
In the Matter of Monmouth County
Agriculture Development Board
Resolution No. 2017-10-1,
Helmlinger's Meadow Hill Farm,
LLC.

State Agriculture Development
Committee
OAL DOCKET NO. ADC 18798-17
SADC ID #1815

FINAL DECISION

Overview

This case arises from complaints filed pursuant to the Right to Farm Act, N.J.S.A. 4:1C-1, et seq. (RTFA) against Helmlinger's Meadow Hill Farm, LLC. The sole issue under consideration is whether Helmlinger's feeding of source-separated food waste (SSFW) to cattle on his farm located on Block 50, Lot 4.03 in Upper Freehold Township, Monmouth County (farm) is entitled to RTFA protection. The SSFW Helmlinger feeds his cattle consists of unsold perishable food collected from grocers, grocer warehouses, and food distributors.

The SADC has reviewed the May 20, 2021 Initial Decision by the administrative law judge, the voluminous exhibits accompanying that decision, the legal briefs filed by the parties, an official transcript of the September 28, 2020 Office of Administrative Law (OAL) hearing, over 400 pages of exhibits considered by the Monmouth County Agriculture Development Board (MCADB), minutes of MCADB meetings at which this matter was heard, and approximately 350 pages of incident reports from the N.J. Department of Environmental Protection and Monmouth County Board of Health pertaining to the farm between 2016 and 2017. We **ADOPT, MODIFY** and **REJECT** the Initial Decision issued by the OAL as set forth in more detail below.

Factual Background and Procedural History

A. Background

The farm is 18.9 acres in size and is part of a larger farm management unit. The farm was preserved by Monmouth County in 2007 with a cost share grant from the State Agriculture Development Committee (SADC). It is located in the AR Agricultural Residential zone and is surrounded by farms and residential neighbors. Christopher Helmlinger is the principal of Helmlinger's Meadow Hill Farm, LLC (Helmlinger).

In 2010, the Monmouth County Agriculture Development Board (MCADB) granted Helmlinger a site-specific agricultural management practice (SSAMP) for "breeding and raising cows, pigs, and chickens; farming

hay; and the boarding, training, and sale of horses". At that time, Helmlinger had a calving operation consisting of approximately 30 cows and was not feeding them SSFW.

B. County Proceedings

1. Complaint

In the fall of 2015, the residential neighbors started experiencing odors emanating from the farm and noted an increase in the number of cattle. One of the neighbors testified that the overwhelming odor became very apparent and that it coincided with the deliveries of the SSFW to the farm. The neighbors made various calls to the NJ Department of Environmental Protection (NJDEP) and the county and township health departments during 2016 but, according to one of the neighbors, agency officials indicated they had no enforcement authority because the farm was protected by the RTFA.

Owners of five of the neighboring properties (Jeff and Dana Gale; Calvin and Anna Malsbury; Dan and Denise Knoll; Robert Eilers and Elizabeth Adams-Eilers; and Barbara McEvoy) (collectively, the complaining neighbors) filed an RTFA complaint with the MCADB on March 16, 2017. Their complaint alleged that Helmlinger's farm operation had changed in the past year and that it was unreasonably interfering with their daily lives and with the use and enjoyment of their property, decreased their quality of life, and had devalued their property. They identified specific concerns, including odors emanating from and rodents attracted by the SSFW, manure management, and "toxic" runoff.

2. Site Visits

On April 3, 2017, the farm was inspected by a subcommittee of MCADB members, by MCADB staff, and by representatives of the New Jersey Department of Agriculture (NJDA), the U.S. Department of Agriculture - Natural Resources Conservation Service (NRCS), Rutgers Cooperative Extension, and the Upper Freehold Township Health Department. Mr. Helmlinger and his attorney were present during the inspection. Based on this site visit, NJDA produced a trip report in April 2017 documenting that Mr. Helmlinger had 110 steer and that approximately 4.6 acres of the 18.9 farm were pasture.

NJDA made various site management recommendations in its April 2017 report, including the following: because Helmlinger's manure waste storage facility was originally designed to handle the manure from 30 cows and 15 horses but the number of animals on the property had increased, he needed to either empty the manure storage facility every 60 days or enlarge it; a diversion, drain or berm be constructed upgradient of the manure storage facility to reduce stormwater entering the storage facility; the NRCS design for the manure storage facility

called for a 40' x 40' vegetative filter strip at the rear of the storage facility, which had not been installed, so NJDA recommended such filter strip be installed and maintained to NRCS standards; improve SSFW storage to prevent leaching; maintain feedlot bunks to minimize SSFW spillage; and that he should begin incorporating a minimum of 0.3 to 0.5 lbs. of sodium bicarbonate per day per animal into the approved food ration in an effort to offset the potential for acidosis in the cattle's digestive systems, which was recognized as possibly contributing to the odors coming from the operation.

NJDA had previously approved a food ration of 89 lbs. of SSFW, nine lbs. of brewer's yeast, and five to eight lbs. of hay per animal per day. NJDA also confirmed that the feed rates and total days of feed available in the storage facility matched the SSFW delivery receipts. NJDA noted that the high level of moisture in the approved feed ration could cause acidosis, causing odors from the livestock's mouths, urine, and manure. Hence, the addition of sodium bicarbonate to the approved feed was recommended. The trip report also recommended that reducing the intake of SSFW and feeding additional roughage instead could solidify the steer manure and reduce the risk of leachate.

On April 20, 2017, the Monmouth County Health Department's solid waste enforcement team (MCHD SWET) visited the farm, stating in a trip report dated April 24, 2017 that the purpose of the visit was to "determine if the produce consisting of fruits and vegetables, which are past their prime conditions as used as animal feed violate any solid waste regulations." MCHD SWET stated in the trip report that Helmlinger received two deliveries of the SSFW per week, consisting of 17,000 to 35,000 lbs. each based on the four most recent delivery receipts. The report stated that the SSFW was typically fed to the cattle within three to five days of delivery. It also observed that the SSFW storage facility was not leak-tight, was directly adjacent to the manure storage facility and that, during rain events, liquids generated from the stored produce could wash into the manure storage area, significantly adding to bacterial decomposition and thereby potentially generating odors. However, MCHD SWET noted Helmlinger's representation that he intended to construct a new, watertight, SSFW concrete pit storage facility several hundred feet away to replace the existing storage facility.

MCHD SWET also stated in the trip report that SSFW, if not used beneficially in the same manner as on the Helmlinger farm, would normally be discarded and disposed of as solid waste. Further, the MCHD concluded that Helmlinger's SSFW feeding operation would not be considered waste processing or composting regulated by NJDEP due to the minimal holding times for the food materials. Finally, MCHD SWET recommended that the storage times for the SSFW brought to the farm be reduced to two to three days maximum in order to prevent potentially

significant odors. It noted that this could be accomplished by reducing the amount of material brought to the farm during each delivery and increasing the frequency of the deliveries.

On August 17, 2017, NJDA and NRCS representatives returned to the farm as a follow-up to their April 3, 2017 site visit. During the August 2017 inspection, the NJDA observed the following (memorialized in a September 5, 2017 trip report): Helmlinger decided to haul the manure off the farm on a weekly basis and spread it on other parcels he was farming; a storm drain inlet was installed upgradient of the manure storage facility, but it was noted that this would not eliminate all stormwater entering the manure storage facility and that installing a roof over the storage facility was still recommended; the vegetative filter strip had been planted, but additional vegetative growth would be needed and management of the area maintained; a new SSFW facility was constructed at a location on the farm further away from the residential neighbors, and NJDA thought this new facility should reduce oxidation of the SSFW; the farm area appeared to be clean with less spillage of the SSFW on the ground; and the report verified that sodium bicarbonate was incorporated into the cattle's diet at 0.5 lbs. per animal per day. The report also stated, "[g]iven the ongoing nature of this matter, it is important to note that continued management will be needed to maintain compliance with the [Animal Waste Management] regulations." See N.J.A.C. 2:91-1.1, et seq.

3. MCADB Proceedings

The MCADB held hearings in this matter on May 2, 2017, July 11, 2017, August 1, 2017, and September 5, 2017. During the pendency of the MCADB proceedings, in July 2017, Helmlinger moved the SSFW storage facility to the other side of the farm, further away from the complaining neighbors' properties.

Helmlinger, represented by counsel, and the complaining neighbors appeared at the MCADB proceedings. Helmlinger testified about his extensive cooperation in working with the aforementioned public entities and implementing their recommendations. He asserted that the absence of any violations found by those agencies supported a finding that his operation was a generally accepted agricultural practice and not a direct threat to public health and safety. He also argued that since the MCADB granted an SSAMP for the operation in 2010, which was not appealed to the SADC, he was entitled to an irrebuttable presumption that the farm's activities did not pose a public or private nuisance. He also introduced letters of support from non-complaining neighbors. The complaining neighbors' arguments were characterized as "self-created" and "self-serving".

The complaining neighbors argued that the current operation should not be entitled to RTFA protection. They stated that the odors adversely affected their health, safety, and quality of life, and that the odors, as well as the runoff, from the farm adversely affected their property interests. The complaining neighbors stated that despite Helmlinger's efforts to modify his operation in consultation with government entities, "the unusually noxious odors continue[d] to occur on a regular basis", albeit with somewhat less frequency. Further, they pointed to the recurring nature of the complained-of activities as evidence that it would be premature to find that the operation was generally accepted, as Helmlinger's implementation of the government entities' recommendations was either unsuccessful or incomplete.

Margaret Jahn, enforcement officer for the township's board of health testified before the MCADB that inspectors from her office had visited the farm over the past year, but she expressed frustration with not knowing her role when the RTFA process was involved. Nick Bryson, who was leasing six acres of land to Helmlinger, stated that Helmlinger was no longer permitted to spread manure on Mr. Bryson's property after he received complaints about the odors from his neighbors, the Lambersons. Devone Lamberson appeared at the August 2017 MCADB meeting and stated that he used to work at a wastewater treatment plant, and that the odor from the manure was ten times worse than what he experienced at the plant.

The MCADB considered the above-noted trip reports, among other evidence, during the hearings conducted in this matter. At its October 3, 2017 meeting, the MCADB adopted a resolution granting Helmlinger RTFA protection from the complained-of issues except for the feeding of SSFW.

The MCADB found that the subject matter of the complaint related directly to activities that were approved under the 2010 SSAMP, and therefore, the board retained jurisdiction over the matter in accordance with N.J.A.C. 2:76-2.7(d). However, the MCADB found that the expansion of the farm activities and modifications to the feeding of the livestock "remove[d] the matter from the purview of *res judicata*¹ and permits the MCADB to hear the complaint". The MCADB also stated in its resolution that Helmlinger was seeking to modify the 2010 SSAMP to protect the current farming operations from the neighbors' complaints.

Ultimately, the MCADB found the following:

¹*Res judicata* or "claim preclusion" is the judicial principle that a cause of action may not be relitigated once it has been judged on the merits.

1. The runoff issues, presence of rodents, and animal waste management and associated odors stemming from the subject property have been properly mitigated and found by the MCADB to be generally accepted farm management practices and are permissible activities for a Commercial Farm, under the New Jersey Right to Farm Act, subject to the above conditions . . . (Resolution, page 8, paragraph 1).

2. The use of source-separated food waste as cattle feed and the odors associated with this process under its current use is found by the MCADB to not be generally accepted farm management practice nor a permissible activity for a Commercial Farm, as the practice of using food waste as the primary source of a steer's diet is not commonplace in the industry, the practice is potentially exacerbating the odor emanating from the subject property, and, at this point, there is no related AMP or affiliated regulations in place at this time associated with the New Jersey Right to Farm Act[.] (Resolution, page 8, paragraph 2).

C. *SADC appeal*

Helmlinger and the Knolls appealed the MCADB resolution to the SADC on November 30, 2017 and December 4, 2017, respectively. N.J.S.A. 4:1C-10.2.

Helmlinger appealed the MCADB's denial of RTFA protection for the feeding of SSFW, contending that the MCADB impermissibly heard the matter as an SSAMP modification request. He argued that the complaining neighbors did not demonstrate that the operation posed a direct threat to public health and safety and that the operation was in compliance with all relevant state and federal laws. He that the NJDA had issued multiple approvals for the rations he was feeding his cattle and that therefore it was a generally accepted agricultural management practice.

The Knolls argued that the MCADB's finding that Helmlinger properly mitigated odor and animal waste issues was contrary to the evidence; that conditioning Helmlinger's RTFA protection on continued work with NJDA and NRCS was improper, as those conditions involved "unknown and unsettled prospective measures"; and that the granting of RTFA protection was premature because it was still unknown whether the conditions set forth in the resolution would adequately address the odor and runoff issues.

The SADC transmitted the appeals to the OAL as a contested case on December 27, 2017. On June 28, 2018, the Knolls sent a letter to the OAL withdrawing their appeal.

D. OAL Proceedings

The OAL hearing on this matter was held on September 28, 2020. Helmlinger and the MCADB appeared with counsel, and a summary of each party's witnesses follows.

1. On behalf of Helmlinger:

(a) Daniel Wunderlich

Daniel Wunderlich, an employee of the NJDA, was qualified by the administrative law judge (ALJ) as an expert witness in livestock feed management. He explained that New Jersey does not have regulations on SSFW, and that the American Association of Feed Control Officials has issued a manual containing guidelines for feeding livestock. He testified that he visited the Helmlinger farm numerous times and analyzed the feed. Based on these analyses, he advised Mr. Helmlinger on feed practices to implement. These suggestions, including the provision of adding sodium bicarbonate to the feed in an effort to address the odors, were implemented by Mr. Helmlinger.

Mr. Wunderlich opined that he did not see issues that would adversely or directly affect public health or safety and that there was nothing notable about the odor from the farm other than "normal farm odor".

(b) Christopher Helmlinger

Mr. Helmlinger testified that he began feeding livestock SSFW in 2015 because it was more cost effective than using corn. He also testified that his animals "gain great off of it", and receive a "choice" grade or better, with a handful of them making "prime" grade and earning a premium price. Mr. Helmlinger lives on the farm and, with regard to the odors, stated "I can smell my cattle a lot and a hint of the separated food waste at times." He stated that his home is located approximately 600 feet from the SSFW storage facility and about 150 feet from where the cattle were located. He also testified that he has two children that play outside and that he eats meals and has family parties outside. He also testified that he implemented the recommendations of various public entities, including constructing a roof and a three-sided bunker with walls for the SSFW storage facility.²

² Improvements to the SSFW storage facility were funded in part with a cost-share grant from the SADC.

2. On behalf of the MCADB:

(a) Jeffrey Gale

Mr. Gale described the odor as "the equivalent of sitting behind a garbage truck full of rotting food in the middle of a summer day" and "overwhelming and overbearing". He described how his family cannot hold parties at their house anymore and how they can only have one or two close family members visit who are "willing to pick up and leave [due to the odors]." He also discussed how his daughter, who was attending college at the time of the OAL hearing, did not want to come home on weekends, and that his children did not invite their friends to their home anymore, due to the smell. He went on to discuss the psychological impacts of not knowing when the odor would affect his property:

you're scared to open your door because you're not sure what's waiting for you outside. It becomes extremely taxing not to know whether or not this is the time, this is the hour, this is the day when I'm not going to be able to do anything outside.

(b) Barbara McEvoy

Barbara McEvoy described the odor as a combination of "a landfill, if you got close to a landfill on a hot day, mixed with the smell of manure". She testified that wind direction and speed, as well as what activities were occurring on the farm, were factors contributing to the odor, which caused a lack of predictability and made it difficult to plan activities on her property. She testified how she would have family over at her home and would suddenly be forced to go inside due to the odor. "I'm an outside person and it forced me to be much more of an inside person than I wanted to be."

(c) Denise Knoll

Denise Knoll said the best way to describe the odor is as a potato that went bad and that "[i]t will take your breath away. It gives you headaches if you breathe it in too long." She stated that she and her family have become prisoners in their own home: "I can't put a garden in. I can't put clothes on the line like I used to. My son can't have his friends over. We can't have picnics. We can't eat outside on the deck." Like Jeff Gale and Barbara McEvoy, she testified about the unpredictability of the odor: "my whole life is dictated by the fact of whether it smells or not or the wind is in my favor and it's hard for me to live like that."

E. Initial Decision

The ALJ found, in an initial decision dated May 20, 2021, that all of the witnesses' testimony was credible. While the judge did not discount the complaining neighbors' concerns, she noted that the sense of smell is "particularly subjective" and found Mr. Wunderlich's testimony "impressive". "While the complaining witnesses described the 'unbearable' odor emanating from the SSFW and the effect it had on their quality of life, Wunderlich was not aware of any smells, other than those he would normally expect on his numerous and unannounced visits to the [Helmlinger] farm." The ALJ also noted Helmlinger's implementation of various government entities' recommendations, including the addition of sodium bicarbonate to the feed, the relocation and improvements to the SSFW storage facility, and that "delivery dates of the SSFW were modified so that large amounts were not delivered at once."

The ALJ referenced NJDA and Rutgers University's recognition that feeding SSFW to cattle was economically and ecologically beneficial. She also mentioned that Mr. Wunderlich visits farms periodically to "make sure that they are compliant with the practices for feeding SSFW to cattle and to ensure the nutritional value of SSFW as cattle feed is maintained." The judge stated that several counties permit the use of SSFW as feed, including one that has regulated the practice.

The judge framed the issue as whether the MCADB properly denied a modification to Helmlinger's 2010 SSAMP in a proceeding initiated by the neighbors' complaints. The ALJ's theory of the case appeared to be based on the board's determination that Helmlinger's use of SSFW to feed cattle -- an activity outside the four-corners of the 2010 SSAMP and, thus, a revision to that earlier approval --- was not a generally accepted farm management practice that would be protected under the RTFA. She also held that Helmlinger was required to carry the burden of proof by a preponderance of the credible evidence.

The ALJ noted that during the MCADB proceedings, the board considered whether to act on the complaints in accordance with N.J.S.A. 4:1C-10.1(a), or whether to refer the complaint to the SADC for a determination of whether the practice of feeding SSFW to cattle was a generally accepted agricultural management practice in accordance with N.J.S.A. 4:1C-10.1(c). However, the judge assumed for the sake of argument that the MCADB could retain jurisdiction. She then opined that since the NJDA supervises the implementation of feeding cattle SSFW "at farms across the state", clearly the NJDA finds the practice to be a generally accepted agricultural management practice. Therefore, she concluded that the feeding of SSFW to cattle "can be protected under the Act provided that the practice does not pose a direct threat to public health and safety." In essence, the judge

determined that feeding SSFW to livestock was a generally accepted agricultural management practice because the practice was overseen by the NJDA.

The ALJ also observed that the only claims about a direct threat to public health and safety were related to odors. While fully recognizing that the complaining neighbors found the odors overwhelming, the ALJ accepted the opinion of Mr. Wunderlich, who she referred to as a "neutral observer", that the odors were "no different from farm odors he encountered throughout the state." The judge stated that the original conditions first complained of were "ameliorated" by Helmlinger through his implementation of NJDA's recommendations regarding feed rations and feed storage. Moreover, she observed that no citations were issued to Helmlinger alleging any violation of a public health and safety law, and that no evidence was presented at the hearing suggesting that the feeding of SSFW to cattle created a direct threat to the public health and safety.

Accordingly, the ALJ found the MCADB's determination to be arbitrary and capricious. The judge found that the practice of feeding cattle SSFW was protected under the RTFA and "reversed" the CADB's determination.

No exceptions to the initial decision were filed by Helmlinger or by the MCADB.

SADC Determination

A. Standard of Review

At the outset it should be noted that the ALJ "reversed" the MCADB based on a finding that its decision with regard to SSFW was "arbitrary and capricious". However, the "arbitrary and capricious" standard is not the correct standard of review. Rather, the role of an ALJ is to hold a de novo hearing and determine whether or not a commercial farmer is entitled to an SSAMP. See Borough of Glassboro v. Gloucester County Agriculture Development Board; Lewis D. DeEugenio, Jr. and Summit City Farms, OAL Dkt. No. ADC 18801-2016, SADC ID #1787 (2019), p. 17. Therefore, the initial decision is **MODIFIED** to reiterate and clarify that the proper handling of RTFA appeals entails an ALJ conducting a de novo review and making independent findings of fact and conclusions of law addressing the parties' dispute.

Further, we agree with the judge that Helmlinger had the burden of proof in this case, but our reasoning differs from the ALJ's. Helmlinger had the burden of proof because he responded to the complaints by asserting that his operation was entitled to RTFA protection. A farmer seeking RTFA protection has the burden of proving RTFA eligibility requirements. N.J.S.A. 4:1C-10. Accordingly, we

MODIFY the initial decision to find that Helmlinger had the burden of proof because a farmer seeking protection under the RTFA has the burden of proving statutory eligibility requirements.

B. RTFA Procedure

The ALJ recognized that N.J.S.A. 4:1C-10.1(c) requires an RTFA complaint to be forwarded by a board to the SADC for a determination whether the agricultural activity in dispute is a generally accepted practice if the practice has not been addressed by an adopted agency regulation. The judge observed that section 10.1(c) is unclear in complaint cases against a commercial farm that has previously obtained an SSAMP. However, this question is squarely addressed by N.J.A.C. 2:76-2.7 (d), which states that if a CADB determines that a farm is a commercial farm and that the complaint "concerns activities" that are addressed by an SADC-adopted AMP or an SSAMP approved by the CADB, then the CADB retains jurisdiction over the complaint. The MCADB cited and relied upon this regulation as its authority to retain jurisdiction over the neighbors' complaints against Helmlinger.

During the MCADB proceedings, Helmlinger argued that his activities were protected by virtue of his 2010 SSAMP and, therefore, that he was entitled to the irrebuttable presumption that his SSFW feeding activities did not constitute a public or private nuisance.

The complaining neighbors, on the other hand, argued that his operation so drastically changed since 2010 that the MCADB could not conclude that his activities were "addressed" by the prior SSAMP and therefore, the matter should have been referred to the SADC for a hearing in accordance with N.J.A.C. 2:76-2.7(e), which applies when there is no AMP for, or previously-issued SSAMP addressing, the disputed activity.

Among the activities subject to the 2010 SSAMP was the "raising" of the cattle on Helmlinger's farm. Since the feeding of livestock is unmistakably related to the activity of raising the livestock, we find that the MCADB followed the letter of N.J.A.C. 2:76-2.7(d) and therefore, it was proper for the MCADB to retain jurisdiction over the matter. On this issue, we note that the MCADB's broadly worded 2010 SSAMP resolution contributed to the confusion over the proper procedure to employ in respect to the 2017 complaints. The 2010 resolution lacked many specific details about the operation being protected, such as the number of livestock and the feed being given to the animals.

The MCADB stated in its 2017 SSAMP resolution that Helmlinger sought to modify the 2010 resolution in order to protect his SSFW feeding operations from the complaining neighbors' complaints. We find, based on the record, that Helmlinger never sought to modify his 2010 SSAMP and, therefore, it was improper for the MCADB to make such

a finding. However, we also find from the record that Helmlinger defended his operation against the neighbor's complaints by asserting RTFA protection based on the 2010 SSAMP; on the claim that his current SSFW feeding operation was "generally accepted" by the NRCS, NJDA, Rutgers, and livestock feeding literature; and on his compliance with government agency recommendations. Accordingly, we find it proper for the MCADB to retain jurisdiction over the neighbors' complaints because: (1) feeding livestock SSFW is directly related to raising livestock, and thus "concerns an activity" that was the subject of the 2010 SSAMP; and (2) Helmlinger affirmatively sought MCADB recognition that his feeding operation was a generally accepted agricultural management practice.

Based on the foregoing, we **MODIFY** the initial decision to find that the MCADB properly retained jurisdiction over the matter in accordance with N.J.A.C. 2:76-2.7(d).

D. Generally Accepted Agricultural Management Practice

The MCADB found that feeding livestock SSFW was not a generally accepted agricultural management practice in part due to the lack of regulations guiding this practice and because "it is not commonplace in the industry". The ALJ made the contrary finding that feeding SSFW to cattle constitutes a generally accepted agricultural management practice.

We find that, as a general proposition, the feeding of SSFW to cattle is a generally accepted agricultural management practice. Rutgers University and the U.S. Environmental Protection Agency have documentation recognizing that feeding animals SSFW is beneficial, both for the animal and for the environment. Further, the feeding of SSFW is identified as an exception to NJDEP's solid waste management rules if it is approved by NJDA. N.J.A.C. 7:26-1.1(a)3. Finally, we note that NJDA has approved the SSFW feeding of livestock on four farms, including Helmlinger's.³

However, the RTFA requires that the generally accepted agricultural management practice be found as to the "specific operation", meaning the specific farm on which the operation or practice occurs. N.J.S.A. 4:1C-10. Therefore, the ALJ was obliged to make this finding with regard to the Helmlinger farm operation itself. That, in turn, required a balancing of this legitimate agricultural practice against the competing permitted neighboring land uses.

³ This number appears to be in contrast to Mr. Wunderlich's testimony where he stated that he reviewed 12 farms with feed rations similar to Helmlinger's between 2016 and 2017. T18:1 - 4. However, there are only four documented NJDA approvals for this type of feed, including one issued to Helmlinger.

E. Balancing Competing Interests

The express intent of the RTFA is to protect commercial farm operations "while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey." N.J.S.A. 4:1C-2e. See also Curzi v. Raub, 415 N.J. Super. 1, 21 (2010) (purpose of the RTFA is "to protect commercial farms from nuisance actions, as long as recognized and accepted agricultural techniques are used, while balancing that interest against other lawful interests, such as the right of residential complaining neighbors to the use and enjoyment of their property.").

The initial decision failed to address the balancing of Helmlinger's SSFW feed practice with his neighbors' interests in the use and enjoyment of their residential properties. The ALJ was required to "conscientiously consider the impact of the proffered agricultural use on surrounding property owners" and to give "due consideration of the impact on affected parties" in accordance with Curzi, *Ibid.* at 23.

Having evaluated the credibility of all of the witnesses, the ALJ still failed to articulate a balancing of interests required by the RTFA. Accordingly, the initial decision must be **MODIFIED** to include the below balancing analysis.

We recognize that the practice of feeding SSFW to livestock is a generally accepted agricultural management practice in concept, and we commend Helmlinger for incorporating in his farm operation recommendations from agencies with expertise in agriculture and solid waste management. However, it is possible for generally accepted agricultural management practices to be "beyond the ken of reasonable conduct despite falling within the scope of the [RTF] Act." Township of Franklin v. Den Hollander, 338 N.J. Super. 373, 391 (App. Div. 2001), *aff'd* 172 N.J. 174 (2002).

Although Helmlinger did incorporate the recommendations of various public entities with respect to the management of feed rations and animal waste management practices, the complaining neighbors still complained of the odor and its impact on their lawful residential uses. While Helmlinger's efforts in coordination with these agencies with expertise in agriculture and solid waste management are laudable, these entities he worked with are not experts in what odors are acceptable for residential uses.

Odors are regulated under the Air Pollution Control Act, N.J.S.A. 26:2C-1, *et seq.* (APCA), which provides penalties for those causing odors that result in the unreasonable interference of neighbors' enjoyment of life or property. The APCA is enforced by the NJDEP, but

its enforcement may be delegated to counties via the County Environmental Health Act, N.J.S.A. 26:3A-21, et seq. Monmouth County's Health Department has an Air & Noise Control Program, which, in part, "responds to citizen complaints . . . of odors".⁴

During the CADB proceedings, the complaining neighbors stated that they made numerous complaints to the NJDEP and local health agencies regarding the odors. Ms. Knoll testified that the odors mainly occurred later in the day, but the NJDEP's practice was to send inspectors the following morning after the odors had dissipated. This course of action is borne out by NJDEP and Monmouth County incident reports, and we take administrative notice of this publicly available governmental information. N.J.S.A. 52:15B-10(b); N.J.A.C. 1:1-15.2; Re New Jersey Bell Telephone Company, 1992 WL 526766 (N.J. Bd. Reg. Com.). These incident reports show that, between 2016 and 2017, more than 250 calls were placed with the NJDEP and local health agencies complaining of odors from the Helmlinger farm. The number of complaints to State and local government during this time period reflects consistent and widespread impacts on the neighbors' quality of life.

Although the ALJ found the complaining neighbors to be credible and recognized that they found the odors "unbearable", she relied on Mr. Wunderlich's opinion that the odors were not unusual for a farm. Mr. Wunderlich's expertise in livestock feed management was an improper foundation upon which the ALJ could rely as conclusive on neighborhood odor impacts. Therefore, we consider Mr. Wunderlich's testimony regarding odors to be that of a lay witness.

The ALJ found both Mr. Wunderlich and the complaining neighbors to be credible witnesses during the OAL proceedings, and we accept as true both Mr. Wunderlich's testimony that the odor was "normal farm odor" as well as the complaining neighbors' testimony that the odors were "unbearable". These contrasting observations on the nature and extent of the odor are consistent with the neighbors' testimony that the odor was unpredictable rather than constant.

We note Mr. Wunderlich's testimony that he had visited the Helmlinger farm on 12 - 15 occasions between 2016 and 2017 which, on average, was about once every other month during that time period. On the other hand, the residential neighbors living in close proximity to the farm had more frequent opportunities to perceive farm odors, reflected, at least in part, by over 250 complaints to state and local government agencies during the same timeframe.

⁴ See <https://www.visitmonmouth.com/page.aspx?ID=2124> (last visited December 27, 2021).

The neighbors consistently testified as to the intensity and unpredictability of the odor during the CADB and OAL proceedings. With regard to the nature and intensity of the odor, the neighbors described it as being like a landfill and being stuck behind a garbage truck full of rotting food; they also described the odor as being "overbearing" and "overwhelming", and that "[i]t will take your breath away". The neighbors also testified as to how the odor impacted their lives. They did not feel comfortable having gatherings at their home and further, there was testimony that their children would not visit or have friends over at their home. They testified that they could not engage in residential activities like eating outside, putting clothes outdoors on a clothesline, or utilizing their outdoor pool because of the odor. Finally, we find the testimony regarding the constancy and unpredictability of the odor important factors in our determination. The fact that the affected neighbors could not plan for gatherings or other uses outside of their homes on a daily basis because they did not know when the odor would occur made these impacts particularly significant.

Further compounding the adverse impacts on the neighbors' quality of life was the intensity of the adjoining agricultural operation and the size and orientation of the parties' properties. The Helmlinger farm is a relatively small piece of property for the size of the operation, with approximately 110 head of cattle on an 18.9-acre parcel, that receives approximately two deliveries a week of food waste ranging between 17,000 and 35,000 lbs. per load. Further, the residential neighbors are located in close proximity to and downwind from this operation.

While the RTFA was designed to protect responsible commercial farm operations from unreasonable interferences with their operations, it was not intended to allow those operations to unduly burden other lawful interests. Here, the impact of Helmlinger's SSFW feeding operation did not merely inconvenience his residential neighbors' property interests; rather, the intensity and unpredictability of the odor caused by this operation posed a constant threat to the neighbors' residential uses. The record reflects that this operation caused an unacceptable negative impact on the neighboring residential uses.

Curzi, infra at 23, requires a balancing of the Helmlinger agricultural operation against the interests of affected property owners in order to determine whether the operation is entitled to RTFA protection. Based on the record before us, we strike this balance in favor of the adjoining neighbors, whose quality of life was substantially and adversely affected, and find that the SSFW feeding operation was not entitled to RTFA protection.

F. *Direct Threat to Public Health and Safety*

In the initial decision, the ALJ noted that, "[n]o citations were ever issued to [Helmlinger] farm for any violation of the public health and safety and no evidence was presented to show that the feeding of SSFW to cattle created a direct threat to public health and safety." Concluding that a direct threat to public health and safety was not demonstrated, the judge went on to find that the feeding of SSFW to cattle is protected under the RTFA.

Under N.J.S.A. 4:1C-10, an agricultural practice subject to a complaint cannot be eligible for RTFA protection unless there are findings that the practice does not pose a direct threat to public health and safety and that the commercial farmer engaging in the practice is not in violation of relevant federal and state laws. A CADB lacks jurisdiction to grant RTFA protection to a commercial farmer unless those findings can be made. With respect to the existence or nonexistence of a direct threat in this case: (1) the finding that a direct threat existed would have rendered Helmlinger's SSFW feeding operation ineligible for RTFA protection; and (2) an MCADB finding that no direct threat to public health and safety was posed by Helmlinger's SSFW feeding operation would have allowed the board to proceed with the hearing on the neighbors' complaints and Helmlinger's defenses.

However, we make the following observations regarding the direct threat to public health and safety and state law compliance provisions even though they do not relate to the ultimate disposition of this matter.

We agree with the ALJ that there was insufficient evidence to prove that Helmlinger's feeding of SSFW to his cattle posed a direct threat to public health and safety. On the other hand, the record was incomplete as to whether the practice *did* pose such a direct threat.

What is noticeably lacking in the review of this matter is the input from those agencies with expertise in odors and the acceptable level of impact on nearby residential neighbors. The complaining neighbors raised the issue of how the odors emanating from the operation substantially and unreasonably impacted the residential uses of their properties. Although CADBs have expertise in reviewing what practices are acceptable from an agricultural perspective, they are ill-equipped to assess something as technical and amorphous as odor, including compliance with the Air Pollution Control Act. CADB meeting minutes, of which we take administrative notice, show the discomfort the MCADB had with this issue.

Despite over 250 complaints registered with the agencies charged with odor regulations, there were only a few occasions where

investigators did go out to the site and when they did, they did not find a violation. The vast majority of the complaints resulted in follow-up calls to the complainant the next day where the complainant would inform the agency that the odor no longer existed or did not answer the follow-up call. In those instances, the case would be closed.

Further, these reports show incidents where the investigator referred the complainant to the MCADB for RTFA proceedings. This sentiment is reflected in a July 7, 2017 letter from NJDEP's Air Compliance and Enforcement section to Helmlinger. In that letter, NJDEP advised Helmlinger that it had received a "significant number of complaints" identifying his farm as the source, and the NJDEP warned him that he was subject to its air pollution control regulations at N.J.A.C. 7:27-5.1, et seq. and potentially liable for enforcement action. But then NJDEP referred him to the MCADB "to ensure that best management practices and techniques available for agricultural activities are being applied".

This case underscores the importance of engaging necessary public bodies that have relevant expertise in an RTFA matter. While CADBs have primary jurisdiction over commercial farms, their jurisdiction is not exclusive, and it may be necessary for other administrative agencies to engage in the RTFA process, particularly those with expertise in public health impacts and with issues related to compliance with applicable state and federal laws and regulations.

In sum, there was no comprehensive review of the nature of the odors caused by Helmlinger's SSFW feeding operation and the impact it had on the neighbors' properties. Therefore, we cannot find that there was or was not a direct threat to public health and safety posed by Helmlinger's SSFW feeding operation. However, that jurisdictional issue has no bearing on our conclusion, because even if there was no direct threat to public health and safety present, based on the record before us and the "balancing of interests" required by Curzi, infra at 23, Helmlinger's feeding of SSFW to his cattle was not entitled to RTFA protection due to the unacceptable negative impacts on neighboring properties.

Conclusion

In sum:

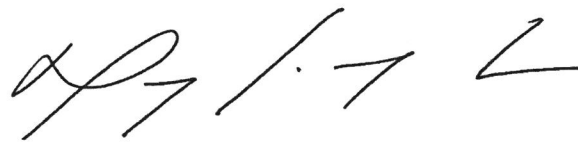
- We **MODIFY** the Initial Decision to reiterate and make clear that the proper handling of RTFA appeals entails an ALJ conducting a *de novo* review and making independent findings of fact and conclusions of law addressing the parties' dispute.

- We **MODIFY** the Initial Decision to find that Helmlinger had the burden of proof because a farmer seeking protection under the RTFA has the burden of providing statutory eligibility requirements.
- We **ADOPT** the ALJ's conclusion that the feeding of SSFW to cattle is a generally accepted agricultural management activity.
- We **REJECT** the finding in the Initial Decision that the feeding of SSFW to livestock as it occurred on the Helmlinger farm was a generally accepted agricultural management practice.
- We **MODIFY** the Initial Decision to include the foregoing balancing analysis, finding that Helmlinger's specific SSFW feeding operation resulted in unreasonable impacts to the neighbors, rendering the practice ineligible for RTFA protection.
- We **MODIFY** the Initial Decision to conclude that the issue of whether this case presents a direct threat to public health and safety was raised, but there was insufficient evidence to reach a conclusion on that jurisdictional issue.

IT IS SO ORDERED.

STATE AGRICULTURE DEVELOPMENT COMMITTEE

Final Decision approved:
January 27, 2022

A handwritten signature in black ink, appearing to read 'D. H. Fisher', written in a cursive style.

Douglas H. Fisher, Chairperson