IN THE COURT OF APPEALS OF IOWA

No. 3-974 / 13-0106
Filed December 5, 2013

STATE OF IOWA ex rel. IOWA DEPARTMENT OF NATURAL RESOURCES,
Plaintiff-Appellee,

vs.

JERRY PASSEHL,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, DeDra L. Schroeder, Judge.

Jerry Passehl appeals from a ruling assessing penalties against him and granting injunctive relief to the State. **AFFIRMED.**

Harry L. Haywood III of Haywood Law Office, Eldora, for appellant.

Thomas J. Miller, Attorney General, David R. Sheridan, Assistant Attorney General, and Jacob L. Larson, Assistant Attorney General (Environmental Law Division), for appellee.

Heard by Vogel, P.J., and Potterfield and McDonald, JJ.

POTTERFIELD, J.

Jerry Passehl appeals from a ruling assessing penalties against him and granting injunctive relief for violations of an administrative consent order and environmental protection laws. The district court did not err in entering partial summary judgment based upon Passehl's admissions of violations of the administrative consent order. We find no abuse of discretion in the assessment of penalties, and no error in the entry of injunctive relief. We therefore affirm.

I. Background Facts and Proceedings.

Jerry Passehl has a salvage yard. The Iowa Department of Natural Resources (DNR) investigated Passehl for reported violations of Iowa Code chapter 455B[1] related to water quality, solid waste, and hazardous conditions. As a result of the investigations and follow-up investigations, the DNR issued five separate notices of violations in 2003, 2004, 2006, and 2007.

On December 5, 2008, Passehl, who was then represented by counsel, signed an administrative consent order; he did not acknowledge fault in the consent order. The consent order recited the DNR's statement of facts, which summarized the five-year history of Passehl's asserted noncompliance with statutory provisions concerning waste water and hazardous conditions. Passehl did not admit the allegations or the conclusions of law, but did agree to the following remedial actions provided for in section V:

> 1. Mr. Passehl shall evacuate any and all remaining contaminated soil around both car crushers and dispose of it in a sanitary landfill; Mr. Passehl shall submit disposal receipts proving he has done so within 30 days of this order.

[1] For ease of reference and because there have been no substantive relevant changes, all citations are to the current 2013 Iowa Code unless otherwise indicated.

> 2. Mr. Passehl shall properly dispose of all discarded appliances at his property at an approved landfill or recycling center, and submit receipts to the Department within 30 days of this order to prove he has done so. Additionally, Mr. Passehl shall not accept any appliances in the future unless he obtains an [Appliance Demanufacturing Permit] ADP.
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> 3. Mr. Passehl shall ensure that he does not have more than 500 passenger tire equivalents on his property unless he obtains a waste tire stockpile permit. In the future, Mr. Passehl shall maintain separate tire piles for "waste tires" and "used" tires for ease of volume assessment, organizing his current tire inventory in this manner to the maximum extent practical.
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> 4. Mr. Passehl shall pay an administrative penalty of $3,000 to the order of the Iowa Department of Natural Resources within 60 days after issuance of this Order.

Further, the consent order provides:

> Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.191 and 455B.307.

By entering into the consent order, Passehl waived his rights to appeal provided by Iowa Code sections 455B.178,[2] 455B.308,[3] and Iowa Administrative

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[2] Section 455B.178 provides in part, "Except as provided by 455B.191, subsection 7, judicial review of any order or other action of the commission or the director may be sought in accordance with the terms of the Iowa administrative procedure Act, chapter 17A."

Subsection 7 of section 455B.191 in turn provides, "If the attorney general has instituted legal proceedings . . . , all related issues which could otherwise be raised by the alleged violator in a proceeding for judicial review under section 455B.178 shall be raised in the legal proceeding instituted in accordance with this section."

[3] Section 455B.308 states:

> Any person aggrieved by an order of the director may appeal the order by filing a notice of appeal with the director within thirty days of the issuance of the order. The director shall schedule a hearing for the purpose of hearing the arguments of the aggrieved person within thirty days of the filing of the notice of appeal. The hearing may be held before the commission or its designee. A complete record shall be made of the proceedings. The director shall issue the findings in writing to the aggrieved person within thirty days of the conclusion of the hearing.

Code rule 561-7.5(1).[4] The DNR director signed the administrative consent order on January 22, 2009.

Several follow-up inspections in 2009 and 2010 by the DNR found continuing lack of compliance with the consent order. On April 21, 2009, Passehl was also informed that his National Pollutant Discharge Elimination System (NPDES) permit had expired and must be renewed, which required that he also implement a written pollution prevention plan. He was given extensions of time to come into compliance and was warned that continued noncompliance could result in the matter being referred to the Iowa Attorney General's office, which could "seek higher per-day penalties for your noncompliance."

In March 2010, DNR referred the Passehl matters to the attorney general. On December 27, 2010, the State filed a petition against Passehl seeking the assessment of civil penalties and injunctive relief for his failure to comply with the administrative consent order, as well as for operating without a NPDES permit,[5] failing to implement a Storm Water Pollution Prevention Plan, and failing to notify the DNR of a hazardous condition on three occasions.[6] Passehl, pro se, filed an answer on January 25, 2011.

The State filed a motion for partial summary judgment on August 22, 2011, asserting Passehl's failure to timely answer requests for admissions

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> Judicial review may be sought of actions of the commission in accordance with the terms of the Iowa administrative procedure Act, chapter 17A. Notwithstanding the terms of the Act, petitions for judicial review may be filed in the district court of the county where the acts in issue occurred.

[4] Rule 561-7.5 governs DNR contested cases.

[5] *See* Iowa Code § 455B.105(11)(c), .197.

[6] *See generally* Iowa Code ch. 455B, Div. IV, Part 4; *see id.* § 455B.386 (providing a person violating a notice requirement is subject to a civil penalty of not more than $1000).

resulted in deemed admissions of the violations alleged in the petition. The State asked the court to conclude Passehl was liable as a matter of law for administrative consent order noncompliance, failure to notify the DNR of hazardous conditions, and failure to be properly permitted.

The original hearing on the partial summary judgment motion was set for September 23, 2011, but was continued after Passehl obtained counsel and requested a continuance. The hearing on the motion was rescheduled for November 18. Counsel for Passehl filed an appearance on November 16. On November 18, Passehl filed a resistance, an affidavit, and attachments, and requested a continuance of the hearing on the motion. The State objected, but the court granted the continuance. The hearing was rescheduled for February 17, 2012. On February 8, 2012, Passehl filed a second affidavit and resistance to the State's summary judgment motion.[7] The presiding judge retired and was unable to hear the motion on February 17, 2012. The motion hearing was again rescheduled for June 1.

On May 24, Passehl filed a third affidavit and resistance to the motion for partial summary judgment, which contained a "statement of disputed facts" wherein Passehl asserted, "Each allegation of noncompliance cannot be

[7] In the February 8, 2012 filing, Passehl's counsel argued, "To base this violation to have occurred solely on the unrepresented Defendant's failure to respond to request for admissions without an order to compel being granted does not render this issue ripe for said determination by Summary Judgment." Counsel further argued, "The state is relying upon the pro se defendant having failed to deny the request for admissions as sole basis for its finding of violations" and that "it would be proper to allow Defendant who has no legal training, the time to respond to State's request including deposing David Hopper of the Iowa DNR." However, the February filing was almost three months after counsel filed an appearance and the record contains no motion for extension of time to respond to admissions or belated response to request for admissions.

determined by Summary Judgment without presentation of evidence admissible at trial . . . ."[8]

A hearing was held on June 1, 2012, at which the State noted that Passehl, who was now represented by counsel, had still not responded or objected to the requests for admission. Counsel for Passehl argued there was additional discovery to be conducted and "there is substantial evidence that will need to be presented to allow the Court to determine any of these issues and responsibility of Jerry Passehl." On June 6, the district court entered partial summary judgment

The trial on the amount of civil penalty and injunctive relief was held on September 14. Passehl testified at length. On October 9, 2012, the court entered a ruling, which provides in part:

> Iowa Code § 455B.191(2) and § 455B.307(3) dictate that for each solid waste or storm water discharge violation, a person is subject to a maximum civil penalty of $5,000 for each day of such violation. The Code also provides that a person who fails to notify the IDNR of an occurrence of a hazardous condition, not later than six hours after the onset of the condition, shall be subject to civil penalty of not more than $1,000. Iowa Code § 455B.386.
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> The factors which the Court is to consider in assessing the amount of civil penalty for violations is set forth in Iowa Code § 455B.109(1)(a)-(d). These factors include:
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> 1. The costs saved or likely to be saved by the violator's noncompliance;
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> 2. The gravity of the violation;
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> 3. The degree of culpability of the violator;
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> 4. The maximum penalty authorized for that particular violation under the law;

[8] At the June 1 hearing on the motion, the State did not object to the court's consideration of Passehl's documents filed in November 2011 and February 2012. However, the State did object to the May 24 filing and moved to strike it. The court granted the motion.

5. Whether the assessment of penalties appears to be the only or most appropriate way to deter future violations, either by the violator or by others similarly situated; and

6. Other relevant factors that arise from the circumstances of the case.

It is clear from the record that Defendant Passehl received repeated warnings over a significant amount of time regarding violations of Iowa's solid waste laws. The repeated violations led to the issuance of the Administrative Consent Order. Then, despite the fact that Passehl had entered into the consent order, Defendant Passehl failed to comply with many of the requirements of the order. At the time of trial, Defendant Passehl did show recent progress regarding his compliance with the consent order and compliance with Iowa's solid waste laws.

The evidence presented at trial was clear that from June 2003 to the present, contaminated soil was observed on almost every inspection of the defendant's property. Defendant Passehl was required to remove the contaminated soil by May 5, 2009. Passehl failed to remove the contaminated soil by May 5, 2009.

Defendant Passehl was in violation of the consent order by failing to remove contaminated soil from his property and dispose of it in a landfill for at least 795 days.

. . . .

The consent order also dictated that Passehl was required to dispose of appliances at an approved landfill or recycling center and provide receipts documenting proper disposal. Passehl also was prohibited from accepting any future appliances until or unless he obtained an Appliance Demanufacturing Permit.

This Court previously found that Defendant Passehl failed to comply with the order by failing to provide receipts documenting proper disposal by May 5, 2009. . . .

. . . .

Defendant Passehl did provide one receipt to the IDNR between May 5, 2009, and the present which showed the proper disposal of appliances observed on his property. The receipt indicated eight air conditioners were retrieved from defendant's property on January 7, 2012. However, this Court is left to wonder what happened to the washing machine, another washing machine, stove, and refrigerator, all which were noted during various inspections.

. . . .

Under the consent order, Defendant Passehl was required to maintain less than 500 waste tires on his property unless he obtained a Waste Tire Stockpile Permit. Passehl was also required to organize his tires into separate piles for waste tires and used tires for volume assessment. This Court has previously ruled that Passehl failed to maintain separate tire piles for waste tires and

used tires on his property and that this action violated the consent order. The testimony received from Mr. Hopper indicated that, until recently, the tires were not recognizably organized into separate piles for waste and used tires and that tires were intermixed with other miscellaneous junk. At the time of trial, it was noted that Passehl is now using a tire rack to organize his used tires.

. . . .

Under the consent order, Passehl was required to pay an administrative penalty of $3,000 within 60 days of the order. A payment plan was subsequently established to accommodate Passehl, wherein he could pay $500 per month until the penalty was paid in full. Under that payment plan, the final payment would have been due on September 15, 2009. Passehl has only made one payment towards the penalty, which totaled $304.95. By those calculations, Passehl failed to pay the remaining balance of the penalty totaling $2,695.05 with an applicable 1.5% interest on the unpaid balance. The outstanding balance of the administrative penalty, including interest, would be $4,150.17.

. . . .

. . . . Passehl failed to renew his authorization by failing to submit appropriate moneys with his application and failed to comply with the Iowa Storm Water Discharge Rules from April 8, 2009, to present. Passehl did receive an economic benefit by failing to pay his NPDES annual permit fees. Passehl did receive numerous letters and warnings regarding his failure to reapply and what he needed to do to become current Passehl made some attempts to have proper authorization, but did not supply the appropriate moneys, then Passehl stopped attempting to obtain proper authorization.

This Court previously ruled that Passehl failed to timely notify the IDNR of the hazardous condition on April 15, 2008, April 10, 2009, and on at least one other occasion. *Passehl's own documentation shows the Court that he failed to notify* the IDNR of a hazardous condition on three separate occasions and that the spills involved waste oil. One of the spills involved significant amounts of waste oil, 200 pounds approximately. That threatened harm to the environment is reasonably foreseeable.

Passehl argued at trial that he would have difficulty paying a civil penalty and has numerous outstanding debts. The Court is allowed by Code to consider the economic impact of a civil penalty on a person based upon the evidence presented at trial. While Passehl's tax returns show that he has very little by way of income, due to business and farming losses, defendant's businesses and operations have improved over the last four years. In addition, Passehl submitted evidence that indicates an interest in real property of one quarter of a million dollars.

> Evidence at trial clearly shows that Passehl has repeatedly failed to comply with the administrative order's requirements in a timely fashion, or has simply failed to comply. The State requested injunctive relief to ensure that the defendant complies with the administrative order's requirements and to prevent future violations of the order. The plaintiff requests that the Court issue an order granting injunctive relief requiring defendant to comply with the IDNR's Administrative Consent Order, solid waste violations, and storm water discharge violations.

The district court assessed civil penalties totaling $40,260.17 and granted injunctive relief requiring Passehl to comply with the administrative consent order and his storm water pollution prevention plan, renew his authorization to discharge under NPDES, and pay the annual permit fees that were due and owing.

In a motion to amend or enlarge, Passehl argued the court's June 6 ruling did not establish as a matter of law that Passehl had violated chapter 455B. He also contended the court had not ruled on whether the consent order was lawful and reasonable. He argued the unavailability of appeal from the consent order violated his due process rights. The State resisted, arguing the consent order was res judicata and noting Passehl was represented by counsel while negotiating the terms of that consent order. The court determined the consent order was res judicata and Passehl's constitutional challenge "cannot be heard." The court declined to expand or amend its ruling.

Passehl now appeals, contending (1) the district court erred in not acting in an appellate capacity to determine whether the administrative consent order

was valid, (2) partial summary judgment was improperly granted, and (3) the district court erred in imposing civil penalties in excess of $10,000.[9]

II. Scope and Standards of Review.

This case was tried at law and is thus reviewed for legal error. *State ex rel*. *Miller v*. *DeCoster*, 608 N.W.2d 785, 789 (Iowa 2000). The district court's findings of fact are binding on us if supported by substantial evidence. *Id.*

III. Discussion.

A. *The validity of the administrative consent order*. The essence of Passehl's first contention is that the district court was required to determine—and was limited to determining—whether the administrative consent order was a valid enforceable agreement.[10] In his appellate brief, Passehl states, "This Court has been asked to find the Administrative Consent Order invalid and unenforceable until the judicial process under the Iowa administrative act has been utilized."

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[9] Our review has been made more difficult by Passehl's failure to comply with our rules of appellate procedure. For example, Iowa Rule of Appellate Procedure 6.903(2)(f) provides, "All portions of the statement [of facts] shall be supported by appropriate references to the record or the appendix in accordance with rule 6.904(4)." However, entire paragraphs of Passehl's statement are unsupported by citation to the record.

Rule 6.903(2)(g)(1) requires a statement addressing how an issue was preserved for appellate review, "with references to the places in the record where the issue was raised and decided." Passel's brief falls short, which we will address in more detail later. We note too that rule 6.903(2)(g) states, "The argument section shall be structured so that each issue raised on appeal is addressed in a separately number division." Passehl's statement of issues and his argument section do not use the same terminology, frustrating our review. Moreover, he has failed to place the witness's name at the top of each appendix page where that witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(c).

[10] Passehl contends he "denied the Administrative Consent Order was valid and enforceable," citing to the first page of his answer to the State's petition. That page contains no statement that the consent order is not valid and enforceable. Passehl does state, "[P]aragraph 43 thru 45 [which set out statutory authority for administrative civil penalties] are denied for lack of belief or knowledge that they meet the constitutional requirements of notice and opportunity to be heard." He also denied paragraphs 46 through 74. Paragraph 62 of the petition states Passehl entered into a consent order and sets out the requirements of that order.

Passehl contends we are to apply the principles set out in *Organic Technologies Corp*. *v*. *State ex rel*. *Iowa Department of Natural Resources*, 609 N.W.2d 809, 815 (Iowa 2000), which involved judicial review of a contested case wherein the DNR found violations of chapter 455B. The case is not on point.

As this court noted in *State ex rel*. *Iowa Department of Natural Resources v*. *Shelley*, 512 N.W.2d 579, 580 (Iowa Ct. App. 1993), "[T]here is a difference between judicial review of agency action and enforcement of an agency order." That difference was explained in *City of Des Moines Police Department v*. *Iowa Civil Rights Commission*, 343 N.W.2d 836, 840 (Iowa 1984):

> [J]udicial enforcement of an agency order and judicial review of an agency order are two separate and distinct proceedings. Judicial review is provided for the party "claiming to be aggrieved by a final order of the commission." Judicial enforcement, on the other hand, is the method by which the [agency] in behalf of a successful complainant can enforce [an agency] order against a noncomplying party. The statutory procedure for pursuing enforcement of [an agency] order provides that a final order of the [agency], if not voluntarily complied with, is enforced by the filing of a petition by the [agency] in district court for an order of the court enforcing the [agency] order.

(Citations omitted.).

An administrative consent order is a valid agency action. *See Iowa Water Pollution Control Comm'n v*. *Town of Paton*, 207 N.W.2d 755, 760 (Iowa 1973) (concluding that agency is granted express authority to enter orders directing action and to order a hearing, "[b]y necessary and fair implication the commission may enter agreements with offenders to resolve . . . problems"). In *Paton*, the court stated:

> The [water pollution control] commission's consent orders are like consent judgments. "Judgments by consent are contractual in nature and are, in effect, contracts of parties acknowledged in

> court. They do not result from a judicial determination of the rights of the parties or the merits of the case, but are merely recitals of their agreements."

Id. (citation omitted). Consent orders entered by government agencies are to be construed as contracts, because they have many of the attributes of ordinary contracts. *United States v. ITT Cont'l Baking Co*., 420 U.S. 223, 236 (1975). The parties here agreed to resolve their ongoing dispute by entering into an administrative consent order, in which Passehl's explicitly waived his appeal rights. As explained in *Paton*, "[S]uch [consent] orders are generally not subject to appellate review. This is on the theory that the consent of a party operates as waiver of the right of appeal. One who agrees to an order is hardly an 'aggrieved party' empowered to appeal . . . ." 207 N.W.2d at 762 (citations omitted). The terms of the consent order are therefore res judicata. *See Paton*, 207 N.W.2d at 762; *see also Shelley*, 512 N.W.2d at 581 (finding an unappealed administrative order became a final agency action entitled to res judicata effect in the subsequent enforcement proceeding). The district court did not err in concluding Passehl is not entitled to challenge the validity of the consent order.

The action before the district court was an enforcement action. The right to seek enforcement and compliance was specifically enunciated in the consent order: "Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.191 and 455B.307."

B. Partial summary judgment was appropriate. Passehl contends the State was not entitled to partial summary judgment because it did not carry its

burden of showing there were no undisputed material facts. Here, Passehl's argument is based in part upon a claim not made before the district court, i.e. that the appendix containing the State's exhibits supporting its motion for partial summary judgment is not part of the summary judgment record. Claims not submitted to and decided by the district court are not properly preserved for review. *See Taft v. Iowa Dist. Ct.*, 828 N.W.2d 309, 323 (Iowa 2013); *see also Lee v. State*, 815 N.W.2d 731, 739 (Iowa 2012) (noting the error preservation rule provides opposing counsel notice and an opportunity to be heard on the issue and a chance to take corrective measures). In any event, the appendix was filed with the district court, was cited to by the State in its filings related to the summary judgment motion, and is part of the record before this court.

Passehl also contends his November 17, 2011 affidavit "established numerous disputed facts" and the consent order limited the enforcement process. He also contends, "The very question of whether the consent order was a final order negates the granting of summary judgment based upon admission by not responding to request for admission." We have already addressed the second issue, concluding the consent order was a final order. As to his bare claim that his November 17, 2011 affidavit established disputed facts, we reject that claim as well. The November affidavit contains only general statements that he had taken some steps to comply with the consent order, but did not rebut the alleged violations of the order.

The State moved for partial summary judgment based upon Passehl's admissions of violations of the consent order. It was on this basis the court

entered summary judgment. "[B]ased upon failure to timely respond to Plaintiff's First Requests for Admissions," the following were deemed admitted:

> . . . Passehl failed to maintain separate tire piles for waste tires and used tires, in violation of Administrative Consent Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01.
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> . . . Passehl failed to provide receipts by May 5, 2009, showing proper disposal of all discarded appliances on his property at an approved landfill or recycling center, in violation of Administration Consent Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01.
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> . . . Passehl failed to timely apply for renewal of NPDES General Permit No. 1 within a proper time frame, in violation of 567 Iowa Administrative Code 64.8(1)(a).
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> . . . Passehl failed to pay the remaining balance of annual NPDES permit fees for NPDES General Permit No. 1 for the years 2008, 2009, and 2010, totaling $375, in violation of 567 Iowa Administrative Code 64.16(3)(b).
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> . . . Passehl failed to properly remove and dispose of all contaminated soil located on Passehl's property by May 5, 2009, in violation of Administrative Consent Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01.
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> . . . Passehl failed to notify the IDNR of the occurrence of a hazardous condition within six (6) hours after the onset or discovery of the condition on April 15, 2008, April 10, 2009, and at least one other occasion, in violation of Iowa Code section 455B.386 and 567 lowa Admin[istrative] Code 131.2.
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> . . . Passehl has only paid $304.95 of the $3,000 administrative penalty assessed by Administrative Consent Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01.
>
> . . . Passehl has failed to pay any accumulated interest on any unpaid portions of the administrative penalty assessed by Administrative Consent Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01, in violation of Iowa Code section 455B.109(4).

Iowa Rule of Civil Procedure 1.510(2) provides that a matter is "admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission written answer or objection . . . ." The district court did not err in ruling the matters were deemed admitted and the State has thus proved the violations admitted therein.

Passehl's November 17, 2011, affidavit states, "I have sorted tires in groups; farm, industrial, auto, and large equipment as requested by the DNR." This does not dispute the admission that he "failed to maintain separate tire piles for waste and used tires."

His November affidavit addresses two window air conditioners found upon inspection of his property on September 28, 2011; it does not, however, dispute he "failed to provide receipts by May 5, 2009, showing proper disposal of all discarded appliances" that were the subject to the consent order.

Concerning the third and fourth admissions—"Passehl failed to timely apply for renewal of NPDES General Permit No. 1 within a proper time frame," and "Passehl failed to pay the remaining balance of annual NPDES permit fees for NPDES General Permit No. 1 for the years 2008, 2009, and 2010, totaling $375"—Passehl's affidavit does assert in paragraph 12, "Since I have less than 5 acres and located in a low erosivity area I am exempt from having to obtain a [NPDES]."[11] We are not at all convinced that this statement is sufficient to create a factual dispute; rather, Passehl raises a legal dispute. In any event, evidence was presented on this issue at trial.

Joseph Griffin, a DNR environmental specialist, testified Passehl was required to have an authorization to discharge under NPDES General Permit No. 1, which concerns storm water discharge associated with industrial activity; Passehl did have such authorization, but it expired on April 8, 2008; Passehl

[11] We observe that there is some terminology confusion. What is at issue is Passehl's authorization to discharge (which the parties have referred to as a permit) under NPDES General Permit No. 1. The authorization to discharge is subject to a permit fee of $175 per year. This is the fee at issue.

attempted to renew his authorization in 2009 and 2010; and Passehl did not renew his authorization thereafter. Griffin acknowledged two ways one could be exempt: show they had no discharge from their site, or prove they do not need to obtain authorization. Counsel for Passehl asked, "How do they then bring that to your attention to say, hey, I don't think I qualify, ..." Griffin responded, "They can call me."

Passehl attempted to show at trial that he was exempt from obtaining authorization to discharge because he had no storm water discharge. The district court found otherwise. As for Passehl's claim he was exempted because his property contains fewer than five acres, the evidence showed that exemption related to construction sites only, not industrial activity sites.

We turn to the admission, "Passehl failed to properly remove and dispose of all contaminated soil located on Passehl's property by May 5, 2009." Passehl's November 2011 affidavit states, "I have complied with the soil disposal," and references receipts from September 4, 2009, March 16 and April 9, 2010, and November 9, 2011. The receipts provided belie his claim that he "dispose[d] of all contaminated soil . . . by May 5."

As for his failure to pay more than $304.95 of the $3000 administrative penalty and accumulated interest, Passehl's affidavit states, "I admit [it] has not been paid in full." His contention that a workable payment plan was not reached appears not pertinent.

C. *The civil penalties imposed were not an abuse of the district court's discretion*. Passehl challenges the imposition of penalties, contending that if we find the consent order valid, the order limits any civil penalty to $10,000 or less.

This argument was not made before the district court and is therefore not properly before us. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Regardless, the consent order itself provides, "Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.191 and 455B.307."[12]

Iowa Code section 455B.191(1) provides:

> Any person who violates any provision of part 1 of division III of this chapter or any permit, rule, standard, or order issued under part 1 of division III of this chapter [storm water discharge/water quality] shall be subject to a civil penalty not to exceed five thousand dollars for each day of such violation.

Section 455B.307(3) similarly, states:

> Any person who violates any provision of part 1 of this division or any rule or any order adopted or the conditions of any permit or order issued pursuant to part 1 of this division [regulating hazardous conditions] shall be subject to a civil penalty, not to exceed five thousand dollars for each day of such violation.

Based on Passehl's admissions of violations, the district court ruled:

> 1. For violations associated with contaminated soil, totaling 795 days of violations, Defendant Passehl shall pay $10 for each violation, for a total of $7,950.
> 2. For violations associated with appliance disposal, Defendant Passehl shall be assessed a civil penalty of $10 per appliance, for a total of $40.

[12] We note, too, that counsel for Passehl indicated at the beginning of the trial that "[t]he reason we are here is basically to determine the penalties for noncompliance with the consent order and the findings based upon the defendant's failure to deny a request for admissions." Counsel noted the relevant factors were found in Iowa Code section 455B.109(1)(a)-(d).

> 3. For violations of tire organization, this defendant was in violation a total of 1,435 days. This Court will assess Defendant Passehl $10 per day of violation, for a total of $14,350.
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> 4. Defendant Passehl shall pay an administrative penalty with interest, at the time of trial, totaling $4,150.17 no later than June 1, 2013.
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> 5. Regarding civil penalties for storm water discharge violations, the defendant was in violation for 1,347 days. At a rate of $10 per day of violation, Defendant Passehl is assessed penalty in the amount of $13,470 for these violations.
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> 6. Regarding assessment of civil penalty for failure to notify the Iowa Department of Natural Resources of a hazardous condition, the Court finds there were three separate occasions where Defendant Passehl failed to notify the IDNR. Each occasion shall be assessed a civil penalty of $100, for a total of $300.

"Review of the district court's assessment of civil penalties is for abuse of discretion." *State ex rel*. *Miller v*. *DeCoster*, 596 N.W.2d 898, 904 (Iowa 1999).

> An abuse of discretion occurs when "the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.

Mercer v. Pittway Corp., 616 N.W.2d 602, 612 (Iowa 2000) (citations omitted).

Passehl entered into a consent order after five years of asserted violations of laws intended to protect the environment. He then failed to comply with the provisions of that consent order. The district court considered the costs saved by Passehl, the gravity of the various violations, the maximum penalty that could be imposed, the ability to deter future violations, the lack of deterrent effect of the consent order, as well as Passehl's asserted inability to pay. We conclude the district court considered relevant factors and provided tenable reasons for imposing civil penalties of $40,260.17. The penalties were within those authorized by statute. We find no abuse of discretion. We therefore affirm.

AFFIRMED.