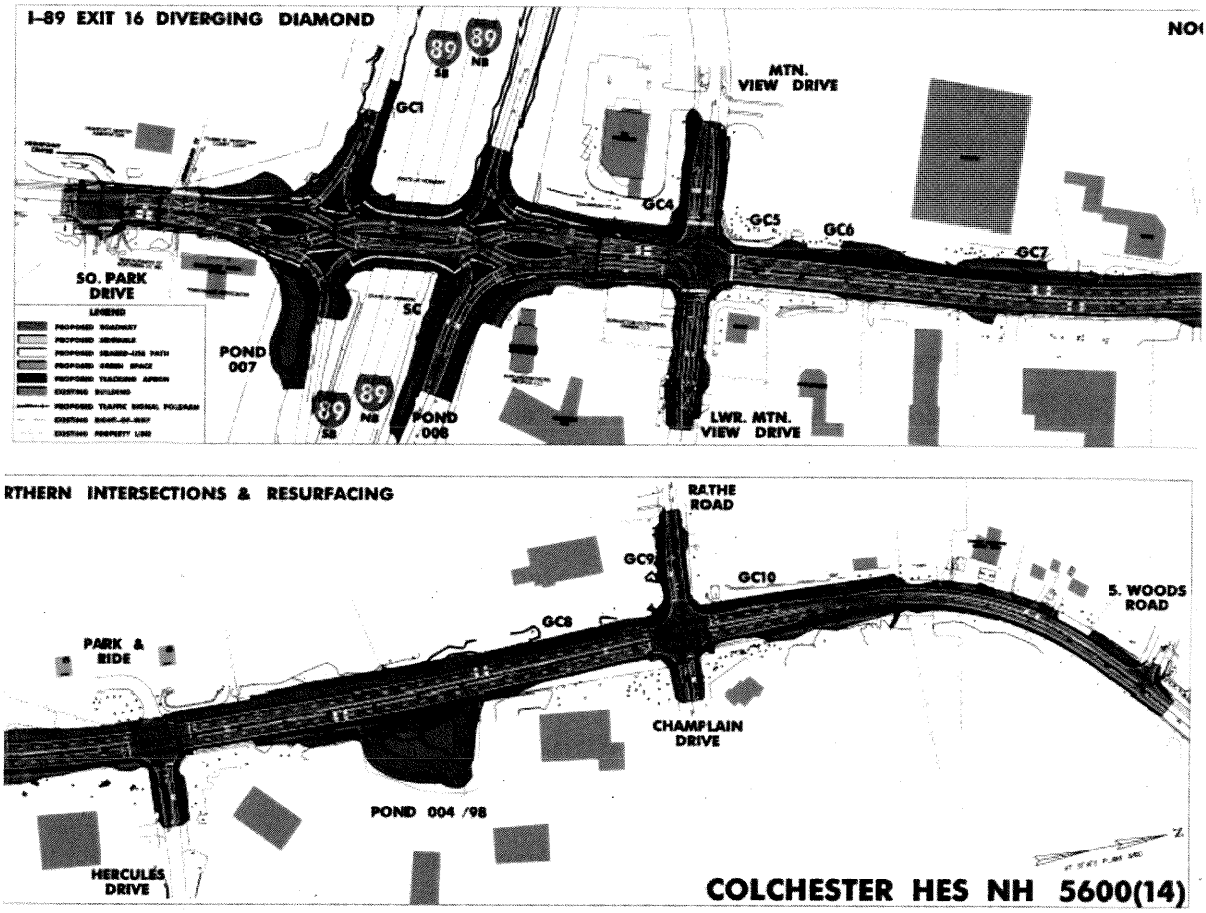

Exhibit 99 (for illustrative purposes).

11. The Route 2/7 element involves widening the road in some areas and improving two sub-standard horizontal curves by regrading the roadway banking within those curves. These curves are along Route 2/7 between Mountain View Drive and Hercules Drive and between Rathe Road and Sunderland Woods Road.

12. New pavement markings will delineate new turn lanes for the following locations:

a. A dedicated right turn lane from Route 2/7 northbound to Lower Mountain View Drive.

b. An additional left turn lane from Lower Mountain View Drive to Route 2/7 southbound.

c. An additional right turn lane from Mountain View Drive to Route 2/7 southbound.

d. Dedicated left turn lanes on Route 2/7 for the Hercules Drive intersection.

e. An additional through lane for Route 2/7 northbound at Rathe Road.

13. Retaining walls will be built on the east side of Route 2/7 along the Hampton Inn property and on the north side of Lower Mountain View Drive along the North Country Federal Credit Union property to minimize the impact of slope construction from their respective roadways.

14. Upgraded LED street lighting, traffic signal equipment, signing and pavement markings will be installed at each intersection along Route 2/7 in the Project, including at the intersection of Main Street and Tigan Street in the City of Winooski. Street lighting will be added along Route 2/7 from South Park Drive through the interchange to the Mountain View Drive intersection.

15. Concrete sidewalks and asphalt shared-use paths will be built through a portion of the Route 2/7 corridor. Concrete barriers will separate the roadway from the shared-use paths under the overpasses.

16. The Project will promote connectivity and safe transportation by providing access to future bus stops.[2] This includes a left turn lane leading to a park and ride that will be located on the west of Route 2/7 across from Hercules Drive, and a concrete bus stop pad on the southwest corner of the Mountain View Drive intersection.

[2] These bus stops are not part of the Project proposed here.

Exit 16 Interchange Overview

17. The Exit 16 interchange will be reconfigured into a DDI. Route 2/7 will cross to the left side of the road under the interstate to improve traffic flow by minimizing conflicting crossing traffic movements at the signalized ramp intersections. All approaches to these crossovers are channelized with curbed islands. The lanes in the interchange area on Route 2/7 will be widened to accommodate large trucks. A heavy-duty, dual sided guardrail will be installed through the middle of the roadway to separate traffic where it has been shifted to the left side of the road.

18. Short, channelizing one-way ramps, called slip ramps, will be constructed at all freeway ramps to facilitate the movement of vehicles through the interchange. Two of these ramps (off-ramp right turns) will be controlled by traffic signals to assist in the protection of pedestrian crossings and to create gaps in arterial traffic for downstream drives and intersections.

19. Overhead guide signs to indicate lane assignment and to provide destination information will be installed on structures in advance of approaching the interchange along Route 2/7 and both Exit 16 off-ramps.

II. The Stormwater Appeal

The Stormwater System

20. The Project area currently has 10.2 acres of existing impervious surface.

21. The total impervious area post-construction will be 11.3 acres, an increase of 11% from existing conditions. This will include 1.576 acres of new impervious surface and 3.203 acres of redeveloped impervious surface, for a total jurisdictional area of 4.779 acres to be covered by a discharge permit. The Project also proposes 6.51 acres of resurfaced impervious area and 0.46 acres of new pervious area, neither of which is considered jurisdictional for purposes of stormwater permitting.

22. The stormwater system is designed to comply with the Stormwater Management Rule for non-impaired watersheds (Chapter 18 of the Environmental Protection Rule) and the 2002 Vermont Stormwater Management Manual (VSMM).

23. The VSMM Water Quality, Groundwater Recharge, and Channel Protection standards are to be satisfied by structural stormwater treatment practices (STPs). The STPs include three dry ponds (Dry Ponds 007, 008, and 4/98) and eight grass channels (designated, from south to north,

as GC1, GC4, GC5, GC6, GC7, GC8, GC9, and GC10). The Project intends to satisfy waiver conditions for the Overbank Flood Protection and Extreme Flood Protection standards.

24. The stormwater system has eight discharge points that discharge into Sunnyside Brook, which is east of and roughly parallel to the Project. VTrans Ex. 4, Bates 022904–05, 023029. From south to north (i.e. downstream to upstream) these are designated as S/N 007, S/N 008, S/N 006, S/N 005, S/N 004, S/N 003, S/N 002, S/N 001. VTrans Ex. 4, Bates 023029.[3]

Site balancing

25. VTrans has applied ANR's Site Balancing Procedure for the Discharge of Stormwater Runoff from the Expansion or Redevelopment of Impervious Surfaces (the Site Balancing Procedure) to the Project's stormwater system. VTrans Ex. 10.

26. "Site balancing means that where control and/or treatment of certain limited areas of the expanded or redeveloped impervious surfaces are deemed impracticable, the impact from these areas of untreated impervious surfaces will be compensated on an equivalent basis by controlling and/or treating impervious surfaces within the project limits that would not otherwise be subject to treatment and/or control requirements. . . . [T]he requirements for treatment and/or control . . . shall be equal to or greater than the treatment and/or control requirements on the expanded or redeveloped impervious surfaces for which treatment is impracticable." VTrans Ex. 10, p. 2.

27. To apply the Site Balancing Procedure, a stormwater project designer must demonstrate to ANR that "treatment and/or control of the impervious areas in question is impracticable due to physical, topographical, or environmental constraints." VTrans Ex. 10, p. 2–3. The Site Balancing Procedure includes a non-exclusive list of "[E]xamples of impracticability." Id.

28. Mr. LaCroix credibly testified that site balancing is commonly used for linear transportation projects, such as that proposed here, because they are fairly large and complex, and constrained by surrounding development.

[3] The southernmost part of the Project drains to a ninth discharge point, S/N 009, into the City of Winooski's closed drainage system. VTrans Ex. 4, Bates 022905. The only impervious surface area in the Project draining to this point is non-jurisdictional resurfacing, and so no stormwater management practices are proposed associated with this area or discharge point.

29. Chris Gianfagna is an Environmental Analyst with ANR's Stormwater Program who reviews stormwater permit applications for ANR. See ANR Ex. 1. Mr. Gianfagna testified that "impracticability" under the Procedure is a site-specific determination.

30. Mr. Gianfagna testified that ten to eleven of the "easily 100" stormwater permit applications he has reviewed involved the Site Balancing Procedure.

31. Mr. Torizzo has never used the Site Balancing Procedure. He opined that there is always a way to provide direct treatment, and that site balancing would be necessary only in extremely rare circumstances.

32. The Court finds Mr. Torizzo's opinion that site balancing is generally unnecessary not credible, given his relative lack of experience and the competing credible testimony from Mr. LaCroix and Mr. Gianfagna. Mr. Torizzo's opinion is also belied by the basic fact that ANR has developed the procedure and made it available to stormwater permit applicants.

33. Mr. LaCroix and Mr. Nelson credibly testified that site balancing is appropriate here because direct treatment is impracticable. VTrans Ex. 76, 11.

34. Mr. LaCroix testified that VTrans considered using dry swales, grass channels, and a wet pond to treat stormwater in the southern portion of the Project, but these all failed to provide direct treatment. Specifically, VTrans considered:

- Installing a Grass Channel on the northbound off-ramp to meet the Water Quality Treatment Standard; however, this failed to meet VSMM treatment standards, and so it was taken out of the stormwater application (note that this is shown on VTrans Ex. 99, and identified on VTrans Ex. 11 as "special channel," but is not included as part of the stormwater permit application).
- Installing a Grass Channel along the north side of the northbound on-ramp. This was removed from the stormwater application because it failed to meet the ten-minute residence time requirement under the VSMM.
- Installing a wet pond south of the southbound on-ramp (where Dry Pond 007 is planned). This wet pond failed to meet VSMM standards.

35. VTrans Ex. 11 is a graphic representation of the site constraints justifying use of the Site Balancing Procedure.

36. One of the constraints listed is poor draining soils. VTrans' soil surveys indicated that the soils in the area of the interchange were either hydro group type E or fill material, both of which are poorly draining and not conducive to infiltration.

37. Another constraint is proximity to commercial properties, associated parking areas, and drive accesses. There are commercial properties close to the roadway at the southeast and northeast of the interchange, and on Route 2/7 south of the interchange.

38. Other constraints in and around the area of the interchange are steep slopes, exposed and buried ledge, buried utilities, and the need for underground storage and/or treatment.

39. Mr. Torizzo opined that physical, topographical, or environmental constraints do not make treatment and/or control of the impervious areas in question impracticable. Mr. Torizzo's opinion that direct treatment is practicable rests on his own ability to design an alternative stormwater system.

40. Mr. Torizzo offered extensive evidence of an alternative stormwater system that he designed and which, he opined, could be installed to provide direct treatment of stormwater runoff from the Project without resorting to the Site Balancing Procedure. Vallee Ex. U, V.

41. While Mr. Torizzo's expert report suggests that his alternative system is fully designed (Vallee Ex. R at 13), at trial he admitted it is not completely designed, would need to be adjusted to meet treatment standards, and is not sufficiently developed to apply for a discharge permit.

42. Mr. Torizzo does not know for certain whether his design would require relocating existing utilities, how much it would cost, or how long it would take if utilities had to be relocated. Mr. Torizzo's design extends slightly outside of the Project area proposed by VTrans. Vallee Ex. U. Mr. Torizzo does not know if this would require additional land acquisitions or how much these would cost.

43. Mr. Torizzo's design employs media filter drains. These are acceptable practices under the 2017 VSMM, but not in the 2002 VSMM, the relevant manual in this appeal. As proposed in his plans, these would also require some adjustments to meet site conditions. Mr. Torizzo admitted that one of the media filter drains included in his design will not treat any runoff from the Project.

44. Mr. Torizzo's design includes three gravel wetlands. The designs for these wetlands are not fully developed and include several flaws. For example, gravel wetland 7 is intended to provide 24 hours of detention but calculated to provide only 20 hours. Vallee Ex. V, "WCA_Post_Condition_DDI" p. 48. Gravel wetland 4 would also fail to provide the 12 hours of detention time intended. Id. p. 75. There are also substantial discrepancies between the outlet pipes as proposed in the plans and as analyzed through HydroCAD modelling. Mr. Torizzo credibly testified that these flaws could be corrected.

45. The Site Balancing Procedure states that:

> Site balancing will be allowed if it can be accomplished on a discharge by discharge basis. This can be accomplished by providing additional control and/or treatment beyond what is required for redeveloped impervious surfaces or by controlling and/or treating impervious surfaces that are not otherwise required to provide stormwater treatment within the immediate drainage area for a given discharge point.
>
> If site balancing beyond a discharge by discharge basis is necessary, the applicant shall meet with the stormwater Management Program to describe the site-specific details of the site balancing that is to be proposed . . . . Site balancing will be allowed on a watershed basis within the same receiving water if the Secretary determines that any impacts to water quality and/or channel protection as a result of the proposed site balancing are *de minimus*.

VTrans Ex. 10 p. 3.

46. Here, VTrans proposes to apply site balancing on a watershed basis to meet the Water Quality Treatment Standard, Groundwater Recharge Standard, and Channel Protection Treatment Standard.[4]

47. ANR did not require any additional analysis regarding whether the impact from site balancing in relation to the Water Quality Treatment Standard, Groundwater Recharge Standard, and Channel Protection Treatment Standard would be de minimus.

48. Runoff will be treated to meet the Channel Protection Treatment Standard at Dry Pond 4/98, which will discharge to Sunnyside Brook via discharge point S/N 004. VTrans Ex. 4, Bates 022907. No treatment practices are designed to meet the Channel Protection Treatment

[4] At the same time, the Project includes some discharge by discharge site balancing via GC4, which will treat runoff from both jurisdictional and non-jurisdictional surfaces. See Ex. 4, Bates 022982, 022984.

Standard south and upstream from this (i.e. at discharge points S/N 007, S/N 008, S/N 006, and S/N 005).

49. Some runoff will be treated to meet the Water Quality Treatment and Groundwater Recharge Standards via GC1, GC4, and GC5, which will discharge at S/N 007 and S/N 008. The remaining Grass Channels will discharge at S/N 004 and discharge points downstream from there.

50. The distance between S/N 007, the southernmost and upstream discharge point, and S/N 004 is approximately 1500 to 2000 feet.

51. Mr. Torizzo opined that the proposed use of site balancing would have a more than de minimus impact on water quality because untreated runoff will be discharged upstream from where treated runoff will be discharged. Mr. Torizzo claims that this will cause a significant loading of pollutants. He also opined that the increase of impervious surface at the interchange area and lack of channel protection treatment until S/N 004 would have a more than de minimus impact on Sunnyside Brook between the interchange and S/N 004.

52. Mr. Nelson opined that the impact of site balancing would be de minimus or less than de minimus, that overall the Project would lead to an improvement over existing treatment, and that it would therefore improve water quality in Sunnyside Brook.

53. We find Mr. Nelson's opinion regarding de minimus impact to be more credible. His opinion is supported by evidence, discussed below, that the Project will treat runoff from more surface area than is required to meet the Water Quality Treatment Standard and Channel Protection Treatment Standard. Additionally, there is no evidence to support Mr. Torizzo's opinion that meeting these standards downstream, as opposed to upstream, will have a negative impact on Sunnyside Brook.

Stormwater modelling

54. VTrans used HydroCAD to model the stormwater system.

55. The modelling includes a Downstream Analysis conducted by VHB to analyze flow at each discharge point. An initial Downstream Analysis was conducted in January 2015, then updated in May 2016. VTrans Ex. 4, Bates 023194. The Downstream Analysis was further updated in February 2018. VTrans Ex. 47.

56. Mr. Torizzo opined that the modelling is unreliable due to alleged errors and inconsistencies in the underlying data and assumptions.

57. For example, the stormwater application includes a map titled "Sunnyside Watershed Map" dated September 11, 2014 showing a watershed area of 0.91 acres. VTrans Ex. 4, Bates 023031. Mr. Torizzo opined that this map is inaccurate, noting that this is important because the map forms the basis for many of the calculations in designing the stormwater system and modelling assumptions.

58. Mr. LaCroix testified, however, that this map is illustrative only and was not used for modelling purposes.

59. This clarification by Mr. LaCroix demonstrates that Mr. Torizzo did not fully understand the purpose of this map and suggests that he may not have fully understood the modelling included in the stormwater application. We find his observation that the modelling is flawed to be unreliable, and not credible.

Grass Channels: Water Quality Treatment Standard

60. The proposed stormwater treatment system includes eight Grass Channels, designated from south to north as GC1, GC4, GC5, GC6, GC7, GC8, GC9, and GC10. VTrans Ex. 99.

61. The stormwater permit application includes a summary sheet detailing the characteristics of each Grass Channel and calculations related to stormwater runoff treatment, VTrans 4, Bates 023038 et seq., maps showing the impervious surfaces to be treated by each Grass Channel, VTrans Ex. 4, Bates 022980 et seq., and maps showing the on- and off-site impervious and pervious surface runoff to be treated by each Grass Channel, VTrans Ex. 4, Bates 023157 et seq.

62. In its pre-development condition, there is an existing ditch or swale where each grass channel will be installed. Vallee Ex. N. The existing ditches are not controlled by any existing stormwater permit. There is no evidence that the ditches were designed to treat stormwater runoff.

63. Grass Channels must be maintained to certain standards through a "legally binding and enforceable maintenance agreement." VSMM § 2.7.5.F, p. 2-55. Without maintenance, grass channels can fall into disrepair and no longer be effective in treating stormwater.

64. VTrans proposes meeting the Water Quality Treatment Standard with the eight Grass Channels.

65. GC1 and GC4 will provide direct treatment in the area of the interchange south of the Mountain View Drive intersection. GC1 discharges to S/N 007, and GC4 discharges to S/N 008. VTrans Ex. 4, Bates 022907.

66. The remaining Grass Channels are located north of the Mountain View Drive intersection.

67. The Water Quality Treatment Standard (WQTS) aims to "capture 90 percent of the annual storm events, and to remove 80 percent of the average annual post development total suspended solids load (TSS), and 40 percent of the total phosphorus (TP) load." ANR Ex. 2, VSMM § 1.1.1, p. 1-3.

68. The Project is required to treat stormwater runoff from 100% of expanded impervious area (1.576 acres) and 20% of redeveloped impervious area (0.641 acres), for a total of 2.217 acres to be treated. VTrans Ex. 4, Bates 022909 (application narrative); 023037 (WQTS summary table).

69. The Grass Channels here are calculated to treat stormwater runoff from 2.569 acres, well above the 2.217 acres required. VTrans Ex. 4, Bates 023037.

70. The VSMM includes the following design standards for Grass Channels:

- Sufficient length to detain the peak discharge associated with the water quality storm (0.9 inches) "for an average residence time of 10 minutes, at a velocity of no greater than 1 ft/s, and at a depth generally no greater than 4 [inches]." VSMM § 2.7.5.D, p. 2-55.
- Maximum side slope of 2:1. VSMM § 2.7.5.B, p. 2-54.
- Bottom that is 2-8 feet wide and flat. VSMM § 2.7.5.D, p. 2-55.
- Designed to convey the 10-year storm with minimum of 6 inches of freeboard. VSMM § 2.7.5.B, p. 2-54.
- Designed to pass the one-year storm without producing erosive velocities (i.e. 2.5 ft/s). VTrans 70, VSMM Vol. II, Appendix D7, p. 186.

71. All Grass Channels in the Project are designed:

- To have flat bottoms from 4 feet to 6 feet wide with side slopes either 3:1 or 4:1. VTrans Ex. 4, Bates 023038–53.
- To convey the 10-year storm with a minimum of 6 inches of freeboard. Id.
- To be of sufficient length to detain the peak discharge associated with the water quality storm (0.9 inches) for an average residence time of 10 minutes, at a velocity of no greater than 1 ft/s. Id.
- To pass the one-year storm without producing erosive velocities (i.e. 2.5 ft/s). Id.

72. Five of the Grass Channels are of sufficient length to maintain the water quality storm at a depth under 4 inches. Id. Three have a depth of flow over 4 inches: GC4 (4.4 inches), GC8 (4.49 inches), and GC10 (4.705 inches).

73. GC4 would have to be deeper to reduce flow depth to 4 inches or less. Because of site constraints and proximity to the roadway, GC4 cannot be made deeper without installing some form of traffic protection, such as a guardrail. A guardrail would create an additional safety hazard to traffic and additional expense. VTrans considered installing a guardrail but decided against doing so based on the hazard and expense it would create, and the minimal improvement to water treatment (0.4 inch depth reduction) that it would achieve.

74. GC8 and GC10 exceed the 4-inch recommended depth of flow due to the large amount of off-site runoff that they collect. VTrans Ex. 4, Bates 023049, 023162 (GC8); 023053, 023164 (GC10).

75. Mr. Lacroix prepared a memo dated March 12, 2018 comparing dimensions of the existing ditches to the proposed Grass Channels, admitted into evidence as Vallee Ex. EEE. His measurements are taken from the VTrans HydroCAD model.

76. The measurements show that at many different points the existing ditches do not meet VSMM requirements for grass channels and would therefore not function to meet treatment standards.

77. Mr. Torizzo opined that the dimensions of the existing ditches shown in Vallee Ex. EEE are inaccurate.

78. Mr. Torizzo testified that he measured the ditches (which he called "grass channels") with a tape measure at some point during the Act 250 proceedings (i.e. prior to November 2016), and

re-measured them the Monday before he testified. When the judge noted that Mr. Torizzo had been in the courtroom that day, Mr. Torizzo changed his testimony and stated that he had taken the measurements the previous week. He did not record any of his measurements.

79. Mr. Torizzo offered specific testimony regarding the dimensions of certain points in the existing ditches at GC8 and GC10 and opined that these two existing ditches already qualify as grass channels under the VSMM.

80. By contrast, at certain points in his deposition, which took place approximately six weeks before trial, Mr. Torizzo confused the numbering of the Grass Channels, could not recall how many Grass Channels were proposed, and could not recall where certain Grass Channels would be located.

81. The Court does not find Mr. Torizzo's testimony credible. He apparently measured the ditches immediately before trial, but misstated when he took those measurements until the Court challenged his testimony. He did not record his measurements but recalled measurements at very specific points in different ditches. This contrasts with his poor memory in other areas of testimony and at his deposition. He also appeared reluctant to discuss his own measurements without looking at maps of existing conditions, which calls into question whether the measurements he offered were based on his own observations, or on his interpretation of the existing conditions maps. Finally, his opinion that the existing ditches meet VSMM standards for grass channels ignores the maintenance requirement at VSMM § 2.7.5.F, p. 2-55.

82. A map included in the application shows 13.50 of 23.58 acres as impervious. Id. Bates 023158.

83. HydroCAD modelling for the Water Quality Storm for GC4 shows the inflow area as 23.581 acres with 0.00% impervious surface. VTrans Ex. 4, Bates 023066.

84. Modelling for the one-year storm has the same acreage, but with 57.25% impervious surface. Id. Bates 023075.

85. Downstream Analysis modelling of the ten-year storm for GC4 shows 23.579 acres at 4.32% impervious. VTrans Ex. 47, Bates 024717. The cover page of the updated Downstream Analysis says that the drainage area to GC4 was adjusted to equal 23.580 acres. Id. Bates 024647.

Groundwater Recharge Treatment Standard

86. VTrans proposes meeting the Groundwater Recharge Treatment Standard with the eight Grass Channels.

87. The VSMM states:

> If designed according to the following design criteria, the grass channel will meet the WQv [Water Quality Treatment Standard] for certain kinds of residential development. Use of a grass channel will also meet the minimum recharge Rev [Groundwater Recharge Treatment Standard] requirement . . . regardless of the geometry or slope, provided that the remaining criteria related to land use and channel length are met.

VSMM Vol. I, § 3.5, p. 3-9.

88. The 2002 VSMM Vol. II gives an example of a hypothetical arterial road in Chittenden County where the use of grass channels to meet the Water Quality Treatment Standard also serves to automatically meet the Groundwater Recharge Treatment Standard. VTrans Ex. 70, p. 142.

89. ANR's standard stormwater application form for grass channels also indicates that the Groundwater Recharge Treatment Standard is automatically met if the Water Quality Treatment Standard is met. VTrans Ex. 4, Bates 022946.

90. Mr. Torizzo's testimony on this point was somewhat unclear and contradictory. He reluctantly agreed that the Groundwater Recharge Treatment Standard can be met if the Water Quality Treatment Standard is met with grass channels. But, he then opined that the waiver cannot apply here because of the site conditions. He did not explain what these site conditions are, or why they would prevent the waiver from applying. He then testified that even if the waiver is met, an applicant still must generate calculations to show that the Groundwater Recharge Treatment Standard is met. This contradicts the VSMM and ANR application form, which indicate that the standard is automatically met when the Water Quality Treatment Standard is met and does not need to be calculated.

91. Mr. Torizzo seemed to disregard or deem unreliable the example in VSMM Volume II, stating that the VSMM has many contradictions, that he would rely on Volume I and not Volume II, and that VTrans should not rely on this example. At the same time, however, he admitted that

Volume II is a reliable source of guidance for stormwater system design. He provided no explanation as to why Volume II would not be reliable in relation to this Project.

92. This testimony about the VSMM showed a misunderstanding or misapplication of the VSMM, was contradictory, and makes Mr. Torizzo's testimony, here and in general, less credible.

Dry Pond 4/98: Channel Protection Treatment Standard

93. The Channel Protection Treatment Standard requires "storage of the channel protection volume (CPv) . . . be provided by means of 12 to 24 hours of extended detention storage (ED) for the one-year, 24-hour rainfall event," which is estimated to be 2.1 inches in Chittenden County. VSMM § 1.1.2, p. 1-4.

94. The Project is required to meet the detention criteria for 1.58 acres of impervious surface. VTrans Ex. 78 p. 10.

95. VTrans proposes to meet the Channel Protection Treatment Standard with the installation of a dry pond, referred to in the stormwater permit application as Dry Pond 4 or Dry Pond 98, east of Route 2/7 between stations 36+80 and 38+90. VTrans Ex. 4 p. 8, Bates 022910; Vtrans Ex. 99; see also VTrans Ex. 4, Bates 023165 (summary sheet of Dry Pond 4/98).

96. Dry Pond 4/98 is designed to treat the required Channel Protection Volume for 4.89 acres of impervious surface, including 3.20 acres off site and 1.67 on site. VTrans Ex. 78, p. 10.

97. The Project proposes installing a diversion channel to the west of, and parallel to, Route 2/7 south of GC8 and across Route 2/7 from Pond 4/98. Vtrans Ex. 99. The diversion channel will divert some off-site stormwater runoff away from Pond 4/98.

98. The diversion channel is sized and designed to similar specifications as the Grass Channels. The diversion channel is neither required under the VSMM, nor modelled in the stormwater permit application.

99. There is no evidence that the diversion channel would overflow. Mr. LaCroix nevertheless testified that if the diversion channel did overflow, the overflow would run into Pond 4/98. Mr. LaCroix explained that this would not cause the pond to "fail." Instead, if the amount of water entering Pond 4/98 exceeded the 10-year or 100-year levels it would spill over the pond's emergency spillway.

100. The stormwater application includes two maps depicting the area to be drained to Pond 4/98. VTrans Ex. 4, Bates 023190, 023191. The maps show approximately 11.15 acres of off-site and on-site areas that drain to the pond. See VTrans Ex. 4, Bates 023165.

101. Mr. Torizzo and Mr. LaCroix offered competing testimony as to the accuracy of these maps.

102. Mr. Torizzo and Mr. LaCroix identified the area to the southwest showing an off-site roof, in pink, and off-site paved area surrounding that roof, in orange, as a credit union and parking lot located on Water Tower Hill. They both identified the green rectangle to the right of the parking lot (and to the left of the off-site woods, in yellow) as a grass berm that collects runoff from the credit union roof and parking lot. They agreed that runoff from the berm runs to the east and onto the street.

103. Mr. Torizzo opined that this runoff flows eventually to the diversion channel across Route 2/7 from Pond 4/98 and does not enter Pond 4/98. Mr. Torizzo testified that the area of the credit union on Water Tower Hill which he believes is incorrectly designated as draining to Pond 4/98 is about 1.25 acres. VTrans Ex. 4, Bates 023190.

104. Mr. LaCroix disagreed, opining that the water sheet-flows off the street, down the slope, and to Pond 4/98.

105. This dispute has no impact on our analysis. Even if Water Tower Hill did not drain into Pond 4/98 as predicted by VTrans, the pond would still treat runoff from 1.67 acres of on-site impervious surface, thereby satisfying the Channel Protection Treatment Standard requirement of treating 1.58 acres of on-site impervious surface runoff.

106. The VSMM states:

> If a stormwater discharge is to a coldwater fish habitat, 12 hours of extended detention is required and if a stormwater discharge is to a warmwater fish habitat, 24 hours of extended detention is required. Coldwater fish habitats and warm water fish habitat designations are listed in the Vermont Water Quality Standards.

VSMM § 1.1.2, p. 1-4.

107. Pond 4/98 discharges to discharge point S/N 004. VTrans Ex. 4, Bates 022904–05; 023170. The stormwater permit application designates all discharge points for the Project, including S/N

004, as discharging to Sunnyside Brook. VTrans Ex. 4, Bates 022904.[5] Sunnyside Brook is a coldwater fish habitat. ANR Ex. 4, Appendix A.

108. Runoff leaves the Project from Pond 007, passes through a Class III wetland, and then enters Sunnyside Brook at S/N 007.

109. The Vermont Water Quality Standards (VWQS) states that "[a]ll wetlands . . . are designated as warm water fish habitat for purposes of these rules." ANR Ex. 4, p. A-1.

110. Mr. Torizzo opined that Pond 007 discharges to a wetland, because a discharge is where runoff first enters the waters of the State. He opined that under the Channel Protection Treatment Standard it would therefore have to provide 24 hours of extended detention storage for the one-year, 24-hour rainfall event. VSMM § 1.1.2, p. 1-4. Mr. Torizzo added that he observed surface water at the area of the wetland and opined that 24 hours of detention would be necessary to protect the aquatic habitat in the wetland at discharge point S/N 007, although he was unable to say whether the wetland actually supports any fish habitat. Mr. Torizzo is not a wetland ecologist, nor did he perform any formal assessment of the wetland.

111. Mr. Torizzo opined that because the Site Balancing Procedure requires an equivalent level of treatment, Pond 4/98 should also be required to provide 24 hours of detention storage for the one-year, 24-hour rainfall event to satisfy the procedure. VTrans Ex. 10. Mr. Torizzo did not identify any practical effect that 24 hours of storage at Pond 4/98 would have, or why this would satisfy the purpose of the Channel Protection Treatment Standard better than 12 hours of storage. He testified that 24 hours would be necessary to protect the aquatic habitat in the wetlands; however, Pond 4/98 does not discharge to a wetland.

112. VHB conducted a wetland and stream delineation for the Project. VTrans Ex. 44. The delineation summary identifies this Class III wetland as "2012-P2." Id., Bates 024479.

113. The data sheet associated with the wetland notes that no surface water is present at this wetland under typical conditions, that no surface water was observed, and that the wetland has zero function as fish habitat. Id., Bates 022486. The data sheet notes that surface water is present in other areas of the wetland; however, the other data points indicating no surface water are used to characterize the wetland as a whole.

[5] Excluding discharge point S/N 009.

114. Because VHB was conducting a formal analysis, and given Mr. Torizzo's general unreliability, we find the VHB data to be more reliable than Mr. Torizzo's observation regarding the presence of standing water.

115. The drainage area for Pond 4/98 is 11.159 acres. VTrans Ex. 4, Bates 023165. This drainage area is depicted on two maps which detail the different surface types included in the area. VTrans Ex. 4, Bates 023190–91.

116. The Downstream Analysis modelling shows the impervious cover for the Pond 4/98 drainage area as 14.99% (VTrans Ex. 47, Bates 024739) while the Channel Protection Treatment Standard modelling shows the same impervious cover as 47.80% (VTrans Ex. 4, Bates 023184).

117. Mr. Torizzo opined that these impervious surface percentages should be the same, and the fact that it is different indicates the modelling is unreliable.

118. Mr. LaCroix explained that this discrepancy is due to the way data was inputted for the two models. Details of the different surface types shown on the maps at 023190–91 were inputted into the Channel Protection model via HydroCAD. A summary of the acreage for these areas was inputted manually into the Downstream Analysis at 023184. Because a summary was entered manually into the Downstream Analysis, that model then calculated a different percentage of impervious surface. Mr. LaCroix explained that although the models show different impervious coverage, they are both reliable.

Ponds 007 and 008 and the Overbank Flood Protection Standard

119. The Overbank Flood Protection Standard requires that "[t]he post-development peak discharge rate shall not exceed the pre-development peak discharge rate for the 10-year, 24-hour storm event." VSMM § 1.1.4.

120. Two dry ponds are designed to attenuate Project flows during the 10-year storm event. One dry pond was assigned to each of two on-site sub-catchment areas with the highest amount of impervious expansion.

121. Pond 007 will be situated to the southeast of the DDI, adjacent to and south of the southbound on-ramp. Pond 007 discharges to Sunnyside Brook at discharge point S/N 007. VTrans Ex. 4, Bates 022918, 023029 (map). Pond 008 will be to the east of the DDI, between the

I-89 northbound lanes and the northbound off-ramp. Pond 008 discharges to discharge point S/N 008. VTrans Ex. 4, Bates 022919.

122. Under the "10% rule," the developer, through a downstream analysis, calculates flow rates and velocities downstream of a proposed project "to the point where the site represents 10% of the total drainage area. For example, a 60-acre site would be analyzed to the point downstream with a drainage area of 600 acres." VSMM § 1.2, p. 1-11–1-12. "If flow rates and velocities (for [the ten-year and one-hundred-year storms]) with the proposed detention facility increase by less than 5% from the pre-developed condition, and no existing structures are impacted, then no additional analysis is necessary." Id. ANR "will waive the 10-year control requirement on a case-by-case basis where the developer demonstrates that there will be no increase in flood threat downstream to the point of the 'so-called' 10% rule." VSMM § 1.1.4, p. 1-9. In other words, if the downstream analysis shows increased flow rates and velocities of less than 5%, then the Overbank Flood Protection Standard is met.

123. VHB conducted an initial Downstream Analysis in January 2015, then updated it in May 2016. VTrans Ex. 4, Bates 023194. The Downstream Analysis was further updated in February 2018. VTrans Ex. 47.

124. According to the most recent Downstream Analysis, the flow rate for the 10-year storm at S/N 007 is 16.7 cubic feet per second (cfs) pre-development, and 17.4 cfs post-development with retention from Pond 007. This represents a post-development increase of 0.7 cfs, or 4.2%. VTrans Ex. 47, Bates 024648.

125. The flow rate for the 10-year storm at S/N 008 is 40.1 cfs pre-development, and 34.4 cfs post-development with retention from Pond 008. This represents a post-development decrease of 5.7 cfs, or -14%. VTrans Ex. 47, Bates 024648.

126. All other discharge points will have a decreased flow rate for the 10-year storm post-development. VTrans Ex. 47, Bates 024648.

127. S/N 007 is at the inlet end of an existing 36-inch culvert running under I-89, and S/N 008 is at the outlet end of the same culvert. Sunnyside Brook flows from S/N 007 through the culvert to S/N 008, and downstream past the remaining discharge points. VTrans Ex. 4, Bates 023029

(map showing S/N 007 and 008); 023210 (map showing existing culvert, with S/N 007 and S/N 008 marked in blue pen by Mr. Nelson).

128. Because peak flow for the 10-year storm increases at S/N 007, but then decreases to a greater degree at S/N 008, there will only be an increased flow between these two points, in the culvert. Downstream of S/N 008, peak flows for the 10-year storm will decrease.

129. Mr. Torizzo opined that the Downstream Analysis is unreliable. We have doubts about Mr. Torizzo's credibility in testifying to the accuracy of the Downstream Analysis. Mr. Torizzo did not review, or did not fully review, the Downstream Analysis prior to his February 2018 deposition. At trial he explained that prior to his deposition he had been either unable to fully review the stormwater application, or unable to fully analyze it, noting that it is over 800 pages long. He described the application as a "moving target" due to changes that have been made over time and suggested that at the time of his deposition he did not fully understand what was included in the most up-to-date version of the application.

130. When the Court asked Mr. Torizzo about the contrast between his inability to recall aspects of the Project at that deposition and his more certain testimony at trial, Mr. Torizzo stated that "throughout this process" he had been very overwhelmed by the complexity of the Project and the different versions of the stormwater system, but that he had prepared for trial.

131. The May 2016 Downstream Analysis includes a map titled "Off-Site Watersheds and Times of Concentration Flow Paths" dated April 26, 2016. VTrans Ex. 4, Bates 023208. This map was not altered in the February 2018 Downstream Analysis. VTrans Ex. 47.

132. The "Off-Site Watersheds and Times of Concentration Flow Paths" (Bates 023208) and "Sunnyside Watershed Map" (Bates 023031) depict the Sunnyside Brook watershed differently. For example, the "Off-Site Watersheds and Times of Concentration Flow Paths" map shows an area to the southwest that is in the watershed, and the "Sunnyside Watershed Map" shows this area as outside the watershed. The "Off-Site Watersheds and Times of Concentration Flow Paths" map shows sub-watersheds marked OS7_1 and OS7_2 to the southeast of the interchange as being in the watershed, but they are out of the watershed in the "Sunnyside Watershed Map."

133. Mr. Torizzo pointed to these as inconsistencies in the application that render the modelling unreliable.

134. Mr. LaCroix explained that the "Off-Site Watersheds and Times of Concentration Flow Paths" map, which was used for the Downstream Analysis, is based on more refined information than the "Sunnyside Watershed Map," which was not used for modelling. Based on this explanation, we find the discrepancies do not render the modelling unreliable.

135. The "Off-Site Watersheds and Times of Concentration Flow Paths" map depicts subwatersheds for each discharge point. VTrans Ex. 4, Bates 023208. The subwatershed draining to discharge point S/N 007 depicts areas marked OS7_1 and OS7_2 (among others) as part of the subwatershed draining to S/N 007. At trial, Mr. Torizzo opined, and Mr. LaCroix agreed, that that the entirety of OS7_1 and a large portion of OS7_2 do not drain to Sunnyside Brook.

136. Mr. Torizzo opined that the Downstream Analysis is unreliable because it is based on an inaccurate assumption that OS7_1 and OS7_2 discharge to S/N 007. He explained that if the subwatershed depicted as flowing to S/N 007 on the "Off-Site Watersheds and Times of Concentration Flow Paths" map is corrected to remove OS7_1 and part of OS7_2, that subwatershed will be smaller. With this smaller, more accurate subwatershed, there would be less runoff draining to S/N 007 than what is modelled in the Downstream Analysis.

137. Mr. Torizzo opined that where a relatively small project area is within a large off-site watershed, the impact of the project can be "washed out" in the downstream analysis by the impact of runoff from the larger watershed. Alternatively, if the off-site watershed is smaller, the impacts of the project will be more pronounced. He therefore opined that the increase in the ten-year peak flow will be more than the predicted 4.2%.

138. Mr. Nelson disputed Mr. Torizzo's "washed out" characterization. He explained that if the OS7_1 and OS7_2 areas do not fully drain to Sunnyside Brook, and the subwatershed draining to S/N 007 is actually smaller than the model assumes, then Pond 007 will have a greater impact in treating the stormwater runoff because there would be less stormwater to treat. The increase in the ten-year peak flow will therefore be less than the predicted 4.2%. In other words, if the subwatershed is smaller than the model assumes, treatment will improve.

139. We find Mr. Nelson's explanation to be more credible, because Mr. Torizzo's explanation fails to account for the impact of Pond 007.

140. Mr. Nelson credibly testified that the stormwater system complies with all applicable regulations, and that it will result in an improvement in stormwater management in the Project area and the Sunnyside Brook watershed.

III. The Act 250 Appeal

Act 250 Application Timeline

141. VTrans' initial Act 250 application was submitted in November 2013. The application included a Schedule E. VTrans Ex. 3, Bates 022060. The application assumed that the Project's 9.82 acres of involved land would not trigger the ten-acre Act 250 jurisdictional threshold, and therefore sought only to amend existing Act 250 permits that would be affected by the Project. Vallee Ex. UU.

142. By March 2014, VTrans determined that revisions to the Project (including to the stormwater system) would cause it to exceed the ten-acre threshold. VTrans therefore revised the application to request an Act 250 permit for the Project. Vallee Ex. WW, XX.

143. VTrans submitted new materials to supplement the November 2013 application in April 2014. Vallee Ex. XX. In a cover letter accompanying the new materials, VTrans notes that the Project will basically remain the same as originally proposed but will now exceed the ten-acre threshold. The letter notes that VTrans will file a revised Schedule E, pursuant to the District Commission's March 13, 2014 memorandum. The March 13, 2014 memorandum is not in evidence, and the Court has no information about the contents of the memorandum.

144. VTrans submitted a revised Schedule E on June 4, 2014. Vallee Ex. YY.

Traffic Planning: Pedestrians and Bicycles

145. The Vermont Pedestrian and Bicycle Facility Planning and Design Manual (the Design Manual) states that "VTrans will use this manual in combination with the applicable VTrans Standard Drawings as the standard for development, design, construction and maintenance of pedestrian and bicycle facilities that are implemented by VTrans or any entity using VTrans and/or Federal-Aid Highway funds." VTrans Ex. 22 § 1.1, p. 1-2.

146. Mr. LaCroix credibly testified that the Design Manual would not normally be applied to projects that do not involve the development, design, construction or maintenance of pedestrian or bicycle facilities, such as the northern part of the Project proposed here.

147. The Vermont State Design Standards (the Design Standards) "present the physical design parameters and guidelines of . . . roadways in Vermont." VTrans Ex. 21, § 1.6. Roadway designers are to consider the geometric values in the Design Standards as "minimum values," although these values can in some cases be less strictly applied "to avoid or reduce impact to the natural and built environments." Id.; see also § 1.1 ("The Standards have been designed to be flexible . . .").

148. Roadway designers rely primarily on the Design Standards and look to other materials (such as the Design Manual) to supplement the Design Standards.

Shared-use Paths and Sidewalks

149. There are currently no sidewalks or shared paths along the Route 2/7 portion of the Project. Bicyclists and pedestrians moving through the Project area travel on unmaintained dirt paths outside the limits of the roadway, or in roadway shoulders that in some places are less than one foot wide.

150. The Project will include new five-foot-wide concrete sidewalks for pedestrians, and eight-foot-wide asphalt shared-use paths for pedestrians and bicyclists.

151. The sidewalks and shared-use paths will meet the requirements of the Americans with Disabilities Act Accessibility Guidelines (ADAAG).

152. New sidewalks will begin south of the DDI at the South Park Drive intersection on either side of Route 2/7, connecting to existing sidewalks to the south. The sidewalks will run north and transition to shared-use paths as they enter and run through the DDI, after which they transition back to sidewalks. The sidewalks continue north to connect to existing sidewalks running east-west on Mountain View Drive and Lower Mountain View Drive.

153. Retaining walls will be constructed to allow the shared-use path to run outside of the piers, or abutments, supporting the I-89 overpass.

154. According to Design Manual, eight feet is the minimum width for a paved shared-use path, while the preferred width is 10–14 feet. VTrans Ex. 22, § 5.3.2, Table 5-1, p. 5-13.

155. The eight-foot minimum is only recommended when certain circumstances prevail, such as when "[n]o practical alternative design exists," "[f]or limited distances . . . to bypass a physical

barrier (i.e., building, water body or other immoveable objects)," or where only limited bicycle traffic is expected. Id.

156. Mr. Marshall testified that the shared-use path should be 10–14 feet wide, instead of only eight feet wide, as the current design calls for. He opined that the retaining walls being built to allow the shared-use path to run outside the highway overpass piers could be moved back to allow a ten-foot path to be constructed. This opinion was based only on a general observation of the site, without any in-depth analysis to determine whether moving the retaining wall would be feasible.

157. Based on the opinion that the path could be widened, Mr. Marshall concluded that a practical alternative to an eight-foot path exists. He also concluded that the "limited distances . . . to bypass a physical barrier" exception should not apply for the same reason. Vallee Ex. LL at 3. He opined that bicycle traffic will not be limited, based on the fact that the shared-use path is included in the Project. Id. at 2. He therefore concluded that none of the exceptions that would allow the minimum eight-foot path apply.

158. Mr. Marshall did not conduct any pedestrian or bike studies for the Project area.

159. We find Mr. Marshall's opinion regarding the width of the shared-use path somewhat unreliable. His opinion on bicycle traffic is circular (there must be a high level of bicycle traffic because the proposed path accommodates bicycle traffic). His opinion that the path could be widened to 10 feet is based on a cursory analysis which fails to show that doing so would be "practical" (to rebut the idea that there is "no practical alternative" to an 8-foot path). Finally, the Design Manual's minimum width allowance "[f]or limited distances . . . to bypass a physical barrier" is separate from the "no practical alternative" exception. The Design Manual therefore appears to allow minimum width to go around a physical barrier even where there is a practical alternative. Mr. Marshall's opinion fails to consider this.

Northern Sidewalk

160. No sidewalk or shared-use path will be installed north of the Mountain View Drive intersection. The decision to limit sidewalks and shared paths to the southern part of the Project is based on Project scope, lack of connection to existing facilities, material and construction costs,

impacts to natural resources, utilities, additional right-of-way acquisitions, additional impacts to town services, and usefulness.

161. Vallee argues that a sidewalk should be constructed in the northern part of the Project. To this end, Mr. Marshall designed a ten-foot-wide shared-use path that he claims could be built along Route 2/7 from the Mountain View Drive intersection to the Rathe Road intersection. Vallee Ex. MM.

162. VTrans contends that a northern sidewalk or shared path is outside the scope of the Project because the northern part of the Project as largely a resurfacing operation. Mr. Lacroix testified that adding new sidewalks is typically outside the scope of resurfacing projects such as this.

163. While there are some businesses that attract pedestrian traffic from the south up to the Mountain View Drive intersection, there are fewer such businesses to the north of the intersection. There is no evidence that the businesses at the Mountain View Drive intersection attract pedestrian traffic from the north.

164. There is no evidence that the park and ride to be constructed across from Hercules Drive is intended to accommodate pedestrians. The name "park and ride" alone suggests use by vehicle traffic. The Pedestrian and Bicycle Facility Planning and Design Manual and Vermont State Design Standards each briefly mention park and rides but make no reference to any need to connect them to pedestrian or bicycle traffic. VTrans Ex. 21, 22.

165. A sidewalk or shared path in the northern section of the Project would increase the Project's impervious surface, thereby increasing stormwater runoff. It would also require an additional federal funding request, and it is unclear whether this request would be granted or how long it would take. It would likely require additional right-of-way acquisitions, although the extent of these is not clear. It would require grading and ledge work and would likely require moving telephone poles. It would require additional town services in the form of plowing.

166. Mr. Marshall's expert report notes that a northern sidewalk is needed in part because there is a residential neighborhood to the north of the Project area. Vallee Ex. LL p. 3–4; citing Design Manual p. 3-12. There is no evidence indicating the distance between this neighborhood and the Project, or that there is any pedestrian traffic between the two.

167. The new sidewalks proposed by VTrans will connect to existing sidewalks on Mountain View Drive and Lower Mountain View Drive to the north, and to sidewalks from Winooski to the south. If the sidewalks were extended further north, there are no existing sidewalks to connect to. A northern sidewalk proposed by Mr. Marshall would terminate at the Rathe Road intersection, at which point pedestrians would continue walking in the shoulder.

168. The Design Standards state that bicycle and pedestrian traffic may be expected along principal arterial roads, and that these roads should be designed to accommodate this traffic. VTrans Ex. 21, § 3.14. This section also states that pedestrian and bicycle traffic can be accommodated with shoulders.

169. A pedestrian count conducted from 8:00 am to 7:00 pm on March 9, 2017 counted only ten pedestrians entering and exiting the area of the Project north of the Mountain View Drive intersection. Vallee Ex. D.

170. The Town of Colchester commissioned a sidewalk Feasibility Report for the Exit 16 corridor in 2003. Vallee Ex. E. The report was authored by David Rafael from Landworks in association with Mark Smith from Resource Systems Group, Inc.

171. The sidewalk Feasibility Report recommends constructing a ten-foot-wide recreation path and five-foot-wide sidewalk along Route 2/7 from the southern point of the Project area up to Rathe Road. Vallee Ex. E. at 13. As part of "Phase I (1–5 years)" of a three-phase plan, the report calls for installing a five-foot sidewalk along Route 2/7 from south of the Exit 16 interchange north under the highway overpass to the Mountain View Drive intersection, and a ten-foot path from the Mountain View Drive intersection to Rathe Road. Id. at 32.

172. The 2004 Official Map for Colchester shows a "proposed separated path" along Route 2/7 from the Mountain View Drive intersection to Rathe Road. Vallee Ex. HHH.

173. The Exit 16 Scoping Study was authored by Mark Smith of Resource Systems Group, Inc. (one of the authors of the 2003 sidewalk Feasibility Report). The scoping study contemplates including a sidewalk on Route 2/7 from south of South Park Drive up to the Mountain View Drive intersection, but not further to the north.

174. In a March 24, 2014 letter to the Chittenden County Regional Planning Commission, the Director of Public Works for Colchester explains that "Phase 1 of the Exit 16 Sidewalk Project is now complete," and that the Town wants to move on to Phase 2. VTrans Ex. 24, Vallee Ex. E.

175. In an attached map, Phase 1 appears to follow Route 2/7 from the south up to the South Park Drive intersection, where this Project begins. VTrans Ex. 24. The sidewalk and mixed-use path on either side of Route 2/7 from South Park Drive up to, and onto, Mountain View Drive and Lower Mountain View Drive, as proposed by VTrans here, is marked as "VTrans DCDI."[6] The sidewalk along Route 2/7 from the Mountain View Drive intersection to Rathe Road is designated as "Phase 5," the last phase shown.

176. The map shows the "VTrans DCDI" section connecting to an existing sidewalk on Lower Mountain View Drive, and to a sidewalk on Mountain View Drive designated as "Phase 2." VTrans Ex. 24.

177. VTrans understood from communicating with the Town of Colchester that the Town wanted the construction of a sidewalk and mixed-use path from the southern end of the Project to the Mountain View Drive intersection, based on safety and usefulness, but that the Town did not want the Project to include sidewalks north of Mountain View Drive. VTrans Ex. 24.

178. Mr. Marshall estimates that a ten-foot-wide shared-use path from the Mountain View Drive intersection to the Rathe Road intersection would cost $638,000, which includes a 15% contingency. Vallee Ex. PP. Mr. LaCroix estimated the cost of constructing a sidewalk on Route 2/7 north of the Mountain View Drive intersection at $306,000. VTrans Ex. 23.

179. While Mr. Lacroix's cost estimate does not include relocation of utilities, Mr. Marshall's does. Neither estimate includes costs for additional right-of-way land acquisitions or additional stormwater infrastructure. Mr. Lacroix estimates that this sidewalk would add 0.427 acres of impervious surface to the Project, and that the property acquisition costs would be high. VTrans Ex. 23.

The shoulder north of the Mountain View Drive intersection

180. Route 2/7 north of the Mountain View Drive intersection is a four-lane rural principal arterial roadway that transitions to two lanes north of the Rathe Road intersection.

[6] We infer this to be an abbreviation for Double Crossover Diamond Interchange.

181. The speed limit on this section of Route 2/7 was recently reduced from 50 mph to 40 mph. The Design Hour Volume (DHV) is estimated to peak at 1,900 vehicles on Route 2/7 at the intersections of Hercules Road and Rathe Road. VTrans Ex. 2, Bates 021566.

182. In its existing condition, the shoulder of Route 2/7 from the Mountain View Drive intersection to Hercules Drive is inconsistent in width, generally ranging from four to eight feet. It is as narrow as one foot wide in some places, however, with the narrowest point at the east side of Route 2/7 just north of Lower Mountain View Drive.

183. The existing shoulders on Route 2/7 north of the Mountain View Drive intersection will be adjusted to a uniform four-foot width.

184. As noted above, shoulders can be sufficient to accommodate for pedestrian and bicycle traffic. VTrans Ex. 21, § 3.14. According to the Design Manual, shoulders do not have to be ADAAG compliant. VTrans Ex. 22, § 3.3.3, p. 3-13.

185. Design Standards § 3.14.1, Table 3.7, sets out the minimum width of paved shoulder area to accommodate shared use of rural principal arterial roadways by bicycles. For roads with a 40-mph speed limit and DHV over 400, as here, the minimum width is three feet. Table 3.8, which applies to urban or village principal arterials, requires a four-foot shoulder for a 40-mph road with a DHV over 400.

186. VTrans applied the dimensions in Design Standards § 3.14.1, Table 3.7, and, to be conservative, Table 3.8, when designing the shoulders for the northern part of the Project.

187. Design Standards § 3.6, "Lane and Shoulder Widths on Rural Principal Arterials," states that shoulder widths on rural principal arterials "will adhere to values in Table 3.3," which is set out in this section. Table 3.3 indicates that shoulders on two-lane rural principal arterial roads should be eight feet wide.

188. Mr. LaCroix testified that because Route 2/7 north of the Mountain View Drive is a four-lane rural principal arterial and Table 3.3 deals with two-lane rural principal arterials, Table 3.3 does not apply to this part of Route 2/7.

189. Mr. Marshall opined that Table 3.3 should apply to the Project. In support of this, he testified that the purpose of the shoulder is to accommodate breakdowns and cars being stopped by the police. He stated that an eight-foot shoulder is necessary for these uses. He further

testified that even though a four-lane road has two lanes going in each direction and a stopped car in one lane will not entirely stop traffic because one lane would remain open, the need for a full-width shoulder is the same on a four-lane as on a two-lane rural principal arterial.

190. Mr. LaCroix testified that a disabled vehicle in the Project area north of the Mountain View Drive intersection could pull into the right lane and traffic would continue moving in the left lane. He added that it is not atypical for a roadway like Route 2/7 to have shoulders that cannot fully accommodate disabled vehicles.

191. Table 3.3 is the only one of nine tables in Chapter 3 that singles out two-lane principal arterials; the other eight tables refer to "principal arterial[s]," "rural principal arterial[s]," or "urban or village principal arterial[s]."

192. We find Mr. LaCroix's opinion more credible on the applicability of Table 3.3.

193. First, Mr. Marshall ignores the fact that Table 3.3 is the only table among many others in Chapter 3 that specifies two-lane roads in its title.

194. Second, Mr. Marshall's opinion that the Table 3.3 dimensions should apply because the purpose of the shoulder is to accommodate breakdowns is not credible. Design Standards § 3.5 states that shoulders can serve many purposes, and accommodating breakdowns is only one of these. Safety for bicycles and pedestrians are other purposes. Design Standards § 3.14 state that bicycle and pedestrian traffic should be expected on principal arterials, and that designers should plan for bicycle and pedestrian traffic, including in shoulders. There is no similar recommendation that breakdowns should be expected on all principal arterials, and that designers should design to accommodate breakdowns. That there is a recommendation for pedestrians and bicycles, but not for breakdowns, suggests that the authors of the Design Standards are not recommending that all principal arterial roadways should have shoulders that can accommodate breakdowns.

195. Third, we find Mr. LaCroix's assertion that a full breakdown shoulder is more necessary on a two-lane road than on a four-lane road more reasonable than Mr. Marshall's assertion that the necessity is the same.

196. Some portions of Route 2/7 north of the Mountain View Drive intersection will be widened with new impervious surface as part of the Project. See e.g. VTrans Ex. 2, Bates 022989,

022990; VTrans Ex. 4, Bates 021982–021986. The amount of widening is minimal. Other areas along this part of the roadway will be narrowed as existing impervious surface is returned to pervious, grassed surface. See e.g. VTrans Ex. 4, Bates 022984, 022986. Generally, the widening and narrowing will make the width of the roadway more consistent.

197. Mr. LaCroix characterized the work to be done in this section of roadway as a resurfacing operation. He stated that VTrans does not typically expand impervious area or increase shoulder widths as part of resurfacing projects. Instead, he stated that resurfacing projects try to keep lanes and shoulders as consistent as possible, and that they try to maintain consistent shoulders within the existing footprint of the roadway.

198. Mr. Marshall testified that when he worked on grind and overlay projects for VTrans, they did not alter shoulders to meet design standards. Because the Project here includes proposed widening of Route 2/7 north of the Mountain View Drive intersection, he argues that the Project entails more than a simple grind and overlay. Because the Project involves some widening, he opined that the shoulder should be fully widened.

199. In his report, Mr. Marshall states that pursuant to Chapter 4 of the Design Manual, Route 2/7 north of the Mountain View Drive intersection should have six-foot shoulders. Vallee Ex. LL at 3. At trial, however, he admitted that because the curbs are to be removed from this section of Route 2/7, this recommendation does not apply. Similarly, in his report he states that Chapter 4 of the Design Manual calls for six-foot shoulders on roads where the speed limit is over 35 mph. At trial he admitted that this section of the Design Manual, § 4.3.1, refers to bicycle lanes and does not apply to shoulders. These errors in Mr. Marshall's analysis further lessen his credibility on the subject of shoulders.

200. Mr. LaCroix opined that the four-foot shoulders comply with the complete streets principles in 19 V.S.A. § 10b.

Construction phasing and timeline

201. VTrans has a Transportation Management Plan (TMP) for the Project which is intended to assist with developing a construction phasing and activity schedule and implementing work zone management strategies. VTrans Ex. 29 p. 1.

202. The TMP is a living document, intended to be flexible and subject to change as construction commences. The TMP provides transportation management strategies. The specific implementation of those strategies will be the subject of discussion between VTrans and the contractor that is hired to carry out the Project.

203. The TMP includes a set of assumptions as part of the plan to minimize and mitigate adverse impacts during construction. VTrans Ex. 29 p. 10.

204. The Project is expected to be completed in two construction seasons. VTrans Ex. 29 p. 24. The construction season runs from April 15 to November 15 but may start earlier and end later when conditions allow. Mr. LaCroix credibly testified that the two-year timeline is reasonable and realistic.

205. The first year will largely be off-roadway work, in addition to relocation of a 16" Champlain Water District water line under the innermost southbound lane of Route 2/7 from the South Park Drive intersection to the Mountain View Drive intersection.

206. The second year will include the on-roadway work, including the construction of the DDI itself and the widening of the roadway.

207. Between the first and second years of construction the roadway will be returned to a condition allowing it to function in the same manner as it currently functions.

208. The TMP recommends sequencing for the Project. VTrans Ex. 29 p. 25. More formal construction sequencing and phasing will be done in collaboration with the VTrans construction section and the contractor. The contractor will also coordinate with private property owners impacted by the Project to minimize those impacts.

209. The TMP includes strategies based on modelling the impacts of construction, including lane closures, to avoid, mitigate, and minimize impacts on traffic. VTrans Ex. 29 p. 34–47. The TMP calls for the contractor to prepare contingency plans and build redundancies into construction systems to manage any incidents that arise during construction. VTrans Ex. 29 p. 47.

210. Much of the construction will be carried out at night to minimize impacts on traffic. The number of lanes on Route 2/7 may be reduced during construction. Full lane closures will be avoided; when they are necessary, they will not last more than ten minutes. Closure of side roads

will be avoided to the extent possible, and closures will be timed and arranged to minimize impacts on local businesses. No driveways will be eliminated.

211. The TMP includes a public outreach component to facilitate information sharing.

212. Mr. LaCroix testified that he anticipates blasting to be carried out to remove ledge on the west side of Route 2/7 in the area of the interchange; this is also anticipated in the TMP. VTrans Ex. 29, p. 20.

213. Blasting will require temporary full closure of Route 2/7 and rolling roadblocks on I-89. VTrans Ex. 29, p. 26.

214. Mr. LaCroix testified that he is satisfied with the TMP and construction phasing and sequencing that it sets out.

215. No evidence was introduced to suggest that the TMP is flawed in any way, or that VTrans or the contractor will not follow the TMP.

The Champlain Farms property

216. Champlain Farms is a gas station located at the southeast of the I-89 interchange, adjacent to Route 2/7 and the southbound I-89 on-ramp. Champlain Farms has two driveways onto Route 2/7.

217. The Project will extend onto what is now the northwest corner of the Champlain Farms property, which VTrans will obtain through a negotiated sale or condemnation proceedings. VTrans Ex. 2, Bates 021660 (area to be used for the Project highlighted in yellow).

218. The Project will alter the configuration of Champlain Farms' northern driveway.

219. This alterations and related construction are designed to ensure that large gas tankers and other large vehicles will be able to enter and exit the site and circulate on site. The driveway will maintain the greatest permissible width allowed under the Vermont Design Standards.

220. A VTrans analysis concluded that the Project would not significantly impact cars queuing on the Champlain Farms property as they exit to Route 2/7.

221. The Project will install a sidewalk through a right-of-way between Champlain Farms and Route 2/7 that will cross over the Champlain Farms driveways.

222. During construction, there may be temporary closures to one, but not both, of Champlain Farms' driveways. The contractor will generally avoid closing even one of the two driveways by implementing a partial closure of the driveway.

223. Mr. LaCroix testified that he expects the contractor will not use blasting to remove ledge to the southeast of the interchange near the southbound on-ramp for the installation of Pond 007, given the proximity of the Champlain Farms gas station, but added that the decision to use blasting or not is part of means and methods to be determined by the contractor. VTrans did not identify any ledge in the area where Pond 007 will be installed, including through borings to at least 15 feet below grade. VTrans Ex. 4, Bates 023192.

Costco

224. Jeremy Matosky of Trudell Consulting Engineers testified on behalf of Costco. Costco also offered a number of exhibits into evidence, including a memorandum by Mr. Matosky. Costco Ex. CW-2.

225. Costco recently obtained Act 250 permit #4C0288-19C for its retail outlet located on Mountain View Drive. The permit is conditioned on improvements of the intersection of Route 2/7, Mountain View Drive, and Lower Mountain View Drive, which are part of the Project now before the Court.

226. Mr. Matosky proposed that these improvements could be approved separately from the overall Project proposed here by VTrans.

Conclusions of Law

IV. The Stormwater Appeal

a. Site balancing

Vallee's stormwater appeal Questions 2 and 3 ask whether the stormwater system satisfies Site Balancing Procedure requirements generally, and specifically whether direct treatment throughout the Project is impracticable.

1. Site Balancing and Practicability

To apply the Site Balancing Procedure, a stormwater project designer must demonstrate to ANR that "treatment and/or control of the impervious areas in question is impracticable due

to physical, topographical, or environmental constraints." VTrans Ex. 10, p. 2–3. Mr. LaCroix explained that VTrans considered and tested several different direct treatment methods, but that none met VSMM standards. He also credibly described many constraints that make direct treatment impracticable, including poor soils, steep slopes, exposed and buried ledge, buried utilities, the need for underground storage and/or treatment, and proximity to commercial properties, associated parking areas, and drive accesses. Mr. LaCroix has experience designing linear transportation projects and noted that such projects are particularly suited for site balancing because they are large and must fit into sites constrained by developed surroundings.

The Court does not find Mr. Torizzo's opinion, that direct treatment is practicable, to be credible. Mr. Torizzo has not designed complex linear transportation projects or used the Site Balancing Procedure. His understanding of "constraints" is based on his own subjective, independent assessment of this term, without having ever applied the Site Balancing Procedure or conferred with ANR to understand what is meant by "constraints." His assessment that the procedure should rarely if ever be used is contradicted by Mr. Gianfaga's testimony, which established that up to 10% of stormwater discharge applications he has reviewed involved the Site Balancing Procedure. It is also contradicted by the fact that ANR has made the procedure available generally. Mr. Torizzo also showed a misunderstanding of the procedure. He opined that site balancing is generally unnecessary because there is always a way to provide direct treatment. This sets a higher bar than that anticipated by the procedure by looking at whether direct treatment is possible. The procedure, however, states that it can be applied if direct treatment is impracticable.

Mr. Torizzo also offered an alternative system that he designed to prove that direct treatment is possible. The system, however, is not fully designed, uses treatment practices not approved under the VSMM, and has modelling and design errors that would need to be corrected. It is therefore not clear that the system would satisfy the VSMM. Furthermore, there are questions regarding whether the alternative system would require additional utility relocation or ledge removal, or acquiring additional rights-of-way, how much these would cost, and how long they would take. Given these unknowns, even if the alternative system is possible

to install, it is not necessarily practicable. See In re Goddard Coll. Conditional Use, 2014 VT 124, ¶ 12, 198 Vt. 85.

We note in addition that we are not "a higher environmental agency entrusted with the power to make environmental law and policy," but rather exercise a "narrow role in ensuring that the decisions of ANR are made in accordance with law." Conservation Law Found. v. Burke, 162 Vt. 115, 126, (1993). Given this mandate, it is not our role to instruct an applicant to install an entirely different system than the one they have proposed. See Re: Bernand and Suzanne Carrier, No. 7R0639-EB (Vt. Envtl. Bd. Aug. 14, 1997) ("The Board does not design projects for Applicants nor does it provide advisory opinions on what hypothetical elements of design would receive the Board's approval.").

We conclude that the weight of the evidence supports a conclusion that direct treatment is impracticable under the Site Balancing Procedure.

2. Site Balancing, Grass Channels, and Existing Ditches

In pre-development conditions there is an existing ditch where each grass channel will be installed. Vallee argues that these already provide stormwater runoff treatment as grass channels, and therefore the channels cannot be counted as providing equivalent compensatory treatment under the Site Balancing Procedure.

In support of this argument, Vallee points to the Site Balancing Procedure's requirement for "equivalent" treatment. This reading of the procedure is flawed. The Site Balancing Procedure requires that "the impact from . . . areas of untreated impervious surfaces will be compensated on an equivalent basis by controlling and/or treating impervious surfaces within the project limits that would not otherwise be subject to treatment and/or control requirements." VTrans Ex. 10, p. 2.

VTrans proposes treating runoff from the roadway in the northern part of the Project that is to be resurfaced. The area to be treated will be equal to or greater than the area of new and redeveloped roadway that will not be treated in the southern part. Because the Project only calls for resurfacing these northern roadways, they are not jurisdictional surfaces for the purposes of stormwater permitting, and therefore "not otherwise . . . subject to treatment and/or control requirements." The "equivalent basis" requirement of the Site Balancing Procedure will

therefore be satisfied, because the impact from areas of untreated impervious surfaces (i.e. new and redeveloped roadway in the southern part of the Project) will be compensated on an equivalent basis by controlling and/or treating impervious surfaces within the project limits that would not otherwise be subject to treatment and/or control requirements (i.e. resurfaced roadway in the northern part of the Project).

Whether existing ditches already provide treatment in the northern area is irrelevant to this equation. The premise of Vallee's argument therefore has no basis.

Even if Vallee's premise was correct, the ditches do not qualify as grass channels under the VSMM, and therefore cannot be assumed to provide treatment.

First, to qualify as acceptable treatment practices, grass channels must be maintained to certain standards through a "legally binding and enforceable maintenance agreement." VSMM § 2.7.5.F, p. 2-55. Without maintenance, grass channels can fall into disrepair and no longer be effective in treating stormwater. The existing ditches are not controlled by any existing stormwater permit, or any other binding maintenance agreement. The ditches therefore do not satisfy VSMM standards for grass channels.

Second, based on the testimony of Mr. LaCroix and the measurements presented in Mr. LaCroix's March 12, 2018 memorandum providing existing ditch measurements (admitted into evidence as Vallee Exhibit EEE), the existing ditches do not meet dimensional standards for grass channels. Because they do not meet these dimensional standards, they cannot be assumed to provide any treatment as grass channels under the VSMM.

The Court finds Mr. Torizzo's testimony to the contrary not credible. He measured the ditches a number of years ago and again immediately before trial but got confused and could not remember when he took the most recent measurements. He did not record his measurements either time, but nevertheless offered rough measurements at very specific points in different ditches. This contrasts with his poor memory in other areas of testimony. He also appeared reluctant to explain his own measurements without referring to maps of existing conditions, which made it unclear whether the measurements he offered were based on his own observations on the ground or on his interpretation of the existing conditions maps.

3. Site Balancing and Equivalent Treatment at Dry Pond 4/98

Vallee argues that Pond 007 discharges into a wetland, which would require 24 hours of detention for the one-year, 24-hour rainfall event to satisfy the Channel Protection Treatment Standard, and that in order to provide an equivalent level of treatment at Pond 4/98 under the Site Balancing Procedure, Pond 4/98 must also provide 24 hours of retention.

This argument fails at two levels. First, it relies on a misreading of the Site Balancing Procedure's equivalent treatment standard, and second, it incorrectly assumes that Pond 007 will discharge to a wetland.

The Channel Protection Treatment Standard requires 12 hours of detention for the one-year, 24-hour rainfall event for discharges to a coldwater fish habitats, and 24 hours for discharges to warmwater fish habitats, as those waters are designated in the Vermont Water Quality Standards (VWQS). VSMM § 1.1.2, p. 1-4. Under the VWQS, Sunnyside Brook is a coldwater fish habitat, and all wetlands (apart from specific wetlands not relevant here) are warmwater fish habitat. ANR Ex. ANR-4, Appendix A.[7]

As explained above, the Site Balancing Procedure requires compensation "on an equivalent basis" and that "the requirements for treatment and/or control . . . shall be equal to or greater than the treatment and/or control requirements on the expanded or redeveloped impervious surfaces for which treatment is impracticable." VTrans Ex. 10, p. 2.

Instead of meeting the Channel Protection Treatment Standard for the required 1.58 acres of new and redeveloped impervious surfaces in the southern portion of the Project, VTrans proposes treating 1.67 acres of (primarily resurfaced) impervious surface in the northern part of the project via Pond 004/98.

Vallee contends that Pond 007, in the southern portion of the project, will discharge to a wetland, and that it would therefore need to provide 24 hours of retention to satisfy the Channel Protection Treatment Standard. Therefore, the argument goes, an "equivalent" level of control under the Site Balancing Procedure requires 24 hours of retention at Pond 4/98, where VTrans intends to meet the Channel Protection Treatment Standard.

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[7] Based on the vesting date of the stormwater permit application here we look to the December 30, 2011 VWQS.

This interpretation of the Site Balancing Procedure is an illogical elevation of form over function. Even if Pond 007 discharged into a wetland (which it does not), Pond 4/98 discharges to Sunnyside Brook. There is no evidence that 24 hours of detention at Pond 4/98, as opposed to 12 hours, would have any practical impact whatsoever on Sunnyside Brook, or that it would satisfy the purpose of the Channel Protection Treatment Standard better than 12 hours of storage. To the contrary, both the VSMM and VWQS are satisfied with 12 hours of detention prior to discharge in the coldwater fish habitat of Sunnyside Brook. Requiring 24 hours of storage at Dry Pond 4/98 therefore makes no practical sense. Instead, it would be an overly rigid and unreasoned reading of the Site Balancing Procedure's equivalent treatment requirement.

In addition, we disagree with the factual basis of the argument, that Pond 007 discharges to a wetland.

ANR only considers a wetland to be a "waters" if it contains surface water, and a "receiving water" only if it is a distinct body of surface water with a water column.[8] We give substantial deference to ANR's interpretation of the VWQS. In re ANR Permits in Lowell Mountain Wind Project, 2014 VT 50, ¶ 15, 196 Vt. 467 (citation omitted). Here, Vallee has not shown that ANR's interpretation of whether a wetland is a "water" or "receiving water" is "wholly irrational and unreasonable in relation to its intended purpose." Id. ¶ 17 (quotation omitted).

While VWQS Appendix A does not specifically limit itself to wetlands with a distinct body of surface water, such a limitation is reasonable when considering the definitions of "water" and "receiving water," and the purpose of the warm and cold designations. See Richards v. Nowicki, 172 Vt. 142, 149 (2001) ("We must read the sections of the regulatory scheme in context and the entire scheme in pari materia.") (citation omitted). The VWQS define "receiving water" as "all waters adjacent to a discharge, and all downstream or other waters the quality of which may be affected by that discharge." ANR Ex. ANR-4, VWQS § 1-01(B). The VWQS define "waters" as 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

[8] In its post-trial reply memorandum, Vallee argues that the Court should not consider this interpretation because it was introduced only in ANR's post-trial brief, and not through a witness at trial. This is ANR's legal analysis of its regulations; it is not a factual issue. It was therefore not necessary for ANR to introduce this interpretation through a witness at trial.

portion of it." Id. In light of these definitions, it is reasonable to conclude that wetlands without a distinct body of surface water are not "waters" or "receiving waters." The VWQS explains that the warm or cold fish habitat designations are made to "waters of the State . . . [t]o provide for the protection and management of fisheries." VWQS § 3-05.

If a wetland is not "waters," then it need not be designated warm or cold. Furthermore, if the purpose of the designation is to protect fisheries, it is reasonable to exclude wetlands that do not have a distinct body of surface water and are therefore unlikely to contain fish.

Here, runoff leaves the Project from Pond 007, passes through a Class III wetland, and then enters Sunnyside Brook at S/N 007.

Mr. Torizzo opined that the wetland should be considered the discharge point because this is where runoff leaves the Project site and enters waters of the State. He noted that he observed standing water at the area of the wetland and opined that 24 hours of detention would be necessary to protect the aquatic habitat in the wetland, although he was unable to say whether the wetland actually supports any fish. Mr. Torizzo is not a wetland ecologist.

Mr. Torizzo's opinion conflicts with VHB's wetland and stream delineation. According to that study, although there may be some standing water in some areas of the wetland, the wetland in its typical condition does not have surface water and has zero function as fish habitat.

We find VHB's study more credible than Mr. Torizzo's observation and opinion based on VHB's expertise, the fact that they conducted a more comprehensive study as opposed to Mr. Torizzo's casual field observations, and the general lack of reliability of Mr. Torizzo.

ANR submits that based on the absence of surface water in the VHB study, the wetland here is neither a water nor a receiving water under the VWQS, and that the discharge point is properly designated as S/N 007 discharging to Sunnyside Brook. While we give this interpretation substantial deference, we would reach the same conclusion without deferring to ANR.

For these reasons, we conclude that the Site Balancing Procedure does not require 24 hours of detention for the one-year, 24-hour rainfall event at Pond 4/98 to satisfy the Channel Protection Treatment Standard. The standard is met with 12 hours of detention.

4. Site Balancing and De Minimus Impacts

Vallee submits that VTrans should have conducted a formal analysis to show that the impacts of site balancing on a watershed basis are no more than de minimus in order to satisfy the Site Balancing Procedure.

The Site Balancing Procedure does not require this. Instead, the procedure states that "[s]ite balancing will be allowed on a watershed basis within the same receiving water if the Secretary determines that any impacts to water quality and/or channel protection as a result of the proposed site balancing are *de minimus*." VTrans Ex. 10 p. 3. This puts the responsibility on ANR to determine if impacts are de minimus. We do not read this as requiring the application to provide an impact analysis. In its post-trial brief, ANR explains that it also does not read this language to require an analysis on the part of the applicant to prove that impacts will be no more than de minimus. This interpretation is to be given a high level of deference. Plum Creek Maine Timberlands, LLC v. Vermont Dep't of Forests, Parks & Recreation, 2016 VT 103, ¶ 25, 203 Vt. 197.

Mr. Torizzo opined that the impact of watershed-basis site balancing here would be more than de minimus because untreated runoff will be discharged upstream from where treated runoff will be discharged, which will cause a significant loading of pollutants, and because of the distance between the untreated and treated discharges—the 1,500 to 2,000 feet between S/N 007 and S/N 004.

Mr. Torizzo's opinion rests on conclusory statements that the lack of water quality treatment upstream would have more than a de minimus impact on the brook, without explaining what that alleged impact would be. It also relies on the incorrect assumption that upstream discharges will not be treated. In fact, runoff from a portion of the upstream area of the Project will be treated to meet the Water Quality Treatment and Groundwater Recharge Standards via GC1, GC4, and GC5 and discharged at S/N 007 and S/N 008.

There is no evidence that the use of site balancing to meet the Water Quality Treatment and Groundwater Recharge Standards will have any negative impact on Sunnyside Brook. Rather, Mr. Nelson credibly testified that the impact of site balancing would be de minimus or less than de minimus. He explained this by noting that the Project would have a net positive impact on

water quality in Sunnyside Brook. This is borne out by VTrans' modelling, which shows that the Project will add 1.576 acres of new impervious surface, is required to treat stormwater runoff from 2.217 acres of impervious surface, and will treat 2.569 acres of impervious surface. The net effect of the project is to treat more impervious surface than is required.

Mr. Torizzo also opined that the lack of Channel Protection Treatment from discharge point S/N 007 to discharge point S/N 004 would impact the stretch of Sunnyside Brook between those discharge points. We find this conclusory statement, without any explanation of what the alleged impact might be, unpersuasive. Again, there is no evidence that meeting the Channel Protection Treatment Standard 1500 to 2000 feet downstream from the most upstream discharge point will have any negative impact on Sunnyside Brook. Mr. Nelson, however, credibly testified that the use of site balancing will be de minimus or less than de minimus, and that the stormwater system, with site balancing, will lead to an overall improvement of water quality in Sunnyside Brook.

Based on the evidence presented, we conclude that the use of site balancing on a watershed basis will have a less than de minimus impact on water quality and channel protection in Sunnyside Brook.

5. Conclusion: Site Balancing

We conclude that site balancing on a watershed basis is appropriate here because direct treatment is impracticable (Vallee stormwater appeal Question 3). We further conclude that the Project satisfies the requirements of the Site Balancing Procedure (Vallee stormwater appeal Question 2).

b. Compliance with 10 V.S.A. § 1264

Vallee's Stormwater Appeal Question 1 asks, in part, whether the Project satisfies the requirements of 10 V.S.A. § 1264.

In our pretrial summary judgment decision, we concluded that the Stormwater Permit application in this matter vested in the laws and regulations in effect on October 3, 2014. Diverging Diamond Interchange Act 250 and Stormwater Permit Appeals, Nos. 169-12-16 Vtec, 50-6-16 Vtec (Vt. Super. Ct. Envtl. Div. Oct. 11, 2017) (Walsh, J.). Section 1264 was modified after

that date. 2015, No. 64, § 31. We therefore refer to the prior version of the statute, which went into effect on July 1, 2014. 2013, Adj. Sess., No. 199, § 30.

Section 1264 requires permits for certain stormwater discharges and requires those permits to comply with the 2002 Vermont Stormwater Management Manual (VSMM). 10 V.S.A. § 1264(e)(1) (2014). Section 1264 is also one of the enabling statutes for the Stormwater Management Rule. 10 V.S.A. § 1264(d)(1) (2013); 16-3 Vt. Code. R. § 505:18-102.

Apart from the fact that § 1264 incorporates the VSMM, no evidence or argument was raised by any party regarding the application of this statute.

c. Compliance with the Stormwater Management Rule

Vallee's Stormwater Appeal Question 1 asks, in part, whether the Project satisfies the requirements of Chapter 18, sections 302, 306 and 309.

We note that the Stormwater Management Rule was amended July 1, 2017. Because the application here vested in the Rule as it existed prior to this amendment, we refer to that earlier version of the Rule.

Section 18-302 of the Stormwater Management Rule governs when a stormwater discharge permit is required—in other words, the section determines what surfaces are within the jurisdiction of, and therefore subject to regulation under, the stormwater discharge permitting program. 16-3 Vt. Code. R. § 505:18-302.

There is no dispute here that the Project requires a permit. We addressed to some degree the scope of the permit required in our summary judgment decision, where we held that VTrans had properly identified certain activities on Route 2/7 in the Project area as non-jurisdictional resurfacing. Diverging Diamond, Nos. 169-12-16 Vtec, 50-6-16 Vtec at 26 (Oct. 11, 2017).

Section 18-306 sets out standards for stormwater discharge to waters that are not stormwater impaired. 16-3 Vt. Code. R. § 505:18-306.[9] Generally, § 18-306 sets out treatment requirements for stormwater discharge from new development, expansions of existing impervious surfaces, and redeveloped impervious surfaces, and requires conformity with the VSMM.

[9] It is not disputed that the stormwater discharge from the Project does not enter stormwater-impaired waters.

Section 18-309 includes procedural requirements for obtaining a permit and general requirements to be included in issued permits. 16-3 Vt. Code. R. § 505:18-309.

Neither Vallee nor any other party presented any evidence suggesting any challenge related specifically to these sections of the Stormwater Management Rule.

d. The Vermont Stormwater Management Manual

Vallee's Stormwater Appeal Question 1 asks, in part, whether the Project satisfies the 2002 Vermont Stormwater Management Manual's (VSMM) treatment standards for water quality, groundwater recharge, channel protection, overbank flood protection and extreme flood control.

1. Water Quality Treatment Standard

The Water Quality Treatment Standard aims to "capture 90 percent of the annual storm events, and to remove 80 percent of the average annual post development total suspended solids load (TSS), and 40 percent of the total phosphorus (TP) load." VSMM § 1.1.1, p. 1-3.[10]

VTrans intends to satisfy the Water Quality Treatment Standard with Grass Channels, as provided for in the VSMM. Id. §§ 1.1.1, 2.2 Table 2.1.

The Water Quality Treatment Standard requires treatment of runoff from 100% of expanded impervious area and 20% of redeveloped impervious area. VSMM § 1.1.1, p. 1-3. The Project's total expanded impervious area is 1.576 acres and 20% of redeveloped impervious area is 0.641 acres, for a total of 2.217 acres to be treated. The Grass Channels here are calculated to treat stormwater runoff from 2.569 acres.

Grass Channels must conform with certain design standards in order to meet treatment standards. They must have a maximum side slope of 2:1 (VSMM § 2.7.5.B, p. 2-54) and bottoms that are 2-8 feet wide and flat (VSMM § 2.7.5.D, p. 2-55). They must be designed to convey the 10-year storm with minimum of 6 inches of freeboard (VSMM § 2.7.5.B, p. 2-54) and designed to pass the one-year storm without producing erosive velocities (i.e. 2.5 ft/s) (VSMM Vol. II, Appendix D7, p. 186). The Grass Channels here conform to all of these standards.

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[10] We concluded pretrial that the stormwater permit application vested in laws that predated phosphorus limitations. Diverging Diamond, Nos. 169-12-16 Vtec, 50-6-16 Vtec at 14 (Oct. 11, 2017).

Grass Channels must be of sufficient length to detain the peak discharge associated with the water quality storm (0.9 inches) "for an average residence time of 10 minutes, at a velocity of no greater than 1 ft/s, and at a depth generally no greater than 4 [inches]." VSMM §2.7.5.D, p. 2-55. All of the Grass Channels comply with this requirement, although three have a projected depth of flow greater than four inches: GC4 (4.4 inches), GC8 (4.49 inches), and GC10 (4.705 inches).

GC4 would have to be made deeper to reduce flow depth to 4 inches or less. Because of site constraints and proximity to the roadway, GC4 could not be made deeper without installing some form of traffic protection, such as a guardrail. A guardrail would create an additional safety hazard to traffic, and additional expense. VTrans considered installing a guardrail but decided against doing so based on the hazard and expense, and the minimal improvement to water treatment (0.4 inch depth reduction) that it would achieve. GC8 and GC10 exceed the 4-inch recommended depth of flow due to the large amount of off-site runoff that they collect.

While the VSMM requires Grass Channels to strictly comply with certain parameters, it only calls for them to detain water quality storm peak discharge "at a depth *generally* no greater than 4 [inches]." VSMM § 2.7.5.D (emphasis added). While GC4, GC8, and GC10 exceed four inches, the excess is slight. Importantly, no evidence was introduced to suggest any negative consequences would result, or the Grass Channels would fail, due to this increased depth. For these reasons, we conclude that GC4, GC8, and GC10 comply with the VSMM standards for Grass Channels.

VTrans modelling of GC4 includes discrepancies regarding what percent of the drainage area is impervious surface. Modelling for the Water Quality Storm indicates 0.0% impervious surface, the Downstream Analysis modelling for the ten-year storm shows 4.32% impervious, and modelling for the one-year storm shows 57.25% impervious surface. Vallee argues in its post-trial memorandum that these percentages should all be the same.

VTrans' stormwater application is hundreds of pages long and includes extensive and complex data on modelling. Vallee has pointed to discrete figures which may appear, to the layman, to be inconsistent. Vallee fails, however, to explain why these figures should be the same, whether the different percentages would have a negative impact on the modelling or the

functioning of the stormwater system, or what that negative impact would be. This conclusory allegation, without explanation or context, does not provide the Court with a sufficient basis to doubt the accuracy of the modelling. Given that the different percentages are used to model different storm events, we see no inherent inconsistency in the modelling. Because the Grass Channels are designed according to VSMM standards, and because they are designed to treat more runoff than is required by the VSMM, we conclude that the Water Quality Treatment Standard is satisfied.

2. Channel Protection Treatment Standard

The Channel Protection Treatment Standard requires "storage of the channel protection volume (CPv) . . . be provided by means of 12 to 24 hours of extended detention storage (ED) for the one-year, 24-hour rainfall event." VSMM § 1.1.2, p. 1-4. The one-year, 24-hour rainfall event in Chittenden County is 2.1 inches. Id.

The Project is required to meet the detention criteria for 1.58 acres of impervious surface. VTrans proposes to meet the Channel Protection Treatment Standard with the installation of Pond 4/98, which is designed to treat the required Channel Protection Volume for 4.89 acres of impervious surface, including 3.20 acres off site and 1.67 on site.

The Diversion Channel

The Project includes a diversion channel across Route 2/7 from Pond 4/98 which will divert some off-site stormwater runoff from Pond 4/98. While there was no evidence that the diversion channel might overflow, Mr. LaCroix testified that if it did, the overflow would run into Pond 4/98. Mr. LaCroix credibly testified that even then, Pond 4/98 would not fail. This is because if the amount of water entering Pond 4/98 exceeded the 10-year or 100-year levels, it would simply spill over the emergency spillway.

The Runoff Area to Pond 4/98

Mr. Torizzo and Mr. LaCroix offered competing testimony as to the accuracy of maps depicting the off-site area on Water Tower Hill that would drain to Pond 4/98. VTrans Ex. 4, Bates 023190, 023191.

Mr. Torizzo and Mr. LaCroix agreed that stormwater runoff from a credit union and surrounding parking lot would be collected and diverted by a berm onto the street. They

disagreed, however, as to where the runoff would go after that. Mr. LaCroix stated that the runoff enters Pond 4/98; Mr. Torizzo opined that it enters the diversion channel and does not enter Pond 4/98.

If Water Tower Hill does not drain into Pond 4/98, the pond would still treat runoff from 1.67 acres of on-site impervious surface, thereby satisfying the Channel Protection Treatment Standard requirement of treating 1.58 acres of on-site impervious surface runoff. The opposing testimony therefore has no impact on whether the Channel Protection Treatment Standard is met.

The Runoff Area to Pond 4/98 and Impervious Surfaces

The Downstream Analysis modelling of the ten-year storm shows the impervious cover for the Pond 4/98 drainage area as 14.99% (VTrans Ex. 47, Bates 024739) while the Channel Protection Treatment Standard modelling of the one-year storm shows the same impervious cover as 47.80% (VTrans Ex. 4, Bates 023184).

Mr. Torizzo opined that this difference indicates the modelling is unreliable. Mr. LaCroix explained that this discrepancy is due to the way data was inputted for the two models. Details of different surface types were inputted into the Channel Protection model via HydroCAD. A summary of the acreage for these areas was inputted manually into the Downstream Analysis model. Because a summary was entered manually into the Downstream Analysis, that model calculated a different percentage of impervious surface. Mr. LaCroix explained that although the models show different impervious coverage, they are both reliable. As with Vallee's similar critique of GC4, discussed above, the conclusory allegation that the impervious percentages should be the same throughout the modelling fails to persuade the Court that the modelling is inaccurate, especially where Mr. LaCroix testified that both impervious cover percentages are correct. Given this evidence, and considering that the different percentages are used to model different storm events, we see no inconsistency in the modelling.

3. Groundwater Recharge Treatment Standard

The Groundwater Recharge Treatment Standard requires systems to be designed to maintain the average annual recharge rate for the prevailing hydrologic soil groups to preserve existing water table elevations. VSMM § 1.1.3. Under the VSMM, a grass channel that meets the

Water Quality Treatment Standard is presumed to also meet the Groundwater Recharge Treatment Standard. VSMM § 3.5, p. 3-9; VSMM Vol. II, p. 142.

Here, the use of Grass Channels to meet the Water Quality Treatment Standard serves to automatically meet the Groundwater Recharge Treatment Standard.

We note that Mr. Torizzo's contradictory testimony on this point puts his credibility and reliability as an expert witness into doubt.

4. Overbank Flood Protection Standard

The Overbank Flood Protection Standard requires that "[t]he post-development peak discharge rate shall not exceed the pre-development peak discharge rate for the 10-year, 24-hour storm event." VSMM § 1.1.4. This treatment standard is waived if the site is smaller than five acres, which is the case here, and "the channel has adequate capacity to convey the post-development 10-year discharge downstream to the point of the so-called 10% rule; and downstream conveyance systems have adequate capacity to convey the 10-year storm." VSMM § 1.1.4, p. 1-10. A channel is considered to have adequate capacity to convey post-development ten-year storm discharge, and will satisfy waiver conditions, if a downstream analysis shows that flow rates for the ten-year storm increase by less than 5% from pre-developed conditions. VSMM § 1.2, p. 1-11–1-12.

With attenuation from Pond 007 and Pond 008, the Downstream Analysis shows changes in flow rates at the Project discharge points from +4% to -31%. Although the Downstream Analysis projects a 4% increased flow rate at S/N 007, this is below the 5% threshold and therefore satisfies waiver conditions. VSMM § 1.2, p. 1-11–1-12.

In addition, the flow rate at the next discharge point downstream, S/N 008, will decrease by 5.7 cfs, or -14%. The brook passes through a culvert between these points. Because peak flow for the 10-year storm increases at S/N 007, but then decreases to a greater degree at S/N 008, there will only be an increased flow in the culvert between these two points. Downstream of S/N 008, peak flows for the 10-year storm will decrease at all discharge points.

Downstream Analysis Mapping

The Downstream Analysis watershed map (VTrans Ex. 4, Bates 023208) differs from another watershed map included in the stormwater application (Bates 023031). Mr. LaCriox

explained that the Downstream Analysis map is more accurate and based on more refined information. We find this explanation credible, especially given the later date on the Downstream Analysis map. We do not find that the difference between the maps renders the Downstream Analysis unreliable.

Mr. Torizzo incorrectly stated that the accuracy of the watershed map at Bates 023031 is important because it is used for modelling. Mr. LaCroix, however, clarified that this map was not used for modelling. This raises the question of how well Mr. Torizzo understands both the application and the modelling, which in turn makes his analysis of the application and modelling less credible.

Downstream Analysis Mapping of OS7_1 and OS7_2

Mr. LaCroix and Mr. Torizzo agreed that OS7_1 and a large portion of OS7_2 marked on VTrans Ex. 4, Bates 023208 are not part of the subwatershed for discharge point S/N 007, and do not drain to Sunnyside Brook. Without OS7_1 and part of OS7_2, this subwatershed is smaller than it is depicted on the map and modelled in the Downstream Analysis.

Mr. Torizzo opined that with a smaller subwatershed, the increase in the post-construction flow rate for the 10-year storm at S/N 007 would be higher than the 4% projected by the Downstream Analysis. Mr. Torizzo explained that this is because starting with a larger baseline watershed (as was done here) washes out the impact of the Project by making the increase caused by the Project appear as a smaller percentage in the bigger baseline watershed (the 4% calculated here) than it would in a smaller watershed (more than 4%).

Mr. Nelson disagreed, arguing that with a smaller subwatershed Pond 007 would be more effective and have a greater impact in treating the stormwater runoff because there would be less stormwater to treat. The increase in the ten-year peak flow would therefore be less than the 4% that the model currently predicts.

We find Mr. Nelson's assessment to be more credible, largely because Mr. Torizzo's analysis fails to account for the impact of Pond 007. Mr. Nelson credibly explained that if one assumes a smaller baseline watershed, then Pond 007 will be more effective at managing that smaller watershed and additional runoff from the Project. The post-construction increase in flow

will therefore be less than 4%. Mr. Torizzo offered no evidence or opinion to counter this explanation.

5. Extreme Flood Protection Standard

The Extreme Flood Protection Standard in VSMM § 1.1.5 requires "[t]he post-development peak discharge rate shall not exceed the pre-development peak discharge rate for the 100-year, 24-hour storm event." The Extreme Flood Protection Standard is waived if the impervious area of a proposed project is less than 10 acres. VSMM § 1.1.5, p. 1-11. Here, the sum of all jurisdictional area is less than 10 acres. See 16-3 Vt. Code. R. § 505:18-302 (defining jurisdictional surfaces for the stormwater discharge permit program). This standard is therefore waived.

6. Conclusion: VSMM standards

For the above reasons, we conclude that the stormwater system satisfies the standards set out in the 2002 VSMM.

e. The Stormwater Appeal: Conclusion

Because the use of site balancing here is appropriate and the Site Balancing Procedure was properly applied, we resolve stormwater Questions 2 and 3 in favor of VTrans. Because the Project conforms with the Stormwater Management Rule, 10 V.S.A. § 1264, and the 2002 VSMM, we resolve stormwater Question 1 in favor of VTrans.

Having resolved all Questions in favor of VTrans, we conclude that the stormwater discharge permit application must be approved.

V. The Act 250 Appeal

a. Vallee Standing

At the close of evidence, the Court expressed concern regarding Vallee's status under Act 250 Criteria 1(B), and 1(E), noting that in five days of trial Vallee had presented no evidence that stormwater from the Project would, or even might, enter or affect its property.

The subject matter jurisdiction of Vermont courts is limited to "actual cases or controversies." Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235 (citation omitted); Parker v. Town of Milton, 169 Vt. 74, 76–77 (1998). This limitation is created by the Vermont Constitution, and

is the same limitation as that set by the United States Constitution on federal courts. Parker, 169 Vt. 77 (citing In re Constitutionality of House Bill 88, 115 Vt. 524, 529 (1949)). Standing is an element of subject matter jurisdiction. Bischoff, 2008 VT 16, ¶ 15. If the party bringing a case does not have standing, the Court does not have jurisdiction to adjudicate the case. Id. (citing Brod v. Agency of Natural Res., 2007 VT 87, ¶ 2, 182 Vt. 234). As an element of subject matter jurisdiction, standing can be raised at any stage in a proceeding. Id. (citing cases).[11]

To establish standing, a party must show injury in fact, causation, and redressability. Parker, 169 Vt. at 77–78 (citing Hinesburg Sand & Gravel Co. v. State, 166 Vt. 337, 341 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). An "injury in fact" is one that will impact a party specifically (i.e., is a concrete and particularized injury) and is not hypothetical (i.e., an actual or imminent injury). See Lujan, 504 U.S. at 560–61; see also Brod, 2007 VT 87, ¶¶ 9–13 (indicating that an injury in fact cannot be generalized or speculative).

These principles are reflected in Act 250. See, e.g., In re Stokes Commc'ns Corp., 164 Vt. 30, 34–35 (1995). Thus, a person with a particularized interest that is protected by an Act 250 criterion and which may be affected by a proposed project may be granted "party status" on that criterion in an Act 250 proceeding. 10 V.S.A. § 6085(c)(1)(E). A party that has been granted party status, participated in the proceedings before the District Commission, and retained party status in those proceedings may appeal the District Commission's decision to the Environmental Division. 10 V.S.A. § 8504(d)(1); see also 10 V.S.A. §§ 8502(7) (defining "person aggrieved"), 8504(a), 8504(d)(2) (allowing aggrieved persons to appeal District Commission decisions). A party that does not retain party status by the District Commission may appeal that party status determination to the Environmental Division. 10 V.S.A. § 8504(d)(2)(B); VRECP 5(d)(2).

These statutory restrictions regarding who can appeal Act 250 decisions do not supplant or supersede principles of constitutional standing. Rather, constitutional standing principles

[11] In In re Denio, 158 Vt. 230, 236 (1992), the Supreme Court held that a party's subject matter jurisdiction objection was waived when it only raised the issue on appeal before the Supreme Court, and failed to raise the issue before the Environmental Board. That case can be distinguished from the one now before us, because here the issue of Vallee's party status under Criteria 1(B) and 1(E) was addressed by the District Commission. In addition, the Denio decision rests in large part on the interpretation of a statutory provision, 10 V.S.A. § 6089(c), which required parties to preserve objections before the Environmental Board. Id. That statute has since been repealed. 2003, Adj. Sess., No. 115, § 58.

underpin our understanding and construction of these statutes. See In re Bennington Wal-Mart Demolition / Constr. Permit, No. 158-10-11 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Apr. 24, 2012) (Walsh, J); In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, slip op. at 5–6 (Vt. Envtl. Ct. May 1, 2008) (Wright, J.). In addition, the Act 250 statutes add a layer of "statutory standing restrictions" that supplement the underlying constitutional standing requirements. Verizon Wireless Barton Act 250 Permit Telecomm. Facility, No. 6-1-09 Vtec, slip op. at 5–6, 9 (Vt. Envtl. Ct. Feb. 2, 2010) (Durkin, J.).

Where a person claims party status based on a protected particularized interest in an Act 250 hearing, the District Commission makes a preliminary ruling on that claim and then a final determination at the end of the hearing. 10 V.S.A. § 6085(c). At the initial stage, the party seeking status "need only show that there is a reasonable possibility that [its] particularized interests may be affected by a decision on the proposed project." Bennington Wal-Mart Demolition/Constr. Permit, No. 158-10-11 Vtec, slip op. at 9–10 (Vt. Super. Ct. Envtl. Div. Apr. 24, 2012) (Walsh, J.) (citation omitted). On reexamination of party status at the close of hearing, the party must have demonstrated—and not simply alleged—a reasonable possibility that its particularized interests may be affected by the proposed project. See, e.g., Verizon Wireless Barton Act 250 Permit, No. 6-1-09 Vtec at 3 (Feb. 2, 2010). Without that demonstration, party status is lost. 10 V.S.A. § 6085(c)(6).

Whether a person qualifies for party status is thus a question that continues throughout the Act 250 permit application review process. Because our review of a District Commission decision on appeal is de novo, "we stand in the place of the District Commission and review anew the application presented below as if no proceeding had previously occurred." In re Big Spruce Rd. Act 250 Subdivision, No. 95-5-09 Vtec, slip op. at 9 (Vt. Envtl. Ct. Apr. 21, 2010) (Durkin, J.). Sitting in the District Commission's place, the Environmental Division reconsiders initial party status determinations after evidence has been presented. 10 V.S.A. § 6085(c)(6).

In the Act 250 proceeding below, Vallee was denied final party status under Criteria 1, 1(B), and 1(E). Vallee moved for status before this Court when it filed its Notice of Appeal. VTrans filed an opposition to that motion on January 6, 2017. Based on affidavits filed by Vallee, we granted Vallee status under Criterion 1(B) because it alleged a reasonable possibility that

"wastewater in the form of stormwater runoff may enter its property and affect its interest in keeping the property free from pollution." Diverging Diamond Interchange Act 250 and SW Permits, Nos. 169-12-16 Vtec, 50-6-16 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Mar. 17, 2017) (Walsh, J.) (citing In re N. E. Materials Grp. LLC, No. 35-3-13 Vtec, slip op. at 2–3 (Vt. Super. Ct. Envtl. Div. Aug. 21, 2013) (Walsh, J.)). We granted Vallee status under Criterion 1(E) based on Vallee's allegations regarding the potential impacts from chloride in stormwater runoff from the Project, and on how this would affect Vallee's own use and treatment of de-icing salts. Id. at 5.[12]

During our five-day trial, Vallee had ample opportunity to cross examine VTrans and ANR witnesses and to present evidence through its own witnesses. Despite this opportunity, Vallee failed to introduce any evidence to connect stormwater runoff from the Project in any way at all to Vallee's property, or to show how Vallee might have a particularized interest in the condition of Sunnyside Brook. The basic premise of Vallee's appeal, that the stormwater system would impact interests particular to Vallee, was not addressed.[13]

In a post-trial memorandum, Timberlake notes that sua sponte dismissal of a party is discouraged. While that may be true as a general proposition, we disagree that it applies here. First, the issue of Vallee's party status was raised and contested, and we ruled on that issue, pre-trial. See Diverging Diamond, Nos. 169-12-16 Vtec, 50-6-16 Vtec at 4 (Mar. 17, 2017). This is not a new issue raised only by the Court. Second, as noted above, the Act 250 process mandates initial and final party status determinations. Third, the Court has given Vallee an opportunity to address the issue in its post-trial brief by pointing to evidence demonstrating party status. Huminski v. Lavoie, 173 Vt. 517, 519 (2001) (mem.).

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[12] The entry order also granted Vallee status under Criterion 1, which is no longer before the Court.

[13] Vallee argues in its post-trial memorandum that the evidence (i.e. plans showing the road sloping toward Vallee's property) supports the conclusion that stormwater runoff from the Project will flow onto Vallee's property, and that this is sufficient to establish standing based on Vallee's interest in keeping its property free from pollution. We disagree that some runoff from the roadway may enter Vallee's property is sufficient to demonstrate that the Project will affect an interest particular to Vallee that Act 250 was designed to protect. Vallee introduced no evidence identifying how the runoff would impact its property or identifying any connection between its property and stormwater impacts. Vallee also entirely failed to identify how it might have a particularized interest in the condition of Sunnyside Brook. Instead, in the five days of trial and reams of exhibits admitted into evidence, Vallee focused entirely on the general effects, and effectiveness, of the stormwater system.

Because at trial Vallee failed to identify, or even allege, how the Project's stormwater system might impact its particularized interest, we conclude that Vallee cannot retain final party status on Criteria 1(B) and 1(E). We therefore **DISMISS** Vallee's party status under Criteria 1(B) and 1(E). We will nevertheless treat Vallee as a "friend of the Court" and consider the evidence it offered on these criteria through cross examination and through its own witnesses. 10 V.S.A. § 6085(c)(5). We also consider the evidence offered by Vallee to avoid prejudicing Timberlake and CLF. Although neither of these parties formally adopted Vallee's position or evidence at trial, based on pre-trial events it is clear that these parties shared Vallee's position and wished to rely on Vallee's introduction of that evidence. Furthermore, we do not want to create or require a process of repetitive offers of duplicative evidence.

b. Criterion 1(B)

Criterion 1 (B) reads:

> Waste disposal. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable Health and Environmental Conservation Department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

10 V.S.A. § 6086(a)(1)(B).

Applicants bear the burden of proof under Criterion 1(B). 10 V.S.A. § 6088(a).

A stormwater discharge permit creates a rebuttable presumption of compliance with Criterion 1(B). 10 V.S.A. § 6086(d); Act 250 Rule 19(E)(1). An opponent can rebut the presumption by introducing evidence "fairly and reasonably indicating that the real fact is not as presumed." See In re Hawk Mountain, 149 Vt. 179, 186 (1988). If the presumption is rebutted, the burden shifts back to the applicant to prove compliance with Criterion 1(B), in which case the permit may still be considered as evidence of compliance with the criterion. Act 250 Rule 19(F).

Vallee's Act 250 Question 2 indicates that Vallee intended to show noncompliance with Criterion 1(B) by showing that a stormwater discharge permit should not be issued.[14] Because we conclude that the stormwater permit should be issued, this basic argument fails. Neither Vallee, nor any other party, has made further argument to rebut the presumption that the permit creates.

Because the stormwater permit creates a presumption of compliance with Criterion 1(B), and that presumption has not been rebutted, we conclude that the Project complies with Criterion 1(B).

c. Criterion 1(E)

Criterion 1(E) reads:

> Streams. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

10 V.S.A. § 6086(a)(1)(E).

Vallee's Act 250 Question 3 asks:

> 3. Pursuant to Criterion 1(E) (Will the Project maintain the natural condition of Sunnyside Brook and not endanger the health, safety, or welfare of the public or adjoining landowners):
>
> 3.a. Will the Project maintain the natural condition of Sunnyside Brook due to an increase in Chloride discharges to Sunnyside Brook due to non-stormwater-based chloride impacts? *(underlined portion added based on our February 8, 2018 decision).*

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[14] Vallee's full Question 2 reads:

> Pursuant to Criterion 1(B) (Will the Project meet environmental conservation department regulations regarding the disposal of wastes):
>
> 2.a. VTrans intends to use the issuance of an individual stormwater discharge permit (#6469-INDS) to create a rebuttable presumption that its project satisfies Criterion 1(B). In coordinated Docket 50-6-16 Vtec, Vallee intends to show that VTrans is not entitled to an individual discharge permit. Thus this Court must determine based on its ruling in Docket 50-6-16 Vtec, whether VTrans has satisfied Criterion 1(B) with respect to the issuance of an individual discharge permit.

There is no evidence or suggestion that the Project will cause an increase in chloride discharges to Sunnyside Brook due to non-stormwater-based chloride impacts. We conclude that there will be no such impact, and that the Project complies with Criterion 1(E).[15]

d. Criterion 5, 5(A), and 5(B)

Vallee's amended and clarified Questions 4 and 5 ask whether the Project complies with Criteria 5(A) and 5(B). Before we can address the substance of these Questions, we must address the threshold issue of whether the Act 250 application vested before or after Criteria 5(A) and 5(B) went into effect.

1. Criterion 5, 5(A), 5(B), and vested rights

Procedural History

Until June 1, 2014, Criterion 5 required the District Commission to find that a proposed development "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." 2013, Adj. Sess., No. 147, § 2. Effective June 1, 2014, what was formerly Criterion 5 became Criterion 5(A). Id.; 10 V.S.A. § 6086(a)(5)(A). The statute was further amended to include Criterion 5(B), which requires projects to "incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services" as appropriate. Id. 10 V.S.A. § 6086(a)(5)(B).

The parties dispute whether the Act 250 application here vested in Act 250 before or after Criterion 5(B) went into effect.

Whether the vesting question was property preserved in the Statement of Questions

The Court raised the issue prior to trial of whether Vallee's Statement of Questions properly preserved for our review the question of whether the application vested in former Criterion 5 or new Criteria 5(A) and 5(B). In particular, the Court was concerned that the vesting issue is not explicitly raised in any of the Questions and may not be intrinsic to any of the

[15] We concluded pretrial that the stormwater permit application vested in stormwater regulations that had no chloride standards, and that we are therefore unable to consider stormwater-related chloride impacts in considering the application. Diverging Diamond, Nos. 169-12-16 Vtec, 50-6-16 Vtec at 14 (Oct. 11, 2017).

Questions. See In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 17 (Mar. 17, 2017). Nevertheless, because the parties had briefly addressed the vesting question in pretrial motion practice, the Court concluded on the record at the outset of trial that the vesting question is properly within the scope of our review.

Vesting analysis

VTrans argues that the application vested in November 2013, when the original complete application was filed. Vallee contends that the application was substantially revised, and the complete revised application was not submitted until June 3, 2014 (and deemed complete by the District Commission on June 4, 2014). Vallee's theory appears to be that if a complete application is submitted and vests, and the application is then revised, at some point the revisions are so substantial that the applicant is essentially proposing a new project. Vallee contends that this extinguishes the original vesting date and replaces it with a new vesting date.

There is very little support for this theory in the law.

Our Supreme Court chose to adopt the minority vested rights rule, rather than the majority rule, in Smith v. Winhall Planning Comm'n, 140 Vt. 178, 181–82 (1981). The Court explained that under the majority rule, an application does not vest against future regulation changes unless the applicant proves a substantial change in position in reliance on the existing regulations or shows that the regulations were changed to thwart the applicant's development plans. Id. at 181 (citing Annot., 50 A.L.R.3d 596 (1973)). The Court noted that these are both fact-specific determinations which can often only be resolved through litigation. Id. By contrast, under the minority rule rights vest "under the then existing regulations as of the time when proper application is filed." Id. The Court found the minority rule "the more practical one to administer" because it "makes for greater certainty in the law and its administration" and avoids protracted litigation. Id. at 181–82. In a later case, the Court described the rule adopted in Smith as a "bright line." In re Taft Corners Assocs., Inc., 171 Vt. 135, 142 (2000).

In In re Paynter 2-Lot Subdivision, 2010 VT 28, ¶ 9, 187 Vt. 637, the Court explained that an application is "proper" for vesting purposes when it is "full and complete." (citing Smith, 140 Vt. at 182). Rights do not vest, therefore, when an application is incomplete. In re Ross, 151 Vt. 54, 55–56 (1989) (holding that application failed to vest in town plan where the information in

an Act 250 application was so "inadequate" that it was "insufficient" for the District Commission to make any findings).[16] In addition, Act 250 Rule 10(D) indicates that an application is complete and can be reviewed as long as it is substantially complete. See also Pike Indus., Inc. JO 9-072, No. 151-12-15 Vtec, slip op. at 8–9 (Vt. Super. Ct. Envtl. Div. Sep. 2, 2016) (Walsh, J.).

The purpose of requiring a complete application before rights vest is, at least in part, to prevent applicants from filing bad faith placeholder applications to avoid pending unfavorable changes to regulations. Id. at 59 ("the orderly processes of town government are frustrated when a landowner can easily avoid regulatory requirements by submitting a request for a permit based on partial and insufficient information"); In re Handy, 171 Vt. 336, 350 (2000) ("the zoning proceedings must be 'validly brought and pursued in good faith'") (quoting Smith, 140 Vt. at 182).

There is little case law suggesting that once a proper application is filed and rights vest, those rights can be extinguished.

Once a complete application vests, it is unclear whether vested rights are lost when the application is denied, and then subsequently revised and resubmitted. For example, if an Act 250 permit is denied the applicant can correct the deficiencies in the application and ask the District Commission to reconsider it. 10 V.S.A. § 6087(c). The Supreme Court has explained that "the submission of a reconsideration application is not a separate vesting event," and the revised application is therefore considered under the regulations in effect at the time the original application was filed. In re Times & Seasons, LLC, 2011 VT 76, ¶ 11, 190 Vt. 163.

Similarly, in In re Jolley Assocs., 2006 VT 132, ¶ 3, 181 Vt. 190, a complete conditional use application was filed and vested in existing regulations, but was denied for failing to comply with zoning regulations. The Supreme Court held that a revised application which addressed the reasons for the denial was not "the sort of substantial revision that should dictate a loss of vested rights," and concluded that the revised application vested in the regulations in effect when the

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[16] Likewise, rights do not vest through an action other than submitting an application. See In re Keystone Dev. Corp., 2009 VT 13, ¶ 5, 186 Vt. 523 (mem.) (in which the would-be developer sent a letter or email alerting the municipality of an intent to do some work); In re B & M Realty, LLC, 2016 VT 114, ¶ 20 (Oct. 21, 2016) (where the would-be developer requested an amendment to the zoning regulations). An application for one type of permit generally does not vest rights for the purposes of a subsequent permit. Taft Corners, 171 Vt. at 139–40 (application for subdivision permit does not vest rights for subsequent applications to develop the subdivision). The one exception to this is that an Act 250 application's conformity with a town plan is measured "as of the start of the development process in the town." Taft Corners, 171 Vt. at 141 (citations omitted).

first application was filed. Id. ¶ 16. The Court distinguished Ross because in that case the original application was incomplete and so it never vested in the first place. Id.

The Supreme Court has indicated, in dicta, that if an applicant withdraws an application and then submits a new application, rights vesting in the original application are extinguished and the applicant vests in the laws and regulations in effect at the time the new application is filed. Times & Seasons, LLC, 2011 VT 76, ¶ 16; In re John A. Russell Corp., 2003 VT 93, ¶ 13, 176 Vt. 520 (mem.).

Read together, the case law does not support the idea that vested rights, once established, can be lost by revising an application. The Supreme Court has developed a bright line rule by which rights are vested in the laws and regulations in effect at the time a full and complete application is filed. Paynter, 2010 VT 28, ¶ 9; Taft Corners, 171 Vt. at 142. There is no case law indicating that, once obtained, vested rights can be lost or reset by revising an application; indeed, such a rule would seem to go against the idea of a "bright line" rule. Furthermore, as we noted in an earlier decision in this case,

> Land use permit applications can be complex, and are often subject to revision as they are shepherded through the review process. It is impractical to have any small change trigger a new vesting event, which could require a review of the entire application under entirely new laws or regulations.

Diverging Diamond, Nos. 50-6-16, 169-12-16 Vtec, slip op. at 14 (Oct. 11, 2017).[17]

The purpose of the minority rule, as originally set out by our Supreme Court, is to create certainty and avoid protracted litigation over vested rights. Smith, 140 Vt. at 181–82. Modifying the rule to take away vested rights when an application is substantially changed would decrease certainty and would encourage litigation (over whether a modification is "substantial"). It would also disincentivize collaboration between the applicant and the permitting agency because the

[17] The only suggestion that a substantial revision might push the reset button on vested rights comes in Jolley, where the Court noted that a change to the application to address the reasons for the application being denied was not "the sort of substantial revision that should dictate a loss of vested rights." 2006 VT 132, ¶ 16. This suggests a substantial revision could lead to a loss of vested rights. The Supreme Court has not, however, identified the parameters in which this might occur. Based on the weight of the case law which leans against a loss of vested rights when applications are changed, and on the facts of the case now before us, we need not explore these parameters here.

permitting agency would want applications to conform to regulations while applicants would fear altering their proposals too much and losing their vested rights.

In this matter the Act 250 application was filed in November 2013. There is no suggestion that the application was incomplete. VTrans subsequently made some changes to the Project. While these changes were insubstantial—the Project remained basically the same as initially proposed—the changes brought the Project from 9.82 acres of involved land to over ten acres, thereby triggering the jurisdictional threshold requiring an Act 250 permit. Other adjustments to the application were subsequently made. There is no suggestion of bad faith on the part of VTrans, or of an effort to try to avoid having to comply with incoming Criteria 5(A) and 5(B). As with the stormwater permit application, which we addressed in our October 11, 2017 summary judgment decision, revisions to the Act 250 application did not extinguish the rights that vested when the original application was filed in November 2013. The application therefore vested in former Criterion 5, and new Criteria 5(A) and 5(B) do not apply to the Project.[18] Vallee's Question 5.a is therefore dismissed.[19]

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[18] Even if rights vested anew with the revisions that brought the Project over ten acres, those revisions were presented to the District Coordinator in April 2014, and still vested in former Criterion 5. Furthermore, although 5(A) and (B) do not apply, we effectively address those criteria in our analysis, because 5(A) is the same as former Criterion 5; and because we address the connectivity issues raised under 5(B).

[19] Act 250 Question 5. Pursuant to Criterion 5(B) (Will the Project incorporate demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle and transit networks and services):

5.a. Does the Project incorporate and provide safe access and connections to adjacent land and facilities and to existing and planned pedestrian and bicycle networks as required by Act 250, Criterion 5(B) by failing to provide a sidewalk or shared use path north of Mountain View Drive and/or adequate width shoulders throughout the Project?

2. Whether the Project conforms with Criterion 5

Vallee's Question 4.a asks whether the lack of sidewalks, a mixed-use path, adequate bike lanes and crosswalks, or adequate width shoulders fail to conform to Criterion 5(A). Question 4.b asks whether the construction phasing or timeline fail to conform to Criterion 5(A).[20]

Because the Project vested in former Criterion 5, and not new Criteria 5(A) and 5(B), we will analyze whether the shoulders, shared-use path, and sidewalks satisfy former Criterion 5. We will also analyze whether the construction phasing and timeline comply with former Criterion 5.

Standard of Review

Under former Criterion 5, the Court must find the proposed development "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." 10 V.S.A. § 6086(a)(5) (2014).[21] In reviewing a project under Criterion 5, we also consider whether the Project may exacerbate already congested or unsafe traffic conditions. In re Pilgrim P'ship, 153 Vt. 594, 596–97 (1990).

A permit may not be denied solely due to traffic impacts, but the Court can impose conditions to alleviate impacts from traffic. 10 V.S.A. § 6087(b). "[C]ourts must decide on a case-by-case basis whether to impose mitigating conditions and which conditions to impose." In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 56 (Nov. 9, 2017).

For Criterion 5, "[t]he party opposing the applicant bears the burden of proof . . . but the applicant bears the burden of production to establish at least a 'prima facie case' of compliance." In re N. E. Materials Grp., LLC, 2017 VT 43, ¶ 21 (May 26, 2017), reargument denied (Sept. 22, 2017). An opponent's burden extends to demonstrating that a mitigating condition is supported

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[20] Act 250 Question 4. Pursuant to Criterion 5(A) (Will the Project not cause unreasonable congestion or unsafe conditions with respect to the use of highways):

4.a. Does the Project, by failing to provide sidewalks, a mixed use path, adequate bike lanes and crosswalks, or adequate width shoulders, cause unsafe conditions with respect to the use of highways and other means of transportation—existing or proposed—in violation of Act 250, Criterion 5(A)?

4.b. Will the construction phasing or timeline of the Project's construction result in unreasonable congestion or unsafe conditions?

[21] New Criterion 5(A) contains the same language as former Criterion 5. 10 V.S.A. § 6086(a)(5)(A).

by the evidence and is "reasonable in the sense that it [is] likely to be attainable." Hinesburg Hannaford, 2017 VT 106, ¶¶ 70, 73.

Criterion 5 and the Project in general

Whether the Project generally complies with Criterion 5 is not being challenged. General compliance, however, establishes some context for determining whether the specific challenged elements conform with Criterion 5.

Route 2/7 from the Winooski / Colchester town line to the Mountain View Drive intersection is designated as a high-crash location. Safety problems in this area are caused by traffic congestion.

The DDI will improve traffic flow and increase safety by minimizing conflicting crossing traffic movements at signalized ramp intersections.

In existing conditions, congestion is common at the intersections of Route 2/7 and Mountain View Drive and Lower Mountain View Drive, Hercules Drive, and Rathe Road. This congestion will be ameliorated by widening the road and adding the following turn lanes:

a. A dedicated right turn lane from Route 2/7 northbound to Lower Mountain View Drive.
b. An additional left turn lane from Lower Mountain View Drive to Route 2/7 southbound.
c. An additional right turn lane from Mountain View Drive to Route 2/7 southbound.
d. Dedicated left turn lanes on Route 2/7 for the Hercules Drive intersection.
e. An additional through land for Route 2/7 northbound at Rathe Road.

Two sub-standard horizontal curves along Route 2/7 (between Mountain View Drive and Hercules Drive and between Rathe Road and Sunderland Woods Road) will be corrected by regrading the roadway banking within those curves.

Upgraded LED street lighting, traffic signal equipment, signage and pavement markings will be installed at each intersection along Route 2/7 in the Project, including at the intersection of Main Street and Tigan Street in the City of Winooski. Street lighting will be added along Route 2/7 from South Park Drive through the interchange to the Mountain View Drive intersection.

Based on these facts, we conclude that the Project will generally improve safety and decrease congestion in the Project area.[22]

3. Whether the shoulders, shared-use path, and sidewalks satisfy former Criterion 5

Whether the shoulder north of the Mountain View Drive intersection satisfies Criterion 5

Vallee asserts that the shoulder on Route 2/7 north of the Mountain View Drive intersection fails to comply with Criterion 5.

Route 2/7 north of the Mountain View Drive intersection is a four-lane rural principal arterial roadway. The speed limit on this section of Route 2/7 was recently reduced from 50 mph to 40 mph. The Design Hour Volume (DHV) is estimated to peak at 1,900 vehicles on Route 2/7 at the intersections of Hercules Road and Rathe Road. In its existing condition, the shoulder of Route 2/7 from the Mountain View Drive intersection to Hercules Drive is inconsistent in width, generally ranging from four to eight feet wide but as narrow as one foot wide in some places. The narrowest shoulder is on the east side of Route 2/7 just north of Lower Mountain View Drive.

The Project will adjust the existing shoulders north of the Mountain View Drive intersection to a uniform four-foot width. Along this section the width of the roadway will be slightly increased in some places and slightly decreased in others.

Under the Design Standards § 3.14, principal arterial roads should be designed to accommodate pedestrian and bicycle traffic, which can be done with shoulders. Pursuant to the Design Manual § 3.3.3, shoulders of roadways do not have to be ADAAG compliant.[23] Design Standards § 3.14.1, Table 3.7, sets out the minimum width of paved shoulder area to accommodate shared use of rural principal arterial roadways by bicycles. For roads with a 40-mph speed limit and Design Hour Volume over 400, like Route 2/7 here, the minimum width is

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[22] This conclusion is consistent with the one we reached in a separate case that looked, in somewhat less detail, at many of the improvements proposed here. In re Costco Stormwater Discharge Permit Application, Nos. 75-6-12 Vtec, 104-8-12 Vtec, 132-10-13 Vtec, 41-4-13 Vtec, 59-5-14 Vtec, slip op. at 44–45 (Vt. Super. Ct. Envtl. Div. Aug. 27, 2015) (Durkin, J.), *aff'd* 2016 VT 86, 202 Vt. 564.

[23] The Design Manual states that "VTrans will use this manual in combination with the applicable VTrans Standard Drawings as the standard for development, design, construction and maintenance of pedestrian and bicycle facilities." VTrans Ex. 22, § 1.1, p. 1-2. Because the northern part of the Project repaving and slightly expanding the roadway, the Design Manual does not apply to that part of the Project.

three feet. The four-foot shoulder therefore meets and exceeds the standards in Table 3.7. There is no similar minimal width for pedestrians.

Design Standards § 3.6, "Lane and Shoulder Widths on Rural Principal Arterials," states that shoulder widths on rural principal arterials "will adhere to values in Table 3.3," which is set out in this section. Table 3.3 indicates that shoulders on two-lane rural principal arterial roads should be eight feet wide. There are no values in this table, or elsewhere in the Design Standards, specifying shoulder dimensions for four-lane rural principal arterial roads.

Mr. LaCroix testified that because Route 2/7 north of the Mountain View Drive is a four-lane rural principal arterial, and Table 3.3 deals with two-lane rural principal arterials, Table 3.3 does not apply to this part of Route 2/7. Mr. Marshall disagreed, opining that the shoulder dimensions in Table 3.3 should apply to the Project.

Table 3.3 is titled "Minimum Width of Lanes and Shoulders for Two Lane Rural Principal Arterials." Of nine tables in Chapter 3, this is the only one that singles out two-lane principal arterials. The other eight tables refer to "principal arterial[s]," "rural principal arterial[s]," or "urban or village principal arterial[s]." Based on this context, we assume that the inclusion of "Two Lane" in Table 3.3 was intentional and was intended as a directive that Table 3.3 should be applied more narrowly (i.e. only to two-lane principal arterials) than the other tables in Chapter 3 (which apply to principal arterials regardless of the number of lanes).

We also find the basis of Mr. Marshall's opinion that the Table 3.3 dimensions should apply—because the purpose of the shoulder is to accommodate breakdowns—not credible.

Design Standards § 3.5 states that shoulders can serve many purposes, and accommodating breakdowns is only one of these. Safety for bicycles and pedestrians are other purposes. The Design Standards § 3.14 state that bicycle and pedestrian traffic should be expected on principal arterials, and that designers should plan for bicycle and pedestrian traffic, including in shoulders. There is no similar recommendation that breakdowns should be expected on all principal arterials, and that designers should design to accommodate breakdowns. That there is a recommendation for pedestrians and bicycles, but not for breakdowns, suggests that the authors of the Design Standards are not recommending that all principal arterial roadways should have shoulders that can accommodate breakdowns.

This interpretation is further supported by Design Standards § 3.5, which states that shoulders "are desirable on urban and village Principal Arterials, and should be provided where feasible for maneuvering room, space for immobilized vehicles, safety for the pedestrian in areas where sidewalks are not provided, safe accommodation of bicycles, speed-change lanes for vehicles turning into driveways, and storage space for plowed snow. . . . Where shoulders are provided to accommodate disabled vehicles, they must be at least 6 feet wide." While this section applies to village and urban principal arterials, it demonstrates that not all shoulders are expected to accommodate breakdowns.

Mr. LaCroix testified that a disabled vehicle in the Project area north of the Mountain View Drive intersection could pull into the right lane and traffic would continue moving in the left lane. He added that it is not atypical for a roadway like Route 2/7 to have shoulders that cannot fully accommodate disabled vehicles. Although this section of Route 2/7 has two lanes going in each direction, and a stopped car in one lane will not entirely stop traffic because the second lane would remain open, Mr. Marshall opined that the need for a shoulder large enough to accommodate a stopped vehicle is the same on a four-lane road as it is on a two-lane road. This strikes the Court as contrary to common sense.[24]

Finally, while the Project north of the Mountain View Drive intersection will widen Route 2/7 in some places and narrow it in others, this part of the Project is primarily a resurfacing operation. The work on this section is focused on resurfacing the roadway and ensuring that the lanes and shoulders are uniform.[25] Both Mr. Marshall and Mr. LaCroix opined that widening shoulders is generally outside the scope of a resurfacing project. That general rule applies here. Simply because VTrans proposes widening some parts of the roadway to a limited degree does

[24] Mr. Marshall's credibility on this point is also questionable given some apparently erroneous opinions regarding the shoulder that are included in his expert report. For example, his report states that pursuant to Chapter 4 of the Design Manual, Route 2/7 north of the Mountain View Drive intersection should have six-foot shoulders. Vallee Ex. LL at 3. At trial, however, he admitted that because the curbs are to be removed from this section of Route 2/7, this recommendation does not apply. Similarly, in his report he states that Chapter 4 of the Design Manual calls for six-foot shoulders on roads where the speed limit is over 35 mph. At trial he admitted that this section of the Design Manual, § 4.3.1, refers to bicycle lanes, and does not apply to shoulders.

[25] Vallee argues in its post-trial memorandum that Route 2/7 changes to two lanes north of Rathe Road, and that Table 3.3 therefore applies and requires an eight-foot shoulder. VTrans offers that this section of the Project is resurfacing only and, as such, shoulders are not widened.

not mean that it must widen the entire section of Route 2/7. This is particularly true given that the shoulders as proposed will comply with the Design Standards and Design Manual.

Mr. LaCroix also opined that the four-foot shoulders comply with the complete streets principles set out in 19 V.S.A. § 10b. This further supports the conclusion that widening the shoulders as Mr. Marshall suggests is unnecessary.

By demonstrating that the shoulders in the northern section of the Project comply with relevant standards, VTrans has made out a prima facie case of compliance with Criterion 5 and satisfied its burden of production. Neither Vallee nor any other party in opposition has met the burden of proof to show that the shoulders as submitted in VTrans' application will cause or exacerbate unreasonable congestion or unsafe conditions, and therefore do not comply with Criterion 5. We therefore conclude that the shoulders as designed comply with Criterion 5. Because the four-foot shoulders will comply with Criterion 5, requiring a wider shoulder would not be a reasonable condition to place on the Project.

Whether sidewalks should be included in the northern part of the Project

While the Project does not include any sidewalk north of the Mountain View Drive intersection, Vallee argues that such a sidewalk is necessary to satisfy Criterion 5. We conclude that the evidence does not support this argument, for several reasons.

First, as discussed above, the four-foot shoulder proposed by VTrans satisfies the Design Standards and Design Manual for pedestrian and bicycle use on Route 2/7 north of the Mountain View Drive intersection. There is therefore no need to install a sidewalk or shared use path to compensate for inadequate shoulders. Nor is there any standard that mandates installing a sidewalk or shared-use path in this section of the Project.

Second, the evidence introduced at trial demonstrates there is currently little need for a sidewalk on this part of Route 2/7. A pedestrian study showed very limited pedestrian traffic on Route 2/7 north of the Mountain View Drive intersection. There are few pedestrian destinations in this part of the Project area that might supply or attract pedestrians. While Mr. Marshall noted there is a residential area to the north of the Project area, it is unclear how close it is, whether pedestrians travel between that area and the Project site, and why providing a sidewalk for part, but not all, of the distance between the Project and that residential area would be useful. There

is no logical terminus for a northern sidewalk; a potential sidewalk proposed by Mr. Marshall would terminate at the Rathe Road intersection, at which point pedestrians would have to continue walking in the shoulder. Thus, there is no evidence that a northern sidewalk will make the area safer for pedestrians and bicyclists.

Third, this part of the Project is primarily a resurfacing operation, as discussed above. While a widened shoulder north of the Mountain View Drive intersection is outside the scope of this Project for the reasons set forth above, the inclusion of a sidewalk is even further outside of that scope.

Fourth, while there is evidence that the Town wants to install a sidewalk or shared use path north of the Mountain View Drive intersection, that evidence shows that plans for a sidewalk along this section have evolved over time and become a less immediate priority. The 2003 sidewalk Feasibility Report called for installing a ten-foot-wide recreation path along Route 2/7 north of the Mountain View Drive intersection, designating this as part of Phase I of a three-phase plan. The 2004 Official Map also shows a "proposed separated path" along this section of Route 2/7. More recently, a sidewalk along Route 2/7 north of the Mountain View Drive intersection is a less immediate priority. The Exit 16 Scoping Study, which was written by one of the authors of the 2003 sidewalk Feasibility Report, excludes the northern sidewalk.

Materials produced by the Town in 2014 show the Town is planning sidewalk construction with the expectation that this Project will include a sidewalk / shared-use path along the exact area proposed by VTrans. The materials note that Phase 1 of the Exit 16 Sidewalk Project (sidewalks on Route 2/7 from the Winooski/Colchester town line up to the South Park Drive intersection) is complete, and requests funding for Phase 2, which is a sidewalk along Mountain View Drive. These materials designate a sidewalk or mixed-use path on either side of Route 2/7 from South Park Drive up to, and onto, Mountain View Drive and Lower Mountain View Drive, as proposed by VTrans here, as "VTrans DCDI."[26]

[26] We infer this to be an abbreviation for Double Crossover Diamond Interchange. See, e.g., VTrans Ex. 9, p. 15.

These materials also show that a sidewalk along Route 2/7 north of the Mountain View Drive intersection is not an immediate priority. In fact, this section of sidewalk is designated as Phase 5 of the five-phase plan.

Further communication from the Town to VTrans in 2014 confirmed more directly that the Town wanted VTrans to build a sidewalk and mixed-use path from the southern end of the Project to Mountain View Drive, based on safety and usefulness, but that the Town did not want the Project to include sidewalks on Route 2/7 north of Mountain View Drive.

All of this supports the conclusion that the northern sidewalk is no longer an immediate priority for the Town, which in turn suggests that there is no immediate need for a northern sidewalk, either for safety or connectivity purposes.

Fifth, even if there was some indication that a sidewalk is needed in this part of the Project, there are questions about how reasonable it would be for the Court to require such a sidewalk. The base cost of this sidewalk is estimated to be in the $300,000 to $600,000 range, plus additional costs for right-of-way acquisitions and stormwater treatment. This would again require an additional funding request, and it is not clear that this would be granted or how long it would take. See Goddard Coll., 2014 VT 124, ¶ 12.

We conclude that the lack of a sidewalk on Route 2/7 north of the Mountain View Drive intersection will not create or exacerbate unreasonable congestion or unsafe conditions. Given the limited need for a sidewalk along this section of roadway, particularly as a component of this Project, and considering the estimated cost of such a sidewalk, it would not be reasonable to condition the Project on the construction of such a sidewalk.

Whether the shared-use path satisfies Criterion 5

VTrans proposes installing an eight-foot-wide shared-use path along either side of Route 2/7 through the I-89 interchange.

According to the Design Manual, § 5.3.2, Table 5-1, eight feet is the minimum width for a paved shared-use path, while the preferred width is 10–14 feet. VTrans Ex. 22, p. 5-13. The eight-foot minimum is only recommended when certain circumstances prevail, as set out in the Design Manual, page 5-13. Among these, a minimum-width path is recommended when "[n]o practical alternative design exists," "[f]or limited distances . . . to bypass a physical barrier (i.e.,

building, water body or other immoveable objects)," or where only limited bicycle traffic is expected.

We do not find Mr. Marshall's assertion that the path should be at least 10 feet wide credible. He merely conducted a general observation of the site and did not conduct engineering or other studies to reach the conclusion that a ten-foot-wide path is practical. He has not done any studies of pedestrian or bicycle traffic, but simply assumed that bicycle traffic is probably high because otherwise VTrans would not have proposed a shared-use path to begin with.

The evidence was inconclusive regarding whether a practical alternative design to the eight-foot path exists. On the one hand, Mr. LaCroix explained that significant work would be undertaken—including excavating and building retaining walls—to fit the eight-foot paths into the existing overpass infrastructure. On the other hand, Mr. Marshall gave the offhand opinion, without any real analysis, that the path could be expanded to ten feet.

Even if a ten-foot alternative is practical, however, the Design Manual exception for an eight-foot path for a "limited distance to bypass a physical barrier" can still apply to allow an eight-foot path here. The Design Manual lists this as a separate exception from the "no practical alternative design" exception, and we do not read these two exceptions together. Therefore, we read the Design Manual to allow the "limited distance to bypass a physical barrier" exception to apply, even if there is a "practical alternative design." Here, the piers or abutments and other highway infrastructure present a physical barrier justifying the exception.

We conclude that the eight-foot shared-use path will neither create unsafe conditions or cause unreasonable congestion, 10 V.S.A. § 8606(a)(5), nor exacerbate existing unreasonable congestion or unsafe conditions. Hinesburg Hannaford, 2017 VT 106, ¶ 56. Instead, the path will make the intersection safer and less congested than it is in its current condition with no sidewalk or shared path.

Conclusion: sidewalks, shared-use paths, and shoulders

Vallee's Question 4.a asks whether the lack of sidewalks, a mixed-use path, adequate bike lanes and crosswalks, or adequate width shoulders fail to conform to Criterion 5(A). For the

reasons set out above, we conclude that the sidewalks, shared-use paths, and shoulders conform to Criterion 5, and answer Question 4.a in favor of VTrans.

4. Whether the construction phasing and timeline comply with former Criterion 5

The TMP sets out a two-year construction timeline. The first year will involve primarily off-roadway work, the second will involve on-roadway work, and the roads in the Project area will operate as they do at present during the season between. More specific phasing is set out in the TMP. The TMP also sets out strategies to avoid, mitigate, and minimize impacts on traffic.

The TMP is a living document and offers flexibility as to how construction will be carried out. The process involves collaboration between VTrans, the contractor, local property owners, and the general public.

Regarding Vallee's Question 4.b in general, the TMP designs a process that will avoid, mitigate, and minimize the degree that the Project will exacerbate congestion and unsafe conditions. Neither the parties nor the Court identified any gaps in the TMP that would call for imposing any additional conditions under Criterion 5 in relation to "construction phasing or timeline of the Project's construction." Vallee Question 4.b.

Construction activities are planned to minimize impacts on the Champlain Farms gas station. Gas tankers and other large vehicles will be able to enter and exit the site and circulate on site. Queuing of cars exiting Champlain Farms will be minimized. During construction, there may be temporary closures to either of Champlain Farms' driveways. The contractor will only close one driveway at a time, and even then, will avoid any closures by keeping the driveways partly open. Additionally, based on Mr. Lacroix's testimony, the TMP, and the soil borings conducted in the area where Pond 007 will be installed (adjacent to Champlain Farms), it is unlikely that blasting will occur on any of the land adjacent to the Champlain Farms property. To the extent that blasting does occur, the TMP includes strategies to minimize impacts.

Regarding Timberlake's interest in Vallee's Question 4.b, we therefore conclude that no additional conditions are necessary to mitigate or avoid possible the degree that the Project will exacerbate congestion and unsafe conditions in and around the Champlain Farms gas station in relation to construction phasing or the timeline of the Project's construction.

Although it is generally outside the scope of the Statement of Questions, some of Mr. LaCroix's testimony went to the post-construction impact that the Project will have on Champlain Farms under Criterion 5. While the Project will alter the configuration of the Champlain Farms northern driveway, gas tankers and other large vehicles will still be able to enter and exit the site and circulate on site and there will be no significant impact to cars queuing on the Champlain Farms property as they exit to Route 2/7 post-development. The Project will install a sidewalk through a right-of-way between Champlain Farms and Route 2/7 which will cross over the Champlain Farms driveways. There is no evidence that this will impact Champlain Farms under Criterion 5. We therefore conclude that the Project, post-construction, will not increase congestion or cause unsafe conditions on or around the Champlain Farms property.

We also conclude that, as a whole, the construction phasing will not create or exacerbate unsafe conditions or unreasonable congestion.

In its post-trial brief, Vallee nevertheless asks the Court to condition the Act 250 permit on certain elements and phasing included in the TMP. We decline to do so. Because the construction phasing complies with Criterion 5, conditions to ensure compliance with Criterion 5 are simply unnecessary and therefore it would be unreasonable for the Court to impose such conditions. Furthermore, as Mr. LaCroix explained, the TMP is a living document that is to be updated over time. Tying permit conditions to the TMP as it exists now would prevent such updates and have the effect of making the construction phasing less compliant with Criterion 5.

For these reasons, we conclude that the Project's construction phasing and timeline comply with Criterion 5, and we answer Question 4.b in favor of VTrans.

e. Whether the Project Complies with Criterion 10

In our summary judgment decision, we found, based on the undisputed assertions of the parties, that "[t]he 2014 Colchester Town Plan (Town Plan) applies to the Project." Diverging Diamond, Nos. 169-12-16 Vtec, 50-6-16 Vtec at 28 (Oct. 11, 2017). We subsequently determined that Vallee had not identified any mandatory provision in the Town Plan with which the Project might fail to conform, and we dismissed Vallee's Question regarding conformity with Criterion 10. Diverging Diamond, Nos. 169-12-16 Vtec, 50-6-16 Vtec at 14 (Feb. 8, 2018).

In its post-trial reply brief, Vallee for the first time argues that if the Act 250 application vested on or before April 2, 2014, then the Court must reconsider its pretrial rulings on Criterion 10 and determine whether the Project conforms to an earlier town plan.

This is the first time that any party has raised the possibility that the Act 250 application may have vested in a town plan other than the 2014 Town Plan. It is therefore unclear whether Vallee has properly preserved this argument. Ferrisburgh Realty Inv'rs v. Schumacher, 2010 VT 6, ¶ 27, 187 Vt. 309. Even if the issue is properly raised, no evidence was introduced a trial that would allow us to address this issue. Neither the 2014 Town Plan nor any other town plan was admitted. We are therefore unable to further address this issue, and we decline to alter our previous conclusion that the Project complies with Criterion 10.

f. Act 250: Conclusion

Because the Project complies with all of the Act 250 criteria, we conclude that the Act 250 permit should be **GRANTED**.

VI. Costco Proposal

Costco argues that the Court can approve improvements in the Mountain View Drive intersection separate and apart from the overall Project proposed by VTrans here. This argument is rendered moot by our conclusion that both permit applications should be granted.

VII. Conclusion

For the reasons detailed above, we **GRANT** VTrans' applications for an Act 250 land use permit, with the conditions imposed by the District Commission set out at VTrans Ex. 3, Bates 022019–24, and **GRANT** VTrans' application for an individual stormwater discharge permit.

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

Electronically signed on June 01, 2018 at 09:59 AM pursuant to V.R.E.F. 7(d).

Tom Walsh

Thomas G. Walsh, Judge
Superior Court, Environmental Division

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
Docket No. 597-10-15 Rdcv

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

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

ORDER ON MOTION FOR CONTEMPT

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

On June 19, 2018, the State filed a Motion for Contempt alleging that Defendants failed to comply with the Order. On June 20, 2018, the Court issued an Order to Show Cause. The Court held ~~an evidentiary~~ hearing on the Order to Show Cause on July 23, 2018.

Based on the ~~evidence~~ presented at the hearing on the Order to Show Cause, the Court hereby FINDS as follows:

1. On November 14, 2016, Defendants were served with a copy of the Order.

2. In violation of ¶ 5 of the Order, Defendants did not pay the $24,750.00 civil penalty assessed. The State was able to obtain $752.39 through a tax set-off, leaving a current outstanding balance due to the State of $23,997.61.
3. In violation of ¶¶ 3(i) and (ii) of the Order, Defendants failed to have an outside consulting engineer review the construction, use, and capacity of the manure pit and milk house waste system, and failed to provide the consultant's findings and recommendations to the Agency of Agriculture Food and Markets (AAFM) as required.
4. In violation of ¶ 3(iii) of the Order, Defendants failed to make any alterations or construction to the manure pit and milk house waste system necessary to comply with Vermont statutes and regulations.
5. In violation of ¶ 2 of the Order, Defendants failed to certify in writing to AAFM by November 1st each year for 3 years following the date of the order that there is at least 180 days of storage at the manure pit or that they made arrangements for alternative storage capabilities. Although Defendants were served with the Order mid-November of the first year, Defendants have since failed to submit any writing to AAFM for purposes of complying with the directive of ¶ 2.
6. In February 2018, AAFM representatives responded to complaints regarding the manure pit at Defendants' Farm and observed that manure was leaking and/or overflowing from Defendants' manure pit.
7. Defendants have failed to manage the manure pit in order to prevent overflow of manure, risking discharge of manure to State waters.

8. In violation of ¶ 1 of the Order, Defendants have failed to follow all applicable Vermont statutes and regulations, including that they manage the manure pit properly and so as to not overflow.
9. As set forth above, Defendants have knowingly and willfully failed to comply with the June 28, 2016 Order on Injunctive and Monetary Remedies.

Based on the foregoing findings supported by clear and convincing evidence, and pursuant to 6 V.S.A. § 4995, 10 V.S.A. § 8221, and 12 V.S.A. § 122, the Court hereby ORDERS as follows:

1. Defendants, William and Robin Hanfield, are each in civil contempt for violating this Court's June 28, 2016 Order on Injunctive and Monetary Remedies, a copy of which is attached and incorporated in this Order.
2. Defendants shall comply with the June 26, 2016 Order as set forth below, while all terms not specifically addressed shall remain in full force and effect:
    a. Defendants shall comply with ¶ 3 of the June 28, 2016 Order, as follows:
        i. ¶ 3(i) (Defendants shall "hire an outside consulting engineer, approved in advance by AAFM, to review the construction, use and capacity of the manure pit and milk house waste system") on or before September 1, 2018;
        ii. Defendants shall empty the manure pit on or before November 15, 2018, in order to facilitate the consulting engineer to review the construction, use and capacity of the manure pit.
        iii. ¶ 3(ii) (Defendants shall "provide the consultant's findings and recommendations to AAFM") on or before April 15, 2019;

iv. ¶ 3(iii) (Defendants shall "make any alterations or construction to the manure pit and milk house waste system deemed necessary by AAFM") as directed by AAFM, if deemed necessary by AAFM.

b. Defendants shall comply with ¶ 5 of the June 28, 2016 Order, as follows:

i. On or before the 15th day* of each month, beginning on August 15, 2018, Defendants shall pay $800.00 toward ~~the total amount~~ Defendants' remaining civil penalty of $23,997.61 ~~plus interest at the statutory rate of 12% per annum~~.

3. Should Defendants fail to comply with the requirements set forth in paragraph 2a. above ~~any of the above-listed requirements, which shall include the remaining terms of the June 28, 2016 Order not otherwise addressed above~~, Defendants shall be liable for an additional $100.00 per day in coercive penalties.

4. The Court hereby reserves the right to require Defendants to reimburse the State of Vermont for the costs of bringing the motion for contempt, including reasonable attorney's fees.

5. The Court hereby reserves the right to impose further coercive monetary sanctions and all other coercive measures allowable by law should Defendants fail to comply with this Order.

6. Defendants shall comply with all terms of the June 28, 2016 order not otherwise addressed above.

SO ORDERED.

7/23/18

Hon. Samuel Hoar, Jr.
Superior Court, Civil Division, Rutland Unit

Date

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 597-10-15 Rdcv

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

v.

WILLIAM and ROBIN HANFIELD,
Defendants.

STATE OF VERMONT'S MOTION FOR CONTEMPT

NOW COMES the State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and hereby moves this Court, pursuant to 12 V.S.A. § 122 and the general equitable jurisdiction of the Court, to find Defendants, William and Robin Hanfield ("Defendants"), in contempt of the Court's June 28, 2016 Order on Injunctive and Monetary Remedies. In support of the motion, the State provides the following Memorandum of Law.

MEMORANDUM OF LAW

Procedural History

On October 8, 2015 the State of Vermont filed its Complaint in this matter. The Complaint alleged that Defendants violated 10 V.S.A. § 1259 and Vermont's

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Accepted Agricultural Practices[1] ("AAPs") by, on multiple occasions, allowing the manure pit on Defendants' farm to overtop. Defendants did not answer the Complaint.

On March 21, 2016, the State moved for Default Judgment on liability. In support of the motion, the State filed affidavits and exhibits sufficient to establish the violations alleged in the Complaint. The State represented that if liability was found against Defendants, it would request a hearing on injunctive and monetary remedies. By Judgment Order dated April 27, 2016, this Court granted the State's motion and entered judgment on liability against Defendants.

The April 27, 2016 Judgment Order

In its April 27, 2016 Judgment Order, this Court ordered that Defendants are liable for six violations of Vermont's agricultural and environmental laws and regulations. *See* Judgment Order ("the Default Order"). The Court concluded that Defendants violated 10 V.S.A. § 1259(a) on three separate occasions by discharging waste from their overtopped manure pit to waters of the State without a permit from the Secretary of the Agency of Natural Resources. *Id.* ¶¶ A–C. Additionally, the Court determined that Defendants violated three separate provisions of the Vermont AAPs. *Id.* at ¶ D.

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[1] The AAPs in effect at the time of the underlying violations alleged in the Complaint were adopted in 2006, but were renamed "Required Agricultural Practices" ("RAPs") by Act 64 of 2015. Act 64 also directed the Secretary of the Agency of Agriculture, Food, and Markets ("AAFM") to revise the RAPs. The new RAPs went into effect on December 5, 2016. For purposes of clarity, this Motion refers to the applicable AAFM regulations as AAPs where the underlying violations occurred before December 5, 2016, and as RAPs where the alleged noncompliance has occurred on or since December 5, 2016.

Defendants violated section 4.01(a) of the AAPs by creating the direct discharges described above. Defendants violated section 4.01(b) of the AAPs by failing to manage and control the manure pit to prevent runoff to adjoining waters and across boundaries. *Id.* at ¶ E. Defendants violated section 4.01(d) of the AAPs by failing to manage and maintain the farm's waste management system so as to prevent the discharges or structural failures by allowing the manure pit to overtop on three occasions, and by failing to properly connect the milk house pipe to the manure pit. *Id.* ¶ F.

Having found Defendants liable as set forth above, the Court set a hearing on injunctive and monetary penalties.

The June 28, 2016 Order on Injunctive and Monetary Remedies

The Court held a hearing on June 28, 2016 to determine the appropriate injunctive and monetary remedies for the violations established by the Default Order. The Court required the State to serve notice of the hearing on Defendants in advance of the hearing. Despite being served with a copy of the hearing notice, Defendants did not appear or participate at the hearing. The State presented multiple witnesses to support the appropriate injunctive remedies and monetary penalties. This Court issued the Order on Injunctive and Monetary Remedies that same day, June 28, 2016. *See* Order on Injunctive and Monetary Remedies ("the Remedies Order") at 1.

Specifically, the Court ordered that Defendants comply with five provisions: (1) that Defendant properly manage the manure pit to prevent

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overflow; (2) that Defendants certify in writing to AAFM by November 1 of each of the three years following the Order that Defendants maintained at least 180 days of storage at the manure pit or had alternative storage capabilities; (3) that Defendants hire a consulting engineer, approved by AAFM, to review the manure pit, that Defendants provide the consulting engineer's findings and recommendations to AAFM, and that Defendants make any alterations to the manure pit and milk house waste system deemed necessary by AAFM; (4) that Defendants limit the use of the manure pit to only on-site generated waste until AAFM reviewed the consulting engineer's report and any required alterations were complete; and (5) that Defendants pay a $24,750.00 penalty to the State of Vermont.

The Remedies Order represents a final adjudication of the violations alleged in the Complaint and the appropriate remedies for those violations. No party appealed the Remedies Order to the Vermont Supreme Court.

Facts

In support of the motion for contempt the State offers the following summary of the relevant facts which are supported by the attached Affidavit of David Huber.

After several unsuccessful attempts by the State to have this Court's Remedies Order served on Defendants by the Rutland County Sheriff, an AAFM field agent served Defendants with a copy of the Remedies Order on November 14, 2016. Despite having been served with the Remedies Order, Defendants have

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not complied with this Court's Order.

To date, the outstanding penalty has not been paid to the State of Vermont, save for $752.39 obtained via tax-set off. The current outstanding balance of the amount due to the State is therefore $23,997.61 plus interest at the statutory amount.

More importantly, Defendants have not satisfied the injunctive remedies intended to ensure that State waters are protected. Defendants have neither submitted an engineer's report regarding the construction of the manure pit nor made any alterations to the pit to ensure that the manure pit will not overflow. Defendants have not operated and maintained the manure pit to ensure that it does not overflow.

In response to complaints that the manure pit was overflowing, AAFM investigated the Hanfield Farm in February 2018. The investigator observed that the pit was overflowing and/or leaking, and that more than 100 feet of the roadside ditch along Wheeler Road abutting the Hanfield Farm was full of manure. AAFM staff did not observe the manure reaching waters of the State, but observed clear violations of the RAPs[2], which demonstrate noncompliance with this Court's Remedies Order.

Despite a clear and unequivocal order of this Court, Defendants have continued to allow the manure pit to overtop in violation of Vermont's environmental laws and regulations and the Remedies Order.

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[2] *See supra* at footnote 1.

Argument

This Court has both statutory and inherent authority to enforce its orders. First, section 122 of Title 12 provides, in relevant part:

> [w]hen a party violates an order made against him [or her] in a cause brought to or pending before a superior judge or superior court or the district court after service of the order upon that party, contempt proceedings may be instituted against him [or her] before the court or any superior judge.

12 V.S.A. § 122. While authorized by statute, this court also has the inherent authority to enforce its orders and hold those who violate them in contempt. *See State v. Stell*, 2007 VT 106, ¶ 14, 182 Vt. 368 ("[T]he inherent authority to punish disobedience to judicial orders is a creature of necessity, to ensure that the Judiciary has a means to vindicate its own authority." (internal quotation and citation omitted)).

Civil contempt is a coercive measure and the court has discretion in fashioning an appropriate remedy. *See Sheehan v. Ryea*, 171 Vt. 511, 512 (2000). The remedy can include compensatory or coercive monetary sanctions, provided that the coercive sanctions are "purgeable, i.e., they must be capable of being avoided by defendants through adherence to the court's order." *Id.* (quoting *Russell v. Armitage*, 166 Vt. 392, 407–08 (1997)). In addition, "[i]mprisonment of indefinite duration may be the means to compel a party to do some act ordered by the court, and the party must be released on compliance with the order." *Id.* (citing *In re Sage*, 115 Vt. 516, 517 (1949)).

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Defendants have not performed the actions required of them by the Remedies Order, nor have they paid the penalty. Defendants continue to violate the Remedies Order by allowing the manure pit at their farm to overflow. Defendants have failed to submit to the Agency the report from an outside consulting engineer regarding the construction, use and capacity of the manure pit and milk house waste system. This Court should therefore find Defendants in contempt of the Court's June 28, 2016 Order.

RELIEF SOUGHT

WHEREFORE, based on the foregoing, the State of Vermont respectfully requests that the Court award the following relief:

(1) Find Defendant in contempt of the June 28, 2016 Order on Injunctive and Monetary Remedies;

(2) Order that Defendant comply with all terms of the June 28, 2016 Order on Injunctive and Monetary Remedies;

(3) Order that Defendant immediately pay the remaining penalty of twenty-three thousand nine hundred ninety-seven dollars and sixty-one cents ($23,997.61) with interest at the rate of 12% per annum to the State of Vermont;

(4) Order that Defendant reimburse the State for costs incurred as a result of the need to collect the unpaid penalty, including the cost of service and attorney's fees;

(5) Impose purgeable coercive sanctions or other coercive means to ensure

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109 State Street
Montpelier, VT 05609

Defendants comply with the June 28, 2016 Order; and

(6) Such other relief as the Court may deem just and appropriate.

DATED at Montpelier, Vermont this 19th day of June, 2018.

Respectfully submitted,

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: Ryan P K

Ryan P. Kane,
Megan R.H. Hereth,
Assistant Attorneys General
Attorney General's Office
109 State Street
Montpelier, Vermont 05602
802.828.2153

ryan.kane@vermont.gov
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ERN 7475

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

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT,)
VERMONT DEPARTMENT OF)
ENVIRONMENTAL CONSERVATION)
)
and)
)
VERMONT NATURAL RESOURCES BOARD)
Plaintiffs,)
)
v.)
)
CHITTENDEN RESORTS, LLC)
)
and)
)
RMT ASSOCIATES, LLC)
Defendants.)

PLEADINGS BY AGREEMENT

Plaintiffs, Vermont Department of Environmental Conservation and Natural Resources Board, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Defendants Chittenden Resorts, LLC and RMT Associates, LLC hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

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The Parties

1. Vermont Department of Environmental Conservation (DEC) is a state agency with offices in Montpelier, Vermont. As part of its operations, DEC

oversees environmental wastewater, potable water, and stormwater permits and compliance. DEC is an agency established by statute within the Agency of Natural Resources (ANR) under 3 V.S.A. § 2837.

2. Natural Resources Board (NRB) is an administrative body appointed by the governor with offices in Montpelier, Vermont. NRB is established under 10 V.S.A. § 6021, and administers Act 250 land use permits and compliance.

3. Defendant Chittenden Resorts, LLC is a Vermont limited liability company that operates the Mountain Top Inn and Resort in Chittenden, Vermont, located in Rutland County (the "Resort").

4. Defendant RMT Associates, LLC is a Vermont limited liability company that owns the land and premises comprising the Resort.

Statutory and Regulatory Structure

5. An Act 250 permit is required before commencing development. 10 V.S.A. § 6081(a) (mandating "no person shall . . . commence construction on a . . . development, or commence development without a permit").

6. A permit amendment "shall be required for any material change to a permitted development or subdivision, or any administrative change in the terms and conditions of a land use permit." Act 250 Rule 34(A).[1]

7. DEC administers a Potable Water Supply and Wastewater System permit program under 10 V.S.A. § 1971(1). Under 10 V.S.A. § 1973, "a person

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[1] The Vermont Act 250 Rules are available online at: http://www.nrb.state.vt.us/lup/publications/rules/2015rules.pdf

shall obtain a permit" from DEC before modifying or changing the use of "an existing building or structure in a manner that increases the design flow or modifies other operational requirements of a potable water supply or wastewater system." *See also* Vt. Admin. Code 16-3-300:1-303.[2]

8. DEC also administers a stormwater permit program under Chapter 47 of Title 10. The stormwater permit system applies to discharges from the expansion of an existing impervious surface, such as a parking lot or pathway. *See* Vt. Admin. Code 16-3-505:18-302.[3]
9. Under 10 V.S.A. § 8221, the Attorney General is authorized to bring enforcement actions in superior court to enforce Vermont's environmental laws, including violations of Chapter 47 (Water Pollution), Chapter 64 (Potable Water and Wastewater), and Chapter 151 (Land Use), and all "rules, permits, assurances, or orders implementing" such laws.
10. 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." Chapter 47, Chapter 64 and Chapter 151 are all 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.

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[2] The Vermont Wastewater System and Potable Water Supply Rule is also available online at: http://dec.vermont.gov/sites/dec/files/dwgwp/wastewater/pdf/finalwspwsrules.effective2007.09.29.pdf

[3] The Vermont Stormwater Management Rule is also available online at: http://dec.vermont.gov/sites/dec/files/documents/wsmd-sw-rule-unimpaired-2011-03-15.pdf

Facts relating to Defendants and Factual Allegations

11. Defendants Chittenden Resorts, LLC and RMT Associates, LLC (collectively, "Defendants"), taken together, own and operate the Resort, a four-season resort with a dining room, tavern, spa, salon, pool, hot tub, fitness center, guest rooms, cabins, guesthouses, and equestrian, wedding, meeting, and event facilities. The Resort covers approximately 350 acres and is located at 195 Mountain Top Road in Chittenden, Vermont, located in Rutland County. It is adjacent to the Chittenden Reservoir. The Resort is subject to several environmental permits, including land use permit (LUP) series 1R0166, and several wastewater permits.

12. Between 2011 and 2016, Defendants constructed multiple facilities and amenities and offered services beyond the scope of their permitted activities at the Resort without obtaining additional permits or permit amendments that may have been required. The unpermitted activity included:

    a. In 2012, Defendants improved an additional 11,000 square feet of existing lawn parking by laying down gravel. This development required a stormwater permit and an Act 250 permit or an amendment to the preexisting LUP Series 1R0166.

    b. In the Fall of 2014, Defendants re-installed a rope tow on the Resort's property by installing an electrical panel and concrete anchors at the top and bottom of a hill, supplying power to it,

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including night lighting (which was used for 18 total days), through a generator. While Defendants sought and received the requisite tramway permit from the State of Vermont Department of Labor, this development also required an Act 250 permit or an amendment to the preexisting LUP Series 1R0166.

c. Around 2011, the owner of the Mountain Aire guest house expanded his lawn area by clearing, stumping, and grading about one acre of forested land. In June 2013, the owner of the Mountain Aire guest house and the Defendants entered into an agreement for use of the lawn area by the Resort from time to time for a so-called Marquee events tent. These developments required an Act 250 permit or an amendment to the preexisting LUP Series 1R0166.

d. Defendants used the Resort's Trailside Cottages known as Trillium, Grand Vista, Dewberry, and Campion (collectively, the "Cottages") with occupancy and bedroom counts occasionally exceeding the individual capacity limits for each home established by their wastewater and Act 250 permits. The overall capacity of the Cottages' wastewater system was never exceeded, however.

e. The Mountain Aire Lodge is subject to wastewater permit WW-1-1567, authorizing four bedrooms with a maximum occupancy of seven people. Defendants' Act 250 permit, LUP Series 1R0166, also applies to Mountain Aire Lodge, and authorizes one single family

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dwelling. Defendants expanded and operated this residence as having two dwelling units (including a newly constructed Treehouse dwelling), containing five bedrooms with nine beds, for a total occupancy of 18 people. This exceeds the capacity limits established by the Act 250 and wastewater permits.

f. The Resort's Wedding Barn and Main Inn are subject to wastewater permits WW-1-0678-2 and WW-1-0678-3, authorizing a maximum capacity of 190 people. Defendants' Act 250 permit, LUP 1R0166-6, applies to the Wedding Barn and Main Inn and "incorporates all of the conditions of" wastewater permits WW-1-0678-2 and WW-1-0678-3. Defendants used the Wedding Barn to accommodate up to 250 guests on the main level, exceeding the maximum capacity under their Act 250 and wastewater permits.

g. Pursuant to an Act 250 permit amendment, Defendants constructed an addition to the Wedding Barn, including a catering kitchen, meeting room, spa, and salon. DEC takes the position that the expansion of the Main Inn's sleeping spaces and dining room seating capacity, along with the Wedding Barn addition, exceeded their Act 250 and Wastewater permits. Defendants disagreed with DEC as to what was considered "catering," with the meeting room and spa having been permitted.

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h. The Resort's Beach House Pavilion on the shore of the Chittenden Reservoir is subject to wastewater permits WW-1-0678-4 and WW-1-0678-5, authorizing its use as a wedding and event space, with a maximum total occupancy of 80 people and a maximum frequency of events involving onsite food service of once per week. Defendants' Act 250 permit, LUP 1R0166-8, applies to the Beach House Pavilion and "incorporates all of the conditions of" wastewater permits WW-1-0678-4 and WW-1-0678-5. Beginning in 2015, Defendants occasionally used the Beach House Pavilion at a higher capacity and with more frequent food service than permitted under their wastewater and Act 250 permits.

13. The failure to update or amend pertinent Act 250 and/or wastewater permits as detailed above has resulted in no demonstrable harm either to the public health, safety or welfare, or to the environment.

14. Over the last two years, Defendants have filed pending applications seeking all required Act 250 and wastewater permits and amendments.

Permit Omissions and Violations

15. By expanding the graveled area of the parking lot without the necessary stormwater and Act 250 permits or amendments, Defendants failed to secure all permits or amendment required by 10 V.S.A. § 1264(e)(1), 10 V.S.A. § 6081(a) and Act 250 Rule 34(A).

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16. By installing the rope tow without the necessary Act 250 permits or amendments, Defendants failed to secure all permits required by 10 V.S.A. § 6081(a) and Act 250 Rule 34(A).

17. The construction and development associated with the Marquee events tent near the Mountain Aire guest house without the required Act 250 permits or amendments violated 10 V.S.A. § 6081(a) and Act 250 Rule 34(A).

18. By occasionally exceeding the maximum permitted occupancy allowed under their Act 250 and wastewater permits at the Cottages, Defendants violated their Act 250 and wastewater permits under 10 V.S.A. § 8003(a)(10) and 10 V.S.A. § 1973.

19. By exceeding the maximum permitted occupancy allowed under their Act 250 and wastewater permits at the Mountain Aire guest house, 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) were violated.

20. By exceeding the permitted maximum number of persons allowed under their Act 250 and wastewater permits at the Wedding Barn and Main Inn, by further developing the Wedding Barn beyond the scope of the Act 250 and wastewater permits, and by expanding the sleeping and dining capacity at the Main Inn beyond what was permitted under their Act 250 and wastewater permits, Defendants violated 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10).

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21. By exceeding the maximum occupancy allowed under their Act 250 and wastewater permits at the Beach House Pavilion, Defendants violated 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10).

DEFENDANTS' RESPONSE TO THE ALLEGED VIOLATIONS

Defendants answer the preceding allegations as follows:

22. Defendants admit the factual allegations set forth in paragraphs 11–14, solely for purposes of resolving this case.

SIGNATURES APPEAR ON NEXT PAGE

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

DATED at Montpelier, Vermont this 30th day of January, 2018.

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 Chittenden, Vermont this 26 day of January, 2018.

CHITTENDEN RESORTS, LLC

By: _____
[name/title]: Managing Member

DATED at Chittenden, Vermont this 26 day of January, 2018.

RMT ASSOCIATES, LLC

By: _____
[name/title]: Managing Member

APPROVED AS TO FORM:

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

_____
Christopher D. Roy
Downs Rachlin Martin PLLC
199 Main Street, PO Box 190
Burlington, VT 05402
Attorneys for Defendants

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

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT,	)
VERMONT DEPARTMENT OF	)
ENVIRONMENTAL CONSERVATION	)
	)
and	)
	)
VERMONT NATURAL RESOURCES BOARD	)
Plaintiffs,	)
	)
v.	)
	)
CHITTENDEN RESORTS, LLC	)
	)
and	)
	)
RMT ASSOCIATES, LLC	)
Defendants.	)

CONSENT AGREEMENT AND FINAL ORDER

The above-named Plaintiffs and Defendants (collectively, the "Parties"), having filed Pleadings by Agreement pursuant to Rule 8(g) of the Vermont Rules of Civil Procedure; and the Parties having agreed that settlement of this matter is in the public interest and that entry of this Consent Agreement and Final Order ("Consent Order") without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law and without the admission or denial of liability, based upon the Pleadings by Agreement and pursuant to 10 V.S.A.

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§ 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

PRELIMINARY STATEMENT

1. By and through the Attorney General, Plaintiffs initiated this proceeding for the assessment of a civil penalty pursuant to 10 V.S.A. § 8221. Under 10 V.S.A. § 8221, Defendants are 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.
2. The Pleadings by Agreement allege that Defendants violated various provisions relating to their Act 250 permit(s), wastewater permit(s), and/or stormwater permit(s) that were previously issued pursuant to Vermont statute.
3. The Parties subsequently entered into negotiations to settle the allegations contained in the Pleadings by Agreement. This Consent Order is the result of such negotiations and resolves the liability of the Defendants for matters alleged in the Pleadings by Agreement.
4. The Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred. In arriving at the proposed penalty amount, the State has considered the criteria in 10 V.S.A. § 8010(b)-(c), including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the

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violations, the length of time the violations existed and that Defendants knew or had reason to know the violations existed.

5. The Parties stipulate that the Rutland Civil Division of the Vermont Superior Court has jurisdiction over the subject matter alleged in the Pleadings by Agreement, and that the Pleadings by Agreement state a claim upon which relief can be granted.

RECITATION OF PERMIT VIOLATIONS

6. The Parties have stipulated and agreed that certain claimed permit violations will not be contested by Defendants.

7. Plaintiffs have alleged the following violations of Vermont's land use and environmental laws and regulations at The Mountain Top Inn and Resort in Chittenden, Vermont by Defendants:

   a. violating 10 V.S.A. § 6081(a), 10 V.S.A. § 1264(e)(1) and Act 250 Rule 34(A) in 2011 for expanding the graveled portion of their parking area by approximately 11,000 feet without the necessary stormwater permits, Act 250 permits, and/or permit amendments;

   b. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in the Fall of 2014 for installing a rope tow system without the necessary Act 250 permit and/or amendment;

   c. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) around 2011 for undertaking the construction and development associated with the

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Marquee Events tent near the Mountain Aire guest house without the required Act 250 permits and/or amendments;

d. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the maximum occupancy allowed under their wastewater permits and for exceeding the maximum permitted occupancy allowed under their Act 250 permits at Trailside Cottages Trillium, Grand Vista, Dewberry, and Campion;

e. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the maximum occupancy allowed under the wastewater permit and for exceeding the permit occupancy allowed under the Act 250 permit at the Mountain Aire Lodge and Treehouse;

f. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the permitted maximum capacity under their Act 250 and wastewater permits at the Wedding Barn and Main Inn, further developing the Wedding Barn beyond the scope of the Act 250 and wastewater permits, and expanding the sleeping and dining capacity at the Main Inn beyond what was permitted under their Act 250 and wastewater permits; and

g. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the maximum occupancy allowed under their Act 250 and wastewater permits at the Resort's Beach House Pavilion.

8. Defendants agree that the above violations are deemed proved and established as a "prior violation" in any future state proceeding that

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GENERAL
109 State Street
Montpelier, VT
05609

requires consideration of Defendants' past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010.

PENALTY

9. For the violations described above, Defendants shall pay a civil penalty of ninety thousand U.S. dollars ($90,000.00).

10. Payment shall be paid within fifteen (15) days after entry of this Consent Agreement and Final Order, by check payable to the "State of Vermont" and sent to: Justin E. Kolber, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. In the event that payment is received by the State before the Court has approved the Consent Agreement and Final Order, the State shall hold the check in trust until approval. Should the Court reject the Consent Order and Final Judgment Order, the State will return the check(s) to Defendants.

11. In the event that Defendants fail to pay the amount as described in paragraphs 9-10, such failure shall constitute a breach of this Consent Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. Defendants shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.

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INJUNCTIVE RELIEF

12. Defendants agree to hereby designate Craig Jewett, P.E. of Otter Creek Engineering, or some other qualified professional designated by Defendants, as a compliance officer and as primary contact with respect to all state environmental permits for The Mountain Top Inn and Resort.

OTHER PROVISIONS

13. Defendants waive: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendants under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

14. This Consent Order is binding upon the parties and all their successors and assigns.

15. Nothing in this Consent Order shall be construed to create or deny any rights in, grant or deny any cause of action to, or release any claim from, any person not a party to this Consent Order, including any third party or any other government or sovereign.

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

17. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or

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

penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

18. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendants' obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendants.

19. 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 Court. Any representations not set forth in this Consent Order and Final Judgment Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

20. The Rutland Civil Division of the Vermont Superior Court shall have jurisdiction over this Consent Order and the Parties for the purpose of enabling any of the Parties to apply to this Court at any time for orders and directions as may be necessary or appropriate to carry out or construe the Consent Order, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions. The laws of the State of Vermont shall govern the Orders.

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

DATED at Montpelier, Vermont this 30th day of January, 2018.

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 Chittenden, Vermont this 26 day of January, 2018.

CHITTENDEN RESORTS, LLC

By: _____
[name/title]: Managing Member

DATED at Chittenden, Vermont this 26 day of January, 2018.

RMT ASSOCIATES, LLC

By: _____
[name/title]: Managing Member

APPROVED AS TO FORM:

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

_____
Christopher D. Roy
Downs Rachlin Martin PLLC
199 Main Street, PO Box 190
Burlington, VT 05402
Attorneys for Defendants

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

ORDER AND FINAL JUDGMENT

Based on the Pleadings by Agreement and the terms of the Consent Agreement of the Parties, the Court enters this ORDER and FINAL JUDGMENT.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Rutland, Vermont this ___ day of January, 2018.

_____

Hon. Samuel Hoar, Jr.
Rutland Superior Court Judge

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

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 72-1-18 Rdcv

STATE OF VERMONT,)
VERMONT DEPARTMENT OF)
ENVIRONMENTAL CONSERVATION)
)
and)
)
VERMONT NATURAL RESOURCES BOARD)
Plaintiffs,)
)
v.)
)
CHITTENDEN RESORTS, LLC)
)
and)
)
RMT ASSOCIATES, LLC)
Defendants.)

CONSENT AGREEMENT AND FINAL ORDER

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

§ 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

PRELIMINARY STATEMENT

1. By and through the Attorney General, Plaintiffs initiated this proceeding for the assessment of a civil penalty pursuant to 10 V.S.A. § 8221. Under 10 V.S.A. § 8221, Defendants are 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.
2. The Pleadings by Agreement allege that Defendants violated various provisions relating to their Act 250 permit(s), wastewater permit(s), and/or stormwater permit(s) that were previously issued pursuant to Vermont statute.
3. The Parties subsequently entered into negotiations to settle the allegations contained in the Pleadings by Agreement. This Consent Order is the result of such negotiations and resolves the liability of the Defendants for matters alleged in the Pleadings by Agreement.
4. The Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 10 of the Vermont Statutes Annotated in which the violations occurred. In arriving at the proposed penalty amount, the State has considered the criteria in 10 V.S.A. § 8010(b)-(c), including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the

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violations, the length of time the violations existed and that Defendants knew or had reason to know the violations existed.

5. The Parties stipulate that the Rutland Civil Division of the Vermont Superior Court has jurisdiction over the subject matter alleged in the Pleadings by Agreement, and that the Pleadings by Agreement state a claim upon which relief can be granted.

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7. Plaintiffs have alleged the following violations of Vermont's land use and environmental laws and regulations at The Mountain Top Inn and Resort in Chittenden, Vermont by Defendants:

   a. violating 10 V.S.A. § 6081(a), 10 V.S.A. § 1264(e)(1) and Act 250 Rule 34(A) in 2011 for expanding the graveled portion of their parking area by approximately 11,000 feet without the necessary stormwater permits, Act 250 permits, and/or permit amendments;

   b. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) in the Fall of 2014 for installing a rope tow system without the necessary Act 250 permit and/or amendment;

   c. violating 10 V.S.A. § 6081(a) and Act 250 Rule 34(A) around 2011 for undertaking the construction and development associated with the

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

Marquee Events tent near the Mountain Aire guest house without the required Act 250 permits and/or amendments;

d. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the maximum occupancy allowed under their wastewater permits and for exceeding the maximum permitted occupancy allowed under their Act 250 permits at Trailside Cottages Trillium, Grand Vista, Dewberry, and Campion;

e. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the maximum occupancy allowed under the wastewater permit and for exceeding the permit occupancy allowed under the Act 250 permit at the Mountain Aire Lodge and Treehouse;

f. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the permitted maximum capacity under their Act 250 and wastewater permits at the Wedding Barn and Main Inn, further developing the Wedding Barn beyond the scope of the Act 250 and wastewater permits, and expanding the sleeping and dining capacity at the Main Inn beyond what was permitted under their Act 250 and wastewater permits; and

g. violating 10 V.S.A. § 1973 and 10 V.S.A. § 8003(a)(10) for exceeding the maximum occupancy allowed under their Act 250 and wastewater permits at the Resort's Beach House Pavilion.

8. Defendants agree that the above violations are deemed proved and established as a "prior violation" in any future state proceeding that

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

requires consideration of Defendants' past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010.

PENALTY

9. For the violations described above, Defendants shall pay a civil penalty of ninety thousand U.S. dollars ($90,000.00).

10. Payment shall be paid within fifteen (15) days after ~~entry of~~ become final this Consent Agreement and Final Order by check payable to the "State of Vermont" and sent to: Justin E. Kolber, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. In the event that payment is received by the State before the Court has approved the Consent Agreement and Final Order, the State shall hold the check in trust until approval. Should the Court reject the Consent Order and Final Judgment Order, the State will return the check(s) to Defendants.

11. In the event that Defendants fail to pay the amount as described in paragraphs 9-10, such failure shall constitute a breach of this Consent Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. Defendants shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.

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

INJUNCTIVE RELIEF

12. Defendants agree to hereby designate Craig Jewett, P.E. of Otter Creek Engineering, or some other qualified professional designated by Defendants, as a compliance officer and as primary contact with respect to all state environmental permits for The Mountain Top Inn and Resort.

OTHER PROVISIONS

13. Defendants waive: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendants under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

14. This Consent Order is binding upon the parties and all their successors and assigns.

15. Nothing in this Consent Order shall be construed to create or deny any rights in, grant or deny any cause of action to, or release any claim from, any person not a party to this Consent Order, including any third party or any other government or sovereign.

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

17. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or

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

penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

18. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendants' obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendants.

19. 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 Court. Any representations not set forth in this Consent Order and Final Judgment Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

20. The Rutland Civil Division of the Vermont Superior Court shall have jurisdiction over this Consent Order and the Parties for the purpose of enabling any of the Parties to apply to this Court at any time for orders and directions as may be necessary or appropriate to carry out or construe the Consent Order, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions. The laws of the State of Vermont shall govern the Orders.

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

DATED at Montpelier, Vermont this 30th day of January, 2018.

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 Chittenden, Vermont this 26 day of January, 2018.

CHITTENDEN RESORTS, LLC

By: _____
[name/title]: Managing Member

DATED at Chittenden, Vermont this 26 day of January, 2018.

RMT ASSOCIATES, LLC

By: _____
[name/title]: Managing Member

APPROVED AS TO FORM:

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

_____
Christopher D. Roy
Downs Rachlin Martin PLLC
199 Main Street, PO Box 190
Burlington, VT 05402
Attorneys for Defendants

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

ORDER AND FINAL JUDGMENT

Based on the Pleadings by Agreement and the terms of the Consent Agreement of the Parties, the Court enters this ORDER and FINAL JUDGMENT.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Rutland, Vermont this 11th day of ~~January~~ September, 2018.

Hon. Samuel Hoar, Jr.
Rutland Superior Court Judge

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.

KANE'S SCENIC RIVER FARMS, 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 Kane's Scenic River Farms, LLC, by and through Gravel & Shea PC, hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

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. Kane's Scenic River Farms, LLC ("Defendant"), is an operator of Kane's Scenic River Farms, which is a dairy farming operation that includes real property and farming operations at 5893 VT Route 105 in Sheldon, Vermont ("the Farm").
3. The real property at 5893 VT Route 105 in Sheldon, Vermont is comprised of two or more parcels. Most or all of the production area for

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the Farm is on a parcel owned by the Thomas J. Kane Family Trust, with Nancy and Thomas Kane as Family Trustees. A smaller parcel to the south and west of the production area is owned in part by Aaron Kane.

The State's Allegations: Legal Framework

ANR Water Pollution Regulation

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. Under 10 V.S.A. § 1251, a "person" includes "any individual; partnership; company; corporation; association; joint venture; trust; [or] municipality."
7. Pursuant to 10 V.S.A. § 1251(3), a "discharge" is "the placing, depositing or emission of any wastes, directly or indirectly, into . . . waters of the State."
8. 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."

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9. 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."

Civil Action

10. 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.

The State's Allegations: Facts Relating to Defendant

The Farm

11. The Farm houses approximately 1000 mature dairy cows and 50 youngstock.

12. Among other features, the Farm includes a silage storage area on the northwest end of the production area ("big bunk"); at times, a silage storage area on the eastern end of the production area ("dry cow bunk"); a big manure pit directly southeast of the big bunk; a dry cow manure pit at the southern end of the production area; and several barns.

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13. The Farm's cow pits were originally designed and construction was supervised by the United States Department of Agriculture Natural Resources Conservation Service.

14. VT Route 105 runs generally along the south side of the Farm. The Missisquoi Valley Rail Trail ("Rail Trail") runs generally parallel to Route 105, between Route 105 and the Missisquoi River ("the River").

15. The Missisquoi River, a water of the State as defined in 10 V.S.A. § 1251(13), flows along VT Route 105 just south of the Farm.

March 2016 Discharge

16. On March 16, 2016, ANR received a complaint via its Environmental Compliance Division webpage regarding manure flowing from a culvert under the Rail Trail, near the Farm.

17. Environmental Enforcement Officer (EEO) Ted Cantwell visited the Farm on March 17, 18, and 21, 2016.

18. On March 17, 2016, EEO Cantwell observed manure-laden water flowing from a culvert under Route 105 and the Rail Trail, into a channelized surface water and to the Missisquoi River, about 500 feet downgradient from the culvert.

19. After observing the discharge into the River, EEO Cantwell then walked back up the embankment, crossed Route 105, and travelled into the

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farmyard at the Farm. He noted that there was a small wetland swale area just southeast of the dry cow pit.

20. EEO Cantwell made a second visit to the Farm on March 18, 2016. During this visit, north of the swale area, he observed liquid flowing out of a pipe, which was coming from the big silage bunk area. The liquid, which contained silage leachate, flowed and converged with the swale area.

21. The swale area contained liquid manure and silage leachate.

22. The leachate-and-manure-laden liquid from the swale area flowed through a short, channelized surface water to the culvert, then down to the Missisquoi River as described in paragraph 18.

23. Generally, silage leachate and manure contain high levels of nutrients, including phosphorus.

24. On or about March 18, 2016, Aaron Kane dug a hole in the swale area where the silage leachate and liquid manure was collecting. This revealed an approximately 1" black plastic pipe through which liquid manure was flowing into the swale area. The manure was coming from the adjacent dry cow pit.

25. On or about March 18, 2016, Aaron Kane folded the pipe and wrapped it with metal wire in order to stop the flow.

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Montpelier, VT 05609

26. According to EEO Cantwell, Aaron Kane stated that he was aware that he had some silage leachate leaking into the wet swale area, but that he was not aware of his pit leaking. He said he had been working with the Agency of Agriculture to correct the silage leachate issue but that it had not been fixed yet. He seemed genuinely shocked about the manure discharge.

The Missisquoi River and Lake Champlain

27. The Missisquoi River is part of the Lake Champlain watershed. The River flows into the Missisquoi Bay of Lake Champlain.

28. In the section of River that flows past the Farm—from the mouth to the Tyler Branch—the River is stressed from nutrients, sediment, and turbidity. This means that, though the River currently meets Vermont Water Quality Standards, pollutants prevent it from attaining the highest water quality.

29. The Missisquoi Bay is impaired by phosphorus, which means that it does not meet Vermont Water Quality Standards. It has one of the highest concentrations of phosphorus of any segment of Lake Champlain.

The State's Allegations: Violation

30. By discharging leachate-and-manure-laden water from the Farm to the Missisquoi River on two or more days in March 2016, Defendant violated

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10 V.S.A. § 1259(a). Defendant did not have a permit from ANR for this discharge of waste to waters of the State.

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATION

Defendant answers the preceding allegations as follows:

31. Without formally admitting or denying wrongdoing or liability for violations alleged, for the sole purpose of resolving this dispute, Defendant admits to the factual allegations detailed above (paragraphs 11-26).

32. Defendant claims it had no knowledge of any manure pit discharge and worked with EEO Cantwell and others to investigate and/or address the discharge on March 18, 2016.

33. Without formally admitting or denying wrongdoing or liability, Defendant agrees to the attached settlement of the violation alleged above in order to resolve this dispute.

34. Defendant agrees that the violation alleged is deemed proved and established as a "prior violation" in any future state proceeding that requires consideration of Defendant's past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010.

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

DATED at Montpelier, Vermont this 14th day of Sept., 2018.

Respectfully submitted,

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Laura B. Murphy (ERN 5042)
Megan R.H. Hereth (ERN 7475)
Assistant Attorneys General
109 State Street
Montpelier, VT 05609
(802) 828-3186
laura.murphy@vermont.gov
megan.hereth@vermont.gov

DATED at Burlington, Vermont this 10th day of September, 2018.

KANE'S SCENIC RIVER FARMS, LLC,

By: _____

Timothy M. Eustace, Esq. (ERN 3285)
Gravel & Shea PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
teustace@gravelshea.com
For Defendant

STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
Docket No. Frcv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

KANE'S SCENIC RIVER FARMS, 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 Kane's Scenic River Farms, LLC, by and through Gravel & Shea PC, 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. manure and silage leachate, into waters of the State, i.e. the Missisquoi River, without a permit from the Secretary of the Agency of Natural Resources;

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;

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

WHEREAS, under 10 V.S.A. § 8221, if found responsible 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 the State's allegations described and identified in the Pleadings by Agreement;

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

1. Without formally admitting or denying wrongdoing or liability, Defendant agrees to this settlement of the violations alleged above in order to resolve this dispute;
2. Defendant agrees that the violation alleged is deemed proved and established as a "prior violation" in any future state proceeding that

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

requires consideration of Defendant's past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010;

3. 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;
4. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreement signed by the parties and approved by the Court;
5. The Court should hold this Stipulation and the Consent Order for twenty-one (21) calendar days following their submission to the Court for the State to post them on its website to facilitate possible public participation in consideration of this settlement; and
6. Following expiration of the twenty-one (21) day period, the attached Consent Order may be entered as a final Judgment in this matter by the Court.

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

DATED at Montpelier, Vermont this 14th day of Sept, 2018.

Respectfully submitted,

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Laura B. Murphy
Megan R.H. Hereth
Assistant Attorneys General
109 State Street
Montpelier, VT 05609
(802) 828-3186
laura.murphy@vermont.gov
megan.hereth@vermont.gov

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

DATED at Burlington, Vermont this 10th day of September, 2018.

KANE'S SCENIC RIVER FARMS, LLC,

By: _____

Timothy M. Eustace, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
teustace@gravelshea.com
For Defendant

As to paragraph 9 of the Consent Order:

THOMAS KANE, NANCY KANE,
AARON KANE, and ASHLEY SWAINBANK

_____
Thomas Kane

_____
Nancy Kane

_____
Aaron Kane

_____
Ashley Swainbank

STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
Docket No. 359-9-18 Frcv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

KANE'S SCENIC RIVER FARMS, 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:

RELIEF

1. Defendant shall pay a civil penalty of thirteen thousand five hundred dollars ($13,500). Payments shall be made in four parts, with the first payment of $3,375 due within five (5) business days of the Court's issuance of this Consent Order and Final Judgment Order. Remaining payments of $3,375 each shall be made on December 31, 2018, March 29, 2019, and June 28, 2019.

2. Payment of the thirteen-thousand-five-hundred-dollar ($13,500) 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.
3. In the event that Defendant fails to pay the amounts described in paragraphs 1 and 2 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.
4. Defendant shall perform corrective actions at the Farm at 5893 VT Route 105 in Sheldon, Vermont. Specifically, Defendant shall:
    a. Comply with a Vermont Agency of Natural Resources ("ANR")-approved long-term plan ("the Plan") to permanently eliminate silage leachate discharges from the Farm.
        i. The Plan shall consist of:
            1. The Waste Storage Facility plan document prepared by the United States Department of Agriculture Natural Resources Conservation Service (NRCS), attached as Attachment 1;
            2. The supporting calculations ("WSS Sizing Calculator" and "Paved Lot Runoff Calculator" contained in "WSF Size – Silage Leachate" spreadsheet), which are known to both parties, prepared by the NRCS and transmitted via email

from NRCS to Chris Gianfagna, ANR, on November 16, 2017;

3. Results of the geotechnical investigation in accordance with NRCS Code 313 demonstrating the required separation to groundwater, which shall be submitted to ANR no later than five (5) calendar days before commencing construction to implement the Plan;
4. A certification from a professional engineer licensed in Vermont or an NRCS State Engineer that the structure was designed in accordance with NRCS Code 313, which shall be submitted to ANR no later than five (5) calendar days before commencing construction to implement the Plan;
5. A grading plan with internal and external side slopes and structure floor and crest elevations, prepared by Defendant and subject to review, revision, and approval by ANR, which shall be submitted to ANR no later than five (5) calendar days before commencing construction to implement the Plan; and
6. A map showing the structure location, parcel boundaries, surface waters, and all applicable setbacks in accordance with the Required Agricultural Practices, prepared by Defendant and subject to review, revision, and approval by ANR, which shall be submitted to ANR no later than five (5) calendar days before commencing construction to implement the Plan.

ii. Defendant shall implement the Plan by October 15, 2018. In the event Defendant fails to fully implement the Plan by October 15, 2018, ANR may extend the compliance deadline upon Defendant showing that Defendant made reasonable and good faith efforts to fully implement the Plan by October 15, 2018, and the failure to fully implement the Plan by October 15, 2018 was no fault of Defendant's. ANR agrees that its decision regarding whether to extend the compliance deadline under this paragraph 4(a)(ii)

shall be reviewable by the Court in accordance with Rule 75 of the Vermont Rules of Civil Procedure.

iii. Nothing herein relieves Defendant of the obligation to obtain any and all regulatory approvals necessary to implement the Plan, including but not limited to any required construction stormwater permits.

iv. Upon implementation of the Plan, Defendant shall provide ANR with an as-built plan and a certification from a Professional Engineer or an NRCS Engineer that construction was done in accordance with the Plan. The as-built plan and certification shall be submitted to Chris Gianfagna (chris.gianfagna@vermont.gov). Email format with attachments is an acceptable format.

b. Eliminate silage leachate discharges from the Farm until the long-term plan described in paragraph 4(a) is fully implemented. Defendant shall maintain adequate freeboard in the dry cow pit, consistent with the NRCS 313 standard, to receive leachate and shall not cover or block, or allow to be covered or blocked, the big bunk catchbasin (through which leachate flows to the dry cow pit).

c. Until the long-term plan described in paragraph 4(a) is fully implemented, Defendant shall provide to ANR on the 30th of each month a report that includes:

i. A narrative description of conditions at the Farm, including an estimate of freeboard in the dry cow pit;

ii. Pictures of the available freeboard in the dry cow pit, the big bunk catchbasin, and the horse pasture, including the channel that flows to the Missisquoi River, to ensure there are no discharges;

iii. If a discharge is observed, the report shall so state;

iv. The report shall be submitted to Chris Gianfagna (chris.gianfagna@vermont.gov). Email format with attachments is an acceptable format for the monthly reports.

d. Until the long-term plan described in paragraph 4(a) is fully implemented, Defendant agrees to allow ANR access to the Farm to conduct inspections to confirm compliance with this Order. This access shall be in addition to ANR's existing authorities regarding access.

5. As described in the attached affidavit of Aaron Kane (Attachment 2), the manure pipe discharge was remedied as follows: (i) on or about March 18, 2016, Aaron Kane bent the discharging end of the pipe over and tied it with wire, and plugged the pipe with a plastic cap; and (ii) in October or November

2017, Aaron Kane located the other end of the pipe when the manure pit was empty, filled the pipe with premixed tile grout, and plugged that end of the pipe with a plastic cap and a stainless-steel clamp.

OTHER PROVISIONS

6. While pursuant to Paragraph 1 of the Stipulation for the Entry of Consent Order and Final Judgment Order, the parties stipulate that Defendant does not admit or deny liability for the violation alleged in Paragraph 30 of the Pleadings by Agreement, the parties stipulate that the violation alleged is deemed proved and established as a "prior violation" in any future state proceeding that requires consideration of Defendant's past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010.
7. 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.
8. 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.

9. 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, of which Defendant agrees to make good faith efforts to provide notice to ANR, or for the State to collect the amounts described in paragraphs 1 to 3 or enforce the relief described in paragraph 4: Thomas Kane, Nancy Kane, Aaron Kane, and Ashley Swainbank, as Principals of Kane's Scenic River Farms, LLC, and operators of the Farm, shall be responsible for complying with paragraphs 1, 2, 3, 4(a), 4(c), and 4(d) of this Consent Order.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

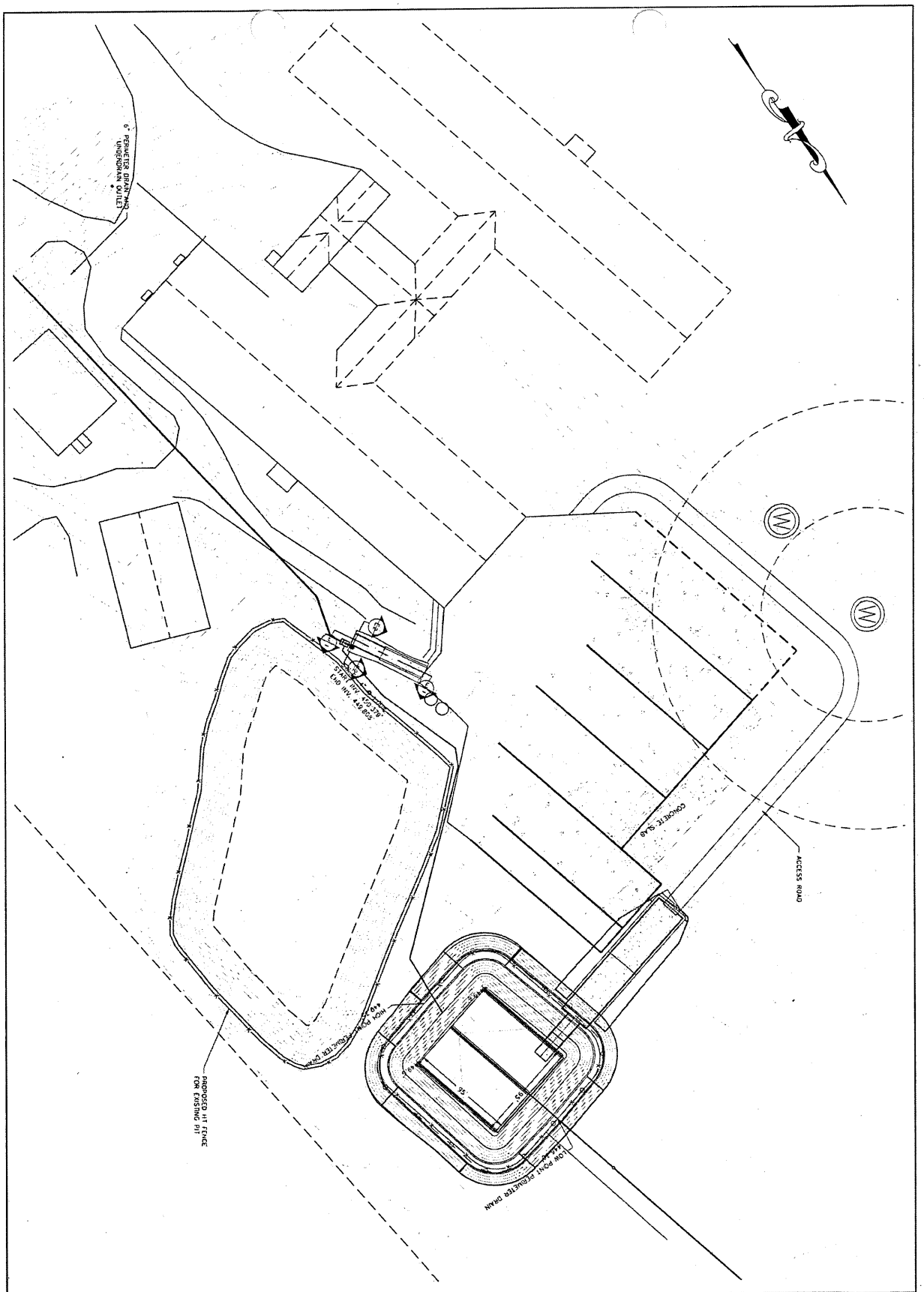
15. This Consent Order may be altered, amended, or otherwise modified only by subsequent written agreement signed by the parties and approved by this Court. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at St. Albans, Vermont this 9th day of October, 2018.

Hon.
Vermont Superior Court Judge,
Franklin Unit

Vermont Superior Court
OCT - 9 2018
FILED: Franklin Civil



Sheet of

Drawing Name

File Name

TOM KANE (HOME FARM)
WASTE MANAGEMENT SYSTEM
SITE PLAN

VERMONT

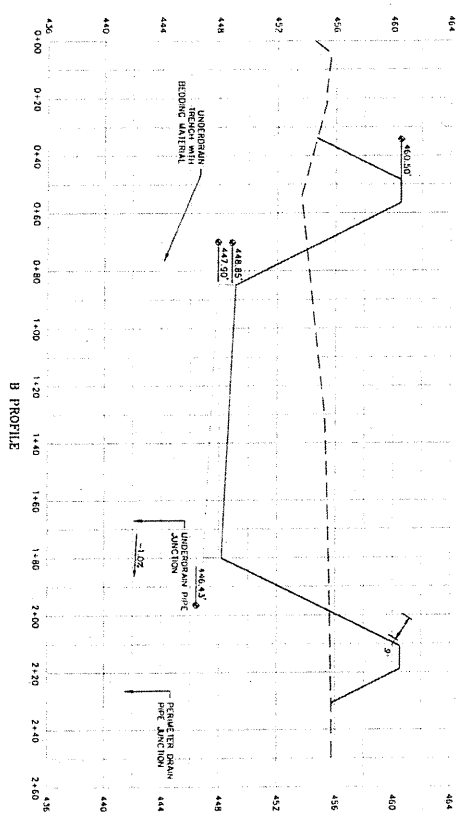
HAZARD CLASS
LOW

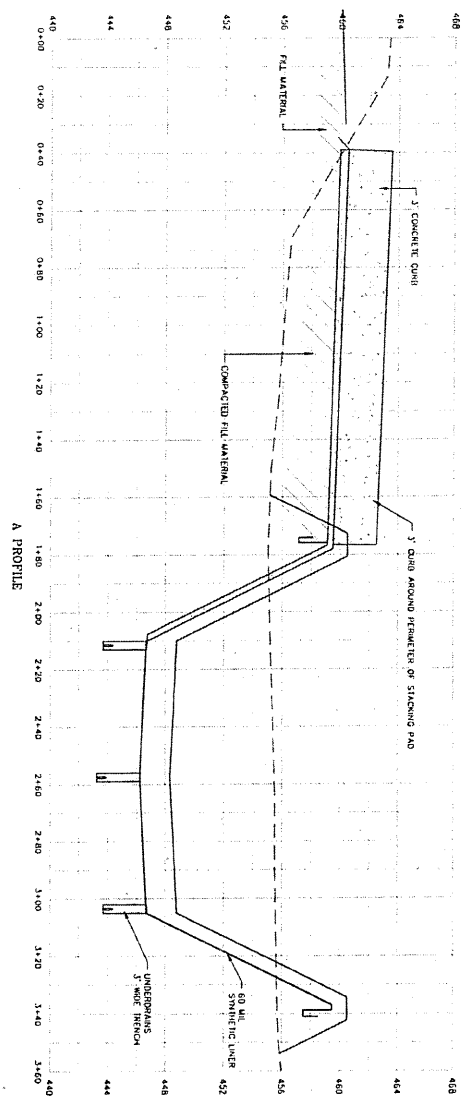
JOB CLASS
I

USDA United States Department of Agriculture
Natural Resources Conservation Service

Designed R. THOMPSON
Drawn X. RIVERA
Checked
Approved by

Date





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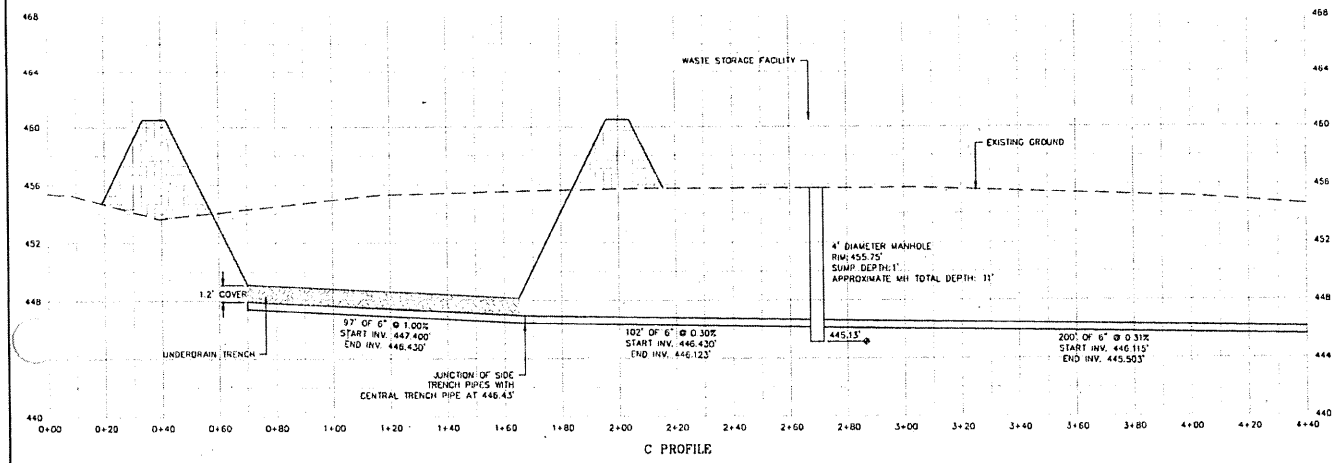
Designed
Drawn X. RIVERA
Checked
Approved by
Date



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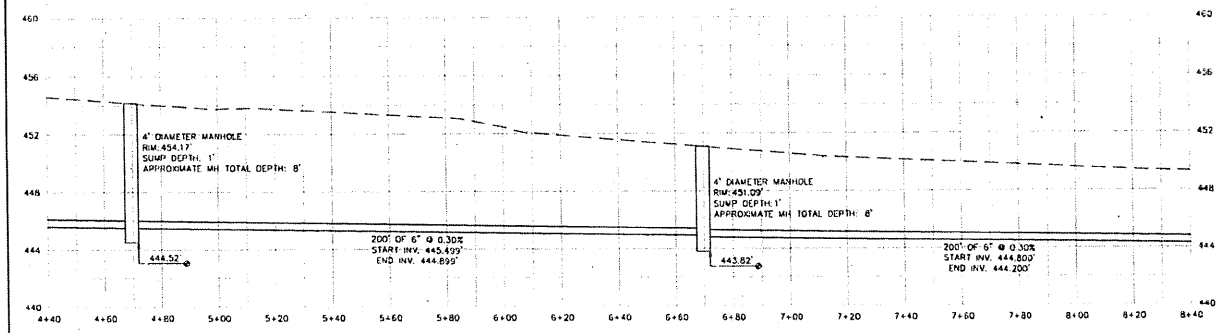

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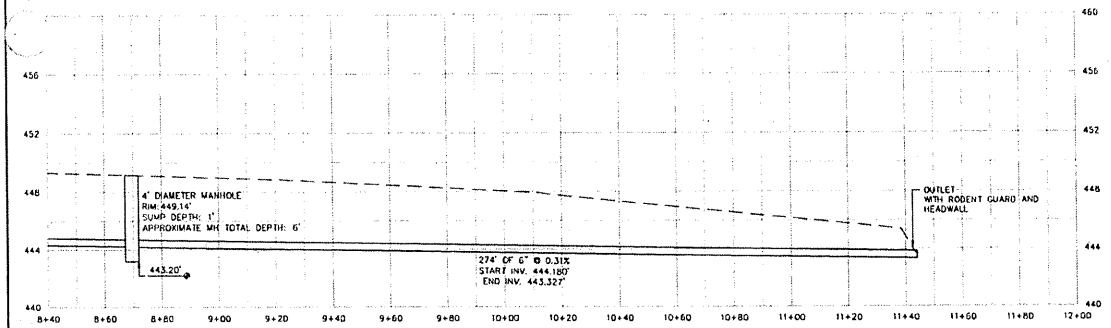


C PROFILE

TRENCH PIPE INVERT ELEVATIONS AT WSF

TRENCH	START INV. (FT)	BEND INV. (FT)	JUNCTION INV. (FT)
EAST	447.90	446.93	446.43
CENTRAL	447.40	–	446.43
WEST	447.90	446.93	446.43

NOTE: ALL SLOPES ARE AT 1%
THIS TABLE DOES NOT INCLUDE VALUES FROM THE TRENCH PIPE JUNCTION TO THE OUTLET. REFER TO PROFILES FOR DETAILS.

PROFILE & CROSS SECTION SCALE
VERTICAL 1" = 4'
HORIZONTAL 1" = 20'

Date
Designed
Drawn X. RIVERA
Checked
Approved By

United States Department of Agriculture
Natural Resources Conservation Service

HAZARD CLASS LOW

JOB CLASS I

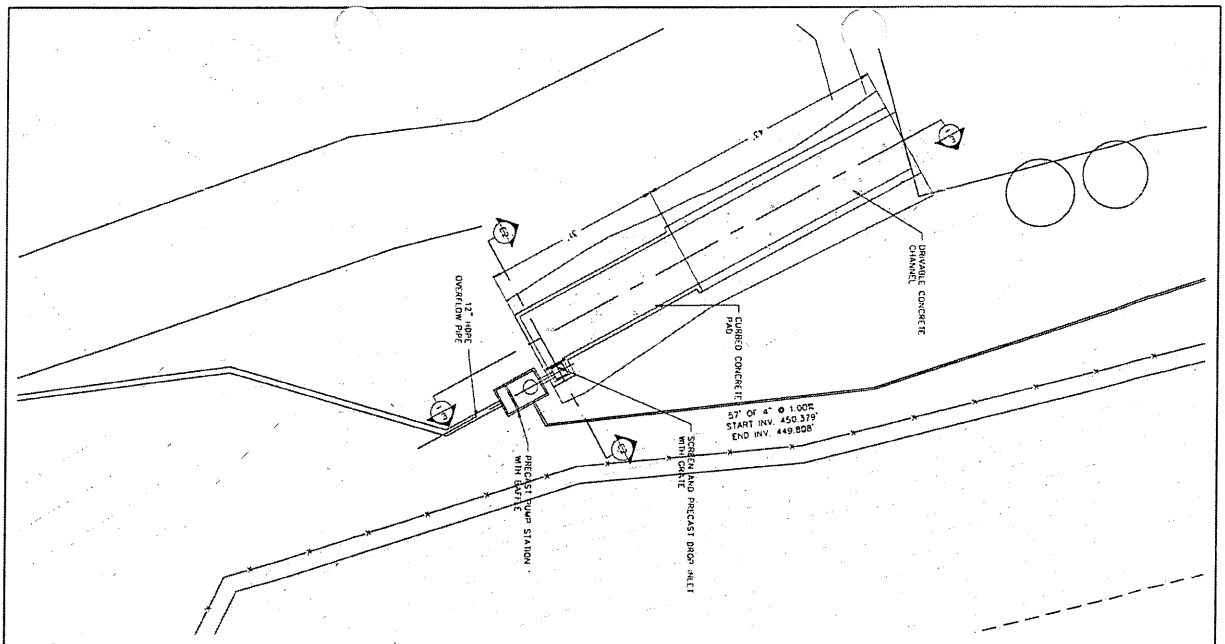
VERMONT

TOM KANE (HOME FARM)
UNDERDRAIN PROFILES

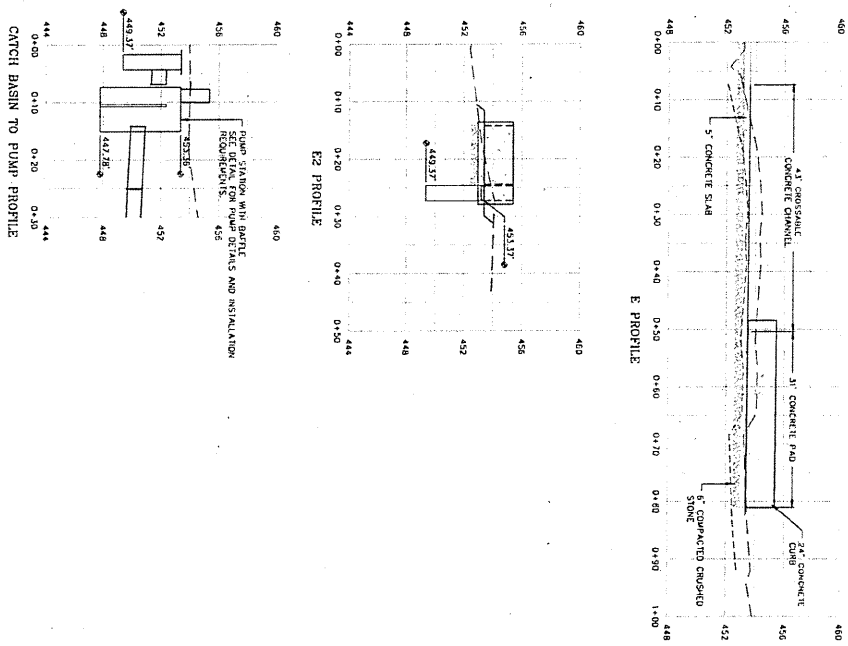
File Name

Drawing Name

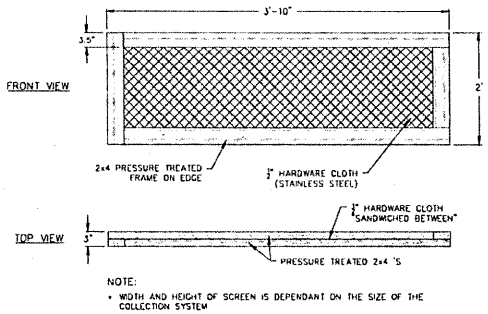
Sheet of



PLAN VIEW

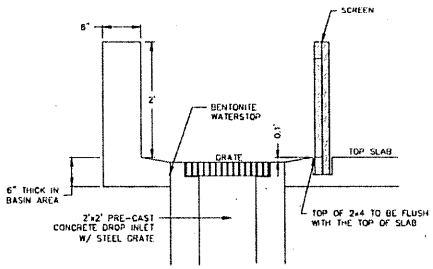


Sheet of		PROJECT INFO	HAZARD CLASS LOW	USDA United States Department of Agriculture	Date
Drawing Name			JOB CLASS I	Natural Resources Conservation Service	Designed
File Name		VERMONT			Drawn
					Checked
					Approved by

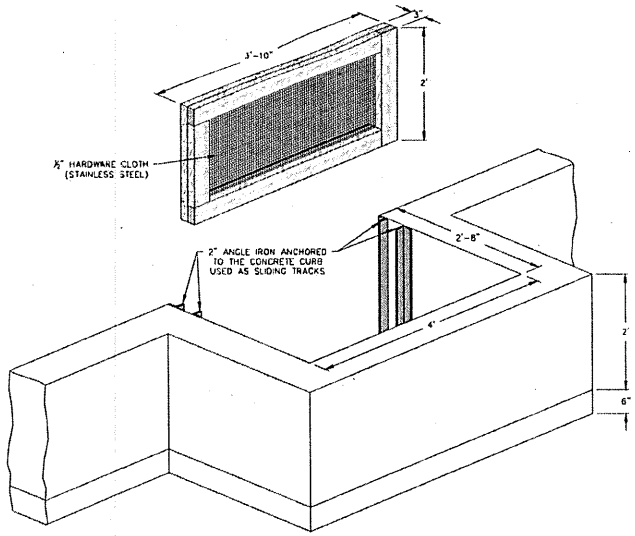


NOTE:
* WIDTH AND HEIGHT OF SCREEN IS DEPENDANT ON THE SIZE OF THE COLLECTION SYSTEM

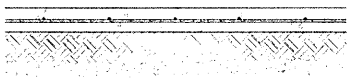
SCREEN DETAIL
(NOT TO SCALE)



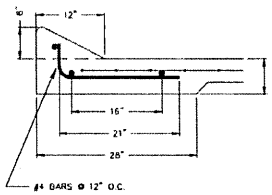
COLLECTION BASIN SIDE VIEW
(NOT TO SCALE)



COLLECTION BASIN DETAIL (FOR BUNK SILO RUN-OFF)
NOT TO SCALE

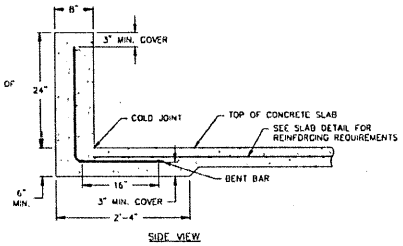


REINFORCED CONCRETE SLAB DETAILS
NOT TO SCALE

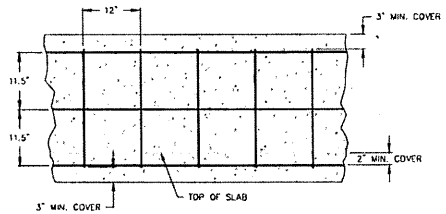


CROSSABLE CONCRETE CURB DETAIL (DELTA SHAPE)
NOT TO SCALE

24" CURB NOTES
* L-BARS SHALL HAVE 3" MINIMUM DIAMETER BEND
* CURB SHALL BE A MINIMUM OF 8" WIDE
* ALL REBAR IS #4



SIDE VIEW



BACK VIEW

24" REINFORCED CONCRETE CURB
NOT TO SCALE

Date
Designed
Drawn
Checked
Approved by

USDA
United States Department of Agriculture
Natural Resources Conservation Service

HAZARD CLASS
LOW

JOB CLASS
I

PROJECT INFO

VERMONT

File Name

Drawing Name

Sheet of

STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
Docket No. _____

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES,
Plaintiff

v.

KANE'S SCENIC RIVER FARMS, LLC,
Defendant

AFFIDAVIT OF AARON KANE

I, Aaron Kane, being first duly sworn, hereby depose and state:

1. On or about March 18, 2016, Environmental Enforcement Officer Ted Cantwell conducted a site visit at Kane's Scenic River Farm (the "Farm") in connection with his investigation regarding an alleged discharge of manure from the Farm.

2. I joined Mr. Cantwell for a portion of his site visit. During that time, we discovered an area near a small wetland swale on the Farm where liquid manure appeared to be surfacing. I was not previously aware of this issue and generally did not visit this wetland area on the Farm. I indicated to Mr. Cantwell that I would dig in that area to investigate further.

3. After Mr. Cantwell departed, Trevor Lewis from the Agency of Agriculture, Food & Markets arrived and he assisted me in the excavation of a small hole at the site. I dug a hole in that area (approximately 4 feet wide by 6 feet long and 2 feet deep) with a mini-excavator and discovered a buried 1-inch plastic pipe that appeared to be discharging liquid manure from the nearby manure pit (the "Pipe").

4. The Pipe appeared to be a section of old water line. The Pipe was not exposed to the surface of the ground before the excavation and I was not previously aware of its presence. To my knowledge, the Pipe was not connected to any of the Farm buildings or other improvements and was not part of the design of the manure pit.

5. I immediately bent the Pipe over and tied it up with a wire to stop the flow. Roughly 30 minutes after I discovered the Pipe, I plugged the Pipe with a plastic cap designed to plug plastic water pipes. I also fastened down the plastic cap with a stainless-steel clamp. To my knowledge, no liquid manure has leaked from the Pipe since that time.

6. At the time of this occurrence the manure pit was full and I was unable to investigate the inside of the pit to see if I could locate the other uncapped end of the Pipe.

7. In October or November of 2017 when the manure pit was empty, I found the unplugged end of the Pipe in the manure pit and filled it with pre-mixed tile grout designed to create a watertight seal. After inserting the tile grout, I plugged the Pipe with a plastic cap designed to plug plastic water pipes. I also fastened down the plastic cap with a stainless-steel clamp.

Aaron Kane

Sworn to before me this
17 day of ~~June~~ August, 2018.

Notary Public
My commission expires: 2/10/19