STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO.: S0226-11 CnC

STATE OF VERMONT

v.

N.L. CHAGNON INC., NELSON CHAGNON, and PATRICIA CHAGNON

FINDINGS OF FACT and CONCLUSIONS OF LAW

This is a civil enforcement proceeding filed by the State of Vermont pursuant to 10 V.S.A. § 8221. The court held an evidentiary hearing on October 26 and December 18, 2012. In addition, the court visited the site with the parties and counsel on October 25, 2012.

FINDINGS OF FACT

Nelson Chagnon owns and operates N. L. Chagnon Inc. which is a small excavating company. He and his wife are nearing retirement age. In December 2006, the Chagnons purchased two adjoining lots within the Gauthier Industrial Park in Essex Junction, Vermont. The industrial park lies behind Susie Wilson Road. It includes various manufacturing and storage businesses. To the northeast, the property slopes down towards wetlands which border Indian Brook. There are about 10 acres of heavily forested wetland in the valley bottom along the brook.

The two lots which Mr. Chagnon purchased are hilly and uneven. Previous owners used the property as a "boneyard" for construction debris such as cement pipes, rubble, and equipment. Mr. Chagnon insisted that the previous owner clean up the site before he took title.

In 2007 Mr. Chagnon embarked on a plan to construct a commercial building on the high ground of the property which is located close to the road. He obtained the following construction permits:

a. Wastewater permit issued 8/31/07;

b. General discharge permit issued 9/27/07;

c. Construction general permit issued 8/21/07;

d. Land use permit issued 11/21/07.

These permits all include requirements that the builder take measures to reduce erosion and runoff of muddy water.

Mr. Chagnon cleared the entire property of trees and other vegetation. At the southern height of the property, closest to the road, he leveled a space for the proposed building. From south to north, the land sloped steeply to a dirt access road and then steeply again down to the wetland area. The Chagnon property included less than an acre of the total wetland.

In 2008, Mr. Chagnon's financing dried up. He was unable to build anything on his property. He used it to store building supplies and excavating equipment. He did not address the bald, scraped surface of the lot which began to erode with the flow of rainwater to the north towards the wetland.

The soil on the Chagnon property and the surrounding area is fine silt and sand. This is true both of the upper area which Mr. Chagnon cleared to build his warehouse and the lower level which is wetland. The wetland area is not a marsh or swamp. There are no pools or moving water. Instead, it is an expanse of extremely damp mud and sand which is overgrown with trees, grasses, shrubs, and invasive reeds (phragmites). The expansive creek bottom protects the water in Indian Brook by providing an absorbent buffer for water and sediment flowing downhill from the higher ground.

In 2009 the Enforcement Division of the Department of Environmental Conservation received a complaint about conditions at the site. A DEC inspection report dated April 15, 2009, noted that earthwork had commenced over a year ago and that the site was not stabilized with an acre of "steep slopes, silty/sand." A silt fence designed to control runoff was "collapsed, unmaintained." Work on the site "appears to be intermittent."

A year later conditions were not greatly improved. A second DEC report noted "large amount of fill put over bank near or in wetland buffer; material being screened on site. No one on site working at time of inspection. All areas, w/exception of one slope unstabilized with active erosion and sediment transport likely occurring during precip. events."

On June 3, 2010, the Compliance and Enforcement Division of DEC issued a notice of alleged violations to the Chagnons. A report by a DEC investigator dated July 9, 2010, focused attention on the problem of erosion and instability of the bank immediately above the protected wetland.

> This embankment was eroding away steadily by large 18" deep rivulets and gullies that lead from the "roadway" atop the embankment to the wetland below about 45 feet downslope. In some places these rivulets were 2' wide near the top of the slope. The slope was very unstable. There were four separate rows of silt fence from different time frames that were failing to keep large deposits of sand and silt from entering the wetland. The wetland is in the upper half of the photograph and Indian Brook is through the woods about 100 feet away from the toe of the slope.

The investigator's photos show an eroding moonscape of bare earth with deep runnels carved into the soil. Work on Mr. Chagnon's proposed building had been stopped for more than two years at this time.

With a violation pending, Mr. Chagnon took steps to address the problem. He retained an engineer (Douglas Henson) who submitted a new construction permit application. The renewed permit covered the work necessary to address the DEC's concerns about erosion into the wetland. The renewed permit issued in October 2011. It called for stabilization of the bank by regrading and replanting the bank and placing an area of riprap stones at the steepest area at the base of the slope.

Between October 2011 and October 2012, Mr. Chagnon completed the stabilization of the bank. He installed heavy stonework at the base of the slope. He replanted the hillside. He has returned to address "rills" – small gullies – which have developed during heavy rains. The hillside is now covered with wild grasses and young trees. The vegetation is extremely dense. The DEC representatives are now satisfied that the slope is sufficiently stabilized.

The remaining area of dispute is what to do about the silt which washed down in an apron-like area at the base of the hill. The affected area is approximately 50' x 100'. Fresh sandy soil has been deposited on the existing sandy soil to a depth of one foot or more.

It has been very difficult for the parties to provide hard information about the exact depth of the new material. By taking some core samples and looking for levels of organic material from the previous groundcover, members of the DEC staff have estimated that about 18 inches of silt covers the affected area. This would compute to 7,500 square feet of material or 277 cubic yards – 40 dump truck loads at 7 yards per load. Since there is no evidence that the contours of the upper level of the site – above the bank – altered greatly, it is unlikely that such an immense amount of sand was deposited at the base of the slope. It is undisputed, however, that water running off the site carried a significant quantity of fine sand and silt onto the area immediately below the hillside.

Following the initial hearing, the court continued the hearing for about six weeks and informed Mr. Chagnon that he should remove as much material from the base of the slope as possible. It is a difficult area to work. There is no access except from above. The sandy slopes are too steep to bear the weight of earth-moving equipment. Mr. Chagnon brought workers and friends to the site and over the course of about a week they cut down the phragmites reeds which have grown over the site and removed approximately six yards of silt and mud by hand in plastic buckets. The work was hampered by the dense growth of roots below the surface. Mr. Chagnon left the ground at the very base of the hill alone because he had "keyed in" large boulders when he built the riprap slope. He did not wish to undermine these boulders which support and stabilize the stonework above them.

Unfortunately, when Mr. Chagnon and his crew carried the sand off the site, they deposited it in a low mound which is still located within the 50-foot buffer zone for the wetlands area. At the final hearing, Mr. Chagnon agreed that he would follow the State's direction in moving the mound further uphill outside of the buffer zone.

CONCLUSIONS OF LAW

There is no dispute that Mr. Chagnon violated the conditions of his original permits by leaving the disturbed ground uncovered and unprotected for two years. His failure to immediately grade and replant the area permitted sand and silt to flow onto the wetlands in violation of law. He does not deny this violation.

In bringing this case to a conclusion for both sides, the court addresses two issues: what further remediation should be ordered and what penalty should be imposed.

Further Remediation

Mr. Chagnon has agreed on the record to remove the sand which he dug out of the wetland and deposited within the 50-foot buffer. The court will confirm this agreement in its final order.

The court will not require additional removal of sand from the base of the slope. The work is almost impossible to complete. The sand is indistinguishable (except by layers of roots and branches) from the sand already on the site. Although the new material is drier in the sense that any increase in elevation increases the distance from the water table, there was no evidence of specific environmental harm or failure of the wetland. In the future, water will continue to drain downhill through and over the sandy creek bottom towards Indian Brook. The area affected (approximately the size of a tennis court) is a very small portion of the total ten acres of wetland.

At this point, the sincere efforts by the State and by Mr. Chagnon to return the site to its original condition have reached the point of diminishing returns. The crucial remediation – the stabilization of the steep bank – has been accomplished. A substantial portion of the sand has been removed. The boulders at the foot of the riprap appear to be stable and fully embedded in the hillside. There is no evidence of specific environmental benefit from the removal of more sand and there is no evidence of specific harm if it remains in place. Work at the foot of the hillside is immensely difficult and labor-intensive. The use of power equipment on the steep, unstable slope would be dangerous. The area is remote and already compromised by previous owners who discarded construction debris in the area. The removal of all traces of the sand which washed downhill during the years 2008 – 2010 is no longer possible since it is difficult to tell with certainty which layer of sand was deposited in which year. The court concludes that the record shows substantial compliance with the renewed construction permit and the requirements imposed by DEC.

For these reasons, the court will order no further work on the site except for the removal of the sand pile which was created in November 2012 to a location outside of the 50-foot buffer.

Civil Penalty

In considering the issue a civil penalty, the court relies upon the seven statutory factors which appear at 10 V.S.A. § 8010(b).

1. Degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violation.

This case has had no impact on public health, safety or welfare. The impact on the environment is low. The bank above the wetland has now been restored to a state of dense, erosion-preventing vegetation. There is no long-term damage to any part of the site except for the area at the base of the slope. In that area, additional sand has been deposited on the underlying sand. The area affected forms a small part of a 10-acre sandy bottom area. There is no evidence of any discharge of muddy water into Indian Brook or other impact on the surrounding wetland.

The state's witnesses testified credibly that a wetland which has become less wet through the addition of the local sand is less desirable than the original, damper, lower wetland. The change in this case is not great. The area remains extremely damp and muddy. Both at the time of the site visit and through photos it was clear that the additional sand had not changed the character of the wetland markedly. It remained wet and difficult to walk through. This is a factor which supports a civil penalty to only a moderate degree.

2. Presence of mitigating circumstances.

There are no mitigating circumstances arising from the actions of the State. From the time the DEC received a complaint about the site, its representatives have worked responsibly with Mr. Chagnon to achieve the highest possible degree of remediation. The court has no complaint about their work or any reason to find any delay by DEC. This factor has no bearing on the civil penalty decision.

There are mitigating circumstances when one considers the experience of Mr. Chagnon. At the commencement of his project in 2007, he was engaged in lawful development with all the necessary permitting in place. This is not a case of a violation by a person involved in illegal or unsanctioned activity. He intended to build a commercial warehouse in a business park specifically designed for that purpose. He was thwarted in his efforts by economic conditions which have affected small businesses throughout the state and elsewhere. This was his first and likely only attempt to develop property for himself. Since the project failed, he has earned nothing from it. Instead, he has lost money.

Mr. Chagnon's circumstances in no way excuse the environmental violation. But they do place it in context. He should not be treated in the same fashion as a large, financially successful

company which cuts corners in order to save money. This is a factor which supports a smaller rather than a larger civil penalty.

3. Whether Mr. Chagnon knew of the violation

Certainly by 2009 Mr. Chagnon knew about the need to take action to remedy the problems at the site. He delayed taking significant steps for about two years. If he had not delayed, it is unlikely that the case would have been filed. His delay in taking action is one of the principal factors that supports a civil penalty.

4. Mr. Chagnon's record of compliance

By October 2011, Mr. Chagnon came to appreciate the seriousness of the State's concerns about the erosion problem. At that point his record of compliance changed from "poor" to "good." He undertook the work himself. He spent money on an engineering study, on employees' wages, and on materials. Over the course of a year, prodded and encouraged by representatives of DEC, he transformed the moonscape into a normal, steep, brushy Vermont hillside. Pushed by the court, he removed a substantial amount of sand from the wetland. It took Mr. Chagnon more time than many would have required to understand that the scrubby forest below the bank has real environmental value. Once he recognized that the State's concerns were not merely the actions of bureaucrats but had purpose, he joined with them in a reasonable cooperative effort to remediate the site.

Since this was Mr. Chagnon's only effort at becoming a property developer, he has no history of prior non-compliance or other violations which would support a heavier penalty.

Mr. Chagnon's initial delay is offset by the commitment to make things right which he has demonstrated in the last year. This is a factor which is neutral in its application to the civil penalty decision.

5. Deterrent effect of the penalty

The concept of deterrence includes both specific and general deterrence. Specific deterrence concerns the impact of a penalty on the defendant himself. Specific deterrence is particularly important when the defendant is continuing in business and will face similar temptations to take a short-cut on environmental measures. Mr. Chagnon is not continuing with his short career as a property developer. He continues to operate an excavating business which brings him into contact with various permit and construction requirements. Specific deterrence is a factor which supports a moderate penalty.

The State argues more forcefully in favor of a penalty which will deter other members of the development community. Representatives of the State testified that building contractors watch the environmental enforcement cases closely and make decisions about whether to comply with environmental regulations depending upon the experience of others. The court accepts this

perception as true. Chittenden County is a small community and it is likely that many people in the building trades are aware of Mr. Chagnon's case. Few, however, would fail to be deterred by his experience – even before the imposition of a civil penalty. After losing heavily on his investment, he has been sued and has incurred substantial costs of his own in repairing and replanting the affected area. At a minimum, the week he and his crew spent digging with spade and bucket in the soggy bottomlands and carrying six yards of wet sand off site would deter all but the most hardened environmental violator. The court believes that it could impose -0- penalty (which is not going to happen) and that other contractors who learned of the facts would do anything they could to avoid having the same experience. Nevertheless, imposing no penalty at all could be understood by the development community to be tacit approval of a violation of law. This is a factor which supports a moderate civil penalty.

6. State's Actual Costs of Enforcement

The State estimates its costs of enforcement at $8,040, exclusive of legal expenses and the cost of investigating the enforcement case. The court finds that these costs are reasonable. It is clear from the testimony and the exhibits that the DEC staff, especially Ms. Foley and Mr. Burke, exhibited determination and professionalism in persuading Mr. Chagnon over time that it was necessary to address the problems on the site.

7. Length of time the violation has existed

The site was in violation of its permits for more than two years. This is neither a short time such as a violation for a month or part of a building season nor is it a very long time. This is a factor which supports a moderate civil penalty.

Considering these factors, the court will impose a moderate civil penalty of $10,000. This exceeds the cost to the State of investigation. It is high enough that no other property developer will be encouraged to postpone regrading, mulching, and replanting the exposed earth on a development because the fine is so low. It recognizes the expense that Mr. Chagnon has borne in the last 12 months to address the environmental problems on the site.

CONCLUSION

The court will issue a final judgment imposing a civil penalty of $10,000 and providing injunctive relief requiring Mr. Chagnon to remove the six-yard pile of material to a location outside the 50-foot buffer zone not later than June 1, 2013. The penalty is levied against both Mr. and Ms. Chagnon since the permits were issued to both individuals as joint owners of the subject property.

Dated: January 3, 2013

Geoffrey Crawford,
Superior Court Judge

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FINAL JUDGMENT ORDER

Following an evidentiary hearing and based upon the Findings of Fact and Conclusions of Law issued in this case, the court enters final judgment as follows:

1. Nelson and Patricia Chagnon are ordered to remove the 6 yard pile of sandy soil which they placed within the "buffer zone" of the subject wetland to a location beyond the buffer zone. This pile shall be removed not later than June 1, 2013. In all other respects, the Chagnons have substantially completed the remediation of the subject site.

2. Nelson and Patricia Chagnon are subject to a civil penalty in the amount of $10,000. Of this amount, $8,040 shall be payable directly to the Agency of Natural Resources as repayment of the cost of enforcement pursuant to 10 V.S.A. § 8010(e)(2). The balance ($1,960) shall be paid to the General Fund.

Dated: January 3, 2013

Geoffrey Crawford,
Superior Court Judge