



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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SHAWN M. LATOURETTE
Commissioner

TAHESHA L. WAY
Lt. Governor

SAM RUSSO,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
BUREAU OF NJPDES STORMWATER
PERMITTING AND WATER QUALITY
MANAGEMENT,

Respondent.

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO.: EER 01690-23

AGENCY REF. NO.:
NJ0313157-561400

This order addresses the challenge by Sam Russo (Russo) to the conditions of a New Jersey Pollutant Discharge Elimination System (NJPDES) permit, No. NJ 0313157 (Permit), issued to Russo on January 20, 2022, by the New Jersey Department of Environmental Protection, Bureau of NJPDES Stormwater Permitting and Water Quality (Department). The present matter is the latest in a lengthy series of administrative and judicial disputes between Russo and the Department pertaining to management of his property, the Suzie Q. Farm, located at 27 Hopkins Lane, Plumsted Township, NJ (Farm), in compliance with the New Jersey Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to -73. Following four days of oral argument and a post-hearing site visit, Administrative Law Judge Tricia M. Caliguire (ALJ) issued an Initial Decision finding that no portion of the Farm constituted a Concentrated Animal Feeding Operation (CAFO) and therefore granted Russo's challenge to the conditions of the Permit. ALJ Caliguire found that

because no part of the Farm is a CAFO, Russo is not properly subject to the terms of the Permit and therefore all other issues are moot.

For the reasons set forth herein, I hereby ADOPT the Initial Decision as discussed below.

FACTUAL AND PROCEDURAL HISTORY

The extensive factual and procedural history of this case is well documented in ALJ Caliguire's Initial Decision. The following discussion focuses on the key points.

Russo and his wife have owned and operated the Farm since 1998. On September 26, 2011, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment alleging Russo violated the WPCA by discharging stormwater associated with construction and industrial activities without an NJPDES permit. After a hearing, ALJ Jeff S. Masin ruled that Russo's activities on the Farm were not agricultural, that Russo violated the WPCA, and that Russo was required to obtain an NJPDES permit for regulated activity. New Jersey Department of Environmental Protection, Central Bureau of Water Compliance and Enforcement v. Samuel S. Russo, Jr., 2017 N.J. AGEN LEXIS 980 (May 22, 2017).

Russo and the Department entered into an administrative consent order (ACO) on October 20, 2017, with Russo agreeing to comply "with all applicable federal, state, and local permits as well as all applicable statutes, codes, rule[s], regulations, and orders." J-8 at DEP0041-54. Russo continued conducting operations at the Farm after entering into the ACO but, despite agreeing to comply with applicable statutes, rules, regulations, and orders, failed to apply for an NJPDES permit. The Department then brought a summary action against Russo, which the Honorable Craig L. Wellerson, P.J.Cv.P., granted on April 3, 2020, ordering Russo to modify his practices to comply with the WPCA and to "submit a formal application for an NJPDES stormwater general permit or individual permit for discharges associated with small construction and industrial



activities” on or before June 1, 2020. J-8 at DEP 0028 (NJDEP v. Sam S. Russo, et al., Dkt. No. OCN-L-1974-19, Order (Ocean Cnty. Sup. Ct. April 3, 2020)).

Russo submitted an application for an NJPDES Industrial Stormwater permit to the Department on September 23, 2020. Russo described the Farm’s primary on-site products or services as “production of beef cattle and hogs” covered by Standard Industrial Classification (SIC) Code Nos. 0212 and 0213. Russo stated that auxiliary products or services are “composting of soiled wood chips, manure and soils” for which there is no applicable SIC Code. J-6 at DEP0011. Russo also stated that “[t]he facility is a livestock farm operating raising cattle and hogs with a non-point source discharge related to the manure and urine from the livestock.” Ibid.

The Department deemed Russo’s application administratively complete on October 15, 2020, and a draft permit was issued on September 26, 2021. J-20. In the draft permit, the Department identified a portion of the Farm as a CAFO in accordance with N.J.A.C. 7:14A-2.13(d). Id. at DEP0108. Russo submitted comments on the draft permit, including that the decision to treat the Farm as a CAFO was not supported by the facts and conditions on-site and that many other activities and site conditions subject to NJPDES permits were no longer present on the Farm. J-22. The final Permit was issued on January 20, 2022, with no changes. J-23.

Russo filed an adjudicatory hearing request on February 16, 2022, and filed a request for stay of the permit conditions on August 29, 2022.¹ The Department transmitted the matter to the Office of Administrative Law for hearing as a contested matter, where it was filed on February 27, 2023. Prehearing conferences were held on April 21 and May 23, 2023, and a prehearing order was issued on June 2, 2023.

¹ By letter, dated December 14, 2022, this request was found incomplete for failure to address the stay factors under N.J.A.C. 7:14A-17.6(c). Russo filed additional information on March 13, 2023, and on June 21, 2023, the stay request was denied.



The Department filed a motion in limine on July 17, 2023, moving to exclude from the hearing evidence or argument that the Department had insufficient basis to require the Permit and therefore, that the action by NJDEP in issuing the Permit was overbroad, arbitrary, capricious, and ultra vires. The ALJ granted that motion on September 1, 2023, and at the hearing Russo was not permitted to argue that operations at the Farm do not require an NJPDES permit. This motion was made and granted because Judge Wellerson had previously ordered Russo to apply for a permit for “small construction and industrial activities” and Russo was legally obligated to comply. In making this ruling, the ALJ noted that Russo would nonetheless be free to argue that specific conditions of the Permit were imposed in error. The ALJ acknowledged that Russo had a reasonable basis for arguing “that while Farm operations may have required a permit, they certainly did not require this permit.” Order Granting Motion in Limine at 8.

The parties requested specific modifications of the issues to be resolved at the hearing by letters dated September 14, 20, and 26, 2023. The ALJ issued an amended prehearing order listing the issues for resolution on October 4, 2023. The due process hearing was held on October 24, 25, and 30, and November 1, 2023. The record remained open for the parties to submit post-hearing briefs after receipt of the transcripts. Simultaneous submissions were made on April 12, 2024. The ALJ conducted a site visit on June 10, 2024, at which additional testimony was taken; following the visit, the record was closed. The ALJ issued her Initial Decision on July 24, 2024.

INITIAL DECISION

Following the October 4, 2023, prehearing order, the ALJ’s Initial Decision considered nine specific challenges to the Permit. Russo claimed:

- a. Some outfalls covered by the Permit have been modified and/or closed and, as such, do not have discharges subject to the regulations.



- b. Some source materials are no longer on the premises. The processes performed at the premises have changed since 2018–19, and therefore, the sampling and analytical parameters listed in the Permit must be modified.
- c. The analytical parameters listed in the Permit are not appropriate; sampling must be performed on discharges, not stationary points.
- d. Petitioner operates an indoor farm vehicle and equipment maintenance shop from which there are no discharges; this facility is covered by the Permit in error.
- e. The facility does not meet the regulatory description of a CAFO found in N.J.A.C. 7:14A-2.13(d).
- f. The facility has not manufactured and/or processed topsoil on-site since April 2020, but the Permit covers these activities.
- g. All automotive restoration activities and vehicle and equipment maintenance activities are performed within a fully enclosed building without drainage and, as such, do not contribute to stormwater discharges from the premises.
- h. All drywells on the premises were closed and sealed in 2020.
- i. Petitioner operates a furnace, not a boiler, and there is no discharge from the furnace to the waters of the State.

[Amended Prehearing Order (October 4, 2023) (PHO), at 2.]

The Department objected to two issues on which testimony was presented at the hearing that it argued were outside the issues listed in the PHO. First, the Department claimed that Russo could not argue that the Farm could not be characterized as an animal feeding operation (AFO), defined at N.J.A.C. 7:14A-1.2, which is a condition precedent to the Farm being characterized as a CAFO, because Russo did not raise the issue in his comments on the draft permit. Second, the Department contended that Russo added the issue of whether “source separated food products contribute to stormwater discharges onsite” even though that exact language was not incorporated into the amended PHO. Resp’t Br. at 6 (quoting letter of DAG Chloe Gogo to Judge Tricia Caliguire, at 2 (September 20, 2023)).



The ALJ concluded that both issues were properly raised at the hearing. First, the ALJ addressed Russo's failure to raise, in his comments on the draft permit, the argument that the Department needed to explain that the Farm met the preliminary requirement of being an AFO. The ALJ concluded this did not prejudice the Department or violate N.J.A.C. 7:14A-17.4(c) because the Department should have determined whether the farm was an AFO, and if it did not consider it, that information should be part of the record. Regardless, the ALJ noted that the condition precedent, AFO status, needs to be considered to determine whether the Farm was properly determined to be a CAFO. Second, the Department had notice that Russo would raise the issue of source separated food products contributing to stormwater discharges onsite as Russo stated that the Department's conclusion was unfounded in his comments to the draft permit. J-22 at DEP0588.

The ALJ heard testimony from two witnesses: Russo, and the Department's witness, Daniel Kuti (Kuti). Kuti is an Environmental Specialist supervisor of municipal stormwater permitting with the Department. Kuti reviewed Russo's application, requested information from Russo, conducted a site visit, drafted the Permit, responded to comments, and wrote the final Permit. J-9; J-10; J-11; J-12; J-13; J-14; J-23; R-1; R-2. The ALJ heard testimony on the state and nature of Farm operations and how they had changed from the time of Judge Wellerson's order to the present, the permitting process, and the Farm's designation as a CAFO. The ALJ also conducted a site visit to the Farm. During his testimony, Kuti acknowledged that Russo's farming operations would have been exempt from having to obtain an NJPDES permit but for its designation as a CAFO. Tr. 3 at 116-20.

The ALJ determined that Russo and Kuti were both pleasant and credible witnesses, but noted that both seemed to have trouble with inconsistencies. With Russo, the ALJ noted there were



inconsistencies between his testimony and the documentary evidence such as his own Farm Management Plan. Regarding Kuti's testimony, the ALJ noted inconsistencies between the activities described in the Permit and the actual Farm operations, including inconsistencies present at the time of Kuti's past site visits. Based on the testimony, documentary evidence, and the ALJ's own site visit, the ALJ made fifteen factual findings:

1. On September 23, 2020, Russo applied for an NJPDES stormwater individual industrial stormwater permit for discharges associated with industrial activities related to the production of beef cattle and hogs, composting of soiled wood chips, manure and soils, and the topsoil pile. Pet'r Br. at 4, ¶ 29, at 5, ¶ 33; Resp't Br. at 3, ¶ 7.
2. The NJDEP regulations provide for a three-year lookback; accordingly, a permit may address and/or require monitoring of stormwater discharges carrying pollutants related to operations conducted at the Farm during the three years prior to the date of application, which was September 23, 2020.
3. Between September 2017, and September 2020, on-site operations included the use of topsoil and compost, milling and blending of asphalt and concrete, and the outdoor storage of industrial equipment.
4. As of September 2023, when the hearing began, Russo only used compost on-site (for animal mortality) and continued to store industrial equipment outdoors. However, the use of topsoil, composting, and processing and blending of asphalt millings occurred within the three-year lookback period and, therefore, are properly included as bases for the Permit.
5. Sampling conducted on-site in September 2019, and in March 2021, showed that stormwater runoff from the Farm exceeded acceptable levels of certain pollutants by more than forty percent, including E-coli, fecal coliform, phosphorous, total suspended solids, and total dissolved solids. These levels of pollutants were characterized by NJDEP as a significant contribution of pollutants to the waters of the State, from stormwater runoff that comes into direct contact with animals on the Farm and/or their waste.
6. Russo rotates the locations of his crops annually. While the photographs and maps of the Farm are similar to what was observed



by Kuti in February 2021, and by [the ALJ] just a month ago, the operation is not static, as Kuti presumed when he wrote the Permit.

7. In the Permit, the NJDEP states that the CAFO was “observed during the February 9, 2021 [NJDEP] site visit to be conducted on the high point of the site,” adjacent to wetlands and approximately 130 feet from the unnamed tributary. J-23 at DEP 0610. During the judicial site visit, Kuti confirmed that the Permit referred to the Batman Field, the highest point of the Farm, and that he was not aware that the location of the cows ever changed.

8. While Kuti did initially testify that the entire farm was the CAFO, and the perimeter fence was a confinement mechanism, he later appeared to abandon that theory and stated, consistent with the Permit, that the alleged CAFO is the area in which the cows were observed on February 9, 2021.

9. When Kuti conducted his site inspection, in February 2021, he observed no crops growing in the Batman Field. He also observed snow falling that day. Though there may be warm weather in February in New Jersey, the month of February is typically outside the normal growing season. On June 10, 2024, corn was growing in the Batman Field.

10. No one asked, and no one testified to, how much time during the growing season that the cows spend in any one portion of the Farm.

11. While the cows generally have free reign to wander the entire property outside the growing season, Russo stated several times that most of the time, he keeps the cows out of the crops during the growing season. No one asked, and no one testified to, whether all plantings follow the same schedule during the growing season.

12. During the growing season, the cows still have access to areas of vegetation, the wooded areas bordering the entire property.

13. The cows graze on vegetation. Each day, they are also fed fresh produce in large, heavy troughs, placed on hard-packed dirt or RCA. Sometimes, the cows are fed, and produce manure, in the fields, evidence of which is the abundance of vegetables grown from seed found in manure.

14. The hogs have a pen and do not wander throughout the Farm. The pen is very large—three acres for approximately 100 hogs—and it cannot be fairly described as crowded or confining. At the same time, in the most literal sense, the hogs are confined to three



acres for their own safety as well as to prevent them from escaping into the neighborhood. In the area of the hogs' confinement, vegetation does not grow; the surface is dirt.

15. Kuti stated that but for the CAFO designation the NJDEP would not have issued a stormwater discharge permit to Russo covering topsoil, composting, the boiler/furnace, food storage and feeding operations, storage of asphalt millings, corn silage, the auto restoration activities, equipment maintenance activities, and/or storage of equipment. In short, if the Farm cannot be regulated as a CAFO, the NJDEP has no basis to issue a NJPDES permit to the Farm.

[Initial Decision at 26-29.]

The ALJ concluded that the Department properly considered whether the Farm was a CAFO despite Russo not applying for a permit to discharge stormwater from a CAFO, but incorrectly determined that the Farm was a CAFO. The ALJ found that the Farm did not meet the regulatory definition of an AFO, the prerequisite condition to a CAFO, because crops were maintained during the normal growing season on the Farm. N.J.A.C. 7:14A-1.2. Accordingly, the Farm did not meet the regulatory definition of a CAFO.

The ALJ also found that while the smaller three-acre hog pen constituted an AFO, it did not meet the requirements of being a CAFO. The ALJ found that the hog pen did not qualify as a CAFO under N.J.A.C. 7:14A-2.13(b) because there were too few hogs inside the pen. Nor did it qualify as a CAFO under N.J.A.C. 7:14A-2.13(d), a determination based on whether it contributes pollution to the waters of the State, because the Department did not evaluate the pollution contributed by the hog pen on its own, without the contributions of the cattle.

The ALJ also made additional findings in the event that I found that the Farm was a CAFO. As it is not, those additional findings are not discussed here.



EXCEPTIONS

The Department filed exceptions in this matter, and Russo filed a reply. The Department argues that the portion of the Farm in which the cattle were located at the time of the permit application, together with the hog pen, constituted both an AFO and a CAFO. The Department also argues that the hog pen alone constituted a CAFO. The Department also argues that even if all or part of the Farm did not constitute a CAFO, the ALJ erred by not finding another basis for Russo's Permit; namely, that the Department alleges the Farm "contributes to a violation of a surface water quality standard, or is a significant contributor of pollutants to surface water." N.J.A.C. 7:14A-24.2(a)7ii. J-23 at DEP0610. Finally, the Department takes exception to the ALJ's finding, based on Kuti's testimony, that the Department would not have issued the Permit but for the CAFO designation.

Russo replied to the Department's exceptions, arguing that the ALJ was correct in finding that the Farm, neither in whole nor in part, constituted a CAFO, that the Farm was not a significant contributor of pollutants, and that the ALJ's initial finding that but for the CAFO finding, a permit would not have been issued, was correct.

DISCUSSION

NJPDES

The federal Clean Water Act (CWA) establishes a comprehensive program intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA is administered by the U.S. Environmental Protection Agency (EPA), as well as by State agencies, through a system of cooperative federalism: the EPA develops regulations, and the CWA authorizes states to administer programs under EPA's oversight. 33 U.S.C. § 1251(b); 40 C.F.R. § 123.25. The Department has primary authority for administering



the CWA in New Jersey pursuant to the WPCA, which was enacted in order to help “restore, enhance and maintain the chemical, physical, and biological integrity” of New Jersey’s waters, public health, aquatic life, and scenic and ecological values. N.J.S.A. 58:10A-2.

Under the CWA, states are authorized to administer their own permit programs for discharges into navigable waters within their jurisdiction. 33 U.S.C. § 1313(b). These programs implement the federal National Pollutant Discharge Elimination System (NPDES) program, which regulates point sources and certain non-point sources that discharge pollutants to waters of the United States. New Jersey received authorization to implement most NPDES program components on April 13, 1982, which it does through the NJPDES rules, N.J.A.C. 7:14A-1 to -25.

The basis for issuing the Permit

The parties in this case have raised numerous questions of law and fact, generating a substantial record in the process. Before any other issues are considered, however, there is a threshold question of whether the Farm was properly subject to the conditions of the Permit in the first place. Judge Wellerson ordered Russo to apply for a NJPDES permit for “discharges associated with small construction and industrial activities,” and Russo did so in 2020. By the time of Russo’s application, however, construction and industrial activities on the Farm had largely ceased. Although NPDES permits include a three-year “lookback” period for these activities to ensure that historical activities do not cause continuing stormwater discharges, N.J.A.C. 7:14A-2.7(a)1i(7), the Department did not make construction and industrial activities the basis for the



Permit. Instead, as the ALJ noted, the Department properly examined the present character of the operation and issued a NJPDES permit regulating a CAFO.²

Small agricultural operations such as Russo's are not typically subject to permitting under NJPDES. N.J.A.C. 7:14A-2.5(a)4. Exceptions that authorize NJPDES permits exist for CAFOs, N.J.A.C. 7:14A-24.2(a)4, N.J.A.C. 7:14A-2.13; where necessary to achieve and maintain applicable water quality standards, N.J.A.C. 7:14A-2.5(d); and for certain other stormwater discharges, N.J.A.C. 7:14A-24.2(a)7. In this case, the Permit identifies Russo's operation as a CAFO and regulates it as such. In the alternative, the Department argues in its exceptions that the Permit was also issued under the catchall stormwater provision, N.J.A.C. 7:14A-24.2(a)7, which reads as follows:

A NJPDES permit under this subchapter is required for the following stormwater DSW [discharge to surface water] and DGW [discharge to groundwater]:

...

7. Stormwater DSW from point or nonpoint sources (other than activities identified under N.J.A.C. 7:14A-2.5(a)4 or 5) for which either the Department or the USEPA Regional Administrator determines (also see N.J.A.C. 7:14A-24.7(a) and (c), 25.2(a)4 and 25.5) that:

- i. Stormwater controls are needed for the point source discharge based on total maximum daily loads (TMDLs) that address the pollutant(s) of concern; or
- ii. The point or nonpoint source discharge, or category of discharges within a geographic area, contributes to a violation of a surface water quality standard, or is a significant contributor of pollutants to surface water;

[N.J.A.C. 7:14A-24.2(a).]

² In his permit application, Russo characterized the Farm as "a livestock farm operating raising cattle and hogs with a non-point source discharge related to the manure and urine from the livestock," J-6 at DEP0011, a description that the Department does not contest.



The Permit itself invokes both of these provisions, as the Department determined that the Farm was “a significant contributor [of pollutants to surface water] in accordance with N.J.A.C. 7:14A-24.2(a)7 and 40 CFR 122.28(b)(3)(i)(G)” and that “a portion” of the Farm constituted a CAFO. J-20 at DEP0108. The question in this case is whether the Department properly applied these standards to the Farm.

The Farm was issued the Permit as a CAFO under N.J.A.C. 7:14A-2.13

Kuti testified at the hearing that the Farm would not have received an NJPDES permit but for its designation as a CAFO. Tr. 3 at 116-20. ALJ Caliguire subsequently found this to be fact. The Department, in its exceptions, disagrees with this conclusion, arguing that the ALJ was incorrect in finding that the Department would not have issued a permit but for the CAFO designation. The Department points to its redirect examination of Kuti, which it claims shows that Kuti did not exclusively rely on the CAFO designation. During redirect, the ALJ asked Kuti, “[b]ut for the designation of this facility as a CAFO would you have issued the permit?” After clarifying that he would still have the monitoring results that showed high levels of contaminants on the Farm, Kuti stated “Yes. It’s still a significant contributor of waste.” Tr. 4 at 71-72. The Department also points to the Permit’s fact sheet, J-23 at DEP0610, which it states shows the Department independently determined that the Farm was a significant contributor of pollutants to surface water under N.J.A.C. 7:14A-24.2(a)7ii.

A final decision “rejecting or modifying findings of fact in an initial decision shall be based upon substantial evidence in the record and shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent and credible evidence in the record.” N.J.A.C. 1:1-18.6(d). The agency head may not “reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines



from a review of the record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record.” N.J.A.C. 1:1-18.6(c). Here, the ALJ found that Kuti stated that, but for the CAFO finding, the Department would not have issued the Permit.

The ALJ’s finding is not arbitrary, capricious, or unreasonable, and the record does not support rejecting that finding or making a new or modified finding. Kuti was asked whether, “if Mr. Russo’s farm had not been designated as a CAFO, the farming operations would have been exempt from having to obtain a storm water discharge permit?” Tr. 3 at 163. Kuti replied, “[a]t the time of the permit? . . . Yes.” Ibid. The Department points to the redirect where, as stated above, Kuti appears to say the opposite; that the CAFO finding was not needed to issue a permit. Tr. 4 at 71-72. The Department states that this is further backed up by other testimony where Kuti stated there was a finding that the Farm was a significant contributor of pollutants to surface water, such as at Tr. 3 at 57 where Kuti said the Department concluded, based on monitoring sample results, “[t]hat there was a significant amount of pollutants being discharged from the storm water runoff.” As stated above, the Department also points to the Permit itself, J-23 at DEP0610.

The Department’s reliance on N.J.A.C. 7:14A-24.2(a)7 as an alternative basis for issuing the Permit is erroneous. Pollutants running off from the Farm fall within the meaning of “nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands,” N.J.A.C. 7:14A-2.5(a)4, which are exempt from the general stormwater provisions of N.J.A.C. 7:14A-24.2(a)7 (“Stormwater DSW from point or nonpoint sources (other than activities identified under N.J.A.C. 7:14A-2.5(a)4 or 5)”; emphasis added). If the Department wishes to issue Russo a NJPDES permit for reasons other than his alleged operation of a CAFO, it must meet the requirements of N.J.A.C. 7:14A-2.5(d), which



allows the Department to require NJPDES permits for small agricultural operations that emit only non-point source pollution where “necessary to achieve and maintain applicable water quality standards.” In this case, the Department has not done so. Neither the Permit, the Department’s argument before the ALJ, nor the Department’s exceptions discuss N.J.A.C. 7:14A-2.5(d), suggest that it was a basis for the Permit, or address the procedural requirements of the subsection.³ Accordingly, there is no basis for this Final Decision to overturn the ALJ’s finding that the Farm would not have received the Permit if it had not been identified as a CAFO. The remaining question is whether the Farm or any part of it was properly identified as a CAFO. It was not.

CAFO Determinations

A CAFO is defined as “an animal feeding operation which meets the criteria set forth in N.J.A.C. 7:14A-2.13.” N.J.A.C. 7:14A-1.2 (emphasis added). Before any property can be determined to be a CAFO, it must be an AFO. N.J.A.C. 7:14A-2.13. An AFO is defined as:

a lot or facility (other than an aquatic animal production facility)
where the following conditions are met:

1. Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period;
and
2. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

[N.J.A.C. 7:14A-1.2.]

As a second step, there are different ways that an AFO may meet the definition of a CAFO. Pursuant to N.J.A.C. 7:14A-2.13(b), a CAFO may be identified based on the number of animals

³ It should be noted that through both Kuti’s testimony and its exceptions, the Department has discussed the results of water quality testing in some detail, including statements that some readings at some locations did exceed the State’s water quality standards. However, when the record is viewed as a whole, it does not allow for the conclusion that the Permit was based on N.J.A.C. 7:14A-2.5(d). This Final Decision does not address the question of whether a NJPDES permit could have been issued to Russo on the basis of N.J.A.C. 7:14A-2.5(d), only that the Permit at issue was not.



confined. Under this provision, depending on whether pollutants are discharged directly into State waters, an operation must include at least 300 or 1,000 cattle or 750 or 2,500 swine. The Farm, which has approximately 160 head of cattle and 100 head of hogs, does not meet these criteria. Alternatively, pursuant to N.J.A.C. 7:14A-2.13(d), an AFO that does not meet those criteria may be designated:

(d) On a case-by-case basis and after conducting an on-site inspection, the Department shall designate, as a concentrated animal feeding operation, any animal feeding operation which does not meet the criteria in (b) above if (d)1 and 2 below are met:

1. The Department determines that the operation is a significant contributor of pollution to the waters of the State. In making this determination the Department shall consider the following factors:

- i. The size of the animal feeding operation and the amount of wastes reaching waters of the State;
- ii. The location of the animal feeding operation relative to waters of the State;
- iii. The means of conveyance of animal wastes and process waste waters into waters of the State;
- iv. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the State; and
- v. Other relevant factors; and

2. The Department determines that:

- i. Pollutants are discharged into waters of the State through a manmade ditch, flushing system, or other similar manmade device; or
- ii. Pollutants are discharged directly into waters of the State which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

[N.J.A.C. 7:14A-2.13(d).]



Neither the whole Farm nor Batman Field is an AFO

The ALJ correctly found that neither the whole Farm nor Batman Field constitutes a CAFO because it does not meet the regulatory definition of an AFO.⁴ There is some dispute in the record regarding the first required factor for an AFO, whether animals “have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period.” N.J.A.C. 7:14A-2.13(d)1. In issuing the Permit, Kuti identified Batman Field specifically as a CAFO. Russo maintains that his cattle are not confined to Batman field but are free to roam within the boundaries of the Farm, while the Department argues that they have been confined, based on Kuti having observed structures like fencing, shipping containers, a gate, and concrete block walls around Batman Field. Regardless, both parties acknowledge that cattle have been stabled or confined and fed or maintained for a total of 45 days in a 12-month period at the Farm, insofar as the fence around the Farm itself keeps the cattle from wandering off.

The key question is whether the second AFO factor, N.J.A.C. 7:14A-2.13(d)2, requiring that “[c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility,” is met, either with respect to the Farm as a whole or with respect to Batman Field. The ALJ determined that it was not, finding credible evidence in the record that both the Farm and Batman Field typically sustain crops during the normal growing season. Initial Decision at 37-38. There is no dispute that crops are maintained during the growing season on portions of the Farm as a whole. Therefore, the Farm as a whole is not an AFO, and thus not a CAFO.

⁴ Throughout this proceeding, including at oral argument and in the ALJ’s Initial Decision, the area determined to be a CAFO, where Kuti observed cattle on his February 9, 2021, site visit, has been referred to as “Batman Field.” In its exceptions, the Department adopts a new term, the “Quadrant,” which apparently encompasses Batman Field, “Batman Mound,” and the hog pen. Batman Mound appears to be within Batman Field, and the hog pen is addressed separately. Accordingly, this Final Decision does not use the term “Quadrant,” nor commingle its analysis of Batman Field with the hog pen.



Regarding Batman Field specifically, however, the Department contends that the ALJ erred in finding that it was not an AFO, noting that Batman Field was barren on the map Russo provided to the Department, J-19 (aerial photograph taken May 2019), and barren when Kuti inspected the Farm on February 9, 2021. Because of this, the Department contends that it was reasonable for Kuti to conclude that Batman Field was an AFO.

But, as the ALJ points out, the Department did not produce any evidence that shows that Kuti inquired about whether, and when, crops were grown at Batman Field, nor any evidence that Russo should have expected Kuti to be interested in the same and volunteered such information. Initial Decision at 35. The Department also does not note whether it further investigated Russo's use of Batman Field. The Department also relied on the Farm Management Plan, which identified specific areas of the Farm on which the cattle were theoretically kept. R-2. However, the ALJ noted that the Farm Management Plan is no longer accurate. Initial Decision at 23.

While it may be true that the Department reasonably relied upon the information it had in front of it at the time, the record shows that the Department did not visit the Farm during the growing season and did not ask Russo whether any crops were grown in Batman Field during the growing season. The record shows that further investigation would have shown that Russo's current use and management of the farm did not reflect the documents provided to the Department. Had the Department visited the farm during the growing season, or had it asked Russo, it would have discovered that Russo rotates crops and thus rotates the areas on which he allows the cattle to roam. Tr. 2 at 41-42. In addition, Russo testified that the cattle are sometimes allowed to graze crops in the field, and photographs were introduced showing them doing so. Tr. 2 at 43, P-2-C to -E.



Despite the Department's claims, the record supports the ALJ's findings. As the ALJ stated, there were plantings in Batman Field at the time of the ALJ's site visit in June 2024, which was during the growing season. Initial Decision at 35. Additionally, photographs in the record show crops growing in the Batman Field. P-1-D; P-1-I to -M. The record also shows that cattle were grazing on crops at the Farm. P-2-C to -E. The ALJ's findings are supported by the record: crops were and are grown in Batman Field during the normal growing season, and the cattle are occasionally allowed to graze on the crops. Batman Field is not an AFO pursuant to N.J.A.C. 7:14A-1.2, and thus cannot be a CAFO.

The Hog Pen is not a CAFO

The ALJ found that the hog pen constituted an AFO, as the hogs are confined there for more than forty-five days a year and no vegetation is grown there during the normal growing season. Initial Decision at 38. The ALJ found, however, that it was not a CAFO pursuant to N.J.A.C. 7:14A-2.13. First, the ALJ found that it did not qualify as a CAFO by size, pursuant to N.J.A.C. 7:14A-2.13(b), as Russo only keeps 100 hogs. Next, the ALJ found that it did not qualify as a CAFO pursuant to N.J.A.C. 7:14A-2.13(d) because the record lacks evidence showing that the Department considered the hog pen, on its own, to be a significant contributor of pollutants to the waters of New Jersey. The Department disagrees with this finding, adopting in its exceptions a new term, the "Quadrant," and asserting that the identification of high pollutant levels on the Farm is enough to qualify the hog pen as a CAFO because "DEP does not distinguish the location of cattle from the location of the hogs."

This argument is misplaced. While the Department is correct in stating that the ALJ did not cite to a requirement that it consider the hog pen on its own, the Department also fails to support its contention that it can consider the cattle with the hogs. As stated above, a lot or facility needs

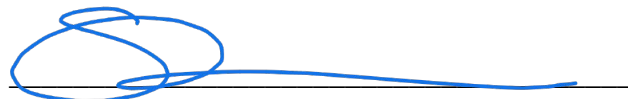


to be considered an AFO before it can be considered a CAFO. N.J.A.C. 7:14A-1.2. Neither Batman Field, nor the rest of the farm, is an AFO. The Department is unpersuasive in its assertion that the ALJ should have considered something that is explicitly not an AFO when determining that the hog pen is a CAFO. The Department's exceptions include an extensive analysis of the five factors under N.J.A.C. 7:14A-2.13(d) that are used to determine if a livestock operation is a significant contributor of pollution to the waters of the State. Throughout, the Department comingles the cattle with the hogs and fails to provide an explanation for why any of the identified pollutants – let alone all of them – should be attributed to the hog pen. Therefore, the ALJ was correct in finding that the hog pen, while an AFO, was not a CAFO.

CONCLUSION

Having reviewed the record, and for the reasons set forth above, I hereby ADOPT the ALJ's Initial Decision. IT IS SO ORDERED.

Dated: December 2, 2024


Shawn M. LaTourette, Commissioner
Department of Environmental Protection



SAM RUSSO

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF NJPDES STORMWATER PERMITTING AND WATER QUALITY
MANAGEMENT

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