

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4120-09T2

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

Petitioner-Respondent,

v.

KINGS LAKE, LLC,
a/k/a KINGS GATE SOUTH,

Respondent-Appellant.

Argued January 26, 2011 - Decided June 17, 2011

Before Judges Axelrad and Lihotz.

On appeal from a Final Agency Decision of
the Department of Environmental Protection.

William F. Ziegler argued the cause for
appellant (Holston, MacDonald, Uzdavinis,
Eastlack, Ziegler & Lodge, attorneys; Mr.
Ziegler, on the brief).

Gwen Farley, Deputy Attorney General, argued
the cause for respondent (Paula T. Dow,
Attorney General, attorney; Lewis A.
Scheindlin, Assistant Attorney General, of
counsel; Ms. Farley, on the brief).

PER CURIAM

Respondent Kings Lake, LLC (Kings Lake) appeals from a
final agency determination upholding an administrative order

issued by petitioner, the New Jersey Department of Environmental Protection (the DEP), imposing a penalty assessment for violations of the Water Pollution Control Act (the Act), N.J.S.A. 58:10A-1 to -43, and the regulations governing pollution discharge elimination promulgated thereunder, N.J.A.C. 7:14A-1 to -25. On appeal, Kings Lake challenges the DEP's jurisdictional authority to issue penalty assessments in this matter, arguing its enforcement is preempted by a different local government agency. We disagree and conclude the DEP properly exercised its statutory authority and affirm the final agency determination.

I.

The facts are not in dispute. Kings Lake obtained preliminary and final subdivision approvals to construct a thirty-five unit single-family residential development on its forty-four acre plot in East Greenwich Township, Gloucester County. Prior to construction, Kings Lake submitted a request to the Gloucester Soil Conservation District (local conservation district) for approval of a proposed stormwater pollution prevention plan, to address land disturbances created by the construction activity. Stormwater is a regulated discharge subject to the DEP's pollution control activities. N.J.A.C. 7:14A-1.1. The DEP issued Kings Lake's New Jersey Pollutant

Discharge Elimination System (NJPDES) general construction permit, No. NJ0088323 (NJPDES permit), governing the site's stormwater discharge. N.J.A.C. 7:14A-24.10.

Additionally, Kings Lake submitted an Application for Soil Erosion and Sediment Control Plan Certification to the local conservation district. The local conservation district issued an Authorization to Discharge, as presented in the proposed plan under RFA No. 08-03-04-070 (the general permit), and a certification for the Soil Erosion and Sediment Control Plan (the plan).

Kings Lake commenced construction on the site around May 1, 2006. In June 2006, a significant regional rain event, measuring 3.24 inches of rainfall over a five-day period, resulted in breaches of the site's erosion control measures. Complaints were received that a significant silt runoff spill from the flooded development created a driving hazard on Kings Highway. Representatives from both the local conservation district and the DEP inspected the site and observed an improperly installed silt fence had failed, causing "offsite erosion and sedimentation due to lack of adequate erosion control measures, breached or ineffective perimeter erosion control measures, and exposed soil areas that had not been seeded or mulched as per the plan."

On June 30, 2006, the local conservation district issued a Notice of Violation (NOV) outlining contraventions of Kings Lake's stormwater discharge plan. The NOV stated "[o]ffsite erosion and sedimentation to the County Road, stream and offsite pond are occurring due to lack of adequate erosion control measures on this rough graded site. Immediate re-grading of areas to prevent discharge from the perimeters to the offsite parcels must be completed." The notice directed Kings Lake to repair or replace all perimeter erosion control measures "where breached or ineffective" and, further, revise the erosion control plan "to incorporate additional structural erosion control measures pursuant to the Standards for Soil Erosion and Sediment Control." No fines were imposed, but Kings Lake was warned that its failure to resolve the violations could result in a stop construction order. Finally, the notice cautioned: "the cited violations may also be violations of the NJPDES General Permit [] and the [Act], [which] provides for penalties of up to \$50,000.00 per day, per violation, with each day the violation continues constituting a separate and distinct offense."

Over the following months, the local conservation district reinspected the site several times. Specifically, on July 10, 2006, Robin Bergeman, a Natural Resource Specialist with the

local conservation district, observed no progress had been made in response to the NOV and erosion continued to occur with each new rainstorm. On July 17, 2006, Bergeman visited the site and noted remedial measures had begun, but erosion persisted and sediment breached the property's perimeter. Finally, on August 16, 2006, Bergeman inspected the site and concluded the soil erosion control violations listed in the NOV were completely corrected and no offsite erosion was detected.

Steven Mathis, Principal Environmental Specialist with the DEP, also attended the August 16, 2006 inspection of the site. Mathis observed a stained area of soil on the ground in the vicinity of a fuel tank accompanied by a petroleum odor near the stain. Mathis documented the absence of spill kits available at the site.

On September 14, 2006, the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) levying civil administrative penalties against Kings Lake for its violation of the Act and the NJPDES regulations, N.J.A.C. 7:14A-2.1. These included a \$20,000 fine for violating the discharge plan and a \$15,000 fine for the fuel spill. The assessment stated:

In accordance with N.J.A.C. 7:14-8.5(d), the [DEP] shall assess a civil administrative penalty against [Kings Lake] for failure to comply with the Permit on the basis of the

seriousness of the violations and the conduct of the violator at the mid point of the ranges stated therein.

In accordance with N.J.A.C. 7:14-8.5(g), the [DEP] has determined the seriousness of the violations to be moderate since they substantially deviated from the requirements of the Permit.

In accordance with N.J.A.C. 7:14-8.5(h), the [DEP] has determined the conduct of [Kings Lake] to be moderate since the violations were foreseeable.

In accordance with N.J.A.C. 7:14-8.5(i), the [DEP] may move from the midpoint of the range to an amount no greater than the maximum amount based upon factors including any unusual impacts imposed on the public or the environment, and any impacts on the receiving water. Since the [June 28, 2006] violation resulted in off-site sedimentation the [DEP] has moved to the maximum amount in the range for this violation.

Kings Lake challenged the fines, arguing they were "disproportionate to the violation and exceed[ed] [] the DEP's own penalty matrix." The matter was certified as a contested case and transferred to the Office of Administrative Law for an evidentiary hearing before an administrative law judge (ALJ).

During the three day hearing, the ALJ heard testimony from Mathis, Bergeman, Kings Lake's planner Robert Pacilli and its site contractor John Cavallaro. Mathis elaborated on the DEP's rationale for fining Kings Lake \$20,000, which is the top end of the moderate range for a moderate sedimentation discharge

violation of the terms of its discharge permit. Responding to examination on this issue, Mathis emphasized the impact of the violation, stating:

A: The penalty regulations allow for movement from the mid[-]point of the range up to the maximum in the range, based upon unusual [] impacts imposed upon the public or the environment and impacts upon the receiving water.

Q: And did you determine that there were impacts like that present in this case to warrant going to the top of the range?

A: Yes.

. . . .

A: It was unusual in that . . . there was obvious impact upon the environment in that the pond had received sedimentation from the site, the pond was obviously discolored. Additional impact, there was an impact upon the public in that it was on the roadway, which created a safety hazard that necessitated the County to respond and to use County resources in order to clean the sediment up off of the road.

With regard to fixing the penalty in the moderate range for the fuel spill violation, Mathis confirmed:

it was the failure to immediately clean up the fuel spill. In that one, . . . we determined that was also foreseeable, for failing to clean it up immediately. The seriousness of that was also moderate, that violation was then moderate[] conduct, moderate seriousness at the midpoint of the range, which was \$15,000.

At the conclusion of the evidence, the ALJ determined sediment control violations had been established:

[The DEP] must show by a preponderance of the credible evidence that [Kings Lake] violated the sediment control terms of its permit and that the penalties sought for this infraction, as well as for the fuel spill, are appropriate. This has been done[.] There is no dispute that a silt fence was breached releasing substantial runoff from the property onto [the County highway] and into two neighboring ponds. The defense appears to be that this was unforeseeable. [Kings Lake]'s witnesses state that there was a deluge preceding the breach. The only data in the record reflects that 3.24 inches of rainfall was measured over a five-day period at the nearest weather station in West Deptford. Mr. Bergeman's uncontroverted testimony is that design strength for silt fence in Gloucester County is 3.3 inches in a twenty-four hour period. While we cannot know the intensity of rainfall on respondent's site during any particular downpour, the available information suggests that a well-placed silt fence should have held.

Respondent maintains also that the surrounding area, including [an adjacent construction] site, slope toward the point of blowout, magnifying flows into the silt fence. Mr. Bergeman, an experienced inspector, credibly related that the silt fence was installed improperly. He thought that sediment controls on the [adjacent construction] site were more than adequate and did not contribute to the violation. To the degree that respondent's property naturally drains [to the] surrounding farms, it is the function of a sediment control plan to divert and contain such flows.

With respect to [the] penalty, I accept Mr. Mathis' assessment that the environmental impact of the spill, as well as the potential road hazard, was reason enough to assess the runoff violation at the top of the range. The fuel spill violation was assessed at the middle of the range, which is the norm under the penalty matrix, N.J.A.C. 7:14-8.5. There appear to be no mitigating circumstances warranting a lesser penalty for the latter infraction.

The ALJ's February 16, 2010 order upheld the amount of the penalties imposed per the AONOCAPA. The DEP adopted the ALJ's factual findings as "fully supported by substantial and credible evidence in the record" and adopted his conclusions which were in keeping with "appropriate legal principles." This appeal ensued.

II.

Our limited review is guided by well-settled principles. Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't. of Env'tl. Prot., 191 N.J. 38, 48 (2007). We are obliged to afford substantial deference to decisions of state administrative agencies. Cooper Univ. Hosp. v. Jacobs, 191 N.J. 125, 140 (2007); St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 13-15 (2005). Generally, the actions of administrative agencies are entitled to a presumption of reasonableness. E. Orange Bd. of Educ. v. N.J. Sch. Constr. Corp., 405 N.J. Super. 132, 143 (App. Div.) (citing City of Newark v. Natural Res. Council, 82 N.J.

530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980)), certif. denied, 199 N.J. 540 (2009); In re Holy Name Hosp., 301 N.J. Super. 282, 295 (App. Div. 1997). We do not substitute our judgment for that of the agency, Div. of Alcoholic Beverage Control v. Maynards, Inc., 192 N.J. 158, 183 (2007), and afford substantial deference to an agency's interpretation of the statute it is charged with enforcing. R & R Mktg., L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 175 (1999). Further, adopted administrative regulations are accorded a presumption of reasonableness, A.A. Mastrangelo, Inc. v. Comm'r of Dep't of Env'tl. Prot., 90 N.J. 666, 683 (1982), and presumed to be valid. N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999).

When an error in the factfinding of an administrative agency is alleged, our review determines whether sufficient credible evidence exists in the record from which the findings made could reasonably have been drawn. Tlumac v. High Bridge Stone, 187 N.J. 567, 573-74 (2006). This review encompasses "the proofs as a whole" and takes into account "the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). We will not upset the ultimate determination of an administrative agency unless it is shown to be arbitrary, capricious or unreasonable, or to have

violated legislative policies expressed or implied in the enabling legislation. Hemsey v. Bd. of Trs., Police & Fireman's Ret. Sys., 198 N.J. 215, 223-24 (2009).

Consequently, our role in reviewing a final decision of an administrative agency is limited to four inquiries: (1) whether the agency's decision comports with federal and state constitutional requirements; (2) whether the agency's action is supported by express or implied legislative policies; (3) whether the factual findings that provide a foundation for the agency's decision are based on substantial evidence; and (4) whether the legislative policies, when applied to the facts, show that the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. In re Taylor, 158 N.J. 644, 656 (1999). Keeping these principles in mind, we examine the issues presented on appeal.

III.

A.

Kings Lake argues the DEP's exercise of authority wrongly encroached the jurisdiction of the affected municipalities and the local conservation district, which, it maintains, have sole authority to enforce the Soil Erosion and Sediment Control Act (SESCA), N.J.S.A. 4:24-39 to -55. Asserting the soil erosion and silt spill were governed by the provisions of SESCOA, Kings

Lake maintains the enforcement of SESCA violations rests exclusively with the local Gloucester County Soil Erosion and Sediment Control District, administered through the Department of Agriculture, and not the DEP. Kings Lake specifically identifies N.J.S.A. 4:24-53, which provides:

If any person violates any of the provisions of this act, any standard promulgated pursuant to the provisions of this act, or fails to comply with the provisions of a certified plan the municipality or the district may institute a civil action in the Superior Court for injunctive relief to prohibit and prevent such violation or violations and said court may proceed in a summary manner

[Emphasis added.]

To further support its position that the DEP's actions were ultra vires, Kings Lake relies on New Jersey Department of Environmental Protection and Energy v. T.E. Warren, Inc., 270 N.J. Super. 546 (App. Div. 1994), which examined the purpose of SESCA and the enforcement provision of N.J.S.A. 4:24-53. Suggesting the facts in this matter are similar to those in T.E. Warren, Kings Lake argues that only the local soil conservation district or the affected municipality can compel compliance with the terms of its soil erosion prevention plan and, therefore, the DEP's penalty assessments must be vacated.

In T.E. Warren, we affirmed the dismissal of a Special Civil Part action because the agency lacked enforcement

jurisdiction. Id. at 548. The defendant was cited for unlawfully depositing sediment into fresh or tidal waters, an alleged violation of a fish and wildlife protection statute, N.J.S.A. 23:5-28(a), which we concluded "may be prosecuted only as a violation of the more specific regulations, referred to in the Soil Erosion and Sediment Control Act as 'standards,' adopted by the State Soil Conservation Committee . . . N.J.S.A. 4:24-42." Id. at 547-48. We concluded the "enforcement [of the standards] is by an action brought pursuant to N.J.S.A. 4:24-53 either by the affected municipality or by the local Soil Conservation District," stating:

In order to avoid duplicative and possibly conflicting regulations and enforcement respecting the movement of sedimentary soil into the State's waterways, the Legislature has consigned the subject exclusively to the regulatory and enforcement procedures of the Soil Erosion and Sediment Control Act . . . N.J.S.A. 4:24-39 to -55, administered generally by the Department of Agriculture. N.J.S.A. 4:24-2.1.

[T.E. Warren, supra, 270 N.J. Super. at 548-49.]

In this matter, we reject Kings Lake's contention premised on the flawed conception that jurisdictional authority regarding issues of soil erosion and waterway contamination is limited to that set forth in SESCA. Unlike T.E. Warren, this matter implicates a violation of the terms of Kings Lake's NJPDES

permit and the DEP's action was not an attempt to intrude upon the local enforcement authority granted by SESCA.

Historically, the control of pollution resulting from construction runoff rested with the federal Environmental Protection Agency (EPA). The EPA was authorized to allow those states that adopted permit programs aligned with the federal requirements to administer the programs for the prevention of pollution discharge into waterways. 33 U.S.C.A. §§ 1311, 1342. New Jersey administers its federally approved discharge permit program pursuant to the Act. The Legislature has clearly reinforced the DEP's enforcement authority in N.J.S.A. 58:10A-2, stating:

The Legislature finds and declares that pollution of the ground and surface waters of this State continues to endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water, even though a significant pollution abatement effort has been made in recent years. It is the policy of this State to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water.

The Legislature further finds and declares that the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500; 33 U.S.C.[A.] §] 1251 et seq.) establishes a

permit system to regulate discharges of pollutants and provides that permits for this purpose will be issued by the Federal Government or by states with adequate authority and programs to implement the regulatory provisions of that act. It is in the interest of the people of this State to minimize direct regulation by the Federal Government of wastewater dischargers by enacting legislation which will continue and extend the powers and responsibilities of the Department of Environmental Protection for administering the State's water pollution control program, so that the State may be enabled to implement the permit system required by the Federal Act.

The Act empowers the DEP to:

- a. Exercise general supervision of the administration and enforcement of this act and all rules, regulations and orders promulgated hereunder;
- b. Assess compliance of a discharger with applicable requirements of State and federal law pertaining to the control of pollutant discharges and the protection of the environment and, also, to issue certification with respect thereto as required by section 401 of the federal act;
- c. Assess compliance of a person with applicable requirements of State and federal law pertaining to the control of the discharge of dredged and fill material into the waters of the State and the protection of the environment and, also, to issue, deny, modify, suspend, or revoke permits with respect thereto as required by section 404 of the "Federal Water Pollution Control Act Amendments of 1972," as amended by the "Clean Water Act of 1977," (33 U.S.C.[A.] § 1344), and implementing regulations;

d. Advise, consult, and cooperate with other agencies of the State, the federal government, other states and interstate agencies, including the State Soil Conservation Committee, and with affected groups, political subdivisions and industries in furtherance of the purposes of this act

[N.J.S.A. 58:10A-5.]

All allowable discharge into the ground water, streams or waterways is limited by mass and concentration of pollutants.

Regulation is accomplished using NJPDES permits. N.J.S.A.

58:10A-6(a). The DEP

is responsible for issuing permits as part of a program regulating the discharge of pollutants into surface waters. Its authority is derived from the [the Act], which was enacted in order for the State of New Jersey to administer federally mandated programs aimed at prohibiting all discharges of pollutants into surface waters except those which conform with a [NJPDES] permit issued by the United States [EPA] or by a state having a similar permit system approved by the USEPA. The federal program is set forth in the Federal Clean Water Act, 33 U.S.C.A. [1251]. The [Act] has a purpose similar to the federal legislation and among other things is intended to implement the federal act by the issuance of [NJPDES] permits[.]

[PSE&G Co. v. New Jersey Dep't of Env'tl. Prot., 193 N.J. Super. 676, 679-80 (App. Div. 1984).]

The DEP's Division of Water Quality, Bureau of Nonpoint Pollution Control (the Bureau) is directly "responsible for

controlling the discharge of pollutants [from storm water] surface waters and ground water in the state." Admittedly, the Bureau coordinates the administration of the permitting process involving construction activities with the Department of Agriculture and the State Soil Conservation Committee through the local Soil Conservation Districts. A permit applicant must submit a request for authorization through the local conservation district, which reviews the application and certifies it to the DEP. The application must include a soil erosion and sediment control plan. N.J.S.A. 4:24-43. The pollution prevention plan in the permit application addresses how contaminants from construction site waste, which have the potential to be transported by stormwater discharge, will be collected to prevent them from invading waterways. However, it is the Bureau that approves all NJPDES permits.

The local conservation district certified Kings Lake's plan and authorized stormwater discharge subject to the terms of the NJPDES permit. The terms of the NJPDES general permit held by Kings Lake incorporated the provisions of SESCA. For example, the general permit noted: "Land disturbances that may result in a stormwater discharge authorized by this permit shall be executed only in accordance with . . . (i) A soil erosion and sediment plan certified pursuant to N.J.S.A. 4:24-43; [or] (ii)

Requirements for soil erosion and sediment control established in or pursuant to a municipal ordinance in accordance with N.J.S.A. 4:24-48[.]" In another section, the permit states "the soil conservation district shall certify the RFA if . . . (i) The soil conservation district has certified the facility's plan for soil erosion and sediment control under N.J.S.A. 4:24-43[.]"

Contrary to Kings Lake's argument, certification of the soil erosion and sediment control plan by the local conservation district is not equivalent to approval of the application for a NJPDES permit. The approval of a permit application additionally required compliance with the terms of issuance under the Act. N.J. Dep't of Env'tl. Prot. v. Bayshore Reg'l Sewerage Auth., 340 N.J. Super. 166, 171 (App. Div. 2001). This fact is clearly stated on the certification page executed by Kings Lake, which stated: "I am aware that pursuant to the Water Pollution Control Act (see N.J.S.A. 58:10A-10(f)(2) and (3)), there are significant civil and criminal penalties for making a false statement . . . in any document filed or required to be maintained under [the Act.]"

When applying for its NJPDES permit, Kings Lake acknowledged its planned construction activities were regulated by the Act. As we have noted, the Act "delegates authority to the DEP to '[e]xercise general supervision of the administration

and enforcement of this act and all rules, regulations and orders promulgated hereunder' and to '[a]ssess compliance of a discharger with applicable requirements of State and Federal law pertaining to the control of pollutant discharges'" Bayshore, supra, 340 N.J. Super. at 171 (citing N.J.S.A. 58:10A-5).

Finally, the local conservation district informed Kings Lake that despite its exercised authority regarding enforcement of the erosion control plan, the conduct could also be assessed by the DEP as violations of the NJPDES permit. The failure of the local district to seek court intervention and penalty assessments for violating SESCA as permitted by N.J.S.A. 4:24-53 does not preclude the DEP from requiring compliance with the Act and enforcing the NJPDES permit provisions.

The DEP's jurisdictional authority in this matter is undeniable and Kings Lake's argument that NJPDES permit violations are subject solely to local enforcement under SESCA is without merit. We conclude the DEP's issuance of the AONOCAPA was proper.

B.

We next review whether the penalties imposed for the violation of the disallowed sediment discharge and for the fuel spill, totaling \$35,000, were properly determined pursuant to

the policy provisions of N.J.A.C. 7:14-8.5. Following our review, we are not persuaded by Kings Lake's arguments that the civil assessments were arbitrary or excessive.

Pursuant to N.J.S.A. 58:10A-10(a), the Legislature has mandated the actions for the violation of any provision of the Act:

Whenever the commissioner finds that any person is in violation of any provision of this act, he shall:

(1) Issue an order requiring any such person to comply in accordance with subsection b. of this section; or

(2) Bring a civil action in accordance with subsection c. of this section; or

(3) Levy a civil administrative penalty in accordance with subsection d. of this section; or

(4) Bring an action for a civil penalty in accordance with subsection e. of this section; or

(5) Petition the Attorney General to bring a criminal action in accordance with subsection f. of this section.

Use of any of the remedies specified under this section shall not preclude use of any other remedy specified.

As required by subsection (d), the commissioner was authorized to adopt a "uniform policy" for imposing civil administrative penalties "of not more than \$50,000.00 for each violation and each day during which such violation continues[,]" which "shall

fall within a range . . . for violations of similar type, seriousness, and duration." N.J.S.A. 58:10A-10(d)(1)(a). The regulations establishing this uniform penalty policy are found at N.J.A.C. 7:14-8.5.

According to N.J.A.C. 7:14-8.5(e), when imposing a civil penalty assessment, the DEP shall:

1. Identify the civil administrative penalty range within the matrix in (f) below by:

i. Determining the seriousness of the violation pursuant to (g) below; and

ii. Determining the conduct of the violator pursuant to (h) below.

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

The matrix of ranges of civil penalties is set forth in N.J.A.C. 7:14-8.5(f) as follows:

		SERIOUSNESS		
		Major	Moderate	Minor
CONDUCT	Major	\$ 40,000-	\$ 30,000-	\$ 15,000-
		\$ 50,000	\$ 40,000	\$ 25,000
	Moderate	\$ 30,000-	\$ 10,000-	\$ 3,000-
		\$ 40,000	\$ 20,000	\$ 7,000
	Minor	\$ 15,000-	\$ 3,000-	\$ 1,000-
		\$ 25,000	\$ 7,000	\$ 2,500

Major conduct includes "any intentional, deliberate, purposeful, knowing or willful act or omission by the

violator[.]" N.J.A.C. 7:14-8.5(h). Moderate conduct includes "any unintentional but foreseeable act or omission by the violator[.]" Ibid. Minor conduct encompasses any other type of conduct. Ibid.

Additional considerations in fixing the amount of a penalty include:

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

[N.J.A.C. 7:14-8.5(i).]

In our review of a sanction imposed by an administrative agency, we alter the sanction imposed "only 'when necessary to bring the agency's action into conformity with its delegated authority.'" In Re Herrmann, 192 N.J. 19, 28 (2007) (quoting In re Polk, 90 N.J. 550, 578 (1982)). We have "'no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency.'" Ibid.

In light of the deference owed to such determinations, . . . the test . . . is whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness. The threshold of 'shocking' the court's sense of fairness is a difficult one, not met whenever the court would have reached a different result.

[Id. at 28-29 (internal citations and quotations omitted).]

Kings Lake challenges the ALJ's factfinding adopted by the agency on this issue, arguing the \$20,000 penalty was excessive when considering that the breach of its stormwater control silt fencing was not foreseeable. To support its position, Kings Lake asserts "Bergeman testified that the washout associated with the rain event was not foreseeable[,]" making the violation minor, not moderate as found. Consequently, Kings Lake concludes the seriousness of the violation and its conduct in reaction to the event fall within the minor category on the regulatory matrix.

We are not persuaded that the penalty imposed should be set aside. Bergeman agreed the rain event was unpredictable, but did not suggest the failure of the silt fence was not foreseeable. The construction sequence utilized by Kings Lake stripped the top soil of the entire site and then a delay in construction left the site susceptible to the run-off erosion.

Bergeman related the need to utilize county trucks to scoop the sediment to abate the created road hazard. He informed Kings Lake that the silt fence was installed improperly and the erosion control measures employed by its engineer had failed, necessitating the plan's revision. Kings Lake did not modify the erosion controls quickly. Despite the initial June 30, 2006 notice of what was required, violations continued and the unabated runoff was not staved for almost two months.

Mathis photographed the site showing the impact upon the public. The agency's assessment of the penalty at the top of the moderate range resulted because the event was foreseeable and had significant impact upon the public, namely the pollutant affect of the pond and the significant safety hazard created on the roadway. Mathis also considered the need for the county to respond after receiving a complaint regarding the road hazard. Evidence that Kings Lake also acted to clear the roadway does

not negate the public impact caused by or the need to expend county resources to rectify the offsite sediment discharge.

We defer to the acceptance of Mathis' testimony over that offered by Pacilli that "the silt fence was installed properly but [] the [soil erosion and sediment control] plan itself did not work[.]" We determine the agency's findings for fixing the runoff violation at the top of the range were based upon credible facts in the record. The fines imposed were reasonably supported and entitled to our deference. Herrmann, supra, 192 N.J. 28.

Similarly, the agency found the record supported Mathis' explanation that the penalty for the fuel spill fell within the matrix of moderate conduct and seriousness. Kings Lake was unaware the spill occurred until it was discovered by Mathis on August 16, 2006. Mathis could not locate spill kits. Further, the spill was not immediately remediated; clean up was not completed until September 2006. The fuel spill violation was properly set at the middle of the range under the penalty matrix. N.J.A.C. 7:14-8.5(e)(2). We conclude the penalty assessed was not "arbitrary, capricious, or unreasonable" and therefore it will not be disturbed. Cottage Club, supra, 191 N.J. at 48.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION