



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUG REED AND NANCY REED	:	
	:	
v.	:	EHB Docket No. 2022-095-B
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: June 25, 2024
PROTECTION and RENEWABLE NATURAL	:	
PRODUCTS, LLC	:	

ADJUDICATION

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board finds that appellants have not met their burden of proving by a preponderance of the evidence the Department acted unreasonably or contrary to the law when it issued an individual NPDES permit for the discharge of industrial stormwater to permittee. The appellants have not demonstrated that the Department erred by failing to include certain permit requirements/site-specific conditions or effluent limitations in the permit.

Background

On September 30, 2022, the Pennsylvania Department of Environmental Protection (“the Department”) issued NPDES Permit No. PA0290548 (“Permit”) to Renewable Natural Products (“Renewable”) located at 4053 Pike Road, Henderson Township, Pennsylvania (“Site”). Renewable is engaged in timber industry activities at the Site. The Permit authorizes the discharge of industrial stormwater to an unnamed tributary to Stump Creek. Doug Reed (“Mr. Reed”) and Nancy Reed (“Ms. Reed”) (collectively, “the Reeds” or “Appellants”) own and reside at a property adjacent to the Site with an address of 4165 Pike Road, Henderson Township, Pennsylvania (the “Reed Property” or the “Property”). On October 30, 2022, the Reeds filed a Notice of Appeal with

the Environmental Hearing Board (“the Board”) challenging the Department’s issuance of the Permit. In general, the Reeds asserted that Renewable’s activities at the Site created environmental issues on the Reed Property and objected that the terms of the Permit lacked sufficient requirements to address their concerns.

The matter proceeded through discovery and the filing of prehearing memoranda. The Department filed two motions in limine, one to exclude previously unidentified expert witnesses and one to exclude previously unidentified fact witnesses. The Board granted the Department’s motion as to expert witnesses and denied the Department’s motion as to fact witnesses. On December 12, 2023, a one-day hearing was held in the Board’s Hearing Room in Erie, Pennsylvania. The Reeds filed their post-hearing brief on February 14, 2024 and the Department and Renewable filed post-hearing briefs on March 7, 2024. The Reeds did not file a reply brief.

FINDINGS OF FACT

Parties

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001 (“Clean Streams Law”); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 (“Administrative Code”); and the rules and regulations promulgated thereunder (“Regulations”). (Parties Joint Stipulation Regarding Facts No. “Stip.” 1).

2. Appellants, Doug Reed and Nancy Adams, a/k/a Nancy Reed, reside at property located at 4165 Pike Road, Henderson Township, Pennsylvania (“the Property” or “the Reed Property”). (Stip. 3).

3. Permittee, Renewable Natural Products, Inc. (“Renewable”) is a Pennsylvania corporation with a mailing address of 350 Main Street, Kersey, PA 15846. (Jt. Stip. 4) and is engaged in the timber industry. (Transcripts of Hearing Testimony Page No. (“T.”) 167).

The Renewable Site

4. Renewable conducts its timber operations at 4053 Pike Road, Henderson Township, Jefferson County (the “Site” or the “Renewable Site”). (T. 140).

5. Pike Road is a dirt road where it bisects the Site. (Stip. 22).

6. The Site is located on both the north and south sides of Pike Road. (Stip. 19).

7. From approximately the years 2000-2010 there was no industrial activity on the Site. (T. 17-18).

8. At some time beginning 2010, industrial operations began and gradually expanded at the Site. (T. 19, 21, 25, 77).

9. For approximately 10 years, industrial sawmill activities were conducted at the Site by operators other than Renewable. (T. 91).

10. Prior to Renewable, D&F Lumber conducted operations at the Site. (T. 141-42).

11. Renewable began its operations at the Site in the Spring of 2022. (T. 141).

12. George Heigel (“Mr. Heigel”) is the owner and operator of Renewable. (T. 140).

13. Renewable primarily uses the Site as a log yard where it grades white oak logs and redistributes the logs to other entities which manufacture those logs at other sites. Renewable also sends logs to be processed into boards off site. Once the logs have been processed into boards, they are returned to the Site where Renewable processes the boards into trim and floor pieces. (T. 143).

14. Renewable does not apply chemicals or preservatives to wood at the Site. (T. 185).

15. The Site includes a berm that surrounds the south, east, and north sides of the Site and extends a bit to the west. (T. 122-23).

16. The berm at the Site was preexisting but was raised in certain spots by Mr. Heigel to make it a level 3 feet. (T. 151).

17. The Site has two outfalls, known as Outfall 001 and Outfall 002. (R-Ex. 1). Outfall 001 is located on the North side of Pike Road at the western side of the Site. (*Id.*). Outfall 002 is located on the South side of Pike Road towards the western side of the Site. (*Id.*).

18. The Site is graded to encourage sheet flow to the outfall locations. (T. 123).

19. The Site contains a sediment pond for catching stormwater runoff. (T. 168, 192).

20. The Site slopes to the north and the west. (T. 122).

The Reed Property

21. The Reeds own the Property which surrounds and abuts the Site. (Stip. 20).

22. The Reed Property is on both the north and south sides of Pike Road. (R-Ex. 1). The Property consists of three parcels that total approximately 155 to 160 acres. (T. 8).

23. The Reeds reside on the Property on the north side of Pike Road. (Stip. 21).

24. The Reeds keep cattle on the Property and grow and harvest hay on the Property. (T. 14, 38, 79-80).

25. The Property contains two water wells and a pond. (T. 12-13; R-Ex. 1).

26. The Property sits at a lower elevation than the Renewable Site. (T. 89-90, 122).

NPDES Permits

27. All entities that discharge pollutants into waters of the Commonwealth must first obtain a National Pollutant Discharge Elimination System (“NPDES”) permit for their discharges,

as required by the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., and the Clean Streams Law. (Stip. 2).

28. An NPDES permit for industrial stormwater regulates the discharge of stormwater from an industrial facility. (T. 209).

29. Federal regulations require facilities that fall into specific classifications to obtain an NPDES permit for the discharge of stormwater if the industrial activity is exposed to stormwater. These permits are designed to ensure that proper Best Management Practices (“BMPs”) are installed and managed and that the receiving waters uses are protected from the stormwater discharge. (T. 209).

30. The PAG-03 general permit is issued to the Commonwealth by the EPA allowing the Department to issue coverage to all facilities across the Commonwealth that meet certain criteria under the general permit. (T. 210-12).

31. The PAG-03 general permit contains different appendices that are associated with specific industrial activities to ensure the conditions and requirements of the coverage of a facility are tailored to the specific type of industrial activity it conducts. (T. 212).

32. Coverage conditions under the PAG-03 general permit do not vary from facility to facility that fall within a specific industrial activity category. (T. 212).

Permit Application Review

33. On March 18, 2022, Renewable submitted a permit application (“Application”) to the Department for the discharge of industrial stormwater from the Site. (Stip. 5).

34. The Application proposed to discharge industrial stormwater to an unnamed tributary to Stump Run at two outfall locations. (Stip. 7).

35. Stump Run is designated and protected for Cold Water Fishes under 25 Pa. Code § 93.9s. (Stip. 8).

36. By the time of the Application’s submission, the Department’s statewide General Permit for the Discharge of Industrial Stormwater (“PAG-03”) had expired on September 23, 2021. (Stip. 9).

37. The Application was considered under the NPDES individual permit plan due to PAG-03’s expiration. Had PAG-03 not been expired, the Application would have been reviewed under the general permit plan. (T. 210).

38. Adam Pesek (“Mr. Pesek”) is employed with the Department in the Clean Water Program of the Northwest Regional Office as an environmental engineer. (T. 157).

39. Mr. Pesek conducted an administrative completeness and technical review of the Application for the Permit and drafted the Permit. (T. 166, 174-175).

40. Different industry categories have different permitting requirements or effluent limitation guidelines in industrial stormwater permits. (T. 166-167).

41. Renewable’s proposed industrial activity was primarily timber industry activity. (T. 167).

42. Pollutants typically found in industrial stormwater from a timber facility are total suspended solids, pH and chemical oxygen demand (T. 167).

43. Mr. Pesek referred to the PAG-03 in drafting the Permit and considered the appendix applicable to the timber industry in establishing the parameters of the Permit (T. 172-73, 185).

44. Mr. Pesek was able to eliminate certain parameters in the permit because Renewable did not propose to utilize treatment chemicals/preservatives in its industrial activities. (T. 185).

45. Mr. Pesek research showed that there were not any applicable federal effluent limit guidelines (“ELGs”) for stormwater for the timber industry. (T. 185).

46. Mr. Pesek reviewed Renewable’s compliance history and did not find any open violations. (T. 182).

47. Mr. Pesek’s review included consideration of the designated use of Stump Creek, specifically that it was not a special protection watershed and therefore the Permit did not require a more stringent criterion. (T. 183).

48. Mr. Pesek considered past sampling results that were submitted from the former D&F Lumber facility which showed effluent concentration from the outfalls were well below the most stringent state water quality criteria. (T. 185-86).

49. As part of his technical review, Mr. Pesek conducted a site visit of the Renewable Site in the summer of 2022 to observe the layout of the Site and to evaluate the implementation/installments of the proposed BMPs. (T. at 167-68).

50. During the site visit, Mr. Pesek observed cleanup occurring, berms in place around the perimeter of the facility, a sediment pond on the southern side of the facility for catching runoff water, a baghouse in place to collect sawdust and a secondary containment for a diesel tank on the Site (T. 168).

51. On June 17, 2022, the Department provided a copy of the draft NPDES Permit to the Reeds via email. (Stip. 10).

52. On July 9, 2023, the Department published notice of the draft NPDES Permit in the Pennsylvania Bulletin. (Stip. 11).

53. On August 8, 2022, the Department received written comments on the draft NPDES Permit from the Reeds, through their counsel. (Stip. 12).

54. The Department reviewed the Reeds' comments and prepared a Fact Sheet Addendum to address their comments. (T. 179; Ex. D-9).

55. On September 30, 2022, the Department issued individual NPDES Permit No. PA0290548 to Renewable authorizing the discharge of industrial stormwater to an unnamed tributary to Stump Creek for a period of five years. (Stip. 13).

56. The Permit incorporates the monitoring requirements and benchmark values from the PAG-03. (Stip. 14).

57. The Permit set monitoring requirements for Outfalls 001 and 002 for pH, Chemical Oxygen Demand, and Total Suspended Solids. (Stip. 15, T. 184).

58. The Permit set benchmark values of 120 mg/L for Chemical Oxygen Demand and 100 mg/L for Total Suspended Solids. (Stip. 16; T. 186-87).

59. In addition to the monitoring requirements and benchmark values, other conditions were incorporated into the Permit, including best management practices to manage stormwater at the site (e.g. berming storage, secondary containment, minimizing wood residue piles, baghouses and closing dumpster lids). (T. 189-191).

60. The Permit does not contain any effluent limitations for specific parameters. (Stip. 17; T. 188).

61. The subject facility in this matter does not treat wastewater or sewage, which would typically be associated with numeric effluent limitations. (T. 217-18).

62. The PAG-03 did not include numeric effluent limitations for the type of timber activity proposed. (T. 216-217).

63. Industrial stormwater permits generally do not include numeric limits unless they fall under an ELG. (T. 216).

64. The Permit does not contain any site-specific conditions. (T. 206).

65. On October 30, 2022, Appellants filed an appeal of the Permit. (Stip. 18).

The Reeds' Environmental and Health Issues

66. After heavy rain events, the Reeds have observed soil movement/erosion and debris on the Property. (T. 14-15).

67. The Reeds have observed sawdust covering various surfaces on their property and on Pike Road. (T. 30; R-Ex.1).

68. The Reeds do not drink the well water and only use it to wash clothes, bathe and to water their cows. (T. 29).

69. Due to their environmental and personal health concerns, at some time in or around 2015 or 2016, Appellant Nancy Reed contacted the Department's Knox Office for assistance (T. 30-31).

70. In or around that time, Department representative Vince King visited the Appellants' property and collected a water sample. (T. 48-49).

71. Appellants installed a filtration system for their well water and regularly treat the water with Clorox (T. 39, 49, 103, 105).

DISCUSSION

Legal Standard

This matter involves a third-party appeal filed by the Reeds of the Permit the Department issued to Renewable. In a third-party permit appeal, in order to be successful, the party challenging the Department's permit decision must show by a preponderance of the evidence that the Department acted unreasonably, contrary to the law, that its decision to issue the permit is not supported by the facts, or that its actions are inconsistent with the Department's obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269. The Board defines "preponderance of the evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Telegraphis v. DEP*, 2021 EHB 279, 288; *Clancy v. DEP*, 2013 EHB 554, 572. Hence, the Reeds' evidence challenging the Department's issuance of the Permit must be greater than the evidence supporting the Department's decision to issue the Permit. *Stocker v. DEP*, 2022 EHB at 364; *Morrison v. DEP*, 2021 EHB 211, 218; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. The party challenging the permit issuance may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *United Refining*, 2016 EHB at 449 citing *Shuey v. DEP & Quality Aggregates, Inc.*, 2005 EHB 657, 711. The Board's review is de novo and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining*, supra.; see also *Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). Where the issues in an appeal require scientific or specialized knowledge or experience to understand, expert testimony is required. *Liddick v. DEP*, 2018 EHB 207, 216. Further, if an appellant challenging a

Department action raises a technical issue, they must come forward with technical evidence. *Id.*; *Prizm Asset. Mgmt. Co. v. DEP*, 2005 EHB 819, 844.

Analysis

In order to prevail in their challenge of the Department's permitting decision in this case, the Reeds must show by a preponderance of the evidence that the Department's decision to issue the Permit to Renewable was unreasonable, contrary to law, unsupported by the facts or in violation of the Pennsylvania Constitution. The Reeds' post-hearing brief set forth two lines of argument in support of their position that the Board should rule in their favor. First, the Reeds argue that the Department abused its discretion by failing to include site-specific considerations for the impact of stormwater discharges that they allege flow onto their Property. Secondly, they argue that the Department failed to include specific effluent limitations for Outfalls 001 and 002 at the Site. The Department and Renewable dispute each of these arguments. The Department asserts that it complied with its statutory and regulatory obligations and that it conducted a full technical review of Renewable's Application. As part of the review process, the Department states that it considered the comments provided by the Reeds prior to issuing the Permit. In addition, the Department argues that the Permit adequately regulates industrial stormwater that is discharged from the Site, ensuring that the receiving water, Stump Creek, is protected from pollution.

One of the unusual aspects of this case is that it involves an individual NPDES permit for discharging stormwater associated with industrial activities as opposed to a general permit. Certain classifications of facilities are required under federal regulation to obtain NPDES coverage for the discharge of stormwater if the industrial activities at the facility are exposed to stormwater. These permits are intended to ensure that proper BMPs are installed and managed and that the uses of the receiving waters are protected. The Department issues both general and individual permits

governing the discharge of stormwater under its NPDES permitting program. The general permit is a statewide permit that allows the Department to issue coverage for all facilities across the state that meet certain criteria. The PAG-03 general permit contains different appendices associated with certain industrial categories to tailor the requirements of the permit toward the particular industrial activity of the facility seeking coverage. Renewable's activities at the Site would be covered under Appendix D which is the category for timber product facilities. The conditions for general permit coverage do not vary from facility to facility within a specific industrial activity category. Most industrial facilities qualify for coverage under the general permit for the discharge of stormwater unless the facility is located in a special protection watershed, in which case, that facility would need to file for an individual NPDES permit. Renewable's Site is not located in a special protection watershed.

Justin Dickey ("Mr. Dickey") is the program manager for the Clean Water Program at the Department's North Regional Office and was the individual who issued the Permit. When asked why Renewable's Application was considered under the individual permit program rather than the general, Mr. Dickey, testified that at the time Renewable sought permit coverage, the PAG-03 general permit was expired and the Department could not issue new coverage under the general permit until it was renewed. Mr. Dickey stated that had the general permit been in effect when Renewable submitted its application, Renewable would have qualified for coverage under the general permit. The fact that Renewable was required to obtain an individual NPDES permit in this case resulted in the Department more closely scrutinizing the Application and provided the Reeds with opportunities for review and comment that would not have existed with a general permit. Despite that, the Reeds believe that the Department failed to properly consider specific

aspects of the Renewable Site and assert it did not include requirements in the Permit to address the impact of Renewable’s activities on them and their Property.

At the hearing, both Mr. and Ms. Reed presented testimony concerning the activities at the Site and the impacts they assert those activities have had on them and their Property. While the timeline of events is not always clear from the Reeds’ testimony, it appears to the Board that much of the Reeds’ arguments stem from their experience of living at the Property over time. The Reeds testified to numerous issues and challenges they have experienced that they say started in or around 2010 when sawmill activities, conducted by operators other than Renewable, began at the Site. The Reeds’ testimony was expansive in both the topics and timeframe it covered, much of which predated the Permit at issue and Renewable’s activities at the Site which did not begin until 2022. However, as we noted above, the Reeds narrowed their arguments in their post-hearing brief to the Permit that is on appeal. In their first line of argument, they assert that the Permit does not contain any site-specific conditions to account for any impact to their Property, including specific BMPs to control site runoff or manage stormwater they allege flows onto their Property. The Reeds cite to 25 Pa. Code § 92a.46, entitled “site-specific permit conditions” which provides as follows:

The Department may establish and include in an NPDES permit, any permit condition, as needed on a case-by-case basis, to assure protection of surface waters. These conditions may include a requirement to identify and implement the following:

- (1) BMPs reasonably necessary to achieve effluent limitations or standards or to carry out the purpose and intent of the Federal Act.
- (2) Toxic reduction activities, effluent limitations based on WETT, and other measures that eliminate, or substantially reduce releases of pollutants at their source.

25 Pa. Code § 92a.46.

The Reeds contend that the Department should have included site-specific permit conditions and stricter BMPs in the Permit and that the Department’s failure to do so constituted

an abuse of discretion. The Reeds failed to convince us that the Department abused its discretion in issuing the Permit without site-specific permit conditions or stricter BMPs. First, it is not clear to the Board what the Reeds precisely mean by their assertion that the Permit should have included site-specific conditions. Although the Reeds assert that the Permit should include site-specific conditions, neither their testimony at the hearing nor the arguments in their post-hearing brief identified any specific conditions or BMPs they believe should have been included in the Permit. Mr. Pesek, the principal Department staffer responsible for the Permit, testified that he thoroughly reviewed the Application which included conducting a visit to the Renewable Site for the purpose of viewing the layout and to determine which BMPs were installed and/or being implemented at the Site. (See T. 167-68). He included the BMPs in the Permit that he determined were adequate to protect the water quality of Stump Creek. It seems that one of the Reeds' concerns with the Permit's BMPs is that they are similar to those that are in the PAG-03 general permit and, therefore, in their opinion, have not been tailored to the Site. Mr. Pesek stated that he considered the BMPs in the general permit as a starting point for his review but that he went beyond that in his analysis and considered the uses of Stump Creek, the location of the stormwater discharge, the nature of the activities that Renewable intended to conduct at the Site and if there were any applicable federal ELGs from Renewable's type of activities.

In the absence of proposing any additional permit conditions or BMPs, the Reeds appear to rely on their factual testimony to persuade the Board that the Permit conditions and BMPs in the Permit are inadequate because of the alleged impacts on them. However, our review of the factual record does not support the Reeds' position. As we understand it, the primary purpose of the Permit in this case is to protect the water quality of Stump Creek. The Reeds provided no evidence whatsoever, such as water samples or test results, demonstrating that the Permit's

conditions failed to protect Stump Creek. The only water sampling evidence discussed during the hearing was provided by Ms. Reed who testified that the Department collected a water sample from a pond on the Property in approximately 2016, long before Renewable was present at the Site or the Permit in question was issued.¹ The lack of any technical evidence demonstrating water quality issues in Stump Creek undercuts the Reeds' appeal.

The record clearly establishes that the Site generally sits topographically higher than Stump Creek and the Reed Property. Because the Reeds' Property is situated between the Site and Stump Creek, it is at least arguable that if the Permit fails to adequately address the stormwater discharged from the Site, the runoff that flows onto the Property has the potential to impact Stump Creek. However, the evidence the Reeds' presented at the hearing either does not support their allegations that the stormwater from Renewable's Site impacts their Property or, in the alternative, is rebutted by credible testimony from other witnesses. In their proposed findings of fact in their post-hearing brief, under a section entitled "Post-Individual NPDES Impacts to Appellants' Property," the Reeds list the ways in which Renewable's stormwater discharges have supposedly negatively affected them as follows: 1) the stormwater runoff accumulates around their house and Property; 2) the runoff picks up surface materials like sawdust which discharges through the Site's berms and onto the Property; 3) the outfalls do not collect or stop discharges from the Site; and 4) their well-water appears murky and has visible sediment. (See Reeds' Post-Hearing Brief, Proposed FoFs Nos. 68-71, at 9). The Reeds exclusively cite to portions of their testimony and to photographs that they provided at the hearing to support their factual proposals. After carefully reviewing the Reeds' testimony and evidence, we find that the Reeds' assertion that the post-permit

¹ Ms. Reed testified to these water samples, but no documentation of these tests or of their results was presented at the hearing.

stormwater runoff from the Site is the cause of the above-mentioned impacts to their Property, is not supported by a preponderance of the evidence.

The first issue with the testimony concerns the timing of many of the allegations. As we said before, the timeline of the Reeds' testimony was at times difficult to follow and many of their allegations involve activities that took place before Renewable was at the Site and/or prior to the Permit issuance. The cited testimony largely pertained to several photographs that made up Reed Exhibit 19. The first photograph was of a jar of water that Ms. Reed testified was collected on January 25, 2020 which was more than two years before the Permit issuance. Additionally, Ms. Reed showed the Board two samples of murky water during the hearing which she testified was collected by her from her kitchen sink in October 2023 and December 2023. The jar of water depicted in the photograph in Reed Exhibit 19 resembled the jars of water Ms. Reed presented at the hearing. We did not receive any substantive information about the well construction or maintenance. Nor did we receive information about whether the samples were collected before or after the filtration system that Reeds testified was installed on their well, and if it was after, why the system did not remove the sediment from the water samples presented at the hearing. Further, the Reeds failed to offer any explanation as to how the murkiness of their well-water is the result of Renewable's stormwater discharge. Not only did the Reeds offer no sampling evidence that could connect the Site's runoff to their well-water quality, but they failed to address the obvious timing issue that their well-water was murky more than two years before Renewable obtained its Permit to discharge as is evidenced by the January 2020 photograph. Without any further explanation from the Reeds, the evidence crucially undermines their assertion that the murky well-water is a consequence of Renewable's stormwater runoff. The next series of photos in Exhibit 19 show dead calves. Mr. Reed testified that the photographs of the dead calves were taken

between approximately 2017 and 2020. (See T. 100-101). Not only do these photographs predate the Permit on appeal but, like the discussion above pertaining to the well-water, the Reeds fail to explain how calves that died well before Renewable began activities at the Site are connected to Renewable's operations.

The final series of photos depict either water on and/or alongside the ditches of Pike Road or sawdust on and around Pike Road. Again, it is not clear exactly when these pictures were taken but Ms. Reed stated that they were after Renewable began operations at the Site. In this sequence of photos, the Renewable Site can only be seen in the first two pictures. In addition to the Site, these two photos show water on Pike Road and in the roadway ditches. It is difficult to discern from these photos where the water on Pike Road is originating from and, more importantly, the photographs do not make clear that Renewable is the source of this water. None of the Reeds' photographs contained in their Exhibit 19 clearly show water leaving the Site and entering their Property. As to photos that depict the sawdust, it is again unclear whether Renewable is the source of the sawdust.

At the hearing, Renewable presented testimony from its environmental consultant, Mr. Long, who was admitted as an expert in the fields of environmental science and engineering. As to the actual topography, Mr. Long testified that "[t]he Renewable [S]ite does set at a higher elevation, but it slopes to the north and the west, which would be away from the Reeds' [P]roperty." (T. 122). Mr. Long also viewed the photographs in the Reeds' Exhibit 19 that depict water on Pike Road and testified as follows:

Based on those pictures, what I see is some engineering design flaws with the township, I don't see proper roadway ditches that have been constructed, sloped, or maintained and I see the water running out into the roadway on that. There is approximately a hundred acres plus that drains to that area.

So during heavy storm events, it is possible that water from the surrounding contributing watershed could reach the road, which is what was visible in those pictures.

(T. 128).

The Reeds did not offer any evidence rebutting Mr. Long's testimony regarding the northwesterly slope of the Renewable Site or of the poor design and maintenance of the Township's roadway ditches. Additionally, Mr. Heigel, Renewable's owner and operator, testified to the stormwater management at the Site. Mr. Heigel improved the berms that had been in place, building up the low areas and grading the berms so that they were level. The Site also has a sediment pond that collects stormwater. Mr. Heigel stated that he has witnessed the stormwater pooling into the sediment pond and permeating into the ground and noted that the water does not even reach the outfalls. Mr. Heigel also stated that Renewable's operations could not be responsible for the sawdust along Pike Road because all of Renewable's machines are equipped with a dust collection system. He further provided that the Amish farmers in the area use sawdust for animal bedding and frequently haul sawdust in open vehicles on Pike Road. He stated that he does not haul sawdust on Pike Road past the Reeds' house because of the concerns that they expressed about sawdust from Renewable. Mr. Heigel testified that he believes the sawdust in the pictures presented by Ms. Reed do not come from Renewable and that the Amish farmers hauling animal bedding are the likely source.

In sum, the Reeds have not shown by a preponderance of the evidence that the Department abused its discretion by not including site-specific conditions in the Permit. The Reeds did not present convincing evidence showing that the stormwater discharged from the Site is impacting their Property or that it contains any contaminants or pollutants requiring additional permit conditions or stricter BMPs to protect the designated use of Stump Creek or the Commonwealth's surface waters. The Reeds' testimony and their photographs do not establish a causal connection

between the impacts they allege and the stormwater discharge from the Site, especially when the record is clear that these issues predate Renewable's operations by years.

In their second argument, the Reeds assert that the Department did not include specific effluent limitations for Outfalls 001 and 002 for the Renewable Site which neither the Department nor Renewable disputes. The Permit requires Renewable to monitor for total suspended solids, pH and chemical oxygen demand and contains benchmark values for suspended solids and chemical oxygen demand. Mr. Pesek testified that the monitoring requirements and benchmark values in the Permit were based off of the parameters set forth in the PAG-03 general permit. Mr. Pesek stated that there was nothing in the application or in his review that suggested that more stringent benchmark values or effluent limitations for other parameters were needed in the Permit.

The primary basis for the Reeds' argument that the Department should have included parameters with effluent limits is that the prior Site operator, D&F Lumber, was subject to effluent criteria in its PAG-03 permit requirements. The Reeds contend that even if there are slight differences between Renewable's and D&F Lumber's operations, their activities are functionally equivalent to one another. They argue that as such, the fact that the Department omitted effluent limitations from the parameters in Renewable's Permit that D&F Lumber was subject to "should strike the Board as incongruous." (Reeds' Post-Hearing Brief at 17). It is worth mentioning that the previous NPDES stormwater discharge permit that was issued to D&F Lumber was not offered into evidence. Hence, we have not seen or reviewed that permit or know what the alleged past prescribed effluent limitations were. No one from D&F Lumber was at the hearing to testify to the nature of its operations or to what extent those operations differed from or were similar to Renewable's activities at the Site. Merely pointing out that the previous operator's permit

contained effluent criteria and that Renewable's Permit does not, is not sufficient to establish that the Department abused its discretion in omitting specific effluent limits from the Permit.

Mr. Pesek testified that he had considered past sampling results that were submitted from the former D&F Lumber facility in his analysis. Those results showed that the effluent concentration from Outfalls 001 and 002 were well below the most stringent state water quality criteria and as such, he decided not to include those parameters in Renewable's Permit. (See T. 185-86). Based on this testimony, the Department clearly considered the effluent limitations that D&F Lumber's permit provided for and reasonably concluded that those effluent limitations were unnecessary in this Permit. Mr. Pesek further testified that total suspended solids, pH and chemical oxygen demand are the types of pollutants he would expect to find in industrial stormwater from a timber facility and that the Permit requires Renewable to monitor for all three. As the Board stated in *O'Reilly v. DEP*, 2001 EHB 19,

The overriding purpose of NPDES permits is to ensure that pollutants in discharges are controlled in the interest of protecting the quality of receiving streams. 25 Pa. Code § 92.3. It would not be practical for any given permit to contain limitations on every conceivable pollutant known to man. Each permit must focus upon pollutants that are likely to be contained in the discharge considering the nature of the activity that is involved. The regulatory agencies study each discharging activity either as a class or individually to assess what pollutants will typically be discharged by that activity, and permits for discharges associated with that activity will contain limitations on the discharge of those pollutants. See generally 25 Pa. Code § 92.31 (effluent standards).

at 32-33. Our words in *O'Reilly* ring true here. Renewable's operations involve timber industrial activity and the typical pollutants associated with that type of operation are total suspended solids, pH and chemical oxygen demand which the Department accounted for accordingly in the Permit to ensure the protection of Stump Creek.

As a final note, both of the Reeds' arguments raised concerns regarding the technical aspects of the Permit. When an appellant raises a technical allegation, they must come forward with technical evidence to prove such an allegation by a preponderance of the evidence. The Reeds' objections asserting that more stringent conditions are required for the Site, such as site-specific BMPs and effluent limitation parameters, are the kinds of assertions that require scientific, technical or specialized knowledge to assist the trier of fact in making an informed determination surrounding such issues. Pa. R. E. 702; 25 Pa. Code §§ 1021.123(a). The Reeds failed to call any expert witnesses at the hearing to support their position that their technical objections are valid ones. The Reeds' case might have been more compelling had they proposed what they believed the site-specific conditions and effluent limits should have been and provided a justifiable and scientific basis for those conditions. The Reeds did not offer any technical evidence demonstrating that the alleged water issues they have experienced through the years are the result of Renewable's stormwater discharge. They did not produce medical or expert technical evidence that the physical health conditions and environmental problems they alleged were related to the activities at Renewable and its stormwater discharge. This alleged link was only supported by their own testimony and several photographs that were in evidence at the hearing. The evidence presented is not sufficient to meet their burden to show by a preponderance of the evidence that the Permit issued by the Department was unreasonable, contrary to the law, not supported by the facts or inconsistent with the Department's obligations under the Pennsylvania Constitution.

Conclusion

The Reeds have not shown by a preponderance of the evidence that the Department acted unreasonably or contrary to the law by not including site-specific conditions or effluent limitations in Renewable's Permit. The evidence and testimony the Reeds presented did not support a finding

of the impacts they allege are due to Renewable’s stormwater discharge and their assertions were rebutted by credible expert testimony from both the Department and Renewable. Additionally, both of the Reeds’ objections are technical arguments and therefore, require technical evidence which the Reeds failed to provide.

CONCLUSIONS OF LAW

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001 (“Clean Streams Law”); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 (“Administrative Code”); and the rules and regulations promulgated thereunder.

2. In third party appeals of Department actions, the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. As the appellant in this case, the Reeds must show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution. *United Refining Company v. DEP*, 2016 EHB 442, 448; *aff'd*, *United Refining Company v. Dep't. of Env'tl. Prot.*, 163 A.2d. 1125 (Pa. Cmwlth. Ct. 2017); *Brockway Borough Mun. Auth. v. Dep't of Env'tl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. Ct. 2016).

4. The preponderance of the evidence standard requires that the Reeds meet their burden by showing that the evidence in favor of their proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. The Reeds’ evidence must be greater than the evidence that Renewable’s Discharge Permit was appropriate or in accordance with the applicable law. The Reeds may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *United*

Refining Company v. DEP, 2016 EHB 442, 449; *aff'd*, *United Refining Company v. Dep't. of Env'tl. Prot.*, 163 A.2d. 1125 (Pa. Cmwlt. Ct. 2017).

5. The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action challenged by the Reeds, the issuance of the Discharge Permit, was reasonable, lawful and supported by our de novo review of the facts. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1192.

6. The Reeds failed to prove by a preponderance of the evidence that the Department's decision to issue the Permit without certain permit requirements/conditions or effluent limitations that they believed should have been included was in error or not supported by the facts.

7. The Reeds failed to show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution in issuing the Permit. *See generally*, *Joshi v. DEP*, 2019 EHB 356.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUG REED AND NANCY REED :
 :
 v. : **EHB Docket No. 2022-095-B**
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and RENEWABLE NATURAL :
 PRODUCTS, LLC :

ORDER

AND NOW, this 25th day of June, 2024, it is hereby ORDERED that the Appellants’ appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark

SARAH L. CLARK
Judge

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Judge

DATED: June 25, 2024

c: DEP, General Law Division:
Attention: Maria Tolentino



(via electronic mail)

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