State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. ESR 3310-13
AGENCY DKT. NO. PEA 120005-G000039686

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,
Petitioner,
v.
HOOD FINISHING PRODUCTS (KASNER),
Respondent.

Kimber Hahn, Deputy Attorney General, appearing for petitioner (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Erick Kasner, Ph.D., President, Hood Finishing Products, appearing pro se for respondent

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

Record Closed: July 18, 2014 Decided: September 18, 2014

STATEMENT OF THE CASE

Respondent, Hood Finishing Company and Erick Kasner, Ph.D., president and general manager ("Hood" or "Dr. Kasner"), appeals 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, N.J.S.A. 58:10C-1 to -29. Specifically, DEP cited Hood for failing to remediate the property located at 59–61 Berry Street, failing to hire a licensed site-remediation professional ("LSRP"), failing to notify the Department of the retention of an LSRP and the scope of the remediation, and failing to pay fees and oversight costs. The Department has issued a penalty in the amount of $35,000, which includes a $20,000 penalty for violation of N.J.A.C. 7:26B-3.3(a), and a $15,000 penalty for violation of N.J.A.C. 7:26C-2.3(a)(1) and (2).[1] The Department declined to assess any penalty for Hood's failure to pay fees and oversight costs, N.J.A.C. 7:26C-2.3(a)(4).

PROCEDURAL HISTORY

On October 9, 2012, Hood submitted a hearing request to appeal the AONOCAPA. On October 19, 2012, the Department granted Hood's request. The matter was transmitted to the Office of Administrative Law ("OAL"), where it was filed on March 8, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Subsequently, on May 7, 2013, Hood retained an LSRP, who issued a response action outcome.[2] On January 28, 2014, the Department informed the OAL that Hood had attained compliance with the remediation requirement, although it contended that Hood had failed to pay outstanding fees or the assessed penalty. (Gradwohl Cert., ¶¶ 20–21.) On

[1] These penalties have been assessed for a period of one day.

[2] A response action outcome is "a written determination by a licensed site remediation professional that the contaminated site was remediated in accordance with all applicable statutes and regulations . . . ." N.J.S.A. 58:10C-2.

February 18, 2014, Hood served interrogatories on DEP. The Department responded on March 20, 2014, and April 2, 2014.

Hood filed a "Motion to Dismiss" on April 17, 2014, which is being treated as a motion for summary decision. The Department filed a cross-motion for summary decision on May 7, 2014. Additional documents in support of Dr. Kasner's certification on behalf of Hood were requested on June 9, 2014. The documents were submitted on June 12, 2014, and DEP responded on June 20, 2014. On June 13, 2014, Hood filed a Motion to Dismiss Fees and requested oral argument on the issue of the assessed fees. On June 17, 2014, Hood moved to depose Joshua Gradwohl of DEP. Oral arguments on the motions were held on July 18, 2014.[3]

FACTUAL DISCUSSION

The following facts are undisputed unless otherwise indicated. Hood is engaged in the business of manufacturing and distributing woodworking materials, including wood finishes, stains, and finish removers. (Pet'r Hahn Cert., Ex. A.) Dr. Erick Kasner is the president and general manager of Hood. (Resp't Kasner Cert., ¶ 1.) At issue in this matter is the property located at 59 Berry Street and 61 Gurley Avenue, Franklin Township, Somerset County ("the property"), which Hood leased to conduct its wood-finishing business. Hood leased this property from landlord/property-owner Berry-Somerset, between June 1, 1998, and August 21, 2003. (Resp't Kasner Cert., ¶¶ 2, 4.)

Sometime prior to June 2003, while Hood was still renting the property from Berry-Somerset, Hood initiated a landlord-tenant action against the landlord, alleging, among other things, that Berry-Somerset had removed an underground storage tank in violation of the lease agreement, without informing Hood of its existence. Dr. Kasner asserted that in settling the landlord-tenant action, Berry-Somerset agreed to "clear ISRA" (i.e., comply with the obligations of ISRA) on Hood's behalf; however, subsequent documentation provided by Hood establishes that the settlement agreement did not include any such agreement. (Resp't Kasner Cert., ¶¶ 8–10; R-2; R-11; R-15.)

[3] Efforts were made to settle the matter between the parties but were not successful.

Hood ceased operations at the property on July 23, 2003. (P-1 at 3.) On August 21, 2003, Hood vacated the property. (Resp't Kasner Cert., ¶¶ 2, 4.) On October 1, 2003, NBSF Cabinets took sole occupancy of the property, and remained there until sometime in 2009.

Hood asserts that on September 13, 2003, twenty-four days after Hood vacated the property, Hood filed a General Information Notice ("GIN") with DEP advising of its intent to cease operations and vacate the premises.[4] DEP does not have a copy of this GIN on file. (Resp't Kasner Cert., ¶ 11.) Hood defends the current AONOCAPA by claiming that Mr. Gradwohl purposefully misplaced the GIN.[5]

On October 5, 2004, Berry-Somerset's environmental consultant prepared a Preliminary Assessment Report ("PAR"), and submitted it to the Department.[6] (P-2.) On December 4, 2004, Berry-Somerset provided DEP with a GIN, reflecting Hood's 2003 cessation of operations.[7] (P-3.)

[4] A general information notice, N.J.A.C. 7:26B-1.4, is a form that owners or operators must complete prior to closing or transferring operations. The form notifies the Department when the closing or transfer will occur, provides contact information for the owner or operator, information about the site, authorization to access the property, etc. N.J.A.C. 7:26B-3.2.

[5] According to Dr. Kasner, Mr. Gradwohl holds a grudge against him stemming from a complaint he made to Mr. Gradwohl's supervisor in an unrelated ISRA matter in 1998. Therefore, Dr. Kasner asserts that Mr. Gradwohl purposefully misplaced the 2003 GIN. However, whether Hood filed a GIN in 2003 is not relevant to the ultimate legal issue in this matter. Hood has not been charged with failing to file a GIN in violation of N.J.A.C. 7:26B-3.2. For the sake of completeness, it should be noted for the record that Dr. Kasner has provided a copy of the 2003 GIN, which has been certified and notarized, and a follow-up letter confirming its receipt. (R-3; R-4.) DEP counters that the form allegedly filed by Hood in 2003 did not originate until January 27, 2004. (Pet'r Gradwohl Cert., ¶¶ 22–23.) Also, it bears a 2004 ISRA number, E20040527. (R-3.)

[6] Filing a GIN is the "notice" part of complying with ISRA, and filing a PAR is part of the "technical requirements for site remediation." Both aspects of the process need to be completed by an owner or operator. N.J.A.C. 7:26B-3.2; N.J.A.C. 7:26E-3.2. "'Preliminary assessment' means the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site . . . and shall include the initial search for . . . environmental information . . . to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any contaminant is required." N.J.S.A. 58:10C-2 (definitions relative to site remediation). The purpose of a "preliminary assessment' is to determine whether contaminants are or were present at a site or have migrated, and whether additional remediation is necessary. N.J.A.C. 7:26E-3.1.

[7] Either the owner or the operator must comply with the closing and transfer procedures required by ISRA. N.J.S.A. 13:1K-9.

On December 20, 2004, DEP's Bill Goodman inspected the property in order to evaluate Berry-Somerset's PAR, and then issued a report on January 4, 2005. (P-4.) The report informed Berry-Somerset of a number of deficiencies in the PAR, including "one area of stressed vegetation at the northeast corner of the building" that was not indicated in the PAR. (Ibid.) Berry-Somerset did not take any action to correct the deficiencies enumerated in the report. (Pet'r Gradwohl Cert. ¶ 9.)

On January 1, 2006, ANCO Environmental Services, Inc., took a groundwater sampling at the property for a prospective purchaser, NBSF Cabinets. (Pet'r Gradwohl Cert., Ex. F). On July 17, 2007, NBSF Cabinets purchased the property from Berry-Somerset, and NBSF became 59 Berry Street, LLC ("59 Berry"). (P-1 at 2.) DEP was not notified of the transfer. 59 Berry assumed all environmental responsibilities from Berry-Somerset. (P-6.) The results of the groundwater sampling were completed on February 23, 2009, and revealed the presence of hazardous substances in the soil and groundwater, including methylene chloride, a major component of nine Hood products.[8] (P-5.)

On May 6, 2009, Hood's consultant, Dennis Brenner, met with Mr. Gradwohl at DEP with regard to any outstanding issues pending against Hood. (R-9.) According to Mr. Brenner, Mr. Gradwohl informed him that the PAR and GIN submitted by Berry-Somerset in 2004 were "in order," but the ISRA case remained open due to the removal and remediation of two underground storage tanks by Berry-Somerset. (Ibid.) Mr. Gradwohl does not recall informing Mr. Brenner that Berry-Somerset's papers were "in order." (Pet'r Br. at 15.)

When 59 Berry purchased the property, it moved for summary judgment against Hood in Somerset County Superior Court, requesting a determination that Hood be held liable for ISRA clearance pursuant to Hood's lease with Berry-Somerset. The Hon. Yolanda Ciccone, JSC, found that Hood was an "industrial establishment" subject to ISRA, with a North American Industry Classification System ("NAICS") number 325510, denoting a facility that engages in paint and coating manufacturing. (P-16, appended

[8] DEP was not aware of the June 2005 sampling until October 11, 2011, when it received the landlord-tenant petition from Berry-Somerset. (Pet'r Gradwohl Cert., Ex. F.)

transcript at 10.) However, Judge Ciccone stated that she could not rule on the issue of Hood's liability under ISRA, and requested that 59 Berry obtain a decision from DEP prior to her issuing her ruling. On October 11, 2011, DEP received a landlord-tenant petition from 59 Berry, requesting a determination as to who is liable for clearing ISRA, 59 Berry or Hood. (P-6.)

On October 19, 2011, DEP responded that it determined that Hood was primarily liable, and 59 Berry was secondarily liable. (Ibid.; P-7.) DEP further indicated that Berry-Somerset filed a GIN on Hood's behalf seventeen months after the notice was required to be submitted. DEP also informed the parties that N.J.A.C. 7:26B-3.2(b) requires both the owner and the operator to remediate all discharge of hazardous substances after filing notice with the Department, or otherwise both owner and operator may be held strictly liable for compliance with ISRA without regard to fault when a triggering event occurs. The letter advised that the Department may compel the owner or operator to comply with ISRA if a lease agreement specifies that one party or the other has primary responsibility for compliance; however, this did not release the other party from liability. The letter stated that Hood's lease agreement clearly requires Hood to comply with the Environmental Cleanup Responsibility Act ("ECRA") (the predecessor law to ISRA)[9] for discharges that occurred during Hood's tenancy, and that Berry Somerset was secondarily liable. The October 19, 2011, letter also apprised Hood, Berry-Somerset and 59 Berry of their joint obligation to hire an LSRP.

On February 24, 2012, Hood provided the Department with a revised PAR and soil and groundwater sampling results, via W.A.T.E.R. Works Laboratory. (P-2.) On April 20, 2012, DEP informed Hood that the documentation fell short of requirements for site remediation pursuant to N.J.A.C. 7:26E, insofar as Hood did not document locations where it collected the samples, and did not address how the results supported the PAR's conclusion that contamination was no longer present. (P-8.) In its letter, the Department reminded the parties of their duty to retain an LSRP, and advised that DEP would be pursuing enforcement action. (Ibid.)

[9] ISRA, which was enacted in 1993, L. 1993, c. 139, superseded ECRA, which had been enacted in 1983, L. 1983, c. 330.

On April 20, 2012, DEP provided Hood with an invoice for the Site Remediation LSRP Annual Fee, in the total amount of $1,850. (P-14.) The invoice billed $450 for LSRP annual fee Category 1 and $1,400 for LSRP Surcharge Groundwater. The Department asserts that it calculated these fees pursuant to the formula established in N.J.A.C. 7:25C-4.2. (Pet'r Br. at 18.) Hood returned the invoice to DEP without payment and indicated, "[t]here will be no LSRP!" (P-14.) On April 21, 2013, DEP billed Hood for the subsequent Site Remediation LSRP Annual Fee, for a total of $3,700, when it was added to the prior year's outstanding fees. On April 21, 2014, DEP issued an updated LSRP fee to Dr. Kasner in the amount of $5,500. (R-16, Ex. B.)[10]

On September 21, 2012, DEP issued an AONOCAPA to Hood for failing to remediate the property, failing to hire an LSRP and to notify the Department within forty-five days, and failing to pay fees and oversight costs. (P-9.) DEP assessed a civil administrative penalty in the amount of $35,000 against Hood for failing to remediate, and failing to hire an LSRP. The Department declined to assess any penalty for Hood's alleged failure to pay fees and oversight costs. On November 19, 2012, DEP amended the AONOCAPA to reflect that Hood's NAICS code was erroneous. (Resp't Kasner Cert., ¶ 37.)

Hood retained an LSRP for the property on May 7, 2013. (P-12 at 1.) The LSRP issued a response action outcome, and on January 28, 2014, DEP informed the OAL that Hood had attained compliance with the remediation requirement. DEP contends that Hood has failed to pay the outstanding fees and the assessed penalty. (Pet'r Gradwohl Cert., ¶¶ 20–21.)

[10] As of the date motions for summary decision were filed, Hood has not made payment. (Gradwohl cert., ¶ 20.)

LEGAL ANALYSIS AND CONCLUSION

I. The Industrial Site Remediation Act.

The Legislature enacted the Environmental Cleanup Responsibility Act (ECRA), later amended and renamed ISRA, in 1983, in response to the problem presented by the frequency with which industries in New Jersey abandoned business operations at industrial sites, and "in response to the inordinate time and money spent in determining fault and apportioning liability for the dumping of toxic wastes." In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 446 (1992). The primary purpose of ECRA was "'to secure the cleanup of [contaminated] industrial sites at the earliest possible date.'" Navillus Group v. Accutherm Inc., 422 N.J. Super. 169, 181 (App. Div. 2011) (citation omitted). ISRA requires as a precondition to closure, sale or transfer that the property of an "industrial establishment" be in an environmentally appropriate condition. In re Adoption of N.J.A.C. 7:26B, supra, 128 N.J. at 446. Thus, the statute is designed to ensure "the cleanup of property even if the current owner or operator is not responsible for the contamination." Id. at 448. ISRA imposes "'a self-executing duty to remediate without the necessity and delay of a determination as to liability for the contamination.'" Navillus, supra, 422 N.J. Super. at 181–82 (quoting Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 63 (App. Div. 1987)).

ISRA maintains the same goals and many of the same features of ECRA. The enhancements in ISRA were intended to streamline the regulatory process of ECRA, "by establishing summary administrative procedures for industrial establishments that have previously undergone an environmental review, and by reducing oversight of those industrial establishments where less extensive regulatory review will ensure the same degree of protection to public health, safety, and the environment." N.J.S.A. 13:1K-7. The Legislature concluded that "the new procedures established pursuant to this act shall be designed to guard against redundancy from the regulatory process and to minimize governmental involvement in certain business transactions." Ibid.

ISRA's requirements are triggered upon an entity's "closing operations," "transferring ownership or operations," or undergoing a "change in ownership." N.J.S.A.

13:1K-8. After triggering ISRA, the owner or operator must "remediate the industrial establishment . . . in accordance with criteria, procedures, and time schedules established by the department." N.J.S.A. 13:1K-9; see also N.J.A.C. 7:26B-3.3(a). The term "remediation" 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.

To comply with ISRA, an owner or operator must first provide notice to DEP that it will be triggering ISRA by filing a GIN, N.J.A.C. 7:26B-3.2, hiring an LSRP, N.J.A.C. 7:26C-2.3, assessing whether the site is contaminated, N.J.A.C. 7:26E-3.2, and then, conducting remediation of the property, regardless of whether it caused the pollution. N.J.A.C. 7:26B-3.3. DEP summarizes the process on its website, in these instructions to NAICS classified sites that trigger ISRA:

> If you determine that your facility is subject to ISRA . . . then you are required to perform all necessary remediation at your facility. The process begins with the filing of a General Information Notice (GIN). The owner or operator of an industrial establishment must notify the NJDEP within five days of any triggering event by filing the GIN. Once this notification is made, the owner or operator must conduct a remediation in accordance with the Technical Requirements for Site Remediation N.J.A.C. 7:26E. With the enactment of the Site Remediation Reform Act on November 4, 2009 this remediation must be conducted by a Licensed Site Remediation Professional (LSRP). This includes at a minimum a **Preliminary Assessment** (PA) to identify potential Areas of Concern (AOCs) and if necessary a **Site Investigation** (SI) to determine if any contaminants are present above any applicable remediation standards. If there is contamination documented in the SI Report, the owner or operator must conduct a **Remedial Investigation** (RI) to determine the nature and extent of contamination. The next step is the proposal of a **Remedial Action Workplan** (RAW) detailing the measures necessary to remediate contaminated property to the applicable remediation standard. The Licensed Site Remediation Professional shall submit a Response Action Outcome when there have been no discharges of hazardous substances or wastes on the property or at the time any such discharges were cleaned up to the remediation standards in effect at the time.

> [<http://www.state.nj.us/dep/srp/isra/isra_applicability.htm>; see also N.J.S.A. 13:1K-9 (requiring owner or operator to comply with these closing and transfer procedures).]

Within forty-five days of triggering ISRA, the person responsible for conducting remediation shall hire an LSRP, notify the Department of the name and license information of the LSRP hired to conduct or oversee the remediation, and notify the Department of the scope of the remediation, including the number of contaminated areas of concern and impacted media. N.J.A.C. 7:26C-2.3. The responsible party is further required to pay all applicable fees and oversight costs as required by N.J.A.C. 7:26C-4 ("fees and oversight costs"). N.J.A.C. 7:26C-2.3(a)(4).

Where the owner of an industrial establishment is a landlord and the operator of the establishment is a tenant, both parties are strictly liable, without regard to fault, for compliance with ISRA. N.J.A.C. 7:26B-1.10. An operator is defined as "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. The Supreme Court has found that the remediation obligations imposed by ISRA were intended to secure cleanup at the earliest possible date, "even if the current owner or operator is not responsible for the contamination." In re R.R. Realty Assocs., 313 N.J. Super. 225, 235 (App. Div. 1998) (quoting In re Adoption of N.J.A.C. 7:26B, supra, 128 N.J. at 447–48).

II. The Department is entitled to prevail as a matter of law because Hood failed to remediate the property, hire an LSRP, notify the Department, and pay fees.

As a tenant who operated a qualifying industrial establishment at the property, Hood triggered ISRA when it ceased operations in July 2003. It is uncontested that prior to ceasing operations, Hood failed to submit a negative declaration, remedial action workplan, remediation agreement, or remediation certification. Therefore, Hood failed to remediate the property. Further, Hood acknowledges that it failed to hire an LSRP within forty-five days of triggering ISRA, and failed to notify the Department of same, in violation of N.J.A.C. 7:26C-2.3(a)(1) and (2). On April 20, 2012, DEP billed Hood for an LSRP, but Hood refused payment. Hood eventually retained its own LSRP,

but not until May 7, 2013. On January 28, 2014, Hood attained compliance with the remediation requirement; however, this was more than ten years after Hood triggered ISRA.

Hood offers several arguments as to why the penalties are inappropriate; however, each argument fails as a matter of law. First, Hood asserts that current compliance should prohibit penalties. However, current compliance does not absolve respondent for failing to comply with ISRA's remediation and LSRP requirements at the time it ceased operations at the property. N.J.S.A. 13:1K-13.1 provides DEP with a full range of enforcement options for ISRA violations, including levying a civil administrative penalty. N.J.A.C. 7:26C-9.5 expressly authorizes a base penalty of $20,000 for violations of the remediation requirement, N.J.A.C. 7:25B-3.3(a) and a $15,000 penalty for failure to hire an LSRP as required by N.J.A.C. 7:26C-2.3(a)(1) and (2). DEP declined to assess penalties for Hood's failure to pay fees and oversight costs. The Department assessed penalties for two violations extending for a period of one day, although Hood was technically in violation for nearly a decade. Because the Department only imposed a fraction of the permissible penalties, the penalties appear to be reasonable. See, e.g., NJDEP v. Omega Trucking Co., ESR 5217-13, ESR 5219-13, and ESR 5221-13 (consolidated), Initial Decision (Nov. 21, 2013) <http://njlaw.rutgers.edu/collections/oal/>.

Next, Hood argues that it should not be held liable because Berry-Somerset was working with DEP to clear ISRA on Hood's behalf in 2004, and, therefore, only Berry-Somerset should be held liable. However, ISRA contemplates joint and several liability. DEP has indicated that Berry-Somerset is no longer a viable corporation. And in response to 59 Berry's petition to DEP, the Department has determined that Hood is primarily liable.

Although ISRA sets forth a specific procedure by which an operator can petition the Department to compel the owner to remediate, Hood never utilized this process at

the time it ceased operations. See N.J.S.A. 13:1K-11.9.[11] However, 59 Berry did request such a determination from DEP, and DEP determined that Hood was primarily liable. Although 59 Berry was technically not the owner when Hood ceased operations, it was the successor who assumed all of the prior owner's environmental liabilities. Even if 59 Berry's petition did not comply with the technical requirements of N.J.S.A. 13:1K-11.9, the statute expressly states that "upon the failure by the person responsible pursuant to the provisions of the lease to comply [with ISRA], the department may compel compliance by all persons." Because ISRA authorizes DEP to compel either an owner or operator to comply with ISRA, Hood's argument that his former landlord is liable fails.

Next, Hood asserts that the settlement agreement in the related matter placed liability squarely on his former landlord, Berry-Somerset. (R-15.) However, the settlement agreement, which was provided, did not address the issue of who would bear the responsibility of clearing ISRA for the property.

[11] N.J.S.A. 13:1K-11.9 provides:

> Where the owner of an industrial establishment is a landlord and the operator of the industrial establishment is a tenant, and there has been a failure to comply with the provisions of P.L.1983, c.330, the landlord or the tenant may petition the department, in writing, to first compel that party who is responsible pursuant to the provisions of the lease, to comply with the requirements of P.L.1983, c.330. The department shall develop a form for a petition made pursuant to this section, and shall establish a list of documents required to be submitted with the petition which shall include, but not be limited to: (1) a copy of the notice required pursuant to subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9); (2) the names and addresses of the landlord and the tenant; (3) a copy of the signed lease between the landlord and the tenant; (4) a certification by the petitioner that includes the relevant facts concerning noncompliance with the act; and (5) any other documents the department deems relevant. The department shall make a determination that the provisions of the lease are unclear within 30 days of receipt of a complete petition. Upon a determination by the department that the provisions of the lease are unclear as it relates to the responsibility of either party to comply with the provisions of P.L.1983, c.330, or upon the failure by the person responsible pursuant to the provisions of the lease to comply, the department may compel compliance by all persons subject to the requirements of P.L.1983, c.330 for the industrial establishment.
>
> [Emphasis added.]

III. Summary decision is warranted because there are no genuine issues as to any material fact challenged.

N.J.A.C. 1:1-12-5 governs motions for summary decisions. The provisions of N.J.A.C. 1:1-12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery that have been filed, it can be decided "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). To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

"An 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 submissions of the issues to the trier of fact." R. 4:46-2. While it is true that a judge is not to "weigh evidence and determine the truth of the matter," Brill, supra, 142 N.J. at 540, "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, a judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary-judgment motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App. Div. 1987).

However, the New Jersey Court Rules provide that if it appears that the responding party "was unable to present by affidavit facts essential to justify opposition," the court may deny the motion or order a continuance to allow for additional discovery. R. 4:46-5(a). The Comment to the rule explains that "where the party opposing the motion is unable to file supporting affidavits because the critical facts are peculiarly within the moving party's knowledge, the motion should not be granted." Pressler, Current N.J. Court Rules, comment on R. 4:46-5(a). Thus, "where one side to a litigated controversy is practically entirely dependent upon the production by its adversary of evidence and factual data, an application for summary judgment by the adversary upon the basis of such evidence should be handled with the greatest caution," considering the illuminative value, from both a substantive and credibility viewpoint, of a full evidentiary hearing. Congdon v. Jersey Constr. Co., 55 N.J. Super. 571, 580 (App. Div. 1959).

The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases," due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539 (citation omitted).

There are several facts that appear to be in dispute in this matter, but none is material to the ultimate legal issues to be decided. First, there is a dispute as to whether Hood filed a GIN on September 13, 2003. N.J.A.C. 7:26B-3.2 requires owners or operators planning to close operations or transfer ownership of an industrial establishment to submit a completed GIN to the Department within five days of either the close of operations, or another specified triggering event. Hood has provided a copy of a notarized GIN it alleges it prepared and submitted to DEP, but DEP has no record of receipt of this GIN. Even if this fact question is decided in a light most favorable to the non-moving party, and it is accepted that Hood did submit a GIN in 2003, this has no bearing on the alleged violations at issue: whether Hood remediated the property, hired an LSRP, or paid fees. Hood has not been cited with failing to file a GIN.

A second factual dispute also proves to be immaterial to the narrow legal issues presented. Hood alleges that on May 6, 2009, Mr. Gradwohl represented to Hood's consultant that Hood's paperwork regarding ISRA clearance for the property was in order. Although Mr. Gradwohl denies that such a conversation ever occurred, even if Hood's version of this fact is accepted as true, it has no bearing on whether Hood complied with ISRA when it ceased operations at the property in July 2003. Hood could not have detrimentally relied on DEP's conduct in 2009, when the alleged violation occurred five years prior.

Finally, there is a dispute regarding which NAICS number applies to Hood. An "industrial establishment" subject to ISRA is an establishment with a specified NAICS number. N.J.A.C. 7:26B-1.4; N.J.S.A. 13:1K-8. Hood proposes that the correct NAICS number for its operations is 423840, which is not one of the specified classifications subject to ISRA. However, in the related landlord-tenant proceeding, Judge Ciccone ruled that Hood was an industrial establishment with NAICS number 325510, subject to ISRA. (P-16, Appendix A at 10.) This code applies to paint and coating manufacturers, which is in accord with how Hood described its operation on its website. (Hahn Cert., Ex. A.) Although this fact is material, Hood's bare assertion that it is in dispute is not sufficient to require a hearing on the matter, given that a judge of the Superior Court has made a determination on that issue.

IV. The equitable defenses raised by Hood.

Hood raises several equitable defenses which must be addressed. Hood asserts that DEP should be estopped from assessing penalties against it, because Hood relied to its detriment on DEP's alleged representation that Hood was not responsible for clearing ISRA. Equitable estoppel is defined as

> the effect of the voluntary conduct of a party whereby he is absolutely precluded . . . from asserting rights which might perhaps have otherwise existed * * * as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse.

> [Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979).]

"Equitable estoppel should rarely be invoked against public entities, except to prevent manifest injustice." W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 553 (1989). This is because estoppel against the government may be detrimental to the public interest and could interfere with essential governmental functions. O'Malley v. Dep't of Energy, 109 N.J. 309, 316 (1987). When a party has raised an estoppel defense against the government, courts have focused on the intentional-misrepresentation requirement. The party to be estopped must have "knowingly and intentionally" misrepresented. Id. at 317. This intent can be seen where the governmental agent "engages in conduct that is calculated to mislead the plaintiff." W.V. Pangborne & Co., supra, 116 N.J. at 553.

Even if the conduct itself does not mislead, however, intentional misrepresentation by the government can be found if a public official knew or should have known of material facts, but that official acted as if he or she did not have knowledge. NJDEP v. Ventron Corp., 94 N.J. 473, 499 (1983). Only justified and reasonable detrimental reliance warrant the application of equitable estoppel. Palantine I v. Twp. of Montville, 133 N.J. 546, 563 (1993) (disapproved of on other grounds); D.L. Real Estate Holdings v. Point Pleasant Beach Planning Bd., 176 N.J. 126, 134–35 (2003). "Erroneous dissemination of information by a government agent does not constitute affirmative misconduct when the party claiming estoppel already has a pre-existing duty to conform to some legal standard." N.J. Dep't of Envtl. Prot. v. Mt. Bethel Humus Co., 95 N.J.A.R.2d (EPE) 202, 206.

Hood argues that because it timely filed a GIN (notifying DEP of its intent to cease operations) which DEP never acted upon, this misled Dr. Kasner into thinking that he was not responsible for complying with the directives of ISRA. It is a disputed fact whether Hood ever submitted a GIN to DEP, but assuming this fact in Hood's favor,

it still would not excuse Hood's failure to remediate, hire an LSRP and pay oversight costs.[12]

Hood also suggests that in 2009, DEP mislead Hood's consultant by representing that the ISRA paperwork was in order. This alleged misrepresentation did not occur until nearly a decade after Hood failed to comply with ISRA. Even if we assume that Mr. Gradwohl made the alleged misrepresentation, DEP still prevails as a matter of law because Hood failed to comply with the requirements of ISRA in 2003. Therefore he could not have relied on Mr. Gradwohl's representation to his detriment.

Next, Hood argues that the AONOCAPA is barred by laches. Laches is defined by the courts as a "defense when there is delay, unexplained and inexcusable, in enforcing a known right, and prejudice has resulted to the other party because of that delay." Gladden v. Bd. of Trs. of the Pub. Emps.' Ret. Sys., 171 N.J. Super. 363, 371 (App. Div. 1979) (emphasis added). Laches requires both knowledge of a right and prejudice to the other party as a result of the delay in enforcing that right.

The policy behind the doctrine is the discouragement of stale claims. Ibid. Whether a claim is stale is based on whether a party had a reason to assert the claim at an earlier date but failed to do so. Berkeley Dev. Co. v. Great Atl. & Pac. Tea Co., 214 N.J. Super. 227, 243 (Law Div. 1986). Prejudice to the respondent is the most important factor that must be established to support a finding of laches. Enfield v. FWL, Inc., 256 N.J. Super. 502, 520 (Ch. Div. 1991) (citing Lavin v. Bd. of Educ., City of Hackensack, 90 N.J. 145 (1982)). The respondent bears the burden of proof to show that it was prejudiced by the petitioner's delayed assertion of its claim without excuse or explanation. Id. at 520 (citing Allstate Ins. Co. v. Howard Savs. Inst., 127 N.J. Super. 479 (Ch. Div. 1974)).

Laches is not applied against the State to the same extent as against private parties. Comm'r of Banking & Ins. v. Tavares, BKI 3379-10, Initial Decision (Aug. 19,

[12] The record should reflect that although Hood ultimately failed to abide by the letter of the Act and its implementing regulations, Dr. Kasner appears to have tried to comply with a very technical and esoteric body of law.

2010), Consent Order (Mar. 31, 2011), <http://njlaw.rutgers.edu/collections/oal/> (citing O'Neill v. State Hwy. Dep't, 50 N.J. 307, 319 (1967)). The State has a long history of limiting the applicability of the doctrine in matters that involve the public interest. Ibid. (citing Hyland v. Kirkman, 157 N.J. Super. 565, 581–82 (Ch. Div. 1978)). It is well established that laches cannot be invoked against the government, nor can the neglect or omissions of public officials, as to their public duties, work an estoppel against the government. Ibid. (citing Seaside Improvement Co. v. Atl. City Steel Pier Co., 110 N.J. 510, 519 (Ch. Div. 1932), aff'd, 114 N.J. Eq. 22 (E. & A. 1933)). This limitation especially holds true where the government is acting to enforce a public right. Ibid. (citing Town of Secaucus v. City of Jersey City, 19 N.J. Tax 10, 27 (2000)).

In this matter, the delay on DEP's part is explained and excusable. Hood's former landlord, Berry-Somerset, had been working with DEP in 2004–2005 to clear ISRA for the property. However, in 2007, Berry-Somerset sold the property to 59 Berry without notifying DEP. DEP did not become aware of contamination on the property until 2009, when 59 Berry's attorney received ground-water-sampling test results from Berry-Somerset's consultant. Berry-Somerset subsequently became a defunct corporation. DEP then elected to hold Hood, the operator, liable for clearing ISRA. Because DEP was not aware that Berry-Somerset was no longer the owner until 2009, its delay in enforcing its right against Hood is justifiable.

Finally, Hood's argument that this action is barred by 28 U.S.C.A. § 2462 fails, because this is a federal statute of limitations, and, thus, is inapplicable to this matter.

V. Hood's motion to depose Joshua Gradwohl.

The purpose of discovery is to facilitate the disposition of cases by streamlining hearings and enhancing the likelihood of settlement or withdrawal. N.J.A.C. 1:1-10.1. The rules governing discovery set forth in the Uniform Administrative Procedure Rules ("UAPR") are designed to achieve this purpose by giving litigants access to facts that tend to support or undermine their position or that of their adversary. N.J.A.C. 1:1-10.1. The UAPR provides that depositions are only available on motion for good cause. N.J.A.C. 1:1-10.2(c). In deciding a motion to depose, the judge shall

> weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness.
>
> [Ibid.]

It appears that Dr. Kasner wishes to depose Mr. Gradwohl in order to determine whether he intentionally destroyed or misplaced the GIN Hood allegedly submitted in 2003. This line of inquiry is not relevant to the ultimate issues in this case.

VI. Hood's motion to dismiss fees should be denied.

The party responsible for remediating a site under ISRA is required to pay all applicable fees and oversight costs as required by N.J.A.C. 7:26C-4 ("fees and oversight costs"). N.J.A.C. 7:26C-2.3(a)(4). Each year until an LSRP has issued a Remedial Action Outcome ("RAO") for the site, the person responsible for conducting the remediation must pay an "annual remediation fee." New Jersey Department of Environmental Protection Site Remediation Program Fee Guidance Document, effective July 1, 2014,[13] (hereinafter "Guidance Document"); see N.J.A.C. 7:2C-4.3(a)(5). The fees are calculated as set forth in N.J.A.C. 7:26C-4.2(b)(3).

In short, the annual remediation fee consists of the "contaminated area of concern category fee" plus "the contaminated media additive fee" (Invoice, Hahn Cert., Ex. 3.) The "contaminated area of concern" fee is calculated by determining how many contaminated areas of concern exist on a site, determining which category applies, and multiplying this by a "base fee" set forth in N.J.A.C. 7:26C-4.3. To calculate the "contaminated media fee," the number of media contaminated at the site is multiplied by the base fee set forth in N.J.A.C. 7:26C-4.3(a)(2). Calculating Hood's fees using the July 1, 2014, base fee and media fee is as follows:

[13] Found at <http://www.state.nj.us/dep/srp/guidance/srra/fee_guidance_document.pdf>.

> Annual remediation fee = (1 category 1 contaminated area of concern x $565) + (1 contaminated groundwater media x $1,750)
>
> Therefore, the annual remediation fee after July 1, 2014, would be $2,315.

Hood has been assessed annual remediation fees for 2012, 2013 and 2014.[14] (Hahn Cert., Ex. 3). Hood's fees have been calculated as follows:

> Annual remediation fee = (1 category 1 contaminated area of concern x $450) + (1 contaminated groundwater media x $1,400)
>
> Therefore, the annual remediation fees applied to Hood for 2012, 2013, and 2014 are $1,850 per year, for a total of $5,550.

DEP did not provide a breakdown or justification of the fees, but the analysis above was obtained from the associated regulations. It is unclear which base fees the Department used prior to July 1, 2014, but base fees are raised periodically based on the equation set forth in N.J.A.C. 7:26C-4.2.[15] However, the fees assessed appear to be accurate, assuming that the fees actually assessed against Hood utilized a lower base rate than those posted in the Guidance Document for use after July 1, 2014.

As of the date the motions for summary decision were filed, Hood has not made payment. (Gradwohl Cert., ¶ 20.) Because the LSRP was not able to issue an RAO for the property until 2014, the penalties assessed are appropriate, and Hood is required to pay the total fee amount.

CONCLUSION

Based upon the above analysis, the Department's motion for summary decision is granted, and respondent's motion for summary decision, motion to depose

[14] It is not clear why Hood was not assessed fees for years prior to 2012. However since Hood has moved to dismiss fees, and this fact mitigates in its favor, this fact does not need to be addressed here.

[15] The base fees are calculated annually, and reflect concerns specific to DEP's annual budget, Site Remediation Department revenue, and total areas of concern reported to the Department.

Mr. Gradwohl, and motion to dismiss fees is denied. Hood violated ISRA by failing to remediate the property, failing to hire an LSRP, and failing to pay costs. The penalty amounts assessed are expressly authorized by N.J.A.C. 7:26C-9.5, and appear to be reasonable. While the concern of Dr. Krasner and Hood over the amount of time that has elapsed since they occupied the property is understandable, nonetheless, the law and the regulations are clear. Joint and several liability applies to the remediation of contaminated property.

ORDER

I hereby **ORDER** that the Department of Environmental Protection's motion for summary decision is **GRANTED**. The respondent shall pay the penalties of $35,000 and the remediation fees which were calculated as $5,500 by the Department. The respondent's motion for summary decision, motion to depose Mr. Gradwohl, and motion to dismiss fees is **DENIED**.

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, 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.

September 18, 2014 — Susan Scarola

DATE — **SUSAN M. SCAROLA**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EXHIBITS

For Petitioner:

P-1 Memorandum from Mr. Gradwohl to DEP's Joe Corleto, July 23, 2012
P-2 PAR submitted to DEP by Berry-Somerset, Oct. 5, 2004
P-3 GIN submitted to DEP by Berry-Somerset, Dec. 4, 2004
P-4 DEP inspection report, Jan. 4, 2005
P-5 Correspondence from ANCO to Anthony Betta, Feb. 23, 2009
P-6 59 Berry's landlord-tenant petition to DEP
P-7 DEP's Oct. 19, 2011, response to 59 Berry's landlord-tenant petition
P-8 Correspondence from DEP to Dr. Kasner, Apr. 20, 2102
P-9 AONOCAPA, Sept. 21, 2012
P-10 Amended AONOCAPA, Nov. 19, 2012
P-11 Dr. Kasner's hearing request, Oct. 9, 2012
P-12 Correspondence from DEP to Dr. Kasner, May 7, 2013
P-13 Correspondence from DEP to Dr. Kasner, Apr. 19, 2012
P-14 Site Remediation LSRP Annual Fee invoice, Apr. 20, 2012
P-15 Correspondence approving new version of GIN for circulation, Jan. 27, 2004
P-16 Correspondence from MaryLou Delahanty to Mr. Gradwohl, Apr. 23, 2012
P-17 Correspondence from Dr. Kasner to Mr. Gradwohl, Jan. 31, 2012
P-18 Landlord-tenant petition to Determine Hood's ISRA Liability, Oct. 11, 2011

For Respondent:

R-1 Correspondence from Dr. Kasner to Mr. Krisak, Oct. 12, 1998
R-2 Correspondence from Dr. Kasner to Mr. Gradwohl, July 2, 2003
R-3 Notarized GIN, Sept. 13, 2003
R-4 Correspondence from Dr. Kasner to Mr. Gradwohl, Sept. 23, 2003
R-5 PAR prepared for Berry-Somerset
R-6 GIN, Dec. 2, 2014
R-7 Correspondence from Mr. Gradwohl to Jeffrey Markovitz, Jan. 4, 2005
R-8 Map of 59-61 Berry marking area of stressed vegetation

R-9 Certification of Dennis Brenner

R-10 Correspondence from Mr. Gradwohl to Ms. Delahanty, Oct. 19, 2011

R-11 Certification of Dr. Kasner, landlord-tenant action

R-12 Penalty Assessment Worksheet

R-13 SRP Case Oversight Report

R-14 DEP's responses to Hood's second set of interrogatories

R-15 Consent to Enter Judgment, Berry Somerset, LLC v. Hood Finishing Prods., Inc., Superior Court Docket No. LT-1054-03 (Law Div. 2003)

R-16 Hood's June 10, 2014, motion