State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. ESR 8679-14
AGENCY REF. NO. PEA130001-G000010664

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

Jeffrey S. Widmayer, Deputy Attorney General, for petitioner (Robert Lougy, Acting Attorney General of New Jersey, attorney)

Joseph J. Sergeant, Esq., for respondent (Berger & Bornstein, attorneys)

Record Closed: March 16, 2016 Decided: July 12, 2016

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

STATEMENT OF THE CASE

Petitioner, the New Jersey Department of Environmental Protection (DEP), issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) against respondent Raritan Shopping Center, L.P., (Raritan) for alleged violations of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24, the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 to -31, the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, and the regulations promulgated under those statutes.

PROCEDURAL HISTORY

On January 13, 2014, the DEP issued an AONOCAPA to Raritan. On February 7, 2014, Raritan requested a hearing to contest the AONOCAPA. (Spera Cert., Ex. K.) On July 10, 2014, the DEP transmitted the matter to the Office of Administrative Law as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 29, 2015, the DEP filed a motion for summary decision "affirm[ing] the injunctive relief and civil administrative penalty assessed in the DEP's January 13, 2014 AONOCAPA." (DEP Brief at 19.) On or about December 10, 2015, Raritan submitted a brief in opposition to the DEP's motion and filed its own motion for summary decision on the issues of liability and penalty.

FACTS

Raritan has owned property located at Route 206 and Orlando Drive in the Borough of Raritan (Site) since March 31, 1993, and operates a shopping mall on the Site. The Site was formerly owned and operated by the Borough of Raritan (Borough) as a municipal landfill, which was closed in 1979. (DEP 0039.)

In the mid-1980's, the Borough sold the Site to Raritan Mall Associates, which built a shopping mall over the former landfill. (Ibid.) Prior to the sale, Raritan Mall Associates had an environmental-engineering firm "evaluate the contents of the landfill,

the ability of the underlying soils to prevent leachate migration and the overall environmental risks." (Ibid.) The firm discovered "bails of wire, sheet metal, refrigerators, car parts, scrap metal, oil tanks, and crushed drums," but found "no evidence . . . to indicate [that] toxic or hazardous chemicals were disposed [of] at the landfill," and concluded that "the landfill presents a minimal risk to the environment." (DEP 0045-0046.)

According to a report prepared by the firm, "[u]nder the then interpretation of the regulations promulgated under the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq. (ECRA), an ECRA approval was required for the transfer of the landfill to Raritan Mall Associates" and "[t]he approval which was obtained [from the DEP] required the development and installation of a groundwater monitoring system." (DEP 0039.) As such, Raritan Mall Associates obtained a Discharge to Ground Water Permit from the DEP and installed five groundwater-monitoring wells at the Site. (DEP 0047.)

Over a five-year period from 1986 to 1991, elevated levels of volatile organic compounds, including trichloroethene (TCE) and tetrachloroethylene (PCE), were detected in certain monitoring wells. (DEP 0049.) However, the environmental-engineering firm concluded that "[t]he presence of elevated concentrations of volatile organics" in a downgradient well and an upgradient well "suggest that VOC contamination is originating from an off-site source" and that "the landfill does not pose any environmental risk to the ownership of the mall." (DEP 0051-0052.)

In 1991, the Borough agreed to conduct ongoing groundwater monitoring at the Site. (DEP 0017.) In 1993, Raritan acquired the Site.

In 2003, a potential purchaser of the Site retained Roux Associates, an environmental-consulting firm, to collect groundwater samples, which revealed a "hot spot" containing levels of benzene, toluene, ethylbenzene, and xylenes (BTEX), chlorobenzene, and TCE, PCE, cis-1, 2-dichloroethene (DCE), and vinyl chloride above DEP groundwater-quality standards. (DEP 0228-0229.) Upon notice of these findings, Raritan hired its own environmental consultant, Enviro-Sciences, Inc., (ESI), which delineated the "hot spot" and collected groundwater samples on August 21, 2003. (DEP

0023.) The samples revealed levels of TCE, DCE, vinyl chloride, toluene, methylene chloride, and benzene above the DEP's groundwater-quality standards. (DEP 0024.)

On October 6, 2003, ESI excavated the "hot spot" to remove the contaminated soil. (DEP 0025-0026.) After ESI excavated the Site, Raritan entered into a Memorandum of Agreement (MOA) with the DEP in early 2004. (DEP 0002.) In applying for the MOA, Raritan noted that "[a]ll contaminants found at the site are related to the former landfill operations," but that "[b]ased on past investigations, both soil and groundwater have been slightly impacted by benzene, toluene, ethylbenzene, and total xylenes, and/or chlorobenzene." (DEP 0006.) Raritan also acknowledged that the "hot spot" was affected by trichloroethene, but asserted that "[a] continuing trichloroethene source no longer remains on-site" after the impacted soils were excavated. (Ibid.)

On September 20, 2004, ESI submitted to the DEP a Remedial Investigation Report/Remedial Action Report (RIR/RAR). (DEP 0012.) According to the report, ESI collected "soil and groundwater samples to confirm and delineate the contamination" in the "hot spot" and excavated the hot spot. (DEP 0018.) ESI noted that "[d]uring the excavation activities . . . the remains of three steel drums . . . contain[ing] yellow sandy soil with an unknown composition" fell out of the drums. (DEP 0026.) ESI further noted that "[t]he drums and their contents were segregated from the rest of the soil pile and were disposed of as hazardous solvent contaminated soil." (DEP 0027.) ESI "propos[ed] No Further Action for the site with the establishment of a Classification Exception Area (CEA) for the benzene concentration found in the groundwater." (DEP 0028.) ESI also stated that

> [d]uring the investigation other volatile compounds were detected, specifically chlorinated compounds. Since these compounds have been detected in groundwater samples collected from the permanent monitoring wells that are presently being sampled on an annual basis by the [Borough] of Raritan, these compounds have not been included in the establishment of this CEA.
>
> [DEP 0025.]

On March 16, 2007, the DEP issued a Notice of Deficiency (NOD) in response to the RIR/RAR. (DEP 0288.) The deficiencies noted by the DEP included an improper groundwater sampling methodology for the delineation of TCE and "failure to meet the monitoring and performance requirements for natural remediation." With respect to the latter deficiency, the DEP 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." (DEP 0289.) The DEP informed Raritan that "if deficiencies included herein are not addressed to the Department's satisfaction [within 60 days] the Department may terminate the MOA." (DEP 0290.)

ESI received an extension to correct the deficiencies and, on June 12, 2007, responded to the NOD. (DEP 0291.) According to ESI, "[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 groundwater-monitoring responsibilities], it is requested that any groundwater issues be deferred/addressed to the Borough of Raritan." (DEP 0292.)

On July 12, 2011, the DEP wrote a letter to Raritan "to remind [Raritan] that as the person remediating Raritan Township Sanitary Landfill . . . [it has] certain obligations under the Site Remediation Reform Act (SRRA), enacted on May 7, 2009." (DEP 0293.) The letter stated that as of May 7, 2012, Raritan would "be required to hire [a licensed site remediation professional (LSRP)] to conduct the remediation and issue a Response Action Outcome (RAO) upon completion. (DEP 0293-0294.)

On January 24, 2012, the DEP again notified Raritan of its obligation to comply with the requirements of the SRRA by May 7, 2012. On January 30, 2012, the DEP sent Raritan a Compliance Assistance Alert advising Raritan to submit an Initial Receptor Evaluation by March 1, 2012. (DEP 0300.) The alert also stated, "if you fail to submit the [evaluation] by March 1, 2012, you must hire an [LSRP] immediately thereafter, if one has not already been retained." (Ibid.)

On December 11, 2012, the DEP notified Raritan that "[t]he site is currently out of compliance with" respect to an "LSRP retention form," a "[r]eceptor evaluation," and a

"[s]ite investigation," and that "[t]he Department will be shortly issuing an administrative order with penalties (for the above referenced items)." (DEP 0296.)

On January 13, 2014, the DEP issued an AONOCAPA to Raritan. (Spera Cert., Ex. J.) According to the AONOCAPA,

> on August 21, 2003, [Raritan] conducted ground water sampling and reported trichloroethene (TCE), cis-1, 2-dichloroethene, vinyl chloride, methylene chloride, benzene, and toluene above the Ground Water Quality Standards (GWQS) at concentrations of 120,000 parts per billion (ppb), 98,000 ppb, and 4,500 ppb, 2,000 ppb, 7.3 ppb, and 1,100 ppb, respectively.[1]
>
> [Ibid.]

The AONOCAPA stated that these are "hazardous substances pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11b" and that Raritan is responsible for the remediation of these hazardous substances. (Ibid.) The AONOCAPA alleged that Raritan (1) failed to conduct remediation in accordance with N.J.A.C. 7:26C-2.3(a)(3); (2) "fail[ed] to hire [an LSRP] upon the occurrence of one of the events listed in N.J.A.C. 7:26C-2.2(a), and to provide the required information to the Department within 45 days as required"; (3) "fail[ed] to submit an initial receptor evaluation within the required timeframe"; and (4) "fail[ed] to pay fees, oversight costs, and submit Annual Remediation Fee Reporting Form as required." (Ibid.) According to the AONOCAPA, "[b]ased on these FINDINGS, the Department has determined that [Raritan] has violated the Spill Compensation and Control Act, and the regulations promulgated thereto, specifically N.J.A.C. 7:26C and 7:26E." (Ibid.)

The DEP 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); $25,000 with respect to (3); and $11,200 with respect to (4), for a total penalty of $66,200. (Ibid.)

[1] These are hazardous substances. See N.J.A.C. 7:1E, Appendix A (List of Hazardous Substances).

On February 7, 2014, Raritan requested a hearing to contest the AONOCAPA. (Spera Cert., Ex. K.) On July 10, 2014, the DEP transmitted the matter to the Office of Administrative Law as a contested case. On September 29, 2015, the DEP filed a motion for summary decision "affirm[ing] the injunctive relief and civil administrative penalty assessed in DEP's January 13, 2014 AONOCAPA." (DEP Brief at 19.) On or about December 10, 2015, Raritan submitted a brief in opposition to the DEP's motion and filed its own motion for summary decision on the issues of liability and penalty.

To date, Raritan has not hired an LSRP, or submitted an initial receptor evaluation, or paid the fees listed in the AONOCAPA.

LEGAL ANALYSIS AND CONCLUSION

Motion for Summary Decision

In matters before the Office of Administrative Law, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). A judge may grant the motion "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). If the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Parties' Arguments

The DEP argues that there are no genuine issues of material fact necessitating a hearing on the issues of liability and penalty because Raritan failed to appropriately remediate the discharge of hazardous substances. According to the DEP, Raritan is liable under the Spill Act for its failure to remediate, not as a "person who has discharged a hazardous substance," but as a person who is "in any way responsible for a hazardous substance" pursuant N.J.S.A. 58:10-23.11g(c)(1), since Raritan owns the

site on which hazardous substances were discharged. The DEP contends that as a person who is in any way responsible for a hazardous substance, Raritan was required to, but did not, hire an LSRP to conduct the remediation of the Site; notify the DEP of the LSRP's name and license information and the scope of the remediation; conduct the remediation; complete and submit an initial receptor evaluation; and pay applicable fees and costs in accordance with N.J.A.C. 7:26C-2.3, N.J.A.C. 7:26-4.3, and N.J.A.C. 7:26E-1.12. The DEP also contends that it properly calculated a civil administrative penalty for these violations in accordance with N.J.A.C. 7:26C-9.5.

In opposition to the DEP's motion for summary decision and in support of its own motion for summary decision, Raritan first submits that it is not liable for the violations alleged in the AONOCAPA because, prior to its purchase of the Site, the DEP approved the closure and encapsulation of the landfill on the Site and "allowed for any then existing hazardous substances to remain in the encapsulated landfill," and because "[h]azardous materials are permitted to remain in a legally closed landfill." (Raritan Brief at 2.) Next, Raritan argues that it was not required to remediate the discharge of hazardous substances in accordance with the SRRA because, at the time the SRRA became law, Raritan had already voluntarily completed remediation and, therefore, was not subject to the requirements of the SRRA and its implementing regulations. According to Raritan, if the DEP had timely considered the documents Raritan submitted as part of the MOA between the parties, this matter would have been resolved well before the enactment of the SRRA. Finally, Raritan contends that the DEP cannot prove that any hazardous substances were discharged after the effective date of the Spill Act and that Raritan "cannot be subjected to a penalty for the effects of past discharges of hazardous materials." (Id. at 26.)

Legal Discussion

The Spill Compensation and Control Act (Spill Act), which became effective on April 1, 1977, recognizes that the discharge of hazardous substances "constitutes a threat to the economy and environment of this State." N.J.S.A. 58:10-23.11a. The Spill Act imposes "liability for damage sustained within this State as a result of any discharge of said substances" and authorizes "the Department of Environmental Protection to

facilitate and coordinate activities and functions designed to clean up contaminated sites in this State."[2] Ibid.

In 1979, the Legislature amended the Spill Act by "impos[ing] strict liability on any person 'who has discharged a hazardous substance or is in any way responsible for any hazardous substance.'"[3] State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 494 (1983) (quoting N.J.S.A. 58:10-23.11g(c)). In particular, 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). Thus, the act does not limit liability "to those who were active participants in the discharge of hazardous substances" and "establishes a broad scope of liability." N.J. Dep't of Envtl. Prot. v. Dimant, 212 N.J. 153, 162, 175 (2012) (citing Marsh v. N.J. Dep't of Envtl. Prot., 152 N.J. 137, 146 (1997); N.J.S.A. 58:10-23.11g(c)(1)).

In 2001, however, "amendments to the Spill Act creat[ed] the 'innocent purchaser' defense codified at N.J.S.A. 58:10-23.11g(d)(5)." N.J. Schs. Dev. Auth. v. Marcantuone, 428 N.J. Super. 546, 549 (App. Div. 2012), certif. denied, 213 N.J. 535 (2013). Under N.J.S.A. 58:10-23.11g(d)(5),

> [a] person . . . who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply:
>
> > (a) the person acquired the real property after the discharge of that hazardous substance at the real property;

[2] The Spill Act defines "discharge" 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." N.J.S.A. 58:10-23.11b.
[3] The term "person" includes partnerships such as Raritan. N.J.S.A. 58:10-23.11b.

> (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, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L. 1976, c. 141;
>
> (c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a 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. 58:10-11.23g(d)(5).]

Thus, "the only way an owner who purchased contaminated land before September 14, 1993, can avoid liability under the Spill Act is to establish, by a preponderance of the evidence, the four elements of the 'innocent purchaser' defense." Marcantuone, supra, 428 N.J. Super. at 549.

In 2009, Governor Jon Corzine signed into law P.L. 2009, c. 60, which included the SRRA and amendments to the Spill Act and the Brownfield and Contaminated Site Remediation Act (Brownfield Act). 43 N.J.R. 1077(a). Through this action, "the Legislature made sweeping changes to the way in which sites are remediated in New Jersey, as a response to comments received from constituents that the traditional process for remediating sites in New Jersey was not adequately protective of public health and safety and of the environment, and was time consuming and costly." Ibid. Since "[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," the Legislature "create[d] a new site remediation

paradigm pursuant to which sites would be remediated without prior Department approval, but while still requiring the Department to maintain a certain level of oversight." Ibid. Now, the DEP "oversees the person responsible for conducting the remediation, which is conducted by [an LSRP]." Ibid.

The amendments to the Brownfield Act require "the discharger of a hazardous substance or a person in any way responsible for a hazardous substance pursuant to the provisions of subsection c. of section 8 of P.L. 1976, c. 141 (C.58:10-23.11g)" to "remediate the discharge of a hazardous substance" in accordance with the SRRA. N.J.S.A. 58:10-1.3(a). The amendments further provide that "[a]ny person who fails to comply with [N.J.S.A. 58:10B-1.3] shall be liable to the enforcement provisions established pursuant to section 22 of P.L. 1976, c. 141 (C.58:10-23.11u)." N.J.S.A. 58:10B-1.3(e).

In 2012, the DEP adopted regulations implementing P.L. 2009, c. 60. 44 N.J.R. 1339(b); N.J.A.C. 7:26C-1.1 to -16.3; N.J.A.C. 7:26E-1.1 to -5.6. These regulations became effective on May 7, 2012. 44 N.J.R. 1339(b). The regulations set forth "the administrative procedures and requirements for the remediation of a contaminated site" and "the technical requirements to remediate a contaminated site and ensure that the remediation is protective of public health and safety and of the environment." N.J.A.C. 7:26C-1.1; N.J.A.C. 7:26E-1.1.

A person is required to remediate a site in accordance with these rules if "[t]he person discharges a hazardous substance or otherwise becomes in any way responsible pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10.23-11g, for a discharge." N.J.A.C. 7:26C-2.2(a)(1). A "person in any way responsible, pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, for any hazardous substance that was discharged" 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 "a no further action letter or a response action outcome." N.J.A.C. 7:26C-1.3.

A responsible person must, among other requirements, hire an LSRP, notify the DEP of the name and license information of the LSRP and the scope of the remediation, conduct the remediation without prior DEP approval, pay all applicable fees and oversight costs, and submit an initial receptor evaluation. N.J.A.C. 7:26C-2.3; N.J.A.C. 7:26E-1.12. If the person responsible for conducting the remediation fails to comply with these requirements, the DEP may issue an administrative order requiring compliance and assessing a civil administrative penalty. N.J.A.C. 7:26C-9.1 to -9.11. Such person has a right to an administrative hearing to contest the administrative order and civil administrative penalty. N.J.A.C. 7:26C-9.10.

I. Raritan is liable for violations of the Spill Act, the Brownfield Act, the SRRA, and the regulations promulgated in accordance with those statutes.

Raritan is liable for violations of the Spill Act, the Brownfield Act, the SRRA, and the regulations promulgated under those statutes as a person who "is in any way responsible for any hazardous substance." N.J.S.A. 58:10-23.11g(c)(1). While Raritan did not, itself, discharge any hazardous substance, the Spill Act "establishes a broad scope of liability" that includes current owners of a contaminated site, like Raritan.

First, it should be noted that, as the DEP argues, Raritan could not rely on an "innocent purchaser" defense to Spill Act liability, because "the only way an owner who purchased contaminated land before September 14, 1993, can avoid liability under the Spill Act is to establish, by a preponderance of the evidence, the four elements of the 'innocent purchaser' defense," and Raritan could not establish the second element, which requires that "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."

Second, Raritan fails to show how it may escape Spill Act liability based on its assertion that "[h]azardous materials are permitted to remain in legally closed landfills." According to Raritan, "the DEP's ECRA Approval [in the 1980s] put in place numerous safeguards that expressly allowed hazardous substances to remain in the encapsulated landfill." (Raritan Brief at 26.) The papers further indicate that "[t]he approval which

was obtained [from the DEP] required the development and installation of a groundwater monitoring system."

Under the groundwater-monitoring requirements for sanitary landfills, N.J.A.C. 7:14A-9.1 to -9.12, monitoring "will be suspended for a municipal solid waste landfill (MSWLF) if the owner or operator can demonstrate that there is no potential for migration of any hazardous constituents from the MSWLF to the uppermost aquifer during the active life of the unit and the post-closure care period." N.J.A.C. 7:14A-9.2(c). Thus, Raritan may be technically correct that, under certain circumstances, "hazardous materials are permitted to remain in legally closed landfills." But, even if the DEP approved the closure of the landfill and the installation of groundwater-monitoring wells in the 1980's, Raritan has failed to establish that the DEP ever suspended groundwater monitoring on the Site or how the DEP was prevented from taking action under the Spill Act when, in 2003, it was notified of the presence of hazardous substances at the Site.

The Spill Act requires that "[a]ny person who may be subject to liability for a discharge which occurred prior to or after the effective date of the act of which this act is amendatory shall immediately notify the department," N.J.S.A. 58:10-23.11e, and the DEP is tasked with "facilitat[ing] and coordinat[ing] activities and functions designed to clean up contaminated sites," N.J.S.A. 58:10-23.11a. And, under N.J.S.A. 58:10-23.11g(c)(1), Raritan is strictly liable for the cleanup of the Site. Raritan has failed to show how an ECRA approval or Discharge to Groundwater permit that the DEP may have issued to a prior owner of the Site in the 1980s absolves Raritan of liability under the Spill Act.

Third, Raritan unpersuasively argues that "[n]one of the alleged violations are valid because the DEP cannot prove that either at the time of the enactment of the SRRA (May 7, 2009), or on the effective date of the [implementing] regulations (May 7, 2012), there existed on the site contaminants (chlorinated compounds or benzene)." (Raritan Brief at 27.) Under N.J.S.A. 58:10B-1.3, "a person in any way responsible for a hazardous substance pursuant to the provisions of subsection c. of section 8 of P.L. 1976, c. 141 (C.58:10-23.11g) . . . shall remediate the discharge of a hazardous

substance." N.J.S.A. 58:10B-1.3(a). The same provision stipulates that "[n]o later than three years after the date of enactment of P.L. 2009, c. 60 (C.58:10C-1 et al.) (or, May 7, 2012), a person responsible for conducting the remediation, no matter when the remediation is initiated, shall comply with the provisions of subsection b. of this section."[4] N.J.S.A. 58:10B-1.3(c)(3).

Even though Raritan initiated remediation in 2003 or 2004, it is nonetheless liable for violations of the SRRA and its implementing regulations because the DEP never issued a final remediation document with respect to the Site. Instead, in response to Raritan's request for a no-further-action letter, the DEP issued a Notice of Deficiency regarding Raritan's remediation efforts. (Spera Cert., Ex. C.) Thus, in accordance with N.J.A.C. 7:26C-1.4(a)(4), Raritan was required to comply with the administrative requirements for the remediation of contaminated sites as a "subsequent owner of the real property where the discharge occurred prior to the filing of a final remediation document with the Department." Under applicable law, the DEP is not required to prove the presence of hazardous substances as of May 7, 2009, or May 7, 2012, in order to hold Raritan responsible for its failure to remediate the Site in accordance with the SRRA, the Brownfield Act, and their implementing regulations; all the DEP has to prove—which it has—is that by May 7, 2012, Raritan had not filed a final remediation

[4] Under N.J.S.A. 58:10-1.3(b), a person responsible for conducting a remediation must:

> (1) hire a licensed site remediation professional to perform the remediation;
> (2) notify the department of the name and license information of the licensed site remediation professional who has been 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 a remediation funding source is required pursuant to the provisions of section 25 of P.L. 1993, c. 139 (C.58:10B-3);
> (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 pursuant to section 28 of P.L. 2009, c. 60 (C.58:10C-28); and
> (9) obtain all necessary permits.

document and failed to meet the requirements of N.J.S.A. 58:10-1.3(b), N.J.A.C. 7:26C-2.3, and N.J.A.C. 7:26E-1.12.

Finally, while Raritan relies on State, 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), in which the court held that the operator of a chemical company could not be penalized under the Spill Act for its discharge of a hazardous substance prior to the effective date of the act, for the proposition that "[s]ince the DEP cannot prove any discharge occurred after April 1, 1977, it cannot impose any penalties" (Raritan Brief at 28), the statutory framework has notably changed since that case was decided in 1989.

As discussed above, the 2009 amendments to the Brownfield Act require "a person in any way responsible for a hazardous substance pursuant to the provisions of subsection c. of section 8 of P.L. 1976, c. 141 (C.58:10-23.11g)" to "remediate the discharge of a hazardous substance" in accordance with N.J.S.A. 58:10B-1.3(b), which has been implemented by N.J.A.C. 7:26C-2.3(a). A responsible person had to comply with these requirements by May 7, 2012. N.J.S.A. 58:10B-1.3(c)(3); N.J.A.C. 7:26C-2.3(b).

Raritan was a responsible person subject to these requirements as the "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). The Brownfield Act amendments further provide that "[a]ny person who fails to comply with [N.J.S.A. 58:10B-1.3] shall be liable to the enforcement provisions established pursuant to section 22 of P.L. 1976, c. 141 (C.58:10-23.11u)," which allows the DEP to levy a civil administrative penalty. N.J.S.A. 58:10B-1.3(e). As a result of Raritan's failure to comply with these requirements, Raritan is subject to the Spill Act's penalty provision, N.J.S.A. 58:10-23.11u.

II. Raritan cannot avail itself of a defense of laches.

According to Raritan, "it is the DEP's inexplicable delay in addressing the closure of the MOA which precipitated the Administrative Order" and "the defense of latches

[sic] should bar the DEP's claims because the long delays caused by the DEP were unexplained, inexcusable and unreasonable." (Raritan Brief at 27.) Raritan further asserts that "[t]he delays have prejudiced Raritan because the matter was actually resolved several years before any of the LSRP requirements even existed." (Ibid.)

As one court has explained, "[l]aches is a defense [to a claim] 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., 171 N.J. Super. 363, 370-71 (App. Div. 1979). However, "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." Hyland v. Kirkman, 157 N.J. Super. 565, 581-82 (Ch. Div. 1978).

The facts of this case do not support a defense of laches. First, any delay in the DEP's response to Raritan's remediation efforts in 2003 and 2004 is explainable. As noted above, the Legislature "create[d] a new site remediation paradigm" in 2009 to require an LSRP to conduct site remediation because "the 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."

Second, and contrary to Raritan's assertion, Raritan has not shown how any delay "in addressing the closure of the MOA . . . precipitated the Administrative Order." In issuing the NOD in 2007, the DEP stated that "if deficiencies included herein are not addressed to the Department's satisfaction . . . the Department may terminate the MOA." Yet, instead of specifically addressing the deficiencies of their remediation efforts, Raritan simply replied that it had remediated the Site and that it did not intend to take any further action. While the DEP took three years to respond to Raritan's RIR/RAR, Raritan has failed to show how any delay "precipitated the Administrative Order" when the facts show that Raritan had no intention of complying with the NOD. It instead appears that Raritan's failure to comply with the NOD is the reason Raritan never received a final remediation letter that would have exempted Raritan from the current administrative requirements for the remediation of contaminated sites.

Finally, the DEP is a government agency against which a 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." The DEP is responsible for protecting the public from hazardous substances and should not be prevented from ordering Raritan to remediate the Site in accordance with applicable law.

III. For Raritan's violations, the DEP appropriately assessed a civil administrative penalty in the amount of $66,200.

N.J.A.C. 7:26C-9.5 sets forth the requirements for a civil administrative penalty determination. Under that rule, the base penalty for the "[f]ailure to conduct remediation in accordance with" the administrative requirements for the remediation of contaminated sites is $15,000, the base penalty for the "[f]ailure to hire [an LSRP] to conduct remediation and submit the required form" in accordance with N.J.A.C. 7:26C-2.3(a)(1) and (2) is $15,000, the base penalty for the "[f]ailure to conduct and submit an initial receptor evaluation, pursuant to N.J.A.C. 7:26E-1.12(a) within the applicable required timeframe" is $25,000, and the base penalty for the [f]ailure to pay all applicable fees and oversight costs" in accordance with N.J.A.C. 7:26C-2.3(a)(4) is "100 percent of the amount of the fee that is in arrears." N.J.A.C. 7:26C-9.5(b). The DEP "may multiply the penalty calculated [for these violations] by the number of days the violation existed." N.J.A.C. 7:26C-9.5(a)(4)(iii).

Since there is no genuine issue regarding the violations set forth in the AONOCAPA, and because Raritan has raised no genuine issue with respect to the calculation of the fees by the DEP, the DEP appropriately assessed a civil administrative penalty in the amount of $66,200. The DEP could have assessed a higher total penalty since the violations had existed for multiple days, but instead it determined to assess only a base penalty for each violation.

Based on the above, I **CONCLUDE** that the DEP's motion for summary decision should be granted, and Raritan's motion for summary decision should be denied.

ORDER

I **ORDER** that the DEP's motion for summary decision is **GRANTED**.

I **ORDER** that, in accordance with the AONOCAPA, Raritan shall,

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

2. Hire an LSRP and notify the DEP of the name and license information and the scope of the remediation, including the number of contaminated areas of concern and impact;

3. Complete and submit an Initial Receptor Evaluation;

4. Pay required fees and oversight costs and submit an Annual Remediation Fee Reporting Form; and

5. Pay a civil administrative penalty of $66,200.

Raritan's cross-motion for summary decision 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.

July 12, 2016
DATE

SUSAN M. SCAROLA, ALJ,

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief and reply

For respondent:

Brief and reply