STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 98-8-15 Vtec

SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES, Petitioner, v. FRANCIS SUPENO, BARBARA SUPENO, and BARBARA ERNST, Respondents.	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 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 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. § 1973(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. § 1973(a)(7) and Wastewater System and Potable Water Supply Permit #WW-9-1411, 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 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 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. Dorr, 2015 VT 1, ¶ 10, 198 Vt. 226 (quoting Carlson v. Clark, 2009 VT 17, ¶ 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 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 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

[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 Cnty. Fair Ass'n, 2004 VT 123, ¶¶ 13–16, 178 Vt. 51.

factor in determining 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 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. 327, 334–35 (2002) ("Absent a compelling indication of error, we will not disturb an agency's interpretation of statutes within its particular area of 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.

[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.

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 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 when

> (1) a violation presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or

[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.

(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 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, 401-02 (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 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 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. 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 signed on February 14, 2017 at 01:38 PM pursuant to V.R.E.F. 7(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division