STATE OF VERMONT

SUPERIOR COURT Environmental Division Unit	ENVIRONMENTAL DIVISION Docket No. 94-8-18 Vtec
Agency of Natural Resources, Petitioner v. Edward D. Tobin and Kelly J. Depalo, Respondents	DECISION ON THE MERITS

This matter arises out of the alleged unpermitted salvage yard operations and violation of the Vermont Hazardous Waste Management Regulations by Respondents Edward D. Tobin and Kelly J. Depalo (Respondents) on their property located at 26 Independent Drive in Hartland, Vermont. In a July 5, 2018 Administrative Order[1] (AO), the Vermont Agency of Natural Resources (ANR) set out factual allegations describing Respondents' alleged violations. ANR seeks administrative penalties of $18,750 for the violations, along with a court order requiring Respondents to get a permit or otherwise bring the property into compliance. On September 6, 2018, Respondents requested a hearing on the AO with this Court.

The Court conducted a merits hearing at the Vermont Superior Court in Woodstock, Vermont, on February 21, 2019. Appearing at the trial were Randy J. Miller II, Esq., representing ANR and Respondents Tobin and Depalo representing themselves.

Based upon the evidence presented at trial, the Court renders the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Respondents own property located at 26 Independent Drive in Hartland, Vermont (the Property).
2. On September 28, 2016, in response to a complaint of unpermitted salvage yard operations, ANR personnel traveled to the Property (2016 site visit).

[1] The AO was filed with the Court on August 31, 2018.

3. Upon arrival, ANR personnel made contact with Respondent Tobin and explained they were responding to a complaint of unpermitted salvage activities.
4. ANR personnel requested access to the Property, which Respondent Tobin granted.
5. Respondent Tobin previously operated a salvage yard for years on the Property, including a car crusher. He discontinued salvage operations in 1992.
6. During the 2016 site visit, ANR personnel observed several junk vehicles, piles of scrap metal, and other junk material located on the Property.
7. During the 2016 site visit, ANR personnel observed several areas of dark stained soils next to vehicles tipped on their side. In addition, Respondent Tobin advised that a drum of used oil, a hazardous material, had tipped over, resulting in stained soils.
8. At the time of the 2016 site visit, Respondents had not undertaken any corrective actions to mitigate the releases. As of the trial, Respondents still had not taken corrective action.
9. During the 2016 site visit, ANR personnel observed two unlabeled drums of used oil stored on the Property.
10. During the 2016 site visit, Respondent Tobin informed ANR personnel that a drum of used oil had been stored on a pervious surface.
11. During the 2016 site visit, Respondent Tobin informed ANR personnel that a drum of used oil had been stored out-of-doors without a structure to shelter it against rain and snow.
12. On October 5, 2016, ANR issued a Notice of Alleged Violation (NOAV) to Respondents informing them of the violations observed and providing them with the compliance directives necessary to bring the Property into compliance with applicable law.
13. To date, Respondents have not obtained a Salvage Yard Permit from the ANR Secretary.
14. The application fee for a Salvage Yard Permit is $750.
15. Respondents submitted an application for a Certificate of Approval for Location of a Salvage Yard to the Town of Hartland Selectboard (Selectboard) on December 20, 2016. The Selectboard provided Location Approval on April 3, 2017. Respondents provided a copy of the Location Approval to ANR on October 15, 2018.
16. To date, Respondents have failed to take further steps to bring the Property into compliance with applicable law.

17. Daniel H. Mason, an Environmental Enforcement Officer with the Environmental Compliance Division of the Department of Environmental Conservation, spent approximately 48 hours pursuing the issues in this enforcement action. His hourly rate is $30 per hour.
18. Shawn Donovan, Environmental Analyst IV with the Waste Management and Prevention Division of the Department of Environmental Conservation, spent approximately 20 hours pursuing the issues in this enforcement action. His hourly rate is $27.92 per hour.
19. Marc Roy, Section Chief, Hazardous Materials Management Section, Waste Management and Prevention Division of the Department of Environmental Conservation, spent approximately 10 hours pursuing the issues in this enforcement action. His hourly rate is $50.04 per hour.
20. ANR issued the AO on July 5, 2018, which set out the alleged facts and violations.
21. Respondents timely requested review of the AO in this Court.

Determining Violations and Penalty Assessment

When a respondent requests a hearing on an administrative order, this Court has the authority to determine whether the alleged violation occurred. 10 V.S.A. § 8012(b)(1). ANR carries the burden of proving the alleged violations by a preponderance of the evidence. Id. § 8013(a). If ANR meets this burden, we are required to "determine anew the amount of a penalty" that should be assessed against the respondent challenging the ANR order. Id. § 8012(b)(4). To do so, we review the evidence before the Court and determine an appropriate penalty assessment pursuant to the seven subsections of 10 V.S.A. § 8010(b)(1)–(8).

ANR, and this Court in this proceeding, must consider seven factors when assessing a penalty:

(1) the degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation;
(2) the presence of mitigating circumstances, including unreasonable delay by the Secretary in seeking enforcement;
(3) whether the respondent knew or had reason to know the violation existed;
(4) the respondent's record of compliance;
(5) [Repealed.]

(6) the deterrent effect of the penalty;

(7) the State's actual costs of enforcement; and

(8) the length of time the violation has existed.

10 V.S.A. § 8010(b)(1)–(8).

The maximum penalty for each violation is $42,500, plus the possibility of "a penalty of not more than $17,000.00 for each day the violation continues." Id. § 8010(c)(1). The total maximum penalty allowed is $170,000. Id.

In addition, the State may "recapture economic benefit" that the violator may have derived from the violation, up to the total maximum penalty amount. Id. § 8010(c)(2).

In an effort to standardize penalties and ensure a fair process, ANR enforcement officers use a form to assess penalty amounts (ANR Penalty Form) that is based on the seven penalty factors. They rate the severity of the violations from 0 to 3 for factors (1), (3), (4), and (8) in 10 V.S.A. § 8010(b)(1)–(8) to come up with an initial penalty score. The highest possible initial score is a 15.

ANR officers also determine the class of the violation, which is based on the degree or severity of the violation. An initial penalty score of 15 equates to an initial penalty of $42,500 for a Class I violation, the maximum penalty allowed for any violation. Class II, III, and IV violations carry lower maximum penalties of $30,000, $10,000 and $3,000, respectively, for an initial penalty score of 15.

The initial penalty can then be adjusted based on penalty factors (2), (6) and (7) of 10 V.S.A. § 8010(b)(1)–(8). If the violator signs an Assurance of Discontinuance, agreeing not to dispute the action, the final penalty may be reduced by 25%. Agency of Natural Res. v. Wesco, Inc., No. 62-6-16 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Oct. 23, 2017) (Walsh, J.).

A. Number of Violations

At the outset of the Court's penalty assessment, we recognize that the AO at issue in this matter alleges violations of five regulations:

1. Vermont Salvage Yard Rule (VSYR) § 26-301(a)(1): Unpermitted salvage yard;
2. Vermont Hazardous Waste Management Regulations (VHWMR) § 7-105(a)(1): failure to take corrective actions;

3. VHWMR § 7-806(b)(5): Failure to properly label used oil containers;
4. VHWMR § 7-806(b)(6): Failure to store used oil containers on an impervious surface; and
5. VHWMR § 7-806(b)(7): Failure to store used oil containers within a structure.

ANR, and therefore this Court on appeal, has discretion to calculate and assess one penalty for events that result in more than one violation or to calculate and assess a separate penalty for each violation stemming from the same activity. Typically, ANR and this Court treat multiple violations of the same permit, or related violations generally, as one violation when calculating penalties. See Agency of Natural Res. v. Westford Fire District 1, No. 143-10-17, slip op. at 4-5 (Vt. Super. Ct. Envtl. Div. Mar. 7, 2018) (Walsh, J.).

In the AO at issue, ANR considered the five alleged violations in three separate penalty assessments: one for the unpermitted salvage yard, one for the alleged release of hazardous waste and failure to act, and one for the failure to properly label and store used oil. Because the alleged violations all relate to the salvage operation on the Property and occurred around the same approximate time, we conclude that a single penalty assessment is appropriate.[2] We also take this approach because the evidence does not clearly establish that each separate violation independently contributed to environmental or human health impacts.

B. Class of Violation(s)

The parties do not dispute the core facts of the violations. Respondents offer that the on-site salvage operations ceased in 1992, however, they do not dispute the manner of storage of the used oil or that vehicles, parts, and other scrap materials remain on-site. Thus, Respondents contest the general utility of this enforcement action and the amount of the ANR penalty.

Pursuant to VSYR § 26-301(a)(1), no person shall establish, operate, or maintain a salvage yard without first obtaining a permit from the Secretary. It is not contested that Respondents' Property meets the definition of a salvage yard pursuant to Subchapter 2 of the VSYR. By failing to obtain a permit from the Secretary to operate, establish, or maintain a salvage yard on the Property, we conclude that Respondents have violated VSYR § 26-301(a)(1).

[2] In conducting the single penalty assessment, this Court considers the most significant violation for each penalty factor to determine the penalty score for that factor.

Pursuant to VHWMR § 7-105(a)(1), in the event of a release of hazardous material, the person in control of such material shall take all appropriate immediate actions to protect human health and the environment and take any further cleanup actions as may be required. By failing to take corrective action to address the releases of used oil on the Property, Respondents have violated VHWMR § 7-105(a)(1).

Pursuant to VHWMR § 7-806(b)(5), containers holding used oil must be labeled or marked with the words "Used Oil" or "Used Oil Fuel" as appropriate. By failing to properly label containers holding used oil, Respondents have violated VHWMR § 7-806(b)(5).

Pursuant to VHWMR § 7-806(b)(6), containers holding used oil must be stored on an impervious surface. By failing to store containers holding used oil on an impervious surface, Respondents have violated VHWMR § 7-806(b)(6).

Pursuant to VHWMR § 7-806(b)(7), a container holding used oil may be stored out-of-doors only if the container is placed within a structure that shelters it from rain and snow. By failing to shelter outdoor containers holding used oil within a structure, Respondents have violated VHWMR § 7-806(b)(7).

We conclude that the unpermitted salvage operations, unmitigated releases, and failure to label and properly store used oil present a Class II violation. A Class II violation includes violations which present more than a minor violation of a statute listed in 10 V.S.A. § 8003(a) or a rule promulgated under a statute listed in 10 V.S.A. § 8003(a). See ANR Penalty Form at 1.

C. Calculation of Base Penalty:

Penalty Factor 1: Actual or Potential Impact on Public Health, Safety, Welfare, and the Environment

Subsection (1) of 10 V.S.A. § 8010(b) requires consideration of "the degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation." At trial, ANR and its experts presented credible evidence that the violation caused an "actual impact" to the environment. See ANR Penalty Form Questions 1 and 2. There is no credible evidence that the violation caused an "actual impact" to public health, safety, or welfare.

Respondents' release of used oil had the potential to migrate and therefore also resulted in a potential adverse impact to the environment, including nearby groundwater and surface

water sources. Further, because of this potential for migration, we conclude that there was some potential for adverse impacts to public health, safety, or welfare.

Respondents offer that any potential release is not significant because the substrate below the Property is mostly ledge. Respondents, however, did not present evidence of the nature of the substrate or show the implications of the substrate for potentially migrating oil releases.

In considering the ANR Penalty Form, we assign a value of "1" to the degree of impact on public health, safely, and welfare (ANR Penalty Form Question 1) as we conclude that there were moderate potential impacts from the release. We also assign a value of "1" to the degree of impact on the environment (ANR Penalty Form Question 2) as we conclude that the releases resulted in minor actual impacts to the environment.

Penalty Factor 3: Whether the Respondent Knew or Had Reason to Know the Violation Existed

Subsection (3) of 10 V.S.A. § 8010(b) requires us to consider "whether the respondent knew or had reason to know the violation existed." Question 3 of the ANR Penalty Form includes two parts: 3(a), knowledge of the requirements; and 3(b), knowledge of the facts of the violation. Respondents knew or should have known about the applicable legal requirements under the waste management statute and the facts of the violation. 10 V.S.A § 6616 is only two sentences long and clearly states that the release of hazardous material to surface or groundwater is prohibited. We combine this with the fact that Respondents acknowledged their long history with the salvage yard and the materials present thereon.

Thus, in considering the ANR Penalty Form, we assign a value of "1" for Respondents' knowledge of the applicable requirements (ANR Penalty Form Question 3(a) assigns a "1" where the respondent "had reason to know about violated requirement"). As to Respondents' knowledge of the facts of the violations we assign a value of "1," concluding there is evidence that Respondents "should have reasonably known that the violation existed" (ANR Penalty Form

Question 3(b)). For instance, the soil staining should have reasonably informed Respondents of the release and violation.[3]

Penalty Factor 4: Respondent's Record of Compliance

Subsection (4) of 10 V.S.A. § 8010(b) requires consideration of "the respondent's record of compliance." The evidence presented shows that Respondents have no previous violations of ANR's regulations. Accordingly, in considering the ANR Penalty Form, we assign a value of "0" for this subsection (ANR Penalty Form Question 4).

Penalty Factor 8: Length of Time the Violation Existed

Subsection (8) of 10 V.S.A. § 8010(b) requires consideration of "the length of time the violation has existed." Respondents testified that they were unaware of the violations until the 2016 site visit. Respondents took some corrective action by applying for and obtaining Location Approval from the Selectboard, but otherwise the violations continue today unmitigated.

These events equate to a violation of long duration, having lasted for months. In considering the ANR Penalty Form, we assign a value of "3" for this factor, concluding that this violation existed for a long duration (ANR Penalty Form Question 5).

In adding the above penalty scores we arrive at a base score of 6, which equates to a base penalty of $9,000 for a Class II violation. See ANR Penalty Form § 6.

D. Penalty Adjustments:

We next consider appropriate adjustments to the base penalty.

Penalty Factor 2: Mitigating Circumstances

Subsection (2) of 10 V.S.A. § 8010(b) requires consideration of "the presence of mitigating circumstances, including unreasonable delay by the Secretary in seeking enforcement." ANR completed a prompt site visit in response to the complaint and timely issued the AO. Based on these facts, the Court concludes that there is no justification for reducing or increasing Respondents' penalty based on mitigating circumstances.

Penalty Factor 6: The Deterrent Effect

[3] In calculating Respondents' initial penalty score, we count the lower of the two scores for 3(a) and 3(b) towards the total. While we assign both 3(a) and 3(b) a score of "1," we do not sum the two.

Subsection (6) of 10 V.S.A. § 8010(b) requires consideration of "the deterrent effect of the penalty." The Secretary may increase the penalty amount up to the maximum allowed in the class of violation if the Secretary determines that a larger penalty is reasonably necessary to deter the respondent and the regulated community from committing future violations. Id.

In reviewing the importance of establishing a penalty that will have a deterrent effect upon Respondents, we consider the facts that Respondents ceased their active salvage yard operations in 1992 and cooperated with ANR throughout the investigation. We conclude that these facts do not warrant an additional deterrent penalty.

Penalty Factor 7: State's Actual Costs of Enforcement

Subsection (7) of 10 V.S.A. § 8010(b) requires that we consider "the State's actual cost of enforcement." The value of the time that all ANR officials committed to responding to Respondent's violations, including prosecution of this matter, totals $2,498.80. We direct Respondents to reimburse these costs as an additional penalty for the violations.

Economic Benefit

The Secretary may recapture any economic benefit Respondents gained by violating the regulations. 10 V.S.A. § 8010(c)(2).

We believe that the State is entitled to recapture Respondents' economic gain from the violations. We conclude that based on the evidence before the Court, the Respondents' gain in this matter is limited to the $750 application fee for a Salvage Yard Permit that Respondents have not expended.

Reduction for Settlement

Finally, ANR may reduce a respondent's penalty when the respondent admits to the violation and enters an Assurance of Discontinuance to fully resolve the compliance issue. Such a reduction is not warranted in this matter, as Respondents did not resolve their dispute by settlement.

The Court therefore increases the base penalty of $9,000 for the Class II violation by adding the economic gain of $750 and $2,498.80 as reimbursement of ANR's costs of enforcement. That brings the total penalty in this case to $12,248.80.

Conclusion

For the reasons stated above, we conclude that Respondents shall be liable for a total penalty in these proceedings of **$12,248.80** for the violations set out in the July 5, 2018 AO. We also **ORDER** the following:

A. Respondents shall cease accepting junk, junk motor vehicles, tires, vehicle parts, or any other materials unless and until all applicable environmental permits, including but not limited to a Salvage Yard Permit, are issued for the Property.

B. Respondents shall not operate, establish, or maintain a salvage yard on the Property unless and until all applicable environmental permits, including but not limited to, a Salvage Yard Permit, are issued.

C. No later than thirty (30) consecutive calendar days following the effective date of this Order, Respondents shall either: (1) submit to ANR a complete application for a Salvage Yard Permit, or (2) remove all junk and junk motor vehicles from the Property and properly dispose of them at a certified salvage yard or shredder. Junk motor vehicles shall be removed intact and shall not be crushed or otherwise dismantled prior to delivery to the certified salvage yard or shredder. Respondents shall provide ANR with proof that all junk and junk motor vehicles located on the Property have been properly disposed of at a certified salvage yard or shredder. Proof of proper disposal shall be forwarded to:

Marc Roy, Technical Services Section Manager
Waste Management & Prevention Division
1 National Life Drive, Davis 1
Montpelier, VT 05620-3704

D. In the event Respondents' application for a Salvage Yard Permit is denied, Respondents shall remove all junk and junk motor vehicles from the Property, to be properly disposed of as described above.

E. Respondents shall manage all used oil stored on the Property in compliance with the VHWMR.

Rights of Appeal (10 V.S.A. § 8012(c)(4)–(c)(5))

This Decision and the accompanying Judgment Order will become final if no appeal is requested within 10 days of the date this Decision is received.[4] All parties to this proceeding have a right to appeal this Decision and Judgment Order. The procedures for requesting an appeal can be found in the Vermont Rules of Appellate Procedure (V.R.A.P.), subject to superseding provisions in Vermont Rule for Environmental Court Proceedings 4(d)(6). Within 10 days of the receipt of this Order, any party seeking to file an appeal must file the notice of appeal with the Clerk of the Environmental Division of the Vermont Superior Court, together with the applicable filing fee. Questions may be addressed to the Clerk of the Vermont Supreme Court, 111 State Street, Montpelier, VT 05609-0801, (802) 828-4774. An appeal to the Supreme Court operates as a stay of payment of a penalty but does not stay any other aspect of an order issued by this Court. 10 V.S.A. § 8013(d). A party may petition the Supreme Court for a stay under the provisions of Vermont Rule of Civil Procedure 62 and V.R.A.P. 8.

[4] There is a certain degree of ambiguity as to the number of days in the appeal period. Formerly, under V.R.E.C.P. 4(d)(6)(A), respondents had 10 days to appeal a final judgment of this Court on an administrative order to the Supreme Court. When the Vermont Judiciary converted to the "day is a day" method for computing time, the 10-day period in V.R.E.C.P. 4(d)(6)(A) was revised to 14 days through an order that became effective on January 1, 2018.

This amendment did not stay intact for long, however, because in a 2018 Emergency Amendment—also effective January 1, 2018—V.R.E.C.P. 4(d)(6)(A) again underwent revision. The Amendment stated that "the rule is amended back to the former time period of 10 days." Reporter's Notes—2018 Emergency Amendment, V.R.E.C.P. 4. The stated purpose of the Emergency Amendment was to avoid a statutory conflict with 10 V.S.A. § 8007(c), which provided the Attorney General with 10 days to appeal an order by this Court approving an assurance of discontinuance. Id. But the tides turned again when the Legislature changed the 10-day period for Attorney General appeals in 10 V.S.A. § 8007(c) into a 14-day period with an amendment that became effective on June 28, 2018. 2018, No. 8 (Sp. Sess.), § 1.

There is also the matter of 10 V.S.A. § 8012(c), which requires this Court to include certain statements in our written decisions on administrative orders. Subsection (5) of this section requires this Court's decisions to include "a warning that the decision will become final if no appeal is requested within *10* days of the date the decision is received." 10 V.S.A. § 8012(c)(5) (emphasis added). There is no separate requirement that we inform the Attorney General of the 14-day period established by 10 V.S.A. § 8007(c) for appeals of assurances of discontinuance.

We note the lack of clarity regarding the length of the appeals period in the relevant statutes and rules. However, there was no assurance of discontinuance in this matter implicating 10 V.S.A. § 8007(c). Therefore, for the limited purpose of providing notice of the appeal period to the parties, we here abide by the mandate in 10 V.S.A. § 8012(c)(5) and the 2018 Emergency Amendment, which direct us to inform the parties that appeals must be taken within 10 days of their receipt of the decision.

Electronically signed on March 14 at 9:40 AM pursuant to V.R.E.F. 7(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division