

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION -
SUSSEX COUNTY
DOCKET NO.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	
	:	
	:	
Plaintiff,	:	
	:	
v.	:	<u>Civil Action</u>
	:	
JOSEPH WALLACE and LAURA WALLACE,	:	
	:	
	:	
Defendants.	:	
	:	
	:	

BRIEF IN SUPPORT OF PLAINTIFF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S VERIFIED COMPLAINT AND ORDER TO SHOW CAUSE SEEKING TEMPORARY AND PERMENANT RESTRAINTS

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PRELIMINARY STATEMENT

The Department of Environmental Protection ("Department" or "DEP") is seeking an order pursuant to R. 4:67-1 restraining Joseph Wallace and his wife Laura Wallace from continuing to import fill material to their residential property located at Block 130, Lot 1.05, 3 Silver Spruce Drive, Vernon Township, Sussex County, New Jersey. The Department also seeks an Order requiring Defendants to (1) provide access to DEP to determine compliance, (2) characterize all fill material to determine if it meets the definition of solid waste as defined by N.J.A.C. 7:26-1.6 and provide an estimate for removing the solid waste within thirty (30) days, (3) remove and properly dispose of all solid waste within ninety (90) days, (4) provide DEP with complete documentation setting forth the source and nature of the fill material within ten (10) days, and (5) within forty-five (45) days place sufficient funds into escrow or an attorney trust account to guarantee adequate funds for removal of the solid waste on-site.

DEP has recently taken soil samples that have shown that Joseph Wallace ("Wallace") has imported contaminated fill material onto his property, which the Department considers to be solid waste. The operation of an unpermitted solid waste facility is a violation of the Solid Waste Management Act ("SWMA"), N.J.S.A. 13:1E-1 to 48, and the surface area disturbances associated with the fill material are potential violations of the Stormwater

Management Rules, N.J.A.C. 7:8, and New Jersey Pollutant Discharge Elimination System ("NJPDDES") Rules, N.J.A.C. 7:14A, promulgated pursuant to the Water Pollution Control Act ("WPCA"), N.J.S.A. 58:10A-1 to -35, as well as the Highlands Water Protection and Planning Act ("Highlands Act"), N.J.S.A. 13:20-1 to -35.

STATEMENT OF FACTS

Initial Discovery of Solid Waste

On February 15, 2019, DEP received test results from a certified laboratory that concluded that one of two soil samples taken from fill material that was dumped on the Wallace property had levels of polycyclic aromatic hydrocarbons ("PAHs") and lead that exceeded residential standards. (Certification of David Ongaro ¶ 10, hereinafter "Ongaro Cert.") DEP then determined that Wallace was operating an unlicensed solid waste facility in violation of N.J.A.C. 7:26-2.8(f) and issued two Notices of Violation ("NOV") on February 20, 2019 (one for operating the unlicensed solid waste facility and the other for failure to permit entry to DEP inspectors on that day). Id. ¶ 13. Soil contamination by PAH and lead has the potential to erode and deposit in off-site areas and potentially harm the environment. Id. ¶ 11.

These soil samples were taken on or about January 31, 2019, when DEP was able to access some of the fill material that had rolled to a neighboring property in groups of frozen chunks of soil. (Ongaro Cert. ¶ 5.) The neighboring property owner called

DEP to report that some of the fill material had rolled onto his property. Ibid. DEP inspectors observed that the frozen chunks of soil were of the same color, consistency, and composition as the fill material on the Wallace property. Id. at 7. Using dedicated equipment, DEP inspectors took samples of the frozen chunks of soil and sent two of those samples to a certified laboratory for testing. Id. ¶¶ 8-9.

Additional DEP Investigative and Enforcement Actions

DEP's first substantial involvement with the Wallace property came in response to a DEP hotline tip made on July 23, 2014, DEP inspectors along with a representative from the Sussex County Soil Conservation District ("District") engaged in a site inspection on August 6, 2014. (Certification of Rajendra Gandhi ¶ 4, hereinafter "Gandhi Cert.") There, inspectors discovered a large quantity of fill material, approximately 100 feet long by 150 feet wide and up to 50 feet deep, in a semi-circular pattern. Id.; (Certification of Richard T. Paull ¶ 14, hereinafter "Paull Cert.") The fill material consisted of soil mixed with concrete, stone, brick, wood, plastic, and asphalt pieces. Wallace claimed to have documentation showing that the fill was clean but he failed to produce it when requested by the Department. (Gandhi Cert. ¶ 6.)

After the August 6, 2014 site inspection, DEP inspectors were concerned that Wallace was operating an unlicensed solid waste facility in violation of N.J.A.C. 7:26-2.8(f) but had no

determinative evidence to conclude so. (Gandhi Cert. ¶ 6.) DEP then issued a Warning Letter to Wallace that advised him that he might be violating the SWMA and advised him to document the origin and composition of the fill material. Ibid.

Thereafter, DEP continued to receive tips and complaints about ongoing violations of the SWMA on the Wallace property from private citizens, Vernon Township officials, and other entities. (Farrell Cert. ¶¶ 5-8.) Included in these complaints was an advertisement purportedly offering to hire truckers to take fill material from New York City to a dump facility at "3 silver spruce drive sussex nj." (Farrell Cert. Exhibit E.) Indeed, Wallace has been convicted of illegally dumping solid waste elsewhere. Id.

DEP inspectors engaged in approximately ten site inspections between September 2015 and September 2018. (Farrell Cert. ¶ 5.) Consistently, Wallace stated that he had documentation verifying the cleanliness of the fill material but continually failed to produce it at DEP's request. (Gandhi Cert. ¶¶ 6-7.) Based solely on visual assessments, DEP inspectors could not determine if the fill material was solid waste. Id. ¶ 4. DEP inspectors were unable to determine that the material was solid waste until they were able to obtain a sample. (Ongaro Cert, ¶¶ 5-13.)

On or about January 19, 2019, Wallace advised DEP inspectors that he would not permit any access to the Wallace property without a search warrant. (Farrell Cert. ¶ 10.) After the January 19, 2019

denial of entry, DEP suspected that Wallace had violated the Stormwater Management Rules and the Highlands Act by exceeding one acre of land disturbance. (Paull Cert. ¶¶ 7, 12.) Regarding stormwater discharge under the WPCA, a 5G3 general permit is required "for any stormwater discharge associated with a small construction activity, which is any 'clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres.'" (Paull Cert. ¶ 5 (citing N.J.A.C. 7:14A-1.2, -6.13, -24.2).) This permit requires that for any land disturbance exceeding one acre, but less than five acres, one must obtain a permit to ensure that the stormwater runoff is properly managed.

The Wallace property is situated in the Preservation Area of the Highlands, and DEP approval is necessary for any "major Highlands development" as defined in N.J.S.A. 13:20-3. This definition includes "any non-residential development in the preservation area" and "any residential development in the preservation area that... results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more...." N.J.S.A. 13:20-3. A site inspection is necessary to confirm the existence of a violation with specificity. N.J.S.A. 13:20-28.

District and Municipal Enforcement Actions

After the initial site inspection on August 14, 2014, the District determined that Wallace had violated the Soil Erosion and Sediment Control Act ("SESCA") N.J.S.A. 4:24-39 to -55 by disturbing an area in excess of 5,000 square feet without a soil erosion and sediment control plan; accordingly, the District issued a Stop Work Order on August 14, 2014 that prohibited Wallace from "importing any additional fill material" onto his property "until such time as a Soil Erosion and Sediment Control (SESC) Plan has been submitted to and certified by the District." (Pauli Cert. ¶ 14.) Nonetheless, Wallace continued to dump fill material and Vernon Township sought injunctive relief in Superior Court, as the municipality is empowered to enforce the SESCO. N.J.S.A. 4:24-53.

The Superior Court denied the temporary restraining order on July 11, 2018 and denied the preliminary injunction on August 10, 2018, reasoning that the Stop Work Order only applied to a particular 5,000 square foot area rather than the whole parcel. (Certification of Matthew D. Knoblauch Exhibit B, 37-39, hereinafter "Knoblauch Cert.") Vernon Township sought interlocutory review in the Appellate Division, which was denied. The permanent injunction hearing is scheduled for May 6, 2019.

As a consequence of the court's decision, the District issued a second Stop Work Order on August 23, 2018 with more explicit

language indicating what actions Wallace was prohibited from taking. (Paull Cert. ¶ 15.) Specifically, the Order required Wallace to (1) immediately stop construction and (2) immediately stop importing fill material on the entire property. (Paull Cert. Exhibit B.) This Order removed any ambiguity regarding what Wallace was prohibited from doing pursuant to the determination of the District.

LEGAL ARGUMENT

POINT I

The Department is Entitled to Injunctive Relief by Virtue of Defendant's Violations of the Solid Waste Management Act

In the absence of legislation, a court's authority to grant injunctive relief is based on notions of equity explained in Crowe v. De Gioia. 90 N.J. 126, 132-34 (1982). In this case, the Legislature has provided a method for the Department to obtain injunctive relief without the need for reliance on traditional equity factors delineated in Crowe. The Department is fully empowered by statute to file a civil action against violators for a temporary or permanent injunction, either independently or in combination with other actions. N.J.S.A. 13:1E-9.

Courts have held that where injunctive relief is statutorily authorized as a remedy, the movant does "not need to show irreparable harm to be entitled to injunctive relief. Where injunctions are creatures of statute, all that need be proven is

a statutory violation." Matawan Reg'l Teachers Assoc'n v. Matawan-Aberdeen Reg'l Bd. of Educ., 212 N.J. Super. 328, 334-35 (Law Div. 1986) (citing Hoffman v. Garden State Farms, 76 N.J. Super. 189, 201 (Ch. Div. 1962)); see also State, Dep't of Env'tl. Prot. v. Interstate Recycling, 267 N.J. Super. 574, 577-78 (App. Div. 1993) (holding that a trial court's reliance on Hoffman, 76 N.J. Super. 189 is appropriate where a state environmental enforcement agency "seeks to enjoin repeated violations" of a police power statute).

Here, the Department's recent sampling has demonstrated that the fill material on the Wallace property is contaminated with levels of PAHs and lead that exceed residential levels. Therefore, the Department has determined that solid waste is present within the mountain of fill material, and Wallace is operating an unpermitted solid waste facility in violation of N.J.A.C. 7:26-2.8(f). Similarly, the Department is authorized by N.J.A.C. 13:1D-9d to enter and inspect the site for the purpose of investigating any actual or suspected source of pollution to the environment. Notwithstanding this authority, defendants denied access to the Department to enter and inspect the property on several occasions, most recently on February 19, 2019. Because the Department is empowered to seek injunctive relief by statute, it need not make any further showing beyond Wallace's violations of N.J.A.C. 7:26-2.8(f) and N.J.S.A. 13:1D-9d.

Additionally, both the WPCA and the Highlands Act authorize the Department to seek injunctive relief either singly or together with other relief. N.J.S.A. 58:10A-10c; N.J.S.A. 13:20-35c. Because of the likelihood of Stormwater permitting and Highlands Act violations, these statutes further confirm DEP's power to obtain injunctive relief.

POINT II

The Department is Entitled to Injunctive Relief Based on Traditional Notions of Equity

Although the Court need not delve into traditional notions of equity, as conveyed in Crowe v. De Gioia, to grant an injunction, these four factors nonetheless open a wide avenue for the Department to obtain relief. A court will grant such relief where the moving party demonstrates: (1) a reasonable probability of success on the merits based on well-settled law, (2) that a balance of hardships and equities favors injunctive relief, (3) that the moving party will suffer irreparable harm in the absence of injunctive relief, and (4) that the public interest will not be harmed. Waste Mgmt. of New Jersey v. Union Cty. Util. Auth., 399 N.J. Super. 508, 519-20 (App. Div. 2008) (citing Crowe, 90 N.J. at 132-34). The movant must demonstrate each factor by clear and convincing evidence. Garden State Equality v. Dow, 216 N.J. 314, 320 (2013) (citing Brown v. City of Paterson, 424 N.J. Super 176, 183 (App. Div. 2012)).

A. The Legal Rights Underlying the Department's Claims Under the SWMA, WPCA, Highlands Act, are Well-Settled and the Department is Entitled to Injunctive Relief on the Merits Based on Its Likelihood of Success

First, any movant seeking preliminary injunctive relief must demonstrate a "reasonable probability of success on the merits." Waste Mgmt. of Union Cty., 399 N.J. Super. at 519-20. Courts have held that even a tenuous claim can be sufficient to meet the Crowe factors if it serves to preserve the status quo; in such a tenuous claim, to preserve the status quo, a court should apply the Crowe factors with more fluidity and give less weight to any weakness compared to an action for a final injunction. See Waste Mgmt. of New Jersey v. Morris Cty. Municipal Util. Auth., 433 N.J. Super. 445, 452-54 (App. Div. 2013) (reversing the trial court for failing to consider its "authority to impose interlocutory restraints regardless of doubts about the movants'" likelihood of success, even though the trial court did not find that the movants' claims were likely to succeed).

Here, the Department satisfies its burden for an injunction because its cause of action is based on unambiguous statutory authority that is well-settled. N.J.S.A. 13:1E-9; N.J.S.A. 13:20-35; N.J.S.A. 58:10A-10. Indeed, the primary objective of this action is to preserve the status quo insofar as the first goal of the Department is to have Wallace cease his unpermitted and

destructive activities. Accordingly, DEP's rights are well-settled and it is entitled to success on the merits.

**B. The Balance of Equities and Hardships Favors
Injunctive Relief as Requested by the Department**

The Department must demonstrate that a "balancing of the equities and hardships favors injunctive relief." Waste Mgmt. v. Union Cty., 399 N.J. Super at 519-20. Such hardships and equities that courts consider range from the destruction of the subject matter of the case to even the additional costs and difficulties faced by delaying an election. Waste Mgmt. v. Morris Cty., 433 N.J. Super at 455-56 (listing hardships that the trial court did not consider); Mckenzie v. Corzine, 396 N.J. Super. 405, 416 (App. Div. 2007) (delaying a ballot question is a hardship because it would "generate additional costs for the county clerks and would also create hardships for the voting public by jeopardizing - if not precluding - their receipt of sample ballots").

Here, the people of New Jersey are negatively impacted by Wallace's activities in that Wallace continues to import and dump thousands of cubic yards of fill material that has been determined to contain contaminants that would qualify certain of the material as solid waste. The hardship here is exacerbated by the reality that the Wallace property is in the most sensitive portion of the Highlands, the Preservation Area. The Legislature has found "that the New Jersey Highlands contains other exceptional natural

resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance...." N.J.S.A. 13:20-2. Indeed, the Highlands has been one of the most vulnerable and most valuable localities in New Jersey since European occupation began, as it was both the last refuge for extirpated megafauna and the site of extreme deforestation to fuel the iron industry.¹

Despite Wallace's claims that he needs to reinforce his property from a washout during Hurricane Sandy or that he is expanding a parking area, he is still not permitted to dump contaminated fill material onto his property. (Knoblauch Cert. Exhibit A, 14-16.) Moreover, Wallace's claims of needing to expand his property for his business and reinforcing it from hurricane damage are unsubstantiated. Thus, Wallace has provided no colorable claim that he would suffer harm from DEP's requested relief, while his actions have created a solid waste pile with the potential to cause harm to the most environmentally sensitive area of the Highlands.

C. Wallace's Continued Importation of Potentially Contaminated Fill Material Presents a Threat to the Environment

¹ Samuel N. Rhoads, The Mammals of Pennsylvania and New Jersey, 234-35, 240-41 (1903) (describing wolves and mountain lions extant in the early nineteenth century Highlands); Emily W.B. Russell, Forest History of the Highlands, in The Highlands: Critical Resources, Treasured Landscapes, ed. Richard G. Lathrop, Jr. (2011) (noting that the entire Highlands was deforested in the mid-nineteenth century).

Third, a movant must demonstrate that the harm to be suffered is irreparable. Waste Mgmt., 399 N.J. Super. at 519-20. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. This case cannot be adequately redressed by monetary damages. A damaged environment is not easily restored to a pre-contaminated condition, and the fill material that meets the definition of solid waste threatens to damage the environment unless properly controlled and managed. Money cannot recreate a contaminated ecosystem exactly as it was nor can money reverse half a decade of unlicensed dumping of contaminated fill material. Only removing fill that meets the definition of solid waste can prevent a potential harm from becoming an actual one.

D. The Department's Requested Relief is Specifically Permitted by the Legislature so the Public Interest will not be Harmed

Fourth, the movant must demonstrate that the public interest will not be harmed by the imposition of injunctive relief. Waste Mgmt. v. Union Cty., 399 N.J. Super. at 519-20. It is a presumption that a State agency seeking to enforce statutory and regulatory provisions is acting in the public interest. Indeed, the Legislature has found that the Highlands is an exceptional resource that is threatened by hazards such as pollution, watershed degradation, and unplanned development. N.J.S.A. 13:20-2.

There is no assertion of the State acting contrary to law, or that some constitutional right is being infringed upon by State action, so the Department's actions go further than not harming public interest, they support it. See Garden State Equality, 216 N.J. at 329-330 (the court denied the State's application for a stay of the trial court's order to permit same-sex couples to marry because such an action violated a party's constitutional rights). Consequently, no public interest will be harmed. The public's interest will be upheld by the imposition of injunctive relief.

CONCLUSION

Joseph Wallace's continued importation and dumping of fill material has disturbed a large area of land. The Department has determined, through chemical analysis, that at least portions of the fill material is solid waste and, as a result, that Wallace is operating an unlicensed solid waste facility. The Department has also determined that the dumping activities have likely resulted in violations of the Stormwater permit requirements as well as the Highlands Water Protection and Planning Act.


For the preceding reasons, injunctive relief requiring immediate cessation of importation of fill material, timely characterization and removal of the fill material that meets the definition of solid waste, Department access to investigate the property, production of records, and establishment of an escrow to

ensure removal of fill that meets the definition of solid waste is necessary and appropriate.

Respectfully submitted,

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Dated:

2/22/2019