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.

POLIDORO PROPERTIES, LLC,

Respondent.

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO.: ECE 08989-14
AGENCY REF. NO.: PEA 130001-032975

This Order addresses the appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on February 14, 2014 by the Department of Environmental Protection (Department) against Polidoro Properties, LLC (Respondent).[1] The AONOCAPA assessed $59,600 in civil administrative penalties against the Respondent for violations of 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.A.C. 58:10B-1.3, and the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and their implementing regulations, relating to the Bergen Auto site, a former gas station, located at 160 North Washington Avenue, Bergenfield, Bergen County, Block 85, Lot 8 (site or property). Specifically, the Department alleged that Respondent failed to hire a Licensed Site Remediation Professional (LSRP) and provide the name and license information

[1] Although the Initial Decision identifies two respondents, Bergen Auto and Polidoro Properties, LLC, the AONOCAPA was issued against Polidoro Properties, LLC, as the violator, regarding the Bergen Auto site. The caption above has been corrected accordingly.

of the LSRP and scope of remediation, in violation of N.J.A.C. 7:26C-2.3(a)1 and 2, which carries a base penalty of $15,000; failed to conduct the remediation, in violation of N.J.A.C. 7:26C-2.3(a)3, which carries a base penalty of $15,000; failed to pay fees and oversight costs, in violation of N.J.A.C. 7:26C-2.3(a)4, which carries a base penalty of 100% of the amount of fees in arrears; and failed to conduct and submit an initial receptor evaluation, in violation of N.J.A.C. 7:26E-1.12(c), which carries a base penalty of $25,000. The Department assessed the base penalty as set forth in N.J.A.C. 7:26C-9.5, for one day of noncompliance for each of the violations, for a total of $59,600.

The Department granted Respondent's request for a hearing to contest the AONOCAPA and transferred the matter to the Office of Administrative Law (OAL), where it was assigned to Administrative Law Judge (ALJ) Gail M. Cookson. In the OAL, the Department filed a motion for summary decision, which Respondent did not oppose. On November 13, 2015, the ALJ issued an Initial Decision finding Respondent liable for the violations alleged in the AONOCAPA, affirming the $59,600 penalty, and requiring payment of overdue annual remediation fees to the Department, which the ALJ found totaled $11,500. On November 25, 2015, the Department filed exceptions to clarify that the overdue annual remediation fees totaled $6,900, not $11,500. Respondent did not file exceptions to the Initial Decision.

Based on a review of the record, I ADOPT in this Final Decision the ALJ's affirmance of the AONOCAPA, the violations alleged therein, and the penalties in the total amount of $59,600 assessed by the Department, for the reasons below. I further ADOPT the ALJ's finding that the Respondent owes the Department annual remediation fees as assessed, but MODIFY the finding to reflect that the amount is $6,900 and not $11,500. I REJECT the ALJ's reference to N.J.A.C. 7:26-5.5(i) as the basis for the Department's penalty calculation and rely instead on N.J.A.C. 7:26C-9.5 and -9.6, as correctly cited by the Department.

FACTS AND PROCEDURAL BACKGROUND

Respondent has owned the property since 2003, when it was purchased from the Estate of Robert Hikade, Sr. (Estate).[2] According to the Underground Storage Tank (UST) closure report completed in 1998 by the Estate's consultant, GZA GeoEnvironmental, Inc. (GZA), the property was used as a Sunoco gasoline station until it was decommissioned approximately 15 years before the report was completed. In 1997, magnetic anomalies were detected during a geophysical survey of the site, indicating the presence of USTs. Further investigation showed that one UST, a half UST, and a waste oil tank remained on site. Soil borings showed elevated organic vapor meter readings, which measure the presence of volatile organic compounds. Groundwater samples collected from temporary well points near the USTs revealed the presence of one or more of what are known as the BTEX compounds (benzene, toluene, ethylbenzene, total xylenes) and naphthalene above the Department's applicable Ground Water Quality Standards. BTEX and naphthalene are hazardous substances as defined under the Spill Act. Based on the subsurface investigation, a spill was reported to the Department.

Soil and groundwater sampling conducted by GZA in 2000 showed that BTEX concentrations remained in excess of the Impact to Ground Water Soil Cleanup Criteria and the Ground Water Quality Standards, N.J.A.C. 7:9C. In 2002, GZA arranged for the excavation and removal of 572.16 tons of contaminated soil from the site. Post-excavation sampling showed the continued presence of BTEX in concentrations above the applicable Ground Water Quality Standards. In June 2002, GZA submitted a Soil Remediation and Groundwater Investigation Report to the Department for review. After reviewing the report and conducting a site inspection, by letter dated July 8, 2002, the Department

[2] The ALJ found that Robert Hikade, Sr. owned the site from about April 22, 1997 until about March 27, 2003, when it was sold to Respondent. (Initial Decision at 3, ¶ 1) However, the record indicates that in 1997, the site was being administered by Robert (Bob) Hikade on behalf of the Estate, until it was sold to Respondent. Certification of David Rubin (Rubin Certif.) ¶¶ 7, 20, Exhs. A and H.

directed the Estate to continue to investigate and remediate the contaminants in the soil and groundwater. GZA's Supplemental Remedial Investigation and Remediation Action Report submitted in 2004 indicated that BTEX remained in the groundwater. Groundwater samples obtained in September 2007 still contained benzene, ethylbenzene, xylene and naphthalene in concentrations above the Ground Water Quality Standards.

In 2012, Stephen Hikade wrote to the Department advising that the Hikade family no longer had any contact with the property and that the Department should contact Respondent with any further inquiries regarding the property. In March 2012, the Department sent a letter to Respondent notifying it of its responsibility to hire an LSRP and complete a remedial investigation. In May and September 2013, the Department attempted to place compliance assistance calls to four phone number associated with Respondent. However, the phone numbers were either disconnected or no one answered. The Department was able to leave a message in March 2014, but Respondent did not return the Department's call or comply. As a result, on February 14, 2014, the Department issued the AONOCAPA, directing Respondent to hire an LSRP and provide the Department with the required information, N.J.A.C. 7:26C-2.3(a)1 and 2; remediate the site, N.J.A.C. 7:26C-2.3(a)3; pay required annual remediation fees, N.J.A.C. 7:26C-2.3(a)4; and complete an initial receptor evaluation, N.J.A.C. 7:26E-1.12(c). The Department assessed the base civil administrative penalties pursuant to N.J.A.C. 7:26C-9.5 for one day of Respondent's non-compliance with these obligations. On May 5, 2014, three months after the AONOCAPA was issued, Respondent retained an LSRP.

The Department's March 16, 2015 motion for summary decision was held to allow the parties to attempt to resolve the matter. When these efforts failed, the Department notified the ALJ and requested that the ALJ issue a decision on the motion.

LEGAL 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)).[3] Applying this standard, the Department's motion, unopposed by Respondent, was properly granted.

The Spill Act imposes strict liability for remediation and removal costs on any owner of real property where the person acquired the property on or after September 14, 1993, there was a discharge of a hazardous substance prior to acquisition, and the person knew or should have known of the discharge. N.J.S.A. 58:10-23.11g(c)(3). The Brownfield Act, as amended by the SRRA in 2009, imposes affirmative obligations on a person responsible for remediation, no matter when the remediation was first initiated. N.J.S.A. 58:10B-1.3(c)(3). A person responsible for conducting

[3] The court in Housel explained in a footnote that the governing standard on a summary judgment motion, set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), is very similar to the standard enunciated in Judson v. Peoples Bank and Trust Co., 17 N.J. 67 (1954), which applied in the years before Brill (not after, as the ALJ stated, Initial Decision at 8).

remediation includes any person who is any way responsible for a hazardous substance pursuant to N.J.S.A. 58:10-23.11(g), which was discharged at a contaminated site. N.J.S.A. 58:10B-1. Among other things, the responsible person must hire an LSRP,[4] remediate the contaminated site and pay fees and oversight costs required by the Department. N.J.S.A. 58:10B-1.3(b).

It is undisputed that there has been a discharge of hazardous substances at the site and that Respondent is a person responsible for remediating the site. In 1997, a discharge or spill was reported to the Department when volatile organic compounds common in gasoline were detected at elevated levels, i.e., above the applicable Impact to Ground Water Soil Cleanup Criteria and Ground Water Quality Standards, in the soil and groundwater at the site. UST closure activities and subsequent soil remediation, groundwater investigation, remedial investigation and groundwater monitoring by the Estate pre-dated Respondent's acquisition, beginning in approximately 1998 and continuing until approximately 2007. The investigation and subsequent monitoring revealed the continued presence of BTEX and naphthalene in the groundwater at the site, in concentrations above applicable Ground Water Quality Standards. While the investigative and remedial actions were taking place, in 2003, Respondent purchased the site.

It is also undisputed that Respondent did not comply with its statutory and regulatory obligations as alleged in the AONOCAPA. Therefore, Respondent's liability is established and the only remaining question is the appropriateness of the Department's penalty assessment.

The Department assesses penalties for violations of the Administrative Requirements for the Remediation of Contaminated Sites under N.J.A.C. 7:26C-9.5, not N.J.A.C. 7:26-5.5[5] as the ALJ found (Initial Decision at 9-10). See N.J.A.C. 7:26-9.1 (Scope). Violations are categorized as minor or non-minor; the latter – such as the violations at issue here – are not subject to a grace period. N.J.A.C.

[4] The SRRA required all persons responsible for conducting remediation to hire an LSRP by May 7, 2012. N.J.S.A. 58:10B-1.3(c)(3).
[5] N.J.A.C. 7:26-5.5 applies to violations of the solid waste rules.

7:26C-9.4(b) and 9.5. The rules set forth a base, i.e., minimum, penalty for each violation, N.J.A.C. 7:26C-9.5, which may be adjusted upward based on the violator's compliance history, N.J.A.C. 7:26C-9.6(a)1, and the violator's conduct, N.J.A.C. 7:26C-9.6(a)2.

The Department assessed the base penalty for each of the four violations alleged in the AONOCAPA. Although the violations were ongoing and "[e]ach day during which a violation continues constitutes an additional, separate, and distinct offense," N.J.A.C. 7:26C-9.2(b), the Department assessed the penalty for only the first day of non-compliance. The Respondent did not contest liability or demonstrate compliance. Thus, I find that the Department acted well within its authority and discretion in applying the penalty schedule set forth in N.J.A.C. 7:26C-9.5 for each of the violations alleged in the AONOCAPA. Accordingly, I ADOPT the Initial Decision affirming the AONOCAPA and the civil administrative penalties as assessed, but REJECT the ALJ's reference to N.J.A.C. 7:26-5.5(i) as the basis for the Department's penalty calculation.

The AONOCAPA also directed payment of required fees and oversight costs. A person responsible for conducting remediation must pay all fees and costs pursuant to an invoice the Department issues. N.J.A.C. 7:26C-4.9. Among such fees and costs is an annual remediation fee, which is calculated pursuant to N.J.A.C. 7:26C-4.2 and -4.3. When the Department issued the AONOCAPA in February 2014, Respondent owed annual remediation fees in the amount of $4,600. Since that time, the annual remediation fee for 2014 became due. According to the Department (Rubin Certif. ¶ 37, Exh. O), the total amount currently owed by Respondent is $6,900, not $11,500. Again, the Respondent did not contest liability or demonstrate compliance. Therefore, I ADOPT the Initial Decision affirming the AONOCAPA and MODIFY that decision to direct payment of the overdue annual remediation fees in the amount of $6,900.

CONCLUSION

For the reasons set forth therein and above, I ADOPT the ALJ's Initial Decision affirming the Department's AONOCAPA and directing payment of the annual remediation fees owed to the Department, as MODIFIED herein. Respondent is ORDERED to pay the civil administrative penalty of $59,600 as set forth in Paragraphs 24, 32 and 34 of the AONOCAPA and to pay the annual remediation fees owed, in the total amount of $6,900, within twenty (20) days from the date of this Final Decision.

IT IS SO ORDERED.

DATE: February 10, 2016

Bob Martin, Commissioner
New Jersey Department of Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, SITE REMEDIATION
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