State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT, Petitioner, v. HAINESVILLE GAS & AUTO SERVICE SITE AND AMER LEE, Respondents.	)	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT. NO. ECE 08587-14 AGENCY DKT. NO. PEA 130001-019608

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT, Petitioner, v. HAINESVILLE GAS & AUTO SERVICE SITE AND HAINESVILLE GAS & AUTO SERVICE, Respondents.	)	OAL DKT. NO. ECE 08589-14 AGENCY DKT. NO. PEA 130002-019608

This Order addresses an appeal of two Administrative Orders and Notices of Civil Administrative Penalty Assessment (AONOCAPA) issued on August 8, 2013, by the Department of Environmental Protection (the Department) concerning the Hainesville Gas &

Auto Service site, a retail gasoline service station located at 274 Route 206 North, Block 805 Lot 2, Sandyston Township, Sussex County (the Site), for violations related to failure to remediate contamination at the Site resulting from the facility's operations.

PROCEDURAL AND FACTUAL BACKGROUND

The Department issued AONOCAPA PEA 130001-019608 to property owner Amer Lee, alleging that Mr. Lee (1) failed to conduct remediation as required by the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11, et seq., the Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1.3, and the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and Department rules, N.J.A.C. 7:26C-2.3(a), to remedy contamination from a 1997 gasoline spill at the Site, groundwater contamination documented by a prospective purchaser in July 2003, and contamination from leaking underground storage tanks as reported by Hainesville Gas & Auto Service in December 2003; (2) failed to pay fees and oversight costs as required by N.J.A.C. 7:26C-2.3(a)4; and (3) failed to submit an initial receptor evaluation for the contaminated site as required by N.J.A.C. 7:26E-1.12(c)[1]. For these violations, the Department assessed $40,000 in civil administrative penalties and directed Mr. Lee to remediate the site in accordance with Department rules, pay fees and oversight costs, and complete and submit an Initial Receptor Evaluation.

AONOCAPA PEA 130002-019608 was issued to Hainesville Gas & Auto Service based on the same facts as the first AONOCAPA, alleging that, in addition to failure to pay fees and oversight costs and failure to submit an initial receptor evaluation for the contaminated site,

[1] Following a confirmed discharge, an initial receptor evaluation documents "in summary form the existence of human or ecological receptors and the actions taken to protect those receptors." See http://www.nj.gov/dep/srp/srra/forms/receptor_evaluation_report_ins.pdf?version_2_2.

Hainesville Gas & Auto Service violated the Underground Storage of Hazardous Substances Act (USHSA), N.J.S.A. 58:10A-21 et seq., and Underground Storage Tank (UST) rules, N.J.A.C. 7:14B, by its failure to remediate a discharge from the UST system. The Department assessed a $40,000 penalty against Hainesville and directed compliance as in the first AONOCAPA.

Amer Lee requested a hearing to challenge each of the AONOCAPAs and the matters were transmitted to the Office of Administrative Law (OAL) and assigned to Administrative Law Judge (ALJ) Gail M. Cookson.[2] Mr. Lee appeared in the OAL on his own and the company's behalf. In the OAL, the Department filed a Motion for Summary Decision on March 13, 2015, which Respondents opposed.

I adopt the ALJ's recitation of the material facts and elaborate here as the facts pertain to this Final Decision.[3] It is undisputed that in 1997 there was a spill at the Site resulting from the overfilling of gasoline by Respondents' supplier. Amer Lee was the operator at the time and the property was owned by Ameean Lee.[4] Although that spill was reported and some remediation undertaken by the gasoline supplier and its insurance carrier, the resulting contamination was never properly nor completely remediated. Further, consultants hired on behalf of the gasoline supplier may not have undertaken sufficient sampling to show accurate levels of potential contamination. In June and July 2003, a prospective purchaser of the property performed a Phase II Investigation "to determine if contamination exists … from the current or past underground storage tank system on-site." The investigation concluded that soil and groundwater were contaminated by petroleum hydrocarbons in excess of Department Ground Water Quality

[2] Hereinafter, Amer Lee and Hainesville Gas and Auto Service are referred to jointly as Respondents.
[3] These facts are based on my review of the documents in the OAL record. Although OAL rules permit the filing of a motion for summary decision with or without supporting affidavits, N.J.A.C. 1:1-12.5(b), the facts surrounding Respondent's December 2003 report to the Department's Communication Center and the subsequent submission of an MOA application by Ameean Lee should have been elaborated upon through certifications of Department personnel.
[4] There is nothing in the record to explain the relationship between Ameean Lee and Amer Lee.

Standards and that remedial action was necessary, but the August 12, 2003 report did not expressly state the source of the contamination, e.g., leaking USTs. In December 2003, the former owner of the Site, Ameean Lee, reported to the Department's Communication Center that the USTs at the Site were leaking and shortly thereafter, Ameean Lee submitted to the Department a Memorandum of Agreement Application, which he certified under signature of a notary, for "[t]he investigation and remediation of suspected leaking underground storage tanks." On January 28, 2004, the Department accepted the MOA application and directed Ameean Lee to submit a schedule of implementation of the remedial steps outlined in the MOA. On December 3, 2004, the Department wrote to Ameean Lee with detailed instructions for additional investigative activities that were required at the Site. The record, including the AONOCAPAs, reflects a gap of nine years to the time compliance assistance calls were made to now owner Amer Lee on January 24 and March 1, 2013[5] to advise of Respondent's obligations under SRRA. When, as a result of a follow-up compliance evaluation on July 10, 2013, the Department determined that the Site had not been remediated and other measures required under SRRA had not been undertaken, the Department issued the AONOCAPAs. In response to the Department's enforcement action, Respondents obtained a letter report, dated April 5, 2015, from MIG Environmental, the same consultant used by the prospective buyer in 2003, which based only on a record review, provided an opinion that the contamination it found and reported on in 2003 was caused by the gasoline spill in 1997 and the subsequent inadequate remediation.

The ALJ issued an Initial Decision on November 16, 2015, which found that Respondents were strictly liable under the Spill Act for the contamination of the Site following

[5] Amer Lee's request for hearing to challenge AONOCAPA PEA 130001-019608 "admits that he owned the site from November 11, 2009 until present." His exceptions dated December 11, 2015 state that he closed the gasoline station in 2005.

the 1997 gasoline spill and the failure to remediate, and that the Department's penalty assessment for the violations cited in AONOCAPA PEA 130001-019608, based on one day of violation, was lenient. Concerning AONOCAPA PEA 130002-019608, the ALJ concluded that the Department did not establish that Respondents' USTs were leaking and/or a primary or contributing cause to the contamination of the Site and that, therefore, summary decision was not appropriate on the violations cited in this AONOCAPA. Moreover, the ALJ concluded that, even if statutory liability had been established under the USHSA, the AONOCAPAs were duplicative factually and the Department should have merged the allegations into one enforcement matter without doubling the penalties. The ALJ thus granted in part and denied in part the Department's motion and affirmed total penalties of $40,000. She further ordered Respondents to complete remediation of the Site, make the required fee and oversight payments, and submit the initial receptor evaluation.

The Department did not file exceptions to the Initial Decision. Respondents filed exceptions beyond the thirteen day deadline allowed by the OAL's rules. Those exceptions argue that the Department's allegations that USTs at the Site were leaking were unsubstantiated. Respondent, Amer Lee, also claims that he did not have the financial ability to remediate the Site at the time of the prospective buyer's investigation in 2003 and that upon resolution of his mother's estate in the near future, he will be in a position to hire a Licensed Site Remediation Professional and conduct the necessary remediation.

For the reasons stated below, I ADOPT the ALJ's findings and conclusions regarding AONOCAPA PEA 130001-019608 and the ALJ's affirmance of the $40,000 civil administrative penalties. I REJECT the ALJ's reference to and reliance on N.J.A.C. 7:26-5.5(i) in support of the penalty calculation for the violations cited, as that rule does not govern.

I further ADOPT the ALJ's determination to deny summary decision as to AONOCAPA PEA 130002-019608 and decline to affirm the Department's penalties assessed in that AONOCAPA for violations of the USHSA.

LEGAL DISCUSSION

The grant of a motion for summary decision is appropriate "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Thereafter, "an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). A genuine issue of material fact exists "when 'the competent evidential materials . . . are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party.'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010) (alteration in original) (quoting Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000)).

The Spill Act, as supplemented by the Brownfield Act and SRRA, provides that "[a]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10-23.11g(c). The term "discharge" is liberally construed to include:

> Any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State ….
> [N.J.S.A. 58:10-23.11b.]

Respondent Amer Lee's status as both an operator (from 1997 until 2009) and later owner of the Site and the Hainesville Gas & Auto Service facility (as of November 2009) dictates that respondent is strictly liable for discharges and contamination at the Site. State Dept. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 502-503 (1983). See also New Jersey Schs. Dev. Auth. v. Marcantuone, 428 N.J. Super. 546, 561 (App. Div. 2012) (purchaser of contaminated land who failed to conduct due diligence prior to purchase is liable under the Spill Act). A violator's intent is not relevant to the inquiry of strict liability. State Dept. of Envtl. Prot. v. Lewis, 215 N.J. Super. 564, 572 (App. Div. 1987). Further, the existence of other responsible parties is not a defense to a responsible party's liability under the Spill Act. Morristown Assocs. v. Grant Oil Co., 220 N.J. 360, 383 (2015). Thus, Respondent's assertion that the facility's gasoline supplier was at fault for contamination resulting from the 1997 gasoline spill is not a defense to this action.

As a person responsible to conduct remediation of the Site under the Spill Act, N.J.S.A. 58:10-23.11 et seq., Respondents must comply with the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-1.1 et seq., and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-1.1, et seq. SRRA, adopted in 2009, is the mechanism by which remediation under the Spill Act, Brownfield Act, and other statutes addressing contaminated sites is implemented. Among other things, SRRA authorizes licensed site remediation professionals to oversee and conduct remediation of contaminated sites and delineates the Department's remedial action permitting requirements to regulate the operation, maintenance and inspection of engineering or institutional controls and related systems installed as part of a remedial action of a contaminated site. As of Mary 7, 2012, any remediation,

regardless of when it was initiated, must comply with SRRA and be conducted under the oversight of a Licensed Site Remediation Professional (LSRP).

Respondents admit the 1997 gasoline spill and resulting contamination but claim that the present contamination is related to that spill and not to leaking USTs reported in 2003. This claim is clouded by the former owner's 2003 MOA application that contained a certification of leaking USTs. However, whether the contamination is related to the 1997 spill or subsequent leaking USTs does not change the nature of Respondents' liability for the contamination and responsibility for remediation of the Site in its entirety. The Department's Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 26C-1.1 et seq., as well as the Technical Requirements for Site Remediation, N.J.A.C. 7:26E- 1.1 et seq., govern the remediation activities that must occur on the Site, pursuant to the Spill Act, the Brownfield Act, and SRRA, as well as the USHSA. See N.J.A.C. 7:14B-8.1(b)4 (remediation of leaking USTs). Further, Respondents are subject to all UST rules, N.J.A.C. 7:14B-1, et seq. for the tanks that continue to be present at the Site. Thus, I find it is not necessary to determine whether the USTs were leaking and that Respondents are consequently also liable under the USHSA as a result. On the record before me and in the absence of any exception by the Department, I agree with the ALJ that summary decision is not available on this allegation. Normally, denial of summary decision would result in remand for further fact finding. Here, a remand is not necessary because liability under the Spill Act and the obligation to remediate the Site is clear. Further, the former owner entered into an MOA with the Department by which he acknowledged and accepted remediation obligations for contamination on the Site. The penalties assessed for leaking USTs and the failure to remediate on that basis are thus cumulative on these facts and I accept the ALJ's conclusion not to impose additional penalties under the USHSA.

AONOCAPA PEA 130001-019608 attached a penalty assessment worksheet, but that worksheet does not reflect the Department's reasoning concerning the penalties assessed. However, by reference to the Department's rules governing civil administrative penalties for violations of N.J.A.C. 7:26C-1.1 et seq., specifically, N.J.A.C. 7:26C-9.5, the penalties assessed reflect the base penalty for one day of violation for each offense. See N.J.A.C. 7:26C-9.5(b) and the tables thereunder. For the failure to conduct remediation as required by N.J.A.C. 7:26C-2.3(a), a non-minor violation, the base penalty for one day of violation is $15,000. For the failure to submit an initial receptor evaluation within the required timeframe as required by N.J.A.C. 7:26E-1.12(c), a non-minor violation, the base penalty for one day of violation is $25,000. Considering Respondents' failure to remediate from the time of initial spill in 1997, the date of the MOA application in 2003 and the dates of the Department's compliance calls in 2013 to remind Respondent Amer Lee of the remediation obligations concerning the Site, a penalty calculation based on one day of violation is very reasonable. I therefore ADOPT the ALJ's finding and conclude that Respondent must pay $40,000 in civil administrative penalties for the violations cited in AONOCAPA PEA 130001-019608.

The AONOCAPAs did not attach invoices for the fees owed, and neither the Department's motion papers nor the Initial Decision presented any detailed discussion concerning the site remediation fees and oversight costs owed by Respondents. I therefore make no findings regarding the fees owed and direct the Department to provide invoices and direction to Respondents for any annual remediation and cost oversight fees owed.

CONCLUSION

For the reasons stated above, I ADOPT the ALJ's findings and conclusions concerning AONOCAPA PEA 130001-019608 and AONOCAPA PEA 130002-019608. I REJECT the ALJ's penalty rationale concerning AONOCAPA PEA 130001-019608 and modify the Initial Decision to reflect that the penalties are based on N.J.A.C. 7:26C-9.5(b). Respondents are directed to conduct remediation of the Site and submit an initial receptor evaluation as required by AONOCAPA PEA 130001-019608. Such remediation must be in compliance with the requirements of SRRA. Respondents are directed to pay penalties of $40,000 within thirty (30) days of the date of this Order as provided in Paragraph 23 of the AONOCAPA. The Department is directed to provide, within twenty (20) days of the date of this Final Decision, an invoice for payment of outstanding annual remediation and oversight fees, together with instructions to Respondents regarding how to make the payments. Respondents shall pay the outstanding fees within thirty-five (35) days of receipt of the invoice.

IT IS SO ORDERED.

February 16, 2016
DATE

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, SITE REMEDIATION
COMPLIANCE AND ENFORCEMENT v.
HAINESVILLE GAS & AUTO SERVICE SITE AND AMER LEE

OAL DKT. NO. ECE 08587-14
AGENCY DKT. NO. PEA 130001-019608

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, SITE REMEDIATION
COMPLIANCE AND ENFORCEMENT v.
HAINESVILLE GAS & AUTO SERVICE SITE
AND HAINESVILLE GAS & AUTO SERVICE

OAL DKT. NO. ECE 08589-14
AGENCY DKT. NO. PEA 130002-019608

SERVICE LIST

Eric S. Pasternack, DAG
Division of Law
R. J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, N.J. 08625
Email: eric.pasternack@lps.state.nj.us

Amer Lee
Hainesville Gas & Auto Service
274 Route 206 North
Hainesville, N.J. 07826
Email: amerlee206@yahoo.com