



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. ECE-WE 4572-12  
AGENCY DKT. PEA 100001-561400

**RUSSO FARM/SAMUEL S. RUSSO, JR.,**

Petitioner,

v.

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

Respondent.

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**Walter Dennen, Esq.,** for petitioner

**Daniel Greenhouse and Aaron Love,** Deputies Attorney General, for  
respondent (Christopher S. Porrino, Attorney General of New Jersey,  
attorney)

Record Closed: September 7, 2016

Decided: October 6, 2016

BEFORE **JEFF S. MASIN**, ALJ t/a:

This contested case was the subject of an Order Granting Partial Summary Decision, issued on October 2, 2015, which Order decided the liability phase of the dispute between the Department of Environmental Protection and Russo Farms/Samuel S. Russo, Jr. As noted in that Order, the penalty to be imposed upon the respondent for the proven violation of environmental laws, determined in the Order to have occurred, had to be determined following a hearing at which the respondent would have the

opportunity to present evidence and argument as to why the DEP's determination to establish the penalties at the mid-range of the penalty amounts authorized by regulation, a determination based upon considerations as to the nature of the seriousness of the violations and the conduct of the violator, should not be modified. Due to a prolonged health issue that prevented Mr. Russo's attendance at such a hearing, the penalty phase was only concluded with a hearing held on September 7, 2016. The record concerning the penalty issue closed following that hearing. In order to present the entire decision concerning the contested case in one initial decision for review, I have incorporated in this document the text of the October 2, 2015, Order, up to its limited discussion of the penalty, which is now replaced by this detailed assessment of that issue. The rest of the Order, as previously issued reads as follows.

The Department of Environmental Protection (DEP) issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) on October 26, 2011, charging therein that Sam S. Russo, Jr. (Russo) had violated provisions of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. (WPCA), in connection with the operation of premises located at 27 Hopkins Lane, Block 58, Lots 13 and 14, Plumstead Township, Ocean County, New Jersey. After the contested case was transferred to the Office of Administrative Law, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23, the DEP moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. In replying to this motion, Mr. Russo contends that the DEP is attempting to utilize arguments and evidence to support its case that are irrelevant, as they involve matters that are not asserted with the AONOCAPA and which can neither be used to prove the allegations charged therein nor to support the civil administrative penalty imposed thereby. In order to permit a review of this concern within the larger analysis of the motion, it is best to first review the specific details of the AONOCAPA. It asserts that Mr. Russo

1. is the owner and operator of a facility and land use project, locally known as the "Russo Farm," which is in fact an unapproved land use development and recycling materials processing yard used for Russo's demolition, hauling, and excavating business, and for "additional business activities" operated at the facility;

2. on June 22, 2011, the Ocean County Soil Conservation District (OCSCD) issued to Russo a "Soil Disturbance" letter advising him that certain activities conducted on this property were required to be carried out in accordance with an approved Sol Erosion and Sediment plan (SESC);
3. on July 22, 2011, DEP representatives observed activities and conditions at the property that were being conducted despite the absence in DEP records of a valid New Jersey Pollutant Discharge Elimination System (NJPDES) Permit for stormwater discharges at that location, including the arrival of over 20 loads of trucked material, including soil and road millings, food waste that was graded into the ground, construction debris, wood grinding equipment and materials, and "other active source materials storage and related processing activities;
4. on July 21, 2011, the OCSCD issued to Russo a "Violation Notice" letter advising that his failure to obtain and his carrying out of certain activities occurring at the premises without an approved SESC Plan constituted a violation of applicable law;
5. on August 1, 2011, Russo installed acres of new asphalt on dirt roads and dirt areas on the premises and on August 2, 2011, the OCSCD issued a Stop Construction Order to Russo for this illegal activity which was carried out without Russo having in his possession an approved SESC Plan, a General NJPDES stormwater permit, or any local municipal approvals for this "nonfarming paving activity, thereby violating the Stormwater Management Rules, N.J.A.C. 7:8;
6. on August 9, 2011, the DEP issued to Russo a "Violation Notice" advising that the activities occurring at the premises needed both an approved SESC Plan, NJPDES stormwater discharge Permit for Construction Activities ("5G3"), and a "DGW" stormwater permit for what it characterized as "ongoing intermittent recycling activities";

7. that on specified days in July and August 2011, the facility located at the designated premises was active without an approved SESC Plan in violation of the Act and without a valid NJDPES General Permit for Construction Activities or any municipal approvals for the newly paved areas;

8 &9. that these activities established that Russo acted in violation of the requirements of N.J.A.C. 7:14A, resulting in a "FINDING" that Russo had violated the WPCA, specifically N.J.S.A. 58:10A-6, and regulation promulgated pursuant thereto, N.J.S.A. 7:14A-1 et seq.

The AONOCAPA imposed a civil administrative penalty of \$60,000, while also requiring that Russo cease all stormwater discharges and/or unpermitted discharges of industrial wastewater emanating from the premises, except those in conformity with a valid NJPDES and Certified SESC permits and plans.

The DEP contends that the material facts necessary to determine the validity of these charges are not in genuine dispute and that given this state of the evidence, it is entitled as a matter of law to a decision finding that Russo did violate the law as charged in the AONOCAPA, resulting in the imposition of the stated penalties and other remedies. N.J.A.C. 1:1-12.5; Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In response, Mr. Russo contends that the facts relied upon by the DEP are indeed in dispute, that he has lawful exemption from the requirements that the DEP contends apply to his property as he is conducting an agricultural venture protected by the Right To Farm Act, N.J.S.A. 4:1C-1 to -10, and that the DEP has, in attempting to obtain this summary decision, brought forth facts and allegations about matters that are not properly part of this case. In its reply to these assertions, the DEP argues that Mr. Russo's claims for an agricultural exemption are unsupported by any substantial evidence and that he bears the burden to establish the right to any such protection. It argues that the undisputed facts concerning such matters as Russo's construction on the premises of a motocross track and his alleged conduct on the premises of a car restoration business are proper means of establishing that he

engaged in the charged activities and thereby violated the law, as charged in the AONOCAPA.

A review of the evidential material presented by the parties in regard to this motion shows that many of the facts related to the allegations in the AONOCAPA are not in dispute. As asserted in the first numbered paragraph of the AONOCAPA, Mr. Russo is the owner of the property located at 27 Hopkins Lane, Plumstead Township, a property that his Certification notes he purchased in 1998. In regard to the assertions of paragraph 3, Russo agrees that in the summer of 2011, he utilized asphalt millings to improve the existing roadbed of roads located on the property, which, he asserts, is a farm. He also used asphalt millings for feed lots. This admission as to the use of asphalt millings for the roads accords with the Certification of Richard Ambrosio, a DEP Environmental Specialist III, who states that he observed paved asphalt roads on the premises. Mr Russo also admits that during July 2011, he did have delivered to his property soil which both he and the DEP agree was "acid producing soil." As per an invoice provided by Russo, the amount of soil delivered to the property totaled 93,739.85 tons. The soil was obtained from the New Jersey Turnpike Authority and was the product of the Authority's road widening project. Mr. Russo does not dispute its receipt and use on the property, stating in his "Statement of Additional Material Facts" that this soil, while not "dumped or disposed of," was instead placed on his property in accordance with acceptable farming practice. He also agrees that he constructed a truck scale, although again claiming that it has never been used for non-agricultural purposes. In regard to the allegation in paragraph 1 that "additional business activities are operated at this facility," both parties agree that there has been some car restoration work done on the premises. However, as will be seen, they differ on exactly what this involves and whether it has been a "business." Again, while Mr. Russo asserts its irrelevancy as to proving anything charged as a violation in the AONOCAPA (as it is not specifically mentioned therein), he admits that motocross bikes have been ridden, apparently on a paved track, "on a small part of the ninety-acre property."

In addition to these agreed upon facts, the DEP contends that, as asserted in paragraphs 5, 6 and 7 of the AONOCAPA, there is no evidence that Mr. Russo ever applied for or obtained any NJPDES permit for these activities. In his response to the

DEP's motion, Mr. Russo "does not dispute the he has never obtained any NJPDES permit for his activities at the property."

In his response to the motion, Mr. Russo first contends that while the subject of the AONOCAPA is his alleged violation of the WPCA, the motion, and indeed even some of the "Findings" in the AONOCAPA itself, misleadingly suggest that the violations for which he is to be found guilty are for alleged non-compliance with requirements for a sediment control plan. In his view, given the actual scope of the AONOCAPA, information presented about the installation of a truck scale to accommodate "various industrial waste processing and disposal activity" and alleged construction and operation of a classic car restoration business," and of "a recreational motocross track" is at best "extraneous, if not irrelevant, to the actual issues of this contested case." Thus, whether he disputes these facts or not (he does at least to some degree), is itself irrelevant.

In addition to these arguments about the DEP's misplaced focus, Russo denies that the motion can be granted as a matter of law. As the case is about an alleged violation of the WPCA, specifically N.J.S.A. 58:10-6, the DEP must show that "unpermitted pollutants were discharged." Salem Packing Company v. New Jersey Department of Environmental Protection and Energy, 92 N.J.A.R. 2d (EPE) 270. Nowhere does the DEP assert that any such discharge has occurred. Instead, the DEP apparently expects that the judge, and ultimately, the Commissioner, will "presume" that a discharge resulted from the activities alleged to have occurred on the property.

Finally, much of Mr. Russo's argument in opposition to the motion is based upon his assertion that he is a "farmer engaged in agriculture" and that this status means that, as "the Department well knows . . . any discharges from agriculture are exempt from the permit requirement under which the Department has assessed the administrative penalty in the AONOCAPA." As he disputes the DEP's position that his claim to be a farmer entitled to such exemption is unjustified, the motion cannot be granted.

## Summary Decision

N.J.A.C. 1:1-12.5 authorizes a party to file a motion for summary decision as a means of determining the outcome of a contested case. Summary decision is the administrative law equivalent of a summary judgment motion in the judicial branch. The standards for deciding such a motion were first established in Justice Brennan's seminal decision in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954) and more recently illuminated in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). Under the Brill standard a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious . . . ." Judson, supra, at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the

contradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that “reasonable minds could differ” as to the material facts, then the motion must be denied and a full evidentiary hearing held.

### Regulatory Provisions

The Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. incorporates legislative findings set forth at N.J.S.A. 58:10A-2.

The Legislature finds and declares that pollution 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.

The Legislature further finds and declares that the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500; 33 U.S.C. 1251 et seq.) establishes a permit system to regulate discharges of pollutants and provides that permits for this purpose will be issued by the Federal Government or by states with adequate authority and programs to implement the regulatory provisions of that act. It is in the interest of the people of this State to minimize direct regulation by the Federal Government of wastewater dischargers by enacting legislation which will continue and extend the powers and responsibilities of the Department of Environmental Protection for administering the State's water pollution control program, so that the State may be enabled to implement the permit system required by the Federal Act.

Legislative findings in regard to the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 to -55, demonstrate the direct relationship of the need for such controls in respect to the very concern about water pollution that is reflected in the above findings. N.J.S.A. 4:24-40 states

The Legislature finds that sediment is a source of pollution and that soil erosion continues to be a serious problem throughout the State, and that rapid shifts in land use from agricultural and rural to nonagricultural and urbanizing uses,



construction of housing, industrial and commercial developments, and other land disturbing activities have accelerated the process of soil erosion and sediment deposition resulting in pollution of the waters of the State and damage to domestic, agricultural, industrial, recreational, fish and wildlife, and other resource uses. It is, therefore, declared to be the policy of the State to strengthen and extend the present erosion and sediment control activities and programs of this State for both rural and urban lands, and to establish and implement, through the State Soil Conservation Committee and the Soil Conservation Districts, in cooperation with the counties, the municipalities and the Department of Environmental Protection, a Statewide comprehensive and coordinated erosion and sediment control program to reduce the danger from storm water runoff, to retard nonpoint pollution from sediment and to conserve and protect the land, water, air, and other environmental resources of the State.

The WPCA incorporates a system of permits that allow for certain discharges of pollutants. N.J.S.A. 58:10A-6 is a state provision to carry out the requirements of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.

a. It shall be unlawful for any person to discharge any pollutant, except as provided pursuant to subsections d. and p. of this section, or when the discharge conforms with a valid New Jersey Pollutant Discharge Elimination System permit that has been issued by the commissioner pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.) or a valid National Pollutant Discharge Elimination System permit issued by the administrator pursuant to the Federal Act, as the case may be.

b. It shall be unlawful for any person to build, install, modify or operate any facility for the collection, treatment or discharge of any pollutant, except after approval by the department pursuant to regulations adopted by the commissioner.

c. The commissioner is hereby authorized to grant, deny, modify, suspend, revoke, and reissue NJPDES permits in accordance with P.L.1977, c.74, and with regulations to be adopted by him. The commissioner may reissue, with or without modifications, an NPDES permit duly issued by the federal government as the NJPDES permit required by P.L.1977, c.74.

Subsection d. provides

The commissioner may, by regulation, exempt the following categories of discharge, in whole or in part, from the requirement of obtaining a permit under P.L.1977, c.74;

(8) Discharges resulting from agriculture, including aquaculture, activities.

N.J.A.C. 7:14A-2.4 provides for a permitting program to regulate and issue permits for discharge of pollutants to surface and ground waters of the State. N.J.A.C. 7:14A-

2.4(b)1 specifically authorizes the permits for discharge to surface and ground waters. N.J.A.C. 7:14A-7.2(b) provides that “no person shall discharge to groundwater prior to obtaining a discharge to groundwater (DGW) permit.” N.J.A.C. 7:14A-24.10(a)(1) provides for a permit for construction sites, known as a “5G3” permit. This provision specifically requires that the NJPDES permit must (“shall”) “require compliance with the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq., and implementing rules.” N.J.A.C. 7:14A-24.4 requires that “(a) Any operating entity for a stormwater DSW or DGW identified under (a)1 through 8 below that does not have an effective NJPDES permit authorizing its stormwater discharges shall submit a request for authorization for a general NJPDES permit, or an application for an individual NJPDES permit,

#### Discussion

It is apparent from these provisions that the need to control water pollution, which is the very concern of the WPCA, is directly implicated in the NJPDES permitting process and the SESC Act. Acts of noncompliance with provisions of the permitting process under the WPCA and the requirements of the SESC Act are so intimately associated with the overarching Federal and State mandates regarding water pollution control as to make a violation of the requirements for obtaining NJPDES permits and a failure to obtain necessary soil erosion and conservation approvals evidence of violations of the WPCA itself. Each of these statutory and regulatory provisions is directly associated with the common goal of preventing the pollution of our vital waters. As such, here the AONOCAPA alleges that Russo violated the requirements of the WPCA, by failing to obtain necessary NJPDES permits and by engaging in activities that required an approved SESC Plan. Evidence that is related to establishing such failures is certainly relevant.

As for Mr. Russo's argument that the DEP must demonstrate that unpermitted discharges occurred, he argues that the AONOCAPA does not even mention the word, “pollutant.” The AONOCAPA alleges that observations were made of soil and road millings, food waste and construction waste debris brought onto the site and it is admitted by Russo that APS soil received from the Turnpike widening project was both received at the premises and was applied to the land thereon. The United States Code, 33 U.S.C. 1362(6) defines “pollutant” as including rock, sand, cellar soil, industrial waste

and biological materials. All that the DEP is required to demonstrate is that such pollutants were discharged on the premises, as any release that “might” flow or drain into waters of the State violates the Act. N.J.S.A. 58:10A-3e.

“Discharge” means an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a pollutant into the waters of the State, onto land or into wells from which it might flow or drain into said waters or into waters or onto lands outside the jurisdiction of the State, which pollutant enters the waters of the State. “Discharge” includes the release of any pollutant into a municipal treatment works;

It is of no moment that the AONOCAPA does not allege that there was any actual flow or drainage of the “pollutant” into the waters of the State, or that the reference to materials brought to and discharged on the premises does not specifically refer to them as “pollutants.” If the materials are defined as such by statute and or by regulation, or both, their discharge onto the premises without the required permits violates that law. It would be foolhardy indeed to permit pollutants to be placed upon locations where they might flow or drain to the waters of the State, and to only allow sanctions for such action if the pollutants actually did enter the waters. Indeed, the very definition of “discharge” negates any argument that actual pollution of the waters need be proven (“on to land . . . from which it might flow or drain into said waters . . .”).

Finally, Mr. Russo contends that he is exempt from the requirements because of the agricultural nature of the property, under the Right to Farm Act. In his Certification of July 23, 2015, Russo offers that he is the owner of this “farm property,” that he has “always conducted some level of agricultural and farming activity at the farm property” including “the raising of animals and livestock” since he first purchased the property in 1998, and that “for the overwhelming majority of the time that I have owned the farm property it has qualified for farmland assessment.” However, he admits that that status as farmland qualified for assessment as such was “unilaterally revoked in August 2011 by Plumstead Township officials.” He contends that that revocation is now the subject of a lawsuit. In response to his claim, the DEP notes that at the time of the alleged violations, both the Township and the Department of Agriculture had determined that the property was not a legitimate farm entitled to any farming exemption. In support of this position, the DEP offers letters from the tax assessor and the construction official

for Plumstead, written in August 2011, in which the tax assessor notes that farmland qualification will be denied for the 2012 tax year and in which the construction official writes to an environmental specialist for the DEP's Solid and Hazardous Waste Management Program, advising that the opinion of the Township is that the property "is no longer to be considered a site devoted to agriculture." In his letter, Construction Official Ricciardi refers to several site investigations and Stop Construction Orders and to a letter of the Ocean County Agricultural Development Board, dated August 2, 2011, which advised that the property "is not eligible for Right to Farm protection and will not receive further consideration by the Board."

In his Certification, Mr. Russo attempts to support his claim to Right to Farm exemption by noting that he had "maintained and used the farm roads," improved them at various times, including during the summer of 2011, he used asphalt millings "in agriculture" by applying them to the existing road beds. He used the truck scale that he admits locating on the property, "on an infrequent basis for my agricultural activities including weighing loads of bedding and feed for my livestock and outgoing shipments of livestock to market." He claims that "[E]very building on the property is related or used in some manner for the operation of my farm or my life as a farmer and was built for or used in an agricultural use." In further support of his position, Russo provides a copy of a Plumstead Township Supplemental Farmland Form, dated July 25, and identified in the Certification at paragraph 8 as for calendar year 2011 and two forms, "Application For Farmland Assessment, identified as for calendar year 2012 and 2013." He also offers a letter report from the Rutgers Agricultural Experiment Service Soil Testing Laboratory, "reported" May 29, 2011, which analyzed samples of soil and refers to "Crop or Plant" Farm: corn grain (primary) Est. Farm: hay, grass (secondary)." He also points to DEP Exhibit 24, an inspection report authored by Murray Lantner, P.E. Environmental Engineer with the United States Environmental Protection Agency and Richard Ambrosio, Environmental Specialist 3, NJDEP (misidentified in Russo's Brief as Exhibit 25). In that report, concerning an inspection conducted on May 10, 2012, the authors noted that at the time of the inspection Russo advised that several animals, including goats, sheep, lambs, longhorn cattle and calves, chickens, donkeys, a horse, pigs and piglets were present, and that the number of such animals on site varied. He claimed to be tilling and planting four fields covering 65 of the 100 acres and that he

grew rye straw used for bedding material for animals and sold off-site. He also planned on growing sorghum.

The charges in the AONOCAPA relate to activities purportedly occurring on the Hopkins Lane property in and around August 2011. Any Right to Farm exemption from the rules on discharge that Mr. Russo relies upon to defeat the charges must have been in existence as of the time of the alleged activity. What the conditions were in May 2012, when the inspection by Lantner and Ambrosio occurred, is not necessarily proof of whether a proper exemption applied in August 2011. Russo contends that he is challenging the Township's refusal to treat the property as eligible for exemption, but he does not assert that there was a valid exemption in place at the time of the alleged violations, and he offers no documentary proof of actual farming activity occurring at that time. In his Certification he makes bald assertions that he "always conducted some level of agriculture and farming activity . . . including raising animals and livestock." His reference to the use of farm roads and their maintenance and improvement tells us nothing about whether he was actually farming the property at the time of this use and improvement. And his reference to using the truck scale "on an infrequent basis" for agricultural activities is both vague and unsupported by any documentation that would assist in understanding the nature and extent of such alleged activity. The presence of some farm animals, such as he claimed to have when he described these to Lantner and Ambrosio, even if these were present in similar type and number at the time of the alleged violations, does not offer any substantive evidence of a legitimate farming operation such as would support an exemption. On the whole the evidence offered by Russo to oppose the DEP's documentary case that the property did not have, and was not qualified for, an agricultural exemption is flimsy, non-specific, and without substance. It is not the sort of evidence that can be utilized to defeat official records and correspondence that demonstrates that at the relevant time, the Township and the County Agricultural Board each deemed the property unworthy of exempt status.

Based upon the evidence offered by the parties in connection with this motion for summary decision, I **FIND** that Mr. Russo did, as asserted, own and operate at the time of the alleged violations, a facility located at 27 Hopkins Lane, Block 58, Lots 13 and 14, Plumstead Township, Ocean County, New Jersey. I **FIND** that on June 22, 2011, Mr.

Russo was advised by the Ocean County Soil Conservation District that certain activities carried out by him on this property were required to be carried out in accordance with an approved Soil Erosion and Sediment Control Plan. As he had no such approval, the letter provided that he had thirty days to apply for such approval. Further, I **FIND** that on July 19, 2011, DEP representatives observed truckloads of materials trucked onto the site, including road millings, food waste, construction waste debris, and soil from the New Jersey Turnpike widening project that was acid-producing. Mr. Russo had no valid NJPDES Permit for the discharge of these pollutants on the premises. And on July 21, 2011, the OCSCD issued to Russo a "Violation Notice" advising that he had carried out activities on his premises without the necessary approved Soil Erosion and Sediment Control Plan. Thereafter, Mr. Russo installed new asphalt on dirt roads and dirt areas at the facility and a Stop Construction Order was issued to him by the OCSCD for illegal disturbance of the land, as this activity was carried out without Russo being in possession of an approved Soil Erosion and Sediment Control Plan, a General NJPDES stormwater permit and any local municipal approvals for nonfarming paving at the facility. I **FIND** that on August 9, 2011, the DEP advised Russo, through a "Violation Notice," that the activities occurring at the facility were in violation of the law as he needed an approved SESC Plan, a NJPDES stormwater discharge Permit for Construction Activity, and an Individual "RF" and "DGW" stormwater permit for ongoing recycling activities. I **FIND** that throughout this period of July and August 2011, Russo operated his facility without the necessary permits, approved plans and such, and that he has failed to meet his burden to demonstrate that the activities qualified for an agricultural exemption under N.J.S.A. 58:10A-6 during this period of time. Indeed, the undisputed evidence demonstrates that the property had been denied any such exemption by the local tax assessor and the Ocean County Agricultural Development Board. Based upon these findings, I **FIND** that the DEP has established that the undisputed material facts support its motion for summary decision and that the alleged disputed material facts are not in genuine dispute. I **CONCLUDE** that summary decision is warranted as to Mr. Russo's liability for the alleged violations and **CONCLUDE** that, as charged in the AONOCAPA, Mr. Russo acted in violation of the Water Pollution Control Act, N.J.S.A. 58:10A and the applicable regulations.

This concludes the incorporated Order.

### Penalty

The DEP assessed Mr. Russo penalties for his unpermitted and illegal activities occurring on July 19, 2011 and August 2, 2011. Civil penalties are authorized by N.J.A.C. 7:14.8-5(e).

(a) The Department may assess a civil administrative penalty pursuant to this section of not more than \$50,000 for each violation of each provision of the Water Pollution Control Act and for violations of any rule, water quality standards, effluent limitation, administrative order or permit issued pursuant thereto. The Department shall assess a minimum mandatory civil administrative penalty for violations which occur after June 30, 1991 in an amount:

1. Not less than \$5,000 for each violation that causes a violator to be, or continue to be, a significant noncomplier; or
2. Not less than \$1,000 for each serious violation.

(b) . . .

(c) Each day during which a violation as set forth in (b) above continues shall constitute an additional, separate and distinct violation.

The amount of the penalty assessed by determining

(d) . . .

(e) . . .

1. . . .

- i. . . . the seriousness of the violation pursuant to (g) below; and
- ii. Determining the conduct of the violator pursuant to (h) below.

2. The civil administrative penalty shall be at the midpoint of the range within the matrix in (f) below, unless adjusted pursuant to (i) below.

Under this provision it is necessary to determine whether the “seriousness” of the violations and the “conduct” of the violator were of a “minor,” “moderate,” or “major” nature. The DEP has assessed that as to each of the charged violations, each category was “moderate” for each of the two days in question, thereby choosing to limit the extent of the penalty, as it could have chosen to penalize for each and every day that the

violations continued. The matrix at N.J.A.C. 7:14-8.5(f) provides that where the “seriousness” and the “conduct” factors are each “moderate,” the range of penalty for a violation of the WPCA is between \$10,000 and \$20,000, so that the mid-point is \$15,000. As there are two violations each, for two days each, the total penalty is \$60,000.

N.J.A.C. 7:14-8.5(g) provides that a violation is considered “moderate” if it meets the following definition.

2. Moderate shall include:

- i. Any violation, other than a violation of an effluent limitation identified in (g)2ii or iii below, which has caused or has the potential to cause substantial harm to human health or the environment;
- ii. Any violation of an effluent limitation which is measured by concentration or mass of any discharge exceeding the effluent limitation as follows:
  - (1) By 20 to 50 percent for a hazardous pollutant; or
  - (2) By 40 to 100 percent for a nonhazardous pollutant;
- iii. The greatest violation of a pH effluent range in any one calendar day which violation deviates from the midpoint of the range by at least 40 percent but no more than 50 percent of the midpoint of the range excluding the excursions specifically excepted by a NJPDES permit with continuous pH monitoring; or
- iv. Any violation, other than a violation of an effluent limitation identified in (g)2ii or iii above, 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, water quality standard, effluent limitation, administrative order or permit 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(h)2. provides that the “conduct” of a violator is “Moderate” when it is deemed to “included any unintentional but foreseeable act or omission by the violator.”



While the regulation provides for setting the penalty at the midpoint of the applicable range, it also provides that the penalty may be increased or decreased from the midpoint based upon consideration of certain specified factors.

- (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 on the basis of the following factors:
  - 1. The compliance history of the violator;
  - 2. The number, frequency and severity of the violation(s);
  - 3. The measures taken by the violator to mitigate the effects of the current violation or to prevent future violations;
  - 4. The deterrent effect of the penalty;
  - 5. The cooperation of the violator in correcting the violation, remedying any environmental damage caused by the violation and ensuring that the violation does not reoccur;
  - 6. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation;
  - 7. Any impacts on the receiving water, including stress upon the aquatic biota, or impairment of receiving water uses, such as for recreational or drinking water supply, resulting from the violation; and
  - 7. Other specific circumstances of the violator or violation.

At the September 7, 2016, hearing, Albert Raimond Belonzi, the supervisor of the Central Bureau of Water Compliance and Enforcement, testified that before the issuance of the AONOCAPA on September 23, 2011, as part of his responsibility in that position, he personally reviewed the enforcement file and spoke to Richard Ambrosio, the DEP inspector who had visited the Russo property and observed violations thereon, as well as to Mr. Ambrosio's supervisor. Then, in accordance with procedure due to the size of the proposed penalty, the recommendation as to penalty was presented for approval to the Bureau Chief. In explaining the rationale for the characterizations of "seriousness" and "conduct," Belonzi noted that on July 19, 2011, DEP and Ocean County Soil Conservation District ("OCSCD") inspectors had been at the Russo property and had observed significant evidence of violations of the applicable environmental

statutes and regulations, notably that Russo had on his property materials that could not be present without appropriate DEP approval of stormwater discharge permits, none of which Russo possessed. Previous to that date, the OCSCD had already alerted Russo, by way of a "Soil Disturbance" letter dated June 22, 2011, that activities that had been observed on the property required that he have an approved Soil Erosion and Sediment Control Plan ("Soil Plan"). In reviewing the penalty matrix in order to fix the penalty to be included in the AONOCAPA, Belonzi found that the activities observed on site involved "moderately" serious activity, due to the "substantial deviation" from the requirements of the Water Pollution Control Act and its applicable regulations.<sup>1</sup> Turning to the "conduct" category, he noted that on July 21, the Ocean County Soil District issued a "Violation Notice" to Russo, which advised that he had failed to obtain the required Soil Plan. Then, on August 1, despite these notices, which should have cautioned Russo that he could not continue to carry out activities involving the disturbance of soil and the receipt and placement on the soil of such source materials and other materials as observed on July 19, without first obtaining approval for a Soil Plan and without the approval of the DEP through the receipt of NJPDES Permits, Russo installed a substantial area of asphalt. Given that Russo had received the several notices prior to August 1, from Russo's perspective it was "foreseeable" that he needed to comply with the Water Pollution Control Act and the permitting regulations before carrying on any such additional work on the property as he did on August 1. Therefore, while the DEP might have found that his conduct was of a "major" quality, in order to keep the penalty "fair," the conduct was deemed "moderate."

Mr. Russo argues that the penalty should be reduced, as he disputes the "foreseeable" characterization. In support of this position, he presented testimony from Plumstead Police Chief Matthew Petrecca, who explained that he was familiar with the Russo property due to the numerous times since 2009 that his department has been alerted to visits to the property by DEP personnel, estimating that there have been between 50 and 100 such occasions when he was aware of such visits. In addition there have been numerous citizen complaints concerning the number of trucks coming and going from the site.

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<sup>1</sup> As there were no permits, there were no effluent limits to consider and thus, no exceedance of effluent limits was relevant to the consideration.

Frank Spino III, a retired Investigator I for the DEP, who worked in the solid waste area, often went to the property to determine if it was in conformance with the DEP statutes and regulations regulating solid waste. He also spoke of the many complaints received about the property. He at first observed wood being ground up and on later occasions he saw asphalt millings. He was also aware that acid-producing soils were brought to the property. He observed waste containers, most of which were empty, and Russo advised that a couple of these containers that had material in them contained material that was cleaned up from the property. When Spino became aware that Russo was receiving asphalt millings from the Ocean County Road Department, he advised Russo that he had to spread the material, roll it and seal it. He did not discuss with Russo anything about Russo needing to obtain either a stormwater permit or having to have a sediment control plan. Spino's focus was on solid waste issues. He knew that Russo had no Class B recycling permit. He understood that the wood grindings were to be used on the Russo farm. He told Russo that he had to stop grinding or he might be in violation of DEP rules, but again, he was speaking from the solid waste perspective. He also told Russo that too much grass was on the site, and testified that grass might have been brought onto the property. There was also a concern about painted wood chips observed on site.

Sam S. Russo testified that he bought the property in 1998 and was aware that the prior owner had permitted illegal dumping on the property, which Russo operated as a farm. Russo first brought trucks, a loader and a grinder there in 1998 to allow him to clean up the materials that were on the property when he bought it. Grinding equipment that he brought there in 1998 has remained there ever since and is still there. In addition, a company he owns, Sam S. Russo, Inc., has stored equipment on the property. Waste storage containers, used for the screening and removal of debris in and after 1998, have also remained on site since then, some of which are used for animal containment. Some were used in and after June 2011, to contain construction and demolition materials related to the fire that destroyed his house on December 2, 2008, as well as materials generated by the demolition of ten to fifteen pig huts. These materials are taken to the appropriate authorized facilities for disposal.

Russo explained that he did use asphalt millings received from the Ocean County Road Department to construct and maintain his roads, and to create feed lots and animal penning areas. Asphalt fillings were laid over “acres and acres.” In June and July 2011, he received acid-producing soil offered by an engineering group that was involved with the Turnpike widening project. Russo was told that with the proper modifications to the soil he received, much of it could be used on his soil.

As best as Russo could recall, he was never told by anyone from the DEP or other authority that he need a stormwater permit or a Sediment Control Plan. Neither was he told by the DEP before 2011, that his activities could be seen as construction or industrial activity.

Mr. Russo acknowledged that after he was told by the OCSCD in February 2009, that he had to submit a soil erosion plan, he did not do so. Indeed, on March 12, 2009, he received a Stop Construction Order from OCSCD relating directly to their need for such a plan. He also acknowledged that he had received solid waste-related notices from 2003 onward.

The DEP calculated penalties for the AONOCAPA prior to its issuance in late September 2011, shortly after the last inspection and issuance of the August 9, 2011, Violation Notice advising Russo that activities occurring on his property required approval under a NJPDES Stormwater Discharge Permit, a Soil Erosion and Sediment Control Plan and an individual “RF” and “DGW” stormwater permit for the ongoing intermittent recycling activities. When the AONOCAPA was issued, Mr. Russo chose to seek an administrative hearing to challenge the DEP’s claims. Due to several unfortunate factors, consideration of the propriety of the penalty chosen by DEP in September 2011 is only now being undertaken. Obviously much time has passed, but the question that must be decided is whether the DEP’s decision about the penalty was correct when made. In other words, given the nature of the violations, was the penalty proposed in line with the regulatory scheme set forth in the applicable penalty provision?<sup>2</sup>

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<sup>2</sup> It must be noted here that during the penalty hearing there was some suggestion, for the first time, of purported activity on Russo’s part that may have occurred after August 9 and before the issuance of the

The regulatory scheme presumes that once the seriousness of the violation(s) and the nature of the violator's conduct have been determined, the penalty assessment will be established at the midpoint of the range of penalties set forth in the matrix. N.J.A.C. 7:14-8.5(e)1. This is exactly what the DEP did here. Given this presumption, a decision to raise or lower the penalty for each violation must be supported by some concrete evidence addressing the factors listed at N.J.A.C. 7:14-8.5(i). Here, the DEP decided that it would not raise the penalties above the midpoint, despite what Mr. Belonzi noted might have been viewed as "major" conduct on Mr. Russo's part. No consideration will be given here to any potential rise in the penalties. Mr. Russo argues for reduction of the "conduct" characterization to "minor," disputing that he acted in a manner that involved "foreseeable" violations of the Act.

Again, the possible factors for reducing the penalty are:

1. The compliance history of the violator;
2. The number, frequency and severity of the violation(s);
3. The measures taken by the violator to mitigate the effects of the current violation or to prevent future violations;
4. The deterrent effect of the penalty;
5. The cooperation of the violator in correcting the violation, remedying any environmental damage caused by the violation and ensuring that the violation does not reoccur;
6. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation;
7. Any impacts on the receiving water, including stress upon the aquatic biota, or impairment of receiving water uses, such as for recreational or drinking water supply, resulting from the violation; and
8. Other specific circumstances of the violator or violation.

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AONOCAPA, concerning the supposed burial of materials. No such matters were raised in the AONOCAPA, which was never amended to assert any such facts, or in the briefs regarding the liability phase of the case. As such, no evidence on this subject was received and no consideration of any such matters is a part of this analysis.

Starting with factor 7, there is no evidence that the activities carried on Russo's property had any impact on receiving waters. There is also no evidence concerning factor 6, "extraordinary costs or impacts . . . imposed on the public or the environment . . . ." There is, however, much evidence that Mr. Russo was well aware that his property had been the focus of a great deal of interest from environmental authorities for many years prior to 2011, although from the DEP standpoint, that interest was generated by its Solid Waste unit rather than from its Water Compliance and Enforcement unit. In addition, prior to 2011, from at least February and March 2009, Russo was on notice that the OCSCD was concerned about his activities, and was demanding both that he cease certain operations and that he provide a Soil Erosion and Sediment Control Plan. Thus, while Russo contends that during these years he had not received any notice or advice from the DEP that he needed stormwater permits or other water pollution-related approvals, it would hardly be appropriate to overlook Russo's ongoing lack of cooperation and compliance with the OCSCD when assessing whether he deserves some reduction from the midpoint of the penalty range. Factors 5 and 8 allow for this "circumstance" to be evaluated. Beside his general need to comply with applicable legal constraints affecting the use of his property, whether these exist only in published statutes and regulations, or whether he has been formally noticed of such by means of notices of violation or other such means, Mr. Russo should surely have been aware that his activities on his property were of substantial concern to environmental authorities and that such activities as laying down asphalt over large areas, well after those concerns were manifested to him, created potentially impervious surfaces that would likely produce runoff. And he knew, or should have known, that such runoff might be a concern in regard to the erosion and sediment control that a plan such as demanded by OCSCD would address. Yet he seems to have continuously ignored the OCSCD. As such, when considering whether he could have foreseen that his receipt of the various materials on site and his conduct in using the asphalt as he did, as well as other activities he conducted, and his failure to address the requests and demands of the OCSCD, might have implicated violations of the WPCA, I am convinced that his conduct at the very least involved both "foreseeable" acts of commission and omission, such that the DEP properly concluded that the "conduct" penalty should be set at the presumptively appropriate midrange of the authorized penalty limits. Nothing Russo has

offered in seeking to lower the penalties is persuasive enough to overcome the regulatory presumption that the penalty be set at the midpoint of the range.

In view of the findings and conclusions set forth herein, I **CONCLUDE** that a penalty of \$15,000 is appropriately established for each of the four violations and thus Mr. Russo shall pay a civil administrative penalty of \$60,000.

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, PO 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.



October 6, 2016

DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency:

Date Mailed to Parties:

mph

**LIST OF WITNESSES:**

For petitioner:

Samuel S. Russo, Jr.  
Police Chief Matthew Petrecca

For respondent:

Albert Raimond Belonzi  
Frank Spino, III

**LIST OF EXHIBITS:**

**For petitioner:**

P-1 Certification of Richard Ambrosio, September 13, 2013, with attachments  
1-27

**For petitioner (Penalty Phase):**

P-1 Administrative Order and Notice of Civil Penalty, October 20, 2011  
P-2 Letter to Sam Russo from Kerry Jennings, Ocean County Soil  
Conservation District, June 22, 2011  
P-3 Letter to Sam Russo, with Notice of Violation, from Richard Ambrosio,  
August 11, 2011  
P-5 Stop Construction Order, Soil Erosion and Sediment Control Act, March  
12, 2009

**For respondent:**

R-1 Certification of Sam S. Russo, July 23, 2015  
R-2 Certification of Walter B. Dennen, Esq., July 23, 2015, with attachments A  
and B