



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
SITE REMEDIATION COMPLIANCE)
AND ENFORCEMENT,)
Petitioner,)
v.)
RARITAN SHOPPING CENTER, LP,)
Respondent.¹)

ADMINISTRATIVE ACTION FINAL DECISION

OAL DKT NO. ESR 8679-14
AGENCY REF. NO. PEA 13001-
G000010664

This matter involves the challenge by Respondent, Raritan Shopping Center, LP (Raritan) to the New Jersey Department of Environmental Protection's (Department) January 13, 2014 Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) alleging violations of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a, et seq. (Spill Act), the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1, et seq. (Brownfield Act), the Site Remediation Reform Act, N.J.S.A. 58:10C-1, et seq. (SRRRA), the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, (Technical Requirements), with respect to a commercial property owned by Raritan known as Block 116.01, Lot 11.01 and located at Route 206 and Orlando Drive in the Borough of Raritan, Somerset County (Site). Specifically, the Department cited Raritan for: (1) failure to conduct remediation

¹ The caption has been corrected to reflect the proper status of the parties and to remove Raritan Township Sanitary Landfill Site as a respondent.

in accordance with N.J.A.C. 7:26C-2.3(a)3; (2) failure to hire a licensed site remediation professional (LSRP) and provide the Department with required information within 45 days in accordance with N.J.A.C. 7:26C-2.2(a); (3) failure to submit an initial receptor evaluation within the required timeframe; and (4) failure to pay fees and oversight costs, and to submit an Annual Remediation Fee Reporting Form as required. The Department ordered Raritan to comply with the above-noted statutory and regulatory requirements and assessed a penalty of \$15,000 with respect to (1) above; \$15,000 with respect to (2) above; \$25,000 with respect to (3) above; and \$11,200 with respect to (4) above, for a total penalty of \$66,200.

Raritan requested a hearing to contest the AONOCAPA on February 7, 2014. The Department transmitted the matter to the Office of Administrative Law (OAL), where it was assigned to Administrative Law Judge (ALJ) Susan M. Scarola.

On September 29, 2015, the Department filed a motion for summary decision. Raritan responded on December 10, 2015, opposing the Department's motion and cross-moving for summary decision.

The ALJ issued an Initial Decision on June 30, 2016, granting summary decision in favor of the Department and denying Raritan's cross-motion. The ALJ ordered Raritan to comply with the terms of the AONOCAPA and pay the civil administrative penalty of \$66,200. On July 12, 2016, the ALJ issued a corrected Initial Decision removing inadvertently included language reserved for Spill Act arbitration decisions and revising the decision date. Neither Raritan nor the Department filed exceptions to the Initial Decision.

Based on my review of the record, I find that the ALJ's findings of fact and conclusions of law were correct and, consequently, ADOPT the Initial Decision as set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

I ADOPT the ALJ's recitation of the facts as supplemented in this Final Decision.

Since March 31, 1993, Raritan has owned and operated a shopping mall, consisting of two buildings housing various commercial tenants on the Site. In its various submissions to the Department, Raritan listed approximately twenty tenants operating at the mall as of 2003. Prior to Raritan's ownership, the Borough of Raritan (Borough) owned and operated the Site as a municipal landfill from 1959 to 1979, when the landfill ceased operating.

In 1984, the Borough sold the Site to Raritan Mall Associates, which built the shopping mall on top of the former landfill between 1985 and 1986. Prior to that transfer, Raritan Mall Associates, as the prospective purchaser, commissioned the necessary environmental assessment and clean-up plan and submitted these reports to the Department to obtain approval of the transfer. The Department issued an approval based on Raritan Mall Associates' assertion that the landfill "posed a minimal risk to the environment" and acknowledgement that, if required ground water monitoring wells detected hazardous substances above action levels, further remedial investigation, including delineation and ground water treatment, would be undertaken.

Under a September 1985 agreement with the Borough, Raritan Mall Associates agreed to assume the responsibility for ground water monitoring for a period of five years, after which the cost of any continued monitoring would be assumed by the Borough. Raritan Mall Associates obtained the required permit and installed the required ground water monitoring system consisting of five monitoring wells prior to its purchase of the Site. Over the five-year period from 1986 to 1991, certain of these monitoring wells showed elevated levels of volatile organic compounds, including trichloroethene (TCE) and tetrachloroethylene (PCE). In 1991, the

Borough reassumed responsibility for ongoing ground water monitoring from Raritan Mall Associates.

Raritan acquired the Site in March 1993, while ground water monitoring was ongoing. Prior to acquisition, Raritan commissioned a Phase I and Preliminary Phase II Environmental Assessment. This assessment reported the presence of elevated levels of hazardous substances, including TCE, at the Site and recommended that Raritan conduct any additional well testing required by the Department. There is no indication in the record that Raritan conducted any further investigation prior to purchase.

On August 14, 2003, a prospective purchaser of the Site collected ground water samples revealing a “hot spot” of several hazardous substances (benzene, toluene, ethylbenzene, and xylenes (BTEX), chlorobenzene, and TCE, PCE, cis-1,2-dichloroethene (DCE), and vinyl chloride) at levels above the Department’s ground water quality standards. Upon notice of these findings, on August 21, 2003, Raritan sought to delineate the “hot spot” and collected ground water samples revealing TCE, DCE, vinyl chloride, toluene, methylene chloride, and benzene in levels above the Department’s ground water quality standards. On October 6, 2003, the Department approved a disruption application and on October 8, 2003, Raritan excavated the “hot spot” in an effort to remove contaminated soil.

On February 10, 2004, the Department and Raritan finalized a Memorandum of Agreement (MOA) under N.J.A.C. 7:26C-3.3, obligating Raritan to remediate the hot spot, delineate the ground water contamination, determine whether an off-site source was contributing to the hot spot, and submit the results of its activities to the Department in the form of a Remedial Investigation Report/Remedial Action Report (RIR/RAR).² In the MOA, Raritan

² The governing rule at the time allowed an entity to submit a voluntary offer to conduct remediation that, upon

admitted that a discharge of hazardous substances had occurred at the Site and voluntarily agreed to conduct the required remediation.

On September 20, 2004, Raritan submitted an RIR/RAR to the Department indicating that it had delineated and excavated the hot spot. The RIR/RAR further noted that “[d]uring the excavation activities . . . the remains of three [extremely corroded] steel drums were encountered . . . contain[ing] yellow sandy soil with an unknown composition” and “[the] drums and their contents were segregated from the rest of the soil pile and were disposed of as hazardous solvent contaminated soil.” Raritan proposed “No Further Action for the site with the establishment of a Classification Exception Area (CEA)” to allow the elevated concentrations of benzene to remain, provided ground water usage was restricted. Finally, the RIR/RAR acknowledged that other volatile compounds, specifically chlorinated compounds, were detected at the Site, but because those compounds were previously detected in ground water samples collected from the existing permanent monitoring wells subject to annual sampling by the Borough, they were not included in the proposed CEA.

In response to the RIR/RAR, on March 16, 2007, the Department issued a Notice of Deficiency (NOD) to Raritan noting an improper and incomplete ground water sampling methodology for the vertical and horizontal delineation of contamination at the Site and “failure to meet the monitoring and performance requirements for natural remediation.” With respect to the latter deficiency, the Department stated that “[t]he chlorinated solvents detected in the ‘hot spot’ were not included in the CEA application” and that “[a] revised CEA application must be submitted.”

acceptance by the Department, constituted an MOA under which the entity was required to conduct the remediation in accordance with the Technical Requirements and pay all Department oversight costs. N.J.A.C. 7:26C-3.3 (2004).

On June 12, 2007, Raritan responded to the NOD stating, “[t]he analytical results of the post-excavation soil samples confirmed that soil remediation was successful” and that “[b]ased on [the Borough’s assumption of ground water-monitoring responsibilities], it is requested that any ground water issues be deferred/addressed to the Borough of Raritan.” Raritan thereby failed to address the deficiencies noted by the Department in the NOD, leaving the required remediation at the Site incomplete.

On July 12, 2011, the Department advised Raritan that “as the person remediating” the Site, it was now subject to SRRA and, as of May 7, 2012, Raritan would be required to hire an LSRP to complete the remediation.³

On January 24, 2012, the Department again notified Raritan of its obligation to comply with the requirements of SRRA and hire an LSRP by May 7, 2012. Shortly thereafter, on January 30, 2012, the Department sent a Compliance Assistance Alert advising Raritan to submit an Initial Receptor Evaluation by March 1, 2012.

On December 11, 2012, the Department notified Raritan a third time that the Site remained out of compliance due to Raritan’s failure to retain an LSRP, provide a receptor evaluation, and conduct a proper site investigation. The Department advised that if Raritan did not address these deficiencies, the Department would issue an Administrative Order assessing penalties for Raritan’s non-compliance. Raritan did not respond.

On January 3, 2013, the Department sent Raritan an invoice for a total of \$11,200 (a Category 3 Annual Remediation Fee of \$8,750 and a Media (Ground Water) fee of \$2,450), to be

³ SRRA required that no later than three years after its date of enactment (May 7, 2009), a person responsible for conducting the remediation, no matter when the remediation is initiated, shall comply with its requirements. N.J.S.A. 58:10B-1.3(c)(3).

paid by March 3, 2013. Though not explicitly stated, the fees due covered the first two annual fees owed under SRRA.

Finally, on January 13, 2014, the Department issued the AONOCAPA. To date, Raritan has not taken any action to address the violations cited.

In its motion for summary decision, the Department asserted that, as the owner of property where a discharge occurred, Raritan is a person “in any way responsible” under the Spill Act and therefore must remediate the Site in accordance with SRRA, and take all the steps directed in the AONOCAPA. Accordingly, the Department requested that the ALJ order Raritan to comply with the terms of the AONOCAPA and pay a civil administrative penalty of \$66,200. In its cross-motion for summary disposition and opposition to the Department’s motion, Raritan argued that it should not be liable for the violations cited in the AONOCAPA, stating that: (1) it qualifies an “innocent purchaser” under the Spill Act; (2) the Department allowed hazardous materials to remain on the Site as part of its approval of the transfer of the property from the Borough to Raritan Mall Associates; (3) it is not subject to SRRA because it had voluntarily completed remediation at the Site prior to passage of the law and any delay in completion was a result of the Department’s failure to respond to the RIR/RAR in a timely manner; (4) the Department cannot prove that contaminants were present at the Site either at the time of the enactment of SRRA (May 7, 2009) or the date when Raritan was required to hire an LSRP (May 7, 2012); (5) the Department cannot impose penalties because it cannot prove any discharge occurred after April 1, 1977; (6) the ARRCs do not apply to the remediation; and (7) the Department’s actions are barred by laches because the Department’s delay in addressing Raritan’s response to the NOD prevented Raritan’s completion of its obligations under the MOA thereby precipitating issuance of the AONOCAPA.

In the Initial Decision, the ALJ found that the Department is entitled to judgment as a matter of law, concluding that Raritan failed to comply with the Spill Act, the Brownfield Act, SRRA, and the rules promulgated under each of those laws. The ALJ ordered Raritan to comply with the AONOCAPA and pay the civil administrative penalty of \$66,200. Neither party filed exceptions to the Initial Decision.

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). I find that the parties raise no genuine issues of material fact and ADOPT the ALJ’s conclusion that the Department is entitled to summary decision as a matter of law.

Under the Spill Act, “any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred.” N.J.S.A.

58:10-23.11g(c)(1); see also State, Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 494 (1983).⁴ Thus, Spill Act liability is not limited solely “to those who were active participants in the discharge of hazardous substances.” N.J. Dep't of Env'tl. Prot. v. Dimant, 212 N.J. 153, 162, 175 (2012) (citing Marsh v. N.J. Dep't of Env'tl. Prot., 152 N.J. 137, 146 (1997); N.J.S.A. 58:10-23.11g(c)(1)). Instead, the Spill Act “establishes a broad scope of liability.” Ibid.

A person “in any way responsible” under the Spill Act (a responsible party) includes “[e]ach subsequent owner of the real property where the discharge occurred prior to the filing of a final remediation document with the Department.” N.J.A.C. 7:26C-1.4(a)4. A final remediation document is narrowly defined as either a no further action letter (NFA) or a response action outcome (RAO). N.J.A.C. 7:26C-1.3.

Therefore, a subsequent purchaser of a property containing a discharge of hazardous substances prior to the filing of an NFA/RAO is a responsible party unless the purchaser qualifies as an innocent purchaser. N.J.S.A. 58:10-23.11g(d)(5); see also N.J. Schs. Dev. Auth. v. Marcantuone, 428 N.J. Super. 546, 549 (App. Div. 2012), certif. denied, 213 N.J. 535 (2013). To demonstrate that a person is an innocent purchaser of a property acquired prior to September 14, 1993, the person must establish, by a preponderance of the evidence, that:

- (a) the person acquired the real property after the discharge of that hazardous substance at the real property;
- (b)(i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property ...;
- (c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a

⁴ Discharge" is defined as “as any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State of New Jersey, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.” N.J.S.A. 58:10-23.11b.

corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

[N.J.S.A. 58:10-23.11g(d)(5).]

To establish that a person had no reason to know that any hazardous substance had been discharged, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, i.e., the performance of a preliminary assessment, and, if the preliminary assessment indicates necessary, a site investigation. Ibid.

The Brownfield Act provides that any responsible party under the Spill Act must: (1) hire an LSRP to perform the remediation; (2) notify the Department of the name and license information of the LSRP hired to perform the remediation; (3) conduct the remediation without the prior approval of the Department, unless directed otherwise by the Department; (4) establish a remediation funding source if required; (5) pay all applicable fees and oversight costs as required by the Department; (6) provide access to the contaminated site to the Department; (7) provide access to all applicable documents concerning the remediation to the Department; (8) meet the mandatory remediation timeframes and expedited site specific timeframes established by the Department; (9) submit an initial receptor evaluation; and (10) obtain all necessary permits. See N.J.S.A. 58:10B-1.3(a); N.J.A.C. 7:26C-2.3; N.J.A.C. 7:26E-1.12. If the responsible party fails to comply, the Department may issue an administrative order requiring compliance and assessing a civil administrative penalty. N.J.A.C. 7:26C-9.1 to -9.11.

These remediation requirements stem from the enactment of SRRA. N.J.S.A. 58:10C-1, et seq. Among other things, SRRA established an affirmative obligation for responsible parties to

remediate hazardous substances and authorized LSRPs to oversee and conduct remediation of contaminated sites. N.J.S.A. 58:10B-1.3a. SRRA was passed, in part, because “[t]he number of Department staff necessary for overseeing remediations under the traditional process did not keep pace with the growing number of contaminated sites being identified in New Jersey.” 43 N.J.R. 1077(a).

Based on these principles, the ALJ correctly concluded that Raritan is liable for violations of the Spill Act, the Brownfield Act, SRRA, and the rules governing the remediation of contaminated sites. As set forth in the MOA, Raritan admits that a discharge occurred at the Site. Therefore, as the current owner of a property on which hazardous substances have been discharged and for which a final remediation document has not been filed, Raritan is a responsible party strictly, jointly and severally liable under the Spill Act and must complete remediation in accordance with the Brownfield Act and SRRA. N.J.S.A. 58:10-23.11g(c)(1); N.J.S.A. 58:10-1.3(a); N.J.A.C. 7:26C, 2.2(a)1, -2.3, N.J.A.C. 7:26-4.3; N.J.A.C. 7:23E-1.12. This remains true regardless of the source of the discharge, Raritan’s fault in causing the discharge, or the assumption of ground water monitoring responsibilities by the Borough.

I further agree with the ALJ’s conclusion that Raritan, having purchased the contaminated property before September 14, 1993, cannot satisfy each element of the four-pronged innocent purchaser test. Specifically, Raritan cannot establish, by a preponderance of the evidence, that at the time of acquisition, it “did not know and had no reason to know that any hazardous substance had been discharged at the real property.” N.J.S.A. 58:10-23.11g(d)(5). At the time of Raritan’s purchase in March 1993, the Site had been subject to ongoing ground water monitoring that showed elevated levels of hazardous substances, including TCE and PCE. Raritan commissioned an Environmental Assessment prior to its purchase but its investigation

does not satisfy the requirement that a purchaser conduct “all appropriate inquiry” sufficient to demonstrate that it did not know and had no reason to know of the presence of hazardous substances; the Environmental Assessment report expressly acknowledged the presence of elevated levels of hazardous substances in the ground water at the Site. Raritan therefore had knowledge of the actual or likely presence of hazardous substances at the Site prior to acquisition and cannot qualify as an innocent purchaser.

The ALJ correctly determined that Raritan cannot avoid Spill Act liability based on its assertion that “[h]azardous materials are permitted to remain in legally closed landfills” as a result of the Department’s approval of the transfer of the Site from the Borough to Raritan’s predecessor, Raritan Mall Associates. The record refers to that approval as one issued under the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq. (ECRA). Raritan did not provide a copy of an ECRA approval or certification to support its contention, relying instead only on references in the environmental reports of Raritan Mall Associates. ECRA did not apply to landfill closures, see N.J.S.A. 13:1K-8 (stating that facilities subject to the Solid Waste Management Act or the Solid Waste Disposal Act, such as landfills, are not industrial establishments to which ECRA applies). Here, however, the transfer of the property was for the purpose of developing a commercial shopping center. The Department’s approval to transfer the landfill from the Borough to Raritan Mall Associates was conditioned upon the installation of monitoring wells and a five year ground water monitoring system, and was based on the acknowledgment by Raritan Mall Associates, as shown in reports submitted to the Department of investigations conducted at the Site, that if the ground water monitoring system detected hazardous substances above certain levels, further remedial investigation would be required, including delineation and ground water treatment. As the ALJ correctly notes, the installation of

a ground water monitoring system at the Site indicates that remediation remained ongoing after the landfill stopped operating. Raritan later entered into an MOA with the Department to undertake voluntary remediation. Accordingly, the Department's approval, even if termed an ECRA approval, was not a release of liability for remediation of future contamination on the Site. Instead, it was conditioned upon the acceptance of such potential future liability. Thus, Raritan is strictly liable for remediation of the Site as the current owner of a property on which hazardous substances have been discharged and remediation remains incomplete.

The ALJ also correctly concluded that Raritan's argument that it was not required to remediate the discharge of hazardous substances in accordance with SRRA because, at the time SRRA was enacted in 2009, Raritan had already voluntarily completed remediation is similarly flawed. Raritan's arguments largely focus on the quality and thoroughness of its remediation efforts at the Site to address excavation of contaminated soil in relation to the ground water monitoring "hot spot" as set forth in its RIR/RAR. However, Raritan never received an NFA or an RAO and therefore never completed the remediation. N.J.A.C. 7:26C-1.3. Instead of closing the remediation, Raritan's RIR/RAR resulted in an NOD citing deficiencies that Raritan never addressed. Raritan claims that if the Department had timely considered the documents Raritan submitted as part of its MOA with the Department, this matter would have been resolved well before the enactment of SRRA in 2009, but its argument on this point is similarly misplaced. Raritan was alerted to the deficiencies in the RIR/RAR through the 2007 NOD, two years before the enactment of SRRA, but took no corrective action. Accordingly, while the Department did not issue the AONOCAPA until January 13, 2014, Raritan had already made clear that it did not intend to comply with the NOD. Raritan became subject to SRRA as of May 7, 2012, not

because of the Department's delay but because of its own inaction. See N.J.S.A. 58:10B-1.3(c)(3).

I also concur with the ALJ in dismissing Raritan's argument that the alleged violations are invalid because the Department cannot prove that either at the time of the enactment of SRRA (May 7, 2009) or the date when Raritan was required to hire an LSRP pursuant to SRRA (May 7, 2012), contaminants were present at the Site. Nothing in the law requires the Department to prove when the discharge on the Site occurred in order to make the remediation subject to SRRA. As stated above, Raritan is strictly liable for the remediation and, therefore, is required to comply with the requirements of SRRA, regardless of when the remediation was initiated. N.J.S.A. 58:10B-1.3(c)(3). While Raritan may have initiated remediation in 2003 or 2004, the remediation remained incomplete on May 7, 2012, the date Raritan's remediation became subject to SRRA, because Raritan never obtained an NFA or RAO. N.J.A.C. 7:26C-1.3.

Similarly, the ALJ correctly found that Department of Environmental Protection v. J.T. Baker Company, 234 N.J. Super. 234 (Ch. Div. 1989), aff'd, 246 N.J. Super. 224 (App. Div. 1991) is inapposite to the facts here. Raritan claims that, under the holding in Baker, the Department must prove that a discharge occurred after April 1, 1977 in order to impose Spill Act liability in this matter. Baker involved pre-Spill Act discharges and the issue under review in that case was whether penalties could be assessed retroactively for those discharges., The Court concluded that the Spill Act did not allow retroactive penalties against the defendant for a discharge that occurred years before the law was enacted. Id. Baker addressed only penalties and did not conclude that the discharger was not responsible to conduct the remediation and, therefore, does not support Raritan's claim that it should be absolved from its remediation obligations. On the facts here, Raritan is liable not as a discharger but rather as the informed

purchaser and owner of contaminated property which is in need of remediation. N.J.S.A. 58:10-23-11g. Lastly, the penalty provisions to which Raritan is subject were adopted well after Baker; thus that case has no application here. See N.J.A.C. 7:26C-9.5.

The ALJ also correctly determined that the facts do not support Raritan's claim of laches. The defense of laches is unavailable "to prevent the enforcement of a public right or the protection of the public interest for failure or delay on the part of public officers in the performance of their duty" as was the case where the Department is seeking to enforce environmental remediation requirements. See Hyland v. Kirkman, 157 N.J. Super. 565, 581-82 (Ch. Div. 1978) ("the doctrine of laches has been held not to be imputed to the government to prevent the enforcement of a public right or the protection of the public interest for failure or delay on the part of public officers in the performance of their duty"). Here, the Department's delay in addressing Raritan's response to the 2007 NOD did not precipitate issuance of the AONOCAPA as claimed by Raritan because, despite being notified multiple times of deficiencies and of the need to take corrective action, Raritan took no corrective action. It was therefore Raritan's refusal to comply with the NOD that led to the AONOCAPA, not any delay by the Department. Further, SRRA was enacted to address delay in effectuating remediation as well as the growing number of contaminated sites in the State.

Finally, while not expressly addressed by the ALJ, Raritan is incorrect in its assertion that the ARRCs do not apply to this matter. While the Site contains a former landfill, the necessary remediation is of ground water contamination, not the landfill itself. Further, Raritan seeks a final remediation document and therefore must comply with the ARRCs. N.J.A.C. 7:26C-1.4 (stating that the ARRCs apply where a person remediating a landfill is seeking a final remediation document). Accordingly, the ARRCs are plainly applicable.

For these reasons, I find that the ALJ correctly determined that Raritan violated the Spill Act, the Brownfield Act, SRRA, the ARRCs, and the Technical Requirements. It is undisputed, as confirmed by the results of Raritan's own testing, that the ground water at the Site contained hazardous substances in excess of the Department's standards that Raritan has not completely remediated. As property owner, Raritan, despite all of its arguments to the contrary, is strictly liable for remediating those hazardous substances until issuance of an NFA or RAO.

Penalty Assessment

Under N.J.A.C. 7:26C-9.5, the Department determines the seriousness of the violation and, for all non-minor violations, such as those here, assesses the base penalty set forth in the tables that are part of the rule. The base penalty for the failure to conduct remediation in accordance with N.J.A.C. 7:26C-2.3(a)3 is \$15,000. N.J.A.C. 7:26C-9.5(b). The base penalty for failure to hire an LSRP in accordance with N.J.A.C. 7:26C-2.3(a)1 and 2 is \$15,000. Ibid. The base penalty for failure to conduct and submit an initial receptor evaluation pursuant to N.J.A.C. 7:26E-1.12(c) is \$25,000. Ibid. The base penalty for the failure to pay all applicable fees and oversight costs is "100 percent of the amount of the fee that is in arrears," which, here, is \$11,200. Ibid. The Department "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)4iii. Here, the Department exercised its discretion and assessed a penalty for only one day of violation for each offense, i.e., the base penalty.

The Department also correctly calculated the outstanding fees owed by Raritan. As the responsible party conducting remediation under the ARRCs, Raritan must pay an annual remediation fee comprising two parts: (1) a fee based on the categorization of the Site; and (2) a

fee based on the number of contaminated media at the Site. N.J.A.C. 7:26C-4.3(a). Here, the Department reasonably determined that the Site is a Category 3 due to the presence of the former landfill. N.J.A.C. 7:26C-4.2(b)4iii (including, as a Category 3, any site where “at least one landfill is an area of concern”). The Department further correctly determined that there was one contaminated medium at the Site, i.e., the ground water. N.J.A.C. 7:26C-4.2(b)6 (defining media to include contaminated ground water, contaminated sediment, and contaminated ground water migrating into surface water). The base annual remediation fee for a Category 3 site with one contaminated medium is \$6,400 (\$5,000 site fee and \$1,400 contaminated media fee). N.J.A.C. 7:26C-4.3(a)(2).⁵ However, as the remediation began before the effective date of SRRA, Raritan’s first and second annual remediation fees are set by county in Table 4-1 of the rule. N.J.A.C. 7:26C-4.3(a)(4) (calculating fees as a pro-rated percentage of the annual remediation fee based on the assigned anniversary month of each county). Utilizing Table 4-1, Raritan’s first annual remediation fee, due June 20, 2012, for a Category 3 site with one contaminated medium in Somerset County, was \$4,800 (\$3,750 for the site fee and \$1,050 for the contaminated media fee) or 75% of the sum of each base fee. N.J.A.C. 7:26C-4.3, Table 4-1. Raritan’s second annual remediation fee, due March 1, 2013, was the base fee of \$6,400 (\$5,000 site fee and \$1,400 contaminated media fee). Ibid. Therefore, the Department correctly calculated that, as of March 3, 2013, Raritan owed \$11,200 for its first and second annual remediation fees under SRRA.

⁵ N.J.A.C. 7:26C-4.3(a)2 provides that, prior to the Department's publication of the first “Annual Site Remediation Reform Act Program Fee Calculation Report,” fees were to be calculated using the amounts set forth therein. The Department’s first report was not published until June 16, 2014. 46 N.J.R. 1481(b). Therefore, Department’s assessment of fees for the period before March 2013 was calculated in accordance with N.J.A.C. 7:26C-4.3.

CONCLUSION


For the reasons stated therein and above, I ADOPT the Initial Decision granting summary decision in favor of the Department and denying Raritan's motion for summary decision. Raritan is ORDERED to take all steps set forth in the AONOCAPA, specifically:

1. Conduct the remediation, without prior Department approval unless required, in accordance with N.J.A.C. 7:26C-1.2(a);
2. Hire an LSRP and notify the Department of the name and license information and the scope of the remediation, including the number of contaminated areas of concern and impact;
3. Complete and submit an Initial Receptor Evaluation;
4. Pay required fees and oversight costs and submit an Annual Remediation Fee Reporting Form;⁶ and
5. Pay the civil administrative penalty of \$66,200.

Raritan is ordered to pay total penalties of \$66,200 within forty-five (45) days of this Final Decision, by directing payment to the Treasurer, State of New Jersey, as set forth in paragraph 29 of the AONOCAPA.

IT IS SO ORDERED.

DATE: October 6, 2016



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

⁶ The amount of fees and oversight costs due (\$11,200) is included in the calculation of the civil administrative penalty and is not owed separately.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
SITE REMEDIATION COMPLIANCE AND ENFORCEMENT, v.
RARITAN SHOPPING CENTER, LP
OAL DKT. NO. ESR-8679-14
AGENCY REF. NO. PEA 130001-G000010664

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