No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS SUPENO, BARBARA SUPENO, and BARBARA ERNST,

Petitioners,

v.

SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the assessment of a penalty, in a proceeding entirely separate from and subsequent to a hearing on the underlying merits, constitutes a denial of due process where the potential magnitude of the penalty was not disclosed prior to the expiration of the deadline for appealing the decision on the merits, and was not reasonably ascertainable from the face of the pertinent regulatory criteria, leaving Petitioners unaware of the amount at stake and thereby depriving them of the opportunity to intelligently assess whether to appeal the decision on the merits.

2. Whether it is a violation of the Fourth Amendment for the State to impose an administrative penalty enhancement against a party found in violation of environmental regulations based on that party's refusal to allow state officials access to property without a court order.

OPINION BELOW

The opinion of the Vermont Supreme Court is published as *Agency of Natural Resources v. Supeno*, 2018 VT 30, and is reproduced on page 1 of the Appendix.

JURISDICTION

The Vermont Supreme Court issued its decision on March 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. XIV, sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Statutes, Rules, and Constitutional Provisions

STATEMENT OF THE CASE

1. Introduction

Barbara Ernst, Barbara Supeno, and Francis Supeno ("the Supenos") are the owners of two adjoining properties in Addison, Vermont. In September, 2014, the Vermont Agency of Natural Resources ("the Agency") conducted a search of one of the two properties pursuant to an administrative warrant and concluded that the Supenos were in violation of certain State administrative rules governing septic and potable water supply systems. This Petition raises a due process challenge to the procedures used in assessing Petitioners with a penalty of $27,213. The violations and the penalty were addressed in two entirely separate proceedings. On short notice, Petitioners were forced into an initial hearing on the merits where the environmental court found them to be in violation. Although Petitioners were informed that the Agency might later seek to impose a penalty, they were never informed of the penalty amount. Nor was there any way for Petitioners to find that information for themselves given the vague and ambiguous nature of the criteria used by the Agency to calculate the penalty. Believing the violations to be minor in nature, Petitioners allowed their appeal rights to lapse as to the underlying order finding them in violation. They were then assessed a penalty of $27,213 in an entirely separate proceeding. Had they been informed of the magnitude of the penalty they Agency would later seek to impose, they would have exercised their appeal rights as to the first proceeding.

Petitioners first raised their due process argument with the environmental court in the administrative penalty proceeding by way of a motion for summary judgment, renewing that argument on appeal to the Vermont Supreme Court. *See* Appendix at 16-17, 2. Petitioners raised their Fourth Amendment argument for the first time on appeal to the Vermont Supreme Court; *see* Appendix at 5, ¶ 27; as the environmental court gave no indication that it would apply

a penalty enhancement based on Petitioners' assertion of their Fourth Amendment rights until it issued its decision.

2. The Emergency Order

On September 18, 2014, ANR applied to the environmental court for an emergency order, alleging that the Petitioners were in violation of certain environmental regulations, as well as the terms of their existing Wastewater System and Potable Water Supply Permit. The Agency alleged that Petitioners had on occasion allowed the property to be occupied by more than two people, in excess of its permitted septic capacity, and that they had created an unapproved cross-connection between a private well and a public water supply.

That same day, the environmental court conducted an initial telephonic hearing on the Agency's application, which Petitioners Barbara Supeno and Barbara Ernst found themselves obliged to attend on less than two hours' notice and without the benefit of counsel. The court immediately issued a decision, finding Petitioners to have committed the violations alleged, and ordering them to take prompt corrective action. Petitioners were informed that they had five days to request a evidentiary hearing. Petitioners timely requested a hearing, which the court convened on September 25, 2014. On October 2, 2014, following the conclusion of the merits hearing, the court issued a revised Emergency Order, finding the Petitioners to have promptly corrected the violations. The court invited the Petitioners to file an application for a permit amendment.

The court's order states: "The Secretary retains the right to subsequently issue Administrative Orders, including penalties, pursuant to 10 V.S.A. § 8008 with respect to the violations described herein." Neither the court nor the agency provided any information on the penalty or the potential range of penalties that the Secretary might seek to impose. The court's

Order constituted a final judgment, which was appealable to the Vermont Supreme Court within ten days, or by October 12, 2014. *See* App. at 18.

Although Petitioners did not agree that they were in violation, they did not exercise their right to appeal the court's Order because they were not informed as to what might be at stake. Having taken the required corrective action, they believed the matter resolved. In compliance with the court's Order, Petitioners submitted an application for permit amendment, which is still pending over three years later.

3. The Administrative Order

On August 2, 2015, months after the appeal period for the Emergency Order had expired and the case was closed, the Agency served Petitioners with an Administrative Order, assessing the Petitioners with a penalty of $29,325.00. This came as a complete surprise. Because this announcement came after the Petitioners' appeal rights had expired, Petitioners were unable to raise any challenge to the findings of fact that served as the basis for the proposed penalty. By waiting until after the expiration of the appeal period, the Agency effectively thwarted any attempt to undercut the proposed penalty on the facts. Had the Petitioners been made aware of the potential magnitude of the penalty they faced, they would not have allowed their appeal rights relative to the emergency proceedings to lapse. As it was, neither the finding that Petitioners were in violation, nor the underlying findings of fact, were any longer open to challenge under basic principles of *res judicata* and collateral estoppel.

Petitioners appealed the Agency's Administrative Order to the environmental court, which opened a separate matter to conduct a *de novo* review of the Agency's application of its penalty criteria. The environmental court held a penalty hearing on April 20, 2017. This hearing was focused solely on the application of the penalty criteria, which are adopted by rule and set

forth in the Agency's "Administrative Penalty Form." The court noted that the Petitioners had committed a "Class II" violation because they had engaged in "activities or construction initiated before the issuance of all necessary environmental permits." Running through the remaining criteria, the court found that the violations posed a "moderate potential impact" on public health, safety, welfare, and the environment; that Petitioners had reason to know the violation existed; that the violations were of long duration; that there were no mitigating circumstances; and that it would be appropriate to increase the penalty to deter Petitioners and the "regulated community" from committing future violations.

4. The Cross-Connection

The environmental court heard testimony that despite the existence of a physical connection between the piping for the water systems for 306 and 330, the well was inoperable. It had been decommissioned in November, 2010 through a combination of disconnecting it from the electrical panel, fully depressurizing the tank, opening the boiler drains, and establishing air gaps within the system. The Petitioners' uncontroverted testimony was that from the time the connection to the public water supply was established, the well was never at any time online. No actual impact resulted from the cross-connection. However, the Agency argued, and the court accepted, that the cross-connection posed a threat of potential harm, merely because harm was conceivable.

5. The Septic System

Petitioners began renting the property at 306 Fisher Point Road to vacationers in the summer of 2010, occasionally to groups of more than two. Petitioners did not understand applicable regulations to limit their ability to have occasional extra guests stay at the property.

The Agency's witnesses admitted that they had no information to suggest that Petitioners actually knew that this constituted a permit violation.

At trial, all witnesses agreed that the septic system was at all times functioning as intended, and that there was never any actual risk of harm to the public health, safety, welfare or the environment. Petitioners' expert, a professional engineer with decades of experience in septic design and permitting, reviewed the occupancy records for the 306 Fisher Point Road property in light of actual water usage, and concluded that there was never even any potential risk of harm. Rather than attempt to discredit this testimony, the Agency took the position that the mere presence of an extra bed in the house presented an existential threat of potential harm. The court agreed with the Agency's position that any possibility of altering the levels of use presented a *per se* potential for harm. Applying the Agency's penalty criteria, the court concluded that this represented a "moderate potential impact from the potential failure of a wastewater treatment system."

6. The Environmental Court's Decision

The environmental court issued its penalty decision on May 15, 2017. It assessed a fine of $27,213.00, and found no mitigating circumstance in Petitioners' prompt corrective action. Although the court acknowledged that Petitioners permitted inspectors to enter their property upon being presented with a copy of the court's access order, the court deemed it appropriate to assess a penalty enhancement in light of the fact that Petitioners initially denied entry to Agency officials: "In reviewing the importance of establishing a penalty that will have a deterrent effect upon Respondents, we consider that Respondents were not cooperative with ANR and denied ANR access at the time of the original site visit." App. 11. The court thus penalized Petitioners for asserting their Fourth Amendment rights.

The testimony at trial established that the well and the connection to the public water supply were never online at the same time, and that the connection to the public water supply was only established in November, 2010, at the same time the well was decommissioned. Nevertheless, the court found a cross-connection was in place "at a minimum" from October 2009 to November 2011. The court found this to be a violation of "moderate" duration, and increased the penalty accordingly.

The court refused to consider evidence relating to penalties imposed in analogous matters. The court also declined to consider evidence relating to actual occupancy of the property, which is the only evidence that logically ought to be considered in assessing "potential impact."

7. The Vermont Supreme Court Decision

The Petitioners timely filed a notice of appeal with the Vermont Supreme Court. The Vermont Supreme Court affirmed the environmental court's decision in all respects. The court held that because the Petitioners were on notice of the fact that a penalty might later be imposed, Petitioners were afforded all the process they were due. Decision at 4-5. However, the court failed to address Petitioners' argument that knowledge of the penalty amount was critical to assessing whether to appeal or not. The court also incorrectly concluded that the environmental court did not penalize Petitioners for exercising their Fourth Amendment rights, ignoring the plain language of the environmental court decision, quoted above. Decision at 12.

ARGUMENT

1. Due Process Requires That Parties Be Informed of the Amount of a Proposed Penalty Prior to the Expiration of Their Appeal Rights.

Petitioners were deprived of due process because they were not informed of the amount of the penalty the Agency would seek to impose until after their appeal rights relative to disputed facts had lapsed. Knowledge of the amount of the penalty the Agency would later seek to impose was indispensable to an intelligent assessment of whether to appeal the Emergency Order. Had Petitioners been aware of the magnitude of the proposed penalty, they would have exercised those appeal rights. They were unfairly deprived of that opportunity because the Agency did not disclose this information in time for them to exercise those rights.

The Due Process clause of the United States Constitution provides persons threatened with a governmental deprivation of life, liberty, or property, with a right to adequate notice and an opportunity to be heard. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); U.S. Const., Amend XIV, § 1. "The right to be heard is worth little unless one is informed that the matter is pending and can choose "whether to appear or default, acquiesce or contest." *Town of Randolph v. Estate of White*, 166 Vt. 280, 283, 693 A.2d 694 (1997). A party who is not provided with notice of what is at stake in a legal proceeding is deprived of his or her ability to make an intelligent decision as to whether to appear, default, acquiesce, or contest. *See id.*; *see also Ottenheimer Publ. Inc. v. Employment Sec. Admin.*, 340 A.2d 701, 704 (Md. Ct. App. 1974) (purpose of notice is to "provide sufficient information so that [parties] may decide if an appeal is in their interest."). "[T]o be constitutionally sufficient, the notice must communicate the interest at stake...." *Schulte v. Transportation Unlimited, Inc.*, 354 N.W.2d 830, 834 (Minn. 1984); *see also City of East Orange v. Kynor*, 893 A.2d 46, 51 (N.J. App. Div. 2006) (finding violation of due process where City sought payment in an amount above that stated in the

complaint and published notice); *Tafti v. County of Tulare*, 130 Cal. Rptr. 3d 472, 480 & n.9 (Cal. Ct. App. 2011) (notice must specify the scope of the hearing and what is at stake); *Mizell v. Rutledge*, 328 S.E.2d 514, 518 (W. Va. 1985) (notice must inform a party of the specific consequences of Agency's determination).

To determine what process is due, the courts look to three factors: "(1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of the interest under the procedures used, and (3) the governmental interests involved, including fiscal and administrative burdens." *Town of Randolph*, 166 Vt. at 283, 693 A.2d 694 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). The greater the property interest at stake, the more due process requires in terms of procedural safeguards. *See Comito v. Police Board of Chicago*, 739 N.E.2d 942, 949 (Ill. Ct. App. 2000) ("[D]ue process is a flexible concept which requires different levels of protection depending on the level of protectable interest at stake; the more significant the property interest, the more process is due.").

There should be no denying that a penalty of $27,213 affects a substantial private interest. In the Petitioners' case, a penalty this high is financially ruinous. In addition, the fast-track procedures that apply when the environmental court is called upon to issue an emergency order practically ensure that any defense will be less than fully developed. *See* V.R.E.C.P. 4(c)(3) (party must move for merits hearing within five days of the date of an emergency order, hearing must be held within five days of the filing of the motion). In this case, Petitioners had just one week to prepare for the hearing, even though there was never any emergency – neither the septic system nor the cross-connection ever presented any risk of actual harm.

The subjective nature of the Agency's penalty criteria afforded the Petitioners with inadequate warning that their unwitting actions would subject them to a penalty of over $27,000. Neither the statute nor related penalty decisions provided fair warning to Petitioners that they were facing a penalty on this order of magnitude. Under the Agency's administrative penalty criteria, the amount of the penalty is largely a matter of interpretation, driven by subjective considerations. The Agency calculated its proposed penalty based on a variety of vague and ambiguous criteria, such as whether an actual or potential impact is classified as "minor" or "moderate;" whether the Agency deems "mitigating circumstances" or "deterrent effect" sufficient to warrant a penalty adjustment; or the indeterminate point where usage levels rise to a degree that should be deemed a violation of occupancy limits set under a party's wastewater permit. These subjective criteria resulted in a largely *ad hoc* process that is in and of itself a violation of due process. *See Las Vegas v. Nevada Indus., Inc.*, 772 P.2d 1275, 1277 (Nev. 1989). Decisions "arrived at without reference to any standards or principles are arbitrary and capricious; such ad-hoc decision-making denies an applicant due process of law." *In re MVP Health Ins. Co.*, 2016 VT 111 ¶ 20, 155 A.3d 1207 (quoting *In re Miserocchi*, 170 Vt. 320, 325, 749 A.2d 607 (2000)) (internal bracketing omitted). As constituted, the penalty criteria failed to provide Petitioners with adequate notice of the amount of the penalty that the Agency would seek to impose.

The Agency may argue that Petitioners were on notice of the potential range of penalties it might impose because those penalties are authorized under statute and related regulations. *See* 10 V.S.A. 8010(c)(1) (establishing maximum penalty amount of $170,000). This argument should be rejected. Failure to inform a party of applicable appeal procedures should not be deemed cured by virtue of the existence of a statute or related regulations. *Town of Randolph,*

166 Vt. at 697, 693 A.2d 694 ("[T]he notice must state the facts that support the finding of a violation, *the action the state intends to take*, and information on how to challenge the notice.") (emphasis added). The mere existence of vaguely formulated statutory or regulatory authority was insufficient to inform Petitioners of the very substantial penalty the Agency would later seek to impose.

The administrative and financial burdens involved in timely disclosure of this information would have been inconsequential. The Agency had all the information it needed to arrive at a penalty determination prior to the expiration of the appeal period. Allowing the Agency to impose a penalty after its expiration deprived the Petitioners of a fair opportunity to challenge the factual findings underlying that penalty. Principles of due process prohibit the imposition of undisclosed remedies: "[R]elief 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 the remedy was being considered." *Prue v. Royer*, 2013 VT 12 at ¶ 53, 67 A.3d 895.

The environmental court found that penalties imposed in other comparable cases were irrelevant. But while the facts and circumstances will vary from case to case, this information was in fact highly relevant as courts routinely look to similar cases for guidance in assessing penalties. *See, e.g.*, *United States v. Emerson*, 107 F.3d 77, 81 & n. 9 (1st Cir. 1997) (review of penalties imposed in similar cases may be instructive in evaluating appropriate range of penalties). Petitioners provided the environmental court with a number of decisions in other enforcement matters, which the court refused to consider. These cases plainly showed that the penalty imposed here was greatly in excess of what had been imposed in other similar cases.

The highly subjective nature of the Agency's penalty criteria, against the backdrop of relatively modest penalties imposed in other similar cases, provided no fair warning of the amount of the proposed penalty. The loss of appeal rights is not merely an academic issue. The five days that the Supenos had to prepare for the "emergency" hearing was not adequate time. After the hearing the Supenos became aware of facts that might have changed the outcome. If they had known that the findings from that first case would have exposed them to a $27,000 penalty in a subsequent proceeding, they would have challenged those findings. Notwithstanding the Agency's assertion to the contrary, the Supenos were not made aware of the consequences they faced before they allowed their appeal rights to lapse. This Court should therefore issue a writ of certiorari to examine these issues.

2. Parties Cannot Be Penalized for Asserting Their Fourth Amendment Right to Be Free from Unreasonable Search and Seizure.

The trial court found that Appellants' prompt compliance with the Emergency Order was not entitled to any consideration as a "mitigating circumstance," weighing Appellants' compliance against their refusal to allow Agency investigators to inspect their property during their initial visit, which led to the issuance of a search warrant (a so-called "access order"). *See* PC 16-17. The court then went further, increasing the penalty because "[Appellants] were not cooperative with ANR and denied ANR access at the time of the original site visit." PC 17.

The Fourth Amendment to the United States Constitution provides the Appellants with the right to be free from unreasonable searches. *See* U.S. Const., Amend. IV. It is a fundamental precept that a court may not punish a person for standing on his or her constitutional rights. *See State v. Ryce*, 368 P.3d 342, 347, 376, 380 (Kan. 2016) (citing *United States v. Goodwin*, 457 U.S. 368, 372, (1982)) ("An individual … may not be punished for exercising a protected statutory or constitutional right."). Until they obtained a warrant, the Appellants were under no

obligation to simply open their doors to Agency personnel. The implicit finding to the contrary should be rejected.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari.

Dated at Burlington, Vermont the 14th day of June, 2018.

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APPENDIX

Agency of Natural Res. v. Supeno

Supreme Court of Vermont

March 16, 2018, Filed

No. 17-187

Reporter
2018 VT 30 *; 2018 Vt. LEXIS 27 **; 2018 WL 1354549

Agency of Natural Resources v. Francis Supeno, Barbara Supeno, and Barbara Ernst

Notice: THIS OPINION IS SUBJECT TO MOTIONS FOR REARGUMENT UNDER V.R.A.P. 40 AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE VERMONT REPORTS.

Prior History: **[**1]** On Appeal from . , J.

Disposition: Affirmed.

Core Terms

violations, penalties, reserved, claim preclusion, parties, penalty assessment, Environmental, administrative order, notice, factors, water supply, due process, wastewater, quotation, res judicata, assess, final judgment, mitigating, deterrent, bedroom, rental

Counsel: *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.

Judges: Present: *Reiber, C.J., Skoglund, Eaton and Carroll, JJ.*

Opinion by: SKOGLUND

Opinion

[*P1] **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.

[*P2] 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 **[**2]** 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.

[*P3] 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 **[**3]** the basement.

[*P4] 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.

[*P5] 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 **[**4]** 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.

[*P6] 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.

[*P7] 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 **[**5]** 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.

[*P8] 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

[*P9] 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, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*).

[*P10] 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*.

[*P11] Here, respondents **[**6]** 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.

[*P12] 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. *Pratt v. Rowe, 2013 VT 12, ¶ 58, 193 Vt. 267, 67 A.3d 895* (explaining that "relief cannot be granted if the party against which it is granted **[**7]** 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

[*P13] 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 **[**8]** claims as those that were raised or might have been raised in the EAO.

[*P14] 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.

[*P15] On appeal, we review de novo the question of whether claim preclusion applies to a given set of facts. *Faulkner, 178 Vt. 51, 2004 VT 123, ¶ 8, 869 A.2d 103*. 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 **[**9]** administrative order); see *Lamb v. Geavgan, 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)).

[*P16] 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 **[**10]** 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.").

[*P17] 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, 178 Vt. 51, 2004 VT 123, ¶ 16 n.5, 869 A.2d 103*, 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.

[*P18] In determining whether to adopt this exception, we consider the purposes of claim preclusion: "(1) to conserve the resources of courts and litigants **[**11]** 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]

[*P19] 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 **[**12]** did not bar ANR from seeking penalties as part of an AO proceeding.

[*P20] 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 995. 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*.

[*P21] 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 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.*

[*P22] The **[**13]** 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.

[*P23] "[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 52, ¶ 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 **[**14]** AO rather than in the initial EAO.

III. Penalty

[*P24] 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. Parsons*, 2013 VT 16, ¶ 20, 194 Vt. 87, 75 A.3d 582 (quotation omitted).

[*P25] 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. **[**15]** 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.

[*P26] 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

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

statutory factors. The court found there was a moderate potential[2] for an adverse impact on health or the 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 [**16] 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.

[*P27] Respondents argue that the court clearly erred by including an increase for a deterrent because respondents did [**17] 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. 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, 194 Vt. 87, 2013 VT 10, ¶ 20, 75 A.3d 582* ("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 [**18] 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.

[*P28] 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.

[*P29] 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 [**19] 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 JED 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.

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[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 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.

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Sec'y v. Supeno

Superior Court of Vermont, Environmental Division

May 15, 2017, Decided

Docket No. 98-8-15 Vtec

Reporter
2017 Vt. Super. LEXIS 35 *

SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES, Petitioner, v. FRANCIS SUPENO, BARBARA SUPENO, and BARBARA ERNST, Respondents.

Core Terms

violations, cross-connection, wastewater, Respondents', calculation, water supply, Environmental, requires, rental, rental property, potable water, public health, maximum, deterrent, assign, penalties, modified, expenses, bedroom, public water system, enforcement action, potential impact, length of time, credible, duration, factors

Judges: [*1] Thomas G. Walsh, Judge, Superior Court, Environmental Division.

Opinion by: Thomas G. Walsh

Opinion

DECISION ON THE MERITS

The matter before the Court is a request for a hearing on an Administrative Order (AO) issued by the Agency of Natural Resources (ANR) on June 25, 2015 imposing a $29,325 penalty on Francis Supeno, Barbara L. Supeno and Barbara J. Ernst (Respondents) for water and wastewater permit violations, and an illegal cross-connection between a private well and a public water supply at a rental house on Lake Champlain.[1] The AO is the penalty phase of ANR's enforcement action in this case. The bulk of the enforcement action took place in September 2014 when ANR discovered the violations and applied to the Court for an Emergency Administrative Order (EAO). The Court granted the EAO, which required Respondents to correct the violations at 306 Fisher Point Road in Addison, Vermont (Rental Property).

Following some discovery disputes in the matter of the AO, the Court denied cross-motions for summary judgment and then granted Respondents a continuance. The Court finally conducted a single day merits hearing on April 20, 2017. The ANR appeared at trial represented by attorney John S. Zaikowski, Esq. Also [*2] appearing were Barbara Supeno and Barbara Ernst, represented by attorney David E. Bond, Esq. Francis Supeno is also represented by Attorney Bond, however, Mr. Supeno was not present at trail.

Findings of Fact

1. Respondents Francis J. Supeno and Barbara L. Supeno, brother and sister, own property at 306 Fisher Point Road in Addison, Vermont (Rental Property). This property was operated as a rental house. Barbara J. Ernst has some involvement with the property and rentals.

2. Respondents Barbara L. Supeno and Barbara J. Ernst own and reside on the adjacent property at 330 Fisher Point Road in Addison, Vermont. Francis J. Supeno lives in Massachussets.

3. Respondents Francis and Barbara Supeno obtained a Wastewater System and Potable Water Supply Permit (#WW-9-1411) on October 22,2009 (WW Permit).

4. The WW Permit authorizes the replacement of a former seasonal cottage with a year-round single family residence having one bedroom, the construction of an on-site potable water supply from a drilled bedrock well, and wastewater disposal system to be located on the adjoining 330 Fisher Point Road.

5. The water supply at 330 Fisher Point Road is provided by the Tri-Town Water District #1, which [*3] is a public water

[1] Respondents also filed an action against ANR in the Civil Division, alleging discrimination and other constitutional torts relating to this enforcement action. On November 13, 2015, Respondents filed a motion to stay this proceeding pending the outcome of their civil case. While Respondents' motion to stay was pending in this Court, the Civil Division stayed Respondents' civil action. We therefore determined that Respondents' motion to stay in the Environmental Division was moot and we proceeded to trial.

supply system.

6. In June 2014, ANR received a complaint of alleged violations of the WW Permit at 306 and 330 Fisher Point Road.

7. At the time of the complaint, 306 Fisher Point Road was advertised for rental as a two-bedroom, two-bathroom home.

8. In August 2014, in response to the June 2014 complaint, ANR sent e-mail communication to Respondents as part of ANR's investigation of the complaint. No response was received.

9. In September 2014, ANR visited 330 Fisher Point Road as part of its investigation into the complaint. Respondent Barbara Supeno denied ANR access into the house.

10. ANR petitioned this Court for an Access Order. The Access Order was granted on September 9, 2014. That same day, ANR completed a site visit to 306 Fisher Point Road.

11. On September 18, 2014, the ANR Secretary applied to this Court for an EAO pursuant to the provisions of *10 V.S.A. § 1978(a)(6)*, *10 V.S.A. § 8009(a)(3)*, and V.R.E.C.P. 4(c). That same day, the Court conducted an initial hearing on the application and issued the EAO in docket no. 142-9-14 Vtec.

12. The EAO establishes three broad violations.

13. The first violation resulted from Respondents' failure to obtain a permit before modifying the rental home at 306 Fisher Point **[*4]** Road to add a second bedroom in the basement, increasing the design flow of the building to an amount that is approximately double the design capacity of the wastewater system authorized in the wastewater system and potable water supply permit in violation of *10 V.S.A. § 1978(a)(6)* and Condition 3.6 of the Wastewater System and Potable Water Supply Permit #WW-9-1411.

14. Altering the home's use to a rental property also had the potential to increase the flow of the potable water and wastewater.

15. Increasing wastewater flows causes a risk of failure to the wastewater system which in turn could result in human exposure to contaminates and/or contamination of soil and groundwater.

16. The second and third violations resulted from Respondents splicing into the water supply line from Tri-Town Water, a public water system that serves 330 Fisher Point Road, and connecting it to the Rental Property. The Rental Property also had a permitted drilled well. An unapproved cross-connection allowed Respondents to switch between the two water sources.

17. The second violation was Respondents' failure to obtain a permit before making a new or modified connection to a new or existing potable water supply in violation of *10 V.S.A. § 1978(a)(2)* and **[*5]** Wastewater System and Potable Water Supply Permit #WW-9-1411, Conditions 1.1, 1.2, and 2.1.

18. The third violation was Respondents' unapproved cross-connection, which was prohibited by Water Supply Rule § 21-8. The interconnection subjected the public water system (Tri-Town) to the risks associated with introducing water from a different source, in which potentially polluted water could be drawn into the public water system.

19. Respondents caused the cross-connection to be removed on September 22, 2014, four days after the initial EAO application hearing and nearly two weeks after ANR discovered the violations.

20. Respondents timely requested a hearing on the EAO, which the Court held on September 25, 2014 pursuant to *10 V.S.A. § 8009(d)* and V.R.E.C.P. 4(c)(3). Following the hearing, the Court modified the EAO to allow Respondents to seek a permit from ANR to connect the Rental Property with the public water supply. The modified EAO was issued on October 2, 2014.

21. In signing the two emergency administrative orders, the Court found that the alleged violations took place. Respondents did not appeal that determination.

22. On June 25, 2015, ANR issued an AO for the same violations included in the EAO. **[*6]** No new violations were added. The AO assessed a $29,325 penalty against the Respondents.

23. ANR served Respondents with the AO on August 3, 2015.

24. Respondents timely requested a hearing on the AO with this Court.

25. The state's actual cost of enforcement includes the value of the time that ANR officials committed to responding to Respondent's violations, including prosecution of the trial before this Court. This included Environmental Enforcement Officer Dan Mason, Chief Environmental Enforcement Officer Sean McVeigh, and Engineer David Swift for a total cost of $6,213.

26. Although ANR offered some evidence regarding the financial gain that Respondents enjoyed by operating 306 Fisher Point Road as a rental property, that evidence does not provide a clear picture of actual economic gain.

Penalty Assessment

When a respondent requests a hearing on a penalty assessed in an AO, we are required to "determine anew the amount of a penalty" that should be assessed against the respondent challenging the ANR order.[2] *10 V.S.A. § 8010(b)(1), (4)*. We therefore review the evidence before the Court and determine an appropriate penalty assessment, pursuant to the eight subsections of *10 V.S.A. § 8010(b)(1)-(8)*.

ANR, and this Court in this proceeding, **[*7]** 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 $17,000 for each day a penalty continues. *Id. § 8010(c)(1)*. Generally, ANR treats multiple violations of the same permit, or related violations generally, as one violation when calculating penalties. We take the same approach in this case, and analyze the three violations as a single violation.

The State may also "recapture economic benefit" that the violator may have derived from the violation, up to the total maximum penalty allowed of $170,000. *Id. § 8010(c)(2)*.

In an effort to standardize penalties and ensure a fair process, ANR enforcement officers use a form that is based on the seven factors. **[*8]** They rate the severity of the violations from 0 to 3 for factors (1), (3), (4) and (8), and come up with an initial penalty score. The highest possible initial score is a 15, which equates to an initial penalty of $42,500 for a Class I violation, the maximum allowed. Classes II, III, and IV carry lower maximum penalties of $30,000, $10,000 and $3,000 respectively. The initial penalty can then be adjusted based on penalty factors (2), (6) and (7). If the violator signs an Assurance of Discontinuance, agreeing not to dispute the action, the final penalty may be reduced by 25%.

At the outset of the Court's penalty assessment, we conclude that this matter presents a Class II violation. A Class II violation includes "[a]ctivities or construction initiated before the issuance of all necessary environmental permits." ANR Administrative Penalty Form, Class II, subsection 2. In this matter, the October 2, 2014 EAO established three violations: the failure to obtain a permit before the modification 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; the failure to obtain a permit before **[*9]** making a new or modified connection to a new or existing water supply; and installation of an unapproved cross-connection between public and non-public water supply systems. We therefore classify the violation(s) as Class II.

A. *Calculation of Base Penalty*:

a. *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." There is no credible evidence that the violations caused an "*actual* impact" that harmed the public health, safety, welfare, or the environment. ANR Administrative Penalty Form (ANR form) Questions 1 and 2.

Respondents' violations of modifying the use of the home by increasing the number of bedrooms potentially increases the flow of the potable water and wastewater. Likewise, altering the home's use to a rental property also had the potential to increase the flow of the potable water and wastewater. Increased wastewater flows have the potential to exceed the flow design capacity of the wastewater system and therefore result in the *potential* adverse impacts on public **[*10]** health, safety, welfare, and the environment. Increasing wastewater

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[2] Respondents offered into evidence many Exhibits (including but not limited to Exhibits H, I, K, L, M, N, S, T, U, V, W, X, Z, AA, CC and HH) which are copies of e-mail exchanges between Respondent Barbara Supeno and Environmental Enforcement Officers, ANR engineers, the Secretary of ANR, Vermont's Governor, and U.S. Environmental Protection Agency staff. The offer in support of this evidence was that the Respondents had antagonized ANR staff with their persistent complaints, and ANR conspired to retaliate against Respondents by assessing a high fine. At trial, these exhibits were admitted on the condition that Respondents would produce other evidence supporting their retaliation claim. As no other evidence was offered, these exhibits are given little weight by the Court in assessing a penalty. We additionally note that on appeal, the Court calculates the penalty, not ANR. Evidence of complaints made by Respondents does not affect the Court's analysis of assessing an appropriate penalty in this matter.

flows causes a risk of failure to the wastewater system which in turn could result in human exposure to contaminates and/or contamination of the soil and groundwater.

The parties introduced conflicting evidence concerning the *potential* adverse impacts on public health, safety, welfare, and the environment from the cross-connection. The adverse impact is the potential of exposing the public water supply to a water source of unknown quality; this being the private well. The concern is the possibility of water from the private well flowing into the public water system. First, ANR offered evidence of past use of the cross-connection system and that even if the cross-connection was temporarily disconnected, it could have been re-connected. ANR testified that Respondent Ernst confirmed that within three months of ANR's inspection, Respondents were switching the water supply between the well and the public supply.

Respondents offered that the cross-connection was taken out of service shortly after the cross-connection was constructed by decommissioning the well. As such, water from the well could not have potentially harmed **[*11]** the public water system. They also contend that Ernst's statement regarding switching between the well and public supply was erroneous. We have concerns with the credibility of Respondents' testimony here. The offered purpose of the cross-connection was an alternate water supply for 330 Fisher Point Road, but this is not rational as it would have been less effort to directly connect the well to 330 Fisher Point Road, instead of running the connection from the well, through 306 Fisher Point, and then to 330 Fisher Point. Thus, we conclude that there was some potential for impact to public health, safety, and welfare stemming from the cross-connection.

In considering ANR's penalty calculation form, we assign a value of "1" to the degree of impact on public health, safely, and welfare (ANR form Question 1) and a value of "1" to the degree of impact on the environment (ANR form Question 2) as we conclude there is moderate potential impact from the potential failure of a wastewater treatment system.[3]

b. *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 consideration of "whether the respondent knew or had reason to know the **[*12]** violation existed." The ANR penalty calculation form includes two parts related to this subsection: 3a, knowledge of the requirements, and 3b, knowledge of the facts of the violation. Respondents knew or should have known about their legal requirements under the WW Permit and the facts of the violations. The credible evidence shows that Respondents had a permit limiting the use of 306 Fisher Point to one bedroom and expressly authorizing a water supply from a private well. Thus, in considering ANR's penalty calculation form, we assign a value of "2" for respondents' knowledge of requirements (ANR form Question 3a, which assigns a "2" where respondent "had a permit or permit by rule"). As to Respondents' knowledge of the facts of the violations we assign a value of "2," concluding there is "some evidence that the Respondent knew the violation existed" (ANR form Question 3b). For instance, Respondents' plumber, Everett Windover, a water quality specialist with Culligan, testified that in 2010 he explained the prohibition again cross-connection of water supplies and associated concerns to Respondents and that they understood the issues.

c. *Penalty Factor 4: Respondent's Record of Compliance **[*13]***

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

d. *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 the cross-connection was constructed in October 2009. ANR offered evidence that the cross-connection violation existed for years; at a minimum from late 2009 through 2011. Respondents countered that the cross-connection was effectively taken out of service soon after it was constructed. Respondents called their plumber, who testified that he decommissioned the well water in November 2011 by disconnecting electricity to the well pump and removing filter bowls. Respondents' plumber further testified that he physically removed the cross-connection by severing the plumbing in September 2014. At the time of removing the cross-connection, the plumber reconnected the well.

At a minimum, the cross connection was in place from October **[*14]** 2009 to November 2011, which is not a short duration. The court could conclude that the violation existed for a long duration, from 2009 to 2014, by concluding that the plumbing of the cross-connection was in place for this entire

[3] If the Court were to consider the cross-connection violation alone, we would likely as assign a value of "0" to the degree impact on public health, safely, and welfare (ANR form Question 1) and a value of "0" to the degree of impact on the environment (ANR form Question 2) as we would likely conclude there was minor potential impact from the cross-connection. As we treat all violations in one calculation we use the moderate impact based on the potential failure of the wastewater system.

period and could easily have provided water from either the well or the public system. We conservatively give some benefit to Respondents' offer that some temporary measures were taken in 2011 to take the well out of service. In considering ANR's penalty calculation form, we assign a value of "2" on the cross-connection alone, concluding that this violation existed for a moderate duration (ANR form Question 5).

The length of time that Respondents had the potential for increased wastewater flow correlates to the period when respondents rented the property and had an extra bedroom. This period was from July 2010 through September 2014; more than four years. We consider the potential for impact and therefore do not limit the violation to the actual number of humans using the property during the rental period. In considering ANR's penalty calculation from, we assign a value of "3" concluding the potential for increased wastewater flow existed for a long duration **[*15]** (ANR form Question 5).

Thus, taking these violations together results in a single, long duration violation that is given an assessment of "3" for the length of time the violation existed.

In adding the above penalty scores we arrive at a base score of 7 which equates to a base penalty of $12,000 for a Class II violation. See ANR form Question 6.

B. *Penalty Adjustments*:

We next consider appropriate adjustments to the base penalty.

e. *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 attempted a prompt site visit in response to the complaint of potential violations and associated environmental concerns. Respondents did not allow ANR access to investigate the complaint. ANR was required to obtain a court order for access. With the Access Order, ANR officials responded promptly and attempted to bring the subject property into compliance voluntarily. ANR first pursued an emergency order to obtain compliance and then sought penalties at a later date pursuant to the express reservation within the emergency order of the right to subsequently **[*16]** pursue penalties. This evidence supports the timeliness of ANR's actions. After denying ANR access, objecting to the emergency order and requesting a hearing on the emergency order, Respondents remediated the violations.

At the conclusion of trial, Respondents requested that the Court take judicial notice of the ANR orders from other enforcement actions which Respondents filed in support of an earlier motion for summary judgment. These other actions appear to be a hand-picked subset from the pool of all ANR enforcement actions. The other actions include Environmental Citations issued pursuant to 10 V.S.A. § 8019 which have a statutory maximum penalty of $3,000. Environmental Citations are available for ANR's use in response to minor violations. We conclude that the penalties established within an Environmental Citation are not analogous to the events and facts of this matter. Furthermore, each enforcement matter has unique and specific underlying facts. The underlying facts support the amount of fine imposed in each case. Thus, it would be difficult to simply review an AO and correlate the penalty to the facts of this matter without ANR's explanation of how it arrived at the penalty in the other matters. **[*17]**

Based on these facts, the Court declines to reduce Respondents' penalty based on mitigating circumstances.

f. *Penalty Factor 6: The Deterrent Effect*

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 this matter the maximum penalty is $30,000 and the base penalty we have calculated is $12,000, allowing for a maximum deterrent of $18,000.

When people make decisions, they consider the risk of penalties and other negative consequences of their prior decisions. In reviewing the importance of establishing a penalty that will have a deterrent effect upon Respondents, we consider that Respondents were not cooperative with ANR and denied ANR access at the time of the original site visit. Furthermore, we conclude that the long period of time that the violations existed, despite the fact that Respondents knew or should have known about the violations, warrants a deterrent penalty.

At trial, Respondents **[*18]** Barbara Supeno and Barbara Ernst offered their inability to pay a high penalty. Respondent Francis Supeno did not offer evidence on his ability to pay a penalty. Respondents did offer into evidence that they had paid expenses for the rental property in excess of $150,000 in 2010, $80,000 in 2011, $71,000 in 2012 and $97,000 in 2013. Respondents also offered that Francis Supeno was primarily responsible for the property's finances. We therefore decline to conclude that the Respondent do not have an ability to pay

a high penalty.[4]

We therefore conclude a need to impose an additional penalty of $9,000 (50% of the maximum of $18,000) as deterrent for Respondents to avoid future violations.

g. *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 $6,213. We direct Respondents to reimburse these costs as an additional penalty for the violations.

h. *Economic Benefit*

The Secretary may recapture any economic benefit Respondents may have gained by violating its permit. 10 V.S.A. § 8010(c). ANR **[*19]** offered that the gross receipts received by Respondents from rentals was economic benefit resulting from the violations as Respondents did not have the approvals needed for rental generally or the extra bedroom. Based on Respondents' own evidence, gross rental receipts during the violation period approximated $165,000. Respondents offer evidence that they incurred operating expenses for the rental property in excess of $150,000 in 2010, $80,000 in 2011, $71,000 in 2012 and $97,000 in 2013, and therefore, they argue that there is no economic gain. We have credibility concerns with Respondents' offered expenses. First, during cross examination, ANR established considerable duplicate accounting of expenses. Second, Respondents' offer of operating expenses relating to a two-bedroom house rental exceeding an average of $410 per day for every day of 2010 is beyond credible. Lastly, we have no way of confirming that the expense accounting offered by Respondents is an accurate allocation of expenses reasonably related to rental income.

While we believe that recapturing economic gain from a violation is appropriate, we conclude that based on the evidence before the Court, we cannot calculate **[*20]** the gain in this matter. Thus, we decline to impose any amount of additional penalty relating to economic gain.

i. *Reduction for Settlement*

Finally, ANR may reduce a respondent's penalty when the respondent admits the violation and enters an Assurance of Discontinuance fully resolving the compliance issue. Such a reduction is not warranted in this matter as Respondents neither admitted the violations nor resolved their disputes by settlement.

The Court therefore increases the base penalty of $12,000 by adding $9,000 as deterrent and adding $6,213 as reimbursement of ANR's costs of enforcement. The total penalty in this case is $27,213.

Conclusion

For the reasons stated above, we conclude that for the violations at issue within the October 2, 2014 EAO, Respondents shall be liable for a total penalty in these proceedings of **$27,213.00**.

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. All parties to this proceeding have a right to appeal this Decision and Judgment Order. The procedures for requesting an appeal are found in the Vermont Rules of Appellate Procedure (V.R.A.P.) **[*21]** subject to superseding provisions in Vermont Rule for Environmental Court Proceedings (V.R.E.C.P.) 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) 828-3276. 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 the Vermont Rules of Civil Procedure (V.R.C.P.) 62 and V.R.A.P. 8.

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

Electronically signed on May 15, 2017 at 2:42 PM pursuant to V.R.E.F. 7(d).

/s/ Thomas G. Walsh, Judge

Thomas G. Walsh, Judge

Superior Court, Environmental Division

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[4] Furthermore, ability to pay is not among the factors to be considered when calculating a penalty. 10 V.S.A. § 8010.

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Sec'y v. Supeno

Superior Court of Vermont, Environmental Division

February 14, 2017, Decided

Docket No. 98-8-15 Vtec

Reporter
2017 Vt. Super. LEXIS 2 *

SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES, Petitioner, v. FRANCIS SUPENO, BARBARA SUPENO, and BARBARA ERNST, Respondents.

Core Terms

violations, administrative order, res judicata, emergency, summary judgment, enforcement action, penalties, parties, Rental, fines, wastewater, split, water supply, reserved, immediate threat, Respondents', statutes, phase, final judgment, requirements, agency's

Judges: [*1] Thomas G. Walsh, Superior Court, Environmental Division Judge.

Opinion by: Thomas G. Walsh

Opinion

DECISION ON MOTIONS

The matter before the Court is a request for hearing on an Administrative Order (AO) issued by the Agency of Natural Resources on June 25, 2015 imposing a $29,325 penalty on Francis Supeno, Barbara L. Supeno and Barbara J. Ernst (Respondents) for water and wastewater permit violations, and an illegal cross-connection between a private well and a public water supply at a rental house on Lake Champlain. The AO is the penalty phase of ANR's enforcement action in this case. The bulk of the enforcement action took place in September 2014 when ANR discovered the violations and applied to the Court for an Emergency Administrative Order (EAO). The Court granted the EAO, which required Respondents to correct the violations at 306 Fisher Point Road in Addison, Vermont (Rental Property).

The Respondents oppose the AO on three grounds. First, they claim the state infringed upon their due process rights because they were not informed of the possibility of being assessed a penalty of nearly $30,000. Second, they claim the AO is barred by the doctrine of res judicata, which prevents subsequent litigation [*2] of a claim or defense following a final judgment of an action where the parties, subject matter and causes of action are identical or substantially identical. Third, the Respondents claim the penalty violates the *Eighth Amendment to the United States Constitution*, which prohibits excessive fines. The Respondents, who are represented by Attorney David Bond, filed a motion for summary judgment, asking the Court to deny ANR's penalty claim and dismiss the matter.

ANR, which is represented by Attorney John Zaikowski, filed a cross motion for summary judgment. ANR argues that the liability for the violations has already been found and is not in dispute, and the penalty is reasonable.

Both motions are DENIED for reasons explained below.

Factual Background

Solely for the purposes of deciding the pending motions for summary judgment, we recite the following facts. We understand these facts to be undisputed unless otherwise noted.

1. Respondents Francis J. Supeno and Barbara L. Supeno own property at 306 Fisher Point Road in Addison, Vermont. They operate a rental house, along with Barbara J. Ernst.

2. Respondents Barbara L. Supeno and Barbara J. Ernst own and reside on the adjacent property at 330 Fisher Point Road in Addison, Vermont.

3. On September [*3] 18, 2014, the ANR Secretary applied to this Court for an EAO pursuant to the provisions of *10 V.S.A. § 1973(a)(6)*, *10 V.S.A. § 8009(a)(3)*, and V.R.E.C.P. 4(c). That same day, the Court conducted an initial hearing on the application and issued the EAO in docket no. 142-9-14 Vtec.

4. ANR cited several violations in its EAO.

5. Respondents failed to obtain a permit before modifying the

rental home to add a second bedroom in the basement, increasing the design flow of the building to an amount that is approximately double the design capacity of the wastewater system authorized in the wastewater system and potable water supply permit in violation of 10 V.S.A. § 1974(a)(6) and Wastewater System and Potable Water Supply Permit #WW-9-1411, Condition 3.6.

6. Respondents spliced into the water supply line from Tri-Town Water, a public water system that serves 306 Fisher Point Road, and connected it to the Rental Property. The Rental Property also had a permitted drilled well. An unapproved cross-connection allowed Respondents to switch between the two water sources. Respondents failed to obtain a permit before making a new or modified connection to a new or existing potable water supply in violation of 10 V.S.A. § 1974(a)(7) and Wastewater System and Potable Water Supply Permit #WW-9-1411, **[*4]** Conditions 1.1, 1.2, and 2.1.

7. The interconnection subjected the public water system (Tri-Town) to unanticipated risks by introducing water from a different source, in which potentially polluted water could be drawn into the public water system. Unapproved cross-connections are prohibited by Water Supply Rule § 21-8.

8. Respondents timely requested a hearing on the EAO, which the Court held on September 25, 2014 pursuant to 10 V.S.A. § 8009(d) and V.R.E.C.P. 4(c)(3). Following the hearing, the Court modified the EAO to allow Respondents to seek a permit from ANR to connect the Rental Property with the public water supply.

9. Both the initial and final EAO contained the following language: "The [ANR] Secretary reserves the right to subsequently issue Administrative Orders, including penalties, pursuant to 10 V.S.A. § 8008 with respect to the violations described herein."

10. In signing the two emergency administrative orders, the Court found that the alleged violations took place. Respondents did not appeal that determination.

11. On June 25, 2015, ANR issued an AO for the same violations included in the EAO. No new violations were added. The AO assessed a $29,325 penalty against the Respondents.

12. ANR served Respondents **[*5]** with the AO on August 3, 2015.

13. Respondents timely requested a hearing on the AO with this Court, and subsequently filed a motion for summary judgment.

14. ANR responded in opposition, and filed a cross motion for summary judgment.

Discussion

Summary judgment may only be granted when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a) (applicable here through V.R.E.C.P. 5(a)(2)). In reviewing a motion for summary judgment, the Court: 1) accepts as true any factual allegations made in opposition to the motion by the non-moving party, as long as they are supported by affidavits or other evidentiary material; and 2) gives the non-moving party the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (internal citation omitted).

This case is not appropriate for summary judgment. Although ANR offers possible grounds to find the $29,325 penalty is reasonable, the Court finds it inappropriate at this stage to grant summary judgment because the parties dispute a material fact: how the penalty factors outlined in 10 V.S.A. § 8010 should be weighed. In addition, the Court rejects the Respondents' arguments that **[*6]** they should not be subjected to the AO based on res judicata and due process violations, and declines to address the reasonableness of the fines at this stage.

I. *Res Judicata*

Respondents contend the doctrine of res judicata prohibits ANR from assessing a penalty in an AO for violations that were addressed in an earlier EAO. While res judicata can bar subsequent administrative actions in certain circumstances, this is not one.

Under common law, "res judicata bars litigation of a claim or defense if there exists a final judgment in former litigation in which the parties, subject matter, and causes of action are identical, or substantially identical." *Kellner v. Kellner*, 2004, VT 1, ¶ 8, 176 Vt. 571 (mem.) (quotations and citations omitted). If the requirements are met, res judicata bars parties from relitigating claims that were previously litigated and those that could have been litigated in a prior action. Natural Res. Bd. Land Use Panel v. Doyle, 2015 VT 1, ¶ 10, 198 Vt. 226 (quoting Carlson v. Clark, 2009 VT 13, ¶ 13, 185 Vt. 324). The doctrine is applicable to both judicial and administrative decisions. *Id.* The purpose of res judicata, which is also referred to as claim preclusion, is to protect courts and parties from the burdens of relitigation. State v. Dann, 167 Vt. 119, 125 (1997).

On the surface, it appears this case meets the criteria to **[*7]** trigger res judicata. The parties are identical; the subject matter—configuration of the water supply and capacity of the wastewater system at the Respondents' Rental Property—is identical; and the EAO and AO spring from the same cause of action—violations of the state's water supply and wastewater laws that were observed by ANR in September 2014.

The case fails, however, on the first test for res judicata. The EAO was not a final judgment in the action but the first phase of enforcement. Like every other EAO issued by ANR, the EAO issued to Respondents contains the following paragraph:

> 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.[1]

Sec'y, Vt. Agency of Natural Res. v. Supeno, No. 142-9-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Oct. 2, 2014) (Walsh, J.) (emphasis added). The language specifically reserves ANR's right to pursue penalties against Respondents. The language, along with the rest of the EAO, became a judicial order when the Court signed it. Despite their protests to the contrary, Respondents knew or should have known the EAO was only the first step in ANR's enforcement action related to the water and wastewater violations **[*8]** observed by ANR officials in September 2014. The Court finds three bases for this interpretation.

a. The Court expressly reserved ANR's right to maintain a second action.

The Restatement (Second) of Judgments § 26 provides exceptions to the general rule of res judicata. The rule does not apply when "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." Restatement (Second) of Judgments § 26(b).[2] Where there are reasons to justify splitting a claim, res judicata should not apply; "rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action." *Id.* cmt b.

Here, by signing the EAO, this Court adopted the reservation language and expressly reserved ANR's right to issue an Administrative Order against the Respondents based on the same subject matter and the same violations. The language also put Respondents on notice that ANR could initiate a second phase of enforcement. They should not have expected the EAO to constitute a valid and final judgment on their violations. *Id.* § 24 (the parties' expectations of whether the "transaction" out of which the action arose is part of a "convenient trial unit" is a factor in determining **[*9]** whether a valid and final judgment has been rendered.) Additionally, the Court had a justifiable reason to split the injunctive relief and penalty claims; that is, to allow ANR to expeditiously address a public or environmental danger in the EAO.

The Court therefore finds that the court-issued EAO signed on October 2, 2014 expressly reserved the right for ANR to split the enforcement action against the Respondents into two phases and res judicata does not apply.

b. State statutes are permissive: ANR may split the enforcement action.

Emergency administrative orders are governed by 10 V.S.A. §§ 8009-10. Section 8009 describes the requirements for ANR to pursue an EAO and how the respondent may request a hearing before this Court.[3] The section does not mention penalties. Section 8010 says that an administrative penalty may be included in an administrative order issued or an emergency administrative order. While not expressly permitting ANR to split enforcement into two actions between an emergency administrative order and an administrative order, the statutes also do not prohibit it. Therefore, the Court finds that the statutory language governing ANR's emergency and administrative orders allows the agency to split the enforcement **[*10]** action into two phase.

c. ANR has a pattern of consistently splitting enforcement actions that require an emergency administrative order into two phases.

We give weight to a state agency's consistent interpretation of a state statute intended to govern their activities. In re Verizon New England, Inc., 173 Vt. 332, 334-35 (2002) ("Absent a compelling indication of error, we will not disturb an agency's interpretation of statutes within its particular area of

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[1] 10 V.S.A. § 8008 provides that ANR may issue Administrative Orders when the Secretary determines a violation exists, outlines the requirements that ANR must meet and what may be included.

[2] The Vermont Supreme Court adopted the principles of res judicata as stated in the Restatement (Second) of Judgments in Faulkner v. Caledonia City Pub. Ass'n, 2004 VT 1, ¶¶ 13-16, 176 Vt. 51.

[3] 10 V.S.A. § 8009 lists the grounds for issuing an emergency administrative order, such as when a violation presents an immediate threat of substantial harm to the environment, or an immediate threat to the public health, and when an ongoing activity requires a permit.

expertise.")

ANR has consistently interpreted 10 V.S.A. §§ 8009-10 as allowing the agency to issue an EAO to put a stop to the harmful or potentially harmful activity, and then to later issue a penalty based on those same violations in another order. See *Sec'y, Vt. Agency of Natural Res. v. Marcelino & Co., Inc.*, No. 219-10-08 Vtec (Vt. Envtl. Ct. Oct. 8, 2009) (Wright, J.) (upholding an EAO to require respondent to stabilize a road construction site) and *Sec'y, Vt. Agency of Natural Res. v. Marcelino & Co., Inc.*, No. 62-4-10 Vtec (Sept. 12, 2012) (Durkin, J.) (upholding an assurance of discontinuance[4] (AOD) based on the same violations and fining respondent $20,000); *Sec'y, Vt. Agency of Natural Res. v. Malone*, No. 129-8-10 Vtec (Vt. Super. Ct. Envtl. Div. Aug. 6, 2010) (Durkin, J.) (upholding an EAO to cease **[*11]** clearing, dredging and grading activities in a wetland) and *Sec'y, Vt. Agency of Natural Res. v. Malone*, No. 125-8-11 Vtec (Vt. Super. Ct. Envtl. Div. May 14, 2012) (Walsh, J.) (upholding an AOD based on the same violations and fining respondent $6,000[5]); *Sec'y, Vt. Agency of Natural Res. v. Mandich*, No. 19-2-13 Vtec (Vt. Super. Ct. Envtl. Div. Feb. 15, 2013) (Walsh, J.) (upholding an EAO to cease use of a failing septic system at a meat processing plant) and *Sec'y, Vt. Agency of Natural Res. v. Mandich*, No. 22-2-14 Vtec (Vt. Super. Ct. Envtl. Div. Feb. 19, 2014) (Walsh, J.) (upholding an AOD based on the same violations and fining respondent $10,749.)

In this case, ANR is following its consistent pattern of issuing an EAO first, and then seeking a penalty in a second order. We therefore find no compelling indication of an error with ANR's interpretation of the statutes, or in the agency's application of the statutes in its two-phased enforcement action against the Respondents.

d. ANR has a compelling reason for splitting an enforcement action that requires an emergency administrative order.

The Vermont Legislature gave ANR the ability to quickly enforce the state's environmental laws **[*12]** when

> (1) a violation presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or
>
> (2) an activity will or is likely to result in a violation which presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or
>
> (3) an activity requiring a permit has been commenced and is continuing without a permit.

10 V.S.A. § 8009(a)(1)-(3). The Legislature expedited the normal enforcement process by giving the respondent only five days after receiving the order to request a hearing (as opposed to 15 days upon receipt of an administrative order), and requiring this Court to hold a hearing "at the earliest possible time and [which] shall take precedence over all other hearings." *Id.* at (d). Additionally, unlike an administrative order, an emergency administrative order is not stayed when a respondent requests a hearing. *Id.* The order remains in place even if the respondent appeals it to the Supreme Court. *Id.* at (f). It also remains in place if this Court dissolves the emergency administrative order and ANR chooses to appeal that ruling to the Supreme Court. *Id.*

In an EAO, time is clearly of the essence for the protection **[*13]** of people and natural resources. We decline to throw a wrench in the streamlined process by requiring ANR to calculate penalties against respondents because officials should rightly be focused on immediately stopping the harm. They also may not yet know the extent of the violations.

For these public policy reasons, we find that ANR has a compelling reason to bifurcate its enforcement actions when an emergency administrative order is issued, and we therefore support ANR's interpretation of the statutes. Cf. *Faulkner v. Caledonia Cnty. Fair Ass'n, 2004 VT 123, ¶ 13-16, 178 Vt. 51* (quoting *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 n.7 (1981)*).

II. Due Process

The Respondents claim both procedural and substantive due process violations of their rights. They first claim they were "blindsided" by the AO and its sizable penalty; they were not informed of the applicable appeal procedures; and past penalties issued by ANR did not serve as a fair warning of their liability. Putting aside the inherent contradiction in their arguments, the Respondents' procedural claims are without merit. As previously described, the eight-page EAO contains

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[4] Pursuant to 10 V.S.A. § 8007(a), the Secretary of Natural Resources may accept from a respondent an assurance of discontinuance (AOD) of a violation as an alternative to an administrative or judicial proceeding that takes the form of an administrative order. In an AOD, the respondent admits the violation and agrees to perform specific actions to rectify environmental problems. The AOD is akin to a settlement. Generally, the respondent receives a lesser penalty as a result of their cooperation, in acknowledgement that an AOD saves the ANR the time and expense of litigation. After receiving an emergency order, most respondents agree to an AOD.

[5] Respondent was initially served an administrative order with a penalty of $19,500. The parties were headed to trial before they signed the AOD with the lighter penalty.

a paragraph—as all of ANR's emergency administrative orders do—that expressly retained the right for ANR to issue an administrative order with penalties based on the violations described **[*14]** therein. While the EAO did not expressly state that it could be appealed to the Supreme Court, that is a well-trod path by both lawyers and self-represented parties. It should not require an explicit how-to guide. Furthermore, respondents are currently availing themselves of the opportunity to appeal the AO and the $29,325 penalty.

Next, the Respondents substantive due process claim appears to be that ANR officials have "unbounded discretion" to set penalties. That is not true. ANR is bound both by 10 V.S.A. § 8010 and their own rules, called the Environmental Administrative Penalty Rules. The state statute caps penalties at $170,000 and lists factors the Secretary must consider in determining the amount to assess. The agency's rules set specific guidelines for officials to follow in assessing the penalties they impose. See *Natural Res. Bd. v. Stratton Corp.*, No. 106-7-14 Vtec, slip op. at 6-10 (Vt. Super. Ct. Envtl. Div. Nov. 17, 2016) (Walsh, J.). Respondents due process claims are without merit.

III. Excessive Fines

Respondents argue that the fine imposed in the AO is excessive and violates their rights under the *Eighth Amendment of the U.S. Constitution.* Specifically, Respondents contend that the penalty they were assessed is twice as much as any other penalty ANR has imposed for septic permit violations. **[*15]** ANR counters that the penalty is reasonable.

The U.S. Supreme Court has "never decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." McDonald v. City of Chicago, 561 U.S. 742, 765 n. 13 (2010). Respondents make no argument as to why the Eighth Amendment would apply in this case. Additionally, their claim does not address the fact that the penalty includes an assessment for the violation related to the unapproved cross-connection between the public water supply and the Rental Property's well, not just the septic permit violations.

The Court will address the reasonableness of the penalty imposed against the Respondents pursuant to 10 V.S.A. § 8010 at trial.

Conclusion

The Court rejects the Respondents' arguments that ANR violated the res judicata doctrine, the Due Process Clause, and the Excessive Fines Clause. The Court also declines at this stage to find that the penalty is reasonable, as ANR argues. This matter is not appropriate for summary judgment because the parties have a material dispute over the penalty assessed pursuant to the factors outlined in 10 V.S.A. § 8010. The Court therefore **DENIES** the Respondents' motion for summary judgment and DENIES the agency's cross motion for summary judgment.

This matter is set for trial on April 20 and 21, 2017.

Electronically **[*16]** signed on February 14, 2017 at 01:38 PM pursuant to V.R.E.F. 7(d).

/s/ Thomas G. Walsh

Thomas G. Walsh, Judge

Superior Court, Environmental Division

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STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 142-9-14 Vtec

SECRETARY, VERMONT
AGENCY OF NATURAL RESOURCES,
Plaintiff

v.

FRANCIS J. SUPENO, BARBARA L. SUPENO,
AND BARBARA J. ERNST,
Respondents

VIOLATIONS:

1. 10 V.S.A. §1973(a)(6) and Wastewater System and Potable Water Supply Permit #WW-9-1411, Conditions 3.6.: failure to obtain a permit before the modification 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.

2. 10 V.S.A. §1973(a)(7) and Wastewater System and Potable Water Supply Permit #WW-9-1411, Conditions 1.1, 1.2, and 2.1.: failure to obtain a permit before making a new or modified connection to a new or existing potable water supply.

3. Water Supply Rule (WSR) §21-8: Unapproved cross-connection between the distribution system of a Public or Non-Public water system and any pipes, pumps, hydrants, tanks or other water systems whereby contaminated or polluted water or other contaminating substances may be discharged or drawn into the Public and Non-Public water system.

EMERGENCY ORDER

The Secretary (Secretary) of the Vermont Agency of Natural Resources (Agency), applied to the Environmental Court for an Emergency Order pursuant to the provisions of 10 V.S.A. § 8003(a), 10 V.S.A. § 8009(a)(3), and V.R.E.C.P. 4(c) on September 18, 2014. After conducting its initial hearing on the application, the Court issued the Emergency Order on September 18, 2014. The Respondents timely requested a hearing on the Order, and the Court

held a merits hearing on September 25, 2014. John Zaikowski, Esq. represented the Agency. Respondents were represented by their attorney David Bond, Esq.

The Secretary retains the right to subsequently issue Administrative Orders, including penalties, pursuant to 10 V.S.A. §8008 with respect to the violations described herein.

Based on the presentation of evidence and argument at the merits hearing, the Court makes the following findings regarding the violations above:

1. Respondents Francis J. Supeno and Barbara L. Supeno own property, a single family dwelling, located at 306 Fisher Point Road in Addison, Vermont. Respondents rent the home at 306 Fisher Point Road to guests on a seasonal basis.

2. Respondents Barbara J. Ernst and Barbara L. Supeno own and reside on the adjacent property located at 330 Fisher Point Road in Addison, Vermont (330 Fisher Point).

3. On October 22, 2009, Respondents Francis and Barbara Supeno obtained Wastewater System and Potable Water Supply Permit #WW-9-1411 (the permit).

4. The permit authorizes the replacement of a former seasonal cottage with a year-round single family residence having one bedroom, the construction of an associated on-site potable water supply from a drilled bedrock well, and wastewater disposal system by construction and utilization of a mound-type wastewater treatment/disposal system. The wastewater disposal system is physically located on adjoining property at 330 Fisher Point Road.

5. 330 Fisher Point Road obtains its water from Tri-Town Water District #1, which is a public water supply system.

6. On June 19, 2014, Agency personnel received a complaint that there were alleged water and wastewater violations occurring at 306 and 330 Fisher Point Road, Addison Vermont.

7. Subsequent to receiving the complaint but before requesting access, Chief Environmental Enforcement Officer (CEEO) Sean McVeigh became aware that the property is advertised on several websites as a 2 bedroom, 2 bathroom rental.

8. On August 22, 2014, Agency personnel requested access to the properties from the property owners via email to conduct an inspection regarding the alleged water and wastewater violations. The Agency received no response to the request.

9. On September 5, 2014, CEEO McVeigh and Environmental Enforcement Officer Dan Mason (EEO Mason) traveled to 330 Fisher Point and sought permission to access the properties identified above in order to conduct an inspection and investigation, and were refused access by Respondent Barbara L. Supeno.

10. On September 9, 2014, the Agency obtained an Access Order pursuant to 10 V.S.A. §8005(b)(1), to inspect the properties.

11. On September 9, 2014, EEO Mason and CEEO McVeigh executed the Access Order and inspected 306 Fisher Point Road, accompanied by two troopers from the Vermont State Police. Respondent Ernst accompanied them during the inspection. The inspection began with the well head located on 306 Fisher Point Road that, according to the permit, is the sole source of water for the structure. The well head had a locked well cap and appeared to be missing a well tag.

12. They then made their way to the basement of the structure at 306 Fisher Point Road to inspect the water system. CEEO McVeigh observed what appeared to be two separate water supply lines entering the structure through the basement wall. Respondent Ernst stated that the structure was in fact served by both the permitted drilled well (lower line) and by Tri-Town Water (upper line), a public water system. She stated that the Tri-Town Water connection

to 306 Fisher Point Road was spliced into the connection that serves their residence at 330 Fisher Point Road, and that it was not a direct connection between the subject structure and a Tri-Town Water service line. Respondent Ernst stated that using the water supply in this manner was akin to "watering this house" in the way that you would water a garden.

13. Respondent Ernst stated that they have the ability to switch back and forth between the two water sources. She stated this configuration has existed in the structure since construction in 2009. She stated that the well on the property produced water with a high sulfur content whereas Tri-Town Water has a high chlorine content. Respondent Ernst stated that they alternated between the sources to limit their exposure to each issue, however this statement was made in error. She stated that they most recently discontinued use of the drilled well approximately three (3) months ago, however this statement was made in error. They were currently using whole house highly filtered Tri-Town Water as the sole water source for 306 Fisher Point and had done so since construction in 2009. The well had also been disconnected from any electrical source, drained and depressurized.

14. CEEO McVeigh observed the physical configuration of the system. The two systems were joined together via hard piping connections and it appeared that it would be easy to alternate between sources using several valves. CEEO McVeigh observed the valves on the well piping to be in the closed position and that the pressure tank gauges read zero. He observed the valves on Tri-Town Water piping to be in the open position. He also observed the electrical breaker box and it appeared that the breakers for the well system were on, but the breaker label "Well" had been changed to "lightning arrestor." The well's connection valves appeared to be in a rusted and disused state.

15. The failure to obtain a permit from the Secretary before making a new or modified connection to a new or existing potable water supply is a violation of 10 V.S.A. §1973(a)(7) and Wastewater System and Potable Water Supply Permit #WW-9-1411, Conditions 1.1, 1.2, and 2.1

16. This new connection requires a permit, and it had commenced and continued without a permit.

17. The physical configuration of the system as observed constitutes a "cross connection" as defined in Vermont Water Supply Rules §21-2.

18. In the event the second water supply line is connected to the water supply serving the existing building at 330 Fisher Point Road, this interconnection subjects the public water system (Tri-Town) to unanticipated risks by introducing water from a different source, whereby contaminated or polluted water, or other contaminating substances, may be discharged or drawn into the public water system from the water system in 306 Fisher Point Road.

19. Unapproved cross-connections are prohibited by Water Supply Rule (WSR) §21-8 and pursuant to that rule, immediate action must be taken to completely eliminate the cross connection. This cross-connection would require a permit, and it had commenced and continued without a permit.

20. On September 22, 2014, a plumber hired by Ms. Supeno and Ms. Ernst removed the cross-connection between 306 and 330 Fisher Point Road.

21. CEEO McVeigh also observed within the structure the permitted bedroom on the second floor, what appeared to be a bedroom in the basement, and a convertible futon sofa on the first floor. The bedroom located in the basement meets the definition of a bedroom pursuant to Wastewater System and Potable Water Supply Rule § 1-201(a)(8).

22. The creation of a second bedroom in the residence increases the design flow of the building to an amount that is approximately double the design capacity of the wastewater system authorized in the permit. A permit would be required before adding an additional bedroom to the residence.

23. In addition, given the residence is permitted for one bedroom, the design flow was calculated using the standard assumed occupancy of two people per bedroom for single family residential living units. When a building will be subject to rental use the wastewater and water systems should be sized for at least two people per bedroom pursuant to the Wastewater System and Potable Water Supply Rules, §1-808, Table 1. Therefore any rental usage must be limited to a total of two persons maximum unless and until water and/or wastewater systems with additional capacity are permitted.

24. The failure to obtain a permit from the Secretary before the modification 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 is a violation of 10 V.S.A. §1973(a)(6) and Wastewater System and Potable Water Supply Permit #WW-9-1411, Condition 3.6.

25. This modification requires a permit, and it had commenced and continued without a permit.

26. Following issuance of the September 18, 2014, Emergency Order and prior to the merits hearing held on September 25, 2014, Respondents ceased use of the Tri-Town water system as the water supply source at 306 Fisher Point Road in accordance with Paragraph A of that Order; retained a qualified licensed plumber who physically severed and disconnected the

Tri-Town water line within the basements of 306 and 330 Fisher Point Road in accordance with Paragraph B of that Order; and removed the second bedroom in the basement of 306 Fisher Point Road in accordance with Paragraph E of that Order.

ORDER

Having found Respondents in violation of the above rule, permit, and statutes, and that grounds for the issuance of the Emergency Order existed, the Environmental Court Orders that all provisions contained within the Order Section of the September 18, 2014 Emergency Order remain in full force and effect, subject to the replacement of Paragraph D of that Order as set forth below. The Court Orders that Paragraph D of the September 18, 2014 Emergency Order be replaced with the following directives:

D. No later than sixty (60) consecutive calendar days following the date of this Order, Respondents shall retain a qualified licensed engineer and have that engineer either: 1) submit an administratively complete application to the Agency to amend the permit to allow for the use of the water line running between 306 and 330 Fisher Point Road; or 2) submit a written proposal for its abandonment for approval. In the event an application to amend the permit or proposal for abandonment is approved, then Respondents shall complete all construction in accordance with the approved permit or abandonment proposal, whichever is applicable, no later than thirty (30) consecutive calendar days following approval. In the event a permit application is submitted and denied, Respondents shall submit a written proposal for the water line's abandonment within fifteen (15) consecutive calendar days of the denial; and complete abandonment within fifteen (15) consecutive calendar days of approval.

Dated at Burlington, this 2nd day of October, 2014.

By: _____
Honorable Judge
Superior Court, Environmental Division

ENDORSEMENT

Issued at 4:05 o'clock p.m, this 2nd day of October, 2014 at, Burlington, Vermont.

Statutes current with legislation through Chapter 110 (including all legislation effective upon passage through April 25, 2018) and Municipal Act 15 of the 2017 adjourned session (2018), but not including changes and corrections made by the Vermont Legislative Council. The final official version of the statutes affected by the 2017 adjourned session (2018) legislation will appear on LexisAdvance in October 2018.

§ 8008. Administrative orders

(a) The Secretary may issue an administrative order when the Secretary determines that a violation exists. When the Board determines that a violation of chapter 151 of this title exists, the Board may issue an administrative order with respect to the violation. An administrative order shall be served as provided for under the Vermont Rules of Civil Procedure. A copy of the order also shall be delivered to the Attorney General. An order shall be effective on receipt unless stayed under subsection 8012(d) of this title.

(b) An order shall include:

(1)a statement of the facts which provide the basis for claiming the violation exists;

(2)identification of the applicable statute, rule, permit, assurance, or order;

(3)a statement that the respondent has a right to a hearing under section 8012 of this title, and a description of the procedures for requesting a hearing;

(4)a statement that the order is effective on receipt unless stayed on request for a hearing filed within 15 days;

(5)if applicable, a directive that the respondent take actions necessary to achieve compliance, to abate potential or existing environmental or health hazards, and to restore the environment to the condition existing before the violation; and

(6)a statement that unless the respondent requests a hearing under this section, the order becomes a judicial order when filed with and signed by the Environmental Division.

(c) An order may include:

(1)a "stop work" order that directs the respondent to stop work until a permit is issued, compliance is achieved, a hazard is abated, or any combination of the above. The agency issuing the order shall consider the economic effect of a "stop work" order, if included, on individuals other than the respondent;

(2)a stay of the effective date or processing of a permit under section 8011 of this title; and

(3)a proposed penalty or penalty structure.

(d)(1) The administrative order and proof of service shall be simultaneously filed with the Attorney General and the Environmental Division. The Division shall sign the administrative order in the event that:

(A)the administrative order is properly served on a respondent in accordance with subsection (a) of this section;

(B)the respondent does not request a hearing in accordance with subsection (b) of this section; and

(C)the order otherwise meets the requirements of this chapter.

(2) When signed by the Environmental Division, the administrative order shall become a judicial order. Upon motion by the Attorney General made within 10 days of the date the administrative order is signed by the

10 V.S.A. § 8008

Division and upon a finding by the Division that the order is insufficient to carry out the purposes of this chapter, the Division shall vacate the order.

Statutes current with legislation through Chapter 110 (including all legislation effective upon passage through April 25, 2018) and Municipal Act 15 of the 2017 adjourned session (2018), but not including changes and corrections made by the Vermont Legislative Council. The final official version of the statutes affected by the 2017 adjourned session (2018) legislation will appear on LexisAdvance in October 2018.

§ 8010. Administrative penalties

(a) An administrative penalty may be included in an administrative order issued under section 8008 of this title or in an emergency administrative order issued under subdivision 8009(a)(1) or (3) of this title. An order assessing administrative penalties shall be accompanied by an affidavit setting forth the facts establishing the date of violation.

(b) In determining the amount of the penalty, the Secretary shall consider the following:

(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.

(c)

(1)A penalty of not more than $ 42,500.00 may be assessed for each determination of a separate violation. In addition, if the Secretary determines that a violation is continuing, the Secretary may assess a penalty of not more than $ 17,000.00 for each day the violation continues. The maximum amount of penalty assessed under this subsection shall not exceed $ 170,000.00.

(2) In addition to any penalty assessed under subdivision (1) of this subsection, the Secretary may also recapture economic benefit resulting from a violation up to the $ 170,000.00 maximum allowed under subdivision (1) of this subsection.

(d) Notwithstanding the provisions of subsection 8003(b) of this title, imposition of an administrative penalty under this section precludes imposition of any other administrative or civil penalty under any other provisions of law for the same violation.

(e) Penalties assessed under this section shall be deposited in the General Fund, except for:

(1)those penalties which are assessed as a result of a municipality's enforcement action under chapter 64 of this title, in which case the municipality involved shall receive the penalty monies; and

(2)those penalties that are assessed as a result of the State's actual cost of enforcement in accordance with subdivision (b)(7) of this section, in which case the penalties shall be paid directly to the Agency of Natural Resources.

Rule 4. Review of Environmental Enforcement Orders

(a)Applicability of Rules.

(1)This rule applies to review of environmental enforcement orders in the Environmental Court under *10 V.S.A. §§ 8001- 8013* and *24 V.S.A. § 2297b* and to appeals from the Environmental Court to the Supreme Court in those proceedings.

(2)The Vermont Rules of Civil Procedure, as modified by Rules 2(b)-(c), the Vermont Rules for Electronic Filing, and the Vermont Rules of Appellate Procedure apply to all proceedings under this rule except as otherwise provided in paragraph (3) of this subdivision and except where another procedure is expressly provided by subdivisions (b)-(e) of this rule.

(3)The following provisions of the Vermont Rules of Civil Procedure shall not apply to proceedings under this rule: Rules 3 (Commencement of Action), 4 (Process), 4.1 (Attachment), 4.2 (Trustee Process), 7(a) and (c) (Pleadings Allowed), 8(a)-(f) (General Rules of Pleading), 9 (Pleading Special Matters), 10 (Form of Pleadings), 12 (Defenses and Objections), 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 18 (Joinder of Claims and Remedies), 22 (Interpleader), 23 (Class Actions), 23.1 (Derivative Actions), 24(a)(2) (Nonstatutory Intervention as of Right), 24(b)(2) (Nonstatutory Intervention by Permission), 38-39 (Jury Trials), 40(b) (Progress Calendar), 47--49 (Jurors and Juries), 51 (Argument of Counsel; Instructions to Jury), 53 (Masters), 56 (Summary Judgment), 57 (Declaratory Judgments), 64 (Replevin), 68 (Offer of Judgment), 72 (Appeals from Probate Courts), 74 (Appeals from Decisions of Governmental Agencies), 75 (Review of Governmental Action), the last sentence of Rule 77(d) (Lack of Notice of Entry), 80.1 (Foreclosure of Mortgages and Judgment Liens), 80.2 (Naturalization of Aliens), 80.4 (Habeas Corpus), 80.5 (District Court Procedures for Civil License Suspensions and Penalties for DWI), 80.6 (Judicial Bureau Procedures), 80.7 (Procedures for Immobilization or Forfeiture Hearings Pursuant to *23 V.S.A. § 1213(c)*), and 80.8 (Transfer from District to Superior Court).

(b) Assurances of Discontinuance. --An assurance of discontinuance filed pursuant to *10 V.S.A. § 8007(c)* shall be deemed a pleading by agreement pursuant to Rule 8(g) of the Vermont Rules of Civil Procedure. Assurances shall be simultaneously filed with the court and the Attorney General. The court may sign the assurance with or without a hearing. If the assurance is signed by the court, the assurance shall become a judicial order and the court shall notify the Secretary, the respondent and the Attorney General. Notwithstanding Rule 60 of the Vermont Rules of Civil Procedure, within 10 days of the date that an assurance is signed by the court, the Attorney General may move the court to vacate the order on the grounds that the assurance is insufficient to carry out the purposes of *10 V.S.A. Chapter 201*. After hearing, upon finding that the assurance is insufficient to carry out the purposes of Chapter 201, the court shall vacate the order.

(c)Emergency Orders.

(1) Procedure for Issuance. --Upon presentation of an emergency administrative order to the court pursuant to *10 V.S.A. § 8009(b)*, if the court finds that the Secretary has made a sufficient showing that (A) a violation presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or (B) an activity will or is likely to result in a violation which presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or (C) an activity requiring a permit has been commenced and is continuing without a permit, an emergency judicial order may be issued pursuant to *10 V.S.A. §§ 8008* and *8009*. Rule 65(a) of the Vermont Rules of Civil Procedure shall provide the procedure governing issuance of these orders, except that: (i) an affidavit but no complaint is required; (ii) the affidavit must establish and the court must find that all reasonable efforts have been made to notify the respondent of the presentation of

the order to the court, and, if so, the court may allow the presentation to be made ex parte; (iii) any order, including an order issued ex parte, may, if the court so orders, continue in effect until further order of the court; and (iv) the order need only state the grounds upon which it has been granted, that the respondent has the right to a prompt hearing on the merits of the order, that the hearing must be requested by motion filed within five business days of receipt of the order, that the order will remain in effect until further order of the court or a date provided, and the address or addresses where the motion must be filed. At any hearing on an application for an emergency order, the court may permit either party to present evidence. Any evidence so received that would be admissible upon the hearing on the merits becomes part of the record and need not be repeated upon the hearing on the merits.

(2) Effect; Service. --An emergency judicial order shall become effective on actual notice to the respondent. The Secretary shall cause the order to be served upon the respondent.

(3) Hearings on Modification or Dissolution; Stay. --If a motion requesting a hearing on the merits of the order is filed with the court and the Secretary by the respondent within five business days of the receipt of the order, the court shall schedule a prompt hearing, which shall take precedence over all other hearings and shall be held within five business days of filing of the motion. The court may affirm, modify or dissolve the order. The filing of a motion does not operate as a stay of the order, but the court may, upon motion, stay or modify the order upon such terms and conditions as it deems appropriate. Subdivision (d) of this rule shall govern the hearing and any resulting appeal, except that paragraph (2) of that subdivision is inapplicable and a pretrial conference will be held only in the discretion of the court. The court's ruling on a motion filed under this paragraph shall be deemed a final judgment.

(d) Procedure for Review of Administrative Orders.

(1) Generally. --This subdivision governs request for review of any order issued by the Secretary pursuant to *10 V.S.A. § 8008*, except as otherwise provided for emergency orders issued pursuant to *10 V.S.A. § 8009* and subdivision (c) of this rule.

(2) Notice of Request; Stay. --Review of an order of the Secretary shall be taken by filing a notice of the request with the clerk of the Environmental Court and with the Secretary within 14 days of receipt of the order or decision. The notice operates as a stay of an order issued, and payment of any penalty imposed, under *10 V.S.A. § 8008* pending the hearing. The court also may hear and determine a motion for an emergency order under subdivision (c) of this rule with regard to the alleged violation that is the subject of the proceeding under this subdivision.

(3) Intervention. --Upon timely motion under Rule 24 of the Vermont Rules of Civil Procedure, the court may grant party status to an aggrieved person as provided in *10 V.S.A. § 8012(d)*.

(4) Scheduling; Discovery; Pretrial Proceedings.

(A) As soon as the Secretary receives proof that an administrative order has been served upon a respondent, the Secretary shall file the order and proof of service with the court.

(B)

(i) Within 7 days of the filing of a notice of request for hearing, the Secretary shall file a pretrial memorandum which shall include a list of witnesses and a summary of any evidence which the Secretary plans to present in support of the administrative order.

(ii) Within 14 days of the filing of the Secretary's memorandum, the respondent shall file a pretrial memorandum which shall state respondent's agreement or disagreement with each element of the "statement of facts" in the administrative order; shall include a list of witnesses and a summary of any evidence which respondent plans to present to contest such facts; shall state with particularity whether respondent accepts or contests each element of the "order" section of the administrative order; if a penalty was imposed by the order, shall include a summary of any evidence respondent plans to present regarding mitigating or other factors affecting the penalty calculation; and shall include a preliminary statement of the legal and jurisdictional issues which respondent plans to raise in the proceeding.

(C)The court shall promptly thereafter convene a pretrial conference, and shall thereupon issue appropriate orders, including orders for the disposition of legal issues prior to the hearing, orders for discovery necessary to a full and fair determination of the proceeding, and other appropriate orders consistent with *10 V.S.A. § 8012*, as provided in Rule 2(d).

(5) Trial De Novo; Judgment. --Review shall be de novo, but, if a violation is found, the court's review of the remedy imposed shall be subject to *10 V.S.A. § 8012(b)*. The final judgment in a ruling under this subdivision or paragraph (3) of subdivision (c) may, as appropriate under each specific subsection of *10 V.S.A. § 8012(b)*, affirm, reverse, modify, or dissolve the decision of the Secretary or may vacate and remand the case for further proceedings consistent with the order of the court. In addition to the requirements of Rule 52 of the Vermont Rules of Civil Procedure, the judgment shall contain the statements required by *10 V.S.A. § 8012(c)(4)* and (5).

(6) Appeal to Supreme Court; Stay Pending Appeal.

(A)A final judgment under this rule shall be appealable as of right to the Supreme Court pursuant to *10 V.S.A. § 8013(c)*. The notice of appeal shall be filed within 14 days of the date of receipt of the judgment appealed from in accordance with Vermont Rule for Electronic Filing 5(f).

(B) Notwithstanding Rule 62 of the Vermont Rules of Civil Procedure and Rule 8 of the Vermont Rules of Appellate Procedure, an appeal to the Supreme Court by the Secretary shall stay the dissolution of an emergency judicial order. An appeal by the respondent or the Attorney General shall not stay the operation of an emergency or other order but shall stay payment of a penalty. A respondent may seek a stay in the Supreme Court pursuant to Rule 8 of the Vermont Rules of Appellate Procedure.

(e) Procedure for Review of Final Municipal Solid Waste Orders.

(1) Generally. --This subdivision shall govern requests for review under *24 V.S.A. § 2297b* of a final solid waste order issued by the legislative body of a municipality pursuant to *24 V.S.A. § 2297a*.

(2) Notice of Request; Stay. --Review of a municipal solid waste order shall be taken by filing a notice of the request with the clerk of the Environmental Court and with the municipal clerk within 14 days of receipt of the final order. The notice operates as a stay of any order issued, and payment of any penalty imposed, pending the hearing.

(3) Hearing. --Review shall be de novo and shall be governed by paragraph (d)(5) of this rule, substituting "legislative body" for "Secretary."

(4) Judgment. --The court may reverse, affirm, modify, or vacate the order in accordance with *24 V.S.A. § 2297b(c)*, (d). In making its determination, the court shall consider the factors set forth in *24 V.S.A. § 2297a(a)*.

(5) Appeals; Stay on Appeal. --Appeals from Environmental Court decisions under this rule are governed by the Vermont Rules for Electronic Filing and the Vermont Rules of Appellate Procedure. On an appeal of a final judgment under this rule, Rule 62 of the Vermont Rules of Civil Procedure and Rule 8 of the Vermont Rules of Appellate Procedure shall govern stays, and the decision of the Environmental Court on all matters other than penalties shall be deemed to be judgments in an action for an injunction for purposes of those rules.

DEFENDANT'S EXHIBIT
tabbies
MM

ADMINISTRATIVE PENALTY FORM

CASE NAME Sypes, Sypes & Ernst *COMPLAINT #* _____

VIOLATION 10 VSA 1973(a)(6) and WW Permit #WW-9-1411, Cond. 3.6,
10 VSA 1993(a)(7) and #WW-9-1411, Cond. 1.1, 1.2, and 2.1, and Water Supply Rule 21-3

CLASSIFICATION OF VIOLATION

CLASS I - A Class I violation meets one or more of the following criteria:

1) A violation of any of the following that does not qualify as a minor violation under Class II:

a) an assurance of discontinuance; or

b) an order issued pursuant to 10 V.S.A. Chapter 201; or

c) an order issued pursuant to any statute listed in 10 V.S.A. Section 8003(a); or

2) The violation presents a threat of substantial harm to the public health, safety, or welfare or to the environment, or the violation has caused substantial harm to the public health, safety, or welfare or to the environment.

CLASS II - A Class II violation meets one or more of the following criteria:

1) The violation constitutes a minor violation of:

a) an assurance of discontinuance; or

b) an order issued pursuant to 10 V.S.A. Chapter 201; or

c) an order issued pursuant to any statute listed in 10 V.S.A. Section 8003(a); or

2) The violation is more than a minor violation of a statute listed in 10 V.S.A. Section 8003(a), a rule promulgated under a statute listed in 10 V.S.A. Section 8003(a), or a related permit. Activities or construction initiated before the issuance of all necessary environmental permits shall be Class II violations.

CLASS III - A Class III violation meets one or more of the following criteria:

1) The violation is a minor violation of a statute listed in 10 V.S.A. Section 8003(a), a rule promulgated under a statute listed in 10 V.S.A. Section 8003(a), or a related permit.

CLASS IV – A Class IV violation meets one or more of the following criteria:

1) A Class IV violation is a de minimis violation of a statute listed in 10 V.S.A. Section 8003(a), a rule promulgated under a statute listed in Section 8003 (a), or a related permit.

INITIAL PENALTY CALCULATION

CLASS I: 0-$42,500; CLASS II: 0-$30,000; CLASS III; 0-$10,000; CLASS IV: 0-$3000
(Circle choices & place any comments in the space provided or on the backside of the last page)

1. The degree of actual or potential impact on public health, safety, and welfare:

a)	No actual impact or minor potential impact;	0
b)	Minor actual impact or moderate potential impact;	(1)
c)	Moderate actual impact or major potential impact;	2
d)	Major actual impact.	3

2. The degree of actual or potential impact on the environment:

a)	No actual impact or minor potential impact;	0
b)	Minor actual impact or moderate potential impact;	(1)
c)	Moderate actual impact or major potential impact;	2
d)	Major actual impact.	3

3. Did the respondent know or have reason to know the violation existed:

a) Knowledge of the requirements;

i)	new requirement;	0
ii)	had reason to know about violated requirement;	1
iii)	had a permit or permit by rule;	(2)
iv)	repeated the violation after notice.	3

b) Knowledge of the facts of the violation:

i)	could not have reasonably known that the violation existed;	0
ii)	should have reasonably known that the violation existed;	1
iii)	some evidence that the respondent knew the violation existed.	(2)
iv)	clear evidence that the respondent knew the violation existed	3

c) Lower number of 3a or 3b 2

4. **The respondent's record of compliance with the statutes specified in 10 V.S.A. Section 8003 or related rules, permits, orders, or assurances of discontinuance in the seven years preceding the violation:**

a)	No prior violations;	(0)
b)	one prior violation;	1
c)	two prior violations;	2
d)	three or more prior violations.	3

5. **The length of time the violation existed (not to be assessed if violation will be subject to the continuing violation provision, #9):**

a)	immediate correction;	0
b)	a violation of very short duration;	1
c)	a violation of moderate duration;	2
d)	a violation of long duration.	(3)

Total of sections 1, 2, 3c, 4 and 5 7

6. PERCENTAGE OF MAXIMUM PENALTY CALCULATION

After the Secretary has evaluated a violation under the criteria in sections 1-5, has determined the score under each of the criteria, and has added the scores to compute a total score, the initial penalty amount shall be determined by taking the maximum penalty for the Class of violation involved and multiplying that number by the applicable percentage based on the initial score. The following table lists the applicable percentage and resulting calculation for each class:

Score	Percentage	CLASS I	CLASS II	CLASS III	CLASS IV
1-2	10%	$4,250	$3000	$1000	$300
3-4	20%	$8,500	$6,000	$2,000	$600
5-6	30%	$12,750	$9,000	$3,000	$900
(7-8)	40%	$17,000	$12,000	$4,000	$1,200
9-10	50%	$21,250	$15,000	$5,000	$1,500
11	60%	$25,500	$18,000	$6,000	$1,800
12	70%	$29,750	$21,000	$7,000	$2,100
13	80%	$34,000	$24,000	$8,000	$2,400
14	90%	$38,250	$27,000	$9,000	$2,700
15	100%	$42,500	$30,000	$10,000	$3,000

a) *Initial penalty amount before adjustments* $12,000

7. INITIAL PENALTY ADJUSTMENT

a) If a rating of 3 is listed in sections 1 or 2, the initial penalty amount shall be adjusted to the maximum allowed for the class of violation:

$_____

b) If a rating of 3 is listed in two or more of sections 3a, 3b, 4 or 5, the initial penalty amount shall be adjusted to at least 70% of the maximum allowed for the class of violation:

$_____

8. ECONOMIC BENEFIT & COST OF ENFORCEMENT ADJUSTMENT.

The penalty amount calculated above may also be adjusted when the respondent has realized an economic benefit as a result of the violation and/or the state has incurred costs of enforcement related to the violation. The Secretary may adjust the penalty by adding an amount equal to such economic benefit and/or enforcement costs to the penalty amount.

a) Economic benefit: $11,325-
Calculation-

- Rental Income for 1 year:
- September 15, 2013 through September 15, 2014 (365 days)
- 365 days x 30% occupancy rate = 109 days
- 109 days x $150/night = $16,350 - $5,025 (utilities/night) =
- Reserved if litigation necessary ($11,325)

b) Cost of enforcement: $_____
Calculation -

- Costs for Cease & Desist Order / Emergency Order / Costs of enforcement
- Reserved if litigation necessary

c) *Total (8a + 8b)* $11,325- (reserved)

9. CONTINUING VIOLATION

The Secretary may consider any violation of a statute listed in 10 V.S.A. §8003(a) or a rule promulgated under such statute or a condition of a related permit, order, or assurance of discontinuance that continues longer than one day as a continuing violation subject to additional penalties for each day of continuance of the violation. The continuing violation amount shall be determined by taking the per-day maximum continuing violation penalty for the class of violation involved and multiplying it by the applicable percentage based on the initial score. The following table lists the applicable percentage and resulting calculation for each class:

Score	Percentage	CLASS I	CLASS II	CLASS III	CLASS IV
1-2	10%	$1,700	$1,200	$400	$120
3-4	20%	$3,400	$2,400	$800	$240
5-6	30%	$5,100	$3,600	$1,200	$360
7-8	40%	$6,800	$4,800	$1,600	$480
9-10	50%	$8,500	$6,000	$2,000	$600
11	60%	$10,200	$7,200	$2,400	$720
12	70%	$11,900	$8,400	$2,800	$840
13	80%	$13,600	$9,600	$3,200	$960
14	90%	$15,300	$10,800	$3,600	$1,080
15	100%	$17,000	$12,000	$4,000	$1,200

a) Per-day penalty amount for continuing violation $_____

b) Number of days constituting continuance of the violation $_____

Total (9a x 9b) $_____

10. FINAL ADJUSTMENTS

After the Secretary has determined the initial penalty amount, the initial penalty adjustment (if any), the amount of economic benefit and/or the costs of enforcement (if any), and the added penalty for a continuing violation (if applicable), the Secretary shall consider the criteria below before setting the final penalty amount.

a) Mitigating circumstances: $_____

If mitigating circumstances exist the penalty may be reduced. Unreasonable delay by the Secretary in seeking enforcement shall be considered a mitigating circumstance.
Explain -

b) Deterrent effect: Increase to 6 yrs. Class II $ 6,000

The Secretary may increase the penalty amount up to the maximum allowed in the class of the violation if he or she determines that a larger penalty is reasonably necessary to deter the respondent and the regulated community from committing this violation, or similar violations, in the future.
Explain - Long standing non-compliance with permit and applicable rules - Rental activity results in economic benefit

c) *Total (10a + 10b)* $ 6,000-

FINAL PENALTY AMOUNT

The final penalty amount for any single violation, or group of violations, which are treated as a single violation, shall not exceed the maximum for the class of the violation involved. The final penalty amount for any continuing violation shall not exceed $170,000. If higher penalties are calculated, the violations may be referred to the Attorney General for civil enforcement pursuant to 10 V.S.A. §8221.

INITIAL PENALTY AMOUNT (6a)	$ 12,000-
INITIAL PENALTY ADJUSTMENT (Higher of 7a or 7b)	$ —
ECONOMIC BENEFIT & ENFORCEMENT COST ADJUSTMENT (8c)	$ 11,325 (revised)
CONTINUING VIOLATION AMOUNT (9C)	$ —
FINAL ADJUSTMENT (10C)	$ 6,000
FINAL PENALTY AMOUNT	$ 29,325 -

Prepared by JJZ/RSM/SwFt Date 4/17/15, 4/20/15