

IN THE IOWA DISTRICT COURT FOR FRANKLIN COUNTY

STATE OF IOWA, ex rel., IOWA )  
DEPARTMENT OF NATURAL )  
RESOURCES (99AG23542), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JERRY PASSEHL, )  
 )  
Defendant. )

LAW NO. CVCV500739

RULING

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The above-captioned matter came before the Court for trial on September 14, 2012. The plaintiff was represented by Assistant Attorney General Jacob J. Larson. The defendant, Jerry Passehl, was present in person and was represented by his attorney, Harry Haywood.

The only issues before the Court were the amount of civil penalty and injunctive relief. The Court had previously ruled that the Defendant Passehl had failed to comply with the requirements of an Administrative Consent Order entered into between the DNR and Passehl, failed to timely apply for renewal of an NPDES permit for his facility, failed to pay annual NPDES permit fees in full, and failed to notify the DNR of a hazardous condition on three separate occasions. These matters were contained within the Court's ruling on the State's Motion for Partial Summary Judgment, which was filed herein on June 6, 2012.

The Court received numerous exhibits, heard testimony of witnesses and the defendant, considered the applicable case law, and reviewed the post-trial briefs provided by counsel. The Court is prepared to rule.

## FACTS

An Administrative Consent Order was entered into by Iowa Department of Natural Resources (IDNR) and Passehl on January 22, 2009, in order to resolve allegations of violations of Iowa's Environmental Protection Laws. The order required the defendant, in part, to do the following: Excavate any and all remaining contaminated soil around both car crushers and dispose of it in a sanitary landfill and submit disposal receipts within 30 days of the order; properly dispose of all discarded appliances and submit receipts within 30 days of the order and refrain from accepting any further appliances unless he obtains an Appliance Demanufacturing Permit; store no more than 500 passenger tire equivalents on his property unless he obtains a waste tire stockpile permit and to separate said piles into "waste tires" and "used tires" for ease of volume assessment; and pay an administrative penalty of \$3,000 to the IDNR within 60 days of the order. By agreement, some of the deadlines set forth in the original consent order were extended.

The matter before the Court is based upon the State of Iowa's Petition seeking civil penalties and injunctive relief, which was filed on December 27, 2010. The petitioner alleges that Passehl failed to comply with the Administrative Consent Order. As stated above, the Court's ruling on Plaintiff's Motion for Partial Summary Judgment entered June 6, 2012, left only the following two issues for trial: 1) Civil penalty to be assessed against the Defendant; and 2) Injunctive relief.

Iowa Code § 455B.191(2) and § 455B.307(3) dictate that for each solid waste or storm water discharge violation, a person is subject to a maximum civil penalty of \$5,000 for each day of such violation. The Code also provides that a person who fails to notify the IDNR of an occurrence of a hazardous condition, not later than six hours

after the onset of the condition, shall be subject to civil penalty of not more than \$1,000.  
Iowa Code § 455B.386.

The factors which the Court is to consider in assessing the amount of civil penalty for violations is set forth in Iowa Code § 455B.109(1)(a)-(d). These factors include:

1. The costs saved or likely to be saved by the violator's noncompliance;
2. The gravity of the violation;
3. The degree of culpability of the violator;
4. The maximum penalty authorized for that particular violation under the law;
5. Whether the assessment of penalties appears to be the only or most appropriate way to deter future violations, either by the violator or by others similarly situated; and
6. Other relevant factors that arise from the circumstances of the case.

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

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

Defendant Passehl was in violation of the consent order by failing to remove contaminated soil from his property and dispose of it in a landfill for at least 795 days. the State was not seeking civil penalty for the contaminated soil observed on August 17, 2012, as Passehl did present evidence that he had removed the contaminated soil on August 17, 2012. The standard to be applied for removal of contaminated soil is cleanup activity as to sight and smell, as testified to by Mr. David Hopper, Field Inspector with the IDNR Field Office No. 2. The argument of Passehl that there was not a threshold level for cleanup of oil contaminated soil is without merit. The argument of Passehl that a similar threshold as to ground water and soil contamination for underground storage tanks should be utilized does not apply to this case. These standards are not applicable to the case before this Court. Those standards are only for groundwater and soil contamination from underground storage tanks.

The Court has considered the issue of how much economic benefit Passehl received by failing to timely remove the contaminated soil. While it is clear that Passehl received some financial benefit by not having to pay for proper disposal, the determination of the amount of that benefit is unclear to this Court.

The issue of the gravity of the violations is most concerning to this Court. There is a significant actual harm to the environment and public health and safety due to these substances contaminating the soil. In addition, the State spent significant time, expense, and effort in continuing to follow up on the numerous violations which occurred over a significant number of years.

Additionally, the factor of degree of culpability of Passehl in this case is concerning. The IDNR sent numerous letters to Passehl outlining what needed to be done to be in compliance and to remove the contaminated soil for a period of

approximately eight years. In addition, Defendant Passehl was subject to numerous inspections where the contaminated soil was present, pointed out, and Passehl was directed to remove the same and adequately dispose of it. Passehl was given an extension of the deadline to clean up the contaminated soil. Shockingly, Defendant Passehl even personally owned the equipment necessary to excavate and remove the contaminated soil, but yet failed to do so.

The Court is convinced that a penalty against Passehl could serve to deter future violations by Defendant Passehl, as well as other persons involved in similar activities.

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

This Court previously found that Defendant Passehl failed to comply with the order by failing to provide receipts documenting proper disposal by May 5, 2009. The IDNR inspected defendant's property and observed appliances on his property on several occasions. Mr. Hopper testified that a properly demanufactured appliance would have a marking or a tag on the appliance that would indicate that it had been demanufactured. However, frankly, due to how these appliances were stored amongst other miscellaneous parts and tires and the like, it truly must have been difficult to determine if there were any properly marked appliances. A person can store a nondemanufactured appliance for up to 270 days before required disposal.

Defendant Passehl did provide one receipt to the IDNR between May 5, 2009, and the present which showed the proper disposal of appliances observed on his property. The receipt indicated eight air conditioners were retrieved from defendant's

property on January 7, 2012. However, this Court is left to wonder what happened to the washing machine, another washing machine, stove, and refrigerator, all which were noted during various inspections.

In considering how much economic benefit Defendant Passehl received by failing to properly dispose of the appliances, the only economic benefit this Court can find is that Passehl did not have to pay a fee to an appliance demanufacturer for the appliances that are unaccounted for. The gravity of the violations is concerning in that hazardous substances could be unleashed into the environment. In addition, the Court considered the expenses and time associated with the state addressing these violations.

The record is clear that the IDNR sent Defendant Passehl two letters warning that he must properly dispose of appliances prior to the issuance of the consent order and two letters after the issuance of the consent order. Passehl did comply with the order's requirement but he did so after the October 4, 2011, inspection.

Under the consent order, Defendant Passehl was required to maintain less than 500 waste tires on his property unless he obtained a Waste Tire Stockpile Permit. Passehl was also required to organize his tires into separate piles for waste tires and used tires for volume assessment. This Court has previously ruled that Passehl failed to maintain separate tire piles for waste tires and used tires on his property and that this action violated the consent order. The testimony received from Mr. Hopper indicated that, until recently, the tires were not recognizably organized into separate piles for waste and used tires and that tires were intermixed with other miscellaneous junk. At the time of trial, it was noted that Passehl is now using a tire rack to organize his used tires.

The only economic benefit that this Court can find to Passehl regarding the waste tires is that Defendant Passehl avoided the cost of a waste tire storage permit. Frankly, without being able to determine how many tires actually existed on the property, this Court cannot even begin to make a decision regarding whether that permit was indeed required. Mr. Hopper did talk about proper tire storage in order to avoid potential fire hazards and avoid disease. As far as culpability, Passehl did receive six letters total regarding properly organizing his tires, three letters prior to the consent order and three letters after.

The August 17, 2012, inspection did show significant progress on Passehl's part. It is interesting to note that Passehl did have the equipment available to him on site to organize his tires as needed but yet chose not to properly do so.

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

The IDNR called witness Joe Griffin regarding required operation under an NPDES General Permit No. 1 (storm water discharge associated with industrial activity). Griffin testified that Passehl was required to operate under such a permit because he operates an auto salvage yard. Passehl's authorization to operate under this general

permit expired on April 8, 2008. Passehl failed to renew his coverage under the NPDES general permit within the proper time period. Passehl was notified in July 2008 that he had failed to renew his authorization. Passehl did attempt to renew his authorization in September 2009. Passehl sent with his renewal request inadequate amounts of money to cover the annual permit fee. Passehl was notified that he did not send the required amount to renew his authorization. Because Passehl continued to be in arrears, Passehl was notified of the additional moneys that he would need to send in order to have a valid, up-to-date authorization. Passehl stopped making attempts to renew his authorization.

Mr. Passehl argues that he was not required to operate under an NPDES General Permit No. 1. Passehl claims his facility has no discharge and is not required to obtain a permit. However, Passehl did admit that, given enough rain, there is discharge from his facility. Therefore, Passehl failed to renew his authorization by failing to submit appropriate moneys with his application and failed to comply with the Iowa Storm Water Discharge Rules from April 8, 2009, to present. Passehl did receive an economic benefit by failing to pay his NPDES annual permit fees. Passehl did receive numerous letters and warnings regarding his failure to reapply and what he needed to do to become current. Passehl made some attempts to have proper authorization, but did not supply the appropriate moneys, then Passehl stopped attempting to obtain proper authorization.

This Court previously ruled that Passehl failed to timely notify the IDNR of the hazardous condition on April 15, 2008, April 10, 2009, and on at least one other occasion. Passehl's own documentation shows the Court that he failed to notify the IDNR of a hazardous condition on three separate occasions and that the spills involved

waste oil. One of the spills involved significant amounts of waste oil, 200 pounds approximately. That threatened harm to the environment is reasonably foreseeable.

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

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

#### **ORDER**

Based upon the foregoing, **THE COURT ORDERS** as follows:

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

3. For violations of tire organization, this defendant was in violation a total of 1,435 days. This Court will assess Defendant Passehl \$10 per day of violation, for a total of \$14,350.

4. Defendant Passehl shall pay an administrative penalty with interest, at the time of trial, totaling \$4,150.17 no later than June 1, 2013.

5. Regarding civil penalties for storm water discharge violations, the defendant was in violation for 1,347 days. At a rate of \$10 per day of violation, Defendant Passehl is assessed penalty in the amount of \$13,470 for these violations.

6. Regarding assessment of civil penalty for failure to notify the Iowa Department of Natural Resources of a hazardous condition, the Court finds there were three separate occasions where Defendant Passehl failed to notify the IDNR. Each occasion shall be assessed a civil penalty of \$100, for a total of \$300.

7. The Court, in addition, as a part of this Order, grants the following injunctive relief for failing to comply with IDNR Administrative Order:

a. Enjoining Defendant Passehl from any violation of Administrative Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01;

b. Enjoining Defendant Passehl to excavate any contaminated soil on his property to sight and smell immediately after the occurrence of any such contamination and dispose of the contaminated soil at a landfill and keep receipts documenting the disposal;

c. Enjoining Defendant Passehl from accepting any appliances until he obtains an appliance demanufacturing permit, to properly dispose of any appliances discovered on his property, and enjoining Passehl to create a recordkeeping protocol, within 30 days of the issuance of this Ruling, for his discovery of any appliances on his property and the proper disposal of those appliances;

d. Enjoining Defendant Passehl to properly organize the tires located on his property into separate piles for "used tires" and "waste tires" through rows, stacking, and sorting to provide for accurate volume assessment within 30 days of the issuance of this Ruling; and

e. Enjoining Defendant Passehl to pay the remaining balance on the administrative penalty assessed in Administrative Order Nos. 2009-SW-01, 2009-WW-01, and 2009-HC-01, and accrued interest, which together total \$4,150.17, pursuant to Iowa Code section 455B.109(4), within 30 days of the issuance of this Ruling.

8. The Court is further enjoining Defendant Passehl that he comply with his storm water pollution prevention plan and grants the following injunctive relief:

a. Enjoining Defendant Passehl from any violation of 567 Iowa Administrative Code 64.8(1) and NPDES General Permit No. 1;

b. Enjoining Defendant Passehl to renew his authorization to discharge under NPDES General Permit No. 1 for his auto salvage facility within 30 days of the issuance of this Ruling;

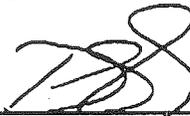
c. Enjoining Defendant Passehl to pay his outstanding NPDES General Permit No. 1 annual permit fees that are due (\$550), pursuant to 567 Iowa Administrative Code 64.16(3)(b), within 30 days of the issuance of this Ruling; and

d. Enjoining Defendant Passehl to comply with the Storm Water Pollution Prevention Plan he developed for his auto salvage facility.

9. The Court further is issuing an order containing a permanent injunction pursuant to Iowa Code section 455B.391(1), which shall enjoin Defendant Passehl from any violation of Iowa Code section 455B.386 or 567 Iowa Administrative Code 131.2.

10. Costs in this matter are assessed against Defendant Passehl.

Dated this 5 day of October, 2012.



DeDRA SCHROEDER, JUDGE  
SECOND JUDICIAL DISTRICT OF IOWA

Clerk shall provide copies to:  
Jacob J. Larson, Asst. A.G.  
Harry Haywood, Esq.