

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE DEPARTMENT	:	
OF NATURAL RESOURCES &	:	C.A. No. K12M-06-020 WLW
ENVIRONMENTAL CONTROL, an	:	
Administrative Agency of the State of	:	
Delaware,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MIKE DAVIDSON ENTERPRISES, LLC,	:	
5500 ANDERBY HALL ROAD, LLC, MIKE	:	
DAVIDSON EXCAVATING, LLC,	:	
Delaware Limited Liability Companies, and	:	
MICHAEL P. DAVIDSON, individually and	:	
in his official capacity as owner of Mike	:	
Davidson Enterprises, LLC, 5500 Anderby	:	
Hall Road, LLC and Mike Davidson	:	
Excavating, LLC,	:	
	:	
Defendants.	:	

Submitted: October 26, 2012

Decided: November 16, 2012

ORDER

Upon Defendants' Motion for Stay of
Administrative Proceedings. *Denied.*

Ralph K. Durstein, III, Esquire, Department of Justice, Wilmington, Delaware;
attorney for Plaintiff.

Stephen E. Smith, Esquire and Glenn C. Mandalas, Esquire of Baird Mandalas, LLC,
Dover, Delaware; attorneys for Defendants.

WITHAM, R.J.

Before the Court is Defendants' motion to stay an appeal before the Environmental Appeals Board pending resolution of the present action filed by the plaintiff, the Delaware Department of Natural Resources and Environmental Control ("DNREC"), on June 27, 2012.¹ Such a motion is addressed to the sound discretion of the trial court, which is to inform its exercise of judgment through a well-articulated process.² For the reasons that follow, the Court concludes that the efficient and just administration of remedies dictates in this instance that the pending motion be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Origins of Defendants' Business

In 2009, Defendant Mike Davidson Enterprises, LLC (hereinafter "MDE") applied for and received a permit³ from DNREC to operate a construction and demolition waste recycling facility near Sandtown, Kent County. The facility receives construction and demolition debris; produces mulch and grade stakes from the construction and demolition wood waste; and provides for the recycling of concrete, brick, and metal from the construction and demolition debris.

¹The twenty-three-count complaint alleges that the Defendants violated a litany of Delaware's solid waste laws, codified at 7 *Del. C.* Ch. 60, and the regulations promulgated thereunder.

²*McWane Cast Iron Pipe Corp. v. McDowell Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970); *Miller v. Phillips Petroleum Co. Norway*, 537 A.2d 190 (Del. 1988).

³MDE was issued what is known as a Resource Recovery Facility Permit. The application procedure for this type of permit is found at 7 *Del. C.* § 1301-4.4.

B. Administrative Action

DNREC conducted multiple compliance assessments at MDE's facility between January 4, 2010 and June 8, 2012. According to DNREC, the assessments revealed a number of violations of the terms of MDE's permit and Delaware's solid waste laws, including but not limited to failure to fulfill the sampling and analysis requirements of the permit. DNREC issued Notices of Violation on April 6, 2010 and May 4, 2012, formally notifying MDE of violations and requiring MDE to achieve compliance immediately. According to DNREC, these notices went unaddressed. On June 8, 2012, DNREC Secretary Collin O'Mara issued a Notice of Conciliation and Secretary's Order to MDE for allegedly violating the terms of the facility's permit.⁴ The Order alleges that MDE failed to fulfill the sampling and analysis requirements of its permit.⁵ DNREC performed its own sampling and analysis of various waste and materials generated by MDE's facility, and discovered that the mulch sold by MDE contained levels of arsenic, chromium and polychlorinated biphenyls (PCBs) that exceed the analytical and performance criteria specified in the permit.⁶ DNREC ordered MDE to (1) cease and desist from selling Alternate Daily Cover or residential

⁴*See Secretary's Order to Cease and Desist Pursuant to 7 Del. C. § 6018 Issued to Mr. Michael P. Davidson, Owner & President, Mike Davidson Enterprises, LLC*, Delaware Dep't of Natural Resources and Environ. Control, Order No. 2012-WH-0020, *available at* <http://www.dnrec.delaware.gov/Info/Documents/Secretary%27s%20Order%20No.%202012-WH-0020.pdf>.

⁵*Id.* at 1.

⁶*Id.*

commercial mulch; (2) cease and desist any grinding and any processing of wood waste into mulch; (3) identify and permanently remove any sources of contamination causing violations of the permitted analytical and performance criteria; and (4) provide documentation to the Department indicating that the mulch failing the analytical and performance criteria has been properly disposed within 30 days of the date of the Order.⁷ MDE almost immediately appealed the Order to the Environmental Appeals Board (“EAB”), alleging, among other counts, that the Secretary exceeded his authority in crafting an cease and desist order based upon what MDE deems are “vague allegations and impermissible testing procedures.” The appeal was continued at DNREC’s request, and is now scheduled for November 27, 2012.

C. Commencement of Lawsuit and Motion to Stay

On July 27, 2012, as the administrative proceedings were pending, Plaintiff DNREC filed a complaint against MDE; 5500 Anderby Hall Road, LLC; Mike Davidson Excavating, LLC; and Michael P. Davidson, (hereinafter “Defendants”) alleging that Defendants’ are illegally operating a construction and demolition waste recycling facility. The Complaint alleges that Defendants have improperly stored over 25,000 tons of waste on the property since the issuance of their permit in 2009, in violation of 70 *Del. C.* Chapter 60, and the solid waste regulations promulgated thereunder. The prayer for relief seeks civil penalties, costs, fees, and remedial action to alleviate the environmental damage to the site. DNREC conducted numerous

⁷*Id.* at 6.

compliance assessments between January 14, 2012, and May 17, 2012, which revealed that Defendant was stockpiling solid wastes in violation of their permit. Defendants thereafter filed the motion *sub judice*, asking the Court to stay the hearing before the EAB scheduled for November 27, 2012 pending the resolution of this lawsuit.

Standard of Review

The criteria for evaluating a motion to stay were enunciated in *McWane Cast Iron P. Corp v. McDowell-Wellman E. Co.*,⁸ and have been applied consistently by Delaware courts. The question falls squarely within the province of the trial court's discretion and is to be determined in light of all the facts and circumstances and in the interest of expeditious and economic administration of justice.⁹ The moving party assumes the burden of showing “factors of hardship sufficient to tip the scale in its favor.”¹⁰

DISCUSSION

Defendants ask the Court to stay its appeal of the cease and desist order pending before the Environmental Appeals Board on the grounds that DNREC has withheld documents necessary to their defense of the administrative case. Yet, curiously, Defendants point to no express grant of authority giving this Court the

⁸263 A.2d 281 (Del. 1970).

⁹*Life Assur. Co. of Pa. v. Associated Inves. Int. Corp.*, 312 A.2d 337, (Del. 1973).

¹⁰*Moore Golf, Inc. v. Ewing*, 269 A.2d 51, 52 (Del. 1970); *Texas City Refin., Inc. v. Grand Bahama Pet. Co., Ltd.*, 347 A.2d 657, 658 (Del. 1975).

power to enjoin state administrative proceedings. Defendants rely on *Givens v. Delaware Harness Racing Commission* for the proposition that it is within the Superior Court's discretion to stay administrative proceedings when that agency withholds evidence from an appellant critical to its defense.¹¹ Defendants contend that DNREC has thwarted their discovery requests, and thus, a stay of the EAB appeal is appropriate to permit Defendants to compel disclosure of the evidence which they contend is necessary to its defense. Even assuming that DNREC has engaged in the alleged wrongdoing, the Court declines to stay Defendants's appeal before the EAB. There is nothing in the rules of this Court or the laws of this state that permit this Court to interfere with the expeditious disposition of an administrative appeals process.¹²

More importantly, 7 *Del. C.* § 6005(b)(1)-(2) permits DNREC to pursue monetary penalties and conciliation concurrently.¹³ The litigation pending before this

¹¹See 2011 WL 5822626, at *1 (Del. Super. Nov. 17, 2011).

¹²*Cf. DaimlerChrysler Corp. v. Delaware Dep't of Ins.*, 2007 WL 914909, at *1 (Del. Super. Jan. 23, 2007) (declining to stay administrative proceedings before the state Insurance Commissioner pending interlocutory appeal of the Hearing Officer's pre-hearing rulings on the grounds that the Superior Court lacks jurisdiction to issue such a stay).

¹³Those subsections state, in their entirety:

(b) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any condition of a permit issued pursuant to § 6003 of this title, or any order of the Secretary, shall be punishable as follows:

(1) If the violation has been completed, by a civil penalty imposed by Superior Court of not less than \$1,000 nor more than \$10,000 for each completed violation. Each day of continued violation shall be considered as a separate violation. The Superior Court shall have jurisdiction of a violation in which a civil penalty is sought. If the violation has been

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Court complements, rather than duplicates, the effort to suspend MDE's permit. The remedies DNREC seeks in this litigation, namely monetary damages, are wholly distinct from the remedy sought in the administrative proceedings pending before the EAB. Ordinarily, courts in this State will only be inclined to grant a stay "when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues."¹⁴ Here, DNREC has elected to pursue distinct remedies in the appropriate forums as permitted by 7 *Del. C.* § 6005(b)(1)-(2). Accordingly, even assuming that this Court has the authority to stay the EAB appeal, a stay is unwarranted as the Secretary's order and this action involve wholly distinct issues. In this action, DNREC seeks civil penalties, reimbursement for all expenses incurred in the abatement of the purported environmental damage to the MDE site, and attorney's fees, among other forms of relief. The Environmental Appeals Board will decide the narrow issue of whether MDE's permit should be

completed and there is a substantial likelihood that it will reoccur, the Secretary may also seek a permanent or preliminary injunction or temporary restraining order in the Court of Chancery.

(2) If the violation is continuing, the Secretary may seek a monetary penalty as provided in paragraph (b)(1) of this section. If the violation is continuing or is threatening to begin, the Secretary may also seek a temporary restraining order or permanent injunction in the Court of Chancery. In his or her discretion, the Secretary may endeavor by conciliation to obtain compliance with all requirements of this chapter. ...

7 *Del. C.* § 6005(b)(1)-(2). *See also Bryson v. J.T.B., Inc.*, 1977 WL 23826, at *6 (Del. Ch. 1977) (interpreting the legal remedies set forth in 7 *Del. C.* § 6005(b)(1)-(2) as ancillary to the administrative remedies).

¹⁴*McWane*, 263 A.2d at 283.

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suspended. As these two actions do not involve an overlap of identical issues, a stay of Defendants' appeal before the EAB is inappropriate. To the extent that Defendants object to the outcome of its appeal, they are invited to appeal the EAB's decision to this Court.¹⁵

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay of its appeal before the Environmental Appeals Board is **DENIED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr. _____
Resident Judge

WLW/dmh

¹⁵See 7 Del. C. § 6008(g) (granting the Superior Court jurisdiction hear appeals of the decisions of the Environmental Appeals Board).