

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. Oscv

STATE OF VERMONT
Agency of Agriculture,
Food and Markets and
Agency of Natural Resources

Plaintiff

v.

RICHARD M. NELSON

and

NELSON FARMS, INC.

Defendants

MOTION AND APPLICATION
FOR
PRELIMINARY INJUNCTION

NOW COMES the State of Vermont, Agency of Agriculture, Food and Markets and the Agency of Natural Resources, by and through its attorney, Attorney General William H. Sorrell, and pursuant to 10 V.S.A. § 8221, and the provisions of 6 V.S.A. § 1(a)(7), 6 V.S.A. § 4812(c), 10 V.S.A. § 1274(a), and Rule 65(b) of the Vermont Rules of Civil Procedure, moves the court for an order to preliminary enjoin the Defendants pending a final determination of the merits of this action to cease from allowing or causing agricultural wastes from their Derby Center Clydeside Farm and from their Derby Line Crystal Brook Farm agricultural operations to directly discharge to and into the waters of the state.

As set forth in the affidavit of Kathryn M. Gehr, attached hereto and incorporated herein, the Defendants' farms have and will continue to directly discharge agricultural wastes from the production areas of their farms into ditches and into the Clyde River and Crystal Brook, respectively. The Defendants' actions are in violation of Vermont law. There are reasonable grounds to believe that Vermont's water quality laws have been and will be violated, that those discharges will continue and repeat until remediated unless the Defendants are preliminarily enjoined from directly discharging agricultural wastes into the waters of the state in the present and in the future.

Vermont agricultural laws expressly prohibit the direct discharge of wastes into waters of the state. Vermont's Accepted Agricultural Practices ("AAPs") Rules¹ provide that agricultural operations shall not create any direct discharge of wastes into the surface waters of the State from a discrete conveyance such as, but not limited to, a pipe, ditch, or conduit without a permit from the Secretary of Natural Resources. (AAPs 4.01(a)). In addition, barnyards, manure storage areas, animal holding areas and production areas shall be managed or controlled to prevent runoff of wastes to adjoining waters, groundwater or across property boundaries. (AAPs 4.01(b)).

Furthermore, Vermont environmental laws provide that no person shall discharge any waste, substance or material into waters of the state without first obtaining a permit for that discharge from the Secretary of Natural Resources. 10

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¹ Formally adopted rules have the force and effect of law. *Green Mt. Realty, Inc. v. Fish*, 133 Vt. 296, 298-299 (1975).

V.S.A. § 1259(a). The Defendants do not have a permit from the Secretary of Natural Resources for these discharges.

With regard to the environmental law Title 10 claims in this action, 10 V.S.A. §8221(c) provides that in any civil action, like this complaint, brought to enforce Vermont's water pollution control laws in chapter 47 of title 10 in which a preliminary injunction is sought, such relief shall be obtained upon a showing that there is the probability of success on the merits, and that a violation exists or that a violation is imminent and substantial harm is likely to result. It is not necessary in an action such as this for the State to demonstrate immediate and irreparable injury, loss or damage. Furthermore, any balancing of the equities may only affect the time by which compliance must be obtained, but not the necessity of compliance within a reasonable period of time. *Id.* § 8221(d).²

With regard to the agricultural law Title 6 claims in this action, the Vermont Supreme Court has adopted the view generally that in a statutory injunction case in which a governmental unit, like the State here, seeks to enjoin the violation of a statute, the State need only show that there is a violation and that the violation is substantial and not innocent. *Town of Sherburne v. Carpenter*, 155 Vt. 126, 129-132 (1990). The Court in *Carpenter* ruled that the trial court cannot weigh the injury to the public against the cost of compliance, as it is assumed that the public injury outweighs the private cost. *Id.* at 131.

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² Generally, the factors to be considered for the issuance of a preliminary injunction in a civil action between private parties, not applicable here, are: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest. *In re: J.G.*, 160 Vt. 250, 255 n.2 (1993).

Here, there is a strong probability of success on the merits. Plaintiff's complaint, and the affidavit accompanying this application, set forth first hand observations that there has been, is, and will continue to be unlawful direct discharges into the waters of the state from the Defendants' farms unless fully remediated. Moreover, the Defendants' violations of Vermont agricultural and environmental law are clear. The Defendants were provided multiple opportunities to prevent the discharge of agricultural wastes into the waters of the state, and they failed to do so. The ongoing direct discharges and threats of direct discharges from the Defendants' farm operations have damaged and are threatening to damage the water quality of the Clyde River and Crystal Brook such that preliminary injunctive relief is warranted.

WHEREFORE, the Plaintiff respectfully requests that the matter be set for a hearing at a date, time and place for the Defendants to receive notice, that the Plaintiff's evidence be received by the court and that a preliminary injunction issue pending a final determination of the merits of this action commanding the Defendants to cease from allowing or causing agricultural wastes from the production areas of their farms to discharge into ditches and directly into the Clyde River and Crystal Brook, waters of the state, respectively, to wit:

- 1.) to create and maintain an impervious berm at the focal point of the production area of the Derby Center Clydeside Farm to prevent the runoff of agricultural wastes from the production area from directly discharging into the Clyde River;

- 2.) to prevent the overtopping or leaking of the manure pit at the production area of the Derby Center Clydeside Farm from entering any ditches or other discrete conveyances and directly discharging agricultural wastes into the Clyde River, and to prevent any overtopping or leaking of the manure pit from mixing with stormwater runoff from the adjacent farm fields from entering any ditches or other discrete conveyances and directly discharging into the Clyde River;
- 3.) to maintain an impervious berm at the eastern end of the production area of the Derby Line Crystal Brook Farm to prevent the runoff of agricultural wastes from the production area from directly discharging into Crystal Brook;
- 4.) to maintain a fenced cow walkway at the north end of the production area of the Derby Line Crystal Brook Farm to prevent agricultural wastes from the production area of the farm from directly discharging into Crystal Brook;
- 5.) to divert the milkhouse plate cooler water in the south end of the production area near the manure pit at the Derby Line Crystal Brook Farm in such a manner to prevent agricultural wastes from mixing with it and directly discharging into Crystal Brook; and,
- 6.) Enjoin the Defendants to employ a qualified person, subject to the approval of the Plaintiffs, to ensure that there are no direct discharges from their Derby Center Clydeside Farm and from their Derby Line Crystal

Brook Farm agricultural operations into the waters of the state during the pendency of this action;

- 7.) Order that agents of the Plaintiffs may enter upon the land of the Defendants at all reasonable hours between 6:00 AM and 9:00 PM to inspect, measure, survey, photograph, test and sample the Defendants' land to determine whether the Defendants continue to directly discharge into the waters of the state during the pendency of this action.

Dated at Montpelier, Vermont this 20 day of September, 2013.

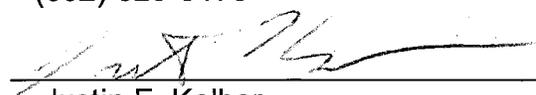
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