



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE  
Governor

BOB MARTIN  
Commissioner

KIM GUADAGNO  
Lt. Governor

NEW JERSEY DEPARTMENT OF	)	
ENVIRONMENTAL PROTECTION,	)	
CENTRAL BUREAU OF WATER	)	
COMPLIANCE AND ENFORCEMENT,	)	<u>ADMINISTRATIVE ACTION</u>
	)	FINAL DECISION
Petitioner,	)	
	)	OAL DKT NO.: ECE-WE 4572-12
v.	)	AGENCY REF NO.: PEA100001-
	)	561400
SAMUEL S. RUSSO, JR.,	)	
	)	
Respondent. <sup>1</sup>	)	

This matter arises from Samuel S. Russo, Jr.'s challenge to the Department of Environmental Protection's (Department) September 26, 2011, Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA), in which the Department found that Mr. Russo, who owns property known as Russo Farm located at 27 Hopkins Lane, Plumsted Township, Ocean County (Property), had violated the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 et seq., and the rules promulgated pursuant thereto, N.J.A.C. 7:14A-1 et seq. Specifically, based on inspections conducted by the Department on July 19 and August 2, 2011, followed by a Stop Construction Order issued by the Ocean County Soil Conservation District on

---

<sup>1</sup> The caption for the Initial Decision identified Russo Farm/Samuel S. Russo, Jr. as the Petitioner. The caption for this Final Decision is revised to reflect the proper burden of proof in this enforcement matter. Further, because the Department's enforcement action was taken only against Samuel S. Russo, Jr., as the property owner, the caption has been adjusted to remove reference to Russo Farm.

August 2, 2011, the Department found that Mr. Russo had allowed soil and road millings, construction waste debris, and wood grinding equipment and related materials on the property; graded and excavated areas of the property; and installed a substantial area of asphalt without a New Jersey Pollutant Discharge Elimination System (NJPDES) permit or an approved Soil Erosion and Sediment Control Plan. Accordingly, the Department determined that Mr. Russo was discharging stormwater associated with construction activities and with industrial activities without a NJPDES stormwater general permit or individual permit. The Department assessed a civil administrative penalty in the amount of \$60,000 for the alleged violations on two days (July 19 and August 2, 2011), based on its determination that Mr. Russo's conduct was moderate and that the violations were moderately serious.

On October 26, 2011, Mr. Russo requested an administrative hearing. The Department granted the request on January 20, 2011, and transmitted the matter to the Office of Administrative Law, where the matter was assigned to Administrative Law Judge (ALJ) Jeff S. Masin. The Department filed a motion for summary decision both as to Mr. Russo's liability and the appropriateness of the penalty. On October 2, 2015, the ALJ issued an Order Granting Partial Summary Decision (Order), finding that Mr. Russo violated the WPCA as set forth in the AONOCAPA and granting summary decision in favor of the Department. Following a hearing on September 7, 2016, on the Department's penalty assessment, the ALJ issued an Initial Decision on October 6, 2016, affirming, with a detailed discussion, the \$60,000 penalty. The Initial Decision incorporated the October 2, 2015, Order, except for that Order's limited discussion of the penalty.

Mr. Russo filed exceptions to the Initial Decision on October 18, 2016, asserting that there are numerous genuine issues of material fact that should have precluded summary decision,

and that the ALJ erred in several other respects. Mr. Russo primarily argued that the Property is a farm and the activities at issue were related to Mr. Russo's farming activities. He also contested the nature and extent of prior notices he had received regarding the activities that were the subject of the AONOCAPA. The Department filed exceptions on October 19, 2016, and replied to Mr. Russo exceptions on October 24, 2016. The Department endorsed the Initial Decision, requesting that it be adopted with only minor changes and that evidence that had been excluded from testimony at the September 7, 2016, hearing should be considered in this Final Decision.

On October 28, 2016, the Department submitted a letter advising that the parties had reached a tentative settlement, and requested that review of the Initial Decision be placed on hold while the settlement terms were negotiated and approved. However, on May 12, 2017, the Department indicated that the parties did not finalize the settlement. Since the parties were unable to settle, I now issue a Final Decision in this matter.

Based on my review of the record, I ADOPT the Initial Decision with the modifications set forth below.

### DISCUSSION

I ADOPT the ALJ's recitation of the facts as supplemented herein. I also ADOPT the ALJ's conclusion that there are no genuine issues of material fact with respect to Mr. Russo's liability for the violations enumerated in the AONOCAPA, and the ALJ's affirmance of the \$60,000 civil administrative penalty assessed by the Department.

Summary decision is appropriate where "the pleadings, discovery and affidavits '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.'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010) (quoting N.J.A.C. 1:1-12.5(b)). A genuine issue of material

fact exists only “when ‘the competent evidential materials . . . are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party.’” Ibid. (alterations in original) (quoting Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000)).

Under the WPCA, it is unlawful for any person to discharge a pollutant except in conformance with a valid NJPDES permit. N.J.A.C. 7:14A-2.4(b)11. A NJPDES permit is required for any “stormwater discharge (or stormwater DSW) associated with small construction activity” and for any “stormwater discharge (or stormwater DSW) associated with industrial activity.” N.J.A.C. 7:14A-24.2(a)2 and 3. Stormwater discharges associated with small construction activity include discharges of stormwater from construction activity such as “clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres.” N.J.A.C. 7:14A-1.2. The NJPDES rules enumerate certain categories of industries engaged in industrial activity, including “[f]acilities involved in the recycling of materials.” N.J.A.C. 7:14A-1.2. For those facilities, stormwater discharges associated with industrial activity include discharges from “material handling sites; refuse sites; . . . sites used for the storage and maintenance of material handling equipment; [and] sites used for treatment storage, or disposal of by-product or waste product.” Ibid. Another category of industrial activity includes “[c]onstruction activity including clearing, grading and excavation” that results in the disturbance of at least five acres of land. Ibid.

Here, it is undisputed that on July 19, 2011, Mr. Russo accepted and placed on the Property approximately 100,000 tons of acid producing soil (APS) that had been generated from the New Jersey Turnpike Authority’s road widening project. It is also undisputed that in August 2011, Mr. Russo used asphalt millings to pave an existing roadbed and to construct a truck staging area that includes a truck scale, which totaled approximately five acres. See Ambrosio

Cert. ¶ 6. The above activities clearly constitute “discharges” of “pollutants” that would be exposed to “stormwater,” as those terms are defined by the WPCA and NJPDES rules, and were land disturbances that required a stormwater permit for small construction activity prior to their being undertaken. See N.J.A.C. 7:14A-1.2. Since it is undisputed that Mr. Russo conducted the above activities without a NJPDES permit in July and August 2011, I agree that the Department is entitled to summary decision with regard to Mr. Russo’s liability for failure to obtain a NJPDES stormwater general permit for discharges associated with small construction activity as required by N.J.A.C. 7:14A-24.2.

Undisputed evidence submitted by the Department further shows that construction and demolition debris, containers, and heavy equipment were stored on the Property in July and August 2011.<sup>2</sup> See Ambrosio Cert. ¶ 5; Ex. 27. Photographic evidence also establishes that there were no agricultural activities at the subject areas during the time period in question. Ambrosio Cert. Ex. 27. Rather, the record shows that Mr. Russo was the owner of Sam S. Russo, Inc., a demolition, excavation, and disposal company that provided heavy equipment and container services, and that he used the Property’s address as Sam S. Russo, Inc.’s business address. Ambrosio Cert. Ex. 7, 26. Mr. Russo also acknowledged that he stored at the Property equipment owned by Sam S. Russo, Inc. during the time in question. T170:12-17.<sup>3</sup> Based on the uncontroverted record before me, I find that the above activities constitute industrial activities for which a NJPDES stormwater permit is required.<sup>4</sup> Accordingly, I agree with the ALJ that the

---

<sup>2</sup> The Department’s AONOCAPA only referenced the paving of the road and truck staging areas as having taken place in August 2011; however, the photographs submitted by DEP establish that construction and demolition debris, containers and heavy equipment continued to be stored at the Property through at least August of 2011. Ambrosio Cert. Ex. 27.

<sup>3</sup> “T” refers to the transcript of the September 7, 2016 penalty hearing.

<sup>4</sup> During the September 7, 2016, hearing, the Department indicated, for the first time, that Mr. Russo’s obligation to obtain a stormwater permit for industrial activities depended on whether his wood grinding activities qualified for an exemption under solid waste rules related to recycling. T189:21-190:5. Although no regulatory citation was

Department is entitled to summary decision with respect to Mr. Russo's liability for failure to obtain an individual NJPDES permit for stormwater discharges associated with industrial activity.

Mr. Russo's exceptions to the Initial Decision primarily address his contention that the Property is a farm, as demonstrated by its farmland status under the Farmland Assessment Act of 1964, and that the activities discussed above did not require a permit because they were in furtherance of or related to his farming activities. Pursuant to N.J.S.A. 58:10A-6(d)(8) and the NJPDES rules, discharges resulting from agriculture activities are exempt from NJPDES permitting requirements. Specifically, N.J.A.C. 7:14A-2.5(a)1 provides that "any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands" does not require a NJPDES permit.

Thus, the pertinent question here is whether the specific activities observed by the Department and asserted in the AONOCAPA were "agricultural activities." The municipality's assessment of the Property or any portion thereof as "farmland" pursuant to the Farmland Assessment Act is not dispositive as to whether a particular activity was agricultural in nature under the WPCA and Department rules, nor does the Property's status for tax assessment purposes exempt any and all activities at the Property from the environmental laws of the State.

The record in this matter contains overwhelming and uncontroverted evidence that Mr. Russo's placement of APS at the Property, observed by the Department on its July 19, 2011 inspection, was not an agricultural activity. Mr. Russo contracted through his construction and

---

provided in the record, the solid waste exemption referred to appears at N.J.A.C. 7:26-1.4(a)3. I need not address in this Final Decision whether Mr. Russo was required to and failed to obtain an industrial stormwater permit for wood grinding, since the storage of construction and demolition debris, containers and heavy equipment already establish Mr. Russo's liability for failure to obtain such a permit on July 19 and August 2, 2011.

demolition company, Sam S. Russo, Inc., with Enterprise Network Resolution (ENR) to truck and dispose of the approximately 100,000 tons of APS generated from the New Jersey Turnpike Authority's road widening project. Ambrosio Cert. Ex. 20-21. The construction of the truck scale was also completed as part of Sam S. Russo, Inc.'s contract with ENR. Ibid. Additionally, photographs taken in July and August 2011 show the complete absence of any agricultural activities at the areas of the Property at issue. Ambrosio Cert. Ex. 27. In contrast, Mr. Russo's opposition to the Department's motion for summary decision is conclusory and self-serving, with no documentary or other evidence to controvert the Department's evidence or establish that the grading of land with APS, paving of portions of the Property with asphalt millings, and presence of construction and demolition debris, containers, and heavy equipment were agricultural activities at the time in question. Moreover, based on various reports and violations issued by the Ocean County Soil Conservation District and the Department for the above activities, Plumsted Township determined the above activities were not agricultural and informed Mr. Russo that, as a result, the Township would deny the Property farmland status for the 2012 Tax Year. Ambrosio Cert. Ex. 15. Thus, even when viewed in the light most favorable to Mr. Russo as the non-moving party, the record overwhelmingly supports the Department's position that Mr. Russo's activities were not agricultural and thus required him to obtain NJPDES permits.

In the Initial Decision, the ALJ discussed at length whether Mr. Russo had any claim to an exemption under the Right to Farm Act for qualifying "commercial farms." See Initial Decision at 13. As Mr. Russo noted in his exceptions, Mr. Russo did not base any part of his defense upon any Right to Farm Act protection, but rather alleged that the Property had been and continued to be used for farming, and that the disposal of APS and use of asphalt millings were in furtherance of his agricultural activities. I agree that Mr. Russo was not asserting any Right to

Farm Act protection as a defense. However, even if he did qualify as a “commercial farm” under the Right to Farm Act and its implementing regulations, such qualification would have only protected Mr. Russo from municipal regulation, not from state or federal regulation. Mr. Russo had been informed of that distinction by the Ocean County Agriculture Development Board. Ambrosio Cert. Ex. 10. Thus, I modify the Initial Decision to reflect that a property’s qualification for protection under the Right to Farm Act has no bearing on whether any particular activity is exempt under the NJPDES rules as a nonpoint source discharge resulting from agricultural activity.

The Department assessed a total penalty of \$60,000 against Mr. Russo pursuant to N.J.S.A. 58:10A-10.d, which authorizes the Department to assess a civil administrative penalty of not more than \$50,000 per violation per day in accordance with the uniform penalty policy set forth at N.J.A.C. 7:14-8.5. The penalty amount was determined based on the penalty matrix at N.J.A.C. 7:14-8.5(f), which takes into account the seriousness of the violation, N.J.A.C. 7:14-8.5(g), and the conduct of the violator, N.J.A.C. 7:14-8.5(h).

The Department determined that Mr. Russo’s failure to obtain a stormwater general permit for small construction activity and to obtain a stormwater individual permit for industrial activity each constituted a moderately serious violation, which includes “any violation ... which substantially deviates from the requirements of the [WPCA].” N.J.A.C. 7:14-8.5(g)2iv. As discussed above, it is unlawful for any person to discharge a pollutant except in accordance with a NJPDES permit issued by the Department. Accordingly, the Department’s determination that Mr. Russo’s violations were moderate in seriousness was appropriate.

The Department also designated Mr. Russo’s conduct to be moderate. Such conduct includes any unintentional but foreseeable act or omission. N.J.A.C. 7:14-8.5(h)2. I find nothing



in the record that warrants disturbing the Department's determination that Mr. Russo's violations of the WPCA were unintentional but foreseeable. Based on the nature of Mr. Russo's activities as discussed above, and the previous notices and scrutiny from the Ocean County Soil Conservation District that certain activities at the Property required a Soil Erosion and Sediment Plan, I agree with the ALJ that Mr. Russo should have been aware that his activities in July and August 2011 were of concern to regulatory agencies and may be subject to regulation. Furthermore, in a July 7, 2011, letter to ENR regarding Sam S. Russo, Inc.'s acceptance at the Property of materials from the New Jersey Turnpike Authority's road widening project, including APS, asphalt millings, and dredge spoils, Mr. Russo acknowledged that "[s]ome of the materials we accept require permission and/or exemptions from the NJDEP." Ambrosio Cert. Ex. 7. Thus, I find the Department's determination of moderate conduct to be appropriate.

For each violation cited on July 19 and August 2, 2011, the Department assessed a penalty of \$15,000, or the midpoint of the penalty range for violations of moderate seriousness and moderate conduct, for a total penalty of \$60,000 (two violations on each day, for two days of violations). See N.J.A.C. 7:14-8.5(f). Based on the record before me, I find that the Department properly started at the midpoint of the penalty range for violations of moderate seriousness and moderate conduct, for each of the violations cited in the AONOCAPA. I further agree with the ALJ that the record does not demonstrate any mitigating factors that would warrant a decrease from the midpoint of the penalty range. Accordingly, I find the \$60,000 penalty to be reasonable and appropriate under the circumstances.<sup>5</sup>

---

<sup>5</sup> Although the Department indicated in its October 24, 2016 exceptions that "the total extent of the land disturbance [resulting from the disposal of APS] is not specified in the record," but that "the parking lot alone approached five acres," the August 7, 2012 EPA inspection report submitted with the Department's motion papers indicates that Mr. Russo informed the EPA inspector that he placed APS "on approximately 26 acres of his site, raising the level of the 26 acres by 1 foot or less." Ambrosio Cert. Ex. 24. Thus, the disposal of APS may actually constitute construction

## CONCLUSION

Based on my careful review of the record and the Initial Decision, I conclude that the ALJ correctly granted summary decision in favor of the Department. I ADOPT the ALJ's conclusions affirming the Department's determination that Samuel S. Russo, Jr., violated the WPCA and its implementing rules and affirming the penalty, and MODIFY the Initial Decision to reflect additional facts and legal discussion as noted herein. Mr. Russo is hereby ORDERED to pay the civil administrative penalty of \$60,000 within 20 days from the date of this Final Decision as set forth in Paragraphs 14 and 15 of the AONOCAPA.

DATE: May 22, 2017

A handwritten signature in blue ink, appearing to read "Bob Martin", is written over a horizontal line.

Bob Martin, Commissioner  
New Jersey Department of  
Environmental Protection

---

activity that disturbs at least 5 acres of land and may therefore fall under the definition of "stormwater discharges... associated with industrial activity" at N.J.A.C. 7:14A-1.2. Regardless of whether the disposal of APS required a general permit for small construction activity or a permit for industrial activity, a NJPDES permit was required for stormwater discharges associated with disposal of APS on July 19, 2011, and for stormwater discharges associated with the storage of construction and demolition debris, containers and heavy equipment on that date. See N.J.A.C. 7:14A-24.2. Accordingly, the Department's assessment of two penalties on July 19, 2011 was correct regardless of whether the amount of land disturbed from disposal of the APS exceeded five acres.

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
CENTRAL BUREAU OF WATER COMPLIANCE AND ENFORCEMENT

v.

SAMUEL S. RUSSO, JR.

OAL DKT. NO. ECE-WE 4572-12  
AGENCY DKT. NO. PEA100001-561400

SERVICE LIST

(Corrected June 20, 2017)

Walter B. Dennen, Esq.  
Aimino & Dennen, LLC  
40 Newton Avenue  
Woodbury, New Jersey 08096  
Email: [wdennen@aimino-dennen.com](mailto:wdennen@aimino-dennen.com)

Samuel S. Russo, Jr.  
27 Hopkins Lane  
Cream Ridge, New Jersey 08514

Aaron Love, DAG  
Department of Law & Public Safety  
Division of Law  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, New Jersey 08625  
Email: [Aaron.Love@dol.lps.state.nj.us](mailto:Aaron.Love@dol.lps.state.nj.us)