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*Acting Commissioner*

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NEW JERSEY DEPARTMENT OF	)	<u>ADMINISTRATIVE ACTION</u>
ENVIRONMENTAL PROTECTION, BUREAU	)	FINAL DECISION
OF HAZARDOUS WASTE AND	)	
UNDERGROUND STORAGE TANK	)	OAL DKT NO.: ECE 11231-16
COMPLIANCE AND ENFORCEMENT, <sup>1</sup>	)	AGENCY REF. NO.: PEA 120005-004983
	)	
Petitioner,	)	
	)	
v.	)	
	)	
BRAD DUBOW/DEBA REALTY, LLC,	)	
	)	
Respondents.	)	

This Order addresses the appeal of a Notice of Civil Administrative Penalty Assessment (NOCAPA) issued on December 11, 2014, by the New Jersey Department of Environmental Protection (Department), Bureau of Hazardous Waste and Underground Storage Tank Compliance and Enforcement (Bureau), against Brad Dubow (Dubow) and Deba Realty, LLC (Deba Realty) (collectively respondents) for violations of the Underground Storage of Hazardous Substances Act (USHSA), N.J.S.A. 58:10A-21 et seq., the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 et seq., the Air Pollution Control Act (APCA), N.J.S.A. 26:2C-1 et seq., and the

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<sup>1</sup> The caption is modified to include the bureau in the Department that issued the enforcement document at issue in this decision.

regulations promulgated pursuant thereto.<sup>2</sup> The violations relate to a gas fueling and service station and its underground storage tank (UST) system located at 2775 Route 23 South, Newfoundland, Morris County (facility), which is owned by respondent Deba Realty. The Department assessed \$28,600 in total civil administrative penalties against respondents.<sup>3</sup>

On January 10, 2018, Administrative Law Judge (ALJ) Michael Antoniewicz issued an Initial Decision granting the Department's motion for summary decision as to respondents' liability and the Department's penalty assessments. On January 12, 2018, ALJ Antoniewicz issued an Amended Initial Decision in which he corrected two minor errors in the Initial Decision.<sup>4</sup> For the reasons set forth herein, I ADOPT in part, MODIFY in part, and REJECT in part the Amended Initial Decision.

### FACTUAL AND PROCEDURAL BACKGROUND

The Department discovered the air pollution control and UST violations during inspections in 2012 and 2013. The facility and associated UST system, including the two 4,000-gallon unleaded gasoline USTs and one 6,000-gallon unleaded gasoline UST present on site, are owned by Deba Realty. According to the record, respondent Dubow was never a member of

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<sup>2</sup> All references to the UST rules and the air pollution control rules are to the rules in effect at the time of the violations.

<sup>3</sup> In its motion for summary decision, as discussed later in this decision, the Department revised its penalty determination for the air pollution control violations from \$10,200, as assessed in the NOCAPA, to \$8,600, resulting in a total civil administrative penalty for both the UST and the air pollution control violations of \$28,600, rather than \$30,200.

<sup>4</sup> After the ALJ issued his Initial Decision, counsel for the Department sent a letter to the ALJ advising that the Initial Decision included findings that did not relate to this matter, and thus appeared to have been included by mistake. Under N.J.A.C. 1:1-18.1(h), upon the filing of the Initial Decision with the Department, the OAL relinquished jurisdiction over the case and thus the letter concerning the apparent need to correct the Initial Decision should appropriately have been directed to the agency head as an exception to the Initial Decision. However, the ALJ promptly issued the Amended Initial Decision with the irrelevant findings deleted, which is the decision I reviewed and address herein.

Deba Realty but “acted as a property manager” on behalf of his father, David Dubow, who was a member of Deba Realty until 2015. During the relevant time, Deba Realty leased the property to Del 4, Inc., Edward Vikhrov, and Sergey Yaganov, who operated the facility. In 2014, after the violations at issue occurred, Deba Realty entered into a lease with a separate entity, Del 4 II Corp., and Sarabjit Singh.<sup>5</sup>

According to the record, all three USTs were installed in 1978 and constructed of single wall galvanized steel. As an existing UST system, defined in the UST rules as an UST system installed before September 4, 1990, N.J.A.C. 7:14B-1.6, the facility was required to comply with the performance standards for new USTs under N.J.A.C. 7:14B-4.1, or the upgrade requirements in N.J.A.C. 7:14B-4.2(b) through (d), or the closure requirements. On January 1, 2000, an internal lining was installed in each UST to comply with the updated standards. Pursuant to N.J.A.C. 7:14B-4.2(b), an owner or operator of an existing UST upgraded by internal lining must internally inspect the lined tank within 10 years of having installed the lining and every five years thereafter, to ensure the integrity of the corrosion protection that the lining is to provide.

Gasoline dispensing facilities, e.g., gas stations, are also subject to the air pollution control rules. In addition to needing a permit to operate, N.J.A.C. 7:27-8.2(c)7, the gas station must be equipped with vapor recovery systems to reduce the amount of VOC (volatile organic compounds) emissions that escape into the outdoor atmosphere when gasoline is delivered and dispensed. N.J.A.C. 7:27-16.3. Phase I vapor recovery systems control the emissions of

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<sup>5</sup> Based on the record, it appears that Del 4 II Corp. and Singh took over operating the gas station under a sublease with the prior tenant/lessee, before they formally entered into the lease agreement with Deba Realty.

gasoline vapors during the transfer of gasoline from the tanker truck to the gasoline dispensing facility storage tank by returning the vapors to the truck. Phase II vapor recovery systems control the emissions of gasoline vapors during the transfer of gasoline from the gasoline dispensing facility storage tank to the motor vehicle fuel tank by returning the vapors to the facility tank. A vapor boot fits over the nozzle, which allows vapors displaced from the vehicle tank during fueling to flow through the nozzle bellows and eventually back to the UST through a connecting hose and pipe.

Gas stations must also prevent overfilling and spillage. N.J.A.C. 7:27-16.3. Pursuant to N.J.A.C. 7:27-8.3, no person shall use or cause to be used any equipment or control apparatus unless all components are functioning properly and used in accordance with the facility's operating permit or certificate.

During an inspection on January 6, 2012, the Department's representative found that the facility did not have a valid air permit. Its permit had expired on May 30, 2011. Two of the fuel ports also had gasoline in the vapor boot. Gasoline in the vapor boot blocks vapors from flowing through the hood into the hose, which obstructs the Phase II vapor recovery system. Gasoline can collect in the vapor boot when the boot is damaged or a vehicle tank is overfilled.

The Department also determined that the facility had not conducted the required internal inspection of the lined USTs and that above-ground metal flex piping under one of the gasoline dispensers, which was in contact with the ground, did not have corrosion protection. The piping connected the dispenser to the UST and regularly contained gasoline. The Department issued a Field Notice of Violation (FNOV), which advised of the Department's

observed violations and potential violations at the facility, and imposed a delivery ban. The delivery ban was lifted the next day after the facility operator engaged a contractor to install plastic booting on the piping and scheduled a tank lining inspection.

Approximately a year later, on January 11, 2013, the Department's representative conducted another inspection of the facility and found additional UST and air pollution control violations. The facility's Phase II vapor recovery equipment at one of the fuel ports was not functioning properly. The Department observed that the external portion of the hose at one of the fuel ports was damaged, which would allow vapors to escape into the outdoor atmosphere. The facility still had no air permit. The Department issued a second FNOV.

On September 18, 2013, the Department investigated a discharge report that one of the 4,000-gallon USTs at the facility was overfilled. The Department confirmed that fuel had spilled during delivery, and required the facility to provide tank overfill protection verification. The facility also failed to maintain financial assurance and to amend its registration to reflect that the facility had a new operator. The Department additionally found problems with the vapor recovery systems. The Phase I vapor recovery system on one of the 4,000-gallon tanks was not functioning properly. The cap on the automatic tank gauging port was loose, which would allow gasoline vapors to escape from the tank during refilling. Liquid was also blocking the Phase II vapor recovery system at one of the fuel ports. Finally, the facility still had no air permit. The Department issued a third FNOV. The facility subsequently provided proof of financial assurance and repaired the tank overfill protection system.

A few months later, on December 6, 2013, after receiving another discharge report, the Department returned to the facility to investigate. This time, the Department saw a leak in the fuel piping under one of the tanks. The Department imposed a delivery ban due to the discharge, line leak, and pending verification of tank overfill protection. The facility then repaired the line, conducted the required tests, completed a seven-day site investigation of the discharge, and obtained an air permit.

After the facility achieved compliance with the UST and air pollution control rules, the Department issued the NOCAPA which is the subject of this proceeding. The NOCAPA was issued against "Brad Dubow/Deba Realty LLC," as the alleged owner(s), and "Sarabjit Singh/DEL 4 II Inc.," as the alleged operator(s) of the facility. In the NOCAPA, the Department assessed \$20,000 in civil administrative penalties for violations of the UST rules. The Department also assessed \$10,200 in civil administrative penalties – later amended in the motion for summary decision to \$8,600 in accordance with N.J.A.C. 7:27A-3.10(m)8 – for violations of the air pollution control rules.

Respondents and Sarabjit Singh/Del 4 II Inc. separately requested hearings. The Department granted the requests and transmitted the matters to the OAL for hearing, where they were consolidated. The Department withdrew the NOCAPA against Singh/DEL 4 II Inc., after being informed they were not the lease holders at the time of the alleged violations. The Department filed a motion for "summary decision as to Deba Realty's liability and the appropriateness of the assessed penalties as a matter of law." Respondents Dubow and Deba Realty opposed the motion, arguing that the penalties were excessive and that Deba Realty

should not be held liable for the facility operator's failure to obtain the necessary air permits. In doing so, respondents conceded that "Deba [Realty] is a landlord and owner of the equipment."

The ALJ granted the Department's motion and affirmed the penalties assessed in the NOCAPA against respondents, as modified by the Department to \$28,600. The ALJ made findings of fact and conclusions of law as to Deba Realty's liability, yet ultimately also held Dubow individually liable for the same violations and penalties.

✓ No exceptions were filed.

#### DISCUSSION

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. N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). Like the standard for summary judgment under Rule 4:46-2, the standard on a motion for summary decision requires the court or agency head 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)). Under this standard and based on the record, I ADOPT in part and MODIFY in part the Amended Initial Decision as to respondent Deba Realty's liability, and I REJECT the Amended Initial Decision as to Brad

Dubow's individual liability for the same air pollution control and UST rule violations and penalties which the Department sought against Deba Realty.

#### Air pollution control violations against Deba Realty

The Department assessed a total penalty of \$3,000 against respondents for failing to have a current air permit, in violation of N.J.A.C. 7:27-8.3(b). The penalty amount reflected a daily penalty of \$100, in accordance with N.J.A.C. 7:27A-3.10(m)8,<sup>6</sup> multiplied by 30 days. The facility failed to have the required permit for almost two years.

The Department also assessed penalties for violations of N.J.A.C. 7:27-8.3(e), which prohibits any person from using or causing to be used any equipment or control apparatus unless all components are functioning properly. During the January 6, 2012 inspection, the Department observed two fuel ports blocked by liquid, indicating the presence of gasoline in the vapor boot. The gasoline blocked vapors from flowing through the boot back into the hose and prevented the Stage II vapor recovery system from operating properly. For these two violations, the Department assessed a penalty of \$400 in accordance with N.J.A.C. 7:27A-3.10(m)8 for each of the two fuel ports, for a total of \$800.<sup>7</sup>

The Department also assessed a penalty of \$800 for the broken hose at one fuel port, which was observed on January 11, 2013. The external portion of the hose was damaged,

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<sup>6</sup> The penalty assessed for the violation of operating without a permit was that applicable to a facility with an estimated potential emission rate for the source operation of less than 0.5 pound per hour. Although the record does not reflect that respondents' facility had this estimated potential emission rate, the violation was not disputed and the penalty assessed was the minimum established under the rule.

<sup>7</sup> As indicated previously, the Department in its motion for summary decision corrected the penalty for each of these individual violations of N.J.A.C. 7:27-8.3(e) from \$600 as assessed in the NOCAPA to \$400, for a total of \$800 for the fuel port violations.



allowing gasoline vapors to escape into the air. For this second violation of N.J.A.C. 7:27-8.3(e), the Department assessed \$800, in accordance with N.J.A.C. 7:27A-3.10(m)8.<sup>8</sup>

Finally, the Department assessed two separate penalties for violations observed on September 18, 2013. The vapory recovery system was blocked at one of the fuel ports and the cap on the automatic tank gauging port for one of the USTs was loose, which allowed vapors to escape from the tank during refilling. The Department assessed a penalty of \$2,000 for each of these third violations of N.J.A.C. 7:27-8.3(e), pursuant to N.J.A.C. 7:27A-3.10(m)8, for a total of \$4,000.<sup>9</sup> The total penalty for the violations of N.J.A.C. 7:27-8.3(e) was therefore \$5,600.

The violations are undisputed. Deba Realty's ownership of the facility and USTs are similarly undisputed. As the owner who leased the gas fueling station, including the USTs, Deba Realty was responsible along with the operator to ensure that the USTs and control apparatus, such as the Phase II vapor recovery system, were operated in accordance with the APCA and implementing regulations. Deba Realty failed to do so.

The Department assessed penalties in accordance with the penalty schedule. N.J.A.C. 7:27A-3.10(m)8. Accordingly, I AFFIRM the Amended Initial Decision as to Deba Realty's liability for the air pollution control violations and total penalties of \$8,600.

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<sup>8</sup> The Department corrected the penalty for this second violation of N.J.A.C. 7:27-8.3(e) from \$1,200 as assessed in the NOCAPA to \$800.

<sup>9</sup> The Department corrected the penalty for each of these third violations of N.J.A.C. 7:27-8.3(e) from \$2,400 as assessed in the NOCAPA to \$2,000.

### UST violations against Deba Realty

In the NOCAPA, the Department alleged violations of the UST rules and assessed penalties for two of the violations. First, the Department assessed a \$15,000 penalty against respondents for violating, as cited in the NOCAPA, N.J.A.C. 7:14B-4.1(a)1. The Department explained that the rule requires the owner or operator to ensure that all product bearing metallic tanks, piping and fittings are protected from corrosion. The Department further described the violation as respondents' failure to conduct an internal tank lining inspection within 10 years of installation of internal tank lining in all tanks. In its opposition to the Departments's motion for summary decision, Deba Realty did not dispute the violation or its liability. Nor did Deba Realty file any exceptions to the Amended Initial Decision.

The \$15,000 penalty was assessed in accordance with the penalty matrix set forth in N.J.A.C. 7:14-8.5(f). The Department found that the seriousness of the violation was moderate, because in failing to conduct an internal tank lining inspection Deba Realty failed to provide corrosion protection for the UST system. This failure had the potential to cause substantial harm to human health or the environment because an unprotected metal tank could develop leaks, which could result in a discharge of gasoline, a hazardous substance, to the soil and contaminate groundwater. A regular inspection of the internal lining is required because the lining may degrade over time and its condition is not otherwise visible. The Department assessed the conduct as moderate, because an owner or operator is charged with knowing the applicable regulations and the construction of its UST system. Thus, the Department determined that the violation was foreseeable. Pursuant to N.J.A.C. 7:14-8.5(e)2, the

Department assessed the penalty at the midpoint of the range for moderate seriousness/moderate conduct, which was \$15,000.

As reflected in the Department's description of the uncontested violation, the proper citation of the rule violated for which a penalty was assessed is N.J.A.C. 7:14B-4.2(b), which like N.J.A.C. 7:14B-4.1(a), requires the owner or operator to insure that all product bearing metallic tanks, piping and fittings are protected from corrosion. I note that in the NOCAPA, the Department separately cited N.J.A.C. 7:14B-4.2(b)1i, with the noncompliance described as respondents' failure to inspect the lining within 10 years of installation and every five years thereafter. Because the Department accurately described the violation as respondents' failure to provide corrosion protection by failing to conduct an internal tank lining inspection within the time required, Deba Realty did not dispute the violation, and the justification for the penalty is not affected by the incorrect rule citation, Deba Realty was on sufficient notice of the alleged violation. Therefore, based on the factual findings and penalty justification set forth above, I MODIFY the Amended Initial Decision to correct the citation of the rule violated to N.J.A.C. 7:14B-4.2(b), and ADOPT the Amended Initial Decision on the penalty amount of \$15,000.

Second, the Department assessed a \$5,000 penalty against respondents for violating N.J.A.C. 7:14B-4.1(a)2 because there was unprotected metallic flex piping under dispenser #3/4. Pursuant to N.J.A.C. 7:14B-4.2(c), applicable to existing UST systems that have been upgraded, metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally

recognized association or independent testing laboratory and shall comply with N.J.A.C. 7:14B-4.1(a)2ii(2), (3) and (4). In the justification for the penalty assessment, the Department stated that the cited rule requires the owner or operator to insure that all product bearing metallic tanks, piping and fittings are protected from corrosion. The Department also described that respondents had steel piping in soil unprotected against corrosion under each dispenser. Deba Realty did not contest the violation or its liability for same.

The \$5,000 penalty was also assessed in accordance with the penalty matrix set forth in N.J.A.C. 7:14-8.5(f). The Department found that the seriousness of the violation was moderate, because allowing gasoline-bearing steel piping to be in soil without protection against corrosion could result in a discharge and had the potential to cause substantial harm to human health or the environment. The Department determined that the conduct was minor and assessed the penalty at the midpoint of the range for moderate seriousness/minor conduct, which was \$5,000.

Based on the foregoing, I MODIFY the Amended Initial Decision to clarify that N.J.A.C. 7:14B-4.2(c), applicable to upgraded UST systems such as the one at the facility, requires compliance with the sub-paragraphs of the rule cited as being violated, N.J.A.C. 7:14b-4.1(a)2. Further, based on the factual findings and penalty justification set forth above, I MODIFY the Amended Initial Decision to correct the citation of the rule violated to N.J.A.C. 7:14B-4.2(c), and ADOPT the Amended Initial Decision on the penalty amount of \$5,000.

### Individual liability of Brad Dubow

Finally, the finding of liability against Brad Dubow individually is rejected. Although the Department's motion for summary decision may have been intended to apply against both respondents, other than two alleged findings of fact regarding Dubow's role and responsibilities, the Department's motion was focused on Deba Realty. Indeed, the Department requested a finding that "Deba Realty" is liable for the violations in the NOCAPA and an order directing "Deba Realty" to pay the civil administrative penalty as revised.


Similarly, the ALJ in the Amended Initial Decision made two findings of fact regarding Dubow's role and responsibilities, but included no discussion regarding Dubow's individual liability and simply concluded that the NOCAPA is affirmed as to both respondents. More is needed to support a finding of Dubow's individual liability and to support the penalties assessed against him. See, e.g., Dep't of Env'tl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381 (App. Div. 1995) (explaining that a determination of whether the individual defendants were responsible corporate officials with respect to the violations turned on whether they actually participated in the violations or would have been in a position to prevent the violations, and that evidence was needed to provide a basis for determining the amount of penalties assessed against each defendant); Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473 (1983) (explaining that courts will not pierce a corporate veil "[e]xcept in cases of fraud, injustice, or the like"). Accordingly, I REJECT the Amended Initial Decision as to Dubow's individual liability.

### CONCLUSION

For the foregoing reasons, I ADOPT as MODIFIED the Amended Initial Decision as to Deba Realty's liability and REJECT the Amended Initial Decision as to Brad Dubow's individual liability. Respondent Deba Realty is directed to pay the total penalties of \$28,600 within thirty (30) days of this Final Decision, in accordance with paragraph 14 of the NOCAPA. The claims against respondent Brad Dubow as set forth in the NOCAPA are dismissed with prejudice.

IT IS SO ORDERED.

DATE: 4/10/18

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

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
BUREAU OF HAZARDOUS WASTE AND  
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v.

BRAD DUBOW/DEBA REALTY, LLC

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