

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

G. ScottCo Investment Company dba
Pleasant Acres Mobile Home Park, et al.,

Plaintiffs/Counterclaim Defendants
Third-Party Plaintiffs,

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2010 MAY 27 PM 2:17
CLERK OF COURTS
FINAL APPEALABLE ORDER

v.

Case No. 05VH-10023 (Sheward, J.)

Director Chris Korleski Ohio
Environmental Protection Agency, et al.,

Defendants/Counterclaim Plaintiffs.

TERMINATION NO. 18
BY: PG 5/27/10

**DECISION AND ENTRY GRANTING IN PART AND DENYING IN PART OAK HILLS'
AND WATER SPECIALISTS' OBJECTIONS TO THE MAGISTRATE'S DECISION;
AND, DENYING THIRD-PARTY DEFENDANT WATER SPECIALISTS' MOTION TO
STRIKE**

This matter is before the Court upon Defendant and Third-Party Plaintiff, Oak Hills MHC, LLC's, ("Oak Hills,") Objections to the Magistrate's Decision and Motion for Reconsideration filed July 27, 2009. On July 13, 2009, the Magistrate issued a Decision following a Bench Trial held on June 22, 2009. The State of Ohio filed a Memorandum Contra Oak Hills' Objections on August 5, 2009, as did Third-Party Defendant Water Specialists, Inc., on August 6, 2009. Oak Hills filed Supplemental Objections on March 8, 2010, after Oak Hills had received a transcript of this previously digitally recorded trial. On March 15, 2010, the State of Ohio filed a Memorandum Contra Oak Hills' Supplemental Objections. Also on March 15, 2010, Third-Party Defendant Water Specialists, Inc. filed a Memorandum in Opposition to Oak Hills' Supplemental Objections. Then, on March 18, 2010, Third-Party Defendant Water Specialists filed a Supplemental Objections. In addition, Third-Party Defendant Water Specialists filed a

Motion to Strike Plaintiff's Supplemental Objections on March 15, 2010. Oak Hills filed a Memorandum in Opposition on April 1, 2010; and, on April 12, 2010, Third-Party Defendant Water Specialists filed a reply.

I. Procedural History

A. Summary Judgment and Damages Trial

Previously, this Court granted summary judgment in favor of the Ohio EPA on November 21, 2008. In that Decision, the Court determined the State was entitled to summary judgment as to Count One, Oak Hills had violated its discharge permit, and there were Nine Hundred Twenty-Nine (929) days of violations. See Court's Decision and Entry filed November 21, 2008 at page 2-3. As to Count Two, which alleged discharge violations on September 1 and 19, 2006, the Court also determined the State was entitled to summary judgment. See Decision and Entry filed November 21, 2008 at page 11. The Court also granted judgment on Count Three for failing to submit plans for disinfection facilities. *Id.* at 11. In addition, the Court granted summary judgment on Counts Four and Five against Oak Hills for failing to report testing. See Decision and Entry filed November 21, 2008 at page 10.

In addition, the Court granted in part Third-Party Defendant Water Specialists' Motion for Summary Judgment on May 13, 2009. In short, the Court determined the Third Party Plaintiff, Oak Hills, had no right to indemnification, and contribution; but, Oak Hills claim for breach of contract required determination of issues of fact and summary judgment was not appropriate. Thereafter, the case was referred to the magistrate to determine the amount of civil penalty to be assessed against Oak Hills, and the nature and extent of an injunction. See Notice filed April 16, 2009.

B. The Magistrate's Findings

The Magistrate found as follows:

First, the Magistrate found there should be a \$300 per day fine for the 929 days of violations (Count One) related to effluent getting into the stream. See Magistrate's Decision pages 46-47. The Magistrate specifically found these 929 days of violations were more than just technical, or insignificant, in nature. However, there was very limited evidence as to the extent of the harm the violations caused. *Id.* at 46.

In addition, the Magistrate imposed a \$5,000.00 per day fine for violations between September 1 and September 19, 2006 (Count Two). *Id.* at 47-48. The Magistrate imposed a mid-range fine because the evidence did not establish lasting environmental harm. *Id.* at 48.

With respect to the technical violations of the permit, the Magistrate found they fell into two categories: 1099 days of violations due to the failure to report information; and 1069 days of violations for the failure to submit a plan to comply with new chlorine limits (Counts Four and Five). *Id.* at 48. As for the 1099 days of violation for the failure to self-report, the Magistrate imposed a \$20.00 per violation fine. *Id.* The Magistrate imposed a \$30.00 per violation fine for the 1169 days related to the failure to submit a plan to comply with new chlorine limits. *Id.* at 49-50.

After determining the dollar value of the fine, the Magistrate analyzed whether there was high degree of recalcitrance, defiance and/or indifference to the environmental regulations. *Id.* at 50. The Magistrate found that Oak Hills had in fact exhibited recalcitrance and indifference and therefore increased the fine by \$50.00 per violation. *Id.* at 52. The Magistrate reached this conclusion in large part because there

was a very long standing history of effluent problems known to Oak Hills and its investors. (At the time Oak Hills purchased the manufactured home park, it knew that it had an I&I issue. Id. at 51. The property had been purchased in 2002 but not until 2008 and 2009 did Oak Hills hire a contractor to conduct the studies necessary for resolving the problem. Id. at 50.)

The Magistrate thereafter determined what economic benefit Oak Hills gained by avoiding expenditures required to alleviate the I&I problem. Id. at 52. The Magistrate found there was some savings to Oak Hills and therefore imposed an increase of \$10.00 per violation. Id. at 53. This was in spite of the fact that Mr. Martin testified that Oak Hills was rarely profitable and that the members of Oak Hills had yet to receive any disbursements. Id. at 52.

Next, the Magistrate determined the State had incurred extraordinary enforcement costs. Id. at 53. Accordingly, the Magistrate increased the fines by \$20.00 per violation. Id. The Magistrate came to this conclusion because there were no stipulations or agreements as to the nature and extent of the violation. Id. Also, the EPA established Oak Hills had made false statements in its pleadings. Id. at 53. And finally, Oak Hills had initiated this litigation by filing the Complaint. Id.

The Magistrate also assessed Oak Hills' ability to pay. Id. at 54. At trial, Oak Hills put on evidence to establish its financial situation and that it did not have the ability to pass the fines on to its renters. Id. at 54. Oak Hills also showed financial distress. Oak Hills owed \$4.6 million dollars for the purchase of the facility and the note was due on August 1, 2009. Id. at 55. For that reason, the Magistrate reduced the total fine by 15%. Id. at 56.

Finally, the Magistrate calculated the fines. With respect to the 929 effluent violations Oak Hills owes \$300,067. *Id.* at 56. With respect to the violations between September 1 and September 19, 2006, Oak Hills is responsible for an \$8,636.00 fine. *Id.* For the 1099 days of reporting violations, Oak Hills owes \$93,415.00, and for the “1458” days when Oak Hills failed to comply with the permit concerning chlorine limits, the fine totals \$136,323.00. *Id.* at 57. All together, the total comes to \$538,441.00. *Id.*

II. Oak Hills’ Objections

A. Oak Hills’ Original Objections

Oak Hills proposes this Court follow the example set in *Maurer* for the imposition of fines. Oak Hills maintains the facts of this case are much like those in *Mauer*. Oak Hills maintains in its Original Objections, filed July 27, 2009, the Magistrate erred when determining Oak Hills’ ability to pay. Oak Hills’ Objections at 2-7 in reference to page 54 of the Magistrates Decision. Oak Hills also assigned error to the three hundred dollar per day fine the Magistrate imposed. Oak Hills’ Objections at page 7 in reference to pages 46 and 47 of the Magistrate’s Decision. Oak Hills next submits to this Court that the Magistrate erred in shifting burdens on to Oak Hills. Specifically, Oak Hills maintains the Magistrate erred when he determined, “[i]t was Oak Hills burden to produce such evidence [of environmental harm] if it wanted to establish grounds for a minimum fine.” Magistrates Decision at page 47. Next, Oak Hills argues that the Magistrate erred when awarding extraordinary enforcement costs. Oak Hills’ Objections at 10 in reference to page 53 of the Magistrate’s Decision. Oak Hills insists because it has been unable to identify a single case where extraordinary enforcement costs were imposed, none should be imposed here. Oak Hills’ Objections at page 11. In addition,

Oak Hills maintains the Magistrate erred in holding that the penalty to be assessed must be larger than the cost of compliance, and in determining Oak Hills' economic benefits. Oak Hills' Objections at 13. In addition, Oak Hills finds error in the Magistrate's increase of the civil penalty due to recalcitrance. Oak Hills' Objections at 18. Next, Oak Hills objects to the Magistrate's calculation of the civil penalty. Oak Hills' Objections at 22. Oak Hills objects to the Magistrate's calculation of 1458 days for chlorine violations at the end of his Decision. *Id.* at 23. Oak Hills next objects to the injunctive relief imposed. *Id.* at 24. And, the Magistrate's assessment of penalties for violations in June of 2003. *Id.* at 25. Oak Hills also objects to the Magistrate's penalties for changes in Water Specialists' reporting procedure. *Id.* at 27. Those errors were clerical errors. *Id.* at 29. Then, Oak Hills assigned as error the Magistrate's decision to not award damages for what it maintains was a breach by Water Specialists. *Id.* at 30. (This objection relates to Water Specialists' Motion for Summary Judgment and the Decision that dismissed Oak Hills' contribution and indemnification claims.)

B. Oak Hills' Supplemental Objections

Oak Hills reorganized and restructured its objections and arguments in its Supplemental Brief. The objections in the Supplemental Brief are as follows:

1. The Magistrates erred in calculating the total number of permit violations from 1169 to 1458, a difference of 289 days. Supplemental Objections at 2.
2. The Magistrates erred in assessing fines for alleged violations where it was proven at trial no violation occurred. *Id.* at 3
3. The Magistrate erred in assessing one of the highest fines in Ohio history. *Id.* at 5.

4. The Magistrate erred in shifting the burden of proof for a minimal fine to Oak Hills. Id. at 8.
5. The Magistrate erred in recommending a civil fine for Oak Hills permit violations in excess of established precedence Id. at 10. (This section discusses the *Maurer* case, complete with graphs.)
6. The Magistrate erred in that determining Oak Hills has the ability to pay \$538,441. Id. at 17.
7. The Magistrate erred in taking into account the finances of the individual member investors of Oak Hills. Id. at 21.
8. The Magistrate erred in increasing the penalties to award extraordinary enforcement costs. Id. at 24.
9. The Magistrate erred in determining that Oak Hills derived some sort of economic benefit from the permit violations and increased the civil penalty. Id. at 27.
10. The Magistrate erred in increasing the penalty for demonstrated recalcitrance where there was no evidence of recalcitrance by Oak Hills. Id. at 30.
11. The Magistrate erred in failing to award damages to Oak Hills despite the fact that Water Specialists breached its contract. Id. at 35.
12. The Magistrate erred in failing to differentiate between and adjust the penalty amount for purely paperwork violations caused by Water Specialists. Id. at 39.
13. The Magistrate erred in imposing penalties for failing to submit a chlorine test. Id. at 41.

14. The Magistrate erred in holding that the penalty must be larger than the costs of compliance. *Id.* at 43.

15. The Magistrate erred in granting injunctive relief that is impossible to comply with (6) *Id.* at 45.

III. Standard of Review

A. Civ. R. 53

In ruling on objections to a magistrate's decision, Civ.R. 53(D)(4)(d) requires a trial court to undertake an independent review of the objected matters to ascertain whether the magistrate properly determined the factual issues and appropriately applied the law. *Koepfen v. Swank*, Butler App. No. CA2008-09-234, 2009 Ohio 3675, P26. Here, Oak Hills objects to the factual findings, as well as the legal conclusions with respect to the fine he imposed. A review of the objections shows they fall into three main categories. First, Oak Hills objects to the fine imposed, and next Oak Hills objects to the increases the magistrate found appropriate. Also, Oak Hills identifies as objections various errors that fall into the "other" category. With respect to the fines, the Supreme Court has set forth a standard to determine the penalty. *State ex rel. Brown v. Dayton Mallebale, Inc.* 1981 Ohio App. LEXIS 12103, partially reversed on other grounds (1982), Ohio St.3d 151.

B. The *Dayton Malleable* Method

The *Dayton Malleable* Method consists of three steps of analysis. The first step considers four factors that comprise the penalty. They are:

1. The sum appropriate to address the harm or risk of harm to public health or the environment;

2. The sum appropriate to remove the economic benefit gained or to be gained from delayed compliance;
3. The sum appropriate as a penalty for violator's degree or recalcitrance, defiance or indifference to requirements of the law; and,
4. The sum appropriate to recover unusual or extraordinary enforcement costs thrusts upon the public. *Id.*

In Step Two, the Court must next consider the mitigating factors. *Id.* They are, the sum if any, to reflect the part of non-compliance attributable to the government; and, the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond the violator's control, such as floods or fires. *Id.* Finally, in Step Three, the court is to sum the penalty factors and the mitigating factors by subtracting the total reductions from the total penalty. *Id.*

C. Malleable applied in State of Ohio ex. Rel. v. Maurer Mobile Home Court Inc.

The Court applied the *Malleable* method in *State of Ohio ex. Rel. v. Maurer Mobile Home Court Incorporated*. 2007-Ohio-2262. In *Maurer*, the State alleged that the mobile home park had violated waste water standards. Specifically, the State claimed Maurer had modified its treatment plants without the requisite permission, Maurer had discharged pollutants in excess of the allowed levels on hundreds of occasions, and it had failed to submit a Sludge Management Plan as directed. As to Count One the Court imposed a one dollar per day fine for failure to obtain a permit for sixty-one days. The Court opted for a very minimal civil penalty because the ponds were beneficial to the environment. (*Maurer* had the ponds, but it simply did not have a permit.) As for Count Two, the Court in *Maurer* imposed a sixty dollar per day fine. *Id.* at 64. The

Court found that many of the violations related to Count Two were minor, and they would not adversely affect the Maumee River. *Id.* Finally, in Count Three, the Court imposed a two dollar per day fine for failure to submit a Sludge Management Plan during a 2556 day period. The Court found the EPA was aware of the disposal practices and there was no evidence of damage to the environment or public health. *Id.* Consequently the fine was very low. In Step Two of the *Malleable* method for calculating a fine, the trial court found no economic benefit from the violations in Counts One or Three. *Id.* at p.66. As for Count Two, the Court added three thousand dollars in penalties for the interest Maurer saved by waiting nine years to make improvements to the plan. *Id.* The Court found no evidence of recalcitrance or indifference and consequently reduced the fifty dollar per day fine to forty-five dollars and the two dollar fine to one. It also found the government should have been more helpful through the regulatory process. *Id.* at 67.

IV. Application of *Malleable*

A. The Magistrate's Application of *Malleable*

As for Step One, the Magistrate found the violations created a high risk of serious harm. Magistrate's Decision and Entry pp 45-49. There was evidence of a high degree of recalcitrance, defiance and/or indifference. *Id.* at 50-52. Oak Hills gained an economic benefit from delayed compliance. *Id.* at 52-53. And, the State incurred extraordinary enforcement costs. *Id.* at 53-54. Next, the Magistrate addressed Step Two and found Oak Hills had a limited ability to pay. *Id.* 54-56. Finally, the Magistrate assessed the fine by summing the penalty and the reduction in Step Three. *Id.* at 56-57.

B. This Court's Review

1. The sum appropriate to address the harm or risk of harm

Is \$300 per violation for 929 days when Oak Hills' effluent went into the Big Darby too much? No. There was evidence that this waterway was the "cream of the crop," and fell into the top of the "index of biotic integrity." Tr. 335-336. Oak Hills takes this high rating to mean it won't hurt to dump a little extra into it. The water has room for Oak Hills' waste. Oak Hills places great emphasis on the Magistrate's acknowledgement that there was little evidence of lasting environmental harm. Magistrate's Decision at 48. However, a review of the transcript reveals Sheree Gossett Johnson spoke at length and explained State's Exh.1-A, which detailed Oak Hills' effluent violations. Tr.351-357. These violations included ammonia and fecal coliform running into the Big Darby. *Id.* at 351-353. Moreover, she explained that some of the encroaching waste would suck oxygen from the stream and deprive marine life of the necessary element. *Id.* at 153. The deprivation was not minor, or technical, as the Magistrate noted, but "very detrimental." Tr. At 353 and Magistrate's Decision at 46. Later, Ms. Gossett-Johnson testified that the dissolved oxygen at the treatment plant was very low when she sampled it and the system was "big time wrong." Tr. 151-152; 173.

Stripping a waterway of oxygen by burdening it with human waste products is an obvious harm to the environment. The statutory scheme gives wide latitude to the penalty that may be imposed. Three hundred dollars is on the low end. R.C. 6111.09. Although it is much larger than the fine imposed in *Maurer*, the facts there are quite different than these. There, the Court noted the violations were minor. *Id.* at 64. There,

the mobile home park had the requisite ponds in their treatment system and they were beneficial, but they did not have the proper permit for the ponds. Here, the mobile home's treatment facility was inadequate. Tr.146, 148.

The evidence offered by Ms. Gossett-Johnson was not rebutted. Oak Hills did not contend that their violations were harmless or otherwise good for the waterway, like Maurer did with respect to the ponds for which it did not have the correct permits. *Maurer*. That is what Oak Hills needed to do if it wanted a de minimus fine. Oak Hills wishes this Court to read the magistrate's finding, "[i]t was Oak Hills burden to produce evidence that it did not cause significant harm if it wanted to establish grounds for a minimal fine," without the qualifying "if." Magistrate's Decision at 47. But when read in its totality, the magistrate did not shift any burden of proof.

2. The sum appropriate to remove the Economic Benefit gained from delayed compliance

Likewise, the Magistrate correctly found Oak Hills derived an economic benefit from its non-compliance. The Magistrate found ten dollars per violation was an appropriate increase for the economic benefit Oak Hills gained by delaying the I&I remedy. Magistrate's Decision at 53. The State proposed the measure be based on the difference between what Oak Hills paid its former contractor, Water Specialists, and its later contractor, TCCI. *Id.* at 52. However, the Magistrate declined that approach, and seemed to consider Oak Hills' stressed financial condition. *Id.*

In terms of the evidence, there was evidence by Oak Hills' proprietor, George DeGraca, that tying into the county's sanitation system would have cost \$500,000.00. *Id.* at 26. Mr. Coughlin echoed this figure. *Id.* at 31. Mr. Coughlin also estimated there

was \$143,885 in future repair work to reduce the I&I problem. Id. The Magistrate chose not to adopt either of these amounts as the cost benefit enjoyed by Oak Hills, and instead implemented a meager ten dollar amount. When this amount is multiplied by the number of violations, it equates to \$37,360.00 in total fines which represents the economic benefit Oak Hills gained from delaying its compliance. ((929 effluent violations x \$10 =\$9290) +(19 days in September 2006 x \$10 = \$1900)+(1099 days of reporting violations x \$10=\$10990)+(1458 days of Chlorine limit violations x \$10 = \$14,580) = \$37,360.)

The Court finds Oak Hills has little room to complain in light of the much larger figures the Magistrate could have selected. Oak Hills distressed financial condition, which the Magistrate clearly considered, does not mean a benefit was not had. The ten dollar additional fine per violation stands.

3. The sum appropriate as a penalty for recalcitrance

The Magistrate also found evidence of recalcitrance and upped the base fine by \$50.00 per violation. Oak Hills argues it proved it implemented the recommendations of its plant operator and fully complied with its obligations to address I&I issues, which shows the opposite of recalcitrance. Oak Hills' Supplemental Objections at 30. (Oak Hills does not cite to the transcript or the Magistrate's Decision for this proposition.) Rather, for Oak Hills to have been recalcitrant, it would have had to refuse directives or orders issued by the State. Id. at 32.

That is exactly what Oak Hills did when it violated its NPDES permit, which is the equivalent of a directive limiting the discharge from Oak Hills. The State showed repeated, ongoing, almost systematic violations of it spanning years. State's Exhs. 1A

and 1B. The I&I problem persisted from the time Mr. DeGraca and company owned Oak Hills until the time suit was brought, and thereafter. Two hundred eighty nine days of violation for the non-submittal of chlorine compliance elapsed from the time the State filed its motion for Summary Judgment on September 11, 2008 through the last day of the damages hearing. Thus even ongoing litigation could not convince Oak Hills to correct their practices. This is recalcitrance defined, and the fifty dollar fine is supported by the evidence. Likewise, the 1458 days of violations found by Magistrate in his final step of the *Dayton Malleable* Method is upheld. Magistrate's Decision at 57.

4. The sum appropriate to recover unusual or extraordinary enforcement costs

Next, the Magistrate found the State bore extraordinary enforcement costs. Decision and Entry at 53. Oak Hills complains that it should not be punished for making the State prove its case. However, it was Oak Hills that brought this action, after affirmatively representing it was in compliance with current EPA regulations. Amended Complaint ¶¶60; Second Amended Complaint ¶¶61. The State argues the extraordinary enforcement costs are warranted especially because the violations were self-reported, yet Oak Hills refused to stipulate to them. Additionally, Ms. Gossett-Johnson testified at length as to the amount of time and effort she invested in bringing Oak Hills' into compliance. Tr. 181, 199, 266; State's Exhs. 10, 11, 13. However, there was no testimony of the cost or time earmarked for Oak Hills in terms of an accounting. The State did not allocate hours or dollars spent before or during the litigation process in any fashion, or even a proportion of Ms. Gossett-Johnson's work consumed by this matter. Therefore, the Court removes the \$20.00 per violation extraordinary enforcement cost the Magistrate imposed.

5. Mitigating Factors

Now, moving on to Step Two of the *Dayton Malleable* Method, the Court considers mitigating factors. First, is any part of Oak Hills' noncompliance attributable to the government. The answer unequivocally is no. Oak Hills' investors/operators knew of the I&I problems from Day One. Jason Nelson Tr. 919; Gossett-Johnson Tr. at 180, 191. And, Ms. Sheree-Gossett tried to educate and trouble shoot. Tr. 173,181

Next, what sum is appropriate to reflect any part of the non-compliance caused by factors completely beyond the violator's control, such as flood or fires? *Id.* The Magistrate found none. But, he did find the state of the economy was a reason to reduce the total fine by fifteen percent. Magistrate's Decision at 55. Oak Hills complains that the Magistrate should not have considered the finances of the individual investors, and he overestimated Oak Hills' ability to pay. With respect to the Magistrate's consideration of the individual investors' ability to contribute, the State argues it was proper because the Oak Hills member agreement allows for cash calls to continue operations and cover expenses. State's Supplemental Brief at 18. Moreover, it is the offending party's burden to show the impact of the penalty would be ruinous. There was no economic expert testimony to that effect here. Rather, the member investors testified in a vague or incredulous fashion about the finances and equity of the operation. It was however clear that Oak Hills was operated as a tax shelter. Magistrate's Decision at 55. In the end, Oak Hills failed to establish that a fine in excess of \$500,000 would be ruinous and it was their burden to do so. Accordingly, those objections are overruled.

Likewise, the Court overrules Oak Hills' sister objection that the "Magistrate erred in holding the penalty to be assessed must be larger than the cost of compliance." Oak Hills' Supplemental Objections at 43. The Magistrate's recitation of the law on this subject, read in its entirety, accurately reflects the *Dayton Malleable* Appeals Court holding. That is, to be effective, the penalty must be substantial and should exceed social and business costs of the violation. *State ex rel Dayton Malleable* (CA 2nd Dist. 1981) 1981 Ohio App. LEXIS 12103.

V. Other Fine Related Objections

The first of the Objections in this left-over conglomerate is the Magistrate's decision to impose a penalty for failing to submit a chlorine test. Supplemental Objections at 41. Oak Hills contends that a PTI (Permit to Install) had previously been submitted and the violations were caused by Water Specialists. *Id.* Although neither of Oak Hills' Objections cite to the Magistrate's specific finding, the Court infers from the context that Oak Hills objects to the Magistrate's finding there were "1169 days of violation for not having submitted a plan to comply with the new chlorine limits." Magistrate's Decision at 48. This finding is not new. It was made at the time the Court granted summary judgment to the State on Count 3. See Decision filed November 21, 2008 at 12. Specifically, the Court found Oak Hills "had to submit detailed plans to achieve compliance with the final effluent limitation for total residual chlorine within six months which was by January 1, 2004. Oak Hills did not contest the existence of that requirement. The State then produced appropriate Civ.R. 54(C) [sic] evidence that indicated that Oak Hills never met that requirement. No plan was submitted and no new equipment has been installed at the WWTP in compliance with the permit requirements.

Hence, Oak Hills is in violation of the permit. The State then calculated the time of the non-compliance to be 1169 days as of the day of the filing of its motion for summary judgment (July 1, 2005- September 11, 2008.)”

Although the summary judgment decision was not a final appealable order, there must be evidence presented that there was not a violation of the permit. That evidence was not forthcoming. Oak Hills’ argument that it did not have to get a permit fails completely and is not remotely tenable. The Court therefore overrules this objection.

In a somewhat similar fashion, Oak Hills objects to the fine imposed for 185 instances where no permit violation took place. Supplemental Objections at 3. Essentially, Oak Hills argues it misaligned columns on its monthly operating reports and mislabeled one month as June; and, the State should have recognized the error. *Id.* Nowhere in the objections does Oak Hills cite to the transcript where these mislabeling errors were presented to the magistrate as such, and a credit requested. See State’s Exh. 1-C and Tr. 158, 282 and p.3 Oak Hills Supplement. The Court’s review of those exhibits...

VI. Injunction

The Magistrate enjoined further violations of Oak Hills’ NPDES permit. Future violations would be viewed as contempt of the Court, and fined \$1,000.00 per violation, in addition to an appropriate civil penalty. Magistrate’s Decision at 58. Additionally, the Magistrate ordered Oak Hills to connect to the new sewer line operated by the Franklin County Sanitary Engineer on or before December 31, 2009. *Id.* The Magistrate specifically provided reservation for Oak Hills’ failure to connect if it “is due to a force or event outside Oak Hills reasonable control.” *Id.* This connection has not been made,

and Oak Hills maintains it is not possible because the necessary lift station and EQ basin have not yet been built by Franklin County. Oak Hills' Supplemental Objections at 46. And, Oak Hills argues the \$1,000 per day fine for future violations is exorbitant. *Id.* The State not surprisingly insists the injunction is appropriate, and notes the escape clause for events outside Oak Hills' control. State's Memo at 19.

The Court overrules the objection to the extent that it requests a reduction in the fine. With respect to the deadline, the Court reserves that matter for a contempt hearing. The State may move to enforce the order present evidence that the required connection has not been made; the defense may show the failure to connect is due to a force or event outside Oak Hills' reasonable control.

VII. Breach of Contract: Water Specialists' Supplemental Objections filed March 18, 2010 and Oak Hills' Supplemental Objections at 35.

Both Water Specialists and Oak Hills object to the Magistrate's determination that Water Specialists breached its contract with Oak Hills, but evidence of damages was not presented. Magistrate's Decision at 63. Oak Hills assigns error to the Magistrate's failure to award damages. Oak Hills' Supplemental Objections at 35. Water Specialists claims the Magistrate erred in finding a breach, but correctly determined no damages flowed. Water Specialists' Memo filed March 18, 2010 at 2. Specifically, Water Specialists asserts, "[g]iven the Magistrate's finding that Oak Hills failed to prove damages for a breach, it was unnecessary for the Magistrate to decide whether Water Specialists had breached its contract with Oak Hills, and the Magistrate's finding of breach should be stricken as superfluous." *Id.* Water Specialists breaks down the Magistrate's errors into three areas. *Id.* at 3.

First, Water Specialists insists the Magistrate erred when he found that Water Specialists' actions "directly led to violations' of Oak Hills' NPDES permit." *Id.*, citing the Decision at 61. Water Specialists argues that Oak Hills has no one to blame but itself for the penalties. *Id.* at 4. To that end, Water Specialists submits Oak Hills would not have faced any claims for civil penalties if it had complied with the State's request to correct its pollution problems by connecting to the Darbydale Waste Water Treatment Plant. *Id.* It cites to Ms. Gossett-Johnson's testimony as evidence. *Id.* at 4-5. Further, Water Specialists supports its argument by noting Oak Hills elected not to challenge any of the individual violations the State levied during the summary judgment process. *Id.* at 5. Finally, Water Specialists did not directly and proximately cause the enhancements, including increases due to Oak Hills' for recalcitrance. Thus, even if Water Specialists made a number of mistakes on MORs, it was Oak Hills' actions, that resulted in the enforcement action and penalties. *Id.* at 6

Second, the Magistrate erred in determining that Water Specialists' failure to accurately report dates 'on a number of occasions' constitutes a breach of contract. *Id.* at 7. Water Specialists submits the doctrine of substantial performance applies to instances such as this when the non-performances is merely nominal, trifling, or technical departures from the contract terms. *Id.*, citing *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St 427. Here, Water Specialists served as a contractor for Oak Hills for 15 years. The first time it heard of any problems was when Oak Hills terminated the relationship in February 2008. *Id.* at 8, citing *Tr.* at 1577-78. In the course of those fifteen years, it completed thousands of entries, and any paperwork

errors were minor, technical departures from the terms of the contract, and not the basis for a claim of breach. *Id.* at 8.

Third, the Magistrate erred by placing the burden of proof on Water Specialists to establish that it did not breach the contract. *Id.* at 9. Under this assignment of error, Water Specialists takes issue with the Magistrate's determination that Water Specialists failed in its duty to inform Oak Hills of the continuing issue with the level of chlorine used by the WWTP. *Id.* at 9, citing Decision at 62. Specifically, the Magistrate found, "there was no evidence at the trial that indicated that Water Specialists informed Oak Hills of that condition, which was a clear violation of the contract." *Id.*

Oak Hills maintains just the opposite: The Magistrate correctly found a breach of the contract, but failed to award damages. Oak Hills' Supplemental Objections at 35.¹ Oak Hills asserts that Water Specialists was to conduct water sampling, keep current on EPA rules, provide relevant information to Oak Hills, and perform technical and operating services related to the plant. *Id.* at 35 citing Tr. at 87, 620-634, and Oak Hills Trial Exhs. 1, 27 & 51. The Magistrate found Water Specialists fell short on a number of occasions, in a number of ways, and each of those resulted in substantial penalties against Oak Hills. *Id.* at 36 citing Magistrate's Decision at 61-63. Oak Hills points to 167 instances where Water Specialists breached the contract by failing to report flow rates for the weekend and that resulted in a fine of \$16,7000. *Id.* at 37, citing the Magistrate's Decision at 56, Tr. At 158; States' Exh. 1-C. Additionally, there were 179

¹ Water Specialists opposed those objections, priming some of its arguments presented in its objections filed three days later. Primarily, Water Specialists argued damages may not be based on speculation. March 15, 2010 Brief at 6. The only evidence of contract damages related to the fee Oak Hills paid Water Specialists for services at both the wastewater treatment plant, and the water plant. *Id.* Next, Water Specialists argued even if they breached, the breach did not directly and proximately cause Oak Hills' damages, as detailed in their later brief. *Id.* at 9.

other violations that lead to \$17,900 in fines. *Id.* Essentially, Oak Hills attempts to demonstrate damages were not speculative but rather, it met its burden and established contractual damages with reasonable certainty.

A contract is (1) an agreement, (2) with consideration (i.e., *quid pro quo*), (3) between two or more parties, and (4) to do or not to do a particular thing. *Powell v. Grant Med. Ctr.* (2002), 148 Ohio App.3d 1, 10, at P27, 2002 Ohio 443, quoting *Lawler v. Burt* (1857), 7 Ohio St. 340, 350. Under Ohio law, to prevail on a claim for breach of contract, a plaintiff must prove: (1) the existence of, and terms of, a contract; (2) performance by the plaintiff; (3) non-performance by the defendant; and (4) damages caused by defendant's breach. *Powell*, *ibid*; *Roth Produce Co. v. Scartz*, Franklin App. No. 01AP-480, 2001 Ohio 8866; *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600. The doctrine of substantial performance provides that, where a contract requires numerous performances by one or more of its parties, a party's breach of a single term thereof does not discharge the non-breaching party's obligations under the remainder of the contract unless performance of that single term is essential to the purpose of the agreement. *Kersh v. Montgomery Developmental Center* (1987), 35 Ohio App.3d 61, at 62, citing *Boehl v. Maidens* (1956), 102 Ohio App. 211.

There is no dispute, here, as to the existence of a contract. Water Specialists' Exh. 1. The magistrate found Water Specialists breached it, but no ascertainable damages flowed. Water Specialists asks this Court to revoke the finding of breach because not all of the elements were established, namely the fourth. Water Specialists does not cite any contract case on point, only the general proposition that a court should not decide an issue that is not necessary to the ultimate outcome. *Meyer v. United*

Parcel Serv., Inc., 2009-Ohio-2463 ¶53. Oak Hills insists that not only was there a breach, but damages flowed: \$16,700 related to flow rates for the weekends; \$17,900 related to the MOR report for June 2003 which was mislabeled; and, \$136,000 for noncompliance with the chlorine limit. Oak Hills' Memo filed March 8, 2010 at 36-37.

With respect to the cites for the flow rates and the MOR report, Tr. At 158, State's Trial Ex. 1-C, Oak Hills Exh. 50, a review does not evidence the proposition for which Oak Hills offers them. Moreover, the case was referred to the magistrate for damages, not to re-litigate matters previously resolved. Oak Hills did not object to the violations when the matter was before the Court for Summary Judgment. See Decision filed November 21, 2008.

With respect to the chlorine limit violations, the Magistrate specifically found following the trial, "[t]hough not directly asserted by Oak Hills, it was apparent from the testimony that Water Specialists failed in its duty to inform Oak Hills of the continuing issue with the level of chlorine used by the WWTP." Magistrate's Decision at 62. Previously, on summary judgment, the Court identified the services Water Specialists was to provide. They included three visits per week to the wastewater treatment plant. During the visits plant operations and system conditions would be reviewed with Oak Hills or a representative; sampling. In addition, Water Specialists agreed to be available in emergency situations under separate billing. And, Water Specialists would provide reports, as needed regarding changes or improvement that needed to be made to ensure reliable operation of the plant. Decision filed May 13, 2009 at 3-4; see also Water Specialists' Trial Exh 1. In addition, the Factual History of the Summary Judgment Decision noted, "Water Specialists had no involvement with various other

projects at the Oak Hills MHP, including installation of chlorination process *** that required a permit to install from the Ohio EPA.” Id. at 5. Along those same lines, the July 19, 2009 Trial Decision reflected, “When Oak Hills received its permit in 2002 it was instructed to submit a plan to reduce the chlorine effluent. It did not. The Court held that Oak Hills was responsible for such a plan and that said plan was to be submitted by July 1, 2005. That lead [sic] to 1169 days of violations from July 1, 2005 to September 11, 2008, the date the OEPA moved for summary judgment.” Decision at 6. And, the “OEPA maintained responsibility for compliance with NPDES permit lies with plant owner. To that end, maintenance staff from Oak Hills conducted the majority of sampling during the time at issue in this case.” Factual History of the Decision filed May 13, 2009 at 4.

Returning though to the contract, and the testimony, the Court finds Water Specialists did not breach its contract in any substantial way. Although there was evidence of MOR mishaps, etc., those were relatively minor in relation to the term of the contract. A review of the Oak Hills-Water Specialists Contract, Water Specialists’ Exh. 1, and Mr. Eitel’s testimony pertaining to the agreement, shows there is a provision whereby Water Specialists agreed to “strive to stay current with Ohio EPA rules and provide information to keep you up to date regarding the system and the changing requirements.” Mr. Eitel testified of numerous email correspondences whereby he notified Ms. Nelson and Mr. DeGraca of problems with the waste water treatment plant facilities, including those related to the chlorine tank. Tr. 1551-1574. Moreover, Mr. Eitel did not receive notices of EPA violations. Id.1553. With respect to the provision regarding changes or improvements, there was no breach.

Moreover, there was no evidence by Oak Hills that Water Specialists did not conduct the weekly visits. Although Oak Hills tried to suggest Mr. Eitel and/or Chuck Taylor did drive-bys instead, the only person who would have had personal knowledge of this, Wendy Nelson, did not testify. Thus, the direct evidence to support the alleged breach in this respect was not forthcoming, and circumstantial suggestions that the men were otherwise occupied and too busy to attend to Oak Hills does not carry the day.

Similarly, there was testimony from a representative of T.C.C.I., the contractor that replaced Water Specialists which was offered as a comparison to establish breach. That information is not however, determinative of the terms of a contract with another entity.

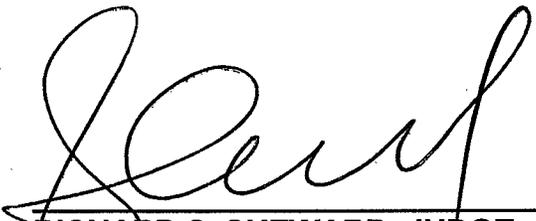
And finally, while Mr. Eitel and his company were the NPDES certified operators, their role was defined by the contract. Oak Hills' attempts to downplay its' duties under the operating agreement does result in a finding of breach by the other party. Tr.1677-78. In response to all of the correspondence regarding violations and trouble spots, there was no evidence that Oak Hills considered the problems to be within Water Specialists purview at the time they were brought up. The only corrective remedy that Oak Hills made was with respect to their employee, Jason Nelson. Thus, this Court's independent review of the evidence shows no material breach by Water Specialists. Rather, it finds an honest, good faith effort to comply with the terms of the contract, and the departures from strict compliance were limited, and in some way tied to shortcomings on Oak Hills' part, like the failure to report accurate information on the bench sheets.

Moreover, and more specifically, Oak Hills suggestion that \$136,323 be recovered from Water Specialists under a contract theory as the damages directly and proximately caused by Water Specialists' breach is nothing more than an attempt to revitalize their subrogation claim. See Oak Hills' Supplemental Objections at 36-37. This Court has determined there is no basis for the claim. Decision and Entry filed May 13, 2009. Accordingly, whether titled as contract or otherwise, the argument fails.

VIII. Conclusion

To conclude, the Court upholds the Magistrate's decision with respect to the State's claims against Oak Hills in all respects except the finding of an extraordinary enforcement cost enhancement. To that end, the Court removes the \$20.00 enhancement. This equals a reduction of \$65,300 from the total fine of \$538,441, leaving the total owed by Oak Hills to be \$473,141. With respect to Oak Hills claim that Water Specialists' breached the contract, the Court finds no material breach, and thus no damages. This is a final appealable order. Civ.R. 54.

IT IS SO ORDERED.



RICHARD S. SHEWARD, JUDGE

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