



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

**INITIAL DECISION**

OAL DKT. NO. EER 01690-23

AGENCY DKT. NO. NJ0313157-  
561400

**SAM RUSSO,**

Petitioner,

v.

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

Respondent.

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**Craig S. Provorny**, Esq., for petitioner (Herold Law, P.A., attorneys)

**Chloe Gogo**,<sup>1</sup> and **Kathrine M. Hunt**, Deputy Attorneys General, for respondent  
(Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: June 10, 2024

Decided: July 24, 2024

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

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<sup>1</sup> Lead counsel for respondent.

## **STATEMENT OF THE CASE**

Since 1998, petitioner, Sam Russo<sup>2</sup> (Russo), and his wife have owned and operated the Suzie Q. Farm, 27 Hopkins Lane, Plumsted Township, New Jersey (the Farm).<sup>3</sup> For reasons described below, Russo applied to respondent, the New Jersey Department of Environmental Protection, Bureau of NJPDES Stormwater Permitting and Water Quality (NJDEP), for a New Jersey Pollution Discharge Elimination System (NJPDES) permit. Russo challenges specific conditions of the permit, No. NJ 0313157 (the Permit).

## **PROCEDURAL HISTORY**

The NJDEP issued the Permit to Russo on January 20, 2022. On February 16, 2022, petitioner filed an adjudicatory hearing request. On August 29, 2022, Russo filed a request for stay of permit conditions. 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.

In the interim, the NJDEP transmitted this matter to the Office of Administrative Law for hearing as a contested matter, where it was filed on February 27, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -23. Prehearing conferences were held on April 21 and May 23, 2023, and a prehearing order was issued on June 2, 2023.

On July 17, 2023, the NJDEP submitted a motion in limine to exclude from the hearing evidence and/or argument that the NJDEP had insufficient basis to require the Permit and therefore, that the action by NJDEP in issuing the Permit was overbroad, arbitrary, and capricious, and ultra vires. On September 1, 2023, after responsive briefing,

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<sup>2</sup> This matter relates to several other proceedings in which Russo and Suzie Q. Farm, which Russo owns and operates, are named. For simplicity, only Russo's name is used when referring to all such matters.

<sup>3</sup> The Farm is shown on the Plumsted Township tax maps as Block 58, Lots 13 and 14; Block 61, Lots 2, 3, 6, and 14; and Block 62, Lot 7.

I granted the motion in limine; at the hearing, Russo was not permitted to argue that operations at the Farm do not require an NJPDES permit.

By letters dated September 14, 20, and 26, 2023, the parties requested specific modifications of the issues to be resolved at the hearing. An amended prehearing order listing issues for resolution at the hearing was issued 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. I conducted a site visit on June 10, 2024, at which additional testimony was taken, and the record closed.

## **FACTUAL DISCUSSION AND FINDINGS**

### **Background**

As stated in the order of September 1, 2023, there is no dispute as to the matters that took place between the parties between 2011 and September 23, 2020, when Russo applied for the Permit. The parties do, however, dispute how and whether operations at the Farm have changed since September 2020. Generally, Russo contends that most activities that were subject to regulation have ceased, the cessation of some occurring as early as 2018–19, and that the NJDEP mischaracterizes remaining operations. The NJDEP disagrees and contends that the conditions of the Permit reflect current operations and operations that were conducted on-site within the three years prior to the date of the permit application.

To provide context for the current dispute, I **FIND** the following background **FACTS**, as described in documents filed by both parties prior to the hearing, including the petition of appeal, the answer, and papers supporting and opposing the NJDEP's motion in limine:

1. On or about September 26, 2011, the NJDEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) alleging that Russo had violated the New Jersey Water Pollution Control Act (NJWPCA), N.J.S.A. 58:10A-1 to -73, by discharging stormwater associated with construction and industrial activities without a NJPDES permit. Following a hearing, Russo was found to have violated the NJWPCA as alleged by NJDEP; the ALJ ruled that activities on the Farm were not agricultural, and Russo was required to obtain a NJPDES permit for regulated activity. J-8 at DEP0030 (NJDEP v. Samuel S. Russo, Jr., OAL Dkt. No. ECE 4572-12, Initial Decision (Oct. 6, 2016) Comm’r, Final Decision at 8 (May 22, 2017) (modifying Initial Decision to state that even if the Farm had qualified as a “commercial farm” under the Right to Farm Act,<sup>4</sup> it would not be exempt from “NJPDES rules as a nonpoint source discharge resulting from agricultural activity”).<sup>5</sup>
2. On October 20, 2017, Russo and the NJDEP entered into an Administrative Consent Order (ACO) by which Russo agreed 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.
3. After entering the ACO, Russo continued to conduct operations at the Farm, but failed to apply for a NJPDES permit and on August 5, 2019, NJDEP brought a summary action against Russo for a preliminary injunction, permanent injunctive relief, and statutory penalties, pursuant to R. 4:67-6. 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).). In this matter, the NJDEP alleged that certain Farm practices posed a risk of harm to surface water and groundwater, namely maintenance of soil mounds; paving of Farm roads, parking lots and livestock pens with asphalt millings and recycled crushed aggregate (RCA); and the use of wood chips, leaves, grass clippings, clean fill, and topsoil. J-8 at DEP0028.

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<sup>4</sup> N.J.S.A. 4:1C-1 to -10.4.

<sup>5</sup> A number of documents filed by the parties prior to the hearing were also submitted as joint exhibits at the hearing, in which case the reference numbers found in the Appendix are used.

4. On April 3, 2020, the Honorable Craig L. Wellerson, P.J.Cv.P., found that Russo was required to obtain a NJPDES stormwater general or individual permit, and his failure to do so violated the NJWPCA and the Commissioner's May 22, 2017, Final Decision.
5. Judge Wellerson ordered Russo to, among other things, "submit a formal application for a 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 0028. Further, Russo was prohibited from continued use of soil mounds, asphalt millings, RCA, wood chips, and topsoil.
6. Russo sought an interlocutory appeal of Judge Wellerson's order, which was denied by the Appellate Division on August 6, 2020.
7. On September 23, 2020, Russo filed an application with the NJDEP for a NJPDES Industrial Stormwater permit. In this application, Russo described 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. Further, Russo 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.
8. NJDEP deemed Russo's application administratively complete on October 15, 2020. A draft permit was issued on September 16, 2021. J-20. In the draft permit, the NJDEP described the Farm as follows, in pertinent part: "The Department has identified a portion of the activity as a Concentrated Animal Feeding Operation (CAFO) in accordance with N.J.A.C. 7:14A-2.13(d)." Id. at DEP108.
9. During the notice and comment period, the following comments were made by Russo:

- a. Many of the conditions existing at the Farm in 2018 and 2019, when NJDEP conducted on-site inspections, no longer exist, and were not included in the permit application.
- b. Outfalls covered by the draft permit have been modified, no longer exist, and/or no longer discharge.
- c. Some source materials are no longer on-site. Operations on-site have changed.
- d. Sampling results taken from stationary points are not appropriate for developing analytical parameters for discharge samples.
- e. The decision to treat the Farm as a CAFO is not supported by the facts and conditions on-site.
- f. Source separated food products do not contribute to stormwater discharges on-site.
- g. Since April 2020, topsoil is not blended, screened, used and/or stored on-site and is not a source of stormwater discharge.
- h. Automotive restoration activities and vehicle and equipment maintenance activities do not contribute to stormwater discharge on-site.
- i. The Farm does not qualify as a CAFO as there are only 160 cattle and 100 swine on-site and the Farm may not meet any one of the remaining factors.
- j. All drywells have been closed and sealed.
- k. The description of wastes, fluids, or pollutants on-site is incorrect.
- l. Asphalt millings are no longer processed and/or distributed on-site.
- m. The water boiler is heated with wood.

[J-22.]

10. The NJDEP responded to each comment but made no changes to the final permit because of any comment(s).

## **Disputed Issues**

In his request for a hearing in this matter, Russo made the following general charge: “The Permit should never have been issued by DEP.” Petition (February 16, 2022), Addendum at 2. At the hearing, Russo was precluded from arguing that a permit was not required; he was not precluded from arguing that the conditions of the permit issued to him are not appropriate for his operations.

Russo argues that the Permit covers activities that are wholly unrelated to any described in the AONOCAPA, the ACO, the Order from the Superior Court, or the application Russo filed. Russo was required to apply for a “NJPDES stormwater general permit or individual permit for discharges associated with small construction and industrial activities.” Petitioner’s Proposed Findings of Fact and Conclusions of Law (April 12, 2024) (Pet’r’s Br.), at 8 (citing Ex. R-13 at ¶ 1). Russo applied for an “individual or general stormwater discharge permit limited to industrial activities,” using Form RF, which is used for “discharges related to industrial activities.” Id. (citing Exs. J-6, J-7, J-8, J-12, and P-29).

Specifically, Russo challenges the following conditions of the Permit:

- 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.]

In its brief, the NJDEP objects to two issues on which testimony was presented but which it contends are outside the issues listed in the amended PHO. Proposed Findings of Fact and Conclusions of Law of the Respondent State of New Jersey Department of Environmental Protection (April 12, 2024) (Resp't Br.), at 6. First, by letters of September 14 and 26, 2023, and at the hearing, Russo argued that the Farm cannot be properly 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 under N.J.A.C. 7:14A-2.13(d). The NJDEP argues simply that this issue cannot be considered after the Permit was issued because it was not raised during the public comment period.<sup>6</sup> (Resp't Br. at 40 (citing N.J.A.C. 7:14A-15.13, -17.2(e)(5)).) While responsive briefing was not conducted here, Russo pre-emptively covered the NJDEP argument:

At N.J.A.C. 7:14A-1.2, [NJDEP] defines CAFO as . . . **an animal feeding operation** [AFO] which meets the criteria set forth in 7:14A-2.13. Based on the foregoing there is no question that under NJDEP's *own* regulations, a lot or facility cannot be considered a CAFO unless it *first* meets the definition of an AFO[.]

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<sup>6</sup> At the hearing, Daniel Kuti, NJDEP Environmental Specialist and Supervisor of Municipal Stormwater Permitting, stated that in "determining that it was a CAFO, it was implied that it was an [AFO] but there was nothing specifically that said [AFO] in the draft," but that he read the public comments to say that the Farm "is an [AFO]." Tr. of October 30, 2023 (Tr. 3), at 138, 139.



[Ltr. from Craig S. Provorny, Esq. to Judge Tricia Caliguire (Sept. 26, 2023), at 2 (emphasis in original).]

I agree with Russo and **CONCLUDE** that his failure, in comments on the draft permit, to object to the NJDEP's failure to explain that the Farm met the preliminary requirement of being an AFO did not prejudice NJDEP in its preparation for the hearing and does not violate N.J.A.C. 7:14A-17.4(c).<sup>7</sup> The NJDEP contends that the Farm is a CAFO, which, by the regulations, means it is an AFO. Even so, NJDEP argues here that it does not have to prove that the Farm meets the AFO element of the CAFO definition because Russo did not challenge that portion of the CAFO definition at the draft permit stage. If the NJDEP determined that the Farm is a CAFO, it should have also determined that the Farm is an AFO. But, if the NJDEP did not consider the condition precedent of AFO designation before finding that the Farm is a CAFO, that information should be part of the record and, in any event, the condition precedent must be considered here.

Second, the NJDEP contends that in his hearing request, Russo also added the issue of whether "source separated food products contribute to stormwater discharges onsite." Resp't Br. at 6 (quoting letter of DAG Chloe Gogo to Judge Tricia Caliguire, at 2 (September 20, 2023)). Because this exact language was not incorporated in the amended PHO, NJDEP argues that any testimony or documentary evidence supporting this challenge should be disregarded. Ibid.

The NJDEP had notice that Russo would raise this issue at the hearing; in his comments to the draft permit, Russo stated, "NJDEP's reliance on source separated food products as a contributor to stormwater discharges is unfounded." J-22 at DEP0588. My error in not including this issue in the list of issues in the PHO is not sufficient to prejudice NJDEP in its hearing preparation. NJDEP's only witness drafted the entire Permit; at the hearing, he appeared knowledgeable about the basis for finding that source separated food products contribute to stormwater discharges from the Farm. I **CONCLUDE** that

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<sup>7</sup> N.J.A.C. 7:14A-17.4(c) provides that "[t]he issues presented in the adjudicatory hearing shall be limited to those permit conditions contested in a request for an adjudicatory hearing or those specifically identified by the Department . . . ."

testimony and documentary evidence regarding Russo's challenge to that portion of the Permit were appropriate.

### **Testimony**

Over the course of four days, two witnesses testified: petitioner, on his own behalf, and Daniel Kuti (Kuti), NJDEP Environmental Specialist and Supervisor of Municipal Stormwater Permitting, on behalf of the NJDEP. Kuti has been in his current position for approximately eighteen months; when he was involved in this case, he held the title of Environmental Specialist 3, and his duties included drafting stormwater permits.

### **General Information**

Russo and his wife have owned the Farm since 1998; at the time of purchase, the Farm covered sixty-seven acres. Over time, they added parcels, and the Farm is now approximately ninety-eight acres. Primary operations have always been raising animals and crops. Tr. of October 24, 2023 (Tr.1), at 22. The growing season lasts for 150 to 180 days. Tr. of November 1, 2023 (Tr. 4), at 95.

In September 2020, when Russo applied for the Permit, he had approximately 160 head of cattle and 100 head of hogs,<sup>8</sup> and he used 60 acres to grow crops—primarily corn, soybeans, and rye straw. (While he typically plants 60 acres, in 2023, Russo only planted 20 acres. Tr. 1 at 25.)

Kuti is familiar with the Farm due to his review of the permit application. J-6; J-7; J-8. He is familiar with the Farm's enforcement history, learning of it through the application process. He stated that the NJDEP had an interest in regulating the Farm due to "the high-level pollutants that were identified as running off the site." Tr. of October 25, 2023 (Tr. 2), at 123.

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<sup>8</sup> Russo explained that the term "animal units" is sometimes used to calculate the size of a herd, but given that an animal unit is 1000 pounds, and each of his cattle weigh about 1000 pounds, there is no difference. Tr. 1 at 22. I note that counsel asked Russo about the size of his herds in 2021, though he actually submitted the permit application the prior year.

Kuti drafted the Permit and is therefore familiar with its conditions. J-23. He reviewed the application, requested more information from Russo, conducted a site visit on February 9, 2021, drafted the Permit, responded to comments, and wrote the final Permit. J-9; J-10; J-11; J-12; R-1; R-2; J-13; J-14.

Russo described the housing for his cattle and hogs as “free range,” which he said means the animals have freedom to go where they want on the Farm. For example, during a storm, cattle lay down, sometimes under or in the barns, sometimes in the wooded areas. If they choose to enter the barns, they can leave at will. Russo called them “herding animals,” and said he does not lead them to specific areas of the Farm, the only exception being for medical treatment.

Russo identified three sets of photographs of the Farm, all taken over the past five years. The photographs, generally, depict Farm operations, including crops in various stages of growth on the various named fields, which range in size from approximately ten to twenty acres, and various aspects of the feeding of cows and hogs, from grazing in fields and on grass clippings to eating from metal feeders and off an RCA surface. P-1 (A-L); P-2 (A-L); P-3 (A-B); P-4 (A-B).

The parties introduced maps of the Farm, enlarged for use at the hearing, and marked to show the Farm boundaries, locations of the crops, various buildings and roadways, the unnamed tributary, the man-made trench, and the directions of stormwater flow. P-17, enlarged as J-19; J-10; J-15; R-1.

Russo identified a July 19, 2021, Google Earth photograph, marked up by First Environment, the environmental consulting company he retained to assist with his application. P-17; J-19. Russo stated that as depicted in the photograph, corn was grown in four separate areas of the Farm that year. An unnamed tributary is shown as a blue line below the cornfields; the closest feeder is located to the north and east of the unnamed tributary, approximately 200 yards away, near the “hutch for the hogs.” Tr. 1 at 69. A trench (marked as a “ditch”) with a discharge point is shown on the photograph, but Russo stated that a manmade trench was converted to a swale after he acquired the Farm. The swale is shallower; the cattle walk through it, and cars drive through it. Water

running through the swale in a southerly direction eventually makes it to Lahaway Creek through the unnamed tributary.

Russo identified his “Free Range Open Lot Livestock Program,” part of his self-certified farm management plan, which was developed in 2019, with the assistance of Dr. Michael Westendorf of Rutgers University, and which was given a “gold star” by the New Jersey Department of Agriculture (Farm Mgt. Plan). R-2.<sup>9</sup> The Farm Mgt. Plan does not include the use of stables to confine livestock; rather, Russo rotates crops and therefore rotates the areas in which the cows can roam. The cows are always kept within the geographic boundaries of the Farm, which are defined by fences. The hogs do not have access to the entire ninety-eight acres; they are kept in a three-acre area, delineated by concrete barriers, in which their shelter, food, and water are kept. Russo explained that concrete barriers are necessary for hogs as they can get through fences and have left the Farm and had to be retrieved. The hogs are not, however, kept in a stable and are not confined in the barn, unless for protection of piglets from birds of prey. Tr. 1 at 71-72.

Outside of the growing season, Russo stated that the cows are not restricted in their movement, but that the large feeding troughs are often set up on the hard-packed dirt areas because the heavy equipment (and cow hooves) can damage soft, muddy soil. When the cows are fed in the fields, any manure is left where it drops, as it serves as fertilizer. If they are fed on hard-packed dirt, the manure that drops there is collected and trucked off the property (for use at another location).

During the growing season, Russo stated that the cows are generally kept out of the crop areas, Tr. 2 at 41, but that the areas in which the cows graze are not static. He further explained:

We'll plant rye and we'll let the animals have a quick at it and then pull them back off and still – we sacrifice the crop. Naturally, if you did that with corn, you'd lose it. So, chances are, when we have crops we're not too excited about letting the animals on, unless conditions get so bad that forfeiting the

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<sup>9</sup> While the Farm Mgt. Plan was submitted to NJDEP with the permit application, some parts of the document are no longer being used. Russo developed a “supplemental plan” that incorporates the changes in available materials consistent with Judge Wellerson’s order. See Tr. 2 at 54.

crop is the less of the two evils[.] So, like right now, I have twenty acres in corn. When Judge Wellerson took away my wood chips, we were trying to salvage the sixty acres of crop we were planning, and we turned the cattle loose and let them just eat some of it because we needed to get better ground for them.

[Tr. 2 at 43.]

The cattle eat from large portable metal feeders; they are not physically connected to the feeders and are not forced to feed. They generally come to the feeders when they hear them being filled with food. Some of the cows' food is grown on the Farm; produce is delivered daily from supermarkets and feed companies and usually put into the feeders the same day it is delivered. Russo stated that the feed is approved by the New Jersey Department of Agriculture, and the feeders are located at least 600 feet from the unnamed tributary that leads to Lahaway Creek.

The metal feeders are quite heavy and are therefore located on top of RCA, a mix of concrete, asphalt millings, other aggregate, and crushed stone. Tr. 1 at 52, 53. The RCA prevents the feeders from sinking; only if the fields are dry can Russo locate the feeders in the fields. Tr. 1 at 54. RCA is found in numerous locations, including in front of buildings B1, B2, B3, and B4, the Material Storage (MS) Areas 2 and 3, on Hopkins Lane, in the northwest cornfield, and on the road between MS Area 2 and the Batman Field. Tr. 2 at 29-30.

The hogs are fed in the middle of the three-acre "hog pen." Tr. 1 at 67. They have a constant supply of food but prefer fresh produce and, according to Russo, are not led to the food but are "waiting for it" when it is poured into the feeder. Tr. 1 at 67; P-3-B.

## **The Permitting Process**

NJDEP issues three types of stormwater discharge permits, including individual permits, which is the type of permit issued to the Farm. Kuti explained that the State is concerned with stormwater, or rain, because the runoff "enters our surface waters and can discharge to groundwater and carry along with it pollutants to those water bodies or

to the groundwater.” Tr. 2 at 111. An operation may be subject to stormwater permitting because it is within the eleven categories of activities covered by the regulations or because it is a significant contributor of pollutants to the environment. Kuti initially stated that the Farm is regulated due to industrial activities conducted on-site in the three years prior to the permit application, those being topsoil manufacturing and milling and blending of asphalt and concrete, and current out-door storage of industrial equipment. Tr. 4 at 62, 69-70.

Kuti stated that all stormwater permits require Stormwater Pollution Prevention Plans (SPPP) and Best Management Practices (BMP). A SPPP is developed by the permit holder to show how stormwater will be controlled and how on-site activities will be kept from impacting stormwater runoff. Under the Permit, Russo is required in the SPPP to create a Comprehensive Waste Management Plan regarding the handling of feed products, waste products, and animal mortalities. Tr. 2 at 131-34. The BMP is a set of guidelines to prevent stormwater pollution.

Some permits, including the permit at issue here, also include monitoring through sampling at discharge locations (before leaving the subject property to enter the waters of the State or into groundwater). Under the Permit, Russo is required to take monthly samples of stormwater runoff from three locations for listed contaminants. Tr. 2 at 129.

Russo submitted the permit application on September 23, 2020. Two weeks later, NJDEP sent Russo (with a copy to counsel) a request for additional technical information, including a site map showing, among other things, the facility boundaries and paved areas and buildings. J-11. With respect to the animals, NJDEP also asked Russo to fill out an “Request for Information [RFO] form,” with a link,<sup>10</sup> or at a minimum to provide “the types and quantities” of animals and the Farm’s “Animal Waste Management Plan.” J-11 at DEP0063. In response, Russo gave the number of animals and attached the “Farm Mgt. Plan.” Id. at DEP0070. NJDEP sent a second request for technical information on January 13, 2021, which sought no additional information regarding the animals. J-13.

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<sup>10</sup> The web address included in the request for information includes “CAFO,” which appears to be the first time NJDEP inquired as to whether the Farm could be a CAFO, but as of May 2024, the linked page on the agency website does not exist or was removed.

Kuti admitted that he did not ask specifically where the cattle were kept on the Farm but did ask for “the location of at least the activities on the site.” Tr. of October 30, 2023 (Tr. 3), at 116. He reviewed the Farm Mgt. Plan and stated that it named specific lots on the Farm “where the cattle were and it didn’t identify all areas of the farm.” Ibid.

On February 9, 2021, Kuti inspected the Farm. He spent about two hours walking the Farm, taking notes as he went, and created a map to supplement his notes. J-14; J-15. Kuti agreed that the photographs identified by Russo are consistent with the Farm as it appeared when he conducted the site inspection, except that the cows were in the northwest portion of the Farm, in the Batman Field.<sup>11</sup> After the site visit, Kuti requested additional information from Russo regarding Farm activities, maps, sampling, and storage.<sup>12</sup> By letter of March 10, 2021, Russo stated that there are no feed/food waste storage areas or animal waste storage areas. Animal bedding locations and feed distribution areas were marked on the map submitted by Russo. J-17.

As part of the application, NJDEP reviewed the results of two sets of water sampling, the first performed by NJDEP in September 2019, and the second performed on March 18, 2021, by First Environment, as requested by NJDEP. Both sets of samples showed high levels of E-coli, fecal coliform, phosphorous, total suspended solids, and total dissolved solids. Tr. 3 at 35-56; J-18.

The draft permit was issued by NJDEP on September 16, 2021. J-20. The NJDEP described the Farm as follows, in pertinent part:

The applicant is primarily involved with the feeding and management of mixed livestock. This operation has been deemed a significant contributor by the Department in accordance with NJAC 7:14A-24.2(a)7 and 40 CFR 122.28(b)(3)(i)(G). Based upon the operations onsite and pollutant sources the Department has identified a portion of

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<sup>11</sup> Kuti said the lighting was “good,” it was cold, “there was snow on the ground,” and it might have been snowing when he arrived. Tr. 2 at 138.

<sup>12</sup> Presumably, Kuti made these requests in person; they are referred to in a letter from NJDEP counsel on February 22, 2021, but otherwise were not documented in a letter to Russo. See J-16; J-14 (described as “notes”).

the activity as a [CAFO] in accordance with NJAC 7:14A-2.13(d).

[J-20 at DEP0108 (emphasis added).]

As stated above, Russo submitted comments on the draft permit, arguing that neither the Farm nor any portion of the Farm qualifies as a CAFO. J-22. He summarized the five factors that the NJDEP must consider under N.J.A.C. 7:14A-2.13(d), arguing that only one factor may be applicable to the Farm. Id. at DEP0590. On January 20, 2022, the Permit was issued without significant changes from the draft. J-23.

The Permit requires monthly collection, testing, and reporting (to NJDEP) of stormwater samples at three locations. The BMP affects the maintenance of vehicles (including car washing) and equipment, battery storage, retention ponds, and storage of food waste. The SPPP is a stormwater control requirement; Russo is required to write the plan and keep it on-site. Further, the Permit covers CAFO activities and requires a comprehensive waste management plan that describes how the Farm will handle and/or manage animal feed, waste disposal, and animal mortalities.

### **Changes in Operations and/or Physical Changes to the Property**

In the Petition and at the hearing, Russo complained that Permit requirements do not reflect operations as of September 2020 (or currently). Kuti stated that the Permit is appropriate for two reasons: First, the regulations require a three-year lookback period for “significant materials.”<sup>13</sup> Tr. 2 at 128. An applicant must identify the areas on its property where “significant materials” were stored or disposed of in the three years leading up to the submittal of the permit application. Ibid; Tr. 3 at 103. For example, significant materials that were found in the former topsoil and/or compost piles could still impact stormwater, even after those piles were scraped away. Tr. 4 at 54.

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<sup>13</sup> N.J.A.C. 7:14A-24.7(a)(1)(i)(7). “Significant materials” include “raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production . . . fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with stormwater discharges.” N.J.A.C. 7:14A-1.2.



Second, Kuti stated that it is the applicant's responsibility to apply for a modification to a NJPDES permit if the site conditions no longer reflect those included in the Permit. Tr. 4 at 48, 49. Russo has never applied for a modification to the disputed terms of the Permit. Tr. 3 at 108.

Russo complains that the Permit requires him to take action in response to numerous conditions that are no longer found on the Farm and/or does not recognize physical changes in the Farm. For example, he pointed to the description in the Permit of discharge location 001A, where a ten-inch concrete pipe was located. J-23; R-1. He said that pipe was used as an "under-drain outlet" for the Big Oak Field, to dewater the field as needed to plant and harvest crops and to permit cattle to graze. Tr. 1 at 78-79. He said it was never connected to any other part of the Farm and was removed in approximately 2019, by the time of the application. Its former location is approximately 400 feet from the unnamed tributary.

Further, NJDEP listed materials in the draft permit, and in the final Permit, that were formerly used or stored on-site, but which Russo stated were not in use by September 2020 (or currently), namely wood chips, leaves, food waste, and asphalt millings. And, in the draft permit, the Farm is found to "manufacture and process topsoil material." J-20 at DEP 0108. Russo clarified that topsoil is not a manufactured product. Tr. 1 at 91. Prior to September 2020, topsoil was used to create berms for the cattle, see P-2-F, but by the date of the application, Russo no longer used topsoil because he could not use berms.

Russo identified a photograph of a dead calf, partially covered with hay and compost. (R-9.) The preferred method to care for dead livestock is to set the carcass on a wood chip base and to cover it with wood chips, so that the carcass can decompose without attracting predators. Once Russo stopped using wood chips, in compliance with Judge Wellerson's order, he used topsoil and hay to "entomb" dead livestock. Tr. 1 at 93. Russo surmised that the compost pile identified by NJDEP during the February 9, 2021, site inspection was the one depicted in this photo, see J-23 at DEP602, because other than for dead animals, the Farm does not use compost. Tr. 1 at 88.

Russo reviewed the September 23, 2020, permit application. J-6. When providing applicable SIC Codes for on-site operations, Russo included “composting of soil, wood chips, manure, and soils,” which he stated was either in reference to the dead animal composting or was an oversight. Tr. 1 at 98. Kuti confirmed that the mortality pile (i.e., covering dead animals) was determined to be a composting activity.

Building B-1 was designated by NJDEP as the “automotive restoration building”; Russo calls it the “repair shop.” Russo stated that the primary purpose of Building B-1 is to “keep the farm going.” Tr. 1 at 11. Russo explained that he does not have time to obtain repairs of equipment off-site and must do the work himself (or have his staff do it). He conceded that some car repairs are conducted in that building (twenty-five to thirty/year for himself and family members). There are no floor drains in the building; Russo said the floor has never been washed with water, only swept, and the roof does not leak.

Russo identified a photograph taken in the past year, which shows a sink in Building B-1. P-5A. Below the sink is a thirty-gallon catch can; the sink is used for hand washing infrequently and has no external discharge point, but Russo is in the process of hooking it up to the septic system. When reviewing his response to an NJDEP request for information, Russo admitted that he wrote that the discharge point for the sink is “a thirty-gallon holding tank between buildings two and three,” an answer he now believes was a mistake. J-17. The Permit identifies a sealed waste oil tank inside Building B-1 as a potential discharge point. Russo stated that the tank is empty and has not been used in over fifteen years.

Kuti stated that with respect to Building B-1, the Permit requires BMP for vehicle equipment and non-stormwater discharge, to conduct auto maintenance activities indoors and prevent such activities from impacting stormwater runoff.

The Permit refers to dry wells; Russo stated they were “dug up, destroyed, backfilled,” and sealed after the NJDEP tested them and before the Permit application was filed. Tr. 1 at 117, 118.

Russo did not take the photographs marked as R-10, through R-12, but identified them as taken on the Farm. The first two photos showed a sheen on the ground, the source of which Russo could not identify. R-10; R-11. The furnace burns wood; the heavy equipment (tractors, bulldozer, etc.) use petroleum products. Russo does not have a boiler on the Farm, does not have a fuel oil tank, and does not use petroleum products for heating.

Russo identified three photographs of Farm, the first two of which he took in the past year, P-5B, and the third which was taken by the NJDEP. P-5C. The second photo is the portable outdoor furnace, used primarily to heat water for the dunk tank where heifers are rehabilitated after difficult deliveries.<sup>14</sup> P-5B; R-11. The third photo shows the portable furnace without the chimney, which had broken off. P-5C.

### **The Designation of the Farm as a CAFO**

While Russo did not (and does not) believe activities on the Farm are subject to a NJPDES permit, he applied for the Permit as ordered by Judge Wellerson. See J-8. He believed that he applied for a “storm water general permit for industrial and small construction activities.” Tr. 1 at 130-31. Russo identified the opinion of Judge Wellerson, in which the only industrial activity identified was the operation of the topsoil pile. R-13. The order did not reference a CAFO permit, there was no discussion of a CAFO before Judge Wellerson, and the final decision of then-NJDEP Commissioner Bob Martin did not reference a CAFO permit. In the ACO Russo entered with the NJDEP, there was no reference to a CAFO permit, nor did Russo agree to apply for one. Prior to receiving the draft permit, Russo had not heard of a CAFO.

While Kuti explained how and why the Farm was characterized, and permitted, as a CAFO, he also stated that but for the CAFO designation, the NJDEP would not have issued a stormwater discharge permit to Russo covering topsoil,<sup>15</sup> composting, the boiler/furnace, food storage and feeding operations, storage of asphalt millings, corn

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<sup>14</sup> A “heifer,” or female calf, is called a “cow” after it delivers its first calf. Tr. 1 at 109.

<sup>15</sup> Presuming that as of September 2020, “there were no topsoil activities going on.” Tr. 3 at 118.

silage, the auto restoration activities, equipment maintenance activities, and/or storage of equipment. Tr. 3 at 188-20.

Kuti stated that a CAFO is, simply, an operation where feed is brought to the property for animals which are sold as a product. He discussed the different methods used to determine if a facility is a CAFO. Here, the NJDEP determined that the Farm is a “significant contributor” of pollutants to the waters of the State, Tr. 3 at 12-13, by examining a series of factors, including: the size of the animal feeding operation; the amount of waste reaching the waters of the State; the location of the animal feeding operation relative to the waters of the State; the means of conveyance of animal waste and processed waste waters into the waters of the State; the slope, vegetation, rainfall and other factors affecting the likelihood or frequency of discharge of animal waste and processed waste waters into waters of the State; and other relevant factors. Tr. 3 at 14-15.

The NJDEP also looks to the manner in which pollutants are discharging to waters of the State: either through a manmade device or by direct discharge. Tr. 3 at 5. While only one of these means of discharge needed to be satisfied for the CAFO determination to apply, Kuti observed both means of discharge at the facility. Tr. 3 at 15. However, in the permit, DEP discusses the second means of discharge—if pollutants are discharged directly into the 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 animals “confined in the operation.” T-3 at 15, 6. Kuti stated that the NJDEP would have issued the Permit based on the monitoring sample results alone because they indicated a significant contribution of pollutants from the Farm to the waters of the State. Tr. 4 at 71-72.

With respect to confinement of the animals, Kuti stated that he observed both the cattle and the hogs confined to separate areas through the use of structures like fencing, shipping containers, a gate, and concrete block walls, which isolated the animals from the rest of the Farm. Tr. 3 at 92-93. He testified that during his site visit, crops were not growing in the areas where the animals were kept.<sup>16</sup> Tr. 3 at 92, 132.

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<sup>16</sup> Kuti conducted the site visit in February, outside the typical growing season in New Jersey.

Kuti stated that in the Permit, the CAFO is not locked into a particular location, but the Permit requires monitoring of stormwater discharges from the northwest corner of the Farm, where he saw the cows. Tr. 4 at 83. (Later, Kuti stated that he presumed, when he wrote the Permit, that the cows remained at the location where he found them in February 2021.) Kuti also stated that if the CAFO operations move from the location that he observed during the site visit, Russo must notify the DEP and have the permit modified to reflect a change in monitoring locations, since the monitoring locations established in the present version of the permit reflect the conditions that Kuti observed during the site visit.<sup>17</sup> Tr. 4 at 83-84.

In MS Area 2, Kuti saw trommels, a tractor, fencing, and containers. The Permit only requires that vehicle maintenance be covered by the BMP. In MS Area 3, Kuti saw the wood furnace, a small pile of food waste and soil, wood debris, and the mortality compost pile. The only requirement in the Permit to address MS Area 3 is that the comprehensive waste management plan must include the discharge from the furnace.

Kuti observed animal feed (vegetables) in troughs and on pallets (bagged feed), below the Batman Field, west of the Batman Field, and near an unlabeled building above MS Area 3. He also saw empty cans near MS Area 2 and a tarped pile along Hopkins Lane. Feed—vegetables, corn silage, and empty cans—are “source materials” and, therefore, are covered in the Permit under the comprehensive waste management plan. Kuti explained that “source materials” are any raw, intermediate, or final product that can contribute to stormwater runoff. Even former storage areas could have lasting impacts on the environment through stormwater runoff.<sup>18</sup>

Kuti explained the difference between source materials and significant materials. First, a source material is “any raw, intermediate, or final product that can contribute to stormwater pollution runoff.” Tr. 3 at 4. He explained that NJDEP was concerned about

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<sup>17</sup> Kuti acknowledged that during the hearing, we saw through photographs and testimony that the “CAFO location” had changed several times before and after the Permit was issued.

<sup>18</sup> Though not disputing that composting is no longer conducted on-site, NJDEP was concerned about residual materials that went into the compost, such as AFO materials and asphalt fillings, which could be exposed to stormwater.

source materials like those that were processed for composting and topsoil,<sup>19</sup> materials associated with the CAFO, and materials associated with the processing of the asphalt millings at the Farm, as these “could impart pollutants into the stormwater runoff. Id. at 6, 7. He stated that both the production of compost or topsoil and the machinery used in production are considered by NJDEP to be source materials. Id. at 8.

While similar to source materials, significant materials differ in that the term does not refer to machinery found on the Farm. Id. at 11. Significant materials are “raw, intermediate and final products and materials tha can impart pollutants to storm water.” Ibid. By the terms of the Permit, both significant materials and source materials must be identified and Russo was directed to address ways of limiting their potential exposure to stormwater. Ibid.

### **Judicial Site Visit**

On June 10, 2024, both parties and Kuti accompanied an OAL legal assistant and me on a two-hour visit to the Farm. The hogs were in the same three-acre area where Kuti saw them in February 2021. They are kept in that area by shipping containers and stone walls, and most of them were sheltered in the shade offered by various wooden containers, open and turned on the side. The cows, however, were not found in the Batman Field, where Kuti saw them on February 9, 2021, but were wandering between the wooded area at the west edge of the Farm, and a four-acre dirt area, and under various shelters (mainly small, open, wooden buildings). The cows were kept from areas where crops were growing by large shipping containers and gates. As stated previously, the cows are prevented from leaving the Farm by the perimeter fence. The hogs and cows are not maintained together, except for one hog, which we saw walking around with the cows (the hog’s preference, according to Russo).

Following the walking tour of the Farm, Russo and Kuti gave additional testimony, generally to clarify issues identified on review of the transcripts and post-hearing briefs. Where significant, that testimony was included in the above summary.

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<sup>19</sup> Kuti said compost has a higher nutrient value than topsoil. Tr. 3 at 9.

## **DISCUSSION AND ADDITIONAL FINDINGS OF FACT**

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Russo was a very pleasant witness, calm even when challenged about inconsistencies between his testimony and the documentary evidence, including the applications he signed, and convincing in his concern for his animals. Russo was also convincing regarding the "humane" facility he operates, where cows and hogs are free to wander through a bucolic farm, eating when they hear the food delivery and otherwise spending their day munching on grass in the woods, finding shade, or rolling around in the dirt or mud.

Where Russo was not as convincing was in explaining the inconsistencies between his testimony and the documentary evidence.<sup>20</sup> For example, the Farm Mgt. Plan is impressive, developed with the assistance of a well-regarded expert from Rutgers University, and approved by the Department of Agriculture, an agency devoted to the promotion and protection of farms and farm animals. But Russo no longer uses the Farm Mgt. Plan in the form submitted to the NJDEP. He insisted that he does not compost, as in "produce compost" as compared to "use compost," and never has produced compost. But, in his permit application, he included "composting of soiled wood chips, manure and soils" as a "product or service provided by this facility." J-6 at DEP0011. He submitted

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<sup>20</sup> It was clear from his testimony that Russo did not create the documents that he signed; I am not even persuaded that he read all of them.

the Farm Mgt. Plan to the NJDEP with his application, and it includes composting activities. He cannot get credit for the benefits of the Farm Mgt. Plan without being held to all activities described in the Farm Mgt. Plan.

As the enforcement history shows, efforts made by the NJDEP to settle its previous claims against the Farm were met with resistance, and Russo did not comply with the ACO that he entered, which is why the agency took him to Superior Court. Over and over, Russo described changes that he was “forced” to make to satisfy Judge Wellerson’s order (and to avoid sanctions). Because of those changes, however, the Farm no longer meets the regulatory description of an industrial operation. After the Superior Court order, Russo removed from the Farm the majority of the source materials contributing to pollution of the waters of the State. (He could not, of course, not bring in food for the animals.) And he also finally applied for the NJPDES permit.

Kuti was also a pleasant and credible witness, but he too struggled with inconsistencies between the Permit that he wrote and the evidence of Farm operations. Kuti’s credibility was enhanced by his admission that without the CAFO designation, none of the current operations at the Farm are subject to permitting.<sup>21</sup> Tr. 3 at 163.

Kuti described all food meant for the animals, including fruits, vegetables, and corn silage, as “source materials,” a “significant source of pollution to the waters of the State,” given that the food is out in the open and exposed to stormwater. Food can contribute nutrients and total suspended solids to the water. It can also affect its pH level. Kuti could not, however, reconcile that there are close to one thousand farms in New Jersey with cows, all of which presumably feed those cows, many of which presumably feed their cows fresh produce, most of which likely use fences to prevent cows from leaving the properties, and none of which are subject to NJPDES permitting as a CAFO. Tr. 3 at 171.

Kuti’s statements regarding Russo’s obligations to modify the Permit if the CAFO area changes from that observed on February 9, 2021, reflect a considerable disconnect between the actual operations at the Farm and the operations permitted as a CAFO. With

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<sup>21</sup> In its brief, NJDEP argues that the Permit also appropriately monitors discharges from historical operations. Resp’t Br. at 24.



every harvest, the areas on the Farm in which the cattle are free to roam change. And Russo stated that he has allowed the cows to wander into crop areas before harvest, to eat both corn and rye grass. The only constant is that the cattle are kept on the ninety-eight acres by the perimeter fence and the hogs are kept on three acres in the center of the Farm by sturdier, closer to the ground, movable barriers.

The type of crops grown at the Farm are not growing from late fall through early spring (unless, as Russo stated, he plants winter wheat), meaning that during those months, the cattle are free to move anywhere on the Farm. An issue not addressed at the hearing but raised with Russo during the judicial site visit is why, in February 2021, outside the growing season, the cows were on a ten-acre portion of the property rather than roaming freely throughout the entire Farm. Russo responded that they were not restricted at that time (and Kuti admitted that he did not ask if they were so restricted but that he recalled the use of containers and gates in the area).

Kuti did not say that during his inspection he saw all the cows in the Batman Field, and he did not say whether he saw any of the cows walking in other parts of the Farm, such as the wooded area south and west of the Batman Field. He did say, and the Permit reflects, that he observed the cows being fed in the Batman Field and that the area was bordered on at least one side by roll-off containers and trailers. (The Batman Field is at the northern end of the Farm, so the perimeter fence would have been at least a portion of the “confinement” mechanism Kuti observed.)

The requirement that the Permit is already due for modification to reflect movement of “the CAFO operation” is strong evidence that the Farm does not operate a CAFO. Russo testified credibly that the main method of confinement of cattle is a fence around the perimeter of the Farm, which Kuti stated was enough to serve as confinement within the terms of the regulations. Russo also stated credibly that the cows are generally kept out of the fields where crops are growing, but they otherwise have free access to roam around within the fence. Chances are that the cows have moved around the Farm (i.e., changing the location of the CAFO) several times since the Permit was issued. I saw them in a different location. No one addressed whether Russo already violated the Permit by failing to seek modifications and/or whether Russo needs modifications every time the

crops on a particular field are harvested and the cows are again permitted to walk through—even if they choose not to do so.

Kuti said that the CAFO he permitted was the one in which the cows were found on the day of his site visit, in the northwest corner of the Farm, but he also testified that the confinement of the cows is accomplished by the perimeter fence. During my site visit, Kuti confirmed that the Permit does not designate a portion of the Farm as the CAFO because he presumed that the cows were kept in the single location in which he saw them throughout the year. He did not question Russo or his staff about this and after his site visit, Kuti relied on the Farm Mgt. Plan for such questions. Kuti stated that the Farm Mgt. Plan was consistent with his observations, but the Farm Mgt. Plan makes frequent references to the use of mounds, compost, and wood chips, all of which were no longer in use by February 2021.

Based on the testimony, documentary evidence, and the site visit, I **FIND as FACTS:**

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 me 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.<sup>22</sup>
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,

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<sup>22</sup> I obtained this information by asking Russo about the vegetables other than corn observed growing in two of the corn fields. While he was not technically under oath, I have no reason to doubt the truthfulness of this statement.

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.

### **LEGAL ANALYSIS AND CONCLUSIONS**

The Federal Clean Water Act (CWA) prohibits the discharge of any pollutant into the water by any person. 33 U.S.C. § 1251, 1311. Pollutants are discharged when they enter navigable waters from a “point source,” or any “discernable, confined and discrete conveyance, including but not limited to any [CAFO].” 33 U.S.C. § 1362(12), (14). A National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to 40 C.F.R. § 122 et seq. is required to discharge pollutants. 33 U.S.C. § 1342(a). NPDES permits are issued either by the EPA, itself, or by the states in a federally approved permitting system. Waterkeeper Alliance, Inc. v. United States EPA, 2005 U.S. App. LEXIS 6533, \*5 (2d Cir. Feb. 28, 2005).

The New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 to -73 (NJWPCA), and the NJPDES Permitting rules, N.J.A.C. 7:14A-1 et seq.,<sup>23</sup> give NJDEP the authority to promulgate rules and regulations and to make permitting decisions based on the Federal Program.

When enacting the NJWPCA, the Legislature noted “the policy of this State to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health [and] to safeguard fish and aquatic life and scenic and ecological values . . . .” N.J.S.A. 58:10A-2. The purpose of the NJWPCA was “to minimize direct regulation by the Federal Government of wastewater dischargers” through the extension of “the powers and responsibilities of the [NJDEP] for administering the State’s water pollution control program.” Ibid.

NJPDES permits are specifically aimed at curtailing the impact of stormwater runoff, which is a collection of water from the subject land’s surface that may contain pollutants of variable amounts and concentrations. N.J.A.C. 7:14A-25. Each body of

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<sup>23</sup> On April 13, 1982, the EPA initially approved New Jersey’s request to be a NPDES permitting authority. 47 Fed. Reg. 17331 (April 22, 1982).

water in the State is assigned specific Surface Water Quality Standards. N.J.A.C. 7:9B-1.14. By regulating stormwater runoff to each such body of water, the NJDEP looks to prevent an exceedance of the waterbody's Surface Water Quality Standards.

The NJPDES regulations set forth the types of stormwater discharges for which the NJDEP requires a NJPDES permit. Of relevance here:

(a) A NJPDES permit under this subchapter is **required** for the following stormwater [discharges to surface water (DSW)] and [discharges to groundwater (DGW)]:

2. Stormwater DSW **associated with industrial activity from point or nonpoint sources . . .**;

4. Stormwater DSW and DGW that are from **concentrated animal feeding operations and for which a NJPDES permit is required under N.J.A.C. 7:14A-2.13 . . .**;

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 USEPA Regional Administrator determines . . . 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), (4), (7) (emphasis added).]

As stated above, Kuti conceded that the means by which the NJDEP asserts authority to regulate operations on the Farm is by characterizing the Farm as a CAFO for which a permit is required, pursuant to N.J.A.C. 7:14A-24.2(a). Russo argues first that he did not apply for a permit to discharge from a CAFO, and "NJDEP has yet to provide a legal basis under any statute, its regulations or caselaw supporting its unilateral decision to issue" a CAFO permit to Russo other than "the broad, yet unsupported, principle, that

by applying for a permit, an applicant submits itself to the total and complete authority of NJDEP and whatever determination it makes.” Resp’t’s Br. at 9, ¶¶ 13, 14. Second, Russo argues that even if NJDEP has the authority to issue a permit for which it did not receive an application, here, NJDEP improperly characterized the Farm as a CAFO. Each argument will be addressed in turn.

### **NJDEP authority to issue permits without a specific application**

The NJDEP argues that they have no discretion here; the regulations include CAFOs within the activities for which a NJPDES permit is required. Pet’r’s Br. at 31, fn. 8 (citing N.J.A.C. 7:14A-2.4). NJDEP also cites the New Jersey Supreme Court, as follows:

We construe the [Water Pollution Control] Act to authorize the issuance of a NJPDES permit [without an application having been filed] but only if DEP has a substantial evidential basis for its belief [that there is an actual discharge of] pollutants that might flow or drain into the state’s waters.

[Id. (quoting Vi-Concrete Co. v. State Dep’t of Env’t Prot., 115 N.J. 1, 12 (1989).]

The Vi-Concrete property was used as a sanitary landfill until 1968, unbeknownst to Vi-Concrete, which purchased the property eight years later. Vi-Concrete, 115 N.J. at 4. In 1985, “without any application having been filed,” the NJDEP “issued a NJPDES permit to Vi-Concrete requiring that four ground-water monitoring wells be installed.” Ibid. The Commissioner upheld the agency action, finding that the NJWPCA required the NJDEP to issue a NJPDES permit “regardless of evidence of discharge” and “in the absence of specific exemptions.” Id. at 5. The Appellate Division affirmed this decision.

The New Jersey Supreme Court reversed, first, noting that when the landfill closed, there was no requirement to install monitoring wells, and second, that the NJWPCA does not “mandate that NJPDES permits be issued to all closed sanitary landfills.” Id. at 6, 12. Further:

We construe the Act to authorize the issuance of a NJPDES permit to the owner of a closed landfill, but only if the DEP has a substantial evidential basis for its belief that the landfill actually is discharging pollutants that might flow or drain into the state's waters. The inference that all closed landfills leach, and therefore are dischargers, is simply insufficient under this statutory scheme to support the DEP's unilateral issuance of a NJPDES permit with its attendant burdens and costs.

[Id. at 12.]

Because the NJDEP did not have such “substantial” evidence of a discharge of pollutants at the Vi-Concrete site, the permit issued by the NJDEP unilaterally was invalid. Id. at 13; see also Twp. of Vorhees v. N.J. Dep’t of Env’t Prot., 149 N.J. 119, 130 (1997).

Here, the NJDEP did not act unilaterally; Russo applied for a NJPDES permit, though for a permit for a small industrial operation, not for a CAFO. While there appears to be no caselaw on the issue of whether the NJDEP can issue any permit it deems appropriate, regardless of the application, the regulations offer the following support for the action the NJDEP took here—issuing a CAFO permit to an operation it deemed to be a CAFO: First, NJDEP is authorized to consider whether a NJPDES permit is required under N.J.A.C. 7:14A-2.13(d) “on a case-by-case basis” and after conducting an on-site inspection, “the Department shall designate, as a [CAFO], any [AFO] which does not meet the criteria in (b) above if (d)1 and 2 below are met . . . .” Second, N.J.A.C. 7:14A-2.4 states, that the “Department shall, at a minimum, issue NJPDES permits for . . . [d]ischarges from [CAFOs] as specified in N.J.A.C. 7:14A-2.13.” Third, the action taken by the NJDEP furthers the intent of the rules, stated as follows:

1. Restore, enhance, and maintain the chemical, physical, and biological integrity of the waters of the State;
2. Protect public health and safety;
3. Protect potable water supplies;
4. Safeguard fish and aquatic life and scenic and ecological values;



5. Enhance the domestic, municipal, recreational, industrial, agricultural and other uses of water; and
6. Prevent, control, and abate water pollution.

[N.J.A.C. 7:14A-2.1(b).]

### **NJDEP action in issuing a CAFO permit to the Farm**

Whether the NJDEP decision to issue a CAFO permit to the Farm was appropriate depends not on the form of the application (or fact of an application), but on the correct character of the operation. To start:

Except for indirect discharges, a permit shall be obtained for any discharge from an [AFO] if the [AFO] meets the criteria for a [CAFO] under (b) or (d) below.

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

If an operation is properly characterized as an AFO, it can be regulated as a CAFO if the following additional requirements are met, in pertinent part:

**(b)** An animal feeding operation shall be considered concentrated if either (b)1 or 2 are met:

**1.** More than the numbers of animals specified in any of the following categories are confined:

- i. 1,000 slaughter and feeder cattle;
- ii. 700 mature dairy cattle (whether milked or dry cows);
- iii. 2,500 swine each weighing over 25 kilograms (approximately 55 pounds); [or]
- x. 1,000 animal units; or

**2.** More than the number and types of animal set forth in (b)2i through x below are confined, and pollutants are discharged into waters of the State, or directly into waters of the State which originate outside of and pass over, across, or through the facility or otherwise come in contact with the animals confined in the operation.

- i. 300 slaughter or feeder cattle;
- ii. 200 mature dairy cattle (either milked or dry cows);
- iii. 750 swine each weighing over 25 kilograms (approximately 55 pounds); [or]
- x. 300 animal units.

(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(b)(1), (2), -2.13(d)(1), (2).]

As Russo argues, and Kuti agreed, if the Farm—or an operation on the Farm—does not meet the definition of an AFO, then it cannot be a CAFO. See Tr. 3 at 130. An AFO is defined as:

[A] lot or 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 (Definitions).]

Neither “stabled” nor “confined” is defined in the regulations, but there is no dispute that the Farm sustains crops in the normal growing season over much of the “lot or facility.” Kuti agreed that crops are grown on the Farm and the animals are not stabled, but he found the cows were “confined”<sup>24</sup> to ten acres in the northwest portion of the Farm.<sup>25</sup> Further, Kuti stated he was not given any information “for the application” that crops grew on the Batman Field, Tr. 4 at 132, and therefore, he concluded that there were no crops grown there, and the Batman Field met the definition of an AFO. Tr. 3 at 131-32. NJDEP did not, however, produce any evidence that Russo should have anticipated that Kuti would have needed such information. When Kuti asked for additional information following the site visit, he did not include information regarding crop production during or outside of the normal growing season.

As Kuti testified, there are only two CAFOs—other than the Farm—located in New Jersey. The Red Bird Farm has approximately 300,000 chickens, which are confined in long buildings and are not free to roam around outside these buildings. Tr. 3 at 125, 126-27. The Pig Farm Recycling has 2500 pigs kept in a feedlot, “a confined area where the

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<sup>24</sup> In a comment that stretches credulity, Kuti said that if the cows meander into the barn on their own and are free to leave at will, while in the barn, they are confined. Tr. 3 at 137. Kuti’s statement is contrary to the EPA’s NPDES Manual, cited below, in which the agency states that “confinement” does not include when animals are free to wander in and out of areas for food and shelter.

<sup>25</sup> The Batman Field is located in the northwest section of the Farm, but during the hearing, the CAFO was described as being in the northeast section of the Farm. During the judicial site visit, there was no argument over the site of the alleged CAFO.

food is brought in to the animal.” Tr. 3 at 125, 127. These operations are closer to the “large-scale industrial operations that raise extraordinary numbers of livestock . . . generate billions of dollars of revenue [and] millions of tons of manure every year,” which the federal CAFO regulations were promulgated to address. Waterkeeper Alliance, 2005 U.S. App. LEXIS at \*8, 12.

In 1995, and then in 2012, EPA issued guidance manuals to assist state agencies that regulate CAFOs, as well as to inform inspectors, facility operators and the general public. US EPA NPDES Permit Writers’ Manual for Concentrated Animal Feeding Operations, EPA 833-F-12-001 (February 2012) (2012 Manual).<sup>26</sup> The Clean Water Act includes CAFOs as “point sources” which may not discharge pollutants to water without permits. But, even after regulations were promulgated and amended, confusion persisted among state permitting authorities “over the meaning and intent of the regulations,” and therefore, guidance was issued. US EPA Guide Manual on NPDES Regulations for Concentrated Animal Feeding Operations, EPA 833-B-95-001, at 1 (December 1995) (1995 Manual).

EPA uses the term “feedlot” to “denote an animal feeding operation,” but the term “is not synonymous with [CAFO].” Id. at 2. EPA uses the term “feedlot” interchangeably with “AFO,” and states that not every AFO or feedlot is a CAFO and, therefore, subject to NPDES regulation. In explaining the criteria used to determine whether a facility, including a farm, “that houses animals” can be considered an AFO, EPA states that the second part of the definition, that no part of the facility sustains “crops, vegetation, forage growth, or post-harvest residue” during the normal growing season, “distinguishes feedlots from pastureland, which is not subject to the NPDES program.” Id. at 4. Feedlots may have metal or concrete floors and may be open dirt areas without vegetation. Ibid. But if the cows (and hogs) are grazing on some form of vegetation, it is not an AFO and therefore not a CAFO. This follows the decision of the Second Circuit Court of Appeals reversing a lower court which found that since crops were growing outside the containment area, there was no CAFO. Concerned Residents for the Env’t v. Southview

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<sup>26</sup> While helpful, an EPA guidance document does not have the force of law and cannot replace the text of the regulation. Christensen v. Harris County, 529 U.S. 576, 587 (2000).

Farm, 34 F.3d 114 (2d Cir. Sept. 2, 1994). The Court stated that a “lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility *in which* the animals are confined.” Id. at 123.

The Supreme Court of Minnesota considered the application of the federal rules to an operation where fields were used as cropland during the summer and an animal feeding site in the winter, when up to 3500 cattle consumed crop residues that remained on the land after harvest. In re Reichmann Land & Cattle, LLP, 867 N.W.2d 502, 504 (Sup. Ct. MN 2015). Given that the operator, Reichmann, kept more than 1000 cattle on the lot for more than forty-five days in a twelve-month period, the CAFO designation would apply if “crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of’ Reichmann’s winter feeding fields.” Id. at 507. The Court concluded that the winter-feeding facility was not an AFO because crops were grown on that same land in the normal growing season. Therefore, Reichmann was not required to obtain an NPDES permit. Id. at 509.

As stated above, at one point, Kuti described the entire Farm as the CAFO (although the Permit expressly states otherwise). For argument’s sake, if the Farm was the CAFO, the confinement mechanism would be the perimeter fence (as Kuti also stated early in his testimony). But then, there is no question that crops are maintained in the normal growing season on more than half of the Farm’s acreage. I **CONCLUDE** that the petitioner has proved, by a preponderance of the credible evidence, that the entire Farm does not meet the regulatory definition of an AFO and, therefore, does not meet the regulatory definition of a CAFO.

The area designated by the Permit as a CAFO, on which Kuti observed the cattle in February 2021, is known as the Batman Field. There are no stables, but Kuti observed a form of confinement: roll-off containers, a trailer, and gates. Russo stated that while the cows were free to move wherever they wanted at that time, since February is not part of the growing season, and were free to graze on post-harvest residue or vegetation in the wooded areas, he fed the cows together in one place out of large metal troughs. Although no one asked Russo this question, it is reasonable to assume that Russo fed

the cows in the same area for at least forty-five days. Even if the act of feeding in one location was enough to satisfy the first prong of the AFO definition, there is credible evidence that the Batman Field typically sustains crops in the normal growing season. (Photos of crops growing on the Batman Field were admitted into evidence, and I saw plantings in the Batman Field during my site visit.) I **CONCLUDE** that the petitioner has proved, by a preponderance of the credible evidence, that the Batman Field, designated by NJDEP as a CAFO, does not meet the regulatory definition of an AFO and, therefore, does not meet the regulatory definition of a CAFO.

The hogs, however, are confined to a three-acre area for more than forty-five days in a calendar year, where they are fed and maintained. The hog pen does not contain vegetation in the normal growing season; it is a dirt area with various wooden structures under which the hogs may find shade. Therefore, I **CONCLUDE** that the preponderance of the credible evidence proves that the hog pen is an AFO. To be a CAFO, the hog pen must meet the requirements of N.J.A.C. 7:14A-2.13(b) or (d):

(b) An animal feeding operation shall be considered concentrated if either 1 or 2 are met:

1. More than the numbers of animals specified in any of the following categories are confined:

iii. 2,500 swine each weighing over 25 kilograms (approximately 55 pounds);

or

2. More than the number and types of animal set forth [below] are confined, and pollutants are discharged into waters of the State, or directly into waters of the State which originate outside of and pass over, across, or through the facility or otherwise come in contact with the animals confined in the operation.

iii. 750 swine each weighing over 25 kilograms (approximately 55 pounds) . . . .

[N.J.A.C. 7:14A-2.13(b)(1)(iii), (2)(iii).]

Russo has only 100 hogs, so his AFO does not qualify as a CAFO by size, pursuant to the above sections of the regulation. If, however, the following portion of the regulation applies, the hog-AFO would be a CAFO:

(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).]

Between the exhibits introduced by the NJDEP, the testimony of Kuti, and the language of the Permit, there is a dearth of evidence that the NJDEP considered the hog

pen on its own, without the contributions of the cattle (waste and feed), to be a significant contributor of pollution to the waters of the State. Sampling of water was not conducted near the hog pen; there was no evidence introduced of a means by which hog waste would reach the unnamed tributary or waters beyond the Farm's boundaries. I **CONCLUDE** there is insufficient evidence that the hog-AFO is a CAFO.

### **Permit Monitoring Requirements**

It bears repeating here that Kuti stated unequivocally that if the Farm or operations at the Farm could not be characterized as a CAFO, the NJDEP has no basis to issue a NJPDES permit to Russo. Prior to the hearing (as described above), the NJDEP moved successfully to prevent evidence or argument on this issue. Judge Wellerson ordered Russo to apply for a NJPDES permit covering industrial activities but the NJDEP's witness stated that current operations do not support a NJPDES permit unless a CAFO is present.

If the Commissioner finds, however, that a CAFO is found within the Farm, it will be necessary to consider the testimony regarding Russo's claims that many of the other conditions attached to the Permit are arbitrary, capricious, unreasonable and/or not supported by conditions at the Farm. Russo's main argument here is that operations at the Farm had changed so significantly by the time of his permit application that many of the requirements of the Permit are simply not applicable. In response, NJDEP argues that review of all NJPDES permit applications include a three-year look-back, pursuant to N.J.A.C. 7:14A-24.7(a)(1)(i)(7), which provides, in pertinent part:

Operating entities for stormwater discharges associated with industrial activity or small construction activity (from point or nonpoint sources) . . . shall apply for an individual NJPDES DSW permit . . . [and] this individual permit application shall include . . .

i. A site map showing:

(7) Each area known to be used at present or in the three years prior to the submittal of this application for outdoor storage or disposal of "significant materials" as defined in N.J.A.C. 7:14A-1.2 . . . .



Here, I agree with respondent that the obligations imposed on Russo to monitor for pollutants associated with historical operations, and the associated requirements of the SPPP and the BMP are appropriate. There is evidence, including Russo's testimony, that Russo continues to use compost on-site, though such use is now limited. I **CONCLUDE** that the NJDEP properly considered the impact of operations conducted up to three years prior to the submission of the permit application and the associated permit requirements are supported by the evidence of pollutants generated by those prior operations.<sup>27</sup> To the extent that the requirements of the SPPP and BMP are driven by current operations, including the outdoor storage of industrial equipment and the vehicle maintenance facility, those requirements are appropriate.

### **ORDER**

For the reasons stated above, I **ORDER** that the appeal of petitioner Sam Russo to those conditions of the Permit issued by respondent New Jersey Department of Environmental Protection imposing obligations due to an alleged CAFO is **GRANTED**. Alternately, should the Commissioner find that the CAFO Permit is appropriate, Russo's appeal to all other conditions of the Permit, those related to historical industrial operations, is **DENIED**.

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.

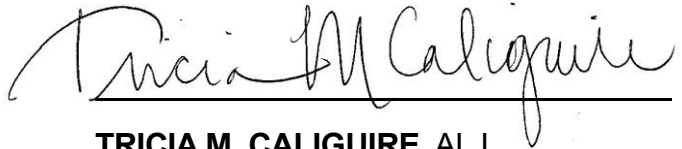
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<sup>27</sup> While Russo claimed that due to the change in operations, sampling and analytical parameters must be modified, he failed to present evidence of the form which such modifications would take and has not otherwise formally requested a modification of permit conditions.

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.

July 24, 2024

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency:

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

TMC/kl

## **APPENDIX**

### **WITNESS LIST**

#### **For petitioner**

Sam Russo

#### **For respondent**

Daniel Kuti, Environmental Specialist and Supervisor of Municipal Stormwater Permitting

### **EXHIBIT LIST**

#### **Joint**

- J-1 Water Compliance and Enforcement Compliance Inspection Report notes prepared by Dan Lockward, NJDEP, dated July 27, 2018
- J-2 Water Compliance and Enforcement Meeting notes prepared by Bryan Barrett, NJDEP, dated April 25, 2019
- J-3 Discharge Monitoring Results submitted by NJDEP, dated September 10–11, 2019
- J-4 Sampling point images conducted by DEP (central water enforcement or solid waste enforcement), September 2019
- J-5 Sampling point images conducted by DEP (central water enforcement or solid waste enforcement), October 2019
- J-6 New Jersey Pollutant Discharge Elimination System (NJPDES) Permit Application, dated September 23, 2020
- J-7 Supplemental Application Form to NJPDES-1 DSW Permits for Stormwater Discharges Associated with Industrial Activity, dated September 25, 2020

- J-8 Letter to DEP Permit Administrative Section, Division of Water Quality from Anthony J. Reitano, Esquire, with enclosures, dated September 25, 2020
- Superior Court of New Jersey – Law Division Order Docket No. OCN-L-1974-19 dated 4/3/2020
  - Final Decision, NJDEP Administrative Action, OAL Dkt No. ECE-WE 4572-12; Agency Reference No. PEA1000001-561400 dated 5/22/2017
  - Administrative Consent Order in the Matter of Sam S. Russo and Suzy Q Farm NEA 170001-194246 (Solid Waste) NEA 170001-1523-01-1002.1 (Land Use) NEA 170001-561400 (Water Quality) dated 10/20/2017
- J-9 Email to Sam Russo from Ben Manhas, NJDEP Bureau of Pretreatment and Residuals, Division of Water Quality Re: NJPDES/DST Permit NJ0313157 Suzie Q Farm – Administratively Incomplete w/attachment 10/5/2020 Letter to Mr. Russo from Ben Manhas, NJDEP (same as above)
- J-10 Letter to Ben Manhas, NJDEP Bureau of Pretreatment and Residuals, Division of Water Quality from Anthony J. Reitano, Esquire, w/enclosures, dated October 13, 2020
- USGS Topo Map (Figure 1, Site Location Map)  
Runoff Map (Suzie Q Farms – Google Earth)
- J-11 Email to Sam Russo, Anthony Reitano from Gabriel Mahon, Chief, NJDEP Bureau of Nonpoint Pollution Control, Division of Water Quality Re: Technical Deficiencies – NJPDES/DST Permit NJ0313157 (Suzie Q Farm), dated October 15, 2020
- J-12 Letter to Gabriel Mahon, Bureau Chief, Division of Water Quality from Anthony J. Reitano, Esquire, Re: Responses to October 15, 2020 Email from DEP, dated November 16, 2020
- J-13 Letter to Sam Russo from Gabriel Mahon, Chief, NJDEP Bureau of Nonpoint Pollution Control, Division of Water Quality Re: Request for Additional Technical Information, dated January 13, 2021
- J-14 Site Visit conducted by DEP, dated February 9, 2021

- Notes
- J-15 Site Visit conducted by DEP, dated February 9, 2021
- Map
- J-16 Letter to Craig S. Provorny, Esquire, from Kevin Fleming, Deputy Attorney General, Re: DEP v. Sam S. Russo et al – Follow-up to the Department's January 13, 2021 deficiency letter, dated February 22, 2021
- J-17 Letter to Gabriel Mahon, Bureau Chief, Division of Water Quality from Craig S. Provorny, Esquire, Re: Request for Additional Technical Information w/enclosure, dated March 10, 2021
- Exhibit A – Interim Map
- J-18 Discharge Monitoring Results submitted by First Environmental on behalf of applicant, dated March 18, 2021
- J-19 Email thread between Daniel Kuti, Gabriel Mahon, and Eleanor Krukowski (DEP) and Daniel Lattanzi and Richard Erickson (First Environmental) Re: Suzie Q Farm Depth to Ground Water Sample Location w/attachment, June 21, 2021 to July 19, 2021
- Site Map
- J-20 Letter to Sam Russo from Eleanor Krukowski, Bureau of NJPDES Stormwater Permitting and Water Quality Management Re: Stormwater Suzie Q Farm w/enclosure, dated September 16, 2021
- Draft NJPDES permit
- J-21 EPA Multi-Sector General Permit and Appendices\*  
Memorandum to 2021 MSGP Permittees and NOI preparers dated July 23, 2021
- J-22 Letter to Gabriel Mahon, Chief, Bureau of NJPDES Stormwater Permitting and Water Quality Management from Craig S. Provorny, Esquire Re: Comments on Sam Russo Draft Permit, dated October 21, 2021
- J-23 Letter to Sam Russo from Gabriel Mahon, Bureau Chief, Bureau of NJPDES Stormwater Permitting and Water Quality Management Re: Stormwater Suzie Q Farm w/enclosure, dated January 20, 2022
- Response to Comments
  - Final NJPDES permit

J-24 Concentrated Animal Feeding Operation (CAFO) GP

**For petitioner**

- P-1 Farm Photos – Crops
- P-2 Farm Photos – Free Range Cattle
- P-3 Farm Photos – Hogs
- P-4 Farm Photos – Feeding
- P-5 Farm Photos – Equipment
- P-6 Not admitted
- P-7 Not admitted
- P-8 Not admitted
- P-9 Not admitted
- P-10 Not admitted
- P-11 Not admitted
- P-12 Not admitted
- P-13 Not admitted
- P-14 Not admitted
- P-15 Not admitted
- P-16 Not admitted
- P-17 First Environment Map Showing Corn Fields
- P-18 Not admitted
- P-19 Not admitted
- P-20 Not admitted
- P-21 Not admitted
- P-22 Not admitted
- P-23 Not admitted
- P-24 Not admitted
- P-25 Appendix D – Facilities and Activities Covered re: 2021 MSGP
- P-26 NJDEP Division of Water Quality Discharge to Stormwater Permit  
Application Forms and Checklists
- P-27 NPDES Animal Feeding Operations Information
- P-28 Division of Water Quality, Bureau of Nonpoint Pollution Control CAFO  
Nonapplicability Form

- P-29 NJDEP, Division of Water Quality, Instructions, Form RF
- P-30 Not admitted
- P-31 Not admitted
- P-32 Not admitted
- P-33 Not admitted
- P-34 Respondent NJDEP's Answers to Petitioner's First Set of Interrogatories,  
July 14, 2023
- P-35 Not admitted
- P-36 Not admitted
- P-37 Not admitted
- P-38 Not admitted
- P-39 Not admitted
- P-40 Not admitted

**For respondent**

- R-1 Site Map, submitted as an attachment to Exhibit J-12, dated  
November 13, 2020
- R-2 Farm Management Plan, submitted as an attachment to Exhibit J-12
- R-3 NJAC 7:14A-24.7
- R-4 Response to NJDEP Interrogatories and RFA, dated August 14, 2023
- R-5 Supplemental Responses to NJDEP Interrogatories, dated September 5,  
2023
- R-6 Photograph, dated February 9, 2021
- R-7 Photograph, dated February 9, 2021
- R-8 Photograph, dated February 9, 2021
- R-9 Photograph, dated February 9, 2021
- R-10 Photograph, dated February 9, 2021
- R-11 Photograph, dated February 9, 2021
- R-12 Photograph, dated February 9, 2021
- R-13 Opinion, Superior Court of New Jersey, Law Division Ocean County,  
Docket No. OCN-L-1974-19, dated April 3, 2020

R-14 Order, Superior Court of New Jersey, Law Division Ocean County, Docket  
No. OCN-L-1974-19, dated January 22, 2021