

FILED  
COMMON PLEAS COURT  
DARKE COUNTY, OHIO

2014 FEB 7 AM 8 29

CINDY PIKE  
CLERK

**IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO**

<b>STATE OF OHIO, ex. rel.</b>	:	<b>CASE NO. 12-CV-00327</b>
<b>Michael DeWine, Attorney General</b>	:	
	:	<b>JONATHAN P. HEIN, JUDGE</b>
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>STATE LINE PROPERTIES, LLC, et. al.:</b>	:	<b>JUDGMENT ENTRY-</b>
<b>Defendants.</b>	:	<b>Decision following Trial to the Court</b>

This matter came before the Court for trial pursuant to notice and following the submission of post-trial briefs by the parties. Plaintiff is represented by Ass't. Attorneys General Christine L. Rideout and Aaron Farmer. Defendants State Line Properties, LLC, State Line Agri, Inc. and Kremer Family Farms, Inc. (hereafter "Defendants") are represented by Jack Van Kley, Esq. Defendant Barbara Parker was represented by Nathan Hosek, Esq. and Daniel Brown, Esq. but did not appear for trial since she was dismissed prior to trial.

**Procedural History**

The Court on August 5, 2013 entered its decision on a motion for summary judgment that directed liability against State Line Properties. At trial, the parties agreed that State Line Agri, Inc. and Kremer Family Farms, Inc. were successor corporations who are now liable for the conduct of its predecessor(s). At trial, the Court refused to permit the joinder of Rick Kremer individually as a party.

### Decision

The primary question for the Court is to determine what amount of damages should the Defendants be required to pay as a result of their failure to comply with environmental regulatory requirements imposed by R.C. Chapter 6111 and federal law incorporated therein. One consideration is the number of days of various violations. The Court previously determined that the days of violation must be calculated between May 24, 2007 (the applicable date for the statute of limitations) and October 31, 2008 (the date when the Defendant's NPDES permit expired). See Decision filed August 5, 2013 at page 4. From the testimony, and Plaintiff's Ex. 18, the Court finds the number of violation days to be:

Count 1	--	21 days
Count 2	--	0 days
Count 3	--	31 days
Count 4	--	105 days
Count 5	--	60 days
Count 6	--	150 days
Count 7	--	31 days
Count 8	--	31 days
Count 9	--	90 days
Count 10	--	84 days
Count 11	--	60 days
Count 12	--	<u>189</u> days
TOTAL		852 days

The violations involve the failure of Defendants to monitor and report various aspects of the effluent treated by a private waste water treatment plant (WWTP) which serviced Defendants' apartment building located on the northern edge of the City of Greenville. Previously, this Court determined that when a report is not submitted in a timely manner, each day is a violation for which a penalty may be imposed.

The Court is mindful of the factors for imposition of penalties as set forth in *State of Ohio v. Dayton Malleable*, 2<sup>nd</sup> Dist. No. 7622, 1981 WL 2776 (April 21, 1981), affirmed in part, reversed in part, 1 Ohio St.3d 141(1982). Briefly stated, the Court must first consider the factors comprising an appropriate penalty and then consider any mitigating factors that would reduce an appropriate penalty.

The penalty factors are as follows: (1) whether the violations created harm or risk of harm to public health or the environment; (2) whether the Defendants benefitted economically from their non-compliance; (3) whether Defendants demonstrated recalcitrance, defiance or indifference to the environmental regulations; and (4) whether the State has incurred extraordinary enforcement costs.

Considering these factors in this case, the Court finds that the risk of harm to public health existed when reports are not completed; such failure clearly frustrate the regulatory purpose and undermine the ability to quantify the extent of the pollution. Nonetheless, the Court finds actual pollution occurred since the WWTP was at times inoperable yet discharging water and fecal material into the discharge tributary. The actual harm here is considered minimal since there was no testimony of actual pollutants in the discharge tributary and also because the unnamed branch of the Boyd Creek which served as the discharge tributary flows away from the city park and through an unpopulated agricultural area. Also, any actual harm was further minimized since the outflow from the WWTP was relatively small (compared to the operating capacity of the plant). The Court further finds that the Defendants benefitted economically by not employing WWTP operators who should have been taking samples and submitting reports. Next, while the Defendants were not wilfully defiant based on their attempts to gain cooperation from the City of Greenville to tie into the city's system, the extended time where Defendants

operated without a NPDES permit cannot be ignored and is deemed to be indifferent to the state's environmental laws. While Defendants may have hired managers, the delegation of this duty is not a valid explanation for non-compliance; lack of proper supervision by Defendants of their managers and operators is another indicia of indifference. Finally, the Court does not find that the state incurred extra-ordinary enforcement costs. Its enforcement actions were customary. No additional manpower was used; no independent testing was required; no expert testimony was required.

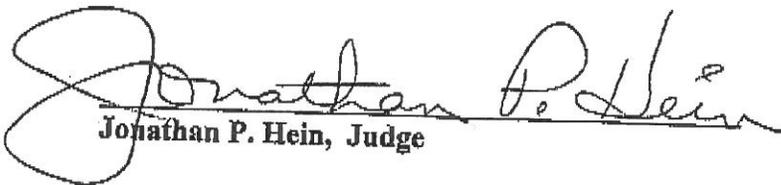
The mitigation factors are as follows: (1) whether any part of non-compliance was the result of governments factors; (2) whether non-compliance was beyond the control of the Defendants; (3) whether sanctions cause an impossibility in continuing the purposes of the violator's entity.

Considering these factors in this case, the Court finds mitigating the non-compliance prior to October 31, 2008 while waiting for the City of Greenville to make its decision about accepting the effluent from the apartment complex. All parties agreed that this was the best environmental outcome. The Defendants' attempts to access the city's WWTP prior to expiration of their NPDES permit are relevant in considering mitigation. However, attempts after October 31, 2008 are not relevant. Further, the Plaintiff's prior regulatory actions against the Defendants should have demonstrated to Defendants the need to at least seek renewal of the NPDES permit while attempting relief through the City of Greenville; this non-compliance is deemed indifference to regulatory requirements. The Defendants' good intentions are insufficient to demonstrate mitigation when defending environmental regulatory litigation.

### Conclusion

Based on the above factors, the Court determines that the total penalty to be imposed against the Defendants shall be \$63,900. [Calculated at \$75 per day per violation.] Since the apartments were economically infeasible to the Defendants and subsequently taken by the lender, the penalty imposed cannot be measured against the social and business costs to the Defendants. This amount does serve as a penalty toward the Defendants -- economically and socially. Whether this penalty affects the ability of Kremer Family Farms' to emerge from Chapter 11 federal bankruptcy reorganization is unclear; there was no testimony about the impact of particular fines on the reorganization plan. Admittedly, the penalty does not meet the State's demand of \$170,250 but the Court finds the demanded amount to be excessive in view of the consideration to allow the Defendant the possibility of future economic viability.

**IT IS THEREFORE ORDERED AND DECREED** that judgment is granted in favor of Plaintiffs and against Defendants, jointly and severally, in the amount of \$63,900, plus interest at the statutory rate of 3% per annum from date of judgment. Further, the Defendants shall pay the court costs herein. **FINAL APPEALABLE ORDER.**

  
Jonathan P. Hein, Judge

cc: Christine L. Rideout / Aaron Farmer, Attorneys for Plaintiff (via fax)  
Jack Van Kley, Attorney for Defendant State Line Properties, et. al. (via fax)  
Nathan D. Hosek / Daniel Brown, Attorneys for Defendant Parker (via fax)

