

The court scheduled a hearing on June 8, 2006, to give the defendants an opportunity to present a proposed plan by a qualified engineer for the elimination of the excessive runoff.

At that hearing, defendants offered the testimony of a registered professional engineer, Billy D. McSpadden, who testified that he had recommended certain measures to control the excessive runoff and was working with the defendants to develop and implement a plan. He testified that he expected to have the plan developed and implemented within two weeks. Based upon this testimony, the court continued to withhold issuance of the preliminary injunction.

On July 6, 2006, plaintiffs filed a motion for an order compelling defendants to show cause why they failed to present and implement a plan designed to eliminate the nuisance and why an injunction should not issue. The court scheduled a hearing on this motion for September 5, 2006, but the hearing was rescheduled to September 28, and then to October 31.

At the hearing on October 31 which extended into November 1, 2006, the plaintiffs offered photographs dramatically demonstrating that large quantities of storm-water runoff from defendants' farms continued to flow onto the properties of plaintiffs, and into the West Branch of Little River, which flows in close proximity to their properties. The runoff contained silt and mud, and there was evidence at this hearing, as there had been at the first hearing, that it also contained pollutants.

Plaintiffs also presented the testimony of Joseph E. Patrick, a registered professional engineer. Patrick testified that the steps taken by defendants to control the excessive runoff were inadequate and suggested additional measures that should be

employed. One suggestion was that the existing silt fences be replaced with Type A silt fences which are constructed using metal posts and hog wire. He also testified that the temporary sediment traps located on the farms are improperly designed and are ineffective.

The evidence presented at that hearing showed unmistakably that the measures taken by defendants up to that point to control storm-water runoff from their chicken house sites had been unsuccessful, and that the plaintiffs continued to suffer injury.

A further and final hearing was conducted on April 4, 2007, at which the court heard testimony from several witnesses presented by the defendants, including Andy Hughes, a biologist experienced in wastewater management. He testified that he was engaged by the defendants to prepare an erosion control plan and that his plan supplemented the one previously made by Billy McSpadden by recommending greater amounts of ground cover through the use of vegetation in some areas and the use of gravel in others. He also recommended that the paving of the road adjacent to the farms would greatly reduce silt runoff onto the property of adjoining landowners. He testified that his inspection of the farms shortly before the hearing showed that on the Gary Gray farm many of his recommendations had been implemented by the placement of sod in some areas, seeding in other areas, and by the addition of gravel. He testified that "lush" grass was growing and that all the silt he observed was trapped behind the silt fences. He testified that substantial grass was growing on both farms but that there were bare spots on the Larry Gray farm that needed additional attention.

Billy McSpadden testified that there had been improvements at the farms since the last hearing due to over-seeding, sod placement, the additional of gravel, and the

grading of ditches. He, too, testified that paving the adjoining public road would be effective in removing storm water.

Ronnie Murphy, who is employed by the Alabama Department of Agriculture and Industries, and who is experienced in soil conservation and runoff issues, testified that he had inspected the farms and that the management practices he observed were adequate but acknowledged that they were not as good as they could be. He suggested that mulch and hay be added in some areas, and stated that conditions should continue to improve if managed properly.

Ray Hilburn, who is also employed by the Alabama Department of Agriculture and Industries, and who holds a degree in poultry science, also testified. He testified to the presence of sod and young rye grass on the farms. He stated that he saw no evidence of excessive erosion or of silt runoff into Harrison Creek but that silt had accumulated in the ditches of the adjoining public road.

Richard Huscher, an employee of the Alabama Department of Environmental Management, who holds a masters degree in biology, testified that the Gray farms were subject to certain ADEM standards applicable during the construction phase of the chicken house construction because more than an acre of land was disturbed. He stated that initially the Gary Gray farm was not in compliance with the storm-water runoff best management practices and was cited for violations, but that there has now been compliance with those requirements at the Gary Gray farm.

Huscher stated that the Larry Gray farm is now also in compliance with ADEM regulations but he recommended that the stand of grass be enhanced on that property. He testified that the sediment traps on the farms were adequate as long as they are

properly maintained. He acknowledged that there are bacterial levels in Harrison Creek but insisted that they do not exceed ADEM's standards.

Fred Leslie, chief of field operations for the Alabama Department of Environmental Management, testified that he supervised the investigator who did the field testing of waters in Little River and Harrison Creek. Samples were taken on March 6-8, 2007. He stated that the tests showed nothing "particularly worrisome," and nothing in violation of ADEM's water use criteria. He reported that the greatest amount of pollutants found were upgrade from the Gray farms (but downgrade from an adjoining cattle farm), and that a very low pollutant count was found downgrade from the Gray farms.

In rebuttal to the testimony of the above-mentioned witnesses, plaintiff Nicely testified that she was continuing to experience runoff from the Gary Gray farm onto her property and into Harrison Creek. She stated that one of the silt fences on the Larry Gray farm was down and that the silt that is supposed to be captured by the fence flows into the public road and from the road runs onto plaintiff Goodwin's property.

Plaintiff Goodwin testified that water continues to run onto the Goodwin property from the Gray farms and has caused the grass in the yard to turn yellow. She, too, stated that a silt fence on the Larry Gray farm was down and that mud and silt has come into her mother's yard as a result.

At the request of the defendants and the acquiescence of the plaintiffs, the court accompanied by counsel for all the parties, make a view of the subject farms on April 5, 2007.

The court made the following observations on the Larry Gray farm: the silt fence near the Goodwin property appeared to be in tact but appeared inadequate to effectively retard the flow of rushing storm water; the temporary sediment traps were nearly full; the ground cover was very thin on large areas between the Goodwin property and the chicken house nearest that property; the ground cover on the Gary Gray side of the Larry Gray chicken houses was very good; hay bails were poorly maintained; gravel was scarce, and vegetation between the upper temporary sediment trap and the nearest chicken house was very poor.

The court made the following observations on the Gary Gray farm: sod was present in some areas; storm water from the chicken house nearest the property of plaintiff Nicely was directed by a large pipe or culvert; the water from this pipe flows into a riprap slope; from there the water flows onto a wetland area on the Nicely property adjoining Harrison Creek; an extended silt fence is located below the houses in the direction of Harrison Creek; the silt fences were well maintained but appeared inadequate to deter high velocity storm water; vegetation around the houses was generally good except on the lower side of the upper house; and some gravel was present at the end of the upper house but appeared inadequate.

Following the view, the court inquired of counsel if they would agree for the court to make another view of the farm without counsel present during a rain event, and they agreed. The court attempted to make such a view on one occasion but the rain had stopped upon its arrival. Rain has been so limited and sporadic that a view during a rain event has not been accomplished.

The matter is now submitted on the issue of whether a permanent injunction should issue against the operation of the subject chicken houses.

The court hereby confirms its finding made in an earlier order that excessive storm-water runoff of silt, mud, and pollutants from the construction sites of the subject chicken houses flowed onto the plaintiffs' properties and constituted a nuisance, and the court further finds that based upon the evidence presented at the hearings on October 31 and November 1, 2006, that condition continued to exist at that time.

The evidence presented at the hearing on April 3, 2007, and the court's view of the farms, convince the court that some of the measures implemented by defendants have reduced the amount of storm-water runoff onto the properties of the plaintiffs. The court finds, however, that the plaintiffs are entitled to further abatement of the nuisance.

It has been held that a court, before granting or refusing injunctive relief, should consider the question of abatement of the nuisance by improved methods. *Martin Bldg. Co. v. Imperial Laundry Co.*, 124 So. 82, 220 Ala. 90 (Ala. 1929). It has also been held that in lieu of enjoining the operation of a business that results in injury created by a nuisance, the court can apply the "comparative injury doctrine" and place continuing restrictions on the way the business is operated as a means of minimizing the injury created by a nuisance. *Boggan v. Waste Away Group*, 585 So.2d 1356 (Ala. 1991). The court finds that the application of such doctrine is appropriate in this case.

Accordingly, it is adjudged that the defendants are hereby enjoined as follows:

1. The defendants shall maintain ground cover on all areas of their farms that subject plaintiffs' property to ground water runoff. The ground cover shall be thick vegetation maintained year-round with over-seeding of rye grass to insure adequate vegetation in the winter. Gravel shall be used as ground cover in those areas used for driveways.

2. Larry Gray shall forthwith take measures to enhance the vegetation in the area between his chicken houses and the Goodwin property.
3. In the area of water flow from the culverts on the Larry Gray farm to the temporary sediment trap located nearest Gray Road and the property of Goodwin and Lowman, Larry Gray shall triple the area covered in riprap; he shall also place riprap in the slope or ditch between the upper temporary sediment trap and the culvert that directs storm water into it.
4. The defendants shall maintain the temporary sediment traps now in use, so as to make them effective in entrapping silt and turbid water flowing into them regardless of the size and intensity of a rainfall event, modifying the traps if necessary to accomplish this objective. The traps shall be cleaned out no less than once per year.
5. The defendants shall replace the existing silt fences with Type A silt fences constructed with metal posts, hog wire, and other material specified for a Type A silt fence in a manner that makes them effective in entrapping silt regardless of the size or intensity of a rainfall event. Sediment build-up at the fences shall be removed on a regular basis.
6. The defendants shall forthwith replace the existing bails of hay now in use with new ones and shall replace the bails regularly as they become ineffective in deterring the flow of water.
7. Gary Gray and Patsy Gray shall forthwith take measures to enhance the vegetation on the lower side of their upper house, and shall add gravel on the driveway at the end of the upper house.
8. The defendants shall install and maintain check dams as recommended in the management plan submitted by Billy D. McSpadden.
9. The defendants shall use their best efforts to insure that the ditches along the public road adjoining their property are maintained and cleaned out as needed, and shall further use their best efforts to obtain the paving of that road by the appropriate public authority.
10. In addition to the specific requirements set out herein, the defendants shall employ whatever measures may be reasonable and necessary to prevent excessive storm water from running from their properties onto the properties of the plaintiffs.
11. The defendants shall utilize methods to reduce the presence of flies at the chicken houses.

12. The defendants shall utilize the services of a certified waste hauler for the removal of waste from the chicken houses and shall dispose of the waste in accordance with Alabama Department of Environmental Management regulations.


It is adjudged that this is a **permanent and continuing injunction**, and this court shall retain continuing jurisdiction of this action for purposes of modification and enforcement. For the violation of the injunction, the defendants shall be subject to the contempt powers of the court including the imposition of daily fines, the awarding of attorney fees, and other sanctions authorized by law.

The reference to defendants in this order is to Larry Gray, individually, and Larry Gray d/b/a Larry Gray Farms; and Gary Gray and Patsy Gray, individually, and d/b/a Gray Farms d/b/a P.J.'s Poultry Playhouse.

Other relief is denied except for matters that are due to be submitted to a jury.

DATED August 10, 2007.

ED
AUG 10 2007
CLERK
DEAL COUNTY


Randall L. Cole
CIRCUIT JUDGE

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