

COPY

IN THE SUPERIOR COURT OF JACKSON COUNTY

STATE OF GEORGIA

FILED
SUPERIOR COURT
JACKSON COUNTY GA
2007 OCT 15 AM 8:58
CAMIE W THOMAS, CLERK

CAROL COUCH, Director of the
Environmental Protection Division of the
Georgia Department of Natural Resources,)
)
)

Plaintiff,)

vs.)

AGRI-CYCLE, L.L.C., and RICHARD
HARVILLE, Managing Partner,)
)
)

Defendants.)

CIVIL ACTION FILE
NO. A07CV1201

ORDER GRANTING INJUNCTIVE RELIEF

The above-captioned case came on for hearing on October 2, 2007, on the request for interlocutory injunction by the Plaintiff, Carol Couch, Director of the Environmental Protection Division of the Georgia Department of Natural Resources (hereinafter "the Director"). The Director requested that the court enjoin Agri-Cycle, LLC (hereinafter "Agri-Cycle") from receiving waste for processing at its facility until the Defendant's appeal of an Administrative Order issued to it by the Director is ruled on by an Administrative Law Judge, or until Agri-Cycle can demonstrate to the Director that it can operate in accordance with the law and without posing a threat to human health, safety, and welfare, whichever event occurs first. The hearing lasted nearly ten (10) hours, numerous documents were introduced into evidence and testimony was received from multiple witnesses for both sides. For the reasons that follow the court finds that the conduct of Agri-Cycle is more than a series of unfortunate events; their continued operation constitutes a clear and present danger to the citizens of Jackson County and the State of Georgia, and an injunction must be granted.

APPLICABLE LAW

It is a violation of the Georgia Water Quality Control Act ("the Act") to "use any waters of the state for the disposal of sewage, industrial wastes, or other wastes ... except in such manner as to conform to and comply with this article and all rules, regulations, orders, and permits established under this article and applicable to the waters involved." O.C.G.A. § 12-5-28 (a). Among other things, The Act authorizes the Director to apply to superior court for an order enjoining or restraining an act or practice which constitutes a violation of the Act. O.C.G.A. § 12-5-48. That Code section further provides: "Upon a showing by the division that such person has engaged in ... any such act or practice, a permanent or temporary injunction, restraining order, or other order shall be granted without the necessity of showing a lack of adequate remedy at law." *Id.* Counsel for Agri-Cycle argued that the Director must still meet the traditional requirements for obtaining injunctive relief before such relief can be granted. Specifically, Agri-Cycle's counsel argued that the Director must be required to show irreparable harm to her, a likelihood of success on the merits, and a balancing of the equities in her favor. The Director argued that it is clear from the language of the statute that the only showing required of the Director is that a violation of the Act has occurred. The Director claimed that it is not reasonable to read the traditional elements of equitable relief into what is clearly a legal remedy.

The intent of the legislature in enacting the Water Quality Control Act is expressed in O.C.G.A. § 12-5-21(a) "The people of the State of Georgia are dependent upon the rivers, streams, lakes, and subsurface waters of the state for public and private water supply and for agricultural, industrial, and recreational uses. It is therefore declared to be the policy of the State of Georgia that the water resources of the state shall be utilized prudently for the maximum benefit of the people, in order to restore and maintain a reasonable degree of purity in the waters

of the state and an adequate supply of such waters, and to require where necessary reasonable usage of the waters of the state and reasonable treatment of sewage, industrial wastes, and other wastes prior to their discharge into such waters.”

It should be noted, contrary to Agri-Cycle’s contention, the harm that must be irreparable is that to the environment, not to the Director herself. Thus, a violation or violations of the Act must do irreparable harm to the environment. The court determines that this element is provided by the Act itself. The court holds that a violation of the Act is a *per se* showing of irreparable harm. This can be gleaned from the language in the Act itself. It should be apparent from the language chosen by the legislature that the traditional elements of injunctive relief are either not applicable or were to be deemed met by the demonstration of a violation of the Act. The wording of the statute is clear; “[u]pon a showing ... that such person has engaged in ... such act or practice ... a permanent or temporary injunction, restraining order, or other order *shall be granted...*” (emphasis added). The traditional elements of “likelihood of success on the merits” and “irreparable harm” are inapplicable since the Director is required to prove only that such a violation or violations have occurred because such a violation of the Act in and of itself would harm the environment.

Consequently, either the legislature did not intend the traditional elements of injunctive relief to apply in such cases, or the General Assembly made the legislative determination that by requiring the Director to make a showing that the Act had been violated demonstrated *per se* that the irreparable harm was legislatively presumed to occur. Either way, a showing of the traditional equitable elements is not required.

However, the court believes that, an injunction being an equitable procedure, the legislature may not subvert the traditional function of the courts to balance the equities between

the parties in determining whether injunctive relief should be granted. The court concludes that, to seek the injunctive relief specially authorized by this statute, the Director is required only to prove by a preponderance of the evidence that a violation of the Georgia Water Quality Control Act has occurred; but for the court to grant the injunctive relief sought, the court must determine that the equities preponderate in favor of the injunction. This court believes, however, that proof of the violation of the Act alone cannot be sufficient.

FINDINGS OF FACT

The evidence showed that the Director issued a permit to Agri-Cycle to operate a land application system for the processing of industrial waste at its facility located in Talmo, Georgia, and for the discharge of treated wastewater from that facility to the waters of the state, specifically Allen Creek. The Director also approved and incorporated into the permit the Design and Development Report (hereinafter "DDR") dated May 28, 2004. The DDR specifically identifies the manner in which the waste received by Agri-Cycle was required to be treated. The permit, through the incorporation of the DDR, required that the waste received by the facility was to receive pretreatment from a primary clarifier and a Belt Filter Press unit before being processed in an anaerobic lagoon, then sent to an aerobic lagoon for further treatment, and finally sent to a polishing pond before being land applied (or sprayed) on to designated spray fields. The permit, through the DDR, required that wastewater sprayed on the fields "should enter the soil during spraying and there should be no ponding or water flow over the soil or run-off from the spray field."

The evidence adduced at the hearing showed that Agri-Cycle did not comply with these requirements. Witnesses testified that Agri-Cycle never had a Belt Filter Press as part of its pretreatment process and rarely used its primary clarifier. Waste received by the facility was

routinely routed directly to the anaerobic lagoon. In addition, although the permit only authorized the use of a single anaerobic lagoon with a holding capacity of approximately 3 million gallons in the treatment process, Agri-Cycle constructed a second anaerobic lagoon of approximately the same size doubling the anaerobic capacity to approximately 6 million gallons of waste. Despite Agri-Cycle's contention that the methodology of the testing of the waters of Allen Creek was done improperly because there was no testing of the water upstream and downstream to ascertain the source of the runoff, there was testimony and photographic evidence that Agri-Cycle had applied excessive wastewater to its spray fields resulting in both ponding and runoff to Allen Creek.

CONCLUSIONS OF LAW

The undisputed evidence presented to this Court was that Agri-Cycle rarely used its primary clarifier unit and never used a Belt Filter Press unit in its pretreatment process. Because the permit specifically required that "[a]ll pretreatment units are to be maintained and operated for maximum efficiency," Agri-Cycle's failure to do so was a clear violation of the permit. That violation was repeated every day Agri-Cycle failed to utilize those units.

Agri-Cycle argued that Condition A.2.o. of the permit authorizes any permittee to make any changes to its wastewater treatment processes so long as those changes do not "result in new, different, or increased discharges of pollutants or flow to the system." Mr. Richard Harville testified, over objection by the Director's counsel, that Mr. Sean Stauffer, a former EPD employee who once had regulatory oversight for the Agri-Cycle facility, had orally authorized Agri-Cycle to make whatever changes it wanted to the facility so long as those changes did not have the result identified in that condition. Even if this hearsay testimony can be considered for the truth of the matter asserted, it still would be at odds with another provision of the permit,

Condition A.2.h.2., which requires that “[a]ll pretreatment units are to be maintained and operated for maximum efficiency” by Agri-Cycle. Even if Condition A.2.o. is construed to allow certain actions as not needing EPD approval, Condition A.2.h.2. excludes the use of the pretreatment units from that authorization by specifically requiring them to be “maintained” and utilized to “maximum efficiency.” Because Agri-Cycle failed to comply with Condition A.2.h.2., it was regularly and continually violating this condition of the permit.

In addition, Agri-Cycle’s deliberate decision not to use the pretreatment units that were required by the permit actually did result in a “different flow” to the system. Rather than receiving prescreened wastewater with a substantial amount of solids removed, the anaerobic lagoon received an untreated waste flow that had virtually none of its solids removed. The DDR itself states that, under the approved process, by the time the wastewater reaches the anaerobic lagoon, “all floatable and settleable solids [should] have been removed from the liquor flow stream.” Consequently, under the very provision on which Agri-Cycle relies, this modification to the system required a modification and re-issuance of Agri-Cycle’s permit. This conclusion is also consistent with the requirements of the Georgia Water Quality Control Act which provides that “No person, without first securing from the division a permit, shall ... modify any system for disposal of sewage, industrial wastes, or other wastes...” O.C.G.A. § 12-5-28(b).

Notwithstanding the claims of Agri-Cycle, no EPD employee has the authority to alter the requirements of the law and it is unreasonable of a permittee to think otherwise. Nor was any credible evidence presented to the contrary. The Georgia Water Quality Control Act only gives the Director of the EPD the authority to set the conditions of a permit, not EPD staff personnel. O.C.G.A. § 12-5-30(b). Furthermore, the permitting authority conferred on the Director is discretionary, not ministerial, and cannot be delegated to others. The general rule of law

governing the delegation of power or authority is that a discretionary power or authority vested by law in one particular official, such as the Director of EPD, cannot be delegated to others, unless such delegation is specifically authorized by a law of equal dignity (i.e., a constitutional power can only be delegated if expressly authorized by the Constitution, and a statutory power can only be delegated if authorized by statute). No such authorization of delegation exists for permitting decisions under the Georgia Water Quality Control Act.

Furthermore, even if Mr. Stauffer made the representations testified to by Mr. Harville, and even if such representations had some legal basis, subsequent actions by EPD and Agri-Cycle rescinded those representations; yet Agri-Cycle continued to violate its permit. In March of 2006, the EPD sent to Agri-Cycle a proposed Consent Order which put Agri-Cycle on notice that failure to use its pretreatment processes was a violation of the permit. By clearly identifying the failure to use the pretreatment components required by the DDR as a violation of the permit, Agri-Cycle was put on notice that any representations made by Mr. Stauffer were no longer effective. Nevertheless, Agri-Cycle continued to operate in a manner not in conformance with its permit. Therefore, the failure to properly utilize its pretreatment units constituted an on-going violation of Agri-Cycle's permit and is a proper basis for the relief sought from this Court by the Director.

In addition, the unauthorized construction of the second anaerobic lagoon, also constituted a modification to, or increase in, the flow of the facility and was not authorized under the permit. The DDR describes the use of a single anaerobic lagoon with a holding capacity of approximately 3 million gallons. The addition of a second anaerobic lagoon essentially doubled that capacity. It was this unauthorized lagoon that experienced berm construction problems

which resulted in a breaching of the berm and the discharge of materials from the anaerobic lagoon to the polishing pond which subsequently caught on fire and burned for nearly 24 hours.

Finally, the permit, through the incorporation of the DDR, requires that "there should be no ponding or water flow over the soil or run-off from the spray field." There was both photographic evidence and witness testimony that both ponding on and run-off from the spray fields had occurred. These, too, constitute violations of the permit and serve as a proper basis for the relief sought by the Director.

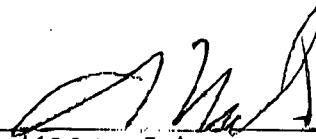
CONCLUSION

Because the Director presented evidence at the hearing which proved by a preponderance that Agri-Cycle has violated its permit and the Georgia Water Quality Control Act by modifying its treatment processes without obtaining a permit to do so, by expanding its capacity to treat waste without EPD approval, and by hydraulically overloading its spray fields, the Director has met the burden imposed by O.C.G.A. § 12-5-48. The court notes that the relief sought by the Director is not complete closure of the Agri-Cycle operation. The injunctive relief sought is that granted in the court's Temporary Restraining Order. The Director concedes that Agri-Cycle may continue to operate only as outlined and expressly permitted by the court in the Consent Amended and Restated Temporary Restraining Order filed September 14, 2007. While such an injunction would severely impact the business of Agri-Cycle, the evidence at the hearing proved that failure to grant the injunction would allow Agri-Cycle to continue to violate the permit and DDR, would cause continued pollution of Allen Creek, and would cause buildup of flammable wastes on the property which have already proven to be a major hazard to the community. Balancing the equities between granting of the injunction and virtually closing the business versus not granting the injunction and permitting Agri-Cycle to continue to pollute Allen Creek,

to improperly treat the water, to overspray the fields, and to pose other serious safety hazards to the community, the court finds the equities balance in favor of granting the injunction.

For all of the above reasons, the court grants the injunction and prohibits Agri-Cycle from receiving waste for processing at its facility until the Defendant's appeal of an Administrative Order issued to it by the Director is ruled on by an Administrative Law Judge, or until Agri-Cycle can demonstrate to the Director or to the court that it can operate in accordance with the law and without posing a threat to human health, safety, and welfare, whichever event occurs first.

So ordered, adjudged, and decreed this October 15, 2007.



David Motes, Judge
Jackson Superior Court