State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NORTHERN BUREAU OF WATER COMPLIANCE AND ENFORCEMENT,
Petitioner,
v.
ACADEMY AUTO RECYCLERS INC.,
Respondent.

OAL DKT. NO. ECE 03730-15
AGENCY DKT. NO. PEA 130002-87741

Kevin Fleming, Deputy Attorney General, for petitioner (Gurbir Grewal, Attorney General of New Jersey, attorney)

Stuart Reiser, Esq., for respondent (Shapiro, Croland, Reiser, Apfel and DiIorio, attorneys)

Record Closed: March 15, 2018 Decided: March 20, 2018

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was filed as an appeal by Academy Auto Recyclers Inc. (Academy) from an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by petitioner, the New Jersey Department of Environmental

Protection (the Department), on or about June 24, 2014. The Department alleged that Academy violated the terms of its New Jersey Pollutant Discharge Elimination System (NJDEPS) Scrap Metal Processing/Auto Recycling General Permit by failing to ensure that fluids from the vehicles it dismantled drained properly. Academy requested an administrative hearing on July 14, 2014. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on March 19, 2015. The case was assigned to the Honorable Joan Bedrin-Murray, Administrative Law Judge, on March 23, 2015.

The Department filed a Notice of Motion for Summary Decision and a supporting brief and certifications on March 4, 2016. Academy opposed the Motion via brief and certifications filed on April 11, 2016. The Department replied to Academy's opposition via brief filed on April 19, 2016. Judge Bedrin-Murray heard oral argument on May 9, 2016, but left the OAL in or about December 2017, having not ruled on the pending Motion prior to her departure. The matter was reassigned to me on February 12, 2018. I spoke with counsel on February 26, 2018, and updated them on the status of the matter. It was agreed that we would speak again on March 15, 2018, after the parties had again reviewed the possibility of amicably resolving their dispute. Their discussions did not lead to settlement, and I closed the record on March 15, 2018.

I have reviewed the submissions of the parties and the accompanying documents, and have listened to the recording of the oral argument that took place in May 2016. My decision on the Motion follows.

FINDINGS OF FACT

Notwithstanding the opposition filed to the Motion, the material facts are uncontroverted and I **FIND**:

Academy is an automobile recycling facility that dismantles motor vehicles to sell parts and scrap metal. Its facility is located on the western bank of the Saddle River. At all times pertinent to the AONOCAPA, it operated under the terms and conditions of

a NJPDES stormwater permit issued by the Department in accordance with the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1, et seq. (WPCA).

The Department inspected Academy's facility on June 12, 2009, and issued a Notice of Violation (NOV) on June 30, 2009. Academy was cited for failure to implement Best Management Practices (BMPs) that would prevent the exposure of fluids from vehicles and other scrap materials to stormwater or the ground surface; and failure to store all engine blocks, cores, transmission components, turnings, and other oily materials on a concrete pad that drained to an oil/water separator, in violation of Department regulations and the terms of its permit.

The inspection was conducted by Maria Coppola, who indicated in her report that while sections of concrete pads had been installed, they were not located near the oil/water separator nor were they pitched in the direction of the separator. She found that the auto crusher did not have a containment system that drained to an oil/water separator or other type of treatment system. She reported that "[n]umerous piles of auto parts were stored on the ground where the potential to discharge to groundwater of the State exist," and that "[n]umerous piles of scrap contained oily residue, [and] stormwater puddles were present with oily sheens." Coppola noted that engine blocks with transmissions attached were not covered to prevent exposure to stormwater runoff, and were located on a pervious surface. She found that a Stormwater Pollution Prevention Plan (SPPP) had not been updated since the late 1990's. The NOV directed that a report detailing remedial measures, and an implementation timeline, be submitted within thirty calendar days.

Via two separate letters dated July 27, 2009, Academy's President, Robert Slobodin, replied to the concerns raised in Coppola's NOV. He admitted that his SPPP was only "almost complete." He asked for an extension to finish setting up a properly functioning concrete slab. Slobodin stated that the last section of concrete was yet to be completed, and he indicated that "[o]nce that is finished all the source material and the car crusher will be positioned on the concrete which drains into the oil/water separator." Citing the lack of storm sewers and street flooding, Slobodin indicated that

a make-over of his facility was needed to facilitate the work needed to achieve compliance. He stressed that any oily sheen in puddles observed by Coppola was the result of stormwater that flows onto his property from surrounding streets and other properties. Slobodin did point out that he "strives to comply with all BMP's." He urged that spill kits were in use, and that containers of source material were stored so that they have no contact with stormwater. While he asked for an extension of time, Slobodin's letter did not specify when the needed adjustments to his facility would be completed. On March 4, 2010, the Department issued an NOV directly to Slobodin for failure to comply with the July 2009 NOV.

On June 16, 2011, the Department again inspected Academy's facility and observed continuing violations; to include, failure to drain fluids in a manner that prevents exposure of such fluids to stormwater or the ground surface, and failure to store all engine blocks, transmission components, turnings and other oily materials on a concrete pad that drained to an oil/water separator. Coppola observed such violations as failure to clean and degrease parts indoors in a manner which prevents contact of cleaning or degreasing products with stormwater or the ground; materials stored on unpaved surfaces; failure to incorporate a schedule in the SPPP for the maintenance and cleaning of oil/water separators as required by the permit; and failure to locate spill kits in close proximity to storage tanks and transfer areas.

Via letter dated July 29, 2011, Slobodin replied to the Department's concerns. His letter reveals progress, but he conceded that he had yet to fully comply with the permit's requirements, stating that while "the concrete pad is finished and the oil water separator…[is] installed and working…[w]e are in the process of moving all the source material onto the concrete pad." Slobodin took exception to some of Coppola's concerns; indicating that he takes precautions with fluids, have spill kits, and no open containers. But he nonetheless stated that "[w]e are asking for an extension to completely implement the SPPP."

The Department followed up with inspections in 2013 and 2014, and per a certification filed by Coppola, many violations she first noted in 2009 remained unrectified. Academy argues otherwise, but on August 1, 2013, Slobodin wrote to

Coppola and again asked for an extension of time to "completely implement the SPPP." His letter stated quite clearly that he is "in the process" of moving all source material to the concrete pad that drains to the oil/water separator. He noted that "[m]ost of the source material is on the concrete pad which drains to the separator." (Emphasis supplied). The letter reassured Coppola that "[w]e use BMP's in order to minimize where practical any discharges of contaminants." Nonetheless, I **FIND** that, by Slobodin's own admission, the work needed to fully comply with Departmental regulations and the terms of the permit was not yet compete in August 2013.

The AONOCAPA was issued by the Department on June 24, 2014. While it mentions the post-2011 inspections, it penalizes Academy only for the following violations in 2009 and 2011:

1. Failure to drain fluids from vehicles and other scrap materials in a manner that prevents exposure of such fluids to stormwater or the ground surface.
2. Failure to place engine blocks on a concrete pad that drains to an oil/water separator.

The AONOCAPA asserts that Academy failed to comply with the requirements of its NJPDES permit, Part IV, Section E.2.d.v and Part IV, Section E.2.k.i and ii. These sections provide that:

> Fluids must be drained in a manner that prevents exposure of such fluids to stormwater or the ground surface.
>
> All engine blocks, cores, transmission components, turnings, and other oily materials shall be placed on a concrete pad large enough to contain and support the entire pile of engine blocks or turnings.
>
> The drainage area of the concrete pad must drain into an oil/water separator.

I **FIND** that it is these specific violations, and only these specific violations, that are at issue.

In opposition to the Department's Motion, Slobodin relates via certification that Academy has two concrete slabs. The first is located at the entrance of the property and cars are initially inspected there. He urges that he tried to promptly respond to the Department's concerns; including some concerns he viewed as unfounded. He notes that the cars "are now drained of all fluids at the second concrete pad, which is located in the southwest corner of the property and drains to the oil/water separator." But conspicuously absent from the certification is any assertion that this method of draining cars was in place during the subject 2009 and 2011 inspections.

Rather, the focal point of Slobodin's certification is that the oily sheens and petroleum that Coppola observed was not generated by the process he used to dismantle cars, but rather, by neighboring businesses. According to Slobodin, this problem was exacerbated by the absence of proper storm sewers. He points out that Coppola was less than willing to consider this information, although he later learned that the Department did inspect the neighboring property and discovered that it was operating a business there without proper permits in place. But to reiterate, I **FIND** that the AONOCAPA cited Academy for failing to have best practices in place; most specifically, a properly functioning oil/water separator, and a large enough concrete block to accommodate its operations. It was not cited for the oily sheen and petroleum that Slobodin urges was not his facility's fault. Although the genesis of the oily sheen and petroleum is posited as a disputed fact, this is not a factual dispute material to the issue before me.

After being served with the AONOCAPA in 2014, Academy retained the services of Kenneth Woodruff, an Environmental Specialist. Woodruff's role was to assist Academy in reviewing its compliance with Department regulations and the conditions of the NJPDES permit. Woodruff submitted a certification in opposition to the Department's Motion; but having not been retained prior to 2014, he could offer no first-hand information about Academy's employment of best practices during the time relevant to this dispute.

Somewhat curiously, Woodruff notes that the June 2011 inspection cannot be located on-line, suggesting that the inspection did not really take place. But Woodruff's certification is of little help in rebutting the certification submitted by Coppola, who stated both that the violations noted in 2009 and 2011 were not remedied, and that she did inspect in 2011. Her certification is certainly more persuasive than that of a third party who did on-line research. And more to the point, Slobodin could have asserted both that the 2009 violations were promptly remedied and that no inspection took place in 2011. He does not do so in his certification. The assertions made by Coppola thus were not disputed by any affiants with first-hand knowledge of the pertinent events.

Woodruff explains, correctly so, that the alleged violations, "at their core, appear to be that the concrete pads at the facility were not sufficiently large enough to store all the engine blocks and to accommodate the vehicle draining operation." Woodruff confirms that Slobodin had repeatedly advised the Department that he lacked the funds to retrofit his facility to become compliant with this concern.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "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." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers no affidavits or matter in opposition or only facts which are immaterial or of an

insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing, Anderson v. Liberty Lobby, 477 U.S. 242, 249, (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision, and that the Department is entitled to judgment as a matter of law on its contention that Academy violated the WCPA and the terms of its NJPDES permit.

The Violations

In 1972, Congress enacted the Federal Water Pollution Prevention and Control Act (since amended by the Clean Water Act), 33 U.S.C. §1251 et seq., to protect the public health and welfare by restoring, enhancing, and maintaining the chemical, physical and biological integrity of our nation's waters. Upon approval of a state's water pollution control program by the Administrator of the United States Environmental Protection Agency (EPA), that state may issue permits for the discharge of pollutants under terms at least as stringent as the federal requirements. 33 U.S.C. §1342. New Jersey has established and received federal approval for the NJPDES program, which issues permits that regulate the discharge of pollutants into New Jersey's waters. The NJPDES program is administered under the WPCA. 33 U.S.C. §1342(b); 40 C.F.R. §123.25. N.J.S.A. 58:10A-6(a). The statute provides that no person may "discharge any pollutant except . . . when the discharge conforms with a valid [NJPDES] permit." N.J.S.A. 58:10A-6(a). By applying for and obtaining a NJPDES permit authorizing the discharge of pollutants, a permittee assumes the weighty obligation to monitor its pollutant discharge so as to "maintain . . . the integrity of [the State's] waters . . . [and] to protect the public health." N.J.S.A. 58:10A-2.

In response to the EPA's adoption of Federal Rules governing the discharge of stormwater, the Department amended its NJPDES rules to incorporate the Federal requirements. 40 C.F.R. §122.26; N.J.A.C. 7:14A-1.1 et seq. The stormwater amendments became effective November 2, 1992. 24 N.J.R. 4088. "Stormwater" includes water from precipitation (including rain and snow) that runs off the land's surface; is transmitted to the subsurface; is captured by separate storm sewers or other sewage or drainage facilities; or is conveyed by snow removal equipment. N.J.A.C. 7:14A-1.2. The NJPDES permit issued to Academy required that mechanisms be in place that would prevent stormwater polluted by engine fluids from discharging directly onto the soil, and potentially contaminating groundwater and the waters of the Saddle River.

Persons or entities issued a permit under the WPCA are strictly liable for compliance with its terms; a failure to comply is a violation of the WPCA, regardless of intent. Only the doing of the proscribed act need be shown. NJDEP v Lewis, 215 N.J. Super. 564, 573 (App. Div. 1987), citing, Department of Health v. Concrete Specialties, Inc., 112 N.J. Super. 407, 411 (App. Div. 1970); Department of Labor & Industry v. Rosen, 44 N.J. Super. 42, 50 (App. Div. 1957); State v. Kinsley, 103 N.J. Super. 190, 193 (Cty. Ct. 1968), aff'd 105 N.J. Super. 347 (App. Div. 1969). See also: N.J.S.A. 58:10A-10.

Academy urges that any oily sheen observed on its premises was the fault of its neighbors or the town; that it deposited no pollutants into the Saddle River; and that it has worked at remedying the violations noted by the Department notwithstanding financial constraints. These arguments are unavailing. Nowhere in its submission does Academy deny that as of the date of the two relevant inspections in 2009 and 2011, it had yet to complete the work needed to have a fully functional concrete block upon which to dismantle cars so that fluid would run off into an oil/water separator, as required by its permit. As late as 2013, Slobodin advised, on behalf of Academy, that his facility still had not fully implemented its SPPP; he thus admitted that he was not employing all appropriate best practices to prevent exposure of vehicle fluids to

stormwater or the ground surface. The Department cited Academy for failure to employ best practices, to include use of an oil/water separator, and not for the observed oily sheen, or for actual pollution of the environment. I **CONCLUDE** that by Slobodin's own admission, Academy was guilty of the violations cited in the AONOCAPA.

The Penalties Imposed

By statute, the Department may assess a civil administrative penalty of up to $50,000 for each violation, and each day that a violation continues may be considered a separate violation. N.J.S.A. 58:10A-10. The formula for calculating the penalty is detailed at N.J.A.C. 7:14-8.5. Under the regulation, the Department must categorize the seriousness of the violation and the conduct of the violator as major, moderate or minor, and then use the matrix at N.J.A.C. 7:14-8.5(f) to determine the appropriate penalty range. A "moderate" violation is defined as one "which has caused or has the potential to cause substantial harm to human health or the environment," or which "which substantially deviates from the requirements of the WPCA …. or [a] permit now or hereafter issued pursuant thereto…" N.J.A.C. 7:14-8.5(g)(2)(i) and (iv). "Moderate conduct" is defined by the regulation as "any unintentional but foreseeable act or omission by the violator…" N.J.A.C. 7:14-8.5(h)(2).

Violations are assessed at the mid-point, unless listed penalty adjustment factors apply. N.J.A.C. 7:14-8.5(e)(2). The regulation provides at N.J.A.C. 7:14-8.5(i):

> The Department may, in its discretion, move from the midpoint of the range to an amount no greater than the maximum amount nor less than the minimum amount in the range on the basis of the following factors:
>
> 1. The compliance history of the violator;
> 2. The number, frequency and severity of the violation(s);
> 3. The measures taken by the violator to mitigate the effects of the current violation or to prevent future violations;
> 4. The deterrent effect of the penalty;

5. The cooperation of the violator in correcting the violation, remedying any environmental damage caused by the violation and ensuring that the violation does not reoccur;
6. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation;
7. Any impacts on the receiving water, including stress upon the aquatic biota, or impairment of receiving water uses, such as for recreational or drinking water supply, resulting from the violation; and
8. Other specific circumstances of the violator or violation.

Here, the Department characterized the seriousness of the violation and Academy's conduct as "moderate." For the first violation, the Department imposed a penalty at the mid-point of the range, $15,000. For the second violation, the Department imposed a penalty at the top of the range, $20,000. The failure to employ best practices and the failure to have an oil/water separator in place were viewed as two separate violations. Accordingly, the total penalty imposed by the Department was $70,000.

I **CONCLUDE** that the Department correctly viewed both the violation and the conduct here as "moderate." Academy's violations had the clear potential to harm the environment. Slobodin clearly could have and should have foreseen that his noncompliance had the potential to cause such harm. As to the violation in 2009, I **CONCLUDE** that the Department correctly imposed the penalty at the mid-point. As to the 2011 violation, I **CONCLUDE** that the Department correctly imposed a penalty at the highest end of the range, as this was now a violation that had continued unabated for several years. I cannot agree that Academy adequately cooperated with the Department in addressing its concerns; indeed, it does not appear that any real progress toward full compliance, including retaining an environmental consultant, took place until after the AONOCAPA was issued.

The NJDEPS permit's overriding concern is that fluids be managed in a manner that prevents pollution; the practices through which to do so are variously described in the permit document. The AONOCAPA cites to two different provisions of the permit,

and determines that Academy violated both, hence doubling the penalty. But clearly, the requirements that the facility have "all engine blocks, cores, transmission components, turnings, and other oily materials" on a sufficiently large concrete block, and one that "must drain into an oil/water separator" are both part and parcel of the larger requirement that "fluids must be drained in a manner that prevents exposure of such fluids to stormwater or the ground surface."

Academy was advised that it failed to utilize best practices in several other respects, but none of these shortcomings was deemed a separate violation. Doubling the penalty is thus somewhat arbitrary. Indeed, in both 2009 and 2011, Academy failed to drain fluids in a manner that prevented contamination with stormwater or ground surfaces; the failure to properly use a sufficiently large concrete block, and one with an oil/ water separator, are examples of that failure.

For this reason, I **CONCLUDE** that the appropriate penalty should have been $15,000 for the first violation, and $20,000 for the second violation, for a total penalty of $35,000.

ORDER

Based on the foregoing, the Motion for Summary Decision filed by the Department is **GRANTED** as to its determination that there was a violation of the WPCA and the requirements of the NJPEDS permit. For the reasons expressed above, the AONOCAPA penalty assessment is modified to $35,000.

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, P.O. 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.

March 20, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: March 20, 2018

Mailed to Parties:

sej