State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

AMENDED

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ECE 11231-16

AGENCY DKT. NO. PEA120005-004983

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

v.

BRAD DUBOW/DEBA REALTY, LLC,

Respondents.

Elspeth Faiman Hans, Deputy Attorney General, for petitioner (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Daniele Cervino, Esq., for respondents (Beattie Padovano, attorneys)

Record Closed: November 28, 2017 Decided: January 10, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Respondents, Deba Realty, LLC (Deba) and Brad Dubow (Dubow), individually, in the underlying enforcement action, filed an appeal contesting the findings and

penalties imposed in a Notice of Civil Administrative Penalty Assessment (NOCAPA) issued by the New Jersey Department of Environmental Protection (petitioner or Department/DEP). A NOCAPA was issued on December 11, 2014, against the respondents assessing a penalty of $30,200. The petitioner has conceded a reduction of this penalty to the amount of $28,600.

PROCEDURAL HISTORY

Respondents filed its request for a hearing on December 31, 2014. On January 20, 2015, the Department granted the request and agreed to transmit the matter as a contested case to the Office of Administrative Law (OAL). The matter was filed with the OAL on July 26, 2016. Subsequently, the Department transmitted the matter NJDEP v. Sarabjit Singh & Del 4 Inc. II Corp. filed under OAL Dkt. No. ECE 11416-16 on July 27, 2016. By Order dated September 9, 2016, the matters ECE 11231-16 and ECE 11416-16 were consolidated and the hearing was scheduled for November 17 and 28, 2017.

On July 14, 2017, an Order was entered no longer consolidating the two matters because ECE 11416-16 NJDEP v. Sarabjit Singh & Del 4 Inc. II Corp. was withdrawn and returned to the transmitting agency as a withdrawn case leaving ECE 11231-16 as the sole litigated case.

On October 18, 2017, petitioner filed its motion for Summary Decision, arguing that respondents were liable for violations covered under the NOCAPA and that the assessed penalties were appropriate as a matter of law. Respondents filed a letter brief in response to the petitioner's motion on November 9, 2017. On November 27, 2017, petitioner filed a reply letter brief in opposition to respondents' filing and in further support of its motion for Summary Decision. Oral argument was held on November 28, 2017.

FINDINGS OF MATERIAL UNDISPUTED FACTS

1. Since 1995, respondent, Deba, has owned a property located at 2775 Route 23 South, Newfoundland, Morris County, New Jersey, which is the site of a retail gasoline dispensing facility and automobile service station.

2. The facility has an underground storage-tank system consisting of two 4,000 unleaded gasoline tanks and one 6,000-gallon unleaded gasoline tank, with associated fuel dispensing and vapor recovery equipment (UST System).

3. The fuel tanks are made of steel and have an internal fiberglass lining which was installed on January 1, 2000.

4. Respondent, Deba, was the owner of the UST System from January 6, 2012, through December 20, 2013.

5. Respondent, Dubow, was the “property manager” for the site and exercised decision-making authority on behalf of Deba Realty with respect to the company’s ownership and leasing of the facility.

6. Dubow was listed as the contact person for Deba on the UST System registration certificates in effect for 2012 and 2013.

7. On January 15, 2006, Deba entered into an agreement to lease the facility to Del 4, Inc., Edward Vikrov and Sergey Yaganov.

8. Dubow signed the original lease agreement on behalf of Deba.

9. On March 17, 2014, Sarabjit Singh and Andrew Guerra signed an addendum memorializing the transfer of the lease from Del 4 Inc. to Singh and Del 4 II Corp. as of February 20, 2014.

10. On January 6, 2012, DEP Environmental Specialist John Stavash conducted a

compliance inspection of the facility.

11. During his inspection, Stavash determined that an internal-lining inspection of the tanks had not been performed.

12. During Stavash's inspection, he determined that metal flex piping under the gasoline dispensers was in contact with the ground and did not have any form of corrosion protection.

13. In addition, during Stavash's inspection, he observed liquid blockages of the Stage II vapor recovery systems at two fuel ports.

14. During Stavash's inspection, he determined that the UST System did not have a valid air permit from the Department.

15. The Department issued a Field Notice of Violation (FNOV) for these violations and mailed a copy of the FNOV to the respondents.

16. Contractors for the facility installed plastic booting on the metal piping booting and conducted a tank-lining inspection after the FNOV was issued.

17. On January 11, 2013, Stavash conducted a compliance inspection of the facility.

18. During the inspection, Stavash observed a broken vapor recovery hose at one of the fuel ports. The vapor recovery hose is an essential part of the UST System's Stage II vapor recovery system.

19. The Department issued a FNOV to the facility for the violation.

20. On September 18, 2013, Stavash conducted an investigation at the facility in response to a report of an overfill of one of the 4,000 gallon tanks.

21. During the inspection, Stavash observed that the cap on the automatic tank

gauging port for one of the tanks was loose. The cap on the port is an essential part of the UST System's Stage I vapor recovery system because it prevents vapors from escaping from the tank during refilling.

22. The Department issued a FNOV to the facility for the violation.

23. On December 6, 2013, Stavash conducted an investigation at the facility in response to a report of a discharge of gasoline.

24. During the inspection, Stavash observed that a leak in fuel piping under one of the dispensers had resulted in a discharge of gasoline. Stavash imposed a delivery ban on the UST System and required the facility to verify overfill protection and repair the defective piping.

25. On December 24, 2013, Stavash confirmed that the piping had been repaired and tests conducted.

26. The facility obtained an air permit on December 20, 2013.

27. On December 11, 2014, the Department issued a NOCAPA to respondents in which it assessed a civil administrative penalty of $30,000 for the violations of the UST Rules and Air Rules mentioned above.

28. Gasoline is a hazardous substance that has the potential to cause harm to human health and the environment if it enters the soil or groundwater.

Respondents, in their submission and in addition, in oral argument, concede the above material facts are undisputed. Respondents' main argument is that these facts warrant a lesser penalty than the penalties imposed by the petitioner.

LEGAL ANALYSIS

I. Summary Decision is Appropriate because there is no Genuine Issue of Material Fact and the Petitioner is Entitled to Prevail as a Matter of Law

N.J.A.C. 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. 1:12-5(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). For purposes of this matter, the parties have for intent and purposes agreed that there are no undisputed facts. (See Pet'r's reply letter br., p. 2.)

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." Id. 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." Id. 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).

In this case, the petitioner seeks to hold respondents liable for violating various conditions at the subject facility, specifically the NOCAPA issued on December 11, 2014, for violations of the Underground Storage Tank Act Rules (N.J.A.C. 7:14B) and the Air Pollution Control Rules (N.J.A.C. 7:27). There is no dispute as to whether respondents have, in fact, violated the applicable law set forth herein above. As set

forth more fully below, summary decision is appropriate because there is no material issue in dispute and respondents are precluded from arguing in an enforcement proceeding its only defense, which is that the violations require a finding of a minor penalty. The respondents raise issues as to the amount of the penalties assessed by the petitioner for the violations herein and whether portions of the Air Rules apply to Deba as the owner and lessor of the facility operated on the property.

As stated herein above, the respondents have basically conceded the material facts as presented by the petitioner, in both their written submission and in oral argument. Based on this, the matter is ripe for a Motion for Summary Decision.

II. Petitioner is Entitled to a Finding that Deba Realty is Liable for a Violation of N.J.A.C. 7:14B-4.2(b)(1) and 7:14B-4.1(a)(1) and the Assessment of the $15,000 Penalty was Correct and Reasonable

To protect against leaks due to corrosion, the owner or operator of an existing underground storage tank must ensure that it meets all the standards set forth in N.J.A.C. 7:14B-4.1 or upgrade the tank by providing corrosion protection pursuant to N.J.A.C. 7:14B-4.2(b)-(d). An existing steel tank may be upgraded by installing an internal lining, in which case the lining must be inspected and tested for structural integrity and proper performance within ten years after installation and every five years thereafter. N.J.A.C. 7:14B-4.2(b)(1).

There is also no dispute that the tanks owned by Deba were steel tanks with an internal lining installed on January 1, 2000. Furthermore, there is no dispute that the tanks had not been otherwise upgraded to comply with the applicable code, N.J.A.C. 7:14B-4.1(a)(1). Deba Realty, as the owner of the tanks, was, therefore, required to ensure that the lining of the tanks was inspected no later than January 1, 2010. N.J.A.C. 7:14B-4.2(b)(1). It is a fact that at the time of Stavash's inspection on January 6, 2012, this inspection had not been completed and none of the other forms of corrosion protection allowed under N.J.A.C. 7:14B-4.1(a)(1) were present.

An additional undisputed fact is that Deba is the owner of the UST System.

Accordingly, Deba is responsible for compliance with the UST Rules. N.J.A.C. 7:14B-4.1-4.2. There is also no dispute that as the owner of the property, Deba failed to inspect the internal lining of the tanks for more than two years after the applicable deadline. Based on this activity, the petitioner assessed a $15,000 penalty finding the activity to be at the mid-point for moderate conduct and moderate seriousness. (See Stavash Cert. at ¶ 24.) In addition, Deba's failure to provide corrosion protection for a fuel line under the dispensers, the petitioner assessed a $5,000 penalty for moderate conduct and moderate seriousness. N.J.S.A. 58:10A-32-10(d)(1)(a).

Accordingly, I **CONCLUDE** that respondents are liable for the violations of N.J.A.C. 7:14B-4.1(a)(1) and N.J.A.C. 7:14B-4.2(b) and thus the petitioner is entitled to summary decision on this issue.

In the NOCAPA, DEP also exercised its discretion with respect to the level of penalties to be assessed, yet consistent with the penalty matrix. Respondent has been an owner of the property for an extended period of time with full knowledge of what it had acquired, inclusive of the UST contamination.

Furthermore, pursuant to the UST Act, the Department calculates penalties for violations of the Tank Rules in accordance with the WPCA and WPCA Rules. See N.J.S.A. 58:10A-32; N.J.A.C. 7:14B-12.1; N.J.A.C. 7:14-8.1. Under the WPCA, the Department may assess a civil administrative penalty of up to $50,000 for each violation of the WPCA and the regulations promulgated under it, and each day that a violation continues may be considered a separate violation. N.J.S.A. 58:10A-10(d)(1)(a). N.J.A.C. 7:14-8.5 sets forth the details of how the Department shall determine the appropriate penalty for each violation (apart from certain violations, of no relevance) for which separate calculations are listed at N.J.A.C. 7:14-8.6 to -8.12.

Pursuant to N.J.A.C. 7:14-8.5, the Department must categorize the seriousness of the violation and the conduct of the violator as major, moderate, or minor and then use the matrix in subsection (f) in order to determine the appropriate penalty range. Violations are assessed at the mid-point of the range unless listed penalty adjustment factors apply. N.J.A.C. 7:26-5.5(f)(2). In this case, the Department characterized both

the seriousness of the violation and Deba's conduct as moderate and assessed the penalty at the midpoint of the range.

The seriousness of a violation is "moderate" where the violation "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, the Department determined, and I agree, that Deba Realty's violation was of "moderate" seriousness based on the potential environmental and health impacts of the violation. A metal tank that is exposed to gasoline, dirt, and moisture may rust and develop holes if it is not protected from corrosion. Ibid. Such holes can allow a discharge of gasoline, a listed hazardous substance, into the soil, where it can contaminate groundwater and cause harm to human health and the environment. Ibid.; see N.J.S.A. 58:10A-21 (finding that leaking USTs due to corrosion "is among the most common causes of groundwater pollution in the State."). Since the condition of the internal lining is not visible to the eye, the Department has determined that periodic inspection is required. N.J.A.C. 7:14B-4.2(b). In the subject case, the internal lining of the tanks was not inspected for more than two years after an inspection was required. Although a subsequent inspection revealed that the lining was still in good condition, Deba's failure to ensure its integrity for over two years is a significant deviation from the requirement that could easily have resulted in harm to the environment or human health.

A violator's conduct is "moderate" if the violation arises from an "unintentional but foreseeable act or omission by the violator." N.J.A.C. 7:26-5.5(h)(1). In this case, the registration forms submitted to the Department for the facility in 2011 reported that the tanks were construed from galvanized steel with internal lining installed in January 2000. The respondents argues that the assessment of the violations were harsh and should be assessed as minor for the failure to inspect the tank lining instead of moderate because the "corrosion protection was initially provided and continues to be provided." (Resp't's br. at 3-4.) However, only the potential for harm to human health or the environment, not actual harm is required for a finding of moderate seriousness. N.J.A.C. 7:14-8.5(g)(2)(i). The certification of Stavash clearly establishes this potential for such harm. (Stavash Cert. at ¶ 24.) Regular inspections are needed in order to make sure that the tank remains protected. The fact that no leak occurred does not

negate the potential for such harm.

Deba, as the owner of the facility since 1995, was the owner of the tanks at the time this lining was installed. As the long-time owner of a commercial gas station facility, Deba is expected to be familiar with the construction and condition of its tanks and understand the requirements pertaining to them. The violation was thus an entirely foreseeable result of Deba's failure for two years to ensure that its operators or contractors perform the required testing. There is no question that the Department has the "discretion" to adjust the penalty from the midpoint of the range provided by the matrix based on a number of factors, including compliance history, number of violations, cooperation of the violator and environmental impacts and costs. N.J.A.C. 7:14-8.5(i). In this case, the Department determined that an adjustment was not necessary, so the penalty was assessed at $15,000, the midpoint of the moderate-moderate range. N.J.A.C. 7:14-8.5(f). I **CONCLUDE** that the Department's penalty determination was appropriate and reasonable under the regulations, it should be affirmed.

III. Petitioner is Entitled to a Finding that Deba Realty is Liable for a Violation of N.J.A.C. 7:14B-4.2(c) and 7:14B-4.1(a)(2) and the Assessment of the $5,000 Penalty was Correct and Reasonable

The "owner or operator" of an existing underground storage tank must ensure that it meets all the standards set forth in N.J.A.C. 7:14B-4.1 or upgrade the tank by providing corrosion protection pursuant to N.J.A.C. 7:14B-4.2(b)-(d). N.J.A.C. 7:14B-4.2(a). Any metal piping that "routinely contains" gasoline and "is in contact with the ground" must be cathodically protected in accordance with N.J.A.C. 7:14B-4.1(a)(2)(iii) to prevent defects and leaks due to corrosion. N.J.A.C. 7:14B-4.2(c).

During Stavash's inspection on January 6, 2012, he observed metal flexible piping under one of the gasoline dispensers at the facility which was in contact with the ground and did not have any form of cathodic protection.

Respondents further argue that a penalty of $3,000 instead of $5,000 should be assessed for Deba's failure to provide corrosion protection for the metal line under the

dispenser. Such a position would be contrary to the default penalty assessment at the midpoint of the applicable range. N.J.A.C. 7:14-8.5(i). Any adjustment to that penalty is optional and within the petitioner's discretion. N.J.A.C. 7:14-8.5(i).

Accordingly, I **CONCLUDE** that respondent Deba Realty is liable for the violations of N.J.A.C. 7:14B-4.2(c) and N.J.A.C. 7:14B-4.1(a)(2)(ii) and thus the petitioner is entitled to summary decision on this issue.

The penalty for the above violations is calculated according to the matrix set forth in N.J.A.C. 7:14-8.5. In this case, the petitioner determined the seriousness of the violation as "moderate" for essentially the same reasons that failure to inspect the tank lining was moderate, i.e., the lack of corrosion protection could lead to leaks in the piping which could allow discharges of gasoline with "the potential to cause substantial harm to human health or the environment." N.J.A.C. 7:14-8.5(g)(2)(i).

Although the seriousness of the conduct could have been assessed as "moderate" because Deba Realty, as the owner of the facility, should have been aware of whether the construction of its tanks and accessory equipment complied with applicable DEP regulations, the petitioner only assessed the violation as "minor," which includes any conduct which is not intentional, deliberate, willful, or unintentional but foreseeable. Petitioner determined that an adjustment was not necessary, so the penalty was assessed at $5,000, the midpoint of the moderate-minor range. N.J.A.C. 7:14-8.5(f). Therefore, I **CONCLUDE** that the petitioner's penalty determination was reasonable and appropriate pursuant to the applicable regulations, it is entitled to summary decision as to the amount of this penalty.

IV. Petitioner is Entitled to a Finding that Deba is Liable for a Violation of N.J.A.C. 7:27-8.3(b) and the Assessment of the $3,000 Penalty was Correct and Reasonable

The Air Rules forbid any "person" from operating or causing to be operated a "significant source" without a valid air permit. N.J.A.C. 7:27-8.3(b). A gasoline transfer

facility is a "significant source" for the purpose of these rules. See N.J.A.C. 7:27-8.2(c)(7). The facility was, therefore, required to maintain a valid air permit at all times.

There is no dispute that when Stavash made his inspection on January 6, 2012, the air permit for the facility was expired and was not renewed. In addition, the permit was not renewed until December 20, 2013. The facility, therefore, did not have a valid air permit for over two years. The requirement to maintain a current air permit applies to anyone who "operat[es]" a gas station facility or "caus[es it] to be operated." N.J.A.C. 7:27-8.3(b). There is no dispute that Deba Realty owned the facility, leased it to an operator for a financial profit with the understanding that the operator was going to use it to conduct a gasoline dispensing business, and was aware that it was registered with the Department as an operating UST facility.

Based on the above, Deba Realty caused the subject facility to be operated under the meaning of Air Rules and as such was, therefore, responsible for complying with N.J.A.C. 7:28-8.3 and 7:27-16.3.

Accordingly, I **CONCLUDE** that respondents are liable for the violations of N.J.A.C. 7:27-8.3(b) and thus the petitioner is entitled to summary decision on this issue.

Pursuant to the APCA, the petitioner may assess a civil administrative penalty of up to $10,000 for a first violation of the APCA and the Air Rules under it, and $25,000 for a second violation and up to $50,000 for a third or subsequent violation. N.J.S.A. 26:2C-19(b); N.J.A.C. 7:27A-3.10(a). In addition, for each day that a violation continues, it may be considered a separate violation. N.J.S.A. 26:2C-19(b); N.J.A.C. 7:27A-3.10(b). N.J.A.C. 7:27A-3.10(m) and (n) details the specific amount of the penalties that the Department shall assess for violations of specific provisions of the Air Rules.

The daily penalty for a first violation of N.J.A.C. 7:27-8.3(b) for a facility emitting anything less than 0.5 pounds per hour is set at $100. N.J.A.C. 7:27A-3.10(m)(8). The petitioner assessed this amount for Deba Realty's failure to have a valid air permit. This violation persisted for two and half years and Deba Realty failed to correct it for nearly

two years after receiving the NOV in January 2012. Based on these facts, the petitioner could have assessed a penalty of up to $10,000. N.J.A.C. 7:27A-3.10(a), (b).

Despite the above and following the petitioner's standard practice and in the interest of reasonableness, it capped the daily penalties assessed at thirty days and therefore assessed a total penalty of $3,000. Therefore, I **CONCLUDE** that the petitioner's penalty determination was reasonable and appropriate pursuant to the applicable regulations, it is entitled to summary decision as to the amount of this penalty.

V. Petitioner is Entitled to a Finding that Deba is Liable for Violations of N.J.A.C. 7:27-8.3(e) and the Assessment of the $5,600 Penalty was Correct and Reasonable

The Air Rules forbid any "person" from "us[ing] or caus[ing] to be used any equipment or air control apparatus unless all components connected or attached to or serving the equipment or control apparatus[] are function properly." N.J.A.C. 7:27-8.3c. A facility engaged in dispensing gasoline for vehicle refueling is required to have DEP approved systems in place to control vapor emissions during vehicle fueling (Phase I) as well as filling of storage tanks from a delivery vehicle (Phase II). N.J.A.C. 7:27-16.3(d), (e).

A typical Phase I system, like that at the facility, consists of a vapor recovery unit that connects to the tank's fill port and returns vapors displaced from the storage tank to the tanker truck via a vapor return hose. The Phase II system consists of a rubber hood or "bellows" that fits snuggly over the nozzle and over the gas tank opening when the nozzle is inserted. The bellows is connected to a vapor hose running with the fuel dispenser hose, which is in turn connected to piping returning to the storage tank. During fueling, the bellows captures vapors displaced from the vehicle's fuel tank and directs them into the vapor return system. In order for these systems to work correctly, there must be no blockages preventing vapors from following the return path and no openings allowing vapors to escape.

It is a fact that during Stavash's inspections on January 6, January 11, and September 18, 2013, he observed five separate failures of the vapor control systems at the facility. On January 6, 2012, when Stavash manipulated the bellows of two of the fueling nozzles, he saw gasoline drain out, indicating that gasoline had built up in the bellows, blocking vapors from being collected during fueling, known as a "liquid blockage." On January 11, 2013, Stavash observed a damaged vapor recovery hose at one of the dispensers, which would allow vapors to escape during fueling. Lastly, on September 18, 2013, Stavash observe another liquid blockage at one of the fueling nozzles. Stavash also observed a loose cap on the automatic tank-gauging port of one of the USTs, which would allow vapors to escape during refilling of the UST.

Based upon the above facts, in this case, I **CONCLUDE** that the subject facility had two violations of N.J.A.C. 7:27-8.3(e) on January 6, 2012, and a third violation on January 11, 2013, and a fourth and fifth violation on September 18, 2013, as Deba Realty caused its tanks and vapor-control equipment to be used by entering into a commercial transaction to lease its tanks and related equipment to a tenant to operate as a gas dispensing facility. Accordingly, I **CONCLUDE** that Deba Realty is responsible for complying with N.J.A.C. 7:27-8.3(e) and is, therefore, liable for the violations for same.

Like the penalties for violations of N.J.A.C. 7:27-8.3(b) as set forth herein above, penalties for violations of N.J.A.C. 7:27-8.3(e) are set forth in N.J.A.C. 7:27A-3.10(m)(8). The daily penalty for a first violation of N.J.A.C. 7:27-8.3(e) for a facility emitting anything less than 0.5 pounds per hour is set at $400, with penalties for second violations at $800 and third violations at $2,000. N.J.A.C. 7:27A-3.10(m)(8). In the NOCAPA, the Department assessed higher penalties of $600, $1,200, and $2,400, but it admits that this was an error and the petitioner requests that an adjustment be made to reflect the correct amounts set forth in N.J.A.C. 7:27A-3.10(m)(8).

Due to the fact that the January 6, 2012, inspection was the first time the Department had observed a violation of N.J.A.C. 7:27-8.3(e) at the subject facility, the Department should have assessed two first violation penalties of $400 each for the two liquid blockages. The January 11, 2013, inspection was the second time the

Department observed a violation of N.J.A.C. 7:27-8.3(e) at the facility, thus a second violation penalty of $800 should have been assessed for the broken fuel hose. The September 18, 2013, inspection was the third time the Department observed violations of N.J.A.C. 7:26-8.3(e) at the facility, thus two third-violation penalties of $2,000 each should have been assessed for the loose riser cap and the liquid blockage.

In total, the Department should have assessed penalties of $5,600 for the five violations of N.J.A.C. 7:27-8.3(e) that Stavash observed through the three inspections he conducted. Accordingly, instead of the total penalty of $7,200 assessed for these violations in the NOCAPA, the correct penalty is $5,600 (as requested by the petitioner) based on the Stavash observed violations and the penalty schedule at N.J.A.C. 7:27A-3.10(m)(8). This adjustment reduces the total penalty in the NOCAPA from $30,200 to $28,600. Therefore, I **CONCLUDE** that the petitioner's penalty determination should be reduced to $28,600 which is reasonable and appropriate pursuant to the applicable regulations, the petitioner is entitled to summary decision as to the amount of this penalty.

VI. Appropriateness of Penalties Assessed by the Department

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." Ibid. (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 Environmental Protection, 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. Contrary to respondent's characterization that petitioner is seeking the "highest penalties," an examination of petitioner's calculations indicates that the sanctions imposed are not arbitrary, capricious, unreasonable, or outside the statutory authority. Petitioner has set forth its rationale for penalty amounts, indicating the formula used to assess each penalty and citing the pertinent administrative code provisions. Notably, the petitioner exercised very little discretion as it simply applied the applicable rules to assess a penalty. Each of the violations was assessed as minor conduct, which is the lowest level on the conduct spectrum. See N.J.A.C. 7:14-8.5(h)(3).

Moreover, a penalty for violating the WPCA is mandatory and the Department does not have discretion whether to impose the sanction. See Lewis, 215 N.J. Super. at 575 (noting that "shall" has been generally interpreted as being mandatory). "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." Ibid. 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 Department, 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.

CONCLUSIONS OF LAW

Based on the foregoing, I **CONCLUDE** that petitioner's motion seeking a Summary Decision affirming its imposition of a $28,600 fine is granted. I base this conclusion on the lack of any dispute as to any material fact in this case which form the basis for liability. Thus, there is no argument that respondents violated the applicable law. Finally, acting pursuant to duly promulgated rules, the Department's enforcement actions are within the statutory authority and do not appear to be arbitrary, capricious, or unreasonable.

ORDER

I hereby **ORDER** that petitioner's motion for Summary Decision in this matter, affirming its determination of respondents' violation of its permit and the imposition of a $28,600 fine, is **GRANTED**.

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.

January 10, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: January 12, 2018

Date Mailed to Parties:

jb