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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT, Petitioner, v. ARJUN GOYAL,[1] Respondent.	)	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT NO.: ECE 08637-14 AGENCY REF. NO.: PEA 130002-004326

This Order addresses the appeal of an Administrative Order and Notice of Civil Administrative Penalty (AONOCAPA) issued on August 8, 2013, by the New Jersey Department of Environmental Protection (Department), Bureau of Enforcement and Investigations (Bureau), against Arjun Goyal (Respondent), for violations of the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11a et seq., the Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq., the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and implementing regulations, relating to property located at 501 White Horse Pike, Egg Harbor City, Atlantic County, Block 206, Lot 1.01 (site), owned by Respondent.

[1] Although the initial decision identifies two respondents, Gas Stop Site and Arjun Goyal, the administrative order and notice of civil administrative penalty was issued against Mr. Goyal as the alleged violator, regarding the Gas Stop site. The caption has been corrected accordingly.

A gas station used to be operated on the site by a third party, Egg Harbor Gas & Go, LLC (Gas & Go). In the AONOCAPA, the Department alleged that Respondent failed to conduct remediation at the site as required by N.J.A.C. 7:26C-2.3(a)3 and failed to conduct a proper vapor intrusion investigation as required by N.J.A.C. 7:26E-1.15(b) and (c). The Department directed Respondent to conduct the remediation and vapor intrusion investigation. The Department assessed a $15,000 penalty for the failure to conduct the remediation and a $25,000 penalty for the failure to conduct a proper vapor intrusion investigation.[2]

On September 26, 2017, Administrative Law Judge (ALJ) John S. Kennedy issued an Initial Decision finding Respondent liable for the violations, upholding the total penalty of $40,000, and ordering that Respondent complete the remediation of the site. Respondent filed exceptions to the Initial Decision, and the Department filed a reply.

For the reasons set forth herein, I ADOPT in part, REJECT in part, and MODIFY in part the Initial Decision.

FACTUAL AND PROCEDURAL BACKGROUND

This matter involves the discharge of hazardous substances from underground storage tanks (USTs), including three 3,000-gallon unleaded gasoline USTs and two 2,000-gallon unleaded gasoline USTs, which were operated on the site until 2010. The Department initially

[2] The AONOCAPA also alleged that Respondent failed to submit a site investigation report within the required timeframe, in violation of N.J.A.C. 7:26E-3.14(a)2, assessing a penalty of $15,000. However, the penalty assessment worksheet cited N.J.A.C. 7:26E-1.15(b), failure to conduct a proper site investigation. Since DEP withdrew this alleged violation and penalty in its motion for summary decision in the OAL, the discrepancy need not be resolved here.

discovered a discharge of gasoline in the tank field soils during a November 2004 inspection of the site. The resulting soil investigation showed sampling results that were below the applicable soil cleanup criteria.

In 2007, the Department discovered another suspected release and directed Gas & Go to perform a site investigation. On January 22, 2008, concentrations of benzene, toluene, ethylbenzene, xylenes, 1,2-dichloroethane (1,2-DCA), and methyl tertiary butyl ether (MTBE) above the applicable Class I-PL (Protection Area) ground water quality standards (GWQS) were detected. Moreover, a residential property was identified within 30 feet of the ground water contamination. After the USTs failed a tank tightness test and because a discharge occurred, Respondent took the USTs out of service on January 1, 2010.

The discharge of hazardous substances and site contamination triggered the site investigation and remediation requirements set forth in N.J.A.C. 7:26C-2. The proximity of a residential property within 30 feet of the ground water contamination also triggered the requirement to conduct a vapor intrusion investigation. N.J.A.C. 7:26E-1.15.

Respondent's consultant, MIG Consulting, LLC (MIG), submitted a Remedial Investigation Report dated March 23, 2011, to the Department. The report showed that on August 20, 2010, benzene, toluene, ethylbenzene, xylenes, MTBE and tertiary-butyl alcohol (TBA) were detected in the ground water at the site at concentrations exceeding the GWQS. According to MIG's September 10, 2013, letter to Respondent summarizing the status of site investigation activities, MIG installed three monitoring wells at the site on July 22, 2010. On

July 15, 2011, and again on July 25, 2013, benzene, xylenes, toluene, and lead were detected in the ground water at the site at concentrations above the GWQS.

Despite multiple compliance assistance calls by the Department to Respondent, Respondent had not corrected the violations by the time the Department conducted a follow-up compliance evaluation on July 9, 2013. As a result, on August 8, 2013, the Department issued the AONOCAPA contested here.

Respondent timely requested a hearing to contest the AONOCAPA. The Department granted the hearing request and transmitted the matter to the Office of Administrative Law (OAL), where it was assigned to ALJ Bruce M. Gorman.

On October 24, 2014, after the AONOCAPA had been issued, Respondent submitted a Receptor Evaluation Form, which certified that the ground water data triggering a vapor intrusion investigation was received on July 29, 2011. Therefore, according to Respondent's own report, Respondent was required to conduct the vapor intrusion investigation and provide the results to the Department by December 26, 2011, at the latest. N.J.A.C. 7:26E-1.15(c). However, Respondent submitted the report on January 6, 2015, by electronic mail and subsequently on January 6, 2017, in hard copy.

In the OAL, after pre-hearing and status calls, on March 10, 2015, ALJ Gorman issued a notice of hearing for December 7, 2015. On June 23, 2015, the ALJ adjourned the hearing due to a scheduling conflict, to be rescheduled at a later date. ALJ Gorman subsequently retired and the matter was reassigned to ALJ Kennedy.

On January 11, 2017, the Department filed a motion for summary decision. In its motion, the Department argued that no dispute of material fact existed as to whether Respondent was the owner of the property on which there was a discharge of hazardous substances. Therefore, Respondent was strictly liable under the Spill Act to conduct remediation in accordance with N.J.A.C. 7:26C-2.3(a), which Respondent does not dispute he failed to do. The Department also argued Respondent was required to provide the results of a vapor intrusion investigation to the Department by December 26, 2011, but missed the deadline by at least three years.

By letter dated January 13, 2017, Respondent objected to the Department's motion for summary decision, arguing that N.J.A.C. 1:1-12.5 required a motion for summary decision to be filed at least 30 days before the first scheduled hearing date. On February 1, 2017, ALJ Kennedy directed Respondent to file any opposing papers within 20 days, or by February 21, 2017. Respondent submitted his opposition on or around February 24, 2017.

In his opposition, Respondent claimed that he lacked funds to conduct the remediation and that the Department, not he, was responsible for funding remediation. Respondent also argued that the Department unreasonably withheld certain monies from the Department's Petroleum and Underground Storage Tank Remediation, Upgrade and Closure Fund (UST Fund) to which Respondent claimed he was entitled, which further prevented Respondent's timely remediation. As to the failure to file the vapor intrusion investigation report, Respondent did not claim that he timely submitted it; rather, he argued that he was denied access to the neighbor's property which prevented him from timely completing the vapor intrusion

investigation. Finally, Respondent again asserted that the ALJ should deny the motion for summary decision as a matter of law because the motion was not filed at least 30 days before the initially scheduled hearing date of December 7, 2015, which the ALJ adjourned in June 2015.

The Department filed a reply on or around March 7, 2017. The ALJ held a case management conference on June 12, 2017, and both parties filed additional papers on June 13, 2017. The ALJ issued an Initial Decision on September 26, 2017, granting the Department's motion for summary decision. The ALJ found there was no issue as to any material fact regarding Respondent's failure to conduct remediation as required by N.J.A.C. 7:26C-2.3(a)3 or Respondent's failure to timely conduct a vapor intrusion investigation. Respondent's defenses of lack of funds and lack of access did not excuse his admitted violations, for which he was strictly liable.

Respondent filed exceptions to the Initial Decision, in which he reiterated his arguments made in opposition to the Department's motion for summary decision. He argued that the motion was untimely, that lack of funds prevented him from complying with his remediation obligations, and that lack of access to his neighbor's property prevented him from timely complying with his vapor intrusion investigation obligations.

The Department in its reply responded that N.J.A.C. 1:1-12.5 did not preclude the motion for summary decision because the December 7, 2015, hearing had been adjourned and no new hearing date scheduled. The Department also reiterated its arguments, raised in its motion for summary decision, that Respondent's failure to comply with N.J.A.C. 7:26C-2.3(a)3

and N.J.A.C. 7:26E-1.15(b) and (c) was undisputed and therefore the ALJ properly granted the Department's motion for summary decision.

DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). When a party moves for summary decision, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue which can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply "sit on his or her hands," but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is "'sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Contini, supra, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). The ALJ properly applied this standard and granted the Department's motion.

As the undisputed owner of property where a discharge of hazardous substances occurred, under the Spill Act, the Brownfield Act, and the SRRA, Respondent is strictly liable to remediate the site. N.J.S.A. 58:10-23.11b; N.J.S.A. 58:10B-1.3(a) and (b); see Tree Realty, Inc. v.

Dep't of Treasury, 205 N.J. Super. 346, 348 (App. Div. 1985) (finding appellant "responsible as owner of the property for all cleanup and removal costs without regard to fault" because "'in any way responsible[]' include[s] any owners or controllers of the property at the time of the unlawful discharge"). Respondent does not dispute his liability. In his answer to the AONOCAPA included with his hearing request, Respondent admitted he is responsible for the discharged hazardous substances and for the remediation of same and strictly liable for all cleanup and removal costs. However, he argues that, procedurally, the Department's motion for summary decision was infirm. He also argues that equitable reasons should have precluded the grant of summary decision. These arguments lack merit and are rejected.

First, Respondent argues that the ALJ should have rejected the Department's motion for summary decision as "out of time" under N.J.A.C. 1:1-12.5(a),[3] which requires that summary decision motions be filed no later than 30 days prior to the first scheduled hearing date, because it was not filed within at least 30 days before the first scheduled hearing date, which Respondent claims was December 7, 2015, or by a date ordered by the ALJ. I disagree. The December 7, 2015 hearing date was adjourned by the first assigned ALJ on June 23, 2015. Thus, there was no hearing date pending when the Department filed its motion. To have required the Department to submit a motion for summary decision 30 days before an adjourned hearing date, even if that was the first hearing date scheduled, makes no sense and cannot be what the rule intended. As the Department noted in its reply, the intent of the OAL rule was to prevent late adjournments of a hearing date actually scheduled.

[3] Respondent cited N.J.A.C. 1:1-12.5(f), which relates to review of partial summary decisions. From his argument, it is apparent he meant to cite N.J.A.C. 1:1-12.5(a).

Moreover, the rule gives the ALJ discretion to allow motions for summary decision to be filed at other times. The ALJ properly exercised his discretion to allow the Department's motion with an opportunity for Respondent to file opposition, which he did.

The right to a hearing is mandated only when there are disputed adjudicatory facts. See Contini, supra, 286 N.J. Super. at 120. Here, there were none. The Department's motion was properly considered and the Initial Decision is modified to expressly so find.

Second, Respondent argues that he was not in violation of N.J.A.C. 7:26E-1.15(b) and (c) because he ultimately completed the vapor intrusion investigation and submitted the required vapor intrusion investigation report by electronic mail on January 16, 2015, and submitted the report in hard copy with appendices on January 6, 2017. Respondent argues that his admitted delay in filing the report was because the owner of the neighboring property refused to allow Respondent's Licensed Site Remediation Professional (LSRP) access. The Department counters that the ALJ properly found that the denial of access is not a defense and that N.J.A.C. 7:26C-8.2(d) provides the procedure for gaining access and requesting additional compliance time from the Department if efforts to obtain access fail. Respondent does not claim he followed the regulatory procedure as provided in N.J.A.C. 7:26C-8.2(d). The Department additionally notes that the LSRP did not attempt to access the neighboring property until well after the report was due.

Pursuant to N.J.A.C. 7:26E-1.15, a person responsible for conducting remediation shall conduct a receptor evaluation of the vapor intrusion pathway when a volatile organic ground water contaminant that is petroleum hydrocarbon based is identified at a concentration

exceeding the applicable vapor intrusion ground water screening level and is within 30 feet of a building. Here, Respondent admitted that concentrations of benzene, ethylbenzene, and xylenes, which are petroleum hydrocarbon based, as well as 1,2-DCA and MTBE, were identified in ground water samples collected from the site on January 22, 2008, at concentrations exceeding the applicable vapor intrusion ground water screening levels. Respondent also admitted that a residential property was located within 30 feet of the contamination. Thus, based on Respondent's own admissions, he was required to conduct a receptor evaluation and a vapor intrusion investigation in accordance with N.J.A.C. 7:26E-1.15. Respondent had failed to do so at the time the AONOCAPA was issued.

Additionally, according to the Receptor Evaluation Form submitted by Respondent's LSRP on October 24, 2014, the date on which laboratory data was available and confirmed contamination above the ground water remediation standards was July 29, 2011.[4] Thus, Respondent was required to conduct a vapor intrusion investigation by December 26, 2011, or if he could not, to follow the procedures set forth in N.J.A.C. 7:26C-8.2(d) for obtaining access to the site. Respondent does not claim he timely conducted the vapor intrusion investigation. He simply argues that he should not be penalized, since he did attempt to gain access to the neighboring property but could not do so within the regulatory timeframe, yet ultimately did complete the investigation and submit the report which showed no exceedances of the applicable screening levels.

[4] The Initial Decision incorrectly cites this date as July 25, 2011.

Although Respondent submitted information showing his ongoing efforts to remediate the site, the fact that he failed to conduct the vapor intrusion investigation within the required timeframe is undisputed. Pursuant to N.J.A.C. 7:26C-9.5, the base penalty for this violation is $25,000.[5] Therefore, I agree that the penalty was properly assessed.

Finally, Respondent argues that his failure to remediate the site, as he admits was required, was the Department's fault. He argues that the Department has failed to fund remediation activities, improperly withheld $50,000 from the UST Fund that Respondent had been awarded for closure activities, and otherwise should be held responsible for Respondent's failure to remediate the site. The Department counters that the Department is not responsible for finding funds to remediate Respondent's site. The Department further asserts that the Underground Storage Tank Finance Act (UST Finance Act), N.J.S.A. 58:10A-37.1 et seq., prohibits the use of UST Fund monies for Respondent to remediate the site, because the USTs on site had already been upgraded to be compliant with the comprehensive regulatory program and standards required by L. 1986, c. 102, codified at N.J.S.A. 58:10A-21 et seq. (UST regulatory program). As a threshold matter, I agree that remediation of the site is Respondent's obligation and the Department is not responsible for funding remediation. I also agree that the UST Finance Act prohibits the use of the UST Fund grant monies to be used to remediate the site. Thus, Respondent's argument is rejected.

[5] The Initial Decision incorrectly references N.J.A.C. 7:26-5.5(i), which pertains to civil administrative penalties under the Solid Waste Management Act; thus that part of the Initial Decision is rejected. The enforcement provisions of the SRRA and the Spill Act are set forth in N.J.A.C. 7:26C-9. N.J.A.C. 7:26C-9.5 provides for base penalties of non-minor violations, such as the violations at issue here.

The UST Finance Act established the UST Fund in the Economic Development Authority (EDA) to be administered by the EDA and the Department. The UST Finance Act was initially enacted in 1997 to provide financial assistance to eligible owners required to upgrade or close their USTs to comply with state or federal law. The statute sets forth specific requirements and conditions for the use of UST Fund monies. As relevant here, the UST Finance Act prohibits the award of financial assistance to remediate a discharge from a petroleum underground storage tank if the discharge began after the tank was upgraded to meet the Department's regulations promulgated to effectuate the UST regulatory program.

The record shows that the USTs removed from the site had been upgraded in 1998 to be compliant with the Department's UST regulatory program. Accordingly, the funds to which Respondent claims he is entitled may not be used to remediate the site. As such, his argument fails.

Because Respondent does not claim he remediated the site, there is no dispute that he violated and continues to be in violation of N.J.A.C. 7:26C-2.3(a)3. Under N.J.A.C. 7:26C-9.5, the base penalty for this violation is $15,000. Therefore, I agree that the penalty was properly assessed.

CONCLUSION

For the reasons set forth therein and above, the Initial Decision of ALJ Kennedy is HEREBY ADOPTED in part, REJECTED in part, and MODIFIED in part. Respondent is directed to pay the penalty of $40,000 within twenty (20) days of this Final Decision, as set forth in

paragraph 26 of the AONOCAPA. Respondent is further directed to conduct the remediation in accordance with N.J.A.C. 7:26C-1.2(a), as set forth in paragraph 18(1) of the AONOCAPA.

IT IS SO ORDERED.

DATE: 2/12/18

Catherine R. McCabe, Acting Commissioner
New Jersey Department of
Environmental Protection

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ENVIRONMENTAL PROTECTION,
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v.
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