

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
POTOMAC RIVERKEEPER, INC.,

and

STEVAN HUDOCK,

Petitioners,

v.

Civil Action Nos. 12-AA-28
and 12-AA-29 - Consolidated

THOMAS L. CLARKE, DIRECTOR,
DIVISION OF MINING AND
RECLAMATION, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent,

and

NORTH MOUNTAIN SHALE, LLC,

Intervenor/Respondent.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION AND STANDARD OF REVIEW

This case involves two separate appeals from an order of the West Virginia Environmental Quality Board ("EQB") dated February 13, 2012. The EQB order affirmed in part and remanded in part the terms of a water discharge permit (known as an "NPDES" permit) issued by the West Virginia Department of Environmental Protection ("WVDEP") pursuant to the West Virginia Water Pollution Control Act, W.Va. Code §§ 22-11-1 to -30 ("WVWPCA") for stormwater discharges from a shale quarry in Berkeley County owned by North Mountain Shale, LLC ("NMS"). See EQB Order, p. 4. This Court reviews the EQB decision pursuant to W.Va. Code § 22B-1-9. As set out in *WVDEP v. Kingwood Coal Co.*, 490 S.E. 2d 823 (W.Va. 1997), this Court reviews findings of fact by the EQB under a deferential standard and

conclusions of law for simple error. Applying these standards, as discussed below, this Court hereby affirms the decision of the EQB.

II. DISCUSSION

NMS owns a shale quarry in Berkeley County which has obtained from WVDEP both a water discharge (“NPDES”) permit pursuant to the WVWPCA and a quarry permit pursuant to the West Virginia Quarry Reclamation Act, W.Va. Code §§ 22-4-1 to -24. *See* Certified Record, p. 1. Pursuant to the quarry permit, NMS must construct two sediment control ponds to reduce the loads of sediment and other pollutants which will leave its property as a result of quarrying activities and flow into adjacent streams. The discharges of pollutants, such as suspended solids, iron and manganese, are subject to “effluent limits” in the NPDES permit.

The WVWPCA provides that NPDES permits may be appealed to the EQB. W.Va. Code §§ 22-11-21. The EQB hears appeals *de novo* in trial-type hearings as to factual issues. *Kingwood Coal Co.*, 490 S.E. 2d at 834. Here, two parties filed separate appeals from terms of the NPDES permit to the EQB: the Potomac Riverkeeper, Inc. (“Riverkeeper”) and Stevan Hudock. The EQB heard the two appeals together, but did not otherwise consolidate them.

The Riverkeeper, WVDEP and NMS filed motions for summary judgment in advance of an evidentiary hearing. By order of June 3, 2011, the EQB granted motions for partial summary judgment by WVDEP and NMS and denied the Riverkeeper’s motion. The EQB then conducted an evidentiary hearing on the remaining issue on June 8, 2011. By order of February 13, 2012, the EQB generally affirmed WVDEP’s permit decision with some modifications (“EQB Order”).

Orders of the EQB may be appealed to this Court. W.Va. Code § 22B-3-3. The Riverkeeper and Hudock each filed petitions in this Court for judicial review of the EQB Order. The cases have been consolidated before this Court. This Court reviews findings of fact by the

EQB under a deferential standard and rulings of law for simple error. *Kingwood Coal Co.*, 490 S.E. 2d at 825.

There are two issues raised by the Riverkeeper in its appeal to this Court. First, whether the EQB (and WVDEP) imposed inappropriate technology-based effluent limits for total suspended solids (“TSS”). Second, whether the EQB (and WVDEP) properly declined to impose turbidity limits on discharges from NMS’s sediment ponds. Mr. Hudock has raised five separate issues: (i) whether the EQB properly declined to re-open the evidentiary hearing below to allow him to introduce evidence concerning NMS’s plans to use flocculant to meet its effluent limits; (ii) whether the EQB (and WVDEP) properly declined to impose a flow limit on stormwater discharges; (iii) whether the EQB properly declined to consider further permit modification to address concerns over sampling frequency; (iv) whether the EQB properly determined that it lacked authority under the WVWPCA to hear claims about depletion of well water and springs; and (v) whether the EQB properly granted a directed verdict as to claims that the permit application did not accurately represent the quality or quantity of water likely to be discharged. The Court addresses each Petitioner’s claims separately.

III. RIVERKEEPER’S APPEAL

WVDEP’s NPDES permit included limits on NMS’s discharge of total suspended solids (“TSS”). The permit allows a monthly average concentration of 35 milligrams per liter (mg/l) and a daily maximum of 70 mg/l. The Riverkeeper claims in its appeal that these limits did not represent “technology-based limits” developed by WVDEP after application of its “best professional judgment.” The Court disagrees.

WVDEP’s NPDES program is a federally-approved State program which generally mirrors an EPA-developed program adopted under the federal Clean Water Act. *See* 33 U.S.C. § 1342(k). Pursuant to that program, wastewater dischargers must obtain an NPDES

permit from WVDEP. W.Va. Code § 22-11-8. WVDEP is, at a minimum, required to impose technology-based limits which represent the level of treatment achievable for an industry segment after application of best practicable technology. *See* W.Va. Code St. R. (“WVCSR”) § 47-10-6.3.a. Then, if any of the planned discharges nonetheless threaten to exceed the in-stream concentrations of pollutants allowed by WVDEP’s “water quality standards” (*See* W.Va. Code § 22-11-7b & WVCSR §§ 47-2-1, *et seq.*), WVDEP must impose more stringent “water quality based” limits to ensure that the in-stream standards are not exceeded. *See* WVCSR § 47-10-6.3.d.

Initially, the Court is concerned that this claim was never timely raised by the Riverkeeper before the EQB. It appears that the original challenge to the TSS limits claimed that an EQB-approved “pollution diet” called a “total maximum daily load” (“TMDL”) did not authorize discharges from a new shale quarry, rather than a claim that WVDEP failed to impose technology-based limits. *See* NMS’s Br., pp. 6-7; WVDEP’s Br., pp. 6-7. However, even if it was timely raised, the Court concurs with the EQB and the discussions by WVDEP and NMS that: 1) the limits had already been recognized as appropriate technology-based limits in an EPA-approved TMDL for the Potomac River; 2) the limits were properly “borrowed” from a previous industry-wide “General NPDES” permit used statewide for quarries; and 3) the limits are identical to those adopted by EPA for controlling sediment from ponds used in the coal mining industry. *See* EQB Summary Judgment Order of June 3, 2011, pp. 4-7; NMS Br., pp. 2-5 & 8-12; WVDEP Br., pp. 5-10. The Court believes that it was appropriate and reasonable for WVDEP to consider these limits as representing the application of best practicable technology.

Next, the Riverkeeper claims that WVDEP and the EQB erred by not imposing “turbidity limits”¹ on discharges from NMS’s ponds. The turbidity standard is expressed as a

¹ Turbidity is a measure of water clarity as influenced by suspended particulates.

“net” limit—it prohibits a specific net increase in turbidity units and “shall be determined by measuring stream quality directly above and below the area when drainage from [a permitted activity] enters the affected stream.” WVCSR § 47-2-8.33 (App. E). The standard, then, presumes that the discharge at issue is made directly into a stream where the standard applies and that the “net” effect of the regulated discharge can be measured by sampling immediately upstream and downstream of the point where the discharge enters the stream. The standard does not apply to quarry operations, except in trout streams. WVCSR § 47-2-8.33, App. E, Table 1.

Here, all parties agree that the standard does not apply to the two streams into which NMS’s two ponds discharge directly (two unnamed tributaries of Mill Creek). Rather, it cannot here apply until those tributaries reach Mill Creek (which is considered a trout stream). WVDEP did not apply a turbidity limit on the discharges from NMS. The EQB affirmed that decision, finding that there is no feasible or reasonable way to isolate the effects of NMS’s discharges in Mill Creek, but did impose additional monitoring requirements. EQB Order, ¶ 1.9.

The EQB found that the turbidity standard could not be fairly applied to NMS’s discharges because that standard does not apply in the immediate receiving stream, and would apply instead only to the downstream waters of Mill Creek. By the time NMS’s discharges reach Mill Creek, though, the EQB found that they comprise only about 1 percent of the flows entering the stream, and that it would be unreasonable (and infeasible) to attribute a net increase in turbidity between any two points in Mill Creek to NMS. The Court agrees. The standard does not apply to the streams into which NMS will discharge directly, and the EQB reasonably found that a permit limit on NMS’s discharges cannot reasonably be devised to measure the net increase in turbidity between any two points downstream in Mill Creek.

IV. HUDOCK'S APPEAL

1. Hudock's Motion to Re-open EQB Proceeding to Challenge Flocculant Usage

Hudock claims that he learned for the first time, during parallel proceedings before the West Virginia Surface Mine Board ("SMB") in a challenge to NMS's quarry permit, that NMS might use flocculants² to control sediment discharges from its ponds, one of which will discharge to a stream which runs through Hudock's adjacent farm. He claims that because this fact was not revealed in the permit application process, his motion to re-open the record to challenge the potential use of flocculants should have been granted. The Court disagrees, and affirms the ruling of the EQB.

The Court agrees, as the EQB ruled, that Hudock's motion was late. *See* EQB Order, p. 9. More importantly, however, with the permission of NMS, the EQB ordered that before NMS could use flocculants in the pond which will discharge to a stream running through Hudock's property (Outlet 002), NMS would have to obtain a modification to its NPDES permit. EQB Order, p. 9. More recently, NMS has submitted an application to WVDEP for a modification to its permit asking for permission to use flocculant. Pending approval of the modification, the EQB's order prohibits NMS from discharging flocculant-treated water to the stream which flows through Hudock's property. Moreover, he will be able to challenge in another appeal to the EQB any approval by WVDEP to use flocculants—precisely the remedy he has sought from the EQB and seeks from this Court. Accordingly, this Court rules that the EQB has already provided Hudock with the relief he sought and that the issue is moot.

² Flocculation is "a process of contact and adhesion whereby dispersed particles are held together by weak physical interactions ultimately leading to phase separation by the formation of precipitates of larger than colloidal size." *Compendium of Chemical Terminology*, 2nd ed. (the "Goldbook") (compiled by A. D. McNaught and A. Wilkinson, Blackwell Scientific Publications, Oxford (1997)). The use of flocculants is a treatment method used to settle particles out of the water.

2. The EQB (and WVDEP) Properly Declined to Impose a Limit on Flows

The NPDES permit requires NMS to monitor the flow from its two discharge points, but does not impose limits on the quantity of the flows. Certified Record, p. 2. Hudock claimed that without a limit on the value of flows, WVDEP cannot ensure that discharges will not adversely affect his property. Hudock's EQB Br., ¶ II, pp. 6-7. The EQB granted a directed verdict to WVDEP on this issue. *See* EQB Order, p. 4. The Court concurs with the EQB's ruling.

The NPDES permit issued by WVDEP pursuant to the WVWPCA is concerned with the discharges of "pollutants" and with water quality; not with water quantity. *See* NMS's Br., pp. 10-11. The impacts of quarrying on water quantity are not, however, unregulated. They are expressly regulated by WVDEP under a separate permit program established under the West Virginia Quarry and Reclamation Act. *See* W.Va. Code §§ 22-4-5(b)(7) (requiring pre-quarrying assessment of base level water quantity); -14(f) (requiring a drainage control plan to "control water runoff, prevent erosion and provide adequate drainage control") & -16(b) (requiring replacement of springs and wells used by agricultural water users). NMS obtained a quarry permit under that statute, and Hudock had the right to challenge it before the SMB. *See* W.Va. Code § 22-4-25. In fact, it appears Hudock tried to bring this claim before the SMB, but his claim was untimely. *See* NMS Br., p. 12, n. 8. The Court rules that any claims about inadequate protection over water quantity are regulated under the Quarry and Reclamation Act rather than under the WVWPCA and were, therefore, not properly before the EQB.

3. Permit Monitoring Requirement

Below, the Riverkeeper—but not Hudock—called an expert witness to challenge whether the required discharge sampling frequency was sufficient. NMS and the Riverkeeper settled this challenge by agreeing to a change in the monitoring frequency which the EQB

accepted. *See* EQB Order, p. 4; Hudock Opening Br., Ex. D, p. 2. Hudock notes that he was not a party to this settlement and claims on appeal that it is “insufficient.” Hudock Opening Br., ¶ III, pp. 7-9. The Court rejects Hudock’s appeal for several reasons. First, it does not appear that Hudock ever raised this issue before the EQB. Hudock Notice of Appeal (Feb. 24, 2011). The issue appears to have been raised and pursued solely in the separate appeal of the Riverkeeper. *See* EQB 6/8/11 Tr., pp. 48-104 (testimony of Riverkeeper expert hydrologist). Second, in his opening brief to this Court, Hudock did not specify how the monitoring provision in either the permit or the settlement between the Riverkeeper and NMS is insufficient. Hudock Opening Br., pp. 7-9. In his reply brief, Hudock did try to resurrect the claim, but he relied on the testimony of the Riverkeeper’s expert—not on any evidence adduced by Hudock—and did not provide the other parties with an opportunity to respond. As a consequence, the Court is of the opinion Hudock has waived this claim and has failed to show that the settlement between the Riverkeeper and NMS was unreasonable.

4. Claims Regarding Depletion of Natural Springs or Wells

Hudock claims that he was prepared to offer testimony before the EQB that “NMS’s mining activities would cause a depletion of his well water . . . and would dry up the natural springs that fed his pond,” but that the EQB ruled that groundwater effects were outside the scope of the NPDES permit. Hudock Opening Br., p. 9. *See* EQB Order, p. 4; EQB Tr., p. 113 (restricting hearing to terms and conditions of the NPDES permit). The Court concurs with the EQB. As discussed above concerning claims about the failure of the NPDES permit to impose surface water flow limits, issues concerning groundwater quantity and quality are expressly covered by the West Virginia Quarry and Reclamation Act and the permits issued thereunder. That Act contains express provisions for requiring replacement of water sources

adversely affected by quarrying. W.Va. Code § 22-4-16. The West Virginia Supreme Court has ruled that a nearly identical statutory provision in the West Virginia Surface Coal Mining and Reclamation Act (W.Va. Code § 22-3-24(b)) precluded the use of NPDES permits as the vehicle for imposing restrictions to protect groundwater sources. *Four-H Road Comm. Assoc. v. Robinson*, 355 S.E. 2d 624, syl. Pt. 4 (W.Va. 1987). Accordingly, Hudock's claims concerning groundwater impacts of quarrying are covered by the Quarry and Reclamation Act rather than the WVVPCA and could have been raised in an appeal of the quarry permit to the Surface Mine Board.

5. Remaining Claims

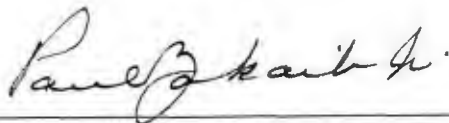
Finally, Hudock claims that the Board should not have granted a directed verdict as to issues presented by Lewis Baker, a geologist called to testify by Hudock. Hudock Opening Br., ¶ V, p. 10. Hudock claims that a directed verdict was inappropriate because of "evidence by Mr. Baker that the NPDES permit did not accurately reflect either the quality or quantity of wastewater from NMS's facility." *Id.* According to Hudock, this meant that WVDEP had "insufficient data on which to base its NPDES permit limits." *Id.*

Mr. Baker claimed that the shale removal operation would intersect a groundwater table, that the groundwater would make its way to NMS's sediment ponds and discharge from those ponds through the two NPDES outlets. *See* EQB Tr., 175 & 187-88. Beyond that, though, Baker did not explain how the NPDES permit was inadequate. The only regulated pollutants he could identify that the groundwater might produce would be acid (measured in pH), iron, aluminum and manganese. EQB Tr., 193. He did not know, however, if the shale in the vicinity of the NMS operation is associated with any of these pollutants. Importantly, WVDEP imposed limits on each of these potential pollutants. Certified Record, pp. 2-3. Baker could not identify

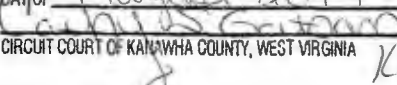
any deficiency with those effluent limits. See EQB Tr., 189 (unable to identify any changes to the NPDES permit) & 190 ("I'm not really familiar with your NPDES permit.").

As set forth above, the Court AFFIRMS the EQB's Order and DISMISSES these appeals from its docket.

ENTERED this 25th day of Aug, 2014.



HONORABLE PAUL ZAKAIB, JR.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29
DAY OF August, 2014
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA KL

Application Milestones

NORTH MOUNTAIN SHALE, LLC
Modification, NPDES 2 WV1023292

(3) Application Milestones Completed			
OFFICE	MILESTONE	DATE	COMMENT
HPU	Application Received	11/20/12	Application created by B_CINAL
HPU	Major Milestone Remarks	11/20/12	On 11/19/12, e-mail notification of submittal was received. On 11/20/12, the consultant sent in an original signature page, map and Official Check #5002287669, in the amount of \$1,950.00, for the Art. 11 filing fee. This major modification requests to add flocculation as a treatment method to Outlets 001 and 002. Facility Name: North Mountain Quarry.
HPU	Gave to Inspector	11/21/12	E-mail/checklist sent to the I & E inspector, specialist and supervisor and to the team leader.
(3) Application Milestones Still Required			
OFFICE	MILESTONE		
HPU	Groundwater Protection Fee Current		
HPU	Signoff, Inspector		
HPU	Final Technical Review Complete		

Appendix
A