State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY DECISION MOTION

OAL DKT. NO. ECE 08637-14
AGENCY DKT. NO. PEA 130002-004326

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,

Petitioner,

v.

GAS STOP SITE AND ARJUN GOYAL,

Respondents.

Bethanne M. Sonne, Deputy Attorney General, for petitioner (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Sandford F. Schmidt, Esq., for respondent (Law Offices of Schmidt & Tomlinson, attorneys)

Record Closed: September 12, 2017 Decided: September 26, 2017

BEFORE **JOHN S. KENNEDY,** ALJ:

STATEMENT OF THE CASE

This matter was filed as an appeal by Gas Stop Site and Arjun Goyal (respondent) from an Administrative Order and Notice of Civil Administrative Penalty Assessments (AONOCAPA) issued by petitioner New Jersey Department of Environmental Protection (NJDEP or Department) on or about August 8, 2013, alleging that the Gas Stop Site, which is located at XXX White Horse Pike, Egg Harbor City, Atlantic County, otherwise known as Block 206, Lot 1.01 on the tax maps of Egg Harbor City (Property or Site) is contaminated with hazardous substances that were discharged to the land and waters and for which certain persons or entities are strictly liable to remediate pursuant to the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24, the Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 through -31, the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 through -29 and N.J.A.C. 7:26C-2.3(a)3 and 7:26E-1.15(b) & (c), as set forth in more detail below. Respondent, as the current owner of the Site, responded to the AONOCAPA and requested an administrative hearing on or about September 10, 2013.

This matter was transmitted by the NJDEP to the Office of Administrative Law (OAL) on July 10, 2014, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the Honorable Bruce M. Gorman, Administrative Law Judge (ALJ) on August 12, 2014, and reassigned to me on June 2016, upon Judge Gorman's retirement.

Petitioner, NJDEP, submitted a Notice of Motion for Summary Decision and Brief with attachments in support under cover of January 10, 2017. Respondent filed opposition to the motion on February 24, 2017, and petitioner filed a reply on March 7, 2017. A case management conference was conducted on June 12, 2017, and additional arguments were filed by both parties on June 13, 2017.

MOTION UNDER CONSIDERATION

NJDEP moves for summary disposition on the AONOCAPA on the grounds that the facts are not in dispute and that the NJDEP is entitled to an order affirming the penalties assessed in the amount of $40,000. It argues that liability has been established through undisputed facts. It further argues that the penalties assessed in the AONOCAPA was an appropriate exercise of the NJDEP's discretion and that the respondent must be ordered to comply with the affirmative obligations of the AONOCAPAs.

FACTUAL DISCUSSION

Based upon the papers submitted, I **FIND** the following undisputed **FACTS**:

1. Respondent, Arjun Goyal, has owned the Site from October 28, 1997 to present.

2. Respondent leased the Site to Egg Harbor Gas and Go, L.L.C., who operated regulated Underground Storage Tank (UST) systems at the Site from June 25, 1998, until 2010, when the USTs were taken out of service.

3. On November 15, 2004, the Department conducted an inspection of the site and discovered a discharge of gasoline in the tank field soils. On July 25, 2011, hazardous substances, including benzene, toluene, ethyl benzene, xylenes, 1,2-dichloroethane and methyl tertiary butyl ether (MTBE) were discovered by the NJDEP in ground water at concentrations exceeding the Department's applicable Ground Water Quantity Standards.

4. There is a residential property within thirty feet of the groundwater contamination. The proximity of the property triggers respondent's obligation to conduct a vapor intrusion investigation.

5. The Department made compliance assistant calls and sent e-mails to respondent between February 1, 2012, and July 17, 2013, at which time the department explained that respondent was out of compliance and needed to complete a vapor intrusion investigation and remediate the Site pursuant to SRRA. On July 9, 2013, the Department conducted a follow-up compliance evaluation of the Site and determined that respondent had not corrected the violations.

6. The vapor intrusion investigation was conducted in December 2014, but a hard copy of the investigation report was not provided to the Department until December 30, 2016. The vapor intrusion report revealed that volatile organics detected in the sub-slab and indoor air samples are below the Residential Indoor Air Screening Levels.

7. The vapors intrusion investigation was not conducted until December 2014, because respondent could not obtain permission from his neighbor to conduct the beeper intrusion investigation.

8. The DEP's Petroleum and Underground Storage Tank Remediation Upgrade and Closure Fund (PUSTRUCF) granted funds in the amount of $139,000 to respondent for the closure of USTs that were in upgrade compliance pursuant to the Underground Storage Tank Finance Act (USTFA). $69,502 was dispersed for the removal of the USTs.

9. In the AONOCAPA, the NJDEP cited the respondent for the following violations: failure to conduct remediation as required pursuant to N.J.A.C. 7:26C-2.3(a)3; failure to conduct a proper site investigation pursuant to N.J.A.C. 7:26E-3.14(a)2; and failure to conduct a proper vapor intrusion investigation pursuant to N.J.A.C. 7:26E-1.15(b) & (c). [Opitz Cert., Exhibit E]

10. NJDEP assessed a $15,000 penalty for the respondent's failure to conduct remediation as required pursuant to N.J.A.C. 7:26C-2.3(a)3. In accordance with the regulatory penalty schedule and its discretion, the NJDEP assessed a $15,000 penalty (day 1 x $15,000 per day) for the first day that the respondent failed to conduct remediation.

11. NJDEP assessed a $15,000.00 penalty for the respondent's failure to conduct a proper site investigation in violation of N.J.A.C. 7:26E-3.14(a)2[1]

12. NJDEP assessed a $25,000.00 penalty for the respondent's failure to conduct a proper vapor intrusion investigation pursuant to N.J.A.C. 7:26E-1.15(b) & (c). In accordance with the regulatory penalty schedule and its discretion, NJDEP assessed a $25,000 penalty (day 1 x $25,000 per day) for the first day that the respondent failed to conduct a proper vapor intrusion investigation.

13. Thus, the AONOCAPA assessed penalties against respondent in the total amount of $55,000, $40,000 of which is still being sought.

ANALYSIS AND CONCLUSIONS OF LAW

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." According to informal representations of respondent's counsel, respondent cannot afford to defend the

[1] Pursuant to petitioner's Brief in support of Summary Decision, NJDEP has decided not to pursue enforcement of N.J.A.C. 7:26E-3.14 (a)2.

motion, the funds escrowed by the predecessor owner of the Property have been depleted, and the Property has been named in an action in foreclosure by its bank. Of course, a litigant cannot just "sit on his or her hands and still prevail" on a summary decision motion. Housel for Housel v. Theodoridis, 314 N.J. Super. 597, 604 n.3 (App. Div. 1998). As stated by the Court in Housel, the following well-established standard was still binding on parties even after Brill:

> [I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954).

It is also clear as a matter of law that liability for a violation of environmental protection statutes like the Spill Act is imposed not on the basis of negligence but as a matter of strict liability. N.J.S.A. 58:10-23.11g(c). Subsection (c)(3) provides, in relevant part:

> In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993, on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993.

Thus, the NJDEP bears the burden only of proving the statutory violation. The landowner's or operator's intent to violate is not an essential element for these types of causes of action. See NJDEP v. Lewis, 215 N.J. Super. 564, 572–76 (App. Div. 1987).

In the present AONOCAPA, NJDEP determined that the property owner had failed to conduct remediation as required pursuant to N.J.A.C. 7:26C-2.3(a)3. Respondent asserts that remediation has not been completed due to lack of funds and because the NJDEP has failed to release $50,000 of the $139,000 he obtained from the state to fund the cleanup. The PUSTRUCF granted $139,000 to respondent for the closure of USTs that were in upgrade compliance pursuant to the USTFA. $69,502 was dispersed for the removal of the USTs. These funds are to be used exclusively for the removal of the UST's. The USTFA strictly forbids the use of these funds for remediation of discharges from upgraded USTs. See N.J.S.A. 58:10A-37.7. It is clear, however, that respondent did not conduct the remediation prior to when the NJDEP issued the ANOCAPA and still has not completed the remediation. As this regulation is a strict liability regulation, there can be no consideration for the cause of the delay in conducting the remediation.

In the AONOCAPA, NJDEP also exercised its discretion with respect to the level of penalties to be assessed, yet are consistent with the penalty matrix. Respondent has been an owner of the Property for over ten-years with full knowledge of what it had acquired, inclusive of the UST contamination.

> The Department may adjust the amount determined pursuant to (f), (g) and (h) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (f) above, on the basis of the following factors:
>
> 1. The compliance history of the violator;
>
> 2. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation for which the penalty is being assessed;
>
> i. Immediate implementation of measures to effectively

> mitigate the effects of the violation will result in a reduction to the bottom of the range.
>
> 3. The nature, timing and effectiveness of any measures taken by the violator to prevent future similar violations;
>
> i. Implementation of measures that can reasonably be expected to prevent a recurrence of the same type of violation will result in a reduction equal to the bottom of the range.
>
> 4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
>
> 5. Other specific circumstances of the violator or the violation.
>
> [N.J.A.C. 7:26-5.5(i)]

In this instance, NJDEP was lenient in assessing respondent for only "one day" under each of the potentially continuing violations. Such is certainly reasonable under all the circumstances and shall not be adjusted herein.

Respondent contends that since the vapor intrusion report was ultimately prepared and provided to the NJDEP, he should not be assessed the $25,000 fine. The basis for this fine is set forth in the certification of Elizabeth Opitz at paragraph 46. She relies on the chart set forth at N.J.A.C. 7:26-9.5(b). The fine is assessed for a violation described as "failure to conduct a proper vapor intrusion investigation." Respondent argues that there is no requirement within the chart that the vapor intrusion investigation be conducted in a timely manner. However, in accordance with N.J.A.C. 7:26E-1.15(c), respondent was required to conduct a vapor intrusion investigation, and notify the department of the results, within 150 days after determining that need for a vapor intrusion investigation. On July 25, 2011, hazardous substances, including benzene, toluene, ethyl benzene, xylenes, 1,2-dichloroethane and methyl tertiary butyl ether (MTBE) were discovered by respondent in ground water at concentrations exceeding the Department's applicable Ground Water Quantity Standards. Therefore, respondent was required to conduct a vapor intrusion investigation, and notify the department of the results in 150 days, from July 25, 2011, which was December 22,

2011. The vapor intrusion investigation was conducted in December 2014, and a hard copy of the investigation report was not provided to the NJDEP until December 30, 2016. N.J.A.C. 7:26C-8.2(d) requires that if the property owner does not grant access, the person responsible for conducting the remediation shall initiate and vigorously pursue an action in Superior Court. There has been no indication by respondent that such an action was taken.

Based on the foregoing, it is clear and I **CONCLUDE**, as a matter of undisputed fact, that respondent is liable for the full amount of the penalties assessed in the AONOCAPA for violations of N.J.A.C. 7:26C-2.3(a)3 and N.J.A.C. 7:26E-1.15(b) & (c) in the total amount of $40,000.

ORDER

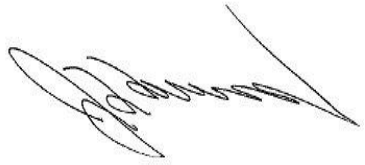
For the reasons set forth above, the Motion for Summary Disposition filed by the petitioner, NJDEP is hereby **GRANTED** and the AONOCAPA with a total penalty assessment of $40,000 shall be **AFFIRMED**. It is further **ORDERED** that respondent is also liable to complete remediation of the Site.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR,**

OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



September 26, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency:

Mailed to Parties:

JSK/dm