

ISSUE

Whether the Court should grant Defendants' Motion for a Protective Order pursuant to Superior Court Civil Rule 26(c) when discovery has not yet commenced?

FACTUAL AND PROCEDURAL BACKGROUND

A. Origins of Defendants' Business and Issuance of Their Permit

Defendants Mike Davidson Enterprises, LLC ("MDE"), 5500 Anderby Hall Road, LLC ("AHR), and Mike Davidson Excavating, LLC ("MDX") are limited liability companies incorporated in Delaware.¹ Defendant Michael P. Davidson operates a construction and demolition waste recycling facility ("the facility") located at 3051 Willow Grove Road, near Sandtown, Delaware.² MDE owns the facility.³ AHR owns land neighboring the facility.⁴ MDX conducts operations on the same premises.⁵

In 2009, MDE applied for a permit⁶ from DNREC to operate the facility, which receives construction and demolition debris; produces mulch and grade stakes from the construction and demolition wood waste; and provides for the recycling of

¹ Compl. ¶ 4.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ MDE 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.

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concrete, brick, and metal from the construction and demolition debris.⁷ MDE received temporary approval from DNREC on June 25, 2009,⁸ and on November 6, 2009, DNREC issued Resource Recovery Facility Permit No. SW-09/03 (“the Permit”) to MDE.⁹ DNREC conducted two compliance assessments at the facility on January 14, 2010, and March 9, 2010, during which inspectors found what they deemed to be ongoing violations of the provisions of the permit and Delaware solid waste regulations.¹⁰

DNREC issued Notice of Violation (“NOV”) No. 10-SW-01 to MDE on April 6, 2010, notifying MDE of the violations discovered during the January 14 and March 9 inspections, and requiring MDE to provide documentation of full compliance within 30 days.¹¹ On May 3, 2010, MDE requested an extension to the compliance deadline and requested a meeting with DNREC representatives.¹² DNREC conducted a follow-up compliance inspection at the facility on May 10, 2010, and found that the

⁷ See Resource Recovery Facility Permit No. SW 09/03, Def. Opening Brf. in Support of Mot. to Stay, Ex. A, e-file 47162732, at 1 [hereinafter Resource Recovery Facility Permit]; Compl. ¶ 5.

⁸ Compl. ¶ 6.

⁹ *Id.* ¶ 8.

¹⁰ *Id.* ¶¶ 9-10.

¹¹ *Id.* ¶ 11.

¹² *Id.* ¶ 12.

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alleged violations continued.¹³ Representatives from DNREC met with MDE on May 12, 2010, to discuss the NOV requirements and the proposed deadline extension.¹⁴ DNREC issued MDE an extension, requiring compliance by May 20, 2010.¹⁵ MDE submitted a written response to DNREC on May 18, 2010, which, according to DNREC, failed to address a number of the violations cited in the NOV.¹⁶ DNREC conducted eleven additional compliance assessments between the period of June 2, 2010, and May 17, 2012, all which it alleges confirmed ongoing violations at the facility.¹⁷

B. Administrative Action

On June 8, 2012, DNREC Secretary Collin O'Mara issued an Order to Cease and Desist ("the Order") to MDE for violating the terms of the permit.¹⁸ The Order alleges that MDE failed to fulfill the sampling and analysis requirements of the

¹³ *Id.* ¶ 13.

¹⁴ Compl. ¶ 14.

¹⁵ *Id.* ¶ 15.

¹⁶ *Id.* ¶ 16.

¹⁷ *Id.* ¶ 17.

¹⁸ 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*, Del. Dep't of Nat. Res. and Env'tl. Control, Order No. 2012-WH-0020 [hereinafter "Cease and Desist Order"], available at <http://www.dnrec.delaware.gov/Info/Documents/Secretary%27s%20Order%20No.%202012-WH-0020.pdf>.

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permit.¹⁹ DNREC performed its own sampling and analysis of various waste and materials generated by MDE's facility and discovered that the mulch sold by the facility contained levels of arsenic, chromium, and polychlorinated biphenyls (PCBs) that exceeded the analytical and performance criteria specified in the permit.²⁰ DNREC ordered MDE to (1) cease and desist from selling Alternate Daily Cover or residential 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.²¹ MDE appealed the Order to the Environmental Appeals Board ("EAB"), alleging that the Secretary exceeded his authority in crafting a cease and desist order based upon what MDE deems are "vague allegations and impermissible testing procedures."²²

C. Commencement of the Lawsuit and the Present Motion

On July 27, 2012, as the administrative proceedings were pending, DNREC filed a twenty-three count complaint against Defendants alleging numerous violations

¹⁹ *Id.* at 1.

²⁰ *Id.*

²¹ *Id.* at 6.

²² See *Statement of Appeal, In Re: Order No. 2012-WH-0020 Issued to Mike Davidson Enterprises, LLC*, Def. Mot. For a Protective Order, Ex. 2, at 38.

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of 70 *Del. C.* Chapter 60 and the solid waste regulations promulgated thereunder. The Complaint alleges, essentially, that MDE has unlawfully stored more than 25,000 tons of solid waste on the property since January 14, 2010, in violation of the aforementioned laws and the terms of its permit. DNREC seeks civil penalties for MDE's non-compliance, several orders compelling Defendants to fully comply with Delaware solid waste laws, reimbursement for its abatement of the violations, attorneys' fees and costs.

Defendants filed the instant motion, styled as a "Motion for a Protective Order," on August 28, 2012. In this motion, Defendants accuse DNREC of filing "duplicative and wasteful" actions all the while wrongfully interfering with Defendants' business operations. Defendants' motion asks the Court to enter a protective order: (1) staying the administrative proceedings; (2) compelling DNREC to comply with the relevant Rules of Civil Procedure; (3) enjoining DNREC from inspecting or investigating Defendants' business operation and property unless conducted in accordance with Rule 26 of the Superior Court Rules of Civil Procedure; (4) protecting under seal the identity of Defendants' business customers and business relations; (5) enjoining DNREC from interfering with Defendants' business relationships with its customers; (6) prohibiting DNREC from utilizing, publishing, or relying on any sampling data that has been improperly or invalidly obtained; (7) enjoining DNREC from publishing or releasing data, findings, or information to the public regarding the company's compliance status until the applicability of such standards and matters in this case are resolved through litigation;

and (8) imposing all other appropriate terms and conditions upon DNREC as deemed appropriate by the Court.

On September 17, 2012, DNREC filed a response to Defendants' motion, asserting that Defendants' motion presents no basis for the Court to enjoin DNREC from enforcing environmental laws and the terms of the permit. DNREC argues that a protective order is a tool that enables the Court to limit or control the scope, terms, conditions, timing, and confidentiality of discovery. It may not be used to fashion relief as broad as that sought by Defendants' motion, DNREC contends. Accordingly, DNREC asks that Defendants' motion be denied.

DISCUSSION

The focus of the analysis must be the protective order requested by Defendants. Superior Court Civil Rule 26(c), which imbues this Court with the authority to issue protective orders, states, in relevant part:

(c) *Protective Orders*: Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Court; ... (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as

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directed by the Court.²³

The purpose of protective orders is to prohibit “improper discovery requests, outside the proper scope of discovery, through Court intervention.”²⁴ They are intended to restrict the use which a party can make of information *which it obtains by virtue of the discovery process*.²⁵ Rule 26(c) does not contemplate the use of protective orders to enjoin a party from the lawful pursuit of authority or information outside the scope of discovery. With these guidelines in mind, the Court turns to Defendants’ requests for relief.

The Court first notes that it denied Defendants’ motion to stay the administrative proceedings before the Environmental Appeals Board regarding the Secretary’s Cease and Desist Order in a separate order issued on November 16, 2012.²⁶ Of the remaining seven grounds for relief pursued by Defendants in their motion, only two pertain to discovery. The first is a request that this Court compel DNREC to comply with Superior Court Civil Rule 26. Defendants seemingly allege that DNREC committed a discovery violation by continuing to inspect Defendants’

²³ Super Ct. Civ. R. 26(c) (emphasis in original). This rule is modeled closely after its federal counterpart. *See* Fed. R. Civ. P. 26(c)(1).

²⁴ *U.S. Die Casting Dev. Co. v. Security First Corp.*, 1995 WL 301414, at *2 (Del. Ch. Apr. 28, 1995).

²⁵ *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (Protective orders are “limited to the context of pretrial civil discovery” and “are not intended to restrict the dissemination of information gained from other sources.”).

²⁶ *See Order Upon Defs.’ Mot. for Stay of Admin. Proceedings*, E-File 47824961.

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facility even after the initiation of the present lawsuit. Curiously, at the time that Defendants filed the present motion, discovery had not yet commenced in this case. DNREC reserves the right to enter and inspect Defendants' facility at any time to ensure compliance with the terms of their permit.²⁷ Routine inspections of Defendants' facility, conducted pursuant to DNREC's express authority, do not implicate Rule 26 merely because litigation has commenced. Accordingly, Defendants' allegation that DNREC has violated Rule 26 by continuing to inspect Defendants' facility is unfounded.

The only remaining request that implicates discovery in the present case is that asking the Court to place the identity of Defendants' customers under seal. In support of this request, Defendants seemingly rely on Superior Court Civil Rule 5(g)(2), which protects the interests of litigants against the public dissemination of potentially sensitive, non-public information.²⁸ But the identities of Defendants' customers are public information that falls outside the reach of this rule. Accordingly, the Court cannot fashion the requested relief.

²⁷ See 7 Del. Admin. C. § 1301-4.1.9.2. The express terms of Defendants' permit also preserved DNREC's right to inspect the facility. See Resource Recovery Facility Permit SW-09/03, Ex. A, Defendants Opening Brief in Support of Their Motion to Stay, e-file 47162732, at 2.

²⁸ The relevant portion of Superior Court Civil Rule 5(g)(2) provides:
Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of this Court specifying those Court Records, categories of Court Records, or portions thereof which shall be placed under seal
Super. Ct. Civ. R. 5(g)(2).

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The remainder of Defendants' prayer for relief asks the Court to enjoin DNREC from enforcing solid waste regulations that are within its clear authority to enforce.²⁹ Rule 26(c) does not contemplate the use of protective orders to interfere with the prospective enforcement of administrative regulations simply because a matter is in litigation. DNREC retains the right to conduct routine inspections at MDE's facility and collect mulch product samples for analysis.³⁰ Furthermore, Rule 26(c) does not authorize the Court to enjoin DNREC from communicating with Defendants' customers or client base. DNREC is mandated by statute to notify the public of the release or imminent threat of a release of a hazardous substance such as arsenic.³¹ In this case, analysis of mulch samples collected May 17, 2012, at the

²⁹ See 7 Del. C. § 4701(a)(4) (granting DNREC the authority to “[m]ake and enforce regulations relating to the protection, care and use of the areas it administers”); 7 Del. C. § 6005(a) (vesting authority in the DNREC secretary to enforce 7 Del. C. Ch. 60 and the solid waste regulations promulgated thereunder).

³⁰ See, e.g., 7 Del. C. § 9106(a)(2) (permitting the Secretary and/or his agents to enter, “at reasonable times, upon any real property, public or private, to conduct sampling, inspection, examination, and investigation evaluating the release or imminent threat of release” of hazardous substances such as arsenic or PCBs); see also *DNREC Compliance Enforcement Response Guide*, Ch. 3, § II.C, available at <http://www.dnrec.state.de.us/dnrec2000/Admin/Enforcement/Guide/Chapter%20Three.pdf>. The permit contained additional sampling and analysis requirements, with DNREC reserving the right to collect composite samples of MDE's mulch product on a quarterly basis. See Cease and Desist Order, *supra* note 18, at 4-5.

³¹ See 7 Del. C. § 9107(a)(1) (requiring the Secretary to provide public notice of the release or imminent threat of release of hazardous substances within 20 days of his determination of that fact); *id.* § 9103(12)(b) (defining hazardous substances as those “defined in [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERLA), 42 U.S.C. § 9601 *et seq.*]”); *United States v. Honeywell, Inc.*, 542 F.Supp.2d 1188 (E.D. Cal. 2008) (stating that arsenic

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facility by DNREC's Solid & Hazardous Waste Management Section revealed high concentrations of arsenic, chromium, and PCBs that exceed regulatory criteria in MDE's permit. Therefore, DNREC had a legal duty to inform the public, including MDE's customers, of this contamination. The commencement of this litigation does not relieve DNREC of its obligation to protect public health and safety. The relief Defendants seek in their motion lies beyond the scope of Rule 26(c). Accordingly, Defendants Motion for a Protective Order is hereby **DENIED**.

IT IS SO ORDERED.

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

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is a "hazardous substance" under CERCLA).