SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO.:

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, v. STRATEGIC ENVIRONMENTAL PARTNERS, LLC, RICHARD BERNARDI AND MARILYN BERNARDI, Defendants.	:	**CIVIL ACTION**

BRIEF IN SUPPORT OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S VERIFIED COMPLAINT

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PRELIMINARY STATEMENT

Strategic Environmental Partners, LLC ("SEP"), Richard Bernardi and Marilyn Bernardi, ("Defendants"), have blatantly and in full disregard of their obligations under an Administrative Consent Order ("ACO") and "Closure and Post-Closure Care Plan and Post-Closure Financial Plan" permit ("Closure Plan") issued them by the New Jersey Department of Environmental Protection ("DEP" or "Department"), violated the Solid Waste Management Act ("SWMA"), N.J.S.A. 13:1E-1.1 et seq. and the Air Pollution Control Act, N.J.S.A. ("APCA") 26:2C-1 et seq. The Department therefore seeks civil penalties, injunctive relief and recovery of allowable costs against the Defendants, jointly and severally, for violations of the ACO and Closure plan, that were not issued to Defendants pursuant to the Solid Waste Management Act, and that authorized Defendants to close and cap the former Fenimore landfill in Roxbury Township, Morris County.

The Department also seeks civil penalties and injunctive relief against the Defendants for violations of the Air Pollution Control Act, ("APCA") N.J.S.A. 26:2C-1 et seq. Defendants' improper operation of the landfill has resulted in months of unabated emissions of hydrogen sulfide gas from the site, polluting the environment and negatively affecting the reasonable enjoyment of life and property by residents living in the vicinity of the landfill.

FACTS RELEVANT TO ALL ALLEGATIONS

The Fenimore landfill is one of nearly 700 so-called "legacy landfills" in New Jersey that ceased operating prior to 1982, but were never closed and capped in an environmentally sound manner. In 2009, SEP approached the Department with a proposal to close, cap and redevelop the Fenimore landfill into a solar energy generating facility. SEP sought to finance the closure, in part, by accepting regulated fill material from customers who would pay SEP a tipping fee (i.e., disposal fee) for each cubic yard of material deposited at the site. "Certification of Robert J. Kinney" ("Kinney Cert."), Exhibit 1, ¶ 13; Exhibit 2, ¶ 2, 4.

On October 6, 2011, SEP and Richard Bernardi executed an ACO describing SEP's and Bernardi's financial and compliance obligations related to the closure and redevelopment. Kinney Cert., Exhibit 1, ¶ 13. Incorporated into the ACO was a Closure Plan permit. These authorizations required SEP to install environmental controls and comply with numerous environmental safeguards and complete closure of the landfill over a four-year, four-phase period. Id., at p. 1. On behalf of SEP and its owner and sole officer, Marilyn Bernardi, Richard Bernardi agreed to the terms and conditions of the ACO. Id., p. 12.

In May 2012, as a result of numerous material breaches of the Closure Plan and ACO by Defendants, the Department issued notices

to terminate the ACO and revoke the Closure Plan. SEP appealed these actions to the Office of Administrative Law. Kinney Cert., Exhibit 3. These matters are currently pending a ruling on the Department's Motion for Summary Decision. In November 2012, the landfill began emitting noticeable amounts of hydrogen sulfide, a noxious gas with a characteristic "rotten-egg" odor. DEP traced the odors back to decomposition of construction and demolition debris materials ("C&D fines") containing ground-up gypsum wallboard that had been disposed of at the landfill. Kinney Cert., Exhibit 4, p. 3. The Closure Plan required Defendants to prevent and control emissions of air contaminants. Kinney Cert., Exhibit 2, p. 1-4, ¶ 12. Despite numerous orders and directives from DEP and the Morris County Superior Court to abate hydrogen sulfide emissions,[1] hydrogen sulfide odors continue to emanate from the landfill, polluting the air and interfering with life in neighborhoods surrounding the landfill. See "Certification of Jeffrey Meyer," ("Meyer Cert."). On June 26, 2013, DEP Commissioner Bob Martin issued an Emergency Order authorizing the Department to enter the

[1] On November 29, 2012, the Department sought an injunction against SEP ordering SEP to cease receipt of C&D fines and compliance with the daily-cover provisions of the Closure Plan. The Court did not enjoin receipt of C&D fines, but ordered SEP to cover all exposed materials daily. Kinney Cert., Exhibit 9.

landfill property in order to abate the hydrogen sulfide pollution from the site. Kinney Cert, Exhibit 5.[2]

FACTS RELATED TO VIOLATIONS OF THE SOLID WASTE MANAGEMENT ACT

The ACO and Closure Plan required Defendants to undertake numerous actions related to proper closure and post-closure care of the landfill. Critically, Defendants were required to:

1) Establish an "alternative funds escrow account" within 30 days of execution of the ACO. Kinney Cert, Exhibit 1, ¶ 21.[3]

2) Deposit into the escrow account tipping fee revenues received by Defendants from receipt of materials authorized to be deposited at the landfill under the Closure Plan ("Materials Acceptance Protocol" or "MAP-approved" materials). Id.

3) Submit progress reports every month, including "a financial summary detailing the revenues received from the acceptance of MAP-approved material and SEP's expenditures associated with the landfill pursuant to Paragraph 31 of the Plan Approval [Closure Plan]." Id., ¶ 24.

The escrow account is critical to landfill closure and post-closure care. Absent a source of funds to ensure proper closure and

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[2] Commissioner Martin's action was authorized by legislation signed by Governor Chris Christie on June 26, 2013, and codified at N.J.S.A.13:1E-125.1 et seq. Kinney Cert., Exhibit 6.

[3] For ease of reference, this section of the Brief will reference provisions of the ACO (Exhibit 1) that cross-reference requirements in the Closure Plan.

post-closure monitoring, the cost of addressing environmental issues arising at a landfill would fall to the taxpayers.

Notably, the ACO also indicates that "SEP has proposed to close the landfill in accordance with the requirements of the SWMA and its implementing regulations, N.J.A.C. 7:26-2A.9." Ibid., ¶ 8. In this regard, Defendants agreed to the following provision of the Closure Plan:

> ODOR CONTROL: The closure activities shall not cause any air contaminant to be emitted in violation of N.J.A.C. 7:27-5.2(a). Malodorous emissions shall be controlled by the use of daily cover. In the event that this is not satisfactory, a suitable deodorant as approved and permitted by the Department's Air Quality Program shall be used or the Department shall require a change in the type of recyclable materials accepted. Malodorous solid waste shall be covered immediately after excavation, unloading or redeposition with a minimum of six inches of cover material or approved alternative material.
>
> Kinney Cert., Exhibit 2, ¶ 12; see also, N.J.A.C. 7:26-2A.8(b)(30) (landfill requirements for control of malodorous emissions).

Shortly after executing the ACO, Defendants began violating various requirements of the ACO and Closure Plan. SEP took several months to open the required escrow account, and then deposited only a token amount of $100.00. Kinney Cert., Exhibit 20. After finally opening the account, SEP never made a single deposit of revenues generated from tipping fees. SEP consistently failed to report monthly tipping-fee revenues as required by the ACO and Closure Plan, thus preventing the Department from monitoring SEP's compliance. See "Certification of Robert Confer" ("Confer Cert."),

¶ 8. The Department also learned that Defendants had misrepresented their financial position in a financial plan submitted to the Department on or about September 6, 2011. The Department reviewed and relied upon this financial plan to issue the Closure Plan approval to Defendants. Several months after executing the ACO and Closure Plan, the Department learned that Defendants had concealed and failed to disclose $2.5 million in closure-related debts and obligations. Defendants also omitted SEP's $950,000 private mortgage on the Landfill property in its September 2011 financial submission. Kinney Cert., Exhibit 7.

In July 2012, in a supplemental filing to the Morris County Superior Court in response to the Department's Order to Show Cause to halt fill deliveries to the landfill, Defendant Richard Bernardi submitted a Certification stating that SEP had received $1,265,184.00 in tipping fees from January 1, 2012 to July 15, 2012 from the deposit of 137,130 cubic yards ("cy") of fill material (approximately $9.22/cy). Kinney Cert., Exhibit 8, p. 6, ¶ 19. At that time, SEP's escrow account held only $100.00. Kinney Cert., Exhibit 20. Since the Closure Plan was issued in October 2011, SEP has accepted 375,366 cubic yards of regulated material. Confer Cert., ¶ 9. Using the average $9.22/cy tipping fee rate noted above, Plaintiff estimates that Defendants collected $3,460,874.50 in tipping-fee revenue; however, the current balance of the escrow account is merely $86.00. Kinney Cert., Exhibit 20.

Defendants' monthly reports have never included the financial information required by Paragraph 24 of the ACO. Confer Cert., ¶ 8. The Department therefore has never had meaningful information about SEP's revenues or expenditures. On May 12, 2012, defendant Richard Bernardi refused a request of a DEP inspector to view the financial information required to be submitted with the monthly reports. "Certification of Gina Conti," ("Conti Cert."), ¶ 5.

Both the ACO and Closure Plan clearly set forth DEP's right to inspect records to ascertain compliance with permit conditions. Kinney Cert., Exhibit 1, ¶ 44, Exhibit 2, ¶ 27. On December 12, 2012 and again on December 17, 2012, Department inspectors visited the site to perform authorized inspections and to review related documents. On each date, Defendants refused or inhibited access by inspectors to documents and information related to the inspection. Further, during the inspection of December 17, 2012, Defendant Richard Bernardi not only refused to provide the Department's inspectors with access to records, but ordered them to leave the site and threatened to call local police. "Certification of Rajendraku Ghandi," ("Ghandi Cert."), ¶¶ 4 - 6; Exhibit 2.

As noted, Paragraph 12 of the Closure Plan, as noted, requires Defendants to control malodorous emissions by the use of daily cover or another suitable odor control. On November 19, 2012, the Department began receiving citizen complaints of malodorous emissions in the vicinity of the landfill. Meyer Cert., ¶ 2. An

initial investigation by Department inspectors determined that the malodorous substance was hydrogen sulfide. Id., ¶ 4, 8-9.

As noted above, on November 29, 2012, the Department sought an injunction in Superior Court, Morris County, Chancery Division, ordering SEP to cease receipt of C&D fines, which the Department believed was responsible for the hydrogen sulfide emissions and resulting odors, and requesting that the Court order Defendants to abate the odors immediately. Kinney Cert., Exhibit 9.

On December 10, 2012, the Court denied the Department's request to enjoin Defendants' receipt of C&D fines, but ordered Defendants to cover all malodorous materials with daily cover as required by Paragraph 12 of the Closure Plan. Kinney Cert., Exhibit 18.

Despite the Court's December 10, 2012 Order, and numerous subsequent orders from the Department to implement odor controls at the landfill, hydrogen sulfide emissions persisted unabated because Defendants failed to comply with Paragraph 12 and apply daily cover to all malodorous materials. Conti Cert., ¶ 8. As a result of these blatant violations of the Closure Plan, Defendants should be assessed civil penalties and other appropriate sanctions.

FACTS RELATED TO VIOLATIONS OF THE AIR POLLUTION CONTROL ACT

On or about November 19, 2012, the Department began receiving odor complaints from citizens in the Roxbury Township area, who identified the landfill as the source. Meyer Cert., ¶ 2. When an

odor complaint is received, the Department sends an inspector to investigate. Department inspectors are trained to identify the source of the odor and assess its intensity on a graduated scale, beginning at 0 (not detectable), 1 (very light), 2 (light), 3 (moderate), 4 (strong), and 5 (very strong). In addition to the intensity scale, Department inspectors characterize the odor, its duration and frequency. Id., ¶ 3. A "verified complaint" is one in which an inspector determines that the duration and intensity of the odor has unreasonably interfered with the complainant's enjoyment of life and property. Id.

Rotten-egg type odors are consistent with hydrogen sulfide gas. Meyer Cert., ¶ 3. As of June 26, 2013, the Department had received 2,523 complaints regarding sulfur-like or rotten egg odors emanating from the landfill. Meyer Cert., ¶ 9; See also "Certification of Leslie Bates" ("Bates Cert."), ¶3, Exhibit 1; "Certification of Patrick Sanders" ("Sanders Cert."), ¶3, Exhibit 1; "Certification of Hiram Oser" ("Oser Cert."), ¶3, Exhibit 1; "Certification of Philip Savoie" ("Savoie Cert."), ¶3, Exhibit 1; "Certification of Todd Boyer" ("Boyer Cert."), ¶3, Exhibit 1; "Certification of Jennifer McClain" ("McClain Cert."), ¶3, Exhibit 1; "Certification of Robert J. Heil, Jr." ("Heil Cert."), ¶3, Exhibit 1; "Certification of Douglas Bannon" ("Bannon Cert."), ¶3, Exhibit 1; "Certification of Scott Michenfelder" ("Michenfelder Cert."), ¶3, Exhibit 1; "Certification of Mark Burghoffer"

("Burghoffer Cert."), ¶3, Exhibit 1; "Certification of Michael Cisek" ("Cisek Cert."), ¶3, Exhibit 1; "Certification of Robin Jones" ("Jones Cert."), ¶3, Exhibit 1; "Certification of Elizabeth Dorry" ("Dorry Cert."), ¶3, Exhibit 1.

As of June 26, 2013, Department representatives had verified a total of 172 complaints relating to rotten egg-like odors emitting from the landfill on the dates that follow (on some of the dates below, more than one complaint was verified): November 21, 2012; November 30, 2012; December 7, 2012; December 9, 2012; December 10, 2012; December 15, 2012; December 17, 2012; December 18, 2012; December 20, 2012; December 23, 2012; December 24, 2012; December 26, 2012; December 27, 2012; December 29, 2012; January 2, 2013; January 8, 2013; January 9, 2013; January 11, 2013; January 28, 2013; January 30, 2013; February 7, 2013; February 9, 2013; February 10, 2013; February 14, 2013; February 15, 2013; February 19, 2013; February 21, 2013; February 22, 2013; February 23, 2013; February 26, 2013; February 27, 2013; March 6, 2013; March 10, 2013; March 14, 2013; March 18, 2013; March 21, 2013; April 8, 2013; April 11, 2013; April 12, 2013; April 15, 2013; April 18, 2013; April 22, 2013; April 23, 2013; April 25, 2013; April 26, 2013; April 29, 2013; May 3, 2013; May 7, 2013; May 8, 2013; May 9, 2013; May 14, 2013; May 17, 2013; May 19, 2013; May 28, 2013; May 31, 2013; June 4, 2013; June 5, 2013; June 6, 2013; June 8, 2013; June 10, 2013; June 12, 2013; June 13, 2013; June 15, 2013; June

16, 2013; June 17, 2013; and June 19, 2013. See Meyer Cert., ¶¶ 4-9, Exhibit 1; Bates Cert., ¶3, Exhibit 1; Sanders Cert., ¶3, Exhibit 1; Oser Cert., ¶3, Exhibit 1; Savoie Cert., ¶3, Exhibit 1; Boyer Cert., ¶3, Exhibit 1; McClain Cert., ¶3, Exhibit 1; Heil Cert., ¶3, Exhibit 1; Bannon Cert., ¶3, Exhibit 1; Michenfelder Cert., ¶3, Exhibit 1; Burghoffer Cert., ¶3, Exhibit 1; Cisek Cert., ¶3, Exhibit 1; Jones Cert., ¶3, Exhibit 1; Dorry Cert., ¶3, Exhibit 1. Department representatives determined that the odors were caused by emissions of hydrogen sulfide and that the landfill was the source of odors. Meyer Cert., ¶ 4, 8-9.

The Defendants were aware of the emissions of hydrogen sulfide from the landfill, and the complaints of township residents, based upon the Department's investigations noted above, which identified the landfill as the source of the hydrogen sulfide emissions. Department inspectors discussed the hydrogen sulfide emanating from the landfill with Richard Bernardi during many of their inspections to the landfill and surrounding areas. Id. In addition, DEP officials hand-delivered Richard Bernardi a Notice of Violation on December 3, 2012, that documented the odors emanating from the landfill. Meyer Cert. ¶ 19. Defendants' consulting engineer, Bashar Assadi, acknowledged that the landfill was emitting hydrogen sulfide as early as December, 2012. Kinney Cert., Exhibit 21.

N.J.S.A. 26:2C-19(e) requires "a person who causes a release of air contaminants in a quantity or concentration which . . .

might reasonably result in citizen complaints" to immediately notify the department. At no time did Defendants notify the Department that hydrogen sulfide was being released from the landfill.

LEGAL ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO A PERMANENT INJUNCTION BASED ON DEFENDANTS' VIOLATIONS OF THE APCA AND SWMA

Injunctive relief is available for violations of both the APCA, N.J.S.A. 26:2C-19(a), and the SWMA, N.J.S.A. 13:1E-9(d). Further, both statutes allow the Department to request such relief by summary action. Id. Therefore, DEP brings these summary actions in conjunction with R. 4:67 requesting that the Court 1) immediately impose a constructive trust[4] upon the assets of the Defendants as they relate to Defendants' obligations to fund the escrow account - or, alternatively, order that revenues related to Defendants' escrow obligations be deposited into a Court-managed escrow account; 2) order Defendants to immediately provide a

[4] A court may impose a constructive trust "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." Flanigan v. Titus, 175 N.J. 597, 608 (2003) (citing Beatty v. Guggenheim Exploration Co., 225 N.Y. 380 (1919)). There must be 1) a wrongful - but not necessarily fraudulent - act; and 2) a transfer or diversion of property that unjustly enriches the recipient. Flanigan, 175 N.J. at 608. As detailed in this Brief, Defendants' have engaged in wrongful acts that have diverted property (escrow proceeds) which have unjustly enriched Defendants.

complete accounting (based upon Generally Accepted Accounting Principles) of all tipping fee revenues to date, to include but not be limited to invoices, bills and other information detailing the sources of all revenues, information as to all bank accounts or other accounts in which tipping fee revenues were deposited, and information as to all expenditures by each defendant since December 11, 2011; 3) award, pursuant to the SWMA, the Department's costs of investigation that led to the establishment of the violations; 4) award the Department's reasonable costs of preparing and litigating the case; 5) assess actual damages caused by Defendants' violations of the SWMA, ACO and Closure Plan; and 6) assess appropriate civil penalties pursuant to both the ACPA and SWMA, as further described below.

A. The Legal Rights Underlying Plaintiff's APCA Claims Are Well Settled and Plaintiff is Entitled to Permanent Injunctive Relief on the Merits.

"A permanent injunction requires proof that the applicant's legal right to such relief has been established and that the injunction is necessary to prevent a continuing, irreparable injury." Verna v. The Links at ValleyBrook Neighborhood Assn., 371 N.J. Super. 77, 89 (App. Div. 2004) (citations omitted). See also Rinaldo v. RLR Investment, LLC, 387 N.J. Super., 387, 397 (App. Div. 2006) (the determination of whether to grant a permanent injunction does not involve a prediction as to the outcome of future proceedings, but involves the court making findings of fact

based upon the evidence presented to determine whether the applicant has established the liability of the other party, the need for injunctive relief, and the appropriateness of such relief on the balancing of equities). Cf. Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 9 (App. Div. 1992) ("Permanent injunctive relief is an appropriate remedy to abate a continuing nuisance").

The factors to be considered for a permanent injunction are similar to those for a preliminary injunction. A party seeking a preliminary injunction must show that: (1) the legal right underlying the claim is well-settled and there is a reasonable likelihood of ultimately prevailing on the merits; (2) there is a likelihood that immediate and irreparable injury will occur if relief is not granted; and (3) on balance, that the benefits of the relief granted would outweigh any harm such relief will cause other interested parties. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); cf. Rinaldo, 387 N.J. Super. at 395 (quoting Crowe v. DeGioia). See also Mckenzie v. Corzine, 396 N.J. Super. 126, 132-34 (2007) (where plaintiffs do not seek to preserve the status quo and instead would have the court significantly alter the status quo, the correct approach is to determine whether all the so-called Crowe factors are present). The fundamental difference, as articulated in Rinaldo, is a finding by the Court that the evidence presented establishes the liability of the party against whom

relief is sought, rather than a likelihood of success on the merits. 387 N.J. Super. at 397.

The Legislature, in adopting the APCA, empowered the Department to "prevent, control, and prohibit air pollution throughout the State." N.J.S.A. 26:2C-8(a). To implement this legislative intent, the Legislature gave the Department a broad mandate to promulgate regulations and to issue orders designed to prevent the threat to the public safety, health and general welfare. N.J.S.A. 26:2C-8(a) and -19(e); see also State of New Jersey Department of Health v. Owen-Corning Fiberglas Corp., 100 N.J. Super. 366, 382 (App. Div. 1968), aff'd 53 N.J. 248, 392 (1969)(The "clear purpose" of the Act is the "protection of the public health and public welfare"). Accordingly, the Department is authorized to file a civil action for injunctive relief for violations of both the APCA and its implementing regulations. N.J.S.A. 26:2C-19(a).

The APCA regulations prohibit any person from emitting into the atmosphere substances in quantities that can result in air pollutant, N.J.A.C. 7:27-5.2(a). "Air pollution" is defined as the "presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property throughout the State of New Jersey." N.J.S.A. 26:2C-2. An odor is

an air contaminant which can be a form of air pollution. Hydrogen sulfide is such an air contaminant, which, as the Court found, has "[t]he familiar odor of rotten eggs." Owen-Corning Fiberglas Corp., 100 N.J. Super. at 392.

"In determining whether an odor unreasonably interferes with the enjoyment of life or property in violation of the [APCA], the Department shall consider all of the relevant facts and circumstances, including but not limited to, the character, severity, frequency and duration of the odor, and the number of persons affected thereby." N.J.S.A. 26:2C-19(g).

The exhibits accompanying the certifications of the Department's inspectors show conclusively that emissions of hydrogen sulfide gas were coming from the landfill. See Meyer Cert., ¶ 7; Bates Cert., ¶4, Exhibit 1; Sanders Cert., ¶4, Exhibit 1; Oser Cert., ¶4, Exhibit 1; Savoie Cert., ¶4, Exhibit 1; Boyer Cert., ¶4, Exhibit 1; McClain Cert., ¶4, Exhibit 1; Heil Cert., ¶4, Exhibit 1; Bannon Cert., ¶4, Exhibit 1; Michenfelder Cert., ¶4, Exhibit 1; Burghoffer Cert., ¶4, Exhibit 1; Cisek Cert., ¶4, Exhibit 1.

The hydrogen sulfide emissions created an odor of such severity, character and frequency as to unreasonably interfere with the neighboring residents' use and enjoyment of their life and property in 172 verified instances. Id. Defendants took no effective measures to reduce or abate the emissions of hydrogen

sulfide coming from the landfill over the many months hydrogen sulfide has been emitted, even though Defendants' consulting engineer, Bashar Assadi, acknowledged in an e-mail in December 2012 that the landfill was generating hydrogen sulfide gas. Id.; Kinney Cert., Exhibit 21.

The Defendants' liability cannot be disputed. The Department's investigations demonstrate beyond purview that the emissions of hydrogen sulfide from the landfill unreasonably interfered with the citizens' enjoyment of their lives and property. As such, the Defendants violated the APCA, N.J.S.A. 26:2C-1 et seq., and the regulations established thereto, specifically, N.J.A.C. 7:27-5.2.

As noted above, N.J.S.A. 26:2C-19(e) requires a person who causes a release of air contaminants in a quantity or concentration that might reasonably result in citizen complaints to immediately notify the Department. At no time did Defendants notify the Department of the emissions of hydrogen sulfide despite being aware of the emissions and citizen complaints of the odors resulting from the emissions. See e.g. Meyer Cert., ¶¶ 5-7, Exhibit 1. DEP inspectors verified hydrogen sulfide odor complaints on 66 separate occasions between November 19, 2012 and June 26, 2013. Defendants are therefore liable for 66 violations of N.J.S.A. 26:2C-19(e).

Because the Plaintiff has established violations of the APCA - specifically, the emissions of hydrogen sulfide air pollution from the Fenimore landfill in quantities that unreasonably interfered

with the surrounding neighbor's enjoyment of life and property - and because Defendants failed to report such emissions or take effective steps to prevent such emissions, the Plaintiff is entitled to permanent injunctive relief under its well-settled rights under the APCA.

B. The Legal Rights Underlying Plaintiff's SWMA Claims are Also Well-Settled and Plaintiff is Entitled to Permanent Injunctive Relief on the Merits.

Plaintiff's legal rights under the SWMA likewise are well-settled. The SWMA, N.J.S.A. 13:1E-1.1 et seq., governs the collection, transportation, transfer, processing and disposal of solid waste. The Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq., was enacted to ensure the proper closure of sanitary landfills and provide a mechanism for compensation for damage resulting from improper operation or closure. N.J.S.A. 13:1E-101. The Department is empowered with the authority to implement and enforce these Acts to protect human health and the environment. "The grant of an express power is always attended by the incidental authority fairly and reasonably necessary to make it effective." Cammarata v. Essex County Park Comm'n, 26 N.J. 404, 411 (1958). A legislative grant of authority should be "liberally construed in order to enable the administrative agency to accomplish its statutory responsibilities." New Jersey Guild of Hearing Dispensers v. Long, 75 N.J. 544, 562 (1978); see also, N.J.S.A. 13:1E-14 ("This Act

shall be liberally construed to effectuate the purpose and intent thereof.").

By their terms, the ACO and Closure Plan are governed by the SWMA and its regulations. See Kinney Cert., Exhibits 1, 2. Defendants agreed to comply with the ACO (and Closure Plan as incorporated in its entirety), "which shall be fully enforceable as a Final Agency Order in the Superior Court of New Jersey." Id., Exhibit 1, ¶ 43. The Department's authority to enforce orders under the SWMA is clear:

> N.J.S.A. 13:1E-9
> a. All codes, rules and regulations adopted by the department related to solid waste collection and disposal shall have the force and effect of law.
>
> ***
>
> b. Whenever the commissioner finds that a person has violated any provision of P.L.1970, c.39 (C.13:1E-1 et seq.), or any rule or regulation adopted, permit issued, or district solid waste management plan adopted pursuant to P.L.1970, c.39, he shall:
> (1) Issue an order requiring the person found to be in violation to comply in accordance with subsection c. of this section;
> (2) Bring a civil action in accordance with subsection d. of this section;
> (3) Levy a civil administrative penalty in accordance with subsection e. of this section;
> (4) Bring an action for a civil penalty in accordance with subsection f. of this section; or
> (5) Petition the Attorney General to bring a criminal action in accordance with subsection g. of this section.

Regulations implementing the SWMA amplify this authority. The Department may assess civil penalties "[f]or a violation of a requirement or condition of an administrative order, permit,

license or other operating authority," issued pursuant to the SWMA. N.J.A.C. 7:26-5.4.

It is axiomatic that the Department has the authority to enter into an ACO with a landfill owner. See DuPont v. Dep't of Envt'l Prot., 283 N.J. Super. 331, 351 (App. Div. 1995) (there is no question the Department may issue administrative orders generally). Moreover, the Appellate Division has recognized DEP's authority to propose remediation and cleanup and then enter into consensual agreements to address particular site conditions. Ibid. at 352 (citing State Dep't of Envt'l. Protection v. Mobil Oil, 246 N.J. Super. 331, 337 (App. Div. 1991)).

As discussed above, Defendants have failed to comply with numerous critical requirements in violation of the ACO and Closure Plan. Significantly, Defendants violated the financial assurance requirements of the ACO and Closure Plan by failing to deposit any tipping fees into escrow. Defendants failed to control malodorous emissions from the landfill by effective use of daily cover or other means of odor control. Defendants failed to allow lawful inspections or provide access to information requested by Department personnel. Finally, Defendants violated the ACO and Closure Plan by failing to submit monthly updates on revenues and expenditures. As a result of these violations, the Department is entitled to permanent injunctive relief under the SWMA.

C. The Department Need not Show Irreparable Harm for This Court to Order Injunctive Relief, but Even if Such a Showing was Necessary, the Department Would Prevail.

Where the plaintiff is a governmental entity and where, as in both the APCA and SWMA, an injunction is authorized by statute, the plaintiff need not demonstrate actual irreparable harm, but rather need only show that the statute in question has been violated. New Jersey v. Interstate Recycling, Inc., 267 N.J. Super. 574, 577-578 (App. Div. 1993); Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189, 201 (Ch. Div. 1962).

In Interstate Recycling, 267 N.J. Super. 574, 577-578, the Court held that plaintiff DEP need not show actual environmental damage under the SWMA in order for the Court to enjoin repeated violations of the SWMA. Similarly, in Hoffman, 76 N.J. Super. 189, the Court did not require a showing of actual harm, because injunctive relief was authorized by the statute regulating the milk industry.

Even if the Department was required to demonstrate irreparable harm, it would prevail on the merits under both statutes. The emissions of hydrogen sulfide from the landfill and the Defendants' failure to abate the emissions pose a potential threat to the environment and the public health, safety and welfare of the residents of Roxbury and the surrounding community. The intolerable odors are greatly affecting the residents' abilities to enjoy their community and many have complained of physical maladies

associated with the odors. See Meyer Cert., ¶¶ 5-6, Exhibit 1; Bates Cert., ¶3, Exhibit 1; Sanders Cert., ¶3, Exhibit 1; Oser Cert., ¶3, Exhibit 1; Savoie Cert., ¶3, Exhibit 1; Boyer Cert., ¶3, Exhibit 1; McClain Cert., ¶3, Exhibit 1; Heil Cert., ¶3, Exhibit 1; Bannon Cert., ¶3, Exhibit 1; Michenfelder Cert., ¶3, Exhibit 1; Burghoffer Cert., ¶3, Exhibit 1; Cisek Cert., ¶3, Exhibit 1.

Additionally, Defendants' blatant disregard of their financial assurance obligations under the ACO and Closure Plan threaten the proper closure and environmental monitoring of the Fenimore landfill. Defendants' violations of the Closure Plan already have forced the Department to expend substantial public resources to abate the emissions of hydrogen sulfide from the facility pursuant to the Commissioners' Emergency Order issued June 26, 2013. See Kinney Cert., Exhibit 10. Had Defendants made the required escrow payments, public monies may not have been necessary to address the odor violations of the Closure Plan, nor would the Department have had to seek this Court's intervention to recover the Department's costs as authorized by the SWMA.

For these reasons, the Court should grant Department's request for a permanent injunction ordering the Defendants to take immediate action to remedy the violations.

D. Injunction is Proper Without a Traditional Balancing of the Equities Where the Government is Enforcing a Statute.

For the same reasons as those set forth above, when a governmental entity is seeking an injunction under statutory authority, injunctive relief is appropriate to restrain violations of environmental statutes without resort to the traditional balancing of equities and public interest test. Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 337-338 (4th Cir. 1983). See also Department of Health v. Passaic Valley Sewerage Commission, 100 N.J. Super. 540, 554-555 (Ch. Div. 1968), aff'd 105 N.J. Super. 565 (App. Div. 1969) (compliance with environmental statute will be required despite cost or difficulty). Where, as here, the plaintiff is a sovereign and where the activity may endanger the public health, "injunctive relief is proper, without resort to balancing." Illinois v. Milwaukee, 599 F.2d 151, 166 (7th Cir. 1979), rev'd on other grounds, 451 U.S. 304 (1981), cited in Environmental Defense Fund v. Lamphier, 714 F.2d 331, 337-338 (4th Cir. 1983).

However, even if the Court applied a traditional balancing test to this application, the Department would satisfy it. The public interest in avoiding potential threats to life, property and the environment resulting from emissions of hydrogen sulfide, strongly tip the balance of equities in favor of the Department.

The benefit to the public if the relief is granted will clearly outweigh any potential harm such relief may cause the Defendants, as any harm the Defendants might suffer would be economic harm. And, "economic injury is not irreparable." Delaware River and Bay Auth. v. York Hunter Construction Co., Inc., 344 N.J. Super. 361, 365 (Ch. Div. 2001).

POINT II

CIVIL PENALTIES AGAINST EACH DEFENDANT ARE WARRANTED UNDER THE APCA AND SWMA.

To assist the court in its determination of appropriate penalties under the APCA and SWMA, the Department has calculated proposed penalty assessments for the violations alleged in the Verified Complaint consistent with regulations regarding the assessment of civil administrative penalties. See N.J.A.C. 7:27A-3.5 et seq. (APCA); N.J.A.C. 7:26-5.1 et seq. (SWMA). The APCA authorizes the Department to seek civil penalties for violations of this statute by instituting a summary civil action in Superior Court. N.J.S.A. 26:2C-19(d). The Act authorizes per day penalties of up to $10,000 for the first offense, $25,000 for the second offense and $50,000 for the third and each subsequent offense for each violation. N.J.S.A. 26:2C-19(a) and (d). Similarly, the SWMA authorizes the Department to seek civil penalties "of not more than $50,000.00 per day, to be collected in a civil action commenced by

a local board of health, a county health department, or the commissioner." N.J.S.A. 13:1E-9(f).

The APCA, like the SWMA and other environmental protection statutes, is a strict liability statute that requires the DEP to demonstrate only that a prohibited act was done by the defendants. State of New Jersey Department of Environmental Protection v. Leeds, Inc., 153 N.J. 272, 284 (1998); See e.g., State of New Jersey Department of Environmental Protection v. Lewis, et al, 215 N.J. Super. 564, 575 (App. Div. 1987) (the penalty sections of the SWMA and Water Pollution Control Act ("WPCA") state that violators "shall be" subject to penalties for a violation of the respective acts - only the doing of the proscribed act need be shown). Like the penalty provisions of the SWMA, the APCA provides that "a person who violates any provision" of the APCA, "shall be subject, upon order of a court, to a civil penalty..." N.J.S.A. 58:16A-19(d).

A party seeking a statutory civil penalty need only demonstrate "the doing of the proscribed act." Lewis, 215 N.J. Super. at 573-574; Department of Health v. Concrete Specialties, Inc., 112 N.J. Super. 407, 411 (App. Div. 1970). As described above, Defendants' violations of the APCA and SWMA, are clear and unambiguous. Therefore, civil penalties are appropriate.

The amount of the penalty imposed is within the discretion of the judge. Id. However, "[t]he number of violations, their

frequency, the precautions taken to prevent further mishaps and the circumstances under which the offenses occurred are all relevant factors in determining the penalty." Concrete Specialties, Inc., 112 N.J. Super. at 411.

The factors that the Department considers under the APCA to determine an appropriate penalty amount include the nature of the violations and the nature and extent of the environmental harm likely to result from the type of violation. N.J.A.C. 7:27A-3.5(d)(1). Under the SWMA, the Department generally considers the seriousness of the violation and the conduct of the violator. See N.J.A.C. 7:26-5.5(g).

A. **Solid Waste Management Act Penalties**[5]

The Department's SWMA regulations use a matrix of factors associated with conduct and seriousness of the violations. Id. "Major," "moderate," and "minor" seriousness and conduct are spelled out in the regulations. Ibid.

Count 1 of the Complaint addresses Defendants' failure to comply with the escrow provisions of the Closure Plan. The Department determined that the seriousness of these violations warranted a factor of "Major" under the regulations, and that the conduct was also "Major." This is because the establishment and funding of the escrow account was critical to landfill closure and post-closure care. Absent escrow funds, the State's taxpayers

[5] The Department's analysis of the violations and proposed SWMA penalties are detailed in Kinney Cert., Exhibit 24.

would potentially be liable for the costs of closure and post-closure. Given that DEP had to take action under the Commissioner's emergency powers to abate hydrogen sulfide emissions at the landfill, major seriousness and major conduct for failing to deposit tipping fees as required are justified. The Department calculated a penalty of $50,000.00 per month for the period between December 11, 2011 - the date SEP first received MAP-approved materials - and June 26, 2013, the date the Emergency Order was effective. Based upon this time-frame, a penalty of $770,000.00 was calculated. DEP also calculated a separate penalty for Defendant's failure to timely establish the escrow account, assessing major conduct/moderate seriousness to the violation. Based upon these factors, a penalty of $101,500.00 was calculated, for a total penalty for Count 1 of $871,500.00.

For Count 2 - addressing Defendants' failure to account for revenues and expenditures in monthly reports - the Department considers the violations as major conduct with moderate seriousness. DEP recommends a penalty of $35,000.00 per month for the period January 2012 through May 2013, for a total of $595,000.00.

Count 3 involves Defendants' failure to properly address malodorous emissions from the landfill. The Department calculated a penalty of $335,000.00 for this violation. A penalty of $35,000.00 was calculated for the first month in which Defendant

failed to cover malodorous materials (November 2012), and a penalty of $50,000.00 is calculated for each successive month (6) based upon Defendants' clear failure to comply with Paragraph 12 of the Closure Plan and the Court's orders. This inaction therefore constituted major conduct, and the violations were of major seriousness for the time period of the violations.

Count 4 involves Defendants' failure to fully cooperate with a lawful inspection of the landfill by Department officials. For both the December 12, 2012 and December 17, 2012 incidents, DEP utilized guidance at N.J.A.C. 7:26G-2.7(c). A penalty of $30,000.00 was calculated for the December 12 incident, in which Defendant Richard Bernardi refused to grant Department officials access to records. The second incident involved a threat by Mr. Bernardi to call the police in addition to a refusal to produce records. For this incident, DEP also calculated a penalty of $30,000.00.

Subject to the Court's reasonable discretion, the penalty amounts calculated are appropriate to the violations alleged, and should be assessed in light of the Defendants' egregious conduct.

B. Air Pollution Control Act Violations Penalties

For Count 5 - violations of emission of hydrogen sulfide in such quantities and duration that are, or are likely to be, injurious to human health or welfare and property - the maximum penalty is $10,000.00 for a first offense, $25,000.00 for a second offense and $50,000.00 for a third, fourth and each subsequent

offense. N.J.A.C. 7:27A-3.10(m)(5). For emissions that would unreasonably interfere with the enjoyment of life or property, but are not likely to be injurious to health, welfare or property, the base penalty is $1,000.00 for a first offense, $2,000.00 for a second offense, $5,000.00 for a third offense, and $15,000.00 for a fourth and each subsequent offense. N.J.A.C. 7:27A-3.10(m)(5).

There were 172 verified complaints of hydrogen sulfide emissions on 66 separate dates. Meyer Cert., ¶ 8, 14. Seventy-one (71) of the verified complaints included health effects on 55 separate dates. Id., ¶14. For the verified complaints on the 11 dates that did not include health effects, the penalties were calculated between $500.00 and $16,500.00, for a total of $112,000.00. For the verified complaints on the 55 dates where health effects were reported, the penalties were calculated at the maximum penalties between $10,000.00 and $50,000.00 for a total of $2,335,000.00. Under the standards set forth in the regulations discussed above, the total penalty calculation for the violations of emissions of hydrogen sulfide from the Fenimore landfill in quantities that unreasonably interfered with the surrounding neighbor's enjoyment of life and property is calculated at $2,447,000.00.

For Count 6 - failure to notify the Department of release of air contaminants that pose a potential threat to public health or welfare - the base penalty under the regulations is $2,000.00 for

the first offense, $4,000.00 for the second offense, $10,000.00 for the third offense and $30,000.00 for the fourth and each subsequent offense. N.J.A.C. 7:27A-3.11(a). The base penalty for failure to notify the Department of release of air contaminants that might result in citizen complaints, but that is not a threat to public health, welfare or the environment is $200.00 for the first offense, $400.00 for the second offense, $1,000.00 for the third offense and $3,000.00 for the fourth and each subsequent offense.

For the verified complaints on the 11 dates that did not report injuries or a threat to public health, welfare or environment, the penalties were calculated at $200.00 for each day for a total of $2200.00. For the verified complaints on the 55 days where an injury or threat to public health, welfare or environment was reported, the penalties were calculated at $2,000.00 for each day for a total of $108,000.00.

For the 66 dates where the Department received verified complaints but the Defendants did not notify the Department of the emission of hydrogen sulfide, the total penalty calculated under the above standard should be $110,200.00 Meyer Cert. ¶20.

Given the extent and seriousness of the Defendants' violations, the Court should award a civil penalty against Defendants, jointly and severally, for the emissions of hydrogen sulfide air pollution from the Fenimore landfill in quantities that unreasonably interfered with the surrounding neighbor's enjoyment

of life and property in the total amount of $2,447,000.00. The Court should also award a civil penalty against Defendants, jointly and severally, for the failure to report the emissions of hydrogen sulfide in the total amount of $110,200.00.

CONCLUSION

For the reasons stated herein, the Department respectfully requests that the Court grant all the relief requested in the Department's Verified Complaint against each Defendant, jointly and severally, and assess civil penalties under both the APCA and SWMA as requested herein, subject to the Court's appropriate discretion.

Respectfully Submitted,

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