

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: March 18, 2016)

JANET L. COIT, in her capacity as :
Director of the RHODE ISLAND :
DEPARTMENT OF ENVIRONMENTAL :
MANAGEMENT, :
Plaintiff, :

v. :

C.A. No. KB-2013-1156

ANGELA CELICO, as Trustee of the Angela :
Celico Revocable Trust; :
DAVID I. STRONG; :
RICHARD D’AMBRA; :
BPF REALTY, LLC; and :
APM FELT, LLC, :
Defendants. :

DECISION

STERN, J. Before the Court is the Rhode Island Department of Environmental Management’s (Plaintiff or RIDEM) motion for a permanent injunction. Plaintiff avers that it is entitled to permanent injunctive relief under Rule 65 of the Superior Court Rules of Civil Procedure because it has proven both its success on the merits and that the public interest will be served by the issuance of the injunction. Further, Plaintiff contends that the Rhode Island Water Pollution Control Act¹ (RIWPCA) relieves Plaintiff from proving the otherwise required “irreparable” harm in seeking an injunction. BPF Realty, LLC (Defendant) concedes that Plaintiff need not prove irreparable harm; however, it maintains that Plaintiff has not proven success on the merits. Jurisdiction is pursuant to G.L. 1956 § 46-12-17. For the following reasons, the Court grants Plaintiff’s motion for a permanent injunction.

¹ G.L. 1956 §§ 46-12-17, et seq.

I

Facts² and Travel

In June 2010, Defendant purchased a parcel of property located at 460 Bradford Road in Bradford, Rhode Island (the Property). The Property consisted of a large, factory-style building, known as Bradford Printing and Finishing (Bradford), and a large wastewater treatment facility (Bradford WWTF), which services Bradford's wastewater discharge. The instant suit arises because Bradford is suspected of illegally discharging wastewater to the Bradford WWTF and of illegally discharging pollutants from the Bradford WWTF to waters of the State.

On September 20, 2012, Defendant entered receivership,³ and Attorney Theodore Orson was appointed as Receiver (the Receiver). Plaintiff notified the Receiver that certain off-site, third-party property owners were discharging wastewater into the Bradford WWTF through potentially undocumented connections to Bradford's wastewater sewer lines. Tr. at 25:6-8. Plaintiff also notified the Receiver that Defendant was discharging untreated sanitary wastewater from Bradford directly into the Bradford WWTF. After receiving such notification, the Receiver filed a Petition for Instructions Regarding Third-Party Discharge to Wastewater Treatment Facility (the Petition). As a result of the Petition, the Court issued an order permitting Plaintiff to file a separate action "with regard to any enforcement and/or other actions it may take with regard to [the discharges at 460 Bradford Road]," and on October 29, 2013, Plaintiff initiated the instant action, seeking permanent injunctive relief.

On June 17, 2014, the Court entered a Preliminary Injunction (the Preliminary Injunction), providing a temporary solution to some of the discharge concerns at the site. The

² The following facts are found following hearings held before the Court on June 22, 2015 and July 2, 2015, hereinafter "Tr."

³ The receivership matter was Diamond Bus. Credit, LLC v. Bradford Printing & Finishing, LLC, WB-2012-0586.

Preliminary Injunction required Defendant to cease the use of devices which produced sanitary sewage on the property and of all wastewater systems, excluding those which produced “greywater,” and required the use of portable toilets by Defendant until permitted on-site wastewater treatment systems were installed.

Subsequently, on June 22, 2015 and July 2, 2015, the Court held evidentiary hearings on Plaintiff’s motion for a permanent injunction. Testimony from Plaintiff’s first witness, Alexandre Pinto (Pinto), an engineer in RIDEM’s Office of Waste Resources, explained that the Bradford WWTF was subject to a Rhode Island Pollution Discharge Elimination System (RIPDES) permit. Pinto explained that a RIPDES permit is issued by Plaintiff and authorizes certain commercial businesses to discharge wastewater from the operations and processes that occurred at the site. Tr. 4:14-16. Pinto explained that while Bradford was in operation, process wastewaters from the production of military fabric, plus small amounts of sanitary wastewater, stormwater runoff, and cooling waters, were directed to the Bradford WWTF. Id. at 5:20-6:8. Pinto expounded that to treat such wastewater, Bradford WWTF’s treatment procedure utilizes a neutralization lagoon, aeration lagoon, settling tank, temporary sludge storage lagoon, and a discharge pipe to the Pawcatuck River. Id.

Pinto further testified that in 2012, after an on-site inspection, he notified Defendant of his concerns that the Bradford WWTF was not operating properly and was not capable of operating in such a way that would provide adequate wastewater treatment. Id. at 16:14-21. A copy of this email notifying Defendant was introduced as Plaintiff’s Exhibit 3. Pinto explained that for Bradford WWTF to operate effectively, a significant amount of wastewater must flow through the facility. Id. at 7:15-17. If there is too little effluent⁴ moving through the system, the

⁴ The term “effluent,” as used here, refers to the wastewater in the system.

“good” bacteria in the sludge lagoon dies off, compromising the effectiveness of the treatment process.⁵ Id. at 9:22-10:3; 47:18-21.

Pinto explained that the Bradford WWTF was intended to process wastewater from three sources—sanitary, industrial, and storm water—and was designed to operate with an average of two million gallons of effluent per day flowing into the facility. Id. at 7:15-17; 10:4-9; 13:5-12. Pinto elaborated that when flows into the facility are below average capacity, the bacteria in the lagoons that is responsible for the treatment of the wastewater does not have enough “food,” or good bacteria, to properly treat the wastewater. Id. Pinto further explained that the clarifier allowed the sludge to settle and for clear water that drains off as effluent to be discharged into the Pawcatuck River, and under normal operations of the Bradford WWTF, such sludge would be removed on a set schedule and properly disposed of at an appropriate facility. Id. at 84:19-22. However, since the Bradford WWTF had not been operated at capacity or with regularity, no sludge has been removed from the lagoon since approximately 2007. Id. at 83:24-25.

Additionally, Pinto testified that managing and controlling the vegetation around the lagoons would prevent the plants and their root systems from growing so large as to compromise the structural integrity of the lagoons’ walls or barriers. Id. at 13:18-25. Pinto noted in a site inspection report from 2011, introduced as Plaintiff’s Exhibit 2, that he observed an overgrowth of vegetation around the lagoons during that visit to the site.

Pinto also testified that during an inspection in April of 2015, he observed bathrooms that had toilets with handles. Id. at 35:20. Plaintiff introduced photographs of these toilets taken during the Site Inspection Report from April 7, 2015 as their Exhibit 9. These handles on the

⁵ Angelo Liberti (Liberti), Plaintiff’s second witness, testified that operations of Bradford WWTF were below normal because of a downturn in business caused by a fire in 2007 and severe flooding in 2010. Id. at 127:6, 129:25. Such decrease in business resulted in low amounts of wastewater flow, ultimately causing “good” bacteria to die off. See id. at 47:18-21.

toilets had been removed in previous inspections and indicated to him that the toilets, in violation of the Preliminary Injunction, had been in use at some point. Id. at 35:19-24. Photos attached to Exhibit 5—a site inspection report from 2012—show images of toilets without handles. Further, Pinto testified that during this same inspection he observed pumping from Bradford WWTF’s neutralization lagoon into an adjacent wetland. Id. at 36:1-6. Photographs of this discharge were submitted as evidence in Exhibit 9.

Finally, Pinto testified to the current contents of the lagoons at Bradford WWTF, stating that the neutralization lagoon⁶ “is still receiving storm water[,]” and “probably consists mostly of storm water at this point” but that “there is still probably some residual wastewater from previous operations.” Id. at 39:13-16. Pinto testified that the activator lagoon has wastewater in it, as well as sludge that has settled to the bottom of the tank. Id. at 39:16-19. He also testified that “[t]he sludge lagoon has not changed” and that it “still holds a significant amount of sludge from previous operations.” Id. at 39:19-21. Pinto stated that Defendant’s staff indicated to him that there is an overflow pit in the area between the lagoons and the building that overflows when the water level in the neutralization lagoon gets too high. Id. at 28:25-29:1. Photos of this pit were introduced as Plaintiff’s Exhibit 4, a site inspection report dated September 25, 2012. Furthermore, Pinto explained that the water in this pit and the water in the lagoon were at the same elevation, and that when the lagoon water level rises, the pit water level rises to the point that eventually water from the pit overflows into the vegetated area and onto a paved area near the production facility. Id. at 19:12-20.

⁶ Pinto explained that the neutralization lagoon, or equalization lagoon, is the “first part of the wastewater treatment process at this facility.” Id. at 5:20-22. All wastewater from the site enters this lagoon before proceeding through the other lagoons at the Bradford WWTF. Id. at 5:22-6:8.

Defendant argued on cross-examination of Pinto that this pumping from the lagoons was going into woods and not a wetland. Id. at 66:15-21. Defendant also asserts that this discharge stopped within a few days and submitted photographs to demonstrate that the discharge had ceased. Id. 67:10-12.

Liberti, RIDEM's Chief of Surface Water Protection, was Plaintiff's second witness, and he testified that the sludge in the lagoons consists of the dead bacteria normally used to provide treatment of wastewater, as well as chemicals, accumulated metals, and other residual components of the waste stream. Id. at 84:2-16. Liberti also stated that he maintained the same concerns as Pinto pertaining to the management and control of the vegetation surrounding the lagoons. Id. at 87:12-18.

Additionally, Liberti testified that the stormwater runoff that flows into the Bradford WWTF posed several risks. Id. at 91:23-92:12. For instance, stormwater runoff contains multiple pollutants picked up from roads, roofs, parking lots, and the industrial floor drains in the Bradford factory that lead directly into the Bradford WWTF. Id. at 90:3-7. Liberti further explained that the risk imposed by the floor drains emptying into the Bradford WWTF is augmented by the fact that this facility has historically had spills and leaks of chemicals and other pollutants that can either leak into the floor drains or get picked up by the stormwater that flows through or around the facility. Id. at 92:15-22.

Liberti also testified as to the sludge located in the sludge lagoon. Id. at 140:10-18. He explained that when Bradford WWTF was operating under normal circumstances, the sludge in the sludge lagoon would be removed and disposed of in New Hampshire because testing revealed the sludge to be hazardous waste and thus unable to be accepted by the Central Landfill in Johnston, Rhode Island. Id. at 140:12-15, 145:7-8. However, the sludge currently stored in

the sludge lagoon has not been tested recently. Liberti admitted that the last tests were conducted while the plant was in full operation under the previous owner around 2009. Id. at 148:13-20. Liberti stated that tests need to be conducted to determine if sludge is leaching into the groundwater through the walls of the basin, but that the general knowledge concerning such sludge is that it will leach into groundwater over a long period of time. Id. at 149:18-150:1.

Defendant's witness, Nicholas Griseto (Griseto), the president and owner of BPF Realty, LLC, testified that after a fire in 2007, as part of the repairs to the property, drains in the bleach house were capped with cement. Id. at 160:3-23. Further, Griseto testified that during the 2010 flood of the Pawcatuck River, none of the barriers or walls of Bradford WWTF's lagoons were breached by this flooding. Id. at 167:22. Defendant submitted Exhibit D—an aerial photograph depicting the results of the flooding—to supplement Griseto's testimony.

Additionally, Griseto testified that in order to comply with the Preliminary Injunction, all the toilet facilities at Bradford were secured by shutting off all running water, except for sinks. Id. at 169:4. Further, Griseto stated that the lids were removed from the toilets, and that signs were posted in the bathroom directing any employees towards the port-a-johns located on site. Id. at 169:6-10. However, Griseto did state that one set of urinals were connected to the sink water. Id. at 169:5. Despite this concession, Griseto testified that "every bathroom has not been used in the facility" since August 2014. Id. at 170:4-5.

Furthermore, Griseto testified that the overflow pit in the area between the lagoons and the building, photographed in Exhibits 4, E, and G, was caused during an accident in either 2011 or 2012, during which a heavy-duty bucket loader crushed an underground pipe. Id. at 171:21-172:13; 173:7. Griseto testified that even though the pipes are connected to the neutralization

lagoon, water from the lagoon could not flow back into the pipe due to a one-way valve in the pipe. Id. at 177:23-25.

With regard to the pumping of water into the wetlands, Griseto attested that this had only occurred for a few days prior to Pinto's inspection and that such pumping was stopped immediately upon request from RIDEM. Id. at 183:20; 184:4-5. Griseto explained that this pumping occurred because of the recent, heavy rainfall and that they "were trying to get the water out of the parking lot." Id. at 183:22-24.

Finally, Griseto testified that though there are current tenants using the property, their operations are of a limited nature, using the space for the storage of supplies, and that no one is on site for more than a few hours a day. Id. at 184:24-25, 185:4-5. Griseto also stated that there is no evidence that these tenants are using the drains on site to dispose of any type of waste, and that these tenants are using the provided port-a-johns. Id. at 185:13-15.

At the end of the hearing, the Court requested that counsel submit post-trial memorandum pertaining to Plaintiff's motion for a permanent injunction. Along with Plaintiff's post-trial memorandum, it submitted a proposed order for a permanent injunction. Plaintiff's permanent injunction would enjoin Defendant from any further unauthorized discharges to waters of the State, and order that Defendant (1) install the approved on-site wastewater treatment systems on the Property; (2) decommission the Bradford WWTF; (3) submit a plan for redirecting stormwater away from the Bradford WWTF; and (4) implement said plan as subject to the approval of RIDEM.

II

Standard of Review

“The issuance and measure of injunctive relief rest in the sound discretion of the trial justice.” Cullen v. Tarini, 15 A.3d 968, 981 (R.I. 2011). “A party seeking injunctive relief ‘must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.’” Nat’l Lumber & Bldg. Materials Co. v. Langevin, 798 A.2d 429, 434 (R.I. 2002) (quoting Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997)). The “[i]rreparable injury must be either ‘presently threatened’ or ‘imminent’; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction.” Id. (quoting R.I. Tpk. & Bridge Auth. v. Cohen, 433 A.2d 179, 182 (R.I. 1981)). In addition, a “party seeking an injunction must also demonstrate [actual] success on the merits and show that the public-interest equities weigh in favor of the injunction.” Id. Therefore, to succeed on a claim for a permanent injunction, a party must demonstrate (1) actual success on the merits, (2) irreparable injury, and that (3) public-interest equities weigh in favor of the injunction. See id. The standard for a permanent injunction is almost identical to that of a preliminary injunction, except that the plaintiff must prove its actual success on the merits rather than the likelihood of success on the merits. Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987).

However, in the purview of the RIWPCA, the traditional standards of a permanent injunction have been statutorily modified by § 46-12-17. See § 46-12-17. In any proceedings in which injunctive relief is sought under the RIWPCA, “it shall not be necessary for the [Plaintiff]

to show that without the relief, the injury which will result will be irreparable or that the remedy at law is inadequate.” Sec. 46-12-17.

Further, because Plaintiff asks the Court to command Defendant to take certain actions, Plaintiff must prove “great urgency” in the implementation of the injunction, and that its rights under the injunction are “very clear.” King v. Grand Chapter of R.I. Order of E. Star, 919 A.2d 991, 995 (R.I. 2007) (“When a preliminary injunction is mandatory in nature in—that it commands action from a party rather than preventing action—a stricter rule applies and such injunctions should be issued only upon a showing of ‘very clear’ right and ‘great urgency.’”) (quoting Smart v. Boston Wire Stitcher Co., 50 R.I. 409, 415, 148 A. 803, 805 (1930)).

As a result, in the instant matter, Plaintiff need only prove (1) actual success on the merits; (2) that public-interest equities weigh in favor of the injunction; (3) urgency in implementing the injunction; and (4) that its rights are “very clear.”

III

Analysis

Plaintiff avers that it satisfies the requirements for a permanent injunction; specifically, that it has established actual success on the merits by proving that Defendant violated § 46-12-5, and that it has shown that the equities weigh in its favor due to the harmful effects Defendant’s actions have and continue to have on the environment and surrounding community. Defendant contests Plaintiff’s claims on the following grounds: (1) Plaintiff does not have standing as Defendant has ceased operation, and the possibility of future harm is insufficient for a permanent injunction; (2) Plaintiff has failed to establish actual success on the merits because it has not proven that pollutants are “likely” to enter the “waters of the State.”

A

Plaintiff's Standing

Defendant contends that Plaintiff does not have standing because Defendant ceased operation, thereby halting any ability of it to cause Plaintiff any harm. Defendant argues that Plaintiff's complained-of injury is not imminent and is speculative; both of which are insufficient to confer standing upon Plaintiff. Contrarily, Plaintiff contends that it has alleged past injuries that are capable of repetition, and that several of these injuries are continuous in nature.

Our Supreme Court has held that “[s]tanding is [simply] an access barrier that calls for the assessment of one’s credentials to bring suit.” Ahlburn v. Clark, 728 A.2d 449, 452 (R.I. 1999) (quoting Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm’n, 452 A.2d 931, 932 (R.I. 1982)). “It is what entitles one to obtain an adjudication and thus confers a right to review but not necessarily to relief.” Blackstone Valley Chamber of Commerce, 452 A.2d at 932. In addressing challenges to standing, our Supreme Court has held that the operative question is “whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged [act]. If he [or she] has, he [or she] satisfies the requirement of standing.” Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997) (quoting R.I. Ophthalmological Soc’y v. Cannon, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974)). Simply, “[t]he standing inquiry is satisfied when a plaintiff has suffered ‘some injury in fact, economic or otherwise.’” Dauray v. Mee, 109 A.3d 832, 840 (R.I. 2015) (quoting Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008)); 59 Am. Jur. 2d Parties § 37 at 443 (“[t]he requirement of standing is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation”).

Such requirement of the plaintiff to show an “injury” is typically referred to as the “‘injury in fact’ requirement.” Pontbriand, 699 A.2d at 862. The “injury in fact” requirement is satisfied when a litigant sufficiently alleges that there has been “an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). In applying this definition, “[t]he line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury.” Matunuck Beach Hotel, Inc. v. Sheldon, 121 R.I. 386, 396, 399 A.2d 489, 494 (1979).

“The issues of standing and mootness are related concepts to be used in analyzing the basic question” of whether a matter is justiciable. 1A C.J.S. Actions § 76. In Bucci v. Lehman Bros. Bank, FSB, our Supreme Court has instructed “‘that a case is moot if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant[s] of a continuing stake in the controversy.’” 68 A.3d 1069, 1079 (R.I. 2013) (quoting Boyer v. Bedrosian, 57 A.3d 259, 272 (R.I. 2012)); see also 20 Am. Jur. 2d. Courts § 46. However, the Bucci Court explained that such doctrine is not to say that an action will be rendered moot simply because a defendant voluntarily ceases the complained-of conduct. Id. While our Supreme Court has had “‘few opportunities to address whether a defendant’s voluntary cessation of allegedly improper conduct will render a case moot,’” it has noted “‘that the voluntary cessation of an activity may not necessarily moot the remedy of injunctive relief.’” Id. at 1080 (quoting Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 794 n.11 (R.I. 2005)). In turning to the precedent of the Supreme Court of the United States, the Bucci Court held that “‘[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as

soon as the case is dismissed.” Id. (quoting Knox v. Serv. Emps. Int’l Union, Local 1000, 132 S.Ct. 2277, 2287 (2012). “Thus, if the court were to dismiss the case as moot, it ‘would . . . leave [t]he defendant . . . free to return to his old ways.’” Id. (quoting Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

Consistent with the above principles and holdings, the Bucci Court articulated the standard when analyzing mootness and a defendant’s voluntary cessation of the complained-of conduct, classifying it as “stringent.” Id. The Court explained that “[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” Id. (quoting Friends of the Earth, Inc., 528 U.S. at 189). Further, the Court clarified that a “‘heavy burden of persua[ding]’ the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” Id. (quoting Friends of the Earth, Inc., 528 U.S. at 189).

Here, Defendant attacks Plaintiff’s standing, claiming that Plaintiff’s injury is insufficient to sustain an action, and maintains that the instant suit is mooted as a result of Defendant’s voluntary cessation of operations at the Bradford WWTF. Despite Defendant’s argument that Plaintiff has only asserted a future, speculative injury, the Court is satisfied that Plaintiff has alleged facts sufficient to give it standing to sue Defendant. In reviewing the facts recited at the permanent injunction hearing,⁷ it is evident that Plaintiff is asserting that—since 2012—Defendant has been polluting the Pawcatuck River by discharging certain pollutants into the river. See Tr. at 25:6-8. Specifically, after several investigations, it was apparent that Bradford WWTF was not operating in such a way that would provide adequate wastewater treatment. See

⁷ In addressing Plaintiff’s standing, the Court is not making any ruling on the validity of these facts, but only recites them to determine whether Plaintiff has alleged or argued facts that would be sufficient to establish standing. The Court will rule on the validity of the facts infra, when discussing Plaintiff’s success on the merits of its suit.

id. at 16:19-21. This inadequacy, in conjunction with Defendant's failure to control the vegetation surrounding the lagoons, poses a risk, if not a certainty, that certain effluent and polluted waters are entering the Pawcatuck River. See Tr. at 149:18-150:1; 13:18-25. After examining these allegations, the Court finds that not only was Plaintiff injured at one point between 2012 and now, but that the complained-of injury continues to persist, manifested in the possibility, or certainty, of pollutants entering the Pawcatuck River by leaching through the lagoons' barriers. See Tr. at 13:18-25; 149:18-150:1. The amount of pollutant entering the Pawcatuck River is irrelevant; so long as any pollutant is entering the river, Plaintiff has alleged a sufficient injury to confer upon itself standing to bring the instant action. See Matunuck Beach Hotel, Inc., 121 R.I. at 396, 399 A.2d at 494.

Similarly, the Court is not satisfied that Defendant has sustained its "heavy burden" in demonstrating to the Court that it is absolutely clear that the harm to Plaintiff has ceased. See Bucci, 68 A.3d at 1080. From the facts alleged—even though Defendant has ceased operation at Bradford—it is not evident that the complained-of injury has ceased. For instance, vegetation continues to grow on the borders of the lagoons, compromising the barrier's integrity, and making it more likely that sludge or pollutants will be able to leach through them into the Pawcatuck River. See Tr. at 13:18-25; 149:18-150:1. Further, the cessation of operations is a main cause of the injury to Plaintiff, as Bradford is not operating in such a way that would produce sufficient quantities of effluent to provide adequate wastewater treatment. See id. at 7:15-16; 9:22-10:3; 16:19-21; see also Ex. 3. Not only is there an insufficient amount of wastewater moving through the facility to effectively treat the water, but Defendant has also failed to remove or dispose sludge from the lagoons since approximately 2007. See id. at 83:24-25. Based on these allegations, the Court is not convinced that Defendant has put forth sufficient

allegations or evidence to prove or demonstrate with absolute clarity that such pollution has ceased, despite the termination of operations at Bradford. See Bucci, 68 A.3d at 1080.⁸

Accordingly, the Court finds that Plaintiff has demonstrated an injury in fact sufficient to establish standing. Further, the Court finds Defendant's contentions of mootness to be unsupported and finds the matter justiciable on that ground.

B

Permanent Injunction: Success on the Merits

For Plaintiff to satisfy its burden of proving success on the merits, it must establish that Defendant violated the RIWPCA. Specifically, Plaintiff contends that Defendant violated § 46-12-5 of the RIWPCA, entitled "Prohibitions," which, in pertinent part, states the following:

- “(a) It shall be unlawful for any person to place any pollutant in a location where it is likely to enter the waters or to place or cause to be placed any solid waste materials, junk, or debris of any kind whatsoever, organic or non organic, in any waters.
- “(b) It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.”

Further, Plaintiff alleges that the Defendant violated several provisions of the Rhode Island Water Quality Regulations (the Regulations),⁹ specifically Rules 9.A, 11.B, and 13.A. Rule 9.A, entitled "Activities Shall Not Violate Water Quality Standards," prohibits the following:

⁸ The Court further notes that Defendant has a pattern of ceasing the complained-of conduct and then resuming it. For instance, the Preliminary Injunction required the cessation of the use of any and all devices which would produce sewage on the Property and all wastewater systems. However, during Pinto's inspection in April 2015, he noticed that toilets in Bradford's bathrooms had handles on them. See id. at 35:20; Ex. 9. These handles had been removed during a previous inspection. See id. at 35:20-21; Ex. 5. Such evidence of resumption of complained-of activity does not bode in favor of Defendant's argument claiming mootness based on voluntary cessation. See Bucci, 68 A.3d at 1079.

“No person shall discharge pollutants into any waters of the State or perform any activities alone or in combination which the Director determines will likely result in the violation of any State water quality criterion or interfere with one or more of the existing or designated uses assigned to the receiving waters or to downstream waters in accordance with rules 8.B., 8.C., 8.D., and 18 of these regulations”

Rule 11.B of the Regulations, entitled “Pollutants,” similarly provides:

“No person shall discharge pollutants into the waters of the State except as in compliance with the provisions of Chapter 46-12, or other applicable chapters, of the Rhode Island General Laws or these regulations, and pursuant to the terms and conditions of an approval issued by DEM thereunder.”

Lastly, Rule 13.A of the Regulations states:

“No person shall: discharge any pollutant into, or conduct any activity which will likely cause or contribute pollution to, the waters of the State; or construct, install, or modify any treatment works including the extension of sewers to an existing sewer system, without having obtained all required approvals from the Director.”

Defendant rebuts Plaintiff’s claim by alleging that it is grounded in speculation, which cannot be a basis for a permanent injunction. More specifically, Defendant argues that Plaintiff has failed to prove that wastewater is “likely” to enter the “waters” of the State. See § 46-12-5(a). As a result, for the purposes of demonstrating actual success on the merits, Plaintiff needs to prove that Defendant violated either (1) § 46-12-5(a); (2) § 46-12-5(b); or (3) any supplemental regulations.

⁹ The R.I. Department of Environmental Management Water Quality Regulations are available at <http://www.dem.ri.gov/pubs/regs/regs/water/h20q09a.pdf>.

Section 46-12-5(a)

To prove that Defendant violated § 46-12-5(a), Plaintiff must establish that Defendant placed a pollutant in a place that is likely to enter the waters of the State. Sec. 46-12-5. As defined in the RIWPCA, a pollutant is “any material or effluent which may alter the chemical, physical, biological, or radiological characteristics and/or integrity of water, including, but not limited to, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge . . . chemical wastes, [and] biological materials . . .” Sec. 46-12-1(15). “Waters” is broadly defined as “all surface waters including all waters of the territorial sea, tidewaters, all inland waters of any river, stream, brook, pond, or lake, and wetlands, as well as all groundwaters.” Sec. 46-12-1(23). However, the dispositive definition, which is not defined in the RIWPCA, is that of “likely.” Sec. 46-12-5(a).

The Court is not persuaded by Defendant’s assertion that the word “likely” equates to a “more likely than not” or a “preponderance of the evidence” standard. “Likely” is defined as “[a]pparently true or real; probable . . . [s]howing a strong tendency; reasonably expected.” Black’s Law Dictionary 1069 (10th ed. 2014). The use of the words “probable” and “reasonably expected” illustrate something more than a possibility, but less than certainty. See State v. Green, 480 N.E.2d 1128, 1132 (Ohio 1984) (“Although the term ‘likely’ connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty.”); Gillogly v. New England Transp. Co., 73 R.I. 456, 464-65, 57 A.2d 411, 415 (1948) (“A person who owes a legal duty to another is bound to foresee that which is probable, that is, what according to the usual experience of mankind is likely to happen.”); Prue v. Goodrich Oil Co., 49 R.I. 120, 140 A. 665, 666 (1928). Most notably, “likely” is not defined as “more

probable than not” or “more true than not.” In fact, by its definition, an event is “likely” when it is reasonable to believe that it will happen. This “reasonableness” standard, perhaps intentionally employed by the legislature,¹⁰ is a lower burden than that of a preponderance of the evidence, which has been deemed to be satisfied when something is “more likely than not.” 29 Am. Jur. 2d Evidence § 173 (a preponderance of the evidence is established when “the factfinder is satisfied that the fact is more likely true than not true”). Therefore, the question now becomes whether Plaintiff has proven that Defendant’s actions will likely (or are reasonably likely to) result in the entry of pollutants into the waters of the State.¹¹

Here, the Court is satisfied that Plaintiff has met its burden in proving that Defendant placed a pollutant in a place where it is “likely” to enter the waters of the State. See § 46-12-5(a). Plaintiff, through Pinto and Liberti’s testimony, has proven that the lagoons, which are directly adjacent to the Pawcatuck River, hold pollutants. See § 46-12-1(15); Tr. at 39:13-21; 83:24-25; 84:4-16. Specifically, the lagoons hold stormwater, wastewater, and sludge, which Pinto explained has not been removed since 2007. See Tr. at 83:24-25. Further, Liberti explained that the “sludge” consists of chemicals, accumulated metals, and other components of the waste stream, almost all of which are included in the definition of “pollutants.” See § 46-12-1(15); Tr. at 84:4-16.

¹⁰ The Court finds that if the legislature intended to employ a “preponderance of the evidence” standard, it would have stated so. It has been held that “[a] legislature is presumed to know the state of existing law and to enact statutes with reference to it.” 82 C.J.S. Statutes § 377. For instance, in In re Jamo, the First Circuit explained that in interpreting a statute, the presumption “is ‘that Congress knew and adopted the widely accepted legal definitions of meanings associated with the specific words enshrined in the statute.’” 283 F.3d 392, 397 (1st Cir. 2002) (citing United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001)). Pursuant to such presumption, it logically follows that our General Assembly intentionally employed the word “likely” rather than a “preponderance of the evidence.”

¹¹ The statutory invocation of the term “likely,” for all intents and purposes, lowers Plaintiff’s standard of proof required to prove actual success on the merits in proving that Defendant violated § 46-12-5(a).

The Court is also satisfied that Plaintiff has surpassed its relatively low burden in proving such pollutants are “likely” to enter the waters of the State. See § 46-12-5(a). “Waters” broadly includes the Pawcatuck River, see § 46-12-1(23), which is in very close proximity to the Bradford WWTF lagoons. See Exs. 1, D. The Court finds that Plaintiff has proven that the proximity of the lagoons to the Pawcatuck River makes it “likely” that the pollutants will enter into the Pawcatuck River for three reasons: (1) the vegetation surrounding the lagoons is overgrown and unmanaged; (2) the neutralization lagoon occasionally floods or leaks; and (3) the Pawcatuck River also floods from time to time.

First, Pinto testified that when the vegetation on the lagoons’ barriers is not properly maintained, the plant’s roots become so large that they compromise the integrity of the lagoons’ walls.¹² See Tr. 13:18-25; Ex. 10. In several site inspection reports, Pinto noted that the vegetation around the lagoons and on the surface of the sludge lagoon was excessive. See Exs. 2, 4, 8, 10. Pictures included in Pinto’s inspection report show excessive foliage growing on the borders of the lagoons and extending over the lagoons. See id. Further, several pictures show that almost the entirety of the lagoons is covered by algae. See id. Liberti, in describing the concerning effects of the excessive vegetation, stated that it was general knowledge that when the walls of the lagoons were compromised, sludge and wastewater contained in the lagoons can leach through the lagoons’ barriers and into groundwater. See Tr. at 13:18-25. Based on this credible, substantiated testimony and evidence, the Court finds that the pollutants contained within the lagoons are in a place in which they are “likely” to enter the Pawcatuck River by leaching through the lagoons’ deteriorating retaining walls.

¹² In the instant matter, the Court notes that the lagoons’ walls are the only things separating the pollutants within the lagoons from the Pawcatuck River. See Exs. 1, D.

Second, Pinto further testified that the neutralization lagoon occasionally floods into an “overflow pit” when the water level in the neutralization lagoon gets too high.¹³ See id. at 28:25-29:1; Ex. 4. The “overflow pit” and neutralization lagoon’s water levels rise at the same level and eventually reach a level where the “overflow pit” overflows into a vegetated area. See Tr. at 19:18-20; Ex. 4. Griseto explained that once water flowed from the neutralization lagoon to the “overflow pit,” it could not then flow back to the neutralization lagoon because there is a one-way valve. See Tr. 177:23-25. In addition to the neutralization lagoon flooding into the overflow pit, Pinto notes in several inspection reports that the neutralization lagoon was “leaking” water due to a recent heavy rain, causing an area between the lagoon and production building to flood. See Exs. 6, 7. The “leaking” was extensive enough to “impact employees’ access to [the building].” See Ex. 7. After hearing the aforementioned testimony and reviewing the evidence submitted by the parties, the Court finds that the pollutants contained within the neutralization lagoon are reasonably “likely” to enter the Pawcatuck River, or other waters of the State, because the lagoon floods its surrounding areas and “leaks” substantial water whenever there is a significant rainfall.

Lastly, Exhibit D affirms the Court’s finding that the pollutants in the lagoons are likely to enter the Pawcatuck River. See Ex. D. Exhibit D, introduced by Defendant to show that none of the lagoons’ walls were breached during a flood of the Pawcatuck River, actually proves the contrary. See id. Exhibit D shows extensive flooding and a breach of the neutralization lagoon’s barriers. See id. Specifically, one end of the neutralization lagoon, which is the long, narrow lagoon closest to Bradford’s factory, empties into the Pawcatuck River. See id. Despite Griseto testifying that none of the lagoons’ barriers were breached during the flooding, Exhibit D clearly

¹³ The neutralization lagoon collects all the wastewater from the facility and has elevated levels of bacteria. See Tr. at 5:19-25; 54:1-15.

shows a commingling of the polluted wastewater in the neutralization lagoon with the water from the Pawcatuck River. See Tr. at 167:3-23; Ex. D. Based on this aerial photograph of the flooding around Bradford and the breach of the neutralization lagoon’s wall, the Court does not find Griseto’s testimony credible and finds that when the Pawcatuck River floods, the pollutants within the lagoons are in a place likely to enter the Pawcatuck River, or other waters of the State.

Accordingly, the Court finds that Plaintiff has proven actual success on the merits in demonstrating that Defendant has put pollutants in a place “likely” to enter waters of the State, in violation of § 46-12-5(a).

2

Section 46-12-5(b)

To find a violation under § 46-12-5(b), Plaintiff must prove that Defendant “discharge[d]” a pollutant into the waters, unless done so pursuant to any rules or regulations promulgated under the statute, and pursuant to a permit.¹⁴ Sec. 46-12-5(b) (emphasis added). Put simply, the operative question—to determine whether a violation of § 46-12-5(b) occurred—is (1) if Defendant discharged pollutants into the waters, and (2) if they did so without a permit. Statutorily, “discharge” is defined as “the addition of any pollutant to the waters from any point source.” Sec. 46-12-1(4). The meanings of “waters” and “pollutants,” defined supra § A(1), remain the same.

Here, the Court finds that Defendant has discharged pollutants into the “waters” of the State based on evidence and testimony that Defendant pumped pollutants from the lagoons into

¹⁴ Unlike § 46-12-5(a), Plaintiff is not entitled to a lower evidentiary burden because § 46-12-5(b) omits the word “likely.” Therefore, the Court will analyze any alleged breach of § 46-12-5(b) under a “preponderance of the evidence” standard.

adjoining wetlands.¹⁵ On June 6, 2013, Pinto, in a site inspection report, noted that he observed pipes in an area where the neutralization lagoon “overflows/leaks” when the level gets too high from stormwater runoff. See Ex. 8; see also Tr. at 93:1-11. He also observed a section of pipe protruding from a boundary fence immediately proximate to the wetlands, which indicated to him that “the flood water that leaked from the neutralization lagoon was pumped to the wetlands in the recent past.” See Ex. 8. Further, on April 7, 2015, Pinto conducted an on-site inspection of the Bradford WWTF and noted a pump at the effluent end of the neutralization lagoon which was pumping water out of the lagoon into wetlands behind the fence line on the southwest side of the Property. See Ex. 9; Tr. 36:1-6. Several pictures contained in the inspection report show a pump at the end of the neutralization lagoon connected to long, white hoses running through a fence with water discharging from the end. See Ex. 9. Pinto explained that wetlands were adjacent to the fence line and clarified that wetlands are waters of the State. See Tr. 38:3-6; 70:13-15; see also § 46-12-1(23).¹⁶

Further, the Court finds that Defendant was making this discharge into the wetlands when its permit was void, suspended, or otherwise no longer valid. Regardless of whether Defendant discharged such pollutants into the wetlands in conformity with rules or regulations prescribed

¹⁵ The Court also finds that Defendant has a tendency to repeat this behavior. See infra n.16.

¹⁶ While Defendant avers that this was only a “one time” occurrence, the Court does not find that to be true, as it was noted that wastewater was being discharged to the wetlands on June 6, 2013. See Ex. 8. Further, Liberti testified that Bradford had discharged wastewater into the wetlands on several other occasions despite orders by RIDEM to cease such pumping. See Tr. 134:7-8. Additionally, Defendant argues that Griseto only pumped the wastewater into the wetlands at the direction of Pinto. See Tr. 202:1-24. However, the Court does not find this testimony to be credible. The Court does not believe that an agent of RIDEM, who is charged with environmental safety and protection, would order wastewater to be discharged into wetland (or “woods,” as the Defendant argues). Such conclusion is further supported by Exhibit 9—Pinto’s site inspection report—which recounts that Pinto “instructed Mr. Griseto to stop discharging contaminated water from the neutralization lagoon to the wetlands and explained that the water can be pumped to other offline tanks . . . as long as storage capacity is available and it does not cause a discharge from the facility to the river.” See also Tr. 67:1-8.

by Plaintiff, Defendant had no permit to do so during the time between September 17, 2012 and the date of the hearing, June 22, 2015. See Exs. 11, 12, 13. While it is true that Defendant—at one point—had a permit¹⁷ to discharge treated wastewater to the Pawcatuck River, which had been transferred to them from Bradford Dyeing Association (Bradford Dyeing) on October 1, 2009, that permit was voided. Tr. 105:1-9, 12; Ex. 13. RIDEM only approved the transfer of the permit from Bradford Dyeing to Defendant so long as “production levels, production produced, rates of discharge, and wastewater characteristics will remain unchanged [from the levels that Bradford Dyeing had].” See Ex. 13; see also Tr. at 105:3-9. However, as described in a September 17, 2012 letter from Plaintiff to Griseto, production had changed significantly. See Ex. 13. At the time of the letter, Bradford was producing, on average, 16,553 pounds of wastewater per day, which was well below the prior production—and permit requirement—of 40,000 pounds of wastewater per day.¹⁸ Id.; see also Tr. at 108:4-15. Based on such reduction in wastewater flow, Plaintiff terminated the permit. Id. However, based on certain showings by Defendant, Plaintiff offered to reissue a modified permit that would permit a discharge of 10,000 pounds per day. Id. The letter further referenced other issues that RIDEM required Bradford to rectify before a new permit would issue, such as issues with sludge disposal and certain fees in arrears in the amount of \$6000.00. Id. The offer in the letter to reissue a modified permit was contingent upon a response by Bradford within seven days addressing the issues raised by RIDEM. Id. Bradford sent no such letter. Id.

The Court’s finding that Defendant’s permit was voided on September 17, 2012 is further supported by the testimony of Liberti. When Liberti was asked whether Bradford applied for the

¹⁷ Plaintiff identified the permit as RIPDES permit RI0000043. See Ex. 13.

¹⁸ Such decrease in flow is insufficient to sustain bacteria growth in the lagoons for proper wastewater treatment. See Tr. 77:1-12. Therefore, as a result of the lower flow through the facility, “there is no real treatment being provided to the pollutant.” See id. at 77:7-8.

modified permit referenced in the September 17, 2012 letter, he responded, “No, I don’t believe so.” See Tr. 107:3. He further explained that “[s]ince the time of this letter the business went into receivership and the permit was considered null and void and at this point we have concerns that are unrelated to the production side.” Id. at 111:23-112:1. Such concerns were “related to the storm water, the decommissioning, ongoing sanitary discharges or the potential for ongoing sanitary discharge without adequate treatment.” Id. at 112:2-4. Further, Liberti testified that prior to April 2015, Defendant was informed that any discharge to wetlands was not permitted. Id. at 143:21-23. Defendant offered no evidence to prove that they had complied with Plaintiff’s requests to modify its permit, or that their permit was valid.

Accordingly, as Defendant discharged pollutants into the “waters” of the State on June 6, 2013 and April 7, 2015, and on both dates did not have a valid permit, the Court finds that Plaintiff has proven by a preponderance of the evidence that Defendant violated § 46-12-5(b).¹⁹

C

Permanent Injunction: the Equities

After finding that Plaintiff has met its burden in proving success on the merits, the Court must also balance the equities—this involves “weighing the hardships to either side, and examining the practicality of imposing the desired relief.” R.I. Tpk. & Bridge Auth., 433 A.2d at 182. The Court is required to weigh “relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.” Restatement (Second) Torts § 941 (1979). Further, in analyzing the equities, “it is accepted that in balancing the equities, a court may consider the interests of third parties and of the public in general.” Rose Nulman Park

¹⁹ The Court’s finding that Defendant violated § 46-12-5(b) by the unlawful discharge of pollutants to “waters” of the State without a permit also compels a finding that Defendant violated Rules 9.A, 11.B, and 13.A. See supra § III(B).

Found. ex rel. Nulman v. Four Twenty Corp., 93 A.3d 25, 32 (R.I. 2014) (citing Restatement (Second) Torts § 942 (1979)); see also 42 Am. Jur. 2d Injunctions § 36 (“Courts have discretion in weighing the benefits and burdens that granting or denying an injunction would have on the public.”).

Here, the balance of the equities militates in favor of granting Plaintiff’s motion for a permanent injunction. The weight of considerations to environmental protection and public health far outweighs any financial obligation that Defendant argues counterbalance the proverbial scales of equity. In the interest of justice, the financial obligations imposed by the injunction cannot be permitted to filibuster any obligations Defendant has to the public or State in maintaining a safe, functional, and compliant wastewater treatment facility. Defendant has let the facility fall into a state of disrepair despite maintenance suggested by Plaintiff, and it shall be accountable for bringing the facility up to the standards prescribed by RIDEM or our general laws. If the Defendant wished to decommission the facility, it also should have done so in conformance with RIDEM regulations.

To allow a wastewater treatment facility, holding chemicals, pollutants, and sewage sludge to lay dormant to the point that it is flooding, overflowing, or leaching pollutants into surrounding waters is categorically negligent. The introduction of these pollutants not only eviscerates the State’s environmental protection efforts, but also poses a risk to the public’s health. Liberti testified that the bacteria and viruses contained within the pollutants, specifically the human waste, pose direct threats if not properly treated. See Tr. 88:20-24. Further, from a careful review of all the evidence and testimony, it is reasonable to infer that if pollutants and human fecal waste are discharged or otherwise permitted to enter the “waters” of the State, it can pose serious health concerns to the residents of Bradford, Rhode Island and surrounding

municipalities. To deny the injunction would be to put private parties' financial burdens arising from basic obligations before the protection of our environment and public safety, and for that reason, the equities not only tip, but drastically slant, in favor of granting Plaintiff's permanent injunction.

D

Permanent Injunction: Plaintiff's Rights and Urgency of Injunction

Based on Defendant's violations of the RIWPCA, Plaintiff has proven that its rights are "very clear." See King, 919 A.2d at 995. As a governmental department charged with the preservation, regulation, and supervision of the State's environment, Plaintiff's rights to prevent Defendant from injuring or otherwise damaging the State's wetland or waters are abundantly clear. Specifically, just as Plaintiff is vested with the power "[t]o issue a permit for the discharge of any pollutant" into the waters of the State, it logically follows that Plaintiff also has a right to prevent such action when Defendant violates any rules or regulations set forth by RIDEM. See § 46-12-3(11).

Further, in examining the harmful effects that Defendant's unlawful discharge of pollutants has or may have on the environment and health of the State's citizens, it is similarly clear that Plaintiff has proven that the necessity for the injunction is urgent. See King, 919 A.2d at 995. Defendant's voluntary discharge of pollutants, or the likelihood that pollutants will enter the Pawcatuck River in another way, must be addressed immediately to cease any further harm. In reviewing the facts and violations proven, in conjunction with the equities, there can be no other finding than one of urgency. To find the contrary would be to strip the injunction of its purpose and demean the harmful effects of Defendant's illegal discharge of harmful pollutants.

Accordingly, due to the harmful effects of Defendant's conduct, the Court finds that Plaintiff has proven the requisite showing of urgency.

IV

Conclusion

In conclusion, the Court grants Plaintiff's motion for a permanent injunction because Plaintiff has proven that Defendant has violated §§ 46-12-5(a) and (b), the equities so require, Plaintiff's rights are very clear, and Plaintiff has demonstrated urgency in addressing Defendant's unlawful conduct. Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Coit v. Celico, et al.

CASE NO: KB-2013-1156

COURT: Kent County Superior Court

DATE DECISION FILED: March 18, 2016

JUSTICE/MAGISTRATE: Stern, J.

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