COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 23, 2023

In the Matter of
Double "S" Farms, LLC

OADR Docket No. 2017-010
Enforcement Doc. No. 00002395
Unilateral Administrative Order
Dartmouth, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Double "S" Farms, LLC ("the Petitioner") challenges a Unilateral Administrative Order ("UAO") issued by Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") to the Petitioner on May 12, 2017, for alleged violations of the laws and regulations governing the disposal and management of Solid Waste in Massachusetts[1] at its farm 435 Highland Avenue in North Dartmouth ('the Site"). The UAO alleged that the Petitioner (1) accepted solid waste, including cranberry waste by-products; stumps and brush; and sand with clam shell remnants without a valid site assignment in violation of 310 CMR 16.01(8)(a)6, and (2) established and is maintaining a dumping ground of solid waste in violation of 310 CMR 19.014(1). UAO, Section II., Para. 11. In the UAO, MassDEP acknowledged that the Petitioner had held an Agricultural

[1] M.G.L. c. 111, §§ 150A and 150A ½, 310 CMR 19.00 and 310 CMR 16.00.

Composting Registration with the Massachusetts Department of Agricultural Resources ("MDAR") for agricultural composting operations at the Site but noted that the registration expired on March 31, 2017. UAO, Section II, Para. 4.

The UAO ordered the Petitioner to take two actions. First, the Petitioner was ordered to cease accepting solid waste for disposal at the site, and to stop accepting and disposing of cranberry waste by-products; stumps and brush; and sand with clam shell remnants. UAO, Section IV., Para. 20.A. Second, the Petitioner was ordered to submit to MassDEP a plan detailing how it intended to comply with the solid waste regulations. UAO, Section IV., Para. 20.B. In its Notice of Claim, the Petitioner denied the allegations and asserted that MassDEP "continues to misinterpret and misconceive the agricultural practices being conducted at the site" and this results in a mischaracterization of areas of the farm as Dumping Grounds, an Open Dump and/or Disposal Sites. Notice of Claim at p. 2.

Based on my review of the entire administrative record, my evaluation of the witnesses' testimony at the adjudicatory hearing, and my observations during a view of the subject property on August 17, 2017, I find that a preponderance of the credible evidence presented demonstrates that the alleged violations occurred and that the UAO requires reasonable remedial measures intended to correct the violations. Therefore, I recommend that MassDEP's Commissioner issue a Final Decision affirming the UAO.

WITNESSES [2]

The following witnesses testified at the Hearing:

[2] Each witness submitted written pre-filed direct testimony before the Hearing. This written pre-filed testimony is identified in this Recommended Final Decision as [Witness] PFT, ¶ [ ]. Prefiled Rebuttal Testimony is identified as PFR. Witnesses were cross-examined at the Hearing, which electronically recorded. Citations to the Hearing recording are identified as [Hearing] at [Time-Stamp].

For MassDEP:

Daniel Connick. Mr. Connick was employed by MassDEP as an Environmental Engineer with over 24 years in MassDEP's solid waste section. His experience and responsibilities included field inspections to assess compliance with permits and regulations; review of permits and recommendations for approval and disapproval; providing technical support and assistance regarding the applicability and interpretation of the solid waste management regulations and permitting; and enforcement activities. He holds a Bachelor of Science degree in mechanical engineering and a Master of Science degree in environmental engineering.

Mark Dakers. Mr. Dakers is the Section Chief of the Solid Waste section in the Southeast Regional office, with over 20 years' experience in that section and over 24 years of experience with MassDEP. His responsibilities include supervising the solid waste management staff to implement MassDEP's programs and policies; conducting field inspections for compliance with permits and regulations; providing technical support and assistance regarding the applicability and interpretation of the solid waste management regulations and permitting; and enforcement and permitting activities. He holds a Bachelor of Science degree in geology.

For the Petitioner:

Jeffrey Douglass. Mr. Douglass is the operator of Double "S" Farms in North Dartmouth. He has been a farmer all his life. Prior to operating Double "S" Farms in North Dartmouth Mr. Douglass managed a 100-head herd of American Plains Bison on Double "S" Farms in Tiverton, Rhode Island, and maintained a significant number of beef cattle, chickens, geese, and horses. He also ran a commercial composting business. He is a member of several associations concerned with livestock. His experience also includes operation of a 900-acre quarry and operation of heavy machinery.

Christine Worthington Berdt, Ph.D. Dr. Worthington Berdt has been the owner/manager of SouthCoast Ag Consulting, LLC since 2016. She provides crop consulting services including basic and comprehensive nutrient management plans for agronomic management production systems. Previously, as Agriculture Market and Development Technical Services Manager for ICL Specialty Fertilizers she established and managed agricultural research trials throughout North America. She was also employed as Agricultural Scientist for New England Cranberry Growers/Owners at Ocean Spray Cranberries, Inc. She holds a Bachelor of Science degree in agronomy, a Master of Science degree in environmental plant and soil science, and a Ph.D. in horticultural sciences.

BACKGROUND

Double "S" Farms is an approximately 320-acre farm located in North Dartmouth, Massachusetts (the "Site"). Mr. Douglass has been a farmer all his life. Douglass PFT at ¶ 4. Prior to acquiring the Site, Mr. Douglass ran a commercial composting business; managed approximately 350 acres of hay and silage land; and managed and/or maintained many head of American Plains Bison, beef cattle, chickens, geese, and horses. Douglass PFT at ¶ 7. He acquired the farm in Dartmouth in 1997 and later added a 60-acre parcel that had been used as a gravel pit when Route 195 was constructed.[3] Douglass PFT at ¶ 13. The farm produces beef, pork, poultry, and free-range laying hens; sells timber and saw logs; and sells bales of hay. Douglass PFT at ¶ 6. The farm also contains a composting facility. To address the poor-quality soils at the farm, particularly in the former gravel pit area, Mr. Douglass produced compost to be spread on the farm's fields. Douglass PFT at ¶¶ 13, 15. Mr. Douglass has training in composting, including at the Maine Compost School and MDAR's Agricultural Composting

[3] This highway construction occurred in the 1950s.

Workshop. His compost operation took in yard waste, wood chips, leaves, manure, vegetable sludge and cranberry waste, including yard waste from the Dartmouth Transfer Station, and seafood and seafood waste. Douglass PFT at ¶¶ 15-17, 38. Some of the cranberries the Petitioner accepts are not intended for compost but are to be land applied and used as animal feed. Douglass PFT at ¶¶ 29, 34 36. At the time the UAO was issued, a portion of the Site was an MDAR registered agricultural composting operation, and the UAO did not cite as violations any activities in this portion of the Site. Dakers PFT at ¶ 20.

The history underlying the enforcement action on appeal began in 2015 when, following odor complaints from nearby residents, MassDEP and representatives of the Town of Dartmouth Board of Health ("BOH") and MDAR inspected the Site. Dakers PFT at ¶ 5.[4] As noted above, the Site was a registered compost site with MDAR at the time of this inspection. Dakers PFT, Ex. D1 (Notice of Noncompliance, 2/1/2015). During the inspection Mr. Dakers observed that the Petitioner was taking in bagged solid waste for pig feed, separating out the organic material that was suitable for feed and putting the rest of the material in a dumpster. Dakers PFT at ¶ 5. Mr. Dakers told Mr. Douglass at that time that by taking bagged solid waste and handling it as he was, he was operating an illegal transfer station. Hearing at 45:45-46:49. MassDEP issued a Notice of Noncompliance to the Petitioner in February 2016, citing the Petitioner for violations of 310 CMR 16.01(8) (failure to obtain a site assignment for the facility) and 310 CMR 19.014(1) (operating a dumping ground). Dakers PFT at ¶ 7; Dakers PFT, Ex. D1 (Notice of Noncompliance, 2/1/2015); Hearing at 48:56 (the NON was issued for feeding the pigs and dumping the trash). Although Mr. Dakers observed that the registered compost operation was not implementing best management practices, MassDEP did not take any enforcement action based on its observations of the compost operation. Mr. Dakers observed a delivery of cranberries to

[4] The UAO was not based on the 2015 inspection.

the farm during the inspection and he told Mr. Douglass at the time that he should not be stockpiling the cranberries he was taking in but should be mixing them into the compost right away. Hearing at 49:17-49:25.

On February 6, 2017, as the result of odor complaints from a nearby neighborhood, MassDEP and the Dartmouth Board of Health conducted an aerial inspection ("flyover") of several sites with potential to cause odors, one of which was the Petitioner. Dakers PFT at ¶¶ 8-9. Based on observations made during the flyover and following their review of the photographs from the flyover and maps of the area of the flyover, MassDEP, the Dartmouth BOH and MDAR agreed that a site visit to the Petitioner was warranted. The photographs depicted large piles of reddish-brown material approximately 800 feet west of the neighborhood where the complaints arose. It also appeared that there were materials in areas not associated with the MDAR compost operation at the Site, and these areas had not been previously inspected. Dakers PFT at ¶ 10. MassDEP, MDAR and the Dartmouth BOH inspected the Site on April 10, 2017. In between the flyover and the inspection, the Petitioner's MDAR Agricultural Composting Registration for agricultural composting operations at the farm expired.

During the April 10, 2017 inspection, MassDEP observed stockpiles of cranberry waste by-products in at least twelve locations; one stockpile of stumps and brush; and a stockpile of sand with clamshell remnants. Based on its observations, MassDEP determined that the Petitioner was maintaining an illegal open dump and handling or disposing of solid waste without a valid site assignment. MassDEP issued the UAO on May 12, 2017. The UAO alleged that the Petitioner's activities with respect to the observed materials constituted violations of 310 CMR 16.00 and 310 CMR 19.00. As noted above, the UAO required the Petitioner: (a) to immediately cease accepting solid waste for disposal at its property and immediately cease accepting and disposing of the cranberry waste by-products, stumps and brush, and sand with

clamshell remnants; and (b) within 30 days of the date of the UAO, to submit to MassDEP a plan detailing how it intends to comply with 310 CMR 16.00 and 310 CMR 19.00.

The Petitioner filed its appeal with the Office of Appeals and Dispute Resolution ("OADR") on June 5, 2017. The Petitioner denied that it had accepted solid waste without a valid site assignment and denied it had established and was maintaining a dumping ground. The Petitioner asserted that "…the DEP continues to misinterpret and misconceive the agricultural practices being conducted on the Farm." Notice of Claim at 2. The Petitioner further asserted that this misunderstanding of its activities resulted in MassDEP describing the stumps, shells and cranberries as "disposal sites", "open dumps" and "dumping grounds." Id.

I conducted a pre-hearing conference with the parties on August 3, 2017 to discuss the issues that would be adjudicated, determine whether a settlement might be possible, hear from the parties regarding their respective positions, and set a schedule for the parties to file their pre-filed testimony and for the adjudicatory hearing. At that time, the parties had initiated settlement discussions and agreed that a 60-day stay of the appeal would be beneficial to their settlement efforts. The Order staying the appeal required the Petitioner to file status reports every 21 days during the period of the stay. The Status Reports indicated that the Petitioner was making some efforts to determine whether and how to develop a plan to manage the materials at the farm, particularly the cranberries, but by the beginning of February 2018 when it appeared that no real progress had been made to address the use of cranberry waste materials as feedstock, MassDEP moved to vacate the stay. The Petitioner opposed the motion. I determined that there was no longer good cause to delay the appeal, as a settlement seemed unlikely, so I vacated the stay, scheduled the adjudicatory Hearing, and set a schedule for the parties to file their witnesses' testimony. Together with the parties and their counsel, I conducted a view of the Site on August 17, 2017, pursuant to 310 CMR 1.01(13)(j). I conducted an adjudicatory hearing on May 15,

2018 at which witnesses who had filed written testimony in advance of the hearing were cross-examined. The hearing was recorded on a digital recorder and the recording was provided to the parties shortly thereafter. The parties filed post-hearing memoranda, as well as memoranda and affidavits regarding a hearsay objection to certain testimony. My ruling on the hearsay objection is below in footnote 9.

ISSUES FOR RESOLUTION

The issues to be adjudicated, which were agreed to by the parties at the pre-hearing conference, are as follows:

1. Whether the Petitioner disposed of cranberry waste by-products in violation of 310 CMR 16.01(8)(a)(6)?
2. Whether the Petitioner disposed of stumps and brush in violation of 310 CMR 16.01(8)(a)(6)?
3. Whether the Petitioner disposed of sand with clamshell remnants in violation of 310 CMR 16.01(8)(a)(6)?
4. Whether the Petitioner has established and is maintaining a dumping ground of solid waste in violation of 310 CMR 19.014(1)?
5. Whether the directives of the UAO are reasonable remedial measures intended to correct the alleged violations?

STATUTORY AND REGULATORY FRAMEWORK

MassDEP derives its authority to regulate solid waste from the Massachusetts Solid Waste Management Act, M.G.L. c. 111, § 150A ("SWMA"). The SWMA governs the disposal of refuse or solid waste in the Commonwealth that does not constitute hazardous waste. In the Matter of Harold B. Wassenar, Docket No. 2007-162, Recommended Final Decision (February 24, 2010), 2010 MA ENV LEXIS 214, at 13-14, adopted as Final Decision (March 18, 2010),

2010 MA ENV LEXIS 144; See also Final Decision on Reconsideration (December 22, 2010).

The statute defines "refuse" as:

> all solid or liquid waste materials, including garbage and rubbish, and sludge, but not including sewage, and those materials defined as hazardous wastes in [M.G.L. c. 21C, § 2] and those materials defined as source, special nuclear or by-product material under the provisions of the Atomic Energy Act of 1954.

Wassenar, 2010 MA ENV LEXIS 214, at 14. The statute prohibits any party from operating "a dumping ground for refuse or any other works for treating, storing, or disposing of refuse" without prior approval from the local Board of Health. G.L. c. 111, Â§ 150A; Wassenar, 2010 MA ENV LEXIS 214, at 14-15.

The SWMA authorizes MassDEP to adopt rules and regulations governing solid waste facilities, and to issue orders to enforce the statute. Id.[5] In accordance with its statutory authority, MassDEP has promulgated the Site Assignment Regulations at 310 CMR 16.00, et seq., to regulate "the process for deciding whether a parcel of land is suitable to serve as the site for a solid waste management facility." 310 CMR 16.01(1); 310 CMR 16.01(2); Wassenar, 2010 MA ENV LEXIS 214, at 15-16.

The Site Assignment Regulations provide that:

> [n]o place in any city or town shall be maintained or operated as a site for a facility unless such place has been assigned by the board of health or the Department, whichever is applicable, pursuant to M.G.L. c. 111, Â§ 150A[,] [and that] [a]ny disposal of solid waste at any location not so assigned shall constitute a violation of said statute and of 310 CMR 16.00.

310 CMR 16.06; Wassenar, 2010 MA ENV LEXIS 214, at 16. In addition to the Site Assignment Regulations at 310 CMR 16.00, et seq., MassDEP has promulgated the SWMA

[5] The provisions of M.G.L. c. 111, § 150A1/2 also authorize "[t]he [D]epartment[,] . . . in cooperation with the department of public health, [to] promulgate rules and regulations for the siting of [solid waste] facilities pursuant to the provisions of [G.L. c. 111, Â§ 150A."

Regulations at 310 CMR 19.000, et seq., to regulate "the storage, transfer, processing, treatment, disposal, use and reuse of solid waste in Massachusetts." 310 CMR 19.001; 310 CMR 19.002; Wassenar, 2010 MA ENV LEXIS 214, at 16-17. The regulations are "intended to protect public health, safety and the environment[,]" 310 CMR 19.002, and prohibit a party from "establish[ing], construct[ing], operat[ing] or maintain[ing] a dumping ground [6] or operat[ing] or maintain[ing] a landfill in Massachusetts in such manner as to constitute an open dump. " 310 CMR 19.014(1); Wassenar, 2010 MA ENV LEXIS 214, at 17. This prohibition "include[s] without limitation, disposing or contracting for the disposal of refuse in a dumping ground or open dump. " Id. The SWMA Regulations also prohibit a person from "dispos[ing] or contract[ing] for the disposal of solid waste at any place in Massachusetts which has not been approved by the Department [,]" and "dispos[ing] or contract[ing] for the disposal of solid waste at any facility in Massachusetts that is not approved to manage the particular type of solid waste being disposed." 310 CMR 19.014(2); 310 CMR 19.014(3); Wassenar, 2010 MA ENV LEXIS 214, at 17.

The SWMA Regulations also specifically restrict the storage and disposal of certain solid wastes, including household appliances, yard waste, tires, wood waste, metal containers, televisions, computers, miscellaneous electronic equipment, and concrete. 310 CMR 19.017(1)-19.017(3); Wassenar, 2010 MA ENV LEXIS 214, at 18. Under the SWMA Regulations, a party may not accept those materials for disposal without first having implemented a waste ban plan approved by MassDEP. 310 CMR 19.017(3); Wassenar, 2010 MA ENV LEXIS 214, at 18.

[6] The regulations define a "dumping ground" as a "a facility or place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit in accordance with M.G.L. c. 111, Â§ 150A, 310 CMR 16.00 or 310 CMR 19.000." 310 CMR 19.006.

BURDEN OF PROOF

As the party that issued the enforcement order, MassDEP had the burden of proving by a preponderance of the evidence at the Hearing that the Petitioner committed the acts alleged in the UAO and that those acts constitute violations of the applicable regulations. See Matter of Iron Horse Enterprises, Docket No. 2014-22, Recommended Final Decision (May 2, 2016), adopted by Final Decision (May 5, 2016). This burden included proving by a preponderance of the evidence that the requirements of the UAO directing the Petitioner to cease accepting and disposing of materials alleged to be solid waste, and to submit a plan to MassDEP, are reasonable remedial measures intended to correct the purported violations. Matter of James A. Ficociello, DDS, PC, OADR Docket Nos. 2013-039 & 40, Recommended Final Decision (December 3, 2014), adopted by Final Decision (December 22, 2014); Matter of West Meadow Homes, Inc., OADR Docket No. 2009-023, Recommended Final Decision (June 20, 2011), adopted by Final Decision (August 18, 2011) (remedial measures ordered by UAO affirmed as reasonable to correct party's wetlands violations); Matter of William T. Matt, Trustee, East Ashland Realty Trust, OADR Docket No. 97-011, Final Decision (administrative order's directives affirmed as being reasonable to address party's solid waste and wetlands violations). "A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d).

STANDARD OF REVIEW

I reviewed MassDEP's determinations underlying its grounds for issuing the UAO *de novo*, meaning that my review was anew based on a preponderance of the evidence presented at

the Hearing and the governing statutory and regulatory requirements, irrespective of what MassDEP determined previously. See e.g., Matter of Edwin Mroz, OADR Docket No. 2017-021, Recommended Final Decision, (June 7, 2019), 2019 MA ENV LEXIS 57, adopted as Final Decision, (June 18, 2019), 2019 MA ENV LEXIS 63; Matter of Michael J. Cove, OADR Docket No. 2017-031, Recommended Final Decision, (May 1, 2020), 2020 MA ENV LEXIS 49, adopted as Final Decision, (May 11, 2020). The *de novo* standard of review has long been the standard of review in administrative appeals challenging Department enforcement orders. Id.

Under the *de novo* standard of review, the Presiding Officer makes (1) findings of fact based on a preponderance of the evidence with no deference to any prior factual determinations of MassDEP and (2) legal determinations based on the governing statutory and regulatory requirements with deference to MassDEP's reasonable interpretations or construction of those requirements. Matter of Pioneer Valley Energy Center, LLC ("PVEC"), OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 MA ENV LEXIS 109, at 26, adopted as Final Decision (November 9, 2011), 2011 MA ENV LEXIS 108 ("[a]n administrative agency's [reasonable] interpretation of a statute the agency is charged with enforcing is entitled to 'substantial deference'", citing Commerce Ins. v. Comm'r of Ins., 447 Mass. 478, 481 (2006)); In the Matter of Edwin Mroz, OADR Docket No. 2017-021, Recommended Final Decision (June 7, 2019), 2019 MA ENV LEXIS 57, 38-40, adopted as Final Decision (June 18, 2019), 2019 MA ENV LEXIS 63; Matter of Environmental Testing & Research Laboratories, Inc., OADR Docket No. 2018-006, Recommended Final Decision, 28 DEPR 58 (May 28, 2021), adopted by Final Decision, 28 DEPR 88 (September 28, 2021); See also Matter of West Meadow Homes, Inc., Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, adopted as Final Decision (August 18,

2011), 2011 MA ENV LEXIS 84. Mroz, 2019 MA ENV LEXIS 57, at 36-62; Cove, 2020 MA ENV LEXIS 49, at 15, 19-67.

Notwithstanding the Presiding Officer's independent factual and legal findings and recommendation on the challenged enforcement order in the appeal, it is MassDEP's Commissioner, as the final agency decision-maker in the appeal, who has the ultimate authority over the enforcement order's fate, and as a result, the Commissioner may affirm the enforcement order in whole or in part or vacate the enforcement order in its entirety based on the evidentiary record and the governing statutory and regulatory requirements. 310 CMR 1.01(14)(b);[7] Matter of Roofblok Limited, OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 17 DEPR 377 (2010) (Commissioner's Final Decision vacated Department's $86,498.50 penalty assessment against appellant for solid waste, hazardous waste, and water pollution violations after accepting DALA Administrative Magistrate's finding that penalty was improper, "but for different reasons than those articulated by the DALA Magistrate"); West Meadow Homes, 2011 MA ENV LEXIS 85, at 11-14, 28-37 (Commissioner's Final Decision affirmed Department's UAO and vacated Department's $6,000.00 penalty against appellant for wetlands violations after adopting Chief Presiding Officer's findings that Department properly issued UAO but failed to comply with Civil Administrative Penalties Act, G.L. c. 21A, § 16, in assessing penalty); Mroz, 2019 MA ENV LEXIS 57, at 36-62 (Commissioner's Final Decision affirmed Department's UAO against appellant for wetlands violations after adopting Chief Presiding Officer's finding that Department properly issued UAO).

[7] It is a well settled principle that "the [Department's] commissioner determines 'every issue of fact or law necessary to the [final] decision [in an appeal,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended decision, with a statement of reasons.'" Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., at 457 Mass. at 228.

As for the relevancy, admissibility, and the weight of evidence that MassDEP and the Petitioner presented at the Hearing, this was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

DISCUSSION

I. MASSDEP HAS ESTABLISHED THAT THE PETITIONER COMMITTED THE VIOLATIONS ALLEGED IN THE UAO

MassDEP contends that as to all the materials, the Petitioner has disposed of solid waste and is maintaining a dumping ground. At the heart of the dispute is the Petitioner's contention that the materials at issue are not solid waste and that their presence on the farm is not disposal. Petitioner contends that the materials alleged to have been brought onto the farm and placed in numerous locations do not constitute "refuse" because they are not useless, unwanted or discarded, and their placement on the property does not constitute "disposal". Petitioner asserts that because he intends to use the materials in the operations of the farm, and in some cases, has used them, their current locations are not their final locations, and therefore do not constitute dumping grounds. Petitioner's Closing Brief at pp. 12-17.

As discussed in detail below, contrary to the Petitioner's contentions, a preponderance of credible evidence demonstrates that as to each type of material, the Petitioner has disposed of solid waste and is maintaining a dumping ground. The Petitioner has no site assignment for any

area of the Site. At the Hearing, MassDEP proved through the testimonial, documentary, and photographic evidence of its witnesses that the Petitioner committed the solid waste violations alleged in the UAO. Mr. Douglass's testimonial and documentary evidence that the materials are not solid waste Petitioner have not persuaded me otherwise.

A. The Applicable Solid Waste Regulations

The Solid Waste Management Facility Regulations define solid waste or waste as "useless, unwanted or discarded solid, liquid or contained gaseous material resulting from industrial, commercial, mining, agricultural, municipal or household activities that is abandoned by being disposed or incinerated or is stored, treated or transferred pending such disposal, incineration or other treatment...." 310 CMR 19.006. "Solid Waste" does not include "materials which are recycled, composted, or converted in compliance with 310 CMR 16.03: *Exemptions From Site Assignment*, 310 CMR 16.04: *General Permit for Recycling, Composting or Aerobic and Anaerobic Digestion Operations*; or 310 CMR 16.05: *Permit for Recycling, Composting or Conversion (RCC) Operations*." 310 CMR 19.006, definition of Solid Waste, subpart (i). "Refuse" means "solid waste."

It is a violation of 310 CMR 16.00 for any person to handle or dispose of solid waste at any location that does not have a site assignment, unless exempt pursuant to 310 CMR 16.03. 310 CMR 16.01(8)(a)6. 310 CMR 16.02 defines "disposal" as "the final dumping, landfilling or placement of solid waste into or on any land or water or the combustion of solid waste." This regulation defines "handling" as "processing, storing, transferring or treating a material or solid waste." 310 CMR 16.02 defines "storage" to mean "temporary containment of a material or solid waste in a manner which does not constitute disposal." A "dumping ground" is defined as "as facility or place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit." 310 CMR 19.006. It is a

violation for any person to establish, construct, operate or maintain a dumping ground in such a manner as to constitute an open dump. 310 CMR 19.014(1).

Based on the evidence presented at the Hearing, I make the following findings:

B. The Petitioner disposed of cranberry waste by-products in violation of 310 CMR 16.01(8)(a)(6)

MassDEP alleged that the Petitioner disposed of stockpiles of cranberry waste by-products in at least twelve locations, ranging in size from single loads of eight (8) cubic yards to one multi-truck load stockpile of over 3300 cubic yards. UAO at ¶ 6. MassDEP contends that the Petitioner brought cranberry waste materials to the Site and failed to manage or use them in accordance with the regulations. MassDEP contends that the focus of its case is not on what the Petitioner intends to do with the cranberry wastes to improve the farm, but on its past activities of bringing the materials to the farm and failing to manage them or use them in accordance with MassDEP regulations. MassDEP's Closing Brief at pp. 1-2. The Petitioner asserts that except for a few pick-up truck loads, all of the organic materials are composted, spread on the fields and/or used as animal feed and therefore not "useless, unwanted or discarded" and therefore not solid waste. Petitioner's Closing Brief at p. 5, 12. The Petitioner argues that it is using the organic materials not as waste but as livestock feed,[8] compost feed stock and as soil amendment. Petitioner's Memorandum of Law at p. 1.

Double "S" Farms receives cranberry by-products from Ocean Spray Cranberries, Inc. in Middleboro, Massachusetts. Ocean Spray sent 6697 tons of cranberry by-products to Double "S"

[8] MassDEP was not primarily concerned with the SDC Mr. Douglass was feeding to his animals. Dakers PFT at ¶ 38. Mr. Dakers is aware that SDC can be used to supplement animal feed; he recommended that Mr. Douglass limit the amount of SDC brought to the farm to the amount needed to feed the animals. He is also aware that fresh, whole cranberries when mixed with silage may be suitable as feed during a limited time of the year, and that wet feeds should be fed within 1-3 days of delivery. Dakers PFR at ¶¶ 4-7; Ex. DR-1 and DR-2. He saw little evidence that the fresh cranberries were mixed with silage or were being used as an animal feed. Dakers PFR at ¶ 8. The PFT of Petitioner's expert witness, Dr. Worthington Berdt discusses the proper use of cranberry wastes as animal feed.

Farms in 2015 and 8190 tons in 2016. Dakers PFT at ¶ 64; Dakers PFR at ¶ 61; Dakers Ex. D2 and D3; Dakers PFR at ¶ 63 (correcting omission of attachment error in Ex. D3).[9] Department inspectors observed several types of cranberry by-products/wastes during the April 10, 2017 inspection, including (1) stockpiles of whole cranberries with small amounts of cranberry leaves and vines, known in the industry as 'vines and berries"; (2) sweetened dried cranberries ("SDC"), generated as part of the production of "Craisins"; (3) cranberry pomace, which is a by-products of the juicing process and consists of the skins of the cranberry; (4) cranberry sludge produced by the Ocean Spray Cranberry, Inc. industrial pretreatment facility in Middleboro;[10] and (5) cranberry vines, which are a by-products of cranberry harvest or food production. Dakers PFT at ¶ 18. [11]

MassDEP presented substantial evidence of disposal of cranberry wastes by the Petitioner. Mr. Connick and Mr. Dakers testified about their observations during the April 10, 2017 inspection of the Site. In preparation for the inspection, Mr. Connick prepared and printed an aerial photograph of the site from the MassGIS database. Connick PFT at ¶ 7. During the inspection he made field notes on the photograph and after the inspection he oversaw preparation of a clean copy of the photograph with various locations on the farm identified by labels. Connick PFT at ¶ 10. These photographs are attached to his PFT as Ex. C1 and C2. Areas north

[9] The Petitioner objected to the admission of Dakers Exhibits D2, D3 and D4. These exhibits consist of email message chains between Department personnel, BOH personnel and an employee of Ocean Spray Cranberries, Inc. The Petitioner's objection raised a concern about the reliability and authenticity of the email messages, implying they could have been fabricated or altered. I denied Petitioner's motion to strike these exhibits at the Hearing but asked the parties to brief the issue post-hearing. Based on the affidavit submitted by Mr. Dakers and the attachment demonstrating that the Ocean Spray employee is, in fact, an Ocean Spray employee, I find that there is no basis to strike these exhibits because there is no evidence the information contained in them is unreliable. I have limited my use of them in my consideration of this case to the fact that the Petitioner obtained cranberry by-products from Ocean Spray in certain quantities. The matter of tipping fees is not relevant and has not factored into my analysis.

[10] Ocean Spray has an Approval of Suitability BRPWP29 (transmittal x260739) approval from MassDEP which authorizes the cranberry sludge to be land-applied for growing vegetation in accordance with specific permit conditions. Dakers PFT at ¶ 18.d.

[11] Sean Bowen of MDAR accompanied MassDEP on this inspection.

of railroad tracks running through the farm are designated with an "N" and areas south of the tracks are designated with an "S". The inspectors observed conditions in areas N1 through N12 and areas S1 through S5. Dakers PFT at ¶ 19. They also observed conditions in the active compost area, areas N1 and N2. Dakers PFT at ¶¶ 20-23. In response to a question from Mr. Bowen of MDAR, Mr. Douglass stated that areas N1, N2 and S1 were the only areas where he was composting. Dakers PFT at ¶ 23. Mr. Dakers was present for this conversation and heard Mr. Douglass' statement. Hearing at 1:32:50-1:33:03. Composting activities in areas N1 and N2 were not included in the UAO because composting in those areas is regulated by MDAR. Dakers PFR at ¶ 12. As to area S1, the vast majority of the activities observed by MassDEP in this area are not regulated by MDAR, except for one "poorly managed windrow". Dakers PFR at ¶ 13.

In area S1, identified by Mr. Douglass as 'the former compost area", Mr. Connick observed several stockpiles of cranberries and piles of cranberry pomace. These stockpiles and piles are shown in Exhibits C7 and C8, respectively. Based on the aerial photographs, his on-site observations, and on-site photographs, he estimated that one pile of cranberries on a sloped area on the western end of area S1 covered an area of approximately 1/10 of an acre and were piled at least four feet deep on average contained approximately 650 cubic yards of cranberries. Connick PFT at ¶ 13; see also Dakers PFT at ¶ 24. During his 2015 inspection of the site, Mr. Dakers had observed a large stockpile of vines and berries approximately 6-7 feet high in the southwest corner of area S1. On April 10, 2017 he observed the same stockpile. Its height had decreased several feet due to decomposition, but the footprint of the stockpile was relatively unchanged. Dakers PFT at ¶ 24; Connick Ex. C7. At the hearing, he stated that he knew it was the same stockpile because of a tree that stuck out in his mind against which cranberries were piled three or four feet high. Hearing at 1:42:01-1:42:36. More materials had come into this stockpile since his 2015 inspection, as he noticed bright red cranberries. Additional vines and berries had been

deposited in front of the stockpile Mr. Dakers observed in 2015. Dakers PFT at ¶ 24; Dakers Ex. D5; Hearing at 1:42:56. The cranberries and vines were not in any enclosure and were placed directly on the ground and/or on top of existing vegetation including trees and boulders. Dakers PFT at ¶ 24; Connick Ex. C7. The top 3-6 inches of the berries in the older stockpile observed in 2015 had decayed and were brown in color. The berries' outer shells had broken and the berries at depth within the pile were mostly intact but were soft and saturated. Mr. Dakers detected a light odor of fermenting fruit when he excavated into the pile. Id. Mr. Dakers asked Mr. Bowen to clarify if what he observed was composting and Mr. Bowen said it was not, as that term is commonly used by MassDEP and MDAR. Dakers PFT at ¶ 26; Hearing at 1:44:57-1:45:31.

In area S4, MassDEP observed a small pile of cranberry by-product at the west side of the area. The cranberries were dark brown rather than red, indicating they were not recently deposited. Dakers PFT at ¶ 30; Connick PFT at ¶ 16; Connick Ex. C11. They observed several small stockpiles of cranberry byproduct, including SDC and vines and berries in area S5. Connick PFT at ¶ 17; Connick Ex. C12; Dakers PFT at ¶ 31. The stockpiles were approximately 5 cubic yards in size. They also observed several stockpiles of older cranberry by-products, pomace in scattered stockpiles, and several stockpiles of vines. Dakers PFT at ¶ 31; Dakers Ex. D6. A large stockpile of cranberries was observed in the southeast corner of area N6, an open grass field, and a smaller pile in the north end of that area. Connick PFT at ¶ 20; Dakers PFT at ¶ 33; Connick Ex. C14 and C15. Mr. Dakers estimated the pile to be 126 feet long by 15 feet wide by six feet high. He assumed an average height of three feet to estimate the volume of the large stockpile as 210 cubic yards. Dakers PFT at ¶ 33. The estimate was based on pacing off distances, his observations, and photographs, and was conservative, that is, an underestimation of the volume. Hearing at 1:57:23-1:58:18. One stockpile of cranberry pomace was observed in area N8, one stockpile of vines and berries was observed in area N9, and one pile of cranberry

sludge was observed in area N10. Connick PFT at ¶¶ 22-24; Connick Ex. C18, C19 and C20. The stockpile in area N8 was estimated at 400 cubic yards, the stockpile in area N9 was estimated to be 78 cubic yards, and the stockpile of sludge in area N10 was estimated to be 5 cubic yards. Dakers PFT at ¶¶ 35-37. In areas N11 and N12, wooded areas accessed through a gate at the south end of area N9, MassDEP observed that cranberries had been deposited over a significant area on the east side of a dirt road extending from the gate southward. The stockpile was irregular in shape ranging up to 5 feet deep. There were also two discrete small stockpiles of cranberries at the southern end of area N12. Connick PFT at ¶ 25; Connick Ex. C21; Dakers PFT at ¶ 38.

Mr. Dakers testified that all of these materials could potentially be land applied. Hearing at 1:54:37-38; 1:55:40-53; 1:58:21-30; 1:59:37-1:59:56; 2:00:16-2:00:25; 2:00:36-2:00:40. In response to a question at the hearing regarding how he concluded that a material was unwanted if Mr. Douglass intended to use it on-site, Mr. Dakers testified that he based his conclusion on how the material was handled, how long it had been there, how it was stored, the presence of the material there for several years, and the volumes of the materials, and he stated that he did not see significant quantities of materials being reused or any evidence of intent. Hearing at 2:07:17-2:08:40.

In response to MassDEP's testimony, Mr. Douglass testified that he will use all of the cranberry by-products on the farm. He denied that he operates an open dump, dumping ground or solid waste facility, and asserted that the Double "S" Farm compost operation has always been operated in an environmentally sound manner. Douglass PFT at ¶¶ 17-18. He testified that the compost shown in Ex. C5 will be spread on the farm's new field. Douglass PFT at ¶ 24. The area depicted in Ex. C7 will be used as a pasture. The pile in area S5, depicted in Ex. D5, will be spread and incorporated into the future pasture area. Douglass PFT at ¶ 25. The cranberry

pomace in area S1, depicted in Ex. C8 is intended to be field applied; the piles are maintained for that purpose. Douglass PFT at ¶ 26. The material depicted in Ex. C14 in area N6 was sampled and analyzed and determined to be suitable for spreading on the farm's fields. Douglass PFT at ¶ 30. The pomace depicted in Ex. C18 in area N8 will be spread on the hayfield as a soil amendment. Douglass PFT at ¶ 31. The cranberry by-products shown in Ex. C21 and C22 in areas N11 and N12, which he described as "spread" on the "Cranberry Field", will not be composted but will be land applied pursuant to the Cranberry Station Newsletter, October 2001. Douglass PFT at ¶ 34; Douglass Ex. E(L).

Mr. Douglass testified that except for a few pickup truck loads, all the organic waste produced by the farm or brought onto the farm is either composed by the livestock and/or composted and used on the farm. Douglass PFT at ¶ 35. He stated that the layout of the farm, including the compost pad and cranberry pulp storage, are all approved by the Natural Resources Conservation Service ("NRCS"). Douglass PFT at ¶ 37; Douglass Ex. H.[12]

On cross-examination, Mr. Douglass was asked when the area depicted in Ex. C7 would be used as a pasture. He responded, "When the practice is complete…approximately a year." Hearing at 2:52:44-2:55:42. When asked at what depth the cranberries in areas N11 and N12, depicted in Ex. C21 and C22 and described in his PFT ¶ 34 as "spread" were spread, he acknowledged that the cranberries had not been spread yet, were not currently spread, but were "on-site" ready to be further land applied. Hearing at 3:00:25-3:02:36. When asked about his PFT ¶ 30, in which he described Ex. C14 as showing "dark brown composted cranberries" and which he described as "finished composted product", he stated that the material was not composted by a formula but "just natural cranberry compost" (pomace, whole berries and SDC

[12] Douglass Ex. H is identified by the Petitioner in its index of exhibits as "NRCS Plan for Jeff Douglass at Double "S" Farms." The exhibit is a plan identifying various areas of the site, but it does not appear to be an approval of any sort by the NRCS.

but with no leaves or hay added to it), and it was composted "right where the material sits." Hearing at 3:02:37-3:04:42.

Mr. Dakers effectively rebutted Mr. Douglass's testimony that the large stockpiles in areas N11 and N12 will be land applied pursuant to the Cranberry Station Newsletter ("CSN").[13] Mr. Dakers testified that this newsletter "substantially confirms [the Department's] assertions that Mr. Douglass is disposing of solid waste." Dakers PFR at ¶¶ 34-35. Dumping whole cranberries into piles on a farm is considered an illegal activity except when allowable under the land spreading guidance in the newsletter. That guidance clearly states that cranberries should not be stockpiled more than 30 days prior to land application. The newsletter contains a list of general criteria for land application in accordance with accepted agricultural practices. These include keeping records of application rates and locations. There is no indication that Mr. Douglass has such records. In Mr. Dakers' opinion, Mr. Douglass is not following the best management practices in the CSN referenced in his testimony. Dakers PFR at ¶ 36. The whole cranberries in areas N11 and N12 have not been composted and have been stored for more than 30 days. Dakers PFR at ¶ 37. Mr. Dakers also effectively rebutted Mr. Douglass's testimony that he intends to use the materials. Mr. Dakers noted that Mr. Douglass claimed during both the 2015 and 2017 inspections that he intended to land apply the whole cranberries and cranberry by-products at some future date but there is little evidence that he has land applied any of the wastes, other than the cranberry sludge on fields near N3. Dakers PFR at ¶ 39. Finally, Mr. Daker's noted that Exhibit D7, MDAR's denial of the agricultural composting registration, contains an email message from Mr. Douglass to MDAR which states that only 12 cubic yards of compost had been applied to the site in 2016 and that Mr. Douglass did not have the equipment

[13] Douglass Ex. E(L). Cranberry Station Newsletter, October 2001, UMass Cranberry Experiment Station, East Wareham, MA.

to screen the additional compost he had on site. Dakers PFR at ¶ 40. It is Mr. Dakers opinion that the whole cranberries dumped in areas N11 and N12 are solid waste disposed of at the property. Dakers PFR at ¶ 44.

A preponderance of the credible evidence plainly demonstrates that the cranberry by-product materials are solid waste that has been disposed of at the site. These materials are unwanted by their generator and the evidence demonstrates that where they have been placed is where they will stay, therefore constituting disposal and making those locations dumping grounds. I found Mr. Connick and Mr. Dakers to be credible witnesses, and their photographic evidence overwhelmingly persuasive in support of MassDEP's enforcement action. My own observations during the site view reinforce my judgment. By contrast, Mr. Douglass was not a persuasive witness and his assertions that the materials are wanted and useful do not overcome the fact that he has allowed the materials to sit and rot for years without any plan for incorporating them into his farm operations. There was no evidence presented by him that he is doing anything with these materials other than stockpiling them in various locations with the hope that one day he will be able to use them. I find that the Petitioner has disposed of cranberry waste by-products in violation of 310 CMR 16.01(8)(a)(6).

C. The Petitioner disposed of stumps and brush in violation of 310 CMR 16.01(8)(a)(6).

The UAO alleged that during MassDEP's inspection, the inspectors observed one stockpile of stumps and brush located south of the railroad tracks. The stumps and brush had been pushed down a slope into a wooded area "in a manner making recovery for future grinding appear infeasible, thus making it evident the stumps and brush were disposed of at the site." UAO at ¶ 7. The Petitioner asserts that these stumps and brush are a "pile of retractable stumps" that will be ground and composted "when economically feasible." Petitioner's Closing Brief at p. 7.

A site assignment is not required for:

> [d]isposal of stumps, trees and brush at a single family home or farm where the stumps, trees and brush are generated and disposed within the boundaries of such home or farm by the occupant or resident of that home or farm.

310 CMR 16.03(2)(c)6. The exemption does not apply to stumps and brush brought onto the farm from off-site.

During the inspection, Mr. Connick observed stumps and brush in a wooded area designated as area S2 on Ex. C2, extending from the access road into the wooded area. He estimated that the brush and stumps covered an area approximately one-third of an acre and constituted approximately 1,600 cubic yards of stumps and brush. Connick PFT at ¶ 14; Connick Ex. C10 (three photographs). The stumps and brush were pushed into uncleared vegetated areas such that, in his opinion, reclaiming the materials to process them would be difficult. Id. On cross-examination, Mr. Connick explained that the stumps were pushed over an embankment and would be difficult to retrieve and were in an area where the topography and lack of clearing made setting up a woodchipper difficult, thus increasing the cost of recovery and processing. Hearing at 21:00-23:00. He estimated the volume of stumps and brush by taking field observations, comparing them to the photograph, using the scale on MassGIS or Google Earth to estimate the length and width and adding the average depth of the pile, which he estimated to be three feet. Connick PFT at ¶ 14; Hearing at 21:50-23:00. Mr. Connick also observed a pile of stockpiled brush and stumps in an area designated as area N5 on Connick Ex. C13 in a location that was readily accessible to chipping equipment, though he did not observe any wood chips. Connick PFT at ¶ 19. Mr. Dakers's testimony confirms these observations. Dakers PFT at ¶ 28. Additionally, Mr. Dakers testified that Mr. Douglass stated that the stumps and brush at area S2 had been generated off-site from one or more locations. Dakers PFT at ¶ 28.

In response to this testimony, Mr. Douglass testified that the stumps will be ground and composted when economically feasible. Douglass PFT at ¶ 28. At the hearing, when asked when it would be economically feasible, he testified that it depended on the market for chips as a feedstock and he has no control over the market. Hearing at 2:55:50. He further testified that the stumps are retractable by a large excavation [sic] with a thumb, and that he performed this activity for 25 years in Rhode Island. Douglass PFT at ¶ 28.

In rebuttal to Mr. Douglass' testimony that the stumps could be extracted by a large excavator with a thumb, Mr. Dakers testified that he observed two locations where stumps had been placed by Mr. Douglass. Dakers PFR at ¶ 45. In area N5, the stumps were in a location readily accessible to chipping equipment. The land was cleared of other vegetation and was relatively flat. Mr. Dakers saw no evidence of previous chipping in this area. Dakers PFR at ¶ 46. In area S2, the stumps were pushed down a slope in a wooded area making recovery for future grinding appear infeasible. In his opinion, because the ground was neither cleared nor flat, it was evident that the stumps and brush were intended to be disposed of, not processed. Dakers PFR at ¶ 47. Mr. Dakers further testified that according to Mr. Douglass's composting registrations, he took in almost 500 cubic yards of stumps from off-site in 2015 and 2016, but there was no indication that he had chipped any during that time period. Dakers PFR at ¶ 48. Based on his observations and Mr. Douglass's statement about economic infeasibility, it was Mr. Dakers's opinion that the stumps and brush have been placed in a manner that makes them not amendable to processing and that processing is not economically feasible, and that the stumps and brush in area S2 have been speculatively accumulated and thus disposed. Dakers PFR at ¶ 49.

Based on this testimony, I find, first, that the stumps and brush do not qualify for an exemption from site assignment because they were not generated on the site. Second, I find that the stumps and brush are solid waste. A preponderance of the credible evidence demonstrates

that the stumps and brush have been placed in an area where it is infeasible to retrieve them for chipping or other processing. They have been, therefore, discarded in that location, and are therefore, solid waste. Given the infeasibility of processing them (both due to location and Mr. Douglass's stated economic infeasibility to deal with them), I find that area S2 is the final dumping place for these materials. While Mr. Douglass stated that he intends to deal with them, he has no plan to do so and could not say when he might have the ways and means to do so. His ability to use heavy equipment and his experience using it is irrelevant where he failed to persuade me that he has any real intention to remove the stumps and brush from area S2 and process them. Therefore, their placement in area S2 constitutes "disposal." As this solid waste has been disposed in that location, I find that area S2 is a dumping ground for the stumps and brush because it is "a place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit." 310 CMR 19.006.

D. The Petitioner disposed of sand with clamshell remnants in violation of 310 CMR 16.01(8)(a)(6).

The UAO alleged that during its inspection, MassDEP observed a stockpile of sand with clam shell remnants that had been disposed of on the Site. UAO at ¶ 8. Mr. Dakers observed sand mixed with broken shells at area S1, depicted in Connick Ex. C9 (two photographs). He also observed a skate and moon snails on ground. Dakers PFT at ¶ 27. Mr. Dakers reviewed the Petitioner's submissions to MDAR, Dakers Ex. D9 (Agricultural Composting 2016 Annual Report and 2017 Registration Renewal) and Dakers Ex. D10 (Certificate of Agricultural Composting Registration 2016), which indicated the amount of crushed clam shells brought onto the site but generated off-site, and neither submission identified small drag chain or shell wash fines. Dakers PFT at ¶ 71. These materials were obtained from Sea Watch International in New Bedford. Dakers PFT at ¶ 72. Sea Watch confirmed to MassDEP that the material they shipped to the Petitioner consisted of "shell wash fines", which are bits of shell and sand that are

generated in the course of running clam shells through a washing system, and "small drag chain" material, which consists of sand and shell fragments that have sunk to the bottom of a tank that is part of a shucking system. The sand and shell fragments are dragged up and into tubs by a drag chain conveyor and the tubs are dumped into roll-off containers which were delivered to the petitioner. Id. Mr. Dakers testified that he is familiar with shell wash fines and small drag chain wastes from Sea Watch and that MassDEP has determined that these materials are a solid waste. Dakers PFT at ¶ 73; Hearing at 1:47:53-1:48:25. These materials appeared useless and unwanted to Mr. Dakers because they were haphazardly dumped on the property and not re-usable. In his expert opinion, these materials are considered solid waste, even if Mr. Douglass wanted the materials or wanted to land-apply them.

Mr. Douglass testified that in this location, a portion of the SI field was being reclamated by removing trees, laying down "clam sand" (shell and shell fragments, sand, and stone) and covering the clam sand with organic materials such as compost or soils. Douglass PFT at ¶ 27. Mr. Douglass further testified that composting of seafood and seafood waste at the site had been approved by the Town of Dartmouth and notice of the approval was given to MassDEP and MDAR. Douglass PFT at ¶ 38. Attached to his PFT as Ex. I is correspondence from the Town of Dartmouth Board of Health ("BOH") to MassDEP and MDAR dated September 26, 2013. This letter describes a visit by the BOH to the site on September 20, 2013, during which Mr. Douglass described the process he was proposing to compost seafood and food waste materials. The BOH emphasized to Mr. Douglass the need to assure a nuisance-free operation and to assure that the materials were composted properly. The BOH was comfortable with Mr. Douglass piloting the project and to receive a trial load of 10-20 cubic yards of high nitrogen seafood waste that would be salted into the carbonaceous bulking agent, such as leaf and yard waste and wood chips. The

letter noted that Mr. Douglass has agreed to incorporate the waste into the compost piles within twelve hours of receipt of the seafood product." Douglass PFT, Ex. I.

Mr. Dakers disputed that this letter was an approval, describing it as a "comfort letter" in which the BOH stated it had no objection to the Petitioner accepting one trial load of 10-20 yards of seafood waste at the recently registered MDAR compost site. Dakers PFR at ¶ 51. He reiterated that what he observed during the April 2017 inspection was not the composting of seafood waste but the disposal of solid waste in the form of shell wash fines and small drag chain waste, which is not an organic material that is acceptable for composting. Dakers PFR at ¶ 52. In his opinion, these materials are solid waste that has been disposed of at the site. Dakers PFR at ¶ 59. Mr. Dakers testified at the hearing that Mr. Douglass told him he was land applying this material. It did not appear to Mr. Dakers that Mr. Douglass was land applying the material and further, MassDEP considers this material a solid waste and MassDEP has not allowed this use at other sites. Hearing at 2:18:29-2:19:13.

Although Mr. Douglass testified that he was using the seafood wastes as part of his soil reclamation efforts, there was no evidence tending to prove that he was using the seafood waste for this purpose in a manner designed to accomplish that purpose. Instead, as depicted in Ex. C9, the shell wash fines and small drag chain wastes were mixed with sand and piled or spread on the ground. As with the stumps and brush, Mr. Douglass intended to use the seafood waste in the operation of his farm, but the testimony of Mr. Dakers supports a finding that this material is a solid waste that has been disposed of at the site. As this solid waste has been disposed in that location, I find that area S1 is a dumping ground for the seafood waste because it is "a place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit." 310 CMR 19.006.

E. The Petitioner has established and is maintaining a dumping ground of solid waste in violation of 310 CMR 19.014(1).

The crux of the Petitioner's case is that he wants the materials, they are (or could be) useful to him, and he intends to use them, therefore they are not "solid waste". If he intends to use them then their placements cannot constitute "disposal". If they are not solid wastes being disposed, then he cannot be maintaining a "dumping ground". The Petitioner's understanding of the Solid Waste Management Act and its implementing regulations is misguided. Previous decisions of MassDEP have found that a stated intent to use material at some future date does not remove it from the solid waste regulations. See Matter of Ferry Street Partners Investment Trust, Daniel J. Messier, Trustee, OADR Docket No. 2015-008, Recommended Final Decision (October 11, 2016), 2016 WL 7493838, adopted by Final Decision, (December 14, 2016), 2016 WL 7493837 (construction and demolition debris and other materials piled on site for approximately two years were disposed of, notwithstanding the owner's stated intent to use them at some date in the future); Matter of Pan Am Railways/Boston & Maine, Docket Nos. 2007-080 & 081, Memorandum of Decision and Order Granting Partial Summary Decision to MassDEP on Liability (January 28, 2010), 2010 MA ENV LEXIS 85 (discarding or abandoning railroad ties on the ground along the railroad tracks constituted disposal, notwithstanding the Petitioner's removal of some of them and its stated intent to remove others).

As discussed in above in sections B through D, a preponderance of the evidence supports findings that the cranberry waste materials, the stumps and brush, and the seafood waste are all solid wastes that have been disposed of at the site. Despite Mr. Douglass's assertions that he wants the various materials and intends to use them in the operation of this farm, such that they are not useless and unwanted and, therefore, are not solid waste, it is not his perspective that matters. Rather, it is the perspective of the generators of these materials that informs the analysis. The waste whole cranberries, pomace and sweetened dry cranberries are shipped by Ocean Spray

to the Petitioner because Ocean Spray no longer has use for them and considers them waste. The same is true for the stumps and brush, which are generated by persons or entities who have no use for them. And Sea Watch provides seafood processing wastes, shell fines and small drag chain wastes to the Petitioner because it has no use for them. They are all considered wastes by their generators. The Petitioner's management (or lack of management) of these materials also demonstrates that they are solid waste. Rather than being incorporated into a recycling or composting operation, the cranberries are piled in multiple locations and are rotting in place; the stumps and brush are located where they will be difficult to retrieve and process; and the seafood wastes have been spread over the ground or left in piles. In essence, the Petitioner is hoarding materials it may find useful at some indeterminate time in the future when it has the means to properly incorporate them into its farm operations.

There are exemptions in the solid waste regulations that could apply to Double "S" Farms. 310 CMR 16.04 [14] and 310 CMR 16.05 [15] provide an exemption from the requirement for a site assignment for recycling, composting or aerobic and anaerobic digestion operations at

[14] 310 CMR 16.04(1) states that the exemption applies to the operations identified below, which are eligible for a General Permit and do not require a site assignment, a facility permit pursuant to 310 CMR 19.000: *Solid Waste Management*, or a recycling, composting, or conversion permit pursuant to 310 CMR 16.05, provided the operation meets the requirements of 310 CMR 16.04(2)-(3):
(a) a recycling operation that receives no more than 250 tons per day of recyclable materials, not including paper;
(b) a composting operation that:
1. receives no more than 105 tons per week and no more than 30 tons per day of Group 2 organic materials, listed at 310 CMR 16.04(3)(b): *Table 1. Examples of Organic Materials*, or other organic materials with a carbon to nitrogen ratio of 30:1or less;
2. contains less than 5,000 cubic yards of organic materials per acre; and
3. has less than 50,000 cubic yards of organic materials on site at any one time; or
(c) an aerobic or anaerobic digestion operation that receives no more than 100 tons per day of organic material from on or off site, based on a 30 day rolling average.

[15] 310 CMR 16.05, applicable to Recycling, Composting and Conversion (RCC) operations, provides that "[t]he recycling, composting, conversion or handling of recyclable or organic materials that does not qualify for an exemption pursuant to 310 CMR 16.03 or a general permit pursuant to 310 CMR 16.04, shall apply for a recycling, composting or conversion (RCC) permit pursuant to 310 CMR 16.05. A RCC operation that has a RCC permit does not require a site assignment or a solid waste management facility permit pursuant to 310 CMR 19.000: *Solid Waste Management* provided the owner or operator complies with the permit." 310 CMR 16.05(1).

locations subject to a general permit or holding a site-specific permit. The Petitioner has not applied for or been granted a site-specific permit and has not submitted certifications pursuant to 310 CMR 16.06 that would enable it to obtain a general permit. Dakers PFT at ¶ 51.

Pursuant to 310 CMR 16.03(2)(c)1, handling or disposing of organic materials at an agricultural unit as defined in 330 CMR 25.02 [16] does not require a site assignment provided that the owner or operator "compl[ies] with the regulations and guidelines of Department of Agricultural Resources. If the Department of Agricultural Resources determines that the activity at a specific agricultural unit is no longer regulated by the Department of Agricultural Resources, then the owner and operator shall be subject to 310 CMR 16.00." To be eligible for this exemption a farm must register their composting operations and the process for registering is set forth in 330 CMR 25.03. [17] At the time of the Hearing, the Petitioner had a registered agricultural composting operation on a portion of the farm, though MDAR sought to revoke the registration. Dakers PFT at ¶ 55; Dakers Ex. D7. The waste cranberry materials at the site are considered organic materials. Dakers PFT at ¶ 53. But all the activities within the scope of the UAO are located outside the areas included in Petitioner's composting registration and therefore are not subject to and cannot be in compliance with the MDAR regulations. Dakers PFT at ¶ 56.

[16] An "Agricultural Unit" is "land which conducts activities listed in M.G.L. c. 128, § 1A." M.G.L. c.128 § 1A provides: "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market."

[17] [MDAR] may register agricultural composting operations if [MDAR] determines that:
(1) the compost operation is located on agricultural unit;
(2) the applicant has submitted a completed application;
(3) the applicant agrees to a site visit and to comply with the Department's Agricultural Compost Guidelines;
(4) the applicant demonstrates knowledge and capability to conduct the agricultural composting operation to produce a stabilized compost product.

Additionally, some of the activities observed by MassDEP during its April 10, 2017, inspection are not regulated by MDAR. Dakers PFT at ¶ 57; Dakers Ex. D8 (these included taking and handling sand with clam shells and handling or burying on site; taking and handling stumps and wood waste and not chipping or composting them; taking cranberry waste byproducts and not composting them but handling them as solid waste).

Each area where these materials are present constitutes a dumping ground. 310 CMR 10.014(1) provides:

> (1) No person shall establish, construct, operate or maintain a dumping ground or operate or maintain a landfill in Massachusetts in such manner as to constitute an open dump. For the purpose of 310 CMR 19.014, the phrase "establish, construct, operate or maintain" shall include without limitation, disposing or contracting for the disposal of refuse in a dumping ground or open dump.

As noted above, a "dumping ground" is defined as "as facility or place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit." 310 CMR 19.006.

In sum, the materials that the Petitioner has taken in are useless and unwanted by their generators; they are not being recycled, composted or converted in compliance with 310 CMR 16.04 or 310 CMR 16.05; and they are not being recycled, composted or converted in compliance with 310 CMR 16.03. Rather, they have all been collected on site by Mr. Douglass for potential use at some indeterminate time in the future when he has the means, inclination, and wherewithal to deal with them. In the meantime, they are solid wastes, and their locations are dumping grounds.

Having found that the Petitioner has established and is maintaining a dumping ground because he has disposed of solid waste at a site not subject to a site assignment or permit, and not qualified for any exemption, I find that he is in violation of 310 CMR 10.014(1).

II. The directives of the UAO are reasonable remedial measures intended to correct the alleged violations and should be affirmed.

The UAO directed the Petitioner to take two actions: (1) cease accepting solid waste for disposal at the Site and (2) submit to MassDEP a plan for how the Petitioner intended to comply with the Solid Waste regulations. I find the UAO's requirements to be reasonable remedial measures intended to address the conditions at the Site. See Matter of William T. Matt, Trustee, East Ashland Realty Trust, OADR Docket No. 97-011, Final Decision, 5 DEPR160, 1998 MA ENV LEXIS 934, at 49-50 (administrative order's directives affirmed as being reasonable to address party's solid waste and wetlands violations). The Petitioner "presented no evidence that th[e] [remedial measures] [are] impractical or impossible to meet, and . . . the [Petitioner] has had more than [ample time] since the [UAO] was issued [six years ago] to prepare for the possibility of having to comply with its requirements." Id. The UAO requires him to develop a plan. If he is serious about wanting to reclamate the soils on the farm in order for the farm to be sustainable, then he should agree that coming up with a plan is not an unreasonable requirement. Throughout his testimony, Mr. Douglass expressed his intention to deal with the various materials when he could, but he could not say when, exactly, any of it would or could be done. Unfortunately for the Petitioner, the road to compliance with the solid waste regulations is not paved with good intentions**.** He must act to comply with the UAO.

CONCLUSION

As discussed above, a preponderance of the evidence demonstrates that the materials alleged to be solid waste are solid waste and that they have been disposed of at the Petitioner's Site such that he is maintaining a dumping ground. Therefore, I find that MassDEP has proven that the violations occurred. I further find that the UAO's directives to cease accepting the waste materials and to submit to MassDEP a plan for dealing with those materials on the site are

reasonable, and the Petitioner presented no evidence tending to prove that they are not. I recommend that MassDEP's Commissioner issue a Final Decision affirming the UAO.

Date: 6/23/2023

Jane A Rothchild
Senior Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her consideration. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to M.G.L. c. 30A.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

SERVICE LIST

In the Matter of
Double "S" Farms, LLC

Docket No. 2017-010
Enf. Doc. # 0002395

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