IN THE SUPREME COURT FOR THE STATE OF VERMONT

No. 2014-063

In re: APPEAL BY PLUM CREEK MAINE TIMBERLANDS, LLC

Appeal from Superior Court
Essex Civil Division
Dockets No. 72-12-10 Excv,
30-6-11 Excv, 19-4-11 Excv,
31-6-11 Excv

BRIEF OF THE AMICUS VERMONT LAND TRUST, INC.

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STATEMENT OF THE ISSUES

Whether the trial court erred by failing to give substantial deference to the interpretation of a forestry management plan made by the regulatory agency that helped to develop and approved the plan?

Whether the trial court erred by requiring evidence of willful disregard or residual environmental harm to support a finding of violation of a forestry management plan, when (a) the plan and applicable statute required compliance with water-quality regulations, and (b) it was undisputed that multiple violations of the regulations had occurred?

INTERESTS OF THE AMICUS

Vermont Land Trust, Inc. (VLT) is a tax-exempt, non-profit Vermont corporation qualified as a conservation organization under 10 V.S.A. § 6306. Since 1977, VLT has conserved and stewarded more than 470,000 acres of farm and forest land in Vermont.

All of VLT's conservation easements on forest land require that timber cutting be undertaken strictly in accord with the terms of an approved forest management plan. Under the terms of VLT's conservation easements, violation of a forest management plan is also a violation of the easement.

Many of VLT's conservation easements pertain to forest land enrolled in Vermont's Use Value Appraisal (UVA) Program, commonly known as "current use." 32 V.S.A. § 3751 *et seq.* To be eligible for the UVA Program, timber cutting on enrolled land must be conducted in compliance with an approved forest management plan. 32 V.S.A. § 3755(b)(1).

Owners of conserved forest land in Vermont typically use the same forest management plan for purposes of complying with the requirements of VLT's conservation easement and the UVA Program. VLT staff work closely in the field with staff from the Vermont Department of Forests, Parks and Recreation (the Department)

in monitoring compliance with forest management plans. VLT respects and depends on the expert judgment of the Department and its professional foresters for orderly administration and interpretation of forest management plans. Owners of conserved land have a strong interest in consistent interpretation of land management plans by the Department and by VLT.

VLT was profoundly concerned by the trial court's decision in this case. While the court acknowledged that it was obligated to grant "substantial deference" to the Department's expertise in forest management, the court consistently failed to do so. The court erred by weighing *ex post* rationalizations about the meaning of the management plan, offered by the landowner's litigation expert, against the determination of the state's forester who helped to develop and approved the plan.

The court also ignored undisputed violations of the Department's water-quality regulations and held that such violations would not constitute a violation of current-use requirements unless there were a showing of willful disregard or residual environmental damage. VLT believes that requiring proof of willful intent or residual environmental harm—rather than proof of non-compliance with clear standards of conduct—would undermine the effectiveness of the current-use program in achieving conservation goals.

VLT is therefore filing this amicus brief—the first in its 37-year history—because disregard of the "substantial deference" standard, and creation of new burdens of proof for enforcing water-quality standards, would introduce confusion into forest management practice, and thereby impede VLT's ability to steward and enforce conservation easements on forest land.

This brief is intended first to assist this Court in understanding why the trial court erred and, second, to explain why equitable and efficient achievement of land-use and water-quality goals will be advanced by reversal of the trial court's decision.

STATEMENT OF THE CASE

Plum Creek Maine Timberlands, LLC (Plum Creek) owns more than 86,000 acres of forest land in the Northeast Kingdom. Plum Creek is the largest landowner in Vermont. Decision filed January 27, 2014 (the Order), at 1 & 5.

Plum Creek's predecessor in title, Essex Timber Company, LLC (Essex Timber), acquired title to these holdings subject to a conservation easement previously granted to VLT. Essex Timber also enrolled various conserved tracts in the UVA Program. VLT's conservation easement is co-held by the Vermont Housing and Conservation Board (VHCB), which purchased the easement with state funds. The conservation easement required that forest management plans fulfill all the requirements of the UVA Program for timberland enrolled in the program. *Id.* at 4; Conservation Easement, at 10 (Ex. 3); Forest Management Plan (Ex. 14) at 12.

The Department approved Essex Timber's management plan in 2007 (as amended, the Plan). The Plan utilized planning techniques developed by state forester Matthew Langlais for large tracts of land. Mr. Langlais was responsible for administering the UVA Program in Essex County, and had special expertise in planning timber management for large timber holdings such as Plum Creek's. Order at 3; Tr. 5/31/13, at 101-102; 108-111; Plan (Ex.14).

The UVA Program Manual (the Manual) contains silvicultural guides and technical references which establish the standards applicable to forest management

plans. Mr. Langlais is thoroughly familiar with the Manual. Tr. 5/31/13 at 104; Program Use Value Manual (Ex.36-5).

After Plum Creek bought Essex Timber's Northeast Kingdom properties, Mr. Langlais met with representatives of Plum Creek to review the Plan with them. After this review, Plum Creek formally adopted Essex Timber's Plan and Mr. Langlais approved the continued enrollment of Plum Creek's land in the UVA Program. Order at 5; Addendum to Plan (Ex. 15).

The Plan allowed amendments to prescribe cutting plans for specific stands within the larger holding. Plan (Ex. 14) at 1. From 2007 forward, Mr. Langlais continued to work regularly with Plum Creek's forester and with VLT's stewardship forester to review and approve proposed amendments to the Plan and to assure compliance therewith. Order at 8.

In 2009, Mr. Langlais worked closely with Plum Creek in developing a plan for the "Upper Clough Brook North" tract in Lemington. The amendment prescribed "treatments" for specific stands within Upper Clough Brook North. Tr. 5/29/13 at 153–54; Amended Harvest Prescription (Ex. 22).

As part of his review of the proposal, Mr. Langlais met with the professional foresters then advising Plum Creek, inspected each stand, and discussed each intended prescription with Plum Creek's advisors. After this review and discussion, Mr. Langlais approved the "Harvest Prescription Amendment" effective October 27, 2009. Amended Harvest Prescription at 1; tr. 5/31/13, at 116–17.

On January 26, 2010, Mr. Langlais inspected the stands involved in the Harvest Prescription Amendment. At that time, Plum Creek had commenced but not completed a timber-cutting operation. Based on that inspection and two more site visits soon

afterward, Mr. Langlais concluded that Plum Creek's logging crew had failed to comply with many requirements of the Plan. These violations were described in an "Adverse Inspection Report" dated April 26, 2010. Adverse Inspection Report (Ex. 36-6); Order at 8.

Mr. Langlais identified 14 violations by Plum Creek of the regulations known as the Acceptable Management Practices (AMPs). 16-6 Vt. Code R. § 200 (Ex. 18). Compliance with the AMPs is required to maintain water quality during logging operations in Vermont on lands enrolled in the UVA program, and under the terms of conservation easements held by VLT. *Id.* at § 200; Adverse Inspection Report (Ex. 36-6).

Compliance with the AMPs was a condition of the Plan. Plan (Ex. 14) at 2. Under the current-use statute, a property owner loses eligibility for remaining in the UVA program upon a finding of violation of the AMPs. 32 V.S.A. § 3755(b)(3).

Mr. Langlais found that each of the AMP violations created a discharge into waters of the state. These violations included failure to maintain a protective buffer by a stream, excavating within a stream, leaving equipment in a stream, construction of unnecessary stream crossings, and improper crossing of streams with heavy equipment. Adverse Inspection Report (Ex. 36-6); tr. 5/31/13, at 136–39.

Mr. Langlais also found that Plum Creek's logging crew cut 140 acres (in Stands 34, 43 and 44) in a manner contrary to the requirements of the Plan amendment, and contrary to his discussions with Plum Creek's foresters prior to approval of those prescriptions. This type of violation is known as a "cut contrary." Mr. Langlais found that the residual basal areas in multiple stands did not comply with prescribed

treatments for those stands. Adverse Inspection Report (Ex. 36-6); tr. 5/31/13, at 139, 141–42.

Based on the Adverse Inspection Report and pursuant to 32 V.S.A. § 3756(i), the Director of the Vermont Division of Property Valuation and Review notified Plum Creek that it had failed to follow the management plan and its property would be removed from the UVA Program. Letter from Vermont Dept. of Taxes to Plum Creek dated July 9, 2010 (Ex. 32A) at 1.

Plum Creek appealed the Director's decision to the Tax Commissioner pursuant to 32 V.S.A. § 3758(a), and appealed the conclusions of the Adverse Inspection Report to the Commissioner of the Department pursuant to 32 V.S.A. § 3758(d). The initial determinations were upheld in the administrative appeals, and Plum Creek then appealed to the Vermont Superior Court pursuant to 32 V.S.A. § 3758(a) & (d).

The appeals were consolidated and tried in the Essex unit before Hon. Mary Miles Teachout, Hon. Calvin Colby and Hon. John Noble.

At trial, Plum Creek maintained that its cutting fully complied with the Plan. The principal support for this claim came from its expert witness, Robbo Holleran. Mr. Holleran, a forester, had no involvement in the management of the Plum Creek tracts prior to issuance of the Adverse Inspection Report. Mr. Holleran acknowledged at trial that he had never prepared a forest management plan for a large landowner similar to the type of plan used by Plum Creek. His experience as a forester was generally limited to land holdings of 100 to 200 acres. Tr. 5/30/13, at 162–63.

Mr. Holleran testified that the residual basal areas in each stand complied with the requirements of the Plan when the *uncut* areas as well as the cut areas of each stand were counted. For example: "If we take the state's [calculation of residual basal area in

a cut section of the stand] and average it with the number of acres of the remainder of the stand . . . it brings us to a compliant across-the-stand condition . . . ." Tr. 5/31/13 at 63–64. *See also* tr. 5/31/13 at 9; 22–23.

On cross examination, Mr. Holleran was reminded that all cutting stopped in mid-operation immediately after Mr. Langlais' first inspection visit. Mr. Halloran was asked if his averaging theory of compliance would have worked if cutting had not been halted. He responded that he could not answer the question. Tr. 5/31/13 at 78; *see also* 84.

In response, Mr. Langlais testified that Mr. Holleran's averaging technique was inconsistent with the Plan's prescriptions. The portions of stands that were uncut, but whose areas were included in the denominator when Mr. Holleran calculated basal area, had not yet been treated to the prescribed cutting. Tr. 5/31/13 at 168.

Mr. Langlais explained:

> I don't agree with Mr. Holleran's assertion that you can take measurements in portions of a stand that weren't cut and average it with portions that are cut to provide a mathematical result of a basal area. It's against our standard practice to consider light and shade from an uncut forest a half a mile away to provide the microsite conditions to regenerate a stand. So that is the number one basis by which I disagree with his report.

Id. at 175.

In response, Mr. Holleran opined that the sampling must be based on the "overall stand basal area" (rather than on the areas that had been cut prior to a halt-work order) based on his understanding of the practice of "other county foresters and their interpretation of the term." Tr. 6/4/13, at 19. Mr. Holleran also testified that "overall stand residual basal area" "means 'across the stand.'" Tr. 5/31/13 at 94.

The Plan uses the term "overall stand residual basal area" once in connection with Stand 34, and never uses the term "across the stand." In connection with Stands 43 and 44, the Plan uses the term "target residual basal area." Amended Harvest Prescription (Ex. 22) at 2.

The principal dispute about the cutting violations was the meaning of the Plan's specifications for residual basal area at the completion of the work. That is, the parties disagreed about the amount and distribution of timber allowed to be cut in specific stands under the terms of the Plan.

Plum Creek did not attempt to dispute most of the water-quality violations. Rather Plum Creek argued principally that it halted or repaired most of the AMP violations by April 26, 2010, and that Mr. Holleran was not aware of any instance in which a property owner had been removed from the UVA Program based on violations of AMPs. Holleran's Report dated September 15, 2011 (Ex. 36) at 10.

On January 24, 2014, the Court issued its Decision. It found that "Plum Creek's harvest to date is in compliance with its approved forestry management plan and has the potential to be in compliance if the harvest is resumed and completed in accordance with the approved forest management plan." Order at 2.

The Court cited *Jones v. Department of Forests, Parks and Recreation*, 2004 VT 49, ¶7, 177 Vt. 81, 857 A.2d 271, 275, as providing the applicable standard for "substantial deference" to the Department's expertise. Order at 2, 20.

In addressing the central issue dividing the parties—the interpretation of the cutting requirements in the Plan—the Court found Mr. Holleran's "conclusions and opinions as a forester . . . to be more credible and reliable than those of Mr. Langlais . . ." and stated that "[w]hile Mr. Langlais' methodology was not incorrect, it appears to

consist of application of manual standards and reliance on statistical measures without the depth of analysis and understanding demonstrated by Mr. Holleran." Order at 15–16.

In addressing the AMP violations, the court acknowledged that these had occurred. The court found that Plum Creek had "acted promptly" to correct them and instituted new training practices to help prevent recurrences. Order at 16. The court also found that there was "no specific evidence of how extensive any discharge of sediment or slash into the water was, nor is there any evidence of impact of water quality or environmental degradation." *Id.*

In its legal analysis, the court held that the decision by the commissioner of the Department had a presumption of validity, but that Plum Creek overcame that presumption and the court would hear the case on a "*de novo* basis." Order at 21.

The court then framed the legal questions as "whether the State's evidence adequately supports the Department's determination and shows application of proper standards, *or whether Plum Creek's evidence outweighs the State's evidence.*" Order at 21 (emphasis supplied).

With respect to the cutting violations, the court found the opinion of Plum Creek's expert about the proper interpretation of the Plan's cutting requirements to be "more credible" than the opinion of the state forester. Order at 21

"The court has found Mr. Holleran's expert opinions to be the most credible and reliable with respect to both the standards to be applied and the overall determination of whether the cutting done is compliant with the prescriptions." *Id.*

The court found that the state forester's interpretation of the Plan's requirements was not entitled to deference in light of Mr. Holleran's testimony, as a "highly

experienced forester," that "measurement across the stand as a whole is the norm." Order at 22.

The court found that "[t]he evidence of compliance presented by Plum Creek is more credible and reliable than the evidence of non-compliance presented by the State." Order at 23.

The court then held that "the State is no longer entitled to deference on issues requiring factfinding once the presumption is overcome and the factfinder is evaluating the weight of evidence of different expert witnesses." Order at 23.

The court found that "the State's conclusions were based on methodologies that might be sufficient for initial evaluation, but are not as thorough as they should be where the consequences are so severe." *Id.*

While acknowledging that the AMP violations were "undisputed," the court declined to find that these were sufficient to support a finding of violation of the Plan because there was "no evidence of willful disregard for the AMPs, nor is there any evidence of residual effect on water quality resulting from the violations." *Id.* at 24.

The court therefore reversed the findings of non-compliance made by the commissioner of the Department as well as the decision by the director of the Division of PVR.

The State of Vermont filed this appeal on February 18, 2014.

STANDARD OF REVIEW

"While we review the trial court's factual findings for clear error, we treat decisions within the Department [of Forest, Parks and Recreation]'s area of expertise with substantial deference." *Jones v. Dep't of Forests, Parks and Recreation*, 2004 VT 49, ¶7, 177 Vt. 81, 84, 857 A.2d 271, 275, *citing Houle v. Quenneville*, 173 Vt. 80, 93, 787 A.2d 1258, 1267 (2001) and *Agency of Natural Res. v. Upper Valley Reg'l Landfill Corp.*, 167 Vt. 228, 238, 705 A.2d 1001, 1007 (1997).

ARGUMENT

I. THE TRIAL COURT ERRED BY WEIGHING THE CREDIBILITY OF COMPETING EXPERTS RATHER THAN BY GIVING SUBSTANTIAL DEFERENCE TO THE DETERMINATION OF THE DEPARTMENT OF FORESTS, PARKS & RECREATION WITHIN ITS AREA OF EXPERTISE.

Vermont's UVA Program grants extremely favorable property-tax treatment to landowners who commit to managing their properties in compliance with forest management plans approved by the Department. 32 V.S.A. § 3755(b)(1).

The Department is required to inspect the enrolled properties for compliance. If the Department finds in an inspection that the property is being managed "contrary to the forest or conservation management plan, or contrary to the minimum acceptable standards for forest or conservation management," then the Department "shall file with the owner, the assessing officials, and the Director an adverse inspection report." 32 V.S.A. § 3755(c).

"Minimum acceptable standards for forest management" is statutorily defined to mean standards established by the Department. 32 V.S.A. § 3752(13). These include the AMPs promulgated as administrative rules.

Current-use properties become ineligible to remain in the UVA Program if the Department issues an adverse inspection determination. 32 V.S.A. § 3755(b)(3).

The Department's determination of a plan violation is "entitled to substantial deference." That is, the Department's finding must be upheld unless it is found to be "standardless, unsupported by the evidence, or contrary to law." *Jones v. Dep't of Forests, Parks and Recreation, supra* at ¶14.

In *Jones*, this Court reversed a trial court's decision that the Department erred in finding a violation of a management plan. Similarly to this case, the state forester in *Jones* determined that the residual basal area in the cut portion of a stand was below the requirements of the applicable plan. The landowner's expert disputed this, and the trial court accepted the opinion of the landowner's expert.

This Court reversed, holding that the testimony of the state forester was a sufficient basis for upholding the violation of the plan. In so ruling, this Court "cautioned that courts are not a higher environmental agency entrusted with the power to make environmental law and policy, but rather exercise a narrow role in ensuring that the decisions of ANR are made in accordance with law." *Id.* at ¶14, *citing Conservation Law Found. v. Burke*, 162 Vt. 115, 126, 645 A.2d 495, 502 (1993).

While the Order in this case noted the deferential standard set forth in *Jones*, the court failed to apply it. Rather the court erroneously determined that once Plum Creek introduced sufficient evidence to burst the presumption of validity accorded to an administrative agency's findings, then the court was free to weigh the credibility of various witnesses as in any civil proceeding.

The trial court's approach confused a "bursting bubble" presumption of validity in administrative appeals with the standard of deference accorded to an agency determination within its expert competence.

The trial court cited *Kruse v. Town of Westford*, 145 Vt. 368, 371–72, 488 A.2d 770, 771–72 (1985)) for the proposition that although the Department's decision was entitled to a presumption of validity, the presumption "dissolves" as soon as the landowner presents evidence to the contrary, and the Court must then apply a *de novo* standard of review. Order at 21.

Kruse applied a "bursting bubble" presumption in a review of a property tax appraisal in which the taxpayer challenged the town's appraisal as being higher than the property's fair market value. *Kruse*, 145 Vt. at 371–73, 488 A.2d at 771-72. However, in a case such as this, involving a determination by the Department concerning its own area of expertise, such as timber harvesting, heavy cutting, and forestry practices, the "bursting bubble" is not the end of the inquiry.

In *Mollica v. Div. of Prop. Valuation & Review*, 2008 VT 60, 184 Vt. 83, 955 A.2d 1171, this Court held that construction of a building on a Christmas tree farm did not violate the requirements of the UVA Program. In that decision, this Court clarified how deference is accorded in *de novo* proceedings after the presumption of validity has burst:

> Although *de novo* review under § 4467 presumes the validity of the taxing authority's decision only 'until the taxpayer produces some evidence to the contrary,' this does not mean that the court ultimately owes no deference to the decision of the administrative agency. For example, in considering the superior court's de novo review of the Department of Forests, Parks and Recreation's determination that a taxpayer was not in compliance with a forest-management plan, we noted that 'we treat decisions within the Department's area of expertise with substantial deference.'

Mollica, *supra* at ¶ 8, 184 Vt. at 87, 955 A.2d at 1174 (*quoting Jones*, *supra* at ¶ 7) (internal citation omitted) (emphasis added); *accord Ghia v. Town of Ludlow*, 2012 WL 390740, *2 (Vt. 2012).

In reaching the conclusion in *Mollica* that the Vermont Department of Taxes Division of Property Valuation and Review was not entitled to substantial deference, the Court contrasted the scenario with that presented in *Jones*, "where the administrative agency was acting within a narrow area of technical expertise," and therefore entitled to substantial deference. 2008 VT 60, at ¶ 11.

The issue in *Jones*, as here, involved review of a determination by the Department that landowners enrolled in the UVA Program had violated their forest management plan. *Jones*, 2008 VT 60, at ¶ 7. It is not, as in *Mollica*, simply statutory interpretation. This case involves the Department acting within a narrow area of technical expertise and, as such, according to both *Mollica* and *Jones*, substantial deference must be given to its determination.

Rather than defer to the Department in this case, the trial judges chose instead to weigh the opinion of an expert unfamiliar with management plans for large tracts of timber against the determination of the Department's expert who helped to develop and had approved Plum Creek's cutting plan.

For example, in connection with Stand 44, the Plan specified "intermediate thinning" and a "target residual basal area of 60 ft^2." Intermediate thinning "will target at-risk and mature stems." Amended Harvest Prescription (Ex. 22) at 2.

Mr. Halloran found that only 23 percent of the stand had been cut, and those sections had a residual basal area of only 36 ft^2. Nonetheless, Mr. Halloran found compliance with the Plan's basal area requirements by averaging the residual basal area

of the cut area with the 77 percent of the stand that was untouched. Holleran's Report dated September 15, 2011 (Ex. 36) at 9–10.

In the Adverse Inspection Report, by contrast, Mr. Langlais based his violation finding on the residual basal areas in the portions of the stand that were actually cut. His calculation of the residual basal area in the cut portions of Stand 44 was 16 ft^2. Adverse Inspection Report (Ex. 36-6) at 2.

In his testimony regarding interpretation of the Plan, Mr. Langlais repeatedly cited the Manual and standard practices as the basis of his findings of violation in Stand 44. Tr. 6/3/13, at 11–18; *see also* tr. 5/31/13, at 175–91 (referencing standards in describing violation involved in cutting of other stands).

Mr. Halloran testified and the Court found, with respect to Stand 44, that a goal of the cut was regeneration, and that opening gaps in the forest would accomplish that goal. Order at 19; Holleran's Report dated September 15, 2011 (Ex. 36) at 10.

The Plan's prescription for Stand 44 does not mention regeneration as a goal, but rather specifies intermediate thinning. Amended Harvest Prescription (Ex. 22) at 2. The *Silvicultural Guide for Northern Hardwood Types in the Northeast (revised)* (the Guide), included in the Manual, describes the goals of thinning a stand. Guide (Ex. 36-2) at 21. Regeneration is not specified in the Guide as a goal of a thinning treatment. Rather the goal of thinning is to provide adequate growing space for existing stems with the highest value potential.

Yet Mr. Halloran testified and the Court found that in the cut areas of Stand 44 there was successful regeneration after three years, and therefore the purpose of the prescription for Stand 44 had been accomplished. Order at 19; Holleran's Report dated September 15, 2011 (Ex. 36) at 9. Mr. Halloran referred to sections of the Guide that

govern regeneration cuts, and asserted that it would have been appropriate to clear cut sections of Stand 44 to foster regeneration. Holleran's Report dated September 15, 2011 (Ex. 36) at 9.

In sum, Mr. Holleran first chose to substitute a management goal that was not prescribed for the one that was prescribed, and then he relied on the basal area of the 77 percent of the stand that was uncut to justify his conclusion that the cutting complied with the requirements of the Plan.

Plum Creek's expert repeatedly offered this type of *ex-post* rationalization of his client's violations by reinterpreting the Plan's prescriptions. By way of further example, the prescription for Stand 43 was two-fold. A "two stage shelterwood" cut to a pre-defined residual basal area would be used to *release* "quality growing stock" and create conditions for regeneration. In separate areas of the stand an "overstory removal" would be used to *release* pre-existing red spruce regeneration. Amended Harvest Prescription (Ex. 22) at 2. However, Mr. Holleran re-characterized the goal of the overstory removal as creating new *regeneration*, and found that this was accomplished. Holleran's Report dated September 15, 2011 (Ex. 36) at 7–9.

Plum Creek essentially clear cut sections of Stand 43 with no regard for residual basal area or whether the clear-cut areas were located in such a way as to release pre-existing red spruce regeneration. That type of cutting will indeed allow *regeneration* of species like birch or pin cherry. However, because this severe cutting was done in areas lacking red spruce regeneration, it did not advance the management goal of *releasing* existing red spruce stock through overstory removal. Mr. Langlais explained this at length with specific reference both to the language of the Plan and to the standards in

the Guide. Tr. 5/31/13 at 177-187; *see also* tr. 5/31/13 at 156 (describing similar treatment goals on another stand).

If the court had given substantial deference to the Department's determination about the requirements of the Plan, it would have found clear violations of the Plan in the cutting of these two stands. The state forester's opinion rested on agreed forestry standards, his own measurements and observations during a site visit, and his own professional understanding of the Plan that he helped to formulate and approved. Using a substantial-deference standard, there was no basis for rejecting the Department's determination. The Department's determination with respect to the third "cut-contrary" violation was equally well-grounded.[1]

The record also showed that Plum Creek commissioned at VLT's request an assessment by an independent forester of the extent of cutting in the Clear Brook North stands. That forester's data supported the conclusions of Mr. Langlais about the extent of the cutting. Tr. 6/3/13 at 20-22; 27-30; Dirigo assessment, State's Ex. F.

The trial court acknowledged that there was a rational basis and evidentiary support for Mr. Langlais' determinations when it grudgingly found that they were "not irresponsible." But then the court disclosed why it rejected those conclusions—because the consequences of an adverse finding might be so heavy for Plum Creek.[2] Order at 23 (referring to "the magnitude" of consequences of an adverse inspection determination).

The judges apparently decided that the financial consequences to Plum Creek would be too great to defer to the opinion of the Department when there was an

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[1] With respect to Stand 34, *see* tr. 5/31/13 at 145–76.

[2] Because the trial court found no violation of the Plan, it never reached the question of whether the penalty for a violation of the Plan would be removal of all of Plum Creek's land from the UVA, or only some acreage related to the violation. VLT takes no position on the proper penalty for a violation in this case.

alternative opinion that would allow Plum Creek to remain in the UVA Program. However, calibrating judicial deference according to the consequences to the landowner is wholly inconsistent with the "substantial deference" standard, and with the requirements of the current-use statutes.

The Department's determination was supported by evidence from Mr. Langlais, and it was neither standardless nor contrary to law. The trial court erred by rejecting it. The violations for cutting contrary to the Plan should have been upheld.

II. THE TRIAL COURT ERRED BY CREATING A TEST FOR REGULATORY VIOLATIONS THAT WOULD REQUIRE PROVING INTENTIONAL DISREGARD OF REGULATORY STANDARDS, OR PERSISTENT ENVIRONMENTAL HARM, WHEN:

a. THERE IS NO DISPUTE THAT APPLICABLE REGULATORY STANDARDS WERE REPEATEDLY VIOLATED; AND

b. THE STATUTE EXPRESSLY REQUIRES COMPLIANCE WITH THOSE REGULATORY STANDARDS AS A CONDITION OF RECEIVING TAX BENEFITS.

Plum Creek did not dispute the Department's finding that there were multiple violations of the AMPs—the regulatory standards promulgated by the Department to protect water quality during logging operations in Vermont. The state forester found that all of the violations created discharges into surface waters. Adverse Inspection Report (Ex. 36-6).

The court found that the AMP violations included locating a log landing within a stream protection zone, unnecessarily crossing a brook, skidding logs within a stream protection zone, failing to maintain protective areas, operating equipment within a stream, altering a stream channel and unnecessarily crossing a stream. Order at 16.

However, the court ruled that those AMP violations should not be deemed a violation of the UVA Program's requirements unless the Department also could prove that Plum Creek intentionally disregarded the AMPs or that the violations created ongoing environmental damage. Order at 16–17; 19; 24–25.

As with the cut-contrary violations, the court tailored its compliance standard to the consequences of non-compliance for Plum Creek: "The question is whether the level of AMP violations in this case . . . is sufficient to support a finding of non-compliance

with the approved plan, resulting in the removal of 56,604 acres from the UVA." *Id.* at 24.

The Plan specifically required compliance with the AMPs as a condition of the timber harvesting. Plan (Ex. 14) at 2. Under the current-use statute, a property owner loses eligibility for remaining in the UVA program upon a finding of violation of the AMPs. 32 V.S.A. § 3755(b)(3). Neither of these standards is written so as to establish different conduct requirements depending on a landowner's financial stake in preserving favorable tax treatment.

The purpose of the AMPs is to implement the statutory goal "to seek over the long-term to upgrade the quality of waters and to reduce existing risks to water quality." 16-6 Vt. Code R. § 200, *citing* 10 V.S.A. § 1250 (State water quality policy).

Vermont requires that all persons who create a discharge into surface waters of the state must apply for and receive a discharge permit or must fall within certain statutory exceptions. 10 V.S.A. § 1259(a). One exception is for limited discharges incidental to logging operations that comply with the AMPs. 10 V.S.A. § 1259(f).

The purposes and requirements of the AMPs are stated with concise clarity in 16-6 Vt. Code R. § 200:

> These AMP's are intended to prevent "discharges"; that is mud, petroleum products and woody debris, from getting into our streams, ponds, lakes and rivers. They are also meant to maintain natural water temperatures by requiring that trees be left along streams and other water bodies.
>
> The AMP's have the force of law and violations can be costly, so it is important to understand the conditions under which they can be enforced. These conditions are as follows:
>
> 1. A violation occurs only if there is a discharge. If no discharge occurs, the logger or landowner cannot be fined or prosecuted for not having the AMP's in place.

2. If there is a discharge and the AMP's are properly in place, there is no violation.

3. *If there is a discharge and the AMP's have not been followed, there is a violation.* (Emphasis supplied).

The trial court cited no law in support of the proposition that the management plan would not be violated unless there was a showing of intentional disregard of the AMPS, or persistent environmental harm. The trial court simply created a standard that excused prohibited conduct. The court apparently decided that it would be more equitable for Plum Creek to keep its tax benefits than to punish it for failing to comply with clear regulatory standards designed to protect the environment.

However, the consequences for non-compliance have been specified by the legislature. Continued eligibility for the tax benefits is expressly conditioned on compliance with the AMPs. 32 V.S.A. § 3755(b)(3). The trial court was not free to re-write the statute based on its own notions of fairness or equity.

As this Court has stated, "[t]he determination of whether statutory language is mandatory or directory is one of legislative intent." *In re Mullestein*, 148 Vt. 170, 174, 531 A.2d 890, 892 (1987); *Vermont Human Rights Comm'n v. State Agency of Transp.*, 2012 VT 88, ¶ 8, 192 Vt. 552, 556, 60 A.3d 702, 705.

Where the statute's plain language is clear and unambiguous, "no further interpretation is required." *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 346 (2002); *Town of Killington v. State*, 172 Vt. 182, 188–89 (2001).

The trial court erred by creating a different standard for a landowner to maintain eligibility for favorable tax treatment than set by the controlling statute.

III. EQUITABLE AND EFFICIENT ACHIEVEMENT OF LAND-CONSERVATION AND WATER-QUALITY GOALS WILL BE ADVANCED BY REVERSAL OF THE TRIAL COURT'S DECISION.

VLT filed this brief because the success of long-term, forest-land conservation in Vermont critically relies on consistent interpretation and administration of the forest management plans required under the UVA Program, and under conservation easements funded by the VHCB and held by VLT and others.[3]

Management plans are essential elements in the UVA Program and in the administration of conservation easements. The orderly and fair administration of management plans requires that they be interpreted and implemented consistently with reasonable uniformity. The Department plays a central role in providing that uniformity through the work of its professional foresters.

In connection with Plum Creek's Plan at issue in this case, VLT's forester worked closely with Mr. Langlais, and concurred with the Department's conclusions about the nature of the violations.

The purpose of providing current-use tax incentives is to conserve and protect the productivity of the land and to protect the "natural ecological systems." 32 V.S.A. § 3751.

Implementation of a meaningful "substantial deference" standard is vital to assuring consistent administration of forest management plans and to achieve the statutory program goals.

VLT and other holders of conservation easements benefit by consistent oversight and enforcement of the UVA Program. The public benefits from state foresters'

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[3] While VLT holds conservation easements on more Vermont land than any other organization, there are a number of other non-profit organizations which hold conservation easements on forest land in the current-use program.

oversight of the UVA program when these tax subsidies create productive, healthy forests. Landowners benefit by drawing on the state foresters' professional skills in shaping and approving management plans that increase sustainable timber revenues while reducing the owners' tax burden.

The trial court's decision to ignore clear violations of the AMPs creates all the wrong incentives for landowners; and, if affirmed, would undermine the state's efforts to improve water quality. Not all degradation of water quality arrives with the drama of Tropical Storm Irene, or is readily documented. As described and prescribed by Vermont's Water Quality Standards, the elements of high-quality water include chemistry, suspended solids, temperature, distribution of macro invertebrates and a range of other characteristics. 16-5 Vt. Code R. § 100 : 3-01 (Water Quality Criteria and Indices).

The AMPs are a crucial regulatory component of conservation efforts to protect and enhance Vermont water quality by limiting discharges into surface waters. When VLT approves a management plan that is conditioned on compliance with the AMPs, VLT expects the landowner to comply with the express requirements of the regulations. Neither VLT nor presumably the Department wishes to be drawn into extensive litigation involving the jousting of experts over the materiality of violations.

Unfortunately, the trial court's decision, *if affirmed*, would create incentives for landowners to be less vigilant in assuring compliance with their plans, and to engage in costly battles of experts about the meaning of management plans.

Reversal of the trial court's decision would create incentives for landowners to take reasonable steps to assure that their logging crews are aware of the requirements of the Plan and to comply with the requirements of the AMPs.

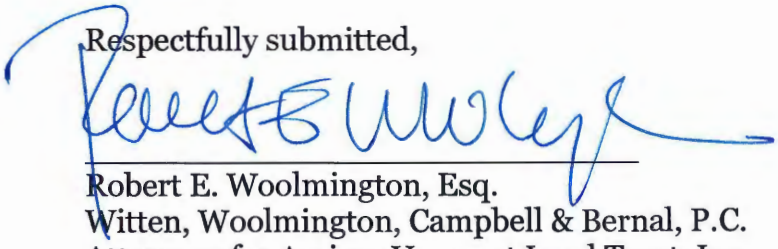
The UVA Program is not mandatory. Landowners choose to apply for the substantial tax benefits associated with it. As a condition of participation, landowners bear the burden of proof to demonstrate compliance with all the requirements of the program. 32 V.S.A. § 3755(e).

By choosing to accept the benefits of the program, Plum Creek was obligated to assure compliance with the Program's requirements. It unfortunately failed to do so. The Department's determination was reasonable, supported by the record and fully in accordance with applicable law. It must be affirmed.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,



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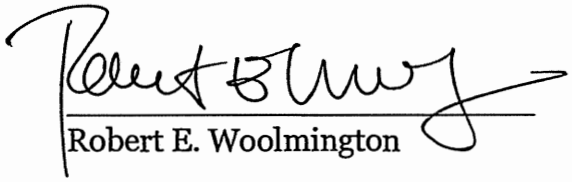
CERTIFICATE OF COMPLIANCE

Robert E. Woolmington, Counsel for the Amicus, Vermont Land Trust, Inc., hereby certifies that this brief complies with the word count limit of 9,000 words pursuant to VRAP 32(a)(7)(A)(i). According to the word count of Microsoft Word 2010, the text of this brief (excluding statement of issues, table of contents, table of authorities, signature blocks and certificate of compliance) contains 6292 words.



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