Virginia:
In the Circuit Court of the City of Richmond, John Marshall Courts Building

JEFF KELBLE OF THE POTOMAC RIVERKEEPER, INC., and MARK FRONDORF, THE SHENANDOAH RIVERKEEPER,	)	
Petitioners,	)	
v.	)	
COMMONWEALTH OF VIRGINIA, ex rel. VIRGINIA STATE WATER CONTROL BOARD, and THE VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY	)	**Case No.: CL13-4387**
Respondents,	)	
and	)	
VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., VIRGINIA BIOSOLIDS COUNCIL, VIRGINIA FARM BUREAU FEDERATION, and VIRGINIA AGRIBUSINESS COUNCIL,	)	
Intervenor-Respondents.	)	

ORDER

On the 16th day of September 2016, came the parties, by counsel, upon Petitioner's administrative appeal, under the Virginia Administrative Process Act, in response to amendments of regulations ("Regulations") promulgated by the Virginia State Water Control Board ("Board") and the Virginia Department of Environmental Quality ("DEQ") pertaining to the land application, marketing, and distribution of biosolids.

As defined by the Regulations, "biosolids" refers to "sewage sludge that has received an established treatment and is managed in a manner to meet the required pathogen control and vector attraction reduction, and contains concentrations of regulated pollutants below the ceiling limits ... such that it meets the standards established for use of biosolids for land application, marketing, or distribution." 9 Va. Admin. Code § 25-32-10(A); *see also* Commonwealth's App. Tab 10(c) at 1. By contrast, "sewage sludge" encompasses "any solid, semisolid, or liquid residue generated during the treatment of domestic sewage in a treatment works." *Id.*

Biosolids have been regulated by state and federal authorities for decades. As required by the Clean Water Act Amendments of 1987, the United States Environmental Protection Agency developed the Standards for the Use and Disposal of Sewage Sludge (40 C.F.R. § 503), which establishes minimum criteria for land using biosolids to condition soil or fertilize crops. Commonwealth's App. Tab 10(c) at 7. In 1996, Virginia overhauled its biosolids regulatory program to incorporate the federal standards. *See* 12 Va. Reg. 2651, 2652 (June 24, 1996) (codified at 9 Va. Admin. Code §§ 25-31, 25-32). Virginia's current regulatory program is more stringent than the federal requirements (for example, requiring public information meetings and detailed applications and permits before farms can receive biosolids). Commonwealth's App. Tab 7(c) at 9-10.

The Regulations were originally promulgated by the Virginia Department of Health. On January 1, 2008, regulatory oversight of the land application of biosolids was transferred from the Department of Health to the DEQ and the Board. *See* 2007 Va. Acts Ch. 881. The Board voted to amend the Regulations to reflect the transfer of regulatory oversight, but this exempt action did not allow substantive changes to be made. Commonwealth's App. Tab 31(a) at 1-2. On June 23, 2008, the Board issued a Notice of Intended Regulatory Action ("NOIRA") in the

Virginia Register of Regulations to make substantive changes to the Regulations. Commonwealth's App. Tab 5. The DEQ formed a technical advisory committee ("TAC") that conducted nine publically-noticed hearings from October 3, 2008 to September 22, 2009, when the Board voted to approve the amendments. Commonwealth's App. Tab 31(a) at 2; *see e.g.* Tabs 7(b), 9(b), 10(b), 11(b), 12(b), 14(b), and 15(b). The Regulations were reviewed by the Attorney General, the Department of Planning and Budget, the Secretary of Natural Resources, and the Governor before they were submitted to the Virginia Register of Regulations and published on July 29, 2013. The final public comment period ended on August 28, 2013, and the Regulations became effective on September 1, 2013.

Prior to the development of the challenged amendments to the Regulations, the General Assembly directed the Secretary of Natural Resources and the Secretary of Health and Human Resources to convene an Expert Panel to study potential health and environmental issues for biosolids use. H.J.R. 694 (2007). The Expert Panel was comprised of twenty one experts from diverse backgrounds. Commonwealth's App. Tab 4(c) at 1-2. The Expert Panel was aided by presentations of the DEQ and Department of Conservation and Recreation, and was provided with relevant background information including a bibliography of over sixty pertinent sources. Commonwealth's App. Tab 4(c) 6-10 and Appendix; Tabs 3(c)-(e). The Expert Panel met a total of twelve times before presenting a Final Report to the Governor and General Assembly on December 22, 2008. Commonwealth's App. Tab 4(c) at i. The Expert Panel concluded that land application is a viable reuse of biosolids that has been shown to be protective of the environment when applicable law and regulations are followed. Commonwealth's App. Tab 4(c) at 6, 15, 24 (stating that "the Panel uncovered no evidence or literature verifying a causal link between biosolids and illness," "as long as biosolids are applied in conformance with all state and federal

law and regulations, there is no scientific evidence of any toxic effect," and "it is important that biosolids be viewed as a resource ... Many Virginia's [sic] farmers depend on biosolids to provide nutrients and organic matter that enhance soil and crop production.... it is sensible to take advantage of the benefits of a product that is ever present and must be managed"). The timing of the proposed regulatory action allowed the Board and the DEQ to consider the findings and recommendations of the Expert Panel in its amendments to the Regulations. Commonwealth's App. Tab 5 at 2; Tab 30 at 2.

Petitioners contend (1) the amendments to the Regulations violate the Board's duties under Virginia Code § 62.1-44.19:3 to "ensure" that sewage sludge is regulated safely for human health and the environment, and to prevent the escape, flow, or discharge of sewage sludge into state waters in a manner that would cause "pollution" (as defined by Virginia Code § 62.1-44.3), and (2) the Board did not have substantial evidence to support its determination that the regulations fulfilled its statutory obligation under Va. Code § 62.1-44.19:3.

I. Standards of Review

In appealing an agency's decision to the circuit court, Petitioners have the burden of demonstrating an error of law that is subject to review by the Court. *See* Va. Code Ann. § 2.2-4027; *Crutchfield v. State Water Control Bd.*, 45 Va. App. 546, 553 (2005). Judicial review of an agency decision is limited to determining (1) whether the agency acted in accordance with law; (2) whether the agency made a procedural error which was not harmless error; and (3) whether the agency had sufficient evidentiary support for its findings of fact. *See Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 242 (1988).

Questions of law in an agency's decision are reviewed de novo. *Gordon v. Ford Motor Co.*, 55 Va. App. 363, 375 (2009). In interpreting a statute, courts will apply the plain meaning

unless the terms are ambiguous or applying the plain language would lead to an absurd result. *Baker v. Commonwealth,* 284 Va. 572, 576 (2012).

Questions of fact in an agency's decision are reviewed under the substantial evidence standard. An agency's factual determinations will be sustained unless, on consideration of the entire record, a reasonable mind would necessarily reach a different conclusion. *Alliance to Save the Mattaponi v. Commonwealth Dep't of Envtl. Quality ex rel. State Water Control Bd.*, 270 Va. 423, 441 (2005). In applying the substantial evidence standard, the facts are viewed in the light most favorable to sustaining the agency's action. *Crutchfield*, 45 Va. App. at 553. Courts will take into account the experience and specialized competence of the agency in reviewing purely factual issues and mixed questions of law and fact. *Browning-Ferris Indus. of S. Atl., Inc. v. Residents Involved in Saving the Env't, Inc.,* 254 Va. 278, 284 (1997).

"[W]here the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts." *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 244 (1988). In such a case, the agency's decision may be overturned only if it can be fairly characterized as "arbitrary and capricious and thus a clear abuse of delegated discretion." *French v. Va. Marine Res. Comm'n*, 64 Va. App. 226, 237 (2015). A decision is arbitrary and capricious if "there is no credible evidence in the record to support the finding and the agency arbitrarily disregarded uncontradicted evidence." *Palmer v. VMRC*, 48 Va. App. 78, 87 (2006) (internal citations omitted).

II. Analysis

Upon consideration of the administrative record, relevant statutory authority, and argument of counsel, the Court **FINDS** that the Board's amended Regulations fulfill the statutory

requirements of Virginia Code § 62.1-44.19:3, and that the record reflects substantial evidence supporting the Board's decision to approve the amended Regulations.

A. The Board's Statutory Duty to "Ensure" the Prevention of "Pollution"

The Court agrees with Respondents that Petitioners mischaracterize the first issue as a pure question of law. While the interpretation of the statutory language is a legal issue, whether the regulations' protective measures are adequate to prevent pollution is a factual determination. *See Envtl. Def. Fund, Inc. v. Va. State Water Control Bd.*, 15 Va. App. 271, 278 (1992) ("Proper judicial review of the Board's action must not be restricted to legal issues, but must encompass 'all . . . proofs' found within the entire record. Code § 9-6.14:17 [now § 2.2-4027]. Interrelated factual and legal issues must be considered together in the context of the entire record, with each examined under the appropriate standard of review."). As a mixed question of law and fact, the Court applies a presumption of official regularity and takes into account the experience and specialized competence of the administrative agency. *Browning-Ferris Indus.*, 254 Va. at 284.

In construing the meaning of "ensure" and "pollution," the Court looks first to Virginia Code § 62.1-44.19:3 to determine whether the language is clear and unambiguous. For the reasons stated by Respondents, the Court **FINDS** that the language of the statute is clear and unambiguous, and an application of its plain meaning would not lead to an absurd result. The General Assembly, by using the term "ensure," has not imposed strict liability for preventing discharge, but rather has vested the Board with discretion to promulgate regulations permitting discharge under certain statutory conditions. *See* Va. Code Ann. § 62.1-44.34:18(C). Likewise, the Court agrees that only the discharge of untreated sewage into state waters or soil is deemed to be pollution, absent a further determination of a nuisance, injury to public health or to the environment, or unsuitability for certain enumerated uses. *See* Va. Code Ann. § 62.1-44.3.

Applying this reading of the statute, the Board has clearly fulfilled its obligation to "ensure" the prevention of "pollution" under Virginia Code § 62.1-44.19:3.

B. Substantial Evidence Supports the Board's Decision

The Court also **FINDS** that there was substantial evidence to support the Board's decision to approve the amendments. The Board was aided by the report of the Expert Panel, which found that "no evidence or literature verified a causal link between biosolids and illness," and "as long as biosolids are applied in conformance with all state and federal law and regulations, there is no scientific evidence of any toxic effect to soil organisms, plants grown in treated soils, or to humans (via acute effects or bio-accumulation pathways) from inorganic trace elements (including heavy metals) found at the current concentrations in biosolids." Commonwealth's App. Tab 4(c) at 15.

The record supports the finding that the Board's determination was based on credible evidence and that the Board did not arbitrarily disregard uncontradicted evidence. The Board specifically addressed the issues raised by Petitioners and approved the amendments based on substantial evidence to the contrary. The Board heard staff presentation, testimony from interested persons both for and against the amendments (including Petitioners), and conducted lengthy discussion and deliberations. *See* Commonwealth's App. Tab 32 at 37-42 (Kelbe's testimony before the Board) and 53-63 (the Board's discussion of Kelbe's concerns). The DEQ considered all comments submitted during the public comment period and provided the Board with a summary response to each comment. Commonwealth's App. Tab 31(a) at 376-642. The DEQ specifically responded to comments (including those from Petitioners) related to environmental concerns such as water quality, karst topography, Total Maximum Daily Loads (TDMLs), slope and buffers. *Id.* at 408-24. The DEQ found the Regulations are designed to

manage the land application of biosolids in a manner that prevents runoff into surface waters and groundwater; that biosolids do not contribute to local nitrogen and phosphorus allocation any more than other well-managed agricultural operations; that organic matter in the biosolids helps to build and stabilize the soil thereby reducing erosion and runoff in the long term, that established buffer, setback, and slope restrictions were protective of state waters and karst topography; and that land application could occur under established conditions without negative environmental impact. *Id.* at 423-24.

Because the Court finds that the Board's amended Regulations fulfill the statutory requirements of Virginia Code § 62.1-44.19:3, and that the record reflects substantial evidence supporting the Board's decision, the Petitioners' request that the regulations be remanded is therefore **DENIED**.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order.

The Clerk is directed to forward a certified copy of this Order to counsel for the Plaintiff and counsel for the Defendants.

It is so **ORDERED**.

ENTER: 12/1/16

Joi J. Taylor, Judge