



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF)	<u>ADMINISTRATIVE ACTION</u>
ENVIRONMENTAL PROTECTION, SITE)	FINAL DECISION
REMEDATION COMPLIANCE AND)	
ENFORCEMENT,)	OAL DKT NO. ESR 17293-15
)	AGENCY REF. NO. PEA140001-
Petitioner,)	031866
)	
v.)	
)	
FRAGALE'S BAKING CO., INC. SITE)	
AND Q.R.I. FRAGALE'S BAKING, INC.,)	
)	
Respondent.)	
)	
)	
NEW JERSEY DEPARTMENT OF)	OAL DKT NO. ESR 00231-16
ENVIRONMENTAL PROTECTION, SITE)	AGENCY REF. NO. PEA140002-
REMEDATION COMPLIANCE AND)	031866
ENFORCEMENT,)	
)	
Petitioner,)	
)	
v.)	
)	
FRAGALE'S BAKING CO., INC. SITE)	
AND ROSARIA FRAGALE,)	
)	
Respondent.)	
)	

This is an appeal by Respondents Q.R.I. Fragale's Bakery, Inc. (QRI) and Rosaria Fragale (collectively Respondents) of two Administrative Orders and Notices of Civil Administrative Penalty (AONOCAPAs), issued by the New Jersey Department of Environmental

Protection (the Department) on September 23, 2014 and October 29, 2014. The AONOCAPAs alleged Respondents were persons responsible for conducting remediation as a result of discharge of gasoline and heating oil from underground storage tanks at the Fragale's Baking Co., Inc. site in Garfield. Specifically, both Respondents were cited for violating N.J.A.C. 7:26C-14.2(b) for failing to comply with the requirements for the remediation of a contaminated site under direct oversight by the Department, as required by the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 to -29.

The September AONOCAPA alleged that Respondent QRI, as the owner and operator of the underground storage tanks, was responsible for violations of the Underground Storage of Hazard Substances Act (UST Act), N.J.S.A. 58:10A-21 et seq., the Brownfield and Contaminated Site Remediation Act (Brownfields Act), N.J.S.A. 58:10B-1 et seq., and the regulations promulgated thereunder, including N.J.A.C. 7:14B and 7:26C, and imposed a \$25,000 penalty. The October AONOCAPA alleged that Respondent Rosaria Fragale, as owner of the property where the discharge occurred, was responsible for violations of the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 et seq., and the regulations promulgated thereunder, including N.J.A.C. 7:26C, and imposed a \$25,000.00 penalty.

Respondents requested administrative hearings to challenge the AONOCAPAs in October and November of 2014, respectively, and at Respondents' request the matters were transferred to the Department's Office of Dispute Resolution (ODR). In October 2015 Respondents requested termination of the ODR process, and the matters were transmitted to the Office of Administrative Law (OAL), where they were assigned to Administrative Law Judge (ALJ) Jeffrey A. Gerson. The two cases were consolidated by order dated January 28, 2016. The ALJ set a hearing date of April 26, 2016.

On March 11, 2016, the Department filed a motion for summary decision, which Respondents did not oppose. On April 26, 2016, the ALJ signed an Order in the presence of counsel for the Department and the Respondents granting summary decision in the Department's favor and directing Respondents to pay the assessed penalties and complete required compliance as directed by the Department. The ALJ memorialized his findings in an Initial Decision dated June 28, 2016.

Respondents did not file exceptions to the Initial Decision. The Department filed a letter on July 7, 2016, setting forth additional proposed findings of fact and conclusions of law, and urging affirmance of the Initial Decision.

Based upon my review of the record and as explained below, I ADOPT the ALJ's Initial Decision granting the Department's motion for summary decision in its entirety as supplemented by this Final Decision.

FACTUAL DISCUSSION

Rosaria Fragale has owned the property at 68-72 Gaston Avenue, also known as Block 93 Lot 9.01, in Garfield, Bergen County, which is the site of Fragale's Baking Co., Inc. (the Site), since the 1950s. QRI was incorporated in 1978 and its main business address was listed as 68 Gaston Avenue in Garfield.¹ Rosaria Fragale was listed as QRI's registered agent. From May 1997 through September 1998, QRI certified on the UST New Jersey Underground Storage Tank Facility Questionnaire that it owned and operated underground storage tanks at the Site.

¹ Respondent QRI's hearing request stated that it ceased operating at 68 Gaston Avenue in 2004 because its corporate charter was revoked. In 2004 an entity known as Fragale's Bakery LLC was incorporated and listed its business address as 68 Gaston Avenue, Garfield. It appears that Fragale's Bakery LLC's corporate charter was revoked in 2011.

On June 10, 1998, QRI excavated a gasoline tank and also uncovered a No. 2 fuel oil tank at the Site. On the same day, QRI notified the Department of discharges at both tanks, which were assigned incident numbers 98-06-10-1000-56 and 98-06-10-1056-11. The fuel oil tank was excavated on August 28, 1998, and on that day QRI reported to the Department the presence of soil staining and free phase fuel oil on ground water.

On March 22, 2001, QRI installed three monitoring wells at the Site to evaluate ground water quality. On April 6, 2001, QRI collected samples from the wells, and detected lead at 14.3 parts per billion (ppb) in the first monitoring well (MW1), and at 3,220 ppb in the second well (MW2). The Department's Class II-A Ground Water Quality Standard for lead is 5 ppb. See N.J.A.C. 7:9C Appendix Table I.

On August 31, 2005, the Department issued a conditional approval of QRI's Remedial Investigation Workplan. QRI, however, did not satisfy the conditions of the approval and did not submit the documents and data required by the Department. On July 16, 2012, the Department called QRI and informed QRI of its obligations pursuant to SRRA.²

On September 23, 2014 and October 29, 2014, the Department issued the AONOCAPAs that are the subject of this Final Decision to Respondents for their failure to remediate the Site in accordance with Department requirements.

LEGAL DISCUSSION

After careful consideration of the record, I find that there is no dispute of material fact presented in this matter. I therefore concur with and ADOPT the ALJ's Initial Decision.

² The September 2014 AONOCAPA also states that on March 31, 2014, the Division of Law called QRI and informed QRI of its obligation under SRRA to submit a Remedial Investigation Plan by May 7, 2014.

Summary decision is appropriate in cases in which “the pleadings, discovery and affidavits ‘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.’” E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010) (quoting N.J.A.C. 1:1-12.5(b)). A genuine issue of material fact exists only “when ‘the competent evidential materials . . . are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party.’” Ibid. (alterations in original) (quoting Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000)). “Further, ‘[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.’” Ibid. (quoting Piccone, *supra*, 329 N.J. Super. at 195).

SRRA, and related legislative amendments to the Brownfields Act, the Spill Act, and the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq., was enacted in 2009. See P.L. 2009, c. 60. SRRA created a Licensed Site Remediation Professional (LSRP) program and the Site Remediation Professional Licensing Board, and shifted, in most cases, the oversight of the remediation of contaminated sites from the Department to LSRPs. Pursuant to the dictates of N.J.S.A. 58:10C-6, the Department adopted regulations implementing SRRA, namely the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The relevant statutes and regulations require responsible persons to conduct clean-up activities on contaminated sites using LSRPs, but also provide for Department oversight if the responsible persons are not complying with their statutory and regulatory responsibilities.

SRRA defines “person responsible for conducting the remediation” to include, in pertinent part: the owner or operator of an industrial establishment subject to ISRA; the owner or operator of an underground storage tank subject to the UST Act for the remediation of a discharge; and any other person who is in any way responsible for the discharge of a hazardous substance pursuant to the Spill Act, specifically N.J.S.A. 58:10-23.11g.³ See N.J.S.A. 58:10C-2. The Department’s regulations make clear that this includes the owner of the real property where the discharge occurred at the time of the discharge. N.J.A.C. 7:26C-1.4(a)4i.

A “person responsible for conducting the remediation” is required to hire an LSRP and remediate the site, generally without the Department’s approval or oversight. N.J.S.A. 58:10B-1.3. The Department, however, is required to undertake direct oversight of the remediation of a contaminated site in certain instances, including if the discharge was discovered prior to May 7, 1999, and the “person responsible for conducting the remediation” has failed to complete the remedial investigation of the entire contaminated site by May 7, 2014. N.J.S.A. 58:10C-27a(3); N.J.A.C. 7:26C-14.2(a)3.

For contaminated sites subject to remediation under direct oversight by the Department, the “person responsible for conducting the remediation” must comply with N.J.S.A. 58:10C-27c and N.J.A.C. 7:26C-14.2(b). Those requirements include, among others, retaining an LSRP, submitting a feasibility study to the Department, submitting an initial remediation cost review, performing remediation of the site in accordance with the remedial action selected by the Department, establishing a remediation trust fund, and implementing a public participation plan. Ibid.

³The Spill Act and the Brownfields Act were also amended to include the same definition of “person responsible for conducting the remediation.” P.L. 2009, c. 60, §§ 35, 40.

Here, it is undisputed that there was a discharge from underground storage tanks at the Site in 1998. It is also uncontested that Rosaria Fragale owned the Site at the time the discharge occurred in 1998, and thus is a “person responsible for conducting the remediation” pursuant to N.J.A.C. 7:26C-1.4(a)4i. See also N.J.S.A. 58:10-23.11b; N.J.S.A. 58:10C-2. And it is uncontested that QRI affirmatively represented to the Department that it owned and operated the underground storage tanks at the Site at the time of the discharge, and thus is also a “person responsible for conducting the remediation.” N.J.S.A. 58:10B-1, N.J.S.A. 58:10C-2; N.J.A.C. 7:26C-1.4(a)2.

Under SRRA, if the discharge was discovered prior to May 7, 1999, and the “person responsible for conducting the remediation” failed to complete the remedial investigation of the entire contaminated site by May 7, 2014, the remediation of the contaminated site becomes subject to direct oversight by the Department. N.J.S.A. 58:10C-27a(3); N.J.A.C. 7:26C-14.2(a)3. It is undisputed that both of those conditions were met here, as the discharge occurred in 1998 and Respondents had not completed the remedial investigation by May 7, 2014. Thus, Respondents were subject to the requirements for remediating the Site under direct oversight by the Department under N.J.S.A. 58:10C-27c and N.J.A.C. 7:26C-14.2(b).

Last, it is uncontested that Respondents failed to comply with the requirements for remediating the Site under direct oversight by the Department. Respondents failed to retain an LSRP, failed to submit a feasibility study, an initial remediation cost review, or a proposed public participation plan, and failed to establish a remediation trust fund as required by N.J.A.C. 7:26C-14.2(b). See also N.J.S.A. 58:10C-27c.

For all of these reasons, I conclude that each Respondent is liable for violations of N.J.A.C. 7:26C-14.2(b) for failure to comply with the requirements for remediation under direct oversight by the Department.

PENALTY DETERMINATION

Although Respondents do not challenge the amount of the penalties assessed, I have undertaken such an analysis and conclude that the penalties are authorized by and in accordance with the governing statutes and regulations.

Generally, a regulatory agency retains “broad discretion in determining the sanctions to be imposed for a violation of the legislation it is charged with administering. Consequently, such a sanction will be set aside on appeal only if it is arbitrary, capricious or unreasonable.” In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987) (citations omitted).

N.J.A.C. 7:26C-9.5 establishes civil administrative penalties for violations of SRRA, the UST Act, ISRA, the Spill Act, and the regulations adopted pursuant to those statutes. N.J.A.C. 7:26C-9.1. N.J.A.C. 7:26C-9.5(b) sets forth a table of violations, and provides that if the violation in the table is listed as “M” for minor, the grace period provisions of N.J.A.C. 7:26C-9.4 apply. If the violation is listed as “NM” for non-minor, the base penalty amount listed in the table at N.J.A.C. 7:26C-9.5(b) is applicable. The Department may adjust the amount of the base penalty by applying the factors in N.J.A.C. 7:26C-9.6(a), and multiply the penalty amount by the number of days of the violation. The penalty adjustment factors set forth in N.J.A.C. 7:26C-9.6(a) provide that the penalty may be increased for repeat violations, or if the violation is intentional. Failure to comply with the requirements for remediation under direct oversight by

the Department pursuant to N.J.A.C. 7:26C-14.2(b) is listed as a non-minor violation, with a base penalty of \$25,000. N.J.A.C. 7:26C-9.5(b).

As discussed above, Respondents failed to comply with the requirements for the remediation of the contaminated site under direct oversight by the Department as required by N.J.S.A. 58:10C-27 and N.J.A.C. 7:27C-14.2(b). The regulations establish a base penalty of \$25,000 for the violation, N.J.A.C. 7:26C-9.5(b). The Department did not apply the penalty enhancement factors in N.J.A.C. 7:26C-9.6. Each Respondent was assessed a penalty of \$25,000. Based on my review, I conclude that the penalty assessments were proper, authorized by, and in conformance with the governing statutes and regulations.

CONCLUSION

After careful review of the record, for all of the foregoing reasons, I ADOPT the ALJ's Initial Decision granting the Department's motion for summary decision in its entirety.

Accordingly, Respondent QRI is hereby ORDERED to pay the penalty of \$25,000 imposed by paragraph 31 of the September 23, 2014 AONOCAPA and also to remediate the discharges at the Site in accordance with Department oversight as directed by paragraph 30 of the AONOCAPA.

Respondent Rosaria Fragale is also hereby ORDERED to pay the penalty of \$25,000 imposed by paragraph 22 of the October 29, 2014 AONOCAPA and also to remediate the discharges at the Site in accordance with Department oversight as directed by paragraph 20 of the AONOCAPA.

While the AONOCAPAs did not establish a deadline for penalty payment, the invoices sent to Respondents provided them approximately 45 days to make payment. Respondents are directed, therefore, to make their payment within 45 days of the date of this Final Decision.

IT IS SO ORDERED.

September 26, 2016
DATE



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

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