State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT, Petitioner, v. BLUE ROSE CORPORATION AND SHALIMAR HOLDINGS, LLC, Respondents.	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT NO. ESR 8635-14 AGENCY REF. NO. PEA 130001-254163

This is an appeal of an Administrative Order and Notice of Civil Administrative Penalty (AONOCAPA) issued on July 26, 2013, by the New Jersey Department of Environmental Protection (Department) to Blue Rose Corporation (Blue Rose) and Shalimar Holdings, LLC (Shalimar) alleging violations of the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 et seq., and its implementing regulations, including N.J.A.C. 7:26C and N.J.A.C. 7:26E, at a property in West Windsor Township, Mercer County. The AONOCAPA assessed a $59,600.00 penalty for the failure to remediate antimony, copper, lead, chromium, and dieldrin contamination in the soil, and cadmium, chromium, lead, and nickel contamination in the ground water.

Respondents requested an administrative hearing to challenge the AONOCAPA, and the Department transmitted the matter to the Office of Administrative Law (OAL) where it was assigned to Administrative Law Judge (ALJ) Solomon A. Metzger. On October 7, 2016, the Department filed a motion for summary decision, which Respondents did not oppose. On May 3, 2017, the ALJ issued an Order granting summary decision in the Department's favor and directing Shalimar to pay the assessed penalty and undertake compliance as required by the AONOCAPA. On August 8, 2017, the ALJ issued an Initial Decision memorializing the findings of the prior Order.[1] Neither Respondents nor the Department filed exceptions to the Initial Decision.

Based upon my review of the record, I ADOPT the ALJ's Initial Decision in its entirety, as supplemented by this Final Decision.

FACTUAL BACKGROUND

Respondents' property is located at 119 Penn Lyle Road, designated as Block 16.11, Lot 15, in West Windsor Township (the Site). From the 1950s until 2006, the Site was used for storage of automotive parts and miscellaneous debris, including items of potential environmental concern, such as gasoline tanks with liquids, empty and crushed 55-gallon drums, and empty underground storage tanks.

Blue Rose owned the Site from October 20, 2003, until April 26, 2006, at which time Shalimar purchased the Site. On April 13, 2005, Blue Rose's environmental consultant, Hill Environmental Group (Hill Environmental), notified the Department Hotline of the presence of

[1] The August 8, 2017, Initial Decision and this Final Decision apply to Shalimar only. On November 21, 2016, counsel for Blue Rose sent a letter to the ALJ stating that Blue Rose had filed for Chapter 7 Bankruptcy protection on September 14, 2016 and requesting a stay of this matter. On August 1, 2017, the Department rescinded the AONOCAPA as it applied to Blue Rose Corporation only, due to the bankruptcy proceeding.

antimony, dieldrin, lead, chromium, and copper in the soil, and the presence of nickel, lead, chromium and cadmium in the ground water.

On May 24, 2005, Blue Rose entered into a Memorandum of Agreement (MOA) with the Department for the remediation of the contamination in the soil and ground water at the Site. Pursuant to the MOA, Blue Rose assumed responsibility to remediate the discharges, agreed to conduct remediation and submit documentation to the Department in accordance with N.J.A.C. 7:26E, and pay the Department's costs for oversight.

On June 15, 2005, Blue Rose submitted a site investigation report, but failed to implement any remedial action. On August 10, 2006, Shalimar submitted a remedial investigation report. In these reports, both property owners documented the presence of hazardous substances in the soil and ground water. On March 30, 2007, the Department conducted a compliance review which identified deficiencies in Shalimar's remedial investigation report. On July 23, 2008, the Department sent Blue Rose a notice of intent to terminate the MOA because Blue Rose had failed to pay the Department's oversight costs. Over the next several years the Department contacted Respondents numerous times, directing the entities to come into compliance. On February 11, 2013, the Department completed another compliance evaluation, which reflected no changes in status of the Site. Thus, on July 26, 2013, the Department issued the AONOCAPA, citing Respondents with failure to remediate the site by, specifically, failing to: (i) hire a licensed site remediation professional (LSRP) as required by N.J.A.C. 7:26C-2.3(a)1; (ii) conduct the remediation without prior Department approval as required by N.J.A.C. 7:26C-2.3(a)3; (iii) conduct and submit an initial receptor evaluation as required by N.J.A.C. 7:26E-1.12(c); and (iv) pay all applicable fees and oversight costs as required by N.J.A.C. 7:26C-2.3(a)4.

LEGAL DISCUSSION

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).

In 2009, the Legislature enacted the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-l through -29, and related amendments. SRRA and those amendments significantly altered the paradigm for the cleanup of contaminated sites in New Jersey by shifting the initial oversight of cleanups from the Department to LSRPs. N.J.S.A. 58:10B-1.3(b). To implement the new paradigm, the Department promulgated regulations, including the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation (Technical Requirements), N.J.A.C. 7:26E.

Pursuant to the regulations, any discharger or a person in any way responsible for the discharged hazardous substance, pursuant to N.J.S.A. 58:10-23.11g, must conduct a remediation of the discharged hazardous substances. N.J.A.C. 7:26C-2.2(a)1. In accordance with N.J.S.A. 58:10B-1.3(b) and N.J.A.C. 7:26C-2.3, a person in any way responsible for a

hazardous substance must remediate according to ARRCS, including: (i) hiring an LSRP; (ii) conducting the remediation without prior Department approval; (iii) conducting and submitting an initial receptor evaluation; and (iv) paying all applicable fees and oversight costs.

It is undisputed here that there has been a discharge of hazardous substances at the Site as defined by the Spill Act, N.J.S.A. 58:10-23.11b. The Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3(a), obligates the discharger of a hazardous substance or a person in any way responsible for a hazardous substance pursuant to the Spill Act, N.J.S.A. 58:10-23.11g, to clean up and remove the hazardous substances discharged at a contaminated site. Further, under N.J.S.A. 58:10-23.11g(c)(3), owners of real property are strictly liable, jointly and severally, without regard to fault for cleanup and removal costs. It is undisputed that hazardous substances were present in both the soil and ground water on the Site in concentrations exceeding regulatory limits. See N.J.A.C. 7:1E, Appx. A. Therefore, there is no dispute that a discharge of hazardous substances was identified on the Site on April 13, 2005.

It is undisputed that Blue Rose purchased the Site on October 20, 2003, was the owner at the time its consultant Hill Environmental reported the discharge, and therefore has satisfied the ownership requirement of N.J.S.A. 58:10-23.11g(c)(3). Shalimar purchased the Site on April 26, 2006, over a year after Blue Rose entered into an MOA with the Department, therefore also satisfying the ownership requirement of N.J.S.A. 58:10-23.11g(c)(3).

Because Blue Rose purchased the contaminated Site on October 20, 2003, and knew or should have known of the discharge of hazardous substances at the Site from prior use, and because Shalimar purchased the Site on April 26, 2006, knowing of the discharge and resulting MOA, Shalimar is responsible, pursuant to the Spill Act, for the hazardous substances discharged at this Site. N.J.S.A. 58:10-23.llg. Therefore, Shalimar is responsible for conducting

the remediation, as defined at N.J.S.A. 58:10B-l, and is legally obligated to remediate the discharges at this Site. N.J.S.A. 58:10B-1.3 and N.J.A.C. 7:26C-2.2(a).

By failing to complete the remediation, Shalimar has failed to abate the risks to the public health and safety and environment caused by the discharge. Thus, the Department's issuance of the AONOCAPA was appropriate.

PENALTY DETERMINATION

Although Shalimar did not challenge the amount of the penalties assessed, I conclude that the penalties as assessed 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).

The Department assessed a civil administrative penalty against Shalimar because of its failure to comply with the requirements of ARRCS and the Technical Requirements, particularly for violations of N.J.A.C. 7:26C-2.3(a)1 and 2, 7:26C-2.3(a)3, 7:26C-2.3(a)4, and 7:26E-1.12(c). The ARRCS establish the circumstances and amounts of penalties that the Department can assess for violations. N.J.A.C. 7:26C-9.5 establishes civil administrative penalties for violations of SRRA; the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq.; the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq.; and 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 may 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. Here, for each of the violations the Department assessed only the base penalty.

Shalimar failed to hire an LSRP. Under, N.J.A.C. 7:26C-9.5(b) this violation is a non-minor penalty with a base penalty of $15,000. Shalimar is the party responsible for conducting remediation and failed to do so. According to N.J.A.C. 7:26C-9.5(b), failure to remediate is a non-minor offense with a base penalty of $15,000. On February 12, 2013, the date of violation indicated in the AONOCAPA, there were outstanding annual remediation fees of $2,300 for the years 2012 and 2013, totaling $4,600. Under N.J.A.C. 7:26C-9.5(b) the penalty for the failure to pay fees is 100 percent of the amount of the fee in arrears. Under N.J.A.C. 7:26C-9.5(b), Shalimar's failure to submit an initial receptor evaluation is a non-minor violation with a base penalty of $25,000.

Based on my review, I conclude that the penalty assessments were proper, authorized by, and in conformance with the Spill Act and implementing rules.

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 Shalimar is hereby ORDERED to pay the penalty of $59,600.00

imposed by paragraph 19 of the June 26, 2013, AONOCAPA and to undertake compliance as directed by paragraph 17 of the AONOCAPA. While the AONOCAPA did not establish a deadline for penalty payment, the invoices sent to Respondents provided them approximately 45 days to make payment. Shalimar is directed, therefore, to make its payment and undertake compliance within 45 days of the date of this Final Decision.

IT IS SO ORDERED.

September 7, 2017
DATE

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENTOF ENVIRONMENTAL PROTECTION,
SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,
v.
BLUE ROSE CORPORATION AND SHALIMAR HOLDINGS, LLC
OAL DKT. NO. ESR 8635-14
AGENCY DKT. NO. PEA 130001-254163

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