State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. ESR 12756-14
AGENCY DKT. NO. PEA 140001-024397

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION— SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,
Petitioner,
v.
CROSSLEY MACHINE COMPANY, INC., SITE AND CROSSLEY MACHINE COMPANY, INC.,
Respondents.

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

David Restaino, Esq., appearing for respondent (Fox Rothschild, LLP, attorneys)

Record Closed: February 22, 2017 Decided: April 13, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Respondents, Crossley Machine Company, Inc., Site and Crossley Machine Company, Inc., appeal an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") issued by the Department of Environmental Protection ("DEP" or "the Department") for violations of the Industrial Site Remediation Act ("ISRA"), the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3, and the Site Remediation Reform Act ("SRRA"), N.J.S.A. 58:10C-1 to -29, and the regulations promulgated thereunder, specifically, N.J.A.C. 7:26B, 7:26C, and 7:26E, governing the requirements for the remediation of contaminated industrial sites.

Specifically, the DEP cited the respondents for failing to remediate the property located at 301 Monmouth Street, Trenton, New Jersey; failing to hire a licensed site-remediation professional; failing to conduct remediation as required; failing to pay fees and oversight costs; and failing to submit an initial receptor evaluation within the required time frame. The Department has issued a total civil administrative penalty in the amount of $75,900, which includes a $15,000 penalty for violation of N.J.A.C. 7:26C-2.3(a)(1) and (2), a $15,000 penalty for violation of N.J.A.C. 7:26C-2.3(a)(3), a penalty of $900 for violation of N.J.A.C. 7:26C-2.3(a)(4), a penalty of $25,000 for a violation of N.J.A.C. 7:26E-1.12(c), and a penalty of $20,000 for a violation of N.J.A.C. 7:26B-3.13(a).

PROCEDURAL HISTORY

On May 29, 2014, the Department issued an AONOCAPA to respondent Crossley Machine Company. The DEP timely received respondent's hearing request on July 17, 2014. On August 19, 2014, the DEP notified respondent that the Department had granted its request. On or about October 2, 2014, the matter was transmitted to the Office of Administrative Law as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On or about February 3, 2017, the Department filed a motion for summary decision, arguing that there were no genuine issues of material fact regarding the administrative order or penalty. On or about February 21, 2017, respondent's counsel filed a cross-motion to withdraw from the matter, with a stay to be granted until the corporation determines who will direct its actions. The Department replied on or about February 22, 2017, opposing respondents' counsel's cross-motion to withdraw as counsel to the extent that counsel requests a stay.

FACTUAL DISCUSSION

The following facts are undisputed unless otherwise indicated:

From September 26, 1908 to June 4, 1999, respondent owned the Crossley Machine Site, which consists of two lots in Trenton, Mercer County, New Jersey. (Harris Cert., ¶¶ 4,6; Exh. E, at 3–4.) At the site, respondent engaged in the business of manufacturing precision components and equipment for the ceramic and refractory industries. (Harris Cert., ¶ 6; Exh. E, at 4.) This involved the use of petroleum-based cutting fluids and lapping oils in the machining and tooling process. (Harris Cert., ¶ 22; Exh. J, Sect. C – Receptor Evaluation Supplemental Information, at 1.) In May 1999 respondent performed a site investigation, which revealed soil contamination above the DEP's residential soil standards. (Harris Cert., ¶ 7–8; Exh. A.) Respondent found that the soil at the site contained arsenic, cadmium, copper, and lead. Ibid.

On or about May 27, 1999, respondent sold its assets under a license agreement with Mokry Tesmer Co. of Middletown, Ohio, and shortly thereafter changed its corporate name to Monmouth Machine Company. (Harris Cert., ¶ 18; Exh. E, at 3.) On June 9, 1999, respondent submitted a General Information Notice to the DEP, notifying the Department of the sale of assets. (Harris Cert., ¶ 10; Exh. B.)

On June 12, 2013 and July 15, 2013, the Department placed compliance-assistance calls to the vice president of Monmouth Machine Company, Inc., at which time the Department informed respondent of its obligation to remediate discharges at the Crossley Machine Site. (Harris Cert., ¶ 11.) On January 3, 2014, DEP invoiced

respondent for the annual remediation fee of $900, due March 4, 2014. (Harris Cert., ¶ 12; Exh. C.) On February 28, 2014, the Department conducted a follow-up compliance evaluation and noted that respondent had not performed the remediation. (Harris Cert., ¶ 13.)

On May 29, 2014, the Department issued an AONOCAPA to respondent. (Harris Cert., ¶ 14; Exh. D.) The AONOCAPA ordered respondent to: remediate all discharges at the industrial establishment, N.J.A.C. 7:26B-3.3(a); hire a licensed site-remediation professional and notify the Department of the same, as well as the scope of the remediation, including the number of contaminated areas of concern and impacted media, N.J.A.C. 7:26C-2.3(a)(1), (2); conduct the remediation in accordance with N.J.A.C. 7:26C-1.2(a), N.J.A.C. 7:26C-2.3(a)(3); pay required fees and oversight costs, N.J.A.C. 7:26C-2.3(a)(4); and complete and submit to the Department an initial receptor evaluation, N.J.A.C. 7:26E-1.12(c). (Harris Cert., ¶ 15; Exh. D., ¶ 19.) Pursuant to N.J.A.C. 7:26C-9.5, the Department assessed a civil administrative penalty of $75,900 against respondent. (Harris Cert., ¶ 16; Exh. D, ¶ 20.)

LEGAL ANALYSIS AND CONCLUSION

A party's motion for summary decision may be granted "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." N.J.A.C. 1:1-12.5(b). However, an adverse party may prevail if that party responds to the motion with a certification that "set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Under N.J.A.C. 1:1-12.5, which is akin to the judiciary's motion for summary judgment, see R. 4:46-1, "the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of

the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533–34 (citation omitted).

Here, the Department filed a motion for summary decision, arguing that there are no genuine issues of material fact regarding the administrative order or penalty. (Petitioner's Brief at 9.) The DEP asserts that respondent was obligated by law to remediate the site and failed to do so. (Id. at 15–16.) Petitioner further argues that the civil administrative penalties were properly assessed against respondent. (Id. at 21.)

The respondent argues in its cross-motion that its counsel should be permitted to withdraw from the matter. It argues that there is no longer an officer, director, or shareholder available to direct the corporation's actions, and therefore requests that a stay be granted until the corporation determines who will direct its actions. (Respondent's Opposition Brief, ¶ 1.) The respondent also asks that the Department consider the corporation's limited resources. (Id. at ¶ 2.) Respondent argues that it lacks sufficient funds to comply with the relief sought by the Department. (Ibid.) Notably, respondent does not dispute any facts set forth by the Department.

The Department opposes the cross-motion of respondent's counsel to withdraw as counsel to the extent that counsel requests a stay. (Petitioner's Reply Brief at 1.) The Department argues that proceeding with the motion for summary decision would neither deny the respondent the opportunity to defend itself, nor be unduly prejudicial to respondent. (Ibid.) With respect to the request that the Department consider the respondent's limited financial resources, the Department submits that neither the ISRA, the Brownfield Act, nor the SRRA provide for any such defense. (Id. at 2.)

I. There is no dispute that respondent violated the regulations cited in the AONOCAPA, and the penalties assessed in the AONOCAPA are in accordance with applicable law.

The ISRA is meant to address the "legacy of contaminated industrial property in this State." N.J.S.A. 13:1K-7. The ISRA requires "[t]he owner or operator of an industrial establishment planning to close operations or transfer ownership or operations [to] notify the department in writing . . . ." N.J.S.A. 13:1K-9(a). After notifying the DEP of a plan to cease operations or transfer ownership, "the owner or operator of an industrial establishment shall, except as otherwise provided by [the ISRA], remediate the industrial establishment." N.J.S.A. 13:1K-9(b)(1). The term "remediation" or "remediate" encompasses "all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of hazardous substances or hazardous wastes . . . ." N.J.S.A. 13:1K-8. The remediation must be conducted in accordance with the Brownfield Act and the SRRA. N.J.S.A. 13:1K-9.

Whenever the person responsible for conducting the remediation fails to comply with any statute, administrative order, administrative consent order, remediation agreement, remediation certification, rule, remedial action permit, or guidance the Department may issue an administrative order that specifies the violation, cites the action or omission that caused the violation, and requires compliance with such provision or provisions. N.J.A.C. 7:26C-9.3.

A. Respondent violated the regulations cited in the AONOCAPA.

There is no dispute that respondent failed to remediate the industrial establishment, hire a licensed site remediation professional and notify the Department of the same, conduct the remediation in accordance with N.J.A.C. 7:26C-1.2(a), pay required fees and oversight costs, and complete and submit an initial receptor evaluation. Thus, respondent is in violation of N.J.A.C. 7:26B-3.3(a), 7:26C-2.3(a)(1)–(a)(4), and 7:26E-1.12(c). These violations are discussed, in turn, below.

1. Respondent violated N.J.A.C. 7:26B-3.3(a).

N.J.A.C. 7:26B-3.3(a) provides:

> An owner or operator shall remediate the industrial establishment in accordance with this chapter and the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, when any of the events listed in N.J.A.C. 7:26B-3.2(a) occur.

Thus, in order to establish that respondent has violated N.J.A.C. 7:26B-3.3(a), the DEP must show that: a) the site is an industrial establishment; b) respondent owned or operated the establishment; c) one of the events listed in N.J.A.C. 7:26B-3.2(a) occurred, thus triggering the duty to remediate; and d) respondent failed to remediate the site. Those requirements have been met here.

a. The Crossley Machine Site is an industrial establishment.

"Industrial establishment" is defined as "any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or hazardous wastes on-site." N.J.S.A. 13:1K-8. "Hazardous substances" are those elements and compounds, including petroleum products, which are defined as such by the department. Ibid.

During its ownership of the site, respondent manufactured components and equipment for the ceramic and refractory industry. (Harris Cert., ¶ 6; Exh. J, Sect. C – Receptor Evaluation Supplemental Information, at 1.) Respondent admits to the use of petroleum-based cutting fluids and lapping oils in the machining and tooling process, as well as small amounts of solvent in the machine-maintenance operations. (Ibid.) Because respondent's business involved the use of hazardous substances, the site qualifies as an "industrial establishment" under the ISRA. Respondent does not argue otherwise.

b. Respondent owned and operated the site.

"Owner" means any person who owns the real property of an industrial establishment or who owns the industrial establishment. N.J.S.A. 13:1K-8. "Operator" means any person, including users, tenants, or occupants, having and exercising direct actual control of the operations of an industrial establishment. N.J.S.A. 13:1K-8.

Respondent does not deny that it owns the site in question and has operated a precision machine shop on some or all of the facility since 1875. (Exh. J, Sect. C – Receptor Evaluation Supplemental Information, at 1.) Therefore, respondent qualifies as the owner and operator of the industrial establishment.

c. The sale of assets triggered a duty to remediate.

The "events" listed in N.J.A.C. 7:26B-3.2(a) include the closing of operations or the transfer of ownership or operations of an industrial establishment. Once one of these events occurs, the owner or operator of the industrial site is required to complete and submit a General Information Notice to the DEP. N.J.A.C. 7:26B-3.2(a). The owner or operator is then responsible for remediating the industrial establishment. N.J.A.C. 7:26B-3.3(a).

Respondent sold its assets under a license agreement with Mokry Tesmer Co. on or about May 27, 1999. On or about June 9, 1999, respondent submitted a General Information Notice to the Department, notifying the DEP of the sale of its assets. Respondent therefore triggered a duty to remediate.

d. To date, respondent has failed to remediate the site.

N.J.A.C. 7:26B-3.3(a) requires that a remediation be performed when a triggering event occurs. It is undisputed that this remediation has yet to occur; therefore, respondent has violated the regulation.

2. Respondent violated N.J.A.C. 7:26C-2.3(a)(1)–(a)(4).

N.J.A.C. 7:26C-2.3(a) sets forth the requirements for conducting the site remediation. N.J.A.C. 7:26C-2.3(a)(1) and (a)(2) require that the person responsible for the remediation hire a licensed site-remediation professional and provide the DEP with notice of the same and the scope of the remediation. It is undisputed that respondent failed to hire a licensed site-remediation professional, and is thus in violation of these regulations. (Petitioner's Brief at 18.)

N.J.A.C. 7:26C-2.3(a)(3) requires that the remediation be conducted without prior Department approval and in accordance with applicable regulations. The regulation also requires that the remediation address all deficiencies identified by the Department. N.J.A.C. 7:26C-2.3(a)(3)(iii). Respondent did not conduct the remediation prior to the issuance of the AONOCAPA and has not conducted the remediation to date. (Petitioner's Brief at 18.) Therefore, respondent continues to be in violation of N.J.A.C. 7:26C-2.3(a)(3).

N.J.A.C. 7:26C-2.3(a)(4) requires that the person responsible for the remediation pay all applicable fees and oversight costs. On or about January 3, 2014, the DEP invoiced respondent for the annual remediation fee of $900. (Harris Cert., ¶ 12.) In response to the Department's finding that respondent did not pay the $900, respondent admitted that "certain fees have not been paid." (Exh. E, ¶ 11.) Respondent was therefore in violation of N.J.A.C. 7:26C-2.3(a)(4) when the AONOCAPA was issued and remains in violation today.

3. Respondent violated N.J.A.C. 7:26E-1.12(c).

N.J.A.C. 7:26E-1.12(c) requires that the person responsible for conducting the remediation submit an initial receptor evaluation for a contaminated site one year after the earliest applicable requirement to remediate. Respondent submitted a receptor evaluation form on or about August 15, 2015. (Harris Cert., ¶ 22; Exh. J.) However, it is undisputed that respondent failed to conduct the evaluation within the required one-year

time period and had not yet completed the evaluation when the DEP issued the AONOCAPA on May 29, 2014.

B. The penalties assessed in the AONOCAPA are in accordance with applicable law.

N.J.A.C. 7:26C-9.5 sets forth the requirements for a civil administrative penalty determination. According to the table in N.J.A.C. 7:26C-9.5(b), the base penalties for the violations alleged against respondent are as follows: failure to remediate a site in accordance with ISRA pursuant to N.J.A.C. 7:26B-3.3(a) = $20,000; failure to hire a licensed site-remediation professional and to provide the required information to the Department within forty-five days pursuant to N.J.A.C. 7:26C-2.3(a)(1) & (2) = $15,000; failure to conduct a remediation as required pursuant to N.J.A.C. 7:26C-2.3(a)(3) = $15,000; failure to pay applicable fees and oversight costs pursuant to N.J.A.C. 7:26C-2.3(a)(4) = 100 percent of the amount of the fee that is in arrears; failure to submit an initial receptor evaluation pursuant to N.J.A.C. 7:26E-1.12(c) = $25,000. The DEP "may multiply the penalty calculated [for these violations] by the number of days the violation existed." N.J.A.C. 7:26C-9.5(a)(4)(iii).

For each of these violations, the DEP assessed only the base penalty, totaling $75,900 in all. Notably, the Department did not multiply the penalty amount by the number of days of the violation, nor did it enhance the penalties based on the factors in N.J.A.C. 7:26C-9.6(a). Thus, the penalties are sound and reasonable under the facts of this case. See New Jersey Dep't of Envtl. Prot. v. Hood Finishing Products, ESR 3310-13, Final Decision (February 2, 2015), <http://njlaw.rutgers.edu/collections/oal/> (granting summary decision for the DEP where the Department assessed only the base penalty against respondent company for violations of the ISRA and the SRRA). Since there is no genuine issue regarding the violations set forth in the AONOCAPA, and because the respondent has raised no genuine issue with respect to the calculation of the fees by the DEP, the DEP appropriately assessed a civil administrative penalty in the amount of $75,900.

Respondent argues that its limited resources should be taken into consideration in mitigating the penalty. However, neither the ISRA, the Brownfield Act, nor the SRRA provides for such a defense. N.J.A.C. 7:26C-9.6 lists several factors that may be taken into account when adjusting a penalty. Notably, the violator's financial status is not included in this list. In fact, the factors mentioned allow only for an increase, not a decrease, in the penalty assessed. For these reasons, the DEP is entitled to summary judgment as to the penalties assessed in the AONOCAPA.

II. The respondent has not shown good cause for withdrawal of respondent's counsel.

RPC 1.16(a) provides that an attorney must withdraw from the representation of a client if the representation will result in a violation of the rules of professional conduct or other law, the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or the lawyer is discharged. RPC 1.16(b) provides circumstances under which termination of representation is permissive. This includes, for example, when the representation will result in an unreasonable financial burden on the lawyer, when the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled, or when other good cause for withdrawal exists.

Respondent's counsel seeks to withdraw, noting that there is no longer an officer, director, or shareholder available to direct the corporation's actions. Counsel therefore asks for a stay of the matter until the corporation determines who will direct its actions. However, as noted by the Department, the AONOCAPA was issued on May 29, 2014, almost three years ago, and the corporation has had ample opportunity to determine who will direct its actions and to formulate a defense. Respondent has not demonstrated that good cause for withdrawal exists under the ethics rules or otherwise.

CONCLUSION

The DEP's motion for summary decision should be granted because there is no dispute that respondent failed to remediate the industrial establishment, hire a licensed site-remediation professional and notify the Department of the same, conduct the remediation in accordance with applicable regulations, pay required fees and oversight costs, and complete and submit an initial receptor evaluation. Thus, respondent is in violation of N.J.A.C. 7:26B-3.3(a), 7:26C-2.3(a)(1)–(a)(4), and 7:26E-1.12(c), as noted in the AONOCAPA. The Department assessed only the minimum penalties required for these violations, and is therefore entitled to summary decision as to the amount assessed, $75,900. Although respondent argues that the respondent's limited resources should be taken into consideration to mitigate the penalty, the law does not provide for a reduction in penalties on this basis.

As to the respondent's attorney's cross-motion to withdraw as counsel, it has not been shown that termination of representation would be required under the rules of professional conduct or otherwise. Further the granting of this motion would unnecessarily delay the resolution of the matter.

ORDER

I **ORDER** that, in accordance with the AONOCAPA, the respondent shall:

1. Remediate the industrial establishment in accordance with N.J.A.C. 7:26B-3.3(a) and N.J.A.C. 7:26C-2.3.

2. Hire a licensed site-remediation professional and notify the DEP of the name and license information and the scope of the remediation, including the number of contaminated areas of concern and impacted media.

3. Conduct the remediation, without prior DEP approval unless required, in accordance with N.J.A.C. 7:26C-1.2(a).

4. Pay required fees and oversight costs.

5. Complete and submit an initial receptor evaluation.

6. Pay a civil administrative penalty of $75,900.

The respondent's cross-motion for summary decision is **DENIED**.[1]

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.

[1] If respondent retains other counsel, then this attorney may file the appropriate substitution of attorney. Further, if respondent determines who will be appearing on behalf of the corporation, the motion for present counsel to withdraw may be renewed.

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.

April 13, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief and reply

For respondent:

Brief