State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. ECE-WE 15484-12
AGENCY DKT. NO. PEA120002-95291

AUTO SCRAP, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION– WATER COMPLIANCE AND ENFORCEMENT,
Respondent.

_____

Janette Faulk, for petitioner Auto Scrap, Inc., pursuant to N.J.A.C. 1:1-5.4(a)(5)

Scott B. Dubin, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: August 13, 2015 Decided: September 10, 2015

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Auto Scrap, Inc., filed an appeal in the underlying enforcement action contesting the findings and penalties imposed in an Administrative Order and Notice of

Civil Administrative Penalty Assessment (AONOCAPA) issued by the New Jersey Department of Environmental Protection–Water and Land Use Enforcement (respondent or DEP) on April 30, 2007. Petitioner filed a request for hearing on May 9, 2007. The DEP granted the request on April 17, 2012, and agreed to transmit the matter as a contested case to the Office of Administrative Law (OAL), where it was filed on November 15, 2012. A long series of telephone settlement conferences were held beginning February 21, 2013; however, the parties were unable to resolve the matter. A hearing was scheduled for October 28, 2015. On July 24, 2015, respondent filed a Motion for Summary Decision, arguing that petitioner was liable for violations for allowing motor oils and other pollutants from its auto salvage yard to discharge onto the ground at its site, in violation of its stormwater discharge permit (NJPDES Permit) issued pursuant to the Water Pollution Control Act (WPCA). Petitioner failed to file any response to respondent's motion. The motion was filed referring to the DEP as the petitioner and Auto Scrap as the respondent even though the transmittal sheet listed the DEP as respondent and Auto Scrap as the petitioner. I will refer to the parties in this decision as originally set forth in the transmittal sheet, i.e., Auto Scrap as petitioner and the DEP as the respondent. The record closed on August 13, 2015, which was twenty days after the respondent's filing of its motion and service on the petitioner. As petitioner failed to submit any opposition to the respondent's motion, the motion was decided as unopposed and the supported facts set forth in the motion by respondent were accepted as findings of fact.

FACTUAL DISCUSSION

Petitioner owns and operates an auto salvage yard and auto recycling facility located at 34-38 Stover Avenue in Kearny, New Jersey. Petitioner failed to properly pave its site, which would have directed polluted stormwater runoff to drains and to on-site oil/water separators. Petitioner violated its permit by not paving large areas of its property. By failing to pave these areas, stormwater polluted by engine parts and vehicles was discharged onto the ground with the potential to contaminate groundwater and perhaps the Lower Passaic River, which was located 900 feet away from the site.

Respondent stated that the DEP inspected and notified the petitioner that it was required to pave portions of its site under its permit and the WPCA. DEP stated that it provided petitioner with guidance through its inspections, follow-up letters, and Notices of the Violation (NOVs) of the problems with the site and the corrections required in order to be compliant under the law. Petitioner, however, took little corrective action. The DEP took enforcement action against Auto Scrap in 2012 and issued an Administrative Order, alleging violations of the permit and WPCA, requiring compliance and assessing a $55,000 penalty.

After the Administrative Order, some areas were paved, but others remained unpaved a full three years later. The result of such inaction by the petitioner was polluted stormwater having the possibility to discharge onto the exposed ground, in violation of the permit and the WPCA.

FINDINGS OF MATERIAL FACTS

Petitioner, Auto Scrap, Inc. t/a Auto Salvage is a closely held New Jersey corporation which operated an auto recycling facility located in Kearny. Auto Scrap identification (PI) number is 95291. Petitioner receives motor vehicles at its site and dismantles the vehicles to sell the auto parts and scrap metal. (Kevin Marlowe (Marlowe) Cert. Exh. B; Marc Zuckerman (Zuckerman) Cert. Exh. C.) Auto Scrap is located approximately 900 feet from the lower Passaic River. (Zuckerman Cert. ¶ 6.)

On November 1, 1999, DEP issued a New Jersey Pollutant Discharge Elimination System (NJPDES) General Permit (GP) No. 0107671 with an expiration date of November 30, 2004. The permit was issued pursuant to the WPCA, N.J.S.A. 58:10A-1, et seq. and DEP regulations. The permit authorized discharge of stormwater from scrap metal processing and recycling and establishments engaged in dismantling of motor vehicles into the waters of New Jersey.

On July 16, 2001, DEP issued Authorization to Discharge for Scrap Metal Processing/Auto Recycling (GP) (NJ0107671) with a NJPDES No. for Auto Scrap of NJG 0139432 with an expiration date of November 30, 2004. On May 1, 2002, the DEP

inspected Auto Scrap and issued a NOV stating failure to prepare and implement all of the requirements of a Stormwater Pollution Prevention Plan (SPPP) and the fact that the facility had exposure of pollutants to stormwater in violation of the WPCA and DEP regulations. (Resp't's Br., p. 5.)

On April 2, 2003, DEP issued an NOV citing violations observed during an inspection on March 4, 2003, including failure to eliminate uncontrolled fluid discharges to the ground and failure to provide a containment system under the hydraulic equipment. On November 5, 2003, and June 23, 2004, DEP inspected the facility and observed violations of the permit, including failure to eliminate fluid discharges to the ground and failure to drain fluids in a manner to prevent exposure to stormwater or groundwater. On December 6, 2004, DEP inspected the facility and issued an NOV citing an unpermitted discharge of petroleum products from greasy engines into stormwater and the failure to implement SPPP, Best Management Practices (BMPs) and quarterly inspections. (Resp't's Br., p 5.)

On February 1, 2005, DEP issued an NJPDES Permit (NJG 0139432, DT 010001 Stormwater General Permit) to Auto Scrap, with an expiration date of January 31, 2010. The permit authorized discharge of stormwater run-off under certain conditions and listed required BMPs. By letter dated April 4, 2005, DEP provided a copy of the December 6, 2004, inspection report. It provided that Auto Scrap failed to implement the BMPs to maintain the site, allowed exposure of pollutants into stormwater, engines exposed and uncontrolled discharge of pollutant fluids, all in violation of permit conditions.

By letter dated April 14, 2005, petitioner submitted an Initial Implementation and Inspection Certification and a Noncompliance Incident Report showing oil/water separator system "not installed" and areas unpaved or partially paved. (Resp't's Br., p 6.) Auto Scrap installed two oil/water separators. During DEP's inspection on November 2, 2005, petitioner advised Zuckerman that an oil/water separator was installed. During Zuckerman's inspection on November 1, 2006, petitioner advised him that the second separator was installed. By letter dated January 7, 2009, Kenneth Woodruff (Woodruff), the consultant for Auto Scrap, provided a certification that annual

inspections were performed and that additional concrete is needed for paving. (Resp't's Br., pp. 6-7.)

On February 17, 2011, Zuckerman (DEP) inspected the facility and observed various violations of the permit, including: failure to implement BMPs to prevent fluids from vehicles and other scrap materials from going to the stormwater and ground and failure to place engine blocks on a concrete pad that drains to an oil/water separator. Zuckerman observed that the entire site is graded to drain to its two oil/water separators. However, the facility had not paved all required areas with an impervious surface. In addition, Zuckerman observed staining of the ground. By letter dated May 17, 2011, Zuckerman provided Faulk with a copy of his February 17, 2011, inspection report. Zuckerman's report requested a written response, but none was received from Auto Scrap. By letter, dated February 27, 2012, Woodruff provided an annual certification and stated that additional paving was indeed needed.

The DEP inspector conducted an inspection on March 21, 2012, and an NOV was issued on that date. He observed that the conditions found on February 17, 2011, had not been corrected. The NOV cites the failure to eliminate uncontrolled fluid petroleum hydrocarbon discharges to the ground as required by the permit and the failure to provide a containment system under the hydraulic crusher exposed to stormwater or the ground surface, as required by the permit.

On April 17, 2012, DEP issued an AONOCAPA based on the February 2011 and March 2012 inspections. The AONOCAPA cited various violations of the permit, including (1) failure to implement BMPs to prevent exposure of fluids from vehicles and scrap metal to the stormwater or ground surface, (2) failure to place engine blocks on a concrete pad that drains to an oil/water separator, and (3) the hydraulic crusher was on soil with no concrete pad or fluid-collection system and did not drain to an oil/water separator. The AONOCAPA assessed a penalty of $55,000 for these violations.

On October 2, 2012, DEP again inspected the Auto Scrap facility and observed that the permit violations that existed prior to the AONOCAPA had not been remedied. By e-mail, dated June 21, 2013, Woodruff provided a draft of planned improvements,

including a "Conceptual Concrete Paving Plan." The DEP issued NJPDES Permit No. NJG 139432, PI95291 effective October 1, 2013. On November 26, 2013, DEP inspected Auto Scrap and observed that the facility failed to complete the concrete work according to the agreed-upon schedule.

On April 30, 2014, DEP inspected the facility and observed that Area 3 had not been paved by the agreed upon extension date of April 15, 2014. On May 22, 2014 and again on June 12, 2014, DEP inspected Auto Scrap and observed that areas had not been paved by the agreed-upon extension date of May 15, 2014. Auto Scrap agreed to the conditions of the site, i.e., that Areas 1, 2, and 4 are paved (completed) and that Areas 3 and 5 to 9 are not completed. On October 30, 2014, DEP inspected Auto Scrap and observed that the concrete was not completed according to the agreed-upon schedule. The DEP inspector issued an NOV for failure to comply with the permit condition and prepared an inspection report.

The above are determined to be **FINDINGS OF FACT** as the petitioner did not dispute these statements and failed to file any position contradicting same or advocating for any position.

LEGAL ANALYSIS

Summary decision is appropriate because there is no genuine issue of material fact and the respondent is entitled to prevail as a matter of law as the petitioner is liable for the violations of the WPCA and the DEP's implementation rules, set forth in the DEP's Order.

N.J.A.C. 1:1-12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue

which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

N.J.A.C. 1:1-12.5(b) provides that a summary decision is appropriate:

> . . . if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Brill, supra, 142 N.J. at 536. I am required to do "the same type of evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b) [concerning a motion for involuntary dismiss] in light of the burden of persuasion that applies if the matter goes to trial." Brill, supra, 142 N.J. at 539-40. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

The procedure permitting the filing of a motion for summary judgment is intended to provide a "prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits . . . shows not to present any genuine issue of material fact requiring disposition at a trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In this case, the respondent seeks to hold petitioner liable for violations described and penalties assessed in DEP's AONOCAPA. The DEP requests that the petitioner,

Auto Scrap, be found liable for violating the WPCA, N.J.S.A. 58:10A-1 et seq., for violating NJPDES Stormwater Permit issued to Auto Scrap for violating rules implementing the WPCA at N.J.A.C. 7:14A-1 et seq., and that Auto Scrap be assessed the penalty set forth in the AONOCAPA, i.e., $55,000.

In N.J. Department of Environmental Protection v. Cedar Square, EWR 09796-94 (consolidated), Initial Decision (July 20, 1999), http://njlaw.rutgers.edu/collections/oal/, ALJ Masin granted the DEP's motion for summary decision as to the permittee's liability for permit exceedances. Ibid. The motion was predicated on data contained in DMRs that had been submitted to the DEP by the permittee. Ibid. ALJ Masin stated "[w]here the self-monitoring reports reveal that exceedances have occurred, the fact of such exceedances is established, and there is then no material fact in dispute as to whether the limits for that pollutant or other parameter established in the permit have been violated." Ibid. ALJ Masin proceeded to find that, consistent with legislative history and federal case precedent, the DEP need only show that the permittee is in violation of the effluent limitations set forth in its permit to establish liability under the WPCA. Ibid. Moreover, it was held that summary decision is appropriate on the issue of liability where the discharger's DMRs show permit exceedances and the discharger does not deny that its discharges exceeded permit limitations. Ibid.

In light of the foregoing principles, case law and the facts in the case at hand, the petitioner's motion for summary decision must be granted. The failure of the petitioner to file any paperwork can only serve to conclusively establish liability for violations of the WPCA and the regulations promulgated thereunder. N.J.S.A. 58:10A-6(a); N.J.A.C. 7:14A-2.9. Therefore, as to the issue of liability, the respondent has shown that there are no genuine issues as to any material fact challenged and that it is entitled to prevail as a matter of law. It is thus entitled to summary decision on this matter.

DEP is Authorized to Administer and Enforce the NJPDES Program

The DEP is authorized to enforce the NJPDES program through its delegated authority under the Federal Water Pollution Prevention and Control Act (the Federal Act), 33 U.S.C.A. § 1251 et seq., and the New Jersey WPCA, for purposes of the

regulation of stormwater discharges and for the purposes of this case. Congress enacted the Federal Water Pollution Prevention and Control Act in order to protect public health and welfare by restoring, enhancing and maintaining the chemical, physical and biological integrity of the nation's waters. Ibid. If its water pollution control program has been approved by the Administrator of the USEPA, Section 402(a)(1) of the Federal Act, 33 U.S.C.A. § 1342, authorizes a State to issue permits for the discharge of pollutants under the terms which are at least as stringent as the federal requirements.

Pursuant to this federal scheme, New Jersey has established and received federal approval of a State program for the issuance of permits regulating the discharge of pollutants into waters of New Jersey. The NJPDES program was established and is administered under the WPCA. 33 U.S.C.A. § 1342(b); 40 C.F.R. § 123.25.

The WPCA has, as part of its basis for adoption, the Legislature's recognition that:

> [P]ollution of the ground and surface waters of this State continues to endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water, even though a significant pollution abatement effort has been made in recent years. It is the Policy of this State to restore, enhance and maintain the chemical, physical and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values and to enhance the domestic, municipal, recreational, industrial and other uses of water.
>
> [N.J.S.A. 58:10A-2.]

In order to accomplish these goals, the Legislature directed the DEP to regulate the discharge of pollutants through NJPDES permits. N.J.S.A. 58:10A-6(a). Under this system, no person may "discharge any pollutant except . . . when the discharge conforms with a valid [NJPDES] permit." N.J.S.A. 58:10A-6(a). By applying for and obtaining a NJPDES permit authorizing the discharge of pollutants, a permittee assumes the important and weighty obligation to monitor its pollutant discharge in order

to "maintain . . . the integrity of [the State's] waters . . . [and] to protect the public health." N.J.S.A. 58:10A-2. USEPA approved the New Jersey delegated responsibility to the DEP for administering the National Pollutant Discharge and Elimination System (NPDES) program. 47 Fed. Reg. 17331 (April 13, 1982).

In response to the USEPA's adoption of Federal Rules governing the discharge of stormwater, DEP amended its NJPDES rules to incorporate the Federal requirements. 40 C.F.R. § 122.26; N.J.A.C. 7:14A-1.1 et seq. The stormwater amendments became effective November 2, 1992. 24 N.J.R. 4088. "Stormwater" includes water from precipitation (including rain and snow) that runs off the land's surface, is transmitted to the subsurface, or is captured by separate storm sewers or other sewage or drainage facilities, or conveyed by snow removal equipment. N.J.A.C. 7:14A-1.2.

In connection with the regulation of stormwater and in accordance with the Federal Act and federal guidelines, DEP developed and issued the NJPDES (General Permit number NJG0139432) to petitioner, Auto Scrap.

Whether Petitioner violated the WPCA and NJPDES

Auto Scrap receives motor vehicles at its facility in Kearney where it dismantles the motor vehicles in order to sell the auto parts and scrap metal. This facility is located about 900 feet from the lower Passaic River. For over fifteen years, Auto Scrap has been required to operate its auto salvage business under a NJPDES Permit. On November 1, 1999, DEP issued a NJPDES General Permit pursuant to the WPCA and DEP regulations. The permit authorized discharge of stormwater from scrap metal processing and recycling facilities and establishments engaged in dismantling of motor vehicles under specified conditions of the permit.

On July 16, 2001, DEP issued Authorization to Discharge for Scrap Metal Processing/Auto Recycling NJPDES Permit to Auto Scrap, with an expiration date in 2004. On February 1, 2005, DEP issued a NJPDES Permit to Auto Scrap with an expiration date of January 31, 2010. The permit remained in effect until September 30,

2013. A new permit was issued and effective on October 1, 2013. The 2011 and 2012 violations alleged in the AONOCAPA are in regard to the 2005 permit which remained in effect until 2013, which included the provisions and conditions.

The permit lists conditions in Part II (General Requirements: Discharge Categories) Unit Specific Conditions in Section E1, for a SPPP and in Section E2 for (BMPs). BMPs required by Section E2 include:

> E2d: "Collection of Liquids from Vehicles and other Scrap Material" under which is permit condition v:
>
> > v. Fluids must be drained in a manner that prevents exposure of such fluids to stormwater or the ground surface.
>
> E2k: "Engine Blocks/Turning Piles" under which is permit condition i:
>
> > i. All used engine blocks, cores, transmission components, turnings and other oily materials shall be placed on a concrete pad large enough to contain and support the entire pile of engine blocks or turnings.
>
> E21: "Hydraulic Processing Systems" under which is permit condition iii:
>
> > iii. Stationary Hydraulic Systems
> > A containment system, such as a concrete pad with berms, shall be provided under the hydraulic systems of stationary scrap processing equipment exposed to stormwater which drain into an oil/water separator or other treatment system.

Under its permit, Auto Scrap is required to pave areas so that the ground is not exposed to polluted stormwater. The purpose of the paving requirements is to direct stormwater contaminated with motor oils from its operations to run into drains leading to oil/water separators. The failure to have such impervious surfaces would allow the oily stormwater to run on exposed ground, thereby percolating down into groundwater. Additionally, oil-contaminated stormwater could flow toward the street and lower Passaic River, which is approximately 900 feet away. DEP had inspected the facility

from 2002 to monitor compliance with the permit. DEP issued NOVs to Auto Scrap in 2002, 2003, 2004, and 2012 based on some of the inspections. Auto Scrap's environmental consultant (Woodruff) prepared annual reports of the condition of the facility and compliance with the permit, which indicated that the facility needed more paving.

Zuckerman inspected the facility on February 17, 2011, and found that the entire facility was graded to drain to its two oil/water separators. Auto Scrap, however, had not paved all required areas with an impervious surface. In addition, staining of the ground was observed by Zuckerman. Zuckerman observed various violations of the permit, including failure to implement BMPs to prevent fluids from vehicles and other scrap materials from going to the stormwater and ground, and failure to place engine blocks on a concrete pad that drains to an oil/water separator. By letter, dated May 17, 2011, Zuckerman provided petitioner with a copy of his February 17, 2011, inspection report. The report requested a written response, but no response was received. By letter, dated February 27, 2012, Woodruff provided an annual certification stating additional paving was required.

On March 21, 2012, Zuckerman again inspected Auto Scrap. Zuckerman found that the conditions he observed on February 17, 2011 had not been resolved. He found that large areas of the site allowed stormwater run-off from greasy liquids and vehicles and allowed the water to flow onto the ground without being directed to either of the two oil/water separators. DEP issued an NOV on that date. The NOV cited the failure to eliminate uncontrolled fluid petroleum hydrocarbon discharges to the ground as required by the permit and failure to provide a containment system under the hydraulic crusher exposed to stormwater or the ground surface, as required by the permit. (Zuckerman Certif. ¶ 19.) Zuckerman took photographs in order to document his observations, including the March 21, 2012, inspection. The photographs taken by Zuckerman illustrates that BMPs were not followed. This situation was aggravated by the fact that large areas of the facility had permeable ground surface. Consequently, polluted stormwater would not be contained and/or directed to an oil/water separator system, as required by the permit.

On April 17, 2012, DEP issued AONOCAPA 120002-95291 citing violations of the permit based on the February 17, 2011, and March 12, 2012 inspections and assessing a penalty of $55,000. (Exh. 1.) The alleged violations included:

> 1. The facility failed to implement BMPs to prevent exposure of fluids from vehicles and scrap metal to the stormwater or the ground surface.
>
> This violated permit condition E2d.v., which provides: "Fluids must be drained in a manner that prevents exposure of such fluids to stormwater or the ground surface."
>
> 2. The facility failed to place the engine blocks on a concrete pad that drains to an oil/water separator.
>
> This violated permit condition E2ki., which provides: "All used engine blocks . . . shall be placed on a concrete pad large enough to contain and support the entire pile of engine blocks . . . ."
>
> 3. The facility's hydraulic scrap metal crusher was located on soil with no concrete pad or fluid collection system and did not drain to an oil/water separator.
>
> This violated permit condition E2liii., which provides: "A containment system, such as a concrete pad with berms, shall be provided under the hydraulic systems of stationary scrap processing equipment exposed to stormwater which drain into an oil/water separator or other treatment system."
>
> [AONOCAPA: Exh. 1 ¶¶ 6, 8; Permit provisions: Zuckerman Certif. ¶¶¶ 12, 21, 22.]

Following DEP's issuance of the AONOCAPA, DEP conducted inspections to monitor compliance with the AONOCAPA and the permit. On October 7, 2012, Zuckerman inspected the facility and observed that the permit violations that existed prior to the AONOCAPA had not been remedied. DEP met with the facility representatives and requested that it develop a compliance plan. Petitioner again hired Woodruff and Associates to develop a plan for grading the ground and paving the graded areas with concrete to ensure that stormwater is channeled to the drains leading to the two on-site oil/water separators. In June 2013, Woodruff provided a diagram of the site, dividing the areas to be graded and paved and numbering the areas 1 to 9.

The parties agreed on a schedule to pave areas 1 to 9 with concrete. (Zuckerman Certif. ¶ 25.)

On November 26, 2013, DEP inspected the facility and observed that the facility failed to complete the agreed upon concrete work according to the schedule. On April 30, May 22, and June 12, 2014, DEP inspected the facility and observed that areas 1, 2, and 4 were paved, that area 3 had not been paved by the agreed upon extension date of April 15, 2014, and that areas 5 to 9 were not paved. On October 30, 2014, DEP inspected the facility and observed that the concrete was not completed according to the agreed upon schedule. Zuckerman issued an NOV for failure to comply with conditions in the permit issued in October 2013.

As described above and in the certification of Zuckerman, petitioner violated its permit and the WPCA and its implementing rules, as cited in the AONOCAPA. For that reason, petitioner should be found liable for failing to take required measures to prevent the discharge of contaminated stormwater in violation of the WPCA and its stormwater permit as set forth in the AONOCAPA. As a result, summary decision with respect to petitioner's liability and the findings and conclusions in the AONOCAPA is granted against petitioner.

Appropriateness of Penalties Assessed by the DEP

N.J.S.A. 58:10A-10(d)(1)(a) is the applicable penalty provision of the WPCA. It states that the Commissioner

> is authorized to assess, in accordance with a uniform policy adopted therefore, a civil administrative penalty of not more than $50,000 for each violation and each day during which such violation continues shall constitute an additional, separate, and distinct offense. Any amount assessed under this subsection shall fall within a range established by regulation by the Commissioner for violations of similar type, seriousness, and duration.

In adopting its civil administrative penalty policy, DEP was required to take into consideration the following factors:

> [T]he type, seriousness, including extent, toxicity, and frequency of a violation based upon the harm to public health or the environment resulting from the violation, the economic benefits from the violation gained by the violator, the degree of cooperation or recalcitrance of the violator in remedying the violation, any measures taken by the violator to avoid a repetition of the violation, any unusual or extraordinary costs directly or indirectly imposed on the public by the violation other than costs recoverable pursuant to [N.J.S.A. 58:10A-10(c)(3) and (4)], and any other pertinent factors that the commissioner determines measure the seriousness or frequency of the violation, or conduct of the violator.
>
> [N.J.S.A. 58:10A-10(d)(1)(b).]

Thus, while the type of enforcement action to be taken is left to the discretion of DEP, the language of the statutory provision clearly indicates that a penalty assessment is mandatory where there has been a violation of the Act. Dep't of Envtl. Prot. v. Lewis, 215 N.J. Super. 564, 575 (App. Div. 1987). Intent to violate the Act is not required to impose a penalty. Id. at 572. Proof that a violation has occurred is sufficient to initiate an action against the violator. Id. at 573.

Administrative penalties may only be assessed in accordance with the regulations. The implementing regulation to N.J.S.A. 10A-10(d)(1)(a) was promulgated at N.J.A.C. 7:14-8.5(f) and establishes a range for the uniform assessment of civil administrative penalties as follows:

Seriousness/Conduct

	(Major)	(Moderate)	(Minor)
Major	$40,000-$50,000	$30,000-$40,000	$15,000-$25,000
Moderate	$30,000-$40,000	$10,000-$20,000	$3,000-$7,000
Minor	$15,000-$25,000	$3,000-$7,000	$1,000-$2,500

> Any violation . . . which substantially deviates from the requirements of the Water Pollution Control Act, The New Jersey Underground Storage of Hazardous Substances Act, or any violation of any rule . . . administrative order . . . now or hereafter issued pursuant thereto; substantial deviation shall include, but not be limited to, those violations which are in substantial contravention of the requirements or which substantially impair or undermine the operation or intent of the requirement.
>
> [N.J.A.C. 7:14-8.5(g)(2)(iv).]

A violation designated as moderate in conduct is defined as "any unintentional but foreseeable act or omission by the violator." N.J.A.C. 7:14-8.5(h)(2). The DEP maintains that the fine should be at the top-point of the range for the civil administrative penalties at moderate in seriousness and moderate in conduct. The basis for this position is supported by the DEP's statement that this violation had the potential to cause substantial harm to human health or the environment, impair and undermine the operation or intent of the statute and regulations, and is in substantial contravention of the regulations. N.J.A.C. 7:14-8.5(f). N.J.A.C. 7:14-8.5(e)(2) requires DEP to assess the civil administrative penalty at the mid-point of the range in the penalty matrix unless DEP makes an adjustment within the range based on various factors set forth in N.J.A.C. 7:14-8.5(i).

Deterrence plays a role in penalty assessments under the WPCA. See N.J.A.C. 7:14-8.5(i)4. The regulation states that the penalty should have a deterrent effect. This effect should have an impact not only upon the violator, but also upon the regulated community. See N.J.A.C. 7:14-8.5(i)4 and Dep't of Environmental Protection v. Engineered Precision Casting Company, 93 N.J.A.R.2d (EPE) 87, *20 (191) (partial motion for summary decision regarding Water Pollution Control Act violations—case withdrawn and concluded). The WPCA provides that DEP "shall" assess penalties against any person who violates the Act. Shall is generally interpreted as mandatory. Lewis, supra, 157 N.J. Super. at 575; State of New Jersey v. Koziol, 157 N.J. Super. 499, 502-03 (App. Div. 1978), holding that Penalties in the Pesticide Control Act, N.J.A.C. 13:1F-1 et seq., "evidence legislative determination to deter violations.

The DEP assessed penalties against the petitioner based on the seriousness of the violation and the conduct of the violator. N.J.A.C. 7:14-8.5(d) and 8.5(e). A violation that is moderate in seriousness includes "Any violation . . . which has caused or has the potential to cause substantial harm to human health or the environment." N.J.A.C. 7:14-8.5(g)(2)(i). In this case, petitioner's failure to implement BMPs as required by the permit to direct polluted stormwater to oil/water separators to minimize pollution of groundwater, had the potential to cause harm to human health and the environment.

A violation designated as moderate in seriousness is if it substantially deviates from the requirements. N.J.A.C. 7:14-8.5(g)(2)(iv). DEP properly determined that the seriousness of the February 17, 2011, and March 21, 2012, violations was moderate because petitioner substantially deviated from the requirements of the permit by its (1) failure to implement BMPs to prevent exposure of fluids from vehicles and scrap metal to the stormwater or ground surface (paving violation) ($20,000), (2) failure to place engine blocks on a concrete pad that drains to an oil/water separator (engine block violation) ($20,000), and (3) that the hydraulic system was on soil with no concrete pad or fluid-collection system and did not drain to an oil/water separator (hydraulic crusher violation) ($15,000). Accordingly, the penalties for violations cited in the AONOCAPA were properly assessed at the moderate range for seriousness.

I **FIND** the assessment of moderate seriousness/moderate conduct is appropriate for these violations. NJDEP v. Egg Harbor Gas and Co., EWR 2907-05, Initial Decision (July 7, 2006), aff'd, Comm'r (August 21, 2006), http://njlaw.rutgers.edu/collections/oal/, aff'd, A-0309-06T5 (App. Div. May 4, 2007), http://njlaw.rutgers.edu/collections/courts/.

A violation designated as moderate in conduct is defined as "any unintentional but foreseeable act or omission by the violator." N.J.A.C. 7:14-8.5(h)(2). Petitioner's actions may have been unintentional, but they were foreseeable. Petitioner was required to comply with its NJPDES permit and yet it failed to do so. In addition, the petitioner received numerous notices from the DEP over the years advising it of the need to pave the required area with impervious surfaces so stormwater, polluted with

oils from motor vehicles, would drain to the oil/water separators.

The penalty may be adjusted up or down from the mid-point of the range. N.J.A.C. 7:14-8.5(i). "The Department may, in its discretion, move from the midpoint of the range to an amount no greater than the maximum amount nor less than the minimum amount in the range" based on eight factors. N.J.A.C. 7:14-8.5(i).

In developing the rule, DEP determined that the penalty does not start at the bottom of the range, but rather at the mid-point of the range, to be moved up or down under the circumstances of the case, based on the eight factors discussed below. N.J.A.C. 7:14-8.5(e) and (i) which establishes that the DEP may, in its discretion, move the penalty up or down based on specified factors. In 1991, the DEP clarified that the mid-point of the ranges is the starting point and that any adjustment is from the mid-point.

DEP rules authorizes the department to "move from the midpoint of the range" on the basis of eight factors discussed below. N.J.A.C. 7:14-8.5(i). There must be sufficient evidence to "move from the midpoint."

In this case, the AONOCAPA started at the mid-point of the moderate seriousness/moderate conduct range $15,000 for each of the three violations. Applying the facts and circumstances of these violations to the following eight factors in N.J.A.C. 7:14-8.5(i), demonstrates that a decrease in the penalty from the mid-point of the range is not warranted as the violations date back to 2003. The DEP issued NOVs in 2002, 2003, 2004, and 2012. In addition the "paving" and "engine block" violations were observed on February 17, 2011, and March 12, 2012. There is no evidence that petitioner took any measures to mitigate the violations as they may have or should have become known to it, at the time of the inspections on February 17, 2011, and March 12, 2012. Petitioner also failed to meet agreed upon deadlines to remedy the violations after the AONOCAPA and much discussion between the parties. Even after the assessment of the penalties, the permit violations continued well after the AONOCAPA was issue in 2012. Some limited remedial measures were taken after the AONOCAPA was issued and there is no indication that any paving would have been done without the

assessment of the penalty. Petitioner allowed the conditions to exist at its property despite numerous reports and NOVs by DEP and reports by the petitioner's consultant that additional paving was needed. Petitioner failed to meet subsequent agreed upon deadlines to remedy the site after the AONOCAPA was issued, despite frequent reminders by the DEP, even after those deadlines were extended several times. There were no unusual or extraordinary costs or impacts on the public. There is the potential of pollutants in the stormwater at the property to percolate to the ground water and for the ground water plume to run towards the Passaic River. There is also the potential for stormwater to run along the surface to the Lower Passaic River at the end of the street. There are no special circumstances in this case.

Based on the DEP's analysis of the above factors, I **FIND** that the DEP properly moved from the mid-point of the penalty range to increase the penalty for the following violations because they continued for more than one year from DEP's February 17, 2011, inspection at least until its March 12, 2012, inspection: (1) failure to implement BMPs to prevent exposure of fluids from vehicles and scrap metal to the stormwater or ground surface and (2) failure to place engine blocks on a concrete pad that drains to an oil/water separator.

The DEP also properly determined that there was not sufficient evidence to move from the mid-point for the following violation observed on March 12, 2012: (3) the hydraulic crusher was on soil with no concrete pad or fluid-collection system and did not drain to the oil/water separator.

I **FIND** that based upon the factors in N.J.A.C. 7:14-8.5(i), the DEP properly exercised its discretion to assess a reasonable and appropriate penalty of $55,000 against Auto Scrap for the violations set forth in the AONOCAPA. Each day during which a violation continues constitutes "an additional separate and distinct violation" under the WPCA N.J.S.A. 58:10A-10(d)(1)(a) and the DEP rules at N.J.A.C. 7:14-8.5(c). Accordingly I further **FIND** that the DEP is authorized to issue a penalty based on the number of days of violations, such as from the time the permit conditions were required to be implemented, but the DEP assessed a penalty for one day of violation.

In addition, the DEP did not assess a separate "economic benefit" penalty, although such a penalty assessment would have been authorized under the WPCA, due to the fact that the petitioner operated its business without undertaking the required stormwater collection requirements which was a significant cost savings to it.

Generally, a regulatory agency retains "broad discretion in determining the sanctions to be imposed for a violation of the legislation it is charged with administering." In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987) (citing Knoble v. Waterfront Comm. of N.Y. Harbor, 67 N.J. 427 (1975)). "Consequently, such a sanction will be set aside on appeal only if it is arbitrary, capricious or unreasonable." Scioscia, supra, 216 N.J. Super. at 660 (citing Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). However, the broad discretion afforded administrative agencies has its limits. Crema v. New Jersey Dept. of Envtl. Prot., 94 N.J. 286, 299 (1983). Administrative agencies should articulate the standards and principles that govern their discretionary acts by setting forth procedural and substantive safeguards, standards and rules. Id. at 301.

In the present case, the application of duly promulgated rules pursuant to the penalty provisions of N.J.S.A. 58:10A-10 is consistent with principles which guide discretionary agency actions. Respondent has set forth its rationale for penalty amounts, indicating the formula used to assess each penalty and citing the pertinent administrative code provisions.

"The existence of a penalty section in a statute is generally strong evidence of the Legislature's intent to deter violations. If the Legislature had intended that a trial judge have discretion in whether penalties should be imposed at all, it could easily have so provided." Lewis, supra, 215 N.J. Super. at 575. While a judge cannot refuse to impose a penalty for violations of the Act, he or she does have discretion in the amount of the penalty. Id. at 574. However, in accordance with N.J.A.C. 7:14-8.5(i), the DEP, and likewise an ALJ, may in its discretion only move the penalty from the midpoint of the range to an amount no greater than the maximum amount and no less than the minimum amount in the range.

I **FIND** that the penalty in the amount of $55,000 was properly assessed by the DEP in the AONOCAPA under the DEP's penalty matrix set forth in N.J.A.C. 7:14-8.5. I also **FIND** that the DEP properly exercised its discretion in assessing one penalty per violation (even though the violation continued for years and each day the violations continued is a separate offense under the WPCA). I also **FIND** that the DEP further exercised restraint in not assessing a separate "economic benefit" penalty, although such penalty assessment would have been authorized under the WPCA.

CONCLUSIONS OF LAW

Based on the foregoing, I **CONCLUDE** that respondent's motion seeking a summary decision affirming its determination that petitioner is liable for the violations set forth in the AONOCAPA is granted. Its imposition of a $55,000 penalty is affirmed based on the factors set forth in this decision. I based this conclusion on the lack of any dispute as to any material facts. That is, petitioner did not dispute the facts or the law presented by the State by failing to file any responsive papers to the respondent's motion.

ORDER

I hereby **ORDER** that respondent's Motion for Summary Decision in this matter affirming its determination of petitioner's violation of the applicable law is **GRANTED** and the imposition of a penalty is **AFFIRMED** in the amount of $55,000.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, P.O. Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 10, 2015
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: September 11, 2015

Date Mailed to Parties:

jb