



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT, Petitioner, v. CROSSLEY MACHINE COMPANY, INC., SITE AND CROSSLEY MACHINE COMPANY, INC. Respondents.

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO. ESR 12756-14
AGENCY REF. NO. PEA 140001-024397

This Order addresses an appeal by Crossley Machine Company, Inc. Site and Crossley Machine Company, Inc. (n/k/a Monmouth Machine Company) (hereinafter referred to as Respondent) of a May 29, 2014, Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the Department of Environmental Protection (Department), in which the Department found that Respondent violated the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq., the Brownfield Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1.3, the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and implementing regulations, the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B, the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation (Technical Requirement), N.J.A.C. 7:26E. The Department cited Respondent for failure to remediate its industrial

establishment located at 301 Monmouth Street, Trenton, Mercer County (the Crossley Machine site) as required by N.J.A.C. 7:26B-3.3(a); failure to hire a licensed site remediation professional (LSRP) upon the occurrence of an ISRA triggering event as defined in N.J.A.C. 7:26C-2.2(a), and to provide the Department, within 45 days, the LSRP's name and license information and the scope of remediation, including the number of contaminated areas of concern and impacted media, in violation of N.J.A.C. 7:26C-2.3(a)1 and 2; failure to conduct the remediation in accordance with the ARRCs, in violation of N.J.A.C. 7:26C-2.3(a)3; failure to pay fees and oversight costs as required by N.J.A.C. 7:26C-4, in violation of N.J.A.C. 7:26-2.3(a)4; and failure to submit an initial receptor evaluation for a contaminated site one year after the earliest applicable requirement to remediate listed at N.J.A.C. 7:26C-2.2, in violation of N.J.A.C. 7:26E-1.12(c). The Department assessed a total penalty of \$75,900 for the five violations.

FACTUAL AND PROCEDURAL BACKGROUND

Crossley Machine owned the site from September 26, 1908, to June 4, 1999, and manufactured precision components and equipment for the ceramic and refractory industries. Crossley Machine operated under the Standard Industrial Classification (SIC)¹ code 3559. The manufacturing process at the site involved the use of petroleum-based cutting fluids and lapping oils as well as solvents. Soil samples obtained during Respondent's May 1999 site investigation demonstrated contamination with arsenic, cadmium, copper and lead.

On May 27, 1999, the corporation sold its assets and shortly thereafter the company's name was changed to Monmouth Machine Company. Respondent notified the Department of the

¹ The SIC code is a system in which government agencies use four-digit numbers to classify businesses. SIC Code 3559 covers businesses which manufacture special industry machinery. The Department used SIC codes until 2004; it now uses the North American Industrial Classification System (NAICS). See 36 N.J.R. 2931(a) and 36 N.J.R. 4298(c).

sale of assets by submitting a General Information Notice (GIN) to the Department on June 9, 1999, as required by ISRA and N.J.A.C. 7:26B-3.2(a).

On June 12, 2013, and July 15, 2013, the Department made compliance assistance calls to Louis Russo, President of Monmouth Machine Co., informing him of his obligation to remediate the discharge at the site under N.J.S.A. 58:10B-1.3 of the Brownfield Act.² Then, on January 3, 2014, the Department invoiced Respondent for the annual remediation fee of \$900, due on March 4, 2014. A follow-up compliance evaluation on February 28, 2014, revealed that Respondent still had not remediated the site.

As a result, the Department issued the May 29, 2014, AONOCAPA for the violations described above and assessed a penalty of \$75,900. The Department ordered the Respondent to remediate the site and to conduct the remediation pursuant to the Department's regulations, hire an LSRP and notify the Department of the required information, pay required fees and oversight costs, and complete and submit an initial receptor evaluation. Respondent thereafter submitted a receptor evaluation form dated August 15, 2015.

Respondent requested a 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) Susan M. Scarola. The Department filed a motion for summary decision on February 3, 2017, which Respondent opposed based on inability to pay for remediation and penalties. Counsel for Respondent also cross-moved to withdraw from the matter, arguing that there was no longer an officer, director, or shareholder to direct the corporation's actions, and requested that the matter be stayed until the corporation determines

² The SRRA required all persons responsible for conducting remediation to hire an LSRP by May 7, 2012. N.J.S.A. 58:10B-1.3(c)(3). As a matter of practice, the Department made compliance calls to all persons responsible for conducting remediation, including Respondent, to ensure that the requirement was met.

who will direct its actions. The Department opposed Respondent's cross-motion with a response dated February 22, 2017.

The ALJ issued an Initial Decision on April 13, 2017, granting the Department's summary decision motion, concluding that no genuine issue of material fact existed as to Respondent's liability for the five violations cited in the AONOCAPA, and upholding the \$75,900 penalty. The ALJ denied Respondent's cross-motion to allow counsel to withdraw from the case and stay the matter. The ALJ rejected Respondent's argument that the Department should have considered the corporation's limited finances in ordering remediation and assessing penalties, noting that neither ISRA, the Brownfield Act, nor SRRRA provides for such a defense, and that the penalty rule, N.J.A.C. 7:26C-9.6, does not include inability to pay as a factor to adjust the penalty downward but allows only for an increase in penalties based on aggravating factors. Lastly, the ALJ found that the Department's penalties, which were assessed at the base amount for each cited violation and for only one day of violation for each cited violation, were appropriate.

Respondent filed exceptions³ to the Initial Decision on May 9, 2017. The Department replied to Respondent's exceptions on May 10, 2017. For the reasons that follow, I find that the ALJ correctly determined that Respondent violated the statutes and rules cited and I ADOPT the Initial Decision.

DISCUSSION

Summary decision and cross-motion

The grant of a motion for summary decision is appropriate "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as

³ Respondent's exceptions were untimely and offered no explanation for the lateness of the submission.

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). Further, “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.” N.J.A.C. 1:1-12.5(b). A genuine issue of material fact exists “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.’” E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010) (alteration in original) (quoting Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000)).

The Department supported its motion with the certification of Environmental Specialist Jamilah Harris, who was involved in the investigation of Respondent’s property and the ensuing enforcement action. Respondent’s response and cross-motion did not contest the factual predicates of the Department’s AONOCAPA nor the Department’s certification, but sought a stay and permission for counsel to withdraw from the matter on the basis that there was no longer an officer, director, or shareholder available to direct the corporation’s actions. Respondent also claimed inability to pay for both remediation and the penalties, but did not otherwise dispute the Department’s evidence.

The ALJ found that Respondent had not demonstrated good cause under the governing Rules of Professional Conduct, RPC 1.16(b), to allow for permissive withdrawal of counsel. RPC 1.16(b) enumerates the circumstances under which a court may allow termination of representation. These circumstances include representation that will result in an unreasonable financial burden on the lawyer, or when the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw. The grant of leave to withdraw is in the discretion of the trial court. Jacobs v.

Pendel, 98 N.J. Super. 252, 255 (App. Div. 1967) (considering factors such as proximity of the trial date, the possibility for the client to obtain other representation in advance of the trial date, and justifiable cause for the attorney's withdrawal such as a client's failure to pay fees). I find that the ALJ properly concluded that Respondent did not demonstrate good cause to withdraw counsel. Furthermore, the ALJ found, and I concur, that no stay was warranted based on the length of time this matter has been pending, during which time Respondent should have determined who would direct its actions and prepare its case in response to the Department's AONOCAPA.

Violations

ISRA, at N.J.S.A. 13:1K-8, defines an "industrial establishment" as "any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or hazardous wastes." Respondent was engaged in the business of manufacturing precision components and equipment for the ceramic and refractory industries. The business required the handling of petroleum-based cutting fluids and lapping oils and the use of solvents. ISRA, at N.J.S.A. 13:1K-8, and its implementing regulations, at N.J.A.C. 7:26B-1.4, define hazardous substances to include petroleum products such as these petroleum-based fluids and oils, as well as solvents.

It is undisputed that Respondent was the owner or operator of a manufacturing operation which qualified as an industrial establishment, and that Respondent did not remediate the Crossley Machine site, and thus violated N.J.A.C. 7:26B-3.3(a) in the ISRA Rules. Under N.J.A.C. 7:26B-3.3(a), "[a]n owner or operator shall remediate the industrial establishment in accordance with this chapter and the Administrative Requirements for the Remediation of

Contaminated Sites, N.J.A.C. 7:26C, when any of the events listed in N.J.A.C. 7:26B-3.2(a) occur.” ISRA and its implementing regulations define an owner as “any person who owns the real property of an industrial establishment or who owns the industrial establishment” and an operator as “any person . . . having and exercising direct actual control of the operations of an industrial establishment.” N.J.S.A. 13:1K-8; N.J.A.C. 7:26B-1.4.

N.J.A.C. 7:26B-3.3(a) requires the owner or operator of an industrial establishment to remediate the site “when any of the events listed in N.J.A.C. 7:26B-3.2(a) occur.” The sale or transfer of an industrial establishment’s assets is one such event. N.J.A.C. 7:26B-3.2(a) requires an owner or operator to file a GIN to comply with ISRA upon the occurrence of any of the listed events. Respondent filed a GIN in June 1999 upon the sale of its assets and thus acknowledged that the sale had triggered ISRA liability. In May 1999, soil sampling showed that portions of the site were contaminated with arsenic, cadmium, lead, and copper, all hazardous substances as defined at N.J.S.A. 13:1K-8 and N.J.A.C. 7:26B-1.4. I find that the ALJ correctly concluded that Respondent was required to remediate the site and that, as of February 28, 2014, Respondent had not done so.

There is no dispute that Respondent failed to perform the actions required under the ARRCs at N.J.A.C. 7:26C-2.3(a). The person who is responsible for conducting the remediation at a site pursuant to N.J.A.C. 7:26C-1.4(a) must hire an LSRP, N.J.A.C. 7:26C-2.3(a)1; notify the Department of the name and license information of the LSRP hired to conduct or oversee the remediation and the scope of the remediation, N.J.A.C. 7:26C-2.3(a)2; conduct the remediation without prior Department approval, N.J.A.C. 7:26C-2.3(a)3; and pay all applicable fees and oversight costs, N.J.A.C. 7:26C-2.3(a)4. The ALJ found and I concur that Respondent did not take any of these steps nor did it pay the applicable fees.

Lastly, the Technical Requirements at N.J.A.C. 7:26E-1.12(c) require the person responsible for conducting the remediation to submit an initial receptor evaluation for a contaminated site one year after the earliest applicable requirement to remediate listed at N.J.A.C. 7:26C-2.2. The sale of Crossley Machine's assets in 1999 triggered Respondent's ISRA compliance obligations and established the one-year deadline for submitting the initial receptor evaluation. I concur with the ALJ's finding that Respondent did not complete the initial receptor evaluation within the one-year period, having submitted it only after the Department issued the AONOCAPA. Respondent's claimed inability to pay for remediation does not absolve it of the responsibility to remediate in accordance with the applicable statutes and regulations.

Penalties

The Department determines penalties for violations of N.J.A.C. 7:26B, 7:26C, and 7:26E pursuant to N.J.A.C. 7:26C-9.5. Each of the violations cited in the AONOCAPA are non-minor violations under N.J.A.C. 7:26C-9.5(b). In accordance with N.J.A.C. 7:26C-9.5(a)4, the Department identifies the violation and the corresponding base penalty dollar amount listed at N.J.A.C. 7:26C-9.5(b), and adjusts the base penalty upward by applying the factors in N.J.A.C. 7:26C-9.6(a), as applicable. Then, the Department may multiply the base penalty amount or adjusted base penalty amount by the number of days the violation existed.

The base penalties for each of the violations cited in the AONOCAPA are as follows: \$20,000 for failure to remediate a site; \$15,000 for failure to hire an LSRP and to provide the required information to the Department; \$15,000 for failure to conduct remediation; 100 percent of the amount of the fee in arrears (\$900) for failure to pay applicable fees and oversight costs; and \$25,000 for failure to submit an initial receptor evaluation. For each of the violations cited,

the Department assessed only the base penalty with no upward adjustment under N.J.A.C. 7:26C-9.6(a) and assessed penalties for only one day of violation for each of the five violations cited in the AONOCAPA, for a total penalty of \$75,900. The Department's penalty assessment is reasonable and appropriate based on the undisputed findings that Respondent committed each of the violations cited in the AONOCAPA.

In its exceptions, Respondent repeated the argument it made before the ALJ that Respondent's inability to pay should have been considered by the Department when calculating the penalties. I find that the ALJ correctly concluded that under the applicable statutes and rules, inability to pay is not a defense. N.J.A.C. 7:26C-9.5 sets specific and circumscribed penalties and N.J.A.C. 7:26C-9.6 describes the factors to be considered. Inability to pay is not a factor that the Department considers when assessing an administrative penalty. See N.J. Dep't of Env'tl. Prot. v. Tanner, EWR 6694-97 (March 13, 2000) (finding that ability to pay is not a factor set forth in the Water Pollution Control Act; further, consideration of ability to pay shifts the focus from the seriousness of the violation to the violator's financial situation).

Respondent's exceptions: Due process

Respondent, in its exceptions, also repeated the argument it made before the ALJ that counsel should be allowed to withdraw and the matter stayed until the corporation determines who will direct its actions, also claiming that requiring counsel to defend Respondent without the benefit of an officer to direct the corporation's actions is a violation of due process. In reply to this exception, the Department argues that the matter should be decided and that an indefinite stay of the matter would result in lack of remediation for an indeterminate period of time.

Due process requires “notice and an opportunity to be heard” and is “a flexible [concept] that depends on the particular circumstances.” Doe v. Poritz, 142 N.J. 1, 106 (1995). The Department notified Respondent of the May 29, 2014, AONOCAPA and Respondent filed an adjudicatory hearing request, which the Department granted. Respondent thus had proper notice of the AONOCAPA and exercised its opportunity to be heard by requesting and participating in the hearing process at the OAL. Respondent’s counsel does not indicate the date as of which the corporation no longer had a principal or agent to direct its actions. Further, counsel did not move to withdraw until more than two-and-a-half years after the issuance of the AONOCAPA and only in response to the Department’s motion for summary decision. Respondent received notice and had an opportunity to be heard. Respondent’s defense was its responsibility and, in view of the lack of documentary support as to the corporation’s circumstances, I find that adequate due process was provided.

CONCLUSION

Having reviewed the record and the submissions of the Department and the Respondent, I ADOPT the ALJ’s Initial Decision in its entirety for the reasons therein and above. Respondent is directed to complete all the actions required in paragraph 19 of the AONOCAPA if it has not yet done so. Respondent is also ordered to pay the penalty of \$75,900 within twenty (20) days of this Order as set forth in paragraphs 20, 25, and 26 of the AONOCAPA.

IT IS SO ORDERED.

DATE August 22, 2017



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

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