

IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO

CASE NUMBER: 2009 CV 3251

STATE OF OHIO ex rel.
Richard Cordray, Ohio Attorney
General

PLAINTIFF.

vs.

JUDGE PETER J KONTOS

VALLEY VIEW ENTERPRISES, INC., et al.,

DEFENDANTS.

JUDGMENT ENTRY

This matter is before the Court on remand from the Eleventh District Court of Appeals to determine the number of violations established by the State by a preponderance of the evidence, and then to proceed to a civil penalty phase and to subsequently apportion the penalties among the liable parties.

Ohio R.C. 6111.07(A) provides for the assessment of civil penalties for water pollution violations. Specifically, R.C. 6111.09(A) requires the payment of a civil penalty of not more than \$10,000 for each day of the pollution violation.

The amount of a civil penalty imposed for a violation of pollution control policies lies within the discretion of the trial court. See *State ex rel. Brown v. Dayton Malleable*, 1 Ohio ST. 3d, 151, 438 N.E.2d 120 (1982). Courts must make this determination after evaluating the factors set forth in *Dayton Malleable. Id.* These factors are:

- 1) Recalcitrance, defiance or indifference demonstrated by the violator;
- 2) Economic benefit gained by the violation;
- 3) Harm or threat of harm to the environment; and
- 4) Extraordinary costs incurred by enforcement. *Id.*

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Program: NPDES
County: Trumbull
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This Court finds that although the Defendants efforts were often delayed, the Defendants did not exhibit complete indifference to the environmental requirements. Defendant Ferrara's primary career was in the retail business and his formation of Valley View Properties represented his first experience with property development. Because Ferrara lacked such experience, Defendants hired Western Reserve Land Consultant to work with the EPA on behalf of Valley View Properties. Further, the Defendants made some efforts to obtain compliance so that their actions may not be demonstrated to be total recalcitrance.

The Court agrees that by delaying or avoiding compliance, the Defendants have gained some economic benefit. However, no evidence was submitted as to how much Defendants were economically benefitted by their lack of compliance. Furthermore, although this Court finds that Plaintiff has certainly incurred costs in monitoring compliance, preparing notices of violation and in litigation preparation, no evidence was submitted as to those amounts. Therefore, this Court cannot make any findings as to any amount to be considered and/or awarded for extraordinary costs of enforcement.

Finally, this Court finds that although there was certainly some harm or a potential for harm to the environment and to the wetlands, many of the violations were administrative and occurred during a time period when Valley View was complying with a Cease and Desist Order, when no work was being performed and the area was stabilized.

With these factors in mind, the Court makes the following determinations as to the days of violations and the amount of the civil penalties.

Counts 1 and 2

The State assesses 2703 days of violation for Counts 1 and 2, for the failure to submit Phase I SWP3, to be assessed against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The State calculates the days of violation using a start date of December 7, 2004 which is 5 years before the filing of the complaint until May 2, 2012 which is

the end date of the trial. However, all but 143 days of these days occurred after the April 29, 2005 Cease and Desist Order. Once the Cease and Desist Order was issued Valley View did no further work on Phase I and the area was stabilized. The Court further notes that Defendants did attempt to submit a SWP3, albeit a deficient one. This weighs in favor of a lesser penalty than the \$25/day that the State has proposed. Therefore the Court assesses a civil penalty of \$13,515 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court arrived at that figure by finding the State proved 2703 days of violations by a preponderance of the evidence and assessing a penalty of \$5.00 per day.

Count 3

The State proposes 18 days of violation at \$50 per day for Defendants Valley View Enterprises Ltd. and Ferrara for Count 3, for the failure to timely apply for a General Storm Water Permit for Phase II. The State calculates the days of violation using a start date of July 13, 2007 based on Moody's testimony that he observed construction activities occurring on Phase II on July 13, 2007 until July 31, 2007 when the Notice of Intent for Coverage was received by the Ohio EPA. Although the State proposes a penalty of \$50 a day, the short time between when the notification of violation and the filing of the Notice of Intent weighs in favor of a lesser penalty. Therefore, the Court assesses a civil penalty of \$180.00 against Defendants Valley View Enterprises Ltd. and Ferrara. The Court arrived at this figure by finding the State proved 18 days of violation and assessing a penalty of \$10.00 per day.

The State proposes 322 days of violation on Count 3 for Defendants Valley View Enterprises, Ltd. and Ferrara for failure to develop a SWP3 for Phase II. The State calculates the days of violation using a start date again of July 13, 2007 based on Moody's testimony until June 17, 2008 which the State contends is the date of the last notice of violation letter which documents that the plan had not yet been received. The State proposes a penalty of \$50/per day. The transcript however, references an April 3, 2008 letter from Western Reserve Land

Consultants, Inc. (Defendants' Exhibit E) that submits the Phase II amended storm water pollution prevention plan to the Ohio EPA. Pg. 269. The Court cannot find by a preponderance of the evidence that there were 322 days of violation. Therefore the Court finds that the State proved only 247 days of violation and assesses a civil penalty against Defendants Valley View Enterprises Ltd. and Ferrara \$2,470.00. The Court arrived at this figure by finding the State proved 247 days of violation and assessing a penalty of \$10.00 per day.

Count 4

Count 4 relates to the State's claim that Defendants failed to comply with the 2003 general storm water permit. There are six separate components to Count 4.

First, the State proposes eight separate days of violation on Count 4 for failure to properly implement sediment traps at Phase I. These dates are gleaned from eight separate notice of violation letters sent to Defendants notifying them that sediment traps were not installed or were not installed properly. Therefore, the Court assesses a civil penalty of \$80.00 against Defendants Valley View Properties, Ltd., Valley View Enterprises Inc., and Ferrara. The Court arrived at this figure by finding the State proved 8 days of violation and assessing a penalty of \$10.00 per day.

Next, the State alleges that Valley View Properties, Ltd., Valley View Enterprises, Inc. and Ferrara are liable for a total of 202 days of violation for failure to install or maintain inlet protection at Phase 1. The State begins the first 200 days of violation on July 28, 2015 and ends on February 13, 2006. The State also alleges two separate independent days of violation on the dates of March 31, 2006 and September 13, 2007. The start date of the 200 day violation is based upon the testimony of Chris Moody and Exhibit 17 which state that there was an onsite inspection on July 28, 2005. The end date is based upon Moody's testimony and Exhibit 22 regarding the February 13, 2006 on site meeting in which he noted that the inlet protection was improperly constructed. The March 31, 2006 and September 13, 2007 violations were also based

upon testimony of on-site inspections by Moody. The Court notes that there was not a complete failure to install inlet protection; rather the sediment traps were not constructed exactly as specified in the ODNR "Rainwater and Land Development" manual. This weighs in favor of a lesser penalty than the \$25/day that the State has proposed. Therefore the Court assesses a civil penalty of \$1,010.00 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court arrived at that figure by finding the State proved 202 days of violations and assessing a penalty of \$5.00 per day.

The State alleges 179 days of violation are attributable to Valley View Properties, Ltd., Valley View Enterprises, Inc. and Ferrara for failure to properly stabilize disturbed areas at Phase I. This consists of a 177 day violation with the same July 28, 2005 start date described above, but with an end date of January 30, 2006, which is derived from Moody's testimony. The end date is taken from Exhibit 17-19 which detail the January 30, 2006 on-site inspection where the stabilization issues remained. In addition to the 177 day violation, there are two isolated violation dates of March 7, 2006 and March 31, 2006. The Court notes that temporary stabilization had been performed, but this was deemed inadequate. This weighs in favor of a lesser penalty than the \$25/day that the State has proposed. Therefore the Court assesses a civil penalty of \$895.00 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court arrived at that figure by finding the State proved 179 days of violations and assessing a penalty of \$5.00 per day.

The State alleges one day of violation by Valley View Properties, Ltd. and Ferrara for failing to install construction entrances, sediment traps and diversion berms at Phase II. The violation is based upon Moody's testimony from an onsite visit on September 13, 2007. The State recommends a penalty of \$50 per day for the violation. However, the short duration of the violation weighs in favor of a lesser penalty. The Court assesses a civil penalty of \$10.00 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court

arrived at that figure by finding the State proved 1 day of violations and assessing a penalty of \$10.00 per day.

The State alleges one day of violation by Valley View Properties, Ltd. and Ferrara for failing to install a silt fence at Phase II. The violation is based upon Moody's testimony from an onsite visit on September 13, 2007. The State recommends a penalty of \$50 per day for the violation. However, the short duration of the violation weighs in favor of a lesser penalty. The Court assesses a civil penalty of \$10.00 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court arrived at that figure by finding the State proved 1 day of violations and assessing a penalty of \$10.00 per day.

COUNTS 7 & 8

For Counts 7 & 8 the state alleges that Valley View Properties, Ltd. , Valley View Enterprises and Ferrara are responsible for 602 days of violation for the illegal discharge of dredged or fill material into Waters of the State and violations of Ohio water quality standards. The State's evidence of the start date is derived from Wilk's testimony of an on-site visit and the end date is the date that the Ohio EPA Section 401 Water Quality Certification Addendum was considered completed. The grant of the Water Quality Certification authorized impacts after the fact. Since the Defendants were granted authorization for these impacts after the fact, and did make efforts to obtain the grant of this permit, this weighs in favor of a lesser penalty than the \$100.00 per day that the State seeks. The Court assesses a civil penalty of \$6,020.00 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court arrived at that figure by finding the State proved 602 days of violations and assessing a penalty of \$10.00 per day.

Count 9

For Count 9 the State alleges that Valley View Properties, Ltd. , Valley View Enterprises and Ferrara are responsible for 219 days of violation for failure to obtain a permit to install a sewer disposal system at Phase II. The State uses a start date of October 23, 2007, the date Mooney discovered that a sanitary sewer system had been installed. The permit to install was submitted on May 15, 2008 and was granted on May 29, 2008, the end date used by the State. The Court assesses a civil penalty of \$2,190.00 against Valley View Properties Ltd., Valley View Enterprises Inc. and Ferrara individually. The Court arrived at that figure by finding the State proved 219 days of violations and assessing a penalty of \$10.00 per day.

Therefore, in accordance with R.C. 6111.09 and after reviewing each of the *Dayton Malleable* factors, the Court finds Valley View Properties, Ltd., and Ferrara jointly and severally liable for \$26,380.00 for violations of Ohio's water pollution control laws. Of this amount, the Court additionally finds that Valley View Enterprises, Inc. is also jointly and severally liable for \$2,650.00 of the total.

Date: 10/28/15

SO ORDERED.

JUDGE PETER J KONTOS

FILED
COURT OF COMMON PLEAS
OCT 28 2015
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

**TO THE CLERK OF COURTS:
YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT
ON ALL COUNSEL OF RECORD OR UPON THE PARTIES
WHO ARE UNREPRESENTED FORTHWITH
BY ORDINARY MAIL.**


JUDGE PETER J KONTOS